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COMMENTS

STEROID TESTING POLICIES IN PROFESSIONAL SPORTS: REGULATED BY CONGRESS OR THE RESPONSIBILITY OF THE LEAGUES?

I. INTRODUCTION

Drug testing¹ for performance enhancing drugs in professional team sports² has become a major topic of interest due to extensive media coverage of recent sports doping issues and Congress's involvement with the issue. At the heart of the issue is whether drug testing policies should be regulated by Congress or remain under the control of the sports leagues and players to implement as they see fit. This issue carries with it short- and long-term consequences affecting the leagues, the players, and their interactions with each other. Also affected are those who watch, and at times live,³ the entertainment that is professional sports. The fans' perceptions of the integrity and fairness of the game are at stake, and with it, the viability and well-being of the leagues.

Although steroid use may have been present in professional sports in the past, only recently has it come to the forefront, due in large part to Major League Baseball (MLB).⁴ Much of this attention began in 1998 when

1. Drug testing as used throughout this Comment will refer to drug testing for steroids and other performance enhancing drugs and not drug testing for narcotics such as marijuana and cocaine. Professional leagues have been drug testing for narcotics longer than they have been testing for performance enhancing drugs, and testing positive for narcotics often has different consequences than testing positive for performance enhancing substances.

2. Professional sports as used in this Comment will refer to the four major professional sports leagues in the United States: Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL).

3. Sports fans tend to form strong emotional alliances with specific teams, with their emotional well-being resting on whether their team wins or loses.

4. This Comment pertains to the four major professional sports leagues; however, the actions of MLB players attracted much of the initial attention to steroid use in professional sports, and consequently, were a primary focus of congressional action.

Androstenedione (Andro) was discovered in Mark McGwire's locker.⁵ However, at the time, most steroids and performance enhancing drugs were not banned by MLB.⁶ Four years later, in 2002, a federal investigation of the Bay Area Laboratory Cooperative (BALCO) began.⁷ BALCO was a company that created a designer steroid, THG, which was, at that time, undetectable.⁸ Home run giant Barry Bonds⁹ was a BALCO client, although he denied knowingly taking THG.¹⁰ Later in 2002, Jose Canseco and Ken Caminiti claimed that eighty-five percent and fifty percent, respectively, of MLB players used steroids.¹¹

In 2004, President Bush included drug testing in his State of the Union address, calling for professional sports leagues to increase their fight against steroid use by players:

Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.¹²

5. Major League Baseball, *Drug Policy in Baseball Event Timeline*, MLB.COM, http://mlb.mlb.com/NASApp/mlb/mlb/news/drug_policy.jsp?content=timeline (last visited Feb. 9, 2006) [hereinafter *MLB Drug Policy Timeline*]. McGwire is currently seventh all-time for home runs hit with 583. *MLB Home Run Tracker*, ESPN.COM, <http://sports.espn.go.com/mlb/hrtracker> (last visited July 17, 2006). He also set the record for the most home runs hit in a season with seventy before it was eclipsed by Barry Bonds. *All-Time Single-Season Home Run Leaders*, ESPN.COM, <http://sports.espn.go.com/mlb/alltime/leaders?breakdown=0&year=0&type=0&sort=8> (last visited July 17, 2006).

6. *MLB Drug Policy Timeline*, *supra* note 5.

7. *Balco Investigation Timeline*, USA TODAY, Aug. 3, 2005, <http://www.usatoday.com/sports/balco-timeline.htm>.

8. *Id.*

9. Bonds is currently second all-time for home runs hit, twenty-one behind the leader, Hank Aaron. *MLB Home Run Tracker*, *supra* note 5. Bonds also holds the record for the most home runs hit in a season with seventy-three. *All-Time Single-Season Home Run Leaders*, *supra* note 5.

10. *Balco Investigation Timeline*, *supra* note 7.

11. John Shea & Susan Slusser, *Baseball Players' Tests Show Steroid Use; Dozens of Positives to Bring Continued Checks, New Penalties*, S.F. CHRON., Nov. 14, 2003, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/11/14/MNG0V31U7Q1.DTL>.

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

Because all of the professional leagues were slow to implement changes in their drug testing policies, their ability to self-police was in doubt and Congress heeded the President's call to action as its own. In 2005, Congress introduced multiple bills designed to regulate drug testing in the professional sports leagues.¹³

Although significant attention has been given to professional athletes' use of performance enhancing drugs by the media and Congress, whether the use of such substances by athletes is a significant problem when examined across all of the professional sports leagues¹⁴ is debatable. During the 2005 season, twelve MLB players received suspensions for violating the steroid policy,¹⁵ and in 2006, none have tested positive so far.¹⁶ In the minor leagues, thirty-four players tested positive during 2006.¹⁷ No NHL players tested positive during the 2005–2006 season.¹⁸

This Comment proposes that, while it is in the best interests of the leagues to promulgate drug testing policies that are perceived by the public as protecting the integrity of the game, it is not, and should not be, Congress's responsibility to mandate a drug testing policy to which all the leagues must adhere. This Comment will focus on: (1) collective bargaining in professional sports, (2) the drug testing policies of the four professional sports leagues, (3) Congress's proposed drug testing requirements and a comparison with the leagues' current policies, (4) a legal analysis on the premise that Congress did enact a mandatory drug testing policy, and (5) an analysis of where the

13. The bills include four in the House of Representatives: Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, H.R. 2565, 109th Cong. (superceded by H.R. 1862); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong.; and three in the Senate: Clean Sports Act of 2005, S. 1114, 109th Cong. (companion bill to H.R. 2565); Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); and Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. (2005).

14. While a rash of positive drug tests in 2006 of track stars Justin Gatlin and Marion Jones (who was later cleared of charges) and Tour de France winner Floyd Landis seem to indicate that use of performance enhancing drugs is a problem, these athletes are individual athletes and not team sport athletes who Congress is focusing its attention toward. See *infra* section IV.

15. *Lawton Becomes 12th Suspended for Steroids*, ESPN.COM, Nov. 2, 2005, <http://sports.espn.go.com/mlb/news/story?id=2211753>.

16. Statistic current through August 30, 2006. See Barry M. Bloom, *Grimsley Suspended for 50 Games*, MLB.COM, June 12, 2006, http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20060612&content_id=1501780&vkey=news_mlb&fext=.jsp&c_id=mlb. As the title suggests, Grimsley was suspended for violating the drug testing policy, but he did not test positive for performance enhancing drugs. *Id.*

17. *Dodgers Minor Leaguer Suspended 50 Games*, ESPN.com, Aug. 29, 2006, <http://sports.espn.go.com/espn/wire?section=mlb&id=2565462>.

18. *No Players Failed Drug Tests This Season, NHL Says*, ESPN.COM, June 12, 2006, <http://sports.espn.go.com/nhl/news/story?id=2481131>.

responsibility of regulating drug testing in professional sports should fall.

II. COLLECTIVE BARGAINING IN PROFESSIONAL SPORTS

Unionization and collective bargaining by players in professional sports leagues is regulated by the National Labor Relations Act (NLRA), which governs employer-employee relations.¹⁹ The NLRA gives employees the right to form and join labor organizations, collectively bargain, and “engage in other concerted activities for the purpose of collective bargaining.”²⁰

The first union of players in professional sports was the National Basketball Players Association, which formed in 1964,²¹ followed closely by the Major League Baseball Players Association in 1965.²² Two years later, the National Hockey League Players Association was formed,²³ and lastly, the National Football League Players Association in 1970.²⁴

Shortly after, or concurrently with, the formation of players’ unions, the first collective bargaining agreements (CBAs) were created between the players and the owners. The National Basketball Players Association completed the first CBA of any of the professional sports leagues in 1964,²⁵ with MLB players following in 1968.²⁶ While the complexity of, and important issues in, CBAs have changed since the first agreements, they are still the “primary basis for determining legal relationships between owners and

19. National Labor Relations Act, 29 U.S.C. §§ 151–69 (1994). Professional sports are covered by the NLRA because the National Labor Relations Board ruled that professional sports leagues are an industry affecting interstate commerce, which is the requisite nexus to be covered under the NLRA. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 513 (2005).

20. 29 U.S.C. § 157.

21. See NBA Players Ass’n, *NBPA History*, <http://nbpa.com/history.php> (last visited Oct. 20, 2005). The NBPA was formed in 1954 but was not recognized by the owners as the exclusive bargaining representative of the players until 1964. See *id.*

22. Major League Baseball Players Ass’n, *MLBPA Info*, <http://mlbplayers.mlb.com/NASApp/mlb/pa/info/history.jsp> (last visited Oct. 20, 2005). Many efforts over the years were taken to unionize players in baseball, including the first baseball union, the Brotherhood of Professional Base Ball Players in 1885. *Id.*

23. Nat’l Hockey League Players Ass’n, *Origins of the NHLPA*, <http://nhlpa.com/AboutTheNHLPA/Whats.asp> (last visited Oct. 20, 2005).

24. Nat’l Football League Players Ass’n, *History*, http://www.nflpa.org/AboutUs/NFLPA_History.aspx#6 (last visited Feb. 2, 2007). Although the association was formed in 1956, it was not formally recognized as a union until 1970. See *id.*

25. NBA Players Ass’n, *supra* note 21. However, the NFLPA had the first rudimentary forms of bargaining, with the NFL owners acquiescing to the demands of the players after the players won a court case that held the NFL was subject to antitrust laws. Nat’l Football League Players Ass’n, *supra* note 24.

26. Major League Baseball Players Ass’n, *supra* note 22.

players in professional sports today."²⁷

In the collective bargaining relationship, the NLRA requires the employee and employer to bargain in good faith for "wages, hours, and other terms and conditions of employment."²⁸ Failure by either party to bargain over these terms at the request of the other party, or the employer unilaterally implementing these terms, will constitute an unfair labor practice.²⁹ Because players in the professional leagues are unionized, the union and owners must follow the NLRA's mandates governing collective bargaining.³⁰

In the context of the NLRA, what constitutes wages, hours, and terms and conditions of employment is not always clear. However, it has been established that drug testing of employees is a mandatory subject of collective bargaining, and therefore, it must be bargained for in good faith.³¹ Therefore, before professional sports leagues can implement drug testing, the policies must be collectively bargained for between the players' union and the league; the league or teams cannot unilaterally implement a policy.

By its nature, collective bargaining takes a significant amount of time and effort, with changes to the CBA slow to happen. This is also true for drug testing policies, where compromise may not be easily attained. The players have a lot at stake and the unions are hesitant to agree to broad policies with harsh penalties.³² While the union and the players are concerned with the privacy of the athletes,³³ "the consequences to the athlete for proven drug usage" is the greatest concern.³⁴ These consequences range from partial season suspensions to loss of salaries and endorsement deals and possibly the end of careers.³⁵

III. SURVEY OF STEROID TESTING POLICIES OF THE PROFESSIONAL SPORTS

27. MITTEN, *supra* note 19, at 586.

28. National Labor Relations Act, 29 U.S.C. § 158(d) (1994).

29. *Id.*

30. See Allan H. "Bud" Selig & Robert D. Manfred Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 48 (2004).

31. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989) (finding that drug and alcohol testing is a mandatory subject of collective bargaining because it is "germane to the working environment, and outside the scope of managerial decisions," which are two criteria the Supreme Court had established for mandatory subject matters).

32. MITTEN, *supra* note 19, at 658.

33. In respect to drug testing, professional athletes have only the privacy interests given to them by the CBA; therefore, unions are hesitant to agree to harsher drug testing measures, such as increasing the number of times a player can be tested and adding off-season testing to give the athletes more privacy. See *id.*

34. *Id.*

35. *Id.*

LEAGUES

In 2005, drug testing policies in professional sports underwent significant changes. These changes were due to new CBAs and the pressure put on the leagues by Congress. Of the four major professional leagues, the NBA and the NHL negotiated new CBAs in 2005, which contained updated steroid testing policies, and MLB collectively bargained a new drug testing policy. These new policies differ extensively from the previous versions in the type of testing, the frequency of player testing, and the penalties for violating the policy.

A. National Basketball Association

Drug testing for steroids under the 1999 CBA provided for testing in three situations. First, a player could be tested for reasonable cause.³⁶ Reasonable cause was determined by an independent expert, who was responsible for examining the relevant information and deciding if there was reasonable cause to test the player.³⁷ Second, all first-year players were required to be tested.³⁸ The CBA required testing of all first-year players once during training camp and at any time during the season, on no more than three occasions.³⁹ Third, veteran players could be tested on a limited basis—only once during training camp.⁴⁰ Players were tested for fifteen different steroids,⁴¹ and the penalties for testing positive were a five-game suspension for the first positive test, a ten game suspension for the second, and a twenty-five game suspension for any subsequent violation.⁴²

The 2005 CBA instituted a more stringent drug testing policy, increasing the number of prohibited substances and penalties and introducing random drug testing for all players.⁴³ Under the policy, a player can be randomly tested up to four times each season. Any player, regardless of status, must “undergo testing . . . without prior notice . . . [and] testing . . . will be conducted according to a random player selection procedure by a third-party

36. See NAT'L BASKETBALL PLAYERS ASS'N, NBPA COLLECTIVE BARGAINING AGREEMENT art. XXXIII § 5 (1999).

37. *Id.*

38. *Id.* § 6.

39. *Id.*

40. *Id.* § 7.

41. *Id.* exhibit I-2.

42. *Id.* art. XXXIII, § 10(c).

43. NAT'L BASKETBALL PLAYERS ASS'N, NBPA COLLECTIVE BARGAINING AGREEMENT art. XXXIII (2005) [hereinafter 2005 NBA CBA].

organization.”⁴⁴ Under the policy, the “list of performance enhancing drugs has been substantially broadened”⁴⁵ to include eighty-seven steroids, performance enhancing drugs, and masking agents.⁴⁶ Also, the penalties for violating the policy have been increased, with a ten-game suspension for the first positive test, a twenty-five game suspension for the second, a one-year suspension for the third, and permanent dismissal from the league for the fourth violation.⁴⁷

B. National Football League

The NFL has been at the forefront of steroid testing in professional sports in the United States. The NFL began testing in 1987, suspending players in 1989, and testing year-round in 1990.⁴⁸ Additionally, the league has continually updated its list of prohibited substances to stay ahead of designer steroids.⁴⁹ In fact, the league banned the use of Andro before Congress designated it a controlled substance and Ephedra before the Food and Drug Administration (FDA) banned it.⁵⁰

Under the 1998 CBA, all players were tested at least once a year in training camp.⁵¹ During the preseason and regular season, players were randomly selected each week to undergo drug testing.⁵² For in-season testing, there was no limit on the number of times a player could be tested, and players participating on a team that made the playoffs were subject to random testing for as long as their team remained active.⁵³ For off-season testing, players were selected in the same manner as in-season testing and could be tested up to two times.⁵⁴ Players were tested for sixty-one performance enhancing

44. *Id.*

45. Nat'l Basketball Ass'n, CBA Principle Deal Points § IV, http://www.nba.com/news/cba_summary_050804.html (last visited Oct. 10, 2005).

46. See 2005 NBA CBA, *supra* note 43, exhibit I-2.

47. *Id.* art. XXXIII § 9(c). Under permanent dismissal, a player cannot participate in the league for a minimum of two years. Nat'l Basketball Ass'n, *supra* note 45, §§ 11–12. After two years, he can apply for reinstatement. *Id.*

48. *The Drug Free Sports Act of 2005: Hearings on H.R. 1862 Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. On Energy and Commerce*, 109th Cong. 105 (2005) [hereinafter *Hearings on H.R. 1862*] (statement of Gene Upshaw, Executive Director, National Football League Players Association).

49. *Id.* at 98 (statement of Paul Tagliabue, Commissioner, National Football League).

50. *Id.* at 100.

51. NAT'L FOOTBALL PLAYERS ASS'N, STEROID POLICY § 3(A) (1998).

52. *Id.*

53. *Id.*

54. *Id.*

substances,⁵⁵ and if they violated the testing policy, were subject to a four-game suspension for the first positive test, a six game suspension for the second, and at least a twelve month suspension for the third violation.⁵⁶ In 2006, the NFL and the Players Association agreed on a new steroid testing policy.⁵⁷ The new policy is similar to the previous policy, except that players can be tested up to six times in the off-season⁵⁸ for eighty-four performance enhancing substances⁵⁹ and will be suspended for eight games for the second positive test.⁶⁰

C. Major League Baseball

In 2002, for the first time ever, the league and players agreed on a drug testing policy for steroids as part of their CBA.⁶¹ Until 2002, the union had refused to collectively bargain over any steroid testing, claiming that it invaded the players' privacy and "was an abuse of human rights."⁶² The CBA required survey testing of players for the 2003 season.⁶³ Under the survey testing, each player was tested twice with no punishment for a positive test.⁶⁴ If more than five percent of players tested positive, then mandatory testing for the following seasons would be implemented until positive tests were under two and one-half percent in consecutive years.⁶⁵ During the 2003 season, 1438 players were survey tested, with between five and seven percent of the players testing positive.⁶⁶ Thus, mandatory testing was implemented for the 2004 season, but under this testing, a player testing positive was subject only to further testing and a treatment program; no suspensions were included in

55. *See id.* app. A. These substances included thirty-four anabolic agents, nineteen masking agents, and eight stimulants. *Id.*

56. *Id.* § 6.

57. NAT'L FOOTBALL LEAGUE, POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES (2006), available at <http://nflpa.com/PDFs/rulesandregs/bannedsubstances.pdf>.

58. *Id.* § 3(A).

59. *See id.* app. A (listing forty-seven anabolic agents, twenty-two masking agents, five hormones and other agents, and ten stimulants).

60. *Id.* § 6.

61. Scott Danaher, Comment, *Drug Abuse in Major League Baseball: A Look at Drug Testing in the Past, in the Present, and Steps For the Future*, 14 SETON HALL J. SPORTS & ENT. L. 305, 322 (2004).

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

63. *MLB Drug Policy Timeline*, *supra* note 5.

64. Danaher, *supra* note 61, at 323.

65. *Id.*

66. *MLB Drug Policy Timeline*, *supra* note 5.

the punishment for violating the policy.⁶⁷

For the 2005 season, the league and the union agreed upon a more stringent drug testing policy.⁶⁸ Under this policy, all players were subject to random testing for forty-five banned steroids and various other precursors⁶⁹ at least once during the season.⁷⁰ Discipline included a ten-day suspension for the first positive test, a thirty-day suspension for the second, a sixty-day suspension for the third, and a one year suspension for the fourth violation.⁷¹ During the 2005 season, twelve players were suspended for violating the steroid policy, all of them receiving the ten-day suspension.⁷²

Toward the beginning of the 2005 season, Commissioner Selig requested that the players' union chief, Don Fehr, reopen negotiations on the drug policy.⁷³ Selig proposed a fifty game suspension for the first positive drug test, a one hundred game suspension for the second, and a permanent ban for the third violation.⁷⁴ The union later countered the proposal, offering to accept a policy that started with a twenty game suspension for the first offense.⁷⁵ An agreement between the two sides was expected by the end of October 2005,⁷⁶ and a new drug policy for the 2006 season was announced mid-November.⁷⁷

The new policy tests all athletes for steroids and amphetamines⁷⁸ once

67. *Id.*

68. See MAJOR LEAGUE BASEBALL, ATTACHMENT 18, BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION (2005), available at http://mlb.mlb.com/mlb/downloads/joint_drug_prevention_and_treatment_program_2005.pdf [hereinafter MLB Drug Testing Policy].

69. *Id.* § 2(B).

70. *Id.* § 3(A)(1).

71. *Id.* § 9(B).

72. *Lawton Becomes 12th Suspended for Steroids*, *supra* note 15.

73. *MLB Drug Policy Timeline*, *supra* note 5.

74. *Id.*

75. *New Steroids Policy Could Happen by Series*, ESPN.COM, Sept. 28, 2005, <http://sports.espn.go.com/espn/print?id=2174716&type=story>.

76. *Id.*

77. Press Release, Major League Baseball, MLB, MLBPA Announce New Drug Agreement (Nov. 15, 2005), available at http://mlb.mlb.com/NASApp/mlb/news/press_releases/press_release.jsp?ymd=20051115&content_id=1268552&vkey=pr_mlb&fext=.jsp&c_id=mlb?

78. Amphetamines are stimulants used to increase alertness and physical ability. Division of Alcohol and Drug Abuse, *Stimulants*, <http://www.well.com/user/woa/fsstim.htm> (last visited Dec. 7, 2005). They are a controlled substance, obtained only through a prescription from a doctor. *Id.* Amphetamines are viewed by most as being more widely used by MLB players than steroids. Mark Kreidler, *Baseball Finally Brings Amphetamines into Light of Day*, ESPN.COM, Nov. 15, 2005, http://sports.espn.go.com/mlb/columns/story?columnist=kreidler_mark&id=2225013. The use of

during the pre-season and at least once during the season.⁷⁹ Players are also subject to unlimited random testing throughout the season and off-season.⁸⁰ The penalties for testing positive for a steroid are fifty games for the first positive test, one hundred games for the second, and a lifetime ban for the third violation.⁸¹ For amphetamines, a player is subject to mandatory follow-up testing for the first positive test, a twenty-five game suspension for the second, eighty game suspension for the third, and discipline by the commissioner of up to a lifetime ban for the fourth violation.⁸²

D. National Hockey League

The NHL's first steroid testing policy was introduced in the 2005 CBA. Under the policy, every player is subject to two random tests during the season⁸³—one as part of the player's whole team being tested and one where the player is tested individually.⁸⁴ Penalties for testing positive for a steroid are a twenty-game suspension for the first positive test, a sixty game suspension for the second, and a permanent suspension for the third violation.⁸⁵

IV. CONGRESSIONAL ACTION

Six bills introduced in Congress in 2005 sought to regulate the use of performance enhancing drugs in professional sports by requiring mandatory drug testing. However, each bill undertakes to accomplish this in a slightly different way from its counterparts in terms of which leagues must implement the policy, the number of times a player could be tested, the prohibited substances, and the penalty for testing positive for a performance enhancing drug.

Congress introduced these bills seeking to regulate drug testing in

amphetamines in MLB goes back to the 1980s, and it is estimated that as many as fifty percent of MLB players use them to get energy before games. *Id.*

79. Press Release, Major League Baseball, *supra* note 77.

80. *Id.*

81. *Id.* However, a player can seek reinstatement to the league after serving a two-year suspension. *Id.*

82. *Id.*

83. NAT'L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION art. 47.6 (2005) [hereinafter NHL CBA].

84. Nat'l Hockey League, *NHL, NHLPA Team Up Against Performance-Enhancing Substances*, NHL.COM, July 22, 2005, http://www.nhl.com/nhlhq/cba/drug_testing072205.html.

85. NHL CBA, *supra* note 83, art. 47.7.

professional sports for a variety of reasons. The two main justifications set forth were protecting the “integrity and value of sports and . . . reduc[ing] performance enhancing substance use by youth.”⁸⁶ Congress felt that steroid use in professional sports was undermining the values of sports by desecrating the “honesty, integrity, and innate human ability,” cheating the athletes, fans, and the history of the sport,⁸⁷ and setting a bad example for young athletes who look up to the professional athletes as role models.⁸⁸

*A. Drug Free Sports Act*⁸⁹

The Drug Free Sports Act, introduced in the House of Representatives, is the most developed of the bills in Congress.⁹⁰ It would require that the four major professional sports leagues, as well as Major League Soccer and the Arena Football League, implement the guidelines set forth in the bill.⁹¹ The bill requires that each athlete be tested a minimum of five times each year, regardless of whether the athlete is in-season or out-of-season.⁹² For prohibited substances, the bill would adopt the Prohibited Substances List as contained in the World Anti-Doping Association (WADA) Code.⁹³ However, the Secretary of Commerce, who is in charge of issuing the regulations, can add substances known to be performance enhancing in a sport and remove substances with no enhancing effect for professional athletes.⁹⁴ An athlete is

86. COMM. ON ENERGY AND COMMERCE, DRUG FREE SPORTS ACT, H.R. REP. NO. 109-210, pt. 1, at 4 (2005).

87. *Hearings on H.R. 1862, supra* note 48, at 1 (statement of Cliff Stearns, Rep., Fla.).

88. COMM. ON ENERGY AND COMMERCE, DRUG FREE SPORTS ACT, H.R. REP. NO. 109-210 pt. 1, at 4.

89. Drug Free Sports Act, H.R. 3084, 109th Cong. (2005).

90. The Act has had the most congressional action and is the only bill to get as far as having a Congressional Report to accompany it.

91. H.R. 3084 § 2(2).

92. *Id.* § 3(a)(1).

93. *Id.* § 3(2)(A)(i). WADA is an independent international anti-doping agency whose primary responsibility is the development and oversight of the World Anti-Doping Code (the Code). See World Anti-Doping Agency, *Mission*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Oct. 24, 2005). The Code is a uniform set of anti-doping rules adopted by most national anti-doping organizations and international sport federations throughout the world. World Anti-Doping Agency, *Q & A on the Code*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367> (last visited Oct. 24, 2005). As part of the Code, the Prohibited Substances List is comprised of 150 banned substances. See WORLD ANTI-DOPING AGENCY, THE 2006 PROHIBITED LIST INTERNATIONAL STANDARD (2006), available at http://www.wada-ama.org/rtecontent/document/2006_LIST.pdf.

94. COMM. ON ENERGY AND COMMERCE, DRUG FREE SPORTS ACT, H.R. REP. NO. 109-210, at 13.

subject to a half-season suspension for the first positive test, a full season suspension for the second positive test, and a permanent suspension for any subsequent positive test.⁹⁵ If a league does not comply with the testing policies and procedures set forth in the bill, it would be fined \$5 million initially with a possibility of additional fines of \$1 million for each day of noncompliance.⁹⁶

B. Clean Sports Acts of 2005,⁹⁷ Professional Sports Integrity Act of 2005,⁹⁸ and Professional Sports Integrity and Accountability Act⁹⁹

These bills are very similar, differing only in the leagues required to adhere to the act and the number of times an athlete can be randomly tested. The Professional Sports Integrity and Accountability Act, similar to the Drug Free Sports Act, requires that the Arena Football League, Major League Soccer, the Women's NBA, and minor league baseball, in addition to the four major professional sports, implement the requirements as set forth in the bill.¹⁰⁰ The remaining bills pertain only to the four major professional sports leagues.¹⁰¹

The final difference between the bills is the range of testing required. The least restrictive bill requires an athlete to be tested a minimum of three times during a calendar year.¹⁰² On the other hand, the most stringent bill requires testing five times a year, including three times during the season and twice during the off-season.¹⁰³ The remaining bill requires testing four times a year—twice during the season and twice during the off-season.¹⁰⁴

The similarity of the bills is in the types of prohibited substances and the severity of the penalty for violating the policy. All of the bills would adopt the prohibited substances list from the United States Anti-Doping Agency (USADA).¹⁰⁵ Additionally, all of the bills would require a two-year

95. H.R. 3084 § 3(5)(a).

96. *Id.* § 4.

97. Clean Sports Act of 2005, H.R. 2565, 109th Cong. (2005); Clean Sports Act of 2005, S. 1114, 109th Cong. (2005).

98. Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (2005).

99. Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005).

100. S. 1334 § 3(5).

101. H.R. 2565 § 723(4); S. 1114 § 3(4); H.R. 2516 § 3(2).

102. S. 1334 § 5(d)(1).

103. S. 1114 § 4(b); H.R. 2565 § 724(b).

104. H.R. 2516 § 4(b)(1).

105. S. 1114 § 4(b); H.R. 2565 § 724(b); H.R. 2516 § 4(b)(3); S. 1334 § 5(b). In essence, this is the same as adopting the WADA Code's Prohibited Substances List, as USADA adopts the Prohibited

suspension for the first positive test and a lifetime ban for the second violation.¹⁰⁶ However, under the Clean Sports Acts, a league could impose a lesser penalty if the athlete “did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used the prohibited substance.”¹⁰⁷

*C. Integrity in Professional Sports Act*¹⁰⁸

The Integrity in Professional Sports Act was introduced in response to MLB and the union not agreeing on a more stringent drug testing policy by the promised date.¹⁰⁹ The sponsor of the bill, Jim Bunning, said that “the World Series has come and gone, and they still have not come to an agreement, so we’re going to move ahead in Congress.”¹¹⁰ He was also of the “opinion that [MLB] and the players union w[ould] not come to an agreement that’s satisfactory.”¹¹¹

The bill is very similar to its predecessors, applying to the four major sports leagues,¹¹² requiring a minimum of five tests in a calendar year, three during the season and two during the off-season,¹¹³ and mandating a two-year suspension for the first positive test and a permanent suspension for the second violation.¹¹⁴ However, the bill does not specify which prohibited substances would be tested for, only that athletes will “be tested for all prohibited substances and prohibited methods for which testing is reasonable and practicable at the time of the administration of each test.”¹¹⁵ It also urges the leagues to invalidate any personal records set by athletes using performance enhancing drugs.¹¹⁶

Substances List. See UNITED STATES ANTI-DOPING AGENCY, 2005 GUIDE TO PROHIBITED SUBSTANCES AND PROHIBITED METHODS OF DOPING 5 (2005), available at http://www.usantidoping.org/files/active/what/usada_guide.pdf; see also discussion *supra* note 93.

106. S. 1114 § 7(b); H.R. 2565 § 724(7)(B)(i); H.R. 2516 § 4(b)(6); S. 1334 § 5(e)(1).

107. S. 1114 § 7(b); H.R. 2565 § 724(7)(B)(i).

108. Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005).

109. The promised date was by the end of the 2005 World Series. See discussion *supra* Part III.C.

110. Howard Fendrich, *Bunning, McCain Plan New Steroids Bill*, WASH. POST, Nov. 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110100757.html>.

111. *Id.*

112. S. 1960 § 4(7).

113. *Id.* § 6(c)(1)(A).

114. *Id.* § 6(d)(1).

115. *Id.* § 6(c)(3)(A).

116. *Id.* § 3(1).

D. Comparison with the Leagues' Policies

The bills proposed by Congress are considerably more stringent on steroid testing in professional sports than even the harshest policy formed by any individual league. They differ significantly on the number of times a player can be tested, the prohibited substances tested for, and the length of suspension.

Under Congress's proposed bills, a player would be subject to testing three to five times a year.¹¹⁷ The NBA's policy has a mandated maximum testing of five times a year,¹¹⁸ the NFL requires testing at least once with no maximum,¹¹⁹ MLB requires testing twice with no maximum,¹²⁰ and the NHL limits testing to two "no notice" tests.¹²¹

Second, under Congress's bills, the professional leagues would be required to test for substances as declared by the Prohibited Substances List of the WADA Code.¹²² None of the sports leagues adopt this list and instead test for substances that the union and the league can agree upon in collective bargaining. The substances included under the Prohibited Substances List are considerably more inclusive than those tested for by the leagues. The WADA list includes over 150 substances¹²³ while the NBA, testing for the most substances, includes eighty-seven.¹²⁴ Similarly, the NFL tests for eighty-four substances.¹²⁵ However, the Drug Free Sports Act could accommodate the leagues' prohibited substances by allowing the Secretary of Commerce to individualize the policy by leaving out substances not shown to be performance enhancing in a particular sport.¹²⁶

Lastly, and most importantly, is the difference in the penalties for testing positive for a performance enhancing substance under Congress's bills

117. *Compare* Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. § 5(e)(1) (2005) (requiring testing three times a year) *with* Clean Sports Act of 2005, S. 1114, 109th Cong. § 4(b) (2005) (requiring testing five times a year).

118. 2005 NBA CBA, *supra* note 43, § 6(a).

119. NAT'L FOOTBALL PLAYERS ASS'N, *supra* note 51, § 3(A).

120. Press Release, Major League Baseball, *supra* note 77.

121. NAT'L HOCKEY LEAGUE, *supra* note 83.

122. Drug Free Sports Act, H.R. 3084, 109th Cong. § 3(2)(a)(i) (2005). Some bills, such as the Clean Sports Act, adopt the Prohibited Substances List from the USADA. Clean Sports Act of 2005, H.R. 2565, 109th Cong. § 724(b). However, the USADA list is the same as the WADA list. *See* discussion *supra* note 105.

123. *See* WORLD ANTI-DOPING AGENCY, *supra* note 93.

124. *See* 2005 NBA CBA, *supra* note 43, exhibit I-2.

125. NAT'L FOOTBALL LEAGUE, *supra* note 57, app. A.

126. COMM. ON ENERGY AND COMMERCE, DRUG FREE SPORTS ACT, H.R. REP. NO. 109-210, at 13 (2005).

and those imposed by the leagues. The least stringent bill would require a half-season suspension for the first positive test, a full-season suspension for the second, and a permanent suspension for the third violation.¹²⁷ The majority of the bills, however, require a two-year suspension for the first positive test and a permanent suspension for the second violation.¹²⁸

A full season suspension would equate to eighty-two games for the NBA and NHL, one hundred and sixty-two for MLB, and sixteen for the NFL. Under the least stringent penalty, as proposed by the Drug Free Sports Act, an athlete would face a forty-one game suspension in the NBA and NHL, an eighty-one game suspension in MLB, and an eight-game suspension in the NFL for his first positive test.¹²⁹ In contrast, under the leagues' agreements, a first positive test requires a ten-game suspension in the NBA,¹³⁰ a twenty-game suspension in the NHL,¹³¹ a fifty-game suspension in MLB,¹³² and a four-game suspension in the NFL.¹³³ Thus, even under the most lenient of Congress's proposals, the penalty imposed is seventy-five percent greater than the most severe league requirement and more than double that of the other three leagues' requirements. The harsher penalty, the two-year suspension for the first positive test, as proposed by the majority of legislation,¹³⁴ would be around eight times longer than the most severe league penalty.

E. Impact of Congressional Action on the Leagues' Steroid Policies

Government-mandated requirements for steroid testing would significantly alter the professional sports leagues' steroid testing policies. Currently, all of the leagues have policies whose provisions would not meet even the most lenient of Congress's proposals,¹³⁵ and therefore, they would be

127. Drug Free Sports Act, H.R. 3084, 109th Cong. § 3(5)(A).

128. Clean Sports Act of 2005, H.R. 2565, 109th Cong. § 724(7)(A) (2005); Clean Sports Act of 2005, S. 1114, 109th Cong. § 7(b) (2005); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. § 4(b)(6) (2005); Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. § 5(e)(1) (2005). These penalties mirror those of the WADA code. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 10.2 (2003), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf.

129. H.R. 3084 § 3(5)(A). This is a half-season suspension for the first positive test as required by the bill.

130. Nat'l Basketball Ass'n, *supra* note 45, § 9(B).

131. NAT'L HOCKEY LEAGUE, *supra* note 83.

132. Press Release, Major League Baseball, *supra* note 77.

133. NAT'L FOOTBALL PLAYERS ASS'N, *supra* note 51, § 6.

134. See sources cited *supra* note 128.

135. See discussion *supra* Part IV.D. While all of the leagues' policies, except the NHL's, would meet the bills' requirements for the number of times a player must be tested, none of them would meet the requirements that would be imposed for the substances tested for and penalties for testing positive.

required to strengthen their policies to the minimum required by the act. Under the Drug Free Sports Act, the leagues would be “require[ed] . . . to adopt and enforce policies and procedures for testing athletes . . . for the use of performance enhancing substances. Such policies and procedures shall, at minimum, include” the requirements as set forth by the bill.¹³⁶ Similarly, the other prominent bill, the Integrity in Professional Sports Act, requires the following:

Each professional sports league shall adopt and enforce policies and procedures to—(1) proscribe the use of prohibited substances and prohibited methods by each professional athlete competing in a professional sports event of the league; [and] (2) test for the use of prohibited substances and prohibited methods by each professional athlete competing in a professional sports event of the league . . .¹³⁷

Furthermore, the bill makes it “unlawful for a professional sports league to organize, sponsor, endorse, promote, produce, or recognize a professional sports event without adopting and enforcing a testing policy that meets or exceeds the requirements” of the bill.¹³⁸ These provisions would clearly require the leagues to, at a minimum, adopt the steroid policy requirements as set forth in the bill. Thus, to a large extent, government-mandated requirements would remove steroid policies from collective bargaining.¹³⁹ While the leagues and unions could bargain for a more stringent policy,¹⁴⁰ it is highly unlikely given the difficulty in bargaining for the current policies.

V. LEGAL CHALLENGE TO LEAGUE STEROID TESTING POLICIES

The current drug testing policies of professional sports leagues are promulgated through collective bargaining between the players’ unions and the leagues.¹⁴¹ Because these policies are formed through collective bargaining and implemented by the leagues, who are private actors, athletes are rarely able to challenge steroid testing based on state or United States

136. Drug Free Sports Act, H.R. 3084, 109th Cong. § 3(a) (2005).

137. Integrity in Professional Sports Act, S. 1960, 109th Cong. § 6(a) (2005).

138. *Id.* § 5.

139. Technically, a bill would not remove steroid testing from collective bargaining because the unions and leagues could still bargain over the steroid policy for terms in excess of those set forth in the act. However, given the stringent testing requirements set forth in the bills, it is highly unlikely that most unions would bargain over the policy.

140. S. 1960 § 9(b) (“Nothing in this Act shall be construed to prohibit a professional sports league from adopting and enforcing policies and procedures more stringent than the requirements of this Act.”).

141. *See supra* Part II.

constitutional grounds.¹⁴² Although constitutional provisions, such as the Fourth Amendment search and seizure provision,¹⁴³ do not apply to actions taken by a private party like a professional sports league, the Constitution protects against private actions where they can be fairly attributed to the state.¹⁴⁴ If the government enacted a law mandating regulations for steroid testing policies for the professional sports leagues, the leagues' drug testing policies would likely be challenged under a constitutional provision with the threshold issue of state action.¹⁴⁵

A. State Action

State action requires a constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State," and that a private party depriving the constitutional right must be "a person who may fairly be said to be a state actor."¹⁴⁶ Where a private actor acts pursuant to a government regulation, the first requirement is satisfied.¹⁴⁷ The second requirement is satisfied where "there is a sufficiently close nexus between the State and the challenged action of the [private actor] so that the action of the latter may be fairly treated as that of the State itself."¹⁴⁸ Whether a close nexus exists is determined by examining whether the state has exercised coercive power or given significant encouragement so

142. MITTEN, *supra* note 19, at 657–68; *see also* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 614 (1989) (explaining that the Fourth Amendment does not apply to searches and seizures "effected by a private party on his own initiative"); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.").

143. Government-mandated drug testing is usually challenged under the Fourth Amendment because First, Fifth, and Fourteenth Amendment challenges have generally failed. *See* CHARLES V. DALE, *FEDERALLY MANDATED RANDOM DRUG TESTING IN PROFESSIONAL ATHLETICS: CONSTITUTIONAL ISSUES*, CRS REPORT FOR CONGRESS 2 (2005), available at http://www.opencrs.com/rpts/RL32911_20050627.pdf.

144. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

145. The drug testing policy of a league would likely be challenged by an athlete who tested positive under the policy. *See* Long v. Nat'l Football League, 870 F. Supp. 101 (W.D. Pa. 1994).

146. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); *see also* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999); Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (adopting the two-part test).

147. *Am. Mfrs.*, 526 U.S. at 50. In this instance, the government regulation was a state statute. *Id.*

148. *Jackson*, 419 U.S. at 351; *see also Am. Mfrs.*, 526 U.S. at 52.

that the actions of the private party must be deemed as that of the state.¹⁴⁹

A sufficiently close nexus does not exist between a league's drug testing policy, implemented through collective bargaining, and the state for state action to be present. In *Long v. National Football League*,¹⁵⁰ Terry Long challenged the NFL's drug testing policy on constitutional grounds, claiming that there was a sufficient nexus between the league's policy and state action.¹⁵¹ Long challenged the NFL's policy after he tested positive for an anabolic steroid and was suspended by the NFL in accordance with its drug testing policy.¹⁵² The court rejected Long's argument of a sufficient nexus between the NFL's policy and the state, saying that the NFL's policy was not influenced by the state and the state did not "formulate[] the standards" for or "in any way influence[] or implement[]" the NFL's drug testing policy.¹⁵³

However, a sufficiently close nexus can exist between a private employer's drug testing policy and the state when the state compels the employer to comply with a regulation or where the regulation supersedes the employer's CBA. In *Skinner v. Railway Labor Executives' Ass'n*,¹⁵⁴ the government issued regulations that not only required railroad companies to drug test employees involved in major accidents but permitted the companies to drug test employees in other certain circumstances.¹⁵⁵ Both regulations were held to be such governmental action as to implicate the Fourth Amendment.¹⁵⁶ The regulation requiring the railroads to drug test employees was attributable to the government because the government was compelling the railroads to comply with the requirements, and thus, "the lawfulness of its acts is controlled by the Fourth Amendment."¹⁵⁷ Even the regulation merely permitting the railroads to drug test employees implicated the Fourth Amendment because the regulation was intended to supersede any inconsistent

149. *Am. Mfrs.*, 526 U.S. at 52; *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

150. *Long*, 870 F. Supp. 101.

151. *Id.* at 103. Long challenged the drug testing policy based on the Fourth and Fourteenth Amendments of the United States Constitution. *Id.* He claimed that the city of Pittsburgh collecting tax from the sale of tickets, providing services for the team, and appointing board members to the Stadium Authority was enough state action to bring a constitutional claim against the NFL and his team, the Pittsburgh Steelers. *Id.* at 104.

152. *Id.*

153. *Id.* at 105.

154. 489 U.S. 602 (1989).

155. *Id.* at 609-11. The railroad companies were permitted to drug test employees after an accident where a supervisor had reasonable suspicion that an employee caused the accident, where a specific rule has been violated, and where reasonable suspicion existed based on the supervisor's own observations of an employee. *Id.* at 611.

156. *Id.*; see also *infra* Part V.C.1.

157. *Skinner*, 489 U.S. at 614.

provision of the CBA and required the railroads not to collectively bargain away the right to drug test.¹⁵⁸

On the contrary, a sufficiently close nexus will not exist where a government regulation does not substitute its judgment for, or formulate standards for, decisions of a private employer. Pennsylvania's workers compensation regulation that permitted insurers to withhold payments for disputed claims until review was not considered a state action in *American Manufacturers Mutual Insurance Co. v. Sullivan*.¹⁵⁹ An insufficient nexus existed between the insurer's decisions and the state regulation because the insurer made the decisions on whether to withhold payments and the regulation did not articulate any standards to make such decisions.¹⁶⁰ Furthermore, the regulation was not an encouragement for or authorization of the insurers to withhold payments.¹⁶¹

B. State Action for Government-Mandated Steroid Testing

Challenging the current steroids policies of the professional sports leagues on constitutional grounds is highly unlikely because the leagues are private actors.¹⁶² However, steroid policies implemented by the leagues in accordance with government regulations might be successfully challenged as state action, and if so, would be open to challenge on a variety of constitutional grounds. Although Congress may declare that "[n]othing in this Act shall be construed to deem . . . any professional sports league an agent of or an actor on behalf of the United States Government,"¹⁶³ such a determination is not up to Congress to make;¹⁶⁴ a sufficiently close nexus between the leagues' policies and the state may exist and state action may be present.

158. *Id.* at 615–16. These requirements were evidence that the government did not "adopt a passive position" but "encourage[d], endorse[d], and participate[d]" in drug testing. *Id.*

159. 526 U.S. 40, 43, 51 (1999).

160. *Id.* at 52.

161. *Id.* at 53 ("We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it.")

162. See *Long v. Nat'l Football League*, 870 F. Supp. 101 (W.D. Pa. 1994) (denying the claim that the NFL's drug policy violated the Fourth and Fourteenth Amendments because the policy was not a state action); *supra* part V.

163. Integrity in Professional Sports Act, S. 1960, 109th Cong. § 9(a) (2005).

164. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995). In *Lebron*, even though the statute declared that Amtrak was not an agent or actor of the government, the Court found that it was, concluding that the statute governed matters in Congress's control, but not challenges outside of Congress's control. *Id.* at 392.

For a league's actions in regards to its drug testing policy to be attributed to the state, there must be a "sufficiently close nexus between the [government regulation] and the challenged action of the [league] so that the action of the [league] may be fairly treated as that of the State itself."¹⁶⁵ A nexus may be found where the state "formulated the standards" for or "influenced or implemented" the league's drug testing policy;¹⁶⁶ encouraged, endorsed and participated in drug testing;¹⁶⁷ compelled the league to comply with its regulation;¹⁶⁸ or intended the regulation to supersede the league's CBA.¹⁶⁹

Under the current legislation, leagues would be required to adopt the government regulations regarding drug testing of athletes.¹⁷⁰ This compulsion by the government to comply with its requirements is similar to the mandatory drug testing in *Skinner*, which implicated the Fourth Amendment.¹⁷¹ The government regulations are also intended to supersede any inconsistent provision of the CBA by requiring minimum standards,¹⁷² similar to the permissive drug testing in *Skinner*.¹⁷³ Contrary to *Long* and *Sullivan*, these regulations would greatly influence and set the standards for the leagues' steroid testing policies. The league would not make the decisions, like the insurers' decisions in *Sullivan*,¹⁷⁴ on when, who, or how to drug test. Even if the leagues were said to make decisions regarding drug testing, they would be following the standards set by the government to make those decisions. It seems likely that the government would be encouraging, endorsing, and participating in the leagues' drug testing policies were it to mandate requirements for steroid testing. Based on the above analysis, a sufficient

165. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). While the test for state action has two requirements, the first requirement of a constitutional deprivation by actions of the state is met by the league acting pursuant to the government regulation. The test for the second requirement, whether the league may fairly be said to be a state actor, is the close nexus test. *See supra* Part V.A.

166. *See Long*, 870 F. Supp. at 105.

167. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615–16 (1989).

168. *Id.* at 614.

169. *See supra* note 158 and accompanying text.

170. *See supra* Part IV.E.

171. *Skinner*, 489 U.S. at 614.

172. The government regulations on steroid testing do not state in the bill that they are intended to supersede the CBA, but this would be the practical effect of the regulations. *See Integrity in Professional Sports Act*, S. 1960, 109th Cong. § 9(c) (2005) ("Nothing in this Act shall be construed to have any effect on the collective bargaining obligations of any employer that is not subject to this Act or on any subject matter that is outside of the scope of this Act.").

173. *Skinner*, 489 U.S. at 615–16.

174. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (explaining that the insurers, not the government, made the individual decisions and that the standards to make the decisions were also not formulated by the government).

nexus could exist between the government-mandated steroid testing requirements and the leagues' steroid testing policies that the polices would be considered state action and subject to constitutional challenge.

C. Constitutional Challenge to League Steroid Policies

A major concern with government-mandated steroid testing requirements is that they would open the door to constitutional challenges. If the leagues' steroid policies, as formulated under government regulation, were deemed state action, then a variety of constitutional claims could be brought challenging the policies.¹⁷⁵ Regardless of whether these challenges are successful, the leagues and government could be faced with defending a variety of continuous claims.

1. Fourth Amendment Challenge

Although different constitutional claims could be introduced, the most prevalent issue raised with government-mandated drug testing requirements is that the policy would be an unreasonable search and seizure under the Fourth Amendment.¹⁷⁶ The Fourth Amendment provides each person in the United States with the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the federal government.¹⁷⁷ Generally, a warrant supported by probable cause is needed for a reasonable search and seizure.¹⁷⁸ However, a search not supported by probable cause can be constitutional where "special needs beyond the normal need for law enforcement" exist.¹⁷⁹ A special need is a judicially created exception to "the warrant and probable-cause requirement"¹⁸⁰ for suspicionless drug testing.¹⁸¹ Where a special need is not found and no probable cause and warrant exists, the drug testing is in violation of the Fourth Amendment.¹⁸² The

175. The policies could be challenged under various state constitutional provisions, and drug testing policies in general are challenged under the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. DALE, *supra* note 143, at 2 n.2.

176. The Fourth Amendment has been the primary vehicle for challenging drug testing polices because First, Fifth, and Fourteenth Amendment challenges have usually been unsuccessful. *See id.*

177. U.S. CONST. amend. IV.

178. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

179. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

180. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

181. DALE, *supra* note 143, at 2; *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 653; PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW 295 (2005).

182. *See Chandler v. Miller*, 520 U.S. 305 (1997) (requiring state office candidates to undergo drug testing before running for office violated the Fourth Amendment because using testing to set a

constitutionality of a special needs search is evaluated under a reasonableness standard where the governmental interests are balanced against the individual's privacy interests.¹⁸³

The special needs doctrine has been applied to suspicionless drug testing where the government can establish a compelling justification or where those persons tested have diminished expectations of privacy. Drug testing employees in safety-sensitive positions is a compelling government justification where the special needs doctrine applies to protect the safety of the public and fellow employees "from the threat of an impaired employee with access to dangerous instrumentalities."¹⁸⁴ The Supreme Court has upheld suspicionless drug testing on this principle for Customs Service employees seeking promotion to positions requiring seizure of illegal drugs and the carrying of firearms,¹⁸⁵ and to railroad employees involved in accidents or who violated safety standards.¹⁸⁶ The principle has also been applied by the federal courts to random testing of horse racing jockeys.¹⁸⁷ In testing of the railroad employees and the jockeys, the compelling government interest was strengthened by the fact that these employees worked in pervasively regulated industries, which diminished their expectations of privacy.¹⁸⁸

The special needs doctrine also has been applied to the public school setting where the government has an important interest and the students being tested have diminished expectations of privacy.¹⁸⁹ The government has an important interest in protecting the health and safety of the student-athletes¹⁹⁰ and preventing drug use among those who look up to athletes as role

good example was not a special need that outweighed the candidate's privacy interests); *see also* DALE, *supra* note 143, at 3.

183. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

184. *Taylor v. O'Grady*, 888 F.2d 1189, 1195 (7th Cir. 1989).

185. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). The potential harm to the public due to one of the individuals using drugs while performing his or her job outweighed the individual's privacy interests. *Id.* at 679.

186. *See Skinner*, 489 U.S. at 633-34.

187. *Dimeo v. Griffin*, 943 F.2d 679, 683 (7th Cir. 1991). This testing was a special need because the safety of the participants and the government's interest in protecting tax revenue from betting on racing was greater than the individual's moderate privacy infringement as he or she was employed in a highly regulated industry, lessening the expectation of privacy. *Id.* at 684. Drug testing of those involved in horse racing was also held not to violate the Fourth Amendment in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986).

188. *Skinner*, 489 U.S. at 627; *Dimeo*, 943 F.2d at 684.

189. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding random drug testing of public school students participating in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of public school athletes).

190. *Vernonia*, 515 U.S. at 661-62.

models.¹⁹¹ Furthermore, the athletes have diminished expectations of privacy because they are in a school environment¹⁹² and because of the inherent nature of voluntarily participating in athletics.¹⁹³

2. Government-Mandated Regulations and the Fourth Amendment

Whether government-mandated drug testing of professional athletes is a special needs exception requires a "context-specific inquiry," weighing carefully the individual's privacy interests against the government's interests.¹⁹⁴ Because the special needs doctrine is context-specific, arguments can be made for either side that congressionally mandated drug testing of professional athletes does or does not fall within the doctrine. This analysis is further complicated due to the unique nature of professional athletics and the lack of analogous precedent.

The basis for an argument that drug testing fits within the special needs doctrine is that the government's interest in protecting the integrity of professional sports and the health and welfare of professional athletes and youth athletes who emulate professional athletes outweighs the diminished privacy expectations of the athletes. The privacy interests of the athletes would be infringed upon by drug testing, but the extent of the infringement would be in question. Similar to high school and college athletes who have diminished expectations of privacy,¹⁹⁵ professional athletes may have diminished expectations of privacy because they must commonly undergo physical evaluations, follow certain rules and regulations specific to only their sport, frequently give information to their team, coaches, and trainers about their physical condition and medical treatment, and work in less-than-private surroundings due to communal changing and showering and constant media attention.¹⁹⁶

Two of the most articulated governmental interests for drug testing

191. *Id.* at 663. The government interest was in deterring drug use by athletes and by the general school population that looks up to athletes as role models. *Id.*

192. *Id.* at 655 (discussing that the most significant element of the case was the guardian relationship that the government has over public school children and that this relationship permitted a "degree of supervision and control that could not be exercised over free adults"); see also *Earls*, 536 U.S. at 830 (explaining that the essential basis of *Vernonia* was the school's custodial responsibility over its students).

193. *Vernonia*, 515 U.S. at 657 (explaining that participation in sports requires changing and showering in less-than-private surroundings).

194. *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

195. *Vernonia*, 515 U.S. at 657; *Hill v. Nat'l Collegiate Athletic Ass'n.*, 865 P.2d 633, 648 (Cal. 1994).

196. *Vernonia*, 515 U.S. at 657; *Hill*, 865 P.2d at 648, 658.

programs are to protect the health and welfare of professional athletes and to deter steroid use by young athletes who emulate those athletes.¹⁹⁷ The health and welfare of professional athletes and young athletes is a compelling government interest, as one of the major purposes of the special needs exception is to protect the safety of the public and fellow employees from an impaired employee.¹⁹⁸ Safety of the public and fellow employees was a compelling justification for drug testing those participating in horse racing,¹⁹⁹ customs service employees,²⁰⁰ and railroad workers.²⁰¹ Use of performance enhancing drugs has significant health consequences for professional athletes who take them,²⁰² but can also affect young athletes who look to professional athletes as role models.²⁰³ Use of performance enhancing drugs by professional athletes has been connected to the increased use of such substances by young athletes.²⁰⁴ Additionally, the "tolerance of performance enhancing substances by professional athletes has increased the pressure on [young athletes] to use performance enhancing substances in order to advance their athletic careers."²⁰⁵ When coupling the health effects on professional athletes with the justification of deterring drug use in young athletes who look to professional athletes as role models, similar to the role model effect of the high school athletes,²⁰⁶ the government interest is even more compelling.

On the contrary, the argument that drug testing does not fit within the special needs exception is that the privacy expectations of the athletes outweigh the slight governmental interests. The argument that professional athletes have diminished expectations of privacy because of the nature of athletics, such as in the high school athletes' case, suffers because it overlooks the key elements of the public school cases: the custodial relationship of the government over school children²⁰⁷ and the nature of athletic participation. The custodial relationship gives the government more interest and control over

197. Steven O. Ludd, *Athletics, Drug Testing and the Right to Privacy: A Question of Balance*, 34 HOW. L.J. 599, 619 (1991). See also Integrity in Professional Sports Act, S. 1960, 109th Cong. § 2 (2005); Danaher, *supra* note 61, at 315.

198. See Taylor v. O'Grady, 888 F.2d 1189, 1195 (7th Cir. 1989). See also *supra* Part V.C.1.

199. See Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991).

200. See Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

201. See Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

202. S. 1960 § 2(a)(3).

203. S. 1960 § 2(a).

204. *Id.* § 2(a)(6).

205. *Id.* § 2(a)(7).

206. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995).

207. See *supra* note 192 and accompanying text.

the students,²⁰⁸ whereas the government does not have this control over professional athletes, which may increase their expectations of privacy as compared to high school athletes. Additionally, in high school and college sports, athletes do not have a property right, only the privilege, of participating in school athletics,²⁰⁹ whereas professional athletes are employed to play sports and thus have a property right.

Professional athletes also do not have diminished expectations of privacy as they do not work in a pervasively regulated industry,²¹⁰ such as horse racing²¹¹ or the railroad industry.²¹² In fact, it could be argued that professional sports is an industry that is generally unregulated by the government. The media, teams, leagues, and players' unions are the primary avenues used to regulate the industry. The industry, and professional athletes specifically, are subject to relentless scrutiny, so drug testing of the athletes may infringe on their privacy more than an incremental amount.

The health and welfare of the public and fellow employees was a compelling justification for drug testing those participating in horse racing,²¹³ customs service employees,²¹⁴ and railroad workers.²¹⁵ However, a distinction between the drug testing in those cases and drug testing professional athletes is the highly regulated nature of those industries. Additionally, an athlete who takes performance enhancing drugs and participates in a sport does not endanger the health and welfare of himself or his fellow athletes as much as a railroad employee, customs service employee, or jockey who takes an illegal narcotic such as cocaine or marijuana. While an athlete taking a performance enhancing substance may be able to hit the ball harder, run faster, or jump higher, his substance use does not impair his mental capabilities and functioning as does an employee taking an illegal narcotic.

Overall, the privacy expectations of professional athletes, possibly diminished due to the inherent nature of athletics, would be weighed against the government's interest in protecting the health and welfare of the professional athletes and young athletes, which might possibly be compelling when examined together.

208. *Vernonia*, 515 U.S. at 655.

209. *Brands v. Sheldon Cmty. Sch.*, 671 F. Supp. 627, 631 (N.D. Iowa 1987); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944-45 (D. Kan. 1987).

210. *Dimeo v. Griffin*, 943 F.2d 679, 684 (7th Cir. 1991).

211. *See id.*

212. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989).

213. *See Dimeo*, 943 F.2d at 683.

214. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

215. *See Skinner*, 489 U.S. at 633-34.

VI. WHERE DOES THE RESPONSIBILITY LIE?

Drug testing policies for the professional sports leagues should be left to the individual leagues and not to Congress. Formulating appropriate standards is best accomplished by the leagues and players at the collective bargaining table and not in congressional sessions because congressionally mandated drug testing creates complications that otherwise do not exist.

First, implementing drug testing policies through collective bargaining results in the policies being more accepted and minimizes, if not eliminates, judicial challenges. Collectively bargaining a drug testing policy tends to result in greater acceptance from those affected by the policy than if it were required by Congress. For the policy to be included in a CBA, both the players and the league must agree upon it and its substance. This aspect gives both parties an ownership in the policy, strengthening their acceptance of and adherence to the policy that would not be present if they were compelled by the government to follow certain requirements.

By implementing the policy through collective bargaining, the terms of the policy are protected from judicial challenge, unlike a federal law. A significant example of the difference between a collectively bargained for policy and a government mandate is the banning of Ephedra. The NFL initially banned the drug, followed by the FDA; however the FDA's ban was later limited by a court's decision.²¹⁶ Implemented under collective bargaining and the NLRA, courts give great deference to collectively bargained terms and will not subject them to such scrutiny. Under government-mandated testing, even collectively bargained terms in excess of the prescribed minimum requirements might not be safe from judicial scrutiny. Furthermore, a government-mandated policy could be subject to a Fourth Amendment challenge, as discussed above, and various other federal or state constitutional challenges.

Second, collective bargaining "allows for a more rapid and certain response to developments in doping and anti-doping technology" than does congressional action.²¹⁷ While this may not always be the case, as collective bargaining can be a slow process, it does have the potential to be more responsive to changes in the drug testing landscape than a federal law. Similar to the NFL banning Ephedra before the FDA, it also banned Andro seven years before Congress declared it a controlled substance.²¹⁸ Waiting until the

216. *See* *Nutraceutical Corp. v. Crawford*, 364 F. Supp. 2d 1310 (D. Utah 2005).

217. *Hearings on H.R. 1862, supra* note 48, at 100 (statement of Paul Tagliabue, Commissioner, National Football League).

218. *Id.* The NFL banned Andro in 1997 and Congress declared it a controlled substance in

Secretary of Commerce makes determinations on which drugs are performance enhancing, as provided for in various bills, could allow players to use some prohibited substances longer than if the policy was controlled by the league and players.

Third, one size does not fit all. A policy created by Congress and applicable to the four major professional sports leagues does not take into account the differences between the leagues. The average career length of an athlete varies significantly between the leagues,²¹⁹ and thus, a uniform suspension would have a different impact on each athlete depending on what league he is in. The four major sports are also different in what they require physically.²²⁰ Therefore, testing each sport for the same substances may be underinclusive, not testing for substances that help enhance performance in a sport, or overinclusive, testing for substances that have no bearing on a particular sport.

Finally, Congress has more pressing issues to deal with than regulating drug testing in professional sports. Professional sports and drug testing are popular topics, giving congressmen who introduce bills media attention and popularity within their respective states. However, “[i]f [Congress] passed a steroids bill now while letting the deficit careen out of control and not doing much to get Iraq on track, [they] would attract a lot of ridicule for spending their time on it.”²²¹ It is generally agreed that “[s]teroids are bad, we don’t want our athletes to use them and it sets poor examples for our young people, but we’ve just seen massive failures of governance on the national and local level.”²²² If Congress wants to reduce the use of performance enhancing drugs by youth, there are other, more effective ways to accomplish this and more important issues to our nation than performance enhancing drug use by professional athletes.

If Congress’s purpose in formulating drug testing acts was to pressure the leagues to strengthen their policies, it has accomplished this goal. Congress

2004. *Id.*

219. Rob Demovsky, *When This Year's NFL Superstar Becomes Next Year's Free-Agent Bust, GMs Learn a Hard Lesson*, GREEN BAY PRESS-GAZETTE, Oct. 19, 2003, at 1C. The average career length of an NFL player is 3.3 years; an NBA player, 4 years; and an NHL Player, 5.5 years. *Id.* MLB does not keep the statistic. *Id.*

220. For example, while basketball requires lean and agile athletes, football requires athletes with more strength.

221. James R. Carroll, *Congress Ready to Crack Down on Steroids*, LOUISVILLE COURIER-J., Sept. 28, 2005, available at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050928/NEWS0104/509280435/1008/NEWS01> (quoting Norman Ornstein, Senior Analyst, American Enterprise Institute for Public Policy Research).

222. *Id.* (quoting Michael McCann, Sports Law Professor, Mississippi College School of Law in Jackson).

should continue to leave drug testing policies to the leagues to modify as they see fit and as external pressure, such as that from the media and fans, demands. The leagues have brought their policies to a respectable level where the athletes will be deterred from using performance enhancing drugs and face a high likelihood of being caught if they do use steroids.

VI. CONCLUSION

The use of performance enhancing drugs by athletes in professional team sports has attracted considerable attention in recent years. A substantial amount of the attention has been due to Congress's involvement in proposing a variety of bills that would regulate the steroid testing policies of the professional sports leagues. Increased scrutiny by Congress, the media, and the fans has led the leagues to implement steroid testing policies that test athletes more often, for more substances, and with more stringent penalties. However, these policies still would not meet the requirements of even the most lenient of Congress's proposed bills.

While Congress's proposals might be stricter than the leagues' current policies, the benefits of harsher steroid policies are outweighed by the complications that government-mandated steroid testing creates. One of the major complications, a league's steroid testing policy being challenged on constitutional grounds, would create considerable problems for the government and the leagues regardless of whether such challenges were successful, especially if state action were found.

It is debatable whether performance enhancing drug use by professional athletes is a significant problem when examined across all of the professional sports leagues. Even so, the leagues, operating within the restraints of collective bargaining, have improved their steroid policies to be in greater harmony with Congress's bills. The leagues' policies are sufficiently stringent to accomplish the objective of preventing steroid use by athletes, and future changes in the leagues' policies would be best accomplished by the individual leagues and not by Congress.

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