

Fall 2006

Did Major League Baseball Balk? Why Didn't MLB Bargain to Impasse and Impose Stricter Testing for Performance Enhancing Substances?

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Repository Citation

Michael J. Cramer and James W. Swiatko Jr., *Did 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 (2006)

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ARTICLES

**DID MAJOR LEAGUE BASEBALL BALK? WHY
DIDN'T MLB BARGAIN TO IMPASSE AND IMPOSE
STRICTER TESTING FOR PERFORMANCE
ENHANCING SUBSTANCES?**

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I. INTRODUCTION

The period of 1994 through 2002 has been called a myriad of things by commentators, fans, baseball personnel and players when referring to this time period in baseball history. Unfortunately, not many of the names used or applied are complimentary, at least by those who are not part of the Major League Baseball (MLB) hierarchy. Names such as "Baseball's Watergate" or "Selig's Watergate,"¹ the "Tainted Era,"² the "Non-Drug Testing Era," the "*ERA" or simply the "Steroids Era"³ have been suggested. Conversely, MLB commissioner Bud Selig has called this period a "renaissance" for baseball and "baseball's Golden Age."⁴ As can be seen by these few examples of opinions about the subject time period, a wide gap exists in the perceptions of those who have expressed opinions on the subject.

This article will examine the state of baseball and specifically MLB's efforts to enact a performance enhancing drug policy (PED Policy) during this

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1. HOWARD BRYANT, JUICING THE GAME 399 (2005).

2. *Id.* at 402.

3. S.L. Price, *The Liars Club*, SPORTS ILLUSTRATED, Dec. 26, 2005, at 113.

4. BRYANT, *supra* note 1, at 115; *MLB, MLBPA Reach Five Year Labor Accord*, MLB.COM, Oct. 24, 2006.

period. Further, it will discuss certain legal options which were available to MLB during the collective bargaining negotiations which occurred during this time to enable it to accomplish the enactment of such a policy. An assumption has been made at the outset that the Major League Baseball Players Association (MLBPA) was not supportive of such a policy and was not eager to negotiate or implement such a policy at any time during this period. Thus, to the extent that such a policy was needed in Major League Baseball, it would fall to the leadership of MLB to accomplish its adoption and implementation.

The article begins with a look at what occurred on the field during the subject period, for as we shall see, player performance should have and ultimately did have a major impact on the timing of and need for a PED policy. We have gone back in time prior to 1994 to put the 1994-2002 time period in context. Based on the performance on the field during the relevant period, and in comparison to baseball's history and record book, we submit that such a policy was necessary and should have been implemented early in the relevant period. Further, we believe MLB had legal tools available to it to accomplish such a policy during negotiations, notwithstanding the objections by or reticence of the MLBPA. Since we have the benefit of hindsight, it should be noted that a PED policy was adopted later rather than sooner and the use of such a policy as a deterrent was suspect.⁵ How and why this happened is also necessarily discussed, as is our view of why all of the tools available to MLB during collective bargaining were not used.

A. Maris Beats the "Babe" (Three Times)

October 1, 1961 dawned cool and bright in New York City. There was no doubt a baseball game would be played that day at Yankee Stadium. As was customary at that time, the final game of the season was an afternoon game. A crowd of 23,154 was on hand, about average for a team that drew 1,747,736 for the year in the first ever 162 game major league season which called for 81 home games.⁶ But this was to be no ordinary game, although the over 40,000 empty seats belied the importance of it.

Roger Maris had only this last game to break Babe Ruth's thirty-three-year-old record for most home runs in a season. The single season home run record was and is probably the most revered record in baseball and possibly in

5. In the 2002 CBA between MLB and the MLBPA, the parties agreed to a PED policy for the first time. The CBA was reopened in 2005 after a Congressional investigation was begun and the penalties, among other things, contained in the 2002 PED were greatly enhanced.

6. HENRY D. FETTER, *TAKING ON THE YANKEES, WINNING AND LOSING IN THE BUSINESS OF BASEBALL 1903-2003*, 294-95 (2003); MAURY ALLEN, *ROGER MARIS, A MAN FOR ALL SEASONS*, 160 (1986).

all American sports, "The Holy Grail of hardball."⁷

Entering that afternoon game of October 1st, Maris had hit sixty home runs, tying the Babe's record set in 1927. Since Ruth accomplished this feat thirty-four years before, only eight other players had hit as many as fifty home runs in a season: Hank Greenberg (fifty-eight in 1938), Jimmie Foxx (fifty-eight in 1932), Ruth (fifty-four in 1928 and fifty in 1938), Mickey Mantle (fifty-four in 1961 and fifty-two in 1956), Hack Wilson (fifty-six in 1930), Johnny Mize (fifty-one in 1947), Ralph Kiner (fifty-one in 1947 and fifty-four in 1949) and Willie Mays (fifty-one in 1955).⁸

Counting Maris's and Mantle's 1961 season and adding Ruth's two seasons of fifty or more prior to 1927, there had been only fourteen seasons of fifty or more home runs in the modern era through 1961, and only two seasons of sixty (Maris and Ruth). It is interesting to note here, especially in light of what we shall see occurred in the 1990s, that all of the players who hit fifty or more home runs up to 1961 were later enshrined in the Baseball Hall of Fame, and deservedly so, as they were among the best players in baseball for many years.

Perhaps the ghost of the Babe or some other supernatural force was at work that day, but when Maris came to bat for the second time in the game, the lengthening shadows of Yankee Stadium stretched in a straight line from just to the left of home plate to the edge of the right field bleachers, as if pointing the way for the record home run to follow and framing all of the key participants in the drama unfolding – the pitcher, Red Sox rookie Tracy Stallard, Maris and the fans in the bleachers. These were the same bleachers where Maris had deposited many a home run ball that year and where a great number of the crowd was squeezed shoulder to shoulder in hopes of catching the historic home run should it come.

Maris picked up his custom 35 oz., 32 inch, model A92, blond, heavily pine-tarred Louisville Slugger, made of sturdy northern ash, and took a few practice swings. There was no score in the game and the game meant nothing to the final standings as the Yankees had clinched the American League pennant a couple weeks before on the way to one of the greatest seasons in baseball history. (The 1961 Yankees hit 240 home runs, setting a new MLB team record.)

At 2:34 PM, in the bottom of the fourth inning, Maris turned on a Stallard fastball and hit it on a line into the right field bleachers, 365 feet from home plate where a lucky nineteen-year-old caught it and soon after accepted a

7. Tom Verducci, *Shooting Stars*, SPORTS ILLUSTRATED, June 6, 1994, at 18.

8. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK 172-73 (2001).

previously made offer to sell the ball to a restaurateur for the grand sum of \$5000.⁹

In the clubhouse after the game, visible in Maris's locker as he faced the press, were a pack of Camel cigarettes and a can of beer. This was Maris's way of relaxing after a game. It is unlikely that Maris knew much, if anything, about performance enhancing drugs or steroids, and it is a safe bet that neither drugs nor steroids were mentioned in any baseball article published anywhere in 1961 or for that matter, many, many years after.

While Maris unfortunately was not given his due as the true record holder until after his untimely death in 1986 at the age of fifty-two (because Ruth had hit his 60 home runs in a 154 game season, Maris in a 162 game season), no one seriously challenged his sixty-one homers on the field during his lifetime and he ended up taking a record from the Babe for the third time in 1995 by holding the home run record longer than the great Babe had.¹⁰ What made Maris's record all the more remarkable was that from 1961 through 1994 only three players hit as many as fifty home runs: Willie Mays, George Foster, and Cecil Fielder. Mays, with fifty-two home runs in 1965, and Foster, also with fifty-two home runs in 1977, hit the most during the thirty-three year period, and therefore, no player got closer than nine home runs from Maris's sixty-one home run record.¹¹

As Tom Verducci noted in *Sports Illustrated* in 1994, when commenting about Maris's record:

The record has remained so out of reach that in its place we have established what [Steve] Hirdt of [The Elias Sports Bureau] calls a "surrogate record" – making a fuss whenever someone approaches 50 home runs¹²

Verducci notes in the same article that while Ruth's record of sixty home runs was "challenged immediately and frequently after he set it in 1927," with four players hitting at least fifty-four home runs in the eleven years post 1927, Maris's was virtually unchallenged.¹³

9. See FETTER, *supra* note 6, at 295.

10. Commissioner Fay Vincent in 1991 officially removed the distinction between most home runs in a 162 game season versus most home runs in a 154 game season. One hundred fifty-four games was a normal season until expansion created a need for a 162 game season in 1961. By removing the distinction, Maris' sixty-one home runs was recognized as the true record for the first time. For more information on what motivated Vincent to do this see FAY VINCENT, THE LAST COMMISSIONER, 209-11 (2002).

11. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8, at 172-73.

12. Verducci, *supra* note 7, at 21 (emphasis added).

13. *Id.*

Thus, it would seem safe to say as the period 1961-94 came to an end that Maris's record was even more untouchable than Ruth's, correct? Everything in the record books said yes. But a practice had already begun that was to shake the integrity of the game and call into question future challenges to the home run record that one commentator had insisted could not be "gerry mandered very easily."¹⁴ He, unfortunately for Maris and the game, was wrong.

B. 1994 – 2002: Sixty Is Left In The Dust And Fifty Becomes Commonplace

One of the points of Verducci's article quoted above was to suggest that one of the game's young superstars, Ken Griffey, Jr., was on pace to pass Maris in 1994. Alas, as we now know, the 1994 season ended dismally with a player strike and MLB's ultimate cancellation of the World Series. For the first time since 1904, no series was played. What scandal and tragedy and World Wars had not been able to impact, collective bargaining differences between the parties had accomplished.

Lost in the cancellation of the season was not a run at Maris's record by Griffey, but rather one by Matt Williams of the San Francisco Giants. During the shortened season, he had reached forty home runs faster than any player in history, except Maris.¹⁵ Whether the record would have been broken in 1994 if a full season had been played, we will never know. Baseball history suggests that September would prove to be a tough obstacle for anyone trying to break the record and therefore it cannot be assumed Williams would have surpassed sixty.¹⁶ Standing alone, 1994 may have been simply a baseball oddity. But while the cancellation of the rest of the season and the World Series ended the 1994 challenges to Maris's record, a buzz was created for 1995.

Sure enough, despite yet another shortened season because of the lingering collective bargaining issues, Albert Belle, in 144 games in 1995, became the first person since Cecil Fielder in 1990 to hit fifty home runs and only the fourth player since Maris to attain that number.¹⁷

Little did anyone know at that time, but Belle's entry into the elite fifty home run club would be the first of a stunning eighteen times that the fifty home run mark would be eclipsed in the eight year period from 1995 – 2002.¹⁸

14. *Id.* at 19.

15. Dan Schlossberg, *Blast Off!*, STREET AND SMITH'S BASEBALL, 1996, at 21-22.

16. Dennis Tuttle, *62 Taters*, TUFF STUFF, Oct. 1997, at 40.

17. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8.

18. Murray Chass, *Going, Going, Gone*, N.Y. TIMES, Mar. 30, 2003, at 8A.

From 1901 to 1994, the fifty mark had been attained only eighteen times and now this was to be duplicated in a few short years.

Baseball fans and observers were beginning to take notice after the 1995 season that something was different. For two years in a row, players had made runs at Maris's mark. They had been stopped only by a strike in one year and a delayed beginning the next.

Street & Smith's, the long time preseason magazine bible of baseball, did a cover story in the spring of 1996 entitled "Blast Off!"¹⁹ In the article, the author stated, "[c]learly, something is responsible for the power explosion. If it is not the ball, the ballparks, the pitching, the strike zone or global warming, what's happening?"²⁰

The 1996 and 1997 seasons did not disappoint the prognosticators. Two more players joined the 50 home run club in 1996, Mark McGuire with 52 in just 130 games and the most baffling of all, Brady Anderson with 50.²¹ Prior to 1996, Anderson, a leadoff hitter for the Baltimore Orioles, never hit more than 21 home runs and through 2000 had hit only 151 home runs in his other 12 seasons - an average of about 12.5 per year.²²

The indications of a huge power surge during 1996 are almost too numerous to mention. A few examples should suffice to create an adequate picture. An average of 2.19 home runs per game were hit in 1996.²³ That translated to 4962 for the season.²⁴ The previous high was 4458 in 1987 (a year that itself was an anomaly).²⁵ While expansion had occurred in 1993, subtracting those teams' home runs still resulted in a sizeable increase for the year.²⁶

Ten teams surpassed their season records for home runs in a season, and three teams surpassed the 1961 Yankees team mark that had lasted for thirty-five years! Only thirty-three teams in baseball history had hit as many as 200 home runs in a season through 1996; eight of them did it in 1996 alone.²⁷

Seventeen players hit forty or more home runs; the prior best was eight in

19. Schlossberg, *supra* note 15.

20. *Id.* at 21-22.

21. See THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8, at 173.

22. See Peter Gammons, *Foreword* to THE 2006 ESPN BASEBALL ENCYCLOPEDIA 21 (Gary Gillette & Pete Palmer eds. 2006).

23. Steve Aschburner, *Power Surge*, STREET AND SMITH'S BASEBALL, 1997, at 37.

24. *Id.*

25. *Id.*

26. *Id.*

27. See THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8, at 49.

1961.²⁸ Forty-three players hit thirty home runs or more.²⁹ The prior record for a season was twenty-eight in 1987. Fully forty-eight players set personal best home run records (players with twenty or more home runs).³⁰ A study disclosed that 1996 also marked the fourth straight year that the average distance of fly balls and home runs increased.³¹

The year 1997 began with a great deal of anticipation and speculation only as to *when* the record would fall, not *whether* it would. Just a few years before, Maris's record seemed so far out of reach as to create excitement for the player who merely reached fifty. Now, a record breaking performance seemed inevitable.

Scores of articles were written in the preseason about the soon-to-occur (they were sure) record breaking performance.

Again, the players did not disappoint the pundits. Two more players joined the fifty home run club, Ken Griffey Jr. (fifty-six) and Mark McGwire (fifty-eight), for the second consecutive year. As with 1996, McGwire again provided a unique twist to the chase for Maris. As previously noted, McGwire had hit fifty-two in 1996 in only 130 games; in 1997, he hit fifty-eight but became the first person to hit fifty or more playing for two different teams in two different leagues (Oakland, American League; St. Louis, National League).³²

Around the majors, twelve players hit forty or more home runs.³³ While the total number of home runs hit did not surpass the record setting 1996 year, the total for the year was second in baseball history only to the 1996 total.³⁴ Baseball's power surge had now reached four consecutive seasons.

Then came 1998. The story is well known. Mark McGwire averaged an astounding home run for every 7.27 at bats and smashed Maris's record. He hit seventy for the year, fifteen percent more than Maris's total that had stood for thirty-seven years, and he not only hit a greater number of home runs, he regularly hit them more than 400 and occasionally 500 feet! As he pursued the record, 25,000 or more fans would show up just to watch him in batting practice.³⁵ Amazing as McGwire's feat was, what made the year even more interesting was the joint pursuit of Maris all year long by McGwire and

28. Aschburner, *supra* note 23, at 37.

29. *Id.*

30. *Id.*

31. *See id.*

32. *See* THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8, at 172-74.

33. *See id.*

34. *See id.* at 60.

35. *See* MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS xii (2006).

Chicago Cub, Sammy Sosa, who hit sixty-six. When the dust had settled, the sixty home run club that had had only two members in ninety-seven years was doubled in size in one year.

In all, thirteen players hit more than forty home runs in 1998. Two other players reached the fifty mark, Ken Griffey Jr. (again, with fifty-six) and Greg Vaughn (with fifty). The total home runs hit for the year exceeded 5000 for the first time (two expansion teams were added in 1998).³⁶

But this incredible year was not the zenith followed by a few years to allow baseball to catch its collective breath and marvel at what had been accomplished. Instead, the beat went on and the "best" was yet to come.

In 1999, McGwire and Sosa reprised their 1998 show and once again, McGwire prevailed, sixty-five home runs to sixty-three for Sosa. Thirteen players exceeded forty home runs. Over 5500 home runs were hit during the season, setting yet another record.³⁷

There was no letup in 2000 as sixteen players topped forty home runs with Sammy Sosa hitting fifty again. For the fourth time in five seasons, the total home runs hit by all major league teams established a new record. Almost 5700 home runs were hit.³⁸

After the strike in 1994 through 2000, baseball completed six years of unprecedented power displays. Indeed, in the period from 1995 through 2000, twenty-two of the thirty major league teams set team home run records for most home runs in a season. Six of the eight remaining teams had their second highest season total during this six year period.³⁹ Of these six, one team was the New York Yankees, who had their highest total in 1961 on one of the greatest teams in history. Two of the other five teams hit their highest total in 1987, which was an odd year where home runs spiked dramatically and then fell off dramatically over the next few years.⁴⁰ Finally, the only two teams that did not attain their best or second best home run totals during this period were the Minnesota Twins in the American League and the Milwaukee Brewers in the National League. During this period, these two teams finished 161 and 132 games respectively out of first place.⁴¹ They simply were not very good teams.

As baseball hurried toward its first collective bargaining year (2002) since

36. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8, at 187-88.

37. *Id.* at 187-88.

38. *See id.* at 60.

39. *Id.* at 185-88.

40. In 1987, almost 4500 home runs were hit, then a Major League baseball record. *Id.* at 186-88. In 1988, about 3200 were hit. *Id.* In 1986, about 3800 had been hit. *Id.*

41. *See id.*

the disastrous 1994 strike, the players kept hammering away. A discussion of 2001 need focus on only one player – Barry Bonds. Just three years after McGwire broke Maris's thirty-seven-year-old record, Bonds hit seventy-three home runs and took the home run title from McGwire. Bonds, who had never hit fifty home runs before, was in the midst of a home run hitting display unrivaled in baseball history. From the beginning of his career through 1998, when McGwire hit his then record seventy home runs, Bonds averaged one home run for every 16.1 at bats, no slouch was he, but this rate would not put him among the all time leaders. From 1999 through 2004, Bonds would hit a home run every 8.5 at bats, easily the best rate for any such period in history other than McGwire's noted below.⁴²

Three other players hit fifty or more home runs: Sammy Sosa, who reached the sixty home runs mark for the third time (hitting sixty-four home runs), Luis Gonzalez of the Diamondbacks, and Alex Rodriguez of the Rangers.⁴³

Coincidentally, 2001 was McGwire's last year. Only three years after he had engaged in the great show with Sosa, he was gone. McGwire finished his career with 583 home runs.⁴⁴

Since McGwire's career was finished at this point, it is possible to make a few quick observations on his prodigious home run numbers. Perhaps the best short summary of and perspective on McGwire's statistics was offered by Joe Posnanski of the *Kansas City Star*. In discussing recently whether McGwire should be admitted to the Hall of Fame (McGwire will be on the ballot in December 2006, having served the mandatory five-year period of retirement before he would be eligible), Posnanski noted that prior to age thirty-two, McGwire was "closer [in accomplishment] to (Dave) Kingman than Cooperstown."⁴⁵ Kingman was a 1970s to 1980s ballplayer who was known for long home runs (442 of them) but not a lot of other talents.⁴⁶ Certainly, no one would ever confuse him with a hall of famer. Posnanski further noted that prior to age thirty-two, McGwire had 277 homers, a .252 average and just under 4000 at bats. He averaged a respectable one home run per every 14.4 at bats.⁴⁷ Kingman at the same age had 270 homers and a .243 average in a similar number of at bats.⁴⁸

42. See FAINARU-WADA, *supra* note 35, at 278; Gammons, *supra* note 22.

43. See Chass, *supra* note 18, at 1.

44. Gammons, *supra* note 22.

45. Jack Curry, *McGwire's Path Could Predict Bonds's*, N.Y. TIMES, July 23, 2006, at N5.

46. *Id.*

47. *Id.*

48. *Id.*

Suddenly, however, at a point in time when most players' skills begin to decline, McGwire hit 306 homers in his next 2528 at bats, an astounding ratio of one home run every 8.26 at bats, the best in history.⁴⁹ By comparison, Babe Ruth averaged one home run for every 11.7 at bats in his career and was the career leader.⁵⁰

In the final year of MLB without a PED policy, 2002, baseballs continued to fly out of the park.⁵¹ The fifty home run mark was topped twice more led by Alex Rodriguez of the Rangers, who hit fifty-seven.⁵² When all was said and done, the fifty mark had been attained eighteen times since 1994, duplicating in eight short years what had been accomplished in the ninety-four years previous to this.

The sixty home run mark, previously accomplished twice in ninety-four years (and then just barely), was reached six times and the seventy home run mark twice! As noted previously, almost all material power records were surpassed in this time.

C. What Happened?

While one could make the case that this recitation simply appears to be a pining for the good ole days and a lament for the passing of Maris's long held record, that is most assuredly not the intent.

Rather, the intent is to show objectively that what was happening on the field should have peaked the interest of MLB, especially in light of the lack of other objective measures to explain the explosion in offense in baseball.

Further, there were various subjective indications of what was happening all around. These included comments from players and commentators and the changing physical appearance of players over the course of the 1990s. While all of the labels for the era noted in the first paragraph of the article were suggested post 2000, it is submitted that enough information, both objective and subjective was available over the course of the entire decade of the 1990s to suggest that performance enhancing drugs (steroids, human growth hormone, etc.) were being used, and they were having an impact on MLB, the record book and therefore, the integrity of the game.

Assuming this is the case for purposes of argument, what should have been MLB's response and what actually occurred? It should be noted here that over the course of the 1990s and indeed into the 2000s, many arguments

49. *Id.*

50. *Id.*

51. *See supra* note 5.

52. *See Chass, supra* note 18.

have been advanced that would suggest that PEDs were not the major, or the sole, cause of the power surge in baseball. Among the arguments presented for the obliteration of the record book are:

1. Smaller ballparks
2. Juiced baseballs/better bats
3. Major League expansion
4. Weight lifting
5. Smaller strike zone

We will spend a few words to deal with each of these, but the point is not to prove that there were no other factors, but merely to demonstrate that there was a good case to be made for the emergence of PEDs as a major issue in baseball and to then discuss MLB's response to them.

As to the arguments noted above, let us begin with smaller ballparks. The 1990s saw the biggest building boom in MLB history. Eleven new ballparks were built (five more were to open in 2000 and 2001).⁵³ However, the building of a new park did not necessarily mean the building of an easier park to hit in. In reviewing the records of the number of home runs hit since the completion of the new breed of parks built prior to 2002, eight of the sixteen parks were among the top sixteen parks in the majors for hitting home runs. The other eight were in the bottom sixteen of all parks.⁵⁴

Further, in 1998, when McGwire and Sosa both exceeded sixty home runs and McGwire set the new record, they played that year in only four new ballparks, two of which were not known to be "hitters" parks. Three of the smaller parks built in the 1990s (Cleveland, Baltimore and Texas, all of which were American League parks) were not part of the equation for McGwire and Sosa, as they did not play there.

Indeed, Barry Bonds played half of his games in 2001 in his new park in San Francisco. That park, Pac Bell Park, has proven to be one of the toughest parks in baseball to hit home runs in.⁵⁵

As to the "juiced baseball," MLB has insisted for a decade that there have been no specification changes to the ball,⁵⁶ and there is no evidence to suggest otherwise other than simply saying that because there are so many home runs, it must be the ball. Indeed, given the tremendous amount of bad publicity MLB has received since the revelations about steroid use have come out in force since 2003, one could argue that it would be in baseball's interest to say

53. BILL JAMES, THE NEW BILL JAMES HISTORICAL BASEBALL ABSTRACT 314 (2001).

54. See Chass, *supra* note 18.

55. *Id.*

56. See BRYANT, *supra* note 1, at 332.

the ball was changed to provide more offense. It has not done so. Further, it goes without saying that if a player applies more power to a ball, one may propel it farther. Since there is objective evidence to suggest that the application of additional power was occurring through use of PEDs and conversely, no objective evidence to prove the ball itself had been tampered with, one could logically assume that one cause of more home runs was far more likely than the other.

As to better bats, again, there is no known evidence that suggests the bats are making the balls go farther. Indeed, while there are several small bat makers producing bats today, the great majority of the bats continue to come from the major bat companies that have been supplying bats for decades.

Expansion is the next argument and may be the one most cited as evidence for the increased power numbers. Recall that in 1998, two new teams were added. The theory behind expansion as an argument is that with each new team added, twenty-five more players who would have been in the minors are now major leaguers.

There are many issues with this line of thinking. First, there is a history of expansion in the major leagues and the records that go with such history. Expansion occurred five times in the majors since 1961.⁵⁷

At no time during these expansions was there ever a period of several years of tremendous offensive statistical increases except for post 1993 expansion and 1998 expansion, both of which were in the suspect period of PED use.

None of the other four expansion periods (including 1969 when four teams were added in one year) ever resulted in the power surge seen in the 1990s.

Bill James in 2001, assessing the 1990s, acknowledged the argument on behalf of expansion as a reason often advanced for the increase in offense in MLB but quickly dismissed it as a valid argument saying, "[e]xpansion favors neither the hitter nor the pitcher, on balance; it does as much to create a shortage of good hitters as it does to create a shortage of good pitchers."⁵⁸

Weight lifting is another argument for the explosion of home runs. Clearly, there has been a noticeable increase in weight lifting in baseball. Indeed, Mark McGwire has credited it with helping him tremendously.⁵⁹ But there is the rub. Weight lifting can create steroid users, and steroid users increase their weight lifting.⁶⁰ Saying weight lifting is the reason for the

57. See JAMES, *supra* note 53, at 249-328.

58. *Id.* at 307.

59. Austin Murphy, *In Sight*, SPORTS ILLUSTRATED, Aug. 26, 1996, at 32.

60. See FAINARU-WADA, *supra* note 35, at 6, 63-65; 75.

power explosion is to ignore that weight lifting also may mean a player is a steroid user.

Finally, the smaller strike zone. This is another issue related directly to governance by MLB (ala, juiced baseball). Like the lively baseball issue, MLB has denied changing the strike zone. Like the lively ball issue, if in fact the strike zone was intended to be smaller, which in turn caused a substantial offensive explosion, it would behoove MLB to offer this in lieu of a drug induced power surge. No such acknowledgement has been made by MLB.

Certainly, looking at the list of possible reasons for the increased offense in baseball in the 1990s, one cannot discount all or perhaps any of the above reasons as contributing factors. However, nothing on this list of other possible reasons is new to baseball in general, with the possible exception of weight lifting, and if this truly is the major reason, one has to accept all of the baggage that goes with it, i.e., the close connection between weight lifting and steroid use. Indeed, as this article was being submitted to print, a story broke in Europe about an organization that supplied anabolic steroids and HGH to bodybuilders across Europe.⁶¹ Weight lifting and steroid use go hand in hand. Well known in the states is the Balco investigation that dealt with similar issues.⁶²

While we have spent our time thus far discussing what happened on the field as a means of coming to a conclusion as to whether this should have caused a reaction by MLB and when, and now have quickly reviewed other possible reasons for the on field offensive explosion, we should discuss the other signals that were, or should have been apparent to MLB as it approached its labor negotiations in 1994 and 2002.

As before, we have the benefit of hindsight and more information than MLB knew in the 1994-96 period and 2002, specifically, disclosures such as those of Jose Canseco in his book,⁶³ Barry Bonds and the *Game of Shadows* book,⁶⁴ the Congressional investigations of 2005,⁶⁵ the drug testing results

61. Brian Montopoli, *10 Are Arrested in Europe as Part of Steroids Raid*, N.Y. TIMES, Aug. 30, 2006, available at <http://www.nytimes.com/2006/08/30/sports/othersports/30steroids.html>.

62. See generally FAINARU-WADA, *supra* note 35, at 6, 63-65, 75.

63. See JOSE CANSECO, JUICED (2005).

64. See FAINARU-WADA, *supra* note 35, at 17-18.

65. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Government Reform*, 108th Cong. (2005) (evaluating MLB's efforts to eradicate steroid use in which MLB's PED policy was examined and several players were called to testify). During the hearings Mark McGwire repeatedly refused to discuss any topic dealing with his use or others' use of steroids, preferring to answer each time sadly and pathetically with "I'm not here to talk about the past." BRYANT, *supra* note 1, at 388-91.

pursuant to the 2002 negotiations,⁶⁶ the Jason Grimsley affair of June 2006⁶⁷ and other similar developments. But was there other information available to MLB prior to the conclusion of the 1994-96 negotiations that should have, when added to the on-field demonstrations, caused a response from MLB?

Without belaboring this, given the on-field and very visible power displays, we will discuss briefly other signs that were there for MLB, and sometimes all, to see.

First, as early as 1988, stories appeared in print about Jose Canseco and his alleged steroid use. Fans in Boston were openly chanting "Steroids! Steroids!" at Canseco.⁶⁸ And this was not during some early season, meaningless game. It was during the American League Championship Series.

Increasingly, players with bloated bodies, bulging muscles and oversized heads, among other defining features, were showing up in major league clubhouses.⁶⁹ It is inconceivable that there was not increasing common knowledge of use by players, executives, owners and MLB personnel. As long time manager Tony LaRussa (who managed Canseco and McGwire) stated in an interview for *60 Minutes* in 2005 when referring to Canseco, as early as 1988 "everyone knew" of steroid use.⁷⁰

Also, throughout the sports world in the late 1980s and early 1990s, sports doping and abuse was widely known, and major public sports figures were involved.⁷¹

If we bypass the 1994-96 negotiations and focus on 2002, the available evidence becomes much more public and widely known. Most visible, of course, during the 1998 home run chase, McGwire was found to have androstenedione in his locker.⁷² While not banned in baseball, it was banned as a steroid by almost every major sports league and the international sporting community.⁷³ HBO ran a two-part special on use of steroids in 2000.⁷⁴ Most damaging (or enlightening) of all was the 2002 article by Tom Verducci in *Sports Illustrated* called "Totally Juiced" wherein several star players

66. Harvey Araton, *Magic of an Era is Going, Going, Gone*, N.Y. TIMES, Nov. 15, 2003, at D1.

67. Jack Curry, *A New Front in Baseball's Drug War*, N.Y. TIMES, June 8, 2006, at D1.

68. Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 34.

69. *See id.*

70. *See* BRYANT, *supra* note 1, at 377.

71. *See* FAINARU-WADA, *supra* note 35, at 17-18.

72. *See id.* at xii. *See also* GEORGE WILL, BUNTS 105 (1998).

73. *See* FAINARU-WADA, *supra* note 35, at xiii. *See also* Harvey Araton, *The News is Out, Popeye Spikes His Spinach*, N.Y. TIMES, Aug. 23, 1998; Bob Herbert, *In America; A Hero and His Shadows*, N.Y. TIMES, Aug. 27, 1998, at A23.

74. Nick Cafardo, *Taking a Swing at Strategy*, BOSTON GLOBE, Mar. 3, 2004, available at http://www.boston.com/sports/baseball/articles/2004/03/04/taking_a_swing_at_strategy/.

described the use and abuse of steroids.⁷⁵

MLB's reactions? As we noted previously, MLB had no PED policy until 2002, and then that policy was perceived to be so deficient as to invite Congressional inquiry and subsequent strengthening and amendment of the plan.

Commissioner Bud Selig has been quoted as saying MLB did not believe it had a problem prior to 1998.⁷⁶ And when it acknowledged the problem, MLB believed that the union was the impediment to implementation of a policy.⁷⁷

Rob Manfred, Executive Vice President of MLB and the person responsible for collective bargaining on behalf of MLB, agreed with Selig and stated that baseball had not considered PEDs to be a problem in 1994.⁷⁸

Noteworthy, however, was the extensive and comprehensive PED policy that MLB submitted to the MLBPA in the 1994 negotiations. When asked about this, Manfred stated that while MLB did not consider PEDs to be a problem at this point, he was aware of the issues in other sports.⁷⁹

He went on to say that the PED policy was abandoned in 1994 because of union opposition and because of the path that the negotiations took after the strike and what he believed was unnecessary interference in the process by the White House and incorrect action by the National Labor Relations Board (NLRB).⁸⁰

One thing was clear. Selig, Manfred and MLB came to believe at some point that PEDs were an issue, certainly prior to 2002. But they made it clear that whatever their feelings on the subject, they had to negotiate with the union and no policy could be implemented without an agreement with the union.⁸¹ Legally, they stated that their hands were tied without union approval and consent. In their minds, the integrity of the game was a negotiable issue.

75. See Verducci, *supra* note 68.

76. See BRYANT, *supra* note 1, at 395.

77. See *id.*

78. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Government Reform*, 108th Cong. (2005) (statement of Robert D. Manfred, Jr., Executive Vice President, Major League Baseball), available at http://www.businessofbaseball.com/steroidhearings_ManfredStatement.htm.

79. Mr. Manfred graciously agreed to meet to discuss MLB's collective bargaining in 1994 and 2002 while this article was being prepared. The comments occurred during this session.

80. Mr. Manfred, in our discussion, stated that he wished MLB had stuck to their 1994 proposal as he could see that the need was probably there at that time.

81. See *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Government Reform*, 108th Cong. (2005) (statement of Robert D. Manfred, Jr., Executive Vice President, Major League Baseball), available at http://www.businessofbaseball.com/steroidhearings_ManfredStatement.htm.

Knowing that an issue existed and that it was threatening the foundations of the game, did MLB have other alternatives, and was there a way consistent with the requirements of the law to implement a much needed PED policy and thereby to act in the best interests of the game?

II. MAJOR LEAGUE BASEBALL, COLLECTIVE BARGAINING, AND STEROIDS

In its last two collective bargaining negotiations, MLB had the opportunity to act in the best interests of the game and thereby preserve the integrity of its records and its heritage by imposing a testing policy for performance enhancing substances accompanied by stringent penalties for violating those standards.⁸² Though the union, the MLBPA, was on record as being opposed to any strong testing policy,⁸³ its opposition may not have mattered had MLB used the full arsenal of options that collective bargaining allows for during the negotiations. One such option was bargaining to impasse and subsequent imposition of a testing policy by MLB. However, before discussing bargaining to impasse as such a tool and the likelihood of its success in negotiations, it is essential to briefly review the legal aspects and process of collective bargaining as they relate to MLB, the MLBPA and specifically to impasse.

A. Getting to Impasse

In the four major professional sports leagues (MLB, National Hockey League, National Basketball Association, National Football League) there are Collective Bargaining Agreements (CBA) between the league and its member clubs and the players as represented by a players union. Collective bargaining is governed by federal labor law, specifically the National Labor Relations Act (NLRA).⁸⁴ Section 8 of the NLRA specifies that a CBA is constrained to negotiation regarding wages, hours, and terms and conditions of employment.⁸⁵

A quick summary of the collective bargaining process as it relates to sports leagues and baseball is as follows: a union is formed by players of a professional sports league who then elect representatives (as to baseball, the

82. Major League Baseball signed its last two CBA agreements in 1997, after a strike in 1994 and continued bargaining until 1997, and 2002 after a much shorter period of negotiations and no work stoppage.

83. Murray Chass, *If Grand Jury Exposes Players, Union May Squash Drug-Testing Program*, N.Y. TIMES, Feb. 13, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9505E1DD113AF930A25751C0A9629C8B63&sec=health&pagewanted=print>.

84. See generally National Labor Relations Act, 29 U.S.C. § 151-69 (2000).

85. *Id.* § 158.

MLBPA) to bargain with representatives from the league (here, MLB) regarding the mandatory subjects of collective bargaining. Once there is an agreement on these subjects, a CBA is drafted and signed by each side putting the CBA into effect for an agreed upon period of time. When the CBA expires (or occasionally by agreement during a CBA term), each side once again comes together to discuss issues of collective bargaining and draft a new agreement, or amendment, as the case may be.

Section 6 of the Clayton Act gives workers (or in the case of professional sports, players) the right to form, join and assist labor organizations, the right to collectively bargain through representatives, and the right to engage in concerted activities such as strikes or picketing to advance and protect their interests.⁸⁶ This “statutory” labor exemption allows unions to enter into agreements which may create a practice regarding the working conditions of the employees it represents, which, but for the exemption, would be illegal monopolistic acts.⁸⁷ “The ‘Non-Statutory Labor Exemption’ — the more applicable concept in sports law — is a judicially-derived expansion of the [statutory] labor exemption that protects union activity from antitrust scrutiny. It has been the crux of nearly all antitrust actions in professional sports (with the exception of baseball, which had a blanket exemption from antitrust laws until late in 1998).”⁸⁸ MLB had enjoyed its own antitrust exemption until 1998, when Congress passed the Curt Flood Act of 1998, which gave the MLBPA the same antitrust remedies enjoyed by the other major professional sports leagues.⁸⁹ The courts have fleshed out the

86. Clayton Act, 15 U.S.C. § 17 (2000).

87. Mark Conrad, *Mark's Sportslaw News*, SPORTSLAWNEWS.COM, <http://www.sportslawnews.com/archive/jargon/LJAntiexemption.html> (last visited Aug. 16, 2006).

88. *Id.*

The non-statutory labor exemption is based on the policy that favors collective bargaining and gives it preference over the antitrust laws. Basically, any union-management agreement that was a product of good faith negotiation will receive protection from the antitrust laws. That means that the provisions of the agreement cannot be attacked as collusive or anti-competitive. Say that a salary cap is agreed to by a union and management. In pure antitrust terms, a cap can be a violation of the antitrust law. But since the cap was part of the collective bargaining agreement negotiated in good faith and agreed-to by the union and management, the cap cannot be attacked in court as a violation of antitrust [law].

Id.

89. This article is not meant to be an exhaustive explanation of the interplay between antitrust and labor laws. For a better understanding of baseball's longstanding antitrust exemption and how it changed as a result of the Curt Flood Act of 1998, see Eric I. Long, *The 1994 Baseball Strike Revisited: A Better Impasse Analysis*, 22 S. ILL. U. L.J. 117 (1997); John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball's Federal Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347 (1999); Lacie L. Kaiser, Note, *The Flight From Single-Entity Structured Sports Leagues*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 230 (2004).

application of the non-statutory labor exemption within the bargaining process, which would apply to MLB and the MLBPA within their collective bargaining process.

In *Mackey v. National Football League*,⁹⁰ the court suggested that the basis for the non-statutory labor exemption is the existence of a collective bargaining agreement and that there can be no antitrust challenge as long as a CBA was in place.⁹¹ This decision sets out the nature of the exemption but does nothing to clarify how long the exemption lasts, nor does it address what would happen when the CBA expires, i.e., can the players challenge the terms, or what happens if there is an impasse during the negotiation process? In *Powell v. National Football League*⁹² the court did its best to clarify these issues.

The *Powell* court resolved the issue of the exemption's duration by stating that it lasts as long as there is an ongoing collective bargaining relationship.⁹³ This means that from the formation of the union until a decertification of the union, the non-statutory exemption is in place, and in the eyes of the law, an ongoing bargaining relationship exists.

Now, on to impasse, which is a point reached during the collective bargaining process where one side believes the negotiations can go no further or the party is unwilling at that point to further discuss any current proposals or any specific issue. As reiterated in *Powell*, and defined by the Supreme Court, impasse is "a temporary deadlock or hiatus in negotiations" which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' Furthermore, an impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.'"⁹⁴ Following that characterization, the Court made it clear that impasse was a "recurring feature" in the collective bargaining process. One basis it reasoned that the non-statutory labor exemption extends past impasse is that allowing a unilateral withdrawal at impasse would "undermine the utility of multi-employer bargaining."⁹⁵

It is well established that when a CBA expires it is labor law, not antitrust law, that governs conduct between the employer (or league in

90. 543 F.2d 606 (8th Cir. 1976).

91. See *id.* (internal quotations omitted).

92. 930 F.2d 1293 (8th Cir. 1989).

93. *Id.*

94. *Id.* at 1299 (quoting *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982)).

95. *Id.*

professional sports) and the union.⁹⁶ However, the end of a CBA does not signal an end of cooperation; rather, it signifies a continued duty to bargain in good faith and for the employer to maintain the status quo as to wages and working conditions.⁹⁷

Though there is “no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations which arise in the field of industrial bargaining,”⁹⁸ the NLRB attempted to lay out five factors to define whether impasse had actually been reached in the course of a CBA negotiation: “the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issues [over] which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.”⁹⁹ “Specifically, these factors were intended to guide the inquiry into whether further bargaining would be futile.”¹⁰⁰

The NLRB, which is the governing body for disputes concerning collective bargaining, is not restricted to these factors, as none are dispositive; the question of impasse is one of fact. However, the NLRB has looked at these factors in light of the totality of the circumstances to make a decision.¹⁰¹ Because the NLRB’s decision as to whether an impasse had occurred is retrospective, it places both emphasis and incentive on both sides to make a continued attempt at negotiation and ultimately a new CBA, rather than challenge the existence of an impasse in negotiations.

B. Options at Impasse

As a result of the non-statutory labor exemption and the Curt Flood Act, the options of the players union at impasse are limited, leaving it only with the ability to strike, bring an unfair labor practice suit or decertify. Under the right conditions and circumstances, the league would be able to unilaterally impose terms once impasse is reached. It could also lock-out the players (equivalent of an owner’s strike) or do nothing at all and continue to maintain the status quo hoping that at some point negotiations will spark up. It is important to note that impasse may be reached a number of times during the negotiation process, and it is often used as a method to stimulate the collective

96. *Id.* at 1300.

97. *Id.*

98. Taft Broadcasting Co., 163 N.L.R.B. 475, 482 (1967).

99. *Id.* at 478.

100. Long, *supra* note 89, at 1301.

101. *Id.*

bargaining process.¹⁰²

In 1986, Pete Rozelle, then commissioner of the National Football League, “unilaterally implemented steroid testing in the NFL.”¹⁰³ However, this occurred before testing for performance enhancing drugs had become considered a mandatory subject of collective bargaining. Today, both the MLBPA and MLB agree that drug testing is indeed a mandatory subject of collective bargaining.¹⁰⁴ Therefore, MLB would not be able to simply implement a testing policy unless MLB bargains to impasse.¹⁰⁵ Instead of turning a blind eye to a serious and growing problem, MLB could have, through collective bargaining, forced the issue of drug testing by continually presenting the MLBPA with new drug testing proposals. Had the MLBPA continually rejected drug testing proposals, and MLB bargained strenuously and in good faith, MLB could have claimed an impasse in negotiations and imposed its last best offer. If the players accepted a policy such as the one in place today, the league would have at the very least looked like it was doing its best to protect the integrity of the game.

Player unions in professional sports have challenged the legitimacy of whether a league can actually unilaterally impose terms at impasse, but courts have continued to support the league, finding this method as a healthy way to stimulate the collective bargaining process and a furtherance, rather than a hindrance, of labor policy. The seminal case regarding this issue is *Brown v. Pro Football, Inc.*¹⁰⁶ In *Brown*, a CBA between football clubs and players expired and negotiations reached impasse.¹⁰⁷ At impasse the clubs unilaterally

102. See *Taft Broadcasting Co.*, 163 N.L.R.B. 475.

103. Harvey Araton, *Union Misses the Mark On Testing in Baseball*, N.Y. TIMES, Mar. 22, 2004, at D8.

104. See Statement of Allan H. Selig, Commissioner of Baseball, Before the Committee on Energy and Commerce, United States House of Representatives, May 18, 2005, available at <http://energycommerce.house.gov/108/Hearings/05182005hearing1507/Selig.pdf>; Robert Manfred, *Policy is Real Progress...*, USA TODAY, Dec. 7, 2003, available at http://www.usatoday.com/news/opinion/editorials/2003-12-07-oppose_x.htm.

105. Mark M. Rabuano, Note, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439 (2002).

The NLRB decisions of *Johnson-Bateman* and *Minneapolis Star Tribune* (which are as of yet unchallenged) and the arbitration precedents in both MLB and the NFL all consistently hold that drug-testing programs cannot be unilaterally implemented and must involve collective bargaining. Since a drug-testing program will affect the athlete's ‘terms and conditions of employment’ - as defined by Section 8(d) of the NLRA - it should be considered a mandatory subject. As such, the implementation of a drug-testing program by the League may not be effectuated unilaterally without prior bargaining with the MLBPA.

Id. at 454-55.

106. 518 U.S. 231 (1996).

107. *Id.*

imposed the proposed changes to the players' contract, an act that the players believed was an antitrust violation of the Sherman Act.¹⁰⁸ However, the court held the non-statutory labor exemption waives "antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."¹⁰⁹ The court found that the league was entitled to implement changes unilaterally after bargaining to impasse so long as it met "carefully circumscribed conditions."¹¹⁰ Basically, the courts are looking to the *Taft* factors and totality of the circumstances to determine if impasse was in fact reached and whether the implemented terms are permissible. "[T]he new terms must be 'reasonably comprehended' within the employer's pre-impasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status."¹¹¹ Furthermore, the collective bargaining process must have been free of any unfair labor practice, such as bargaining in bad faith.¹¹² Should the employer exceed its labor law rights in implementing terms at impasse, the union would have the full range of labor law remedies available, including filing a grievance with the NLRB.¹¹³

C. Impasse and Collective Bargaining Between MLB and the MLBPA 1994-2002

The year 2002 marked the first time MLB and the MLBPA were able to agree on a drug testing policy through collective bargaining.¹¹⁴ The agreement called for "Survey Testing" during the 2003 season to determine what percentage of players were using performance enhancing drugs, and if it was determined that five percent or more players were using, mandatory testing would follow in 2004 and continue through 2005.¹¹⁵ When it was determined that between five and seven percent of players on the forty-man MLB rosters were in fact using performance enhancing drugs, mandatory

108. *Id.*

109. *Id.* at 235 (quoting *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir. 1995)).

110. *Id.* at 238.

111. *Id.*

112. *Id.* at 238-39.

113. *See id.*

114. *See* Major League Baseball, *Special Report: Drug Policy in Baseball, Event Timeline*, MLB.COM, http://mlb.mlb.com/NASApp/mlb/mlb/news/drug_policy.jsp?content=timeline (last visited Aug. 16, 2006).

115. *See id.*

testing began in 2004, but with less than stringent penalties for failing a test.¹¹⁶ Even though in 1994 MLB had proposed a drug testing policy that included a sixty-day suspension upon a second offense and a one-year suspension (both without pay) upon a third offense, the 2002 agreement only penalized a player fifteen days on a second offense and a *potential* one-year suspension upon a fifth offense; neither proposal called for mandatory suspension after failing one test.¹¹⁷

Don Fehr, Executive Director of MLBPA, called a player strike in 2002 a last resort and stated that a strike

would not be entered into unless the players feel they have no other viable option. It is our hope over the next few weeks that we will enter some serious and substantive discussions with the owners. That's the goal. We're going to do everything we can to make sure that goal is realized.¹¹⁸

Even with an apparent willingness, if not real determination to discuss steroids as a term through collective bargaining, ultimately MLB chose not to push the union on this issue and was satisfied with the result of the 2002 CBA negotiations in regard to performance enhancing drugs. Commissioner Bud Selig stated, following the results of the survey testing,

that he was pleased to learn

that there is not widespread steroid use in baseball. [He was] also pleased that the drug testing program negotiated last year as part of the collective bargaining agreement with the players association heightened awareness to the dangers of improper drug use and now has allowed [them] the means to implement the new more comprehensive drug testing and enforcement program.¹¹⁹

Judging from that statement, Commissioner Selig did not seem to think negatively of the fact that by the percentages, one or more players per team at minimum were using performance enhancing drugs, or essentially cheating. In fact, the Commissioner seemed to be quite satisfied with the new testing policy, further stating that he believed it would help eradicate all performance

116. *See id.*

117. *See id.*

118. Barry M. Bloom, *Players Do Not Set Strike Date*, MLB.COM, July 8, 2002, http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20020708&content_id=77910&vkey=news_mlb&fext=.jsp.

119. Barry M. Bloom, *Mandatory Steroid Testing to Begin*, MLB.COM, Nov. 13, 2003, http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp&c_id=mlb.

enhancing drugs from the game of baseball.¹²⁰

Unfortunately, it took involvement from Congress, including the threat of legislation by Senator John McCain calling for the government to seize control of testing and punishment for drug use in baseball, as well as continued public and media pressure, for Commissioner Selig and MLB to take the next step.¹²¹ For the first time in MLB history, MLB and the MLBPA reopened a CBA and agreed to negotiate new terms of part of the agreement, something that neither party legally had to do.¹²² This suggests that, if pushed during the previous CBA negotiations in regard to a testing policy, the MLBPA may have been willing to accept, or at least bargain for, a more stringent testing policy.

Early in 2005, the union agreed to a new testing policy that suspended players for ten games with one positive test, and just ten months later agreed to increase the penalty for one positive test to fifty games, a one-hundred game suspension for a second offense and a lifetime ban for a third offense.¹²³ It seems clear that the union was willing to negotiate on this subject when adequate pressure was applied, considering it did so even when there was no expired CBA and it was not required to bargain at all. This begs the question as to why MLB did not push harder in the 1994-97 negotiations and especially during the 2002 negotiations for a more stringent testing policy, knowing that it could have bargained to impasse and imposed such a policy had the union balked at such a proposal and subsequent negotiation attempts.

Given the legal constraints regarding impasse as defined by *Brown*, it certainly appears that MLB could have used impasse as a tool to impose a testing policy for performance enhancing drugs. It simply would have had to bargain in good faith, continually proposing and negotiating for such a policy. If the MLBPA declined to bargain further on the subject, MLB could claim an impasse and impose its last best offer.

In summary, if MLB and the MLBPA had reached impasse and MLB had actually imposed a new drug testing policy, the union would have had four options: bring an unfair labor practice grievance with the NLRB; strike and refuse to negotiate further; decertify and bring an antitrust action; or accept the terms and sign a new CBA.

As previously discussed, the NLRB will look at a grievance filed in regard to a violation of labor laws governing collective bargaining and will take a

120. *See id.*

121. Barry M. Bloom, *Selig, Fehr Testify Before Senate*, MLB.COM, Mar. 10, 2004, http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20040310&content_id=648635&vkey=news_mlb&text=.jsp&c_id=mlb.

122. *See id.*

123. *See Major League Baseball, supra* note 114.

retrospective look at the negotiations in light of the *Taft* factors and the totality of the circumstances. Because the baseball season runs about nine months out of the year, it is likely that such an action would commence and conclude during the short off-season. The players would either have to accept the terms for part of a season, strike and miss part of a season, or face the likelihood of a lock-out by owners. Furthermore, if MLB bargained in good faith and implemented a reasonable proposal, thus staying within the *Taft* factors, any attempt by the players to procure an injunction from the NLRB would likely be futile.

If the players decided to strike as a result of the unilateral implementation of steroid testing terms, they would run the risk of losing fan interest, and it is the fans that ultimately pay the salaries of the players through gate receipts. Striking merely to repel a steroid testing policy would likely encourage the media to paint a picture of widespread steroid use and therefore further alienate fans. Though this option would put the most economic pressure on the owners who would be losing money as long as no games were being played, it would also be a substantial risk for the players.

The boldest, but most unlikely option for the players had they found themselves in this situation, would have been to decertify and bring an antitrust suit claiming a restraint of trade by the owners. Because of the non-statutory labor exemption, no antitrust action could commence as long as the union existed because, in the eyes of the law, a collective bargaining relationship would still exist and labor laws would waive any antitrust liability by the league.

Finally, the players could acquiesce to the league's proposal as it stands or continue to bargain, and perhaps compromise, on a steroid testing policy. This is what the labor laws are in place to encourage: continued negotiation and eventual compromise. Given the law regarding impasse, it certainly appears that this tool could have been used by MLB to implement a strong performance enhancing drug policy. The question remains: why did MLB not attempt to use it?

III. THE BUSINESS OF BASEBALL IN THE STEROIDS ERA

Now that it is clear that MLB had the tools, if it chose to use them, to attempt to implement a PED policy earlier (during the 1994-96 negotiations) and a stronger policy (when one was finally implemented in 2002), the question is: why were those actions not taken at those respective points in time? Before answering that question, it would seem another question should be answered first: assuming everything which has been said thus far is true, i.e., that baseball records were being not just broken, but obliterated, that PED

use was at least a material cause of the record setting performances and that there existed a legal means to attempt to implement a stronger and more effective policy faster, WAS THERE A NEED TO DO SO? Like many things in business, life and sports, difficult issues may be overcome with effort, but the cost of surmounting the issue is usually considered in light of the need. Hence, before attempting to answer the ultimate question, we will spend some time on whether there was, in fact, a need to implement an earlier and/or stronger policy.

A. PEDs and the Integrity of Baseball

Baseball is a unique game in the world of sports. Even a casual fan seems to have some knowledge of baseball statistics, the “stats.” Numbers like 56, 60, 61, 714, and .400 are readily identifiable as significant baseball numbers.

So too with baseball history. Again, even casual fans seem to possess a baseball moment that they remember fondly. Henry Fetter, in his recent book about the business of baseball stated:

[n]or does any sport so assiduously cultivate its history and make it a part of the continuing life of the game. “Baseball fans have an abiding interest in the history of the game,” a California judge recently wrote, rejecting, on First Amendment grounds, an effort by a number of retired players to prevent major-league baseball from using their names and likenesses on websites, documentaries, and game programs. The public has an enduring fascination in the records set by former players and in memorable moments from previous games. . . . The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today’s performances. Thus, the history of baseball is integral to the full understanding and enjoyment of the current game and its players.¹²⁴

Bob Costas in his best selling book, *Fair Ball*, noted that “[b]aseball is reliant upon its history to a far greater extent than any other sport.”¹²⁵ He goes on to say:

[y]et Mark McGwire and Sammy Sosa are forever linked with Babe Ruth and Roger Maris. Cal Ripken Jr. is forever linked with Lou Gehrig. Ken Griffey Jr. may be forever linked with Hank Aaron. This is unique to baseball, the only sport whose present and future are so

124. See FETTER, *supra* note 6, at 387-88 (citing *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 315 (Cal. App. 1 Dist. 2001)).

125. BOB COSTAS, *FAIR BALL* 105 (2000).

dependent upon an understanding and appreciation of its past.¹²⁶

This, of course, was written before the revelations about possible PED use by McGwire and Sosa were given more credence at the March 2005 Congressional hearings.

In a popular movie released a couple of years ago about baseball, starring Kevin Costner, *For Love of the Game*, Costner's character, aging pitcher Billy Chapel, perhaps said it best, "[w]e count everything in baseball . . . that's all we do." Hence, the problem. With bloated, inflated numbers, history is interrupted. It is as if a separate set of books now exists for a period of time. Whereas once fans deliberated and argued, endlessly it seems, about whether Mickey Mantle was as good as Joe DiMaggio or Hank Aaron was better than Babe Ruth or Tony Gwynn was better than Ty Cobb, now the argument is, "What do McGwire's or Bond's numbers translate into if they were not using PEDs?" Most assuredly, this is not a way to continue interest and tradition, and it will cause one of the real critical parts of the game, "counting everything," to mean much less. We will no longer count to compare, as the numbers we must compare against are fictitious, tainted and suspect.

In a *New York Times* column in 2003, Harvey Araton summed up his concerns about the Steroid Era with the following comment: "a sport whose statistics and records are practically its lifeblood, experienced an offensive surge that stretched believability to the breaking point."¹²⁷

One could make the argument that baseball's attendance has continued to grow during this time so it is apparent there is no lingering issue. The problem with this argument is that this attendance growth (which only in 2005 surpassed the pre-1994 strike average attendance numbers for the first time) was taking place in large part while the players' statistics were not suspect. Now that the cat is out of the bag, it will be interesting to see how fans deal with the disconnect that baseball has created.

Picture this scenario: When a young boy, just old enough this year to ask his dad for the first time who hit the most home runs in a season after he attends his first game and sees one hit out of the park, what does his dad say? Does he say, "Well, son, there are a couple of guys that hit seventy or more home runs, the most ever, but because there is a question about whether they used drugs, the real record holder might still be Roger Maris with sixty-one?" If we are looking for a way to have our children's eyes glaze over and drift on to something else and therefore leave baseball behind, this is a good way to start.

126. *Id.* at 106.

127. Araton, *supra* note 66.

Beyond the special connection between fans, history and the allure of the stats, each of which is in jeopardy because of the potential PED offensive inflation, one other factor comes into play. As he normally does on any subject that he chooses to write about, George Will has written lucidly about the issue of steroids in baseball from a perspective of cheating and how that impacts the sport. He notes that:

sport is valued not only because it builds character but because it puts on display, and crowns with glory, for the elevation of spectators as well as participants, attributes we associate with good character. Good character, not good chemistry. A society's recreation is charged with moral significance. Sport would be debased, and with it a society that takes sport seriously, if sport did not strictly forbid things that blur the distinction between the triumph of character and the triumph of pharmacology.¹²⁸

Tom Verducci, in a column he wrote the week his special report on steroid use was published,¹²⁹ opined that "[b]aseball is a game built upon public trust. If there is no faith in the legitimacy of the competition and the records, then baseball moves closer to the realm of pro wrestling."¹³⁰

We are quite sure we could not have said it better. Whether because we miss the ability to compare real numbers with real numbers, whether it be because we lose our sense of history and feel like a part of our history is gone, or whether it is simply moral indignation that ultimately turns us off because we as a society will simply not condone cheating that is worn on many players' sleeves like a badge of honor as opposed to a symbol of shame, it is axiomatic that we will lose respect for the integrity of the game.

But discussing the integrity of the game does not end with the public perception simply from the fans' standpoint and the likely impact to the game because of adverse fan reaction. It also necessarily involves those playing the game, the players.

Certainly, no one believes that all of the players are in favor of PED use. Various estimates have been given by some of the more outspoken players as to how many players use steroids.¹³¹

Tom Verducci, commenting on what he heard from players, trainers and

128. WILL, *supra* note 72, at 105-07.

129. See FAINARU-WADA, *supra* note 35.

130. Tom Verducci, *Baseball's Worst Kept Secret*, SPORTS ILLUSTRATED, May 28, 2002, available at http://sportsillustrated.cnn.com/sionline/special_report/news/2002/05/28/Verducci_insider.

131. VERDUCCI, *supra* note 68. In the article, the estimate of player use varied from ten to fifty percent of all players. *Id.*

executives called the game “a pharmacological trade show.”¹³²

But there are many that do not use steroids who find the concept unfair and demeaning to the game. Kenny Rogers, long time pitcher for several major league teams stated, “[m]y belief is that God gave you a certain amount of ability, and I don’t want to enhance it by doing something that is not natural and creates an unfair advantage. I’m critical of guys who do it.”¹³³ They are legitimately concerned that all achievements will be swept up by the broad brush of opinion and that legitimate accomplishments during this time will be tainted.

Consider someone such as Ken Griffey Jr. There has never been any discussion of PED use associated with his name. There is no reason to believe he is anything other than a very talented ballplayer, the likes of which do not come along more than once every decade or so. Why should his accomplishments of the 1990s be tainted by those around him who did use PEDs? The same is true for someone like Alex Rodriguez, now of the Yankees. He twice hit more than fifty home runs, as we have seen, during the period in question, once hitting fifty-seven. But because the sixty mark had been passed several times in the few years before, almost no attention was paid to his accomplishment. He was left virtually alone in the last couple weeks of that season either because his achievement was no longer viewed as special because of the tainted achievements that preceded it or because it was viewed as one more bulked up guy hitting fifty-plus home runs.

For these reasons, we submit that the answer to the question posed at the beginning of this section is yes, there is and was a need to implement a PED Policy sooner and stronger to protect the integrity of the game.

B. Why MLB Chose Not To Use The Legal Tools Available To It To Implement A PED Policy – Part I

The short answer is that MLB did not want a PED policy badly enough given other issues it faced, at least during the 1994-96 negotiations.

While the signs of PED abuse were visible in 1994 as MLB prepared to square off with the MLBPA for its 1994 CBA negotiations (and, indeed, as noted previously, MLB actually submitted a proposal that was in many ways tougher than the 2002 policy that was ultimately implemented), baseball was preoccupied with economic issues at this time.¹³⁴

132. *Id.*

133. *Id.* at 43.

134. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Government Reform, 108th Cong.* (2005)

It is not intended here that we perform an exhaustive examination of the 1994-96 negotiations and strike. However, a few key factors surrounding the negotiations should be discussed, as they had an impact in reaching the conclusion we noted above. First, in 1993, the year prior to the strike, baseball had achieved record attendance and two new teams had been added (Colorado and Florida).¹³⁵

Attendance was not just up in 1993, it was up a “staggering number – up more than 50% from the average per-season figure of the [1980s], which was a record setting decade.”¹³⁶

During 1994, baseball was headed for yet another record year until the strike interrupted it. But 1995 saw attendance plummet to the late 1980s levels (down twenty million from 1993); the fans were obviously disillusioned with the strike.¹³⁷

While it appeared prior to the strike that baseball was doing well, from a business standpoint, baseball’s financial situation was worsening. In 1994, the value of baseball’s new national television contract fell by over sixty percent. Big market teams were earning tremendous sums of money from local media, and new stadiums were creating increased revenue disparities.¹³⁸ There were also many other factors adding to an increasing disparity of revenue between large and small teams.¹³⁹

In addition, as the negotiations dragged on it was estimated that the 1994 strike had cost the owners \$500 million in lost revenue in 1994 and \$800 million more in 1995.¹⁴⁰

(statement of Robert D. Manfred, Jr., Executive Vice President, Major League Baseball), *supra* note 78. See also BRYANT, *supra* note 1, at 395.

135. COSTAS, *supra* note 125, at 18. In 1993, attendance passed the 70 million mark for the first time and broke the old record by twenty-four percent. *Id.* It was the ninth new record in twelve years. *Id.* Even without the addition of the expansion teams, the prior record would have been broken. *Id.*

136. See JAMES, *supra* note 53, at 311.

137. See *id.* “Baseball took a powerful hit from the 1994-95 strike. Average game attendance fell from 31,612 in 1994 to 25,021 in 1995, a drop of 20.9%.” ANDREW ZIMBALIST, MAY THE BEST TEAM WIN BASEBALL ECONOMICS AND PUBLIC POLICY 93 (2003).

138. See ZIMBALIST, *supra* note 137, at 46.

139. *Id.*

140. See FAINARU-WADA, *supra* note 35, at xii. The 1994 strike was the culmination of a long run of work stoppages and strikes involving MLB and the MLBPA. In fact, every CBA negotiation from the birth of the union to the 1994 negotiation had ended in a work stoppage. Among the issues were collusion claims brought against MLB in the late 1980s by the union, which ultimately cost the owners \$280 million. A review of each of these negotiations leads us to believe that MLB made a series of bad choices over the years and suffered several setbacks at the bargaining table. This history assuredly had an impact on the labor negotiations of 1994-96 and certainly was a factor as MLB proceeded to negotiations in 2002. For a good discussion of the history or labor negotiations between

To this mix, the owners limited the Commissioner's powers to act "in the best interests of baseball" at a meeting on February 11, 1994.¹⁴¹ The Commissioner at the time was actually an acting Commissioner, Bud Selig, an owner who had been appointed after Fay Vincent was forced to resign in 1992. One of the reasons why Vincent was forced to resign was because of his perceived unilateral action in settling the 1990 negotiations.¹⁴² Thus, the impact of the revision of the Commissioner's power was to make it more difficult to avoid a clash with the union as multiple points of view were fighting for the MLB position on various issues and there was no obvious tie breaker within MLB.

The negotiations that led to the strike and the two years that followed before an agreement was reached were marked by bitter differences not only between MLB and the union, but also between the larger and smaller revenue teams within MLB.¹⁴³ The substantive issues of revenue sharing and a luxury tax system meant to redistribute revenue among the teams were the priority for MLB. The luxury tax system had originated as a salary cap initiative by MLB.¹⁴⁴

Overlaying all of this were a series of court decisions, NLRB decisions and arbitrator rulings that went in favor of the union as the strike lengthened.¹⁴⁵ The issue of a PED policy was simply not important enough, and impasse tools were not even considered for the issue of a PED policy. The concept of bargaining to impasse was not foreign to MLB, however. In fact, in December of 1994, MLB's Executive Council had declared an impasse and unilaterally implemented MLB's final salary cap proposal. They rescinded the action six weeks later after the NLRB threatened to file an unfair labor practice charge based on bad faith bargaining.¹⁴⁶

MLB may choose to blame the union's intransigence as the reason there was no policy implemented (and it seems likely the union certainly would

the parties, see ZIMBALIST, *supra* note 137, at 75-121. Also, from the perspective of the union, see MARVIN MILLER, *WHOLE DIFFERENT BALLGAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION* (2004).

141. See ANDREW ZIMBALIST, *IN THE BEST INTEREST OF BASEBALL* 144-45 (2006).

142. *Id.* at 145.

143. *Id.* at 150-51.

144. *Id.* at 146.

145. *Id.* at 145-50. For a good (though a bit disjointed) discussion of the various legal maneuverings which occurred during the 1994 negotiations see G. RICHARD MCKELVEY, *FOR IT'S ONE, TWO, THREE, FOUR STRIKES YOU'RE OUT OF THE OWNERS' BALLGAME* 161-202 (2001). Noteworthy is McKelvey's summary of the key issues on the table by MLB, a twenty-seven page document, and the absence of any reference to a proposed PED policy. *Id.* All of the issues were economic. *Id.*

146. MCKELVEY, *supra* note 145, at 185-89.

have objected to any real discussions),¹⁴⁷ but in truth, this simply was not important enough of an issue for MLB. While it is difficult to believe all of the propaganda from either side, the information available suggests that the union's claims regarding negotiating a PED policy ring true, little discussion was actually had about a PED policy and economic issues were the focus.¹⁴⁸ As noted in Bryant's book:

[u]nion officials . . . say the draft [of the MLB 1994 PED policy] never made it to the negotiating table in any meaningful form, and if it did, baseball did not fight for it during negotiations or after the strike. Union officials say they'd barely heard of the document. All they [MLB] cared about was the money issue, the revenue sharing and salary cap said one player representative.¹⁴⁹

Given the lack of general knowledge at the time of MLB's submittal of a PED policy in conjunction with the 1994 negotiations, the lack of reference to it in any material summary that exists with regard to these negotiations, the surprise the existence of the policy generated during the Congressional investigations,¹⁵⁰ the lack of comment about the policy by MLB at that time and the comments of the union officials about its absence as an issue at the table, it appears that the conclusion is inescapable that MLB simply did not want it badly enough at the time.

As one union official stated, while acknowledging that the union would have been an impediment to enactment of a policy, "[t]he fact is that it just wasn't that important a labor point for them, but it seems relevant now."¹⁵¹

In conclusion, at least as to the 1994-96 negotiations, the use of the tool of bargaining in good faith to impasse and implementation of a PED policy was almost certainly not considered by MLB, as economic issues were the focus. For MLB, no time or effort was to be expended on a PED policy that could better be used to get to a labor contract that ultimately took three years to attain. As we move to the 2002 negotiations, we shall see that the conclusion was similar there for different reasons.

C. Why MLB Chose Not To Use The Legal Tools Available To It To Implement A PED Policy – Part II

The short answer (and this one is a little longer than the first one) is that

147. See BRYANT, *supra* note 1, at 396.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

had MLB used the legal avenue of declaring an impasse, it would have risked another strike, and MLB made the decision that it was not economically feasible for it to do so.

By the time McGwire and Sosa had begun their challenge to Maris's record in 1998, baseball had begun to show signs of renewed life at the box office. After a disastrous attendance year in 1995, attendance had begun to climb again in 1996 and 1997, although the total numbers were still significantly below the 1993 attendance numbers.¹⁵²

With the challenge to Maris in 1998, attendance continued to rise. As noted previously, 25,000 people were coming to the ballpark to see McGwire in batting practice; in 1961, Maris was unable to get 25,000 to see him hit his sixty-first home run! Whereas, ten to fifteen writers showed up to talk to Maris in September of 1961 when he was within a couple home runs of breaking Ruth's record, now thirty to fifty writers were showing up to tail McGwire in July when he had forty-two home runs!¹⁵³

Such was the power of the home run that year that attendance was up everywhere McGwire and Sosa played, and St. Louis drew almost 3.2 million fans despite being out of the race a couple months before the season ended and finishing third in their division, nineteen games out of first place.¹⁵⁴ The baseball McGwire hit for his seventieth home run was sold at an auction for \$3 million with several bidders active in an attempt to buy the coveted ball.¹⁵⁵ Thirty-seven years before, the \$5000 paid by the enterprising restaurateur seemed like a big deal. Interest in the game was clearly increasing.

This trend continued in 1999-2001 while, as we have seen in Section I of this article, baseballs flew out of the park at unprecedented rates.

But while attendance slowly but surely was returning to pre-strike levels largely because of the excitement of increased home run production, the economics of baseball in the eyes of the owners was in many cases worsening.¹⁵⁶ A "Blue Ribbon Panel" was convened by Selig to study the game's economic issues and report back to ownership.¹⁵⁷ With this as a

152. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8.

153. Gary Smith, *Home Run Fever*, SPORTS ILLUSTRATED, Aug. 3, 1998, at 42.

154. THE SPORTING NEWS COMPLETE BASEBALL RECORD BOOK, *supra* note 8.

155. Darren Rovell, *McFarlane Wins Auction for Historic Bonds Ball*, ESPN.COM, June 25, 2003, <http://sports.espn.go.com/espn/print?id=1572871&type=news>.

156. See ZIMBALIST, *supra* note 141, at 161.

157. See *id.* Discussing the Blue Ribbon Report while testifying before the committee on the Judiciary of the House of the Representatives on December 6, 2001, Selig noted that the Blue Ribbon Panel had concluded that "baseball's econmic system is broken"; that losses for the previous seven years for all clubs was \$1.4 billion and that debt levels for the clubs was at an unprecedented \$3.0 billion.

backdrop, the CBA negotiated from 1994-1996 was set to expire.

For a number of reasons, MLB did not put forth demands for a new agreement on the bargaining table until December 2001, a month after the expiration of the old agreement.¹⁵⁸ This only served to increase the pressure on the parties, delayed resolution and helped to cause the negotiations to take place during the season, which set the stage for a probable work stoppage once again.

The result was a highly compromised agreement in August of 2002 that accelerated to a settlement only after the union stated that it would strike again on August 30, 2002 if an agreement was not reached.¹⁵⁹

As negotiations proceeded to a close at the end of August, Selig was faced with several clubs that had taken on great amounts of debt, collective losses that he put at over \$500 million per year, a drop in attendance for two-thirds of MLB's teams, due in all likelihood to expectation of a work stoppage and the possibility of another strike that could deal a fatal blow to MLB as a major sport in the years ahead.¹⁶⁰ To be sure, the union was faced with all the economic uncertainty that would go with another strike. As Zimbalist noted, "Average salaries had surpassed \$2 million, and the players were unwilling to lose a year of their short playing careers. They were also leery of risking the scorn of fans if there was another work stoppage."¹⁶¹

When push came to shove, although MLB now believed that it had to have a PED policy, and, indeed, the subject of such a policy was one of the last two

158. *See id.* at 162.

159. *See id.* at 163.

160. ZIMBALIST, *supra* note 137, at 55-59. Zimbalist does not recite the statistics noted as authoritative but rather as an example of what Commissioner Selig had made public about baseball's economics. Zimbalist throughout his book criticizes baseball's accounting practices and casts doubt on whether baseball's circumstances were as dire as reported. He does acknowledge that "there may be eight to ten teams with perennial financial problems that are not due to poor management" *Id.* at 74. Selig may quibble with Zimbalist as to the number of teams that had financial issues but the disparity between them is not great. Selig had not, to my knowledge, taken the position that half or two-thirds of the teams were in financial troubles. From my personal observations during the period 1998-2004, it would not be unfair to suggest that about one-third of the teams had substantial financial issues, about one-third were stable although not more than marginally profitable at best and the balance stable to fairly strong. The collective losses Selig quoted were legitimate in my opinion but, of course, as Zimbalist noted, there are many considerations that must be taken into account to get to a true cash loss for baseball in general. However, cash losses were real for many clubs, and based on anticipated revenues going forward, many clubs had to reduce their payrolls to balance their books. I can say without hesitation that many owners believed that economic reform was needed and that the prospect of a strike in 2002 was not economically palatable to them. They were legitimately fearful that they could suffer additional and long term financial difficulties because of harsh reaction to a strike. *Id.*

161. *See ZIMBALIST, supra* note 141, at 161.

material issues left on the table during the 2002 negotiations,¹⁶² the parties settled for the policy that we now know was later amended after Congressional pressure.

As we have seen, the use of impasse as a tool is and was available to MLB and could be effective. Given the extensive publicity about the subject of PEDs and the increasing possibility of long term damage to the game, it would seem that it was a perfect time for MLB to use the tool.

It should be noted that simply saying a party may use the power if necessary is not to suggest that it is easy to do and without peril. Certainly, a party must exhaust its ability to accomplish what it wants at the table. Despite its best intentions to do this, the NLRB and the courts could rule later that the party has not met the tests for impasse and vacate imposition of the terms imposed by the party after impasse. Often, a party may hold up several issues in fear of a single issue going to impasse and demand resolution of all or nothing. This would certainly complicate declaring an impasse.

But, since we know that only two material issues were left on the table and a PED policy was one of them at the end of the 2002 negotiations, it was an opportune time for MLB to take a stand and, failing resolution of the PED issue, announce to the world that the only issue left on the table was a strong PED policy. It is difficult to believe the players would have chosen to go on strike, with all the risk that entailed, because of a PED policy. Indeed, as we saw after the Congressional investigation of 2005, once the use of PEDs was isolated as an issue, standing alone with no other labor issues around it, it became extremely difficult for the union to defend not having a strong policy. Thus, the tool, if used, may well have solved many of the post-2002 issues baseball faced.

But why didn't baseball do this?

As stated at the outset, it appears 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. As with 1994, we do not believe use of impasse was considered despite the significant chance of effectiveness here. This was a case where business considerations and consequences (and a steroid policy or the consequences of not having a substantial one were not treated as among the paramount issues considered) dictated the course of MLB's actions during negotiations, not legal rights or opportunities available through legal means. To be sure, this is not unusual and may well be considered the norm for most labor negotiations. But in labor negotiations, we do not often see issues which

162. See *supra* text accompanying note 79.

affect the integrity of the business left on the table, especially, as here, where the leader of the business in this instance, Bud Selig, stated prior to the negotiations “[i]t’s a problem we can and must deal with now . . . I’m very worried about this.”¹⁶³

Any risk of a strike or work stoppage was simply deemed not a good risk by MLB given the shaky financial footings many of its teams rested on and the general overall economic condition of the game. Certainly, as we have seen, one of the risks of using impasse as a tool is a strike by the union. Thus, it was not so much the union being obstructionist or an impediment (although it almost certainly was) as it was MLB’s decision to not challenge them by use of the legal tools available to it that resulted in its failure to negotiate and implement a PED policy.

While it is easy to suggest that MLB was limited by the rules of collective bargaining, it was precisely those rules which would have allowed for a stronger approach had MLB chosen to use them. The failure to gain a PED Policy in 1994-96 or to enact a strong policy in 2002 was the result of choices made by MLB within the bargaining process. Therefore, as convenient as this argument by MLB may be, the “constraints” of collective bargaining were not the reason a better, stronger policy was not attained.

Simply, while there was a way, there was no will. MLB, because of its long history of ineffective bargaining with the union, the culmination of such with the 1994 strike and the economic position it found itself in because of its prior bargaining and actions, simply could not take any actions (even those by legal means which were available and potentially helpful) that would expose the owners and the game to further risk of loss. MLB was a victim of its own actions, inactions and prior failed bargaining.

Thus, the potential use of bargaining to impasse, while a viable legal option, was almost assuredly not considered by MLB in 1994 and 2002 when it surely could have used it. It is difficult to believe the integrity of the game was not worth it.

IV. POSTSCRIPT

The last few weeks of the 2006 baseball season proved to be eventful. Eventful but not necessarily uplifting. As the season was winding its way down to its final outs in St Louis, MLB and the MLBPA agreed upon a new

163. Amy Shipley, *Baseball Players Say Steroid Use is Heavy*, WASH. POST, May 29, 2002, at D1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contented=A24530-2002May28>.

CBA for a five year period.¹⁶⁴ This is noteworthy as it was agreed to by the parties without a strike, lockout or other work stoppage for the second consecutive contract negotiation (2002 being the first), which meant that this was the first time that two such contracts (consecutive or otherwise) had been agreed to without divisive labor action. It also predated the actual expiration of the current CBA. Such is the state of labor relations in baseball that these events were a great cause of celebration.

Contained within the CBA, by all reports, was the same PED policy that had been negotiated by the parties in 2002 and amended twice thereafter in the interim by agreement of the parties. No threat of strike was heard from the union and, by all accounts, while the overall negotiations were not easy, the parties proceeded to an agreement with a purpose.¹⁶⁵

Indeed, five more years of labor peace was a positive development for the game.

But also contributing to the eventful last few weeks of the season was the predominance of news regarding performance enhancing drugs in the game. Interestingly, none of the news involved the suspension of a big name player such as Rafael Palmeiro and the 2005 controversy. None of the news involved proven drug use by a current player and none involved positive test results by any former or current player.

What did cause a stir were two events. The first was the widespread speculation that, based on reports of federal agents, former teammates of Jason Grimsley, including such big name current stars such as Roger Clemens and Andy Pettitte were said to be former steroids users.¹⁶⁶ This story was subsequently quieted by reports that the reports of the federal agents may not have included Clemens and Pettitte's names.¹⁶⁷ Whether there was any or no truth to the story was not the issue. The fact is that the national media and, in all probability, the majority of fans believed that the story was not only possible but probable. In fairness to these two players, no hard evidence of any kind was presented publicly that would implicate the players. But the ability for the public to take the leap to belief in the allegations is troubling to the

164. *MLB, MLBPA Reach Five-Year Labor Accord*, MLB.COM, Oct. 24, 2006, available at http://mlb.mlb.com/NASApp/mlb/news/press_releases/press_release.jsp?ymd=20061024&content_id=1722380&vkey=pr_mlb&fext=.jsp&c_id=mlb.

165. *Id.*

166. Jack Curry, *Cloud Over Clemen's Finale: He and Pettitte Deny Report*, N.Y. TIMES, Oct. 2, 2006, available at <http://www.nytimes.com/2006/10/02/sports/baseball/02drugs.html?th=lemc=thepagewan>.

167. Jack Curry, *Doubt Cast on Report That Named Players*, N.Y. TIMES, Oct. 3, 2006, available at <http://www.nytimes.com/2006/10/03/sports/baseball/03doping.html?ex=1317528000&en=44519a2d460686f0&ci=5088&partner=rssnyt&emc=rss>.

sport.

The other “event” is the one that we believe is most troubling. The “event” we speak of is the run at 60 home runs by David Ortiz of the Boston Red Sox (who finished with 54) and Ryan Howard of the Philadelphia Phillies (who finished with 58). These accomplishments would have put Howard in the top five seasons of all time for home runs in a season if we excluded all “Steroids Era” statistics and Ortiz would have been in the top 10 seasons with the same caveats.¹⁶⁸ Certainly, it is possible and logical to state that their accomplishments should be viewed with great assurance as to their legitimacy as these players accomplished their feats (1) post 2002 PED implementation with drug testing sampling, (2) post 2004 random testing after the 2003 samples came back with significant evidence of player PED use and, (3) post 2005 amendments to the 2002 PED policy which put some real teeth in the penalties provided in the PED.¹⁶⁹

But that is not what happened. While not much was said about Ortiz in the press as his season came to an anticlimactic end because of injuries, much was written about Howard and specifically, much was said about whether his season was really legitimate, or, said another way, not drug enhanced.¹⁷⁰ Given the PED policy and amendments thereto, how can this be? If what baseball needed, as we have argued in this article, was a strong PED policy and now we have one (however belated it was) how can a challenge be made to the current players’ accomplishments?

The answer is, sadly, that the impact of the choices MLB made in conjunction with the 1994 and 2002 labor negotiations continue to be felt today and there is no easy answer in sight as to how those choices made and

168. *Single Seasons With 50 Home Runs*, SUNDAY STAR LEDGER (Newark, N.J.), Oct. 1, 2006, § 5, at 10.

169. Not only did public perception appear to be in the corner of Ryan Howard on his quest to hit sixty-plus home runs, but both of Roger Maris’ sons apparently still hold the belief that their father, Roger, is true holder of the single-season home run record. Jeff Passan, *Maris Clan: Howard Would be Worthy of Record*, YAHOO! SPORTS, <http://sports.yahoo.com/mlb/news?slug=jp-maris090606&prov=yahoo&type=lgns>. And the Maris boys are not the only ones that feel this way. An ESPN.com front page poll asked if Ryan Howard were to hit sixty two home runs this season, would you consider him the single-season home run record holder? Over fifty percent of over 100,000 voters said “yes.” ESPN subsequently removed the poll results and has not acquiesced to our requests for final published poll numbers. However, CBSsportsline.com conducted a poll asking the very same question, and while the number of voters was significantly less, the results were nonetheless similar. See Gregg Doyel, *Howard’s Stellar Slugging Inspires More Cynicism Than Awe*, <http://www.sportsline.com/mlb/story/9653616>.

170. Dan Graziano, *Holding Out the Awards in a Stand Out Season*, Oct. 1, 2006, SUNDAY STAR LEDGER (Newark, N.J.), Oct. 1, 2006, §5, at 7; Tim Litke, *Howard’s Year Hard For Many to Believe*, MSNBC.COM, Sept. 8, 2006, available at <http://www.msnbc.msn.com/id/14695739/print/1/displaymode/1098/>.

the impact felt will be mitigated in the near future. Those choices allowed for a significant explosion in baseball statistics as we have seen. One of the causes of that explosion was the use of performance enhancing drugs by major league players. This in turn caused a tremendous decrease in the average fan's trust in the integrity of the game. While many of the drugs that probably caused the offensive explosion have now been banned and are tested for by MLB, one of the most talked about illegal substances, human growth hormone (HGH) cannot be tested for with any reliability, and certainly not by urine screens. (no blood testing is allowed under the CBA). Thus, while it may be said that many players have become clean over the past couple baseball seasons because of the increasingly strong PED policy during that time, there is simply no way of knowing who is still using illegal, and undetectable, PEDs.

Hence the Ryan Howard problem. With no evidence that he is or has been a PED user, his records and achievements and others to come after him are and most certainly will be questioned because of the actual and perceived PED use in the period 1994 to 2002. As one commentator noted:

Reflecting the current, conflicted state of affairs, some people think Howard isn't getting enough credit, others that the sinister trinity of Bonds, McGwire and Sosa has already been there and ruined that for everyone else. A suspicious few have even questioned whether Howard, despite appearances and his bonafides as a minor league slugger already established, is part of that unholy performance-enhancing alliance himself.¹⁷¹

Even commentators unabashedly favorable to Howard have felt compelled to raise the steroids issue before dismissing it quickly.¹⁷²

Indeed, Howard may well have used HGH for the entirety of his minor league career although, again, there is no evidence to suggest he is other than a talented, rather large, naturally strong person with siblings who are built a similar way.¹⁷³ These accusations, are, however most certainly not fair to Howard, if he, in fact, is clean and it will not be fair to the next Ryan Howard that comes along who is clean. More importantly, we believe, there will be a continuing cloud on the record book and integrity of the game as MLB is simply not capable, at this point, absent blood testing and better testing for substances like HGH, to prove it has a clean game. To say that this "state of affairs" is not impacting the game is simply unsupportable. A recent poll noted

171. Litke, *supra* note 170.

172. Rob Maadi, *Ryan Howard in Elite Home Run Company*, WASH. POST, Sept. 21, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/22/AR2006092201979.html>.

173. *Id.*

that just about half of those polled are rooting against Barry Bonds to break Hank Aaron's career HR record. In the same poll, more than a majority believed MLB had not done enough about PEDs and, more than a majority believed that PEDs were an issue in baseball. It does not take a rocket scientist to equate the PED questions and responses with the desire to see Aaron's record stand.¹⁷⁴ During the World Series this year, Bob Costas was interviewed and, in response to a question about the biggest story in sports TODAY, he noted that the "overriding story has long been the influence of performance-enhancing drugs and to what extent we can view performances as authentic."¹⁷⁵

MLB may argue that there is no reason to believe HGH or like substances are being used but this is as naïve an approach as suggesting in the mid 90's that there was not a problem to begin with. A reference to a recent accusation by an NFL player who is concerned about the use of HGH is enlightening as to the mindset of the player:

[w]hen there is something out there that people believe is going to help them, we'd be very naïve and foolish to think that if you can't test for it, guys aren't going to try it. Right now there is not a test for HGH, and when they develop that, I hope the NFL will institute that in our drug policy. If there's anybody on our team that would use it, there would be guys on our team who would confront him and say, 'Hey, this is not something we want to do.' But right now, I'm sure there are guys that use it, and its part of the world we live in.¹⁷⁶

With the license to cheat granted to players by the inaction of MLB pre 2002 (and the obstruction action of the MLBPA during this time), players assuredly used PEDs and many, we suspect, progressed from steroids to HGH or both. Had a policy been implemented when the need first presented, certainly there is reason to believe that players would not have tried any PEDs and less would have progressed to substances such as HGH with the advent of testing. Would all performances have subsequently been legitimate? Probably not. But very few problems are solved by doing nothing, and, unfortunately, most get worse. In the case of CBA negotiations in 1994 and 2002, MLB's do nothing (or do little) approach, despite having legal tools available to help solve the issue of PEDs, continues to have ramifications today. It will take far greater tools to now solve the problems created then.

174. Poll: *Half of Fans Don't Want Bonds to Hit 755*, ESPN.COM, Oct. 19, 2006, available at, <http://sports.espn.go.com/mlb/news/story?id=2631763&campaign=rss&source=ESPNHeadlines>.

175. Michael Schmidt, *30 Seconds With Bob Costas*, N.Y. TIMES, Oct. 22, 2006, at N12.

176. *Skins' Jansen Tackles Use of HGH in NFL*, STAR LEDGER (Newark, N.J.), Sept. 8, 2006, at 47.

