

November 3, 2009 House Hearing

“The NFL StarCaps Case: Are Sports’ Anti-Doping Programs at a Legal Crossroads?”

**Conducted by the House Energy and Commerce Subcommittee on Commerce, Trade, and
Consumer Protection**

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Mr. Chairman, Members of the Committee, good morning. My name is Travis Tygart and I am the CEO of the United States Anti-Doping Agency (USADA). I want to thank this Committee for its longstanding interest in the rights of clean athletes and for its support for clean sport and for the opportunity to appear before you today to discuss an important issue in all of our efforts to eliminate doping in sport.

USADA has been recognized by Congress as the independent, national anti-doping agency for Olympic, Paralympic and Pan American Sports in the United States. Our mission is to protect and preserve the health of athletes, the integrity of competition, and the well-being of sport through the elimination of doping. USADA is responsible for drug testing, investigation of potential doping violations, results management of anti-doping rule violations, and anti-doping education and research in Olympic, Paralympic, and Pan American Games sport in the United States.

While USADA's current mandate does not extend to professional sports outside of the Olympic Movement, we do not work in a vacuum. The elimination of doping in professional sport is very important to the elimination of doping at all levels of sport in our country.

Sport in America has taken on a significance that extends well beyond a type of leisure time activity or a form of entertainment. Sport has become woven into the fabric of our society because sport inspires dreams and passions. In its purest form, sport builds character and promotes the virtues of selfless teamwork, dedication and commitment to a greater cause. True

sport is built on the idea of honesty and respect--respect for the rules, respect for one's competitor, respect for the fundamental fairness of stepping onto a playing field and competing against another individual or team. True sport teaches active lessons that can create a lifetime legacy of ethical values and healthy habits.

It is these core principles of sport that bring our communities together to cheer athletes and empower athletes to pursue their dreams and inspire others through the accomplishment of those dreams. Sadly, when doping is introduced into sport, its corrosive effect eats away at these core attributes and compromises everything valuable about sport.

The existence of doping in professional sport hurts us all. Last year, this Subcommittee conducted hearings on the Mitchell Report detailing past widespread doping in Major League Baseball. Major League Baseball was not the only sport organization hurt by those revelations. Sports fans everywhere felt disillusioned and betrayed. Once again, the accomplishments of clean athletes in all sports were brought into question by a public that has come to assume that doping is the status quo at the highest levels of all sport.

Most importantly, the stars in our professional sports are often the heroes and role models for all young athletes in our country, regardless of what sport a young athlete plays. I live in Colorado, and I am reminded of this weekly when our local newspaper runs a feature on its high school athlete of the week. Invariably, the student athlete, whether he or she plays tennis, volleyball, soccer, or swims, identifies the Denver Broncos or Colorado Rockies as his or her favorite team and names a professional player as his or her favorite athlete. As we learned in the

hearings that were conducted by the House Committee on Government Reform in March 2005, young athletes like Taylor Hooton are keen observers of the actions of their professional heroes and more than one young athlete has died as a result of taking performance enhancing drugs while imitating his or her professional role model. Simply put, USADA cares, and we should all care, that our professional sports leagues have strong and effective anti-doping programs.

Before I address the specific topic of federal legislation to protect the uniform enforcement of anti-doping programs implemented by professional leagues, I would like to digress momentarily to the StarCaps problem that led to the case of *Williams v. National Football League*. Four weeks ago, I testified before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, and outlined a series of legislative and regulatory changes that USADA believes are necessary to protect athletes and other consumers from mislabeled dietary supplements – in particular, those supplements that contain undisclosed substances that are either prohibited in sport or are otherwise dangerous to the consumer. Had these legislative and regulatory changes been in place back in 2008, the prohibited diuretic, bumetanide, would most likely not have been in the StarCaps supplement, if that is in fact where it came from.

In my prior testimony, for example, we specifically recommended that:

- Dietary supplement companies should provide the FDA with a comprehensive list of all dietary supplements they manufacture with a copy of the master formulas and product labels.
- Distributors and retailers of dietary supplements should obtain evidence of compliance from the manufacturers and licensors that all pre-market requirements have been complied with or bear responsibility for the products they sell as if they were the manufacturer.
- The FDA should be given the power to unilaterally prohibit sales and initiate immediate recall of any product that has not followed all pre-market requirements.

With respect to today's hearing, USADA strongly supports federal legislation that protects the uniform national enforcement of a professional sports league's sound anti-doping program against interference from inconsistent state laws. Where a sport league has a national scope, its anti-doping program cannot be effective unless it is uniform and national in scope. Players, coaches, officials and teams must all be subject to the same uniform anti-doping requirements.

We have learned that lesson from the history of anti-doping in the Olympic Movement, the adoption of the World Anti-Doping Code, and the acceptance of the World Anti-Doping Code by governments like the United States through ratification of UNESCO's International Convention Against Doping in Sport.

On October 4, 2008, the President, following the advice and consent of the Senate, executed the UNESCO International Convention Against Doping in Sport. That Convention commits the United States to coordinate the implementation of the fight against doping in sport in the United States through appropriate measures, which may include legislation, regulation, policies, or administrative practices consistent with the principles of the World Anti-Doping Code. The UNESCO Convention specifically recognizes that "the elimination of doping in sport is dependent in part upon progressive harmonization of anti-doping standards and practices in sport and cooperation at the national and global levels." There can be no national-level harmonization of anti-doping policy if each state is allowed to legislate around the policy in its own unique way.

As described in the World Anti-Doping Code, sport anti-doping programs are based on three fundamental objectives:

- To maintain a level playing field for the athletes.
- To protect the athletes' health.
- To preserve the spirit of sport.

To ensure a level playing field for athletes, the anti-doping rules of a national professional league must apply uniformly across the nation without interference from unique or inconsistent state laws. If application or enforcement of anti-doping rules can vary depending on where a particular competition takes place, or where an athlete or team is domiciled, the playing field is not level. This problem, created when unique state laws are superimposed upon a national anti-doping program, is illustrated by the fact that the Minnesota Vikings players in the StarCaps case claimed the benefit of unique Minnesota statutes. As a result, they were allowed, by means of a judicial injunction, to continue playing while New Orleans Saints players, who also tested positive for StarCaps, had no similar statute to rely on. The fact that because the Williamses played for Minnesota they were allowed to play after violating a rule that applied to players in all states was not fair to the clean players on any of the teams that the Williamses played against.

The same scenario, where a particular state's laws could make the playing field uneven for different athletes in the same sport, could play out in any of the critical aspects of an anti-doping program. For example, there could be unique or inconsistent state regulations pertaining to conduct which constitutes a violation of the anti-doping rules, the selection of athletes to be tested, the sample collection process, the laboratory analysis of samples, the results management and hearing process, and the imposition of discipline.

In states where employee drug testing is prohibited during non-working hours or cannot be done without advance notice, teams in those states could gain a competitive advantage if their players use prohibited substances to improve their off-season training and conditioning. Free agent players who use prohibited substances may also gravitate to those states that do not allow such testing.

In any professional sports league, an anti-doping program establishes rules of competition for that sport. If players on teams in particular states are exempted from some of these rules, you are allowing those states to change the rules of the game. You might as well allow a state to change the strike zone to favor its hometown baseball team.

The problem of an uneven playing field caused by non-uniform anti-doping rules was the primary reason behind the worldwide adoption of the World Anti-Doping Code. Before the enactment of the World Anti-Doping Code, the rules of international sports federations like the International Amateur Athletic Federation could not be uniformly enforced worldwide because of the patchwork of inconsistent national anti-doping laws. The result was that a track athlete in France could be treated very differently than a Dutch track athlete despite having positive tests for the same prohibited substance.

The World Anti-Doping Agency and the hundreds of governments and sport organizations around the world that have agreed to follow the World Anti-Doping Code have recognized that, for important public policy reasons, anti-doping rules must be uniform and not

subject to a patchwork of state and national regulation. Only then can a level playing field be ensured for all participants.

As a signatory to the World Anti-Doping Code, USADA is obligated to follow all of the requirements of the Code in the operation of its Olympic anti-doping program, known as the USADA Protocol. Some professional leagues, like the ATP Tour (men's professional tennis tour) and the WTA Tour (women's professional tennis tour), are also now committed to comply with the World Anti-Doping Code. Any sports league or sport governing body that adopts the gold standard World Anti-Doping Code should receive the benefit of federal preemption of any inconsistent state law that could interfere with uniform application of its anti-doping rules. Federal preemption in these circumstances is consistent with, if not mandated by, the UNESCO International Convention Against Doping in Sport to which the United States is a party.

Other professional leagues have adopted anti-doping programs that substantially comply with the principles of the Code. Whether viewed from the perspective of the obligations of the United States under the UNESCO Convention, or simply from the public policy goal of eliminating doping in United States sport, these sound anti-doping programs should also be protected from inconsistent state regulation. There is much less justification, however, for preempting state laws in favor of professional league anti-doping programs that are not fair or effective.

To obtain the protection of federal preemption as a matter of public policy, a professional league's anti-doping program should most importantly be independent and transparent in addition to being required to at least satisfy the following criteria:

- Effective out of season and out of competition, no advanced notice testing;
- A full list of prohibited substances and methods that would capture new, designer drugs such as THG as they are developed;
- Implementation of best legal and scientific policies and practices as they evolve which must include adequate sanctions and due process protections for those accused of doping violations;
- Investments into education to truly change the hearts and minds of would be cheaters and to teach the lessons of life that can be learned only from ethical competition;
- Investments into scientific research for the detection of new doping substances and techniques and for the pursuit of scientific excellence into anti-doping;
- And importantly, partnerships with law enforcement to ensure that in addition to holding athletes accountable, those who illegally manufacturer, traffic and distribute these dangerous drugs and who are typically outside of sports jurisdiction are also held accountable for their illegal behavior. (It is the success of this very cooperation seen here in the U.S. through the BALCO investigation and others like it such as Gear Grinder and Operation Raw Deal that has demonstrated to the world the importance of sport and government partnership in fighting doping.)

Requiring these minimal principles is consistent with the World Anti-Doping Code, the USADA Protocol and the recommendations you all heard about in the Mitchell Report. If all of the U.S. professional leagues implemented anti-doping programs that met these criteria, it would go a long way towards eliminating doping in U.S. sport and restoring public confidence in the integrity of achievement and the value of true sport as the teacher of life lessons. Most importantly, it would be a significant step toward protecting the health of our young athletes who emulate their heroes in the professional leagues.