

April 2013

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Recommended Citation

Anthony F. Iliakostas, *Separation of Sport and State: The Federal Government's Involvement in Major League Baseball's Drug Testing Program*, 3 *Pace. Intell. Prop. Sports & Ent. L.F.* 40 (2013).

Available at: <https://digitalcommons.pace.edu/pipself/vol3/iss1/3>

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Separation of Sport and State: The Federal Government's Involvement in Major League Baseball's Drug Testing Program

Abstract

Major League Baseball has been one of the premier major sports leagues in taking action and putting an end to the use of performance-enhancing drugs in baseball. Entering its eighth year, Major League Baseball has implemented and improved its drug-testing policy. However, with congressional hearings on the use of steroids and other drugs in baseball along with federal investigations, there is a lingering worry that the government is intervening in Major League Baseball's drug testing program. In this article, Anthony Iliakostas breaks down Major League Baseball's drug testing program and how the U.S. government has gotten involved. The article concludes by answering the ultimate question: should the government intervene in Major League Baseball's drug testing program?

Keywords

baseball, steroids, drug testing

SEPARATION OF SPORT AND STATE: THE FEDERAL GOVERNMENT'S INVOLVEMENT IN MAJOR LEAGUE BASEBALL'S DRUG TESTING PROGRAM

Anthony F. Iliakostas*

I. Introduction

The 2012 Major League Baseball season was the picture perfect season for a baseball player like San Francisco Giants outfielder Melky Cabrera. Cabrera has had his fair share of time on the baseball field. Prior to the 2012 season, Cabrera, who coined the nickname “Melk Man,” played with the New York Yankees, the Atlanta Braves and the Kansas City Royals, respectively.¹ Since becoming a major leaguer in 2005, he amassed 54 home runs, 357 runs batted in and had a career batting average of .277.² His best year up to the 2012 season was in the season prior, when Cabrera had a .305 batting average, hit 18 home runs and drove in 87 runs.³

In the 2012 season, Cabrera was playing the best baseball any player could ask for. He instantly became a fan-favorite as he was selected to be a starting outfielder for the National

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¹ *Melky Cabrera Statistics and History*, BASEBALLREFERENCE.COM, <http://www.baseball-reference.com/players/c/cabreme01.shtml> (last visited Sept. 29, 2012).

² *Id.*

³ *Id.*

League All-Star team after collecting over 7 million votes from fans.⁴ By the All-Star Break, Cabrera had a commanding lead in the National League in hits with 119; he also had a .353 batting average.⁵ His on-field performance showed at the All-Star Game as Cabrera helped the National League shut-out the American League.⁶ His performance also led to his receipt of the All-Star Game MVP award.⁷ By August 14th, Cabrera led the National League with a .346 batting average while also driving in 60 runs and hitting 11 home runs.⁸ Cabrera's statistics showed that he was one of the best players in the league. Since he would be a free agent after the 2012 season, Cabrera's recent performance guaranteed him a five or six year deal with the potential of receiving around \$15 million per year.⁹ However, this all changed on August 15, 2012.

It was on the aforementioned date that Major League Baseball announced that Melky Cabrera tested positive for elevated levels of testosterone.¹⁰ Because Cabrera tested positive for a performance-enhancing drug that is banned under Major League Baseball's drug testing policy, he was suspended for 50 games.¹¹ Cabrera's suspension carried into the postseason, thus making him ineffective for the remainder of the regular season.¹²

⁴ 2012 All-Star Game starters announced, MLB.COM (July 1, 2012, 1:50 PM), http://mlb.mlb.com/news/article.jsp?ymd=20120701&content_id=34266298&vkey=pr_mlb&c_id=mlb.

⁵ Lyle Spencer, *Melky delivers, earns All-Star MVP honors*, MLB.COM (July 11, 2012, 1:39 AM), http://mlb.mlb.com/news/article.jsp?ymd=20120711&content_id=34835348&vkey=allstar2012.

⁶ *Id.*

⁷ *Id.*

⁸ BASEBALL-REFERENCE.COM, *supra* note 1.

⁹ Mark Probst, *Why Melky Cabrera Won't Be a San Francisco Giant Next Year*, BLEACHERREPORT.COM (Jul. 13, 2012), <http://bleacherreport.com/articles/1258145-why-melky-cabrera-wont-be-a-san-francisco-giant-next-year>.

¹⁰ Tyler Kepner, *Seeking an Edge, Then Falling Off a Cliff*, N.Y. TIMES (Aug. 15, 2012), http://www.nytimes.com/2012/08/16/sports/baseball/melky-cabrera-suspended-50-games-for-doping.html?_r=0.

¹¹ *Melky Cabrera Suspended 50 Games*, ESPN.COM (Aug. 15, 2012, 11:10 PM), http://espn.go.com/mlb/story/_/id/8271981/melky-cabrera-san-francisco-giants-suspended-50-games (last visit Sept. 29, 2012).

¹² *Id.*

However, shortly after Cabrera was sanctioned, he, along with his agents, faced more scrutiny as there were reports that Cabrera tried to dodge his 50-game suspension. Five days after Cabrera was suspended, the New York Daily News conducted an investigation revealing that Cabrera, along with an associate, tried to create a fake website advertising a fake product that contained testosterone.¹³ The goal was to argue that Cabrera did not know this product contained testosterone, thus contending that he “unknowingly” used a performance-enhancing drug.¹⁴ However, this was all just a sham. Major League Baseball has joined forces with the Food and Drug Administration (“FDA”), a federal agency, to look into this matter.¹⁵ On the FDA’s end, agent Jeff Novitzky, who is known for policing steroid use in professional sports, is heading the investigation.¹⁶ The ramifications that could come out of this federal investigation have yet to be determined.

While this is not the first time a baseball player has been caught using performance-enhancing drugs, this is certainly not the first time that the federal government has intervened in drug-related matters in Major League Baseball. From congressional hearings on Capitol Hill down to this very investigation, the question begged to be asked is this: should the federal government intervene in matters associated with a private entity like Major League Baseball? Another important question to ask is this: is Major League Baseball’s drug testing policy so passive that it prompts the federal government’s involvement? If so, can modifications be made

¹³ Teri Thompson et al., *Exclusive: Daily News Uncovers Bizarre Plot by San Francisco Giants’ Melky Cabrera to Use Fake Website and Duck Drug Suspension*, NY DAILY NEWS (Aug. 19, 2012, 7:50 AM), <http://www.nydailynews.com/exclusive-daily-news-uncovers-bizarre-plot-melky-cabrera-fake-website-duck-drug-suspension-article-1.1139623>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

to Major League Baseball's drug testing policy upon its expiration in 2016 to remedy these issues?

The objective of this scholarly article is to address the issue of whether or not government intervention in Major League Baseball's drug testing and treatment policy crosses the line. This article will analyze in detailed fashion Major League Baseball's Joint Drug Prevention and Treatment Program Policy. It will also discuss case law regarding federal investigations into the use of performance-enhancing drugs in baseball, from the BALCO scandal, one of the biggest steroid investigations in recent sports history, to the Capitol Hill hearings involving notable baseball executives and player testimonies. Finally, this article will discuss, based on this information, whether the federal government should intervene in some or all aspects of Major League Baseball's drug testing policy.

II. Major League Baseball's Joint Drug Prevention and Treatment Program

Major League Baseball's drug testing policy was agreed upon on Tuesday, November 15, 2005 between Major League Baseball and Major League Baseball's Players Association.¹⁷ This policy, which became effective beginning the 2006 season, replaced the old drug testing policy. Under the older policy, a player would be suspended for 10 days for a first offense, 30 days for the second offense, 60 days for the third offense and a year for a fourth offense.¹⁸ However, as this section will enumerate, under the newer and stricter policy punishments were extended in

¹⁷ Barry M. Bloom & Jim Molony, *MLB, union agree to stricter drug policy*, MLB.COM (Nov. 16, 2005), http://mlb.mlb.com/news/article.jsp?ymd=20051115&content_id=1268529&vkey=news_mlb&fext=.jsp&c_id=mlb.

¹⁸ *Id.*

such a manner that Major League Baseball Commissioner Bud Selig believed, at the time, that it could “eradicate steroid use in baseball.”¹⁹

Major League Baseball’s drug testing policy is 34 pages long and lays out in great detail the system by which players are tested for steroids, testosterone and other performance enhancing drugs. According to its purpose, Major League Baseball’s Joint Drug Prevention and Treatment Program was created to

- (i) educate Players on the risks associated with the use of Prohibited Substances ...;
- (ii) deter and end the use of Prohibited Substances by Players; and (iii) provide for, in keeping with the overall purposes of the Program, an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the existence, interpretation, or application of this Program.²⁰

This program also affects all Major League Baseball players who are members of a club’s 40-man roster, Major League Baseball free agents, and players released from a Major League Baseball roster.²¹ In the case that a player is released by a Major League Baseball team, he is under the power of the drug testing program unless the player has voluntarily retired or signed a minor league baseball deal or signs a contract with an unaffiliated professional baseball team.²²

The policy is rather verbose and detailed, but it lays out the essential elements of how the Major League Baseball drug-testing program shall be conducted. First, under Section 1, the Office of the Commissioner of Baseball and the Major League Baseball Players Association shall select an individual to serve as the Independent Program Administrator (“IPA”).²³ The

¹⁹ *Id.*

²⁰ Major League Baseball’s Joint Drug Prevention and Treatment Program, Preamble, Page 1, MLB.COM, <http://mlb.mlb.com/pa/pdf/jda.pdf>.

²¹ *Id.*

²² *Id.*

²³ *Id.*, at Section 1(A)(1)(a), Page 1.

IPA's duties include administering the Program's testing requirements (which include the collection of urine and blood samples and the reporting of test results), monitoring and supervising the collection procedures, laboratory analysis, testing protocols, and communicating with Comprehensive Drug Testing and World Anti-Doping Agency's Montreal Laboratory about the drug test results.²⁴ It is important to note that the IPA has no authority to discipline athletes who violate Major League Baseball's drug testing policy.²⁵ Such disciplinary authority is given to the Commissioner of Major League Baseball.²⁶ In addition, Comprehensive Drug Testing is the organization responsible for collecting all urine and blood samples and transporting these samples to the drug testing laboratories in Montreal to be tested.²⁷

Section 2 of the drug testing policy explicitly enumerates substances that Major League Baseball players are prohibited from using.²⁸ These substances include marijuana, opiates, various steroids (including anabolic androgenic steroids), and testosterone.²⁹

Section 3 describes the process by which a Major League Baseball player is tested from banned substances. Under Section 3(A)(1), a player is tested for performance-enhancing drugs and other banned substances via a urine sample upon reporting to spring training and at random, unannounced points during the season.³⁰ The IPA is also entitled to perform unannounced drug tests during the offseason, as long as the urine sample is tested for the presence of performance-enhancing drugs.³¹

²⁴ *Id.* at Section 1(A)(2), Page 3.

²⁵ *Id.* at Section 1(A)(3), Page 3.

²⁶ *Id.*

²⁷ *Id.* at Section 1(C)-(E), Page 5.

²⁸ *Id.* at Section 2, Pages 7-10.

²⁹ *Id.*

³⁰ *Id.* at Section 3(A)(1), Page 11.

³¹ *Id.* at Section 3(A)(2), Page 11.

In addition to collecting urine samples, each player is subject to an unannounced collection of his blood sample to be tested for human growth hormones (“hGH”) during spring training.³² The rules do not expressly require the collection of hGH during the regular season; however, a random test for hGH may be conducted during the offseason.³³ Major League Baseball’s drug testing policy states that the notion of in-season hGH testing will be considered in the future as further scientific observations are made and as science advances.³⁴

The Major League Baseball drug testing policy additionally allows for the possibility for reasonable cause testing. According to the policy, if either the Office of the Commissioner of Baseball or the Major League Baseball Players Association has information that gives reasonable cause to believe that a player has engaged in the use or distribution of a performance-enhancing drug in a 12-month span, the IPA can pursue an immediate urine and/or blood sample from the player.³⁵

According to the drug testing policy, all blood and urine samples are collected in compliance with the procedures and testing protocols of the drug-testing program.³⁶ Furthermore, all protocols regarding collection and testing must be in compliance with the Montreal Laboratory.³⁷

What qualifies as a positive result under Major League Baseball’s drug testing policy? Three scenarios help illustrate what qualifies as a positive result under the drug testing policy. First, if the test sample drawn from the player contains a banned substance listed in Section 2 of

³² *Id.* at Section 3(A)(3)(a), Page 11.

³³ *Id.* at Section 3(A)(3)(c), Page 11.

³⁴ *Id.* at Section 3(A)(3)(d), Page 12.

³⁵ *Id.* at Section 3(C)(1)(a), Page 12.

³⁶ *Id.* at Section 3(E), Page 14.

³⁷ *Id.*

the drug testing policy; second, if a player refuses or fails to take a drug test; or third, if a player attempts to substitute or mask his sample in a manner that alters the test.³⁸

If a player tests positive for a performance-enhancing drug or some other banned substance under Section 2 of Major League Baseball's drug testing policy, a player will be reprimanded under Section 7, citing various forms of discipline.³⁹ If a player tests positive for a performance-enhancing drug as a first offense, the player is suspended fifty (50) games.⁴⁰ If a player tests positive for a performance-enhancing drug as a second offense, the player is suspended one-hundred (100) games.⁴¹ If for a third time the player tests positive for a performance-enhancing drug, the player is banned from Major League Baseball.⁴² However, the player is entitled to "apply...to the Commissioner for discretionary reinstatement after a period of two (2) years."⁴³ At this point, it is up to the Commissioner of Major League Baseball to issue a determination of whether or not to reinstate the player.⁴⁴

Section 7 of the drug testing policy lists other varying disciplines for players who use alternative banned substances, such as stimulants and marijuana, as well as punishments for players who fail to comply with an initial violation or a treatment program. Rules are even laid out that sanction players who are found criminally liable for possessing or using a prohibited substance.⁴⁵ Nevertheless, when comparing these punishments to the punishments handed down to those using performance-enhancing drugs, the punishments are incomparable.

³⁸ *Id.* at Section 3(F), Page 14.

³⁹ *Id.* at Section 7, Pages 22-28.

⁴⁰ *Id.* at Section 7(A)(1), Page 22.

⁴¹ *Id.* at Section 7(A)(2), Page 22.

⁴² *Id.* at Section 7(A)(3), Page 22.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *Id.* at Section 7(B)-(M), Pages 22-28.

If a player wishes to contest his drug test that rendered a “positive” result and led to his subsequent punishment, he is fully entitled to appeal his case. According to Section 8, an arbitration panel has jurisdiction to “review any determination that a Player has violated the Program.”⁴⁶ If an appeal comes to fruition, the Commissioner’s Office has the burden of proving that the player tested positive for a banned substance in accordance with the rules set forth in the Major League Baseball drug testing policy.⁴⁷ The Commissioner is not required to prove intent, fault, negligence, or knowledge of the player using the banned substance.⁴⁸

As for the player who is appealing, he may challenge the positive result claiming that it was a deviation from the ordinary procedures of Major League Baseball’s Drug Testing Program.⁴⁹ Also, a player is not in violation of the league’s drug testing policy if the banned substance in his test result was not his fault.⁵⁰ However, the player has the burden of establishing this affirmative defense.⁵¹ Ultimately, it is up to an arbitration panel to hear the player’s appeal, listen to both sides (the player and the Commissioner of Major League Baseball), and decide whether to uphold or sustain the player’s punishment.⁵²

In an effort to “clean up” players and treat them after violating the terms of the drug testing policy, it is the duty of the IPA, Major League Baseball’s Players Association, and the Commissioner of Major League Baseball to supply education programs for players.⁵³ The program includes instructions on proper nutrition, training and conditioning.⁵⁴

⁴⁶ *Id.* at Section 8(A), Page 28.

⁴⁷ *Id.* at Section 8(B)(1), Page 28.

⁴⁸ *Id.*

⁴⁹ *Id.* at Section 8(B)(2), Page 29.

⁵⁰ *Id.* at Section 8(B)(3), Page 29.

⁵¹ *Id.*

⁵² *Id.* at Section 8(C)(4)-(5), Page 31.

⁵³ *Id.* at Section 9(A), Page 33.

⁵⁴ *Id.*

III. Major League Baseball's Legal Woes with Performance-Enhancing Drugs

Major League Baseball's enforcement of its joint drug prevention and treatment program began only as a result of a series of whistle-blowing and perhaps, singlehandedly, one of the biggest drug scandals in professional sports history. That scandal involved the Bay Area Laboratory Co-Operative, better known as BALCO. Created in 1984 by Victor Conte, BALCO was a company that was designed to supply medical supplements to athletes.⁵⁵ It was not until 2002 that there was a federal investigation conducted against BALCO on suspicion of selling performance-enhancing drugs to athletes.⁵⁶ Some of these athletes included US Olympian track runner Marion Jones and baseball players including Jason Giambi and Barry Bonds.

On September 3, 2003, local and federal officials raided the BALCO office after a series of tips and results from the investigation.⁵⁷ Ultimately, on February 11, 2004, Victor Conte, BALCO executive James Valente, track coach Remi Korchemny, and trainer Greg Anderson (known for training baseball slugger Barry Bonds) were all indicted and charged with conspiracy to distribute performance enhancing drugs to professional athletes; these drugs included anabolic steroids and human growth hormones.⁵⁸ Initially, these men pled not guilty, but on July 15, 2005, Victor Conte and Greg Anderson pled guilty as part a plea-bargain deal.⁵⁹

While the BALCO case was in full effect, in March of 2005, the House Government Reform Committee conducted a series of hearings on Capitol Hill, where Major League Baseball

⁵⁵ See, *What is the Balco Scandal*, THE TELEGRAPH (Mar. 21, 2011), <http://www.telegraph.co.uk/sport/othersports/drugsinsport/8396065/What-is-the-Balco-scandal.html>; *BALCO Investigation Timeline*, USA TODAY (last updated Nov. 26, 2007), <http://usatoday30.usatoday.com/sports/balco-timeline.htm>

⁵⁶ *Id.*

⁵⁷ *BALCO Investigation Timeline*, USA Today (last updated Nov. 26, 2007), <http://usatoday30.usatoday.com/sports/balco-timeline.htm>

⁵⁸ *U.S. v. Conte*, CR No. unavailable, *indictment* (N.D. Cal. 2004), found on: news.findlaw.com/wp/docs/sports/usconte21104ind.pdf.

⁵⁹ *BALCO Investigation Timeline*, USA TODAY (last updated Nov. 26, 2007), <http://usatoday30.usatoday.com/sports/balco-timeline.htm>.

officials and baseball players testified under oath about the use of steroids and other performance enhancing drugs in Major League Baseball.⁶⁰ Led by Representative Tom Davis of Virginia, the purpose of these committee hearings was to examine the rampant use of steroids and other performance enhancing drugs among young athletes in the scholastic and collegiate level.⁶¹

Representative Davis stated the committee's purposes for these meetings is to:

consider major league baseball's recently-negotiated drug policy, how the testing policy will be implemented, how it will effectively address the use of prohibited drugs by players, and most importantly, the larger societal and public-health ramifications of steroid use.⁶²

Further, Representative Davis went on to state that there is a cloud of doubt over baseball because of the use of steroids and he felt that part of the blame could be on the legislature for "wrongly sending the message that baseball's anti-trust exemption is also a public accountability exemption."⁶³ Nevertheless, Representative Davis hoped that the testimonies of Major League Baseball officials and players, which would be under oath, would provide those with the opportunity to come clean and attest to the use of anabolic steroids and other performance enhancing drugs.⁶⁴

In addition to Representative Davis's testimony, Representative Henry Waxman of California, another member of the House Government Reform Committee, stated the following regarding Major League Baseball's lack of power in 2005 regarding steroid use:

⁶⁰ *Id.*

⁶¹ *Baseball and Steroids* Hearing, Page 1 (2005) (statement of Rep. Tom Davis, Member, H. Comm. Gov't Reform), available at Lexis Nexis Committee Hearing Transcript Database and <http://lawandbattingorder.squarespace.com/storage/Tom%20Davis%20Baseball%20and%20Steroids.pdf>.

⁶² *Id.*

⁶³ *Id.* at 2-3.

⁶⁴ *Id.* at 3.

Baseball had a responsibility to do the right thing, and it didn't do it. I don't see any other way to read the history of the past 30 years. Now Major League Baseball is absolutely right that it couldn't impose mandatory testing on the players. [...] Baseball's constitution says the commissioner can 'investigate any act alleged or suspected to be not in the best interest of the national game of baseball.' The collective bargaining agreement expressly recognizes the baseball commissioner retains inherent authority to take actions necessary, again I quote, 'the preservation of the integrity of or the maintenance of public confidence in the game of baseball.' But Major League Baseball never exercised its authority to investigate steroid use.⁶⁵

Representative Waxman further testified that his hope would be for Congress to find out as many facts about steroids with the hope that one day a federal policy would be implemented at all levels of sports. It would be a policy "that provides a strong disincentive to using steroids."⁶⁶

The 2005 Congressional hearings on steroid use in baseball commenced with the testimonies of several Major League Baseball officials, including Commissioner Bud Selig. At the time of his testimony, Major League Baseball had a different system of punishment in place.⁶⁷ However, much like the current baseball policy, which has been refined, Selig testified that Major League Baseball's drug testing policy contains a broad list of banned substances, players are tested randomly at one point during the season, and the policy enforces testing during the regular season and in the off-season.⁶⁸ In addition to testifying that Major League Baseball's drug testing laboratories are based in Olympic and World Anti-Doping Agency certified laboratories in Montreal, Selig asserted that Major League Baseball's drug testing policy "is as

⁶⁵ *Baseball and Steroids* Hearing, Page 6 (2005) (statement of Rep. Henry Waxman, Member, H. Comm. Gov't Reform), available at Lexis Nexis Committee Hearing Transcript Database and <http://lawandbattingorder.squarespace.com/storage/Tom%20Davis%20Baseball%20and%20Steroids.pdf>.

⁶⁶ *Id.*

⁶⁷ *Baseball and Steroids* Hearing, Pages 2-3 (2005) (statement of Allan Selig), available at Lexis Nexis Committee Hearing Transcript Database and <http://lawandbattingorder.squarespace.com/storage/Bud%20Selig%202005%20Congressional%20Testimony.pdf>.

⁶⁸ *Id.*

good as any in professional sports.”⁶⁹ Commissioner Selig stated that Major League Baseball will remain vigilant in the war against performance enhancing drugs.⁷⁰

Another influential testimony made at Capitol Hill in 2005 was by Robert D. Manfred Jr., Executive Vice President of Major League Baseball. He commented that the drug testing policy has been collectively bargained for with Major League Baseball’s Players Association and he understood how important it was to address the use of performance enhancing drugs in the sport.⁷¹ Manfred, however, pointed out to the House Government Reform Committee that Congress was not entitled to intervene based on the express word of the National Labor Relations Act and that the issue of drug testing in baseball is strictly confined between Major League Baseball and its players association.⁷² He stated:

I am sure that every member of the Committee is well aware that the system of collective bargaining created by the National Labor Relations Act is, by design, an incremental process. The law creates a framework for mandatory negotiation, but no outside party or governmental agency has the authority to dictate a substantive result. Because the process is essentially consensual, the agreements that emerge necessarily reflect a balancing of different interests and are often not as forceful as those that can be produced by a different process or in a different legal framework.⁷³

Despite comments by Commissioner Selig, Manfred and other Major League Baseball officials, this did not stop members of the legislature from expressing concern about Major League Baseball and the use of steroids in the sport. For example, Senator Jim Bunning testified before the same committee that the possession and sale of anabolic steroids without a

⁶⁹ *Id.* at 3-4.

⁷⁰ *Id.*

⁷¹ *Baseball and Steroids* Hearing, Pages 1-2 (2005) (statement of Robert Manfred, Jr.), available at Lexis Nexis Committee Hearing Transcript Database and <http://lawandbattingorder.squarespace.com/storage/Robert%20Manfred%202005%20Congressional%20Hearing.pdf>.

⁷² *Id.* at 2.

⁷³ *Id.*

prescription has been illegal under federal law since 1991.⁷⁴ He added that Congress regulates steroidal dietary supplements as controlled substances.⁷⁵ Bunning acknowledged that Major League Baseball is taking strides to correct the error of steroid use and the use of performance enhancing drugs in the sports, but he warned the committee that Major League Baseball should claim responsibility and fix this grave error.⁷⁶ According to Senator Bunning, if Major League Baseball should prove to be lax in this initiative, then “we [the legislature] will have to do it for them.”⁷⁷

The highlight of the Capitol Hill hearings involved the testimony of numerous baseball players. Perhaps the most notable one involved super slugger Rafael Palmeiro, who emphatically stated twice that he had never used performance-enhancing drugs.⁷⁸ He additionally stated that Major League Baseball was taking effective measures to wipe out steroid use in the sport with its drug testing policy.⁷⁹ Palmeiro even assured members of the committee that he was ready to “heed the call” to help young people avoid using steroids.⁸⁰ This testimony certainly didn’t work in Palmeiro’s favor as he tested positive for steroids in August of 2005 and was suspended for 10 games.⁸¹ Because Palmeiro testified under oath before the committee,

⁷⁴ *Baseball and Steroids* Hearing, Page 1 (2005) (statement of Sen. Jim Bunning), available at Lexis Nexis Committee Hearing Transcript Database and <http://lawandbattingorder.squarespace.com/storage/Senator%20Bunning%202005%20Congressional%20Testimony.pdf>.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 3.

⁷⁷ *Id.*

⁷⁸ *Testimony of Rafael Palmeiro before the Committee on Government Reform*, BIZOFBASEBALL.COM (Mar. 17, 2005), <http://www.bizofbaseball.com/steroidhearings/PalmeiroTestimony.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Jorge Arangure, Jr., *Palmeiro Suspended for Steroid Violation*, THE WASHINGTON POST (Aug. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/01/AR2005080100739.html>.

Congress looked into a potential perjury charge, but did not pursue it because of a lack of sufficient evidence.⁸²

While Major League Baseball's appearance at Capitol Hill was noteworthy, one notable case has addressed the issue of federal intervention in Major League Baseball and its drug testing program. The issue in this recent case law does not regard the actual authority and enforcement. Rather the issue is in regards to whether or not the government had the authority to seize confidential information from Comprehensive Drug Testing, Major League Baseball's independent drug testing laboratory under the league's drug testing policy.

The case of *U.S. v. Comprehensive Drug Testing (CDT III)* deals with federal authorities attempting to seize information of ten baseball players who tested positive for steroids.⁸³ During the BALCO investigation, federal authorities tried to obtain a grand jury subpoena from the Northern District of California to obtain information from Comprehensive Drug Testing ("CDT"); the players and CDT tried to negotiate a compliance agreement, but the government moved to quash the subpoena.⁸⁴ However, the government was issued a warrant from the Central District of California authorizing the search of CDT's facilities, and it was confined to the ten baseball players that they believed used steroids.⁸⁵ However, the facts indicate that the government sifted through the records of hundreds of baseball players when the warrant was executed.⁸⁶ Federal authorities also received a warrant from the District of Nevada to obtain urine samples from CDT.⁸⁷

⁸² Jorge Arangure, Jr., *Congress Declines to Prosecute Palmeiro for Perjury*, THE WASHINGTON POST (Nov. 11, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/10/AR2005111000852.html>.

⁸³ *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 66 (9th Cir. 2010).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Naturally, CDT moved to have the warrants evaluated to determine if seizure of evidence was in compliance with the Federal Rules of Criminal Procedure.⁸⁸

Briefly, the court found that the government's warrant from the Central District of California to seize evidence of ten baseball players was "untimely," and the court noted that "[t]he Government demonstrated a callous disregard for the rights of those persons whose records were seized and searched outside the warrant."⁸⁹ The Ninth Circuit court also rejected the government's argument that it was not entitled to return evidence to Comprehensive Drug Testing obtained through the Nevada warrant.⁹⁰ However, the Ninth Circuit cites to *United States v. Tamura*, stating that *Tamura* is designed "to maintain the privacy of materials that are intermingled with seizable materials, and to avoid turning a limited search for particular information into a general search of office file systems and computer databases."⁹¹ Based on this reasoning, the court held that the government was obligated to confine its search to the ten baseball players of interest.⁹²

While *CDT III* is not the ideal case questioning the authority of Major League Baseball's drug testing policy, it addresses two important points. The first is that Major League Baseball has been a victim of litigation regarding its drug testing policy. Secondly, it shows that Major League Baseball is susceptible to government intervention with something like seizure of confidential player information.

⁸⁸ *Id.* at 1166-67.

⁸⁹ *Id.* at 1167, 69-70.

⁹⁰ *Id.* at 1170.

⁹¹ *Id.*

⁹² *Id.* at 1171.

IV. Government Intervention in Major League Baseball's Drug Testing Policy

We have reached the ultimate and final question: based on the BALCO scandal, the hearings on Capitol Hill, and the evolution of Major League Baseball's drug testing policy, should the government play a role in Major League Baseball's drug testing program and policy? The answer, in my opinion, could not be any simpler: NO. First, the drug testing policy and the program, in general, has been collectively bargained for between Major League Baseball and the Major League Baseball Players Association, as expressly stated in the preamble of the League's drug testing policy.⁹³ A recent collective bargaining agreement, which is set to expire in 2016, also states that:

[t]he intent and purpose of the Clubs and the Association (hereinafter "the Parties") in entering into this Agreement is to set forth their agreement on certain terms and conditions of employment of all Major League Baseball Players for the duration of this Agreement. Each of the Parties acknowledges the rights and responsibilities of the other Party and agrees to discharge its responsibilities under this Agreement.⁹⁴

If the drug testing program has been agreed upon and is active, it is simply because Major League Baseball and the Players Association have agreed to its rules and conditions.

Secondly, if the government intervenes with Major League Baseball's drug testing program, that the League will become an additional entity that the government will need to regulate. If Congress were to propose the creation of an agency to regulate Major League Baseball's drug testing program, I believe this would further strain the financial bind that the country is facing today. I have come to learn that the task of agency regulation takes time and money. Why put Congress through the effort of regulating Major League Baseball's drug testing

⁹³ Major League Baseball's Joint Drug Prevention and Treatment Program, *supra* at 1.

⁹⁴ Major League Baseball Collective Bargaining Agreement, 2012-2016 Basic Agreement, Article I, Page 1 (2012), available at: http://mlb.mlb.com/pa/pdf/cba_english.pdf.

program on a full-time basis? Its drug testing program may not be perfect, but as a private entity, it has done an exceptional job continuing to refine the language of the drug testing policy to strictly and effectively impose penalties on players who are caught using a banned substance.

In addition, Major League Baseball is a multi-billion dollar industry, and thus has the resources and is fully capable to create an effective program that can regulate the use of performance enhancing drugs in baseball. In the span of nearly a decade since the BALCO scandal began, Major League Baseball has set the standard and raised the bar in enforcing strict policies to try and eradicate the use of performance enhancing drugs in the sport. As a baseball fan and a big proponent of the drug testing policy, Major League Baseball has done a superb job building a body of law that could be an example for other sports leagues with the same concerns.

Similarly, if the government intervenes with Major League Baseball's drug testing program, this opens the door for the government to intervene in the same manner with other sports leagues. Again, this should not be the case. Other sports leagues such as the National Football League and National Hockey League already have policies in place regarding drug testing that have been collectively bargained for. If the government were to step in and disrupt the nature of these already existing drug testing policies, then this would negate the essence of collective bargaining.

There are reasons why the government should not intervene in Major League Baseball's drug testing program. However, Major League Baseball should remain on its toes for situations such as the *CDT III* decision. *CDT III* deals with the confidential identity of players who test positive for performance enhancing drugs. The legal question is whether their identity is at risk if there is a pending investigation against an entity that has violated federal law, such as BALCO.

These players remain vulnerable in that sense, and unfortunately, there is very little legal precedent on this specific issue in the realm of a major league sport such as baseball.

V. Conclusion

In light of what has happened with the Melky Cabrera case, it will be interesting to see how the case pans out, especially since the FDA is playing a role in the investigation. Facts are scarce as of now, so it would be moot to further comment on this case.

More importantly, the discussion of performance enhancing drugs in Major League Baseball will remain one of the hottest topics in the sports industry. Questions of integrity and tainting will remain rampant. We have even begun to see the next huge performance-enhancing drug scandal unravel right before us. In late January of 2013, news broke that a Miami-based health clinic called Biogenesis supplied performance-enhancing drugs to numerous baseball players.⁹⁵ These players include Alex Rodriguez, Bartolo Colon, and yes, Melky Cabrera.⁹⁶

But the next step for Major League Baseball should be to continue to strictly enforce their drug testing policy to the point that government intervention would be unnecessary. Major League Baseball has taken one such initiative by addressing the use of hGH in baseball. In fact, starting this past spring training, all players will be subject to hGH blood testing for reasonable cause at all times during the year.⁹⁷ At the onset of the 2012-2013 offseason, players will be subject to random hGH testing.⁹⁸ Additionally, starting this 2013 season, Commissioner Selig

⁹⁵ Tim Elfrink, *A Miami Clinic Supplies Drugs to Sports' Biggest Names*, MIAMINEWTIMES.COM (Jan. 31, 2013), <http://www.miaminewtimes.com/2013-01-31/news/a-rod-and-doping-a-miami-clinic-supplies-drugs-to-sports-biggest-names/>.

⁹⁶ *Id.*

⁹⁷ Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement, Section IX, Page 6 (2011), *available at*: http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf.

⁹⁸ *Id.*

and the Major League Baseball Players' Association have agreed to begin in-season, unannounced, random hGH testing of its baseball players.⁹⁹ Bud Selig's goal in implementing this new hGH testing policy is to help Major League Baseball take a leadership stance in anti-doping efforts in the future.¹⁰⁰ The hope of many baseball fans is that the drug testing policy continues to be enforced effectively and that the government, quite simply, "butts out."

⁹⁹ Matt Snyder, *MLB introduces random, unannounced, in-season HGH testing*, CBSSPORTS.COM (Jan. 10, 2013, 12:48 PM), <http://www.cbssports.com/mlb/blog/eye-on-baseball/21534544/mlb-to-announce-random-unannounced-in-season-testing-for-hgh>.

¹⁰⁰ *Id.*