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Due Process in Anti-Doping Proceedings Within the International Olympic Committee and Professional Tennis Associations

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DUE PROCESS IN ANTI-DOPING PROCEEDINGS WITHIN THE INTERNATIONAL OLYMPIC COMMITTEE AND PROFESSIONAL TENNIS ASSOCIATIONS

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Today, professional athletes across the globe are subjected to rigorous drug testing in an attempt to eradicate the use of performance enhancing substances in sports. Many professional sports tours, including tennis, work closely with the International Olympic Committee and World Anti-Doping Agency to monitor and address doping violations. Although anti-doping rules are important to the safety of professional athletes, the current enforcement of anti-doping rules creates due process concerns for athletes that test positive for banned substances. This article specifically argues that the strict scrutiny sanction which bans athletes from professional play for even an unknowing or accidental doping violation is a disproportionate punishment, with an especially adverse impact on professional athletes that are minors. The fairest outcome for a doping violation would be a departure from the strict scrutiny standard for a more educational and rehabilitative approach for first offenses. Moreover, this article advocates for anti-doping hearings and appeals to adopt the clear, “preponderance of the evidence” standard of review used in United States Federal Administrative Agency adjudication proceedings. These changes, amongst others described in this comment, would strike a fairer balance between the International Olympic Committee’s interest in regulating drug use in sports and an individual athlete’s interest in their career and livelihood.

I. Introduction

On October 7th, 2022, a then 31-year-old Simona Halep, a professional tennis player with a former world number one ranking and two grand slam titles was sanctioned by the International Tennis Integrity Agency for testing positive for Roxadustat, a banned substance by the World Anti-Doping Agency.¹ Despite her contentions that she did not knowingly ingest Roxadustat, she was struck with a 4-year ban from all competition.² Halep had been participating in drug testing for doping purposes since 2013, and this was her very first offense.³ In a recent interview, Halep expressed that a loss at the appeals stage would effectively end her professional tennis career.⁴

As illustrated by this example, doping in professional sports is a present issue, with important interests for both athletes and athletic organizations. More examples of these important stories that have surfaced include several athletes being stripped of their Olympic titles or banned from

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¹Jill Martin & Patrick Snell, *Simona Halep Given Four-Year Ban for Anti-Doping Violations, Vows to Appeal Decision and ‘Clear My Name,’* CNN (Sept. 13, 2023), <https://www.cnn.com/2023/09/12/sport/simona-halep-doping-ban-tennis-spt-intl/index.html> [<https://perma.cc/X3ML-9A3J>].

²*In the Matter of Disciplinary Proceedings Before an Independent Tribunal Under the Tennis Anti-Doping Programme 2022*, SPORT RESOLUTIONS (Sept. 11, 2023), <https://www.itia.tennis/media/bb0i20p5/230911-itia-v-simona-halep-decision-redacted-pp.pdf> [<https://perma.cc/Y9HM-G3UH>].

³ *Id.* at para. 3.

⁴ *Simona Halep Fears Loss of Doping Appeal Will End Her Career*, ESPN (Dec. 15, 2023), https://www.espn.com/tennis/story/_/id/39120610/simona-halep-fears-loss-doping-appeal-end-career [<https://perma.cc/Y5FP-V5VK>].

professional play for extended periods of time.⁵ Since the increase in doping use and subsequent regulation, professional athletes around the world have been subject to rigorous drug testing with hefty consequences if the results come back positive. Because the International Olympic Committee and other professional sports organizations have cracked down on sports doping, legal proceedings regarding violations of the international doping rules have been of great relevance to athletes and international arbitrators alike. Although the International Olympic Committee and organizations like the professional tennis tours have taken strides to elevate anti-doping proceedings to incorporate the fairest process, there are concerns that continue to plague the anti-doping proceedings process and issuing of sanctions. Doping infractions can exact ineligibility on the athletes for varying amounts of time, with some being several years.⁶ The way these hearings come out and can greatly affect the welfare, finances, career, and personal image of professional athletes. Ensuring the fairest process to athletes in anti-doping proceedings is critical, in both professional tennis and Olympic sports.

This analysis will compare anti-doping hearings in professional and Olympic sports organizations with United States Federal Administrative Agencies and explain the possibility of due process concerns regarding anti-doping proceedings in professional tennis and the International Olympic Committee. Further, this article will advocate for a fairer process for the professional athletes involved in these cases, particularly a departure from the strict liability of doping violations and subsequent sanctions.

II. History and Background

As defined by the World Anti-Doping Code, doping is understood as “the occurrence of one or more of the anti-doping rules”⁷ within the code, which include:

[T]he use or attempt to use a forbidden substance or a prohibited method, refusal for sampling after receiving an invitation to doping control in accordance with anti-doping rules, avoidance of sampling, falsification or attempt to falsify any part of the doping control, possession of prohibited substances and/or methods, trafficking or attempted trafficking of any prohibited substance and/or methods.⁸

Simply put, athletes cannot use performance enhancing substances to aid their ability to compete in sports. Although sports doping is a highly regulated area of the law today, this has not always been the case. In fact, the discovery and use of performance enhancing substances far predates the modern day. In ancient Greece, the use of performance enhancing substances in sports was

⁵ Richard I.G. Holt, et al., *The History of Doping and Growth Hormone Abuse in Sport*, GROWTH HORMONE & IGF RESEARCH (Apr. 3, 2009), <https://www.sciencedirect.com/science/article/pii/S1096637409000525> [<https://perma.cc/3QFC-JKHD>].

⁶ See Ilias Bantekas, *The Resolution of Professional Tennis Disputes*, J. OF INT’L DISP. SETTLEMENT (May 31, 2023), [<https://perma.cc/83FH-KBVL>].

⁷ *World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY (Jan. 1, 2021), https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf [<https://perma.cc/VB6T-9U2R>].

⁸ Robert Alexandru Vlad, et al., *Doping in Sports, a Never-Ending Story?*, ADVANCED PHARM. BULL. (Nov. 29, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6311632/#R14> [<https://perma.cc/5GGG-XXX9>].

encouraged.⁹ Moreover, many athletes used substances to aid their strength in the ancient Roman Empire.¹⁰ Although the substances being used today are different than those used by the ancient athletes, it is apparent that doping has a long history in sports.

Until the boom of sports doping in the second half of the 20th century, substantive regulations did not exist in professional sports organizations and the International Olympic Committee.¹¹ The use of stimulants and anabolic steroids permeated many professional sports throughout the 20th century, including cycling, sprinting, long distance marathon, and swimming.¹² Prior to anti-doping rules, there were several deaths of athletes reported due to drug use in professional competition.¹³ As a result, the Olympics first banned conventional substances in 1972 and anabolic steroids in 1976.¹⁴ The regulation of drug testing athletes evolved to the creation of the World Anti-Doping Agency.¹⁵ The World Anti-Doping Agency is an international and independent agency founded in 1999, which established the World Anti-Doping Code.¹⁶ The World Anti-Doping Code is the international standard for all doping testing and results management.¹⁷ The International Olympic Committee was key in establishing the World Anti-Doping Agency and provides fifty percent of its funding.¹⁸ The International Olympic Committee's anti-doping rules reflect those set forth by the World Anti-Doping Agency.¹⁹ Therefore, all athletes wanting to compete in the Olympic games must submit to the drug testing and the applicable rules to compete.²⁰ The International Tennis Integrity Agency anti-doping rules govern professional tennis, and are also binding on tennis players in the Olympics in addition to the World Anti-Doping Code rules.²¹

Today, the true prevalence of doping as conducted by the World Anti-Doping Agency is a hard measure since it is often a secretive area of regulation.²² However, approximately 1% of all tests conducted by the World Anti-Doping Agency come back positive.²³ Compared to other Olympic sports, tennis has experienced far fewer doping violations.²⁴ However, players who violate doping

⁹ *Id.*

¹⁰ *Id.*

¹¹ Holt, et al., *supra* note 5.

¹² *Id.*

¹³ *Id.*

¹⁴ Vlad, et al., *supra* note 8.

¹⁵ *See id.*

¹⁶ *Fight Against Doping*, INT'L OLYMPIC COMM. (last visited Feb. 9, 2024), [https://olympics.com/ioc/fight-against-doping#:~:text=The%20IOC%20has%20established%20a,by%20athlete%20and%20entourage%20education.\[https://perma.cc/YU4N-R2KN\]](https://olympics.com/ioc/fight-against-doping#:~:text=The%20IOC%20has%20established%20a,by%20athlete%20and%20entourage%20education.[https://perma.cc/YU4N-R2KN]).

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Tennis Anti-Doping Programme Introduction*, INT'L TENNIS INTEGRITY AGENCY (last visited Feb. 9, 2024), [https://www.itia.tennis/anti-doping/#:~:text=Significant%20bans%3A%20The%20ban%20for,which%20their%20results%20were%20disqualifi ed.\[https://perma.cc/LU3J-EHX2\]](https://www.itia.tennis/anti-doping/#:~:text=Significant%20bans%3A%20The%20ban%20for,which%20their%20results%20were%20disqualifi ed.[https://perma.cc/LU3J-EHX2]).

²² Holt, et al., *supra* note 5.

²³ *Id.*

²⁴ Robby Reynolds, *It's Time to Talk About Doping in Tennis*, SEN (2021), <https://www.sen.com.au/news/2021/05/06/its-time-to-talk-about-doping-in-tennis/> [https://perma.cc/8ZZH-WMC6].

rules in professional tennis can be punished by being banned from play for several years.²⁵ The way these sanctions are implemented can greatly affect the career and finances of athletes, and as well as their perception and reputation in the public eye. Ensuring the fairest process to athletes in anti-doping proceedings is critical, in both the professional tennis tours and Olympic sports.

III. Doping Rules and Testing

Both the World Anti-Doping Agency and International Tennis Integrity Agency have extensive testing rules and procedures that athletes must abide by to compete in both Olympic and professional play. The World Anti-Doping Code gives authority to both the World Anti-Doping Agency and respective national doping associations to conduct drug testing both in and outside competition.²⁶ To be tested by these organizations, an athlete must be registered in the “Registered Testing Pools.”²⁷ Athletes in the Registered Testing Pools are “the highest-priority athletes established separately at the international level.”²⁸ Although athletes are notified that their status as a Registered Training Pool Athlete will subject them to in and out of competition testing, the tests themselves come without notice.²⁹ Because of this randomized system, Registered Training Pool athletes are required to submit their “whereabouts information” for testing outside of competitive events.³⁰ The whereabouts information is very extensive, including:

an up-to-date mailing address and phone number, one daily specific 60-minute time slot between 5am and 11pm when the athlete is available and accessible for testing, athlete’s overnight accommodation for each day, information about training and regular activities that are part of the athlete’s regular routine, competition, training and travel schedule, and more.³¹

Moreover, the World Anti-Doping Agency retains authority to test athletes even during their periods of ineligibility.³²

Once an athlete is notified of an impending test, the test samples are collected via blood or urine.³³ The results are then sent to laboratories either accredited or approved by the World Anti-Doping Agency.³⁴ The possibility of being subject to drug testing at any point of the day on any day and having to submit personal information of daily whereabouts and night accommodations are a highly personal inquiry into the lives of professional athletes. This burden should be a consideration especially in the possibility of sanctions for missed tests.

²⁵ *See id.*

²⁶ WORLD ANTI-DOPING AGENCY, *supra* note 7.

²⁷ *Id.*

²⁸ *Requirements of the Registered Testing Pool*, ITTF (last visited Feb. 9, 2024), <https://www.ittf.com/anti-doping/requirements-registered-testing-pool/> [<https://perma.cc/2V4T-HC7M>].

²⁹ WORLD ANTI-DOPING AGENCY, *supra* note 7.

³⁰ *Id.*

³¹ ITTF, *supra* note 28.

³² WORLD ANTI-DOPING AGENCY, *supra* note 7.

³³ *Id.*

³⁴ *Id.*

The International Tennis Integrity Agency's policies mirror the World Anti-Doping Agency in many ways and is similarly extensive in scope.³⁵ The International Tennis Integrity Agency has the authority to do both in and out of competition testing.³⁶ Moreover, the Tennis Anti-Doping Programme gives express authority to the World Anti-Doping Agency to conduct in and out of competition testing.³⁷ One way the Tennis Anti-Doping Programme differs from the World Anti-Doping Code is that it reserves the right to test all tennis players, even those not in the Registered Testing Pool.³⁸ The Tennis Anti-Doping Programme states: "Players (including those serving a period of Ineligibility) must submit to Testing at any time or place upon request by or on behalf of the ITIA or by or on behalf of any other Anti-Doping Organisation with Testing authority over such Player."³⁹ Essentially, the players are on call anywhere and everywhere for the drug tests. Once the supervised samples are obtained from the athlete, either urine or blood, are sent to the same accredited or approved laboratories set out by the World Anti-Doping Agency.⁴⁰ Tennis players are not only subject to World Anti-Doping Agency testing, but also the International Tennis Integrity Agency testing as well.⁴¹

Third party testing for doping violations is important to ensure fair and impartial results. Without third party testing, certain national doping organizations could alter their results to allow athletes who have been impermissibly doping to compete in international competition. For example, Russia has had the most Olympic medals stripped from their athletes due to doping violations.⁴² A World Anti-Doping Agency investigation was launched on Russia in 2019 to monitor their compliance with the international doping rules.⁴³ The investigation resulted in evidence of Russia tampering with or destroying evidence of doping on large scales.⁴⁴ The tampering sought "either to remove any trace of failed drug tests or to alter the concentrations of prohibited substances to a level lower than the threshold for a positive result."⁴⁵ As a result of Russia's consistent violation of international anti-doping rules, the World Anti-Doping Agency and International Olympic Committee banned Russian athletes from competing under their flag for four years.⁴⁶ This punishment was cut down to two years after an appeal to the Court of Arbitration for Sport.⁴⁷ Third party testing is necessary to hold countries around the world accountable in the event of dishonesty and cheating regarding doping. Moreover, having all athletes report to a neutral third party allows

³⁵ See *Tennis Anti-Doping Programme*, INT'L TENNIS INTEGRITY AGENCY (Jan. 1, 2023), <https://www.itia.tennis/tadp/rules> [https://perma.cc/WN2W-B8W5].

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ INT'L TENNIS INTEGRITY AGENCY, *supra* note 35.

⁴² *Number of Stripped Medals at the Summer Olympics by Country and Color From 1968 to 2020*, STATISTA (last visited Feb. 9, 2024), <https://www.statista.com/statistics/1113052/summer-olympics-stripped-medals-by-country/> [https://perma.cc/Z3WX-EJ9L].

⁴³ Tariq Panja, *Inside Russia's Failed Doping Cover-Up*, N.Y. TIMES (July 23, 2021), <https://www.nytimes.com/2019/11/26/sports/russia-doping.html> [https://perma.cc/92PY-6C62].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Factbox-Timeline of the Russia Doping Case*, REUTERS (Dec. 17, 2020), <https://www.reuters.com/article/idUSKBN28R2HR/> [https://perma.cc/3MAQ-838C].

⁴⁷ *Id.*

for impartial review of drug test samples and equal opportunity to have a trial or appeal the decisions made by the World Anti-Doping Agency or International Olympic Committee.

IV. Results Management, Violations, and Initial Adjudication Processes

When a violation or positive test result occurs under the World Anti-Doping Code, and before notice is given to the athlete, the World Anti-Doping Agency will “determine whether any prior anti-doping rule violation exists.”⁴⁸ If there is not a permissible purpose for the presence of the banned substance in the athlete’s sample, the athlete is given a charge and notice of their violation by the World Anti-Doping Agency’s Results Management Authority.⁴⁹ The information provided to the athlete is thorough, and includes the relevant rule violations and consequences, facts behind the allegations, the athlete’s right to provide an explanation or admit to a violation and have the possibility of getting their ineligibility reduced by one year, and any information regarding a provisional suspension during these anti-doping proceedings.⁵⁰ Prior to being issued a provisional suspension, athletes must be given: (a) an opportunity for a *Provisional Hearing*, either before the imposition of the *Provisional Suspension* or on a timely basis after the imposition of the *Provisional Suspension*; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a *Provisional Suspension*.⁵¹

Moreover, the rules also allow for “an opportunity for an expedited appeal against the imposition of a *Provisional Suspension*, or the decision not to impose a *Provisional Suspension*, in accordance with Article 13.”⁵² Even though an athlete might be found to not have violated the anti-doping provisions after trial or appeal, they will still have lost time in competitive play. This could result in missing some of the largest athletic championships, lost prize money, and negative press coverage.

The professional tennis rules have a provision that highlights its intersection with the International Olympic Committee and Olympic games. The relevant rule states: “Where a Player commits an Anti-Doping Rule Violation at the Olympic Games, the International Olympic Committee will determine at least the question of Disqualification from the Olympic Games.”⁵³ If a violation is found, players are given “prompt notice” in writing of their infraction, the facts surrounding the case, and other pertinent details, similar to those contained in the World Anti-Doping Code.⁵⁴ Moreover, tennis professionals found in violation of the anti-doping rules are also issued a mandatory provisional suspension prior to any proceedings on their case.⁵⁵

In both professional tennis and the International Olympic Committee, athletes are afforded an adjudicative hearing to dispute their violations. International Olympic Committee doping

⁴⁸ WORLD ANTI-DOPING AGENCY, *supra* note 7.

⁴⁹ *World Anti-Doping Code International Standard Results Management*, WORLD ANTI-DOPING AGENCY (Jan. 2023), https://www.wada-ama.org/sites/default/files/2023-01/international_standard_isrm_-_abp_update_2023_final_0.pdf [https://perma.cc/5PAT-PVQU].

⁵⁰ WORLD ANTI-DOPING AGENCY, *supra* note 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ INT’L TENNIS INTEGRITY AGENCY, *supra* note 35.

⁵⁴ *See id.*

⁵⁵ *Id.*

proceedings are performed by an independent tribunal, often national organizations, or even the Court of Arbitration for Sport.⁵⁶ The Court of Arbitration for Sport was created by the International Olympic Committee and facilitates arbitration and mediation.⁵⁷ The Court of Arbitration for Sport has almost three hundred arbitrators coming from eighty-seven countries, chosen for their “specialist knowledge of arbitration and sports law.”⁵⁸ Around 300 cases are registered by the Court of Arbitration for Sport annually.⁵⁹ If an athlete wishes to appeal the decision of the lower tribunal, most rulings can be appealed directly through the Court of Arbitration for Sport.⁶⁰ Professional tennis runs their first hearing through their own independent tribunal. Three people from the tennis independent panel create the independent tribunal that does the first hearing of these cases.⁶¹ Appeals from the lower board decisions are then appealed to the Court of Arbitration for Sport, where the same rules apply as for the International Olympic Committee.⁶² The Court of Arbitration for Sport has final authority over the case and their decisions are binding.⁶³

A first hearing for a doping violation has several requirements that are set out by the World Anti-Doping Code. If the World Anti-Doping Agency, Results Management Authority, and the athlete in question all agree, the doping proceeding can occur as a single hearing at the Court of Arbitration for Sport under the appellate procedures.⁶⁴ If instead the first hearing is held at another operationally independent tribunal, the International Standard for Results Management under the World Anti-Doping Code sets out several requirements for fair process.⁶⁵ These minimum requirements of due process that are afforded to athletes include:

- a) The hearing panel must remain fair, impartial and *Operationally Independent* at all times; b) The Hearing Process shall be accessible and affordable; c) The Hearing Process shall be conducted within a reasonable time; d) The right to be informed in a fair and timely manner of the asserted anti-doping rule violation(s), the right to be represented by counsel at the *Athlete* or other *Person*’s own expense, the right of access to and to present relevant evidence, the right to submit written and oral submissions, the right to call and examine witnesses, and the right to an interpreter at the hearing at the *Athlete* or other *Person*’s own expense; and e) The right for the *Athlete* or the other *Person* to request a public hearing. The *Results Management* Authority may also request a public hearing provided that the *Athlete* or the other *Person* has provided his/her written consent to the same.⁶⁶

⁵⁶ *Court of Arbitration for Sport*, WORLD ANTI-DOPING AGENCY (last visited Feb. 9, 2024), <https://www.wada-ama.org/en/anti-doping-partners/court-arbitration-sport> [https://perma.cc/V3YN-6U6Z].

⁵⁷ *Id.*

⁵⁸ *Frequently Asked Questions*, CT. OF ARB. FOR SPORT (last visited Feb. 9, 2024), <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> [https://perma.cc/MP6M-AJ6Q].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ INT’L TENNIS INTEGRITY AGENCY, *supra* note 35.

⁶² *Id.*

⁶³ CT. OF ARB. FOR SPORT, *supra* note 58.

⁶⁴ WORLD ANTI-DOPING AGENCY, *supra* note 49.

⁶⁵ *Id.*

⁶⁶ *Id.*

These due process requirements set by the World Anti-Doping Agency provide a good framework for a fair hearing. However, there is a factor of concern. Not all athletes that play in international competition make a large amount of income. If an athlete cannot afford to pay for an interpreter at their hearing and are not proficient in English or whatever language the hearing is using, they may not be able to effectively advocate for themselves and provide relevant explanation for their case. If that person cannot afford counsel and cannot communicate, the ability of the athlete to present evidence and oral submissions to the tribunal may be implicated. This is an important concern because the stakes of the outcome of the hearing are incredibly high for the professional athlete. If they cannot effectively counsel for themselves, this could lead to longer sanctions for the athlete. A fairer hearing should include an interpreter appointed by the tribunal to make sure that the due process protected by the World Anti-Doping code rules is more effective.

The International Tennis Integrity Agency operates in a slightly different form from the World Anti-Doping Agency when it comes to results management. First, if a national organization has tested their own tennis players for performance enhancing drugs and the results come back positive, the International Tennis Integrity Agency delegates the results management directly to the national organization for the first hearing.⁶⁷ From there, the athlete can appeal through the Court of Arbitration for Sport.⁶⁸ If the International Tennis Integrity Agency issues the drug testing, they will have jurisdiction over results management.⁶⁹ For an anti-doping rules violation or positive test, the review board for the International Tennis Integrity Agency will appoint three review board members to determine if a rule violation exists.⁷⁰ These groups of three include one technical, one legal, and one medical expert.⁷¹ For a whereabouts infraction, one or more board members will be appointed.⁷² From there, the case is delegated to an operationally independent tribunal, which will conduct the hearing in accordance with the International Standard of Result Management rules.⁷³

V. Comparison with Federal Administrative Agencies

United States Federal Administrative Agencies have adjudication processes for those individuals or groups that are not in compliance with the law.⁷⁴ Rules regarding administrative adjudication are governed by the Administrative Procedure Act. Parties to an agency adjudication are first afforded notice of their hearing, which includes: “(1) the time, place, and nature of the hearing; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted.”⁷⁵ This notice requirement is similar to those in the anti-doping codes. Fair notice is essential to procedural fairness for all adjudicative proceedings, whether it be for doping or for large administrative agencies. An administrative law judge, hearing officer, or a board will

⁶⁷ INT’L TENNIS INTEGRITY AGENCY, *supra* note 35.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ INT’L TENNIS INTEGRITY AGENCY, *supra* note 35.

⁷⁴ *Adjudication*, CTR. FOR EFFECTIVE GOV’T (last visited, Feb. 9, 2024), <https://www.foreffectivegov.org/node/2529> [<https://perma.cc/4ULH-Q5PM>].

⁷⁵ Administrative Procedure Act, 5 U.S.C § 554(b)(1)-(3) (1978).

be assigned to the case.⁷⁶ Once the adjudication commences, the Administrative Procedure Act affords parties the right to submit their own evidence in support of their case, like the initial hearings before a tribunal for doping cases. The statute states that a party may introduce “his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”⁷⁷ The administrative agency adjudication seems a bit more like a traditional trial based on this language in the statute. Moreover, the concerns of language barriers are decreased in the federal administrative agencies because they typically deal with domestic matters. However, because anti-doping rules are international, a consideration should be given to how language capabilities effect the proceedings and whether an interpreter should be supplied by the tribunal.

Another differentiating factor between the federal administrative agency adjudication and anti-doping adjudication lie in their standards for review. Formal adjudication for the federal administrative agencies uses a “substantial evidence” review.⁷⁸ The Administrative Procedure Act states in relevant part that: “A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.”⁷⁹ By comparison, the standard of review set out by Section 3.1 of the World Anti-Doping Code states that:

[T]he standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.⁸⁰

This standard of proof originated from Commonwealth jurisdictions and Australia, which takes into account “the personal reputation of the athlete.”⁸¹ What satisfies the comfortable satisfaction standard changes depending on the severity of the allegations made.⁸² This standard of review seems like a moving target for athletes because what defines “comfortable satisfaction” is subjective on a case-by-case basis.⁸³ This makes it difficult to set precedent on decisions and allow athletes to anticipate what kind of evidence they might need to prevail on their anti-doping violations claims. Without adequate preparation and ultimate procedural fairness, an athlete might be subject to intense sanctions which could cut down significantly on their years in professional sports.

⁷⁶ CTR. FOR EFFECTIVE GOV'T, *supra* note 74.

⁷⁷ Administrative Procedure Act, 5 U.S.C § 556(d) (1978).

⁷⁸ 5 U.S.C § 556(d).

⁷⁹ 5 U.S.C § 556(d).

⁸⁰ WORLD ANTI-DOPING AGENCY, *supra* note 7.

⁸¹ Richard H. McLaren, *An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS L. REV. 193, 203 (2006), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1348&context=sportslaw> d[<https://perma.cc/QCA2-6HEJ>].

⁸² *Id.* at 199.

⁸³ *See id.*

Anti-Doping agencies would benefit from a clearer standard, something more akin to “by a preponderance of the evidence” review. This standard of proof is used in civil courts in the United States. Because anti-doping hearings are not considering criminal activity, this standard could be promising in the context of doping proceedings. The “by a preponderance of the evidence” standard requires the burdened party to prove that the proposition in question is more likely to be true than false.⁸⁴ In doping cases, the burden of proof is on the anti-doping organization to provide evidence of a doping rule violation and culpability.⁸⁵ Often, there is little evidence of a doping violation other than the positive tests themselves.⁸⁶ This factor gives some merit to the “comfortable satisfaction” standard. Because of the limited availability of evidence to the burdened party, a less strict evidentiary standard makes it easier for doping violations to hold up in the Court of Arbitration for Sport.⁸⁷ In turn, this might make it easier for anti-doping organizations to enforce their rules. Although there is an important interest in the ability for anti-doping organizations to enforce their rules, the “comfortable satisfaction” standard is simply not clear enough, considering the crippling sanctions imposed on the athlete if they lose in the Court of Arbitration for Sport. It would be a different circumstance if the punishment for a doping violation did not include strict liability sanctions. However, because there is so much at stake for an athlete on the losing end of a doping violation appeal, even a slightly more definitive standard like the “preponderance of the evidence” review would be much fairer process to professional athletes, in both professional tennis and other Olympic sports.

The International Olympic Committee and professional tennis organizations can look to U.S. federal administrative agencies for a good model surrounding adjudication processes for several reasons. For example, the “substantial evidence” review in federal agency adjudication is consistent throughout formal adjudication and does not seem to consider the reputation of the parties or the gravity of the allegations at hand.⁸⁸ This allows for a clearer, more trial-like adjudication process. Further, this would likely provide a more definitive basis for precedent on these decisions. A standard like “substantial evidence” or “preponderance of the evidence” would likely allow for parties being charged with violations to better prepare for their adjudications and represent themselves more effectively. Consequently, a more definitive standard of proof would be beneficial and much more consistent for athletes who face severe penalties if their hearings don’t come out in their favor.

VI. Applicable Sanctions and Strict Liability for Doping Violations

Clearly, the International Olympic Committee and professional sports organizations have a high interest in the regulation of performance enhancing substances. If the use of performance enhancing drugs did not come with consequences, history has shown that athletes will use these substances to perform better in their sport and endanger their health in the process.⁸⁹ There is also

⁸⁴ *Preponderance of the Evidence*, CORNELL L. SCH. (last visited, Mar. 6, 2024), https://www.law.cornell.edu/wex/preponderance_of_the_evidence [https://perma.cc/2M76-US4W].

⁸⁵ Klaus Vieweg, *The Definition of Doping and the Proof of a Doping Offense (An Anti-Doping Rule Violation) Under Special Consideration of the German Legal Position*, 15 MARQ. SPORTS L. REV. 37, 41 (2004). <https://core.ac.uk/download/pdf/148695127.pdf> [https://perma.cc/4JDC-GERL].

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See* 5 U.S.C § 556(d).

⁸⁹ *See* Holt, et al., *supra* note 5.

evidence that certain countries would even promote the use of performance enhancing substances to win on the international stage.⁹⁰ Without proper repercussion, athletes could cheat using these drugs and win in competitions that their ordinary strength and ability would not prevail. It is largely accepted that athletes who willingly and knowingly violate anti-doping rules should face appropriate sanctions. With modern medicine and technology, international sporting competitions without regulations would become a slippery slope to endangering athletic competition and the athletes themselves.⁹¹

Although all these considerations have considerable weight to international sports and to the public, the most troubling piece of anti-doping proceedings lies in the severity of its sanctions, particularly the rigid strict liability standard for doping violations. The consequence for a doping violation often takes the shape of ineligibility, and possible forfeiture of titles and prize money during the periods that the athlete was doping.⁹² According to Article 9 of the World Anti-Doping Code, if the doping violation was in connection with a specific event during in-competition testing, their results from the competition are disqualified, and any medals, points, or prizes are forfeited.⁹³ An athlete can only escape this sanction if they can prove they have “no fault or negligence” for the violation.⁹⁴ For general violations of the anti-doping rules, the effects on athletes are just as severe.⁹⁵ If the tribunal determines that the athlete’s doping was “intentional,” the World Anti-Doping Code imposes an automatic four-year minimum ineligibility from play, even if it is the athlete’s first offense.⁹⁶ The World-Anti Doping Code defines the term “intentional” to mean “those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.”⁹⁷ This provision highlights that an intentional violation includes both knowing and negligent states of mind.⁹⁸ The only way an athlete can reduce their sanction under this provision is if athlete admits to their doping violations.⁹⁹ An admission of this sort would reduce the four-year period of ineligibility by one year.¹⁰⁰

Although the idea behind this provision is likely to incentivize athletes to be honest and to reduce the number of cases that go to the tribunals, making an admission like this could cause ruin on an athlete’s reputation and sponsorship deals. The money that athletes make off sponsorship deals is typically the largest portion of their income, as many players don’t make enough in prize money to support themselves on the tour. This loss of support would make their return to play incredibly difficult, both financially and emotionally. Even for wildly successful athletes like professional

⁹⁰ See Panja, *supra* note 43.

⁹¹ See Holt, et al., *supra* note 5.

⁹² See *Former No. 1 Tennis Player Simona Halep Gets 4-Year Ban in Doping Case*, ASSOCIATED PRESS (Sept. 12, 2023), <https://apnews.com/article/halep-doping-suspension-30423339c201039e0c7389537a7291d8> [<https://perma.cc/2PX5-4MKQ>].

⁹³ WORLD ANTI-DOPING AGENCY, *supra* note 7.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.*

⁹⁹ WORLD ANTI-DOPING AGENCY, *supra* note 7.

¹⁰⁰ *Id.*

tennis player Simona Halep, a four-year suspension has the likelihood of ending her career.¹⁰¹ First, many athletes and especially professional tennis players have a short amount of “peak” years that they may compete due to the extreme physicality required to perform at the highest level. Not only do athletes then lose out on income for four years but will pay the price when they try to come back and have not had the ability to compete for many years. This would set them back immensely, as playing in competition is considered an essential tool to improving performance in sports. Although promoting the confession of athletes who have doped is a positive goal, it makes professional athletes choose between two incredibly difficult paths.

More concerningly, if the athlete proves that they did not have the intentional state of mind to dope, the athlete is nonetheless subject to a two-year ban from all competition if they are sanctioned under the “use” or “failure to submit” provisions of the code due to the presence of banned substances in their body.¹⁰² Meaning that even if the athlete did not knowingly ingest banned substances and was not negligent, they will still suffer a complete ban from competition for two whole years.¹⁰³ Importantly, Anti-Doping Organizations have a very high interest in enforcement of the World Anti-Doping Code and protecting international competition from dishonesty and cheating using performance enhancing substances. Moreover, the health and safety of athlete in sports is of critical importance. However, if an athlete has proven that they did not have the intentional state of mind to dope and were not negligent, a two-year ban from all competition is an incredibly harsh standard. Although not as harsh in the intentional four-year ban, a two-year ban can have severely detrimental effects on the athlete’s career, finances, and public image. If the player has established in adjudication that the doping was accidental or unknowing, the player should not have to endure negative press and scrutiny by the public.

An example of a case of unknowing doping resulting in initial two-year sanctions was that of professional tennis icon Maria Sharapova. Sharapova was one of the biggest stars in professional tennis, with a former world number one ranking, thirty-six professional titles, five of which are grand slams.¹⁰⁴ She is one of the wealthiest athletes in history, especially from her wide array of sponsorship and brand deals.¹⁰⁵ On January 26, 2016, Sharapova tested positive for performance enhancing substances after a urine test taken after her quarter-final loss in the Australian Open that year. That test revealed the drug Meldonium was in her system during competition.¹⁰⁶ The particular issue with Sharapova’s case was the lack of proper notice that the drug was in fact a banned substance under the Tennis Anti-Doping Programme.¹⁰⁷ Meldonium was only deemed a banned substance on January 1st of that same year, only a few weeks prior to her positive test.

¹⁰¹ See ESPN, *supra* note 4.

¹⁰² WORLD ANTI-DOPING AGENCY, *supra* note 7.

¹⁰³ *Id.*

¹⁰⁴ Hareesh Ramchandani, *Russia, Grand Slam, Sugarpova: Everything You Always Wanted to Know About Maria Sharapova (But Never Had Time to Find Out)*, TENNIS MAJORS (March 16, 2023), <https://www.tennismajors.com/wta-tour-news/russia-grand-slam-sugarpova-11-questions-about-maria-sharapova-443013.html> [<https://perma.cc/UMS8-74L9>].

¹⁰⁵ *Id.*

¹⁰⁶ Dana Sleeper, *Inconsistent Line Calls: Case of Maria Sharapova Highlights Problems with Anti-Doping Programs in Professional Tennis*, THE JEFFREY S. MOORAD CENTER FOR THE STUDY OF SPORTS LAW (last visited Feb. 9, 2024),

https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2017/0228.html [<https://perma.cc/8YQL-V7XB>].

¹⁰⁷ *Id.*

Professional tennis players had received an email with “player news,” but with no mention that Meldonium had been added to the banned substance list.¹⁰⁸ After being charged with an anti-doping violation and the subsequent hearings and appeals process, Sharapova’s period of ineligibility was reduced to fifteen months instead of the two-year sanction because of her lack of knowledge and proper notice that the drug had been newly banned.¹⁰⁹ Even though the Tennis Anti-Doping Programme was not clear about the addition of Meldonium to the banned substance list and Sharapova did not know the substance she was taking was banned.¹¹⁰

Nonetheless, Sharapova was still issued a fifteen-month ban.¹¹¹ As a result, she lost multi-million-dollar relationships with many brands, including TAG Heuer, Porsche, Evian, and Nike.¹¹² Further, she could not compete for championships or in any competition at all, which hurt her playing career. And not only did Sharapova lose time in her tennis career, but she also took a hit in her professional marketing, and her reputation in the public eye. Had Maria Sharapova knowingly violated the substance ban, her suspension from play would be much more appropriate. However, Sharapova paid a hefty price for the Tennis Anti-Doping Programme’s administrative error and lack of due diligence regarding notification.

Sharapova’s story gives rise to an important inquiry. It is unclear how often administrative errors occur under the purview of the International Olympic Committee, World Anti-Doping Agency, or International Tennis Integrity Agency. It seems entirely unjust for an error on behalf of the administration to cause a professional athlete a piece of their career and livelihood. If such instances occur, a policy should be put in place to make sure that the athlete is somehow compensated for their losses. However, even if there is a monetary compensation, that athlete will likely never be able to repair the damage that has been done to their reputation. With a more relaxed standard for first offenses, athletes around the world would not have to suffer the harsh consequences, even without the requisite state of mind.

Another consideration for whether strict scrutiny should be applied to certain doping violations is the possibility of contaminated substances. Contaminated substances are at the center of the issue for professional tennis player Simona Halep. She has asserted and provided evidence to show that “contaminated licensed supplements” were the cause “for her positive test at the U.S. Open.”¹¹³ Contamination of substances used by athletes is more likely than many may think. A recent study conducted by Hans Geyer in Germany determined that out of 634 supplements tested, 14.8% of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Merrit Kennedy, *Sharapova Loses Major Sponsors After Positive Drug Test*, NPR (March 8, 2016), [https://www.npr.org/sections/thetwo-way/2016/03/08/469629511/sharapova-loses-major-sponsors-after-positive-drug-test#:~:text=Maria%20Sharapova%20Loses%20Major%20Sponsors,%3A%20The%20Two%2DWay%20%3A%20NPR&text=Hourly%20News-,Maria%20Sharapova%20Loses%20Major%20Sponsors%20After%20Positive%20Drug%20Test%20%3A%20The,world%27s%20highest%2Dpaid%20female%20athlete.\[https://perma.cc/TLX4-G2DU\]](https://www.npr.org/sections/thetwo-way/2016/03/08/469629511/sharapova-loses-major-sponsors-after-positive-drug-test#:~:text=Maria%20Sharapova%20Loses%20Major%20Sponsors,%3A%20The%20Two%2DWay%20%3A%20NPR&text=Hourly%20News-,Maria%20Sharapova%20Loses%20Major%20Sponsors%20After%20Positive%20Drug%20Test%20%3A%20The,world%27s%20highest%2Dpaid%20female%20athlete.[https://perma.cc/TLX4-G2DU]).

¹¹³ Gabrielle Tétrault-Farber, *Halep Says Truth Will Come Out After Doping Ban Appeal*, REUTERS (February 9, 2024), [https://www.reuters.com/sports/tennis/halep-says-truth-will-come-out-after-doping-ban-appeal-2024-02-09/\[https://perma.cc/HB5F-4FS5\]](https://www.reuters.com/sports/tennis/halep-says-truth-will-come-out-after-doping-ban-appeal-2024-02-09/[https://perma.cc/HB5F-4FS5]).

them were contaminated with a banned substance.¹¹⁴ This study demonstrates an increased likelihood than an athlete may come into contact with supplements that could cause them to have a positive doping test. Although an athlete may unknowingly ingest a contaminated substance, the World Anti-Doping Code still retains the authority to significantly sanction the athlete. The World Anti-Doping Code states:

In cases where the Athlete or other Person can establish both No Significant Fault or Negligence and that the detected Prohibited Substance (other than a Substance of Abuse) came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete or other Person's degree of Fault.¹¹⁵

This provision shows that even if the athlete ingested substance that were contaminated and established no fault or negligence on their behalf, they could still be punished from play to up to two years. The contrast between no ineligibility and two years leaves lots of room for discretion to the doping organization. Although athletes must be mindful of what they put in their body, it is difficult to reconcile how two individuals could have the same state of mind and degree of fault, and in theory receive two different outcomes that would affect their careers in drastically different ways.

A particular group of professional athletes which the strict scrutiny impacts very distinctly are minors. Often, minors that are being pushed to such a high level at such a young age are not in full control of their lives and are subjected to the wishes of their family, their coaches, and their country. In fact, the International Olympic Committee on harassment and abuse recognizes doping practices on minors as “non-accidental physical abuse.”¹¹⁶ Many minors can easily be coerced or brainwashed by those they trust. Or, if there is a pattern of abuse, they may feel uncomfortable to speak up to the proper authorities, especially if their country encourages doping practices. With a strict scrutiny standard that does not account for an athlete's state of mind or lack of education regarding doping practices, children could be powerless. In fact, evidence exists to show that sports doping and sanctions that follow disproportionately impact minors. The American Academy of Pediatrics reports that “children as the most vulnerable group affected by doping and the threat such practices represent.”¹¹⁷ Because of the likelihood of coercion and abuse surrounding positive doping tests in children, minors should have stronger protections in sports and should not be subject to harsh sanctions.

There are several countries that have record highs for athletes who are minors testing positive for doping. In a ten-year global study about minors and doping, the results showed that Russia, India,

¹¹⁴ Asker Jeukendrup, *Contamination of Nutrition Supplements*, MYSPORTSCIENCE (last visited Feb. 9, 2024), [https://www.mysportscience.com/post/contamination-of-nutrition-supplements#:~:text=It%20is%20now%20well%20known,the%20list%20of%20banned%20substances.\[https://perma.cc/4VNX-7U8Y\]](https://www.mysportscience.com/post/contamination-of-nutrition-supplements#:~:text=It%20is%20now%20well%20known,the%20list%20of%20banned%20substances.[https://perma.cc/4VNX-7U8Y]).

¹¹⁵ WORLD ANTI-DOPING AGENCY, *supra* note 7.

¹¹⁶ Marcus Campos, et al., *WADA's Concept of the 'Protected Person' – and Why it is No Protection for Minors*, SPORT, ETHICS, AND PHILOSOPHY (July 21, 2022), <https://www.tandfonline.com/doi/full/10.1080/17511321.2022.2091014> [https://perma.cc/8KGK-KPFP].

¹¹⁷ *Id.*

and China ranked the highest for most positive doping cases in their minor athletes.¹¹⁸ The positive tests were most commonly flagged for diuretics, stimulants and anabolic steroids, and 1,400 of the positive tests studied were from minors.¹¹⁹ The World Anti-Doping Agency reported that a whopping eighty percent of these cases ended up with a sanction being imposed on the minor athlete.¹²⁰ What is even more concerning is just how young these athletes are when they might be possibly subject to such harsh sanctions. The same study reported that the youngest athlete tested was only eight years old, and the youngest athlete sanctioned for doping was only twelve.¹²¹ The World Anti-Doping Code retains the authority to sanction minors, even though they often receive the status of “protected persons.”¹²² The relevant provision from the World Anti-Doping Code states:

Where the anti-doping rule violation not involving a Substance of Abuse is committed by a Protected Person or Recreational Athlete, and the Protected Person or Recreational Athlete can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Protected Person or Recreational Athlete’s degree of Fault.¹²³

This provision is similar to the provision regarding contaminated substances. This sliding scale gives much discretion to the court when athletes who are minors should have more solid protections under the World Anti-Doping Code. Even with a “protected person” status, vulnerable minors are held to the same strict scrutiny standard as adults.

In many legal systems, minors are a protected class in the eyes of the law. They cannot enter many binding contracts or provide informed consent. By treating a minor’s protected status the same as an adult’s possibility of ingesting a contaminated substance or knowing doping violation, the court’s discretion on sanctions goes too far. Even if sanctions for unknowing adults cannot be changed under the World Anti-Doping Code, the lack of protections for athletes who are minors under the strict scrutiny standard should not stand. Although the World Anti-Doping Agency has set out to protect minors in theory, it does not present as effectively in practice. If minors do not have a more lenient standard for sanctions, their status as a “protected person” is almost meaningless. This lack of protections unfairly converts “minor athletes from victims into suspects.”¹²⁴

A recent example of how harsh these sanctions can be on athletes who are minors is illustrated in the case of fifteen-year-old Olympic figure skater Kamila Valieva. The skater from Russia was

¹¹⁸ *Global Study of Doping Cases Involving Minors Points to Russia, India and China*, ASSOCIATED PRESS (Jan. 24, 2024), [https://apnews.com/article/doping-wada-minors-children-ba2d18fa92aeac018fa7542269ace6e#:~:text=Diuretics%2C%20stimulants%20and%20anabolic%20steroids%20were%20the%20most%20commonly%20found,the%20%20Operation%20Refuge%20study.\[https://perma.cc/H7KT-FZ9L\]](https://apnews.com/article/doping-wada-minors-children-ba2d18fa92aeac018fa7542269ace6e#:~:text=Diuretics%2C%20stimulants%20and%20anabolic%20steroids%20were%20the%20most%20commonly%20found,the%20%20Operation%20Refuge%20study.[https://perma.cc/H7KT-FZ9L]).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² WORLD ANTI-DOPING AGENCY, *supra* note 7.

¹²³ *Id.*

¹²⁴ Campos, et al., *supra* note 116.

sanctioned by the Court of Arbitration for Sport for a knowing doping violation after she tested positive for a banned heart medicine.¹²⁵ The Court of Arbitration for sport decided that Valieva was subject to the full four-year ineligibility sanction, and Russia's Olympic gold medal was stripped away.¹²⁶ The lower tribunals held that Valieva was protected as a minor, but the Court of Arbitration for Sport did not agree.¹²⁷ The likely toss-up between the outcomes from the lower tribunals and the appeals tribunal is because of the wide discretion afforded to tribunals under the World Anti-Doping Code regarding imposition of sanctions. Because of Russia's long history of doping violations and cheating, it is very possible that Valieva was a young, impressionable child who was only doing what was told to her by her team or her family. Without a safe haven afforded to all minors in the World Anti-Doping Code, strict scrutiny will exact harsh punishment on children who may not have any idea of what they are doing. A more appropriate consequence for minors who test positive for performance enhancing drugs for the very first time would be a reprimand and no period of ineligibility. Minors should be protected and educated about the harms of doping before they are harshly punished for mistakes they may not even know are wrong.

VII. Appeals

Even if there was no way to change the strict scrutiny standard under the World Anti-Doping Code, there are several ways that the appeals process could better balance the interests of doping organizations and the athletes. First, the location of the Court of Arbitration for Sport is a possible obstacle for many athletes outside of Europe, as it is located in Lausanne, Switzerland.¹²⁸ Moreover, some scholars have argued that the Court of Arbitration for Sport is "Eurocentric," and that "representation of arbitrators typically does not reflect the demographics and unique socio-economic and cultural challenges of athletes from poorer nations."¹²⁹ An unbiased panel that is representative of the people could possibly increase the fairness of the appeals process. Even more importantly, the Court of Arbitration of Sport being so far away from the individuals it has jurisdiction over in doping proceedings can decrease the access to the court. Further, taking an anti-doping case all the way to the court of appeals can be a costly endeavor for many athletes. Not every athlete who receives a doping violation may have the funds to travel to Switzerland to appear in person, or the equipment or access to technology to attend the hearing virtually. If an athlete cannot afford to even attend the appeals, it is even less likely that they will be able to pay for elite legal counsel or expert witnesses to testify on their behalf. This financial obstacle could leave many athletes without the ability exercise their right to an appeal, completely blocking their access to justice on their case.

Even if an athlete can afford to attend the proceedings themselves, there must be a more exacting review in the appeals stage to ensure the fairest process for all athletes, whether they be adults or children. The Court of Arbitration for Sport retains the authority for a *de novo* review of decisions

¹²⁵ *Russian Figure Skater Kamila Valieva Disqualified in Olympic Doping Case*, NBC NEWS (Jan. 29, 2024), <https://www.nbcnews.com/news/world/russian-figure-skater-kamila-valieva-disqualified-olympic-doping-case-rcna136154> [<https://perma.cc/M2QC-5Q9S>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Shaun Star & Sarah Kelly, *A Level Playing Field in Anti-Doping Disputes? The Need to Scrutinize Procedural Fairness at First Instance Hearings*, 21 INT'L SPORTS L.J. 94, 95 (2020), <https://link.springer.com/article/10.1007/s40318-020-00176-6> [<https://perma.cc/SC7M-KR9D>].

¹²⁹ *Id.*

made in the lower tribunals.¹³⁰ This review gives no weight to the decision of the first tribunal. The World Anti-Doping Code expressly states that “In making its decision, CAS shall not give deference to the discretion exercised by the body whose decision is being appealed.”¹³¹ The rationale behind this standard of review is likely that a tribunal or anti-doping organization in an athlete’s own country could be much more lenient on sanctions and reasoning than the appeals court.¹³² This is a valid concern, as some countries have blatantly ignored doping rules in the past or even encourage performance enhancing substance use in their athletes.¹³³ Although these issues exist, there are several concerns regarding an automatic *de novo* review at the appeals stage. One argument identifies the issue that this format is that renders a decision by the lower tribunals essentially meaningless.¹³⁴ The *de novo* review standard leaves all discretion to the Court of Arbitration for Sport to render a decision based entirely on their own reasoning. This issue is exacerbated by the finality of the Court of Arbitration for Sport’s decision. The court asserts that its decisions are “final and binding.”¹³⁵ If an athlete decides to pursue the single hearing option under the Court of Arbitration for Sport, the one hearing will be the only review of their case.¹³⁶ Essentially, all roads end at the Court of Arbitration for Sport for doping violations cases.

A fairer process in doping violations cases would allow athletes to appeal to some other institution in addition to the options already available in the Court of Arbitration for Sport. The ability of the Court of Arbitration for Sport to single-handedly decide the fates of many professional athletes is too much power for any one tribunal to have. Some other avenues or different institution to appeal to would better protect the athlete’s interest as well as ensure enforceability of doping violations sanctions. A model for this idea can be found in the appeals processes of the federal administrative agencies in the United States. Federal administrative agency adjudication processes are similar to those set up by the International Olympic Committee and International Tennis Integrity Agency. However, they differ in that the federal agencies have an appeals route through the federal court system.¹³⁷ Although this option exists for private parties in adjudication proceedings, receiving judicial review is not an easy feat. Private parties must first exhaust all their options within the adjudication process of the agency prior to making a judicial appeal.¹³⁸ The amount of steps parties must go through prior to receiving a judicial appeal depends on the agency that has jurisdiction over their case.¹³⁹ But once a private party receives a green light to seek judicial review, achieving

¹³⁰ Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT’L AND COMPAR. L. 97, 113 (2009), <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1111&context=gjicl> [<https://perma.cc/XJ3V-Y3M2>].

¹³¹ WORLD ANTI-DOPING AGENCY, *supra* note 7.

¹³² Weston, *supra* note 130 at 113.

¹³³ See Ava Wallace & Emily Giambalvo, *A Timeline of Russia’s State-Sponsored Olympic Doping Scandal*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/sports/olympics/2022/02/11/russia-olympics-doping-scandal/> [<https://perma.cc/5ZMD-4AWW>].

¹³⁴ Weston, *supra* note 130 at 114.

¹³⁵ CT. OF ARB. FOR SPORT, *supra* note 58.

¹³⁶ WORLD ANTI-DOPING AGENCY, *supra* note 7 at 62.

¹³⁷ Jana Caracciolo, *Procedures: Agency Adjudication*, NAT’L AGRIC. L. CTR. (Jan. 25, 2024), <https://nationalaglawcenter.org/procedures-agency-adjudication/#:~:text=Only%20after%20the%20party%20has,agency%20action%20can%20do%20so.> [<https://perma.cc/89WK-DK23>].

¹³⁸ *Id.*

¹³⁹ *Id.*

a judgment in the federal courts overturning the agency's decision is rare due to the high burden of proof on plaintiffs and deference given to agency decisions.¹⁴⁰ The path for private parties to achieve a favorable judgment after a loss at the agency adjudication is not an easy one, but they do have a chance of winning their appeal in the federal court system.

Although the likelihood for redress is limited for private parties in judicial review of federal administrative agency adjudication decisions, some likelihood still exists. Even the possibility for a different tribunal to hear the case is a fairer process than what is afforded to athletes subject to the World Anti-Doping Code and jurisdiction of the Court of Arbitration for Sport. In a guidance report published by the U.S. Department of Justice, the federal executive agency emphasizes the importance of a separation of reviews of cases.¹⁴¹ Even arguing for the effectiveness of *de novo* review, the Department of Justice highlighted that "To maximize the effectiveness of this responsibility, agencies should ensure that administrative review is conducted by an appeal authority that is separate and distinct from the office or official that made the initial determination."¹⁴² Because of the limited availability for an athlete to seek an appeal outside of the Court of Arbitration for Sport, there must be consideration for whether *de novo* review is properly ensuring that athletes get a fair and impartial ruling on their case. This is especially imperative as the Court of Arbitration for Sport is hearing more cases in recent years.¹⁴³ One statistic demonstrates that in 2020, the Court of Arbitration for Sport heard 948 cases as opposed to only 600 in 2016, and the number of appeals heard doubled from the 2016 statistic to 811 in 2020.¹⁴⁴ As the wide reach of the Court of Arbitration for Sport expands, so must the procedural protections for athletes whose livelihoods and careers are at stake. Without the most effective methods to ensure justice at both the first hearing and appeals stage, athletes could face extreme consequences that somehow could be avoided with different procedural measures in place. A consideration for fairer process might include an appellate standard of review that includes some element of deference to the lower tribunals. Without such a change, the proceedings at lower tribunals other than the Court of Arbitration for Sport are rendered inconsequential, leaving far too much power to one individual institution.

VII. Solutions

Although doping regulations and enforcement has improved since the World Anti-Doping Agency's inception in 1999, there is much more work to be done to ensure the fairest process to professional athletes in professional tennis and other Olympic sports. There are several solutions that might alleviate some due process concerns that arise out of Anti-Doping proceedings in all sports that are subject to the World Anti-Doping Agency's rules. One solution is to better educate athletes about doping, or increasing the education that athletes should be required to learn before

¹⁴⁰ *Id.*

¹⁴¹ *OIP Guidance: Adjudicating Administrative Appeals Under the FOIA*, OFF. OF INFO. POL'Y U.S. DEP'T OF JUST. (Aug. 12, 2021), <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20Under%20the%20FOIA> [<https://perma.cc/2AWY-GM5J>].

¹⁴² *Id.*

¹⁴³ Grit Hartman, *The Secretive Life of the Court of Arbitration for Sport*, PLAY THE GAME (Nov. 18, 2021), <https://www.playthegame.org/news/the-secretive-life-of-the-court-of-arbitration-for-sport/> [<https://perma.cc/KJH3-CSUX>].

¹⁴⁴ *Id.*

participating in professional sports. The World Anti-Doping Agency has implemented education principles relatively recently, publishing the first “International Standard for Education” on January 1st, 2021.¹⁴⁵ The World Anti-Doping Agency defines the purpose of education in the context of doping with the goals “to raise awareness, inform, communicate, to instill values, develop life skills and decision-making capability to prevent intentional and unintentional anti-doping rule violations.”¹⁴⁶ Further, section eighteen of the World Anti-Doping Code is dedicated to the World Anti-Doping Agency’s policy on educating professional athletes about doping and performance enhancing substances.¹⁴⁷ The relevant principles of the World Anti-Doping Code regarding education state:

Education programs are central to ensure harmonized, coordinated and effective anti-doping programs at the international and national level. They are intended to preserve the spirit of sport and the protection of *Athletes’* health and right to compete on a doping free level playing field as described in the Introduction to the *Code*.

Education programs shall raise awareness, provide accurate information and develop decision-making capability to prevent intentional and unintentional anti-doping rule violations and other breaches of the *Code*. *Education* programs and their implementation shall instill personal values and principles that protect the spirit of sport.¹⁴⁸

The adoption of education as a pillar of the Anti-Doping mission was a step in the right direction for anti-doping organizations.

Further, the World Anti-Doping Agency sets guidelines for individual nations’ anti-doping organizations education programs.¹⁴⁹ Although having educational guidelines and providing some materials is an improvement for the World Anti-Doping Code, there are flaws that still exist with this system. The issue with the guidelines is that the World Anti-Doping Agency guidelines allow for certain imperative information, including the principle of strict liability and the rights and responsibilities of the World Anti-Doping Code, to be published on as little as a simple website, without more.¹⁵⁰ The method of posting educational materials only to a website is not adequate to hold athletes to such strict liability in the event of a positive doping test. Making information available does not ensure that the information reaches the proper audience, in this case athletes all around the world. Not all athletes might have access to the proper technology to read all the proper materials about doping. Further, minors that are being forced to dope by adults may have this information hidden from them to prevent them from speaking out about them being subjected to taking performance enhancing substances. The World Anti-Doping Agency has made a positive

¹⁴⁵ *Education and Training*, WORLD ANTI-DOPING AGENCY (last visited, Mar. 6, 2024), [https://www.wada-ama.org/en/what-we-do/education-and-training#:~:text=The%20introduction%20to%20the%202021,force%20on%201%20January%202021.\[https://perma.cc/3G6N-UQD2\]](https://www.wada-ama.org/en/what-we-do/education-and-training#:~:text=The%20introduction%20to%20the%202021,force%20on%201%20January%202021.[https://perma.cc/3G6N-UQD2]).

¹⁴⁶ *Id.*

¹⁴⁷ WORLD ANTI-DOPING AGENCY, *supra* note 7 at 110.

¹⁴⁸ *Id.*

¹⁴⁹ WORLD ANTI-DOPING AGENCY, *supra* note 7 at 111.

¹⁵⁰ *Id.*

effort in the educational sphere surrounding the use of performance enhancing substances, but more needs to be done to ensure the fairest process to athletes of all ages.

Improving the educational process for doping is imperative to improving anti-doping procedures, especially because evidence exists to show that the current educational programs in place are not very effective. Several studies assessed data surrounding percentage of questions answered correctly on a quiz given to athletes surrounding banned substances or knowledge of rules in the World Anti-Doping Code¹⁵¹. In Jamaica, the athletes scored an average thirty-eight percent correct.¹⁵² In Japan, the athletes scored an average of 64.54% correct.¹⁵³ In Poland, the average score was 45.22%.¹⁵⁴ Australian athletes were tested and scored only a 32.2% correct on average.¹⁵⁵ Although the World Anti-Doping Agency has elevated the emphasis on education, there is still a disconnect between educational tactics and information that professional athletes retain about banned substances.¹⁵⁶ Because the sanctions for a positive doping test can be detrimental to an athlete's life and career, a more diligent educational process should be required before an athlete is able to compete in professional sports and is subject to vast drug testing under the World Anti-Doping Code. One possible solution to correct this issue may be requiring athletes to participate in in-person classes where they are made aware of the doping rules and are offered an opportunity to anonymously report if they are being coerced to dope against their will. If the education were to remain solely online, another solution may be to require athletes to pass online exams that include the relevant doping information as a prerequisite to competition in professional events.

Once athletes are properly educated and become subject to testing, there are several ways doping hearings themselves can be improved to be fairer to athletes while still protecting the interests of anti-doping organizations. The first is to ensure interpreters are provided by the court at no extra cost to the defendant athlete. If the Court of Arbitration for Sport is to retain jurisdiction on both first hearings and appeals, athletes will already be taking on great expense to appear in person at their trial. Ensuring clear communication across language barriers for athletes from all parts of the world is to ensure they can present the information relevant to their case. Especially if an athlete cannot afford to retain counsel, the ability to represent oneself is imperative to justice in these cases. It should be the responsibility of the World Anti-Doping Agency or the Court of Arbitration of Sport to ensure smooth and complete access to their tribunals, including through language.

Further, athletes should be able to rely on a standard of proof clearer and more definitive than that of "comfortable satisfaction of the court." This standard currently in place for anti-doping proceedings is too flexible, partially subjective, and does not allow for clear precedent, which is fundamentally unfair considering the sanctions athletes face in lieu of an unfavorable decision. Moreover, tribunals considering the personal reputation of the athlete could even have their

¹⁵¹ Julian R. Woolf, *An Examination of Anti-Doping Education Initiatives From an Educational Perspective: Insights and Recommendations For Improved Educational Design*, 8 PERFORMANCE ENHANCEMENT & HEALTH 1, 4 (Aug. 2020), <https://www.sciencedirect.com/science/article/pii/S2211266920300220> [<https://perma.cc/S67P-LJFW>].

¹⁵² *Id.* at 4.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

decisions clouded by repressed and implicit biases. Initial anti-doping hearings should adopt a “preponderance of the evidence” standard, which gives the anti-doping courts a more definitive basis for decisions and would give athletes better precedent on what to expect for their initial anti-doping proceedings.¹⁵⁷ This standard would still allow anti-doping organizations to present their case with the strength of their evidence while protecting the individual athletes from personal scrutiny.¹⁵⁸

Moreover, the doping appeals process could better serve athletes by giving them another forum besides the Court of Arbitration for Sport to hear their case. Because the Court of Arbitration for Sport is the only place where final and binding decisions are rendered, this court holds immense power to exact sanctions on athletes. It is important that athletes have a different tribunal hear their claims in case the Court of Arbitration for Sport is not entirely fair during the appeals process. Moreover, if the Court of Arbitration for Sport is to retain sole and final jurisdiction over all professional athletes across the world, it should move away from an automatic *de novo* standard of review. If the Court of Arbitration for Sport is the only court to hear an appeal and gives no deference whatsoever to the tribunals below, it renders the lower court’s decisions meaningless.¹⁵⁹ In that case, the Court of Arbitration holds significantly too much power and most times imposes sanctions on athletes that deprives them of their ability to compete for a significant amount of time, even if the doping violation was unknowing or due to a contamination error.

The most important solution of all should be to depart from strict liability in first offense doping cases. Professional athletes, both tennis players and from other Olympic sports, have an incredibly short window of time that they can compete at the highest level due to the immense strain on the body and mind. When a doping sanction even for an unknowing offense or contaminated substance robs an athlete of precious years to compete, it can ruin the athlete’s reputation, career, and personal life. The move away from strict liability for first offenses is especially critical for minors who have tested positive for performance enhancing substances. Because minor athletes are often victims of abuse, they may not have the capability to speak up for themselves and their own wishes regarding the substances they ingest.¹⁶⁰ To hold powerless athletes to a standard which threatens their entire career before it has even started is a punishment far too grave. Instead of a strict liability standard for even first offenses or unknowing offenses, a better sanction would be a proper warning and mandatory education regarding the dangers of doping and the requisite punishments. This method would still achieve anti-doping organizations’ goal to encourage compliance with doping rules, while still maintaining justice and fairness to professional athletes.

VIII. Conclusion

Sports and the use of performance enhancing drugs have a long and complicated history. The introduction of anti-doping rules was a necessary addition to the international sports community, but the rules and their enforcement do come with their own share of pros and cons. Without them, athletes can use drugs to alter and improve their performance far beyond what they could do on

¹⁵⁷ See CORNELL L. SCH., *supra* note 84.

¹⁵⁸ See McLaren, *supra* note 81.

¹⁵⁹ Weston, *supra* note 129 at 114.

¹⁶⁰ See Campos, et al., *supra* note 116.

their own.¹⁶¹ Further, there is much evidence to support that there are grave dangers associated with athletes using substances in competition.¹⁶² Because of the risks associated with doping in sports and unfair advantage that banned substances provide, the World Anti-Doping Code and similar rules for other Olympic sports were an essential component to regulations in professional sports. The World Anti-Doping Agency's enforcement of the rules is an important interest, so that athletes and countries around the globe actually observe and follow the regulations in place.

Despite this high interest for anti-doping organizations, it is impossible to ignore the elements of fair process that are absent from anti-doping proceedings and appeals. For many athletes in Olympic sports, including professional tennis, the present and harsh reality is that they may suffer sanctions spanning the course of several years due to elements of unfairness in the doping testing, proceedings, and appeals mechanisms that are currently in place. Athletes like Maria Sharapova and Simona Halep, both who asserted that they never knowingly ingested banned substances, will never get back the time they lost playing the sport they trained their whole lives for. Athletes who are children, who are often abused and coerced into ingesting banned substances, will be punished instead of protected by an organization who claims to seek to protect athletes from harms. Because anti-doping organizations are interested in protecting athletes, the professional tennis tours, International Olympic Committee, and World Anti-Doping agency must take action to reform the anti-doping system to remedy the strict liability sanctions imposed on athletes for first time doping violations.

¹⁶¹ See Holt, et al., *supra* note 5.

¹⁶² See *id.*