

THE RIDDLE OF THE RODCHENKOV ACT: CAN A NEW U.S. LAW DETER DOPING FRAUD AT THE OLYMPICS?

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Introduction

On February 6th, 15-year-old Russian figure skater Kamila Valieva became the first woman ever to land a quad at the Olympics helping the Russians win team figure skating gold over the United States. Days later, however, reports broke that Valieva had previously tested positive for a banned performance enhancing drug.¹ The International Olympic Committee (IOC) announced that while Valieva could continue skating, no medal ceremony would be held for the team event until all issues regarding her case were resolved. Consequently, nine U.S. Olympic figure skaters who competed against Valieva in the team competition and finished in second place left Beijing receiving boxes for their medals with nothing inside them.²

On February 11th, the head of the United States Anti-Doping Agency (USADA), Travis Tygart, announced the U.S. could prosecute the Russians involved in the Valieva case under the Rodchenkov Anti-Doping Act of 2019 (RADA). This new law is named after Grigory Rodchenkov, who helped orchestrate Russia's state-sponsored doping program but then blew the whistle on it in 2016. RADA makes it a federal crime to participate in doping fraud at a major international sports competition involving U.S. athletes. It grants extraterritorial jurisdiction to U.S. courts over such cases. Tygart argued that, in the Valieva case, "If there's a doctor, or a

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¹ Tariq Panja, *Kamila Valieva's sample included three substances sometimes used to help the heart. Only one is banned*, NEW YORK TIMES, (Feb. 15, 2022), <https://www.nytimes.com/2022/02/14/sports/olympics/valieva-drug-test-heart-medications.html>

² Eren Orbrey, *Nathan Chen is waiting for his silver medal*, THE NEW YORKER, (Feb. 26, 2022), <https://www.newyorker.com/culture/q-and-a/nathan-chen-is-waiting-for-his-silver-medal>.

coach, or state officials, sport official, who conspired to dope [Valieva], then [RADA] fits like a glove.”³

This note explores the legal issues surrounding the riddle of how exactly to enforce an American domestic law criminalizing doping fraud on foreign actors. Part I analyzes the first case brought under RADA in January 2022. Part II examines the investigative issues a U.S. prosecution of Russian officials could encounter. Part III argues that RADA would not be impermissibly extraterritorial if relied on in a potential American prosecution of Russian officials for doping fraud in the Valieva case.

I. The Lira Case: Proving Doping Fraud Through A Whole Of Government Approach

After RADA was signed into law by President Trump in 2020, the head of the FBI’s transnational threats unit, Joseph Gillespie, vowed to wield RADA like “a massive hammer” through the FBI’s “Integrity In Sport and Gaming” initiative to deter doping fraud.⁴ Some legal scholars were more skeptical of RADA’s potential with one commentator arguing, “You can’t bring a case if you don’t have evidence. Without the transfer of people, information, witnesses, it leads to nothing.”⁵ Yet, the first federal RADA prosecution demonstrates how U.S. authorities can engage in information sharing to establish a credible case of doping fraud conspiracy.

In January 2022, Eric Lira, a Texas doctor, was charged by the Justice Department for engaging in doping fraud. Lira allegedly provided banned drugs to multiple athletes, including Blessing Okagbare, a Nigerian sprinter, for the purpose of cheating at the Tokyo Olympics. Okagbare was disqualified in Tokyo last summer due to doping violations. The case against Lira

³ Lizzy Yee, Arnaud Siad and Aleks Klosok, *US could prosecute Russians in Kamila Valieva case, says USADA chief*, CNN, (Feb. 11, 2022), https://lite.cnn.com/en/article/h_d0e85874ced56ad7fd3f2adf202c2d8f.

⁴ Rick Maese, *Behind new law, the FBI is getting into anti-doping, but not everyone wants the help*, THE WASHINGTON POST, (Apr. 9, 2021) <https://www.washingtonpost.com/sports/2021/04/09/fbi-sports-corruption-rodchenkov-act/>.

⁵ *Id.*

was opened after a whistleblower shared photographs with the FBI showing packages of banned substances with Lira’s address on them sent to Okagbare and another athlete.⁶

The government’s complaint details how the FBI worked with multiple federal actors to compile evidence establishing a case against Lira. The complaint notes that federal agents consulted with USADA.⁷ Section 6 of RADA made this type of information sharing possible allowing the FBI to coordinate doping investigations with USADA.

When Okagbare entered the U.S. returning from the Tokyo Olympics, Customs and Border Patrol, under “their border search authority,” conducted “a limited review of [Okagbare’s] cellphone” and preserved “copies of a series of WhatsApp messages, including a series of WhatsApp encrypted voice messages” with Lira.⁸ The messages showed Okagbare requesting illegal drugs and Lira indicating he would send them.

The complaint also notes the FBI obtained Lira’s cellphone data “transmitting communications through cell towers” in New York. Lira’s text messages showed Okagbare writing, “So I took 2000ui of the E [likely erythropoietin, a blood doping agent] yesterday, is it safe to take a test this morning?” Lira replied, “Good day... 2000 ui is a low dosage.” Later, Okagbare texted Lira, “Eric my body feel so good / I just ran 10.63 in the 100m on Friday / I am sooooo happy / Whatever you did, is working so well.”⁹ These messages, U.S. prosecutors allege, show Lira schemed to commit doping fraud.

In short, the first federal prosecution under RADA involved a whole of government approach. The FBI secured Lira’s phone records, Border Patrol conducted a search of

⁶ Eddie Pells, *Texts, pictures lead to 1st doping case under new US law*, AP, (Jan. 13, 2022), <https://apnews.com/article/winter-olympics-sports-business-doping-africa-5f2c057c6978cc580a48c2ab2c8d75f5>.

⁷ Criminal complaint, *U.S. v. Lira*, 21MAG12412, (S.D.N.Y. 2021), <https://www.justice.gov/usao-sdny/press-release/file/1462091/download>

⁸ *Id.* at 6.

⁹ *Id.* at 8.

Okagbare's phone, USADA coordinated with the FBI, and a whistleblower provided photographs showing Lira sending athletes banned substances. Information sharing between federal actors, USADA, and a whistleblower was key to an effective investigation.

Another important lesson from the Lira case is that while many anti-doping investigations in the past have focused on the athletes themselves, the FBI did not charge any athlete who received banned substances from Lira. This is because RADA explicitly makes it a crime for "any person, other than an athlete" to engage in doping fraud.¹⁰ In this way, the law targets doping's enablers for their crimes as opposed to athletes. This fact has special relevance to the Valieva case because U.S. prosecutors would not be targeting Valieva but rather the Russian officials around her who may have illegally conspired to provide her with banned substances. A RADA prosecution in the Valieva doping case would therefore have the potential to deter Russian actors from engaging in doping fraud not just with Valieva but with other Russian athletes as well.

II. The Valieva Case: RADA's Role In Deterring Doping At The Olympics

A. Information Sharing:

A potential U.S. investigation of Russian officials involved in the Valieva scandal would depend on effective information sharing between federal actors just as it did in the Lira case. RADA provides U.S. officials with new tools to conduct such an investigation. First, the law protects whistleblowers who come forward with information on Russian doping by including them under existing witness protection laws. Second, RADA allows full information sharing between USADA and the federal government.¹¹ As the FBI compiles evidence, it can work with USADA which has close relationships with numerous international sports organizations and

¹⁰ 21 U.S.C.A. § 2402(a) (West).

¹¹ 21 U.S.C.A. § 2404 (West).

national anti-doping agencies in many countries. USADA may be able to provide U.S. prosecutors with guidance concerning the World Anti-Doping Code and testing procedures that national anti-doping organizations are required to follow. If WADA were willing to cooperate, USADA could establish an information sharing agreement under WADA's International Standard for Testing and Investigations that would allow the transfer of Valieva's test results and other information in WADA's possession to U.S. law enforcement.

In the Lira case, the FBI was able to procure text messages from the phone of a U.S. citizen connected to New York cell towers to expose Lira's alleged attempt to engage in doping fraud. Accessing the phone records and communications of foreign actors, including Russian officials potentially engaged in criminal conduct, is a far easier task with the investigatory tools of the U.S. intelligence community. For years, federal agencies have shared information effectively to investigate international drug trafficking schemes, RADA has now given the U.S. government a similar ability to share information between agencies during the course of doping fraud investigations.

B. Criminal Forfeiture & Restitution:

RADA has been compared to the Magnitsky Act, which allows the U.S. to freeze financial assets of human rights abusers around the world, because RADA provides for criminal forfeiture of the property of those engaged in a doping fraud conspiracy.¹² If Russian officials involved in the Valieva case have assets that can be recovered through the U.S. financial system and are convicted of doping fraud, then those assets may be subject to forfeiture. RADA's criminal forfeiture provision is similar to an FCPA enforcement action. It provides a disgorgement

¹² Rebecca Ruiz, *U.S. Lawmakers Seek to Criminalize Doping in Global Competitions*, NEW YORK TIMES, (Jun. 12, 2018), <https://www.nytimes.com/2018/06/12/sports/american-doping-criminal-law.html>.

remedy for any ill-gotten gains that result from doping fraud.¹³ The FCPA has resulted in billions of dollars of disgorgements and fines,¹⁴ so if utilized RADA's forfeiture provision likely has the potential to inflict a similar serious financial penalty for doping fraud.

Further, RADA contains a ground-breaking restitution remedy that if applied in the Valieva case could permit U.S. figure skaters and their sponsors to obtain restitution from Russian officials who are convicted of doping fraud. Until RADA, there was no available vehicle for U.S. athletes to seek damages for being defrauded by doping schemes. RADA allows for victims to recover the full extent of their losses that are the proximate result of doping fraud under the Mandatory Victim Restitution Act.¹⁵ Thus, U.S. figure skaters could potentially sue to recover the value of any sponsorship or endorsement revenue they may have obtained had they been awarded a gold medal at the Olympics. Under federal law, the Justice Department could enforce a U.S. court's restitution order through all "available and reasonable means" and victims "may secure a lien in their own names against the defendant's property in order to secure restitution, and they may bring other civil actions in their own names against the defendant."¹⁶

III. Solving the RADA Riddle: Extraterritorial Enforcement Is Justified Under The Passive Personality Principle Of International Law

RADA explicitly establishes "[t]here is extraterritorial Federal jurisdiction" to prosecute doping fraud conspiracies at major international sports competitions.¹⁷ The World Anti-Doping

¹³ Bradley Henry and Mariah Vitali, *FCPA Can Guide Foreign Parties' Anti-Doping Act Compliance*, Law360, (Jan. 7, 2021), <https://www.law360.com/articles/1341584/fcpa-can-guide-foreign-parties-anti-doping-act-compliance>.

¹⁴ *Id.*

¹⁵ 18 U.S.C.A. § 3663A(c)(1)(A)(iii) (West).

¹⁶ Restitution in Federal Criminal Cases, CONGRESSIONAL RESEARCH SERVICE, (Oct. 15, 2019), <https://sgp.fas.org/crs/misc/RL34138.pdf>.

¹⁷ 21 U.S.C.A. § 2402(b) (West).

Agency (WADA) actively lobbied against this section of the bill arguing that it would jeopardize “cooperation between nations.”¹⁸ The Russian government expressed the same concern.¹⁹

However, many nations have criminalized assisting doping fraud, including Russia.²⁰ After RADA was passed, China also made “knowingly offering banned substances to athletes” a crime.²¹ In 2015, WADA itself applauded countries who levied criminal penalties on “those individuals who are ultimately putting banned substances into the hands of athletes.” WADA noted that “given the threat of being imprisoned, these personnel are often more cooperative with anti-doping authorities.”²²

The extraterritoriality provision of RADA has not yet been addressed by a federal court as the only prosecution so far involved a Texas doctor but if there was a federal prosecution of Russian officials involved in the Valieva case, a U.S. court may exercise extraterritorial jurisdiction justifiably under the passive personality principle of international law. This principle allows for a U.S. court to assert jurisdiction when a foreign actor violates a U.S. criminal law outside the country and the victim is an American citizen. While controversial, U.S. courts have found extraterritorial jurisdiction based on the passive personality principle for crimes committed outside America by non-citizens, including failure to make child support payments,²³ and engaging in sexual contact with a minor in foreign waters where the victim was a U.S. citizen.²⁴

¹⁸ WADA, *WADA statement on U.S. Senate’s passing of the Rodchenkov Anti-Doping Act*, (Nov. 17, 2020) <https://www.wada-ama.org/en/news/wada-statement-us-senates-passing-rodchenkov-anti-doping-act>.

¹⁹ Reuters, *Russia says U.S. overreaching itself in anti-doping bill*, (Nov. 17, 2020), <https://www.reuters.com/article/uk-doping-usa-idUKKBN27X15L>.

²⁰ Genevieve F.E. Birren, *The Rodchenkov Anti-Doping Act: The United States’ Response to the Russian Doping Scandal*, 32 Marq. Sports L. Rev. 241, 253 (2021).

²¹ Xinhua, *China formally criminalizes doping*, (Dec. 27, 2020), http://www.xinhuanet.com/english/2020-12/27/c_139621535.htm.

²² WADA, *WADA Statement on the Criminalization of Doping in Sport*, (Oct. 25, 2015) <https://web.archive.org/web/20181115211159/https://www.wada-ama.org/en/media/news/2015-10/wada-statement-on-the-criminalization-of-doping-in-sport>.

²³ *United States v. Hill*, 279 F.3d 731, 740 (9th Cir. 2002).

²⁴ *United States v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002).

RADA's extraterritorial jurisdiction complies with the passive personality principle as it only applies to doping fraud conspiracies at major sports competitions where U.S. athletes are competing or where the competition is receiving financial support from a U.S. entity.

RADA builds on numerous U.S. statutes which have extraterritorial application and have been used to prosecute sports-related corruption worldwide. For example, the Justice Department indicted Russian hackers under the Computer Fraud and Abuse Act in 2018 for engaging in state-sponsored hacking operations against USADA and WADA officials computers while they were investigating Russian doping fraud.²⁵ RADA has been compared to the Racketeer Influenced and Corrupt Organizations (RICO) Act which was used by the Justice Department in 2015 to prosecute FIFA officials from around the world for corrupt activities including illegal kickbacks.²⁶ Extraterritorial jurisdiction was challenged by those FIFA officials, but U.S. courts rejected their arguments, holding that RICO and federal wire fraud statutes applied to their foreign conduct.²⁷ U.S. courts have an even stronger basis for finding that extraterritoriality is justified under RADA because Congress explicitly provided for extraterritorial jurisdiction within the text of the law. The RICO Act does not contain an explicit textual extraterritoriality provision, yet the Supreme Court has still held the law applies to conduct occurring outside America.²⁸

The most compelling argument in favor of extraterritorial enforcement under the passive personality principle is that Russian doping in the Valieva case victimized U.S. athletes. The

²⁵ U.S. Department of Justice, *U.S. Charges Russian GRU Officers with International Hacking and Related Influence and Disinformation Operations*, (Oct. 4, 2018), <https://www.justice.gov/opa/pr/us-charges-russian-gru-officers-international-hacking-and-related-influence-and>.

²⁶ U.S. Department of Justice, *Sixteen Additional FIFA Officials Indicted for Racketeering Conspiracy and Corruption*, (Dec. 3, 2015), <https://www.justice.gov/opa/pr/sixteen-additional-fifa-officials-indicted-racketeering-conspiracy-and-corruption>.

²⁷ *United States v. Hawit*, No. 15-CR-252 (PKC), 2017 WL 663542 (E.D.N.Y. Feb. 17, 2017); *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020).

²⁸ *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 340 (2016).

entire U.S. figure skating team was defrauded and deprived of an Olympic medal. This had numerous detrimental impacts on U.S. figure skaters. To begin with, U.S. athletes earn money for winning medals.²⁹ Further, as the Helsinki Commission's Paul Massaro noted, "athletes who do eventually have their medals upgraded can miss out on millions of dollars in rollovers, bonuses, and sponsorships that they would have obtained had they not been defrauded. This is in addition to the emotional toll of having been wrongfully denied a lifetime's achievement only to unceremoniously receive a medal in the mail. They do not stand on the top of the medal stand, they do not benefit from millions of people seeing them crowned as champions, and when they receive a medal later there is no fan or commercial interest in their retroactively recognized performance. For individuals who dedicate decades of their lives to the perfection of a sport, this nonchalant theft of life achievement can be devastating."³⁰

Some may object that extraterritorial enforcement of RADA is impractical as it would be difficult for U.S. prosecutors to serve process or arrest a Russian figure skating official charged with doping fraud. But the Lira case gives some insight into how this could happen. When the Nigerian athlete, Okagbare, traveled across U.S. borders, federal officials were able to detain her and search her phone. If a Russian official traveled to the U.S. for a competition, the FBI could then serve process on the official. It is also plausible that U.S. prosecutors could work with a cooperative foreign government to serve a Russian official at another international competition. During the FIFA case, the FBI worked with the Swiss government to arrest and extradite FIFA

²⁹ Brandon Penny, *U.S. Olympic Committee Significantly Increases Payments To Athletes For Olympic/Paralympic, World Medals*, UNITED STATES OLYMPIC COMMITTEE, (Dec. 13, 2016) <https://www.teamusa.org/News/2016/December/13/US-Olympic-Committee-Significantly-Increases-Payments-To-Athletes-For-Olympic-World-Medals>.

³⁰ Paul Massaro, *Getting Off the Sidelines*, AMERICAN INTEREST, (Feb. 18, 2019), <https://www.the-american-interest.com/2019/02/18/getting-off-the-sidelines/>.

officials who had been charged with violating the RICO Act.³¹ The U.S. has extradition agreements with over 100 countries around the world.³²

Others may argue that U.S. action risks impeding international cooperation on anti-doping. But the Valieva case itself demonstrates that the current international anti-doping program, which largely depends on country-by-country action, still has significant gaps. Far from displacing international anti-doping efforts which are primarily focused on athlete doping, RADA enforcement does not target athletes whatsoever but rather goes after the coaches, doctors, and state officials who enable doping fraud. In this way, RADA can be an important gap filler and add value to international efforts to promote a level playing field.

Conclusion

Few who saw it will soon forget the image of Kamila Valieva standing alone at center ice in tears at the end of her Olympic performance. “The adults in the room failed her” was the often-repeated line. If Russian officials did engage in doping fraud in the Valieva case, exposing their illegal conduct and indicting them under RADA would do more than root out corruption. A successful RADA prosecution of Russian officials has the potential to deter future doping fraud conspiracies at the Olympics and help Russian athletes from being subjected to abuse. It could also provide U.S. figure skaters who left Beijing without medals a restitution remedy. Lessons learned from the first federal prosecution under RADA and past extraterritorial application of other anti-corruption statutes including RICO and the FCPA demonstrate how RADA can be a useful tool in restoring integrity to international sports if strongly enforced.

³¹ Philip Bump, *How the U.S. can arrest FIFA officials in Switzerland, explained*, WASHINGTON POST, (May 27, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/27/how-the-us-can-arrest-fifa-officials-in-switzerland-explained/>.

³² Jonathan Masters, *What is Extradition?* COUNCIL ON FOREIGN RELATIONS, (Jan. 8, 2020), <https://www.cfr.org/backgrounder/what-extradition>