

# CONGRESSIONAL ATTEMPTS TO “STRIKE OUT” STEROIDS: CONSTITUTIONAL CONCERNS ABOUT THE CLEAN SPORTS ACT

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*“Experience should teach us to be most on guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”*<sup>1</sup>

—Justice Louis D. Brandeis

## INTRODUCTION

In May of 2005, Senator John McCain introduced a bill in the Senate titled The Clean Sports Act of 2005 (“CSA”).<sup>2</sup> The bill sought to require all players in the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball to submit to mandatory uniform testing for anabolic steroids.<sup>3</sup> The contents and objectives of the bill have

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1. *United States v. Olmstead*, 277 U.S. 438, 479 (1925) (Brandeis, J., dissenting).

2. S. 1114, 109th Cong. (2005). Its counterpart was also introduced in the House of Representatives. H.R. 2565, 109th Cong. (2005). This bill did not become law during the 109th Congress. However, given that the terms of the CSA were nearly identical to those of at least two other bills, *see infra* notes 4–5, legislation that would impose uniform mandatory drug testing in all professional sports leagues is quite likely to resurface during future sessions of Congress. For purposes of this Note, I will refer to the CSA when I discuss this type of legislation.

3. Congress has the power to enact a bill like the CSA through the Interstate Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court held that Congress has the power to regulate 1) channels of interstate commerce, 2) instrumentalities of interstate commerce and persons or things in interstate commerce, and 3) activities that substantially affect interstate commerce. 514 U.S. 549, 558–59 (1995).

appeared in Congress under other names, such as The Drug Free Sports Act<sup>4</sup> and the Integrity in Professional Sports Act (“IPSA”).<sup>5</sup> The authors of this bill articulate several purposes behind the CSA—the most important being a reduction in the use of anabolic steroids among teenagers.<sup>6</sup> The Act discusses adverse health effects that result from the use of anabolic steroids, cites several studies confirming that the teenage use of these performance-enhancing steroids is becoming more common, and asserts that the problem is “of national significance.”<sup>7</sup>

The writers of the CSA propose that there is a causal connection between the use of performance-enhancing drugs by professional athletes and the use of these substances by children and teenagers. These assertions are based on several surveys and studies, as well as testimony from medical and health experts.<sup>8</sup> Thus, while the CSA also hopes to “return integrity to professional sports,”<sup>9</sup> it seems the main thrust of the bill and others like it is to discourage younger athletes, who look to professional athletes as role models, from thinking of anabolic steroids as a normal, or even necessary, supplement to athletic training.

If passed, the CSA would require that each athlete be randomly tested for performance-enhancing substances five times throughout the calendar year, including at least twice in the off-season.<sup>10</sup> The bill does not identify who would administer the testing. An athlete who tests positive the first time would be suspended from his league for two years, and a second positive test would result in a lifetime ban from all professional leagues.<sup>11</sup> Additionally, while the player is guaranteed the right to a “fair, timely, and expedited hearing” if he should wish to dispute a positive test,<sup>12</sup> the appropriate league would be required to publicly disclose within 30 days the identity of any athlete testing positive, as well as the prohibited substance found in the test results.<sup>13</sup> Finally, any league that violates the

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Thus, Congress can regulate MLB, the NBA, the NFL, and the NHL, as professional sports are undoubtedly activities that have a substantial effect on interstate commerce.

4. H.R. 1862, 109th Cong. (2005).

5. S. 1960, 109th Cong. (2005). One commentator analyzed the IPSA, and concluded that the proposed legislation is constitutional. Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777 (2006). The IPSA, however, does not contain a key term present in the CSA: the requirement that the names of athletes who test positive for steroids, as well as the substance found that caused the positive test, be publicly disclosed. This provision is a significant intrusion on privacy, and may tip the scale in favor of finding the CSA unconstitutional. For further discussion of this aspect of the CSA, see *infra* Part III.B.

6. S. 1114, § 2(a)(1)–(8).

7. *Id.* § 2(a)(1). The writers of the CSA also found that “[e]xperts estimate that over 500,000 teenagers have used performance-enhancing substances.” *Id.* § 2(a)(2).

8. *Id.* § 2(a)(4)–(8).

9. *Id.* § 2(a)(10).

10. *Id.* § 4(b)(1).

11. *Id.* § 4(b)(7)(A)(i)–(ii).

12. *Id.* § 4(b)(8)(B).

13. *Id.* § 4(b)(9)(A).

requirements of the minimum testing standards may face a civil penalty of up to \$1,000,000 for each violation.<sup>14</sup>

While the CSA did not pass in its current form, the federal government has a vested interest in curbing the anabolic steroid problem that is plaguing professional sports, as it is unlikely that this issue will fade away. If enacted, a bill that requires professional sports leagues to randomly test every athlete, without any individualized suspicion, must ultimately survive constitutional scrutiny. Most notably, the CSA implicates an individual's right to not be subjected to unreasonable searches and seizures, as guaranteed by the Fourth Amendment.<sup>15</sup>

This Note examines the United States Supreme Court's interpretation of the Fourth Amendment and its protections in terms of drug testing. When it finds a special need for suspicionless searches, the Supreme Court applies a balancing test to consider whether the search is nonetheless reasonable under the Fourth Amendment.<sup>16</sup> The Court has held that certain government interests outweigh an individual's privacy interests, making the drug testing a reasonable search.<sup>17</sup> These possible governmental interests include potential threats to public safety, integrity of the work force, and protection of sensitive information.<sup>18</sup>

This Note examines the prominent court decisions that have considered the issue of drug testing in the Fourth Amendment context. It analyzes the reasoning offered by courts in applying the balancing test and uses the various judicial justifications to demonstrate how government-imposed random, suspicionless drug testing of professional athletes would violate the Fourth Amendment. Ultimately, this Note concludes that a bill like the CSA is unconstitutional, and explores other means of achieving these congressional goals.

## I. DRUG TESTING BY URINALYSIS IS A FOURTH AMENDMENT SEARCH

The Fourth Amendment of the United States Constitution provides, in part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”<sup>19</sup> In his frequently cited concurring opinion in *Katz v. United States*, Justice Harlan outlined a two-prong test for determining when a government intrusion constitutes a Fourth Amendment search.<sup>20</sup> An intrusion is a search if the person has an actual expectation of privacy

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14. *Id.* § 6(b)(2). Congress asserts that its power to impose a monetary fine on a professional sports league or to enjoin it from operating comes from the Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2006). S. 1114, § 6.

15. U.S. CONST. amend. IV.

16. *See infra* note 49 and accompanying text.

17. *See infra* Part II.A.

18. *See infra* Part II.A.

19. U.S. CONST. amend. IV.

20. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

and society considers that expectation to be reasonable.<sup>21</sup> Justice Harlan's test is now the standard in Fourth Amendment analysis.<sup>22</sup>

In *Skinner v. Railway Labor Executives' Ass'n.*, the United States Supreme Court applied Justice Harlan's test and explicitly held that drug testing through urinalysis is a search within the meaning of the Fourth Amendment.<sup>23</sup> In its analysis, the Court accepted the notion that the railway workers have an actual expectation of privacy in their bodily fluids, noting that a urinalysis test can reveal a slew of personal medical information, such as whether one is pregnant or has diabetes.<sup>24</sup> Furthermore, that expectation of privacy is reasonable, as "[t]here are few activities in our society more personal or private than the passing of urine. . . . [I]ndeed, its performance in public is generally prohibited by law as well as social custom."<sup>25</sup>

While urinalysis is a search within the meaning of the Fourth Amendment, the analysis does not end there. An individual is not protected from unreasonable searches by a private party; the Fourth Amendment only protects a person against unreasonable searches conducted by the government or by a private party acting as an agent or instrument of the government.<sup>26</sup> In order to determine whether a private party is acting as an agent or instrument of the government, one must consider "the Government's participation in the private party's activities."<sup>27</sup>

In *Skinner*, the Federal Railroad Administration ("FRA"), an agency created by Congress in 1966 to regulate the railroads,<sup>28</sup> began requiring blood and urine tests of railroad employees to check for drug and alcohol abuse.<sup>29</sup> These tests were only administered after the employee was involved in a train accident.<sup>30</sup> The employees' union brought suit, arguing that this testing violated the Fourth Amendment.<sup>31</sup> The Court began its analysis by determining that the government was sufficiently involved in the FRA's testing policy, so as to make the testing a government activity.<sup>32</sup> Although the government did not compel private railroads to conduct this testing, it "did more than adopt a passive position toward the underlying private conduct."<sup>33</sup> For instance, the government "removed all legal barriers to the testing authorized . . . and indeed ha[d] made plain not only its strong preference for testing, but also its desire to share the fruits of such

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21. *Id.*

22. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 27–28 (2001).

23. 489 U.S. 602, 617 (1989).

24. *Id.*

25. *Id.* (quoting *Nat'l Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and rev'd in part on other grounds*, 489 U.S. 656 (1989)).

26. *Id.* at 614.

27. *Id.* at 614–15.

28. *See generally* Federal Railroad Administration, About the FRA, <http://www.fra.dot.gov/us/content/2> (last visited Oct. 17, 2007).

29. *Skinner*, 489 U.S. at 606.

30. *Id.*

31. *Id.* at 612.

32. *Id.* at 615–16.

33. *Id.* at 615.

intrusions.”<sup>34</sup> The Court found that the government’s encouragement and support was enough to implicate the Fourth Amendment.<sup>35</sup>

The Court also noted that “[t]he fact that the Government has not *compelled* a private party to perform a search does not, by itself, establish that the search is a private one.”<sup>36</sup> This statement strongly implies that if the government *were* to compel a private party to do a search, then the search would probably be considered a search by an agent of the government.

The Clean Sports Act, and any other bill that would establish mandatory, random, and suspicionless drug testing of professional athletes, clearly implicates the Fourth Amendment. Although the CSA does not specify the method of testing, professional leagues would most likely use urinalysis, because it is the current method of testing employed by all professional sports in the United States and by the United States Anti-Doping Agency, which monitors testing for the Olympic Games.<sup>37</sup> However, the Supreme Court has also held that blood tests and breathalyzer tests are searches under the Fourth Amendment.<sup>38</sup> Thus, any form of drug testing adopted by the leagues would likely be considered a search.

Furthermore, the search would be one conducted by the government, or at least by an agent of the government, as required to implicate the Fourth Amendment. If Congress enacted the CSA, the listed professional sports leagues would become agents of the government, at least with respect to their roles in implementing the federally mandated drug testing. Through the CSA, the federal government would require MLB, the NBA, the NFL, and the NHL to drug test all of their athletes, which is clearly “encouragement, endorsement, and participation.”<sup>39</sup> Furthermore, Congress seeks to “share the fruits” of this testing, not only by ascertaining the names of players who test positive and the substance that caused the positive result, but also by fining any league that does not comply with the minimum testing standards.<sup>40</sup> Based on the Supreme Court’s analysis in *Skinner*, courts would surely find that when the government directs a professional sports league to randomly drug test its athletes, that league becomes an agent of

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34. *Id.*

35. *Id.* at 615–16.

36. *Id.* at 615 (emphasis added).

37. United States Anti-Doping Agency, <http://www.usantidoping.org> (last visited Sept. 24, 2006).

38. *Skinner*, 489 U.S. at 616.

39. *See id.* at 615–16.

40. S. 1114, 109th Cong. § 6(b)(2) (2005).

the government.<sup>41</sup> Under the CSA, then, a player who is randomly drug tested is subject to a government search.<sup>42</sup>

## II. ESTABLISHING WHETHER SUSPICIONLESS DRUG TESTING IS REASONABLE UNDER THE FOURTH AMENDMENT

The next step in determining whether a search violates Fourth Amendment protections is to determine whether that search is unreasonable.<sup>43</sup> Under the proposed legislation, a professional sports league would test its athletes without a warrant and without regard to whether the league has any reason to suspect that a specific athlete is taking performance-enhancing substances.<sup>44</sup> A search without a warrant or without individualized suspicion is inherently unreasonable.<sup>45</sup>

Despite the warrant requirement of the Fourth Amendment, the U.S. Supreme Court has held that there are some situations where the purpose of the search may be frustrated if law enforcement must first obtain a warrant.<sup>46</sup> Presumably, the purpose of drug testing professional athletes randomly and without advance notice is to prevent an athlete from cheating the test, perhaps by flushing his system or refraining from using steroids for a short period of time before the test. Certainly, if a warrant were required in each instance before any athlete could be tested, drug testing of this magnitude would be nearly impossible to execute.

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41. The IPISA contains a key provision that the CSA does not: “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.” S. 1960, 109th Cong. § 9(a) (2005). While this provision reflects the drafters’ intent to avoid claims that the bill is unconstitutional, it is well established that the judiciary ultimately has the final power to make such determinations.

42. Other commentators have not reached this definitive conclusion. Rather, most argue that as much relevant precedent exists to support a finding of state action (meaning that the private party’s actions are attributable to the government) as exists to support the opposite, such that a court could come to either conclusion. *See* Peck, *supra* note 5, at 1802–05; Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibilities of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 669–71 (2007).

43. *See Skinner*, 489 U.S. at 619 (“For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.”).

44. S. 1114, § 4(b).

45. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (noting the usual rule that a search without suspicion will not pass Fourth Amendment scrutiny).

46. *Skinner*, 489 U.S. at 623 (“[T]he delay necessary to procure a warrant . . . may result in the destruction of valuable evidence [of drugs in the blood stream.]”); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (“[R]equiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”); *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967) (“It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.”).

Fourth Amendment jurisprudence requires that a warrantless search be executed only upon “probable cause . . . that the person to be searched has violated the law.”<sup>47</sup> However, courts recognize some circumstances where a person’s privacy interests are minimal compared to the compelling government interests that are furthered by the search, rendering individualized suspicion unnecessary to make the search reasonable.<sup>48</sup> Airport security screening and DUI checkpoints are examples of such circumstances. Thus, when determining whether a warrantless search is unreasonable, courts first determine whether the government has demonstrated a special need for the search; if it has, courts then balance the government’s public interest against the individual’s privacy interest.<sup>49</sup>

#### *A. When Suspicionless Drug Testing Constitutes a Reasonable Search*

Courts have considered the issue of suspicionless drug testing in several contexts. From these decisions, it appears there are three specific government interests that present a “special need” and may override an individual’s privacy interests. These include “integrity of the workforce, public safety, and protection of sensitive information.”<sup>50</sup> Of these three, arguably only the protection of public safety applies to the CSA. Nonetheless, the analysis offered provides helpful insight as to how courts apply the balancing test, and what factors ultimately tip the scale to make a suspicionless search reasonable.

##### *1. The Protection of Public Safety*

In *Skinner*, the FRA implemented a plan to test all railroad employees for drugs and alcohol after “a major train accident,” an “impact accident,” or “any train incident that involves a fatality to any on-duty railroad employee.”<sup>51</sup> The FRA administered these tests, in part, to determine the cause of these accidents, but also to deter employees from using drugs while working.<sup>52</sup> The ultimate goal of the testing scheme was to ensure public safety, as the particular railroad workers targeted by the testing were “engaged in safety-sensitive tasks.”<sup>53</sup> The Court found this governmental interest compelling enough to “justify departures from the usual warrant and probable-cause requirements.”<sup>54</sup> The question for the Court was

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47. *Skinner*, 489 U.S. at 624; *accord T.L.O.*, 469 U.S. at 340; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Sibron v. New York*, 392 U.S. 40, 62–66 (1968).

48. *Skinner*, 489 U.S. at 624.

49. *See, e.g., Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (“[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs . . . it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).

50. *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989). *But see Taylor v. O’Grady*, 888 F.2d 1189, 1199 (7th Cir. 1989) (“A generalized interest in the integrity of the work force will not sustain suspicionless urinalysis testing . . .”).

51. *Skinner*, 489 U.S. at 609 (quotations omitted).

52. *Id.* at 629–30.

53. *Id.* at 620.

54. *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987)).

whether this interest warranted the administration of these tests with absolutely no individualized suspicion.<sup>55</sup>

The Court first considered the employees' privacy interests and noted that they had a reduced expectation of privacy because they were members of a heavily regulated industry.<sup>56</sup> And, while producing a urine sample is a highly private activity, the means by which the sample was produced were minimally intrusive.<sup>57</sup>

The Court also found that the government had a compelling interest in promoting public safety.<sup>58</sup> This type of testing would be an effective way to ensure public safety because it would "deter[] employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place,"<sup>59</sup> as the customary penalty for testing positive was the employee's termination.<sup>60</sup> Moreover, the government has a strong interest in administering these drug tests without the requirement of individualized suspicion.<sup>61</sup> At the scene of an accident, where everyone involved would no doubt be disoriented and disheveled, investigators would have a difficult task determining if any employee exhibited any signs of impairment due to drugs or alcohol, much less enough to merit testing.<sup>62</sup>

The Court held that the government had a compelling interest in protecting public safety by monitoring the drug and alcohol abuse of railroad employees and that suspicionless drug testing was the most effective means of achieving this goal.<sup>63</sup> Because the Court determined that the employees' privacy concerns were not strong enough to outweigh the government's interest, it found the drug testing to be a reasonable search under the Fourth Amendment.<sup>64</sup>

The testing regime in *Skinner* differs from that outlined in the CSA, because the testing in *Skinner* was not random. Rather, the FRA only tested employees after an accident.<sup>65</sup> To be sure, the need to discover the cause of the accident was a factor the Court mentioned when applying the balancing test.<sup>66</sup> Furthermore, the testing subjects in *Skinner* were directly involved in public safety, as they controlled the operation of the national railroad system. While Congress argues that the behavior of professional athletes has profound effects on teenagers' health and safety,<sup>67</sup> the effect on the public at large is hardly analogous to that of railway workers.

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55. *Id.* at 621.

56. *Id.* at 627.

57. *Id.* at 626 ("The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample.").

58. *Id.* at 620.

59. *Id.* at 629.

60. *Id.* at 607.

61. *Id.* at 628.

62. *Id.* at 631.

63. *Id.* at 622–24.

64. *Id.* at 634.

65. *See supra* note 51 and accompanying text.

66. *Skinner*, 489 U.S. at 630.

67. S. 1114, 109th Cong. § 2(a)(1)–(8) (2005).



A railway worker who operates trains, maps out routes, or maintains railroad tracks presents a direct threat to the public if he or she is even slightly impaired. Inebriation may lead to a mismarked route, the failure to switch the tracks, or poor operation of a train, all of which could result in a deadly collision. In contrast, though a professional athlete who uses steroids may inadvertently encourage a teenager to engage in similar behavior, a teenager's fate is hardly in the hands of professional athletes in the way a passenger's fate is directly in the hands of railway workers. Therefore, suspicionless testing under the CSA may not lead to the protection of public safety in the manner contemplated in *Skinner*.

The Supreme Court has also considered the constitutionality of drug testing in a random setting, absent a triggering event. In *Vernonia School District 47J v. Acton*, the school district faced a difficult and urgent situation when it noticed a "sharp increase in drug use" among its students, especially the athletes.<sup>68</sup> Several athletes sustained serious injuries, all as a result of what the coaches believed to be "the effects of drug use."<sup>69</sup> The district's efforts to curb the problem included offering "special classes, speakers, and presentations designed to deter drug use," as well as retaining a drug-sniffing dog; however, these efforts were to no avail.<sup>70</sup> Finally, the district began a drug-testing program for its athletes, as it believed a random testing program would deter drug use, thereby protecting the students' health and safety.<sup>71</sup>

The Court began its analysis by noting that a minor student in a school environment has a reduced expectation of privacy.<sup>72</sup> These expectations "are even less with regard to student athletes" because athletes often shower and undress in front of their teammates and because, simply by being a member of an athletic team, they agree to certain standards of regulation higher than those of the general student population.<sup>73</sup> The Court also noted that the testing was conducted in a relatively private manner.<sup>74</sup> Additionally, only certain school personnel had access to the results of the tests; the school did not give the results to the police, nor did they use the results to discipline the students.<sup>75</sup> Finally, the *Vernonia* Court noted that school districts are the caregivers of their students.<sup>76</sup> The government did not

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68. 515 U.S. 646, 648 (1995).

69. *Id.* at 649.

70. *Id.*

71. *Id.* at 650.

72. *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)). The issue of constitutional rights in the school context continues to make headlines. See generally *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

73. *Id.*

74. The boys used a urinal, but were fully clothed while a testing administrator stood twelve to fifteen feet behind them. *Id.* at 650. Girls went into a bathroom stall and could be heard, but not seen. *Id.* The Court noted that these conditions were hardly different than what one would normally experience in a public restroom. *Id.* at 658.

75. *Id.* at 658.

76. *Id.* at 665 ("The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.").

simply have an interest in promoting the students' safety; rather, it had a *duty* to do so.<sup>77</sup>

Taking into account the students' reduced expectations of privacy and the relatively minor intrusion on their privacy interests, the Court next considered the governmental interest in the drug testing program. Finding that the situation in *Vernonia* was an "immediate crisis,"<sup>78</sup> and that deterring drug use in school children is "at least as important as . . . deterring drug use by engineers and trainmen,"<sup>79</sup> the Court found that the search was reasonable and thus, constitutional.<sup>80</sup> Though the Court upheld this drug testing regime, it "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."<sup>81</sup>

Like student athletes, professional athletes also have a lowered expectation of privacy, though perhaps for different reasons. Professional athletes choose to place themselves in the public eye, and they voluntarily sign contracts with heavily-regulated organizations. However, the federal government is not responsible for those athletes' health and safety in the same way a school is responsible for its students. Moreover, while its drafters indicate that the safety of our nation's children is the primary reason the CSA should be enacted,<sup>82</sup> the link between drug testing professional athletes and deterring drug use among teenagers is much more attenuated than it was in *Vernonia*. Thus, the exceptions that allowed random drug testing of student athletes in *Vernonia* are not necessarily applicable to drug testing of professional athletes under the CSA.

## 2. Promoting Integrity in the Workforce

Another compelling government interest that may outweigh an individual's privacy concerns is the interest in maintaining the honesty and professionalism of federal employees. In May 1986, the Commissioner of Customs for the United States Customs Service announced a plan to drug test all customs employees eligible for promotion to certain positions.<sup>83</sup> The positions at issue were those that involved drug interdiction and those that required an employee to carry a firearm.<sup>84</sup>

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77. *See id.*

78. *Id.* at 663.

79. *Id.* at 661 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

80. *Id.* at 664–65; *see also* *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002). In *Earls*, the Court once again found a school's suspicionless drug testing policy to be constitutional, writing that, just as in *Vernonia*, "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy." *Earls*, 536 U.S. at 836.

81. *Vernonia Sch. Dist. 47J*, 515 U.S. at 665.

82. S. 1114, 109th Cong. § 2(a)(1)–(8) (2005) ("The adoption by professional sports leagues of strong policies to eliminate the use of performance-enhancing substances would result in the reduced use of these substances by children and teenagers.").

83. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660 (1989).

84. *Id.* at 660–61.

The employees involved in drug interdiction were required to search for and confiscate illegal drugs. As to this group, promotion of integrity in the federal workforce was a compelling government interest, sufficient to warrant suspicionless drug testing.<sup>85</sup> The Court noted that the illegal trafficking of drugs into the United States plagues this country.<sup>86</sup> Customs officials “may be tempted not only by bribes from the traffickers, but also by their own access to vast sources of valuable contraband seized and controlled by the Service.”<sup>87</sup> Because of this, it is important that the employees in these positions are not in any way susceptible to these temptations, as it would interfere with the ultimate goal of the Service.<sup>88</sup>

The Court found that the Customs employees had diminished expectations of privacy because “employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity.”<sup>89</sup> By contrast, the government had a compelling interest in ensuring that the people responsible for protecting our borders did not have a compromised sense of duty, due perhaps to their own drug use.<sup>90</sup> Thus, the government’s interest in its Customs employees having “unimpeachable integrity and judgment”<sup>91</sup> outweighed the already lessened privacy interests of Customs employees, making the suspicionless drug testing a reasonable search.<sup>92</sup>

Professional athletes are similar to the *Von Raab* employees in some respects. They are not government employees, but they nevertheless have reduced expectations of privacy because they are public figures.<sup>93</sup> The *Von Raab* Court specifically wrote that the plaintiffs had reduced expectations of privacy “in respect to the intrusions occasioned by a urine test,” because they should reasonably expect “inquiry into their fitness and probity.”<sup>94</sup> Professional athletes also should expect this inquiry into their fitness, as surely most, if not all athletes, submit to physical examinations on a regular basis.<sup>95</sup>

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85. Of course, whenever an employee is required to carry a firearm, public safety is at issue. Indeed, the *Von Raab* Court found that suspicionless drug testing of these employees was a reasonable search, citing the protection of public safety as the overwhelming government interest. *Id.* at 670–71.

86. *Id.* at 669.

87. *Id.*

88. *Id.* at 670. While the Court does not explicitly say so, this analysis can be read as supporting the conclusion that there is a “special need” for suspicionless drug testing of Customs employees. *See infra* note 106.

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

90. *Id.* at 670.

91. *Id.*

92. *Id.* at 679.

93. Athletes, however, do *not* belong to a heavily-regulated industry—at least not one regulated by the government. The teams, the leagues, and the player’s unions provide regulations for professional sports. *See Showalter, supra* note 42, at 675.

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

95. Indeed, most professional sports leagues require their athletes to pass a physical exam before their contracts are valid. *See, e.g.*, NBA Player’s Association Collective Bargaining Agreement, art. XI, § 5(f) (July 30, 2005), *available at* [http://www.nba.com/cba\\_articles/article-XI.php](http://www.nba.com/cba_articles/article-XI.php).

Because athletes serve as role models for children and play prominent roles in the media and popular culture, the federal government arguably has an interest in retaining the integrity of professional sports. Nevertheless, promoting the integrity of a work force not its own likely does not qualify as a compelling government interest in the suspicionless drug testing of professional athletes.

### 3. *Protection of Sensitive Information*

The government's interest in the protection of sensitive information is the final compelling government interest the Supreme Court recognizes that may overwhelm an individual's privacy concerns. Such interest was at stake in *Harmon v. Thornburgh*, where the Department of Justice ("DOJ") began randomly drug testing its employees by urinalysis.<sup>96</sup> There were five categories of employees subject to testing, including those with access to classified information.<sup>97</sup> The court held that, as to this category of employees, random drug testing was a reasonable search,<sup>98</sup> citing *Von Raab* for the proposition that "the Government has a compelling interest in protecting truly sensitive information."<sup>99</sup>

The *Harmon* court did not provide much reasoning behind its conclusion that the government's interest in protecting top secret information outweighed the DOJ employees' privacy interests. In fact, the court noted that the testing was more intrusive than the testing in *Von Raab* and *Skinner* because it was random testing and was not triggered by a distinct event.<sup>100</sup> Furthermore, the DOJ employees worked in a traditional office setting, where perhaps simple observation of the workers would just as easily uncover drug use.<sup>101</sup>

Finally, unlike the employees in *Skinner* and *Von Raab*, the DOJ employees did not have a reduced expectation of privacy. Nevertheless, the court held that the government interests still outweighed the employees' privacy expectations.<sup>102</sup>

The court's holding is significant because it implies that a strong government interest can outweigh even an ordinary expectation of privacy. Thus, a finding that professional athletes do not have a reduced expectation of privacy in their bodily fluids may not necessarily precipitate a finding that their privacy interests outweigh the federal government's interest in protecting the safety of teenage athletes, especially if a court were to find this government interest particularly strong.

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96. 878 F.2d 484, 486 (D.C. Cir. 1989). For further analysis of this case, see *infra* Part II.B.2.

97. *Harmon*, 878 F.2d at 486.

98. *Id.* at 492.

99. *Id.* at 491 (quoting *Von Raab*, 489 U.S. at 677) (quotations omitted).

100. *Id.* at 492.

101. *Id.* at 489. This factor is distinct from *Von Raab*, where the employees were Customs officials, and the Court found that because they did not work in a "traditional office environment[.]" it would be difficult to determine if someone was abusing drugs or alcohol. *Von Raab*, 489 U.S. at 674.

102. *Harmon*, 878 F.2d at 492.

***B. When Suspicionless Drug Testing Constitutes an Unreasonable Search***

On occasion, courts have found drug testing to be unconstitutional in one of two ways. Drug testing will violate the Fourth Amendment if (1) the government fails to show that a special need exists that would warrant the suspicionless testing, or (2) after applying the balancing test, the court finds that the individual's privacy interest outweighs the government's interest in the testing.

*1. Failure to Show a Special Need*

In *Chandler v. Miller*, the U.S. Supreme Court considered a Georgia statute that required all candidates running for state office to certify that they had taken a drug test, and that this drug test was negative.<sup>103</sup> The Eleventh Circuit applied the balancing test established in *Skinner* and determined that the government's interest in eliminating drug abuse by elected officials outweighed the candidates' privacy concerns.<sup>104</sup> The Supreme Court, however, reversed this decision, holding for the first time that a drug testing regime was not reasonable under the Fourth Amendment.<sup>105</sup>

The Court declared that before it could engage in the balancing test, the government must show a "special need" for the privacy intrusion.<sup>106</sup> This special need must be something beyond ordinary crime detection.<sup>107</sup> The Georgia governor argued that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials."<sup>108</sup> While the Court agreed that these were legitimate concerns, the government did not offer any evidence that these were *actual* concerns.<sup>109</sup>

Among the reasons for refusing to find that a special need existed, the *Chandler* Court observed that there was no record of a particular problem of drug abuse by elected officials, no evidence that the officials performed any tasks that

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103. 520 U.S. 305, 308 (1997).

104. *Id.* at 311–12.

105. *Id.* at 323.

106. *Id.* at 314. Some courts writing after *Chandler* have stated that, with this "special need" requirement, the Court has added a step to its analysis of suspicionless searches. *See, e.g.*, 19 Solid Waste Dept. Mechs. v. City of Albuquerque, 156 F.3d 1068, 1072 (10th Cir. 1998). However, language in both *Von Raab* and *Skinner* suggests that the "special need" requirement was always present but simply not at issue in those cases. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989) ("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests . . ."); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. at 620 ("The Government's interest in regulating the conduct of railroad employees to ensure safety[] . . . 'presents "special needs" beyond normal law enforcement that *may* justify departures from the usual warrant and probable-cause requirements.'" (emphasis added) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987))).

107. *Chandler*, 489 U.S. at 313–14.

108. *Id.* at 318.

109. *Id.* at 319 ("Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity.").

compromised the public safety, and no reason why these individuals, if abusing drugs, would not be apprehended under “ordinary law enforcement methods.”<sup>110</sup>

Thus, while the Court noted that the drug testing program required by the Georgia statute was similar to the ones administered in *Skinner* and *Von Raab*, in that it was relatively non-invasive,<sup>111</sup> and while public officials arguably have a reduced expectation of privacy, the Court did not even reach the balancing test that would apply these factors. Rather, the government failed to pass the threshold test: Is this drug testing warranted by a special need?<sup>112</sup>

The *Chandler* Court outlined three elements to consider when determining whether the government has successfully demonstrated a special need where public safety is the asserted compelling interest: (1) whether the drug use is an actual threat and not a hypothetical concern; (2) whether the drug testing is aimed at actually detecting drug use and not simply deterring it; and (3) whether there is a genuine threat to public safety.<sup>113</sup>

Thus, after *Chandler*, it is clear that the government must demonstrate that a special need exists for imposing the CSA. The competing interests will be balanced only if the government can first make this showing.<sup>114</sup>

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110. *Id.* at 319–22.

111. *Id.* at 318.

112. *Id.*

113. Joy L. Ames, *Chandler v. Miller: Redefining “Special Needs” for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273, 291–94 (1997).

114. There are, however, different interpretations of the “test” for determining when the Fourth Amendment will allow suspicionless searches. Joy Ames writes that, under the framework adopted by the *Chandler* Court, the government must first show that a special need exists and then weigh the competing interests. *Id.* at 288, 294. Joshua Peck also asserts that Congress must offer a “compelling governmental interest, then a court must balance the promotion of the legitimate governmental interest (or ‘special needs’) against the intrusion of Fourth Amendment rights.” Peck, *supra* note 5, at 1794. However, writing after a Supreme Court decision in 2002 that approved of a school district drug testing any student involved in extracurricular activities, Thomas Proctor argued that the government need only show a special need for the search to be reasonable, and in fact, there are three factors for evaluating whether one exists: (1) the nature of the privacy interest; (2) the character of the intrusion; and (3) the immediacy of the concern. Thomas Proctor, *Constitutionality of Testing High School Male Athletes for Steroids Under Vernonia School District v. Acton and Board of Education v. Earls*, 2005 BYU L. REV. 1335, 1351. The problem, of course, with Proctor’s test is that it ignores the Court’s outcome in *Chandler*, where the Court explicitly found that no special need existed, and thus found it unnecessary to balance any interests. *Chandler*, 520 U.S. at 318 (noting in dicta that if Georgia could have shown a special need, the testing likely would have been reasonable, as the requirements were relatively non-intrusive). These differing interpretations show that when the Court analyzes these drug-testing cases, the elements of the “test” tend to be confusing and inconsistent. Thus, if the CSA were passed and subsequently challenged, it is not clear what framework for analysis a court would establish. This is further evidenced by the fact that there are only two Supreme Court cases to consider drug testing after *Chandler*—one that did not find a special need, and one that did—and neither case explicitly used the elements outlined in *Chandler*. *Compare* Bd. of Educ. v. Earls, 536 U.S. 822, 829–30

## 2. Weak Government Interests

In *Harmon v. Thornburgh*, the court found the protection of sensitive information to be a compelling government interest that would allow suspicionless drug testing of certain DOJ employees with access to classified information.<sup>115</sup> However, the court also found that drug testing under this rationale was an unreasonable search as to other DOJ employees.<sup>116</sup> The DOJ's proposed program set forth five categories of DOJ employees subject to random drug testing: (1) any person with access to top secret information, (2) all attorneys and their assistants conducting grand jury proceedings, (3) any person working as a presidential appointment, (4) any person prosecuting criminal cases, and (5) any person responsible for "maintaining, storing, or safeguarding a controlled substance."<sup>117</sup>

The court began its application of the *Skinner* balancing test by noting the three basic government interests that may outweigh individual privacy interests: "integrity of the workforce, public safety, and protection of sensitive information."<sup>118</sup> The government's integrity interests, however, were found to be too minimal to justify a suspicionless search.<sup>119</sup> Furthermore, the court recognized that in previous Supreme Court cases where the Court found an overwhelming government interest in a suspicionless search due to a threat to public safety the threat was immediate.<sup>120</sup> Thus, because there was no *immediate* threat posed to public safety, as is the case with a customs official who carries a gun or an engineer who conducts trains, the court found that the government's public safety interests did not outweigh the employees' privacy interests.<sup>121</sup>

As discussed above, the most obvious government interest at issue in the CSA is the protection of public safety.<sup>122</sup> Under *Harmon*, the question would then be whether there is an immediate threat to public safety. In their findings, the CSA's drafters estimated the number of teenagers using performance-enhancing substances and described the adverse side effects that may result from such

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(2002) (declaring that special needs always exist in the school context), *with* *Ferguson v. City of Charleston*, 532 U.S. 67, 79–84 (2001) (finding no special need for a hospital to test certain pregnant women for cocaine, because such testing was "indistinguishable from the general interest in crime control").

115. 878 F.2d 484, 491–92 (D.C. Cir. 1989); *see supra* Part II.A.3.

116. *Id.* at 492–93.

117. *Id.* Because none of the plaintiffs were category 3 or category 5 employees, the court only ruled as to the constitutionality of suspicionless drug testing of DOJ employees who were "federal prosecutors, workers with access to grand jury proceedings, and employees holding top secret national security clearances." *Id.* at 487.

118. *Id.* at 489.

119. *Id.* at 491. Refusing to read *Von Raab* broadly, the court rejected the notion that the interest in maintaining governmental integrity is sufficiently compelling to justify drug testing any federal employee. *Id.*

120. *Id.*

121. *Id.* at 491.

122. Another purpose of the CSA, "protect[ing] the integrity of professional sports," S. 1114, 109th Cong. § 2(b) (2005), is probably not a strong enough government interest to validate random, suspicionless drug testing. *Harmon* identifies the interest in ensuring "integrity of the workforce," but this refers to the government's interest in promoting the integrity of its *own* employees. *Harmon*, 878 F.2d at 490.

substance abuse.<sup>123</sup> In order for the CSA to pass constitutional muster, however, this threat to teenagers' safety must be immediate, and the random, suspicionless drug testing of professional athletes must be a legitimate means of addressing that threat.

Another example of a court finding asserted government interests insufficient to outweigh individual privacy concerns occurred in *Petersen v. City of Mesa*.<sup>124</sup> In *Petersen*, firefighters in Mesa, Arizona claimed that the City's policy of randomly drug testing its firefighters, without any individualized suspicion, violated their Fourth Amendment rights.<sup>125</sup> In applying the special needs part of the test, the Arizona Supreme Court noted that "[a]lthough the City need not present a compelling interest, the City's interest must be important enough to justify the government's intrusion into the firefighters' legitimate expectations of privacy."<sup>126</sup> Thus, following the *Chandler* Court's analysis, the core issue in the case was: "[H]as the City identified a real and substantial risk?"<sup>127</sup>

The City asserted that the special need at interest was the need to protect public safety, as firefighters "occupy safety-sensitive positions."<sup>128</sup> The court agreed that the City had an interest in preventing drug use among firefighters, but stressed that the City must show more than just a general interest in order to overwhelm the individual privacy interests at stake.<sup>129</sup> "[T]he nature and immediacy of the City's concern" are the determining factors.<sup>130</sup>

Like the Georgia government in *Chandler*, the City of Mesa was unable to provide any evidence that drug use among its firefighters was a genuine concern.<sup>131</sup> The City also failed to show that any of the accidents or injuries that occurred during the firefighters' course of duty were at all linked to drug use.<sup>132</sup> In light of the factors the *Chandler* Court offered for finding a special need, the *Peterson* court found no actual concern about drug use, and no genuine threat to public safety.<sup>133</sup> "At most," the court wrote, "the [drug testing] furthers only a

123. S. 1114 § 2(a)(1)-(3).

124. 83 P.3d 35 (Ariz. 2004). Though this is a state supreme court case, its analysis is particularly relevant. The court's discussion of *Chandler* provides insight as to how courts today are likely to consider drug testing, as the other cases examined in this Note were decided prior to *Chandler*. Additionally, *Petersen* examines a truly random drug testing regime conducted outside the school context, which the U.S. Supreme Court has never done.

125. *Id.* at 37.

126. *Id.* at 39 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)) (quotations omitted).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (citing *Vernonia*, 515 U.S. at 660).

131. *Id.* ("[T]he record is devoid of any indication that the City has ever encountered any problem involving drug use by its firefighters.")

132. *Id.*

133. *Id.*



generalized, unsubstantiated interest in deterring and detecting a hypothetical drug abuse problem . . . .<sup>134</sup>

Despite impliedly finding that no special need existed, the *Peterson* court also applied the balancing test.<sup>135</sup> The court compared the City's interests to that of the federal government in Supreme Court cases of the same nature, such as *Von Raab* and *Vernonia*. Unlike the customs officials in *Von Raab*, the firefighters did not carry firearms, nor were they "required to use deadly force in the regular course of their duties."<sup>136</sup> Furthermore, in *Vernonia*, the high school began randomly drug testing student athletes because the school faced an emergency situation, "brought about by a 'sharp increase in drug use'" among the students.<sup>137</sup> Because the threat to public safety was not of an extreme nature, nor was drug abuse a problem of immediate concern, the court opined that the City did not present a compelling government interest in the suspicionless drug testing of firefighters.<sup>138</sup>

The court conceded that a firefighter does have a decreased expectation of privacy due to the communal living situation, and due to the fact that "[a] firefighter's ability to do this job in a safe and effective manner depends, in substantial part, on his or her health and fitness."<sup>139</sup> However, the U.S. Supreme Court has only considered random, suspicionless drug testing in a school context.<sup>140</sup> In *Skinner*, the testing only occurred after an accident, and in *Von Raab*, the employees had advance notice of the testing—in neither instance, was the testing "random." The court reasoned that there are "increased privacy concerns occasioned by *random* testing."<sup>141</sup>

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134. *Id.*

135. The court may have applied the balancing test to be sure of its holding. *See id.* at 41 ("Nonetheless, because the Supreme Court has stated that a lack of empirical data, by itself, is not fatal to a suspicionless testing program . . . we now consider the extent of Petersen's acknowledged Fourth Amendment privacy interests and then balance these interests against the City's [interests]."). Alternatively, it may have been following a test similar to the one articulated by Thomas Proctor. Proctor, *supra* note 114, at 1351. *Petersen* is inherently similar to *Chandler*, in that there was no evidence in either case of any drug abuse problem. Nevertheless, the Arizona Supreme Court was probably correct not to end its analysis at the special needs prong. In *Chandler*, there was no evidence of a drug-use problem, nor any genuine threat to public safety even if one had existed. In *Petersen*, at least arguably, if there were a drug problem among firefighters, it would pose a threat to public safety. The *Chandler* Court did not clarify whether both of these prongs must be met for the government to make a special needs showing.

136. *Petersen*, 83 P.3d at 40.

137. *Id.* at 41 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995)).

138. *Id.*

139. *Id.*

140. *Id.* at 42.

141. *Id.* (emphasis added). As the court noted, case law generally supports this proposition. *Id.* at 42–43. For example, random testing is an "unexpected intrusion[] on privacy," and may constitute an "unsettling show of authority." *Nat'l Treasury Employees' Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (quotations omitted). Additionally, random testing could subject a person "to a continuous and unrelenting government scrutiny

The court ultimately found that the firefighters had decreased privacy interests, but that these interests, when weighed against the City's "generalized and unsubstantiated interest" in detecting and preventing drug and alcohol abuse, were strong enough to make the random, suspicionless drug testing an unreasonable search.<sup>142</sup>

In analyzing the CSA, one should still determine whether the drafters have shown a special need for drug testing professional athletes. However, *Petersen* demonstrates that courts might be inclined to administer the balancing test for good measure, as much more case law exists for analogy and guidance.

### III. THE CSA WOULD SUBJECT PROFESSIONAL ATHLETES TO UNREASONABLE SEARCHES

The CSA does not require any particular government agency to administer the drug tests to professional athletes in the four major professional sports leagues. However, the government is using the CSA as a means of imposing national uniform drug testing standards.<sup>143</sup> MLB, the NBA, the NFL, and the NHL become agents of the government when carrying out this government-imposed drug testing regime.<sup>144</sup> Further, a urinalysis test is a clearly established "search" under the Fourth Amendment.<sup>145</sup> Thus, under the CSA, professional athletes would be subject to searches by government agents. These searches would be warrantless, suspicionless, and unreasonable by Fourth Amendment standards.

Congress has not yet enacted the CSA, so the possible Fourth Amendment implications have not been fully explored in the academic world. However, Matthew J. Mitten has opined that the CSA would *not* violate the Fourth Amendment, or, at least, that courts would most likely uphold the CSA as constitutional.<sup>146</sup> Mitten begins his analysis by observing that the Court has upheld testing high school students for recreational drugs as a means of protecting the students' safety.<sup>147</sup> Furthermore, lower courts have also upheld testing college athletes for performance-enhancing substances as a means of promoting the integrity of collegiate athletics.<sup>148</sup> "[T]his judicial precedent," he writes, "likely also applies to professional sports."<sup>149</sup>

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that exposes the employee to unannounced testing at virtually any time." Anchorage Police Dep't Employees Ass'n v. Mun. of Anchorage, 24 P.3d 547, 557–58 (Alaska 2001).

142. *Petersen*, 83 P.3d at 43.

143. For an overview of the current testing policies in place for the four major professional sports leagues, see Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 123–37 (2006).

144. *See supra* notes 39–42.

145. *See supra* notes 23–25 and accompanying text.

146. Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 805–06 (2006). Joshua Peck believes that the IPSEA, a similar provision, would also pass Fourth Amendment scrutiny. Peck, *supra* note 5, at 1827.

147. Mitten, *supra* note 146, at 805.

148. *Id.* at 805–06.

149. *Id.* at 806.

The problem with this argument is that the two lower court opinions he cites are not quite on point.<sup>150</sup> The plaintiffs in both cases challenged the drug testing as an invasion of privacy, not as an illegal search.<sup>151</sup> Moreover, the plaintiffs claimed that the drug testing violated their rights under their state constitutions, not under the Fourth Amendment to the U.S. Constitution.<sup>152</sup> Finally, the plaintiffs in *Hill v. NCAA* would not have had a valid Fourth Amendment claim, because the National Collegiate Athletic Association is a private party, not a government agency.<sup>153</sup>

Courts may find the CSA to be constitutional, but there is not as much judicial precedent to rely on as Mitten suggests. In fact, this is a unique situation. Essentially, through the CSA, the federal government would compel certain private parties—the various professional sports leagues—to drug test their employees. The government has never done this before. Assuming that the CSA renders those private parties government agents, the only relevant judicial precedents are those that recognize the special-needs requirement and balance the competing public and private interests before permitting the government to circumvent traditional Fourth Amendment constraints.

In analyzing the CSA, the balancing test must be applied in light of the aforementioned case law, which provides some insight as to when a government interest will outweigh an individual's privacy interests and when it will not. As discussed above, there are three government interests, which the Supreme Court considers to be "special needs," that have the potential to be strong enough to outweigh Fourth Amendment concerns.<sup>154</sup> Of those, only the concern for public safety conceivably applies to the CSA.

#### *A. The Special Need*

A bill like the CSA will only be constitutional if the government can show that a special need, beyond the normal need for crime control, exists for requiring that all professional athletes submit to random, suspicionless drug

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150. See *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (applying student athletes' claims to the California Constitution's Privacy Initiative, which allows for a cause of action against nongovernmental agencies); *Brennan v. Bd. of Trs. for Univ. of La. Sys.*, 691 So. 2d 324 (La. Ct. App. 1997) (finding that drug testing did not violate the plaintiff-student's right of privacy under the Louisiana Constitution).

151. *Hill*, 865 P.2d at 637; *Brennan*, 691 So. 2d at 325.

152. *Hill*, 865 P.2d at 637; *Brennan*, 691 So. 2d at 325.

153. See *NCAA v. Tarkanian*, 488 U.S. 179, 193–99 (1988) (holding that a university's compliance with NCAA rules and regulations did not render the NCAA's conduct state action). While *Tarkanian's* holding may be considered specific to its facts, and not a holding that the NCAA can *never* be a state actor, lower courts have generally agreed that the NCAA is a private party. See *Hill*, 865 P.2d at 641 ("Case law generally confirms the status of the NCAA as a private organization . . ."); *Arlosoroff v. NCAA*, 746 F.2d 1019, 1021–22 (4th Cir. 1984) (determining that the NCAA's adoption of a by-law that applied to state universities was not state action, and additionally noting that prior cases finding the NCAA to be a state actor relied on propositions that were rejected by the U.S. Supreme Court in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

154. *Harmon v. Thornburgh*, 878 F.2d 484, 488 (D.C. Cir. 1989).

testing.<sup>155</sup> As previously mentioned, the elements that support a finding of a special need are: (1) the drug use is an actual threat, not a hypothetical concern; (2) the drug testing is aimed at actually detecting drug use, not simply deterring it; and (3) there is a genuine threat to public safety.<sup>156</sup>

The CSA appears to pass the special needs test. First, steroid use among professional athletes is widely perceived as an actual threat. Several big-name athletes have admitted to taking anabolic steroids at some point in their careers.<sup>157</sup> Most recently, Marion Jones, a well-known track and field star who won five Olympic medals, admitted to using performance-enhancing steroids and lying to federal investigators about it.<sup>158</sup> Others, such as Rafael Palmeiro and Bill Romanowski, have tested positive for steroids, but deny knowingly using these performance-enhancing drugs.<sup>159</sup> The positive test results and confessions by these and other athletes have led to a media frenzy of accusations and suspicions, as well as the general belief that steroid use presents a huge problem in professional sports. However, anabolic steroid use is not nearly as common as one might expect. For example, when MLB began testing for performance-enhancing substances in 2003, only 5% to 7% of players tested positive.<sup>160</sup> This number dropped to 1% in 2004.<sup>161</sup> Nevertheless, Congress believes that steroid abuse plagues professional sports.<sup>162</sup>

The second element—that the testing be aimed at actually detecting drug use—likely implies that drug-testing programs merely symbolic of a “tough” anti-drug stance will not satisfy this factor.<sup>163</sup> The detailed nature of the program set forth in the CSA certainly quells suspicions that this proposal is merely symbolic. The bill requires the leagues to conduct tests continuously throughout the season and offseason, and imposes substantial fines on leagues that do not comply.<sup>164</sup> Additionally, the testing program would simultaneously deter and detect drug use.

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155. Chandler v. Miller, 520 U.S. 305, 314 (1997).

156. Ames, *supra* note 113, at 291–94.

157. See, e.g., JOSE CANSECO, JUICED 11 (2005); John T. Wendt, *The Year of the Steroid: Are New Testing Regimes Enough?*, 22 ENT. & SPORTS LAW 8, 10 (Winter 2005); Edward Epstein, *The Muscle Marketplace: Schwarzenegger Raps Steroid Use, But The Arnold Classic Remains A Showcase For Drug-Enhanced ‘Freak’ Physiques*, S.F. CHRON., Feb. 20, 2005, at A1.

158. Michael S. Schmidt & Lynn Zinser, *Jones Admits to Doping and Enters Guilty Plea*, N.Y. TIMES, Oct. 6, 2007, at D1.

159. See Hal Bodley, *Palmeiro Suspended for Steroids Policy Violation*, USA TODAY, Aug. 2, 2005, available at [http://www.usatoday.com/sports/baseball/al/orioles/2005-08-01-palmeiro-suspension\\_x.htm](http://www.usatoday.com/sports/baseball/al/orioles/2005-08-01-palmeiro-suspension_x.htm); *Romo Tells “60 Minutes” He Used Steroids*, ESPN.COM, Oct. 13, 2005, <http://sports.espn.go.com/nfl/news/story?id=2190441>.

160. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 845 (2006).

161. *Id.*

162. In March of 2005, Congress subpoenaed several professional baseball players, both current and retired, to testify before the House Government Reform Committee about the severity of and possible solutions to the anabolic steroid problem in Major League Baseball.

163. See Ames, *supra* note 113, at 292.

164. S. 1114, 109th Cong. §§ 4(b)(1), 6(b)(2) (2005).

The threat of suspension and public disclosure serves as a strong deterrent to professional athletes, and because each athlete would be tested five times a year, but without notice of the test date, any detectable steroid use would likely be discovered.

Finally, the use of performance-enhancing drugs arguably creates a genuine threat to public safety. In their findings, the drafters of the CSA listed surveys, studies, and testimony of steroid users to prove a causal link between steroid use among professional athletes and steroid use among teenagers,<sup>165</sup> as well as the myriad adverse health effects of steroid use.<sup>166</sup> The problem is that a professional athlete who uses performance-enhancing substances does not pose a direct threat to public safety in the same way a train conductor who uses cocaine does; the threat to public safety in the case of professional athletes is much more attenuated. The Supreme Court, however, has never explicitly held that the threat to public safety must be direct in order for it to qualify as a special need.<sup>167</sup>

### ***B. The Athletes' Privacy Interests at Stake***

While a professional athlete may have a reduced expectation of privacy, the procedures set forth in the CSA are much more intrusive on that athlete's privacy interests than other drug-testing schemes that have been ruled constitutional. The aforementioned cases have established that many different types of individuals have reduced expectations of privacy, such as students, government workers, and candidates for public office.<sup>168</sup> It can hardly be argued that professional athletes do not also have reduced expectations of privacy. Professional athletes are public figures, and as such, are subject to higher levels of scrutiny than the average person experiences.

There are differences, however, between professional athletes and the plaintiffs of these cases. In finding no Fourth Amendment violations in *Vernonia*, *Von Raab*, and *Skinner*, the Supreme Court focused on the degree of the privacy intrusions, as well as the character of the intrusions.<sup>169</sup> The degree of the intrusion refers to how closely officials monitored the production of urine samples, whereas the character of the intrusion refers to what, precisely, the officials did with the

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165. *Id.* § 2(a)(4)–(8).

166. *Id.* § 2(a)(3).

167. *But see* Harmon v. Thornburgh, 878 F.2d 484, 491 (D.C. Cir. 1989) (“*Von Raab* provides no basis for extending this principle [of protecting public safety] to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.”).

168. *See supra* Part II.

169. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657–58 (1995) (finding a low degree of intrusion in both the monitoring of the production of urine samples and the fact that testing results were disclosed only on a need-to-know basis, and not turned over to law enforcement); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 n.2 (1989) (holding that the fact that the employees had advance notice of when the testing would occur decreased the level of intrusiveness); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989) (observing that production of urine samples was not directly monitored).

testing results. The CSA does not speak to the degree of intrusion; however, the character of the privacy intrusion under the CSA would be significant.

The CSA calls for the drug testing to be random in the sense that the athletes will have no advance notice of when their tests will be administered.<sup>170</sup> The random nature of this testing adds to the intrusiveness of the search.<sup>171</sup> Random testing is obviously more effective at detecting and deterring drug use, but it also presents a greater invasion of a player's privacy interests.<sup>172</sup> Even if this random factor does not "tip the scales," as the *Harmon* court suggests, it at least counterbalances the athlete's reduced privacy interests.

According to the CSA, if a player tests positive for a prohibited substance, the appropriate professional league must publicly disclose the athlete's identity within thirty days of receiving the positive results.<sup>173</sup> That provision is surely a significant intrusion on a player's privacy interests,<sup>174</sup> and would have an adverse effect on the player's market value and public persona. Furthermore, while the CSA does provide an avenue for appeal, nothing in the act requires that the appeals be heard and decided within thirty days of the original positive result. Thus, a player with a false positive test result may nevertheless be stuck with the stigma of being a steroid user.<sup>175</sup>

The CSA addresses professional athletes who, because of their chosen profession, likely have reduced expectations of privacy. However, there is nothing in the CSA to suggest that the testing process or the treatment of the results would be minimally intrusive in any way. In fact, the revelation of an athlete's identity, and perhaps the random nature of the testing,<sup>176</sup> adds to the character of intrusiveness on a player's privacy interests. The government interest in drug testing professional athletes must be particularly strong in order to outweigh these individual privacy interests at stake.

### ***C. The Possible Compelling Government Interests***

In the body of the CSA, the drafters assert that the purposes of the act are (1) to protect the integrity of professional sports, and (2) to protect the health and

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170. S. 1114 § 4(b)(1)(B)(i)–(ii).

171. See *supra* note 141.

172. See *supra* note 141.

173. S. 1114 § 4(b)(9)(A).

174. See *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) ("The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties.").

175. False positives are not uncommon in urinalysis tests, for a variety of reasons. See Rick Collins, *Changing the Game: The Congressional Response to Sports Doping via the Anabolic Steroid Control Act*, 40 NEW ENG. L. REV. 753, 756 (2006); Laura S. Stewart, Comment, *Has The United States Anti-Doping Agency Gone Too Far? Analyzing the Shift From 'Beyond A Reasonable Doubt' To 'Comfortable Satisfaction'*, 13 VILL. SPORTS & ENT. L.J. 207, 228 (2006).

176. See *supra* note 141.

safety of athletes generally.<sup>177</sup> From this statement, along with the statistical information provided in the findings, it is clear that of the compelling government interests traditionally recognized by the courts, only the protection of public safety is implicated. In *Vernonia*, the Court found that this governmental interest—to protect public safety, especially the safety of children—was strong enough to outweigh the “minimal” privacy interests of the student athletes.<sup>178</sup> On its face, the drug-testing regime in *Vernonia* seems most analogous to the proposal outlined in the CSA. Indeed, the governmental interests are quite similar. Congress alleges that the anabolic steroid problem is one of “national significance,”<sup>179</sup> and given the estimated number of teenagers who have used performance-enhancing substances, steroid use appears to pose an immediate threat to public safety. The difference here is that the goal is to curb steroid use among teenagers, but the testing is aimed at professional adult athletes. In *Vernonia*, drug use among students had become uncontrollable,<sup>180</sup> and the school district’s decision to begin random drug testing was a direct solution to the problem. In that respect, what Congress has proposed in the CSA is quite different than the drug testing regime that the *Vernonia* Court endorsed.

The link between steroid use among professional athletes and steroid use among teenagers is not so direct that the CSA will provide an immediate solution to the problem. Furthermore, of all the illegal substances available to teenagers, steroids pose the least “immediate threat” to public safety.<sup>181</sup> Nevertheless, one would be hard-pressed to say that drug abuse—of any kind—by our nation’s youth is *not* a compelling government interest. The question is really whether legislation like the CSA would actually ameliorate this problem.

Because professional athletes have a reduced expectation of privacy, and because the health and safety of America’s children is always of national concern, there is a distinct possibility that a court would find that this governmental interest would outweigh the privacy interests of professional athletes, and the CSA would be deemed constitutional. Based on the judicial analysis in other drug-testing decisions, the stronger argument is that the CSA calls for a considerable intrusion on the privacy interests of athletes, and the government’s desire to keep

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177. S. 1114 § 2(b).

178. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

179. S. 1114 § 2(a)(1).

180. See *supra* note 70 and accompanying text.

181. For example, in its thirty-second annual Monitoring the Future survey conducted in 2006, the National Institute on Drug Abuse found that 66.5% of twelfth-grade students had used alcohol in the last year, 31.5% had used marijuana, and 5.7% had used cocaine, as opposed to the 1.8% of twelfth graders who used steroids in the last year. NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., MONITORING THE FUTURE STUDY: TRENDS IN PREVALENCE OF VARIOUS DRUGS FOR 8TH-GRADERS, 10TH-GRADERS, AND 12TH-GRADERS, 2003-2006, at 5–6 (2006), available at <http://www.nida.nih.gov/pdf/infacts/HSYOUTHtrends07.pdf>. Note that this survey estimates that only 1.6% of 8th grade students, 1.8% of 10th grade students, and 2.7% of 12th grade students have used anabolic steroids in their *lifetimes*. *Id.* at 6. This does not quite match up with congressional assertions that 5% to 7% of students have admitted to using steroids. 151 CONG. REC. S6221-02 (2005).

professional sports steroid-free, while important, is not compelling enough to overcome Fourth Amendment protections.

#### IV. WOULD THE CSA ACTUALLY SOLVE THE PROBLEM?

In a close case such as this, policy concerns will no doubt have a heavy influence on a court's decision. On the one hand, it is obvious that professional athletes serve as role models for children and teenagers. The hope is that a strict policy on anabolic steroids, such as the one outlined by the CSA, would deter athletes from using performance-enhancing substances and "clean up" professional sports, thus discouraging children from wanting to use steroids in order to emulate their idols.

The problem with this argument is two-fold. First, it assumes that children today *know* that their favorite players are using steroids. It further assumes that once the CSA is in place, the children will opt not to use steroids, because they will *know* that their favorite players *are not* using performance-enhancing substances.<sup>182</sup> Unless the athlete tests positive for steroids, the public will have no way of knowing who is and who is not using steroids, or, perhaps, who cheated the test.

In fact, revelation of the athlete's name *could* have the opposite effect. Consider the teenager who has a certain favorite baseball player, a player who perhaps is under no suspicion for steroid use. Suppose the CSA is implemented, the player tests positive for anabolic steroids, and the results of test are publicly revealed, including which illegal substance the player had been using. This particular teenager might begin using performance-enhancing substances, because now the teen knows that his or her favorite player uses steroids. If not for the testing system, the teen may have never known, and thus never made the choice to emulate his or her idol in that way.

Furthermore, while the CSA would no doubt rid professional sports of the anabolic steroid problem, it remains to be seen how much this would actually affect children and teenagers. In fact, some studies have shown that even when teenagers *themselves* must submit to drug testing in schools, the testing has little or no deterrent effect.<sup>183</sup>

Perhaps the biggest problem with the CSA's assumption that its testing scheme will curb performance-enhancing drug use among teenagers is that anabolic steroids do not pose a serious threat to the integrity of professional sports.

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182. Some argue that kids will continue to use anything to gain an edge, whether or not certain substances are prohibited in professional sports. *See, e.g.*, Colin Laitner, Note, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 192, 214 (2006) ("If what these driven kids want is to play at the professional level or dominate at their current level, and taking steroids seems to them like the only route, then it will not matter that their favorite sport star is clean of enhancements thanks to a rigorous testing policy.").

183. *See* Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 164 (2003), available at <http://www.monitoringthefuture.org/pubs/text/ryldjpom03.pdf>.



Not only are very few athletes testing positive for these prohibited substances,<sup>184</sup> but several types of performance-enhancing “designer” drugs, such as modafinil, erythropoietin, and most notably, human growth hormone (“hGH”), are difficult or impossible to detect through regular testing.<sup>185</sup> HGH is particularly problematic because no valid test for this substance currently exists<sup>186</sup> and because recent developments suggest that hGH is widely used among professional athletes.<sup>187</sup> A bill like the CSA would only rid professional sports of *detectable* performance-enhancing substances, which are probably not the biggest worry today.

If Congress is truly concerned with the link between the drug use among professional athletes and the drug use among teenagers, then perhaps it would be better to test players for *all* illegal substances and to impose criminal sanctions.<sup>188</sup> Not only is it actually cheaper to test urine samples for common illegal drugs, rather than for anabolic steroids,<sup>189</sup> but it is arguably more worthwhile. Children look to professional athletes as role models in all aspects of their lives. Professional athletes are constantly in the news due to their drug and alcohol

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184. See *supra* notes 160–161 and accompanying text.

185. James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L. REV. 45, 46 (2006).

186. Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 167 (2006). Major League Baseball, however, might become the first professional league to begin blood testing for hGH, despite concerns regarding legitimacy. See Howard Bryant, *Congress Might Seek Blood Tests for Baseball*, WASH. POST, June 9, 2006, at E01.

187. See Wendt, *supra* note 157, at 10 (noting Jason Giambi’s admitted use of hGH); Mark Fainaru-Wada & Lance Williams, *Steroids Scandal: The BALCO Legacy, From Children to Pros, the Heat is On to Stop Use of Performance Enhancers*, S.F. CHRON., Dec. 24, 2006, at A1 (discussing retired MLB first baseman David Segui, who admitted to using hGH when he played, and MLB pitcher Jason Grimsley, who gave federal agents the names of several professional athletes whom he believed were using hGH after the agents raided his home and found several kits of hGH).

188. Of course, such a testing regime would also have to pass constitutional muster, but the connection between all illegal drugs and public safety is arguably more direct, especially considering the fact that of all illegal drugs, steroids pose the smallest threat to teenagers. See *supra* note 181. While the move from steroids to other illegal substances could strengthen the governmental interests at stake, it could also strengthen the athletes’ privacy interests. An athlete could argue that he does not have a reduced expectation of privacy in his use of illicit drugs other than steroids, because only steroids directly relate to athletic performance. Alternatively, because any illegal drug use potentially affects athletic performance, the counterargument is that an athlete’s privacy expectation in the search for illegal drugs in his system remains reduced, regardless of which substances are being tested for. The constitutionality of such a scheme is ultimately beyond the scope of this Note. This proposed plan is merely meant to suggest that because a bill that would test athletes for all illegal substances would better serve congressional interests in protecting public safety, perhaps the CSA is merely a symbolic proposition.

189. A test for amphetamines, marijuana, cocaine, opiates, and phencyclidine costs about \$20 to \$50, while a test for anabolic steroids costs between \$80 and \$120. Nat’l Fed’n of State High Sch. Ass’ns, *Drug Testing—How Much Does Drug Testing Cost?*, [http://www.nfhs.org/web/2004/04/drug\\_testing\\_\\_how\\_much\\_does\\_drug\\_testing\\_cost.aspx](http://www.nfhs.org/web/2004/04/drug_testing__how_much_does_drug_testing_cost.aspx) (last visited Oct. 5, 2007).

abuse.<sup>190</sup> Considering the fact that alcohol, marijuana, and cocaine are much more prevalent among high school students than steroids,<sup>191</sup> perhaps this is the drug abuse we should be more focused on deterring. Furthermore, given that the majority of illegal substances available to teenagers pose a much bigger threat to public safety than anabolic steroids,<sup>192</sup> this might create a more direct impact on the health and safety of children. If legislation that compels suspicionless drug testing of professional athletes has a stronger effect on public safety, then it is more likely to satisfy the special needs test.

## V. OTHER SOLUTIONS

If the concern in all of this truly is the health and safety of our nation's school children, then it seems that there are other, better ways to ensure that these kids are not using performance-enhancing substances—without implicating the Fourth Amendment. Congress should draft legislation that actually gets to the heart of the problem, rather than one source of influence in a young adult's decision to use steroids. Given that the U.S. Supreme Court has upheld random drug testing of any high school student involved in extracurricular activities,<sup>193</sup> one commentator has suggested that Congress focus its efforts on creating laws that would implement more drug testing of athletes at the high school and college levels.<sup>194</sup> Not only would this be a more effective solution to the problem of steroid use among America's youth, but it would likely lead to the eventual dissolution of anabolic steroids in professional sports, albeit taking longer than implementing the CSA. If we begin extensive education and testing in schools today, this will begin to deter children from using steroids. If steroid use is not an option at the high school and college levels, then perhaps these student athletes will find other safer, healthier, and legal ways to edge out the competition. This could create a domino effect. If one cannot use illegal performance-enhancing substances to help overcome the hurdle into collegiate sports, and one cannot use those substances to overcome the hurdle into professional sports, then presumably, once at the professional level, one would have established other legitimate methods of training.

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190. For example, Travis Henry, a running back for the Denver Broncos, recently tested positive for marijuana for the second time in two years and is facing a one-year suspension under the NFL's testing policy. Gary Myers & John Marzulli, *Broncos Star Henry Faces 1-Year Pot Ban*, N.Y. DAILY NEWS, Oct. 4, 2007, available at [http://www.nydailynews.com/sports/football/2007/10/04/2007-10-04\\_broncos\\_star\\_henry\\_faces\\_1year\\_pot\\_ban.html](http://www.nydailynews.com/sports/football/2007/10/04/2007-10-04_broncos_star_henry_faces_1year_pot_ban.html).

191. See *supra* note 181.

192. See *supra* note 181.

193. Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

194. Laitner, *supra* note 182, at 216–18 (arguing that education and screening processes that begin at a young age will help children understand both the harmful effects of steroids, and the zero tolerance policy on their usage).

Another option would be to impose criminal sanctions on athletes.<sup>195</sup> It is a federal crime to possess anabolic steroids, including hGH, without a prescription.<sup>196</sup> The federal government seems adamant about ridding professional sports of steroids, so why not charge athletes who have tested positive with a crime? As of December 2006, “more than 30 stars of track, baseball, football, and other sports were [caught] using banned drugs.”<sup>197</sup> The government has not indicted a single one,<sup>198</sup> challenging the legitimacy of the Anabolic Steroid Control Act and the criminal justice system. Congressional concern about steroid use is evidenced by the fact that it amended the Controlled Substances Act in 1990 to include anabolic steroids, thereby making simple possession of steroids a federal crime.<sup>199</sup> However, this particular law is never enforced.<sup>200</sup> If Congress passes the CSA and strictly enforces it, then the government should strictly enforce the criminal possession provisions under the Controlled Substances Act, as well.

### CONCLUSION

The Clean Sports Act was undoubtedly written with good intentions, but at its heart it gives Congress the power to conduct suspicionless searches, while not providing a compelling enough motive. Judicial precedent requires the federal government to make a showing of a special need “beyond the normal need for law enforcement” to justify drug testing without any individualized suspicion.<sup>201</sup>

The health and safety of America’s children is surely of utmost concern to legislators. Anabolic steroids present a clear threat to teenagers, as the use of steroids is growing and produces serious adverse health effects. As important as it is for the federal government to ensure public safety, there must be limits as to how far the government can go to reach this objective. The intense regulation of professional sports is not the answer. Not only will legislation like the CSA compromise the civil rights of professional athletes, but it is not a direct solution to the problem, and in fact, may not be a solution at all.

Furthermore, even if a special needs showing can be made, the government’s interest in the search must outweigh individual privacy concerns. Case law shows that when the degree and character of the privacy intrusion are both minimal, the search will be reasonable, even if the individual does not have a reduced expectation of privacy.<sup>202</sup> The United States Supreme Court has only

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195. Of course, if student athletes were subject to criminal penalties, it would probably serve as a greater deterrent than simply being unable to participate in extracurricular activities. However, if school districts were to give law enforcement authorities the names of students who tested positive for steroids, this could change the nature of the privacy intrusion on the student. In light of the Supreme Court’s analysis in *Vernonia* and *Earls*, if drug testing regimes were to result in criminal sanctions against students, this might tip the scales, making the search unreasonable.

196. 21 U.S.C. § 844(a) (2006).

197. Fainaru-Wada & Williams, *supra* note 187.

198. *Id.*

199. Anabolic Steroids Control Act of 2004, 21 U.S.C. § 801 (2006).

200. Fainaru-Wada & Williams, *supra* note 187.

201. Nat’l Treasury Employees’ Union v. Von Raab, 489 U.S. 656, 665 (1989).

202. *See supra* Part II.A.

considered truly random, suspicionless drug testing in the context of public schools,<sup>203</sup> where it noted in both cases that the test results were not handed over to law enforcement and were only released on a need-to-know basis; this added to the minimal nature of the intrusion and persuaded the Court to uphold the drug testing schemes.<sup>204</sup> In contrast, the terms of the CSA require heightened intrusions into the athletes' privacy. Names of athletes who test positive, as well as the prohibited substance found, will be released to the public.<sup>205</sup> This element distinguishes those cases, and therefore tips the scale in favor of finding that the CSA violates the Fourth Amendment.

The U.S. Constitution created a federal government of limited powers. Regulating professional athletes in the futile hope of changing habits and behavior of children and teenagers overextends those powers. If the federal government is going to strip away the traditional contours of the Fourth Amendment, the connection ought to be much more concrete than it is here. There may be a legitimate way in which the federal government could achieve its objectives of protecting the health and safety of America's children, but imposing the Clean Sports Act's substantial intrusions on individual privacy interests is not a constitutional route.

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203. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

204. *Earls*, 536 U.S. at 832–34; *Vernonia*, 515 U.S. at 658.

205. See *supra* notes 173–175 and accompanying text.