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BACK TO THE GAME: HOW CONGRESS CAN HELP SPORTS LEAGUES SHIFT THE FOCUS FROM STEROIDS TO SPORTS

Joseph M. Saka

I. INTRODUCTION

On November 15, 2005, Major League Baseball (MLB) and the Major League Baseball Players Association (MLBPA) announced a new drug testing agreement that averted the passage of pending Congressional legislation. The agreement increased penalties, initiated more frequent testing, and added amphetamines to the banned substance list. The agreement has been seen as a meaningful step in curbing the use of performance-enhancing drugs in professional baseball. Many experts including congressional representatives, sports journalists, and MLB and MLBPA personnel cited Congressional intervention as an impetus for the agreement.


3. Curry, supra note 2; MLB, MLBPA Announce New Drug Agreement, supra note 2.

4. Curry, supra note 2.

Prior to the agreement, the use of performance-enhancing drugs in professional sports had received substantial notoriety. Indeed, in the 2004 State of the Union Address, President George W. Bush discussed steroid use in professional sports alongside some of the most important issues affecting Americans today. A number of recent events had highlighted the problem of steroid use in the United States.

One of the most significant of these events that eventually triggered Congressional intervention was the discovery of tetrahydrogestrinone (THG), a virtually undetectable designer steroid. THG first made news after a syringe containing THG, and purported to be manufactured by Bay Area Laboratory Co-Operative (BALCO), was anonymously delivered to the United States Anti-Doping Agency (USADA). On September 3, 2003, federal and local agents raided BALCO's San Francisco offices and found that BALCO had been distributing THG. Coverage of this story increased when Greg


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

Id.


9. Wilairat, supra note 8, at 385; Bryant, supra note 5, at 303.
Anderson, the personal trainer of a number of athletes, including Barry Bonds, was implicated as being part of a conspiracy to distribute anabolic steroids. Barry Bonds, the seven-time National League Most Valuable Player, had broken the single-season home run record just two years earlier, hitting 73 homeruns in a single season. Bonds testified in the grand jury investigation of BALCO alongside perennial MLB All-stars Jason Giambi and Gary Sheffield. The San Francisco Chronicle later published portions of both Bonds' and Giambi's testimony in the BALCO steroids case where they admitted using THG.

In light of this scandal, the United States Senate Committee on Commerce, Science, and Technology, chaired by Senator John McCain, began holding hearings in October 2003 on performance-enhancing drugs. In order to rectify the problem, Congress proposed a number of bills that would directly regulate performance-enhancing drugs in professional sports by setting standards and penalties for the leagues. These bills were postponed after MLB and the MLBPA came to a new drug-testing agreement. Although the new agreement withholds this legislation's passage, renewed Congressional intervention is always possible.


15. See discussion infra Part IV.B.


17. Id.

18. Id.
This note will discuss one way Congress may address the problem of performance-enhancing drug usage in professional sports. The note will first examine the definition of steroids and the history of prior steroid legislation. Next, the note will look at MLB’s struggle to adopt a meaningful drug policy, and will contrast MLB’s efforts with those of the International Olympic Committee (IOC). Next, the note will discuss Congress’ authority in professional sports, and will examine the legislation regulating the performance-enhancing drug usage in professional sports. Finally, the note will analyze how Congress can address performance-enhancing drug usage in professional sports. The note will conclude that Congress should impose forced arbitration upon professional sports leagues and unions in the event that collective bargaining does not result in a drug testing agreement.

II. BACKGROUND

A. What are Steroids?

Anabolic steroids are synthetic drugs designed to emulate the naturally-occurring male hormone testosterone. Anabolic steroids are often prescribed by medical professionals to treat problems such as “loss of function of testicles, breast cancer, low red blood cell count, delayed puberty and debilitated states resulting from surgery or sickness,” anabolic steroids are also illegally used without a prescription. Frequently, steroids are used illegally to improve athletic performance or physical appearance. Anabolic steroids cause these results because they act as “synthetic forms of androgens, the male sex hormone produced in the testicles, which increase the metabolism, stimulate protein production, and contribute to the growth of skeletal muscle and male sexual characteristics.”

These physical gains, however, are not without negative side effects which include both physiological and psychological damage. Major physiological side effects include live tumors and cancer, jaundice, fluid retention, high blood pressure, increases in low-density
lipoprotein (LDL or bad cholesterol), and decreases in high-density lipoprotein (HDL or good cholesterol). Dangerous psychological side effects include extreme mood swings with manic-like symptoms leading to violence and depression, as well as "paranoid jealousy, extreme irritability, delusions, and impaired judgment stemming from feelings of invincibility."

Abuse of anabolic steroids also may cause gender specific side effects. Men may experience "shrinking of the testicles, reduced sperm count, infertility, baldness, development of breasts, and increased risk for prostate cancer." Women may experience "growth of facial hair, male-pattern baldness, changes in or cessation of the menstrual cycle, enlargement of the clitoris, and deepening of the voice." For adolescents, use of anabolic steroids can cause a halt in growth and accelerated puberty change creating a risk that adolescents will remain short for the rest of their lives.

B. Past Legislation

In an effort to curb steroid use and prevent its negative side effects, Congress began passing legislation targeting steroids beginning with the Anabolic Steroid Control Act of 1990. The Anabolic Steroid Control Act added anabolic steroids to Schedule III of the Controlled Substances Act (CSA). In the Anabolic Steroid Control Act of 1990,

26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
Congress defined anabolic steroids as: "any drug or hormonal substance, chemically and pharmacologically related to testosterone." Although the CSA includes immediate precursors, drugs "which the Attorney General has found to be . . . an immediate chemical intermediary used or likely to be in the manufacture of such controlled substance," as controlled substances, a loophole enabled supplement manufacturers to legally market steroid precursors because they did not fall within "the current definition of 'immediate precursor' under the CSA." Steroid precursors are not considered immediate precursors because they are "derivatives of testosterone that metabolize into anabolic steroids once ingested." Nevertheless, although these steroid precursors remained legal, they had a similar function to anabolic steroids.

In 1994, Congress facilitated easier access to performance-enhancing drugs by passing the Dietary Supplement Health and Education Act of 1994 (DSHEA), which broadened the definition of dietary supplements. DSHEA made it difficult for the Food and Drug Administration (FDA) to regulate nutritional supplements, because the broad definition of dietary supplements allowed many steroid precursors to be sold over-the-counter, free from regulation.

34. Anabolic Steroid Control Act, § 802(6). Immediate precursors are defined in full as a substance:

A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

Anabolic Steroid Control Act, § 802(23)(A)-(C).
36. Wilairat, supra note 8, at 378.
37. Id. at 392.
Moreover, before 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.

amended at 21 U.S.C. § 321(ff)(1)(2000)). DSHEA defined dietary supplement as:

[A] product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

- a vitamin;
- a mineral;
- an herb or other botanical;
- an amino acid;
- a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
- a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).

Id.

42. § 342 f(1). To show that a dietary supplement was adulterated, the FDA had to show that it:

A) presents a significant or unreasonable risk of illness or injury under—
   (i) conditions of use recommended or suggested in labeling, or
   (ii) if no conditions of use are suggested or recommended in the labeling, under ordinary conditions of use;

B) is a new dietary ingredient for which there is inadequate information to provide reasonable assurance that such ingredient does not present a significant or unreasonable risk of illness or injury;

C) the Secretary declares to pose an imminent hazard to public health or safety, except that the authority to make such declaration shall not be delegated and the Secretary shall promptly after such a declaration initiate a proceeding in accordance with sections 554 and 556 of title 5, United States Code, to affirm or withdraw the declaration; or

D) is or contains a dietary ingredient that renders it adulterated under paragraph (a)(1) under the conditions of use recommended or suggested in the labeling of such dietary supplement.

Id.

43. See Hearing on Dietary Supplements, supra note 14 (testimony of John M. Taylor).
44. Id. (testimony of Charles Bell)(highlighting how Ephedra, a dangerous dietary supplement, went marketed for years before being regulated by the FDA).
Realizing the danger of these loopholes, Congress finally made some progress by passing the Anabolic Steroid Control Act of 2004. The Act “equated androstenedione to anabolic steroids and added sixty substances, including THG, to the list of Schedule III drugs.” The Act also provided funding to public and private entities “to carry out science-based education programs in elementary and secondary schools to highlight the harmful effects of anabolic steroids.” Nevertheless, the Act did not define some steroid precursors, such as dehydroepiandrosterone (DHEA), as anabolic steroids.

III. APPROACHES TO THE PERFORMANCE-ENHANCING DRUGS PROBLEM IN PROFESSIONAL SPORTS: A COMPARATIVE ANALYSIS

Although MLB’s new agreement received Congressional approval, it took time and effort to come to that accord. An examination of MLB’s efforts to adopt a meaningful drug agreement personifies the struggle professional sports leagues must endure where there is a collective bargaining requirement. In contrast, an examination of the drug policy of the International Olympic Committee (IOC) exemplifies one of the most respected testing systems.


46. Wilairat, supra note 8, at 391.


48. Wilairat, supra note 8, at 391. See id., for the view that the Anabolic Steroids Control Act did not go far enough because it excluded DHEA.


50. See Danaher, supra note 40; Selig & Manfred, supra note 31, at 48-57 (discussing how sports leagues have failed to establish meaningful regulations).

A. Steroid Testing in MLB

1. The Collective Bargaining Requirement for MLB

A reason often cited by doping experts to explain the discrepancy between the drug policies of MLB and the IOC is that MLB "must collectively bargain [with the MLBPA] over the terms of any drug policy prior to implementation."\(^5\) The MLBPA, although "not formally a union under the National Labor Relations Act," negotiated a collective bargaining agreement in 1968.\(^3\) The following year, the National Labor Relations Board (NLRB) decided that professional baseball was subject to the NLRA.\(^4\) As such, the NLRA requires the MLB and the MLBPA to negotiate “in good faith with respect to wages, hours, and other terms and conditions of employment.”\(^5\) The NLRB has consistently found that drug policies are required topics of bargaining, “requiring good faith negotiations with the union prior to implementation.”\(^6\)

This collective bargaining requirement is an obstacle to a more stringent drug policy. Players associations will undoubtedly resist implementation of broad drug policies because drug testing can lead to intrusion of privacy, fines, and suspensions.\(^7\) Thus, depending on the strength of the union, the collective bargaining requirement can serve as a significant impediment to instituting a meaningful drug policy.\(^8\)

2. A Brief History of Collective Bargaining in MLB

Although Congress only began holding hearings on performance-enhancing drugs in professional sports after 2000, the problem began, particularly with MLB, well before then.\(^9\) In the summer of 1998, baseball players Mark McGwire and Sammy Sosa chased, and eventually exceeded, Roger Maris’ single season homerun record of 61

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54. *Id.* (citing The American League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969)).
58. *Id.* at 48.
that had lasted since 1961. During this time, McGwire admitted to using androstenedione (andro), which is now an illegal precursor to testosterone. Although andro was neither illegal nor restricted by the rules of baseball at the time, andro had already been banned by the National Football League (NFL), the National Collegiate Athletic Association (NCAA), and the IOC. Just three years later, in 2001, Barry Bonds set a new single season homerun record after hitting 73 homeruns. Veiled beneath these record breaking seasons was the concern that the success could be attributed to illegal performance-enhancing drugs.

While MLB was concerned by these allegations, few steps were taken to address them. From 1997 to 2002, MLB and the MLBPA had a collective bargaining agreement that restricted MLB from making any significant changes. Meanwhile, steroids were banned by MLB but were not the subject of testing. MLB Commissioner Bud Selig was able, however, to unilaterally institute steroid testing in Minor League Baseball, uninhibited by a collective bargaining requirement.

In 2002, at the expiration of the labor agreement, MLB and the MLBPA negotiated a new drug policy that, for the first time, called for steroid testing. Due to the pressures of collective bargaining, the new drug policy was not as tough as MLB had hoped. It fell short of expectations in that the plan: only called for forewarned testing during the baseball season, did not add andro or amphetamines to the banned substances list, and provided only negligible penalties for drug


62. Id. Andro has since been made illegal by Congress. Wilairat, supra note 8, at 391.

63. Hermosa, supra note 11.

64. Assael and Keating, supra note 49, at 81.

65. Id. at 80.

66. See id. at 78, 82.

67. Id.

68. Id. at 81.

69. Id. at 82.

70. Hearing on Steroid Use, supra note 7 (statement of Allan H. Selig). For an examination of the difficult negotiation between MLB and MLBPA, see Bryant, supra note 5, at 256-260.
The MLBPA, however, agreed that if five percent or more of players tested positive for steroids in 2003, the League would institute random drug testing the following season. Not surprisingly, the requisite five percent of players had tested positive to steroids, and random steroid testing commenced in 2004.

Around this time, the BALCO scandal began making headlines, and Congress demanded the adoption of a tougher drug policy. The MLBPA, led by Executive Director Donald Fehr, opposed any changes to the then active collective bargaining agreement. Nevertheless, in January 2005, in response to much criticism, MLB and the MLBPA amended the existing drug testing agreement adding tougher guidelines. The new drug policy created stricter punishment, added steroid precursors, masking agents, and diuretics to the banned substances list, and provided for additional testing throughout the season and off-season. Although the drug testing agreement was more severe than any plan in the past, questions still remained about its effectiveness. The policy was criticized for not adding amphetamines to the banned substances list and for having too lenient of a punishment regime.

In March 2005, the House Committee on Government Reform held a full hearing where MLB officials and MLB players (including Sammy Sosa, Mark McGwire, Jose Canseco, Rafael Palmeiro, Frank Thomas, etc.) testified.

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71. Assael and Keating, supra note 49, at 82. A first positive test did not result in a suspension, a second positive test only resulted in a suspension of 15 days, and a third suspension only resulted in a suspension of one year. Id.

72. Id.

73. Id. at 83.

74. Hearing on Steroid Use, supra note 7 (statement of The Honorable John McCain).

75. Id. (statement of Donald M. Fehr).


77. Bodley, supra note 76.

78. Id. See also Wendt, supra note 10, at 11.

79. Bodley, supra note 76.

80. Bryant, supra note 5, at 394-95. When Congress subpoenaed the drug agreement, the body discovered that the supposedly mandatory ten-day suspension for a first offense was in fact optional, at the discretion of the commissioner. Id.
and Curt Schilling) testified.\textsuperscript{81} The House Committee criticized MLB’s drug testing policy, and questioned some of the most renowned power hitters in baseball about their alleged drug use. In September 2005, the Senate Committee on Commerce, Science, and Technology held a hearing on Steroids Legislation. Senator John McCain reinforced criticism that he had previously offered, and assured MLB that if the League did not agree to a tougher drug policy, he would push legislation that would complete this goal.\textsuperscript{82} Because Bud Selig supported a new drug testing agreement during the hearing, most of the criticism fell upon Donald Fehr.\textsuperscript{83}

Facing the threat of Congressional legislation, the MLBPA finally relented on November 15, 2005, and agreed to a new drug policy, despite being in the middle of an existing collective bargaining agreement.\textsuperscript{84} This new joint drug testing agreement calls for stricter penalties, more frequent testing, and an expanded banned substances list, including amphetamines.\textsuperscript{85} The agreement has appeased Congressional demands for the present.\textsuperscript{86} The new agreement, however, does not preclude Congress from addressing future issues.

B. Steroid Testing by the IOC

An examination of the IOC’s drug policy adoption provides a stark contrast to MLB’s experience, and shows what is possible without the requirement of collective bargaining. In 1999, the IOC created the World Anti-Doping Agency (WADA) “to promote and coordinate the fight against doping in sport internationally.”\textsuperscript{87} In 2003, WADA...
created the World Anti-Doping Code (the Code), a uniform set of anti-doping rules. Although it took time to finalize the code, the end result of the program provides an explanation for the adoption hardship. The Code was adopted unanimously by 1200 delegates representing 80 governments, the IOC, the International Paralympic Committee (IPC), all Olympic sports, national Olympic and Paralympic committees, athletes, national anti-doping organizations, and international agencies.

The Code has been praised for its severe punishment regime, broad banned substances list, and frequent and independent testing requirements. The Code provides an immediate two-year ban after one offense and a lifetime ban for a subsequent offense. While the Code does not state explicitly the number of tests given each year, it does state that an “effective number of In-Competition and Out-of-Competition tests should be administered,” and provides that advance notice testing is imperative. Finally, adopters of the Code commit to independent testing in conformity with the guidelines set forth in the International Standard for Testing. This testing policy has been called the gold standard for drug testing, and it inspired Congress when it drafted performance-enhancing drug legislation.

It should be noted that testing for steroids and other performance-enhancing drugs is becoming increasingly difficult, regardless of the steroid policy. The BALCO scandal highlighted the difficulty of

89. Id.
90. Id.
92. Id. at 27. See also Wendt, supra note 10, at 11.
94. Id. at 21.
"designer steroid" detection. THG is just one of many designer steroids that are currently being produced and marketed secretly. Moreover, Human Growth Hormones, a banned performance-enhancing drug that is virtually undetectable in urine tests, are becoming increasingly prevalent. In order for detection to be effective, there must be agencies like the USADA that receive government funding and are committed to researching and detecting designer steroids.

IV. POTENTIAL FOR CONGRESSIONAL INTERVENTION

Congress has authority to regulate professional sports through the Interstate Commerce Clause of the United States Constitution. Under this clause, Congress has the power to "regulate commerce . . . among the several states." With respect to professional sports, the Supreme Court has noted explicitly that Baseball and other professional sports leagues operate in interstate commerce. Congress is thus able to regulate professional sports leagues as it would any other industry engaged in interstate commerce.

Concerned over usage of performance-enhancing drugs in professional sports, Congress used its authority to draft legislation addressing the problem. There were a number of proposals from both parties in the Senate and the House. Any statutory enactment would have likely resulted in litigation.

97. Id. (statement of Terry Madden, Chief Executive Officer, U.S. Anti-Doping Agency).
98. See id. (statement of Dr. Don H. Catlin, M.D.).
100. See Hearing on S. 529, supra note 96 (statement of Dr. Don H. Catlin, M.D.).
101. See U.S. CONST. art. I, § 8, cl. 3.
102. U.S. CONST. art. I, § 8, cl. 3.
104. See Hearing on Steroids Legislation, supra note 51 (statement of Donald M. Fehr, discussing potential Constitutional issues of the proposed legislation).
A. The Proposed Legislation

In November 2005, just before MLB's new drug testing agreement, there were a number of bills under consideration. In the Senate, two main bills were being considered: the Integrity in Professional Sports Act\textsuperscript{105} and the Clean Sports Act of 2005.\textsuperscript{106} In the House, a number of bills were also introduced, including: the Drug Free Sports Act,\textsuperscript{107} the Professional Sports Responsibility Act of 2005,\textsuperscript{108} and the Professional Sports Integrity Act of 2005.\textsuperscript{109}

Although the exact details of each bill varied, the prevailing sentiment indicated that Congress desired professional sports drug policies that included more frequent and random testing, more drugs on the banned substances list, and more severe penalties for positive tests. Some of the bills were inspired by IOC standards. For example, both bills in the Senate and the Professional Sports Integrity Act of 2005 in the House included provisions adopting the penalty regime of the World Anti-Doping Code, directing leagues to issue a two-year suspension after a first positive testing, and a lifetime ban after another positive testing.\textsuperscript{110}

Ultimately, all of the bills were shelved after MLB and the MLBPA came to an agreement.\textsuperscript{111} Senator John McCain of Arizona gave the League an ultimatum: that MLB and the MLBPA agree to a tougher drug policy or Congress would pass legislation setting the standards for the League.\textsuperscript{112} Congress's pressure was a big reason as to why MLB and the MLBPA came to an agreement.\textsuperscript{113}

B. Constitutional Issues

During the Senate Commerce Committee's hearing on proposed steroid legislation, Donald Fehr indicated any proposed legislation that

\begin{itemize}
\item \textsuperscript{105} Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (1st Sess. 2005).
\item \textsuperscript{110} S. 1334, §6(d)(1); S. 1114, §4(b)(7)(A); H.R. 2516, §4(b)(6).
\item \textsuperscript{111} Curry, \textit{supra} note 2.
\item \textsuperscript{112} Hearing on Steroids Legislation, \textit{supra} note 51, (statement of The Honorable John McCain).
\item \textsuperscript{113} Curry, \textit{supra} note 2.
\end{itemize}
passed would be challenged in court.\textsuperscript{114} This challenge would most likely arise under the Fourth Amendment of the Constitution,\textsuperscript{115} which protects individuals from "unreasonable searches and seizures."\textsuperscript{116}

In order to determine whether a search or seizure is reasonable, the Supreme Court balances the extent of the intrusion upon the individual against the promotion of a legitimate government interest.\textsuperscript{117} Thus, a court would be forced to balance the government's interest in controlling drug usage against the intrusion into players' Fourth Amendment rights.\textsuperscript{118} Such a case would raise many novel Constitutional issues, and the outcome is thus contentious.

V. ANALYSIS

Although Congress has now postponed any attempts to pass legislation directed at performance-enhancing drugs in professional sports, the issue has not disappeared. First, MLB's drug agreement is in its early stages, and the results of the testing program may not satisfy Congress' demands.\textsuperscript{119} Second, Congress remains dissatisfied with the drug policies of the National Hockey League (NHL) and the National Basketball Association (NBA), which means that Congress could again broach the issue of performance-enhancing drugs in professional

\begin{itemize}
\item \textsuperscript{114} Hearing on Steroids Legislation, \textit{supra} note 51, (statement of Donald M. Fehr). Fehr stated that, "given the doubt that any such legislation would be Constitutionally valid, along with the evidence that the agreement reached by the parties in collective bargaining is successfully dealing with the problem, legislation at this time is not warranted." \textit{Id.} at 11.
\item \textsuperscript{115} Charles V. Dale, Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues, CRS Report for Congress, May 9, 2005. Although challenges to drug tests have also been brought under the First, Fifth, and Fourteenth Amendment, these challenges would likely fail. \textit{Id.} at 2 (fn 2).
\item \textsuperscript{116} U.S. CONST. AMEND. IV. The Fourth Amendment provides in full:
\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
\end{quote}
\textit{Id.}
\item \textsuperscript{118} \textit{Skinner}, 489 U.S. at 619.
\item \textsuperscript{119} \textit{See} Curry, \textit{supra} note 2.
\end{itemize}
sports. Third, while the higher risk of testing positive due to increased testing will dissuade some athletes from using steroids, undoubtedly some will continue to seek them. Finally, MLB has yet to approach the topic of how to appropriately test players for HGH use.

Congress could deal with each problem as it arises, but a better approach is to find long-term solutions that would allow Professional Sports Leagues to adapt to evolving and unexpected issues. One method that can curb performance-enhancing drug usage is to require arbitration in the event that leagues and players’ associations are unable to agree on a drug policy.

There are a number of reasons why it is prudent for Congress to take this approach. First, Congress has a legitimate interest in a national problem that the collective bargaining process has not addressed adequately. Second, the suggested approach avoids many of the hardships that would have arisen from the passage of any of the recent Congressional proposals. Finally, the suggested approach addresses the performance-enhancing drug problem in professional sports while simultaneously granting leagues and players autonomy over the regulations that will impact them.

A. Congress Has Legitimate Reasons to Intervene

1. Steroid Use in Professional Sports is a Problem

Many criticized Congress’ efforts as it attempted to address steroid use in professional sports. Some suggested that Congress was grandstanding on this issue to gain publicity. Others complained that Congress should not be spending time on this issue when larger problems loom. Regardless of Congress’ intentions in addressing the issue, steroid use remains a national problem. Steroid use by professional athletes is unethical and illegal, causes health hazards, and, as professional athletes are role models, promotes further use and sale. Because professional sports leagues have been unable to

120. Kathy Kiely, Focus on NBA, BHL to Improve Drug-testing Policies, USA TODAY, Nov. 15, 2005.
121. Passan, supra note 99.
123. Id.
124. Id.
125. Wilairat, supra note 8, at 379.
126. Wilairat, supra note 8, at 383-84; see also Veronia School Dist. 47J, 515 U.S. at 663.
successfully discourage steroid use, Congress has sufficient reason to take action.

a. Using Steroids is Immoral and Illegal

Congress has a substantial interest in regulating steroid use on the sole basis of its illegality. Moreover, steroid use is against the rules of the professional sports leagues and as such is cheating. Players who use steroids do so because they believe it improves their athletic performance. Players, who do not use steroids by following the rules of the sport, are often left at a disadvantage compared to players that have increased their strength, gained the ability to train harder, and gained the ability to recover faster.

The disadvantage caused by steroid use encourages non-using players to take steroids to remain competitive. This creates "an atmosphere of coercion where clean athletes, who do not want to take drugs, feel compelled to do so to succeed." As former National League MVP and the late, admitted steroid user Ken Caminiti once said, "I can't say, 'Don't do it,' not when the guy next to you is as big as a house and he's going to take your job." While those who use steroids in fear of losing their job should not be exonerated, some usage would be avoided absent such pressure.

Finally, if sports leagues are aware of drug use in their sport, and continue to call their sport clean without taking correcting measures, they are selling a fraudulent product to consumers, fans, and spectators. Congress has a legitimate concern regarding a billion-dollar industry taking advantage of consumers.

b. Steroids Cause Health Risks

Congress also has a legitimate concern over the health hazards of steroid use. As mentioned earlier, these hazards include both psychological and physiological effects. This has resulted in more frequent and new kinds of injuries. Baseball managers and trainers

128. See Wilairat, supra note 8, at 379-81.
129. Hearing on Steroid Use, supra note 7, (statement of Terry Madden).
130. Id. Terry Madden serves as the Chief Executive Officer of the United State Anti-Doping Agency. Id.
132. Wilairat, supra note 8, at 379.
noticed injuries such as muscle and ligament tears that generally resemble those from contact sports.\textsuperscript{134}

Steroids also can result in serious psychological problems.\textsuperscript{135} During March 2005, the House Committee on Government Reform heard testimony from parents whose children committed suicide due to depression resulting from steroid use.\textsuperscript{136} This testimony has been cited as one of the reasons for Congress' and MLB's and MLBPA's response.\textsuperscript{137}

c. Professional Athletes Function as Role Models

Another reason for Congress' intervention in professional sports is due to professional athletes' position as role models.\textsuperscript{138} The Supreme Court has recognized that professional athletes serve as role models to children, and has found that athletes' use of performance-enhancing drugs can influence others, especially teenagers, to do the same.\textsuperscript{139} One significant example of this phenomenon is that in the year after Mark McGwire's announcement of his andro usage, sales of the substance skyrocketed 1,000 percent, creating $50 million in profits.\textsuperscript{140}

Perhaps more shocking are survey results, conducted by Blue Cross Blue Shield in 2001, which "found that use of steroids and similar drugs increased by [twenty five] percent from 1999 to 2000 among boys ages 12 to 17."\textsuperscript{141} Another national survey done for federal drug agencies found that nearly half a million teenagers have used steroids.\textsuperscript{142} Teenagers often use performance-enhancing drugs to emulate their athletic role models.\textsuperscript{143} This teenage use translates into

\begin{itemize}
\item 134. Id.
\item 136. Hearing on Restoring Faith, supra note 81 (statement of Dr. Denise and Raymond Garibaldi). See also Statement of Mr. Donald M. Hooton available at http://www.businessofbaseball.com/steroidhearings/HootonTestimony.pdf.
\item 137. George Vecsey, A Tragedy that Echoes After a Life Burns Out, N.Y. TIMES, Aug. 21, 2005.
\item 138. Veronia School Dist. 47J, 515 U.S. at 663.
\item 139. Id.
\item 140. Assael and Keating, supra note 49, at 79.
\item 142. Id.
\item 143. Wilairat, supra note 8, at 383-84.
\end{itemize}
physical dangers. One way Congress can address these physical dangers is by assuring that sports leagues take serious steps in stopping its players from drug use.

2. Collective Bargaining Has Not Addressed The Problem Adequately

Not only is the use of performance-enhancing drugs a problem, but the history of the development of MLB’s drug policy reveals that collective bargaining has not addressed the problem adequately. Although MLB suspected illegal performance-enhancing drug use, few steps were taken to curb it. From 1997 to 2002, MLB and the MLBPA had a collective bargaining agreement which did not provide for drug testing. Although this partially reflects the League’s lack of seriousness regarding the steroid problem, it also reflects the difficulty encountered by MLB during the collective bargaining process. Indeed, during this same time, MLB Commissioner Bud Selig unilaterally instituted steroid testing in Minor League Baseball where he was not restricted by collective bargaining requirements.

In 2002, when the labor agreement expired, MLB and the MLBPA negotiated a new drug policy, which for the first time called for steroid testing. However, due to the pressure of collective bargaining, the new drug policy was not as tough as MLB had hoped. Nevertheless, this drug policy continued until the BALCO scandal made headlines, at which point Congress demanded MLB adopt a tougher drug policy. Even with Congress’ intense pressure, the MLBPA initially remained insubordinate to any changes to the existing drug policy. Although this was a partial reflection of the MLBPA’s desire to hold off negotiations until the existing collective bargaining agreement expired, it also reflected that the MLBPA found the existing drug policy sufficient.

144. Id.
146. Id. at 78-79.
147. Id. at 81.
148. Id. at 82.
149. Hearing on Steroid Use, supra note 7 (statement of Allan H. Selig).
150. Hearing on Steroid Use, supra note 7 (statement of The Honorable John McCain).
151. Id. (statement of Donald M. Fehr).
152. Id. (statement of Donald M. Fehr).
Congressional intervention and pressure was the necessary impetus for a meaningful drug policy.\textsuperscript{153} The collective bargaining process was not addressing adequately the problem of performance-enhancing drugs in professional sports, and it therefore was necessary for Congress to intervene.

\textit{B. Congress' Proposed Legislation Would Result In A Number Of Difficulties}

Congress' proposed legislation, ultimately, should be praised for putting pressure on MLB and the MLBPA to agree on a new drug policy. Despite this progress, however, the passage of this legislation would result in a number of problematic issues.

Any legislation that imposed drug testing requirements on sports leagues quite likely would be challenged in court.\textsuperscript{154} Such litigation would raise complex Constitutional questions; the legislation even could be struck down and declared unconstitutional.\textsuperscript{155} Regardless of the outcome of the litigation, the government would be forced to participate in the costly matter.

In addition to the financial hardship of litigation, the legislation would require Congress to regulate many different sports leagues — a role in which Congress lacks expertise. Each sports league has its own organization, including rules, regulations, and season structure. In addition, some of the proposed bills fail to consider the resources that will have to be redirected from other important matters to regulate professional sports. Although placing pressure on sports leagues to implement more stringent drug policies is a worthy goal, direct regulation by Congress is an inappropriate means to achieve this result.

\textit{C. An Alternative Solution: Congress Should Require Arbitration For Sports Leagues In The Event That Collective Bargaining Does Not Result In A Drug Testing Agreement}

A better method to curb the use of performance-enhancing drugs by professional athletes is to impose arbitration on sports leagues and players associations if they are unable to reach a drug testing agreement otherwise. This requirement probably will yield more

\textsuperscript{153} Curry \textit{supra} note 2.

\textsuperscript{154} Hearing on Steroids Legislation, \textit{supra} note 51 (statement of Donald M. Fehr). Fehr hinted at this in the hearing. \textit{Id.} at 11.

stringent drug policies for sports leagues, while still granting the
leagues and the players autonomy over an issue with which they have
greater familiarity.

Arbitration often is used by state governments in disputes with
public employees such as policemen and firemen. For example, in
New York, the law requires that state policemen enter binding
arbitration if they are unable to resolve disputes over compensation
issues. The rationale for such a policy is "to promote harmonious
and cooperative relationships between government and its employees
and to protect the public by assuring, at all times, the orderly and
uninterrupted operations and functions of government." A similar
rationale exists in the context of professional sports. Future strike-threats by players have caused sports leagues to concede
to drug policies that insufficiently deter performance-enhancing drug
use. If arbitration were required in the event of an impasse, sports
leagues could propose meaningful drug policies without fear of an
ensuing strike due to players' objections. Arbitration thus would cause
players associations to make reasonable proposals in fear that
unreasonable proposals would make the arbitrator side with the
league.

Also, an arbitration policy would give both the players and the
leagues increased voice in league governance. The NLRA states that it
is "the policy of the United States to eliminate the cause of certain
substantial obstructions to the free flow of commerce[,] and to mitigate
and eliminate these obstructions when they have occurred by
encouraging the practice and procedure of collective bargaining." Forced arbitration is in accord with this policy. Although, in
compulsory arbitration, one of the parties might be ultimately
dissatisfied with an arbitrator's decision, their deliberations at least
would be taken into consideration prior to a drug policy
implementation. Most importantly, arbitration would give governing
power to those with expertise and familiarity of the sport.

VI. CONCLUSION

The attention of sports fans has recently been averted from sports to
steroids. To address this problem, Congress should require arbitration
in professional sports in the event that sports leagues and players

157. Id.
associations cannot come to a drug policy agreement. This solution, however, is not the only means of Congressionally inspired progress. Other ideas have been suggested, including increased funding for research of steroids and increased punishment for producers or distributors of illegal performance-enhancing drugs. Regardless of the method chosen, the ultimate goal should be to revitalize the era of sports spectatorship and enjoyment for the athletic performance, and not the drug use.