

BEFORE THE UNITED STATES HOUSE OF
REPRESENTATIVES COMMITTEE ON
OVERSIGHT AND GOVERNMENT REFORM

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Mr. Chairman and Members of the Committee:

My name is Donald M. Fehr, and I serve as the Executive Director of the Major League Baseball Players Association (MLBPA). I appear today in response to the Chairman's and Ranking Member's 19 December invitation to testify.

Let me begin by re-stating the MLBPA's position. As I said when I appeared before this Committee nearly three years ago, the Major League Baseball Players Association does not condone or support the use by players - or by anyone else - of any unlawful substance, nor do we support or condone the unlawful use of any legal substance. I cannot put it more plainly. The unlawful use of any substance is wrong.

Moreover, the Players are committed to dispelling any suggestion that the route to becoming a Major League athlete somehow includes taking illegal performance enhancing substances, such as steroids. It does not take a physician to recognize that steroids are powerful drugs that no one should fool around with. This is particularly true for children and young adults, as the medical research makes clear that illegal steroid use can be especially harmful to them.

Playing Major League Baseball requires talent, drive, intelligence, determination, and grit. Steroids and other unlawful performance enhancing drugs (PEDs) have no place in the game.

I appeared before this Committee in March 2005. That same year I testified before the Senate Commerce Committee and also the House Sub-Committee on Commerce, Trade and Consumer Protection. In 2004 I also appeared before the Senate Commerce Committee.

At each hearing I explained the Joint Drug Agreement (JDA) that we had reached in 2002 and which began to operate in 2003, and voiced my view that, given time, it would be effective in ridding the game of unlawful PEDs. Nevertheless, the Players took the virtually unprecedented step of reopening the JDA and improving it. We announced a stronger program in January 2005, and, then, later that same year, we did it again. Even though by all accounts the program we had in place was working very well to deter drug use, in response to the urgings of members of Congress, including members of this Committee, the players reopened the agreement a second time and announced a new, stronger, JDA in November 2005.

Among other things, the November, 2005 agreement greatly increased penalties, significantly increased the number and frequency of tests, added off-season-testing, and provided that the program would be run by an Independent Program Administrator (IPA).

When our November 2005 agreement was announced, it was praised by members of Congress of both Houses, many of whom had taken part in the various hearings. It was said to be the standard against which other leagues' programs should be measured; that it was what Congress was hoping for all along; and, that it was proof that the collective bargaining process had worked.

For his part, at the time that this agreement was announced the Commissioner of Baseball said it was "the most stringent steroid testing program in sport." Last month, just days after the Mitchell Report issued, Commissioner Selig said much the same thing.

That agreement he has praised is scheduled to run through December 2011, as do the other terms of our collective bargaining agreements.

We believe our drug agreement is the best in American professional sports. Our testing procedures are indeed state-of-the-art. The tests are conducted and the samples are collected by a well-respected independent company based in California and the samples are analyzed by the world-class WADA-certified Olympic lab in Montreal.

Our agreement contemplates that we will discuss improvements during its term, and we have done so. For example, over the past two years, the parties have implemented changes - what Senator Mitchell might call “best practices” - including the following:

- We have added language confirming that players may be disciplined for “non analytical positives” i.e., - violations of the Program that are proven through means other than testing. And this has led to a number of publicly announced suspensions;
- We have improved our rules for processing therapeutic use exemptions.
- We have improved our collection procedures by adding player chaperones to monitor players once they’ve been notified they are going to be tested that day.

- We have shortened the notice period given to Clubs that a collector is coming to the ballpark. Notice is now given the same day and only a few hours before the collector arrives.

And so the program that in November 2005 was hailed as the standard for other sports has indeed been strengthened over the past two years, and it compares quite favorably to the programs in other major sports. As Senator Mitchell's report recognizes (p. 276), baseball's program has the toughest penalties. We require year-round random testing, test players at the site of competition, test for amphetamines in addition to steroids, and our program is run by an independent administrator.

Senator Mitchell pointed out that our JDA is indeed working to detect the use of detectable performance enhancing substances. With respect to steroids, the numbers are clear: We have conducted more than 3,000 tests in each of the last two years, and the number of steroid positives we have had during that time is five. More precisely, during 2006 and 2007 we conducted 6,252 tests, and there were five steroid positives (two in 2006 and three in 2007).

But what about undetectable PEDs, most notably Human Growth Hormone (HGH)? We share Senator Mitchell's concern, and we have acted. Starting in January 2005, we banned HGH. We do not test for HGH, because there is no scientifically reliable urine test available. As soon as one is, our agreement states that HGH testing for players will begin automatically.

Even in the absence of a test, our commitment against HGH is no less strong than our commitment against steroids. We have developed and agreed to procedures which allow players to be suspended for HGH use based on evidence other than a positive test, a so called “non-analytical” finding. In both 2006 and 2007, players were suspended on that basis.

Of course, it is possible that a valid blood test for HGH will be developed before a valid urine test. However, as Senator Mitchell has indicated, if there is a blood test developed in the near future it may well be of very limited utility; i.e. a player will need to have used HGH a very short time before the test in order for it to show up. In addition there are very serious issues involved with blood tests for athletes, particularly on competition days, and in baseball we play nearly every day. As of now, no major professional sport has blood testing for PEDs. If and when a blood test becomes available, we will consider it based on the facts then available.

However, the biggest problem with HGH is very probably its availability to the American public. Anti-aging clinics and others openly advertise in magazines stressing the benefits of HGH. We will continue to take steps against HGH, but this is a societal, not just a baseball problem. If we did not know that before, the investigations into internet pharmacy sales of HGH made public over the last year have made this apparent.

All one need do in order to appreciate the magnitude of this problem is to go onto Google's website and type in the words, "Where can I buy HGH?" A few days ago this search returned 349,000 options in a quarter of a second. Advertisements for HGH can be found in newspapers and magazines nationwide. For example, in the current Continental Airlines magazine, on page 99, there is an advertisement with the following headline: "Choose life. Grow young with HGH." Abuse of HGH and other licit (and illicit) pharmaceuticals is not just baseball's problem.

Senator Schumer has introduced legislation to reclassify HGH as a Schedule III drug, making its treatment comparable to anabolic steroids. This may be a good first step. But I hope consideration will also be given to addressing the dangers of online sales and marketing of HGH that is false and misleading and to determine why so much product is available to organizations, such as Signature Pharmacy in Florida, which do not appear to be prescribing the pharmaceutical legitimately. And, as I have suggested before, serious consideration should be given to determining whether the Dietary Supplement Health and Education Act is being adequately enforced or whether the law needs to be amended. Certainly a review of DSHEA is warranted.

In addition, there clearly is more that we as players can do in the way of education. Telling our nation's kids that drugs will destroy them is only half the battle. The nation's high school athletes - - and their parents - - will still aspire to college scholarships and will still pursue their athletic dreams. Knowing what to do is as important as knowing what not to do. Ballplayers must lead the way in developing

nutrition, strength, flexibility and wellness routines. In an era of child obesity, this may turn out to be an even more powerful idea than we can appreciate today.

Let me turn now to the Mitchell Report.

Since 2002, the players and owners have worked together effectively in many ways to deal with the problems involving PEDs in baseball. Senator Mitchell's investigation, however, was a unilateral action undertaken by management. Commissioner Selig hired former Senator George Mitchell and his law firm, DLA Piper, to conduct the investigation on behalf of the owners. We had no role in it whatsoever. In such circumstances a union, including one which represents baseball players, is obligated to represent its members – all of its members - in connection with the investigation.

The MLBPA fulfilled its responsibilities. Where we thought we could cooperate with the Mitchell investigation we did. Where the rights of our members needed to be asserted, we did that. We gave appropriate legal advice to the players (and to their individual counsel) with respect to the employment consequences of the investigation, and urged players to retain individual counsel where that was appropriate. In many ways, we thought the conduct of the investigation was unfair. But, for the most part, we have avoided speaking publicly about those issues, and it would serve no purpose to do so here.

Most of the media comment and reaction to what is contained in the report has focused on the individual players who were named by Senator Mitchell, and what they are alleged to have done. That is as unfortunate as it is understandable. But, in that process, an important point may have been lost. The Mitchell Report reveals virtually nothing about drug use under our current new agreement, *i.e.* 2006 and 2007. There is not a single allegation in the report about any individual who may have used steroids during that time. There is only one incident discussed involving a player and HGH during 2006. But that incident was publicly known at that time, and the player was disciplined. In short, whatever the case was prior to our November 2005 agreement, the Report does not even remotely suggest that our current JDA is failing. To the contrary, it confirms that it is working very well.

Indeed, for the most part the revelations in the Report are quite dated, as Senator Mitchell himself noted. In fact, the Report shows little about steroid use that was not detected since we began individual random testing with disciplinary consequences in 2004, which was two years before the current agreement.

Let me now turn to the recommendations contained in the Report. I hope you can appreciate the situation in which we are placed. We had no role in writing this Report. We were not even allowed to read it prior to the time it was released to the public on December 13. And then, about the same time the press conference was ending, as I recall, we received notice this Committee was going to hold a hearing, the principal

subject of which would be when the union would agree to the Report's recommendations. This is not the way collective bargaining ordinarily occurs.

In many ways the Mitchell Report has taken us off track. We have accomplished much in this area through joint endeavors. But due to the investigation which led to the Report, we were forced to exercise our more traditional role of making sure that players being investigated by management were appropriately represented. Hopefully we can now work together in a more collaborative way with the Clubs. Again, if the positions were reversed, I hope we would have acted more constructively and inclusively. But I understand, this Committee is not interested in what was done wrong in the past. You want to know what we are willing to do going forward.

Today we are being asked to reopen our contract for the third time. It would have been much easier, in my view, to discuss changes to our program if MLB had approached us privately. Several times now in the last few years we have shown flexibility and the willingness to discuss these issues and make needed changes. Instead, we are now being asked to negotiate against the backdrop of a media extravaganza.

Nevertheless, we have never refused to discuss changes to our JDA at any time during its term, and we have advised the Commissioner that we are willing to have discussions now. A preliminary meeting was held a week ago today, and we expect to have more meetings soon. I do not know what the result of those discussions will be. I can assure you that the Players will discuss the recommendations and any other issues

which may come up in good faith, as we have done previously, and we trust that the Commissioner will do the same.

I know that many of you will urge us to adopt Senator Mitchell's recommendations. Respectfully, I hope that you will adopt his recommendation that the parties be allowed time to discuss, privately and away from the spotlight, what can and should be done.

In his report, Senator Mitchell paints a picture of an industry which, at least prior to the adoption of the JDA in 2002, had a problem with PEDs far larger than many of us, certainly including me, appreciated at the time. Indeed, our survey testing in 2003 demonstrated as much. He also suggests that everyone connected with the game bears responsibility, and is somewhat to blame, and I agree. In retrospect, we should have acted sooner. The MLBPA accepts its share of the responsibility, as do I.

We will not quibble about who deserves how much blame and for what; we instead choose to look forward. Since we reached our first Joint Drug Agreement in 2002, the Association has worked vigorously to try and combat this problem and do our best to rid the game of performance enhancing drugs. We will continue to do so. On behalf of the players I reaffirm their commitment to this.

The union's task – and my job – is to represent the players, all of the players. We represent players who use prescription medicine to address long-time medical conditions.

We represent players who want their medical records to remain confidential and private. We represent players who have been wrongly accused of misconduct and have been vindicated. We represent players who, even if they may have made mistakes, nevertheless are entitled to due process and a fair defense. We represent players who share an interest in collection procedures that ensure the integrity of samples, but also respect privacy and do not interfere with the integrity of competition. We represent players who believe that only scientifically validated tests should be used as the basis for punishment. We represent players who understand that they are not above the law, but believe that products that are publicly available should not be banned. We represent players who believe that no one should have their reputations forever tarnished without the opportunity first to confront their accuser and have a neutral weigh the evidence.

Indeed, we represent all of the players. The union and its players have demonstrated, time and time again since 2002, that we are committed to the fight against performance enhancing drugs. That commitment, we believe, cannot now be fairly questioned.

In conclusion, Mr. Chairman, the Players will discuss Senator Mitchell's recommendations and any other issues which may come up in good faith, as we have done previously, and we trust the Commissioner will do the same. We have already begun those meetings. The meetings will need to be expanded to include not only the players but the Commissioner as well. We are not in a position today to pass judgment on the recommendations; indeed, the Commissioner has yet to make clear to the players

the details of what he is proposing. But you have my commitment that we will meet not only on the ideas suggested by Senator Mitchell but other suggestions and proposals as well, in order to ensure that the Joint Drug Agreement in baseball not only remains the best in professional sports but is one that is as effective as it is fair.