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# FROM MEDALS TO MORALITY: SPORTIVE NATIONALISM AND THE PROBLEM OF DOPING IN SPORTS

DIONNE L. KOLLER\*

## I. INTRODUCTION

Marion Jones is a national hero. While she boosted the prestige of the United States during her amazing dominance of track and field, she contributed to it even more when she went to prison for lying about her use of performance-enhancing substances during that period. This is because singling out Jones enabled the United States, unequivocally, to show moral outrage over sports doping. Although Major League Baseball was at the time mired in a performance-enhancing drug scandal of its own, it was Jones who allowed the United States to demonstrate its unwavering resolve and moral clarity on the issue. In giving her the maximum six months in prison, Judge Kenneth Karas explained that he wanted to send a message to athletes that cheating in sports is wrong, stating that “athletes in society . . . serve as role models to children around the world. When there is a widespread level of cheating, it sends all the wrong messages.”<sup>1</sup> Yet Karas, and the government officials who supported Jones’s harsh penalty, were not just sending a message to elite athletes; they were sending a message to the world. Notwithstanding the government’s tap dancing around the issue of steroid use in professional sports, the Jones prison sentence hoped to convey that the United States was now officially tough on doping.<sup>2</sup>

It is clear that Marion Jones broke the law when she lied to a grand jury inquiring about her performance-enhancing drug use. However, her spectacular fall from Olympic champion to convicted felon must be put in its

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1. *Track Star Marion Jones Sentenced to 6 Months*, CNN.COM, Jan. 11, 2008, <http://www.cnn.com/2008/CRIME/01/11/jones.doping/index.html> (explaining that Jones’s sentence was based on the fact that the use of steroids “affects the integrity of athletic competition” and that he hoped her sentence would “have a deterrent factor”).

2. See MICHAEL D. GIARDINA, *SPORTING PEDAGOGIES: PERFORMING CULTURE AND IDENTITY IN THE GLOBAL ARENA* 99 (2005) (explaining that the “figure of the American athlete – in fact the whole of sporting culture in the United States – has become [re]-sutured into the various narratives about the contested nature of freedom[s], patriotism[s], and democracy in a post-9/11 moment”).

proper context. That Jones was put before a grand jury and asked about her performance-enhancing drug use in the Olympic Games would have been unimaginable for our government officials not so long ago. When international acclaim was to be had simply by winning Olympic medals, the United States Government was happy to look the other way while prominent athletes were accused of doping violations. Indeed, government officials turned a blind eye to mountains of evidence that many of our Olympic athletes were winning by doping. Competing against athletes from countries like East Germany, the Soviet Union, and China, who were believed to use performance-enhancing drugs to achieve athletic success, gave government officials no incentive to clean up our doping problem. Marion Jones likely had this system in mind when she took her "flaxseed oil" and became America's sweetheart. Indeed, had she competed in the 1980s or early 1990s, Jones would very likely be in her retirement now, enjoying the riches and fame that those now-retired gold medals would bring. Instead, she went to prison and helped usher in a new era in the American Olympic Movement. The United States still wants to win in Olympic competition,<sup>3</sup> but now we must do it with the moral authority that we do not cheat.

This essay seeks to go behind the common anti-doping rhetoric, which explains the doping problem as one of cheating individuals and a misguided private sector, to highlight the complexity of the government's relationship to Olympic Movement sports and sports doping and the sports paradigm in which this relationship takes place. In doing so, we can better understand the impulses of a nation that once produced Marion Jones, and others like her, and which now purports to be a worldwide leader in the fight against doping. It is in understanding the true role of the government in a win-at-all-costs sports paradigm that can ensure the anti-doping "cure" is not worse than the disease.

## II. DOPING AND THE TEMPTATION OF ATHLETES

Reflecting the ethos of American society, doping is routinely portrayed as a problem of the individual and not the culture.<sup>4</sup> Specifically, doping is a

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3. Amy Shipley, *Mettle, Not Medals, is Goal of United States Team; Olympic Officials Emphasizing Character Instead of Athletic Achievement*, WASH. POST, Apr. 19, 2008, at A1 [hereinafter Shipley, *Goals of United States Team*].

4. This is quite unlike the reaction in Canada to doping scandals such as that involving sprinter Ben Johnson in the 1988 Olympics. Scholars have noted that the scandals in Canada provoked national "shame" and were seen as a "national disgrace." Further, it was noted that "few" blamed Johnson or rejected him, but instead the government attempted, through the Dubin Commission and other forms of inquiry, to understand the root of the problem and the pressures athletes faced to win. Bruce Kidd et al., *Comparative Analysis of Doping Scandals: Canada Russia, and China*, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT 153 (Wayne Wilson &

problem of an individual athlete gone wrong, an athlete who chose cheating and greed over “clean” competition. Thus, the rhetoric of the anti-doping movement is one of misguided individualism, and the temptation to cheat rather than “work” for victory.<sup>5</sup> As President Bush stated in his 2004 State of the Union address: “the use of performance-enhancing drugs like steroids in . . . sports . . . sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character.”<sup>6</sup> Commentators note that with the rewards for athletic success so great, the temptation to cheat is enormous.<sup>7</sup> For instance, scholars have explained the doping problem in terms of game theory, the study of how players in a game pursue strategies that will maximize their returns by anticipating the actions that will be taken by other players.<sup>8</sup> Game theory has been applied to the

Edward Derse eds., 2001).

5. Darryl C. Wilson, “*Let Them Do Drugs*” – *A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game*, 8 FLA. COASTAL L. REV. 53, 58-59 (2006) (explaining that it is the “outlandish” potential for riches that drives athletes to cheat, because they are drawn to “doing whatever it takes to compete and win a potential lifetime of riches.”); *The Drug Free Sports Act of 2005: Hearing on H.R. 1862, Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Energy and Commerce Comm.*, 109th Cong. 5 (2005) [hereinafter *The Drug Free Sports Act of 2005*] (statement of Rep. Cliff Stearns) (explaining that athletes’ “better sports through chemistry attitude replace [sic] hard work, dedication and honesty as the keys to success for our athletes . . .”).

6. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 87-88 (Jan. 20, 2004). Some have noted, however, that the explanation of performance-enhancing drug use as a “substitute” for the hard work of training is a mischaracterization. As explained by Paul Haagen, “[p]erformance-enhancing substances are not a substitute for training, but an aid to training. They cannot transform a bad athlete into a great athlete, nor can they permit even a great athlete to get away with not training. They can, however, substantially improve the performance of athletes who train hard.” Paul H. Haagen, *The Players Have Lost that Argument: Doping, Drug Testing and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 835 (2006).

7. Matthew J. Mitten, *Drug Testing of Athletes – An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 797 (2006) (explaining that “[i]n today’s society, the economic and intangible rewards for extra-ordinary athletic achievements and winning performances are substantial. Therefore, there is a significant incentive for athletes to maximize their on-field performance, which is the paramount objective of sports competition”). Shi-Ling Hsu, *What Is a Tragedy of the Commons? Overfishing and the Campaign Spending Problem*, 69 ALB. L. REV. 75, 97 (2005); Joshua H. Whitman, *Winning at All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. ILL. L. REV. 459, 459 (2008).

8. Michael Shermer, *The Doping Dilemma*, SCI. AM., Apr. 2008, at 82-89. The classic example of game theory is the prisoner’s dilemma, where an individual and his partner are arrested for a crime and held in separate cells. Neither wants to “rat” on the other. The prosecutor gives the each person the following options: 1. If one confesses and the other does not, the individual who confessed goes free and the other gets three years in prison; 2. If the other prisoner confesses and the first does not, the first gets three years and the other goes free; 3. If both prisoners confess, each get two years; 4. If both remain silent, then each get one year. With these choices, the logical course is to “rat” on your partner and defect from the agreement to keep quiet; David Crump, *Game Theory, Legislation and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331 (2001); *Olympics Clean? Not Likely*, CHI.

athletic context by suggesting that although the rules of the game clearly prohibit doping, athletes in sports such as cycling or track and field, where doping is prevalent, will defect, and start doping as a way to maximize his or her outcomes. Commentators have noted that because performance-enhancing substances are so effective, detection is still difficult, and the payoff for using such substances is so great, the incentive to use performance-enhancing substances, and not compete clean, is high. Once a few athletes choose to break ranks and violate the rules to gain a competitive advantage, this induces others to do so as well. However, the penalties for doping are such that athletes remain silent instead of openly communicating about how to remedy the problem.<sup>9</sup> Thus, commentators have explained that doping is rational individual behavior given the incentives in place in the current athletic system. Athletes who follow the rules, therefore, “feel like suckers.”<sup>10</sup> The game theory explanation is reflected in the actions of American weightlifter Mark Cameron, who was caught doping at the 1976 Montreal Olympic Games. In explaining Cameron’s conduct, the head of the United States Olympic Committee’s (USOC) medical delegation to the Games reportedly stated that “he knew his test would be positive but he was playing a game. He felt the statistics were on his side and he took the calculated risk that he wouldn’t be one of the athletes tested. He lost.”<sup>11</sup>

These explanations of doping are consistent with American rhetoric in a host of areas, especially in connection with sports. The focus is on individualism and private choice,<sup>12</sup> and the drive to be the best. This is an explanation frequently advanced by government officials. In the words of Senator Joseph Biden: “athletes have always tried to improve their competitive advantage and their performance on the playing field . . . there’s always been a history of some using improper substances to be able to do that . . . . It’s a simple, basic proposition. It’s cheating.”<sup>13</sup> What follows from this simplistic

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TRIB., July 12, 2008, available at <http://www.chicagotribune.com/news/opinion/chi-0712edit2jul12,0,6352361.story> (stating that athletes “game the system” and get away with using performance-enhancing substances because they know that the chances of getting caught are small).

9. Shermer, *supra* note 8; Peter Brown, *The Doping Game: Payoffs that Make Cheaters into Losers*, SCI. AM., Apr. 2008, at 88.

10. Brown, *supra* note 9.

11. Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT, *supra* note 4, at 65, 74.

12. Bobby Julich, *My Generation Must Continue to Tell Young Riders Not to Cheat*, ESPN.COM, July 18, 2007, <http://sports.espn.go.com/oly/tdf2007/news/story?id=2941115> (stating that athletes who are doping are “making poor choices”).

13. *Hearing to Examine the International Convention Against Doping in Sport, adopted by UNESCO on Oct. 19, 2005 as Treaty Doc.110-14: Hearing Before the S. Comm. On Foreign*

explanation for doping in sports is that because individuals cannot be trusted to do the right thing, the government must step in to protect the integrity of sport. The assumption is that the government has little role in sports doping, and is essential to the solution. In the words of Edwin Moses, former United States Olympic gold medal winner,

The United States is unique among Western democracies in not having a ministry of sport, because Americans generally believe that less government is good and that private organizations and the market can be trusted to do work that affects the public trust. Whatever the merits of this perspective in other contexts, the traditional deference to the private organizations that govern sport is not warranted in the case of doping . . . Notwithstanding the efforts of some well-intentioned individuals, sports governing bodies in this country and internationally have shown time and time again that they are not structurally equipped for this work, nor are they sufficiently accountable to the larger interests of society that are affected by doping.<sup>14</sup>

The sentiment expressed by Moses and many others is premised on the notion that the government is a dispassionate third party in the relationship between the nation and elite sport. To be sure, doping is cheating, but the temptation to cheat and the ability to pull it off is manifest well beyond the level of the individual athlete. With elite Olympic Movement sport, the individual is connected to the national community, and the national community is connected to the international community through a sporting ideal that is both international in scope but nationalistic in execution. It is also a sports paradigm that, at the highest levels, values winning over all else. Far from being on the sidelines in this system, the United States government has been and continues to be an important player in the American Olympic Movement.

### III. SPORT AND THE TEMPTATION OF THE STATE

The explanation of doping as an individual problem that grows out of bad individual choices obscures the role that the United States government has played in allowing the practice to take root. It also overlooks the nature of the sporting environment in which the government's role was shaped. Thus, to be

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*Relations*, 110th Cong. (2008) (statement of Sen. Joseph R. Biden, Chairman).

14. Edward H. Jurith & Mark W. Beddoes, *The United States' and International Response to the Problem of Doping in Sports*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 461, 477 (2002).

able to examine critically the government's role in doping in sport, it is important to understand the relationship between the Government and Olympic Movement sport and the origins of the current American Olympic Movement structure. This relationship takes place in a sort of legal twilight zone, caught between the private sector and the public interest.<sup>15</sup> Within this twilight zone there is a collision between the nominally private status of sports regulators in the United States and the powerful temptation on the part of the government to use elite sport to demonstrate national supremacy through winning.

### A. *The Use of Sport in the National Interest*

Scholars have long recognized that sport can be used in multiple ways to enhance nationalism. First, sport can be a powerful force for nationalism domestically.<sup>16</sup> Second, sport can be used to enhance a nation's prestige and demonstrate supremacy in the international community.<sup>17</sup> Scholars have noted that "nations are dependent upon the international sports world to confirm their national stature," and in fact "the establishment of an international athletic presence is not, therefore, a gratuitous matter for nations, but rather the path they must currently follow if they expect to be recognized and treated as a nation."<sup>18</sup> Thus, for most, if not all nations, elite sport is in many respects viewed as a tool; it is not simply valued for the sake of its inherent characteristics.<sup>19</sup> Political leaders often use sport to demonstrate the superiority of their political system,<sup>20</sup> and nations of all ideologies have long recognized that athletic success, particularly within the Olympic Movement,

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15. Dionne L. Koller, *Frozen in Time: The State Action Doctrine's Application to Amateur Sports*, 82 ST. JOHN'S L. REV. 183, 184 (2008) [hereinafter Koller, *Frozen in Time*].

16. See Alan Bairner, *Sportive Nationalism and Nationalist Politics: A Comparative Analysis of Scotland, the Republic of Ireland, and Sweden*, 20 J. SPORT & SOC. ISSUES 314, 314-15 (1996).

17. Jurith & Beddoes, *supra* note 14, at 461-462; RICHARD ESPY, *THE POLITICS OF THE OLYMPIC GAMES* 7-8 (1979); James A.R. Nafziger, *Legal Aspects of a United States Foreign Sports Policy*, 8 VAND. J. TRANSNAT'L L. 837, 839-840 (1975).

18. William J. Morgan, *Sport and the Making of National Identities: A Moral View*, 24 J. PHIL. SPORT 1, 3 (1997) (explaining that "[s]ince nations not only see themselves in this regard as members of a larger, international community, but actively curry the favor of that community in seeking validation of their own nationality, the bond between the national and international is equally strong here.")

19. JoAnne D. Spotts, *Global Politics and the Olympic Games: Separating the Two Oldest Games in History*, 13 DICK. J. INT'L L. 103-115 (1994); Jeffrey M. Marks, *Political Abuse of Olympic Sport* – *DeFrantz v. United States Olympic Committee*, 14 N.Y.U. J. INT'L L. & POL. 155 (1981); James A.R. Nafziger & Andrew Strenk, *The Political Uses and Abuses of Sports*, 10 CONN. L. REV. 259, 259 (1977); Nafziger, *supra* note 17, at 838.

20. Jurith & Beddoes, *supra* note 14, at 461; MARTIN BARRY VINOKUR, *MORE THAN A GAME: SPORT AND POLITICS* 17 (1988).

further national interests.<sup>21</sup> This use of sport is referred to as “sportive nationalism,” which is defined as “the use of elite athletes by governments to demonstrate national fitness and vitality for the purpose of enhancing national prestige.”<sup>22</sup> As one scholar has explained, “[s]portive nationalism is not a single generic phenomenon; on the contrary, it is a complicated socio-political response to challenges and events, both sportive and non-sportive, that must be understood in terms of the varying national contexts in which it appears.”<sup>23</sup> Nearly all nations to some degree use elite sport to enhance national prestige.<sup>24</sup> This practice is most evident in Olympic Movement competition.<sup>25</sup> Not surprisingly, sportive nationalism takes different forms in different nations, “depending on the nature of the government that seeks prestige benefits from international sporting success.”<sup>26</sup> The sporting paradigm in which expressions of nationalism take place is one that emphasizes, above all else, winning.

There are several notorious examples of sportive nationalism. A leading case is the 1936 Berlin Olympic Games, used by Hitler’s regime as one part of its propaganda campaign to promote Nazi ideology.<sup>27</sup> The Games were

21. Spotts, *supra* note 19, at 115; Nafziger, *supra* note 17, at 838; Nafziger & Strenk, *supra* note 19.

22. John Hoberman, *Sportive Nationalism and Doping*, in PROCEEDINGS FROM THE WORKSHOP, RESEARCH ON DOPING IN SPORT 7 (The Research Council of Norway, 2001) [hereinafter Hoberman, *Sportive Nationalism and Doping*]; John Hoberman, *How Drug Testing Fails: The Politics of Doping Control*, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT, *supra* note 4, at 241, 260 [hereinafter Hoberman, *How Drug Testing Fails*].

23. Bairner, *supra* note 16, at 315.

24. ESPY, *supra* note 17, at 4 (“All states use sport as a diplomatic tool.”); Hoberman, *Sportive Nationalism and Doping*, *supra* note 22, at 7, 9 (stating that “to the best of my knowledge, no sitting government has ever renounced sportive nationalism as its fundamental approach to international athletic competition,” and that “[s]portive nationalism continues to prevail as national policy around the world . . . .”); VINOKUR, *supra* note 20, at 111 (“Governments and countries throughout the world – regardless of political system – now seem to recognize that international sports victories have a new political meaning.”).

25. Scholars have pointed out that despite the lofty ideals, the Olympic Games have always been a potent force to promote nationalism. ESPY, *supra* note 17; EAST PLAYS WEST; SPORT AND THE COLD WAR (Stephen Wagg & David L. Andrews eds., Routledge 2007); Barrie Houlihan, *Building an International Regime to Combat Doping in Sport*, in SPORT AND INTERNATIONAL RELATIONS: AN EMERGING RELATIONSHIP 62, 74-75 (Roger Levermore & Adrian Budd eds., Routledge 2004) (explaining “over the last 40 years, many, indeed most, of the major sporting states have, at worst, ruthlessly exploited international in general and the Olympic Games in particular for a variety of ideological and nationalistic purposes...few states have been prepared to value sport for its intrinsic qualities.”).

26. See generally Hoberman, *Sportive Nationalism and Doping*, *supra* note 22, at 7.

27. ROB BEAMISH & IAN RITCHIE, FASTEST, HIGHEST, STRONGEST: A CRITIQUE OF HIGH-PERFORMANCE SPORT 32-35 (2006) (explaining that the 1936 Olympics provided Hitler with a “propaganda victory” because of its impressive organization of the Games as well as its athletes’



awarded to Germany to help restore it in the world community after its defeat in World War I, and Hitler's regime developed a state-sponsored sports training program to develop athletes for the Games and support Hitler's vision of Aryan supremacy.<sup>28</sup> In the Post World War II era, East Germany successfully used sport as a tool to achieve its foreign policy objectives.<sup>29</sup> As it was in the former Soviet Union and other Eastern Bloc countries, the government completely controlled the sports system, which emphasized, above all else, winning.<sup>30</sup> The ultimate goal was to demonstrate the superiority of the East German political system<sup>31</sup> and to gain acceptance as part of the international community.<sup>32</sup> It was long suspected, and subsequently confirmed, that the government-sponsored sports program included the systematic administration of performance-enhancing substances, such as anabolic steroids, to many of its male and female athletes to increase their success in Olympic Movement competition.<sup>33</sup> The East German program had convincing results, from both a sporting and diplomatic view. East Germany won record numbers of medals in international competition<sup>34</sup> and during this time "gained diplomatic recognition by a majority of the states of the world."<sup>35</sup> Similarly, the Soviet Union used international athletic competition to great political advantage, relating its athletes' success to what it claimed was the "superiority of the Soviet political system."<sup>36</sup> Today, China is a leading example of using sport for political purposes. It hopes that by hosting the Beijing Olympics it can solidify its place in the modern international

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successful performance).

28. *Id.*

29. Jurith & Beddoes, *supra* note 14, at 463-64. VINOKUR, *supra* note 20, at 59; Nafziger & Strenk, *supra* note 19, at 262 ("The German Democratic Republic has used sports to gain diplomatic recognition more aggressively and successfully than any country in the world." East Germany worked "to use sport as a lever to remove the barriers which isolated them from the Western World.").

30. VINOKUR, *supra* note 20, at 98.

31. *Id.* at 88.

32. *Id.*; ESPY, *supra* note 17, at 32-35.

33. Houlihan, *supra* note 25, at 64 (describing East Germany and the Soviet Union as "subversives" within the early movements to combat doping in sport, and explaining that in both nations "state organized doping was firmly established behind a public front of pompous condemnation of drug use as contrary to the spirit of Olympism and a problem confined to the commercialized West.").

34. Nafziger & Strenk, *supra* note 19, at 264.

35. VINOKUR, *supra* note 20, at 59.

36. *Id.* at 98, 109 (explaining that "[t]he leaders of the Soviet Union have always considered sport to be a key aspect of international politics," and that "a frequent Soviet media tactic . . . is to proclaim that Soviet sports victories are another verification of the superiority of the Soviet system").

order.<sup>37</sup>

### B. Sportive Nationalism in the United States

The United States has long embraced the win-at-all-costs sports paradigm that prevails today. In Olympic Movement competition, this has meant medal targets and performance bonuses for medal winners. More generally, this reflects the fact that in the United States, it is being the best and not just showing up that is rewarded. Yet, expressions of sportive nationalism in the United States present a challenge to our government. On the one hand, our nation revels in American athletes' success. At the same time, the United States wants to make it clear that while Olympic victories reflect well on our political system, they are not a product of it. It is sportive nationalism with a capitalist twist, and there are no legal restraints to using sport in this way.<sup>38</sup>

Unlike nations such as the former East Germany and the Soviet Union, the United States government traditionally did not use Olympic Movement sport as an international relations tool.<sup>39</sup> Nevertheless, over the last thirty years, sportive nationalism has been a significant part of United States' foreign policy.<sup>40</sup> Yet despite the many examples<sup>41</sup> of United States sportive

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37. Paul Mooney, *Preparing for the 2008 Beijing Olympic Games, China's Authorities Go After Human-Rights Advocates*, U.S. NEWS & WORLD REPORT, Feb. 14, 2008, available at <http://www.usnews.com/articles/news/world/2008/02/14/preparing-for-the-2008-beijing-olympic-games-chinas-authorities-go-after-human-rights-advocates.html>; S. L. Price, *Olympic China*, SPORTS ILLUSTRATED, Aug. 13, 2007, at 72; Orville Schell, *What Drives China: The Roots of a National Inferiority Complex*, NEWSWEEK, Aug. 4, 2008; Amy Shipley and Maureen Fan, *In Run-Up to Beijing Games, a Gold Rush: China Defines Success by Precious Medals*, WASH. POST, Aug. 3, 2008, at A1. China has long been accused of using doping to achieve international athletic success. Throughout the 1990s, Chinese athletes in sports such as swimming were breaking long-held world records and winning gold medals as they never had before. See also generally Todd & Todd, *supra* note 11.

38. See generally Nafziger, *supra* note 17.

39. *Id.*

40. Nafziger & Strenk, *supra* note 19, at 259; VINOKUR, *supra* note 20, at 108.

41. Most commonly, of course, sportive nationalism is apparent in political rhetoric, with government officials often stating that American athletes reflect what is best about the United States. For instance, as stated by President Bill Clinton, in an address to Olympic athletes competing in the 1996 Atlanta Olympic Games: "So tonight when you walk into that opening ceremony . . . you carry the symbol of all that we have become, not only in fact, but in the eyes and spirit and the hopes of the rest of the world. And just as surely as those of us who work in the diplomatic area or the fine people who wear the uniform of the United States military, you will become a symbol . . . you are a source of enormous pride to our country and an inspiration to the world." Remarks to the United States Olympic Team in Atlanta, Georgia, 2 PUB. PAPERS 1156, 1158 (July 19, 1996). President George W. Bush reflected the same sentiments of the United States' athletes as "symbols" or "ambassadors" of the United States, stating that: "For our athletes, a place on America's team is the culmination of years spent training and competing. They are proving that persistence and teamwork can help meet high goals. They are performing with honor, conducting themselves with humility, and serving as

nationalism, the government, and by extension, sports officials, the media,<sup>42</sup> and the American public downplay, and even ignore the obvious relationship between sports and international relations.”<sup>43</sup> Indeed, to distinguish the United States from countries like the former Soviet Union, East Germany and China, our government officials have often minimized the role of elite sports in international affairs.<sup>44</sup> The reality, however, is that the United States over the last thirty years has recognized the importance of sport in international affairs and has positioned the United States Olympic Movement to enhance the nation’s prestige.<sup>45</sup>

In doing so, the United States government effectively filters its sportive nationalism through a privatized Olympic Movement structure, codified by the Amateur Sports Act of 1978, which provides no role for the government in the regulation of sport.<sup>46</sup> This structure was a deliberate effort to contrast the United States with the Communist sports systems of the former Eastern Bloc. In the 1970s, the overwhelming success of the Soviet Bloc in international competition, during the height of the Cold War, put pressure on the United States to match their sporting success.<sup>47</sup> Our comparative weakness in

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ambassadors of peace and goodwill to the entire world. By showing respect for every competitor, they are showing America’s respect for the world . . .” The President’s Radio Address, 40 WEEKLY COMP. PRES. DOC. 1603, 1603 (Aug. 14, 2004). In addition, the United States’ efforts in hosting multiple Olympic Games evidence sportive nationalism. Since 1984, the United States government has spent at least \$2.1 billion (in 1999 dollars) to stage the Los Angeles (1984), Atlanta (1996) and Salt Lake City (2002) Olympic Games, and we currently have a bid to host another. *United States Government Accountability Office Report, Olympic Games: Preliminary Information on Federal Funding and Support: Report to Congressional Requesters*.

42. Laura S. Stewart, Comment, *Has the United States Anti-Doping Agency Gone too Far? Analyzing the Shift from “Beyond a Reasonable Doubt” to “Comfortable Satisfaction”*, 13 VILL. SPORTS & ENT. L.J. 207, 219 (2006) (noting the “scant” attention paid by the United States media to the revelation that many famous United States Olympic athletes were doping during the 1980s).

43. Nafziger & Strenk, *supra* note 19, at 259; VINOKUR, *supra* note 20, at xii (explaining that sport’s relationship to politics “has been little explored”).

44. Nafziger & Strenk, *supra* note 19, at 259 (explaining that “United States sports officials, journalists, politicians, and the public often ignore the relationship between sports and international politics”).

45. Such a development is consistent with the United States’ growing awareness of sport as an international relations tool. VINOKUR, *supra* note 20, at 18 (explaining that “[a]s the awareness by governments of the significance of sports in domestic and international politics grows, they will tend to increase control of sports to advance their own political goals”).

46. Jurith & Beddoes, *supra* note 14, at 476-77; Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91, 94-95 (2005) [hereinafter Koller, *Does the Constitution Apply*].

47. Nafziger, *supra* note 17, at 854 (“The United States government clearly should develop a comprehensive and coherent foreign sports policy . . . .”); Peter J. Beck, “*The Most Effective Means of Communication in the World?*: British Sport and National Prestige, in SPORT AND INTERNATIONAL RELATIONS: AN EMERGING RELATIONSHIP 77, 84 (Roger Levermore & Adrian

international competition prompted President Ford to establish the Commission on Olympic Sports (the "Commission") to study the issue. The Commission noted at the outset that "in international sport . . . American performances are deteriorating. Against athletes from nations for whom Olympic medals are as precious as moon rocks, U.S. competitors seem to have steadily diminishing chances of success."<sup>48</sup> The United States understood by this time that the international sporting community supported a form of sport and competition that emphasized nationalism and winning.<sup>49</sup>

Given this, the result of the Commission's work was a uniquely American style for Olympic Movement sport regulation, and by extension, our nationalistic uses of sport that focused on fostering "individual athletic achievement."<sup>50</sup> Unlike many countries that participate in the Olympic Movement, the United States does not have an official government agency or ministry for sports. Instead, the Commission's primary recommendation was to create a centralized sports organization that had the exclusive right to select athletes for Olympic Movement competition.<sup>51</sup> The Commission rejected a role for the federal government, preferring instead to rely on privately incorporated National Governing Bodies (NGBs) to develop athletes.

As a result of the Commission's report, Congress passed the Amateur Sports Act of 1978, which restructured what was the former USOC so that it would function as an institution to coordinate the United States' amateur athletic development.<sup>52</sup> The Act gave the USOC the exclusive power to "coordinate and develop amateur athletic activity in the United States, directly related to international amateur athletic competition . . ." and "to obtain for the United States, directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each event of the Olympic Games," among other things.<sup>53</sup> The Act made the USOC a federally chartered, non-profit private corporation,<sup>54</sup> not a government agency, with the

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Budd eds., 2004); As stated by the House Judiciary Committee: "the overall decline of American achievement in Olympic and international competition was apparent. For a nation of almost 250 million people, we were falling seriously below our potential to . . . field strong international teams . . ." Amateur Sports Act of 1978, *H.R. Rep. No. 95-1627*, at [pinpoint cite for quote] (1978).

48. *Amateur Sports Act: Hearings Before the S. Comm. on Commerce, Science, and Transportation*, 95th Cong. 40 (1977) [hereinafter *Amateur Sports Act Hearings*] (statement of Gerald B. Zornow on Behalf of the President's Commission on Olympic Sports).

49. Morgan, *supra* note 18 (explaining that the international sporting order links nationalism and international interests because the international athletic community encourages nationalistic displays).

50. *Amateur Sports Act Hearings*, *supra* note 48.

51. *Id.*

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

53. Amateur Sports Act of 1978, 36 U.S.C. § 220503(2), (4) (2006).

54. *Id.* § 220502(a)-(b).

authority to oversee the various NGBs for all recognized Olympic sports. The NGBs establish specific eligibility criteria for athletes in their respective sports. In addition, the Act gives the USOC the authority to represent the United States in relations with international athletic bodies, to resolve conflicts and disputes related to Olympic athletics, and to provide financial assistance to organizations in furtherance of USOC goals.<sup>55</sup>

Despite the fact that in 1978 Congress was well aware of the problems with performance-enhancing drug use in Olympic Movement sports, neither the Commission nor the resulting Amateur Sports Act mentioned the issue. Instead, the Act specifically aimed to maximize the United States' prestige in two ways. First, the United States wanted to produce athletes who would be successful in elite international competition. Second, the United States was determined to demonstrate its supremacy in the international order through the very structure of American Olympic Movement sport. The United States was intent on producing winning athletes but it would do so without the government control exercised by its Cold War enemies.

Yet structuring the USOC as a private, and not a government, agency represents one of sportive nationalism's most potent legal implications. Rather than put amateur athletic development under the control of the national government, as it was in Communist nations, the federal government chose to structure the United States Olympic Movement through a private, federally chartered corporation.<sup>56</sup> Therefore, as with privatization of traditional government services, relying on the private sector for Olympic Movement regulation "strips away the traditional legal methods for enforcing accountability"<sup>57</sup> because the requisite "state action" is not present to trigger constitutional protections.<sup>58</sup> The only possibility that the Constitution could be applied is through the state action doctrine, whereby constitutional restrictions are applied to private entities in circumstances where it fairly can be said that the state is responsible for the conduct at issue because of its relationship to the private actor.<sup>59</sup> Thus, sportive nationalism expressed in a way that threatens athletes' rights might be left without a constitutional

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55. *Id.* § 220505(c)(1)-(6).

56. *Id.* § 220503.

57. Michele Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 573 (2001) (explaining that due process protections would attach to the denial of welfare benefits when the government had control of the program).

58. The state action doctrine provides that before a right can be asserted under the federal constitution, it must be shown that the alleged violation of the right was perpetrated by actions of the state. See *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, et al. 531 U.S. 288 (2001); *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

59. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

remedy.

The private structure and the resulting absence of constitutional protections for Olympic Movement athletes might not be of concern if sportive nationalism simply could not exist in a privatized Olympic Movement. That is, if sportive nationalism involves the *government* using elite sport to enhance international prestige, a question is whether sportive nationalism in the United States could even exist in a way that threatens athletes' rights, given the private structure of the USOC and now the United States Anti-Doping Agency (USADA). The answer is that, in its uniquely American way,<sup>60</sup> sportive nationalism has proven to survive, and indeed, thrive, in a privatized Olympic Movement. The reliance on the private sector however has the potential to threaten athletes' rights because when international interests are at stake, the federal government has ignored the private status of the USOC in favor of pursuing the national interest.<sup>61</sup> Because of sportive nationalism's political dimension, courts are hesitant to step in when their expression potentially affects athletes' rights. For instance, after the Soviet Union invaded Afghanistan prior to the 1980 Olympic Games in Moscow, President Carter and Congress called on the USOC to boycott the Games.<sup>62</sup> The President made clear that whatever the USOC decided, he would take all steps necessary to enforce his decision not to send a team to Moscow.<sup>63</sup> Not surprisingly, the USOC voted not to send a team to the Games.<sup>64</sup> Despite the considerable evidence that the federal government, and specifically President Carter, made the decision not to send a team to the 1980 Olympic Games, the court, considering an athletes' challenge to the boycott, held that the President and federal government held only the power of "persuasion" over the USOC.<sup>65</sup> According to the court, the government did not have sufficient "control" over the USOC to justify a finding of state action to support the athletes' constitutional law claims. Significantly, the court explained that holding the President and government's efforts to influence the USOC to boycott the Games as sufficient for a finding of state action would bring the courts into a

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60. See generally Hoberman, *Sportive Nationalism and Doping*, *supra* note 22 (explaining that sportive nationalism can take different forms depending on the ideology of the government practicing it).

61. See *DeFrantz v. U.S. Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980); see also James A.R. Nafziger, *Diplomatic Fun and the Games: A Commentary on the United States Boycott of the 1980 Summer Olympics*, 17 WILLAMETTE L. REV. 67 (1980).

62. Marks, *supra* note 19, at 155.

63. *Id.* at 156.

64. See *DeFrantz*, 492 F. Supp. 1181, *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).

65. *Id.* at 1194.

“nonjusticiable realm” because of the politics involved.<sup>66</sup>

This “nonjusticiable realm” in the view of the *DeFrantz* Court included using athletes for foreign policy purposes.<sup>67</sup> Significantly, however, the *DeFrantz* Court did not confront the issue of using athletes in a way that stripped them of their eligibility to compete at all. The disappointed 1980 Olympians retained their eligibility for international competition; they were denied the opportunity to compete only in the 1980 Olympic Games. It therefore remains an open question as to whether a court would step in and check sportive nationalism practiced in a way that did not simply deny an athlete the ability to compete in one competition, but denied the athlete the right to compete at all.<sup>68</sup> Moreover, it is unclear how a court would view the actions of USADA, as a strong case can be made that in certain circumstances it engages in state action.<sup>69</sup> Accordingly, although the American Olympic Movement operates in many ways as a private sector corporation, history has shown that the USOC is subject to considerable government influence.<sup>70</sup>

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66. *Id.*

67. *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). In 1987, the Supreme Court in *San Francisco Arts & Athletics v. United States Olympic Committee*, ruled in a 5-4 decision that constitutional restraints did not apply to the USOC's actions in a case involving the use of the Olympic trademark. *Id.* The Court held that “neither the conduct nor the coordination of amateur sports has been a traditional government function,” so that the restraints of the Constitution did not apply to the USOC's actions. *Id.* at 553-54. The dissent recognized the incongruity of such a holding, stating that the “representation function” of the USOC is of particular significance here “because an organization that need not adhere to the Constitution cannot meaningfully represent this Nation. The Government is free, of course, to ‘privatize’ some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations.” *Id.* at 560 (Brennan, J., dissenting). The irony pointed out by the dissent is even greater considering that the United States Olympic Movement was established as a private sector endeavor to represent what was superior about the United States political system. However, it is apparent that what the Olympic Movement in the United States was really structured to demonstrate was the superiority of capitalism, and not necessarily the values of individual rights as reflected in the Constitution. Given the changes in the conduct of the USOC and its relationship to the federal government as well as the importance of the athletes' interests now affected by decisions of the USOC (and USADA), it is not clear whether that holding would be expanded to include an athlete eligibility dispute.

68. I have made the argument previously that court involvement might be justified where expressions of sportive nationalism strip athletes of eligibility without appropriate Due Process protections. See Dionne L. Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, *BYU L. REV.* (forthcoming 2008) [hereinafter Koller, *How the United States Government Sacrifices*].

69. Koller, *Does the Constitution Apply*, *supra* note 46, at 116-36.

70. For example, Congress did not hesitate to step in and force reforms to the USOC management structure in the wake of corruption and management scandals. *Olympic Family – Functional or Dysfunctional?: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Legislative Efforts to Reform the U.S. Olympic Committee: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the*

Yet, notwithstanding the fact that the government has shown its willingness to step in with the “private” American Olympic Movement when necessary to protect the national image, the government and the public persist in viewing sport as a private matter. Even beyond the boycott situation, courts have reinforced this view, further reflecting the practice of sportive nationalism that has, since the Commission report, cultivated an image of American Olympic Movement sport as an individual, private sector pursuit. For instance, the Supreme Court held in *San Francisco Arts & Athletic v. United States Olympic Committee* that the USOC’s role is a private sector one, and not a public function. Although the Court did not deal with an athlete dispute,<sup>71</sup> the Court’s opinion in *San Francisco Arts* viewed the regulation of amateur athletics as fundamentally private, and not a government prerogative.<sup>72</sup> The dissent, in contrast, emphasized the real-world foreign relations functions that the United States Olympic Movement serves:<sup>73</sup>

Although at one time amateur sports was a concern merely of private entities, and the Olympic Games an event of significance only to individuals with a particular interest in athletic competition, that era is passed. In the Amateur Sports Act of 1978, Congress placed the power and prestige of the United States Government behind a single, central sports organization. Congress delegated to the USOC functions that Government actors traditionally perform – the representation of the Nation abroad . . .<sup>74</sup>

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*H. Comm. on Energy and Commerce*, 108th Cong. (2003); *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. (2003); *U.S. Olympic Committee Reform Act of 2003: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003); *State of the U.S. Olympic Committee (USOC): Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2003); *Investigation of the Olympic Scandal: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. (1999); *Oversight of Activities of the Olympic Committee: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Commerce, Science, and Transportation*, 103rd Cong. (1994).

71. The facts of *San Francisco Arts & Athletics v. United States Olympic Committee* pertain to the use of the word “Olympic” by a non-USOC entity. 483 U.S. 522, 525-527 (1987). The non-profit sponsor of an event it called the “Gay Olympic Games” found itself embroiled in a lawsuit with the USOC which denied the “Gay Olympic Games” sponsor the use of the Olympic trademark. *Id.* at 527.

72. *Id.* at 543-45.

73. *Id.* at 550 (Brennan, J., dissenting) (“The USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community . . . . As the Olympic Games have grown in international visibility and importance, the USOC’s role as our national representative has taken on increasing significance. Although the Olympic ideals are avowedly non-political, Olympic participation is inescapably nationalist.”).

74. *Id.* at 559-60. The representation function of our athletes in the Olympic Games, and the presence of our political leaders at the Games are apparent in the current climate. Although the United States openly opposed, in 1993, China’s bid to host the Olympic Games in 2000 because of human rights issues, President Bush has recently stated that he would attend the opening ceremonies



Justices Brennan and Marshall further underscored this point, stating that “the [Amateur Sports] Act gave the USOC authority and responsibilities that no private organization in this country had ever held.”<sup>75</sup> The dissent explained that this function has become increasingly important as the Olympic Games have grown in importance.<sup>76</sup> The dissent asserted that Congress put the “power and prestige of the United States Government” behind the USOC.<sup>77</sup> It is now doing the same with USADA. Thus, the notion that Olympic Movement sport in the United States is simply the result of private and not public action likely has more value as Cold War propaganda than a basis in reality. The conduct of the American Olympic Movement can be traced back to our government just as surely as if there was an official government ministry for sport. That is because the conduct of the American Olympic Movement is not just reflected in the government’s actions, but in the government’s decision not to take action. Thus, whatever the benefits of the “private” distinction, it enabled the United States to ignore the issue of sports doping for decades while reaping the benefits of international sporting success.

#### IV. SPORTIVE NATIONALISM AND DOPING

As explained above, the sporting paradigm in which the Amateur Sports Act was passed, and the “private” structure of the American Olympic Movement that was crafted, valued, above all else, winning medals.<sup>78</sup> In the United States, while winning in Olympic Movement sport was a reflection on the government, it was not officially a product of it. However, scholars have long argued that it is impossible to distinguish “private” from “public” acts<sup>79</sup> because all conduct can be traced to some decision of the state to either affirmatively permit conduct, or a decision not to prohibit it.<sup>80</sup> It is in this way that sports doping in the United States is a product of government action. That is, although it had knowledge of the doping problem, the government did little to intervene when our Olympic, and later professional, athletes used

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of the 2008 Games in Beijing, noting the sensitive foreign policy implications if he were not to attend.

75. *Id.* at 557.

76. *Id.* at 550.

77. *Id.* at 559.

78. Shipley, *Goals of United States Team*, *supra* note 3 (explaining the USOC’s practice of establishing “medal targets” for the United States’ participation in the Olympic Games).

79. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993). “The overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private acts.” *Id.*

80. *Id.*; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351 (1982).

performance enhancing substances to substantially increase their chances of achieving success. This is because the “medals” paradigm in which the Amateur Sports Act was passed gave the government every incentive to do nothing.

*A. Cold War Sportive Nationalism – Medals Without Morality*

Because of the undeniable advantages that athletes using performance enhancing drugs have over those who do not,<sup>81</sup> sportive nationalism in a “medals” paradigm creates temptations for governments either to affirmatively dope athletes to achieve success in international competition, like the former East Germany, or, as the United States government did, turn a blind eye and allow sports doping to take place. Thus, the traditional thinking has been that sportive nationalism undermines efforts to fight doping in Olympic Movement sport because it creates incentives for governments to tolerate doping to achieve athletic success.<sup>82</sup> Critics have suggested that sportive nationalism “can only encourage” a nation’s tacit acceptance of doping.<sup>83</sup> This was certainly the case with the United States, which did little to stop doping in sports for decades.<sup>84</sup> The focus for the United States, it seemed, was not combating performance-enhancing drug use, but combating the Eastern Bloc’s success in Olympic Movement competition.

This approach was possible because of the structure of the American Olympic Movement that was established by the Amateur Sports Act. Without any specific mention in the Act, and consistent with the government’s emphasis on the free market to develop world-class athletes, the effort to control doping by Olympic Movement athletes was left to the private sector.

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81. Jurith & Beddoes, *supra* note 14, at 463-64 (explaining that doping “increases the chances of winning”).

82. See generally Hoberman, *Sportive Nationalism and Doping*, *supra* note 22. The link between sportive nationalism and steroid use has strong Cold War roots. This link likely started with World War II, as scholars have described the way the United States and Europe were “haunted” by anabolic steroids because of the widely-held belief that Nazi soldiers were routinely injected with steroids to make them “hyper-masculinized, ultra-aggressive” fighters. This use of steroids continued after the war, and became a feature of the sportive nationalism that was an important part of the political life of Communist, totalitarian regimes. This use of performance-enhancing substances to heighten athletic performance, in the words of one commentator, “stalked” Western Europe and the United States because the steroid enriched Nazi soldiers had been replaced “with testosterone-enriched male and androgenized female communist athletes” who dominated much of Olympic Movement competition. BEAMISH & RITCHIE, *supra* note 27, at 31.

83. Hoberman, *How Drug Testing Fails*, *supra* note 22, at 262; Jurith & Beddoes, *supra* note 14, at 463-464 (explaining that “doping has been condoned at virtually all levels of sports administration because it increases the chances of winning . . .”).

84. Stewart, *supra* note 42, at 211; Houlihan, *supra* note 25, at 64 (explaining that the United States Government, at best, was “apathetic” on the issue of doping).

The USOC administered drug testing through each sport's NGB, which was also charged with prosecuting athletes for doping violations under the NGB's own administrative procedures.<sup>85</sup> Accordingly, the USOC and NGBs, which were charged with selecting athletes for Olympic and international competition, also administered drug testing and determined the sanctions.<sup>86</sup> This arrangement prompted critics to argue that the USOC and NGBs had an inherent conflict of interest that prevented them from administering a credible drug testing and sanctioning program.<sup>87</sup>

The pressures on athletes to dope, and the subsequent conflict of interest inherent in the testing and sanctioning regime administered by the USOC, did not go unnoticed by Congress. For instance, as early as 1973, even before the Amateur Sports Act was passed, Congress held a hearing on doping in sports.<sup>88</sup> At that hearing, Congress heard testimony from a former Olympian who effectively stated that sportive nationalism led individual athletes to doping. As stated by Phil Shinnick,

Athletics should be defined by the individual, but unfortunately, in American sports and in our society, there seems to be a structure that has a high emphasis on winning . . . there seems to be political pressures on athletes especially during these times, to win . . . for the country . . . When I was assistant chief of the mission to the 1965 World University Games in Budapest . . . I was under constant pressure from the gentlemen at the State Department to beat the "Commies."<sup>89</sup>

Shinnick also testified unequivocally that American athletes, including himself and several other Olympic champions, used performance-enhancing substances such as anabolic steroids and amphetamines.<sup>90</sup> Similarly, former Olympic Gold medalist Harold Connolly powerfully testified that "by 1968,

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85. 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, 126 (2003); Jurith & Beddoes, *supra* note 14, at 476.

86. 36 U.S.C. § 220503(4) (2006). The USOC is directed "to obtain . . . the most competent amateur representation possible in each event of the Olympic Games." *Id.*

87. Tygart, *supra* note 85, at 126; Jurith & Beddoes, *supra* note 14, at 476.

88. *See Proper and Improper Use of Drugs by Athletes: Hearing Before the S. Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary*, 93rd Cong. (1973).

89. *Id.* at 139 (statement of Phil Shinnick, Director of Athletics, Livingston College, Rutgers University).

90. *Id.* at 134-39.

athletes in every event were using anabolic steroids and stimulants.”<sup>91</sup> Connolly described the “state of openness” that had developed to the point where, at the 1968 Olympic trials, “any number of athletes on the 1968 Olympic team . . . had so much scar tissue and so many puncture holes in their backsides that it was difficult to find a fresh spot to give them a new shot.”<sup>92</sup>

Public examples of athlete doping continued through the 1970s and 1980s. For instance, as mentioned above, at the 1976 Montreal Olympic Games, weightlifter Mark Cameron was disqualified for steroid use. The USOC did not support the disqualification, but instead railed against the International Olympic Committee for imposing it. The head of the USOC medical delegation acknowledged that Cameron had been doping, but that Cameron had taken the chance that he would not be selected for testing and miscalculated. Cameron was not dropped from the team and was permitted to remain with the team in the Olympic village.<sup>93</sup> At the 1983 Pan American Games, twelve members of the United States Track and Field team abruptly flew home before competing after sports officials used a new screening procedure for testosterone that caught at least fifteen athletes. The track and field athletes apparently did not want to risk taking the test.<sup>94</sup> Prior to the 1984 Los Angeles Olympic Games, the USOC’s drug testing program produced eighty-six positive tests. Nevertheless, the results were not made public and no athlete was prevented from competing.<sup>95</sup> It was later reported that numerous positive test results from the 1984 Games were covered up.<sup>96</sup> These incidents, as well as other evidence of the prevalence of performance-enhancing drug use in the American Olympic Movement were presented to Congress.<sup>97</sup> In 1989, the Senate Judiciary Committee held hearings on “The Steroid Abuse Problem in America.”<sup>98</sup> At that hearing, there was testimony

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91. *Id.* at 274 (statement of Harold Connolly, former Olympic champion; track and field coach, Santa Monica High School, Cal.).

92. *Id.*

93. Todd & Todd, *supra* note 12, at 74.

94. *Id.* at 79.

95. *Id.*

96. *Id.* at 101.

97. See *Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. (1995) (statement of L. Richard Rader, former pentathlon athlete) (explaining that in 1986, all members of the men’s modern pentathlon world championship team tested positive for banned substances, yet the USOC allowed them to participate in competition. Rader noted that “Americans tested positive in the 1984 and 1988 Olympics. The USOC took no action.” He also explained that these incidents “gave credence to estimates of doping in pentathlon as high as 70-80 percent during the 1970s and 1980s).

98. *Steroids in Amateur and Professional Sports - The Medical and Social Costs of Steroid*

that described how the USOC's pre-Olympic testing program actually helped our athletes beat official drug tests, and that "at least 40% of the women's [Olympic track and field] team in Seoul ha[d] probably used steroids at some time in their preparation for the games."<sup>99</sup> One expert testified that in 1984 and 1985, the USOC did unannounced drug tests of a variety of sports and found that fifty percent of the tested athletes were positive for steroid use.<sup>100</sup> This expert testified that a member of an NGB had stated that "if we were informed we could not select an athlete taking steroids, we simply wouldn't have a team."<sup>101</sup> Similarly, there were numerous media reports of performance-enhancing drug use by American athletes.<sup>102</sup> For instance, at the 1996 Atlanta Olympic Games, only two positives were officially announced, despite the fact that one of the individuals heading up the testing effort stated that many more positives were discovered.<sup>103</sup> In the lead-up to the Atlanta Games, the USOC was conducting out-of-competition testing, but with forty-eight hours notice to athletes. Moreover, the testing was limited to a handful of sports.<sup>104</sup> There was evidence that numerous medalists were allowed to compete in Olympic competition after failing drug tests.<sup>105</sup> Reports were that over 100 athletes who tested positive for banned substances between 1998 and 2000 were cleared and allowed to compete.<sup>106</sup>

The doping problems, of course, were not simply limited to the Olympic Movement, but were a significant problem in professional sports as well.<sup>107</sup>

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*Abuse: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 1 (1989).

99. *Id.* at 7 (statement of Pat Connolly, Coach and Trainer).

100. *Anabolic Steroid Restriction Act of 1989: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 49 (1989) (statement of Dr. Charles Yesalis, Pennsylvania State University Professor).

101. *Id.* at 46.

102. *See generally* Todd & Todd, *supra* note 11.

103. Hoberman, *How Drug Testing Fails*, *supra* note 22, at 253.

104. Todd & Todd, *supra* note 11, at 103.

105. These individuals were identified in documents released to *Sports Illustrated* by former USOC anti-doping chief Dr. Wade Exum in 2003. CBC Sports, *10 Drug Scandals*, CBC.ca, Jan. 19, 2003, <http://www.cbc.ca/sports/indepth/drugs/stories/top10.html>; *see also* Peter McEntergart, *Scorecard*, SPORTS ILLUSTRATED, Apr. 21, 2003, at 21.

106. CBC Sports, *supra* note 105.

107. Wilson, *supra* note 5, at 72-73; *see generally* Scott B. Shapiro, *Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL*, 7 WYO. L. REV. 183 (2007); *see generally* Paul A. Fortenberry and Brian E. Hoffman, *Illegal Muscle, A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sport's CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121 (2006); *see generally* David K. Osei, *Doping, Juicing and Executive Bypass Oversight: A Case Study of Major League Baseball's Steroid Scandal*, 4 VA. SPORTS & ENT. L.J. 155-56 (2004); *see generally* Haagen, *supra* note 6; *see generally* Mitten, *supra* note 7.

This too, was well known to Congress. In 1973, there was testimony before Congress that there was a culture of doping in professional football and baseball.<sup>108</sup> Nevertheless, despite the ample evidence of doping in the American Olympic Movement, Congress did nothing to respond to the problem,<sup>109</sup> passing the Amateur Sports Act without any mention of doping, and taking no action thereafter. During this time, the United States' performance in Olympic Movement competition was strong and medal counts were up. The incentive was to simply do nothing and allow the "private" American Olympic Movement to regulate itself. Additionally, the United States was not inclined to take serious steps to fight doping in the American Olympic Movement programs, because it was believed that the Communist nations were routinely doping their athletes<sup>110</sup> to win, and in international relations, winning was the goal.

It follows, of course, that if sport can be used to enhance a nation's prestige, a nation's sporting policy and practice may also diminish it.<sup>111</sup> This was the case for the United States. By the 1990s, our sporting policies had yielded substantial success. But those successes were coupled with the worldwide belief that our athletes' wins were fueled by doping.<sup>112</sup> The overwhelming international perception was that the United States was not doing enough to fight the use of performance-enhancing drugs by its Olympic athletes<sup>113</sup> and that the USOC simply covered it up.<sup>114</sup> The United States was

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108. *Proper and Improper Use of Drugs by Athletes: Hearing Before the S. Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary*, 93rd Cong. 138, 141-143 (1973) (statement of Phil Shinnick, Director of Athletics, Livingston College, Rutgers University).

109. With respect to professional sports doping, it has been noted that Congress left the issue to the collective bargaining process because it seemed like an employment issue and not a transcendent issue of national importance. Haagen, *supra* note 6, at 840.

110. Houlihan, *supra* note 25, at 66.

111. Beck, *supra* note 47, at 78 (noting sports "propaganda potential" for reflecting, enhancing, and diminishing a nation's international prestige).

112. Jurith & Beddoes, *supra* note 14, at 463 (stating that "regrettably, the United States is considered by many to be the worst offender").

113. *Id.* at 475; Tygart, *supra* note 85, at 124; *The Drug Free Sports Act of 2005*, *supra* note 5, at 18 (statement of Frank Shorter, former Chairman, U.S. Anti-Doping Agency) ("In the 1990s, the world did not view the United States as being committed to preventing doping amongst its Olympic athletes." Shorter also explained that failing to adequately regulate performance enhancing drug use in United States sport "undermines the image of the United States and our athletes as being committed to drug-free sport.").

114. Ryan Connolly, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161-66 (2006); CL Cole, *Drafting Kelli White*, 28 J. SPORT & SOC. ISSUES 219, 219 (2004).

even compared to the East Germans.<sup>115</sup> It was suggested that the United States be prevented from bidding to host the Olympic Games.<sup>116</sup> In short, the international community viewed the United States as “the biggest cheaters in the world.”<sup>117</sup> In the words of Senator John McCain, Olympic doping scandals “harm our image and will contribute to our image, whether deserved or undeserved, that the United States is a bully and unethical.”<sup>118</sup> Also hurting our image were the professional sports scandals such as doping in Major League Baseball. Although not within their jurisdiction, the World Anti-Doping Agency (WADA) has repeatedly embarrassed the United States with its commentary on the lax baseball doping program.<sup>119</sup> By the late 1990s, the international community apparently had had enough of doping. The winning at all costs era, it seems, is over.<sup>120</sup>

### B. Paradigm Shift – Morality and Medals

It was out of this climate that there emerged a new paradigm for sport in the late 1990s. While the private sector was delivering athletes who were winning, they were no longer enhancing national prestige because of the cloud of doping.<sup>121</sup> The United States Government, therefore, recalculated its interest to reflect that it is no longer in the national interest to simply have athletes who are successful in international athletic competition. It must do so with the moral authority<sup>122</sup> that the United States does not cheat.<sup>123</sup> To that

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115. S. 529, *To Authorize Appropriations for the U.S. Anti-Doping Agency: Hearing on S. 529 Before the S. Conn. on Commerce, Science, and Transportation*, 109th Cong. 7 (2005) [hereinafter *Appropriations for the U.S. Anti-Doping Agency*] (statement of Terrence Madden, CEO, USADA) (“Some people wanted to equate us with the East German System.”).

116. Cole, *supra* note 114, at 220. Doping scandals were widely viewed as damaging a nation’s bid to host an Olympic Games, as it did with China’s bid to host the 2000 Olympic Games.

117. *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 115, at 7-10 (statement of Terrence Madden, CEO, USADA).

118. Cole, *supra* note 114, at 221.

119. Janice Lloyd, *WADA Chief Approves of Congress’ Work*, USA TODAY, Feb. 21, 2008, available at [http://www.usatoday.com/sports/olympics/2008-02-21-notes-wada-congress\\_n.htm](http://www.usatoday.com/sports/olympics/2008-02-21-notes-wada-congress_n.htm).

120. See Kidd et al., *supra* note 4, at 153 (stating that “as rapid globalization changes each nation’s often conflicted sense of itself, reactions to doping incidents turn out to be significant markers of each country’s position in the world diplomatic order”).

121. See Houlihan, *supra* note 25, at 69 (explaining that the United States “realized that the strengthening association between elite sport and drugs was undermining the utility of sport” in international relations); Stewart, *supra* note 42, at 237 (noting that “doping is an intense international issue, the focus of much publicity and controversy”).

122. Stewart, *supra* note 42, at 242-43 (characterizing doping as a “moral issue”).

123. Houlihan, *supra* note 25, at 69-70 (explaining the change of heart on doping by the United States and other Olympic superpowers as “seeking to ensure the continuing utility of international sport” for foreign relations purposes). Houlihan also noted that the participation by the United States

end, the Executive Branch Office of National Drug Control Policy (ONDCP) and Congress made fighting drug use in Olympic Movement and professional sports a top priority. The goal was to help restore the “honor and integrity” of United States sport<sup>124</sup> and by extension, the United States itself.

To achieve this, ONDCP announced its national strategy to combat drug use and doping in sports.<sup>125</sup> Initially, it was believed that it was necessary to form a government agency with “certain governmental or quasi-governmental powers” to tackle the issue.<sup>126</sup> With an eye toward restoring our national image, ONDCP asserted that governmental status would improve the accountability of anti-doping efforts and significantly enhance the United States’ credibility.<sup>127</sup> ONDCP was careful to assert that, while the entity it proposed needed to be an instrumentality of the United States, it must also reflect the free market view of sports regulation: “We have to be very respectful of the notion of amateur sports and the independence of amateur sports from federal intervention.”<sup>128</sup> The ONDCP Strategy also involved significant international efforts to develop what became WADA.<sup>129</sup> Ultimately, WADA was established and began operations on November 10, 1999.<sup>130</sup> In August 2000, President Clinton, through Executive Order 13,165, facilitated the United States Government’s role in the World Anti-Doping Agency<sup>131</sup> stating that the Administration was adopting a policy to take whatever steps were needed to fight doping in sport.<sup>132</sup> The United States’ role with WADA was hoped to have a substantial public image payoff. In the words of former ONDCP head Barry McCaffrey, “that we created a World Anti-Doping Agency in short order is astonishing . . . it’s become an institution that in the coming several years . . . will serve our purposes well.”<sup>133</sup> In addition to its efforts to establish WADA, the United States

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and other Olympic superpowers was due to a “reassessment” of national interests. *See id.* at 71-72.

124. Cole, *supra* note 114, at 219.

125. *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 18-23 (statement of Barry McCaffrey, Director, Office of National Drug Control Policy).

126. *Id.* at 20.

127. *Id.*

128. *Id.* at 12.

129. Jurith & Beddoes, *supra* note 14, 481-82.

130. World Anti-Doping Agency, *WADA History*, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited July 15, 2008).

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

132. 3 C.F.R. 288 § 1.

133. WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS, PROCEEDINGS: FIRST MEETING OF THE WHITE HOUSE TASK FORCE ON DRUG USE IN SPORTS 10 (Dec. 7, 2000) [hereinafter WHITE HOUSE TASK FORCE] (keynote remarks of Barry R. McCaffrey, Director, Office of National Drug



Government was a leader in drafting the World Anti-Doping Code (WADC), which was initially adopted on March 5, 2003.<sup>134</sup>

While the United States Government worked on the international level to create WADA, it was also working domestically to create USADA.<sup>135</sup> Because of its importance to the United States' international image, both ONDCP and Congress directly influenced how USADA would be structured and what its mission would be.<sup>136</sup> Ultimately, USADA was not given government agency status. It was established and began operations on October 1, 2000<sup>137</sup> as a private, not-for-profit corporation.<sup>138</sup> Through legislation, Congress has "designated" USADA as the "official" anti-doping agency for the United States, mandating that USADA conduct all Olympic movement drug testing.<sup>139</sup> Congress has also stated that USADA shall "ensure that athletes participating in amateur athletic activities recognized by the United States Olympic Committee are prevented from using performance-enhancing drugs or performance-enhancing genetic modifications accomplished through gene doping."<sup>140</sup> To that end, Congress provides the majority of USADA's funding.<sup>141</sup> Curiously, USADA's status and the requirement that it conduct Olympic Movement drug testing are not part of the Amateur Sports Act. The very brief legislation that outlines its funding and duties is part of an Office of National Drug Control Policy funding statute.<sup>142</sup> However, USADA already has enhanced the United States' image abroad. As

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Control Policy).

134. Koller, *Does the Constitution Apply*, *supra* note 46, at 104.

135. Jurith & Beddoes, *supra* note 14, at 475 (stating that "the formation of the United States Anti-Doping Agency as an independent testing and prosecuting body for Olympic and international competition is intended to restore credibility" to the United States); Wilson, *supra* note 5, at 76-77 (explaining that "to prove to the world" that the United States was committed to fair competition, the United States created USADA and adopted the WADA Code).

136. See Koller, *Does the Constitution Apply*, *supra* note 46; see also *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 115, at 3 (testimony of Jim Scherr, Chief Executive Officer, U.S. Olympic Committee) (noting that the committee "had a hand in creating" the USADA).

137. USADA, *USADA History*, <http://www.usantidoping.org/who/history.html> (last visited July 27, 2008).

138. Tygart, *supra* note 85, at 127.

139. See Office of National Drug Control Policy Reauthorization Act of 2006, H.R. 6344, 109th Cong. (2006).

140. See *id.* at § 701(b)(2); 120 STAT. 3534.

141. *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 115, at 7-10 (statement of Terrence Madden, CEO, USADA) (explaining that, "As Jim stated, most of our funding now comes from the federal government"). See also Pub. L. 109-469, Office of National Drug Control Policy Reauthorization Act of 2006, Dec. 29, 2006 § 703 (authorizing appropriations of \$9,700,000 for FY 2007 and \$10,300,000 for FY 2008).

142. H.R. 6344 § 701.

one former USOC official stated, USADA's actions have "largely dispelled what was previously a widespread international impression that some American athletes were drug cheaters, with their behavior condoned by their respective sports federations."<sup>143</sup>

USADA's effectiveness to a large extent depends on its "partnership" with the federal government. For instance, prior to the 2004 summer Olympic Games, the federal government raided a San Francisco area entity, the now-infamous Bay Area Laboratory Cooperative (BALCO), which was distributing illegal performance-enhancing substances to professional and Olympic athletes. One of the substances, known as "the clear," was specifically manufactured to be undetectable in standard drug tests. Shortly after this raid, the United States Senate took the "unprecedented"<sup>144</sup> step of subpoenaing the secret grand jury documents that were connected to the raid and turning the documents over to USADA with the express purpose of disqualifying the athletes who apparently had obtained performance-enhancing substances from BALCO.<sup>145</sup> In addition to BALCO, USADA partners with the government regularly to develop evidence and pursue sanctions against athletes. USADA has continued to work with the government on a variety of investigations involving the sale and distribution of performance-enhancing drugs, and the Government has agreed to provide USADA once again with any evidence of purchases by Olympic Movement athletes.<sup>146</sup> Athletes who assist in federal investigations hope to receive lighter penalties from USADA for their doping offenses.<sup>147</sup>

Moreover, because of the success USADA has enjoyed in pursuing athletes who dope and in bolstering the United States' image, many members of Congress and even the President have urged the professional sports leagues

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143. *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 115, at 3-7 (statement of Jim Scherr, Chief Executive Officer, U.S. Olympic Committee) Scherr also noted that the USADA has "expanded its scope of activity, increased its aggressiveness and greatly improved its overall effectiveness of operation, earning widespread respect both domestically and internationally." *Id.* at 22.

144. *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 115, at 2 (statement of Sen. Ted Stevens) ("The actions 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 . . .").

145. Koller, *Does the Constitution Apply*, *supra* note 46, 92-93; *Appropriations for the U.S. Anti-Doping Agency*, *supra* note 114 (statement of Terrence Madden, CEO, USADA) (thanking the committee for providing the documents that enabled the USADA to win all of its BALCO-related actions against athletes).

146. See Amy Shipley, *A Wider Front in the Doping Battle: Law Enforcement Takes the Lead in Sports Probes*, WASH. POST, Mar. 2, 2007, at A1.

147. Amy Shipley, *Gatlin Will Claim Sabotage in Defense of Doping Charges*, WASH. POST, July 30, 2007, at A1.

to adopt the World Anti-Doping Code and use USADA for testing and results management. In 2003, the Chairman of WADA stated that he was considering pressuring the International Olympic Committee (IOC) and international sports federations to not hold competitions in the United States because of, among other things, the professional leagues' refusal to adopt the WADA standards.<sup>148</sup> The President's 2004 State of the Union address, in which he urged professional leagues to "get tough" and "to get rid of steroids now," followed.<sup>149</sup> In 2005, Congress considered legislation, the Clean Sports Act and the Professional Sports Integrity and Accountability Act, which would have required uniform standards for doping control in professional sports. The legislation would have made the World Anti-Doping Code, administered by USADA, the applicable standard for doping control.<sup>150</sup> This proposed legislation and the government's newfound interest in the issue likely had to do with the enormous international pressure on the United States to take steps to fight doping in professional, and not just Olympic Movement, sports.

It might be argued that with the government's change of heart on doping, the link between sportive nationalism and sports doping has finally been severed, or at least has been successfully restrained. The United States' initiatives in helping to establish WADA and establishing USADA suggest that a new era in international sport may be afoot, and the sportive nationalism that so characterized the Cold War era is now over. Such a view, however, fails to understand that sportive nationalism is a flexible concept that can respond to the changing politics of the world. Sportive nationalism has not been halted by triumphant anti-doping regulation. Instead, it seems that anti-doping regulation is a more evolved manifestation of sportive nationalism. Accordingly, it is no longer winning medals in Olympic Movement competition that provides international prestige. The medals must be won with moral authority. This change of position was apparent in the lead up to the Beijing Olympic Games, as USOC officials have announced that unlike in previous Olympic Games, the United States has no medal target for these games.<sup>151</sup> Instead, the USOC made it a top priority to "send a clean team to Beijing" because of the international consequences of doping scandals. As part of this effort, USADA recruited several top American athletes to participate in Project Believe, requiring them to submit to extensive blood and urine testing in the months leading up to the Games to demonstrate that they

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148. Haagen, *supra* note 6, at 840.

149. Address Before a Joint Session of the Congress on the State of the Union, *supra* note 6.

150. See generally *id.*

151. Shipley, *Goals of United States Team*, *supra* note 3.

are not doping.<sup>152</sup> Whether or not it actually restores the integrity of sport, as anti-doping initiatives purport to do, Project Believe has the potential to burnish the United States international image and immunize our medal winners from speculation that they are cheating.

## V. IMPLICATIONS FOR ANTI-DOPING INITIATIVES

At first blush, the recognition that Congress and the Executive Branch are finally taking doping in sport seriously should prompt acclaim, not skepticism. However, the recognition that sportive nationalism led the United States to ignore and accept athlete doping and is now prompting the United States to fight it, does not end the matter. The awareness that anti-doping initiatives are rooted in nationalism provides an opportunity to examine the potential implications.

### A. *Anti-Doping Initiatives are Not Taken Seriously*

While it is hard in the current climate to imagine the anti-doping zeal waning, the most obvious implication for our current anti-doping efforts is that anti-doping initiatives rooted in nationalism ultimately may not be taken seriously. That is, because the international political climate is susceptible to change, it may be that the anti-doping effort is not continued with as much force as it is today. This could be the case if several nations, which purport to adopt the World Anti-Doping Code, do not follow through, and suspicions of athlete doping from countries such as China and Russia persist. It might also happen if the cost in terms of medals lost is seen as too great. Scholars have noted that because there is an “instrumental” view of elite international sport, the commitment to fighting doping in sport might not remain as strong as it appears to be now because “the perceived utility of international sport” might diminish, or the cost, in the form of lowering the current levels of athletic success, might be seen as too great.<sup>153</sup> Thus, the long-term appeal of reduced athletic performance, and the public’s attitude towards it, may not sustain our current anti-doping efforts.<sup>154</sup>

Moreover, because the anti-doping effort is not fully integrated into our Olympic Movement structure, it is not far-fetched to imagine that such efforts could be marginalized in the future. As mentioned above, USADA is not

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152. *Id.*

153. Houlihan, *supra* note 25, at 75.

154. Thomas Boswell, *There’s Something in the Air, Other Than Another Ball Headed for the Fence*, WASH. POST, May 23, 2008, at E1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/22/AR2008052203868.html>.

mentioned in the Amateur Sports Act. Instead, it is given its status as the United States' "official anti-doping agency" and funded through an ONDCP grant program, not a dedicated stream of funding. In the past, USADA has had to hire lobbyists to secure continued funding.<sup>155</sup> Unlike the USOC, which was created by statute and has a dedicated, independent source of funding through Congress's grant of exclusive use of the Olympic trademarks, USADA's structure does not guarantee long term sustainability.

*B. Anti-Doping Initiatives are Implemented in a Way that Threatens Athletes' Rights*

A second potential implication for anti-doping initiatives rooted in nationalism is that the government temptation to ignore doping and do whatever it takes to win is replaced with a temptation to do whatever it takes to sanction athletes and clean up sport. Thus, anti-doping initiatives can be implemented with the same "be the best" drive that led to the doping problem in the first place. Taken to the extreme, the incentive might be to subvert the values of due process – fairness, accuracy, and preventing tyranny over the individual – in order for the United States to appear strong on the issue. In this way, the anti-doping fight itself, instead of the medals won through doping, can become a measure of the strength, character, and success of the United States. This could lead the government to misuse its power over the Olympic Movement to skirt traditional legal protections and be the best doping "punisher" in the world.

This is of concern for two reasons. First, while USADA does operate with Congress's designation that it is the "official anti-doping agency" for the United States,<sup>156</sup> and despite its substantial relationship with the federal government, like the USOC, it was deliberately created to be a "private" entity that does not have to adhere to constitutional standards. There is evidence that creating USADA in this way, despite early calls for it to be a full-fledged government agency,<sup>157</sup> was to ensure that the United States could be tough on doping without regard to athletes' constitutional rights. At the time USADA was created, there were concerns that the United States would not be able to establish an effective anti-doping agency because the constitutional rights of privacy and due process could make enforcement difficult.<sup>158</sup> Government

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155. Paul Singer, *The Straight Dope*, NAT. J., Sept. 18, 2004, (explaining that USADA has hired two lobbying firms to represent its interests before Congress).

156. Pub. L. No. 107-67 § 644; 115 STAT. 514, 555 (2001).

157. Koller, *Does the Constitution Apply*, *supra* note 46, at 106.

158. WHITE HOUSE TASK FORCE, *supra* note 133, at 7 (keynote remarks of Barry R. McCaffrey, Director, Official National Drug Control).

officials even questioned whether notions of due process should apply in the sport setting.<sup>159</sup> The government's goal, fueled by concerns over the United States' international image, was to aggressively pursue and sanction athletes believed to have used performance-enhancing substances. In such a scenario, the failure to apply constitutional protections to entities that are so clearly acting with government assistance and influence has a paradoxical result. Instead of protecting the liberty of such organizations to administer sport without government interference in the form of constitutional restrictions, deliberately creating "private" entities like the USOC and USADA protects the government's ability to wield considerable influence in the regulation of athletes. Government is not kept out through the USOC and USADA's private status; it is in fact invited in to assert influence without traditional constitutional checks.<sup>160</sup>

Second, although the "private" status of the USOC and USADA mean constitutional protections do not routinely apply to their conduct in all cases, I have previously argued that in some circumstances an argument can be made that USADA is a "state actor" so that constitutional limitations would apply to its actions.<sup>161</sup> Under these circumstances, an examination of USADA testing and sanctioning regime, implemented with government assistance and approval, raises significant due process concerns. While doping control is premised on protecting individuals, doping enforcement procedures in many cases appear more concerned with outcomes and not individuals.<sup>162</sup> Such an approach is fundamentally unfair because the government and government-backed doping regulators enjoy the benefits of sportive nationalism while imposing substantial burdens on individual athletes.

This is so because today's Olympic athletes have a strong claim that they have a property right in their sporting careers that would trigger due process protections. The due process protections that are given to athletes, however, come up short of traditional notions of due process because in many respects athletes are not given a meaningful opportunity to protect their eligibility. The

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159. *Id.* at 35 (statement of Mickey Ibarra, Dir. of White House Intergovernmental Affairs) (explaining that an athlete suspected of doping could be removed immediately from competition before a hearing took place, because due process protections "ultimately undermine the effort" to clean up sport). Other officials echoed these concerns, questioning whether due process protections should have applicability in the fight against doping in sport. *Id.* at 56 (statement of Scott Blackmun, description).

160. Koller, *Frozen in Time*, *supra* note 15, at 232.

161. Koller, *Does the Constitution Apply*, *supra* note 46, at 116.

162. This is demonstrated by the fact that doping violations are considered strict liability offenses by the World Anti-Doping Code. "It is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated." World Anti-Doping Agency, *World Anti-Doping Code*, art. 2.1.1, 8 (2003).

current drug testing and adjudication regime administered by USADA, and derived from its agreement to follow the protocols established by WADA through the WADC,<sup>163</sup> makes it difficult, if not impossible, for athletes to meaningfully defend themselves. USADA has stated that it can ban athletes based on circumstantial evidence if the evidence “comfortably satisfied” doping regulators that a violation had taken place.<sup>164</sup> Regulators do not need a positive drug test but what is instead referred to as a “non-analytical positive,”<sup>165</sup> circumstantial evidence that is considered to be the equivalent of a failed drug test. This low threshold for finding a doping offense is coupled with the strict liability nature<sup>166</sup> of doping regulation. Punishment for unintentional use of a banned substance is often the same as that for intentionally cheating.<sup>167</sup> This strict liability system and the “comfortable satisfaction” standard together leave athletes with little room to clear their name and unduly risks an unjust result.<sup>168</sup> Moreover, the presumptions built in to the hearing procedures also afford athletes little ability to demonstrate their innocence.<sup>169</sup>

The sportive nationalism at work in the United States anti-doping

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163. 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, 1221 (2005) (explaining that “the substantive rules governing whether a doping offense has occurred” is governed by the World Anti-Doping Code).

164. See *World Anti-Doping Code*, *supra* note 162; Tom Weir, *Runners in the Cross Hairs*, USA TODAY, June 9, 2004, at 1C. Officials have further explained that this standard is certainly less stringent than the “beyond a reasonable doubt” standard, but more than a “mere balance of probabilities.” Richard H. McLaren, *An Overview of Non-Analytical Positive and Circumstantial Evidence Cases in Sports*, 16 MARQ. SPORTS L. REV. 193, 203 (2006).

165. Weir, *supra* note 164.

166. Doping regulators assert that there is a powerful justification for the strict liability standard, specifically the compelling need to protect the integrity of sport for all competitors. Moreover, regulators note that requiring a showing of intent before a sanction could be imposed would “invite costly litigation” that would “cripple” sporting federations. *World Anti-Doping Code*, *supra* note 162, art. 2.1.1 Comment, at 8-9.

167. Michael Hiltzik, *Presumed Guilty: Athletes See Doping Case Appeals as Futile Exercise*, L.A. TIMES, Dec. 11, 2006, at A1, available at <http://www.latimes.com/sports/other/la-me-doping11dec11,0,7716038.story>.

168. The dissenting arbitrator in the Floyd Landis hearing concluded, “Because everyone assumes an athlete who is alleged to have tested positive is guilty, it is not fashionable to argue that laboratories should comply with strict rules. However, if you are going to hold athletes strictly liable with virtually no possibility of overcoming a reported alleged positive test even in the face of substantial and laboratory errors, fairness and human decency dictates that strict rules be applied to laboratories as well.”

169. Koller, *How the United States Government Sacrifices*, *supra* note 68; Haagen, *supra* note 6, at 838, 848 (describing the WADA Code as “an extremely athlete-unfriendly document” and noting that “given the underlying substantive rules, the procedural rights are likely to be of small comfort to the accused”).

movement can also provide a strong incentive to disregard procedural protections for internationally high-profile athletes so that the United States can be viewed by the international community as being aggressive on the issue of doping.<sup>170</sup> Moreover, even when doping regulators “follow the rules” as written, those rules, with strong United States Government backing, fall short of meaningful due process. Given that athletes are no longer amateurs in the traditional sense, but are individuals pursuing sporting careers, this process is not sufficient. Because of these concerns, commentators have suggested that the issue of how to best fight doping in professional sports should be left to the collective bargaining process.<sup>171</sup>

*C. The Fight Against Doping Can Have Perceived Socio-Economic Consequences*

For the fight against doping to retain credibility, it must be perceived by athletes and the public as fair. This is true not simply with the methods used to test and the procedures used to adjudicate accused athletes, but also with respect to who the anti-doping initiatives ultimately catch. Looking to fight performance enhancing drug use in the most expedient way possible to bolster the United States’ credibility could mean that athletes who are members of groups traditionally lower on the social-cultural hierarchy, such as racial and ethnic minorities, are disproportionately affected. Sport, of course, is not divorced from the traditional power relationships in society.<sup>172</sup> Just like the discretion to prosecute in our criminal system has demonstrated racial and socio-economic consequences, it is naïve to think that those same impulses do not filter their way into sport regulation. Thus, it is not difficult to conclude that in acting on nationalistic impulse to catch cheaters and restore the United States’ image in the international sporting community, some of the same biases that are manifest in the criminal justice system may be manifest in the

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170. Vicki Michaelis, *BALCO Creates Inquiry Road Map: Investigation Creates New Ways to Out Suspected Performance Enhancers*, USA TODAY, Sept. 7, 2006, available at [http://www.usatoday.com/sports/2006-09-06-balco-doping\\_x.htm](http://www.usatoday.com/sports/2006-09-06-balco-doping_x.htm) (explaining that “catching” Floyd Landis and Justin Gatlin is “helping to lift the black marks . . . on the U.S. image globally . . .” and that “at a time when the U.S. Olympic Committee is contemplating a bid for the 2016 Summer Games, that offers some comfort”).

171. Haagen, *supra* note 6, at 846 (asserting that “[t]he WADA Code explicitly makes a series of trade-offs in determining how to combat performance-enhancing drugs, and those trade-offs place heavy burdens on participating athletes. Those costs are not speculative, they are real. They include invasions of privacy and false positives. Congress should be very slow to take the decisions about how to make those trade-offs in American professional sports out of collective bargaining.”); see generally Mitten, *supra* note 7.

172. See generally JAY COAKLEY, *SPORT IN SOCIETY: ISSUES AND CONTROVERSIES* (7th ed., McGraw-Hill, 2001) (1978).



anti-doping fight as well. Such a phenomenon plays out in several ways. First, the United States has shown that it is interested in targeting athletes with a high international profile and for which there will be a high international relations payoff.<sup>173</sup> A number of these athletes are African-American, such as Marion Jones and Justin Gatlin, among many others. Second, the focus on sports like track and field can have a disproportionate impact on African-American athletes as track and field is traditionally a sport with a significant number of African-American participants, especially sprinters. Track and field is one of the most tested sports by the USADA.<sup>174</sup> Indeed, all of the athletes sanctioned by USADA as a result of the Senate providing BALCO grand jury documents to USADA were African-American. Moreover, the use of criminal law against athletes who have used or are alleged to have used performance enhancing substances, such as Jones and Barry Bonds, who is under indictment for perjury, also raises concerns. While the facts may strongly support the actions taken against these athletes, it is undeniable that they were selected for prosecution. In contrast, many white athletes such as professional baseball players Roger Clemens and Andy Pettitte, also accused of performance-enhancing drug use, were largely embraced on Capitol Hill during Congressional hearings. These actions can create a perception that African-American athletes are cheaters,<sup>175</sup> and reinforce long-held, damaging social hierarchies.

Lawmakers and commentators have also noted the “odd” demographics of those caught under Major League Baseball’s drug testing program. For instance, in 2005, it was noted that eight of the twelve players caught were Hispanic and nearly all were foreign born.<sup>176</sup> Representative Bobby Rush, in a hearing on performance enhancing drug use in professional sports, made the same point, stating that while he wanted performance enhancing drug use in professional sports eradicated, he also wanted “to be sure that players are treated equitably and fairly.” Rush explained that of the players suspended from Major League Baseball and expelled from minor league baseball, “the overwhelming majority of them are Latino or African-American.”<sup>177</sup> While it may be that all of the athletes targeted for criminal prosecution and

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173. Koller, *How the United States Government Sacrifices*, *supra* note 68.

174. In its most recent report, the USADA stated that it performed 1755 drug tests on track and field athletes, by far the largest number for any sport. *Athlete Test History*, USADA, <http://www.usantidoping.org/what/stats/history.aspx> (last visited July 28, 2008).

175. Gregory Moore, *Cheaters Like Gatlin, Others Make Track a Modern Day Sodom*, Aug. 27, 2006, [http://blackathlete.net/artman2/publish/Track\\_amp\\_Field\\_36/Cheaters\\_Like\\_Gatlin\\_Others\\_Make\\_Track\\_A\\_Modern\\_Da\\_2267.shtml](http://blackathlete.net/artman2/publish/Track_amp_Field_36/Cheaters_Like_Gatlin_Others_Make_Track_A_Modern_Da_2267.shtml).

176. Haagen, *supra* note 6, at 845.

177. *The Drug Free Sports Act of 2005*, *supra* note 5 (statement of Rep. Bobby Rush).

prosecution under sports doping codes are guilty of prohibited performance-enhancing drug use, it is the perception that those who are caught are largely members of minority groups that reinforces negative societal stereotypes and, eventually, could pose troubling consequences for the credibility of anti-doping initiatives.

*D. The Fight Against Doping Can Develop Skewed Ethical Dimensions*

Anti-doping initiatives rooted in nationalism can also have an effect on the ethics of the doping debate. That is, where the movement to fight doping in sports is grounded at least to some extent on enhancing the United States' image, all of us as citizens can claim a stake in punishing offending athletes. Such a claim obscures the ethical dimensions of the doping debate by creating a new class of rights which can overshadow claims of rights made by athletes who feel victimized by overzealous anti-doping regulations. Thus, political leaders frequently speak of the fight against performance-enhancing drug use as one necessary because doping "cheats us as fans" and as citizens and fans we "want to protect the sports that we care so very much about."<sup>178</sup> Indeed, it is commonly asserted that sport "belongs to all of us here in America."<sup>179</sup> While such inclusive expressions of sport underscore its nationalistic tendencies,<sup>180</sup> it also tends to dilute the ethical claims made by athletes that anti-doping initiatives are unfair. To the extent we see ourselves as having rights in sports we do not play, and to which we have no obligations, but merely observe as fans, any claim of right is certainly not as strong as rights claimed by those who take on the burdens of sports training and regulation.<sup>181</sup> It is their rights about which we should be concerned, more than the rights of ourselves as fans and citizens. If we do not like what we see in sport, we have the right not to watch. An anti-doping fight grounded in nationalism can unjustly expand this right not to watch into a right to impose punishment and strip eligibility without proper concern for the harm to athletes.

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178. *Id.* at 6 (statement of Rep. Cliff Stearns).

179. *Id.* at 14.

180. Such claims of right also contradict the widely held view, supported by the government, that sport is private.

181. See Angela J. Schneider & Robert B. Butcher, *An Ethical Analysis of Drug Testing, in DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT* *supra* note 4, at 129 (explaining the questionable ethical dimensions of the fight against performance-enhancing drug use, including the fact that there is not a clear basis for banning performance-enhancing substances while allowing other performance-enhancing techniques, the invasions of privacy perpetrated by the testing protocol, and the coerced consent to testing, which is a prerequisite to the athletes' participation in sport).

## V. CONCLUSION

Perhaps the greatest consequence of an anti-doping fight rooted in nationalism is that in simply responding in the most expedient way possible to the image problems the United States had because of doping, our anti-doping response has missed an opportunity to consider the real structure of the doping problem and take genuine steps to combat it. Thirty-five years ago, before anyone seriously considered a government response to doping, a former Olympic athlete testified before Congress on drug use in sports and what might be done about it.<sup>182</sup> He stated that it was superficial and idealistic to view the problem as one at the level of the individual athlete so that the individual athlete was the key moral decision maker in the decision whether to dope or not. This athlete made an impassioned plea to Congress to examine the structure of elite athletics that places on the athlete an enormous pressure to win, as the process of participation is subordinated to the goal of winning.<sup>183</sup> It is this structure, and the government's role in it, that should be examined in any sincere attempt to eradicate doping in sport. Without such an examination, our anti-doping initiatives are left to stand on the thin and transient reed of sportive nationalism. Such a platform does not bode well for the long term goal of preserving the integrity of sport. Accordingly, because our anti-doping initiatives are anchored in a nationalistic impulse, and not in an effort to change the dominant sports paradigm,<sup>184</sup> they ultimately may be doomed to fail.

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182. *Proper and Improper Use of Drugs by Athletes: Hearing Before the S. Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary*, 93rd Cong. 143-45 (1973) (statement of Phil Shinnick, Director of Athletics, Livingston College, Rutgers University).

183. *Id.* at 134, 151 (explaining that the structure of American sport "has a high emphasis on winning."); see also *Steroids in Amateur and Professional Sports - The Medical and Social Costs of Steroid Abuse: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 46-47 (1989) (statement of Dr. Charles Yesalis, Pennsylvania State University Professor) (explaining that the "appetite for these drugs has been created by our society based on our interest in appearance and win at all cost" instead of competing for competition's sake).

184. Ethicist Arthur Caplan also stresses this point, stating that "but if . . . your countrymen only see gold medals as making the competition worthwhile . . ." then the integrity of sport is "in trouble." Caplan also notes that "at the end of the day, if we don't want cheating in the Olympics, then we cannot behave as if the one and only goal for each and every athlete is winning a gold medal . . . if all the honor, money and celebrity accrue only to those who finish first, then no matter what testing is done, athletes will cheat . . . the best antidote to doping is not to create a culture in which only those who finish first count." Arthur Caplan, PhD., *The Losing Battle Against Doping: Why You May Be to Blame for Drugs at the Olympics*, MSNBC.COM, Feb. 26, 2006, <http://www.msnbc.msn.com/id/10629211/>.