

Reimagining U.S. Olympic Sports – How the Covid-19 Pandemic Serves as the Catalyst for a
New Amateur Sports Act with Public Funding and Greater Transparency and Fairness

by

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Abstract: The Amateur Sports Act was enacted over four decades ago when Olympic sports were still an “amateur” pursuit. That law created a self-funding system for the United States Olympic and Paralympic Committee and the national governing bodies for the respective Olympic sports. Its self-governance model resulted in a system of limited transparency and ineffective governance that culminated with the sex abuse scandals involving young athletes. With the growth and change in the now U.S. Olympic and Paralympic movement over the last four decades, this article advocates significant changes to the law to permit direct or indirect governmental funding for the United States Olympic and Paralympic Committee (USOPC) and the sport governing bodies in return for more stringent transparency and ethical rules. The new law should “federalize” a new governing body that will oversee the USOPC and the governing bodies and create additional rights for athletes and required disclosure and ethics rules for the Olympic bodies. Because of the Covid pandemic and the funding shortfalls faced by the USOPC and the governing bodies, the article concludes that now is the time for such a major change.

I. Introduction

The Covid-19 virus, which began in Wuhan, China at the end of 2019 and spread throughout the world in a few short months, has caused millions of infections, and hundreds of thousands of deaths.¹ Professional and amateur sports were particularly impacted. Contests ranging from major leagues games to local recreational events have been cancelled or postponed. In the United States, the National Basketball Association and National Hockey League suspended their seasons.² Major League Baseball, which postponed its season for three months, planned a truncated schedule of games.³ The National Collegiate Athletic Association (“NCAA”) cancelled all of its college championships scheduled for the spring of 2020, including the lucrative men’s and women’s basketball tournaments.⁴ Internationally, the plethora of cancelled or postponed events included many soccer matches, regional and world championships for various sports, Olympic Trials and, ultimately, the Summer Olympic Games scheduled for Tokyo which is slated to take place one later year, in the summer of 2021.⁵

¹ As of mid-July, 2020, the worldwide death toll was estimated to over 550,000 people, with a total of almost 13 million infections. In the United States, the respective totals were about almost 135,000 deaths out of 3.2 million cases. See Coronavirus Map, , July 12, 2020, https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html?action=click&pgtype=Article&state=default&module=styln-coronavirus&variant=show®ion=TOP_BANNER&context=storyline_menu (accessed July 12, 2020).

² See *NBA Suspends Season Until Further Notice After Player Tests Positive for the Coronavirus*, ESPN.com, March 11, 2020, https://www.espn.com/nba/story/_/id/28887560/nba-suspends-season-further-notice-player-tests-positive-coronavirus (accessed May 4, 2020); Jabari Young, *NHL Suspends Season Due to Coronavirus*, CNBC.com, March 12, 2020, <https://www.cnbc.com/2020/03/12/nhl-to-suspend-season-due-to-coronavirus.html> (accessed May 4, 2020).

³ See Tyler Kempner, *Baseball’s Plan: A Truncated 50-Game Sprint with Fingers Crossed*, N.Y. Times, June 23, 2020, <https://www.nytimes.com/2020/06/23/sports/baseball/mlb-60-game-season.html> (accessed July 12, 2020).

⁴ See *NCAA Cancels Men’s and Women’s Basketball Championships Due to Coronavirus Concerns*, March 17, 2020, <https://www.ncaa.com/live-updates/basketball-men/d1/ncaa-cancels-mens-and-womens-basketball-championships-due> (accessed May 4, 2020).

⁵ See, e.g. *Coronavirus: How the Virus Has Impacted Sports Events All Over the World*, BBC.com, May 4, 2020, <https://www.bbc.com/sport/51605235> (accessed May 4, 2020). The lists included the postponement of all soccer Champions League and Europe League tournaments and the first cancelation of Wimbledon “grand slam” tennis tournament since World War II. See also, Kelly Cohen, *Tokyo 2020 Olympics Officially Postponed Until 2021*,

The fallout from the decision by the International Olympic Committee to postpone the 2020 games has affected the various constituent governing bodies in the United States. A Wall Street Journal article estimated that the Olympics cancellation, coupled with the economic damages from Covid-19 could result in up to \$800 million in losses for the United States Olympic and Paralympic Committee (“USOPC”) and the 50 national governing bodies (“NGBs”) that make up the Olympic system in this country.⁶ It even prompted the USOPC to ask Congress for a “handout” of \$200 million, which was denied. The optics of asking for such aid when the virus was spreading throughout the country and resulting in hospitalizations and deaths, was, to put it mildly, not ideal.⁷ One commentator said that the entire USOPC board should be “shown the door” for its “tone-deafness and managerial ineptitude”⁸

Yet, the very fact that the USOPC (along with a number of NGBs)⁹ needed to run hat in hand to Congress was in large part due to the fact that the United States is one of a very few countries where Olympic bodies receive no government funding.¹⁰ In addition, the USOPC (previously known as the United States Olympic Committee until it changed its name in 2019), along with a number of the NGBs like USA Gymnastics, USA Swimming and USA Track and Field, have attracted their fair share of criticism and controversy for their less than transparent governance, lack of proper action on reports of sexual abuse of athletes (often underage), and general spending practices.¹¹ The U.S. domestic Olympic movement, starting with the USOPC, needs governance

ESPN.com, https://www.espn.com/olympics/story/_/id/28946033/tokyo-olympics-officially-postponed-2021 (accessed May 4, 2020).

⁶ See Rachel Bachman, *U.S. Olympic Sports Groups Seek Government Aid*, The Wall Street Journal, April 12, 2020, <https://www.wsj.com/articles/u-s-olympic-sports-groups-seek-government-aid-11586689219> (accessed April 13, 2020).

⁷ This proposal was criticized by some commentators. See Allan Abrahamson, *The Challenge is Real . . . Asking Congress for \$200 Million is No Answer*, Wire Sports, March 26, 2020, (retrieved March 27, 2020) (“ why the USOPC had the gumption to say to Congress, in the face of this crisis, that the talents of, say, a backstroker or a rhythmic gymnast or a skateboarder ought to be worth as much or more than the likes of their fellow Americans — truck drivers, janitors, waiters, teachers, salespeople, bartenders, you know, everyday folks.”). See also, Will Hobson, *USOPC asked for \$200 million in the coronavirus stimulus bill to ‘sustain American athletes’*, Wash. Post, March 26, 2020, <https://www.washingtonpost.com/sports/2020/03/26/usopc-asked-200-million-federal-stimulus-money/> (retrieved March 27, 2020) (“In the offices of the senators who received [the] email [from the USOPC], the request was never taken seriously, according to two congressional staffers who spoke on the condition of anonymity to discuss internal deliberations.”)

⁸ See Philip Hersh, *U.S. Olympic CEO deserves credit for decision to take pay cut, but she and board still should be shown the door*, Globetrotting by Philp Hersh, March 27, 2020, <http://www.globetrottingbyphilphersh.com/home/2020/3/27/us-olympic-ceo-deserves-credit-for-decision-to-take-pay-cut-but-she-and-board-still-should-be-shown-the-door> (retrieved March 27, 2020). (“The time to dissolve the USOPC board - or, at the very least, replace its chairperson - is now.”)

⁹ *Id.* Among the 18 NGBs – some in non-Olympic sports - who responded to a Globetrotting email survey of 45 such national bodies, 16 said they had applied for PPPs, and 13 said the loans had been approved as of Wednesday. Only three of those 18 have cut or furloughed staff so far, but some have cut salaries and voluntary retirement plan (403b) contributions. Others said salary reductions remain a possibility.

¹⁰ See Brian Padden, *Olympic Funding Often Reflects Country’s Values*, Voice of America, Oct. 27, 2009, <https://www.voanews.com/archive/olympic-funding-often-reflects-countrys-values> (retrieved March 27, 2020).

¹¹ Although there are problems with a number of NGBs, the United States Gymnastics Association has fared the worst – multiple lawsuits by gymnasts claiming sexual abuse, a bankruptcy filing and a loss of sponsors. [In soccer, See, e.g. Rachel Bachman, *U.S. Soccer Federation’s Struggles Deepen*, Wall Street Journal (Dec. 11, 2019) https://www.wsj.com/articles/u-s-soccer-federations-struggles-deepen-11575567787?mod=cx_life&cx_navSource=cx_life&cx_tag=contextual&cx_artPos=8#cxrecs_s (retrieved May 1, 2020).] (noting that “ U.S. Soccer has been operating for more than a year without knowing who its next CEO will be.

reform, new business models, greater athlete rights and secure methods of funding. Only with such efforts will the organs of the Olympic movement in the U.S. evolve into effective financial and governance model in the third decade of the 21st Century. The outbreak and consequences of the Covid-19 pandemic should be a catalyst for the movement to address these issues, and for Congress to consider a complete rewrite of the over four-decade old Amateur Sports Act (“Sports Act”).

The problems governing the Olympic system in the United States derive from the now-antiquated structures that derive from the Sports Act, first passed in 1978 and most recently amended two decades later.¹² The system helped create a history of flawed leadership of the USOPC and many, if not most, of the NGBs that make up the main constituents of this system, resulting in a lack of full accountability to the athletes, the U.S. government, and by extension, the American public. These systemic weaknesses flow from the quirky quasi-private, quasi-public system of Olympic governance in the United States that has not fundamentally changed in well over two decades. It needs to change now.

The Covid-19 did not create the underlying problems, but the uncertain financial situation coupled with the longstanding governance issues, demonstrated how fragile the system is. The need for change is apparent, but the more difficult question is how. The article centers on rewriting the Sports Act to provide a system for the USOPC and all of the National Governing Bodies to receiving federal funding. With more pressing economic matters occupying Congress, the body may not take up the idea of direct funding immediately. But if funds are scarce, there can be other methods than straight appropriations. While the funding mechanisms should (ideally) include direct annual appropriations from Congress based on a formula that combines need, numbers of members and demonstrated success; it could also be based on a Federal tax return check-off, and/or a tax credit for donations (as opposed to a tax deduction). In addition, a system of community-based grants such as those used for Arts organizations by the National Endowment for the Arts could be utilized to help smaller local or regional bodies of these organization, or even elite athletes seeking help to pay for their training.

However, in return for the funding, the USOPC and NGBs would be subject to strict governance and transparency requirements, such as: (1) releasing detailed annual financial statements to Congress and the public; (2) release of all sponsorship agreements as part of an annual report to Congress and posting these contracts on the organization’s website; (3) accepting the jurisdiction of a Congressionally mandated Commission for Olympic and Paralympic Sports, which will be empowered to appoint an inspector-general to review allegations of financial misappropriation and other violation of the above mandates; (4) mandating the creation of an ethics board wholly independent of the directors of the USOPC and the NGBs and; (5) amending the dispute resolution system and expand the power of an athlete ombudsman to ensure athlete rights. Finally, a government system could result in athletes given “state actor” status, able to assert certain constitutional claims in court or through an administrative board. The last proposal should result in athletes being to express their political views more openly than before at a time when issues of racial equality and civil rights has become more pressing.

The brother of the U.S. men’s coach, who is the chief commercial officer for the federation, is reported to be a candidate to be the next CEO and in recent years has weighed in on decision-making about soccer staffing usually left to technical experts or coaches, . . . “; and “[m]any of U.S. Soccer’s youth national team coaches and technical staff have left and haven’t been replaced, leaving a void that could have long-term effects on the U.S. men’s and women’s senior national teams.”;]

¹² 92 Stat. 3045 (1978); Pub. L. No. 105-225, 112 Stat. 1253, 36 U.S.C. Sec. 220501 et seq. (1998).

No doubt such changes will not be accepted by every stakeholder in the U.S. Olympic system. Detractors will argue that U.S. Olympic sports has been a privately funded affair and that sponsor-based financing, plus contributions from the IOC and broadcaster NBC has saved U.S. taxpayers money while maintaining impressive medal counts. However, with an uncertain financial future rocking many sports in the Covid-19 era, a governmental funding regimen tied to greater accountability would make the Olympic structure in the United States more dynamic, more transparent, more accountable and more positive for the key stakeholders, the athletes. These reforms would not only benefit the Olympic movement and the particular NGBs, but also would benefit the athletes who sacrifice so much to be compete in the sport. A new structure could give real meaning to the oft-used cliché “athletes first.” And the driving force to a true reimagining of the USOPC and the respective NGBs.

This article will examine the issues and the proposed changes in detail. Specifically, it examines: (I) the history of the USOPC before and after the passage of the Sports Act; (II) the present governing structure of the USOPC; (III) limited legal accountability of the USOPC and the NGBs due to an antitrust exemption (recognized in three Federal circuits) and the lack of state actor status that prevents constitutional challenges against these organization by athletes and others; (IV) the reasons for amending the law based on the administrative, legal, ethical and transparency problems in the USOPC that harm Olympic athletes; and (V) the provisions of a new Sports Act to provide secure funding and, in return, greater responsibility and transparency.

I. The History of the Olympic Movement in the United States

A. Before 1978

The modern Olympic movement was conceived by a French aristocrat, Baron Pierre de Coubertin, who wanted to restage the ancient Olympic games held in ancient Greece over two and a half millennia earlier.¹³ Organized as a fin-de-siècle celebration of athletic and moral traits and dominated by aristocrats, the Olympics evolved from a relatively small gathering of privileged amateur athletes to a political, cultural and economic behemoth, an enterprise that has over 200 national Olympic committees, multi-billion dollar broadcast contracts and quadrennial summer and winter games that host thousands of athletes.¹⁴ Since it was formed in 1894, the International Olympic Committee (IOC) has become a powerful non-governmental entity that can operate with virtually unassailable authority in international sports. It takes its role – and itself – incredibly seriously, with the kind of moralistic virtue that reeks of late 19th century aristocratic noblesse

¹³ See History, *Olympic*, <https://www.olympic.org/ancient-olympic-games/history> (accessed March 27, 2020). See also Angela Gemalski, An Olympic Joke: Sanctioning the Olympic Movement, 27 Mich. St. Int'l. L. Rev. 305, 307 (2019).

¹⁴ In 2016, the Rio Summer Olympics hosted over 10,000 athletes from 206 countries in over 40 sports. About 7.5 million tickets were available and 380,000 foreign spectators were estimated to attend the games. In addition, 450,000 condoms were distributed to athletes. See Julie In, *16 Facts: Rio 2016 Olympic Games*, CNN.com, August 8, 2016, <https://www.cnn.com/2016/07/27/world/16-facts-rio-2016-olympic-games/index.html> (accessed May 4, 2020). For the 2018 Winter Olympics in PyeongChang, South Korea, there were 2952 athletes from 92 countries competing. See *2018 Winter Olympics Facts and Figures*, Dean & Draper Insurance, Feb. 11, 2018, <https://www.deandraper.com/blog/2018-winter-olympic-facts-and-figures> (accessed May 4, 2020).

oblige¹⁵ and more than a whiff of racism and sexism.¹⁶ It has little legal accountability due to its private status and the traditionally hands-off approach of Swiss law,¹⁷ and at least traditionally, engaged in a level of corruption with regard to handling bids of candidate cities to host the games.¹⁸ Suffice it to say, notions of independent oversight and corporate transparency are not part of the Olympic lexicon.¹⁹ It preaches goals of peace and harmony through sport through its Charter,²⁰

¹⁵ This idea came from the viewpoint of de Coubertin, who was described as “a man who comes from the best conservative stock of France, who is deeply interested in the moral regeneration of his country. See *The Princeton French Debate*, N.Y. Times, December 23, 1895, p. 10, as cited in JULES BOYKOFF, *POWER GAMES: A POLITICAL HISTORY OF THE OLYMPICS* p. 20 (2016). He later wrote that “Strength and agility have been deeply appreciated among savage and civilized peoples alike” and applied the notion that sport can help “clarify order and moral thought.” Certainly, class bias was a large part of his philosophy of the Olympics, culminating in the requirement that the games be limited to amateurs. See *Boycoff* at pp. 20-21.

¹⁶ *Id.*

¹⁷ See Michaël Mrkonjic, *The Swiss Regulatory Framework and International Sports Organizations*, Danish Institute for Sports Studies, Playthegame.org, https://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS-report_-_12The_Swiss_regulatory_framework_p_128-132_.pdf (accessed May 9, 2020) (“Until 2000, corruption of foreign public agents was not prosecuted in Switzerland. Offering bribes was the usual way of doing business and they were deductible from corporate tax. . . .”) More recently, Swiss lawmakers passed legislation allowing more scrutiny of bank accounts held by governing bodies and their leaders. The law was prompted by FIFA bribery scandals in recent years involving officials from FIFA, the international soccer federation. Presently, the IOC president and other sports officials in Swiss-based bodies are now classed as “politically exposed persons” involved cases of money laundering. See *New Swiss Law Allows More Scrutiny of FIFA and IOC Finances*, The Guardian, Dec. 14, 2014, <https://www.theguardian.com/football/2014/dec/12/swiss-law-fifa-ioc-finances-scrutiny-sports-governing-bodies> (accessed May 4, 2020).

¹⁸ See Sean Ingle, *Tokyo Olympic Games Corruption Claims Brings Scandal Back to the IOC*, The Guardian, May 11, 2016, <https://www.theguardian.com/sport/2016/may/11/tokyo-olympic-games-2020-ioc-international-olympic-committee-corruption-bid-scandal> (accessed May 9, 2020) (“Nagano won the right to host the 1998 Winter Games after providing IOC members with trips to luxury hot spring resorts, first-class air tickets, and geisha . . . while the then IOC president, Juan Antonio Samaranch, was put up in the top suite at the Hotel Kokusai 21, which the Nagano Olympic Committee rented for 30 days at \$2,700 a night. The largesse didn’t end there. Nagano also provided millions of dollars in corporate contributions to help build an Olympic museum in Switzerland while the bidding race was going on. . . . All this was meticulously documented by its bid committee in a series of files that filled 10 large cardboard boxes. However, when the focus turned on them, the papers were burned.”). In bidding for the 2002 Winter Games in Salt Lake City, 10 IOC members being either expelled or resigning amid allegations of bribes and offers of scholarships, medical care, dubious real estate deals and even sexual favours. *Id.* However, it should be noted that two members of Salt Lake City Committee were acquitted of conspiracy, mail fraud and wire fraud charges in connection with the bid. See Lex Hemphill, *Acquittal Ends Scandal that Dogged Winter Games*, N.Y. Times, December 6, 2003, <https://www.nytimes.com/2003/12/06/sports/olympics-acquittals-end-bid-scandal-that-dogged-winter-games.html> (accessed May 9, 2020).

¹⁹ Aside from the past corruption in bidding, one example of its secretive nature involves the post-Olympic games payments the IOC makes to the international federations. Such information, not disclosed by the IOC, came to light in a recent investigative article. It was reported that the amounts vary widely among Federations, but some of them are heavily dependent on the IOC’s largess – and its influences. The amounts of money ranged from a high of \$40 million to three federations to \$14 million to the lowest level. For more detail, see Jens Weinreich, *How federations share the revenues from the Olympic Games*, playthegame.org, April 3, 2020, <https://playthegame.org/news/news-articles/2020/0644-how-federations-share-the-revenues-from-the-olympic-games/> (retrieved April 3, 2020).

²⁰ See *International Olympic Committee [IOC], Olympic Charter, Fundamental Principles of Olympics*, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.14440823.1914180718.1589471959-1158988461.1589471959 (accessed May 14, 2020) (“The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.”)

but it has become, as one writer said “a giant entertainment monopoly.”²¹ Despite its lofty goals, it had autocratic leadership and limited rights for athletes engaged in political protest, an activity severely restricted at the event.²² It’s almost fanatical devotion to amateurism resulted in athletes stripped of their medals for seemingly minor deviations²³ and for summary enforcement of its rules against political demonstrations. During the 1968 Mexico City games, two U.S. track athletes were expelled and banned from the Olympics under heavy pressure by the IOC.²⁴

The Olympic Charter requires the creation of the National Olympic Committees (NOCs) “to develop, promote and protect the Olympic Movement [with]in their respective countries.”²⁵ The IOC funds NOC activities, notably in developing nations.²⁶

The beginning of what became the United States Olympic Committee, and more recently, the US Olympic and Paralympic Committee, began at the time of the founding of the modern Olympic movement. The two American members of the original IOC formed a participation committee for U.S. participation in the first modern games in Athens in 1896.²⁷ The distinctly *ad hoc* nature of this committee continued until a more formal arrangement commenced in 1921 and after a few name changes, it became known as the USOC in 1961.²⁸ It was granted a federal charter in 1950, which gave what was then known as the U.S. Olympic Association nonprofit corporate status, so it could solicit tax-deductible contributions.²⁹ While the non-profit designation certainly helped in finding private contributors, it also served to get the government out of the governance of Olympic

²¹ See Brian Alexander, *It’s Time to Dismantle the U.S. Olympic Committee*, Outside the Line, March 2, 2018, <https://www.outsideonline.com/2285436/usoc-has-long-way-go> (accessed April 3, 2020).

²² See *Former IOC President Samaranch dies*, The Wall Street Journal, April 21, 2010, <https://www.wsj.com/articles/SB10001424052748704133804575197713942494370> (accessed June 15, 2020) (“He was also a lightning rod for critics, who attacked him for his ties to the Franco era in Spain, his autocratic style. . . .”); See also, P.S. Wood, *Olympics ’84*, The New York Times, July 3, 1983, <https://www.nytimes.com/1983/07/03/magazine/olympics-84.html> (accessed June 15, 2020) (“As president of the powerful International Olympic Committee (I.O.C.) from 1952 to 1972, Brundage, a millionaire businessman and athlete, fought what he considered the corruption of the sporting ideal. He sought to strip skiers of their medals if trademarks were visible on their equipment. He found the participation of women in Olympic competition distasteful and resisted their inclusion.”)

²³ See Sally Jenkins, *Why are Jim Thorpe’s Olympic Records still not Recognized?* Smithsonian, July, 2012 <https://www.smithsonianmag.com/history/why-are-jim-thorpes-olympic-records-still-not-recognized-130986336/> (accessed June 15, 2020) (“Thorpe’s epic performance in the 15 events that made up the pentathlon and decathlon at the 1912 Summer Games remains the most solid reflection we have of him. Yet even that has a somewhat shadowy aspect. The International Olympic Committee stripped his medals and struck his marks from the official record after learning that he had violated the rules of amateurism by playing minor-league baseball in 1909-10.

²⁴ See Rick Maese, *Two sprinters gave the black-power salute at the Olympics. It took them decades to recover from that gesture*, The Washington Post, May 28, 2018, https://www.washingtonpost.com/national/two-sprinters-gave-the-black-power-salute-at-the-olympics-it-took-them-decades-to-recover-from-that-gesture/2018/05/28/b29e9dfc-4a58-11e8-827e-190efaf1flee_story.html (accessed June 15, 2020).

²⁵ See *International Olympic Committee [IOC], Olympic Charter*, Ch. 4, sec. 27, Para 1. See also Gemalski, *supra* at 314.

²⁶ See *How the IOC Finances a Better World Through Sport*, Olympic.org/funding, <https://www.olympic.org/funding> (accessed July 12, 2020). . The IOC represents that 90% of Olympic Movement revenues are distributed to NOCs, IFs, and OGOCS. *Id.*

²⁷ The two constituent American members, James Edward Sullivan and William Milligan Sloane, formed a committee to organize the participation of U.S. athletes. See *United States Olympic and Paralympic Committee, History*, <https://www.teamusa.org/About-the-USOPC/History> (accessed March 28, 2020).

²⁸ *Id.* In 1940, the AOA changed its name to the United States of America Sports Federation and, in 1945, changed it again to the United States Olympic Association. In 1961, the name was changed to the United States Olympic Committee.

²⁹ *Id.*

sports. And it resulted in a fairly weak organization that had little role in the selection of Olympic athletes due to turf wars between the Amateur Athletic Union (“AAU”) and the NCAA.³⁰ This was particular acute in track and field where the AAU, founded in 1888³¹ wielded significant power over the sport³² and it clashed with the less powerful USOC with regard to issues such as eligibility.

In the decade before the passage of the 1978 Amateur Sports Act, the seminal statute that governs the Olympic sports system in the United States, the organizational structure of U.S. Olympic sports was a mess. It was virtually unregulated with little mandate, so that with conflicting private entities like the AAU having their fingers on the process of choosing an Olympic team.³³ This resulted in limited corporate support for amateur sports often due to highly publicized disputes wars between various athletic bodies as to who was eligible to compete in the Olympics.³⁴ These organizational problems may have been one reason for the lack of success of the U.S. Olympic teams, at a time when the Communist nations, such as the U.S.S.R. and East Germany were demonstrating their successes in the Olympic medal count.³⁵ In 1975, President Gerald Ford appointed a commission to propose changes in the amateur sports system in the United States.³⁶ Two years later, the commission issued a lengthy report that was highly critical of the structure in place, noting that it was “fragmented, not bound by common purpose or any effective coordinating system.”³⁷

The Presidential commission recommended legislation to create a centralized sport organization that had the exclusive right to select athletes for Olympic Movement competition.³⁸

³⁰ See Wood, n. 22 (“In America, by contrast, governance of sport was a crazy quilt of overlapping, aggressively protective or irresponsibly oblivious jurisdictions, controlled mainly by the ever-warring Amateur Athletic Union (A.A.U.) and National Collegiate Athletic Association (N.C.A.A.).”

³¹ See *About the Amateur Sports Union*, aausports.org, https://aausports.org/page.php?page_id=99844 (accessed May 14, 2020). (“The AAU was founded in 1888 to establish standards and uniformity in amateur sport. During its early years the AAU served as a leader in international sport representing the U.S. in the international sports federations. The AAU worked closely with the Olympic movement to prepare athletes for the Olympic games. In the late 1970’s, the AAU reshifted its focus and efforts to providing sports programs for all participants of all ages beginning at the grassroots level.”)

³² *Id.*

³³ See PRESIDENT’S COMM’N ON OLYMPIC SPORTS, FIRST REPORT TO THE PRESIDENT at 3-5. For further explanation, see Dionne Kohler, *A Twenty-First-Century Olympic and Amateur Sports Act*, 20 Vand. J. Ent & Tech. L. 1027, 1032 (2018)

³⁴ In some cases, high school and college students who “have lost their eligibility to compete in school sports because they have represented the nation in international competition . . . Athletes have been prevented by the NGB from competing in their sport simply because it was sponsored by a rival organization.” See PRESIDENT’S COMM’N ON OLYMPIC SPORTS, FIRST REPORT TO THE PRESIDENT at 2-3; See also Kohler, *supra* at 1045.

³⁵ For example, in the 1972 Summer Olympic Games in Munich, the Soviet Union won 50 gold medals, to the U.S. count of 33. If one combines East and West Germany, the gold medal is equal to that of the U.S. See 1972 Summer Olympic Medal Table, Wikipedia.org, https://en.wikipedia.org/wiki/1972_Summer_Olympics_medal_table (Accessed January 11, 2020). A major coaching error occurred during those games when the U.S. spring coach Stan Wright gave the wrong start time for a 100-meter heat because he looked an outdated schedule. The result was that the two runners were disqualified and never ran the race. While coach Wright was subjected to a withering cross-examination on national television by ABC commentator Howard Cosell, USOC officials were not asked to comment. See DAVID CLAY LARGE, *MUNICH 1972 – TRAGEDY, TERROR AND TRIUMPH AT THE OLYMPIC GAMES* (Rowman and Littlefield, 2012) p. 184

³⁶ See PRESIDENT’S COMM’N ON OLYMPIC SPORTS, FIRST REPORT TO THE PRESIDENT 4, 7 (1976). For background, see Neal Amdur, *U.S. Report Urges New Body to Direct Amateur Sports*, N.Y. Times, Jan. 13, 1977, p. 54.

³⁷ *Id.* at n.61.

³⁸ PRESIDENT’S COMM’N Report at xix.

That recommendation would be central to what would become the Amateur Sports Act of 1978 (later amended as the Ted Stevens Olympic and Amateur Sports Act.³⁹ For purposes of this article, we will refer to both as the Sports Act.

B. 1978 - Present

In a number of ways, the Sports Act successfully standardized a fragmented system. It granted the USOC the “exclusive jurisdiction ... over ... all matters pertaining to United States participation in the Olympic Games ... including representation of the United States in the Games.⁴⁰ It also sought a more aspirational policy role for Olympic athletes and for U.S. athletics in general by establishing national goals for amateur athletics and fostering positive relationships with various athletic organizations.⁴¹ It also standardized dispute resolution procedures,⁴² and sought to provide opportunities to develop programs for women, minorities and disabled athletes.⁴³

In return for its exclusive jurisdiction to control U.S. Olympic participation, the now-USOPC is required to designate a respective governing body in a sport to establish criteria to select athletes in its given sport.⁴⁴ The chosen NGBs run and oversee their sport or group of sports, and establishes criteria for competition, and sanctioning competitions on a regional and national level⁴⁵ and recommending to the USOPC the athletes and teams suitable to represent the United States in the Olympic Games, the Paralympic Games, the Pan-American Games, and other international competitions.⁴⁶ It also allows the 50 national governing bodies to fund their own operations, essentially from sponsorship agreements⁴⁷ in addition to receiving funding by the USOC, which came to \$65 million in 2018.⁴⁸ Part of the problem derives from rules made by the USOC, which require CEOs to be paid and appointed while board positions to be voluntary.⁴⁹

In 1998, the Sports Act was amended to include provisions involving the inclusion of Paralympic athletes to the USOC’s jurisdiction and essentially replicated the same system for those athletes.⁵⁰ It also increased (at least in theory) athletic participation in decision making by the then-USOC and the NGBs by creating “athletes advisory councils” in the USOC and the NGBs.⁵¹ The amendments required that 20 percent of the USOPC board comprise amateur athletes.⁵² In addition, the USOC was required to hire an athlete “ombudsman” to advise athletes on their rights. The USOC was also given additional authority, including the ability to remove to federal court any suit brought in state court for violation of the Sports Act,⁵³ and a provision was introduced

³⁹ P.L. 95–606 (codified at 36 U.S.C. § 371 *et seq.* (1978)).

⁴⁰ *See* Gold Medal LLC v. USATF, 187 F.Supp.3d 1219, 1228 (D. Oregon 2016), citing 36 U.S.C. § 220503(3) (2012).

⁴¹ *See* 36 U.S.C. § 220503.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at § 220505©(4)

⁴⁵ *Id.* at § 220523(a)(2)-(4).

⁴⁶ *Id.* at § 220523(a)(6)-(7). For a more thorough explanation, see Kohler, n. 33 *supra* at 1049-50.

⁴⁷ *Id.* at § 220524

⁴⁸ *See Money Crisis Faces U.S. Olympic Sports*, Tampa Bay Times, March 20, 2020, <https://www.tampabay.com/news/health/2020/03/28/money-crisis-faces-us-olympic-sports/> (accessed May 14, 2020).

⁴⁹ *Id.* at 220523(a)

⁵⁰ *See* Olympic and Amateur Sports Act Amendments of 1998, Pub. L. 105-277, (Oct. 21, 1998) 112 Stat. 2681 -603.

⁵¹ *Id.* *See also* Kohler, n. 33 at 1051.

⁵² *See* USOPC Bylaws, sec. 3 (2017)

⁵³ 36 U.S.C. § 220505(b)(9).

preventing a court from entering injunctive relief against the USOC in any dispute over an athlete's participation in the Olympic Games where the claim is brought within twenty-one days of the event.⁵⁴ Finally, and significantly, the amended act eliminated private rights of action against the USOC and the NGBs,⁵⁵ a point that will be discussed in more detail later in this article.

This legislative blueprint gives the now-USOPC a peculiar status. It is not a governmental entity, and there is limited rights for aggrieved parties to sue. Yet, it does have some minimal level of accountability to the public and to Congress. One Supreme Court justice noted that the USOPC performs an important government function by representing the United States to the world and coordinating U.S. Olympic Movement sports.⁵⁶ While it is Federally chartered under the Sports Act, that does not mean much in terms of oversight by Congress. In fact, as one scholar put it, a Federal charter is more an “honorific” and it confers no substantive relationship with the federal government.⁵⁷

Yet, there are a few tenuous connections to Congress under the Sports Act. The USOPC must submit a quadrennial report to Congress⁵⁸ and it has been the subject of investigation by the Senate and House committees at times of controversy, like the Larry Nasser sex abuse scandal at USA Gymnastics.⁵⁹ Yet despite these recent initiatives, the oversight of the USOPC generally has been haphazard.⁶⁰

II. Present Organization and Funding of the USOPC and the NGBs

A. Structure

Presently, the United States Olympic & Paralympic Committee is governed by a 16-member board of directors, headed by a CEO. The board meets four times per year. The powers of the USOPC board are standard for a non-profit entity. Board members are empowered “to take such other action as is customary for a board of directors of a corporation,” including the appointment of a CEO, setting compensation for the CEO and key employees, engaging in strategic planning and budgeting.⁶¹ The Board includes six “independent members” (also known as “independent

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 583 U.S. 522, 559 (Brennan, J., dissenting)

⁵⁷ *See* Dionne Kohler, *Amateur Regulation and the Unmoored United States Olympic and Paralympic Committee*, 9 Wake Forest L. Rev. Online 88 (Nov. 2019), http://wakeforestlawreview.com/2019/11/amateur-regulation-and-the-unmoored-united-states-olympic-and-paralympic-committee/#_ftn33 (accessed May 17, 2020).

⁵⁸ 36 U.S.C. § 220511 (2018).

⁵⁹ *See* Juliet Macur, *Congress Holds Hearings into Sexual Abuse in Olympic Sports*, N.Y. Times, May 23, 2018, <https://www.nytimes.com/2018/05/23/sports/larry-nassar-house-hearing.html> (accessed May 18, 2020) (Heads of the USOC, U.S.A. Gymnastics, USA Swimming, USA Taekwondo and USA Volleyball, testified to a House subcommittee investigating how the Nasser scandal happened and determining what the U.S.O.C. and the governing bodies are doing to prevent future abuse.)

⁶⁰ *See* Kohler, n. 57, *supra*.

⁶¹ *See* *Bylaws of the United States Olympic Committee*, §3.1 (2018). *Other duties include:*

to elect members of the Board, following receipt of the recommendations of the Nominating and Governance Committee and to elect the Chair;

b) to remove the Chair or any other member of the Board or any Committee for cause or not for cause;

c) to elect one member of the Board to act as, and be referred to internationally as, the President of the U.S. Paralympics;

d) to hire, fire, evaluate and set the compensation for the CEO;

directors”), three members from the NGBs, and three members nominated by the Athletes Advisory Council.⁶² An independent board member cannot have held a paid or volunteer governance position at the USOPC or an NGB for two year period to appointment.⁶³ The CEO of the organization and all the American members of the IOC are ex officio members of the board.⁶⁴

The board utilizes what are known as “constituent councils” to “serve as sources of opinion and advice” to the board.⁶⁵ Two of them, The Athletes’ Advisory Council and National Governing Bodies Council each have three representatives on the board, while six members of the board are “independent.” It also has a number of committees, which include an Ethics committee of five members appointed by the board.⁶⁶

The Athletes’ Advisory Council (“AAC”) is responsible for broadening communication between the USOPC and active athletes, and serves as a source of input and advice to the organization’s board of directors.⁶⁷ It is comprised of one representative from each Olympic and Pan American sport, eight athletes representing the Paralympic Sport Organizations, and six athletes elected by the AAC to serve at-large, including a chair and two vice chairs. Athletes on the AAC must have represented the U.S. in Olympic, Paralympic, Pan American or other major international competition within the last 10 years.⁶⁸

There has been criticism that the AAC has not been an effective voice for athletes’ concerns⁶⁹ and some athletes considered breaking away and forming an independent organization to represent their concerns. However, an agreement entered in early 2020 ensures that the AAC will stay under

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- e) to enact, amend, or repeal provisions of these Bylaws;
 - f) to admit new members, to reclassify and to terminate the membership of members, as provided by these Bylaws;
 - g) to receive and review the reports of the CEO and committees and task forces;
 - h) to approve the selection of independent auditors;
 - i) to maintain a culture of ethical behavior and compliance throughout the corporation;
 - j) to achieve as much transparency in the operations of the corporation as is reasonably achievable and to keep the attendees at the Olympic and Paralympic Assembly and the stakeholders in the Olympic and Paralympic movements in the United States informed about the business and operations of the corporation; and
 - k) to take such other action as is customary for a board of directors of a corporation.

⁶² *Id.*

⁶³ *Id. at 3.4.* In addition, the two-year period applies where an immediate family member of the director was employed by or held any paid position or volunteer governance position with the USOPC or NGBs; the director was affiliated with or employed by the corporation’s outside auditor or outside counsel; an immediate family member of the director was affiliated with or employed by the corporation’s outside auditor or outside counsel as a partner, principal or manager; or the director held a paid position or any volunteer governance or leadership position with, the AAC.

⁶⁴ See *Bylaws of the USOC Athletes Advisory Council*, Art 3(d) (2018), usocdev.org, (accessed May 14, 2020).. They are: the Athletes’ Advisory Council, National Governing Bodies Council, Multi-Sport Organizations Council, the Paralympic Advisory Committee and Collegiate Advisory Council.

⁶⁵ See *United States Olympic and Paralympic Committee 2018 Annual Report*, p. 6, <https://www.teamusa.org/footer/finance> (accessed April 11, 2020).

⁶⁶ See *United States Olympic and Paralympic Committee*, 2020 Bylaws, sec. 5.5.1. <https://www.teamusa.org/Footer/Legal/Governance-Documents>. The other committees are Finance, Audit, and Risk; and Nominating and Governance.

⁶⁷ *Id.* See also *United States Olympic and Paralympic Committee/Leadership/AAC*, <https://www.teamusa.org/About-the-USOPC/Leadership/AAC> (retrieved March 29, 2020).

⁶⁸ *Id.*

⁶⁹ See Tom Roeder and Stephanie Earls, USOC leaders, athletes and critics cite communication breakdown, *The Gazette* (Colorado Springs), Jan. 13, 2019, https://gazette.com/news/usoc-leaders-athletes-and-critics-cite-communication-breakdown/article_fe4858b0-15f0-11e9-a62e-57101a784c5a.html (accessed May 29, 2020). (Some athlete representatives were “seen by some critics and athletes as being allies of the old regime of Olympic Committee”)

the wing of the organization in return for more funding and the appointment of a full-time executive director.⁷⁰ As one AAC representative stated, “a lot of athletes weren’t really comfortable taking the risk of creating a completely independent organization.”⁷¹

The 1998 Amendments to the Sports Act require the USOPC to appoint an “athlete ombudsman” to provide independent advice to athletes, at no cost, “in resolving disputes involving opportunities for athletes to participate in Olympic, Paralympic, and Pan American Games; world championship competitions; or other protected competitions.”⁷²

Because Congress does not provide funding for Olympic sports, the Sports Act gave the then-USOC the authority to do so.⁷³ To help in its quest for financial stability, the Sports Act awarded it the rights to control their trademarks, including the word “Olympics” and the five-ring logo. The protections and enforcement are broader than for most other trademarks⁷⁴ and differ from the protection under the Lanham Act, the general governing law for trademarks.⁷⁵ The Lanham Act requires that the unauthorized use of a trademark in commerce must show a “likelihood of confusion,”⁷⁶ while the Sports Act states that the unauthorized use of an Olympic trademark is actionable without the need to prove such confusion.⁷⁷ In addition, the Supreme Court has ruled that an unauthorized user of the word does not have available the normal statutory defenses.⁷⁸ Under the Sports Act, the National Governing Bodies owns the rights to the trademarks for their given sport, not USOPC, but they have similar rights.⁷⁹

The USOPC also provides cash grants to the NGBs. In 2018, it amounted to \$65 million.⁸⁰ This is an important source, because, as one report stated, “Half the NGBs are little more than ma-

⁷⁰ See Rachel Bachmann, *Athletes Reach Deal to Gain Funding but Stay Under U.S. Olympic Wing*, The Wall Street Journal, January 23, 2020, <https://www.wsj.com/articles/athletes-reach-deal-to-gain-funding-but-stay-under-u-s-olympic-wing-11579813012> (accessed March 29, 2020). The agreement would triple the governing body’s annual funding of the athlete group, to \$525,000. The funding increase will enable the AAC, which for decades has been led by athlete volunteers, to hire a professional executive director.

⁷¹ *Id.* (Statement by AAC chair Han Xiao).

⁷² See *USOPC Athlete Ombudsman*, <https://www.usada.org/athletes/usopc-athlete-ombudsman/> (accessed April 19, 2020).

⁷³ See 36 U.S.C. § 220521(a).

⁷⁴ See 36 U.S.C. § 380. Among the protected marks are “OLYMPIC, OLYMPIAD, OLYMPIAN and FUTURE OLYMPIAN; GO FOR THE GOLD and GATEWAY TO GOLD, LET THE GAMES BEGIN, PARALYMPIC, PARALYMPIAD and PARALYMPIAN and PAN-AMERICAN, PAN AM GAMES. See *U.S. Olympic and Paralympic Brand Usage Guidelines*, <https://www.teamusa.org/brand-usage-guidelines> (accessed May 14, 2020). In order to protect that income stream, Congress also conferred enhanced authority upon the USOC, granting it rights that, in certain circumstances, exceeded those then enjoyed by most trademark owners, and enhanced enforcement powers. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 523 (1987), see also, Marcella David, *Trademark Unraveled: The U.S. Olympic Committee Versus Knitters of the World*, 14 Minn. J. L. Sci. & Tech. 705, 715 (2013).

⁷⁵ See Lanham Act, 15 U.S.C. § 1051 et. Seq.

⁷⁶ *Id.* at 1125(a).

⁷⁷ See 36 U.S.C. § 220506(c).

⁷⁸ See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 530. For a detailed discussion on the ambiguities between trademark protection under the Lanham Act and the Sports Act, see Marcella David, *Trademark Unraveled: The U.S. Olympic Committee Versus Knitters of the World*, 14 Minn. J. Law, Science & Tech. 705 (2013).

⁷⁹ See *U.S. Olympic and Paralympic Brand Usage Guidelines*, <https://www.teamusa.org/brand-usage-guidelines> (accessed July 14, 2020).

⁸⁰ See Eddie Pells, *No games, big losses: Money crisis faces US Olympic sports*, Associated Press, March 27, 2020, <https://apnews.com/82241fb79bcbabe42d27b4e2160a8d85> (accessed March 28, 2020).

and-pop operations, working with small staffs and on revenue not more than \$5 million a year.”⁸¹ Among the organizations receiving grants in 2018 were USA Hockey, US Judo, USA Karate and non-NGB organizations like National Wheelchair Basketball.⁸² However, some of the grantees were not mom-and-pop operations. USA Track and Field received almost \$4 million that year, despite its endorsement agreement with Nike valued in the hundreds of millions of dollars.⁸³

Before the Covid crisis, the USOPC employed about 500 people and had a budget of approximately \$1 billion over two years.⁸⁴ According to the USOPC, the organization spent about 83 percent of its budget supporting athletes, another 10 percent on fundraising costs and the rest on administrative expenses.⁸⁵ Nearly half of the USOPC’s budget is directed toward programming and services that support and impact elite performance for Olympic and Paralympic athletes and hopefuls either directly or via the appropriate national governing body.⁸⁶ Considerably smaller sums go to Olympic and Paralympic Competitions,⁸⁷ training facilities (in Colorado Springs, CO and Lake Placid, NY),⁸⁸ and the NGBs, the U.S. Anti-doping Agency, and the U.S. Center for SafeSport.⁸⁹ The proceeds to SafeSport have received much criticism as being too paltry.⁹⁰ The USOPC gives financial support to a number of elite athletes often from private donors through its foundation. It also provides health insurance to more than 1,000 athletes.

The coronavirus pandemic, and the resulting postponement of the Tokyo 2020 Summer Games until the summer of 2021 will result in financial uncertainty for a considerable number of U.S. Olympic and Paralympic athletes who already have qualified for those Games, or are seeking to so qualify. As one commentator noted, that with the delay in money from television revenues and any possible alteration of the terms of the sponsorship agreements due to the delay, the USOPC may be in a more precarious position than Olympic committees from other countries, which have governmental funding.⁹¹ In fact, the postponement resulted in likely USOPC budget cuts of 10 – 20% annually until 2024. As of 2020, the USOPC’s share of the domestic broadcast fees from NBC Universal (“NBCU”) would have been about \$185 million, a significant portion of the

⁸¹ *Id.*

⁸² See United States Olympic Committee, 2018 Form 990 tax return, schedule I. <https://www.teamusa.org/footer/finance> (accessed April 12, 2020).

⁸³ *Id.*

⁸⁴ See Philip Hersh, *For many Olympic-related Sports Bodies in the USA, surviving fiscal impact of Pandemic would be like winning a gold*, Globetrotting by Philp Hersh, April 29, 2020, <http://www.globetrottingbyphilphersh.com/home/2020/4/29/for-many-olympic-related-sports-bodies-in-the-usa-surviving-fiscal-impact-of-pandemic-would-be-like-winning-a-gold> (accessed April 30, 2020).

⁸⁵ See USOPC, Allocation of Resources, <https://www.teamusa.org/About-the-USOPC/Allocation-of-Resources> (accessed March 29, 2020).

⁸⁶ *Id.* (“In addition to grants and rewards that pay for coaches, training and travel, this includes athlete health insurance, sports medicine and science, coaching education programs, and Paralympic outreach and development. In 2020, that amount to over \$440 million or 47 percent of the budget.”).

⁸⁷ *Id.* The amount for 2020 was over \$85 million or 8 percent of the budget.

⁸⁸ *Id.* The amount for 2020 was \$112 million or 11 percent of the budget.

⁸⁹ *Id.* The amount for 2020 was \$118 million or 12 percent of the budget.

⁹⁰ *Id.* The amount allocated to SafeSport was only \$18.6 million.

⁹¹ See Ron Katz, US Gov’t Should Replace US Olympic Committee, Law360, April 10, 2020, https://www.law360.com/sports-and-betting/articles/1261478/us-gov-t-should-replace-us-olympic-committee?nl_pk=6ada3079-4db3-4c29-8042-be5ea277a863&utm_source=newsletter&utm_medium=email&utm_campaign=sports-and-betting (accessed April 13, 2020).

organization's projected revenue of \$412 million.⁹² As a result, the USOPC announced buyouts for at least 30 employees,⁹³ and layoffs and furloughs to an additional 80 employees.⁹⁴

Aside from television revenues, an important source of USOPC funding is from the sale of domestic and international sponsorships. In light of the Summer Olympics delay, the USOPC proposed to extend current sponsorship agreements for one more year, but that may result in a conflict between old sponsors and new ones which may be competitors of the expiring sponsors and which were to begin in 2021.⁹⁵

As of the summer of 2020, it is not yet known what concessions sponsors will seek because of the delay of the Olympics. However, it is likely that any extensions of existing agreements and/or delays in payments will further weaken the financial position of the USOPC. This situation could lead to one of two results: either the training of athletes will be curtailed, or the USOPC will obtain "bailout" money from the U.S. government. Government aid is not likely, because, as noted at the beginning of this article, the USOPC sought \$200 million, but that request was rejected.⁹⁶

If the Tokyo games are cancelled outright, the situation could become even more dire. One report said that the USOPC opted not to take out insurance against such losses, but rather to self-insure.⁹⁷ There would be a likelihood of serious decreases in membership among the NGBs (and the resulting loss of dues revenues) and the likelihood of no broadcast fees.

B. Ethical and Transparency Weaknesses

Almost from the beginning of the Sports Act era, the then-USOC was beset with organizational, financial and ethical lapses. In the 1990s, the USOC was led by five different CEOs in six years. In addition, two of its medical directors accused the organization of covering up positive drug tests and of creating an atmosphere that encourages the use of performance-

⁹² See Rachel Bachman, *Coronavirus Prompts Budget Cut for U.S. Olympic & Paralympic Committee*, The Wall Street Journal, April 21, 2020, <https://www.wsj.com/articles/coronavirus-fallout-prompts-u-s-olympic-paralympic-committee-to-cut-budget-10-20-11587492104> (accessed April 21, 2020). Because of the USOPC operates in four-year cycles, the projected revenue for that period would have \$1.12 billion and the delay may force the USOPC to cut its estimate by \$200 million. Id.

⁹³ See Chris Smith, *USOPC Begins Cost-Saving Efforts; 30-Plus Employees Take Buyouts*, Sports Business Daily, May 7, 2020, https://www.sportsbusinessdaily.com/Daily/Issues/2020/05/07/Olympics/USOPC.aspx?ana=mk_sbd_da_emda&mkt_tok=eyJpIjoiWmpWbElqSTRORFEyWVRrMilsInQiOiJ3TktVekpyVDVMa2JZb2RxODAyYWxTNjRuS251UHRQWlV2b1BuSUp3bTlwU1NuMlJZM0xRTl1WUXNMR2oyelZVVVN5NktZUFk2dXRXekxJYjh5Rk55ejArXC9lOHVYendjVGdGUEpOdnNldEJuTHA2TkxhMnFKOVkyYUNNSHEwRUMifQ%3D%3D (accessed May 7, 2020).

⁹⁴ See Bob Williams, *USOPC implements widespread layoffs and furloughs in cost-cutting measure*, SportBusiness, May 22, 2020, <https://www.sportbusiness.com/news/usopc-implements-widespread-layoffs-and-furloughs-in-cost-cutting-measure/> (accessed May 29, 2020).

⁹⁵ Chris Smith, *USOPC Offers to Extend Domestic Sponsorships to 2021*, Sports Business Daily, April 16, 2020, https://www.sportsbusinessdaily.com/Daily/Closing-Bell.aspx?ana=mk_sbd_cb_emcb&mkt_tok=eyJpIjoiTVRFeU56QTNOMlJoTm1NeSIsInQiOiJzS2VvaTFmdTd2KzV6ZDlyZ2RwWEFUUnczcmJibXlrRDdRS3pYUFVvaRzA0ck5FYlN3c1JWMIh0VXZnS094RG5vTEIEZW5lTmFoRINOSWJFZzlrMlR5YW8zRVFuZ3NFdEVyMmN6Z0JHMnJyVHNzcVZPVERQWklNbHBMUnlrbWVnknifQ%3D%3D (accessed April 16, 2020).

⁹⁶ See n. 7, supra.

⁹⁷ See *No games, big losses: Money crisis faces US Olympic sports*, The Economic Times, March 28, 2020, https://economictimes.indiatimes.com/news/sports/no-games-big-losses-money-crisis-faces-us-olympic-sports/articleshow/74857858.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (accessed June 20, 2020).

enhancing drugs.⁹⁸ It also was accused of a lack of oversight in during Salt Lake City's scandal-plagued bid to win the 2002 Winter Games.⁹⁹ The then-USOC had an unwieldy volunteer board of 115 members representing various governing bodies and other constituencies that displayed, at a minimum, bickering over petty matters and at its worst, open conflict with its paid leadership. One CEO, upon his resignation, said “this was a far more political organization than I could have possibly imagined. I wonder whether the organization has the resolve or the fortitude to recreate itself.”¹⁰⁰ That same CEO, however, was criticized by the USOC’s vice-president after he hired several staff members at \$300,000 or more a year and provided lucrative packages, including guaranteed bonuses and \$70,000 to \$90,000 in moving costs (in late 1990s dollars).¹⁰¹ Ultimately, the USOC did reduce the number of board members which eased some of the organizational problems.¹⁰²

More recently, however, the then-USOC’s lack of action in the sexual abuse scandals involving Dr. Larry Nassar on hundreds of young female gymnasts brought national criticism. For example, after damning press accounts of USA Gymnastics (the governing body for the sport) shielding Nassar,¹⁰³ an independent investigation revealed that the USOC did not report Nassar to law enforcement or take any steps to bar Nassar from USOC events or facilities. The report added that the USOC did not even discuss the allegations against Nassar with its own department that deals with sexual abuse cases.¹⁰⁴ Yet, the action and potential conflicts existed well before the Nassar scandal, dating back two decades and involves other NGBs. Its failure to act – potentially in violation of the Sports Act – most notably in the cases of swimming coaches¹⁰⁵ was nothing

⁹⁸ See Jere Longman, *OLYMPICS; U.S.O.C.'s Struggles Threaten United States Olympic Movement*, N.Y. Times, November 26, 2000, <https://www.nytimes.com/2000/11/26/sports/olympics-usoc-s-struggles-threaten-united-states-olympic-movement.html> (accessed April 21, 2020). (“The drug-testing program has become so discredited that in October, the U.S.O.C. farmed out its testing program to an independent agency headed by Frank Shorter, the 1972 Olympic marathon champion.”)

⁹⁹ *Id.* A panel lead by a former U.S. Senator noted “[USOC} officials attended few meetings to monitor the activities of bidders. That allowed the committee's former head of international relations, Alfredo LaMont, to work secretly as a paid consultant with Salt Lake City bidders. LaMont subsequent plead guilty to tax-related charges in the scandal.”

¹⁰⁰ *Id.* (Statement of former USOC CEO Norm Blake after his resignation). Examples of the petty bickering included such issues as whether staff members should be entitled to the same leather jackets and rings as the Olympic athletes.

¹⁰¹ *Id.* Sandy Baldwin, a USOC vice president, sent a letter to Bill Hybl, the committee's outgoing president, raising concerns about the proposed budget and salary levels.

¹⁰² See Scott M. Reid, *USOC signals push for more control over all governing bodies for Olympic sports*, The Oregonian, Dec. 6, 2018, <https://www.oregionregister.com/2018/12/06/usoc-signals-push-for-more-control-over-all-governing-bodies-for-olympic-sports/> (accessed July 20, 2020) (“The USOC reduced its board of directors from 120 to 11 in 2003. It expanded its board to 15 members in 2010.”).

¹⁰³ See Marisa Kwiatkowski, Mark Alesia and Tim Evans, *A Blind Eye to Sex Abuse: How USA Gymnastics Failed to Report Sex Abuse*, The Indianapolis Star, Aug. 4, 2016, <https://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/> (accessed May 15, 2020).

¹⁰⁴ See Ropes & Gray, *Report of the Independent Investigation – The Constellation of Factors Underlying Larry Nassar’s Abuse of Athletes*, <https://www.nassarinvestigation.com/en> (accessed May 15, 2020). See also, Juliet Macur, Top U.S.O.C. Officials Failed to Act on Nassar Allegations, Report Says, N.Y. Times, Dec. 10, 2018, <https://www.nytimes.com/2018/12/10/sports/usoc-investigation-report.html> (accessed May 15, 2020).

¹⁰⁵ See Letter by the Committee to Restore Integrity to the USOC (Robert Allard, Jessica Armstrong, Kathy Johnson Clarke, Nancy Hogshead-Makar, Micki King, Jonathon Little, Eva Rodansky, Patricia A. Rodowsky, Jennifer Sey, Jennifer Spiegel, Edward G. Williams, *The USOC Knew NGBs were not Complying with the Amateur Sports Act, Knew Athlete Sexual Abuse was a Frequent, Reoccurring Problem, and Made the Calculated Decision not to Act on Behalf of Athletes*, Feb. 4, 2018), <https://swimmingworld.azureedge.net/news/wp-content/uploads/2018/02/usoc-memo-congress-blackmun.pdf> (one particularly outrageous example cited: “The USOC and USA Swimming fail[ed]

short of breathtaking, covering abuses not only in swimming, but in many sports over many years, even decades.¹⁰⁶ Then USOC CEO Scott Blackmun was asked to resign in 2018, receiving a controversial severance package totaling \$2.4 million.¹⁰⁷ As a sign that the USOPC and the NGBs could not be entrusted to protect athletes, the Safe Sport Authorization Act enacted in 2017 mandated criminal penalties for the failure to report suspected sexual abuse.¹⁰⁸

Two events occurred in 2019: the USOC was formally renamed as the USOPC to recognize the contributions of Paralympians¹⁰⁹ and its leadership admitted past mistakes. In a *mea culpa* that was long overdue, USOPC Sarah Hirshland and chairwoman Susanne Lyons acknowledged the shortcomings of the organization at an annual meeting in the fall of 2019. However, in what was interpreted as a pushback to Congress, Lyons was quoted: “We don’t have to wait for anyone else to make rules for us. We can best do that for ourselves.”¹¹⁰

However, the scandal points to an underlying issue regarding the roles of the USOPC and the NGBs. This came to light in the sex abuse scandals when the USOPC and USA Gymnastics took interpreted their powers under the Sports Act in an incredibly narrow way, concluding that the Act “prevented a more robust response to reports of sexual abuse of its athletes” and that athlete safety and wellbeing “were the responsibility of NGBs.”¹¹¹

In 2018, the then-USOC entered into a joint venture with Los Angeles Olympic Organization Committee (known as LA 2028) to form U.S. Olympic and Paralympic Properties (USOPP). The purpose is to provide joint marketing efforts to the 2028 Games to be held in Los Angeles, CA. The agreement stipulates a baseline revenue to the USOC during the 2024 and 2028 quadrennials plus a share of revenues greater than a pre-determined revenue target.¹¹² The then-USOC created

to take action against Olympian and USA Swimming-certified swim coach Mitch Ivey, even though he [was] fired from the University of Florida after The Chicago Tribune, N.Y. Times and ESPN Outside the Lines report on Ivey’s sexual abuse of numerous underage athletes. One of Ivey’s victims commit[ed] suicide years later. An investigation of Ivey during his tenure at the Santa Clara International Swim Club in the 1980s would have found rampant problems of sexual abuse, not only by Ivey, but also by Ivey’s assistant coaches. USA Swimming waited 20 years to ban Mitch Ivey, allowing him to sexually harass and abuse other young swimmers.”)

¹⁰⁶ See Senators Jerry Moran and Richard Blumenthal, Senate Olympics Investigation: The Courage of Survivors: A call to Action, July 30, 2019, https://www.moran.senate.gov/public/_cache/files/c/2/c232725e-b717-4ec8-913e-845ffe0837e6/FCC5DFDE2005A2EACF5A9A25FF76D538.2019.07.30-the-courage-of-survivors--a-call-to-action-olympics-investigation-report-final.pdf (accessed July 5, 2020). (“While the Nassar case is breathtaking in scale, athletes from a range of Olympic sports have similarly suffered abuse at the hands of officials, coaches, fellow athletes, and others connected to their sports. The egregious nature of this and past instances of abuse – combined with the number of victims – required Congressional attention and action.”)

¹⁰⁷ See Jere Longman, *U.S. Olympics Chief Received \$2.4 Million in Severance Amid Scandal*, N.Y. Times, July 3, 2019, <https://www.nytimes.com/2019/07/03/sports/olympics-scott-blackmun.html> (accessed May 15, 2020).

¹⁰⁸ See Safe Sport Authorization Act of 2017, Public Law 115-126, 132 Stat. 318 (Feb. 2017)

¹⁰⁹ See Rick Maese, *U.S. Olympic Committee Changes Name to Recognize Paralympians*, The Washington Post, June 20, 2019, <https://www.washingtonpost.com/sports/2019/06/20/us-olympic-committee-changes-name-recognize-paralympians/> (accessed May 29, 2020).

¹¹⁰ See U.S. Olympic committee faces major challenges, The Herald News, Sept. 13, 2019, https://www.heraldandnews.com/sports/u-s-olympic-committee-faces-major-challenges/article_ecf5cd54-35bc-5308-abf6-5c3b7094435e.html (accessed April 19, 2020).

¹¹¹ See Kohler, n. 33. See also, Will Hobson & Steven Rich, *An Athlete Accused Her Coach of Sexual Abuse. Olympic Officials Stayed on the Sideline*, Wash. Post (Feb. 14, 2017), https://www.washingtonpost.com/sports/olympics/an-athlete-accused-her-coach-of-sex-abuse-olympic-officials-stayed-on-sideline/2017/02/14/35a6fc76-d2eb-11e6-a783-cd3fa950f2fd_story.html?noredirect=on (accessed May 18, 2020).

¹¹² *Id.* at p. 15. LAOPP is an LLC owned 20% by the USOPC and 80% by LA 2028.

the U.S. Olympic and Paralympic Foundation (USOPF) in 2013 for the purpose of generating philanthropic support for the USOPC.¹¹³ Whether this effort is successful remains to be seen.

For many NGBs, their finances are dependent on their own sponsorship agreements and the USOPC. While the amounts and percentages vary from year to year and group to group, generally, NGBs receive less than 10% of their annual revenues from the USOPC.¹¹⁴ Some receive support from international sports federations, but NGBs must pay most of their own operating costs.

With the possible exception of the largest bodies, many NGBs are dependent on membership and event registration fees for revenue and they have seen memberships fees and event revenues drop or vanish as precautions to curb the virus have erased sports calendars.¹¹⁵ An example of challenges facing a smaller NGB involve USA Weightlifting, which, according to one report, has lost about 1,500 members in the two months since the onset of the Covid-19 crisis in mid-March, resulting in around \$100,000 in reduced revenue. Additionally, several hundred competitions, ranging from elite national championships to local inter-club tournaments, have also been cancelled or postponed until later in 2020. Over 100 in-person coaching courses were cancelled.¹¹⁶

USA Track and Field is blessed with a lucrative funding source in Nike where a long-term agreement pays a total of \$400 million and concludes in 2043¹¹⁷ (some reports say 2040, but since the agreement has not been publicly released, so one is not sure), it also has sponsorship agreements, with firms such as Hershey and Toyota.¹¹⁸

III. How the Law Shields the USATF and the NGBs from Lawsuits

The Olympic governance organizations have been given certain judicial and statutory immunities, resulting in difficulties for aggrieved parties to successfully bring lawsuits against them.

It make sense that the USOPC or an NGB would protections against expensive and time-consuming litigation in areas such as athletic eligibility to participate in competitions or to challenge a doping violation. And, not surprisingly, the USOPC and the NGBS have been granted certain legal immunities that make challenges against their policies and practices difficult, if not impossible to win.

The immunities involve antitrust and constitutional claims. Some federal circuits have created an antitrust exemption over governing bodies, while 1998 amendments to the Sports Act rendered these organizations not to be state actors, thereby insulating these bodies from constitutional

¹¹³ *Id.* at p. 20. The USOC made grants to the USOPF totaling, \$12,599,000 and \$23,650,000 for the year ended December 31, 2018 and two-year period ended December 31, 2018, respectively, which must be used by the USOPF exclusively for its own administrative and fundraising expenses.

¹¹⁴ See Rachel Bachman, *U.S. Olympic Sports Groups Seek Government Aid*, The Wall Street Journal, April 12, 2020, <https://www.wsj.com/articles/u-s-olympic-sports-groups-seek-government-aid-11586689219> (accessed April 13, 2020).

¹¹⁵ *Id.* (“The federal economic-rescue package [enacted in April 2020] allow[ed] certain employers to apply for loans to cover payroll, rent and utilities. Sports governing bodies believe they meet the criteria, including having fewer than 500 employees, and they’re seeking or plan to seek aid alongside tens of thousands of other businesses and nonprofits.”)

¹¹⁶ See Rob Williams, *USA Weightlifting’s woes paint familiar picture for Olympic NGBs*, SportBusiness, <https://www.sportbusiness.com/2020/05/usa-weightlifting-pivots-revenue-streams-online-to-mitigate-covid-19-financial-losses/> (accessed May 25, 2020).

¹¹⁷ See Tripp Mickle, *Nike Signs 23-Year Sponsorship Extension with USATF Valued at More than \$400M*, Sports Business Journal, April 17, 2014, <https://www.sportsbusinessdaily.com/Daily/Issues/2014/04/17/Marketing-and-Sponsorship/Nike-USATF.aspx> (accessed May 15, 2020).

¹¹⁸ See USATF Sponsors, <https://www.usatf.org/about/sponsors> (accessed May 15, 2020).

challenges. In addition, arbitration agreements signed by athletes result in many disputes being decided by arbitrators than courts. There may be justifications for these immunities and mandatory arbitration and a new Sport Act may want to retain them to limit court challenges. However, those immunities should come with additional responsibilities, as will be discussed later.

A. Antitrust Exemption for USOPC and NGBs

It is almost a truism that professional sports leagues have long been vulnerable to antitrust concerns, in large part due to their cartel structure, which produces economic domination over the particular sport.¹¹⁹ However, due to the unique characteristics of professional sports leagues, the courts have often treaded gingerly into their alleged anti-competition activities, by either justifying what arguably would be anti-trust violations as “pro-competitive” under the “rule of reason” standard of interpretation¹²⁰ or by the creation of antitrust exemptions, either by statute¹²¹ or by the courts.¹²²

Although traditional amateur Olympic sports organizations do not command the same economic domination, it is clear that that such sports involve commerce. Examples would be sponsorship and broadcast agreements. It is also fair to say that the activities of Olympic governing bodies could also be subject to antitrust challenge, as they (1) exercise domination and control of a given market; (2) enact policies that can restrict competition to maintain that control. The question has been raised as to whether these bodies have an anti-trust exemption created by the Sports Act.¹²³ In at three federal circuits, the answer is yes.

Decisions of the U.S. Courts of Appeals for the 9th, 10th and 11th Circuits have concluded that such an immunity exists, while the Fifth Circuit denied the creation of an exemption.¹²⁴ The

¹¹⁹ See Thane Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. of Miami L. Rev. 730, 768 (1987) (“from other sports vulnerable to antitrust review”)

¹²⁰ See Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 Jeffrey S. Moorad Sports L.J.75 (2015). (“Professional sports leagues have benefitted from the application of the Rule of Reason when their actions have been challenged as anticompetitive with courts refusing to apply the per se rule.”)

¹²¹ See Sports Broadcasting Act of 1961, Pub. L. 87–331, §1, Sept. 30, 1961, 75 Stat. 732, 15 U.S.C. 1291 et seq.

¹²² See, e.g. Federal Baseball Club v. National League, 259 U.S. 200 (1922), (antitrust does not apply to baseball as it was not engaging in an activity in interstate commerce); Flood v. Kuhn, 407 U.S. 258 (1972) (upheld baseball’s antitrust exemption based on past precedents, despite the conclusion that baseball’s activities are clearly within interstate commerce); See also Powell v. NFL, 78 F. Supp. 777 (D. Minn. 1988), *rev’d*, 930 F.2d 1293 (8th Cir. 1989), *cert denied*, 111 S. Ct. 711 (1991).and McNeal v. NFL, McNeil v. National Football League, 764 F. Supp. 1351 (D. Minn. 1991) (series of cases interpreting the scope of the non-statutory exemption to the antitrust laws).

¹²³ See David Hanselman and Joshua Eastby, *A Potential Antitrust Pitfall For Amateur Sports Organizations*, Law360.com, March 28, 2019, <https://www.law360.com/articles/1142671/a-potential-antitrust-pitfall-for-amateur-sports-organizations> (accessed May 30, 2020) (“The situation for amateur sports organizations created under the Amateur Sports Act of 1978 is markedly different.[8] Where other sports organizations are typically subject to at least a partial antitrust review, when it comes to national governing bodies, the standard generally is “all bets are off.”).

¹²⁴ See JES Properties, Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1232 (11th Cir.2006) (United States Equestrian Foundation immune from antitrust liability where it set up scheduling rules to minimize competition conflicts). The case involved a challenge to a rule developed by the United States Equestrian Foundation that imposed a mileage distance for equestrian competitions. The purposes for the rule was: 1) “to concentrate elite riders into fewer competitions in order to yield the most competitive international equestrian team possible,” and 2) “to promote equestrianism nationwide by forcing promoters to hold recognized competitions in more diverse locations.” *Id.* at 1227. The Eleventh Circuit reasoned that, due to “the monolithic control” exercised by national governing bodies, “the question ... is whether the application of the antitrust laws to the facts of this case would unduly interfere with the operation of the ASA.” It held that “[b]ecause the ASA requires [a national governing body] to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is plainly

rationale for the granting of the exemption is ensuring that the policies of the USOPC are “uniform” and preventing potentially extensive and costly litigation that would limit its powers to control the Olympic program. As one court stated: “[Appellant] complains of exactly that action which the [Sports Act] directs—the monolithic control of an amateur sport by the [USOC and national governing body] for that sport.” It added: [a]lthough [a national governing body] is a private actor, the monolithic control exerted by [a national governing body] over its amateur sport is a direct result of the congressional intent expressed in the [Sports Act].”¹²⁵ This is exactly the kind of problem that comes about when a private actor takes on the role of a quasi-public entity. In an interesting mix of private and public responsibility – that kind of entity (in this case the USOPC) is tasked with making broad restrictions to further its goal to streamline and control the Olympic movement in the United States. On the other hand, it gives the organization a virtual *carte blanche* on decision making.

In so doing, at least in the three circuits that granted the antitrust immunity, the USOPC and the NGBs have considerable power to make exclusionary rules – from limitation on athletes to wear their own sponsored clothing to limitation of compensation to restrictions on certain types of competitions -- without the threat of antitrust challenge. As one court stated: “[i]n light of the broad authority bestowed upon national governing bodies to fund the Olympic Mission, . . . [t]o compel the Olympic Committee . . . under the antitrust laws to permit any would-be advertiser to sponsor individual athletes without national governing body approval ‘would unduly interfere with the operation of the [Sports Act].’”¹²⁶ In addition, the exemption is only applicable in a minority of jurisdictions so it could encourage forum shopping. Rather, eliminating this exemption in those circuits would create a uniform system whereby courts would utilize the policy-based “rule of reason” standard to determine whether the restriction’s pro-competitive qualities outweigh its anti-competitive characteristics.¹²⁷ As explained later in the article, a new Sports Act could create a limited statutory anti-trust exemption in return for the funding and transparency rules discussed.

repugnant to the ASA; *Behagen v. Amateur Basketball Ass’n of U.S.*, 884 F.2d 524, 529 (10th Cir.1989) (antitrust exemption inferred from ASA where basketball NGB established player eligibility rules). In this case, the Tenth Circuit reversed a jury verdict in favor of a basketball player who challenged under the antitrust laws an eligibility rule developed by the national governing body for amateur basketball that prohibited a player from participating in amateur events if the player had participated in professional games.[citation omitted]. The Tenth Circuit held that the antitrust issue should not have gone to the jury because the eligibility rule was exempt from the antitrust laws under the ASA. [citation omitted]; and *Gold Medal LLC v. USATF*, 899 F.3d 712 (9th Cir. 2018) (antitrust exemption applied, rejecting a challenge to a ban on branded apparel during the Olympic Track and Field Trials). The Fifth Circuit denied the existence of such an exemption in *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n, Inc.*, 213 F.3d 198 (5th Cir. 2000) (the exclusionary activities of non-profit, volunteer-run soccer organizations should not be afforded implied antitrust immunity for a rule requiring soccer players, coaches, and referees to conduct soccer games only at “sanctioned” facilities.) The court held that the exclusionary activities of non-profit, volunteer-run soccer organizations should not be afforded implied antitrust immunity for a rule requiring soccer players, coaches, and referees to conduct soccer games only at “sanctioned” facilities, which did not include Eleven Line’s for-profit soccer facility. The Gold Medal court distinguished this case from the others in large part because the national governing body for youth soccer did not issue the challenged rule or explicitly approve it. *See id.* at 204.

¹²⁵ *See* *Gold Medal v. USATF*, *supra*, 899 F.3d at 716.

¹²⁶ *Id.* at 717.

¹²⁷ *See* John Roberti, Kelse Moen, and Jana Steenholdt, *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, <https://www.justice.gov/atr/page/file/1042806/download> (accessed February 16, 2020) (“However well-intentioned antitrust exemptions may be, most of them threaten to institutionalize anticompetitive conduct, often in sweeping ways that could be better addressed through more narrowly-tailored reforms that do not otherwise conflict with the modern, procompetitive thrust of the antitrust laws.”)

B. Limitations on Constitutional Challenges to USOPC and NGBs Decisions

The structure outlined by the original Amateur Sports Act (and retained in the 1998 amendments), granted only a limited role for Congress in overseeing the sport governing bodies. While the law chartered the then-USOC, that organization – and the national governing bodies that it oversees -- are considered private actors, thereby limiting athletes' rights to challenge policies on constitutional grounds.¹²⁸ In the case of constitutional challenge, the original legislation did not address this point and it was up to the courts to consider the question.

Addressing this issue was *DeFrantz v. United States Olympic Committee*, which involved a challenge by 25 athletes and one member of the Executive Board of the USOC¹²⁹ to enjoin the USOC from carrying out a resolution, adopted by the USOC House of Delegates on April 12, 1980 not to send an American team to participate in the Games of the Moscow Summer Olympics held that summer.¹³⁰ The decision to boycott the games was made after heavy pressure by President Jimmy Carter and Congress,¹³¹ as a response to the Soviet invasion of Afghanistan the year earlier.

In rejecting the plaintiffs' claim, the district court concluded that the USOC was not a state actor and, as a result, it dismissed the due process violations claims, noting that "the USOC is an independent body, and nothing in its chartering statute gives the federal government the right to control that body or its officers."¹³² Furthermore, the facts here do not indicate that the federal government was able to exercise any type of "de facto" control over the USOC.

Since *DeFrantz*, but before the passage of the 1998 Amendments to the Act, one court raised the possibility that an action claiming Title IX gender discrimination against an NGO for barring a women's team from competing in an international tournament could demonstrate state action.¹³³ In so doing, it inferred that under the Sports Act, a private right of action can exist based on the

¹²⁸ At the time, the USOC was a corporation created and granted a federal charter by Congress in 1950. Pub.L. No. 81-805, 64 Stat. 899. This charter was revised by the Amateur Sports Act of 1978, Pub.L. No. 95-606, 92 Stat. 3045, 36 U.S.C. sec. 371 *et seq.* See also, *DeFrantz v. USOC*, 492 F. Supp. 1181 (D.D.C. 1980). (which concluded that the USOC was not a state actor and an aggrieved athlete could not bring suit claiming constitutional violations).

¹²⁹ See *DeFrantz*, 492 F. Supp. At 1182.

¹³⁰ *Id.* The USOC's vote denied the U.S. Olympic athletes the opportunity to compete in the wake of the invasion and occupation of Afghanistan by Soviet military forces.

¹³¹ *Id.* at 1184. ("the Administration strenuously urged a boycott of the Moscow games. On January 20, 1980, President Carter wrote the President of the United States Olympic Committee to urge that the USOC propose to the IOC that the 1980 summer games be transferred from Moscow, postponed, or cancelled if the Soviet forces were not withdrawn within a month. . . . the United States House of Representatives passed, by a vote of 386 to 12, a Concurrent Resolution opposing participation by United States athletes in the Moscow Games unless Soviet troops were withdrawn from Afghanistan by February 20th. The Senate passed a similar resolution by a vote of 88 to 4. . . . the USOC's 86-member Executive Board held a meeting . . . inviting White House counsel Lloyd Cutler to address them . . . President Carter told members of the Athletes Advisory Council, an official body of the USOC, that American athletes will not participate in the Moscow summer games. . . . the President sent a telegram to the president and officers of the USOC and to its House of Delegates, urging the USOC vote against sending an American team to Moscow. In a [subsequent speech, the President said that "if legal actions are necessary to enforce (my) decision not to send a team to Moscow, then I will take those legal actions." . . . On April 10 and 11, 1980, the 13-member Administrative Committee of the USOC met in Colorado Springs and voted to support a resolution against sending a team to Moscow. Only Anita DeFrantz, a plaintiff in this action, dissented. . . .") The USOC House of Delegates, on a secret ballot, passed by a vote of 1,604 to 798, a resolution adopting the boycott. *Id.* at 1184-85.

¹³² *Id.* at 1194. The decision also stated that if the USOC was a state actor, no violation could be found. The court also concluded that the USOC had not only had the authority to decide not to send an American team to the summer Olympics, but also that it could do so for reasons not directly related to sports considerations. *Id.* at 1189, and that the Amateur Sports Act does not confer an express or implied private right of right of action to maintain this suit, *Id.* at 1192.

¹³³ See *Sternberg v. U.S.A. National Karate-Do Federation*, 123 F.Supp.2d 659 (E.D.N.Y. 2000).

law's enumerated goal of providing assistance to women's athletics¹³⁴ (a conclusion which is contrary to the *DeFrantz* court's prohibition on private actions) and that action could include a claim for Title IX discrimination. In another case, a trial court ruled that a coach is permitted to bring a racial discrimination claim under 42 U.S.C. 1981 as the law did not "preclude" private actions.¹³⁵ But courts have also upheld the *DeFrantz* court's conclusion that private rights of action are precluded by the law.¹³⁶ Notably, the Supreme Court did conclude that the USOC was not a state actor, it came in the context of a trademark infringement case, not a case involving athletes' rights,¹³⁷ it did not involve a situation involving the rights of athletes.

DeFrantz dates from a time when the Olympic movement was far smaller, and amateurism was still the rule. However, as the Olympics became professionalized, some scholars have argued that the premise of *DeFrantz* is flawed, and that athletes do have protected property and liberty interests in their athletic eligibility. Prof. Koller noted that a sports body "can be held to constitutional standards in circumstances where the federal government has directed their actions" (as in the case of the USOC in the *DeFrantz* case).¹³⁸ In addition, more recent applications of state actor doctrine show that courts have become more flexible in determining the relationship between the state and the ostensive private entity.

There are three bases for a non-governmental entity to be regarded as a state actor: (1) when the government becomes excessively entangled with private behavior that encourages or causes the unconstitutional behavior; (2) when a private entity performs what is traditionally an exclusively public function; and (3) when the private actor and the government have a "symbiotic relationship."¹³⁹ In the sports area, two Supreme Court cases have focused on the first basis, entanglement, and they illustrate that differences in approach: *NCAA v. Tarkanian*¹⁴⁰ and *Brentwood Academy v. Tennessee Secondary School Athletic Association*.¹⁴¹ *Tarkanian* involved the question whether the NCAA would be a state actor because it suspended a coach working in a public university and both the University and the coach claimed constitutional due process violations under the Fifth and Fourteenth Amendments.¹⁴² The court concluded that although a state-backed institution suspended the coach for alleged NCAA violations, it did not act under color of state law under 42 USC §1983, since the governing body (the NCAA) was not a state actor as it operated outside the state and was composed of both public and private member

¹³⁴ *Id.* at 664-65. The court in *Sternberg* held that the plaintiff had an implied private cause of action for sex discrimination under the Amateur Sports Act because one of the Act's purposes is to encourage and provide assistance to women in amateur athletics.

¹³⁵ See *Lee v. U.S. Taekwondo Union*, 331 F. Supp. 2d 1252 (D. Hawai'i, 2004) (Former coach is able to sue for racial discrimination lawsuit under 42 U.S.C. 1981, but the court denied the claim .

¹³⁶ See *Oldfield v. Athletic Congress*, 779 F.2d 505, 507 (9th Cir.1985) (Ninth Circuit affirmed the summary judgment, holding that the Amateur Sports Act contained no express private right of action allowing an athlete to challenge his eligibility determination.).

¹³⁷ See *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 547 (1987), for the proposition that the USOC had the power to enforce its trademark right to the term "Olympic" as a decision of an independent body.

¹³⁸ See Dionne Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. Rev. 1465 (2008) ("Such an approach would be targeted in that it would only apply to the individual circumstances of a particular case. [footnote omitted] Whether a court would apply the Constitution to the USOC or USADA in an athlete-eligibility dispute is an open question, although in some circumstances the USOC and USADA may engage in state action [footnote omitted].

¹³⁹ See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. Rev. 1, 6-7 (2005).

¹⁴⁰ 488 U.S.179 (1988).

¹⁴¹ 531 U.S. 288 (2001)

¹⁴² 488 U.S. at 181.

institutions.¹⁴³ In *Brentwood*, decided over a decade later, the Supreme Court concluded that a privately-funded state interscholastic athletic organization’s “pervasive entwinement” with the state resulted in that organization’s classification as a state actor.¹⁴⁴ Taking this approach, a court could find that the USOPC could be a state actor because of the mandates given in the Sports Act and that the organization was chartered by Congress.

With the passage of the 1998 amendments to the Sports Act, the question as to whether the USOPC and the NGBs are state actors became moot because, as noted earlier, those amendments specifically barred private causes of action against Olympic organizations, with few exceptions.¹⁴⁵

In addition to the antitrust and constitutional issues, courts have also concluded that the Sports Act pre-empts actions based on state law,¹⁴⁶ closing another avenue for claims against these organizations.

The limited, or “static” view of state action with regard to organizations like the USOPC has been criticized as too formalistic and contrary to an earlier, more expansive view of the doctrine.¹⁴⁷ While it is true that government funding alone does not confer state actor status,¹⁴⁸ if the USOPC will receive Federal funding and subject to a Federally-appointed commission with regulatory powers under a new Sports Act, it would be far more likely that it would be conferred state actor status by the courts.

IV. Reasons for Amending the Sports Act

A. The Old Model is Antiquated

Many in the athletic community have advocated changes in the Sports Act and they are correct.¹⁴⁹ It is based on an outdated model of amateur sports and limited government involvement, and it gives far too much autonomy to the USOPC and the national governing bodies. The

¹⁴³ *Id.* at 193.

¹⁴⁴ See *Brentwood Academy v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. at 300 (the court found that the state interscholastic athletic association a state actor even though its funding came from dues payments and issued regulations without input from the state’s board of education). Sensing a departure from the approach taken in *Tarkanian*, Justice Thomas, in his spirited dissent, noted that the majority did not define “entwinement” nor was there any “symbiotic relationship” between the State of Tennessee and the TSSAA. *Id.* at 313.

¹⁴⁵ See 36 U.S.C. § 220505(b)(9) (2001)

¹⁴⁶ See *Pliuskaitis v. USA Swimming*, 720 Fed.Appx. 481 (10th Cir. 2018) (“we agree with the district court that the Sports Act preempts [] Pliuskaitis’s claims for breach of duty, breach of contract, breach of good faith and fair dealing, and tortious interference. We likewise agree with the district court that the defamation claim is untimely, and we affirm the district court’s decision dismissing that claim”)

¹⁴⁷ See Dionne Kohler, *Frozen in Time: The State Action Doctrine’s Application to Amateur Sports*, 82 St. John’s L. Rev. 183 (2008) (“T]his static conception of the USOC and NCAA as private actors has provided a powerful incentive for the government to pursue policy objectives, . . . without its methods being subject to constitutional constraint.”).

¹⁴⁸ See *Rendell-Baker v. Kohn*, 458 U.S. 830 (1982) (court rejected state actor status for a private school receiving state funding); See also *Jackson v. Metropolitan Edison*, 419 U.S. 345, 350 (1974) (“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.”).

¹⁴⁹ See Edward G. Williams and Nancy Hogshead-Makar, Co-Chairs The Committee to Restore Integrity to the USOC; Our Recommendations for an “Athletes First” Olympic Committee, Jan. 22, 2019, http://aroundtherings.com/site/A_75538/Title_THE-COMMITTEE-TO-RESTORE-INTEGRITY-TO-THE-USOC-OUR-RECOMMENDATIONS-FOR-AN-ATHLETES-FIRST-OLYMPIC-COMMITTEE/292/Articles (accessed April 19, 2020). See also Olympians Rising: Recommendations to Congress: Reforming the U.S. Olympic Committee to Ensure Health and Livelihood of Athletes, Sept. 19, 2018, https://b4e28f76-a1fb-478b-b91a-cd0786d4a572.filesusr.com/ugd/6c3074_b899564b76b14e989567335d0a9b4406.pdf (accessed May 18, 2020).

limitations of the law hurts the U.S. Olympic sports system in several ways. First, as noted earlier, many governing bodies do not have adequate or consistent funding.¹⁵⁰ And for those organizations like the USA Track and Field that are awash in funding, they are heavily dependent on that sponsorship largesse and it would be naïve to think that Nike’s \$400 million, 20-plus year sponsorship agreement with USA Track and Field is irrelevant in its decision making. And, more fundamentally, if the sponsorship funds dry out – which may occur in the wake of the post Covid-19 environment – both the USOPC and the particular NGB could suffer severe financial hardship. The fact that the USOPC and many of the NGBs applied for government funds proves this point.

In fact, that hardship may be coming to those NGBs. In the month after the announcement of the postponement of the Tokyo Summer Olympics, not only has the USOPC had to cut its budget, but the NGBs in various sports also have announced cutbacks in staffing and compensation, anticipating lower revenues caused by cancellation of events and possibly, sponsorship losses. USA Track and Field laid off employees and its CEO took a 20 percent salary cut (although his salary remains quite generous).¹⁵¹ Anticipating a significant loss of revenue, USA Cycling has announced layoffs and furloughs, and USA Rugby filed for bankruptcy.¹⁵² If cancellations of events drag on, the more insecure the funding will likely be.

Some have argued that government funding should not be the answer and that the United States does not have the tradition of top-down planning in Olympic athletics.¹⁵³ Others have argued for the creation of an athletic-centered USOPC and for some changes in the Sports Act. One organization, known as the Committee to Restore Integrity to the USOC, proposed some key changes, which include: direct athlete representation on the [USOPC] Board of Directors; designating 50 percent of the [USOPC] board seats for athletes; compensating athlete representatives; establishing two-year period between service as an athlete representative and employment at the USOPC, an NGB or at the U.S. Center for SafeSport.¹⁵⁴ Additional recommendations include the creation of an inspector general to receive complaints, investigate facts, and make determinations of financial and other wrongdoing.¹⁵⁵ These proposals should serve as a basis for a broad reform of the U.S. Olympic system.

¹⁵⁰ See Padden, n. 10, supra.

¹⁵¹ See Michael Pavitt, *USA Track and Field Chief to Take Pay Cut as Organisation Lays Off Seven Staff, Inside the Games*, April 18, 2020, <https://www.insidethegames.biz/articles/1093288/usa-track-and-field-pay-cut-lay-offs#.XpzB2lyZmDk.twitter> (accessed April 19, 2020). (“Numerous competitions have been either postponed or cancelled due to the pandemic. This included the US Olympic Trials in Eugene, . . . Oregon, which will move to 2021 following the postponement of the Tokyo 2020 Olympic Games to next year. . . . [t]he USATF Under-20 Championships and the National Youth Outdoor Championships. . . . The decrease in USATF CEO Max Siegel’s salary of over \$1 million (reported in the 2017 tax returns would still result in a very healthy level of compensation.

¹⁵² *Id.* USA Cycling cut 15 per cent of the organisation’s staff, with a further 25 per cent placed on furlough because it was expecting a 30 per cent loss of revenue due to the coronavirus pandemic and its impact on events. A major reason that USA Rugby filed for bankruptcy was the financial constraints caused by the pandemic.

¹⁵³ See Emily Dunham, *No Federal Funding for U.S. Olympians*, *The Daily Signal*, Feb. 7, 2014, <https://www.dailysignal.com/2014/02/07/federal-funding-us-olympians/> (“What seems like unnecessary commercialism is actually capitalism at work. International Olympic partners and the national team sponsors make the Games possible and – at least in the United States – without costing the taxpayers a dime.”).

¹⁵⁴ See n. 149, supra. In addition, a proposal to provide the Athlete Advisory Committee with a staff (which has been accepted by the USOPC, to an extent in 2020); creating an Athlete Advocate’s office that is staffed to provide confidential legal advice to athletes on the rights granted to them under the Sports Act and/or the USOC Bylaws and policies has been discussed.

¹⁵⁵ *Id.*

One can argue that sponsors could be catalysts for change by using their financial wherewithal to mandate reforms in the way the USOPC or the NGBs operate. That is possible, but not likely. Look at U.S. Gymnastics. Its sponsors have fled the organization and its future is cloudy in the wake of lawsuits by sexual abuse victims and a bankruptcy filing.¹⁵⁶ While it has a new CEO who has earned some praise for her efforts to salvage the organization, it may be too little, too late. That turns the argument on its head -- the organization may cover up transgressions *because* of the fear of loss of sponsorship money.

For these reasons, it is time for the Federal government to play a large role in regulating the Olympic system. The new law would have three central tenets – (1) a governmental funding component; (2) mandatory transparency and disclosure rules, and (3) the creation of a new Congressionally-appointed organization called the “Commission for Olympic and Paralympic Sports.” These components will be discussed below.

A new Sports Act can create the right combination of a consistent funding mechanism for the USOPC and the NGBs, and in return, these organizations would be required to conduct themselves in more transparent, and effective manner or risk being publicly shamed or even decertified. Some of these proposals are derived from positions taken by two leading organizations seeking to reform the Olympic movement in the United States – The Committee to Restore Integrity to the USOPC and Olympians Rising.¹⁵⁷ Others are solely from the author.

B. The NCAA May No Longer Be a Lifeline for Olympic Athletes

One of the peculiarities in the U.S. Olympic system is that college athletes are under the control of a different organization which sets its own rules and provides its own funding through its member schools. The National Collegiate Athletic Association (“NCAA”) has governed collegiate sports for over a century and establishes standards for eligibility based on the notion of amateurism that the Olympic movement has long eschewed.¹⁵⁸ Many, but not all of the Olympic sports are part of the NCAA regimen, and many Olympians came from the NCAA ranks, especially in track and field and swimming.¹⁵⁹ Some of the sports that are both NCAA and Olympic sports including track

¹⁵⁶ See Des Bieler, *Amid Sexual Assault Scandal, USA Gymnastics Loses Major Sponsors*, Wash. Post, Dec. 14, 2017, <https://www.washingtonpost.com/news/early-lead/wp/2017/12/14/amid-sexual-assault-scandal-usa-gymnastics-loses-major-corporate-sponsors/> (accessed May 16, 2020) (“Rocked by the sexual assault scandal involving former team physician Larry Nassar, USA Gymnastics has lost a pair of major corporate sponsors, Procter & Gamble (P&G) and Kellogg’s.”). See also Suzanne Krowiak, *Ask me Anything: Li Leung, USA Gymnastics CEO*, Indianapolis Monthly, September 9, 2019, <https://www.indianapolismonthly.com/arts-and-culture/circle-city/ask-me-anything-li-li-leung-usa-gymnastics-ceo> (accessed May 16, 2020).

¹⁵⁷ The Committee to Restore Integrity to the USOC, n. 149. See also, Olympians Rising is another organization composed of former Olympians “and friends that are disgusted with the negligence of the U.S. Olympic Committee, and outraged by their dysfunction, neglect and out-of-whack priorities.” See <https://www.olympiansrising.org/> (accessed May 18, 2020).

¹⁵⁸ See NCAA Constitution 2019-2020, sec. 2.9 (“The Principle of Amateurism”) and Division I Manual 2019-20, 12.01 (General Principles of Amateurism), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>

¹⁵⁹ See Ross Dellenger and Pat Forde, *A Collegiate Model in Crisis: The Crippling Impact of Schools Cutting Sports*, Sports Illustrated, June 11, 2020, https://www.si.com/college/2020/06/11/college-sports-program-cuts-ncaa-olympics?suid=5cc1c2c924c17c4939479167&utm_source=Sailthru&utm_medium=email&utm_campaign=SI%20Extra%20061120&utm_term=SI%20Extra%20-%20USE%20THIS%20-%20List (accessed July 8, 2020) (“Sarah Wilhelmi, the U.S. Olympic and Paralympic Committee’s director of college partnerships says 88% of American summer Olympians in Rio had played their sport in college, and in the 2018 winter games, one-third of Americans were former college athletes.”)

and field, swimming/diving, weightlifting, fencing, gymnastics, women's field hockey, rowing, volleyball, rifle/shooting, wrestling, golf, tennis, water polo, skiing and baseball/softball (2021 only).¹⁶⁰ While NCAA participation in track is robust all over the country, there are relatively few schools which offer programs in sports such as rifle, skiing, water polo and gymnastics.¹⁶¹ Other sports, like figure skating, curling and biathlon, are not NCAA sports.

Student-athletes in the NCAA sports system have had certain advantages over their non-collegiate counterparts. Many receive full or partial scholarships, which cover tuition, room and board and meals under a concept known as "full cost-of-attendance."¹⁶² They have coaches and facilities to practice and compete right on campus and do not have to engage in the kinds of costs that those in, say, figure skating must bear, which could be in the hundreds of thousands of dollars before those very few even make an Olympic team.¹⁶³

There is a strong connection between collegiate sports and the Olympic movement. At the 2016 Summer Games, more than 80 percent of the U.S. national team (more than 1,000 Olympians overall) currently or formerly competed in college beforehand.¹⁶⁴ For the 2018 Winter Games in PyeongChang, South Korea, that number was 148.¹⁶⁵ The NCAA even allows some prize money to be collected without affecting eligibility.¹⁶⁶

Athletic expenses are a significant part of an institution's budget.¹⁶⁷ The post-COVID environment has the potential to cause disruption in the traditional collegiate system. In the spring of 2020, a survey of athletic directors from Division I schools painted a bleak financial picture of college sports based on the impact of the corona virus on the financing of their operations. Eighty-six percent of the FBS athletic directors believed their universities will require their athletic departments to make "financial sacrifices" because of the crisis, which will involve significant decreases in revenues.¹⁶⁸ This hints at remedies including cutting certain sports and laying off staff

¹⁶⁰ See Steve Dittmore, *The Ramifications of Olympic Sports Elimination Due to Covid-19*, Athleticdirector.com, April 9, 2020, <https://www.athleticdirector.com/articles/more-universities-may-nee-to-eliminate-sports-and-that-would-be-bad-for-the-usopc-but-should-it-matter/> (accessed May 16, 2020).

¹⁶¹ See NCAA 2018-19 Participation Study, Men's Sports; NCAA 2018-19 Participation Study, Women's Sports, pp. 82-83, https://ncaaorg.s3.amazonaws.com/research/sportpart/2018-19_RES_SportsSponsorshipParticipationRatesReport.pdf (accessed April 7, 2020);

¹⁶² See NCAA Division I Manual, 15.02 (Institutional Financial Aid)

¹⁶³ See Kaitlin Mulhare, *This is the Insane Amount of Money it Takes to Become an Olympic Figure Skater*, Money, Magazine, Feb. 9, 2018, <https://money.com/olympic-figure-skating-costs/> (accessed May 16, 2020) ("Coaching fees, travel expenses, and physical therapy and athletic conditioning to keep the body operating at elite levels add up. But figure skating is among the priciest, with costs running more than \$35,000 a year and as much as \$50,000 annually by some estimates.")

¹⁶⁴ See Olympians Made Here, NCAA.org, <http://www.ncaa.org/about/resources/media-center/olympians-made-here> (accessed April 7, 2020). Most were former collegiate athletes at the time of their Olympic experience. See Putting Rio Into Reach, NCAA.org, <http://www.ncaa.org/about/resources/media-center/feature/putting-rio-within-reach> (accessed April 7, 2020).

¹⁶⁵ See *Olympians Made Here*, n.164.

¹⁶⁶ *Id.*

¹⁶⁷ See NCAA Division III 2018-19 Facts and Figures, ncaaorg.s3, https://ncaaorg.s3.amazonaws.com/about/d3/2018-19D3_FactandFigures.pdf (accessed May 16, 2020). (average operating expenses range from about \$2.4 million for schools without football to almost \$4 million for school with a football program).

¹⁶⁸ See Dennis Dodd, *College sports' bleak financial future in wake of coronavirus pandemic apparent in AD survey*, CBSSports.com, April 2, 2020, https://www.cbssports.com/college-football/news/college-sports-bleak-financial-future-in-wake-of-coronavirus-pandemic-apparent-in-ad-survey/amp/?_twitter_impression=true&fbclid=IwAR04gclSxbeK_5_8wih2ufmgpyJWpP2zdUn3V92KUv5emQ0cju4CJcPMgM ("Over one-third of ADs forecast at least a 30 percent decrease in revenue for the 2020-21 academic year.") (accessed April 7, 2020).

if finances become too tight.¹⁶⁹ In addition, a reported letter from five athletic conference commissioners pointed that the situation was the “direst financial crisis since at least the Great Depression.”¹⁷⁰ As of spring 2020, some colleges have already announced cuts in their athletic budgets and some of the cuts the sports eliminated from varsity status are Olympic sports.¹⁷¹

This could mean that some Olympic sports could be imperiled. If fewer schools offer competitive varsity programs, the option to pursue a college as a way to subsidize one’s training may evaporate for some athletes, forcing them to incur greater expense or drop out of participation. It may also increase competition for grant money through the NGBs that offer it, or through the grant-based NEA-type systems advocated in this article. At this time, it is too early to say.

C. U.S. Center for SafeSport Needs More Funding

Given the sexual abuse scandals that have rocked the various national governing bodies, there is no question there is a need for an organization to protect athletes and to vet coaches and other personnel. The U.S. Center for SafeSport was established with the purpose of “preventing all forms of abuse in sport” and soon after became federally authorized under the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017.¹⁷² It is organized as an independent nonprofit organization based in Denver, Colorado, designated by the U.S. Congress to respond to reports of sexual misconduct within U.S. Olympic and Paralympic sports.

Under the SafeSport Act, the Center, develops resources and policies to safeguard athletes from bullying, harassment, hazing, physical abuse, emotional abuse, sexual abuse, and sexual misconduct.¹⁷³ The law entrusts the Center as the exclusive authority to respond to reports of allegations of sexual abuse and sexual misconduct within the USOPC and their recognized National Governing Bodies. Its most important role is to engage in background checks on coaches and other support personnel and it maintains the exclusive jurisdiction to investigate and resolve allegations that a “participant” engaged in sexual misconduct and child abuse¹⁷⁴ and discretionary

¹⁶⁹ *Id.*

¹⁷⁰ See Rich Perelman, *Financial implosion of college athletics now threatens Olympic-sport programs in the U.S.*, The Sports Examiner, April 15, 2020, http://www.thesportsexaminer.com/lane-one-financial-implosion-of-college-athletics-now-threatens-olympic-sport-programs-in-the-u-s/?fbclid=IwAR1i8GPM2Kn7kgVFWXVUF_OB0xZ1HHUIr6J93T4g_OJYNTdklN_Xj8JrsY (accessed April 16, 2020). (“The five signatories, representing the American Athletic Conference, Conference USA, Mid-American Conference, Mountain West Conference and the Sun Belt Conference, . . . sought “temporary relief from several regulatory requirements for a period of up to four years, “including dropping the minimum to 16 varsity intercollegiate sports for Division I status and offering a minimum of 200 athletics scholarships (or spent \$4 million) annually;” to provide “short-term relief . . . [to] facilitate the opportunity for institutions to retrench and rebuild the financial structures of the institution.”

¹⁷¹ See Bill Koch, *Brown University will Cut 11 of its Varsity Sports*, The Providence Journal, May 28, 2020, <https://www.providencejournal.com/sports/20200528/brown-university-will-cut-11-of-its-varsity-sports> (accessed May 30, 2020) (The affected sports include men’s and women’s fencing, men’s and women’s golf, women’s skiing, men’s and women’s squash, women’s equestrian, men’s indoor track and field, men’s outdoor track and field and men’s cross country which will all transition to club status.)

¹⁷² Public Law No: 5-126 (February 14, 2018).

¹⁷³ See *A Federally Authorized Resource to End Abuse*, U.S. Center for SafeSport, <https://uscenterforsafesport.org/about/our-work/> (accessed April 4, 2020).

¹⁷⁴ See U.S. Center for SafeSport, *SafeSport Code for the U.S. Olympic and Paralympic Movement* (2020), Arts. IV A and B; Art. VIII J (accessed April 4, 2020). The organization has the exclusive authority to respond to allegations of sexual abuse and sexual misconduct, but it also has the discretion to investigate other violations of the SafeSport code, like bullying, harassment, and physical and emotional abuse. After a report is filed, the Center evaluates whether

jurisdiction to investigate and resolve allegations that a Participant engaged in non-sexual child abuse; emotional and physical misconduct, including stalking, bullying behaviors, hazing, and harassment.¹⁷⁵ Despite being designated by Congress, Congress took a hand-off approach in terms of governance and financing of the organization, resulting in the USOPC exercising a great deal of control, even dominance, despite the ostensibly independent nature of the organization.¹⁷⁶ At least one governing body, however, questioned whether there is a need for a centralized organization like SafeSport, arguing that it could adequately police abusive conduct, despite having its own sex abuse issues.¹⁷⁷

The Center coordinates with law enforcement for potential criminal investigations, but its internal governance involves a hearing process and a range of sanctions, from a warning to permanent ineligibility to participate in the sport.¹⁷⁸ There is an arbitration procedure if a party wishes to contest the determination of the Center.¹⁷⁹ As noted, while most actions have involved sexual abuse investigations, one prominent track and field coach was suspended by the Center for non-sexual abuse of a teenage runner.¹⁸⁰

The organization is seriously underfunded. In its 2018 tax return, it reported revenues of over \$6 million, but salaries and expenses took a hefty portion of that amount.¹⁸¹ Salaries alone were close to one million dollars and legal fees another \$647,000.¹⁸² Much of the funding comes from the USOPC and the Center has been justifiably criticized not only for the inadequate funding, but for its lack of independence.¹⁸³ In fact, in its first year of formal operation, most attendees of its

it will take the case. If it chooses not to, the report goes back to the NGB and the sport's officials can choose to pursue it either by investigating internally or hiring an outside investigator. In rare circumstances the Center may investigate a report of emotional or physical abuse. For more information, see Erin Strout, What is SafeSport and Why did it Suspend Alberto Salazar?, *Women's Running*, Feb. 5, 2020, <https://www.womensrunning.com/culture/what-is-safesport-and-why-did-it-suspend-alberto-salazar/> (accessed April 5, 2020)

¹⁷⁵ *Id.*

¹⁷⁶ See Diana Moskowitz, *SafeSport, the USOC's Attempt to Stop Child Abuse, is Set Up to Fail – Just Like it was Supposed To*, *Deadspin*, July 24, 2018, <https://deadspin.com/safesport-the-usocs-attempt-to-stop-child-abuse-is-se-1826279217> (accessed April 4, 2020).

¹⁷⁷ See David W. Chen, *A Tennis Coach was Abusing Minors. Should the Sport's Federation Have known?*, *N.Y. Times*, April 4, 2020, <https://www.nytimes.com/2020/04/04/sports/tennis/tennis-sex-abuse-safesport.html> (accessed April 5, 2020). (“Gordon Smith, the tennis association’s executive director and chief operating officer at the time, . . . objected to a “single mandatory national entity” overseeing abuse cases across federations and, over the objections of representatives for gymnastics, volleyball and wrestling, he said that a sport should be able to ‘opt out of the centralized structure’ if it could police itself. . . Whether the U.S.T.A. could police itself, though, was another matter. . . Just months earlier, a prominent U.S.T.A. coach from the Bay Area had been arrested a second time on charges of abusing one of his teenage players.”)

¹⁷⁸ See SafeSport Code, Art. XIII A.

¹⁷⁹ *Id.* at Art. XIV

¹⁸⁰ See Strout, n. 174 (coach was temporarily suspended for “allegations of misconduct” after middle distance runner Mary Cain released an opinion video claiming she was emotionally and physically abused by Salazar. [note: Ms. Cain was a student in one of my classes at Fordham and has since been a guest speaker in my classes since her graduation; however, I was not involved in her decision to go public, nor was I aware of the allegations she made before her public statements])

¹⁸¹ See U.S. Center for SafeSport, Return of Organization Exempt from Income Tax, IRS Form 990, <https://uscenterforsafesport.org/wp-content/uploads/2019/09/2018-990.pdf> (accessed April 4, 2020).

¹⁸² *Id.* at pp. 7 and 8. Another \$165,000 went to computer software and \$150,000 went to a firm who served the help desk.

¹⁸³ *Id.* (“Even before the center opened its doors, Hogshead-Makar, CEO of ChampionWomen, and Marci Hamilton, CEO of Child USA and a professor at the University of Pennsylvania, had sent multiple letters critiquing the proposed SafeSport code that the center would be in charge of enforcing. One stated: “We understand that SafeSport board and staff will only be working for the new organization. Still unaddressed: What are the rules of SafeSport employment

meetings were USOC officials.¹⁸⁴ By comparison, the US Anti-Doping Agency, had a \$20 million budget in 2016, while SafeSport will less than one fifth of that.¹⁸⁵ The amounts seemed to improve in 2019, the United States Olympic and Paralympic Committee (USOPC) gave the Center \$7.4 million and the NGBs of each sport collectively contributed \$2.05 million. The total 2019 budget was \$10.5 million.,¹⁸⁶ better, but not good enough. This lack of adequate funding results in a backlog of cases. As of early 2020, the Center for SafeSport received more than 200 reports a month, had an estimated 1,100 open cases, and only 18 investigators and lawyers.¹⁸⁷ As noted below, a new Sports Act must address this lack of funding.

V. A Reimagined Sports Act

A new Sports Act would revamp the funding and the accountability of the USOPC and the NGBs by creating the following funding and transparency standards. A new Sports Act should include the following changes:

A. Public funding of USOPC and NGBs

It is crucial that a revised Sports Act contain provisions to create mechanisms for government funding of the USATF. The bulk of the discussion will be on ways the Federal government can fund the USOPC, the NGBs, and elite athletes. The legislation could utilize one or more the following methods for distributing monies. Several ideas will be discussed: direct appropriations from the Federal budget; direct grants to targeted local and regional bodies within the governing bodies and/or a tax check-off system whereby taxpayers can contribute directly.

1. Direct Grants – General Funding and Funding for US SafeSport

As part of a revised Sports Act, Congress would mandate funding to the USATF (as well as the USOPC and other national governing bodies) through direct appropriations. Congress could vote on an annual appropriation or create a multi-year funding mechanism that coincides with the scheduling of the Olympics. It could also create a staggered four-year funding period to dovetail the different cycles for summer and winter Olympic sports. Congress could also propose a lump-sum fund for the USOPC, which would disperse amounts to the various NGBs based on a formula that includes number of members, number of events and numbers of participants in particular events.

for those who have previously been affiliated with the organizations that SafeSport will be investigating? It is our view that “independence” can only be achieved if former USOC/NGB and Coaching Association employees and consultants have at least a two-year separation time before employment or engagement with SafeSport.”)

¹⁸⁴ See Philip Hersh, *The John Coughlin story, tragic for all involved, should lead to empathy and understanding instead of finger-pointing*, Globetrottingbyphilliphersh.com, Jan. 23, 2019, <http://www.globetrottingbyphilliphersh.com/home/2019/1/22/the-john-coughlin-story-tragic-for-all-involved-should-lead-to-more-than-finger-pointing> (accessed May 30, 2020). (“Although SafeSport is independent, others feel it is not independent enough from the USOC, which established SafeSport and provides much of its funding.”)

¹⁸⁵ *Id.* In 2016, SafeSport received about \$2 million, while USADA received over \$12 million. See also Senate Report 113-281, 113th Congress, 2d Session, UNITED STATES ANTI-DOPING AGENCY REAUTHORIZATION ACT, Report of the Committee on Commerce, Science, and Transportation on S. 2338, Dec. 1, 2014, <https://www.govinfo.gov/content/pkg/CRPT-113srpt281/html/CRPT-113srpt281.htm> (accessed May 17, 2020).

¹⁸⁶ See Strout, n.174. [author’s note: I have not been able to find the 2019 returns at this time]

¹⁸⁷ *Id.*

A new Sport Act should provide for direct funding for the Center for SafeSport, an amount to be determined in consultations with interested stakeholders – victims of sexual and other abuse, public health experts, coaches, athletic directors along with representatives from the various NBGs and the USOPC, or, through the Commission for Olympic and Paralympic Sports chosen by Congress (described later in the article). This should be a separate appropriation, granted in multi-year cycles to ensure a more consistent amount of funding. The Commission for Olympic and Paralympic Sports could be empowered to recommend specific changes in its operations, addressing the criticisms of the organization from both athletes’ rights advocates and those who feel that the accused do not get adequate due process.¹⁸⁸

2. Income Tax Check-Off Option

Another way to raise funds would utilize a method that is used for funding presidential elections and certain prescribed charitable organizations. programs: an optional check-off on Federal and state tax returns.¹⁸⁹ In the 1980s, nine states replicated this program, which at the time was the only direct public funding program for Olympic sports. However, it was not successful, generating only \$3 million between 1986 and 1991.¹⁹⁰ . On many state tax returns, a similar system for charitable funding exists, although the types of charities and the permanence of these check-off vary greatly.¹⁹¹ Notably, some of these programs have been sports-related.¹⁹²

A revised Sports Act could consider a provision recreation this kind of check-off system. At least, it could be one method of raising funds for the USOPC and the national governing bodies. In conjunction with state tax schemes, states could utilize their own checkoff systems to tailor funding national governing bodies are located within their states, or more specifically, local affiliates of such organizations or even local non-profit gyms and training centers for potential Olympia athletes.

Unfortunately, there are some serious administrative and political issues in such a proposal. Funding amounts can vary, depending on public support as the system is a voluntary method of contribution. Also, the allegations of sexual abuse and the failure to protect athletes would likely

¹⁸⁸ See Grace Kier, *Three Years On, Center for SafeSport Faces Controversy*, Pulitzer Center, April 20, 2020, <https://pulitzercenter.org/reporting/three-years-center-safesport-faces-controversy> (accessed May 28, 2020).

¹⁸⁹ First appearing on the federal income tax form in 1972, the best known is the Presidential Election Campaign fund. By checking a box on the Federal return, taxpayers could direct \$3.00 of their tax liability to the fund. It does not increase their payment or decrease their refund, but rather redirected a portion of the government’s spending revenue to public campaign funds. See Kathleen Quinn, *Income Tax Checkoff Programs*, National Conference of State Legislatures, May 2016, <https://www.ncsl.org/research/fiscal-policy/income-tax-checkoff-programs.aspx> (accessed February 23, 2020).

¹⁹⁰ See Michael Janofsky, *Olympics: U.S.O.C. Seeks Fund Using State Lotteries*, N.Y. Times, Oct. 3, 1991, <https://www.nytimes.com/1991/10/03/sports/olympics-usoc-seeks-funds-using-state-lotteries.html> (accessed July 9, 2020).

¹⁹¹ *Id.* (“Colorado has capped the number of checkoffs at 15, and employs a minimum contribution requirement and a queue for new programs seeking to make it onto the form. Oregon, the state offering the most checkoffs, has an application process and a “Charitable Checkoff Commission,” a five-member committee that determines which checkoffs can be included on each year’s state tax return.”)

¹⁹² *Id.* (“Between 2000 and 2014, Wisconsin’s income tax form included a Green Bay Packer’s Football Stadium checkoff box to help raise funds for a \$295 million renovation project. California has included a Sea Otter Fund checkoff since 2007. The Olympic training center in Lake Placid, N.Y., home to the 1980 Winter Olympics, still holds a place on New York’s checkoff list. In addition, while not a checkoff contribution, Maine residents can purchase state park passes in the checkoff portion of its tax return.”)

make public support for a checkoff lukewarm (or worse). However, if the USOPC is subject to the requirements of a new Sports Act, yet Congressional appropriations are not likely in the near term due to the more pressing economic situation, a tax contribution approach could be an alternative.

In 2018, almost 141 million taxpayers filed returns.¹⁹³ Even if only 20 percent of those taxpayers checked off a \$3.00 contribution, \$85 million would be raised this way every year. To put this in perspective, it would more than double the amount that the USOPC paid to the various summer Olympic governing bodies in 2016.¹⁹⁴ If 50 percent of taxpayers utilized this option, the amount would be about \$211 million, not far from the total Sponsorship and licensing revenues received by the USOPC in 2018, an Olympic year. In non-Olympic years, the taxpayer amount would be far greater than the sponsorship fees.¹⁹⁵ Before the USOPC would get its hands on the taxpayer money, a system would be in place – through the Commission for Olympic and Paralympic Sports appointed by Congress -- to distribute the money equitably.

3.. Local Sports Funding – An NEA-grant like system

Since its creation in 1965, the National Endowment for the Arts has created a panel-review mechanism for funding local arts organizations.¹⁹⁶ The NEA provides grants for organizations engaged in “exemplary projects” involving different facets of the arts (performing and visual) in all the 50 states, the District of Columbia and U.S. territories.¹⁹⁷

Projects can be based on one specific event or a group of activities.¹⁹⁸ Funding is available through four categories: (1) organizations exhibiting “artistically excellent projects that celebrate our creativity and cultural heritage;” (2) those which service underserved populations; (3) projects that integrate arts, culture, and design activities into efforts that strengthen communities by advancing local economic, physical, and/or social outcomes; and (4) organizations engaged in particular research projects. These grants, whose monies range from \$10,000 to \$200,000 (depending on the category) are matching grants, meaning that the organization must also raise an equivalent amount from other sources.¹⁹⁹

Applications are reviewed by panelists who comprise a diverse group of arts experts and other individuals, including at least one knowledgeable layperson, with broad knowledge in the areas under review. These are done in “closed session.” These recommendations are forwarded to the National Council on the Arts, where they are reviewed in open session. Then, a funding decision

¹⁹³ See IRS Tax Return Stats for 2018 Season, CPA Practice Advisor, Dec. 26, 2018, <https://www.cpapracticeadvisor.com/tax-compliance/news/12439495/irs-tax-return-stats-for-2018-tax-season> (accessed May 18, 2020).

¹⁹⁴ See Ben Fischer, Medal-Rich Teams Draw Even More Funding from USOC in 2016, Sports Business Journal, May 22, 2017, <https://www.sportsbusinessdaily.com/Journal/Issues/2017/05/22/Olympics/USOC.aspx> (accessed May 18, 2020).

¹⁹⁵ See United States Olympic Committee, 2018 Annual Report, p. 16, <https://www.teamusa.org/footer/finance> (accessed April 11, 2020).

¹⁹⁶ See *Grant Review Process*, National Endowment for the Arts, <https://www.arts.gov/grants/apply-grant/grants-organizations/grant-review-process> (accessed May 16, 2020).

¹⁹⁷ See *Grants for Organizations*, National Endowment for the Arts, <https://www.arts.gov/grants/apply-grant/grants-organizations> (accessed March 1, 2020). (“Grants for organizations support exemplary projects in artist communities, arts education, dance, design, folk and traditional arts, literary arts, local arts agencies, media arts, museums, music, musical theater, opera, presenting and multidisciplinary works, theater, and visuals arts”).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* They are officially titled “Grants for Arts Projects,” “Challenge America,” “Our Town,” and “research Projects.”

is made.²⁰⁰ The one pre-requisite is that the organization must be a not-for-profit, tax exempt 501c(3) entity.²⁰¹

A similar system could be employed to localized athletic organizations as part of a new Sports Act. Taking the example of the USA Track and Field, which has many local affiliates, say that a local running club wishes to sponsor events geared to helping children exercise and thereby preventing childhood obesity. The organization could apply for a grant of \$25,000 to recruit interested students in gym classes, bus them to events, buy uniforms and get them to engage in sprints or middle distances at their local track. It could also be used to repair the facility or buy new equipment in furtherance of that goal. The promise of governmental funding can spur private donation efforts. Like the NEA, an independent group of reviewers can be tasked to evaluate the application and debate its merits. The reviewers could be appointed from a list, much like independent arbitrators are from organizations such as the American Arbitration Association.

4. Direct Athlete Funding

It is true that many NGBs have programs to fund elite athletes, but despite that, many, if not most, Olympic athletes, do not receive much compensation for their athletic prowess. While superstars like Michael Phelps, the most successful swimmer in Olympic history, has earned \$55 million in 2014,²⁰² he is the very rare exception. Many, if not most, do not make enough from their sport to sustain a living. Fifty percent of the top 10 track athletes in their event earned less than \$15,000 a year from their sport.²⁰³ The high cost of training is largely borne by the athletes and his/her family and some have had to file for bankruptcy because of the resulting debts.²⁰⁴

The revised Sports Act could include provisions for direct athlete funding, either through the NEA-type grants noted above or through a fund that would be distributed based on applications to the Commission for Olympic and Paralympic Sports, discussed later. Another possibility to establish a mechanism where, in return for funding, the athlete must devote a small percentage of time to teaching and coaching interested youngsters based on interest and financial need. The specifics could come from either the legislation or be entrusted to the Commission.

5. State Funding

While this article focuses on Federal funding, there could be opportunities where states can also fund more localized clubs, groups or individual athletes through a tax deduction system. Individual states can enact their own laws to creating funding system and given that states control localities more than the Federal government does, it can be argued that states can be more effective

²⁰⁰ See *Grants for Arts Projects: Application Review*, National Endowment for the Arts, <https://www.arts.gov/grants-organizations/gap/application-review> (accessed March 1, 2020).

²⁰¹ See *Grants for Arts Project: Applicant Eligibility*, <https://www.arts.gov/grants-organizations/gap/applicant-eligibility> (accessed March 1, 2020).

²⁰² See Edward Etzel, *Opinion: When the Olympic Games don't pay the bills for Team USA athletes*, Marketwatch.com, February 12, 2018, <https://www.marketwatch.com/story/when-the-olympic-games-dont-pay-the-bills-for-team-usa-athletes-2018-02-11>

²⁰³ *Id.*

²⁰⁴ In 2012, the mother of gymnast Gabby Douglas filed for bankruptcy in part due to the costs of her training and living away from home. See Kimberly Palmer, *Why Olympic Athletes' Families Go Broke*, US News & World Report, August 7, 2012, https://money.usnews.com/money/blogs/alpha-consumer/2012/08/07/why-olympic-athletes-parents-go-broke?mod=article_inline (accessed March 31, 2020).

in targeting strong candidates for funding. Revenues could be derived from direct funding or a tax check-off system explained earlier.

6.. A National Lottery

The idea of a lottery for Olympic funding is not new. It has been used the United Kingdom and other countries like Brazil, Denmark, and Switzerland with varying success providing funding to their national Olympic committees.²⁰⁵ Others use the proceeds to fund their elite athletes directly.²⁰⁶ The U.K.'s system has been particularly successful. In 2016, three-quarters of the U.K.'s Olympic funding came from lottery proceeds which totaled \$460 million²⁰⁷ and is credited in helping that nation achieve second place in gold medals awarded at the Rio Games.²⁰⁸ The lottery provides generous funding to elite athletes, with amounts as high as about \$100,000 a year.²⁰⁹ Despite the success, critics have noted that grass roots level sports do not share in the spoils of this system.²¹⁰

In the early 1990s, a “test program” was created aiming to fund athletes for the 1992 Winter and Summer games with the hope creating a larger fund for the 1996 Atlanta Olympics.²¹¹ The program had only limited success and was not extended. While a national Olympic lottery in the United States could be an alternative to a government funding approach, with multiple state and multi-state lotteries in existence, it is not assured how much would be raised by yet another lottery.

Another method of indirect public funding was the creation of a series of “Olympic Coins” to raise money for the 1984 Summer Olympics in Los Angeles. Congress passed legislation authorizing the U.S. mint to do just that.²¹² It was estimated that those sales raised \$40 million for

²⁰⁵ See *Brazilian Olympic sport suffers from lottery funds in free fall*, Games Magazine Brazil, April 27, 2020, <https://www.gamesbras.com/english-version/2020/4/27/brazilian-olympic-sport-suffers-from-lottery-funds-in-free-fall-17198.html>, accessed July 2, 2020) (outlining the losses in funding due to Covid-19 pandemic as initial estimates of \$58 million was not be achieved); *Sport receives financial support from state football pools and the National Lottery*, Ministry of Culture Denmark, <https://english.kum.dk/policy-areas/sport/financial-support/>, (accessed July 2, 2020); *Swiss Olympic to put SFr42m lottery funding back into national sport*, Sportcal, Nov. 25, 2019, <https://www.sportcal.com/News/Search/128892> (accessed July 2, 2020).

²⁰⁶ See Ralph Richards, *Sports Lottery Funding*, Clearinghouse for Sport, Jan. 9, 2019, https://www.clearinghouseforsport.gov.au/knowledge_base/organised_sport/funding/sport_lottery_funding (accessed July 2, 2020) (Deutsche Sportlotterie, was established in 2014-15 . . . to improve the financial support provided to emerging and current German national level athletes. Unlike other national lotteries, the German Sport Lottery is solely dedicated to funding high performance sport athletes; not national sporting organisations.”).

²⁰⁷ See Tim Wigmore, *Britain's Huge Investment in Summer Olympic Sports Pays Off*, The New York Times, Aug. 22, 2016, <https://www.nytimes.com/2016/08/23/sports/olympics/britains-huge-investment-in-summer-olympic-sports-pays-off.html> (accessed June 21, 2020).

²⁰⁸ *Id.*

²⁰⁹ *Id.* (“In 2016, athletes who have earned a podium level finish at the Games receive up to about \$37,000 a year from U.K. Sport, which allocates funding for the Games, to contribute to their living and personal sporting costs. U.K. Sport also gives leading athletes support worth about \$47,000 to about \$79,000, which is spent on coaching and training. Each medal that Britain won in Rio has cost, on average, more than \$6.5 million.”).

²¹⁰ *Id.* (“U.K. Sport’s ruthless approach to funding has also been criticized for prioritizing sports favored by more affluent people, like rowing and equestrian, over those that are more popular with poorer socioeconomic groups but offer scant medal hopes, like basketball and volleyball.”).

²¹¹ See Michael Janofsky, *Olympics: U.S.O.C. Seeks Fund Using State Lotteries*, N.Y. Times, Oct. 3, 1991, <https://www.nytimes.com/1991/10/03/sports/olympics-usoc-seeks-funds-using-state-lotteries.html> (accessed July 9, 2020).

²¹² See Olympic Commemorative Coin Act, P.L. 97-220, 96 Stat. 222 (1982). The law authorized release of a commemorative 1983 and 1984 silver dollars and a \$10 gold Olympic coin in uncirculated and proof sets.

the USOC.²¹³ Given the costs of producing the coins and the decline in interest in numismatics, it would be difficult and impractical to replicate such a program today.

B. More Accountability and Transparency from the USOPC and the NGBs

In return for Congressional funding – whether it be funds directed to the USOPC, NGBs, individual athletes or local athletic facilities -- those receiving those funds will be subject to far more scrutiny that has been the case in the past. A new Sports Act should put best corporate practices in effect, whether in its reporting of relevant information or disclosure of relevant documents. These disclosures must ensure public accountability will involve more than simply releasing IRS tax forms.

1. Release of Information outlining salaries, bonuses, expenses to Congress and the Commission for Olympic and Paralympic Sports

As non-profit corporations, the USOPC and NGBs release annual reports, which include audited financial statements and tax information. These documents are found on the organization's respective website.²¹⁴ These IRS reporting requirements would remain under a new Sports Act. The organization also issue annual reports, but all too often, they put the best light on the organization, something typical of annual reports in the business and non-profit world generally. For example, the 2018 annual report states that the USOPC "Create[d] a stable, safe and supportive training environment for elite U.S gymnasts, while evaluating USA Gymnastics' reforms and status as the recognized NGB in the United States" and "[t]he [USOPC] was a central driver of organizational reform at USA Gymnastics, forcing the resignation of both USAG's CEO and full board of directors." The report also noted how the [USOPC] "Supported elite U.S. Gymnasts and [engaged in the] continued evaluation of USA Gymnastics."²¹⁵ Maybe so, but those rosy statements would conflict with comments made by many, particularly by the victims of sexual abuse.²¹⁶ Other subjects include general statements about the organization's programs for athletes, training facilities, media and promotions and a one-page financial statement.²¹⁷

In 2018, the USOPC had assets of \$468 million and liabilities of \$126 million.²¹⁸ The sources of revenue centered on broadcast and sponsorship and licensing fees.²¹⁹ The USOPC's activities are organized within a four-year cycle ending in the year the Olympic Games are held. That has

²¹³ See Wood, n. 22 <https://www.nytimes.com/1983/07/03/magazine/olympics-84.html> (accessed July 9, 2020).

²¹⁴ See Team USA – Finance, <https://www.teamusa.org/footer/finance> (accessed April 11, 2020). As of that date, annual reports from 2014-18 and listed as are tax disclosures and audited statements.

²¹⁵ See United States Olympic Committee, 2018 Annual Report, p. 16, <https://www.teamusa.org/footer/finance> (accessed April 11, 2020).

²¹⁶ See Nicole Chavez, *Simone Biles Claps Back at USA Gymnastics After They Wish Her a Happy Birthday*, CNN.com, March 20, 2020, <https://www.cnn.com/2020/03/14/us/simone-biles-usa-gymnastics-investigation-trnd/index.html> (accessed May 17, 2020). ("The Olympic gold medalist turned 23 on Saturday and USA Gymnastics, the sport's governing body in the United States, posted on Twitter to celebrate. "HAPPY BIRTHDAY to the most decorated gymnast of all time, @simonebiles! We know you will only continue to amaze us and make history!" USAG tweeted. And Biles had a very specific birthday request for them: 'how about you amaze me and do the right thing... have an independent investigation,' Biles tweeted.")

²¹⁷ See 2018 Annual Report, p. 34.

²¹⁸ See 2018 Consolidated Financial Statements and Report of Independent Certified Public Accountants, United States Olympic Committee, p. 5., <https://www.teamusa.org/footer/finance> (accessed April 11, 2020).

²¹⁹ *Id.* at p. 6. In 2018, Sponsorship and licensing came to almost \$145 million and broadcast revenue was over \$121 million.

ramifications for 2020 because the Olympics are deferred to at least 2021.²²⁰ There are also revenues deriving from donations.²²¹ Broadcast rights income is significant, because of the lucrative agreement between NBC and the IOC for the broadcast of the summer and winter Olympic games to U.S. audiences. The 2018 statement reports that the USOPC will receive 12.75 percent of the \$7.65 billion that NBC will pay for the Olympics from 2022 to 2032. In addition, NBC has a separate broadcasting agreement with the USOPC for rights to broadcast various Olympic trials for \$60 million over that same 10-year period.²²² However, a separate revenue sharing agreement with the IOC mandates that the USOPC pay back money to the IOC to offset the costs of the Olympic Games (even if they were not in the United States). The amounts paid were \$15 million for the 2012, 2016, 2020 periods. That increases to \$20 million starting in 2021.²²³ The report also outlines the various investments that the USOPC made.²²⁴

The biggest question – and one where a new Sports Act could address – is more detailed information with regards to compensation and expenses of members of the board and the CEO. The 2018 IRS Form 990 outlines the salaries and bonuses paid to the staff of the USOC. Suffice it to say, many were very well compensated. CEO Sarah Hirshland received just over \$200,000 in salary and a bonus of \$80,000.²²⁵ But to her credit, that is less than the annual compensation for the prior “interim CEO” Susanne Lyons who received a \$304,000 base and a \$100,000 bonus, respectively.²²⁶ Every listed staff member received total compensation between the \$300 - \$500,000 range, except for the chief marketing officer who made over \$850,000 and the former CEO who had a buyout of that brought his paycheck to almost \$3 million.²²⁷

The USOPC is not the only organization that has paid some of its leading employees well. Regarding the NGBs, similar questions about compensation and expenses occur. USA Track and

²²⁰ *Id.* at p. 12. Because of the Olympic calendar, the consolidated financial statements include the changes in net assets and cash flows for the year ended December 31, 2018 and the two-year period ended December 31, 2018, the second year of the four-year cycle. However, I only used figures for 2018, and did not include 2017.

²²¹ *Id.*

²²² *Id.* at p. 29, note J.

²²³ *Id.* at p. 31, note M. The USOPC makes periodic contributions to the IOC to offset the costs of the Olympic Games and Olympic Winter Games held through 2040. Under the agreement, the then-USOC made quarterly payable totaling \$45,000,000 to the IOC for the 2012, 2016 and 2020 quadrennial periods. Beginning in 2021 and ending in 2040, the USOPC will contribute \$20,000,000 to the IOC during each quadrennial period, adjusted for inflation as defined in the agreement. However, with the postponement of the 2020 Tokyo Olympics, the amount for 2021 may be amended. It is unclear at this time.

²²⁴ *Id.* at p. 24 (Note D -- Disclosures about fair value of assets and liabilities).

²²⁵ See United States Olympic Committee, 2018 IRS Form 990, Schedule J, Part 2, <https://www.teamusa.org/footer/finance> (accessed April 12, 2020).

²²⁶ *Id.*

²²⁷ *Id.* The list is as follows: Morane B. Kerek, Chief Financial Officer, \$364,949; Richard W. Adams, Chief of Paralympics, \$433,276; Alan R. Ashley, Chief Sport Performance, \$591,823; Lisa P. Baird, Chief Marketing Officer, \$864,847; Jon M. Denney, Chief Development Officer, \$573,331; Kevin E. Penn, Chief of Business Operations, \$440,824; Russell C. Huebner, Former Chief of Paralympics, \$336,267; Brian H. Gordon, SVP, Marketing and Media, \$383,169; Michael J. O'Connor, SVP, Business Development, \$402,220; Mitchell Pol, SVP Partnership Marketing, \$499,573; Patrick D. Sandusky, Chief Communications, \$463,800; Peter C. Zeytoonjian, SVP Marketing, \$458,661. Scott Blackmun, the departing CEO received a buyout of almost \$2.5 million in addition to his base and bonus, resulting in a total of \$2,999,737. Given the recent layoffs and furloughs and the reductions in the USOPC's budget, there may be salary reductions for those executives who remain with the organization.

Field's CEO Mas Siegal earned over \$4 million in salary and 'other compensation' in 2018.²²⁸ Even taking aside the over \$3 million in retirement income (to be paid over a period of several years), his base pay was \$611,014, and he earned a bonus of \$500,000, and \$146,160 in "other reportable compensation," for a total of \$1,257,174.²²⁹ A one million dollar salary (composed of \$500,000 in base compensation and \$500 in bonuses) is large. The CEOs of USA Swimming, USA Triathlon, and the Executive Director of USA Figure Skating, were also well-compensated in 2018. However, smaller NGBs pay far less. For example, USA Archery's CEO earned just over \$160,000.²³⁰ The compensation issues raise questions, which could be addressed by the appointment of an inspector general with auditing powers under a new Sports Act. In addition, as will be discussed, the new Commission for Olympic and Paralympic Sports could issue standards for compensation.

2. Disclosure of Sponsorship Agreements

It has been stated earlier that sponsors constitute a high level of the total funding to the constituencies of the Olympic movement and the dependency on sponsorship can create an unbalanced power relation between sponsors and these organizations. The USOPC and many NGBs have sponsorship agreements, some of them in the hundreds of millions of dollars for longer terms. There indeed is a "have v. have-not" dichotomy among the NGBs. Suffice it to say, the USOPC, with 14 "worldwide" and 21 "domestic" sponsors.²³¹ and USA Track and Field with a huge Nike sponsorship constitutes the "halves." Others, like USA Badminton, did not have any.²³² Yet, accurate information as to the amounts of the sponsorship fees are not readily available. Press reports give only general information.

As part of the funding mandate, the USOPC and each of the NGBs receiving federal funding should be required to: (1) disclose and discuss a prospective sponsorship agreement to the respective board; (2) disclose the agreement to the members of the respective organization at a stipulated time before its annual meeting or disseminate it to the membership for comment before the agreement is approved by the board; (3) release the sponsorship contracts to Congress, the Commission for Olympic and Paralympic Sports and to the public at large. One would think that the first requirement is done anyway, as part of the fiduciary duties of the CEO and the board. Just releasing the monetary amount does not give a full picture of how kind of agreement is made. It is equally important to disclose these agreements to the membership for comment and debate as part of the deliberative process. The members of an NGB are the most important stakeholders and their feedback should be a part of the process to ensure that many points of view are heard.

Sponsorship agreements should not be a *fait accompli* by the CEO or the board. The board and/or the membership could debate the exclusivity and length, bonuses or any consulting fees paid to board members or the CEO. In addition, the board or the membership should have the

²²⁸ *Id.* USA Track and Field, 2018 IRS Form 990, Part VII, <https://usatf.org/about/financials/tax-information>. See also, Sarah Lorge Butler, After Delay, USATF Releases 2018 Tax Information and Reports Big Salary for CEO, Runner's World, April 22, 2020, <https://www.runnersworld.com/news/a32243052/usatf-releases-2018-tax-information/?fbclid=IwAR1DGmjcbHqw3QTVcKMVydPsc0gVHhdHaAAoOVqepLXuQzgWpQIMeujofBU> (accessed April 22, 2020).

²²⁹ *Id.* Timothy Hinchey, the CEO of USA Swimming, made \$721,101 during 2018. Brett Harris, the CEO of USA Triathlon, made \$413,480. David Raith, the executive director of USA Figure Skating, made \$363,036.

²³⁰ See USA Archery, 2018 IRS Form 990, Part VII, section A.

²³¹ See *Team USA Sponsors*, <https://www.teamusa.org/sponsors> (accessed May 30, 2020).

²³² See *Team USA – Badminton*, <https://www.teamusa.org/usa-badminton> (accessed May 30, 2020).

opportunity to object to making an agreement with a particular sponsor due to societal or political issues. The board and membership should discuss whether payments to outside third parties (including law firms) are reasonable. Or questions involving term, renewals, indemnification, and scope of services. Or limitation on rights of athletes to wear items from competing firms at events, rights of termination and morals clauses. While it would remain up to the board to ultimately approve the agreements (or not), it should have a robust debate, including an awareness of the viewpoints expressed by the membership before making its decision.

It would be naïve to think that sponsors would be happy to disclose their contracts to the public. These are private business contracts and sponsors want to be able to limit public release of agreements that contain detailed information. But public universities have disclosed their sponsorship agreements and reporters and the public.²³³ and that does not seem to have dissuaded sponsors like Nike who have made deals with such public institutions such as the University of Michigan, Ohio State University and the University of Texas.²³⁴

3. Rights Under the Freedom of Information Act

The Freedom of Information Act (FOIA)²³⁵ provides the public the right to request access to records from any federal agency. Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of nine exemptions which protect interests such as personal privacy, national security, and law enforcement.²³⁶ As a condition of accepting funding, a new Sports Act would subject the USOPC and the NGBs to FOIA actions by individuals. For example, if Simone Biles and other gymnasts who wishes to seek records from USA Gymnastics regarding records involving sexual abuse by coaches, they should be permitted to before having to engage in litigation and going through the civil discovery process.

4. Creating a Limited Antitrust Exemption – Upon Determine of Compliance by the Commission

²³³ See Mark Synder, *Michigan Finalizes Contract with Nike for up to \$173.8 Million*, Detroit Free Press, April 26, 2016, <https://www.freep.com/story/sports/college/university-michigan/wolverines/2016/04/26/michigan-nike-contract/83533954/> (accessed May 17, 2020). The articles gives a detailed breakdown as to the terms of the agreement and access to the actual document.

²³⁴ *Id.*

²³⁵ 5 U.S.C. § 552. See also FOIA Improvement Act of 2016, Public Law 114-186 (June 30, 2016) (liberalizing some of the procedures of the original act, such as making records available in electronic format.

²³⁶ See What is FOIA? Foia.gov., <https://www.foia.gov/about.html> (accessed May 17, 2020). For the exceptions, see FOIA Exceptions, Department of Homeland Security, <https://www.dhs.gov/foia-exemptions> (they include: classified information in the interest of national security; records related solely to the internal personnel rules and practices of an agency; information exempted from release by statute; trade secrets and commercial or financial information which could harm the competitive posture or business interests of a company; opinion, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters; information that would constitute a clearly unwarranted invasion of personal privacy of the individuals involved, such as security numbers, home addresses and telephone numbers of employees; certain records or information compiled for law enforcement purposes, such as endangering the life or physical safety of an individual; information that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. geological and geophysical information and data, including maps, concerning wells.

As noted earlier, several courts have created an antitrust exemption for the USOPC and NGBs,²³⁷ but this exemption has not been uniformly adopted. Assuming that these organizations comply with the transparency requirements of a new Sports Act, the law would grant a limited exemption to these bodies.

If compliance is determined under standards promulgated by the Commission, then the USOPC or the respective NGB would be granted a limited antitrust exemption that would prevent challenges based on allegations that the body engaged in anticompetitive conduct in connection with processes of naming athletes to the U.S. Olympic team, Pan-American Games or world championships and with the nature of negotiating is sponsorship agreements. This limited exemption would be statutorily granted and applicable nationwide. However, it would not bar challenges to other rules, such as the limitation of athletes to compete in non-authorized tournaments or limitations on compensation for such participation.

5. Amending the Labor Laws to Permit the Unionization of Elite Athletes

In the wake of the sexual abuse scandals that rocked gymnastics, some scholars have advocated the unionization of members of national Olympic teams as a way for those athletes to have greater protection from abuse.²³⁸ However, there are hurdles to unionizing under the National Labor Relations Act (“NLRA”),²³⁹ because questions arise whether these elite athletes can be considered “employees.” While this issue has been debated with some frequency in the case of college athletes (which resulted in one notably National Labor Relations Board ruling,²⁴⁰ it has not been addressed with respect to Olympic athletes. But it should.

The NLRA does not explicitly state who is an “employee” and only states who is not. Anyone considered an independent contractor is not an employee and not protected under this law.²⁴¹ Because of this lack of a more specific definition, courts and the National Labor Relations Board (“NLRB”) have crafted their own standards which may be difficult for a group of athletes on an Olympic or championship team to attain. Although there are scholars who think so, I remain skeptical.

The common-law definition for an “employee” includes any person who “performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”²⁴² Members of, say, the U.S. Olympic Swimming team would not fit this definition since: (1) they were chosen to represent the United States but not “hired” to do so under an employment contract; and (2) they receive no salary, but only a bonus if any one or more of the

²³⁷ See n. 124 *supra*.

²³⁸ See Marc Edelman and Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance*, 61 *Ariz. L. Rev.* 463 (2019) (“creation of a formal union body to represent and protect the interests of the young athletes who compete within each individual, amateur sport in this nation.”)

²³⁹ See 29 U.S.C. §151 et seq.

²⁴⁰ See *Northwestern University and College Athlete Players Association (CAPA)*, 362 NLRB No. 167 (2015) (“On March 26, 2014, the Regional Director issued a Decision and Direction of Election in which he found that all football players receiving a grant-in-aid scholarship are employees within the meaning of Section 2(3) of the Act. . . . The Board then stated that it had determined that, even if the scholarship players were statutory employees (an issue the Board emphasized it was not deciding), it would not effectuate the policies of the Act to assert jurisdiction.

²⁴¹ See 29 U.S.C. §152(3).

²⁴² See *Brown Univ.*, 342 NLRB Dec. (CCH) 483, 500, n. 27 (2004) (citing *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85, 94 (1995)). For more explanation and analysis, see Edelman and Pacella, *supra* at 61 *Ariz. L. Rev.* at 484.

team members medal. It makes little sense to fight a challenge at the NLRB or in the courts, which will be costly and time-consuming.

Instead, it is easier to enact a provision in either the Sports Act or the National Labor Relations Act mandating that such athletes should have the right, if they choose so, to unionize and that representatives could negotiate agreements dealing with respect to working conditions and protections from abusive coaching and sexual abuse. The agreement could mandate penalties against the governing bodies and the USOPC and grants protection against retaliation if an athlete accuses a coach or other team personnel of sexual or emotional abuse. It could also allow the athletes the right to strike, a right, albeit highly unlikely to be exercised by many athletes barely past the age of majority (and some below that age) and because they would not want to sacrifice the allure and honor of being on an Olympic team.

So, this solution is not without risk. It could lead to difficulties in team cohesion and false allegations that could upend the team in the preparation of the competition. Conceivably, it could significantly change the governance of the USOPC and the NGBs because the union may require the termination of the various athletes' advisory committees found in these organizations. As an alternative, the whistleblower protection provisions sought by the USOPC's Athlete Ombudsman noted below may make more sense.

6. Ending Special Trademark Protection for the USOPC and the NGBs

As noted earlier, the Sports Act included enhanced trademark protection as a way for these bodies to monetize their marks. With a governmental funding regime, there is little reason to grant enhanced trademark protection, which limited statutory defenses to those accused of unauthorized uses and to eliminate the likelihood of confusion requirement. Instead, the new Sports Act would treat the USOPC and the NGBs like any other trademark holder.

C. A New Agency – The Commission for Olympic and Paralympic Sports

1. Basic Organization and Powers

One of the most novel provisions of a new Sports Act would be the creation of a commission with administrative law powers to promulgate regulations to facilitate enforcement of its general provisions. This “agency” may not be a traditional administrative agency, but rather a group of experts appointed by Congress for a particular term and empowered to promulgate a specific set of rules that will be applicable to the governing powers of the USOPC and the NGBs. This idea has been proposed by other scholars²⁴³ and by athlete advocates.²⁴⁴

The Commission for Olympic and Paralympic Sports (“Commission”) would be composed of a group of U.S. citizens appointed through a bipartisan application process. One approach could be one that is used for appointment for Federal regulatory agencies, where the party in power in the White House appoints a certain number and the party out of office appoints a fewer number. For example, that is the case with the five-member Federal Communications Commission.²⁴⁵ However, for this Commission, I think a better approach is based on a system used in appointing

²⁴³ See Kohler, n. 57

²⁴⁴ See Committee to Restore Integrity, n. 134 *supra*.

²⁴⁵ See *What We Do*, FCC.gov., <https://www.fcc.gov/about-fcc/what-we-do> (accessed May 19, 2020) (“The agency is directed by five commissioner who are appointed by the President of the United States and confirmed by the U.S. Senate. The president also selects one of the commissioners to serve as chairman. Only three commissioners can be of the same political party at any given time”)

a Congressional Advisory Commission (“CAC”), whereby the law would mandate the number of members, their terms and their respective powers. While most CACs are temporary in nature, this Commission would be similar to and will have some of the powers of a Federal administrative agency. However, I would call it more “quasi-administrative” as it will not have all the burdens and costs of a modern administrative agency, with paid staff and permanent office space. Its mandate would promulgating specific rules under its power in the new Sports Act by also could make policy recommendations that would have to be adopted by Congress.

There is no one type or specific model for such a commission as some are creations of the Executive Branch, while others from the legislative branch, and still others are hybrid.²⁴⁶ To get a broader array of potential appointees the Sports Act should mandate a fully Congressional-appointed commission. The number could range from a dozen to 20, to provide an array of different viewpoints by those who may represent different stakeholders. Having said that, the legislation would require that a certain percentage – say, 50 percent of the members – could be present or former Olympic and/or Paralympic athletes. Others could include survivors of sexual and emotional abuse, former executives from the Olympic movement, other sports executives, labor leaders or corporate officials. Any former USOPC or NGBs director or officer could be appointed, but that person would no longer have any ties to any Olympic organization for a period of, say, two or three years. The Sports Act would direct who could make the appointments. There are several ways to do so, but the most common would be appointment of members by the respective leaders of the House and the Senate.

Example 1 (15-person Commission):

- Four members shall be appointed by the Speaker of the House of Representatives
- Three members appointed by the majority leader of the Senate;
- Four members appointed by the minority leader of the House of Representatives;
- and
- Three shall be appointed by the minority leader of the Senate²⁴⁷

Or, as an alternative:

Example 2 (15-person Commission)

- Four members shall be appointed by the majority leader of the Senate, in consultation with the Chairmen of the Committee on Commerce, Science and Transportation
- Four members shall be appointed by the Speaker of the House of Representatives, in consultation with the Chairmen of the Committee on Energy and Commerce

²⁴⁶ See Congressional Research Service, Designing Congressional Commissions: Background and Consideration for Congress, CRS Reports.com, Oct. 2, 2018, https://www.everycrsreport.com/reports/R45328.html#_Toc526338651 (accessed May 19, 2020).

²⁴⁷ *Id.*, citing the example of the Commission on the Abolition of the Transatlantic Slave Trade P.L. 110-183, Section 4, 112 Stat. 607.

- Three members shall be appointed by the minority leader of the Senate, in consultation with the Ranking Minority Members of the Committee on Commerce, Science and Transportation
- Three members shall be appointed by the minority leader of the House of Representatives, in consultation with the Ranking Minority Member of the Committee on Commerce, Science and Transportation²⁴⁸

These are just models. There may be arguments for more members of such a Commission (or maybe less). If the number of 20, the same or similar proportions can hold. Or the legislation may grant the President the power to make some of all of the Commission appointments.

Commission members should serve for four years, beginning the year after a given winter and summer Olympic cycle. Members would be compensated typically set in accordance with one of the federal pay scales, prorated to the number of days of service.²⁴⁹

The Sports Act would grant the Commission the power of being the overseer of the operations of the USOPC and NGBs. In so doing, it would be empowered to appoint an inspector-general (described below). As an alternative, the Inspector General appointed and removed by the Chair of a separate Senate committee,²⁵⁰ but with the Commission may be in a better position to do so, given its expertise in the workings of Olympic organizations and require the Inspector General to report on its operations to the Senate Commerce Committee on an annual basis. However, it may be more effective to have the Commission appoint the inspector general as detailed below.

2. The Appointment of an Inspector-General

Whether the power to appointment an inspector general lies with Congress or with the Commission, the Sports Act would create what is known as a “statutory” Inspector-General, intended to be an independent, nonpartisan official whose aim to prevent and detect waste, fraud, and abuse in the operations of the USOPC and the NGBs.²⁵¹ The statutory authority for such an appointment rests in the Inspector General Act of 1978 and related amendments which expanded the scope of the duties of one in the position.²⁵²

Amendments enacted in 1998²⁵³ and 2016,²⁵⁴ are applicable to this discussion. The 1998 amendments created a category of inspector-generals for “designated federal entities” (DFEs), which could include the aforementioned Olympic bodies, thereby granting greater powers to inspector generals.²⁵⁵ The latter amendments allow inspector generals to conduct computerized data comparisons across different agency automated record systems without restrictions in the

²⁴⁸ *Id.*, citing the example of the Commission on Wartime Contracting P.L. 110-181, Section 841(b), 112 Stat. 231.

²⁴⁹ *Id.* (“Approximately 33% of those identified) have compensated their members. Among these commissions, the level of compensation is almost always specified, and is typically set in accordance with one of the federal pay scales, prorated to the number of days of service. The most common level of compensation is the daily equivalent of Level IV of the Executive Schedule, which has a basic annual rate of pay of \$164,200 in 2018.”)

²⁵⁰ See USOC Reform Recommendations to Congress, Olympians Rising, <https://www.olympiansrising.org/> (accessed May 18, 2020).

²⁵¹ See Statutory Inspectors General in the Federal Government: A Primer, Congressional Research Service, Jan. 3, 2019, p. 1, <https://fas.org/sgp/crs/misc/R45450.pdf> (accessed May 20, 2020).

²⁵² P.L. 95-452; 5 U.S.C. Appendix (IG Act).

²⁵³ See The Inspector General Act Amendments of 1988, P.L. 100-504.

²⁵⁴ See The Inspector General Empowerment Act of 2016, (P.L. 114-317).

²⁵⁵ See n. 253, p.3

law.²⁵⁶ This gives the Olympic Inspector General the power to compare how the various Olympic bodies run their operations and it may be a way to determine which agencies are more efficient and more transparent than others. So, if NGB A has a payroll five times that of NGB B, but with the same number of members of similar numbers of affiliated organizations, that may be something to pique the inspector general's interest. If NGB C has paid what seems to be an unusually large sum for their web pages as compared with other NGBs, that also may be a matter of interest. This does not mean that the NGBs in question are engaging in improper activities per se, but it will give the outside inspector general the power to review. Internal documents dealing with the reporting (or non-reporting) of sexual or other abuse by coaches and other personnel would be reviewable and those claiming abuse would not have to wait to litigate and go through discovery to find out.

Under the mandate of the new Sports Act, the inspector general would have the power to engage in periodic performance audits, inspections or evaluations, and investigations. For example, a performance audit would include whether the USOPC and NGBs comply under generally acceptance of rules regarding the conduct and fiduciary duties of the CEO, board and officers. The focus would be primarily on alleged misuse or mismanagement of the organization's programs, and effectiveness of their internal controls.²⁵⁷ Specifically, the inspector general would have access to records and information related to the affiliated entity's programs and operations; power to subpoena information and documents; administer oaths when conducting interviews.²⁵⁸ If criminal activity is suspected, the information may be turned over to the Justice Department for possible prosecution. He or she may need a small staff to aid in investigations and audits of the USOPC and the 40 plus NGBs. The inspector general would be obligated to file an annual report regarding all of the to both Congress and to the Commission for Olympic and Paralympic Sports.

The importance of an inspector general in the Olympic sphere was aptly summed up by Han Xiao, Chair of the USOPC Athlete Advisory Council, who stated in testimony to the Senate that an inspector general would "preserve the anonymity of athletes, providing protection for whistleblowers," allow for proactive investigations, and reduce legal costs to all parties.²⁵⁹

The idea for an independent inspector general has been sought by both The Committee to Restore Integrity to the USOC and Olympians Rising, the most prominent groups seeking change in the Olympic structure.²⁶⁰

²⁵⁶ *Id.*

²⁵⁷ *Id.* at p. 9-10.

²⁵⁸ See 5 U.S.C. Appendix (IG Act) §§3(a), 6(a), 6(e), and 7..

²⁵⁹ He added that the appointment of an independent inspector general would "Allow[] for the investigation of other issues that arise outside the protections afforded by the Sports Act; Assist[] in proactively identifying issues within NGBs and the USOC, including possible corrective actions; Contribut[e] to more routine and proactive oversight of the USOC and the entire Olympic and Paralympic system; Improv[e] the athletes' and the American public's trust in USOC and NGB governance; Reduc[e] legal costs for all parties due to the reduction in necessary Section 10 hearings and their binding arbitrations when the Inspector General intervenes." See Xiao, Han. Testimony before the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, On the Future of Athlete Safety: "Strengthening and Empowering U.S. Amateur Athletes: Moving Forward with Solutions" July 24, 2018.

²⁶⁰ See Committee to Restore Integrity, n. 134. See also, Olympians Rising: Recommendations to Congress: Reforming the U.S. Olympic Committee to Ensure Health and Livelihood of Athletes, Sept. 19, 2018, https://b4e28f76-a1fb-478b-b91a-cd0786d4a572.filesusr.com/ugd/6c3074_b899564b76b14e989567335d0a9b4406.pdf (accessed May 18, 2020).

3. Appointment of an Independent Ethics Board for the USOPC and the NGBs

There has been criticism of the independence and ineffectiveness of the various ethics committees that populate the USOPC and the NGBs, especially in the wake of the sex abuse scandals. A key problem is that the USOPC appoints members of its ethics committees (a system in place since its creation in 2005).²⁶¹ The responsibilities of the ethics committee include overseeing compliance with the USOPC Code of Conduct; recommendations for revision of the Code of Conduct, reviewing the organizational structure of the USOPC, and reviewing the handling of ethics-related compliance, *or if directed by the Board*, directly handling those complaints (emphasis added).²⁶² There is also a conflict of interest policy which generally requires USOPC Board members, employees and volunteers to disclose potential conflicts of interest, such as owning a business that provides goods or services to the USOPC or any NGB, or, more generally, participating in activities, or maintaining interests “that interfere with the satisfactory performance of USOPC work assignments.”²⁶³

The interrelationship between the USOPC’s board and its ethics committee hurts the independence of the ethics committee. Some NGB ethics committee have the same problem. As an alternative, the Committee on Olympic and Paralympic Sports could do one of two things: either appoint an independent ethics committee that will oversee the USOPC and all the NGBs or appointment independent ethics committees that are specific to the USOPC and each NGB. In either case, athletes and other stakeholders can report potential violations of ethics rules, which will be promulgated by the Committee and will override the internal rules of the USOPC and respective NGBs. In promulgating these rules (which would go through a process similar to rules and regulations promulgated by administrative agencies under the Administrative Procedure Act (“APA”), the Committee can have a public comment process where the public, athletes, coaches, and the representatives of the governing bodies can post their views.²⁶⁴

It is noteworthy the USOPC’s own athletic representative, Mr. Xiao, in his Senate committee testimony, proposed the creation of an independent oversight committee “to evaluate the business practices of the USOPC, provide recommendations to the USOC Board of Directors, and report directly back to Congress.”²⁶⁵ The Commission should go a step further and take control of the oversight process by the appointment of the independent board or boards (depending on which approach is taken). The Commission should set the standards for members of this committee and could send a public notice seeking candidates for a seat on this ethics board.

Case Study: USA Triathlon -- A Possible Model for Simple and Direct Ethics Rules –

²⁶¹ See Bylaws of the United States Olympic and Paralympic Committee, sec. 5.5.1 (2020) (“The Nominating and Governance Committee shall appoint the members of the Ethics Committee other than its chair. The chair of the Ethics Committee shall be a member of the Board, appointed by the Chair with approval of the board.”).

²⁶² *Id.* at 5.5.3.

²⁶³ See U S Olympic & Paralympic Committee Policy. Feb. 27, 2020, <https://www.teamusa.org/Footer/Legal/Governance-Documents> (accessed May 21, 2020).

²⁶⁴ See 5 U.S.C. sec. 551 et seq.

²⁶⁵ See Xiao, Han. Testimony before the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, ON THE FUTURE OF ATHLETE SAFETY: “Strengthening and Empowering U.S. Amateur Athletes: Moving Forward with Solutions” July 24, 2018. Alternatively, Congress could appoint several members of the USOC Board of Directors in a bi-partisan manner. Both models would provide more outside perspective to the USOC’s governance structure without significantly impacting the stability of the organization. *Id.*

One existing governance and ethics model could be the code of ethics developed by USA Triathlon in 2017.²⁶⁶ The document grants a broad definition of conflict of interest, which includes “approval of any contractual arrangement involving [USA Triathlon] if the Colleague would or could be *perceived to* potentially financially benefit from becoming, not-becoming or remaining a party to the arrangement (emphasis added).²⁶⁷ “Financial Interests” between the body and an entity that has a “transaction or arrangement” are prohibited, as well as a *potential ownership* or investment interest in, or compensation arrangement with, any entity or individual with which [USA Triathlon] is negotiating a transaction or arrangement” (emphasis added).²⁶⁸

While much of the document is aspirational – it seeks to foster “open communications to achieve a transparent environment,”²⁶⁹ the conflict of interest rules stand as the centerpiece. In short, it is one of the most effectively drafted rules I have seen. Intended to supplement all federal and state law, the policy requires the reporting of any real or perceived conflicts to the organization’s ethics committee.²⁷⁰ The member who has “knowledge or suspicion” of a potential unethical conduct by another in the organization, has a procedure to report that allegation to the ethics committee.²⁷¹

It details a procedure to report potential conflicts of interest to the committee, and cautions that the failure to do so would result in suspension of the member from the organization.²⁷² The notification must detail the existence and nature of the Colleague’s potential Conflict of Interest, and all material facts that an “ordinarily prudent person” would consider relevant. Then, the Ethics Committee will determine whether the alleged conflict violates the organization’s bylaws and, finally, decide whether to “approve” or “disprove” the transition or situation at issue.²⁷³ If the

²⁶⁶ See USAT Code of Ethics and Conduct, <https://www.teamusa.org/USA-Triathlon/About/USAT/Governance>

²⁶⁷ Id. at sec. II, C(2).

²⁶⁸ Id. at sec. II(D). The entire provision states: “Financial Interest: A person has a financial interest if the person has, directly or indirectly, through business, investment, or family: 1. An ownership or investment interest in any entity with which USAT has a transaction or arrangement; 2. A compensation arrangement with USAT or with any entity or individual with which USAT has a transaction or arrangement; or 3. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which USAT is negotiating a transaction or arrangement.

²⁶⁹ Id. at sec. V (“USAT recognizes that open and honest communication is essential to achieving the productive and transparent environment necessary to protect the integrity of sport. All USAT Colleagues are encouraged to create an environment and culture in which asking questions and challenging the status quo is encouraged and rewarded. Colleagues shall be encouraged to: A. Contribute ideas B. Listen C. Ask questions D. Hold open and honest discussions E. Make decisions that incorporate appropriate input from all applicable units.”)

²⁷⁰ Id. at sec. VII(A) (“USAT has instituted a strict policy regarding conflicts of interest: All USAT Colleagues must refrain from any activity or investment that creates, or that might appear to create, a Conflict of Interest. This policy requires all Conflicts of Interest, either actual or perceived, to be immediately reported to the USAT Ethics Committee. This policy is intended to supplement but not replace all applicable state and federal laws governing conflicts of interest in nonprofit or charitable organizations.”)

²⁷¹ Id. at sec. VII(B)(4) (“Any Colleague having knowledge or suspicion that any Colleague of USAT, including, but not limited to any USAT Region or Committee member, has or may enter into an agreement that could present the potential for a perceived Conflict of Interest must be promptly reported in writing on the Code of Ethics Complaint Form to the Chairperson of the USAT Ethics Committee. After consultation with the other members of the Ethics Committee, the Chairperson of the Ethics Committee shall notify the Executive Director of all potential Conflicts. The Executive Director shall then immediately disclose the potential Conflict to all Colleagues vested with considering and making any decision on the arrangement or agreement at issue.”)

²⁷² Id. at sec. VII(B). The policy notes that every “colleague” has a “duty of loyalty” to report such potential conflicts, taking language from a standard of fiduciary duty.

²⁷³ Id. at sec. VII(B)(1) and (2) (“1. All USAT Colleagues must promptly complete and update USAT’s annual Conflict of Interest in accordance with USAT disclosure procedures identifying: a. The existence and nature of the Colleague’s

conflict violates the bylaws, the Committee can require the member to discontinue or modify his/her presence on the organization’s Board of Directors or its committees. Or it can refer the matter to Board without an opinion.²⁷⁴

4. Strengthening Medical Insurance Options for Olympic Athletes

The USOPC does offer medical insurance for elite athletes. Titled “Elite Athlete Health Insurance” (“EAHI”), these policies are preferred provider organization (“PPO”) plans that are common to many medical insurance plans offered by employers.²⁷⁵ Premiums are paid in full by the USOPC for athletes-only policies; but athletes have to pay a relatively small portion of policies that include family members.²⁷⁶

Information outlining the scope of the coverage was not found, and it is possible that this insurance plan may provide adequate coverage for the majority of athletes covered. However, the Commission would have the power to investigate the levels of coverage and, in consultation with athletes or athlete representatives, look into different plans or require certain kinds of coverage. The issue may be particularly acute with regard to mental health coverage (a problem with many

potential Conflict of Interest, and b. All facts known to him or her regarding the subject matter of a transaction or situation that an ordinarily prudent person might reasonably believe to be material to the transaction or situation.

2. A Colleague’s failure to complete, file, or update USAT’s annual Conflict of Interest form in compliance with USAT’s procedures by the applicable deadline shall result in the suspension of that Colleague’s membership until the Colleague is in compliance.

²⁷⁴ *Id.* at sec. VII(B)(3) (“The USAT Ethics Committee shall examine all Conflict of Interest disclosures, to determine whether they violate Article XVIII of these Bylaws and, if appropriate, vote to:

a. Approve or disapprove any transaction or situation at issue;

b. Require the Colleague to remove himself or herself from positions in which the Conflict of Interest exists until there is no longer a conflict; . . .

c. Require the Colleague to discontinue, reduce, or modify his or her participation on the Board, committee, or task force where the conflict arose or exists;

d. Provide the Colleague who is the subject of the disclosed Conflict of Interest an opportunity to present additional facts regarding the transaction before the Ethics Committee, however, the Colleague that is the subject of the disclosed Conflict of Interest shall not be present for or participate in any deliberations or votes of the Ethics Committee with respect to the perceived Conflict of Interest. Recusal of a Colleague shall require the Colleague not to be present for or to participate in any meeting, conference call, e-mail, listserv, or any other electric or nonelectronic communications or collaboration concerning the transaction; and/or e. Refer the matter to the Board of Directors with or without an opinion of whether the transaction or situation constitutes a Conflict of Interest.

²⁷⁵ See Elite Athlete Health Insurance, Team USA, <https://www.teamusa.org/Team-USA-Athlete-Services/Medical/Athlete-Health-Insurance> (accessed May 21, 2020).

²⁷⁶ *Id.* The following table lists 2020 amounts paid by athletes and reported to the IRS once athletes enroll in EAHI:

	2020 Benefit Value	Paid by Athlete	2020 Monthly Taxable Amount	2020 Annual Taxable Amount
Athlete Only	\$493	\$0	\$493	\$5,916
Athlete + Child	\$986	\$119	\$867	\$10,404
Athlete + Spouse	\$986	\$143	\$843	\$10,116
Athlete + Family	\$1,800	\$156	\$1,644	\$19,728

medical insurance plans).²⁷⁷ With elite athletes, the mental health issues are particularly acute with the Covid pandemic cancelling athletes' events and disrupting training schedules.²⁷⁸ The Commission would have the power to review the scope of medical coverage for elite athletes and could make recommendations adopt such a system for medical insurance. It could consider the proposal by one Olympic reform organization to a system found in the United Kingdom which involves such an approach to medicine and athletic training.²⁷⁹

5. Athlete Representation on the USOPC and the NGBs

The USOPC should be acknowledged for taking steps to increase athlete participation. In 2020, it amended its bylaws to increase the percentage of athletes NGB boards and committees from 20 percent to 33.3 percent over the next year.²⁸⁰ These proposals, are steps in the right direction, but far too little. Athletes should be a stronger constituency and there is no guarantee that this modest increase will change the dynamic of the USOPC. This falls short of proposals by athletes' rights groups. As noted earlier in this article, The Committee to Restore Integrity to the USOC has called for 50 percent of the USOPC and NGBs boards to be composed of athletes.²⁸¹

Assuming that athletes do not choose to unionize (which would limit or preclude their involvement as the USOPC would be their employer), the new Sports Act could impose such a requirement, it would be best for the Commission to determine who would be qualified to be an "athlete" for purposes of this requirement. Must the athlete be actively engaged competition? Or can a retired athlete be eligible and if so, would there be a maximum amount of time that the athlete would be so qualified? The present Sports Act has a 10-year window, meaning that it is limited to those who have represented the United States in international amateur athletic competition within the

²⁷⁷ See Graison Dangor, 'Mental Health Parity' Is Still An Elusive Goal In U.S. Insurance Coverage, NPR.com, <https://www.npr.org/sections/health-shots/2019/06/07/730404539/mental-health-parity-is-still-an-elusive-goal-in-u-s-insurance-coverage> (accessed May 21, 2020). ("The laws have been partially successful. Insurers are no longer permitted to write policies that charge higher copays or deductibles for mental health care, nor can they set annual or lifetime upper limits on how much they will pay for such care. But advocates for patients say insurance companies still interpret mental health claims more stringently than those for physical illness . . . The insurance industry's own data show a growing gap between coverage of mental and physical care in hospitals and skilled nursing facilities.")

²⁷⁸ See Julie Kliegman, Mentally, *That's a Whole 'Nother Ball Game*, SI.com, April 29, 2020, <https://www.si.com/olympics/2020/04/29/mental-impact-of-the-pandemic-on-athletes> (accessed May 21, 2020)

("Elite athletes face a unique challenge. They may feel anything from anxiety and uncertainty to fear and anger to sadness and even grief over the postponement and cancellation of their competitions. Coping, often through trying to re-create some semblance of routine, is its own challenge.")

²⁷⁹ See H Paul Dijkstra, N Pollock, R. Chakraverty, J M Alonso, *Managing the health of the elite athlete: a new integrated performance health management and coaching model and coaching model*, Br. J. Sports Med. 2014 Apr; 48(7): 523–531 (describing describe the systems, processes and implementation strategies to assist the athlete, coach and support teams to continuously monitor and manage athlete health and performance. These systems facilitate a balanced approach to training and competing decisions, especially while the athlete is ill or injured. They take into account the best medical advice and athlete preference.), cited in *Olympians Rising: Recommendations to Congress: Reforming the U.S. Olympic Committee to Ensure Health and Livelihood of Athletes*, Sept. 19, 2018, https://b4e28f76-a1fb-478b-b91a-cd0786d4a572.filesusr.com/ugd/6c3074_b899564b76b14e989567335d0a9b4406.pdf (accessed May 18, 2020).

²⁸⁰ See Proposed Amendments to Bylaws of the United States Olympic & Paralympic Committee, June 19, 2020 (accessed July 6, 2020) [note: these are still in proposal stage and could be adopted by August 24, 2020 – at this time, they have not been formally adopted]

²⁸¹ See Committee to Restore Integrity to the USOC, n. 134

preceding 10 years.²⁸² It also states that a minimum of 20 percent voting power to athlete representatives on boards and committees.²⁸³

There are arguments pro and con about including non-competing former athletes as part of the pool of candidates for the athlete seats in these boards and committees. For example, an athlete who has not competed for 10 years may either be less aware of present circumstances or potentially become involved in the governance side of a particular sport. In fact, some former athletes have become well connected in the International Olympic Movement²⁸⁴ and others have become involved in executive positions at the USOPC and NGBs.²⁸⁵ On the other hand, there is an arbitrariness in this requirement because the ages of respective athlete competition vary greatly. A gymnast may end competition at age 18 (and may not be classified as an “athlete” after the age of 28, while an equestrian athlete may retire at 55 and be allowed to be an athlete representative until the age of 65. For these reasons, the 10-year rule should be lifted, and the Commission should craft rules and regulations regarding the minimum percentage of athlete participation on boards and committees and creating a definition of eligible athletes to run for those positions. One idea would be that athletes looking for long-term employment at the USOPC or NGBs should either refrain from representing athletes on an Athletes Advisory Committee, or be required to refrain from such employment for two-to-four years.²⁸⁶

6. Appointment of an Independent Athlete-Ombudsman

Another positive step by the USOPC is the creation of an “NGB Oversight & Compliance Committee, which would expand the athlete Ombudsman power to represent athletes in matters involving NGBs (and not just the USOPC). However, that may not be a substitute for a purely independent representative. Currently, the Office of the Athlete Ombudsman’s provides “cost-free, independent and confidential advice to elite athletes on all sport-related rules, policies and processes, and to assist in the resolution of athlete concerns and disputes.”²⁸⁷ Questions about the effectiveness of the office came to light when it was reported that the ombudsman gave legal advice to USA Badminton, the NGB for the sport, to defeat an athlete’s complaint regarding qualification for the 2019 Pan American Games.²⁸⁸ This incident has come after increasing complaints about the effectiveness and the potential conflicts between the ombudsman and governing bodies.²⁸⁹

²⁸² See 36 U.S.C. § 220522(a)(10).

²⁸³ *Id.*

²⁸⁴ In fact, Thomas Bach, the President of the IOC was a fencer who won a medal for Germany in the 1976 Summer Olympics; Anita DeFrantz, was a rower who won a bronze medal in the same 1976 Summer Olympics and was the lead plaintiff in the lawsuit challenging the ban on U.S. athletes competing in the 1980 games in Moscow, serves on the IOC board. See <https://www.olympic.org/about-ioc-olympic-movement#President> (biography of Thomas Bach); <https://www.olympic.org/ms-anita-l-defrantz> (biography of Anita DeFrantz)

²⁸⁵ Stephanie Hightower, was a world-class hurdler for the United States, who later served as the A former world-class hurdler, Hightower has served USATF in countless capacities, beginning with USATF’s Athletes Advisory Committee and including as USATF women’s track & field chair and as team leader, team manager and chef de mission for Team USA at international competitions. She was selected to the 1980 U.S. Olympic team. See Stephanie Hightower honored with 2018 USATF Giegengack Award, <https://www.usatf.org/news/2018/stephanie-hightower-honored-with-2018-usatf-giegen> (accessed May 25, 2020).

²⁸⁶ See Committee to Restore Integrity to the USOC, n. 134

²⁸⁷ See Athlete Ombudsman, Team USA, <https://www.teamusa.org/athlete-ombudsman> (accessed May 25, 2020).

²⁸⁸ See Scott Reid, *USOPC athlete ombudsman allegedly advised USA Badminton on player’s complaint*, The Orange County Register, March 29, 2020, <https://www.ocregister.com/2020/03/28/usopc-athlete-ombudsman-allegedly-advised-usa-badminton-on-players-complaint/> (accessed May 25, 2020).

²⁸⁹ *Id.*

The new Sports Act should give the Commission the right to appoint an independent ombudsman who would report only to the Commission. The ombudsman would represent athletes in their grievances with the USOPC or NGBs as an independent advocate with no ties to any Olympic organization. Compensation and budget would be decided by the Commission from funds allocated from Congress.

7. Term Limits for USOPC and NGB Board members

The Commission may wish to consider term limits as a way to effectuate change in the respective operations of these boards. The term limits could be term maximum (e.g. two terms) or a “time” maximum (e.g. 10 years). There are pros and cons in determining whether terms limits should be mandated, but at the USOPC and many NGBs, there are time limits. The USOPC has a limit of eight years for directors, but not for the CEO.²⁹⁰ For USA Track and Field, the respective term maximum is also eight years.²⁹¹ The Commission may wish to adopt a uniform standard for the USOPC and all of the NGBs, or may wish to modify the time periods based on its best judgment.

8. Compensation of Key USOPC and NGB Employees

As noted earlier, the compensation of certain members of the USOPC and NGBs has been quite generous, often above standard compensation schemes for non-profits.²⁹² This has caused considerable criticism in the press, by victims of sexual abuse (many of whom are currently in litigation against the USOPC) and by Olympic reformers.²⁹³ The Commission should be empowered under a new Sports Act to set parameters for compensation. One method to do so is to adopt guidelines recommended for CEOs of charitable non-profits by the U.S. Treasury.²⁹⁴ The three-part standard would include the Commission determining whether the compensation arrangement was approved in advance by an authorized body (e.g. the board) of the USOPC or NGB; (2) the individuals in that body who do not have a conflict of interest concerning the transaction; and (3) the body obtained and relied upon appropriate data as to comparability, and adequately and timely documentation to justify its determination.²⁹⁵

Another approach the Commission would take is to set specific guidelines on the competition and wrestling that power from the respective board. The Commission could treat the Officers and other top employees of the USOPC or NGB as governmental employees with standards of compensation set by the Federal Office of Personnel Management (“OPM”). The OPM sets compensation rates for various types of Federal positions, including members of the Executive, Legislation and Judicial Branches.²⁹⁶ The Commission could consider the pay rates found in the

²⁹⁰ See *Bylaws of the United States Olympic Committee*, §3.6.1 (2018)

²⁹¹ See *USATF, Governance Handbook and Bylaws*, §11(d) (2018).

²⁹² See notes 203 – 205

²⁹³ See Sally Jenkins, *Congress Must Fix the USOC and that includes Exorbitant Executive Spending*, The Wash. Post, March 28, 2018, https://www.washingtonpost.com/sports/olympics/congress-must-fix-the-usoc-and-that-includes-exorbitant-executive-spending/2018/03/26/a051c898-3128-11e8-94fa-32d48460b955_story.html (accessed May 30, 2020).

²⁹⁴ See IRS, *Charities and Nonprofits, Rebuttable Presumptions – Intermediate Sanctions*, irs.gov, <https://www.irs.gov/charities-non-profits/charitable-organizations/rebuttable-presumption-intermediate-sanctions> (accessed May 26, 2020).

²⁹⁵ *Id.*

²⁹⁶ See 2020 Executive & Senior Level Employee Pay Tables, OPM.gov., <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2020/executive-senior-level/> (accessed May 26, 2020).

Rates of Basic Pay for Employees in Senior-Level and Scientific or Professional Positions for certain higher level positions²⁹⁷ or the rates for Senior Executive Service²⁹⁸ in helping formulate a standard. The Commission should also consider compensating athletes who serve on the USOPC and NGB boards and committees. That may create a large pool of athletes interested in serving on those committees.

9. Dispute Resolution

Because of the time and costs of litigation, arbitration has been the strongly preferred method of adjudicating disputes between various stakeholders in the Olympic movement. The original Amateur Sports Act specifically mandates “swift and equitable resolution of disputes by arbitration through the offices of the American Arbitration Association (“AAA”).²⁹⁹ The AAA is also used as the adjudicator of choice in domestic doping disputes.³⁰⁰

Critics of the system have noted the relatively expensive arbitration fees and the expertise and impartiality of the arbitrators.³⁰¹ These criticisms may have some weight because under both the Amateur Sports Act and general Federal law, arbitration ruling are “binding” and it is quite difficult to have them vacated by the courts.³⁰² Many cases brought by athletes have involved eligibility issues and there is good reason to keep the system as it is. Arguably, arbitration is a preferred method than litigation for such cases due to timeliness issues. The same can be said of performance-enhancing substances, which also comes under the arbitration provisions of the United States Anti-Doping Agency (“USADA”).³⁰³ The new Sports Act could give the Commission the power to change the arbitration system if it wishes. It could establish its own group of arbitrators based on standards of experience, knowledge of the Olympic system and general expertise in dispute resolution. It may require arbitration by three-person arbitration panels whereby each party would get to appoint an arbitrator with the third arbitrator considered a “neutral” arbitrator appointed by the Commission. Another proposal would be for the Commission to set up a training system or certification system for potential arbitrators to ensure that the arbitrators are knowledgeable about the issues particular to sports cases, especially those with regard to Olympic eligibility, governance issues and doping. Or it can keep the system as it is.

²⁹⁷ See Office of Personnel Management, Salary Table No. 2020-SL/St, Rates of Basic Pay for Employees in Senior-Level (SL) and Scientific or Professional (ST) Positions, Jan. 2020, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/SLST.pdf> (accessed May 26, 2020).

²⁹⁸ See Office of Personnel Management, Salary Table No. 2020-ES Rates of Basic Pay for Members of the Senior Executive Service (SES), Jan. 2020, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/ES.pdf> (accessed May 26, 2020). (lists salary rates from \$131,000 to \$197,000),

²⁹⁹ 36 U.S.C. §220529(a).

³⁰⁰ See Maureen A. Weston, Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport, 38 GA. J. INT'L & COMP. L. 97, 107.

³⁰¹ See Committee to Restore Integrity to the USOC, n. 134

³⁰² See 36 U.S.C. §220529(d); See also Federal Arbitration Act, 9 U.S.C. §10(a). Court will vacate arbitration awards in rare circumstances, such as when an arbitrator exceed his or her authority, or engaged in fraud or “evident partiality.” See also, Gault v. v. United States Bobsled and Skeleton Federation, 578 N.Y.S.2d 683, 685 (N.Y. App. Div. 1992).

³⁰³ If a U.S. athlete is dissatisfied with the USADA Review Board’s proposed disposition of an alleged doping offense, he may request a hearing before a single arbitrator or a panel of three arbitrators who are qualified as both AAA and North American CAS arbitrators. In this arbitration proceeding, USADA and the athlete are adversarial parties. See Matthew Mitten, Legal Protection of Sports Participation Opportunities in the United States of America, Newsletter of the National Sports Law Institute, Marquette University Law School, Vol. 19, no. 4 Oct – Dec 2008), <https://law.marquette.edu/assets/sports-law/pdf/for-the-record/v19i4.pdf>

10. State Actor Status

The *DeFrantz* and *San Francisco Arts and Athletics* rulings made clear that the USOPC in its present form is not a state actor.³⁰⁴ Under a new Sports Act, state actor status can be conferred by the creation of the government-appointed Commission for Olympic and Paralympic Sports which will have the power to issue rules and regulations under the new system. Does that require the courts to hear constitutional challenges or can those rights be limited by contract or by arbitration clause as in the case of private business agreements?³⁰⁵ This is a matter that has scant jurisprudence and a full examination would be the subject of a separate article. Suffice it to say, that the doctrine is unclear.³⁰⁶

With regard to allegations of violations of due process regarding eligibility requirements for inclusion for an Olympic, Paralympic or World Championship team, it may be possible that the Sports Act or the Commission consider restricting those rights to arbitration. There are good reasons for this, mainly the timelessness of such claims and the lack of expertise of judges to make such determinations. In any event, this question may be moot because even if athletes could bring those particular claims, they would likely be dismissed because participation in the Olympics or in world championships are not “rights” but “privileges.”³⁰⁷ The bigger question is whether an athlete could challenge policies that may affect their free speech rights.

The nationwide protests in 2020 by those under the “Black Lives Matter” movement that rocked the nation also forced a reckoning on race in society. In the sports world, more athletes engaged in “taking a knee” during the National Anthem.³⁰⁸ Private actors, such as the National Football League and National Basketball Association, could restrict such a practice, and not be subject to a constitutional challenge.³⁰⁹ However, in the case of athletes doing the same at an Olympic Trials, a sanction by the USOPC should be subject to First Amendment challenge in court. For example, the USOPC could be sued if it decides that athletes cannot engage in protest activities during the playing of the national anthem at a medal ceremony – an issue that has come up at a recent Pan-American Games, where one athlete raised a fist and the other “took a knee” at a medal ceremony to protest racism in the United States.³¹⁰ Some circuits have explicitly

³⁰⁴ See n. 130.

³⁰⁵ See *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir., 2017 (state action claim regarding arbitration clause between a private firm and a consumer on grounds that it involves a permissive state statute rejected).

³⁰⁶ See Brittany Scott, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 *Hastings Const. L. Quart.* 451, 453 (2019) (“The Court rarely overtly discusses First Amendment waiver in its opinions. It is somewhat baffling that the Court has been willing to articulate a waiver test in other constitutional rights cases but has not expressly articulated a standard for evaluating First Amendment waiver.”)

³⁰⁷ See *DeFrantz v. USOC*, 492 F. Supp. 1181 (D.D.C. 1980).

³⁰⁸ See John Branch, *The Anthem Debate Is Back. But Now It's Standing That's Polarizing*, *N.Y. Times*, July 4, 2020, <https://www.nytimes.com/2020/07/04/sports/football/anthem-kneeling-sports.html> (accessed July 6, 2020) (“The stand-or-kneel debate, sparked by Colin Kaepernick’s posture during the national anthem in 2016 and smoldering since, has reignited — bigger than before, and this time with an unexpected twist. Today, athletes may have to explain why they chose to stand, not kneel, during “The Star-Spangled Banner.”)

³⁰⁹ See Paul Callan, *There is no Constitutional Right to Take a Knee While You're at Work*, *CNN.com*, Sept. 26, 2017, <https://www.cnn.com/2017/09/26/opinions/first-amendment-football-protest-callan-opinion/index.html> (“The Founding Fathers made no mention of restricting the right of the National Football League or any other private employer to “prohibit” or “abridge” the freedom of speech.”)

³¹⁰ See Derrick Bryson Taylor, *U.S. Fencer and Hammer Thrower Lead Silent Protests at Pan-American Games*, *N.Y. Times*, Aug. 11, 2019, <https://www.nytimes.com/2019/08/11/sports/race-imboden-fencer-kneels.html> (accessed May 22, 2020) (“The United States fencer Race Imboden took a knee at the awards ceremony of the Pan-American Games on Friday, and the next day, the hammer thrower Gwen Berry raised her fist during the national anthem in a pair of silent political protests that officials said could have consequences.”).

permitted such a limitation to a First Amendment challenge, as long as the waiver as long as the agreement is “knowingly” and “voluntarily” made.³¹¹ At this time, such restrictions are possible, although not in the best interests of the athletes.

11. Standards for Determining Sexual and Physical abuse by USA SafeSport

Finally, the Committee should be empowered to change standards for adjudication involving SafeSport cases. Aside from the lack of adequate funding (discussed earlier), SafeSport has been the subject of critical commentary, from both victims and accused alike. Critics complain that investigations take too long, and the results have been inconsistent. One coach’s suspension came 15 months after the case was referred to the Center for SafeSport by USA Gymnastics and 32 months after USAG first investigated the coach and her gym.³¹² In addition, they have cited inconsistencies in sanctions for seemingly similar cases.³¹³ On the other hand, others have criticized what they deem is a lack of proper due process by the group before make a determination of abuse and punishment.³¹⁴ While there have been calls to change the SafeSport Code, the Commission may be in the best position to enact rules to speed up the process, ensure a level of due process for those accused of violations and to mandate standards of proof. The Commission could also recommend that Congress enact legislation to dissolve and replace the body or simply rely on traditional law enforcement.

The sexual abuse of athletes and the failures of governing bodies to adequately address it has been the central reason for advocacy group seeking to amend the Sports Act. In 2019, the “Empowering Olympic and Amateur Athletes Act was proposed in the Senate.³¹⁵ The bill echoes some of the proposals found in the article, albeit in a more limited manner. It would allow Congress to dissolve the USOPC’s board of directors if it finds that it is failing to fulfill its purposes as described in the original Amateur Sports Act. It would also increase funding for USA Safe Sport, and require the creation of a public website that would contain a list of individuals who are barred from the USOPC or a national governing body.³¹⁶

The bill strengthens reporting and audit requirements of the USOPC to Congress and the president, including requiring such reporting to take place annually instead of every four years. Similar to what is proposed in this article, the bill would empower Athlete Ombudsman to provide independent advice, but mainly as to SafeSport issues.

As of the fall of 2020, there is a good possibility the bill will pass. A broad range of athletes, former athletes, and academics have signaled their support (including me). While this bill is a good beginning, I argue that it is a short of a “reimaging” of U.S. Olympic and amateur sports. It is time

³¹¹ See, e.g. *Snepp v. United States*, 444 U.S. 507, 508 (1983) (Court upheld contract provision signed by former CIA agent not to publish any information relating to his employment without government approval, concluding it was within the CIA’s power). See also Scott, at n. 306.

³¹² See Scott M. Reid, *SafeSport: Amy Nyman made gymnasts feel ‘scared, degraded and humiliated’*, Orange County Register, May 28, 2020, <https://www.ocregister.com/2020/05/28/safesport-amy-nyman-made-gymnasts-feel-scared-degraded-and-humiliated/> (accessed May 28, 2020) (“Gymnasts and their families’ anxiety about the case was further heightened, parents said, by how long it took to resolve and by SafeSport investigators’ failures to respond to emails, phone calls and texts in a timely manner – if they responded at all. An attorney for Nyman also complained about the length of the case.”)

³¹³ *Id.*

³¹⁴ See Grace Kier, *Three Years On, Center for SafeSport Faces Controversy*, Pulitzer Center, April 20, 2020, <https://pulitzercenter.org/reporting/three-years-center-safesport-faces-controversy> (accessed May 28, 2020).

³¹⁵ See 116th Congress, S. 2330 (2019).

³¹⁶ *Id.*

to take the next step. If the new Sports Act as proposed in this article would be passed, it could give either Congress or the Commission the power to dissolve the USOPC's board.

Conclusion

It was not the goal of this article to trash the USOPC and the NGBs. Many of their leaders and members have dedicated their lives and careers in furtherance of U.S. Olympic sports. In many respects they could point to certain material successes. Medal counts in the Olympics have never been higher for the United States. A few medalists have been able to secure lucrative endorsements and become respected public figures. Training facilities are much improved over the last four decades. But this has come at a price – that being lack of proper governance, generous compensation, cover-ups of athlete abuse, overdependence on sponsor money, and lack of serious athlete rights.

In recent years, improvements in the present system have come, but incrementally. Athletes at least have some seats at the table. Ethics and transparency is taken more seriously. Sponsors have brought in money to provide a cushion for certain organizations to grow. And some NGBs have avoided controversy and scandals.

The CEOs, directors, officers and employees do not have an easy job. The present CEO of USA Gymnastics, Li Li Leung, has tried hard to resurrect the sport after years of ghastly leadership. Sarah Hirshland of the USOPC has earned some positive reviews from athletes from her actions with regard to advocating postponement of the Tokyo Olympics.³¹⁷ She also has created an athlete-led group “to challenge the rules and systems” in the USOPC “that create barriers to progress, including your right to protest.”³¹⁸

But even if Covid-19 never became the worst pandemic of the last 100 years and became a footnote in the annuals of communicable diseases, the sports world is a far more complicated place today than it was when the Amateur Sports Act was enacted in 1978. Over four decades later, the non-governmental structure crafted by the Sports Act has run its course. It is a relic of another era, just like amateur Olympism. There were problems with the structure before Covid, but the economic disruption and the mental and physical toll that has been unleashed by the Covid pandemic may become the catalyst to spark the needed changes in Olympic sports. So, it is time to reimagine American Olympic sports as a better managed, better funded, better scrutinized system to protect all of its stakeholders. A new Sports Act and the creation of Commission for Olympic and Paralympic Sports would be a much-needed step in that direction.

³¹⁷ See Rachel Bachman, *Team USA Chief Says Athletes' Feedback Enabled Call for Delay of Olympics*, The Wall Street Journal, March 26, 2020, <https://www.wsj.com/articles/team-usa-chief-says-athletes-feedback-enabled-call-for-delay-of-olympics-11585236262> (accessed June 22, 2020) (“ . . . the improved relationship with athletes— thousands of whom are still coming to grips with having no Summer Olympics this year—is no small feat.”).

³¹⁸ See Torrey Hart, *USOPC Creates Athlete Group to Examine Policies – Including Right to Protest*, Swimsam.com, June 9, 2020, <https://swimsam.com/usopc-creates-athlete-group-to-examine-policies-including-right-to-protest/> (accessed July 23, 2020).