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## The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to "America's Game" and How It Got That Way

Mitchell J Nathanson, *Villanova*



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# THE SOVEREIGN NATION OF BASEBALL: WHY FEDERAL LAW DOES NOT APPLY TO ‘AMERICA’S GAME’ AND HOW IT GOT THAT WAY

By

Mitchell Nathanson\*

## ABSTRACT:

This article examines the relationship between Major League Baseball (MLB) and the law and discusses how it has evolved that MLB has become unofficially exempt from federal law on a wide range of issues due to its unique status within American society. Although its antitrust exemption is well-known, MLB has, in practice, not been subject to the forces of federal law in many other contexts as well, setting it apart from most other corporations and organizations – even other professional sports leagues such as the NFL, NHL and NBA. As a result of the wide berth provided to MLB by the federal courts and legislature, MLB has largely been free to govern itself pursuant to its own definition of what is in “the best interest of baseball” – denying its players even the most basic and fundamental due process rights, arbitrarily punishing those it has labeled as “rogue” owners, and willfully violating federal law that has applied to it for decades in theory but not in practice, in the process. From its inception in 1876 to the present, MLB has been, in effect, an extra-judicial entity, a society unto itself, answerable to no one in all but the most extreme circumstances. It is this atmosphere of de-facto sovereignty that has led to the culture of corruption identified within the recently released Mitchell Report, which beneath the fireworks over the names of the players identified within the report, quietly and systematically details MLB’s decades-long disregard for federal law. Such disregard eventually provided a fertile breeding ground for the corporate malfeasance that permitted MLB to ignore both federal law and the overwhelming evidence of illegal drug use taking place within its locker rooms and to, in fact, encourage it throughout the 1990’s and 2000’s. In the end, as the Mitchell Report highlights, 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 how things progressed to this point.

## I. INTRODUCTION

On November 16, 2007, Barry Bonds – baseball’s all time home run king – was indicted on four counts of perjury and one count of obstruction of justice stemming from his federal grand jury testimony in connection with the investigation of steroid use in sports in general and, in Bonds’ case, Major League Baseball in particular.<sup>1</sup> Pursuant to the indictment, federal prosecutors alleged that Bonds perjured himself when he denied

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\* Associate Professor of Legal Writing, Villanova University School of Law

<sup>1</sup> Dave Anderson, *A Good Day for Baseball, And a Better One Looms*, THE NEW YORK TIMES, Nov. 18, 2007, at Sports Sunday 11.

ever knowingly having taken steroids and human growth hormone, suspected performance-enhancing substances.<sup>2</sup> This day was a long-time in coming as the federal investigation had dragged on for several months with the much anticipated and expected indictment the subject of much speculation within the world of Major League Baseball (MLB). Now that it had arrived, it was largely greeted with cheers from the commentariat: The New York Times hailed it as “A Good Day for Baseball,” promising that, as a result of the official ferreting out of Bonds, “A Better One Looms” in the future.<sup>3</sup>

Very quickly, Bonds was vilified – compared to other high profile, recently-outed liars such as entertaining magnate Martha Stewart and government official I. Lewis (Scooter) Libby, Jr.,<sup>4</sup> -- and portrayed as an outlier: an immoral cog in an otherwise righteous wheel. In fact, the very indictment itself was perceived as an indication of the integrity of the system: it may have its flaws but it eventually identified and spit out the wrongdoers. A couple of months later, in January, 2008, star shortstop Miguel Tejada found himself in much the same position as Bonds, Stewart and Libby when he too was investigated for perjury in conjunction with his testimony regarding steroid use to a Congressional committee.<sup>5</sup> In all of these examples, Americans could take solace in the idea that, regardless of the ugly facts involved in these cases, evil was rooted out. In the end, the system worked.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Alan Schwarz, *Prosecution's Best Pitch Is Precision, Experts Say*, THE NEW YORK TIMES, Nov. 17, 2007, <http://www.nytimes.com/2007/11/17/sports/baseball/17/perjury.html>. “Bonds’s situation and Libby’s situation are particularly similar, in regard to the denials of any kind of wrongdoing,” according to Peter Keane, a professor at Golden Gate University School of Law.

<sup>5</sup> Alan Schwarz, *Justice Department Asked to Investigate Tejada*, THE NEW YORK TIMES, Jan. 16, 2008, <http://www.nytimes.com/2008/01/16/sports/baseball/16/tejada.html>.

Bonds and Tejada were not the lone outliers, however. On December 13, 2007, another event much anticipated in the world of Major League Baseball took place: the release of “The Mitchell Report.”<sup>6</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 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>7</sup> Once again, 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 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

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<sup>6</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>7</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.

point after the substances were banned by the 2002-2006 collective bargaining agreement.<sup>8</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>9</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 Bonds, 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 “outliers” and people like Stewart and 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, as the Mitchell Report highlighted, in MLB it was the system itself

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<sup>8</sup> Mitchell Report, at 2.

<sup>9</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.”

that was corrupt, with the identified players merely symptoms of the problem rather than the problem in and of themselves. This article examines how MLB got to this point.

This article analyzes the relationship between MLB and the law and shows that MLB has historically been unofficially exempt from federal law on a wide range of issues due to its unique stature within American society. Although the antitrust exemption is well-known and has been much written about, MLB has, in practice, not been subject to the forces of federal law in many other contexts as well, setting it apart from most other corporations and organizations – even other professional sports leagues.<sup>10</sup> As a result of the wide latitude provided to MLB by the federal courts and legislature, MLB has largely been free to govern itself pursuant to its own definition of what is in “the best interests of baseball.” From its inception in 1876 to the present, MLB has been, in effect, an extra-judicial entity, a society unto itself, answerable to no one in all but the most extreme circumstances.

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<sup>10</sup> As the Bonds and Tejada indictments indicate, there is a difference between the applicability of federal law to MLB and to its players. Players have always been subject to federal law when acting outside of the cocoon of MLB. Once ensconced within it, however, the cloak of immunity typically covers them as well – to the extent that such immunity inures to the benefit of MLB. Indeed, Bonds was only indicted through his alleged activities in connection with BALCO – a San Francisco area laboratory not affiliated with MLB and which was alleged to have supplied and injected him with illegal steroids. Initially, the federal BALCO investigation targeted athletes not affiliated with MLB (primarily track and field athletes) and Bonds’s name was drawn into the investigation after the fact, when it became apparent that he too was a client. Tejada as well came under scrutiny for activities outside the scope of MLB – his testimony before a Congressional committee in 2005 where it was alleged that he had perjured himself. *See also* Michael S. Schmidt, *Drug Test Results From 2003 Could Soon Be In Evidence*, THE NEW YORK TIMES, May 18, 2008, Sports Sunday at 1 (reporting that the federal government plans to question 104 players who tested positive for performance-enhancing drugs in 2003. The results were supposed to be anonymous but, due to the separate BALCO investigation, the names of some of the players became known to the federal government which was initially only seeking information pertaining to 10 players who, similar to Tejada, were suspected to have perjured themselves before the BALCO grand jury. In the course of its investigation into BALCO’s files, the names of all 104 players who tested positive became known. Without the BALCO investigation, it is likely that the anonymity sought by MLB and the Players Association with regard to the testing would have been honored by the federal government.) The dichotomy of treatment by federal courts and legislators of players and MLB is a relevant inquiry but one that is outside of the scope of this Article.

It is this atmosphere of de-facto sovereignty that led to the culture of corruption identified within the Mitchell Report. Through the years, as this article discusses, MLB has denied its players even the most basic and fundamental due process rights without fear of restraint, arbitrarily punished those it has labeled as “rogue” owners, and, as demonstrated in the Mitchell Report, willfully violated federal law that has applied to it for decades in theory although not, as further demonstrated within the Report, in practice. As a result, MLB has become a fertile ground for the willful violation of law by players, owners, and the office of the commissioner which has, ironically, finally called on Congress to apply federal law to it for the first time – albeit on its own terms.

## **II. THE MITCHELL REPORT: MLB AS ENRON**

### *A. 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>11</sup>

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

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:

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>12</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>13</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>14</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>15</sup> In 1988 the CSA was amended, making "the distribution of anabolic steroids illegal unless

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<sup>12</sup> *Id.* at SR 11.

<sup>13</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>14</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>15</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.



(1) it was done pursuant to the order of a physician, and (2) it was for the purpose of treating a disease.”<sup>16</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>17</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>18</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>16</sup> See 1988 Anti-Drug Abuse Amendments, Pub. L. No. 100-690, 102 Stat. 481 (1988). See also Mitchell Report at 19.

<sup>17</sup> Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4789 (1990). See also Mitchell Report at 19-20.

<sup>18</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>19</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>20</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>21</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>22</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>19</sup> Phil Sheridan, *Baseball Turned a Blind Eye – And Saw Cash*, THE PHILADELPHIA INQUIRER, Nov. 18, 2007, at E1.

<sup>20</sup> Mitchell Report, at 61-66.

<sup>21</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>22</sup> *Id.* at 69.

“The Sporting News,” historically considered “The Baseball Bible” a few weeks later.<sup>23</sup> In the updated article printed in “The Sporting News,” steroid use was called “baseball’s deep, dark, sinister secret.”<sup>24</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>25</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>26</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>27</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>28</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>29</sup> the only solution, he stressed, was for the federal government to step in and ban and/or

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<sup>23</sup> *Id.* at 69-70.

<sup>24</sup> *Id.* at 70.

<sup>25</sup> Mitchell Report, at Appendix C.

<sup>26</sup> *Id.* at 71.

<sup>27</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>28</sup> *Id.*

<sup>29</sup> Mitchell Report, at 60.

restrict unsafe nutritional supplements.<sup>30</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>31</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>32</sup> This “interview right” is one enjoyed by all employers in order to ensure that its rules are being followed.<sup>33</sup> MLB, however, “rarely required” its players “to participate in investigatory interviews

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<sup>30</sup> Selig & Manfred, *Regulation of Nutritional Supplements*, at 48, 58-59.

<sup>31</sup> *Id.*

<sup>32</sup> Mitchell Report, at 290-91.

<sup>33</sup> *Id.* at 292.

regarding alleged performance enhancing substance violations.”<sup>34</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>35</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>36</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>34</sup> *Id.*

<sup>35</sup> *Id.* at 290-91.

<sup>36</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>37</sup> He stated that he would implement all of the recommendations that did not require collective bargaining immediately.<sup>38</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>39</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 WorldCom still fresh, the release of the Mitchell Report makes the comparison between MLB and these corruption scandals both inevitable and appropriate.

### 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

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<sup>37</sup> *Id.* at 285-306.

<sup>38</sup> Statement of Commissioner Allan H. Selig Before the House Committee On Oversight and Government Reform, Jan 15, 2008, at 9-10.

<sup>39</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.”)

impression of the company.<sup>40</sup> For years, management hid debt, inflated profits and supported stock prices that “considerably overstated the firm’s value.”<sup>41</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>42</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>43</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 bankruptcy, it was the people at the top – the ones who created the culture of deceit in which the company operated.

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

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<sup>40</sup> Anthony H. Catanach, Jr. & Shelley Rhoades-Catanach, *ENRON: A Financial Reporting Failure?*, 48 Vill. L. Rev. 1057, 1060-61 (2003).

<sup>41</sup> *Id.* at 1057.

<sup>42</sup> *Id.* at 1076.

<sup>43</sup> *Id.* at 1057, 1076.

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>44</sup> Such a diversion would avoid the most difficult questions of all, namely, how did “America’s Game” get to this point? How did our national pastime become infected with greed, corruption and deceit? How did baseball come to represent not only America at its best but also at its worst? The remaining sections of this Article attempt to answer these questions by examining the roots and development throughout the twentieth century of MLB’s extra-legal authority. As these sections will show, what started benignly eventually turned malignant as MLB’s de facto sovereignty became more and more ingrained until, by the end of the century, MLB could rightly believe that it had become something of a nation unto itself, answerable to no one.

### **III. THE ROOTS OF MLB’S EXTRA-LEGAL AUTHORITY**

#### ***A. The Birth of the National League and the “Baseball Creed”***

In order to understand the environment MLB existed within at the turn of the twenty-first century, it is necessary to understand the environment that brought MLB into existence over a century earlier. As the nineteenth century turned toward the twentieth, the importance of sport as something symbolic and representative of other values began to take shape within the United States.<sup>45</sup> This was out of necessity. The Industrial Revolution -- offering employment to more and more men indoors, operating machines in

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<sup>44</sup> Mitchell Report, at 167-75.

<sup>45</sup> Daniel A. Nathan, SAYING IT’S SO: A CULTURAL HISTORY OF THE BLACK SOX SCANDAL, 36-37 (University of Illinois Press, 2005).



factories rather than working outside among the elements, combined with the closing of America's frontier, profoundly challenged this male-dominated society's values and determinants of social status.<sup>46</sup> "With no frontier to conquer, with physical strength becoming less relevant in work, and with urban boys being raised and taught by women, it was feared that males were becoming 'soft,' that society itself was becoming 'feminized.'"<sup>47</sup> As such, the definition of "manliness" itself was challenged and had to be redefined.<sup>48</sup> Soon, sports replaced work as the defining characteristic of manliness.<sup>49</sup> In time, the ideology of athletic prowess as representative of manliness took hold. Boys were encouraged to engage in athletic competition, as sports, according to the evolving mantra of the time, built strong character as well as bodies.<sup>50</sup> For the first time, leisure activities were considered to be as important, if not more so, than work. Now, it was sport that turned boys into "healthy, respectable men," not field work.<sup>51</sup>

Baseball, which by the mid-point of the nineteenth century began to emerge as the most popular sport, was an immediate beneficiary of this national mindset. For if sport contributed to manliness, then no sport contributed to it more so than the nation's most popular one. In time, a set of values emerged that became synonymous with the game itself; a set of values that has since become known as "the baseball creed."<sup>52</sup> In essence, the creed held that baseball contributed to individual and public welfare by "building

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* See also, Benjamin G. Rader, *BASEBALL: A HISTORY OF AMERICA'S GAME*, 37 (University of Illinois Press, 2d. ed. 2002).

<sup>49</sup> *Id.*

<sup>50</sup> Nathan, *SAYING IT'S SO*, at 37.

<sup>51</sup> *Id.*

<sup>52</sup> Mitchell Nathanson, *Gatekeepers of Americana: Ownership's Never-Ending Quest for Control of the Baseball Creed*, 15 *NINE: A Journal of Baseball History & Culture* 68, 73 (2006).

manliness, character, and an ethic of success.”<sup>53</sup> The values supposedly taught by the game translated into everyday life, according to the creed, as the virtues embodied by baseball could be used to instill the proper values in the nation’s youth as well as educate immigrants (which, by the late nineteenth century were streaming into the country in unprecedented numbers) as to the American way of life.<sup>54</sup> Through the creed, baseball became elevated in status, from a game played in one’s off-hours to something mystical and transformative. By the turn of the twentieth century, it was believed by some that “being a true American and being a fan are synonymous.”<sup>55</sup> Baseball, by now the national sport, “occup[ied] a niche just below belief in God and respect for motherhood.”<sup>56</sup>

Unfortunately, America’s game, as represented by the professional teams that emerged after the Civil War, and which had initially done much to spark communal pride in the teams now representing the growing industrial cities in the Northeast and Midwest, was rife with problems.<sup>57</sup> The National Association of Professional Base Ball Players (the “National Association”), the dominant, but by no means only, professional league at the time, was besieged with rumors of gambling and fixed games, causing interest to wane.<sup>58</sup> With the game under attack, a group of entrepreneurs saw the opportunity to highlight their association with the national game, save it from disgrace, and elevate their societal status all in one fell swoop.<sup>59</sup> In short, they created a new league, the National League, that promised to rid the professional game of gambling and other unseemly

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<sup>53</sup> Stephen A. Reiss, *TOUCHING BASE: PROFESSIONAL BASEBALL AND AMERICAN CULTURE IN THE PROGRESSIVE ERA* 98 (University of Illinois Press, 1999).

<sup>54</sup> Nathanson, *Gatekeepers of Americana*, at 73.

<sup>55</sup> Jeffrey A. Durney, Comment, *Fair or Foul? The Commissioner and Major League Baseball’s Disciplinary Process*, 41 *Emory L. J.* 581, 583 (1992).

<sup>56</sup> *Id.*

<sup>57</sup> Nathanson, *Gatekeepers of Americana*, at 71.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 71-72.

behavior.<sup>60</sup> Rules were seemingly tightened, good conduct was supposedly mandated and the national pastime would once again be in sync with its image.<sup>61</sup> These entrepreneurs were not shy about trumpeting their civic accomplishments. They proudly exclaimed that they “rescue[d] the game from its slough of corruption and disgrace,” and protected the “respectable and honorable” game by outlawing such vices as (at least for a time) Sunday baseball and alcohol in the stands.<sup>62</sup> They, as well as those who would follow them in baseball ownership throughout the late nineteenth and into the twentieth centuries, promoted themselves as the gatekeepers of the American way of life, entrusted with the responsibility of protecting American values and ideals.<sup>63</sup> And they were overwhelmingly successful in spreading their message.

Much of their message was spread via the conduit of the journalists who covered the teams.<sup>64</sup> Given that many of these journalists were dependant upon the owners for their traveling expenses and other promotional work thrown their way, they were willing accomplices. As such, they were eager, through hundreds of articles written in newspapers and periodicals from coast to coast, to promote both the game’s owners as well as the game itself as essential tools for teaching the American way of life. By the second decade of the twentieth century, their message had permeated the culture. In 1919, a philosopher echoed the prevailing sentiment of the time:

I know full well that baseball is a boy’s game, and a professional sport, and that a properly cultured, serious person always feels like apologizing for attending a baseball game instead of a Strauss concert, or a lecture on the customs of the Fiji Islands. But I still maintain that, by all the canons

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 71-72.

<sup>62</sup> *Id.*

<sup>63</sup> *See generally*, Nathanson, *Gatekeepers of Americana*.

<sup>64</sup> *Id.* at 74.

of our modern books on comparative religions, baseball is a religion, and the only one that is not sectarian but national.<sup>65</sup>

As the ones entrusted to protect the integrity of this national religion, the owners of Major League baseball teams were thus accorded a responsibility and therefore an authority higher than that of mere law. The courts may have kept the masses in line; MLB ensured that they remained true Americans.<sup>66</sup>

Of course, the baseball creed is little more than a cultural fiction in that there has always been a substantial disparity between the ideology of the game and its realities. The entrepreneurs who founded the National League did not, after all, prevent gambling, game fixing and the other vices that existed beforehand; regardless, the ideology affected the ways in which people behaved and thought about the game -- it was of little matter that the creed was sheer fantasy. Ultimately, however, the disparities between the myth and reality were exposed to the extent that the creed was jeopardized. The revelation of this disparity would test the theory of baseball as America and, ironically, result in an even greater elevated status of the game within American society.

#### *B. Scandal and Redemption Through Extra-Legal Means*

As stated above, despite MLB owners' protestations to the contrary, the national game hardly rid itself of gambling and rumors of game fixing through the creation of the National League. Regardless, the cultural fiction of the baseball creed remained dominant as these rumors remained just that due to MLB's hesitance to investigate them. And if it was hesitant to confront these rumors directly, it certainly was unwilling to turn to the law to investigate and potentially punish its players. Consequently, players of

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<sup>65</sup> Nathan, SAYING IT'S SO, at 15.

<sup>66</sup> See generally, Nathanson, *Gatekeepers of Americana*.

“doubtful loyalty” were tolerated and continued to play Major League ball from one year to the next out of fear that exposure would damage the creed irreparably, resulting in a loss of societal status of the “magnates” who owned the teams and who had appointed themselves the gatekeepers of America’s national image.<sup>67</sup>

Eventually, MLB had no choice but to confront the issue as rumors of fixed games grew louder in the early part of the twentieth century. Even before the Black Sox scandal of 1919, rumors abounded. Shortly before the infamous World Series contest between the Cincinnati Reds and the Chicago White Sox that season, reports surfaced that two of the greatest stars of the game – Ty Cobb and Tris Speaker – conspired to fix a Detroit victory over Cleveland in an otherwise meaningless game.<sup>68</sup> Predictably, these reports were ignored by MLB. When, however, a few weeks later rumors began spreading that the World Series itself was fixed, tarring the pinnacle moment of celebration of America’s “civil religion,” MLB was, reluctantly, goaded into action.<sup>69</sup> Its response would cement its status as a de facto sovereign entity.

For months, MLB refused to investigate the rumors that Chicago had conspired to throw the Series to Cincinnati.<sup>70</sup> It is likely that MLB would have been successful in stonewalling any investigation of the Series were it not for the tenacity of a sportswriter who clearly was not beholden to MLB’s ownership cabal (at least in this instance) – Hugh Fullerton.<sup>71</sup> Fullerton covered the Series and grew suspicious of what he saw. He pressed MLB to take action to investigate the allegations, to no avail. He tried to publicly

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<sup>67</sup> Lowell L. Blaisdell, *The Cobb-Speaker Scandal*, 13 NINE: A Journal of Baseball History & Culture 54 (2004).

<sup>68</sup> *Id.*

<sup>69</sup> Nathan, SAYING IT’S SO, at 15.

<sup>70</sup> *Id.* at 17-18.

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

admonish MLB for its inaction through the media but found himself stonewalled when Chicago's largest newspaper – the *Chicago Herald and Examiner* refused to run his stories, partly out of concern that challenging baseball's pristine status would hurt newspaper sales.<sup>72</sup> Eventually, he found an outlet for his stories and turned the heat up on MLB, contending that the image of the game had been sullied by the rumors and that unless the allegations were investigated, this would continue to be the case.<sup>73</sup> Still, he was ignored. Finally, he pressed the button that brought action, alleging that it was the status of the owners themselves that was at stake. Discussing the diminishing stature of the game, Fullerton asserted that,

fault for this condition lies primarily with the owners. Their commercialism is directly responsible for the same spirit among the athletes and their failure to punish even the appearance of evil has led to the present situation, for the entire scandal could have been prevented and the future of the game made safe by drastic action...<sup>74</sup>

For a time, MLB still refused to act, rebutting his allegations as “improbable muckraking.”<sup>75</sup> Eventually, however, it realized that it had no choice but to act in order to protect the sanctity of the cultural fiction of the baseball creed.

In a grand gesture, AL president Ban Johnson publicly proclaimed that he was providing \$10,000 in league funds and hiring two “special prosecutors” to investigate Fullerton's allegations, actions were permissible under an Illinois statute that allowed interested private parties to intervene and assist in the criminal prosecution of certain

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* See also, Gene Carney, *Uncovering the Fix of the 1919 World Series: The Role of Hugh Fullerton*, 13 *NINE: A Journal of Baseball History & Culture* 39, 42-43 (2004).

<sup>74</sup> Nathan, *SAYING IT'S SO*, at 18.

<sup>75</sup> David Q. Voigt, *AMERICAN BASEBALL: FROM THE COMMISSIONERS TO CONTINENTAL EXPANSION* 126 (Pennsylvania State University Press, 1983).

cases.<sup>76</sup> Soon the Illinois State Attorney's Office indicted eight members of the White Sox and five reputed gamblers for conspiring to fix the 1919 World Series.<sup>77</sup> With the nexus of baseball and the American legal system now at hand, MLB recognized the reality that it must take bold and affirmative action in order to protect its image or risk losing control of it as it was knocked from its pedestal and treated as any other nefarious business. The Black Sox scandal was merely the tip of the iceberg. If even a few of the numerous other rumors of game fixing were exposed through investigations by state and local prosecutors, the game's sacred status would be tarnished forever.

Upon Fullerton's urging, MLB dissolved the league's "National Commission" – a structurally weak tripartite body that ostensibly ruled the game and replaced it with a powerful, autocratic commissioner.<sup>78</sup> To fill this position, MLB likewise followed Fullerton's recommendation and hired Kenesaw Mountain Landis – a longtime friend of MLB who demonstrated his fealty in 1914 when, as a federal judge, he presided over but refused to rule on the Federal League's antitrust suit against the National and American leagues, choosing instead to wait out the Federal League until it had virtually exhausted itself out of existence.<sup>79</sup> His public persona fit the role for which it was designed – protector of the American way of life – in that he had gained the reputation as a "hanging

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<sup>76</sup> Michael W. Klein, Comment, *Rose Is In Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 Hastings Comm/Ent. L. J. 551, 574 (1991).

<sup>77</sup> *Id.* at 573-74. See also Nathan, SAYING IT'S SO, at 4.

<sup>78</sup> Nathan, SAYING IT'S SO, at 4. See also Carney, *Uncovering the Fix*, at 45.

<sup>79</sup> See Klein, *Rose Is In Red*, at 558. By refusing to rule on the Federal League's case, Landis forced a settlement between the Federal and Major Leagues which, effectively, dissolved the Federal League. One Federal League team, Baltimore, refused to join in the settlement, however, and pursued its antitrust case against MLB. Eventually, the case reached the United States Supreme Court and became the infamous case in which MLB's antitrust exemption was carved out. See *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*, 259 U.S. 200 (1922).

judge” who was not intimidated by powerful people or institutions.<sup>80</sup> He famously fined Standard Oil a whopping \$29,240,000 for antitrust violations (which was overturned, as were many of his rulings, on appeal),<sup>81</sup> challenged the authority of labor leader Big Bill Haywood,<sup>82</sup> and even tried to exercise jurisdiction over Kaiser Wilhelm I for Germany’s sinking of the *Lusitania*.<sup>83</sup> He looked the part as well, with his shock of white hair and perpetual sneer he had “the visage of an Old Testament prophet who ha[d] looked around and [was] not amused by what he’[d] seen.”<sup>84</sup> And of course there was the name itself: rock solid, larger than life.<sup>85</sup> Not surprisingly, he was a proponent of the baseball creed, remarking at one point that “[b]aseball is something more than a game to an American boy; it is his training for life work. Destroy his faith in its squareness and honesty and you have destroyed something more; you have planted suspicion of all things in his heart.”<sup>86</sup> In Landis, MLB had found the image necessary to elevate the game above the mundane once more.

Landis was not so easily convinced to accept the position, however. Perhaps taking into account the numerous times he had been reversed upon appeal, he was unwilling to accept such humiliations anymore, stating that he would only take on the role if he were granted absolute power, answerable to no one either within or outside of

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<sup>80</sup> Matthew B. Pachman, Comment, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 Va. L. Rev. 1409, 1415 (1990).

<sup>81</sup> Klein, *Rose Is In Red*, at 558.

<sup>82</sup> Pachman, *Limits on the Discretionary Powers*, at 1415.

<sup>83</sup> William Marshall, *BASEBALL’S PIVOTAL ERA: 1945-1951*, 4 (The University Press of Kentucky, 1999).

<sup>84</sup> Durney, *Fair or Foul?*, at 585.

<sup>85</sup> Rader, *BASEBALL*, at 120.

<sup>86</sup> Nathan, *SAYING IT’S SO*, at 49.



Major League Baseball.<sup>87</sup> Despite MLB's assurances that he would have this power, he refused to accept the job until a new Major League Agreement was drafted, one that cemented his authority and insulated him from the vagaries of the appellate process.<sup>88</sup> Left with no choice, MLB eventually relented and ceded the authority to him that he demanded.<sup>89</sup> With that, Landis stepped into his new role and proceeded to remove the stain upon the national pastime's image.

Although acting in his official capacity as the game's protector, Landis's investigation into gambling and game fixing within MLB was exceedingly limited in scope. Rather than tackling the numerous rumors that swirled around the game, Landis chose to investigate the alleged World Series fix only, proceeding on the "single sin myth" that the 1919 fix was the only instance of foul play within MLB.<sup>90</sup> In this way, he could rather easily restore the game's image: simply punish the lone transgressors and return the game to its lofty perch.<sup>91</sup> The potential morass involved in investigating the culture of corruption that led the 1919 fix would be avoided due to its unwieldy nature. Very quickly, it became clear that Landis was out to "solve" the Black Sox scandal rather than address the underlying problems that led to it, and to return MLB to its elevated status as quickly as possible. In this way, he would reassert the cultural fiction of the baseball creed, evidence to the contrary be damned, that nevertheless was prevalent before Hugh Fullerton intervened and exposed it as myth. He would be aided in this regard by the new Major League Agreement he had insisted upon as a condition to taking

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<sup>87</sup> Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 Marq. Sports L.J. 211, 220-21, 246-47 (1996).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Nathan, SAYING IT'S SO, at 7. *See also*, David Q. Voigt, *The Chicago Black Sox and the Myth of Baseball's Single Sin*, in AMERICA THROUGH BASEBALL, 65, 73 (Chicago: Nelson-Hall, 1976).

<sup>91</sup> *Id.*

the position. Soon, through his handling of the Black Sox scandal as well as his indifference to other, similar allegations, he would accomplish what MLB had set out to do when it hired him – return baseball to its elevated plane, immune from the reach of federal law.

C. *The 1921 Major League Agreement, the Black Sox, and Their Immediate Aftermath*

As stated above, Landis was adamant that he would not accept the position of commissioner without the grant of absolute, unquestioned authority. Accordingly, when, during the final drafting session of the 1921 Major League Agreement the owners added a clause that would make the commissioner’s power to suspend or expel club or league officials or employees advisory rather than final, Landis threatened to walk away from the job.<sup>92</sup> With the image of America’s game hanging in the balance, the owners were left with no choice but to accede to Landis’ demand: the offending provision was struck and Landis was granted absolute power.<sup>93</sup> The finalized Major League Agreement bestowed unparalleled power in the hands of one man: Landis was to be the final arbiter of disputes between leagues, clubs and players, the determinant of punishment for any conduct he deemed to be contrary to the best interests of the game, and the arbiter of disagreements over proposed amendments to league rules.<sup>94</sup> In a catch-all provision that he would invoke numerous times throughout his tenure, and which would provide authority for virtually any action he wished to take, the Agreement permitted him “to take other steps as he might deem necessary and proper in the interest and morale of the

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<sup>92</sup> Reinsdorf, *The Powers of the Commissioner*, at 246-47.

<sup>93</sup> *Id.* at 247.

<sup>94</sup> *Id.* at 221. See also Pachman, *Limits on the Discretionary Powers*, at 1415.

players and the honor of the game.”<sup>95</sup> And perhaps most importantly (and most indicative of the owners’ desperation for the moral salvation of their game), the owners expressly waived any rights to challenge Landis’s rulings in court, “no matter what would be the severity of the new Commissioner’s discipline.”<sup>96</sup> Taken together, the Agreement anointed Landis with “autocratic power over everyone in baseball, from the humblest bat boy to a major league president.”<sup>97</sup> Through the 1921 Major League Agreement, Landis would be able to rule from a perch high above the judicial branch. In this way, he was able to both restore public confidence in the game and to diminish the role of the legal system in baseball’s affairs all at once, which was a point he was not shy about making. “Just keep in mind,” he once said, “that regardless of the verdict of juries, baseball is entirely competent to protect itself against the crooks both inside and outside the game.”<sup>98</sup>

Landis wielded his power from the moment he assumed his new role. On August 2, 1921, the eight indicted players and five indicted gamblers were acquitted by a jury of all charges.<sup>99</sup> Despite the jubilation that erupted in the courtroom and of baseball fans across the nation, relieved that their heroes had been cleared of all wrongdoing, Landis was unmoved. The next day he asserted MLB’s superior moral authority by banishing all eight players from the game anyway.<sup>100</sup> “Regardless of the verdict of juries, no player who throws a ball game, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed, and does not promptly tell his club about it, will ever play professional baseball.”<sup>101</sup> In his newly-

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<sup>95</sup> Major League Agreement art. I §§ 2-4 (1921).

<sup>96</sup> *Id.* at art. VII, § 2.

<sup>97</sup> J. Spink, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 76 (1947).

<sup>98</sup> *Id.* at 84.

<sup>99</sup> Nathan, SAYING IT’S SO, at 5.

<sup>100</sup> *Id.* at 31.

<sup>101</sup> *Id.*

appointed role as the moral conscience of the national pastime, Landis did not need to investigate the allegations on his own, nor preside over a hearing in order to reach his verdict. Rather, his job was to administer a “character bath” to the game, regardless of the vagaries of the legal system.<sup>102</sup> In this he was widely hailed. By banishing the Black Sox, he effectively, in the words of one baseball historian, “reaffirmed professional baseball’s position as a respectable social institution whose ethical standards were demonstrably superior to those of the law.”<sup>103</sup> By staying true to his reputation as a jurist who administered “tough justice,” his decision signaled the return of integrity to America’s game.<sup>104</sup> He took the law into his own hands and administered what many believed to be justice, irrespective of the jury’s verdict. In the end, to many Americans, truth had prevailed even though the law did not. The Black Sox may have been found innocent within the world of law but Landis insisted that they face judgment in a higher court – his.<sup>105</sup> In the process, the extra-legal and sovereign authority of Major League Baseball had been firmly established. Landis’s punishment of the Black Sox set the precedent for his tenure as Commissioner, where he ruled not with a sword of justice but with an “extra-legal scythe” to be used at his pleasure and whim.<sup>106</sup> This was particularly true given the reality that, regardless of his ministrations, there was nothing anyone within MLB could do to check him – the owners had forfeited their right to access to the courts in the 1921 Agreement.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 50.

<sup>104</sup> *Id.* at 62.

<sup>105</sup> See Anderson, *A Good Day for Baseball*, SS 11. In an article comparing the Bonds indictment with the Black Sox scandal, Anderson praised Landis in ignoring the judicial acquittal of the Black Sox: “Truth had prevailed, as it usually does.”

<sup>106</sup> Harold Seymour, *BASEBALL: THE EARLY YEARS*, 338 (New York: Oxford University Press, 1960, 1989).

Shortly after the Black Sox scandal, Landis once again wielded his scythe in an effort to protect MLB's position as an institution with its own system of justice, separate and apart from that of federal law. In 1926, two members of the banned Black Sox announced that a series of games between the White Sox and the Detroit Tigers in 1917 had been similarly fixed.<sup>107</sup> In fact, Landis had been made aware of this accusation four years earlier, in 1922, but chose to ignore it in order to protect the integrity of the "single sin myth" surrounding the 1919 World Series.<sup>108</sup> Now, however, with the accusation aired in public, Landis was forced into action. He held a series of "hearings" over the course of several days, where he served not only as judge, but as prosecutor, defense attorney and jury as well.<sup>109</sup> He permitted oral testimony only, refused to call independent witnesses or to release the box scores of the games – which would have revealed a curious pattern of play -- to the public.<sup>110</sup> He also treated the witnesses for the prosecution and defense differently: he required the testimony of the accusers to take place in the presence of the defense witnesses who could then mold their subsequent testimony to rebut that of what they had just heard; the accusers, however, were permitted only sporadic opportunities to likewise respond to contrary testimony.<sup>111</sup> In addition, although Landis encouraged the exposure of inconsistencies in the accusers' testimony through this procedure, he failed to follow up on likely misleading or inconsistent testimony presented by the defense witnesses.<sup>112</sup> In the end, there was only one verdict which was possible – the verdict Landis orchestrated through his actions in organizing

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<sup>107</sup> Lowell, Blaisdell, *Judge Landis Takes a Different Approach*, 15 NINE: A Journal of Baseball History & Culture 32, 32-33 (2006).

<sup>108</sup> *Id.* at 41; see also Voigt, *The Chicago Black Sox and the Myth of Baseball's Single Sin*, at 73.

<sup>109</sup> Blaisdell, *Judge Landis*, at 32-33.

<sup>110</sup> *Id.* at 36.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

and presiding over the hearing.<sup>113</sup> The players were exonerated and the single sin myth remained intact. Most importantly, the accusation was “resolved” by MLB itself, quickly and emphatically, before the legal system had time to intervene. In his handling of this affair, Landis made sure that he would provide closure to the episode; there would be no replay of the Black Sox trial in open court, subject once again to the whim of juries and the requirements of due process.

Around the same time, Landis was confronted with yet another scandal, this one involving two of the greatest stars of the game. And once again, he administered “baseball justice” in an effort to maintain jurisdiction for misdeeds within the game in-house rather than in the legal system. In 1926, the rumors of game fixing by Ty Cobb and Tris Speaker, which briefly surfaced in 1919 shortly after the games in question were played, reemerged.<sup>114</sup> Coming on the heels of the Detroit-Chicago “hearings,” Landis once again had no choice but to take action. And once again he did so both swiftly and with finality. Two weeks after exonerating the Tigers and the White Sox, he did the same to both Cobb and Speaker.<sup>115</sup> This time, however, he convened no hearings, heard no testimony, considered no evidence.<sup>116</sup> Once again, he refused to release the box scores and game descriptions to the public, some of which hinted at the possibility that the game in question appeared to be proceeding in curious fashion.<sup>117</sup> Curiously, however, and in tacit recognition that there was more to the matter than he was otherwise letting on, Landis proclaimed that although Cobb and Speaker were cleared of any wrongdoing, they

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<sup>113</sup> *Id.* at 41-42.

<sup>114</sup> Blaisdell, *The Cobb-Speaker Scandal*, at 61.

<sup>115</sup> *Id.* at 65.

<sup>116</sup> *Id.* at 61-65.

<sup>117</sup> *Id.*

would need to play for different teams in the upcoming season if they wished to continue to play Major League baseball.<sup>118</sup>

The lack of consistency in Landis's rulings, as exposed through his handling of the three scandals noted above, indicate his desire to mold his verdicts to whatever he determined beforehand best protected the image of America's game. For instance, he expelled Buck Weaver of the Black Sox for merely having knowledge of the fix (there was no evidence that he took money or participated in it) in his effort to "cleanse" the game. However, he exonerated both Cobb and Speaker, who even if they did not participate in a fix of the game in question, at a minimum had knowledge of an attempt to do so, because doing so would protect the image of a game that had presumptively already been cleansed.<sup>119</sup> Landis massaged investigations, or refused to even conduct them, such that they would uniformly result in verdicts that exalted baseball, not in ones that damaged its reputation. In his 24 years in office, Landis banned 13 men for various "crimes" committed against baseball.<sup>120</sup> He likewise fined numerous others for sins such as offensive language, barnstorming in the offseason, and other similar offenses.<sup>121</sup> All of this was done with a singular goal: to present a façade of a pristine, all-American game that jibed with the cultural fiction of the baseball creed. In so doing, and in reassuring the public that "a firm patriarchal hand of justice ruled over the nation's pastime," its societal role as an elevated, sovereign institution, remained firmly intact.<sup>122</sup>

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<sup>118</sup> *Id.* at 65.

<sup>119</sup> *Id.* at 66.

<sup>120</sup> See Pachman, *Limits on the Discretionary Powers*, at 1415-16. These crimes ranged from gambling to a suggestion that a pitcher would leave his club so as to prevent it from winning the pennant.

<sup>121</sup> *Id.*

<sup>122</sup> Norman L. Rosenberg, *Here Comes the Judge!: The Origins of Baseball's Commissioner System and American Legal Culture*, 20 *Journal of Popular Culture* 140 (Spring 1987).

#### IV. JUDICIAL ACKNOWLEDGEMENT OF THE EXTRA-LEGAL AUTHORITY OF MAJOR LEAGUE BASEBALL

##### A. Baseball's Antitrust Exemption

The legal system historically has been all too eager to play into this fiction, deferring to MLB and its “law of baseball” whenever possible, allowing it to manage its own affairs without fear of judicial or Congressional oversight. This was first officially recognized in the Supreme Court’s 1922 ruling in *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*<sup>123</sup> where it upheld the D.C. Circuit’s ruling that MLB was exempt from federal antitrust laws.<sup>124</sup> In so doing, the Supreme Court skirted around the obvious -- that MLB was a business not unlike any other, engaging in interstate commerce – and held that it was somehow different, transcendent, above such mundane acts of legislation as the Sherman Act.<sup>125</sup> To hold otherwise would be to hold that America’s game was no different than a shirt factory, and this simply would not do.<sup>126</sup> The cultural fiction of the baseball creed would not permit it. Thirty-one years later, presented with the opportunity to reverse itself in *Toolson v. New York Yankees*,<sup>127</sup> the Court refused to do so, holding instead that it was up to Congress to demystify the national pastime if it so chose.<sup>128</sup> It would not be the body that would smash the myth. Finally, in 1972, in *Flood v. Kuhn*,<sup>129</sup> the Court admitted that it had erred in *Federal Base Ball* in holding that MLB was not engaged in interstate commerce but nevertheless refused to overturn the decision and to render the Sherman

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<sup>123</sup> 259 U.S. 200 (1922).

<sup>124</sup> *Id.*

<sup>125</sup> See Nathanson, *Gatekeepers of Americana*, at 77-78.

<sup>126</sup> *Id.*

<sup>127</sup> 346 U.S. 356 (1953)(per curium).

<sup>128</sup> See *id.* See also, Nathanson, *Gatekeepers of Americana*, at 77-78.

<sup>129</sup> 407 U.S. 258 (1972).



Act applicable to it.<sup>130</sup> Instead, in a telling passage, the Court held that the *Federal Base Ball* and *Toolson* decisions were “aberration[s] confined to baseball.”<sup>131</sup> Further, in justifying the perpetuation of these aberrations, Justice Blackmun, after engaging in a long, syrupy, retelling of the mythical history of America’s game, announced in plain terms that baseball was indeed something different than anything else:

Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.<sup>132</sup>

No other industry, not even another professional sports league, was to be granted such deference by the highest court in the land. Baseball was special. The antitrust exemption was merely one way of acknowledging this reality. If there was ever any doubt that baseball was not subject to the ordinary rules governing the rest of society, Blackmun’s opinion in *Flood* removed any trace of it.

*B. Judicial Deference to the Powers of MLB’s Commissioner*

The antitrust exemption is not the only area in which courts have deferred to baseball law. The U.S. legal system has likewise been very willing to defer to MLB in other areas as well, treating it once again unlike other businesses and even unlike other professional sports leagues. This first became apparent in 1931 when the Northern District of Illinois recognized the unique and powerful authority inherent in Judge Landis’s Commissioner’s office. As stated above, upon accepting the position in 1921,

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 282.

<sup>132</sup> *Id.* at 266-67 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)).

Landis sought complete, autocratic, unchallenged control over MLB and the Major League Agreement was drafted in order to provide him with it. From the moment it was first tested in federal court ten years later, it was clear that Landis's goal had been realized.

The facts of *Milwaukee American Association v. Landis*<sup>133</sup> were somewhat convoluted and labyrinthine and involved the repeated reassignment and optioning of a player who at one point was under contract to the St. Louis Cardinals but whose contractual status was now in doubt given that each team he was assigned to was either owned or controlled by the Cardinals.<sup>134</sup> In short, Commissioner Landis ruled that St. Louis's option of the player to Milwaukee of the minor league American Association was void and that the player must either be returned to St. Louis, transferred to another club not controlled or owned by St. Louis (unlike Milwaukee), or released unconditionally. Landis, who was no fan of the "farm system" as pioneered by St. Louis wherein one club owned or controlled several minor league clubs and shuffled players throughout, took a strong stand against such joint ownership, ruling that, in this case, such shuffling was contrary to the "best interests" of the game, pursuant to the power granted to him under the 1921 Major League Agreement. At issue before the court was whether Landis's "best interests" power held any legal weight when challenged in a court of law.

At the outset of the opinion, the court made clear that in fact it did. The court took notice of the broad swath of power granted to the Commissioner by MLB in an effort to "preserve discipline and a high standard of morale," concluding that this "disclose[s] a clear intent upon the part of the parties to endow the commissioner with all

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<sup>133</sup> 49 F.2d 298 (E.D. Ill 1931).

<sup>134</sup> *Id.* at 300-02.

the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.”<sup>135</sup> With the Black Sox scandal less than a decade in the past, the court was quite willing to defer to MLB in its efforts to preserve a code of conduct above and beyond that required by the legal system. As such, although it recognized the reality of Landis as an “absolute despot,” it was not uncomfortable with this designation. Further, it held that the “best interests” provisions of the Major League Agreement that granted the Commissioner not only the power to resolve disputes brought to him but the power to initiate investigations on his own volition and to decide on whatever remedial action he deemed appropriate were not limited in any fashion:

[T]he provisions are so unlimited in character that we can conclude only that the parties did not intend so to limit the meaning of conduct detrimental to baseball, but intended to vest in the commissioner jurisdiction to prevent any conduct destructive to the aim of the code.... So great was the parties’ confidence in the man selected for the position and so great the trust placed in him that certain of the agreements were to continue only so long as he should remain commissioner.<sup>136</sup>

Given the deference to baseball law, the court was not uncomfortable ceding authority to a system that embraced the rule of man over the rule of law – the polar opposite of the most basic tenet of the American legal system. This deference would prove troublesome over a half century later when Pete Rose would find himself deprived of a property right as a result of this inverted system of justice.

A further indication of the extent to which the court was willing to defer to the authority of Commissioner Landis was its response to the argument that the provision of the Major League Agreement wherein the club owners expressly waived their right of access to the courts was in violation of public policy in that it deprived the court of its

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<sup>135</sup> *Id.* at 299.

<sup>136</sup> *Id.* at 302.

jurisdiction. Once again, the court appeared to be untroubled by this unfettered, unchecked grant of absolute power to one man. While acknowledging that most such provisions are “commonly held void,” here, the court held that submission of a dispute to Commissioner Landis as arbiter was not, provided that his decision was not unsupported by the evidence or “unless the decision is upon some basis without legal foundation or beyond legal recognition.”<sup>137</sup> What was left unsaid was how these determinations were to be made if all access to the courts was barred. In a roundabout fashion, the court soothed itself by concluding that the rulings of the commissioner of baseball could never be considered arbitrary or improper because they were necessarily made in furtherance of his pursuit “to keep the game of baseball clean”.<sup>138</sup> When and if this pursuit tramples the rights of others who may get in his way was not a question the court appeared willing to answer. In a case that, on its face, would seem to raise red flags, and which the court recognized the presence of absolute, unchecked, despotic power, the court curiously chose these qualities as justification for deferring to a private body rather than stepping in and acting as a judicial check. Legal instinct and common sense would seem to dictate a contrary result. But such senses are of little use when the legal system is confronted with America’s game.

After Landis’s death in 1944, MLB did in fact revise the Major League Agreement, removing the prohibition of access to judicial review and reigning in future commissioners’ power by requiring that only conduct that violated a specific league rule could be violative of the “best interests” clause.<sup>139</sup> However, these limitations lasted only 20 years; in 1964 outgoing commissioner Ford Frick convinced club owners to strike

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<sup>137</sup> *Id.* at 303.

<sup>138</sup> *Id.*

<sup>139</sup> See Pachman, *Limits on the Discretionary Powers*, at 1416-17.

these changes and return to the office of the commissioner the broad array of unchecked powers enjoyed by Judge Landis.<sup>140</sup> And once again, the federal judiciary confirmed both that these powers had been restored in full and that it would defer to MLB just as it had under Commissioner Landis.

In June of 1976, Oakland A's owner Charles O. Finley sold some of his star players to the Boston Red Sox and New York Yankees rather than risk losing them to free agency at the end of the season.<sup>141</sup> Commissioner Bowie Kuhn nullified the sales, asserting that they would debilitate the A's, upset the competitive balance of the American League and, as such, were in violation of the "best interests" clause.<sup>142</sup> Finley challenged Kuhn's ruling in federal court, with the case eventually reaching the Seventh Circuit Court of Appeals in 1978. In upholding Kuhn's actions, the court recalled and reiterated Justice Blackmun's refrain in *Flood* that "baseball cannot be analogized to any other business or even to any other sport or entertainment."<sup>143</sup> Likewise, the court noted that baseball's Commissioner was similarly unique in that in no other sport or business is there a comparable position; one designed to protect and promote the "morale of the players and the honor of the game."<sup>144</sup> "While it is true," the court announced, "that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor."<sup>145</sup> Moreover, the court tacitly recognized the cultural fiction of the baseball creed and the unique role of baseball in American society when it noted that in 1957, the Supreme Court held that,

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<sup>140</sup> *Id.*

<sup>141</sup> *See Finley v. Kuhn*, 569 F.2d 527, 530-32 (7th Cir. 1978).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 537.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

unlike baseball, the antitrust laws do in fact apply to professional football. This, the court reasoned, was a “substantive pronouncement” with regard to the nexus between baseball and the legal system in that it indicated that baseball was something special and, as such, should be treated differently by the legal system than other professional sports.<sup>146</sup>

The court then expanded upon the holding in *Landis* by ruling that the actions of the Commissioner can even be arbitrary and in direct contradiction of previous rulings without running afoul of either the Major League Agreement or the law.<sup>147</sup> Finley contended that, at a minimum, the Commissioner’s actions must be consistent with “prior baseball tradition” and that his power was limited to ruling only on those violations that were either immoral or unethical or which were in contradiction to posted league rules.<sup>148</sup> The court rejected these claims and thereby rejected any limitations placed upon the power of the Commissioner to act, unchecked, pursuant to the “best interests” clause.<sup>149</sup> From the language of the court’s opinion in *Landis*, it does not appear that that court was willing to go that far, citing as it did the requirement that the Commissioner’s actions be consistent with “legal foundation.”<sup>150</sup> The *Finley* court’s recognition of the power of the Commissioner to act in an arbitrary fashion appears to reject this most basic limitation.

The *Finley* court did, however, establish a two-pronged test to determine when it would be justifiable for the judiciary to intercede in baseball’s affairs; however, this test was couched in an excess of language deferential to the autonomy of MLB such that it was unclear precisely when a court could intervene pursuant to this test. Specifically, the

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<sup>146</sup> *Id.* at 541.

<sup>147</sup> *Id.* at 536-37.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Landis*, at 303.

court held that MLB must “follow the basic rudiments of due process of law.”<sup>151</sup> In addition, MLB must follow its own rules and regulations.<sup>152</sup> Failure to adhere to either of these parameters would constitute exceptions to the nonreviewability clause.<sup>153</sup> Absent these facts, the courts were content to steer clear of the legal business of baseball. “Any other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also, as noted in the *Landis* case, the ‘intent of the (baseball) code,’ an even more complicated and subjective task.”<sup>154</sup> Of course, courts have been more than willing to intercede into the affairs of other organizations with similarly confusing, Byzantine codes of conduct. But those other organizations are not Major League Baseball.

On the heels of *Finley* came *Atlanta National League Baseball Club v. Kuhn*.<sup>155</sup> In that case, the Northern District of Georgia was presented with a squabble between Commissioner Kuhn and Braves owner Ted Turner that emanated from boasts made by Turner at an October, 1976 cocktail party. At the party, Turner told San Francisco Giants owner Bob Lurie that he was willing to spend whatever it took to lure free agent Gary Matthews (who had just completed his option year with the Giants and who was soon to be a free agent) from the Giants to his Braves. The Braves had previously been fined for tampering with Matthews a month earlier and, as an additional punishment, Kuhn denied the Braves their selection in the first round of the January, 1977 amateur draft. Lurie filed a complaint with Kuhn and Kuhn held that Turner’s comments were in violation of the “best interests” clause on several grounds. As a result, although Kuhn did not

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<sup>151</sup> *Finley*, at 544.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 539.

<sup>155</sup> 432 F. Supp. 1213 (N.D. GA, 1977).

disapprove the Braves' signing of Matthews (which occurred between the date of Turner's boast and the date of Kuhn's hearing on the matter), he did suspend Turner for one year and reaffirmed the stripping of the Braves' first round draft choice in the 1977 amateur draft. Turner filed a complaint in federal court and, once again, the extent of the Commissioner's "best interests" powers were examined by the judiciary. And once again, the judiciary read them to be remarkably broad.

Initially, the court rejected Kuhn's assertion that *Finley* held that the nonreviewability clause deprived the court of subject-matter jurisdiction. Instead, and seemingly in conflict with *Finley*, the court held that the actions of the commissioner cannot be arbitrary and that the arbitrary nature of a Commissioner's decision is one for the courts to decide.<sup>156</sup> However, what it gave with one hand it took with the other as, in exercising this judicial oversight function, the court demonstrated just how far it was willing to go in order to defer to MLB, and how differently it was willing to treat MLB from any other professional sports league. This becomes clear when the *Atlanta* case is contrasted with a case that was factually similar in many respects other than the most important one: namely, that it did not involve MLB.

Three years prior to *Atlanta*, the Western District of Texas was presented with *Professional Sports Ltd. v. The Virginia Squires Basketball Club, et. al.*,<sup>157</sup> a case that involved the powers of the Commissioner of the American Basketball Association (ABA), which, at the time, was a struggling rival of the established National Basketball Association (NBA). In that case, the plaintiffs, the San Antonio Spurs, purchased a player, George Gervin, from the Virginia Squires, for \$225,000. Upon his review of the

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<sup>156</sup> *Id.* at 1218.

<sup>157</sup> 373 F. Supp. 946 (W.D. TX, 1974).



proposed purchase, the ABA's Commissioner vetoed the sale, citing his authority under the ABA's by-laws which permitted him to settle any and all disputes in which either a player or coach is a party.<sup>158</sup> Similar to the Major League Agreement, the ABA's by-laws stated that "his decision[s] in such matters shall be final."<sup>159</sup> The Spurs challenged the Commissioner's authority to intervene in this sale and the court agreed that the commissioner had acted improperly. The court held that although the Commissioner did have the power to act as an arbiter to settle disputes, he did not have such power when it was the Commissioner himself who created the dispute.<sup>160</sup> Here, as the court noted, both teams agreed upon the terms of the deal; only the Commissioner objected to the arrangement. As such, the court held that "[w]hile the by-laws clearly contemplate arbitration by the Commissioner of disputes between clubs when he is acting impartially, it would be unreasonable and unrealistic to believe that the club members ever intended to authorize him to settle disputes which he himself had instigated..."<sup>161</sup> Although the league's by-laws further empowered the Commissioner to "cancel or terminate any contracts...for violation of the provisions of the Certificate of Incorporation and By-Laws or for any action detrimental to the welfare of the League or professional basketball," the court held that this "best interests" clause would not save him in this case given that the Commissioner's actions were taken without the required notice and hearing. The court held:

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<sup>158</sup> *Id.* at 949.

<sup>159</sup> *Id.* The relevant portion of the ABA's by-laws (Art. IV, § 5) stated: "The Commissioner shall hear and finally decide any dispute to which a player or a coach is a party. In all matters pertaining to the eligibility of players and all disputes arising between clubs relative to title to players' contracts, the Commissioner shall make such investigation, and call such witnesses and demand such papers as he deems necessary, and his decision in such matters shall be final."

<sup>160</sup> *Id.* at 950.

<sup>161</sup> *Id.*

...the principles of fundamental fairness, as well as the by-laws themselves, contemplate a meaningful ‘notice and hearing’ in actions taken under these sections, and since proceedings of this nature could have the effect of depriving a party of some property right, these terms should be construed to require at least the minimum essentials of ‘due process.’<sup>162</sup>

In sum, “[t]he simple truth is that the member clubs have not given the Commissioner the power and authority he claims.”<sup>163</sup>

The *Atlanta* court acknowledged the holding in *Pro Sports Ltd.* but concluded that it was ultimately inapplicable to the issues before it. In dismissing Braves’ owner Ted Turner’s argument that both *Pro Sports Ltd.* and *Atlanta* involved disputes generated by the Commissioner himself, the court held that here, Commissioner Kuhn was not acting pursuant to his power as an arbiter (which presumably would be improper in this instance, according to *Pro Sports Ltd.*) but rather, pursuant to his “best interests” power which authorized him to investigate any act, either upon complaint or upon his own initiative, alleged or suspected to be in violation of the “best interests” of the game, and to determine the appropriate punishment, if any.<sup>164</sup> The court, however, ignored the remainder of *Pro Sports Ltd.* which contemplated the “best interests” clause of the ABA’s by-laws and held that any actions taken pursuant to this clause with the potential to affect a property right must be accompanied by “at least the minimum essentials of due process.” Unlike the *Pro Sports Ltd.* court, the *Atlanta* court took no steps to discern whether the Major League Agreement included any form of notice and hearing provisions in conjunction with the Commissioner’s “best interests” power, and if so, whether they were adhered to in this case at all, let alone, in a “meaningful” way. Even the *Finley*

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<sup>162</sup> *Id.* at 951.

<sup>163</sup> *Id.* at 952.

<sup>164</sup> *Atlanta*, at 1219.

court made passing mention of how “the basic rudiments of due process of law” must be followed;<sup>165</sup> however, when put to the test, the *Atlanta* court was not prepared to hold MLB to this requirement.

The dichotomy between *Pro Sports Ltd.* and the MLB cases evidences the differences in treatment by the federal judiciary of members of professional sports leagues in general and those within MLB. Non-MLB members are afforded at least some level of judicially protected due process – perhaps not Constitutional due process but some level of fundamental fairness. MLB members, on the other hand, do not seem to enjoy the same privilege. This becomes particularly acute when it is the rights and interests of athletes that are involved as it appears as if, taken together, the *Landis*, *Finley* and *Atlanta* cases stand for the proposition that MLB has the ability to waive the rudimentary due process rights of its players via the Major League Agreement (of which the Players Association is not a signatory), regardless of any potential property interests that may be at issue. This was evidenced in the Black Sox case in 1922 and would become clear once more in 1989 when Pete Rose would face a similar banishment from MLB. As evidenced by the court’s holding in *Pro Sports Ltd.*, the ABA, or any other professional sport, would most likely face stern judicial resistance if it attempted to similarly punish a player after the cursory hearings held first by Commissioner Landis and later by Bart Giamatti.

As for why it is that federal courts are so hesitant to plunge into the intricacies of Major League Baseball’s internal affairs when they show no such trepidation when confronted with the workings of other professional sports leagues, some commentators have suggested that it is the sheer simplicity of the Major League Agreement that is to

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<sup>165</sup> *Finley*, at 544.

blame.<sup>166</sup> In the NFL charter, the powers of the Commissioner are spelled out in stunning breadth and depth, with the range of acceptable punishments explicitly detailed.<sup>167</sup> In the NBA, the “standard player contract” specifies that players may be suspended only for activities related to gambling; all other “detrimental” activities may be redressed by way of fine only.<sup>168</sup> Because the Major League Agreement contains none of the specificity or limiting provisions as those contained within the relevant NFL and NBA documents, some have concluded that courts defer to this seemingly broad, unlimited grant of power to MLB’s Commissioner.<sup>169</sup> However, this argument would seem to cut against the case for judicial deference in that this broad grant of unlimited power would necessarily fail the “fundamental fairness” tests of both *Pro Sports Ltd.* and *Finley* due to vagueness. Without clearly demarcated procedures designed to ensure at least the most rudimentary level of due process, the broad swath of power wielded by MLB’s Commissioner would seem to cry out for judicial oversight and intervention. Yet judicial deference is more often the response.

The bald reality, as exposed by the baseball cases, that many of the laws and legal safeguards that apply to the majority of society simply do not apply to MLB, registered some unease in the *Atlanta* court but apparently not enough to cause it to rethink its holding: “The court therefore concludes, with some misgivings, that under this provision, the Commissioner did have the authority to punish plaintiffs.”<sup>170</sup> As for why it is that

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<sup>166</sup> See Pachman, *Limits of the Discretionary Powers*, at 1417-19.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1222. The *Atlanta* court did, however, step in with regard to the power of MLB’s Commissioner to issue sanctions, holding that he may not impose a sanction that is not explicitly enumerated within the Major League Agreement. As such, the court held that Kuhn’s denial of the Brave’s first round draft choice was improper because the denial of a draft choice is not enumerated within the list of possible sanctions within the Major League Agreement. Specifically, Article I, § 3 lists the punitive measures the

federal courts time and again defer to MLB even in the face of precedent that requires them to slalom through their reading of the law in order that they reach their desired outcomes is perhaps not clear on the surface; perhaps it is not even clear to these courts themselves. Rather, the rationale rests within a notion that has become so ingrained in the American subconscious that it is most likely driving these decisions from the backseat – not in the face of the decisionmakers but a forceful presence nonetheless. Very likely it is an even more forceful presence *because* it is beneath the surface, lingering and nagging at every turn. It is the concept of baseball as something greater, something transcendent, something that speaks to the soul of America. Something that would be sullied if forced to comply with the mundane concepts of due process and other legal niceties. Something that has convinced a large swath of Americans that its very status as our national symbol justifies its treatment in the most un-American of ways.

## V. SOCIETAL ACCEPTANCE OF THE EXTRA-LEGAL STATUS OF MLB

Because of the widespread acceptance of cultural fiction of the baseball creed, as well as its treatment by the courts, baseball has, through the course of the twentieth century, become in fact what it was touted to be a century earlier: something greater than merely a game, something that transcends everyday life and something which, therefore, is justifiably treated with kid gloves by the American legal system. This special

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Commissioner may take as (a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars in the case of a Major League Club and not to exceed Five Hundred Dollars in the case of any officer, employee or player. *See also Atlanta*, at 1223. The *Atlanta* court held that neither the *Landis* nor the *Finley* court had ruled on this issue and reasoned that “in light of the fact that this contract purports to authorize the imposition of a penalty or forfeiture, it must be strictly construed.” *Id.* at 1225. This limitation on the Commissioner’s powers is quite minor, however, when compared with the seemingly unfettered ability he has to take action pursuant to his “best interests” clause, as would be later demonstrated to devastating effect in the 1989 Pete Rose scandal.

treatment, through the antitrust exemption as well as the deference paid to MLB's Commissioner, repeatedly heightened the pedestal upon which the game stood such that, in circular fashion, with each act of judicial deference, the exalted status of the game became more and more ingrained.

In fact, by the middle of the twentieth century, the game had become something much more to many Americans: it had become as close to a national religion as this country was ever going to get. One sociologist referred to it as a "civil religion."<sup>171</sup> "By civil religion," he wrote, "I refer to that religious dimension, found I think in the life of every people, through which it interprets its historical experience in the light of transcendent reality."<sup>172</sup> Once the analogy had been made, the comparisons between the two became obvious to anyone wishing to make the connection: the ballparks were referred to as "green cathedrals" and spoken about in reverent tones with, in the words of one believer in the church of baseball, "the awe generally reserved for the great cathedrals of Europe;" even rickety, minor league ballparks, replete with inadequate plumbing, peeling paint and overrun with rodents, were thought of as "somebody's place of worship."<sup>173</sup> The *Sporting News*, which for years was devoted to baseball primarily and other sports only when space permitted, gained the moniker of "baseball's bible," with Albert Spalding, the nineteenth century player and sporting goods magnate who brought the game to many parts of the world through his barnstorming world tour of Major League players during the winter of 1888, considered "the baseball messiah."<sup>174</sup> Of

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<sup>171</sup> Robert N. Bellah, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 3 (2d ed. University of Chicago Press, 1992).

<sup>172</sup> *Id.*

<sup>173</sup> Roberta Newman, *The American Church of Baseball and the National Baseball Hall of Fame* 10 *NINE: A Journal of Baseball History & Culture* 46, 46 (2001).

<sup>174</sup> *Id.* See also Mark Lamster, *SPALDING'S WORLD TOUR: THE EPIC ADVENTURE THAT TOOK BASEBALL AROUND THE GLOBE – AND MADE IT AMERICA'S GAME* (Public Affairs, 2007).

course, every religion requires a spiritual center and baseball was no different; the National Baseball Hall of Fame in Cooperstown, NY (the mythical – although largely discredited – birthplace of the game) filled that role admirably with its congregants hoping to make “pilgrimages,” referred to by some as “sacred journeys,” to this baseball “Mecca” at least once in their lifetimes.<sup>175</sup> Given the ready comparisons, it is no wonder the judicial system has attempted to steer clear of this quasi-sacred institution whenever possible.

Beyond religion, baseball wore its mythical status well when presented through literature as it was used time and again to “express the psychological nature of American life and its moral predicament,”<sup>176</sup> most notably, although certainly not exclusively, in Bernard Malamud’s “The Natural.”<sup>177</sup> In it, Malamud attempted to portray the early and mid-century baseball star as mythic hero, assigning to his protagonist, Roy Hobbs, attributes of real baseball players, thereby grounding his story in reality, but then propelling them into a tale that transcends reality, thereby draping his tale, and the game itself, with mythic, transformative, qualities.<sup>178</sup> For instance, the Hobbs character was largely based on the greatest star of the first half of the twentieth century, Babe Ruth (he was a pitcher before becoming a slugger; he makes good on a promise to hit a home run for a boy on his death bed in the hospital, among other similarities).<sup>179</sup> Moreover, he was shot by a deranged female fan, not unlike Eddie Waitkus in 1949.<sup>180</sup> These “real life”

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<sup>175</sup> See Newman, *The American Church of Baseball*, at 51.

<sup>176</sup> See Peter Carino, *History as Myth in Bernard Malamud’s ‘The Natural,’* 14 NINE: A Journal of Baseball History & Culture 67, 68 (2005) (quoting Earl R. Wasserman, *The Natural: World Ceres*, 9 Centennial Review 438-60 (Fall 1965) reprinted in BERNARD MALAMUD AND THE CRITICS 47 (ed. Leslie A. Field & Joyce W. Field (New York University Press)).

<sup>177</sup> Bernard Malamud, *THE NATURAL* (Farrar, Straus & Giroux, 1980).

<sup>178</sup> See Carino, *History as Myth*, at 67-69.

<sup>179</sup> *Id.* at 72.

<sup>180</sup> *Id.* at 73.

attributes provide a realistic basis for the story which then dips into the world of romance and fantasy (witness Hobbs's bat, "Wonder Boy" carved out of a lightning-struck tree; his first game-winning hit miraculously bringing rain to the parched field; his team, the "Knights," led by the mythic hero propelled, Arthurian style, by his Excalibur-like bat, and on and on).<sup>181</sup> These elements work "reciprocally to add an element of reality to myth and an element of myth to history."<sup>182</sup> In the end, the message is clear: baseball is a medium which transcends the everyday. Just as it would appear unseemly to require King Arthur to show two forms of identification before purchasing a pint of ale, it likewise just feels wrong to require baseball's Commissioner to hold a full and fair hearing before banishing someone from the game.

The link between baseball and "American-ness" even extends, naturally enough, to the White House where the link between the two is forced but nonetheless stressed. One needs to look no further than the official White House web site to see a story focusing on the alleged tale of George Washington playing an early version of the game on the fields of Valley Forge, no less.<sup>183</sup> This link has been exploited for as long as both institutions have been around. President Herbert Hoover once quipped that "[n]ext to religion, baseball has furnished a greater impact on American life than any other institution."<sup>184</sup> During times of national crises, baseball has been used to rally the country, as evidenced by President Franklin Roosevelt's "green light letter," in which he gave his blessing for the game to continue through World War II. "I honestly feel that it

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<sup>181</sup> *Id.* at 69.

<sup>182</sup> *Id.*

<sup>183</sup> See *Presidents and Baseball*, <http://www.whitehouse.gov/baseball/>.

<sup>184</sup> Joshua Fleer, *The Church of Baseball and the U.S. Presidency*, 16 *NINE: A Journal of Baseball History & Culture* 51, 52 (2007).



would be best for the country to keep baseball going.”<sup>185</sup> The national interest was not similarly considered with regard to football.

Despite popular sentiment to the contrary, which argues that football has now usurped baseball in both popularity and connection to the national spirit, recent evidence shows that this is hardly the case. In the 2004 presidential election, Democratic nominee (and Massachusetts senator) John Kerry blundered when he stated that his favorite player on his favorite team was “Manny Ortez” – a bungled confabulation of the two Red Sox stars Manny Ramirez and David Ortiz.<sup>186</sup> George W. Bush, who previously proclaimed that there were two sacred places on American soil: The White House and Yankee Stadium,<sup>187</sup> pounced, using Kerry’s blunder to portray him as out of touch with the soul of America.<sup>188</sup> A similar gaffe with regard to Kerry’s favorite players on the New England Patriots would most likely have had little political and symbolic value. Baseball, however, to many Americans, is representative of something deeper. The baseball creed has succeeded in worming itself into the fabric of America, to the point where the game is seen as central to our shared, core values. As such, it only makes sense that, all realities aside, it be afforded an exalted place in our society as and therefore our legal system.

## **VI. BANISHMENT AND PETE ROSE: THE DANGERS OF EXTRA-LEGAL STATUS ON DISPLAY**

As a general notion, those who argue for the self-regulation of all sports, at least to a degree, base their arguments on the theory that because sporting events depend on

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<sup>185</sup> *Id.* 53-54.

<sup>186</sup> *Id.* at 55.

<sup>187</sup> *Id.* at 56.

<sup>188</sup> *Id.* at 55.

not merely the actual but the appearance of honesty and integrity of the competition so heavily, an internal system must be in place that is able to dole out “justice” quickly and firmly. Because time is of the essence, and even a waft of corruption or foul play can be enough to taint an entire league, reliance on the judicial system, with its formal procedural rules and multiple layers of appeal, is considered inappropriate. Integrity must be kept intact and this can only be done if action is taken swiftly and severely.<sup>189</sup> Given the connection between baseball and America, this argument only resonates more strongly with regard to MLB. As such, banishment, “the ultimate sanction,” is seen as a necessary and just response to certain “crimes” committed according to the internal social, political and legal standards of those who oversee the game (as opposed to the external, formal legal standards that govern the rest of society).<sup>190</sup> Banishment, however, affects the victim in ways that extend beyond the games themselves. As a result, judicial deference to professional sports leagues (most notably MLB, where the deference is most pronounced) in their decisions and procedures with regard to banishment raise legal issues that are all too often ignored in the rush to protect the “integrity of the game.” These were perhaps most famously on display in Commissioner Landis’s expulsion of the Black Sox in 1922 but the issues raised by banishment have been in evidence several times since then.

In 1970, for example, Commissioner Kuhn indefinitely suspended Detroit Tigers pitcher Denny McLain for associating with gamblers.<sup>191</sup> Although McLain was never convicted, or even charged with a crime, or even accused of throwing a game,

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<sup>189</sup> See Durney, *Fair or Foul?*, at 623.

<sup>190</sup> Patrice H. Kunesh, *Banishment As Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. Rev. 85, 88 (2007).

<sup>191</sup> Nathan, SAYING IT’S SO, at 136-38.

Kuhn doled out “justice” nevertheless. After conducting an internal investigation, he amended McLain’s suspension to a three-month ban, which itself was derided by many as being much too lenient, regardless of the reality that McLain had seemingly violated no law yet was being punished through the denial a property interest (his salary) anyway.<sup>192</sup> *Newsweek* lamented that “baseball, like all sports, is a very special segment of that society – one that depends for its very existence on the complete confidence of the public. McLain shook that confidence as badly as anyone in the last 50 years, and Kuhn’s action last week compounded the error.”<sup>193</sup> To many, Kuhn’s sentence violated their sense of justice – not of the legal variety but one emanating somewhere else entirely; a higher sense, one which MLB was expected to dole out in order to protect the integrity of the game and, therefore, the American soul.<sup>194</sup> Saddled with this responsibility, and empowered by the legal system to seemingly act, unchecked, however it chose, it is little wonder that a culture of corruption would eventually set in as a sense of entitlement, indifference to the rule of law and to the societal boundaries of acceptable conduct became ingrained within MLB. All of this would be on display in the Pete Rose affair. And from the Rose affair, it certainly was a short trip to the Enron-like system of corruption exposed by the December, 2007 release of the Mitchell Report.

### *The Rose Scandal*

As the generation that could recall the Black Sox scandal died out, successive generations would receive their own lesson of baseball justice through the Rose affair, which in many ways was Black Sox redux.<sup>195</sup> However this time, by the late 1980’s,

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 137-38.

<sup>194</sup> *Id.* at 137.

<sup>195</sup> *Id.* at 185.

there was over 60 years of precedent for MLB's exertion of extra-legal authority. As such, the abuse of Rose's rights was far more blatant. Nevertheless, these abuses were easily brushed off by an organization which was confident by this point that it was highly unlikely that the federal legal system was going to step in and challenge its authority.

The facts of the Rose case were relatively straightforward. In 1985 and '86, Rose, who at the time was managing the Cincinnati Reds (the beneficiaries of the thrown 1919 World Series), was alleged to have placed a series of wagers on 390 Major League games including 52 involving his Reds.<sup>196</sup> Betting sheets were uncovered, complete with Rose's fingerprints, along with the betting records of Rose's bookies, including one of Ron Peters, a bookmaker from suburban Cincinnati.<sup>197</sup> If proved, this activity would violate Baseball Rule 21(d) which forbids any player, umpire, club or league official or employee from betting on any baseball game. If the game was one in which the bettor had no connection, the penalty is a one-year suspension; if, however, the game was one in which the bettor "has a duty to perform," the penalty would be the ultimate sanction: permanent banishment from the game.<sup>198</sup> Upon receipt of this information, Commissioner Peter Ueberroth invoked his power to investigate and, in February, 1989, hired John M. Dowd to conduct an inquiry into the allegations.<sup>199</sup> On April 1, 1989, Bart A. Giamatti succeeded Ueberroth as Commissioner and the investigation continued with Dowd focusing on the bookies, particularly Ron Peters, who was staring down federal charges of cocaine distribution and tax evasion and who was, therefore, in a vulnerable

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<sup>196</sup> See Klein, *Rose is in Red*, at 570.

<sup>197</sup> *Id.*

<sup>198</sup> See Ronald J. Rychlak, *Pete Rose, Bart Giamatti, and the Dowd Report*, 68 Miss. L.J. 889, 891 (1999).

<sup>199</sup> See Klein, *Rose is in Red*, at 575-76.

position himself.<sup>200</sup> As such, in order to coax out his testimony, Dowd informed Peters that, in exchange for his “full and truthful cooperation with the Commissioner,” Giamatti would agree to bring to the attention of Peters’ Federal District Court judge the fact that Peters was “of assistance to us and that we believe that you have been honest and complete in your cooperation.”<sup>201</sup> Peters agreed and then implicated Rose. Thereafter, Giamatti wrote to U.S. District Court Judge Carl Rubin: “It is my purpose to bring to your attention the significant and truthful cooperation Mr. Peters has provided to my special counsel....Based upon other information in our possession, I am satisfied Mr. Peters has been candid, forthright and truthful with my special counsel.”<sup>202</sup>

Rose took exception to Giamatti’s letter, claiming that it constituted evidence that Giamatti had prejudged the case, given that, prior to the hearing as well as the introduction of Rose’s evidence in defense of the charges against him, Giamatti had apparently already concluded that the chief witness against him, Ron Peters, had been “candid, forthright and truthful.” As such, Rose claimed that his upcoming hearing was little more than window dressing as his fate had already been determined. Therefore, he sued Giamatti in state court to prevent the hearing from going forward. Rose based his suit on several theories, the most pertinent of which drew from the dicta in *Finley* and was one based on a breach of contract theory where he claimed that Giamatti was contractually bound to conduct his hearing in accordance with the Rules of Procedure contained within the Major League Agreement which stated that such proceedings should

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<sup>200</sup> *Id.*

<sup>201</sup> *See Id.*

<sup>202</sup> *See Id.* at 576.

be run “in general like judicial proceedings.”<sup>203</sup> He also alleged that the procedures he was to be subject to prevented him from properly confronting his accusers and from cross-examining them (particularly those named within what became known as the “Dowd Report”).<sup>204</sup> He also echoed the court in *Pro Sports Ltd.* by raising substantive and procedural due process issues, claiming that public policy, as well as Ohio law, required “reasonable notice and a hearing with a fair opportunity to defend the charges.”<sup>205</sup> Finally, he called on Giamatti to recuse himself from the proceeding, given his biased opinion as expressed in his letter to Judge Rubin.<sup>206</sup>

Wisely, Rose filed his case in state, rather than in federal, court. As such, without the history of deference behind it, he stood a better chance of at least having his voice heard. In June of 1989, the state court granted his motion for a temporary restraining order, holding that despite the legal system’s tradition of deference to MLB, here there was no choice but to step in given the strong likelihood that Giamatti had prejudged Rose’s case and that the subsequent hearing would be “futile, illusory, and the outcome a foregone conclusion.”<sup>207</sup> MLB, however, removed the case to federal court where the Sixth Circuit eventually denied Rose’s objection to the removal, thereby setting into motion the process for the “futile, illusory” hearing that could now finally take place.<sup>208</sup> Although Rose had one formal legal avenue still open to him – a hearing on his motion for a permanent injunction against Giamatti, albeit this time in federal, rather than state, court – Federal District Court Judge John D. Holschuh strongly hinted that he would

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<sup>203</sup> See *Id.* 580-81. See also *Rose v. Giamatti*, No. A8905178, 1989WL 111447 (Ohio Ct. C.P., Hamilton Co., June 26, 1989).

<sup>204</sup> *Id.* See also *Rose v. Giamatti*.

<sup>205</sup> See Durney, *Fair or Foul?*, at 592. See also *Rose v. Giamatti*.

<sup>206</sup> See Klein, *Rose is in Red*, at 580-81. See also *Rose v. Giamatti*.

<sup>207</sup> See *Rose v. Giamatti*.

<sup>208</sup> See Klein, *Rose is in Red*, at 584.

abide by tradition and defer to the substantive and procedural rules as defined by MLB, irrespective of how it chose to implement them.<sup>209</sup> With state court closed off to him and the federal court clearly hinting that it would provide him no relief, Rose was effectively at the mercy of Giamatti. Therefore, on August 23, 1989, Rose consented to his permanent banishment from the game, signing a document in which he “recognizes, agrees and submits to the sole and exclusive jurisdiction of the Commissioner” to hear and determine this matter as well as any other determined by the Commissioner to be “not in the best interests of the national game of baseball.”<sup>210</sup> In the end, despite the absence of a formal finding that Rose bet on baseball, let alone his Reds, and without so much as even the “futile and illusory” hearing contemplated by the Ohio state court, Rose was banished for life.

The agreement tossed a couple of bones to Rose, however: although it was technically a “permanent” banishment, it provided for the possibility of his reinstatement after one year.<sup>211</sup> More importantly, and perhaps a nod to the denial of due process and lack of a hearing prior to banishment, it contained the following language: “[n]othing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any major league baseball game.”<sup>212</sup> Combined, these two apparent concessions by MLB seemingly paved the path for Rose’s eventual return to the game; as such, they most likely contributed to his ascension to the agreement and his dropping of his legal case, regardless of the ultimate futility of his pressing onward.

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<sup>209</sup> *Rose v. Giamatti*, 721 F. Supp. 906, 916-19 (S.D. Ohio, 1989).

<sup>210</sup> See Klein, *Rose is in Red*, at 586.

<sup>211</sup> *Id.*

<sup>212</sup> See Rychlak, *Rose, Giamatti, and the Dowd Report*, at 895.

Now, pursuant to the terms of the agreement, Rose could see his way out of the forest. Almost immediately, however, MLB made it very clear that any such path was illusory.

Upon the announcement of the agreement, Giamatti stated that irrespective of the language agreed upon by both he and Rose, he believed that Rose bet on baseball.<sup>213</sup> Instantly, for all practical purposes, the terms of the agreement had been changed unilaterally by MLB – in order to successfully apply for reinstatement, Rose would most likely have to admit that he bet on baseball. This was something that was not contemplated by the agreement and added yet another layer of injustice to MLB’s handling of the Rose affair: not only was banishment carried out in the absence of a hearing and in the absence of due process, both the banishment agreement as well as the terms of reinstatement were altered unilaterally and after the fact. To further complicate matters, eight days later, Giamatti died of a heart attack, thereby sealing Rose’s fate.<sup>214</sup> Now it was extremely unlikely that future Commissioners were going to take steps to undo the agreement of their predecessor, someone almost everybody admired immensely. This was made explicit in 1995 when (then acting) Commissioner Selig stated that he would not revisit Rose’s banishment because “Bart Giamatti was one of the best friends I’ve ever had in the world, and I have great faith in his decision. His decision still stands, and as far as I’m concerned, his decision should stand.”<sup>215</sup> Legal niceties and issues of fundamental fairness were not the issue in Selig’s eyes. Instead, it was the reputation of a friend that hung in the balance.

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<sup>213</sup> *Id.* During the question and answer session of the announcement of the agreement between MLB and Rose, Giamatti’s response to the first question posed to him (“Did Rose bet on Baseball?”) was: “In the absence of a hearing and therefore in the absence of evidence to the contrary...I am confronted by the factual record of Mr. Dowd. On the basis of that, yes, I have concluded that he bet on baseball.”

<sup>214</sup> See Nathan, *SAYING IT’S SO*, at 187.

<sup>215</sup> See Rychlak, *Rose, Giamatti, and the Dowd Report*, at 900.



Taken together, the many stages of the Rose affair as well as its ultimate resolution are indicative of a system embracing the rule of man rather than the rule of law – the polar opposite of the principle upon which the American legal system allegedly rests. Yet, somehow, despite the reality that baseball has been governed in such fashion ever since the days of Judge Landis, it is still seen as symbolic of America. If so, this raises serious questions about what this says about both institutions. Rose’s case illustrated that even the most basic concessions to the applicability of the rule of law as outlined in *Finley* were little more than dicta. When they stood in the way of “baseball justice,” they were to be pushed to the side as well. *Finley*’s two-pronged test regarding the Major League Agreement’s waiver of recourse to the courts called for judicial intervention when the Commissioner does not follow baseball’s internal rules or when he violates the basic rudiments of due process of law.<sup>216</sup> Giamatti violated both prongs of the *Finley* test yet Federal District Court Judge John D. Holschuh strongly hinted that this was of little matter as he was prepared to defer to Giamatti regardless.

Giamatti, like Landis before him, initiated and presided over an affair where he was the investigator, prosecutor, judge and jury, acting in so many different capacities so as to exceed, at least according to *Finley*, even the broad powers granted him within the Major League Agreement. Outside of the context of MLB, courts have held that such a concentration of power in one office raises serious concerns as there exists an obvious potential for abuse.<sup>217</sup> On top of this, the fact that the decisions made by this powerful

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<sup>216</sup> *Finley*, 569 F.2d at 544.

<sup>217</sup> See Durney, *Fair or Foul?*, at 609-10. See also *Automotive Serv. Councils of Michigan v. Secretary of State*, 267 N.W. 2d 698, 705 (Mich. App. 1978). The court quoted a well-known treatise on administrative law when it wrote: “The danger of unfairness is particularly great in an agency in which there is a high degree of concentration of both prosecuting and judicial functions, especially where the functions are combined in the same men. The courts have pointed out that in such situations the agency members must be zealous in the recognition and preservation of the right to a hearing by impartial triers of the facts, and

individual are not subject to judicial review absent extraordinary circumstances is likewise a factor that, in non-MLB contexts, has caused concern by several courts, including the Supreme Court.<sup>218</sup> The institutionalized, structural biases inherent in such a system – one in which there appears to be no restraint upon a Commissioner to punish people without proper review and safeguards as well as one in which the Commissioner himself is free to set forth the rules of procedure which he will then follow (or not, as the Rose affair demonstrated) – are obvious and odious.<sup>219</sup> Yet the judicial system continues to defer.

In the absence of a judicial check, a culture of abuse was allowed to fester as MLB was free to conduct its affairs however it pleased in order to achieve other goals. In Rose’s case, as in the case of the Black Sox, it was to protect the image of the game, to present it as one with its integrity intact despite the actions of alleged outliers such as Rose and the 1919 White Sox. The prospect of a full and fair investigation and resulting hearing, complete with the possibility of exoneration of the suspects, was something MLB was not willing to risk, particularly when it did not have to, given its elevated role within American society which made judicial interference highly unlikely.

## VII. CONCLUSION

After the Rose affair, the extra-legal status of Major League Baseball was more assured than ever. Accordingly, MLB was free to establish its own rules and then break them whenever and however it wished, federal law notwithstanding. In this environment,

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such fusion of functions has been subjected to considerable criticism.” 1 *Am. Jur.* 2D Administrative Law § 78.

<sup>218</sup> See *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (“We should...be even more scrupulous to safeguard the impartiality of arbitrators ... since [they] have completely free rein to decide the law as well as the facts and are not subject to appellate review.”) *Id.* at 149.

<sup>219</sup> See Klein, *Fair or Foul?*, at 610-11.

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 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. 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." 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.

