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## Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?

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**DOES THE CONSTITUTION APPLY TO THE ACTIONS OF THE  
UNITED STATES ANTI-DOPING AGENCY?**

DIONNE L. KOLLER\*

TABLE OF CONTENTS

	Page
I. Introduction .....	92
II. Background—Why and How USADA Was Created .....	94
A. The Federal Government’s Interest in Drugs and Sports .....	94
1. The Federal Government and the USOC .....	94
2. The Fight Against Performance-Enhancing Drug Use in Amateur Sports .....	96
3. The National Anti-Doping Strategy .....	98
B. The Government’s Efforts to Establish Domestic and International Anti-Doping Agencies .....	101
1. The Creation of the World Anti-Doping Agency .....	101
2. The Government’s Role in Creating USADA .....	105
C. Why USADA’s Designation as a Private Entity is Important .....	109
III. Does the Constitution Apply to USADA’s Actions? .....	111
A. Is USADA a Government Entity for Purposes of the Constitution? .....	112
B. Are USADA’s Actions Fairly Attributable to the State? .....	116
1. Nothing Would Preclude a Finding of State Action Against USADA .....	117
2. USADA’s Actions Generally Will Not Be Fairly Attributable to the Government .....	120
a. USADA Does Not Perform a Traditional Public Function .....	121
b. Substantial Government Funding and Regulation Are Not Enough to Support a Finding of State Action .....	122
c. The Government is Not Pervasively Entwined in USADA’s Operations .....	125
d. In Most Cases, USADA’s Actions Are Not the Result of Joint Action with the Government or Significant Government Coercion or Encouragement .....	126

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3. In Unique Circumstances, USADA’s Actions May Be Fairly Attributable to the State..... 127

    a. USADA’s Relationship with the Federal Government Positions It to Be a State Actor..... 127

    b. The Events Leading Up to 2004 Athens Olympic Games ..... 132

IV. Conclusion ..... 136

“United States government leadership is critical if we are to succeed in eliminating the threat of drugs in sports.”<sup>1</sup>

I. INTRODUCTION

In 2003, a syringe was sent anonymously to the United States Anti-Doping Agency (USADA) containing what was discovered to be tetrahydrogestrinone (THG), a “designer” steroid that was engineered to be undetectable in standard drug tests.<sup>2</sup> The entity that allegedly manufactured and distributed THG, the Bay Area Laboratory Cooperative (BALCO), came under grand jury investigation for violations of numerous federal laws.<sup>3</sup> Information obtained as part of the investigation contained the names of several elite amateur and professional athletes who allegedly had used THG, including several Olympic-caliber track and field athletes.<sup>4</sup> As the BALCO scandal unfolded and the 2004 Athens Olympic Games approached, USADA as well as many members of Congress and the Executive Branch became concerned that these track and field athletes might not be caught. Both USADA and the federal government were determined to ensure that the United States sent a “clean” team to the Athens Olympics.<sup>5</sup> To that end, a Senate Committee subpoenaed Department of Justice documents related to the BALCO investigation, which included the names of the track and field athletes in question, and turned them over to

1. *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 106th Cong. 23 (1999), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_senate\\_hearings&docid=f:75594.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:75594.pdf) [hereinafter *Effects of Drugs Hearing*] (statement of General Barry R. McCaffrey, Director, Office of National Drug Control Policy).

2. Richard McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, 15 MARQ. SPORTS L. REV. 175, 176 (2004). Olympic sprinter Marion Jones’s former coach Trevor Graham later admitted being the anonymous sender. Lance Williams & Mark Fainaru-Wada, *How a Syringe Ushered in a Major Sports Scandal: Coach Acknowledged He Gave Evidence to Investigators*, S.F. CHRON., July 23, 2004, at A15; see also Adrian Wilairat, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL’Y 377, 385 (2005).

3. McLaren, *supra* note 2, at 176.

4. See *id.* at 176–77.

5. See Owen Slot, *United States Risk Losing Race Against Time to Keep Athens Clean*, TIMES (London), Apr. 29, 2004, at 46; John Niyoy, *USOC Establishes Lofty Standards for Olympics: But Barriers Could Hinder Expectation of 100 Medals*, DETROIT NEWS, May 6, 2004, at 1E.

USADA.<sup>6</sup> Relying on these documents, USADA pursued and ultimately secured sanctions against several athletes<sup>7</sup> for what it deemed to be “non-analytical positives,”<sup>8</sup> that is, where the athlete did not fail a drug test but where there was some evidence of an attempt to cheat.<sup>9</sup>

USADA’s aggressive pursuit of athletes allegedly involved in the BALCO scandal, and the federal government’s involvement in these efforts, sparked enormous controversy.<sup>10</sup> Critics of USADA’s actions asserted that USADA was not respecting athletes’ constitutional due process rights, and at least one athlete, Marion Jones, threatened to sue USADA if it sanctioned her based on a “non-analytical positive.”<sup>11</sup> As stated at the time by one sports commentator, “You get an uneasy feeling from watching [USADA] . . . You get the feeling they’d waive the U.S. Constitution if they could—which is a pretty unsettling thing to feel about an organization that is funded by U.S. taxpayer dollars and a grant from the White House.”<sup>12</sup> USADA, on the other hand, has suggested that it is a private, non-governmental organization that is not bound by the constraints of the Constitution.<sup>13</sup> Amid such controversy, it is not at all clear what USADA’s legal status is for constitutional purposes.<sup>14</sup>

This Article examines USADA and its relationship to the federal government to determine whether USADA’s actions could be constrained by the Constitution. While it is clear that USADA has very close ties to the federal government, this Article argues that it is not a government entity, and in most cases is not engaged in state action. Accordingly, in the typical doping case, constitutional restrictions would not apply to USADA’s conduct. In unique circumstances when the federal government does intervene, however,

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6. See Press Release, U.S. Senate Comm. on Com., Sci., and Trans., Comm. to Subpoena DOJ Documents Relating to Banned Substance Use in Olympics (April 8, 2004), <http://commerce.senate.gov/newsroom/printable.cfm?id=220726>.

7. Beau Dure, *BALCO Investigation: Key Players*, USATODAY.COM, Dec. 13, 2005, [www.usatoday.com/sports/balco-players.htm](http://www.usatoday.com/sports/balco-players.htm).

8. 2004 USADA ANN. REP. 1, available at [http://www.usantidoping.org/files/active/who/annual\\_report\\_2004.pdf](http://www.usantidoping.org/files/active/who/annual_report_2004.pdf).

9. McLaren, *supra* note 2, at 177.

10. See Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1203–04 (2005).

11. Joel Stein, *Chasing the Truth: Track Stars Marion Jones and Her Boyfriend Tim Montgomery are Entangled in Steroids Investigations*, TIME, June 7, 2004, at 52, 52.

12. Sally Jenkins, *Due Process? Not for Track Stars*, WASH. POST, June 26, 2004, at D1.

13. See Travis T. Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124, 124–25 (2003).

14. Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523, 561 (2002) (“Questions remain, however, over the legal and practical status of USADA . . .”).

as it did in the months leading up to the 2004 Athens Olympic Games, there is a strong case that USADA's conduct amounts to state action.

## II. BACKGROUND—WHY AND HOW USADA WAS CREATED

### A. *The Federal Government's Interest in Drugs and Sports*

In examining whether USADA is a government entity or whether, as a private entity, its actions might be attributable to the government, it is necessary to consider the “nature and history” of USADA and the importance of fighting drug use in sports to the United States Government.<sup>15</sup> Moreover, it is helpful to understand the significance to USADA of avoiding constitutional restrictions.

#### 1. The Federal Government and the USOC

Understanding the history of USADA necessarily requires a brief overview of the federal government's relationship with the United States Olympic Committee (USOC), from which USADA was created. The United States, unlike many other countries, does not have an official government agency or ministry for sports. This is because, as one commentator has explained, “[t]he issue of sports governance does not fit neatly into the U.S. Government structure.”<sup>16</sup> This does not mean, however, that sports issues are not important to the United States Government. It is in this tension between the structure of our government, which tends to leave sports issues to the private sector, and our government's interest in sports, where the USOC, and now USADA, operate.

The USOC, as it exists today, was developed as a result of the Commission on Olympic Sports created by President Ford in 1975 to study ways in which the United States could be more successful in Olympic competition.<sup>17</sup> The Commission called on Congress to restructure the USOC so that it would function as an institution to centrally coordinate the United States' amateur athletic development.<sup>18</sup> This led to the Amateur Sports Act of 1978,<sup>19</sup> which

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15. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995) (“Before proceeding to consider Lebron's contention that Amtrak, though nominally a private corporation, must be regarded as a Government entity . . . we examine the nature and history of Amtrak . . .”); see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291–95 (2001) (reviewing the history and structure of the TSSAA before analyzing whether its actions were “fairly attributable” to the state).

16. *Panel II: Regulations Governing Drugs and Performance Enhancers in Sports*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 337, 340 (2002) [hereinafter *Panel II: Regulations Governing Drugs*] (statement of Edward Jurith, General Counsel, Office of National Drug Control Policy).

17. Exec. Order No. 11,868, 3A C.F.R. 174 (1975).

18. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 554 (1987).

made the USOC a federally-chartered corporation. The Act gave the USOC the exclusive power to coordinate and govern Olympic Movement athletics in the United States.<sup>20</sup>

Both through formal means, such as providing funding and through the oversight requirements of the Amateur Sports Act, and by more informal means, the federal government exercises significant influence over the USOC. For instance, after the Soviet invasion of Afghanistan prior to the 1980 Moscow Olympic Games, President Carter and Congress called on the USOC to boycott the Games.<sup>21</sup> The President, however, made clear that he would take all steps necessary to enforce his decision not to send a team to Moscow.<sup>22</sup> Not surprisingly, the USOC voted not to send a team to the Games.<sup>23</sup> More recently, Congress has taken an interest in reforming the USOC in response to allegations of mismanagement and ethical violations. To this end, in 2003, committees in both the House and Senate held several hearings on USOC reform, and a group of Senators created an independent commission to recommend changes to the USOC's structure. During one such hearing, Bill Martin, acting president of the USOC, told Congress: "All of this comes down to the question of just what Congress, to whom we are ultimately accountable, wants the USOC to do. Unfortunately, it seems that individual Members have differing views on what our mission should be . . ."<sup>24</sup> Martin further stated that "[w]e need Congress' help in developing and implementing an organizational restructuring plan . . ."<sup>25</sup> Thus, although the USOC operates in many ways as a private corporation, it is nevertheless subject to considerable government oversight and influence. As will be explained below, the federal government's influence over the USOC allowed Congress and the Office of

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19. Pub. L. No. 95-606, 92 Stat. 3045 (1978) (codified as amended at 36 U.S.C. §§ 220501-220529 (2000)).

20. *S.F. Arts*, 483 U.S. at 554.

21. See H.R. Con. Res. 249, 96th Cong. (1980); Alan Abrahamson, *Pointless to Some: Time Hasn't Healed Everything for the 1980 U.S. Olympians Who Didn't Have a Chance to Compete*, L.A. TIMES, July 19, 2005, at D1.

22. Barry Lorge, *President Threatens to Bar U.S. Athletes*, WASH. POST, Apr. 11, 1980, at A1.

23. See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1182 (D.D.C. 1980), *aff'd*, 701 F.2d 221 (D.C. Cir. 1980) (declining to enjoin the USOC from carrying out its resolution of April 12, 1980, not to send a team to Moscow).

24. *Does the U.S. Olympic Committee's Organizational Structure Impede its Mission?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 26 (2003), available at [http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=86055.pdf&directory=/disk2/wais/data/108\\_house\\_hearings](http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=86055.pdf&directory=/disk2/wais/data/108_house_hearings) [hereinafter *USOC Organizational Structure Hearing*] (statement of William C. Martin, Acting President, USOC).

25. *Id.* at 27.

National Drug Control Policy (ONDCP) to take the lead role in establishing USADA.

## 2. The Fight Against Performance-Enhancing Drug Use in Amateur Sports

In addition to the federal government's considerable interest in the USOC, both Congress and the Executive Branch also have had an interest in performance-enhancing drug use in sports. For instance, in 1989, the Senate Judiciary Committee held hearings on "the steroid abuse problem in America" following the 1988 Olympic gold medal performance of Canadian sprinter Ben Johnson, who was later stripped of his medal after it was discovered that he had used steroids.<sup>26</sup> At that hearing, it was stressed that steroid use by elite athletes undermines important Olympic ideals and has a substantial negative effect on young people.<sup>27</sup> Similar concerns were voiced by the Subcommittee on Crime of the House of Representatives Committee on the Judiciary during its hearing on steroid-related legislation,<sup>28</sup> involving the Anabolic Steroids Control Act of 1990,<sup>29</sup> which amended the Controlled Substances Act<sup>30</sup> in an attempt to further restrict the use of anabolic steroids.<sup>31</sup>

Government concern over performance-enhancing drug use in sports continued, and in the late 1990s ONDCP and Congress made fighting drug use in sports a top priority. The issue gained greater prominence at this time because of persistent reports of performance-enhancing drug use by elite athletes and the fact that such use, in the view of many, was leading to an increase in the use of performance-enhancing drugs, including steroids, by young people. As stated by Senator Ron Wyden in a 1999 hearing on doping in sports, "[W]e are seeing a public health crisis with respect to these drugs in American youths. It seems that now the same number of kids using some kind of steroid, is the number that are using cocaine."<sup>32</sup> General Barry McCaffrey,

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26. See *Steroids in Amateur and Professional Sports—The Medical and Social Costs of Steroid Abuse: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 101 (1989) [hereinafter *Abuse of Steroids Hearings*] (statement of Sen. Joseph Biden). The Senate Committee on the Judiciary noted that the Steroid Trafficking Act was necessary because "illegal steroids trafficking remains a major drug problem in the United States." S. REP. NO. 101-433, at 2 (1990).

27. *Id.*

28. *Hearing on H.R. 4658 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 10 (1990) [hereinafter *Anabolic Steroids Control Act Hearing*] (statement of Rep. Mel Levine).

29. Pub. L. No. 101-647, 104 Stat. 4851. The legislation supplemented the provisions of the Anti-Drug Abuse Act of 1988, which made the illegal sale of steroids a felony. See Pub. L. No. 100-690, 102 Stat. 4181 (1988).

30. 21 U.S.C. §§ 801-904 (2000).

31. See *Anabolic Steroids Control Act of 1990* § 1902.

32. *Effects of Drugs Hearing*, *supra* note 1, at 4 (statement of Sen. Ron Wyden).

former head of ONDCP, underscored this point, stating at the same hearing that there was wide-spread use of steroids among young adolescents. He noted that about 550,000 young people used steroids in 1995, with the number expected to grow.<sup>33</sup> Moreover, it was not just steroid use by Olympic Movement athletes that concerned the government, but use of such drugs by professional athletes as well.<sup>34</sup> Accordingly, many members of Congress and particularly the ONDCP became very interested in fighting doping in sports.<sup>35</sup>

The fight against doping in sports also became more urgent because of the growing international perception that the United States was not doing enough to fight the use of performance-enhancing drugs by its Olympic athletes.<sup>36</sup> As stated by Dr. Johann Olav Koss, the Athlete Representative to the IOC and the World Anti-Doping Agency (WADA):

The perception internally is bad about the USA, and about what the USOC or other national governing bodies have done to protect their athletes in participating and helping them cheat . . . . This is the perception . . . . There is no way you ask anyone outside the United States to believe that American athletes have not been cheating in the past.<sup>37</sup>

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33. *Id.* at 9 (statement of Barry McCaffrey).

34. *See Abuse of Steroids Hearings, supra* note 26, at 2 (statement of Sen. Joseph Biden).

35. This interest continues today. Indeed, the issue of drugs in sports even gained the attention of President Bush, who mentioned the issue in his 2004 State of the Union Address. He stated that

[t]he use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message, that there are shortcuts to accomplishment and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.

Pres. George W. Bush, State of the Union Address, 40 WEEKLY COMP. PRES. DOC. 94, 100 (Jan. 20, 2004), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004\\_presidential\\_documents&docid=pd26ja04\\_txt-10.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd26ja04_txt-10.pdf). More recently, Congress passed and President Bush signed the Anabolic Steroid Control Act of 2004. Pub. L. No. 108-358, 118 Stat. 1661 (2004). The Act added certain anabolic steroid precursors to the list of controlled substances, required a review of the Federal sentencing guidelines for offenses involving anabolic steroids, and established a grant program in support of anabolic steroid education. *Id.* Moreover, as stated recently by Congressman Henry Waxman, "There is an absolute correlation between the culture of steroids in the major league clubhouse and the culture of steroids in high school gyms. If we can remove steroids from the clubhouse, we will fix the problems in school locker rooms." Press Release, John McCain, McCain, Davis, and Waxman Announce Introduction of "Clean Sports Act of 2005" (May 24, 2005), [http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content\\_id=1579](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1579); *see also* Sarah Baldwin, Note and Comment, *Performance Enhancing Drug Use in Olympic Sport: A Comparison of the United States and Australian Approaches*, 24 LOY. L.A. INT'L & COMP. L. REV. 265, 275 (2002).

36. Tygart, *supra* note 13, at 124.

37. WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS, PROCEEDINGS: FIRST MEETING OF THE WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS 36 (Dec. 7, 2000) [hereinafter WHITE HOUSE TASK FORCE] (statement of Dr. Johann Olav Koss).



This perception was fueled by the structure of the United States' prior anti-doping program, the National Anti-Doping Program (NADP). The NADP administered drug testing through the USOC, but relied on each sport's National Governing Body (NGB) to prosecute athletes for doping violations under the NGB's own administrative procedures.<sup>38</sup> As a result, the entities that were charged with selecting the finest athletes for Olympic and international competition, the USOC and NGBs, also administered drug testing and meted out the sanctions. Critics argued that the USOC and NGBs therefore had an inherent conflict of interest that prevented them from administering drug tests and punishing dopers effectively.<sup>39</sup>

The need to bolster the credibility of United States' anti-doping efforts, combined with the perceived public health effects of doping by elite athletes, spurred Congress and ONDCP to press for immediate change to the way anti-doping was approached in the United States. These concerns were even more urgent because the United States, as host for the Salt Lake City Olympic Games in 2002, wanted to ensure that it sponsored a "clean" Olympic Games.<sup>40</sup>

### 3. The National Anti-Doping Strategy

Serious government efforts to address doping in sports came together in 1999, when ONDCP announced its "National Strategy" to combat drug use and doping in sports.<sup>41</sup> ONDCP began working on the issue of doping in sports after the 1998 Nagano Olympic Games, where, in the words of ONDCP Director Barry McCaffrey, "an athlete who tested positive for marijuana was awarded the Olympic gold and hoisted up on the medal platform as a hero to all the world's youth."<sup>42</sup> The National Strategy, which was in development for over a year,<sup>43</sup> was premised on the belief that "the United States government [had] a responsibility to undertake efforts at the national, binational and international levels to strengthen anti-doping regimes."<sup>44</sup> The National Strategy was meant to explain the federal efforts to combat doping in sport,<sup>45</sup> and it was developed by an inter-agency working group in consultation with various "stakeholders," including athletes and the USOC.<sup>46</sup> The so-called Federal Team that worked on the strategy included the Secretary of the

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38. Tygart, *supra* note 13, at 126.

39. *Id.* at 126–27; *see also Effects of Drugs Hearing, supra* note 1, at 23 (statement of Barry McCaffrey).

40. *Effects of Drugs Hearing, supra* note 1, at 10 (statement of Barry McCaffrey).

41. *Id.* at 13, 18–23.

42. *Id.* at 13.

43. *Id.* at 14.

44. *Id.* at 20.

45. *See Effects of Drugs Hearing, supra* note 1, at 20–21.

46. *Id.* at 18–20.

Department of Health and Human Services (HHS), as well as other HHS officials, and officials from the Drug Enforcement Agency, the Department of State, and the White House.<sup>47</sup> Although the Government had clear objectives in mind when the National Strategy was announced, McCaffrey noted that ONDCP had to respect the view that the federal government should not intervene in amateur sports issues.<sup>48</sup> The goal was for the National Strategy to significantly change the United States' approach to doping prior to the 2000 Sydney Summer Olympic games.<sup>49</sup>

In announcing the National Strategy, ONDCP asserted that drug use and doping in sport had become an "international crisis."<sup>50</sup> ONDCP noted that at the Olympic level, doping had grown to a point where it was hurting honest athletes who could not successfully compete against those who used performance-enhancing drugs.<sup>51</sup> In addition, those who were successful had their victories questioned.<sup>52</sup> Beyond the effects at the Olympic level, ONDCP stressed that doping had an impact on children, as the use of performance-enhancing drugs by children continued to grow.<sup>53</sup> The use of such drugs was of particular concern because performance-enhancing drugs like steroids were believed to have serious health consequences, and ONDCP noted that doping in sports was "perceived" to be a major public health crisis.<sup>54</sup> Additionally, ONDCP asserted that trafficking in performance-enhancing drugs was a burgeoning criminal industry.<sup>55</sup> Because there were significant and widespread effects of doping, it advocated for "a new approach" to address the problem.<sup>56</sup>

ONDCP specifically listed several areas that needed to be addressed. First, ONDCP stated that because professional sports did not ban a number of performance-enhancing drugs that were banned in international competition, there were international concerns over the United States' commitment to anti-doping.<sup>57</sup> In addition, ONDCP stated that the USOC's anti-doping program was insufficient because of the inherent conflicts of interest and a failure to effectively administer no-notice, out-of-competition testing.<sup>58</sup> While ONDCP noted that these issues were the basis for international criticism, it was also of

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47. *Id.* at 19.

48. *Id.* at 12.

49. *Id.*

50. *Effects of Drugs Hearing, supra* note 1, at 14–15.

51. *Id.* at 15.

52. *Id.*

53. *Id.* at 15–16.

54. *Id.* at 16.

55. *Effects of Drugs Hearing, supra* note 1, at 17.

56. *Id.* at 18.

57. *Id.*

58. *Id.*

major concern to Olympic sponsors and the American public, who, according to ONDCP, were viewing the Olympics as “yet another fraud on the public.”<sup>59</sup>

ONDCP’s Strategy sought to address these concerns with several specific proposals. Most significantly, on the national level, ONDCP asserted that an effective anti-doping program might require federal oversight and reporting such that there would be appropriate federal review and certification.<sup>60</sup> Moreover, through the National Strategy, ONDCP contemplated working with the USOC and others to “facilitate the development of an externalized and fully independent domestic anti-doping mechanism or body (including research, testing, and adjudication).”<sup>61</sup> The strategy thus envisioned an effective and accountable “U.S. agency” with “certain governmental or quasi-governmental powers.”<sup>62</sup> ONDCP asserted that governmental status would improve the accountability of anti-doping efforts and significantly enhance the United States’ credibility.<sup>63</sup> ONDCP stated that while it was not advocating the creation of additional “bureaucracy,” it did hope to work with Congress on developing the proposed anti-doping institution.<sup>64</sup> ONDCP’s strategy also advocated for more federal support for advanced research into doping to develop better drug tests.<sup>65</sup>

The ONDCP Strategy also involved significant international efforts to develop an “independent and accountable international anti-doping agency” that engages in year-round no-notice testing of athletes.<sup>66</sup> ONDCP asserted that this agency should work to deter doping by having no statute of limitations on doping offenses (so that athletes could lose their titles at any time if evidence becomes available that they cheated), a policy of preserving samples for at least ten years so they could be tested if and when new drug tests become available, and an aggressive research agenda to remain one step ahead of cheaters.<sup>67</sup>

ONDCP stated that as a follow up to its announcement of the National Strategy, it would form a task force chaired by ONDCP and other executive branch officials, and in cooperation with Congress, move forward on the proposed reforms.<sup>68</sup> To that end, Executive Order 13,165 established the White House Task Force on Drug Use in Sports, which included the Director of ONDCP, the Secretary of HHS, the Olympic Task Force Vice Chairs, and

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59. *Id.*

60. *Effects of Drugs Hearing, supra* note 1, at 20.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Effects of Drugs Hearing, supra* note 1, at 21.

66. *Id.*

67. *Id.*

68. *Id.* at 22.

representatives appointed by the Department of Labor, the President's Council on Physical Fitness and Sports, the Office of Management and Budget, the National Security Council, the Department of State, the Department of the Treasury, the Department of Education, the Department of Justice, the Department of Transportation, the National Institute on Drug Abuse, and the Substance Abuse and Mental Health Services Administration.<sup>69</sup> The purpose of the Task Force was to "develop recommendations for the President on further executive and legislative actions that can be undertaken to address the problem of doping and drug use in sports."<sup>70</sup> The Task Force was convened in December, 2000, after the formation of the World Anti-Doping Agency (WADA) and USADA.<sup>71</sup> The Task Force discussed further challenges in the fight against doping, with one of the key conclusions being that USADA, to be effective, needed "some instrumentality of the United States status."<sup>72</sup> As stated by Barry McCaffrey, "We are going to have to make sure we do have an agency that can act as a representative of the U.S. Government."<sup>73</sup>

*B. The Government's Efforts to Establish Domestic and International Anti-Doping Agencies*

As noted above, key components of ONDCP's National Strategy were the establishment of both an international anti-doping agency independent of the International Olympic Committee (IOC) and the establishment of a domestic anti-doping agency that was independent of the USOC.<sup>74</sup> It was contemplated that these entities would work in a coordinated way and that the United States government would have influence with both.<sup>75</sup>

1. The Creation of the World Anti-Doping Agency

To be sure, the effort to establish WADA was a multi-national one, including the governments of Australia, Great Britain, France, and Germany, among others.<sup>76</sup> The United States government, however, as part of the National Strategy, played a significant role in the effort.<sup>77</sup>

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69. Exec. Order No. 13,165, 3 C.F.R. 288 (2001), *reprinted in* 21 U.S.C. § 1701 (2003).

70. 3 C.F.R. 288, § 2(b).

71. See Christopher Smith, *2002 Backdrop for Anti-drug Message*, SALT LAKE TRIB., Dec. 6, 2000, at A6.

72. WHITE HOUSE TASK FORCE, *supra* note 37, at 83 (closing remarks by Barry McCaffrey).

73. *Id.* at 83–84.

74. See *supra* notes 60–67 and accompanying text.

75. See *Effects of Drugs Hearing*, *supra* note 1, at 23 (statement by Barry McCaffrey).

76. See *id.* at 22.

77. See *Panel II: Regulations Governing Drugs*, *supra* note 16, at 340 (statement of Edward Jurith: "At ONDCP, we led an initiative in the last Administration working with other nations and the International Olympic Committee . . . to create the World Anti-Doping Agency . . .").

In the late 1990s, the United States was leading a movement to effectuate change within the IOC, which was viewed by many United States government officials as corrupt.<sup>78</sup> The United States had long wanted an Olympic Movement drug testing entity that was independent of the IOC;<sup>79</sup> however, at least some members of the government believed that progress in the fight against doping could not be made until larger questions of IOC reform were resolved.<sup>80</sup> The United States Government stepped up its efforts in this regard in February 1999, when a delegation of government officials and others within the United States Olympic Movement, led by ONDCP Director Barry McCaffrey, went to Lausanne, Switzerland, for the World Conference on Doping in Sport.<sup>81</sup> Out of this conference came the Lausanne Declaration, which called for an independent International Anti-Doping Agency to be established before the Sydney Games in 2000.<sup>82</sup> There were significant concerns, however, that what the IOC was proposing for such an entity was, as Barry McCaffrey reported to the Senate Committee, “more public relations ploy than public policy solution” and that the proposal did not meet the United States’ requirements.<sup>83</sup> Among the United States’ concerns were that the proposed agency was not truly independent from the IOC, was not transparent, and that it failed to give governments who would substantially fund the agency, including the United States, an adequate role in the agency’s leadership and policy-making process.<sup>84</sup> McCaffrey told the Senate Committee that ONDCP had started to develop an “international consensus approach” to pressure the IOC into making changes to the proposal.<sup>85</sup> McCaffrey stated that he planned to lead a team of Executive Branch officials to Europe in order to work with United States allies and international organizations, such as the U.N. Drug Control Programme and the Council of Europe, in an effort to build consensus to force the IOC to change its proposal for an independent anti-doping agency that met the United States’ goals.<sup>86</sup> Moreover, McCaffrey told the Senate Committee that if the IOC was not responsive to ONDCP’s reform efforts, then “we will need your support to force change. In short, your leadership and that of the Committee will be

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78. See, e.g., *Effects of Drugs Hearing*, *supra* note 1, at 27 (statement of Sen. Wyden: “I think that there is an extraordinary record of foot-dragging with respect to the International Committee. . . . They have always found a way to duck out of the specifics . . . which are essentially transparency and accountability.”).

79. See *id.* at 11 (opening statement of Chairman, Sen. John McCain).

80. *Id.* at 28 (testimony of Barry McCaffrey).

81. *Id.* at 48 (statement of Frank Shorter, U.S. Olympic Gold Medalist).

82. *Id.* at 63–64 (statement of Richard Pound, First Vice President of the IOC).

83. *Effects of Drugs Hearing*, *supra* note 1, at 21 (statement of Barry McCaffrey).

84. *Id.*

85. *Id.* at 22.

86. *Id.*

critical to the creation of a truly independent agency and a fully effective international anti-doping regime.”<sup>87</sup> McCaffrey led another delegation to a Summit of Governments in Australia later that year once again to address the problem of doping in Olympic sports.<sup>88</sup> In addition, Senator Ted Stevens previously had traveled to Switzerland to meet with the head of the IOC, Juan Antonio Samaranch, regarding the issue of doping.<sup>89</sup> Henry Kissinger worked with the ONDCP, as well, to effectuate change generally within the IOC.<sup>90</sup>

WADA was ultimately established and began operations on November 10, 1999.<sup>91</sup> Its mission is to “combine[] the resources of sports and governments to enhance, supplement, and coordinate existing efforts to educate athletes about the harms of doping, reinforce the ideal of fair play, and sanction those who cheat themselves and their sport.”<sup>92</sup> WADA receives its funding from the IOC and world governments.<sup>93</sup> In August 2000, President Clinton, through Executive Order 13,165, facilitated the United States government’s role in WADA.<sup>94</sup> The Executive Order stated that the Administration was adopting a policy “to take the steps needed to help eliminate illicit or otherwise banned drug use and doping in sports at the State, national, and international level.”<sup>95</sup> The Executive Order stated that as part of these efforts, “the United States has played a leading role in the formation of a World Anti-Doping Agency . . . .”<sup>96</sup> The Executive Order authorized the Director of ONDCP “to serve as the United States Government’s representative on the WADA board.”<sup>97</sup> It also authorized federal employees, acting in their “official capacit[ies],” to serve on WADA committees or advisory committees and serve as experts to the organization.<sup>98</sup>

The United States has a significant leadership role in WADA. For instance, the United States sits on WADA’s Foundation Board.<sup>99</sup> The

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87. *Id.*

88. *See Effects of Drugs Hearing, supra* note 1, at 8.

89. *Id.* at 7 (statement of Sen. Stevens).

90. *Id.* at 19 (statement of Barry McCaffrey).

91. World Anti-Doping Agency History, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited Nov. 7, 2005).

92. World Anti-Doping Agency Mission, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Nov. 7, 2005).

93. World Anti-Doping Agency Finance, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=259> (last visited Nov. 7, 2005) (stating that the first two years of WADA’s existence were funded by the Olympic Movement, and since 2002 “equally from the Olympic movement and the governments of the world”).

94. Exec. Order No. 13,165, 3 C.F.R. 288 (2001), *reprinted in* 21 U.S.C. § 1701 (2003).

95. 3 C.F.R. 288, § 1.

96. *Id.* § 3(a).

97. *Id.*

98. *Id.* § 3(c).

99. *Id.* § 3(a).

Foundation Board is WADA's "supreme decision making body,"<sup>100</sup> and it has the authority to supervise the activities of WADA, as well as to designate the individuals who will serve on the Executive Committee, which handles the day-to-day operations of WADA.<sup>101</sup> In addition, the United States is one of the five nations represented on WADA's Executive Committee, and it recently chaired WADA's Ethics and Education Committee.<sup>102</sup> The United States, along with many other governments, pays dues to WADA pursuant to a previously agreed-upon formula.<sup>103</sup> These dues are paid through ONDCP.<sup>104</sup> Stated ONDCP Director Barry McCaffrey: "That we created a World Anti-Doping Agency in short order is astonishing. From its origins as a house-tethered goat of the IOC, it's become an institution that in the coming several years . . . will serve our purposes well."<sup>105</sup>

In addition to its efforts to establish WADA, the United States Government "played a leadership role" in drafting the World Anti-Doping Code (WADC),<sup>106</sup> which was adopted on March 5, 2003.<sup>107</sup> The Code has been adopted by all major international sports federations and more than one hundred countries.<sup>108</sup> The Code is administered by WADA<sup>109</sup> and is what USADA follows in testing and sanctioning United States athletes.<sup>110</sup> The United States, along with other governments, agreed to continue funding

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100. World Anti-Doping Agency Composition: Introduction, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=258> (last visited Nov. 7, 2005).

101. *Id.*; see also *Effects of Drugs Hearing*, *supra* note 1, at 75 (Draft Mission Statement and Constatng Document for World Anti-Doping Agency, Art. 11).

102. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 140 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.21&filename=20323.pdf&directory=/diskb/wais/data/109\\_house\\_hearings](http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.21&filename=20323.pdf&directory=/diskb/wais/data/109_house_hearings) [hereinafter *Restoring Faith in America's Pastime*] (statement of Dr. Gary Wadler).

103. See Memorandum of Understanding, Executive Office of the President Office of National Drug Control Policy–World Anti-Doping Agency, FY 2004.

104. *Id.* Most recently, in its FY 2005 budget request, ONDCP asked for \$1 million for WADA membership dues. WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2005 BUDGET SUMMARY 90 (2004), <http://www.whitehousedrugpolicy.gov/publications/policy/budgetsum04/budgetsum05.pdf>.

105. WHITE HOUSE TASK FORCE, *supra* note 37, at 10 (keynote remarks of Barry McCaffrey).

106. *Restoring Faith in America's Pastime*, *supra* note 102, at 136 (testimony of Dr. Gary Wadler).

107. John T. Wendt, *WADA, Doping and THG*, ENT. & SPORTS LAW., Winter 2004, at 1, 28.

108. *Id.* at 28.

109. World Anti-Doping Agency Mission, *supra* note 92.

110. UNITED STATES ANTI-DOPING AGENCY, 2005 GUIDE TO PROHIBITED SUBSTANCES AND PROHIBITED METHODS OF DOPING 1 (Larry D. Bowers et al. eds., 2005), available at [http://www.usantidoping.org/files/active/what/usada\\_guide.pdf](http://www.usantidoping.org/files/active/what/usada_guide.pdf) [hereinafter 2005 USADA GUIDE TO PROHIBITED SUBSTANCES]; see *Restoring Faith in America's Pastime*, *supra* note 102, at 136 (testimony of Dr. Gary Wadler).

WADA as part of the International Convention Against Doping in Sport, which will be presented to the United Nations Educational, Scientific, and Cultural Organization (UNESCO)'s General Conference in the near future.<sup>111</sup>

## 2. The Government's Role in Creating USADA

While the United States Government worked on the international level to create WADA, it also was laying the foundation at home for the establishment of USADA. USADA states that it was formed as a result of the recommendations of the USOC Select Task Force on Drug Externalization (USOC Task Force).<sup>112</sup> However, this explanation does not account fully for the important role ONDCP and Congress played in USADA's creation. Specifically, much of the impetus for and effort to create USADA was from ONDCP, with strong Congressional backing, long before the USOC Task Force had even convened.

As noted above, the notion of an anti-doping entity independent of the USOC was a featured part of ONDCP's National Strategy and had strong Congressional approval.<sup>113</sup> During the October 1999 hearing in which the National Strategy was presented, Senator John McCain stated that the "gross shortcomings" of the USOC's anti-doping program had been exposed, and

a consensus on the necessary elements of an approach to curbing the use of performance enhancing drugs exists.

The first step is the establishment of an independent or external agency to perform year-round, out-of-competition testing for banned substances. . . .

Testing must be universal in that all athletes wishing to compete in the Olympic games should be required to submit to the testing regime established by this independent agency. . . .

Finally, a comprehensive and sustained anti-drug and sports ethics education program should be developed and implemented.<sup>114</sup>

This point was echoed by ONDCP. In announcing the National Strategy, ONDCP Director Barry McCaffrey stated that "[w]orking with the USOC and other stakeholders to facilitate the development of an externalized and fully independent domestic anti-doping mechanism or body" was "[a]mong the key initiatives at the national level."<sup>115</sup>

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111. World Anti-Doping Agency Finance, *supra* note 93; *see also* UNESCO General Conference, International Convention Against Doping in Sport, Sept. 6, 2005, <http://unesdoc.unesco.org/images/0014/001405/140597e.pdf> (Final Draft).

112. 2001 USADA ANN. REP. 2, *available at* [http://www.usantidoping.org/files/active/who/annual\\_report\\_2001.pdf](http://www.usantidoping.org/files/active/who/annual_report_2001.pdf).

113. *See supra* notes 60–67 and accompanying text.

114. *Effects of Drugs Hearing*, *supra* note 1, at 1–2 (opening statement of Sen. John McCain).

115. *Id.* at 20 (statement of Barry McCaffrey).



Both ONDCP and Congress had direct influence on how USADA would be structured and what its mission would be. While briefing Congress on the National Strategy, McCaffrey commented on the USOC Task Force's work, stating that the USOC's early proposals were "pretty good work. . . . I do not think it is at the end of its developmental cycle, *but the U.S. Olympic Committee has gone for the notion of drug testing externalization.*"<sup>116</sup> At that same hearing, Bill Hybl, then-president of the USOC, reported to the Committee on the progress of the USOC Task Force and its recommendations to date.<sup>117</sup> The Committee also heard testimony from athletes and other experts on the USOC Task Force's proposals and solicited their views on how a new anti-doping program should be structured.<sup>118</sup> Indeed, in addition to the broad outlines of an anti-doping entity, Congress was concerned with details such as for how long, and where, athletes' urine specimens should be kept and stored.<sup>119</sup> Both ONDCP and Congress wanted to see an anti-doping agency established before the 2000 Sydney Olympics.<sup>120</sup>

The work of the government, and particularly ONDCP, in creating USADA was underscored by USADA's first chair, Frank Shorter. In his presentation as part of the White House Task Force on Drug Use in Sports in December, 2000, Mr. Shorter explained:

[The formation of USADA] really was through the efforts of Barry McCaffrey and the White House in the United States, as the result of having gone to the drug summit in Lausanne eighteen months ago and determining that there needed to be a totally independent drug testing agency in the United States for all Olympic sports . . . .<sup>121</sup>

Mr. Shorter noted that he became involved in the effort because of his previous work with Barry McCaffrey, including attending as part of ONDCP's delegation the Lausanne Summit.<sup>122</sup> Significantly, Mr. Shorter highlighted ONDCP's role in influencing the USOC and establishing USADA by stating that "through [ONDCP's] Rob Housman's work behind the scenes, the elements of this new agency that we discussed and formulated in Lausanne eighteen months ago, *happened to show up* in the task force report of the U.S. Olympic Committee in the creati[on] of this agency."<sup>123</sup>

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116. *Id.* at 12 (emphasis added).

117. *Id.* at 52–56 (statement of Bill Hybl).

118. *E.g., id.* at 108–12 (memorandum of Doriane Lambelet Coleman).

119. *See Effects of Drugs Hearing, supra* note 1, at 25 (questioning by Sen. Ted Stevens directed to Barry McCaffrey).

120. *Id.* at 12 (statement of Barry McCaffrey).

121. WHITE HOUSE TASK FORCE, *supra* note 37, at 15 (statement of Frank Shorter, USADA chair).

122. *Id.*

123. *Id.* (emphasis added). More recently, in reflecting on USADA's formation, Jim Scherr testified before the Senate Committee on Commerce, Science and Transportation on the "joint

Therefore, because of the federal government's ability to influence the USOC, and ONDCP's behind-the-scenes efforts, it is not at all surprising that the USOC Task Force, in December 1999, ultimately recommended that "an Independent Organization be created to conduct a comprehensive anti-doping program in the United States."<sup>124</sup> Consistent with ONDCP's National Strategy, and the wishes of members of Congress such as Senator McCain, this entity was to have responsibility for drug testing all athletes participating in the Olympic Movement,<sup>125</sup> and the entity was to conduct research and educate the public on the effects of doping.<sup>126</sup> In addition, initial funding for USADA was to come from the USOC and the federal government, but the expectation was that for USADA to fulfill the mission outlined for it by ONDCP and the Senate Committee, continued funding would have to come from the federal government.<sup>127</sup> Therefore, it is apparent that, in reality, USADA was not simply created as a result of the USOC's Task Force, but was in fact created according to the specific goals laid out by ONDCP.<sup>128</sup> In the words of Barry McCaffrey, the USOC was really just one of the many "stakeholders" with whom ONDCP worked in creating the National Strategy, which featured an official testing agency independent from the USOC.<sup>129</sup>

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effort" between the USOC and Congress to address doping in sports, stating that "[w]e think that the fruit of this partnership—USADA—has more than fulfilled our early expectations when we first discussed the concept nearly six years ago, and believe that with increased federal support it will become an even more effective weapon to be used to eradicate this growing national problem." *U.S. Anti-Doping Agency: Hearing on S. 529 Before the S. Comm. on Com., Sci., and Transp.*, 109th Cong. (2005), [http://commerce.senate.gov/hearings/testimony.cfm?id=1511&wit\\_id=4275](http://commerce.senate.gov/hearings/testimony.cfm?id=1511&wit_id=4275) [hereinafter *S. 529 Hearing*] (testimony of Jim Scherr, May 24, 2005).

124. REPORT OF THE USOC SELECT TASK FORCE ON DRUG EXTERNALIZATION (Dec. 3, 1999), <http://www.runfrankshorter.com/usada.shtml> [hereinafter REPORT ON DRUG EXTERNALIZATION].

125. Tygart, *supra* note 13, at 125.

126. REPORT ON DRUG EXTERNALIZATION, *supra* note 124.

127. *S. 529 Hearing*, *supra* note 123 (testimony of Jim Scherr).

128. See Press Release, Office of Nat'l Drug Control Policy, Addendum to Statement of John P. Walters Dir. of Nat'l Drug Control Policy Before the House Comm. On Appropriations, Subcomm. On Transp., Treasury and Related Agencies: The Office of Nat'l Drug Control Policy's FY 2004 Budget Request (Apr. 9, 2003), <http://www.whitehousedrugpolicy.gov/news/testimony03/040903/add4.html> [hereinafter ONDCP 2004 Budget Request]. Indeed, ONDCP has since characterized the creation of USADA as a natural extension of the federal government's efforts to combat doping in sports. See *id.* To support its FY 2004 funding request for USADA, found under the heading of "Other Federal Drug Control Programs," ONDCP stated that doping and drug use in sports was a growing national problem and that American athletes "at all competition levels" are "jeopardizing their health and undermining the core values of sport" by using performance-enhancing drugs. *Id.* ONDCP's request then stated that "[a]s a result, USADA was established to lead a comprehensive anti-doping program in the U.S."

129. *Effects of Drugs Hearing*, *supra* note 1, at 20 (statement of Barry McCaffrey).

From these substantial government efforts, USADA was established and began operations on October 1, 2000.<sup>130</sup> USADA was created as a private, not-for-profit agency that undertakes its duties pursuant to a contract with the USOC to administer the United States' drug testing programs.<sup>131</sup> USADA's mission is to preserve "the well-being of Olympic sport, the integrity of competition, and ensuring the health of athletes."<sup>132</sup> To that end, USADA focuses on the four areas outlined by ONDCP and the Senate Committee: education, research, testing, and results management.<sup>133</sup> USADA is responsible for testing "any athlete who is a member of a NGB."<sup>134</sup> In addition, USADA can test "any athlete participating at a competition sanctioned by the USOC or a NGB," or "any athlete who has been named by the USOC or [a] NGB [to an Olympic or Pan American team or who] is competing in a qualifying event to represent the USOC or [a] NGB in international competition."<sup>135</sup> Indeed it has been stated that USADA's authority is broad enough to ensure that it combats all athletic doping within the United States Olympic Movement.<sup>136</sup> USADA is designated by Congress as the United States' official anti-doping agency.<sup>137</sup>

USADA is governed by a nine-member Board of Directors.<sup>138</sup> The Board consists of a diverse group of individuals from the medical and sports world.<sup>139</sup> The Board has the authority to elect its own members.<sup>140</sup> None of the individuals on the Board of Directors is directly affiliated with the United States government, although it was contemplated initially that the ONDCP director would be able to submit nominations for the board.<sup>141</sup> Currently, Congress is proposing legislation that would involve ONDCP in drug testing programs for professional sports leagues and the NCAA.<sup>142</sup>

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130. USADA History, <http://www.usantidoping.org/who/history.html> (last visited Nov. 7, 2005).

131. Tygart, *supra* note 13, at 127.

132. 2004 USADA ANN. REP., *supra* note 8, at 3.

133. *Id.*

134. Tygart, *supra* note 13, at 128.

135. *Id.*

136. *Id.* at 129.

137. Act of Nov. 12, 2001, Pub. L. No. 107-67, § 644, 115 Stat. 514, 555 ("The Congress of the United States recognizes the United States Anti-Doping Agency (USADA) as the official anti-doping agency for Olympic, Pan American, and Paralympic sport in the United States.").

138. USADA Board of Directors, <http://www.usantidoping.org/who/meet/board.aspx> (last visited Nov. 7, 2005).

139. *See id.*

140. USADA History, *supra* note 130.

141. *See Effects of Drugs Hearing*, *supra* note 1, at 103 (Bill Hybl's response to Sen. John McCain's written questions).

142. *See* Press Release, John McCain, *supra* note 35.

C. *Why USADA's Designation as a Private Entity is Important*

The Supreme Court has explained that, with respect to constitutional due process protections, “this Court in the Civil Rights Cases affirmed the essential dichotomy . . . between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield.”<sup>143</sup> The importance to USADA of operating as a private entity, in a climate free of constitutional restrictions, is therefore clear. If USADA is simply a private entity, an athlete charged with a doping violation would be entitled to no more due process than what USADA<sup>144</sup> and the Amateur Sports Act<sup>145</sup> provide.<sup>146</sup> If, however, USADA were a state actor, an athlete so accused would be entitled to constitutional due process protections.<sup>147</sup>

Even before USADA was created, there were concerns that the United States would not be able to establish an effective anti-doping agency because of constitutional rights of privacy and due process.<sup>148</sup> After USADA was created, at least some within ONDCP believed that the due process protections offered by the Amateur Sports Act to an athlete should be changed so that an athlete suspected of doping could be removed immediately from competition before a hearing took place.<sup>149</sup> Indeed, although acknowledging his views were “politically incorrect,” Mickey Ibarra, Assistant to President Bill Clinton

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143. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (citations omitted); *see also* *Behagen v. Amateur Basketball Ass’n*, 884 F.2d 524, 530 (1989) (“It is axiomatic that the fifth amendment applies to and restricts ‘only the Federal Government and not private persons.’”) (citation omitted); *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (holding that with regard to private conduct, the Constitution does not allow for due process protections, “no matter how unfair that conduct may be”).

144. For an explanation of USADA’s notice and appeal procedures for athletes who test positive, see Tygart, *supra* note 13, at 135–38.

145. Pub. L. No. 95-606, 92 Stat. 3045 (1978) (codified as amended at 36 U.S.C. §§ 220501–220529 (2000)) (giving an athlete the right to notice and a hearing in actions of their NGBs, among other things).

146. A thorough analysis of whether an athlete would have a property interest in his or her athletic career sufficient to trigger due process protections is outside the scope of this Paper. For purposes of the state action analysis discussed here, it is assumed that a credible argument could be made in this regard.

147. The protections provided to accused athletes through USADA and under the Amateur Sports Act and those required by the Constitution, if USADA were found to be a state actor, might not differ in the final analysis. However, the potential litigation that would arise if the Constitution were applied to USADA’s actions could significantly hamper the agency’s anti-doping efforts.

148. *See* WHITE HOUSE TASK FORCE, *supra* note 37, at 7 (keynote remarks of Barry McCaffrey).

149. *Id.* at 35 (statement of Mickey Ibarra, Dir. of White House Intergovernmental Affairs) (“[R]emoving an athlete from competition at that point [after positive test results but before a hearing] helps level the playing.”).

and Director of White House Intergovernmental Affairs, stated to the White House Task Force on Drug Use in Sports that the Amateur Sports Act, because of the due process protections, “ultimately undermines the overall effort that we have here. . . . If at some point [an athlete who tested positive is] put back because they win the adjudication, fine. . . . But let’s get that athlete off the playing field . . . .”<sup>150</sup> The former president of the USOC, Scott Blackmun, echoed these concerns, asserting that an athlete is not prohibited from competing without being first given a hearing because “the United States is a country with fundamental notions of due process.”<sup>151</sup> Blackmun went on to state that the question is: “[S]hould those fundamental notions of due process really have application in sport and in doping?”<sup>152</sup>

Due process challenges to anti-doping efforts are not new,<sup>153</sup> and could be raised to challenge USADA’s actions in several areas.<sup>154</sup> First, USADA applies a strict liability standard so that an athlete is responsible for any substance present in his or her body that is on the banned substance list even if the athlete did not intend to ingest the substance and has no knowledge of how it got there.<sup>155</sup> Thus, to sanction an athlete, USADA need not show that the athlete intended to cheat.<sup>156</sup> This feature is considered central to efforts to combat doping.<sup>157</sup> In addition, due process challenges have been premised on whether the substance in question actually was performance enhancing.<sup>158</sup> Due process challenges have also been made based on the doping standards themselves, and whether they provide credible evidence of a doping violation.<sup>159</sup> Finally, in addition to challenging the procedures that led to the positive result, athletes have challenged the appeal procedures as well.<sup>160</sup>

The importance to USADA’s operations in avoiding a finding of state action, and therefore constitutional challenges, is also illustrated in the events surrounding the investigation of several elite track and field athletes, including

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150. *Id.*

151. *Id.* at 56 (statement of Scott Blackmun, President of the USOC).

152. *Id.*

153. See Straubel, *supra* note 14, at 526–31 (discussing the cases of Olympic athletes Mary Slaney and the Nandrolone Four).

154. This Article will not determine what, if anything, due process might require for an accused athlete. For a discussion of these issues, see *id.* at 544–53.

155. Wendt, *supra* note 107, at 29; see Tygart, *supra* note 13, at 129 (describing the USADA testing policy as “no fault”); Baldwin, *supra* note 35, at 281 (explaining that in the United States athletes can appeal their drug test only on the basis of procedural mistakes in the testing).

156. Wendt, *supra* note 107, at 29.

157. See 2001 USADA ANN. REP., *supra* note 112, at 2 (describing the USADA Vision as including a testing program that is “fair and impartial in its attempt to identify athletes who use performance enhancing compounds . . . either intentionally . . . or inadvertently”).

158. Tygart, *supra* note 13, at 130.

159. See, e.g., *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 589 (7th Cir. 2001).

160. See, e.g., *Reynolds v. Int’l Amateur Athletic Fed’n*, 505 U.S. 1301, 1301–02 (1992).

Marion Jones, in the months leading up to the 2004 Athens Olympics. Jones was among those who were rumored to have obtained performance-enhancing drugs from BALCO, and USADA was investigating her and others for doping violations.<sup>161</sup> Neither Jones nor any of the others under investigation had failed drug tests.<sup>162</sup> Commentators argued that Jones was being unfairly tainted by USADA's suggestions that she had used performance-enhancing drugs when she had not failed a drug test.<sup>163</sup> In maintaining her innocence, Jones stated, "I am not going to engage in the United States Anti-Doping Agency's secret kangaroo court. I will answer questions in a public forum that will be open for the entire world to see, hear, and evaluate . . . ."<sup>164</sup> Part of the frustration for Jones and the other targeted athletes included the fact that USADA asserted that it could change the required burden of proof for disqualifying an athlete while the investigations were underway. When the doping violations allegedly had taken place, the applicable burden of proof was "beyond a reasonable doubt."<sup>165</sup> During the investigations, however, USADA noted that the International Association of Athletics Federations (IAAF), the world governing federation for track and field, had decided to adopt the standard used in the World Anti-Doping Code.<sup>166</sup> That standard required only that doping cases be proven "to the comfortable satisfaction" of the sanctioning authority.<sup>167</sup> USADA therefore asserted that it need no longer prove a doping case beyond a reasonable doubt. Such a mid-stream change in the burden of proof could give rise to a constitutional due process challenge if USADA were in fact a state actor.

### III. DOES THE CONSTITUTION APPLY TO USADA'S ACTIONS?

There are two potential ways that USADA's actions would trigger the constitutional rights of athletes affected by its actions. First, the Constitution would apply to USADA if it were in fact a government entity.<sup>168</sup> Second, the Constitution would apply to USADA's actions if, although it were a private actor, USADA's actions were "fairly attributable to the state" such that USADA was engaged in state action.<sup>169</sup> An examination of USADA indicates

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161. See Williams & Fainaru-Wada, *supra* note 2, at A15.

162. See *Ban on U.S. Stars Expected: Jones Says She'd Sue if Doping Agency Bars Her from Athens*, HOUSTON CHRON., May 17, 2004, at 11.

163. Jenkins, *supra* note 12, at D1.

164. *Sprinter Wants Public Dope Hearing*, CBS NEWS, June 16, 2004, [www.cbsnews.com/stories/2004/07/31/national/main633257.shtml](http://www.cbsnews.com/stories/2004/07/31/national/main633257.shtml).

165. *Doping Officials Lower Violation Standards*, KTVU, June 14, 2004, [www.ktvu.com/balco/3417910/detail.html](http://www.ktvu.com/balco/3417910/detail.html).

166. *Id.*

167. *Id.*

168. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

169. See *id.* at 937.

that it is likely not a government entity for constitutional purposes and that in the typical doping case, it is not engaged in state action. However, in some unique circumstances, USADA's actions may be "fairly attributable to the state."

A. *Is USADA a Government Entity for Purposes of the Constitution?*

Congress has designated USADA as the "official anti-doping agency" for the United States.<sup>170</sup> Accordingly, for Olympic and anti-doping purposes, USADA is an instrumentality of the United States. The relevant question, however, is whether USADA is "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."<sup>171</sup> It is important to note that in such an analysis, neither USADA's, Congress's, nor the Executive Branch's characterizations of USADA's status are determinative.<sup>172</sup> As the Supreme Court has explained, "The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'"<sup>173</sup>

Courts have considered the question of whether a corporation is a government entity in a variety of contexts, such as for purposes of sovereign immunity,<sup>174</sup> tax immunity,<sup>175</sup> and the application of the Federal Advisory Committee Act.<sup>176</sup> The Supreme Court's decision in *Lebron v. National Railroad Passenger Corp.*<sup>177</sup> is the leading case on determining whether a corporation is a government entity for constitutional purposes. In that case, the Court considered a challenge to a decision by Amtrak to prohibit a politically themed billboard display in Amtrak's Pennsylvania Station in New York.<sup>178</sup> The plaintiff, Lebron, claimed Amtrak's refusal to permit the billboard space to be rented for such a purpose violated his First and Fifth Amendment rights.<sup>179</sup> The Court noted at the outset that while actions of private entities may "sometimes be regarded as governmental action for constitutional purposes," such an inquiry was not necessary because the plaintiff correctly argued that,

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170. Act of Nov. 12, 2001, Pub. L. No. 107-67, § 644, 115 Stat. 514, 555.

171. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995).

172. *See id.* at 392 ("If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.").

173. *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 346-47 (1880)).

174. *United States ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d 526 (D.C. Cir. 2002).

175. *United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990).

176. *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997).

177. 513 U.S. 374 (1995).

178. *Id.* at 377.

179. *Id.*

for constitutional purposes, “Amtrak [was] not a private entity but Government itself.”<sup>180</sup>

The Court highlighted several factors that supported its conclusion that Amtrak was part of the government for constitutional purposes. First, the Court noted that Amtrak was created by the Rail Passenger Service Act of 1970 to further important government objectives regarding the “‘continuance and improvement’ of railroad passenger service.”<sup>181</sup> Second, the Amtrak board was controlled by the government.<sup>182</sup> The Act provided that the Amtrak board would consist of “nine members, six of whom are appointed by the President of the United States.”<sup>183</sup> Two additional directors were to be appointed by the holders of Amtrak’s preferred stock, which was held at that time by the government.<sup>184</sup> The ninth member of the board would be selected by the other eight directors.<sup>185</sup> As a result, the Court noted that “Amtrak is not merely in the temporary control of the Government . . . [Amtrak] is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees.”<sup>186</sup> Additionally, the Act required Amtrak to submit annual reports to the President and Congress.<sup>187</sup> The Court explained that the Act’s provision that Amtrak “will not be an agency or establishment of the United States Government,” was dispositive of Amtrak’s status only “for purposes of matters that are within Congress’s control,” and not for constitutional purposes.<sup>188</sup> Accordingly, the Court held that “where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and it retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”<sup>189</sup>

A court considering USADA’s status for constitutional purposes likely would conclude that USADA is not part of the government under the *Lebron* analysis. First, USADA is not a government-created corporation, but is instead incorporated under the laws of the state of Colorado as a nonprofit

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180. *Id.* at 378.

181. *Id.* at 384 (quoting Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 101, 84 Stat. 1327, 1328).

182. *Lebron*, 513 U.S. at 385.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 398.

187. *Lebron*, 513 U.S. at 386.

188. *Id.* at 391–92 (quoting Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330).

189. *Id.* at 400.



corporation.<sup>190</sup> Also, it does not currently have any special federal statute laying out its purpose or other requirements of existence.<sup>191</sup> While USADA does operate with Congress's designation that it is the official anti-doping agency for the United States,<sup>192</sup> and it is undoubtedly subject to some reporting requirements with respect to the federal funding it receives, this is not the equivalent of the statute enacted by Congress to create Amtrak, which essentially codified the government's permanent ability to control Amtrak's operations.<sup>193</sup> Second, the government does not have the statutory right to appoint USADA's directors. While it was at least initially contemplated that some of USADA's directors would be appointed after consultation with ONDCP,<sup>194</sup> there is no evidence that this is the case. Even if some directors were, as a matter of practice, appointed after consultation with ONDCP, this would likely not be sufficient. The Supreme Court stressed in *Lebron* that the ability to control the entity through the board must be "permanent" and the control must be exercised through appointment of the *majority* of the board of directors for the entity in question to be considered part of the government itself.<sup>195</sup>

It might be suggested that the absence of a federal statute incorporating USADA should not be determinative, as it is clear that USADA was created with significant government involvement to serve important government objectives. Indeed, the government worked in creating USADA with the USOC, itself a corporation created by Congress.<sup>196</sup> Moreover, at least initially, ONDCP hoped USADA would be an agency of the government.<sup>197</sup> There is nothing in *Lebron*, however, that suggests that such a status would be enough to make USADA a government entity. The Court's holding in *Lebron* was specific in that it applied to government-created corporations where the government retains permanent, controlling authority through the board of

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190. United States Anti-Doping Agency, Articles of Incorporation (Mar. 20, 2000), <http://www.sos.state.co.us/biz/ViewImage.do;jsessionid=0000VXWeka-BI8kS-2DZIOPXYjm:10e80j0vs?masterFileId=20001056949&fileId=20001056949>.

191. This may soon change, however. At the time of this writing, there is a bill in the Senate that designates USADA as the United States' official anti-doping agency and sets out USADA's mission. See 151 CONG. REC. S2044 (daily ed. Mar. 3, 2005) (statement of Sen. Grassley). The bill requires USADA to submit reports to Congress and provides for increased funding to USADA through FY 2010. See *id.*

192. Act of Nov. 12, 2001, Pub. L. No. 107-67 § 644, 115 Stat. 514, 555.

193. See Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327; see also notes 179-188 and accompanying text.

194. See *Effects of Drugs Hearing*, *supra* note 1, at 103 (Bill Hybl's response to Sen. John McCain's written questions).

195. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 398, 400 (1995).

196. See WHITE HOUSE TASK FORCE, *supra* note 37, at 57 (statement of Scott Blackmun).

197. *Id.* at 83-84 (closing remarks of Barry McCaffrey).

directors.<sup>198</sup> This level of control is simply not present with USADA. However, if it were discovered that in fact the government did exert the level of control over USADA that it exerted over Amtrak, it might not be determinative to the Court that such control is not specified in a federal statute. The Court made clear that the Constitution applied to governmental action in whatever form it took, and that it would not be swayed by declarations of an entity's "private" status.<sup>199</sup>

This restrictive view of *Lebron*, and its likely application to USADA, is consistent with case law.<sup>200</sup> Particularly pertinent is a decision by the Ninth Circuit on whether the Red Cross was an instrumentality of the government for purposes of the First Amendment.<sup>201</sup> In that case, the Court held that the Red Cross was not a government actor for constitutional purposes because "[t]he daily affairs of the Red Cross are not controlled by government officials."<sup>202</sup> Moreover, the Court found it determinative that "the government [had] not retained permanent authority to appoint the majority of the Red Cross governing board . . ."<sup>203</sup> The Court found it irrelevant that the Red Cross was held to be a government instrumentality in other contexts and that the organization "performs many important functions for the United States" government.<sup>204</sup>

Similarly, here, a court likely would find that USADA performs many important functions both domestically and internationally in serving the United States government's Olympic Movement interests. Moreover, like the Red Cross, USADA is in some aspects an instrumentality of the United States. USADA participates in international conferences and in other international anti-doping initiatives on behalf of the United States government.<sup>205</sup> However, *Lebron* and *Hall v. American National Red Cross* make clear that an entity's governmental status in one context is not determinative for purposes of applying the Constitution to the entity's actions.<sup>206</sup> As stated by the court in *Hall*, "Government-created corporations are often held to be tax-immune government instrumentalities, but courts have also frequently found them not

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198. *Lebron*, 513 U.S. at 400.

199. *Id.* at 392.

200. See *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 148–49 (2d Cir. 2004); *Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico*, 84 F.3d 487, 492 (1st Cir. 1996); *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1406–09 (9th Cir. 1996).

201. See *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919 (9th Cir. 1996).

202. *Id.* at 922.

203. *Id.*

204. *Id.* at 922–23.

205. See 2001 USADA ANN. REP., *supra* note 112, at 3.

206. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 391–92 (1995); *Hall*, 86 F.3d at 922–23.

to be subject to constitutional treatment as government actors.”<sup>207</sup> Therefore, like the Ninth Circuit in *Hall*, a court likely would find that USADA is not a government entity for constitutional purposes.

*B. Are USADA’s Actions Fairly Attributable to the State?*

Assuming that USADA is not a government entity, but is in fact private, the next inquiry in determining whether the Constitution applies to its actions is whether, in a particular case, USADA’s seemingly private action should be deemed that of the state for constitutional purposes.<sup>208</sup> While it is clear that USADA enjoys a close relationship with the federal government, in most cases USADA’s actions likely could not be deemed that of the state for constitutional purposes. However, the events leading up to the 2004 Athens Olympic Games show that in some instances, USADA’s actions might be fairly attributable to the state.

Attributing seemingly private conduct to the government is difficult.<sup>209</sup> Indeed, the Supreme Court has found state action in few cases. As the Court stated in *Lugar v. Edmondson Oil Co.*, requiring state action “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.”<sup>210</sup> At bottom, it must be determined whether the challenged action is “fairly attributable to the State.”<sup>211</sup>

Against this backdrop, the Supreme Court, while noting that the doctrine is far from clear, has articulated a two-step inquiry for determining whether the challenged action is “fairly attributable to the State.” First, it must be shown that the allegedly unconstitutional action was the result of “the exercise of some right or privilege created by the State.”<sup>212</sup> Second, the Court has stated that in order to determine whether it is fair to attribute private actions to the state, the Court must determine “whether there is a sufficiently close nexus between the State and the challenged action.”<sup>213</sup> The Court has articulated several theories for finding the requisite “close nexus.” For instance, the Court has explained that it can be fair to attribute private action to the government where the state has “exercised coercive power or has provided such significant

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207. *Hall*, 86 F.3d at 922.

208. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

209. Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 890 (1994); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1413 (2003) (noting that the Court is “significantly more unwilling to find state action”).

210. *Lugar*, 457 U.S. at 936.

211. *Id.* at 937.

212. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

213. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

encouragement, either overt or covert, that the choice must in law be deemed to be that of the State”<sup>214</sup> or where the “private actor operates as a ‘willful participant in joint activity with the State or its agents[.]’”<sup>215</sup> The Court has also found state action where a private actor is “controlled by an ‘agency of the State,’”<sup>216</sup> or when the private actor has been delegated a function that has been “traditionally the exclusive prerogative of the State.”<sup>217</sup> More recently, the Court stated that the “pervasive entwinement” of state officials in the structure of an ostensibly private entity would be enough to support a finding of state action.<sup>218</sup>

In short, the Court has made it clear that constitutional standards apply only “when it can be said that the State is responsible for the specific conduct” at issue.<sup>219</sup> However, as the Court explained in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, the analysis of what conduct the state is “responsible for” is not one that is undertaken with reference to bright-line rules or criteria.<sup>220</sup> Instead, the Court stressed that there is not one set of facts or circumstances that establish state action, and that if state action is shown under one theory, it is not relevant that the facts might not amount to state action under a different test.<sup>221</sup> As a result, the Court stated, “[E]xamples may be the best teachers . . . .”<sup>222</sup>

#### 1. Nothing Would Preclude a Finding of State Action Against USADA

As an initial matter, it is likely that a court would find that USADA’s actions meet the first prong of the state action inquiry. Because of its designation by Congress as the United States’ “official” anti-doping agency,<sup>223</sup> and its resulting exclusive authority to test and sanction all United States Olympic Movement athletes, USADA is exercising a right and privilege given to it by Congress.

Thus, the remaining question is whether USADA’s actions are “fairly attributable to the State.” One of the leading examples to be used in this analysis is the case of *San Francisco Arts & Athletics, Inc. v. United States*

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214. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

215. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (quoting *Lugar*, 457 U.S. at 941).

216. *Brentwood*, 531 U.S. at 296 (quoting *Pennsylvania v. Bd. of Dir.*, 353 U.S. 230, 231 (1957)).

217. *Jackson*, 419 U.S. at 353.

218. *Brentwood*, 531 U.S. at 291.

219. *Blum*, 457 U.S. at 1004 (emphasis omitted).

220. 531 U.S. at 295–96.

221. *Id.*

222. *Id.* at 296.

223. Act of Nov. 12, 2001, Pub. L. No. 107-67, § 644, 115 Stat. 514, 555.

*Olympic Committee*,<sup>224</sup> which involved a state action challenge to the USOC.<sup>225</sup> It might be argued that because the Court in *San Francisco Arts* held that the USOC was not a state actor under the circumstances of that case,<sup>226</sup> USADA likewise is not a state actor because it performs functions that were previously performed by the USOC. Such an assumption, however, would misread *San Francisco Arts* and ignore key differences between the USOC and USADA.

In *San Francisco Arts*, the USOC brought suit against San Francisco Arts and Athletics, Inc., an organization that was attempting to organize and promote the “Gay Olympic Games,” seeking to prohibit it from using the word “Olympic” in its materials.<sup>227</sup> San Francisco Arts first argued that the Amateur Sports Act, which gave the USOC the exclusive right to control the use of the Olympic words and symbols, afforded the USOC nothing more than the usual trademark protection.<sup>228</sup> As a result, San Francisco Arts argued it could rely on defenses provided by the Lanham Act.<sup>229</sup> The Court disagreed, holding that the Amateur Sports Act granted the USOC exclusive use of the word Olympic, thereby providing more protection to Olympic marks and trademark than given in the usual trademark case.<sup>230</sup> The Court found that this did not violate the First Amendment.<sup>231</sup>

In addition, San Francisco Arts argued that the USOC’s enforcement of its exclusive right to the marks in this case violated Equal Protection under the Fifth Amendment.<sup>232</sup> The threshold issue for the Court, therefore, was whether the USOC was a state actor such that the Constitution would apply to its actions.<sup>233</sup> The Court noted that the USOC is a private corporation chartered by Congress.<sup>234</sup> In the Amateur Sports Act, Congress imposed certain requirements on the USOC such as reporting on its operations and expenditures in a yearly report to Congress.<sup>235</sup> In addition, the USOC received some federal funding.<sup>236</sup> Aside from its relationship to the federal government as outlined in the Amateur Sports Act, there was no other evidence that the Government was involved in the trademark enforcement determinations that

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224. 483 U.S. 522 (1987).

225. *Id.* at 542–47.

226. *See id.* at 547.

227. *S.F. Arts*, 483 U.S. at 524–25.

228. *Id.* at 528.

229. *Id.* at 530.

230. *Id.*

231. *Id.* at 534–35, 540.

232. *S.F. Arts*, 483 U.S. at 542.

233. *Id.*

234. *Id.* at 542–43.

235. *Id.* at 543 n. 23; *see* Amateur Sports Act of 1978, Pub. L. No. 95-606, § 113, 92 Stat. 3045, 3049 (1978) (codified as amended at 36 U.S.C. § 220511 (2000)).

236. *S.F. Arts*, 483 U.S. at 543.

the USOC made with respect to San Francisco Arts' use of the word Olympic and accompanying marks.<sup>237</sup>

The Court stated that on these facts, San Francisco Arts could not show state action.<sup>238</sup> First, the Court explained that extensive regulation of a private entity "does not transform the actions of the regulated entity into those of the government."<sup>239</sup> Second, the Court stated that the USOC's receipt of government funding did not change the analysis.<sup>240</sup> The Court stated that "[t]he Government may subsidize private entities without assuming constitutional responsibility for their actions."<sup>241</sup> Finally, the Court held that state action could be found where the entity at issue "performs functions that have been 'traditionally the exclusive prerogative' of the Federal Government."<sup>242</sup> While the Court acknowledged that the USOC's activities served "a national interest," it held that this fact was not enough to make the USOC's actions governmental action.<sup>243</sup> The Court held that "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function."<sup>244</sup> Significantly, the Court also explained that state action normally can only be found where the government has exercised "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government."<sup>245</sup> The Court noted that in this case, there was simply no evidence that the government coerced or encouraged the USOC in its decision to deny San Francisco Arts the use of the Olympic mark.<sup>246</sup>

Based on this, it cannot be said that the USOC is a private actor in *all* circumstances as a matter of law.<sup>247</sup> *San Francisco Arts* stands for the proposition that the USOC is not a state actor under the "traditional public function theory" because the USOC does not perform functions that were traditionally the "exclusive prerogative" of the government. The "public function" theory was San Francisco Arts' primary argument that the USOC's action amounted to state action, since it was unable to show that the challenged action, the denial of the use of the Olympic mark, had any specific relationship

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237. *Id.* at 546.

238. *Id.*

239. *Id.* at 544 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)).

240. *Id.*

241. *S.F. Arts*, 483 U.S. at 544 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982)).

242. *Id.* (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)) (emphasis omitted).

243. *Id.*

244. *Id.* at 545.

245. *Id.* at 546 (quoting *Blum*, 457 U.S. at 1004).

246. *S.F. Arts*, 483 U.S. at 547.

247. *See Behagen v. Amateur Basketball Ass'n*, 884 F.2d 524, 530 (1989) (holding that the USOC is not a governmental actor); *Harding v. U.S. Figure Skating Ass'n*, 851 F. Supp. 1476, 1479 (D. Or. 1994) (holding the defendant United States Figure Skating Association to be "a private association, not a governmental body").

to the United States Government. There was no allegation that any member of the government even knew that the dispute over the use of the Olympic mark was occurring, much less that anyone connected to the government was involved in denying or otherwise “coercing or encouraging” the USOC to deny the plaintiffs the use of the mark.<sup>248</sup> Thus, *San Francisco Arts* can only be read for the narrow holding that the USOC is not performing a traditional public function, and only under *that theory* is it not engaged in state action. There is nothing in *San Francisco Arts*, however, that would preclude a finding of state action in other circumstances. *San Francisco Arts* explicitly contemplated that where there is evidence of government coercion or encouragement of a USOC decision, a finding of state action could be appropriate.<sup>249</sup> At most, then, *San Francisco Arts* would support the argument that USADA does not perform a traditional public function so that it is not a state actor under that theory. *San Francisco Arts* clearly leaves open the possibility, however, that USADA could be a state actor, at least in some circumstances, if other indicia of state action are present.

Still, even if *San Francisco Arts* could be construed as holding that the USOC is not a state actor in all circumstances as a matter of law, such a holding would not necessarily be applicable to USADA. USADA’s relationship with the federal government, both through the Executive Branch and with Congress, is meaningfully different than the relationship between the USOC and the federal government. For instance, while the USOC is mostly self-supporting, and not reliant on government funding, USADA receives the majority of its operating budget from the federal government.<sup>250</sup> Moreover, while the USOC has always been subject to Congressional oversight, USADA is subject to direction and influence not just by Congress but also the ONDCP, which has taken a direct interest in its operation.<sup>251</sup> Accordingly, USADA’s actions in a specific case must be reviewed to determine whether they are fairly attributable to the government.

## 2. USADA’s Actions Generally Will Not Be Fairly Attributable to the Government

As explained above, for the Constitution to apply to USADA’s conduct, it must be shown that ultimately, the state is “responsible” for USADA’s actions such that USADA “may fairly be said to be a state actor.”<sup>252</sup> An important

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248. *See S.F. Arts*, 483 U.S. at 547.

249. *See id.* at 546.

250. *See* 151 CONG. REC. S2044 (daily ed. Mar. 3, 2005) (statement of Sen. Grassley) (noting that “the Federal Government has provided approximately 60 percent of USADA’s operational budget”).

251. *See, e.g.*, Memorandum of Understanding, Executive Office of the President Office of National Drug Control Policy–United States Anti-Doping Agency, Inc., Mar. 20, 2003.

252. *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

step in such an inquiry is to determine the specific conduct of which a plaintiff who brings suit against USADA would complain.<sup>253</sup> Here, the challenged action would be the finding that an athlete had violated the relevant anti-doping code. Because in routine cases such a finding is not made with any government involvement, USADA's actions likely would not be fairly attributable to the state.

a. USADA Does Not Perform a Traditional Public Function

The Supreme Court has explained that it is fair to attribute a private entity's actions to the state where the entity performs a function that is "traditionally the exclusive prerogative of the State."<sup>254</sup> Such functions have been defined as those where the state is uniquely obligated to provide the services in question.<sup>255</sup> It has been noted that this is an "arduous standard to satisfy."<sup>256</sup> In addition, the Supreme Court has made clear that a private actor that engages in conduct which is beneficial to the public does not transform its actions into state action.<sup>257</sup> The Supreme Court has found a traditional public function to be present in only a narrow range of circumstances, such as the administration of elections<sup>258</sup> and municipal parks.<sup>259</sup> The Court has declined to find a traditional public function in cases involving the coordination of amateur athletics<sup>260</sup> and the education of special needs children.<sup>261</sup>

Given the Supreme Court's restrictive approach to the traditional public function theory, it is clear that USADA does not perform a function that traditionally has been "the exclusive prerogative of the state." First, there is nothing which obligates the government to drug test Olympic Movement athletes. While it can be argued that the international agreements the United States has entered into to fight doping obligate it to provide for drug testing of athletes, there is nothing that specifies the government itself must do the testing and apply the sanctions. Second, drug testing in general has never been the exclusive prerogative of government. Thousands of private entities use the practice to ensure that their employees, students, and the like are drug free.<sup>262</sup>

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253. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

254. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

255. *Am. Mfrs.*, 526 U.S. at 55–56.

256. *Johnson v. Rodrigues*, 293 F.3d 1196, 1203 (10th Cir. 2002).

257. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

258. *E.g.*, *Terry v. Adams*, 345 U.S. 461, 470 (1953); *Nixon v. Condon*, 286 U.S. 73, 88–89 (1932).

259. *E.g.*, *Evans v. Newton*, 382 U.S. 296, 302 (1966).

260. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987).

261. *Rendell-Baker*, 457 U.S. at 836–37.

262. Substance Abuse and Mental Health Services Administration, U.S. Dep't of Health & Human Services, Workplace Drug Testing Programs (July 1, 2003), <http://www.oas.samhsa.gov/>



In fact, USADA's own history shows that drug testing was not traditionally the exclusive prerogative of the government—it is because the anti-doping program was ineffectively handled by the USOC that the federal government got involved.<sup>263</sup> Finally, given that the Supreme Court has found that the USOC is not performing a traditional government function, it is unlikely that a court would hold that USADA, which tests and sanctions athletes as part of the USOC's overall eligibility determination process, is performing one.

b. Substantial Government Funding and Regulation Are Not Enough to Support a Finding of State Action

It is well settled that where a private actor is heavily regulated or where the state creates the legal framework for the challenged action, this alone is not enough for a finding of state action.<sup>264</sup> Accordingly, although USADA receives about sixty percent of its operating budget from the federal government, and the government designated USADA as the United States' "official" anti-doping agency, this falls short of the government involvement required for a finding of state action.

Several cases are instructive in this regard. For instance, in *American Manufacturers Mutual Insurance Co. v. Sullivan*,<sup>265</sup> the Court considered whether there was state action in a case challenging a decision by a private insurer to withhold payment for medical services under a state workers' compensation program.<sup>266</sup> The state statute governing the program authorized employers to withhold payments for potentially unnecessary medical treatment pending utilization review.<sup>267</sup> The Court held that such conduct was not fairly attributable to the state because the decision to deny payment for medical services was made by private insurers and the only involvement by the state was through the statute that authorized those private parties to make the challenged decision.<sup>268</sup> The Court noted that the state's decision to allow workers' compensation insurers to withhold payment for medical services pending utilization review in some way can be seen as "encouraging" them to do so, but that "this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal

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NHSDA/A-11/WrkplcPlcy2-06.htm#P136\_7936 (describing survey of American workers, forty-nine percent of whom reported some kind of workplace drug testing in 1997).

263. See WHITE HOUSE TASK FORCE, *supra* note 37, at 10 (keynote remarks of Barry McCaffrey).

264. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker*, 457 U.S. at 842; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350–51 (1974).

265. 526 U.S. 40 (1999).

266. *Id.* at 43–44.

267. *Id.* at 45.

268. *Id.* at 52, 59.

remedy.”<sup>269</sup> For state action to be found, the Court stated that there must be some “overt, significant assistance of state officials.”<sup>270</sup>

This is similar to the holding in *Blum v. Yaretsky*.<sup>271</sup> In that case, the Supreme Court held that the decisions of a nursing home subject to various Medicaid and other state regulations were not subject to constitutional attack.<sup>272</sup> The Court noted that although the applicable Medicaid guidelines encouraged the hospital’s decisions to discharge its patients as soon as possible, the state was not “responsible” for those actions because the “decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties.”<sup>273</sup> Similarly, in *Rendell-Baker v. Kohn*,<sup>274</sup> several teachers brought suit against a private school, asserting unconstitutional state action, after they were terminated for speaking out against the school’s director.<sup>275</sup> Public funds made up 90–99% of the school’s budget, and students were transferred to the school pursuant to state law.<sup>276</sup> With respect to the named petitioner, Rendell-Baker, a state board had to approve the initial hiring decision.<sup>277</sup> In addition, that same state board upheld the school’s decision to terminate Rendell-Baker.<sup>278</sup> The Supreme Court held that despite the school’s close ties to the state, the decision to terminate the teachers was not subject to challenge on constitutional grounds because the decisions were not mandated or otherwise influenced by any state regulation.<sup>279</sup> As a result, although the school was subject to extensive regulation, the Court found that there could be no state action because nothing indicated the state was involved in any way in the personnel matters at issue.<sup>280</sup> The Court stated that the school’s decisions to discharge the petitioners were not compelled or influenced by state authority: “Indeed, in contrast to the extensive regulation of the school generally, the

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269. *Id.* at 53.

270. *Am. Mfrs.*, 526 U.S. at 54 (quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 486 U.S. 478, 485 (1988)). *American Manufacturers* involved a claim brought under 42 U.S.C. § 1983. 526 U.S. at 49. It is well settled that the “under color of [state] law” inquiry used for § 1983 “has[ ] been treated as the same thing as the state action” requirement. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

271. 457 U.S. 991 (1982).

272. *Id.* at 1012.

273. *Id.* at 1005.

274. 457 U.S. 830 (1982).

275. *Id.* at 832, 834–35.

276. *Id.* at 832.

277. *Id.* at 833.

278. *Id.* at 834.

279. *Rendell-Baker*, 457 U.S. at 841.

280. *Id.* at 841–42.

various regulators showed relatively little interest in the school's personnel matters.<sup>281</sup>

The case of *Jackson v. Metropolitan Edison Company*<sup>282</sup> is also a useful example. In that case, the plaintiff brought suit against Metropolitan Edison for terminating her electricity.<sup>283</sup> The Court noted that while the electric company was privately owned and operated, it was subject to extensive state regulation.<sup>284</sup> However, the Court rejected the argument that furnishing electricity was a power traditionally reserved to the state.<sup>285</sup> Moreover, the Court held that the actions of the electric company were not state action because the state had not placed its "imprimatur" on the challenged action.<sup>286</sup> The Court explained that a private entity's exercise of discretion permitted by statute, without additional state involvement, does not make the private entity's action state action.<sup>287</sup>

These cases are all consistent with the Court's holding in *San Francisco Arts*, where the Court stated that the USOC's actions were not subject to constitutional challenge because there was nothing in the record to indicate that the government had any interest in the USOC's decision to deny the plaintiffs the right to use the Olympic trademarks.<sup>288</sup> Therefore, where the challenged action is ultimately taken by private parties, and the only indicia of state involvement is funding and regulation, this is not enough for a finding of state action.

Here, USADA is not as heavily regulated or dependent on government funding as the entities in *American Manufacturers*, *Rendell-Baker*, *Blum*, or *Jackson*. However, similarly to those cases, it is a private entity that would perform the action subject to challenge. Moreover, as in the above cases, there is nothing to indicate that the government would take any interest or involvement in the challenged action (here, routine athlete drug testing). While the federal government helped create USADA and places great weight on fighting doping, this alone would not be enough. As the Court stated in *Blum*, "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under

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281. *Id.* at 841. *See generally* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that there was no state action where the state Liquor Control Board had given a liquor license to a private club that refused to serve African Americans where there was no showing that the state Liquor Control Board had a role in establishing or enforcing the policy).

282. 419 U.S. 345 (1974).

283. *Id.* at 347.

284. *Id.* at 350.

285. *Id.* at 353.

286. *Id.* at 357.

287. *Jackson*, 419 U.S. at 357.

288. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 546-47 (1987).

the terms of the Fourteenth Amendment.”<sup>289</sup> Accordingly, as in the cases discussed above, it is unlikely that a usual case involving a constitutional challenge to USADA’s actions, based merely on the federal government’s funding and oversight of USADA, would succeed.

c. The Government is Not Pervasively Entwined in USADA’s Operations

Another potential theory to demonstrate that USADA’s actions are fairly attributable to the government is that USADA is “pervasively entwined” with the government.<sup>290</sup> This argument also likely would fail. In *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, the Supreme Court found that a state high school athletic association was engaged in state action where the plaintiff demonstrated that the state was responsible for the decisions of the nominally private athletic association because public officials were pervasively entwined in the management and control of the association.<sup>291</sup> In that case, the Court noted that the state was entwined from the “top down” in that employees of the state’s board of education sat on many of the athletic association’s committees, and because employees of the athletic association were part of the state retirement system.<sup>292</sup> The state was also entwined from the “bottom up” in that an overwhelming majority of the members of the association were public high schools represented by school principals and others acting in their official capacities.<sup>293</sup> The Court noted that “[t]here would be no recognizable [Athletic] Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions . . . .”<sup>294</sup>

In contrast, USADA is not in any way controlled on a day-to-day basis by public officials. There are no public officials on USADA’s board of directors, and there are no public officials working in the day-to-day management of USADA.<sup>295</sup> While at most it can be argued that the private individuals who control USADA are friendly to the government’s anti-doping agenda,<sup>296</sup> this alone is not enough to show the type of “largely overlapping identity”<sup>297</sup> that

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289. *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

290. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001).

291. *Id.* at 298 (“The nominally private character of the [Athletic] Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . .”).

292. *Id.* at 300.

293. *Id.* at 299–300.

294. *Id.* at 300.

295. *See* 2004 USADA ANN. REP., *supra* note 8, at 4–7.

296. *See* WHITE HOUSE TASK FORCE, *supra* note 37, at 15 (statement of Frank Shorter).

297. *Brentwood*, 531 U.S. at 303.

was critical to the Court's holding of "pervasive entwinement" in *Brentwood*. Accordingly, it is unlikely that a Court would find that USADA engaged in state action under this theory.

d. In Most Cases, USADA's Actions Are Not the Result of Joint Action with the Government or Significant Government Coercion or Encouragement

The Supreme Court has held that state action may be found where a private entity is a "willful participant in joint activity with the State or its agents."<sup>298</sup> In addition, the Court repeatedly has stressed that actions are fairly attributable to the state where the state has "exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the State."<sup>299</sup> In the usual case involving the testing and sanctioning of an athlete, there would be no evidence of joint action or significant coercion and encouragement sufficient to support a finding of state action.

To establish state action based on a "joint action" theory, it must be shown that the private party took the challenged action with the "overt, significant assistance of state officials,"<sup>300</sup> or has worked "in concert" with state officials to effectuate the deprivation of constitutional rights.<sup>301</sup> Moreover, a showing of state action under the "coercion and encouragement theory" requires more than "mere approval or acquiescence," or "subtle encouragement."<sup>302</sup> The level of government involvement under these theories of state action is not present in the typical drug testing case. As USADA notes in its most recent annual report, it conducted a total of 7,360 drug tests during the year.<sup>303</sup> Of these, it made forty-three "adverse findings."<sup>304</sup> It also issued sanctions in forty-one pending cases.<sup>305</sup> Given this volume, it is hard to imagine how Congress or ONDCP or any other arm of the government would have the ability to be involved in USADA's actions at the level required to support a finding of state action under these theories. In addition, even if Congress and ONDCP remained informed of USADA's day-to-day actions with respect to

298. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941 (1982) (quoting *U.S. v. Price*, 383 U.S. 787, 794 (1966)); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980).

299. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

300. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) (quoting *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988)); see also *Lugar*, 457 U.S. at 927; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 155-56 (1970).

301. *Rendell-Baker*, 457 U.S. at 838 n.6; see also *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

302. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999).

303. 2004 USADA ANN. REP., *supra* note 8, at 2.

304. *Id.* at 16 (noting that three of the adverse results were not from U.S. athletes and "were referred to the appropriate country or [international federation]").

305. *Id.* at 34 (listing the athletes and the sanctions imposed).

testing and sanctions, there is simply no showing that Congress or ONDCP, in the usual case, has any interest in, or influence over, the outcome. Most decisions subject to challenge would not be made by any government official, and government employees do not assist with testing or sanctioning athletes. Unlike cases where the “joint action” theory has been invoked, such as with pre-judgment attachment of property by *ex parte* application to a state official,<sup>306</sup> or the discriminatory use of peremptory challenges,<sup>307</sup> USADA does not need the participation of any state official to test and sanction athletes in routine cases. Moreover, while the government clearly approves of and encourages generally the process of testing and sanctioning athletes, there is nothing to suggest that in the usual case, it coerces or significantly encourages USADA to take a specific action or reach a particular outcome. Therefore, notwithstanding USADA’s substantial government funding and oversight, with respect to the *typical* doping case, a court is unlikely to hold that USADA’s actions are fairly attributable to the state.

3. In Unique Circumstances, USADA’s Actions May Be Fairly Attributable to the State

The conclusion that USADA’s actions, in routine doping cases, likely would not be fairly attributable to the government, however, does not mean that USADA could never be considered a state actor. Indeed, USADA’s close relationship with the federal government may, under certain circumstances, make it particularly vulnerable to a finding of state action. As the Supreme Court has stated, “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>308</sup> Weighing the circumstances of USADA’s close relationship with the federal government with the events that occurred during the months leading up to the 2004 Athens Olympic Games illustrates that USADA may, in some cases, be a state actor.

a. USADA’s Relationship with the Federal Government Positions It To Be a State Actor

The Supreme Court’s requirement that for there to be state action there must be “a sufficiently close nexus between the State and the challenged action”<sup>309</sup> assumes that the state has a relationship with the private entity such that the state actually *could* coerce, encourage, jointly participate with, or otherwise control the private actor to achieve the challenged action. USADA and the federal government have such a relationship.

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306. *See* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1982).

307. *See* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991).

308. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

309. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

First, both *Lebron* and *Brentwood* demonstrate that the government's creation of a nominally private entity to serve important government interests positions the private entity for a finding of state action. Here, as explained above, it was the government, particularly ONDCP and the Senate Committee, that took the lead in forming USADA.<sup>310</sup> As Michael Straubel noted, USADA was established and "assigned specific tasks with a set of preexisting guidelines."<sup>311</sup> Moreover, as in *Lebron* and *Brentwood*, because USADA was created to fulfill important government objectives, the federal government has a continuing interest in and influence over its operations. This is illustrated when viewed in comparison to the United States' professional sports leagues. For instance, when the World Anti-Doping Code was adopted, it was hoped that the National Basketball Association (NBA), National Football League (NFL), Major League Baseball (MLB), and other American professional sports leagues would adopt it.<sup>312</sup> The leagues refused, preferring instead to test and sanction their respective athletes pursuant to their collective bargaining agreements.<sup>313</sup> In contrast, such a refusal to adopt the WADC was never an option for USADA.<sup>314</sup> In addition, USADA's role as an entity to serve government interests is further demonstrated with respect to the recent scandals involving performance-enhancing drug use and professional sports.<sup>315</sup> While holding hearings on the issue, Congress has explicitly considered expanding USADA's jurisdiction to assist in coordinating drug testing for professional and college athletes.<sup>316</sup> Indeed, when USADA was in the developmental stage, members of Congress and ONDCP hoped that by establishing USADA, the government could eventually fight the use of performance-enhancing drugs at both the professional and collegiate level.<sup>317</sup> As stated by Jim Scherr, during Congressional hearings on steroids and professional sports "it was suggested that perhaps USADA should be expanded to perform the same function for the professional leagues and perhaps the NCAA that it does for the American Olympic Movement. . . . [W]e believe that the proposal warrants serious consideration."<sup>318</sup> The ability of Congress even to consider "expanding" USADA demonstrates that USADA is not simply a private actor, but an entity that was created to serve important public objectives. As a result, USADA is positioned to be influenced by the federal government in a way that supports a finding of state action.

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310. See discussion *supra* Part II.B.2.

311. Straubel, *supra* note 14, at 561.

312. See Wendt, *supra*, note 107, at 29–30.

313. See *id.*

314. 2005 USADA GUIDE TO PROHIBITED SUBSTANCES, *supra* note 110, at 2.

315. See *supra* notes 2–10, 161–67 and accompanying text.

316. *Effects of Drugs Hearing*, *supra* note 1, at 12 (statement of Barry McCaffrey).

317. *Id.*

318. *S. 529 Hearing*, *supra* note 123 (testimony of Jim Scherr).

Also illustrating USADA's propensity to be influenced by the government is that the government has a mutually beneficial relationship with USADA. Such a mutually beneficial relationship can be important in establishing state action.<sup>319</sup> First, USADA relies heavily on government subsidies in the form of grant funding through ONDCP.<sup>320</sup> Significantly, in its four years of existence, USADA has received *increasing* financial support from the federal government. For instance, in 2001, it received \$3.3 million to support its operations.<sup>321</sup> By 2004, the support had grown to more than \$7.1 million.<sup>322</sup> Also significant is the fact that the funding requests are tied to expansion of USADA's programs.<sup>323</sup> Therefore, since its creation, USADA has seemingly become increasingly dependent on government funding. USADA also has tax-exempt status.<sup>324</sup>

In addition to funding, USADA directly benefits from its relationship with the federal government in that it is designated by Congress as the United States' official anti-doping agency.<sup>325</sup> This designation provides USADA with the international and domestic authority and credibility it needs to achieve its mission. Without such a designation, USADA would be unable to represent the United States internationally in such forums as the Council of Americas, the Council of Europe, and WADA.<sup>326</sup> As stated by Terry Madden, the CEO of USADA, in testimony given for the White House Task Force on Drug Use in Sports, it was important to have the official "imprimatur" of the United States government so that USADA could be "invited to the table of the Council of Europe"<sup>327</sup> and other international anti-doping conferences.

The benefits USADA derives from its relationship with the federal government were even more important during the months leading up to the 2004 Athens Olympics. USADA was a fledgling organization, having been in existence for less than four years, and it relied heavily on the United States government for funding and domestic and international credibility. Indeed, in 2002 and 2003 USADA worked closely with Republican lobbyists who had close ties to the President to help it lobby for additional federal funding.<sup>328</sup> As

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319. *See* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

320. 151 CONG. REC. S2044 (daily ed. Mar. 3, 2005) (statement of Sen. Grassley).

321. 2001 USADA ANN. REP., *supra* note 112, at 24.

322. 2004 USADA ANN. REP., *supra* note 8, at 28.

323. *See* 151 CONG. REC. S2044 (daily ed. Mar. 3, 2005) (statement of Sen. Grassley).

324. *See* U.S. INTERNAL REVENUE SERVICE, CUMULATIVE LIST OF ORGANIZATIONS DESCRIBED IN § 170(C) OF THE INTERNAL REVENUE CODE OF 1986 (Publication No. 78, June 30, 2005), <http://apps.irs.gov/app/pub78> (search the database search field for "anti-doping agency").

325. Act of Nov. 12, 2001, Pub. L. No. 107-67, § 644, 115 Stat. 514, 555.

326. *See* 2002 USADA ANN. REP. 14, *available at* [http://www.usantidoping.org/files/active/who/annual\\_report\\_2002.pdf](http://www.usantidoping.org/files/active/who/annual_report_2002.pdf).

327. WHITE HOUSE TASK FORCE, *supra* note 37, at 29.

328. USADA: *Four Years Later*, KEEPING TRACK NEWSL. (Janet Heinonen, Eugene, Or.), Mar. 2005, *available at* <http://keepingtracknewsletter.com/archive/index.php?keepingtrack=56>.



a result, USADA during this time was especially concerned with cultivating its relationship with the United States government and continuing to receive the benefits it needed to establish itself.

Likewise, the United States government greatly benefits from its relationship with USADA. First, USADA enhances the United States' image in the international Olympic Movement. Prior to the creation of USADA, as mentioned above, the United States was embroiled in doping scandals that badly damaged its reputation.<sup>329</sup> The perception was that the United States turned a blind eye to performance-enhancing drug use by its elite athletes. USADA, however, has enhanced significantly the United States' credibility with respect to anti-doping, both at home and abroad. Moreover, USADA benefits the federal government by actively supporting federal anti-drug initiatives. Funding requests for USADA are made by ONDCP to Congress as part of ONDCP's request for funds to implement other Federal Drug Control Programs.<sup>330</sup> This is due to the fact that USADA was created not simply to drug test Olympic Movement athletes, but to educate children on the dangers of performance-enhancing drug use and to conduct research.<sup>331</sup> Additionally, as noted above, some members of Congress now hope to use USADA to shape the drug testing and sanctions regimes of the major professional sports leagues.<sup>332</sup>

USADA also is in a position to be influenced by the federal government because in many respects, it appears to be an agent of the government.<sup>333</sup> Again, as mentioned previously, USADA is designated as the United States' official anti-doping agency.<sup>334</sup> Such an official designation was found to be important in the Supreme Court's recent ruling in *Brentwood*, where the Court noted that the school board "[s]pecifically, in 1972 . . . went so far as to adopt a rule expressly 'designating' the Association as 'the organization to supervise and regulate the athletic activities in which the public junior and senior high

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329. See Straubel, *supra* note 14, at 554.

330. See ONDCP 2004 Budget Request, *supra* note 128 (addendum to statement of John P. Walters).

331. See 2002 USADA ANN. REP., *supra* note 326, at 3.

332. See Clean Sports Act of 2005, S. 1114, 109th Cong. § 2(b) (2005).

333. In undertaking a state action inquiry, the Supreme Court has explained that "the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (citing *Lebron v. Nat'l. R.R. Passenger Corp.*, 513 U.S. 374 (1995)). Thus, even if USADA and the government maintained that USADA was a private entity, such a designation would not be determinative.

334. Act of Nov. 12, 2001, Pub. L. No. 107-67 § 644, 115 Stat. 514, 555; see also *S. 529 Hearing*, *supra* note 123 (testimony of Jim Scherr).

schools in Tennessee participate on an interscholastic basis.”<sup>335</sup> This designation was among the facts that tipped the scale in that case toward a finding of state action.<sup>336</sup> Moreover, such a designation or apparent agency relationship was absent from cases where the Court held that government funding and government regulation, without more, was insufficient to support a finding of state action.<sup>337</sup>

In addition to its official designation, USADA and its actions, in many cases, carry the imprimatur of the United States government.<sup>338</sup> Such an “imprimatur,” or approval, can be important in finding state action.<sup>339</sup> USADA’s actions appear to be approved by the United States government because the very policies that USADA is enforcing, through the WADC, are policies that the United States not only has seen and approved, but had a part in drafting. As explained above, the United States played a significant role in establishing WADA and establishing the WADC,<sup>340</sup> which USADA now enforces.<sup>341</sup> This is similar to the rules involved in *Brentwood*, where the Supreme Court noted that the state high school athletic association there had reviewed and approved of the rules at issue in the case.<sup>342</sup> Here, not only has the United States government reviewed the WADC, it had a substantial hand in actually crafting it, and it retains the authority, through its position on the WADA board, to influence its shape in the future.

Moreover, the “imprimatur” of the federal government is most apparent to the athletes who are tested and sanctioned by USADA. For instance, when the

335. *Brentwood*, 531 U.S. at 292 (quoting TENN. COMP. R. & REGS. 0520-1-2-.26 (1972), a provision later moved to Rule 0520-1-2-.08).

336. *See id.* at 300–02.

337. *See* *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

338. It is important to note as an initial matter that USADA and the federal government’s designation of USADA as the “independent” anti-doping agency is not necessarily a statement of USADA’s relationship to the government. In fact, the designation probably has less to do with asserting USADA’s independence from the federal government than an attempt to stress that it is separate from the USOC, so that the previous conflicts of interest present when the USOC handled the United States’ anti-doping program are no longer present. Thus, this “independent” designation appears to be more about international credibility, and less a statement of its position vis-à-vis the federal government. In any event, state action cases establish that this designation is not determinative.

339. *See Jackson*, 419 U.S. at 357.

340. *See* discussion *supra* Part II.B.1. Indeed, even before WADA was formed and the WADC drafted the United States played a significant role in shaping Olympic Movement drug policy to serve domestic interests. For instance, ONDCP pushed the IOC to make marijuana a banned substance. *See* Kathy Orton, *U.S. Supports New Drug Standards: McCaffrey Pledges \$1 Million Toward Advanced Olympic Testing*, WASH. POST, Jan. 26, 1999, at D3.

341. 2005 USADA GUIDE TO PROHIBITED SUBSTANCES, *supra* note 110, at 2.

342. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 292 (2001).

BALCO scandal was unfolding, many athletes were aware of the Senate Committee's assistance with USADA's investigation of athletes for doping violations. In responding to allegations that she had used THG, sprinter Marion Jones attempted to clear her name by offering to publicly answer any questions from USADA.<sup>343</sup> Jones stated that "[w]e can answer these questions before the United States Senate, which has shown an interest in this matter . . . ."<sup>344</sup> Moreover, as stated by Kelli White, a track and field athlete who admitted using BALCO-engineered steroids to the Senate Committee, "I appreciate the many reasons why this Committee previously subpoenaed the BALCO documents pertaining only to the track and field athletes and turned them over to USADA rather than the other sports, but would like to see a more equal treatment of all sports."<sup>345</sup> In short, the United States government, through ONDCP and Congress, has put its considerable "power and prestige"<sup>346</sup> behind USADA, both domestically and internationally. As such, USADA is markedly different from the private entities at issue in *Jackson*, *American Manufacturers*, *Blum*, *Rendell-Baker* and *Moose Lodge*, and therefore it is uniquely positioned to engage in state action.

b. The Events Leading Up to 2004 Athens Olympic Games

Positioned as it was to be a state actor, it is not surprising that USADA was significantly aided and encouraged by the federal government to target potential dopers in the months leading up to the 2004 Athens Olympic Games. These events, combined with the factors outlined above, would make a strong case for state action.

In 2004, the BALCO scandal, and the professional and amateur athletes caught in it, was a matter of concern in the highest levels of government. Indeed, President Bush mentioned the issue of doping in sports in his State of the Union Address.<sup>347</sup> These concerns increased in the spring of that year, as the United States was preparing to select its teams for the Athens Olympic Games. Given the United States' past reputation for allowing dopers to remain eligible for competition, there was intense pressure to ensure that the United States sent a "clean" team to the Games.<sup>348</sup> Specifically, Senator John McCain and the Senate Committee were deeply concerned that track and field athletes implicated in the BALCO scandal might compete in Athens.<sup>349</sup> Yet without the information from the BALCO grand jury investigation, USADA was

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343. *Sprinter Wants Public Dope Hearing*, *supra* note 164.

344. *Id.*

345. *S. 529 Hearing*, *supra* note 123 (statement of Kelli White).

346. *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 559 (1987) (Brennan, J., dissenting).

347. *See* Bush, *supra* note 35, at 100.

348. *See supra* note 5 and accompanying text.

349. *See* Press Release, U.S. Senate Comm. on Com., Sci., and Transp., *supra* note 6.

seemingly powerless to bring doping cases against those who may have used the previously undetectable THG. Accordingly, to prevent any BALCO-tainted athletes from going to Athens, the Senate Committee subpoenaed documents from the Department of Justice that were part of the ongoing BALCO investigation.<sup>350</sup> As stated by Senator John McCain:

I continue to be keenly interested in curbing the use of banned performance-enhancing drugs by our nation's athletes. To that end, this morning the Committee approved . . . the issuance of a subpoena . . . [T]he subpoena would compel the Department of Justice to produce documents relating to U.S. amateur athletes' alleged purchase of banned performance-enhancing substances from [BALCO] and their possible use of such substances.<sup>351</sup>

The Department of Justice did not object to the subpoena, as would be expected, but in fact was "happy" to comply.<sup>352</sup> It was widely reported that such willing compliance—turning over secret grand jury testimony to Congress during an ongoing investigation—was highly unusual, and "virtually without precedent."<sup>353</sup> After the material was provided to the Senate Committee, the Committee turned the material over to USADA. This action was explained in a Senate Resolution, which stated, in pertinent part:

Whereas, when it appears that evidence under the control or in the possession of the Senate is needed for the promotion of justice, the Senate will take such action as will promote the ends of justice consistent with the privileges of the Senate: Now, therefore, be it

*Resolved*, That the Chairman and Ranking Minority Member of the Committee on Commerce, Science, and Transportation, acting jointly, are authorized to provide to the U.S. Anti-Doping Agency the documents subpoenaed by the Committee regarding the potential use of banned, performance-enhancing drugs by U.S. Olympic sport athletes.<sup>354</sup>

As stated by Senator Ted Stevens, during a hearing on a bill to increase funding to USADA, "The actions that we took as a Committee last year ensured that the United States did not send athletes who were not drug-free to Athens. Those were unprecedented actions . . . ."<sup>355</sup>

350. *Id.*

351. *Id.*

352. See Ford Fessenden, *Government's Handling of Evidence from BALCO Case is Not Typical*, N.Z. SPORTS DRUG AGENCY NEWS, Nov. 5, 2004, <http://www.nzda.co.nz/news.php?type=archive&nid=176>.

353. Slot, *supra* note 5 at 46. But see Mark Fainaru-Wada & Lance Williams, *Steroid Scandal May Hit Olympics: U.S. Athletes Could Get Yanked—Even without Drug Tests*, S.F. CHRON., May 16, 2004, at A1 (noting that the subpoenaed material did not include grand jury transcripts, but included "items such as e-mails, letters, invoices and canceled checks").

354. 150 CONG. REC. S5004 (daily ed. May 6, 2004) (statement of Sen. Frist).

355. S. 529 Hearing, *supra* note 123.

A strong argument can be made that the Senate Committee's efforts to assist USADA in taking action against certain athletes<sup>356</sup> constituted the requisite "joint action" with, and significant encouragement of, the federal government to support a finding of state action.<sup>357</sup> As explained above, it is well established that a private party engages in state action where it jointly participates with the state in taking the challenged action.<sup>358</sup> Courts have noted this requires a showing of overt and significant state participation in the challenged action, or a clear "concerted effort" between the state and the private entity.<sup>359</sup> This level of participation and cooperation between USADA and the federal government was evident in the actions taken to secure sanctions against athletes implicated in the BALCO scandal leading up to the Athens Olympic Games.

First, the decision to pursue sanctions against athletes based on information obtained from the BALCO investigation was done in concert with the federal officials, specifically the Senate Committee, who provided USADA with material obtained as part of a government investigation. Such a joint effort likely would be enough of a close nexus to support a finding of state action. For instance, in *Lugar v. Edmondson Oil Co.*,<sup>360</sup> the Court found state action where a public official, the local sheriff, facilitated the challenged action.<sup>361</sup> In that case, a private party to whom the plaintiff was allegedly indebted filed an ex parte petition for attachment of the plaintiff's property.<sup>362</sup> The county sheriff executed the petition.<sup>363</sup> At a subsequent hearing, the plaintiff established that the private creditor had not properly established grounds for attachment.<sup>364</sup> The plaintiff then brought suit for violation of his due process rights.<sup>365</sup> The Supreme Court held that the sheriff's "joint participation" with

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356. It is unclear which athletes were implicated in the documents, as the contents have not been made public. However, after receiving the BALCO information from the Senate Committee, USADA began proceedings against track and field athletes Tim Montgomery, Alvin Harrison, Chryste Gaines, and Michelle Collins for "potential" doping violations. See Tim Brown, *Now Baseball May Get Tested*, L.A. TIMES, Dec. 3, 2004, at D1.

357. Note that it is not necessary to demonstrate that the impetus for the challenged action originated with the federal government for there to be state action if it is state action that enforces the private entity's actions. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); see also *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

358. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 927 (1982); *Dennis v. Sparks*, 449 U.S. 24, 26–27 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

359. See *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1454 (10th Cir. 1995); *Starnes v. Capital Cities Media, Inc.*, 39 F.3d 1394, 1397 (7th Cir. 1994); *Hoai v. Vo.*, 935 F.2d 308, 313 (D.C. Cir. 1991).

360. 457 U.S. 922 (1982).

361. *Id.* at 942.

362. *Id.* at 924.

363. *Id.*

364. *Id.* at 925.

365. *Lugar*, 457 U.S. at 925.

the private party to seize the plaintiff's property was sufficient to characterize that party as a state actor for purposes of the Fourteenth Amendment.<sup>366</sup> Similarly, the Supreme Court found state action in *Edmonson v. Leesville Concrete, Co.*,<sup>367</sup> where the Court held that a private litigant engaged in state action in the discriminatory use of peremptory challenges because of the "overt, significant[,] and "indispensable" participation of the court.<sup>368</sup>

Here, a court could find that the federal government did not simply authorize and approve of USADA's actions,<sup>369</sup> it indispensably aided and encouraged them. Like the private party's reliance on the sheriff in *Lugar*, and the private litigant's use of peremptory challenges in *Edmonson*, but for the Senate Committee's involvement, USADA probably could not have obtained access to the grand jury material and made a case for sanctions against otherwise "clean" athletes.<sup>370</sup> Moreover, far from having a neutral connection to USADA's actions, the Senate Committee subpoenaed the grand jury materials for a singular purpose—preventing certain athletes from going to the Athens Olympics. This is very likely the type of "overt, significant assistance" and "encouragement"<sup>371</sup> with the force of the government's "power and prestige"<sup>372</sup> that can be sufficient to support a finding of state action.

The case for state action is also strong in these circumstances because the level of interest and involvement in the operations of USADA on the part of the Senate Committee distinguishes USADA's relationship with the federal government during the months leading up to the Athens Olympics from the relationships between the private actors and the state in *Moose Lodge*, *Jackson*, *Blum*, *Rendell-Baker*, *American Manufacturers*, and *San Francisco Arts*. In none of those cases did the state take any interest in, or have any involvement with, the challenged actions. In fact, there was nothing to suggest that the state in those cases had any direct knowledge that the challenged actions even took place. Here, in contrast, the Senate Committee was heavily involved in the investigation and in the pursuit of sanctions against BALCO-implicated

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366. *Id.* at 942; *see also* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

367. 500 U.S. 614 (1991).

368. *Id.* at 624.

369. *See* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974).

370. For instance, sprinter Kelli White accepted sanctions after USADA presented her with material it obtained from the BALCO investigation. *See* Mark Zeigler, *Drugs Cost Montgomery Sprint Mark, 2-Year Ban*, SIGNSONSANDIEGO.COM, Dec. 14, 2005, <http://signsonsandiego.com/uniontrib/20051214/news-1s1/trakdrug.html>. As a result White agreed to testify against sprinter Tim Montgomery, who sought to challenge USADA's sanctions in the Court of Arbitration for Sport (CAS). *Id.* The CAS ruled, based in part on this testimony and the BALCO documents, to uphold USADA's determination that Montgomery engaged in doping. *Id.*

371. *See* *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999).

372. *See* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 559 (1987).

athletes.<sup>373</sup> It is precisely this type of “concerted effort”<sup>374</sup> that can support a finding of state action.

#### IV. CONCLUSION

While USADA is not a government entity, neither is it a typical private corporation. USADA was created by Congress and ONDCP to serve important government objectives both domestically and internationally. USADA is heavily subsidized by the government, and it operates with the government’s “imprimatur.” The federal government, through its involvement with WADA, has important influence over USADA’s testing and sanctions policies. Yet it is clear that despite the government’s substantial involvement with USADA, in the usual case, USADA’s actions would not be fairly attributable to the state. The federal government generally has no interest or involvement in the typical doping case handled by USADA. In addition, the federal government has no day-to-day control over USADA. However, because of its close relationship with the federal government, USADA is vulnerable to the type of government involvement with and influence over its actions that could support a finding of state action. In unique situations, such as that which took place in the months leading up to the Athens Olympic Games in 2004, a strong argument can be made that USADA’s actions are fairly attributable to the state.

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373. The government remains involved in USADA’s efforts in this regard. Terry Madden, USADA’s Chief Executive Officer, recently testified before the Senate Committee on Commerce, Science, and Transportation that “we continue to work with the Department of Justice and the United States Attorney for the Northern District of California in the ongoing investigation into the BALCO doping conspiracy.” *S. 529 Hearing, supra* note 123 (testimony of Terry Madden).

374. *See* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) (citing *Shelly v. Kraemer*, 334 U.S. 1, 20 (1948)) (state action may be found where “the injury caused is aggravated in a unique way by the incidents of governmental authority”).