

THE DRUG FREE SPORTS ACT OF 2005

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION
OF THE
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HOUSE OF REPRESENTATIVES
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THE DRUG FREE SPORTS ACT OF 2005

WEDNESDAY, MAY 18, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Upton, Cubin, Radanovich, Bass, Pitts, Bono, Terry, Ferguson, Rogers, Otter, Myrick, Murphy, Blackburn, Barton (ex officio), Schakowsky, Markey, Towns, Rush, Green, Baldwin.

Mr. STEARNS. Good morning.

Illegal steroids and performance-enhancing drug use in sports, particularly in professional sports, is a complex and far-reaching issue that this subcommittee has been involved with for some time.

I would like to sincerely thank the witnesses before us today at our second hearing this year on this important issue as well as for their comments about H.R. 1862, the Drug Free Sports Act, which was recently introduced by both Democrats and Republicans.

My colleagues, during the 2004 State of the Union address, the President of the United States said, "Athletics play such an important role in our society, but unfortunately some in professional sports are not setting much of an example. The use of performance-enhancing drugs, like steroids, in baseball, football, and other sports is dangerous, and it sends the wrong message: that there are shortcuts to accomplishments, and that performance is more important than character. So today, I call on team owners, union representatives, coaches, and players to take the lead to send the right signal, to get tough, and to get rid of steroids now."

Unfortunately, the President's urgent call still remains completely unfulfilled.

At our March hearing, we learned how urgent things are, including how destructive many of these substances can be on the human body and mind, particularly for young people misguided by attitudes that place winning above all else.

Today, I would like to focus the committee on the simple notion that sport, at its core, is about honesty, integrity, and innate human ability. Illegal steroid use is a desecration of those values. It is cheating, pure and simple. It cheats our sports, it cheats honest and hard-working athletes, and it cheats all of us as fans. And whether athlete, league official, or a Member of Congress, we are

all here today as fans who want to protect the sports that we care so very much about.

As those directly responsible for the integrity and legacy of professional sports in America, the commissioners, the player representatives, and the governing body officials here today will provide us their candid and honest views on this proposed piece of legislation. And with those views, we also expect action to eliminate this problem.

But let us be clear. This is not an opportunity to direct blame and to try and embarrass anyone. This is simply an opportunity to dissect the elements of the steroid problem affecting the business of professional sports and, frankly, to implement the best solution for the leagues, the players, and the fans.

I, along with many of my colleagues, believe the best solution includes a comprehensive and uniform drug-testing rules, procedures, and penalties for all professional sports. This should include a harmonization of drug testing if we are committed to building a unified front from the professional sport leagues to deal with this complex issue going forward today.

Desperate policies tailor-formed by each league are at a risk of being overwhelmed by newer, more sophisticated threats, like designer steroids, gene doping, and more creative drug masking techniques.

In this regard, my colleagues, the elite professional leagues collectively must provide coherent and consistent leadership to all those that they influence, including the high school players, the college athletes, and especially the fans. And although this has been a difficult time, I am very encouraged by the recent progress that has been made by the league and the players in this regard.

Even so, I am not convinced that an effective solution to this problem can be found in a system that allows those with a vested interest in the performance of the players and leagues to simply police themselves. This complex and large-scale problem demands a more harmonized approach, greater transparency, and significant independent, third-party involvement if the players, if the management and fans can be confident that their game is clean.

These necessary elements are not byproducts of a simple compromise. They are standards that have been institutionalized and out of the reach of the vested interests of the organizations who are involved.

Our legislation H.R. 1862, the Drug Free Sports Act, is modeled after the United States Anti-Doping Agency, or USADA, standards, which have been embraced by the U.S. Olympic Committee and many professional sports organizations worldwide as a benchmark for anti-doping programs.

H.R. 1862 requires the following minimum criteria for any program: random testing of each athlete, at least once a year; testing for substances on the prohibited substance list issued by the World Anti-Doping Agency; testing by an unaffiliated, independent party; penalties that include a 2-year suspension on the first offense, and a lifetime ban for a second offense; an athlete's right to appeal a positive test within 30 days. In addition, the Secretary of Commerce may exempt sports that have drug testing programs in existence that meet or exceed the minimum requirements.

Our bill creates a careful balance between effective detection and strong deterrence to ensure that a professional league represents the best in athletics and the best in drug testing.

Requiring amateur athletes in college or Olympic competition to adhere to stricter standards for drug testing than they would face in many of the professional leagues, I believe, sends the wrong message to our young people. Such inconsistencies only serve to perpetuate the idea that the more successful you are, the less the law and fair play matter today.

Sport, both amateur and professional, belongs to all of us here in America. Our professional leagues should adhere to the goal standard of drug testing, the standard that has been outlined in H.R. 1862, the Drug Free Sports Act.

So today, we need strong, decisive action by our professional leagues before the arms race of illegal steroids and a better-sports-through-chemistry attitude replace hard work, dedication, and honesty as the keys to success for our athletes and, of course, for our children.

I again want to thank our witnesses for being here today, our distinguished panel, and I look forward to their testimony.

With that, I recognize Ranking Member Schakowsky.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

And I, too, welcome and thank our witnesses for being here today.

As we discovered at our last hearing on steroids, professional sports leagues have very different policies on the use of performance-enhancing drugs. Some leagues have strict standards resulting from collective bargaining agreements. Others seem content to let the threat of a bad reputation serve as the punishment in their drug policy.

Because the lenient end of the policy range seemed to be a de facto condoning of steroid abuse, you, Mr. Chairman, decided to provide a minimum standard to which the leagues would adhere by drafting H.R. 1862, the Drug Free Sports Act. Although there are some serious policy questions that need to be answered, I look forward to working with you to craft a bill that provides a strong but sensible policy.

The Drug Free Sports Act would establish a baseline policy for performance-enhancing drugs to which professional sports leagues must adhere unless they adopt a stronger policy on their own. This policy is intended to be largely indistinguishable from what Olympians are currently required to follow and would be based off the World Anti-Doping Agency's, WADA, list of prohibited substances.

I believe H.R. 1862 needs clarification to ensure that the medical and physiological exceptions of the WADA list are also in the standards for the professional teams. There should be no question about whether an athlete with diabetes would be punished because of using insulin, a drug which is prohibited on the WADA list, unless it is needed for medical reason. We also need to contend with the fact that the WADA list differentiates between drugs that are prohibited in and out of competition and how to address this in the bill.

I am concerned that the bill is not clear about what determines whether a league's policy is considered stronger or weaker than the

policy in the bill. Since there are a number of variables in each policy, including frequency of testing, lists of prohibited drugs, and penalties for positive test results, there are a multitude of potential combinations, and no one distinguishable fact of which to base the determination.

While I believe that many of the issues I raise are drafting issues, there are still a number of substantial policy questions we need to address in order to ensure that the Drug Free Sports Act sets a well-reasoned and reasonable standard for professional athletes.

Although the Drug Free Sports Act contends strictly with performance-enhancing drugs and professional sports leagues, I believe that taking a strong stance against the use of performance-enhancing drugs and professional sports will benefit our junior high, high school, and college athletes who may turn to harmful drugs to stay competitive. As you may recall, a survey by the University of Michigan found that 54 percent more high school seniors took steroids in 2003 than did in 1996.

As I stated in March, I believe that one of the reasons there was an increase in steroid abuse in young athletes is because there is a ripple effect through the athletic world. Young athletes are seeing professional athletes make millions of dollars off of their juiced-up abilities, and they know that the use is rewarded. These young athletes are taking steroids to meet physical performance standards that would be impossible without artificial augmentation. They are, like their heroes, trying to be superhuman and destroying themselves in the process.

Student athletes also are putting themselves at great risk by using steroids. Steroids stunt growth and increase the likelihood of ligament and tendon injury, not to mention heart attacks, liver failure, and other permanent and irreversible problems. Our young athletes are doing this because they know that when "play ball" is called out, the field today is not level, and they want to be in the game.

I believe that if professional athletes recognize and adopt standards that promote safe and healthy sportsmanship, whether through standards set forth in the bill or strong collective bargaining agreements, we will be more likely to see the same on high school and collegiate levels.

Again, Chairman Stearns, I appreciate your holding this hearing today. I look forward to working with you to address the outstanding drafting issues in H.R. 1862 as we move the bill toward subcommittee markup. I am hopeful that these hearings and the testimony from our witnesses will provide us with valuable guidance as we continue to carefully examine the subject. I am optimistic that we will proceed cautiously and address these concerns before moving the legislation through the committee.

Thank you.

Mr. STEARNS. I thank the gentlelady.

The distinguished chairman of the full committee, Mr. Barton from Texas.

Chairman BARTON. Thank you, Mr. Chairman.

The purpose of this hearing is to examine H.R. 1862, the Drug Free Sports Act. I want to commend the sponsor and the co-spon-

sors for their efforts to bring this legislation forward to provide a uniform drug-testing policy for professional sports.

I want to thank this distinguished group of witnesses today for participating and being with us in a voluntary fashion and sharing their views. It is important that we have a full and open debate on the legislation as it moves forward. It is the Energy and Commerce Committee that has principle jurisdiction on this issue. This committee will use that jurisdiction in a responsible way to address this issue in a responsible legislative fashion.

Nobody thinks that athletes should use illegal steroids. Nearly everybody believes that athletes can and should be role models, so why in the world did we ever get into a situation where steroids apparently were swallowed like M&Ms and adults winked at each other when baseball players started growing arms as big as tree trunks. However it happened, I am glad that it finally seems to be changing, and I want to personally thank Mr. Selig for his leadership in helping to make that change.

I am pleased that some of the professional sports leagues have addressed the issue and made improvements to their existing policies in recent months. Major League Baseball and its Players Association have reopened their existing collective bargaining agreement. The National Football League and the National Football League Players Association have likewise made improvements. Major League Soccer recently adopted its policy that includes testing for the substances prohibited by the World Anti-Doping Agency.

I applaud these improvements, but I still have to ask: "Is that enough?" The U.S. Government has signed on to the international standard developed by the World Anti-Doping Agency and supports it with funding. We see fit to apply these standards to amateur and professional athletes that compete in the Olympics. Unfortunately, many professional sports leagues have not yet adopted the same standard because the Olympics do not govern their professional competition.

To confuse things further, many of our professional athletes who participate in the Olympics, including the NBA and the NHL stars, abide by different standards at different times, depending on where they are playing. Additionally, baseball players follow the same standard for the Olympics, although Major League players do not play on our national Olympic team.

What message are we sending when we ask amateurs to do more than our professionals? It is a shame that we have come to this point. The overwhelming majority of athletes do not use performance-enhancing substances and are great role models. But the fact remains that these substances are increasingly used by high school students, and I am very, very worried about that trend.

I am committed, as chairman of this committee, to seeing that we stop sending mixed messages to our kids and our athletes, whether they are playing on the sandlot or in the stadium. Cleaning up our professional sports will be a first step to achieving this goal. I think this is important legislation, and after a series of hearings this week, it is my intention to work with subcommittee Chairman Stearns to move toward a legislative markup in the very near future.

This is just a first step. We also need to work with our colleagues and our high schools and their associations to create national model legislation for the State level for both the college level and the high school level in terms of steroid abuse.

Mr. Chairman, I thank you for holding this hearing. It is very important, and this will result in legislation in the very near future.

With that, I yield back.

Mr. STEARNS. I thank the chairman.

Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman, for recognizing me. And I also want to thank you for holding this hearing and for the legislation you have introduced.

I am pleased to see that hearings on this issue are now finally taking place in the actual committee that has jurisdiction on this matter and that you have drafted a bill, which we all can deliberate.

Having said that, Mr. Chairman, while I support the spirit of your bill, I must express some reservations on its substance.

I want illegal performance-enhancing drugs eliminated from professional sports as much as anyone. But I also want to be sure that players are treated equitably and fairly. Of the four players suspended from Major League Baseball and the 63 players expelled from the Minor Leagues, the overwhelming majority of them are Latino or African American. I think we need to be careful before we punish players with particularly harsh penalties that may be unduly and inadvertently burdensome on young athletes of color.

Most of the banned substances in question have only been illegal for several months, by act of Congress. Most of these newly banned substances are precursors to steroids, and they were widely available to the general public on a legal, commercial basis only a short time ago. Many of these substances could be still on the shelves of your local fitness store or your local gym. Much of the stuff could be in the hands of trainers, or even friends.

The fact that so many Latino and African American ball players are testing positive for steroid use may be simply because they are unaware that the substances are, in fact, illegal. Either the substances are readily available and legal in Latin America, or the Caribbean, mostly Spanish-speaking countries, where the ball players train during the winter, or the stuff is available in the gyms, say in a drink form, and is given to the players without their knowledge that they are drinking a banned substance.

I could come up with all sorts of scenarios in which a player unwillingly takes a banned substance. But the bottom line is that because the professional leagues have yet to formally implement an educational outreach policy to inform all players of the new testing policies in all relevant parts of the world and to all economic backgrounds, a 2-year ban for a first-time offense seems too harsh. For these young players, such a punishment can be devastating to their nation careers, and we shouldn't be unreasonably punitive for behavior that is not intentional.

I would also note that unlike other major sports, all of the baseball players who have been publicly revealed as testing positive for steroids are relatively obscure players, not the big names we are

always hearing about. For whatever reason this is the case, the fact remains that a 2-year suspension would have an overly harsh affect on these players who are young and struggling to make it in professional sports.

With that said, I think we need a strong punishment and deterrent to dissuade young ball players from taking illegal performance-enhancing drugs, but I don't think we ought to ruin a kid's career for one mistake. I think a 2-year suspension might be just that: a punishment that ruins a kid's career, not one that achieves a credible deterrent. Moreover, the fact that all sports leagues do not use blood testing, which is a more stringent and accurate test for performance-enhancement drugs, exacerbates the desperate impact of a drug testing policy. The wealthy, superstar athletes are able to exploit the flaws of a urine test by employing world-class trainers and using expensive, high-tech substances and masking agents. On the other hand, the up-and-coming athlete does not have that kind of wealth at his or her disposal and can not exploit the holes in the testing.

Thus, I think we need to have the most accurate test possible to cut down on the—Mr. Chairman, could I have an extra 30 seconds?

Mr. STEARNS. With unanimous consent, so ordered.

Mr. RUSH. And some Major League Baseball steroids policies are currently too loose and lenient, and I want to commend Commissioner Selig for stepping up to the plate and advocating stricter rules and harsher penalties. But I also feel, Mr. Chairman, that your bill's penalties go too far in the opposite direction. It is my hope that we can come up with a credible medium that accomplishes the goal of deterrence without being overly and blindly punitive.

With that, Mr. Chairman, I yield back.

Mr. STEARNS. I thank my colleague.

Mr. Upton.

Mr. UPTON. Well, thank you, Mr. Chairman, and I thank you as well for your perseverance of getting this hearing moving, and I applaud Chairman Barton as well as you in terms of looking at this legislation moving forward. I have a full statement for the record that I will ask unanimous consent to put in.

Mr. STEARNS. So ordered.

Mr. UPTON. Gentlemen, I appreciate all of you being here. And as I said in the last hearing, I am one of those guys that goes out a little before 6 o'clock every morning with my dog to get my paper, and often it is the sports section that I look at first.

And I have to say that when we had the hearing in March, I was very disappointed, particularly in MLB, because that particular day of the hearing, both the Players Union as well as the Commissioner's office was trying to put a damper on participation in our hearing that day. That day we had a great hearing as we learned quite a bit about the issue. We heard about Taylor Hooten. We learned that literally half a million high school kids are on steroids.

We heard from the NFL and the NCAA, and I think they have a terrific testing program: every athlete every year unannounced, heavy suspensions when they are caught. After the hearing, I talked to a good friend of mine, Bill Martin, the Athletic Director for the University of Michigan, my Home State, who was the acting

President of the USOC for some time, and I shared with him my thoughts. He shared with me some very constructive ideas that I look to pursue as this legislation moves forward. I am a dad with two kids, two kids that play sports. And the message from pro athletes is prevalent, not only with both my son and my daughter, but with their friends as well. I applaud what MLB has announced this week with the movement that they have made. We are a Nation of laws, and as sports fans, and the players, too, we want that competition to be fair, and they want it to be by the rules. And there is no excuse for those sports that don't follow that set of rules that should be the same for every athlete, a man or a woman.

And the Commissioners, you all, have a very big responsibility to your sport, for not only the legions that have passed before, but obviously to set the standard for those athletes that follow. You have a responsibility to your sport and, frankly, to the Nation, knowing the impact that it has, literally, on hundreds of thousands, if not millions, of Americans to look out for their best interests for that particular sport.

Mr. Selig, again, you have come a long way since the hearing that we have had last March. I welcomed reading the testimony last night when I got home and the correspondence that you have had with the Players Union, and I would hope that that continues in a good spirit and we can come to a conclusion that, in fact, will set a standard for all sports and for all families, and for all Americans.

And Mr. Chairman, I yield back my time.

Mr. STEARNS. I thank the gentleman.

Mr. TOWNS, the gentleman from New York.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Let me begin by thanking you for holding this hearing. I feel that we are starting to take productive steps toward a new beginning in drug oversight for our professional leagues. And I hope that we don't have to come together like this too many more times.

I participated in the Government Reform Committee hearing on baseball and steroids only a few weeks ago. I was encouraged to hear the concerns of my colleagues and the equally concerned responses from Commissioner Selig and the other members of his team. I want to commend the Commissioner for listening to our requests and responding as quickly as he did. We thank you for that.

Baseball's new three strikes and you are out program is a giant step in the right direction. The softer penalty plan and its ability to ban amphetamines is exactly what the league needs.

Further, its tough penalties will undoubtedly force players to seriously rethink a journey into steroid use, as their careers could be severely derailed. If their bad decisions are discovered, last I feel the independent administration of the program will allow the league to implement the new rules quickly and report its findings to us as soon as possible. As the Commissioner and his colleagues know, we will be watching and waiting.

As I have stated in previous remarks before this committee and in the Government Reform hearing room as well, my primary concern is the effect of steroid use on our pro leagues will have on our children. They idolize our pro athletes, and they listen very carefully to every word they say and to every swing and to every pass

and to every shot they take. We can not allow the stupid decision of a few misguided, greedy pros to permanently harm a child's health, or worse, send them to an early grave, as was the heart-breaking case with young Taylor Hooten, who took his own life after a long bout with steroid-induced depression.

Commissioner, please, please enforce this new policy. It is what the league needs, and I will say a prayer for its success.

Thank you so much. I am delighted to have you here.

On that note, I yield back.

Mr. STEARNS. I thank the gentleman.

Mr. Terry.

[No response.]

Mr. STEARNS. Mr. Terry waives.

Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

I have a full statement I would like to put in the record, but I am just going to briefly say that, one, I am glad all of our commissioners are here from professional sports. I am a proud co-sponsor of this bill, mostly out of frustration. Because coming from the State of Texas where we love our athletes, whether it is high school or college or professionals, and like my colleague that is a Cubs fan, I look at the Washington Post every morning and see that the Astros are digging their way out, and they won last night.

But I guess the frustration is the message being sent. And when I find out that ten Texas high school players are taking steroids, that is what bothers me, because I know what steroids can do. When some of us have an illness, whether it is for pain, they give us steroids for a brief period of time. Even when you get poison ivy, you have a strict regimen of the steroids to cure that, and yet we are seeing what is happening and that message that is being sent by professional athletes. And we love somebody that runs for the touchdown or hits those home runs, but we also want to make sure that next generation and that we don't have a number of young men and women today, not just young men, who have problems with their health in their 30's and 40's because of what they did in high school.

And Mr. Chairman, that is why I am glad we have the hearing on the bill, and I look forward to the witnesses. And again, there has been leadership from some of our professional sports, and I would like to see that continue. And again, we need to send the right message to those young people who are our next generation.

Thank you, Mr. Chairman.

Mr. STEARNS. I thank my colleague.

Ms. Blackburn.

Ms. BLACKBURN. I will waive and reserve my time for questions.

Mr. STEARNS. The gentlelady waives and reserves.

The gentleman from New Hampshire, Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman.

You know, in Congress, we face a lot of what I would call intractable problems, problems that can't be solved easily. In fact, we usually end up just coping with them from year after year, and that is the way the system is set up. In my opinion, the problem that we face today with use of performance-enhancing drugs, or abuse of them, is a problem that can be addressed, and it is appro-

priately addressed by Federal policy. The 500,000 school kids that my friend from Michigan, Mr. Upton, refers to as being known to take performance-enhancing drugs, do so not because they read about it somewhere or they thought it would work. It is because they see their idols, their people that they would like to be, the future for themselves. They see those individuals participating in this process, making themselves into sort of superhuman beings, like kids would like to be, and appearing to get away with it.

And the problem is that there isn't any sufficient coordination within the professional athletic community to make sure that this process stops. So I commend the chairman, and I am proud to be an original co-sponsor of the legislation that we are considering here in this committee, which would direct the Secretary of Commerce to establish uniform drug testing standards and in so doing, would establish very severe penalties, not only for players, but also for sporting organizations that are in non-compliance.

I think this is a legislative initiative that should be at the top of the priority list for this committee, which, as others have noted, actually has jurisdiction over this issue, and that it should be an issue that we send to the floor as quickly as possible, because we can solve this problem, and we can do it soon.

With that, Mr. Chairman, I yield back.

Mr. STEARNS. I thank the gentlemen.

Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman, and thank you for holding this hearing on an issue that is calling into concern the integrity of professional sports in our country.

But an even scarier proposition is that these gross lapses of integrity are the motivation for thousands and certainly millions of young people, amateur athletes who are dangerously breaking the rules to become like their professional sports heroes. And this is why we are here today: to make sure that the commissioners and respective heads of the professional sports players unions are ready to get serious and tough on steroids testing, or if it is necessary for Congress to act to implement a national policy to show our young athletes that steroids will not be tolerated.

Now some leagues have been more stringent with their testing programs than others, but we have seen even in the past week two examples of NFL players who have pushed the envelope and even actively subverted the testing regime of their league. Bill Romanowski, a 16-year-veteran most recently with the Oakland Raiders, was quoted as saying: "As soon as they found out that something could be tested for, I stopped taking it. I didn't want that embarrassment, but I have pushed that envelope ethically and morally, because if I could take something that would help me perform better and it wasn't on the list, I was going to take it."

Just yesterday, in this Committee's Oversight and Investigation Subcommittee, we had a hearing on the subversion of drug testing in the workplace where it was discussed that Minnesota Vikings runningback, Ontario Smith, was caught with the now infamous "Wizzinator", which is designed to mislead drug testers. These are some egregious examples, but they are not uncommon. Also, there are a majority of athletes in professional sports that do not take

performance-enhancing drugs, and they want stronger testing to discourage those who do.

Jim Tomeg quoted on ESPN.com said, "As players, we want the fans to know we do care about their opinion and hold them in high regard. The fans are a big part of what we do and what we are about, and we want them to know that we do want stricter penalties if someone gets caught. It would be a better game if we would do it that way."

I say to the heads of the players unions here today: do what the majority of your players likely want you to do. Help clear their names. Agree to tougher testing, because Congress is here and willing to act if you can't do the right thing on your own.

Mr. Fehr, I thank you for being here, and I thank the rest of our witnesses for being here today.

Mr. Selig has put on to the table a new, very strong proposal, and most of us here will hope that you will do the right thing and agree to that proposal. Sports, I speak, I am sure, for all of us up here, and baseball is particularly close to my heart. I have been a fan for my whole life. And now I am at the age, and our son is at the age, where I am beginning to pass on my love of the game along to him. He is 6 years old. I coach his tee-ball team. He has got a picture of David Ortiz on his wall. When our family goes to his tee-ball games, the parents at the games, like me and my wife and others, don't care as much about what some players are doing and taking to destroy their bodies. That is a shame. But it is not the primary thing that we are concerned about. We do care that some of those players are our kids' role models and that what they do will indirectly and directly affect what our kids do.

Please work hard to get tougher testing for the sake of the integrity of your sport, for the safety of your players, and frankly, most importantly, for the safety of young people in America today.

Thank you, Mr. Chairman.

I yield back.

Mr. STEARNS. I thank you.

The gentlelady from California, Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman.

I will waive other than welcoming our witnesses here today and to say that I look forward to your testimony.

Thank you.

Mr. STEARNS. Mr. Otter.

Mr. OTTER. Thank you, Mr. Chairman.

And let me join with everybody on the panel in welcoming the witnesses here today. And I would like to thank you, Mr. Chairman, and the ranking member, for holding this hearing. I think it is terribly important.

I would like to broaden the perspective of this committee just a little bit in our discussion on the use of illegal drugs. And I have listened to all of the issues raised concerning steroid use by the professional and the amateur athletes. I have heard that steroid use is cheating and that Congress should protect the sanctity of these sports and their records. I have also heard that Congress has no role to play here.

While I understand these opinions, it is my belief that the proper role of government is to keep its citizens free. And citizens hooked on illegal drugs are not free.

I also believe that we tend to overlook the fundamental fact that illegal steroid use is illegal and that the laws of this land supersede the testing policies of athletic organizations. It is a laudable goal and not disingenuous to ask professional sports leagues to set an example for society by stringently testing their employees for illegal drug use.

However, I do not believe we can ask them to make a greater contribution to this effort than we ourselves are willing to make. We can't just pick on the headlines and focus on only those drugs that get the headlines and then pass laws against them. If we pass legislation to create a uniform Federal drug policy, it can not focus, indeed, Mr. Chairman, it should not focus solely on the illegal steroid use, but it must reflect our Nation's drug control policy.

So if we pass legislation to create a uniform drug testing policy, let it reflect the laws of the land and the consequences of breaking those laws. And if we pass legislation to create a uniform Federal drug testing policy, all should be prepared to meet that standard. And let us, as Members of Congress, and the bureaucracy that we set in this town at every level, be the first amongst the many to stand in line. If it is the role of the Federal Government to set a standard for drug testing, then let us also set the example.

Thank you, Mr. Chairman.

And I yield back my time.

Mr. STEARNS. I thank the gentleman.

The gentleman from Michigan, Mr. Rogers.

[No response.]

Mr. STEARNS. He waives.

The gentleman, Mr. Pitts.

Mr. PITTS. I will submit my remarks, Mr. Chairman.

Mr. STEARNS. The gentleman waives and submits.

Mr. STEARNS. Mr. Radanovich.

[No response.]

Mr. STEARNS. No. With that, I think we are finished with our opening statements.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TENNESSEE

I thank you Mr. Chairman for holding this important hearing today and I thank you for introducing H.R. 1862, the Drug Free Sports Act.

I am not one who prefers government involving itself with private business. In contrast, I actually prefer that private business self-regulate and government get involved only when a failure to do so causes public harm.

As a result of the steroid controversy stemming from the BALCO investigation, Major League Baseball Player's Association's ongoing reluctance to strengthen their steroid policies, and the widespread rumors and confirmed use of steroids by our nation's professional athletes, it has come to my attention that the only motivation that will cause a serious approach to this issue is Federal legislation.

My primary concern is for our nation's youth. A recent University of Michigan Study has shown that steroid use among high-school seniors jumped 54 percent from 1996 to 2003. This is a startling statistic and one to which professional athletes and players associations hold a portion of responsibility. If the message to our nation's youth is that penalties should be small and testing infrequent, this only serves to exacerbate the problem.

So I state again, although I don't prefer government intervention, as a combined result of a lack of private responsibility, and the need to address this issue, I am a cosponsor of this legislation. Until I am satisfied that the industry is stepping up its efforts, I will continue to work very hard with Chairman Stearns and Chairman Barton to get it passed out of Committee and through the House of Representatives.

Mr. STEARNS. Let me welcome the first panel. And let me say for my colleagues, we do have three panels. The first panel will be this morning. We will take a lunch break after the first panel. And the second panel we will have in the afternoon. And the third panel is tomorrow. And we did this because we wanted to make sure that we could accommodate all of the commissioners and all of the people that wanted to testify but they had conflicts of interest.

And so I want my colleagues to realize that the subcommittee has been very flexible in this matter. And also, I want to thank the witnesses on all three panels for their accommodation and willingness to show based upon this flexibility.

With that, we will have our first panel.

We have Mr. Frank Shorter, the former Chairman of the United States Anti-Doping Agency; Mr. Donald Garber, the Commissioner for Major League Soccer; Mr. Robert Foose, Executive Director of the Major League Soccer Players Union; Mr. Bud Selig, Commissioner of the Major League Baseball; Donald Fehr, Executive Director of the Major League Baseball Players Association; Mr. Gary Bettman, Commissioner, National Hockey League; and Mr. Robert Goodenow, Executive Director of the National Hockey League Players Association.

Good morning, gentlemen, and I welcome you.

And Mr. Shorter, we will start with you with your opening statement. Welcome.

STATEMENTS OF FRANK SHORTER, FORMER CHAIRMAN, UNITED STATES ANTI-DOPING AGENCY; DONALD P. GARBER, COMMISSIONER, MAJOR LEAGUE SOCCER; ROBERT FOOSE, EXECUTIVE DIRECTOR, MAJOR LEAGUE SOCCER PLAYERS UNION; ALLAN H. "BUD" SELIG, COMMISSIONER, MAJOR LEAGUE BASEBALL; DONALD M. FEHR, EXECUTIVE DIRECTOR, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION; GARY BETTMAN, COMMISSIONER, NATIONAL HOCKEY LEAGUE; AND ROBERT W. GOODENOW, EXECUTIVE DIRECTOR, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION

Mr. SHORTER. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, good morning. My name is Frank Shorter, and I want to thank the committee for its interest in this important subject and for the invitation to testify.

Today, I am here as an athlete who competed in international Olympic sport for more than 10 years. I am also here as the former Chairman of the United States Anti-Doping Agency, USADA. Accordingly, my comments are from the perspective of an athlete who values an effective anti-doping program and as someone who truly understands the challenges inherent in creating and operating such a program.

We value sport in our society because it builds character and promotes teamwork, dedication, and commitment. It requires honesty, respect for the rules and for our fellow competitors. It leaves a legacy of health that can last a lifetime. Sport brings communities to-

gether. It creates role models for our kids, and it inspires dreams. These are all reasons why sport occupies such a special place in our schools and in our society at large. When athletes enhance their performance by doping, it is cheating of the worst kind, and it undermines all of these important values of sport. When an athlete is successful through doping, it sends a clear message to all athletes: the new price of achieving your dreams is compromising your integrity and risking your health. Athletes who perform outstanding feats through doping makes sport nothing more than another circus unworthy of any place in our schools or our social fabric.

All sports organizations, amateur and professional, must be truly committed to the same goal: the complete eradication of doping in sports. We owe it to the clean athletes competing today and the young athletes just beginning to chase their dreams to ensure that success in sports does not require the use of drugs.

I can tell you what it feels like to have your dream compromised by the drug use of another. In 1972, I won the gold medal for the United States in the marathon at the Olympics in Munich. Four years later, I ran an even better and faster race but finished second at the Olympics in Montreal. I lost that race to an East German. At that time, we all suspected, and it was later confirmed, that in 1976, East Germans were benefiting from a state-sponsored doping program. I knew I could have improved my chance of winning by taking steroids, but I never even considered it. I chose to compete clean, and as a result, I finished second.

In discussing anti-doping programs, I hear the term “athlete’s rights” used frequently. To me, the greatest right an athlete has is to compete in clean sport on a level playing field. The question we all need to ask is: “What is the best way to protect the rights of clean athletes and remove the long shadow that steroids, and other drugs, have cast over sport in the United States?”

In the Olympic movement, both throughout the world and in the United States, the quest to eradicate doping has recently led to two significant shifts in the way anti-doping programs are operated. The first shift has been toward harmonization of anti-doping rules, including penalties across all sports. The second significant change has been the effort to externalize anti-doping programs and shift the responsibility for testing and adjudicating away from the sports, and instead, place that responsibility with an independent and transparent agency.

At the world level, this paradigm shift resulted in the creation of the World Anti-Doping Agency, WADA, as the independent agency charged with the anti-doping responsibilities formerly performed by the International Olympic Committee. The effort to harmonize anti-doping rules across sport led to the creation of a uniform document, the World Anti-Doping Code, which was based largely on the USADA model. While it is not often that most of the world can come together and agree on something, that is exactly what this uniform standard represents. All Olympic sports organizations throughout the world and most governments, including the United States, have agreed to these principles and endorsed this model as the most effective framework for the fight against doping in sports.

Formerly, each international federation was responsible for creating its own anti-doping rules. The result was a wide variety of penalty and testing provisions that had little continuity across sports. Now that each sport has adopted the Olympic model, all athletes in the Olympic movement operate under the same rules and face the same consequences if they cheat. Accordingly, all Olympic athletes, from the top track athletes and cyclists, who are full-time professionals, to the best curlers, handball players, or sailors in the world, are all subject to the same anti-doping rules, procedures, and penalties.

The Olympic standards effectively balance athletes' rights to a fair system, with the need for effective penalties designed to hold all athletes accountable for their decisions.

First, the Olympic model is fair to athletes. For example, it ensures that athletes who have a valid medical need for a substance that is otherwise prohibited, can obtain a therapeutic use exemption, called a "TUE", in advance of a competition. Accordingly, where an athlete can prove that he or she would experience a significant impairment to health if the medication is withheld, that there are no reasonable alternatives, and that the medication will not produce an additional enhancement to the athlete's performance, an athlete will receive advance permission to continue taking that medication.

While athletes are taking medication for a legitimate reason are protected, the standards greatly improve the chances of stopping an athlete who considers doping or is doping and holds that athlete accountable through a fair adjudication system. Importantly, the Olympic model provides for both in-competition testing and out-of-competition, no advance notice testing. Comprehensive out-of-competition testing is fundamental to an effective anti-doping program because steroids are often taken well in advance of competition.

The Olympic standards also provide for substantial penalties for those athletes who do cheat. A first offense for taking a steroid results in a 2-year suspension. A second violation results in a lifetime ban. Unfortunately, in today's society where the rewards of success in sport are great, the penalty for doping must be strong enough to be an effective deterrent.

Another important feature of the Olympic model is a standardized list of prohibited substances. An international committee of experts is specifically tasked with reviewing and updating the list of prohibited substances. We have all learned through the on-going BALCO investigation, those who are trying to cheat the system are constantly innovating in their effort to obtain an unfair advantage over competitors. Accordingly, the list of prohibited substances must be both broad in nature and constantly revised in order to be effective.

For all of these reasons, if a sports organization is truly committed to fighting doping in sports, I think the first step is to adopt testing and enforcement standards similar to that of the Olympic movement. I believe the second important action would be to place the responsibility for doping in the hands of an independent and transparent agency, as the United States Olympic Committee did when it created USADA.

In the 1990's, the world did not view the United States as being committed to preventing doping among its Olympic athletes. The system of self-regulation by the various sports led to perceptions of conflict and allegations of attempts to hide doping behavior amongst United States athletes. The USOC also recognized that the effectiveness of anti-doping efforts would be improved through centralization of resources and harmonization of regulations and procedures. Accordingly, USADA was formed in the year 2000. USADA has been recognized by Congress as the independent, national anti-doping agency for Olympic and paralympic sport in the United States. USADA's 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.

I served as the Chairman of USADA from 2000 to 2003. During that period, I was able to see firsthand the benefits of externalizing the responsibility for drug testing and adjudication. As an independent agency, USADA has no conflict of interest. Its function is to protect the rights of clean athletes by conducting its testing and adjudication programs with integrity and transparency to stop those athletes who dope and then hold them accountable for their decision to use these drugs.

Mr. STEARNS. Mr. Shorter, I will probably have to ask you to sum up.

Mr. SHORTER. Okay.

There is still more that can be done in the Olympic movement. USADA needs more resources, more testing to combat this threat. Education is so important. But I really hope that the continued exposure of this problem through this committee and through the bill USADA can act as a model and also provide any help that the committee might need and be involved in any program that the professional sports would want to implement to basically, in short, shorten their learning curve. We all went through this in the Olympic movement in the 1990's. We have gone through the process very similar to what is being gone through now. We are here to provide support, education, and as I said, to shorten their learning curve, should they choose to use us.

Thank you.

[The prepared statement of Frank Shorter follows:]

PREPARED STATEMENT OF FRANK SHORTER

Mr. Chairman, members of the Committee, good morning my name is Frank Shorter. I want to thank the Committee for its interest in this important subject and for the invitation to testify. Today, I am here as an athlete who competed in international Olympic sport for more than ten years. I am also here as the former Chairman of the United States Anti-Doping Agency (USADA). Accordingly, my comments are from the perspective of an athlete who values an effective anti-doping program and as someone who truly understands the challenges inherent in creating and operating such a program.

We value sport in our society because it builds character and promotes teamwork, dedication and commitment. Sport requires honesty and respect for the rules and fellow competitors. It leaves a legacy of health that can last a lifetime. Sport brings communities together, it creates role models for our kids and it inspires dreams. These are all reasons why sport occupies a special place in our schools and in our society at large. When athletes enhance their performance by doping, it is cheating of the worst kind and it undermines all of these important values of sport. When an athlete is successful through doping it sends a clear message to all athletes; the new price of achieving your dreams is compromising your integrity and risking your health. Athletes who perform outstanding physical feats through doping make sport

nothing more than another circus act unworthy of any place in our schools or our social fabric.

All sports organizations, amateur or professional, must be truly committed to the same goal; the complete eradication of doping in sports. We owe it to the clean athletes competing today and the young athletes just beginning to chase their dreams to ensure that success in sports does not require the use of drugs.

I can tell you what it feels like to have your dream compromised by the drug use of another. In 1972 I won the gold medal for the United States in the marathon at the Olympics in Munich. Four years later, I ran an even better race but finished second at the Olympics in Montreal. I lost that race to an East German. At the time we all expected, and later it was confirmed, that in 1976 the East Germans were benefiting from a state sponsored doping program. I knew I could have improved my chance of winning by taking steroids, but I never even considered it, I chose to compete clean and as a result, I finished second.

In discussing anti-doping programs I hear the term "athlete's rights" used frequently. To me the greatest right an athlete has is the right to compete in clean sport on a level playing field. The question we all need to ask is: what is the best way to protect the rights of clean athletes and remove the long shadow that steroids and other drugs have cast over sport in the United States?

In the Olympic movement, both throughout the world and in the United States, the quest to eradicate doping has recently led to two significant shifts in the way anti-doping programs are operated. The first shift has been towards harmonization of anti-doping rules, including penalties, across all sports. The second significant change has been the effort to externalize anti-doping programs and shift the responsibility for testing and adjudicating away from the sports and instead place that responsibility with an independent and transparent agency.

At the world level, this paradigm shift resulted in the creation of the World Anti-Doping Agency (WADA), as the independent agency charged with the anti-doping responsibilities formally performed by the International Olympic Committee. The effort to harmonize anti-doping rules across sport led to the creation of a uniform document the World Anti-Doping Code, which was based largely based on the USADA model. While it is not often that most of the world can come together and agree on something that is exactly what this uniform standard represents. All Olympic sports organizations throughout the world and most governments, including the United States government, have agreed to these principles and endorsed this model as the most effective framework for the fight against doping in sports.

Formerly, each international federation was responsible for creating its own anti-doping rules. The result was a wide variety of penalty and testing provisions that had little continuity across sports. Now that each sport has adopted the Olympic model, all athletes in the Olympic movement operate under the same rules and face the same consequences if they decide to cheat. Accordingly, all Olympic athletes, from the top track athletes and cyclists, who are full time professionals, to the best curlers, handball players, or sailors in the world, are all subject to the same anti-doping rules, procedures and penalties.

The Olympic standards effectively balance athletes' rights to a fair system, with the need for effective penalties designed to hold all athletes accountable for their decisions. First, the Olympic model is fair to athletes. For example, it ensures that athletes, who have a valid medical need for a substance that is otherwise prohibited, can obtain a therapeutic use exemption or "TUE" in advance of a competition. Accordingly, where an athlete can prove that he or she would experience a significant impairment to health if the medication is withheld, that there are no reasonable alternatives and that the medication will not produce an additional enhancement to the athlete's performance, an athlete will receive advance permission to continue taking that medication.

While athletes who are taking medication for a legitimate reason are protected, the standards greatly improve the chances of stopping an athlete who considers doping or who is doping and holds that athlete accountable through a fair adjudication system. Importantly, the Olympic model provides for both in-competition testing and out-of-competition, no advance notice testing. Comprehensive out-of-competition testing is fundamental to an effective anti-doping program because steroids are often taken well in advance of competition.

The Olympic standards also provide for substantial penalties for those athletes who do cheat. A first offense for taking a steroid results in a two-year suspension. A second violation results in a lifetime ban. Unfortunately, in today's society where the rewards of success in sport are great, the penalty for doping must be strong enough to be an effective deterrent.

Another important feature of the Olympic model is a standardized list of prohibited substances. An international committee of experts is specifically tasked with re-

viewing and updating the list of prohibited substances. As we have all learned through the on-going BALCO investigation, those who are trying to cheat the system are constantly innovating in their effort to obtain an unfair advantage over their competitors. Accordingly the list of prohibited substances must be both broad in nature and constantly revised in order to be effective.

For all of these reasons, if a sports organization is truly committed to fighting doping in sports, I think the first step is to adopt testing and enforcement standards similar to that of the Olympic movement. I believe the second important action should be to place the responsibility for doping in the hands of an independent and transparent agency, as the United States Olympic Committee (USOC) did when it created USADA.

In the 1990s, the world did not view the United States as being committed to preventing doping among its Olympic athletes. The system of self-regulation by the various sports led to perceptions of conflict and allegations of attempts to hide doping behavior among United States' athletes. The USOC also recognized that the effectiveness of anti-doping efforts would be improved through centralization of resources and harmonization of regulations and procedures. Accordingly, USADA was formed in 2000. USADA has been recognized by Congress as the independent, national anti-doping agency for Olympic and Paralympic sport in the United States. USADA's 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.

I served as the Chairman of USADA from 2000 through 2003. During that period I was able to see first hand the benefits of externalizing the responsibility for drug-testing and adjudication. As an independent agency USADA has no conflict of interest. Its function is to protect the rights of clean athletes by conducting its testing and adjudication programs with integrity and transparency to stop those athletes who dope and then hold them accountable for their decision to use drugs for performance enhancement. While no system is perfect, it is clear that the creation of USADA has had a significant impact on the fight against doping among United States Olympic athletes. Now, that USADA has been operating for nearly five years as an independent Agency, the United States is considered the world leader in its commitment and in its testing, education and adjudication systems. There is now simply no doubt that in the Olympic movement the United States is doing everything within its power to eliminate doping by United States athletes.

There is still more that can be done in the Olympic movement. For example, USADA needs additional resources for research and testing to combat an ever-increasing sophistication among those committed to cheating. The battle against doping will also never be won without a continual and substantial commitment of resources towards educating the next generation of athletes of the physical and moral consequences of doping.

My hope is that the increasing exposure the problem of doping in sports is receiving through the effort of this Committee and others will result in an increased commitment of resources to the fight against drugs in sport. I also hope that there will soon come a time, where every American sports organization, amateur or professional, will be in a position to say that it is doing everything within its power to eliminate doping in sports. Thank you.

Mr. STEARNS. Thank you.

Mr. SHORTER. And I am sorry I went over.

Mr. STEARNS. Mr. Garber, welcome.

STATEMENT OF DONALD P. GARBER

Mr. GARBER. Good morning, Mr. Chairman and members of the committee. My name is Don Garber, and I am the Commissioner of Major League Soccer.

I would like to thank each of you for giving me the opportunity to speak on such an important issue affecting sports and society.

When Major League Soccer was founded 10 years ago, we created a league for a new America, a league for the exploding Hispanic and ethnic populations in our country and the tens of millions youth soccer players throughout our Nation's communities. We knew then, and we know now, that we had the opportunity to take a strong stand against drug abuse, so we created one of the most comprehensive and strict programs in all of sports.

With soccer enjoying the highest participation levels among kids in our countries from youth programs to high schools and as the fastest growing sport at the collegiate level, our players have to serve as role models. They have to be held to a higher standard both on and off the field. The future of our league and the future of our sport depend on it.

Major League Soccer condemns the use of performance-enhancing drugs and welcomes the various investigations by Congress. Doping violates the ethics of sport, sets a poor example for our fans, especially our young fans, and poses as significant health risks to our athletes. In a business whose product is fair competition, there is no room for behavior that undermines that which is fundamental, the notion that players and teams are playing by the same set of rules.

With serious focus on the issue, the ongoing review of our policy, a partnership with our union and a commitment by our players, I am proud to say that MLS has been free of steroid abuse. We have been successful for three reasons. First, the league established a "zero tolerance" policy against illegal drug use at our inception in 1996. Second, we formally banned the use of performance-enhancing drugs in 1999. Third, our players share our commitment and believe there is no room for performance-enhancing drug substances, or any drug use, in our league.

Since our inception, MLS has had the independent ability to create and enforce a policy that is strict, that is soccer-specific, and that is regularly updated. As a result, our program has proven to be successful, as shown by our exemplary testing record.

During our recent collective bargaining process, MLS maintained its commitment to this strict program, and that commitment was embraced by our players, and they enforced this policy. Under the policy agreed to by our players, we adopt the WADA list of banned substances. We conduct year-round testing without prior notice. Each player is tested at least once with no limit on tests. We work with an independent agency. We provide a mechanism for appeal. And we have discipline up to and including termination for first-time offense.

Now although the idea of creating universal drug testing standards for all U.S. professional sports is commendable, MLS believes that this issue is more appropriately managed through a league-specific program created in collaboration with our players and agreed to in collective bargaining. In controlling our own policy, we can continue to tailor it to meet the specific needs of the sport of soccer and our unique player pool. In addition to both parties having a hand in creating the policy, we believe it will be more effective and more readily embraced.

With respect to the specifics of the Drug Free Sports Act, as you will see from our written statement, our policy is mostly consistent with the proposed content of the act. Our policy does differ from the proposal in one very important aspect. As stated, we have the discretion to discipline a player up to and including termination of his contract for a first offense. We do not have a minimum suspension of 2 years, as proposed by the legislation. While we understand the appeal of the disciplinary certainty provided by a minimum sanction, we believe that a player is more likely to be de-

tered from violations if he knows that a first violation can result in termination of his contract. It is not difficult to imagine a player that the risk of receiving a minimum sanction is worth the violation.

We also believe that disciplinary discretion is important, because mandatory minimum standards may create unjust results given the presence of very real mitigating circumstances. In some cases, a 2-year suspension might be too harsh. For example, we do not believe it is appropriate to impose the same suspension on a player who knowingly uses performance-enhancing substances as a player who unknowingly ingested a tainted nutritional supplement, just as an example. We believe that factors such as these are critical in determining the appropriate level of discipline.

And although MLS retain discretion, I think it is important to state that the league will not advocate its responsibility to impose the necessary and appropriate discipline nor will discretion be used to treat star players differently than any other player.

Every professional sports league shares the belief that pro athletes have a special relationship with their fans. They are revered, they are respected, and they are emulated in ways that are unmatched in our society. As a result, it is our strong belief, one shared with our players, that we together have a responsibility and an obligation to be held to a higher standard, to lead by example. However, we believe that a policy agreed to between leagues and their players, tailored to address the specific needs and concerns of each sport, will simply be more effective in creating a drug-free sport. And one only needs to look at the success of MLS's policy to see the merits of this approach.

Working together with our players, we have created a strict and rigorous drug program that ensures the place of our players as role models and citizen athletes and MLS's position as the league for a new America.

Ladies and gentlemen, thank you for your time.

[The prepared statement of Donald P. Garber follows:]

PREPARED STATEMENT OF DONALD P. GARBER, COMMISSIONER, MAJOR LEAGUE
SOCCER

Chairman Stearns and Members of the Committee: Major League Soccer ("MLS") condemns the use of performance-enhancing substances and supports the various Congressional investigations into the use of steroids and related substances in professional sports. Doping violates the ethics of sport, sets a poor example for fans, particularly young fans, and poses significant health risks to the athletes. The recent scrutiny given to the subject has caused the leagues and player unions to review their policies, and has focused attention on the dangers of steroid use for both professional and young athletes alike.

Soccer throughout the world is not immune from doping. Given the physical rigors of the sport, there would no doubt be competitive advantages for a player to illegally enhance his size, strength, speed, endurance and recuperative abilities. In fact, there have been several cases in international soccer during the last decade where star players, and in one case a team, was found guilty of utilizing performance-enhancing drugs.

MLS, however, has been free of doping due to our focus on the issue, the ongoing review of our policies, our partnership with our Union and the commitment by our players. MLS also attributes its success to the creation of a "zero tolerance" policy at the League's inception in 1996. This initial policy stemmed from MLS' desire to ensure the integrity of our game and the safety of our athletes, to present a positive image to the American sports fan and to hold its players up as positive role models to the nation's youth.

While the policy has expanded from a focus on drug testing to a more comprehensive substance abuse and behavioral health program that includes education, prevention, and, when necessary, treatment, MLS has always had the ability to create and enforce a policy that is one of the strictest in professional sports. As a result, the League has an exemplary testing record.

Earlier this year, MLS concluded its first Collective Bargaining Agreement with its players. During the collective bargaining process, MLS maintained its commitment to a strict policy that provides the League with complete discretion to discipline players who use performance-enhancing substances. In ratifying the CBA, the players affirmed this policy. Our current policy:

- adopts the WADA list of banned substances;
 - subjects players to testing year round;
 - subjects players to random testing upon no notice;
 - subjects each player to testing at least once a year;
 - has no limit on the number of times a player may be tested;
 - provides for discipline up to and including termination for a first-time offense—
- MLS is the only major league in which a player's employment may be terminated for a first offense.

Although the idea of creating universal drug testing standards for all U.S. professional sports is commendable, MLS believes that this issue is more appropriately managed through a league-specific program created in collaboration with the players during the collective bargaining process. Through discourse and negotiation between those parties most engaged in the sport, we believe that MLS has created, and will continue to maintain, a very effective and focused doping policy that has led to its demonstrably successful record in this area.

In controlling its own policy, MLS can continue to tailor the policy to meet the specific needs of the sport of soccer and its unique player pool. In addition, if both the League and players have a hand in creating the policy, we believe it will be more effective as it will be more readily embraced than a policy mandated by a third party.

MLS also believes that a single government-mandated policy cannot adequately govern or address the unique and distinct qualities of the different professional leagues. These differences are significant and include, among others: league structure, economic status, labor relations, player demographics, length of the season and physical demands particular to each sport. Importantly, soccer is an internationally regulated sport. Subjecting the sport to a "one-size-fits-all" policy, could lead to a variety of unintended consequences.

THE DRUG FREE SPORTS ACT

MLS believes that the goal of the Drug Free Sports Act ("Act") is noble and applauds the idea of restoring the integrity and trust between the players and fans that has been damaged by recent scandals. It is important to note that MLS' policy is aligned with many of the key elements of the Act. However, as previously stated, it is our strong belief that a sport-specific program will be more effective than a generalized program that attempts to encompass every sport. Nonetheless, we are pleased to assist the Committee by providing feedback on the proposed legislation.

Timing and Frequency of Random Testing

The Act requires each athlete to be subject to a minimum of one test each year to be conducted randomly with no notice provided to the athlete.

The MLS testing program currently exceeds this requirement. MLS tests every player at least once with no notice and otherwise subjects its players to unlimited, random testing year-round.

MLS doubts that a single test will be a sufficient deterrent unless the threat of future testing exists. This was an issue in our CBA discussions and we applaud our Union for supporting more substantial testing.

Applicable Substances

The Act sets the WADA International Standard Prohibited List as the applicable standard. As previously stated, MLS has already adopted the WADA Prohibited List as its prohibited list.

Soccer perhaps more than any other team sport is truly international. MLS players compete in numerous international competitions including the Olympics and FIFA World Cup and are already subject to strict international doping standards. More than twenty-five percent (25%) of the League's players are part of the player pools for various national teams. With such a large percentage of MLS' player pool already subject to the WADA Prohibited List for international competition, MLS believed that it should hold its players to the same standard in domestic competition.

In addition, the WADA Prohibited List is the strictest standard in sports. By adopting it, MLS is taking the strongest possible stance against doping and attempting to protect its player pool from the dangers associated with all performance-enhancing substances.

Method of Testing and Analysis

The Act requires that testing and analysis be administered by an independent party not affiliated with the professional sports association.

The MLS program is administered by doctors from Assessment Intervention Resources (“AIR”) who have expertise in the fields of addictionology, behavioral health, and drug testing. Pursuant to the collective bargaining agreement, both the League and MLS Players Union must approve the program doctors.

Although AIR consults with the League on general program parameters and costs, the doctors are independent contractors and their decisions are free from League influence. MLS believes this is the most appropriate structure.

Penalties: Suspension

The Act proposes a minimum suspension of two years for a first positive test and a permanent suspension for a second positive test.

Currently, MLS has the right to impose discipline up to and including termination for a first offense for a performance-enhancing drug violation. MLS is the only major U.S. professional sports league that has the right to terminate a player for a first offense.

While we understand the appeal of certainty, during the negotiation of the CBA, MLS considered, and rejected, the inclusion of a minimum sanction for violations of the policy. MLS believes that a player is more likely to be deterred from violations if he knows that even a first violation can result in a termination of his contract. The inclusion of a minimum sanction in the policy could result in a player judging that the risk of receiving the minimum sanction is worth the violation.

MLS also believes that disciplinary discretion is important because mandatory minimum standards may create unjust results. No one can foresee the unique circumstances of each individual case. Depending on the length of the minimum suspension, there could be a situation in which the minimum is too harsh. The penal code treats individuals who commit similar crimes differently based on intent and premeditation. Flexibility is necessary in imposing discipline in order to ensure that a player who knowingly uses performance-enhancing substances is treated more harshly than a player who unknowingly ingests a tainted nutritional supplement.

Although MLS retains discretion, the League will not abdicate its responsibility to impose appropriate discipline. Nor will discretion be used to treat star players differently than other players. We serve as the guardians of the sport of soccer in the U.S. We take this responsibility very seriously. We established a strong program at inception and continue to improve it to ensure that our athletes are held to the highest possible standard. We have taken a leadership position in this area and will continue to lead responsibly in the future. We are justifiably proud of our record.

Penalties: Disclosure

The Act requires disclosure to the public of the name of any player having a positive test result.

MLS will disclose the name of any player that has a verified positive test result for a performance-enhancing substance.

Appeals Process

The Act states that any athlete who tests positive has the opportunity for a prompt hearing and a right to appeal before its professional sports association.

MLS currently provides players a right to appeal a positive test. We believe that an accused party’s right to a fair hearing is fundamental. The key to this provision to ensure fairness is that the hearing be conducted by the individual league and not a third party unconnected to the sport.

Summary

Every professional sports league shares the belief that professional athletes have a special relationship with their fans. They are revered, respected and emulated in ways unmatched in our society. As a result, it is our strong belief—one shared with our players—that we together have a responsibility and an obligation to be held to a higher standard of behavior on and off the field. We need to “lead by example” and take a stand against steroid abuse to ensure that our young fans and future players will always be competing in a drug-free environment.

MLS acknowledges the urge to establish universal standards for all sports leagues, however, we believe that specialized programs—collaboratively created and

agreed to between leagues and their players—tailored to address the specific needs and concerns of each sport, will be more effective in creating drug-free sports.

One only needs to look at MLS' success to see the validity of this approach. Working together with our players, MLS has created a strict and rigorous drug testing and discipline program that establishes our players as role models, and "citizen athletes."

Mr. STEARNS. Thank you.

Mr. Foose, welcome.

STATEMENT OF ROBERT FOOSE

Mr. FOOSE. Thank you, Mr. Chairman and members of the subcommittee.

My name is Bob Foose, and I am the Executive Director of the Major League Soccer Players Union. The union appreciates the opportunity to appear before this subcommittee and to express its views on the Drug Free Sports Act.

Our union is the newest in professional sports. Formed in April of 2003, we recently completed negotiations with MLS on the first collective bargaining agreement in the history of the league.

Like all labor negotiations, at times ours were contentious. One subject on which it was easy for the players and management to agree, however, was drug testing. Our players are extremely proud of the fact that MLS is a league that has not had problems with performance-enhancing drugs, and the players want to keep it that way. MLS players are among the most talented and the fittest athletes in the world. Steroids and other performance-enhancing drugs simply have no place in the game.

They are also keenly aware that soccer is the most popular youth sport in the United States. MLS players take great pride in being role models for the millions of children who play soccer every day in our country.

Because of the breadth of competitions across international lines, the world of soccer differs fundamentally from that of other team sports with respect to drug testing. The significant number of MLS players are part of senior and youth national teams for their respective countries, and many of our players have been or will in the future be members of their Olympic teams.

When competing for these teams, players are subject to random testing for performance-enhancing drugs and strict penalties by the world governing body for soccer, known as FIFA as well as the International Olympic Committee. Both of these organizations test using the World Anti-Doping Agency's list of prohibited substances.

MLS players are also subject to drug testing by MLS. The program adopted in our CBA is run by an independent outside entity jointly approved by the union and the league. Testing includes random testing, for-cause testing, and return-to-duty testing. Players are tested both for performance-enhancing and recreational drugs of abuse. Significantly, our program also uses the WADA list of prohibited substances. If a player tests positive for a performance-enhancing substance, the Commissioner of MLS has the authority to impose discipline up to and including the termination of that player's contract. Moreover, such a player also has no confidentiality protection. Ours, therefore, is one of the most stringent policies in professional sports.

As a union, we accepted such a policy because our players are clean and they want to protect the integrity of the sport often referred to as “the beautiful game”. Our players believe strongly in the power of the collective bargaining process. Indeed, our union is a prime example of that power. It has only been by organizing a labor union and engaging in collective bargaining that MLS players today, for the first time in the 10-year history of the league, have improved their terms and conditions of employment.

Collective bargaining works, and when it is allowed to work, labor and management can devise creative solutions to the problems and issues in their particular workplaces. In our case, collective bargaining has resulted in the drug policy designed to keep MLS free from the problems caused by the use of performance-enhancing drugs. We are opposed to governmental amendment of our CBA. For that reason, we oppose H.R. 1862 in its current form.

Leaving aside that philosophically we do not believe that Congress should override the provisions of collective bargaining agreements, I would like to comment briefly on a couple areas of the proposed bill.

The bill calls for a mandatory 2-year suspension for any positive test, with no exceptions. Although our CBA allows for termination for a positive test, discretion is also given to impose lesser penalties. This discretion is consistent with WADA’s anti-doping code, which allows less than a 2-year suspension under certain circumstances, such as where the athlete bears no significant fault or negligence. We believe that a 2-year ban for any positive test is too harsh, particularly when it does not allow for any mitigating factors.

Moreover, we do not believe that a one-size-fits-all penalty covering all sports is appropriate. The lengths of players’ careers in professional sports differ greatly from sport to sport. In many circumstances, a 2-year ban could effectively end an MLS player’s career, and it certainly would have a greater impact than in other sports in which the length of a playing career is longer.

Similarly, the penalties imposed under H.R. 1862 for noncompliance would have dramatically different impacts on the various sports leagues covered by the bill. As a union, we want MLS to prosper. It is simply not fair to impose a penalty on MLS that would have a much more significant impact than one imposed on other leagues.

Let me close by inviting all of you to an MLS game. The defending MLS Cup Champion, D.C. United, play their home games within the shadow of the Capitol, at RFK stadium. When you go to the game, you will see talented, committed, and amazingly fit athletes who do not use performance-enhancing drugs. Those athletes, now through their union and working with the league, have done a tremendous job of keeping performance-enhancing drugs out of the game. The MLS Players Union is committed to continuing that effort.

On behalf of all MLS players, I thank you for the opportunity to testify today.

[The prepared statement of Robert Foose follows:]

PREPARED STATEMENT OF BOB FOOSE, EXECUTIVE DIRECTOR, MAJOR LEAGUE
SOCCER PLAYERS UNION

Mr. Chairman and members of the Subcommittee: My name is Bob Foose, and I am the Executive Director of the Major League Soccer Players Union ("MLS Players Union"), the labor organization representing players in Major League Soccer ("MLS"). The MLS Players Union appreciates the opportunity to appear before this Subcommittee and to express its views on H.R. 1862, the Drug Free Sports Act.

Our union is the newest in professional sports. Formed in April of 2003, we recently completed negotiations with MLS on the first collective bargaining agreement in the history of the league. Those negotiations were lengthy. Because we were bargaining a first agreement, we covered everything from direct deposit of paychecks to the first retirement plan ever to cover players in the league—and most everything in between.

Like all labor negotiations, at times ours were difficult and contentious. One subject on which it was easy for the players and management to agree, however, was on the use of performance enhancing drugs. Our players are extremely proud of the fact that MLS is a league without performance enhancing drugs, and the players want to keep it that way.

It takes a tremendous amount of talent to play professional soccer. Major League Soccer players are among the fittest athletes in the world, and steroids and other performance enhancing drugs simply have no place in the game. As stated in our collectively bargained drug policy, "the use of performance enhancing substances violates the ethics, integrity and image" of professional soccer. We are also keenly aware that youth soccer is the most popular youth sport in the United States. Major League Soccer players take great pride in being role models for the millions of children who play soccer every day in our country.

Before I describe our collective bargaining agreement and drug policy, I would like to explain briefly how the world of soccer differs fundamentally from that of other sports, and how, as a result, MLS players are subject to testing for the use of performance enhancing substances on many levels. First, many members of our union are in the player pool for their respective National Teams. These are the teams that are currently representing their countries in competition to qualify for the 2006 World Cup. In addition, members of our union also compete for other National Teams in youth tournaments, such as the World Youth Championship this summer in the Netherlands, for players under the age of 20, and the U-17 World Championship this fall in Peru, for players under the age of 17.

These National Teams, which are separate from MLS, compete in tournaments sanctioned by the world governing body for soccer, known as the Federation Internationale of Football Associations, or FIFA. In competing in FIFA tournaments and exhibition games, players are subject to random testing for the use of performance enhancing drugs, and are tested for the World Anti-Doping Agency ("WADA") list of prohibited substances. Any player who tests positive is subject to significant discipline under the FIFA Disciplinary Code, including a minimum six-month suspension for a first-time offense. Many of the members of our union also have been, and will in the future be, members of the U.S. and other Olympic Teams. Members of those teams are subject to strict International Olympic Committee and WADA testing requirements.

MLS players, of course, are also subject to drug testing by MLS. This year is the tenth season of MLS, and the first one in which players in the league are covered by a collective bargaining agreement. Even before the negotiation of this agreement, MLS players had been subject to a stringent drug testing program, in which all players were randomly tested at least once per year, at any time during the year. Players were tested both for the use of performance enhancing drugs and recreational drugs of abuse.

After the union was organized, one of our first steps was to poll the players on their priorities for a first collective bargaining agreement. That poll included questions regarding whether players wanted to negotiate changes to the league's drug policy. The players, however, understood the need to continue a stringent drug policy, as we work with the league to grow the sport of soccer in the United States. In negotiations, therefore, while we fought hard over 18 months on terms such as an increased minimum salary, employer-paid health insurance and a pension plan for all players, the players accepted management's proposal to maintain a strict policy with respect to the use of performance enhancing substances.

The drug testing program adopted in our agreement is run by an independent outside entity, jointly approved by the union and the league. Testing includes: (a) random testing, in which players are tested at least once each year; (b) for-cause testing in which players may be tested when they exhibit behavior indicating the use of a

prohibited substance; and (c) return to duty testing, following a failed drug test and/or completion of treatment for substance abuse. Players are tested both for performance enhancing and recreational drugs of abuse. Significantly, the drug testing program in MLS uses the WADA list of prohibited substances.

If a player tests positive for a performance enhancing substance, the Commissioner of MLS has the authority to impose discipline up to and including the termination of that player's contract. Moreover, there is no confidentiality protection for a player who tests positive for a performance enhancing substance. Ours, therefore, is a strict policy, and is one of the most stringent in professional sports. As a union, we accepted such a policy because our players are clean, and they want to protect the integrity of the sport often referred to as "the beautiful game."

Thus, Major League Soccer has in place a strict drug policy that has helped keep the league free of the problems caused by the use of performance enhancing drugs. The players believe strongly in the power of the collective bargaining process. Indeed, our union is a prime example of that power. For the first several years of the league, the players were involved in a lawsuit against MLS in an effort to improve their economic well-being. That effort, however, proved unsuccessful. It was only by organizing a labor union and engaging in collective bargaining, that MLS players today for the first time have improved their terms and conditions of employment. Through collective bargaining, players have raised the minimum league salary, implemented the first retirement plan for players in league history, and provided for a neutral grievance and arbitration procedure in which disputes can be aired and resolved. And, the players and the league have agreed on a system that will continue to combat and prevent the use of performance enhancing drugs in soccer.

Collective bargaining works, and when it is allowed to work, labor and management can devise creative solutions to the problems and issues in their particular workplaces. Under the National Labor Relations Act, drug testing of current employees is a mandatory subject of bargaining, subject to good faith negotiation between the parties. As described, we have just negotiated a first agreement in which we covered all subjects, including drug testing. The result is that MLS has a strict policy that we think will keep performance enhancing substances out of the league. We are, however, opposed to governmental amendment of our agreement. For that reason, we oppose H.R. 1862 in its current form.

Leaving aside that philosophically we do not believe that Congress should override the provisions of collective bargaining agreements, I would like to comment briefly on the proposed bill.

The bill calls for a mandatory two-year suspension for any positive test, with no exceptions. Although our agreement allows for termination for a positive test, discretion is also given to impose lesser penalties. This discretion is consistent with WADA's anti-doping code, which allows less than a two-year suspension under certain circumstances, such as where the athlete bears no significant fault or negligence. We believe that a two-year ban for any positive test is too harsh, particularly when it does not allow for any mitigating factors.

Moreover, we do not believe that a one-size fits all penalty covering all sports is appropriate. The lengths of players' careers in professional sports differ greatly from sport to sport. Although soccer players' careers may not be as short as those of football players, they are shorter than those in other sports such as baseball. In many circumstances, a two-year ban can effectively end an MLS's player's career, and it certainly would have a greater impact than in other sports in which the length of a playing career is longer.

Similarly, the penalties imposed under H.R. 1862 for noncompliance would have dramatically different impacts on the various sports leagues covered by the bill. I think I can speak for both the union and the league when I say that we are striving for the day when a \$5,000,000 fine will have the same impact on MLS that it has on more wealthy leagues. However, the fact is that such a day has not yet arrived. As a union, we want MLS to prosper. It is simply not fair to impose a penalty on MLS that would have a much more significant impact than one imposed on other leagues.

Let me close by inviting all of you to an MLS game. The defending MLS Cup champions, D.C. United, play their home games within the shadow of the Capitol, at RFK stadium. When you go to the game, you will see talented, committed and amazingly fit athletes, who do not use performance enhancing drugs. Those athletes, now through their union, and working with the league, have done a tremendous job of keeping performance enhancing drugs out of the game. The MLS Players Union is committed to continuing that effort.

On behalf of all MLS players, I thank you for the opportunity to testify today.

Mr. STEARNS. I thank you.

Mr. Selig, welcome.

STATEMENT OF ALLAN H. "BUD" SELIG

Mr. SELIG. Good morning.

As you know, I have the distinct privilege of serving as the ninth Commissioner of Baseball. The first, and most important, point that I would like to make this morning is that the eradication of performance-enhancing substances from all of professional baseball is my top priority. Moreover, I can assure you that this is a priority that is shared by the owners of all 30 Major League Clubs. In fact, just last week at a Major League meeting in New York, all 30 owners endorsed a resolution supporting my ongoing efforts to rid our game of steroids and other performance-enhancing substances.

In previous hearings before various Committees in the House of Representatives and in the Senate, I have detailed the efforts undertaken by Major League Baseball, dating to the late 1990's, to deal with the issue of performance-enhancing substances. In the minor leagues where our players are not unionized and we are free to act unilaterally, I promulgated an industry-wide policy in 2001 and have since amended that policy on a number of occasions to make it stronger and more effective. At the Major League level, the process is more complicated because drug testing is a mandatory subject of collective bargaining. Nonetheless and notwithstanding this fact, we have worked with the Major League Baseball Players Association to strengthen the Major League policy in each of the past three seasons.

At this point, however, the history of our efforts is not the most important topic. While we have made important strides in dealing with the issue of performance-enhancing substances, it is clear to me that our fans and their elected representatives here in Congress expect more to restore their faith in the integrity of our rules and in the performance of our players. As a result, today I will focus on our next steps in the continuing battle to eliminate the use of performance-enhancing substances from Major League Baseball.

First, I have decided that Major League Baseball's Minor League Drug Policy will be amended effective for the 2006 season. Most important, the penalties under the policy will be significantly increased. First-time offenders will be suspended for 50 games. Second-time offenders will be suspended for 100 games. And third-time offenders will be permanently banned from the game. I firmly believe that this "three strikes and you are out" approach will create a level of deterrence sufficient to convince our players not to risk their health through the use of steroids and other drugs.

In addition, amphetamines, which have been banned as "drugs of abuse" in the minor league program for a number of years, will now be classified as performance-enhancing substances under this program. The change in the classification of amphetamines means that amphetamine users will be immediately suspended for a first-time positive test rather than receiving treatment and counseling. While amphetamines are not the same as steroids and their use can raise difficult questions, particularly in the area of addiction, these substances do have performance-enhancing characteristics. Because of this fact, those who use amphetamines should be disciplined for any positive test.

As I am sure you are well aware, I have had conversations with Don Fehr of the Players Association about the issue of performance-enhancing substances in recent weeks. In a recent letter to Mr. Fehr, I shared with him my view that the issue of performance-enhancing substances has raised questions about the integrity of our great game.

In the letter, I suggested a number of changes to the Major League Drug Policy, including the following.

Discipline. As in the minor leagues, the Major League Drug Policy should follow the “three strikes and you are out” approach. First-time offenders should be suspended 50 games. Second-time offenders should be suspended for 100 games. Third-time offenders should be banned from the game for life.

Amphetamines should be banned under our program in the same manner as other performance-enhancing substances.

Frequency of testing. In order to restore the public confidence in our game, the frequency of testing in the Major League program should be increased.

Independence of administration. Major League Baseball and the Players Association should agree on a single, independent administrator who should be responsible for all aspects of the program from the scheduling of tests to the collection of urine through the analyzing test results. Only at the point of discipline should officials from Major League Baseball and the Players Association become involved in the process.

Finally, I told Mr. Fehr that I considered it imperative that we act quickly to make these changes to restore the faith of our fans in the integrity of our players’ performance on the field and to refocus the attention on that performance and away from the halls of Congress and testing labs.

I am certain that our players do want performance-enhancing substances out of the game, and many have so stated publicly. Perhaps Tino Martinez of the New York Yankees said it best: “Whatever they want to do to get this out of the fans’ heads and clean up this game, I am all for it.”

The use of performance-enhancing substances calls into question not only the integrity of the Commissioner’s Office, the Players Association, and the Clubs, but the integrity of each and every player. Such substances create an uneven playing field to the advantage of those who elect to cheat. The use of such substances also raises important health concerns. Over the past 3 years, the players and their bargaining representative have been very responsive to our desire to implement stronger policies in this area. Mr. Fehr has indicated a willingness to discuss the issues raised in my letter, and I am hopeful that the Players Association will once again prove willing to address the concerns that have been articulated by Congress and our fans. From our perspective, and I suspect from the perspective of many in Congress, the ability of baseball to police itself is preferable to legislation. If we can not do it, and I really hope that we can, I understand why legislation would be considered by Congress.

As important as it is for Major League Baseball to address the issue of performance-enhancing substances to restore the integrity of the game, it is equally important for us to send a message to the

young people in America that the use of performance-enhancing substances is wrong and dangerous. In our effort to fulfill our obligation in this area, Major League Baseball has entered into an innovative arrangement with the Partnership for a Drug-Free America. Over the past 18 months, we have worked with the Partnership to develop comprehensive attitudinal and usage data on performance-enhancing substances. Based on this research, the Partnership is in the process of developing a campaign directed at young people and young athletes that will involve advertising on television, in print, and on radio as well as educational material. We are focused on developing the right message and finding the right messengers. In this regard, we are considering the direct involvement of high school coaches in our educational efforts. Most important, our commitment to this effort will be ongoing in the sense that the Partnership will be doing research on the effectiveness of the program so it can be refined in response to new developments.

I am pleased to inform you that we have been in detailed discussions with the Taylor Hooten Foundation about an ongoing relationship with Major League Baseball. I believe that the Foundation is doing great work on this issue of steroid awareness and hope that our support will help the Foundation to continue to fulfill this mission.

As I hope the foregoing makes clear, Major League Baseball has demonstrated and continues to demonstrate a willingness to deal with the issue of performance-enhancing substances without the need for Federal legislation. At the same time, however, I would not resist Federal legislation if Congress continues to believe that a uniform standard for all sports is necessary. I made this commitment in my testimony before the House Committee on Government Reform on March 17, 2005, and I reiterate that commitment today. I would like to stress, however, that I believe that there are important differences among the various professional sports and between professional sports and the Olympics that may make private regulation more effective and appropriate.

If Federal legislation is the path that Congress chooses to follow, the legislation that has been introduced by Congressman Stearns in conceptually in accord with my views on the topic of performance-enhancing substances. In order to have an effective program, there must be a comprehensive list of banned substances, fair, independent, and accurate tests must be administered regularly to the athletes, and serious discipline must be imposed on those who test positive.

To conclude, I want to reiterate that my top priority is to eradicate the use of performance-enhancing substances in professional baseball. In pursuit of that goal, I will continue to pursue a very aggressive, collectively bargained policy with the Major League Players Association. At the same time, I will continue to be the supporter of an appropriately tailored, uniform Federal standard. I hope that we will have the opportunity to work with Congress in developing that standard.

[The prepared statement of Allan H. "Bud" Selig follows:]

PREPARED STATEMENT OF ALLAN H. SELIG, COMMISSIONER OF BASEBALL

Good morning. As you know, I have the distinct privilege of serving as the Ninth Commissioner of Baseball. The first and most important point that I would like to make this morning is that the eradication of performance enhancing substances from all of professional Baseball is my top priority. Moreover, I can assure you that this is a priority that is shared by the owners of all 30 Major League Clubs. In fact, just last week at a Major League meeting in New York, all 30 owners endorsed a resolution supporting my on-going efforts to rid our game of steroids and other performance enhancing substances.

In previous hearings before various Committees in the House of Representatives and in the Senate, I have detailed the efforts undertaken by Major League Baseball, dating to the late 1990's, to deal with the issue of performance enhancing substances. In the minor leagues, where we are free to act unilaterally, I promulgated an industry-wide policy in 2001 and have since amended that policy on a number of occasions to make it stronger and more effective. At the Major League level, the process is more complicated because drug testing is a mandatory subject of collective bargaining. Notwithstanding this fact, we have worked with the Major League Baseball Players Association ("MLBPA") to strengthen the Major League policy each of the past three seasons.

At this point, however, the history of our efforts is not the most important topic. While we have made important strides in dealing with the issue of performance enhancing substances, it is clear to me that our fans and their elected representatives here in Congress expect more to restore their faith in the integrity of our rules and the performance of our players. As a result, today I will focus on our next steps in the continuing battle to eliminate the use of performance enhancing substances from Major League Baseball.

First, I have decided that the Major League Baseball's Minor League Drug Policy will be amended effective for the 2006 season. Most important, the penalties under the policy will be significantly increased. First time offenders will be suspended for fifty games. Second time offenders will be suspended for one hundred games. And, third time offenders will be permanently banned from the game. I firmly believe that this "three strikes and you're out" approach will create a level of deterrence sufficient to convince our players not to risk their health through the use of steroids and other drugs. In addition, amphetamines, which have been banned as "drugs of abuse" in the minor league program for a number of years, will now be classified as performance enhancing substances under this program. The change in the classification of amphetamines means that amphetamine users will be immediately suspended for a first-time positive test rather than receiving treatment and counseling. While amphetamines are not the same as steroids and their use can raise difficult questions, particularly in the area of addiction, these substances do have performance enhancing characteristics. Because of this fact, those who use amphetamines should be disciplined for any positive test.

As I am sure you are aware, I have had conversations with Donald Fehr of the MLBPA about the issue of performance enhancing substances in recent weeks. In a recent letter from me to Mr. Fehr, I shared with Mr. Fehr my view that the issue of performance enhancing substances has raised questions about the integrity of our great game.

In the letter, I suggested a number of changes to the Major League Drug Policy including the following:

1. *Discipline.* As in the minor leagues, the Major League Drug Policy should follow the "three strikes and you're out" approach. First-time offenders should be suspended fifty games. Second-time offenders should be suspended for one hundred games. Third-time offenders should be banned from the game for life.

2. *Amphetamines.* Amphetamines should be banned under our program in the same manner as other performance enhancing substances.

3. *Frequency of Testing.* In order to restore the public confidence in our game, the frequency of testing in the Major League program should be increased.

4. *Independence of Administration.* Major League Baseball and the MLBPA should agree on a single, independent administrator who should be responsible for all aspects of the program from the scheduling of tests, to the collection of urine, through the analysis of tests results. Only at the point of discipline should officials from Major League Baseball and the MLBPA become involved in the process.

Finally, I told Mr. Fehr that I considered it imperative that we act quickly to make these changes to restore the faith of our fans in the integrity of our players' performance on the field and to refocus attention on that performance and away from the halls of Congress and the testing labs.

I am certain that our players want performance enhancing substances out of the game and many have so stated publicly. Perhaps Tino Martinez of the New York Yankees said it best: "Whatever they want to do to get this out of the fans' heads and clean up this game, I'm all for it."

The use of performance enhancing substances calls into question not only the integrity of the Commissioner's Office, the Players Association and the Clubs, but also the integrity of each and every player. Such substances create an uneven playing field to the advantage of those who elect to cheat. The use of such substances also raises important health concerns. Over the past three years, the players and their bargaining representative have been responsive to our desire to implement stronger polices in this area. Mr. Fehr has indicated a willingness to discuss the issues raised in my letter and I am hopeful that the MLBPA will once again prove willing to address the concerns that have been articulated by Congress and our fans. From our perspective, and I suspect from the perspective of many in Congress, the ability of Baseball to police itself is preferable to legislation. If we cannot do it, and I hope we can, I understand why legislation would be considered by Congress.

As important as it is for Major League Baseball to address the issue of performance enhancing substances to restore the integrity of the game, it is equally important for us to send a message to young people in America that the use of performance enhancing substances is wrong and dangerous. In an effort to fulfill our obligations in this area, Major League Baseball has entered into an innovative arrangement with the Partnership for a Drug-Free America. Over the past eighteen months, we have worked with the Partnership to develop comprehensive attitudinal and usage data on performance enhancing substances. Based on this research, the Partnership is in the process of developing a campaign directed at young people and young athletes that will involve advertising on television, in print and on radio, as well as educational materials. We are focused on developing the right message and finding the right messengers. In this regard, we are considering the direct involvement of high school coaches in our educational efforts. Most important, our commitment to this effort will be on-going in the sense that the Partnership will be doing research on the effectiveness of the program so it can be refined in response to new developments.

I am also pleased to inform you that we have been in detailed discussions with the Taylor Hooten Foundation about an on-going relationship with Major League Baseball. I believe that the Foundation is doing great work on this issue of steroid awareness and hope that our support will help the Foundation continue to fulfill its mission.

As I hope the foregoing makes clear, Major League Baseball has demonstrated and continues to demonstrate a willingness to deal with the issue of performance enhancing substances without the need for federal legislation. At the same time, however, I would not resist federal legislation if Congress continues to believe that a uniform standard for all sports is necessary. I made this commitment in my testimony before the House Committee on Government Reform on March 17, 2005 and I reiterate that commitment today. I would like to stress, however, that I believe that there are important differences among the various professional sports and between professional sports and the Olympics that may make private regulation more effective and appropriate.

If federal legislation is the path that Congress chooses to follow, the Drug Free Sports Act that has been introduced by Congressmen Stearns is conceptually in accord with my views on the topic of performance enhancing substances. In order to have an effective program, there must be a comprehensive list of banned substances, fair, independent and accurate tests must be administered regularly to the athletes, and serious discipline must be imposed on those who test positive.

To conclude, I want to reiterate that my top priority is to eradicate the use of performance enhancing substances in Professional Baseball. In pursuit of that goal, I will continue to pursue a more aggressive, collectively bargained policy with the MLBPA. At the same time, I will continue to be a supporter of an appropriately tailored, uniform federal standard. I hope that we will have the opportunity to work with Congress in developing that standard.

Mr. STEARNS. I thank you.

Mr. Fehr, welcome.

STATEMENT OF DONALD M. FEHR

Mr. FEHR. Thank you, Mr. Chairman, Ranking Member Schakowsky, Chairman Barton, and other members of the committee and of the subcommittee.

I appear today in response to the invitation to testify with respect to H.R. 1862. And I was struck, listening to a number of the opening comments that were made before any of the witnesses were asked to deliver their remarks, that there were a number of things that not only do we agree with, the vast majority, but I suspect are well worth repeating.

The first is that this is a complex and far-reaching issue. The second is that we ought to be dealing with illegal steroid use. Third is that the overwhelming majority of professional athletes in baseball, and I am sure in all other professional sports, don't use and don't want to use. Fourth, dealing with such issues in sports is probably only the first step. And last, to pick up on a comment that Mr. Stearns made, in my testimony before Government Reform 2 months ago yesterday, I referenced the issue of gene doping, and I would just like to commend Mr. Stearns for mentioning that here today. That is the issue that is on the horizon, and that is an issue which potentially will arise even before the child is old enough to know about it. And I am pleased to see that you are paying attention to that issue going forward.

With that, let me take just the few brief minutes I have now to address the subject of H.R. 1862 and what we do in baseball.

First of all, let me restate the position I have articulated before various committees of the Congress for several years now, beginning, I believe, with the Senate Commerce in 2002. Simply put, neither players, nor the Players Association, condone or support the use by players, or by anyone else, of any unlawful substances, nor do we condone or support the unlawful use by players or by anyone else of any otherwise legal substance. The use of any illegal substance or the illegal use of any legal substance is wrong. And clearly, the unlawful use of steroids has no place in the game. And one need not be a physician to appreciate that steroids are powerful drugs that people should not fool around with, particularly children and females, as the medical research makes it absolutely clear that illegal steroid use can be especially harmful for them.

Having said that, we have addressed, as Commissioner Selig indicated, the issue of illegal steroid use in collective bargaining over the past years, and we think we have done so with significant effect. The evidence we have of the program so far was that the incidents of use dropped precipitously in 2004. The number of confirmed positives fell to about 1 percent of tests. We nevertheless enhanced the program for this year. And the evidence we have so far, and I acknowledge it is only so far this year, does not suggest that this trend is moving in the other direction.

And I want to make clear that there is no dispute about this. Commissioner Selig has made clear repeatedly, and including last week, that he believes our current program is working.

How does it work?

Every player is tested at least once for illegal steroids. The tests are all random. They are unannounced. Nobody knows when they will be. There are a repeated number of random tests throughout the year and during the off-season, and every player is potentially subject to having his name pulled every time random tests are administered. For a first positive, there is a 10-day suspension. We did not have that previously. Heavier penalties for repeat offenses,

which obviously we hope we don't have. In addition to that, the individual is publicly identified. That is, in our judgment, meaning the judgment of Players, an extraordinarily powerful deterrent between the two.

I would point out, also, that where an individual tests positive once, he is subject to what we have termed a treatment program, and that will include, in the ordinary course, for-cause testing for that individual on a frequent basis, quite apart from the tests which are conducted for everyone. Both the collection of the test samples, which is done by Comprehensive Drug Testing, Inc., and confirmed, I believe, brought to Major League Baseball by Commissioner Ueberoch more than 20 years ago, and the analysis of those samples, which is done by the WADA certified lab in Montreal, are done completely by independent experts whose reputation and business depend entirely on conducting themselves in an above-board and appropriate manner, and we believe that they have.

What we have done is obviously a product of good faith collective bargaining, which is what the law of the land suggests is the appropriate method Congress has repeatedly endorsed as the appropriate method to determine the terms and conditions of employment.

The reason why Congress has done that is the belief that solutions devised by the parties in the relationship are likely to work better and be more effective and be more adaptive than those imposed by any outside party, including the Congress. For that reason, I think it will come as no surprise to the members of the committee that we do not believe the proposed legislation should be enacted. We believe that collective bargaining has been and remains the appropriate forum to deal with such matters, even matters as controversial and potentially volatile as random suspicionless, excuse me, employee drug testing as we have here.

I agree with some of the other witnesses that the notion that a one-size-fits-all approach is probably not the best one. And in addition to that, it is unclear from the legislation itself how the list of substances would be determined.

When we get to a WADA list, I would point out that that would mean that no one within the community of those affected in baseball would have any role. We are not a part of WADA. We are not a part of the Olympic movement. We don't serve on the committees. It is an important notion, excuse me, that the people involved in the process have some role in putting it together.

In addition to that, let me refer to a comment I made at the beginning. We believe strongly that whatever proscriptions are in place ought to be for illegal drugs. People playing Major League Baseball are nevertheless American, and if the Congress of the United States and the appropriate Federal and State agencies believe that product X is fully safe and available for purchase by Americans in pharmacies and health food stores and wherever else it might be, we don't believe that someone should be prohibited from purchasing or using such a substance merely because he has a job as a professional athlete.

Turning to the penalties. In our belief, a mandatory 2-year penalty for a first-time positive is too severe. The purpose and goal of the program is, and in our judgment, ought to be to deter use of

illegal substances. We believe that a far less significant penalty, especially for a first offense, especially those that it may be inadvertent or unknowing or that may involve young individuals who lack certain sophistication, is not necessary to achieve the goal that we are all interested in achieving. As a practical matter in baseball, while not true for everyone, perhaps, for the vast majority of individuals, it is my belief that a 2-year penalty is effectively career ending.

Moreover, as the Olympics have demonstrated for us, the severity of the penalty in and of itself is no guarantee that there will not be attempts to violate the rules. Were that so, we would not have seen positive test results in the Olympics.

Very briefly, let me turn to the appeals process, which is reflected in the bill.

This appears quite problematic, it is confusing, and it is uncertain. It is unclear whether the individual would have the matters determined by a neutral judge, jury, or arbitrator. It is unclear whether any notion of traditional due process rights would be involved when we have contracts involved here. It is even unclear whether there would be a right to counsel. Thirty days is, very probably, far too short a time period in which these hearings need to be conducted, especially if significant scientific or other expert testimony or the process for witnesses needs to be involved.

Mr. STEARNS. Mr. Fehr, I will just have you sum up, if you don't mind.

Mr. FEHR. Thank you.

One final point, Mr. Chairman, we do feel that there are potentially constitutional issues involved in the legislation as drafted, particularly Fourth Amendment issues. The question rises as to whether or not searches ought to be required by Federal law, the premises of which is that there will not be, and need not be, individualized probable cause. I have been accused in the past of clinging to sort of antiquated notions of fair play in constitutional due process by people who believe sometimes that we are slow to get to things. We think that you ought to be very careful in such areas.

Finally, we look forward to the discussions with the Commissioner that he has previously referenced and to the discussions that I will be having with my constituency over the course of this season in that regard.

Thank you.

[The prepared statement of Donald M. Fehr follows:]

PREPARED STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR, MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

Mr. Chairman and Members of the Committee: My name is Donald M. Fehr, and I serve as the Executive Director of the Major League Baseball Players Association. I appear today in response to the invitation of the Chairman to testify with respect to HR 1862, the Drug Free Sports Act of 2005.

I appreciate the Committee's interest in and concern about the unlawful use of steroids, which led to this hearing. Let me begin by stating the position of the Major League Baseball Players Association ("MLBPA"), which I have previously articulated before several committees of the Congress. Simply put, the Players Association neither condones nor supports the use by players, or by anyone else, of any unlawful substance, nor do we support or condone the unlawful use by players, or by anyone else, of any legal substance. I cannot put it more plainly: the use of any illegal substance or the illegal use of any legal substance is wrong.

Lest there be any question, I should add that we are committed to dispelling any notion that the route to becoming a Major League athlete somehow includes taking illegal performance-enhancing substances like steroids. Playing Major League Baseball requires talent, drive, intelligence, determination, and grit. The unlawful use of steroids has no place in the game. One need not be a physician to appreciate that steroids are powerful drugs with which no one should fool around. This is particularly true for children and young adults, as the medical research makes clear that illegal steroid use can be especially harmful to them.

The players want to rid their game of the use of illegal performance-enhancing substances, and the agreements we have reached with the owners have served and will continue to serve that goal. In the 2002 negotiations, the MLBPA reached a steroid testing agreement with the Major League Clubs, and then, over the last winter, the MLBPA and the owners agreed to modify and enhance that agreement effective for this season. The evidence we have of the operation of the program in 2004, and of the enhanced program so far this year, suggests that we were correct; it is working well. The number of confirmed positives fell to about 1% in 2004, and the results we have so far this year also suggest that the enhanced program is effectively deterring steroid use.

Briefly, our current testing program operates in the following manner. Under the agreement effective this season, every player will be tested once for illegal steroids on a random and unannounced basis and, in addition, players at random will be chosen for additional unannounced testing. Every player is potentially subject to being tested whenever random tests are conducted, including during the off-season, no matter how many times he has previously been tested. No player will know in advance when any test will be administered.

For a first positive, a player faces a 10-day suspension without pay, and is publicly identified as having violated the testing regimen. The penalties for subsequent positive tests are significantly stronger. The loss of ten or so games that the player will never get back is quite meaningful to a Major League player, but perhaps more significant are the consequences resulting from public identification. No player wants to be identified as having violated the rules. (Note also that a player who tests positive is, in addition, subject to a treatment program designed by our Health Policy Advisory Committee. This treatment program can include individualized random testing for any such player, in addition to the testing to which all players are subject.)

Both the collection of test samples (done by Comprehensive Drug Testing, Inc.) and the analysis of those samples (done by the WADA certified laboratory in Montreal) are conducted by independent contractors, whose business and reputation depend entirely on conducting themselves in a completely above-board and appropriate manner. The impression that somehow our testing program is not or was not handled by outside entities, which possess both the requisite independence and expertise, is simply incorrect.

In short, we have negotiated a program that we firmly believe will work. Moreover, the evidence so far is that it is working. In addition, with our recent midterm amendments we have significantly strengthened the policy, demonstrating a clear capability and willingness to modify our program as needed. Indeed, on March 17th of this year, Commissioner Selig hailed our new agreement, saying that the program was as good as any in professional sports. And, what we have done was a product of good faith collective bargaining, just as Congress has always intended.

Under the National Labor Relations Act, the negotiation of terms and conditions of employment is committed to good faith collective bargaining between employers and the organizations selected by and representing employees. Needless to say, the agreement reached in September 2002, and now amended, is a product of that process. We continue to believe that collective bargaining is the appropriate forum for consideration and resolution of these issues. One of the premises of our labor laws is that solutions devised by the parties in the workplace are more likely to be workable and enduring, precisely because they are forged by those parties, rather than by others outside that relationship, no matter how well intentioned they may be.

Accordingly, it should come as no surprise that the Players Association does not believe the proposed legislation should be enacted. As Congress has repeatedly noted, collective bargaining is the appropriate forum in which to deal with matters affecting terms and conditions of employment, even matters as controversial and politically volatile as random suspicionless employee drug testing in the absence of significant concerns about public safety. We believe the program we have implemented in Major League Baseball will work, and will be seen to have worked, if given the opportunity. Our program provides players with the assurance that the testing will be thorough, fair, and accurate, while also making it clear that the unlawful use of steroids is neither tolerated nor excused in the Major Leagues.

Further, we do not agree with the underlying presumption of the legislation—that a single federally mandated and operated drug testing program, in which the covered substances would be chosen by an international body free of any input from or responsibility to the individuals and the entities it will regulate, is the most effective or appropriate means to eliminate illegal performance enhancing drugs in professional sports in the United States. In fact, such an approach may create even more problems than it solves.

For example, there appears to be some confusion over how the legislation should be read. Some claim it would require testing for all substances banned by the World Anti-Doping Agency (WADA), as well as any additional substance which the Secretary of Commerce determines is performance-enhancing and for which testing is reasonable and practicable. Others have asserted the opposite—the covered list would be limited to those substances banned by WADA that the Secretary of Commerce also determines are performance enhancing.

Obviously, how this provision is interpreted will have a significant impact on the scope of the legislation. If the former description is accurate, the legislation would delegate significant authority over American professional sports to an international body, WADA, which is under no obligation even to consider the views or concerns of the leagues or players in the United States, the impact of its decisions on these persons or entities, or the differences between competition in professional and Olympic sports.

Moreover, the legislation contains no provision which makes it clear that players may use substances which the United States Congress has determined are safe and effective for sale and use by all adult Americans and are readily available for purchase without a doctor's prescription. Professional athletes should not be punished for the appropriate use of legal substances. The Association has never contended that players should be above the law; conversely, they should not be placed below it. In addition to being patently unfair, no public policy basis has been advanced for penalizing professional athletes for the use of legal substances.

Turning to the penalties set forth in the bill, we respectfully submit that those proposed punishments are far too severe. The goal of our program is—and should be—to deter use of illegal substances, and we have agreed that mandatory suspensions for first offenders are necessary for that purpose. However, a two-year suspension for a first offense would, as a practical matter, end the player's career in the vast majority of circumstances. Penalties of that magnitude are simply not necessary to deter use and appear to punish only for the sake of punishing. Moreover, as the Olympics have demonstrated, the severity of the penalty, by itself, does not guarantee the result; if it did, we would see no positive tests in the Olympics.

Our players are extremely diverse. Some are far more educated when they arrive in the league than others, and there is no uniformity as to their legal sophistication or the operative medical rules among their respective countries of origin. In addition, some substances which are illegal in the United States or by WADA rule are legal in other countries. Given these circumstances, there is always the possibility of error or mistake. Ending an individual's career as a result of a single mistake or a poor decision is neither fair to the players involved nor necessary to persuade the public that Major League Baseball and its players are committed to ridding the sport of illegal performance enhancing substances.

The portion of the legislation creating an appeals process is also problematic and confusing. For example, it is unclear whether an athlete will have the right to have his or her fate determined by a neutral judge, jury or arbitrator, whether traditional due process standards will apply, or whether there is even a right to counsel. The legislation also mandates that the entire appeals process—from notification of an appeal to final adjudication—be completed within 30 days, far too little time in cases where there may be factual or scientific issues in controversy. Again, we respectfully submit that additional thought needs to be given as to how this process would work, before Congress passes a law that could deprive an athlete of the right to engage in his chosen profession.

Elsewhere, the legislation is specific in some circumstances but vague in others. For example, it contains a mandate regarding both timing and the frequency of random testing. We believe that such matters are not susceptible to a "one size fits all" approach and are best left to those with knowledge of the workings of a particular sport. In fact, the testing regime we have established for Major League Baseball is more effective, frequent, and random than the proposed regime in the bill.

Similarly, the bill also calls for "tests to be administered by an independent party not affiliated with" the professional league. No credible evidence has been brought forward to question the integrity of the administration of any drug testing program currently in force in any professional sport. The NFL and its union apparently have chosen to administer its program in-house, in the main. In baseball, as noted, the

parties have retained reputable independent contractors for collection and analysis. Absent any actual evidence of abuse, each sport should be permitted to determine how best to effectuate its program.

Finally, the legislation raises troubling constitutional questions. Suspicionless drug testing, mandated by the federal government, can run afoul of the general Fourth Amendment requirement that searches must be based on individualized suspicion of wrongdoing. The reasons asserted to justify deviation from this principle in the context of professional sports may fall short under the Supreme Court's reasoning in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the court held that a Georgia statute requiring candidates for state office to submit to drug testing was unconstitutional. Among other things, the Court determined that the stated intention of having candidates set a good example was not sufficient to justify the inherent invasion of privacy. The bill also raises additional constitutional concerns that will have to be addressed.

In conclusion, today, in baseball, our players are tested throughout the year on an unannounced, random basis, at a level in excess of the standard called for in the bill. They are tested for all the substances that the United States has determined to be illegal steroids and steroid precursors. The tests are administered by independent, qualified experts. The evidence so far indicates that our penalties are sufficient to deter initial use and repeat offenses without destroying careers. This result was achieved without the creation of a new federal agency or authority, or the resulting problems that will arise from the imposition of the one-size-fits-all approach called for in the legislation. Instead, it was achieved, as it should be, through collective bargaining, utilizing the medical and scientific expertise of the federal government to determine what substances should be covered.

The Players Association shares the Committee's goal in making sure that baseball, like other sports, whether it is played at the professional or amateur level, is free of all illegal performance enhancing drugs. We want the fans, and especially the children, the Major Leaguers of the future, to know that we are determined to achieve that goal.

Mr. STEARNS. I thank the gentleman.

Mr. Bettman, welcome.

STATEMENT OF GARY BETTMAN

Mr. BETTMAN. Thank you, Chairman Stearns, Ranking Member Schakowsky, members of the subcommittee.

My name is Gary Bettman, and I am the Commissioner of the National Hockey League.

The NHL believes the public is entitled to have confidence in the integrity in competition in our sport and in all professional sports. The League also believes its fans should be able to watch our exceptional athletes perform in an environment free from the influence of performance-enhancing drugs. According, the NHL appreciates the opportunity to cooperate in any way it can in the effort to eliminate the use of performance-enhancing drugs in professional and amateur athletics.

A brief review of the 10-year history of the NHL Players Association Substance Abuse and Behavioral Health program and our experience to date in the testing of NHL players for the use of performance-enhancing drugs may be instructive to the subcommittee as such experience and history form the basis for the NHL's specific comments regarding H.R. 1862.

Under the NHL and NHLPA program, a player suspected of having a substance abuse problem, which could include a problem associated with the use of performance-enhancing drugs, can be referred for participation in the program. The program expressly provides that, as part of the treatment and follow-up care, players may be required to undergo substance testing as determined by the doctors who administer the program. Such testing may take place both in season and during the off-season.

As a historical matter, the NHL players who have been referred to the program have had problems associated with drug and/or alcohol abuse as opposed to the use of performance-enhancing substances.

Also during the last 10 years, the League has been extensively involved in the development and administration of drug-testing programs in connection with international competitions in which NHL players participate, including the Olympics. When participating in such international play, NHL players are held to and abide by the strict international standards of the World Anti-Doping Agency, which have been adopted by the world governing body for hockey, which is known as the International Ice Hockey Federation.

Of the nearly 1,000 NHL players who have participated in those international competitions and were subject to drug testing in connection therewith, we are aware of only three positive tests for the performance-enhancing drugs. Of the three, one player tested positive for a drug that is also used for asthma as an inhaler and which may be used as a therapeutic use exception. A second player tested positive for a substance that is designated as an allowable narcotic, i.e. a prescribed painkiller, and the third player established the mistaken use defense in connection with his use of over-the-counter nutritional supplements.

These statistics lend support to our belief that as a general matter, performance-enhancing drugs have not been an issue in the NHL. Notwithstanding this fact, and in recognition of the public concern regarding the use of performance-enhancing drugs in professional sports, generally the NHL and the Players Association recognize the need for a comprehensive drug testing and doping control policy that will ensure the prevention of performance-enhancing drugs in our sport.

In conjunction with the new collective bargaining agreement, which we hope to have shortly, the NHL and the NHLPA anticipate an effective and meaningful new program that will feature, in addition to enhanced educational efforts, frequent and random no-notice testing coupled with the immediate and mandatory discipline for the use of performance-enhancing drugs.

Regarding H.R. 1862, the Drug Free Sports Act of 2005, the NHL is supportive of a program featuring mandatory testing and discipline imposed in connection with an athlete's use of performance-enhancing drugs. Given the commitment the NHL shares with the NHLPA to implement such a mandatory and effective program, we do not see the need for the proposed legislation as it would relate to the NHL. However, should Congress decide to proceed along the lines that this proposed legislation would contemplate, we have in our statement made specific comments most particularly relating to mandatory testing, Section 3, and the provision regarding exemptions, Section 4.

Section 3(1) provides for each athlete to be tested a minimum of once each year. We recommend, with respect to NHL players, that each athlete be tested a minimum of two times per season. Section 3(1) further provides that tests should be conducted at random throughout the entire year. We would recommend team-wide test-

ing in season on a no-notice basis and random testing individually in the off-season.

Section 3(3) of the legislation provides the tests should be administered by an independent party not affiliated with the Professional Sports Association, and we agree.

Section 3(4) provides that a positive test should result in the imposition of a suspension and public disclosure, subject to the determination made pursuant to an appeal. We agree that there should be public disclosure, an appropriate appeal process, and we also think that there should be pre-notification for the player and that he should be offered counseling and treatment.

Section 3(4) provides a minimum 2-year suspension for an athlete who tests positive and for the permanent suspension of an athlete who tests positive more than once. We agree that significant punishment for players who test positive should be in accordance with progressive discipline, but we would like to discuss further the appropriateness of a first-time, 2-year offense, because that could be career-ending, as was indicated by other witnesses.

Section 4 provides that the Secretary may exempt from the regulations promulgated pursuant to Section 3 any sports association that has previously adopted and implemented policies and procedures for testing athletes. We would suggest that subsequently adopted policies, as long as they meet the requirements, should also result in an exemption.

The NHL believes that every professional athlete serves as a role model, and with that status comes a corresponding responsibility to engage in conduct that will bring honor to the player, his team, and the sport in which he earns his livelihood. For these reasons, we fully support the proposed requirement that the NHL and other professional sports leagues conduct mandatory testing on athletes for performance-enhancing drugs.

Thank you for inviting us here today and for hearing our opinion on the legislation.

[The prepared statement of Gary Bettman follows:]

PREPARED STATEMENT OF GARY BETTMAN, COMMISSIONER, NATIONAL HOCKEY
LEAGUE

On behalf of the National Hockey League ("NHL"), and in response to the request of the Subcommittee on Commerce, Trade and Consumer Protection (hereinafter the "Subcommittee"), this shall constitute my written statement regarding H.R. 1862, the Drug Free Sports Act of 2005. At the outset, I would like to say that the NHL appreciates being afforded the opportunity to provide the Subcommittee with our comments and feedback regarding the proposed legislation, and undertakes to cooperate in any way it can in the effort to eliminate the use of performance-enhancing drugs in professional and amateur athletics.

The NHL's views on H.R. 1862, the Drug Free Sports Act of 2005, are based upon the NHL's practical experience over the past ten years in administering the NHL/NHLPA Substance Abuse and Behavioral Health Program (the "NHL/NHLPA Program" or the "Program"), as well as the NHL's extensive role in the development and administration of drug testing programs in connection with various international competitions involving NHL players over the past several years. A brief history of the NHL/NHLPA Program and our experience to date in the testing of NHL players for the use of performance-enhancing drugs may be instructive for the Subcommittee.

NHL/NHLPA SUBSTANCE ABUSE AND BEHAVIORAL HEALTH PROGRAM

In 1995, and in conjunction with the parties' agreement on the now recently expired collective bargaining agreement ("CBA"), the NHL and the National Hockey

League Players' Association (the "NHLPA") jointly negotiated, created, and agreed to implement the NHL/NHLPA Program (Attachment 1 hereto). The Program was designed to be a "comprehensive effort to address substance abuse among NHL players and their families, to treat those with a substance abuse problem in a confidential, fair and effective way, and to deter such abuse in the future." (Attachment 1, Section 1) In order to accomplish these goals, the Program contemplates and has employed extensive education, counseling, inpatient and outpatient treatment, follow-up care, and where appropriate, punitive sanctions, up to and including permanent suspension from play.

Pursuant to the terms of the Program, players who are suspected of having a substance abuse problem, which could include a problem associated with the use of performance-enhancing drugs, can be referred for participation in the NHL/NHLPA Program. (Players can also refer themselves into the Program.) A player who has been referred to the Program is evaluated by the Program Doctors¹, who then determine what, if any, treatment is required for the player. The Program expressly provides that:

as part of treatment and follow-up care, players may be required to undergo periodic substance testing at a frequency and on a schedule to be determined by the doctors. Such testing may take place both in-season and during the off-season.

(Attachment 1, Section 3D)

The Program also incorporates an important educational component, which mandates that the Program Doctors:

meet with the players on each team at least once each year to review issues relating to substance abuse. . . . The education program will include instruction on the risks of alcohol and drug use, how a player can help teammates who may have a substance abuse problem, how to deal with high risk situations involving alcohol and drugs, and how a player and his family can obtain assistance under this program.

(Attachment I, Section 3) This provision reflects the comprehensive nature of the Program, and the belief of the NHL and the NHLPA that education regarding drugs, including performance-enhancing drugs, is one of the most effective tools in preventing substance abuse. Pursuant to our mandate, and in response to the issues that have surfaced in professional sports generally over the past several years, the Program Doctors developed educational materials specifically relating to the dangers of steroid use and presented these materials to the players on at least four different occasions in the recent past. A representative sample of the educational materials prepared and presented to the players regarding the use of steroids is provided as Attachment II.

As a historical matter, the players who have been treated under the Program have exhibited problems associated with alcohol and/or "recreational" drug use, rather than steroid (or steroid precursor) or performance-enhancing use. The experience of our Program in this regard is not surprising when one considers that primary of the alleged benefits of steroid use—significant large muscle development—generally is not consistent with playing hockey at the highest levels of the sport, and the resulting bulkiness attributable to steroid use simply is not a desired characteristic of skilled NHL players.² Nevertheless, in the event NHL players were to exhibit symptoms associated with abuse of performance-enhancing drugs, the Program, even as currently designed and written, is broad enough in scope to provide treatment (and if appropriate, discipline) for such players and the Program Doctors are empowered to intervene on that person in any manner they feel is appropriate.

In addition, the Program Doctors have, over the ten years they have administered the Program, developed relationships and gained the trust of those who are in the best position to know what players may be using—i.e., Team Physicians and Team Athletic Trainers. In the event the Program Doctors were to suspect an emerging problem among NHL players with the use of performance-enhancing drugs, or were to otherwise be advised of such concerns by the Team Physicians or Team Athletic Trainers, pursuant to the express terms of the Program, the Program Doctors are empowered to develop even more focused and extensive educational and training

¹ The League and the NHLPA retained Dr. Dave Lewis of Visions Residential Treatment Program, California, and Dr. Brian Shaw of Toronto Hospital and the Hospital for Sick Children, to direct and oversee the Program. Drs. Lewis and Shaw have extensive experience in treating substance abuse, including among professional athletes, and have served as the Program Doctors since the inception of the Program in 1995.

² Our belief that steroid use is not desired by or prevalent among skilled hockey players is seemingly confirmed by the fact that there have been only eight positive results in the approximately 3,100 tests of NHL and non-NHL players administered at the World Hockey Championships (conducted by the International Ice Hockey Federation ("IIHF")) since 1993/94.

programs relating to the risks and other concerns associated with performance-enhancing drugs. Moreover, heightened awareness at the Club level would no doubt translate to performance-enhancing drug-related referrals to the Program.

DRUG TESTING OF NHL PLAYERS IN INTERNATIONAL HOCKEY COMPETITIONS

The frequent and consistent participation of NHL players in international competitions, and the drug testing NHL players undergo in connection therewith, objectively supports our view that the use of performance-enhancing drugs by NHL players is negligible, to the extent it exists at all. Over the past ten years, NHL players have represented their nations of origin annually in connection with the IIHF World Championships, twice in Olympic competitions in 1998 and 2002, and just this past year in the 2004 World Cup of Hockey, which the NHL and the NHLPA organized and sponsored. In connection with such international play, the NHL and its players are held to and abide by the strict international standards of the World Anti-Doping Agency ("WADA"), which have been adopted by the IIHF.

In the past ten years, of the nearly 1,000 NHL players who have participated in the IIHF World Championships, the Olympics, and World Cup of Hockey competitions, and were subject to drug testing in connection therewith, we are aware of only three positive tests for performance-enhancing drugs.³ Of the three, one of the players tested positive for salbutamol, a drug that is also used for asthma as a Proventil inhaler, and which may be used with a Therapeutic Use Exemption. A second player tested positive for tramadol, a substance that is designated as an "allowed narcotic" (i.e. a prescribed painkiller). The third player established a "mistaken use" defense in connection with his use of over-the-counter nutritional supplements.

NHL/NHLPA INTENTIONS REGARDING FUTURE TESTING FOR PERFORMANCE-ENHANCING DRUGS

Despite our conviction that, as a general matter, performance-enhancing drugs are not an issue in the NHL, the NHL and its Players' Association recognize the need for a modernized drug testing and doping control policy that will be specifically directed to the prevention of performance-enhancing drugs in our sport. Fans in particular, and the public at large, are entitled—and deserve—to have confidence that our games are being played in a steroid-free environment. Accordingly, on a going-forward basis, and in conjunction with a new CBA, the NHL and the NHLPA anticipate putting into place a new Program that will feature, in addition to enhanced and focused educational efforts, frequent and random no-notice testing coupled with immediate and mandatory discipline for the proven use of performance-enhancing drugs. Although the precise details of the new Program directed specifically toward the prevention of performance-enhancing drug use have not yet been finalized, on the basis of our communications to date, the NHL is satisfied that the NHLPA shares our desire and commitment to design and implement a Program to deal effectively and meaningfully with these serious issues.

H.R. 1862, THE DRUG FREE SPORTS ACT OF 2005

The National Hockey League has reviewed the proposed Drug Free Sports Act of 2005 and, as stated above, is supportive of a program featuring mandatory testing and discipline imposed in connection with an athlete's use of performance-enhancing drugs. The NHL remains of the belief that, given the commitment the NHL shares with the NHLPA to implement a mandatory and effective Program to eradicate the use of all performance-enhancing drugs from our game, we do not see a need for the proposed legislation as it would relate to the NHL. However, should Congress decide to proceed in this area and legislate along the lines that this proposed legislation would contemplate, the NHL's specific comments regarding the provisions of the proposed legislation are directed toward the rules requiring mandatory testing for athletes (Section 3), and the provision regarding exemptions (Section 4), and are as follows:

- Section 3(1) of the proposed legislation provides for "each athlete [to be] tested a minimum of once each year that such athlete is participating in the activities

³In connection with international competitions in which NHL players have participated over the past ten years, the Program Doctors, along with the USOC, administered the pre-competition drug testing for the Olympics, and the IIHF and the IOC administered the in-competition testing. The Program Doctors administered the out-of-competition and in-competition testing for the World Cup of Hockey. The IIHF also administered the in-competition testing for the World Championships. With respect to the tests administered by the IIHF, the IOC and the USOC, it is our understanding that no NHL player had a positive test result for performance-enhancing drugs; however, we do not have access to specific data or testing results.

organized by the professional sports association.” It is our recommendation, at least with respect to NHL players, that each athlete be tested a minimum of two (2) times per season.

- Section 3(1) further provides that the “tests shall be conducted at random throughout the entire year and the athlete shall not be notified in advance of the test.” With respect to NHL players, we would recommend that each team’s entire roster of players be tested at the same time during the NHL season, on a no-notice basis. (As a technical matter, no-notice team-wide testing would not be considered “random”.) The players could also be subject to random testing during the off-season.
- Section 3(2) provides that each athlete shall be tested for the substances:
 - (A) determined by the World Anti-Doping Agency to be prohibited substances; and
 - (B) determined by the Secretary to be performance-enhancing substances for which testing is reasonable and practicable.

As you may know, the World Anti-Doping Agency has two separate lists of prohibited substances: an out-of-competition list and an in-competition list. The in-competition list tests for many categories of drugs that are not identified on the out-of-competition list, including marijuana and stimulants that the NHL believes should be included in a drug-testing program for NHL players. For this reason, the NHL favors application of the in-competition list for NHL players.

With respect to Section 3(2)(B), we look forward to obtaining a better understanding from the Secretary as to what the provision is intended to cover so that we can provide further comments, if any.

- Section 3(3) of the proposed legislation provides that “tests shall be administered by an independent party not affiliated with the professional sports association.” We agree, and in fact, our Program currently operates in accordance with this approach, as has the testing performed in connection with the participation of NHL athletes in international competitions, as described above.

- Section 3(4) of the proposed legislation provides that a positive test shall result in the imposition of a suspension and public disclosure of the test result, subject to the determination made pursuant to an appeal. The NHL agrees that it would be appropriate to issue a suspension and publicly disclose the name of an athlete who has tested positive for the use of a performance-enhancing drug, but believe that prior to such suspension and disclosure—and even in the event an appeal is not filed—it would be prudent to implement a process that would require a medical review officer to contact the player who tested positive to determine whether there is an legitimate medical explanation⁴ for the player’s use of the banned substance. If so, and the player has a proper medical prescription authorizing the use of the substance, the positive test results should be considered cancelled and penalties should not be imposed. If, however, a legitimate medical explanation for the player’s use of the banned substance does not exist, it would then be appropriate to impose a suspension and make the positive test results public, in addition to providing counseling and treatment.

- Section 3(4)(A) of the proposed legislation provides for a minimum suspension of two (2) years for an athlete who tests positive, and for the permanent suspension for an athlete who tests positive more than once. The NHL agrees that a player who tests positive for performance-enhancing drugs should be subject to a significant punishment, and further agrees that progressive discipline should be imposed for a player who tests positive more than once. We would, however, like to further discuss with the Subcommittee the merits associated with the specific proposal to impose a two-year ban for a first-time offender and a lifetime ban for a second-time offender. We do, however, agree, that at some point in time a lifetime ban would be an appropriate sanction for a repeat offender.

- Section 3(5) of the proposed legislation provides for an internal appeals process. We agree this is a necessary component of any mandatory drug testing program.

- Section 4 of the proposed legislation provides that the Secretary may exempt from the regulations promulgated pursuant to section 3 any professional sports association that has previously adopted and implemented policies and procedure for testing athletes for prohibited substances that meet or exceed the requirements of such regulations.

The NHL notes that it may also be appropriate to issue an exemption for subsequently adopted policies, as long as they meet or exceed the requirements of the regulations.

⁴See 49 C.F.R. § 40.137 (2003) (Department of Transportation Procedures for Transportation Workplace Drug Testing Programs).

The public is entitled to have confidence in the integrity of competition in the game of hockey and in all professional sports, and to watch the exceptional athletes of today compete on a level playing field, free of the influence of performance-enhancing drugs. Every professional athlete serves as a role model, and with that comes a corresponding responsibility to engage exclusively in conduct that will bring honor to himself, his team, or the game in which he earns his livelihood. For these reasons, we support the requirement that the NHL and the other professional sports leagues conduct mandatory testing on athletes for performance-enhancing drugs.

Mr. STEARNS. I thank the gentleman.

Mr. Goodenow.

STATEMENT OF ROBERT W. GOODENOW

Mr. GOODENOW. Thank you.

Mr. Chairman, members of the committee, my name is Robert Goodenow, and I serve as Executive Director and General Counsel of the National Hockey League Players Association.

I appreciate the opportunity to provide this committee—

Mr. STEARNS. Mr. Goodenow, would you hold for 1 second? I think what we are going to do, for the members, is I think we will listen to his, and then we will take a break to go vote. And how many votes are there? There are possibly two votes, and so we come—I think what we will do is go to questions and see if we can get moving so you folks wouldn't have to stay through lunch. So we will all, the members, come back after we vote, and then we will continue with questions.

So continue your opening statement.

Mr. GOODENOW. Thank you.

As I said, I appreciate the opportunity to provide this committee with our perspective on the proposed legislation, H.R. 1862.

Given that this is the first opportunity to appear before your committee, I thought it would be useful for me to spend a few minutes providing a background on how we have addressed substance abuse and the use of steroids and other performance-enhancing drugs in our sport. And I will then provide some comments on your proposed legislation.

However, before I address those two matters, I want to be clear and emphatically state to the committee that the NHLPA membership, the officials in our organization, myself included, are strongly opposed to the use of improper and unlawful performance-enhancing substances by anyone in our sport.

There are three main reasons for this position.

First, the NHLPA is keenly concerned in protecting its members' personal health. Second, the NHLPA members want to protect the competitive integrity and fairness of their sport. And third, because NHLPA members are seen by young aspiring hockey players and fans around the world as important role models, they want to leave no doubt about their opposition to performance-enhancing substances and the possibility of their use of such substances.

Back in 1995, NHLPA and the League implemented, as Gary referenced, a Substance Abuse and Behavioral Health Program, and the program was broadly designed to address any potential substance abuse by NHL players and their families and to treat those problems in a confidential, firm, and effective way. And the program has incorporated education, counseling, inpatient, outpatient treatment and testing, follow-up care, and where appropriate, puni-

tive sanctions up to and including permanent suspension from play.

To further your committee's goal today to obtain information through testimony in an efficient manner, I will avoid further describing the details of the programs pertinent design and operation of the past 10 years. I will attest that the submission by the League is accurate for all purposes.

Our program has worked with for what it was designed for. Both the NHLPA and the League are pleased with its operation and results. However, over the past 10 years, and in particular in recent years, the focus on the use of performance-enhancing drugs in sport has dramatically changed.

Since the current version of our program does not include mandatory random steroid testing, our program and our sport, when contrasted against other professional and international sports groups, could be seen by some as void of the appropriate current testing protocols. I acknowledge that we have work to do, work that we will do, in order to bring our program up to appropriate current standards.

We have been addressing the use of steroids. Gary has commented about the impact of testing on the international scene by hundreds of our members. We are very proud of the fact that hockey has not had a problem, but that is not to stay that further steps shouldn't be taken to clarify and make very well known to the public and everyone involved in our sport that our sport is, in fact, clean.

We have been fortunate to date without having any use of performance-enhancing drugs, but we understand in a going-forward basis and in connection with any new collective agreement that we are able to negotiate, we will be putting into place a program that will feature, in addition to enhanced and focused educational efforts, appropriate, mandatory random testing with discipline for the use of any performance-enhancing drug. Given the fact that we are over 8 months into the Owners' most recent lockout, which has cost the sport the loss of an entire season, we are still without a new collective agreement, the details of any new drug testing program have yet to be finalized. But I want to assure this committee that we have a strong commitment to deal effectively and meaningfully with these important issues, and I understand you are looking for a gold standard. I can assure you that the results of our negotiations will meet any one standard at any time.

I would like to address a couple of issues with the proposed legislation.

My initial comment, which is given with the greatest of respect to the good intentions behind the proposed legislation, is that this is an area that is best left to the professional sports leagues and players associations to address through collective bargaining so that the specific and different circumstances of each sport can be taken into account. As I noted earlier, while we are currently focused on many issues in our collective bargaining, I am fully confident we will be able to agree on the terms of an appropriate and effective program uniquely tailored to the sport of hockey.

Specifically, Section 3(2) of the proposed legislation outlines how prohibited substances should be determined. The list of prohibited

substances should be developed on a basis that is relevant to the particular sport and not simply by adopting the list formulated by WADA for Olympic competitions. Some of the substances prohibited on the WADA list are not performance-enhancing and should therefore not be tested for in this legislation. Further, the WADA list bans substances for different sports and doesn't distinguish between the different sports, so any reference to a WADA list would have to be more specific.

Very importantly, Section 3(4) contemplates a penalty of a minimum 2-year suspension, and you have heard panelists here comment on that. Unlike the Olympics, which take place every 4 years and are mainly a forum for amateur athletes, the National Hockey League represents a career opportunity that can only be obtained after many years of hard work and a substantial amount of good fortune. A penalty of 2 years for a first offense is extraordinary and an unreasonably long punishment. A 2-year suspension would seriously undermine any hockey player's ability to resume his career, and you could, therefore, in effect, be taking away the livelihood of an individual on a first offense.

We agree that meaningful punishment should be a part of any future program, however, we believe a lesser suspension—

Mr. STEARNS. Mr. Goodenow, I need you to sum up. We are about 6 minutes from the floor. We have to go vote, so I want to show you courtesy. If you could, just sum up.

Mr. GOODENOW. We believe the initial suspension should be less than that.

Also, in the area of due process in an athlete's ability to appeal, we believe that the enforcement provisions should afford thorough due process opportunities. The legislation should provide for a strict liability offense. There should be therapeutic use exemptions, and I have other points that you can read in my submission.

Just to close, then, Mr. Chairman, I want to again share with you the NHLPA's members' sentiment that they want to do their part to maintain the public's confidence that our sport is free of the use of performance-enhancing drugs, and we are pleased to be here before you today to answer any questions.

Thank you.

[The prepared statement of Robert W. Goodenow follows:]

PREPARED STATEMENT OF ROBERT W. GOODENOW, EXECUTIVE DIRECTOR, NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION

Mr. Chairman and Members of the Committee: My name is Robert W. Goodenow, and I serve as the Executive Director and General Counsel of the National Hockey League Players' Association. I appreciate the opportunity to provide this Committee with our perspective on the proposed H.R. 1862 Drug Free Sports Act of 2005.

Given that this is my first opportunity to appear before your Committee, I thought it would be useful for me to spend a few minutes providing some background on how we have addressed substance abuse and the use of steroids and other performance enhancing drugs in our sport. I will then provide my comments on your proposed legislation.

However, before I address those two matters I want to clearly and emphatically state to the Committee that the NHLPA membership, and officials in our organization including myself, are strongly opposed to the use of improper or unlawful performance enhancing substances by anyone in our sport. There are three main reasons for this position. First, the NHLPA is keenly concerned with protecting its members' personal health. Second, NHLPA members want to protect the competitive integrity and fairness of their sport. Third, because NHLPA members are seen by young aspiring hockey players and fans around the world as important role mod-

els, they want to leave no doubt about their opposition to performance enhancing substances and the possibility of their use of such substances.

NHLPA/NHL SUBSTANCE ABUSE AND BEHAVIOURAL HEALTH PROGRAM

In 1995, and in conjunction with our last Collective Bargaining Agreement ("CBA"), the NHLPA and NHL jointly implemented the "NHL/NHLPA Substance Abuse and Behavioral Health Program ("Program"). The Program was broadly designed to address any potential substance abuse among NHL players and their families and to treat those problems in a confidential, fair and effective way. The Program incorporates education, counseling, inpatient and outpatient treatment and testing, follow-up care and, where appropriate, punitive sanctions, up to and including permanent suspension from play.

To further the Committee's goal today to obtain information through testimony in an efficient manner I will avoid further describing details of the Program's purposes, design and operation over the past 10 years. Instead I will refer you to the League's submission on the Program's background because I understand the information they have submitted to be accurate.

Our Program has worked very well for the purposes it was designed for. Both the NHLPA and NHL have been pleased with its operation and results. However, over the past 10 years, and in particular in recent years, the focus on the use of performance enhancing drugs in sport has dramatically changed.

Since the current version of our Program does not include random mandatory steroid testing, our Program and our sport could be seen by some as "void" of the appropriate current testing protocols when contrasted against other professional and international sport groups. I acknowledge that we have work to do, work that we will do, in order to bring our Program up to current levels. I will provide you with the following two points to assist your perspective in understanding our sport's past approach on this issue:

1.) We have been addressing the issue of steroids. Our Program Doctors have developed and presented educational materials to the players specifically highlighting the dangers of steroid use in at least 4 of the last 7 years. Our Program Doctors have confirmed to us that there is virtually no steroid use in hockey which is not surprising when one considers that the alleged benefits of such steroid use (enhanced bulk muscle mass) do not benefit elite hockey players. The purported benefits of steroid use are simply not applicable to skilled NHL players. This viewpoint is strongly supported by the fact that, despite the absence of a regular or mandatory testing program for performance enhancing drugs during an NHL season, we are not aware of a single instance over the 10 years the Program has been in effect in which an NHL player has tested positive for performance enhancing drugs during any of the many International Ice Hockey competitions our players have participated in where there has been mandatory testing.

Specifically, in the past 10 years, hundreds of NHL players have participated in the International Ice Hockey Federation World Championships, the 1998 and 2002 Olympics and the 2004 World Cup of Hockey Competition. These NHL players were subject to the drug testing protocols in connection with their participation in these events. These protocols utilized a substance list and testing procedures equivalent to the current WADA Code. We are aware of only 3 positive tests for performance enhancing drugs. Of these 3, one of the players tested positive for Salbutamol, a drug that was being used for asthma as a Proventil inhaler and may be used with a therapeutic use exemption. A second player tested positive for Tramadol, a substance which is designated as an "allowed narcotic." The third player established a "mistake in use defense" in connection with his use of over the counter nutritional supplements.

2.) In short, we have been fortunate to have no issue to date with any use of performance enhancing drugs by hockey players. Having said that, our Association and the NHL do recognize the need to include a new drug testing policy that is specifically directed at performance enhancing drugs. On a going forward basis, and in connection with any new Collective Bargaining Agreement which we are able to negotiate, we will be putting into place a program that will feature, in addition to enhanced and focused educational efforts, appropriate random testing coupled with mandatory discipline for the use of any performance enhancing drugs. Given the fact that we are over eight months into the Owners' most recent lockout, which has cost the sport the loss of an entire season, and are still without a new collective agreement, the details of any new drug testing program have yet to be finalized. I can give this Committee my complete assurance that our new Program will have a strong commitment to deal effectively and meaningfully with these very important issues. We fully recognize the importance of an effective Program. The players I rep-

resent see no place for the use of performance enhancing substances in our sport and are sensitive to their position as role models to many aspiring hockey players and fans around the world.

COMMENTS ON H.R. 1862, THE DRUG FREE SPORTS ACT OF 2005

My overriding initial comment, which is given with the greatest of respect to the good intentions behind this proposed Legislation, is that this is an area that is best left for the individual sports leagues and player associations to address through collective bargaining so that the specific and different circumstances of each sport can be taken into account. As I noted earlier, while we are currently focused on many issues in our CBA negotiations, I am fully confident that we will be able to agree on the terms of an appropriate and effective program uniquely tailored to the sport of hockey.

Now, with respect to the specifics of proposed Act, H.R. 1862, the Drug Free Sports Act of 2005, I would make the following comments:

Section 3(1) provides for random and no-notice testing. While any program we develop would contemplate random and no-notice testing, the scheduling challenges faced by a professional hockey player and his team would have to be taken into account. For example, it can oftentimes take several hours to provide a urine sample after a player has become dehydrated following completion of a hockey game. Travel requirements to upcoming games will often require that players leave an arena within one hour of completing a game to board a flight to their next city. There should therefore be flexibility and practical parameters to testing protocols, such as no testing on any game days to avoid any disruption that could occur to the entire team's schedule if a player were dehydrated and unable to provide an appropriate sample for several hours.

Section 3(2) outlines how prohibited substances should be determined. The list of prohibited substances should be developed on a basis that is relevant to the particular sport and not simply by adopting the list formulated by the World Anti Doping Agency ("WADA") for Olympic competitions. Some of the substances prohibited on the WADA lists are not performance enhancing and should therefore not be tested for in this Legislation. Further, the WADA list bans different substances for different sports and doesn't distinguish between the different sports, so any reference to the WADA list would have to be more specific.

Section 3(4) contemplates a penalty of a minimum 2 year suspension. The penalty of 2 years for a first offence is an extraordinary and unreasonably long punishment. Unlike the Olympics, which take place every 4 years, and are mainly a forum for amateur athletes, the National Hockey League represents a career opportunity that can only be obtained after many years of hard work and a substantial amount of good fortune. A 2 year suspension would seriously undermine any hockey player's ability to resume his career and you could therefore, in effect, be taking away the livelihood of an individual on a first offence. We agree that meaningful punishment should be part of any future program. However, we believe a lesser suspension for first-time offenders, coupled with the negative public coverage such an individual will receive, would have a significant effect on his future behavior and the behavior of all players. There should be a range of penalties that takes into account whether the athlete used a legal or illegal performance enhancing substance, with a more severe penalty for any use of an illegal substance.

The appeal process contemplated in Section 3(5) should be to an independent arbitrator and not to the League. All enforcement provisions should include appropriate due process protections. In this regard, this legislation should not provide for a strict liability offence. Regulations would have to be in place to ensure that the athlete was afforded adequate opportunity to advance a mistake in use defense or any other appropriate defense, particularly where the regulations governing labeling on nutritional supplements do not ensure that banned substances cannot be found in certain supplements, even when its listed ingredients are carefully scrutinized by the athlete before taking it. Furthermore, there should be specific provisions for therapeutic use exemptions.

To close I want to again share the NHLPA members' sentiment that they want to do their part to maintain the public's confidence that our sport is free of the use of performance enhancing drugs.

Thank you for inviting us to appear today.

Mr. STEARNS. I thank the gentleman.

We will reconvene right after our two votes. The subcommittee is in recess.

[Brief recess.]

Mr. STEARNS. We will reconvene, and we will start with questions. And we finished the first panel, and so I will start with questioning.

You know, just sort of a general comment as we start, we had Commissioner Selig mention Tino Martinez of New York, and when he said, "Whatever they want to do to get this out of the fans' heads and clean up this game, I am all for it," then of course you had the President of the United States in the year 2004, in his State of the Union Address, say: "Tonight, I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough and get rid of steroids now."

So we have the baseball players, we have the President of the United States, and from what I hear from all of you today, you all agree that we should get steroids out of professional sports. So that is the easy part.

Now how do we do this? Obviously the bill I have is not going to be agreed upon by everybody. I understand, Mr. Goodenow, how you feel about it, and Mr. Foose, how you felt about it. One of the sticking points appears to be the collective bargaining issue. And Mr. Foose, you said that Congress should not interfere with collective bargaining, I think those were your words, if I am not correct. Now obviously you know that steroid possession is a criminal offense. You know that, because of the Drug Abuse Act of 1988. It seems to me Congress has a compelling interest in ensuring the integrity of competition and in compliance with Federal criminal law. And you would agree with that?

Mr. FOOSE. Yes, I agree.

Mr. STEARNS. Now all security professionals are tested for drug use, and those rules have the force of Federal law. So are you suggesting by your statement that Congress should allow collective bargaining to be shielded from illegal activity?

Mr. FOOSE. No.

Mr. STEARNS. Well, I think you need to explain, because I think we have established that we have a compelling reason to have the laws obeyed, and yet you sort of indicated that the collective bargaining is such—that we should not, as Members of Congress, interfere with that. And that is what the crux of, I felt, your argument is, so you might want to explain that.

Mr. FOOSE. Well, I think in this case, we have a collectively bargained agreement that does not, where there is no violation of law, and in our case, the collectively bargained agreement, we think, is a very good policy and has been successful in keeping performance-enhancing drugs out of our game, so we don't believe that this is a situation where Congress should reach in and override substantive provisions of our CBA. You know. I guess I—

Mr. STEARNS. But you are saying now that Congress could interfere if they felt—

Mr. FOOSE. If there were illegal activity, I—

Mr. STEARNS. Do you think there has been any illegal activity in professional sports dealing with steroids in the last 2 or 3 years?

Mr. FOOSE. I don't know the answer to that.

Mr. STEARNS. Okay. Mr. Fehr, you know, the comment he made about Congress should not get involved with collective bargaining, we should not interfere, and this, obviously, one of the Democrats

has indicated that is a concern, and so I would like you to address that. Don't you think we have a right, when we think there is criminal activity, to be involved?

I just need you to turn your microphone on.

Mr. FEHR. Thank you.

Let me respond in a couple of ways.

First of all, players are certainly not above the law, as I indicated, neither should they be below it. Prosecution of individuals involved in illegal and illicit drug use, possession, sale, transfer should be the same for professional athletes as it is for everybody else. The question is whether or not, when it comes to activity at the workplace and relationships at work, those things ought to be determined apart from whatever the criminal law does by the people that are involved in bargaining them, and that is what the labor law is designed to do. And we think that it has worked, and we think that it will work.

Having said that, you know, obviously, subject to constitutional limitations, it is up to the Congress to determine what the most appropriate way to proceed is.

Mr. STEARNS. Let me ask the same question I asked to Mr. Foose. The last 4 or 5 years, do you think there have been steroids in baseball?

Mr. FEHR. Oh, of course.

Mr. STEARNS. Okay.

Mr. FEHR. The testing has so indicated.

Mr. STEARNS. Okay. Do you think your policy to detect these steroids has been rigorous and sound and forceful in the last 3 or 4 years?

Mr. FEHR. I believe that—

Mr. STEARNS. Just yes or no.

Mr. FEHR. [continuing] what we began in 2003 and then again in 2004, yes, it has, and the data indicates it. The first testing was in 2004 with penalty.

Mr. STEARNS. I mean, I am just saying, you know, I am not a professional in this area of testing for steroids, but I think most of us would agree that nothing would have happened unless Congress had stepped up to the plate and said, "We are going to do something unless you do something." So now we seem to be moving, but it seems like we have this collective bargaining chip that has been thrown out there that Congress has no right to interfere, and then I think this Fourth Amendment has also been brought up as a possibility that we don't have the right because you are secure in your homes.

So Mr. Shorter, I would ask you a question. These folks have said that they want to use the Fourth Amendment to say that we have no right to ask for random testing of these professional athletes and that they should not have to comply because of the Fourth Amendment right. What is your opinion on that?

Just turn your speaker on.

Mr. SHORTER. There are professional athletes already, as has been mentioned here, in professional hockey and professional basketball, when they decide they want to compete in the Olympic games for the year before, they are subject to testing by USADA and then internationally. And so these professional athletes, who

have been in the Olympics, have already been part of the program, and there haven't really been objections. So USADA has dealt with pro athletes already. I mean, they have been part of the process already.

Mr. STEARNS. And we have—

Mr. SHORTER. And there haven't been any complaints about, you know, intrusion and violation, because I think what you forget here again is that you are protecting the rights of clean athletes. And I will tell you, when a clean athlete gets a knock on the door, they are smiling.

Mr. STEARNS. Yes.

Mr. SHORTER. And they are saying, "Come on in."

Mr. STEARNS. And in professional tennis, we do it without any problems.

Mr. SHORTER. Yes.

Mr. STEARNS. I have never heard them complain about collective bargaining or complain about the Fourth Amendment.

Mr. SHORTER. And professional cycling. All of the professional cyclists who are American who are competing overseas are subject to the international WADA testing requirements.

Mr. STEARNS. Okay.

Mr. FEHR. Mr. Chairman?

Mr. STEARNS. Yes.

Mr. FEHR. Mr. Chairman, may I just make a brief remark?

Mr. STEARNS. Sure. Sure.

Mr. FEHR. I want to make sure everybody understands what my position is.

With respect to matters that employees agree to individually and collected bargaining or otherwise, you don't have Fourth Amendment issues. My law school training tells me that that issue arises when the government either insists upon or conducts a search. That is where it applies. And the point of my comment was not to suggest that I necessarily know the answer with respect to the legislation, but to indicate that it is an issue out there which needs to be carefully looked at.

Mr. STEARNS. But you admit that it has been carefully looked at in other professional sports adequately?

Mr. FEHR. No, I don't think so, and the reason why is I am not aware that in the other professional sports—

Mr. STEARNS. Like in tennis or in other cases you think that it is still up in the air, in your mind?

Mr. FEHR. No, I must not be being clear. Let me try once again. In the other sports, I am not aware that that testing is mandated by the Federal Government. It is the insistence upon a search by the government without cause, which raises the Fourth Amendment issue.

Mr. STEARNS. My time has expired.

Ranking Member Schakowsky.

Ms. SCHAKOWSKY. Thank you.

This is clearly a tricky issue, the question of whether or not at all the Federal Government ought to intervene if it is a one-size-fits-all if we have to make exceptions for different sports on different things and where those are. But I want to make a couple of comments.

One is, Mr. Selig, I know that you stepped up and made some very strong suggestions on how Major League Baseball ought to perform, and I appreciate that. But you also in your testimony, you talked about it being equally important for us to send a message to young people in America, and you talk about the partnership with Partnership for a Drug Free America, so I just want to say this, that all of the high-production value TV ads, all of the materials that are produced, in my view, will come to nothing if we don't set the example. And I know you weren't talking about either/or, but if we don't stop the use of steroids and other drugs, performance-enhancing drugs in professional sports, then kids, not just high school and collegiate athletes, but we are hearing about it now in junior high school, are going to do that. So the most important thing, if we have to choose, it is certainly to clean up the sports themselves.

And I just wanted to make that point.

Did you want to comment on that?

Mr. SELIG. I would like to.

Ms. SCHAKOWSKY. Okay.

Mr. SELIG. I agree with you. No. 1, they are not an either/or. We are going to do both. There is question that not only do I agree with you, but I believe in the last 3 or 4 months, and I said this last week at the owners meetings and I would say it again here today, that this is an integrity issue. Do I believe our program is working? Yes, I do. I said that, and Mr. Fehr is right in characterizing that.

But we have issues that now transcend that. We have public confidence. We have integrity. And there should be no doubt left in anyone's mind that we have rid our sport of steroids. And to do that, we have to toughen the penalties and do all of these other things. The reason for all of the other programs, like the Partnership for a Drug Free America and all of the other programs, is to at least continue the educational process in our schools and with high school coaches. And we are working with the Taylor Hooten Foundation just to educate people. But you are right; we lead by example, and the example is to have the very toughest program we can, which eliminates steroids from our sport.

Ms. SCHAKOWSKY. Thank you. I just think the worst of the options would be do as I say, not as I do, and as you said, we lead by example, and I couldn't agree with you more.

Mr. SELIG. I agree with you.

Ms. SCHAKOWSKY. Mr. Fehr, you were talking about how the players are citizens and entitled to the same rights, but you do acknowledge that we distinguish. For example, someone who is over 18 years old can go to Las Vegas and bet on baseball, but a baseball can't. And that is fair, in your view, right?

Mr. FEHR. That is something which is determined by the private parties involved in bargaining. Whether that should be an issue addressed by the government is a separate issue. But certainly, players have agreed to that.

Ms. SCHAKOWSKY. So distinguishing, though, between the behavior of players and the rest of citizens' rights, it is certainly within the realm of possibility and in fact applicable.

Mr. FEHR. I am sorry for interrupting. And players do that frequently, yes.

Ms. SCHAKOWSKY. Right. And so it seems to me that, as a matter of principle to say that what is right for the rest of us has to be right for baseball players I think is not a principle we necessarily need to follow.

But let me ask all of you——

Mr. FEHR. Can I——

Ms. SCHAKOWSKY. Oh, go ahead.

Mr. FEHR. I am sorry. I think that in any industry, and certainly in baseball, the parties are free, and in baseball we do pay attention to the differences that relate to the sport and have a raft of agreements that govern conduct relating to that sport that wouldn't necessarily appear otherwise. And parties are free to do that. I think they do that pretty well, as I have previously indicated.

I think there is a separate question and that goes like this. It is one thing to say we are involved in the sport and we govern ourselves by having these rules. It is quite something else to say that a governmental entity prescribes one set of rules for one adult person and a different set of rules for another person where the safety issues and all of the rest of it would appear to be similar. And that is an issue, which I think bears a fair amount of scrutiny. I am not sitting here telling you that I have all of the answers. I do mean to tell you that I think it is an issue that needs to be paid attention to.

Ms. SCHAKOWSKY. Let me ask you about the issue and go one-size-fits-all. And just to hear back from you where the problems arise. Are they in the size of the penalties? Are they in the manner of testing? I am concerned about that. I don't necessarily want to go there, but some testing to be better than others and more effective in finding the use of drugs. What are the problems with a one-size-fits-all that we might want to be thinking about?

Mr. GARBER. Well, I will take a lead here. Each sport has its different governing bodies, has its different idiosyncrasies, has its different relation——

Ms. SCHAKOWSKY. As specific as possible, because we have a——

Mr. GARBER. AS it relates to Major League Soccer, it is our strong belief that our decision and our agreement with our union to have the right to terminate a contract is a stronger deterrent against a player's decision to make that decision to use steroids than to have that minimum of 2 years. A player could make that decision that I will take the risk of losing 2 years. We believe by having that maximum of a contract termination, it is a stronger deterrent. It also, by the way, gives us the ability to look at a very young player pool and to look at each individual situation and make a decision that is just. And there are going to be cases where that minimum of 2 years is just too severe based on mistakes that are made, inadvertent use that is made, lack of intent, tainted nutritional supplements, et cetera. So we believe the flexibility is more effective, and in fact, that flexibility has proved, in our case, to be very successful.

Ms. SCHAKOWSKY. Mr. Shorter, I wonder if you would answer that as well. Maybe you don't think there is a problem at all, and I——

Mr. SHORTER. I don't think there is a problem with the one-size-fits-all, because the whole Olympic movement is a myriad of sports. The other thing that comes to mind immediately to me is, having had 30 years experience in the performance-enhancing drug area, having shared the locker room, and one point I would like to make, you know, is the clean athletes have always known about the performance-enhancing drugs. Until about the year 2000, there was no place for them to go. But it has been out there, so we have all been educated as athletes over the years. And part of that education for me is to realize that performance-enhancing involves not too many drugs at any one time. In other words, the drugs that are being used in all of these sports are the same drugs. And cheating with them is cheating. It doesn't matter what sport you are in. Basically, it is steroids, human growth hormone, which you can—if you can afford it, gets you by a steroid test, because those tests are just now coming online, the blood enhancement drug, the stimulants, but there isn't much more out there, really, at any one time. The pool of drugs being used by the cheats is not that broad. So to say, "Well, we have to have a specific program for a specific sport," to me, doesn't seem to make sense.

With regard to the fairness of adjudication, I would like to say that I think there is a misunderstanding with the idea of strict liability. Strict liability to USADA and WADA does not mean an immediate 2-year ban, because there is an initial probable cause meeting held by experts to see if you are even going to have a hearing. At that hearing, there are mitigating circumstances in which there is a history of penalties being reduced. And then through the appeals, the arbitration process, the athlete has the further chance to have that penalty mitigated.

So you can't confuse strict liability, which means for that event in which you tested positive, you are disqualified. But it does not mean that you might not necessarily get a warning or that if, for instance, you can prove that your drink was spiked by a competitor, you will have no penalty. So that misconception should be cleaned up. So in other words, the fear that the penalty would be too severe if it is 2 years hasn't proven to have been the case internationally.

Ms. SCHAKOWSKY. Because the process leading up to that decision, you are saying?

Mr. SHORTER. Yes, because after the positive test and it gets into that process, the hearing and appeals allow for mitigation of the penalty. The rules allow for it.

Mr. STEARNS. The gentlelady's time has expired.

Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman.

And I didn't make an opening statement, but thank you for doing this bill.

There is no doubt in my mind, however, Mr. Chairman, that you wouldn't have felt the need to draft 1862 or hold this hearing if it was not for Major League Baseball and the decade of doping that we have just hopefully completed. There is no doubt in my mind, as a baseball fan, and by the way Mr. Selig and Mr. Fehr, my first son's name is Nolan and my second son's name is Ryan, just to establish my love of Major League Baseball.

Mr. FEHR. We will pass that along.

Mr. TERRY. Thank you. And that the integrity of the game, as Mr. Selig has mentioned, has been questioned. As a matter of fact, I fall in the category of most baseball fans that feel that Major League home run records should have an asterisk next to it. And I also feel that there has been maybe some criticism on Mr. Selig for not being hard enough to try and establish a ban of steroids and penalties sooner, and certainly criticism of the Players Union for resisting it for so many years. Most of us think that the only way that you can clear the Major League Baseball fans' minds of the last decade and suspicions that any performance that is grand in baseball today may be backed up by performance-enhancing drugs. The only way to maybe clear our minds or give us confidence is by a harder stance, harsher penalties.

So I am frustrated that again it is the Players Union that is resisting this. In fact, when some of the players, I don't know if it is a majority or just a couple vocal folks, that support this. So I would urge you and Major League Baseball to clean it up. Adopt the harsher standards soon, and perhaps we wouldn't need to go through this particular hearing or adopt this particular legislation.

I want to know, though, Mr. Fehr, I have been told that even the Players Union has gone so far to resist putting amphetamines onto the list of banned substances, even though that is a very controlled substance. Is that accurate that the Players Union has resisted putting amphetamines on the list?

Mr. FEHR. I can give you the history of it very succinctly. It has not been on traditionally. As you know, there have been rumors and comment about that going back 25 or 30 years before I even got to baseball. We dealt with steroids in 2002. Again, this last time, the owners have indicated that when this agreement expires, they want to talk about amphetamines. We have indicated that we are prepared to do that. The Commissioner has indicated that he would like to talk about it now. I have advised the players of that. And among other things, we will be discussing that with them over the course of the next several weeks.

Mr. TERRY. All right. I think that answers my question that this will be an issue dealt with through collective bargaining, but I will just tell you these type of drugs that are supposedly legal for Major League players to use but are a controlled substance just further undermines the confidence in the game by us fans. So I would encourage you to resolve those issues as quickly as possible so we don't have to take it up and pass a national policy in place of what you fail to do.

I am curious. I am going to just go from Frank down at the far end, a couple of yes or no questions. I am curious whether 1862, our Chairman's bill here, is it more restrictive or less restrictive or about the same as the current drug policy for the organization that you represent.

Frank, will you start?

Mr. SHORTER. It is equal to, but not as well delineated, because it is not in its final form. So I am not hedging on the answer, I am saying the theory. And as Mr. Stearns, the chairman, pointed out at the start, the USADA model tended to be the model used, the outline, I would say, to be used. And so I would say it is the

equal in theory and in hope, but not in practice, because the advantage of having the WADA code and the testing procedures and everything else that we had is that we have dealt with a lot of problems and a lot of the loopholes that have to be closed in order to have something that covers all areas. So the answer is yes, as an outline.

Mr. TERRY. All right. Fair enough. And realize there will be a lot of regulations to fill in the gaps.

But Mr. Garber?

Mr. GARBER. Equal to.

Mr. TERRY. Next?

Mr. FOOSE. I would agree.

Mr. TERRY. Equal to in Major League Soccer.

Mr. Selig?

Mr. SELIG. The——

Mr. TERRY. I think we know the answer, but——

Mr. SELIG. Yes, you do know the answer. It is clearly much more restrictive and even more restrictive than the proposal that is on the table that I have just made.

Mr. TERRY. Very good.

Mr. FEHR. In most respects, it is more restrictive; in some, it is not. For example, the testing, what we already have is considerably more frequent.

Mr. BETTMAN. It is more comprehensive than what we have had in the past, and it is probably in line with where we anticipate being when we have a new collective bargaining agreement.

Mr. GOODENOW. It is clearly more restrictive than the one we have lived under, and it is, as I said in my comments, stronger in a couple of areas than I would agree to, frankly, as being appropriate for our sport going forward.

Mr. SHORTER. Mr. Chairman, I will have to revise my yes. Mr. Chairman, I have to revise my yes in that the frequency of testing. It calls for one, and part of the effectiveness of USADA is the athletes, particularly the cheaters, never know how many times, where, when, how, and so in numbers of tests, USADA's testing is more——

Mr. STEARNS. If the gentleman would just yield for a clarification.

Mr. TERRY. Yes.

Mr. STEARNS. I think the bill is saying that at least one. It can be more than one or two.

Mr. SHORTER. Oh, well, that is okay then.

Mr. STEARNS. So it says at least one.

Mr. SHORTER. Okay.

Mr. TERRY. Very good. And I will yield back my time except with the last comment to Mr. Bettman and Goodenow. The chairman and I will be available for you two after this hearing to resolve the NHL labor dispute.

Mr. BETTMAN. On behalf of Bob and I, we appreciate the generous offer and note that if it were that easy, it probably would be done.

Mr. TERRY. Granted. I yield back.

Mr. STEARNS. I thank the gentleman.

Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman.

My first question is addressed to both Mr. Selig and Mr. Fehr. In my opening statement, I voiced my concern over the fact that all of the players who baseball has publicly disclosed as violating the new policy are relatively obscure players and the vast majority of them are Latino or African American. Do you have an opinion or an explanation for why this is so, both of you?

Mr. FEHR. I can give you an impression that I have. I don't know that we have enough data yet to have the opinion which is grounded more firmly than that. The impression is two-fold.

First of all, I think the program is working, and that is why you don't see, you know, many more players, and that is why you don't see established players. I think second, we have always been concerned that when you get into testing for substances, which are freely available, sometimes legally, sometimes not otherwise, in the countries from which a lot of our players come and spend the winter where the manufacturing standards are not there, the labeling requirements aren't there, that there is possibility for confusion and mistake. And one of the things that we have to do, we have talked about it internally, is to make sure that our educational efforts for the Latin American players, in particular, are upgraded to the point where whatever the cause is it isn't for lack of information.

Mr. SELIG. Congressman, there has been, over the last 6 or 8 months, and maybe even longer than that, an educational process both by the Players Association and by the clubs in terms of spring training, in terms of videos. Agreements are done in both Spanish and English, so there has been a very conscientious attempt, and I note with some interest that some of the Hispanic players have said that they don't really believe there is a valid excuse. I don't have enough data, either, but I would tell you there have been ongoing educational programs so that I would hope, at this point, that anybody who is taking these things really has been told and has been told, really, time and time again.

Mr. RUSH. Mr. Selig, I have a question for you and additional question that others may comment on as well.

I believe that tough penalties should result from tough testings. And my understanding is that one of the real flaws in the current steroid testing, frankly in all of the professional sports, is that urine sampling does not adequately pick up all of the performance-enhancing substances, particularly, as was mentioned earlier, human growth hormones. And according to Dr. Gary Waddler, a New York University professor and a member of the World Anti-Doping Agency, only a blood test can detect human growth hormones, and this is why the Olympics require blood testing in addition to urine sampling.

Why don't baseball and the other major sports use blood tests?

Mr. SELIG. It is my understanding, and I have heard Dr. Waddler say that, but I think given the fact that we are using the best labs that there are, one in Montreal and one in UCLA, and the fact that we believe that we have stayed ahead of the curve, and I would also say that I have been told by experts in the field that that is a bit of a fallacy that the blood test is not foolproof at this point in time, and so I think that as we get more sophisticated in

this area, there is a feeling that there will be a urine test that hopefully in a short period of time, whatever that short period of time, that we will detect that, and I think that is where we are headed in this direction. It isn't that we don't want to be there, but I think it is a question of staying ahead of the curve and that the blood test is not foolproof, and I think that is one of the great reasons they are not using it. And hopefully, as I said, they are in the process of developing a urine test, which will pick that up.

Mr. FEHR. If I could just add to that.

It is my understanding that the urine testing for all of the steroids is about as good as it gets. Second, with respect to human growth hormone, we have been advised by the people at the Olympic lab in Montreal specifically, because we asked after the March 17 hearing before Government Reform again to make sure we were right, that there is no generally accepted test for human growth hormone. There was an experimental test done with a limited amount of material that a research had developed at the Olympics last year that they hoped to have available testing some time later this year, and we have committed to look at it, and as soon as there is a reliable test, to implement it as part of our program.

Mr. STEARNS. I thank the gentleman.

Ms. Blackburn.

Ms. BLACKBURN. Thank you, Mr. Chairman. And I thank the panelists for being with us and for staying with us this morning.

Mr. Shorter, I just want to say thank you to you. I appreciate the role model that you have been. I have a son who is a runner and a husband who is a runner, and I remember the 1976 Olympics very well.

Mr. SHORTER. Thank you.

Ms. BLACKBURN. And I certainly shared some of the pain that came through that as we watched.

Let me ask you this. Sitting here today, and you have got commissioners and union representatives that are sitting next to you. Do you think they are ever going to coordinate to create anything that is even close to the WADA rules without Congress forcing them to do so?

Mr. SHORTER. I honestly don't know. I am just very appreciative of the fact that USADA was invited to be here, because one of our goals when we started in 2000 was to set up a truly independent entity with no conflict of interest and to hopefully get to this point where it could be an example of success, because at the international level, as I said in my opening remarks, in the 1990's, the United States was viewed by the world sporting community as possibly the worst of offenders. Now this program works, and it is there to be used by others, if they so choose.

Ms. BLACKBURN. Okay. Now let me ask you one other quick thing.

Professional athletes that participate in the Olympics, like the 1992 Dream Team, are they subjected to the same testing procedures and penalties as amateur athletes?

Mr. SHORTER. Yes, for that 1-year period.

Ms. BLACKBURN. They are. Okay.

Mr. SHORTER. They have to agree to be subject to the testing.

Ms. BLACKBURN. All right. For that 1-year period. Thank you for that.

Mr. FEHR, you have got an interesting background. For a guy out of the Midwest, I guess you have played some baseball in your day.

Mr. FEHR. Oh, I tried, but—

Ms. BLACKBURN. What position did you play?

Mr. FEHR. [continuing] that was the reason I went to law school rather than become a baseball player.

Ms. BLACKBURN. All right. What position did you play?

Mr. FEHR. Usually first base on the theory that that was the most harmless one.

Ms. BLACKBURN. Okay. Left-hander?

Mr. FEHR. No.

Ms. BLACKBURN. No. All right. Okay. You have got four kids.

Mr. FEHR. I do.

Ms. BLACKBURN. All right. When you talk to them about drug use, how do you square your position with the Players Association and with the role model that you would like to see your children have?

Mr. FEHR. I tell my kids what I tell the players when it comes to personal advice, which is you don't take anything under any circumstances that a doctor does not prescribe for you to take.

Ms. BLACKBURN. So you separate the two?

Mr. FEHR. What I say is that there are agreements, there are issues that have to do with the propriety of searches under certain circumstances and what level of discipline is appropriate—

Ms. BLACKBURN. Yes.

Mr. FEHR. [continuing] and that has to be worked out in that fashion. What I tell players personally, if a player says, you know, "What do you think about those things?" is the same thing that I told my children. But just as our children, when they become adults, make their own decisions, all adults do.

Ms. BLACKBURN. Well, you know, as a parent, sometimes those of us who have children that are watching the game, we can't separate those two like that.

Let me ask you this. You spent 7 years advising the Olympic Committee, is that correct, working with the Olympic Committee from 1996 to 2003?

Mr. FEHR. I think that is right. I am not sure if the dates are—

Ms. BLACKBURN. Yes. Did you agree with their drug-testing policy?

Mr. FEHR. I took no part or participation in any drug testing or substance abuse—

Ms. BLACKBURN. So you separated those two, also?

Mr. FEHR. No, I did, because—

Ms. BLACKBURN. Okay.

Mr. FEHR. [continuing] I represented people that may have a conflicted interest, and I did not believe it was appropriate for me to do so.

Ms. BLACKBURN. Okay. All right. Let me ask you about this. There is an article from the San Jose Mercury News, a Victor Chai article. Are you familiar with that one? And it is on their website. And it references a comment that Bob Costas made where he felt that you were spectacularly misguided in regards to your approach

on the steroid issue, and he seems to elude that if you had addressed the issue appropriately that there would be no Congressional investigations on steroids in baseball or in any of the other professional sports. And as referenced by the letter sent by Mr. Selig and several articles that I have read, many players have stepped up and said that they want increased penalties for steroid offenses. I think they just want to get this over with. And players that are clean, as Mr. Shorter said, you know, they just open the door and say, "Come on in." They have got nothing to hide.

So it seems that you might be one of the few people in the world that thinks that baseball's current penalties are tough enough. So I have to ask you, are you spectacularly misguided in your approach to this issue and to the legislation?

Mr. FEHR. I have not seen the comments of the article to which you refer.

Ms. BLACKBURN. I have them with me. I will be happy to supply it to you.

Mr. FEHR. And I don't, as a matter of practice, comment on what media personalities say.

In answer to your question, the reason I believe our program is working is the same reason the Commissioner does, and that is that the data indicates that it does. The incidents of use fell precipitously once the program was put in. If by your question you mean to suggest that if the program had been put in at an earlier time might we have seen those results earlier, I think it is, in hindsight, it is likely that we would have.

Ms. BLACKBURN. Okay. Okay. Then if you are not misguided, is it the Major League players who are pushing you to keep the penalties where they are or is it you that is pushing to keep these penalties where they are?

Mr. FEHR. In my job, first of all, what I am is a representative, and my job is to attempt to forge a political consensus internal within the union on any issues which are the subject of collective bargaining. This has been an issue which was divisive. There have been many players, for example, that have voiced the opinion that, you know, if somebody can get a warrant, let them get a warrant. There have been others that have gone the other way. And what we did to break that situation was to agree on the year of survey testing in 2003, which produced the penalties that we have in 2004 and the results we see now.

Ms. BLACKBURN. Okay.

Mr. FEHR. I expect that that dialog will continue.

Ms. BLACKBURN. Well, my hope is that the dialog will continue and that action will be following very quickly and that the issue is not going to linger. And the hope is that you will seriously respond to Mr. Selig's concerns into the reform options that are listed in the April 25 letter.

And Mr. Chairman, if those items are not submitted into the record, I would like to submit those to the record, the letter of April 25 from Mr. Selig to Mr. Fehr and then Mr. Fehr's response that followed shortly after that.

Mr. STEARNS. By unanimous consent, so ordered.

Ms. BLACKBURN. One other quick question before my time does expire. The World Baseball Classic that is going to be in March

2006, and I have read that you have agreed to accept the WADA standards for the World Baseball Classic. And if you oppose those standards being used for Major League Baseball, then why did you accept them for that event?

Mr. FEHR. The short answer is that with respect to that event, first of all, your belief is accurate. They will be in effect. And that was done in conjunction with the International Baseball Federation, which gave its sanction to allow people from various places around the world to compete without consequences to their ability to participate in other international competitions. That was done outside of the ordinary collective bargaining process. It is a voluntary event. No players are obligated to participate.

Ms. BLACKBURN. I thank our witnesses.

Mr. Chairman, I yield back.

Mr. STEARNS. I thank the gentlelady.

Let us see. Mr. Towns, no. Mr. Bass, no. Mr. Ferguson, no. Ms. Cubin.

Ms. CUBIN. I will pass.

Mr. STEARNS. The gentlelady passes.

Mr. Murphy.

Mr. MURPHY. Thank you, Mr. Chairman.

I want to follow up on some comments that were made about—Mr. Fehr, you were talking about you might tell something different to your children than to players because they are adults.

I have spent my career as a psychologist working with kids and many a child who has drug problems. What would you tell your children that is different than telling adults, when it comes to using drugs?

Mr. FEHR. I did not suggest that what I would tell my children is different than what I would tell adults. In fact, what I meant to say, and hopefully I did say, is that if a player asks me for personal advice as to what his rights are, which is distinct, I tell him the same thing that I tell my kids: “You don’t do anything a doctor doesn’t tell you to do with good and sufficient reason.” What I did say is that adults make their own decisions.

Mr. MURPHY. Well, that is two different things. Do you give your kids five chances if they say they want to experiment with drugs?

Mr. FEHR. I don’t throw them out of the house, but the answer is it has never come up in my house.

Mr. MURPHY. Please answer the question. Would you give them five chances if they wanted to experiment with a dangerous, deadly drug?

Mr. FEHR. No.

Mr. MURPHY. Then that is a different response, isn’t it? You tell your children something and you tell adults something different, because I thought the Players Association liked five strikes.

Mr. FEHR. What the Players Association negotiated is what is fairly standard in employer/employee agreements.

Mr. MURPHY. So if your kid came back to you and said, “But dad, can I negotiate something that is fairly standard?” Or would you say there are clear lines here on what is what should be done when it comes to experimenting with dangerous drugs?

Mr. FEHR. I would not permit my kids, if I had anything to say about it, to experiment.

Mr. MURPHY. Well, then I go to the next step here, and that is that clearly baseball, as part of the business, that it tries to get children to come to the games. Millions of dollars are spent every year on souvenirs, handouts at games to give to kids to get them there. We want kids to enjoy baseball, to look up to players. And then I come back to this point, too, with a different message going to kids versus adults, and that is for all of you who have kids. If you found that your kids were hanging out with people who were using dangerous drugs, would you tell them to stay away or would you say, "I will give you five chances."

Mr. FEHR. The question is to me? You tell them to stay away.

Mr. MURPHY. To you, sir, yes, sir.

Mr. FEHR. Yes, you tell them to stay away.

Mr. MURPHY. So but yet, we say, "I want you to stay away, but I want you to admire and spend money on and get baseball cards of them and buy their bats with their signature on or the gloves and look up to the people that we are going to give five chances." How do you reconcile that?

Mr. FEHR. Congressman, two things, I guess, I would say.

First of all, I don't believe that anyone who is identified as a steroid user is likely to be one of those people that people are going to emulate. I think it is going to be quite the opposite.

Mr. MURPHY. Well, we don't know that yet.

Mr. FEHR. That is correct. We don't. We have to see. Just as we don't know if I am right or if I am wrong that the program will effectively deter use. We have to see that, too.

Mr. MURPHY. I guess what I—

Mr. FEHR. Second—I am sorry.

Mr. MURPHY. Go ahead. No, go ahead.

Mr. FEHR. I am sorry.

I have lost my train of thought. I apologize.

Mr. MURPHY. I am sorry I interrupted you.

I guess my concern is this in that when I have counseled parents on issues with kids with drugs and alcohol, even such things as parents coming up with this ludicrous reasoning and saying, it is prom time this time of year, "We don't want our kids to drive when drinking." So parents say that they will have alcohol at their house and ask the kids to turn in their keys, but the message still comes across that it is okay to drink and the parents will just supervise. Well, it is a mixed message that comes through, and clearly we are concerned about that, because it does send another mixed message.

I just want to bring up one more thing, because I am also getting a sense here that among professional sports and maybe the players, they don't think the government should be involved in this. Am I correct on that?

Mr. FEHR. I think the players' view can best be expressed that they ought to be subject to the law to the same extent everybody else is, no question about that. If someone else would be in trouble with the law in similar circumstances, terms and conditions of employment should be negotiated in the way that they traditionally are.

Having said that, let me make one thing absolutely clear. As I indicated that I would do at the hearing a couple of months ago and have in the past, players are aware of these proceedings. They

are aware of the views of yourself and the other members on the panel. They are aware of the questions, and if they weren't otherwise following it, we make sure they are aware. And they understand that it would not make a lot of sense to ignore what is going on here.

Mr. MURPHY. Well, Mr. Chairman, along those lines, I mean, for those who are concerned if government should be involved at all, I was looking up some numbers here and found State and local governments, and the Federal Government, too, have given some \$20 billion for building stadiums and arenas for professional sports. And I never heard the Players Associations from any group saying, "No, we don't want any government involvement." I never heard any owners saying, "We don't want government involvement." I never heard any sports announcements. I mean, the general idea was, "We think it is a good thing. Send lots of money."

I would hope that would be something the committee could also look into. And I know you brought up the point, too, about jurisdiction in terms of violating the law, but it also seems to me that there are two standards here that are being asked for. "Give us the money to build the stadiums, but don't watch what we do in the stadiums."

Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman.

The full Chairman of the Committee, Mr. Barton from Texas.

Chairman BARTON. Well, thank you, Mr. Chairman.

Just on the point that we just had, in my District, I have the Texas Rangers ballpark at Arlington that the voters of Arlington voted a sales tax, which was paid off early. And these same voters just voted another sales tax for a new stadium for the Dallas Cowboys, which is the NFL, which we are going to have later today. So I think your point on that is well taken.

Again, I want to thank each of you gentlemen for attending voluntarily. We didn't have to subpoena anybody, and I want the record to show that it is appreciated that each of you came voluntarily. And we intend to work with you. We are going to have a legislative hearing on Congressman Stearns' bill, and we do intend to mark it up, which means amended and then reported out, and we do intend to take it to the floor and then pass it on the floor, and we then intend to work with the Senate so that we go to conference and actually set a Federal law. And I know some of you have got some questions about that, and I understand that.

My first question is to Mr. Shorter. First of all, we appreciate all of the enjoyment and the inspiration that you have given our Nation over the years.

Mr. SHORTER. Thank you.

Chairman BARTON. I have been a big fan of yours. I have never had the pleasure to meet you, but you and I are of the similar generation, so I am glad to see somebody here with a little gray in their hair like me, except you have had a much better athletic career.

My question to you, sir: do you think that the standards that are applicable to the Olympics and to some of the other international sports can be made applicable to the major professional sports in this country?

Mr. SHORTER. Yes, I do, because I think we really have come to a point where you can't promote a sport and police it. I think I have heard that mentioned here before. And if you bear with that standard all of the way along, you have to look for models as you try to create a solution that create that situation, which is an entity that is totally independent, transparent, and has no conflict, and the policing in a good way, which is promoting the rights of the clean athletes to a level playing field. I mean, that is what we have all mentioned here. And the standards are not that complicated. You know, you have a uniform updated list of prohibited substances, which isn't as complicated as people might think, because it is really more a question of staying up with what is out there. And I eluded before to where the clean athletes participate as much as anyone in this, as evidenced by the THG BALCO scandal where we got the syringe with the THG, retro-engineered it, and found out. That is the process at work. When you have a truly independent entity at work, the clean athletes feel they can go there to help.

The other is to have the deterrent and effective sanctions, and I think there has been adequate talk about that. And then the testing standards, both for how you test the athletes, in other words the selection process for testing, isn't totally random. The WADA code, for example, does have an outline of just how you approach the testing so that it is somewhere in between target testing and totally random to be more effective. And I would submit that if you don't have a truly independent policing mechanism, there is always the tendency to not follow that in terms of your testing. So you can talk about out-of-competition testing, but there is more to it than that.

And then the point being that it truly does have to be out-of-competition. And so if there is an area for discussion, it might be just in all of the professional sports, for example, what is out-of-competition and what is in-competition, because the baseball is a very long time. And that is a lot of in-competition. So you have to determine that.

So it is possible, and I guess the point I am making, in sum, is there is a model. It is totally independent. It has no conflict of interest. And it is there for, you know, your benefit to examine and for the people at USADA to answer everyone's questions.

Chairman BARTON. Okay. My last question, this is to the players representatives. We have players representatives from Major League Baseball, from soccer, and from the National Hockey League. I tried to listen, even though I wasn't in the room, I was in my Chairman's office, and we had a TV set that I tried to listen to each of your given testimony, and I have scanned it and read it. The gist of your testimony, I think, is that you all would rather there not be a national bill, but you are willing to accept that there might be a bill, and your primary opposition, other than the Major League Baseball's constitutional question, the players rep, Mr. Fehr, is that the 2-year ban is too long. Is that fair? The sanctions part of the bill needs some work. Would that be a fair assessment of the general tone of the players representatives' testimony? Anybody?

Mr. FEHR. I will respond first, Mr. Chairman.

I don't think you could summarize it down that finely. I think that we have a lot of issues with the appeals process and otherwise, but let me just make, you know, this commitment to you as this process moves forward. We will tell you exactly what we think, where we think the problems are, and you will exercise the best judgment you have. That is what all of you do. That is what you are here for.

Chairman BARTON. Well, I mean, in a perfect world, I would rather this be done at the collective bargaining level, if you have got that relationship, or done in a voluntary discussion with the players in your specific sports, but as Mr. Shorter has, I think, fairly eloquently pointed out, we don't live in a perfect world, and sometimes you have to do things, set standards independently and are verified independently. And in this case, I think there really needs to be a Federal standard. I think we have gone too long, basically, asking the marketplace to do it for whatever reason, where it just hasn't been able to do it as well as it should be done. So we are going to try to set up a Federal standard that does it.

But having said that, as Chairman, I am very open to a dialog on what is best. And so I would encourage you and your staffs to work with Congressman Stearns and other members of the committee so that we get it right. You know. The one thing that is not negotiable, at least from my perspective, is that we are not going to do anything. You know, I am really going to try to get a Federal bill.

I thank the gentleman from the Hockey Association.

Mr. GOODENOW. Just a brief comment to your question.

It is very clear that what we are hearing here today is that the ability for us to self-police is in doubt, and the momentum of the issue and the circumstances are driving this committee to take the approach that you have said it is going to take. We understand that, and we hear that.

Specifically to your point about the 2-year suspension. I think that that is something that I would encourage people on your committee and researchers prior to markups, et cetera, to spend time with people like myself to get a little more in-depth explanation of some of our philosophies. Given the unique circumstances that can arise on a sport-by-sport basis, but just in the general fairness point of view, you know from our statements that we are not trying to avoid the strictest of scrutiny, WADA standards, the state-of-the-art, if you will, approaches to dealing with some of these issues, but we do believe, and I believe very strongly, that, you know, we need to take a little closer look to some of the difficulties that can arise, as I said, in a first offense situation to eliminate a person's ability to have a career in a sport, which I think would be a great likelihood if the penalty were 2 years. I think it would be extraordinary, you know, and not fair. But I understand the approach the committee wants to take, and I appreciate the fact that the committee is inviting further dialog on those types of issues, and I would encourage that.

Chairman BARTON. Does our soccer representative wish to comment, because my time is expired, but I am giving you a chance?

Mr. FOOSE. I would just add that for soccer, we feel very good about our policy. We feel very good about our players. So while we

philosophically have issues with the notion of a Congressional act, we would welcome the opportunity to continue to talk about what is in that act and continue to applaud our players and the work that they have done in this area.

Chairman BARTON. All right. And I guess my final comment, Mr. Chairman.

I hope we have a hockey season next year. You know, there is a hockey team in Texas. It is called the Dallas Stars. They are pretty good, and it would be good to get them back on the ice. So we are not just football and baseball and basketball in Texas. We do have a little hockey, too.

Mr. GOODENOW. We appreciate the thought, and we share the sentiment.

Chairman BARTON. Okay. Thank you, Mr. Chairman.

Mr. STEARNS. Thank you, Mr. Chairman.

The gentleman from Michigan, Mr. Upton.

Mr. UPTON. Well, thank you, Mr. Chairman, and I regret that I had to be gone for a little while. I missed some of the flow of the questions and answers, so I hope that I am not repetitive, but I do have a number of questions.

And I guess my first one, Mr. Selig, is to you. At least from my standpoint, I truly, as I said in my opening statement, appreciated the movement that you have made from where we were before, which frankly, a lot of thought was way too weak and not even necessarily what was indicated back then to where you are today and was announced across the country. And a quick question, though, as I went through your testimony and listened, you indicated that, at least for the minor leagues, you are going to impose this standard, in essence "three strikes and you are out", 50, 100, and lifetime for 2006. Was there a reason you couldn't do it for 2005?

Mr. SELIG. The season had already started, and I didn't think it was quite fair, frankly, to once a season started and people had done whatever they were doing in terms of process, we have 160-plus minor league teams spread out all over, and just as a matter of pragmatism, I just felt it was not fair, that we ought to give everybody enough notice so that we had an element of fairness. But it will be in for the 2006 season.

Mr. UPTON. And do you need to get a Players Union contract or some change in the contract for what you imposed for 2006, or is it automatic?

Mr. SELIG. For the plan that I have out, that is exactly right. That is a subject of collective bargaining, and it is out there right now. And as I said before, while I am confident today in telling you that I think the program is working, I think there are integrity issues that have now transcended that as well as public confidence, so I am very determined to get the plan that I have proposed put into practice.

Mr. UPTON. Now Mr. Fehr, as we listened to the testimony from the soccer and other sports, both union as well as management, it seemed like it was fairly clear. There is no room for mischievous actions. We are proud of the record. Mr. Foose talked about that, very proud of the record by the Association in terms of what they have. They have a lot tougher penalty than what I call a measly 10 games, which is the current policy now. I have reviewed the cor-

respondence between Mr. Selig. I think my colleague, Ms. Blackburn, put it into the record, but the letter from the Commissioner to you and your response back dated May 1 and April 25. And in the letter from the Commissioner, he indicated that Jim Toney says, "I am disappointed with Major League Baseball and the Players Association for not implementing a plan that is completely solid. We need to prove to the fans that there is no question baseball should be clean and is clean, and we are not sending the right message with this policy. We are continuing to beat around the bush. MLB should set a higher standard, like the Olympic athletes. We are the best of the best. Why shouldn't we be accountable for things? I think we should."

You know, as I indicated, I am a big sports fan. I have had the opportunity to be with a number of players throughout my tenure, and I cheered for them since I was a little guy. They are outstanding people. I knew some of them in college. Corey Patterson, and I am a big Cubs fan. Corey Patterson, a bunch of different folks that are out there, seem like they want to have the right stand on these issues, and when you see someone like Jim Toney, when you see some of the stars that play soccer in MLS, and again they are heroes to our kids, it seems like they are all on the same page, but you all seem to be the ones that are saying, "No, 10 games." I mean, that is not even a 16th of the season. I mean, you know, when I listen to my Chairman Barton talk about the need for legislation, I think, at least on this dais, among Republicans and Democrats, that we will move this bill, particularly if you all stay stuck at 10. If we don't see some movement, we will do it. And John McClain is a good friend, and I know him fairly well, and I know he was very disappointed where things went from last year to where we are now. I haven't talked to him since this announcement came out, but I will bet he is on board with the "three strikes and you are out" policy.

And I just want to know, Mr. Fehr, what is the problem with going along with what at least some of the players are saying as well as what the players in other professional leagues have said and done, knowing that it is their decision in many cases whether or not they are going to take one of these substances? They know what they are playing with. They are playing not only with their financial future but their name, their own integrity, the impact on the profession itself. And they have got to be knowing what they are doing. And 10 games, in essence a week, if you have got a couple double-headers, is the same as a stubbed toe or, you know, coughing and getting some back spasms and you miss 2 weeks of the season. I mean, this isn't even that.

Mr. FEHR. With all due respect, it is not that. There is a lot of public opprobrium that comes with it, and I think the comments from the individuals identified this year suggest that.

Let me respond very briefly. First of all, I don't discuss comments players make. They are entitled to say whatever they want. I talk to them privately, and in many, and perhaps most, cases when things like this come up, I do, but it has never been my role to discuss those conversations, so I don't.

Mr. UPTON. Yes, let me just say, too, I have not talked to Corey Patterson about this issue. I just talked to him and met him and—

Mr. FEHR. Yes, I understand.

Mr. UPTON. [continuing] he seems like he is a fine young man. He played for the Lugnuts in Lansing.

Mr. FEHR. And we can all agree on that.

Second, Players Association took a step after a lot of divisive internal discussion in 2002 that produced an agreement which had a dramatic effect in reducing steroid use in 2004. Then even though the contract ran through 2006, it was re-negotiated again last winter to have a first-time penalty, which was the request of the Senate Commerce Committee to have a first-time penalty. We think that will even have a bigger effect. The matter has proceeded. There have been some other developments over the course of this year. We have the Commissioner's letter. As I have indicated in response to previous questions, the players know about that. I will be discussing it with the players. We believe, essentially, in retail politics, which means every player on every team has an opportunity to converse not only with staff but leads with the players on his team and hopefully on others, and we will be a position to discuss the Commissioner's ideas with him.

I don't know if you were here when I made this comment before, but in case you weren't, sometimes there is a perception that players don't appreciate the opinions of people on the dais, as you have suggested. We make certain that they understand.

Mr. UPTON. Let me just say one thing in conclusion.

I have learned that I guess some 70 minor league players have been identified as taking steroids this season. That is a new figure that I got. Seventy minor leaguers this year, which the season is rather fresh, and which I suspect is a dramatic increase from where you were last year. Is that right? I don't remember.

Mr. SELIG. Well, it is still early, so I don't want to make any judgment.

Mr. UPTON. No, but at least at this point in the season, 70, I would think, was a dramatic incline from where we were a year ago.

Mr. SELIG. More than I would have thought.

Mr. UPTON. And I think in large part because of the policy that you have, which is more in line with where the other professional leagues are. I mean, we heard from the NFL last month that every player every year is tested multiple times, tough suspensions, and that has been on the books since 1987. And yet here we are, and you come up with a better system than you had a few months ago with a better system out here further, and we are already at 70, so that, to me, shows that we have not had decline. It is a problem. It is not not a problem.

And I yield back. I know my time is up.

Mr. STEARNS. I thank the gentleman.

The gentlelady from California, Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman, and thank all of you for sticking with us this long. I also want to say to Mr. Shorter, it is truly an honor to have you here. The 1972 Olympics was a big year in my life. I actually fell in love with a gymnast at the time and

fell in love with gymnastics. And that changed my life, I think, forever. So again, it is a pleasure to have you here.

Mr. SHORTER. Thank you. Thank you.

Ms. BONO. But it is hard I think when you are this long in questioning to be unique, and I think most of my questions have been answered.

I just need, perhaps, some clarification and have questions for Mr. Fehr about your written and verbal testimony. You said the legislation contains no provision, which makes it clear that players may use substances which the U.S. Congress has determined are safe and effective for sale and use by all adult Americans and are readily available for purchase without a doctor's prescription. Can you tell me what drugs you were talking about specifically that are in question?

Mr. FEHR. Until recently, and it may still be the case in some circumstances, for example the WADA list prohibited over-the-counter cold remedies—

Ms. BONO. Ephedrine.

Mr. FEHR. [continuing] and allergy remedies.

Ms. BONO. So pseudoephedrine, ephedrine—

Mr. FEHR. That was one. I am not sure that that was all, but that was one.

But the point I was making was one which was not specifically directed at the nature of the substance. It was directed at a different point, which is if something is legally available in the United States and the appropriate governmental authorities, you know, Congressional, Federal, executive, State, and local, have decided that it is and adults can use it, it is a fundamental philosophical question as to whether we say to a professional athlete, "You can't make that decision when everyone else can." That is the question. And it sort of begs the question as to whether it is dangerous, because if it is dangerous, it ought to be banned for everybody.

Ms. BONO. Except there is a difference, is there not? When you are talking about ephedrine and pseudoephedrine, I mean, these are all stimulants, even caffeine to some degree. They are stimulants. So those people who are taking them, generally speaking, might be any of us in the room where our heart rate is reasonable. If you put these in an athlete, their heart rate is way up. I don't know what it might be on the baseball field, but certainly higher if you add a stimulant. I just have great concerns. I did before baseball. I remember when the Orioles pitcher, Steve Belcher, died and have had tremendous concern about this since then. So you are saying it is okay to take ephedrine and pseudoephedrine and these stimulants—

Mr. FEHR. No.

Ms. BONO. Okay. I am sorry. Would you clarify for me?

Mr. FEHR. I don't mean to interrupt. I have not said it is okay in the sense that Don Fehr is recommending it or that nobody ought to think twice about it, that there aren't significant decisions that ought to be made. As I indicated previously, you don't take anything, in my judgment, that you don't need for an appropriate medical reason. What I said is a fundamentally different question, and that is is it appropriate for governmental agencies to say that if you are a professional athlete, you can't do what someone else

who is exactly your twin in all other respects, including a recreational athlete who may run six times a week for 2 or 3 hours at a time and may have the same circumstances. It is not a question as to whether it makes sense for him to do it, whether he should, whether a doctor would recommend it, whether you or I would, whether there are dangers there. There are dangers in all kinds of over-the-counter medications. That is why we have the side effects list.

Mr. STEARNS. Will the gentlelady yield just for a question?

Ms. BONO. What if I said no?

Mr. STEARNS. All right.

Ms. BONO. Yes, Mr. Chairman, of course. I am not that foolish.

Mr. STEARNS. Mr. Fehr, I can go out and buy a corked bat and I can use it like I want to, but I can't use a corked bat if I am a professional player. So following your reasoning, people who are in your union should be able to use a corked bat.

Mr. FEHR. No, I would put it—

Mr. STEARNS. Well, that is the kind of reasoning you are using, and basically what the gentlelady is saying that she thinks these drugs shouldn't be used, and you are saying the government shouldn't step in and no one should step in and tell you not to use those drugs, but you say to your players they can't use a corked bat, but the players can go out and buy it for their sons just to play around.

Mr. FEHR. Maybe I am being inarticulate today. I will try one more time in the parameters of the question that you asked to make it a little different.

If players agree on rules of the game that include no corked bats, those can be fully enforced within the game, and I have no problem with that, whether it is done individually or in collective bargaining where there is a union or however it is done. If you would raise a different question and say the Federal Government ought to pass a law about it, then I would say that that may raise different issues.

Mr. STEARNS. But we have passed a law, the Drug Abuse Act in 1988. It is against the law to use steroids. We have passed a law. It is a criminal offense.

Mr. FEHR. Right.

Mr. STEARNS. It is a felony of 5 years in jail if you distribute it.

Mr. FEHR. Right. And players are no different under the law than anybody else, and they are subject to prosecution to exactly the same extent anybody else should be.

Mr. STEARNS. I yield back. Thank you for the time.

Ms. BONO. Mr. Selig, would you care to comment on this? Please do, sir.

Mr. SELIG. Well, in this regard, I have said that even though I think our program is working, I will reiterate again that all of this has brought integrity issues, and it is my job, as the Commissioner of baseball, that anything that impugns our integrity in one form or another we must deal with and deal with directly, and that is why I, frankly, believe that harsher penalties, more independence in the testing, all of the things that I have asked for I labored long and hard trying to put that together, because the thing that has become clear to me that while we can convince ourselves that this

program is working, and I want to say again it is, that is not the issue any more. The issue is this sport and all its players who deserve better and all its clubs that deserve better. And therefore, the only way that I am now convinced that we really can take care of this issue is to make the penalties tougher. I happen to believe that 50 and 100 and life are the appropriate ones for baseball. I think each sport has its own indigenous characteristics as to what is an appropriate penalty. I would agree with a lot that has been said today, and that is why I think that the 50 and the 100 and life are most appropriate. But this is an issue that needs to be dealt with quickly.

Ms. BONO. Thank you. Again, Mr. Fehr, I don't know how your negotiations are going to go, but I hope that you seriously look at the use of these stimulants. I hate to see these young people die. And I think you evaded the question a little bit about what you tell children, and I just would like your quick answer. Are high school students encouraged to use them? I know the answer. I just want to hear you say yes. They are all being forced and encouraged by their parents, "You need that scholarship. You need to be a better athlete than the rest of the kids." How prevalent is it in high schools? I know of a story of a young baseball player at Palm Springs High School who was on steroids and, while swinging a bat, his muscles were so overdeveloped compared to his bone, he literally pulled his pelvis apart by the strength of his muscles compared to his bones.

Mr. FEHR. I don't know what the extent of the use is in high schools. I am perfectly prepared to accept that it is significant and something that needs to be paid attention to. One of the side effects with adolescents is precisely the one that you just mentioned. It screws up the growth cycle, for lack of a better way to put it. I don't have the medical training to put it—

Ms. BONO. Screws up makes sense. We understand that.

Mr. FEHR. [continuing] more precisely than that. And so it is a significant issue that needs to be paid attention to. No question.

Ms. BONO. Thank you very much.

Mr. Chairman, thank you for bringing this forward. I yield back.

Mr. STEARNS. And I thank the gentlelady.

We have finished our questions, so for all intents and purposes, we are all done, and I am going to let the panel go.

We are going to reconvene for the second panel at 2:30 in this room. I want to thank all of you for your patience during the voting. And we hope to move forward here. And you have done yeomen's service here, so thank you.

The subcommittee is temporarily in recess.

[Brief recess.]

Mr. STEARNS. The subcommittee will reconvene for panel No. 2, and we welcome David Stern, the Commissioner of the National Basketball Association, and Billy Hunter, the Executive Director of the National Basketball Players Association. And Mr. Hunter, I understand you played for the Redskins, so welcome back to Washington DC, so to speak.

And Commissioner Stern, I thank you very much. I know how busy you are this morning dealing with Columbia University and your being chair of the Board of Directors. I appreciate your will-

ingness to come down this afternoon. And the good news is, you won't hear all of the members' opening statements that drone on for quite some time. So this will not be as long as we had this morning, which was, I think, approaching 4 hours.

So your time will be short, but it will be appreciated, and it will be duly noted. There was a lot of press here, so I think it is important that the NBA also participate and you give us your views.

So it is customary to let you have an opening statement, and we will let you start, Commissioner Stern, and then we will go to Mr. Hunter. So the floor is yours. You just have to turn on the mike there in front of you a little bit, and just move it a little closer to you. And we welcome you here and your opening statement.

STATEMENTS OF DAVID J. STERN, COMMISSIONER, NATIONAL BASKETBALL ASSOCIATION; AND G. WILLIAM HUNTER, EXECUTIVE DIRECTOR, NATIONAL BASKETBALL PLAYERS ASSOCIATION

Mr. STERN. Thank you, Chairman Stearns, and I would like to thank the members of the subcommittee for the opportunity to appear and give testimony on House Resolution 1862, the Drug Free Sports Act.

The NBA was the first league to have a drug policy, or shall I say, an anti-drug policy in 1983, which at that time focused predominantly on drugs of abuse. But in 1999, we added steroids and other performance-enhancing substances.

Now there is a broad list of banned substances that have been added because of the mechanism that we have agreed to with our Players Association for adding new drugs, and among the drugs that have been added over time, have been Andro, ephedrine, and designer steroids.

Our testing policy currently is that veterans are tested in training camp and rookies are tested randomly four times a year. Our current penalties are 5 games for a first offense, 10 for a second, 25 for a third, and an indefinite suspension for the fourth. We are currently engaged in collective bargaining talks. I guess I could say we are engaged. At least there is a broad framework for having discussions in collective bargaining. And we have proposed, through the union, a broader list of drugs, four random tests for veterans in season, one test out of season, and a penalty phase that reads, basically, 10 games for the first offense, 25 games for the second offense, and dismissal for the third offense.

Specifically, on H.R. 1862, I would only make the following specific suggestions from the NBA.

First, that the penalty that is proposed, a first offense being 2 years, should be looked at carefully in light of the fact that all of the penalties are absolute. There is absolute liability. So even if a player has, you know, taken a nutritional supplement that was tainted, inappropriately tainted and he is, nevertheless, subject to the penalty, and therefore we think that you may want to take another look at 2 years for the first offense.

The number of tests proposed in H.R. 1862, which is one, we think you may want to take a look at that with respect to possibly strengthening it and making it more than one.

The independent third party conducting the program, I think that is fine. I would only just say to you that we use retired law enforcement officers and I sit here before you today and say that their integrity, in our view, is beyond question. We have an independent panel of advisors who add drugs to the list. We have an independent drug counselor who advises us, and we send the results to an independent lab. So I would just give that to you for your consideration.

We feel we have a strong program, and it will get much stronger, much, much stronger. But if Congress sees fit to legislate here, I can pledge to you that we will meet or exceed any standard that you set. And so we welcome your attention to this subject, and we think these hearings are a very good idea to draw the attention of the country to this subject.

Thank you very much.

[The prepared statement of David J. Stern follows:]

PREPARED STATEMENT OF DAVID J. STERN, COMMISSIONER, NATIONAL BASKETBALL ASSOCIATION

Chairman Stearns and Members of the Subcommittee: On behalf of the National Basketball Association ("NBA"), I appreciate the opportunity to testify before the Committee regarding H.R. 1862, the "Drug Free Sports Act."

The NBA supports the efforts of this Subcommittee and the Congress to confront and address the issue of steroids and performance-enhancing substances in professional sports. These drugs undermine the fundamental integrity of all athletic competition; they pose serious health risks to the players involved; and their use in major league sports sends a harmful and potentially destructive message to countless young fans who emulate professional athletes. Steroids and performance-enhancing drugs have no place in the NBA.

In 1999, the NBA and the National Basketball Players Association ("Players Association") agreed through collective bargaining to include steroids and performance-enhancing substances in our pre-existing drug testing program. Since that time—again, through agreement with the Players Association—we have made improvements to the program by adding new performance-enhancing substances to our list of banned drugs, and by implementing and expanding an ongoing program to educate players about the dangers of these substances.

I should point out that the NBA, in 1999, had no evidence of even minimal use of steroids or performance-enhancing drugs by NBA players. Nor are we aware of any such evidence today. But we believed then—and still believe today—that a strong and effective testing policy is the best way to ensure that these substances never enter the culture of the NBA, and to demonstrate to our fans the collective commitment of NBA teams and players to fair and legitimate competition.

Currently, the NBA and the Players Association are engaged in active negotiations for a new labor contract, to succeed the one that is scheduled to expire on June 30th of this year. In those negotiations, the NBA has already made proposals to the Players Association that would significantly strengthen our steroids and performance-enhancing drug program, and the NBA is committed to obtaining those improvements as part of the new agreement. These proposals include increasing the number of random tests for all players to 4 times per season, adding 1 random test for players during the off-season, broadening our already-substantial list of banned steroids and performance-enhancers to include all those declared illegal by Congress and many that are prohibited by WADA, and toughening the penalties for violators.

It is my belief that the NBA can maintain a sound drug testing policy for steroids and performance-enhancing substances through collective bargaining with the Players Association. Indeed, a policy that is the product of agreement between management and labor will always be superior to one that is imposed from the outside, as the parties to the agreement will be invested in its success. Nevertheless, if this Subcommittee and the Congress feels that legislation must be enacted in this area, we offer the following observations on the specific proposal contained in the Drug Free Sports Act.

First, while the provisions of the bill set forth certain baseline standards regarding testing, substances, and penalties, the particulars of those standards are left up to the Secretary of Commerce, to be issued 9 months after the bill becomes law.

Without knowing the specifics of the regulations, of course, it is not possible for us to react fully to the proposal, or to anticipate its effect on the NBA.

Second, as noted above, the NBA would prefer to manage our own drug testing program, rather than having this task performed by some "third party." The NBA has been testing its players for drugs since 1983. We have substantial experience in this area, are highly knowledgeable about the schedules and habits of our players, and are confident in the integrity of our processes and methods. Moreover, because the Players Association, along with the NBA, jointly created our anti-drug program, NBA players have confidence in its legitimacy and impartiality, and that trust is critical to making the program run smoothly. We assume, under these circumstances, that the NBA would obtain—under Section 4 of the Act—an exemption from the requirement that our testing be administered by an outside party.

If Congress did require that a third party administer the NBA's drug testing program, we would want the ability to monitor the testing and have input into the testing protocols in order to ensure that these processes were being conducted in accordance with the highest standards of integrity and fairness to NBA players. It appears that some consideration has been given to this idea in Section 3(5), which provides that the professional sports association—and not the third party administrator—would hear and decide any appeal filed by a player to an adverse testing determination. This is a step in the right direction, but more would be needed to satisfy the NBA and its players that a third-party drug testing program is being administered properly and fairly.

Third, while we believe it is important to prohibit a broad list of steroids and performance-enhancing substances, we do not believe that the WADA list of banned substances is appropriate for the NBA. The sport of basketball emphasizes a specialized set of physical abilities—particularly quickness, agility, and basketball skill—that are distinct from those required in a number of other sports. Accordingly, illicit substances that could assist athletes in strength sports (such as weightlifting or football), power sports (such as baseball), or endurance sports (such as cycling or marathon running) are not likely to be of benefit to NBA players. The Subcommittee might want to reconsider whether it is sensible to test NBA players for these substances, or for the NBA to be required to incur the cost of such unnecessary testing.

Fourth, while stiff penalties are necessary for the legitimacy of any anti-drug program, we believe the Subcommittee should consider tempering the penalties mandated by the Drug Free Sports Act. Under the usual "strict liability" standard that is applicable to drug testing policies (including the NBA's current policy), a player can commit a violation unknowingly by, for example, ingesting a tainted nutritional supplement that is legally sold over the counter. Under those circumstances, a two-year ban (if the violation was the player's first) or a lifetime ban (if the violation was the player's second) would appear to be too harsh. Indeed, even the WADA Code does not provide for strict adherence to the penalties proposed in the bill, and instead makes clear (in Section 10.5 of the Code) that special circumstances—such as a contaminated supplement—should be taken into account and could result in a reduced (or even no) penalty. Fundamental fairness to athletes whose livelihoods are at stake should require no less.

The NBA believes that the penalties we have proposed to the Players Association in our current round of collective bargaining are fair and appropriate for our sport. Under that proposal, a first-time offender of the steroids and performance-enhancing drugs policy would be suspended from his team for 10 games. In the NBA, where the average player now earns approximately \$4.5 million per season, a ten-game suspension would result, on average, in a financial penalty to the player of \$500,000. The player's suspension would also be publicly announced, which would do significant damage to the player's reputation and off-the-court financial prospects.

The NBA's proposed penalty for a second offense—a suspension of 25 games—would result in an average financial penalty of \$1.25 million, and could significantly affect a player's ability to obtain any performance-based bonuses in his contract or prove his value for purposes of obtaining a subsequent contract. If a player were to receive a third "strike," he would be dismissed and disqualified from the NBA. In this instance, as we have done in other areas of our drug program, we would allow for the possibility of reinstatement after two years in exceptional circumstances—but only if the player could satisfy the NBA and the Players Association that reinstatement is warranted. In practical effect, as has been the case with other NBA players who have been dismissed and disqualified from the NBA under our drugs of abuse program, this punishment would often result in the player never again being employed in the NBA.

The foregoing penalties, we submit, are strict enough to punish violators appropriately, deter the use of steroids and performance-enhancing drugs in the NBA,

and provide fair opportunities for players to conform their conduct appropriately. Moreover, these are penalties that the NBA believes it can agree upon with the Players Association at the bargaining table. If Congress requires penalties that are stiffer than these, it could well result in greater opposition from the Players Association in other areas of the program, such as the number of times each season that a player will be required to submit to a test.

Finally, Section 5 of the Act sets forth penalties that would apply only to professional sports leagues if they fail to implement drug testing programs that meet or exceed the applicable minimum standards. We assume, therefore, that the bill would allow a sports league simply to impose such a program without bargaining its provisions with the players' union or otherwise complying with the federal labor laws. If that is not the case (and it would be helpful if the Act were made clear on this point), we would suggest that the penalties be made applicable to both management and labor, thereby providing incentives for both parties to reach an agreement in collective bargaining that meets the proposed federal standard.

In summary, the NBA believes it can maintain a strong and effective drug testing policy for steroids and performance-enhancing substances, and we expect to have just such a program in place when we conclude our new collective bargaining agreement. If Congress nonetheless sees fit to establish minimum standards for such a program, we suggest that they be flexible enough to account for characteristics that distinguish one professional sport from another, and reasonable with respect to penalties. In all events, we appreciate the Subcommittee's effort and attention to this important matter, and look forward to providing any additional information or assistance as necessary.

I thank the Subcommittee for considering the views of the NBA on this significant piece of legislation.

Mr. STEARNS. I thank you.

Mr. Hunter.

STATEMENT OF G. WILLIAM HUNTER

Mr. HUNTER. Mr. Chairman and members of the subcommittee, I am the Executive Director of the NBA Players, as well as the WNBA Players Association. I appear today in response to the May 12, 2005 invitation extended by Chairman Stearns.

I appreciate the subcommittee's interest in and concern about the use of steroids by professional athletes and others, particularly young adults and children, as evidenced by legislation H.R. 1862 introduced by several members on this subcommittee.

I would like to begin by clearly stating the position of the National Basketball Players Association. As a former State prosecutor and United States Attorney, I have participated in the prosecution of numerous drug cases and have a keen understanding of and insight into the use of drugs of abuse. While we strongly believe that the use of steroids and other performance-enhancing drugs are virtually non-existent in the NBA, we are committed to ensuring that the use of such drugs does not become an issue of concern.

To that end, in the 1999 collective bargaining agreement between the NBPA and the NBA in our anti-drug program a steroid testing protocol that provides for random testing of all incoming players four times during their rookie seasons and to test veterans once during the training camp period. Since testing for steroids and other performance-enhancing drugs was instituted in 1999, there have been approximately 4,200 tests conducted with only 23 initial laboratory-positive tests, less than 1 percent. Of the 23 tests that were initially laboratory positive, only three satisfied the additional steps that are required to be confirmed as positive under our anti-drug program either because, one, the player was terminated from employment prior to confirmation of his test result, or two, because the medical director found a reasonable medical explanation for the

test result. The three players who had confirmed-positive tests were immediately suspended.

Additionally, all players are subject to reasonable cause testing. If either the NBA or the NBPA has information that gives it reasonable cause to believe that a player is using, in possession of, or distributing steroids, then they may present such information to an independent expert who is empowered to immediately decide whether reasonable cause exists to test the player. If reasonable cause is found, the player is subject to being tested up to four times during a 6-week period following the order to test. The testing during this period may be administered at any time without any prior notice to the player.

It is vitally important in the efforts to control the usage of steroids and other performance-enhancing drugs that the list of banned substances for which players are tested remains current. Accordingly, in our program that is updated regularly by our Prohibited Substances Committee, comprised of three independent drug-testing experts and a representative from both the NBA and the NBPA. The committee will ban a substance that is either declared illegal by the Federal Government or found to be harmful to players and improperly performance-enhancing. Under our anti-drug program, at least 17 substances have been added to the list of prohibited substances since 1999.

While our anti-drug program has always had a strong emphasis on education and treatment rather than punishment with a standard of progressive discipline for violators, the anti-drug program does provide for substantial penalties for those who are caught using steroids and other performance-enhancing drugs. A first-time offender is automatically suspended for five games and is required to enter education, treatment, and a counseling program established by the program's medical director.

For a second offense, the player is suspended for ten games and required to reenter the program. For a third offense, the player is suspended for 25 games, nearly a third of the 82-game NBA season, and is again required to enter the program and submit himself to treatment and counseling.

Further, any player who fails to comply with the treatment program as prescribed by the medical director by engaging in behavior that demonstrates either a mindful disregard of his treatment responsibilities or by testing positive for steroids suffers additional penalties up to and including indefinite suspension.

Another key component of our anti-drug policy is our emphasis on education, treatment, and counseling. During each season, every NBA is required to attend and participate in a meeting where the dangers of steroids and performance-enhancing drugs drug use are discussed by drug counselors. Also, all rookie players are required to attend a week-long rookie transition program administered by the NBA and the NBPA jointly before the start of their first NBA season during which numerous topics are discussed in detail, including the dangers of using steroids and performance-enhancing drugs. Finally, the program's medical director supervises a national network of medical professionals located in every NBA city available to provide counseling and treatment to all players.

With the additional scrutiny that the use of steroids and other performance-enhancing drugs has received in society, in particular in professional sports such as baseball, football, track and field since our groundbreaking agreement was reached in 1999, there has been discussions that our agreement requires modification. While I am reluctant to discuss the specifics of these discussions in great detail due to the sensitive, evolving, and complicated nature of collective bargaining negotiations, I represent to you that I have had numerous discussions with Commissioner Stern and the NBA about making significant changes in our next CBA to deal with the growing societal problem of the use of steroids and other performance-enhancing drugs. We want to send a strong and unequivocal message to society in general and our young fans in particular that we do not condone, support, or accept the use of performance-enhancing drugs in our sport. To that end, we have indicated the willingness to significantly increase both the frequency of testing that our players undergo as well as the penalties imposed upon the violators.

We continue to believe that collective bargaining is the most appropriate forum for the resolution of these issues and are confident that the changes that are currently under consideration will address in a meaningful way the concerns of the subcommittee, as embodied in the pending legislation. Congress has long given deference to parties operating under collective bargaining agreements to develop their own solutions to problems, properly recognizing that the parties bound by a collective bargaining agreement have a long-standing relationship with unique problems and problem-solving methods that are often difficult to comprehend by those outside the relationship. While we fully believe in and support the subcommittee's and Congress's goal of eliminating the use of steroids and performance-enhancing drugs in sports, we believe this goal is best accomplished by the leagues and players working together to accomplish this universal objective. We think that the players, supported by the leagues, are best able to demonstrate to everyone, especially our young fans that the only way to become a professional athlete is by cultivating and nurturing their talent, determination, and desire and by working harder than everyone else.

I want to thank the subcommittee for the opportunity to appear before you today.

[The prepared statement of G. William Hunter follows:]

PREPARED STATEMENT OF G. WILLIAM HUNTER, EXECUTIVE DIRECTOR, NATIONAL BASKETBALL PLAYERS ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is G. William Hunter and I am the Executive Director of the National Basketball Players Association, the labor union that represents all NBA players in collective bargaining. I appear today in response to the May 12, 2005 invitation of Chairman Stearns to testify.

I appreciate the Subcommittee's interest in and concern about the use of steroids by professional athletes and others, particularly young adults and children, as evidenced by the legislation, H.R. 1862, introduced by several members of this Subcommittee. I would like to begin by clearly stating the position of the NBPA. As a former state prosecutor and United States Attorney, I have participated in the prosecution of numerous drug cases and have a keen understanding of and insight into drug use and abuse. While we strongly believe that the use of steroids and other performance enhancing drugs are virtually non-existent in the NBA, we are committed to ensuring that the use of such drugs does not ever become an issue of concern.

To that end, in the 1999 Collective Bargaining Agreement between the NBPA and NBA we introduced in our Anti-Drug Program a steroid testing protocol that provides for random testing of all incoming players four (4) times during their rookie seasons and tests veteran players once during the training camp period. Since testing for steroids and other performance enhancing drugs was instituted in 1999 there have been approximately 4200 tests conducted, with only 23 initial laboratory positive tests (less than one (1) percent). Of the 23 tests that were initially laboratory positives, only 3 satisfied the additional steps that are required for a sample to be confirmed as positive under our Anti Drug Program, either because the player was terminated from employment prior to confirmation of his test result or because the Medical Director found a reasonable medical explanation for the test result. The three (3) players who had confirmed positive tests were immediately suspended.

Additionally, all players are subject to reasonable cause testing. If either the NBA or the NBPA has information that gives it reasonable cause to believe that a player is using, in possession of, or distributing steroids, then they may present such information to an Independent Expert, who is empowered to immediately decide whether reasonable cause exists to test the player. If reasonable cause is found, the player is subject to being tested up to four (4) times during a six week period following the order to test. The testing during this period may be administered at any time, without any prior notice to the player.

It is vitally important in the efforts to control the usage of steroids and other performance enhancing drugs that the list of banned substances for which players are tested remains current. Accordingly, in our Program that list is updated regularly by our Prohibited Substances Committee, comprised of three independent drug testing experts and a representative from both the NBPA and NBA. The Committee will ban a substance that is either declared illegal by the Federal Government or found to be harmful to players and improperly performance enhancing. Under our Anti-Drug Program at least seventeen (17) substances have been added to the list of prohibited substances since 1999.

While our Anti-Drug Program has always had a strong emphasis on education and treatment rather than punishment, with a standard of progressive discipline for violators, the Anti Drug Program does provide for substantial penalties for those who are caught using steroids and other performance enhancing drugs. A first time offender is automatically suspended for five (5) games and is required to enter an education, treatment and counseling program established by the Program's Medical Director. For a second offense the player is suspended for ten (10) games and required to reenter the education, treatment and counseling program. For a third offense, the player is suspended for twenty five (25) games (nearly a third of the 82 game NBA season) and is again required to enter the education, treatment and counseling program. Further, any player who fails to comply with the treatment program, as prescribed by the Medical Director, by engaging in behavior that demonstrates either a mindful disregard of his treatment responsibilities or by testing positive for steroids, suffers additional penalties, up to and including an indefinite suspension.

Another key component of our Anti-Drug Policy is our emphasis on education, treatment and counseling. During each season, every NBA player is required to attend and participate in a meeting where the dangers of steroid and performance enhancing drug use are discussed by drug counselors. Also, all rookie players are required to attend a week long Rookie Transition Program, before the start of their first NBA season, during which numerous topics are addressed in detail, including the dangers of using steroids and performance enhancing drugs. Finally, the program's Medical Director supervises a national network of medical professionals, located in every NBA city, available to provide counseling and treatment to players.

With the additional scrutiny that the use of steroids and other performance enhancing drugs has received in society, and particularly in professional sports, such as baseball, football and track and field, since our ground breaking agreement was reached in 1999, there has been discussion that our agreement requires modification. While I am reluctant to discuss the specifics of these discussions in great detail due to the sensitive, evolving, and complicated nature of collective bargaining negotiations, I represent to you that I have had numerous discussions with Commissioner Stern and the NBA about making significant changes in our next CBA to deal with the growing societal problem of the use of steroids and other performance enhancing drugs. We want to send a strong and unequivocal message to society in general and our young fans in particular that we do not condone, support or accept the use of performance enhancing drugs in our sport. To that end, we have indicated a willingness to significantly increase both the frequency of testing that our players undergo, and increase the penalties imposed upon the violators.

We continue to believe that collective bargaining is the most appropriate forum for the resolution of these issues and are confident that the changes that are currently under consideration will address in a meaningful way the concerns of the Subcommittee, as embodied in the pending legislation, H.R. 1862. Congress has long given deference to parties operating under collective bargaining agreements to develop their own solutions to problems, properly recognizing that the parties bound by a collective bargaining agreement have a longstanding relationship with unique problems and problem solving methods that are often difficult to comprehend by those outside the relationship. While we fully believe in and support the Subcommittees' and Congress' goal of eliminating the use of steroids and performance enhancing drugs in sports, we believe this goal is best accomplished by the leagues and players working together to accomplish this universal objective. We think that the players, supported by the leagues, are best able to demonstrate to everyone, especially our young fans that the only way to become a professional athlete is by cultivating and nurturing their talent, determination, and desire and by working harder than everyone else.

I want to thank the Subcommittee for the opportunity to appear before you today.

Mr. STEARNS. Mr. Hunter, thank you.

And I think we will go to questions, and I will start.

Mr. Stern, I appreciate your comments about the penalties. We might look at those. And you also mentioned the testing. The way the bill is set up is that it is at least one random testing. It could be more. But I appreciate you actually telling us how you think we could improve the bill.

You know, I just mentioned in the other hearing, the last sentence dealing with when the President of the United States spoke in 2004 in his State of the Union Address, early on in his speech, he talked about steroids, and he concluded in his conversation on steroids when he said: "So tonight I call on team owners, union representatives, coaches, and players to take the lead to send the right signal, to get tough, and to get rid of all steroids now." So the President was prescient in a way, because he talked about this some time ago. We have had players, both on and off the field, say that they would like to see this straightened out.

So Mr. Hunter, when we come to you and we look at your policy, it appears that rookies are tested during training camp and veterans can be tested during training camp. So I guess the question I have for you is why do you treat the veterans differently than rookies regarding the frequency and timing of the tests?

Mr. HUNTER. Well, I think simply because we have concluded, after negotiations with the NBA years ago, that once a player becomes a veteran, he is much more tuned to what is expected of him, so what we do is we try to program the rookies when they come in so they understand what their obligations and responsibilities are so that when they make the transition from college to the pros, we put them through the program. Veterans then understand, you know, what they are going to be confronting after that first year.

Mr. STEARNS. So after the first year, veterans don't get tested?

Mr. HUNTER. No, veterans get tested in training camp, then we have—

Mr. STEARNS. But only in the training camp.

Mr. HUNTER. [continuing] what is called reasonable cause.

Mr. STEARNS. Yes, only in the training camp, though.

Mr. HUNTER. They get tested in the training camp, and if it is detected, if it is discovered that they are using any kind of drug, then—

Mr. STEARNS. But most of these could, during the training camps, not take steroids and then under your policy, they could take them later on. And you—

Mr. HUNTER. Well, I don't know when you say under my policy. It is a joint policy of the NBA and the NBPA.

Mr. STEARNS. Right. I stand corrected. Under the joint policy. The way you have set it up, veterans could be tested during the training, but there is not random testing, and it is only in a certain period that they are tested. So my question is to you, particularly for veterans who are trying to achieve and establish a legacy, they could be taking steroids the other part of the year and you would never test and you would never know. Isn't that possible?

Mr. HUNTER. Well, no, it is always possible, but I would think that it is incumbent upon, you know, other teams, other coaches, other individuals, if they suspect that a player might be taking some steroids—

Mr. STEARNS. So you are saying that you are depending upon the honor system of the NBA players to control whether players take steroids or not?

Mr. HUNTER. Well, I think that has a lot to do with it, but I would also say that I think, as Commissioner Stern indicated early on, the original policy was adopted in 1983. It was then modified some time in the 1990's, at which time the NBA was always well ahead. We were on the cutting-edge of drug policies for professional sports.

Mr. STEARNS. But you see, my point is if you are depending upon the honor system of the NBA players and you are testing them only in a discreet part of the year during their training, then you are leaving out all of the other time. Do you think that policy would work with the Olympics? Do you think it would work with the NCAA?

Mr. HUNTER. Well, I think what—

Mr. STEARNS. Obviously not, because they have random testing, and it is throughout the whole year, and you also see it—

Mr. HUNTER. But I think what has happened—

Mr. STEARNS. And baseball is doing the same thing.

Mr. HUNTER. Yes, but I think what has happened is we have gone through an evolution. You know, when the policy was adopted years ago, we didn't have a problem. We were on the forefront of the issue in that we did adopt a policy—

Mr. STEARNS. Mr. Hunter, I suspect that you don't know that you don't have a problem if you don't test.

Mr. HUNTER. Well, I think we do know that we don't have a problem. I think that the statistics indicate that we don't have a problem.

Mr. STEARNS. Okay. Commissioner Stern, let me ask you this. When an NBA player goes to play in the Dream Team in the Olympics, that NBA player is willing to be subject to the World Anti-Doping Agency.

Mr. STERN. That is correct, Congressman.

Mr. STEARNS. So here we have these top-flight athletes going to be under the umbrella of the Olympics. Then why wouldn't it make sense for the NBA to be under Olympic testing standards instead of—

Mr. STERN. Well, I——

Mr. STEARNS. I mean, you are willing to do it when you go play in the Olympics, but you won't adopt their standards——

Mr. STERN. Well, I didn't say to you that we wouldn't adopt them.

Mr. STEARNS. No, I understand, but you are not now doing it.

Mr. STERN. Well, I would say to you that our drug program, or anti-drug program, is a work-in-progress. In 1983, it was one thing, and in 1999, it was another. And I would say to you that what Mr. Hunter said, I just want to correct one thing. It is not about an honor system. There is testing of veterans upon a showing of reasonable cause.

Mr. STEARNS. But who determines a reasonable cause?

Mr. STERN. An independent expert.

Mr. STEARNS. Who is this expert?

Mr. STERN. It is somebody selected under the collective bargaining agreement.

Mr. STEARNS. So the players——

Mr. STERN. It is a law enforcement person.

Mr. STEARNS. So the players select somebody——

Mr. STERN. No, the players and the owners select somebody who could be a retired judge or somebody in whom we have confidence, really, for the protection of the players, to issue a search warrant, in effect.

Mr. STEARNS. And that person walks around regularly all year round and inspects?

Mr. STERN. No. No, that person——

Mr. STEARNS. Well, how do you know he is getting any cooperative——

Mr. STERN. That person is like a privately selected judge, who, if we have reason to believe that a player——

Mr. STEARNS. How would you have reason to believe if you don't test? Intuition?

Mr. STERN. Well, no. I——

Mr. STEARNS. Tell me, how would you have reason to believe if you don't test?

Mr. HUNTER. By performance. Generally, what happens——

Mr. STEARNS. You can tell by performance of an athlete?

Mr. HUNTER. Yes, I think you can. I think clearly that when you deal with professional athletes, if you are a professional athlete, and with you all within that community, I assure you that there will be players, rumors occur. There is gossip around the league. Someone would say invariably——

Mr. STEARNS. So Mr. Hunter——

Mr. HUNTER. [continuing] "My man may be on something."

Mr. STEARNS. Okay. So Mr. Hunter, I could show you a year's worth of NBA games, and you could tell——

Mr. HUNTER. No, I didn't say me. I said that——

Mr. STEARNS. This person, this select person that Commissioner Stern said, that person could look at those films and determine whether he was on steroids or not?

Mr. HUNTER. No, I think you are misunderstanding what he is saying. What we are saying is we have an independent, arbiter mediator. Someone presents the evidence or the information to this in-

dividual. He then makes a determination if probable cause exists and then tests the player. The player is then randomly tested.

Mr. STEARNS. Okay.

Mr. HUNTER. So someone has to collect the evidence on the player—

Mr. STERN. Right, but Congressman, that is a sideline, just to make sure that you understood our policy. The broader question, we, the NBA, don't have a problem with a program approaching the WADA—

Mr. STEARNS. No, and that—

Mr. STERN. We absolutely hear—

Mr. STEARNS. I heard you in the beginning.

Mr. STERN. And it is not an issue for us. I think that there may be an issue. I think there are some unnecessary drugs tested for, but we don't have any issue with a WADA-like—

Mr. STEARNS. Commissioner, and I appreciate that. You were saying early on there are parts of the bill that you support, and I appreciate that. And Commissioner Selig has come out in support of the bill, and that might be because of frustration. Can I assume that you would support this bill if we looked at the areas that you were concerned about, namely penalties and we had established the testing procedures? Could I assume that you would endorse this bill?

Mr. STERN. Yes.

Mr. STEARNS. You know, not down to the "i"s and "t"s, but the concept. You are endorsing the bill today.

Mr. STERN. Yes, you know, obviously I support the bill concept subject to, obviously, there are regulations that are—

Mr. STEARNS. A few changes.

Mr. STERN. [continuing] going to be issued under it, and I have to see them.

Mr. STEARNS. Yes.

Mr. STERN. But let me say to you, as I said in my opening statement, that we fully expect whatever negotiated policy we come up with through this collective bargaining procedure to start our next season with a drug program that is far more comprehensive than set forth in the bill.

Mr. STEARNS. Much more rigorous.

Mr. STERN. So we support Congress's involvement here, and we support this legislation, subject to the issues that I have raised.

Mr. STEARNS. I will take that as an endorsement.

Mr. STERN. Yes.

Mr. STEARNS. Okay.

Mr. STERN. Well, I am an attorney, so I want to—

Mr. STEARNS. All right. Well, I am going to conclude. My time is over. But I just want to state, for the record, that 1999 is when you put in the program. There were 23 initial positive tests in the whole history of the NBA steroid policy. Only three satisfied the additional steps of a positive test. I don't know what those additional steps are. We can get into that later, but you know, the whole idea was that a reasonable medical explanation that was excusing all of these other 20 people because during that height from 1999 to 2005, to think there were only three positive tests would indicate, Mr. Hunter, that this was not a comprehensive, rigorous

program, because I think all of us agree that there are steroids in professional sports. And the way you test, I am not sure you are getting to the bottom line.

Mr. HUNTER. I don't share that agreement.

Mr. STEARNS. Okay. Okay. We will let it go.

My time is up.

Mr. STERN. No, and just let the record show that I am with Mr. Hunter on that.

Mr. STEARNS. All right.

Mr. STERN. Our testing process, we split the sample. The rights of the players are protected. The second sample has to come up, and then, if the player hasn't already been excluded by the league, our medical director does that. So I don't want to have a guilt by non-association—

Mr. STEARNS. No, I know. No. But I mean, just the statistics are a little bit over 6 years to see 23 initial positive tests and only 3 satisfy a real positive test. I mean, just considering everything, it is just a little difficult to comprehend that out of 6 years, out of all of these players, these rookies and these veterans, that. You know, I guess the question is what is a positive test with the NBA even after you test. I mean, Mr. Hunter said I am a little concerned about your testing procedures. It is not random. It is only during the training period. But I say, even withstanding that, I question even the reasonableness of your positive tests, is what I mean. And I will give you another chance.

Mr. HUNTER. But why is it so difficult to assume that basketball players may not need to use steroids?

Mr. STEARNS. I think it is reasonable to assume that if you don't test, you won't find out. And I will leave it at that.

The gentleman from Massachusetts is recognized.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Just so I can get an idea of the parameters of this, under the existing policy, how many players in the course of last season, how many veterans, were tested after the season began?

Mr. HUNTER. Everybody in the league was tested. Veterans—

Mr. MARKEY. After the season began?

Mr. HUNTER. No, in training camp.

Mr. MARKEY. No, no, after the season—

Mr. HUNTER. No, once the season began, there were no veterans tested.

Mr. MARKEY. Right. So the point is, what I think I heard is that you have a standard of gossip, rumor, innuendo that could trigger a test—

Mr. STERN. Or fact.

Mr. MARKEY. [continuing] or fact, in the course of a season.

Mr. HUNTER. Correct.

Mr. MARKEY. So how many veterans in the NBA were tested in the 2003/2004 season, based upon the standard that rumor, innuendo, or fact had been presented, which would justify that testing?

Mr. STERN. None.

Mr. MARKEY. None.

Mr. STERN. That is why we proposed in our collective bargaining, and Mr. Hunter has indicated, I think, sort of a broad, general area that will be fruitful, that the number of tests for veterans be in-

creased and to include the season so that we don't have a situation where the non-testing becomes an issue. We want to be able to resolve all of Congressman Stearns' doubts about our players and our testing whether or not we agree that just because the tests have been negative that somehow proves, some assume, guilt, we are prepared to step up, because of the importance of this subject to the kids and to our fans and do the testing.

Mr. MARKEY. Okay. Now, Mr. Hunter, let me ask you. Mr. Stern just indicated that you have broadly discussed——

Mr. STERN. I don't want to negotiate here.

Mr. MARKEY. [continuing] okay, I understand, I understand, that veterans should be tested during the season.

Mr. HUNTER. Yes.

Mr. MARKEY. By what standard should they be tested, and what should be the increase in the numbers of tests?

Mr. HUNTER. Well, I think that that is what Commissioner Stern is eluding to when he says he really doesn't want to get into the negotiations, because that is one of the issues that is on the table as to how many times a player should or should not be tested. But let me just refer to the bill that you proposed, because in your bill, you are proposing a minimum of one test per year. So I think we already meet that standard in that we test the veterans when they come to training camp in October.

Mr. MARKEY. Okay.

Mr. HUNTER. And we are now prepared to move beyond that. That is what things have evolved to.

Mr. MARKEY. Would you agree to at least one test randomly conducted during the course of the regular season?

Mr. HUNTER. Yes.

Mr. MARKEY. You would accept that?

Mr. HUNTER. Yes.

Mr. MARKEY. Okay. So that is the minimum. And so at least that has been negotiated.

Mr. HUNTER. But that is all your proposed bill calls for.

Mr. MARKEY. I understand, but it is not my bill, just so you know.

Mr. HUNTER. Okay.

Mr. MARKEY. Okay. So there may be those that are casting an even higher-arched eyebrow toward this area in whether or not basketball players take steroids in any lesser quantity than other sports do. That is an unknown area until we actually have testing.

Mr. STERN. Yes, but even in the phrasing, that is a very unusual way to put it, and I would just like to say that that, you know, we don't know whether basketball players take steroids, therefore we have the testing——

Mr. MARKEY. Right.

Mr. STERN. [continuing] not take any less than other sports.

Mr. MARKEY. I am saying we are in cognito. Because we don't have that testing during the regular season or the play-offs, we are not in a position to be able to answer it one way or the other. We will only be able to assess the comparative use to other sports after we have a regular season and play-off testing regime in place.

Mr. STERN. Correct. Correct.

Mr. MARKEY. And Mr. Hunter seems to be saying that basketball players are less likely to take steroids.

Mr. HUNTER. I think so. I really do. And that is my opinion.

Mr. MARKEY. And what we are saying is that, at this point, we really don't have the evidence in the regular season, because again, if you think about it, if a CBA player is under a rigorous testing regime, and you are pretty confident that the younger players are not taking drugs and an old veteran, during the course of the season, sees this kid down here who is playing well and you know he doesn't have drugs in him, he might just be tempted to keep a relatively high salary to take the drugs. Now I am saying, I don't know the answer, but no one else does, either, but it is important for us to remove the uncertainty.

Mr. HUNTER. Well, look, let me reference the Olympic team, for example. Our players were randomly tested. They had no idea when they were going to be tested, and these players were selected, they were tested, and not one of them tested positive for performance-enhancing drugs. So that is 15 that were selected for the Olympics. Not one tested positively, so I think that kind of dispels the whole theory that, you know, there has got to be a group of them out there that are using and if you test them, you are going to find it.

Mr. MARKEY. Well, the only way to dispel it would be to have an Olympic type testing regime for the NBA during the regular season and the play-offs. Then you could be confident. But until you do that, and as the all-stars that went into play for the Olympic knew that that was the precondition to them going into an Olympic environment, whereas right now all of the players know that the precondition to the regular season and the play-offs is that there is no testing. So that creates a completely different, you know, psychological environment for the players in terms of their relationship with these controlled substances. And until we have some kind of standard, which we put in place, then the deterrent is not there during the regular season and the play-offs.

Mr. STERN. Congressman Markey, I would just like to say that we want to have testing, because we ask our youngsters to admire our players, and we would like to demonstrate that that is not the case, not because our incumbents, so to speak, are concerned about the newcomers or, you know, not to prove or disprove some negative about it. That is a separate issue. I don't think that guilt by association with respect to athletics is a fair shot at our players. I think that what our players will be prepared to do, whether or not they take. You know, they are saying, "We don't take drugs, but because of who we are and what we want to stand for, we will submit to random testing." And I tell you that Mr. Hunter has said that. We are some place between, at least on the basis of this hearing, one and four, and I thank you for your assistance here, which Mr. Hunter told you he didn't need.

Mr. HUNTER. No, but just so the record is clear, Commissioner Stern and I have had those discussions, and I have agreed to a test. So—

Mr. STERN. Okay. But you know, how can we know if someone doesn't do something unless we test them? That is applicable to a broad range of occupations. And I just, you know, want to say that,

on behalf of NBA players, that is not why we are having testing. We are having testing because we want to stand as models for kids to see that you can't do this without testing.

Mr. MARKEY. And I very much appreciate that, and that should be the highest goal which we have. But you can also imagine some younger kid who is being tested, he is 21 or 22 years old, and he is clean, and now he gets into the NBA and he is 23 or 24 and he knows he is not going to be tested all season long. Now the pressure is there for all of those younger people, and we are talking about hundreds of younger people, and again, we don't know the answer to this question unless and until there is a rigorous testing regime put in place, or these young people's health may be put in jeopardy. And while we do care about the general young population in the country having examples set for them, which would be deleterious to their health, but we also care about these several hundred young people, who, over a couple of years, are entering the NBA clean, but now put under tremendous pressure in order to maintain a competitive edge against older veterans to have to do the same thing that those older veterans do.

Now Mr. Hunter says that they don't do it.

Mr. HUNTER. I am convinced they don't do it.

Mr. MARKEY. And I am saying you may be right, but there is no empirical basis for your argument. It is a conclusion, which you have reached based upon your life's experience, but until we do test, we are not going to know the answer. And I appreciate, honestly, Mr. Hunter, you and Mr. Stern coming here today, because it is helping us to formulate a correct policy. And we are still working on it on the committee as well what would be the right set of policies across leagues to legislate, and we are not finished with the process yet, but I congratulate you, Mr. Chairman, for holding these hearings. And I thank you, Mr. Commissioner and Mr. Hunter, for coming here.

Mr. STERN. And as I said earlier, we applaud the committee for being engaged in this. We think it is a terrific idea. Thank you.

Mr. STEARNS. I thank the gentleman.

The full Committee Chairman, Mr. Barton, from Texas.

Chairman BARTON. Thank you, Mr. Chairman.

I, too, want to commend both of you gentleman for testifying voluntarily, and especially you, Commissioner Stern, while the play-offs are going on and I know you have got a busy schedule, making arrangements to come this afternoon.

I want to let you know that Mr. Markey is an all-star in our Congressional basketball league.

Mr. MARKEY. Mr. Stern has seen me play basketball, so I think should have a right to revise—

Mr. STERN. He is available.

Chairman BARTON. He used to be. I don't think the bonus to signing would be all that large, and there are some days that I would rather see him on the court than in the committee room, so—

Mr. MARKEY. The older I get, the better I was. I mean, that is the rule for most people in my category.

Chairman BARTON. I have two questions for you gentlemen.

I don't want to pound a dead horse, but both Mr. Stearns and Mr. Markey have talked about the fact that under current testing procedures, your veteran players aren't tested during the season, but I also understand that you all are willing to change that policy. Can we say that the NBA and the Players Association is supportive of a year-round testing program?

Mr. STERN. On behalf of the NBA, I say to you, you can say that.

Chairman BARTON. Okay. Mr. Hunter?

Mr. HUNTER. Well, we are in the process of negotiating, and unfortunately, I am not prepared to negotiate a deal here.

Chairman BARTON. Well, if we pass a Federal law telling you you have to do it—

Mr. HUNTER. Well, my position—

Chairman BARTON. I understand the collective bargaining—

Mr. HUNTER. Well, no, my position is the same as Commissioner Stern's. If you pass the law, I can assure you we are going to abide by it.

Chairman BARTON. Well, you can be assured that the law is going to require year-round testing programs. So it would be helpful for you, especially you, Mr. Hunter, in your political situation. I mean, we all get elected. I understand that. Your constituency probably doesn't want to do that. You might tell them that Chairman Barton said they were going to have to do it. So if that helps your position with Mr. Stern and you can make me the black hat guy on that one. But all of the other professional sports have agreed to year-round testing. That is what they do. You know, some of the international agencies. And I understand where you and your group are coming from, but you know, that is going to be a component of the bill.

Mr. HUNTER. No, I understand your position, and I sort of concluded coming here that that was your position.

Chairman BARTON. Okay. My second question, and it is a little bit similar to the first question, I think we have support on the committee that the testing agency be independent and that it be the same for all sports. I was listening in my office, watching on television when each of you gave your oral testimony. I understand that your current testing agency are retired law enforcement agencies, and I am sure that they do have integrity. I am not doubting that. But do you have an official position on using the independent agency that would be universally used by all of the professional sports?

Mr. STERN. On the behalf of the NBA, I don't have any objection to that, subject to our having access to check their reliability, because to me, the rights of the individual players tested are important, and we make sure, through a chain of custody, that a sample taken is a sample tested. But subject to our being able to assure the fairness of such a procedure, we have no problem with that.

Chairman BARTON. Mr. Hunter?

Mr. HUNTER. I am in agreement.

Chairman BARTON. Okay. That is all my questions, Mr. Chairman. I appreciate it. I do want to commend you all again, each of you, and say, as a fan who went to the Mavericks-Suns game in Dallas Sunday evening, you have got a great product, and we want

to help keep it great through some of these testing regimes that maintain the integrity and the confidence of the fans.

Mr. STERN. I think that you and Chairman Stearns, both of whom have teams still remaining in the play-offs—

Chairman BARTON. Unlike Mr. Markey.

Mr. STERN. [continuing] are rubbing it into Congressman Markey, but that is quite okay.

Chairman BARTON. Well, he has the New England Patriots football team as world champions, and that baseball team up there is world champions of the World Series, so he is not doing bad.

Mr. STERN. But he is really a Celtic fan at heart, I know that.

Mr. MARKEY. Yes, the Commissioner is correct.

Chairman BARTON. We wouldn't mind the Mavericks-Suns game being a little bit earlier in the evening. If you can do something about that.

Mr. STERN. You, too.

Chairman BARTON. Thank you, Mr. Chairman.

Mr. STEARNS. Thank you, Mr. Chairman.

The gentleman, Mr. Terry.

Mr. TERRY. Thank you.

And again, thank you all for being here.

Mr. STEARNS. Mr. Terry, I am sorry. I beg your pardon. Ranking Member Schakowsky is here. I am sorry.

Ms. SCHAKOWSKY. Actually, I don't have questions.

I do want to just say that in Chicago, we are prouder of the Bulls than we have been for a long time, and I want to thank both of you for coming. I appreciate your input. I wasn't here, but I have read your testimony, and we will work with, Mr. Stern, to consider your input as we move forward.

So thank you very much.

Mr. STEARNS. Thank you, Congresswoman Schakowsky.

And Mr. Terry.

Mr. TERRY. Just for clarity in the record, picking up on your comments in the answers to the questions, is it a fair statement to say under the current policies of the NBA that your policy is less restrictive than what is proposed in the chairman's bill H.R. 1862?

Mr. HUNTER. Yes.

Mr. TERRY. You think so, Mr. Hunter. How about you, Mr. Stern?

Mr. STERN. It is actually in some ways less restrictive and in some ways more restrictive, because we test rookies potentially four times a year randomly. So it is actually more restrictive for them. It is less restrictive for veterans who we test randomly only in training.

Mr. TERRY. It appears, from Mr. Hunter's answers, that you are moving into an area where it is substantially similar to what the chairman has drafted, at least your negotiations. And I am just curious of where you are in the negotiations, what your time table is, and do you feel that at the completion of the negotiations that it will be substantially similar to what the chairman has proposed or maybe even more restrictive? Mr. Hunter?

Mr. HUNTER. I am going to defer to Commissioner Stern on that one, please.

Mr. STERN. I would say that in any new collective bargaining agreement that we have, as to testing regime, it will be more re-

strictive. As to penalties, it depends upon the outcome of where you place the penalty for the first negative testing.

Mr. TERRY. Okay. I appreciate that.

Mr. STERN. Oh, positive test. I am sorry, the first positive test. And that is why we commented upon that part of the—

Mr. TERRY. Commissioner Stern, it just peaks my curiosity. I wanted to ask this to the prior panel but just didn't have the time. As a Commissioner, would it be advantageous to the Players Association or to the league in itself to remove the drug testing issue from collective bargaining, i.e. we have a law, therefore it is not an item to be on the table? It just seems odd to me that you negotiate back and forth on a drug policy and maybe, you know, give up. You know, as just a general sports fan, you know, "Gee, we will agree to one more test if you lift the cap or the salary caps X amount or we allow the rookies to be paid more," or whatever it would be. It just seems odd that that is something to be negotiated as opposed to taken off the table by a national law.

Mr. STERN. If that were the dynamic, I would agree with you, but suffice it to say, in my experience, which encompasses our initial agreement in 1983 and each subsequent collective bargaining agreement, on the subject of drugs, the players and the owners were very much on the same side of the table. You could disagree about the scope of the program based upon issues of privacy, rights, and the like, but it was never a question of if you raise our per diem, we will give you more drug tests. It was always what is fair. In 1983, our union said, "We have got issues with drugs of abuse, and if we catch somebody using them, they should be permanently barred from our league." You know, but if they come forward, we should treat them and actually pay them their salaries. And we had the first, in effect, employee assistance program really at a time when professional sports were viewed as being at the hub of it. It turned out in subsequent years that drugs of abuse became the center of our foreign policy, our professions, and a lot of other places. So I think our players and their union have been exemplary in dealing with this subject, just on its merits. And I respect the differences that they might have about the number of intrusions or about, on the subject of year-round testing, because we have a very long season, perhaps as long as October 1 to June something, that players who want to go away on vacation might not have a knock on the door in the Alps—

Mr. TERRY. Well, Mr. Hunter, I will back you up a little bit. I am not a huge NBA fan, but I do pay attention to what goes on in the sport, as in football and Major League Baseball. Unlike Major League Baseball where it was obvious to even the casual fans what was going on, and it was completely ignored by the owners in the league, you don't see that in the NBA. So I will say, at least for the innuendo and the casual sports fan, you don't see basketball players all of a sudden bulking up from one season to the next at an incredible rate. So that was Major League's obvious dirty little secret. I don't see that in the NBA, so you guys must be doing a decent job.

But the chairman does raise a good point, and Mr. Markey, that empirically, you need to have that type of testing. We rely on the numbers, not innuendoes. I appreciate it.

One last party shot, though. Just as a casual fan, drafting high school students is an issue and a problem. I will yield back.

Mr. STEARNS. I thank the gentleman.

We are getting ready to close, so I am just going to take the liberty, as chairman, just to ask one more question and then ask Mr. Hunter to clarify something that you and I talked about.

The question for Commissioner Stern is the Women's National Basketball Association, should what we have in the men's be also applicable to the women's?

Mr. STERN. I think it should be applicable. I wouldn't want to discriminate against the women. I think it should be applicable to all professional sports.

Mr. STEARNS. So the same thing that is adopted in the NBA should be adopted in the Women's NBA?

Mr. STERN. Correct, and we currently do have random testing in the WNBA.

Mr. STEARNS. And is it for the women's the same as for the men's where it is just tested during the training camp only? And do you do veterans different than the newcomers, the rookies?

Mr. STERN. I believe that there is one more test, random test during the season for the WNBA.

Mr. STEARNS. So you are saying it is—

Mr. STERN. I think it complies with this, because it had a different cycle of collective bargaining. Its collective bargaining agreement was entered into between the last one that we are operating under and the one we are hopeful to be operating under.

Mr. STEARNS. So today it looks like the Women's NBA has a tougher standard than the men's right now?

Mr. STERN. It is ahead of the NBA in many ways.

Mr. STEARNS. Okay. It is ahead. All right. And we establish that.

Mr. Hunter, I am going to just go back to my question here, and this is from your opening statement. You state that of the 23 initial positive tests in the history of the NBA's steroid policy only three satisfied the additional steps of a positive test. What are the additional steps, and what were the reasonable medical explanations that were excused by the medical doctor? And if you don't know, we can have you—

Mr. HUNTER. Well, let me give you my best understanding.

When we refer to the 23, what we are saying is that at least 20 of those tests were individuals who were terminated. So these were guys who, when they were in training camp, they tested positive, but they didn't make the team.

Mr. STEARNS. Oh, so—

Mr. HUNTER. So they were gone. They were out of the league.

Mr. STEARNS. Okay.

Mr. HUNTER. Three actually made the team.

Mr. STEARNS. All right.

Mr. HUNTER. Or these were players who—

Mr. STEARNS. That is good to clarify.

Mr. HUNTER. Right.

Mr. STEARNS. Okay.

Mr. HUNTER. And then relative to those three, you actually do what is called an A and a B sample. So the first time, the test comes back positive, and then what you do is you test it again to

ensure that the lab got the correct results. So it was affirmed in each of those three cases. And I believe in at least two of them, the players were taking prescription medicine that they had received from a physician.

Mr. STEARNS. So all three were excused because they were taking prescriptions?

Mr. HUNTER. No, they were suspended.

Mr. STEARNS. They were suspended?

Mr. HUNTER. That is correct.

Mr. STEARNS. And they were taking prescription medicine?

Mr. HUNTER. Yes.

Mr. STERN. And seven of the tests positive were for Sudafed, and they—

Mr. STEARNS. So have you ever gotten a test positive for steroids?

Mr. STERN. Yes, there were three. Those three that were suspended—

Mr. STEARNS. But he was saying they were prescription drugs.

Mr. STERN. But they were suspended.

Mr. STEARNS. So the question is those three were not for steroids? They were for prescription drugs?

Mr. HUNTER. No, I think within whatever it was they were taking, there was ephedrine or something that showed up.

Mr. STEARNS. But they were not steroids?

Mr. HUNTER. No, they were not steroids.

Mr. STEARNS. So what you are telling me is that from 1999 to 2005, out of all of your tests, you never got steroids?

Mr. STERN. No, that is incorrect. There were three steroid positive tests, as we both testified to. They were clearly steroids. And so—

Mr. STEARNS. Not prescription drugs?

Mr. STERN. Not prescription drugs.

Mr. STEARNS. Okay. They were steroids.

Mr. STERN. They were steroids. And seven of the initial tests were for Sudafed. They were medically excused. And in the others, the players were dismissed or left the NBA voluntarily and never played again, so there was no need to further deal with the subject.

Mr. STEARNS. Okay. So that answers the question. What were the reasonable medical explanations that were excused by the medical doctor?

Mr. STERN. Sudafed.

Mr. STEARNS. Sudafed. Okay.

Let me ask the last question, Commissioner Stern. You have touched about it in your opening statement about the unusual strict liability standard that is applicable to drug testing policies. A player can commit a violation unknowingly by, for example, ingesting a tainted nutritional supplement that is legally sold over the counter. And that is pretty strict then, because they have strict liabilities, all of the players.

Mr. STERN. Yes, they do.

Mr. STEARNS. So even if it is tainted, they still are disciplined?

Mr. STERN. They are disciplined. If it turns up, they are disciplined, and that is the way it is in H.R. 1862—

Mr. STEARNS. That is right.

Mr. STERN. [continuing] which does not incorporate even the exceptions under the WADA legislation for, you know, possible amelioration based upon external circumstances like that. And I would urge the Congress to consider stronger legislation with respect to nutritional supplements, which would help us with that problem.

Mr. STEARNS. Well, I think I have completed my questions, and I want to thank both of you for taking up your time. We got through a lot quicker than I thought, and so I would now announce to the rest of the members we are going to have a hearing. It is going to reconvene tomorrow at 10 a.m. with our third panel. And with that, I thank the witnesses.

Mr. STERN. Thank you.

[Whereupon, at 3:44 p.m., the subcommittee was adjourned.]

THE DRUG FREE SPORTS ACT OF 2005

THURSDAY, MAY 19, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2123 of the Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Upton, Cubin, Radanovich, Bass, Pitts, Bono, Terry, Ferguson, Rogers, Otter, Myrick, Murphy, Blackburn, Barton (ex officio), Schakowsky, Markey, Towns, Rush, Green, and Baldwin.

Staff present: Bud Albright, staff director; Andy Black, deputy staff director; David Cavicke, chief counsel; Chris Leahy, policy coordinator; Brian McCullough, professional staff; Will Carty, professional staff; Billy Harvard, clerk; Kevin Schweers, communication director; Jonathan Cordone, minority counsel; Turney Hall, staff assistant; and David Vogel, staff assistant.

Mr. STEARNS. Good morning, everybody. The subcommittee will come to order, and I want to welcome our third panel in the continuing hearing we have had on steroids, and all of you know that we had two panels yesterday, and we had our opening statements, so the third panel is fortunate not to hear us again in our opening statements.

We want to welcome the Commissioner Paul Tagliabue, the Commissioner of the National Football League. I guess you are accompanied by Harold Henderson. Mr. Henderson, welcome. He is the Executive Vice President of Labor Relations, and of course, Gene Upshaw, the Executive Director of the National Football League Players Association.

I know both of you, Mr. Upshaw and Mr. Tagliabue, you came from China, and I think you just recently gave your—the Upshaw Award, which we are all very impressed, and secretly desire to have some day in our afterlife. We will have to live with our present position. So with that, let me ask you to give your opening statement, and then we will have some questions for you.

So Commissioner, we will start with you.

Mr. TAGLIABUE. Thank you. Is this on?

Mr. STEARNS. Just need to put your mike on.

STATEMENTS OF PAUL TAGLIABUE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE, ACCOMPANIED BY HAROLD HENDERSON, EXECUTIVE VICE PRESIDENT, LABOR RELATIONS, NATIONAL FOOTBALL LEAGUE; AND GENE UPSHAW, NATIONAL DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

Mr. TAGLIABUE. Thank you, Mr. Chairman, and members of the subcommittee.

We very much appreciate the chance to appear here today and speak with the committee about these very important subjects. We strongly support the principle of drug free sports. I believe that has been clear in our policies for almost 20 years, and for us, as I think it is for the committee, the critical question is how best to accomplish this in the years ahead.

The subcommittee has properly focused on the key concerns, the health of athletes who use these substances, the values that are promoted or debased by the use or abuse of these substances, and the proper roles of government and the private sector in combating their use.

For two decades, we in the NFL have had very strong programs in place to eliminate from all of our teams the use of performance-enhancing drugs. My predecessor, Pete Rozelle, took the lead on this in the years 1986 through 1989, and I inherited his policies, and have been able to expand them beginning in 1990, with strong support from the NFL Players Association, through Mr. Upshaw and his Executive Committee.

Obviously, outside of professional sports, there are severe problems in this area, with the availability of these substances and their use and abuse by young people, and I am well aware of the committee's concerns that when we are talking about the high schools and other schools and youth organizations, it is a very difficult problem to address because of the limitations of resources that they have at that level and the cost of dealing with some of these programs, but we strongly feel that criminal prosecution is appropriate in those areas for people who are supplying these types of substances illegally, and in that manner, the issue can be addressed for all of society, not just for professional sports.

I think the committee knows our program quite well, so I don't have to reiterate all of that. Just to summarize, we conduct more than 9,000 tests a year for steroids and other prohibited substances. These include mandatory, unannounced tests for all players during training camp, random, unannounced tests of seven players on each of the League's teams each week. Players are notified, without any prior warning, that they should test, and they do so. If they refuse to do so, they are subject to suspension. We conduct approximately 1,600 tests during the off-season, and players are required to register with our program, to indicate where they will be if they will not be at their principal place of residence, and they are subject to unannounced, random testing on that basis.

Our program is independently managed and supervised. When a player is suspended, I read about it in the newspaper. That is when I learn. We have a program medical advisor, who is a leading member of the faculty at Ohio State University, who selects the players for random testing. It is his independent judgment, done on

a computer-based selection system. No representative of the League, my office, Mr. Upshaw's office, or any team, has any role whatsoever in determining who will be tested, or in determining when a test is positive. Once a violation is confirmed by the program managers and advisors, discipline is imposed, subject to a player's right of appeal.

Teams have no notice that one of their players has tested positive until the player has been notified of the confirmed positive test and of the disciplinary action. Our penalties are severe. For a first offense, the minimum suspension is for 25 percent of the season, four out of sixteen regular season games. In other leagues, this would be the equivalent of a 20 to 40 game suspension. If a suspension begins late in the season, it carries into the playoffs. If the suspension—if an offense occurs during the preseason, we suspend during the regular season, so that the penalty is effective by taking the player out of competition when the games count, rather than during the preseason, when the games do not count in the standings.

In addition to these penalties, financial penalties, a player who once tests positive is subject to reasonable cause testing 24 times a year on an unannounced basis, and the combination of the suspension without pay and the subsequent testing 24 times a year on an unannounced basis has made our discipline very effective. We have suspended 54 players, and in only two cases was there—has there ever been a repeat, and in those two cases, the player chose to retire rather than to continue his career.

We understand the elements of the bill and the committee's interest in uniform national legislation. We would, as I say, support the principle of drug free sport, but in our judgment H.R. 1862, as drafted, is not appropriate to be enacted in its present form. At least as it applies to the NFL, we feel that it is unnecessary, but we recognize the committee's feeling that legislation is appropriate, and there are several areas that we think clarification would be very important.

First of all, the relationship of this legislation to the National Labor Relations Act. We think that the way the bill is written, it could easily be construed as superseding and effectively repealing the NLRA when it comes to collectively bargained programs in professional sports, and we think that would be unfortunate. Second, we think that the legislation inappropriately turns over to an international agency, the World Anti-Doping Agency, a key Federal policymaking function that can best be handled by the National Institute of Drug Abuse within NIH. Over the years, we have worked with NIH on these programs, NIDA. As you know, the NIDA implements Federal policy and programs in this area with respect to other industries, including transportation and the Federal workplace. And we think that the NIDA would be the appropriate agency here, not an organization located in Montreal, which is primarily responsible to another organization located in Switzerland, when it comes to making this legislation both effective and consistent with U.S. legal principles.

So I would be pleased to discuss with the chairman and the other members of the committee other aspects of the bill. But let me step back and just comment on the NIDA point. We are running a busi-

ness. This is a critically important function for us to preserve the integrity of our games. We manage other critically important functions. For instance, as the committee knows, we are responsible for stadium security in the face of potential terrorist attacks or attacks by deranged individuals. We do this very conscientiously and very carefully. We are responsible for the integrity of our games, to ensure that there is no influence of any gambling or any other untoward influence on the integrity of our games. We hire staff. We have worked with FBI in those areas. So we manage very well and very conscientiously critical functions, and we think we can manage this critical function as well.

To turn this over, as I say, to—the critical aspect to the World Anti-Doping Agency, which is responsible to more than 150 nations, as I understand it, and many dozens of different sports with different interests, some of those sports' interests being directly or indirectly competitive with our own interests, we think is inappropriate for multiple reasons. We have great respect for WADA and for the IOC, but we also know that we were there with these testing programs effectively in the early 1990's before WADA even existed, and at a time when the IOC was not handling these issues particularly well, so we think it is a little bit anomalous, to say the least, that we should now be obligated to follow their lead, and turn over this aspect of our program to that organization operating on an extraterritorial basis.

In terms of independence, I have read that some people say that, you know, the League has a conflict of interest in this area. I don't understand that. We have a program that is outsourced to, in the first instance, the IOC-certified lab at UCLA. The second step of the function is handled independently by our medical advisor at Ohio State University. The third phase of our function, in terms of toxicology and proof of actual positive test, is handled by another leading forensic expert in Utah. I do not play a role in those determinations. The teams do not play a role, and most importantly of all, it is not about me personally or about the team ownership. It is about the fact that, as Commissioner, I have no stake in keeping players on the field. I have no stake in who wins a game, or who qualifies for the playoffs, or who gets to the Super Bowl. My stake is in the integrity of the game.

When I am in a room with 32 owners, 32 coaches, I know that each of them wants to get to the Super Bowl. I am indifferent on that matter. I don't care who gets to the Super Bowl. My job is to be neutral, and to ensure the integrity of our game, whether it is from untoward influences having to do with potential gambling, or whether it is from substance abuse with performance-enhancing substances.

So, Mr. Chairman and members of the committee, I will wrap up by saying that we strongly support the principle of drug free sport. I think that we are unique in having a 20 year track record which demonstrates that, and we understand the committee's interest in putting some more teeth into national policy in this area, and if the committee concludes that legislation is necessary, we would look forward to continuing to work with the committee on the specifics of the legislation.

[The prepared statement of Paul Tagliabue follows:]

PREPARED STATEMENT OF PAUL TAGLIABUE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE AND HAROLD HENDERSON, EXECUTIVE VICE PRESIDENT-LABOR RELATIONS, NATIONAL FOOTBALL LEAGUE

Chairman Stearns and Members of the Subcommittee: The issue that the Subcommittee is considering today—the use of steroids and other performance-enhancing drugs in professional sports—is an important one that merits thoughtful attention by Congress. It is an issue that spans a wide range of concerns: the health of athletes who use these substances, the values that are promoted or debased by the use of these substances, and the proper roles of government and the private sector in combating their use.

For two decades, the National Football League (“NFL”) has had very strong programs in place to eliminate from all teams the use of performance-enhancing drugs. No one in the medical, scientific, research or sports community has had all the answers. But we have invested in research and development and we have worked with leading institutions, top scientists and others to seek to stay ahead of an ever-changing curve. The NFL’s policies, which have included prompt and stiff sanctions for violators, have addressed these issues in a firm and constructive way. Today the quickening pace of new developments in medicine and science, including genetics, heightens the challenges that we all face.

In these efforts, we have had strong support and active participation in all of our programs by the NFL Players Association (“NFLPA”), the collective bargaining representative of NFL players. Together, we intend to continue to have very strong policies and programs to deal with the scientific, medical, ethical, competitive and legal questions likely to result from the ever-escalating availability of body-changing, performance-enhancing, and eventually even gene-altering substances in our society.

We have produced to the Subcommittee detailed information about the structure and operation of our program.

Outside of professional sports, the availability and the use of steroids and other performance-enhancing substances continues to be a severe problem. These issues need to be addressed by effective criminal and regulatory prohibitions and by the prosecution and punishment of those who continue to make such substances readily available in our society, including to young people. This is particularly important when institutions such as high schools and other youth organizations do not have the resources necessary to address these challenges.

1. THE NFL’S PROGRAM ON ANABOLIC STEROIDS AND PERFORMANCE-ENHANCING SUBSTANCES.

More than twenty years ago, in 1983, Commissioner Pete Rozelle notified all NFL players that anabolic steroids fell squarely within the League’s prohibitions against the abuse of drugs and that steroids had serious adverse health effects. In 1987 and 1988, the League began testing for steroids to obtain a documented understanding of the extent of steroid use among NFL players. And in 1989, the NFL instituted discipline for steroid use, with heavy suspensions imposed on players testing positive for these substances.

In testimony given in May 1989 to the Senate Judiciary Committee, Commissioner Rozelle explained the basis for the League’s more stringent approach:

“The fundamental responsibility of [the Commissioner] is to protect, as best he can, the integrity of the game he oversees and the public’s confidence in it. In my view, steroid use both threatens that integrity and confidence and presents other significant problems as well.

“Our measures are designed to promote common sense, fair play, and good health. If they do no more than generate an increased awareness among athletes at all levels of the potential risks of using steroids, our program will have been a modest success. . . . [But] we hope our new measures will be a much larger success, and a significant step toward eradicating these drugs from our sport.”

In August 1989, Commissioner Rozelle issued the first suspensions of NFL players for positive tests for steroids, and a Federal Court in the Nation’s Capital upheld the suspensions as within the Commissioner’s authority under the collectively-bargained disciplinary principles then in place in the League.

In the NFL’s submission to the Federal Court in support of that ruling, the League underscored the negative health and competitive aspects of steroid use for NFL players, and also emphasized the responsibility of the League and its players to set a proper example for America’s youth on these matters. In part, the League’s submission explained:

“[F]ans cannot be expected to purchase tickets to games tainted by steroids. [In addition,] the image of the NFL and its players is critically important to the

young people of our Nation who, for good or ill, emulate their sports heroes. Commissioner Rozelle's affidavit explains the basis for this concern, and makes reference to arbitration and court decisions that underscore its legitimacy. In this connection, it is not surprising that the NFL Players Association has never challenged the importance of maintaining the image of the NFL or of NFL players."

Shortly after becoming Commissioner in late 1989, Commissioner Tagliabue instituted a number of changes in the League's substance abuse programs and relationships. These changes took account of the need for greater investment in specialized resources and increasingly varied and sophisticated testing techniques in order to deal with the growing array of substances that were creating both competitive issues and adverse health effects for NFL players. These changes included year-round random, unannounced testing for all players; retaining new medical and scientific advisors to oversee the administration of the policy; and moving the testing to two laboratories certified by the International Olympic Committee. All of our testing is now at the WADA-certified lab at UCLA.

In 1993, the key elements of the League's program were agreed to by the NFL Players Association in collective bargaining. Since then, the League and the NFLPA have met regularly to review the workings of the program and ensure that we remain proactive in responding to developments in science and technology, doping control research and the policies of other organizations. For example, in 1997, we added a number of steroid precursors to the list of banned substances, including androstenedione and DHEA. The former was not made a controlled substance by Congress until last year; the latter remains a legal substance.

In December 2000, the Program's jointly-retained medical advisor, Dr. John Lombardo, issued a "Health Alert" to all NFL players regarding Ephedra. We began testing for it in 2001, and discipline was imposed for any positive Ephedra test starting in 2002. As a result of a recent federal court decision, the status of Ephedra under FDA regulations is uncertain.

We have also pioneered the use of new and improved testing techniques. As new types of so-called "designer drugs" are discovered, we move promptly to address them. For example, when the designer steroid THG was identified in 2003, the League re-tested more than 2000 urine specimens—every specimen in the UCLA lab's possession—to ensure that no significant use of this substance would avoid detection and disclosure. And our policy has from the outset incorporated a "related substances" provision, to ensure that minor chemical changes do not escape the prohibitions of our program. This longstanding feature of our program is reflected in the WADA and United States Anti-Doping Agency ("USADA") guidelines.

We have continued our policy of investing in research and development by entering into a partnership with the USADA to establish a new laboratory at the Center for Human Toxicology at the University of Utah. We expect this laboratory to be operational later this year, and once it receives appropriate certification, it will be available to professional and amateur sports organizations for both testing and research.

This process of continual examination and improvement has continued into 2005. In our most recent meetings, the League and the NFLPA agreed to the following improvements in our program dealing with performance-enhancing substances, which will take effect this season:

- To reduce the threshold for a positive Testosterone test from the current 6:1 Testosterone/Epitestosterone ratio to a ratio of 4:1. This is the standard adopted by the WADA earlier this year.
- To increase number of times a player can be randomly tested during the offseason from 2 to 6.
- To add additional substances to the list of banned substances.
- To codify the League's ability to re-test specimens for designer steroids and other substances that may have evaded detection.

Under our current program, more than 9000 tests for steroids and other prohibited substances are conducted each year. These include a mandatory unannounced test for all players during training camp; random, unannounced tests of seven players on each of the League's 32 teams each week throughout the preseason and regular season; weekly, random, unannounced tests of each playoff team through the Super Bowl; and approximately 1600 offseason tests which, like the regular season tests, are conducted on a random, unannounced basis. The selection of players for random testing is determined independently by the Program's Medical Advisor, who uses a computer-based selection system specially designed for this purpose. No representative of the NFL, the NFLPA, or any NFL team has any role whatsoever in determining who will be tested. No representative from any team has any role in determining when a test is positive; once a violation is confirmed, discipline is im-

posed, subject to a player's right of appeal; and teams have no notice that one of their players has tested positive until the player has been notified of disciplinary action.

In this respect, it is important to understand what a four-game suspension, which has been the discipline for first offense, means in the NFL. It takes the player entirely out of the lineup—and out of the locker room—for one-quarter of our regular season. In other leagues, this would be the equivalent of a 20 or 40 game suspension. If a suspension begins late in the season, it will carry into the playoffs. Any suspended player likewise loses a quarter of his annual salary. Suspended players also may be required to forfeit some or all of their signing bonuses. And insofar as they have the opportunity to earn performance bonuses, a loss of four games will almost certainly place those performance targets out of reach.

In addition to these penalties, a player who tests positive is subject to reasonable cause testing on an unannounced basis 24 times a year. One indication of the effectiveness of this combination of measures is that we have only had two players test positive a second time; both chose to retire rather than accept an even longer suspension and the accompanying public embarrassment.

2. GROWTH HORMONE AND TESTOSTERONE.

Two other matters related to the scope and effectiveness of the League's testing programs also deserve mention. The key issues here relate to current limitations of testing science and laboratory capabilities.

The first is the subject of Human Growth Hormone ("HGH"). We have prohibited this substance since 1991. Currently, there is no readily available urine test for HGH. A blood test was first used at last summer's Olympic games in Athens, where 300 of the more than 11,000 athletes who competed in the Games were tested. No athlete tested positive. Currently, no lab in the United States is certified by WADA to conduct these tests, although we are advised that this will certainly change, and perhaps soon. We are currently evaluating our next steps with respect to growth hormone and will continue to consult with experts in the field, including those associated with other leading sports organizations. As scientific developments warrant, we will be prepared to adjust our own policies, as we have consistently done in the past.

The second matter involves Testosterone and the Carolina situation that has been in the media in recent weeks. If, as has been suggested, players were using substances for which no test was available, or were using a substance at levels that were calibrated to escape detection under existing NFL test protocols, they would have avoided a positive test under either our program or those administered by other leading sports anti-doping organizations.

These matters are under investigation by both our office and by Federal law enforcement authorities. We are proceeding deliberately and with due respect for the government's investigation. Until those reviews conclude, it is inappropriate to comment on the specifics of any individual player.

Currently, we are addressing testosterone issues in two respects. First, to take account of the evolving consensus as to test protocols for the Testosterone/Epitestosterone ratio, we are lowering the threshold for a positive test from a ratio of 6:1 to a ratio of 4:1. Second, we are developing a program to review player tests over time to identify unusual changes in player T:E ratios, even if they are below the 4:1 threshold. Significant deviations would then result in more detailed medical review, reasonable cause testing and other responses.

3. SUMMARY OF THE NFL'S VIEWS ON H.R. 1862.

We understand that a principal reason for these hearings is to consider whether a uniform national policy should be put in place to govern testing and discipline by professional sports organizations for any abuse of steroids and other performance-enhancing substances. We have carefully reviewed H.R. 1862, and would respectfully urge that it not be enacted into law in its present form. We believe that the bill, at least insofar as it relates to the National Football League, is unnecessary; that it would unwisely supercede and effectively repeal the National Labor Relations Act and the authority of the National Labor Relations Board over important terms and conditions of player employment in professional sports; and that it potentially risks undermining the effectiveness of the anti-substance abuse programs that we have had in place for more than 15 years.

The bill would not improve upon the NFL's current program. We test for a broad list of steroids, other performance-enhancing drugs, and masking agents. We review our program regularly and revise it on an annual basis. Our testing protocols are administered by an independent, jointly retained physician who is not employed by

the NFL or any NFL team. All of our testing is performed at the UCLA Olympic Laboratory—an independent lab that is certified by the WADA and other major certifying bodies. We have year-round random testing in the NFL with substantial penalties for players who test positive. While the WADA recently cut its out-of-competition testing in half for Olympic athletes, we have expanded the number of off-season tests to which NFL Players are subject. Unlike WADA, we do not distinguish between in-season and out-of-season by permitting the use of certain substances in the off-season but prohibiting them during the season. In short, the drug testing program in the NFL is not a “problem” that needs federal legislation in order to be “fixed.”

In several respects, we believe that a federalized drug testing program is less desirable than the collectively-bargained approach that exists in the NFL. First, we do not believe there is any demonstrated basis for supplanting collective bargaining as the appropriate means for addressing these issues. If any professional sports organization believes it has been faced with a refusal to bargain in good faith on these issues, it should seek relief before the National Labor Relations Board as federal law provides.

Second, a uniform system for all sports will necessarily fail to account for the differences among sports organizations in structure, length of season, number of players, average career length, and program cost. One risk is that the uniform program will have a “least common denominator” element that actually lowers standards in some sports leagues. As one example, the bill would only require that players be tested once per year. Under our policy, some players are randomly tested as often as 10 times a season—far more than would be required under the bill. Over time, this provision may thus become a basis for viewing less comprehensive testing programs as effective, or for lowering the current level of testing or otherwise diluting the terms of the current collectively-bargained program.

Third, our collectively-bargained approach allows for a more rapid and certain response to developments in doping and anti-doping technology. As one example, in 1997, the NFL and NFLPA agreed to include Androstenedione as a banned substance. Players testing positive for Andro were suspended. But it was not until 2004 that Congress designated Andro as a controlled substance. Had we been required to wait for the Secretary of Commerce to make such a determination, as Section 3 of H.R. 1862 appears to contemplate, NFL players might have been able to use Andro without penalty for years longer than was the case under our current program. The Secretary is obligated to follow traditional rulemaking procedures, meaning that the process can be cumbersome and protracted, particularly when compared to the process by which the NFL and NFLPA have expanded the list of banned substances over the past decade.

A second such example involves Ephedra. As noted earlier in my statement, the NFL and NFLPA determined to include Ephedra as a prohibited substance at the start of the 2001 season. NFL players testing positive for Ephedra are suspended. The FDA eventually implemented a ban on Ephedra but its rules were sharply limited by a federal judge’s decision last month. Agreements between the NFL and the Players Association are not subject to these kinds of court challenges. Indeed, under the National Labor Relations Act, courts give great deference to these kinds of employer-employee agreements. Regulations issued by the Secretary of Commerce are, by nature of the notice and comment and judicial review provisions in the Administrative Procedure Act, necessarily subject to lengthy administrative procedures, court challenges, and potential revision or invalidation by a single federal judge. They may also be subject to challenge under provisions of state law that are not applicable in the context of collectively-bargained agreements. And once Congress federalizes drug testing in sports, and replaces collective bargaining under the National Labor Relations Act with statutory and regulatory mandates, there can be no assurance that even agreed-upon provisions that exceed federal minimums will be respected by the courts. Nor would the anti-injunction provisions of the Norris-LaGuardia Act necessarily continue to apply.

Fourth, simply incorporating the WADA list of prohibited substances is likely to be overbroad in some respects and under-inclusive in others. For example, WADA prohibits such substances as beta blockers and erythropoietin (EPO). The former, used to slow the heart rate and reduce muscle tremor, has been seen in sports such as archery, golf and rifle; the latter has been seen in more extended endurance events, such as cycling. There is simply no indication from our independent medical experts that either has been used or would be effective in professional football, and a requirement to test for them would almost certainly be a costly misuse of medical and laboratory resources. By contrast, the WADA does not currently prohibit synephrine, a stimulant banned and tested for in the NFL.

Fifth, the penalties required by the bill are excessive in the context of professional football. As we explained earlier, a four-game suspension, combined with ongoing testing, works. From any perspective—financial, competitive, and reputational—it is a substantial penalty. There have been virtually no repeat offenders in the NFL. A two-year suspension, in the context of a sport where the average career length is less than four years, is therefore both unnecessary and disproportionate. It would diminish the substantial support that the League’s steroid program currently has among players and could lead to demands to reduce testing in a way that sharply limits the number of players detected and disciplined.

It also bears mention that other drug testing organizations, such as USADA and WADA, currently do not impose a mandatory two-year suspension for every athlete who tests positive for every prohibited substance. Rather, the two-year sanction is more properly viewed as a maximum penalty. In 2004, fully one-third of the Olympic-level USA athletes testing positive for a substance prohibited by the USADA were not suspended. A significant number received no more than a public warning. Under our policy, players are held to a strict liability standard—claims of inadvertent or unintentional use are expressly precluded as defenses and are not considered as mitigating circumstances for discipline.

Finally, Section 6 of the Bill calls for various studies and reports relating to the Bill’s effectiveness. The first such report would address “the effectiveness of the regulations prescribed pursuant to this Act” in the context of professional sports. How will such effectiveness be measured? Cynical critics of the NFL program claim that it is not effective because there are relatively few positive tests—demanding, in effect, that the League “prove a negative.” But the US Anti-Doping Agency, using the same lab and similar testing procedures, identified only 9 athletes who tested positive for steroids in 2004. Does that mean that USADA has an ineffective program? Or does the relatively low number of positive tests instead mean that, within the limits of existing science, doping control efforts are in fact effective? We believe the evidence sharply supports the latter conclusion. What will be the standard of effectiveness under H.R. 1862?

These are but a few examples of the issues that would be raised if the NFL’s policy more closely reflected the provisions of H.R. 1862. We genuinely respect the concern that underlies the bill, but we believe that the NFL has demonstrated a long and genuine commitment to combat the use of performance-enhancing drugs in football. Federalizing that program under the direction of the Secretary of Commerce will not further the Subcommittee’s goals.

If the Subcommittee determines nonetheless to proceed with legislation, we would urge that it do so deliberately. Rather than proceed on an accelerated basis, we would suggest that the Subcommittee conduct further in-depth discussions to narrow the areas of potential difficulty and focus the application of the bill more precisely.

4. THE NFL’S PROGRAMS TO COMBAT USE OF PERFORMANCE-ENHANCING SUBSTANCES BY YOUNG PEOPLE.

We recognize that one of the Subcommittee’s primary concerns is the extent to which young people are using steroids today. This has been one of the primary factors underlying the NFL’s programs as well.

Among athletes and coaches, where we can influence behavior, we make an aggressive effort to discourage the use of steroids, supplements and drugs of abuse. As one example of this, we have worked with leading institutions in medicine and sports to create reliable guides on fitness, nutrition, safety and conditioning—entitled “Play Safe! The NFL Youth Football Health and Safety Series.” This four-volume series, which was first distributed in 2003, gives players, coaches, parents and the public general information on football-specific health and safety issues in a clear, easy-to-understand format. Needless to say, this series emphasizes that the use of performance-enhancing substances, and/or other drugs of abuse, is unacceptable.

By partnering in the publication of this series with leading academic and public service organizations, we have sought to ensure that this series will be regarded as definitive and independent and also widely distributed and used. The series editor is Dr. Barry Goldberg, the Director of Sports Medicine at Yale University Health Services and Clinical Professor of Pediatrics at Yale University School of Medicine. The series is produced in partnership with the American College of Sports Medicine, the American Red Cross, the National Athletic Trainers Association, and the Institute for the Study of Youth Sports at Michigan State University.

Two of the four volumes of this series deal with matters of direct interest to this Subcommittee. One volume specifically discusses “Strength and Conditioning” and

offers practical, step-by-step techniques to build strength, endurance and flexibility, improve performance and decrease risk of injury—all without steroids or other substances. Another volume in the series entitled “Health Concerns for Young Athletes” has an entire section on substance abuse and specific warnings about steroids, including the following:

“There should not be any controversy about steroid use in sports; nonmedical use is illegal and banned by most, if not all, major sports organizations.”

“The use of anabolic-androgenic steroids to enhance performance is not only illegal, it is dangerous.”

This series has been distributed nationwide in both print and on-line editions and has been furnished to the Subcommittee. It has been furnished to high school football programs throughout the country and to our NFL National Youth Football Partners network, which includes the Boys and Girls Clubs of America, Jewish Community Centers Association, Police Athletic Leagues, Pop Warner, and the YMCA, among others. The entire series is available free of charge on NFLHS.com, a popular high school football website sponsored by the NFL. The site also includes articles and Q&A sessions between a former NFL coach and high school players on various topics, including the dangers of steroids and drug use. NFL representatives and other professionals also address these issues at our annual NFL Youth Football Summit in Canton, Ohio and youth football coaches throughout the country receive our NFL Coaching Academy Playbook, which includes a chapter devoted to health and safety issues that gives specific advice to football coaches on the dangers of steroids and steps coaches can take to detect and deter drug use by their players.

USA Football, a not-for-profit advocacy and educational organization jointly endowed by the NFL and the NFLPA, has made a wide array of resources available to parents, coaches and players across the nation. The USA Football website contains articles on steroids and drugs of abuse, and USA Football is making this a key focus of its health and safety programs for 2005, including at its Huddle 2005 national conference next month. The message is always the same—to play football in a way that is safe, within the rules, and without use of artificial performance-enhancing products.

The NFL’s recognition that a strong anti-steroids policy may positively affect the conduct of our Nation’s youth is not of recent vintage; in fact, it dates back at least to the late 1980s. In the same 1989 testimony before the Senate Judiciary Committee to which we earlier referred in this statement, Commissioner Rozelle emphasized precisely this point:

“The third risk of anabolic steroid use by adult athletes, as dangerous as the other two, is its potential effect on the youth of America. Whether NFL players like it or not, they are role models. I worry about the young athlete, still in his formative years, who emulates his favorite college or pro football star by taking a drug he believes to be a harmless source of size and strength. Equally worrisome is the youngster who recognizes the risks, but ignores them and looks beyond to the rewards of a larger physique and possibly a professional contract.

“In 1987, the NFL produced a video tape on the harmful effects of steroids featuring a discussion among our drug advisor, the medical officer for the United States Olympic Committee, an expert from the American College of Sports Medicine, and two team physicians from the NFL. This tape was made available for showing to our own players, and 450 copies of it have been distributed throughout the country by the National State High School Coaches Association.”

So the question remains, what accounts for the levels of steroid use by high school students and what can we do about it?

First, steroids, growth hormones, and similar substances are freely available—almost on demand—in the retail marketplace or over the Internet. As the Subcommittee knows, we live in an era of borderless electronic commerce and the global Internet pharmacy. A web search for “buy steroids” yields a large number of Internet sites where one can buy a wide range of steroids. The most difficult problem appears to be deciding where—not how—to buy steroids. The same is true of growth hormones, where one of the first sites identified in response to a search for “buy human growth hormone” offered customers the chance to “Buy 2 and Get 3rd Free.” These substances are freely marketed as cure-alls, promising youth, vigor, enhanced social standing, freedom from disease, improved personal appearance, and the like. Apart from the Internet, magazines, newspapers, faxes and other print materials advertise a wide variety of steroids, growth hormones, and similar products.

Second, there are substantial media pressures that lead adolescents to use steroids or “body shaping drugs.” Dr. Linn Goldberg, who testified before the Committee at an earlier hearing, has decried the extent to which steroid use has become acceptable among advertisers, who suggest their product is “on steroids”—i.e., big-

ger, faster, better. As Dr. Goldberg asks, "Could anyone imagine marketing strategy that [suggests] that their product is 'on' any other drug of abuse, like cocaine, LSD or marijuana?"

Third, high school students evidently assume that there is very little risk of detection except perhaps by attentive parents or a well-informed school or athletic official. Our own research has disclosed no state in which there is mandatory testing of athletes for steroids, although a number of states are looking at instituting such programs. A survey of high schools conducted by the National Federation of State High School Associations in 2003 showed that fewer than 4 percent tested students for steroids. Generally, where testing has been proposed, it has been rejected, as occurred recently in California. Given budget constraints and other pressures, this is not surprising. For example, the same 2003 survey found that of school districts that do not have drug testing, 54 percent cited budget concerns as the reason. Yet these circumstances leave a large gap in the state and local educational infrastructure that might serve to address issues of concern to the Subcommittee.

Fourth, the use of steroids is probably as prevalent among non-athletes as it is among athletes, and the use of steroids is not limited by age or gender to high school boys. It evidently continues to be true that the "perfect body" remains something that many high school students strive for, and drug testing of professional athletes is likely to have a very limited influence on many high school students if their levels of self-esteem and peer acceptance drive their behavior.

Research presented at a 2004 meeting of the Endocrine Society found that while both athletes and non-athletes used both anabolic steroids and body shaping drugs, "student athletes were less likely to use steroids, alcohol, cocaine, cigarettes, pseudoephedrine and diet pills" than were non-athletes. Dr. Goldberg's studies showed "an increase in anabolic steroids use among high school non-athletes, which may be one of the reasons for the national increase in steroid use among teens." This appears to be true among both boys and girls.

It is questionable whether the same approaches that affect behavior of athletes will work for non-athletes. In testimony given in March before this Committee, Dr. Goldberg cited research suggesting that special programs, called ATLAS and ATHENA, which are targeted separately to high school boys and girls, could lead to significant reductions in all types of drug use, including anabolic steroids.

5. CONCLUSION.

Our challenge going forward will be to ensure that our research is current, that adequate resources are available to support programs proven to be effective with young people, including non-athletes, and that sports organizations remain firm in their commitment to clean competition at all levels.

Thank you for inviting us to appear today. We will be pleased to answer any questions.

Mr. STEARNS. I thank you. Mr. Upshaw, welcome.

STATEMENT OF GENE UPSHAW

Mr. UPSHAW. Thank you, Mr. Chairman. Thank you, Mr. Chairman.

I want to first start by saying we, as players, support the position in the statement that the Commissioner has just put on the record. He mentioned a couple of things that I just want to touch on, because we totally agree in this area when it comes to performance-enhancing drugs and stimulants.

The first thing that I want to say, it is a product of collective bargaining, and it has been a product of collective bargaining, but never once in the history of the Players Association have we ever decided to trade one issue for another issue when it came to performance-enhancing substances. We believe strongly in this. This is definitely player-driven, and when I say it is player-driven, the players understand what this program is all about. When I say they understand what this program is all about, they feel the same way as the Commissioner does about the integrity of the game. The integrity of the game is really what and why we must have it.

The other reason that we have it in place is that it can—if we don't have it in place, there will be cheaters. There are players, and players have said in the past, and that is why we have a strong policy, is because they don't want to use performance-enhancing drugs, but they want to make sure that they are out of the game totally. We have never in the history of this agreement on these issues had one player to say, or defend anyone that has used it. We don't want to send that message. We understand our role as role models, and you do hear players from time to time that say they are not role models and they don't want to be role models. Well, we also have to accept the responsibility that goes with what we do.

When we get to the penalties of the legislation, we strongly believe as players that the 2 year ban is strictly too much. We have a career that basically lasts for about 4 years. If you lose 2 years in a suspension for a first offense, your career is basically over. That is something that we have to look at. We look at the 25 percent loss of pay, the four game suspension, as a very, very severe suspension, and we believe it has worked, and history has proven that it has worked in the NFL. We have not had repeat offenders, which is a really a way to judge the program. So, we have done what we need to do, as far as educating our players, educating our teams, and getting the players to understand that if there needs to be change, we will do it.

We also have an annual, or quarterly review, in which we look at the policy and make changes if changes need to be made. There are times when changes have to be made before we have a quarterly meeting. An example of that was in 2003, our lab at UCLA discovered THG. Immediately on—we had a phone call with Mr. Henderson and Mr. Tagliabue, and we agreed to add that to the list without a quarterly meeting. We have to move fast to try to stay ahead of what the drug of abuse and drug—performance-enhancing drugs that come on the radar screen, and we will continue to do that.

To sum up, to say that one size fits all, is something that I heard in the testimony yesterday. I think we have to draft, and we have, in our situation, crafted an agreement and a policy that addresses football, and the Commissioner is absolutely right. When WADA decided to do whatever they decided to do in 2000 and 2002, we were there before that. We started testing players in 1987, suspending players in 1989, and having year round testing in 1990. So, we have a track record of doing what needs to be done in this area to guarantee that our game is performance-enhancing free.

Last, but not least, the whole issue of integrity of the game is really something that we would like to stress here today, because it is important to understand that the contests on the field have to be judged in a way that is fair, and the public has confidence in what we put on the field. That is why our product is what it is.

The last thing I would like to touch on is the independence of the program. It is independent. The League office, my office, or Harold Henderson's office have nothing to do with who is tested, the outcome of the tests, or the penalties of the tests. If you are guilty in the National Football League, you will be suspended, and we feel strongly that that is the right way to go. You can't get any more

independent when none of us have a particular interest in the outcome of who is playing and who is not playing. What our job is to do is to make sure that the integrity is protected, and I think we have done a good job of that.

As I said earlier, we understand our position as role models, and I would like to thank the chairman for mentioning the Gene Upshaw Award. I was in Lancaster, Pennsylvania last night, and there were over 400 high school and college kids in the audience, and I had an opportunity there to talk about this issue in front of those kids, and whenever we have an opportunity to do that, we will do it, we have done it, and our players continue to do it whenever asked, and even when not asked, because it is an important issue. And my whole message dealt with character, it dealt with cheating, and it dealt with their athletic abilities, and we all understand that as role models on what we have to do, and we have done that in the National Football League, and I am not saying we have done it perfectly. I am not saying we have caught everyone, but if you use performance-enhancing drugs in the National Football League, you will get caught.

Thank you very much.

[The prepared statement of Gene Upshaw follows:]

PREPARED STATEMENT OF GENE UPSHAW, EXECUTIVE DIRECTOR, NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is Gene Upshaw. I am the Executive Director of the NFL Players Association, the labor union that represents all NFL players in collective bargaining. I also played in the NFL for 15 seasons with the Oakland and Los Angeles Raiders. For my accomplishments as a player, I have been honored by induction into the Pro Football Hall of Fame.

I am pleased to respond to the Subcommittee's invitation to appear and testify on H.R. 1862, the Drug Free Sports Act.

The bill directs the Secretary of Commerce to issue regulations requiring testing for steroids and other performance-enhancing substances by professional sports leagues, including Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, Major League Soccer and others. Testing is to be random and occur at least once a year. By rule, the Secretary is to issue a list of prohibited substances including those listed by the World Anti-Doping Agency ("WADA"). The bill provides a minimum two (2) year suspension for a positive test and permanent suspension for a second positive test.

Before commenting on H.R. 1862, it may be helpful to the Subcommittee for me to provide some background and explanation of the collectively-bargained Policy and Program on Anabolic Steroids and Related Substances that has been in place in the NFL for more than a decade. It is the most comprehensive in professional sports today. Our results confirm that the program is very effective. It reflects a strong and ongoing commitment by both management and our union backed by substantial financial investments, top scientific resources and more than a few tough decisions.

There are numerous issues on which management and labor disagree, and we are presently involved in a difficult round of collective bargaining negotiations. But there is complete agreement on this: steroids and other performance-enhancing substances have no place in our game, or anywhere in sports. For many years, we have been committed to keeping them out of the NFL, and we will continue to work with the League, and with government and private parties, to help remove them from American life.

The NFL began testing players for steroids in 1987; started suspending violators in 1989; and in 1990 instituted a year-round random testing program, including during the off-season, backed by suspensions without pay for violations. The program has strong features to deter evasion, including suspension for players testing positive for masking agents or who attempt to dilute their urine to beat the tests. Players who test positive are subject to up to 24 unannounced tests per year, including during the off-season. They remain subject to this frequent, year-round testing for the remainder of their professional football careers.

We also recognize the importance of staying current, and have consistently expanded our own list of prohibited substances—in the past several years, nearly 20 additional substances have been added to the banned list. Those included ephedra, which we prohibited three years ago. As the Subcommittee knows, the federal government's ban of that dangerous supplement was just limited by a District Court Judge. Nonetheless, ephedra will remain a prohibited substance in the NFL because of the risks it continues to present to our player population.

This process of ongoing review is one of the most important aspects of our Program. The League and the players meet on a quarterly basis to review the operation of the Program and discuss issues. Every year the Policy is re-written—hopefully for the better. We expect shortly to conclude that process for 2005 and will shortly publish the revised Policy and distribute it to all the players. We will provide the Subcommittee with the new version, but I can highlight a couple of changes today.

First, we have reduced the threshold for a testosterone positive. While a player formerly had to have a t:e ratio greater than 6:1 for a positive test, that ratio will now be 4:1.

Second, we have increased the maximum number of off-season tests from 2 to 6 per player. Thus, at a time when other drug testing organizations both in this country and around the world are sharply reducing their “out of competition” testing, we are sending the message to our players that steroid use is inappropriate at *any* time—in-season or out.

Why has this issue been among the highest priorities of the NFL and its players?

First, these substances threaten the fairness and the integrity of the game on the field. To allow the use of steroids and banned stimulants would not only condone cheating, but also compel others to use them to remain competitive. Our own players want to rid the League of these substances so they can compete on a level playing field.

Second, we have a responsibility to protect our players from the demonstrated adverse health effects of steroids and other banned substances. Medical literature is replete with research linking the use of these substances to a wide range of serious health problems.

Third, we take seriously our role in educating and leading young people. As President Bush said, the use of performance-enhancing drugs is dangerous and sends the wrong message that there are shortcuts to success and that performance at any price is more important than integrity. Our players regularly meet with young people—both athletes and non-athletes, girls as well as boys—in a wide variety of settings, including our “Pipeline to the Pros” sessions. We consistently emphasize that steroids or other drugs are the wrong course for players. They are dangerous. They are unfair. They are wrong.

The key provisions of our policy are:

- An annual test for all players plus unannounced random testing in and out of season. We test players on all teams each week of the season, conducting more than 9,000 tests a year for steroids and related substances.
- A list of more than 70 prohibited substances, including anabolic steroids, steroid precursors, growth hormone, stimulants and masking agents. This list is continually revised and expanded.
- A mandatory four-game suspension (25 percent of the regular season schedule) without pay upon a first violation. A second violation would result in a six-game suspension and a third would ban a player for a minimum of one year. Players cannot return to the field after a suspension until they test clean and are cleared for play.
- Strict liability for players who test positive. Violations are not excused because a player says he was unaware that a product contained a banned substance.
- Education of players and teams about the program through literature, videos, a toll-free hotline and mandatory meetings.

The consistent application of these core tenets has resulted in the recognition by experts in the field of the NFL's policy as the most effective in professional sports. Over the past five seasons, less than 1 percent of our players have violated our steroid program and been suspended. In short, virtually all of our players get the message and participate in the NFL without using anabolic steroids or other performance-enhancing substances.

We would be naive if we did not understand that there are temptations and pressures to succeed facing football players that require us to make education and deterrence of substance abuse a constant priority.

When our steroid testing lab—the U.C.L.A. Olympic Analytical Laboratory—informed us in 2003 of the new designer steroid called THG, we immediately added it to our banned substance list.

As we go forward, we will continue to be vigilant. The NFL spends \$10 million a year on our steroid and drug programs, including the funding of research to identify new substances and to improve testing. To date, close to \$100 million has been invested on this initiative. And we are prepared to do more if necessary.

Despite efforts that we and others in sport have made to eliminate anabolic steroids and other performance-enhancing drugs from athletic competitions, there are those in America and elsewhere who will seek to beat the system by designing and producing illicit substances that inappropriately affect athletic performance while escaping detection.

We are proud of our Program and what it has accomplished. Is it perfect? Does it catch everyone? No. But the players overwhelmingly support the program, recognize its value, and believe it applies to all players in a fair and even-handed way.

In that respect, our Program is different from any other drug testing program the Subcommittee is likely to examine. It has not been imposed by management or by a sports federation or any other governing body. The players were not dragged *unwillingly* to the bargaining table. In the NFL, players and teams recognized the problem and have reached a common consensus that these substances had to get out of the game and that testing and tough discipline for violators were the key elements of an effective program. For more than a decade, as thousands of players have entered the League, this Program has continued to have extraordinary support from players.

Let me turn briefly to comment on H.R. 1862. While we share the goals that the legislation is designed to achieve, there are important differences in our approach from that outlined by the bill.

H.R. 1862 would impose a Federal regulatory regime on all professional sports requiring a uniform testing and discipline system. Sports leagues would be mandated to establish a uniform steroid testing program based on the World Anti-Doping Agency list of prohibited substances.

The bill provides that that Secretary of Commerce may exempt Leagues that have adopted testing policies and procedures that “exceed the requirements” of Federal regulations. However, it is not clear what that phrase covers. For example, would a League have to impose greater penalties than the bill prescribes to be exempt? Would a League have to ban more substances than the WADA in order to “exceed” the federal regulatory requirements? Would more tests than required by the Secretary of Commerce be needed to obtain exemption? The bill answers none of these questions and unless the Federal regulations mandated the most minimal requirements, the possibility of qualifying for an exemption might be illusory.

Furthermore, the bill fails to acknowledge the collective bargaining process or address the special characteristics of individual team sports. The number of games played, the size of the team rosters, the average length of a player’s career, the physical demands of the individual sport, the length of preseason training, are just a few of the characteristics that differentiate the individual team sports and affect the components of a successful testing program. Although the penalties proposed by H.R. 1862 for a positive test may be appropriate for Olympic competitions occurring every two or four years; they are not suitable for professional football. The penalties and testing regime we have adopted and have been implementing have been effective and have the support of management and the players. Moreover, the costs of running such a program are substantial and a successful testing program must take into account the capabilities of U.S.-based testing facilities. In sum, H.R. 1862 raises several critical issues. For example:

- Does the Secretary of Commerce possess the expertise or experience to effectively implement the broad powers conferred by H.R. 1862?
- Is a uniform penalty structure and testing program appropriate for all professional sports? In other words, when it comes to professional team sports, does “One Size Fits All”?
- Finally, will a statute mandating a uniform substance abuse testing program administered by the Federal Government be as effective and likely to succeed as one produced and implemented through collective bargaining, and which has been praised for more than a decade by many experts who have led anti-doping efforts in sports?

One simple but powerful fact will be of interest to the Subcommittee: I constantly spend a great deal of time with current NFL players, and I cannot recall an occasion in more than ten years in which a player who used steroids was defended by his teammates or any other player. NFL players know what cheating is and they do not want cheating or cheaters in our game.

In considering the effectiveness of our program, the comments of current players and coaches are instructive:

"I'm not sure how much more we can do with our steroid policy. It is already the most comprehensive testing in professional sports. If you are doing steroids now, you've got some kind of death wish because I doubt very much there are many players taking steroids now in the NFL." Rob Konrad, Oakland Raiders, *Boston Globe*, March 31, 2005.

"I was drug tested for steroids just last week and I was drug tested through the season. I just have a hard time believing that people can do it and beat the system the way it is." Sean O'Hara, New York Giants, *Newsday*, April 1, 2005.

"The NFL has been very clear about steroids and that feeling permeates every locker room. So it is considered bad to do anything like that, not only from an organizational standpoint, but a player-to-player standpoint. You will be frowned upon if another player found out you were taking steroids. I think there is a very small percentage of guys in the NFL doing it. Very small." Jerome Bettis, Pittsburgh Steelers, *New York Daily News*, April 21, 2005.

"I coached in the League before there was [a steroid policy]. I can see the difference. That's how far our professional sport has come. I think it is the cleanest professional organization in the world." Dick Vermeil, Head Coach, Kansas City Chiefs, *Florida Today*, May 16, 2004.

I hope that as it continues its review, the Subcommittee will understand the importance of this level of player support, and will respect the process by which it has been achieved and maintained.

Today new challenges are being presented to our society by the improper use of human growth hormone and the continuing advance of gene therapy and genetic manipulation.

Both the government and private sectors must aggressively address these challenges. If not, the secret designers of new illicit substances will slog on, and the future will bring more high-profile grand jury investigations, health risks to young people and dishonor to sports. NFL players are prepared to do their part, as they have for more than 15 years.

Mr. Chairman, we in the NFL thank you for your leadership on this issue, and we appreciate the opportunity to testify today.

Mr. STEARNS. And I thank you. And I agree with you. The perfect is the enemy of the good. You can't necessarily guarantee perfection, but you certainly can strive for it.

The hearing we had yesterday, there are two areas that came up dealing with the unions, and one was brought up by Mr. Fehr from the Baseball Players Association, and then Mr. Foose, from the Major League Soccer Players. They mentioned the Fourth Amendment, which is that individuals are secure in their homes. Yet the NFL has 1,600 tests off-season, and as you folks have mentioned, the players have to tell you where they are going to be, so I tried to convey to them I thought that was a moot issue, and sort of a red herring. It wasn't a serious issue. Can I assume, based upon your 1,600 off-season, that you have never felt that you were denying the Fourth Amendment rights of your players by saying we are going to test you randomly, we want to know where you are going to be so we can be there?

Mr. UPSHAW. Maybe I wasn't clear at the beginning, but this policy is player-driven. The players wanted this.

Mr. STEARNS. Okay. So—

Mr. UPSHAW. This is what our players wanted.

Mr. STEARNS. Okay.

Mr. UPSHAW. This is why our policy has been successful.

Mr. STEARNS. Yes.

Mr. UPSHAW. Because our players want it, and when I say they want it, they understand the rules. When you talk about off-season, in-season testing, and all of those issues, in the National Football League, there is only 1 month that you are not—

Mr. STEARNS. Okay.

Mr. UPSHAW. [continuing] at the facility. So, we are there all the time. We believe, as players—

Mr. STEARNS. I hope Mr. Fehr and Mr. Foose of the Major League Soccer have heard your comments this morning, because I didn't think—I thought it can be worked out. It is not a Constitutional crisis of denying the Fourth Amendment, and I think you brought that out.

The other area is, and this has been mentioned, the National Labor Relations Act, and how this would be effected by this bill, and I guess I would say to that that obviously, steroid possession is a criminal offense, and we have a compelling interest in ensuring the integrity of competition and in compliance with the Federal criminal law. So, in the event that there is criminal action, then we have a right to get involved. Now, obviously, we want to work with you, and my idea this morning is to leave this hearing with a full understanding how—could you support H.R. 1862 with certain modifications? I think that is what I am asking, Mr. Commissioner.

You and I talked earlier a little bit about the components of this bill. There are six major components. One is the testing, and how you mentioned it is an outside group, how it is random, every player, 1,600 in the off-season, I think you are to be complimented on your manner of testing. Also, it is administered such that the Commissioner doesn't even know about it until he reads about it in the newspaper, so it is an independent body that does that. That is what we have in the bill. There is an area dealing with what substances we should include. We have suggested WADA.

Now, Mr. Tagliabue, I think you indicated that you would suggest the NIDA. Is that—

Mr. TAGLIABUE. Yes.

Mr. STEARNS. If we had a modification to this bill to reflect a list of substances not necessarily by WADA but another group, maybe, for example, the NIDA, would that move you more toward supporting the idea of the bill?

Mr. TAGLIABUE. Yes. I think so. You know, I think there are probably four or five critical areas. One is—

Mr. STEARNS. Okay.

Mr. TAGLIABUE. [continuing] what I have mentioned, in terms of the role of the NIDA, instead of the role of a non-U.S. agency located outside of the United States. The second is on the discipline, where I think our program is very effective.

Mr. STEARNS. Do you think our 2 years is too draconian?

Mr. TAGLIABUE. Yes, and even there, you know, I read in the "L.A. Times" yesterday that the WADA's chairman himself says that there is a range of penalties that goes from zero to 2 years, depending upon the circumstances.

Mr. STEARNS. Right.

Mr. TAGLIABUE. So, I think that is a second key area.

Mr. STEARNS. Okay.

Mr. TAGLIABUE. A third key area is, and I don't mean to make a mountain out of a molehill, is the issue of the National Labor Relations Act. I think there could be language that would make it clear that collective bargaining continues in this area, because I do feel that the way the bill is currently written, successors to me and

successors to Mr. Upshaw could take the view, well, let us just recede to the minimum standards of the bill, and I think that that approach of receding to a lowest common denominator would be inappropriate and unfortunate. I am not going to do it, and he is not going to do it, but neither one of us is going to be around forever, and the future is a long time, so I think clarifying that point about the continued importance and respect for collective bargaining in this area is a key thing, coupled with whatever provisions might go into Federal law.

So those would be some of our key thoughts.

Mr. STEARNS. So if we incorporated those—so if this bill moved in that direction, then would I assume that you would not be against H.R. 1862 if it incorporated some of the things you were talking about?

Mr. TAGLIABUE. You could assume that, yes.

Mr. STEARNS. Okay. So, I would say that this morning, you are saying, we support the idea of a Federal bill with these modifications. Now, Mr. Upshaw, is there anything that you might want to add, because I forgot to—I want to make sure that you are fully—

Mr. UPSHAW. No. I—well, since—

Mr. STEARNS. [continuing] suggestions, too.

Mr. UPSHAW. [continuing] he didn't mention it, but in the bill, it also speaks to exemptions from the bill, exemptions from this, and I was not clear about how you gain such an exemption, and when I look at—except the penalty, and the way that you have drafted the independence, we are way ahead of where—we want to know, have we done too much? Do we roll it back, or I mean, we are not in—we are not saying that we would do that because the bill would allow us to do that, because it is not good for our sport. That is why one size doesn't fit all. But on the other hand, if there are provisions and clarifications on exemptions, I would definitely like to know what they are.

Mr. TAGLIABUE. Mr. Chairman, I would say two things, which is my focal point here. If there are Federal standards, and they are high, and they are demanding, fine. What I do not want to see happen here is that our ability to effectively run the best program in the country is limited. If I want to fire somebody because their report comes to me that they, a collector didn't do his or her job, I want to be able to fire that person and not have to go to the Secretary of Commerce.

And I don't want to have to have long regulatory hearings about, you know, tenure—

Mr. STEARNS. Arbitration.

Mr. TAGLIABUE. [continuing] and arbitration and incumbency and back pay rights, and all the other stuff. When we find that a player has substituted some substance for his urine, the collector is fired if he didn't do his job, and so that is one key thing.

Second key thing is, I don't want to have to run around and do things that the best scientific opinion can't agree is necessary. We are already having a discussion on this issue with respect to Human Growth Hormone. WADA is already talking about testing for Human Growth Hormone. They are talking about going from urine testing to blood testing, which is, I am told, the only way you

can test for Human Growth Hormone. Our scientific people are not satisfied that the blood test has yet been properly validated. I don't want to be forced to spend millions of dollars on a test that someone is saying you have to do because it makes them look good in some international forum, when our scientific people say the test has not yet been validated.

If we do have a validated test, like Mr. Upshaw said, on any substance, this came up with THG, we are the only one, only one that I am aware of, who went back and got 2,000 samples of urine previously collected and went back and tested all of them for THG, retested all of them once the test had been identified. I am not aware of any other organization that did that. And I think that shows our bonafides here, but the same token, I want to be forced to spin my wheels and spend money on something that has not been proven, just because someone else thinks it is in their interest to say they are the world's leaders in anti-doping.

Mr. STEARNS. My time has expired. The Ranking Member, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you very much, gentlemen, for being here and for your testimony, and for the work that you are doing in the NFL to make sure that your sport is not tainted by performance-enhancing drugs.

I wanted to—let us begin with the assumption that there will be a Federal bill, and go over some of the provisions. I want to—I think you spoke to this a little bit, but I want to ask this question directly of both of you. Do you think the Department of Commerce is the most appropriate Federal agency in which to house a program regulating performance-enhancing drugs, or do you think this program, for example, would be better administered by a department or agency with expertise on pharmaceuticals and public health, such as the Department of Health and Human Services?

Mr. Tagliabue, if you want to begin.

Ms. TAGLIABUE. I guess I would say that on first blush, I think it is a little anomalous that this goes to the Department of Commerce, but I would also have to add that even though I have practiced law in Washington for 20 years, I am not the world's greatest expert on the scope of the authority of the Secretary of Commerce.

As I did say, I think that the NIDA should have a major role here, because it is within the National Institutes of Health. It does administer drug testing programs in other areas that are critical to our society, such as transportation and the Federal workplace. And it just seems to me that taking advantage of that expertise, plus their relationships with the Department of Justice and the White House and the FDA and the DEA makes sense, and we all know that our government is—works best when a bunch of agencies work together on the civil side and on the criminal side, and I think that the NIDA here can be that lynchpin, as they say. I don't see how WADA fits into that picture.

Ms. SCHAKOWSKY. Well, WADA only to the extent that that was the list.

Mr. TAGLIABUE. Yes, but that is a critical issue.

Ms. SCHAKOWSKY. Yes.

Mr. TAGLIABUE. And NIDA can talk to WADA and see what their list is. They can take advantage of WADA's expertise. It doesn't

have to be farmed out to Montreal or to Switzerland for that purpose.

Ms. SCHAKOWSKY. Mr. Upshaw.

Mr. UPSHAW. I agree 100 percent, and also, I don't think we can stress it firmly enough, that we have the best experts in this country, that we should use and take advantage of the people we have. As I look at the WADA list and I look at the people that they purport to represent, I do not see any collectively bargained groups there. I see no team sports in that list, and I don't see a lot of input from the people that it really affects, and as the chairman has pointed out, the thing that makes our program so unique is that it is player-driven, and players want a fair, level playing field when it comes to these issues. And that is why we feel better about having it here in our country.

Ms. SCHAKOWSKY. Do you believe that legislation should include, as part of penalties for a first offense, a requirement that athletes undergo drug rehabilitation and recommended medical treatment? Do you do that, and do you think that should be part of the—

Mr. UPSHAW. Yes.

Mr. TAGLIABUE. We do extensive counseling, treatment, and both on a mandatory and on an optional basis, for which we pay under our health insurance plans, when it comes to the drugs of abuse. We do less of that under these performance-enhancing substances, because I believe our advice has been that this is more of a matter of choice, and it is less of an issue of addiction here. So, you know, we are certainly into the multifaceted approach to deterrence which starts with education, can go to counseling, goes to strict penalties, goes to rehabilitation, if there is evidence that that works. But if it is just a matter of a player trying to get an edge, as Mr. Upshaw suggests, then the best deterrent is to eliminate him from the game by suspending him, and not to get too carried away with counseling.

Mr. UPSHAW. I just want to add one last caveat to what the Commissioner said, and that is once there is a positive test, the one thing that I don't think has been mentioned, the player is not eligible to return unless he is clean, and given medical clearance to return, and that is determined by the medical advisors, not by my office or Paul's office or Harold's office. The medical people make that decision, and not us, and if they feel that he needs counseling, that will be part of it.

Ms. SCHAKOWSKY. Thank you.

Mr. STEARNS. I thank you. The full chairman of the committee, Mr. Barton from Texas.

Chairman BARTON. Thank you, Mr. Chairman, and I want to thank each of you three gentlemen for attending our hearing voluntarily, and especially you, Mr. Tagliabue. I know that you were traveling, I think in China, and you are amazingly coherent for somebody who has just gotten back from that long of a journey.

I really only have one general question, and it goes to the overall scope and structure of the program. I hope it is evident that Congressmen and Congresswomen on both sides of the aisle really think it is time to do something, and we are not being derogatory about what the NFL has done. I think in many ways, you all have done an excellent job. But at our hearing yesterday, we had the

Major League Baseball and the Players Association, Major League Hockey and their Association, the National Basketball League Association and their Players Association, and we had somebody from the Olympic Committee, and we laid out the parameters that we were going to have an independent testing agency that was going to do testing year-round, and it was going to include a random testing protocol.

So, my general question is, understanding that you have your own testing program, and you are very pleased with it, do you see that your program could be integrated into the kind of program that I just said?

Mr. TAGLIABUE. Yes, I think we definitely feel that way, and you know, I think our basic attitude is that we operate under the Federal Trade Commission Act. We operate under the Food and Drug Act. We operate under the antitrust laws. We can operate under something in this area, so long as it is written in a thoughtful and effective way.

Chairman BARTON. Well, we are going to use what we call regular order, which we will have a subcommittee markup, and that could happen as early as next week. Then, we will take a little time, and my friends on the minority side have already talked to me that they have got a list of issues that they want to work on, so we will probably take some time between subcommittee and full committee, but then at full committee, we will also have an open markup process. And I am open to a bill that, as long as it has these general parameters, work with each of the major professional leagues to kind of customize parts of the program around what your specific sports and player relationships and collective bargaining agreements are, but we do want to have one testing agency, so that we get uniformity. And as I said, we do want it to be a year-round program, and have a random protocol in it, so that the players, you know, can't kind of be pre-warned and game the system. And my understanding was steroids, as soon as you stop using them, there is a pretty fast release time, so that it would be, without the random aspect of it, you could kind of get around the testing program.

Mr. UPSHAW. Just to speak a little bit about the random release time. It is our understanding that the steroids that are being used in this area, is not a release time that is very quick. It is between 35 and 45 days. And that is why, because we understand the cycles of what happens when you are using these type of supplements, and performance-enhancing drugs. The other part that is—I had a little concern about was the independence in the laboratories in who are they certified—I mean, we all are using the same labs that the Olympics are using now. That is what we use in the NFL. The experts that are doing the testing, the guy that found the THG, was the guy that does our testing, and does our analysis out at UCLA.

And so there is a little gray area, and matter of fact, there is a big gray area, about the certification procedures of the lab.

Chairman BARTON. This is—my time is about to expire, and I have one question that is a little bit off-point from this hearing, but I don't normally get three illustrious witnesses like this. We had a hearing in our Oversight Subcommittee earlier in the week about

devices and drugs that are used to beat drug tests, and the individual who actually got caught with one of the devices I believe was a player for the Minnesota Vikings. Does the NFL have a policy that sanctions or punishes players that use, you know, fake urine samples or masking agents, or in some cases, prosthetic devices to help beat drug tests? Is there a policy on that?

Mr. TAGLIABUE. Absolutely, Mr. Chairman. This goes back 20 years, you know, which is as basic as spare the rod, spoil the child. We have explicitly in our policy that when a player delivers his urine sample, he must be naked from the knees to the nose, and this idea that all of a sudden, there has been a new world-renowned discovery, because there is a device for delivering, you know, someone else's urine, it is something we have been addressing for 25 years, and it is treated as a positive automatically. Any effort to dilute, subvert, adulterate, ignore, misdeliver, is a positive, and it results in automatic suspension.

Mr. UPSHAW. Suspension.

Chairman BARTON. Well, we don't—we found out that it is not illegal under Federal law to have these devices.

Mr. TAGLIABUE. That is a different—

Mr. UPSHAW. That is different.

Mr. TAGLIABUE. It is illegal for us.

Chairman BARTON. Well, that is good. This is another area you are ahead. It is going to be illegal by the end of this Congress.

Mr. TAGLIABUE. Well, it should be. There are a lot of things that should be illegal.

Chairman BARTON. But I have—that is not directly on point, but I just wanted to—and I appreciate that you already had—I would assume the Players Association supports the position that the Commissioner just enunciated.

Mr. UPSHAW. We jointly wrote the policy, and we totally agree with it, and that—I was asked a question about the Fourth Amendment earlier. I mean, we cannot go into his house and find what he has there. That is completely different, but if he comes and tries to use a device, or any player tries to use a device, as the Commissioner has pointed out, it is a positive test, and you are suspended.

Mr. TAGLIABUE. And we also, Mr. Chairman, we—our supervisors spot-check our collectors on an unannounced basis to make sure that the collectors are enforcing the knees, the nose requirement, and if they find that they are not, then the collector is fired.

Chairman BARTON. Very good. I guess my last comment, Mr. Chairman, I would hope next year, the Cowboys and the Texans each get one free first round draft choice.

Mr. UPSHAW. At the rate they are playing, they might.

Chairman BARTON. That is the best line all year, right there.

Mr. TAGLIABUE. You have got to recognize he is a Raider.

Chairman BARTON. Yes.

Mr. UPSHAW. That is why, when Paul said he had no, you know, he was not concerned about who won, well, I am still a little concerned about the Raiders, so—

Chairman BARTON. Yes, well, a good line is a good line.

Mr. STEARNS. Thank you, Mr. Chairman. The gentleman from Massachusetts.

Mr. MARKEY. I thank you so much.

First of all, thank you so much for having a good policy on the books for a long time. You help us with everyone else, because you have been able to work on this process with the players and the owners in a very constructive way over a long period of time, and so, you have showed that where there is a will, there is a way.

One of the objections which you raise is the National Labor Relations Act, and that you like to keep as many things subject to collective bargaining as possible, although I think I heard from both of you that you keep these health issues in a separate category from every other collective bargaining issue, which is pretty much what Congress does as well. What we do is we pass minimum wage laws, and we say you can't negotiate around them. We pass child labor laws, and we say, you can't negotiate around those. We pass worker safety laws, and we say you can't negotiate around those. Those are off the table for you guys, and for everyone. So, Congress, even with the National Labor Relations Act and collective bargaining, we pass laws here that we believe are just so fundamental that we are not going to allow them to be subject to collective bargaining.

Now, what you say is, and especially you, Mr. Upshaw, because we appreciate it that you have always tried to keep them separate. Some of the other representatives from the other leagues, who represent the unions, have obviously not adopted that position. They see it as a central bargaining chip with other issues, which is troubling to us, so as we move forward, it is going to be necessary for us to take note of that, that you have set an example as to how it should be done, but we can't be sure that the other leagues, especially the unions, will follow suit.

You, Mr. Upshaw, have set a model for how important it is to keep it as a health issue, as—even as a competitiveness issue, but still, not a collective bargaining issue, although you keep it inside the collective bargaining process. So, just so you understand, as we would move forward, if we did pass legislation, we would think of it in the same context that we think of worker safety, child labor laws, minimum wage, we are just putting it in a separate category, as you have yourselves, although not legally, but at least *de facto* in the way that you negotiate.

Now, Commissioner Tagliabue, you have expressed several specific concerns about H.R. 1862, and if I can list them, perhaps we could work through them a little bit. One, you say that the number of tests required is less than the NFL already does. Two, that the regulatory process to add new drugs to the prohibited list may be too slow to respond to developments in doping technology. Three, that the World Anti-Doping Association list of prohibited substances is overbroad in some respects and underbroad in others. Four, that the penalties are excessive in the context of professional football. And five, that it would be difficult to measure the effectiveness of the regulations issued pursuant to the bill. I think I have summarized your five objections.

So, let me ask this, then. If we increased the number of tests, streamlined the regulatory process, so that we move more rapidly to add new doping agents to the prohibited list, gave the Secretary of Commerce discretion to make adjustments to the World Anti-Doping regime, and perhaps moved the jurisdiction to NIDA, and

adjusted the penalties so that they affect a set percentage of the season, rather than a set amount of days, would the NFL then be able to support the bill?

And I would ask Mr. Upshaw if you could respond as well.

Mr. TAGLIABUE. I think the answer is yes, and I guess the way I would summarize what, you know, the points you made, as I said at the outset, I think putting NIDA in here is very important, in place of the World Anti-Doping Agency. It seems to me that is a critical part.

Second, I think, as you said, the legislation can and should clarify the relationship of this bill, this statute, to the NLRA, and I think the key thing there is that by having a collectively bargained component to whatever program will be going forward, it insulates it from challenge in a very effective way. That is my main point. I think that is Mr. Upshaw's main point here, that by having it collectively bargained, it effectively insulates it from challenge in ways that might not otherwise be the case.

Mr. MARKEY. You are saying that other leagues may challenge it.

Mr. TAGLIABUE. A player.

Mr. MARKEY. A player may challenge it.

Mr. TAGLIABUE. If you just have a regulatory scheme, a player can come in with an agent and file a lawsuit under the—you know, in a Federal court or in a state court, and rely on a state statute that has to do with employment terms and conditions. There are a lot of them out there, some of them specific to the rights of professional athletes. Those kinds of suits are barred by collective bargaining, because the union is the sole and exclusive bargaining rep of the members of the unit, and therefore, deference is required to union negotiated agreements. So, I think that is a very important element of preempting collateral challenges to suspensions.

Mr. MARKEY. All right. But assuming that the legislation dealt with the collateral challenge, would the essential principles that you have laid out, as modified by what I just said—

Mr. TAGLIABUE. Yes.

Mr. MARKEY. Would that be appropriate for the committee to legislate?

Mr. TAGLIABUE. Yes. I think so. Like I say, I think the three key points that we would make on the five areas that you have raised are NIDA role rather than WADA, clarifying the point about collective bargaining authority, which I think is more than a theoretical point, and third, would be addressing the penalty provisions in a way that is less draconian and is more, allows somewhat greater discretion to the individual sports, and you know, nonetheless, stiff and clear, but less draconian than a 2-year suspension.

Mr. MARKEY. Okay. Now before—

Mr. TAGLIABUE. The other issues about, you know, flexibility and getting things in and getting things out, those are real concerns, but I would assume in the process going forward, that could be managed. But just to take one example, when we banned ephedra, we were the first to do it, there were industry groups saying that they were going to sue us if we banned ephedra. We said we are banning ephedra for our athletes, not for society generally. You want to sue us, sue us.

Mr. MARKEY. Did they sue?

Mr. UPSHAW. No.

Mr. TAGLIABUE. No, because we tailored our program to our athletes. Did they sue generally? Yes. As you know, a Federal Court in Utah has struck down part of the FDA ban, so I don't want to be in a situation where, by taking this from where we are to where we are going, all of a sudden, we fall under the general rubric of okay, you live with the rest of society on ephedra. If our doctors find that ephedra is dangerous to our athletes, in the kinds of high level physical activity that they engage in, we are going to ban it. We don't want to lose that authority by what may happen here, by putting us under the Administrative Procedure Act or anything else.

Mr. MARKEY. Okay. So—and under the Administrative Procedure Act, the challenge would be that the law, as we have promulgated it, is not reasonable, and isn't related to the issue that it is dealing with, that it is arbitrary, that there is no defined standards. Couldn't we cure that in the way in which we draft the legislation, so that as we flesh out the Administrative Procedures Act, we have given enough guidance that it could sustain a challenge in court?

Mr. TAGLIABUE. I would hope so, but I, knowing what ephedra represents for our athletes, I am astonished that there is a Federal Court decision out there in the last 2 months saying that the FDA's authority to deal with ephedra is not as extensive as the FDA though.

Mr. MARKEY. I just—if I might—I just don't think that is an insuperable obstacle in—

Mr. TAGLIABUE. No, like I said, I don't think it—

Mr. MARKEY. [continuing] terms of our ability to craft—

Mr. TAGLIABUE. [continuing] is insuperable.

Mr. MARKEY. [continuing] it in a way that could—

Mr. TAGLIABUE. But it is a real—

Mr. MARKEY. [continuing] withstand an APA challenge, you know, because if we were tasked with that specifically, it would be possible to write something in a way that the court would not be able to rule it was arbitrary and capricious, or was unreasonable, because there were specific justifications that were built in for each one of the—could I ask Mr. Upshaw, because—I am far, far over. I apologize.

Mr. UPSHAW. The only response I would like to make, you did touch on a percentage. We do have a percentage. We have 25 percent of a season being lost for violating the policy, and that sort of gets back to the question I raised earlier about exemptions. We need to clarify what does that mean. If we are going beyond what—where this bill is and where it might end up, I would think that the clarification on exemptions need to be a lot clearer for us, because we think right now, we are exempt.

Mr. STEARNS. The gentleman's time has expired.

Mr. MARKEY. But can I just—but on those five items that I listed, if we were able to work on them, would you be able to support legislation?

Mr. UPSHAW. Well, what we would have to do, both the Commissioner and myself, would be to see the whole bill in totality. We

can't respond to one piece of it, you know, in piecemeal. We would have to see it—

Mr. MARKEY. Well, I mean—right. No—until all—

Mr. UPSHAW. We are not—

Mr. MARKEY. [continuing] conditions are complete. But if we did complete all of those five conditions that are in the testimony, would be able, then, to support the legislation?

Mr. UPSHAW. I am not ready to make that commitment yet, I mean, but I am willing to say that the players and the League are willing to look at all of them, and then judge it after we see it all.

Mr. STEARNS. Would the gentleman from Massachusetts yield briefly before he yields back his—

Mr. MARKEY. I would be glad to, and I apologize. I thank you for your indulgence.

Mr. STEARNS. I just want to ask Mr. Upshaw if you know who the defending Super Bowl champion is.

Mr. UPSHAW. Yes.

Mr. STEARNS. Who is it?

Mr. UPSHAW. New England.

Mr. STEARNS. Oh. And where is Mr. Markey from?

Mr. MARKEY. Yes, well—

Mr. UPSHAW. I know. I am surprised Mr. Markey didn't bring that out.

Mr. UPTON. Mr. Chairman, do you know where the quarterback from that team is from?

Mr. UPSHAW. He is from California.

Mr. MARKEY. I was actually going to use as one of my arguments that the nexus that we would have is that a lot of times, there is public funding for the stadiums for these professional football teams, but Massachusetts did not provide any public funding for the Kraft family, so I was not able to use that argument.

Mr. UPSHAW. And I just want to remind you that Mr. Kraft reminds us of that all the time.

Mr. STEARNS. The gentleman's time has expired. The gentleman from Michigan, Mr. Upton.

Mr. UPTON. Thank you, Mr. Chairman, and I, again, appreciate this second day of hearings, and I—to start off, I just wanted to say again, Mr. Commissioner, we appreciated your response this last year on the decency debate, you know, it was a very important part of what we were able to do in the last Congress, when we passed legislation again in this Congress, and we are waiting for the Senate to act.

And we appreciate your role for a long time in this issue, as well, on steroids, as you have been the leader in the field, and the questions haven't been to the NFL like they have been to Major League Baseball and other sports, and that is because of the respect that both of you have for the game, not only in the past but the future.

One, just to follow up on Mr. Markey's question, in terms of, as you know, in this legislation that was introduced, it calls for a 2-year ban. It seems to me that you would, knowing that the NFL has tested every player every year since 1987, and the first offense is a four game suspension, this, in essence, would be, if a team didn't go to the playoffs, 32 games. It seems as though, if it was rolled back to 1 year, would that be, obviously, preferable, but it

wouldn't be exactly where you are, is that what I am hearing this morning?

Mr. TAGLIABUE. Yes, I think it still would be too much. I mean, we have had 54 suspensions in 15 years, and only two repeats out of 54, and both of those players retired. I think that shows a very effective program, because it is not just the four game suspension, but the fact that once you have tested positive, you are tested 24 times a year on an unannounced basis. That is more effective as a deterrent than another 6 months, another 9 months, another twelve months. So I think that when you look at our program, 54 suspensions in 15 years, it is working.

And as Mr. Upshaw said, these players have a short career, and neither one of us is for—

Mr. UPSHAW. And once a player is in that program, he is in it for the remainder of his career. He is not out because he tests clean for a period of time. He is still in.

Mr. UPTON. Now, this particular player that Mr. Barton, Chairman Barton referenced, from the Vikings, that was apparently, I am told, found through airport security with a device, what is likely to happen—and he was obviously not being tested at the time. What is likely to happen to someone like this scenario that happened?

Mr. TAGLIABUE. Well, this player has been in the league, I think, for two or 3 years. He has already been suspended for four games under our drugs of abuse program, which means that he has either tested—

Mr. UPTON. Was he suspended for this incident?

Mr. TAGLIABUE. No, but he has been suspended for four games last year under our drugs of abuse program, which means that he has either tested positive already twice or three times. In other words, the program has caught him twice or three times in his first 2 years in the league. So, whatever he is using, it is not very effective.

Mr. UPTON. Mr. Upshaw.

Mr. UPSHAW. There is nothing else to add to that, except as the Commissioner has pointed out, it would be, from what I can understand about this device, it would be almost impossible to bring it into a testing area and use it. He just couldn't do it, unless they are, you know, I just don't think it is even possible when you are talking about from the knees up.

Mr. UPTON. That is why, as I am listening, you wonder why he even purchased this stuff, knowing that it is not going to work.

Mr. UPSHAW. You mean you don't believe it was for his cousin?

Mr. UPTON. Oh. Find out. Let me just ask a question on the Human Growth Hormone, and that is where a real potential for abuse could be. Tell me what you are doing on this issue.

Mr. TAGLIABUE. Well, we have with us some scientists who work on our program, and I will try to just recap what they have been telling me over the many months. No. 1, we are working with other organizations, including the World Anti-Doping Agency, trying to share learning in this area. Second, it appears that the actual performance-enhancing effects of this, the Human Growth Hormone, may be misperceived. In other words, it may be overblown that the actual performance-enhancing effects are less than some athletes

expect. So, we are going to educate our players in this area. Hopefully, education here is going to be an important deterrent.

And third, we are actively looking at the two types of tests that are being developed in the labs. Both are, as I understand it, blood tests, rather than urine-based tests. They test this—different elements. One tests for the Human Growth Hormone itself. The other, as I understand it, tests for the chemical consequences within the body of the use of the substance. As I said earlier, in the judgment of our experts, neither test has yet been adequately validated as reliable. The WADA did test, I think, 300 athletes in Athens, out of, I think, 11,000, and there were no positive tests. That could either be, I guess, because the test isn't effective, or they are not using it. But we are on top of it. We regard it as an important issue, and in fact, we, the NFL, raised this as a critical issue in Congress back in 1992, 1993, and 1994, when this was first coming up with the pharmaceutical firms. So, we have been on it since it has been on the horizon.

Mr. UPTON. Thank you again. I yield back my time.

Mr. STEARNS. I thank my colleague. Mr. Towns, the gentleman from New York.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Let me just say that I really appreciate you holding this hearing. I think it is very important, you know, but I come saying that we can learn from what the NFL is doing, and I think that I want to say to the Commissioner in particular, I think that the real problem, though, is some of the other sports teams, in terms of the other leagues, I should say, you know, have not made the kind of progress you have made, and that is the thing that we are dealing with. And I must say to you that I feel that, you know, that when someone is doing basically what they should do, that we should leave them alone, but—and you seem to be doing that, you know.

You are moving forward, you know, taking action, but others are not taking action, and that is the problem. And I just have difficulty with, you know, when you legislate, you know, one size fits all, and I just hope that somewhere along the line, that others will get the message and begin to move, because I really would hope that we would not have to get involved in this process. I really would hope that it would clean it up. And my real concern is the youth. They idolize professional athletes. They see them as role models, and then when we here they are doing all kinds of things, that really bothers me.

Now, I know you have an outreach program. How is that working? Is it effective?

Mr. UPSHAW. Well, we like to believe that it is effective, and we try to improve in this area as much as we can, and as I said in my opening comments, we recognize that we are role models, and we recognize we have a responsibility, and with that, we also take this issue on with the type of force that needs to be given here to get it out of the game and out of our society in general. We don't want to send the wrong message.

Jointly, between the NFL and the Players Association, we have a number of programs that we are using to use as an outreach, and whenever given the opportunity to talk about this in any form, we

will do it, and we continue to do it, and I think the Commissioner has a couple examples here right now.

Mr. TAGLIABUE. To your point, we have published a four part health series for young athletes through our Youth Football Fund. I am holding up some of it here. Two of the four volumes deal directly with strength and conditioning, and with the evils of using performance-enhancing substances. This has been produced for us under the direction of a leading physician at the Yale University Medical Center. It has been produced for us by—in conjunction with the American College of Sports Medicine, the American Red Cross, the Institute for the Study of Youth Sports at Michigan State University and other such organizations, so we give this as wide circulation as we can. It is on our Internet site. It is on Internet sites of the USA Football Organization, which is a not for profit advocacy group that we endowed in this area.

So we think we have been doing as much as we can do here. We can't prosecute people. We can't indict them. But we can educate, and we have been very proactive in this area of youth education, not only through these materials, but as Mr. Upshaw gave with his own example last night, he was out speaking to kids, and we have many, many players out speaking to kids about how to play the game, and the fact that you play it without using performance-enhancing drugs.

We have a video series that goes with this. We have clinics for high school coaches every year, including out at the Hall of Fame, and at the beginning of our season, and we emphasize throughout the ways of dealing with these issues of performance-enhancing drugs, and that they have no place in the game whatsoever.

Mr. TOWNS. All right. Let me just—which I would like to make certain that I fully understand, is the probable cause, the basis in terms of a player is subjected to probable cause testing instead of random. I mean, what leads to that?

Mr. UPSHAW. Well, we don't have probable cause in this area. You are randomly tested, seven players per week per team are tested every week, in season and out of season. The only place that we would use probable cause to get someone into a program would be drugs of abuse.

Mr. TOWNS. Drugs—I didn't get that.

Mr. UPSHAW. Drugs of abuse.

Mr. TOWNS. Drugs of abuse, yes. So, for instance, if you felt, or you heard that a person was using, would you do anything about that?

Mr. UPSHAW. We would do something about it. Of course we would. We have medical experts that will intervene, and they would make the determination if he meets the criteria, he would be tested.

Mr. TOWNS. Yes. You know, Mr. Chairman, you know, I think your legislation is, you know, when you look at what some of these sports teams are doing, the leagues are doing, that—and I understand it, but when you have someone that is moving, you know, forward, in a very positive kind of way, you know, then I wonder, you know, if we should take action now, or should we wait and see, would others finally get the message. You know, some people learn faster than others, and maybe they might eventually realize that

we are serious here, and that we are going to take some action. Rather than just do it now, to do it later.

I just sort of hate to see everybody, you know, sort of being under the same umbrella, or—and knowing that, for instance, NFL in particular, I really feel that they understand our seriousness, and they understand that—how important this is to the young people. Now, I must admit there is others that don't. I think baseball hasn't learned the lesson, and of course, in particular, but if we wait, maybe they will understand that, rather than to move forward now.

I would prefer us not being involved in it, if we don't have to get involved in it.

Mr. STEARNS. Well, I thank the gentleman's opinion, and that is why we have the hearing. I think we have, it was in the bill, the Secretary of Commerce exempts those organizations that have higher standards, so they are not involved, and I think, based upon what we have heard today, there is some reason to adjust, to amend the bill, to recognize some of the things that the Commissioner has talked about, and of course, what the other people have said. So—but I appreciate your opinion.

With that, are you complete? Yield back—go ahead.

Mr. TOWNS. So in other words, you are saying that you will be moving forward, rather than to just wait and see, in terms of, if others will come in line.

Mr. STEARNS. It would be my preference to move forward to try to amend the bill to incorporate what we have had on this hearing, the two hearings yesterday, the hearing we had in March, and the one we had in 2003. So, that we have had a series of five hearings, and I think we have a credible bill that is still in the making, and so, any suggestions you have, you know, I am thinking that we would try to incorporate, and possibly have a markup soon. I am not sure when, but to continue to keep the debate going. And I think obviously, as you know, the debate has created within somebody's mind, to increase the penalties and to make more serious the testing. That is what we saw, obviously, with baseball. So, I mean, just the fact that we are moving forward has created that momentum.

Mr. TOWNS. Well, let me just say why my reservations, I have reservations. We need to set up a program to be able to test in the high schools. They do not have the resources to do that, and of course, I think that if we are going to take action here, we should include the young people. Let us develop a way that some dollars will go into a situation where they can be tested, because you are talking about toxicology labs, and of course, that becomes expensive, in terms of urine, of course, and blood. So, what about a high school that has football players that might be involved. They don't have the money to do any testing, because they only can get uniforms, and generally, the uniforms, in many instances, you know, are hand-me-downs. So, I think that if we are going to take action, I think we should do it in a comprehensive basis, rather than to just jump into it and do something. Let us look at what we—my concern is the youth. I mean, that is my concern, and I want you to know that any legislation that comes out of here, I believe it should deal with the youth as well.

Mr. STEARNS. I thank the gentleman. His time has expired. Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman. I am curious.

I am just trying to figure out generally how the NFL's drug policy mirrors the chairman's draft bill here. Mr. Upshaw, if you could help me, just give an average 5 year veteran, never had an issue with drugs or anecdotal or rumors about that player. How many times in 1 year would that particular player be tested?

Mr. UPSHAW. He could be tested every time there is a test, depending on the randomness of the program that Dr. Lombardo has put together. So he could be tested as often as there are tests.

Mr. TERRY. All right. So unlike the NBA, veterans are eligible for random tests. Did you say that the team only has to do seven random tests a year?

Mr. UPSHAW. No, seven per week.

Mr. TERRY. Seven per week.

Mr. UPSHAW. Yes.

Mr. TERRY. Could the team do the same seven players—

Mr. UPSHAW. No.

Mr. TERRY. [continuing] throughout the year—

Mr. UPSHAW. I mean, you would—

Mr. TERRY. [continuing] and game it that way?

Mr. UPSHAW. [continuing] have to ask Dr. Lombardo how that program works, because that is another part of independence of it from our standpoint, we don't know who those seven guys are. It is only the computer program that tells who those seven players will be, and there is no distinction between veterans or rookies or practice squad players or anyone. It is seven players.

Mr. TAGLIABUE. The way it works is that our program advisor, who is at Ohio State University, generates, or has a computer program that randomly identifies seven players on every team every week, and that list of players, randomly generated at Ohio State University, is delivered to the team early in the week, and a team representative or a program representative then says Upshaw, Henderson, Tagliabue, give us your urine right now.

Mr. TERRY. So that All Star, MVP, All Pro, is likely to be—

Mr. TAGLIABUE. All Star—

Mr. TERRY. [continuing] randomly tested.

Mr. TAGLIABUE. It does not matter. It is—a computer in Columbus, Ohio is identifying the names, and there is no time to say not him, do him. You know, this idea that people can shove, shift, jump, and jive. It doesn't make sense.

Mr. TERRY. Well, I appreciate that.

Mr. TAGLIABUE. It doesn't work that way. You get a list early in the week, and it is you, you, you, and you right now. If you don't give us your urine, you are suspended.

Mr. TERRY. Well, I do appreciate—I think in many ways, a lot of fans feel that probably the NFL players, or football players in general, are more susceptible to want to use performance-enhancing, just because it—I think it takes such a toll on your body. But I do think the NFL has probably done one of the best jobs of the professional sports, in trying to come up with a comprehensive drug policy.

Mr. Tagliabue, I asked this to Mr. Stern yesterday. It seems to me that it would be advantageous to professional sports to remove drug testing from collective bargaining, as opposed to the policy of keeping it part of collective bargaining, where you can really focus on the issues, pay and treatment of personnel. Do you see, perhaps, there, an advantage to removing drug treatment or drug policy from collective bargaining?

Mr. TAGLIABUE. No. I think that collective bargaining is appropriate for all aspects of employee healthcare, including the quality of our physicians, the right of an athlete to get a second opinion, if he wishes to get a second medical opinion that is different from the team physician, including the allocation of the costs of psychological counseling, and all of these matters. I think that this is another area, it is part of the broader area of healthcare for the players.

Mr. TERRY. Well, then let me—

Mr. TAGLIABUE. And to Mr. Upshaw's credit and his association's credit, they have viewed this issue that way. They have not viewed it as a Fourth Amendment issue or as a privacy issue. So, I think it works fine.

Mr. TERRY. Well, let me interrupt. I am sorry, because I only have 56 seconds left, and I have one specific question for Mr. Upshaw, but I want to follow up on what you are saying here in regard to the collective bargaining matter.

The general, one of the principles or generalities of which the chairman has based his bill is that this would be a minimum policy, a floor, in that you can, in essence, I am using this word, opt out of the federally run, under Department of Commerce program, if you exceed those standards. So my question would be, is there incentive, then, in this bill, for all of the professional sports to exceed the minimum standards here, as to escape the administrative controls and the issues of which you spoke?

Either one of you can speak.

Mr. UPSHAW. Well, this sort of gets back to the exemption issue. I mean, as the bill is written today, the 2 year ban brings us back, right back in, and that is a problem. And I definitely have a problem with the independence of it, and I also have a problem with the involvement of WADA. I mean, we have used WADA where we thought it was necessary in our sport, and we have used their advice, and we continue to use their advice, but we don't believe that they are the gold standard.

Mr. TAGLIABUE. I said earlier that I think that as the bill is currently written, there are some perverse incentives that can reduce programs in this area to the lowest common denominator, but we have identified the areas where we feel that changes could be made, and that would be rectified.

Mr. TERRY. I appreciate that. Mr. Upshaw, as a Husker alum, donor, booster, give me your insights on Bill Callahan.

Mr. UPSHAW. Well, I think Bill can be a tremendous. I mean, he started late. He was still under contract with the Raiders, and he, you know, had a tough time getting his staff together. I am very optimistic that he will turn that program around. I don't want to get into how the last coach got out of there, but that is for another story.

I just want to make one more comment, and I probably shouldn't, but I will, about the collective bargaining issue. One of the things that make this program that we have designed in the NFL so unique is that when you are dealing with the collective bargaining arena, you then take out the integrity of what one individual club, or one club owner, or one team might decide to do on its own. By keeping it under one umbrella, that we don't want to see independent programs out there, and that is very important to remember. But the most important part to remember is that the people we are talking about are the players, and to get the support of the players, to keep the support of the players, and to understand that if you refuse to test, if you just refuse, I am just not going in, it is a positive test. And I think that is one of the biggest deterrents we have in our system that makes it what it is.

Mr. STEARNS. I thank the gentleman. The gentlelady from California, Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman. I actually just want to comment. I don't have many questions. I appreciate your thoroughness and certainly your strong stance against steroids, most especially ephedra. I just believe ephedra is such a terrible drug, and yesterday, I pressed Baseball Players Union rep, Mr. Fehr, on this issue, and I just really want to thank you. There is no clinical reason for ephedra. I guess it is a bronchodilator, but it is a very poor one at that, and it is a dangerous substance, so I thank you for your stance on that.

I have questions, considerations, and problems with this legislation, and I think that it needs to be refined and fixed. I think we have heard some great testimony on ways to improve the legislation. I look forward to working with you, Mr. Chairman, and thank all of you gentlemen.

Mr. STEARNS. I thank the gentlelady. Mr. Bass, the gentleman from New Hampshire.

Mr. BASS. Thank you, Mr. Chairman. I, too, don't have any questions. I want to thank our panel for being here today. This has been a very good series of hearings. Every conceivable question that could be thought of has been asked. So now we have—we know where we are. We know—we think we may know where we are going, and I think we are going to have a productive markup and a successful bill on the floor.

I yield back.

Mr. STEARNS. I thank the gentleman. Mr. Murphy.

Mr. MURPHY. I thank you, Mr. Chairman. Just a couple quick questions.

One on the issue where the National Football League, which appears to have the most comprehensive programs in professional sports for testing, but you recall the issue of the physician giving the Carolina Panthers steroids, just weeks before the 2004 Super Bowl appearance. It begs the question, on a situation like that, on two things.

One, is the current system really working to catch systems like that, and should there be a different number other than a random seven, once a team is reaching the playoffs, to—like I believe in the preseason, you test everyone. But once a team is reaching the playoffs, there should be more extensive testing.

Mr. UPSHAW. Well, I will comment briefly on what we believe came out of that, and it is an ongoing investigation as we speak. We have realized that we needed to change some standards, and we have done that. We actually changed the ratio from 6 to 1 to 4 to 1. We also included more off-season testing as part of our ongoing program, so we have increased that from two to six.

The other part of it is, knowing that the nature of the tests and the nature of the randomness of it, if a person is in the playoffs or in the Super Bowl, he is still being tested all the way up until that point. He doesn't know when it is, and you also have to remember that we are talking about anabolic steroids that stay in your system for 30 to 45 days. So to cycle in and cycle out, you are taking too much of a chance, and we don't believe that we need to increase the number from seven, because we have been doing it all year.

Mr. TAGLIABUE. I guess the only thing I would say about the Carolina investigation is that we don't know enough yet to be definitive, but it does involve a unique substance, which is the so-called ratio between naturally appearing testosterone in the body and epitestosterone, and whatever the issues are there, they would be an issue under any drug testing program. They have to do with the limitations of science, medicine, and testing technology, not with the limitations of our program. Whatever those issues are, so far as we are aware of what is being investigated there, they would exist under a WADA program, an IOC program, or any program that anyone could come up with, given the current state-of-the-art.

Mr. MURPHY. Yes, I understand. What I was wondering is if a team is making it to the big game at the end, that should it be a situation or be considered a situation where just all the players would be tested because, obviously, that would make a big difference.

Mr. TAGLIABUE. You know, it is a thought worth considering. I think that the deterrent effect of unannounced, random testing the way it is is pretty comprehensive.

Mr. MURPHY. Let me shift to another question here I am wondering about, and that is a procedure I am not clear, but I want to know if that is the case. If players are being considered in a draft, NFL draft, is there a test that takes place for those college players prior to that? What is done, and is it comprehensive?

Mr. TAGLIABUE. We have, each year, what is called the combine in Indianapolis, where we invite about 600 collegiate players to a timing, testing, and physical evaluation program. It lasts about a week, and in addition to all of the medical testing, we do test those players for drugs, both drugs of abuse and steroids.

Mr. MURPHY. And what happens if a player who is being considered for the draft tests positive for steroids?

Mr. TAGLIABUE. Well, at the moment, he goes into unannounced testing, which I think in this context would be 24 tests a year from the moment he signs a contract with an NFL team.

Mr. MURPHY. So they would not necessarily be in a situation that would have any potential suspensions. They are obviously not a member of the team yet, but you would monitor them to the same level as someone else who has been discovered.

Mr. UPSHAW. He would automatically enter into the program. It is just part of a pre-employment physical that we do to make sure that if there is a violation, it is automatically into the program. And he is there for the rest of his career.

Mr. TAGLIABUE. At this point, we do not have discipline for pre-employment positive tests. We do mandate that as soon as the player signs a contract, if he does sign a contract with an NFL team, he goes into the automatic 24 unannounced tests a year.

Mr. MURPHY. Well, I do want to commend the League for doing such comprehensive testing, acknowledging it is a serious problem. And I think it also—although I think we need to do more with our youth to convince them of the dangers of this. Sadly, nothing is more convincing than when you see some retired player ending up with a premature death on this, and I am hoping we can continue this kind of real serious approach to this, and I thank you for the message you send to today's youth about that. It has to be unrelenting and strong. Thank you.

Mr. UPSHAW. Thank you.

Mr. STEARNS. I thank the gentleman. I don't have any more questions, but I think the ranking member has indicated that she does. Is there anyone who would like to do another round? Okay. Mr.—the gentleman from New York. Okay. Okay. The gentlelady is recognized, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you. I just had a couple more questions. Again, assuming that we do do legislation, should the legislation allow for any discretion to be considered when issuing a penalty for a first time offense or subsequent offenses, and how do you deal with that?

Mr. UPSHAW. Well, under our policy, there is no discretion. If you test positive, you are positive, you have a chance to appeal. You have a chance to have a B bottle tested, but that is the way we deal with it.

Ms. SCHAKOWSKY. Okay. In the bill, it identifies the Professional Sports Association, that is a quote, as the judge in any appeal process, and it is my understanding that under your negotiated agreement, the Commissioner may be the judge or a designee, but that in practice, the Commissioner has been appointing judges that are mutually agreed upon by the Players Association. I am wondering if, instead of identifying the Professional Sports Association as the judge, whether or not in the legislation, we should have the Professional Sports Association appoint a designee mutually agreed upon by the Players Association, if that would be a preferable way to go, in language in the—in legislation.

Mr. UPSHAW. I don't want to speak for the other leagues, but in our situation, we are very comfortable and satisfied with the Commissioner as the person that hears those appeals. Obviously, when you start talking about these types of issues, the players feel firmly and strongly that it is fair, and that is why we have the Commissioner, and I don't know if you could take the legislation to say one size fits all, as obviously you can see, all of these programs are completely different from each other. But we feel that the Commissioner is charged with the integrity of the game, and we would leave it in his hands.

Ms. SCHAKOWSKY. But am I wrong that it has been common practice that the Commissioner has appointed judges, or is that not so?

Mr. UPSHAW. We don't—I mean it is his decision. We have enough confidence in his decision to do this, but I can't recall any judge that has ever heard a case.

Mr. TAGLIABUE. The way we have handled this is that I appoint, in some cases, a law professor to sit as the appeal officer. In other cases, it might even be our general counsel, if the Players Association is okay with that. Generally, Mr. Upshaw and I have agreed that since the buck stops with me, and it stops with the League, when it comes to liability and responsibility for everything that goes on in the NFL, he is comfortable that I have the authority to designate appeal officers. I feel very strongly that I have the responsibility to make sure the NFL is a safe and sound place for people to play, and I want to make sure that we are ultimately overseeing the safety in the terms and conditions of working in the NFL, including the designation of appeal officers. And the union has been comfortable with that.

Ms. SCHAKOWSKY. Okay. Let me finally just say this. Mr. Upshaw, would you say from your point of view that the 2 year suspension, as a career ending penalty, is your biggest objection to the way the bill is right now?

Mr. UPSHAW. Well, that is one of them. That is one of my biggest objections.

Ms. SCHAKOWSKY. Okay. Do you want to just quickly, then—or do you feel that—

Mr. UPSHAW. Well, I—

Ms. SCHAKOWSKY. [continuing] sufficiently the point has been made?

Mr. UPSHAW. I think the point has been made that—

Ms. SCHAKOWSKY. Okay.

Mr. UPSHAW. [continuing] turning the testing program and the protocol—

Ms. SCHAKOWSKY. Right. Okay.

Mr. UPSHAW. [continuing] over to WADA—

Ms. SCHAKOWSKY. WADA.

Mr. UPSHAW. I don't want to get there and go there any more, but I have a real concern there, and I also have, you know, a big concern about the whole appeal process, which you raised already, so—

Ms. SCHAKOWSKY. Okay. Good. So, it would be the 2 year suspension, the testing program itself, and the appeals process would be your main three headline items?

Mr. UPSHAW. That definitely would be on the list, and in looking at the whole bill in totality, would also be helpful, too.

Ms. SCHAKOWSKY. I understand. Thank you very much. I appreciate it.

Mr. STEARNS. I thank the gentlelady. The gentlelady from Tennessee, Ms. Blackburn, is recognized.

Ms. BLACKBURN. Thank you, Mr. Chairman, and thank you to both of you, for being here with us today. I apologize, I had to jump out and take care of a couple of meetings, and then come back. So, we do appreciate your being here, and I think that as many of our

members have said, we would rather not be handling this issue, and we would rather not be in the process of discussing this and having to bring forward a bill, but we feel as if the industry doesn't take the steps that it needs to, then we do need to do something, and in all fairness, I am going to have to say that you all have taken steps, and we appreciate both your willingness to be here, and the steps that you are on the record having taken, and maybe it is that we are here because of BALCO and baseball, as we continue to hear many times, and I think also we are here, in part, because this issue has been one of those wink and nod and turn a blind eye sort of issues for many folks.

Mr. Commissioner, you made a statement early on in your comments that you are concerned about the integrity of the game, and I would just submit to you that I think for many of us, we are concerned about the integrity of pro sports, and concerned about the longevity of pro sports.

I think that one of the things we have all found is the quickest way to lose something is to abuse it, and the process and the practice that has gone on does cause us concern, and that ties right back to one of the reasons that we are here, and you also made a comment that your choice would be to protect the game from untoward influence, and so therefore—and we join you in that, but I think we are also concerned with that, and have been a little bit surprised about the resistance that we see from some—or the willingness to come in and police this.

Mr. Upshaw, I think my question, I want to come to you on this. You have mentioned several times the bargaining chip, and talking about a bargaining chip with your collective bargaining, and the penalties, the penalty system. In addition to the penalties, is there—with the suspensions, is there a financial penalty that they are paying?

Mr. UPSHAW. Yes. It is 4 weeks without pay.

Ms. BLACKBURN. But there is no additional—that is what I am trying to get at. They are not having to sit down and write a check for a specific amount.

Mr. UPSHAW. Well, it all depends on, you know, some contracts. It all—

Ms. BLACKBURN. Okay.

Mr. UPSHAW. Because the contracts—if any—

Ms. BLACKBURN. All right. That is what I wanted to know, and I am going to move on. I have got 2 minutes, and we have a vote now. I want to go back to a May 16 USA Today article by Jarrett Bell. And your legal counsel for the Players Association made a comment about if a player tested positive for drugs, someone who is getting ready to go through the draft, that they would not have to give back their signing bonus, that it was your position that he would not have to give back the signing bonus, and could continue to work on through his contract. And you all have had a situation that has come up through the draft this year in that, and I was struck in some of my reading, there was a New England Patriots player who was referencing all of this, and the testing, and said this proves the rewards outweighs the risks. So, I want to know if you agree with those statements, and if, under your current policy, is it to the advantage of a college prospect to use a performance-

enhancing substance to better his numbers, and this was all done in reference to the Combine.

Mr. UPSHAW. Well, that was what I reference, you lose pay, and you could lose additional money, depending on what is negotiated in the contract. There are certain provisions of the contract that players are required to refund money for things that might occur that is in the contract. I don't think there is any dispute between our office and Harold Henderson's office on what the language says. And all they were doing, and I remember reading the article, was basically defending their position about what the language said, and the language will speak for itself.

But as far as a player taking a chance to do this, and use performance-enhancing drugs to gain an advantage, or to even be drafted or get into the NFL, is a risk that he takes that he will get caught, and he will be suspended. The point now is, if a player does this, and I don't believe that the risk is worth the reward, under no circumstance, because it is not the message we would want to send, and it is not the message we want our players to come into the League with. But on the other hand, he will and is in the program, and he is one positive test away from being suspended the next time. So, the policy is strong enough in the areas that it needs to be strong, and the language that—negotiated by agents and general managers is another issue, that is an addition to what we—

Ms. BLACKBURN. Okay. So you would—

Mr. UPSHAW. [continuing] require under the program.

Ms. BLACKBURN. [continuing] take issue, then, with the May 16 article.

Mr. TAGLIABUE. Yes, I think it is ridiculous.

Mr. UPSHAW. Yes.

Ms. BLACKBURN. Okay. All right. That is—Commissioner, go ahead.

Mr. TAGLIABUE. I think it is a great exaggeration. We have thousands of players in the League every year. We have been at this for almost 20 years. We have had 54 players violate the policy. We have had no player—we have had only two players out of those 54 ever be a repeat, and both of those players resigned rather than face the humiliation, embarrassment, and financial consequences of having been a repeat offender, so I think that the discipline clearly works.

With respect to the entering player, if we have been testing them, as I think we have, if college players coming into the NFL for 10 or 15 years, we have tested between 5,000 and 10,000 players, and we have had one incident, this year's incident.

Ms. BLACKBURN. Okay.

Mr. TAGLIABUE. So, I think that to suggest that this shows that the players, the college players think that the rewards outweigh the risks is not supported by the record.

Ms. BLACKBURN. Thank you. I appreciate that very much. I know my time has expired. I had one other point, and I will just ask them to respond in writing.

Mr. STEARNS. No, I—we have 11—about 10 minutes before the vote, I think.

Ms. BLACKBURN. Okay.

Mr. STEARNS. And this—after you finish, we are going to finish the hearing.

Ms. BLACKBURN. Okay.

Mr. STEARNS. So if you want to go ahead.

Ms. BLACKBURN. Both of you had mentioned, but—did not go back to, but you mentioned in your marks genetic manipulation, and the gene-altering drugs, and we don't have to go into that now. If you will just respond to me. Commissioner, you had the, Play Safe, I think is your magazine. If you will respond a little bit to how you are addressing that. When we talk about long-term effects, that is something that is of great concern in how that addresses our children, how it affects our children, I mean. And you can just respond to me in writing how you are addressing that genetic manipulation issue within the greater issue of the performance-enhancing drugs, and I thank you both so much for your time, and I will have to say we love our Tennessee Titans.

Mr. TAGLIABUE. Just one other point. I read, just this week, several people in the media saying that in this area, there is a wink and a nod, and there is rhetoric, but no hard programs. We spend over \$10 million a year on our anti-substance abuse programs. That is a pretty costly way of approaching rhetoric.

Mr. STEARNS. I thank the gentlelady. With that, Commissioner and Mr. Upshaw, thank you very much. Mr. Henderson, I appreciate your attendance, too, and so, with that, we will close down the hearing, and the subcommittee is finished.

[Whereupon, at 11:48 a.m., the subcommittee was adjourned.]

