

ENFORCING DRUG POLICIES IN COLLEGE SPORTS:

The Federal Government and NCAA

Tyler Brown*

In the article *NCAA Drug-Testing: It's Time to Change*, Jason Lewis draws the valid conclusion that the NCAA's approach to drug testing is fractured and ineffective. According to Lewis, criticism lies against the NCAA's drug-testing process because member institutions are primarily responsible for drug testing their own student-athletes, while the NCAA conducts its own drug testing of student-athletes primarily only in championship competitions. Lewis makes the point that member institutions are not required to develop drug-testing programs, and, moreover, where a member institution does decide to implement its own drug-testing program, the NCAA simply offers guidance and does not mandate instructional protocol.

According to Lewis, this lack of consistency created by the current drug-testing process creates room for abuse, by either student-athletes or member institutions. Lewis suggests a new structure that the NCAA and member institutions could adopt to create consistency among NCAA collegiate athletic institutions. Lewis proposes that the NCAA and its member institutions become signatories to the World Anti-Doping Agency (WADA)'s World Anti-Doping Code (WADC or the "Code") or, alternatively, amend their drug-testing programs to conform to the Code. Is this proposal the most feasible approach?

To be sure, Lewis's proposal is an ideal approach, but, as Lewis points out, by adopting the Code, the NCAA and member institutions would be held to a much higher standard. Accordingly, the NCAA and its member

* J.D. Candidate 2016, Sandra Day O'Connor College of Law, Arizona State University.

institutions would lose a significant amount of control over their own affairs. Indeed, as Lewis mentions, a more strict and consistent drug-testing program would saddle the NCAA and member institutions with increased financial burdens.

Although it may be true that the NCAA exists today “to govern competition in a fair, safe, equitable, and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount,”¹ it is also true that the NCAA is a private organization, made up of more than 1,000 active member institutions, colleges, and universities representing diverse student bodies, educational missions,² and various athletic budgets.³ Over the past few decades, the NCAA has become increasingly powerful, due in large part to the growing popularity of college sports on television and through other media outlets.⁴ Because member institutions and the NCAA prefer wide latitude in how they operate their athletic institutions, and because of the financial burdens of implementation and administration

1. *Division II Strategic Positioning Platform*, NCAA, <http://www.ncaa.org/governance/committees/division-ii-strategic-positioning-platform> (last visited Apr. 16, 2015).

2. *See NCAA Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Apr. 16, 2015).

3. *See* Christopher Schnaars et al., *Sports' College Athletics Finances*, USA TODAY (May 16, 2012, 8:14 AM), <http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1>.

4. *See, e.g.*, Darren Rovell, *Once an Afterthought, the Dance Is Now Big Business*, ESPN (Oct. 11, 2005, 1:44 PM), <http://proxy.espn.go.com/espn/print?id=2186638&type=story>; *see also* David Davenport, *Legal Cases Are Blowing Up the NCAA Big Business Model – Why It Matters*, FORBES (Aug. 11, 2014, 5:17 PM), <http://www.forbes.com/sites/daviddavenport/2014/08/11/legal-cases-are-blowing-up-the-ncaa-big-business-model-why-it-matters/>.

of a strict and consistent drug-testing program, the likelihood of the NCAA and member institutions adopting the Code are probably very slim.

Accordingly, it may be safe to assume two conclusions. First, member institutions are probably not willing to change the NCAA's rules if those changes will decrease the autonomy of their athletic programs or if the amended rules might impose additional financial burdens. And second, the NCAA's amended drug-testing program will only ever be as strict or as well funded as the member institutions would require. Given these assumptions, the *federal government* may be the only entity capable of creating and enforcing drug-testing rules and regulations that govern intercollegiate athletics.

Perhaps the greatest obstacle to the federal government seizing control over the NCAA's regulatory function, however, is the Ted Stevens Amateur Sports Act, particularly the section on "restricted amateur athletic competition."⁵ The act reads in relevant part:

An amateur sports organization that conducts amateur athletic competition shall have exclusive jurisdiction over that competition if participation is restricted to a specific class of amateur athletes, such as high school students, college students, members of the Armed Forces, or similar groups or categories.⁶

Due to this federal legislation, the NCAA has exclusive regulatory jurisdiction over its own competitions. In order for the federal government to have regulatory power over the NCAA, this section of the United States Code would need to be removed or amended.

5. See 36 U.S.C. § 220526(a) (West 2014).

6. *Id.*

If this code section were removed or amended, then under Congress's power to regulate interstate commerce,⁷ Congress could potentially regulate college athletics through legislation or perhaps through the creation of a federal agency exclusively tasked with regulating college athletics.⁸ Proponents of a federal regulatory plan believe a new federal agency could be placed under the Department of Education, could be charged with creating rules and regulations governing college athletic competitions, and could be empowered to enforce its rules.⁹ The agency could be "funded through a tax on the revenue of college athletic departments, conferences . . . or even through the general revenue of the United States."¹⁰

The final step would be to mandate that universities comply with the rules of the federal agency. One method to force universities to comply would be to tie compliance to federal student aid.¹¹ Indeed, federal funding for education is already used to force member institutions to comply with Title IX.¹²

Under this federal agency approach, the federal government could assume the NCAA's regulatory functions,

7. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) (holding that Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce).

8. John Infante, *NCAA Miami Problems Show Need for Federal Takeover*, ATHLETIC SCHOLARSHIPS.NET (Jan. 23, 2013), <http://www.athleticscholarships.net/2013/01/23/ncaa-federal-takeover.htm>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* 20 U.S.C. §§ 1681-1688 (codifying Title IX of the Education Amendments of 1972); *see also* 34 C.F.R. §§ 106.1-106.71 (identifying the purpose of 34 C.F.R. § 106 as to effectuate Title IX of the Education Amendments of 1972, as codified in 20 U.S.C. §§ 1681-1688).

and therefore it might be in the best position to force member institutions to comply with the Code. The federal agency could require that member institutions adopt the Code, and, moreover, the agency could then appoint the United States Anti-Doping Agency to administer the drug-testing procedures. The NCAA could then be “left to run championships and distribute revenue,” which could be taxed to pay for the federal regulatory responsibilities.¹³ Although this proposition may seem out of the ordinary, it presents an alternative solution to the NCAA drug-testing problem.

Granted, empowering the United States Congress with the ability to legislate drug-testing policies over college athletic institutions would not come without criticism. While Congress has not notably attempted to legislate drug-testing policies regarding college athletics in particular, Congress has on numerous occasions attempted to legislate drug-testing policies over professional athletics, albeit generally unsuccessfully.¹⁴

First and foremost, the critics of congressional legislation governing drug testing in the private sports industry are sure to cite constitutional concerns.¹⁵

13. Infante, *supra* note 8.

14. *See, e.g.*, Clean Sports Act of 2005, S. 1114, 109th Cong. (2005); Office of National Drug Control Reauthorization Act, H.R. 2564, 109th Cong. (2005); Drug Free Sports Act, H.R. 1862, 109th Cong. (2005); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (2005).

15. *See, e.g.*, *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce and H.R.*, 100th Cong. (2008) (statement of Donald Fehr, Executive Director, Major League Baseball Players Association), *available at* <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg49522/html/CHRG-110hhrg49522.htm>.

Constitutional critics might point out that “suspicionless drug testing,”¹⁶ mandated by the federal government, can run afoul of the general Fourth Amendment requirement that searches must be based on individualized suspicion of wrongdoing.

In addition to the constitutional critics, other critics suggest that the involvement of an entity like the WADA will simply not improve the current system in any respect.¹⁷ These critics believe that athletic programs are “already managed by independent entities and individuals with substantial expertise and integrity.”¹⁸

Finally, perhaps the most significant critic of increased legislation surrounding drug testing in the sports industry is President Barack Obama. Indeed, President Obama admitted that “congressional hearings around steroid use is [sic] not probably the best use of congressional time.”¹⁹ President Obama believes that the drug-testing issue is primarily a problem that those in the sports industry need to solve for themselves.²⁰

On the other hand, Senator John McCain is sure to point out that there are many issues that Congress would much rather address, and, but for the nonfeasance of athletic institutions, Congress would not be attempting to take

16. *Id.*

17. *See id.* (statement of David Stern, Commissioner, National Basketball Association).

18. *Id.*

19. Ben Pershing, *Obama Differs with McCain on Steroids*, THE WASHINGTON POST (Oct. 2, 2008, 11:57 AM), <http://voices.washingtonpost.com/44/2008/10/obama-takes-swipe-at-mccains-s.html> (statement of President Barack Obama).

20. *See* Walter T. Champion & Danyahel Norris, *Obama vs. Bush on Steroids: Two Different Approaches to a Pseudo-Controversy — Or Is It Really Worthy of Note in a State of the Union Address?*, 36 T. MARSHALL L. REV. 193, 199-204 (2011).

action.²¹ Other proponents of federal legislation point out that perhaps the critics have simply the “wrongheaded idea that the unique nature of sports makes impossible a positive federal role in fixing this problem.”²² These proponents point out that sports leagues in other nations are overwhelmingly “subject to independent drug testing and enforcement agencies that are, one way or another, governmental or quasi-governmental bodies.”²³ For example, Australia operates the Australian Sports Drug Agency.²⁴ But ultimately, proponents of federal legislation governing drug-testing point out that perhaps the critics are most concerned about the bottom line: money. According to Major League Baseball player Jose Canseco, if Congress does not take action, sports institutions “will not regulate themselves” and drug-testing issues “will go on forever.”²⁵ And in the end, it may all boil down to “making money.”²⁶ Indeed, any legislation that potentially affects the budgets of sports institutions will likely be adamantly opposed.

The NCAA’s approach to drug testing is fractured and ineffective. Lewis offers the proposition that the NCAA and its member institutions should either become signatories

21. *John McCain Wants USADA to Oversee Pro Sports’ Testing*, CBS SPORTS (May 24, 2005, 6:43 PM), <http://www.cbc.ca/sports/john-mccain-wants-usada-to-oversee-pro-sports-testing-1.565189>.

22. Robert Housman, *Steroids and the Feds*, THE WASHINGTON TIMES (April 5, 2005), <http://www.washingtontimes.com/news/2005/apr/5/20050405-095934-9345r/?page=all>.

23. *Id.*

24. *Id.*

25. *Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Gov’t. Reform H.R.*, 109th Cong. (2005) (statement of Jose Canseco, former Oakland Athletic and Texas Ranger), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg20323/html/CHRG-109hhrg20323.htm>.

26. *Id.*

to the Code or amend their drug-testing programs to conform to the Code. While this proposition is valid, another solution may be found through the involvement of the federal government. The federal government would need to repeal or amend existing legislation that is currently preventing it from regulating intercollegiate sports and then subsequently assume the NCAA's regulatory functions. While this plan could face strong opposition, as indicated by recent legislation attempting to govern professional athletic programs, it is another viable solution in the attempt to force the NCAA and its member institutions to comply with the World Anti-Doping Code.