

**BEFORE THE CONSTITUTION SUBCOMMITTEE
OF THE HOUSE COMMITTEE ON THE JUDICIARY**

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On the Fairness and Efficacy of the NCAA's Enforcement Process and the Desirability of
Requiring Greater Procedural Protections For Accused Parties

I want to thank the Subcommittee for allowing me to share my views on a matter of significance and importance to many of America's institutions of higher learning, to hundreds of athletic coaches and thousands of student-athletes at those institutions, and to millions of fans of the athletic teams of those institutions -- the procedures that the National Collegiate Athletic Association (NCAA) should be required to employ in its enforcement processes.

By way of introduction, I have been involved in litigating, teaching, speaking, and writing about sports legal issues for about 28 years. Since 1983 I have been a professor of law teaching primarily sports law, antitrust, business enterprises, and labor law at Tulane Law School, where I founded and currently direct the nation's first sports law certificate program. I was from 1995-97 the president of the Sports Lawyers Association, a 1,100-member organization of lawyers who work for or represent sports industry clients, on whose board of directors I have served since 1986. I am also the editor-in-chief of the SLA's on-line monthly newsletter, *The Sports Lawyer*. I often speak at sports law conferences, have written several major law review articles and two book chapters on sports legal matters, and along with Professor Paul Weiler of Harvard Law School I have coauthored the leading sports law textbook and supplement used in American law schools, *Sports and the Law*, published by The West Group (formerly West Publishing Company), now in its third edition. I also regularly work with and am frequently cited by the print and broadcast media on sports legal issues, and I have authored several columns in publications of wide general circulation. This is the ninth time I have appeared before a congressional committee in the last 12 years on some aspect of sports, including college sports.

Perhaps even more relevant, I am and have been for 12 years Tulane University's faculty athletics representative. In this position, I am deeply involved in a wide range of matters involving the

governance and operation of both Conference USA and the NCAA as well as Tulane's compliance with NCAA rules. I have over the years served on a variety of committees within both organizations, and currently I am a member of the NCAA's Division I Academics, Eligibility, and Compliance (AEC) Cabinet. I have also become quite familiar with the NCAA's enforcement procedures by having been involved in infractions cases involving Tulane University as well as by having represented clients before the NCAA Infractions Committee. Thus, I have a great deal of both academic knowledge of and practical experience with the NCAA enforcement process.

It must be emphasized, however, that while my positions described above give me a familiarity with, and a variety of perspectives on, the matter before the Subcommittee today, I speak here only as an individual. I am not authorized to speak for or to represent Tulane University, Conference USA, the NCAA, or the Sports Lawyers Association, and the views I express here are mine alone.

I should make one additional preliminary comment. My testimony today focuses only on the process and procedures employed by the NCAA to deal with alleged violations of NCAA rules by member institutions or their employees or "representatives" – the so-called enforcement process. This, however, is only one aspect of the NCAA's overall governance effort. Processes and procedures are followed in a number of other contexts that are also crucial to the operation of the NCAA, and these too can sometimes be very highly publicized and controversial. For example, there are mechanisms for NCAA member institutions to seek and to appeal staff interpretations of NCAA rules; to request waivers of initial or continuing-eligibility rules; to petition for the reinstatement of athletes who have lost their eligibility (like in the recent highly publicized cases of Division I-A football players Jeremy Bloom from the University of Colorado and Mike Williams from the University of Southern California); to review positive drug tests and to appeal penalties for doping violations; or to seek a waiver for extraordinary circumstances from any of the thousands of NCAA rules. The procedures for each of these types of proceedings differ, and each at one time or another has been criticized for being too rigid or unfair.

I refer the Subcommittee to an article in which I have summarized these various NCAA processes,¹ although some procedures described therein have since been modified. To study and critique

¹ Roberts, *Resolution of Disputes In Intercollegiate Athletics*, 35 VALPO. U.L. Rev. 431 (2001).

each of these processes here would require more time and space than is available. My understanding is that the Subcommittee's primary interest today is in the NCAA's enforcement process, and thus it is on that to which my attention is directed here. Nonetheless, many of my general comments and conclusions about the enforcement process are equally applicable to all or most of the other NCAA governance processes as well.

I. The NCAA's Enforcement System and Processes: A Summary of Concerns

The NCAA's enforcement process and procedures for dealing with alleged institutional infractions of its rules are set forth in Articles 19 and 32 of its By-Laws. A brief summary of this system is useful to understand the peculiarities of how it works and what might trouble critics of that system. While almost all of the attention and criticism of the enforcement process relate to the way the system handles what are called "major infractions," it is important to understand that such major infractions constitute only a small percentage of the total violations of NCAA rules by member institutions, their staff members, or athletics "representatives."

The vast majority of what the NCAA rules define as "secondary infractions" (minor breaches that do not give a violating institution any competitive or recruiting advantage²) are initially discovered by the institution itself, self-reported to the school's conference and the NCAA enforcement staff, and resolved administratively with minor penalties like reprimanding the offending coach or making anyone who received a small impermissible benefit repay it. There are dozens of such "technical" infractions committed by every Division I institution every year, but they have little impact on the system and attract virtually no public attention. They also virtually never give rise to any legal issues or controversy.

The far more significant rules violations, the so-called "major infractions," however, often attract great public attention, involve significant consequences for the offending institution, and give rise to

² See NCAA By-law 19.02.2.1 ("A secondary violation is a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.") Such secondary infractions are today handled almost exclusively through the violating school's conference office, with the NCAA staff playing only a minimal oversight role.

substantial factual and legal disputes. In this arena, so much is often at stake that there is today a cottage industry of lawyers who make a fine living doing nothing but representing member institutions in major infractions cases.

The process is commenced when the NCAA enforcement staff is made aware of a possible major rules violation.³ This awareness may come from many sources, including the institution itself or the news media, but more often it comes either from a “tip” from someone affiliated with another institution or from an athlete involved in the violation who has had a falling out with the coach or school and “turns state’s evidence” in retaliation.⁴ Regardless of the source of the information, if the enforcement staff believes after some evaluation and effort to corroborate the information that there is sufficient suspicion to take the matter further (i.e., “reasonably reliable information” that a violation has been committed), it will notify the CEO of the suspected institution in what since last year is called a “Notice of Inquiry” (an NOI -- see By-law Art. 32.5) and commence a more formal investigation (NCAA By-law Art. 32.2), frequently by dispatching an investigator to talk to potential witnesses and seek any documentation that might shed light on the allegations. It may also ask the target institution to investigate the situation and make a report of its own internal findings. Once the enforcement staff has made whatever inquiry it believes is appropriate, it will decide whether there is sufficient cause to issue a second notice of specific rules violations, called a “Notice of Allegations” (an “NOA” --see By-law Art. 32.6). It should be noted

³ The NCAA Enforcement staff is today headed by David Price, Vice President for Enforcement Services. There are under Mr. Price four Enforcement “Directors,” and below them another 16 associate or assistant directors. It is worth noting here that while I do not personally know everyone on the enforcement staff, I do know Mr. Price well. In my view he is an individual of strong character who strives mightily to carry out his responsibilities with integrity, fairness, and even-handedness. My experience with both him and the entire staff convinces me that there is little or no reason to believe that the enforcement staff pursues cases for any reason other than their reasonable belief that the information available to them indicates that their actions are required or appropriate under the NCAA’s rules. I believe it would be wrong and unjustified to believe that the NCAA enforcement staff acts out of animus, bias, or any personal vendettas against any individuals or institutions in carrying out its duties.

⁴ In this regard, the NCAA has created a limited immunity for athletes who may have been involved in a violation, often by being the recipient of some “extra benefit” from the institution. See NCAA By-law Art. 32.3.8 – **Limited Immunity**. Under this provision, the enforcement staff may give an athlete who turns “state’s evidence” against an institution a waiver from being declared ineligible for athletics participation as a result of the violation he/she reports. This sometimes results in the unseemly, yet often necessary, scenario of an athlete who took money or other inducements from an institution being allowed to transfer to another school and play while innocent coaches and student-athletes at the first institution end up being penalized (e.g., barred from post-season play) because their institution has been disciplined.

that this system of two notices at increasing levels of enforcement staff confidence in the validity of the accusations is new, having been adopted in 2003. Previously, a more thorough investigation was conducted before any formal notice was given to the institution, which, if the evidence warranted it, was then followed by an “official letter of inquiry” (OLI) to the target institution. While there is little experience with the new dual notice process, it appears that in this new system the Notice of Allegations is roughly the procedural equivalent of the old OLI – somewhat akin to a criminal indictment.

Of course, if an NOI, or in turn an NOA, is not issued, the matter is dropped, at least for the time being. If both an NOI and then an NOA are issued, the process becomes much more formal and significant.

An institution receiving an NOA is in trouble. I have asked various former members of the NCAA enforcement staff and the Infractions Committee if there has ever been an institution that after receiving an OLI (which appears to be the rough equivalent of the new NOA) was subsequently exonerated entirely. The response I have always received leads me to conclude that while it is theoretically possible for an institution to survive receipt of an NOA (previously an OLI) with complete exoneration, no one can ever remember it happening. And if it has, it was a freak occurrence. The reality is that any institution receiving an NOA will be found guilty of some violation. Thus, an institution given official notice of allegations (i.e., “indicted”) by the NCAA enforcement staff is in a very different position than many criminal defendants in a public court. The ultimate goal for the institution is virtually never to seek exoneration, but rather to convince the Committee on Infractions to impose the lightest possible penalties, often by confessing guilt, blaming the violation on an “out of control” coach or booster with whom it has severed its relationship, and imposing some penalties on itself that it thinks will be enough to satisfy the Committee.

Once an institution has completed the required internal investigation and has submitted its written report, the institution is scheduled for a hearing before the Committee on Infractions. Each NCAA

Division has its own committee (which is really a quasi-judicial tribunal, not a committee in the usual sense of that word). Of course, the cases receiving the most attention arise in Division I, whose ten-member committee today is chaired by Thomas E. Yeager, the commissioner of the Colonial Athletic Association.⁵

At the Committee on Infractions hearing, the institution is entitled to representation by legal counsel, as is any allegedly implicated current or former coach and/or student-athlete (what the NCAA calls an “involved individual” – see By-law Art. 32.1.5). The hearing is closed and no one is allowed in the hearing room except the NCAA enforcement staff, a few representatives of the accused institution and its lawyer,⁶ and any involved individuals and their lawyers. In the interests of saving time, hearings are limited to a few hours on a single day. First, the staff makes its presentation to support its NOA, and then each “defendant” is allowed to present a position. No witnesses are allowed except the NCAA staff, individuals representing the institutions, and directly affected coaches and student-athletes. Thus, third persons making the accusations or those who the “defendants” claim could exonerate them are not permitted to appear or to present testimony. Neither are third parties who may be implicated in the NOA as participants in the violations. Indeed, no one gives “sworn testimony.” “Testimony” of third parties is given to the committee only through hearsay (or often multiple hearsay) oral reports, written transcripts, and accompanying written statements. Thus, because most of the people with personal knowledge of the relevant facts are not permitted to attend, cross-examination of “witnesses” is not possible. Rules of evidence are not followed, and whatever the committee allows will be heard. In short,

⁵ The current members of the Division I Committee on Infractions are Paul Dee, athletics director at the University of Miami; Gene Marsh, a law professor from the University of Alabama; Jerry Parkinson, dean of the law school at the University of Wyoming; Josephine Potuto, a law professor from the University of Nebraska; Eugene Smith, athletics director at Arizona State University; Andrea Myers, athletics director at Indiana State University; Thomas Yeager, the commissioner of the Colonial Athletic Association; and three practicing lawyers, Alfred Lechner, James Park, Jr., and Brian Halloran

⁶ NCAA By-law Art. 32.8.6.2 provides: “At the time the institution appears before the committee, its representatives should include the institution’s chief executive officer, the head coach of the sport in question, the institution’s director of athletics, legal counsel, enrolled student-athletes whose eligibility could be affected . . . , and any other representatives whose attendance has been requested by the committee.”

the proceeding is quite informal and haphazard by judicial standards.⁷

Another way in which the proceeding is unlike a normal judicial case is that the committee is not limited to finding violations that are alleged in the NOA. If during the course of the hearing, the committee finds evidence of violations not listed in the NOA, it may rule that such violations have been committed without the institution being given the opportunity to investigate or to prepare to rebut such alleged violations and without the individuals affected by the ruling being notified or consulted. This offers yet another reason why, unlike a criminal defendant, institutions might feel constrained from aggressively seeking to use all possible objections and tactics to avoid any penalties – even in the unlikely event it proves that the charges in the NOA are without merit, there can still be a price to pay, especially if the committee becomes put off by overaggressive posturing or believes that the institution does not display a sufficiently cooperative or contrite attitude.

After the hearing, the Committee on Infractions issues its written findings and imposes penalties. At this point the institution can either accept the decision and penalties of the Committee on Infractions or it may appeal to the five-member Infractions Appeals Committee, which in Division I is currently chaired by Terry Don Phillips, director of athletics at Clemson University.⁸ Since its inception in the early 1990s, this committee has been surprisingly independent and assertive in reversing some Committee on Infractions findings and reducing penalties, although it has never exonerated an institution that the Infractions Committee has found to have committed one or more violations. This has undoubtedly had a significant influence on the Committee on Infractions, whose unfettered discretion is now subject to meaningful oversight and possible reversal.

⁷ See generally NCAA By-law Art. 19 & Administrative By-law, Art. 32. Generally, the Committee on Infractions is empowered to establish its own rules of evidence and procedure for the conduct of the hearing. See By-law Art. 32.8.7. Most of this procedure is not set forth in any published document and is subject to change at any time by the Committee, including during the conduct of a hearing itself.

⁸ Current Members of the NCAA Division I Infractions Appeals Committee are Terry Don Phillips, athletics director at Clemson University; William Hoye, faculty athletics representative from Notre Dame University; Noel Ragsdale, a law professor at and the faculty athletics representative for the University of Southern California; Alan A. Ryan, Jr., in-house counsel for Harvard University; and Christopher Griffin, a practicing lawyer.

The Infractions Appeals Committee's decision is final and unappealable to any further body within the structure of the NCAA (see By-law Arts. 32.11.4 & 32.11.5).

This NCAA enforcement process has come under much criticism, much of it understandable, yet generally unjustified. Examples of aspects of the enforcement process that have come under such criticism include the following:

?In almost every case, the incriminating evidence against the accused institution and individuals is presented to the Infractions Committee through narrative accounts by the enforcement staff, backed up by written transcripts of interviews and signed statements. The first-hand witnesses, including the "accusers," are not allowed to attend the hearing or to give testimony even if they want to, no matter how crucial their testimony is to the case. Thus, the accused institution and involved individuals have no ability to confront or to cross-examine the witnesses against them, or to present witnesses in their defense. Audio or video tape recordings of the interviews of first-hand witnesses are not allowed to be played at the hearing so voice inflection, body language, or even context cannot be evaluated by the Infractions Committee.

?Although the incriminating evidence against the accused institution and involved individuals is presented in an oral report by an enforcement staff investigator, counsel for the "defendants" do not have a right to ask questions directly of (i.e., cross-examine) even that investigator.

?Although there is a four-year statute of limitations (see By-law Art. 32.6.3), the exceptions to the rule effectively eviscerate it.⁹ Thus, penalties are often handed down many years after the violation and frequently end up adversely impacting primarily coaches and student-

⁹ These exceptions are: "(a) Allegations involving violations affecting the eligibility of a current student-athlete; (b) Allegations in a case . . . of willful violations on the part of the institution or individual involved, which . . . continued into the four-year period; and (c) Allegations that indicate a blatant disregard for the Association's fundamental recruiting, extra-benefit, academic or ethical-conduct regulations or that involve an effort to conceal the occurrence of the violation." NCAA By-law Art. 32.6.3. Suffice it to say that the great majority of major violations fall within one of these categories, especially since they invariably involve some type of willful violation and/or an effort to conceal the violation.

athletes who were not at the institution at the time of the violations and are innocent of any wrongdoing.

?The Committee on Infractions is allowed to find violations of rules and impose penalties even for transgressions that were not alleged in the NOA. Thus, institutions, coaches, or student-athletes can be found to have violated rules with serious adverse consequences even though they have been given no notice of any such charge against them and have not had any opportunity to investigate or to prepare a defense. I have no data as to how often this actually occurs, but the mere possibility that it might can and does at least occasionally deter “defendants” from defending the charges in the NOA as vigorously as they might.

?An institution’s or a staff member’s failure fully to self-report any violation that they knew or should have known about (i.e., to turn yourself in) and that the enforcement staff subsequently determines occurred is itself considered a breach of the rules that can compound the severity of the penalty imposed.¹⁰ Thus, the notion embedded in the Fifth Amendment of the U.S. Constitution that a person does not have to incriminate himself is given no recognition in the NCAA enforcement process.

?A school that allows an athlete to play in an athletic contest pursuant to a court order requiring it to do so, but the athlete is later determined by the courts and the NCAA to have been ineligible, may still be penalized by the NCAA’s Division I Management Council in any of a variety of substantial ways “in the interest of restitution and fairness to competing institutions.”¹¹ This remarkable procedure, under which an institution can be severely

¹⁰ NCAA By-law Art. 32.1.4 is captioned “**Cooperative Principle**” and states: “The cooperative principle imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof.” Art. 32.2.1.2, captioned “**Self-Disclosure by an Institution**,” then provides: “Self-disclosure shall be considered in establishing penalties, and, if an institution uncovers a violation prior to its being reported to the NCAA and/or its conference, such disclosure shall be considered as a mitigating factor in determining the penalty.”

¹¹ NCAA By-law Art. 19.7, captioned “**Restitution**,” provides: “If a student-athlete who is ineligible under the terms of the constitution, by-laws, or other legislation of the Association is permitted to participate in intercollegiate competition contrary

penalized for doing only that which a court has ordered it to do, has nonetheless been employed on several occasions and has been found by the courts to be a lawful exercise of regulatory authority for a sports governing organization.¹²

Other examples could be cited. It is sufficient here simply to make the point that in many significant ways the NCAA enforcement process employs methods or procedures that seem quite at odds with basic rights of accused individuals or notions of fundamental fairness that Americans have come to take almost for granted – rights involving due process, equal protection, privacy, freedom from unreasonable searches and seizures, the right to confront one’s accuser, the right not to be forced to incriminate oneself, and perhaps others. This fact, however, does not necessarily lead to any overall conclusion about the reasonableness of the NCAA’s process or whether Congress or the courts should as a policy matter impose greater requirements on the NCAA. My own view, which I will expand on more in Part III of this statement, is that while the government should strongly encourage the NCAA to invest substantially more of its immense financial resources into creating a more substantial and more professional enforcement process, it would be unwise and do far more harm than good to impose traditional notions of fairness appropriate for the criminal justice system on the NCAA.

II. Current Legal Constraints on the NCAA’s Enforcement Process

Prior to the early 1980s, the NCAA was generally considered to be a state actor and thus its rules and actions were subjected to judicial review under traditional constitutional standards. Usually, the NCAA was able successfully to persuade courts that its procedures were adequate under due process standards,¹³ or that the rights being asserted by plaintiff athletes were not constitutionally protected

to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Management Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: [list of nine categories of penalties is omitted].”

¹² See, e.g., *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001). For recent cases upholding an identical rule of a state high school governing body, see *Indiana High Sch. Athletic Ass’n v. Martin*, 765 N.E.2d 1238 (Ind. 2002); *Indiana High Sch. Athletic Ass’n v. Reyes*, 694 N.E.2d 249 (Ind. 1997).

¹³ See, e.g., *Regents of the Univ. of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Howard Univ. v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Justice v. NCAA*, 577 F.Supp. 356 (D.Ariz. 1983).

property rights in the first place.¹⁴ Occasionally, the courts found that eligibility to play college sports was a protected property right and that the NCAA had failed to meet constitutional safeguards,¹⁵ but this was the exception. However, after the Supreme Court’s “state action” trilogy in 1982,¹⁶ the Fourth Circuit clearly reversed course in *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984), by holding the NCAA to be a private actor immune from constitutional attack in a case brought by a prospective student-athlete at Duke University, a private institution. But even after *Arlosoroff*, many still believed that this view was either an aberration or was limited to cases involving only private universities.

The Supreme Court put an end to this confusion in 1988 in the highly publicized case of *NCAA v. Tarkanian*, 488 U.S. 179 (1988). In a 5 to 4 decision written by Justice Stevens¹⁷ in a case involving NCAA disciplinary action for numerous major infractions by University of Nevada at Las Vegas men’s basketball coach Jerry Tarkanian, the Supreme Court held that the NCAA was not a state actor and thus was not subject to having its rules or decisions challenged for alleged violations of constitutional due process (and logically of equal protection, free speech, unreasonable searches and seizures, privacy, and all other rights provided for in the Bill of Rights of the U.S. Constitution). Because the case involved an employee of a state university, the scope of the *Tarkanian* ruling was sweeping, and since then it has been universally accepted that NCAA rules and conduct are beyond the reach of the U.S. Constitution.¹⁸

The Supreme Court reaffirmed this ruling in 2001 in *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288 (2001), another 5-4 decision,¹⁹ even though ironically the majority there held that a state high school athletic association whose membership was 84% public high

¹⁴ See, e.g., *Colorado Seminary v. NCAA*, 417 F.Supp. 885 (D. Colo. 1976), *aff’d*, 570 F.2d 320 (10th Cir. 1978).

¹⁵ See, e.g., *Hall v. NCAA*, 530 F.Supp. 104 (D.Minn. 1982).

¹⁶ These decisions were in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); and *Blum v. Yaretsky*, 457 U.S. 991 (1982).

¹⁷ In the majority were Justices Stevens, Blackmun, Rehnquist, Scalia, and Kennedy. Dissenting were Justices White, Brennan, Marshall, and O’Connor. Notable is that the division among the justices was not along normal ideological lines, with some “liberals” and “conservatives” on each side.

¹⁸ It remains a legal mystery exactly what would happen if a coach were fired by a state university at the direction of the NCAA and then successfully established that the university, unquestionably a state actor subject to constitutional requirements, had violated his due process or other constitutional rights. If the court merely ordered damages to be paid, it would not be a conceptual problem. But if the court ordered the institution to rehire the coach, the school would be put between the proverbial rock and a hard place – being threatened with contempt of court if it did not reinstate the coach but with severe sanctions, possibly expulsion, by the NCAA if it did. This scenario has not yet played itself out so it is not clear what approach the courts would take.

¹⁹ In the majority were Justices Souter, Stevens, Ginsberg, Breyer, and O’Connor. Dissenting were Justices Thomas, Rehnquist, Scalia, and Kennedy. Notable is that the division among the justices was sharply along normal ideological lines, with Justice O’Connor casting her frequent swing vote in this case with the “liberals” in the majority.

schools was a state actor and could be challenged for violating a member school's First Amendment free speech rights. Justice Thomas' dissent argued that "it [was] not difficult to imagine that application of the majority's entwinement test could change the result reached in [*Tarkanian*], so that the National Collegiate Athletic Association's actions could be found to be state action" (see *id.* at 314, fn.7). However, writing for the majority, Justice Souter expressly adopted the holding and reasoning in *Tarkanian*, distinguished the two cases, and reaffirmed that the NCAA was not a state actor and its actions not subject to constitutional review (see *id.* at 297-98). Thus, the narrow 5-4 holding in *Tarkanian* was expanded and entrenched since all nine justices in *Brentwood Academy* took the view that the result in *Tarkanian* was intact and correct.

In addition to being immune from attack under the U.S. Constitution, the NCAA is apparently also immune from state constitutional or statutory provisions establishing due process and other similar constitutional-like protections. Shortly after *Tarkanian*, at least four states (Nevada, Nebraska, Illinois, and Florida) adopted legislation that specifically required the NCAA to grant various degrees and types of due process to individuals and institutions accused of violating NCAA rules.²⁰ When in 1990 the NCAA received information that Jerry Tarkanian had again violated its rules and Tarkanian in turn demanded in a letter that he be given a number of procedural rights not provided for under the NCAA's rules, including access to a number of documents, the NCAA challenged the Nevada statute in a declaratory judgment action filed in Las Vegas. Both the District Court and in turn the Ninth Circuit, relying on several cases that had struck down state laws designed to regulate professional sports leagues,²¹ held that it violated the Dormant Commerce Clause of Article II of the U.S. Constitution for a single state to attempt to set the standards for NCAA rules and procedures when those rules and procedures necessarily have to be applied uniformly nationwide, as most NCAA rules do due to the inherent nature of the athletic competition activity that it regulates. Accordingly, Nevada's statute (and

²⁰ For a brief look at the differing approaches of the Nebraska and Nevada statutes, see Weiler & Roberts, *Sports and the Law* (3d ed.) at pp.757-58 (West Group 2004).

²¹ See, e.g., cases holding that state antitrust laws cannot apply to professional sports leagues – *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); *Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 194 Cal.Rptr. 367, 668 P.2d 674 (1983); *State of Wisconsin v. Milwaukee Braves*, 31 Wisc.2d 699, 144 N.W.2d 1 (1966); *Matuszak v. Houston Oilers*, 515 S.W.2d 725 (Tex.Ct.App. 1974); or holding that state labor laws cannot apply to professional sports leagues – *Hebert v. Los Angeles Raiders*, 2 Cal.Rptr.2d 489, 820 P.2d 999 (Cal.App. 1991).

of course the other states' as well, assuming their circuits would agree with this ruling) was held to be unconstitutional and could not be enforced against the NCAA.²² See *NCAA v. Miller*, 795 F.Supp. 1476 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993).

Thus today, after *Tarkanian*, *Brentwood Academy*, and *Miller*, it seems reasonably clear that, except to the limited extent federal legislation might apply,²³ the NCAA's enforcement process and procedures are unconstrained by either federal constitutional or state law. Thus, the question for Congress to consider is whether it would be appropriate for new federal legislation to impose any procedural requirements on the NCAA, and if so, what those requirements should be.

III. The Implications of Imposing Stricter Procedural Requirements on the NCAA Enforcement Process

In order fully to understand and appreciate the NCAA's process and procedures for enforcing its complex array of substantive rules governing eligibility, recruiting, academic standards, and amateurism (the "enforcement process"), it is first necessary to understand the larger culture in which those procedures exist and operate. The NCAA enforcement process is simply the mechanism for enforcing the substantive rules that govern intercollegiate athletics, and it can only be understood in the context of that underlying "law." The degree of difficulty of enforcing these rules cannot be overstated, in significant part because the idealized purpose and vision of intercollegiate athletics that the NCAA's substantive rules purport to preserve stand in stark contrast to the commercial market realities that dictate the priorities and create the behavioral incentives for those operating within this system. In other words, the market-driven commercial and psychic incentives for coaches, athletic administrators, boosters, and even university presidents and faculty to "cheat" are enormous. In such an environment, where the urges

²² Interestingly, in the wake of a recent controversial investigation involving the University of Alabama's football program, the Collegiate Athletic Association Procedures Act was introduced in the Alabama House of Representatives in 2003. It would require that the NCAA provide due process to any Alabama institution accused of rules infractions and would give the Alabama state courts jurisdiction to review NCAA findings and penalties. Unless the Eleventh Circuit takes a different view of this issue than the Ninth Circuit did in *Miller*, this legislation, should it pass, would likely suffer the same fate as Nevada's did over a decade ago.

²³ So, for example, the NCAA arguably could, if threshold statutory elements are met, still be subject to the substantive requirements of the Americans With Disabilities Act, the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, or the antitrust laws, just to name a few. While the NCAA has been sued for alleged violations of all of these federal statutes in recent years, none of the cases remotely implicates the NCAA's process or procedures for dealing with alleged rule infractions by member institutions, and it is hard to imagine a case in which one would.

of so many within the system to violate the rules are great, yet the “law enforcement powers” of the entirely private organization entrusted with enforcing those rules are very limited, it requires extraordinary authority, vigilance, and aggressiveness to prevent wholesale disregard for the “law,” chaos, and eventually the deterioration of the system itself.²⁴

It should be noted that for purposes of my testimony today, I am specifically focusing on Division I-A football and Division I men’s basketball. I am aware that the vast majority of college athletes do not play for NCAA Division I member schools, and that even in Division I the vast majority of athletes do not play I-A football or I men’s basketball. But to a greater or lesser extent, the overwhelming majority of these thousands of student-athletes in all of their various sports roughly resemble the amateur ideal of the student-athlete that the NCAA is entrusted to preserve, and while there are still some psychic, reputational, and even financial incentives for coaches and others in these other sports and divisions to violate the rules, they exist at a much lower level with very little commercial or public influence. Thus, a great majority of the serious violations of NCAA rules, of the time and effort of the NCAA’s enforcement staff, and the public and media attention on infractions occurs in the two sports of I-A football and I men’s basketball. And it is not mere coincidence that these two enormously commercialized sports generate a huge percentage of intercollegiate athletic revenues. If it were not for I-A football and I men’s basketball, the process and procedures that we are discussing today would be little noticed, would probably work well without controversy, and would draw no interest from Congress. So it is on I-A football and I men’s basketball that I focus here.

As I have often said and written before, the intercollegiate sports “industry” is a peculiar animal. On the one hand, the statement of the NCAA’s “Fundamental Policy” claims that:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of

²⁴ There are many who would argue that the “system” of big-time intercollegiate athletics has become so corrupt, exploitive, and hypocritical that it is not worth protecting. Whatever the merits of that larger philosophical argument, it is not relevant to an assessment of the fairness of the enforcement process established for the purpose of preserving the system. One can only reasonably assess the fairness and effectiveness of any process by evaluating it in terms of how it achieves the goals for which

the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.²⁵

On the other hand, multi-billion dollar television contracts for the Division I men's basketball tournament (known as "March Madness"), over \$15 million payouts to each team participating in a Bowl Championship Series football game every year, and the frequent revelations of academic cheating, paying athletes and their families, using sex and drugs to recruit, criminal rap sheets, and illiterate "student"-athletes suggest a very different reality. Division I-A football and I men's basketball are big business, and the economic, morale, and public relations consequences for an institution of success or failure on the field or court are substantial. Winning head football and men's basketball coaches today routinely make millions of dollars,²⁶ whether or not most of their players fail to graduate, commit major crimes, or can even read or write. On the other hand, it is generally accepted and understood that a coach who loses too many games will soon find himself unemployed no matter how successful he is in running a "clean" program.

Thus, with so much at stake, there are enormous incentives for "revenue sport" coaches and others to do as much as possible to gain a competitive advantage, even if that means breaking an NCAA rule. There is no doubt that the incentives to cheat are great, the opportunities to cheat are numerous, the likelihood of getting caught appears to be fairly small, and every institution is suspicious that its competitors are "getting away with something" and thereby gaining some competitive advantage. It is this environment that the NCAA is charged with adopting and enforcing its complex set of rules designed to preserve the ideal of the amateur student-athlete. This is obviously no easy task.

The task is made even more difficult by the fact that the NCAA is a private organization, and thus it lacks the authority to employ important investigative and prosecutorial techniques available to public law enforcement and criminal justice authorities. It has no power to compel individuals to provide information. It cannot subpoena witnesses to attend depositions or hearings. It cannot hold

it was established, not whether the goals were legitimate in the first place.

²⁵ NCAA Constitution, Art. 1.3.1.

²⁶ A perfect example is in my home state of Louisiana. Because his team won the BCS national championship last year, LSU's football coach Nick Saban was rewarded by having his contract renegotiated so that he is now earning \$2.3 million in 2004, with increases over the next several years to \$3.0 million annually.

individuals in contempt for not complying with its procedural rules or requests. It cannot impose fines or imprison individuals who violate the rules or lie. It cannot arrest or detain anyone. It cannot grant anyone immunity from criminal prosecution should his “testimony” reveal illegal activity. In short, as a purely private membership organization, the NCAA must rely entirely on the voluntary cooperation of those who have relevant information to provide that information, and its only “power” is the ability to withhold or condition the benefits of membership.

Thus, the NCAA enforcement process necessarily must try to carry out its mission in an environment in which the deck is heavily stacked against it. Furthermore, it is critical to recognize that, just like with any public criminal justice system, no process for ascertaining facts, determining guilt, and handing out punishment is perfect. Even with our criminal justice system and all of its constitutional protections for defendants, we often read about convicted “criminals” being released from prison, sometimes from death row, after many years of incarceration because new evidence has established their innocence. Over the years many people have been falsely accused and often convicted of crimes that they did not commit, just as many guilty individuals have escaped justice. Thus, it is pointless to ask if the NCAA’s system is imperfect, for it inevitably is and will be. No matter how much power is entrusted to enforcement authorities and how few protections are given to the “accused,” some who are guilty will escape; and no matter how many rights are guaranteed, some who are innocent will be unjustly accused and perhaps even found guilty. Rather, the appropriate question is how should the NCAA structure its process to minimize both the false positives (those wrongfully accused or found guilty) and the false negatives (those guilty of violations who escape punishment), and thereby deter further wrongdoing, while maintaining an acceptable balance between those two undesirable but inevitable dysfunctions.

In that context, I emphasize two points. First, like the Lee Commission over a decade ago,²⁷ I

²⁷ In the wake of the *Tarkanian* and *Miller* cases, the NCAA came under a great deal of public criticism for the methods it used in the enforcement process, which in turn led NCAA Executive Director Dick Schultz in April 1991 to bring together a group of distinguished individuals, chaired by President Reagan’s Solicitor General, Rex Lee, to study and make recommendations for improving the enforcement process. This Lee Commission issued its report on October 28, 1991, with eleven recommendations. Many of the recommendations have subsequently been adopted to a greater or lesser extent by the NCAA, for example (1) establishing a preliminary notice of impending investigation (the NOI), (2) establishing a summary disposition procedure in appropriate major infractions cases (see By-law Art. 32.7), (3) establishing an appellate body (now the Infractions Appeals Committee), and (4) expanding the extent to which decisions of the Committee on Infractions are publicly reported, and (5) establishing a conflict of interest policy for members of the enforcement staff (see By-law Art. 32.2.2.2). Other recommendations have either entirely or largely not been adopted, most notably (1) to establish a group of

believe that there are things the NCAA can do to improve the fairness, or at least the appearance of fairness, of its enforcement system, provide greater procedural protections for institutions and involved individuals, and reduce the chances of a false positive without seriously undermining its ability to enforce its rules effectively and thereby deter even more rampant misconduct. This, however, would require that the NCAA invest additional resources in its enforcement system, as I will urge and explain shortly. But with billions of dollars flowing through Division I college athletics, the level of expenditure needed to upgrade the enforcement process to an appropriate level would be a relatively tiny investment in order to achieve fairness, justice, and public confidence in the system.

That said, however, I also am firmly convinced that while some of the procedures employed by the NCAA seem rather severe and out of step with traditional American notions of due process and fairness, in fact the NCAA's enforcement process is remarkably accurate. It seldom wrongfully accuses and even more rarely mistakenly "convicts." That is to say, there are very few false positives. There is occasionally controversy about whether a penalty imposed is inappropriately severe, but it is extremely rare that there is any serious doubt about whether a violation has been committed. I believe that this is true in part because the enforcement staff has little or no incentive to pursue false charges against anyone; if anything there is an opposite incentive not to pursue any but the most clear cases simply because of the public pressure and vilification that is often heaped on those who threaten popular athletic programs. Furthermore, often unlike public prosecutors, members of the enforcement staff are not in a position to use the process to build a reputation or career. They are generally young, notoriously poorly paid, have no axe to grind, and invariably toil anonymously and out of the public eye. There is almost no evidence, other than the occasional unsubstantiated accusations of undoubtedly "guilty" coaches who are desperately trying to save their privileged status and large incomes, suggesting that the enforcement staff has ever acted in anything but reasonably cautious good faith. The staff, being generally young and frequently inexperienced, is certainly not perfect and can undoubtedly make mistakes, but the mistakes seem to be relatively few (far less than those made in our criminal justice system) and always made in

neutral former judges as hearing officers entrusted with resolving factual disputes before the Infractions Committee decides penalties, and (2) opening up the Infractions Committee hearings to the public except when highly confidential matters are being presented. See generally, *Report and Recommendations of the Special Committee to review the NCAA Enforcement and Infractions Process* (The Lee Commission), October 28, 1991 (on file in my office).

good faith.

Given that there are very few “wrongful convictions,” giving accused institutions and involved individuals more procedural protections would produce virtually no greater justice.²⁸ On the other hand, giving accused institutions and involved individuals significantly greater procedural rights in some forms might well enable many to escape “conviction” based on what we have come to think of as technicalities – factors not really having anything to do with the innocence or guilt of the defendant – which would in turn likely cause more to violate rules because of a greater sense of impunity. Thus, imposing more stringent procedural obligations on a small and generally inexperienced staff and on the all-volunteer Infractions Committee would likely do far more damage than good by increasing significantly the number of false negatives, and thereby encourage even more violations, while not reducing the essentially non-existent false positives. In a system in which the incentives and opportunities to cheat are already enormous, this shift in favor of more false negatives and a lesser deterrent against misconduct could have a serious adverse effect on the integrity of the college athletics industry (such as it is).

As an example, if the law were to require that accused institutions and individuals have the right to cross-examine those who provide evidence against them and preclude the use of hearsay evidence, it would severely diminish the ability of the system to find and to penalize violations. Witnesses with personal knowledge of violations are frequently young, poor, and unfamiliar with legal processes who would often decline to cooperate rather than be subjected to interrogation and inevitable public scrutiny.

Another example relates to the “Restitution Rule” under which the NCAA can penalize an institution for allowing an ineligible player to participate even if it did so under a court order. While this seems fundamentally unfair at first blush, on closer analysis its value becomes apparent. If an institution were not subject to penalties in such a situation, coaches could recruit a number of ineligible players, seek short-term injunctions just before important contests from local judges who often act out of partisan or parochial interests, and then allow the player to participate to the substantial competitive advantage of the team (and unfair disadvantage to its opponents), all without any fear of subsequent penalty when the

²⁸ One might envision that giving accused institutions and individuals more leeway in presenting evidence and challenging the credibility of the evidence against them might result in the Infractions Committee imposing less severe penalties. Of course, whether that would be more or less appropriate would be a wholly subjective judgment and not susceptible to normative evaluation. Thus, I mention it only in passing here.

appellate courts inevitably reverse the injunction. This has been the reasoning of the courts that have uniformly upheld the legality of the Restitution Rule – that the NCAA members voluntarily agreed to be subject to it and without it schools could easily obtain unfair competitive advantage through dishonorable means.²⁹ Thus the rule may seem unfair on the surface, but it is important to preventing a means for wholesale evasion of the NCAA’s eligibility rules.

III. Recommendations

In the final analysis, the most fundamental problem confronting the NCAA enforcement process is the inevitable one of trying to enforce a complex set of rules designed to preserve aspirations that are at odds with reality. Division I-A football and Division I men’s basketball are businesses driven by commercial pressures and incentives. Winning is of great value and is rewarded; losing is problematic and is punished. Yet in every game one team must win and one must lose, so there will always be huge pressures on every institution to achieve the former and avoid the latter, even though inevitably there will always be losers and few champions. History teaches repeatedly that while “higher values” can be imposed by law up to a point, when market forces become great enough, law-breaking will become widespread and the laws will become increasingly difficult to enforce.³⁰ Therefore, the one clear way to reduce the cheating and to improve the fairness of the enforcement process is to reduce the commercial pressures that today drive Division I intercollegiate athletics and define its “win at all costs” culture. I could make several recommendations in this vein for “cleaning up” college sports, such as capping coaches’ salaries, capping expenditures for recruiting or prohibiting recruiting altogether (as many high school associations do), limiting the revenues and number of TV appearances for a football or basketball team, and/or requiring athletic revenue to be widely shared among all schools in Division I. Such reforms, however, would be counter to the interests of the millions of fans who now “consume” college athletics as an entertainment product, and implementing them would require either direct government regulation or at least an antitrust exemption for the NCAA. But such sweeping reform of college sports

²⁹ See cases cited at n.12, *supra*.

³⁰ There is perhaps no better example of this phenomenon than the Eighteenth Amendment to the U.S. Constitution, which imposed a ban on the manufacture, sale, or consumption of alcoholic beverages. The market demand for such beverages was so enormous that the law simply could not be effectively enforced and it was repealed by the Twenty-First Amendment. Moral principles were eventually forced to give way to economic reality.

is beyond the scope of this hearing and is likely politically unrealistic.

Focusing just on the NCAA's enforcement process, I would not recommend that Congress pass legislation imposing due process requirements, either generally or specifically, on the NCAA. Turning over the regulation of the NCAA enforcement process to courts that are unfamiliar with the peculiar culture of Division I athletics, courts that are invariably located in the very communities where passions in any particular case will run the highest, would only serve to undermine the NCAA's ability to enforce its rules and maintain some semblance of conformity with the values and mission of college sports. It would almost certainly greatly increase the number of rules violators who are able to escape detection and penalty while not decreasing the number of innocent institutions and individuals who are wrongfully accused and punished.

Nonetheless, I do believe that the enforcement process could be significantly improved in ways that would both result in more "convictions" of guilty parties while also enhancing fairness and the public's confidence in the integrity of intercollegiate athletics. But the key to these improvements is not specific legal mandates, but rather increasing the NCAA's investment in the process so as to create a larger, better, and more professional enforcement system. An enforcement staff of only 21 mostly young, inexperienced, and lowly paid investigators to police well over a thousand institutions employing tens of thousands of coaches who recruit hundreds of thousands of student-athletes, in a climate where there are substantial incentives to cheat, is grossly inadequate. Furthermore, the high rate of turnover among the staff, undoubtedly in part the result of relatively low compensation, diminishes its effectiveness. Were there to be a substantially larger and more stable and highly paid professional staff of experienced investigators, the likelihood of detecting violations would be greater, the confidence of everyone in the thoroughness and reliability of investigations would be greater, and the need to rely on "rats," to cut corners, and to employ questionable tactics would be greatly diminished.

Furthermore, 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. These two crucial committees are really

adjudicatory “courts,” not “committees” in any normal sense of that word, and staffing them with volunteers who come solely from within the NCAA system is not appropriate. Because the members of the Infractions Committee have limited amounts of time they can devote to this “volunteer” activity, hearings must be streamlined and cut shorter than they need to be or should be. And because the committee members are not trained or experienced adjudicators, implementing more complex procedural processes would be difficult for them to manage. There is no good reason why witnesses, especially crucial witnesses, who are willing to attend and testify at a hearing should be prevented from doing so, as they are now, other than that the proceedings would become longer and more complicated, taxing both the time and judicial skills of the volunteer judges. Other procedures employed during hearings seem designed solely to create efficiency, not a better result or more confidence in the fairness of the process, and could be improved if the “judges” were paid, experienced, properly trained, and available for however long was required. While I am unaware of any current or former member of either committee who has ever acted with any but the highest degree of integrity and good faith, this is not their primary job or even an important part of their professional careers. Without casting any aspersions on anyone who has served on either of these committees, the old adage that “you get what you pay for” seems particularly apt.

Thus, I would recommend that Congress urge and even pressure the NCAA to invest far greater resources into its enforcement process, including expanding the size and improving the compensation of the enforcement staff and establishing a “judiciary” of paid and properly trained “judges.” The NCAA is and always has operated its enforcement process “on the cheap” despite having huge resources at its disposal, and the process predictably suffers as a result. Congress should use its influence to change this and to require the NCAA to make enforcement one of its highest priorities. If it does, the specific ways that the procedural rules could be made more fair without sacrificing the effectiveness of the process would, I am convinced, naturally follow.

One final recommendation I would make is rather radical, but compelling. I believe Congress should fully explore and structure a mechanism for the NCAA enforcement staff to obtain search warrants and subpoenas from federal courts, which would enable it to obtain evidence and compel

testimony from reluctant or unwilling individuals under penalty of perjury. Likewise, if witnesses could be compelled to appear and testify under oath before the Committee on Infractions, many of the impediments to providing institutions and involved individuals with greater procedural rights and protections would be greatly diminished since witnesses would not have to be coddled with promises of being insulated from exposure or cross-examination. If, as the mere fact that the Subcommittee is holding this hearing suggests, NCAA enforcement action can have substantial consequences that economically and psychologically affect a large segment of the general public, then public policy would be furthered by providing these basic law enforcement tools to those who are entrusted with enforcing the NCAA's rules.

IV. Conclusion

While there are many aspects to the NCAA's enforcement of its rules that are often criticized for being unfair or that violate some traditional sense of due process or other fundamental rights of the "accused," I do not share that general criticism. There are indeed many specific procedures employed during the course of an NCAA infractions case that could make the process at least appear, if not actually be, more "fair," but in the end there is no evidence to suggest that the NCAA's enforcement system is fundamentally flawed or makes major mistakes. Wrongful convictions are extremely rare and the penalties assessed are remarkably predictable and consistent. In the cultural environment in which the enforcement process operates in Division I, most of the seemingly questionable measures and procedures employed can be quite reasonably justified. In I-A football and I men's basketball, the commercial incentives and opportunities to cheat are enormous, the likelihood of detection is slight, and proving violations can be quite difficult. To impose judicially enforceable due process or other strict procedural requirements on the enforcement staff or the Infractions Committee as they are constituted today would only be likely to diminish their ability to detect, "convict," and penalize violations that if allowed to become widespread and unpunished could undermine the entire structure of intercollegiate athletics. Furthermore, creating such a legal obligation would give all those found guilty of rules violations a guaranteed avenue of further appeal to the courts, which would impose both time and financial costs on the NCAA, undermine the effectiveness of its enforcement system, and further burden public courts that

are already strained. If reducing the number of frivolous lawsuits is desirable, this would not be a way to achieve it.

Meaningful positive reform of the enforcement process would require much more than simply imposing “due process” or other simple-sounding requirements on the NCAA. The NCAA could and should be pressured to make a substantially increased investment of resources in its enforcement process. First the NCAA should greatly increase both the size and the compensation of its enforcement staff so as to enable a larger and more stable and experienced investigative staff more effectively to detect, pursue, and prove rule violations without resort to unnecessary short-cuts or questionable tactics. Second, the NCAA should establish in Division I a paid professional administrative “court” to replace the all-volunteer Committee on Infractions and Infractions Appeals Committee so that properly trained and experienced jurists could devote the necessary time, skill, energy, and attention to judging every case thoroughly and fairly. The NCAA has historically carried out its extraordinarily important enforcement function by devoting precious few of its enormous financial resources to it, and inevitably in this environment corners must be cut and the appearance of fairness compromised for the sake of efficiency. Congress should insist that the NCAA substantially increase its financial investment in and commitment to its enforcement process.

Finally, Congress should also consider establishing a mechanism for the NCAA enforcement staff and Infractions Committee to obtain warrants and subpoenas so that evidence could be obtained and testimony taken under penalty of perjury. Armed with such law enforcement tools, policed by a large and well paid investigative staff, and heard by a “court” of properly trained professional “judges,” there is every reason to believe that the NCAA’s enforcement process would be even more effective than it currently is at detecting and penalizing violations of its rules while maintaining an eminently fair and just (albeit inevitably imperfect) process.