

March 29, 2005

Honorable Ricardo H. Hinojosa, Chair
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002.

RE: Proposed 2005 Amendments and Issues for Comment

Dear Judge Hinojosa:

As the Commission undertakes the first set of amendments since the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005) made the guidelines a body of advisory provisions, the National Association of Criminal Defense Lawyers (NACDL) recommends that the Commission take special care to act in rigorous adherence to its statutory purposes and duties. Any new amendment should assure that the purposes of sentencing are met, provide certainty and fairness while avoiding unwarranted disparities, and reflect empirical knowledge. See 18 U.S.C. § 991(b)(1). The Commission ought to explain fully its reasons for amending a particular guideline so that both district and appellate courts and counsel may refer to them as necessary. Congress can also determine that its statutory directives are properly being addressed. Anything less, will invite the federal courts in exercising the discretion required by law to give less weight to the particular guideline.

While the lower federal courts have interpreted and applied *Booker* in differing ways – from giving the guidelines near presumptive weight to treating them as one of seven factors to be considered in imposing a sentence – it is clear that courts are faithfully attempting to carry out their obligations under the law. The process has not resulted in unmoored or unfettered discretion. Rather, each court is measuring the guidelines and the Commission's reasons and purposes in adopting them against the statutory purposes of sentencing and "the nature and circumstances of the offense and the history and circumstances of the defendant." 18 U.S.C. § 3553(a)(1). The Commission's reasoned action, coupled with explanations for any amendments will aid that process.

Of the three proposed amendments and issues published for comment, NACDL will focus its testimony on Anabolic Steroids while

supporting the Comments of the Federal Defenders and the Practitioner's Advisory Group with respect to Aggravated Identity Theft and Antitrust Offenses, respectively.

NACDL Testimony, April 2005

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I attach testimony and a paper prepared by NACDL member Richard D. Collins, who has extensive experience in defending and advising clients concerning anabolic steroids. As the testimony and paper make clear, anabolic steroids are different in many respects from all other controlled substances and for that reason have been treated so by the Commission. In particular, because of the nature and effect of steroid use, care should be taken to make sure that personal use quantities are not prosecuted and punished as trafficking offenses. Before the Commission acts to increase penalties for anabolic steroid offenses, it ought to consider expert testimony and empirical evidence to determine whether an increase is necessary and if so, at what level. Given the experience with how quantity-driven guidelines overrepresent culpability for a substantial number of offenders, the Commission should explore other avenues of addressing Congressional concerns before increasing the marijuana equivalency or the unit of prosecution. In any event, the Commission ought not just increase penalties willy nilly.

As always, NACDL appreciates the opportunity to comment on the Commission's work and is ready to provide any additional information that the Commission may require.

Very truly yours,

Carmen D. Hernandez
Co-Chair, Federal Sentencing Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

Comment [COMMENT1]: Respond
to:
601 Indiana Avenue, NW
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cc: Hon. Ruben Castillo
Hon. William K. Sessions
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl Howell
Commissioner Edward F. Reilly, Jr.
Commissioner Deborah J. Rhodes
Charles Tetzlaff, Esq.
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Testimony to the United States Sentencing Commission

Washington, D.C.
April 12, 2005

Rick Collins, Esquire
National Association of Criminal Defense Lawyers

As a life member of the National Association of Criminal Defense Lawyers and on the association's behalf, I wish to thank the Commission for the opportunity to offer my commentary. The subject of anabolic steroids has received massive media attention lately, as well as new attention from Congress. However, much of the attention has been extremely limited in focus. I would like to offer some observations of illicit steroid use outside of professional baseball. I believe that these observations are relevant to the determination of how to implement the directive to this Commission set forth in Section 3 of the Anabolic Steroid Control Act of 2004. In particular, I will focus on the equivalency of steroids to other Schedule III drugs, and to controlled substances in general.

My comments are offered on behalf of NACDL based upon my "in the trenches" experiences in dealing with anabolic steroid criminal matters. Following a five year stint as a state court prosecutor in the 1980s, I entered private practice focusing on the typical variety of criminal defense matters. Over the last five years, however, my practice has shifted toward a niche practice centering on civil and criminal matters involving steroids and sports supplement matters. I represent and advise several non-profit organizations in the field of bodybuilding, health and fitness, including one with 173 affiliated national federations. Hundreds of matters involving anabolic steroids and related issues have crossed my desk, affording me a unique and extensive view of the intersection of non-medical steroid use and the criminal justice system in this country. I have attached a copy of my curriculum vitae for your reference. I hope that my practical experience in dealing with steroid cases of all types will be helpful to this Commission on the issue of drug equivalency.

Anabolic Steroids Are Different from Other Controlled Substances

At the outset, the Commission should consider that illicit steroid users are profoundly different from other illicit drug users, and a number of their differences bear upon the issue of equivalency. There is a stark contrast between the profiles, motivations, and patterns of possession and use of illicit steroid users and that of persons who use other drugs. Indeed, steroids themselves are different from other controlled substances.

Anabolic steroids are the only hormones in the entire Controlled Substances Act, and testosterone, the criminalized steroid by which all others are measured, is naturally present in the bodies of every American man, woman and child. While the propriety of dealing with the societal problems associated with illicit steroid use via the mechanism of the Controlled Substances Act is not the primary focus of the Commission's interest at present, the Commission should understand that numerous legal reviewers have questioned or criticized the scheduling of steroids as controlled substances. I have attached a law journal article that analyzes the original Anabolic Steroid Control Act of 1990, which in turn references several other law review articles (by reviewers Black, Burge, and Hedges) that arrive at similar conclusions. These articles provide background information that bears on the appropriate equivalency between steroids and other controlled substances.

The profile of the typical steroid user has been misrepresented to the public, and to members of Congress. The "typical" steroid user has been presented as fitting one of two profiles: either the million dollar sports star, or the hapless teenager seeking to emulate him. Certainly, Jose Canseco was not the only steroid user in Major League Baseball. In fact, there are elite level athletes in a variety of professional and Olympic sports who are using or have used steroids to enhance athletic performance. A number of them use steroids in willful and unethical violation of the rules of fair play and may even deserve our scorn. But the Commission's concern cannot be about the regulation of athletic endeavors or the adulation deserved by athletes.

The star-struck adolescents who risk their health by emulating star athletes are deserving of our concern and protection and yet the Commission in amending the guidelines for anabolic steroids should first do no more harm to those young athletes as is likely to happen if penalties are increased without a thorough consideration and empirical analysis of the scientific and societal harms.

The steroid user who has been overlooked in the current focus of attention may be the most common user of steroids. Although I have met or corresponded with well over a thousand steroid users in the criminal justice context and have spoken with many of them expansively, it may come as a surprise that the majority of them were not teenagers, nor were they competitive athletes of any kind. The overwhelming majority were gainfully employed, health conscious adult males, between 25 and 45 years of age, using hormones not for athletic performance but to improve their appearance. These users typically are non-smokers who follow exercise routines including both strenuous weight training and *cardio* programs, and adhere to healthful diets. Do they put too high a premium on superficial appearances? In my opinion, absolutely. Are they overcompensating for underlying self-esteem issues? Perhaps, in many cases. Are they assuming risks that might potentially be harmful to them? Probably, yes, as do smokers, drinkers, and extreme sports enthusiasts. But however

misguided we may judge non-medical users of these hormones to be, I seriously question whether they are the sort of dangerous criminals deserving of extended prison terms. Their motivations are identical to the motives of women who seek surgical breast augmentation or to those of men who seek face-lifts, eye jobs, tummy tucks and the like. Of course, while our laws permit cosmetic surgeons to anesthetize and cut their patients to cater purely to vanity, doctors are forbidden from using hormones for the same purpose.

In any event, the medical and scientific experts I have come to know in this field share my views on the analogy of cosmetic steroid use to plastic surgery. Sadly, though, this view rarely achieves mainstream public exposure, because the media and the recent Congressional hearings seem to focus exclusively on the “hot” issues of steroids in pro sports and steroids as used by teenagers. Consequently, the public sees steroid use solely in the context of sports cheating, even though that is, in my experience, only a small part of the overall steroid pie, and only a minuscule fraction of the criminal justice steroid pie.

The elite athletes whose steroid use draws public attention and Congressional ire are virtually never prosecuted in the criminal justice context. In fact, I am unable to name a single professional athlete who has been arrested for steroid possession. On the other hand, I can show you file after file in my office of non-competing, mature adult males who have been prosecuted.

Patterns of Use and Long-Range Effects

Their motivation, whether labeled as vanity or an excessive quest for self-improvement, is unlike the motivation that drives the use of every other controlled substance. However misguided steroid use without medical supervision may be, it is long-range, goal-oriented behavior. Steroid users are the virtual antithesis of the typical drug offender. Steroid users do not take these hormones for any immediate psychoactive effect, and these hormones do not have any immediate psychoactive effect. They are not stimulants, depressants or hallucinogens. By contrast, the person who uses crack buys it, smokes it, and gets high from that dose. When he wants to get high again, he buys more. The behavior is largely the same with marijuana, LSD, cocaine, and all other controlled substances, including all other Schedule III drugs. Not so with steroid users. Because they seek long-range effects, not an immediate high, their habits are very different from narcotics abusers. Most steroid users plan out – typically memorialized in writing – a cycle of use lasting weeks or months. The plan will typically involve the use of several different drugs in a sometimes elaborate system of methodically planned dosages.

All of this long-range planning is reflected in the users’ purchasing and possession habits. Steroid users never buy steroids daily or weekly. They typically purchase a quantity of steroids that will last for the full duration of at least one planned cycle. Many buy for several cycles. Steroid users are pack rats by nature. For example, those steroid users who use the oral steroid

methandrostenolone will often buy it in a tub of one thousand five-milligram tablets, available for about \$450 online from Thailand.

Purchase and usage patterns must also be taken into account when examining the equivalency issue. One shot of heroin, one snort of cocaine, or one tablet of Ecstasy produces a desired psychoactive effect. It may even make sense to make one tablet of Oxycontin or Valium a dosage unit. One tablet of oxandrolone, oxymetholone, or any other steroid, however, does absolutely nothing. In fact, a number of medical experts have pointed out that a whole bottle of steroids most likely would have little adverse effect. Contrast that with the fact that were a person to ingest an entire bottle of aspirin, that person might die of an overdose. To designate a particular quantity as a “dosage unit,” it must at a minimum have some effect. It must do something. Yet that is not the case with steroids.

Before amending the marijuana equivalency for steroids, the Commission ought to be able explain why it is selecting a particular number. It is unclear why the Commission set 50 tablets (the current equivalency) as the dosage unit for steroids, but it could have been a recognition that steroid users purchase and possess steroids in much more massive amounts than any other drug offenders. It may also be that there was some underlying uneasiness about Congress’s decision – which was contrary to the testimony of the DEA, FDA, NIDA and AMA, all of which sent representatives to testify against scheduling steroids – about forcing these hormones into the Controlled Substances Act.

Regarding injectable steroids, to amend the guidelines to make half of one milliliter (0.5 milliliter) a steroid dosage unit would be a fiction, plain and simple. In all my experience with steroid users, I have never met or even heard of a person who regularly administered half of a milliliter at a time. The landmark 1996 *New England Journal of Medicine* study (that stunned many in the medical community when it found virtually *no* adverse effects when anabolic steroids were administered for ten weeks) used a dosage of 600mg per week (about six times natural replacement dose).

Targeting Traffickers

The argument that increasing the penalties through a revised drug equivalency will target traffickers does not comport with the reality of these cases. In my experience, most people being arrested today for steroid offenses are not traffickers, but personal users. This is because the Internet has become the favored tool of international steroid commerce, with international mail order now a common method of delivery. The traffickers, whoever they are, are often far beyond the jurisdiction of American authorities. The defendant who gets arrested is most often the end user, caught in a “controlled delivery” of the package by undercover agents.

In state courts across America, where the current federal drug equivalency for steroids offers no protection, personal use steroid defendants are being arrested and prosecuted. All too often, they are charged with “intent to sell” offenses, based on the misperception by law enforcers as to the amounts consistent with personal use. I have seen firsthand countless cases of individuals erroneously charged with possession with intent. The “intent to sell” problem is particularly prevalent in cases involving low dosage oral tablets, such as Anabol (methandrostenolone) from Thailand. One of these little pink pentagons provides only 5mg of anabolic steroids, while it is common for users of oral steroids to take 50 to 100mg of oral steroids daily or even more. A man in New York was recently charged with intent to sell in state court for possessing less than four hundred tablets in his car. In a California state case, prosecutors insisted that receiving a package of one thousand Anabol tablets by mail from Thailand proved an intent to sell, despite the reality that one thousand tabs is the *minimum* quantity that could be ordered from that overseas source. I have seen two car-stop state cases in New York where possessors of Anabol, in the amounts of 207 tablets and 280 tablets, were charged with possession with intent to sell without any other evidence of such intent. In one of the many cases generated by the Maryland State Police, a man was charged with possession with intent to distribute steroids when his mother accepted a controlled delivery package containing 100 Anadrol tablets, two bottles of testosterone cypionate, three bottles of nandrolone and two bottles of stanozolol. The house search recovered an additional 400 steroid tablets, another steroid bottle, and some syringes. These are all typical examples of situations where the variety of substances combined with the total quantity was wrongly viewed by law enforcement as inconsistent with personal use.

To make each tablet a dosage unit, and every half a milliliter a dosage unit, would bring the injustices I have seen in state courts into federal courts, with heightened punishments not just for traffickers, but for the typical steroid possessors I have described to you. I suggest we should stop and consider whether that truly is beneficial to society. Personal users who are high profile cheating athletes should be dealt with through the administrative rules of their sports. If those rules are insufficient, let Congress continue to pressure the sports agencies. But as I said before, few if any sports heroes get arrested, and I have grave concerns that the ones who will suffer under a revised drug equivalency standard will be the gym rats. The only competitive athletes I predict will be targeted will be bodybuilders. I have known many former steroid users who have gone on to highly successful careers as lawyers and doctors. One of them went on to become the Governor of the State of California.

I challenge the argument that the current drug equivalency for steroids must be increased in order to make their prosecution worth the effort by the Department of Justice. Enforcing laws should not be based upon the length of potential sentences. The position of the NACDL, and my personal position, is that the current drug equivalency reflects a balanced compromise of concerns and considerations that is better tailored to anabolic steroids than a “one size fits

all” Schedule III equivalency standard. We do not support an amendment to the guidelines as to steroid equivalency, especially if it adopts the standard used with other Schedule III drugs.

I hope that my comments have provided some food for thought on this issue. Should the Commission be interested in further information, I would be happy to provide it.

The Anabolic Steroid Control Act: The Wrong Prescription?

by Richard D. Collins

(Modified from the version originally published in the New York State Bar Association
Criminal Justice Journal, Vol. 9, No. 2, Summer 2001)

According to the body of common knowledge, anabolic steroids are dangerous and deadly drugs. The mainstream media have thoroughly vilified these hormones for several decades. The use by mature adults of *any amount* of anabolic hormones to enhance physical appearance is invariably labeled anabolic steroid “*abuse*” and, consequently, the average American lumps the athletic steroid user into the same depraved category as the heroin or cocaine user. Law enforcement agents and prosecutors readily proceed accordingly in furtherance of our national “War on Drugs.” Only the most progressive physicians accept the legitimacy of anabolic steroid use for any but the most limited medical purposes. Understandably then, the proposition that our current approach to the non-medical use of anabolic steroids is flawed, failing and in need of reform is provocative to many.

While rarely reported in the lay press, there are actually very compelling reasons to revisit the legitimacy of our current anabolic steroid laws. There is mounting evidence that the actual health dangers associated with anabolic steroids for mature adults are significantly *less* than were suggested to Congress or are commonly perceived by the public. There is evidence that the tight regulations have stifled research, undermined beneficial applications, and effectively severed any connection between physicians and most steroid users. Further, there are strong arguments that the legislation has failed to solve the very problems for which it was enacted; rather, it has exacerbated the situation.

The Congressional Hearings

In the mid 1980’s, media reports of two problems came to the attention of Congress: the increasing use of anabolic steroids in professional and amateur sports, and a “silent epidemic” of high school steroid use. Between 1988 and 1990, Congressional hearings were held to determine the extent of these problems and whether the Controlled Substances Act should be amended to include anabolic steroids along with more serious drugs such as cocaine and heroin.¹ It is sometimes overlooked that the reported adverse medical effects of steroid use, such as potential liver damage and endocrinological problems, were completely irrelevant to the criteria for scheduling under the Controlled Substances Act.²

Many witnesses who testified at the hearings, including medical professionals and representatives of regulatory agencies -- including the FDA, the DEA and the National Institute on Drug Abuse -- recommended *against* the proposed amendment to the law. Even the American Medical Association repeatedly and vehemently opposed it, maintaining that abuse of these hormones does not lead to the physical or psychological dependence required for scheduling under the Controlled Substances Act. However, the records from the hearings suggest that any “psychologically addictive” properties of steroids were secondary considerations to Congress. The majority of witnesses called to testify at the hearings were representatives from competitive athletics. Their testimony, and apparently Congress’ main concern, focused on legislative action far less to protect the public than to solve an athletic “cheating” problem.³ Congress wanted steroids out of sports and classified steroids as Schedule III controlled substances. As a result, these sex hormones stand out as a strange anomaly among the codeine derivatives, central nervous system depressants, and stimulants that form the rest of Schedule III.⁴

The Anabolic Steroid Control Act of 1990

The Anabolic Steroid Control Act of 1990⁵ added anabolic steroids to the federal schedule of controlled substances, thereby criminalizing their non-medical use by those seeking muscle growth for athletic or cosmetic enhancement. It places steroids in the same legal class as barbiturates, ketamine and LSD precursors. Those caught illegally possessing anabolic steroids even for purely personal use face arrest and prosecution. Under the Control Act, it is unlawful for any person knowingly or intentionally to possess an anabolic steroid unless it was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice (or except as otherwise authorized). A first offense simple possession conviction is punishable by a term of imprisonment of up to one year and/or a minimum fine of \$1,000.⁶ Simple possession by a person with a previous conviction for certain offenses, including any drug or narcotic crimes, must get imprisonment of at least 15 days and up to two years, and a minimum fine of \$2,500, and individuals with two or more such previous convictions face imprisonment of not less than 90 days but not more than three years, and a minimum fine of \$5,000.⁷ Distributing anabolic steroids, or possessing them with intent to distribute, is a federal felony.⁸ An individual who distributes or dispenses steroids, or possesses with intent to distribute or dispense, is punishable by up to five years in prison (with at least two additional years of supervised release) and/or a \$250,000 fine (\$1,000,000 if the defendant is other than an individual).⁹ Penalties are higher for repeat offenders.¹⁰

The Health Risk Issues

Although the purported health risks of anabolic steroids are irrelevant to the criteria for scheduling controlled substances, they have provided a seemingly valid public basis for the enforcement of the legislation, justifying a policy favoring prosecution of mature adults involved with steroids over allowing them to “destroy themselves” with these substances. It is curious whether the policy would be publicly supported if the actual dangers to healthy adult males were significantly less than the general public has been led to believe. While a comprehensive review of the medical and scientific evidence of health risks is beyond the scope of this article, a few words on the subject are in order.

Without question, there are health risks involved in the self-administration of *any* prescription medicine, particularly in the absence of a physician's advice with respect to dosages and duration of use. Further, without regular monitoring by a doctor, some side effects may go unnoticed or untreated until it is too late. Anabolic steroids can have adverse effects upon the body, with particular risks for teenagers, who are more likely than adults to abuse anabolic steroids in dangerously high dosages and without any medical supervision.

But while steroids can have adverse side effects, including serious ones, to mature adult users as well, the scientific literature is far less conclusive than is claimed by government-sponsored physicians and anti-drug officials. Despite a virtually one-sided presentation in the lay press, the position that anabolic steroids are such dangerous substances as to warrant militaristic government enforcement tactics is surprisingly controversial. Mounting research strongly suggests that the actual health risks have been overstated to the public. A landmark 1996 study, for example, found virtually no adverse effects when anabolic steroids were administered at a dosage of 600 mgs per week (about six times natural replacement dose) for ten weeks.¹¹ The actual risk levels for mature adult males using steroids are related to various factors, such as the dosages and duration of use, the specific types of compounds administered, the existence of any preexisting pathologies, etc. Some highly knowledgeable authorities who have objectively reviewed the medical literature pertaining to mature adult users have concluded that “[a]s used by most athletes, the side effects of anabolic steroid use appear to be minimal.”¹²

The public has been led to believe that “roid rage” -- the descriptive term for steroid-induced spontaneous, highly aggressive, out-of-control behavior -- is rampant among steroid users. While a handful of researchers have claimed that psychiatric symptoms including increased aggression are a common side effect of anabolic steroid use, these claims have been regarded with skepticism by experts. Indeed, the

relationship between anabolic steroids and aggressive behavior is far more complex than the press has reported, and the most exhaustive review of the medical literature did *not* find consistent evidence for a direct causal relationship between steroid use and aggression even in those affected.¹³

Personal Freedom and General Comparative Risks

The law does not prevent individuals from skiing, scuba diving or even hang gliding, although all are extremely dangerous activities. As one reviewer noted: “People in this country can choose to have tummy tucks, breast implants, nose jobs, smoke cigarettes, drink alcohol excessively, or watch strippers as long as they don't hurt other people. Actually smokers are allowed free reign to harm others with second hand smoke in most places in the country except California, so why aren't people allowed to exert their freedom of choice in regards to use of things like marijuana and anabolic steroids, either of which can be credibly argued to be less dangerous or no more dangerous than cigarettes and alcohol.”¹⁴ Smokers are not subjected to arrest and criminal prosecution, even though many, many more deaths result from tobacco *annually* than in all fifty years of non-medical steroid use.¹⁵ Each year, the use of non-steroidal anti-inflammatory drugs – including *over-the-counter* aspirin and ibuprofen – accounts for an estimated 7,600 deaths and 76,000 hospitalizations in the United States.¹⁶ Although the inherent risks of dangerous sports and cosmetic surgery are unnecessary, and may well outweigh the benefits, we do not proscribe these activities. Is it appropriate, then, to prevent mature, informed adults from choosing cosmetic enhancement through physician-administered hormones?

Comparative Risks to Cosmetic Surgery

Commentators from both the legal and medical communities have noted an interesting cultural irony in the comparison of anabolic steroid administration to cosmetic surgery procedures. Under a physician's supervision, these represent different approaches toward a similar goal. In a society preoccupied with physical appearance, confidence and self-image are often intertwined with body shape and condition. Interestingly, under the current views and laws of our society, it is criminal for a physician to administer anabolic steroids to a healthy adult for purposes of cosmetic physical enhancement. However, it is perfectly acceptable (and quite lucrative) to perform the much more radical and dangerous procedure of surgically implanting foreign prosthetics into virtually all parts of the human anatomy for the same purpose, subjecting patients to the potentially fatal risks associated with general anesthesia and post-surgical infection. Many more people have died or been permanently injured from botched liposuctions, breast augmentations and other cosmetic surgery procedures in the past few years than in nearly fifty years of anabolic steroid use by athletes. Liposuction, for example, is now the most popular cosmetic surgical procedure in North America despite the fact that it has resulted in significant incidences of blood vessel blockage and death.¹⁷ Given the comparative risks, it would seem that the current state of legality regarding non-medical steroid use and these procedures might best be reversed.

The Goals of Criminalization for Non-Medical Usage

Whether providing criminal penalties for illegal steroid use is the proper and most effective way of dealing with the “steroid problem” has been debated for quite some time.¹⁸ Proponents of criminalization and law enforcement authorities say that the Control Act and similar state laws: (1) help to deter trafficking, (2) protect young people, and (3) preserve fair competition in sports. Against criminalization are arguments that such penalties have proven to be a failure in stemming abuse of other drugs and alcohol, that criminalization only increases the underground black market, and that efforts are best confined to education and rehabilitation. **Deterring Steroid Trafficking** Proponents of criminalization contend that stiff penalties help deter trafficking,¹⁹ and that the strict controls associated with controlled substance status prevent pharmaceutical companies from manufacturing more product than could be legitimately used for FDA approved purposes. Indeed, it was the allegation of such a “diversion” problem that helped sway Congress to classify steroids even against the advice of medical authorities. The Control Act addresses the diversion problem by the triplicate “paper trail” that is associated with controlled substances. Every person who manufactures, distributes, or dispenses a controlled substance is required to register annually

with the Attorney General.²⁰ But while the paper trail requirements have reduced the amount of legitimate steroids diverted, they have helped foster a booming counterfeit trade where underground labs make and label steroid products to mimic legitimate pharmaceuticals. An even bigger problem is the tremendous increase in production and importation of non-FDA-approved foreign products that have come to replace domestic preparations. All of these products completely bypass the Control Act's paper trail.

In a 1990 statement to Congress, Department of Justice officials estimated the black market to be a 300 million dollar per year industry.²¹ In January 2001, federal law enforcement officials announced that they seized more than 3.25 million anabolic steroid tablets in the single-largest steroid seizure in U.S. history.²² Last year, U.S. Customs agents made 8,724 seizures, up 46 percent from 1999 and up eight-fold from 1994. Public health experts estimate that the steroid black market has grown larger – perhaps far larger – than the \$300 million to \$400 million estimated in 1988.²³ But as officials from the Office of National Drug Control Policy issue statements supporting even broader interdiction, the Congress takes steps toward further regulations, and prosecutors and lawmakers decry the dangers of this huge black market of illegitimate steroids, it seems only sensible to deride the “deterrent” effect of our approach.

Protecting Young People Protecting young people from danger is a worthy goal of any legislation. The Control Act appears to have had the opposite effect. A primary effect of the Control Act's restrictions upon legitimate product has been the increased manufacture and distribution of black market counterfeit products and substandardly made veterinary steroids never intended for human consumption. Some of these black market products are tainted with impurities or contain other foreign substances, supporting the assertion that “continued enforcement of steroid legislation will worsen health risks associated with steroid use. An investigation by *The Atlanta Journal and Constitution* concluded that ‘tougher laws and heightened enforcement’... have fueled thriving counterfeit operations that pose even more severe health risks.”²⁴ A second major effect of the criminalization approach has been to discourage illegal users, including teens, from admitting their steroid usage to physicians. Since some of the greatest dangers inherent in self-administered steroid use involve the failure to be monitored by a doctor, the Control Act has succeeded in greatly escalating this danger and has created an even wider gap between the users and the medical community. Because the self-administration of anabolics is a federal crime, few users are willing to confess their steroid use to physicians. And because federal enforcement efforts have targeted physicians, few doctors want anything to do with athletes taking steroids. Other than in legitimate and authorized research, physicians must prescribe steroids “for a legitimate medical purpose” and “in the usual course of professional treatment” or risk prosecution as a common drug dealer.²⁵ Doctors caught distributing steroids for bodybuilding have been criminally prosecuted.²⁶ The end result is that the people, including minors, using steroids illegally rarely get regular blood pressure checks, cholesterol readings, prostate exams and liver enzyme tests. “Thus, the risks involving the use of anabolic-androgenic steroids have increased well beyond those of the drugs themselves.”²⁷ As one reviewer concluded: “By forbidding trained physicians from administering steroids in a controlled manner, the Legislature has forced athletes to either buy steroids off the black-market or seek out un-ethical and possibly incompetent physicians to supply them steroids.... [I]t appears that Congress' attempt at preventing steroid prescription has at best been futile and at worst harmful.”²⁸

Preserving Fair Competition in Sports Issues of cheating, “hollow victories,” “winning at any cost,” etc., were probably the primary ideological foundation for the Control Act.²⁹ “Permitting steroid users to compete with drug-free athletes reflects on the fairness of athletic competition at every level. Allowing those with an unfair advantage to compete can pressure drug-free athletes to use anabolic steroids to remain competitive.”³⁰ The Control Act has been of extremely limited value in addressing this “cheating” problem. Elite athletes are almost never prosecuted under the Control Act, obtaining their steroid supplies through sophisticated channels that avoid detection by law enforcement. The extremely remote possibility of criminal prosecution deters few if any Olympic and professional level athletes. The most effective way to eradicate anabolic steroids from competitive sports is through systematic drug testing. Athletes who fail the steroid test are prohibited from competing. While testing for anabolic steroids is not perfect, it does remove identified steroid-users from the sport and also serves as the most effective deterrent today. Serious athletes devote huge amounts of time, energy and resources into training for an event. The effect of drug testing -- preventing steroid-using athletes from competing -- is both a more effective and more

appropriate deterrent than the Control Act's threat of making overly ambitious athletes into convicted felons. This is especially true because the vast majority of anabolic steroid users are *not* competitive athletes at all, but merely otherwise law-abiding adults who are using the hormones for physical appearance.

Endnotes

¹ See generally, *Legislation to Amend the Controlled Substances Act (Anabolic Steroids): Hearings on H.R. 3216 Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary*, 100th Cong., 2d Sess. 99, July 27, 1988; *Steroids in Amateur and Professional Sports -- The Medical and Social Costs of Steroid Abuse: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 1st Sess 736, April 3 and May 9, 1989; *Abuse of Steroids in Amateur and Professional Athletics: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 92, March 22, 1990; *Hearings on H.R. 4658 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2nd Sess. 90, May 17, 1990.

² Adverse physical effects are not a basis for controlled substance status; potential for abuse and dependency are. Pursuant to 21 U.S.C. 812(b), a substance in Schedule III is supposed to be placed there if: A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II; (B) The drug or other substance has a currently accepted medical use in treatment in the United States; and (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

³ John Burge, *Legalize and Regulate: A Prescription for Reforming Anabolic Steroid Legislation*, 15 Loy. L.A. Ent. L.J., 33, at 45 (1994).

⁴ 21 U.S.C. § 812(c).

⁵ Pub. L. No. 101-647, Sec. 1902, 104 Stat. 4851 (1990), amending 21 U.S.C. § 812(c) (1981) to include anabolic steroids.

⁶ 21 U.S.C. § 844(a).

⁷ *Id.*

⁸ 21 U.S.C. § 841(a)(1).

⁹ 21 U.S.C. § 841(b)(1)(D).

¹⁰ *Id.*

¹¹ S. Bhasin, T.W. Storer, N. Berman, *et al.*, *The Effects of Supraphysiologic Doses of Testosterone on Muscle Size and Strength in Normal Men*, 335 N Engl J Med (July 4, 1996), 1-7.

¹² M.G. Di Pasquale, ANABOLIC STEROID SIDE EFFECTS: FACTS, FICTION AND TREATMENT (Warkworth, Ontario; M.G.D. Press, 1990), 5. See generally, Mark Myhal and David R. Lamb, *Hormones as performance-enhancing drugs*, in M.P. Warren and N. W. Constantini (Eds.), SPORTS ENDOCRINOLOGY (Totowa, NJ; Humana Press, 2000), 429-472; C. Street, J. Antonio, & D. Cudlipp, *Androgen Use by Athletes: A reevaluation of the health risks*, 21 Can. J. Appl. Physiol., 6 (1996), 421-440; R.D. Dickerman, R.M. Pertusi, *et al.*, *Anabolic steroids-induced hepatotoxicity: is it overstated?*, Clin J Sports Med 1999; 01 (9):34-39; and this author's review of *The Health Risks of Anabolic Steroids*, January 15, 2001 [<http://www.steroidlaw.com/healthrisks.htm>].

¹³ Jack Darkes, *The Psychological Effects of Anabolic/Androgenic Steroids, Parts I through IV*, December 15, 2000 [<http://www.musclemonthly.com/author/jack-darkes.htm>].

¹⁴ Michael Mooney, *Decriminalizing Anabolic Steroids*, May 28, 2001 [<http://www.decriminalizesteroids.com/michael.html>].

¹⁵ According to the US Centers for Disease Control, from the beginning of 1990 through 1994 there was an average of 430,700 deaths annually attributed to smoking. See, <http://www.drugwarfacts.org/causes.htm> citing *Smoking - Attributable Mortality and Years of Potential Life Lost, Morbidity and Mortality Weekly Report* (Atlanta, GA: Centers for Disease Control, 1997), May 23,

1997, Vol. 46, No. 20, p. 449. But despite over fifty years of anabolic steroid use by athletes, “there is little evidence to show that their use will cause long-term detriment; furthermore, the use of moderate doses of androgens results in side effects that are largely benign and reversible.” Street *et al.*, *supra*, note 12.

¹⁶ R. Tamblyn, L. Berkson, W.D. Jauphinee, *et al.*, *Unnecessary Prescribing of NSAIDs and the Management of NSAID-Related Gastropathy in Medical Practice*, *Annals of Internal Medicine* (Washington, DC: American College of Physicians, 1997), September 15, 1997, 127:429-438, from the web at <http://www.acponline.org/journals/annals/15sep97/nsaid.htm>, (May 1, 2001), citing J.F. Fries, *Assessing and understanding patient risk*, *Scandinavian Journal of Rheumatology Supplement*, 1992;92:21-4.

¹⁷ K.A. Smith; R.H. Levine, *Influence of suction-assisted lipectomy on coagulation*, *Aesthetic Plast Surg.* 1992;16(4):299-302.

¹⁸ See, for example, Norma H. Reddig, *Anabolic Steroids: The Price of Pumping Up!*, 37 *Wayne L. Rev.* 1647 (1991), at 1670.

¹⁹ *House Legislative Analysis Section, Analysis of H.B. 4081* (July 3, 1990).

²⁰ 21 USC Sec. 822(a)(1) and (2) (1988).

²¹ *Anabolic Steroids Control Act of 1990: Hearings on H.R. 4658 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 90 (May 17, 1990) (statement of Leslie Southwick, Deputy Assistant Att’y Gen., Civil Division, U.S. Dep’t of Justice).

²² Jeannine Aversa, *Govt. Announces Steroid Seizure*, *Associated Press (AP)*, January 19, 2001.

²³ Tom Farrey, *Yesterday’s Drug Makes Comeback*, part of the series *Crossing the Line: The Failed War on Steroids*, *ESPN.com*, December 20, 2000 [<http://espn.go.com/gen/s/2000/1207/929174.html>].

²⁴ Burge, *supra*, note 3, at 54-55, citing Mike Fish, *Steroids Riskier Than Ever, Drugs Easy to Buy South of the Border*, *Atlanta J. & Const.*, Sept. 28, 1993, at D1.

²⁵ 21 C.F.R. 1306.04(a).

²⁶ For example, Walter F. Jekot, M.D., a popular California physician who helped pioneer steroids for AIDS patients, was sentenced in 1993 to five years in federal prison for dispensing steroids to athletes.

²⁷ Myhal and Lamb, *supra*, note 12.

²⁸ Jeffrey Black, *The Anabolic Steroids Control Act of 1990: A Need for Change*, 97 *Dick. L. Rev.* 131 (1992), at 140 (citations omitted).

²⁹ See, Burge, *supra*, note 3. See also, M.G. Di Pasquale, *Editorial: Why Athletes Use Drugs*, *Drugs in Sports* (Vol. 1, Number 1, February 1992) at 2: “Contrary to what most people believe (the media's irresponsible sensationalism has resulted in the widely held mistaken view that the use by athletes of anabolic steroids and other performance-enhancing drugs is a problem on par with heroin and cocaine abuse), the use of drugs, such as anabolic steroids, by athletes is a problem, not because of the addictive and dangerous side-effects of these compounds, but because these drugs offer an unfair advantage to the athletes who use them.”

³⁰ *Abuse of steroids in Amateur and Professional Athletics: Hearings Before the Subcomm. On Crime of the House Comm. On the Judiciary*, 101st Cong., 2d Sess. 92 (Mar. 22, 1990) (statement of Frank D. Uryasz, Director of Sports Sciences, National Collegiate Athletic Association).