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IS CONGRESS' LATEST EFFORT TO DE-JUICE PROFESSIONAL SPORTS UNCONSTITUTIONAL?

Philip Jacques

I. INTRODUCTION

The Clean Sports Act of 2005¹ (CSA) is Congress' decisive response to the increasing use of illegal performance-enhancing substances by professional athletes. When discussing performance-enhancing substances in sports, whether professional or amateur, it is important to keep in mind that not all of the substances are illegal.² Some over-the-counter substances, such as creatine, are openly used without any repercussions.³ Thus, any statement regarding the use of performance-enhancing substances most likely includes legal and illegal substances, unless otherwise indicated.

Performance-enhancing substances are not a new phenomenon in athletics. The Aztecs and the ancient Greeks looked for substances to give them a competitive advantage, and the practice has only grown since then.⁴ The practice has evolved to such an extent that it is now deeply embedded in the global athletic culture.⁵ As a result of the history of performance-enhancing substances, it seems unrealistic to rely on a law to rid sports of the practice.

It is widely believed that anabolic steroids are the most widely used of the relevant illegal substances, evidenced by the United States Anti-Doping Agency's (USADA) 2007 findings.⁶ The use of illegal substances, such as anabolic steroids, by professional athletes to get a competitive advantage has occurred since the 1960s. Ben Johnson, a Canadian sprinter who tested positive for steroids in the 1988 Seoul

1. Clean Sports Act, S. 1114, 109th Cong. (2005).

2. Dr. Jason J. Koch, *Performance-enhancing: Substances and Their Use Among Adolescent Athletes*, 9 PEDIATRICS IN REV. 310, 311, Sept. 2002, available at <http://pedsinreview.aappublications.org/cgi/content/full/23/9/310>.

3. *Id.*

4. "Aztec athletes and warriors ate human hearts to give them strength in battle and competition. Ancient Greek Olympians used special mushrooms they believed gave them added power. In the 1800s European cyclists used heroin, cocaine, and ether-soaked tablets to enhance their performance." *Id.* at 310.

5. *Id.* at 311-2.

6. See United States Anti-Doping Agency's 2007 Annual Report, http://www.usantidoping.org/files/active/who/annual_report_2007.pdf (last visited September 25, 2009).

Olympic Games, was the first mainstream athlete to test positive for steroids.⁷ The first widely publicized case of extended steroid use was by Lyle Alzado,⁸ a National Football League (NFL) star in the 1970 and 1980s who died of brain cancer. Following Alzado's story, came the news that the female East German swimmers, who dominated the swimming world for over a decade, used steroids, after some of their children were born with birth defects.⁹

The use of performance-enhancing substances has evolved even more, as it has touched virtually every sport, including golf¹⁰ and National Association for Stock Car Auto Racing (NASCAR).¹¹ Additionally, instead of the most rudimentary anabolic steroids, athletes use Human Growth Hormone (HGH), Tetrahydrogestrinone (THG), Erythropoietin (EPO) and other forms of synthetically manufactured substances to get a competitive advantage.¹² President George W. Bush thought that the problem of steroids in professional sports was so prevalent that he addressed it in his January 20, 2004 State of the Union Address.¹³ One of the problems is that many new synthetic substances are undetectable, as there is currently not a test that is capable of detecting their presence.¹⁴ Ultimately, this paper concludes that while Congress should not have to pass legislation to prevent the use of illegal performance-enhancing substances in professional sports, it is within its constitutional power to do so. However, the CSA is unconstitutional, as it violates the Fourth Amendment.

Section II of this paper explains the current state of affairs of performance-enhancing substances in professional sports and the CSA. Section III of this paper analyzes the constitutionality of the CSA by discussing the extent of the use of illegal performance-enhancing sub-

7. 1988: Johnson Stripped of Olympic Gold, BBC, Sept. 27, 2008, http://news.bbc.co.uk/onthisday/hi/dates/stories/september/27/newsid_2539000/2539525.stm.

8. Mike Puma, *Not the Size of the Dog in the Fight*, ESPN, http://espn.go.com/classic/biography/s/Alzado_Lyle.html (last visited Oct. 12, 2008).

9. Michael Janofsky, *OLYMPICS; Coaches Concede That Steroids Fueled East Germany's Success in Swimming*, N.Y. TIMES, Dec. 3, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE1DA1731F930A35751C1A967958260&sec=health&spon=&pagewanted=all>.

10. See Steve DiMeglio, *Gary Player: I know of steroids in golf*, USA TODAY, July 18, 2007, available at http://www.usatoday.com/sports/golf/pgal/2007-07-18-player-comments_N.htm.

11. See *NASCAR toughens drug policy, to test drivers before start of '09*, CBS SPORTS, Sept. 20, 2008, <http://www.sportsline.com/autoracing/story/10986934>.

12. See United States Anti-Doping Agency's Athlete Handbook, http://www.usantidoping.org/files/active/athletes/athlete_handbook.pdf (last visited September 25, 2009).

13. Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 100 (Jan. 20, 2004).

14. *New Cases of Undetectable Steroids*, CBS, Nov. 15, 2007, <http://cbs13.com/local/steroids.athletes.2.569340.html>.

stances in professional sports; whether, it requires the major league sports to act at the Government's discretion; whether, the required urinalysis is a search and seizure under the Fourth Amendment; the extent of the intrusion upon the athletes' private interest; and whether, the Government presents a compelling interest.

Finally, Section III discusses whether, after balancing the private and Governmental interests, the required urinalysis is an unreasonable search under the Fourth Amendment and discusses the possible alternatives to the CSA. While this paper is not intended to advocate for the legalization of illegal performance-enhancing substances, it ultimately arrives at the conclusion that the CSA is unconstitutional and merely a threat, intended to force the professional leagues to implement more stringent drug testing programs.

II. CURRENT STATE OF AFFAIRS

A. *Clean Sports Act of 2005*

The CSA is Congress' attempt to regulate performance-enhancing substances under its authority to regulate interstate commerce. The Senate referred the CSA to the Committee on Commerce, Science, and Transportation.¹⁵ Congress has regulated professional and amateur sports for several years.¹⁶ The CSA states that its purpose 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."¹⁷

The CSA states that the Senate found the use of anabolic steroids and other performance-enhancing substances by minors to be a public health problem of national significance.¹⁸ The CSA states that experts estimate that 500,000 teenagers have used performance-enhancing substances and based upon the testimony of parents of minors, who used performance-enhancing substances, and medical and health experts, the use of performance-enhancing substances has a number of adverse health side-effects.¹⁹ It also states that studies and surveys suggest that the use of performance-enhancing substances by professional athletes results in increase use by adolescents and that the adoption of a strict drug testing policy by professional sports leagues

15. Clean Sports Act, S. 1114, 109th Cong. (2005).

16. *Id.* § 2(a)(14).

17. *Id.* § 2(b).

18. *Id.* § 2(a)(1).

19. *Id.* § 2(a)(2).

would reduce the use of performance-enhancing substances by adolescents.²⁰ Thus, even though the CSA does not state specifically that one of its main purposes is to deter the use of performance-enhancing substances by adolescent athletes, the Congressional findings and extrinsic evidence lead to the conclusion that it is the main thrust behind the proposed legislation.²¹

The CSA mandates that, upon its establishment, all four major professional sports leagues and the United States Boxing Commission adopt its minimum testing standards.²² The minimum standards are those established by the USADA.²³ These minimum standards require random suspicionless testing for all prohibited substances at least five times per year for each athlete.²⁴ Presumably, the method of testing will be urine testing, as it is the method currently used by the USADA; however, blood testing is also a possibility because the USADA is currently developing new tests.²⁵ The penalty an athlete faces for his or her first positive test is an immediate suspension of at least 2 years.²⁶ For a second violation, the penalty is a lifetime ban from all major professional leagues.²⁷ The penalty for a leagues' failure to comply with the act is a \$1,000,000 fine for each violation.²⁸

Additionally, each league must report its testing policies and procedures to the Committee on Commerce, Science, and Transportation of the Senate; and the Committee on Energy, and the Committee on Government Reform of the House of Representatives.²⁹ Similar

20. See *Id.* § 2(a)(5).

21. See S. 1114.; Lindsay J. Taylor, Note, *Congressional Attempts to "Strike Out" Steroids: Constitutional Concerns About the Clean Sports Act* 49 ARIZ. L. REV. 961, 961 (2007); "Representative Tom Davis, Chairman of the House Committee on Government Reform and a sponsor of the Clean Sports Act of 2005, stated that Congress's 'primary focus remains on the message being sent to children.'" Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777, 1781 (2006) (citing *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. On Government Reform*, 109th Cong. 7 (2005) (statement of Rep. Tom Davis, Chairman, House Comm. on Government Reform)); Tiffany D. Lipscomb, Note, *Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy*, 69 OHIO ST. L.J. 303, 340-1 (2008).

22. S. 1114 §§ 3(4); 8.

23. *Id.* § 4(b).

24. *Id.* § 4(b)(1)(A).

25. *USADA Begins Program to Test Body Chemistry*, WASH. POST, at E02, Apr. 17, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR2008041603667.html>.

26. S. 1114 § 4(b)(7)(A)(i).

27. *Id.* § 4(b)(7)(A)(ii).

28. *Id.* § 6(b)(2).

29. *Id.* § 7(c).

pieces of legislation have been proposed with slight variations on the specific procedures in each house of Congress.³⁰ Many scholars praise the CSA for different reasons, including its aspiration to protect America's youth and its economic efficiency.³¹ Interestingly, many of these supporters fail to address the obvious Fourth Amendment implications.

B. *The Use of Performance-Enhancing Drugs in Professional Sports*

In the academic community, it is virtually undisputed that illegal performance-enhancing substances have invaded professional and amateur athletics. Academics also believe that Congress has the authority to address the problem through the commerce clause.³² However, as much as the problem has grown, evidence indicates that the majority of use in the four major professional sports is limited to baseball and football.³³ That being said, the implication from testing statistics and sports insiders is that the problem is more prevalent in the Major League Baseball (MLB) and minor league baseball players. A number of current and former major league baseball players have estimated the use of steroids or HGH by MLB players to be between 40-50%.³⁴ The now deceased Ken Caminiti, the 1996 National League Most Val-

30. See Integrity in Sports Act, S. 1960, 109th Cong. (2005); Professional Sports Responsibility Act of 2005, H.R. 3942, 109th Cong. (2005); Drug-Free Sports Act, H.R. 3084, 109th Cong. (2005).

31. Denise A. Garibaldi, Ph.D., Symposium, *The Challenge and the Tragedy*, 40 *NEW ENG. L. REV.* 717, 717 (2006); Colin Laitner, *Steroids and Drug Enhancements in Sports: the Real Problem and the Real Solution*, 3 *DEPAUL J. SPORTS L. & CONTEMP. PROBS.* 192, 210-1 (2006); Joshua H. Whitman, Note, *Winning at All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 *U. ILL. L. REV.* 459 (2008).

32. See Laitner, *supra* note 31; See also *supra* note 19; Joseph M. Saka, Comment, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus From Steroids to Sports*, 23 *J. CONTEMP. HEALTH L. & POL'Y* 341, 354 (2007); Matthew J. Mitten, Symposium, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 *NEW ENG. L. REV.* 797, 806 (2006); Allan H. "Bud" Selig & Robert D. Manfred, Jr., Symposium, *The Regulation of Nutritional Supplements in Professional Sports*, 15 *STAN. L. & POL'Y REV.* 35, 57-59 (2004).

33. GEORGE J. MITCHELL, DLA PIPER US LLC, 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 SUMMARY AND RECOMMENDATIONS, Dec. 13, 2007, <http://www.files.mlb.com/summary.pdf> [hereinafter Mitchell Report]; Brent Schrottenboer, *UNION-TRIB.*, Sept. 21, 2008, <http://www.signonsandiego.com/sports/20080921-9999-1s21list.html>.

34. Tom Verducci, *Totally Juiced*, *SPORTS ILLUSTRATED*, June 3, 2002, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1025902/index.htm>.

uable Player and admitted steroid user, estimated the use to be as high as 85%.³⁵

Moreover, the highly touted 2007 Mitchell Report states that in MLB in 2005, twelve players tested positive for steroids; in 2006, two players tested positive for steroids; and in 2007, three players tested positive for steroids.³⁶ The Mitchell Report, by way of testimony and physical evidence, also connects eighty-seven former and current players to steroid or HGH use. The discrepancy between the positive test results and Mitchell Report and player reports illustrate that the MLB testing program is inadequate.³⁷ After telling Congress that they did not use illegal performance-enhancing substances, some future MLB Hall of Fame caliber players tested positive or were linked to purchasing the illegal substances.³⁸ In a comparison of positive tests, according to the San Diego Union-Tribune, twenty-two NFL players tested positive for banned performance-enhancing substances in the same three-year time period.³⁹

The NFL's drug testing system has been in place for decades and MLB's drug testing program is in its infancy, as it started in 2002.⁴⁰ There is no question that the NFL has the most stringent testing program, as it received Congressional praise.⁴¹ As a result, at least four NFL players recently tested positive for Bumetanide, which is considered a masking agent.⁴² These players received four game suspensions, consistent with the NFL policy.⁴³ These statistics indicate that the NFL actually catches and punishes offenders at a higher rate than the MLB. However, the occurrences also suggest that some evasion takes place in the NFL.⁴⁴

In contrast, the National Hockey League (NHL) has a random testing policy, and in approximately two years of testing, only one player tested positive for a banned performance-enhancing substance.⁴⁵ The

35. *Id.*

36. Mitchell Report, *supra* note 33.

37. *Id.*

38. Rafael Palmeiro tested positive for steroids, and Barry Bonds and Roger Clemens were linked to the purchase of illegal performance-enhancing substances. *Id.*

39. Schrottenboer, *supra* note 33.

40. Mitchell Report, *supra* note 33.

41. *NFL to test for more performance enhancing drugs*, ESPN, Jan. 24, 2007, <http://www.sports.espn.go.com/nfl/news/story?id=2741136>; Selig, *supra* note 32, at 54-5.

42. *McAllister, Smith, Grant, Texans' Pittman among players testing positive*, ESPN, Oct. 26, 2008, <http://sports.espn.go.com/nfl/news/story?id=3661845>.

43. *Id.*

44. Laitner, *supra* note 31, at 201.

45. Scott Burnside, *Debate over NHL's drug testing policy rages on*, ESPN, Aug. 6, 2007, http://sports.espn.go.com/nhl/columns/story?columnist=burnside_scott&id=2963703.

National Basketball Association (NBA) has a more lax policy on random testing and the substances that are tested.⁴⁶ There are no reports of an NBA or NHL player being linked to the purchase of a banned performance-enhancing substance. This indicates that the problem is primarily limited to the MLB and the NFL.

It is unfortunate that Congress feels legislation is required to make a serious effort to reduce the use of illegal substances in professional sports. Each individual league should act as its own watchdog and adopt the strict policy used by the International Olympic Committee and the USADA. The Major League Baseball Player's Association (MLBPA) stifled most of the MLB's attempts to introduce a new policy. However, in the wake of the Mitchell Report, there has been recent success in negotiations.⁴⁷ In April of 2008, the MLB and the MLBPA agreed to a much stricter testing program.⁴⁸ The previous inability to find common ground indicates that the MLB wanted Congress to take action, so that it could deny responsibility.⁴⁹ Marvin Miller, the former executive director of the MLBPA, would most likely agree with the theory that the MLBPA stymied the new testing program but he would likely say that the effort was a good faith attempt to protect the rights of the individual athletes.⁵⁰ There is also the notion that that the MLB turned a blind eye to the growing steroid problem through the 1990s.⁵¹ If the theory is accurate, the MLB's actions most likely contributed to the current state of affairs with performance-enhancing substances in the MLB.

III. THE CONSTITUTIONALITY OF THE CLEAN SPORTS ACT OF 2005

This section analyzes the constitutionality of the CSA and whether the CSA is the best method to achieve Congress' objectives. There are four important Fourth Amendment search Supreme Court cases that have formed the law in the area of drug testing by urinalysis. An analysis and discussion of each case is necessary because there is not a clearly identifiable rule on point. While the Congressional findings are

46. Laitner, *supra* note 31, at 201.

47. Mitchell Report, *supra* note 33.

48. *Steroid use allegations plague Major League Baseball*, CBS NEWS, http://www.cbsnews.com/elements/2005/11/16/in_depth_sports/timeline1050084_0_main.shtml (last visited Oct. 12, 2008).

49. Peck, *supra* note 21, at 1777-8.

50. Dave Kindred, *Seems Athletes Have Lost Their Legal Legs*, L.A. TIMES, D-2, July 4, 2004, available at <http://articles.latimes.com/2004/jul/04/sports/sp-dogkindred4>; Murray Chass, *Steroid Tests Ignore the 4th Amendment*, N.Y. TIMES, June 2, 2005, available at <http://www.nytimes.com/2005/06/02/sports/baseball/02chass.html>.

51. Peck, *supra* note 21, at 1786.

significant, they overlook obvious problems, which shall be addressed in this section. While Congress' findings are entitled to substantial deference, "they are not insulated from meaningful judicial review altogether."⁵²

The Fourth Amendment of the Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . ."⁵³ The Amendment guarantees the privacy, dignity and security of persons against certain arbitrary and invasion acts by officers of the Government or those acting at their direction.⁵⁴ Thus, a urinalysis violates the Fourth Amendment if it is an unreasonable search that is contributable to the Government or a private party acting at the Government's discretion, but the practice may be permissible if the Government presents a special exception.⁵⁵

The first step in the Fourth Amendment analysis is to consider whether the drug tests are contributable to the Government or a private party acting at its discretion, which is addressed in sub-section A.⁵⁶ The next step in the analysis is to consider whether the individuals' have a diminished expectation of privacy and the nature of the invasion, to be addressed in sub-section B.⁵⁷ The third step is to analyze whether the searches are unreasonable, to be addressed in sub-section C. The final step, to be addressed in sub-section D, is the analysis of whether the Government presents a special exception.⁵⁸

A. *Contributing the Testing to the Government and a Fourth Amendment Search*

The testing under the CSA is contributable to the Government, as it requires the professional leagues to act at its discretion. The Fourth Amendment does not apply to a search by a private party unless the private party is acting as an instrument or agent of the Government.⁵⁹ In *Skinner v. Railway Labor Executives' Ass'n*, the Supreme Court found that the issue hinges on the degree of the Government's partici-

52. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 665-6 (1994).

53. U.S. CONST. amend. IV.

54. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967).

55. *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602 (1989); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Chandler v. Miller*, 520 U.S. 305 (1997).

56. *Skinner*, 489 U.S. at 617.

57. *Id.*

58. *Id.* at 620.

59. *Id.* at 614 (citing *U.S. v. Jacobson*, 466 U.S. 109, 113-4 (1984)).

pation in the private party's activities.⁶⁰ In *Skinner*, the Court found that the Government more than adopted a passive position toward the underlying private conduct, testing by the private railroads.⁶¹ Therefore, the search in question can be a public one even though the Government did not compel the private party to perform the search.⁶²

As such, the CSA requires the individual professional leagues to act as agents of the Government in regards to implementing the drug testing policy.⁶³ The CSA's mandatory drug testing for all of the athletes in the NBA, MLB, NFL and NHL would clearly be "encouragement, endorsement, and participation" by the Government.⁶⁴ Additionally, the Government seeks to share the fruits; specifically, it seeks to ascertain the names of each individual player who tests positive.⁶⁵ Furthermore, the pre-emption of state law and any applicable collective bargaining agreement strengthens the argument that the private leagues act as agents of the Government.⁶⁶

Of course the converse argument is that the leagues are left with the option of not complying. However, this argument fails because of the \$1,000,000 fine that the CSA imposes for non-compliance. The fine leaves the leagues with the option of either complying or going out of business. Lastly, it would be difficult to take notice of the leagues' reporting requirements and still find that each league is not an agent of the Government, as each league would be directly communicating with the Government on the league's compliance.⁶⁷ Consequently, a court would likely find that the CSA requires the individual professional leagues to act as agents of the Government. Thus, drug testing under the CSA is a Government search.

The CSA's required urinalysis is a Fourth Amendment search, as it intrudes upon an individual's reasonable expectation of privacy. Generally, a Government search is a Fourth Amendment search if the person or people have an expectation of privacy and society considers the

60. *Id.*

61. The Court stated "[t]he Government has removed all legal barriers to the testing authorized . . . and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions." *Id.* at 615.

62. "The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." *Id.*

63. Taylor, *supra* note 21, at 965.

64. The Court "strongly implies that if the government were to compel a private party to do a search, then the search would probably be considered a search by an agent of the government." *Id.*

65. *See Id.*; Clean Sports Act, S. 1114, 109th Cong. §§ 4, 6 (2005).

66. *See* S. 1114; *Skinner*, 489 U.S. at 615.

67. *See* S. 1114 § 7.

expectation to be reasonable.⁶⁸ The collection and testing of urine is a search under the Fourth Amendment, in the same manner as blood analysis is, because it intrudes upon a person's reasonable expectations of privacy, as "there are few activities in our society more personal or private than the passing of urine."⁶⁹ As previously stated, the CSA mandates random testing at least five times per year and the adoption of the USADA standard of testing,⁷⁰ which currently uses urinalysis.⁷¹ Additionally, if the USADA were to adopt blood analysis as a testing method, which there is an indication that it might, the CSA mandates that the four major professional sports leagues adopt blood analysis as a testing method.⁷² Thus, the CSA tests are subject to the Fourth Amendment.

The reasonableness of a search under the Fourth Amendment depends on the circumstances surrounding the search or seizure and the nature of the search and seizure itself.⁷³ Generally, the Government is prohibited from conducting a search or seizure absent a judicial warrant or individualized suspicion; however, searches conducted absent suspicion of specific individuals have been upheld in "limited circumstances."⁷⁴ As the testing under CSA is not designed to meet the ordinary needs of law enforcement, a balancing of the intrusion of the individual's Fourth Amendment interests against the promotion of legitimate Governmental interests is necessary.

Some proponents of the CSA argue that it would not violate the Fourth Amendment, as the "judicial precedent" for testing high school students and college athletes "likely applies to professional sports."⁷⁵ A court may find that the CSA is constitutional, "but there is not as much judicial precedent to rely on" as these proponents suggest, because "the only relevant precedents are those that recognize

68. *Katz v. U.S.*, 389 U.S. 347, 360-1 (1967) (Harlan, J., concurring).

69. *Skinner*, 489 U.S. at 617 (quoting *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

70. S. 1114, § 4(b)(1)(A).

71. *USADA Begins Program to Test Body Chemistry*, *supra* note 25, at E02; "[P]rofessional leagues would most likely use urinalysis, because it is the current method of testing employed by all professional sports in the United States and by the United States Anti-Doping Agency . . ." Taylor, *supra* note 21, at 965.

72. *USADA Begins Program to Test Body Chemistry*, *supra* note 25, at E02.

73. *Skinner*, 489 U.S. at 619 (citing *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

74. "[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-6; *Skinner*, 489 U.S. at 628-30.

75. Mitten, *supra* note 32, at 806.

the special-needs requirement and balance the competing public and private interests.”⁷⁶

B. The Private Interest of Professional Athletes and the Nature of the Invasion

Professional athletes have a diminished expectation of privacy.⁷⁷ The Supreme Court held that the individual’s diminished expectation of privacy may detract from the unreasonableness of the search.⁷⁸ The Court concluded that employees who participate in heavily regulated industries and public school children, who voluntarily participate in interscholastic athletic competition, have a diminished expectation of privacy, as they “have reason to expect intrusions upon normal rights and privileges, including privacy.”⁷⁹

Case in point, in *Skinner*, the Court found that the railroad industry was so heavily regulated for safety, that it created a diminished expectation of privacy for the employees.⁸⁰ Professional athletics are not subject to similar regulations. There are neither federal laws regarding the safety equipment used by professional athletes nor requirements as to periodic physical examination of employees, the two most important regulation factors addressed in *Skinner*.

In addition, in *Vernonia School District v. Acton*, the Court concluded that public school children who participate in athletics were subject to four factors, which establish a diminished expectation of privacy. The elements include the requirement to submit to various physical examinations, the requirement to be vaccinated, the requirement to submit themselves to a degree of regulation even higher than generally imposed on students and the requirement to participate in an “element of communal undress,” as they dress and undress in the locker room.⁸¹ The Court stated that public schools exercise a degree of control over students that cannot be exercised over free adults.⁸² Of course professional athletes are also subject to numerous physical examinations and a locker room with an element of “communal undress,” but the Government is not responsible for the health and

76. Taylor, *supra* note 21, at 979.

77. Peck, *supra* note 21, at 1822.

78. Von Raab, 489 U.S. 656; *Skinner*, 489 U.S. 602; *Vernonia Sch. Dist. V. Acton*, 515 U.S. 646.

79. “[T]he expectations of privacy of covered employees [was] diminished by reason of their participation in an industry that is regulated pervasively to ensure safety . . .” *Skinner*, 489 U.S. at 627; *Acton* 515 U.S. at 654.

80. *Skinner*, 489 U.S. at 627.

81. *Acton*, 515 U.S. at 657.

82. *Id.* at 655.

safety of athletes in the same manner that it is responsible for students.

Similarly, in *National Treasury Employees v. Von Raab*, the Court found that because Customs employees are directly involved in the interdiction of illegal drugs and carry firearms in the line of duty, they have a diminished expectation of privacy.⁸³ The Court reasoned that the employees “reasonably should expect effective inquiry into their fitness and probity.”⁸⁴ In contrast, professional athletes entertain the fans of their respective sport. The athletes are not required to protect the country’s borders, and they are not given the authority to use deadly force.

Additionally, in *Chandler v. Miller*, the Court found that because candidates for public office are subject to constant scrutiny by their peers, the public and the press, which is beyond the norm of the ordinary work environment, they have a diminished expectation of privacy.⁸⁵ Professional athletes undergo similar scrutiny, as their multi-million dollar salaries and endorsement contracts attract attention from the media, fans, teams and other players. Thus, as professional athletes are under constant scrutiny, are subject to physical examinations, participate in an environment of “communal undress,” a court would likely find that professional athletes have diminished privacy expectations.⁸⁶ As a consequence, commentators use the “slippery slope” argument to argue that if professional athletes have a diminished expectation of privacy, everyone in the public eye, such as celebrities and musicians, could be subject to similar drug tests.⁸⁷ While that argument has some logical force, because professional athletes should not be subject to the searches based solely on their celebrity status, a court would likely find it unpersuasive, as the aggregate of the circumstances show that professional athletes should expect an invasion of privacy.

In *Chandler*, the Court did not address the invasiveness of the intrusion.⁸⁸ The Court implies that if the individuals voluntarily “give up privacy,” the minimally invasive nature of the test is as important.⁸⁹ Therefore, because professional athletes voluntarily submit them-

83. *Von Raab*, 489 U.S. at 672.

84. *Id.* at 672.

85. *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

86. Taylor, *supra* note 21, at 981.

87. Lipscomb, *supra* note 21, at 336.

88. “In *Chandler*, the Court did not discuss any limited expectation of privacy for the political candidates.” Peck, *supra* note 21, at 1808.

89. *Id.*

selves to scrutiny and give up privacy, a court could very well conclude that an analysis of the invasiveness of the procedure is unnecessary.

However, if a court determined that the analysis is necessary, it would likely find that the procedure for the urinalysis is minimally invasive, because the samples are collected in a medical environment and are similar to procedures that are often encountered in the context of a regular physical examination.⁹⁰ As the CSA's urinalysis would likely be conducted under similar circumstances, a court would most likely find that the procedure is minimally invasive. Nevertheless, it could be argued that the CSA's testing requirements are more invasive than those in *Skinner*, because after an accident, railway workers would have reason to believe that they would be tested, and the CSA testing would be entirely random.⁹¹ However, this argument would likely fail because of the surrounding circumstances: the heightened scrutiny of professional athletes and the minimally invasiveness of the procedure. The potential seizure of the tested individual will not be analyzed here, as "not every [G]overnmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person."⁹²

C. *The Governmental Interest for the Testing*

The Government does not present a compelling interest in support of the CSA. In the context of suspicionless drug testing, the Supreme Court has determined that the Governmental interest for the search must be a "compelling" one.⁹³ The Court has only recognized two Governmental interests that may represent a "special need" that justifies the departure from the normal requirements; the two interests are public safety and the protection of sensitive information.⁹⁴ The Governmental interest that the CSA presents is most analogous to *Chandler*, as it is merely intended to serve as a symbol of fair sportsmanship for America's youth.

The only one of the four Supreme Court cases that involved suspicionless testing in the private sector is *Skinner*, in which the Government had a compelling interest in ensuring public safety by testing the

90. *Id.* at 1807; *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 627-8 (1989); *Vernonia Sch. Dist. V. Acton*, 515 U.S. 646, 658 (1995).

91. The Court "strongly implies that if the government were to compel a private party to do a search, then the search would probably be considered a search by an agent of the government." Taylor, *supra* note 21, at 968.

92. *Skinner*, 489 U.S. at 618.

93. *Id.* at 628.

94. *Id.* at 628-30; *Nat'l Employees v. Von Raab*, 489 U.S. 656, 677 (1989); *Acton*, 515 U.S. at 660-1.

railroad employees for alcohol and drugs.⁹⁵ The Federal Railroad Administration's (FRA) testing of its employees, after the occurrence of an accident, was intended "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."⁹⁶ In *Skinner*, the Supreme Court based its decision on substantial evidence of actual harm that resulted from train accidents, which involved alcohol or drug use as a contributing factor, and the fact that effected employees were engaged in a safety-sensitive task.⁹⁷ The Court also noted that, under the circumstances of a train accident, it would be difficult to determine if any employee displayed signs of alcohol or drug use.⁹⁸ The Court ultimately determined that the danger presented by a railroad employee under the influence of alcohol or drugs is a direct threat to public safety.⁹⁹

Similarly, in *Vernonia*, the school district's approval of the testing policy on the student-athletes for the specific street drugs was in response to an "immediate threat."¹⁰⁰ The Court found that the drug use by the athletes and the danger caused by the drugs represented a compelling interest for the policy.¹⁰¹ In *Vernonia*, there was a sharp increase in the student population's drug use;¹⁰² the athletes were the leaders of the drug culture;¹⁰³ and the targeted drugs were amphetamines, marijuana and cocaine.¹⁰⁴

Moreover, in *National Treasury*, the purpose of the drug testing was "to deter use among those [employees with the opportunity] for promotion to sensitive positions within the Service and to prevent the

95. *Skinner*, 489 U.S. at 620-1.

96. *Id.*

97. "The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,' and that these accidents 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at \$19 million (approximately \$27 million in 1982 dollars).'" *Skinner*, 489 U.S. at 607 (quoting 48 Fed.Reg. 30726 (1989)).

98. *Id.* at 631.

99. "A railway worker who operates trains, maps out routes, or maintains railroad tracks presents a direct threat to the public if he or she is even slightly impaired. Inebriation may lead to a mismarked route, the failure to switch the tracks, or poor operation of a train, all of which could result in a deadly collision." The Court "strongly implies that if the government were to compel a private party to do a search, then the search would probably be considered a search by an agent of the government." Taylor, *supra* note 21, at 969.

100. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 648-50 (1995); Subsequently, because of the "nationwide drug epidemic," the Court expanded on the policy to include public school students participating in any extra-curricular activity. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 838 (2002).

101. *Acton*, 515 U.S. at 664-5.

102. "[T]eachers and administrators observed a sharp increase in drug use." *Id.* at 648.

103. "[A]thletes were the leaders of the drug culture." *Id.* at 649.

104. *Id.* at 649-51.

promotion of drug users to those positions.”¹⁰⁵ The Supreme Court determined that the Government presented special needs, because the integrity of the U.S. Customs work force was in danger, and it indirectly facilitates the drug trade.¹⁰⁶ The Court found that because the Customs officials are the first line of defense against the smuggling of illicit drugs into the United States, it is of national interest to ensure that they have the highest integrity.¹⁰⁷ This is obviously a more indirect connection to public safety than the train accidents of *Skinner*.

Conversely, in *Chandler*, the Supreme Court found that the Governor of Georgia did not present a compelling Governmental interest to support the Georgia statute that required drug testing for candidates running for state office.¹⁰⁸ In making the decision, the Court relied on the lack of a presentation of an indication of a concrete danger.

i. Actual Harm Caused by Performance-Enhancing Substances

Skinner and *National Treasury* present an almost undeniable Governmental interest.¹⁰⁹ In contrast, Congress fails to present a direct threat to public safety in support of the CSA.¹¹⁰ While evidence of actual harm is not necessary to establish a special need in the interest of public safety, the Supreme Court certainly indicates that it is highly persuasive.¹¹¹ As the CSA expresses, its primary purpose is the protection of America's youth; out of concern that young athletes are emulating and will continue to emulate professional athletes who use illegal performance-enhancing substances.¹¹²

While most medical professionals regard steroids and the other illegal performance-enhancing substances as highly dangerous, there is little to no scientific evidence of actual physical harm attributable to

105. *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 646, 666 (1989).

106. *Id.* at 669-70.

107. *Id.* at 668.

108. *Chandler v. Miller*, 520 U.S. 305, 318-9 (1997).

109. “*Skinner* and *Von Raab* present an almost undeniable compelling Governmental interest, and the regulations enacted in these cases directly monitor the compelling interests.” Peck, *supra* note 21, at 1811.

110. “Though a professional athlete who uses steroids may inadvertently encourage a teenager to engage in similar behavior, a teenager's fate is hardly in the hands of professional athletes in the way a passenger's fate is directly in the hands of railway workers.” The Court “strongly implies that if the government were to compel a private party to do a search, then the search would probably be considered a search by an agent of the government.” Taylor, *supra* note 21, at 969.

111. *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 620 (1989); Peck, *supra* note 21, at 1811-2.

112. Clean Sports Act, S. 1114, 109th Cong. § 2(a)(4) (2005).

their use.¹¹³ As previously mentioned, the CSA is aimed at steroids and HGH. Thus, this discussion will focus on those substances. As a consequence of the lack of evidence, a small school of thought has developed, which is led by Dr. Norman Fost, professor of pediatrics and bioethics at the University of Wisconsin and director of its Bioethics Program. This school of thought advocates for the acceptance of steroids and HGH in adult athletic competition.¹¹⁴ Many cases of known steroid abusers, who died of a rare illness, were mistakenly attributed to steroid abuse without any medical evidence to support that conclusion.¹¹⁵ There is also little evidence to support one of the most common beliefs about steroids, which they cause aggressive behavior, commonly referred to as “roid rage.”¹¹⁶ In response, anti-steroid critics say “[a]ll steroid users do not experience the same deleterious effects and many serious problems require months or years to develop.”¹¹⁷

Highly distinguished medical professionals acknowledge the lack of information on the substances and say that is why “we have to just be very respectful of those kinds of drugs.”¹¹⁸ The lack of concrete evidence is most likely the result of the idea that a long term study on healthy subjects would never be approved and “[i]t would take 20 years to see the outcomes.”¹¹⁹ Thus, in response to the claim that steroids cause cancer, Dr. Fost and his associates say “[t]hat’s like saying,

113. “With anabolic steroids, for example, there’s wide agreement that there are short-term hormonal effects like hair loss, acne, infertility, and in women, male-pattern body hair and a lowered voice. But, as Fost points out, these are mostly cosmetic and, except for the voice changes, usually reversible.” Drake Bennett, *Are steroids as bad as we think they are?*, BOSTON GLOBE, Dec. 12, 2004, available at http://www.boston.com/news/globe/ideas/articles/2004/12/12/are_steroids_as_bad_as_we_think_they_are/.

114. Norman Fost, *Point/Counterpoint: Allow Drugs in Sports*, ABC NEWS, Jan. 10, 2008, <http://abcnews.go.com/print?id=4116522>.

115. “Critics assert that steroids and HGH cause life-threatening harm, but the claims are wildly exaggerated or simply made up. Lyle Alzado, Exhibit A for the perils of steroids, died of a brain tumor, but there is not a single medical source showing any association between his tumor and steroids. We are told repeatedly that steroids cause heart disease and strokes but it is hard to identify a single elite athlete who suffered either calamity while using steroids. HGH has been given to half a million children for decades and there is little evidence of any serious harm.” Fost, *supra* note 114, at ¶ 4.

116. Charles Yesalis, a steroid expert and epidemiologist at Penn State, doubts the existence of “roid rage.” Charles Leroux, *As controversy swirls, medical ethicist remains a center of calm and certainty*, CHI. TRIB., Jan. 15, 2008, available at http://www.chicagotribune.com/features/lifestyle/chi0115steroids_fostjan15,0,2159614.story.

117. Garibaldi, *supra* note 31, at 726.

118. Quote from Gary Wadler, a professor of clinical medicine at the New York University School of Medicine and a member of the World Anti-Doping Agency, is one of the medical professionals who acknowledges the lack of information on the subject. Bennett, *supra* note 113.

119. Greg Bishop, *Steroids issue offers no room in the middle*, SEATTLE TIMES, Oct. 11, 2005, at 2, available at http://seattletimes.nwsourc.com/html/sports/2002553049_boostethics11.html.

'I ate a lot of hot dogs, which is why I got brain cancer.' You can't claim serious adverse effects based on anecdotes or ethics."¹²⁰ That being said, researchers have done their best to conduct studies aimed at determining the effects of steroid use. The results of animal research offer a portion of the backing for the argument that steroids cause aggressive behavior.¹²¹

Additionally, the conclusion that steroids increase heart attacks and liver damage is a result of studies on the use of anabolic steroids by men with HIV.¹²² As these studies were not conducted on healthy human beings, they are only an indication of the possible results of steroid use, not conclusive evidence of harm.¹²³ Similarly, as a result of very few studies on HGH, there is little evidence as to its negative health effects.¹²⁴ Therefore, there is inadequate information to come to a determination on the health effects caused by these substances. As a result, these performance-enhancing substances cannot be definitively labeled as equally as dangerous as alcohol or cigarettes, and these substances are much more common among the population than steroids or HGH.¹²⁵ Consequently, the harm caused by steroids is not on the same level as the harm in *Skinner*.

Thus, the theories on the harm of these illegal substances is largely the result of the imputation of the morals of the majority of the athletic world, fear of the unknown and the emotion of the family members of deceased athletes who used steroids.¹²⁶ The emotional factor can be observed in the Congressional findings, as parents testified that

120. *Id.*

121. A Northeastern University research group, headed by Richard Melloni Jr., associate professor of psychology, concluded that steroids injected into adolescent hamsters resulted in aggressive behavior. Leroux, *supra* note 116.

122. The University of California reported that a study published in the Journal of Acquired Immune Deficiency Syndrome "[a]nabolic steroid use causes decreased levels of HDL or 'good' cholesterol, increased levels of LDL or 'bad' cholesterol, and serious liver toxicity within 12 weeks according to a study that measured the effects of anabolic steroids on men with HIV wasting disease." Steve Tokar, *Anabolic steroid use increases heart attack risk and causes liver damage*, Feb. 17, 2006, ¶ 1, <http://www.universityofcalifornia.edu/news/article/7884>.

123. The University of California reported that a study published in the Journal of Acquired Immune Deficiency Syndrome "[a]nabolic steroid use causes decreased levels of HDL or 'good' cholesterol, increased levels of LDL or 'bad' cholesterol, and serious liver toxicity within 12 weeks according to a study that measured the effects of anabolic steroids on men with HIV wasting disease." *Id.*

124. Mayo Clinic, *Human growth hormone (HGH): Does it slow aging process?*, <http://www.mayoclinic.com/health/growth-hormone/HA00030> (last visited Oct. 29, 2008).

125. "[O]f all the illegal substances available to teenagers, steroids pose the least 'immediate threat' to public safety." Taylor, *supra* note 21, at 983.

126. Leroux, *supra* note 116.

their children committed suicide because they used steroids.¹²⁷ Who is to say that the suicide rate of steroid users is any higher than the rate among the overall population?

Compiling comprehensive statistics on the suicide rate of steroid users would most likely be difficult, as steroid use is largely an underground culture. All of this information as to the adverse health effects of steroids and other performance-enhancing substances supports the argument in opposition to the CSA's secondary purpose, the protection of professional athletes.¹²⁸ Therefore, after objectively evaluating the available evidence, a court would likely find that there is inconclusive evidence to establish that steroids and other illegal performance-enhancing drugs are harmful.

ii. The Threat of Illegal Performance-Enhancing Substances in Professional Sports

Moreover, statistical evidence does not indicate an immediate threat of illegal performance-enhancing substances in the four major professional sports.¹²⁹ Specifically, the evidence indicates that the issue is limited to the MLB and NFL.¹³⁰ This is evidenced by the lack of positive test results and reports of illegal performance-enhancing substance purchases in the NBA and NHL. Thus, if the substances have created an "immediate crisis" in professional sports, it is limited to the MLB and NFL. Consequently, passing legislation that requires drug testing for all major sports is excessive, particularly when the NFL is voluntarily attempting to keep pace with the latest developments in illegal substances.

The opposition to this argument claims the rampant use of steroids by baseball pitchers and the previous logic that pitchers would not use steroids, because of their mechanics defeats the idea that "basketball . . . does not lend itself to the use of steroids and performance-enhancing substances' because of the skill set that is required to be an elite basketball player: agility, quickness, touch, and stamina . . ." ¹³¹ Some

127. See Peck, *supra* note 21, at 1781 (citing *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. On Government Reform*, 109th Cong. 116-7 (2005) (testimony of Denise A. Garibaldi, Ph. D.) (explaining how steroid abuse by her son, to potentially compete at the NCAA and Major League level, led to his severe depression and eventual suicide)).

128. Clean Sports Act, S. 1114 109th Cong. § 2(b) (2005).

129. "Statistical evidence of the severity of the problem of steroid use in MLB does not rise to the level of the statistical evidence supporting the other situations where the special needs exception has been applied." Peck, *supra* note 21, at 1812.

130. Mitchell Report, *supra* note 33; Schrottenboer, *supra* note 33.

131. Laitner, *supra* note 31, at 206.

imply that Congress' beliefs about the extent of the use of performance-enhancing substances in professional sports are sufficient to establish that there is an actual threat in professional sports.¹³² If this is the case, Congress could create support for any legislation that it wanted by stating a belief as fact. The facts are that concrete evidence of steroid use only exists in the NFL and the MLB, and all indications are that it is a bigger problem in the MLB.

iii. The Use of Illegal Performance-Enhancing Substances by Adolescents

Additionally, there is a lack of reliable statistical evidence as to the extent of the use of illegal performance-enhancing drugs by adolescents. One puzzling aspect about the Congressional findings is that they were based on the testimony of parents and experts. Why didn't they anonymously survey student-athletes? Is it unreasonable to conclude that this type of survey would get to the heart of the problem and shed more light on whether there is a problem of national significance? On top of that, the Congressional findings described are misleading as to the use of performance-enhancing drugs by adolescents.¹³³

The previous statement is not intended to indicate that Congress misrepresented the truth. It is intended to indicate that the findings are vague. The Congressional findings that "[t]he use of anabolic steroids and other performance-enhancing substances by minors is a public health problem of national significance . . . [and] over 500,000 teenagers have used performance-enhancing substances . . ." leads to the conclusion that the term "performance-enhancing substances" includes the use of illegal and legal substances, such as creatine, protein, and other over-the-counter dietary supplements.¹³⁴ The use of creatine and protein is much more prevalent than the use of steroids and HGH, as they are openly used amongst high school, college and pro-

132. "Nevertheless, Congress believes that steroid abuse plagues professional sports." Taylor, *supra* note 21, at 980.

133. See Clean Sports Act, S. 1114, 109th Cong. § 2(a)(2)-(7) (2005).

134. *Id.* § 2(a)(1)-(2).

fessional athletes.¹³⁵ Creatine and protein are sold over-the-counter, and professional teams even provide them to their players.¹³⁶

While some medical professionals do not condone the use of creatine, the medical community and the Government have not labeled it a dangerous substance, as there is also a lack of evidence to form a valid conclusion as to its health effects.¹³⁷ However, studies have revealed that between 2.9% and 11% of middle school and high school students have used steroids.¹³⁸ As the studies indicate, the subject group was not limited to athletes. Thus, the statistics reflect the use of steroids by athletes and non-athletes, and expose a new trend in American culture, the use of steroids by non-athletes. These non-athletes use steroids for cosmetic purposes; similar to bodybuilders, they want to gain body mass and muscle definition.¹³⁹ Of course, it is also difficult to determine a precise percentage of adolescent non-athletes who use steroids.¹⁴⁰ Therefore, there is a lack of reliable statistical evidence as to the percentage of adolescents, specifically athletes, who use illegal performance-enhancing substances.

iv. The Link Between Substance Use by Professional Athletes and America's Youth

Foremost, it is undeniable that professional athletes act as role models for America's youth, but there are inherent problems with linking the use of illegal performance-enhancing substances by professional

135. "An anonymous descriptive survey at a major university showed almost 50% of male intercollegiate athletes use creatine, with a substantial number beginning their use during high school. One survey of collegiate athletes showed that 29% of football, 21% of men's track, and 16% of women's track athletes voluntarily admitted to some use of PES. Recent reports show that 8.2% of high school athletes used creatine, with up to one third admitting to daily use. . . . Dietary supplements compromise the majority of PES used by teenagers." Koch, *supra* note 2, at 311-2.

136. *Id.*

137. *Id.* at 311-2.

138. In a "study of high school students, 11% admitted to using androgenic and anabolic steroids." *Id.* at 312; "[A] study of nearly 5000 middle and high school students found that 5.4% of boys and 2.9% of girls used steroids in the past year." Tracy Hampton, *Researchers Address Use of Performance-Enhancing Drugs in Nonelite Athletes*, 6 JAMA 607, 607, Feb. 8, 2006, available at <http://jama.ama-assn.org/cgi/content/full/295/6/607>.

139. Adrian Wilairat, Comment, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL'Y 377, 383 (2005).

140. "The proportion of users who do not play sports is not consistent across samples but ranges as high as 38 percent." Kathleen E. Miller, *Anabolic-Androgenic Steroid Use and Other Adolescent Problem Behaviors: Rethinking the Male Athlete Assumption*, 4 SOCIOLOGICAL PERSPECTIVES 467, 472, Nov. 4, 2002, available at <http://www.jstor.org/stable/1389688> (citing William E. Buckley, *Estimated Prevalence of Anabolic Steroid Use among Male High School Seniors*, 23 JAMA, 3441-5, Dec. 16, 1988, available at <http://jama.ama-assn.org/cgi/content/abstract/260/23/3441>).

athletes to the use by adolescents. Certainly, as a result of the media coverage on the issue, one could conclude that adolescents would not have as much knowledge of the substances if professional athletes were not using them. However, both CSA supporters and critics do not claim that adolescents gain knowledge of the substances from the media coverage of professional athletes. Instead, CSA supporters claim that adolescents use the substances because of their desire to emulate the professional athletes who use such substances.¹⁴¹ Dr. Denise Garibaldi, the mother of Rob Garibaldi, testified before Congress that her son, who committed suicide after using steroids, said in reference to his steroid use, "I'm a baseball player, and this is what ballplayers do."¹⁴²

Rob Garibaldi's death was a tragedy, but does the possibility that it was indirectly caused by steroid use give the Government a compelling interest? Critics point to Mark McGwire's widely publicized use of Androstenedione (Andro), a steroid precursor, in 1998 as an example of how adolescents emulate athletes.¹⁴³ That season McGwire set the single season home run record.¹⁴⁴ There was a subsequent increase in Andro sales among adolescents.¹⁴⁵ The flaw with that example is that at that time, Andro was not a banned substance under the MLB's policy or illegal under Federal law.¹⁴⁶ Adolescents may have been emulating McGwire or they may have just gained knowledge of Andro from the publicity of his use. Would the use of an illegal substance have a similar result amongst adolescents?

Logically, there is also a lack of information as to what portion of adolescent users use the illegal substances as the result of knowledge that professional athletes use them. This conclusion is based upon the lack of evidence as to what percentage of adolescent athletes use the illegal substances, and presumably non-athletes would not look to professional athletes as role models. This is important, because "Congress will need to compile evidence to show that the use of steroids by children and young adults is dependent on professional use and, thus, will be lessened if steroid use is deterred in professional sports."¹⁴⁷ However, there is inadequate evidence as to the extent of harm that the use of performance-enhancing substances by professional athletes

141. See Garibaldi, *supra* note 31, at 720; Whitman, *supra* note 319, at 478; Laitner, *supra* note 31, at 214; Wilairat, *supra* note 139, at 383; Saka, *supra* note 32, at 359.

142. Garibaldi, *supra* note 31, at 719.

143. See *Id.* at 720; Wilairat, *supra* note 139, at 381-2.

144. Garibaldi, *supra* note 31, at 720.

145. *Id.*

146. Wilairat, *supra* note 139, at 381.

147. Lipscomb, *supra* note 21, at 339.

has on adolescents because of the lack of information on the extent of use by adolescent athletes. Thus, even though Congress argues that the behavior of professional athletes has a substantial effect on the health and safety of teenagers, the effect on the public is not analogous to that of the railway workers.¹⁴⁸

Some supporters of the proposed legislation argue that “use by Olympic and professional athletes can create the impression of implied legitimacy” and “can serve as a validation that steroids are their ticket to a starting position, a college scholarship, or a career in professional sports.”¹⁴⁹ This is definitely a viable possibility, but the reasoning of the argument could be extending to other professions in the media spotlight. For instance, the reasoning could be used to support imposing legislation that restrict actors and musicians from receiving cosmetic surgery. Congress cannot reasonably be expected to protect America’s youth from exposure to all possible harms that may arise from the actions of those in the media spotlight.

Congress may have recognized this flaw in its reasoning, as the language of the Congressional findings is vague as to the link in use by the two groups.¹⁵⁰ Section 6 of the findings reads that “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.”¹⁵¹ If Congress had such strong evidence in favor of the link they probably would not need to use the word “suggest” or the phrase “actual or alleged.” The assumption by many people seems to be that an increase in the use of performance-enhancing substances, legal or illegal, by young athletes is the result of use by professional athletes.

This assumption disregards the obvious rebuttal that young athletes use the performance-enhancing substances because they want to gain a competitive advantage in their sports.¹⁵² The desire to get a competitive edge and play in the MLB fueled Rob Garibaldi’s steroid use.¹⁵³

148. The Court “strongly implies that if the government were to compel a private party to do a search, then the search would probably be considered a search by an agent of the government.” Taylor, *supra* note 21, at 968.

149. Whitman, *supra* note 31, at 478.

150. Clean Sports Act, S. 1114, 109th Cong. § 2 (2005).

151. *Id.*

152. Lipscomb, *supra* note 21, at 341 (arguing that Congress must erase the idea from the minds of children that steroids are necessary for success); “The problem with [the discouragement] argument is two-fold. First, it assumes that children today know that their favorite players are using steroids. It further assumes that once the CSA is in place, the children will opt not to use steroids, because they will know that their favorite players are not using performance-enhancing substances.” Taylor, *supra* note 21, at 984.

153. Garibaldi, *supra* note 31, at 717-8.

When Dr. Garibaldi listed seven of the fears that teens feel, she acknowledged five other motivating factors for teens to use illegal performance-enhancing substances: (1) not making the team, (2) not receiving a college scholarship, (3) going unnoticed by pro scouts, (4) loss in the competition with girls and (5) muscle dysmorphia.¹⁵⁴ The bottom line is that if the kids want to “play at the professional level or dominate at the current level, and taking steroids seems to them like the only route, then it will not matter that their favorite sport star is clean of enhancements thanks to a rigorous testing policy.”¹⁵⁵

v. *The Use of Performance-Enhancing Substances as an Immediate Crisis*

The previously mentioned Supreme Court cases involved testing for serious street drugs. The CSA does not propose the implementation of such testing. The health dangers associated with street drugs, such as amphetamines, cocaine and marijuana are quite serious and undisputed.¹⁵⁶ Performance-enhancing substances do not present similar health risks. As previously discussed, there is little known about their potential adverse affects.

As a result, the use of performance-enhancing substances in professional sports do not create an “immediate crisis” similar to that in *Vernonia*. This is illustrated by the lack of evidence as to the extent that the substances are used and the insufficient knowledge as to their adverse health effects. Despite the lack of information on the topic, some critics have concluded that there is an immediate danger, but it is one of a lesser degree than in *Skinner* and *National Treasury*.¹⁵⁷ Of course these critics relied on Congressional findings to support their conclusion.¹⁵⁸ The passing of the CSA by Congress without knowledge as to the type or extent of harm caused by performance-enhancing substances and without knowledge as to the extent of the use of the substances is at best protecting professional athletes from the unknown dangers.

154. *Id.* at 721.

155. Laitner, *supra* note 31, at 214.

156. Marijuana use can result in short-term memory loss, respiratory problems associated with cancer. Cocaine is highly addictive. The use of cocaine can result in auditory hallucinations or sudden death, often caused by cardiac arrest or seizures. U.S. Drug Enforcement Administration, <http://www.usdoj.gov/dea/concern/concern.htm>; Amphetamines can result in increased heart rate and blood pressure, heat intolerance, kidney damages, cerebral hemorrhage, seizures, and hallucinations. NCAA, *Choices In Sports*, <http://drugfreesport.com/choices/drugs/amphetamine.html#I>.

157. Peck, *supra* note 21, at 1811-2.

158. *Id.* at 1812, *relying on* Integrity in Sports Act, S. 1960, 109th Cong. (2005).

Furthermore, professional athletes do not conduct “safety-sensitive tasks.” In *Skinner*, the railway employees conducted “safety-sensitive tasks,” as they were responsible for their lives, the lives of others and millions of dollars in property.¹⁵⁹ While some professional sports, such as football and hockey, are dangerous activities, statistically, there is a low potential for the loss of life.¹⁶⁰ Also, even if the suspected health risks of performance-enhancing substances are accepted as true, they “do not impair an [athletes’] mental capabilities and functioning as does an employee taking an illegal narcotic.”¹⁶¹ However, the CSA supporters could make the argument that the testing under the CSA is analogous to the required testing in *Skinner*, because they both can negatively affect performance during activities. Obviously, the drugs in *Skinner* impaired the railway workers abilities to operate the trains.¹⁶² The CSA supporters could argue that because some performance-enhancing substances create and alleged increased risk for heart attacks,¹⁶³ they create a risk on the playing field. However, this argument would most likely fail, because in *Skinner* the drug and alcohol use had already resulted in millions of dollars in damage and the loss of human life, and Congress cannot point to a single death as conclusively attributable to performance-enhancing substances.¹⁶⁴ Ironically, Congress fails to urge the professional leagues to require more stringent policies on the illicit street drugs mentioned in the Supreme Court cases.

vi. Likelihood of the CSA Achieving Its Goals

Furthermore, some critics would argue that the goal of restoring the integrity of professional sports is analogous to protecting the integrity of U.S. Custom’s officials, as steroids have tarnished the historical significance of MLB records and baseball is America’s pastime,¹⁶⁵ but the potential compromise involved is of a different degree. The U.S. Customs officials handle firearms, are the country’s first line of defense against the importation of illegal drugs and are the target of bribes and violence. In contrast, professional athletes play their re-

159. *Skinner v. Ry Labor Executives Ass’n*, 489 U.S. 602, 607, 620 (1989).

160. Between 1999 and 2002, the U.S. Department of Labor recorded 219 fatal work injuries for all professional athletes. U.S. Department of Labor, 1990-2002 Census of Fatal Occupational Injuries Chart, at 34, available at <http://www.bls.gov/iif/oshwc/cfoi/cftb0186.pdf>.

161. Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 675 (2007).

162. *Skinner*, 489 U.S. at 607.

163. Tokar, *supra* ¶ 1.

164. Bishop, *supra* note 119.

165. Peck, *supra* note 21, at 1782-3.

spective sport on a national stage for public entertainment. Thus, the potential danger involved with the lack of integrity in professional sports because of performance-enhancing substances does not arise to the same level as the Customs officials in *National Treasury*.

Furthermore, there is also a lack of evidence to support the conclusion that the CSA would accomplish its goal of restoring the integrity of professional sports.¹⁶⁶ As previously discussed, the indication is that the use of illegal performance-enhancing substances is limited to the NFL and MLB, and is primarily a serious problem for the MLB. Thus, the second purpose is effectively frustrated, because the implication is that the integrity of all professional sports has not been compromised, but the integrity of the MLB and the NFL has been compromised. When discussing the integrity of sports, it is important to be mindful that “rules in sports change and grow with the sport, yet these changes do not alter it to a less pure form.”¹⁶⁷ Thus, what is currently considered cheating and a perversion of a sport, twenty years from now, may be well within the boundaries of the rules. The constant change in equipment exemplifies this theory.¹⁶⁸ As a consequence, it is difficult to label the integrity of any sport as compromised.

In further support of the conclusion that the CSA would not achieve its goals, there is not a reliable test to detect HGH.¹⁶⁹ Some researchers claim that the development of such a reliable test for HGH is years away, while others claim that it has already been developed but is waiting for mass production.¹⁷⁰ Regardless, the truth is that if the CSA were passed today, the professional leagues would not be able to detect this substance. This is particularly problematic; because it appears that the detectable performance-enhancing substances are not the biggest problem.¹⁷¹

As a consequence, there is little available evidence to support the conclusion that if the CSA were passed it would effectively address either one of its purposes. This is the result of the fact that the hazard presented by the CSA is hypothetical. It follows that as the State of

166. See Clean Sports Act, S. 1114, 109th Cong. § 2 (2005).

167. Laitner, *supra* note 31, at 208; Norman Fost, Comment, “*I Was Like Whoa*”: A Commentary on Shapiro’s Performance Enhancement and the Control of Attributes, 65 S. CAL. L. REV. 115, 116 (1991).

168. “In some sports, athletes can enhance their performance technologically by changing their equipment. Tennis racquets, golf balls, and baseball gloves have evolved enormously over the last century, and the speed of change seems to be increasing.” Henry T. Greely, Symposium, *Disabilities, Enhancements, and the Meaning of Sports*, 15 STAN. L. & POL’Y REV. 99, 121 (2004).

169. Taylor, *supra* note 19, at 985.

170. Michael S. Schmidt, *Agency Will Increase Blood Tests for H.G.H.*, N.Y. TIMES, Apr. 2, 2008, available at <http://www.nytimes.com/2008/04/02/sports/othersports/02doping.html>.

171. Taylor, *supra* note 21, at 974.

Georgia failed to make an indication of a concrete danger demanding the departure from the Fourth Amendment's main rule in *Chandler*, Congress has similarly failed to show an indication of a concrete danger that is worthy of overriding the individual athlete's Fourth Amendment right. Thus, just as the State of Georgia did not provide a compelling interest, Congress has also failed to provide one.

Therefore, in evaluating the evidence, a court would likely find that the CSA fails to provide evidence of a concrete danger in support of the conclusion that preventing the use of performance-enhancing substances is a compelling interest for public safety. An analysis of the protection of sensitive information as a compelling interest is not needed, because it is inapplicable to the CSA.

D. Balancing the Private and Governmental Interest to Determine a Special Need

The *Chandler* Court "outlined three elements to consider when determining whether the Government has successfully demonstrated a special need where public safety is the asserted compelling interest: (1) whether the drug use is an actual threat and not a hypothetical concern; (2) whether the drug testing is aimed at actually detecting drug use and not simply deterring it; and (3) whether there is a genuine threat to public safety."¹⁷² After analyzing the CSA, a court would likely determine that the drug use is a hypothetical concern; the drug testing is only aimed at detecting some of the drug use; and there is not a genuine threat to public safety. Therefore, even though professional athletes have a diminished expectation of privacy, a court would likely find that the Government does not present a special need that justifies overriding the individual athletes' privacy interests. Thus, a court would most likely find the searches to be unreasonable and in violation of the Fourth Amendment. However, the outcome would likely require a finding contrary to Congress' findings. As Congress' findings are entitled to substantial deference, a conservative court could rule otherwise.¹⁷³ The reality of the situation is that those testing for the substances will likely always be one step behind those using the substances.¹⁷⁴ The next probable step in performance-enhancing technology is gene therapy, which is almost undetectable, because the

172. *Id.*

173. *Turner Broadcasting System*, 512 U.S. at 665-6.

174. "Unfortunately, those determined to win at any cost will inevitably find a way to cheat." Rick Collins, Symposium, *Changing the Game: The Congressional Response to Sports Doping VIA the Anabolic Steroid Control Act*, 40 NEW ENG. L. REV. 753, 762 (2006).

gene therapy would be used to manufacture copies of existing genes.¹⁷⁵ Thus, it is important to explore the possible alternatives.

IV. CONSTITUTIONAL ALTERNATIVES TO THE CSA

Furthermore, if the CSA is truly intended to protect adolescent athletes from using illegal performance-enhancing substances, it is an indirect approach to resolving the issue. The attempt at this indirect approach indicates that the CSA is nothing more than a scare tactic, intended to serve as a symbol of sportsmanship for America's youth. Scholars on the topic seem to agree with this view. One commentator expressed a similar view when he wrote "[t]he real problem is that the emphasis on success in sports has lead to much higher levels of steroid use in kids and teenagers. A better solution than the Clean Sports Act would be legislation that addressed the drug enhancement issue with kids and the future development of sports."¹⁷⁶

If Congress truly intends to protect adolescent athletes from the potential harm of performance-enhancing drugs, it should pass legislation to provide a vehicle for local school districts to conduct drug tests.¹⁷⁷ Requiring student-athletes at public schools to submit to random drug testing is constitutional, because they have a diminished expectation of privacy.¹⁷⁸ Congress could also take steps towards educating America's youth on the potential dangers of these substances.¹⁷⁹ Apparently, Congress recognizes the need for this step, as it took some action to provide funding for educating children on the effects of anabolic steroids.¹⁸⁰ Congress could take similar action for college athletics. Congress would most likely run into a similar Fourth Amendment problem with mandatory testing in the NCAA. It could get avoid the problem by providing federal funding for the scholastic institutions that encourage the NCAA to adopt the CSA standards.

If Congress insists on taking action to rid professional sports of performance-enhancing drugs, it could give tax incentives to the professional leagues that adopt and implement a policy that is consistent

175. Greely, *supra* note 168, at 118.

176. Laitner, *supra* note 31, at 194.

177. See Taylor, *supra* note 21, at 986 (arguing that the implementation of laws for drug testing high school and college athletes would likely lead to the dissolution of anabolic steroids in professional sports); Tim Walker, Comment, *Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes*, 10 VILL. SPORTS & ENT. L.J. 181, 199 (2003); Laitner, *supra* note 29, at 214.

178. *Acton*, 515 U.S. at 646.

179. Lipscomb, *supra* note 21, at 341; Laitner, *supra* note 31, at 194, 214; Walker, *supra* note 177, at 201.

180. Saka, *supra* note 32, at 348 (citing 42 U.S.C.S. § 290bb-25f (West Supp. 2004)).

with the USADA standards.¹⁸¹ Congress could also authorize “the Internal Revenue Service to levy a special tax on the income of professional athletes who use federally controlled performance-enhancing substances illegally.”¹⁸² Regardless of the future of the CSA, Congress should pass legislation to regulate the contents of all dietary supplements by the FDA.¹⁸³ Currently, there is not a mechanism available to hold manufacturers of these products accountable for what they market.¹⁸⁴ The lack of regulation leaves the unsuspecting consumer to take a potentially dangerous risk.¹⁸⁵ They could test positive or have an adverse health affect, from an over-the-counter product, because many of these products contain compounds that serve as steroid precursors or stimulants.¹⁸⁶

Congress could also ensure that when a player tests positive for or is found to have purchased a substance that is illegal under Federal law, he or she is investigated and prosecuted.¹⁸⁷ The athlete should be prosecuted for breaking federal law, because any other citizen would be prosecuted. Time in a federal penitentiary is a bigger deterrent than a league suspension, as freedom is a great asset. But in the internet age, prosecuting some of these sales could prove problematic.¹⁸⁸ Therefore, either the buyer or the seller should be prosecuted. Regardless of which one is the target, the action will serve as an effective deterrent on the industry.

Additionally, the players’ unions possess too much power for the two sides to reach a reasonable agreement on the topic. The lax testing policies can largely be attributed to the threats to strike by the players’ unions during the collective bargaining process. To thwart

181. Lipscomb, *supra* note 21, at 344.

182. Mitten, *supra* note 32, at 807-8.

183. Rhitesh Dhar, MD, Cardiovascular Toxicities of Performance-Enhancing Substances in Professional Sports, 2005, <http://www.mayoclinicproceedings.com/inside.asp?AID=1031&UID=> (last visited September 25, 2009); Selig & Mafred, *supra* note 32, at 58-9; Walker, *supra* note 177, at 209.

184. *Id.*

185. “[B]efore regulation the FDA has the burden of proving that the dietary supplement in question is adulterated, which is a very high burden to meet. Therefore, the FDA primarily is only able to regulate dietary supplements after they have been marketed and sold. Consumers, subsequently, are able to purchase and use unsafe dietary supplements free from FDA regulation.” Saka, *supra* note 32, at 347; Greely, *supra* note 168, at 120-1.

186. *Id.*

187. Taylor, *supra* note 21, at 987 (arguing for imposing federal criminal sanctions on athletes who possess illegal performance-enhancing substances without a prescription); Mitten, *supra* note 32, at 807.

188. “The report states that because of the simplicity of web searches, and the overwhelming complications involved with mail inspection, steroid dealers are very difficult to detect and prosecute.” Laitner, *supra* note 31, at 211.

these threats, Congress could require that in the event that the leagues and unions are unable to come to an agreement on a drug policy, they are required to arbitrate.¹⁸⁹ The Congressional action would be appropriate, because the collective bargaining process has failed to adequately address the issue, it would avoid the complex constitutional issues that arise under the proposed legislation, and it would offer the leagues and the player's autonomy over the regulations that will impact them.¹⁹⁰

Lastly, even though it is not a popular position, legalizing steroid use for adults, should be considered. Dr. Norman Frost sets forth a strong argument in support of it. He says that if they were legalized, the Government could regulate the industry, which would help to ensure the safety of the substances and dosages.¹⁹¹ Government regulation would assist in determining the long-term effects of steroids and create revenue, while putting illegal operations out of business.¹⁹² Also, those with ethical qualms about the use of performance-enhancing substances because they create an uneven playing field would be satisfied, because everyone would have equal access to them.¹⁹³ Of course if this highly unlikely scenario were to occur, the individual leagues would also have to approve the use of the substances.

V. CONCLUSION

In conclusion, the CSA has two admirable goals, to deter the use of performance-enhancing substances by adolescents and to restore the integrity of professional sports. Despite these goals, it is unconstitutional under the Fourth Amendment, because the Government does not present a compelling interest and when balanced against the private interest, the Governmental interest does not create a special need. There are better methods to address the problem with America's youth and professional athletes, but these issues should be resolved separately.

The Mitchell Report was a step in the right direction for MLB,¹⁹⁴ but if the past is any indication of the future, the battle with illegal performance-enhancing substances is not likely to end soon. Congress

189. Saka, *supra* note 32, at 357; Lisa Pike Masteralexis, Symposium, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 *NEW ENG. L. REV.* 775, 775 (2006) (arguing that the issue of performance-enhancing drugs should be addressed in collective bargaining and not on the floor of Congress).

190. Saka, *supra* note 32, at 357.

191. Leroux, *supra* note 116.

192. *Id.*

193. *Id.*

194. Mitchell Report, *supra* note 33.

should undertake one or more of the constitutional alternatives, but the unfortunate possibility is that the root of the problem may be society's implicit encouragement of the use of performance-enhancing substances.¹⁹⁵ This apparent encouragement may be evidenced by the observation that in America, sports "serve as a model of the larger society."¹⁹⁶ If the ultimate problem lies with America's society, to make a change and action must be taken, which is more drastic than proposed legislation.

195. Whitman, *supra* note 31, at 488.

196. Laitner, *supra* note 31, at 192; Walker, *supra* note 177, at 181; Greely, *supra* note 168, at 99.