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Anti-doping in Major League baseball: the "A-Roid" case and American exceptionalism in sports law[1]

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Introduction

Baseball is America's national pastime, and one of the "big three" sports in this sports-crazed country. Basketball and American football may well be better-suited to televised viewing and the fast-paced, connected, You-Tubed world of the twenty-first century. But the "grand old game" of baseball continues to represent something special in American sport and society. No other sport in the U.S. is the subject of an even remotely-similar quantity and especially quality of literary[3] and cinematographic works. No other sport tugs so strongly on the American soul. No other sport can legitimately be referred to as forming "*part of America's social fabric in deep, almost mystical ways*"[4].

The structure and regulation of American sport diverges in important respects from that of world sport generally. Professional sport tends to be viewed and regulated in the U.S. as a business or form of entertainment, with little or none of the pyramidal structure or social and other values that characterize prevailing conceptions of sport globally. Anti-doping rules and procedures are addressed by league-specific collective bargaining agreements between players and owners, and not by universal, uniform systems under the aegis of an independent or ostensibly independent agency. Even U.S. scholastic and collegiate competitions apply their own anti-doping rules and procedures, incorporating and applying those that are typically in force globally only in Olympic sports and only for athletes aiming at participation in Olympic competitions.[5]

The recent doping case involving the aging but still-active superstar of the New York Yankees, Alex Rodriguez, will trigger soul-searching and debate from a multitude of perspectives. The debate will dwarf that involving Lance Armstrong and the notorious world of professional cycling. Cycling, after all, is a minor, residual sport in the U.S., and Armstrong was a relatively little-known and retired athlete when his case exploded. But baseball is different. It is America's game. The Yankees are America's team. And Alex Rodriguez (a/k/a "A-Rod", but now derisively referred to as "A-Roid") is one of the sport's biggest and highest-paid stars.

Properly understanding the origins of the "A-Roid" case, so as to be able to extract meaningful lessons from it, requires a review of the recent relation between doping and U.S. professional sports, in particular Major League Baseball (MLB).

The "steroid era" in Major League baseball

Reports of illegal use of anabolic steroids and other performance enhancing drugs (PEDs) in baseball became increasingly frequent in the 1990's, when among the players suspected of steroid use were those battling for, establishing and exploding single-season home run records which had stood untouched and unapproached for decades.

The issue soon became even more visible and complex from a legal perspective. In the "BALCO" case of the late 1990's, searches and seizures of the results of drug tests of players carried out under warrant by government agents investigating a notorious San Francisco laboratory – although the searches and thus the material and information seized were ultimately declared unlawful in light of constitutional privacy concerns – showed that many leading players (some of whom testified before a grand jury in December 2003 to provide prosecutors with evidence of BALCO's alleged sale of anabolic steroids) were involved in steroid use.

With this, the issue of PEDs in baseball and American professional sports generally became acute.[6] In January 2004, President G.W. Bush addressed the issue in a memorable State of the Union Address, in which he called on professional sports leagues and athletes to set better examples for children and to rid themselves of PEDs.

Now elevated to an issue of national political interest, Congress responded by proposing various bills aimed at eliminating the use of PEDs in sports. Each sought – essentially for the purposes of protecting the integrity of sport and protecting youth from the dangerous use of steroids – uniform regulation of drug-testing policies in the principal American professional sports leagues. But each differed in details as to testing, prohibited substances, sanctions and other aspects.[7]

In tandem, the professional sports leagues (accused of having closed their eyes to doping practices, at best, and even of having aided and abetted these practices, at worst) acted to stiffen their anti-doping rules. It is here where critical specificities of the American constitutional and legal system enter into play.

Constitutional implications of congressional legislation – The Fourth Amendment

The Fourth Amendment to the United States Constitution protects "[t]*he right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures*"[8]. It is the benchmark against which the validity of Congressionally-mandated blood or urine testing of athletes (the critical feature of any anti-doping policy) would have to be tested.

There can be no doubt that a blood or urine test must be considered a "search" or "seizure". The question, then, is whether random blood or urine tests should be considered reasonable for Fourth Amendment purposes, where not based on specific, individualized suspicion. This involves two hotly-debated issues.

– First, whether a governmentally-mandated policy of suspicionless drug testing by a private party employer (in this case, MLB) converts the private party into an "instrument" or "agent" of the government for Fourth Amendment purposes. This question involves a determination, "in light of all the circumstances" of a particular case, of the "degree of the Government's participation in the private party's activities", i.e., application of the so-called "state action" test.[9]

– And second, once the state action test is satisfied, whether in application of a balancing test developed by the courts, the search can be considered reasonable without individualized suspicion. This involves a determination as to the existence of "special needs", i.e., a substantial government interest sufficient to outweigh the individual's privacy interest so as to permit the suppression of the Fourth Amendment's normal requirement of individualized suspicion.

There are strong (perhaps, compelling) arguments supporting the view that congressionally-mandated suspicionless drug testing of professional athletes would constitute "state action" for Fourth Amendment purposes, but the question has been and remains subject to substantial doctrinal uncertainty.[10] The question of the applicability of the casuistic "special needs" exception in this area has been the subject of very intense debate. Whether professional athletes – like teachers, train operators or agents carrying firearms, as the courts have determined in other cases – enjoy diminished or limited expectations of privacy so as shift the balance of constitutionality in favor of the search, is far from clear. The fact that the cases applying this exception have tended to involve people and occupations having a clear and direct effect on public safety suggests that the "special needs" exception might be hard to satisfy in the case of congressionally-mandated drug testing of professional athletes.

U.S. labor law implications – the collective bargaining system

Under the U.S. National Labor Relations Act, all terms and conditions of employment in industries engaged in or affecting interstate commerce are subject to collective bargaining in good faith between the employees (represented by unions in the case of unionized industries, such as professional sports, including the Major League Baseball Players Association, or MLBPA, in the case of baseball) and the employer (here, the clubs as part of MLB).

Drug testing, then, is by law a **mandatory** subject of private collective bargaining in U.S. professional sports: a league or team may **not** unilaterally implement a drug testing policy, but rather such a policy must be collectively bargained for between the players' union and the league.

As a result, the terms of a sport's applicable collective bargaining agreement (CBA), and the process and climate under which these terms can be changed, become the critical element of anti-doping policy and enforcement in U.S. professional sports. Whether or not (as a practical matter) doping regulation can be effectively implemented via the CBA process is, like the question of the applicability (as a legal matter) of the Fourth Amendment to suspicionless testing imposed by federal legislation, a hotly-disputed issue.

Some authors, citing asserted loopholes, built-in conflicts of interest and intrinsically sluggish approaches for dealing with new doping issues, have been especially critical in this regard, concluding that CBA-based anti-doping policy is "*chaotic and fundamentally flawed*"; "*dooms the development of proper regulations*"; and will leave the league being "*forever* [...] *on the losing side of a cat and mouse game*" and "*always behind the curve when it comes to regulating doping*"[11].

These authors find in their assertions of conflict of interest a particularly damning condemnation of the CBA system's effectiveness:

> *"Both owners and players financially benefit from doping. Players that dope usually perform better. The better the athletes perform, the more revenue the owners make. The more revenue owners make, the more valuable players are to their owners. The more valuable players are, the higher their salaries are."*[12]

Other authors advocate the opposing view for reasons going beyond the constitutional issues involved in a congressionally-mandated policy. One[13] argues that CBA-based policies would:

a give both parties an "ownership" of the policy, strengthening its acceptance;
b potentially provide for rapid response to developments in doping and anti-doping technology;
c permit sport-specific regulation taking account of difference between leagues and sports; and
d avoid distracting Congress's attention from more pressing issues than regulating drug testing in sports.

Another[14] similarly argues that:

a those most affected by the policies are in the best position to collectively bargain on the rules and regulations by which they themselves will be affected;
b unionized bargaining takes into consideration many aspects of business that any "external" regulation would ignore; and
c collective bargaining would likely lead to a more effective and more effectively-revamped policy.

In light of the above debate, a bevy of proposed solutions have been advanced. These range from the more "extreme" solutions of mandatory federal legislation on the one hand or pure CBA-solution on the other, to a host of creative, intermediate solutions. These include:

– the possible creation of a "hybrid" governmental agency to work in conjunction with professional leagues in order to establish drug-testing policies for American professional sports[15];
– the signing of a "soft law" agreement between the World Anti-Doping Agency (WADA) and the American sports leagues which would establish a system

respectful of the diverse circumstances existing in different sports leagues and focus on coordination rather than WADA's traditional harmonization and uniformity[16]; and
– the creation of a Sarbanes-Oxley inspired regulatory model (notwithstanding the manifestly more limited public interest in this area than in the area of financial market supervision).[17]

Anti-doping regulation in MLB today

The CBA currently in effect for MLB is the 2012-2016 Basic Agreement, a document of some 300 pages in length, covering a broad range of matters from basic salary and expense items to revenue sharing and luxury tax provisions to matters involving discipline and grievance procedures. Significantly, the Basic Agreement provides in its art. XII(B) that players may be disciplined for conduct "*materially detrimental or prejudicial to the best interest of baseball*", including engaging in conduct in violation of federal, state or local law. The Basic Agreement is accompanied by a 34-page Joint Drug Prevention and Treatment Program (the Joint Program).

The content of the Joint Program can be summarized as follows.

– It provides for the joint selection of an individual, unaffiliated with the parties to the agreement or any major league baseball club, to serve as "Independent Program Administrator", with authority to administer all aspects of the Program.

– It contains a list of prohibited substances, which may be amended or expanded by agreement of the parties and shall be deemed automatically amended by amendments to the relevant schedules of the U.S. Code of Federal Regulations Schedules of Controlled Substances.

– It establishes separate testing regimes for random testing and for "reasonable cause" testing. Regarding random testing, the Joint Program contemplates:

  a in respect of performance enhancing substitutes and stimulants, a single urine test of each player upon reporting to spring training, an additional unannounced urine specimen on a randomly selected in-season date, and 1,400 additional tests of randomly-selected players, up to 250 of which may be off-season tests; and

  b in respect of blood collections for human growth hormones it provides for an unannounced blood test during spring training and the possibility of unannounced random testing during the off-season. The Joint Program also sets out a follow-up testing regime for players who have been disciplined for violations (involving multiple unannounced tests during the twelve months after the violation was found).

– It provides (Section 7A) for a simple disciplinary scheme for violations involving performance enhancing substances: a 50-game suspension for a first violation: a 100-game suspension for a second violation; and a lifetime suspension for a third violation.

– It also provides (Section 7G) for discipline on a "just cause" basis for violations, the sanctions for which are not specifically referenced in Section 7.

– All authority to discipline players for violations of the Joint Program lies with the Commissioner's Office.

– Review of determinations of violations, or as to the level of discipline and the existence of just cause falls to the Arbitration Panel and the grievance procedure established in the Basic Agreement.

The summary of the Joint Program set out above can be said to represent both the "yin" and the "yang" of a CBA-based anti-doping regime. Constitutional challenges, needless to say, are avoided since there is no Fourth Amendment implication of an agreement between employer(s) and employee(s). But MLB (unlike Congress) is not authorized to impose unilaterally testing or other employment-related measures; instead these matters must be subject to the often slow and uncertain "tit for tat" process of collective bargaining.

The "A-Roid" case

The doping problems of Alex Rodriguez led to the imposition by MLB of an unprecedented 211 game suspension in August 2013 and the subsequent filing of a grievance with an MLB Arbitration Panel challenging the suspension and its length. A five-day hearing was held before an arbitral panel in late September 2013. An arbitral award issued in January 2014 confirmed the suspension, but reduced its length. Various court actions, including one seeking to vacate (set aside) the arbitral award, were brought by A-Rod, but in early February, he withdrew them, accepting the sanction.

To a certain extent, the A-Rod case can be considered a test case of MLB's CBA-based anti-doping regime as embodied in the Joint Program.

Background

A-Rod has established himself as one of the leading baseball players of all time and the greatest slugger of recent years. Having played the latter part of his career with the New York Yankees, and having been linked sentimentally with media figures such as Madonna and Cameron Diaz, he is a sporting icon in the United States (with a commensurate paycheck, of some $ 25 million/year and effective through 2017).

Linked with the BALCO investigation in the early years of the last decade, he has admitted to the use of PEDs in the past, when they were not specifically prohibited in MLB. But his name, and that of a number of other baseball players, including former MVP Ryan Braun, who escaped a doping sanction previously on account of a technicality, appeared again in the records of a notorious Miami-based anti-aging institute named Biogenesis.

MLB's suspension

As a consequence of an apparently quite aggressive investigation into the matter, the Commissioner sanctioned stiffly all thirteen players involved: eleven received the mandatory 50-day suspension for first-time validations; Ryan Braun received a stepped-up suspension of 65 games; and A-Rod received a suspension of 211 games, i.e. the 49 games remaining in the 2013 regular season and the entire 162 games of the 2014 season. At his age (38), and with his recent history of health problems, a 211 game suspension may be tantamount, in practice, to a lifetime suspension, and one would cost him (and save the Yankees) tens of millions of dollars in salary.

The Commissioner's "Notice of Discipline" letter issued to Rodriguez on 5 August 2013 indicates that the suspension was based, in part, on repeated use

of PEDs and, in part, on interfering with MLB's investigation and covering-up violations:

> *"Your discipline under Section 7.G.2 of the Program is based on your intentional, continuous and prolonged use and possession of multiple forms of prohibited Performance Enhancing Substances, including but not limited to Testosterone, Human Growth Hormone, and IGF-1, that you received as a result of your relationship with Anthony Bosch beginning in the 2010 championship season and ending in or about December 2012. Considering all of the facts and circumstances of which I am aware, including your statements duding prior investigatory interviews regarding your knowledge of, and purported adherence to and support for, the requirements of the Program, the substantial length of time you used Performance Enhancing Substances, the quantity and variety of Performance Enhancing Substances you consumed and the frequency with which you consumed them, and your efforts to conceal such use and avoid a positive test under the Program, I have determined that your conduct in 2010, 2011 and 2012 evinces a wanton and willful disregard for the requirements of a Program that was jointly agreed to and is jointly administered by the Office of the Commissioner and the Major League Baseball Players Association (MLBPA).*
>
> *Your discipline under Article XII(B) is for attempting to cover-up your violations of the Program by engaging in a course of conduct, beginning in or about January 2013, that was intended to obstruct and frustrate the office of the Commissioner's investigation of Biogenesis and Anthony Bosch."*

A-Rod counterattacks

Twelve of the thirteen players sanctioned accepted their suspensions. Not A-Rod. Indeed, not only did he file (as is, of course, his right) a grievance under the procedures set out in the Basic Agreement – with the effect of suspending the sanction and thus allowing him to return to the playing field for the final weeks of the 2013 season – but he also filed two separate court claims on the last of the five days of his grievance hearing. The first was a claim for tortious interference with existing contracts and with prospective business relationships brought against MLB, the Commissioner's Office and Commissioner Bud Selig, and alleging essentially that MLB, in order to make an example of A-Rod and "*gloss over Commissioner Selig's past inaction and tacit approval of* [PEDs] [...] *in an attempt to secure his legacy as the "savior" of America's pastime* [...] *engaged in tortious and egregious conduct* [indeed, "a witch hunt"] [...] *to improperly marshal evidence [...] to destroy the reputation and career of Alex Rodriguez*".[18] The second was a suit against the Yankees' doctor for medical malpractice in clearing A-Rod to play in the 2012 play-offs and against the hospital for lack of informed consent and vicarious liability.[19]

In what one of New York's liveliest newspapers called a "*rampage of litigation* [...] *making the game's richest player a one-man stimulus plan for the Manhattan legal economy*"[20], A-Rod seems to have followed Lance Armstrong's failed strategy of taking his case to the courts and thus, to the public. Armstrong's case[21] was aimed at declaring that the cyclist was not obligated to bring an arbitration against the United States Anti-Doping Agency (USADA) in order to challenge the agency's decision to strip him of his cycling titles due to what USADA later described in its 164-page (excluding several hundred pages of damning annexes) reasoned decision[22] as a "*massive fraud*" involving "*one of the most sordid chapters in sports history*" in which Armstrong "*engaged in serial cheating through the use, administration and trafficking of performance enhancing drugs and methods* [...] *and participated in running the U.S. Postal Service Team as a doping conspiracy*".

The federal court threw out Armstrong's case[23] and shortly thereafter – with USADA's devastatingly detailed reasoned decision in the public domain – Armstrong confessed to the charges against him[24].

A-Rod's strategy in filing these court cases was different and more nuanced than Armstrong's: he did not appear to be denying the doping charges but instead was presenting himself as a victim of over-zealous prosecution; seeking to extend his playing (and earning) career as long as possible and staunch, to the extent possible, the reputational damage he has suffered as a consequence of the matter. As one observer noted before the arbitral panel issued its award, there was more than mere litigation strategy involved in this dispute:

"*Rodriguez seems to have very few friends in baseball, and probably deserves to have even fewer than he does. His image has been leaking hot air ever since he joined the Yankees. And yes, he is floundering in a vain attempt to rescue the reputation he personally fed into the wood chipper. But, in his battle with Selig, it's important to remember that – while Rodriguez is fighting for his reputation, and Selig for his legacy – they're also both fighting just as hard to avoid something else. Neither one wants to be the lasting face of the steroid era. The commissioner would like to fit Rodriguez for the role, because that's the only way to save Selig's legacy; this makes his pursuit of Rodriguez look less like an attempt to rescue the game and more like an elaborate attempt to cover his own historical ass.*"[25]

The Arbitration Panel's award[26]

As mentioned, on 11 January 2014, an MLB Arbitration Panel, acting (essentially, and as per established practice) via the independent panel chairman, upheld the suspension, although reducing it from 211 games (the period from the August 2013 announcement of the sanction by the Commissioner through the remainder of the 2013 season and the full 2014 season) to 162 games (the 2014 season).

The 34-page award concludes as follows:

> *"Based on the entire record from the arbitration, MLB has demonstrated with clear and convincing evidence there is just cause to suspend Rodriguez for the 2014 season and 2014 postseason for having violated the JDA by the use and/or possession of testosterone, IGF-1, and HGH over the course of three years, and for the two attempts to obstruct MLB's investigation described above, which violated Article XII(B) of the Basic Agreement. While this length of suspension may be unprecedented for a MLB Player, so is the misconduct he committed. The suspension imposed by MLB as modified herein is hereby sustained."*

Specifically, the award found as "*clear and convincing*" the evidence that Rodriguez committed multiple violations of the Joint Program as alleged, noting (in terms reminiscent of the Armstrong case) that "*the absence of a positive test during the three years in question, in and of itself, does not and cannot overcome the unre-*

butted direct evidence in this record of possession and use". The critical evidence was provided by a cooperating witness, the phony doctor (described in the award as a "drug dealer") who testified as to the detailed program of doping he designed for and administered to Rodriguez.

The award similarly confirms the violation of art. XII(B) of the Basic Agreement by obstruction or cover-up of an investigation. Specifically, the award concludes that "*the evidence considered in its entirety supports a minimum of two such violations*" having been committed.

Significantly, the award confirmed that the Joint Program's Section 7G "just cause" standard applied to cases of continuous use or possession of prohibited substances, and thus (having found that "*the record here establishes that Rodriguez used or possessed three separate performance enhancing substitutes on multiple occasions over the course of three years*") was not limited to the specified 50- or 100-game maximum suspensions set out in Section 7A.

On the basis of comparative suspensions in other cases and all other facts and circumstances deemed relevant, the award concluded that an appropriate suspension was 162 games (one full season), substantially exceeding the maximum suspension in any other MLB substance abuse case to date. The award observes:

> *"It is recognized this represents the longest disciplinary suspension imposed on a MLB Player to date. Yet Alex Rodriguez committed the most egregious violations of the Joint Program to date, and engaged in at least two documented attempts to cover up that behavior in violation of the Basic Agreement."*

Reactions to the award

Immediately upon announcement of the award, the parties issued press releases.

MLB's statement said:

> *"For more than five decades, the arbitration process under the Basic Agreement has been a fair and effective mechanism for resolving disputes and protecting player rights [...]. While we believe the original 211-game suspension was appropriate, we respect the decision."*[27]

MLBPA's statement said that while it "strongly disagrees" with the decision, it recognized it as a "final and binding".

Rodriguez criticized the ruling and vowed to challenge it in court, saying:

> *"The number of games sadly comes as no surprise, as the deck has been stacked against me from Day 1 [...]. This is one man's decision, that was not put before a fair and impartial jury, does not involve me having failed a single drug test, is at odds with the facts and is inconsistent with the terms of the Joint Program and the Basic Agreement, and relies on testimony and documents that would never have been allowed in any court in the United States because they are false and wholly unreliable."*[28]

A-Rod's action to vacate the award

Just two days after the award was issued, Rodriguez filed a U.S. federal court action[29] to vacate (set aside) the award, alleging essentially that the panel chair had exhibited "*manifest disregard for the law*" (a ground for setting aside arbitral awards under applicable U.S. law with extremely high standards of application, requiring more than a mere error in law or failure to understand or apply the law).

Rodriguez surely recognized that his chances of vacating the arbitral award were essentially nil and that his civil cases were unlikely to prosper. Still, he considered that these cases would allow him to vent his arguments in the public forum and allow (or require) the MLB's arguments, evidence and tactics to be revealed and explained as well. Rodriguez may have hoped to be able to establish in the "court of public opinion" that Commissioner Selig and MLB were mean-spirited and over-aggressive in pursuing him, which might (in addition to easing the reputational damage he will suffer) temper their zeal and make more prudent their actions in future cases. Interestingly, under the rules of the Basic Agreement, the actual text of the award (as indeed is stamped on its very cover page) is confidential: it was not released when the decision was announced, and may never have been made public had it not been for Rodriguez's court action to vacate the award (since the court proceeding is public and the award needed to be attached to the complaint).

Similar confidentiality applies, of course, to the underlying investigation and decision of the Commissioner. Thus, for example, the Notice of Decision letter (of less than two pages) was not made public until the award, which included its text, was made public on the filing of the action to vacate. These confidentiality provisions have been criticized as inappropriate in cases in which the investigation results in sanction rather than exoneration. As noted by a columnist, the detailed report issued by the USADA in support of its decision in the Armstrong case:

> *"satisfied the public's desire to know the how – not only the what – that made Armstrong's actions so bad: when the player is found guilty, as in Rodriguez's case, why not lay everything out for the public? Instead, there is no transparency. We are left to guess what Rodriguez did to deserve his infamy and how the arbitrator arrived at that number, 162* [...]. *The raw footage remains out of reach."*[30]

Equally interesting, the award's confirmation of the Commissioner's power to use the "just cause" standard of Section 7G in order to impose sanctions beyond those set out in Section 7A has been said to be detrimental to players:

> *"Rodriguez unwittingly did his fellow players a huge disservice by bringing this case to arbitration* [...]. *Baseball now has the power to impose penalties beyond what people thought they could."*[31]

Others have voiced an entirely opposite view, deeming A-Rod's challenge of the award as a service to the players and baseball generally:

> *"Baseball's pursuit of Rodriguez was aimed as much at exploiting a vacuum of leadership in the union as at targeting a cheat. The most rabid fan and the most casual observer should be troubled by how baseball's emboldened investigative unit snared its man, employing unsavory tactics to establish Rodriguez's guilt* [...]. *By continuing his bare-knuckle resistance to baseball in court, Rodriguez, for the first time, could do something to benefit the greater good. He could continue pushing back against baseball's assault on players' rights and, at the same time, galvanize a once powerful but lately listless, players union.*[32]

As mentioned, the chances for success of Rodriguez's annulment action were considered to be very slim. U.S. federal courts only rarely set aside arbitral awards, and this one was considered to be essentially "*sound and impervious to second-guessing by a federal judge* [...]. *It would take the equivalent of a polar vertex and a vernal equinox* [...]. *The odds are remote at best*."[33]

A-Rod's throws in the towel

On 7February 2014, Rodriguez filed court papers withdrawing his federal lawsuits, including the annulment action; initial press reports indicate that it was unclear if he planned to proceed with the malpractice suit pending in the New York state courts.[34] While not expressly admitting to the doping violations (which, essentially, he never denied), A-Rod seems to have come to the conclusion that neither suits' prospects nor the public's interest in their prosecution was sufficient to pursue them further.

MLB and the MLBPA immediately applauded Rodriguez's decision. Initial press reports suggest that bringing closure to the dispute could be beneficial both to Rodriguez and MLB, whose "dirty laundry" had already been sufficiently exposed.[35]

Lessons and conclusion

American sports, and, in particular, American professional sports, operate to some extent in a world of their own, a world parallel to that of the global sporting world, in which business and entertainment often trump other interests.

American athletes must comply with International Olympic Committee (and, therefore, WADA) rules if they want to compete in the Olympic Games. But U.S. sports have little or no concept of national teams. U.S. professional leagues and clubs have little interest in permitting their players to play in international competitions and no interest (or ability) to require them to play in such competitions. Indeed, a declaration attached by the U.S. Senate to the country's ratification of the little-known UNESCO International Convention Against Doping in Sports (2008) expressly limits its scope to U.S. athletes in the Olympic movement, i.e., excluding not only professional athletes but also collegiate and scholastic athletes generally. The reason is simple:

> *"The U.S. professional league sports, both the unions and the owners, do not want to be governed by the terms of the WADA Code nor turn over testing to an entity entirely outside their control."*[36]

Baseball, perhaps precisely due to MLB's refusal to comply with WADA rules (together, no doubt, with the absence of MLB stars due to the overlap of the summer Olympic Games with the MLB schedule) has recently ceased to be Olympic, becoming the first sport to be cut from the Games since 1936. On the other hand, basketball and the NBA remain welcome at the Olympics, notwithstanding that the NBA's anti-doping policy is viewed by many as considerably weaker than that of MLB.

Baseball's steroid era has run its course. Its last victims are being identified. Significantly, last year not a single contemporary player was voted into the Baseball Hall of Fame because so many eligible players were suspected of steroid use.[37]

The scandals of the steroid era and the threat of legislation have prompted significant movement in the CBA-structured anti-doping policy of MLB, giving birth to the Joint Program and more recently the inclusion of HGH testing. Progress may be slow and it might arrive late, but it is progress nonetheless; Congress has not had to intervene and the courts have not had to review the constitutionality of congressional action.

The "A-Roid" case has brought, and will surely continue to bring, considerable attention to MLB's Joint Program. The resolution of the case, and even more so, the way in which its resolution is accepted (not so much by A-Rod, but by the players' union, the clubs and the public generally), may play an important part in confirming the efficacy, or alternatively, confirming doubts about the efficacy, of the CBA system.

Rodriguez will not starve by losing his $ 25 million paycheck for 2014. Selig will retire able to claim that he definitively closed baseball's steroid era. Unlike in the Armstrong case, it was the sport itself which took action, and during the athlete's sporting lifetime. It is early to say, but a preliminary verdict might conclude that the case:

a is a rather positive and promising manifestation of the American form of anti-doping regulation in professional sports, and
b will not augur any particular and significant change in the current system.

All indications are that this example, consistent with American exceptionalism in sport, will continue to characterize the approach of MLB and of U.S. professional leagues to anti-doping policy in the future. All indications are that, unless and until a very broad-based consensus is reached against the self-regulatory CBA-based practice of anti-doping policy in the U.S. professional sports, such will continue to apply. And all indications are that only a huge scandal, equalling or exceeding that of the steroid era, could realistically trigger such a consensus.

Legislative action at a national level seems quite unlikely to be taken; instead, the threat of legislation (as seen in the case of the steroid era discussed above) is a more likely route to the taking of effective action in the "American way": incremental, sport-by-sport, league-by-league action via the mechanic of collective bargaining.

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1 This is an updated and abbreviated version of a paper submitted by the author in November 2013 in partial satisfaction of the requirements of the ISDE Global Executive Master in International Sport Law.

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3 As noted by S. Kuper, *Financial Times*, 23-24 November 2013 – citing Hemingway, Mailer, Kerowac and others –*American Writers Have Always Taken Sports Seriously*. American authors have always taken baseball very seriously.

4 "Viewpoint: Why Doping in Baseball is Punished so Severely", in: *BBC News Magazine*, 7 August 2013.

5 M. Straubel, *The International Convention Against Doping in Sport: Is it the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?*, 19 Marq. L. Rev. 63 (2008).

6 In fact, entire websites were dedicated to following this controversy. See, e.g., *Baseball's Stereoid Era*, www.baseballssteroidera.com.

7 See generally, Blaine V. Roche, "*Congressional Involvement in Professional Sports' Drug-Testing Policies: Get Involved but Don't Infringe*", 4 Phoenix L. Rev. 489 (Fall, 2010).

8 United States Constitution.

[9] See generally, Joshua Peck, Last Resort: *The Threat of Federal Steroid Legislation – Is the Proposed Legislation Constitutional?*, 75 Fordham L. Rev. 1777 (December, 2006).

[10] See generally, Brent D. Showalter, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?* 17 Marquette L. Rev. (Spring, 2007).

[11] Daniel Gandert and Fabian Ronisky, *American Professional Sports is a Doper's Paradise: It's Time We Make a Change*, Vol. 86, North Dakota L. Rev, 813 (2010).

[12] Id.

[13] See Showalter, *supra*, note 10.

[14] See Roche, *supra*, note 7.

[15] See Roche, *supra*, note 7.

[16] George T. Stiefel, *Hard Ball Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 Buff. L. Rev. 1225 (December 2008).

[17] Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide*, 27 Cardozo Arts & Ent. L. J. 199 (2009).

[18] See the *Complaint of Alexander Emmanuel Rodriguez v. Major League Baseball, Office of the Commissioner of Major League Baseball and Allan Huber "Bud" Selig*, filed 3 October 2013 in the Supreme Court of the State of New York, County of New York.

[19] See the *Verified Complaint of Alexander Rodriguez v. Christopher S. Ahmad, M.D. and New York Presbyterian/Columbia University Medical Center*, filed 4 October 2013 in the Supreme Court of the State of New York, County of Bronx.

[20] T. Thompson and N. Vinton, "What Does Alex Rodriguez Hope to Accomplish by Following Lance Armstrong's Legal Blueprint?", in: *NY Daily News*, 5 October 2013.

[21] See *Amended Complaint and Jury Demand of Lance Armstrong v. Travis Tygart, in his official capacity as Chief Executive Officer of the United States Anti-Doping Agency*, and United States Anti-Doping Agency, case No. A-12-CA-606-SS, filed 10 July 2012 in the United States District Court for the Western District of Austin, Texas.

[22] See *Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility in Report on Proceedings Under the World's Anti-Doping Code and the USADA Protocol Concerning the Matter of USADA v. Lance Armstrong*, filed 10 October 2012.

[23] See *Order Granting Motion to Dismiss* filed 20 August 2012 of *Amended Complaint and Jury Demand of Lance Armstrong v. Travis Tygart, in his official capacity as Chief Executive Officer of the United States Anti-Doping Agency, and United States Anti-Doping Agency*, case No. A-12-CA-606-SS, filed 10 July 2012 in the United States District Court for the Western District of Austin, Texas.

[24] A recent article by best-selling author Malcolm Gladwell questions the logic of anti-doping regulation. Comparing the case of a Finnish athlete with a rare genetic mutation which caused his body to overproduce red blood cells and led him to be a perennial cross-country ski champion, Gladwell asks of Armstrong (whose violations in part involved "blood doping" designed to increase his red blood cell count): "*Before we condemn him, shouldn't we have to come up with a good reason that one man is allowed to have lots of red blood cells and another man is not?*" Gladwell also cites, in what likely characterizes A-Rod's sentiments, an observation of Armstrong's former teammate Tyler Hamilton in his autobiography: "*I've always said you could have hooked us up to the best lie detectors on the planet and asked us if we were cheating and we'd have passed* [...]*; not because we were delusional – we knew we were breaking the rules – but because we didn't think of it as cheating. It felt fair to break the rules.*" M. Gladwell, "Man and Superman", in: *The New Yorker*, September 9, 2013.

[25] C. P. Pierce, "*When the Fall is All There is*", www.grantland.com, 11 November 2013.

[26] Panel Decision No. 131, Grievance No. 2013-12, Major League Baseball Arbitration Panel, Frederic Horowitz, Panel Chair, 11 January 2014.

[27] Quoted in S. Eder, "Arbitrators Ruling Banishes the Yankees Alex Rodriguez for a Season", in: *New York Times*, 11 January 2014.

[28] Id.

[29] See *Complaint of Alexander Emmanuel Rodriguez v. Major League Baseball, Office of the Commissioner of Baseball and Major League Baseball Players Association*, U.S. District Court, Southern District of New York, 13 January 2014.

[30] J. Macur, "In Alex Rodriguez Decision, the Devil is in a Lack of Detail", in: *New York Times*, 12 January 2014.

[31] D. Waldstein, "Arbitrators Ruling on Rodriguez Gives Baseball a Disciplinary Hammer", in: *New York Times*, 15 January 2014.

[32] W.C. Rhoden, "Punishing Lords of Baseball Along With Their Fallen Idol", in: *New York Times*, 17 January 2014.

[33] D. Schroeder, quoted in D. Waldstein, *supra* note 31.

[34] S. Eder, "Rodriguez drops Suits Against Baseball and Union", in: *New York Times*, 7 February 2014.

[35] Id.

[36] See *supra* note 5.

[37] J. Mahler, "Is the Game Over?", in: *New York Times Sunday Review*, 28 September 2013.

