

# FRAUDS & FAKES: AN INSIGHT INTO THE WORLD OF DOPING IN AMERICAN PROFESSIONAL SPORTS AND WHAT CONGRESS CAN DO TO FIX IT.

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## I. INTRODUCTION

*“Tragically, what once was a ‘field of dreams’ may deteriorate into a quagmire of controlled substances . . . .”*<sup>1</sup>

\$7.24 billion is the number of national revenue made by the National Football League (NFL) in 2014.<sup>2</sup> Most of it from television deals.<sup>3</sup> \$2.88 billion is 37% of Major League Baseball’s (MLB) 2014 revenue and is attributed to broadcasting and cable deals.<sup>4</sup> Now, imagine that all of your favorite players were caught using performance-enhancing drugs (PEDs). Would you still watch those games? Would you call for their suspension? Or would you be part of the “large majority of sports fans that don’t care.”<sup>5</sup> Whatever the answer may be, professional sports leagues like the NFL and MLB do not want to find out.

Most sports, both nationally and internationally have implemented rules and regulations concerning doping.<sup>6</sup> The drawback however is that, they are not all uniform. Internationally there are unilateral and independent governing bodies such as the World Anti-Doping Agency (WADA) and the United States Anti-Doping Agency (USADA) whose main objective is to “clean up sport in the U.S.”<sup>7</sup> Anti-doping in American professional sports on the other hand is negotiated within each individual sports’ Collective Bargaining Agreement (CBA).<sup>8</sup> Not only are these anti-doping policies not independent of the leagues themselves, but each league has the ability to make up their own

<sup>1</sup> Press Release, Sen. Byron L. Dorgan, Opening Statement at Senate Hearing Looking Into Reports of Steroid Use in Baseball (June 18, 2002).

<sup>2</sup> James Brady, *The NFL Brought in Enough Money Last Year to Pay for 10 Pluto Missions*, SB NATION (July 20, 2015, 5:04 PM), <http://www.sbnation.com/nfl/2015/7/20/9006401/nfl-teams-revenue-tv-deal-7-billion>.

<sup>3</sup> *See id.*

<sup>4</sup> Mike Ozanian, *MLB Worth \$36 Billion As Team Values Hit Record \$1.2 Billion Average*, FORBES (Mar. 25, 2015, 9:48 AM), <http://www.forbes.com/sites/mikeozanian/2015/03/25/mlb-worth-36-billion-as-team-values-hit-record-1-2-billion-average/#13efca3c741e>.

<sup>5</sup> Roberta Furst Wolf, *Conflicting Anti-Doping Laws in Professional Sports: Collective Bargaining Agreements v. State Law*, 34 SEATTLE U. L. REV. 1605, 1635 (2011) [hereinafter: *Conflicting Anti-Doping Laws in Professional Sports*] (quoting, Paul Elias, *Testing Called into Question*, DULUTH NEWS TRIBUNE (Minn.), Nov. 26, 2003).

<sup>6</sup> *See generally* HISTORY OF PERFORMANCE ENHANCING DRUGS IN SPORTS, <http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017> (last visited Nov. 25, 2017).

<sup>7</sup> Daniel Gandert and Fabian Ronisky, *American Professional Sports is a Dopers Paradise: It’s Time We Make a Change*, 86 N.D. L. REV. 813, 820 (2010).

<sup>8</sup> *See id.*; at 815 (“[M]ajor American sports leagues – the National Football League (NFL), National Basketball Association (NBA), and Major League Baseball (MLB) (collectively known as The Big Three) . . . depend on a Collective Bargaining Agreement (CBA) system.”).

rules.<sup>9</sup> While that was an improvement from not having any regulations or punishments, it is becoming quite outdated<sup>10</sup>

Using a CBA system to enforce anti-doping policies is, and always will be, inherently flawed. The first problem is that a Collective Bargaining Agreement in professional sports requires both the leagues and the players associations to agree, which requires negotiations that characteristically “take a significant amount of time and effort.”<sup>11</sup> This leads to an “unavoidably sluggish approach for dealing with new doping issues, which provides cheaters with a consistent leg up.”<sup>12</sup> The second problem is that neither the players associations nor the leagues have the sole interest of keeping sports clean like WADA and USADA- even though both the league’s union and players openly state that they are concerned with the consequences if a player is caught.<sup>13</sup> It is more important to both sides that the professional sports industry stay financially prudent, and doping sells.<sup>14</sup> Neither the leagues nor the players would agree to regulations that are too strict because then everyone using illegal substances would be caught and that would have a high probability of deterring fans from the sport. Concurrently, the players are concerned with their privacy, which makes the player’s associations hesitant to agree to extensive anti-doping guidelines with harsh punishments.<sup>15</sup> Furthermore, these policies, being part of CBAs, allow anti-doping to be used as a “simple bargaining chip” in exchange for other things like salary negotiations.<sup>16</sup> If the player’s associations and coaches continue to have free reign over anti-doping policies, then none of these problems can ever be fixed. It is time for Congress to take control of anti-doping regulations in American Professional Sports.

This note is divided into five parts. Part II will give a brief history of doping in sports both nationally and internationally. Part III will analyze the differences between the CBA’s anti-doping policies and

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<sup>9</sup> See Brent D. Showalter, *Steroid Testing Policies In Professional Sports; Regulated by Congress or Responsibility of The Leagues?*, 17 MARQ. SPORTS L. REV. 651, 655-66 (2016) (“Of the four major professional leagues, the NBA and the NHL negotiated new CBA’s in 2005, which contained updated steroid testing policies . . .”).

<sup>10</sup> See Charles E. Yesalis and Michael S. Bahrke, *History of Doping in Sports*, 24 INT’L SPORTS STUD. 42, 43 (2002) (No American professional sports league tested for doping until 1987).

<sup>11</sup> Showalter, *supra* note 9, at 655.

<sup>12</sup> Gandert & Ronisky, *supra* note 7, at 816.

<sup>13</sup> See *id.*; Showalter, *supra* note 9, at 655 (“The consequences to the athlete for proven drug usage is the greatest concern.”).

<sup>14</sup> See Gandert & Ronisky, *supra* note 7, at 834 (“Both owners and players financially benefit from doping. The players that dope usually perform better. The better the athletes perform; the more revenue the owners make.”).

<sup>15</sup> Showalter, *supra* note 9, at 655.

<sup>16</sup> See Gandert & Ronisky, *supra* note 7, at 835 (“Through collective bargaining, parties attempt to achieve gains in certain core areas (such as payroll regulation), often as a trade-off for, or at the expense of not making ground in other important areas, such as doping regulations.”).

those policies accepted internationally by WADA and USADA, using the MLB and NFL as representatives for American professional sports. Part IV will go on to discuss what kind of power Congress has in anti-doping legislation, along with how they have already tried to intervene. Part V will discuss what can be done to change Anti-doping regulations in American professional sports. There is a “happy medium” between the Zero-Tolerance policy that many scholars call for and the inherently flawed policies that are currently in place. That medium is congressional intervention in the sense of minimum guideline requirements, as well as the implementation of an arbitration clause in each of the anti-doping policies.

## II. WHAT IS DOPING? A BRIEF HISTORY OF DOPING IN SPORTS

### A. *Anti-Doping on the International Level*

Doping has been present in sports since ancient times, before the first Olympic Games took place.<sup>17</sup> However, using drugs and other substances to improve performance was not considered cheating in its' early history, and there is no indication that anything was done to deter their use.<sup>18</sup> The term “doping” did not become popular until the late 19th century<sup>19</sup> when it was viewed as “standard practice” and was routinely done to the knowledge of the public.<sup>20</sup> This was also around the time that the first attempt to regulate doping was launched by the International Amateur Athletic Association (IAAF).<sup>21</sup> Many other international sporting organizations then followed suit, and a widespread attempt to rebuke doping in the world of competitive sports began.<sup>22</sup>

The International Olympic Committee (IOC), which is well known for having one of the most comprehensive anti-doping policies in the world, did not adopt a program for drug testing until the late 1960's, and their first list of banned substances was not released until 1971.<sup>23</sup> Even more concerning than the fact that it took so long for a banned

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<sup>17</sup> See Yesalis & Bahrke, *supra* note 10, at 43; see also Yu-Hsuan Lee, *Performance Enhancing Drugs: History, Medical Effects & Policy* 1, 8-9 (2006) (However, “[t]he first documented is in 1885, when Dutch swimmers used stimulants.”).

<sup>18</sup> Yesalis & Bahrke, *supra* note 10, at 43.

<sup>19</sup> Lee, *supra* note 17, at 7.

<sup>20</sup> Yesalis & Bahrke, *supra* note 10, at 43.

<sup>21</sup> See Lee, *supra* note 17, at 11 (“The first attempt to prohibit doping was made by the International Amateur Athletic Federation in 1928. IAAF banned the use of doping, or the use of stimulation substances.”).

<sup>22</sup> *Id.*; see also Yesalis & Bahrke, *supra* note 10, at 43.

<sup>23</sup> Lee, *supra* note 17, at 12-3.

substance list to be released is that Anabolic Steroids, one of the more famously used drugs, was not on the IOC's banned substance list until 1976.<sup>24</sup> This addition led to a shift in the world of doping from steroid use to blood-doping.<sup>25</sup> Blood-doping is the reinjection of an athlete's blood before competition to "increase one's red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance."<sup>26</sup> Blood-doping was subsequently added to the IOC's banned substance list in 1986.<sup>27</sup>

As doping became more widespread among athletes, the IOC and other international governing bodies struggled to keep up with the new methods being discovered to enhance performance. After the 1998 Tour de France scandal brought doping back to the center of the international sports stage, it became clear that stricter anti-doping rules and regulations were necessary.<sup>28</sup> To do this, the governing bodies of international sports, such as the IOC created an independent agency called the World Anti-Doping Agency (WADA). WADA's purpose is to research, educate, and most importantly regulate doping uniformly across countries.<sup>29</sup>

### *B. Anti-Doping in the United States*

While increased attention about doping, made huge strides among the international sports community as early as the late 19th century; the United States did not take any action. Instead, steroids were actually being created and sold with FDA approval.<sup>30</sup> In 1958, Dr. John Ziegler

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<sup>24</sup> See generally Claudia L Reardon & Shane Creado, *Drug Abuse in Athletes*, 5 DOVE PRESS J. 95 (2014) (Anabolic Steroids were added to the list of banned substances in 1976, because a method of detection was found in the 1970's. This led to "a marked increase in the number of doping-related disqualifications in the late 1970's.").

<sup>25</sup> See *id.* at 101 (The testing for steroids was producing results, so athletes found new ways to enhance performance that were not illegal).

<sup>26</sup> WORLD ANTI-DOPING AGENCY, *Blood Doping*, <https://www.wada-ama.org/en/questions-answers/blood-doping#item-588> (last visited Nov. 26, 2017); see also *Blood-doping*, DICTIONARY.COM, <http://www.dictionary.com/browse/blood-doping> (last visited Nov. 25, 2016).

<sup>27</sup> Reardon & Creado, *supra* note 24, at 97.

<sup>28</sup> Gandert & Ronisky, *supra* note 7, at 818; see also AUTOBUS CYCLING NEWS, <http://autobus.cyclingnews.com/results/2000/oct00/oct25news.shtml> (last visited Nov. 3, 2016) (On the way to the 1998 Tour De France one of the Festina employees was stopped by customs. Several hundred grams of anabolic steroids, erythropoietin (EPO) and other doping products were discovered. An investigation was launched that revealed systematic doping within the team that had been taking place for years. This also raised suspicion that this was occurring with other Tour De France teams. Many people confessed including all nine riders from the 1998 Festina Team.).

<sup>29</sup> See generally WORLD ANTI-DOPING AGENCY, *Who We Are*, <https://www.wada-ama.org/en/who-we-are> (last visited Nov. 25, 2017).

<sup>30</sup> Yesalis & Bahrke, *supra* note 10, at 50; see also Historical Timeline, HISTORY OF PERFORMANCE ENHANCING DRUGS IN SPORTS, PROCON.COM,

created an anabolic steroid called Dianabol after being told by his Soviet counterpart that his team used anabolic steroids to “improve their strength and performance in competitions.”<sup>31</sup> This discernibly increased steroid use amongst athletes in the United States, which caused an epidemic in the 1960’s.<sup>32</sup> Yet, as of 1969, still “not a single major U.S. sporting organization, amateur or professional” had implemented programs or punishments to deter athletes from doping.<sup>33</sup> The NFL was the first to start drug-testing their players, but that was not until 1982 and did not include testing for anabolic steroids.<sup>34</sup> The NFL’s policy implementation came almost 15 years after the IOC started executing their programs.

It was not until the late 1990s and early 2000s that steroids and other performance enhancing drugs (PEDs) came to be considered a prominent issue facing professional sports in the United States.<sup>35</sup> This steroid use most notably occurred within Major League Baseball (MLB), where unprecedented amounts of records were being broken in small periods of time.<sup>36</sup> This led the MLB to finally ban the use of steroids in 1991.<sup>37</sup> PED testing however was not implemented league wide until 2003.<sup>38</sup> This implementation arguably succeeded the most shocking anti-doping scandal to hit United States professional sports. The Bay Area Laboratory Co-operative (BALCO) was a scandal in 2003 where federal investigators raided the lab and discovered that BALCO was providing steroids to athletes from a variety of sports including multiple MLB players such as Barry Bonds and Jason Giambi.<sup>39</sup> In the aftermath of the BALCO scandal, the United States began to “bring down the hammer” on anti-doping.<sup>40</sup> In the following

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<http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017> (last visited Nov. 11, 2017).

<sup>31</sup> Gandert & Ronisky, *supra* note 7, at 818; *see also* Yesalis & Bahrke, *supra* note 10, at 50.

<sup>32</sup> Gandert & Ronisky, *supra* note 7, at 818.

<sup>33</sup> *See* Yesalis & Bahrke, *supra* note 10, at 43 (Sports Illustrated released an investigative report in 1969 that determined “not a single major U.S. sporting organization, armature or professional . . . has specific anti-doping regulations with an enforcement apparatus.”).

<sup>34</sup> *Id.* at 43.

<sup>35</sup> Gandert & Ronisky, *supra* note 7, at 819.

<sup>36</sup> *See id.* at 819 (“During this period otherwise known as the steroid era, baseball experienced record homeruns. Three players collectively surpassed the thirty-seven-year-old single season homerun record . . .”).

<sup>37</sup> *The Steroids Era*, ESPN, (Dec. 5, 2012, 4:23 PM), [http://www.espn.com/mlb/topics/\\_/page/the-steroids-era](http://www.espn.com/mlb/topics/_/page/the-steroids-era).

<sup>38</sup> *See generally id.*

<sup>39</sup> Gandert & Ronisky, *supra* note 7, at 819; *see also Historical Timeline, History of Performance Enhancing Drugs in Sports*, *supra* note 30 (“Federal Investigators raid a Burlingame, Calif. Laboratory suspected of distributing steroids to professional athletes. Investigators seize financial and medical records from the Bay Area Laboratory Co-Operative . . . those documents allegedly include a calendrer of San Francisco Giants slugger Barry Bonds’ drug regimen and records of Bonds’ payments for drugs.”).

<sup>40</sup> *See generally Historical Timeline, History of Performance Enhancing Drugs in Sports*,

years, President George W. Bush along with Congress passed the *Anabolic Steroid Control Act of 2004*, and both the NFL and MLB made changes to their anti-doping policies.<sup>41</sup> They began to more strictly enforce their testing procedures and punishments, including blood testing, and the banning of Human Growth Hormone.<sup>42</sup>

While doping may no longer be an outwardly accepted practice in both the national and international sports world, it still remains a problem. As recently as 2016, a WADA investigation proved “beyond a reasonable doubt that the Russian government ran a widespread doping system . . . in multiple Olympic sports.”<sup>43</sup> This led to numerous undeserved medals in at least one Olympic games, and 118 of the Russian athletes to be banned from the Rio De Janeiro games.<sup>44</sup> Unfortunately they are not the only ones. The United States is still having its own trouble. “It is estimated that 1 to 3 million athletes in the United States alone have used anabolic steroids.”<sup>45</sup> “With black market sales well in excess of \$100 million.”<sup>46</sup>

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*supra* note 30.

<sup>41</sup> *Congress Passes Steroid Control Act*, NUTRABIO, [http://www.nutrabio.com/News/news.steroid\\_control\\_act.htm](http://www.nutrabio.com/News/news.steroid_control_act.htm) (last visited Nov. 2, 2016); *see also Historical Timeline, History of Performance Enhancing Drugs in Sports*, *supra* note 30.

<sup>42</sup> *See Historical Timeline, History of Performance Enhancing Drugs in Sports*, *supra* note 30 (Jan. 13<sup>th</sup>, 2005 - Penalties for Positive Drug Tests Implemented by Major League Baseball) (Jan. 24, 2007- NFL Announces Stricter Anti-Doping Policies) (Dec. 13<sup>th</sup>, 2007 - Former Senator George Mitchell is hired by the MLB to lead the investigation of alleged steroid use among players.) (Aug. 4<sup>th</sup>, 2011 - “NFL Becomes First Major American Sports Leagues to Conduct Blood Tests.”); *see also* U.S. Anti-Doping Agency, *2008 Guide to Prohibited Substances and Prohibited Methods of Doping*, p. 20 (Human Growth Hormone (HGH) “is the hormone . . . responsible from growth and can increase protein synthesis when administered to an adult whose growth has stopped.” Athletes might use it to induce anabolic effects, reduce muscle cell breakdown and reduce body fat.”).

<sup>43</sup> Will Hobson, *WADA Recommends Banning Russia from Olympics after Investigation Reveals Far-reaching Doping Program*, THE WASHINGTON POST (Jul. 18, 2016), <https://www.washingtonpost.com/news/sports/wp/2016/07/18/russian-officials-ran-doping-programs-in-multiple-olympic-sports-wada-investigation-finds/>.

<sup>44</sup> *See* Rebecca R. Ruiz & Michael Schwirtz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, THE NEW YORK TIMES (May 12, 2016), [http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?\\_r=0](http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?_r=0) (“Dozens of Russian athletes at the 2014 Winter Olympics in Sochi, including at least 15 medal winners, were part of a state-run doping program, meticulously planned for years to ensure dominance at the Games.”); *see also Performance Enhancing Drugs in Sports Fast Facts*, CNN (Oct. 28, 2016, 8:39 AM), <http://www.cnn.com/2013/06/06/us/performance-enhancing-drugs-in-sports-fast-facts/>.

<sup>45</sup> John M. Tokish, Mininder S. Kocher & Richard J. Hawkins, *Ergogenic Aids: A Review of Basic Science, Performance, Side Effects and Status in Sports*, 32 AM. J. SPORTS MED. 1543, 1544 (2004).

<sup>46</sup> *See id.*

### III. DOPING IN PROFESSIONAL SPORTS. WHO DOPES AND HOW IS IT REGULATED?

As stated in part II, doping has been rampant in sports since “sports have been competitive.”<sup>47</sup> However, it is a relatively recent thing that doping is being recognized as one of the major problems facing the sports world.<sup>48</sup> Olympic Committees are implementing independent agencies to regulate doping- such as WADA and the United States Anti-Doping Agency (USADA).<sup>49</sup> Professional sports leagues in the United States such as the NFL and MLB are also attempting to more strictly enforce their policies.<sup>50</sup> This section will analyze the anti-doping policies currently in place within the NFL, MLB, and USADA. As well as compare the differences between the way doping is handled internationally and in the United States.

#### A. *The National Football League’s CBA*

Professional sports in the United States are unionized.<sup>51</sup> The union representing NFL players is The National Football League Players Association (NFLPA).<sup>52</sup> The NFLPA is responsible for numerous responsibilities including:

- (1) Representing all players in matters concerning wages, hours, and working conditions and protecting their rights as professional football players.
- (2) Assuring that the terms of the Collective Bargaining agreement are met.
- (3) Enhancing and defending the image of the players and their profession on and off the field.<sup>53</sup>

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<sup>47</sup> Yesalis & Bahrke, *supra* note 10, at 43; *see also* Lee, *supra* note 17, at 8-9.

<sup>48</sup> Yesalis & Bahrke, *supra* note 10, at 43; *see also* Lee, *supra* note 17, at 8-9.

<sup>49</sup> Gandert & Ronisky, *supra* note 7, at 818; *see also* *Independence & History*, UNITED STATES ANTI-DOPING AGENCY (last visited Nov. 3, 2016), <http://www.usada.org/about/independence-history/> (“The U.S. Anti-Doping Agency (USADA) is recognized by the United States Congress as the official anti-doping organization for all Olympic, Paralympic, Pan American and Para Pan American sport in the United States. USADA began operations October 1, 2000, and as an independent, non-profit organization, is governed by a Board of Directors.”).

<sup>50</sup> *Historical Timeline, History of Performance Enhancing Drugs In Sports*, *supra* note 30.

<sup>51</sup> *See* Gandert & Ronisky, *supra* note 7, at 822.

<sup>52</sup> Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports’ CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 123 (2006).

<sup>53</sup> *See* *About the NFL*, THE NFL PLAYERS ASSOCIATION, <https://www.nflpa.com/about> (last visited Nov 4. 2016) (Other responsibilities include “[n]egotiating and monitoring retirement and



Pursuant to the requirements in the National Labor Relations Act (NLRA), “employers cannot unilaterally make employment rule changes regarding any subject that the NLRA requires to be negotiated between employers and employees.”<sup>54</sup> Drug policies are one of those issues where the ultimately agreed upon terms will be in the best interest of the players as well as the teams.<sup>55</sup> The NFL’s Collective Bargaining Agreement (CBA) is negotiated between the NFLPA and the NFL team owners.<sup>56</sup> It is often praised for being the strictest and most comprehensive anti-doping policy in American professional sports.<sup>57</sup>

The most current CBA was ratified in 2011 and will expire in 2020.<sup>58</sup> The drug policy in this CBA includes testing procedures, confidentiality requirements, and the NFL’s banned substance list.<sup>59</sup> This list is separated into three parts, having each prohibited substance listed with the generic names as well as their brand names so there can be no confusion.<sup>60</sup> For the first time in the NFL’s history, the newest CBA also allows the players to be tested for the Human Growth Hormone (HGH).<sup>61</sup> The list is extremely extensive, not only does it prohibit anabolic agents, but the list also prohibits masking agents that could hide the detection of those banned anabolic agents.<sup>62</sup> Thus leading the testing procedures that the NFL implements to be seen as the most extensive in the league.<sup>63</sup>

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insurance benefits. Providing member services and activities. Providing assistance to charitable and community organizations.”).

<sup>54</sup> 29 U.S.C. §§151-69 (1994) (Congress enacted the National Labor Relations Act (“NLRA”) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.); *see also* Gandert & Ronisky, *supra* note 7, at 822 (“The National Labor Relations Act (NLRA) requires employers and unionized employees to bargain in good faith with respect to wages, hours, and other terms and conditions of employment.”).

<sup>55</sup> Gandert & Ronisky, *supra* note 7, at 822.

<sup>56</sup> Fortenberry & Hoffman, *supra* note 52, at 123.

<sup>57</sup> *See* Gandert & Ronisky, *supra* note 7, at 822 (“the media and legislature widely consider the NFL’s collectively bargained drug policy as the best and most comprehensive drug testing program.”).

<sup>58</sup> *See generally* NFLPA, *supra* note 53.

<sup>59</sup> *See generally* 2015 Policy on Performance-Enhancing Substances, NFL & NFLPA, <http://www.usfreediving.org/PDFs/2008%20USADA%20Doping%20Guide.pdf>.

<sup>60</sup> *Id.* at Appendix A.

<sup>61</sup> *See* Gregg Rosenthal, *NFLPA Approves New Drug Policy; HGH Testing Included*, NFL (Sept. 12, 2014, 7:15 PM) (HGH testing was started in the 2014 season), <http://www.nfl.com/news/story/0ap3000000393562/article/nflpa-approves-new-drug-policy-hgh-testing-included>.

<sup>62</sup> NFL POLICY, *supra* note 59, at Appendix A.

<sup>63</sup> *See* Gandert & Ronisky, *supra* note 7, at 822 (“the NFL as a whole has a superior drug policy because it: (1) provides a comprehensive list of banned substances, (2) tests players during the preseason, regular season, postseason and even during the off-season, (3) gives the testing authority more discretion under the Reasonable Cause Testing clause, (4) applies beyond players,

According to the NFL's CBA, drug testing can take place pre-employment and during preseason, regular season, post season, offseason, and for reasonable cause.<sup>64</sup> This means players are essentially able to get tested at any point during the year. This is unlike the MLB, whose CBA only allows players to be tested during the regular season.<sup>65</sup> It is also important to point out that the NFL's CBA is the only one that allows for pre-employment testing.<sup>66</sup> All testing is done through urine analysis while the player is under observation.<sup>67</sup> He/she is notified the day of the test and then has no more than three hours to submit a specimen, this is done in an attempt to "prevent tampering or "evasive techniques."<sup>68</sup> Post pre-employment testing, it is mandatory for each player to be tested at least once between April 20th and August 9th.<sup>69</sup> During the regular season, a preselected number of players from each team's roster are randomly chosen to be drug tested every week, this random testing continues as long as a team makes it in postseason play.<sup>70</sup> During the off-season players can be tested up to six times, these players are selected on the same basis as during the regular season.<sup>71</sup> The league is able but not required to test free agents, as well as draft-eligible football players.<sup>72</sup> The only players that are subject to ongoing testing are those that have tested positive for a banned substance, every other player can only be tested a maximum of twenty-four times per year.<sup>73</sup> While the randomness and regularity of both regular and offseason testing could be enough to deter some players from taking banned substances, there is an inherent flaw. Once a player has been tested twenty- four times they are maxed out for the year. This means they can essentially put whatever they want into their bodies and not be tested again unless the league has a reasonable basis to do so.<sup>74</sup>

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to team personnel and (5) provides greater disciplinary remedies for violations of the policy." <sup>[1]</sup> <sup>[2]</sup> <sup>[3]</sup> <sup>[4]</sup> <sup>[5]</sup> <sup>[6]</sup> <sup>[7]</sup> <sup>[8]</sup> <sup>[9]</sup> <sup>[10]</sup> <sup>[11]</sup> <sup>[12]</sup> <sup>[13]</sup> <sup>[14]</sup> <sup>[15]</sup> <sup>[16]</sup> <sup>[17]</sup> <sup>[18]</sup> <sup>[19]</sup> <sup>[20]</sup> <sup>[21]</sup> <sup>[22]</sup> <sup>[23]</sup> <sup>[24]</sup> <sup>[25]</sup> <sup>[26]</sup> <sup>[27]</sup> <sup>[28]</sup> <sup>[29]</sup> <sup>[30]</sup> <sup>[31]</sup> <sup>[32]</sup> <sup>[33]</sup> <sup>[34]</sup> <sup>[35]</sup> <sup>[36]</sup> <sup>[37]</sup> <sup>[38]</sup> <sup>[39]</sup> <sup>[40]</sup> <sup>[41]</sup> <sup>[42]</sup> <sup>[43]</sup> <sup>[44]</sup> <sup>[45]</sup> <sup>[46]</sup> <sup>[47]</sup> <sup>[48]</sup> <sup>[49]</sup> <sup>[50]</sup> <sup>[51]</sup> <sup>[52]</sup> <sup>[53]</sup> <sup>[54]</sup> <sup>[55]</sup> <sup>[56]</sup> <sup>[57]</sup> 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<sup>64</sup> See NFL POLICY, *supra* note 59, at 8-9 (§13.1 of the Substance Abuse Policy is title Types of testing and indicates all of the times players can expect to be tested.); *see also* Fortenberry & Hoffman, *supra* note 52, at 126; *see also* Gandert & Ronisky, *supra* note 7, at 823 ("The Steroid Policy outline testing procedure under six contexts- pre-employment, annual preseason testing, preseason/regular season group testing, postseason, off-season, and reasonable cause.").

<sup>65</sup> Gandert & Ronisky, *supra* note 7, at 823.

<sup>66</sup> *Id.*

<sup>67</sup> *See* Fortenberry & Hoffman, *supra* note 52, at 125.

<sup>68</sup> *Id.*

<sup>69</sup> NFL POLICY, *supra* note 59, at 9.

<sup>70</sup> *See* Fortenberry & Hoffman, *supra* note 52, at 126 (These players are selected by a computer program. These players cannot already be subject to reasonable cause testing.); *see also* Gandert & Ronisky, *supra* note 7, at 824.

<sup>71</sup> *See* Fortenberry & Hoffman, *supra* note 52, at 126 (The location of the player does not matter, if they are selected they must show up for testing. The only way to be taken out of the testing pool is to put down in writing that the player has retired from the NFL.).

<sup>72</sup> *See* Gandert & Ronisky, *supra* note 7, at 824 (Free agents are "rookies or veterans that are not under contract with a club.").

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* ("The league can also randomly test any player for which it has reasonable basis to

Once a player is caught in violation of the NFL testing policies, he is entered into stage one of the NFL's three stage intervention program.<sup>75</sup> Stage one requires the medical director to evaluate the player and come up with a treatment plan for him, which can be either outpatient or inpatient.<sup>76</sup> The player may be drug tested at the will of the Medical Director and treating clinician during that time.<sup>77</sup> In the following ninety days, if a player does not test positively for any banned substances, he is released from the program without further penalties, however, if he fails he is moved to stage two.<sup>78</sup> The testing and treatment procedures stay the same for a player in stage two.<sup>79</sup> The noteworthy differences include that a player now faces the possibility of suspension without pay for four to six games, and the length a player can remain in stage two is increased from ninety days to twenty-four months.<sup>80</sup> In addition to the possibility of suspension, a failed drug test in stage two will send the player to stage three of the intervention program.<sup>81</sup> Moving to stage three gives the Medical Director the ability to test players unannounced. Failure to comply with this stage of the intervention program gives the NFL the discretion to banish the player for a minimum of one calendar year.<sup>82</sup> After the twelve-month ban is over there is no guarantee that the player will be reinstated, that is up to the sole discretion of the commissioner.<sup>83</sup> If the player is reinstated he will then remain in stage three of the drug intervention program for the remainder of his career in the NFL.<sup>84</sup>

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conclude has violated the policy.”); see NFL POLICY, *supra* note 59, at 10.

<sup>75</sup> Fortenberry & Hoffman, *supra* note 52, at 127; see also NFL POLICY, *supra* note 59, at 14.

<sup>76</sup> NFL POLICY, *supra* note 59, at 14; see also Chuck Mills, *A Refresher Course on the NFL's Drug Policy*, SB Nation Baltimore Beatdown (Mar. 17, 2016, 7:00 AM), <http://www.baltimorebeatdown.com/2016/3/17/11250306/a-refresher-course-on-the-nfls-drug-policy>.

<sup>77</sup> See NFL POLICY, *supra* note 59, at 14 (These drug tests must be announced so that the player is aware before hand).

<sup>78</sup> See NFL POLICY, *supra* note 59, at 14-15 (If the players do fail stage one, they are advanced to stage two and there is the possibility of a fine.).

<sup>79</sup> NFL POLICY, *supra* note 59, at 16.

<sup>80</sup> See *id.* (Twenty-four months is equivalent to two seasons in the NFL).

<sup>81</sup> NFL POLICY, *supra* note 59, at 18.

<sup>82</sup> See NFL POLICY, *supra* note 59, at 18. (A Player banished from the NFL pursuant to this subsection will be required to adhere to his Treatment Plan and the provisions of this Intervention Program during his banishment. During a Player's period of banishment, his NFL Player Contract shall be tolled.”; If a player tests positive for marijuana, they receive a 10-game suspension as punishment instead of a banishment.).

<sup>83</sup> See NFL POLICY, *supra* note 59, at 19 (“A player seeking reinstatement also must meet certain clinical requirements as determined by the Medical Director and other requirements as set forth in Appendix B.”).

<sup>84</sup> *Id.*

B. *Major League Baseballs' CBA*

Much like NFL players, MLB players have their own union, which is known as the Major League Baseball Players' Association (MLBPA).<sup>85</sup> The MLBPA, like the NFLPA, negotiates the CBA between the MLB and its players on behalf of the players.<sup>86</sup> Part of this current CBA, which expires in 2016, is the Major League Baseball's Joint Drug Prevention and Treatment Program, which has been agreed upon by both parties to:

- (1) Educate players on the risks associated with the use of Prohibited Substance;
- (2) deter and end the use of prohibited substances by players;
- (3) provide for, in keeping with the overall purposes of the Program, an orderly, systematic and cooperative resolution of any disputes that may arise concerning the existence, interpretation, or application of this Program.<sup>87</sup>

This agreement covers all players currently in contract with an MLB club, all players who become free agents, and any player released from a club, unless he voluntarily signs a minor-league contract or retires.<sup>88</sup>

While the MLB started drug testing its players in 2003, the majority of the rules and procedures that are now in place did not arise until after the Mitchell Report was conducted in 2006.<sup>89</sup> The Mitchell Report was an investigative headed by former Majority Leader George Mitchell meant to detect and fix the problems concerning PED use within the MLB in the wake of the BALCO scandal.<sup>90</sup> After his investigation, Senator Mitchell concluded that the "anti- performance-enhancing drug policy since 2002, as amended, has been effective for detectable substances, but still falls short of current best practices in testing."<sup>91</sup> Mitchell further made recommendations on how the MLB

<sup>85</sup> See generally MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, [http://www.mlbplayers.com/ViewArticle.dbml?DB\\_LANG=C&ATCLID=211042995&DB\\_OEM\\_ID=34000](http://www.mlbplayers.com/ViewArticle.dbml?DB_LANG=C&ATCLID=211042995&DB_OEM_ID=34000) (last visited Nov. 25, 2017).

<sup>86</sup> See generally *id.*

<sup>87</sup> MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2005) [hereinafter *MLB TESTING POLICY*] at 1, <http://mlb.mlb.com/pa/pdf/jda.pdf> (When referring to the current collective bargaining agreement, the one in place prior to December 1, 2016 is what is meant.).

<sup>88</sup> *Id.*

<sup>89</sup> See George T. Stiefel III, *Hard Ball, Soft Law in MLB: Who Died and Made Wada the Boss?* [hereinafter *Hard Ball, Soft Law*], 56 *BUFF. L. REV.* 1225, 1234-35 (2008).

<sup>90</sup> See Stiefel III, *supra* note 89, at 1233 ("Mitchell and others spent over a year and a half conducting interviews and collecting evidence related to use of performance-enhancing drugs in MLB with the goal of making conclusions as to the cause(s) of this epidemic and making recommendations.").

<sup>91</sup> *Id.*

could improve its testing policy. One of the major suggestions involved the need for the MLB and MLBPA to give up some control and allow for a more independent Health Policy Advisory Committee.<sup>92</sup> Mitchell made the suggestion that the Health Policy Advisory Committee have control over things such as:

- (1) the number of tests administered; (2) determination of what substances are prohibited; (3) selection and retention of entities responsible for collecting and testing samples; (4) determination to order “reasonable cause” testing; (5) investigating and determining whether a test is considered positive; and (6) the administrator or administrating body should not be able to be removed except for good cause.<sup>93</sup>

The Commissioner implemented all of Mitchell’s recommendations and the CBA was reopened by the MLB and MLBPA so that the anti-doping policies could be adjusted.<sup>94</sup> This new CBA included the appointment of an Independent Program Administrator (IPA) in place of the Health Policy Advisory Committee, as well as an increased amount of testing to go along with the increased list of banned substances.<sup>95</sup>

The current day testing procedures are based largely off of the recommendations from Mitchell Report.<sup>96</sup> There are both urine tests, which test for the presence of banned PEDs, stimulants and DHEA, as well as blood tests which test for HGH.<sup>97</sup> All players are subject to an unannounced urine and blood test upon reporting to Spring Training, as well as an additional unannounced urine test at any point during the season.<sup>98</sup> The IPA also has the discretion to conduct 260 unannounced

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<sup>92</sup> See Stiefel III, *supra* note 89, at 1233-34 (Other recommendations included “(1) vigorously investigating the use of performance-enhancing drugs through non-analytical evidence, enhancing cooperation with law enforcement authorities and establishing a department of investigations; (2) improving the players education program; and (3) by implementing a “state-of-the-art drug testing program.”; The Health Policy Advisory Committee in comprised of 4 people two appointed by the Commissioners Office and two appointed by the MLBPA).

<sup>93</sup> Stiefel III, *supra* note 89, at 1234.

<sup>94</sup> See *id.* (The most notable changes came to the department of investigations, which was not going to be unilaterally implemented. As well as the increased frequency of testing that could be administered.)

<sup>95</sup> See Stiefel III, *supra* note 89, at 1235 (“The IPA was appointed for a three-year term and can be removed only if an independent arbitrator confirms that he has acted in a manner inconsistent with the program of has engaged in other misconduct that affects his ability to function as the IPA.”; “The IPA has authority to issue an annual report summarizing aggregate details of the testing process, audit test results, review performance of the collection company and laboratory conduct up to 375 off-season tests over the three-year term, and develop a mandatory educational program in consultation with the league and MLBPA.”).

<sup>96</sup> *Id.*

<sup>97</sup> MLB TESTING POLICY *supra* note 87, at 14; Mayo Clinic, *DHEA*, <http://www.mayoclinic.org/drugs-supplements/dhea/background/hrb-20059173> (last visited Dec 20, 2016) (DEAH stands for Dehydroepiandrosterone, which is a hormone that some studies suggest could be used to increase bone density).

<sup>98</sup> MLB TESTING POLICY, *supra* note 87, at 14.

blood tests on randomly selected players throughout the season.<sup>99</sup> There is no limit to the number of blood or urine tests a player can randomly be selected for in a given year.<sup>100</sup> The MLB also retains the right to conduct reasonable cause testing if they have reason to believe that a player has “engaged in the use, possession, sale or distribution of a performance enhancing drugs, Stimulant or DHEA.”<sup>101</sup> For those players that have tested positively, there are follow-up testing procedures in place.<sup>102</sup> These players must submit to six unannounced urine tests and three unannounced blood tests for the twelve months following their positive test result, as well as for every subsequent year that player is a member of the same club.<sup>103</sup>

Once a player has tested positive for any PEDs or other restricted substances, his case goes to the treatment board for consideration.<sup>104</sup> There, much like in the NFL, a treatment program is developed for that specific player.<sup>105</sup> The board has the discretion to determine a variety of things such as duration, inpatient/outpatient status, and the need for other services such as counseling.<sup>106</sup> The board also has the discretion to change the duration of the player’s program at any time.<sup>107</sup> If a player fails to comply with the treatment program set out for him he faces fines and eventually suspension.<sup>108</sup>

In the MLB’s Joint Drug Prevention and Treatment Program, the type of drug a player tests positively for determines what type of disciplinary action is taken against him.<sup>109</sup> A first violation for a PED

<sup>99</sup> *Id.* at 13 (“All in-season blood specimen collections will be collected post-game from the non-dominant arms of Players (unless a Player requests otherwise), and will be tested for the presence of hGH only.”)

<sup>100</sup> *Id.* at 13-5.

<sup>101</sup> *Id.* at 17 (“The Player will be subject to an immediate urine and/or blood specimen collection, or a program of testing, as determined by IPA to commence no later than 48 hours after Reasonable Cause Notification was provided.”).

<sup>102</sup> *See generally Id.* at 18.

<sup>103</sup> *Id.* (Any positive test result during follow up testing will be treated as a normal positive test result.).

<sup>104</sup> *Id.* at 23 (The Treatment Board may contact outside Medical Representatives during their evaluation, but they are not allowed to release the name of the player who is being discussed.).

<sup>105</sup> *Id.* at 27 (“The Treatment Program must be in writing and signed by the player . . . The Medical Representatives must inform the Player of the initial duration and content of the Treatment Program.”).

<sup>106</sup> *Id.* (“The plan may be made shorter or longer, and the content” can be changed “depending on the Player’s progress.”).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 26 (“Players who fail to cooperate with their Initial Evaluations or comply with their Treatment Programs will be subject to immediate discipline as set forth in Section 7.D of the Program”) (“First failure to comply: At least 15-game but no more than a 25-game suspension; Second failure to comply: At least a 25-game but not more than 50-game suspension; Third failure to comply: At least 50-game but no more than a 75-game suspension; Fourth Failure to comply: At least one year suspension; and Any subsequent failure to comply by a Player shall result in the Commissioner imposing further discipline on the Player.”).

<sup>109</sup> *Id.* at 37 (See section 7 parts A-C).

leads to an 80 game suspension, a second violation leads to a 162 game or 183 day paid suspension, and a third violation leads to a “permanent suspension from Major League and Minor League Baseball.”<sup>110</sup> The loophole being that a permanently suspended player may apply to the Commissioner for reinstatement a minimum of one year after he is suspended.<sup>111</sup> Players who test positively for stimulants or DHEA have a slightly more lenient punishment.<sup>112</sup> While a second and third violation leads to 25 game and 80 game suspensions respectively, a first violation only requires that a player go for follow up testing.<sup>113</sup> The fourth and final time a stimulant or DHEA are found in a players system the Commissioner is allowed the discretion to suspend the player “for just cause,” for any amount of time up to permanent suspension.<sup>114</sup>

### C. *NFL v. MLB Testing Policies*

As stated at the beginning of Part III, the NFL is considered to have the more comprehensive anti-doping policies, not only between the two leagues but in all of American professional sports.<sup>115</sup> While this is true when you consider the NFLs comprehensive list of banned substances, along with its extensive testing in both pre and post-season, and the “scope of persons covered by the policy,” it almost seems to be clear to why so many people might think that way.<sup>116</sup> However, an argument can be made that the MLB has a leg up when it comes to disciplining their players. Under the NFLs current policy, a player must essentially be caught using banned substances on two separate occasions before that player faces any suspension.<sup>117</sup> On the other hand

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110 *Id.* at 35, 40 (“A “game” shall include all championship season games and post-season games in which the player would have been eligible to play, but shall not include Spring Training games.”).

111 *Id.* at 35 (MLB Joint Drug Prevention) (“The Commissioner shall hear any such reinstatement application within thirty (30) days of its filing and shall issue his determination within thirty (30) days of the closing of the application hearing. A player may challenge the Commissioner’s determination on such application under the Grievance Procedure . . .”).

112 *Id.* at 36.

113 *Id.* (See sections 7.B & 7.C).

114 *Id.* (“up to permanent suspension from Major League and Minor League Baseball, which penalty shall be subject to challenge before the Arbitration Panel.”).

115 Gandert & Ronisky, *supra* note 7, at 822; *see also* Fortenberry and Hoffman, *supra* note 52, at 136 (“The Model Steroid Policy for all sports is the Policy of the NFL”).

116 *See* Fortenberry and Hoffman, *supra* note 52, at 136- 39 (“The NFL policy as a whole, was much stricter in terms of discouraging and detecting steroid use among players . . . .The NFL policy is superior because it (1) provides a comprehensive list of banned substances, (2) tests players during the pre-season, regular season, postseason, and even during off-season, (3) gives the testing authority more discretion under the reasonable cause testing clause, (4) applies beyond players to team personnel and (5) provides greater disciplinary remedies for violations of the policy.”).

117 *See* NFL POLICY, *supra* note 59, at 18.

an MLB player testing positive for any restricted PEDs is disciplined immediately, even for a first offense.<sup>118</sup> With that being said neither of these policies should be praised for only giving their players one or two chances before taking any disciplinary action, and three to four chances before permanent suspension.<sup>119</sup>

Putting aside the often illegal and moral dilemmas that arise from doping, there are other issues that may arise.<sup>120</sup> When these athletes agree to play professional sports, they are also agreeing to be in the public eye, and serve as role models for the younger generation.<sup>121</sup> What does it say to those kids in high school or college with aspirations of making it to the professional level that some of the great players like Barry Bonds and Alex Rodriguez, were only great because they were using PEDs? <sup>122</sup> What does it show them when these players were not only allowed but welcomed back, despite their very public hearings and acknowledgment of PED use.<sup>123</sup> It shows the youth of America that adults condone doping as long as it will help them accomplish their goals, even if that is not the perception any parent or mentor would like to give off.

Therein proving one of the most inherent flaws within the anti-doping policies in American professional sports. The disciplinary action available, while increasingly becoming more severe, is not harsh enough.<sup>124</sup> Even the players that test positively enough times for their leagues to find just cause for a lifetime suspension, have the ability to appeal and be reinstated.<sup>125</sup> Loopholes such as this are what cause doping to stay a persistent and wide-spread problem that is now

<sup>118</sup> MLB TESTING POLICY, *supra* note 87, at 24.

<sup>119</sup> See NFL POLICY, *supra* note 59; see also MLB TESTING POLICY, *supra* note 87.

<sup>120</sup> See Dionne L. Koller, *From Medals to Morality Sportive Nationalism and the Problem of Doping in Sports*, 19 MARQ. SPORTS L. REV. 92, 92 (2008) (Marion Jones the Olympic champion was sentenced to a maximum of six months in jail for lying to a grand jury about her drug use).

<sup>121</sup> *Id.*

<sup>122</sup> Barry Bonds Steroids Timeline, ESPN.COM NEWS SERVICES. (Dec. 7, 2007), <http://www.espn.com/mlb/news/story?id=3113127>; A-Rod Admits, Regrets Use of PEDs, ESPN.COM NEWS SERVICES, Feb. 10, 2009, <http://www.espn.com/mlb/news/story?id=3894847>.

<sup>123</sup> See Ted Berg, *Alex Rodriguez Gets Warm Reception in Return to Yankee Stadium*, USA TODAY, (Apr. 6, 2015, 2:20 PM), <http://ftw.usatoday.com/2015/04/alex-rodriguez-new-york-yankees-mlb-suspension-return> (Alex Rodriguez was suspended for 162 games, making him miss the entire 2014 season, he was allowed back for the first game of the 2015 season where "loud cheers drowned out a few scattered boos . . . fans appeared to support Rodriguez even more than most of his teammates during the parks traditional "roll call.").

<sup>124</sup> See generally History of Performance Enhancing Drugs in Sports, DRUG USE IN SPORTS, <http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017> (last visited Nov. 25, 2017).

<sup>125</sup> NFL POLICY, *supra* note 59, at 19; see also MLB TESTING POLICY, *supra* note 87, at 38 ("A Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the commissioner for discretionary reinstatements after a minimum period of two (2) years").



trickling down to the collegiate and even high school levels.<sup>126</sup> So much so that former President George W. Bush, in his 2004 State of the Union, had to reprimand professional sports for not doing enough to help, stating that “the use of performance enhancing drugs . . . is dangerous and sends the wrong message— that there are shortcuts to accomplishment, and that performance is more important than character.”<sup>127</sup> The slow process that characteristically follows a CBA negotiation is one of the reasons an independent organization like the USADA is needed to help with implementing a faster acting fix to the current doping problem.<sup>128</sup>

#### D. USADA, WADA, and USOC

Former President Bush’s call to “get rid of steroids now” followed his predecessor former President Bill Clinton’s Executive Order, which led to the formation of the White House Task Force on Drug Use in Sports.<sup>129</sup> Out of this task force came the creation of the USADA in 2000 which was designed to help regulate PEDs use in Olympic athletes.<sup>130</sup> USADA is an independent, non-profit, non-governmental organization, “recognized by Congress as the official anti-doping organization for all Olympic sport in the United States.”<sup>131</sup> Although USADA is a non-governmental organization, it is partially funded by

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<sup>126</sup> *Monitoring the Future Study: Trends in Prevalence of Various Drugs*, NATIONAL INSTITUTE ON DRUG ABUSE, <https://www.drugabuse.gov/trends-statistics/monitoring-future/monitoring-future-study-trends-in-prevalence-various-drugs> (last visited Nov. 25, 2017) (2.30% of 12th graders and 1.20% of 10<sup>th</sup> graders have admitted to taking steroids in their life time).

<sup>127</sup> See Showalter, *supra* note 9, at 652-53 (“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”).

<sup>128</sup> See *id.* at 653 (“Because all professional leagues were slow to implement their drug testing policies their ability to self-police was in doubt.”).

<sup>129</sup> See *id.* at 652-63; Bilal Chaudry, *Caught in the Rundown: The Need For a Zero-Tolerance Drug Policy to Bring Integrity Back into Professional Sports and Stop the Spread of Performance Enhancing Drugs into Society* [hereinafter *Caught in the Rundown*], 43 HOFSTRA L. REV. 588 (2014); see also Exec. Order No. 13165, 3 C.F.R. §100-02 (2001) (“The White house Task Force on drugs in Sports was and executive order created to authorize the Director of the ONDCP to serve as the U.S. Government’s representative on the board of the World Anti-Doping Agency.”).

<sup>130</sup> Chaudry, *supra* note 129, at 588.

<sup>131</sup> See *Independence and History*, USADA, <http://www.usada.org/about/independence-history/> (last visited Nov. 25, 2017) (Note that USADA is recognized as the governing body of Paralympic, Pan American, Para Pan American and UFC as well).

the Office of National Drug Policy (ONDP).<sup>132</sup> USADA enforces the same guidelines as WADA, which, as stated in Part I, is responsible for regulating doping in international sports.<sup>133</sup>

Any athlete representing the United States, who has the intention of participating in an international athletic event, is subject to USADA rules and regulations.<sup>134</sup> Athletes regulated by the USADA code are required to be available for testing year-round.<sup>135</sup> This includes being subject to in-competition as well as out-of-competition testing.<sup>136</sup> Out-of-competition testing is conducted while an athlete is not in competition with “little to no notice,” and this test can occur at any time and at any location.<sup>137</sup> In-competition testing is usually conducted within the 12-hours preceding or following an event the athlete competed in.<sup>138</sup> During these tests, both blood and urine samples are collected and tested for a highly extensive list of substances ranging from HGH to Adderall.<sup>139</sup> All national governing bodies (NGBs) of sports are required to provide USADA with a list of eligible athletes to put into their Registered Testing Pool.<sup>140</sup> Athletes who are part of the Registered Testing Pool must provide their whereabouts to the USADA at all times for the possibility of out-of-competition testing.<sup>141</sup> This is a necessity because knowing an athlete’s whereabouts is the only way for USADA to test the athletes without warning them first, without this requirement, random testing would almost always be impossible.<sup>142</sup> Athletes are chosen for testing through a Test Distribution Plan.<sup>143</sup>

If a player tests positively for one or more of the banned substances, or if USADA decides to bring a case against an athlete for a non-analytical violation, it is their responsibility to notify the athlete as well as the USOC, the relevant International Federation (IF), WADA, and the athletes’ NGB.<sup>144</sup> An independent anti-doping review board will then look into the matter and make a recommendation as to whether the

<sup>132</sup> *Id.*

<sup>133</sup> Chaudry, *supra* note 129, at 588.

<sup>134</sup> *Id.*

<sup>135</sup> USDA, Testing, <http://www.usada.org/testing/> (last visited Nov. 25, 2017).

<sup>136</sup> Chaudry, *supra* note 129, at 588. (“Under the USADA, any athlete planning to participate in an international event is subject to random drug testing at any time.”)

<sup>137</sup> *See generally* USDA, *supra* note 135.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* (Athletes are required to notify USADA of any changes of their whereabouts.).

<sup>142</sup> Gandert and Ronisky, *supra* note 7, at 831.

<sup>143</sup> *See* USDA, *supra* note 135 (Athletes Chosen through a Test Distribution Plan are not chosen at random. It is based on a multitude of factors including but not limited to “training periods and competition calendar, the history of doping in the sport/ or discipline, and physical demands of the sport and possible performance-enhancing effect that doping may elicit.”).

<sup>144</sup> *Id.* (A non-analytical case is when there is “proof of a violation based upon evidence other than an adverse analytic finding.”).

athlete deserves to be sanctioned by USADA.<sup>145</sup> This anti-doping review board is made up of independent experts in a multiplicity of various areas such as the scientific, legal, or medical fields.<sup>146</sup> The independent organization is given the discretion to determine whether a charge should be handed out.<sup>147</sup> The athlete under consideration does have the chance to provide evidence in their favor to the board before the final recommendation is made.<sup>148</sup> Pending the board's decision, USADA holds the right to enforce sanctions on the athletes under review.<sup>149</sup> The athlete holds the right to either accept those sanctions or challenge them at an arbitration hearing.<sup>150</sup> The judges presiding over these hearings are again independent of USADA and come from the American Arbitration Association (AAA).<sup>151</sup> The judges presiding over this independently run hearing are shown evidence and hear testimony from witnesses under oath and penalty of perjury; a written decision is then provided to both parties.<sup>152</sup> The last and final chance for an athlete to object to their sanctions is the appeals process.<sup>153</sup> An appeal can also come from any of the major organizations involved in the decision to sanction an athlete, such as the USADA, WADA, or IF. The appeal proceeds in front of the Court of Arbitration for Sport (CAS) and the decision delivered by them is final.<sup>154</sup> It is important to remember that all of the proceedings can take place while the independent review

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<sup>145</sup> *See id.*

<sup>146</sup> U.S. Anti-Doping Agency Adjudication Process, USADA ANTI-DOPING REVIEW BOARD, <http://www.usada.org/testing/results/adjudication-process/> (last visited Nov. 25, 2017).

<sup>147</sup> *See id.* (“It’s important to understand that the anti-doping review board is not the independent arbitration panel that hears and decides contested cases. The anti-doping review board only provides an additional check, reviewing the case information and providing a recommendation as to whether an athlete should be charged with an anti-doping rule violation.”).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> AMERICAN ARBITRATION ASSOCIATION, [https://www.adr.org/aaa/faces/s/about?\\_afLoop=1225946953075541&\\_afWindowMode=0&\\_afWindowId=12wqcgzho\\_1#%40%3F\\_afWindowId%3D12wqcgzho\\_1%26\\_afLoop%3D1225946953075541%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D12wqcgzho\\_55](https://www.adr.org/aaa/faces/s/about?_afLoop=1225946953075541&_afWindowMode=0&_afWindowId=12wqcgzho_1#%40%3F_afWindowId%3D12wqcgzho_1%26_afLoop%3D1225946953075541%26_afWindowMode%3D0%26_adf.ctrl-state%3D12wqcgzho_55) (last visited Nov. 25, 2017) (“The American Arbitration Association (AAA), is a not-for-profit organization with offices throughout the U.S. AAA has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court.”).

<sup>152</sup> U.S. Anti-Doping Agency, *supra* note 146, at Adjudication Process.

<sup>153</sup> *See id.*

<sup>154</sup> *See Frequently Asked Questions*, TRIBUNAL ARBITRAL DU SPORT, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Feb 10, 2017) (“The Court of Arbitration for Sport (CAS) is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.”); U.S. Anti-Doping Agency, *supra* note 146.

board is reviewing the initial charge on the athlete.<sup>155</sup> It is also important to point out that unlike in the American court systems, when doping charges are brought against an athlete they are effectively guilty until proven innocent.<sup>156</sup>

#### IV. ANTI-DOPING LEGISLATION IN THE UNITED STATES

##### A. *Attempted Congressional Intervention*

As stated above, the Anti-Doping policies of professional sports in America are not governed uniformly like agencies such as WADA and USADA; they are governed by the league and players' associations with CBAs.<sup>157</sup> This is not, however, due to the lack of trying by Congress.<sup>158</sup> The legislative branch has a long history of trying to combat doping use in sports with uniform minimum rules that all athletes and sport leagues would be required to follow.<sup>159</sup> Most of Congress's attempts have failed for a variety of reasons, including the fact that designer drugs can be developed faster than legislation can be implemented, as well as the fact that some of the proposed legislation was just not inclusive enough.<sup>160</sup>

Congress's first attempt at intervening in anti-doping policies was the Anabolic Steroid Control Act of 1990 (ASCA).<sup>161</sup> The passages of the ASCA added anabolic steroids to the Schedule III list of the Controlled Substances Act (CSA) and established criminal penalties for the use and possession of such steroids.<sup>162</sup> The ASCA defined anabolic steroids as "any drug or hormonal substance, chemically and pharmacologically related to testosterone."<sup>163</sup> There were twenty-seven anabolic steroids that were then classified as Schedule III controlled substances, but that unfortunately did not elicit the results congress had

<sup>155</sup> See U.S. Anti-Doping Agency, *supra* note 146.

<sup>156</sup> See Daniel Dawer, *Leveling the Playing Field: Why the USADA Must Adopt a Criminal Burden of Proof in Anti-Doping Proceedings 2* (2007) (unpublished essay, University of Texas), [https://liberalarts.utexas.edu/plan2/\\_files/pdf/worthington/dawer08.pdf](https://liberalarts.utexas.edu/plan2/_files/pdf/worthington/dawer08.pdf).

<sup>157</sup> See Yesalis & Bahrke, *supra* note 10, at 43.

<sup>158</sup> See generally Joseph M. Saka, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus from Steroids to Sports*, 23 J. CONT. HEALTH. L. & POL'Y 341 (2007).

<sup>159</sup> See *id.* at 345-48.

<sup>160</sup> See Gandert & Ronisky, *supra* note 7, at 820 ("Technology improved and made steroids and other doping methods more potent and more difficult to trace with established drug tests. Testing could not keep up with the new doping methods being used by athletes.").

<sup>161</sup> See *id.*

<sup>162</sup> See Saka, *supra* note 158, at 345; Gandert & Ronisky, *supra* note 7, at 820; *Drug Scheduling*, DRUG ENF'T ADMIN., <https://www.dea.gov/druginfo/ds.shtml> (last visited Feb. 20, 2017) ("Schedule III drugs, substances, or chemicals are defined as drugs with a moderate to low potential for physical and psychological dependence. Schedule III drugs abuse potential is less than Schedule I and Schedule II drugs but more than Schedule IV.").

<sup>163</sup> Anabolic Steroid Control Act of 1990, 21 U.S.C.A. §802(41)(A) (West 1992).

intended when passing the act.<sup>164</sup> This is because manufacturers found a loophole in the precursor definition set forth by the CSA that allowed them to legally market steroid precursors.<sup>165</sup> Technically, only immediate precursors were prohibited by the language of the CSA, and steroid precursors were not considered immediate because they were “derivatives of testosterone that metabolize into anabolic steroids once ingested,” even though they had the same effects.<sup>166</sup>

In 1994, Congress passed the Dietary Supplement Health and Education Act (DSHEA), which made it even easier to gain access to performance enhancing drugs.<sup>167</sup> By broadening the definition of dietary supplements, Congress gave the green light for many steroid precursors to be sold over-the-counter with no regulation by the Food and Drug Administration (FDA).<sup>168</sup> This action by Congress created another loophole for anabolic steroid manufacturers.

Fourteen years after passing the ASCA, Congress again tried to tackle the doping problem.<sup>169</sup> In 2004, it passed an updated Anabolic Steroid Control Act, which added sixty new substances to the Schedule III list of drugs banned under the CSA by linking androstenedione to anabolic steroids, including Tetrahydrogestrinone (THG).<sup>170</sup> Additionally, the ASCA reserved funding for private and public entities “to carry out science-based education programs in elementary and secondary school to highlight the harmful effects of anabolic steroids.”<sup>171</sup> While the new Act was a step in the right direction, Congress again failed to address the loopholes that had hurt the success of the ASCA in 1990.<sup>172</sup> The Act of 2004 did not address all steroid precursors, and therefore left open the same loopholes that existed in

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<sup>164</sup> See Gandert & Ronisky, *supra* note 7, at 820.

<sup>165</sup> See Saka, *supra* note 158, at 346 (“[T]he CSA includes immediate precursors, drugs ‘which the Attorney General has found to be . . . an immediate chemical intermediary used or likely to be in the manufacture of such controlled substance,’ as controlled substances.” (quoting 21 U.S.C. §802(6) (2000))).

<sup>166</sup> See *id.* (quoting Adrian Wilairat, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL’Y 377, 378 (2005)).

<sup>167</sup> See *id.* (“DSHEA made it difficult for the Food and Drug Administration (FDA) to regulate nutritional supplements, because the broad definition of dietary supplements allowed many steroid precursors to be sold over-the-counter, free from regulation.”).

<sup>168</sup> See *id.*

<sup>169</sup> See Gandert & Ronisky, *supra* note 7, at 821.

<sup>170</sup> See Saka, *supra* note 158, at 348. Androstenedione is “a steroid sex hormone C<sub>19</sub>H<sub>26</sub>O<sub>2</sub> that is secreted by the testes, ovaries, and adrenal cortex and is an intermediate in the biosynthesis of testosterone and estrogen.” *Androstenedione*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/androstenedione> (last visited Feb 20, 2017). Tetrahydrogestrinone is “an artificial anabolic steroid taken for enhancement of performance.” *Tetrahydrogestrinone*, OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/definition/us/tetrahydrogestrinone> (last visited Feb 20, 2017).

<sup>171</sup> See *id.* (quoting 42 U.S.C.S. §290bb-25f (West Supp. 2004)).

<sup>172</sup> See Gandert & Ronisky, *supra* note 7, at 821.

1990.<sup>173</sup> Furthermore, the Anabolic Steroid Control Act of 2004 again failed to address other forms of doping that had arisen over the past fourteen years.<sup>174</sup> Thus, leaving us with laws that detail which substances can and cannot be used, but no legislation regarding how these banned substances should be tested for.<sup>175</sup>

The following year, in 2005, Senator John McCain sponsored and introduced the Clean Sports Act (CSA) in the Senate.<sup>176</sup> The bill was aimed at regulating testing policies, rather than regulating the actual drug as the ASCAS that came before it had attempted.<sup>177</sup> The goal of the CSA was to require all American professional sports leagues “to submit to mandatory uniform testing for anabolic steroids.”<sup>178</sup> Additionally, the CSA aimed to reduce the use of PED’s among teenagers, which the authors believed had become a problem “of national significance.”<sup>179</sup> Specifically, the drafters cited an underlying correlation between the use of PED’s by professional athletes and the increased use of PED’s by teenagers the United States.<sup>180</sup> Furthermore, enacting the CSA was meant to “return integrity to professional sports.”<sup>181</sup> Congress planned to do this by including in the CSA the requirement for each athlete to randomly be tested for PED’s use five times a calendar year, and at least twice during the off-season.<sup>182</sup> If an athlete tested positive even ones time under CSA guidelines, they would be suspended from their league for two years.<sup>183</sup> If an athlete were to test positively for PEDs a second time, the result would be a lifetime ban from all professional sports.<sup>184</sup> The players would be guaranteed the right to a “fair, timely and expedited hearing” if the athlete wanted to dispute the positive test

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> S. 1114, 109th Cong. (2005). The U.S. House of Representatives equivalent bill was H.R. 2565, 109th Cong. (2005).

<sup>177</sup> Lindsay J. Taylor, *Congressional Attempts to “Strike Out” Steroids: Constitutional Concerns About the Clean Sports Act*, 49 *Ariz. L. Rev.* 961, 962 (2007).

<sup>178</sup> *Id.* at 961. (“The bill sought to require all players in the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball to submit to mandatory uniform testing for anabolic steroids.”).

<sup>179</sup> See *id.* at 961-62 (quoting S. 1114, *supra* note 176, at §2(a)(1)) (The bill has “appeared in Congress under other names, such as The Drug Free Sports Act and the Integrity in Professional Sports Act (IPSA).”).

<sup>180</sup> See Taylor, *supra* note 178, at 962 (“The writers of the CSA also found that “[e]xperts estimate that over 500,000 teenagers have used performance enhancing substances.” (quoting S. 1114, *supra* note 176, at §2(a)(2))).

<sup>181</sup> *Id.*

<sup>182</sup> S. 1114, 109th Cong. §4(b)(1) (2005).

<sup>183</sup> *Id.* §4(b)(7)(A)(i)-(ii) (2005).

<sup>184</sup> Taylor, *supra* note 178, at 962; S. 1114, 109th Cong. at §4(b)(7)(A)(i)-(ii) (2005) (There are other circumstances laid out in the CSA that allow for leniency if for instance a player did not know he was inhaling a forbidden substance.).

result.<sup>185</sup> The athlete's respective league would, however, be required to publicly "disclose within 30 days the identity of any athlete testing positive, as well as the prohibited substance found in the test results."<sup>186</sup> Moreover, any league that violated the CSAs testing standards would face fines of up to \$1,000,000 for every violation.<sup>187</sup> These mandatory requirements proposed in the CSA are not very different from the CBA testing policies now adopted in the NFL and MLB.<sup>188</sup> Nonetheless, the CSA died in the 109th Congress and did not become law.<sup>189</sup>

The fact that the CSA was brought to the floor of the Senate does not prove that the government has a commitment to "cleaning up sports" as former President Bush's call to arms demanded.<sup>190</sup> Ultimately, this still leaves us in the same place we were after the failures of the ASCAs of 1990 and 2004, with no legislative control over drug testing in American professional sports.<sup>191</sup> Ultimately, the federal government has left policy decisions regarding drug-testing procedures up to the states and respective professional sports leagues.<sup>192</sup>

### B. *State Preemption*

The question of what laws govern anti-doping regulations leads to yet more confusion and has been a lingering question in the professional sports world.<sup>193</sup> While it was previously established that there is no federal legislation governing testing policies in American professional sports, there is still the question of a sports leagues CBA agreement in comparison to the employment laws of the team's home state.<sup>194</sup> In 2009, the Eighth Circuit released the decision of *Williams v. National Football League* on exactly this question.

The circuit upheld a lower-court ruling that allows professional athletes in the National Football League (NFL), Major League Baseball (MLB), National Hockey League (NHL), and National

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<sup>185</sup> Taylor, *supra* note 178, at 962.

<sup>186</sup> *Id.*; S. 1114, 109th Cong. §4(b)(7)(A)(i)-(ii).

<sup>187</sup> S. 1114, 109th Cong. §4(b)(2) (Congress has the power to regulate this through the Commerce Clause regulating power granted to them in the U.S. Const. art. 1, §8, cl. 3); *United States v. Lopez* tells us that Congress has the power to "regulate 1) channels of interstate commerce, 2) instrumentalities of interstate commerce, and 3) activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (Athlete's Drug Testing Policy's fall under those categories.).

<sup>188</sup> See generally MLB Testing Policy *supra* note 87; see generally NFL Policy, *supra* note 59.

<sup>189</sup> S. 1114, 109th Cong. §4(b)(1) (2005).

<sup>190</sup> Chaudry, *supra* note 129, at 567.

<sup>191</sup> Gandert and Ronisky, *supra* note 7, at 821.

<sup>192</sup> *Id.*

<sup>193</sup> See generally Wolf, *supra* note 5.

<sup>194</sup> *Id.* at 1606.

Basketball Association (NBA) to challenge their doping suspension in state courts and apply favorable state employment law instead of bargained-for terms specified in their contracts. The ruling effectively prevents the owners of professional sports teams operating under collective bargaining agreements (CBA's) from enforcing the provision therein for drug testing.<sup>195</sup>

The broader implication of *Williams* denotes that if a league's CBA conflicts with a state's employment law policies, the state law controls and the terms in the CBA are effectively voided, therefore, rendering the CBA's sanctions illegal.<sup>196</sup> In this specific case, a Minnesota employment law prohibited adverse action against employees because they failed a drug test. There are about 25 other states with similar laws.<sup>197</sup> While it is true that the Eighth Circuit's decision in *Williams* is only binding on courts falling under that jurisdiction, it sets a precedent for the entire court system to go down this slippery slope.<sup>198</sup> Furthermore, as the Commissioner of the NFL, Roger Goodell indicated after the *Williams* decision, his leagues' anti-doping policies were meant to be distributed uniformly.<sup>199</sup> Goodell's statement implying that if one state's law prevents the CBAs drug-testing punishments, then those punishments will not be applied to any player regardless of where the players home team. Thus effectively rendering the *Williams* decision applicable to all NFL players.<sup>200</sup>

Prior to the *Williams* decision, it was assumed by both the leagues' and players' associations that CBAs preempted state law when drug testing came into question.<sup>201</sup> This was based on the assumption that the reason drug-testing policies are adopted in CBAs is for the protection of the players' rights from the leagues.<sup>202</sup> While the professional sports

<sup>195</sup> *Williams v. Nat'l Football League*, 582 F.3d 863, 886 (8<sup>th</sup> Cir. 2009); Wolf, *supra* note 5, at 1606.

<sup>196</sup> Wolf, *supra* note 5, at 1607.

<sup>197</sup> *Id.* (adverse action due to a positive drug test was forbidden unless: "1) the employee receives notice of his right to explain the result: (2) the employee receives notice of his right to a second, confirmatory test; and 3) the employee receives notice of his opportunity to undergo drug treatment and fails of refuses to participate.").

<sup>198</sup> *Williams v. Nat'l Football League*, *supra* note 195; Wolf, *supra* note 5, at 1617-18 ("Although *Williams* only directly affected two players on the Minnesota Vikings roster, the decision may reach far beyond the Minnesota franchise or even the jurisdiction of the Eighth Circuit.").

<sup>199</sup> See Wolf, *supra* note 5, at 1616-17.

<sup>200</sup> *Id.* at 1617 ("NFL Commissioner Roger Goodell meted out no punishment to either the Vikings players or the three New Orleans Saints players, citing the need to impose uniform discipline or none at all.").

<sup>201</sup> *Id.* at 1615 (The *Williams* decision tells us that "CBA's do not automatically preempt state law claims. Suits for breaches of CBA's are governed by Section 301 of the Labor Management Relations Act (LMRA), a federal law that governs suits for contractual disputes between an employer and a labor organization. Section 301 requires application of a two-part test to determine if a claim is sufficiently "independent" to survive preemption.").

<sup>202</sup> *Id.* at 1612.



CBAs are nowhere near restrictive enough, they have been getting much better in the recent past. A decision such as the one in *Williams* could easily deter and restrict those efforts when it comes time to renegotiate the leagues' CBAs.<sup>203</sup>

## V. WHAT CAN BE DONE TO CHANGE THESE POLICIES?

### A. *CBA's in their current state are inherently flawed*

There will never be a perfect drug testing policy. There are just too many variables, such as the sheer number of individual players, the exceptions that those players can apply for and the different needs of each sport.<sup>204</sup> But, doing a more thorough job at preventing doping is possible. What the CBA's are currently providing is not sufficient. The drug testing policies currently ruling professional sports in the United States are inherently and fundamentally flawed, for several reasons, including loopholes, a lack of desire to completely eradicate doping, and the slow process of collective bargaining.<sup>205</sup> There are major loopholes in both the NFL and MLBs CBAs. For example, it is possible for the athletes to figure out a rough time frame of when they will be tested, and adjust their intake accordingly if they are doping.<sup>206</sup> The athletes are also given a number of chances after testing positively before any ban is implemented. In addition to that an athlete receives up to three chances before being banned "for life."<sup>207</sup> Furthermore, as we saw in the *Williams* decision, the arguably most effective loophole is that athletes can use their states employment laws to circumvent the CBAs drug testing policies in order to have their punishments removed altogether.<sup>208</sup>

Even worse than the loopholes are the leagues obvious lack of desire to deter players from doping.<sup>209</sup> Leagues such as the NFL have confidentiality clauses in their drug testing policies, and in these policies the leagues promise to protect a players identity to the best of

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<sup>203</sup> *Id.* at 1607.

<sup>204</sup> See Mark Zeigler and Hieu Tran Phan, *Behind the Sheild: NFL drug testing policy not as good as sold*, THE SAN DIEGO UNION-TRIBUNE (Dec. 8, 2014, 6:00 AM) ("As a baseline, NFL players can receive a therapeutic-use exemption to take amphetamines such as Adderall or Ritalin to treat ADD. . . The NFL doesn't make public the number of these exceptions that are issued, while Major League Baseball does.")

<sup>205</sup> See Gandert and Ronisky, *supra* note 7 at 832-38.

<sup>206</sup> See generally MLB Testing Policy *supra* note 87; see generally NFL Policy, *supra* note 59.

<sup>207</sup> MLB Testing Policy *supra* note 87; see also Gandert and Ronisky, *supra* note 7, at 821 (Players can petition the league to be allowed back into the sport even after they are banned for life).

<sup>208</sup> Gandert and Ronisky, *supra* note 7, at 833; see generally *Williams*, 582 F.3d at 863.

<sup>209</sup> Gandert and Ronisky, *supra* note 7, at 833.

their ability because a positive drug test would attract unwanted attention from the media.<sup>210</sup> Effectively saying that instead of using this unwanted attention as a quasi-punishment, the leagues are willing to protect those players for breaching the anti-doping policies.<sup>211</sup> But then again, it is in neither the leagues' nor the players best interest to have a drug- testing policy that fully deters doping.<sup>212</sup> When players are doing well and breaking records, fans are happy and interested. When fans are happy and interested, they tend to spend more money on all things related to their favorite teams, subsequently allowing the players as well as the owners to benefit financially.<sup>213</sup> In recent history, the way these players continue doing well and breaking those records is by using PEDs.<sup>214</sup>

The last impediment to the CBA's effectiveness is the sheer amount of time they actually take to negotiate. Each rule or testing procedure needs to be negotiated and agreed upon by both parties.<sup>215</sup> Not only does this negotiation requirement lead to more lenient compromises due to the need for an agreement as well as the reasons listed in the paragraph above, but it also leaves the testing policies lagging behind in the fast-paced world of doping developments. For instance, a blood test for HGH has been available in the United States since 2008, yet the NFL and MLB drug testing policies did not include HGH testing until 2011 and 2012 respectively.<sup>216</sup> Collective bargaining with its current procedures, requires the professional sports leagues to take a retroactive approach to new PEDs that become available, instead of being able to test for, and hopefully deter the targeted audience before this new drug becomes a widespread problem. The CBA negotiation process effectively requires this new form of doping to become a widespread problem before anything can be done about it.

<sup>210</sup> See NFL Policy, *supra* note 59, §1.2 at 6.

<sup>211</sup> Gandert and Ronisky, *supra* note 7 at 833.

<sup>212</sup> *Id.* at 834.

<sup>213</sup> See *id.* (“Players that dope usually perform better. The better the athletes perform; the more revenue the owners make. The more revenue the owners make, the more valuable players are to their owners. The more valuable players are, the higher their salaries are.”).

<sup>214</sup> *Id.*

<sup>215</sup> See *id.* at 835 (“The NLRA deems drug testing as a labor issue that must be collectively bargained for . . . every issue regarding drug testing in the NFL must be negotiated.”).

<sup>216</sup> See *id.* at 836; see Mike Freeman, *Players Say The NFL Has an HGH Problem, Even if Peyton Manning isn't Part of it*, BLEACHER REPORT (Dec. 30, 2015) <http://bleacherreport.com/articles/2602986-players-say-the-nfl-has-an-hgh-problem-even-if-peyton-manning-isnt-part-of-it> (While both parties agreed to HGH testing in the NFL in 2011, the testing was not actually implemented until Oct. 2014); see also AP, *A timeline of MLB's drug-testing rules*, USA TODAY (Mar. 28, 2014, 4:55PM) <http://www.usatoday.com/story/sports/mlb/2014/03/28/a-timeline-of-mlbs-drug-testing-rules/7024351/> (the MLB agreed to “ add HGH blood testing during spring training, during the offseason, and for reasonable cause” in 2012, and began “HGH blood testing throughout the regular season” the following year in 2013).

*B. Congressional Intervention Can Fix the Flaws*

Congress' authority to regulate drug-testing policies in professional sports stems from Article I, section 8, clause 3 of the United States Constitution.<sup>217</sup> Under this clause, known as the Interstate Commerce Clause Congress is granted the enumerated power "to regulate commerce . . . among the several states."<sup>218</sup> It has been widely accepted by the judiciary that American professional sports leagues fall squarely within the definition of interstate commerce.<sup>219</sup>

As stated in Part IV (A) of this note, Congress has used its power in an attempt to intervene with doping laws in the past, most recently in 2005 with the Clean Sports Act, which unfortunately died in the 109th Congress and was never passed into law.<sup>220</sup> It has been stated that these past failures may deter Congress's desire to propose legislation again.<sup>221</sup> For reasons ranging from the back lash of both the leagues and players associations during the last attempt to the idea that they have more pressing battles to fight.<sup>222</sup> This, however, is Congress' battle to fight, because no matter what other problems our nation is currently facing, PEDs use amongst professional athletes, and collegiate athletes has been and continues to be one of them.<sup>223</sup> Congress also retains a substantial interest in PEDs regulation because not only has it become a public safety issue, but many PEDs that are used are illegal.<sup>224</sup>

The problem with the legislation Congress has proposed in the past is that it aimed to eliminate the CBA negotiations all together and uniformly regulate the league's drug testing policies through an independent governmental third party,<sup>225</sup> thus taking a privately-run matter and making it solely a public policy concern. While a valiant effort "direct regulation by Congress is an inappropriate means" to achieve the ultimate end of cleaning up sports.<sup>226</sup> The congressional intervention that is needed falls somewhere in the middle of completely privately negotiated drug-testing policies and total governmental

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<sup>217</sup> See U.S. CONST. art. I, §8, cl. 3.

<sup>218</sup> *Id.*

<sup>219</sup> See *e.g.* Flood v. Kuhn, 407 U.S. 258, 282 (1972).

<sup>220</sup> S. 1114, *supra* note 176.

<sup>221</sup> Saka, *supra* note 158 at 356.

<sup>222</sup> See *id.* at 357 (In 2005 people were worried that Congress should be spending their time and resources on things such as the war in Iraq and the fear is that now people will do the same things with topics such as Immigration or gender equality.) ; Wolf, *supra* note 5 at 1623 ("because team owners and representative repeatedly spurned congress's attempts to assist in the drug testing efforts in the past, law makers may choose to now reject requests from the same group.").

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at 358.

<sup>225</sup> S. 1114, *supra* note 176.

<sup>226</sup> Saka, *supra* note 158, at 361.

takeover of those testing policies. That is why Congress's next legislative intervention needs to propose three very specific and narrowly tailored provisions. First, instead of trying to set uniform drug-testing standards for the leagues, Congress needs to set minimum standards that can be expanded on.<sup>227</sup> Second, criminal penalties need to be implemented as a possible punishment for PED use. Third, Congress needs to "create an exception to existing applicable, state law drug testing guidelines, such as Minnesota's DATWA, thus federally preempting state jurisdiction in the drug testing of professional athletes."<sup>228</sup>

Just as in the Clean Sports Act, Congress needs to be the one to set minimum drug-testing standards for the professional sports leagues.<sup>229</sup> Setting minimum standards, such as the number of times a year each player must be tested or the procedure in which the drugs are tested for, would ensure that leagues were not making policies that are too lenient, while still leaving them in charge of the specifics. Under this legislation, the leagues and player's associations would still be able to negotiate for things such as, what kind of drugs are to be tested for and what type of notice the players must receive about testing. Unlike the Clean Sports Act, however, an independent third party should not be the ones to enforce these minimum standards, nor should it be required that they be consulted.<sup>230</sup> Allowing the leagues to choose how and by whom their testing- programs are overseen could be the compromise needed to lessen the backlash from the leagues and finally get some sort of anti-doping legislation out of Congress.

The second provision Congress's legislation needs to address is the lack of criminal penalties imposed on athletes who are caught doping. The United States Code gives us a statute that makes it a federal crime to merely possess, let alone ingest anabolic steroids and HGH without a prescription.<sup>231</sup> However, there have been almost no instances in which a professional athlete was prosecuted for failing a drug-test or admitting to PEDs use.<sup>232</sup> There are two main reasons for this lack of criminal

<sup>227</sup> See Fortenberry & Hoffman, *supra* note 52, at 140.

<sup>228</sup> Wolf, *supra* note 5, at 1622.

<sup>229</sup> See S. 1114, 109<sup>th</sup> Cong. (2005).

<sup>230</sup> See Fortenberry & Hoffman, *supra* note 52, at 143 ("The Act creates a reliance on the United States Anti-Doping Agency ("USAA") as it requires that the major sports association consult with USAA in the creation of the testing plan and drug protocols, and doping standards must be consistent with the standards of the USAA.")

<sup>231</sup> Taylor, *supra* note 178, at 987; 21 U.S.C. §844(a) (2006).

<sup>232</sup> See Brian Palmer, *If Lance Armstrong Is Guilty, Why Isn't He Going to Jail*, SLATE, Oct. 11, 2012, at 3:30PM, [http://www.slate.com/articles/sports/explainer/2012/10/lance\\_armstrong\\_doping\\_case\\_why\\_isn\\_t\\_lance\\_going\\_to\\_jail.html](http://www.slate.com/articles/sports/explainer/2012/10/lance_armstrong_doping_case_why_isn_t_lance_going_to_jail.html) ("Criminal prosecution of professional athletes for steroid possession is so rare that, when former Sen. Greg Mitchell was looking for players to cooperate in his investigation of performance enhancing drugs in baseball, he assured them that none of the 221

penalization. First, prosecutorial discretion gives prosecutors the option to decide which cases they pursue, and possession of anabolic steroids without a prescription is only a misdemeanor.<sup>233</sup> Misdemeanors are punishable by only up to a year in prison and therefore present a low priority in most prosecutors' minds.<sup>234</sup> Furthermore, the evidence available against these athletes is circumstantial at best.<sup>235</sup> The only evidence prosecutors have to offer are failed drug tests and eyewitness's, which in most cases would not be convincing enough to be worth the pursuit.<sup>236</sup> Second, not all PEDs are illegal.<sup>237</sup> Until all PEDs, or the action of ingesting something considered to be a PED, is made illegal, criminally prosecuting professional athletes based on what drug was found in their system would disrupt the uniformity of anti-doping policies within the leagues. As the Commissioner of the NFL Roger Goodell indicated after the *Williams* decision, his leagues anti-doping policies were meant to be distributed uniformly.<sup>238</sup> Congress must address this by creating a new regulation imposing criminal penalties on anyone found with any drugs in their system that are banned by their respective CBA's. These penalties should include jail time and a hefty fine. It is true that many PEDs are not believed to have a high risk of dependency, consequently, leading critics to think they should not be criminalized.<sup>239</sup> But, these PEDs have been proven to pose other physical and psychological risks.<sup>240</sup> If more people other than athletes start taking these PEDs without the supervision of coaches and doctors, then it can become a public health and safety issue. This would give congress the right to criminalize the action of physically injecting or ingesting the PED rather than the drug itself. Criminalizing the action of taking PEDS would raise the stakes, which would likely deter a greater number of athletes from using them in the first place. Adding the potential of jail time might be what it takes to make the reward no longer worth the risk.

Lastly Congress's legislation needs to address the state employment laws preemption ability that was recognized in the Eight Circuits decision in *Williams*.<sup>241</sup> A provision creating an exception to

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baseball players who had already tested positive had been prosecuted.”).

<sup>233</sup> See *id.* (“Possession of anabolic steroids without a prescription is a federal misdemeanor punishable by up to one year in prison and a minimum fine of \$1,000.”).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> See *id.* (“Reinfusing your own blood back into your body, while against the rules of professional cycling, is not a crime.”).

<sup>238</sup> *Williams*, 582 F.3d at 863; Wolf, *supra* note 5, at 1617.

<sup>239</sup> Palmer, *supra* note 232.

<sup>240</sup> Fortenberry & Hoffman, *supra* note 52, at 126.

<sup>241</sup> See *Williams*, 582 F.3d at 863 (A Minnesota state employment law was found to preempt the NFLs CBA agreement).

allow CBAs to preempt state law would likely be sought after by the leagues, thus making Congressional intervention slightly more welcome.<sup>242</sup> Furthermore, if such an exception were to be created, the problem of not being able to provide sanctions and punishments uniformly throughout the leagues would disappear. An exception to allow CBAs to preempt state law would be fair because CBAs are negotiated between the leagues and the players, and nothing can go into effect unless it is agreed upon by both parties. Thus, if both parties agree to a certain punishment for failing a drug test, a player should not then be able to use state law to get around that agreed upon punishment.<sup>243</sup>

### C. *The Constitution Can Stop Congress*

While congressional intervention is very badly needed, the passage of this proposed legislation would most likely lead to some major constitutional challenges.<sup>244</sup> There is a high probability that any legislation involving congressional involvement in professional sports drug-testing programs would be challenged in court.<sup>245</sup> The most predominant challenge against congressional intervention would be a Fourth Amendment claim, that government intervention into drug-testing is unreasonable search and seizure.<sup>246</sup> The worst-case scenario of this proposed legislation being litigated is that it could be struck down and declared unconstitutional, which would mean the country would be back to square one with its doping problem in professional sports.<sup>247</sup> The best case scenario would be that the legislation is found constitutional and subsequently enacted. Yet, the best-case scenario would still be costly and time consuming for all parties involved.<sup>248</sup>

### D. *An Arbitration Clause can speed up the process*

The high probability of litigation is why an alternative option to

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<sup>242</sup> See Wolf, *supra* note 5, at 1624 (“Goodell pleaded for a change in law that would allow CBA’s to preempt contrary state law, stating that a change would “protect[] the health of our athletes, ensur[e] confidence in the integrity of the game . . . [and] set[] a positive example for young people.”).

<sup>243</sup> Showalter, *supra* note 9, at 655.

<sup>244</sup> Saka, *supra* note 158, at 361.

<sup>245</sup> See *id.*

<sup>246</sup> U.S. CONST. amend. IV; See Showalter, *supra* note 9, at 671 (“The Fourth Amendment provides each person in the United States with the right “to be secure in their persons . . . against unreasonable searches and seizures” by the federal government.”).

<sup>247</sup> Saka, *supra* note 158, at 361.

<sup>248</sup> *Id.*

Congressional legislation is necessary. This alternative option would be Congress requiring an arbitration condition between sports leagues and player's associations in the event that an agreement on drug-testing policies cannot be reached during CBA negotiations.<sup>249</sup> This would require arbitration if the two parties came to an impasse on drug-testing policies, the arbitrator would hear both sides and then come to a fair conclusion that would be binding on both the players and the leagues.<sup>250</sup> Whether that conclusion be a compromise of both parties or the arbitrator siding with one party, the decision would be as good as law. A requirement like this would be successful at creating a stricter drug-testing policy because it would allow the leagues to freely express their desired policies without fear of a player strike,<sup>251</sup> as well as force the players associations into making more reasonable proposals "in fear that unreasonable proposals would make the arbitrator side with the league."<sup>252</sup> An arbitration requirement would take away the "bargaining chip" stigma given to anything involved in CBA negotiations. It would allow both players associations and the leagues to express their desires without the fear of having to give up something else they wanted in return, such as higher pay or more days off etc. While it is not a guarantee that doping will stop it is a step in the direction of the implementation of stricter drug testing policies without too much congressional oversight.

## VI. CONCLUSION

Doping in sports has been occurring since ancient times. It has been a widespread and persistent problem in American professional sports since their creation. However, most of the time doping is not thought to be a problem at the forefront of our society, it is often overshadowed by problems of war and economics. There are times, however, when scandals occur such as BALCO in 2003 or the Russian Olympic program in 2016 that bring the doping problem back into the spot light. Each of those times, discussion about what can be done ignites and often things such as updated CBAs or proposed legislation take place.

Despite all of the changes and advances that have already been made, the CBA process in its current state is inherently flawed. However, that does not mean it needs to be removed. What needs to happen is that Congress needs to use its Commerce Clause Power to

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 362.

<sup>252</sup> *Id.*

intervene and present the leagues with some guidelines for setting forth drug-testing policies and procedures. This government intervention needs to provide three provisions to drug-testing policies in their current form: (1) Congress needs to set minimum standards that can be expanded on by leagues and player's associations during their CBA negotiations; (2) criminal penalties need to be implemented as a possible punishment for PED use, as making a PED user criminally liable will hopefully deter a greater number of athletes from that use in the first place; and (3) a federal exception needs to be created that allows CBAs to preempt conflicting state laws. This is imperative because if something is not done to combat the *Williams* decision, players will be able to use state laws as loopholes to get out of punishments for failing drug tests. Many leagues will stop implementing punishments in cases where one state law preempts it and another does not. The last option Congress has is to require an arbitration agreement in any instance where CBA agreements come to a halt. This will allow both sides to speak freely without fear and likely lead to a stricter drug testing policy throughout the leagues. If the leagues are truly serious about cleaning up sports, then allowing Congress to have minimal intervention is necessary. Neither the sports leagues nor the player's associations can be impartial when it comes to negotiating, and that is why some Congressional oversight is the only way to get to the ultimate goal of restoring fairness to the world of sport.