

# AMATEUR REGULATION AND THE UNMOORED UNITED STATES OLYMPIC AND PARALYMPIC COMMITTEE

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*In the wake of the USA Gymnastics sexual abuse scandal and Women’s National Soccer Team’s claim for pay equity, members of Congress have proposed legislation that would reform the United States Olympic and Paralympic Committee (USOPC) through amendments to its governing statute, the Ted Stevens Olympic and Amateur Sports Act. While an important step in the right direction, the proposed reforms fail to address deeper, more urgent questions about the USOPC, the sport National Governing Bodies (NGBs) it recognizes, and the meaning of the Olympic and Amateur Sports Act. This Article explores those issues by explaining that the USOPC’s quasi-governmental nature means it is an amateur regulator—trusted to act in the public interest, consistent with its statutory purpose, but without the structure, funding, and institutional expertise of a federal agency. Drawing from existing scholarly literature on quasi-governmental entities, this Article explains that the USOPC’s status allows it to easily become unmoored from its governing statute’s original purposes and intent. This Article asserts that proposed reforms to the Olympic and Amateur Sports Act must take account of this structure and suggests reforms that will create greater accountability to ensure that the USOPC better meets its statutory purposes and serves the national interest.*

## I. INTRODUCTION

The Ted Stevens Olympic and Amateur Sports Act (Olympic and Amateur Sports Act) provides a sweeping vision for the organization and administration of Olympic Movement<sup>1</sup> sports in the United

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1. The “Olympic Movement” in the United States refers to more than simply Olympic and elite athletes. It covers millions of children and young adults who train and compete on behalf of teams or clubs, and in competitions, that are sanctioned by sport National Governing Bodies.

States. At the center of this vision is the United States Olympic and Paralympic Committee (USOPC).<sup>2</sup> Congress granted the USOPC “exclusive authority” over all matters relating to U.S. participation in the Olympic Movement, including the power to recognize national governing bodies (NGBs) for sports ranging from archery to volleyball.<sup>3</sup> The USOPC is not a federal agency, but a private corporation existing as a “quasi-governmental” entity—acting with the imprimatur of the federal government but with few of the accountability structures.

The results of this structure have been mixed. While the United States routinely tops the medal counts in the Olympic Games, grassroots sports participation is declining. In addition, the USOPC has been plagued by scandal. The most recent issues, involving the sexual abuse of hundreds of gymnasts by USA Gymnastics’ team doctor and allegations of discriminatory pay for the U.S. women’s national soccer team have spurred investigations, lawsuits, Congressional hearings, and calls for additional reform.<sup>4</sup>

Both the USA Gymnastics scandal and U.S. women’s national soccer team’s wage claim raise important issues about protecting our nation’s elite athletes and treating them fairly. Both issues also prompt deeper, and arguably more urgent questions about the USOPC, the NGBs it recognizes, and the meaning of the Olympic and Amateur Sports Act.<sup>5</sup> This Article explores those issues by explaining that the USOPC’s quasi-governmental nature fosters confusion over the USOPC and NGB’s authority and obligations under the Olympic and Amateur Sports Act, allowing these entities to easily become unmoored from the statute’s original purposes and public expectations. The USOPC and the NGBs it recognizes are in effect amateur regulators—burdened by the expectation that they are acting in the public interest, consistent with the purposes assigned by Congress, but without the structure, funding, and institutional expertise of a federal agency.

First, this Article explains that the quasi-governmental nature of the USOPC means it is subject to limited judicial intervention and Congressional oversight. This Article then explores the consequences, specifically that the USOPC limited its mission to focus

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2. Until recently, the USOPC was referred to as the USOC, without the inclusion of the Paralympics. For clarity, this Article will use the term “USOPC” even when referring to time periods when the entity was known as the USOC.

3. There are 50 NGBs. *Structure – National Governing Bodies*, U.S. OLYMPIC & PARALYMPIC COMM., <https://www.teamusa.org/About-the-USOPC/Structure> (last visited Nov. 3, 2019).

4. Most recently, U.S. Rep. Diana DeGette proposed legislation that would require Congress to appoint a commission to study reforming the USOPC’s governance structure, and Sens. Richard Blumenthal and Jerry Moran sponsored the Empowering Olympic and Amateur Athletes Sports Act of 2019. Empowering Olympic and Amateur Athletes Act of 2019, S. 2330, 116th Cong. (2019).

5. See *infra* Parts II–IV.

on winning Olympic medals, and it adopted a self-serving interpretation of the Olympic and Amateur Sports Act to avoid taking responsibility for the USA Gymnastics sexual abuse scandal. Finally, this Article concludes by suggesting reforms that will create greater accountability and ensure that the USOPC better meets its statutory purposes and serves the national interest.

## II. A QUASI-GOVERNMENTAL ENTITY

The “amateur” quality of the USOPC’s regulation of the U.S. Olympic Movement can be traced to the USOPC’s structure. It is a private corporation<sup>6</sup> with high-profile, important public purposes: putting the best U.S. athletes on the international stage while developing grassroots sports. The USOPC is what is known as a “quasi-governmental”<sup>7</sup> entity, and literature on such entities explains, and indeed predicts, the types of issues that have plagued the U.S. Olympic Movement. Due to a lack of meaningful accountability, the USOPC may easily stray from its public purposes and public expectations because it is subject to limited judicial review and Congressional oversight.

### A. *A Private Corporation, Not a Federal Agency*

Olympic Movement sport in the United States was deliberately structured to be managed by the private sector and not the federal government.<sup>8</sup> In 1975, President Ford established a Commission on Olympic Sports<sup>9</sup> to study the reasons why the nation was not as successful in international competition as our Cold War opponents. The Commission concluded that the United States needed a central organizing body with jurisdiction to field the best athletes, though the Commission was “clear that it did not want the Federal Government running amateur athletics in this country.”<sup>10</sup>

Congress responded with the Amateur Sports Act of 1978, establishing the modern USOPC as a federally chartered, non-profit

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6. Although federally chartered, the USOPC is not a government corporation. See 5 U.S.C. § 103 (2018).

7. Congressionally chartered nonprofit corporations like the USOPC are a type of quasi-governmental organization existing at the boundary between the federal government and private sector. Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855 (2014).

8. Dionne L. Koller, *How the United States Government Sacrifices Athletes’ Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1478 (2008).

9. Exec. Order No. 11,868, 40 Fed. Reg. 26, 255 (July 22, 1975).

10. *Amateur Sports Act of 1978*, S. REP. NO. 95-440, at 3. For a discussion regarding the Commission’s paradigm while establishing the USOPC, see Dionne L. Koller, *A Twenty-First-Century Olympic and Amateur Sports Act*, 20 Vand. J. Ent. & Tech. L. 1027, 1047 (2018).

patriotic corporation and not a federal agency.<sup>11</sup> Congress granted the USOPC “exclusive jurisdiction” over “all matters” relating to U.S. participation in the Olympic Games.<sup>12</sup> The purposes of the USOPC include coordinating and developing athletic activities related to international athletic competition, obtaining the best athletes for participation in the Olympic Games, and developing grass roots youth sports.<sup>13</sup> To do this, the Olympic and Amateur Sports Act provided that the USOPC would recognize privately incorporated NGBs for each Olympic Movement sport.<sup>14</sup> Congress also granted the USOPC the exclusive right to use the Olympic trademarks to ensure the USOPC could fund its activities without government support.<sup>15</sup> The USOPC is the only national Olympic committee in the world that is supported through the private sector and not the federal government.<sup>16</sup>

Federally chartered corporations are created by statute<sup>17</sup> and exist in the “twilight zone” between the public and private sectors.<sup>18</sup> The USOPC is what is known as a “Title 36 corporation” because it is not-for-profit and grouped in the United States Code along with other “patriotic and national organizations” such as the United Service Organizations and the Veterans of Foreign Wars of the United States.<sup>19</sup> Congress has created about 100 Title 36 corporations, and “it is free to draft corporate charters to include whatever elements it deems appropriate.”<sup>20</sup> The USOPC differs from many other Title 36 corporations in that nearly half are military-related and most do not have the same public profile and wide-ranging responsibilities. The USOPC’s charge to develop grassroots sports, represent the United States in the international Olympic and Paralympic Movement and supervise the U.S. Olympic and Paralympic Movement means it holds a position of public importance that the Society of American Florists and Ornamental Horticulturists (however worthy an organization), does not shoulder.

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11. 36 U.S.C. §§ 220501–29 (2012). The statute is now known as the Ted Stevens Olympic and Amateur Sports Act.

12. 36 U.S.C. § 220503(3).

13. *See id.* § 220503.

14. *See id.* § 220505(c)(4).

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

16. B. DAVID RIDPATH, *ALTERNATIVE MODELS OF SPORTS DEVELOPMENT IN AMERICA* 27 (2018 Ohio Univ. Press).

17. *See* KEVIN R. KOSAR, CONG. RESEARCH SERV., RS22230, CONGRESSIONAL OR FEDERAL CHARTERS: OVERVIEW AND ENDURING ISSUES 1 (Apr. 19, 2013); O’Connell, *supra* note 7, at 855, 860.

18. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 6 (June 22, 2011).

19. KOSAR, *supra* note 17, at 3.

20. *Id.* at 4–5.

Despite being private, federally chartered corporations have engendered confusion because of their quasi-governmental status.<sup>21</sup> Federally chartered corporations are not government corporations, which are agencies of the federal government.<sup>22</sup> A Congressional Research Service Report noted that while federally chartered Title 36 corporations enjoy an “official imprimatur to their activities” along with the prestige and financial benefits that may result, members of Congress have expressed “concern that the public may be misled . . . into believing that somehow the U.S. government approves and supervises the corporations, when in fact this is not the case.”<sup>23</sup> Government entities operate with legal restrictions such as constitutional limitations, the applicability of the Administrative Procedure Act, and the Freedom of Information Act, among others, that do not apply to private corporations.<sup>24</sup> In addition, federally chartered corporations are not managed or overseen by a government agency,<sup>25</sup> and the supervision by Congress is “very limited.”<sup>26</sup> Federally chartered corporations such as the USOPC also do not usually have “government attributes” such as having their debt guaranteed by the full faith and credit of the U.S. Government,<sup>27</sup> and they do not receive appropriations or exercise government power.<sup>28</sup> Because of the potential to mislead the public, Congress in 1989 put a moratorium on chartering new nonprofit corporations. In 2009, Congress reaffirmed the moratorium, stating that “charters . . . falsely imply to the public that an organization and its activities carry a Congressional seal of approval.” Congress also noted that it did not

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21. KOSAR, *supra* note 17, at 5.

22. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 2–3(2011); *see* 5 U.S.C. § 103 (2018); 31 U.S.C. § 9101–10 (2018).

23. KEVIN R. KOSAR, CONG. RESEARCH SERV., RL 30340, CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS (“TITLE 36 CORPORATIONS”): WHAT THEY ARE AND HOW CONGRESS TREATS THEM (2011). The Congressional Research Service Report goes on to conclude that “the chartering process itself tends to send mixed signals to the public. Although the charter does *not* award any material governmental status to the nonprofit corporation . . . there is an understandable assumption on the part of the public that somehow the charter signifies U.S. government approval of the corporation’s activities and that the corporation is being supervised. Neither assumption is merited.” *Id.* at 13; Ronald C. Moe, *Congressionally Chartered Corporate Organizations (Title 36 Corporations): What They Are and How Congress Treats Them*, 46 FED. LAW. 35, 37 (1999).

24. KOSAR, *supra* note 17, at 5.

25. *Id.* at 6.

26. KOSAR, *supra* note 23, at 8.

27. *Id.* at 4.

28. *Id.* (stating that Congress “does not make these organizations ‘agencies of the United States’ or confer any powers of a governmental character or assign any benefits. These organization [sic] generally do not receive direct appropriations, they exercise no federal powers, their debts are not covered by the full faith and credit of the United States, and they do not enjoy original jurisdiction in the federal courts.”).

have the resources to properly monitor such organizations.<sup>29</sup> In short, the federal charter is honorific, and it confers no substantive relationship with the federal government.<sup>30</sup>

Nevertheless, the Supreme Court recognized in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*<sup>31</sup> that the USOPC acts in the “national interest.”<sup>32</sup> Justice Brennan wrote that the USOPC performs an important government function by representing the United States to the world and coordinating U.S. Olympic Movement sports.<sup>33</sup> Although not a traditional government function, Justice Brennan explained that Congress endowed the USOPC with unique authority to serve an important governmental interest, and Congress put the “power and prestige of the United States Government” behind it.<sup>34</sup>

### B. *Limited Judicial Review*

The USOPC’s “amateur” regulation operates with little judicial intervention. This is by design, as Congress denied courts’ jurisdiction to hear claims falling within the USOPC’s exclusive authority.<sup>35</sup> While the USOPC has the capacity to sue and be sued in federal court, Congress explicitly stated that the statute does not create a private right of action.<sup>36</sup> Additionally, the Supreme Court has held that the USOPC is not a state actor,<sup>37</sup> and several circuits have recognized an implied antitrust exemption for the USOPC and NGBs.<sup>38</sup> The statute instead mandates that disputes be sent to binding arbitration.<sup>39</sup> Courts have only recognized a cause of action

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29. *Id.* at 2.

30. *Id.* at 4.

31. 483 U.S. 522 (1987).

32. *Id.* at 544.

33. *Id.* at 550.

34. *Id.* at 559 (Brennan, J., dissenting).

35. *Pliuskaitis v. USA Swimming, Inc.*, 243 F. Supp. 3d 1217, 1223–24 (D. Utah 2017), *aff’d*, 720 F. App’x. 481 (10th Cir. 2018).

36. 36 U.S.C. § 220505(b)(9) (2018) (providing that the USOC may be sued, but that any civil suit brought under the Amateur Sports Act “shall be removed” to federal court, and that “neither this paragraph nor any other provision of this chapter shall create a private right of action.”); *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 594 (7th Cir. 2001) (finding that the “Act did not provide for a private right of action under which [Plaintiff] could seek to have those claims addressed by the district court.”).

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

38. *See, e.g.*, *Gold Medal LLC v. USA Track & Field*, 899 F.3d 712, 713 (9th Cir. 2018); *JES Props. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1230–31 (11th Cir. 2006); *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n*, 213 F.3d 198, 204 (5th Cir. 2000).

39. 36 U.S.C. § 220522(a)(4) (2018). Congress also explicitly prohibited courts from taking jurisdiction to grant an injunction allowing an athlete to compete in the Olympic Games within twenty-one days of the start of the Games. 36 U.S.C. § 220509 (2018).

for individuals who allege that the USOPC or an NGB have failed to follow their own rules<sup>40</sup> or for claims not arising under the Olympic and Amateur Sports Act.<sup>41</sup> Most litigation against the USOPC that is adjudicated by courts is over intellectual property and infringement on the USOPC's "exclusive" right to use the Olympic marks.

This is not to say that the Olympic and Amateur Sports Act has not been interpreted by courts. It frequently has been cited by courts as denying them authority to adjudicate eligibility and other disputes involving athletes, coaches and others who claim a right that is covered by the Olympic and Amateur Sports Act. Thus, judicial interpretations of the statute serve to insulate the USOPC, not define, for instance, the extent of its authority over NGBs. Those determinations and any others that might implicate the USOPC's "exclusive authority" under the statute are settled through arbitration. In addition, because the USOPC is not a government entity, it is not subject to the type of judicial review that attaches to a federal agency. The Administrative Procedure Act, for instance, applies only to federal agency actions, including disputes over an agency's compliance with its "authorizing statute."<sup>42</sup> That type of review is not available for the USOPC's actions, so it enjoys near complete deference to its interpretation of the Olympic and Amateur Sports Act. This freedom is tempered only by occasional Congressional oversight at times of scandal or crisis.

### C. *Limited Congressional Oversight*

The USOPC's amateur regulation also persists because of limited Congressional oversight. In general, Congress subjects federally chartered corporations to very little scrutiny. A Congressional Research Service report explained that

it is not the intention of . . . Congress or the Government Accountability Office to 'look over the shoulder' of these organizations or to conduct audits on their own authority. Congress is understandably ambivalent with respect to these

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40. *Lindland v. U.S. Wrestling Ass'n.*, 227 F.3d 1000, 1004–05 (7th Cir. 2000); *Harding v. U.S. Figure Skating Ass'n.*, 851 F. Supp. 1476, 1480 (D. Or. 1994), *vacated on other grounds*, 879 F. Supp. 1053 (D. Or. 1995).

41. *Pliuskaitis v. USA Swimming, Inc.*, 243 F. Supp. 3d 1217, 1224 (D. Utah 2017), *aff'd*, 720 F. App'x. 481 (10th Cir. 2018); *see also* *Shepherd v. U.S. Olympic Comm.*, 464 F. Supp. 2d 1072, 1074, 1088 (D. Colo. 2006); *Lee v. U.S. Taekwondo Union*, 331 F. Supp. 2d 1252, 1259–60 (D. Haw. 2004) (holding that Olympic and Amateur Sports Act does not preempt federal statutes prohibiting race and disability discrimination).

42. JARED P. COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 2 (Dec. 7, 2016), <https://fas.org/sgp/crs/misc/R44699.pdf>. In the case of a federal agency judicial review is calibrated to the level of deference, if any, courts should give the agency. Where courts have a role, that review is guided by the principles of *Chevron* and *Skidmore* deference. *Id.* at 11–16.

chartered organizations; on the one hand it attempts to protect the public interest against abuse by those corporate bodies while simultaneously seeking to limit its involvement in the internal affairs of these private organizations.<sup>43</sup>

Indeed, the usual tools of Congressional oversight are not available for quasi-governmental entities.<sup>44</sup> For instance, with government agencies, Congress engages in the budget and appropriations process, which provides a check on agency action.<sup>45</sup> Moreover, unlike government agencies, hybrid entities develop their own interests and generate significant political support and influence.<sup>46</sup> However, while quasi-governmental organizations avoid the usual accountability mechanisms of federal agencies, they are often subject to political pressure.<sup>47</sup>

This is the case with the USOPC. Compared to other Title 36 corporations, the USOPC has received a higher level of Congressional scrutiny.<sup>48</sup> The Olympic and Amateur Sports Act requires the USOPC to submit a quadrennial report to Congress.<sup>49</sup> Beyond that, the Senate Committee on Commerce, Science, and Transportation has taken the lead in investigating the USOPC at times of crisis. That Committee, along with the House Energy and Commerce Committee, investigated the USOPC and USA Gymnastics' failure to prevent sexual abuse of athletes and released highly critical reports.<sup>50</sup> Yet despite these recent initiatives, the oversight of the USOPC generally has been through individual members of Congress with a specific interest in the Olympic Movement. For years, this was Senator Ted Stevens, a member of the President's Commission on Olympic Sports who took a personal interest in a range of issues involving the USOPC, from broad questions of whether it was fulfilling the grassroots sports development mandate to specific matters involving modern pentathlon and karate.<sup>51</sup> In a 1995

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43. KOSAR, *supra* note 23, at 9.

44. JONATHAN G. S. KOPPELL, *THE POLITICS OF QUASI-GOVERNMENT* 122 (Robert E. Goodin et al. eds., 2003).

45. *Id.* at 39.

46. *Id.* at 173.

47. KOSAR, *supra* note 18, at 6.

48. *See, e.g.*, KOSAR, *supra* note 23, at 5 (stating that "at least one of these nonprofits, the U.S. Olympic Committee . . . receives much congressional attention due to its high profile responsibilities.").

49. 36 U.S.C. § 220511 (2018).

50. JERRY MORAN & RICHARD BLUMENTHAL, *THE COURAGE OF SURVIVORS: A CALL TO ACTION, SENATE OLYMPICS INVESTIGATION 2* (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>.

51. *See Amateur Sports Act: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the Sen. Comm. on Commerce, Sci. and Transp.*, 104th Cong. at 179–181 (Oct. 18, 1995). Indeed, Sen. Stevens's interest in the statute and administration of the U.S. Olympic Movement not only

hearing, Senator Stevens expressed concern over whether the USOPC was using the authority granted by the Olympic and Amateur Sports Act to manage NGB issues, and noted that an “outside group” was needed to provide oversight over the USOPC, because “Congress won’t do it.”<sup>52</sup> In one hearing that foreshadowed the same issues apparent in the recent USA Gymnastics scandal, Senator Stevens expressed concern that at least some in the USOPC did not believe they had authority over NGBs or the responsibility to, for instance, select a team for the Olympic Games.<sup>53</sup> Senator Stevens presciently stated that “one defect in the law may be that there is not enough monitoring to make certain that these NGBs are really effective in carrying out their responsibilities.”<sup>54</sup>

Congress also has exercised oversight in response to governance and doping scandals. In 2003, Congress took steps to reform the USOPC in response to allegations of mismanagement and ethical violations, making specific recommendations to the USOPC to guide its reorganization.<sup>55</sup> Congress also exercised oversight in response to the athlete doping crisis, spurring the USOPC to create the United States Anti-Doping Agency. Congress subsequently took steps to prevent athletes implicated in a doping scheme from competing in the 2004 Olympic Games.<sup>56</sup> Beyond these moments of responding to scandal or crisis, Congress has not systematically reviewed the USOPC’s operations to ensure it was meeting its statutory mandate.

### III. THE CONSEQUENCES

Quasi-governmental organizations have been criticized for prioritizing private sector results over important public values.<sup>57</sup> Congress also has expressed concerns about such entities because the public may be misled into assuming that the federal government

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was apparent in the hearings he chaired (at least one where he noted he was the only senator in the room), but also with a dispute over the selection of the 2000 Olympic Greco-Roman wrestling team. Sen. Stevens wrote a letter to the United States District Court for the Northern District of Illinois to provide his opinion on the appropriate interpretation of the Olympic and Amateur Sports Act and which competitor should represent the United States in the Olympic Games. See *Lindland v. U.S.A. Wrestling Ass’n*, 227 F.3d 1000, 1008 (7th Cir. 2000).

52. *Amateur Sports Act*, *supra* note 51, at 180–181.

53. *Id.* at 182 (Sen. Stevens explaining to USOPC officials what the “proper reading of the law” is with respect to the USOPC’s authority, and duties, under the Olympic and Amateur Sports Act).

54. *Id.*

55. *Does the U.S. Olympic Committee’s Organizational Structure Impede its Mission?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 108th Cong. 22–25 (Mar. 19, 2003) (statement of William C. Martin, Acting President, United States Olympic Committee).

56. Dionne L. Koller, *Frozen in Time: The State Action Doctrine’s Application to Amateur Sports*, 82 ST. JOHN’S L. REV. 183, 211–216 (2008).

57. KOPPELL, *supra* note 44, at 3

endorses or supervises them when in fact they operate outside of federal accountability structures. The USOPC's history and the most recent (and perhaps most troubling) scandals illustrate well these very concerns. Without consistent, knowledgeable oversight of its activities, the USOPC modified its statutory mission, adopted a limited, self-serving interpretation of the Olympic and Amateur Sports Act, and prioritized medals over values such as athlete wellbeing. It is, in practice, an amateur regulator.

#### A. *Modified Mission*

Hybrid, quasi-governmental organizations are less likely than federal agencies to effectuate the policy preferences of Congress and the President.<sup>58</sup> In fact, such entities are incentivized to resist what they perceive as burdensome policy objectives because of the competing obligations quasi-governmental entities carry.<sup>59</sup> This is the case with the USOPC, which has resisted the statutory purposes that, in its view, detract from its top priority of winning Olympic medals.<sup>60</sup>

The Olympic and Amateur Sports Act effectively gave the USOPC a monopoly over Olympic Movement sports in the United States.<sup>61</sup> As of the most recent amendment in 2018, the statute lists fifteen different purposes for the USOPC, five of which are directly tied to its relationship to the international Olympic Movement, with the remainder directed more generally to U.S. amateur sport.<sup>62</sup> The USOPC is charged with establishing “national goals for amateur athletic activities” and encouraging the achievement of such goals;<sup>63</sup> “promot[ing] and encourag[ing] physical fitness” and the public’s participation in athletics;<sup>64</sup> assisting in developing amateur athletic

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58. *Id.* at 164.

59. *Id.* at 147.

60. See 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](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) (“The law gave the USOC wide-ranging responsibilities, such as promoting racial equality, gender equality, and ‘sports safety.’ USOC leadership historically has taken a focused view of its missions, though. ‘For us, it’s all about medals,’ CEO [Scott] Blackmun said in 2014.”).

61. Congress did not give the USOPC authority over intercollegiate sports, which are regulated by the National Collegiate Athletic Association (NCAA). 36 U.S.C. § 220526(a). However, the NCAA must defer to USOPC policies when intercollegiate athletes compete in Olympic Movement sport. *Id.* §§ 220505(c), 220526(b).

62. *Id.* § 220503(1)-(14). Congress added subsection (15) in February 2018. See Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115-126, § 201, 132 Stat. 318 (2018) (to be codified as amended at 36 U.S.C. § 220503(15) (2018)).

63. 36 U.S.C. § 220503(1).

64. *Id.* § 220503(6).

programs;<sup>65</sup> providing “technical information” relevant to training, coaching, and performance, as well as supporting sports medicine and sport safety research.<sup>66</sup> The USOPC is also required to “encourage and provide assistance to amateur athletic activities” for women, athletes with disabilities, and athletes “of racial and ethnic minorities.”<sup>67</sup> Most recently, through the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act, Congress expanded the purposes of the USOPC to include “promot[ing] a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse of any amateur athlete.”<sup>68</sup> In 1998 amendments, Congress expanded the USOPC’s responsibilities by tasking it with the “same duties with respect to the Paralympic Games as it has with the Olympic Games.”<sup>69</sup>

The USOPC’s mission is therefore highly ambitious. In the 1995 hearings, Senator John McCain questioned whether the USOPC was doing enough to develop grassroots sport, and pointed out that “Olympic leaders admit that the committee programs and emphasis are geared toward elite athletes and the pursuit of Olympic medals.”<sup>70</sup> USOPC officials stated that, while it recognized the importance of grassroots sport, “we cannot be all things to all people with limits on our financial resources” and that “[n]o other of the almost 200 national Olympic committees in the world face the challenges we face” in having to both develop grassroots sport opportunities and elite athletes who will be successful in Olympic competition.<sup>71</sup> In explaining the financial challenge of such a mandate, the USOPC stated that “our focus has become so wide that we can endanger” all of the USOPC’s obligations.<sup>72</sup> The USOPC explained that without additional resources, it would be difficult to balance developing grassroots amateurs with its obligations to elite athletes.<sup>73</sup>

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65. *Id.* § 220503(7).

66. *Id.* § 220503(10)-(11).

67. *Id.* § 220503(12)-(14).

68. 36 U.S.C. § 220503(15).

69. S. Rep. No. 103-325, at 5 (1998); Ted Stevens Olympic and Amateur Sports Act, Pub. L. No. 105-225, §§ 220501–29, 112 Stat. 1253, 1465–78 (1998) (codified as amended at 36 U.S.C. §§ 220501–29 (2012)).

70. Koller, *supra* note 10, at 1052 (quoting *Amateur Sports Act; Hearing Before the Subcomm. on Consumer Affairs, Foreign Com. & Tourism of the S. Comm. on Com., Sci., & Transp.*, 104th Cong. 5 (1995)).

71. *Id.* (quoting *Amateur Sports Act; Hearing Before the Subcomm. on Consumer Affairs, Foreign Com. & Tourism of the S. Comm. on Com., Sci., & Transp.*, 104th Cong. 33 (1995) (statement of Leroy T. Walker, President of the United States Olympic Committee))

72. *Id.* at 1052–53 ((quoting *Amateur Sports Act; Hearing Before the Subcomm. on Consumer Affairs, Foreign Com. & Tourism of the S. Comm. on Com., Sci., & Transp.*, 104th Cong. 34 (1995)).

73. *Id.* at 1053 ((quoting *Amateur Sports Act; Hearing Before the Subcomm. on Consumer Affairs, Foreign Com. & Tourism of the S. Comm. on Com., Sci., & Transp.*, 104th Cong. 37–39 (1995)).

Beyond simply limiting its mission to focus on elite athletes at the expense of grassroots sports, the USOPC developed a culture that limited its mandate to winning medals at the expense of other values.<sup>74</sup> While Congress (and presumably athletes and the American public) assumed that the Olympic and Amateur Sports Act required the USOPC to safeguard athlete wellbeing, the House Energy and Commerce Committee found that the USOPC culture “prioritized reputation and image over athlete safety.”<sup>75</sup> The USOPC’s limiting of its focus was achieved with at least the tacit approval of some members of Congress and little political backlash because, like many hybrid organizations, the USOPC has generated the political influence to “control its own supervision.”<sup>76</sup>

### *B. Self-Serving Statutory Construction*

As an amateur regulator without meaningful oversight, the USOPC also interpreted the Olympic and Amateur Sports Act in a way that was uninformed at best, and deliberately self-serving at worst. In response to the USA Gymnastics scandal, the USOPC and USA Gymnastics took the curious position that the Olympic and Amateur Sports Act prevented a more robust response to reports of sexual abuse of its athletes. The USOPC further asserted in litigation, in response to a question about whether it had a responsibility to protect athletes, that the USOPC “did not have athletes,” and that athlete safety and wellbeing were the responsibility of NGBs.<sup>77</sup>

Senator Stevens’s concerns expressed in the 1995 hearing were echoed in the recent Congressional reports that detailed the USOPC’s flawed interpretation of the Olympic and Amateur Sports Act.<sup>78</sup> For instance, the House Committee found that the USOPC believed that athletes were solely the responsibility of NGBs, not the USOPC.<sup>79</sup>

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74. Mike Harrigan, *No Need to Amend Amateur Sports Act*, SPORTS BUS. J. (Aug. 6, 2018), <https://www.sportsbusinessdaily.com/Journal/Issues/2018/08/06/Opinion/Harrigan.aspx>

75. MAJORITY STAFF, ENERGY & COM. COMM., 115TH CONG., NASSAR AND BEYOND: A REVIEW OF THE OLYMPIC COMMUNITY’S EFFORTS TO PROTECT ATHLETES FROM SEXUAL ABUSE (Comm. Print 2018), <https://republicans-energycommerce.house.gov/wp-content/uploads/2018/12/EC-USOC-Report-12.20.18-Final-REV.pdf>.

76. See KOPPELL, *supra* note 44, at 120 (identifying that quasi-governmental agencies may grow powerful enough to effectively pressure Congressional action).

77. Hobson & Rich, *supra* note 60.

78. JERRY MORAN & RICHARD BLUMENTHAL, SENATE OLYMPICS INVESTIGATION, THE COURAGE OF SURVIVORS: A CALL TO ACTION 6 (2019) (explaining that the statute required NGBs to promote athlete health and safety).

79. MAJORITY STAFF ENERGY AND COMMERCE COMMITTEE, 115TH CONG., NASSAR AND BEYOND: A REVIEW OF THE OLYMPIC COMMUNITY’S EFFORTS TO PROTECT ATHLETES FROM SEXUAL ABUSE 6 (2018) [hereinafter ENERGY AND COMMERCE COMMITTEE REPORT].

The Committee also found that the USOPC either did not know the extent of their authority over NGBs or believed that their authority over NGBs was limited.<sup>80</sup> The NGBs themselves also did not fully understand, or care to understand, the Olympic and Amateur Sports Act. The Committee Report stated that the NGBs did not believe they had any authority over their membership, because affiliated clubs that trained athletes were “private.”<sup>81</sup> The Committee also found that there were inconsistent policies across NGBs and little oversight or enforcement. The report highlighted the USOPC and NGB’s self-serving, and inexplicable belief that they could not take action to meaningfully address sexual abuse of athletes *because of* the Olympic and Amateur Sports Act.<sup>82</sup> Both the Senate and House Committees concluded that the USOPC needed to use their full authority under the statute.<sup>83</sup> Similarly, one member of the President’s Commission on Olympic Sports recently asserted that the USOPC’s flawed response to the USA Gymnastics scandal was due to a failure “to understand” the Olympic and Amateur Sports Act and a failure to educate NGBs on the statute.<sup>84</sup>

In 1995 hearings, Senator Stevens expressed concern that USOPC officials did not understand the USOPC’s authority and obligations under the Olympic and Amateur Sports Act. The USA Gymnastics scandal, however, demonstrates that the USOPC is not properly incentivized to understand, and instead adopts self-serving, limited interpretations of the statute to avoid fully effectuating its responsibilities and mission.

#### IV. SHOULD THE USOPC BE SUBJECT TO GREATER OVERSIGHT?

Scholarly literature on quasi-governmental organizations focuses primarily on accountability.<sup>85</sup> The competing private and public interest goals faced by hybrid entities must be checked and managed so that these entities effectuate their full purpose.<sup>86</sup> The USOPC illustrates these concerns, and after decades of scandals and uneven oversight, reform is once again on the political agenda. The USOPC recently stated that it will move to submitting yearly reports to

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80. *Id.* at 95–96, 101.

81. *Id.* at 97.

82. *Id.* at 7, 95–101. In addition, in a USA Today survey, most NGBs reported that they did not have the power under the Olympic and Amateur Sports Act to punish member clubs that violate SafeSport bans by employing sanctioned coaches or administrators. See Nancy Armour et al., *Was Your Child’s Coach Banned for Sexual Misconduct? Better Check*, USA TODAY: SPORTS (Dec. 13, 2018, 7:05 AM), <https://www.usatoday.com/story/sports/2018/12/13/olympic-sports-scandal-coaching-kids-after-sexual-misconduct-ban/2196969002/>.

83. MORAN & BLUEMNTHAL, *supra* note 78, at 6; ENERGY AND COMMERCE COMMITTEE REPORT, *supra* note 79, at 131.

84. Harrigan, *supra* note 74.

85. KOPPELL, *supra* note 44, at 164.

86. *Id.* at 165–66.

Congress.<sup>87</sup> This is not enough. To create meaningful change, Congress must consider reforms that produce more consistent, specialized oversight to ensure that the USOPC operates in the public interest. This is not to say that the federal government should get into the business of developing Olympic athletes or selecting Olympic teams. However, the USOPC's quasi-governmental structure and its unique role in American life warrants a solution beyond the simplistic label that it is a "private" corporation. Because there is no blueprint for quasi-governmental entities, Congress can use that freedom to create a plan for the U.S. Olympic Movement that benefits the nation and its athletes.

The current proposal from the Senate Commerce Committee focuses on giving Congress the authority to dissolve the USOPC board or decertify an NGB. These reforms, while a step in the right direction, would not do enough to address the accountability issues presented by a quasi-governmental entity such as the USOPC. Because the USOPC is not a government agency, it does not have the kind of contact with Congress that, for instance, the federal appropriations process requires. In addition, Congress does not have the specialized knowledge. Senator Stevens was able to provide unique leadership because he had been a member of the President's Commission on Olympic Sports. However, even with his knowledge of the Olympic and Amateur Sports Act, his ability to provide consistent oversight was limited. Today's well-meaning senators have the benefit of committee investigations, but these investigations come long after harm has been done. The committees also rely on the USOPC to provide insight into the meaning of the Olympic and Amateur Sports Act. As discussed previously, these self-serving interpretations can be suspect.<sup>88</sup> In addition, the drastic actions of dissolving the USOPC board or decertifying an NGB, by their very nature, are not likely to be used.<sup>89</sup>

Instead, Congress should consider two possibilities. The first is to create a sports "ministry" or similar government agency. The United States is the only country in the Olympic Movement without a government agency to regulate sports, and a federal agency would certainly provide greater accountability and important leadership, especially for grassroots sports development. The need for such leadership is discussed in the recently proposed National Youth Sports Strategy released by the Department of Health and Human

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87. *USOC Leader: Reform Possible with or without Congress*, USA TODAY: OLYMPICS (May 22, 2019, 12:16 PM), <https://www.usatoday.com/story/sports/olympics/2019/05/22/usoc-leader-reform-possible-with-or-without-congress/39504551/>.

88. See KOPPELL, *supra* note 44, at 119–21 (discussing the political influence of hybrid organizations).

89. These options are akin to withdrawing federal funding for institutions that do not comply with Title IX. To date, none have ever suffered such a consequence, but many are not compliant with the statute and regulations.

Services.<sup>90</sup> Besides likely not being politically feasible, however, management of the elite level of Olympic Movement sports need not be turned over to a government agency. The use of private arbitration for sport disputes has worked well, and there is little argument for court involvement in these matters. A federal agency aimed at youth sports, perhaps as a division of HHS, is the better solution.

Another possibility is to assign a federal agency to oversee the USOPC. An argument can be made that the USOPC is in effect a type of government contractor, with Congress granting the USOPC exclusive use of the Olympic marks as compensation for providing management of the U.S. Olympic Movement. In such an arrangement, a government agency could be expected to oversee the management of the contract to ensure that the private entity was providing the services according to the government's terms. Providing greater oversight of the USOPC to ensure management issues are being carried out consistent with Congress's intent would not impede the USOPC's ability to field Olympic teams. The problem with this approach, however, is that it is not clear there is a federal agency that encompasses the variety of functions served by the USOPC. While HHS would make sense for youth, grassroots sports, the USOPC's functions within the international community arguably intersect more closely with the State Department. Developing and selecting athletes for international competition does not fit neatly anywhere within the federal landscape, because, as the Supreme Court held, the USOPC does not engage in a traditional public function.

Instead, Congress could create a new entity to provide greater federal oversight with the type of specialized knowledge that a federal agency would exercise. The case law interpreting the Administrative Procedure Act provides a helpful analogy for such a model. The USOPC should be given deference over athlete determinations and judgments directly related to USOPC and NGB's sports expertise. The Olympic and Amateur Sports Act supports this, giving the USOPC broad powers to act independently in assembling U.S. representation in international athletic competition.<sup>91</sup> The USOPC should be given less deference, however, for matters related to management of the U.S. Olympic Movement and specifically regulation of NGBs.

Other quasi-government arrangements provide useful examples for how the USOPC might be reformed to place it under greater

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90. Exec. Order No. 13,824, 83 Fed. Reg. 8,923 (Feb. 26, 2018).

91. Numerous lawsuits have challenged athlete eligibility determinations or Olympic selection procedures, and courts have rightly declined to exercise jurisdiction to step into such disputes. *See* United States Olympic Comm. et al. v. Ruckman, Nos. 09-4618 (FLW), 10-1252 (FLW), 2010 WL 2179527, at \*1-3, \*5-6, \*9 (D.N.J. May 28, 2010); *Lee v. U.S. Taekwondo Union*, 331 F. Supp. 2d 1252, 1254, 1256-59, 1269 (D. Haw. 2004).

federal oversight while also preserving the flexibility and autonomy that enhance its unique function. For example, the Department of Agriculture and Department of the Interior are affiliated with adjunct organizations that are under the control of their respective agencies. The Securities Investor Protection Corporation and the Public Company Accounting Oversight Board operate as nonprofit corporations under the supervision of the Securities and Exchange Commission.<sup>92</sup> There is support within the U.S. Olympic Movement for just such a solution. Recently, the National Governing Body Task Force recommended “stringent” federal oversight of the USOPC. The group suggested that a federal agency house the USOPC to provide more oversight and funding.<sup>93</sup> At a minimum, Congress could design a type of “inspector general” for the USOPC to review its operations. Congress should use this moment of reform to seriously consider these options.

#### V. CONCLUSION

The aftermath of the USA Gymnastics scandal has made clear that in the USOPC’s interpretation, *recognizing* NGBs is far different from *regulating* them, and hoping that the USOPC will behave as an experienced, and not amateur, regulator when it was established to be a private corporation is unrealistic. The USOPC has frequently told Congress that it cannot “be all things to all people.” The expectation that it can be, however, goes back to the USOPC’s quasi-governmental structure. The Olympic and Amateur Sports Act establishes a private entity that is given a sweeping, yet unfunded mandate to act in the public interest. With only market-dependent resources and lacking the management and accountability structures of a government agency, the USOPC and NGBs have acted as the private corporations that they are. Simply put, they are amateur regulators. The American public and its athletes expect, and deserve, better.

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92. KOSAR, *supra* note 18, at 12–16.

93. NGB Task Force Recommendations (June 2019) (on file with author).