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# **DOPERS ARE NOT DUPED: USADA'S ASSISTANCE TO FEDERAL PROSECUTIONS ULTIMATELY PROTECTING CLEAN ATHLETES IS NOT STATE ACTION**

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## **I. INTRODUCTION**

Every story has its twists and turns. The story of the downfall of the Bay Area Laboratory Cooperative (BALCO), the provider of designer steroids to numerous Olympic and professional athletes, is no exception. In May 2008, the BALCO steroid saga came full circle when a federal jury for the United States District Court of the Northern District of California convicted ex-Olympic track coach Trevor Graham of lying to investigators about his contacts with an admitted steroids dealer.<sup>1</sup>

Graham was the individual responsible for tipping off anti-doping officials and the federal government to the illegal activities of BALCO, leading to the downfall of BALCO, the successful pursuit of doping charges against numerous high profile athletes, and ultimately to the conviction of Trevor Graham himself. In 2003, Graham anonymously sent a syringe containing an undetectable steroid, then called "the Clear" by those who used it, to the United States Anti-Doping Agency (USADA).<sup>2</sup> Since, USADA has worked

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1. United States v. Graham, No. 06-00725 2008 U.S. Dist. LEXIS 55630 at \*3-4 (N.D. Cal. July 21, 2008) (*Graham II*).

2. Lance Williams & Bob Egelko, *Verdict Mixed in S.F. Steroid Trial of Coach*, S.F. CHRON., May 30, 2008, at A1. The jury deadlocked in 10-2 and 11-1 in favor of conviction, respectively, on charges of making false statements to federal agents about supplying his athletes with drugs and ever meeting Heredia despite the prosecutor's possession of the photograph of the two. *Id.*; see also

with several laboratories to reverse engineer the substance and develop and validate a test for the detection of the designer steroid now known as tetrahydrogestrinone (THG).

Without Graham, the BALCO scandal surely would not have broken as it did. If he had not mailed the syringe to USADA, a number of athletes using the Clear might have avoided detection for a longer period of time. Yet, in the end when he was faced with criminal prosecution it was Trevor Graham who sought a legal ruling which, if he had been successful, could have changed and potentially undermined the anti-doping efforts for Olympic sports.

In his criminal case, Graham asked the federal district court to declare USADA a governmental entity so that he could more easily obtain documents in discovery from USADA.<sup>3</sup> Had USADA been declared a governmental entity pursuant to Graham's motion, it would undoubtedly not have taken long for defense counsel representing doped athletes to contend, among other things, that USADA's no advance notice drug testing problem should be subject to Fourth Amendment search and seizure requirements.<sup>4</sup>

With his conviction, Graham became the latest person to be found guilty of steroid-related criminal activity in the United States' fight to enforce federal law and to rid sports of performance-enhancing drugs (PEDs).<sup>5</sup> Shortly thereafter, USADA imposed on Graham a lifetime ban from Olympic sport for his involvement in facilitating drug use by athletes coached by him.

The key figure in the fight against drugs in American sport since late 2000 has been USADA, the independent anti-doping agency for Olympic-related sport in the United States. USADA aims to uphold the ideals of fair play, the integrity of sport, and to protect the health of athletes in the Olympic, Pan American, and Paralympic Games.<sup>6</sup> Though USADA has had significant success fulfilling its mission by disciplining sixteen athletes and two coaches connected to the BALCO doping conspiracy to date, some in the U.S. have been publicly critical of USADA's efforts, including, unsurprisingly, those

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*Graham II*, 2008 U.S. Dist. LEXIS 55630, at \*3.

3. United States v. Graham, 555 F. Supp. 2d 1046 (N.D. Cal. 2008) (*Graham I*).

4. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

5. Besides Graham, ex-cyclist Tammy Thomas was convicted by a federal jury on three counts of making false statements to a federal grand jury in November 2003, and on one count of obstructing justice. Michael McCann, *Cyclist's Trial May Foretell Bonds' Fate*, SI.COM, Apr. 7, 2008, [http://sportsillustrated.cnn.com/2008/writers/michael\\_mccann/04/07/tammy.thomas.balco/index.html](http://sportsillustrated.cnn.com/2008/writers/michael_mccann/04/07/tammy.thomas.balco/index.html). On October 5, 2007, Marion Jones admitted lying to federal agents about her use of steroids prior to the 2000 Sydney Summer Olympics. Michael S. Schmidt & Lynn Zinser, *Jones Pleads Guilty to Lying About Drugs*, N.Y. TIMES, Oct. 5, 2007, at A1.

6. USADA, <http://www.usada.org> (last visited Aug. 28, 2008).

suspected or accused of violating sport anti-doping rules.<sup>7</sup> For example, perhaps the best known attack aimed at USADA came from now disgraced Olympic sprinter Marion Jones, who, prior to conviction on federal charges for lying about her drug use, called USADA a “secret kangaroo court” and threatened to sue should she be barred from competitions.<sup>8</sup>

Graham and Jones have each, implicitly or explicitly, raised the question, previously discussed in scholarship, whether the creation of USADA constitutes a ploy to privatize a government function thereby depriving athletes of their rights under the Fifth and Fourteenth Amendment and the Jencks Act.<sup>9</sup> This article addresses the Jencks Act argument unsuccessfully advanced by Graham and others and demonstrates that USADA is a private, independent, autonomous entity whose only connection with the government is the shared goal of ridding sports of PEDs. A proper reading of the law compels a finding that USADA is not a federal agency and is not subject to the Jencks Act. Further, USADA cannot be, and should not be, found to be a state actor under any of the tests that have been employed by the United States Supreme Court.

To understand USADA one must understand the doping problem it was created to address. Section II of this article describes the climate under which USADA took over as the anti-doping agency in the United States. Section III describes the structure of USADA and examines its investigatory procedures. Section IV explains why Trevor Graham lost his Jencks Act argument and why a court should not consider USADA a federal agency. Section V reviews the history behind the various tests of the state actor doctrine employed by the Supreme Court. Lastly, Section VI applies the state actor tests to USADA, concluding that USADA is not a state actor.

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7. It should be noted that USADA does not participate as lead prosecutors in federal criminal trials, but rather prosecutes athletes through private dispute resolution in the Court of Arbitration for Sport, a private entity headquartered in Lausanne, Switzerland, and contracted by the International Olympic Committee, the U.S. Olympic Committee, and numerous other National Olympic Committees and other Olympic sporting organizations to resolve disputes.

8. Paul C. McCaffrey, Note, *Playing Fair: Why the United States Anti-Doping Agency's Performance-Enhanced Adjudications Should Be Treated as State Action*, 22 WASH. U. J.L. & POL'Y 645, 648 (2006). In October 2007, this mere hunch proved correct as Jones admitted to doping and cheating on her way to winning five medals at the 2000 Sydney Olympiad. A.J. Perez, *Poll: Doping Questions Cloud Americans' View of Games*, USA TODAY, July 31, 2008, at A1.

9. See McCaffrey, *supra* note 8, at 647-48; Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 184 (2008); Barrie Houlihan, *Building an International Regime to Combat Doping in Sport*, in *SPORT AND INTERNATIONAL RELATIONS: AN EMERGING RELATIONSHIP* 62 (Roger Levermore & Adrian Budd eds., 2004); see also Jencks Act of 1957, 18 U.S.C. § 3500 (2000).

## II. HISTORY OF USADA

Prior to the Games of the XXVIIth Olympiad, held in Sydney, Australia in 2000, there existed a strong international perception that PEDs were widely used by U.S. Olympic athletes.<sup>10</sup> Rumors abounded concerning the withdrawal by some American athletes scheduled to participate in international athletic competitions when the athletes learned the events would be drug tested.<sup>11</sup> This international sentiment was part of what prompted the United States Olympic Committee (USOC) to ultimately advance a radical new approach to fighting drug use in Olympic-movement sports.<sup>12</sup>

The Olympic Games are organized in many layers of national and international governing bodies as well as sport-specific organizations. In the United States, the National Governing Bodies (NGBs) of each Olympic sport and Paralympic sport<sup>13</sup> have relationships with the USOC and the International Federations (IFs) for that NGB's sport, a relationship that facilitates international competition.<sup>14</sup> The USOC is a member of the International Olympic Committee (IOC), the entity responsible for conducting the Olympic Games.

The idea and need to develop an independent anti-doping agency overseeing Olympic sports in the United States dates back to 1975 when President Gerald Ford established the Commission on Olympic Sports Olympic Task Force.<sup>15</sup> The Task Force aimed to study various means to

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10. Leslie Horna, *U.S. Anti-Doping Agency*, OLYMPIC COACH, Fall 2000, at 6.

11. Anne Benedetti & Jim Bunting, *There's a New Sheriff in Town: A Review of the United States Anti-Doping Agency*, 2 INT'L SPORTS L. REV. 19, 20 (2003).

12. See generally, Alan Abrahamson, *USATF Is Issued Deadline by USOC*, L.A. TIMES, Jan. 30, 2004, at D14.

13. For any sport which is included on the program of the Olympic Games, Paralympic Games, or the Pan-American Games, a NGB may be recognized after proving amateur sports status, proving that it is the sole NGB for its sport, and completing an application of eligibility. For the sport that it governs, an NGB may (1) represent the U.S. in the corresponding international sports federation; (2) establish national goals and encourage attainment of those goals; (3) coordinate the amateur athletic activity for that sport in the U.S.; (4) exercise jurisdiction over international amateur athletic activities and sanction international amateur athletic competitions in the U.S.; (5) conduct amateur athletic competitions (including national championships, and international amateur athletic competitions) and establish procedures for determining eligibility standards for participation; (6) recommend individuals and teams to represent the U.S. in the Olympic, Paralympic, and Pan-American Games; and (7) designate individuals and teams to represent the U.S. in international amateur athletic competitions. See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220524 (2000).

14. 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 n.3 (2003).

15. Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L. J. 91, 94 (2005).

improve the United States' performance at international sporting events. The task force's findings led to the eventual passage of federal law now known as the Ted Stevens Amateur and Olympic Sports Act in 1978 (the "Sports Act")<sup>16</sup> establishing the USOC as the sole entity for nominating athletes to the Olympic Games and empowering it to recognize a NGB for each Olympic sport.<sup>17</sup> This centralized organization of the United States Olympic movement with the purpose of developing athletes across sports enabled the current level of success that Americans have enjoyed at the Olympic Games.<sup>18</sup> However, despite the USOC's many positive influences on American athletic achievement,<sup>19</sup> concerns both abroad and in America that U.S. athletes were fueled by drugs necessitated intensive investigation during the next decades.<sup>20</sup>

While skepticism regarding seemingly super-human performances of athletes is not novel, one of the first proven blows to the purity of Olympic sport occurred in 1988, at the Olympic Games in Seoul, South Korea.<sup>21</sup> After shattering the 100 meter dash record with a time of 9.79 seconds, Canadian sprinter Ben Johnson tested positive for stanozolol, an anabolic steroid.<sup>22</sup> Johnson's gold medal was revoked and his record was erased from the record books.<sup>23</sup> While Ben Johnson became the first high-profile athlete to be caught and sanctioned for the use of PEDs, several critics appeared surprised that the new poster-child of Olympic drug cheats was not an American.<sup>24</sup>

Suspicion regarding the American Olympic movement and its athletes grew during the 1980s and 1990s due in large part to rumors of the USOC and its NGBs protecting their athletes.<sup>25</sup> There was a wholesale lack of credible

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16. 36 U.S.C. § 220524.

17. *Id.*

18. *Id.*

19. While the United States boycotted the 1980 XXII Olympiad in Moscow, the United States accumulated 174 medals, including eighty-three gold medals at the 1984 Olympiad in Los Angeles. *1984 Summer Olympics*, DATABASEOLYMPICS.COM, <http://www.databaseolympics.com/games/gamesyear.htm?g=21> (last visited Aug. 1. 2008).

20. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, *supra* note 15, at 95-97.

21. *U.S. and Soviet Officials Uniting to Discourage Athletes' Drug Use*, N.Y. TIMES, Oct. 3, 1988, at Sports. Article notes that Johnson had been disqualified that week after the results from his tests at the Games in late September had come back positive. The U.S. and the U.S.S.R., despite not having positive tests in Seoul, agreed that working to stop drug cheats was a necessary goal, following the drug scandals. *Id.*

22. Perez, *supra* note 8.

23. *Id.* Johnson was eventually banned from any Olympic competition for life in 1993 for again testing positive for steroids after a race in Montreal. Nikki Dryden, *For Power and Glory: State-Sponsored Doping and Athletes' Human Rights*, 13 SPORTS LAW. J. 1, 13 n.80 (2006).

24. Benedetti & Bunting, *supra* note 11, at 19-20.

25. *Id.* Critics claimed that the USOC would allow athletes to participate in the Olympic Games,

evidence to support any such rumors, but the USOC suffered from a severe public perception problem. In response, President Clinton approved the formation of the White House Task Force on Drug Use in Sports in America in 2000 (the White House Task Force).<sup>26</sup> Charged with formulating a plan to protect and rehabilitate the American image while cleaning up Olympic sport, it painted a grim picture of the future of the American Olympic movement, concluding that “[the] use of drugs in sports has reached a level that endangers not just the legitimacy of athletic competition but also the lives and health of athletes – from the elite ranks to youth leagues.”<sup>27</sup> This conclusion, as well as a review of the support behind the report, eventually convinced USOC President Hybl, on June 15, 1999, to convene the USOC Select Task Force on Drug Externalization (the Select Task Force).<sup>28</sup>

The mission of the Select Task Force was to bring together experts and professionals of various backgrounds, many previously uninvolved to sport, to determine (1) if a new external anti-doping program should be established in the United States and (2) to recommend what that program should accomplish if it was determined to be appropriate.<sup>29</sup> The recommendations made by the Select Task Force paved the way for the creation of USADA in 2000.<sup>30</sup> In fact, the direct result of the Select Task Force was to recommend that the USOC externalize its entire anti-doping efforts by creating an independent anti-doping agency.<sup>31</sup>

### III. USADA’S STRUCTURE AND PROCEDURES

USADA is a non-profit, non-governmental agency organized under the laws of Colorado.<sup>32</sup> The USADA Protocol for Olympic Movement Testing

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despite testing positive for steroids, by exonerating them through its internal appeal process. *Id* These criticisms, however, seem unfounded as the USOC’s National Anti-Doping Panel (NADP) for the quadrennial 1996-2000 had perceived, but not actual, problems. Further, after several independent inquiries into the practices under the NADP—including the McLaren inquiry—the *IAAF v. USATF* decision, and the recent IOC inquiry – no credible facts or evidence of any drug cover-up by the U.S. has been proven. See *IAAF v. USATF*, CAS 2002/O/401, award of Jan. 10, 2003.

26. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, *supra* note 15, at 109.

27. Exec. Order No. 13,165, 65 C.F.R. 49469 (2000), *pursuant to* 21 U.S.C. § 1701 *et seq.*

28. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, *supra* note 15, at 105.

29. Tygart, *supra* note 14, at 124.

30. U.S. Anti-Doping Agency, *Mission, History*, USADA.ORG, <http://www.usada.org/who/mission/html> (last visited Aug. 4, 2008).

31. Tygart, *supra* note 14, at 124-25.

32. See generally U.S. ANTI-DOPING AGENCY, UNITED STATES ANTI-DOPING AGENCY PROTOCOL FOR OLYMPIC MOVEMENT TESTING (2004), *available at* <http://usada.org/files/active/>

(the Protocol) has several established precautionary measures to ensure both actual and perceived independence from the USOC, the federal government, and Olympic athletes. USADA's board of directors is self-perpetuating and has ten members, all of whom must be unaffiliated with any of the above listed groups.<sup>33</sup> Of the ten members, five are elected from outside the Olympic family, while the remaining five may be recommended by the NGBs and the USOC Athlete Advisory Committee, consisting of individuals who have competed in the Olympic Games or a World Championship representing the United States in the previous ten years.<sup>34</sup>

USADA receives a grant from the federal government and contracts with the USOC to conduct drug tests and provides results management for athletes in the Olympic movement within the United States.<sup>35</sup> USADA also provides education and research programs.<sup>36</sup> The USOC provides funding to USADA for performing the valuable service of independent testing for PEDs and prohibited methods of gaining competitive advantage.<sup>37</sup> The agreement with the USOC grants it no rights to dictate policies of USADA regarding which athletes are tested, the process of sample collection, or the results management process.<sup>38</sup>

Besides insulating USADA from the USOC and the government, the Protocol also ensures USADA's independence from any athlete's potentially adversarial interests. Active elite athletes, including active ones, are not permitted on the Board or to be employed by USADA.<sup>39</sup> These measures, in addition to a strict conflict of interest policy for its employees, officers, and directors, distance USADA from any actual or apparent influence by the USOC with respect to testing and the adjudication of positive tests.<sup>40</sup>

The pool of athletes subject to USADA testing includes any athlete who is a member of an NGB, athletes competing in an international event in the

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what/protocol.pdf [hereinafter PROTOCOL].

33. See U.S. Anti-Doping Agency, *Meet USADA*, USADA.ORG, <http://www.usada.org/who/meet> (last visited Oct. 22, 2008).

34. PROTOCOL, *supra* note 32, art. 2.

35. *Id.* art. 1.

36. John Meyer, *Teen Fencer Gets One-Year Suspension for Use of Drug*, DENVER POST, May 2, 2001, at D2 (quoting Terry Madden).

37. Blood doping is when an athlete will inject oxygen-rich red blood cells, either their own or those of another, to artificially increase the ability to process oxygen. World Anti-Doping Agency, *A Brief History of Anti-Doping*, WADA-AMA.ORG, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312> (last visited Oct. 22, 2008).

38. See generally, PROTOCOL, *supra* note 32.

39. U.S. Anti-Doping Agency, *Meet USADA*, *supra* note 33.

40. Tygart, *supra* note 14, at 127.



United States, American athletes representing the United States in international competition, and athletes who are present in the United States during a suspension for an anti-doping violation prior to that athlete's retirement.<sup>41</sup> These athletes can be selected for testing for any reason or no reason at all, provided the athlete is participating in, or is likely to participate in, international competition such that the testing is in furtherance of USADA's primary purpose.<sup>42</sup> Upon selection, an athlete must provide USADA with a urine sample that is split into two locking bottles (referred to as A Sample and B Sample).<sup>43</sup> The athlete splits the sample in front of a doping control officer and closes the Berlinger bottles, specially designed to make any tampering after collection immediately obvious, prior to the samples being sent to a World Anti-Doping Agency (WADA) accredited laboratory for analysis.<sup>44</sup> For any athlete whose A Sample reveals the presence of any banned PED or an elevated level of naturally occurring hormones above the threshold WADA has set for those hormones, a test of the B Sample can be performed to confirm the A Sample result.<sup>45</sup> B Sample analysis may be attended by the athlete or his or her representative.<sup>46</sup> A positive test of the B Sample that confirms the A Sample result is considered by USADA to be an adverse analytical finding (AAF) and forms the basis of an anti-doping rules violation.<sup>47</sup> An athlete may waive his or her right to have a confirming B Sample test, also resulting in an AAF.<sup>48</sup>

Upon receipt of a confirmed positive test, USADA turns the case over to the Anti-Doping Review Board (the Review Board).<sup>49</sup> The Review Board consists of three to five independent medical, technical, and legal experts.<sup>50</sup> The lab results and any materials submitted by the athlete are looked at by the Review Board in an anonymous fashion.<sup>51</sup> The Review Board makes a recommendation to USADA on whether there is sufficient evidence of an anti-doping rules violation to proceed.<sup>52</sup> During a Review Board meeting, an

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41. PROTOCOL, *supra* note 32, art. 4.

42. *Id.*

43. *Id.* art. 8(b).

44. *Id.* art. 7(b).

45. *Id.* art. 8(b).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* art. 8(e).

50. *Id.* art. 9(a).

51. *Id.* art. 9(c)(ii).

52. *Id.* art. 9(c)(i)(5).

athlete either may not testify or have a lawyer appear.<sup>53</sup>

Following the Review Board's recommendation, USADA may decide to charge an athlete or other person with an anti-doping rule violation. At this time, the charged person may choose one of two alternative paths.<sup>54</sup> The athlete may refuse to challenge the charges and accept a sanction.<sup>55</sup> Alternatively, the athlete may challenge the charge and request a hearing before an arbitration panel consisting of one or three arbitrators selected from the American Arbitration Association (AAA)/North American Court of Arbitration for Sport (NCAS) with appeal available to the Court of Arbitration for Sport (CAS).<sup>56</sup> CAS is the final arbiter in doping cases.<sup>57</sup>

#### IV. THE JENCKS ACT AND ITS INAPPLICABILITY TO USADA

Often, and particularly true in the cases arising from the BALCO investigation, the federal government conducts a parallel investigation to that of USADA in efforts to stop steroid-related crimes. USADA regularly cooperates with the federal government in its information gathering.<sup>58</sup> Athletes and others faced with a federal government prosecution often argue they should have the same right of access to USADA's documents as they do to those held by the Department of Justice.<sup>59</sup> This argument fails, as the Jencks Act does not apply to USADA because it is not a federal agency.

##### *A. The Jencks Act and Defining a Federal Agency*

The Jencks Act<sup>60</sup> and the production of materials defined in case law and referred to as *Brady/Giglio* materials<sup>61</sup> are two means whereby a criminal defendant can require the production of materials in the possession of a federal government agency that are believed to be material to guilt or punishment. The Jencks Act, promulgated in 1957 after the case involving the famous actor Clinton Jencks, allows a criminal defendant in a federal prosecution to discover any witness statement against him, which is relevant to the witness's

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53. *Id.*

54. *Id.* art. 10(a).

55. *Id.*

56. *Id.* art. 9(b).

57. *Id.* art. 10(c). A limited appeal right is available to the Swiss Federal Tribunal. That tribunal will not review the substance of the matter and has deferred substantially to the CAS in the rare occasion that a further appeal has been taken.

58. See *United States v. Graham*, 555 F. Supp. 2d 1046 (N.D. Cal. 2008) (*Graham I*).

59. *Id.*

60. 18 U.S.C. § 3500.

61. See *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

testimonial, in possession of the United State government.<sup>62</sup> In interpreting the Jencks Act, the Supreme Court in *Brady v. Maryland* held that the government must disclose evidence that "is material either to guilt or to punishment."<sup>63</sup> This standard of materiality was later expanded to include any type of evidence that could impeach a government witness.<sup>64</sup> These disclosure requirements, however, only apply to the government or federal agencies.<sup>65</sup>

Discovery obligations under the *Brady/Giglio* line of cases are limited to the materials within the possession of federal agencies.<sup>66</sup> "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant."<sup>67</sup>

No one case defines "federal government agency" for discovery purposes in a criminal matter. Under the Administrative Procedures Act (APA),<sup>68</sup> an agency is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," excluding Congress, the courts, and certain other law-making and judicial entities.<sup>69</sup> Under the APA, agencies are entities created by statute that have the power to engage in rulemaking and adjudication.<sup>70</sup>

Cases addressing the meaning of "federal government agency" in other contexts indicate that USADA is not a government agency. Further, the facts surrounding USADA's operations and the underlying investigation establish that USADA is not a government agency.

"Agency" within Title 18, the Criminal Code, of the United States Code is defined to include "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."<sup>71</sup> The United States has no proprietary interest in USADA. Based on

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62. 18 U.S.C. § 3500.

63. *Brady*, 373 U.S. at 87. This type of evidence has also been referred to as "exculpatory evidence."

64. *Giglio*, 405 U.S. at 154-55.

65. 18 U.S.C. § 3500.

66. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 93-94 (1963); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

67. *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989).

68. Administrative Procedures Act, 5 U.S.C. § 5 *et seq.* (2000).

69. 5 U.S.C. § 551 (2000).

70. *Koden v. U.S. Dep't of Justice*, 564 F.2d 228, 232 (7th Cir. 1977).

71. 18 U.S.C. § 6 (2000).

a plain reading of the statute, USADA does not qualify as an agency. The Third Circuit interpreted the definition of “agency” in 18 U.S.C. § 6 in *United States v. Gumbs*.<sup>72</sup> In that case, the defendant was charged with making false claims to the government in violation of 18 U.S.C. § 287.<sup>73</sup> Gumbs entered into construction contracts with the government of the Virgin Islands (GVI) on projects that were funded through a grant from the Department of the Interior. The Third Circuit held that the GVI was not a federal government agency as defined in 18 U.S.C. § 6 and that Gumbs therefore could not be convicted under 18 U.S.C. § 287 because that statute required a false claim to a “department or agency” of the United States.<sup>74</sup> Like the GVI, USADA is not a governmental agency simply because it receives some funding from the federal government. Such an argument leads to absurd conclusions, given the large number of entities that receive government funding but are in no way government agencies.<sup>75</sup>

Entities have also been found to be agents of the government when the government authorizes, directs, and supervises that person’s activities and is aware of his activities.<sup>76</sup> Factors in determining whether a person is a government agent include the

nature of that person’s relationship with the government, the purposes for which it was understood that person might act on behalf of the government, the instructions given to that person about the nature and extent of permissible activities, and what the government knew about those activities and permitted or used.<sup>77</sup>

The case of *United States v. Jones* is instructive to determine the limits of when an entity is an agent of the government. In that case, a pawn shop had cooperated substantially with a government agency, the Bureau of Alcohol, Tobacco and Firearms (ATF), it was not enough to find that the private entity

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72. *United States v. Gumbs*, 283 F.3d 128, 130-31 (3rd Cir. 2002).

73. *Id.* at 130.

74. *Id.* at 132.

75. For example, the federal government, through the National Endowment for the Arts, funds numerous arts programs. If all recipients were considered government agencies, hundreds of poets and local theatre companies would have that designation.

76. This is also known as the “entrapment” theory. *See United States v. Fontenot*, 14 F.3d 1364, 1369 (9th Cir. 1994).

77. *United States v. Jones*, 231 F.3d 508, 517 (9th Cir. 2000) (internal quotations and citations omitted) (ruling that a federally licensed firearm dealer and pawn shop was not a government agent for entrapment purposes where it cooperated with ATF in providing information about defendant, including tipping ATF off when defendant retrieved his firearms from the dealer so that ATF could arrest defendant).

was an agent of the government.<sup>78</sup>

There is no evidence that the government authorizes, directs, or supervises USADA's activities in any way, and none was presented by Graham.<sup>79</sup> Just as the pawn shop's work in *Jones* with the ATF did not turn it into a government agency, USADA's meeting with government agents as part of parallel investigations similarly does not do so.

In *Tanner v. United States*, the Supreme Court addressed the meaning of "United States, or any agency thereof," as used in 18 U.S.C. § 37, in the context of the defendant's conviction for conspiring to defraud the United States.<sup>80</sup> The Court reversed the defendant's convictions for defrauding Seminole Electric, a private company, even though Seminole's construction project was funded by a \$1.1 billion loan from the Federal Financing Bank and a credit agency of the United States Department of Agriculture supervised the construction project.<sup>81</sup> The Court specifically rejected the argument that "anyone receiving federal financial assistance and supervision" is an agent of the United States, noting, "the immense variety of ways the Federal Government provides financial assistance."<sup>82</sup> The Government's suggested requirement that there be "substantial ongoing federal supervision" of the defrauded nongovernmental intermediary before a crime against the United States occurs was similarly rejected as it failed to provide any real guidance.<sup>83</sup> An argument that USADA is a government agency is even less compelling than that for Seminole Electric because the federal government exercises no control over USADA or any of its projects, whereas the federal government retained almost complete control over Seminole Electric's enormous project.<sup>84</sup> While the cases cited above are civil, the definition of government agency is the same in the criminal context, providing no further support to any argument that USADA is a government agency.<sup>85</sup> USADA is even more attenuated

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78. *Id.*

79. The government requested and received the Court's permission to allow the presence of a USADA employee at the execution of the BALCO search warrant in September of 2003. Motion, Exhibit J, ¶71. It was made clear therein that the USADA employee's presence was requested for the purpose of providing technical assistance and that that person possessed no law enforcement authority. If USADA were a federal government agency, such a request would have been unnecessary.

80. *Tanner v. United States*, 483 U.S. 107, 129-130 (1987).

81. *Id.* at 110.

82. *Id.* at 132.

83. *Id.* at 131.

84. *Id.* at 110.

85. See 28 U.S.C. §§ 451 and 1345 (2006); *Acron Inv., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 363 F.2d 236, 240 (9th Cir. 1966) (finding that the Federal Savings and Loan Insurance Corporation qualifies as federal government agency because government possesses ownership interest and more

from the federal government than Seminole Electric, the pawn shop in *Jones*, or the GVI.

USADA is an independent, non-governmental organization organized under the laws of Colorado. The governmental entity that provides USADA with the majority of its funding, the Office of National Drug Control Policy (ONDCP), recognizes USADA as an independent, non-governmental organization.<sup>86</sup> No governmental agencies exercise control over USADA and USADA cannot automatically bring suit in federal court or remove suits brought against it in state courts to federal court.<sup>87</sup>

While USADA receives federal funding and has provided some assistance to law enforcement—as do countless other entities and individuals—those facts do not have the effect of turning USADA into a federal government agency. USADA has no independent authority to obtain materials from the government and is free, absent a subpoena or court order, to decline to produce materials to the government. Indeed, the court in *United States v. Conte* found that USADA cannot obtain grand jury transcripts from the United States Attorney's Office.<sup>88</sup> USADA has no authority to enforce any statutory laws of the United States, which is a determinative factor in this analysis.<sup>89</sup>

In the federal prosecution of Trevor Graham, Graham attempted to obtain USADA's interview of Angel Heredia, a former Mexican discus champion and known steroid supplier.<sup>90</sup> Graham claimed Heredia was "the single most

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than custodial or incidental control); *Fed. Land Bank of Columbia v. Cotton*, 410 F. Supp. 169, 171 (N.D. Ga. 1975) (holding that the Federal land bank was not an agency of the Federal Government which would give the district court jurisdiction under 28 U.S.C.A. § 1345. Bank was not an "agency" within the meaning of Title 28 of the United States Code unless the government had a substantial proprietary interest in it, or at least exercised considerable control over operation and policy in the corporation. Federal land bank was meant to be a private rather than governmental corporation, which would merely be subject to various federal regulations); *Fed. Land Bank of St. Louis v. Keiser*, 628 F.Supp. 769, 771 (C.D. Ill. 1986) (claiming that, despite being a federally chartered corporation, the Federal Land Bank of St. Louis did not qualify as federal government agency for removal purposes pursuant to 28 U.S.C. § 1345).

86. *The International Convention Against Doping in Sport: Hearing Before S. Comm. on Foreign Relations*, 110th Cong. 3 (May 22, 2008) (statement of Scott M. Burns, Deputy Dir. of the Office of Nat'l Drug Control Policy), available at <http://foreign.senate.gov/hearings/2008/hr080522a.html>.

87. See 28 U.S.C §§ 1345 and 1346 (2000).

88. See generally, *United States v. Conte*, 99 F.3d 60 (2d Cir. 1996).

89. *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (stating that FDA files were in the government's possession for purposes of prosecution under sections of the Federal Food, Drug and Cosmetic Act).

90. The federal government prosecuted Graham for perjury. USADA had already convicted Graham in front of the CAS for violations of the WADA Code. Graham was banned for life from Olympic activities. See *Track Coach Trevor Graham Banned for Life by USADA*, L.A. TIMES, July 16, 2008, available at <http://www.latimes.com/sports/la-sp-newswire16-2008jul16,0,5452083.story>.

important witness for the government in [the] prosecution.”<sup>91</sup> Graham filed a motion for production of Jencks Act and *Brady/Giglio* materials based on the premise that USADA is a federal government agency must produce this and any other incriminating evidence.<sup>92</sup> USADA objected and stated, among other things, that the Jencks Act does not apply to it.<sup>93</sup> In its order, the court determined that USADA was not a governmental entity.<sup>94</sup> But nevertheless, the court granted Graham’s motion to compel discovery from USADA as a third party, overruling USADA’s contention that the discovery sought constituted work product because “the need for the material that outweighs USADA’s interest in non-disclosure.”<sup>95</sup>

The fact that USADA regularly conducts parallel civil investigations to those of the federal government does not make USADA a government agency, despite any evidentiary overlap with the federal criminal matter. An entity must, at the very least, act at the government’s direction before it can be saddled with the label and obligations of a federal government agency in this context—the “prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case.”<sup>96</sup> USADA’s purpose to enforce sports doping rules is entirely independent and separate from the government’s job to investigate the commission of crimes in violation of statutory laws. Because USADA is not a government agency and there is no joint investigation between USADA and the government, the government is not obligated under the Jencks Act to produce to USADA materials not in the government’s possession.<sup>97</sup>

## V. STATE ACTION DOCTRINE

The state action doctrine emerged not long after the adoption of the post-Civil War amendments in *United States v. Stanley*, collectively referred to as

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91. *United States v. Graham*, 555 F. Supp. 2d 1046, 1048 (N.D. Cal. 2008) (*Graham I*).

92. *Id.* at 1051. Graham simultaneously filed a motion to compel pursuant to Federal Rule of Civil Procedure 37. *Id.* at 1049; see FED R. CIV. P. 37.

93. *Graham I*, 555 F. Supp. 2d at 1048.

94. *Id.* at 1048-49.

95. *Id.* at 1049.

96. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added) (holding that state prosecutors violated *Brady* when they failed to disclose material, known and unknown to prosecutors, in possession of state agency investigating defendant’s crimes).

97. See *United States v. Durham*, 941 F.2d 858, 860-61 (9th Cir. 1991) (claiming that the DEA and Weber/Morgan County Strike Force, a Utah state agency, were not undertaking a joint investigation and state agency was working on a separate investigation to bring charges under a Utah state statute. The federal government was not in possession of the state agency’s notes of interviews for Jencks Act purposes). *Id.* at 861.

the *Civil Rights Cases*, which stated that “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment.”<sup>98</sup> The state action doctrine holds that the Constitution applies only to national and local governments and government entities; it does not apply to private actors.<sup>99</sup> In support of this doctrine, the Supreme Court has articulated two policy rationales.<sup>100</sup> First, it explained that the doctrine “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”<sup>101</sup> Second, the Court articulated that the doctrine protects state sovereignty because structuring the legal relationships of private citizens belongs to the state, rather than the federal government.<sup>102</sup> To determine whether an individual or entity can be considered a state actor the Court has articulated three tests: public function, entanglement, and entwinement.<sup>103</sup> Each test is independent of the others such that should USADA fulfill any one of the numerous tests employed over time by the Supreme Court, it could be found to be a state actor.

#### *A. Public Function Test*

The first test, usually referred to as the “public function exception” or “traditional function test,” recognizes that an individual or entity that performs a function traditionally and exclusively reserved for the government shall be considered a state actor.<sup>104</sup> First articulated in *Jackson v. Metropolitan Edison Co.*, the Court held that a private utility company did not engage in action sufficient to characterize it as a state actor.<sup>105</sup> While the Court concluded on that occasion that the acts of a public utility company do not constitute state action, it has found state action when a private entity engaged in the

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98. *United States v. Stanley*, 109 U.S. 3, 11 (1883).

99. Robert Hochman, Note, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1692-99 (1996).

100. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 512-13 (2006).

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

102. *Id.*; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001) (describing tests for determining state action); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

103. See e.g., *Brentwood*, 531 U.S. at 298; *Rendell-Baker*, 457 U.S. at 842.

104. *Rendell-Baker*, 457 U.S. at 842 (noting that the relevant question to determine state action is not whether the entity performs a “public function” but whether the function has been traditionally the exclusive prerogative of the state) (emphasis in original); see also *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

105. *Jackson*, 419 U.S. at 352 (holding that state action exists “in the exercise by a private entity of powers traditionally exclusively reserved to the State”).



management of a town,<sup>106</sup> park,<sup>107</sup> or electoral system.<sup>108</sup> Each of these activities is traditionally performed only by governments. By engaging in them, the Court found that the private entities at issue were acting as the state and were therefore subject to the limitations on action set forth in the Constitution.

The Supreme Court has heard argument that the USOC is a state actor because it performs a public function.<sup>109</sup> The Court refused to find that the USOC was a state actor and has subsequently refused to extend the doctrine to other entities involved with the national Olympic movement.<sup>110</sup> In *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, the Court held that the USOC did not engage in any actions sufficient to recognize it as a state actor.<sup>111</sup> The fact that the USOC exists under a government charter was deemed irrelevant to the issue of state action since it no more makes the USOC a state actor than it does any other corporation.<sup>112</sup> That the USOC performs a function in the national interest is also not sufficient for the Court to find a public function or state action.<sup>113</sup> A national or public interest is in no way the same as a public function.<sup>114</sup>

The public function test has been found applicable in only extremely limited circumstances, those that historically were solely and exclusively the prerogative of the state.<sup>115</sup>

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106. See *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

107. See *Evans v. Newton*, 382 U.S. 296, 297 (1966).

108. *Terry v. Adams*, 345 U.S. 461 (1953).

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

110. It is well established fact that the USOC and NGBs are not considered state actors. See *id.* at 543 (clarifying that the fact that the USOC has corporate charter and serves a national interest does not make it a state actor when there is no government control or coercive power exercised over USOC); *Behagen v. Amateur Basketball Ass'n of the U.S.A.*, 884 F.2d 524, 531 (10th Cir. 1989) (finding that it follows from the fact that the USOC is not a governmental actor that the ABA/USA, the NGB for basketball, is also not a governmental actor); *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181, 1191-92 (D.D.C. 1980) (holding that the USOC's vote to prevent the national team from attending the 1980 Olympic Games in Moscow can not be considered state action and that the USOC is an independent body and not so entwined with the government to be a state actor).

111. *S.F. Arts & Athletics*, 483 U.S. 522, 543 (1987).

112. See, e.g., *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-22 (9th Cir. 1996) (finding that, despite being a federally chartered non-profit corporation, the Red Cross is not a government actor for hiring and firing purposes), *cert. denied*, 519 U.S. 1010 (1996).

113. See *S.F. Arts*, 482 U.S. at 543; see also *Hall*, 86 F.3d at 922-23 (stating that the status of the Red Cross is based on the situation at hand and not relative to all the functions of the organization, even if in the national interest).

114. *Hall*, 86 F.3d at 922-23.

115. *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946) (holding that a company operating a town engages in actions considered to be a public function); *Terry v. Adams*, 345 U.S. 461, 476-78 (1953) (claiming that the holding of elections is a public function); *Evans v. Newton*, 382 U.S. 296, 302

### *B. The Entanglement Test*

The entanglement test asks whether the government affirmatively authorizes, encourages, or facilitates private conduct to such a degree that the private conduct can be fairly attributed to the government.<sup>116</sup> The first Supreme Court case to recognize this test, *Shelley v. Kraemer*, held that a private agreement not to sell property within a subdivision to persons of color became illegal when enforced by a court, as the state was acting in violation of the Fourteenth Amendment.<sup>117</sup> This controversial decision created a slippery slope as, under *Shelley*, nearly any private action could be interpreted as state action, provided that a court acted to enforce it.<sup>118</sup> In an attempt to solve this conundrum, the Court in *Lugar v. Edmondson Oil Co.* enunciated a two-part test for state action that asked whether (1) the deprivation has resulted from the exercise of a right having its source in statutory authority, and (2) the party charged with the deprivation can be considered a state actor because his conduct is otherwise chargeable to the state.<sup>119</sup> In *Lugar*, the Court considered an ex parte attachment, holding that it constituted state action because (1) it is authorized by statute, and (2) the sheriff, an agent of the state, carried out the attachment.<sup>120</sup>

Notably, however, entanglement has not been found on the basis of the receipt of public funding alone. In *Rendell-Baker v. Kohn*, the school at issue received ninety-nine percent of its funding from the state government.<sup>121</sup> However, this was simply one of many factors reviewed by the Court, including the governance of the school and involvement of the government in employment decisions and in policy making.<sup>122</sup> Finding that the state was not involved in any of these aspects of running the school, or in any others, the Court held that no state action occurred when the school board fired a number of its teachers and counselors.<sup>123</sup>

### *C. Brentwood and the Entwinement Test*

The Supreme Court's recently endorsed entwinement test recognizes state

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(1966) (finding that the maintenance of public parks is a public function).

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

117. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

118. *CHEMERINSKY*, *supra* note 100, at 528.

119. *Lugar*, 457 U.S. at 937.

120. *Id.* at 938.

121. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 832 (1982).

122. *Id.*

123. *Id.* at 843.

action when it appears that a private entity's actions are "entwined with governmental policies . . . and [its] management or control."<sup>124</sup> The Court found state action on the basis of entwinement alone for the first time in *Brentwood Academy v. Tennessee Secondary School Athletic Association* (TSSAA).<sup>125</sup> The level of entwinement necessary to find state action has been characterized as such that the decisions of the association can be attributed to the government.<sup>126</sup> Case law and the strong dissent of Justice Thomas suggest that this will rarely be the case, even when an entity is publicly funded, if there is independent decision-making at any level.<sup>127</sup>

In *Brentwood*, the Court held that TSSAA, a high school athletics oversight board, is a state actor after a very fact-based inquiry looking to a number of factors including access to the state pension fund and the overwhelming participation by the public schools in the state of Tennessee.<sup>128</sup> Based on these and other facts deemed relevant, the Court found the TSSAA to be entwined with the state government both from the bottom up, as membership and organization was overwhelmingly based on, and driven by, the public schools, and from the top down, as the Tennessee state government provided, among other things, eligibility for the state pension program for the ministerial employees of the TSSAA.<sup>129</sup>

Another aspect of the entwinement test asks whether there is such a "close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."<sup>130</sup> To satisfy the requirement, courts require a showing that either the challenged activity of the entity results from a state's use of "coercive power" or that the state provides significant overt or covert encouragement.<sup>131</sup> *Brentwood*, however, represented a significant departure from the prior, limited, findings of state action. Justice Thomas vigorously dissented.<sup>132</sup> The TSSAA is a uniquely public-private entity that received substantial benefits for its employees from the state and had a membership of almost entirely public schools.<sup>133</sup> It is yet to be seen whether the Court will continue to expand its definition of entities

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124. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

125. *Id.* at 291.

126. *See id.*

127. *Id.* at 305 (Thomas, J., dissenting).

128. *See id.* at 298-99.

129. *See id.* at 300. Notably, the Court's decision in *Brentwood* represents the first and only time it has found state action solely on the basis of entwinement.

130. *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

131. *Id.* at 296.

132. *See id.* at 305 (Thomas, J., dissenting).

133. *See id.* at 291.

that are state actors through the use of the entwinement test, or limit *Brentwood* to its facts.<sup>134</sup>

V. USADA IS NOT A STATE ACTOR OR A FEDERAL AGENCY UNDER ANY TEST EMPLOYED BY THE COURTS OF THE UNITED STATES

As previously noted, Graham attempted to obtain USADA's interview of Heredia by filing, among other things, a motion for the production of Jencks Act and *Brady/Giglio* materials. These materials, however, may only be obtained from governmental parties privy to the federal criminal trial.<sup>135</sup> As demonstrated through the public function, entanglement, and entwinement tests detailed above, USADA is not a state actor.

A. Public Function Test

USADA does not perform a traditional public function. Applying that test to USADA, it cannot be found to be a state actor. The Court's analysis focuses on whether the corporation in question performs a function that has been traditionally and exclusively the prerogative of the state.<sup>136</sup> Testing athletes for PEDs and disciplining those who test positive, as well as others involved in aiding in unnatural performance enhancement in sport, is not a function performed traditionally or exclusively by the government of the United States or of any state.

In fact, prior to 2000, USADA's functions were performed by the USOC and the individual NGBs of each Olympic sport. Because case law already clarifies that the USOC and other similar entities are not state actors as they do not perform traditional public functions, similarly, a court likely will not deem USADA to be one.<sup>137</sup> As previously mentioned, the USOC determined it would be preferable and more transparent to have an outside entity perform anti-doping services under contract with the USOC.<sup>138</sup>

In the United States, private entities handle the majority of sports-related

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134. Megan M. Cooper, *Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to the Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 35 CREIGHTON L. REV. 913, 986 (2002).

135. 18 U.S.C. § 3500.

136. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (noting that the relevant question to determine state action is not whether the entity performs a "public function" but whether the function has been traditionally the *exclusive* prerogative of the state) (emphasis in the original); see also *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (citing *Jackson v. Metro Edison Co.*, 419 U.S. 353 (1974)).

137. See, e.g., *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 543 (1987).

138. Tygart, *supra* note 14, at 127.

drug testing. The National Football League, Major League Baseball, the Professional Golf Association, the National Hockey League, and the National Collegiate Athletic Association each manage the drug testing and adjudication for its individual league.<sup>139</sup> The role of USADA with respect to Olympic athletes and Olympic hopefuls is no different than the role of the laboratories and testing agencies contracted by the professional and collegiate sports leagues in the United States.

In addition to not performing a traditional public function, USADA also is not organized or empowered to enforce federal law or the law of any state.<sup>140</sup> It cannot bring criminal charges or cause the incarceration of any individual. Rather, USADA adopts and enforces its own rules against those who seek to participate in Olympic and Olympic-related sports. USADA processes alleged anti-doping rule violations involving athletes, coaches, and others involved with Olympic sport, but USADA's actions are not similar to those of law enforcement.<sup>141</sup> Often USADA enforces anti-doping rules involving substances and methods prohibited in Olympic sport that are otherwise perfectly legal within the United States. Because USADA has been charged with keeping Olympic sport clean, its rules punish actions far different from, and frequently outside the realm of, what could be deemed criminal by the federal government or any state.<sup>142</sup> USADA, however, does not engage in a selective prosecution of certain criminal laws. USADA has its own rules, standards, and procedures that it enforces, as necessary, against athletes, coaches, and others involved in Olympic-related sports.

A relevant example occurred prior to the 2006 Winter Olympic Games in Turin, Italy, when Zachary Lund, a skeleton<sup>143</sup> athlete, tested positive for

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139. See e.g., MAJOR LEAGUE BASEBALL, 2007-2011 BASIC AGREEMENT (2007), available at <http://mlbplayers.mlb.com/pa/info/cba.jsp>; NATIONAL FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 (2006), available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=0&type=1>.

140. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 926 (1982) (noting that enforcement of a judicial decision is state action).

141. See, e.g., *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Brady v. Maryland*, 373 U.S. 83, 93-94 (1963).

142. It is a violation of the WADA Code to test positive for any trace of alcohol when in competition. It is not illegal in any state or under federal law for an individual over the age of twenty-one to have trace amounts of alcohol in their system while, for example, playing softball. Also, there are many prescription medications that are perfectly legal for individuals with a prescription to possess and take, but that would violate the WADA Code unless the athlete has previously applied for and been granted a therapeutic use exemption (TUE).

143. Skeleton is a sport similar to the luge. USA Bobsled & Skeleton Federation, *Skeleton*, BOBSLEDTEAM.ORG, <http://bobsled.teamusa.org/content/index/851> (last visited Oct. 22, 2008). Whereas, athletes in the luge travel feet first, skeleton athletes slide down an icy track at very high rates of speed on a small sled head first. *Id.*

finasteride.<sup>144</sup> Though one milligram of finasteride is found in the anti-hair-loss medication Propecia,<sup>145</sup> it can also be used as a masking agent, hiding the use of other PEDs.<sup>146</sup> For that reason, the WADA Prohibited Substance List, also employed by USADA, lists finasteride as a prohibited substance.<sup>147</sup> The fact that finasteride, in its prescription form, is legal under the laws of the United States does not affect whether USADA may test for, or seek to discipline individuals for the use or possession of it. USADA may, and does, test for and punish for the use or possession of any known substance or mechanism presently recognized by WADA that may aid in sports doping.<sup>148</sup> A few substances on the Prohibited Substance List are available as prescriptions and a couple are available over-the-counter at stores throughout the United States.<sup>149</sup> Additionally, whether U.S. law prohibits the use and/or possession of some of the substances on the Prohibited Substance List, not all of the substances or methods prohibited by USADA are illegal. Unlike the federal government, which polices the public, USADA's rules only regulate private activity and do not even apply to all American athletes.

For a court to find USADA a state actor on the facts above would drastically expand the prior Supreme Court understanding of a public function and is, therefore, highly unlikely.

### *B. Entanglement Test*

A court also would not be likely to hold USADA to be a state actor under the entanglement test as it is not sufficiently entangled with the federal government such that the federal government can control its actions.<sup>150</sup> The government does not dictate or overtly encourage the undertaking of USADA's responsibilities. No evidence exists to demonstrate that any state, state agency, or the federal government exerts control over USADA. The ONDCP supplies two-thirds of USADA's funding. It does not exert any

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144. Finasteride is the primary ingredient in the anti-hair-loss medication Propecia. Propecia, <http://www.propecia.com/finasteride/propecia/consumer/index.jsp> (last visited Oct. 28, 2008).

145. *Id.*

146. World Anti-Doping Agency, 2007 *WADA Prohibited List*, WADA-AMA.ORG, [http://www.wada-ama.org/en/prohibited\\_list.ch2](http://www.wada-ama.org/en/prohibited_list.ch2) (last visited Oct. 28, 2008).

147. *Id.*

148. There is a USADA process by which athletes may obtain permission to use legitimate medications.

149. See World Anti-Doping Agency, 2007 *WADA Prohibited List*, *supra* note 145, at 11. Ephedrine is common in over-the-counter cold medicines and alcohol is banned in a number of sports for in-competition testing.

150. *Rendell-Baker v. Kohn*, 457 U.S. 830, 848 (1982) (finding state action because the school was heavily regulated and virtually all its funds came from the state).

power over USADA's decision making. The ONDCP funding simply mirrors federal grants received by hundred of thousands of private entities each year. As demonstrated by the Court's reasoning in *Rendell-Baker*, the mere fact of public funding does not make a private entity any more a state actor than an entity receiving no federal funding.<sup>151</sup> The other one-third of USADA's funding is supplied by private funding sources, including the USOC.<sup>152</sup>

Additionally, the federal government exerts no control over USADA's decision-making process or any of its employees.<sup>153</sup> USADA's employees are not federal or state government employees. Additionally, USADA's contract with the USOC is merely a contract for services between two private entities, and nothing more. As articulated in Section I, the Protocol establishes USADA as a private, independent firm, whose policies are set by its own board with guidance taken from the policies of WADA, a private international organization based in Switzerland.<sup>154</sup> The fact that USADA performs services that are within the national interest and occasionally beneficial to law enforcement does not lead to the conclusion that any state agent has control over USADA.<sup>155</sup>

### C. Entwinement Test

There is also not sufficient evidence to satisfy the heavily fact-specific inquiry necessary to determine under *Brentwood* that USADA and the federal government are "pervasive[ly] entwine[d]."<sup>156</sup> First, USADA's policies are not entwined with those of the government. The structure of USADA is not a collection of recognized state actors, such as public schools or city police.<sup>157</sup> Rather, each individual employed by USADA is a private citizen receiving a paycheck from a Colorado non-profit entity. Additionally, USADA employees, unlike the TSSAA board members, do not receive any government benefits, such as pension funds. USADA also does not hold itself out to represent or act for any government nor do those who are within the ambit of USADA's testing believe that the government of the United States or any state

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151. *See id.* at 840-41.

152. As noted above in Section I, the USOC is neither a state actor nor a federal agency and receipt of funds from a private corporation has no effect on USADA's status as a private entity since countless private corporations receive public funds in the form of grants and contracts without becoming state actors or agents of the federal government.

153. *See generally* PROTOCOL, *supra* note 32, at § 1.

154. *See id.*

155. *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 549 (1987) (performing a function that serves the public is not necessarily a public function).

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

157. *See id.* at 314 (Thomas, J., dissenting).

is the party that actually performs the tests and seeks the results. In fact, the only connection between USADA and the federal government stems from the grant of the ONDCP, which is not a strong enough connection to demonstrate that USADA is entwined with the federal government.<sup>158</sup> USADA also does not have a “close nexus” between itself and the State.<sup>159</sup>

As previously stated, USADA is a separate entity from even the USOC, the entity for which it provides virtually all of its services. USADA is not entangled with the federal government in any manner that could be equated to the level of entanglement demonstrated in *Brentwood*. Even assuming that the Court would again find state action solely on the basis of entanglement, USADA is so dissimilar from *Brentwood* that there is no strong argument that such a finding would ever be made as to it.

## VI. CONCLUSION

There is no basis, under any test previously enunciated by the Supreme Court, to find that USADA is a state actor. While it clearly performs a function within the national interest and has, particularly with respect to the BALCO investigations, cooperated with the Department of Justice in the prosecution of athletes, coaches, and their drug suppliers, these facts do not rise to the level of state action. Neither is USADA a federal agency. It does not pass regulations nor is it chartered under a statute defining the scope of its powers.

The USADA process is fundamentally fair and strikes a fair balance between the interest of clean athletes and the accused’s right to due process prior to being removed from competition. The Protocol currently provides athletes within the testing pool with notice of USADA’s procedures, which include a multitude of procedural protections for both athletes and USADA. The interests of USADA in fair sport and protecting clean athletes must drive its testing and procedures. USADA has no incentive to falsely punish athletes, as each positive test demonstrates how far USADA has to go in achieving its mission.

As USADA is not a government agency, it is not required under the Jencks Act to turn over evidence that incriminates an athlete, coach, or other individual in the event that individual finds him or herself in a court of law.

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158. *But cf. id.* at 304 (finding entwinement due to a number of substantial factors, including a greater than eighty-four percent membership of public schools, laws providing access to the state pension fund and the ability of TSSAA to dictate policies to the public schools demonstrated entwinement).

159. *Id.* at 295 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (internal quotation omitted)).



USADA is in no way similar to a police force or the Department of Justice. USADA cannot enforce any laws and its policies and procedures are not coextensive with the laws of the United States. As noted above, many substances and methods deemed impermissible in Olympic sport are perfectly legal under the laws of the United States.

There is no evidence that USADA is under the control of, or is coerced by, the federal government. Certainly, USADA is not entangled with the government in the way that the Supreme Court has found necessary to find that a nominally private entity is in fact a state actor. USADA sets and enforces its policies to reach its goals of clean sport in the Olympic movement.

USADA cannot be labeled, under the law as it now stands, as a state actor or federal agency. Absent either of those monikers, USADA has broad latitude as a private entity duly authorized by the USOC and NGBs to enact and enforce its policies, the USOC National Anti-Doping Policies, and the World Anti-Doping Code in pursuit of its goal of clean sport.