

The NCAA and Foreign Olympics Competitors: We May Train Our Opponents, but We Don't Have to Reward Them

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Robert Burns, in his article “Out of ‘Control’: The Operation Gold Exception and the NCAA’s Susceptibility to Lawsuit under Title VI,” paints a vivid picture of alleged discrimination by the NCAA. And, in some respects, his arguments are convincing.

Burns contends that the NCAA should be susceptible to Title VI lawsuits, due to its controlling authority over member institutions. In finding “controlling authority” — a standard referred to, though not specifically adopted, by the Supreme Court in *Nat’l Collegiate Athletic Ass’n v. Smith*² — Burns points to the NCAA’s power to impose significant punishments on its institutional members and its effective monopoly over the collegiate athletics market, leaving institutions that wish to maintain their athletics programs with no viable alternative to complying with NCAA bylaws and sanctions. Considering the sheer magnitude of the NCAA’s power over colleges and universities in the United States, from imposing bylaws and wielding sanctions to boasting an impressive \$871.6 million in annual revenue, most of which is distributed to member institutions,³ it is difficult to argue with Burns’ conclusion that the NCAA has controlling authority over its members and should thus be held liable under Title VI of the Civil Rights Act of 1964.

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² 525 U.S. 459, 461 (1999).

³ See *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited March 16, 2014) (breaking down NCAA’s 2011-12 revenue).

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Burns also rightly establishes that Title VI bars intentional discrimination⁴⁴ based on “race, color, or national origin”⁵ and that the NCAA has specifically maintained that it will not discriminate based on those factors.⁶ And, as Burns asserts, the NCAA does in fact distinguish between Olympic athletes competing for the United States and for other countries — American Olympians can keep Operation Gold Grant medal bonuses without affecting their NCAA eligibility, while athletes who competed for other nations may not keep similar bonuses.⁷

Burns’ arguments fall short, however, in one crucial aspect: The Operation Gold Grant exception does not distinguish between athletes based on *national origin* and thus cannot be held to violate Title VI or even the NCAA’s own nondiscrimination statement.

As Burns explains, NCAA Art. 12 provides that athletes lose their amateur status, and thus their NCAA eligibility, if they use their skills for any form of payment.⁸ There are two limited exceptions to that rule: the “Expenses/Benefits Related to Olympic Games” exception, providing that athletes may receive all nonmonetary

⁴ The “intentional discrimination” standard was adopted by the Court in *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

⁵ 42 U.S.C. § 2000d.

⁶ *2012-13 Guide for the College-Bound Student-Athlete*, NCAA ELIGIBILITY CENTER 3 (2012), http://grfx.cstv.com/photos/schools/afa/genrel/auto_pdf/2012-13/misc_non_event/ncaaguide.pdf.

⁷ NAT’L COLLEGIATE ATHLETIC ASS’N, 2012-13 NCAA DIVISION I MANUAL, § 12.1.2 at 62 (2012) [hereinafter NCAA MANUAL], *available at* <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁸ *Id.* at § 12 – “Amateurism”.

benefits that automatically come with being part of an Olympic team (such as entertainment, equipment, and clothing),⁹ and the “Operation Gold Grant” exception, providing that athletes may accept funds through the U.S. Olympic Committee’s Operation Gold Grant program (which grants bonuses for U.S. medal wins) without losing their eligibility.¹⁰ The former applies to athletes competing for any Olympic team; the latter, clearly, only applies to those competing for Team USA. This, Burns claims, is discrimination based on national origin.

Unfortunately, Burns’s argument conflates “national origin” and “citizenship” — or, perhaps more accurate under the circumstances, “choice of team.”

The Operation Gold Grant exception is not contingent on national origin, as it is available to anyone who wins a medal for Team USA. And, as is evident when scanning the roster and biographies of Olympics competitors for the United States in any recent Games, Team USA draws athletes with a range of national origins, all of who are eligible for those medal bonuses. The 2014 Sochi Games, for example, featured Russia native Simon Shnapir, a pairs skater;¹¹ Britain native Gus Kenworthy of the freestyle skiing team;¹² and Canada natives Laurene Ross, an alpine skier,¹³ Cam Fowler, a hockey

⁹ *Id.* at § 12.1.2.1.4.3.2 – “Expenses/Benefits Related to Olympic Games”.

¹⁰ *Id.*, § 12.1.2.1.4.1.2 – “Operation Gold Grant”.

¹¹ *Simon Shnapir*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/simon-shnapir> (last visited March 15, 2014).

¹² *Gus Kenworthy*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/gus-kenworthy> (last visited March 15, 2014).

¹³ *Laurenne Ross*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/laurenne-ross> (last visited March 15, 2014).

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defenseman,¹⁴ Paul Stastny, a hockey forward whose father was the first high-profile hockey player to defect from behind the Iron Curtain,¹⁵ and Debbie McCormick, a curler,¹⁶ to name a few. Two years ago, more than 30 naturalized citizens, many of them immigrants from Latin American countries, wore Team USA uniforms at the London Games.¹⁷ In 2008, at least 33 foreign-born athletes represented the United States at the Beijing Games, including natives of China, Britain, Russia, Kenya, Sudan, and Mexico, among others.¹⁸ The U.S. flag-bearer in Beijing embodied that spirit of cross-nationalization: Lopez Lomong, who won two NCAA championships at Northern Arizona University in 2007 shortly before becoming a U.S. citizen and donning the U.S. Olympics uniform, spent his childhood as one of the “Lost Boys of Sudan.”¹⁹

The diversity of backgrounds on Team USA comes from the fact that Olympic competitors need not compete

¹⁴ *Cam Fowler*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/cam-fowler> (last visited March 15, 2014).

¹⁵ *Paul Stastny*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/paul-stastny> (last visited March 15, 2014).

¹⁶ *Debbie McCormick*, NBC OLYMPICS, <http://www.nbcolympics.com/athlete/debbie-mccormick> (last visited March 15, 2014).

¹⁷ Maria Peña, *U.S. Olympic team shows diversity of immigrant community*, FOX NEWS LATINO (July 31, 2012), <http://latino.foxnews.com/latino/news/2012/07/31/us-olympic-team-shows-diversity-immigrant-community>.

¹⁸ David Crary, *Foreign-born athletes take Olympic stage for US*, THE ASSOCIATED PRESS (July 18, 2008), available at http://usatoday30.usatoday.com/sports/olympics/beijing/2008-07-18-immigrants_N.htm.

¹⁹ *Olympian Lopez Lomong – Northern Arizona*, NAU LUMBERJACKS, <http://www.nauathletics.com/sports/track/lomong> (last visited March 15, 2014).

for the country where they or their parents were born. Rather, the Olympic Charter requires only that they compete for a country of which they are nationals.²⁰ Coupled with the fact that dual citizens may select which of their nationalities to compete under,²¹ this has, to some extent, led to Olympic team shopping. Athletes often switch teams by pursuing citizenship of different countries to increase their chances of making it to the Olympics.²² In fact, South Korean speedskating star Ahn Hyun-soo, who became a Russian citizen specifically to compete for Russia at the Sochi Games, admitted to considering naturalization in several countries and searching around for the best deal (the U.S. barely lost out).²³

For athletes with Olympic promise, changing citizenship is generally not a difficult hurdle. In the United States, EB-1 visas for aliens of extraordinary ability allow such athletes to bypass the waiting line for permanent residency; from there, it is only a five-year wait (three, if they marry a citizen) until they can become citizens.²⁴ Often, the process is even quicker — Congress has been known to grant expedited citizenship specifically to allow Olympic hopefuls onto Team USA in time for the Games.²⁵

This means that, in reality, the NCAA's preferential treatment of Team USA members is hardly even based on

²⁰ Olympic Charter rule 41, *available at* http://www.olympic.org/Documents/olympic_charter_en.pdf at 78.

²¹ *Id.* at Bye-law to Rule 41.

²² Duff Wilson & Andrew W. Lehren, *Swapping Passports in Pursuit of Olympic Medals*, THE NEW YORK TIMES (June 15, 2008), http://www.nytimes.com/2008/06/15/sports/olympics/15citizen.html?page-wanted=all&_r=0 (last visited March 15, 2014) (listing dozens of examples of athletes who became U.S. citizens to compete for Team USA).

²³ Sam Borden, *Rejecting the U.S. to Skate for Russia*, THE NEW YORK TIMES (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/sports/olympics/ahn-rejected-us-to-skate-for-russia.html?_r=0 (last visited March 15, 2014).

²⁴ Wilson & Lehren, *supra* note 21

²⁵ *Id.*

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citizenship — which, for the record, is not generally a type of discrimination barred by Title VI.²⁶ Rather, the NCAA distinction may be more appropriately characterized as a preference based on which country the athletes opt to represent. No reading of Title VI's prohibition of discrimination based on "race, color or national origin" would require the NCAA to treat noncitizens who have chosen to compete for other countries' Olympic teams the same as members of Team USA.

As Burns points out, a large percentage of NCAA Olympians compete for countries other than the United States.²⁷ However, that fact alone does not indicate that the athletes are being discriminated against by having to choose between a medal bonus and their NCAA eligibility.

For most international students competing in the NCAA, the benefits of retaining eligibility far outweigh an Olympic medal bonus. An American education offers them access to high-quality facilities and coaching that may be instrumental in their progress to the Olympics, and, thanks to scholarships, they often get a free education worth hundreds of thousands of dollars to boot.²⁸ Forfeiting a one-time bonus is a small price to pay for the opportunity to

²⁶ In fact, distinctions based on citizenship are fairly common, including in the realm of secondary education. For example, noncitizens are not always eligible for federal student aid as citizens are. *Non-U.S. Citizens | Federal Student Aid*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/eligibility/non-us-citizens> (last visited March 15, 2014).

²⁷ See *NCAA Olympic qualifiers by school*, NCAA.COM (July 30, 2012, 11:27AM), <http://www.ncaa.com/news/ncaa/article/2012-07-30/ncaa-olympic-qualifiers-school> (last visited March 15, 2014).

²⁸ Rachel Bachman, *Schools That Train the Enemy*, THE WALL STREET JOURNAL (June 5, 2012, 7:39 PM), <http://online.wsj.com/news/articles/SB10001424052702303830204577448620436755502> (last visited March 15, 2014).

continue training in the program that helped position them for Olympic success.²⁹

Foreign-born athletes choose to compete for American colleges and universities because of the many benefits those institutions and their athletic programs provide. Similarly, those athletes choose whether to compete in the Olympics and, to a significant extent, choose which team to represent. In contrast, athletes cannot choose their race, color, or national heritage — hence the discrimination prohibitions of Title VI.

The opportunities afforded to foreign student-athletes are not without controversy, with some American coaches and Olympians saying that the U.S. should avoid “being a farm club for foreign athletes” and that training so many foreign athletes “hurts our Olympic movement, which we have to think of, first and foremost.”³⁰

Despite the dissents, the NCAA has not moved to curtail participation of foreign students in U.S. athletic programs.³¹ But at the end of the day, the American organization is still free to encourage Americans to

²⁹ On the other hand, some international students never even encounter the dilemma, having forfeited their NCAA eligibility before the Games in favor of the benefits that come with going pro. That was the case with Kirani James, who won back-to-back NCAA championships in his first two years of competition, turned pro, and then won the 400-meter sprint for Grenada at the London Games. Don Kausler Jr., *Tide's Kirani James repeats as NCAA champion in the 400-meter dash*, AL.COM (June 10, 2011, 10:31 PM), http://www.al.com/sports/index.ssf/2011/06/tides_kirani_james_repeats_as.html (last visited March 15, 2014); Tom Fordyce, *Kirani James stuns 400m rivals at London Diamond League*, BBC SPORT (Aug. 5, 2011, 9:13 PM), <http://www.bbc.com/sport/0/athletics/14427554> (last visited March 15, 2014); Christopher Clarey, *Sprinter Gives Grenada Its First Medal*, THE NEW YORK TIMES (Aug. 6, 2012), <http://www.nytimes.com/2012/08/07/sports/olympics/kirani-james-400-meters-track-and-field-roundup.html?pagewanted=all> (last visited March 15, 2014).

³⁰ Bachman, *supra* note 27.

³¹ *Id.*

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compete for Team USA in the Olympics, through the Operation Gold Grant exception.

No, the NCAA should not discriminate based on race, color, or national origin. Yes, the NCAA should be held accountable under Title VI. But the Operation Gold Grant exception is not discrimination violating Title VI, as the benefit is awarded based on choices and achievements rather than inherent characteristics such as national origin. When American-trained athletes opt to compete against America in the Olympics, the American NCAA need not reward that choice.