

# MOVING PAST COLLUSION IN MAJOR LEAGUE BASEBALL: HEALING OLD WOUNDS, AND PREVENTING NEW ONES

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## I. INTRODUCTION

On March 30, 2006, Major League Baseball Commissioner Allan "Bud" Selig appointed former U.S. Senator George J. Mitchell—currently a Boston Red Sox director and partner at the law firm DLA Piper US L.L.P.—to conduct an independent investigation into the illegal use of performance-enhancing drugs by players in Major League Baseball (MLB or "Baseball").<sup>1</sup> After spending nearly 21 months investigating the matter, on December 13, 2007, George Mitchell issued his report, describing Baseball's "widespread illegal use of anabolic steroids and other performance enhancing substances" ("Mitchell Report").<sup>2</sup>

According to George Mitchell, disclosing the truth about Baseball's past is "the only way this cloud [could] be removed from the game."<sup>3</sup> However, the *Mitchell Report's* published findings remain gravely incomplete because the report's investigation lacked assistance from the Major League Baseball Players Association (MLBPA or "the union").<sup>4</sup>

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1. See Boston Red Sox Front Office Directory, available at [http://boston.redsox.mlb.com/team/front\\_office.jsp?c\\_id=bos](http://boston.redsox.mlb.com/team/front_office.jsp?c_id=bos) (last visited Nov. 3, 2008); see also George Mitchell Attorney Profile, available at [http://www.dlapiper.com/george\\_mitchell](http://www.dlapiper.com/george_mitchell) (last visited Nov. 3, 2008).

2. GEORGE MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL, at SR-1 (2007), available at <http://files.mlb.com/mitchrpt.pdf> (last visited Nov. 3, 2008) [*hereinafter MITCHELL REPORT*].

3. *Id.* at SR-37.

4. See *id.* at 7.

The Players Association was largely uncooperative. . . . It rejected totally my request for relevant documents. . . . I sent a memorandum to every active player in Major League Baseball encouraging each player to contact me or my staff if

Part of why the MLBPA did not participate in gathering information for the *Mitchell Report* is because of the MLBPA's longstanding distrust of Baseball management.<sup>5</sup> This distrust emerges from Baseball's prolonged history of betraying its players through misconduct such as collusion.<sup>6</sup> "Collusion," according to former MLB commissioner Fay Vincent, has "so thoroughly polluted the whole relationship between the union and the owners that the impact is still being felt."<sup>7</sup> Indeed, the link between collusion and today's poor working relationship between Baseball and its union cannot be stressed enough.

This article presents a plan for Major League Baseball to move past its history of collusion, and for Baseball and the MLBPA to progress into a new era of more collegial labor-management relations. Part I of this Article provides an historical analysis of Baseball's reserve system, free agency system, and anti-collusion clauses. Part II discusses the three 1980s arbitration decisions that each found MLB club-owners to have illegally colluded in violation of the Major League Basic Agreement [hereinafter *Collective Bargaining Agreement* or *CBA*]. Part III discusses more recent allegations of collusion pertaining to the 2002 and 2007 Baseball off-seasons. Part IV explains how Baseball's history of collusion continues to haunt the game's integrity in terms of both its labor-management relationship and its relationship with fans. Part V suggests a series of best practices that Major League Baseball should adopt to move past its dark history of collusion and toward a new period of better labor-management cooperation.

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he had any relevant information. The Players Association sent out a companion memorandum that effectively discouraged players from cooperating.

*Id.*; see also Michael S. Schmidt, *Mitchell Report Expected to Name at Least 50 Players*, N.Y. TIMES, Dec. 12, 2007, at D1 ("The players union, which has essentially declined to cooperate with Mitchell, was not invited to the DLA Piper offices.").

5. See Frank Deford, *Suicide Squeeze: Bud Selig has put his Legacy on the Line by Tightening the Screws on the Players' Union. If There's a Strike this Season, He'll be the One Who Takes the Fall*, SPORTS ILLUSTRATED, July 8, 2002, at 66 ("The union leaders, who manifestly distrust Selig, have whispered that his canny manipulations in procuring the position reveal the commissioner's true self."); see also Bob Ford, *Outrage, Intrigue . . . Nope, Not Here*, PHILA. INQUIRER, Jan. 16, 2008, at D01 (referencing MLBPA leader Donald Fehr's "distrust of baseball management" with regard to drug testing); cf. *MITCHELL REPORT*, *supra* note 2, at 5 (explaining that the Mitchell Report was requested by Commissioner Selig and Selig "retained the right to prohibit publication" of certain information as well as "to review [the] report three business days before it was released publicly").

6. See, e.g., FAY VINCENT, *THE LAST COMMISSIONER* 281-86 (Simon & Schuster 2007); ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN* 85 (Brookings Institution Press 2003).

7. VINCENT, *supra* note 6, at 281-86.

## II. BASEBALL'S RESERVE SYSTEM, FREE AGENCY, AND ANTI-COLLUSION CLAUSE

### *A. Baseball's Reserve System*

To fully understand MLB collusion, it is helpful to begin by discussing Baseball's broader labor history.<sup>8</sup> In the earliest days of professional baseball, all players began as free agents.<sup>9</sup> In 1879, however, the National League baseball clubs reached a secret agreement to "reserve" up to five players per team who would become bound to their current employer.<sup>10</sup> A few years later, the National League clubs extended this agreement to include all players in their league.<sup>11</sup> Then, in 1903, as part of the Cincinnati Peace Compact between the National and American Leagues, Baseball owners extended the "reserve system" yet again to include even American League players and clubs.<sup>12</sup> At that

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8. See *Second Opinions, Collusion No Surprise to Miller*, *NEWSDAY* (N.Y.), Feb. 15, 1987, at 15 (explaining that according to former executive director of the MLBPA Marvin Miller, collusive practices existed in Baseball for eighty to ninety years before the players association was formed).

9. See ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 190 (Temple University Press 1998); Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of a Counterrevolution*, 4 *VILL. SPORTS & ENT. L.J.* 53, 55 (1997).

10. JAMES QUIRK & ROBERT FORT, *HARD BALL: THE ABUSE OF POWER IN TEAM SPORTS* 55 (Princeton University Press 1999) ("The original reserve clause was invented in 1879 by Arthur Soden, one of the owners of the NL Boston Braves.") [hereinafter QUIRK & FORT, *HARD BALL*]; see also Moorad, *supra* note 9, at 56 (explaining that the "reserve system" was formed, and got its name, when "[t]he owners of the remaining National League clubs, determined to halt contract jumping, reached a secret 'gentlemen's agreement' under which each team could 'reserve' five players. Other teams agreed not to court players on the reserve lists").

11. See *In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the 26 Major League Baseball Clubs*, *Grievance No. 87-3* (1988) (Nicolau, Arb.) at 2 [hereinafter *Grievance No. 87-3*]; Daniel C. Glazer, *Can't Anybody Here Run this Game: The Past, Present and Future of Major League Baseball*, 9 *SETON HALL J. SPORT L.* 339, 342 (1999); Moorad, *supra* note 9, at 56; Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan was Never a Sure Deal*, 10 *SPORTS LAW J.* 45, 47 (2003).

12. Cf. MICHAEL O. COZZILLIO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 118 (Michael O. Cozzillio and Mark S. Levinstein eds., 1997) ("For years, Major League Baseball argued that the standard option clause renewing the contract at the will of the club also renewed the option clause itself, thus creating a 'perpetual' agreement."). See generally *National & American League Professional Baseball Clubs v. Major League Baseball Players Association*, reprinted in PAUL C. WEILER & GARY R. ROBERTS, *WEILER AND ROBERTS' SPORTS AND THE LAW: TEXT, CASE, PROBLEMS* 278, 283 (Paul C. Weiler and Gary R. Roberts eds., 3d ed. 2004); QUIRK & FORT, *HARD BALL*, *supra* note 10, at 54; Edelman, *supra* note 11, at 47 (discussing the joining of the American and National Leagues).

point, Baseball owners added a clause to the standard player contract giving the teams an "option" to renew each player's contract for an additional season under the same terms.

The economic effect of Baseball's historic "reserve system" was entirely to the club-owners' advantage.<sup>13</sup> Under the "reserve system," MLB players had little leverage to negotiate their salaries and therefore benefited little from the game's growing revenues.<sup>14</sup> In terms of real dollars, MLB player salaries appreciated little from the 1900s through the 1960s, even as club-owners were becoming increasingly wealthy.<sup>15</sup>

### *B. MLB Players Form a Union*

Although MLB players were relatively powerless to bargain for higher salaries under Baseball's original "reserve system," the players' financial status began to change in the late 1950s and throughout the 1960s, beginning with the players' forming of the Major League Baseball Players Association (MLBPA).<sup>16</sup>

Originally founded in 1954 to represent the players' pension interests, the MLBPA became a fully functioning union by the late 1960s.<sup>17</sup> Upon becoming a full union, the players hired United Steelworkers chief economist Marvin Miller as their first executive director.<sup>18</sup>

Initially, not all MLB players supported Miller and the union.<sup>19</sup> Hall of Fame pitcher Bob Feller, for instance, believed that baseball players

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13. See Glazer, *supra* note 11, at 342; Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW. J. 21, 21 (2008) ("Professional teams owned players like chattel, paid them salaries well below market value, and bound them to franchises for life.").

14. Glazer, *supra* note 11, at 342-43. Indeed, there were some brief attempts by a few highly educated baseball players to unionize; however, these attempts were generally short-lived and unsuccessful. See Susan H. Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 342-45 (1999).

15. See Glazer, *supra* note 11, at 342-43.

16. See *id.* at 341-44 ("The players voted to create the MLBPA in 1954 as their official representative in the ongoing pension plan discussions with the owners. . . . Initially, the MLBPA did not view itself as the owners' negotiating adversary.").

17. *Id.* at 342.

18. JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST* 55 (Praeger 1999); see also ABRAMS, *supra* note 9, at 73; Glazer, *supra* note 11, at 343; QUIRK & FORT, *HARD BALL*, *supra* note 10, at 73 (explaining that until Miller was hired the MLBPA operated more like an illegal "company union" with the owners paying the costs, as well as controlling the union's representative); Goldberg, *supra* note 13, at 41.

19. See QUIRK & FORT, *HARD BALL*, *supra* note 10, at 52.

were too individualistic to benefit from collective bargaining.<sup>20</sup> Meanwhile, former MLB catcher Paul Richards, who by the time of Miller's hiring was managing the Baltimore Orioles, felt that creating a players union would be too contentious; he believed that "[e]ither Miller or baseball ha[d] to go."<sup>21</sup>

Nevertheless, by the 1970s, almost every player had come onboard with the union's efforts,<sup>22</sup> as Miller's arrival brought with it a rapid transformation of Baseball's antiquated labor/management system, and this led to newfound financial opportunities for players.<sup>23</sup> One of Miller's first successes as Baseball's union leader involved negotiating an agreement with the Coca-Cola Corporation that placed players' pictures on bottle caps in exchange for licensing fees.<sup>24</sup> The bottle caps agreement allowed MLBPA players to enjoy an immediate additional source of revenue.<sup>25</sup> Miller then turned his focus to collective bargaining.

### *C. The MLBPA Fights for Free Agency Rights*

From 1968 through 1975, Miller set the stage to use collective bargaining and grievance arbitration to challenge the game's "reserve system."<sup>26</sup> First, in 1968, Miller negotiated through collective bargaining the right for players to bring their grievances against MLB club-owners before a neutral third-party arbitrator, rather than before the league commissioner.<sup>27</sup> Then, in 1974, Miller encouraged veteran pitchers Andy Messersmith and Dave McNally not to sign new contracts for the 1975 season but rather to make their teams exercise the "option clause" in their previous contracts, which required the players to play the following season under the previous year's terms.<sup>28</sup> After the 1975 season, Miller

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20. Seabury, *supra* note 14, at 347; cf. WEILER & ROBERTS, *supra* note 12, at 277 ("In each sport these bodies were deliberately named *associations* rather than *unions*, because the latter term was considered appropriate only for the teams' concession vendors and maintenance crews, not for elite athletes.") (emphasis in original).

21. QUIRK & FORT, *HARD BALL*, *supra* note 10, at 49.

22. See WEILER & ROBERTS, *supra* note 12, at 277.

23. DUQUETTE, *supra* note 18, at 66-67; Seabury, *supra* note 14, at 347.

24. See ABRAMS, *supra* note 9, at 74; DUQUETTE, *supra* note 18, at 66-67.

25. See *id.*

26. See QUIRK & FORT, *HARD BALL*, *supra* note 10, at 59-61.

27. See WEILER & ROBERTS, *supra* note 12, at 278; Glazer, *supra* note 11, at 345 (noting that Miller won on the incorporation of the Uniform Player's Contract into the Basic Agreement, thus establishing player contracts as an appropriate subject for arbitration); see also Seabury, *supra* note 14, at 347.

28. See Seabury, *supra* note 14, at 352; see also Goldberg, *supra* note 13, at 21 ("In order to create this attack, Miller needed a player who would be willing to 'sit out a

then assisted Messersmith and McNally to bring labor grievances to Baseball's neutral arbitrator, alleging that by playing out the option year in their contract, the players became no longer bound by the reserve system.<sup>29</sup> The question hence posed to Baseball's neutral arbitrator, Peter Seitz, was, when an MLB club renewed a player's contract pursuant to the option clause, whether the club's option to reserve that player renewed with the contract itself.<sup>30</sup>

Up until that point, MLB club-owners had simply presumed they had the right to perpetually renew their players' contracts.<sup>31</sup> However, Seitz found this presumption was misguided.<sup>32</sup> While Seitz explained that as a matter of law "there is nothing to prevent parties from agreeing to successive renewals of the terms of their bargain,"<sup>33</sup> he opined that a perpetual option clause is not enforceable unless the parties state the intent to create a perpetual option with "*explicit clarity*."<sup>34</sup> In Seitz's view, nothing in Baseball's reserve clause expressed such clarity.<sup>35</sup> Therefore, once a player performs for one year under the option clause, he must be declared a free agent.<sup>36</sup>

The MLB clubs then appealed Seitz's ruling to the Eighth Circuit Court of Appeals, which unanimously affirmed.<sup>37</sup> At that moment, the right to Baseball free agency was born.

#### *D. Negotiating Baseball's Free Agency System*

Once the Eighth Circuit affirmed Seitz's ruling, MLB club-owners were left with no choice but to bargain with Miller and the MLBPA over the terms of Baseball's free agency system.<sup>38</sup> Initially, MLB club-owners took the position that free agency rights should be very limited, while the MLBPA claimed to support the broadest possible free agency rights.<sup>39</sup>

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season without a signed contract and then seek his freedom through a grievance arbitration test of the reserve clause's renewability."').

29. See QUIRK & FORT, *HARD BALL*, *supra* note 10, at 61.

30. WEILER & ROBERTS, *supra* note 12, at 278-79.

31. *Id.* at 280.

32. *Id.* at 284.

33. *Id.* at 281.

34. *Id.*

35. Upon issuing this ruling, the owners then fired Seitz immediately pursuant to language in the collective bargaining agreement that allowed either party to remove the chosen arbitrator at any time. See Seabury, *supra* note 14, at 353.

36. See QUIRK & FORT, *HARD BALL*, *supra* note 10, at 61-62.

37. Kansas City Royals Baseball Corp. v. Major League Baseball, 532 F.2d 615 (8th Cir. 1976).

38. See *Grievance No. 87-3*, *supra* note 11, at 2.

39. See QUIRK & FORT, *HARD BALL*, *supra* note 10, at 61-62.

The parties eventually reached a compromise, restricting free agent eligibility to two classes of players: (1) players with "no less than six years of major league service," and (2) players released or not tendered contracts by their club.<sup>40</sup> This compromise preserved Baseball's "reserve system" for the game's younger players, while also limiting the supply of free agents in a manner that made free agency rights very valuable to veterans.

### *E. Anti-Collusion Provisions in the Free Agent System*

Along with the advent of Baseball's free agency, the 1976 Basic Agreement established language pertaining to how players and teams may conduct themselves in the free agent market.<sup>41</sup> Specifically, the 1976 Basic Agreement set forth the "Individual Nature of Rights" with respect to players and teams.<sup>42</sup> Originally drafted as Article XVIII, Section H of the 1976 Basic Agreement, the "Individual Nature of Rights" clause of the 1976 Basic Agreement stated as follows:

The utilization or non-utilization of [free agency shall be] an individual matter to be determined solely by each Player and Club for his or its own benefit. [With regard to free agency], Players may not act in concert with other Players, and Clubs may not act in concert with other Clubs.<sup>43</sup>

Although the Individual Nature of Rights clause has primarily protected player rights, this clause was originally implemented at the demand of club-owners.<sup>44</sup> In 1976, many club-owners feared that without this clause, free agent players would bargain in tandem for new contracts.<sup>45</sup> A similar event had occurred prior to free agency in 1966 when Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale decided to collectively threaten to hold out for more money.<sup>46</sup> In the case

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40. See *Grievance No. 87-3 supra* note 11, at 2-3; see also *In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the Twenty-Six Major League Baseball Clubs*, *Grievance No. 86-2* (1986) (Roberts, Arb.), at 1-2 [hereinafter *Grievance No. 86-2*]; WEILER & ROBERTS, *supra* note 12, at 285.

41. See WEILER & ROBERTS, *supra* note 12, at 285.

42. See *Grievance No. 86-2, supra* note 40, at 2.

43. See *id.*

44. See ABRAMS, *supra* note 9, at 28.

45. Marc Edelman, *Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's "Collusion Clause,"* 1 LOY. L.A. ENT. L. REV. 159, 161 (2004).

46. JANE LEAVY & SANDY KOUFAX, *A LEFTY'S LEGACY* (HarperCollins 2003) ("[Koufax's] joint holdout with Don Drysdale in 1966 was an unprecedented act of



of Koufax and Drysdale, their tandem bargaining helped earn them Baseball's two highest paid contracts.<sup>47</sup>

For almost the next twenty years, the "Independent Rights Clause," as demanded by club-owners, remained unchanged in Baseball's Basic Agreement. Then, in 1995, the parties agreed to remove Article XVIII(H) and replace it with the new Article XX(E).<sup>48</sup> In today's Basic Agreement, Article XX(E)(1), which is somewhat more detailed than the original clause, states as follows:

[T]he utilization or non-utilization of rights under [Consent to Assignment and the Reserve System rules] is an individual matter to be determined solely by each Player and each Club for his or her own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.<sup>49</sup>

Today, the CBA also includes supplemental language to address collusion. For instance, Article XX(E)(2)-(3) of the current CBA entitles any player injured by collusion to recover treble damages for his monetary losses from those clubs found to violate Article XX(E)(1).<sup>50</sup> Further, Article XX(E)(6) allows any injured player to opt out of his contract during the off-season immediately following the Arbitration Panel's ruling of collusion.<sup>51</sup> Meanwhile, the new Article XX(E)(5) gives the MLBPA the right to reopen the Basic Agreement for negotiation if five or more MLB Clubs are found to have violated Article XX(E).<sup>52</sup>

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solidarity, a revolutionary act, received as heresy in a time of national rebellion. The world of baseball has never been the same.").

47. *Id.*; see also Edelman, *supra* note 45, at 161.

48. See 2007-11 BASIC AGREEMENT, art. XX (Reserve System), at 69-81, available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (last visited Nov. 3, 2008) [hereinafter 2007-11 BASIC AGREEMENT, art. Number].

49. *Id.* art. XX(1), at 79-80.

50. *Id.* art. XX(E)(2)-(3), at 80. Further, even beyond these damage awards, Article XX(E)(9) vests the Arbitration Panel with "authority to order such other and further non-monetary (e.g., injunctive) relief as may be necessary to give full force and effect" to Article XX(E). *Id.*

51. *Id.* art. XX(E)(6), at 80-81. To prevent the chaos of an injured player opting out of his contract during the middle of a season, however, Article XX(E)(6) limits the period when a player may opt out of a contract to the time during Baseball's traditional baseball off-season and the free agent period. *Id.*

52. *Id.* art. XX(E)(5), at 80.

### III. MLB CLUBS BEGIN TO VIOLATE THE "INDEPENDENT NATURE OF RIGHTS" CLAUSE: COLLUSION GRIEVANCES I, II & III

Immediately upon signing of the 1976 Basic Agreement, Baseball's new free agent system commenced.<sup>53</sup> During the first ten years of Baseball free agency, the average MLB player salary increased from \$50,000 per year to over \$370,000 per year.<sup>54</sup> At the same time, the average MLB franchise value increased annually by more than 12 percent.<sup>55</sup>

Although the MLBPA expressed some initial concerns that certain club-owners were not playing exactly by the new free agency rules, these concerns were limited.<sup>56</sup> For the most part, MLBPA members were satisfied with their higher salaries and greater freedom of movement provided by free agency rights.<sup>57</sup>

#### *A. Baseball's Free Agent System Breaks Down*

Shortly after the 1985 season, however, Major League Baseball's free agent system completely broke down.<sup>58</sup> Glen Macnow—then a

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53. See generally Edelman, *supra* note 45, at 162.

54. *Id.* at 162 (citing JAMES QUIRK & RODNEY FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* 212 (1992) [hereinafter QUIRK & FORT, *PAY DIRT*]).

55. See, e.g., QUIRK & FORT, *PAY DIRT*, *supra* note 54, at 212.

56. Specifically, concerns about collusion in the market for free agent players emerged during the 1981-82 off-season; however, the MLBPA ultimately dropped its grievance upon finding an improved market for free agents during the 1982-83 off-season. See Peter Gammons, *A Positive Step Forward: Players' Owners Develop Programs to Check Drug, Alcohol Problems*, THE BOSTON GLOBE, Jan. 16, 1983 ("[T]he Players Association reportedly is dropping its collusion suit from the last free agent crop. This year's signings have made the suit seem a tad silly."); Peter Pascarelli, *Hall of Fame Voting Remains Inconsistent*, MIAMI HERALD, Jan. 23, 1983, at 5C ("The Players Association's grievance over alleged collusion among owners involving free agents is likely to be quietly dropped after this season's improved free-agent climate.").

57. See generally Gammons, *supra* note 56.

58. See Mercury News Wire Services, *Union Chief Complains About Free-Agent Plot*, SAN JOSE MERCURY NEWS, Dec. 20, 1985, at 3E (citations omitted):

Don Fehr, chief of the baseball players union, calls the free-agent negotiating position of the 26 major league clubs strange, to say the least. Not a single free agent has signed with any club except his own during the current off-season. Players seem to be worth thousands to their former clubs, but not a nickel to others, Fehr said Thursday.

*Id.*; see also Dave Anderson, *1985 Sports Review: Looking Back at the Bad and the Beautiful*, N.Y. TIMES, Dec. 29, 1985, at 51 ("As the year ended, either in thrift or in collusion, free agents, notably the outfielder Kirk Gibson, were being ignored by clubs in need of available talent."); Jerome Holtzman, *Big Leaguers Not Getting "That Little Something Extra"*, CHI. TRIB., Dec. 15, 1985, at 4.

sports reporter for the *Houston Chronicle*—recorded the following observations:

Things are different this year. Not only are conservative clubs such as the Tigers shunning big-name free agents, but once-active clubs such as Texas, San Diego and Milwaukee are suddenly closing their wallets. Even notoriously high rollers Ted Turner and George Steinbrenner are praising the merits of 'fiscal responsibility,' which is sort of like Hugh Hefner praising the merits of abstinence.<sup>59</sup>

During the 1985-86 off-season, Major League Baseball players no longer had any real opportunity to move to new clubs.<sup>60</sup> Reluctantly most players signed contracts with their previous clubs for less money than expected, and for fewer years than desired.<sup>61</sup> As a result, the players' share of total league revenues fell substantially that season.<sup>62</sup>

Despite this phenomenon, few within baseball circles immediately recognized the presence of collusion. Slowly, however, various player agents began to sense something was wrong with the free agent market.<sup>63</sup> One of the first agents to publicly express concern was David Pinter, the agent who represented California Angels star relief pitcher Donnie Moore.<sup>64</sup> Moore finished the 1985 season sixth in the American League Most Valuable Player voting, posting a 1.92 Earned Run Average and 31 Saves for the California Angels.<sup>65</sup> However, during the 1985 off-season, Moore received just two contract offers—one from his current team, the

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59. See Glen Macnow, *Free Agency/The Big Money and the Big Offers are Disappearing as Major-League Owners Fashion the "Era of Good Sense,"* HOUSTON CHRON., Dec. 25, 1985.

60. See *id.*

61. See, e.g., *Tigers' Gibson Signs Just Before Deadline*, CHI. TRIB., Jan. 10, 1986, at 3.

62. See Aaron Bernstein, *Baseball's Owners Want to Play Softball: Their Revenue-Sharing Proposal Could Ward Off a Players' Strike*, BUS. WK., Dec. 18, 1989, at 52 ("Owner collusion cut players' share to 46% in 1988. And while salaries are rising rapidly this year, the new TV contracts will lift revenues even faster. The players face this choice: Try to regain the 53% share they had in 1983 by standing pat or give up some potential gains to stop the fighting."); Steve Fainaru, *Ueberroth Made Majors a Big Business*, DAILY NEWS (Los Angeles, CA), Apr. 2, 1989, at 1 ("With Ueberroth harping and beating, average players salaries increased a modest 4.7 percent between 1986 and '88. Total revenue, according to commissioner's office figures, rose 770 percent between 1986 and '87 alone.").

63. See Macnow, *supra* note 59.

64. *Id.*

65. See Donnie Moore Profile, available at <http://www.baseball-reference.com/m/-moore01.shtml> (last visited Nov. 11, 2008).

California Angels, and the other from the Hankyu Braves, a club located in Japan.<sup>66</sup>

Shortly thereafter, another player agent who began to voice concern was Doug Baldwin, the agent for Detroit Tigers outfielder Kirk Gibson.<sup>67</sup> On October 29, 1985, the *Los Angeles Times* had reported that Gibson was "at the top of [his] game," and that "[e]ven the traditionally conservative Kansas City Royals, baseball's new champions, are expected to compete for Gibson [on the free agent market.]"<sup>68</sup> However, during the 1985 off-season, Gibson did not receive a single offer from any club other than the Tigers.<sup>69</sup> Not even the Royals pursued Gibson.<sup>70</sup>

As the winter progressed, additional unusual events made players and their agents even more skeptical. First, there was the fact that, as of New Years Day 1986, not a single free agent player received an offer

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66. See Macnow, *supra* note 59.

67. See Holtzman, *supra* note 58.

68. Ross Newhan, *Detroit Slugger Kirk Gibson May Spark a Bidding War; Reliever Donnie Moore Gets a Serious Offer from the Angels*, L.A. TIMES, Oct. 29, 1985, at 1.

69. Holtzman, *supra* note 58; see also Peter Gammons, *Intentional Pass Irks Gibson; Owners' New Strategy: They Will No Longer Pitch to Free Agents*, THE BOSTON GLOBE, Nov. 24, 1985, at 62:

The Cubs were the first major market that evaporated on Kirk Gibson. Then came the Royals and, Monday, the Braves. Now that all the evaporation has taken place, the only choice the prize of this year's free agent market seems to be left with is going back to the Tigers.

*Id.*; United Press International, *Gibson Fed Up with Tigers' Stall Tactics*, SAN JOSE MERCURY NEWS, Dec. 22, 1985, at 17E ("Gibson's agent has suggested collusion among club-owners to hold down the price of free agent marketing."); Tim Kurkjian, *Baseball's Free Agents in a Freeze*, DALLAS MORNING NEWS, Dec. 12, 1985, at 1B ("[S]omething is going on here. Outfielder Kirk Gibson, maybe the top free-agent attraction since Dave Winfield in 1980, has received one offer -- from Detroit, three years for \$3.9 million. Tigers General Manager Bill Lajoie said it's his best offer. Gibson, obviously believing himself worth a lot more, said he would rather 'vomit' than sign for three years with Detroit."); Ben Walker, *Owners Throwing the Players a Curve*, L.A. TIMES, Dec. 15, 1985, at 31:

"There's a very, very unified effort to close off negotiations, specifically with Kirk," says Gibson's agent, Doug Baldwin. "We're at an absolute dead end right now. We haven't heard from a single team." . . . Yet at age 28, Gibson, an outfielder who batted .287 with 29 home runs, 97 runs batted in and 30 stolen bases last season, is the kind of player who would have attracted tremendous attention in the past. In addition, procedural changes this year allow any team that wants to pursue a free agent to go after him.

*Id.*

70. Peter Gammons, *Turner No Longer Pursuing Gibson*, BOSTON GLOBE, Nov. 19, 1988, at 78 ("Well, lo and behold, four days later, Turner announced that he had changed his mind and - like the Royals and Cubs - the Braves would not offer Gibson all that Gen. Sherman left behind.").

that induced his changing teams.<sup>71</sup> Then, there was the bizarre case of Los Angeles Dodgers catcher Steve Yeager, who no team wanted to sign as a free agent, but was quickly traded from the Dodgers to the Mariners upon relinquishing his free agency rights.<sup>72</sup> When asked why Yeager only became enticing to the Mariners after he re-signed with the Dodgers, no MLB employee or member of the Mariners front office offered any logical answer.<sup>73</sup> By this point, MLBPA leader Donald Fehr, who was initially slow to accuse MLB club-owners of colluding, told the media that the off-season happenings had become “troublesome.”<sup>74</sup>

### *B. The Collusion I Grievance*

Based on a culmination of all of these unusual events, on January 31, 1986, the MLBPA decided to file its first of three annual collusion grievances on behalf of 139 MLB players purportedly harmed by collusion during the 1985-86 off-season (“Collusion I”).<sup>75</sup> The named players in the *Collusion I* grievance included not only superstars such as Moore,<sup>76</sup> Gibson,<sup>77</sup> Carlton Fisk,<sup>78</sup> Tony Bernazard,<sup>79</sup> Phil Niekro,<sup>80</sup> and

71. *Union Chief Complains about Free-Agent Plot*, *supra* note 58.

72. *Id.*

73. See, e.g., Murray Chass, *Murray Chass on Baseball: Familiar Problem for Pinella*, N.Y. TIMES, Dec. 15, 1985, at 57:

The Seattle Mariners, seeking a veteran catcher to help their young pitching staff, could have signed Steve Yeager as a free agent. Instead, they waited until he re-signed with the Los Angeles Dodgers for a guaranteed \$600,000, then not only took on the contract but also gave up a hard-working pitcher, Ed VandeBerg, for him. Dick Balderson, the Mariners’ general manager, acknowledged that “it might have been” easier to pursue Yeager as a free agent, but, he added, “at that point it wasn’t the direction we wanted to go.”

*Id.*

74. Mercury News Wire Services, *supra* note 58.

75. See Larry Whiteside, *Award Tops \$10M: Collusion to Cost Baseball Owners*, BOSTON GLOBE, Sept. 1, 1989, at 51.

76. Donnie Moore was one of the most dominant relievers in baseball during the 1985 season. Moore not only made the 1985 American League All-Star Team but he also finished sixth in the voting for American League Most Valuable Player and seventh in the voting for the American League Cy Young Award. During the season, Moore also finished third in the American League in saves (31). See Donnie Moore Profile, *supra* note 65.

77. Kirk Gibson was one of the most dominant outfielders in baseball during the 1984 and 1985 seasons. In 1984, Gibson finished sixth in the American League Most Valuable Player voting, posting a .287 batting average, with 27 home runs, 91 RBI and 29 stolen bases. In 1985, Gibson finished eighteenth in the American League Most Valuable Player voting, posting a .287 batting average, with 29 home runs, 97 RBI and 30 stolen bases. See Kirk Gibson Profile, available at <http://www.baseball-reference.com/g/gibsoki01.shtml> (last visited Nov. 3, 2008).

Joe Niekro,<sup>81</sup> but also more ordinary players such as Yeager, who did not command multi-million dollar salaries.<sup>82</sup> The grievance alleged that the twenty-six MLB clubs harmed each of these 139 players by violating provisions in the Basic Agreement as a result of “acting in concert with each other with respect to individuals who became free agents under Article XVIII after the 1985 season.”<sup>83</sup>

Initially, the MLB clubs denied nearly every aspect of this grievance.<sup>84</sup> In their opening brief, the MLB club-owners alleged that the lack of interest in free agent players during the 1985 off-season was “nothing more than the culmination of a predictable evolution to a more sober and rational free agent market.”<sup>85</sup> Commissioner Uerberroth additionally told the media that “the only conspiracy [in Baseball was] between a few agents and a few other people to get owners to continue spending stupidly and crazily.”<sup>86</sup>

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78. Carlton Fisk won the Silver Slugger Award and was elected to the all-star game as a catcher in 1985. That season, Fisk hit .238 with 37 home runs, 107 RBI and 17 stolen bases. See Carlton Fisk Profile, available at <http://www.baseball-reference.com/f/fiskca01.shtml> (last visited Nov. 3, 2008).

79. Tony Bernazard, a 5'9" 160-lb second baseman, was one of the grittier performers in the league. Bernazard, at the time just age 27, was coming off of his fourth consecutive season as a starting second baseman. In 1985, Bernazard batted .274 with 11 home runs and 17 stolen bases—all solid numbers in that era for a second baseman. See Tony Bernazard Profile, available at <http://www.baseball-reference.com/b/bernato01.shtml> (last visited Nov. 3, 2008).

80. Phil Niekro was a five-time all-star who as of the 1985 off-season had amassed 300 career wins, and was inducted into the Hall of Fame in 1997. See Phil Niekro Profile, available at <http://www.baseball-reference.com/n/niekroph01.shtml> (last visited Nov. 3, 2008). In 1985, Phil Niekro had finished ninth in the American League in wins (16), and eighth in the American League in strikeouts per inning pitched (6.10). *Id.*

81. Joe Niekro was a one-time all-star who as of the 1985 off-season had amassed 231 wins. Joe Niekro had finished second in the National League Cy Young Award voting in 1979 and fourth in 1980. Although in the twilight of his career by 1985, Joe Niekro won 11 games that season, including two for the New York Yankees, after the Yankees acquired him late in the season from the Houston Astros. See Joe Niekro Profile, available at <http://www.baseball-reference.com/n/niekrojo01.shtml> (last visited Nov. 3, 2008).

82. Chass, *supra* note 73 (listing Yeager's salary at \$600,000).

83. *Grievance No. 86-2*, *supra* note 40, at 2; see also Edelman, *supra* note 45, at 163 (citing Seabury, *supra* note 14, at 361); Jeffrey Perron, *Administrative Law—Court's Scope of Review of Arbitration Decisions*, 12 SETON HALL J. SPORT L. 131, 134 (2002).

84. See, e.g., Murray Chass, *Chats or Collusion; Baseball Owners Repeat Past at Their Peril*, INT. HERALD TRIB. (N.Y.), Nov. 10, 2007, at 19 (“I recall how, before any arbitrator found the owners guilty, any time I mentioned collusion the clubs' chief labor executive, Barry Rona, would laugh and scoff at the idea.”).

85. *Grievance No. 86-2*, *supra* note 40, at 4.

86. Walker, *supra* note 69; see also Kurkjian, *supra* note 69.

The facts presented at the hearing, however, almost fully supported the players' claims.<sup>87</sup> Upon reviewing 5,674 pages of verbatim transcript and 288 exhibits,<sup>88</sup> Baseball's neutral arbitrator Thomas Roberts ruled that "[t]he [Baseball] Clubs violated Article XVIII(H) of the Basic Agreement following the completion of the 1985 championship season by acting in concert with regard to the free agency provisions."<sup>89</sup> Further, Roberts found that "every major league club abstain[ed] from the free agency market during that winter until an available free agent was 'released' by his former club upon the announcement that the former club was no longer interested in his services."<sup>90</sup>

With respect to individual players, Roberts found that MLB clubs showed "no interest in the available free agents at all at any price,"<sup>91</sup> and that Chicago White Sox catcher Carlton Fisk was the only player to receive a *bona fide* offer from a club other than his previous employer while his previous employer was still interested in securing his services.<sup>92</sup> In addition, even Fisk's offer was unusually secretive.<sup>93</sup>

In a later section of the opinion, Roberts described "the situation of Kirk Gibson" in vivid detail.<sup>94</sup> According to Roberts, the evidence indicated that Kansas City Royals management, as had been expected, at first expressed strong interest in signing Gibson to a contract for the 1986 season and beyond.<sup>95</sup> Team officials even entertained Gibson on a

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87. *Id.*

88. See *Grievance No. 86-2*, *supra* note 40; see also *Collusion Ruling Costs Owners \$10.5 Million*, AKRON BEACON JOURNAL (Ohio), Sept. 1, 1989, at E1; *Excerpts From the Ruling*, N.Y. TIMES, Sept. 22, 1987, at A32; RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 490-91 (6th ed. 2006).

89. *Grievance No. 86-2*, *supra* note 40. Roberts thereafter awarded the MLBPA \$10,528,087 in damages. See also LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS* 267-68 (DeCupo Press 1991) (1980); Seabury, *supra* note 14, at 362; *Collusion Ruling Costs Owners \$10.5 Million*, *supra* note 88; Richard Justice, *Collusion Award is \$10.5 Million: Baseball Owners are Wincing*, WASH. POST, Sept. 1, 1989, at D1; Chris Mortensen, *Collusion Decision will Cost AL/NL Owners \$10.5*, ATLANTA J. & CONST., Sept. 1, 1989, at F1 ("[Arbitrator] Roberts also decided that players damaged by the loss of multi-year contracts, signing bonuses, bonus clauses, and no-trade clauses . . . could submit additional [damage] claims.").

90. *Grievance No. 86-2*, *supra* note 40, at 15 ("The right of the clubs to participate in the free agent provisions of the Basic Agreement no longer remained an individual matter to be determined solely for the benefit of each club. The contemplated benefit of common goal was substituted . . . [in] violation of the prohibition against concerted conduct found in [the Basic Agreement].").

91. *Id.* at 3-4.

92. *Id.* at 3, 11.

93. *Id.* at 11.

94. *Id.* at 10.

95. *Grievance No. 86-2*, *supra* note 40, at 10.

hunting trip to gauge his interest in joining their organization.<sup>96</sup> However, the Royals' interest in Gibson "suddenly cooled . . . concurrently with a meeting of owners in St. Louis in October of 1985 and a gathering of general managers in Tapon Springs, Florida during November of 1985."<sup>97</sup> At that meeting, it was the retiring Director of the Player Relations Committee, Leland S. MacPhail, who distributed a memorandum to Baseball owners, urging clubs to "exercise more self-discipline in making their operating decisions and to resist the temptation to give in to the unreasonable demands of experienced marginal players."<sup>98</sup> Roberts viewed the memorandum as somewhat of a "smoking gun," indicating a formal agreement amongst MLB club-owners to collude.<sup>99</sup>

### *C. The Collusion II Grievance*

While Baseball and MLBPA lawyers were in the process of arbitrating the Collusion I grievance, Major League Baseball teams and players proceeded to play the 1986 season.<sup>100</sup> For baseball fans, the 1986 season was an especially memorable one, culminating with a seven-game World Series featuring the New York Mets and Boston Red Sox.<sup>101</sup> Although the Mets trailed in the series three games to two, and at one point were even down to their final out, they rallied back to win both games six and seven and earn their second-ever World Series championship.<sup>102</sup> Veteran third baseman Ray Knight, who hit a decisive home run in game seven, was named the series MVP.<sup>103</sup>

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96. *Id.* at 10

97. *Id.* at 10.

98. *Id.* at 14 (quotations and citations omitted).

99. *Id.*

100. See, e.g., Joseph Durso, *Yanks Top Royals, Gooden Foils Pirates in Openers; Mets Win By 4-2*, N.Y. TIMES, Apr. 9, 1986, at A23 (discussing Opening Day for the New York baseball teams).

101. See Peter Alfano, *The World Series '86: Mets Win It, City Loves It*, N. Y. TIMES, Oct. 28, 1986, at D29; Dave Anderson, *Sports of the Times: Mets Reach "116,"* N. Y. TIMES, Oct. 28, 1986, at D29; Joseph Durso, *The World Series: '86, Mets Get the Magic Back, Take 7th Game of the Series; 55,032 at Shea and Millions in Other Spots Celebrate as Red Sox Finally Fall, 8-5*, N. Y. TIMES, Oct. 28, 1986, at A1.

102. See *id.*; Leigh Montville, *After Heartbreak, A Showdown Tonight: Red Sox Still Chasing World Series Title*, THE BOSTON GLOBE, Oct. 27, 1986, at 1; Leigh Montville, *They Were Just One Pitch Away*, THE BOSTON GLOBE, Oct. 26, 1986, at 1 ("One pitch away from a world championship. One pitch from an end to 68 years of frustration. One pitch. Not close enough.").

103. See Peter Richmond, *Knight Turnaround Earns MVP Award*, MIAMI HERALD, Oct. 28, 1986, at 1C.



Then, upon conclusion of the 1986 World Series, a new class of baseball players, including Knight, declared for free agency.<sup>104</sup> Like the free agent class from the previous winter, these players found the market conditions cold.<sup>105</sup> Again, the MLBPA suspected collusion.<sup>106</sup>

On February 18, 1987, the MLBPA filed its second collusion grievance in as many years, charging club owners with "act[ing] in concert with respect to those players who became free agents during the 1986-87 season" ("Collusion II").<sup>107</sup> By the time the MLBPA had filed their *Collusion II* grievance, the MLB clubs had terminated Roberts as the game's neutral arbitrator.<sup>108</sup> This meant that even though Roberts was still responsible for deciding *Collusion I*, a new neutral arbitrator would render a ruling in *Collusion II*.<sup>109</sup>

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104. See, e.g., *Carlton Joins List of Free Agent Filings*, SAN JOSE MERCURY NEWS, Nov. 1, 1986, at 15E; Murray Chass, *Horner Becomes Free Agent*, N. Y. TIMES, Oct. 30, 1986, at D31 ("Bob Horner, who is virtually certain to join baseball's select circle of \$2 million-a-year players, was one of six players who filed for free agency yesterday. Thirteen players, five of whom earned \$1 million or more this year, have placed their names on the free-agent list in the first two days of the 15-day filing period."); *Free-Agent List Now Stands at 25*, ORLANDO SENTINEL, Nov. 1, 1986, at 7.

105. See Tracy Ringolsby, *Signs Indicate a Hard Winter*, DALLAS MORNING NEWS, Nov. 9, 1986, at 3B ("The second season is underway -- the one played at the bargaining table. While the free-agent wars are in the preliminary stages -- the deadline for filing is Tuesday -- owners already are showing signs of playing hardball with finances for a second consecutive winter.").

106. See *Collision on Collusion Continues*, L.A. TIMES, Nov. 2, 1986, at 10; Steve Marcus, *Fehr: Union to Fight Collusion: Says Union Stand May Cause Strikes*, NEWSDAY (N.Y.), Jan. 29, 1987, at 145 ("Major League Players Association director Don Fehr yesterday delivered a strongly worded indictment against baseball's owners, renewing his contention that a conspiracy exists to restrict player movement for the purpose of driving down salaries. Fehr said the union is prepared to counter with legal action and, if necessary, a strike when the Basic Agreement runs out in 1989.").

107. Edelman, *supra* note 45; see also *Grievance No. 87-3*, *supra* note 11; LOWENFISH, *supra* note 89, at 264; Stephen Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. SPORTS L. 104, 110 (1991).

108. See Edelman, *supra* note 45, at 164; see also Dan Shaughnessy, *It's Time for LA to Cash In, Astros Can't Count on First Place if Dodgers Make a Move Soon*, THE BOSTON GLOBE, Aug. 10, 1986, at 56 ("Arbitrator Tom Roberts was fired by baseball's owners Tuesday, a few days after striking the drug-testing clauses in ballplayers' contracts. The owners were afraid that Roberts was going to rule against them again in the collusion/free agent grievance.").

109. Edelman, *supra* note 45, at 164; see also *Collision on Collusion Continues*, *supra* note 106, at 10 (explaining that the MLB clubs wanted Roberts removed from *Collusion I* as well; however, Roberts "was restored to the collusion case and resumed hearings at the end of the World Series").

The parties chose as their new arbitrator George Nicolau, a Columbia law school graduate and esteemed labor law veteran.<sup>110</sup> At the time of his selection, Nicolau already had substantial experience arbitrating sports disputes involving basketball and indoor soccer.<sup>111</sup> MLB club owners were hoping that Nicolau would take a club-friendly view to the changes in Baseball.

Before Nicolau got too far along in arbitrating the new dispute, however, Roberts found the MLB clubs liable for wrongdoing in *Collusion I*.<sup>112</sup> This left Nicolau, in his view, with the task of simply determining whether the "club [owners'] actions during the 1986-87 off-season had continued unabated from the previous winter."<sup>113</sup>

In *Collusion II*, the MLBPA argued that the baseball clubs' pattern of dealing with players did not ostensibly change.<sup>114</sup> The MLB clubs, meanwhile, took the position that even if there was an agreement to collude during the 1985-86 off-season as Roberts had already found, in 1986-87 there was neither "direct evidence of any such meeting of the minds" amongst teams, nor "any circumstantial evidence of the kind [Arbitrator] Roberts found so persuasive in the prior case."<sup>115</sup> The clubs further contended that certain premier free agents during the 1986-87 off-season, including starting pitchers Jack Morris and Doyle Alexander and first-baseman Bob Horner, "artificially limited the market for their services [by] . . . pricing themselves too high."<sup>116</sup>

Upon reviewing all of the evidence, Nicolau, in an extremely thorough 81-page opinion, found that MLB clubs again illegally

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110. Edelman, *supra* note 45, at 164; see also George Nicolau Biography, available at [http://www.nmb.gov/arbitrator-resumes/nicolau-george-gn\\_res.pdf](http://www.nmb.gov/arbitrator-resumes/nicolau-george-gn_res.pdf) (last visited Nov. 3, 2008).

111. See *id.*

112. See *Grievance No. 86-2*, *supra* note 40.

113. Edelman, *supra* note 45, at 164-65.

114. *Grievance No. 87-3*, *supra* note 11, at 16. The MLBPA further asserted:

(1) [T]hat no re-entry free agent received offers from any club save his former club unless and until that club had declared its lack of interest or became ineligible to sign or negotiate with the player after the passing of the January 8 deadline; and (2) that, with one possible exception, no such free agent ever had at any one time two or more offers from two or more clubs.

*Id.* (quotations omitted); see also Edelman, *supra* note 45, at 165 ("Although the MLBPA argued that direct proof of the defendants' agreement was not required under the antitrust doctrine of *conscious parallelism*, the MLBPA again produced some evidence indicating there was a formal agreement still in place.").

115. *Grievance No. 87-3*, *supra* note 11, at 14 (quotations omitted). In testifying that the alleged conspiracy was entirely "imagined," club witnesses claimed there was interest in certain players by new clubs even before their former club indicated a lack of interest, and that, ultimately, certain players did switch teams. *Id.* at 17.

116. *Id.* at 19.

colluded.<sup>117</sup> Stating that “it is not one piece of evidence, but the evidence taken as a whole that tells us where a common understanding exists,”<sup>118</sup> Nicolau explained that even though in *Collusion II* there was less evidence of a formal agreement amongst club-owners, “there [still] were no offers by other clubs before January 8 for free-agent players [that] former clubs wanted to re-sign (a precise echo of 1985), and that activity for such free agents after January 8, which must be weighed in light of what occurred, was exceedingly limited.”<sup>119</sup>

The MLB clubs argued that any finding of collusion must be negated by the movement of free agent players Andre Dawson and Lance Parrish each to new teams; however, Nicolau found that the movement of these players “can hardly be characterized as ordinary or routine,” and the evidence pertaining to these players did more to support the finding of collusion than to negate it.<sup>120</sup> With respect to Dawson’s movement from the Montreal Expos to the Chicago Cubs, Nicolau explained that the evidence showed that Dawson “was so willing to leave the Expos that he called a unilateral press conference to announce he would sign a blank contract to play for the Cubs.”<sup>121</sup> Embarrassed by these events, “the Cubs then offered the all-star outfielder a contract for \$500,000—almost half of his previous season’s salary.”<sup>122</sup> Although the offer was far below what seemed to be Dawson’s fair market value, Dawson accepted the offer and proceeded to play for the Cubs in 1987.<sup>123</sup>

Meanwhile, in the case of Lance Parrish, Nicolau found that he had received no offers from teams other than his previous employer, the Detroit Tigers, until after January 8, 1987, and even then certain team owners tried to prevent Parrish’s movement to the Philadelphia Phillies.<sup>124</sup> Nicolau specifically found the evidence to indicate that American League President Dr. Bobby Brown, as well as Milwaukee Brewers owner Alan [Bud] Selig and Chicago White Sox owner Jerry Reinsdorf, each separately requested that Philadelphia Phillies president

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117. *Id.* at 2, 21. The ruling was based on the testimony of 50 witnesses, 335 exhibits, 8,346 pages of transcripts, and almost 450 pages of submitted briefs. *Id.*

118. *Id.* at 24.

119. *Id.* at 66.

120. *Id.*

121. *Grievance No. 87-3*, *supra* note 11, at 49-50; *see also* Edelman, *supra* note 45, at 165.

122. Edelman, *supra* note 45, at 165.

123. *Id.* Stunned by these events, Chicago Cubs President Dallas Green sent a memorandum to both the Players Relations Committee and to league presidents Bobby Brown and Bart Giamatti, stating that he had not been as prepared as he probably should have been to handle Dawson’s proposal. *Grievance No. 87-3*, *supra* note 11, at 50.

124. *Grievance No. 87-3*, *supra* note 11, at 50-52.

William Giles not sign Parrish.<sup>125</sup> Both Reinsdorf and Selig reminded Giles that he should "keep his 'fiscal responsibilities' in mind."<sup>126</sup> Meanwhile, according to Giles's testimony, Selig even suggested that failure to show restraint in the free agent market might lead other owners, such as the Yankees' George Steinbrenner, to jump into the free agent market.<sup>127</sup> Each of these conversations evidenced, at a minimum, an attempt to collude.<sup>128</sup>

#### *D. The Collusion III Grievance*

With Roberts's decision in *Collusion I* still several months away, and Nicolau's review of *Collusion II* just beginning, Baseball players returned to the field for the 1987 season.<sup>129</sup> By Opening Day of 1987, fans could sense that the players had grown increasingly frustrated with management.<sup>130</sup> As Boston Red Sox outfielder Dwight Evans described matters, Commissioner Ueberroth was "playing a game with this game and acting like the 'Grinch Who Stole Christmas.'"<sup>131</sup>

Although the 1987 season featured an exciting seven-game World Series between the Minnesota Twins and the St. Louis Cardinals,<sup>132</sup> the World Series was somewhat overshadowed by Roberts's strongly-worded September 21 ruling that found MLB club-owners liable for "trying to destroy free agency" by colluding against the interests of

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125. *Id.* at 52-55; Edelman, *supra* note 45, at 165-66.

126. *See Grievance No. 87-3, supra* note 11, at 52.

127. *Id.*

128. Based on these findings, Nicolau then awarded the MLBPA an additional \$138 million in damages. Edelman, *supra* note 45, at 166. Nicolau further ordered that MLB clubs grant those players deprived of their proper free agent rights with the opportunity to accept "new look" free agency following the 1998 season. *See Baseball*, HOUSTON CHRON., Nov. 29, 1989, at 7.

129. *Cf.* Bill Fleischman, *Kubek: Stance on Free Agents Diluting the Game*, PHILA. INQUIRER, Apr. 7, 1987, at B27 (noting that the benches of Major League Baseball teams were weakened because of the growing number of veteran players that elected not to play baseball at all when not offered the kind of contracts they had expected).

130. *See* Bob Verdi, *Tensions of Opening Day: Imperfects Grow in Sports' Most Perfect Game*, CHI. TRIB., Apr. 5, 1987, at 1 ("Opening Day, a celebration for the ages, will be tarnished further by an unrest in the ranks that will not go away quietly. Rarely have players been so united on any issue, this one being their accusation of collusion.").

131. *Id.* (quotations omitted).

132. *See* Fred Mitchell, *Viola's Two Wins Make Him MVP*, CHI. TRIB., Oct. 26, 1987, at 4; *see also* Dan Shaughnessy, *Minnesota Brings it Home, Twins Champs at Last*, THE BOSTON GLOBE, Oct. 26, 1987, at 33.

players in *Collusion I*.<sup>133</sup> To veteran pitcher Jack Morris, Roberts's ruling proved that certain Baseball owners were indeed "crooks."<sup>134</sup>

Yet, even after Roberts's stinging ruling, the free agent market did not return to normal.<sup>135</sup> Although many players received free agent offers for the first time since the 1984-85 off-season, these offers remained lower than expected, not to mention oddly identical to one another.<sup>136</sup>

Still unhappy with the market, on January 19, 1988—for a third consecutive year—the MLBPA filed a collusion grievance against the MLB clubs.<sup>137</sup> This grievance alleged that club-owners had continued to violate the independent rights of players by forming an illegal "Information Bank" that provided all clubs with detailed information about other clubs' free-agent bids—thus preventing bid inflation ("Collusion III").<sup>138</sup> The MLBPA contended that while certain forms of information exchange amongst clubs may be permissible, the Information Bank certainly was not.<sup>139</sup>

133. Ross Newhan, *Arbitrator Rules Baseball Owners Guilty of Collusion*, L.A. TIMES, Sept. 22, 1987, at 1; see also Tracy Ringsolsby, *Collusion Case Goes to Players*, DALLAS MORNING NEWS, Sept. 22, 1987, at 1B.

134. *Morris Says Ruling Proves Owners are Crooks*, S. FLA. SUN-SENTINEL, Sept. 22, 1987, at 4C.

135. See Glen Macnow, *A Shift In the Free Agent Market: A Freeze-Out Thawed, but Neither Side is Particularly Happy*, PHILA. INQUIRER, Jan. 9, 1988, at C1.

136. See *id.* ("Collusion is price-fixing, not location-fixing," the union's associate counsel, Gene Orza, said in yesterday's New York Times. . . . 'Clubs are making offers, but they're all the same offer. . . . The numbers aren't competitive; they're orchestrated.'"); see also Steve Marcus, *Union Charges Owners are on Collusion Course*, NEWSDAY (N.Y.), Nov. 16, 1987, at 162:

"There is no free market," agent Tony Attanasio said. "Look at Bob Horner; he can hit 30 homers a year and he gets no offers. And if you make an offer to a player that is coveted by his former team, whatever you do, don't make the offer unbelievable." That seems to be the case with Yankee free agent Dave Righetti, who has received several offers - all about the same - and none is believed to be much higher than what the Yankees are offering.

*Id.*

137. *Players Union Files Grievance Alleging Third Case of Collusion*, DALLAS MORNING NEWS, Jan. 21, 1988, at B5 ("It's become obvious to us that they're orchestrating prices," Gene Orza, associate general counsel of the union, said Wednesday. "When there's interest from teams, it's remarkably similar.").

138. In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the 26 Major League Clubs, Grievance No. 88-1 (1990) (Nicolau, Arb.) at 1 [hereinafter *Grievance No. 88-1*]; see also Edelman, *supra* note 45, at 166 ("The 'Information Bank' provided all teams with access to detailed information about every contract offer made to any free agent player and permitted every team to get immediate knowledge of the demand for services of every player in the free agent market.") (citation omitted).

139. See *Grievance No. 88-1*, *supra* note 138, at 12.

Nicolau was named the neutral arbitrator in *Collusion III*, and he again ruled in favor of the MLBPA.<sup>140</sup> In *Collusion III*, Nicolau specifically found that “[t]he Clubs violated Article XVIII(H) of the Basic Agreement following the 1987 season by unilaterally establishing and maintaining the Information Bank.”<sup>141</sup> Although the MLB clubs contended that the Information Bank was no different from longstanding forms of information exchange amongst teams, Nicolau explained that based on general contract-law principles “the Panel must first look to the language of the provision at issue” before considering issues of past industry practices.<sup>142</sup> Because Article XVIII(H) prohibited the behavior of “act[ing] in concert,” he found the Information Bank impermissible.<sup>143</sup> According to Nicolau, the Information Bank “was designed, implemented, and manned, not by one club, but by the official representative of all the Clubs,” and, as a result, information to which generally only one club was privy became available to all.<sup>144</sup>

#### *E. Settlement of Collusion I, II and III*

Shortly after Nicolau rendered his ruling in *Collusion III*, the MLB clubs began to slowly negotiate a settlement with the MLBPA.<sup>145</sup> On November 4, 1990, the clubs formally agreed to pay the MLBPA a sum of \$280 million plus interest and distribution costs.<sup>146</sup> As part of this settlement, the MLBPA promised not to file any grievance for collusion that may have occurred during the 1989-90 off-season.<sup>147</sup> The clubs in turn agreed to provide “new-look” free agency to sixteen players directly harmed by *Collusion I, II & III*.<sup>148</sup>

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140. *Id.* at 34.

141. *Id.*

142. *Id.* at 15-16.

143. *Id.* at 17.

144. *Id.* at 18. Arbitrator Nicolau further pointed out that the Information Bank’s “use was explained and encouraged as a centralized means of ascertaining what the clubs were offering particular free agents.” *Id.*

145. See generally Ronald Blum, *Owners in No Rush to Pay for Collusion*, *Fehr Says*, BALTIMORE SUN, Feb. 19, 1990, at 3D (discussing eventual need to pay collusion damages).

146. Edelman, *supra* note 45, at 167 (citing Willis, *supra* note 107, at 148); see also Murray Chass, *Baseball: Players Said to Hit Collusion Jackpot*, N.Y. TIMES, Nov. 4, 1990, at 81; QUIRK & FORT, *HARD BALL*, *supra* note 10, at 91.

147. *Id.*

148. See Murray Chass, *Baseball, Market Will be Well-Stocked*, N.Y. TIMES, Nov. 5, 1990, at C2; Helene Elliot, *Parrish Signs for Three Years with the Angels*, L.A. TIMES, Dec. 14, 1989, at 1; *Parrish Declared Free*, HOUSTON CHRON., Nov. 29, 1989, at 7 (explaining that arbitrator has ordered new look: free agency).

Thereafter, MLB clubs spent significant parts of the next fifteen seasons paying out the settlement amount to injured players.<sup>149</sup> In sum, the MLB clubs paid \$434 million to players, including damages, interest, and distribution costs.<sup>150</sup> Nonetheless, the clubs never felt much of the financial impact of the settlement.<sup>151</sup> This is because the MLB clubs raised funds by selling expansion franchises to ownership groups in Miami, Denver, Phoenix and Tampa Bay.<sup>152</sup>

In May 2004, the MLB clubs finally completed their payment obligations to the MLBPA and closed the settlement fund—thus fulfilling their obligations under the settlement agreement.<sup>153</sup>

#### *F. Baseball's Post-Settlement Denials*

Although Roberts and Nicolau unequivocally found that MLB clubs colluded in violation of the terms of the CBA, most MLB officials have since tried to revise history by reverting back to Ueberroth's mantra that "the only conspiracy [in Baseball was] between a few agents and a few other people to get owners to start spending stupidly and crazily."<sup>154</sup>

Ueberroth still has not apologized for his role in the 1985-88 collusion.<sup>155</sup> Meanwhile, Baseball's current commissioner Bud Selig

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149. Murray Chass, *Murray Chass Says It's Hard to Believe Baseball's Collusion Case is Finally Closed*, PITTSBURGH POST-GAZETTE, May 26, 2004, at B2.

150. *Id.*

151. See Jacob Lamme, *The Twelve Year Rain Delay: Why a Change in Leadership will Benefit the Game of Baseball*, 68 ALA. L. REV. 155, 177 (2004).

152. See *id.* ("Instead of paying the \$280 million settlement that Selig and the other owners agreed to, Commissioner Selig found a way to pawn off their debt onto the innocent. MLB (Selig and the owners) approved the expansion of the game into four new cities: Miami, Denver, Phoenix, and Tampa Bay."); see also Marc Topkin, *Vincent: Expansion Was a "Mistake,"* ST. PETERSBURG PRESS (Fla.), Mar. 5, 2006, at C5 ("Vincent, who served [as commissioner] from 1989-92, said he would have preferred that baseball didn't expand but instead move troubled franchises to Denver, Arizona, South Florida and Tampa Bay, but the owners, desperate for cash to pay off millions in collusion damages, didn't listen.").

153. Chass, *supra* note 148.

154. Walker, *supra* note 69; see also Murray Chass, *When Owners' Offers Better Reflect Starters' Worth*, N.Y. TIMES, Mar. 25, 2008, at D3 (discussing continued ownership denial of collusion); Kurkjian, *supra* note 69.

155. See Fainaru, *supra* note 62 ("Ueberroth acknowledged, 'I have harped and beaten for good business practices,' but he denied that he encouraged the owners to act in concert."); see also Ross Newhan, *Owners' Bill in Collusion: \$10 Million*, L.A. TIMES, Sept. 1, 1989, at 1 ("Ueberroth . . . denied that he orchestrated collusion and claimed that it stemmed from the owners' shock when they opened their books during the collective bargaining negotiations of 1985 and learned how much money was being lost."); Walker, *supra* note 69 ("'Collusion? I can't take that seriously,' [Ueberroth] said. 'The losses have built up and built up, and it just can't continue. Common sense has taken over.'").

remains mum on the topic, refusing even to acknowledge the telephone calls that he placed to former Phillies owner William Giles during the 1986-87 off-season, which were cited in Nicolau's *Collusion II* opinion.<sup>156</sup> The closest that Selig has come to acknowledging collusion was a brief statement he made immediately after *Collusion I*, implying hope that Roberts's decision in favor of the players would lead to "resolving our differences and beginning the process of a new financial structure."<sup>157</sup>

That hope, however, never came into fruition. To this day, the rift between MLB owners and players has only grown wider.

#### IV. MORE RECENT ALLEGATIONS OF COLLUSION

After the parties settled the *Collusion I, II, & III* grievances, the relationship between MLB clubs and the MLBPA never returned to normal.<sup>158</sup> During the next fourteen years, even though the MLBPA did not file any new collusion grievances, the parties' relationship remained guarded at best.<sup>159</sup> In July 1994, after the MLB players competed in the annual All-Star Game, club-owners decided not to follow their long-standing practice of paying a portion of the All-Star Game revenues into the Players Association's pension and disability benefit fund.<sup>160</sup> Then on August 12, 1994, the players declared a strike.<sup>161</sup> In response, on September 14, club-owners cancelled the World Series.<sup>162</sup>

During the 1994 off-season, MLB club-owners further distanced themselves from the players by unilaterally implementing various changes to the Basic Agreement, many of which led the MLBPA to file

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156. *Grievance No. 87-3*, *supra* note 11, at 49-51; see also Chass, *supra* note 148 ("Selig . . . has always refrained from discussing collusion."); *Selig Envis the NFL's Situation but Critics Say Commissioner is to Blame*, ST. LOUIS DISPATCH, Aug. 27, 2002, at E1 ("Selig adamantly denies he was behind collusion.").

157. Peter Pascarelli, *Drama Should Be Aboard*, NEW ORLEANS TIMES PICAYUNE, Sept. 3, 1985, at C5.

158. See Edelman, *supra* note 45, at 167-76.

159. See *id.*

160. WEILER & ROBERTS, *supra* note 12, at 319.

161. See Murray Chass, *Baseball: No Runs; No Hits; No Errors; Baseball Goes on Strike*, N.Y. TIMES, Aug. 12, 1994, at A1; see also George Vecsey, *Sports of the Times: The Players Are Trashing Themselves*, N.Y. TIMES, Aug. 12, 1994, at B7.

162. See Murray Chass, *Baseball: Owners Terminate Season, Without the World Series*, N.Y. TIMES, Sept. 15, 1994, at A1; see also Claire Smith, *Baseball: On Baseball: Take 700 Players and 28 Owners and it Winds up to 0 Solution*, N.Y. TIMES, Sept. 15, 1994, at B13.



and win an unfair labor grievance against the MLB club-owners.<sup>163</sup> Even after Southern District of New York Judge Sonya Sotomayer unwound each of the MLB clubs' unilateral changes to the Basic Agreement, the parties thereafter remained on poor terms, unable to compromise on even topics of great social importance such as drug testing procedure.<sup>164</sup> To many, it seemed the collective bargaining process was entirely broken.

Then, during the 2002-03 off-season, when matters seemingly could not have become any worse, the MLBPA filed several new grievances against the MLB club-owners, again alleging that the club-owners had colluded against player interests.<sup>165</sup>

#### *A. Collusion IV: Allegations from the 2002-03 Off-Season*

Coming on the heels of Baseball's new and promising collective bargaining agreement, the 2002-03 off-season brought the first new allegations of collusion in Baseball since 1988-89.<sup>166</sup> These new allegations claimed that, much like in 1987-88, MLB club-owners again concertedly submitted identical bids for certain free agent players.<sup>167</sup>

Although the MLBPA never made any of its evidence publicly available,<sup>168</sup> independent information compiled from newspaper reports

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163. See *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y. 1995).

164. See discussion, *supra* notes 158-63.

165. See *id.*

166. See Edelman, *supra* note 45, at 176-80.

167. See *Brewers Sign Free Agent Vander Wal*, WISC. ST. J., Jan. 29, 2003, at D2; see also Murray Chass, *Baseball Players See a Down Market but Smell Collusion*, N.Y. TIMES, Jan. 31, 2003, at D1 ("[A]gents have given the union examples of free agents receiving the same or similar offers from multiple teams, and of clubs knowing what offers another club planned to make to a free agent before the offer had been made."); Peter Schmuck, *O's Front Office Honeymoon Swings into Spring Baseball*, BALT. SUN, Feb. 9, 2003, at 8E ("There have been complaints about identical offers from competing bidders and clear indications that ownership finally has decided to get a grip on the industry's salary structure."); T.R. Sullivan, *Bear Market Brings Fehr to Rangers' Spring Home*, FORT-WORTH STAR TELEGRAM, Feb. 26, 2003, at 1 ("Fehr said the union has yet to decide whether a grievance will be filed this time, even though there are a number of agents who have been grumbling about the possibility of collusion. The biggest complaint seems to be that some players have received similar offers from different clubs."); *Union Action Hints at Collusion Case*, ST. PETERSBURG TIMES (Fla.), Jan. 4, 2003, at 5C ("Several agents have told the union their clients received similar offers from several teams.").

168. After completing an internal investigation, in January 2003, MLBPA union lawyer Michael Weiner filed a formal request with MLB club representatives, asking them to turn over "documents that would reflect interclub communications and communications between the commissioner's office and clubs about free agent negotiations." Sam Borden, *Collusion Fight May Be On Again*, DAILY NEWS (N.Y.), Jan.

seems to indicate that certain players were receiving identical bids from multiple teams.<sup>169</sup> Although the 2002-03 off-seasons did not seem to produce any "smoking gun" invitation to collude, there were plenty of troublesome statements—such as those made by owners and staff of the Atlanta Braves, Boston Red Sox, Los Angeles Dodgers, and New York Mets about the need to reduce payroll throughout the league.<sup>170</sup> In addition, Commissioner Selig suggested the need for payrolls to fall throughout Baseball.<sup>171</sup>

Ultimately, on October 24, 2006, in conjunction with signing Baseball's current Basic Agreement, MLB club-owners settled the *Collusion IV* grievances by paying \$12 million in damages to the MLBPA.<sup>172</sup> The parties reached this settlement without an arbitration hearing.<sup>173</sup> Therefore, unlike in *Collusion I, II, & III*, *Collusion IV* produced no formal finding of fault.<sup>174</sup>

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29, 2003, at 50 (citations and quotations omitted). Thereafter, the MLBPA filed a series of labor grievances related to new allegations of collusions. See Bill Madden, *Big League Conspiracy: Collusion Nets \$12 Million*, DAILY NEWS (N.Y.), Oct. 26, 2006, at 71.

169. See, e.g., *Agents Report Similar Offers to Union*, WICHITA EAGLE, Jan. 4, 2003, at 2D; Tom Haudricourt, *Inside the Winter Meetings*, BERGEN COUNTY REC. (N.J.), Dec. 16, 2002.

170. See Josh Dubow, *Selig Happy with Results of New Labor Agreement*, COLUMBIAN (Vancouver, Wash.), Nov. 15, 2002 at 7; see also Edelman, *supra* note 45, at 176.

171. See *id.*

172. See Bill Madden, *Big League Conspiracy: Collusion Nets \$12 Million*, DAILY NEWS (N.Y.), Oct. 26, 2006, at 71:

According to two sources with knowledge of the situation, the collusion issue was raised by a number of agents complaining that their free agent clients had received identical offers from numerous clubs. It was charged that those offers were actually being determined for the clubs by MLB's central office. In a briefing on the new agreement to the 30 clubs on Tuesday, MLB officials acknowledged there would be a payment made to the union "to settle 50 grievances." It is believed the payment will be approximately \$12 million and that it is to come from the nearly \$70 million in luxury-tax funds currently being held in reserve by MLB.

*Id.*; see also *Major League Report*, NEWSDAY (N.Y.), Nov. 7, 2006, at A79 ("Baseball players and owners settled potential claims that management may have conspired against free agents after the 2002 and 2003 seasons as part of an agreement that also dealt with about 40 grievances. Under the deal, a lump sum \$12 million payment from money already earmarked for players will be made to settle unfiled claims of collusive activity."); John Shea, *Whispers of Possible Collusion Crop Up in a Pair of Areas*, S.F. CHRON., Oct. 27, 2006, at C5 ("As a side to the new labor agreement, MLB agreed to pay the union about \$12 million in damages after the union filed a grievance that some free agents in 2002 were offered identical offers from multiple clubs.").

173. See *Major League Report*, *supra* note 172.

174. See *Baseball Report: Washington Hired as Rangers Manager*, COLUMBIAN (Vancouver, Wash.), Nov. 7, 2006, at B6; see also *Sports Log*, BOSTON GLOBE, Nov. 7, 2006, at D2.

*B. Collusion V: MLBPA Allegations from the 2007-08 Off-Season*

Collusion allegations yet again surfaced during the 2007-08 off-season,<sup>175</sup> with player agents for superstars Alex Rodriguez and Barry Bonds each suggesting that clubs were colluding against their clients' interests ("Collusion V").<sup>176</sup> In May 2008, the MLBPA asked Commissioner Selig to begin investigating the possibility of illegal collusion, at least with respect to Bonds.<sup>177</sup>

*1. Purported Collusion Against Alex Rodriguez*

In the case of Alex Rodriguez, Rodriguez was the reigning 2007 American League Most Valuable Player and expectedly the most desirable player to hit Baseball's free agent market in several years.<sup>178</sup> On October 28, 2007, Rodriguez opted out of the final three years and \$91 million of his 10-year contract with the New York Yankees.<sup>179</sup> His agent, Scott Boras, announced that on the free market, he expected Rodriguez would sign for as much as \$40 million per year.<sup>180</sup> Yet, not a single team other than the Yankees made an offer to sign Rodriguez.<sup>181</sup>

In addition to the general lack of interest in Rodriguez, other unusual events took place around the same time.<sup>182</sup> First, Commissioner Selig made a series of statements to MLB club-owners that seemed to endorse

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175. See *Sports in Brief*, TOPEKA CAP. J., Nov. 9, 2007, at 4.

176. See *id.*; see also Tom Verducci, *Life On and Off the Field: Swap Till They Drop*, SPORTS ILLUSTRATED, Nov. 19, 2007, at Z6.

177. See *At Issue, Collusion Complaints Ring Hollow with Bonds*, DENVER POST, May 11, 2008, at C6 ("The players association has requested that the commissioner's office investigate the lack of offers for free agent Barry Bonds, stopping short of filing a collusion grievance.").

178. Jon Paul Morosi, *Brief: A-Rod Wins Third MVP; Maggs Comes in Second*, DETROIT FREE PRESS, Nov. 19, 2007.

179. See Murray Chass, *Timing of Boras's Bluff May Prove Costly*, N.Y. TIMES, Nov. 4, 2007, at 82; Jack Curry & Tyler Kepner, *For Rodriguez and Yankees, It's All But Over*, N.Y. TIMES, Oct. 29, 2007, at A1.

180. See Murray Chass, *Bidding War for Rodriguez Needs 2 Teams*, N.Y. TIMES, Nov. 7, 2007, at D1 ("[O]ne of the reasons Boras was said not to want Rodriguez to meet with the Yankees before he opted out of his contract was because he didn't want the Yankees to make him an offer. When the Yankees persisted, Boras told them the only way they could meet with Rodriguez would be if they put a minimum of \$350 million on the table.").

181. See *id.* (expressing the lack of interest in Rodriguez stated by many club-owners).

182. See Murray Chass, *Is it Collusion or Merely a Friendly Chat*, N.Y. TIMES, Nov. 9, 2007, at D5.

teams not signing Rodriguez to a lucrative new contract.<sup>183</sup> Then, Selig allowed MLB clubs' general managers to meet with one another and discuss their 2007 off-season roster plans by openly stating what players they were making available for trade.<sup>184</sup> This marked a substantial change from the past practice at General Manager Meetings.<sup>185</sup>

The idea of club general managers openly discussing personnel plans was first suggested by General Manager Meetings co-chairs Theo Epstein and Larry Bienfest as a way to create more dialogue and stimulate trades.<sup>186</sup> The MLB clubs, however, never informed the MLBPA in advance about these activities, nor was the MLBPA invited to send counsel to police them.<sup>187</sup>

Although Baseball's Chief Labor Counsel Robert Manfred claims that the General Managers Meetings were adequately policed by Major League Baseball,<sup>188</sup> Manfred's legal staff is not exactly a group that the MLBPA is going to trust to protect player interests.<sup>189</sup> Not only are they employees on behalf of the MLB clubs, but also they are the people that the MLBPA bargains most directly against in labor disputes.<sup>190</sup> In addition, the attorney-client privilege, as well as various ethical canons,

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183. See *But Can Dr. Phil Hit to the Opposite Field*, WICHITA EAGLE, Nov. 11, 2007 at D2 ("The baseball players' union is worried commissioner Bud Selig is trying to hold down the price of Rodriguez's next contract."); see also Chass, *supra* note 182; *Collusion on Market for A-Rod?*, FORT WORTH STAR-TELEGRAM, Nov. 9, 2007, at D9; Ken Davidoff, *Union is Alleging Collusion*, NEWSDAY (N.Y.), Nov. 9, 2007, at A87 ("Selig makes no secret of the fact that he reminds teams to be fiscally responsible this time of year.").

184. See Jeff Blair, *Maybe A-Rod Isn't Done with the Yankees After All*, GLOBE & MAIL (Toronto, Can.), Nov. 15, 2007, at S3 ("[R]est assured the Major League Baseball Players' Association will investigate whether there was collusion involved, especially after that rather bizarre session at the general managers' meetings."); *Collusion on the Market for A-Rod*, *supra* note 183; *Sports in Brief*, *supra* note 175; Verducci, *supra* note 176 (noting that players' association chief Donald Fehr did not like the idea of innovating the general managers' meeting, suggesting it was a form of collusion).

185. See Chass, *supra* note 182.

186. Verducci, *supra* note 176.

187. See Chass, *supra* note 182.

188. See *id.* ("My understanding is there were lawyers in the room to make sure nothing improper happened.' . . . According to Manfred, 'it's hardly shocking that general managers would have a feel for what other teams wanted to do. It's no state secret and there's nothing illegal about clubs knowing about other clubs.'").

189. See *id.* (explaining that the members of Baseball's legal staff that attended the meetings were "Joe Garagiola Jr., senior vice president for baseball operations, and Dan Halem, general counsel for labor").

190. See, e.g., Robert D. Manfred, Jr. Biography, available at [http://mlb.mlb.com/mlb/official\\_info/about\\_mlb/executives.jsp?bio=manfred\\_rob](http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=manfred_rob) (last visited Nov. 3, 2008).

might preclude MLB labor counsel from divulging certain collusion concerns to MLBPA officials.<sup>191</sup>

## 2. Purported Collusion Against Barry Bonds

Barry Bonds, meanwhile, is the seven-time National League Most Valuable Player.<sup>192</sup> Bonds's agent Jeff Borris believes that Bonds too was a victim of collusion in the 2007-08 off-season.<sup>193</sup> Bonds was unable to find a team for the 2008 Baseball season, and he is currently out of the game altogether.<sup>194</sup>

Like his colleague Alex Rodriguez, Bonds is among the most dominant players of his generation.<sup>195</sup> In addition to his seven MVP Awards, Bonds has earned twelve Silver Slugger Awards, two batting titles, and two home run titles.<sup>196</sup> Even at the advanced age of 43, Bonds remains amongst Baseball's most prolific hitters, having led MLB in on-base percentage in six of the past seven seasons, including 2007.<sup>197</sup> During the 2007 season, Bonds became Baseball's all-time homerun leader.<sup>198</sup>

Nonetheless, many Baseball executives do not particularly like Bonds because of both his demeanor and alleged use of performance-enhancing drugs.<sup>199</sup> Some within the game therefore believe that MLB

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191. See generally Dennis Duffy, *Ethical and Professional Issues in Labor and Employment Cases*, 759 Pli/Lit 399 (2007) (discussing some of the ethical and legal conflicts related to multiple representation in the employment context).

192. See *At Issue*, *Collusion Complaints Ring Hollow with Bonds*, *supra* note 177; see also Ronald Blum, *Bonds' Wait Continues, Players' Association Expresses Concern about No Offers*, HAMILTON SPECTATOR (Ont., Can.), May 7, 2008, at 7.

193. See *At Issue*, *Collusion Complaints Ring Hollow with Bonds*, *supra* note 177.

194. See Blum, *supra* note 192; see also Paul Gutierrez, *2008 Baseball Preview: 10 Stories to Watch This Season*, SACRAMENTO BEE, Mar. 30, 2008, at C1.

195. See Barry Bonds Statistics, available at <http://www.baseballreference.com/b/-bondsba01.shtml> (last visited Nov. 3, 2008).

196. See *id.*

197. See *id.*; see also Marc Edelman, *Sports and the Law: Are Baseball Teams Colluding Against Barry Bonds*, ABOVE THE LAW, Mar. 24, 2008, available at [www.abovethelaw.com/2008/03/above\\_the\\_law\\_are\\_baseball\\_teams\\_1.php](http://www.abovethelaw.com/2008/03/above_the_law_are_baseball_teams_1.php) (last visited Nov. 3, 2008) [hereinafter *Sports and the Law*].

198. See Nick Peters, *Alone at Last: Bonds Passes Aaron for Home Run Supremacy*, SACRAMENTO BEE, Aug. 8, 2007; see also Mark Zuckerman, *756, at Last Bonds Passes Aaron with HR off Nats' Bacsik*, WASH. TIMES, Aug. 8, 2007, at C1.

199. See, e.g., Seth Livingstone, *Union: Too Early to Allege Collusion as Bonds Remains Jobless*, USA TODAY, Mar. 20, 2008, at 10C ("[B]onds was indicted on four counts of perjury and one count of obstruction of justice relating to his 2003 grand jury testimony in which he denied knowingly using performance-enhancing drugs."); MITCHELL REPORT, *supra* note 2 at 112-26, 128-30.

club-owners are trying to make Bonds into the scapegoat for Baseball's entire steroid epidemic.

Talk of blacklisting Bonds from Baseball dates back to September 1, 2006, when *Philadelphia Daily News* reporter John Smallwood published an editorial suggesting that "Commissioner Bud Selig should get together on a conference call - a private, secure one with no trace of it ever occurring - with the owners and convince every one of them that Bonds is off-limits."<sup>200</sup> Although there is no evidence that Selig ever considered placing such an illegal call, the Commissioner's Office may have taken more subtle steps to indicate that Bonds is a *persona non grata*.<sup>201</sup> For example, Commissioner Selig refused to celebrate when Bonds broke Hank Aaron's all-time home run record on Tuesday August 7, 2007.<sup>202</sup> In addition, after a private off-season meeting between Selig and the San Francisco Giants organization,<sup>203</sup> the Giants removed almost all references to Barry Bonds from their ballpark.<sup>204</sup>

Following the 2007 MLB season in which Bonds both set the all-time career home run record and led the league in on-base percentage, Bonds did not receive a single contract offer from any club.<sup>205</sup> Purely in terms of his baseball performance, this made no sense because Bonds remained a productive hitter,<sup>206</sup> and he was willing to accept a pay cut

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200. John Smallwood, *Unemployment Remedy for Dealing with Bonds*, PHILA. DAILY NEWS, Sept. 1, 2006, at 112; see also Scott Ostler, *Can you Trust Agent Over 30*, S. F. CHRON., Nov. 6, 2006, at C1 ("Rumors have been buzzing for a month that Commissioner Bud Selig would orchestrate a secret campaign to convince the 30 owners to shun Bonds."); David Whitley, *Bonds Sighting has Nothing to do with Spitball Gang*, OR. SENTINEL, Dec. 7, 2006, at D1 ("Another rumor is that baseball told teams not to sign Bonds, hoping he'll just fade away. Such collusion would be unlawful, unethical and completely understandable.").

201. See *Sports and the Law*, *supra* note 197.

202. Stephen A. Smith, *Selig Flunking History Test*, PHILA. INQUIRER, Aug. 8, 2007, at E1:

Either the commissioner was being a brat, refusing to celebrate the accomplishments of a player he believes has tainted the game - although he can't prove it - or Selig was playing to the people, displaying his disapproval to a public that would approve of such immaturity. Clearly, Selig appeared to be more interested in looking as if he was finally part of the in crowd than being the baseball representative he was supposed to be.

*Id.*

203. See Andrew Baggarly, *Magowan Stays Mum after Meeting with Commish Selig*, CONTRA COSTA TIMES (WALNUT CREEK, CAL.), Mar. 1, 2008, at B2.

204. See *Briefs*, DAILY PRESS (NEWPORT NEWS, VA.), Mar. 28, 2008, at D2.

205. See Shaun Powell, *Why Barry's Out of a Job*, NEWSDAY (N.Y.), Mar. 6, 2008, at A62 ("Barry Bonds isn't out of baseball because of skills. He's out of baseball because of steroids.").

206. See *Sports and the Law*, *supra* note 197.

from his 2007 salary.<sup>207</sup> From a team marketing perspective, this also made no sense because even though Bonds was not Mr. Personality in the eyes of many,<sup>208</sup> he was still likely to draw large crowds for the 2008 season as he approached the 3,000 hits milestone.<sup>209</sup>

Even though no club signed Bonds for the 2008 season, several managers and lower-level team employees expressed an interest in Bonds's services.<sup>210</sup> Most notably, veteran St. Louis Cardinals manager Tony LaRussa wanted to sign Bonds to a contract for 2007-08.<sup>211</sup> However, the Cardinals front office, which often shows extreme deference to LaRussa, refused the request without providing any reason.<sup>212</sup>

When asked why there was such a lack of interest in Bonds throughout Baseball, reporters received little meaningful response. When one reporter asked Assistant General Manager and Harvard University graduate David Forst why the Oakland Athletics were not interested in Bonds, Forst responded by asking the reporter, "[Do you] expect me to answer this on the record?"<sup>213</sup>

#### V. RAMIFICATIONS OF MLB COLLUSION

In a sport where image is everything, MLB club-owners' failure to hold themselves accountable for colluding presents a serious problem. By failing to acknowledge past collusion, MLB club-owners perpetuate fear amongst MLB players that collusion secretly remains part of the

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207. Cf. Ronald Blum, *Players Association to Probe Lack of Offers for Bonds, Will Look for Signs of Team Collusion*, WINNIPEG FREE PRESS, Mar. 19, 2008, at C5. Bonds eventually, during the 2008 season, even purported willingness to play for the league minimum salary; however, still no MLB clubs expressed interest in his services. See Jerry Cransick, *Agent: Little Chance Bonds will Play in the Majors this Season*, ESPN, Jul. 14, 2008, available at <http://sports.espn.go.com/mlb/news/story?id=3486926> (last visited Nov. 3, 2008).

208. See *At Issue, Collusion Complaints Ring Hollow with Bonds*, *supra* note 177 ("The guy brings more baggage into a clubhouse than Samsonite. Though he improved in recent seasons, particularly in his dealings with Todd Greene and Steve Finley, Bonds has never been a great teammate. He's high maintenance.").

209. See Powell, *supra* note 204.

210. See *Bonds a Union Concern*, TORONTO STAR, Mar. 19, 2008, at S3.

211. See *id.*

212. See *id.*

213. Projo.com's Sox Blog, Providence J. Bull, Mar. 20, 2008; see also Forst in his *Fifth Year with Club Replaces DePodesta*, available at <http://sports.espn.go.com/mlb/news/story?id=1740129> (last visited Nov. 3, 2008).

game.<sup>214</sup> In addition, by continuing to deny collusion, MLB club-owners signal to the MLBPA that they still cannot be trusted, as well as signal to fans that honesty and truthfulness are not of paramount importance.<sup>215</sup>

#### *A. Reasonable Concerns about Future Collusion*

Although MLB executives have expressed frustration at some of the more recent allegations of collusion,<sup>216</sup> MLB club-owners are primarily to blame for players' suspicion. Even if these 2007-08 claims are not supported by as much hard evidence as some of the earlier MLBPA claims, five of the club-owners allegedly involved in the 2007 collusion are the same owners who had colluded and denied doing so in the 1980s.<sup>217</sup> In addition, Baseball's current commissioner, Bud Selig, continues to vehemently deny his role in the 1980s collusion, even though he was directly cited for wrongdoing by George Nicolau in the *Collusion II* opinion.<sup>218</sup>

#### *B. Climate of Distrust and Lack of Cooperation*

Collusion by MLB club-owners additionally has made the MLBPA more generally distrustful of ownership.<sup>219</sup> It is widely acknowledged in Baseball circles that the failure by past MLB club-owners, including Selig, to acknowledge past collusion has exacerbated MLBPA distrust of MLB club-owners today.<sup>220</sup> According to Smith College Professor of

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214. See generally John Byczkowski, *Are Players America's Strongest Union? Baseball: MLBPA's Impact Isn't National but Gains are Monumental*, LONG BEACH PRESS-TELEGRAM (CAL.), Aug. 21, 2002, at B1.

215. See *id.*

216. See, e.g., Davidoff, *supra* note 183 (noting that Rob Manfred called union allegations of collusion related to Alex Rodriguez "inflammatory").

217. Those principal MLB owners that remain from the *Collusion I, II & III* era include: Jerry Reinsdorf (Chicago White Sox); Carl Pohlad (Minnesota Twins); Fred Wilpon (New York Mets); George Steinbrenner (New York Yankees); and the executives of the Chicago Tribune newspaper (Chicago Cubs). See Chass, *supra* note 149, (discussing continued ownership denial of collusion); List of Major League Baseball Principal Owners, available at <http://www.forbes.com/forbes/2002/0415/092add2.html> (last visited Nov. 3, 2008).

218. See *Grievance No. 87-3*, *supra* note 11, at 52.

219. See generally Byczkowski, *supra* note 214.

220. See, e.g., *id.*; Joe Capozzi, *Curse Words in Baseball are Strike Deadline*, PALM BEACH POST, Aug. 12, 2002, at 1C ("I would say that collusion has had such a long influence on this because the owners got caught and the players have never forgiven that," [former Commissioner Fay] Vincent said. "The players think the owners are a bunch of thieves and that all goes back to collusion."); Moorad, *supra* note 9, at 70 ("The owners' collusive behavior reinforced suspicions held by MLBPA veterans that



Economics Andrew Zimbalist, who now works as a consultant for MLB, “[p]sychic damages from collusion still have not been settled. The owners’ behavior during this period engendered a deep-seated distrust in the union.”<sup>221</sup> Former MLB commissioner Fay Vincent agrees:

The effects from collusion so thoroughly polluted the whole relationship between the union and the owners that the impact is still being felt. . . . *Selig and Reinsdorf, two ringleaders of collusion, were the ones who were both adamant in saying [Baseball] owners need to violate the CBA and take away from players what they had fairly bargained to have.*<sup>222</sup>

This distrust of Baseball management has manifested itself in many ways harmful to the game of Baseball overall, including through the sustained inability for MLB club-owners, league officials, and the MLBPA to work together effectively on any project—including combating performance-enhancing drug use.<sup>223</sup> For example, on September 6, 2007, MLBPA executives Donald Fehr and Michael Weiner sent a memorandum to all MLBPA players encouraging them not to cooperate with George Mitchell’s investigation of performance-enhancing drug use.<sup>224</sup> This mentality is not healthy for the game overall; however, it is certainly understandable in light of past events.

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owners could not be trusted to abide by their agreements.”); Serena Roberts, *A \$280 Misdeed Still Fuels the Feud*, N.Y. TIMES, Apr. 4, 2004, at 1 (“If he won’t step aside, Selig might be taken seriously if he would act ‘in the best interest of baseball’ and admit to his role in the collusion of the 80s.”); Don Walker, *Labor Cloud Hovers Over Baseball: Little Progress Has Been Made Between Sides*, MILWAKEE J. & SENTINEL, Jul. 7, 2002, at 1C (“Go back to the ‘80s,” Vincent said, referring to a time when owners were guilty of collusion as a way of holding down salaries. ‘The owners cheated ballplayers. That’s the blunt reality. There isn’t any trust.’”); ZIMBALIST, *supra* note 6, at 84; ANDREW ZIMBALIST, IN THE BEST INTERESTS OF BASEBALL? THE REVOLUTIONARY REIGN OF BUD SELIG 132 (2006).

221. ZIMBALIST, *supra* note 6, at 85 (emphasis added).

222. VINCENT, *supra* note 6, at 281-86 (emphasis added).

223. See MITCHELL REPORT, *supra* note 2, at B9 (encouraging players “to seek the advice of MLBPA counsel and a qualified attorney before [meeting with George Mitchell for his investigation.]”). Ultimately, George Mitchell notes in his report that “[t]he MLBPA believes that, by publishing [sections of this report], Senator Mitchell and the Commissioner’s Office are breaching promises of confidentiality made to the MLBPA and to its members.” *Id.* at 27, 284.

224. See generally *id.*

*C. Collusion Sends the Message to Children that Lying, Cheating, and Deception is Acceptable*

Finally, Major League Baseball's history of collusion sends a message to fans, including children, that MLB club-owners do not find their past behavior morally wrong.<sup>225</sup> This message is especially troubling given that, according to Baseball's own *Mitchell Report*, American children emulate the behavior that they see in professional sports.<sup>226</sup> Indeed, if today's children continue to grow up in an era marked by corporate scandals and greed, they will become more likely to emulate these behaviors.<sup>227</sup>

Ethicist Michael Josephson is quick to point out that the entertainment industry has glorified cheating and deception, not only through movies and fictional television shows, but also through reality television program such as "The Apprentice," which suggest these behaviors equal success in the boardroom.<sup>228</sup> Because Major League Baseball is the ultimate form of reality television, when MLB club-owners collude against the rights of MLB players, children become especially likely to emulate these behaviors.<sup>229</sup> This means the wrongs of collusion may survive beyond just one generation.

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225. See generally *MITCHELL REPORT*, *supra* note 2, at 15.

226. See *id.*

227. See, e.g., Mohammed Rawwas, Ziad Swaidan & Hans Isakson, *A Comparative Study of Ethical Beliefs of Master of Business Administration Students in the United States with those in Hong Kong*, 82 J. EDUC. FOR BUS. 146 (2007) ("As a result of the corporate scandals involving Enron, WorldCom, Tyco, Health-South, Martha Stewart, and the Wall Street analysts and the firms that supported them, educators have developed a growing concern about the character of today's master of business administration (MBA) students' ethical beliefs, primarily because the students are tomorrow's business leaders."); cf. Greg Burns, *Enron's Skilling Gets 24-year Prison Term; Judge Rejects His Plea for Leniency*, CHI. TRIB., Oct. 24, 2006, at C1.

228. See Steve Churm, *An Ethical View*, ORANGE COUNTY METRO. (Newport Beach, Cal.), May 27, 2004, at 10:

[Josephson] expresses concern over what he considers "influences on young people" today. For example, highly-rated reality TV shows, he says, are "absolutely subversive." Programs like "Survivor," "The Bachelor" and "The Apprentice," Josephson cautions, send a message that "being sneaky and lying" is not only acceptable behavior but also the way to get ahead. "It's a troubling, troubling trend that parents must play an active role to help stop," he says. Otherwise, Josephson says, we may be doomed to more Enrons.

*Id.*

229. Cf. *MITCHELL REPORT*, *supra* note 2, at 15 (making the same argument with respect to steroid use).

## VI. MOVING PAST COLLUSION, AND TOWARD A MORE RESPECTABLE BASEBALL FUTURE

Shifting focus now to the future, MLB owners should consider implementing the following steps to prevent future collusion: (1) returning Baseball to oversight by an independent outside commissioner; (2) separating the commissioner's governance duties from the game's CEO duties; (3) allowing an MLBPA representative to play a role in policing against collusion at all owner and general manager meetings; and (4) providing full disclosure to players and fans about past collusion.

### *A. Return of Leadership to an Outside Independent Commissioner*

The need for Baseball to return to an outside independent commissioner cannot be overstated.<sup>230</sup> Back in January 1921, Chicago Cubs shareholder Albert Lasker first suggested creating the position of commissioner as a way to protect Baseball from questions to its reputation stemming from the 1919 Black Sox scandal.<sup>231</sup> With public confidence in Baseball plummeting, Lasker persuaded all of the MLB club-owners to meet with him in a Chicago hotel.<sup>232</sup> On January 21, 1921, he first proposed vesting full regulatory authority over all aspects of Baseball in an independent, outside commissioner—free from any partisanship.<sup>233</sup> As described by political science professor Jerold Duquette in his 1999 book *Regulating the National Pastime*, “[t]hese commissioners would be prominent men who had no financial interest in the game.”<sup>234</sup>

To make the commissioner position truly autonomous, Lasker convinced MLB owners to allow the President of the United States to appoint each of Baseball's commissioners.<sup>235</sup> Although no President has ever exercised this power, MLB club-owners at first followed the spirit of Lasker's plan by hiring as commissioners outsiders from the

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230. Marc Edelman, *MLB Owners Missed Golden Opportunity*, SPORTS B. J., Feb. 18, 2008, at 28.

231. See *id.* (noting that eight players on the Chicago White Sox purportedly lost intentionally the 1919 World Series in response to Comiskey's miserly ways); see also QUIRK & FORT, *HARD BALL*, *supra* note 10, at 56.

232. See Edelman, *supra* note 230.

233. See *id.*

234. DUQUETTE, *supra* note 18, at 29.

235. See Edelman, *supra* note 230.

judiciary,<sup>236</sup> legislature,<sup>237</sup> media,<sup>238</sup> and military.<sup>239</sup> However, in 1969, MLB owners made the commissioner's position somewhat less autonomous by hiring Bowie Kuhn—an attorney who had previously served as legal counsel to MLB clubs.<sup>240</sup>

After Kuhn's prolonged tenure, MLB club-owners temporarily returned to selecting independent commissioners by appointing Ueberroth (an outside businessperson),<sup>241</sup> Giamatti (a Yale University professor),<sup>242</sup> and Vincent (an outside businessperson).<sup>243</sup> Yet, MLB club owners once again moved away from an independent commissioner in 1992 when they removed Vincent from his commissionership and replaced him with Milwaukee Brewers owner Bud Selig.<sup>244</sup> By appointing Selig as the game's eighth commissioner, MLB club-owners completely destroyed the principle of nonpartisanship, not only because of Selig's tenure as an owner, but also because of his documented role as a "ringleader of collusion."<sup>245</sup>

Baseball today truly needs to restore independent outside leadership. An independent, outside commissioner provides Baseball with a new ombudsman who is more likely to guard against collusion, while, at the same time, it sends an important message to Baseball players and union members that the game is taking steps to act fairly and honorably.<sup>246</sup>

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236. See Kennesaw Mountain Landis Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_1](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_1) (last visited Nov. 3, 2008).

237. See Albert Benjamin "Happy" Chandler Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_2](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_2) (last visited Nov. 3, 2008).

238. See Ford Christopher Frick Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_3](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_3) (last visited Nov. 3, 2008).

239. See General William D. Eckert Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_4](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_4) (last visited Nov. 3, 2008).

240. See Bowie Kent Kuhn Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_5](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_5) (last visited Nov. 3, 2008).

241. See Peter Victor Ueberroth Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_6](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_6) (last visited Nov. 3, 2008).

242. See A. Bartlett Giamatti Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_7](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_7) (last visited Nov. 3, 2008).

243. See Francis T. Vincent, Jr. Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_8](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_8) (last visited Nov. 3, 2008).

244. See Allan H. "Bud" Selig Biography, available at [http://mlb.mlb.com/mlb/history/mlb\\_history\\_people.jsp?story=com\\_bio\\_9](http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_9) (last visited Nov. 3, 2008).

245. VINCENT, *supra* note 6, at 281-86; see also *Grievance No. 87-3*, *supra* note 11, at 52 (discussing Selig's conduct in collusion against Lance Parrish).

246. Although some would argue that the need for an independent outside commissioner is less important today than it was pre-1968 based on the presence today of a neutral arbitrator, it is worth noting the neutral arbitrator is only able to remove conduct after-the-fact; whereas, a commissioner is positioned to prevent wrongdoing in the first place.

Indeed, the MLBPA is more likely to work together with that outside person than it would be to work with Selig and his delegates.

*B. Divorcing the Commissioner Function from the CEO Function*

Restoring Baseball oversight to a neutral, outside commissioner undoubtedly would lead to some questions about how to handle the role of "Baseball CEO." Since MLB club-owners abandoned the neutral commissioner, Baseball's collective financial duties have come to comprise an increasing part of the commissioner's job.<sup>247</sup> However, the financial governance of Baseball does not belong in the same hands as the person responsible for regulatory oversight. Indeed, while most of the commissioner's responsibilities relate to enforcing the "best interests of baseball" clause from a multi-stakeholder perspective (owners, players, cities, fans), the CEO tasks are really about protecting solely the interests owners.<sup>248</sup>

One potential solution to this problem would be for Baseball to create a separate position of financial leadership, apart from the commissioner's post.<sup>249</sup> This proposed position might best be performed by someone with direct ties to Baseball ownership. However, if such a position is created, the position should be subject to the commissioner's full oversight.

*C. Allowing a "Clean Team" Lawyer to Monitor General Manager Meetings*

At the same time, certain Baseball responsibilities that currently lie with the commissioner, such as guarding against collusion, would be best performed by an employee with allegiance to the players.<sup>250</sup> In this vein, MLB club-owners should grant at least one MLBPA attorney the right to oversee all team and league meetings for the limited purpose of policing against collusion. Although Selig, in his current role as league commissioner, has claimed that league meetings are adequately policed by MLB's own lawyers, these lawyers' loyalties, as a matter of law, lie

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247. See MAJOR LEAGUE CONST., art. II, § 2(a) (describing the Commissioner's role as "Chief Executive Officer of Major League Baseball").

248. *Id.*

249. *Id.* (stating one of the six functions of the Commissioner as to "serve as Chief Executive Officer of Major League Baseball").

250. See generally Tracy Ringolsby, *Does Baseball Need a Commissioner With a Background in the Game?*, ROCKY MTN. NEWS (Colo.), Aug. 17, 1995, at 9B.

with ownership.<sup>251</sup> This makes them inappropriate candidates to detect and disclose collusion.<sup>252</sup>

In addition, even though some MLB officials would likely argue that allowing an MLBPA attorney into private team and league meetings would lead to the leaking of private information to members of the MLBPA, these risks are easily addressed by asking the MLBPA attorney to leave the owners meetings if MLB counsel were to discuss privileged matters, as well as by erecting firewalls to prevent the disclosure of sensitive information obtained by the designated MLBPA counsel to individual players and their agents.<sup>253</sup> In recent years, firewalls have gained a growing acceptance by government agencies as a way to prevent the flow of similar sensitive information.<sup>254</sup> If firewalls have become an accepted solution in the eyes of government, they certainly should suffice in the eyes of Baseball.

#### *D. Full Disclosure of Past Collusion*

Finally, MLB club-owners absolutely must disclose their entire history of colluding against the interest of players to both Baseball's players and fans.<sup>255</sup> While most MLB club owners continue to deny having ever illegally colluded, these denials are nonsensical when considering that three arbitration opinions have found MLB club owners, including Selig, have done exactly that.<sup>256</sup> By continuing to take the position that collusion never happened, MLB club-owners are further weakening their credibility.

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251. See generally *id.*

252. See generally *id.*

253. See, e.g., *How to Clean Up Dirty Problems*, BOWNE REV. FOR DEALMAKERS, Apr., 2007, at 8 ("Two large industry leaders used a clean team when they formed a joint venture in 2004, creating the world's second largest producer of a particular product. They contracted with a consulting team to evaluate and analyze the venture's HR aspects. To avoid violating blackout antitrust regulations, the independent consultants gathered information from the employees of the respective companies but did not disclose one company's information to the other."), available at <http://www.bowne.com/-securitiesconnect/details.asp?storyID=1452> (last visited Nov. 3, 2008).

254. See *id.*

255. See, e.g., Chass, *supra* note 148.

256. See *id.* ("No owner has ever acknowledged participating in collusion -- Fay Vincent, the former commissioner, is the only management person known to have said the owners colluded -- but the owners are not so charity-minded that they would have paid [\$280 million as a settlement of the case] out of the goodness of their hearts.").

Admitting the truth about collusion is an important step toward turning the page for several reasons.<sup>257</sup> First, it would make MLB club officials appear more credible in the eyes of both players and fans. In addition, it serves as an important olive branch toward mitigating the longstanding hostility between owners and the MLBPA. Finally, admitting collusion allows all involved with Baseball to better understand how the system of trust once broke down, thus making it less likely that the system would break down, initially undetected, in the same way again.

## VII. CONCLUSION

Major League Baseball serves an important role in American society, bringing together people from different races, cultures, genders and generations. The game has survived two World Wars, the horrors of 9/11, and even the Black Sox Scandal.<sup>258</sup> Although the game's rules have changed, the intense fan loyalty has generally remained.<sup>259</sup> Nevertheless, if Major League Baseball is not careful, today's labor strife could begin to erode at the basic fabric of America's national pastime.

In light of Baseball's longstanding history of collusion, it is important for MLB owners to immediately move toward a more honest relationship with players and fans. While the following steps to overcome collusion are in no way exclusive, MLB club-owners should, at a minimum, consider: (1) returning central governance of Baseball to an independent outside commissioner; (2) divorcing the role of Baseball CEO from the other responsibilities of Baseball commissioner; (3) allowing an MLBPA lawyer to help police against collusion; and (4) openly and honestly discussing Baseball's past history of collusion with players and fans.

Only with these steps will Baseball succeed at removing the "dark cloud of collusion" from over our national pastime. And only by removing the "dark cloud of collusion" from our national pastime will owners, players and fans become truly able to work together to resolve other matters of social importance, such as the continued use of performance-enhancing drugs in both sports and society.

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257. See *MITCHELL REPORT*, *supra* note 2, at 309 (explaining in the context of Baseball's steroid scandal "the public should know" the truth); *cf. id.* at 37 (discussing how to remove a "cloud" from Baseball).

258. See *DUQUETTE*, *supra* note 18, at 9-10, 30-31.

259. *Cf. Marc Edelman, Why the Single Entity Defense Can Never Apply to NFL Clubs: A Primer on Property Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 892 n.4 (2008) (explaining Baseball's strong revenue growth).