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Why Congress Cannot Require Major League Baseball to Implement Suspicionless Blood Testing for Performance-Enhancing Drugs

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I. Introduction

In the United States, professional baseball is not only ingrained in the fabric of popular culture, it is big business. As of 2010, Major League Baseball (MLB) players earn annual salaries ranging from the league minimum of $400,000,\(^1\) to the astronomical $33 million paycheck of New York Yankees megastar, Alex Rodriguez.\(^2\) The average salary of an MLB player in 2010 was $3,297,828, which is more than a 65 percent increase from the average 2000 salary of $1,998,034.\(^3\) Meanwhile, the inflation rate in the United States has risen just 28.37 percent in the same time span.\(^4\) These figures do not even take into account the possibility of millions more in income from lucrative endorsement deals or through contracts that include performance-based incentives. Unquestionably, MLB players now have a more substantial financial interest in their playing ability than ever before. The combination of the potential for substantially increased earnings, heightened media exposure, and league expansion\(^5\) are all significant factors that have contributed to the current pressure on MLB players to perform.

Performance-enhancing drug use in MLB has been at the forefront of national media coverage of MLB since the 1990’s, when home run records began to fall at an incredible pace. The power surge climaxed in 1998, when Mark McGwire and Sammy

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\(^3\) Id. Available at http://www.cbssports.com/mlb/salaries/avgsalaries?tag=pageRow;pageContainer.

\(^4\) http://inflationdata.com/Inflation/Inflation_Calculators/Inflation_Rate_Calculator.asp#calcresults

\(^5\) Between 1961 and 1977, MLB added 10 new teams, increasing the total from 16 to 26. Since 1993, MLB has added an additional four new teams, leaving the current total at 30; nearly doubling the amount of teams in existence 50 years ago.
Sosa chased the most-hallowed record in all of sport -- MLB’s 1961 single-season home run record of 61 owned, until then, by Roger Maris. When McGwire and Sosa both broke Maris’ mark in 1998, rampant speculation of performance-enhancing drug use ensued. To combat that speculation, MLB instituted the first mandatory, random, and suspicionless drug-testing program. The testing regime was created through the collective bargaining process in 2002; the current drug-testing policy is in place until Dec. 11, 2011, when the existing collective bargaining agreement between MLB owners and the MLB Players’ Association expires.

As it has developed, MLB’s current collective bargaining agreement provides for mandatory, random, and suspicionless urine testing of all Major League Players. This type of testing can detect steroids, amphetamines, and other controlled substances. Since this testing procedure has been in place for some time, there is speculation now that players are using a different substance, Human Growth Hormone (HGH). Although HGH does not function as a performance enhancer in the same manner as most steroids, the United States Government and Major League owners would prefer to eradicate its use by players. However, HGH cannot be detected in a urine sample; it

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7 Alan D. Rogol, Growth Hormone Administration: Is It Safe and Effective for Bodybuilding and Improved Athletic Performance?, 24 Growth, Genetics & Hormones 25, 26 (2008). Steroids have been scientifically proven to build muscle mass by increasing protein synthesis and reducing the amount of time muscles need to recover from workouts. For MLB players, the combination of increased strength and faster recovery translates into improved on-field performance.
8 * * * * Amphetamines, sometimes called “speed” or “uppers,” are central nervous system stimulant drugs that increase alertness, self-confidence and concentration, and decrease appetite while creating a feeling of increased energy. The chemical structure is similar to the naturally occurring adrenaline and noradrenaline that is produced by the body. The effects of amphetamines are similar to cocaine, but last longer.
9 Human Growth Hormone
can only be detected by blood testing. The National Football League (NFL), following the lockout after the 2010 season, has attempted to incorporate blood testing, specifically for HGH, into their new collective bargaining agreement.

The current medical information available leaves many questions concerning HGH unanswered. Although MLB has banned HGH since 2005, without a scientifically valid urine testing procedure, many feel MLB is essentially assuring its players that they can use HGH without consequence. The problem is that MLB’s current collective bargaining agreement does not permit blood testing. However, if a scientifically valid urine test were developed to detect HGH, it would automatically become part of MLB’s testing program and “players would immediately be subject to that testing.”

Therefore, the issue of implementing mandatory, random, suspicionless blood tests on all Major League players has become a central topic in collective bargaining negotiations. In addition, Congress has apparently focused on this issue and may be willing to take steps to force the issue if it is not resolved in negotiations. Indeed, Congress has previously drafted (although not yet enacted) legislation designed to

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10 Rogol, supra note 20, at 29-30. While some MLB players may currently be using HGH to speed up their post-injury recovery time, no credible evidence exists to suggest that HGH substantially increases muscle strength or exercise capacity.
12 62 Ark. L. Rev. 315
14 ESPN, Outside the Lines, May 19, 2010. Michael Weiner, Executive Director of the MLBPA
eradicate steroid use from professional sports, and, indeed, used the threat of legislation to force MLB to adopt its more stringent current testing policy in 2005.\(^{16}\)

The Integrity in Professional Sports Act (IPSA) and other similar federal bills drafted by Congress facially apply to all professional sports\(^ {17}\); however, this Comment focuses on their application to Major League Baseball, because the perceived failure of MLB and the MLBPA to deal address performance-enhancing drug use among players was the primary impetus behind the federal legislation.\(^ {18}\) The threatened legislation was central to Congress’s success in inducing MLB and the MLBPA to agree to a more stringent testing policy.\(^ {19}\) However, despite the increased voluntary efforts of MLB to implement a stricter testing policy, Congress’ threat of legislation remains on the table.\(^ {20}\) Therefore, Congress could attempt to pass such legislation to create a new policy to include mandatory, random, suspicionless blood testing of MLB players, or, at the least, attempt to force MLB into doing so.

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\(^{18}\) See NFL House Hearing, supra note 14 (statement of Rep. Tom Davis, Chairman, House Comm. on Government Reform); see also infra note 59 and accompanying text (explaining why the steroid problem in MLB precipitated the threatened legislation).


\(^{20}\) Id.
Two critical questions must be answered to determine the constitutionality of federal performance-enhancing drug legislation in the American professional baseball realm: first, whether the Fourth Amendment protection against unreasonable searches applies to a federally mandated private employer search, and second, if the Fourth Amendment does apply, whether this threatened legislation can pass constitutional muster.

An article published in the Arkansas Law Review in 2009 concluded that Congress not only has the authority to require MLB to test its players for HGH, but should intervene and attempt to implement the standards by which players are tested.21 “In order to address the prevalence of HGH abuse in MLB, congressional intervention is both appropriate and necessary.”22 “Congress should enact legislation to achieve two objectives: (1) require MLB and other American professional sports to test their athletes for banned substances using the best testing method currently available; and (2) create a federal agency to work with MLB…to research, develop, and establish best testing standards to combat HGH and other performance-enhancing drug use in sports.”23

The crux of the author’s argument in the Arkansas Law Review article is that “because the (government) agency would only issue regulations regarding testing procedures rather than administer testing programs, each individual league would still be responsible for establishing and implementing its own program developed through the collective bargaining process. MLB would be responsible for determining all other aspects of their drug-testing program, including testing frequency, the list of banned substances, and penalties. MLB would only be required to test its players for banned

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21 62 Ark. L. Rev. 315
22 Id. at 344
23 Id.
substances according to the standards promulgated by the independent government agency.”

However, the author concedes, “a drug-testing program implemented by MLB in accordance with federal legislation, however, could be successfully challenged on constitutional grounds if MLB were acting as an agent of the government.”

This Comment concludes that any attempt by Congress to influence MLB’s drug testing policy through federal legislation, or through interference with MLB’s collective bargaining process, would constitute state action invoking the Fourth Amendment.

Furthermore, this Comment concludes that if the Government’s conduct causes MLB to alter its policy to include mandatory, random and suspicionless blood tests, the players’ Fourth Amendment rights would be violated because the Government’s alleged interest in cleansing baseball of performance-enhancing drug use is outweighed by the intrusion of such testing into the players’ privacy interest.

II. Performance Enhancing Drugs & Major League Baseball: Background and History The Evolution of Player Independence

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24 Id. at 345
25 Id. at 347, citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602
26 MLB, like other U.S. professional sports organizations, is unionized and must engage in collective bargaining under the National Labor Relations Act (NLRA). The MLB Players’ Association (Players’ Association) and MLB’s Commissioner and Club Owners (the League) collectively bargain for any drug-testing policy implemented by MLB. The NLRA requires both sides to negotiate “in good faith with respect to wages, hours, and other terms and conditions of employment,” and the failure of either party to bargain for these terms at the request of the other party or the unilateral implementation of these terms by an employer constitutes unfair labor practice. Employee drug-testing policies are mandatory subjects that must be collectively bargained for prior to implementation. However, the obligation to bargain collectively “does not compel either party to agree to a proposal or require the making of a concession.”
Part two of this article addresses the emergence and modern-day prevalence of performance-enhancing drug use in Major League Baseball. Specifically, the evolution of player independence on the free agent market, and its consequences.

For most of baseball’s storied history, the players had very little financial stake in the game or in the quality of their performance. They were paid relatively low salaries and were considered to be the property of whatever team they played for, subject to being traded or sold to another team without any part in the decision.

The indentured nature of the players’ roles was largely a function of the reserve clause in the players’ contracts. The reserve clause was a perpetual one-year owners’ option that tied a player to one ballclub forever. Under baseball’s old reserve system, the ballplayer was the property of the employer for life.

In addition, under the reserve clause the owner was still able to release a player from the organization or assign the contract to any other baseball team without the player’s consent. The Major League Rules also had a no-tampering rule that prohibited negotiations between a player and another team. This mechanism served to prevent the player from even being aware of his open-market value or any interest from other baseball clubs. The reserve clause was mandatory and completely abrogated whatever freedom of movement and choice a player might ordinarily have.\(^{27}\) The only alternatives left to a player dissatisfied with his contract were to either request that his contract be traded to another club or retire.\(^{28}\) As a result, although the players certainly competed to win, they had no financial incentive to excel.


\(^{28}\) *Id.*
In 1969, the winds of change began to blow when St. Louis Cardinals’ outfielder Curt Flood refused to be traded to the Philadelphia Phillies. Flood sought injunctive relief from the reserve clause, naming MLB Commissioner Bowie Kuhn, MLB, and all of its then-24 member clubs as respondents in an antitrust suit after being denied the right to make his own contract with another major league club. In a 5-3 decision, authored by Justice Blackmun, the Supreme Court held for the MLB. The Court stated that the longstanding exemption of professional baseball’s reserve system from federal antitrust laws was an established aberration in which Congress had acquiesced, and that it was entitled to the benefit of stare decisis. Any inconsistency or illogic was to be remedied by Congress and not by the Supreme Court.29

Although Flood lost the battle and was never able to taste the fruits of his labor, the court’s decision in *Flood v. Kuhn* paved the way for modern-day free agency, which itself paved the way for greater performance-enhancing drug use. Just three years after *Flood*, on December 23, 1975, an independent arbitrator, Peter Seitz, effectively nullified the reserve clause and declared that Major League Baseball players became free agents upon playing one year for their team without a contract.30

The controversy began in 1974 when Andy Messersmith signed a 1-year/$90,000 contract with the Los Angeles Dodgers. The Dodgers renewed his contract for the 1975 season under paragraph 10(a) of the Uniform Player’s Contract.31 Messersmith did not sign the contract, but he played the entire 1975 season. At the end of the season, Messersmith took the position that he was a free agent. The Major League Baseball

29 Id.
30 *In re Arbitration of Messersmith, 66 L.A. (BNA) 101, 106 (1975).*
31 Footnote text of this provision
Player’s Association (MLBPA) actively supported Messersmith’s position, which the Dodgers opposed.\textsuperscript{32}

Dave McNally, who had played his entire career with Baltimore Orioles up until his final season in 1975 with the Montreal Expos, was the only player other than Messersmith playing on the one-year reserve clause in effect at the time. After his lone season with the Expos in 1975, McNally retired and had no intention of claiming his free agency.\textsuperscript{33} Players’ union executives asked McNally to add his name to the grievance it had filed in opposition to the reserve clause, to which McNally agreed. Baseball owners wanted McNally’s name off the list, so the Expos offered him a $25,000 signing bonus and a $125,000 if he made the team, but McNally declined.\textsuperscript{34}

Seitz found that there was no contractual relationship between Messersmith and the Dodgers, or between McNally and the Expos, and that the respective clubs had no right to reserve their exclusive services beyond the “renewal year.” Seitz first determined that the reserve clause could not be assumed from the writing. Furthermore, Seitz did not interpret the one-year option to mean a one-year perpetually renewable option. He did not have to contend with history or the antitrust exemption; he simply interpreted and applied provisions already contained in the agreement.\textsuperscript{35}

Seitz’ interpretation of the standard form contract and the Basic Agreement – that the clubs had the unilateral right to renew for only one year – was affirmed in subsequent judicial proceedings. In \textit{Kansas City Royals Baseball Corp. v. Major League Baseball Players’ Ass’n}, the Eighth Circuit held that an arbitration panel had jurisdiction

\textsuperscript{33} http://en.wikipedia.org/wiki/Dave_McNally
\textsuperscript{34} Id.
\textsuperscript{35} Id.
and that its award drew its essence from the Agreement.\textsuperscript{36} Therefore, the court’s review was limited; although it affirmed the arbitrator’s decision, the court intimated no view on the merits of the reserve system.\textsuperscript{37}

Seitz’ decision in the \textit{Messersmith} arbitration accomplished something that the courts and collective bargaining could not: it ended the reserve system.\textsuperscript{38} A restructuring of the reserve system was approved in the 1976 collective bargaining agreement.\textsuperscript{39} As a result, free agents could, and now do earn substantially higher salaries and are subject to expanded media exposure. Consequently, players not only compete on the field collectively to ensure victory for their respective teams, they also compete against one another off the field for salaries and desired positions. Ultimately, this individual competition has lead to players’ attempting to improve their play and statistics through the use of performance-enhancing drugs. That problem emerged in the 1980s and ultimately led the MLB to institute a program of testing for steroids in 2002. Once that program was in place, speculation arose that the players were turning to drugs that could not be detected by urine testing, including most commonly Human Growth Hormone.

\textsuperscript{36} 409 F. Supp. 233, 261 (W.D. Mo. 1976) aff’d, 532 F.2d 615 (8\textsuperscript{th} Cir. 1976)
\textsuperscript{37} Id.
\textsuperscript{38} In re Arbitration of Messersmith, 66 L.A. (BNA) 101 (1975).
\textsuperscript{39} Id.
III. The History of MLB’s Drug Testing Regime

Although speculation as to whether MLB players were abusing substances to enhance their performance on the field did not become prevalent until the 1980’s, steroid use among athletes began in the 1950’s, but not on a widespread scale. Speculation of steroid abuse among MLB players in 1980’s began as a result of a record increase in both homeruns and strikeouts, as well as the visible changes in players’ physiques. Notable players such as Mark McGwire caught the league’s attention when androstenione (andro) was found in his locker in 1998, the same season he broke Roger Maris’s single-season homerun record. Even though andro was legal in baseball at that time, its public discovery in the locker of MLB’s new homerun king prompted MLB to acknowledge that it might have a steroid problem. By 2002, the prevalence of steroid use in MLB became apparent after many former and current players publicly admitted to using steroids during their professional careers, including sluggers Ken Caminiti and Jose Canseco. Several years later, another prominent

42 Andro is a steroid precursor that was legal in baseball in 1998, but was banned in other professional sports, including the NFL and the Olympics. Andro is now classified as a Schedule III Controlled Substance under the Anabolic Steroid Control Act of 2004. See 21 U.S.C. § 812 (2006).
45 Caminiti Admits Steroid Use: http://www.cbc.ca/sports/story/2002/05/28/caminiti020528.html
46 Canseco: Steroids Made Baseball Career Possible; http://www.usatoday.com/sports/baseball/2005-02-13-canseco-60minutes_x.htm
MLB slugger, 12-time All Star Manny Ramirez, made national media headlines after testing positive for a female fertility drug, Human Chorionic Gonadotropin (HCG) that is used by steroid users to restore testosterone production to normal levels.

Prior to 2002, MLB did not have a mandatory drug-testing program in its collective-bargaining agreement. Performance-enhancing drugs were impliedly prohibited since 1971 and expressly prohibited since 1991, but the prohibition could not be enforced without the Players’ Association agreeing to it first. The League attempted to implement a mandatory drug-testing program in the Basic Agreement in both 1984 and 1994, but the Players’ Association would not agree to the proposed testing policies on the grounds that they were “degrading” to players and violated the players’ privacy. The League, which was also concerned with higher priority economic issues at the time, did not emphasize such an agreement until after suspicions as to the level of performance-enhancing drug use began to rise.

Until 2002, the players’ union had refused to collectively bargain over steroid testing, claiming that such testing invaded the players’ privacy and was an “abuse of

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47 Ramirez subsequently retired from MLB on April 8, 2011, to avoid facing a 100-game suspension after reportedly testing positive for a banned performance-enhancing substance in his spring training drug test.

48 HCG could legitimately be prescribed for a man who does not naturally produce enough testosterone, but it is often used to replenish testosterone levels at the end of a cycle of steroid treatments.


50 Id. at 34-35, 43-44.
51 Id. at 44. In 1994, the League proposed a drug-testing program, but the proposal did not reach the main bargaining table during negotiations because “the drug program was not as high a priority as economic issues.” 62 Ark. L. Rev. 315
human rights."

In 2002, only under intense public scrutiny did the League and Players’ Association reach an agreement that provided for the possibility of mandatory random drug testing as part of a new Joint Drug Prevention and Treatment Program. The program served to prohibit the use and possession of several drugs, including all steroids listed on Schedule III of the Controlled Substances Act. However, the program was heavily criticized because mandatory random testing would not be automatic. Instead, the MLB Program would only be implemented if five percent or more of the players tested positive for prohibited substances during the anonymous survey-testing period in 2003.

The CBA required survey testing of players for the 2003 season: each player was to be tested twice with no punishment for a positive test. However, if more than five percent of all players tested positive, mandatory testing for all players for the following seasons would be implemented until positive tests were less than two and one-half percent in consecutive years.

During the 2003 season, 1438 players were survey tested with between five and seven percent of the players testing positive. Thus, mandatory testing was implemented for the 2004 season. Under this policy, a player testing positive was

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55 2002 MLB Program, supra note 92, § 3(A).
subject only to further testing and a treatment program; no suspensions were allowed.  

The most unflattering evidence of baseball’s steroid problem surfaced in 2003 after a federal investigation of the Bay Area Laboratory Co-Operative (BALCO). Federal agents raided BALCO laboratories after receiving an anonymous tip from a “high-profile track and field coach.” Quantities of the “Cream” and the “Clear,” as well as HGH, and various other steroids were discovered in the raid. Information concerning BALCO’s clientele, which included many athletes, including prominent MLB players, was also uncovered during the raid. A federal grand jury investigation followed, and 10 MLB players, most notably Barry Bonds and Jason Giambi, were subpoenaed to testify. Giambi admitted to injecting himself with steroids and HGH that he received from BALCO. Bonds admitted to using “the Cream and the Clear substance” supplied by BALCO, but denied knowing the compounds contained steroids.

58 Mark Fainaru-Wada & Lance Williams, Sports and Drugs: How the Doping Scandal Unfolded, S.F. Chron., Dec 21, 2003, at B1. BALCO was a medical company that sold blood and urine testing services to athletes, and its subsidiary distributed nutritional supplements. (62 Ark. L. Rev. 315)  
59 Id. The coach also provided USADA with a syringe containing the unknown steroid, which was later determined to be tetrahydrogestrinone (THG), also known as the “Clear.” (62 Ark L. Rev. 315) BALCO marketed the “Clear,” a then undetected performance-enhancing steroid developed by chemist Patrick Arnold.  
60 Id.  
61 Id.  
62 Id.  
The initial MLB Program commenced at the beginning of the 2004 season and was met with considerable scrutiny.\textsuperscript{65} Because of its perceived weak penalty structure\textsuperscript{66}, as well as further reports of performance-enhancing drug use that had emerged from the BALCO scandal, baseball’s policy was “mocked and lambasted,” called everything from “a joke” to “worse than terrible.”\textsuperscript{67} In response, Congress harshly criticized the MLB program and threatened legislative regulation if its weaknesses were not addressed and corrected.

In the aftermath of the BALCO scandal and the publicized reports of steroid use, Congress began to investigate the presence of steroids in MLB. In 2005, congressional committees held several publicized hearings that featured testimony from MLB officials and representatives, as well as current and former MLB players. “Congress felt that steroid use in professional sports was undermining the values of sports by desecrating the ‘honesty, integrity, and innate human ability,’ cheating the athletes, fans, and the history of the sport, and setting a bad example for young athletes who look up to the professional athletes....”\textsuperscript{68}

As a result of its investigation and MLB’s failure to strengthen its drug-testing program, in 2005, Congress introduced several pieces of legislation specifically designed to combat the performance-enhancing substance-abuse problem in professional sports. While each of the bills provided slightly different means of achieving this goal, every bill sought to establish minimum-testing requirements and a penalty structure that MLB would be forced to implement.

\textsuperscript{65} Id.
\textsuperscript{66} The 2002 MLB Program did not sanction players who tested positive for a banned substance on their first test. See 2002 MLB Program, supra note 76, § 9(B).
\textsuperscript{67} Fainaru-Wada & Williams, \textit{Sports and Drugs}, supra note 55.
Under the imminent threat of federal legislation, the League and Players’ Association succumbed to the pressure and amended their collective-bargaining agreement to include a stricter testing program in November 2005, just one week before the proposed steroid legislation—the Integrity in Professional Sports Act (IPSA)—was likely to pass.\textsuperscript{69} However, despite the amendment, IPSA was not withdrawn. According to former MLB player and United States Senator from Kentucky, Jim Bunning, the bill remained on the table to ensure that, “if things unravel, we still have tough legislation we can move through Congress,” and because Congress “wants to see what the other major sports leagues do.”\textsuperscript{70}

After MLB implemented a more stringent drug-testing program, steroid use in baseball decreased, but it is alleged that players switched to HGH to evade positive drug-testing results.\textsuperscript{71}

The League and Union agreed upon a more rigid steroid-testing procedure for the 2005 season. Under this new policy, all players were subject to random testing for 45 banned steroids and various other precursors at least once during the season. Punishment for a positive result was as follows: a 10-day suspension for the first positive test, a 30-day suspension for the second; a 60-day suspension for the third, and a one year suspension for the fourth violation.\textsuperscript{72} During the 2005 season, 12 players


\textsuperscript{70} Id.


were suspended for violating the steroid policy; all of them received a 10-game suspension.\textsuperscript{73}

For the 2006 season, yet another new drug policy was agreed upon and implemented.\textsuperscript{74} The new policy, which is still presently in place under the current CBA (which expires at the end of 2011), tests all athletes for steroids and amphetamines\textsuperscript{75} once during the pre-season and at least once during the season. Players are also subject to unlimited random testing throughout the season and offseason. The penalties for testing positive for a steroid are as follows: a 50-game suspension for the first positive test; a 100-game suspension for the second, and a lifetime ban for the third. For amphetamines, a player is subject to mandatory follow-up testing for the first positive test, a 25-game suspension for the second, an 80-game suspension for the third, and discipline at the discretion of the commissioner of up to a lifetime ban for the fourth violation.\textsuperscript{76}

In a recent development, MLB announced plans to begin blood testing its Minor League players for HGH before the end of 2010.\textsuperscript{77} This does not require collective bargaining or the agreement of the MLBPA, because the large majority of Minor League

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\textsuperscript{75} Amphetamines are stimulants used to increase alertness and physical ability. Division of Alcohol and Drug Abuse, Stimulants, http://www.well.com/user/woa/fsstim.htm (last visited Dec. 7, 2005). They are a controlled substance, obtained only through a prescription from a doctor. Id. Amphetamines are viewed by most as being more widely used by MLB players than steroids. Mark Kreidler, Baseball Finally Brings Amphetamines into Light of Day, ESPN.com, Nov. 15, 2005, http://sports.espn.go.com/mlb/columns/story?columnist=kreidler_mark&id=2225013. The use of amphetamines in MLB goes back to the 1980s, and it is estimated that as many as fifty percent of MLB players use them to get energy before games. Id.


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players are not members of the players’ union. In August 2011, Mike Jacobs, formerly of the New York Mets, became the first professional baseball player to test positive for HGH while he was playing for the Colorado Rockies Triple-A affiliate, the Colorado Springs Sky Sox. As a result of the positive test, Jacobs was suspended for 50 games. It remains to be seen whether Congress will be satisfied with this limited drug-testing regime.

IV. What is HGH and How Does it Differ from Other Banned Substances?

78 Id.
Human Growth Hormone is a protein hormone synthesized and secreted by the pituitary gland and is essential for human growth and development.\textsuperscript{80} Once circulated in the bloodstream, HGH travels to bone, muscle, and other tissues where it has many growth promoting, anabolic, and metabolic effects.\textsuperscript{81} HGH enhances protein synthesis and turnover in muscle, and stimulates growth in most tissues.\textsuperscript{82} Synthetic HGH is generally used to treat children with growth disorders, and HGH therapy can only be prescribed legally to treat diseases expressly approved by the Food and Drug Administration (FDA).\textsuperscript{83}

HGH has never been approved for treating athletic injury or improving athletic performance, yet its use in these capacities is increasing.\textsuperscript{84} As a response, Congress increased penalties for the unlawful distribution of HGH.\textsuperscript{85} The FDA further stressed the severity of unlawful HGH distribution by issuing an alert in January of 2007, reminding those prescribing HGH for athletic enhancement and other non-approved uses that they are doing so in violation of federal law.\textsuperscript{86} Currently, possession of HGH is not a criminal offense.\textsuperscript{87}


\textsuperscript{81} Id.

\textsuperscript{82} McHugh, supra note 20, at 1588; see also P.H. Sonksen, \textit{Hormones and Sport: Insulin, Growth Hormone and Sport}, 170 J. of Endocrinology 13, 19 (2001).


\textsuperscript{85} 21 U.S.C. § 333(e). A person who distributes HGH for a non-approved use violates federal law and is subject to a punishment of a maximum term of five years in prison or ten years if distributed to a person under the age of eighteen.

\textsuperscript{86} 21 U.S.C. § 333(e)

\textsuperscript{87} See 21 U.S.C. § 333(e) (stating that only persons who unlawfully distribute HGH are criminally liable under the statute).
HGH abuse is not easy to detect because HGH occurs naturally in the human body, and synthetic versions of the hormone are chemically identical to the natural one. Currently, no urine test exists to detect synthetic HGH, and no such test is likely to be developed in the near future because the minimal quantities of the hormone found in urine excretions are too low and inconsistent to be considered of any scientific determinative value. Presently, HGH can only be detected through a blood-sampling method.

In 1989, the International Olympic Committee became the first to brand HGH as a banned substance. Although supplying HGH for athletic purposes is illegal in the U.S., HGH has nonetheless grown in popularity over the last decade. This is fueled at least in part by the fact that HGH is more difficult to detect than most other performance enhancing drugs (anabolic steroids), as HGH cannot be detected by means of a simple urine test.

The primary way HGH assists in enhancing performance is by reducing the amount of subcutaneous (under the skin) fat. One study revealed that taking HGH led to a significant increase in lean body mass, but the change was primarily for the short

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88 McHugh, supra note 20, at 1589. Unlike the majority of drugs and anabolic steroids, HGH is an endogenous substance indistinguishable from the naturally occurring hormone.
89 McHugh, supra note 20, at 1589
90
term. Although muscle is a primary component of lean body mass, in the instance of HGH, the spike is not muscular. The increase in lean body mass is attributed to a simultaneous decrease in fat related tissue, higher fluid retention, and an increase in connective tissue, as opposed to muscle hypertrophy. No muscle increase was observed in laboratory testing. This makes an athlete’s muscles more visible, but does not lead to an increase of the strength-producing contractile tissue, and therefore HGH does not enhance muscular strength capabilities. As concluded by experiments performed at Washington University in St. Louis, HGH can increase the size of muscles, but not muscle strength. Thus, while HGH can alter an athlete’s appearance, it will not boost his athletic capabilities.

There is still much debate amongst researchers about whether the more noticeable muscles are larger in size as well. However, muscle mass is not synonymous with muscle strength. Some experts claim that HGH will build muscle mass through raised insulin-like growth factors levels leading to heightened protein

96 “Human growth hormone”. Harvard Health Letter. Harvard Health Publications. 2008-01-01. https://www.health.harvard.edu/newsletters/Harvard_Health_Letter. “Used by athletes to build muscle, human growth hormone may in fact make muscles bigger, but not necessarily stronger. HGH is also marketed as an anti-aging treatment, but there are no data about possible side effects from long-term use.”
100 Id.
synthesis without any side effects,\textsuperscript{103} while other researchers argue that there have been no such findings among young, healthy adults.\textsuperscript{104} The latter argument carries more support by research discoveries that HGH affects muscle protein synthesis no different than a placebo.\textsuperscript{105}

The most significant benefit an athlete receives from using HGH is its anabolic effects on the connective tissue within the muscles. These effects “may promote resistance to injury or faster repair, but would make the muscle no more capable of force generation.”\textsuperscript{106} HGH can make an athlete better equipped to avoid or recover from a sports injury.\textsuperscript{107}

Congress has proposed legislation to add HGH to the list of Schedule III drugs under the Controlled Substances Act,\textsuperscript{108} under which a person possessing HGH without a valid prescription could be prosecuted for possession of a controlled substance.\textsuperscript{109}

\textsuperscript{108} 21 U.S.C § 812 (2006)
In addition to criminalizing the possession of HGH as explained above, Congress has drafted and threatened to enact several bills that would mandate suspicionless, random blood drug testing of professional baseball players. This section will outline each bill’s main features.

(A) **Integrity in Professional Sports Act**

The purpose of IPSA is “to protect the health and safety of all athletes, to promote the integrity of professional sports by establishing minimum standards for the testing of steroids and other performance-enhancing substances and methods by professional sports leagues, and for other purposes.”\(^{110}\) The bill dictates the testing procedures for the professional sports leagues.\(^{111}\) First, there will be no notice before testing, i.e., suspicionless drug testing.\(^{112}\) The frequency of the testing will be not fewer than five times annually—with at least three tests during the “professional sports season”\(^{113}\) and at least two tests in the off-season.”\(^{114}\) “The methods, policies and procedures”\(^{115}\) of administration and analysis will be determined by an “independent entity.”\(^{116}\) The analysis will be conducted in a laboratory approved by the U.S. Anti-

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\(^{110}\) See Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005), (the bill would apply to MLB, the Minor Leagues, the NFL, the NBA, and the NHL).

\(^{111}\) Id. § (6)(c).

\(^{112}\) Id. § 6(c)(1)(B).

\(^{113}\) Id. § 4(8).

\(^{114}\) Id. § 6(c)(1). “The term 'off-season’ for each professional athlete means the period of time outside the professional sports season for that athlete.” Id. § 4(4).

\(^{115}\) Id. § 6(c)(2)(A).

\(^{116}\) IPSA defines an “independent entity” as

(A) A not-for-profit organization—

(i) that conducts sport drug testing and adjudication

(ii) that does not have a single professional sports league as its primary source of revenue; and
Doping Agency and located within the United States.\textsuperscript{117} The penalties for a positive test will increase with repeated offenses; players will receive a half-season suspension for a first offense, a full season suspension for a second offense, and a lifetime ban for a third offense.\textsuperscript{118}

The bill also provides an enforcement mechanism if the professional sports league does not comply.\textsuperscript{119} The Federal Trade Commission (FTC) polices violations of IPSA as unfair or deceptive acts or practices under 15 U.S.C. § 41.\textsuperscript{120} The FTC may seek civil penalties not to exceed $1 million for every day the league is not in compliance, and the FTC may delegate enforcement of this Act to any agency of the U.S. Government.\textsuperscript{121}

Perhaps most importantly for the purposes of this Note, the authors of IPSA clarified the constitutional reach of the Act in section 9(a), which reads, “Non-Governmental Entities--Nothing in this Act shall be construed to deem the United States Anti-Doping Agency, any independent entity, or any professional sports league, an agent of or an actor on behalf of the United States Government.”\textsuperscript{122}

(B) \textbf{Clean Sports Act & Drug Free Sports Act}

(iii) whose board of directors and employees are not selected by a professional sports league or any person affiliated with a professional sports league; or
(B) the United States Anti-Doping Agency

\textsuperscript{117} Id. § 4(3).
\textsuperscript{118} Compare Penalties Decreased to Get Support for Steroids Bill, ESPN.com, Nov. 8, 2005, http://sports.espn.go.com/espn/news/story?id=2217767 (explaining that IPSA moved away from the more stringent “Olympic model”--a two year suspension for the first offense and a lifetime ban for the second), with S. 1960 § 6(d)(1) (detailing the original penalty structure of IPSA which adhered to the “Olympic model”).
\textsuperscript{119} S. 1960 § 7.
\textsuperscript{120} Id. § 7(a).
\textsuperscript{121} Id. § 7(b).
\textsuperscript{122} Id. § 9(a).
Many similarities exist between the Clean Sports Act (CSA)\(^\text{123}\), introduced by the House Committee on Government Reform, and the Drug Free Sports Act (DFSA), introduced by the House Committee on Energy and Commerce.\(^\text{124}\) Both bills establish drug testing standards for professional sports that follow the “Olympic Model” with respect to what are deemed banned substances, and the applicable penalties for a positive test.\(^\text{125}\) Again, it must require blood testing? (It does include blood testing) The penalties consist of a two-year suspension for the first violation and a lifetime ban for the second.\(^\text{126}\)

However, there are several differences between the bills. The CSA is under the watch of The Office of National Drug Control Policy Director (the Drug Czar).\(^\text{127}\) The major professional sports leagues must implement testing policies and procedures “which shall be independently administered and shall be consistent with and as stringent as the doping control standard established by the United States Anti-Doping Agency.”\(^\text{128}\) At a minimum, the CSA requires at least three suspicionless, random tests during the season of play, and at least two during the off-season for a total of five tests.\(^\text{129}\) Again, this must include blood testing? (It does include blood testing) The penalties for noncompliance with the CSA by a major professional sports league are enforced by the FTC.\(^\text{130}\)

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\(^{125}\) Id.


\(^{127}\) H.R. 2565 § 723(3).

\(^{128}\) Id. § 724(b).

\(^{129}\) Id. § 724(b)(1); H. Comm. on Gov’t Reform, supra note 110.

\(^{130}\) H.R. 2565 § 726.
In contrast, the purpose behind the DFSA is not explicitly stated. The Secretary of Commerce has the power to issue regulations that the “professional sports associations” are required to follow. Similar to the CSA, the DFSA requires a minimum of five suspicionless, random tests “each year that such athlete is participating in the activities organized by the professional sports association.” This includes the “season of play” and the “off-season.” The penalties for noncompliance with the DFSA by a professional sports association are enforced by the Secretary of Commerce.

(C) Professional Sports and Responsibility Act of 2005

Introduced by the House Judiciary Committee, the Professional Sports and Responsibility Act of 2005 (PSRA) directs the Justice Department to establish a Federal Office of Steroids Testing Enforcement and Prevention. The purpose behind the PSRA is not explicitly stated. The PSRA requires all “major professional leagues” to adopt the standard and procedures for the suspicionless, random testing for performance-enhancing and other controlled substances and the penalty structure for a positive test as determined by the Attorney General. The penalties for noncompliance with the PSRA by a major professional league are administered by the Attorney General.

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132 Id. § 3(a)(1).
133 Id.
134 Id. § 4.
136 H.R. 3942 § 4(a).
137 Id. § 6.
VI: The Constitutionality of the Proposed Legislation

Although federal legislation has been proposed, none of the proposed bills states the method of testing, i.e. blood or urine testing, and up to this point MLB has employed only urine testing for performance-enhancing drugs. However, no urine test exists for the detection of HGH. The U.S. Supreme Court has deemed that both urine and blood tests constitute searches within the meaning of the Fourth Amendment.\(^\text{138}\)

The Fourth Amendment states:\(^\text{139}\)

> 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.\(^\text{139}\)

The Fourth Amendment protects against unreasonable searches. Generally, searches that are conducted without probable cause or individualized suspicion are considered unreasonable.\(^\text{140}\) However, there are certain cases in which suspicionless

\(^{139}\) U.S. Const. Amend. IV
searches are considered constitutional. In making the determination of whether the Fourth Amendment applies to the search in question, the significance of the invasion of privacy, the nature of the privacy interest affected and the nature of the intrusion, and the Government’s legitimate interest supporting the search are the essential factors.


a. State Action

The MLB Program has been effective in removing steroids from baseball, but its effect does not extend to HGH, as it does not provide for players to be tested for the now-banned hormone, which can only be detected through blood testing.

In *Skinner v. Railway Executives Ass’n*, the Supreme Court provided the framework for determining whether the Fourth Amendment should be applied to suspicionless drug testing by a private employer. There, the court employed a “state action” test. It explained that, “whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'”

A state action analysis

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141 See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-829 (2002). The Court in *Skinner* stated that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.” *Skinner*, 489 U.S. at 624).

142 See infra Part I.D.

143 If a scientifically valid urine test existed to test for HGH, this would not be the case. However, the only valid test that currently exists is a blood test.


145 Id. at 614-615

146 Stated by Justice Anthony Kennedy in an opinion for the majority.
considers “the degree of the Government’s participation in the private party’s activities on a case by case basis.”147

In *Skinner*, a federal statute authorized the Secretary of Transportation to regulate all railroad employees.148 As a result, the Federal Railroad Administration (FRA) imposed regulations that authorized (but did not require) railroads to administer various suspicionless tests (blood, breath, and urine) for drugs and alcohol.149 The Government’s testing procedures were specifically tailored to deter “railway employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs.”150

The Court held that the suspicionless testing procedure was reasonable under the Fourth Amendment because it was designed to prevent accidents and limited to employees who were in control of the trains. In the context of safety, “an individualized suspicion requirement would impede the railroad’s ability to obtain valuable information about the causes of accidents or incidents and how to protect the public, since obtaining evidence giving rise to the suspicion that a particular employee is impaired is impracticable in the chaotic aftermath of an accident when it is difficult to determine which employees contributed to the occurrence and objective indicia of impairment are absent.”151

Furthermore, the court commented on these particular features of the government’s action that helped it to find “that the Government did more than adopt a

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147 *Skinner*, 489 U.S. at 614.
149 *Skinner*, 489 U.S. at 606. (“The Supreme Court found coercion sufficient for state action to exist in *Skinner v. Ry. Labor Executives Ass’n*….involving the State ordering a private actor to perform specified functions.”).
150 Id.
151 Id.
passive position toward the underlying private conduct.”\textsuperscript{152} These safety precaution features are applicable in situations where the government’s “regulations … pre-empt state laws, rules or regulations covering the same subject matter, and are intended to supersede any provision of a collective bargaining agreement, or arbitration award construing such agreement.”\textsuperscript{153}

There, the Supreme Court commented on particular features of government action that helped it to find “that the Government did more than adopt a passive position toward the underlying private conduct.” These features include when “the regulations… pre-empt state laws, rules, or regulations covering the same subject matter, and are intended to superseded any provision of a collective bargaining agreement, or arbitration award construing such an agreement.”\textsuperscript{154} When these factors are present, they establish a sufficient degree of state action to implicate the Fourth Amendment.\textsuperscript{155}

Although the holding of the Court in \textit{Skinner} permitted the random testing (including blood) of railway employees, the distinction that must be made in relation to MLB players is that the determinative factor in \textit{Skinner} was the need for random, suspicionless testing for the clear objective of safety. Abandoning the “individualized suspicion” requirement in \textit{Skinner} served the specific purpose of allowing the Government to collect invaluable information in the event of railway accident.

The state action test was applied in the U.S. Court of Appeals for the Seventh Circuit case \textit{Dimeo v. Griffin},\textsuperscript{156} which directly addressed suspicionless drug testing in professional sports. In \textit{Dimeo}, the Seventh Circuit applied the Fourth Amendment to determine the constitutionality of an Illinois Racing Board regulation mandating

\begin{thebibliography}{9}
\bibitem{152} Id.
\bibitem{153} Id.
\bibitem{154} 75 FDMLR 1777; citing \textit{Skinner} at 615.
\bibitem{155} Id.
\end{thebibliography}
suspicionless drug testing of jockeys and other racing participants. The court noted that horse racing is a “heavily regulated activity” and therefore did not address the question of whether the Fourth Amendment applied, proceeding on the basis that it was applicable. The Seventh Circuit proceeded on this basis because of the explicit extensive government participation in the private entity.

The Court stated that the owners of the racetracks as private entities could have implemented suspicionless drug testing “without coming within the scope of the Fourth Amendment.” However, the Court stated that the Illinois Racing Board could not rely upon purely generic interest of preserving integrity of horse racing to justify random drug testing of licensees, aside from a claimed decrease in state revenue. Any such generalized “integrity” justification of state-sponsored activity could serve equally well to support random urinalysis of state judges (for the State has an interest in assuring the public of their honesty), of state university professors (for the State has an interest in preserving students’ perceptions that teachers are law-abiding citizens) or even of state legislators (for the State has an interest in preserving the perception of an honest legislative process, free of “outside influences”). Yet no one has even suggested the extreme position that such widespread testing is permitted because of the State’s concern over integrity.

b. Fourth Amendment Analysis

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157 Id. at 680-85.
158 Id. at 681.
159 Id. at 680-85
160 See Dimeo, 943 F.2d at 681-83. (In the United States, generally, each state that conducts horse racing will license owners, trainers, and others involved in the industry, set racing dates, and enforce drug restrictions and other rules.)
161 Id. at 683.
162 Id.
If the Fourth Amendment is found to apply to the proposed federal legislation, the question becomes whether the bills are constitutional. The central question to determining the constitutionality of a search is whether it is reasonable: “‘reasonableness...is the touchstone of the constitutionality of a governmental search.’”¹⁶³ Five Supreme Court cases provide the framework for determining when a drug test is a reasonable search under the Fourth Amendment: *Skinner; National Treasuries Union v. Von Raab; Vernonia School District 47J v. Acton; Chandler v. Miller; and Board of Education v. Earls*.¹⁶⁴ To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.¹⁶⁵ But particularized exceptions to the main rule are sometimes warranted based on “special needs, beyond the normal need for law enforcement,”¹⁶⁶ that create a compelling governmental interest.

When such “special needs” are alleged, courts must undertake a context-specific inquiry, closely examining the competing private and public interests advanced by the parties.¹⁶⁷ Then, the courts must balance any alleged “special need” against the degree of intrusion on the individuals privacy interest.¹⁶⁸ Thus, “in limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”¹⁶⁹ These “limited circumstances” have justified

¹⁶⁴ 75 FDMLR 1777
¹⁶⁷ See *Von Raab*, 489 U.S., at 665-666.a
¹⁶⁸ Earls 536 U.S. at 829-30.
¹⁶⁹ Chandler 520 U.S. at 314 (quoting Skinner 489 U.S. at 624).
brief stops for questioning or observation at a fixed Border Patrol checkpoint,\textsuperscript{170} or at a sobriety checkpoint,\textsuperscript{171} and administrative inspections in “closely regulated” businesses.\textsuperscript{172}

With respect to drug testing, the “precedents establish that any proffered special need for drug testing must be substantial--important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”\textsuperscript{173} Under this balancing test, the proposed federal legislation violates the Fourth Amendment.

The initial step is to determine the significance of the privacy invasion, which is a two-part inquiry: the nature of the intrusion and the individual’s expectation of privacy.\textsuperscript{174} Then, if the invasion of privacy is deemed not significant, the invasion is balanced against the government’s special need,\textsuperscript{175} which must be a “compelling,”\textsuperscript{176} “substantial,”\textsuperscript{177} or “legitimate” governmental interest.\textsuperscript{178} Furthermore, to prove that special needs do exist, the Government must also show “the nature and immediacy of [their] concerns and the efficacy of the [regulation] in meeting them.”\textsuperscript{179}

\textsuperscript{173} Id. at 318 (Courts must examine the competing private and public interests advanced by the parties. Summarizing the balancing tests, the Sixth Circuit stated, “In reviewing the reasonableness of a drug testing policy, the Court has instructed that we weigh the extent of the intrusion upon the privacy interest of the individuals being tested against the promotion of the government’s proffered special need in conducting the tests.” Int’l Union v. Winters, 385 F.3d 1003, 1007 (6th Cir.2004) (citing Earls, 536 U.S. at 830).
\textsuperscript{174} Earls, 536 U.S. at 834.
\textsuperscript{175} Id. at 830.
\textsuperscript{176} Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989); Skinner, 489 U.S. at 628.
\textsuperscript{177} Chandler, 520 U.S. at 318.
\textsuperscript{178} Earls, 536 U.S. at 829 (Citing 75 FDMLR 1777)
\textsuperscript{179} Id. at 834; see also Chandler, 520 U.S. at 319-20. But see Skinner, 489 U.S. at 634-35 (rejecting the part of the Court’s opinion relying on “a deterrence rationale”). (Citing 75 FDMLR 1777)
When the invasion is deemed non-invasive and the individual’s expectation of privacy is diminished\(^{180}\), “if the ‘special needs’ showing is made, the State cannot be faulted for excessive intrusion.”\(^{181}\)

The only Supreme Court case based on suspicionless drug testing in the private sector is *Skinner*.\(^{182}\) In *Skinner*, a federal statute authorized the Secretary of Transportation to regulate railroad employees. The Secretary of Transportation then delegated the power to the FRA to impose the drug-testing regulations.\(^{183}\) The Court applied a state action test to determine whether the Fourth Amendment was applicable to the regulation, and held that it was.\(^{184}\) The California Court of Appeals held that such random drug-testing regulations did not unconstitutionally infringe upon the privacy interests of railroad workers. The Court reasoned that although the degree of intrusion was great, the special needs test was satisfactorily met, as the Government’s interest in regulating the safety of passengers on railways was indeed compelling, and therefore outweighed the privacy intrusion imposed by the random, suspicionless blood testing of railroad employees.

In *Chandler v. Miller*, there, candidates for high office in Georgia brought an action challenging the constitutionality of a statute requiring all candidates to submit to, and pass, a urine drug test in order to qualify for state office. The Supreme Court held

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\(^{180}\) Individuals can be determined to have a diminished expectation of privacy in specific contexts. See Earls, 536 U.S. at 830-31; Chandler 520 U.S. at 321; Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656-57 (1995); Von Raab, 489 U.S. at 672, Skinner, 489 U.S. at 627 (majority opinion). (Citing 75 FDMLR 1777).

\(^{181}\) Chandler, 520 U.S. at 318.

\(^{182}\) The Seventh Circuit found that the Fourth Amendment applied in determining that a state regulation by the Illinois Racing Board mandating suspicionless drug testing for jockeys and other participants in horse racing in Illinois was constitutional. See Dimeo v. Griffin, 943 F.2d 679, 680-81, 685 (7th Cir. 1991).

\(^{183}\) Skinner, 489 U.S. at 606.

\(^{184}\) Id. at 614.
that Georgia’s requirement did not fit within the “closely guarded” category of constitutionally permissible suspicionless searches.\textsuperscript{185}

Georgia’s testing method was relatively noninvasive; therefore, if the “special need” showing had been made, the State could not be faulted for excessive intrusion. However, Georgia failed to show a special need that was substantial enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.\textsuperscript{186} Georgia asserted no evidence of a drug problem among the State’s elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed is symbolic, not “special.” The Fourth Amendment shields society from state action that diminishes personal privacy for a symbol’s sake.\textsuperscript{187}

In \textit{Von Raab}, the Court upheld the constitutionality of a U.S. Customs (see sheet for missing word) drug-testing program that required urine specimens of employees who applied for promotion to positions involving interdiction of illegal drugs. The positions also required the employees to carry firearms or handle classified materials.\textsuperscript{188} The Supreme Court held; (1) that the Customs Service’s drug-testing program was subject to the reasonableness requirement of the Fourth Amendment; and (2) the suspicionless drug-testing of employees applying for promotion to positions involving interdiction of illegal drugs or requiring them to carry firearms was reasonable under the Fourth Amendment.\textsuperscript{189}

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\begin{itemize}
\item[\textsuperscript{185}] \textit{Chandler}, 520 U.S. 305
\item[\textsuperscript{186}] Id.
\item[\textsuperscript{187}] Id.
\item[\textsuperscript{188}] \textit{Von Raab}, 489 U.S. 656
\item[\textsuperscript{189}] Id.
\end{itemize}
}
The Custom Service’s mission of preventing the illegal trafficking of drugs would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions. Additionally, a warrant would not provide much additional protection of personal privacy, as the Custom Service did not make any discretionary determinations to search potential employees based on a judgment that certain conditions were present, but rather the drug-testing procedure was automatic when an employee elected to apply for, and thereafter pursue, a covered position.\textsuperscript{190}

Finally, in \textit{Board of Education of Independent School District No. 92 of Pottawatome County v. Earls}, high school students challenged the constitutionality of the Tecumseh, Oklahoma, School District’s suspicionless urinalysis drug testing policy. The Supreme Court held that the School District’s policy, which required all students who participated in competitive extracurricular activities to submit to drug testing, was a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its students, and therefore did not violate the Fourth Amendment.\textsuperscript{191}

The Court upheld the suspicionless drug-testing in \textit{Earls} because the students affected by the School District’s policy had a limited expectation of privacy; the degree of intrusion caused by the policy was negligible given the method of collecting the urine samples; and the only consequence of a failed drug test was to limit the student’s privilege of participating in extracurricular activities.\textsuperscript{192}

Furthermore, in the public school context, a search may be reasonable when supported by “special needs” beyond the normal need for law enforcement. Because

\textsuperscript{190} Id.\textsuperscript{191} Earls, 536 U.S. 822\textsuperscript{192} Id.
the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children, a finding of individualized suspicion may not be necessary. In upholding the suspicionless drug testing of athletes, the *Vernonia* Court conducted a fact-specific balancing of the intrusion of the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.

Students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy, as do athletes. Off-campus travel and team locker rooms in addition to specialized required behavior (team conduct, attire, etc...) that do not apply to the student population as a whole contribute to the finding of the student’s limited expectation of privacy. Each of them must abide by the athletic association’s rules, and a faculty sponsor monitors students for compliance with the various rules dictated by the clubs and activities. Such regulation further diminishes the schoolchildren’s expectation of privacy.

This regulation is not present among MLB players. Although MLB players are subject to comply with various rules, these terms and conditions are collectively bargained for. Furthermore, any additional code of conduct a player is required to adhere to by his team outside of the League’s authority, is privately implemented by each team, and not regulated by a governmental entity.

(2) The Federally Legislated Mandatory Suspicionless Blood-Testing of MLB Players is Unconstitutional Under the Fourth Amendment.

The degree of intrusion that would be imposed on MLB players would be extensive and more invasive than any other testing procedure that has previously been

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194 Earls, 536 U.S. 822
upheld by the Supreme Court. Additionally, the players do not have a diminished expectation of privacy as they are not schoolchildren, nor is MLB part of a heavily regulated industry, nor is there a sufficient special need to overcome the substantial intrusion into the players’ privacy.

Furthermore, MLB players do not have a diminished expectation of privacy. Comparing the privacy interest of MLB players to the privacy interest of public school students, and public and private employees in cases in which the Court has found minimal or diminished expectations of privacy, MLB players would not be found to have a diminished expectation of privacy.

However, *Earls* and *Vernonia* can be distinguished. Public school students have a diminished expectation of privacy.\(^{195}\) (In *Earls*, the Supreme Court held that a student’s privacy interest is limited in a public school environment where the State is responsible for maintaining their well-being. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease.)\(^{196}\) The *Earls* Court noted further “the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences.”\(^{197}\)

*Von Raab* is distinguished because it “must be read in its unique context.”\(^{198}\) The Customs Service defended its officer drug-testing program in part as a way to

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\(^{195}\) Id.

\(^{196}\) Id. at 831 (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”) *See T.L.O.*, 469 U.S. at 350.

\(^{197}\) Id. at 833 (“Rather, the only consequence of a failed drug test is to limit the student’s privilege of participating in extracurricular activities...Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.”)

\(^{198}\) *Chandler*, 520 U.S. at 321. “Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use.”
demonstrate the agency’s commitment to enforcement of the law. However, the Chandler Court did not rely upon that justification, stating that “if a need of the ‘set a good example’ genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in Skinner, Von Raab, and Vernonia ranked as ‘special’ wasted many words in entirely unnecessary, and perhaps even misleading elaborations. The Court in Chandler noted that “however well meant, the candidate drug test devised diminished(d) personal privacy for a symbol’s sake. The Fourth Amendment shields society against that state action.”

Skinner can also be distinguished because “by reason of their participation in an industry that is regulated pervasively to ensure safety,” and the “minimal” intrusiveness of the regulation, railroad employees have diminished expectations of privacy. However, the privacy interest of MLB players does not meet any of these specific conditions for a diminished expectation of privacy.

MLB players do not have a diminished expectation of privacy and are not involved in ensuring safety or aiding interdiction efforts that would satisfy the special needs test. The needs revealed can best be described as “symbolic” and not “special.” Therefore, the MLBPA should not concede to the pressure from threatened federal legislation, and refuse to consent to permit its players to be subject to random, suspicionless blood tests.

200 Id at 321-22. (MLB players, like political candidates, “do not perform high-risk, safety sensitive tasks.”) Citing 75 FDMLR 1777.
Conclusion

Congress does not have the authority to implement its own drug testing programs and procedures into Major League Baseball without consent from the MLB Players’ Association union. The case law clearly illustrates that MLB Players do not fall into any of the categories in which random, suspicionless blood testing has been previously permitted.

Unless the MLB owners and MLBPA mutually agree to blood testing for performance enhancing drugs via the collective bargaining process, any attempt by the Federal Government to even influence the collective bargaining process should be deemed state action and a violation of the players’ Fourth Amendment rights. Furthermore, the Federal Government’s interest in cleansing professional baseball of PEDs does not outweigh the privacy interest or the invasive bodily intrusion that would result from mandatory, random, and suspicionless blood tests. Thus, as the Government’s interest is not compelling, it does not fall within the exception of the special needs doctrine, as the so-called need is nothing more than symbolic.