Perjury Statute May Pose Problem for Clemens Prosecution

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Last month, a federal grand jury indicted former Major League Baseball pitcher Roger Clemens on charges of obstruction of Congress, making false statements, and perjury. The six-count indictment alleges that Clemens obstructed a congressional inquiry in 2008 and lied to a House committee in 15 statements under oath, including denials that he had never used steroids or growth hormones. Clemens had been prominently mentioned in the Mitchell Report, Major League Baseball's own accounting of its steroid problem, and he voluntarily went to Capitol Hill to testify before Congress and clear his own name.

Clemens adamantly denied any steroid use, testifying: "Let me be clear. I have never taken steroids or HGH." It is this statement, among others, that is now the subject of the indictment.

Clemens continues to insist that he told the truth. Although three counts of the indictment focus on false statements made by Clemens (18 U.S.C. 1001), two counts focus on perjury (18 U.S.C. 1621), which is more difficult to prove. Specifically, a witness under oath or affirmation in federal official proceedings violates 18 U.S.C. 1621 if he gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. In other words, testimony that is literally true, even if deceptively so, cannot be considered perjury.

Prosecutors generally face an uphill battle in using this section because they have to prove that, at the time of the testimony, the witness did not believe his statement to be true. In addition, prosecutors need to present the testimony of one witness plus at least some corroborative circumstantial evidence to corroborate that the statement made by the defendant under oath was false. Conviction under section 1621 requires

not only that the defendant knew his statement was false ("which he does not believe to be true"), but that his false statement is "willfully" or deliberately presented.

Perhaps the most famous example of false statements is the Martha Stewart case. There, the prosecutors charged Stewart with a violation of the false statements statute. According to the indictment, Stewart lied to investigators by telling them that she and her stockbroker had previously agreed to sell nearly 4,000 shares of ImClone Systems if their market value fell below a certain price, and altered a phone message from the broker in her assistant's computer immediately following a lengthy conversation with her attorney. Because Stewart did not testify under oath, she was not charged with perjury. Even had the statements been made under oath, prosecutors would have faced a tough time proving that Stewart did not believe her statements to be true at the time she made them. The subjectivity of this requirement under 18 U.S.C. 1621 makes perjury charges difficult to prove.

Clemens faces a combined maximum sentence of 30 years in prison and a $1.5 million fine if convicted of all charges. Under the U.S. Sentencing Guidelines, however, Clemens would probably face no more than 15 to 21 months in prison. Clemens' case is prime example of a "self-inflicted wound," as former Representative Tom Davis, the top Republican on the House of Representatives panel at the time of Clemens' testimony, called it. Clemens did not need to testify before the congressional committee. He was not under subpoena at the time. His freedom now hangs in the balance.

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