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**Whatever Happened to the International Convention Against Doping in Sport:
The United States Ratified It, But Then What?**

*Genevieve F.E. Birren, Esq.**

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Abstract

In April of 2008 the United States ratified the UNESCO International Convention against Doping in Sport. The Convention addresses national and international level activities, education and research, and monitoring related to doping. The ratification raised questions about the potential impact on sport entities in the United States because the Convention directs member nations to take steps, including legislative, to combat doping. However, since ratification the United States' compliance level with the Convention had remained unchanged at 78.6% until 2015, when it increased to 89.3%. The past lower overall compliance was due to low compliance levels in several categories, including: Financial Measures; Professional Codes of Conduct; Nature of Research; and Sport Science. All of these areas are dealt with by private entities in the United States and the government takes little to no active role. Due to constitutional concerns, the government is unlikely to get involved in these areas in the future, thus depending on improvements by private entities, leaving the United States unable to fully comply with the Convention.

I. Introduction

Nearly a decade ago, on April 4th, 2008, the United States became the 90th signatory¹ to United Nations Educational, Scientific and Cultural Organization's (UNESCO) International Convention against Doping in Sport (Convention).² The signing of this treaty came on the heels of the Mitchell Report on doping in Major League Baseball, which was released in December of 2007.³ Sports doping was a common item in the news, professional athletes were being called before Congress, and there was a general notion that sports throughout the United States were "dirty." The potential consequences of the United States signing the Convention were varied and far-reaching, but since the United States signed the Convention, it does not appear that much has been done to specifically enact the treaty.

This article examines the Convention, its implications, and implementation – or lack thereof. The first section will provide an overview of the Convention: its purpose, contents, and its methods. The second section will examine which United States organizations the Convention may apply to, and what their legal standing was prior to the ratification of the Convention. The third section will examine the legal ramifications for the effected sport organizations and provide recommendations on how sport organizations can adapt to the Convention. The fourth section will discuss United States' compliance with the Convention.

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¹ United Nations Educational, Scientific and Cultural Organization, *United States Ratifies International Convention against Doping in Sport*, located at http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html. (Last accessed September 10, 2015). [Hereinafter UNESCO.]

² International Convention against Doping in Sport 2005, located at http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html. (Last accessed September 10, 2015). [Hereinafter Convention.]

³ George J. Mitchell, *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and other Performance Enhancing Substances by Players in Major League Baseball*, 2007, located at <http://files.mlb.com/mitchrpt.pdf>. (Last accessed September 10, 2015). [Hereinafter Mitchell Report.]

II. The Convention

A. Purpose and Execution

The Convention's purpose "is to promote the prevention of and the fight against doping in sport, with a view to its elimination."⁴ Several means of achieving this purpose are spelled out in the Convention, including that the parties to the Convention "adopt appropriate measures at the national and international levels which are consistent with the principles of the Code."⁵ These measures may include "legislation, regulation[s], policies or administrative practices."⁶ Finally, the Convention directs that the signatory nations "commit themselves to the principles of the [World Anti-Doping] Code as the basis for the[se] measures."⁷

B. National-level Activities

Article 7 of the Convention permits governments to rely on national anti-doping and sport organizations to carry out the purposes of the Convention.⁸ Sanctions against athletic support personnel, such as athletic trainers and doctors,⁹ and regulations of nutritional supplements are both encouraged.¹⁰

One of the Convention's primary foci for national action is the restriction of the availability and use of doping aids and methods.¹¹ It encourages both governments and sport organizations to adopt measures that restrict the availability, possession, and use of prohibited substances, although it specifically allows for exemptions for therapeutic use.¹² Suggested measures to curb doping by athletes include: "no-advance notice, out-of-competition and in-

⁴ Convention, *supra* note 2, at Art. 1.

⁵ *Id.* at Art. 3(a).

⁶ *Id.* at Art. 5.

⁷ *Id.* at Art. 4(1).

⁸ *Id.* at Art. 7.

⁹ Convention, *supra* note 2, at Art. 9.

¹⁰ *Id.* at Art. 10.

¹¹ *Id.* at Art. 8,

¹² *Id.* at Art. 8(1-3).

competition testing;”¹³ allowing sport organizations to permit “their members to be tested by duly authorized doping control teams from other countries;”¹⁴ and assisting sport and anti-doping organization with “gaining access to an accredited doping control laboratory.”¹⁵

The Convention also provides for financial methods that countries can use to exert control over sports doping. It states the parties shall “provide funding...to support a national testing programme...or assist...in financing doping controls either by direct subsidies or grant.”¹⁶ It further directs governments to withhold funding from both athletes and athletic support personnel during a suspension due to a doping violation,¹⁷ as well as from any sport organization “not in compliance with the Code.”¹⁸

C. International Activities

The third section of the Convention focuses on international cooperation as a means to control and eliminate doping. It encourages cooperation between governments, anti-doping agencies, and sport organizations around the world.¹⁹ This cooperation includes: allowing in- and out-of-competition testing of athletes in their own and other territories;²⁰ allowing movement of doping control teams and samples across borders;²¹ and recognize other members’ doping-control procedures and support reciprocal testing arrangements.²² Parties are also encouraged to

¹³ *Id.* at Art. 12(a).

¹⁴ Convention, *supra* note 2, at Art. 12(b).

¹⁵ *Id.* at Art. 12(c).

¹⁶ *Id.* at Art. 11(a).

¹⁷ *Id.* at Art. 11(b).

¹⁸ *Id.* at Art. 11(c).

¹⁹ Convention, *supra* note 2, at art. 13.

²⁰ *Id.* at Art. 16(a).

²¹ *Id.* at Art. 16(b-c).

²² *Id.* at Art. 16(f-g).

share information on effective anti-doping programs²³ and anti-doping research and developments.²⁴

Parties are also directed to support the mission of the World Anti-Doping Agency (WADA)²⁵ and to provide equal funding of WADA via both public sources and the Olympic movement.²⁶ However, the more detailed section on funding addresses the voluntary fund, which governments and sport organizations can donate to as they chose.²⁷

D. Education and Research

Two other areas of focus for the Convention are education and research related to doping. Parties are directed to “support, devise or implement education and training programmes on anti-doping”²⁸ for athletes, athletics support personnel, and the sports community in general.²⁹ The purpose of this education is to inform people of the health risks³⁰ and ethical issues³¹ doping raises, as well as the specifics of the Code,³² what substances are prohibited,³³ and doping control procedures.³⁴

Section V of the Convention focuses on doping research, both what kinds of research should be conducted and how that research should be carried out. Research on training programs,³⁵ emerging doping substances and methods³⁶ and prevention, and new detection

²³ *Id.* at Art. 23.

²⁴ Convention, *supra* note 2, at Art. 26.

²⁵ *Id.* at Art. 14; WADA was created in 1999 and states its mission “mission is to lead a collaborative worldwide movement for doping-free sport.” World Anti-Doping Agency, *located at* <https://www.wada-ama.org/en/who-we-are>. (Last accessed April 8, 2016.)

²⁶ *Id.* at Art. 15.

²⁷ *Id.* at Art.17-18.

²⁸ *Id.* at Art. 19(1).

²⁹ Convention, *supra* note 2, at Art. 19(1-2).

³⁰ *Id.* at Art. 19(1)(b).

³¹ *Id.* at Art. 19(1)(a).

³² *Id.* at Art. 19(2)(b).

³³ *Id.* at Art. 19(2)(c).

³⁴ Convention, *supra* note 2, at Art. 19(2)(a).

³⁵ *Id.* at Art. 24(b).

³⁶ *Id.* at Art. 24(c).

methods and health issues³⁷ are all encouraged. Such research should be carried out in lawful and ethical ways and should avoid administering athletes prohibited substances.³⁸ Research should also be performed “only with adequate precautions in place to prevent the results [from] being misused and applied for doping.”³⁹

E. Monitoring

In order to monitor the Convention, the Conference of Parties was created.⁴⁰ It meets biannually and every signatory nation is a member with one vote.⁴¹ The functions of the Conference of Parties are many, designed to carry out several purposes: to promote the Convention and its purpose;⁴² to address funding issues;⁴³ to receive reports and monitor compliance with the Convention;⁴⁴ and to examine and approve changes to the list of prohibited substances and to the Convention itself.⁴⁵

III. Current Legal Standing of Affected Organizations

Nowhere does the Convention state what particular sport organizations are, or should be, bound by the Convention’s terms. Although there is reference to the Olympic movement, the Convention is not limited to National Olympic Committees or their member sport governing bodies. This means that the Convention could have an impact on all sport organizations in the United States, both professional and amateur.

All of the sports organizations that could be effected by the Convention are considered private entities at this time. Private entities are not subject to constitutional constraints when “the

³⁷ *Id.* at Art. 24(a)

³⁸ *Id.* at Art. 25(a-b).

³⁹ Convention, *supra* note 2, at Art. 25(c).

⁴⁰ *Id.* at Art. 28(1).

⁴¹ *Id.* at Art. 28(2-3).

⁴² *Id.* at Art. 30(1)(a).

⁴³ *Id.* at Art. 30(b-c).

⁴⁴ Convention, *supra* note 2, at Art. 30(d-e, h-i).

⁴⁵ *Id.* at Art. 30(f-g).

practices [can] not be shown to be approved, encouraged, or even influenced by the state as a consequence of state licensure, regulation, or funding.⁴⁶ This means that they are not obligated to grant constitutional protections to their members, employees, or participants.

A. United States Anti-Doping Agency

The United States Anti-Doping Agency (USADA) was created in 2000 to address “gross shortcomings” in the United States Olympic Committee’s (USOC) drug testing program.⁴⁷ With the support of the USOC, Congress worked with the Office of National Drug Control Police (ONDCP) to create USADA.⁴⁸

USADA is a private, non-profit organization “that undertakes its duties pursuant to contract with the USOC to administer the United States’ drug testing programs.”⁴⁹ USADA has the authority to test:

- a. Any athlete who is a member of a NGB [National Governing Body];
- b. Any athlete participating at a competition sanctioned by the USOC or a NGB;
- c. Any foreign athlete who is present in the United States; or
- d. Any other athlete who has given his/her consent to testing by USADA or who has submitted an out-of-competition testing location form to USADA or an IF [International Federation] within the previous twelve months and has not given his or her NGB and USADA written notice of retirement;
- e. Any athlete who has been named by the USOC or an NGB to an international team or who is included in the USADA Registered Testing Pool or is competing in a qualifying event to represent the USOC or NGB in international competition;
- f. Any United States athlete or foreign athlete present in the United States who is serving a period of ineligibility on account of an anti-doping rule violation and who has not given prior written notice of retirement from all sanctioned

⁴⁶ Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after March v. Alabama*, 6 WM. & MARY BILL OF RTS. J. 461, 515 (1998).

⁴⁷ Dionne L. Koller, *Health Law Symposium: Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS L.J. 91, 105 (2005). This article provides a thorough and detailed analysis of whether USADA would be deemed a state actor by a court and concludes that, although there are specific circumstances where USADA’s actions may be deemed as acting on behalf of the state, in general USADA is not a government entity and cannot be deemed a state actor. The article makes no references to whether USADA could be considered a government agent however.

⁴⁸ *Id.* at 95-96, 106.

⁴⁹ *Id.* at 108.

competition to the applicable NGB and USADA, or the applicable foreign anti-doping agency or foreign sport association.⁵⁰

This is a very broad mandate that allows USADA to test all United States athletes that are involved in Olympic sports, as well as all Olympic foreign athletes when they are on United States soil.

This testing is carried out both in- and out-of-competition, either with advance notice or no notice.⁵¹ Both blood and urine testing occurs and samples are sent to WADA-approved laboratories.⁵² Additionally, USADA is to maintain “a searchable database which includes the identity of all Athletes tested by USADA under its Olympic, Paralympic, Pan American, Parapan American and Youth Olympic movements Testing program and the number of times each Athlete has been tested by USADA.”⁵³ However, USADA is not to comment on any athlete’s results until the athlete has gone through or waived the hearing process and been found to have committed a doping offense.⁵⁴

B. United States Olympic Committee

The United States Olympic Committee (USOC) was created through federal legislation⁵⁵ and has also been deemed a private entity.⁵⁶

The fact ‘that a private entity performs a function which serves the public does not make its acts [governmental] action.’ The Amateur Sports Act was enacted ‘to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States.’ The Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.⁵⁷

⁵⁰ USADA, Protocol for Olympic Movement Testing, 1-2 (2014). [Hereinafter Olympic Testing Protocol.]

⁵¹ *Id.* at 6.

⁵² *Id.* at 8.

⁵³ *Id.* at 18.

⁵⁴ *Id.*

⁵⁵ Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§220501-220529 (1994). [Hereinafter 36 U.S.C.]

⁵⁶ *San Francisco Arts and Athl., Inc. v. U.S.O.C.*, 483 U.S. 522 (1987).

⁵⁷ *Id.* at 543-546.

The purposes of the USOC are “to obtain for the United States... the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and Pan-American Games”⁵⁸ and to oversee “all matters pertaining to United States participation in the [those games], including representation of the United States in the games.”⁵⁹ The USOC is not directly involved in the administration of doping policies or testing regimens, however the USOC communicates closely with USADA and the outcome of doping cases effects the USOC’s eligibility and selection of athletes.

C. National Collegiate Athletic Association

Numerous courts have found the National Collegiate Athletic Association (NCAA) to be a private organization.⁶⁰ The NCAA has several primary purposes, including:

- (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit;...
- (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
- (f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;
- (g) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;
- (h) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and
- (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic programs on a high level....⁶¹

⁵⁸ 36 U.S.C., *supra* note 55, at §§220503(4)

⁵⁹ *Id.* at §220503(3)(A)

⁶⁰ *See e.g.* Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984) (NCAA is "a voluntary association of public and private institutions"); O'Halloran v. Univ. of Wash. 679 F. Supp. 997, 1001 (W.D.Wash. 1988), *revd.* on other grounds, 856 F.2d 1375 (NCAA is private entity); Hill v. NCAA, 865 P.2d 633 (1994), stating that “the NCAA as a private organization, comprised of American colleges and universities, and democratically governed by its own membership”; and NCAA. v. Tarkanian, 488 U.S. 179, 197 (1998) (NCAA is private actor that "enjoy[s] no governmental powers").

⁶¹ NCAA 2015-2016 Division I Manual, art. 1.2 (2015). [Hereinafter NCAA Manual.]

Several of these purposes could be interpreted as applicable to doping in collegiate sports. The NCAA appears to believe that regulating doping is within the purview of its purposes, otherwise it would not have created a drug-testing policy in 1986.⁶² The purpose of this policy is to prevent any participant from having “an artificially induced advantage” and from being “pressured to use chemical substances in order to remain competitive,” as well as “to safeguard the health and safety of participants.”⁶³ The NCAA drug tests student-athletes independently of the schools at NCAA events such as tournaments and championships at all levels, as well as year-round for Divisions I and II.⁶⁴

D. Professional Sports Leagues

All professional sports leagues in the United States are private businesses. The teams are owned by private individuals or organizations and the leagues are private, members-only clubs that cooperate to create a product, the professional sports league and its respective games. Courts have supported the contention that professional sports leagues (and their member teams) are private entities.⁶⁵ Thus, the regulation of doping is achieved through agreements with each league’s respective union.⁶⁶ The National Football League, National Hockey League, Major League Baseball, and National Basketball Association all have agreements with their respective unions, however, none of those agreements specifically agreed to abide by WADA or the

⁶² NCAA 2014-2015 Drug-Testing Program, Chap. IV (2014). [Hereinafter NCAA Drug-Testing Policy.]

⁶³ *Id.*

⁶⁴ *Id.* at Chap. IV, art. 4.

⁶⁵ *See generally* *Oakland Raiders, Inc. v. National Football League*, 131 Cal. App. 4th 621 (2005).

⁶⁶ *See generally* NFL/NFLPA Drug Policies (2015), located at <https://www.nflpa.com/active-players/drug-policies>; NBA Collective Bargaining Agreement, Art. XXXIII (2011), located at <http://nbpa.com/cba/>; MLB/MLBPA Joint Drug Agreement (2011), located at <http://mlbplayers.mlb.com/pa/info/cba.jsp>; NHL/NHLPA Collective Bargaining Agreement, Art. 47 (2012), located at <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement>. (All last accessed September 10, 2015.)

Convention and are unlikely to do so in the future, as the leagues find the penalties required by WADA too extreme.⁶⁷

IV. Implications of the Convention

The Convention is a treaty. The process the Convention went through for Senate ratification proves its treaty status. The Constitution states “all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.”⁶⁸ An issue of contention among legal theorists has been whether the power and authority of treaties is greater, lesser, or equal to that of federal legislation.

Some argue that treaties are not bound by even the limits of the Constitution,⁶⁹ although the Supreme Court has put this idea to rest.⁷⁰ Another perspective is that treaties do not have power in and of themselves, and unless domestic law is enacted to support their terms, American citizens, businesses and organizations can essentially ignore treaties.⁷¹

If treaties have no power until federal legislation is passed to enact them, then the effect of the Convention is nil until such legislation is passed. However, if treaties have power on their own or federal legislation is enacted to make the Convention the federal law of the land, then the impact of the Convention could be broad reaching for professional and amateur sport organizations across the United States. Thus far no specific legislation has been enacted and UNESCO reported that enacting legislation is the primary way that signatories comply with the

⁶⁷ *Why the National Football League Will Never Agree to Steroid Testing by USADA*, (n.d.), located at <https://www.steroid.com/blog/Why-the-National-Football-League-Will-Never-Agree-to-Steroid-Testing-by-USADA.php>. (Last accessed October 6, 2015.)

⁶⁸ U.S. Const. art. VI, §2.

⁶⁹ John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1965, 1967, (1999).

⁷⁰ *Id.* at 1966.

⁷¹ Carlos Manuel Vazquez, *Response: Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2155 (1999).

Convention, with 63 countries reporting such enactments in 2013.⁷² It appears the United States never intended to enact any such legislation, as in May of 2008, just after the ratification of the Convention, Joan Donoghue, the principle deputy legal advisor for the State Department testified before Congress that

[t]he Convention is not structured to secure changes to national law or regulation, but rather to secure commitments by parties to promote international collaboration, research, education, and their own national efforts and awareness of anti-doping control efforts. In other words, no new legislation will be required to implement this Convention.⁷³

A. Transformation in to a State Actor or Government Agent

Prior to the signing of the Convention, there was no federal legislation regarding doping in sports, professional or amateur. Whether the treaty serves as federal legislation or federal legislation is enacted because of the treaty, the result will be the same: the United States government will have mandated policies, procedures and methods for detecting doping in sport organizations.

Federal legislation that mandates the drug-testing policies and procedures of sport organizations could have the effect of turning those sport organizations into state actors or government agents, at least in regard to their drug-testing of athletes. However, becoming a state actor or government agent would mean that those sport organizations would have to grant the athletes they test constitutional protections.

The concepts of state actor and government agent are closely related, however, the criteria for each are different, with the tests for being a state actor being more stringent than those making an entity a government agent. Under tests for either of these, will the Convention,

⁷² *Reports of States Parties on Measures Taken by Them for the Purpose of Complying with the International Convention against Doping in Sport* (2013), located at <http://unesdoc.unesco.org/images/0022/002227/222725e.pdf>. (Last accessed September 10, 2015.) [Hereinafter *4CP Report of Parties*.]

⁷³ Donoghue, Joan. Written Testimony to the Senate, Committee on Foreign Relations. *On the International Convention Against Doping in Sport*. Submitted May 22, 2008. Available at: <http://www.state.gov/documents/organization/138877.pdf>; Accessed: 11/3/16.

either through its own power as a treaty, or through legislation enacted at its direction, cause sport organizations to become either state actors or government agents?

1. State Actor

Four different tests have been created to determine whether a private organization should be considered a state actor for some purpose. These tests include: 1) the public function test; 2) the state compulsion test; 3) the entwinement test; and 4) the close nexus or symbiotic relationship test.⁷⁴

a. Public Function Test

The public function test was created by the Supreme Court in *Rendell-Baker v. Kohn*.⁷⁵ The purpose is to determine whether the function being performed by the private entity “has been ‘traditionally the exclusive prerogative of the State.’”⁷⁶ Since drug-testing and anti-doping measures in sport, much less the general governance of sport, have never been a function carried out by the government, this test fails to make sport organizations state actors.

b. State Compulsion Test

The state compulsion test examines whether the state “exercised coercive power or...provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State”,⁷⁷ not of the private party. Thus, whether the private party is a state actor depends on a totality of the elements involved.⁷⁸ The elements thus far are only that the ratification resulted in sport organizations being required to do something – drug-testing – that they already do. The only change to the drug-testing would be that the procedures, methods

⁷⁴ Bradley T. French, *Comment: Charter Schools: Are For-Profit Companies Contracting for State Actor Status?*, 83 U. Det. Mercy L. Rev. 251, 263 (2006).

⁷⁵ 457 U.S. 830 (1982).

⁷⁶ FRENCH, *supra* note 73, at 263, *citing Id.* at 842.

⁷⁷ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

⁷⁸ FRENCH, *supra* note 73, at 264.

and banned substances would be uniform among all sport organizations, something that is not that case now. However, the mere ratification of the Convention is insufficient to say that the state has compelled sport organizations to perform drug-testing in any specific, state-compelled way. Short of specific federal legislation regarding testing methods and banned substances, it is unlikely that this test can be met.

c. Entwinement Test

The entwinement test, developed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,⁷⁹ is the newest test. In this test, a private party is determined to be a state actor when the “nominally private character of the association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.”⁸⁰

Since the Convention, and any subsequent federal legislation that may result from it, will create federal standards for drug-testing procedures and methods, as well as uniform banned substance lists, it is reasonable to conclude that this may be sufficient to constitute entwinement. Furthermore, the government may choose to have the ONDCP, or some other government agency, monitor the compliance of sport organizations with the federal standards. This would further support the contention that the private sport organizations and the government are so entwined as to deem the sport organizations’ drug-testing policies to be state action. As long as such legislation does not exist, this test is not met.

d. Close Nexus or Symbiotic Relationship Test

The close nexus, or symbiotic relationship test, is basically a combination of the preceding three tests. All components of those three tests are taken into consideration in order to

⁷⁹ *Brentwood Academy v. Tenn. Secondary Sch. Athl. Ass’n*, 531 U.S. 228 (2001).

⁸⁰ *Id.* at 298.

determine whether the relationship between the private entity and the state is such that the regulation of the private entity is “so pervasive as to hold that the entity has functionally ‘merged’ with the state.”⁸¹ Since the ratification of the Convention, and passage of any subsequent legislation, does not amount to making sport organizations state actors under all three of the previous tests, the close nexus test cannot be satisfied.

2. Government Agent

A single, more subjective test is used to determine whether a private party is a government agent. It examines “the degree of the Government’s participation in the private party’s activities.”⁸² The test tends to lean toward making a private entity a government agent because the goal is to protect the rights of the individual. “Constitutional provisions for the security of person and property are to be liberally construed, and ‘it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon’.”⁸³

When federal laws that mandate that private organization to perform some action, regardless of whether that organization would or would not perform that action without such a mandate, the private organization is transformed into a state actor when performing the mandated action, especially if protected interests and rights of individuals are involved. A law that restricts a private organization’s ability to create its own rules and regulations is evidence of government encouragement, endorsement, and/or participation in the business of the organization.⁸⁴ This can even apply to organizations whose employees are unionized, such as professional sports leagues, if the federal law is “intended to supersede ‘any provision of a collective bargaining

⁸¹ FRENCH, *supra* note 74, at 265.

⁸² *Skinner v. Railway Labor Executives’ Assn.* 489 U.S. 602, 614 (1989).

⁸³ *Byars v. U.S.*, 273 U.S. 28, 32 (1927), *citing* *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

⁸⁴ *Skinner*, *supra* note 82, at 615-616.

agreement.”⁸⁵ Thus, a private organization is considered a government agent if it is merely performing an action in place of the government or at the government’s direction.

All sport organizations could be found to be government agents, but only with additional Congressional action. Whether the Convention as a treaty has the effect of federal law or actual federal legislation is passed to enact the Convention, the federal government has chosen to mandate the drug-testing policies of both professional and amateur sport organizations. However, the specifics of that mandate are insufficient as they currently exist to trigger government agent standing. In the eight plus years since the Convention was ratified, the private sport entities in the United States are still not considered government agents and it is improbable that this will change in the future.

If this status were to change, and all sport organizations were be found to be either a state actor or a government agent when implementing the Convention, they would all have to provide their members and employees constitutional protections. This is likely a factor that has influenced why the United States has failed to pass any legislation forwarding the purposes of the Convention.

B. Constitutional Implications

There are several implications regarding constitutional rights that sport organizations would have to abide by as state actors/governments agents. The primary constitutional concern regarding drug-testing is the Fourth Amendment regarding unlawful searches and seizures.⁸⁶ Other constitutional concerns involve privacy issues, as well as the Fifth Amendment and other criminal issues.

⁸⁵*Id.* at 615.

⁸⁶ U.S. Const. amend. IV.

1. Fourth Amendment

The Supreme Court has found that obtainment of bodily fluids is a seizure and thus, limited by the Fourth Amendment. *Skinner v. Railway Labor Executives' Assn.*⁸⁷ concluded that urine testing “intrudes upon expectations of privacy that society has long recognized as reasonable.”⁸⁸ *Schmerber v. California*⁸⁹ held that a blood test “plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.”⁹⁰

Since drug tests involve urine samples, blood samples, or both, organizations that want to drug test their members or employees need to either abide by constitutional criteria or be exempt. As private entities, sport organizations are exempt and do not have to grant their athletes or other employees constitutional protections. However, if implementation of the Convention converted United States sport organizations to state actors and/or government agents, than they would have to abide by constitutional protections.

This would bring the World Anti-Doping Code (WADC), the drug-testing code adopted by the Convention, into direct conflict with the United States Constitution. The Convention simply states that parties shall “adopt appropriate measures...consistent with the principles of the Code”⁹¹ and that these measures include “no-advance notice” tests.⁹² However, under the Fourth Amendment, a search and seizure is only lawful when a warrant has been issued “upon probable cause, supported by [o]ath or affirmation, and...describing the place to be searched, and the persons or things to be seized”.⁹³

⁸⁷ See generally SKINNER, *supra* note 82.

⁸⁸ *Id.* at 617.

⁸⁹ 384 U.S. 757, 767 (1966).

⁹⁰ *Id.*

⁹¹ Convention, *supra* note 2, at Art. 3(a).

⁹² *Id.* at Art. 12(a).

⁹³ U.S. Const., *supra* note 86, at amend. IV.

An athlete who has never tested positive for a banned substance or has not been in any way implicated in the use of a banned substance cannot be lawfully tested under the Fourth Amendment. A warrant for the urine and/or blood for these individuals would not be granted because there is no probable cause to believe that these athletes have committed a doping violation. No legislation can override the Fourth Amendment, and thus, the Fourth Amendment appears to prevent the government from fully enacting the Convention.

2. Privacy Concerns

Although not specifically granted in the Constitution, the Supreme Court recognizes that “the Bill of Rights have penumbras extending beyond their specific terms to create a ‘zone of privacy.’”⁹⁴ This “right to privacy is the right to restrict disclosure of personal information without an individual's consent.”⁹⁵ However, the WADC does not have such a policy.

The identity of Athletes whose Samples have resulted in Adverse Analytical Findings, or other Persons who were alleged by an Anti-Doping Organization to have violated other anti-doping rules, may be publicly disclosed by the Anti-Doping Organization with results management responsibility no earlier than completion of the administrative review described in Article 7.1 and 7.2. No later than twenty days after it has been determined in a hearing in accordance with Article 8 that an anti-doping rule violation has occurred, or such hearing has been waived, or the assertion of an anti-doping rule violation has not been timely challenged, the Anti-Doping Organization responsible for results management must publicly report the disposition of the anti-doping matter. [Emphasis omitted.]⁹⁶

Since USADA would be the Anti-Doping Organization charged with results management, USADA would be obligated to disclose athletes' private drug-testing results, in violation of the United States Constitution. Under these circumstances, USADA is not capable of abiding by the Constitution and by the Convention, and since the Constitution has supremacy over treaties and federal legislation, USADA would have to abide by the Constitutional

⁹⁴ Deanne L. Ayers, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 HOW. L.J. 93, 120 (1987).

⁹⁵ *Id.*

⁹⁶ World Anti-Doping Code, at Art. 14.2, located at http://www.wada-ama.org/rtecontent/document/code_v3.pdf. [Hereinafter WADC.]

protections and thus, could not disclose athletes' test results without their consent. USADA gets around this as a private entity by requiring that all athletes agree to the doping protocols, which include criteria for releasing an athletes name and doping violation.⁹⁷ Although as a government agent or actor, USADA could still ask athletes to waive certain rights, the enforceability of such waivers would be suspect.

3. Criminal Concerns

There is a potential that criminal charges and punishments could be attached to doping offences by athletes. This raises several constitutional concerns. The first is the Fifth Amendment, which protects people from being "compelled...to be a witness against himself."⁹⁸ If an athlete is forced to submit to drug-testing and the results of that test can be used against them in a court of law, even if the test is performed with a warrant, then all athletes are being compelled to provide evidence against themselves in a criminal matter and this may very well be in violation of the Fifth Amendment. Currently, the United States government does not use positive doping results to bring criminal charges against athletes.

Furthermore, people in the United States are presumed innocent until proven guilty. Although the "presumption of innocence is not found explicitly in the Constitution, its articulation is an essential component of a fair trial."⁹⁹ The state is charged with proving the accused has committed a crime beyond a reasonable doubt.¹⁰⁰ At the civil level, the standard is a preponderance of the evidence, but liability must still be proven and is not assumed.¹⁰¹ However, the WADC does not have such a presumption and the burden is on the athlete to prove their

⁹⁷ Olympic Movement Protocol, *supra* note 50, at 18.

⁹⁸ U.S. Const. amend. V.

⁹⁹ William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 339 (2005).

¹⁰⁰ *Id.* at 390.

¹⁰¹ Cornell University Law School, *Legal Information Institute*, (2015), located at <https://www.law.cornell.edu/wex/preponderance>. (Last accessed October 6, 2015.)

innocence.¹⁰² What the WADC fails to consider is that “definitive proof of factual innocence [i]s too much of a burden for mortals to bear.”¹⁰³ If the policies and procedures followed by USADA and other entities operating doping hearings on a guilty until proven innocent standard were considered government agents or actors, than such a standard could violate due process criteria.

V. Actual Effect of the Convention

The adoption of the Convention appears to have had no impact on sports doping in the United States. Since its adoption, no federal legislation regarding sports doping has been passed. Leagues have altered their doping programs, generally to add HGH and other specific substances as well as doping and testing methods.¹⁰⁴ However, none of these doping policies rises to the severity of the WADC in either the number of banned substances or the severity of punishments. So how do we know that that United States has not altered its overall regulation of doping in sports in specifically due to the Convention?

A. The Conference of Parties

1. Representatives

The United States has attended every bi-annual Conference of Parties for the Convention since 2009, the first conference after the United States became a signatory.¹⁰⁵ But mere attendance does not mean that United States has seriously engaged with the Convention or the Conference of Parties.

¹⁰² WADC, *supra* note 96, at art. 3.2.1-3.2.2, and 3.2.1 Comment.

¹⁰³ LAUFER, *supra* note 99, at 332.

¹⁰⁴ See NFL/NFLPA Drug Policies; NBA Collective Bargaining Agreement; MLB/MLBPA Joint Drug Agreement; NHL/NHLPA Collective Bargaining Agreement, *supra* note 66.

¹⁰⁵ *Conference of Parties to the International Convention against Doping Sport, Second Session Draft Final Report* (2009), located at <http://unesdoc.unesco.org/images/0021/002137/213751e.pdf> [Hereinafter 2CP Final Report]; *Conference of Parties to the International Convention against Doping in Sport, Fourth Session Final Report* (2013), located at <http://unesdoc.unesco.org/images/0022/002280/228091e.pdf> [Hereinafter 4CP Final Report]. (Both last accessed September 10, 2015). There is no public final report for the Third Session (3CP).

The known representatives that the United States has sent to the Conference of Parties have not all been members of the American anti-doping world. Some were not even members of the sports world. In 2009 the United States sent three people, Edward Jurith, Michael Gottlieb, and Carolyn Willson.¹⁰⁶ Mr. Jurith has a history in drug regulation, having served as the Acting Director of the Office of National Drug Control Policy (ONDCP) in 2001 and again in 2009.¹⁰⁷ He was an attorney with the ONDCP from 1994 until 2009.¹⁰⁸ Mr. Gottlieb also works at the ONDCP, and sits on the WADA's Foundation Board, Executive Committee, and Finance and Administration Committee.¹⁰⁹ Ms. Willson was a legal advisor for the U.S. Mission to UNESCO, a part of the United States Embassy.¹¹⁰ This group had legal expertise involving drugs and doping in general and in sports, as well as diplomacy, and sending them gave an indication that the United States was serious about its involvement with the Convention.

Documentation does not reveal whom the United States sent as representatives in 2011. However, in 2013 the United States' representatives were Janel Heird and James Grizzle.¹¹¹ Both of these representatives were with the U.S. Mission to UNESCO: Ms. Heird was an administrator¹¹² and Mr. Grizzle was an Education Officer.¹¹³ In 2015 the United States did not send a delegation to the Conference of Parties at all.¹¹⁴ This was a significant change from the

¹⁰⁶ 2CP Final Report, *supra* note 105, at 36.

¹⁰⁷ Eric E. Sterling, *Edward H. Jurith, 1951- 2013, Attorney, White House Drug Policy Leader* (2013), located at http://www.huffingtonpost.com/eric-e-sterling/edward-h-jurith-1951--201_b_4318123.html. (Last accessed September 10, 2015.)

¹⁰⁸ *Id.* (this information was not listed in this article)

¹⁰⁹ *The WADA Interview – Michael K. Gottlieb* (2015), located at <https://www.wada-ama.org/en/media/news/2015-08/the-wada-interview-michael-k-gottlieb> (Last accessed September 10, 2015.)

¹¹⁰ Carolyn Willson LinkedIn page (2015), located at <https://www.linkedin.com/in/carolyn-willson-b496a235/>). (Last accessed September 10, 2015.)

¹¹¹ 4CP, *supra* note 105, at 37.

¹¹² *Id.*; *US Embassy in Banjul gets New Public Affairs Officer* (2015), located at <http://gambiaoneradio.com/?article=1725>. This link does not work anymore (Last accessed September 10, 2015.)

¹¹³ *US Permanent Delegation to UNESCO* (2013), located at <http://unescoeducation.blogspot.com/2013/07/us-permanent-delegation-to-unesco.html>. (Last accessed September 10, 2015.)

¹¹⁴ *Conference of Parties to the International Convention against Doping Sport, Fifth Session Draft Final Report* (2015), located at <http://unesdoc.unesco.org/images/0024/002458/245802E.pdf> [Hereinafter 5CP Final Report].

delegation sent six years earlier. The failure to continue to consistently send representatives specifically from the doping and sports spheres, or any representatives at all, raises questions as to the United States' commitment fulfilling to the Convention.

2. Elected Offices and Committees

The United States has never held any elected position related to the Convention. These positions include the chairperson, four vice-chairpersons, rapporteur, and members of the Approval Committee for the Fund for the Elimination of Doping in Sport.¹¹⁵ Why the United States has never held any of these positions is unknown, but not sending delegate or sending delegates whose primary interest and expertise is not in sport and/or doping may well be a factor. As a result, the United States is not involved the governance and administration of the Conference of Parties or the Convention.

B. United States Compliance with the Convention

Based on the *Reports of States Parties on Measures Taken by Them for the Purpose of Complying with the International Convention against Doping in Sport* (Reports of Parties) the United States is mostly in compliance with the Convention, and that compliance level has increased in recent years.¹¹⁶ The Reports of Parties are self-reports submitted by each signatory where they answer a variety of questions related to compliance with the Convention.

The individual Reports of Parties are not available until the third Conference of Parties in 2011. At that time the United States was 78.6% compliant answers, 7.1% non-compliant

¹¹⁵ *ICDS/ICP/Doc. 1* (2006), located at <http://unesdoc.unesco.org/images/0014/001494/149487e.pdf>. (Last accessed September 10, 2015.)

¹¹⁶ *Reports of States Parties on Measures Taken by Them for the Purpose of Complying with the International Convention against Doping in Sport* (2015), located at <http://unesdoc.unesco.org/images/0023/002344/234470E.pdf> (Last accessed November 3, 2016.) [Hereinafter *5CP Report of Parties*.]

answers, and 14.3% do not know answers.¹¹⁷ Two years later the United States percentages were unchanged.¹¹⁸ However, the 2015 Report of Parties showed compliance levels from the 2009, 2011, and 2013 reports, providing information on changes in compliance in many areas.¹¹⁹ The 89.3% compliance rate in 2015 was a notable increase over the 78.6% compliance rate the United States had in prior years and is deemed acceptable by the Convention.¹²⁰ It is also similar to many of the other top Olympic competitors who had compliance rates higher than the United States: Australia: 96.4%; China: 85.7%; Russia: 85.7%; and the United Kingdom: 85.7%.¹²¹

There are four categories in the Report of Parties, each with various sub-categories:

National Activities to Strengthen Anti-doping

Article 8: Prohibited Substances and Methods

Article 9: Athlete Support Personnel

Article 10: Nutritional Supplements

Article 11: Financial Measures

Article 12: Doping Control

International Cooperation

Article 13: Cooperation between Organizations

Article 16: Cooperation in Doping Control

Education and Training

Article 19: General Education and Training

Article 20: Professional Codes of Conduct

Article 21: Involvement of Athletes and Athlete and Support Personnel

Article 22: Ongoing Education and Training

Article 23: Cooperation in Education and Training

Research

Article 24: Promotion of Research

Article 25: Nature of research

Article 26: Sharing Research

Article 27: Sports science.¹²²

¹¹⁷ *Reports of States Parties on Measures Taken by Them for the Purpose of Complying with the International Convention against Doping in Sport.*, located at <http://unesdoc.unesco.org/images/0021/002137/213762e.pdf>. (Last accessed September 10, 2015.) [Hereinafter *3CP Report of Parties*.]

¹¹⁸ 4CP Report of Parties, *supra* note 72.

¹¹⁹ 5CP Report of Parties, *supra* note 116.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

There are five levels of compliance, ranging from Limited Compliance (Level 1) to High Compliance (Level 5).¹²³ The United States has been at the Level 5 compliance since 2009 for the following Articles: 8, 13, 16, 21, 23, 24 and 26.¹²⁴ Article 22 has been Level 2 throughout all four reports.¹²⁵ Article 22 directs that "...Parties shall encourage sports organizations and anti-doping organizations to implement ongoing education and training programmes for all athletes and athlete support personnel on the subjects identified in Article 19."¹²⁶ Apparently, the United States is not doing this to a satisfactory level. At no time has the United States had an article at Level 1 and only twice has any article appeared at Level 3.¹²⁷

The following articles have changed their compliance levels over time: 9, 11, 12, 20, 25, and 27. These changes warrant further examination.

Article 9: Athlete Support Personal: This article directs members to "take measures or encourage sports organizations and anti-doping organizations to adopt measures, including sanctions or penalties, aimed at athlete support personnel who commit an anti-doping rule violation or other offence connected with doping in sport."¹²⁸ The United States was Level 5 compliant in 2009, dropped to Level 2 in 2011, and was back up to Level 5 in 2013 and has remained there.¹²⁹ The reasons for these changes are unclear.

Article 10: Nutritional Supplements: This article addresses nutritional supplements¹³⁰ and given that the United States has had virtually no regulations regarding nutritional supplements, it is not surprising that this article has had a historically low compliance level. However, in 2015,

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 5CP Report of Parties, *supra* note 116. (please double check that this quote came from this source)

¹²⁷ *Id.*

¹²⁸ Convention, *supra* note 2, at Art. 9.

¹²⁹ 5CP Report of Parties, *supra* note 116. (this is the right citation but the information doesn't line up. The U.S's article 9 compliance in the last report has dropped back to level 2 compliance – this article said it had stayed at level 5 compliance)

¹³⁰ *Id.* at Art. 10.

the United States increased to Level 5 compliance in this area.¹³¹ The United States has not passed any laws regarding the regulation of nutritional supplements since 1994¹³² and without knowing what questions the self-report asks, it is unclear what caused this increase in compliance level.

Article 11: Financial Measures: This article states that, where appropriate, members should:

- (a) provide funding within their respective budgets to support a national testing programme across all sports or assist sports organizations and anti-doping organizations in financing doping controls either by direct subsidies or grants, or by recognizing the costs of such controls when determining the overall subsidies or grants to be awarded to those organizations;
- (b) take steps to withhold sport-related financial support to individual athletes or athlete support personnel who have been suspended following an anti-doping rule violation, during the period of their suspension;
- (c) withhold some or all financial or other sport-related support from any sports organization or anti-doping organization not in compliance with the Code or applicable anti-doping rules adopted pursuant to the Code.¹³³

The United States was Level 2 in 2009 and 2011, moving up to Level 3 in 2013, and finally Level 5 in 2015.¹³⁴ The United States low level of compliance for this article makes sense because the United States does not fund sports in any way at the national level. As discussed previously, USADA and USOC are private entities and do not receive substantial government funding. This increase is likely due to increased funding for testing being provided by private entities, such as professional sport leagues and USADA.

Article 12: Doping Control: This article directs members to:

- (a) encourage and facilitate the implementation by sports organizations and anti-doping organizations within their jurisdiction of doping controls in a manner consistent with the Code, including no-advance notice, out-of-competition and in-competition testing;
- (b) encourage and facilitate the negotiation by sports organizations and anti-doping organizations of agreements permitting their members to be tested by duly authorized

¹³¹ *Id.*

¹³² Dietary Supplement Health and Education Act of 1994, 21 U.S.C. § 9 (1994).

¹³³ Convention, *supra* note 2, at Art. 11.

¹³⁴ *SCP Report of Parties*, *supra* note 116.

doping control teams from other countries;
(c) undertake to assist the sports organizations and anti-doping organizations within their jurisdiction in gaining access to an accredited doping control laboratory for the purposes of doping control analysis.¹³⁵

The United States appears to be doing well in this area, as it was Level 4 in 2009, but has been Level 5 since 2011.¹³⁶

Article 19: General Education and Training: This article is concerned with education and training related to the anti-doping policies and activities.¹³⁷ The United States had been at Level 4 from 2009 to 2013, but increased to Level 5 in 2015.¹³⁸

Article 20: Professional Codes of Conduct: This article states that “... Parties shall encourage relevant competent professional associations and institutions to develop and implement appropriate codes of conduct, good practice and ethics related to anti-doping in sport that are consistent with the Code.”¹³⁹

The United States was Level 2 in 2009, jumped to Level 5 in 2011, and fell back down to Level 2 in 2013, and was then back to Level 5 in 2015.¹⁴⁰ The reason for this inconsistency is unclear, however it may well have to do with changes in the doping policies of private sports entities, such as professional leagues and USADA. Due the constitutional concerns raised prior, the United States government cannot just direct professional leagues and other sport organizations as to what their doping policies should be, as that could open those entities up to being state actors, raising 4th Amendment problems, but if those entities make these changes of their own accord, that would improve the United States’ overall compliance. It is surprising that the United States meets Level 5 compliance however, since the policies of the professional

¹³⁵ Convention, *supra* note 2, at Art. 12.

¹³⁶ *5CP Report of Parties*, *supra* note 116.

¹³⁷ Convention, *supra* note 2, at Art. 19.

¹³⁸ *5CP Report of Parties*, *supra* note 116.

¹³⁹ Convention, *supra* note 2, at Art. 20.

¹⁴⁰ *5CP Report of Parties*, *supra* note 116.

leagues and that NCAA do not meet WADC criteria and thus they do not meet the standards of the Convention.¹⁴¹

Article 25: Nature of Research: Per this article, “[w]hen promoting anti-doping research, as set out in Article 24, States Parties shall ensure that such research will: (a) comply with internationally recognized ethical practices; (b) avoid the administration to athletes of prohibited substances and methods; (c) be undertaken only with adequate precautions in place to prevent the results of anti-doping research being misused and applied for doping.”¹⁴²

Again, the United States was Level 2 in 2009, jumped to Level 5 in 2011, and then fell back down to Level 2 in 2013 and has remained there.¹⁴³ The reasons for this are likely similar to those for Article 20. Most doping research in the United States is conducted by private entities not the government and a fair amount of private research appears to be toward coming up with new methods of doping. Also, due to professional league and NCAA policies not being to the standard of WADA, the United States may not be viewed as sufficiently avoiding administration to athletes.

Article 27: Sports science: This final article requires that member encourage “(a) members of the scientific and medical communities to carry out sport science research in accordance with the principles of the Code; (b) sports organizations and athlete support personnel within their jurisdiction to implement sport science research that is consistent with the principles of the Code.”¹⁴⁴

¹⁴¹ Luke Thomas, *What would happen if the UFC became a WADA Code Signatory?* (2014), located at <http://www.mmafighting.com/2014/8/17/5913709/the-blueprint>. (Last accessed September 10, 2015.)

¹⁴² Convention, *supra* note 2, at Art. 25.

¹⁴³ *5CP Report of Parties*, *supra* note 116.

¹⁴⁴ Convention, *supra* note 2, at Art. 27.

The United States was Level 5 in 2009 and 2011, fell to Level 3 in 2013, and returned to Level 5 in 2015.¹⁴⁵ It is not clear why the United States fell and then regained its compliance in this category, but the reasons may be similar to those for Article 25. Additionally, the United States may not do significant research on some drugs, such as steroids, due to their generally illegal status. Continued Level 5 compliance may be challenging for the United States in the future.

V. Conclusion

In spite of the United States' lack of involvement with the Conference of Parties, it appears that the United States is significantly compliant with the Convention. However, the United States knew that it would not be able to fully comply with all the terms of the Convention, which raises the question of whether the signing of the Convention was done more for appearance sake. The timing of the signing (just after the Mitchell Report), the lack of improvement in compliance or in taking affirmative actions to comply, the change in who we send as representatives all indicate that perhaps this is the case. Additionally, the inability to comply with the Convention may raise concerns about the United States' credibility in regard to anti-doping in the eyes of the international community.

It is unlikely that the United States will be able to achieve complete compliance due to the private nature of the sports industry at the highest levels and the lack of government funding and federal legislation directed towards doping prevention. Too much government involvement could lead to those entities becoming state actors, which would mean that they would have to abide by constitutional protections. As it stands, the United States Constitution prevents full compliance with the International Convention against Doping in Sport unless the individual sport

¹⁴⁵ *5CP Report of Parties*, *supra* note 116.

entities decide themselves to enact policies that comply with the Convention, a move that seems unlikely in the foreseeable future.