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# FALL OF THE ROCKET: STEROIDS IN BASEBALL AND THE CASE AGAINST ROGER CLEMENS

DANIEL HEALEY\*

## INTRODUCTION – THE ROCKET ON THE HILL

Athletes who are chemically propelled to victory do not merely overvalue winning, they misunderstand why winning is properly valued . . . . Drugs that make sport exotic, by radical intrusions into the body, drain sport of its exemplary power by making it a display of chemistry rather than character. In fact, it becomes a display of some chemists' virtuosity and some athletes' bad character. – George F. Will<sup>1</sup>

On February 13, 2008, Roger Clemens (Clemens) traveled to Capitol Hill to clear his name. A seven-time Cy Young Award-winning pitcher for the Boston Red Sox, Toronto Blue Jays, New York Yankees, and Houston Astros, “the Rocket” had come to the end of his career, but only the beginning of his legal and media troubles. In December 2007, Clemens’s trainer, Brian McNamee (McNamee), had implicated his former employer as a steroids user in the “Mitchell Report,” the definitive account of the proliferation of performance-enhancing drugs (PEDs) in Major League Baseball (MLB).<sup>2</sup> After facing two months of intense media scrutiny, Clemens traveled to the Hill to testify before the House Committee on Oversight and Government Reform (the “Committee”) that he had never used PEDs.

Barrel-chested and balding, the Clemens who testified in the Rayburn Building that day barely resembled the lithe pitching phenom who had entered

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1. George F. Will, Op-Ed, *Barry Bonds's Enhancement*, NEWSWEEK, May 21, 2007, at 82, available at <http://www.newsweek.com/id/34762?tid=relatedcl>.

2. 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 (2007) [hereinafter MITCHELL REPORT].

the major leagues twenty-four years before,<sup>3</sup> but he exhibited the same tenacity and sense of self-confidence that had defined his remarkable professional career.<sup>4</sup> At the hearing's outset, Clemens read a prepared statement:

I appreciate the opportunity to tell this Committee and the public—under oath—what I have been saying all along: I have never used steroids, human growth hormone [HGH], or any other type of illegal performance enhancing drugs. I think these types of drugs should play no role in athletics at any level, and I fully support Senator Mitchell's conclusions that steroids have no place in baseball. However, I take great issue with the report's allegation that I used these substances. Let me be clear again: I did not.<sup>5</sup>

The statement directly conflicted with the account provided by McNamee in the Mitchell Report, an account that McNamee himself reiterated before the Committee, sitting a mere few feet from Clemens: "During the time that I worked with Roger Clemens I injected him on numerous occasions with steroids and human growth hormone."<sup>6</sup> McNamee went on to emphasize that he had no reason to lie, having been offered "[no] special treatment or consideration for fingering star players."<sup>7</sup> The trainer had informed federal investigators that he had injected three players: Andy Pettitte, Chuck Knoblauch, and Clemens. He noted that two of those players "confirm[ed] my account. The third is sitting at this table."<sup>8</sup>

It was grand legal theater on a national stage. The two men's stories were completely at odds, and as Rep. Tom Davis (R-Va.) noted, one of them was "lying in spectacular fashion."<sup>9</sup> The Committee interrogated both Clemens

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3. See Appendix I.

4. See Amy Shipley & Barry Svrluga, *Committee Split by Clemens Testimony*, WASH. POST, Feb. 14, 2008, available at 2008 WLNR 2811155 (observing that Clemens "seemed confident and resolute"); Lance Williams, *Hardball on the Hill*, S.F. CHRON., Feb. 14, 2008, at A1 (noting that Clemens's testimony "reflected neither guilt nor introspection").

5. *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong., Feb. 13, 2008 (statement of William Roger Clemens) [hereinafter *Mitchell Report Hearings*].

6. *Id.* at 1 (statement of Brian Gerald McNamee).

7. *Id.* at 3.

8. *Id.*

9. Childs Walker, *Truth or Consequences: Witnesses' Credibility at Issue; Clemens; Denial Could Be a Risky Strategy; on Roger Clemens vs. Brian McNamee*, BALT. SUN, Feb. 14, 2008, at 6Z; see also Rick Morrissey, Op-Ed, *An Inconvenient Truth, All Around*, CHI. TRIB., Feb. 10, 2008, at 1 ("There doesn't seem to be much room for middle ground, for in between, for an opportunity to

and McNamee at length on matters ranging from the specific allegations contained in the Mitchell Report, to McNamee's injection of Clemens's wife with Human Growth Hormone (HGH) in 2003, to a 1998 party at player Jose Canseco's house that Clemens allegedly attended.<sup>10</sup> The emphasis of the questioning was oddly split along party lines, with Committee Democrats such as Rep. Henry Waxman (D-Cal.) vigorously attacking Clemens, and Republicans such as Reps. Dan Burton (R-Ind.) and Chris Shays (R-Conn.) focusing on McNamee.<sup>11</sup> Although Clemens seemed to find a number of allies on the Committee, Waxman and others were incredulous. "I hate to say it because you're one of my heroes, but it's hard to believe you," concluded Rep. Elijah Cummings (D-Md.).<sup>12</sup>

For purposes of possible perjury charges against Clemens, the most significant developments had already occurred off-camera. Andy Pettitte, Clemens's former teammate and longtime friend, signed an affidavit on February 8, 2008, stating that Clemens had admitted using HGH to him in 1999 or 2000;<sup>13</sup> Pettitte's wife had corroborated his account in a separate affidavit.<sup>14</sup> Knoblauch had also confirmed McNamee's story in a February 1, 2008 deposition.<sup>15</sup> The most potentially damaging material to Clemens's case was physical evidence McNamee said he had retained and recently turned over to federal investigators: syringes, gauze, and other evidence he allegedly used while administering steroids to Clemens.<sup>16</sup>

The Clemens hearing—and its unfolding aftermath—is the most prominent example of the very public manner in which the federal government is now meting out punishment to sports stars for past steroids-related indiscretions. Elite-level athletes have historically been punished for illegal anabolic steroid use only through athletic suspensions rather than through the

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assess blame proportionately. Somebody's lying. Somebody is willing to stand before Congress, and, under oath, treat the truth as if it were a cigarette in need of extinguishing.").

10. See generally Bob Hohler, *Clemens Hit Hard on the Hill: Pitcher Leaves Self Vulnerable as he Denies Steroid Use to Skeptical Lawmakers*, BOSTON GLOBE, Feb. 14, 2008, at A1; James Oliphant, *Clemens Duels with His Accuser: Pitcher, Trainer Testify at Hearings*, CHI. TRIB., Feb. 14, 2008, at 1; Walker, *supra* note 9, at 6Z.

11. See generally Hohler, *supra* note 10; Bill Shaikin, *Clemens, Former Trainer Face Tough Crowd on Hill*, L.A. TIMES, Feb. 14, 2008, at 1 (noting that Committee Chair Waxman was "surprised that the questioning splintered largely along partisan lines"); Shipley & Svrluga, *supra* note 4.

12. Hohler, *supra* note 10.

13. Andy Pettitte Aff. ¶ 1, Feb. 8, 2008.

14. Laura Pettitte Aff., Feb. 8, 2008.

15. Interview of Edward Charles Knoblauch, H. Comm. on Oversight & Gov't Reform, 110th Cong. (Feb. 1, 2008) (Interview of Charles Knoblauch).

16. See Hohler, *supra* note 10; see also Shaikin, *supra* note 11.

criminal justice system.<sup>17</sup> Today, however, some of baseball's best players—Clemens, Barry Bonds, and Miguel Tejada—are being investigated and potentially punished not for their alleged drug use, but for lying about it under oath.<sup>18</sup>

Clemens's lead attorney Rusty Hardin has pointed out the "peculiar" phenomenon of the Mitchell Report: "[t]hat a document created by a private citizen commissioned for a private corporation [is] turning the wheels of the justice system," with the help of a few key players.<sup>19</sup> Jeff Novitsky, the Internal Revenue Service agent who had ensnared Bonds and others in his investigation of the Bay Area Laboratory Cooperative (BALCO), attended the Clemens hearing and later signed on to assist in this new high-profile case.<sup>20</sup> Bonds is facing perjury charges over his denials of steroids use in his 2003 grand jury testimony. With the assistance of Novitsky (now with the Food & Drug Administration (FDA)) and the Justice Department, Clemens could very well face similar charges.<sup>21</sup>

This paper examines the Clemens investigation as a singular case of crime and punishment in baseball's "steroids era." Part I discusses MLB's drug policy leading up to the league's 2002 collective bargaining agreement (CBA). Part II discusses BALCO, allegations by former player Jose Canseco, the 2005 congressional hearings on PEDs in baseball, and the Mitchell Report, the investigations and accounts that document the league policy's failures and the PED use of numerous prominent players, including Clemens. Part III focuses on the case against Clemens, considering his congressional testimony with the evidence arrayed against him, as well as the dubious legal tactics that have

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17. Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30 CHAMPION 22, 24 (2006) (noting that since the enactment of the Anabolic Steroids Control Act, "it is difficult to name a single professional or elite-level athlete who went to jail as a steroids offender, although use within sports, such as baseball, seems to have risen").

18. See generally Steve Watkins, Op-Ed, *Be Honest and Dependable; Take Responsibility: Lying Worsens Misdeeds*, INV. BUS. DAILY, Apr. 4, 2008, available at 2008 WLNR 6291780. Paul Fiorelli, Xavier University Director of the Center for Business Ethics, recently speculated that Americans "tolerate mistakes a lot more than we tolerate cover-ups." *Id.*

19. Michael O'Keeffe et al., *Hardin: Probe in Roger Future. Lawyer Feels Investigation Is Likely*, N.Y. DAILY NEWS, Feb. 11, 2008, at 55.

20. See Hohler, *supra* note 10, at A1. According to a former Justice Department official, the BALCO case was "'agent-driven,' with Novitsky doggedly gathering evidence, then trying to persuade prosecutors to bring indictments." Lance Williams, *The Man Who Won't Go Away: How America's Top Steroid Cop Got Roger Clemens in His Sights*, SPORTS ILLUSTRATED, Feb. 18, 2008, at 16.

21. See Duff Wilson & Michael S. Schmidt, *Lawyer's Comments Anger Waxman*, N.Y. TIMES, Feb. 11, 2008, at D1 (noting that Novitsky was "the key" in securing a guilty plea in the perjury case of sprinter Marion Jones and in getting federal prosecutors to charge Bonds with perjury and obstruction of justice).

accompanied his efforts to clear his name. The paper concludes that there is an excellent chance that Clemens will be indicted for perjury, and considers the future of baseball drug testing and ex post facto punishment for use of PEDs.

## I. BASEBALL'S EVOLVING DRUG POLICY

### A. *The Early Years (1970-1991)*

Major League Baseball's drug policies date back to the 1970s and have often correlated with federal drug and dietary supplement regulation, though the league's rules were frequently ineffectual and under-enforced. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>22</sup> which led to a 1971 MLB policy providing for the "possibility of discipline for failure to comply with federal and state drug laws."<sup>23</sup> The league rule also advised trainers that anabolic steroids—then a prescription drug under the Food, Drug and Cosmetic Act—"should not be dispensed without a physician's guidance."<sup>24</sup>

#### 1. The First Performance Enhancers

From 1971 through 1985, Commissioner Bowie Kuhn sent regular memoranda to MLB clubs reiterating the league's drug policy. Kuhn dealt with a number of individual drug incidents, primarily involving narcotics arrests and resulting in player suspensions.<sup>25</sup> MLB sought to regulate drugs of abuse, but generally turned a blind eye to the far more common use of amphetamines, or "greenies," which players used to improve concentration and boost energy during games.<sup>26</sup> Before the end of his tenure, Kuhn pushed

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22. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

23. MITCHELL REPORT, *supra* note 2, at 27.

24. *Id.*

25. *Id.* at 29-34. These included Ferguson Jenkins's 1980 arrest for possession of marijuana, hashish, and cocaine; the 1983 arrests of four Kansas City Royals players for cocaine possession; and the arrest of Atlanta Braves pitcher Pascual Perez. *Id.*

26. A memorandum issued with the 1971 policy provided that players could be disciplined for the "unprescribed possession or distribution of amphetamines or barbiturates (including 'greenies')." Player Jim Bouton's book, *Ball Four*, published in 1970, drew attention to the fact that many MLB players regularly took amphetamines in order to gain "enhanced awareness, better hand-eye coordination, and a sense of superior energy." Hector Del Cid, *Winning at All Costs: Can Major League Baseball's New Drug Policy Deter Kids From Steroids and Maintain the Integrity of the Game?*, 14 SPORTS LAW. J. 169, 179 (2007). Bouton was "labeled a Benedict Arnold by the baseball establishment, some ex-teammates and the press" for exposing clubhouse affairs to the outside world—a phenomenon that would take on even greater importance during the "steroids era." Mireya

the league to institute a stronger drug enforcement program. However, the Major League Baseball Player's Association (MLBPA) opposed such policies as "'degrading' to players and a violation of their privacy," according to statements by then-acting Executive Director Donald Fehr.<sup>27</sup>

## 2. Treatment Without Testing

In 1984, the owners and MLBPA instituted a joint program providing for treatment of players who had used drugs of abuse, though anabolic steroids were not covered in this agreement.<sup>28</sup> The program also did not include mandatory random drug testing, which Fehr claimed could rise to the level of "infringement of constitutional rights, and rights of privacy, etc."<sup>29</sup> Opposition to random testing would become a mainstay among the MLBPA's demands in collective bargaining.

In this early system, under-enforcement was the primary problem. Steroids were illegal and technically disallowed in MLB, but the league lacked the ability or the will to enforce its own policy through testing. As early as 1984, Roger Clemens's rookie season, an "informal arrangement" was in place whereby the league could conduct "reasonable cause" testing of players for drug use.<sup>30</sup> However, while Kuhn's successor Peter Ueberroth sought to address illegal drug use in baseball, the use of steroids was "'not really on the radar' at that time."<sup>31</sup> In 1985, Ueberroth instituted a program that tested for drugs of abuse and amphetamines, but not anabolic steroids or other PEDs.<sup>32</sup>

Conventional wisdom now holds that MLB did not officially "ban" steroids and other PEDs before the CBA of 2002. As Senator Mitchell noted in his Report, however, MLB policy from 1971 onward "prohibited the use of *any* prescription medication without a valid prescription."<sup>33</sup> By implication, this ban applied to steroids and other PEDs even before 1991, following the passage of the Anabolic Steroid Control Act of 1990<sup>34</sup> and Commissioner Fay Vincent's subsequent explicit inclusion of anabolic steroids in the league's

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Navarro, *We're Friends, Right?*, N.Y. TIMES, Feb. 10, 2008, available at 2008 WLNR 2573885.

27. MITCHELL REPORT, *supra* note 2, at 34.

28. *Id.*

29. *Id.* at 35 (citing Letter from Donald M. Fehr to Leland S. MacPhail).

30. MITCHELL REPORT, *supra* note 2, at 25.

31. *Id.* at 36. Ueberroth successor Fay Vincent also mentioned to Mitchell that he "failed to notice the emergence of steroids because he was focused on cleaning up the problem of cocaine use by major league players." *Id.* at 64.

32. *Id.* at 37.

33. *Id.* at SR-10 (emphasis added).

34. Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended throughout 21 U.S.C.).

drug policy.<sup>35</sup> The issue was MLB's failure to implement the policy, which was constantly diluted through the MLBPA's efforts at the bargaining table.

*B. The "Steroids Era" (1991-2002)*

1. Prelude to the Strike

The 1990s saw momentous events and innovations for professional baseball: the 1994 players' strike, the introduction of inter-league play and the playoff "wild card," the construction of a number of popular retro-style ballparks, and a dramatic increase in on-field offensive production, culminating with the historic home run chase of 1998. However, these mostly positive and economically successful changes brought with them the long shadow of steroids and what many later perceived as a "conspiracy of silence" at all levels of management and ownership, perpetrated to appease a strengthened players' union and maintain the sport's fragile popularity.<sup>36</sup>

In 1991, the year Roger Clemens won his third Cy Young Award with the Boston Red Sox, Commissioner Vincent listed anabolic steroids as prohibited substances under the league's drug policy, a response to the federal Anabolic Steroids Control Act of 1990.<sup>37</sup> This proved to be yet another example of the Commissioner's office instituting a rule that was in line with federal law, but rendered useless through a lack of proper enforcement. Media speculation continued throughout the early 1990s that players were using PEDs.<sup>38</sup>

In 1994, following Vincent's ouster by the owners, then-acting commissioner Bud Selig proposed the inclusion of a joint drug program in the league's CBA, listing steroids among the prohibited substances and providing for testing for "reasonable cause."<sup>39</sup> The MLBPA rejected the program. Due

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35. MITCHELL REPORT, *supra* note 2, at SR-11.

36. See generally HOWARD BRYANT, JUICING THE GAME (2006); Wallace Matthews, *National Pastime's False Spring*, NEWSDAY, Feb. 12, 2008, at A59 (arguing that the era and specifically the home run chase of 1998 "was no accident and it was no mistake. It was a concerted effort to first get back in your good graces, then deeper into your pockets by allowing Major League Baseball to become a league of juice monkeys.").

37. Pub. L. No. 101-647, 104 Stat. 4789 (1990). The statute classified anabolic steroids as "Schedule III" controlled substances and increased criminal penalties associated with their use and distribution. Attorney Hector Del Cid argues that the period following the ban "can be likened to the prohibition era because those seeking steroids obtained steroids from homebrewed distributors on the black market." Cid, *supra* note 26, at 190.

38. See MITCHELL REPORT, *supra* note 2, at 68-71. In fact, as early as 1988, *Washington Post* sportswriter Thomas Boswell publicly implicated the Oakland Athletics' Jose Canseco as a steroids user, stating in print that the outfielder was "the most conspicuous example of a player who has made himself great with steroids." *Id.* at 61-62; see also BRYANT, *supra* note 36, at 107.

39. MITCHELL REPORT, *supra* note 2, at 43; Michael J. Cramer & James M. Swiatko, Jr., *Did*



to a bargaining impasse on the program as well as a host of other labor issues, the players instituted a strike later that year, leading to the cancellation of the MLB postseason and World Series.<sup>40</sup>

## 2. The Great Home Run Chase

The MLB players' strike was damaging to the sport, leading to a significant drop in overall attendance in 1995 and widespread resentment on the part of baseball fans.<sup>41</sup> After a sharp downturn in popularity, the homerun chase of 1998 is generally seen as the phenomenon that "brought fans back" to baseball, an uplifting national news story that celebrated friendly competition and brought down the sport's most hallowed record.<sup>42</sup> Mark McGwire of the St. Louis Cardinals and Sammy Sosa of the Chicago Cubs belted home runs at a furious pace throughout the 1998 season, eventually ending up with seventy and sixty-six, respectively, shattering Roger Maris's previous record of sixty-one.<sup>43</sup> Meanwhile, Roger Clemens was having a career year himself, winning the Cy Young Award with the Toronto Blue Jays for the second consecutive year.<sup>44</sup>

However, the story of the home run chase lost some of its luster late in the season when a *New York Times* reporter spotted a bottle of steroid precursor

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*Major League Baseball Balk? Why Didn't MLB Bargain to Impasse and Impose Stricter Testing for Performance Enhancing Substances?*, 17 MARQ. SPORTS L. REV. 29, 43 (2006) (stating that MLB's 1994 proposed PED policy was "extensive and comprehensive," but quoting MLB Executive Vice President Rob Manfred that the league "did not consider PEDs to be a problem at this point"). As Howard Bryant writes, the 1994 document was actually "remarkable . . . in its toughness" and "stronger than any future proposals, when steroid use became a given and dealing with it required muscle." BRYANT, *supra* note 36, at 395-96.

40. MITCHELL REPORT, *supra* note 2, at 43.

41. See BRYANT, *supra* note 36, at 54-55 (noting that the MLB strike "was most devastating emotionally. There were hard feelings to go around, and those feelings defined the poststrike period. Even as fans returned to the ballparks, they returned angrily.").

42. See generally Cramer & Swiatko, *supra* note 39, at 60-61.

43. Thirteen MLB players hit forty or more home runs in 1998, including Ken Griffey, Jr. (fifty-five) and Greg Vaughn (fifty). Cramer & Swiatko, *supra* note 39, at 36. The power surge was the most public example of what was occurring throughout the league: the total number of home runs league-wide topped 5000 for the first time in 1998, followed by 5500 in 1999 and nearly 5700 in 2000. *Id.* Between 1995 and 2000, twenty-two of thirty MLB teams set franchise records for most home runs in a season. *Id.*

44. After leaving the Boston Red Sox to sign with the Toronto Blue Jays in 1997, Clemens went 21-7 with a 2.05 ERA and 292 strikeouts. The pitcher put up comparable statistics the following year, going 20-6 with a 2.65 ERA and 271 strikeouts. See *Roger Clemens*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/c/clemereo02.shtml> (last visited May 7, 2008). It was the beginning of a dramatic late-career renaissance for a player who many in the Boston front office had deemed past his prime. For a more comprehensive listing of Clemens's pitching statistics, see Appendix I.

androstenedione (andro) in McGwire's locker.<sup>45</sup> Andro was a legal over-the-counter supplement at the time, despite its chemical similarity to other forms of illegal anabolic steroids. Given McGwire's enormous popularity, it was not surprising that the discovery increased andro sales by 500%.<sup>46</sup> Responding to the controversy, the commissioner's office promised to further investigate the use of PEDs in professional baseball.<sup>47</sup>

The legality and accessibility of andro were seen by many critics as unfortunate byproducts of the Dietary Supplement Health & Education Act (DSHEA), a statute that opened the gates for numerous ingestible substances with drug-like properties to be sold over-the-counter.<sup>48</sup> DSHEA "reshaped baseball and developed a multibillion dollar industry" built around making professional athletes—and health-conscious consumers—bigger, stronger, faster, and more durable.<sup>49</sup>

In MLB clubhouses, players were increasingly relying on professional trainers, who managed their workout regimens and often regulated the athletes' nutrition and supplement intakes as well.<sup>50</sup> A number of over-the-

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45. See BRYANT, *supra* note 36, at 134; MITCHELL REPORT, *supra* note 2, at 61, 77-85; Joshua H. Whitman, *Winning at All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. ILL. L. REV. 459, 479. McGwire, Sosa, and many other players also admitted to the use of the supplement creatine. See BRYANT, *supra* note 36, at 134. In his autobiographical account of the "steroids era," Jose Canseco speculated that McGwire may have intentionally placed the bottle of andro in plain sight to distract the media from his use of illegal anabolic steroids. JOSE CANSECO, JUICED: WILD TIMES, RAMPANT 'ROIDS, SMASH HITS AND HOW BASEBALL GOT BIG 6, 202-04 (2005).

46. *Cid*, *supra* note 26, at 177.

47. See *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroids Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 277, 333 (2005) [hereinafter "2005 Steroids Hearings"] (statement of Allan H. "Bud" Selig, Comm'r, Major League Baseball) (stating that the andro incident "caused [MLB] to focus on the use of performance enhancing substances as a possible problem").

48. Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325 (codified throughout 21 U.S.C.). In his report, Senator Mitchell stated that "with the benefit of hindsight, knowing what I know now, I regret that I did not speak out against the . . . regulati[on] [of] supplements that resulted from the enactment" of DSHEA. MITCHELL REPORT, *supra* note 2, at 60.

49. *Cid*, *supra* note 26, at 183 (noting that the dietary supplement industry creates "products that claim to increase muscle growth, weight loss, and energy, under the guise of supplemental products for a normal diet"). With the passage of DSHEA and the uproar over andro and other legal PEDs, "the federal government had essentially unlocked the door to the pharmacy, yet it now seemed surprised that people were walking through it." BRYANT, *supra* note 36, at 262.

50. One such trainer was Brian McNamee, who traveled with Roger Clemens during his time with the Toronto Blue Jays and New York Yankees. In 2001, McNamee was accused by a woman of forcing her to ingest gamma hydroxybutyrate (GHB), commonly known as a "date rape" drug. The incident did not lead to criminal charges against McNamee, but did embarrass the Yankees and acted "as a harbinger that baseball ignored." BRYANT, *supra* note 36, at 157.

counter performance-enhancing substances allowed under DSHEA—andro, tetrahydrogestrinone (THG), and ephedra among them—were later banned by the FDA after health risks emerged.<sup>51</sup> In reexamining the rise of PEDs in baseball, however, dietary supplements and steroid precursors now appear to be a red herring, a temporarily convenient media cover obscuring the dramatic rise of anabolic steroids and other illegal PEDs.<sup>52</sup>

### 3. The 2002 CBA

In 2002, MLB and the MLBPA finally agreed on a drug testing policy in their collective bargaining negotiations.<sup>53</sup> Prior to 2002, MLB's drug policy was communicated to players in periodic memoranda from the league Commissioner,<sup>54</sup> but no player was actually punished for PED violations before its inclusion in the CBA.<sup>55</sup> The new agreement explicitly prohibited the use, possession, distribution, or sale of anabolic steroids.<sup>56</sup> The plan also called for "survey testing" during the 2003 season to assess how many players were using PEDs; if testing demonstrated that five percent or more players were using, mandatory testing would be instituted in 2004.<sup>57</sup>

The CBA did not call for a suspension after failing a test, however, and only provided for a fifteen-day suspension for a second offense and a one-year

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51. The FDA instituted a novel health risk/benefit analysis to remove ephedra from the market following the 2003 death of Baltimore Orioles pitcher Steve Bechler. See BRYANT, *supra* note 36, at 275-76. The agency also banned THG, an ingredient chemically similar to an anabolic steroid and legally marketed as a dietary supplement, ruling that it did not "meet the dietary supplement definition" outlined in DSHEA. *MLB Controversy Spotlights Line Between Steroids, Supplements*, TAN SHEET, Dec. 13, 2004, at 9 [hereinafter *MLB Controversy*]. Congress also eventually removed andro and other steroid precursors from the market with the passage of the Anabolic Steroid Control Act of 2004. Pub. L. No. 108-358, 118 Stat. 1661 (codified as amended at 21 U.S.C. §§ 801, 802, 811 (2004)). For a discussion of the 2004 Act and its impact, see Collins, *supra* note 17, at 23. Collins notes that the law "simplified the requisite elements of an anabolic steroid, greatly expanded the steroidal substances listed under the law, and corrected some . . . errors and poor draftsmanship of the 1990 law." *Id.* However, he claims that the law's "effectiveness . . . in combating sports doping is open to question," noting that "law reviewers have been generally critical of the criminalization approach to non-medical steroids use and its militaristic enforcement." *Id.*

52. See *MLB Controversy*, *supra* note 51, at 9 (stating that the BALCO matter "appears to illustrate a broader problem in professional sports, particularly in leagues without strict drug policies: the integration of illegal doping into nutrition regimens, and the disguising of illegal steroid abuse as legally permissible supplement use").

53. Cramer & Swiatko, Jr., *supra* note 39, at 49; see also MITCHELL REPORT, *supra* note 2, at 25-26, 82.

54. MITCHELL REPORT, *supra* note 2, at 25.

55. *Id.* at SR-11.

56. *Id.* at 54. However, the plan did not prohibit use of andro. *Id.* at 82-83.

57. Cramer & Swiatko, *supra* note 39, at 49-50; see also MITCHELL REPORT, *supra* note 2, at 25.

suspension on a fifth offense.<sup>58</sup> Critics called the policy “toothless by design,” a surrender by the owners to avoid another strike.<sup>59</sup> “At least it was a start,” Selig would later say of the agreement.<sup>60</sup> By the end of 2002, baseball had seen its most productive offensive years ever.<sup>61</sup> However, a series of scandals and revelations involving some of baseball’s best players were about to change the game and effectively force the league to start over.

## II. CRIMES AND (EX POST FACTO) PUNISHMENT

### *A. Barry Bonds and BALCO*

The scandal surrounding San Francisco Giants slugger Barry Bonds and BALCO exposed baseball’s deep-rooted PED problem to the public at long last. Anabolic steroids had always been prevalent in bodybuilding, but this culture became increasingly intertwined with that of professional baseball as players sought to build muscle, recover faster, and become more effective power hitters and pitchers.<sup>62</sup> Players increasingly relied on personal trainers as conduits to the weightlifting world and as sources for PEDs.<sup>63</sup> BALCO

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58. Cramer & Swiatko, *supra* note 39, at 49-50.

59. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS* 127 (2006). The players’ union’s chief legal counsel Gene Orza said a strict testing policy “would have been regarded as confrontational”; when asked if the current steroids policy was too weak, Orza replied “[o]nly if you take a dictatorial stance, an anti-American stance.” *Id.*; see also Cramer & Swiatko, *supra* note 39, at 60-63 (speculating that MLB “made the decision not to force this issue beyond the policy it was ultimately able to negotiate because it was not economically feasible for it to take the risk of attempting to force the issue of a strong PED policy”).

60. MITCHELL REPORT, *supra* note 2, at 53.

61. Cramer & Swiatko, *supra* note 39, at 38 (noting that “almost all material power records were surpassed” between 1994 and 2002). Between 1994 and 2002, the fifty home run mark was reached eighteen times, the sixty home run mark six times, and the seventy home run mark twice. *Id.*

62. See BRYANT, *supra* note 36, at 103 (“Drugs were part of the weightlifting world, a vain culture in which the goal was always more: more muscle, more definition, the ability to lift more weight and do more reps. Gyms across America provided the conduits to information about which substances worked best and where illegal drugs could be obtained.”). Jose Canseco described steroids’ fitness industry origins in his autobiography, noting that many bodybuilders “supplement their income by selling them. So do trainers in gyms, and sometimes the owners of the gyms themselves.” CANSECO, *supra* note 45, at 137; see also 2005 *Steroids Hearings*, *supra* note 47, at 307 (statement of Sandy Alderson, then-Executive Vice President for Baseball Operations, Major League Baseball) (noting that during the 1990s, other factors, such as the popularity of strength programs, “obscured a steroid problem” in baseball).

63. Mitchell Report informants McNamee and former New York Mets clubhouse attendant Kirk Radomski were two such figures. See Mike Fish, *Radomski’s Legacy: The Man Who Made the Mitchell Report Sing*, ESPN.COM, Feb. 11, 2008, <http://sports.espn.go.com/mlb/news/story?id=3241127> (noting that Radomski “educated himself about steroids by hanging around New York gyms”); see also Cramer & Swiatko, *supra* note 39, at 40 (stating that there was a “noticeable increase” in weightlifting among MLB players during the post-strike years).

was a company illegally supplying steroids to elite athletes, Bonds foremost among them, but it was only one of many clandestine PED distributors beating the legal system and the MLB's paper-thin drug policy.

### 1. The BALCO Investigation

*Game of Shadows*, published in 2006 by two *San Francisco Chronicle* investigative reporters, tells the story of how Barry Bonds observed the 1998 home run chase, envied the adulation heaped upon McGwire and Sosa, and decided to become a steroids user himself.<sup>64</sup> Bonds allegedly obtained anabolic steroids through his trainer Greg Anderson and BALCO, a company owned and operated by a self-professed nutritionist named Victor Conte. In 2001, Bonds had one of the greatest offensive seasons by any player ever, hitting seventy-three home runs to break McGwire's 1998 record.<sup>65</sup>

The net closed around BALCO and its clients in early 2003 as IRS agent Jeff Novitsky and other federal investigators arrested Anderson and Conte for steroids distribution.<sup>66</sup> The U.S. Attorney's Office for the Northern District of California called several MLB players to testify about their involvement before a federal grand jury, including Bonds and New York Yankees players Jason Giambi and Gary Sheffield.<sup>67</sup> In raids of the BALCO labs and

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64. See generally FAINARU-WADA & WILLIAMS, *supra* note 59. Upon its publication in 2006, George F. Will noted that *Game of Shadows* "poses the kind of problem that ordinary people frequently face reading political journalism," since assessing the story's accuracy "requires weighing the [sources'] veracity." George F. Will, Op-Ed, *Steroids and Spring Training*, WASH. POST, Mar. 12, 2006, at B7. Will points out that many of Fainaru-Wada's and Williams's sources were unidentified; one was Bonds's ex-girlfriend, who "may have an ax to grind," while others were "low lifes" whose accounts may have been less than accurate. *Id.*

65. In addition to his 73 home runs, Bonds had a .328 batting average, 137 RBIs, 129 runs, 177 walks, a .863 slugging percentage, and an on-base percentage of .515. FAINARU-WADA & WILLIAMS, *supra* note 59, at 278. With steroids, Bonds "became one of the greatest hitters of all time," improving his game in every offensive category except stolen bases, all after the age of thirty-five. *Id.* at 280. Bonds's 2001 season was topped in total runs created only by Babe Ruth's 1921 season, and Bonds's 2001, 2002, and 2004 seasons rank among the ten best of all time according to this measure. *Id.* at 280-81.

66. See Collins, *supra* note 17, at 22 (noting that the BALCO investigation was "unprecedented in size and scope," involving "late night trash searches, undercover agents, extensive surveillance, a variety of subpoenas and search warrants, and untold expenditures of money and man hours") (internal citations omitted). Upon his arrest, Conte told federal investigators that BALCO's primary business was providing "elemental analysis of blood and urine samples," but also admitted to supplying elite athletes with testosterone/epitestosterone (nicknamed "the cream") and tetrahydrogestrinone (THG, nicknamed "the clear")—anabolic steroids undetectable in conventional PED testing. See MITCHELL REPORT, *supra* note 2, at 112-13.

67. Other athletes implicated in the BALCO probe included Olympic sprinters Marion Jones, Tim Montgomery, and Kelli White; shot-putter C.J. Hunter; cyclist Tammy Thomas; and professional football player Bill Romanowski.

Anderson's apartment, prosecutors had gathered specific evidence of Bonds's doping regimen, which included anabolic steroid trenbolone, HGH, anti-narcolepsy drug Modafinil, and female infertility drug Clomid.<sup>68</sup>

## 2. Bonds on the Stand

Bonds testified on December 4, 2003, after being instructed that nothing he said would be used to prosecute him for any crime—with the exception of perjury, if he failed to tell the truth. Bonds was asked specific questions about his drug regimen and shown doping calendars, ledgers, and blood samples, all prepared by Anderson and Conte and seized earlier that year in an FBI raid.<sup>69</sup> The player claimed he was never aware of the administration of any PEDs, and was told by Anderson that the substances he was receiving were flaxseed oil and a topical rubbing balm for his arthritis.<sup>70</sup> Bonds's strategy of professing ignorance was "obvious":

[Bonds] didn't know what he put in his body, he simply ingested whatever substance his trainer gave him. If his trainer told him it was flaxseed oil and arthritis cream, then that's what it was. To people who knew Bonds's meticulous and controlling nature, the claim was absurd, but the prosecutors didn't pursue the point.<sup>71</sup>

This failure to press Bonds more aggressively on his potential knowledge of his own PED use was questionable, but the case against the player was later bolstered by the testimony of new witnesses, including his ex-girlfriend.<sup>72</sup> While federal investigators pursued trainers for steroids distribution, they began to build perjury cases against Bonds and the other athletes linked to BALCO.

By 2006, prosecutors believed they had an "airtight" perjury case against

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68. See *MLB Controversy*, *supra* note 51, at 9. Clomid is used by steroid users to counterbalance the effects of anabolic steroids on natural testosterone production. MITCHELL REPORT, *supra* note 2, at 118.

69. FAINARU-WADA & WILLIAMS, *supra* note 59, at 201-05.

70. *Id.* at 202. Flaxseed oil may have been the "delivery agent" for "the clear," and is known to "counteract some of the estrogenic effects of steroid use." WILL CARROLL, *THE JUICE: THE REAL STORY OF BASEBALL'S DRUG PROBLEMS* 13-14 (2005). Conte claimed to be closely regulating Bonds's daily nutrition regimen, supplying him with whey protein, creatine, vitamins, and other supplements to maintain optimal nutrient levels. See *MLB Controversy*, *supra* note 51, at 9.

71. FAINARU-WADA & WILLIAMS, *supra* note 59, at 202.

72. *Id.* at 247. Bonds's ex-girlfriend Kimberly Bell testified before a federal grand jury in 2005, stating that Bonds "confided to her that he was using steroids, saying that they helped him recover from injuries but also blaming them for the elbow injury that sidelined him" for part of that season. *Id.*

Bonds proving that he “had been using banned drugs for years, had known exactly what he was doing, and had lied about it under oath.”<sup>73</sup> The prodigious evidence included statements of “confessed steroids dealers,” Bonds’s ex-girlfriend’s testimony, and “considerable documentary and circumstantial evidence.”<sup>74</sup>

While unique in many respects, the Bonds case represents the unusual tack taken by Novitsky and the U.S. Attorney’s Office for the Northern District of California in their pursuit of elite athletes. Exposed as cheaters in the media, the athletes face prosecution and punishment only when they are not truthful with the federal government regarding their drug use. Significantly, the evidence now arrayed against Roger Clemens is of much the same variety. Bonds was indicted for perjury and obstruction of justice in November 2007 and is currently awaiting trial.<sup>75</sup>

### B. “The Chemist” and Congress

The repercussions of the BALCO investigation were far-reaching both within MLB and on Capitol Hill. President George W. Bush mentioned the influence of steroids in professional sports in his 2004 State of the Union Address, putting MLB on notice that it had to clean up the sport to avoid legislative intervention.<sup>76</sup> Senator John McCain (R-Ariz.) likewise advised

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73. *Id.*

74. *Id.* at 287.

75. See *Barry Bonds Indicted on Perjury, Obstruction Charges*, ESPN.COM, Nov. 19, 2007, <http://sports.espn.go.com/mlb/news/story?id=3112487> (noting that the indictment charged Bonds with four counts of perjury and one of obstruction of justice for which he could face a total of thirty years in prison if convicted). Before his indictment, however, Bonds was able to break Hank Aaron’s career home run record of 755. Bonds finished the 2007 season—and possibly his career—with 762 home runs, 1996 RBIs, 2227 runs, 2935 hits, 514 stolen bases, and a career batting average of .298. See *Barry Bonds*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/b/bondsba01.shtml> (last visited May 8, 2008).

76. President George W. Bush, State of the Union Address, Jan. 20, 2004, available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited May 8, 2008).

The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.

*Id.*; see also *MLB Controversy*, *supra* note 51, at 9. Jose Canseco, noting that the president himself owned the Texas Rangers when Canseco played for them, would later claim that the 2004 State of the Union Address was the first phase of a “witch hunt—even though [the owners] had played a role in helping move the steroid revolution forward, by giving a berth to me and other steroid-using players during my heyday, and benefiting from our enhanced performance.” CANSECO, *supra* note 45, at 134.

Donald Fehr that the MLBPA would have to address the problem or Congress would do it for them.<sup>77</sup>

### 1. Juiced and the Era Exposed

The league was further shaken by the claims of former All-Star Jose Canseco. In his 2005 autobiography *Juiced: Wild Times, Rampant 'Roids, Smash Hits and How Baseball Got Big*, the retired player asserted that steroids and other PEDs were rampant throughout the sport.<sup>78</sup> Canseco, known within MLB as “the Chemist” for his propensity for mixing and using different types of anabolic steroids, claimed that he had personally injected numerous players during his MLB career, including All-Stars such as McGwire, Rafael Palmeiro, Ivan Rodriguez, and Juan Gonzalez.<sup>79</sup> The book “violate[d] the tenet of clubhouse secrecy that for years maintained the steroid era,” issuing a “withering indictment of the sport, its racism, its double standards, and its tacit and blatant condoning of the steroids that to a large degree fueled the sport’s comeback.”<sup>80</sup>

While Bonds had been exposed by the BALCO investigation, speculation still swirled around Roger Clemens, arguably the best pitcher of the era and another player enjoying astonishing late-career success. Although he did not name Clemens as a steroids user in his book, Canseco noted the change he saw in the pitcher in the late 1990s:

[Roger] started working out harder. And whatever else he

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77. MITCHELL REPORT, *supra* note 2, at 56 (citing *Effectiveness of Drug Testing in Preventing Steroid Use: Hearing Before the S. Comm. on Commerce, Science and Transp.*, 108th Cong. 73 (2004)). McCain informed Fehr that if MLBPA continued to fail to address steroids, the Senate would “search for legislative remedies . . . [T]he integrity of the sport, and the American public, demand a certain level of adherence [to] standards that, frankly, is not being met at this time.” *Id.*

78. CANSECO, *supra* note 45, at 9 (claiming that steroids and other PEDs “are a huge part of baseball, and always will be, no matter what crazy, toothless testing schemes the powers that be might dream up”). Although many in and outside baseball were skeptical of Canseco, his tell-all book was “devastating” to the sport. BRYANT, *supra* note 36, at 373. Canseco’s admitted steroid use and allegations regarding other players are discussed extensively in the Mitchell Report, *supra* note 2, at 61-66, 84-85, 104, 204, 246-47.

79. See generally CANSECO, *supra* note 45; BRYANT, *supra* note 36, at 373. In his book, Canseco comes across as proud of his self-professed status as MLB’s “godfather of steroids,” claiming he was

the first to educate other players about how to use them, the first to experiment and pass on what I’d learn, and the first to get contacts on where to get them. I taught the other players which steroid has which effect on the body, and how to mix or ‘stack’ certain steroids to get a desired effect.

CANSECO, *supra* note 45, at 135.

80. See BRYANT, *supra* note 36, at 373.



may have been doing to get stronger, he saw results. His fastball improved by a few miles per hour. He was a great pitcher long before then; it wasn't his late-career surge that made him great. But he certainly stayed great far longer than most athletes could expect. There's no question about that.<sup>81</sup>

Canseco noted that he never observed Clemens taking steroids, but that the two men "talked about what steroids could do for you, in which combinations."<sup>82</sup> Canseco later claimed that his publishers forced him to excise more concrete insinuations about Clemens's PED use due to legal concerns.<sup>83</sup>

## 2. The 2005 Hearings

Prompted by the BALCO probe and the revelations in Canseco's book, the House Committee on Government Reform and Oversight called the first of its hearings on the use of steroids in MLB in 2005.<sup>84</sup> The hearing included testimony from players McGwire, Sosa, Canseco, Rafael Palmeiro, and Curt Schilling, as well as Selig and Fehr. The event was gripping and profoundly sad for baseball fans, rivaled only in bizarre drama by the Clemens hearing nearly three years later.<sup>85</sup> One by one, with the exception of Canseco, the players denied that they had used PEDs—or, in McGwire's case, claimed that they were "not there to talk about the past."<sup>86</sup> As Howard Bryant wrote, the players were publicly trapped, caught between loyalty and legal consequences:

Having received federal subpoenas, they are now just

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81. CANSECO, *supra* note 45, at 212.

82. *Id.* at 211.

83. See JOSE CANSECO, VINDICATED 3-5, 171-72 (2008).

The lawyers might have felt it was too risky to include Clemens, and they must have based that on three reasons: One, I had not seen him do steroids. Two, he had never approached me about using steroids. And three, I had never steered him toward anyone who could supply him with steroids. All I had were conversations with him about steroids, and my general suspicions. It wasn't enough.

*Id.*

84. The hearings were ostensibly designed to investigate PED use in professional sports to ascertain its effects on teenagers. See Whitman, *supra* note 45, at 479-80 (noting that Congress "identified youth safety" as the focal point of its legislative efforts); Sarah Kellogg, *Juiced: Congress, Steroids, and the Law*, WASH. LAWYER, May 2008, at 25-26. See generally FAINARU-WADA & WILLIAMS, *supra* note 59, at 243-47; BRYANT, *supra* note 36, at 388-93.

85. Kellogg, *supra* note 84, at 25 (stating the hearing "was testy, shocking, and sad, ripping apart the image of the players and the sport itself").

86. See BRYANT, *supra* note 36, at 388-93; FAINARU-WADA & WILLIAMS, *supra* note 59, at 243-47.

ballplayers, utterly lost outside the protected cocoon in which they have always been in control. . . . They are faced with either protecting the baseball fraternity or telling the truth to Congress. . . . They are being asked real questions about real subjects with real consequences by people a thousand times more powerful than they. None of them knows what to do.<sup>87</sup>

Faced with aggressive questioning on PEDs and baseball's offensive renaissance, Sosa "acted as if he could hardly speak English."<sup>88</sup> McGwire was evasive, stating repeatedly that he would not discuss his own alleged steroid use and would prefer to plead the Fifth Amendment.<sup>89</sup> Before a panel of skeptical congressmen and a mother whose son had committed suicide due to steroid use, the former All-Stars were largely unable to discuss their pasts or suggest a way forward for their sport.

Most relevant to the Clemens case was the testimony of Baltimore Orioles first baseman Rafael Palmeiro. During the hearing, a defiant Palmeiro denied Canseco's allegations, pointed his finger at then-chairman Tom Davis, and stated unequivocally that he had "never used steroids. Period."<sup>90</sup> However, MLB would announce five months later that Palmeiro had been suspended for ten days for violating the league's drug policy.<sup>91</sup> The player had failed a drug test in May, testing positive for the steroid Stanazolol just two months after testifying before Congress.<sup>92</sup> Palmeiro later contradicted testimony offered in an MLB arbitration regarding the purported source of the Stanazolol—a vitamin B12 shot allegedly given to him by teammate Miguel Tejada.<sup>93</sup> Palmeiro consistently denied ever "intentionally tak[ing] steroids," though the positive test effectively ruined his reputation.<sup>94</sup>

A congressional investigation later concluded it was "impossible to

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87. BRYANT, *supra* note 36, at 390.

88. FAINARU-WADA & WILLIAMS, *supra* note 59, at 245-46.

89. See BRYANT, *supra* note 36, at 391. Many commentators believe McGwire torpedoed his chance at baseball's Hall of Fame with his testimony and that a similar fate could befall Clemens. See, e.g., Shaikin, *supra* note 11, at 1 (arguing that McGwire "derailed" his chances at the Hall with his testimony, and that if Hall of Fame voters believe Clemens used PEDs, his chance at the Hall "would be gravely jeopardized").

90. FAINARU-WADA & WILLIAMS, *supra* note 59, at 246.

91. See BRYANT, *supra* note 36, at 411; MITCHELL REPORT, *supra* note 2, at 103-06.

92. See BRYANT, *supra* note 36, at 413. "Stanazolol" is the generic name for the steroid Winstrol.

93. *Id.*

94. Jack Curry, *Palmeiro Ends Silence on Eve of Report*, N.Y. TIMES, Nov. 10, 2005, at D1; BRYANT, *supra* note 36, at 415 (noting that Palmeiro's reputation is "destroyed by these revelations, but they also represent a colossal embarrassment for baseball and its testing policy" due to allegations of favoritism toward stars in the appeals process).

determine” whether Palmeiro had told the truth in his testimony, given Stanazolol’s four-week detection window.<sup>95</sup> No other evidence of Palmeiro’s alleged steroid use was produced. However, the Committee did subsequently refer Tejada to the Justice Department for a perjury investigation due to inconsistent testimony to congressional staffers.<sup>96</sup>

After questioning the players, the Committee turned to Selig and Fehr.<sup>97</sup> Waxman and other Committee members accused Selig of an elaborate “cover-up,” with Selig shifting blame to Fehr and the union.<sup>98</sup> After being accused of willfully ignoring the mounting steroids problem,<sup>99</sup> Selig stated that eliminating PEDs from baseball was now his “top priority.”<sup>100</sup> Prompted by the congressional hearings debacle and the publication of *Game of Shadows*, Selig later promised to fully investigate the era and enlisted former Senator George Mitchell to produce a comprehensive report on the use of PEDs in baseball.<sup>101</sup> Mitchell was authorized to “expand the investigation and to follow the evidence wherever it may lead.”<sup>102</sup> Mitchell’s account would tie the use of steroids and other PEDs to over eighty MLB players, including Roger Clemens.<sup>103</sup>

### *C. The Mitchell Report and the Rocket*

#### 1. From Radomski to McNamee

Released in December 2007, after a twenty-month investigation, “the

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95. H. COMM. ON OVERSIGHT & GOV’T REFORM, REPORT ON INVESTIGATION INTO RAFAEL PALMEIRO’S MARCH 2005 TESTIMONY BEFORE THE COMM. ON GOV’T REFORM 5 (2005); see also P.J. Meitl, *The Perjury Paradox: The Amazing Under-Enforcement of the Laws Regarding Lying to Congress*, 25 QUINNIPIAC L. REV. 547, 547-48 (2007) (noting that the Committee “declined to recommend prosecution of Palmeiro since the evidence was ‘confusing and contradictory in many respects’”) (internal citations omitted).

96. Barry Svrluga, *Attempting to Clear Air, Clemens May Have Clouded His Legacy*, WASH. POST, Feb. 14, 2008, available at 2008 WLNR 2810673.

97. See FAINARU-WADA & WILLIAMS, *supra* note 59, at 246 (noting that when Selig and other MLB reps testified, “the session became combative. The politicians pounded away, while the officials scrambled to defend themselves.”).

98. BRYANT, *supra* note 36, at 394-95.

99. *Id.* at 398.

100. MICHAEL J. COZZILLIO ET AL., SPORTS LAW: CASES AND MATERIALS 84 (2007).

101. Press Release, Major League Baseball Office of the Comm’r, Statement of Comm’r Allan H. Selig, (Mar. 30, 2006), available at [http://pressbox.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20060330&content\\_id=1374461&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://pressbox.mlb.com/news/press_releases/press_release.jsp?ymd=20060330&content_id=1374461&vkey=pr_mlb&fext=.jsp&c_id=mlb); Kellogg, *supra* note 84, at 25.

102. Press Release, Major League Baseball Office of the Comm’r, *supra* note 101.

103. See Kellogg, *supra* note 84, at 25.

Mitchell Report” detailed the widespread proliferation of anabolic steroids, HGH, and other PEDs throughout baseball as early as the mid-1980s, and made recommendations for more effective and transparent testing.<sup>104</sup> Much of the information directly implicating players for PED use came from former New York Mets clubhouse attendant Kirk Radomski, who began cooperating with the U.S. Attorney’s Office for the Northern District of California following his arrest after a 2005 FBI raid of his home.<sup>105</sup> Jeff Novitsky, the IRS agent behind the BALCO case, was the lead investigator in the arrest.<sup>106</sup> In April 2007, Radomski signed an agreement with the office pleading guilty to one count of anabolic steroids distribution and one count of money laundering, in exchange for cooperation in Mitchell’s investigation.<sup>107</sup>

Mitchell notes that during the investigation of Radomski, he identified Roger Clemens’s personal trainer Brian McNamee as a customer and “possible sub-distributor.”<sup>108</sup> McNamee subsequently entered a written agreement with the U.S. Attorney’s Office for the Northern District of California promising to cooperate and provide truthful statements regarding his supply of PEDs to MLB players. Mitchell interviewed McNamee three times in 2007 in the presence of his attorney.<sup>109</sup>

## 2. The Allegations

Through McNamee’s testimony, the Mitchell Report documents a number of specific instances of Clemens’s alleged use of steroids and HGH, as well as discussions of PEDs with McNamee and Jose Canseco during Clemens’s time with the Toronto Blue Jays and New York Yankees:

### Toronto Blue Jays (1998)

- During a 1998 road trip to Florida, Clemens attended a party at Canseco’s house in Miami, at which McNamee observed Clemens meeting with Canseco and an unidentified man. Canseco admitted to Mitchell’s staff and in *Juiced* that he had had “numerous conversations with Clemens” about the benefits of steroids Deca-

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104. The Mitchell Report implicated roughly eighty players in all, including seven MVPs and thirty-one All-Stars. *Id.*

105. See MITCHELL REPORT, *supra* note 2, at 138-39; see also Fish, *supra* note 63.

106. *Id.*

107. MITCHELL REPORT, *supra* note 2, at 138. Radomski eventually accepted five years’ probation and a \$18,575 fine. See Fish, *supra* note 63.

108. MITCHELL REPORT, *supra* note 2, at 167.

109. *Id.* at 147.

Durabolin and Winstrol and how to “cycle” and “stack” steroids.<sup>110</sup>

- Toward the end of the same road trip, Clemens approached McNamee for the first time about using steroids, and asked McNamee to inject him.<sup>111</sup>
- McNamee subsequently injected Clemens with Winstrol approximately four times over a several-week period.<sup>112</sup>
- Around this time, Clemens showed McNamee a bottle of Anadrol-50, telling McNamee that he was not using it but “wanted to know more about it.” McNamee instructed Clemens not to use it, and gave the bottle to Canseco.<sup>113</sup>

#### New York Yankees (2000-2001)

- In 2000, Clemens approached McNamee and “made it clear he was ready to use steroids again.” During the season, McNamee injected Clemens “four to six times with testosterone from a bottle labeled either Sustanon 250 or Deca-Durabolin” that McNamee had obtained from Radomski.<sup>114</sup>
- During the same period, McNamee injected Clemens four to six times with HGH obtained from Radomski.<sup>115</sup>
- In 2001, Clemens again told McNamee he was ready to use steroids once again, and McNamee subsequently injected Clemens four to five times with Sustanon or Deca-Durabolin.<sup>116</sup>
- The Yankees did not retain McNamee following the 2001 season; Clemens “never again asked McNamee to inject him with performance enhancing substances, and McNamee had no further

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110. *Id.* at 168-69. These statements appear to line up with Canseco’s account in *Juiced*, although Canseco admitted he had never seen Clemens take steroids or hear him admit to steroid use. CANSECO, *supra* note 45, at 211. Canseco did state in his 2008 book *Vindicated* that he was always “suspicious” and believed that the pitcher “may have been dabbling [in PEDs].” CANSECO, *supra* note 83, at 3-5.

111. MITCHELL REPORT, *supra* note 2, at 169.

112. *Id.*

113. *Id.*

114. *Id.* at 171.

115. *Id.*

116. *Id.* at 172.

discussions with Clemens about such substances.”<sup>117</sup> However, Clemens reportedly continued to train with McNamee until as late as 2007.<sup>118</sup>

### 3. Roger Comes Out Swinging

Many MLB officials and implicated players, including Clemens, were understandably shaken by the Mitchell Report’s release.<sup>119</sup> Clemens immediately issued a denial of the Report’s allegations, released a statistical analysis of his career purporting to show consistency and an absence of PED use, and filed a defamation suit against McNamee.<sup>120</sup> The former pitcher and his attorneys also held a press conference, playing a tape recording of a conversation between Clemens and his former trainer.<sup>121</sup> As Clemens challenged the Report’s contents, the lawmakers on the House Oversight and Government Reform Committee “felt compelled to respond,”<sup>122</sup> subsequently issuing subpoenas to McNamee and the three men to whom he claimed he had administered PEDs: Clemens, Pettitte, and Knoblauch.<sup>123</sup>

On January 15, 2008, Mitchell testified before Congress regarding the Report and the portions pertaining to Clemens.<sup>124</sup> In support of McNamee’s credibility, Mitchell noted that the “only penalty Mr. McNamee faced in dealing with federal prosecutors was perjury . . . mean[ing] . . . he faced legal jeopardy only if he lied.”<sup>125</sup> Mitchell further pointed out that McNamee was “being paid by Mr. Clemens [as late as] 2007, as he had been paid for many

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117. *Id.*

118. *Id.* at 173.

119. In his recent book, Jose Canseco described a conversation with Clemens following the release of the report in which Clemens stated that he planned to “sue all those motherf---ers for printing lies about me.” CANSECO, *supra* note 83, at 94. Canseco then offered his help to Clemens: “[I]f you need me to testify on your behalf, or for anything else, I’m here, man.” *Id.*

120. See Teri Thompson & Nathaniel Vinton, *Trials and Tribulations for Roger*, N.Y. DAILY NEWS, Apr. 26, 2008, at 4. Clemens’s suit claimed McNamee’s allegations had “injured Clemens’s reputation and exposed him to public hatred, contempt, ridicule and financial injury.” *Id.*

121. Williams, *supra* note 20, at 16 (noting the tape recording “proved maddeningly inconclusive”).

122. Kellogg, *supra* note 84, at 25; *Mitchell Report Hearings*, *supra* note 5, at 2 (statement of Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov’t Reform). Waxman stated that he had “no interest in making baseball a central part of [the] Committee’s agenda. But if the Mitchell Report is to be the last word on baseball’s past, we believe we have a responsibility to investigate a serious claim of inaccuracy.” *Id.*

123. See Williams, *supra* note 4, at A1.

124. *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 1: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 110th Cong., Jan. 15, 2008.

125. *Mitchell Report Hearings*, *supra* note 5, at 4 (statement of Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov’t Reform).

years, and had an *economic interest against* implicating the individual who supported his livelihood and was his most prominent client.”<sup>126</sup>

In February 2008, Clemens and McNamee traveled to Capitol Hill to testify against each other in a second round of hearings on the contents of the Mitchell Report.

### III. THE CASE AGAINST CLEMENS

#### *A. Prosecuting Steroids Offenders*

In recent years, the federal government has devoted significantly more resources to anti-steroids enforcement. As Schedule III substances under the Steroids Control Act, anabolic steroids bring with them harsh offenses for users, possessors, and distributors,<sup>127</sup> penalties that have been augmented in the last several years in attempts to reign in PED use in professional and amateur sports. Unlawful possession of anabolic steroids is punishable by up to one year of imprisonment and a minimum fine of \$1000, with stiffer penalties for repeat offenders.<sup>128</sup> Distribution is a felony and can lead to five years imprisonment and up to \$250,000 in fines.<sup>129</sup> These penalties were further enhanced by 2006 amendments to sentencing guidelines.<sup>130</sup>

#### 1. The Statutes

Federal investigators have targeted steroids distributors, but in Novitsky's pursuit of trainers such as Greg Anderson and Brian McNamee, their high-profile clients are the ultimate targets, as evidenced by the plea deals they were offered in connection with naming athletes in the BALCO and Mitchell

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126. *Id.* (emphasis added).

127. Pub. L. No. 101-647, Sec. 1902, 104 Stat. 4851 (amending 21 U.S.C. § 812(c) (1981) to include anabolic steroids). Other Schedule III substances include LSD precursors, barbiturates, and narcotic painkillers.

128. 21 U.S.C. § 844(a) (2004).

129. 21 U.S.C. § 841(a)(1) (2004).

130. Collins, *supra* note 17, at 23 (noting that new sentencing guidelines bring steroids into “a 1:1 ratio to other Schedule III drugs, resulting in a 20-fold measurement increase for injectable steroid units and a 50-fold increase for oral steroid units”). Steroids' new place in the hierarchy of federal law enforcement priorities was demonstrated in the title of an April 11, 2006, release by the U.S. Sentencing Commission. United States Sentencing Commission, *U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Firearms, and Steroids*, available at <http://www.ussc.gov/PRESS/rel0406.htm>; see also United States Sentencing Commission, Supplement to the 2005 Guidelines Manual, Mar. 27, 2006, available at <http://www.ussc.gov/2005guid/GLMSupplement-032706.pdf>.

Report investigations.<sup>131</sup> Prosecutors are not after Barry Bonds or Roger Clemens for their alleged use or possession of steroids, but for perjury. In Clemens's case, the alleged perjury concerns his testimony before Congress. The general federal perjury statute is 18 U.S.C. § 1621, which states that whoever

having taken an oath before a competent tribunal . . . that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, *willfully and contrary to such oath* states or subscribes any material matter which he does not believe to be true, is guilty of perjury.<sup>132</sup>

The statute requires *willfulness or knowledge* on the part of the witness; *actual falsity* in the statement; and *materiality*, meaning the false information is capable of influencing the tribunal. Adroit witnesses frequently avoid conviction under the statute by employing the defenses of mistake, confusion, or inadequate memory.<sup>133</sup>

The other potentially applicable perjury statute is 18 U.S.C. § 1001, a "catch-all" provision involving false statements to the federal government that "might substantially impair the basic functions entrusted by law" to a particular agency or congressional committee.<sup>134</sup> Under this statute, prosecutors must prove the witness "1) knowingly and willfully made or concealed a 2) materially 3) false, fictitious, or fraudulent statement or representation within 4) the jurisdiction of the executive, legislative, or judicial branch of the federal government."<sup>135</sup>

Finally, Clemens could conceivably be charged with obstruction of justice. Under 18 U.S.C. § 1505, it is a felony to "influence, obstruct or impede congressional investigations,"<sup>136</sup> including through false statements to congressional committees.<sup>137</sup> This statute likewise requires intent to

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131. See Wilson & Schmidt, *supra* note 21, at D1 (noting that Clemens attorney Rusty Hardin "questioned why Novitsky had entered an agreement with McNamee not to charge him with any crimes as long as he told the truth about ballplayers' using performance-enhancing drugs").

132. 18 U.S.C. § 1621 (2004) (emphasis added); see generally Amy Messigian, *Twentieth Survey of White Collar Crime*, 42 AM. CRIM. L. REV. 755 (2005).

133. See *United States v. Dunnigan*, 507 U.S. 87, 93 (1993) (stating that a witness testifying under oath violates 18 U.S.C. § 1621 if he willfully gives false testimony rather than as result of confusion, mistake, or faulty memory) (emphasis added).

134. 18 U.S.C. § 1001 (2004); *United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985).

135. Meitl, *supra* note 95, at 569.

136. *Id.* at 565 (citing 18 U.S.C. § 1505 (2004)).

137. See 18 U.S.C. § 1505 (2004).



"influence, obstruct, or impede" a congressional committee in the exercise of its investigative duties,<sup>138</sup> which would cover Congress's public proceedings on the veracity of the Mitchell Report.

## 2. The Congressional Perjury Conundrum

Like MLB's historically weak steroids policy, the problem with the perjury statutes with respect to congressional testimony has been under-enforcement. In a recent article, attorney P.J. Meitl examines the dearth of perjury prosecutions related to congressional testimony.<sup>139</sup> Meitl notes that only six individuals have been convicted of perjury or related charges in connection with congressional testimony in the last sixty years.<sup>140</sup> He examines the Palmeiro incident in this historical context, noting that it was "not that unique"<sup>141</sup> and positing it as a classic example of Congress and prosecutors "los[ing] the motivation and desire to see the case through."<sup>142</sup>

Meitl suggests two possible causes for the lack of prosecutions generally: "either almost all – far above 99% – of those who testify to Congress do so truthfully or Congress and prosecutors rarely successfully prosecute the crime of lying to Congress," concluding that "[l]ogic and history indicate the latter."<sup>143</sup> He further speculates that the incredibly low number of successful prosecutions

is indicative of a potentially larger problem—lying to Congress has become accepted. This is due to a number of reasons: the applicable statutes impose *considerable hurdles* in terms of proof and *offer strong defenses*, a *lack of political will* to enforce the law, and an increasing realization on the part of witnesses and the attorneys who represent them that *prosecutions for lying to Congress are extremely rare*.<sup>144</sup>

Additional explanations for failures to prosecute for false testimony are: a lack of reliable evidence; congressional members' lack of skill in witness

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138. *Id.*

139. Meitl, *supra* note 95, at 548.

140. *Id.* The only successful prosecutions were of Blue Cross Blue Shield Chief Financial Officer Jerry Weissman (1996), Department of Housing and Urban Development employee Deborah Gore Dean (1987), Environmental Protection Agency administrator Rita Lavelle (1983), Nixon White House staffers H.R. Haldeman and John Mitchell (1976), and Federal Bureau of Investigation informant Harvey Matusow (1956). *See id.* at 552-55.

141. *Id.* at 548.

142. *Id.* at 561.

143. *Id.* at 548.

144. *Id.* (emphasis added).

questioning; the general sophistication of witnesses called to testify; and limitations on congressional committees' time and resources.<sup>145</sup> As a result of all of these factors, Meitl hypothesizes that many witnesses "routinely lie to congressional committees and get away with it."<sup>146</sup>

However, the Clemens case involves high-profile witnesses, a number of clear-cut and potentially verifiable statements, and a compelling issue that continues to generate headlines in the media and interest on the Hill. It is clear that either Clemens or McNamee knowingly and willfully lied on February 14, 2008. The typical defenses of mistake, confusion, or inadequate memory would be inapplicable given the magnitude of the events and the clarity of the relevant statements.

The Clemens matter also has congressional will behind it. Although he initially expressed reluctance to hold public hearings on the matter, Waxman was fully cognizant that a crime was taking place when he noted that either McNamee had "acted inexcusably and made Mr. Clemens an innocent victim," or that Clemens had "acted shamefully and unconscionably smeared Mr. McNamee."<sup>147</sup> The case has already been referred to the Justice Department for a perjury inquiry, with a letter written by Democratic congressional staffers recommending the investigation of Clemens, not McNamee.<sup>148</sup>

On the law enforcement and prosecutorial side, the matter involves a tandem unique in the history of American law enforcement: Novitsky, the IRS agent turned high-profile FDA steroids investigator;<sup>149</sup> the FBI's Washington bureau; and the U.S. Attorney's Office for the Northern District of California, which has been given unusual discretion in its pursuit of steroids distributors and elite athlete clients for perjury offenses. Olympic cyclist Tammy Thomas

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145. *Id.* at 560-61. Meitl contends that a "prosecution for perjury or false claims is arguably not how a Senator or a congressional member wants to make headlines. Other legislation and hearings await, bigger issues consume their time, and the eventual payoff of a successful prosecution—better government—seems too attenuated to demand their attention." *Id.* at 561-62.

146. *Id.* at 560.

147. *Mitchell Report Hearings*, *supra* note 5 (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov't Reform). Rep. Darrell Issa (R-Cal.) later asserted that Waxman's referral demonstrated that the hearing "was always about going after Clemens," and that Waxman intended to refer Clemens "before the first deposition was taken." Richard Sandomir & Michael S. Schmidt, *Congress Requests Clemens Inquiry*, N.Y. TIMES, Feb. 28, 2008, available at [http://www.nytimes.com/2008/02/28/sports/baseball/28clemens.html?\\_r=1&oref=slogin](http://www.nytimes.com/2008/02/28/sports/baseball/28clemens.html?_r=1&oref=slogin).

148. See also *Clemens Perjury Case in the Works*, CHI. TRIB., Feb. 26, 2008, at 17; *Clemens Reportedly in Hot Water*, CHI. SUN TIMES, Feb. 26, 2008, at 67.

149. Novitsky left the IRS and joined the FDA Office of Criminal Investigations in April 2008. See Michael S. Schmidt & Duff Wilson, *Novitsky Leaves I.R.S. to Join FDA*, N.Y. TIMES, Apr. 23, 2008, at D4. Novitsky will serve as a "special agent with all the same investigative powers he had during his 15 years with the I.R.S." *Id.*

was recently convicted of perjury and obstruction of justice in a BALCO-related case that many viewed as a precursor to the cases of Bonds and possibly Clemens.<sup>150</sup>

Finally, the case may involve physical evidence, which would turn a potentially difficult “swearing contest” prosecution into a “slam dunk.”<sup>151</sup> On this potentially dispositive issue, *United States v. Hiss* provides some striking parallels, due to the involvement of a defamation suit and the possible presence of “smoking gun” evidence.<sup>152</sup> In the *Hiss* case, *Time* magazine editor Whittaker Chambers alleged before the House Un-American Activities Committee that former State Department official Alger Hiss was a member of the Communist Party. Hiss adamantly denied the charge and promptly filed a defamation suit against Chambers, who later released documents and microfilm linking Hiss to Communist activities.<sup>153</sup> Having denied his involvement with the Communist Party under oath, Hiss was subsequently tried and convicted on two counts of perjury.<sup>154</sup> Clemens is similarly faced with one disreputable witness, but could be brought down by additional witnesses, circumstantial evidence, and physical evidence.

### B. The Evidence

#### 1. The Seventeen Words

Examining his February 14 testimony, the most damaging statement to Clemens could be his emphatic opening salvo that he “[had] never used steroids, human growth hormone, or any other type of illegal performance-enhancing drugs.”<sup>155</sup> This statement was directly contradicted by McNamee’s

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150. See *BALCO case: Cyclist Found Guilty of Perjury*, DESERET NEWS (Salt Lake City), Apr. 5, 2008, at D2; Michael O’Keeffe et al., *BALCO Trial’s Wheels in Motion: Cyclist’s Perjury Rap Precursor to Bonds*, N.Y. DAILY NEWS, Mar. 25, 2008, available at 2008 WLNR 5705122. Thomas shouted at the jury after being found guilty of three perjury counts and one of obstruction of justice. *Id.*

151. Lance Pugmire, *Congressional Hearing on Mitchell Report: Waxman Has Options but Won’t Commit on Clemens*, L.A. TIMES, Feb. 14, 2008, at D9 (quoting Chapman University law professor Katherine Darmer).

152. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950). See generally Jacob A. Stein, *Not So Fast with a Defamation Suit*, WASH. LAWYER, May 2008, at 48 (noting that Clemens “may have thought twice” about filing a defamation suit against McNamee if he had read the *Hiss* case). Interestingly, Rep. Issa made public comments that the Clemens investigation “smacks of the McCarthy era,” arguing that the inquiry “had outgrown its original justifications and was not the best use of the committee’s resources.” O’Keeffe, *supra* note 19, at 55.

153. *Hiss*, 185 F.2d at 828-29.

154. *Id.* at 828.

155. *Mitchell Report Hearings*, *supra* note 5, at 1 (statement of William Roger Clemens).

assertion that he personally injected Clemens on “numerous occasions with steroids and human growth hormone.”<sup>156</sup> Potentially undermining McNamee’s own credibility was his statement that the number of times he injected Clemens “was actually greater” than initially stated in the Mitchell Report.<sup>157</sup> McNamee told the Committee that he initially downplayed the player’s steroid use and withheld physical evidence because he “did not want to destroy Roger Clemens.”<sup>158</sup>

## 2. The Pettittes

It is possible that Clemens agreed to testify before Congress believing the panel would be faced with the simple matter of his own word against McNamee’s.<sup>159</sup> However, Clemens’s longtime friend and former teammate Andy Pettitte, in a deposition taken by the committee staff, corroborated McNamee’s account and recalled an admission by Clemens of HGH use. Pettitte stated that in 1999 or 2000, he had a conversation with Clemens in which Clemens specifically told him that he had taken HGH.<sup>160</sup> Pettitte subsequently told his wife Laura about the conversation; Laura Pettitte verified Pettitte’s account in her own affidavit.<sup>161</sup> Pettitte also stated that he had a conversation with Clemens in 2005 around the time of the congressional hearings on steroids in baseball, and asked him what he would say if he were asked whether he had used PEDs.<sup>162</sup> Clemens reportedly told Pettitte that he “must have misunderstood him,” and that it was his wife Debbie who had used HGH.<sup>163</sup>

This became a central point of contention at the hearing, with Clemens acknowledging that Pettitte was his longtime friend and a “very honest fellow,”<sup>164</sup> but that he had “misremember[ed]” their HGH conversations.<sup>165</sup>

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156. *Id.* at 8 (statement of Brian Gerald McNamee).

157. *Id.* at 4. McNamee stated in his deposition before the Committee that he injected Clemens with Winstrol “maybe 16 to 20 times” in 2000, HGH “eight to 12 or eight to 20” times in 2000, and with testosterone and nandrolone “8 to 14” times in 2001. H. Comm. on Oversight & Gov’t Reform, *Deposition of Brian Gerald McNamee*, 12, 21, 22, 51-55 (Feb. 7, 2008).

158. *Mitchell Report Hearings*, *supra* note 5, at 4 (statement of Brian Gerald McNamee).

159. The uncorroborated testimony of one witness is insufficient as a matter of law to prove perjury. *Hammer v. United States*, 271 U.S. 620, 626 (1926); *see also Hiss*, 185 F.2d at 824.

160. Andy Pettitte Aff. ¶ 1, Feb. 8, 2008.

161. Laura Pettitte Aff. ¶ 1, Feb. 8, 2008.

162. Andy Pettitte Aff. ¶ 4, Feb. 8, 2008.

163. *Id.* ¶ 5.

164. Williams, *supra* note 4, at A1.

165. Shaikin, *supra* note 11, at 1. Rep. Cummings asked Clemens “what motive Pettite might have to ‘fabricate a story about you, his friend?’ Said Clemens: ‘Andy would have no reason to.’”

Clemens readily admitted that McNamee had injected Debbie Clemens with HGH, but claimed McNamee did it without Clemens's knowledge and repeatedly denied that he had ever used HGH himself.<sup>166</sup> A number of congressional representatives and legal experts deemed the Pettitte testimony the most damaging to Clemens's credibility, given Pettitte's well-established friendship with Clemens and apparent lack of bias.<sup>167</sup>

### 3. Canseco's Party

The panel also pressed the issue of McNamee's and Clemens's connections to Jose Canseco, detailed in the Mitchell Report. McNamee stated that Clemens was at a 1998 party at Canseco's residence, purportedly the beginning of his interest in PEDs, and that he later handed a bottle of the steroid Anadrol-50 received from Clemens to Canseco.<sup>168</sup> Canseco signed an affidavit stating that Clemens never attended the party and that McNamee's allegation regarding the Anadrol-50 was "completely false."<sup>169</sup> However, in his 2008 book, Canseco describes meeting with Clemens and his legal team and signing the affidavit despite his long-held suspicions of Clemens's steroid use.<sup>170</sup> Other evidence may cut against Clemens's and Canseco's accounts: Novitsky met with Canseco in April regarding a photograph of Clemens

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*Id.* A visibly troubled Clemens also stated that Pettitte "is my friend. He was my friend before this. He will be my friend after this, and again. I think Andy has misheard." Williams, *supra* note 4, at A1.

166. See Shipley & Svrluga, *supra* note 4, at 3. McNamee stated that Clemens instructed him to inject Debbie "in preparation for her modeling a swimsuit in a [*Sports Illustrated*] photo shoot; Clemens claimed he only found out about the injections later and angrily confronted McNamee." *Id.*

167. Waxman stated that Pettitte's "consistent honesty makes him a role model on and off the field." *Mitchell Report Hearings*, *supra* note 5, at 37 (statement of Rep. Henry A. Waxman, Chair, H. Comm. on Oversight & Gov't Reform); see also Walker, *supra* note 9, at 6Z (noting that Rep. Cummings started the "person I believe most is Mr. Pettitte"); Pugmire, *supra* note 151, at 9. But see Shaikin, *supra* note 11, at 1 (noting that Rep. Issa dismissed the Pettitte-Clemens conversations as "just a whole lot of locker-room talk" and "not actual evidence").

168. See MITCHELL REPORT, *supra* note 2, at 168-69.

169. Canseco Aff. ¶ 2-4, Jan. 22, 2008. Canseco asserted that McNamee's statement regarding the party is "absolutely false because Clemens did not attend the party." Canseco further stated that the allegation regarding the Anadrol-50 was "completely false. McNamee has never given me a white bottle of Anadrol-50 or any other steroid or human growth hormone substance. Neither Senator Mitchell nor anyone working with him ever contacted me to ask whether McNamee had given me a bottle of Anadrol-50." *Id.* Clemens provided the Committee with a receipt from a round of golf allegedly proving he was not at the party in question. See Shipley & Svrluga, *supra* note 4, at 3.

170. See CANSECO, *supra* note 83, at 152-55. The statements in *Vindicated* are inconsistent with Canseco's affirmation in his January 22 affidavit that he has "no reason to believe that [Clemens] has ever used steroids, human growth hormone, or any other performance-enhancing drugs." Canseco Aff. ¶ 6, Jan. 22, 2008.

allegedly taken at Canseco's residence at the time of the party.<sup>171</sup> Given the mixed evidence, the amount of time elapsed, and the established unreliability of both Canseco and McNamee as witnesses, it would be difficult to prove any single account of the events.

#### 4. The Syringes

Finally, McNamee stated in his testimony that he had provided federal investigators with syringes used in 2001 to inject Clemens with PEDs.<sup>172</sup> Other accounts have McNamee turning over gauze pads and steroid vials as well.<sup>173</sup> McNamee claimed the evidence was "100% authentic," and that the DNA analysis "should bear this out."<sup>174</sup> In explaining his reasoning for holding on to the evidence for nearly eight years, McNamee stated in his testimony that while he "liked and admired" Clemens, he never "really trusted him," and that he retained the syringes as "evidence that would prevent me from being the only fall guy."<sup>175</sup> McNamee said he was persuaded to turn the physical evidence over to authorities after Clemens taped a personal phone conversation between them and released it to the media.<sup>176</sup>

#### 5. The Referral

Despite the apparent unreliability of McNamee, who admitted during the hearing to lying to police about an alleged sexual assault in 2001 and withholding the physical evidence implicating Clemens,<sup>177</sup> the overall effect of the hearings was to cast doubt on Clemens's account, especially in light of Pettitte's affidavit.<sup>178</sup> "It's not going to be hard to prove that [Clemens] lied

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171. See Michael S. Schmidt, *Novitsky Asks to Talk to Canseco About Photo*, N.Y. TIMES, Apr. 6, 2008, available at 2008 WLNR 6456903; Christian Red, *Canseco Breezes in Fed Grilling*, N.Y. DAILY NEWS, Apr. 23, 2008, at 75, available at 2008 WLNR 7548290. At the meeting with Novitsky, Canseco once again asserted that he had no knowledge of Clemens using PEDs. See Robert E. Kessler, *Canseco to Feds: Rocket, A-Rod Didn't Use PEDs*, NEWSDAY, Apr. 23, 2008, at A44.

172. *Mitchell Report Hearings*, *supra* note 5, at 4 (statement of Brian Gerald McNamee).

173. Michael O'Keeffe et al., *Justice Should Relieve Congress, Rep. Says; Clemens Case Needs to Move to a "Criminal Referral"*, N.Y. DAILY NEWS, Feb. 10, 2008, at 115, available at 2008 WLNR 2637160.

174. *Id.*

175. *Mitchell Report Hearings*, *supra* note 5, at 4 (statement of Brian Gerald McNamee).

176. *Id.*

177. See Hohler, *supra* note 10; Williams, *supra* note 4. Addressing McNamee, Rep. Dan Burton (R-Ind.) said that he "didn't know what to believe, [but] I know one thing I don't believe and that's you." Shipley & Svrluga, *supra* note 4.

178. See Pugmire, *supra* note 151, at 9 (quoting attorney Raymond Shepherd that "while McNamee's stories are being confirmed with the exception of his allegations about Clemens, the

today,” McNamee attorney Richard Emery stated after the proceeding.<sup>179</sup> “We believe he will be referred [for a criminal investigation] because the evidence is so overwhelming.”<sup>180</sup>

Emery turned out to be correct. On February 27, the Committee asked the Justice Department to investigate whether Clemens had committed perjury.<sup>181</sup> Waxman released a Democratic staff memo detailing a number of Clemens’s statements that “appear to be contradicted by other testimony or were implausible,” including Clemens’s unequivocal assertion that he had “never used steroids or HGH.”<sup>182</sup> In support of the referral, Waxman’s memo details a number of the major topics discussed at the congressional hearing, including: the statements made by Andy and Laura Pettitte; medical evidence regarding an abscess Clemens developed on his buttocks from injecting steroids in 1998; Clemens’s assertions regarding lidocaine and vitamin B12 injections received from McNamee in the Blue Jays’ clubhouse; Clemens’s inconsistent testimony regarding conversations with McNamee on the topic of HGH; and Clemens’s questionable assertions that he was not at Jose Canseco’s house during the relevant period in 1998.<sup>183</sup>

### *C. The Legal Strategy*

Given the damaging evidence arrayed against Clemens and the Committee’s referral to the Justice Department, the hearing raised compelling questions of legal strategy and ethics. According to Waxman, the Committee initially considered producing a report on the Clemens discrepancies in lieu of holding hearings, but it was Clemens’s attorneys who “thought it would be

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pitcher has strayed into an area where he could be investigated and charged” with perjury or obstruction of Congress).

179. Hohler, *supra* note 10.

180. *Id.*

181. Mark Hosenball, *Roger Dodger vs. the Feds*, NEWSWEEK, Mar. 10, 2008, available at 2008 WLNR 4225525. Republicans ultimately signed on to demand a probe, although they did not endorse the Democratic staff dossier, since some “remain[ed] skeptical about whether the hearing turned up enough evidence to successfully prosecute Clemens for perjury.” *Id.* Davis would later state that the Democrats’ accompanying memo “reads like an advocate’s brief or prosecutorial indictment of Roger Clemens.” Bill Shaikin, *Clemens Issue Sparks New Partisan Criticism*, L.A. TIMES, Mar. 26, 2008, at 6, available at 2008 WLNR 5740095.

182. Shaikin, *supra* note 181, at 6. Although Davis signed on to the February 27 letter, he noted in a separate letter that he “reject[ed] the Democrats’ contention that Clemens testified falsely on a host of other topics.” *Id.* The Republican committee members released their own 109-page report and sent additional information questioning McNamee’s credibility to the Justice Department. See Howard Fendrich & Ronald Blum, *Republican Report Questions if McNamee Told the Truth*, GLOBE & MAIL (Toronto, Ontario), Mar 26, 2008, at S5, available at 2008 WLNR 5736622.

183. Memorandum from Henry A. Waxman to the Democratic Members of the H. Comm. on Oversight & Gov’t Reform (Feb. 27, 2008).

unfair if the Committee issued a report without giving Mr. Clemens the opportunity to testify in public.”<sup>184</sup>

### 1. The Decision to Testify

As Columbia Law Professor Robert Kheel noted recently, given the possibility of perjury charges, “[y]ou certainly wouldn’t advise your client to take this tack if you were harboring doubts that he’s telling the truth. It’s too dangerous.”<sup>185</sup> On this point, it is possible that Rusty Hardin believes Clemens, or that he deferred to him against his better judgment. Clemens apparently made it clear to his attorney that his public reputation was his most important priority, and that he wanted to testify before Congress.<sup>186</sup> After the hearing, Hardin himself noted that Clemens’s choice was between “protecting his legal position—which would have meant he doesn’t come [to Capitol Hill]—or trying to protect his reputation. He always chose the second course.”<sup>187</sup>

That course has undoubtedly put Clemens in legal jeopardy, even if his core statements were truthful. Attorney Tom Buchanan, who advised the MLB Commissioner’s Office during its gambling investigation of former Cincinnati Reds player and manager Pete Rose, believes Clemens made a mistake by taking the offensive, noting that the former pitcher’s word now stands against that of “Pettitte, Pettitte’s wife, [Chuck] Knoblauch, [and] the physical evidence . . . . It’s difficult with a client of this stature, because things get out of control once you open that Pandora’s Box.”<sup>188</sup> In his effort

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184. *Mitchell Report Hearings*, *supra* note 5, at 4 (statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight & Gov’t Reform).

185. Walker, *supra* note 9, at 62.

186. See Svrluga, *supra* note 96, at E1; *Rusty Reacts: The Most Second-Guessed Lawyer in America Fires Back*, 30 AM. LAWYER 4, 25 (April 2008) (quoting Hardin that Clemens “has made it clear he is not interested in the safest strategy. He has made clear that his public reputation, what his family and friends think, is what he holds dear. Who the hell am I to tell him that he’s wrong?”) [hereinafter “*Rusty Reacts*”]; Peter Grier, *Clemens Denies HGH Use Before Congress; McNamee Repeats Accusations*, CHRISTIAN. SCI. MONITOR., Feb. 14, 2008, at 3 (quoting sports law expert Jeffrey Standen that Clemens “may have decided that it is worse for him to lose [face], so he will stick to his story and attempt to save face no matter the consequences”). Hardin would be within his ethical obligation to permit Clemens to testify, so long as he did not know Clemens planned to offer false testimony. Under the *Model Rules of Professional Conduct*, it is the client who determines the course and objectives of litigation. MODEL RULES OF PROF’L CONDUCT 1.2(a) (2007). A lawyer cannot counsel his client to engage or assist the client in any conduct the lawyer knows to be *criminal or fraudulent*, but may discuss the legal consequences of any such action to help the client determine the “validity, scope, meaning or application of the law.” MODEL RULES OF PROF’L CONDUCT 1.2(d) (2007) (emphasis added).

187. Svrluga, *supra* note 96.

188. Walker, *supra* note 9, at 62.



to publicly defend his reputation, Clemens may have done the exact opposite. Sports marketing consultant Bob Dorfman noted that the pitcher's legal offensive "only heightens the perception of Clemens as an arrogant jock who holds himself above the law."<sup>189</sup>

## 2. Imprudent Statements

Beyond the testimony at the hearings, Hardin has made several statements in the press that have angered Waxman and perhaps encouraged the federal authorities pursuing Clemens. Hardin called the Mitchell Report "horrible" and "disgraceful" upon its release.<sup>190</sup> Upon discovering that Novitsky would attend the hearings, Hardin told the *New York Times* that if Novitsky "ever messes with Roger, Roger will eat his lunch"—a statement that prompted a public rebuke from Waxman.<sup>191</sup> Hardin responded with a claim that Novitsky had tried to intimidate witnesses, and that his conduct throughout the Mitchell Report investigation "has been intended to chill Roger Clemens's attempts to publicly defend his reputation."<sup>192</sup>

## 3. Meetings With Witnesses

Clemens and his attorneys have also been under fire for their conduct with witnesses. The player and several lawyers met independently with McNamee, Canseco, and a former Clemens housekeeper, leading the Committee to investigate the possibility of witness tampering.<sup>193</sup> Waxman stated at the hearing that there would always be a question as to whether Clemens attempted to influence his housekeeper's testimony. McNamee allowed investigators hired by Clemens to "interview him at length" about the evidence in the Mitchell Report before its release, conversations that the interviewers taped.<sup>194</sup> In the most notorious example, Clemens taped a telephone

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189. *Id.*

190. *Mitchell Report Hearings*, *supra* note 5, at 8 (statement of Rep. Henry A. Waxman, Chairman, House Comm. on Oversight & Gov't Reform).

191. Wilson & Schmidt, *supra* note 21, O'Keeffe, *supra* note 19, at 55. In a letter to Hardin, Waxman warned that his public comments "can be seen as an attempt to intimidate a federal law enforcement official in the performance of his official duties." *Id.*

192. Wilson & Schmidt, *supra* note 21.

193. See Hohler, *supra* note 10, Williams, *supra* note 4. Clemens and his attorneys met with the housekeeper at the pitcher's home in Houston "at a time when lawmakers were trying to locate her for an interview and before Clemens had made her whereabouts known." *Id.* Clemens reportedly instructed her to "tell the truth" to the Committee, and that "the reason that you don't remember [Canseco's] party is because I wasn't there." *Id.*

194. Memorandum from Henry A. Waxman to the Democratic Members of the H. Comm. on Oversight & Gov't Reform, at 3 (Feb. 27, 2008).

conversation with McNamee and released it to the press, a tactic that McNamee would claim prompted him to turn physical evidence over to prosecutors.<sup>195</sup> In their efforts to aggressively defend their client's reputation, Clemens's attorneys have managed to embolden his accusers.

#### CONCLUSION – FALLEN STARS AND BASEBALL'S FUTURE

In Clemens's final seasons, as he changed teams, celebrated multiple retirements, played in the World Series for both the Yanks and his hometown Astros and signed enormous contracts to play fractions of seasons, the man with the Texas-size ego did everything imaginable to attract attention. Like Bonds, he was a glutton for glory. Now, with his shadow greatly diminished, others can step into the light. – Thomas Boswell<sup>196</sup>

Roger Clemens traveled to Capitol Hill to defend the integrity of his name and his numbers, but in the months since his testimony, his reputation has only suffered. The pitcher fell into a perjury trap of his own making, one that could have been easily avoided. Rusty Hardin now says that he “saw it all coming,” and that he knew the Mitchell Report would lead to a deposition, a congressional hearing, and a criminal referral.<sup>197</sup> The attorney maintains that he “fully advised Roger. He made the decision. He's a grown-up.”<sup>198</sup>

However, Hardin may not have foreseen the reports of extramarital affairs that have shaken Clemens's personal life, jeopardized his defamation suit against McNamee, and perhaps irreparably damaged the image of integrity he believed he was protecting.<sup>199</sup> Now it is McNamee, not Clemens, dispatching

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195. Navarro, *supra* note 26.

196. Thomas Boswell, Op-Ed, *A Three-Way Argument for Game's Integrity*, WASH. POST, May 10, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/09/AR2008050902742.html>. Boswell extols the allegedly steroid-free success of the Atlanta Braves' three best pitchers during the 1990s—Greg Maddux, Tom Glavine, and John Smoltz—arguing that following the release of the Mitchell Report, “[t]he greatest right-handed pitcher since Walter Johnson is no longer the tainted Clemens but the mesmerizing Maddux.” *Id.* Glavine maintains that the three aces “have done it right. Hopefully, that will be appreciated more and the three of us will be a better example to kids.” *Id.*

197. *Rusty Reacts*, *supra* note 186.

198. *Id.*

199. On April 28, the *New York Daily News* reported that Clemens had a ten-year affair with country singer Mindy McCready, beginning when Clemens was twenty-eight and McCready was fifteen. Teri Thompson et al., *Rocket and the Country Star: Pitching Ace Had 10-Year Fling*, N.Y. DAILY NEWS, Apr. 28, 2008, at 4. McCready told the media that she “could not refute” the story's contents. Ronald Blum, *Lawyer: Clemens “Getting Pummeled,”* SEATTLE TIMES, May 2, 2008 at

private investigators to dredge up information on his accuser.<sup>200</sup> Federal investigators, including Jeff Novitsky, have asked McNamee's legal team to inform them of any newly acquired information on the pitcher's alleged steroids and HGH use as they build their perjury case.<sup>201</sup> On May 5, 2008, Clemens publicly apologized for unspecified "mistakes" in his private life, but again denied using steroids or HGH.<sup>202</sup>

With Waxman and Novitsky pressing the case, it is highly possible that Clemens will eventually be indicted for perjury and obstruction of justice. Although it took federal prosecutors four years to indict Bonds following his grand jury testimony,<sup>203</sup> a Clemens indictment could arrive more quickly given the high-profile nature of the testimony, the congressional heft behind the referral, the additional affidavits, significant preexisting circumstantial evidence, and the presence of easily verifiable physical evidence.

Notwithstanding Clemens's legal fate, his story is just one chapter in the sordid history of baseball's steroids era, according to Fay Vincent. The former Commissioner stated after the hearings that he "didn't find Clemens believable," comparing the incident to Pete Rose's denials about his own gambling.<sup>204</sup> "I think he hurt himself enormously . . . . When that many people are against you and have [that much] information that goes against what you say, it's naïve to think you can beat it."<sup>205</sup> However, Vincent noted that the Clemens matter is only one step in "eliminating the larger problem" of illegal PEDs in baseball.<sup>206</sup> "All this is meaningless in the sweep of things in history," Vincent concluded.<sup>207</sup>

The past decade's scandals, from the opening scuffle over andro to the

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C6. Later reports alleged that Clemens also had affairs with two other women. *Id.* McNamee's attorneys claim the allegations of affairs are relevant to the defamation suite since Clemens "put his reputation at issue"; Clemens's attorneys maintain his private life is irrelevant to the issue of whether he used anabolic steroids or HGH. Thompson & Vinton, *supra* note 120, at 4.

200. See Michael S. Schmidt, *McNamee's Lawyers Preparing to Send Investigators to Houston*, N.Y. TIMES, May 9, 2008, available at <http://www.nytimes.com/2008/05/09/sports/baseball/09/clemens.html>.

201. *Id.*

202. Jose de Jesus Ortiz, *Clemens Regrets Personal "Mistakes,"* HOUS. CHRON., May 5, 2008, at A1.

203. The indictment of Bonds was recently expanded from four counts of perjury to fourteen counts. See Paul Elias, *Prosecutors File New Indictment Against Barry Bonds*, WASH. POST, May 13, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/13/AR2008051302736.html>.

204. Svrluga, *supra* note 96.

205. *Id.*

206. Shipley & Svrluga, *supra* note 4.

207. *Id.*

scorched-earth approach of the Mitchell Report, have forced baseball into consistent self-regulatory action. MLB and the MLBPA recently agreed on a new drug policy, instituting even stiffer penalties for offenders and granting greater independence to the testing program administrator.<sup>208</sup> Despite these changes, one ongoing failure of the program is the undetectability of HGH, a drug that finds testers “always a little bit behind.”<sup>209</sup> Testifying in early 2008, MLBPA chief Fehr chided Congress for HGH’s wide availability, and further suggested another review of DSHEA.<sup>210</sup> His comments were an indication that the MLBPA is taking PEDs seriously at long last, and may even be willing to press the government for stricter enforcement.

As for the players implicated in the Mitchell Report, the former senator was firmly against punishing them for past indiscretions, and Selig accepted the recommendation.<sup>211</sup> However, the Commissioner has specifically reserved the right to punish players for steroids-related criminal convictions.<sup>212</sup> Meanwhile, baseball fans have proven forgiving to those players who appeared to come clean about their PED use: Jason Giambi found new life post-steroids in New York,<sup>213</sup> and Yankees fans gave Pettitte a warm reception during his first 2008 start.<sup>214</sup> Had he chosen a different course, Roger Clemens might have received similar acceptance. The harshest consequences—in a court of law and in the court of public opinion—will be reserved for the liars, and if Clemens is indeed lying, he will ultimately lose in both.

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208. Bill Shaikin, *Baseball Owners, Players Agree on Revised Drug Policy*, L.A. TIMES, Apr. 12, 2008, at 3.

209. Cid, *supra* note 26, at 191-92 (“When new drugs like THG are introduced, testers spend weeks or months to develop a system for testing the new substances so they can be traced. By the time a test is developed, however, it is more likely that a new version of the drug has been created to make the test obsolete.”).

210. O’Keeffe, *supra* note 173, at 115.

211. Shaikin, *supra* note 208, at 3.

212. *Id.*

213. Although Giambi had an abbreviated season in 2004 due to health issues, he belted thirty-two home runs in 2005 and was named A.L. “Comeback Player of the Year.” See Jason Giambi, BASEBALL-REFERENCE.COM, available at <http://www.baseball-reference.com/g/giambja01.shtml> (last visited Oct. 3, 2008).

214. See Dom Amore, *Pettitte’s Honesty a Big Hit with Fans*, HARTFORD COURANT, Apr. 6, 2008, at E3.

