

Columbia Law School

Scholarship Archive

Center for the Advancement of Public Integrity
(Inactive)

Research Centers & Programs

2017

Sports Corruption: The History and Challenges of Anti-Doping Regimes in the U.S. and Abroad

Shlomo Fischer

Follow this and additional works at: https://scholarship.law.columbia.edu/public_integrity



Part of the [Law Commons](#)

Sports Corruption:

The History and Challenges of Anti-Doping Regimes in the U.S. and Abroad

The International Olympic Committee first began drug-testing in response to the death of Knud Enemark Jensen, a Danish cyclist who collapsed of heatstroke during the 1960 Olympics in Rome and whose [autopsy suggested that amphetamines played a role in his death](#). A wide range of performance enhancing substances was formally banned, and doping tests were administered to preserve the integrity of competition and to protect the health of athletes. The IOC's initial regime was neither systematic nor robust, lacking both methodologically and technologically. However, the gap between doping and monitoring gradually began to close as testing became more accurate and reliable, beginning with the IOC's first testing procedure for anabolic steroids in 1976 and highlighted by the [disqualification of Canadian Sprinter Ben Johnson for a positive anabolic steroid test](#) after winning the 100m sprint at the 1988 Olympic games.

Original CAPI Publication:

This brief was prepared by the Center for the Advancement of Public Integrity at Columbia Law School. We can be reached at CAPI@law.columbia.edu.

CAPI would like to thank Shlomo Fischer, CAPI summer research intern and Columbia Law School Student for his authorship of this brief.

The IOC's early anti-doping efforts achieved modest success, but illicit drug use rapidly pervaded other competitions, notably cycling and track and field. The 1998 Tour de France, ignominiously dubbed the "Tour du Dopage" by media sources, was ravaged by various doping scandals. Prior to the race, the nine-member Festina team was disqualified after customs officers discovered a large supply of doping products at the Belgian-French border, as well as a [document outlining systematic drug programs for each of Festina's riders](#). After retrospective drug tests, 92% of participants who were either tested or confessed to drug use, including [9 of the top 10 finishers, were found to have used Erythropoietin](#), an IOC-prohibited hormone that significantly boosts red blood cell production.

Global Measures of Action

Amid growing public concern regarding both the increased sophistication and widespread use of performance enhancing drugs, the IOC created the [World Anti-Doping Agency \(WADA\)](#) in 1999, an organization dedicated to engaging in scientific research, education, and the development of anti-doping protocols to combat drug use in sports. The organization has garnered nearly unanimous support from nations worldwide and promulgates the [World Anti-Doping Code](#), which is designed to harmonize anti-doping regulations across sports and countries.

The Code has been adopted by 80 governments and is characterized by a severe punishment regime, frequent mandatory testing, and a comprehensive list of banned substances that is updated annually. Although the Code was drafted primarily for international competition, the International Convention against Doping in Sport was introduced at a UNESCO conference in 2005 to encourage states to align their domestic anti-doping regulations with the Code; the Convention, which was the first global international treaty against doping, [has been ratified by 181 UN member states](#).

Worldwide Challenges

Although WADA was established to replace a disorganized, bureaucratic drug-testing system with an independent authority capable of maintaining the consistent administration of enforcement policies, the organization is still denounced for its deference to regional federations. Because WADA does not possess the resources to run its own labs worldwide, it delegates these responsibilities to international sports federations and national Olympic

committees. Critics lament a lack of good faith in policing doping activity by the regional federations and at the national level, [suggesting that the leaders of these organizations are reluctant to embark on a public witch-hunt or potentially indict their most marketable athletes](#). The evidence appears to at least partially validate these concerns: for example, FIFA did not produce a single positive drug test ahead of or during the 2015 World Cup, and [Russia has been notoriously accused of promoting a state-sponsored doping program for their Olympic athletes in recent years](#).

The primary reason that WADA cannot act as a fully independent body and conduct all testing itself instead of delegating it to federations and nations is budgetary. WADA is funded equally by the IOC and its supporting governments; it would need significantly more funding than it currently receives to achieve full independence. Travis Tygart, chief executive of the U.S. Anti-Doping Agency, has projected that a [WADA “with teeth” would cost between \\$75 and \\$100 million annually](#).

One option for increased WADA funding is the IOC, with its [expected \\$8 billion in television revenue through 2032](#). Alternatively, WADA could consider soliciting funding for drug-testing from private sports leagues that benefit from Olympic participation and coverage, such as the NBA, FIFA and the NHL. Either way, an increase in WADA funding and a commensurate increase in drug testing would greatly benefit anti-doping efforts worldwide.

Implications in the United States

The United States Anti-Doping Agency (USADA) was launched in 1999 by the United States Olympic Committee shortly after the formation of WADA and is a signatory to the WADC. USADA is recognized by Congress as the [official anti-doping agency for Olympic, Pan American and Paralympic sports in the United States, and is endowed with adjudicatory powers](#).

Professional sports leagues, however, have spurned USADA regulations as well as Congressional attempts to standardize anti-doping procedures and enforcement, in favor of less punitive policy regimes. The four major American sports leagues (MLB, NBA, NFL, and NHL) are privately owned and regulated, falling outside of USADA’s jurisdiction. Not surprisingly, the self-policing measures favored by these sports leagues are generally more player-friendly than USADA’s or Congress’s attempts to solve the doping problem. For example, Congress’s 2005 Clean Sports Act proposal, imposing a two-year ban for a first offense, a lifetime ban for a second offense, and mitigation for players who can prove they exercised extreme caution or substantially aided in identifying other violators, was [labeled “draconian” by then-National Football League Commissioner Paul Tagliabue at a Congressional hearing](#). While Major League Baseball has toughened its stance on drug use in recent years in an effort to control rampant use of Human Growth Hormone and other Performance Enhancing Drugs (PEDs), currently [imposing an 80-game suspension for first-time positive steroid tests](#) (compared to a 10-day ban in 2005), the other major domestic sports leagues have not been ravaged by PED scandals to the same degree, and have thus shifted the focus of their drug programs toward curbing marijuana abuse. The [NBA](#) and [NFL](#) administer random drug tests for marijuana and employ mandatory completion of substance abuse programs, fines and suspensions progressively, [while the MLB will not issue random marijuana screenings for players who have no history of drug use](#). The NHL’s marijuana testing program is non-punitive on a league-wide level, [merely requiring completion of substance abuse programs at the league’s discretion upon testing positive](#).

Moreover, Congressional threats to impose stricter anti-doping regimes on private leagues are somewhat limited by the U.S. Constitution. Any legislative provision relating to drug-testing procedures and/or punishment for using banned substances would constitute state action and thus runs into [Fourth Amendment \(search and seizure/privacy\)](#) and [Fifth Amendment \(due process\) concerns](#). Thus, although Congress technically has the power to regulate any industry that falls under the ambit of the Interstate Commerce Clause, [any anti-doping proposal would be subject to a balancing test weighing the government’s interests against the damages wrought on players’](#)

[private rights](#). These prospective issues have led private leagues (the NBA, NFL, NHL, and MLB) to contract for their own drug-testing policies in their respective Collective Bargaining Agreements with players, [which typically consist of players waiving certain privacy and property rights in exchange for reduced penalties if drug use is found](#).

The BALCO (Bay Area Laboratory Co-Operative) scandal shed light on the prevalent use of performance enhancing drugs contamination in the U.S. sports leagues. An anonymous phone tip to officials at USADA, later identified as coming from U.S. sprint coach Trevor Graham, [accused the BALCO laboratory of providing and administering banned performance enhancing drugs to numerous athletes](#), including prominent stars from the MLB. This extensive program helped to explain the astronomical rise in home run totals in the late 1990s and early 2000s, punctuated by the 1998 “Race for the Record” between Sammy Sosa and Mark McGwire, and Barry Bonds’ herculean 73 home runs in 2001. Bonds, among others, was called to testify before a federal grand jury. He denied use of PEDs and was initially convicted for obstruction of justice due to overwhelming evidence that he had used steroids, but [the ruling was overturned on appeal](#).

Congress attempted to intervene, drafting the [Clean Sports Act of 2005](#), which recommended more frequent testing and harsher penalties, including a one-year ban for first time offenders. MLB Commissioner Bud Selig balked at the measure, but commissioned former senator George Mitchell to [investigate steroid use in baseball in order to test the efficacy of the league’s drug-testing regime](#). The Mitchell Report represented a significant step in the right direction for the MLB as a quasi-joint venture between the league and the federal government; although lacking in subpoena power, [Mitchell was able to use federal agents to compel evidence](#). Mitchell’s work consisted of a 21-month investigation that implicated 86 players, including 31 All-Stars and 7 former MVPs. After Mitchell’s findings were revealed, Selig issued more suspensions to players, but the MLB is still fraught with testing flaws, as evidenced by Ryan Braun’s successful challenge of a positive drug test in 2012 when a sample collector delayed transference for 48 hours, and the notorious [Biogenesis scandal of 2013](#), in which high profile players such as Braun, Alex Rodriguez and Nelson Cruz were accused of obtaining human growth hormone from a health rejuvenation clinic.

Pushback in the United States

Major League Baseball’s refusal to implement USADA standards has had serious consequences. The [IOC officially voted baseball out of the Olympics in July 2005](#), citing non-compliance with WADA as a reason for its elimination. A rise in baseball’s international popularity, particularly in Japan, catalyzed its reinstatement for the 2020 Olympics, but it remains to be seen how eligibility will be determined for players currently playing in non-WADA compliant organizations, including baseball’s minor leagues. Recent developments have been encouraging, however. [WADA supported MLB’s decision to proceed with a “clear and convincing evidence” standard in arbitration proceedings](#) to uphold Alex Rodriguez’s suspension as a result of his role in the Biogenesis scandal; the process considered evidence and information beyond simple administration of drug tests to uphold player suspensions.

The only professional league that has turned over its testing program to USADA is the Ultimate Fighting Championship (UFC). UFC athletes are required to update their whereabouts at all times through a GPS tracking phone app and are required to submit drug tests upon notification of request, 365 days a year. Doping control officers may appear randomly and will wait only 60 minutes at an athlete’s last disclosed location for a drug test to be administered. Athletes are closely monitored during the collection process to ensure its integrity; the standard requires officers to observe delivery of specimens into the provided receptacle. [The regimen is arguably even more effective than the one imposed upon Olympic athletes](#) because the agency is completely independent of the league’s interests.

This testing procedure is in contrast to the other professional leagues, whose testing policies are crafted in collective bargaining agreements between owners and players’ unions, resulting in far less vigorous protocols that also lack transparency. For example, [NFL players are given a longer time period in which to respond to a testing request than](#)

[UFC fighters are, and are not perpetually required to disclose their approximate locations.](#) This, of course, exposes the process to potential tampering. In addition, [players may be randomly selected for testing up to 6 times per year, and a maximum of 10 players per team may be tested in any given week.](#) Perhaps most significantly, the NFL declines to use precise bio marker tests that can detect HGH several weeks after usage, opting instead for an isoform test that only indicates use within a maximum of 48 hours. The UFC also can keep samples to create a biological profile for each athlete and retest samples as technology improves; per the CBA agreement, [NFL destroys samples after 90 days.](#)

Conclusion

The current testing regimes in U.S. professional sports leagues create the illusion of a clean game that protects the integrity of the sport, and its players from substance abuse, but upon further examination the myriad loopholes and curious policy choices suggest they're little more than public relations maneuvers. Owners and league leadership are faced with a tough business decision: keep the box score exciting, or do more to eradicate cheating? Inflated statistics mean more records broken, more intensified media coverage and more fan engagement, which in turn lead to increased revenues. Owners and the leagues appear to balance these concerns by enacting half-hearted anti-doping measures that pay lip service to the need to clean up the sport, while not requiring the USADA/WADA protocols that could actually do so. If owners and league governments really want to protect their players and ensure the integrity of sports, they should do two things: (1) follow the UFC's lead and turn their testing programs over to USADA; and (2) provide the financial support USADA needs to carry out its mission.



This publication is part of an ongoing series of contributions from practitioners, policymakers, and civil society leaders in the public integrity community. If you have expertise you would like to share, please contact us at CAPI@law.columbia.edu.

The series is made possible thanks to the generous support of the Laura and John Arnold Foundation. The views expressed here are solely those of the author and do not necessarily represent the views of the author's organization or affiliations, the Center for the Advancement of Public Integrity, Columbia Law School, or the Laura and John Arnold Foundation.

Published: July 2017 | © 2017, Center for the Advancement of Public Integrity/Trustees of Columbia University
Terms of use and citation format appear at <https://web.law.columbia.edu/public-integrity/about/terms-use>.