

## CHAPTER 12



# DRUG TESTING IN SPORTS

The use of drugs in sports, and the drug testing procedures that have been instituted as a result, have been a major focus at the professional and amateur levels in recent years. Many episodes of drug use in sports have brought attention to this issue, involving both performance-enhancing drugs and recreational drugs. The number of athletes who have used performance-enhancing drugs has increased greatly in recent years. There are too many to note but there are a few well-known episodes.<sup>1</sup> On February 17, 2003, 23-year-old Steve Belcher, a pitcher with the Baltimore Orioles, collapsed and died during spring training. Belcher's family filed a lawsuit against Nutraquest, the manufacturer of Xenadrine RFA-1, a dietary supplement containing ephedra, for \$600 million. The case was eventually settled for approximately \$1 million.<sup>2</sup> Ken Caminiti admitted to the use of steroids during his Most Valuable Player season with the San Diego Padres in 1996. He later pleaded guilty to cocaine possession and died of an overdose-induced heart attack in 2004.<sup>3</sup> The tragic death of Len Bias from a cocaine overdose brought much attention to the sports world (see Case 5-1). Bias had been selected as the second overall pick in the 1986 NBA draft by the Boston Celtics. Canadian sprinter Ben Johnson won a gold medal at the 1988 Olympics in the 100 meter run but forfeited the medal three days later after he tested positive for the banned anabolic steroid Stanozolol.<sup>4</sup> Olympic track star Marion Jones plead guilty to lying to federal investigators after she denied using performance-enhancing drugs. She told a federal judge that she was "a liar and a cheat."<sup>5</sup> Former University of Texas great and Heisman Trophy winner Ricky Williams failed four drug tests in the NFL and was suspended from the league. He was eventually allowed back in the NFL but Williams was forced to repay \$8.6 million to the Miami Dolphins that he had received in a signing bonus from the club.<sup>6</sup>

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<sup>1</sup> See, *Timeline: A Century of Drugs and the Athlete*, USA Today, March 1, 2007.

<sup>2</sup> See generally, Deanna Rusch, *Major League Baseball & Drug Testing: A Legal critique of the Current Policy and a Look at the Future of Drug Testing in the MLB*, *Williamette Sports Law Journal*, Spring 2005.

<sup>3</sup> Associated Press, '96 MVP Admitted Steroid Use, Fought Drug Problem, *ESPN Classic*, November 3, 2004.

<sup>4</sup> *TRACK AND FIELD: Johnson Fails Another Test*, *The New York Times*, November 16, 1999.

<sup>5</sup> Associated Press, *Jones Pleads Guilty, Admits Lying About Steroids*, *NBC Sports*, October 5, 2007.

<sup>6</sup> *Miami Dolphins LTD. v. Williams*, 356 F.Supp.2d 1301.

More recently, baseball has encountered a steroid problem and instituted new rules relating to performance-enhancing drugs. Jose Canseco's book *Juiced* (2006) alleged major steroid use in baseball and has led to much debate in baseball circles regarding the use of performance-enhancing drugs.<sup>7</sup> *Game of Shadows* was published in 2006 and alleged that outfielder Barry Bonds used steroids just before he began his assault on baseball's all-time home run record. Two of baseball's most visible stars, Alex Rodriguez and Manny Ramirez have both been involved with steroid use. Rodriguez first denied steroid use but later admitted it.<sup>8</sup> Ramirez was suspended for fifty games in 2009 for the use of performance-enhancing drugs.<sup>9</sup>

Every professional sport has instituted some form of drug testing and monitoring program. Heavily regulated sports such as horse racing and boxing can require mandatory drug testing without much debate. In sports that engage in collective bargaining, such as football, hockey, baseball, and basketball, drug testing programs are the result of the combined inputs of management and labor through the process of collective bargaining. The regulation of drug testing and drug use in professional sports is quite different from amateur sports. Both, however, present unique legal issues.

Drug use has increased at the interscholastic level as well, becoming a concern for high schools and even for middle schools. Schools and school districts have instituted drug policies for student-athletes and those participating in extracurricular activities.<sup>10</sup> Constitutional challenges have been raised to many schools' drug testing schemes, and several of those challenges have reached the U.S. Supreme Court. Drug testing policies at the high school level have led to a myriad of constitutional challenges relating to equal protection rights and the Fourteenth and Fourth Amendments. The Supreme Court has attempted to fashion the law by balancing the constitutional rights of individuals against concerns regarding drug use by students.

The National Collegiate Athletic Association (NCAA) has a vested interest in ensuring that competition is drug free and has instituted its own drug testing policies. The NCAA requires all student-athletes to sign a consent form to retain their eligibility to participate in sports. The NCAA has been forceful in administering its drug policy for both street drugs and performance-enhancing substances. The association also has dealt with constitutional challenges to its policies.

Drug testing has affected the international stage as well. The U.S. Olympic Committee regulates the use of street drugs such as marijuana and cocaine as well as performance-enhancing drugs. The World Anti-Doping Agency (WADA) has also been aggressive in ensuring that drug use is outlawed in sports. WADA and the International Olympic Committee (IOC) have created a long list of banned substances for which athletes are tested.<sup>11</sup> The IOC has always taken a proactive approach regarding the use of performance-enhancing drugs. It established the very first testing of athletes in the 1968 Winter Games. In 1975, anabolic steroids were added to the IOC's list of banned substances.

Many studies have shown that athletes are using performance-enhancing drugs at an alarming rate.<sup>12</sup> Some experts believe that a doping problem exists at all levels of sports competition. Professional

<sup>7</sup> See generally, Howard Bryant, *Juicing the Game: Drugs, Power, and the Fight for the Soul of Major League Baseball*, Penguin Group, 2005.

<sup>8</sup> Associated Press, *A-Rod Steroids Report a Baseball Shocker*, CBS News, February 7, 2009.

<sup>9</sup> Ken Gumick, *Manny Suspended 50 Games for PED Use*, MLB.com, May 8, 2009.

<sup>10</sup> Associated Press, *Texas Picks Company to Run Massive Steroids Testing Program*, ESPN, January 22, 2008.

<sup>11</sup> For further study see Framl Osch, *International Sports Law Perspectives, Harmonization of Anti-Doping Code Through Arbitration: The Case Law of the Court of Arbitration for Sport*, 12 MARQUETTE SPORTS LAW REV. 675 (2002).

<sup>12</sup> G. A. Green, F. D. Uryazc, T. A. Petr, & C. D. Bray, *NCAA Study of Substance Use and Abuse Habits of College Student-Athletes*, 11 CLINICAL JOURNAL OF SPORT MEDICINE 51 (2001).

and amateur sports associations have taken different approaches in trying to combat the problem of doping in sports. This chapter presents an overview of drug use in sports and what has been done at the professional, amateur, and international levels to control it.

## PROFESSIONAL SPORTS

Professional athletes are usually deemed employees of the team or league. When professional athletes organize in labor unions, they receive protection under the National Labor Relations Act. Any drug testing program implemented in professional sports must therefore be agreed to by management and labor through the collective bargaining process.<sup>13</sup> The National Labor Relations Act requires that owners and unions “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” The National Labor Relations Board (NLRB) determined in *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182 (1989), that drug testing is a subject of mandatory bargaining between management and labor. For example, Major League Baseball owners could not impose a drug testing policy on players without first entering into good-faith negotiations with the MLB Players Association (MLBPA). Because drug programs are mandatory subjects of collective bargaining, teams or leagues cannot unilaterally institute a drug testing program. Even though Major League Baseball undertook just such an effort in the 1980s.<sup>14</sup>

Professional athletes have a great deal at stake in a short professional career. A career can be cut short by a positive drug test, which may subsequently result in discipline by the team or commissioner or in suspension from the league. If an athlete is endorsing a particular product and tests positive for drug use, there is a very good chance the athlete will lose the endorsement contract. In fact, many contracts allow a team or sponsor to deny a bonus payment upon the finding of a positive drug test. The league or team is also concerned about the overall image of the league and wants to assure its fans and the public that the players do not use drugs. That is a conflict that is not easily resolved but has to be hammered out through collective bargaining. Players unions are concerned about the image of players as well as the effect that suspensions might have on a player’s career. Unions have argued for a “stair-step” approach to player discipline, in which discipline ranges from rehabilitation to suspension from the league.

A drug testing scheme at the professional level generally sets forth, among other policies, what players can be tested, the procedure by which the testing is done, what substances are banned by the league, and the discipline imposed for a violation of the drug testing policy. In any drug testing policy for professional leagues, several matters need to be considered by both parties:

- What drugs are prohibited under the policy? Who makes the decision about which drugs are prohibited? How can a drug become prohibited by the league?
- Will random testing of all players occur? If not, how does one determine who is to be tested? Will probable cause be used as a standard for testing?

<sup>13</sup> Mark M. Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, University of Pennsylvania Journal of Labor and Employment Law, Vol. 4.2, 200.

<sup>14</sup> For further study see, Matt Mitten, *Legal Issues Arising of Blood Testing for Human Growth Hormone*, Marquette Law School Legal Studies Paper No. 09-30, 2009.

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- What disciplinary measures are to be taken if an athlete is found to be in violation of the league policy? What are the penalties for repeat offenders of the league's drug policy? What are the appropriate fines and suspensions for violations of the policy?
- How are the tests conducted and by whom? What are the procedures for maintaining the integrity of the samples?
- What are the procedures for challenging the test results?

The four major sports in America have instituted policies regarding performance-enhancing drugs. Major League Baseball was under enormous pressure to control the use of performance-enhancing drugs after the release of the Mitchell Report. As a result, Major League Baseball and the MLBPA were able to come to an agreement to strengthen the league's policy. The following are highlights of the current MLB drug policy.

### **MAJOR LEAGUE BASEBALL'S**

#### ***JOINT DRUG PREVENTION AND TREATMENT PROGRAM***

## **8. DISCIPLINE**

### ***A. Player Fails to Comply with Treatment Program***

1. If the Treatment Board determines . . . that a Player has failed to comply with his Treatment Program . . . that information shall be disclosed to the Commissioner and the Player shall be subject to the following discipline by the Commissioner:
  - (a) First failure to comply at least a 15-game but not more than a 25-game suspension;
  - (b) Second failure to comply: at least a 25-game but not more than a 50-game suspension;
  - (c) Third failure to comply: at least a 50-game but not more than a 75-game suspension;
  - (d) Fourth failure to comply: at least a one-year suspension; and
  - (e) Any subsequent failure to comply by a Player shall result in the Commissioner imposing further discipline on the Player. The level of the discipline will be determined consistent with the concept of progressive discipline.

### ***B. Player Tests Positive for a Performance Enhancing Substance***

1. First positive test result: a 50-game suspension;
2. Second positive test result: a 100-game suspension; and
3. Third positive test result: permanent suspension from Major League and Minor League Baseball; provided, however, that a Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two years. . . .

### ***C. Player Tests Positive for a Stimulant***

1. First positive test result: follow-up testing . . .
2. Second positive test result: a 25-game suspension;
3. Third positive test result: an 80-game suspension; and
4. Fourth and subsequent positive test result: a suspension for just cause by the Commissioner, up to permanent suspension from Major League and Minor League Baseball, which penalty shall be subject to challenge before the Arbitration Panel.

### ***D. Conviction for the Possession or Use of Prohibited Substance***

A Player who is convicted or pleads guilty (including a plea of *nolo contendere* or similar plea but not including an adjournment contemplating dismissal or a similar disposition) to the possession or use of any Prohibited Substance (including a criminal charge of conspiracy or attempt to possess or use) shall be subject to the following discipline:

1. For a first offense: at least a 60-game but not more than an 80-game suspension, if the Prohibited Substance is a Performance Enhancing Substance, or at least a 15-game but not more than a 30-game suspension, if the Prohibited Substance is a Drug of Abuse (including a Stimulant);
2. For a second offense: at least a 120-game but not more than a one-year suspension, if the Prohibited Substance is a Performance Enhancing Substance, or at least a 30-game but not more than a 90-game suspension, if the Prohibited Substance is a Drug of Abuse (including a Stimulant);
3. For a third offense involving a Performance Enhancing Substance: permanent suspension from Major League and Minor League Baseball; provided, however, that a Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two years.
4. If the Prohibited Substance is a Drug of Abuse (including a Stimulant), a third offense shall result in a one-year suspension, and any subsequent offense shall result in a suspension for just cause by the Commissioner, up to permanent suspension from Major League and Minor League Baseball, which penalty shall be subject to challenge before the Arbitration Panel.

### ***E. Participation in the Sale or Distribution of a Prohibited Substance***

A Player who participates in the sale or distribution of a Prohibited Substance shall be subject to the following discipline:

1. For a first offense: at least an 80-game but not more than a 100-game suspension. . . .
2. For a second offense involving a Performance Enhancing Substance: permanent suspension from Major League and Minor League Baseball; provided,

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however, that a Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two years. . . .

3. If the Prohibited Substance is a Drug of Abuse (including a Stimulant), a second offense shall result in a two-year suspension, and any subsequent offense shall result in disciplinary action for just cause by the Commissioner, up to permanent suspension from Major League and Minor League Baseball, which penalty shall be subject to challenge before the Arbitration Panel.

### ***F. Marijuana***

A Player on the Administrative Track for the use or possession of marijuana shall not be subject to suspension. The Player will be subject to fines, which shall be progressive and which shall not exceed \$25,000 for any particular violation.

### ***H. Suspensions***

1. For purposes of this Section 8, a "game" shall include all championship season games, the All-Star Game and post-season games in which the Player would have been eligible to play, but shall not include spring training games. . . .<sup>15</sup>

The NFL's drug policy clearly states that there is no place for prohibited substances in football and that steroid use is banned. Drug testing is frequently performed in the NFL. Players are subject to random drug testing by the league throughout the year, from preseason to postseason. The NBA's list of prohibited drugs includes marijuana, steroids, cocaine, and PCP. The NBA's policy is harsher for those violators who use street drugs than for those using performance-enhancing drugs. If there is reasonable cause to believe a player is using drugs, the league or the Players Association can request a conference with the player and an independent expert. The independent expert will determine whether reasonable cause exists for testing and will authorize testing if appropriate. First-year players can be tested once during training camp and three times during the regular season. Veteran players are also subject to testing. A veteran player may be required to undergo random testing during training camp and at other times for reasonable cause. Discipline under the NBA policy varies depending on the type of drug used. Marijuana and steroids are treated differently. A player has the opportunity to apply for reinstatement with approval by the league and the Players Association.

In 2005 the National Hockey League announced the start of a program dealing with the use of performance-enhancing substances. Every NHL player will be subjected to no more than two random tests every year, with at least one of the tests to be conducted for the entire team. If a player tests positive, a 20-game suspension without pay results. The player can also be referred to the league's substance abuse/behavioral health program for evaluation, education, and further possible treatment. A second positive offense results in a 60-game suspension. The player is suspended

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<sup>15</sup> MLBPA.org

permanently for a third positive test, and the player can apply for reinstatement after two years if suspended for a third time. A summary of the NHL's drug testing program for performance-enhancing drug substances is as follows:

**Testing Procedures:** Following their orientation session on the program, every NHL player will be subject to up to three "no-notice" tests from the start of training camp through the end of the Regular Season. Testing is conducted as follows: 10 teams will be subject to one no-notice test, 10 teams will be subject to two no-notice tests, and 10 teams will be subject to three no-notice tests.

**Sample-Collecting Authority:** Comprehensive Drug Testing, Long Beach California

**Test Laboratory:** INRS-Institute Armand-Frappier, Laval Quebec

**Disciplinary Penalties:** Positive tests for performance-enhancing substances will result in mandatory discipline as follows:

- For the first positive test, a 20-game suspension without pay and mandatory referral to the NHLPA/NHL Substance Abuse and Behavioral Health Program for evaluation, education, and possible treatment.
- For the second positive test, a 60-game suspension without pay.
- For the third positive test, a permanent suspension. A player receiving a third positive test and a permanent suspension from play in the League will, however, be eligible to apply for reinstatement after two years. The application would be considered by the Committee.<sup>16</sup>

Montreal Canadiens goalie Jose Theodore tested positive for a banned substance in 2006 pre-Olympic screening. The team doctor for the Canadiens stated that Theodore had been using a hair-growth agent, which caused the positive test. Theodore was not subject to discipline by the NHL because the pre-Olympic test was not part of the NHL program. He had been taking Propecia for eight years, a known hair-growth stimulant. Propecia is also known as a masking agent for performance-enhancing drugs. In response, Theodore said, "I always like my hair real long and I like to keep it long as long as possible." Theodore also added that he is 5'11" and 182 pounds, stating, "If you look at me with no shirt, if I'm taking steroids then I should change the guy that gave them to me because it's not working."<sup>17</sup>

As can be expected, there has been much debate about the seriousness and enforcement of drug testing policies at the professional level. Major League Baseball has not been the only professional sports league criticized for its drug policy. WADA Chairman Dick Pound alleged that perhaps one-third of NHL players were taking performance-enhancing drugs. This was vehemently denied by the league and the NHLPA. NHL Deputy Commissioner Bill Daly said that there was absolutely "no basis in fact" for the allegations. Pound, who is a lawyer, is on a campaign to clean up sports. He is a former vice president of the IOC and was a participant in the 1960 Olympic Games in Germany.

Many youngsters look to athletes as role models and dream of becoming a sports superstar at some point in their life. It thus follows that society should be concerned when drug use becomes a major issue in sports, because drugs such as steroids can have serious effects on young athletes' future health and careers.<sup>18</sup>

<sup>16</sup> Source: National Hockey League Players Association.

<sup>17</sup> Associated Press, *Theodore Tests Positive, Blames Result on Propecia*, ESPN, February 9, 2006.

<sup>18</sup> See E. T. Walker, *Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes*, 10 VILL. SPORTS & ENT. L.J. 181 (2003).

The concern about drug use in professional sports has led many different groups to initiate some form of drug testing program or procedures. In December 2005, the World Wrestling Federation announced it would begin random drug testing to detect illegal drugs after one of its stars, Eddie Guerrero, died before a show.<sup>19</sup> The Tennis Anti-Doping Program has a set of rules that apply to all levels of tennis. The program is administered for the governing body of tennis by International Drug Testing Management, located in Sweden. The Tennis Anti-Doping Program 2009 information sheet states in part:

Any player who provides an analytically positive urine sample receives fair and due process. Players are considered innocent until proven guilty. They are allowed to continue playing pending a decision on their case by an independent Tennis Anti-Doping Tribunal. The appeals process extends to include possible hearings before the Court of Arbitration for Sport (CAS). When a player is determined to have committed a doping offense, a public announcement is made and the penalties may be retroactive to the date of the positive sample.<sup>20</sup>

The following is the testimony of former Houston Rockets Vice President of Basketball Operations/Athletic Trainer Keith Jones before Congress regarding drug use in the NBA.

Chairman Davis and Members of the Committee:

I am the Vice President of Basketball Operations/Athletic Trainer for the Houston Rockets of the National Basketball Association, and have served as head athletic trainer for the Rockets since 1996. Prior to that, I spent six seasons as head trainer for the Los Angeles Clippers, one season as assistant trainer for the Orlando Magic, and several seasons working as a trainer with football teams in the NFL, USFL, and NCAA. I also worked as the team trainer for the gold medal-winning United States Senior Men's National Basketball Team during the 2000 Summer Olympics in Sydney, Australia, and in the same capacity for the 1998 World Championship of Basketball in Greece and the 1999 Tournament of the Americas in Puerto Rico.

I appreciate the opportunity to testify before the Committee.

In my role as head athletic trainer for the Rockets, and in conjunction with our team physicians, strength and conditioning coaches, and other staff, I am in charge of our team's efforts to prevent, evaluate, manage, and rehabilitate injured or ill players. I interact with Rockets players on a daily basis, am present in the locker and training rooms throughout the season, travel with the team, and attend all practices and games. It is my job to be intimately familiar with the health status of every member of our team and to help them perform on the playing court at the peak of their physical and mental abilities.

I have worked as a trainer in the NBA for 17 years, and have learned a great deal in that period about the physical abilities of professional basketball players and the physical and mental obstacles they face over the course of their careers. I also worked as a trainer of various professional and college football teams prior to joining the NBA, and am therefore in a position to compare and contrast the physical attributes that allow players to succeed in basketball and, separately, in football.

During my tenure in the NBA, I have never observed an NBA player using an anabolic steroid or an illicit performance-enhancing drug. I have never been asked by a player to supply such a substance, nor, of course, would I do so if asked. Steroids and other banned performance-enhancers have no place

<sup>19</sup> Associated Press, *Pro Wrestling to Institute Random Drug Testing*, ESPN, December 4, 2005.

<sup>20</sup> Tennis Anti-Doping Program, Information in Tennis Anti-Doping Program, 2009. *Source*: [www.itftennis.com](http://www.itftennis.com).



in the NBA. They carry enormous health risks to athletes, provide no significant advantage to NBA players, and are banned by the NBA's drug policy. Any benefits that a player might receive from using such a substance are greatly outweighed by their costs.

In my experience, steroids and performance-enhancing drugs are not part of the culture of NBA basketball. I cannot say with certainty why this is so, but I believe it to be true. It may be because, from the moment a player begins to develop as a basketball player in AAU and high school, through and including his career in the NBA, the primary emphasis from coaches—and the primary focus from players—is on basketball skill and ability, rather than physical strength, power, or speed. It may be because basketball rewards quickness, agility, and dexterity, and promotes a lean body type, rather than favoring muscle mass, bulk and the larger body types often seen in football and baseball. It may be because steroids and performance-enhancing substances can have the effect of increasing a player's weight and changing his body structure, making it more difficult for him to feel where he is on the court, in the air, or in relation to other players. It may be because of the increased risk of injury and long-term adverse health effects, and the resulting advice of doctors and trainers in our league to avoid these substances. In more recent years, it may be because the NBA's drug policy serves to deter players from getting involved with these drugs.

No matter the reason, it is my belief that steroids and performance enhancing drugs are not used in any meaningful amount by NBA players.

Even though the NBA does not currently have a problem with steroids and performance-enhancing drugs, I fully support the NBA's inclusion of these substances within its anti-drug policy. If we want to ensure that these drugs stay out of our game, it is important to send the message to players that steroids and performance-enhancing substances are banned and to have an effective testing program.<sup>21</sup>

The issue of drugs in sports calls into question the integrity of sports. Is it unethical or engaging in unfair play if some players are using illegal drugs and others are not?<sup>22</sup> Is it fair to allow certain players to use drugs and perform at a higher level when other players do not use drugs? Players understand that the better they perform, the more money they will make. In today's commercial sports market, players have a huge incentive to hit more home runs, score more touchdowns, or jump higher than the next athlete because their next contract will be directly tied to their performance. An increase in home runs and other statistics may bring more fans to the game, but in the long run, is it good for sports?

## Drug Use in Major League Baseball

In the spring of 1984, Commissioner Bowie Kuhn attempted to institute league-wide regulations concerning drug use. In June 1984, team owners approved a program involving both owners and the MLBPA that set forth punishment and treatment for players who used drugs. When Peter Ueberroth assumed the role of commissioner, he terminated the regulations and instituted his own mandatory drug testing program that covered management, umpires, and all minor league players. Major League players were not covered under the plan. He later attempted to unilaterally institute voluntary drug testing, but the MLBPA rejected the plan. In 1986 Ueberroth tried to introduce a clause into the MLB

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<sup>21</sup> *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the Committee on Government Reform, U.S. House of Representatives*, 109th Cong. 55–57 (2005) (prepared statement of Keith Jones, V.P. of Basketball Operations/Athletic Trainer, Houston Rockets).

<sup>22</sup> Edited by Jan Boxill, *Sports Ethics and Anthology*, Blackwell Publishing, 2003.

standard player contract that required mandatory drug testing, but the MLBPA filed a grievance in response. An arbitrator found in favor of the MLBPA. After that arbitration decision, baseball had no drug testing program until the 2002 season.

In the arbitration decision in Case 12-1, *In the Matter of Arbitration Between Major League Baseball Players Association and the Commissioner of Major League Baseball, Suspension of Steve Howe*, the arbitrator was determining whether the discipline imposed by the commissioner for drug use by a professional baseball player, Steve Howe, was appropriate. Howe was a former standout pitcher at the University of Michigan and the Los Angeles Dodgers who was a perpetual violator of the league's drug policy.



### **CASE 12-1 *In the Matter of Arbitration Between Major League Baseball Players Association and the Commissioner of Major League Baseball, Suspension of Steven Howe***

As in any disciplinary matter, the burden of establishing just cause is on those imposing discipline. While the Commissioner has a "reasonable range of discretion" in such matters, the penalty he imposes in a particular case must be "reasonably commensurate with the offense" and "appropriate, given all the circumstances." Moreover, "offenders must be viewed with a careful eye to the specific nature of the offense, and penalties must be carefully fashioned with an eye toward responsive, consistent and fair discipline." There must, in other words, be "careful scrutiny of the individual circumstances and the particular facts relevant to each case."

The need for scrutiny is at its zenith here simply because of the nature of the penalty at issue. Contrary to the analogy counsel seeks to draw, the Commissioner is not an employer who has decided for himself that he will no longer retain an employee who is then free to go elsewhere in the same industry. The Commissioner's imposition of Baseball's "ultimate sanction, lifetime ineligibility" means that no employer in Baseball may hire Howe no matter what he thinks of his ability, his good faith or his chances of successfully resisting the addiction with which he has been plagued. Thus, the burden on the Commissioner to justify his action transcends that of the ordinary employer inasmuch as he can effectively prevent a player's employment by any one at any level of his chosen profession.

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#### **Discussion and Analysis**

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I fully understand Baseball's institutional interest and its need, in so far as possible, to keep its workplaces free of drugs and to deter

drug use among players wherever it might occur. I also appreciate the pressures brought to bear on Baseball by those who only see the "athlete-as-hero." But those considerations, as important as they are, must be examined in the light of the just cause standard. Under that standard, Baseball's conduct, as well as Howe's, is subject to review.

In justifying his decision, the Commissioner told the Panel that Baseball had done all that could have been done and that Howe had simply "squandered" the many chances Baseball had given him. If Baseball had, in fact, done all it could, both before Howe's 1990 return to the game and after, the imposition of a lifetime ban would be more understandable. But it is obvious that reality and what the Commissioner perceived to be the case is quite different.

We now know that Howe has an underlying psychiatric disorder that was never diagnosed or treated; that this disorder has been a contributing factor to his use of drugs; and that, absent treatment for the condition, he remains vulnerable to such use.

We also know that in 1990 the Commissioner's medical adviser cautioned against Howe's return unless he was tested every other day of the year throughout his professional career and that Baseball did not heed this clear warning even though the Commissioner suggested in his March 1990 decision that such testing be imposed.

These two factors cast a very different light on the nature of the chance Howe was given in 1990 and, indeed, on the nature of the chances he had been given in earlier years.

It was clear from Dr. Riordan's report that in his expert view continuous testing, including testing in the off-season, was essential if Howe was to succeed in resisting drugs during his career while also seeking to overcome his addiction through therapeutic means. In his decision allowing Howe to return, the Commissioner quoted Dr. Riordan's report at some length. The Commissioner's order that Howe play in the minors for a year, his directions regarding testing and his declaration that Howe would be immediately banned if he tested positive were all based on Dr. Riordan's cautionary advice. But the stringent, year-round testing requirement, as we have seen, was not implemented and Howe was unfortunately set on a course without the strategic safeguard Dr. Riordan considered indispensable to his success.

If that safeguard had been firmly in place and if Howe had never been presented with an opportunity to vary its regularity, an opportunity Dr. Riordan had clearly meant to foreclose, it is not at all likely, given the certainty of detection such a regimen would have imposed, that the events of December 19 would have occurred.

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While Howe can certainly be faulted for seeking to delay testing at a time of his admittedly increasing sense of vulnerability, the Office of the Commissioner cannot escape its measure of responsibility for what took place in 1991. Based on medical advice the Commissioner had solicited, the need for continuous testing was obvious. To give Howe "yet another chance" of returning to the game without implementing those conditions was not, in my judgment, a fair shot at success.

As to Howe's undiagnosed psychiatric condition and the inadequacy of his prior treatment, the Commissioner considers it unfair to place on his Office the burden of reviewing a player's medical history before imposing discipline. As I pointed out in *Reyes*, a decision rendered three months before the Commissioner's action here, I fail to see the unfairness of such a requirement. Certainly, as the Association attempted to point out prior to the imposition of discipline in this case, it is not unfair to expect an exceptionally scrupulous review of the record when the matter under consideration is a lifetime ban.

What bears repeating here is that the Commissioner does not stand in the isolated position of an individual employer. He can bar the employment of a player at any level of the game regardless of the opinion or wishes of any one of a great number of potential employers. That is an awesome power. With it comes a heavy responsibility, especially when that power is exercised unilaterally and not as the result of a collectively bargained agreement as to the level of sanctions to be imposed for particular actions.

Here, there was little consideration of the medical records and no discernible pre-decision attempt to probe beneath their surface and ascertain if Howe had been properly diagnosed and treated. Even though Dr. Riordan's 1990 report signaled the possibility of a previously undiagnosed and untreated illness affecting Howe's behavior, by 1992, when discipline was to be imposed as a result of Howe's subsequent actions, the Commissioner considered medical matters of little importance when measured against Baseball's interests. But as made manifest by the opinions of Drs. Wender and Kleber, both impartial medical experts, such matters were highly important in that they served to explain events.

It cannot be known what the Commissioner might have done if he had been fully aware of the facts regarding Howe's condition and previous treatment. What we do know is that those facts were not before him and that virtually no effort was made to ascertain them. When considering the permanent expulsion of a player, this failure to examine all the circumstances, irrespective of the cause, is not, in my view, consistent with his responsibility.

The Commissioner seeks to justify his exclusive reliance on institutional considerations by resting Howe's permanent expulsion on an obligation to deter repeated drug use by others. He argues that there was no alternative, that a less severe sanction would have sent the wrong message to players who will view anything short of a lifetime ban as a license to take up and repeatedly use drugs. This hardly seems the case. All available evidence supports the proposition that drug use in organized Baseball is not what it appeared to be some years ago. As the Association pointed out in Nixon there has not been an "initial offender" in the Major Leagues since 1989 and those who unfortunately repeated an offense are concededly no more than a handful.

To everyone's credit, all this has been accomplished without the imposition of a lifetime ban and, given continued education and awareness at both the minor and Major League levels, this steady progress toward a drug free environment is quite likely to continue. When the industry's goal is the complete elimination of drugs, it can be argued, of course, that a single instance of use is one too many. What cannot legitimately be questioned, however, is the commitment of the industry and the Players Association. No member of the public can seriously contend, given the record, that Baseball's attitude toward drugs is light hearted or that the manner in which the industry and the Association have previously dealt with the problem has imperiled the integrity of the game.

One further observation on the reasoning the Commissioner advanced in this proceeding is appropriate. Deterrence, however laudable an objective, should not be achieved at the expense of fairness. What was considered vital to Howe's sobriety at this point in his life should have been implemented. Moreover, the Office of the Commissioner should have looked closely at all the circumstances in order to ascertain and evaluate his condition and the adequacy of his treatment before deciding what discipline to impose. These failings lead me to conclude that the Commissioner's action in imposing a lifetime ban was without just cause.

What remains, given this conclusion, is the penalty that should be imposed in lieu of a lifetime ban. . . .

. . . As previously stated, Howe now recognizes, despite his efforts of recent years, that he bears a responsibility for the events of autumn and early winter of 1991 and that what occurred then, however the responsibility of others is assessed, was an "unacceptable failure" on his part. Considering that fact and weighing all other aspects of this unique case, including his conviction on the federal charge, it's my judgment that the interests of deterrence and fairness as well as punishment would be realized if the penalty imposed by the former Commissioner is reduced to time served and Howe is thereafter given a

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fair opportunity to succeed. A suspension of this length, 119 days, entails a substantial monetary loss to Howe; almost \$400,000 in base salary and a lost opportunity to earn upwards of \$1,500,000.00 in contract bonuses. A penalty of this magnitude should serve as a clear warning that drug use will continue to be treated with severity. At the same time, a chance to compete coupled with appropriate treatment and rigorous safeguards will give Howe what he was not adequately given in the past.

As is evident from these proceedings, no one can predict whether Howe will succeed even with the treatment and safeguards provided for in the Award. It is not at all certain, as the impartial medical evaluations reflect, that he is quite ready to accept full responsibility for his actions or that he fully understands, even at this juncture, the complex reasons for his behavior. While fundamental fairness requires that his permanent expulsion be set aside, only with his understanding and acceptance of responsibility will his future truly be secure.

Grievance upheld.

Source: Courtesy of Westlaw; reprinted with permission.

The following can be placed in the category of immediate results of the steroid testing program instituted in 2002: Matt Lawton, right fielder of the New York Yankees, admitted that he took the veterinary steroid boldenone before he was suspended for ten games for violating Major League Baseball's steroid policy. Lawton told a sports reporter he had been playing poorly and was injured, so he turned to steroids. He injected the steroids on September 20 and the next day he hit a home run in his first at bat. He admits it was "stupid" to take steroids but that he was desperate. He told *Sports Weekly*, "I wasn't playing well enough to be on a Little League roster, let alone be on the roster of the New York Yankees. I just wasn't physically able to do the job. I had never been in the playoff hunt before. So I did something that will always haunt me."<sup>23</sup> Lawton was an All-Star in 2000 and 2004.

The late Ken Caminiti was not shy about admitting to using steroids during his 1996 MVP season with the San Diego Padres. Caminiti was also a recovering alcoholic and had pled guilty to cocaine possession. Tragically, he died in 2004 of a heart attack due to a drug overdose. In Caminiti's MVP season, he hit 40 home runs, with 130 RBIs, and batted .326. He had a lifetime batting average of .272 but never hit more than 29 home runs in a season other than his MVP season.

However one accounts for it, there has been an onslaught of home runs in the Major Leagues over the past few years. From 1900 to 1997, only two players hit 60 or more home runs in a single season: Babe Ruth did it in 1927 when he hit 60 runs, and Roger Maris did it in 1961 when he hit 61. From 1998 to 2001, the 60-home-run mark was eclipsed six times, and the 70-home-run mark twice. From 1962 to 1990, only three players in baseball even reached 50 home runs: Willie Mays with 52 in 1965, George Foster with 52 in 1977, and Cecil Fielder with 51 in 1991. From 1995 through 2007, twenty-three players have hit more than 50 home runs. What can account for this increase? Table 12-1 lists the single-season leaders for home runs in Major League Baseball.

<sup>23</sup> Lawton Failed Test After Taking Veterinary Steroid, ESPN, December 22, 2005.

TABLE 12-1

MLB SINGLE-SEASON HOME RUN LEADERS					
<i>Name</i>	<i>Home Runs</i>	<i>Year</i>	<i>Team</i>	<i>League</i>	<i>Rank</i>
Barry Bonds	73	2001	San Francisco Giants	NL	1
Mark McGwire	70	1998	St. Louis Cardinals	NL	2
Sammy Sosa	66	1998	Chicago Cubs	NL	3
Mark McGwire	65	1999	St. Louis Cardinals	NL	4
Sammy Sosa	64	2001	Chicago Cubs	NL	5
Sammy Sosa	63	1999	Chicago Cubs	NL	6
Roger Maris	61	1961	New York Yankees	AL	7
Babe Ruth	60	1927	New York Yankees	AL	8
Babe Ruth	59	1921	New York Yankees	AL	9
Jimmie Foxx	58	1932	Philadelphia Athletics	AL	10
Hank Greenberg	58	1938	Detroit Tigers	AL	
Ryan Howard	58	2006	Philadelphia Phillies	NL	
Mark McGwire	58	1997	Oakland Athletics	AL	
			St. Louis Cardinals	NL	
Luis Gonzalez	57	2001	Arizona Diamondbacks	NL	14
Alex Rodriguez	57	2002	Texas Rangers	AL	

*Note:* Chart courtesy of Baseball Almanac ([www.baseball-almanac.com](http://www.baseball-almanac.com)). Reprinted with permission.

**Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance-Enhancing Substances by Players in Major League Baseball** On March 30, 2006, MLB Commissioner Bud Selig requested former Maine Senator George Mitchell to investigate the allegations that many MLB players had used steroids or other performance-enhancing drugs. Mitchell's charge from the commissioner was "to determine, as a factual matter, whether any Major League players associated with [the Bay Area Laboratory Co-Operative] or otherwise used steroids or other illegal performance-enhancing substances at any point after the substances were banned by the 2002–2006 collective bargaining agreement." Mitchell was authorized to expand his investigation beyond players involved with the Bay Area Laboratory Co-Operative (BALCO) if necessary and "to follow the evidence wherever it may lead."

Mitchell accepted the charge of Commissioner Selig on the condition that he be given "total independence" both during the investigation and in compiling the report. The commissioner agreed to this condition. Selig also agreed that the Mitchell Report would be made public when it was completed.

At the outset of the investigation, Mitchell declared that he would conduct a "deliberate and unbiased examination of the facts that would comport with American values of fairness." He retained the law firm of DLA Piper US, LLP, to assist him in the investigation requested by the commissioner. Mitchell's investigation was thorough. He and his team sifted through over 115,000 pages of documents that had been provided to them by a variety of sources, including the Office of the Commissioner of

Major League Baseball and all the Major League teams. Approximately 20,000 other electronic documents from these sources were also reviewed by Mitchell and his legal team. Over 700 witnesses were interviewed during the investigation, and over 550 of those witnesses were “current or former club officials, managers, coaches, team physicians, athletic trainers or resident security agents.” Sixteen individuals from the Commissioner’s Office were interviewed, including Commissioner Bud Selig and Chief Operating Officer Robert DuPuy. Senator Mitchell and his staff attempted to contact almost 500 former players for the investigation. Only 68 agreed to be interviewed. Mitchell also attempted to contact the Players Association during his investigation, but stated in his report that “[t]he Players Association was largely uncooperative.” Mitchell stated that he asked each player to meet with him through his designated representative or the Players Association so that each would have a chance to respond to the allegations contained in the report. He noted, “Almost without exception they declined to meet or talk with me.”

Mitchell’s goal in preparing his report was “to provide a thorough, accurate, and fair accounting of what I learned in this investigation about the illegal use of performance-enhancing substances by players in Major League Baseball.” His investigation led Mitchell to the conclusion that the use of anabolic steroids and other performance-enhancing substances was “widespread” and threatened the integrity of the game of baseball. Mitchell further found that baseball’s response to the crisis had been “slow to develop” and was “initially ineffective,” but that baseball’s response had “gained momentum” after the institution of the 2002 drug testing program. Senator Mitchell found that all 30 Major League teams had players involved with performance-enhancing substances at some point. The report named 78 players, most notably baseball’s all-time home run leader Barry Bonds, star pitcher Roger Clemens, and Clemens’s former teammate Andy Pettitte. However, the report recommended that the commissioner take no action against players who were found to have used steroids in the past.

The Mitchell Report contained many recommendations “to prevent the illegal use of performance-enhancing substances in Major League Baseball.” Senator Mitchell offered these recommendations as a “set of principles and best practices that presently characterize a state-of-the-art drug testing program.” He noted, however, that no drug testing program is perfect. He added that every program should be updated regularly to keep pace with constantly changing challenges and best practices. In summary, the Mitchell Report states that there should be a higher priority on aggressive investigation, enhanced educational programs, and continued drug testing. Senator Mitchell was uncertain how this would actually happen, considering the combative relationship between management and the players union.

The following recommendations were offered by the Mitchell Report to enhance the investigative capabilities of Major League Baseball.<sup>24</sup>

1. The Commissioner should establish a Department of Investigations.
2. The Commissioner’s Office should more effectively cooperate with law enforcement agencies.
3. The Commissioner’s Office should actively use the clubs’ powers, as employer, to investigate violations of the joint program.

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<sup>24</sup> GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 287–94 (Dec. 13, 2007).



4. All clubs should have clear, written, and well-publicized policies for reporting information relating to possible performance-enhancing substance violations.
5. Packages sent to players at Major League ballparks should be logged.

The following recommendations were offered as unilateral actions that the commissioner could take to address the issue of performance-enhancing drugs that did not require collective bargaining.<sup>25</sup>

1. Background investigations of prospective clubhouse personnel.
2. Random drug testing of clubhouse personnel.
3. A hotline for reporting anonymous tips.
4. Testing of top draft prospects prior to the Major League Baseball draft.

Changes to the educational program designed to inform players about the dangers of performance-enhancing substances were also recommended:<sup>26</sup>

1. The design and implementation of the educational program should be centralized with the independent program administrator.
2. Spring training programs should include testimonials and other speakers and presentations.
3. Explain the health risks in context and provide education on alternative methods to achieve the same results.
4. Players need to understand the non-health effects of buying performance-enhancing substances from street dealers and “Internet pharmacies.”

The report’s recommendations for further improvement of the Joint Drug Prevention and Treatment Program were as follows:

1. The program should be independent.
2. The program should be transparent.
3. There should be adequate year-round, unannounced drug testing.
4. The program should be flexible enough to employ best practices as they develop.
5. The program should continue to respect the legitimate rights of players.
6. The program should have adequate funding.

Congress became especially interested in steroid use in baseball in 2005 and again in 2008, holding hearings in which players and baseball management personnel testified before Congress regarding the use of steroids and illegal drugs in the sport. Bud Selig, the Commissioner of Baseball, expressed his concern about drug use in baseball in his testimony before Congress in 2008:

On March 30, 2006, I asked Senator Mitchell to conduct a comprehensive investigation of the illegal use of performance enhancing substances in Baseball. Mr. Chairman, I decided to do this investigation so that no one could ever say that Baseball had something to hide because I certainly did not. Baseball accepts the findings of this investigation, and Baseball will act on its recommendations.

Before I turn to the Mitchell Report, it is important to recall the progress we have made. Baseball now has the strongest drug testing program in professional sports. Our penalty structure of 50 games,

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<sup>25</sup> *Id.* at 295–96.

<sup>26</sup> *Id.* at 298–302.

100 games and life is the toughest. We test for stimulants, including amphetamines. We have year-round, unannounced testing, including testing on game days, both before and after games. We use the Olympic-certified laboratories in Montreal for our testing and the day-to-day administration of the program has been delegated to an Independent Program Administrator. A whole generation of players has grown up under our strict Minor League testing policy, which is entering its eighth season. As a result of all of this, our positive tests have declined significantly from 96 in the 2003 survey test to just two steroid positives in 2006 and three in 2007. This improvement is similar to what we have observed in our Minor League program under which the positive rate declined from nine percent in 2001 to less than one-half of one percent in 2007. Just last week, I met with a group of 12 certified athletic trainers from Major League Clubs who assured me that we have changed the culture in Clubhouses regarding steroid use.

Ever since we last reopened our agreement in 2005, our program has continued to improve. Along with the MLBPA, we have tightened our collection procedures by adding chaperones to monitor players. We also often test players after a game, rather than before a game, to deter stimulant use. And the Commissioner's Office has placed emphasis on discipline for non-analytical positives. We had three disciplines for non-analytical positives in 2007 alone.

Because of these facts, I feel that Baseball is dealing effectively with the present and will continue to evolve to deal with the future. Nonetheless, I felt a need to appoint Senator Mitchell to deal with the past.

As I said in March 2006, "nothing is more important to me than the integrity of the game of baseball." I strongly believed 21 months ago, and I continue to believe today, that Baseball needed to fully, honestly and publicly confront the use of performance enhancing substances by players. I knew that an investigation would be an extraordinarily difficult undertaking. I knew that an investigation would be painful for all of those associated with the sport. No other sport had confronted its past in such a way. But I knew that Baseball must undertake that journey in order to preserve the integrity of our game and maintain credibility with the millions of baseball fans throughout the world. I want to thank this Committee for its role in helping to focus us all on the dangers of performance enhancing substances and for its patience as we at Baseball moved forward with this important investigation.

The investigation had a second purpose, as well. I am committed to keeping Major League Baseball's program the strongest in professional sports. I believed in March 2006 that our current drug program would be effective in curtailing the use of detectable steroids by players. Indeed, Senator Mitchell confirmed that our current program has been effective in that detectable steroid use appears to have declined. I also knew from experience that the development of a state-of-the art drug program is an evolutionary process. I knew that our work on this important issue was not done. By rigorously examining Baseball's experience with performance enhancing substances, my desire was for Senator Mitchell to provide us with recommendations and insights to help make additional progress in the on-going battle against the illegal use of performance enhancing substances in sports, recognizing, of course, our collective bargaining obligations. . . .

Senator Mitchell's thorough and detailed report elicited from me a range of reactions. I am a life-long baseball fan. I have devoted the last 45 years to the game. As a fan of the game of baseball and a student of its history, I am deeply saddened and disappointed by the conduct of the players and many other individuals described by the Senator in his report. On the other hand, as the Commissioner of Baseball, with the responsibility for protecting the integrity of the game for future generations, I am optimistic that Senator Mitchell's report is a milestone step in dealing with Baseball's past and the problems caused by these dangerous and illegal substances in both amateur and professional sports. Senator Mitchell's report helps bring understanding of and hopefully closure to the rumors and speculation that

have swirled around this issue. Perhaps more important, Senator Mitchell's report—including his twenty recommendations which I fully embrace—helps point a way forward as we continue the battle against the illegal use of performance enhancing substances.

I want to be clear that I agree with the conclusions reached by Senator Mitchell in his report, including his criticisms of Baseball, the union and our players. I have personally agonized over what could have been done differently and I accept responsibility. In 1994, during a very difficult round of collective bargaining that included a lengthy strike, we proposed to the union a joint drug program that included steroids as prohibited substances. We made this proposal in an effort to be proactive, and I can assure you that we did not appreciate the magnitude of the problem that would develop. Senator Mitchell has suggested that the Clubs did not give this proposal the highest priority, but the Major League Baseball Players Association was fiercely and steadfastly opposed to any form of random drug testing. Even if the Clubs had taken a harder line on drugs, the Union would not have agreed and the strike could have lasted even longer. Unfortunately, the next round of bargaining did not occur until 2002, and, therefore, we did not have an opportunity to address the problem before it became more significant . . .

In closing, Senator Mitchell quoted a veteran Major League Player in the report as saying that "Major League Baseball is trying to investigate the past so that they can fix the future." Even prior to the issuance of the Mitchell Report, we had made great strides in reducing the number of players who use performance enhancing substances. I am confident that by adopting Senator Mitchell's recommendations, by constantly working to improve our drug program regardless of the effort or the cost, by pursuing new strategies to catch drug users, and by enhancing our educational efforts, we can make additional progress in our on-going battle against the use of performance enhancing substances in Baseball. Senator Mitchell's report identified the principal goals of his investigation: "to bring to a close this troubling chapter in baseball's history and to use the lessons learned from the past to prevent future use of performance enhancing substances." The lessons from the past serve only to strengthen my commitment to keep Major League Baseball's program the strongest and most effective in sports.<sup>27</sup>

One of the Major League players who testified before Congress was Rafael Palmeiro, who was considered a star player in baseball and a potential Hall of Famer. He played 20 seasons and had 569 lifetime home runs, ranking him fifth on the all-time home run list in baseball. He unequivocally stated before Congress in the following testimony that he had never used steroids; however, he later tested positive for steroid use.

Good morning, Mr. Chairman and Members of the Committee. My name is Rafael Palmeiro and I am a professional baseball player. I'll be brief in my remarks today. Let me start by telling you this: I have never used steroids. Period. I don't know how to say it any more clearly than that. Never. The reference to me in Mr. Canseco's book is absolutely false.

I am against the use of steroids. I don't think athletes should use steroids and I don't think our kids should use them. That point of view is one, unfortunately, that is not shared by our former colleague, Jose Canseco. Mr. Canseco is an unashamed advocate for increased steroid use by all athletes.

My parents and I came to the United States after fleeing the communist tyranny that still reigns over my homeland of Cuba. We came seeking freedom, knowing that through hard work, discipline,

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<sup>27</sup> Statement of Commissioner Allan H. Selig Before the House Committee on Oversight and Government Reform, Jan. 15, 2008.

and dedication, my family and I could build a bright future in America. Since arriving to this great country, I have tried to live every day of my life in a manner that I hope has typified the very embodiment of the American Dream. I have gotten to play for three great organizations—the Chicago Cubs, Texas Rangers, and Baltimore Orioles—and I have been blessed to do well in a profession I love. That blessing has allowed me to work on projects and with charities in the communities where I live and play. As much as I have appreciated the accolades that have come with a successful career, I am just as honored to have worked with great organizations like the Make-a-Wish Foundation, Shoes for Orphans Souls, and the Lena Pope Home of Fort Worth.

The League and the Player's Association recently agreed on a steroid policy that I hope will be the first step to eradicating these substances from baseball. Congress should work with the League and the Player's Association to make sure that the new policy now being put in place achieves the goal of stamping steroids out of the sport. To the degree an individual player can be helpful, perhaps as an advocate to young people about the dangers of steroids, I hope you will call on us. I, for one, am ready to heed that call.<sup>28</sup>

## Legal Challenges to Drug Testing

Fewer challenges have been made to drug testing at the professional level than at the amateur level, mainly because many drug testing procedures in professional sports have been agreed to during the collective bargaining process.

In Case 12-2, *Long v. National Football League*, 870 F. Supp. 101 (W.D. Pa. 1994), an NFL player challenged the league's anabolic steroid policy on constitutional grounds. He sued several defendants, including the NFL and the NFL Commissioner, in his failed attempt to challenge the policy.



### CASE 12-2 *Long v. National Football League*

870 F. Supp. 101 (W.D. Pa. 1994)

ZIEGLER, Chief Judge.

This civil action arises from an incident which took place while plaintiff, Terry Long, was a member of The Pittsburgh Steelers football team. Long's urine was tested for the presence of anabolic steroids pursuant to a policy adopted by the National Football League. He was then suspended pursuant to the same policy because the test results were positive.

Plaintiff has alleged violations of the Fourth and Fourteenth Amendments of the United States Constitution, Article I, section 8 of the Pennsylvania Constitution, and various state law claims for the injury that he allegedly suffered as a result of defendants' actions. Plaintiff has asserted claims against The National Football League, Paul

<sup>28</sup> Testimony of Rafael Palmeiro before the Committee on Government Reform, United States House of Representatives, Mar. 17, 2005.

Tagliabue in his capacity as the Commissioner of the National Football League, the Pittsburgh Steelers organization, the City of Pittsburgh, Sophie Masloff in her capacity as the Mayor of the city of Pittsburgh, and the Stadium Authority of the City of Pittsburgh. . . .

Defendants contend that Long's claims for violation of the Fourth and Fourteenth Amendments should be dismissed because they fail to state a claim upon which relief can be granted. Specifically, they argue that plaintiff has failed to allege sufficient facts to support a constitutional claim against the NFL, the Steelers and Paul Tagliabue, as private actors.

Because the language of the Fourteenth Amendment is directed at the states, a violation occurs only by conduct that may be fairly characterized as "state action." Private conduct, however unfair, is not actionable under the Amendment. *National Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988). We must determine whether the amended complaint sufficiently alleges that the conduct of the National Football League in testing and suspending plaintiff constitutes "state action" or is "fairly attributable to the state."

Stressing that the facts of each case are important, the Supreme Court has developed various tests to determine whether conduct by a private party constitutes state action. Two of the tests are relevant here. The first is the symbiotic relationship test. . . . Under the symbiosis analysis, conduct will be considered state action if the state has "so far insinuated itself into a position of interdependence with [the acting party] that it must be recognized as a joint participant in the challenged activity. . . ."

Here, plaintiff alleges that a symbiotic relationship exists between the City of Pittsburgh and the Steelers. The allegations upon which plaintiff's conclusion is based are as follows: (1) the city directly benefits from collection of an amusement tax on the sale of tickets; (2) the city provides numerous services for the Steelers; (3) the city guaranteed the initial bond issuance for the construction of Three Rivers Stadium and (4) city council appoints the board members to the Stadium Authority of the City of Pittsburgh.

Defendants argue, and we agree, that the alleged facts, even if true, fail to establish a symbiotic relationship between the state and the private actors. First, the allegations of financial support and a regulatory framework are not enough to establish "state action." . . .

We do not suggest that financial gain is a separate and distinct test. It is an important element in the mix of information to be considered in determining whether a mutually dependent relationship exists

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between two parties so that the behavior of one may be attributed to the other. Long's amended complaint falls short of stating a claim for constitutional violations under the symbiotic relationship test because it does not set forth sufficient facts which would allow us to fairly attribute the conduct of the NFL and the Steelers to the state. The business association alleged between the parties is simply too attenuated to attribute the conduct of which plaintiff complains to the state. Further, we disagree that the Steelers' use of the stadium establishes such a relationship. . . . [T]he stadium hosts a variety of events, including baseball games and musical concerts.

. . . Plaintiff here has also failed to allege facts which would support a cause of action based on the state's influence over the policy or decisions of the NFL or the Steelers. . . .

The Supreme Court has created a second test to determine whether conduct may fairly be attributed to the state. Unlike the symbiotic relationship test which looks at the overall relationship among the parties, the close nexus test attempts to determine whether the state may be deemed responsible for the specific conduct of which the plaintiff complains. Under this test, the complaining party must show a sufficiently close nexus between the state and the challenged action to establish state action. A state normally is not responsible for a private decision unless it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the state.

Plaintiff alleges that the City of Pittsburgh, Mayor Masloff and the Stadium Authority each "acquiesced and/or consented to, supported and upheld the conduct of the other defendants complained of herein." Defendants correctly assert that acquiescence or indirect involvement is not enough to show the requisite state action. We hold that plaintiff's allegations do not meet the standard of the nexus test. Nothing in the amended complaint suggests that either the City, the Mayor or the Stadium Authority formulated the standards or controlled the decisions of the NFL or the Steelers. A close review of the amended complaint reveals that plaintiff was suspended based on independent medical conclusions and policy objectives of the National Football League, neither of which were influenced by the state. Plaintiff fails to allege that the state in any way influenced or implemented the substance abuse policies adopted by the NFL by which plaintiff was suspended. We will dismiss Counts I and II of plaintiff's amended complaint alleging violations of the Fourth and Fourteenth Amendments because plaintiff has failed to allege sufficient facts which would allow us to fairly attribute the conduct of the private parties to the state.

*Source:* Courtesy of Westlaw; reprinted with permission.

In *Williams v. National Football League and John Lombardo, M.D.*, 582 F.3d 863, the United States Court of Appeals for the eighth circuit upheld a lower court ruling that prohibited the NFL from suspending two Minnesota Viking players who violated the league's anti-doping policy, stating they could contest the suspension through the courts. The court of appeals held that the league's collective bargaining agreement with the NFLPA did not prevent Kevin Williams and Pat Williams from challenging the league's drug testing program under Minnesota State Law.<sup>29</sup> It ruled that the Minnesota drug testing and consumable products laws were not preempted by section 301 of the Federal Labor Management Relations Act ("LMRA").<sup>30</sup>

In Case 12-3, *U.S. District Court, Southern District of New York*, the NBA was arguing against the release of information relating to former NBA player Stanley Roberts. In 1999 the NBA announced that Roberts had been expelled from the league because he tested positive for illegal drugs.<sup>31</sup> Roberts attempted to sign a contract with a team in Turkey, but the Federation Internationale de Basketball (FIBA) stated that Roberts was banned from FIBA competition for two years based on the positive NBA drug test. Roberts sued FIBA in Germany. In the process of defending that lawsuit, FIBA requested the court to send a subpoena to the NBA to retrieve the documents relating to the suspension of Roberts. The following is the opinion relating to that requested subpoena.



**CASE 12-3** *In the Matter of the Application of Federation Internationale de Basketball for a Subpoena Pursuant to 28 U.S.C. § 1782*

U.S. District Court, Southern District of New York

LEWIS A. KAPLAN, District Judge.

The principal question presented by this application is whether a provision of the private collective bargaining agreement between the National Basketball Association ("NBA") and the National Basketball Players Association ("NBPA"), which provides that the details of drug tests administered to NBA players shall remain confidential, should result in the denial of an application by Federation Internationale de Basketball ("FIBA") for discovery of tests results administered to a former NBA player in order to defend itself in the German courts against a lawsuit brought by that player.

The collective bargaining agreements ("CBAs") between the NBA and the NBPA have contained an Anti-Drug Program since 1983. The current version of the program permits testing of players for drug use in limited circumstances and provides, among other things, for the expulsion from the league of those who test positive for so-called Drugs of Abuse. It provides also that the NBA and its affiliates "are prohibited from

<sup>29</sup> Michael S. Schmidt, *Ruling May Weaken Doping Plans in Pro Sports*, The New York Times, September 19, 2009.

<sup>30</sup> Associated Press, *Other Sports Leagues Support NFL*, ESPN.com, July 14, 2009.

<sup>31</sup> *Stanley Roberts Signs with Raptors*, ESPN.com, September 30, 2003.

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publicly disclosing information about the diagnosis, treatment, prognosis, test results, compliance, or the fact of participation of a player in the Program" except "as reasonably required in connection with the suspension or disqualification of a player."

On November 24, 1999, the NBA announced, as permitted by the CBA, "that Stanley Roberts of the Philadelphia 76ers had been expelled from the league because he tested positive for an amphetamine-based designer drug, a substance prohibited by the Anti-Drug Program agreed to by the NBA and the NBPA."

Following his expulsion from the NBA, Roberts sought employment in Europe as a professional basketball player. As he allegedly was on the verge of signing a \$500,000 per year contract to play for a team in Istanbul, FIBA—the rules of which authorize it to ban a player based on a positive drug test administered by the NBA—announced that Roberts was banned from FIBA competition worldwide for two years. Claiming that his prospective Turkish contract fell through as a result of the FIBA ban, Roberts pursued an internal appeals procedure before FIBA. When this proved fruitless, he sued FIBA in the District Court in Munich, Germany, and sought a preliminary injunction barring FIBA from barring him from FIBA competition. He argued, among other things, that he did not in fact violate the NBA's anti-drug rules, that FIBA in any event was not entitled to rely on the press announcement of the NBA test results, and in any case that the FIBA anti-drug policy is not enforceable as a matter of German law because it was not reflected in FIBA's Articles of Association.

In February 2000, the Munich court granted Roberts' application for a preliminary injunction, apparently on the ground that the FIBA anti-drug policy was unenforceable because it was not reflected in its charter. FIBA appealed, and the appeal is scheduled to be heard on October 26, 2000. The parties agreed at oral argument that Roberts seeks to sustain the preliminary injunction in the German appellate court on the ground that the Munich District Court was correct in its view of the German law issue concerning the proper location of the anti-drug policy but, in any case, on the alternative grounds that Roberts did not in fact violate the NBA policy and that FIBA in any case should not be permitted to rely upon the NBA's determination.

On October 20, 2000, FIBA moved by order to show cause for an order, pursuant to 28 U.S.C. § 1782, authorizing issuance of a subpoena commanding that the NBA produce documents relating to (1) Roberts' alleged violation of the NBA drug program (including documents relating to the positive drug test), and (2) any grievance instituted by Roberts under the CBA in connection with the alleged drug violation and the NBA's expulsion of Roberts.



## II.

Section 1782(a) provides in relevant part that: "The district court of the district in which a person resides or is found may order him to . . . produce a document or other thing for use in a proceeding in a foreign . . . tribunal. . . . The order may be made . . . upon the application of any interested person and may direct that the document or other thing be produced, before a person appointed by the court."

Here, the NBA resides within the Southern District of New York. The documents in question are sought for use in a proceeding in foreign tribunal, the Court of Appeals in Munich, Germany. The application is made by FIBA, the defendant-appellant in the German action, and therefore by an interested person. Hence, the fundamental prerequisites to relief are satisfied. . . .

### *Confidentiality*

. . . [T]he NBA asserts that the information in question is confidential under the terms of the CBA between it and the players' association and therefore should not be disclosed. Indeed, it argues that the NBPA's willingness to agree to an anti-drug program in the future would be destroyed if this Court were to grant the requested relief. It goes so far as to contend that the NBA would be unable to maintain any anti-drug program at all if the absolute confidentiality of these test results were breached.

The NBA's position is unpersuasive, particularly in the circumstances of this case. Even if the mutual expectations of confidentiality implicit in the CBA were sufficient to defeat disclosure pursuant to compulsory process in a different situation, the NBA ignores the significance of the fact that it is Roberts—who has the only relevant privacy interest—who has put his compliance with the NBA program in issue by commencing litigation against FIBA in which he flatly denies any violation of the NBA program. Just as the attorney-client and other privileges are waived where the party entitled to confidentiality puts the substance of the privileged matter at issue, any privacy interest an NBA player or former player may have in the confidentiality of his own drug test results must yield where he voluntarily injects the accuracy or existence of those results into litigation brought by him.

The NBA's confidentiality argument would fail even apart from Roberts' role in injecting the test results into the German litigation. It is a fundamental proposition of American law "that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege. . . ." And while there are circumstances in which private interests in confidentiality

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may be sufficient to preclude compelled production, at least in civil litigation, even of some relevant evidence, this is not such a case.

The most basic point is that the CBA does not require that the fact of a positive drug test and expulsion be kept confidential. To the contrary, it explicitly authorizes publication of that information. All that is left, it appears, is the clinical detail about the nature of the test and the level of drugs found in the relevant bodily fluid. There simply is not a very great privacy interest in the details once the basic facts are known, as they are here.

In any case, the private interests of the NBA simply are not sufficient to warrant denial of this application on confidentiality grounds. The NBA's concern is only that the NBPA may resist inclusion of an anti-drug program in the next CBA. But the object of the law here is not to make the NBA's collective bargaining easier. Both sides have enormous stakes in reaching agreement on a future CBA. No doubt they will be able to do so, sooner or later.

. . . In this case, FIBA genuinely needs the requested information in view of Roberts' attempt in Germany to controvert the NBA's finding that he violated its anti-drug policy. The information sought is entirely factual or nearly so; FIBA seeks principally clinical test results and details concerning the test(s) themselves. And the Court simply is not persuaded that disclosure of this information, at least in circumstances in which the bottom line result that the player tested positive for drug use already is public and in which the former player voluntarily placed his compliance with the NBA policy at issue elsewhere, is likely to cause any serious harm either to the interests of the NBA or to the public. The worst that might happen is that the NBPA might decline to continue the anti-drug program with which it has lived for seventeen years, a position that could result in substantial public opprobrium and large economic losses for the players should such a position result in a strike or lockout. Neither the risk of such action nor even its realization is sufficient to justify a conclusion that the federal courts should create an evidentiary privilege for drug test results of NBA players.

**III.**

FIBA's motion is granted in all respects. The NBA is directed to produce the documents described in the subpoena attached to applicant's moving papers forthwith.

SO ORDERED.

Source: Courtesy of Westlaw; reprinted with permission.

## Proposed Federal Legislation

During the first session of the 109th Congress, seven bills were presented addressing issues relating to drug use in sports.<sup>32</sup> The Clean Sports Act of 2005, introduced by Senator John McCain, was written to establish minimum drug testing standards in the major professional sports leagues. All of the proposed bills levied stiffer punishments for those who use illegal drugs than the penalties set forth in the collective bargaining agreements of the major sports leagues. The bill proposed by Senator McCain set the penalties as follows:

(7) PENALTIES-

(A) GENERAL RULE-

- (i) FIRST VIOLATION- Except as provided in subparagraph (B), a professional athlete who tests positive shall be immediately suspended for a minimum of 2 years for a first violation. All suspensions shall include a loss of pay for the period of the suspension.
- (ii) SECOND VIOLATION- A second violation shall result in a lifetime ban of the professional athlete from all major professional leagues.

(B) EXCEPTIONS-

- (i) KNOWLEDGE OF THE ATHLETE- A major professional league may impose a lesser penalty than provided in subparagraph (A) or no penalty if the professional athlete establishes that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used the prohibited substance.<sup>33</sup>

The findings and purpose of the bill, set forth in Section 2, read as follows:

(a) Findings- Congress finds the following:

- (1) The use of anabolic steroids and other performance-enhancing substances by minors is a public health problem of national significance.
- (2) Experts estimate that over 500,000 teenagers have used performance-enhancing substances, which medical experts warn can cause a litany of health problems for individuals who take them, in particular children and teenagers.
- (3) The adverse health effects caused by steroids and other performance-enhancing substances include stunted growth, scarring acne, hair loss, dramatic mood swings, hormonal and metabolic imbalances, liver damage, a higher risk of heart disease and stroke later in life, as well as an increased propensity to demonstrate aggressive behavior, commit suicide, and commit crimes.

<sup>32</sup> Lynn Zinser, *McCain Offers Measure for Testing in Pro Sports*, The New York Times, May 25, 2005.

<sup>33</sup> Clean Sports Act of 2005, §§ 4(b)(7)(A) & (B).

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- (4) Professional athletes are role models for young athletes and influence the behavior of children and teenagers.
  - (5) Congressional testimony by parents of minors who used performance enhancing drugs, as well as medical and health experts, indicates that the actual or alleged use of performance-enhancing substances by professional athletes results in the increased use of these substances by children and teenagers.
  - (6) Surveys and studies suggest a connection between the actual or alleged use of performance-enhancing substances by college and professional athletes and the increased use of these substances by children and teenagers.
  - (7) The real or perceived tolerance of the use of performance-enhancing substances by professional athletes has resulted in both increased pressure on children and teenagers to use performance-enhancing drugs in order to advance their athletic careers and to professional sports['] loss of integrity.
  - (8) The adoption by professional sports leagues of strong policies to eliminate the use of performance-enhancing substances would result in the reduced use of these substances by children and teenagers.
  - (9) Minimum drug testing standards for professional sports established by Federal law would ensure the adoption of strong policies to eliminate the use of performance-enhancing substances in professional sports.
  - (10) Minimum drug testing standards for professional sports established by Federal law would help return integrity to professional sports. . . .
- (b) Purpose- The purpose of this Act is to protect the integrity of professional sports and the health and safety of athletes generally by establishing minimum standards for the testing of steroids and other performance-enhancing substances by professional sports leagues.<sup>34</sup>

Billy Hunter, executive director of the National Basketball Players Association (NBPA), testified as follows before a congressional subcommittee on May 18, 2005, regarding the Drug Free Sports Act of 2005 (H.R. 1862):

I appreciate the Subcommittee's interest in and concern about the use of steroids by professional athletes and others, particularly young adults and children, as evidenced by the legislation, H.R. 1862, introduced by several members of this Subcommittee. I would like to begin by clearly stating the position of the NBPA. As a former state prosecutor and United States Attorney, I have participated in the prosecution of numerous drug cases and have a keen understanding of and insight into drug use and abuse. While we strongly believe that the use of steroids and other performance enhancing drugs are virtually non-existent in the NBA, we are committed to ensuring that the use of such drugs does not ever become an issue of concern.

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<sup>34</sup> Clean Sports Act of 2005, §§ 2(a) & (b).

To that end, in the 1999 Collective Bargaining Agreement between the NBPA and NBA we introduced in our Anti-Drug Program a steroid testing protocol that provides for random testing of all incoming players four (4) times during their rookie seasons and tests veteran players once during the training camp period. Since testing for steroids and other performance enhancing drugs was instituted in 1999 there have been approximately 4200 tests conducted, with only 23 initial laboratory positive tests (less than one (1) percent).

Of the 23 tests that were initially laboratory positives, only 3 satisfied the additional steps that are required for a sample to be confirmed as positive under our Anti Drug Program, either because the player was terminated from employment prior to confirmation of his test result or because the Medical Director found a reasonable medical explanation for the test result. The three (3) players who had confirmed positive tests were immediately suspended.

Additionally, all players are subject to reasonable cause testing. If either the NBA or the NBPA has information that gives it reasonable cause to believe that a player is using, in possession of, or distributing steroids, then they may present such information to an Independent Expert, who is empowered to immediately decide whether reasonable cause exists to test the player. If reasonable cause is found, the player is subject to being tested up to four (4) times during a six week period following the order to test. The testing during this period may be administered at any time, without any prior notice to the player.

It is vitally important in the efforts to control the usage of steroids and other performance enhancing drugs that the list of banned substances for which players are tested remains current. Accordingly, in our Program that list is updated regularly by our Prohibited Substances Committee, comprised of three independent drug testing experts and a representative from both the NBPA and NBA. The Committee will ban a substance that is either declared illegal by the Federal Government or found to be harmful to players and improperly performance enhancing. Under our Anti-Drug Program at least seventeen (17) substances have been added to the list of prohibited substances since 1999.

While our Anti-Drug Program has always had a strong emphasis on education and treatment rather than punishment, with a standard of progressive discipline for violators, the Anti Drug Program does provide for substantial penalties for those who are caught using steroids and other performance enhancing drugs. A first time offender is automatically suspended for five (5) games and is required to enter an education, treatment and counseling program established by the Program's Medical Director. For a second offense the player is suspended for ten (10) games and required to reenter the education, treatment and counseling program. For a third offense, the player is suspended for twenty five (25) games (nearly a third of the 82 game NBA season) and is again required to enter the education, treatment and counseling program. Further, any player who fails to comply with the treatment program, as prescribed by the Medical Director, by engaging in behavior that demonstrates either a mindful disregard of his treatment responsibilities or by testing positive for steroids, suffers additional penalties, up to and including an indefinite suspension.

Another key component of our Anti-Drug Policy is our emphasis on education, treatment and counseling. During each season, every NBA player is required to attend and participate in a meeting where the dangers of steroid and performance enhancing drug use are discussed by drug counselors. Also, all rookie players are required to attend a week long Rookie Transition Program, before the start of their first NBA season, during which numerous topics are addressed in detail, including the dangers of using steroids and performance enhancing drugs. Finally, the program's Medical Director supervises a national network of medical professionals, located in every NBA city, available to provide counseling and treatment to players.

With the additional scrutiny that the use of steroids and other performance enhancing drugs has received in society, and particularly in professional sports, such as baseball, football and track and field, since our ground breaking agreement was reached in 1999, there has been discussion that our agreement requires modification. While I am reluctant to discuss the specifics of these discussions in great detail due to the sensitive, evolving, and complicated nature of collective bargaining negotiations, I represent to you that I have had numerous discussions with Commissioner Stern and the NBA about making significant changes in our next CBA to deal with the growing societal problem of the use of steroids and other performance enhancing drugs. We want to send a strong and unequivocal message to society in general and our young fans in particular that we do not condone, support or accept the use of performance enhancing drugs in our sport. To that end, we have indicated a willingness to significantly increase both the frequency of testing that our players undergo, and increase the penalties imposed upon the violators. We continue to believe that collective bargaining is the most appropriate forum for the resolution of these issues and are confident that the changes that are currently under consideration will address in a meaningful way the concerns of the Subcommittee, as embodied in the pending legislation, H.R. 1862. Congress has long given deference to parties operating under collective bargaining agreements to develop their own solutions to problems, properly recognizing that the parties bound by a collective bargaining agreement have a longstanding relationship with unique problems and problem solving methods that are often difficult to comprehend by those outside the relationship. While we fully believe in and support the Subcommittees' and Congress' goal of eliminating the use of steroids and performance enhancing drugs in sports, we believe this goal is best accomplished by the leagues and players working together to accomplish this universal objective. We think that the players, supported by the leagues, are best able to demonstrate to everyone, especially our young fans that the only way to become a professional athlete is by cultivating and nurturing their talent, determination, and desire and by working harder than everyone else.

I want to thank the Subcommittee for the opportunity to appear before you today.<sup>35</sup>

## AMATEUR SPORTS

Unlike professional sports, there are constitutional considerations at issue in the drug testing of athletes involved in amateur sports. In today's society, drugs are present among high school students and, in some cases, even younger students. Some amateur athletes seeking to emulate their role models have turned to performance-enhancing drugs. Recreational and street drugs also pose a problem in amateur athletics.

### Interscholastic Drug Testing

The interscholastic education level is generally understood to include students from grades 6 through 12. This covers middle school and high school students. The National Federation of State High School Associations does not require a high school to have a drug testing program. Nonetheless, many school districts have implemented a drug testing policy for athletes and other students who

<sup>35</sup> *The Drug Free Sports Act of 2005: Hearings on H.R. 1862 Before the Subcommittee on Commerce, Trade and Consumer Protection of the H. Committee on Energy and Commerce*, 109th Cong. 76–78 (2005) (prepared statement of G. William Hunter, Executive Director, National Basketball Players Association).

participate in extracurricular activities.<sup>36</sup> These policies vary from testing for marijuana to testing specifically for performance-enhancing drugs.

Some drug testing programs have been instituted at the state level. For example, in New Jersey high school athletes whose teams qualify for championship games have been required to undergo random drug testing for steroids. This plan was announced by acting Governor Richard J. Codey, who stated: “This is a growing threat, one we can’t leave up to individual parents, coaches or schools to handle.” In instituting the plan, the governor referred to data compiled by the National Institute on Drug Abuse, which found that 3.4% of all high school students nationwide admitted to using steroids at least once a year. The use among eighth graders was approximately 2%.<sup>37</sup>

The rights of students were discussed in the landmark case *Tinker v. Des Moines*, 393 U.S. 503 (1969). The court stated in part: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.”<sup>38</sup>

Prior to 1995, lower federal courts were split on the issue of drug testing in high schools and whether or not such a policy was a violation of the constitutional rights of students.<sup>39</sup> The question presented is, Under what circumstances will an interscholastic drug testing policy violate a student-athlete’s right to be free from unreasonable search and seizures under the Fourth Amendment to the U.S. Constitution? The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures.” The constitutional prohibition applies only to an “unreasonable” search. However, the Supreme Court has set forth various exceptions to the warrant requirement of the Fourth Amendment. The “special needs” doctrine is such an exception.

In *Vernonia School District v. Acton*, 515 U.S. 646, 653 (1995), the Supreme Court stated the following regarding the special needs doctrine in relation to interscholastic students: “We have found ‘special needs’ to exist in the public school context. There, the warrant requirement ‘would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,’ and ‘strict adherence to the requirement that searches be based upon probable cause’ would undercut ‘the substantial need of teachers and administrators for freedom to maintain order in the schools.’”<sup>40</sup> Furthermore it has been stated, “A school official may properly conduct a search of a student’s person if the official has a reasonable suspicion that a crime has been or is in the process of being committed or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.”<sup>41</sup>

Searches performed at a public school will almost always involve state actors, and a constitutional analysis will follow. The U.S. Supreme Court has stated that an unconstitutional search occurs “when an expectation of privacy that society is prepared to consider reasonable is infringed.”<sup>42</sup> In general,

<sup>36</sup> A.J. Perez, *Texas Testing Program Screens for Less Steroids as Debate Rages*, USA Today, August 20, 2008.

<sup>37</sup> Associated Press, *NJ Faces Random Drug Testing*, Dec. 27, 2005.

<sup>38</sup> *Tinker*, 393 U.S. 503 at 506.

<sup>39</sup> See *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988); *Brooks v. East Chambers Consol. Independent Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989); *Moule by & Through Moule v. Paradise Valley Unified Sch. Dist.*, 863 F. Supp. 1098 (D. Ariz. 1994).

<sup>40</sup> *Vernonia*, 515 U.S. at 653.

<sup>41</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 329 (1985).

<sup>42</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

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courts have determined that drug testing for athletic teams is permissible based on a student-athlete's diminished expectation of privacy. Student-athletes are sometimes required to submit to physical examinations as well as disrobe in front of other student-athletes when participating in athletics in school. Students also use public restrooms and communal locker rooms when they participate in physical education classes. Thus, courts have reasoned that a student who chooses to participate in sports has a diminished expectation of privacy.

One of the major concerns about the implementation of a drug testing policy is requiring a urinalysis test as a prerequisite for participation in a school-sponsored activity. Students often assert that drug testing procedures infringe on their right to participate. Under the law, however, it is clear that participation in sports at the interscholastic level is a privilege and not a right. *Schaill ex rel. Kross v. Tiptecanoe County School Corporations*, 864 F.2d 1309, 1310 (7th Cir. 1988), dealt with high school basketball players who had been required to provide urine samples after school officials had received information that players had been involved in drug use. The school board chose to implement a random drug testing program for all interscholastic athletes and cheerleaders based on the results of five positive drug tests. The Seventh Circuit found the drug testing policy to be reasonable on several grounds, including that drug testing was done in college athletics and at the Olympics and that the students had notice of the testing and gave their consent.

In Case 12-4, *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the Supreme Court ruled that the Fourth Amendment permitted a school policy that prevented students from participating in interscholastic sports unless they agreed to random drug testing. A seventh grader wanted to try out for the football team. Like all other students who wanted to participate in sports, he was required to sign a consent form even though no one had suspected him of using drugs. He and his parents refused to sign the form, and he was prevented from playing football. They sued the school district for failing to allow their son to participate.



### CASE 12-4 *Vernonia School District 47J v. Acton*

515 U.S. 646 (1995)

Justice SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution. . . .

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible. . . .



Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. . . .

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require “suiting up” before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. . . .

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia’s Policy is reasonable and hence constitutional. . . .

The Ninth Circuit held that Vernonia’s Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

*It is so ordered.*

Justice Ginsburg, concur[s]. . . .

Justice O’Connor, with whom Justice Stevens and Justice Souter join, [dissents]. . . .

Source: Courtesy of Westlaw; reprinted with permission.

In *Board of Education of Ind. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the Supreme Court allowed urinalysis drug testing of all students who participated in extracurricular activities. Consequently, *Earls* expanded the decision of *Vernonia* by allowing a school district to test more students with less of a basis than that set forth in *Vernonia*.

The following is a standard consent form used at the high school level to obtain consent for drug testing from a student and his or her parents.

In the interest of the safety of student athletes and student drivers, [ High School] has adopted a drug policy specifically for

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these students. The policy requires that student athletes and drivers be subject to random drug tests. A copy of this policy is attached to this form. Please read it carefully and retain it for your records. A student will not be permitted to participate in any athletic activity or drive until this consent form is signed and on file with the school.

I, \_\_\_\_\_ (name of student) have read the [ High School] Student Athlete and Student Driver Random Drug and Alcohol Testing Policy and do so consent to submit to a chemical test should I be required to do so. I further consent to allow [High School] to test the specimen I provide for illegal drug and/or alcohol content. I realize that if my test is positive for drug and/or alcohol use I will be subject to the consequences in accordance with the provisions of the Student Athlete and Student Driver Random Drug and Alcohol Testing Policy. I further consent to and agree to other terms and conditions of the Student Athlete and Student Driver Random Drug and Alcohol Testing Policy.

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Student Signature Student Name (printed)

Date: \_\_\_\_\_

We/I the undersigned Parent(s)/Guardian(s) of \_\_\_\_\_ (name of student) have read the Student Athlete and Student Driver Random Drug and Alcohol Testing Policy and do consent to all provisions thereof.

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Student's Parent/Guardian Signature Student's Parent/Guardian Name (printed)

Date: \_\_\_\_\_

**Problem 12-1**

You are the new athletic director for the Miller Independent School District. One of your tasks is to draft a new drug testing policy for the six high schools in your district. What should be included in such a policy? How do you draft such a policy and ensure there are no constitutional violations?

### Problem 12-2

Victoria Dixon is an honor student and member of the ninth-grade chess team at her high school. The school district has recently instituted a drug testing procedure whereby “all students involved in extracurricular activities in school will be subject to random drug testing throughout the year.” The first draft of the policy included only athletic teams, but after the parents of some of the football team members complained, the board changed the policy to include all students in extracurricular activities. The board stated, “There is no rampant drug use in high schools in the district at the current time but this policy is instituted to ensure that drug use does not occur.” Victoria and her parents refuse to sign a drug testing consent form, and she is removed from the team. She and her parents file a lawsuit in federal court challenging the policy. What legal considerations are present? What defenses does the school district have in implementing such a policy?<sup>43</sup>

### The National Collegiate Athletic Association

The NCAA began a drug testing program for all student-athletes in 1986 to ensure that all participants in collegiate athletics are on a level playing field and are healthy and safe. A student-athlete who fails a drug test administered by the NCAA is subject to suspension for one year. The student-athlete has the right to appeal any decision handed down by the NCAA. The NCAA also requires mandatory random drug testing during postseason intercollegiate athletic activities. The NCAA drug testing policy has been challenged on various grounds.

In *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994), the California Supreme Court held that the NCAA had not violated the privacy rights of student-athletes with its mandatory drug testing program. A lower court had found in favor of student-athletes from Stanford University who had sued, stating that the NCAA drug testing violated their right of privacy under the California state constitution. The Superior Court of California permanently enjoined the NCAA from enforcing its policy against the plaintiffs and other Stanford athletes. On appeal, the NCAA stated that its program was justified because it was protecting the health and safety of the athletes as well as “safeguarding the integrity of intercollegiate athletic competition.”<sup>44</sup> The court agreed with the NCAA on appeal, reversing the lower court’s decision and upholding its drug testing program.<sup>45</sup> The court stated in part:

Finally, the practical realities of NCAA-sponsored athletic competition cannot be ignored. Intercollegiate sports is, at least in part, a business founded upon offering for public entertainment athletic contests conducted under a rule of fair and rigorous competition. Scandals involving drug use, like those involving improper financial incentives or other forms of corruption, impair the NCAA’s reputation in the eyes of the sports-viewing public. A well announced and vigorously pursued drug testing program serves to: (1) provide a significant deterrent to would-be violators, thereby reducing the probability of damaging public disclosure of athlete drug use; and (2) assure student athletes, their schools, and the public that fair competition remains the overriding principle in athletic events. Of course, these outcomes also serve the NCAA’s overall interest in safeguarding the integrity of intercollegiate athletic competition.<sup>46</sup>

<sup>43</sup> Bob Egelko, *Drug Tests for Chess Club? Judge Says No*, San Francisco Chronicle, May 7, 2009.

<sup>44</sup> *Hill*, 865 P.2d at 659.

<sup>45</sup> *Id.* at 661.

<sup>46</sup> *Id.* at 661.

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In addressing the NCAA's health and safety argument, the court stated:

The NCAA also has an interest in protecting the health and safety of student athletes who are involved in NCAA-regulated competition. Contrary to plaintiffs' characterization, this interest is more than a mere "naked assertion of paternalism." The NCAA sponsors and regulates intercollegiate athletic events, which by their nature may involve risks of physical injury to athletes, spectators, and others. In this way, the NCAA effectively creates occasions for potential injury resulting from the use of drugs. As a result, it may concern itself with the task of protecting the safety of those involved in intercollegiate athletic competition. This NCAA interest exists for the benefit of all persons involved in sporting events (including not only drug-ingesting athletes but also innocent athletes or others who might be injured by a drug user), as well as the sport itself.<sup>47</sup>

Under NCAA bylaws, student-athletes must sign a consent form demonstrating their understanding of the drug testing program and their willingness to participate in the program. Each student-athlete must sign the consent form before the school year or he or she cannot participate in intercollegiate competition. The following is the consent form that must be signed by an NCAA Division I athlete to participate in intercollegiate athletics:

**Consent Form: 2009-2010**

Form 09-3d Academic Year 2009-10  
Drug-Testing Consent- NCAA Division I

Required by:

NCAA Constitution 3.2.4.7 and NCAA Bylaws 14.1.4 and 30.5.

Purpose:

To assist in certifying eligibility.

Requirement to sign Drug Testing Consent Form.

Name of your institution:

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You must sign this form to participate (i.e., practice or compete) in intercollegiate athletics per NCAA Constitution 3.2.4.7 and NCAA Bylaws 14.1.4 and 30.5. If you have any questions, you should discuss them with your director of athletics.

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<sup>47</sup> *Id.*

Consent to Testing.

You agree to allow the NCAA to test you in relation to any participation by you in any NCAA championship or in any postseason football game certified by the NCAA for the banned drugs listed in Bylaw 31.2.3 (attached). Additionally, if you participate in a NCAA Division I sport, you also agree to be tested on a year-round basis.

Consequences for a positive drug test.

By signing this form, you affirm that you are aware of the NCAA drug-testing program, which provides:

1. A student-athlete who tests positive shall be withheld from competition in all sports for a minimum of 365 days from the drug-test collection date and shall lose a year of eligibility;
2. A student-athlete who tests positive has an opportunity to appeal the positive drug test;
3. A student-athlete who tests positive a second time for the use of any drug, other than a "street drug" shall lose all remaining regular-season and postseason eligibility in all sports. A combination of two positive tests involving street drugs ( marijuana, THC or heroin) in whatever order, will result in the loss of an additional year of eligibility;
4. The penalty for missing a scheduled drug test is the same as the penalty for testing positive for the use of a banned drug other than a street drug; and
5. If a student-athlete immediately transfers to a non-NCAA institution while ineligible and competes in collegiate competition within the 365 day period at a non-NCAA institution, the student-athlete will be ineligible for all NCAA regular-season and postseason competition until the student-athlete does not compete in collegiate competition for a 365 day period.

Signatures.

By signing below, I consent:

1. To be tested by the NCAA in accordance with NCAA drug-testing policy, which provides among other things that:
  - a. I will be notified of selection to be tested;
  - b. I must appear for NCAA testing or be sanctioned for a positive drug test; and
  - c. My urine sample collection will be observed by a person of my same gender;
2. To accept the consequences of a positive drug test;
3. To allow my drug-test sample to be used by the NCAA drug-testing laboratories for research purposes to improve drug-testing detection; and

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4. To allow disclosure of my drug-testing results only for purposes related to eligibility for participation in NCAA competition. I understand that if I sign this statement falsely or erroneously, I violate NCAA legislation on ethical conduct and will jeopardize my eligibility.

Source: © National Collegiate Athletic Association. 2008–2010. All rights reserved.

In any drug testing scheme, one of the ongoing issues is what drugs should be banned. The following document sets forth the NCAA's list of banned drugs for the 2009–2010 school year.

#### **2009–2010 NCAA Banned-Drug Classes**

**The NCAA bans the following classes of drugs:**

- a. Stimulants
- b. Anabolic Agents
- c. Alcohol and Beta Blockers (banned for rifle only)
- d. Diuretics and Other Masking Agents
- e. Street Drugs
- f. Peptide Hormones and Analogues
- g. Anti-estrogens
- h. Beta-2 Agonists

**Note: Any substance chemically related to these classes is also banned.**

The institution and the student-athlete shall be held accountable for all drugs within the banned drug class regardless of whether they have been specifically identified.

**Drugs and Procedures Subject to Restrictions:**

- a. Blood Doping.
- b. Local Anesthetics (under some conditions).
- c. Manipulation of Urine Samples.
- d. Beta-2 Agonists permitted only by prescription and inhalation.
- e. Caffeine if concentrations in urine exceed 15 micrograms/ml.

**NCAA Nutritional/Dietary Supplements Warning:**

**Before consuming any nutritional/dietary supplement product, review the product and its label with your athletics department staff.** Dietary supplements are not well regulated and may cause a positive drug test result. Student-athletes have tested positive and lost their eligibility using dietary supplements. Many dietary supplements are contaminated with banned drugs not listed on the label. Any product containing a dietary supplement ingredient is taken at your own risk. **It is your responsibility to check with athletics staff before using any substance.**

Some Examples of NCAA Banned Substances in each class

**Note: There is no complete list of banned drug examples!!**

Check with your athletics department staff to review the label of any product, medication or supplement before you consume it.

**Stimulants:**

amphetamine (Adderall); caffeine (guarana); cocaine; ephedrine; fenfluramine (Fen); methamphetamine; methylphenidate (Ritalin); phentermine (Phen); synephrine (bitter orange); etc.

*exceptions:* phenylephrine and pseudoephedrine are not banned.

**Anabolic Agents:**

boldenone; clenbuterol; DHEA; nandrolone; stanozolol; testosterone; methasterone; androstenedione; norandrostenedione; methandienone; etiocholanolone; trenbolone; etc.

**Alcohol and Beta Blockers** (banned for rifle only):

alcohol; atenolol; metoprolol; nadolol; pindolol; propranolol; timolol; etc.

**Diuretics and Other Masking Agents:**

bumetanide; chlorothiazide; furosemide; hydrochlorothiazide; probenecid; spironolactone (canrenone); triameterene; trichlormethiazide; etc.

**Street Drugs:**

heroin; marijuana; tetrahydrocannabinol (THC).

**Peptide Hormones and Analogues:**

human growth hormone (hGH); human chorionic gonadotropin (hCG); erythropoietin (EPO); etc.

**Anti-Estrogens :**

anastrozole; clomiphene; tamoxifen; formestane; etc.

**Beta-2 Agonists:**

bambuterol; formoterol; salbutamol; salmeterol; etc.

**Any substance that is chemically related to the class of banned drugs, unless otherwise noted, is also banned.**

*Source:* NCAA.org

Case 12-5, *Brennan v. Bd. Of Trustees for Univ. Of Louisiana Systems*, 691 So.2d 324 (La. Ct. App. 1997), concerns a challenge to the NCAA drug testing policy in which a student sued, stating that his expectation of privacy had been violated as a result of the drug testing procedures.

**CASE 12-5 Brennan v. Bd. of Trustees for Univ. of Louisiana Systems**

691 So.2d 324 (La. Ct. App. 1997)

LOTTINGER, Chief Judge.

Plaintiff, John Patout Brennan (Brennan), a student-athlete at the University of Southwestern Louisiana (USL), tested positive for drug use in the second of three random drug tests administered by the National Collegiate Athletic Association (NCAA). Brennan requested and received two administrative appeals in which he contended that the positive test results were "false" due to a combination of factors, including heavy drinking and sexual activity the night before the test, and his use of nutritional supplements. Following the unsuccessful appeals, USL complied with the NCAA regulations and suspended Brennan from intercollegiate athletic competition for one year. Brennan brought this action against USL's governing body, the Board of Trustees for University of Louisiana Systems (Board of Trustees), seeking to enjoin enforcement by USL of the suspension.

In his petition, Brennan alleged that, by requiring him to submit to the NCAA's drug testing program, USL violated his right of privacy and deprived him of a liberty and property interest without due process in contravention of Article I, Sections 2 and 5 of the Louisiana Constitution. The NCAA moved to intervene on the grounds that the drug testing policies and procedures that Brennan placed at issue were developed, administered, conducted and enforced by the NCAA. The intervention was granted.

Following a two day trial, the trial judge entered oral reasons for judgment. Initially, the trial judge stated that he would "pretermitt any consideration of the several constitutional issues . . . since those issues are mooted by the court's decision." The trial judge then concluded that Brennan was entitled to the preliminary injunction because "the subject test results on the plaintiff based on the one blood sample taken from him was flawed, and therefore that sample should not have been the basis of . . . disciplinary action against the plaintiff. . . ."

The Board of Trustees and the NCAA appealed and assigned the following error:

Having declined to address the only causes of action asserted by Brennan, and having failed to find that Brennan was likely to succeed on the merits of any other cognizable cause of action, it was improper for the district court to issue a preliminary injunction in favor of Brennan.



## Validity of the Drug Test

Prior to discussing the assignment of error, it is necessary to review the trial judge's finding that the drug test results were flawed.

After reviewing the record in this case in its entirety, we conclude that the trial judge committed manifest error in finding that the drug test results were flawed. . . .

Upon close review, we find that the record does not contain a reasonable factual basis for the trial judge's conclusion that the test results were flawed. . . . Considering the evidence contained in the record, we conclude that the trial judge was clearly wrong in finding that the test results were flawed.

## Preliminary Injunction

Having concluded that the trial judge erred in finding that the test results were flawed, we now consider whether it was proper to issue a preliminary injunction in favor of Brennan. . . .

### *A. Brennan's Constitutional Claims*

Brennan claims that his constitutional rights to privacy and due process were violated. The Louisiana Constitution's protection of privacy provisions contained in Article 1, § 5 does not extend so far as to protect private citizens against the actions of private parties. Thus, in order to prevail on the merits of either constitutional claim, Brennan must first show that USL was a state actor when it enforced the NCAA's rules and recommendations.

#### *1. State Action . . .*

In the present case, Brennan asserts that USL, not the NCAA, violated his constitutional rights to privacy and due process. Without question, USL is a state actor even when acting in compliance with NCAA rules and recommendations. While we conclude that there is state action in this case, the preliminary injunction could only be issued on the constitutional claims if Brennan made a prima facie showing that he had a privacy interest which was invaded or that he had a property or liberty interest which was entitled to due process protection.

#### *2. Brennan's Privacy Interest*

In determining whether USL violated Brennan's right of privacy, we are guided by the California Supreme Court's recent decision in

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*Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1, 26 Cal.Rptr.2d 834, 865 P.2d 633 (Cal.1994). Therein several student-athletes filed suit against the NCAA challenging its drug testing program as an invasion of the right of privacy. *Id.* 26 Cal.Rptr.2d at 838-39, 865 P.2d at 637. While the court recognized that the drug testing program impacts privacy interests, it reasoned that there was no constitutional violation when the student-athletes' lower expectations of privacy were balanced against the NCAA's countervailing interests. *Id.* . . .

Although Brennan filed suit against USL, the state actor, rather than the NCAA, we conclude, as did the court in *Hill*, that there was no violation of a privacy interest. Brennan, like the student-athletes in *Hill*, has a diminished expectation of privacy. Additionally, we note that USL shares the NCAA's interests in ensuring fair competition in intercollegiate sports as well as in protecting the health and safety of student-athletes. While a urine test may be an invasion of privacy, in this case, it is reasonable considering the diminished expectation of privacy in the context of intercollegiate sports and there being a significant interest by USL and the NCAA that outweighs the relatively small compromise of privacy under the circumstances.

Because Brennan could not make a *prima facie* showing that he had a privacy interest which was unjustly violated, he could not prevail on the merits of the right of privacy claim.

### *3. Brennan's Property or Liberty Interest . . .*

In sum, Brennan could not make a *prima facie* showing that he would prevail on the merits of either constitutional claim; therefore, these claims could not be the basis for the issuance of the preliminary injunction.

### ***B. Brennan's Tort Claim***

Although Brennan could not prevail on the constitutional claims, he contends that the factual allegations in his petition are sufficient to support a cause of action in tort. . . .

Assuming, for purposes of discussion only, that USL had a duty to warn Brennan, the record establishes that Brennan received adequate information and warnings to protect his eligibility. . . .

In the present case, Brennan affirmed that he was aware of the NCAA's drug testing policy. He was told verbally and in writing to inquire about the program if he had any questions. Brennan was told that if he was taking anything at all, prescription or non-prescription, to check with the USL athletic department. Although Brennan had ample opportunity

to inquire about ingesting nutritional supplements, he chose to ingest the supplements without seeking advice from anyone. . . .

### **Conclusion**

For the foregoing reasons, the judgment of the trial court issuing the preliminary injunction is reversed. Costs of this appeal are assessed against the appellee.

REVERSED.

*Source:* Courtesy of Westlaw; reprinted with permission.

## **INTERNATIONAL SPORTS**

Drug use and testing have also become concerns at the international level. Athletes participating in international games, including the Olympics, are subjected to testing. Richard Pound, Chairman of the World Anti-Doping Agency, has stated that “doping is the single most important problem facing sport today. If we didn’t win the fight, Olympic-standard sport will not survive . . . because the public will have no respect for it. Cheats make what should be a triumph of human achievement into a hollow pretence.”<sup>48</sup> In the 2002 Summer games in Athens, Adrian Annus, a Hungarian athlete, was stripped of his gold medal in the hammer throw for failing to take a follow-up test. He was ordered to take another test upon his return to Hungary but failed to appear for that test. When he returned to Hungary, he announced his retirement and eventually was forced to return the gold medal he had won. After the Summer Olympic Games in 2004, U.S. sprinter Michelle Collins was given an eight-year suspension and had to forfeit all her winnings since 2002. A Court of Arbitration for Sport panel found that her involvement in the BALCO scandal amounted to a coverup. Because she had used drugs over an extended period of time, the panel doubled the penalty for her over the other athletes involved in the BALCO affair.

What responsibility does a professional athlete have for substances that enter his or her body? To what extent should an athlete trust and rely upon medical professionals for advice about the use of certain substances?



### **CASE 12-6 *Arbitration CAS 2008/A/1488 P.v. International Tennis Federation (ITF), award of 22***

Tennis

Doping (hydrocholorthiazide; amiloride)

Duty of care of the athlete

Significant fault or negligence

Application of the transitional provisions of the 2009 WADA Code

<sup>48</sup> John Cross & Jane Simon, *Have Olympics Been Ruined by Drug Cheats?*, Aug. 13, 2004, <http://www.mirror.co.uk>.

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1. In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances. If the doctor is not a specialist in sports medicine and not aware of anti-doping regulations, it is of even greater importance that the athlete be significantly more diligent in his/her efforts to ensure that the medication being administered does not conflict with the Code.
2. While it is understandable for an athlete to trust his/her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence. It is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention." To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
3. A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.

P. ("the player") is a 23 year old Spanish professional tennis player. The International Tennis Federation (ITF) is the international governing body for the sport of tennis worldwide.

On 19 June 2007 P. was requested to provide a urine sample at the Wimbledon Lawn Tennis Championships Qualifying Tournament in Roehampton, Great Britain. On 12 September 2007, the player was notified by the ITF's Anti-Doping Programme Administrator, Staffan Sahlström, that the results of her A Sample testing had returned an Adverse Analytical Finding ("AAF") for Hydrochlorothiazide and Amiloride. These substances are Prohibited Substances under the Tennis Anti-Doping Programme ("TADP") as category "S5. Diuretics and other masking agents."

By letter dated 26 September 2007, the player accepted that the A sample had returned an AAF and waived her right to have her B sample tested.

In the same letter, the player advanced the explanation that she ingested a medication called Ameride for therapeutic purposes. The medication was prescribed in June 2007 by her physician, Dr. Neus Tomas Benedicto, a specialist in Nutrition and Food Science, who had been

treating P. for the past year for "liquid retention and overweight." On the doping control form completed at the time of the collection, however, P. did not declare that she was taking the medication Ameride.

On 1 October 2007 the ITF filed a formal charge against the player for the commission of a doping violation under article C.1 of the TADP.

On 11 October 2007, in light of the formal charge, the player voluntarily withdrew from competition and confessed to having committed a doping offence, and explained that "pre menstrual symptoms, HTA and oedemas" were the medical reasons which required her to ingest the medicine Ameride.

On 25 January 2008 the ITF's Independent Anti-Doping Tribunal ("the Tribunal") confirmed the doping offence, declared that P. would be subject to a two-year period of ineligibility commencing 11 October 2007, ordered that P.'s individual results be disqualified in respect of the Wimbledon Qualifiers and subsequent competitions up until the date the player voluntarily withdrew from competition on 11 October 2007, and held that all prize money and ranking points obtained by P. by reason of her participation in these competitions be forfeited.

By e-mail dated 29 January 2008, counsel for the player informed the Tribunal of a factual error included in the player's written submissions which incorrectly attributed medical qualifications to the player which, in fact, are those of her doctor and not those of the athlete.

On 31 January 2008 the Tribunal declined to alter their decision and held that even with the factual error being rectified, the player could not demonstrate that she bore No significant Fault or Negligence and stated that although the error was "*regrettable . . . it is not critical to the decision.*"

On 15 February 2008 the player filed her Statement of Appeal with the CAS against the decision reached by the Tribunal on 25 January 2008. The Appellant requested that the CAS Panel decide that:

*"the mandatory period of 2 years' ineligibility is reduced according to what is stated in clauses M.5.1, and alternatively as a subsidiary, in accordance with clauses M.5.2 of the Tennis Anti-Doping Programme."*

On 28 February 2008 the Appellant filed her Appeal Brief and requested from the CAS that the period of ineligibility be reduced. . . .

On 20 June 2008 a hearing was held at the CAS headquarters in Lausanne, Switzerland. . . .

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LAW

Discussion

7. The question the Panel must determine in this appeal is whether P., in the circumstances of this case, demonstrated that she bore No Significant Fault or Negligence, for her admitted doping offence. Therefore establishing the possibility that this Panel might exercise its discretion to reduce the period of ineligibility.
8. The TADP and the WADC provide that to benefit from finding of No Significant Fault, the athlete must first meet the condition precedent of establishing how the prohibited substance entered into his or her system. The Panel notes that the ITF accepted P.'s explanation and confirms the first instance tribunal's conclusion. The Appellant has therefore met this first threshold requirement.
9. In order to determine whether a period of ineligibility can be reduced under . . . , the Panel must assess whether the athlete's fault or negligence was not significant when viewed in the totality of the circumstances of the case.
10. This Panel finds that neither in P.'s written submissions, nor at the hearing before the Panel, did she provide any evidence that she had advised Dr. Neus Tomas of her very strict responsibilities as an athlete and the onerous provisions under the TADP and the Code to which she was subject. Her own testimony during the hearing revealed that she merely asked the doctor if any of the ingredients in the medication would cause her performance to improve. The player did not bring the List of Prohibited Substances with her to the doctor, and she did not indicate that she was subject to random drug testing for a variety of different substances.
11. Her inquiry into whether the drug would result in her improved performance reveals that P. was sufficiently cognizant of her obligations under the TADP and the Code. Given this awareness, P. should have been able to understand that questioning whether the substance will improve one's performance is not synonymous to enquiring whether the drug contains any substances that are prohibited under the Code. Article B.4 of TADP provides that it is the sole responsibility of each player to ensure that anything that he or she ingests or uses as medical treatment does not infringe on the provisions of the Code.
12. In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances.
13. The Respondent cited a number of cases in support of its position that P. did not demonstrate that she bore no significant fault or negligence

in this case. The ITF specifically referred to cases where the athlete was able to establish how the substance entered into his or her system, yet was unable to show that he or she bore no significant fault or negligence in its ingestion in support of such a determination. In CAS OG 04/003, the CAS confirmed that it was not reasonable to accept and ingest a product without having properly examined and investigated the product for prohibited substances; and in *ITF v. Neilsen*, the Anti-Doping Tribunal dismissed the player's plea of No Significant Fault or Negligence, stating that the player "*did not take any steps at all to check whether his medication infringed the anti-doping rules.*" Similarly in this circumstance the Panel finds that P. has not demonstrated that she took any responsibility in verifying that her prescribed medication did not violate the anti-doping regulations of the TADP or the Code.

14. The facts accepted by the Tribunal demonstrate that P. had been a patient of Dr. Neus Tomas for one year, a specialist in nutrition and food science. However, there is no evidence to suggest that the doctor was familiar with the provisions of the TADP or had knowledge of the WADC List of Prohibited Substances. The player testified during the hearing that she asked her doctor who prescribed Ameride, if there were any ingredients in the drug that would improve her performance. She testified that the doctor answered no, that if anything it would have the opposite effect. She further stated that she always sent her mother to pick up her prescriptions at the pharmacy and she always instructed her mother to ask if there were any ingredients in the medication that would cause her to test positive.
15. In light of the fact that Dr. Neus Tomas was not a specialist in sports medicine and not aware of anti-doping regulations, it was of even greater importance that P. be significantly more diligent in her efforts to ensure that the medication being administered did not conflict with the Code. For any professional athlete, the most rudimentary of actions would have been to query the doctor prescribing the medication as to its composition and whether the substances complied with the Code.
16. P. relies on the argument that her doping violation was unintentional. The player's Appeal Brief directs the Panel to consider the violation's unintentional nature and P.'s lack of awareness as to the constituents of the administered medication, which she argues, reflects her intention to treat her physical ailments, and not to enhance her performance. The Panel is unable to accept these assertions in these circumstances as the basis that P. bore No Significant Fault or Negligence. First, while it is understandable for an athlete to trust his or her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence according to TADP Article M.5.2.

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17. Secondly, it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention" as submitted by the Appellant. P.'s fault cannot be considered insignificant given that she did not conduct a thorough investigation into the composition of the drug and did not take even the most elementary of steps and advise her medical professional that she cannot ingest any Prohibited Substances. To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
18. As such a result is undesirable, the Panel must concur with the Tribunal's finding that *"the player clearly failed to comply with the duty of utmost caution, or to exercise any reasonable level of care to comply with the anti-doping programme."* . . .
19. In the view of the Panel, based on the Tribunal's above reasons and the Panel's own findings, the particular circumstances of this case do not amount to exceptional circumstances within which P.'s fault can be described as insignificant. The Player had at her disposal several different methods to ensure that the prescribed medication did not infringe on the anti-doping rules, yet she failed to any steps whatsoever. Furthermore, in addition to failing to take any precautions, the Panel further relies on the player's failure to declare that she was taking this medication on her doping control form as support for the finding that P. fault cannot be described as insignificant. The lack of investigation and the non disclosure of the medication on the doping control form were acts that the player could have avoided and are not actions that can illustrate No Significant Fault or Negligence. Taking into account the circumstances of the case and, in particular the Appellant's testimony, the Panel takes the view that the application of the sanctions provided for in the TADP is not disproportionate.
20. Indeed as was evidenced during the hearing, the player appeared truly ignorant of all the readily available resources at her disposal. While this is truly regrettable, the Panel finds that a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent these very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.
21. It is therefore the conclusion of this Panel that the decision of the ITF's Independent Anti-Doping Tribunal's was in the circumstances, the correct one, and is upheld by this Panel. The Panel accepts the Tribunal's determination that there existed no circumstances in this case that would warrant the elimination or the reduction of the presumptive two year period of ineligibility and upholds the Tribunal's decision and reasons in awarding the sanction.

Source: Courtesy of Westlaw; reprinted with permission.



## NOTES AND DISCUSSION QUESTIONS

1. Should there be different rules and penalties for the use of illegal street drugs as opposed to performance-enhancing drugs? If so, what should be the standard? Should it differ with regard to amateur and professional sports?
2. Do you believe that the use of performance-enhancing drugs should be legalized? If such drugs were legal, would that not place all athletes on the same competitive level?

### Professional Sports

3. Do you agree with Major League Baseball's drug policy? If not, what should be changed? If you were drafting a drug policy for professional sports, what would you include? Do you think that the new drug testing program in baseball is harsh enough for its violators? If not, what is the appropriate discipline for violations of the policy? *See*, Robert D. Manfred, Jr., *Symposium: Doping in Sports: Legal and Ethical Issues: Federal Labor Law Obstacles to Achieving a Completely Independent Drug Program in Major League Baseball*, *Marquette Sports Law Review*, Fall, 2008; Kirk Radomski, *Bases Loaded*, Hudson Street Press, 2009.
4. Rafael Palmeiro tested positive for steroids after testifying before Congress that he had never used steroids. On his 2004 Topps trading card, it states "Bound for Glory." Is he indeed bound for glory? Should he be inducted into Baseball's Hall of Fame notwithstanding steroid use? Shoeless Joe Jackson and Pete Rose have not made it into the Baseball Hall of Fame because of involvement in gambling. Should Palmeiro's conduct be treated the same? Is it in the "best interests of baseball" to exclude him?
5. Running back Onterio Smith had a history of violating the NFL's drug policy. In May 2005 while traveling through Minneapolis–St. Paul International Airport, he was briefly detained by authorities after a search of his belongings revealed a device called "The Original Whizzinator." The "Whizzinator," named for obvious reasons, is a device used to beat drug tests. Should Smith have suffered any consequences from the NFL as a result of this incident? *See*, Chris Littman, *Onterio Smith's Whizzinator on the Auction Block*, *The Sporting News*, August 28, 2009.
6. ESPN has noted the individuals and entities in sports who have received the most "second chances." Steve Howe was number one on the list. Dwight Gooden and Darryl Strawberry were listed two and four, respectively, both given second chances after drug problems.<sup>49</sup>
7. Leonard Little of the St. Louis Rams was found guilty of involuntary manslaughter when he became intoxicated on his birthday and killed another driver. He was suspended from the league for eight games. What discipline should the commissioner have taken as a result of his actions? Should every league have a policy dealing with alcohol use by players? If so, what should it be? *See*, Josie Karp, *Rams Linebacker Little Coping with Fatal Past*, *CNN Sports Illustrated*, January 28, 2000.
8. Do you believe Congress should be involved in setting regulations for drug testing in professional sports? What role does collective bargaining play with regard to any bill that would

<sup>49</sup> Jeff Merron, *If at First You Don't Succeed. . . .*, ESPN.com, 2007, <http://espn.go.com/page2/s/list/secondchances.html>.

be passed by Congress? Should Congress be involved in setting standards for drug testing at the collegiate and interscholastic levels?

9. The sanction for violation of antidoping rules in the Australian Football League is the loss of two years of eligibility and a lifetime ban for a second violation.<sup>50</sup> Do you agree with this penalty? Should American sports institute the same provisions for violations?
10. Former Pittsburgh Steeler Terry Long passed away in 2005. A revised death certificate listed his death as suicide from drinking antifreeze.<sup>51</sup> In March of 2005 Long had been indicted on federal grand jury charges for arson to his own chicken processing business. He played right guard for the Pittsburgh Steelers from 1984 to 1991. He was small for an offensive lineman in the NFL but was one of the league's most powerful linemen. He was a fourth-round selection by the Steelers from East Carolina University, where he had been an All-American.
11. Do you believe that players who take performance-enhancing drugs are "cheating"? Do you agree with the rationale given by former MVP Ken Caminiti? Who is actually hurt by a player taking performance-enhancing drugs? What ethical issues do drugs in sports present?
12. Mark McGwire admitted using the substance androstenedione ("andro") during his home run rampage in the 1990s. On October 22, 2004, the Anabolic Steroid Control Act of 2004 classified andro as a controlled substance, thereby making its use as a performance-enhancing drug illegal. At the time McGwire was using andro, it was only banned by the NFL. McGwire testified in front of Congress during the hearings regarding steroid use in baseball. When asked if he had ever used steroids, he responded that he would not talk about the past. Baseball has now banned the use of andro as well. How do you think this will affect the possible introduction of McGwire into the Baseball Hall of Fame? How should professional sports address a situation in which a player was using a drug that is later banned? See, Associated Press, *Andro Story on McGwire in 1998 Caught Baseball's Attention*, USA TODAY, December 13, 2007.
13. Unfortunately, baseball players have not always taken drugs seriously. Bill "the Spaceman" Lee pitched for the Red Sox and talked extensively about drug use in his book *The Wrong Stuff* (1984). Pittsburgh Pirates pitcher Doc Ellis talked about a no-hitter he threw on LSD in his book *Dock Ellis, In the Country of Baseball* (1989). See, Jerry Crasnick, *Ex-Pitcher Ellis Dies of Liver Disease*, ESPN, December 20, 2008.
14. Drug testing is highly regulated in sports such as boxing and horse racing. In *Stephenson v. Louisiana State Racing Commission*, 907 So.2d 925 (4th Cir. 2005), the state racing commission suspended a veterinarian's license and racing privilege for two years and fined him \$10,000. The court of appeals found that the evidence supported the commission's finding that the veterinarian had injected the horse with a substance from home prior to the race:

A thorough reading of the hearing transcript reveals that there was substantial circumstantial evidence to support a finding that Dr. Stephenson injected the horse, Delightster, with some substance within the prohibitive four-hour time period. The two investigators on the scene both testified that they saw Dr. Stephenson holding an empty

<sup>50</sup> See Australian Football League, ANTI-DOPING CODE, as amended, Section 12.1, *Imposition of Ineligibility for Prohibited Substances and Prohibited Methods*.

<sup>51</sup> NFL Roundup: *Document Says Former Steeler Drank Antifreeze in Suicide*, NEW YORK TIMES, Jan. 27, 2006.

syringe against the horse's neck. Dr. Stephenson first attempted to conceal the syringe, and then hesitated to surrender it to the investigators. Dr. Stephenson freely admitted that the syringe had contained AMP mixed with a vitamin, thus the fact that the drug analysis proved negative for illegal substances is of no moment. Whether this substance was an illegal narcotic or a vitamin cocktail, injecting any horse with any substance within four hours of post time is a violation of the rules.

Additionally, it taxes the imagination to believe it was mere coincidence that Dr. Stephenson had on his person two syringes, one containing AMP with vitamin B12 in Exhibit A, and the other thiamine mixed with calcium or magnesium in Exhibit B, the two substances Carl Giesse testified he suggested Dr. Stephenson give his horse. Clearly this "coincidence" was not lost on the Commission either as Commissioner Neck pointed out at the hearing.

Dr. Stephenson attempted to explain away the fact that he had an empty syringe in his hand when the investigators found him by stating that he was using it as a "pointing device." According to Dr. Stephenson, he was attempting to explain the symptoms of colic to an illegal alien groom who did not speak English. When this explanation is coupled with Dr. Stephenson's other testimony that the syringe had merely fallen out of his pocket as he attempted to sound the horse's belly with his naked ear, it is easy to see why the Commission gave little credence to either explanation for the presence of the syringe.<sup>52</sup>

15. The Clean Sports Act of 2005 never became law, although it is possible that it will be reintroduced in later sessions of Congress. For further study see, Lindsay J. Taylor, *Congressional Attempts to "Strike Out" Steroids: Constitutional Concerns About the Clean Sports Act*, University of Arizona Law Review, Vol. 49, 2007, p. 961.

## Amateur Sports

16. The Supreme Court has succinctly held: "Urination is 'an excretory function' traditionally shielded by great privacy."<sup>53</sup> With this precept in mind, what factors must be taken into consideration when drafting a drug testing policy for a public high school?
17. At what age or grade should drug testing start?
18. The decision in the *Earls* case expands the decision of *Vernonia* by allowing school districts to test more students with no direct evidence of drug use by students present. Under what circumstances should schools be allowed to test student-athletes? What about those who participate in "competitive" extracurricular activities? How would you define extracurricular activity? How would you treat members of the school's debate team?
19. The Supreme Court's decision in *Earls* mentions that a study shows that students who engage in extracurricular activities at schools are less likely to have substance abuse problems.<sup>54</sup>

<sup>52</sup> *Stephenson*, 907 So.2d 925 at 931.

<sup>53</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989).

<sup>54</sup> See N. ZILL, C. NORD, & L. LOOMIS, *ADOLESCENT TIME USE, RISKY BEHAVIOR, AND OUTCOMES: AN ANALYSIS OF NATIONAL DATA* 52 (1995).

Do you agree with this proposition? If you do agree, wouldn't the proper course of action be to test all students who are not involved in extracurricular activities? What would be the effect of that? What legal ramifications would result?

20. The school board policy found in *Earls* applied to athletes, cheerleaders, and even members of the Future Homemakers of America. Under what circumstances could the Future Homemakers of America be considered a "competitive" extracurricular activity? Where would you draw the line with regard to drug testing high school students?
21. Four Supreme Court justices disagreed with the *Earls* decision. Justices Ginsburg, Stevens, O'Connor, and Souter dissented, with Ginsburg drafting the dissenting opinion. O'Connor also wrote a short dissenting opinion, in which Souter joined. In her dissenting opinion, Ginsburg discussed the policy of random drug testing. She seemed to attack the arguments made by the majority in somewhat of a tongue-in-cheek fashion:

At the margins, of course, no policy of random drug testing is perfectly tailored to the harms it seeks to address. The School District cites the dangers faced by members of the band, who must "perform extremely precise routines with heavy equipment and instruments in close proximity to other students," and by Future Farmers of America who "are required to individually control and restrain animals as large as 1500 pounds." For its part, the United States acknowledges that "the linebacker faces a greater risk of serious injury if he takes the field under the influence of drugs than the drummer in the halftime band," but parries that "the risk of injury to a student who is under the influence of drugs while playing golf, cross country, or volleyball (sports covered by the policy in Vernonia) is scarcely any greater than the risk of injury to a student . . . handling a 1500-pound steer (as [Future Farmers of America] members do)." One can demur to the Government's view of the risks drug use poses to golfers, ("golf is a low intensity activity"), for golfers were surely as marginal among the linebackers, sprinters, and basketball players targeted for testing in Vernonia as steer-handlers are among the choristers, musicians, and academic-team members subject to urinalysis in Tecumseh. Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.<sup>55</sup>

Do you agree with the observations and arguments of the dissent in *Earls*?

22. Some courts have found that drug testing of student-athletes without any suspicion of the use of drugs is unconstitutional. In *Trinidad School District No. 1 v. Lopez*, 963 P. 2d 1095 (Colo. 1998), a band member challenged the school board's policy of suspicionless urinalysis drug tests for sixth- through twelfth-grade students participating in extracurricular activities. In finding that the policy was unconstitutional, the court stated: "Although band members wear uniforms, they do not undergo the type of public undressing and communal showers required of students athletes.' The court here finds this fact significant. Furthermore, the court holds that 'the type of voluntariness to which the *Vernonia* Court referred does not apply to

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<sup>55</sup> *Earls*, 536 U.S. 822 at 851–52.

students who want to enroll in a for-credit class that is part of the school's curriculum.” Also see *Gardner ex rel. Gardner v. Tulia Independent School District*, 183 F. Supp. 2d 854 (N. D. Tex. 2000), in which a policy mandating suspicionless drug testing for all students in grades 7 through 12 who were engaged in extracurricular activity was considered in violation of the Fourth Amendment.

23. The National Center for Drug Free Sport uses handheld computers to track the approximately 25,000 drug tests it evaluates yearly for college athletics. The Dolphin 7900 is used to record an athlete's digital signature and to scan the bar codes that are attached to sample containers. There are plans for the Dolphin to be able to take the athlete's picture to further substantiate the integrity of all samples that are taken. The National Center for Drug Free Sports has found that using paper for compiling test data had created possibilities of human error, but that the use of handheld computers virtually eliminated all error.<sup>56</sup>
24. For other cases dealing with drug testing at the collegiate level, see *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993) (holding a university's random drug testing of students to be unconstitutional), and *O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1998) (holding that the NCAA's use of a monitored urine test did not unreasonably infringe upon a student's right of privacy).
25. What about those students who are not involved in athletics but are involved in extracurricular activities in public school such as the debate team, chess club, choir, Fellowship of Christian Athletes, or the Future Farmers of America? In *Board of Education of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the U.S. Supreme Court examined the constitutionality of a school policy that required drug testing for all students who participated in “competitive” extracurricular activities. The Court stated:

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals' novel test that “any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.” Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a “drug problem.”

Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was “fueled by the ‘role model’ effect of athletes' drug use,” such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality

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<sup>56</sup> *Computerworld*, Feb. 13, 2006.

of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.<sup>57</sup>

## International Sports

26. Should U.S. athletes be subject to international drug testing standards? The International Baseball Federation (IBAF) tested for banned substances in the World Baseball Classic (WBC) in 2006. There were some concerns about which substances were to be tested for. The IBAF was sanctioning the WBC and therefore was required to adhere to the World Anti-Doping Code.

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<sup>57</sup> *Earls*, 536 U.S. 822 at 836–838.

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