

**BRIAN L. PORTO\***

## New Rules for an Old Game: Recent Changes to the NCAA Enforcement Process and Some Suggestions for the Future

Introduction .....	1057
I. NCAA Enforcement Before August 2013: A Brief Retrospective .....	1062
II. The Miami Investigation: Catalyst for Change?.....	1069
III. The NCAA Enforcement Process Post-August 1, 2013 .....	1077
IV. No More Home-Court Advantage: A Plan to Enhance Fairness in NCAA Enforcement.....	1085
Conclusion.....	1092

### INTRODUCTION

The ancient Greek philosopher Heraclitus of Ephesus famously stated: “Nothing endures but change.”<sup>1</sup> Presumably, Heraclitus did not have the NCAA enforcement process in mind when he uttered those words. Still, his words capture the Association’s repeated attempts during the past several decades to tweak that much-maligned process in response to the complaints of its members and the critiques of outside commentators.<sup>2</sup>

---

\* Professor, Vermont Law School; J.D., Indiana University-Bloomington, 1987; Ph.D. (Political Science), Miami University (Ohio), 1979; B.A., University of Rhode Island, 1974.

<sup>1</sup> BARTLETT’S FAMILIAR QUOTATIONS 64 (Justin Kaplan ed., 17th ed. 2002).

<sup>2</sup> I have been one of the critics of the NCAA’s enforcement process, most recently in BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS (2012).

Present circumstances are no exception to the seemingly perpetual state of flux for NCAA enforcement. In mid-November, 2013, at a meeting of the presidents of the member institutions belonging to the five major athletic conferences,<sup>3</sup> change to the enforcement process was in the air.<sup>4</sup> Said University of Nebraska Chancellor Harvey Perlman, the Big Ten Conference's representative to the meeting, "[t]he enforcement mechanism is flawed. . . . I think some attention needs to be given to it. I don't think it can continue in its current form."<sup>5</sup> Echoing that sentiment, PAC-12 Commissioner Larry Scott told a reporter that NCAA-member institutions must ask "some hard questions" about what Scott called the "jury of your peers" model of enforcement, whereby employees of those institutions judge their peers who allegedly violate Association rules and punish the guilty parties.<sup>6</sup> Commissioner Scott added that the members have discussed the possibility of the NCAA "outsourcing enforcement . . . . I'd say we're only at the idea stage," Scott added, "and not very far along. . . . We're looking carefully at involving outside resources. I'm sure that's something that will be considered."<sup>7</sup>

The motivation for the potential "outsourcing" of NCAA enforcement is presumably the Association's performance in two recent cases of rules violations by member institutions, specifically Penn State and the University of Miami. The Penn State case was so unusual as to be unprecedented because it involved neither a violation of a specific NCAA rule nor wrongdoing by an athlete. Instead, it arose from numerous incidents of child sexual abuse committed, during a period of years and often in Penn State athletic facilities, by former assistant football coach Jerry Sandusky.<sup>8</sup>

The NCAA's response was unusual, too; the penalties it imposed on Penn State "resulted not from the usual NCAA enforcement

---

<sup>3</sup> The Big Ten, Big 12, PAC 12, Atlantic Coast (ACC), and Southeastern (SEC) conferences are presently the wealthiest and most prestigious conferences in college sports. George Schroeder, *Big 5 Leagues Want Flexibility but to Remain in NCAA*, USA TODAY (Dec. 11, 2013, 8:16 PM), <http://www.usatoday.com/story/sports/college/2013/12/11/big-5-conferences-img-intercollegiate-athletics-forum/3993327/>.

<sup>4</sup> Pete Thamel, *College Sports Leaders Say Major NCAA Overhaul Imminent*, SI.COM (Nov. 11, 2013, 4:48 PM), <http://sportsillustrated.cnn.com/college-football/news/ncaa-overhaul/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Brian L. Porto, *Can the NCAA Enforcement Process Protect Children from Abuse in the Wake of the Sandusky Scandal?*, 22 WIDENER L.J. 555, 555–56 (2013).

process, but instead from reliance by the Association's president, in conjunction with its Division I Board of Directors, on an investigative report [the Freeh Report] produced by a private law firm that Penn State had hired rather than by the NCAA itself."<sup>9</sup> The criticisms leveled at the NCAA in the wake of the Penn State case, then, did not attack the Association's enforcement process, but rather, the hubris of Association President Mark Emmert and the Division I Board of Directors in bypassing that process and imposing penalties themselves based on the Freeh Report.<sup>10</sup> These criticisms also voiced "concern that the ad hoc procedure the NCAA used in the Penn State case would become the Association's standard enforcement process, or at least its established emergency model, in the future."<sup>11</sup>

But the potential appeal of outsourcing NCAA enforcement derives not only from a fear that the Association will abandon its established enforcement process again, but also from dissatisfaction with that process, as reflected in the recent case against the University of Miami.<sup>12</sup> Lacking subpoena power, an NCAA investigator, who was looking into allegations that a Miami booster had showered Hurricane athletes with benefits that violated NCAA rules, became frustrated by his inability to persuade reluctant witnesses to cooperate with his investigation.<sup>13</sup> To compensate for his own lack of subpoena power, the investigator arranged with Nevin Shapiro's bankruptcy attorney for her to depose the uncooperative witnesses in connection with the bankruptcy proceeding and share their testimony with the NCAA.<sup>14</sup> That arrangement, which came to light months later, after the investigator had left the NCAA, was contrary to NCAA protocols and to the express advice that the Association's legal staff had given to the investigator.<sup>15</sup> The revelation prompted NCAA President Mark Emmert to suspend the Miami investigation pending completion of a

---

<sup>9</sup> *Id.* at 556.

<sup>10</sup> *Id.* at 556–57.

<sup>11</sup> *Id.* at 557.

<sup>12</sup> Chip Patterson, *NCAA Investigating Enforcement After Misconduct in Miami Case*, CBSSPORTS.COM (Jan. 23, 2013, 1:21 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/21604536/ncaa-investigating-enforcement-program-after-misconduct-in-miami-case>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

separate inquiry into the enforcement staff's performance in the Miami case.<sup>16</sup>

The aggregate fallout from the Penn State and Miami cases undoubtedly spurred Dr. Emmert's decision to retain Kenneth Wainstein, a partner with the law firm of Cadwalader, Wickersham & Taft, LLP, to look into the NCAA's botched investigation of Miami.<sup>17</sup> According to Chuck Smrt, a former NCAA investigator who now assists universities with NCAA rules compliance, the hiring by the NCAA of an outside entity to investigate a claim of misconduct by the enforcement staff was unprecedented.<sup>18</sup> In the past, the Association had always used its own employees to conduct such investigations.<sup>19</sup> Smrt observed, "What is different it seems here, is that Dr. Emmert believes the severity of whatever alleged impropriety occurred reached that level where he decided to go outside with the review."<sup>20</sup>

Despite the fallout from the Penn State and Miami cases, it is ironic that the NCAA enforcement process is under scrutiny again at this writing because a major revision of that process took effect as recently as August 1, 2013.<sup>21</sup> That revision followed on the heels of a "Presidential Retreat" held during the summer of 2011, when approximately fifty university presidents and chancellors gathered to address several important issues confronting college sports.<sup>22</sup> The Division I Board of Directors, an eighteen-member body comprised of university presidents, conference commissioners, and directors of athletics, established five "working groups," each one chaired by a college or university president, to draft NCAA legislation.<sup>23</sup> One of the five groups was the Enforcement Working Group, which, according to one recent commentary, "substantially revamped the

---

<sup>16</sup> George Schroeder, *NCAA to Launch External Review of Enforcement Program*, USA TODAY (Jan. 24, 2013, 12:46 AM), <http://www.usatoday.com/story/sports/ncaaf/2013/01/23/ncaa-external-review-enforcement-university-of-miami-fla/1858857/>.

<sup>17</sup> *Review Launched of Enforcement Surrounding Miami Investigation*, NCAA.COM (Jan. 23, 2013, 1:43 PM), <http://www.ncaa.com/news/ncaa/article/2013-01-23/review-launched-enforcement-surrounding-miami-investigation>.

<sup>18</sup> Schroeder, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *New Violation Structure*, NCAA.ORG (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-violation-structure>.

<sup>22</sup> Timothy Davis & Christopher T. Hairston, *NCAA Deregulation and Reform: A Radical Shift of Governance Philosophy?*, 92 OR. L. REV. 77, 79 (2013).

<sup>23</sup> *Id.* at 78–79.

NCAA enforcement and infractions process.”<sup>24</sup> The major changes include (1) increasing the number of categories of violation from two to four; (2) expanding the membership of the Committee on Infractions (COI); and (3) toughening the consequences for coaches who fail to direct their staffs and athletes to follow NCAA rules.<sup>25</sup>

Despite the recent changes to the NCAA’s enforcement process, dissatisfaction persists in the wake of the investigatory missteps in the Miami case, as evidenced by the comments quoted earlier regarding the process being “flawed” and the need to bring “outside resources” to bear in improving it.<sup>26</sup> The dissatisfaction centers not on the categorization of violations or the nature of penalties, which were the focus of the August 2013 reforms, but instead, on who investigates and adjudicates alleged infractions of NCAA rules. One journalist reflected such dissatisfaction when he asked, “Why not outsource the entire enforcement operation to a third party?”<sup>27</sup>

Part I of this Article will briefly describe the workings of the NCAA enforcement process before the August 2013 changes. Part II will examine the Miami investigation, which was conducted under the pre-August 2013 rules and which has surely contributed to the present dissatisfaction with NCAA enforcement. Part III will outline the recent changes in more detail than they are discussed above, and Part IV will present a plan whereby the NCAA would delegate investigations and adjudications of “severe” (Level I) and “significant” (Level II) violations of NCAA rules to outside investigators and judges. Finally, Part V will conclude that, although the recent changes to the NCAA enforcement process are generally positive, they overlook the need for fair, independent investigation and adjudication. This Article will recommend a plan designed to meet these needs.

---

<sup>24</sup> *Id.* at 80.

<sup>25</sup> Stuart L. Brown, Mark Jones & Carrie R. McCaw, *New NCAA Division I Enforcement Model*, ICEMILLER LEGAL COUNS. (Dec. 20, 2012), <http://www.icemiller.com/ice-on-fire-insights/publications/the-ncaa-infractions-enforcement-process-role-of-c/>.

<sup>26</sup> Thamel, *supra* note 4.

<sup>27</sup> Stewart Mandel, *NCAA Needs to Reevaluate Entire Enforcement Model*, SI.COM (Feb. 18, 2013, 8:22 PM), <http://sportsillustrated.cnn.com/college-football/news/20130218/ncaa-miami-investigation-julie-roe-lach/>.

## I

NCAA ENFORCEMENT BEFORE AUGUST 2013: A BRIEF  
RETROSPECTIVE

The NCAA, a voluntary association comprised of more than 1200 public and private four-year colleges and the athletic conferences to which those colleges belong, is the primary regulatory body in college sports.<sup>28</sup> It “regulates athletic competition among its members” (e.g., establishing game rules, eligibility standards for athletes, and lengths of competitive seasons), “conducts several dozen championship events in the sports sanctioned by the association, enters into television and promotional contracts relating to these championship events, and enters into agreements to license the NCAA name and logos.”<sup>29</sup>

The NCAA’s regulatory role also encompasses investigating allegations of rules violations, adjudicating disputes arising from those allegations, and penalizing guilty parties.<sup>30</sup> The Association established its first enforcement program in 1948 to address recruiting violations, and in 1951, it established the COI, which still exists, to investigate allegations and adjudicate cases against alleged rules violators.<sup>31</sup> In 1973, the NCAA’s in-house enforcement staff took control of the investigations, while the COI concentrated on conducting hearings and deciding cases.<sup>32</sup> The close working relationship between the investigators and the adjudicators led to charges that the NCAA had an unfair “home-court advantage” over accused parties in its COI hearings, which produced a high “conviction” rate for the Association, but denied even a reasonable facsimile of due process to accused individuals and institutions.<sup>33</sup> Of the relationship between the enforcement staff and the COI, one commentator stated: “The same people [who] investigate cases serve as staff support for the committee that must eventually rule on the quality and outcome of those investigations. It’s as if the police officer [who] arrested you also clerked for the judge [who] tried you.”<sup>34</sup>

---

<sup>28</sup> Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 559 (2011).

<sup>29</sup> RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS 2-3* (6th ed. 2006).

<sup>30</sup> Weston, *supra* note 28, at 563.

<sup>31</sup> PORTO, *supra* note 2, at 100.

<sup>32</sup> *Id.* at 101.

<sup>33</sup> *Id.*

<sup>34</sup> DON YEAGER, *UNDUE PROCESS: THE NCAA’S INJUSTICE FOR ALL* 131 (1991).

The enforcement process operated under a “cooperative principle,” whereby the NCAA expected the enforcement staff and the accused institution to work together to determine whether the latter had indeed violated one or more Association rules.<sup>35</sup> But in 1978, Burton Brody, a professor of law at the University of Denver and its faculty athletic representative to the NCAA, told a congressional subcommittee investigating the Association’s enforcement process that the cooperative principle was a euphemism.<sup>36</sup> He testified that NCAA investigations were “cooperative only in the same sense ancient Rome’s system of capital punishment was cooperative—the condemned is expected to carry his cross to the crucifixion.”<sup>37</sup> Referencing the investigation of his own institution by the NCAA some years earlier, Professor Brody characterized the enforcement process as follows: “It is at best a burlesque of fairness. No evidence was presented; only the conclusions of staff members. No witnesses were called. The only ‘testimony’ was by the enforcement staff member, without oath, stating the rankest sort of mixture of hearsay and opinion as part of his prosecutorial arguments.”<sup>38</sup>

Although the congressional subcommittee declined to impose any particular reforms on the NCAA, concluding that self-reform was both “possible and preferable,” its majority report was highly critical of the enforcement process, especially “the appearance of an ‘inescapable relationship’ between infractions committee members and the prosecutorial enforcement staff, giving rise to an unbeatable ‘home court advantage.’”<sup>39</sup> And although the NCAA declined to adopt most of the recommendations offered in the majority report,<sup>40</sup>

---

<sup>35</sup> PORTO, *supra* note 2, at 101.

<sup>36</sup> SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 95TH CONG., REP. ON ENFORCEMENT PROGRAM OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 14 (Comm. Print 1978) [hereinafter REP. ON ENFORCEMENT PROGRAM] (statement of Burton Brody).

<sup>37</sup> PORTO, *supra* note 2, at 104 (citation omitted).

<sup>38</sup> RICHARD HARP & JOSEPH MCCULLOUGH, TARKANIAN: COUNTDOWN OF A REBEL 159 (1984).

<sup>39</sup> REP. ON ENFORCEMENT PROGRAM, *supra* note 36, at 32; *see also* Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651, 1656 (1994).

<sup>40</sup> The subcommittee’s recommendations that the NCAA did not adopt included: (1) creating a new entity to supervise the enforcement staff during investigations; (2) hiring a fulltime clerk, preferably a lawyer, to draft an opinion explaining the outcome and the underlying reasoning in each enforcement case; (3) establishing evidentiary standards by which to judge the accuracy of information presented during COI hearings; (4) ending the practice of conducting *ex parte* interviews with sources who made allegations against

at its annual convention in 1979, it approved “proposals to let persons accused of infractions be represented by counsel at hearings before the COI, establish evidentiary standards for those hearings, and set a time limit for reviewing alleged violations (i.e., a statute of limitations).”<sup>41</sup> Still, the NCAA’s rejection of the bulk of the subcommittee’s suggestions prompted a steady stream of journalistic and academic criticism of the enforcement process as being unfair to accused individuals and institutions, which continued long after the gavel came down on the 1978 hearings.<sup>42</sup>

Indeed, the criticism continued even after the NCAA won a major victory against its critics in 1987,<sup>43</sup> when the United States Supreme Court held that the Association was not a “state actor” within the meaning of the Fourteenth Amendment.<sup>44</sup> The Court reasoned that the NCAA had not violated the Constitution in trying to remove Jerry Tarkanian from his coaching position at UNLV because, as a private entity, it was not required to meet constitutional standards of due process.<sup>45</sup> Evidently, the NCAA heard the critics because in 1991 it appointed a committee chaired by former Solicitor General Rex Lee (who had argued the NCAA’s case against Jerry Tarkanian in the Supreme Court) to evaluate its enforcement process and adopted several of the Lee Committee’s recommendations for enhancing due process in enforcement proceedings.<sup>46</sup>

Specifically, at its 1993 national convention, the NCAA established

---

individuals and institutions; (5) opening COI hearings not just to accused institutions, but anyone whose eligibility or employment was at risk because of the enforcement proceedings; (6) narrowing the scope of appeals from reconsideration of the evidence to just reviewing possible errors by the COI in determining culpability or in imposing a penalty; (7) ending the practice of institutions suspending coaches or declaring athletes ineligible at the NCAA’s behest, replacing it with direct imposition of sanctions by the NCAA itself; and (8) eliminating the NCAA’s “restitution rule,” which enabled the Association to punish individuals and institutions retroactively “if and when court actions are ultimately resolved in favor of the NCAA.” PORTO, *supra* note 2, at 106–08 (quoting REP. ON ENFORCEMENT PROGRAM, *supra* note 36, at 51); *see generally* REP. ON ENFORCEMENT PROGRAM, *supra* note 36.

<sup>41</sup> PORTO, *supra* note 2, at 109; *see also* HARP & MCCULLOUGH, *supra* note 38, at 171.

<sup>42</sup> *See, e.g.*, C. Peter Goplerud, III, *NCAA Enforcement Process: A Call for Procedural Fairness*, 20 CAP. U. L. REV. 543 (1991); YEAGER, *supra* note 34.

<sup>43</sup> *See, e.g.*, Robin J. Green, Note, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 109–10 (1992).

<sup>44</sup> *See Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192–99 (1988).

<sup>45</sup> *Id.*

<sup>46</sup> PORTO, *supra* note 2, at 147.



(1) a preliminary notice of impending investigation (NOI); (2) a summary disposition procedure in certain cases of major rules violations; (3) an appellate body, the IAC [or Infractions Appeals Committee]; (4) a mechanism for expanded public reporting of COI decisions; and (5) a conflict-of-interest policy for members of the NCAA's enforcement staff.<sup>47</sup>

The Association also approved the use of tape recorders by its investigators when interviewing witnesses, and required those investigators to provide to accused institutions and individuals "reasonable access to pertinent information, including tape recordings of interviews and documentary evidence."<sup>48</sup>

Despite this progress, criticism of the NCAA enforcement process continued. Indeed,

even after the Supreme Court, in *Tarkanian*, had absolved the NCAA of any duty to provide due process in its enforcement proceedings, the Association continued to feel pressure from several quarters to enhance the fairness of those proceedings voluntarily. That pressure continued through the 1990s and into the new millennium, and it included a hearing held by the House Judiciary Committee's Subcommittee on the Constitution in September 2004.<sup>49</sup>

In 1991, two members of the House of Representatives introduced bills to overrule the Supreme Court's *Tarkanian* decision and to require the NCAA to adopt stricter due process protections for the institutions and individuals against whom the NCAA brought enforcement proceedings. Edolphus Towns (D-NY) introduced H.R. 2157, the Coach and Athlete's Bill of Rights.<sup>50</sup> This legislation "would have reversed the *Tarkanian* decision by requiring the NCAA to provide due process protection to any institution, coach, or athlete whom it investigated for allegedly violating Association rules."<sup>51</sup> According to the Towns bill, the NCAA was a state actor "when the

---

<sup>47</sup> *Id.* Interestingly, the major Lee Committee recommendations that the NCAA rejected are similar to recommendations this Article will offer, namely that the NCAA "establish a group of neutral former judges as hearing offices entrusted with resolving factual disputes before the Infractions Committee decides penalties, and . . . open[] up the Infractions Committee hearings to the public except when highly confidential matters are being presented." *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 14 n.27 [hereinafter *Due Process and the NCAA*].

<sup>48</sup> YASSER ET AL., *supra* note 29, at 98–99.

<sup>49</sup> PORTO, *supra* note 2, at 148.

<sup>50</sup> H.R. 2157, 102d Cong. (1st Sess. 1991).

<sup>51</sup> PORTO, *supra* note 2, at 156.

final or decisive act of suspending or reprimanding a coach, player, or institution of higher education is carried out as a result of sanctions imposed, or the threat of sanctions, by the NCAA upon such coach, player, or institution.”<sup>52</sup>

Also in 1991, Tom McMillen (D-MD) introduced the Collegiate Athletics Reform Act,<sup>53</sup> which would have given the NCAA a five-year exemption from the antitrust laws, enabling it to regain the control of televised college football it had lost in 1984 when the Supreme Court had invalidated the Association’s longstanding Football Television Plan on antitrust grounds.<sup>54</sup> In return for conferring a temporary antitrust exemption on the NCAA,

the McMillen bill would have required the Association to honor the constitutional guarantee of due process before suspending or reprimanding a coach or player from a member institution, prohibiting a member institution from participating in an amateur athletic event, or suspending a member institution’s right to televise athletic events featuring its teams.<sup>55</sup>

Thus, both the McMillen bill and the Towns bill sought to effectively overturn the Supreme Court’s decision in *NCAA v. Tarkanian*; however, neither bill was enacted.<sup>56</sup>

The *Tarkanian* decision remains the law today, so absent congressional legislation imposing more stringent standards of fairness in NCAA enforcement proceedings, “only the NCAA’s own version of due process will constrain it.”<sup>57</sup> Admittedly, the NCAA’s version of due process has expanded and improved since the dark days of the 1970s, when it set its sights on Jerry Tarkanian.<sup>58</sup> As of 2013, just before the most recent enforcement changes took effect, the NCAA’s due process protections included:

notice of an inquiry and notice of specific allegations;

a right to be represented by counsel for both individuals and institutions;

---

<sup>52</sup> H.R. 2157.

<sup>53</sup> H.R. 3046, 102d Cong. (1st Sess. 1991).

<sup>54</sup> See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

<sup>55</sup> PORTO, *supra* note 2, at 157 (citing David Williams, II, *Is the Federal Government Suiting Up to Play in the Reform Game?*, 20 CAP. U. L. REV. 621, 635 (1991)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 160–61.

<sup>58</sup> *Id.* at 161.

the tape-recording of witness interviews unless the interviewee objects;

a four-year statute of limitations (subject to exceptions), meaning that any alleged violation presented to the COI must have occurred within four years before notification that an investigation has begun;

notice of the witnesses and the information on which the NCAA staff will rely during the hearing;

a prohibition on the consideration of information from confidential sources;

recording and transcription of the COI hearing;

a burden of proof resting with the NCAA; and

the opportunity for an appeal.<sup>59</sup>

These guarantees are a far cry from the meager protections that were available to Jerry Tarkanian in the 1970s, when his case began. He was entitled to a lawyer and an appeal, but the NCAA nonetheless enjoyed a tremendous procedural advantage, because “it controlled the flow of information during the enforcement process. Tarkanian did not know what evidence the NCAA staff would present against him, and much of that evidence was the investigators’ recollections, from handwritten notes, of their interviews with witnesses. Tarkanian did not have access to those notes.”<sup>60</sup> Thus, “[t]he most significant improvements since Jerry Tarkanian’s day are the tape-recording of witness interviews and the notice to accused individuals and institutions of the witnesses and information on which the NCAA investigative staff will rely.”<sup>61</sup>

Still, as will become clearer in Part IV, in light of the high stakes involved for coaches and athletes in today’s high-dollar world of commercialized college sports, the protections noted above fall short of providing fairness to individuals and institutions in NCAA enforcement proceedings. Such sentiments were evident during hearings held on the NCAA’s enforcement process by the House Judiciary Committee’s Subcommittee on the Constitution in September 2004. The subcommittee’s chair, Representative Steve Chabot (R-OH), voiced the concern of some of his colleagues that although NCAA enforcement procedures were fairer in 2004 than

---

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 161–62.

<sup>61</sup> *Id.* at 161.

they had been previously, they still fell short of ensuring due process.<sup>62</sup> Furthermore, “Mr. Chabot noted that in the wake of the Lee Committee’s report, the Association had strengthened its appellate system for infractions, providing more protections for schools, athletes, and coaches.”<sup>63</sup> He added, though, that the NCAA had not adopted “the 1991 study’s recommendations to hire independent judges to hear infractions cases and to open infractions hearings to the public.”<sup>64</sup>

Witness comments also reflected frustration with the continued shortcomings of the NCAA enforcement process. B. David Ridpath, then a professor of sports administration at Mississippi State University and a former assistant athletic director for compliance at Marshall University, recommended “opening up the infractions and hearing process to the public,” establishing “an independent Committee on Infractions, [excluding] anybody from [NCAA] member institutions,” and “due process for all” involved in an NCAA investigation, including athletes, coaches, and athletic department employees.<sup>65</sup> Similarly, Gary Roberts, then a professor at Tulane University Law School, testified:

I believe that both the Committee on Infractions and the Infractions Appeals Committee in Division I should be composed of paid professional jurists—not necessarily current or former public judges, but highly respected individuals with training in law and dispute resolution whose motives, knowledge, and skill could not reasonably be doubted.<sup>66</sup>

The subcommittee did not act on these recommendations, so the frustrations expressed by Professors Ridpath and Roberts in 2004 remain ten years later, having been heightened by the NCAA’s overreaching in the Miami investigation, as evidenced by the reference quoted earlier about “outsourcing” NCAA investigations to third parties.<sup>67</sup> Part II will discuss the Miami investigation as illustrative of some of the continuing shortcomings of the NCAA enforcement process.

---

<sup>62</sup> *Id.* at 148.

<sup>63</sup> *Id.* (citation omitted).

<sup>64</sup> *Id.* (citation omitted).

<sup>65</sup> *Due Process and the NCAA*, *supra* note 47, at 111 (testimony of B. David Ridpath, Assistant Professor of Sport Administration, Mississippi State University).

<sup>66</sup> *Id.* at 16 (testimony of Gary R. Roberts, Deputy Dean, Director of Sports Law, Tulane Law School).

<sup>67</sup> Mandel, *supra* note 27.

## II

## THE MIAMI INVESTIGATION: CATALYST FOR CHANGE?

Recall that when the NCAA discovered its investigator had obtained information during the University of Miami investigation to which the Association was not entitled, the COI decided that the tainted information, which had been obtained from depositions taken during bankruptcy proceedings, would be excluded in Miami's enforcement proceedings. Accordingly, the enforcement staff did not rely on any of that information before or during the COI hearing.<sup>68</sup> The investigation itself dated back to 2011, when Nevin Shapiro was sentenced to a twenty-year prison term for operating a Ponzi scheme and told the NCAA he previously gave cash and other impermissible gifts to University of Miami athletes.<sup>69</sup>

More precisely, Shapiro pleaded guilty to securities fraud and money laundering in September 2010 in connection with his Ponzi scheme and received the twenty-year prison sentence in June 2011.<sup>70</sup> He had used his company, Capitol Investments USA, Inc., "to raise approximately \$930 million from individuals who believed they were investing in a grocery-distribution business."<sup>71</sup> The Ponzi scheme collapsed in 2009, and the investors forced Shapiro and his company into an involuntary Chapter 7 bankruptcy proceeding.<sup>72</sup>

In February 2011, Shapiro contacted the NCAA's enforcement staff to discuss his allegations against Miami and told them that he had used proceeds from the Ponzi scheme to benefit Miami athletes with the knowledge of certain Miami coaches and staff.<sup>73</sup> As if that news were not bad enough, the NCAA learned in the late summer and early fall of 2012 that its enforcement staff had improperly retained Mr. Shapiro's attorney, Maria Elena Perez, to use the depositions she would take in Shapiro's bankruptcy proceeding to help the

---

<sup>68</sup> *University of Miami Lacked Institutional Control Resulting in a Decade of Violations*, NCAA.ORG (Oct. 22, 2013), <http://www.ncaa.org/about/resources/media-center/press-releases/university-miami-lacked-institutional-control-resulting>.

<sup>69</sup> David Wharton, *Review of NCAA Enforcement Program is Completed*, L.A. TIMES (Feb. 6, 2013), <http://articles.latimes.com/print/2013/feb/06/sports/la-sp-0207-ncaa-enforcement-20130207>.

<sup>70</sup> KENNETH L. WAINSTEIN ET AL., REPORT ON THE NCAA'S ENGAGEMENT OF A SOURCE'S COUNSEL AND USE OF THE BANKRUPTCY PROCESS IN ITS UNIVERSITY OF MIAMI INVESTIGATION 6 (2013).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 6–7.

Association determine what violations Miami had committed and who was responsible.<sup>74</sup> The NCAA quickly retained Kenneth L. Wainstein, a partner with the law firm of Cadwalader, Wickersham & Taft LLP, to investigate and announced that the enforcement staff would suspend the Miami matter “until all the facts surrounding [the alleged improper employment of Ms. Perez] are known.”<sup>75</sup>

When their investigation was complete, Mr. Wainstein and his colleagues filed a report, which focused on “whether NCAA Enforcement Staff took inappropriate steps in their efforts to secure testimony and records through the bankruptcy process, and if so, to determine how that happened.”<sup>76</sup> The NCAA lacked subpoena power; hence it could not compel testimony from reluctant witnesses by means outside of its enforcement program, which included the bankruptcy process.<sup>77</sup> Aware that the Association was facing uncooperative and unreliable witnesses in the Miami investigation, Attorney Perez, who was Mr. Shapiro’s criminal lawyer, told NCAA Director of Enforcement Ameen Najjar that she could assist the Association’s investigation.<sup>78</sup> Her plan was to qualify to represent Mr. Shapiro in his bankruptcy case and then “us[e] bankruptcy subpoenas to compel deposition[] [testimony] from witnesses who had refused to cooperate with the NCAA.”<sup>79</sup>

The Association’s legal staff, which is separate from the enforcement staff, considered the Perez proposal and advised Mr. Najjar that the enforcement staff should not hire Ms. Perez to take bankruptcy depositions for the Association.<sup>80</sup> Nonetheless, Mr. Najjar, acting on his own authority, accepted her proposal and began coordinating depositions.<sup>81</sup> Indeed, Mr. Najjar lied to his superiors on the enforcement staff, assuring them that the legal staff had approved the Perez proposal.<sup>82</sup> Evidently, he rationalized proceeding with the depositions by concluding that under his arrangement with Ms. Perez, the NCAA would not be “hiring” or “retaining” her, but rather, would

---

<sup>74</sup> Patterson, *supra* note 12.

<sup>75</sup> *Id.*

<sup>76</sup> WAINSTEIN ET AL., *supra* note 70, at 1.

<sup>77</sup> Patterson, *supra* note 12.

<sup>78</sup> WAINSTEIN ET AL., *supra* note 70, at 2.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

merely be reimbursing her for costs she incurred by taking the depositions.

Unfortunately for the NCAA, Mr. Najjar did not bother to check with the legal staff to learn whether his “reimbursement” plan would change the lawyers’ minds about obtaining the deposition testimony.<sup>83</sup> Perhaps he surmised that the new plan would not make any difference to the legal staff because the two major barriers to hiring Ms. Perez to take depositions would remain: (1) under NCAA protocols, only the legal staff could hire outside counsel, and (2) the deposition arrangement was an effort to circumvent the NCAA’s lack of subpoena power, hence to obtain information to which the Association was not entitled.<sup>84</sup> As a result, the enforcement staff did not learn that the legal staff had nixed Mr. Najjar’s plan until after he had left the NCAA’s employ in May 2012.<sup>85</sup>

Meanwhile, between December 2011 and June 2012, Ms. Perez submitted invoices to the NCAA requesting reimbursement for costs, including copying, a court reporter, and the rental of a conference room.<sup>86</sup> These invoices did not raise any red flags at the NCAA, so the enforcement staff paid them.<sup>87</sup> But in August 2012, Ms. Perez sent the Association an invoice for her billable hours in the amount of \$57,115 (\$350 per hour), which raised a large, bright red flag in the mind of Julie Roe Lach, the NCAA’s Vice President for Enforcement, who had been Mr. Najjar’s immediate supervisor when he worked at the NCAA.<sup>88</sup> Ms. Lach “had told Mr. Najjar that his budget for working with Ms. Perez was \$15,000.”<sup>89</sup>

Faced with Ms. Perez’s bill, the enforcement staff consulted with the legal staff about some of her charges, whereupon both staffs discovered that Mr. Najjar had acted without authority, causing Ms. Perez to take two depositions, contrary to the legal staff’s advice.<sup>90</sup> The two staffs agreed to pay Ms. Perez \$18,000 for her costs and services and to sever the NCAA’s relationship with her.<sup>91</sup> The NCAA

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 16.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 23.

<sup>87</sup> *Id.* at 23–24.

<sup>88</sup> *Id.* at 24.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 25.

<sup>91</sup> *Id.*

informed the University of Miami and the public about the misstep in its investigation and, as noted earlier, retained Mr. Wainstein to look into the Association's attempt to acquire bankruptcy deposition testimony in the Miami case.<sup>92</sup> At that point, Dr. Emmert, the NCAA president, suspended the Miami case until after completion of the Wainstein investigation.<sup>93</sup>

Meanwhile, individuals from the enforcement and legal staffs removed from the investigative record in the Miami case any information the NCAA had derived, either directly or indirectly, from the two depositions Ms. Perez took.<sup>94</sup> According to the Wainstein Report, this decision, which the legal staff made in consultation with Dr. Emmert, was based not on a particular NCAA bylaw, but instead on the "fruit-of-the-poisonous-tree" concept in Fourth Amendment law, which bars the use of evidence obtained from an illegal search in court proceedings.<sup>95</sup> The result of these exclusions was that the NCAA removed some factual allegations from the record in their entirety and removed portions of other allegations.<sup>96</sup>

The Wainstein Report concluded that both the Legal Staff and the Enforcement Staff behaved appropriately once they realized Mr. Najjar had acted contrary to legal advice in going forward with the Perez proposal.<sup>97</sup> Despite determining that no "NCAA employee knowingly violated a specific [NCAA] bylaw or [state or federal] law,"<sup>98</sup> the Report nevertheless observed that "it was simply not reasonable for Mr. Najjar to proceed with Ms. Perez's proposal in light of the clear advice to the contrary from the Legal Staff."<sup>99</sup> And despite determining that the arrangement agreed to by Mr. Najjar and Ms. Perez did not violate any bankruptcy rule,<sup>100</sup> the Report opined that both Mr. Najjar and his bosses paid "insufficient attention to the concern that the Perez proposal could constitute a manipulation of the bankruptcy process."<sup>101</sup> The Report added that Mr. Najjar's immediate supervisor, Ms. Lach, and her supervisor, Tom Hosty

---

<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.* at 49.

<sup>94</sup> *Id.* at 25.

<sup>95</sup> *Id.* at 27.

<sup>96</sup> *Id.* at 28.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 30.

<sup>101</sup> *Id.* at 4.



(Managing Director of Enforcement),<sup>102</sup> “exercised insufficient oversight of Mr. Najjar’s handling of the Perez proposal and . . . failed to detect and rectify the problems with the Perez proposal for almost a full year.”<sup>103</sup>

The Report also made clear that, “unlike Mr. Najjar, . . . Ms. Lach never *knowingly* took any steps that were inconsistent with legal advice. . . . The facts clearly indicate,” the Report continued, “that Ms. Lach went along with the Perez proposal only because Mr. Najjar assured her that the Legal Staff had approved it.”<sup>104</sup> Still, the Report found that “[n]either Ms. Lach nor Mr. Hosty examined the Perez proposal carefully enough to appreciate the prudential concerns it raised,” and that “[n]either Ms. Lach nor Mr. Hosty checked with [the] Legal Staff to confirm that [the Legal Staff] had reversed [its] original advice and accepted Mr. Najjar’s ‘way around’” the lawyers’ objections to the Perez proposal.<sup>105</sup> Similarly, among the Report’s “General Findings” were that “Mr. Najjar adopted and Ms. Lach and Mr. Hosty went along with the Perez proposal without sufficiently considering whether it was consistent with the NCAA membership’s understanding about the limits of the Enforcement Staff’s investigative powers.”<sup>106</sup>

Thus, the Wainstein Report answered the question it had set out to answer, namely, how the NCAA came to adopt and approve paying “a source’s attorney to insert herself into an ongoing bankruptcy proceeding and to use its subpoena power to compel depositions from uncooperative witnesses.”<sup>107</sup> The answer, according to the Wainstein Report, lay in a “series of missteps.”<sup>108</sup> Noting that “the Perez proposal was unquestionably a bad idea for the NCAA,”<sup>109</sup> the Report concluded that “[t]he decision to forge ahead with [it] in the face of

---

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.* at 42.

<sup>105</sup> *Id.* at 49. At about the same time the Wainstein Report was released, NCAA President Mark Emmert fired Ms. Lach, who had worked for the NCAA for fifteen years. Dana O’Neil, *Prez Leaves Accountability to Others*, ESPN.COM (Feb. 18, 2013), <http://espn.go.com/espn/print?id=8960028&type=story>.

<sup>106</sup> *Id.* at 51.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 52.

<sup>109</sup> *Id.*

significant concerns reflected both a lapse of judgment and an insufficient regard for the NCAA's reputation and its credibility."<sup>110</sup>

As noted earlier, the Wainstein investigation temporarily suspended the NCAA's inquiry into alleged infractions by the University of Miami.<sup>111</sup> Once the Wainstein Report was published, in February 2013, the NCAA's investigation of Miami resumed absent evidence derived—either directly or indirectly—from the two bankruptcy depositions taken by Ms. Perez.<sup>112</sup> The Miami investigation concluded in October 2013 when the COI announced its findings and its penalties against the Hurricanes.<sup>113</sup> Those findings addressed eighteen allegations, with seventy-nine subparts, and the written record, which included 118 interviews of eighty-one individuals, filled fifteen binders, and totaled several thousand pages.<sup>114</sup>

The investigation ultimately found numerous violations of NCAA rules in Miami's football program between 2002 and 2010 involving Nevin Shapiro, who, in the salad days of his Ponzi scheme, had provided cash, meals, lodging, transportation, and other benefits to approximately thirty current and prospective Hurricane athletes, some of which he gave to identify and secure new clients for a sports agency business in which he had invested.<sup>115</sup> For its part, the University, specifically its athletic department, had failed to take "any significant steps" to educate Mr. Shapiro about NCAA rules or to "monitor his activities" despite his "uncommon access [including leading the team out of the locker room onto the field at home games] to [athletic department] staff and athletes."<sup>116</sup>

Not surprisingly, under these circumstances the NCAA found Miami responsible for a "lack of institutional control" for failing to oversee Mr. Shapiro's athletic boosterism and for maintaining what the COI termed "a culture of noncompliance" with NCAA rules in the athletic department.<sup>117</sup> According to the COI, Miami lacked procedures for athletic department staff members to report potential

---

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 49.

<sup>112</sup> *Id.* at 25.

<sup>113</sup> See NCAA, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT (2013).

<sup>114</sup> *Id.* at 3.

<sup>115</sup> *Id.* at 33, 35–37.

<sup>116</sup> *Id.* at 33.

<sup>117</sup> *Id.* at 56.

rules violations without fear of retribution.<sup>118</sup> Furthermore, the policies Miami did have were generally ignored or applied unevenly.<sup>119</sup>

As a result, the COI imposed numerous penalties on the University and several of its current and former coaches, including three years of probation ending on October 21, 2016.<sup>120</sup> The football program will lose three scholarships per year in 2014–15, 2015–16, and 2016–17.<sup>121</sup> One former Miami assistant football coach may not recruit players for his current institution until June 10, 2014, may not receive performance raises or bonuses until May 21, 2015, and must attend NCAA regional rules seminars in 2014 and 2015.<sup>122</sup> That coach is also subject to a two-year show-cause order ending October 21, 2015, meaning that if he leaves his current institution and seeks to work at another NCAA-member institution before the above date, the new employer would have to show cause why the NCAA should not limit his athletically related duties based on his previous rules violations.<sup>123</sup> A second former assistant football coach will also be subject to a show-cause order, plus required attendance at NCAA regional rules seminars during the show-cause period, if he seeks employment at an NCAA-member school in the future.<sup>124</sup>

Similarly, the COI reduced Miami's men's basketball scholarship allotment by one per year in 2014–15, 2015–16, and 2016–17.<sup>125</sup> The former head coach was suspended for the first five games of his current institution's 2013–14 season.<sup>126</sup> The suspension prohibited him from participating not only in the games themselves, but also in team travel, practice, film study, and team meetings.<sup>127</sup> He was also required to attend an NCAA rules seminar in 2013–14.<sup>128</sup> Additionally, one former assistant basketball coach faces a two-year show-cause penalty ending October 21, 2015, which could limit his duties for a designated period if he obtains employment at another

---

<sup>118</sup> *Id.* at 57.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 63.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 65.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 66.

<sup>125</sup> *Id.* at 67.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 68.

NCAA-member institution.<sup>129</sup> And if he obtains such employment, he must attend an NCAA regional rules seminar annually during the show-cause period.<sup>130</sup>

The COI also imposed several administrative requirements on the Miami Athletic Department. For example, during the probationary period, the department must hire an outside group experienced in NCAA rules compliance to conduct a comprehensive compliance review and must develop and implement educational programs about the NCAA bylaws for coaches, the University's Faculty Athletics Representative (FAR), and department staff.<sup>131</sup> The department was required to submit to the COI by December 15, 2013, a report identifying a schedule for accomplishing the educational program.<sup>132</sup> Finally, during the probationary period, the athletic department must (1) file an annual compliance report with the COI; (2) inform prospective athletes in the penalized sports about the probation and about the specific violations that precipitated it;<sup>133</sup> and (3) publicize the nature of the violations and put a "direct, conspicuous link to the public infractions report" on the department's main web page.<sup>134</sup>

Thus, after publicly acknowledging its own errors in the Miami investigation and expunging tainted material from the investigative record, the NCAA still found "a failure to monitor" in the Hurricanes' athletic department sufficient to impose major penalties on the institution and current and former employees.<sup>135</sup> Ironically, at the same time that Mr. Najjar was conducting the NCAA's Miami investigation by his own rules, the Association, led by Ms. Lach, was designing a new enforcement structure that went into effect on August 1, 2013.<sup>136</sup> In light of the mistakes made in the Miami case and recent

---

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 71.

<sup>132</sup> *Id.* at 72.

<sup>133</sup> Football and men's basketball were not the only sports at Miami that the NCAA penalized. Indeed, the Association's investigation discovered that Miami coaches in ten sports other than football had sent thirty-one impermissible text messages to thirteen prospective athletes between 2007 and 2010. *Id.* at 31. The NCAA accepted Miami's institutionally imposed penalty for those coaches, namely, salary freezes and restrictions on recruiting during the probationary period. *Id.* at 69.

<sup>134</sup> *Id.* at 72.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> Indeed, Ms. Lach attributed her failure to keep a closer watch on Mr. Najjar and to question him carefully about whether the NCAA legal staff had approved his arrangement with Ms. Perez to being "overwhelmed" in the fall of 2011, "as she focused on leading the

speculation about “outsourcing” NCAA enforcement, this “new” structure may well be the subject of reform itself in the near future. Part III will outline the main features of the recently revised NCAA enforcement process.

### III

#### THE NCAA ENFORCEMENT PROCESS POST-AUGUST 1, 2013

When the NCAA’s enforcement staff learns, from an athlete, a high school or college coach, a journalist, or another source, of possible violations of Association rules at a member institution, it must determine whether an investigation is warranted or the matter can be resolved without an investigation.<sup>137</sup> If an investigation is warranted, the enforcement staff will provide a Notice of Inquiry (NOI) to the institution’s president or chancellor, either orally or in writing.<sup>138</sup> Under the new structure, the enforcement staff must issue the NOI to the institution before the staff can conduct on-campus interviews.<sup>139</sup> The enforcement staff then begins an investigation, with which the institution is obligated to cooperate.<sup>140</sup> If investigators discover evidence that warrants a COI hearing, a Notice of Allegations (NOA) will be published.<sup>141</sup>

The NOA, which the enforcement staff issues to institutions and individuals involved in the investigation, will identify the nature and the “possible level” of each alleged violation.<sup>142</sup> That enforcement structure provides for four levels of violation, ranging from “severe” to “incidental,” which have replaced the previous two-layer approach, consisting of “major” and “secondary” violations.<sup>143</sup> The NCAA advertises the new enforcement structure as better reflecting the

---

Enforcement Working Group, which was charged with reforming Enforcement’s policies and procedures.” WAINSTEIN ET AL., *supra* note 70, at 42 n.53.

<sup>137</sup> NCAA, 2013–14 NCAA DIVISION 1 MANUAL § 19.5.1 (2013) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

<sup>138</sup> *Id.* § 19.5.3.

<sup>139</sup> Casey C. Kannenberg, *The New NCAA Enforcement Model*, A.B.A., [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/the\\_new\\_ncaa\\_enforcement\\_model.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_new_ncaa_enforcement_model.html) (last visited Feb. 16, 2014).

<sup>140</sup> NCAA MANUAL, *supra* note 137, § 19.2.3; Stuart L. Brown, Mark Jones & Carrie R. McCaw, *The NCAA Infractions Enforcement Process—Role of Counsel*, ICEMILLER LEGAL COUNS. (Aug. 3, 2012), <http://www.icemiller.com/ice-on-fire-insights/publications/the-ncaa-infractions-enforcement-process-role-of-c/>.

<sup>141</sup> Brown et al., *supra* note 140.

<sup>142</sup> Kannenberg, *supra* note 139.

<sup>143</sup> *New Violation Structure*, *supra* note 21.

varying degrees of severity that its cases represent and “align[ing] more predictably with the significance of the wrongdoing, while also addressing any advantage gained from that wrongdoing.”<sup>144</sup> According to Oregon State University President Ed Ray, having four levels of violation is a major improvement.<sup>145</sup> “In reviewing past cases,” he observed, “we found that people who committed pretty serious violations sometimes ended up characterized as guilty of a secondary violation, which they tried to minimize to others as not important.”<sup>146</sup>

Level I violations are “severe breach[es] of conduct . . . that seriously undermine or threaten the integrity of the NCAA . . . including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage, or a substantial or extensive impermissible benefit.”<sup>147</sup> Level I violations include:

- “(a) Lack of institutional control;
- (b) Academic fraud;
- (c) Failure to cooperate in an NCAA enforcement investigation;
- (d) Individual unethical or dishonest conduct . . . ;
- (e) A [head-coach-responsibility] violation by a head coach resulting from an underlying Level I violation by an individual within the sport program . . . .”<sup>148</sup>

Level II violations, which the NCAA designates as “significant breach[es] of conduct,” confer, or are intended to confer, “more than a minimal but less than a substantial or extensive recruiting, competitive or other advantage” or “more than a minimal but less than a substantial or extensive impermissible benefit.”<sup>149</sup> Alternatively, such a breach “may compromise the integrity of the NCAA Collegiate Model as set forth in the [NCAA’s] constitution and bylaws.”<sup>150</sup> Level II violations include:

- (a) Violations that do not rise to the level of Level I violations and are more serious than Level III violations;

---

<sup>144</sup> *New Reform Efforts Take Hold August 1*, NCAA.ORG (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-reform-efforts-take-hold-august-1>.

<sup>145</sup> *Q&A with Oregon State President Ed Ray*, NCAA.ORG (Oct. 30, 2012), <http://www.ncaa.org/about/resources/media-center/news/qa-oregon-state-president-ed-ray>.

<sup>146</sup> *Id.*

<sup>147</sup> NCAA MANUAL, *supra* note 137, § 19.1.1.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* § 19.1.2.

<sup>150</sup> *Id.*

....

- (c) Systemic violations that do not amount to a lack of institutional control;
- (d) Multiple recruiting, financial aid, or eligibility violations that do not amount to a lack of institutional control;

....

- (f) Collective Level III violations.<sup>151</sup>

Level III violations, designated as “breaches of conduct,” are “isolated or limited in nature; provide no more than a minimal recruiting, competitive, or other advantage; and provide no more than a minimal impermissible benefit.”<sup>152</sup> Multiple Level IV violations, taken together, may also constitute a Level III violation.<sup>153</sup> Finally, Level IV violations, designated as “incidental infraction[s],” are inadvertent and isolated, technical in nature and result in a negligible, if any, competitive advantage; generally, they do not render an athlete ineligible to compete.<sup>154</sup>

Once an institution receives an NOA from the enforcement staff, the institution and any other accused party named in the document have ninety days in which to respond in writing.<sup>155</sup> After receiving the accused parties’ responses to the NOA,

the enforcement staff will prepare two documents . . . : (i) a written reply, due within 60 days of receipt of the [accused] parties’ responses, and (ii) a ‘statement of the case,’ submitted after the conclusion of any pre-hearing conferences. The ‘statement of the case’ will summarize the history of the case and identify remaining area[s] of disagreement between the parties and the enforcement staff, much like the ‘case summary’ in the prior process.<sup>156</sup>

But the new document will deviate from its predecessor by being “more of an enforcement staff advocacy document,” designed to better enable both sides to focus their hearing preparation on matters actually in dispute.<sup>157</sup>

The COI holds hearings in both Level I and Level II cases; the former are usually held in person, whereas the latter will typically be

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* § 19.1.3.

<sup>153</sup> *Id.* § 19.1.4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 19.7.2.

<sup>156</sup> Brown et al., *supra* note 25; *see also* NCAA MANUAL, *supra* note 137, § 19.7.3.

<sup>157</sup> Brown et al., *supra* note 25.

conducted by phone or videoconference unless the COI hearing panel requests an in-person hearing or the parties agree to submit the case on the pleadings (i.e., without oral presentations).<sup>158</sup> This arrangement replaces a previous rule under which all COI hearings were held in person.<sup>159</sup> Also new is that in Level I cases with few or uncomplicated issues, “the institution and/or the involved individual may make a written request to appear before the [COI] panel by videoconference or other mode of distance communication,” and the panel may grant or deny the request.<sup>160</sup> Under the new structure, the COI “will expand [from 10] to as many as 24 members and include the additional perspectives of university presidents, coaches and others.”<sup>161</sup> The larger size will enable the committee to hear cases in panels, presumably facilitating faster resolution of pending matters.<sup>162</sup> President Ray notes: “By expanding the Committee on Infractions to as many as 24 members and creating multiple panels of 5-7 members from that ‘pool’ that can adjudicate cases more frequently, we expect to be able to cut the ‘time to closure’ in half, at least for the less-complicated cases.”<sup>163</sup> The new structure also requires the entire COI to meet at least twice a year to compare the panels’ decisions in similar cases for consistency.<sup>164</sup>

COI hearings are confidential, hence closed to the public. Indeed, attendance is limited to: (1) the hearing panel, (2) the parties and their representatives, (3) applicable conference representatives, (4) the subsequent employing institution of an accused individual (e.g., a coach), (5) a court reporter or recorder, (6) audio-visual support staff, and (7) anyone else approved by the chief hearing officer as

---

<sup>158</sup> Kannenberg, *supra* note 139. In Level III cases, the enforcement staff determines whether one or more violations occurred and, if so, the Vice President for Enforcement or a designee decides whether a penalty is appropriate and, if it is, what that penalty will be. NCAA MANUAL, *supra* note 137, §§ 19.11.2, 19.11.3. The Vice President’s decision is appealable to the COI. *Id.* § 19.11.4. In Level IV cases, if the enforcement staff concludes that a case should be processed, it will refer the matter to the accused institution’s conference for resolution. *Id.* § 19.12.2.

<sup>159</sup> Brown et al., *supra* note 25.

<sup>160</sup> NCAA MANUAL, *supra* note 137, § 19.7.7; *see also* Brown et al., *supra* note 25.

<sup>161</sup> *New Reform Efforts Take Hold August 1*, *supra* note 144.

<sup>162</sup> *Id.* A computer program will generate panels of five or seven available committee members, with alternates, to hear cases. NCAA, DIVISION I COMMITTEE ON INFRACTIONS: INTERNAL OPERATING PROCEDURES § 3-1-2 (2013) [hereinafter INTERNAL OPERATING PROCEDURES], available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisioni/enforcement/committee+on+infractions>.

<sup>163</sup> *Q&A with Oregon State President Ed Ray*, *supra* note 145.

<sup>164</sup> *Id.*



necessary.<sup>165</sup> The chief hearing officer, who is the chair of the COI hearing panel, is authorized to establish the order in which the panel will hear the allegations.<sup>166</sup> The chief hearing officer also presides during the hearing, at which only members of the panel may ask questions, unless a party requests to do so, whereupon the chief hearing officer will rule on the request.<sup>167</sup>

Following the hearing, the panel deliberates and reaches a decision; that decision is the consensus of the panel and the final decision of the COI, as the rules do not provide for dissents.<sup>168</sup> Once the panel reaches its decision, the chief hearing officer appoints a panel member to conduct a “media call” in conjunction with the release of the decision.<sup>169</sup>

Besides determining the level of violation that was committed, the COI hearing panel will decide whether “aggravating” or “mitigating” circumstances exist that may affect the ultimate penalty by justifying a higher or lower range of sanctions in a particular case.<sup>170</sup> Bylaw 19.9.3 identifies fourteen aggravating factors, among which are “[m]ultiple Level I violations . . . ; [a] history of . . . violations . . . [;] [l]ack of institutional control; . . . [and] [o]bstructing an investigation or attempting to conceal the violation.”<sup>171</sup> Bylaw 19.9.4 sets out eight mitigating factors, supporting a lower range of sanctions in a particular case.<sup>172</sup> Among these are “prompt self-detection and self-disclosure of the violation(s); prompt acknowledgement of the violation, acceptance of responsibility, and . . . imposition of meaningful corrective measures and/or penalties; [and] affirmative

<sup>165</sup> INTERNAL OPERATING PROCEDURES, *supra* note 162, § 4-1-2.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 4-7.

<sup>168</sup> *Id.* § 4-15-4.

<sup>169</sup> *Id.* § 4-17.

<sup>170</sup> NCAA MANUAL, *supra* note 137, § 19.9.2.

<sup>171</sup> *Id.* § 19.9.3. The remaining aggravating factors include (1) “[u]nethical conduct, compromising the integrity of an investigation, [or] failing to cooperate . . . ;” (2) “[v]iolations [that] were premeditated, deliberate or committed after substantial planning;” (3) “[m]ultiple Level II violations . . . ;” (4) participation in, condoning of, or negligent disregard of the violation by persons in authority; (5) “significant ineligibility or other substantial harm to a current student-athlete or prospective student-athlete” resulted from the violation(s); (6) “[c]onduct or circumstances demonstrating an abuse of a position of trust;” (7) “[a] pattern of noncompliance within the sport program(s) involved;” (8) “[c]onduct intended to generate pecuniary gain for the institution or involved individual;” (9) “[i]ntentional, willful or blatant disregard for the NCAA constitution and bylaws;” and (10) “[o]ther facts warranting a higher penalty range.” *Id.*

<sup>172</sup> *Id.* § 19.9.4.

steps to expedite resolution of the matter.”<sup>173</sup> Instead of merely comparing the number of aggravating factors to the number of mitigating factors in a particular case, the hearing panel is expected to balance the competing factors when deciding to add to or subtract from the “standard” penalty (which would apply absent aggravating and mitigating factors or when they are in equilibrium) in that case.<sup>174</sup>

Whether or not aggravating or mitigating factors are present, as of August 1, 2013, NCAA rules provide for seven categories of “core penalties” for Level I and II violations. These violations include: (1) competition penalties (limiting eligibility for post-season play); (2) financial penalties (fines and relinquishment of post-season revenue); (3) scholarship reductions; (4) show-cause orders (restrictions on some or all athletics-related duties of institutional personnel); (5) head coach restrictions (suspensions); (6) recruiting restrictions (limits on official and unofficial visits, off-campus activities, and recruiting communication); and (7) probation (submission of periodic compliance reports, acknowledgement in alumni publications of violations committed and penalties imposed, implementation of educational or deterrent programs, and audits of specific programs or teams).<sup>175</sup> Moreover, the penalty ranges within each category under the new enforcement structure permit far more stringent penalties than were imposed for major infractions cases under the previous structure.<sup>176</sup> For example, a competition penalty with aggravating circumstances could result in a two to four year ban on post-season competition, and a recruiting penalty with aggravating circumstances could impose a twenty-five to fifty percent reduction in visits to prospective athletes, off-campus recruiting, and communication with recruits.<sup>177</sup>

---

<sup>173</sup> *Id.* The remaining mitigating factors include: (1) “An established history of self-reporting Level III or secondary violations;” (2) “Implementation of a system of compliance methods designed to ensure rules compliance and satisfaction of institutional/coaches’ control standards;” (3) “Exemplary cooperation, such as . . . [i]dentifying individuals (to be interviewed . . . )” or documents to be reviewed of which the NCAA staff was unaware; (4) unintentional violations of limited scope representing “a deviation from otherwise compliant practices;” and (5) “Other facts warranting a lower penalty range.” *Id.*

<sup>174</sup> Brown et al., *supra* note 25.

<sup>175</sup> NCAA MANUAL, *supra* note 137, § 19.9.5; Brown et al., *supra* note 25.

<sup>176</sup> Kannenberg, *supra* note 139. For the full range of possible penalties within the seven categories listed above, see NCAA MANUAL, *supra* note 137, fig. 19.1.

<sup>177</sup> Kannenberg, *supra* note 139; *see also* NCAA MANUAL, *supra* note 137, fig. 19.1.

The prospect of increased accountability for head coaches under the new enforcement structure is noteworthy. In this regard, President Ray has stated:

We expect head coaches to demonstrate that they've put practices and training and written materials in place that instruct their assistant coaches how to act. If they've done that it can become mitigating evidence that they shouldn't be held accountable for what an assistant coach did. . . . If there is no guidance and an assistant goes rogue, then it's partly the head coach's fault and he/she should be held accountable.<sup>178</sup>

Previously, penalties were based on whether the head coach knew of the violations or could be presumed to have known of them.<sup>179</sup> Under the new enforcement structure, however, if a violation occurs within a coach's program, the head coach is presumed responsible; if the coach cannot rebut that presumption, he or she will face charges.<sup>180</sup> "A head coach who is personally involved in a Level 1 violation faces up to a 10-year period of restrictions on recruiting and coaching activities, including game coaching. A head coach who is personally involved in a Level 2 violation faces up to a five-year period of restrictions."<sup>181</sup>

In any event, if the COI finds one or more violations and imposes penalties, the affected institution or individual has fifteen days in which to file notice of intent to appeal any part of the COI's decision.<sup>182</sup> Appeals are made to the Infractions Appeals Committee (IAC).<sup>183</sup> The NCAA's recent restructuring of its enforcement process did not alter the composition, duties, or operations of the IAC, which remains comprised of five members, including one member from the "general public," who serve three-year terms and may serve up to nine years on the committee.<sup>184</sup>

---

<sup>178</sup> Q&A with Oregon State President Ed Ray, *supra* note 145.

<sup>179</sup> *Accountability and Penalties*, NCAA.ORG (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/accountability-and-penalties>.

<sup>180</sup> *Id.*

<sup>181</sup> Brown et al., *supra* note 25; *see also* NCAA MANUAL, *supra* note 137, fig. 19.1.

<sup>182</sup> NCAA MANUAL, *supra* note 137, § 19.10.2; Brown et al., *supra* note 140.

<sup>183</sup> NCAA MANUAL, *supra* note 137, § 19.4; *Infractions Appeals Committee*, NCAA.ORG (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/infractions-appeals-committee>.

<sup>184</sup> NCAA MANUAL, *supra* note 137, §§ 19.4.1, 19.4.4; *Infractions Appeals Committee*, *supra* note 183.

“The appealing party can agree to an appeal based upon written submissions only or can request an appeal hearing” before the IAC.<sup>185</sup> Either way, when the IAC acknowledges having received the notice of intent to appeal, the appealing party has one month in which to submit its appeal.<sup>186</sup> The COI then has a month in which to submit a document supporting its finding, after which the appealing party has a short final opportunity to submit additional information before the IAC hearing.<sup>187</sup> After considering a case, either via a hearing or written submissions, the IAC can uphold, vacate or remand, or reverse the COI’s decision.<sup>188</sup> It will not reverse unless the appealing party can show that (1) the COI’s decision was clearly contrary to the evidence; (2) the accused institution or individual did not actually violate NCAA rules; (3) a procedural error occurred that caused the COI to find a rule violation; or (4) the penalty imposed was excessive.<sup>189</sup>

If an institution opts not to appeal a COI finding, or if it appeals, but the IAC upholds the sanctions imposed by the COI, NCAA bylaws require the institution to “comply with the Committee’s sanctions and to periodically report [its] compliance to the [COI].”<sup>190</sup> When the IAC hears an appeal, its decision is final.<sup>191</sup>

Taken together, the changes the NCAA has made to its enforcement process, effective August 1, 2013, are likely to make the process faster and enable the NCAA to hold institutions and individuals more accountable for their transgressions than it could under the previous system. Still, these changes fail to address the most persistent critique of NCAA enforcement since the 1970s: that it does not treat accused institutions and individuals as fairly as it should. That critique prompted the previously mentioned Congressional subcommittee hearings in 1978 and 2004 and, fueled by the Miami investigation, has also spurred recent calls for reorganizing and perhaps outsourcing the NCAA enforcement process.<sup>192</sup> Part IV will review recent proposals and will present a

---

<sup>185</sup> Brown et al., *supra* note 140; *see also* NCAA MANUAL, *supra* note 137, § 19.10.2.

<sup>186</sup> NCAA MANUAL, *supra* note 137, § 19.10.3.1; *see also* Brown et al., *supra* note 140.

<sup>187</sup> NCAA MANUAL, *supra* note 137, § 19.10.3.2; *see also* Brown et al., *supra* note 140.

<sup>188</sup> NCAA MANUAL, *supra* note 137, § 19.4.5.

<sup>189</sup> *Id.* §§ 19.10.1.1, 19.10.1.2.

<sup>190</sup> Brown et al., *supra* note 140.

<sup>191</sup> NCAA MANUAL, *supra* note 137, § 19.10.7.

<sup>192</sup> *See* Mandel, *supra* note 27; Thamel, *supra* note 4.

new proposal designed to enhance the fairness of the enforcement process for accused institutions and individuals.

#### IV

#### NO MORE HOME-COURT ADVANTAGE: A PLAN TO ENHANCE FAIRNESS IN NCAA ENFORCEMENT

Even a commentary highly supportive of the NCAA enforcement process pre-August 1, 2013, has acknowledged that, although institutions are formally accountable for alleged violations of NCAA rules, individuals are the ones who commit those violations.<sup>193</sup> Hence, the consequences of NCAA-imposed sanctions “fall on individuals through an institution’s compliance with NCAA directives.”<sup>194</sup> Recognizing that impact on individuals, several members of Congress have recently introduced legislation seeking to ensure that the Association’s enforcement process is fair to college athletes.<sup>195</sup> The various bills aim to address medical and financial issues in college sports too, but at the same time, try to guarantee due process for athletes subject to disciplinary procedures.<sup>196</sup>

Each bill would amend Section 487(a) of the Higher Education Act of 1965.<sup>197</sup> One bill, which Representative Charlie Dent (R-PA) introduced on August 1, 2013, (the same date the NCAA’s new enforcement structure took effect), is known as the “National Collegiate Athletics Accountability Act,” or “NCAA Act,” which leaves little doubt as to the object of its concern.<sup>198</sup> Section 2 of the Dent bill would amend Section 487(a) of the Higher Education Act by prohibiting institutions that sponsor intercollegiate athletics programs (under penalty of losing their federal financial assistance) from belonging to “a nonprofit athletic association” unless that association meets several requirements the Act imposes.<sup>199</sup> Among those requirements is that “prior to enforcing any remedy for an alleged infraction or violation of the policies of such association,” the association must:

---

<sup>193</sup> Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 10 (2012).

<sup>194</sup> *Id.*

<sup>195</sup> See H.R. 3545, 113th Cong. (2013); H.R. 2903, 102d Cong. (2013).

<sup>196</sup> See H.R. 3545; H.R. 2903.

<sup>197</sup> 20 U.S.C. § 1094 (2012).

<sup>198</sup> H.R. 2903 § 1(a).

<sup>199</sup> *Id.* § 2(30).

- (i) provide[] institutions and student athletes with the opportunity for a formal administrative hearing, not less than one appeal, and
- (ii) any other due process procedure the Secretary [of Education] determines by regulation to be necessary; and hold in abeyance any such remedy until all appeals have been exhausted or until the deadline to appeal has passed, whichever is sooner.<sup>200</sup>

Even if the Dent bill is enacted, it is unlikely to increase the fairness of NCAA enforcement proceedings for athletes because the protections it provides are most necessary in Level I and Level II cases, but protections already exist in those cases, as described in Section III.<sup>201</sup> Therefore, the due process requirements of the Dent bill appear most likely to affect Level III and Level IV cases, in which procedures are relatively informal, calling into question the need for “a formal administrative hearing.”<sup>202</sup> The Dent bill could prove highly influential, however, if the Secretary of Education were to accept its invitation to use regulatory authority to mandate that the NCAA put additional protections in place for athletes subject to its enforcement process.<sup>203</sup> Absent action by the Secretary, though, the Dent bill will not make that process any fairer to accused parties than it is today unless the NCAA were to again abandon its customary enforcement process, as it did in the Penn State case, in favor of an ad hoc alternative designed to respond to unusual circumstances. That scenario is unlikely, but considering the language of the Dent bill and its introduction by a Pennsylvania congressman, its insistence on a formal administrative hearing apparently aims to prevent the NCAA from repeating the ad hoc enforcement process used in the Penn State case.<sup>204</sup>

Another bill, which Representative Tony Cardenas (D-CA) introduced on November 20, 2013, is known as the “Collegiate

---

<sup>200</sup> *Id.* § 2(30)(B). The other requirements are that a nonprofit athletic association (1) mandate “annual baseline concussion testing” for athletes playing sports designated as “contact/collision” or “limited-contact/impact” sports; (2) guarantee for up to four years the athletic scholarships of athletes who play contact/collision sports (boxing, field hockey, football, ice hockey, lacrosse, martial arts, rodeo, soccer, and wrestling), whether or not the athlete is injured or demonstrates satisfactory athletic skill; and (3) not prohibit institutions from paying “stipends” (presumably equal to the difference between the full cost of attendance and the amount of an athletic scholarship) to their athletes. *Id.* §§ 2(30)(A), (C).

<sup>201</sup> *See supra* Part III.

<sup>202</sup> H.R. 2903 § 2(30)(B)(i).

<sup>203</sup> *See id.*

<sup>204</sup> I am indebted to Donna Lopiano, one of the authors of the CAP Act, for this insight.

Student Athlete Protection Act.”<sup>205</sup> Like the Dent bill, the Cardenas bill seeks to amend Section 487(a) of the Higher Education Act of 1965 to facilitate several changes in the operation of college sports designed to benefit athletes.<sup>206</sup> Unlike the Dent bill, though, the Cardenas bill would apply only to an institution having an athletic program that earns \$10 million or more annually from media rights associated with television appearances by its teams or by teams belonging to the conference of which the institution is a member.<sup>207</sup>

The Cardenas bill would amend section 487(a) by adding to it a series of “Athletic Program Requirements”<sup>208</sup> to be met by “an intercollegiate athletic program of an institution of higher education” meeting the \$10 million threshold, under penalty of losing its federal financial assistance for failing to comply.<sup>209</sup> Therefore, the Cardenas bill also differs from the Dent bill by focusing its attention on colleges and universities rather than the NCAA. Among the program requirements that the Cardenas bill would apply to institutions meeting the \$10 million threshold is the provision of “a formal administrative hearing, not less than 1 appeal, and [adoption of] any other due process procedure the Secretary [of Education] determines by regulation to be necessary” for any athlete facing a “loss or reduction of athletically related student aid for a violation of a disciplinary standard of the institution.”<sup>210</sup>

The Cardenas bill misses its target by mandating due process by institutions even though the key regulatory authority in college sports is the NCAA, not individual institutions.<sup>211</sup> Therefore, the NCAA, not institutions, should be the primary focus of legislation seeking to ensure fairness for college athletes in disciplinary proceedings.

A better alternative to the Dent and Cardenas bills is the “College Athlete Protection Act” (CAP Act),<sup>212</sup> which was drafted by the

---

<sup>205</sup> H.R. 3545, 113th Cong. § 1(a) (2013).

<sup>206</sup> *Id.* § 1(b)–(c).

<sup>207</sup> *Id.* § 2(a).

<sup>208</sup> *Id.* § 2(b).

<sup>209</sup> *Id.* § 2(b)(k)(2).

<sup>210</sup> *Id.* § 2(b)(k)(2)(C).

<sup>211</sup> Besides due process, the Cardenas bill also addresses the continuation of athletic scholarships for injured athletes, the length of athletic scholarships, insurance coverage for college athletes, and other matters related to the wellbeing of athletes during their college years. *See id.* §§ 2(b)(k)(2)(A), (E).

<sup>212</sup> The Drake Group, College Athlete Protection Act Draft (Feb. 25, 2014) [hereinafter CAP Act] (on file with author).

Drake Group,<sup>213</sup> a college-sports watchdog organization. The CAP Act focuses its attention squarely on the NCAA.<sup>214</sup> Like the Dent and Cardenas bills, the CAP Act addresses more than just the fairness of NCAA enforcement proceedings; indeed, it reaches academic, financial, medical, and insurance issues in college sports, too, along with legal issues other than due process.<sup>215</sup>

Like the Dent and Cardenas bills, the CAP Act would amend Section 487(a) of the Higher Education Act to impose certain conditions on the operation of college sports. Specifically, the CAP Act would require institutions having athletic programs that earn more than \$1 million annually to belong only to an athletic association that meets certain minimum standards specified in the Higher Education Act or risk sacrificing their federal financial assistance.<sup>216</sup> Due process protections are among some of the minimum standards required by the CAP Act. Thus, an athletic association (i.e., the NCAA) would have to establish and enforce due process protections before issuing a show-cause order or suspend a coach, athlete, or other athletics personnel from representing a member institution in athletics events; barring a member institution's teams from appearing on television; barring such teams from competing; or reducing an athlete's financial aid amount or award period.<sup>217</sup>

---

<sup>213</sup> The Drake Group, founded in 1999, is a nonprofit organization comprised mainly of college faculty members, whose principal aim is "academic integrity in collegiate sport." *Our Mission and Goals*, THE DRAKE GROUP, <http://thedrakegroup.org/2012/12/04/hutchins-award-2/> (last visited Feb. 20, 2014). According to its website, the group's vision is "to create an atmosphere on college campuses that encourages personal and intellectual growth for all students, and demands excellence and professional integrity from faculty charged with teaching." *Our Vision*, THE DRAKE GROUP, <http://thedrakegroup.org/2012/12/04/our-vision/> (last visited Feb. 20, 2014). I am a member of the group and of its executive board, and as such I helped draft the CAP Act.

<sup>214</sup> At this writing, early in 2014, the authors of the CAP Act, of whom I am one, are seeking a Congressional sponsor. The other authors are Gerald Gurney, Professor of Adult and Higher Education at the University of Oklahoma; Donna Lopiano, President of Sports Management Resources and former CEO of the Women's Sports Foundation; Allen Sack, President of the Drake Group and Professor of Sociology at the University of New Haven; and Andrew Zimbalist, Professor of Economics at Smith College.

<sup>215</sup> CAP Act, *supra* note 212; see also Brad Wolverton, *Watchdog Group's Proposal Calls for Antitrust Exemption for NCAA*, CHRON. OF HIGHER EDUC. (Oct. 11, 2013), <http://chronicle.com/blogs/players/watchdog-groups-proposal-calls-for-antitrust-exemption-for-ncaa/33711>.

<sup>216</sup> CAP Act, *supra* note 212, § 4(30).

<sup>217</sup> *Id.* § 4(30)(C).



The due process provisions of the CAP Act mirror those presented in my 2012 book, *The Supreme Court and the NCAA*.<sup>218</sup> Not later than one year after enactment of the CAP Act, the athletic association would be required to:

- (I) Hire, as independent contractors, former or retired trial, appellate, or administrative law judges, to hear and decide Level I and II cases, and experienced investigators to investigate allegations of rules violations. The judges “would preside at hearings and appeals, issue subpoenas when necessary, and possess exclusive authority to resolve cases, including determining penalties.
- (II) In Level I and II cases, establish a pre-hearing “discovery” process, including depositions and document production, that would enable Association staff and counsel for accused parties to exchange pertinent information;
- (III) Also in Level I and II cases, permit accused parties, both institutions and individuals, to confront and cross-examine opposing witnesses at hearings;
- (IV) At the discretion of the hearing judge, permit a nonparty whom one of the parties has identified as having engaged in wrongdoing, or having enabled it to occur, to present an oral or written statement at the hearing, subject to rebuttal by the institution;
- (V) Prohibit member institutions from firing or permanently reassigning employees or disassociating themselves from boosters whom one of the parties has identified as having engaged in or enabled wrongdoing until after the case has been resolved and the nonparty’s role in it has been determined; and
- (VI) Open all hearings and appellate proceedings to the public unless an accused party objects, except in the case of post-hearing deliberations of appellate panels.<sup>219</sup>

Despite these provisions, the CAP Act does not view the NCAA as a “state actor” within the meaning of the Fourteenth Amendment, nor would it seek to designate the Association as such. Only a court can do that and, a recent commentary has noted, even if the NCAA were a

---

<sup>218</sup> See PORTO, *supra* note 2.

<sup>219</sup> CAP Act, *supra* note 212, § 4(C). A discussion of the due process provisions of the CAP Act is also available in PORTO, *supra* note 2, at 172–73.

state actor, it would not be required to provide due process to athletes challenging “denials of, or limits on, their eligibility to compete.”<sup>220</sup> That is because, in the words of the commentary’s author, Professor Josephine Potuto, “courts consistently have held that student-athletes have no constitutional right to compete and, thus, no cognizable reliance interest to which procedural due process protections may attach.”<sup>221</sup> Coaches, Professor Potuto concedes, “have a [constitutionally based] reliance property interest only to the extent their contracts of employment provide it; in that case, they also have a contract claim that likely affords protection at least equivalent to that provided by procedural due process.”<sup>222</sup> Finally, she notes, a coach’s liberty interest in his or her reputation would be addressed in a tort action, so there would be no need to depend on NCAA status as a state actor or a claimed failure of procedural due process to reach the claimed injury.<sup>223</sup>

Even assuming that Professor Potuto’s constitutional analysis is correct, it ignores the forest for the trees by stressing the amount of process the NCAA is legally obligated to provide instead of the amount it should provide. As a nonprofit organization supposedly dedicated to maintaining athletics as “an integral part of the educational program” and athletes as “an integral part of the student body” at its member institutions, the NCAA should provide young, often unsophisticated college athletes with every reasonable protection when they are subject to its disciplinary procedures.<sup>224</sup> Surely, an organization promoting athletics as a healthy adjunct to a college education should set an example of scrupulous fairness when deciding the athletic futures of young, impressionable college students. Thus, even though the NCAA is not a state actor under the Fourteenth Amendment, its enforcement process should strive to be as fair as it is efficient and effective.

According to Professor Potuto, the NCAA’s process is fair because it features, among other things, “a neutral and independent COI” and “the right to appeal adverse findings to a neutral and independent infractions appeals committee.”<sup>225</sup> But both the COI and the IAC are comprised mostly of employees of NCAA-member institutions with a

---

<sup>220</sup> Potuto, *supra* note 193, at 11.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 11–12.

<sup>224</sup> NCAA MANUAL, *supra* note 137, § 12.01.2.

<sup>225</sup> Potuto, *supra* note 193, at 14–16.

history of professional involvement in NCAA matters, usually either as a college president or an athletic director.<sup>226</sup> Under these circumstances, it is fair to ask whether such individuals are the most neutral and independent persons available to resolve NCAA enforcement matters or whether former and retired judges, working as independent contractors, would be more neutral, independent, and capable of managing the process effectively.

Professor Potuto states further that at COI hearings, accused parties enjoy “a full opportunity to present their case.”<sup>227</sup> That claim is open to debate, though, because accused parties at NCAA hearings may not confront and cross-examine opposing witnesses, but must instead rely on members of the COI to ask questions.<sup>228</sup> The CAP Act would enable accused parties to confront and cross-examine opposing witnesses, subject, of course, to limitations imposed by the hearing judge.<sup>229</sup>

Finally, Professor Potuto underestimates the sting of NCAA sanctions for college athletes, writing that “[t]he only action the NCAA takes against student-athletes who violate its bylaws and policies is to prevent them from competing in NCAA championships or on university teams.”<sup>230</sup> To be sure, an NCAA sanction does not implicate an athlete’s life, liberty, or property, but that is not to say that the stakes for a college athlete faced with suspension or expulsion from competition are negligible. On the contrary, an athlete who is declared permanently ineligible may lose an athletic scholarship and with it the opportunity to realize a lifelong dream of playing a college sport, pursue a college education at low cost, and possibly prepare for a career in professional sports. Even an athlete who is declared temporarily ineligible may, as a result of prolonged inactivity, lose the chance for a successful collegiate sports career and a professional sports career. Recognizing the high stakes for athletes (and coaches, whose livelihoods can be at issue) in today’s NCAA enforcement process, the CAP Act would mandate legal protections for accused

---

<sup>226</sup> For lists of the current members of these two committees and their professional affiliations, see *Committee on Infractions*, NCAA.ORG, <http://www.ncaa.org/governance/committees/division-i-committee-infractions> (last visited Mar. 2, 2014) and *Infractions Appeals Committee*, *supra* note 183.

<sup>227</sup> Potuto, *supra* note 193, at 15–16.

<sup>228</sup> PORTO, *supra* note 2, at 166.

<sup>229</sup> CAP Act, *supra* note 212, § 4(C)(ii)(III).

<sup>230</sup> Potuto, *supra* note 193, at 30.

parties commensurate with the potential consequences they face from NCAA sanctions.<sup>231</sup>

Happily, as Professor Potuto points out, the NCAA need not be a state actor under the Fourteenth Amendment to be subject to congressional regulation of its enforcement process.<sup>232</sup> Indeed, Congress may regulate the NCAA and college athletic departments by means of its interstate commerce power, its authority under the spending power to condition funds provided to institutions of higher education, and its power to remove or condition tax exemptions those institutions currently enjoy.<sup>233</sup> The CAP Act would regulate the NCAA and its members' athletic departments under Congress's commerce and spending powers, respectively.

#### CONCLUSION

The NCAA's enforcement process has been the subject of criticism since the 1970s and it remains so today in the wake of the Penn State and University of Miami cases. Ironically, although the NCAA has restructured that process as recently as August 1, 2013, journalists, academics, and college sports executives continue to call for changes, going so far as to suggest that the Association outsource its enforcement function to a third party.<sup>234</sup> This Article supports that suggestion and offers specific proposals, contained in the CAP Act, that seek to increase the fairness of the NCAA process to accused parties, just as the Association's recent reforms aim to increase its efficiency and effectiveness. Enactment of the CAP Act proposals would finally make the legal protections in the NCAA enforcement process commensurate with the high stakes that process holds for accused parties.

---

<sup>231</sup> CAP Act, *supra* note 212, § 4(C).

<sup>232</sup> Potuto, *supra* note 193, at 3–4.

<sup>233</sup> *Id.* at 37.

<sup>234</sup> Thamel, *supra* note 4; *see also* Mandel, *supra* note 27.