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MEMORANDUM October 27, 2015

To: Representative Joe Pitts

[redacted]

Subject: **Analysis of Potential Constitutional Challenges to Delegations Made to a Private Entity Under H.R. 3084**

This memorandum responds to your request for a legal analysis of H.R. 3084, the "Thoroughbred Horseracing Integrity Act of 2015." Specifically, you asked whether the bill's delegation of power to a private regulatory body, known as the Thoroughbred Horseracing Anti-Doping Authority (THADA or the Authority), is consistent with the U.S. Constitution.[1] At your request, a duplicate copy of this memorandum with identical language has been provided to Senator Udall.

The permissibility of federal delegations of authority to private entities is relatively unsettled. However, there would appear to be a consensus that delegations of regulatory and enforcement powers to private entities generally raise constitutional concerns, particularly when federal involvement and supervision in the exercise of those powers are absent. Based upon our review of existing law, it would appear that a strong argument can be made that H.R. 3084 delegates to THADA, a private entity, the kinds of regulatory and enforcement powers that would implicate these concerns.

The Thoroughbred Horseracing Anti-Doping Authority

H.R. 3084 would create the Thoroughbred Horseracing Anti-Doping Authority, "an independent organization with responsibility for developing and administering an anti-doping program for covered

[1] This memorandum will not address other potential constitutional concerns, including whether H.R. 3084 infringes on executive power by failing to provide the President with the authority to either appoint or remove THADA board members. The Constitution requires that any official exercising "significant authority pursuant to the laws of the United States" be appointed in conformance with the Appointments Clause, U.S. Const. art. II, § 2, i.e. by the President with the advice and consent of the Senate, or, in the case of inferior officers, by the President, the head of a department, or the courts. *See* Buckley v. Valeo, 424 U.S. 1 (1976). With respect to removal, the Supreme Court held in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), that the President must retain "general administrative control of those executing the laws." *Id.* at 492-93. That control, the Court reasoned, is exercised primarily via the power of removal. *See also* CRS Report R43708, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, by Todd Garvey. The application of these two principles to scenarios in which federal law empowers a private individual, as opposed to a government official, has not been considered by the Supreme Court. Finally, this memorandum also will not address any Tenth Amendment concerns that may arise as a result of provisions in H.R. 3084 that would appear to require state racing commissions to collect fees set by a private body pursuant to an authorization received from Congress.

horses, covered persons, and covered horseraces."[2] THADA would be structured as a non-profit corporation[3] and "shall not be considered nor construed to be an agent of, or an actor on behalf of, the United States Government...."[4] Under the bill, THADA would be given "exclusive jurisdiction" over anti-doping matters for all covered horses, covered persons, and covered horseraces beginning on January 1, 2017.[5] The legislation defines certain elements that must be included in the anti-doping program to be established and implemented by THADA, including lists of permitted and prohibited substances and sanctions for violations.[6] THADA would be empowered to impose sanctions "up to and including a lifetime ban from horseracing" for covered persons and/or covered horses.[7]

Covered persons and covered horses would be required to submit themselves to the jurisdiction of THADA and agree to comply with THADA's anti-doping program in order to participate in covered horseraces.[8] Additionally, THADA's "jurisdiction and authority" would also be imposed as a condition upon the ability to "accept, receive or transmit wagers on covered horseraces and to participate in such races."[9]

Under the bill, THADA would be funded "entirely by the Thoroughbred horseracing industry."[10] Funds necessary for THADA's initial establishment would be obtained through loans and private donations. Subsequent ongoing expenses would be funded by a "per racing start" fee set each year by THADA that, based on the prior year's budget, is estimated to be adequate to cover THADA's expenses for the coming year.[11] State racing commissions would then be required to "remit" to THADA, on a monthly basis, "an amount equal to the applicable fee per racing start multiplied by the number of racing starts in the State in the previous month."[12] Each state racing commission would have discretion, subject to applicable state laws, to determine "the method by which the requisite amount shall be allocated, assessed, and collected."[13] However, because the bill mandates that the "establishment and administration" of the anti-doping program "shall be paid entirely by the Thoroughbred horseracing industry," it would appear that the state racing commissions may only assess, allocate, and collect funds from members of that undefined group.[14] The bill also expressly states that the federal government is not required to "provide funding for or to guarantee the debts of the Authority."[15]

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[2] H.R. 3084, § 5(a). "Covered persons" is defined as "all trainers, owners, veterinarians, and the agents and employees of such persons and other horse support personnel who are engaged in the care, training, or racing of covered horses." *Id.* at § 3(4). "Covered horse" is defined as "any Thoroughbred horse, beginning on the date of the Thoroughbred horse's first timed and reported workout at a race track that participates in races that are the subject of interstate off-track wagers or a licensed Thoroughbred training facility until the Authority receives written notice that the horse has been retired." *Id.* at § 3(3). "Covered horserace" is defined as "any horserace that involves only Thoroughbreds and that is the subject of interstate off-track wagers." *Id.* at § 3(2).

[3] *Id.* at § 5(b).

[4] *Id.* at § 10.

[5] *Id.* at § 4(a).

[6] *Id.* at §§ 6(a), 7(b)

[7] H.R. 3084, § 7(f).

[8] *Id.* at §§ 4(c), 6(b).

[9] *Id.* at § 4(b).

[10] *Id.* at § 12.

[11] *Id.* at § 12(2).

[12] *Id.* at § 12(3).

[13] H.R. 3084, § 12(4).

[14] H.R. 3084 does not expressly define "Thoroughbred horseracing industry." However, the bill does define "Thoroughbred constituencies" to include "owners and breeders, trainers, horse racing associations, veterinarians, State racing commissions and jockeys." *Id.* at § 3(17). Section 5(b) of the bill, which relates to the appointment of THADA board members, may provide further insight. That provision states that "[t]he United States Anti-Doping Agency shall solicit lists of two candidates each from (continued...)

As a threshold matter, it is important to establish that THADA would be a wholly private entity. H.R. 3084 characterizes THADA as an "independent" and "non-profit corporation" that "shall not be considered...to be an agency." Nevertheless, it is "not for Congress to make the final determination" of THADA's status as a government entity.[16] However, when expressed congressional intent is combined with a nearly complete absence of federal supervision,[17] control, funding, and involvement in day-to-day operations, it becomes apparent that THADA would not be considered a government entity, but rather an "autonomous private enterprise."[18]

Delegation of Legislative Authority to a Private Entity

The Constitution's vesting of "all legislative powers" in "a Congress of the United States" has traditionally been interpreted as limiting Congress's authority to delegate "legislative power" to the other branches of government.[19] This "nondelegation doctrine" is based in the separation of powers and exists primarily to prevent Congress from abdicating the core legislative function assigned to it by Article I of the Constitution.[20] By restricting Congress's ability to give away its power, in many respects the nondelegation doctrine "protects Congress from itself."[21]

Although the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated,"[22] the standard adopted for determining whether Congress has in fact delegated "legislative authority" is a lenient one—as evidenced by the fact that the Court has used the test to invalidate federal laws only twice.[23] In order for a delegation to survive scrutiny, Congress need only establish an "intelligible principle" to govern the exercise of the delegated power.[24] Although allowing Congress to make broad delegations, the "intelligible principle" test ensures that Congress, not the delegee, renders the underlying policy decision by delineating reasonable legal standards for the exercise of the provided authority.[25] When a delegation is accompanied by an "intelligible principle," Congress is clearly

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a cross-section of thoroughbred industry representatives, the members of which include owners and breeders, trainers, veterinarians, racing associations, State racing commissions and jockeys."

[15] *Id.* at § 12.

[16] *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392 (1995) ("But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions.").

[17] The federal government's role under the bill appears to be limited to a periodic report that the Comptroller General must provide to Congress that "analyzes the Authority's operations" and reviews "the Authority's effectiveness as an anti-doping organization and the efficiency of such anti-doping program." H.R. 3084 § 5(f).

[18] *See* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, 135 S. Ct. 1225, 1232 (2015) [hereinafter *American Railroads*].

[19] U.S. CONST. art. I, § 1.

[20] Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,' and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (internal citations omitted).

[21] *See* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 358 (1998).

[22] *See, e.g.*, United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[23] *See* Panama Refining v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[24] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [] is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[25] *See, e.g.*, *Panama Refining Co.*, 293 U.S. at 421 ("The Constitution has never been regarded as denying to the Congress the (continued...)

transferring some degree of authority, but by confining the delegee's discretion in the exercise of that authority, the delegation is not of a "legislative" nature such that it would offend the separation of powers.

Some commentators have asserted that a congressional delegation should be treated the same whether it empowers a *private* or *public* entity.[26] Regardless of what entity ultimately exercises the delegated authority, under this line of reasoning, the standard for evaluating its permissibility is the same: a court need only determine whether Congress has provided an "intelligible principle" to guide the entity's exercise of the delegated power. If a reviewing court were to adopt this position, any delegation that does not provide a private entity with essentially unbridled discretion in carrying out its powers would likely be deemed valid for the purposes of the nondelegation doctrine.[27] Under this theory, H.R. 3084 would likely pass constitutional muster. Sections 6 and 7, which lay out THADA's powers and establish an "outline" of the anti-doping program, would appear to adequately confine THADA's discretion by providing an "intelligible principle" to guide THADA in its implementation of the required anti-doping program.

There is substantial evidence, however, to suggest that a reviewing court may employ a different analytical framework in evaluating the type of private delegation envisioned by H.R. 3084. Rather than applying the "intelligible principle" test, some judicial decisions—including Supreme Court opinions—appear to have instead adopted a different approach to evaluating congressional delegations to private entities.[28] This line of reasoning is sometimes referred to as the "private delegation doctrine" and is typically triggered when the federal government allows a private party to "make the law and force it upon a minority."[29] Although these private delegation cases are relatively rare, the reasoning applied generally finds its genesis in the 1936 Supreme Court case of *Carter v. Carter Coal Co.*[30]

In *Carter Coal,* the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, which provided a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in the region. The Court reasoned that by conferring on a majority of private individuals the authority to regulate "the affairs of an unwilling minority," the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be

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necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[26] *See, e.g.*, Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 955 (2014) ("Nor is there any difference between public and private delegations."); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Feder Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 358-65 (1998) (describing the nondelegation doctrine as requiring only an intelligible principle, regardless of whether authority is delegated to a private or public non-federal actor). Whether the courts treat public and private delegations differently is not an issue that this memorandum will address.

[27] The Supreme Court has previously found broad delegations to regulate in the "public interest" or in a "fair and equitable" manner to satisfy the intelligible principle test. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1940); Yakus v. United States, 321 U.S. 414, 420 (1944).

[28] *See, e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928); Carter v. Carter Coal Co, 298 U.S. 238 (1936). Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Gen Elec. Co. v. N.Y. State Dep't of Labor, 936 F.2d 1448 (2nd Cir. 1991); City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999).

[29] Currin v. Wallace, 306 U.S. 1, 15 (1939).

[30] 298 U.S. 238 (1936) [hereinafter *Carter Coal*]. Prior to *Carter Coal*, the Court had upheld relatively broad delegations to private entities. For example, in *St. Louis, I.M. & S. R. Co. v. Taylor*, 210 U.S. 281 (1908), the Supreme Court approved of a law that authorized the American Railway Association to "designate to the Interstate Commerce Commission the standard height of draw bars for freight cars..." *Id.* at 286.

and often are adverse to the interests of others in the same business."[31] Although appearing to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, the Court held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment."[32]

Carter Coal has engendered significant confusion as to whether the Court's holding was based on an extension of the above-outlined nondelegation principles, or was instead grounded in the Fifth Amendment's guarantee of "due process of law."[33] The Due Process Clause, in part, seeks to ensure principles of fundamental fairness, including the notion that decision makers must be disinterested and unbiased.[34] These general principles may be offended when the federal government authorizes a private party to exercise coercive power over another that could be used in a biased or arbitrary manner.[35] As one commentator has summarized: "If a delegation creates the opportunity for private interests to dominate the use of governmental power, then those against whom the power is used may well have suffered deprivations without due process."[36]

In *Carter Coal*, the Court clearly articulated the due process problems involved with providing regulatory authority to private entities:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power

[31] *Carter Coal*, 298 U.S. at 311.

[32] *Id.* at 311-12.

[33] U.S. CONST. amend. V ("No person shall be...deprived of life, liberty, or property, without due process of law..."). *See, e.g.*, Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 671 n.3 (D.C. Cir. 2013), *vac'd*, 135 S. Ct. 1225 (2015) ("At least one commentator has suggested that the 'doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers.' *Carter Coal* offers some textual support for this position, describing the impermissible delegation there as 'clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.' While the distinction evokes scholarly interest, neither party before us makes this point, and our own precedent describes the problem as one of unconstitutional delegation.") (internal citations omitted); Brief of Professor Alexander Volokh as Amicus Curiae in Support of Petitioners at 2-3, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, (2015) (arguing that the D.C. Circuit in *Association of American Railroads v. Department of Transportation* was wrong to strike down the statute using a delegation analysis and should have applied a due process analysis instead); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 153 (2000) ("The *Carter Coal* doctrine is known as a nondelegation doctrine, but in a way the name is misleading. Unlike the public nondelegation doctrine, which relies on the separation of powers to prevent Congress from making standardless delegations to administrative agencies, the *Carter Coal* doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers.").

[34] *See Carter Coal*, 298 U.S. at 311; *Eubank*, 226 U.S. at 143-44 (invalidating a city ordinance on the grounds that it established "no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously...."). *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."). For a strong defense of the due process approach to private delegations, *see generally* Volokh, *supra* note 26 (identifying additional cases involving city ordinances and state statutes for support of the proposition that the Court has historically used the Due Process Clause to evaluate private delegations).

[35] *See Carter Coal*, 298 U.S. at 311. *See also* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986) ("The concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as to some different public interest. When a public official is permitted to exercise a public power, he is generally expected to do so in a basically disinterested way. The community expects him to act from some conception of what is good for the community or according to standards that seek to further community interests, as opposed to acting to further his narrow private interests.").

[36] Lawrence, *supra* note 34, at 661.

> undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[37]

It is difficult to predict how, and under what standard, a modern hypothetical reviewing court would evaluate a private delegation. Moreover, it is not entirely clear what effect framing the issue as one of due process, rather than nondelegation, or vice versa, would have on a court's ultimate evaluation of the constitutionality of the delegation.[38] Nevertheless, when considering constitutional limits on private delegations that arise from cases like *Carter Coal*, it would seem that an important consideration is *to whom* power is given, and *over whom* that power may be wielded.

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) is the most recent court to offer a thorough explication of *Carter Coal* and the private delegation doctrine. In *Assoc. of American Railroads v. U.S. Department of Transportation*, the circuit court interpreted *Carter Coal* as establishing a strict prohibition on congressional delegations of authority to private entities. This is a position that has not been expressly adopted by the Supreme Court, and has been subject to some criticism.[39] The D.C. Circuit opinion flatly held that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.'"[40] In reaching its holding, the court made a clear distinction between delegations to governmental versus private entities. Whereas Congress need only "prescribe an intelligible principle governing the statute's enforcement," when delegating authority to government agencies, "even an intelligible principle cannot rescue a statute empowering private parties to wield *regulatory authority*."[41] Notably, the D.C. Circuit saw no difference between a due process approach and a nondelegation approach, noting that "in any event, neither court nor scholar has suggested a change in the label would effect a change in the inquiry."[42]

American Railroads involved a challenge to § 207 of the Passenger Rail Investment and Improvement Act of 2008,[43] which delegated authority to Amtrak and the Federal Railroad Administration (FRA) to jointly develop "metrics and standards" to improve enforcement of Amtrak's statutorily established passenger rail service priority.[44] The circuit court struck down the law as an unlawful delegation to a private entity. In determining that Amtrak, which the court found to be a private entity, had been delegated "regulatory authority," the court found it significant that the law placed Amtrak on "equal footing" with the FRA in the development of the performance standards, rather than in the required "advisory or subordinate role."[45] The court did not, however, define what it considered to be the contours of "regulatory authority."

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[37] *Carter Coal*, 298 U.S. at 311-12.

[38] *See Ass'n of Am. R.R.*, 721 F.3d at 671 n.3 ("[I]n any event, neither court nor scholar has suggested a change in the label would effect a change in the inquiry."). Professor Alexander Volokh notes that analyzing delegations to private parties under the Due Process Clause, as opposed to the nondelegation doctrine, is preferable because it "better protects accountability:" Due process "is incorporated against the states through the Fourteenth Amendment;" "preserves the availability of a damages action for injured parties;" and "has consistently been applied to issues of bias and fairness." *See* Brief of Professor Alexander Volokh as Amicus Curiae in Support of Petitioners at 2-3, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. __, (2015).

[39] *See generally* Volokh, *supra* note 26.

[40] *Ass'n of Am. R.R.*, 721 F.3d at 670 (quoting *Carter Coal*, 298 U.S. at 311).

[41] *Id.* at 671.

[42] *Id.* at 671 n.3.

[43] P.L. 110-432, Div. B (2008).

[44] *Ass'n of Am. R.R.*, 721 F.3d at 669-70. *See* 49 U.S.C. § 24308(c).

[45] *Ass'n of Am. R.R.*, 721 F.3d at 673.

On appeal, the Supreme Court vacated the D.C. Circuit opinion, holding that Amtrak was in fact a governmental entity.[46] Although disagreeing with the circuit court's characterization of Amtrak as private, the majority opinion did not reflect on the validity of the lower court's prohibition on the delegation of regulatory authority to private entities. Notably, Justices Alito and Thomas appear to have supported the lower court's view in their concurring opinions.[47] Justice Alito also emphasized, as did the D.C. Circuit, that "even the United States accepts that Congress 'cannot delegate regulatory authority to a private entity.'"[48] Nevertheless, while the reasoning in *American Railroads* may be probative of the D.C. Circuit's approach to private delegations, the opinion is not binding precedent within the D.C. Circuit, since it was vacated by the Supreme Court.

Even assuming, *arguendo*, that Congress cannot delegate "regulatory authority" to a private entity, Congress may nonetheless empower a private party to play a more limited role in the regulatory process. The Supreme Court has approved a number of more circumscribed delegations of authority to private entities. *Currin v. Wallace*[49] and *Sunshine Anthracite Coal Co. v. Adkins*[50] provide two such examples, which appear to be unaffected by the Supreme Court's decision in *American Railroads*.

In *Currin*, the Court upheld a law that delegated authority to regulate tobacco markets to the Secretary of Agriculture, but only upon the approval of two-thirds of the growers in the given regional market.[51] The law in question was an example of contingent legislation—or legislation that makes the effectiveness of a delegation contingent upon the occurrence of some future event. Citing to *Carter Coal*, and several other due process cases, the Court stated that "this is not a case where a group of producers may make the law and force it upon a minority."[52] Rather it was Congress, consistent with delegation principles, that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[53] Under *Currin*, it would appear permissible for Congress to delegate to private entities the ability to trigger the exercise of authority in a government official.[54]

The principles established in *Currin* were utilized by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) to uphold an important aspect of the Interstate Horseracing Act (IHA).[55] *Kentucky Division, Horsemen's Benevolent & Protective Association v. Turfway Park Racing Association* involved a challenge to the "horsemen's veto" of the IHA, a provision that prohibits interstate simulcasting of horseraces unless the host track has a written agreement with the necessary "horsemen's group."[56] The

[46] *American Railroads*, 135 S. Ct. at 1228 ("[T]his Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity.").

[47] *See id.* at 1238 (Alito, J., concurring) ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'"); *id.* at 1254 (Thomas, J. concurring) ("Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court...the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government...For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power.").

[48] *Id.* at 1237 (Alito, J., concurring).

[49] 306 U.S. 1 (1939).

[50] 310 U.S. 381 (1940).

[51] *Currin*, 306 U.S. at 6.

[52] *Id.* at 15.

[53] *Id.* at 16.

[54] *Currin* also distinguished its facts from those of *Washington ex rel. Seattle Trust Co. v. Roberge*. 278 U.S. 116. In *Roberge*, the Supreme Court struck down a city ordinance that allowed for the issuance of a permit to construct a group home but only if neighboring land owners consented. *Currin* described that case as "a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners." *Currin*, 306 U.S. at 15-16.

[55] 15 U.S.C. §§ 3001-3007.

[56] 20 F.3d 1406 (6th Cir. 1994). The law defines "horsemen's group" as: "with reference to the applicable host racing association, (continued...)

case considered whether the provision constituted an unlawful delegation of authority to a private entity to determine, by either providing or withholding its consent, the permissibility of off-track betting. Relying primarily on *Currin*, the court held that "the horsemen's veto provision does not allow a private party to 'make the law and force it upon a minority'..."[57] Instead, the court viewed the provision as a form of conditional legislation, approved by the Supreme Court in *Currin* and other cases, in which "the Act merely affords the Horsemen a limited power to waive a restriction created by Congress."[58]

In *Adkins*, the Supreme Court upheld a provision of the Bituminous Coal Act of 1937,[59] which authorized private coal producers to propose standards for the regulation coal prices.[60] Those proposals were provided to the National Bituminous Coal Commission (a governmental entity), which was then authorized to approve, disapprove, or modify the proposal.[61] The Court approved of this framework, relying heavily on the fact that the private coal producers played a subordinate role to the Commission, which clearly retained ultimate authority over the regulation of coal prices. Specifically, the Court held:

> Nor has Congress delegated its legislative authority to the industry. The [private coal producers] function subordinately to the Commission. It, not the [private coal producers], determines the prices. And it has authority and surveillance over the activities of these [private parties]. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.[62]

The U.S. Court of Appeals for the Third Circuit (Third Circuit) applied the reasoning in *Adkins* to uphold a private delegation in *United States v. Frame*.[63] In that case, the Beef Promotion and Research Act of 1985[64] created the Cattleman's Beef Promotion and Research Board, a private entity comprised of cattle producers and importers designed to help strengthen the beef industry by coordinating "promotion and research."[65] The Act gives the Board the authority to collect a statutorily established assessment from the beef industry and to "take the initiative in planning how those funds will be spent," but "government oversight" over the Board was "considerable."[66] Relying on *Adkins*, the court held that "no law-making authority" had been entrusted to the Board primarily because the Board was "subject to the Secretary's pervasive surveillance and authority."[67] Board members were appointed, and removable, by the Secretary

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the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day." 15 U.S.C. § 3002(12).

[57] *Turfway Park Racing Assoc.*, 20 F.3d at 1416.

[58] *Id. See* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (upholding a local ordinance that authorized the waiver of a prohibition on billboards if approved by one–half of affected property owners).

[59] 50 Stat. 72 (1937).

[60] *Adkins*, 310 U.S. at 388-89.

[61] *Id.* at 388.

[62] *Id.* at 399.

[63] 885 F.2d 1119 (3d Cir. 1989).

[64] P.L. 99-198, Title XVI, Subtitle A, *codified at* 7 U.S.C. §§ 2901-2911.

[65] *Frame*, 885 F.2d at 1123.

[66] *Id.* at 1128.

[67] *Id.* at 1129. Other lower court opinions suggest that if an agency is overseeing the actions of a private entity, it must do so with diligence. *See, e.g.*, Todd & Co. v. Securities & Exchange Com., 557 F.2d 1008, 1014 (3d Cir. 1977) ("The independent review function entrusted to the SEC is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism. Since it is a departure from the traditional governmental exercise of enforcement power in the first instance, confidence in the impartiality and fairness of the [private] Association's procedures must be maintained. The SEC, therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization."); First Jersey Secur., Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1979).

of Agriculture and nearly all activities of the Board, including "budgets, plans, or projects," required the Secretary's approval.[68]

Finally, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) has likewise approved of Congress delegating authority to a private entity to play administrative or ministerial roles in the implementation of a governmental program. In *Pittston Co. v. United States*, the court upheld a statutory framework that delegated authority to the Combined Fund, a private entity, to both collect premiums from coal operators and to disperse benefit payments to coal workers.[69] In doing so, the court noted that Congress had "set[] the specific formula for calculating the premiums to be paid" and that the Combined Fund was only "assigned the task of collecting the premiums *designated* by the statute from the persons *specified* by statute."[70] Moreover, the Combined Fund was directed to pay "benefits to the beneficiaries in an amount *specified* by the statute."[71] Because the Fund had no discretion to set the amount of the premium to be collected; the parties from which the premiums were to be collected; or the amount of benefits to be paid, the powers delegated to the private entity were "of an administrative or advisory nature, and delegation of them to the Trustees does not, we conclude, violate the nondelegation doctrine."[72]

Although the scope of Congress's authority to delegate power to private entities appears unsettled, and despite ongoing debates about the proper standards to be applied in such cases, a number of general principles can be gleaned from the above cited precedent. It would appear that broad delegations of regulatory power to private entities are generally disfavored. Furthermore, these delegations may be rejected under the persuasive force of the reasoning used in the vacated decision of *American Railroads* that Congress "cannot delegate regulatory authority to a private entity."[73]

As a result, a law that provides a private entity with ultimate authority to impose regulatory requirements that have a coercive effect on other private parties, or to otherwise exercise broad discretion to formulate policy, would likely raise constitutional concerns. However, some delegations to private entities have withstood constitutional scrutiny. Congress may authorize private entities to engage in more limited regulatory roles. For example, private entities may: trigger authority in a governmental entity; assist or aid a governmental entity in the exercise of its regulatory power; play an advisory or subordinate role to a governmental entity; exercise authority subject to the strict oversight and surveillance of a governmental entity; or administer a regulatory program in a purely ministerial manner.

Application to H.R. 3084

As discussed above, some courts have struck down delegations of regulatory authority to private entities, while other courts have found delegations of administrative or ministerial authority to private entities, like those discussed in *Pittston* and *Frame*, to be permissible.[74] However, the courts have not been particularly clear in defining the differences between an administrative or ministerial authority and one that becomes impermissible because it is regulatory in nature. In *American Railroads*, Justice Thomas described the authority at issue in the case as "the formulation of generally applicable rules of private conduct."[75] In his

[68] *Frame*, 885 F.2d at 1129.

[69] 368 F.3d 385 (4th Cir. 2004).

[70] *Id.* at 395.

[71] *Id.*

[72] *Id.* at 396.

[73] *Ass'n of Am. R.R.*, 721 F.3d at 670.

[74] *See Pittston*, 368 F.3d at 394-96; *Frame*, 885 F.2d at 1128-29.

[75] *American Railroads*, 135 S. Ct. at 1242 (Thomas, J., concurring).

own concurrence in the same case, Justice Alito determined that the power to set metrics and standards is "regulatory power" because private entities may be required to include the metrics and standards in their contracts[76] and "obedience to the metrics and standards materially reduces the risk of liability...."[77]

Taking the case law and these recent statements into account, it appears that a hallmark of regulatory authority is its *coercive* effect on private parties—i.e., whether the authorities delegated to the private entity allow it to impose rules upon other private parties with which those parties are required to comply. Several of the authorities granted to THADA could be viewed as impermissible delegations of authority to a private entity because of their coercive nature.

Authority to Create an Anti-Doping Program, Investigate Violations, and Impose Sanctions upon Violators

Under § 6 of H.R. 3084, THADA is instructed to "develop and administer the Thoroughbred horseracing anti-doping program for covered horses, covered persons, and covered horseraces."[78] In essence, THADA would be tasked with writing rules that define what substances are permitted and prohibited in horseracing. In order for covered persons and covered horses to participate in covered horseraces, they would be required to agree to comply with these rules. H.R. 3084 does provide guidance as to the contents of the anti-doping program. For example, the bill outlines substances that shall be on the initial lists of prohibited and permitted substances.[79] However, THADA would be permitted to amend these initial lists, with full discretion to choose the contents of the final lists. The final lists would not be subject to the approval of a governmental entity and can be changed by THADA at any time, subject to a notice and comment process to be established by THADA.[80]

As part of the anti-doping program mandated by H.R. 3084, THADA would also be responsible for developing procedures to test for the use of prohibited substances and procedures for investigating, charging, and adjudicating program violations.[81] THADA would be granted the same investigatory powers "as the State racing commissions have in their respective states...."[82] These powers could include access to facilities, search and seizure authority, the ability to issue and enforce subpoenas for testimony and documents, and "other investigatory powers."[83] THADA would also be empowered to impose sanctions, in accordance with rules on violations that it establishes.[84] "The rules shall impose up to and including a lifetime ban from horseracing" and shall provide opportunities for violators to reduce the otherwise applicable sanction by satisfying certain conditions.[85]

Authorizing THADA to create these kinds of rules may be regarded as an unlawful delegation of regulatory authority to a private entity. The anti-doping program created solely by THADA, empowered by law with significant discretion in its formulation, is likely to be characterized as imposing coercive requirements that control the conduct of other private entities, namely covered persons. If H.R. 3084 were

[76] *Id.* at 4 (Alito, J., concurring) ("The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.").

[77] *Id.*

[78] H.R. 3084, § 6(a).

[79] *Id.* at § 7(b).

[80] *Id.*

[81] *Id.* at § 6(a)(4)-(5).

[82] *Id.* at § 4(c).

[83] *Id.*

[84] H.R. 3084, § 7(f).

[85] *Id.*

enacted, covered persons and covered horses would be required by federal law to comply with THADA's anti-doping program in order to participate in covered horseraces. If they are suspected of noncompliance, covered persons and covered horses may be subjected to THADA's investigatory powers, which could include the authority to issue subpoenas and search and seize property. Violations of the anti-doping program can lead to sanctions, which are created and imposed by THADA, and can result in a covered person and/or covered horse being banned from thoroughbred racing for life.

The authority granted in H.R. 3084 can be compared to, and contrasted with, the authorities at issue in *Adkins* and the D.C. Circuit's consideration of *American Railroads*. In *Adkins*, a private entity was permitted to propose standards for the regulation of coal prices, which, when implemented, would be coercive requirements placed upon private conduct. That authority was deemed to be lawful because the private entity only *proposed* the rules, and the rules only went into effect if approved by a governmental entity, which could modify the rules as it saw fit. In contrast, under H.R. 3084, THADA, a private entity, would not only propose rules, as the private entity in *Adkins* did, but would also approve and modify those rules with no participation or supervision from a governmental entity. In the absence of government "supervision and surveillance over the activities"[86] of the private entity, the Court's reasoning in upholding the *Adkins* scheme cannot be applied to H.R. 3084.

The D.C. Circuit in *American Railroads* reasoned that the delegation of joint rulemaking authority to a private entity[87] and a governmental entity jointly, where each party had equal authority, constituted an unlawful delegation. If delegating equal authority to one private entity and one governmental entity is unlawful, then delegating authority to a private entity alone, with no government involvement, is also likely unlawful. Therefore, if a reviewing court were to adopt the D.C. Circuit's reasoning, it appears likely that it would consider a grant of rulemaking authority to a private entity like THADA, acting alone, to be unlawful.

Setting the Amount of a Fee

Under H.R. 3084, THADA would be funded through a process by which it establishes a fee "per racing start" adequate to cover implementation of the anti-doping program. State racing commissions would then be required, on a monthly basis, to remit to THADA an amount calculated by multiplying the applicable fee by the number of "racing starts" held in the state over the previous month. Each state racing commission has discretion, subject to applicable state law, to allocate, assess, and collect the amount that is to be remitted to THADA from the thoroughbred horseracing industry (a term that is not expressly defined in the bill.) Thus, while THADA would be the primary actor in establishing the overall cost of its continued operation, it is the state racing commissions that would determine, subject to state law, how to spread those costs amongst the members of the thoroughbred industry. No governmental entity would be involved in either establishing THADA's budget or in determining the amount of the fee.[88]

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[86] *Adkins*, 310 U.S. at 399.

[87] As discussed above, the D.C. Circuit ruled that Amtrak was a private entity. *Ass'n of Am. R.R.*, 721 F.3d at 677. However, this ruling was overturned by the Supreme Court, which determined that Amtrak was a governmental entity for the purposes of this suit. *American Railroads*, 132 S. Ct. at 1233. Therefore, the D.C. Circuit's decision, which was predicated on the fact that Amtrak was a private entity, was vacated. *Id.* at 1233-234.

[88] Under this arrangement, it would appear that the state's may control the sum that must be remitted to THADA by controlling the number of "racing starts" in their state in a given month. It should also be noted that the establishment of THADA as a "nonprofit corporation" may impose implicit restrictions on its finances. When used in law, the term "nonprofit" generally refers to an entity that must be operated on a not-for-profit basis and, as such, is subject to restrictions on its operations and spending that are not applicable to for-profit corporation (e.g., compensation paid by nonprofit entities to officers and others must generally be "reasonable"). *See, e.g.*, D.C. CODE § 29-404.41; NY Not-for-Profit Corp. Law § 202 ; *see also* 26 U.S.C. § 501.

These funding provisions raise several potential delegation concerns. First, may Congress delegate to a private entity like THADA the authority to determine the total cost that must ultimately be paid by a group of private individuals?[89] Several courts have evaluated delegations of authority to private entities to *collect* fees in the past.[90] In determining that the collection of a fee was a ministerial act, those courts focused on the fact that in each instance, the private entity did *not* have the authority to set the amount of the fee. For example, in *Adkins*, the Court upheld a delegation to a group of private coal producers because they acted subordinately to a government entity.[91] This subordination was evidenced, in part, by the fact that the government entity, not the private entity, had the authority to fix reasonable coal prices under the law. In *Frame*, the Third Circuit adopted this reasoning in finding that the collection of assessments across the beef industry by a private entity was not an unlawful delegation.[92] Again, the court focused on the fact that the amount of the assessment was set in statute by Congress and the private entity served a purely ministerial role in collection.[93] Finally, in *Pittston*, the Fourth Circuit upheld the authority of a private entity to collect premiums charged upon members of the coal industry.[94] Here, the court emphasized that the law "set out specific formulas for calculating the premiums to be paid" by each covered operator.[95] The Social Security Commissioner, not the private entity, had complete control over the amount to be paid based on the formula established in statute.[96] In each instance, the courts suggest that allowing the private entity to set the amount of the charge imposed on private parties would transform the delegation from an administrative or ministerial function into a regulatory authority.[97]

Based on this case law, it appears that authorizing THADA to determine the amount of the fee to be remitted by state racing commissions could be found by a reviewing court to constitute an unlawful delegation to a private entity. Under the arrangement that would be established by H.R. 3084, the state racing commissions would essentially act as a middle man: THADA would set the "per racing start" fee; the state racing commission would collect and remit the fee; and the thoroughbred horseracing industry would pay the fee. Therefore, although the state racing commission actually assesses and collects the fee, it could be argued that Congress has delegated authority to THADA to set the total amount that private parties are ultimately required to pay.

It should be noted that nothing in the bill appears to expressly *require* members of the thoroughbred industry to pay the assessed fee. Section 6(b) of the bill provides only that covered persons and their covered horses must, "as a condition of eligibility to participate in covered horseraces," agree to be "bound by...the anti-doping program developed pursuant to subsection (a)."[98] The THADA operation fee

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[89] THADA does not directly impose a fee on private entities. Rather, it does so only indirectly, through the state racing commissions.

[90] *See Pittston*, 368 F.3d at 394-96 (evaluating a private entity's authority to collect premiums mandated in law); *Frame*, 885 F.2d at 1128-29 (evaluating a private entity's authority to collect assessments required by law).

[91] *See Adkins*, 310 U.S. at 399 ("Nor has Congress delegated its legislative authority to the industry. The members of the code[, a private entity,] function subordinately to the Commission[, a governmental entity]. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid.") (internal citations omitted).

[92] *Frame*, 885 F.2d at 1128-29.

[93] *Id.* at 1129 ("Therefore, we hold that the Beef Promotion Act does not constitute an unlawful delegation of legislative authority. In essence, the Cattlemen's Board and the Operating Committee[, private entities,] serve an advisory function, and in the case of collection of assessments, a ministerial one. Congress itself has set the amount of the assessments, while ultimately, it is the Secretary who decides how the funds will be spent.").

[94] *Pittston*, 368 F.3d at 396.

[95] *Id.* at 395.

[96] *Id.*

[97] *See Adkins*, 310 U.S. at 398; *Pittston*, 368 F.3d at 395-96; *Frame*, 885 F.2d at 1128-29.

[98] H.R. 3084 § 6(b).

is not provided for under "subsection (a)." It is only the general statement that "[t]he jurisdiction and authority of [THADA] are hereby imposed... as conditions upon the privilege... to participate in [covered] races," that may compel industry members to pay the THADA operating fee assessed by the state racing commissions. The states, however, could provide the state racing commissions with adequate authority under state law, if that authority does not already exist, to compel payment of the THADA operating fee.

The funding arrangement also raises the question of whether Congress may delegate to a state governmental entity the authority to determine who, and in what proportion, will have to contribute to the state's required remittance to THADA. H.R. 3084 provides the state racing commissions with wide discretion in determining how to collect the THADA operating fee. For example, it appears that the state racing commission could choose to place a larger percentage of the burden on one segment of the industry as opposed to another. This delegation of authority to a state entity is less problematic than a delegation of authority to a private entity. Congress often delegates authority to the states, especially in regard to the enforcement of federal law.[99] Courts have generally not invalidated these arrangements, instead analyzing the delegations under the intelligible principle test of the nondelegation doctrine and noting that such authorizations, when providing the state with the option to exercise federal power,[100] tend to further "another core constitutional value—that of federalism."[101] Moreover, at least one court has previously held that delegations to state governors do not raise the private delegation and due process concerns presented in *Carter Coal,* as a governor, and presumably other state officials, are "motivated to maximize the public good," as opposed to private parties, whose motivations may be "self-serving."[102]

Composition of THADA's Board

Section 5 of H.R. 3084 establishes a board of directors to govern THADA. The board would initially be comprised of the United States Anti-Doping Agency's (USADA) chief executive officer, five USADA board members, and five members "from different constituencies of the Thoroughbred industry who shall be appointed by" USADA.[103] These five additional appointees would be chosen from lists of two candidates submitted by representatives of different groups within the thoroughbred industry, including "owners and breeders, trainers, veterinarians, racing associations, State racing commissions, and jockeys."[104] H.R. 3084 instructs USADA to "provide diversity of industry membership on the board... to the greatest extent practicable," but it may "in its sole discretion," choose more than one person submitted from each thoroughbred constituency's list to serve on the board.[105] Furthermore, if after soliciting two sets of candidate lists from the representative groups, board positions still remain open, USADA "may choose one or more persons at large with substantial experience in the Thoroughbred industry as board

[99] *See e.g.*, Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U.L. REV. 62, 80-82 (1990).

[100] H.R. 3084, rather than providing an option, appears to *require* the state racing commissions to allocate, assess, collect, and remit the THADA operating fee. Although the enforcement mechanism for this requirement is not clear, this memorandum will not address any 10th Amendment concerns that may arise from such an arrangement. Nor does this memorandum address any potential infringement on executive power that may arise from this arrangement. *See* Printz v. United States, 521 U.S. 898, 923 (1997) ("the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.").

[101] *Turfway Park Racing Assoc.*, 20 F. 3d at 1417.

[102] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 367 F.3d 650, 660 (7th Cir. 2004);

[103] H.R. 3084, § 5(b).

[104] *Id.* The "Thoroughbred industry" is not further defined in the bill.

[105] *Id.* at § 5(b).

members."[106] Board members would serve for terms of three years and "may serve no more than two consecutive full terms."[107]

The composition of the board may raise private delegation or due process concerns if THADA's ability to be a disinterested decision maker is questioned. The ability of the private entity to make fair decisions, free from bias, arbitrariness, and self-interest, is an important consideration with regard to the due process principles discussed above. On the one hand, H.R. 3084 contains a conflict of interest provision that appears to guard against biased decision makers serving on the board. Section 5(c) states that:

> no nominee or board member shall be--
>
> (1) an individual who has a financial interest in or provides goods or services to covered horses;
>
> (2) an official, officer, or serve in any governance or policymaking capacity for any Thoroughbred industry representative; or
>
> (3) an employee or have a business or commercial relationship with any of the individuals or organizations described in paragraphs (1) or (2).[108]

On the other hand, it seems that that USADA, a private entity that may not be presumptively disinterested,[109] is given broad discretion in choosing the five board members that represent the industry.[110] It is possible that one section of the industry, based on USADA's choices, could be over-represented on the board. Arguably more problematic, though, are the provisions regarding filling vacancies on the board once the initial board members reach their term limits. The five members representing the thoroughbred industry will continue to be appointed by USADA following the procedure outlined above.[111] However, vacancies in the six seats initially filled by USADA officials "will be filled pursuant to the provisions of the Authority's bylaws."[112] Since THADA's bylaws are not established by the bill, it is not known how those six board seats will be filled when vacancies arise. Therefore, it is possible that procedures and/or qualifications established in the bylaws may not result in disinterested decision makers and could raise due process concerns.

Distinguishing THADA from the United States Anti-Doping Agency

In support of the bill, it may be argued that THADA's envisioned role under H.R. 3084 is similar to that which is performed by the United States Anti-Doping Agency (USADA) under existing law. A thorough review of these two private entities, however, suggests that they may be distinguished based upon the circumstances of their creation, the primary source of their authority, and the specific powers delegated to each entity by Congress.

USADA serves as the "national independent anti-doping organization for the United States."[113] The agency, which is led by a governing board of "10 independent, experienced, and professional individuals, free from any conflicts of interest," was created by the United States Olympic Committee (USOC) in 2000 in response to a USOC task force recommendation that an independent governing body was

[106] *Id.* at § 5(b)(5).

[107] *Id.* at § 5(d).

[108] *Id.* at § 5(c).

[109] *See Carter Coal*, 298 U.S. at 311.

[110] H.R. 3084, § 5(b).

[111] *Id.* at § 5(d).

[112] *Id.*

[113] 21 U.S.C. § 2001(b)(1).

necessary to better combat doping in U.S. Olympic sports.[114] USADA's authority primarily flows from its relationship with the USOC and the National Governing Bodies (NGB) for individual Olympic sports.[115] Through a contractual relationship with the USOC, USADA "conduct[s] drug testing, manage[s] test results, investigate[s] potential violations of anti-doping rules, and adjudicate[s] disputes involving anti-doping rule violations for participants in the Olympic and Paralympic movements..."[116] The agency implements this mission through the USADA Protocol for Olympic Movement Testing (Protocol).[117] Under the USOC bylaws, in order for an NGB to remain a member in good standing with the USOC, it must "comply with the... policies and procedures of the independent anti-doping organization designated by the [USOC] to conduct drug testing and adjudicate anti-doping rule violations."[118] More specifically, according to the USOC National Anti-Doping Policy, NGB compliance with the USADA Protocol "shall be a condition" of USOC funding and recognition.[119]

The federal government did not provide funding to USADA until 2002, and it was not until 2006 that Congress designated USADA as the "independent national anti-doping organization for the United States."[120] The entirety of the requirements imposed upon, and powers delegated to, USADA by law are included in 21 U.S.C. § 2001. Pursuant to that statutory provision, USADA shall:

> (1) serve as the independent anti-doping organization for the amateur athletic competitions recognized by the United States Olympic Committee and be recognized worldwide as the independent national anti-doping organization for the United States;
>
> (2) ensure that athletes participating in amateur athletic activities recognized by the United States Olympic Committee are prevented from using performance-enhancing drugs or prohibited performance-enhancing methods adopted by the Agency;
>
> (3) implement anti-doping education, research, testing, and adjudication programs to prevent United States Amateur Athletes participating in any activity recognized by the United States Olympic Committee from using performance-enhancing drugs or prohibited performance-enhancing methods adopted by the Agency;
>
> (4) serve as the United States representative responsible for coordination with other anti-doping organizations coordinating amateur athletic competitions recognized by the United States Olympic Committee to ensure the integrity of athletic competition, the health of the athletes, and the prevention of use by United States amateur athletes of performance-enhancing drugs or prohibited performance-enhancing methods adopted by the Agency.[121]

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[114] *See* S. Rpt. 113-281 at 1 (2014).

[115] U.S. Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing at 2, *available at* http://www.usada.org/wp-content/uploads/USADA_protocol.pdf ("The USOC has contracted with USADA to conduct drug testing, manage test results, investigate potential violations of anti-doping rules, and adjudicate disputes involving anti-doping rule violations for participants in the Olympic and Paralympic movements... For purposes of transmittal of information by USADA, the USOC is USADA's client.").

[116] *Id.*

[117] *Id.*

[118] Bylaws of the United States Olympic Committee, effective as of September 25, 2015 at 32, *available at* http://www.teamusa.org/~/media/TeamUSA/Documents/Bylaws%20approved%209%2025%2015.pdf.

[119] United States Olympic Committee National Anti-Doping Policy, §§ 4.1-4.2, effective as of January 1, 2015 ("As a condition of membership and recognition by the USOC and in fulfillment of any contractual relationship with the USOC all [NGBs]... shall adhere, in all respects, to the applicable provisions of the... USADA Protocol...") ("NGB compliance... with... the USADA Protocol shall be a condition of USOC funding.").

[120] 21 U.S.C. § 2001(b)(1).

[121] 21 U.S.C. § 2001(b).