

**MAJOR LEAGUE BASEBALL AS ENRON: THE TRUE MEANING OF  
THE MITCHELL REPORT<sup>+</sup>**

By

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On December 13, 2007, an event much anticipated in the world of Major League Baseball took place: the release of “The Mitchell Report.”<sup>1</sup> In it, former United States Senator George Mitchell, acting upon the request of MLB commissioner Bud Selig, identified dozens of other players who had taken steroids and other suspected performance-enhancing substances in violation of federal law over the past several years. Upon its release, baseball had, in the eyes of Selig, closed a chapter: the drug abusers – the outliers -- were identified, perhaps they would be reprimanded, and baseball had been cleansed. “This report is a call to action,” Selig said as he rose his right index finger during the press conference in conjunction with the release of the Report, “and I will act.”<sup>2</sup> As it has so often in the past, Selig seemed to imply in his words and deeds, the system, despite its flaws, ultimately worked. The integrity of MLB remained intact.

Or so the story goes.

Buried beneath the fireworks over the names of the players identified within the Mitchell Report was the true dynamite: namely, a detailed history of the decades-long

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<sup>1</sup> George J. Mitchell, Report To The Commissioner of Baseball Of An Independent Investigation Into The Illegal Use Of Steroids And Other Performance Enhancing Substances By Players In Major League Baseball, December 13, 2007.

<sup>2</sup> Bill Pennington, *Selig Says Report ‘Is a Call to Action’ And Vows to Act Swiftly*, THE NEW YORK TIMES, Dec. 14, 2007, at D1.

disregard for federal law on behalf of Major League Baseball. This willful dismissal of the law was on display, as noted by Mitchell in his report, even in Selig's charge to Mitchell upon handing the investigation over to him. As noted within the report, Selig appointed Mitchell to conduct an investigation:

...to determine, as a factual matter, whether any Major League players associated with [the Bay Area Laboratory Co-Operative] or otherwise used steroids or other illegal performance enhancing substances at any point after the substances were banned by the 2002-2006 collective bargaining agreement.<sup>3</sup>

Selig, however, also permitted Mitchell to "expand the investigation and to follow the evidence wherever it may lead," if he felt it necessary to do so.<sup>4</sup> Mitchell took Selig's opening and ran with it, producing a report that focused on MLB's historical indifference to the pervasiveness of illegal performance enhancing drugs in its locker rooms, and one which went well beyond Selig's 2002 start date, generating a treatise that, in the end, most likely gave Selig and MLB much more than they had bargained for.

In its pages, the Mitchell Report destroyed the myth that Selig and MLB had perpetrated for years: the myth that MLB's signing of the 2002 collective bargaining agreement along with the Major League Baseball Players Association (the "Players Association") somehow rendered 2002 a starting point in the discussion of illegal drug use within the game. By destroying that myth, the Mitchell Report invariably shifted the focus of the blame for baseball's steroid crisis from "rogue" players such as Barry Bonds, Miguel Tejada and the others mentioned within the Report, to MLB itself. By doing so, the Mitchell Report showed that the proper comparison is not between these alleged

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<sup>3</sup> Mitchell Report, at 2.

<sup>4</sup> *Id.* In his Report, Mitchell noted, "I welcomed this latitude as necessary to ensure that my findings were reached in the proper context and that I would not be required to request additional investigative authority from the Commissioner once the investigation began."

“outliers” and people like Martha Stewart and I. Lewis “Scooter” Libby – individual malfeasance within the structure of a just system – but between MLB and entities such as Enron and its compatriots – corporate malfeasance amid a culture of corruption and a willful disregard for the law. As such, and as the Mitchell Report highlighted, in MLB it was the system itself that was corrupt, with the identified players merely symptoms of the problem rather than the problem in and of themselves. This article examines the true meaning and import of the Mitchell Report.

*A. The Culture of Corruption Within MLB as Exposed in the Mitchell Report*

In his triumphant “call to arms” press conference, Selig’s posture indicated that he had either misunderstood or willfully ignored the true thrust of the Mitchell Report in that it was not the naming of names that was most damning but, rather, the conclusion that MLB should have taken action many years earlier. In its “Summary and Recommendations,” the Report concluded that Selig’s assumption that the signing of the 2002 Basic Agreement with the Players Association was of particular relevance was “not accurate.” Rather,

Beginning in 1971 and continuing today, Major League Baseball’s drug policy has prohibited the use of any prescription medication without a valid prescription. By implication, this prohibition applied to steroids even before 1991, when Commissioner Fay Vincent first expressly included steroids in baseball’s drug policy. Steroids have been listed as a prohibited substance under the Major League Baseball drug policy since then, although no player was disciplined for steroid use before the prohibition was added to the collective bargaining agreement in 2002.<sup>5</sup>

Moreover, this prohibition was binding upon the players even absent their express consent to it via a collectively bargained basic agreement. As noted within the Report in its historical review of baseball’s drug policies in theory and in practice:

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<sup>5</sup> Mitchell Report, at Summary and Recommendations (SR) 10-11.

Many players were suspended for drug offenses before 2002, even though none of these suspensions related to the use of steroids or other performance enhancing substances. Some suspensions were reduced in grievance arbitrations brought by the Players Association, but no arbitrator ever has questioned the authority of the Commissioner to discipline players for “just cause” based upon their possession, use, or distribution of prohibited drugs.<sup>6</sup>

As referenced above, in 1991, Commissioner Vincent distributed a memorandum to all 26 team owners, stressing that baseball’s drug policy expressly prohibited the use of “all illegal drugs and controlled substances, including steroids or prescription drugs for which the individual...does not have a prescription.”<sup>7</sup> As such, under “baseball law,” steroids had been banned, at least implicitly, for decades. However, of even more relevance was federal law which, at least in theory, has always applied to baseball. And here, the distribution of prescription drugs of any sort by individuals other than a duly licensed physician acting in furtherance of an individual determination of a proper course of treatment has been prohibited ever since the passing of the Federal Food, Drug and Cosmetic Act of 1938.<sup>8</sup> In 1970, Congress passed the Controlled Substances Act (CSA) which created five “schedules” of controlled substances subject to varying levels of penalties for misuse, depending on, among other things, their potential for abuse.<sup>9</sup> In 1988 the CSA was amended, making “the distribution of anabolic steroids illegal unless (1) it was done pursuant to the order of a physician, and (2) it was for the purpose of

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<sup>6</sup> *Id.* at SR 11.

<sup>7</sup> Francis T. Vincent, Jr. *Memorandum to All Major League Clubs Re: Baseball’s Drug Policy and Prevention Program*, Jun. 7, 1991, at 2.

<sup>8</sup> Federal Food, Drug and Cosmetic Act, c. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. § 353 (b)(1)(B) (2004)). *See also*, Mitchell Report, at 18.

<sup>9</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). *See also* Mitchell Report at 18-19.

treating a disease.”<sup>10</sup> In 1990, the CSA was amended once again, pursuant to the Steroid Control Act of 1990, which “imposed more stringent controls with higher criminal penalties for offenses involving the illegal distribution of anabolic steroids and human growth hormone. That enactment reclassified anabolic steroids as Schedule III controlled substances, effectively raising penalties for their illegal possession or distribution to levels similar to those applicable to narcotics.”<sup>11</sup> Regardless of the reality that federal law now explicitly criminalized the improper possession of steroids and human growth hormone, MLB paid it little mind. As recalled by Vincent years later, “[m]y memo was totally ignored by all. The point was to alert the baseball world to the recent inclusion of steroids as illegal prohibited substances under federal law. But the union did nothing to underscore my memo and I think the clubs ignored it as irrelevant.”<sup>12</sup>

In fact, the clubs’ perception of the law, as well as of Vincent’s memo, was quite accurate. For all practical purposes, federal law had been irrelevant to MLB for nearly a century by that point; there was no reason to assume that the Steroid Control Act signaled any such shift in this reality. Therefore, they were confident that they not only could willfully ignore the mounting evidence of steroid abuse within the game from the 1980’s through the 1990’s and into the early 2000’s, they could in fact reward the most blatant violators of the law with large contracts in recognition of their inflated statistical achievements attained, at least in some measure, through their possession and use of

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<sup>10</sup> See 1988 Anti-Drug Abuse Amendments, Pub. L. No. 100-690, 102 Stat. 481 (1988). See also Mitchell Report at 19.

<sup>11</sup> Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4789 (1990). See also Mitchell Report at 19-20.

<sup>12</sup> Murray Chass, *Mitchell Report Revealed Little New Work*, THE NEW YORK TIMES, Dec. 18, 2007, at D5.

Schedule III controlled substances in violation of the Steroid Control Act.<sup>13</sup> As the Mitchell Report likewise made plain, MLB's frequent refrain that it was unaware of the problem until the release of the Report itself was specious. The evidence to the contrary, as noted within the Report, was overwhelming.

Before the Steroid Control Act was even passed, whispers of steroid abuse within MLB were heard. In 1989, in a well-publicized incident, Oakland A's slugger Jose Canseco was arrested for possession of a handgun in a Detroit airport.<sup>14</sup> Pursuant to the search incident to arrest, steroids were discovered. The next year, Philadelphia Phillies centerfielder Lenny Dykstra arrived at spring training carrying 30 pounds of newly-found bulk, to which he credited to be the work of "really good vitamins."<sup>15</sup> In 1992, Boston Globe columnist Peter Gammons reported that steroid abuse is "much greater than anyone lets on." He further wondered if a recent spate of injuries within the game could be attributed to steroid abuse "as players' muscle mass becomes too great for their bodies, resulting in the odd back and leg breakdowns."<sup>16</sup> Los Angeles Times and USA Today baseball writer Bob Nightengale was likewise suspicious and made his suspicions known in a series of articles emblazoned with headlines such as: "Baseball Still Doesn't Get It," and "Steroids Become an Issue in Baseball: Many Fear Performance-Enhancing Drugs Is Becoming Prevalent and Believe Something Must Be Done," in 1995, with the latter article picked up by wire services across the country and revised and reprinted in

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<sup>13</sup> Phil Sheridan, *Baseball Turned a Blind Eye – And Saw Cash*, THE PHILADELPHIA INQUIRER, Nov. 18, 2007, at E1.

<sup>14</sup> Mitchell Report, at 61-66.

<sup>15</sup> *Id.* at 66-67. Phillies general manager Lee Thomas suspected Dykstra of abusing performance-enhancing drugs but never pursued it beyond asking Dykstra if he had used steroids (Dykstra denied using them). In addition, Phillies trainer Jeff Cooper stated that an unnamed player's use of steroids was "obvious" and that he confronted Thomas with his suspicions. Thomas told Cooper to confront the player. Cooper did, the player said "it was none of his business," and the matter was dropped.

<sup>16</sup> *Id.* at 69.

“The Sporting News,” historically considered “The Baseball Bible” a few weeks later.<sup>17</sup> In the updated article printed in “The Sporting News,” steroid use was called “baseball’s deep, dark, sinister secret.”<sup>18</sup>

Regardless of these and other articles, MLB continued to profess ignorance. In all, the Mitchell Report cited 85 mainstream media articles focusing on the use and abuse of steroids and other performance enhancing substances within MLB between 1988 and 1998.<sup>19</sup> Selig, however, throughout this period, repeated his refrain, stating at one point that “[i]f baseball has a problem, I must say candidly that we were not aware of it.... It certainly hasn’t been talked about much.”<sup>20</sup>

By 2004, however, Selig’s talking points were somewhat different. By then, he professed that, even had he known of such abuse with MLB, there was not much he could have done about it anyway due to the presence of the Players Association and the National Labor Relations Act (NLRA).<sup>21</sup> Although he lauded the toughened standards enacted within the world of amateur athletics, he concluded that such standards were not viable within MLB due to the presence of the Players Association and the constraints placed upon MLB pursuant to the NLRA.<sup>22</sup> Because drug testing was considered a mandatory subject of collective bargaining, MLB’s hands were, according to Selig, effectively tied. Specifically addressing the proliferation of “nutritional supplements” such as the bottle of androstenedione found in Mark McGwire’s locker in 1998,<sup>23</sup> the only solution, he stressed, was for the federal government to step in and ban and/or

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<sup>17</sup> *Id.* at 69-70.

<sup>18</sup> *Id.* at 70.

<sup>19</sup> Mitchell Report, at Appendix C.

<sup>20</sup> *Id.* at 71.

<sup>21</sup> Allan H. “Bud” Selig & Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 *Stan. L. & Pol. Rev.* 35, 35-36 (2004).

<sup>22</sup> *Id.*

<sup>23</sup> Mitchell Report, at 60.

restrict unsafe nutritional supplements.<sup>24</sup> “Congress should not leave the regulation of nutritional supplements to the collective bargaining processes of the four major professional sports leagues....Congress should empower and encourage the Attorney General to schedule certain harmful nutritional supplements as controlled substances under the CSA...in order to return to the hands of the FDA the power to effectively regulate nutritional supplements before they arrive on store shelves and in the hands of athletes.”<sup>25</sup> Selig’s recommendation was both ironic and hollow, particularly given the reality that the federal government had done with regard to steroids in 1990 precisely what he was now recommending it do with regard to nutritional supplements and MLB responded by willfully ignoring the law.

Regardless, as the Mitchell Report stressed, the issues relevant to collective bargaining were ancillary to MLB’s ability to control the problem of substance abuse within the game and to enforce the law. Rather, it was MLB’s decision to disregard the law that led to the culture of steroid abuse as personified by the game’s greatest slugger, Barry Bonds. The Report noted that although MLB, through the Commissioner’s Office, lacked the power to directly issue warrants and subpoenas, it could conduct investigatory interviews and compel even union-represented employees, such as those represented by the Players Association, to attend and answer truthfully.<sup>26</sup> This “interview right” is one enjoyed by all employers in order to ensure that its rules are being followed.<sup>27</sup> MLB, however, “rarely required” its players “to participate in investigatory interviews

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<sup>24</sup> Selig & Manfred, *Regulation of Nutritional Supplements*, at 48, 58-59.

<sup>25</sup> *Id.*

<sup>26</sup> Mitchell Report, at 290-91.

<sup>27</sup> *Id.* at 292.

regarding alleged performance enhancing substance violations.”<sup>28</sup> With regard to violations of federal law, the Report found that MLB had been similarly non-compliant. The Report noted that, if it wished, MLB could partner with state and federal law enforcement agencies, which do have both warrant and subpoena power, and coordinate investigations through the indirect use of these powers.<sup>29</sup> However, prior to the investigation undertaken by Senator Mitchell, MLB made little use of this avenue as well. In exploring this avenue of investigation, the Report noted that “[o]ne law enforcement official advised us in frustration that there is no clearly designed person in the Commissioner’s Office to call when law enforcement does have information.”<sup>30</sup> As for why this is the case, the Report does not say. It may be for the simple reason that, just like Commissioner Vincent’s 1991 memo, those within MLB have historically simply not wanted to know the substance of the information potentially waiting for them on the other end of those calls.

Regardless, as the Mitchell Report made clear, the process of undertaking an illegal drug possession investigation of a suspected Major League player can and should be no different than investigations of employees in any other circumstance; the presence of the Players Association is, ultimately, irrelevant. In any other walk of life, the ability to conduct drug testing is not a prerequisite for undertaking such a criminal investigation. Employers have always had the ability to take reasonable steps to investigate, identify and rid themselves of drug offenders operating within their employ. Technically, MLB is no different than any other work environment. Except that, for some reason, MLB believes that it is.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 290-91.

<sup>30</sup> *Id.* at 290.

In his response to the release of the Mitchell Report, Selig lauded the numerous (20) recommendations contained within; recommendations calling on MLB to use its powers of investigation, conduct background checks on clubhouse employees, cooperate with federal and state law enforcement, and the like.<sup>31</sup> He stated that he would implement all of the recommendations that did not require collective bargaining immediately.<sup>32</sup> However, as the Report made clear, MLB, not unlike Dorothy in Oz, had all of these powers at its disposal all along. Echoing his earlier plea for Congress to regulate nutritional supplements, Selig likewise called on Congress to classify Human Growth Hormone a Schedule III controlled substance under the CSA,<sup>33</sup> ignoring the fact that steroids had been similarly classified a Schedule III controlled substance for 18 years by that point, to little effect. As such, despite Selig's attempts to label the players identified within the Mitchell Report as outliers, the Report showed that these players were merely the symptoms of a larger problem: MLB itself. With corporate scandals such as Enron and, most recently as of this writing, Fannie Mae and Freddie Mac, still fresh, the release of the Mitchell Report makes the comparison between MLB and these corruption scandals both inevitable and appropriate. Given the necessary passage of time required for full and tempered reflection, the Enron scandal serves as a helpful point of comparison.

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<sup>31</sup> *Id.* at 285-306.

<sup>32</sup> Statement of Commissioner Allan H. Selig Before the House Committee On Oversight and Government Reform, Jan 15, 2008, at 9-10.

<sup>33</sup> *Id.* at 15. ("I am here to ask for your assistance in this fight. The illegal use of performance enhancing substances is a problem for Baseball – but it is a social problem that extends beyond this sport or any sport. It is a societal issue. Senator Mitchell's report identified the difficulties inherent in any attempt, whether by Baseball, by other professional sports, or by the Olympics, to stop by itself the use of illegal performance enhancing substances. We welcome your participation in attacking the problem at its source. There are a number of bills that have been introduced that we wholly support, including Representative Lynch's bill (HR 4911) and Senator Schumer's bill (Senate Bill 877) to make HGH a Schedule III Controlled Substance, Senator Grassley's bill (Senate Bill 2470) to prohibit the sale of DHEA to minors, and Senator Biden's bill (Senate Bill 2237) to crackdown on the sale of controlled substances over the Internet.")

B. Enron

In Enron, many commentators see “a textbook case of earnings management” in the active manipulation of accounting results for the purpose of creating an altered impression of the company.<sup>34</sup> For years, management hid debt, inflated profits and supported stock prices that “considerably overstated the firm’s value.”<sup>35</sup> In the end, before the scandal broke and its true image was revealed, Enron had succeeded in creating an erroneous, fictitious portrait of a robust, thriving, company.<sup>36</sup> Upon reflection, considerable evidence existed throughout Enron’s existence that should have led analysts and regulators to question Enron’s confident boasts through the years; yet until management could hide the company’s condition no longer and its collapse was brought into public view, few thought to challenge them.<sup>37</sup> Once out in the open, however, a very different picture of the company emerged; a picture of a company run by executives who believed themselves to be above the law, answerable to no one. As such, without the constraints placed upon them by the legal system, they felt unencumbered and free to massage the company’s image so as to make it appear to be something it most certainly was not. In short, corporate malfeasance led to a culture of active manipulation of results and ignorance of counter-information that otherwise would have caused it to stop and reevaluate its business strategy. In the end, it was not the thousands of Enron employees who brought the company to ruin, it was the people at the top – the ones who created the culture of deceit in which the company operated.

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<sup>34</sup> Anthony H. Catanach, Jr. & Shelley Rhoades-Catanach, *ENRON: A Financial Reporting Failure?*, 48 Vill. L. Rev. 1057, 1060-61 (2003).

<sup>35</sup> *Id.* at 1057.

<sup>36</sup> *Id.* at 1076.

<sup>37</sup> *Id.* at 1057, 1076.

The release of the Mitchell Report cast a similar shadow upon MLB. Upon its release, Selig's long-professed ignorance of the culture of steroid use in Major League locker rooms seemed silly and his repeated assertions of helplessness in combating the problem ridiculous. Instead, like Enron, the Report made clear that it was not the hundreds of players who brought MLB to this point, it was MLB itself – the entity that perpetuated and thrived within a similar culture of deceit. This revelation is, by itself, stunning and, as such, it is easy to see why Selig was so eager to respond to the Report by immediately diverting the public's attention from this to the litany of player names mentioned in the report, most notably that of pitcher Roger Clemens.<sup>38</sup> Unfortunately, to a great degree, Selig's tact was successful: The Clemens affair dominated the headlines for months afterwards, relegating the revelations of the Mitchell Report to the dustbin of history in remarkably short order.

## CONCLUSION

Selig's success in this regard should come as no surprise. Historically, MLB has been amazingly successful in shunning the ugliness of its business affairs to the side while it presents a wholesome, symbolically "American" image to the public.<sup>39</sup> As such, it is not surprising that suspicion and evidence regarding illegal drug and steroid use was ignored throughout the 1980's, '90's and '00's, particularly when to acknowledge such abuses would very likely dampen enthusiasm for the game and threaten its integrity as an

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<sup>38</sup> Mitchell Report, at 167-75.

<sup>39</sup> For an in-depth analysis of MLB's historical indifference to federal law, see Nathanson, *The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to "America's Game" And How It Got That Way*, forthcoming in the *Villanova Sports & Entertainment Law Journal*, from which this article is excerpted and modified (available online at: [http://works.bepress.com/mitchell\\_nathanson/23/](http://works.bepress.com/mitchell_nathanson/23/))

untarnished sport, emblematic of American values. This pressure became increasingly acute after the labor unrest and resulting work stoppage which wiped out the 1994 World Series and which damaged the popularity of the game. Upon its return in 1995, baseball was looking for a return to its exalted status, much as it was in the wake of the Black Sox scandal decades earlier. Eventually, it found the path through power hitters such as Mark McGwire, Sammy Sosa and Barry Bonds, who threatened home run records and brought people back to the game, just as Babe Ruth had in the early 1920's. As pitcher Greg Maddux said in a promotional spot for MLB at the time, "chicks dig the long ball." As the Mitchell Report makes clear, without the threat of legal action hanging over its head for non-compliance with existing federal law, MLB had no incentive to comply with it and every incentive to ignore it, blissfully and willfully. As a result, players got bigger and home run records that had stood unchallenged for decades were smashed and then smashed again as the baseball record book was rewritten with each passing season. In its considered ignorance, MLB encouraged the culture of corruption that emerged in team clubhouses throughout the league and profited from it both in terms of dollars and status. The Mitchell Report exposed it but, despite the machinations of Selig to deflect attention away from MLB and onto players such as Barry Bonds, the exposure was not in the form of a window into the secret workings of a Major League locker room, but of a mirror where what was exposed was merely a reflection of the inner workings of MLB itself.