

# STATEMENT OF RONALD S. KATZ<sup>1</sup>

Knight Commission Meeting

May 19, 2015

Washington, D.C.

## **Responding to Change: Alternative Regulatory Schemes for College Sports (why the student-athlete concept is flawed)**

### **I. Introduction**

The invented noun “student-athlete” should be abandoned. It suggests an equivalence between academics and athletics that should not exist because it has led in many cases to what, in effect, are professional college sports.

This Statement makes six suggestions to end this flawed equivalence. They revolve around the core duty of a college or university – education – and the hallmark of that education: graduation.

These suggestions are straightforward and simple. Complexity simply has not worked to regulate college sports, e.g., see the NCAA Bylaws. As this Commission stated in its 2001 publication, “The evidence strongly suggests that it is not enough simply to add new rules to the NCAA’s copious rule book.”<sup>2</sup>

Finally, if these suggestions are implemented, they will greatly ameliorate the antitrust case losses that have dogged the NCAA. Emphasizing education over commerce is the most effective way for the NCAA to win antitrust cases.

### **II. Six Suggestions to Change the College Sports Focus From “Student-Athletes” to Students**

- (i) *Change the designation "student-athlete" to "student."*

This simple change, which has no downside, clarifies that institutions of higher education have as their core mission the provision of education rather than athletics or entertainment. Indeed, although it has been suggested that the term “student-athlete” was coined in order to make sure the student-athletes would not be eligible for Workers’ Compensation,<sup>3</sup> the term “student” is much more likely to achieve that aim.

No college sports regulatory scheme will work if the focus is incorrect. In my opinion, the current focus on the student-athlete is incorrect.

Even the 2010 report of this Commission—*Restoring the Balance*<sup>4</sup>—illustrates the problem. With all due respect, balancing is not called for: if academics do not have primacy at all times, then anti-educational phenomena like “one-and-done” will occur, giving college sports a black eye. Indeed, “balance” is a misleading word in this context because of the gross imbalance at the

FBS schools: according to the 2010 report of this Commission, median spending per *athlete* at FBS schools exceeded median spending per *student* by a factor of six.<sup>5</sup>

Student-athletes are the only group that has a hyphenated designation. Members of the student band are not called student-musicians, chemistry majors are not called student-chemists, and so on. In and of itself, this hyphenation implies that student-athletes will be treated differently. *This different treatment is precisely the problem that needs to be addressed.*

Student-athletes should be treated like every other student. In the current environment, this suggestion will probably be perceived as radical. In reality, it is just a proposal to go back to basics. There is evidence that such a return to basics will not lessen revenue from football and men's basketball.<sup>6</sup>

Under this proposal, for example, scholarships should not exceed the cost of attendance for students, whether or not they are athletes. Then all of the NCAA Bylaws regarding educational requirements could be dispensed with, because those requirements would be the same as those set by the college or university for all students on a track for graduation, i.e., taking at least the minimum course load required by the university for graduation and achieving the minimum grades required by the university.

(ii) *Require that all students be on track for graduation in order to play a sport.*

Playing a sport is a privilege, not a right. If a student is not progressing toward the primary goal of an institution of higher education – graduation – then that student should not be able to partake of this privilege. This rule would make it clear that education is the top priority of institutions of higher education. The rule would also be easy to apply because standards of progressing toward a four-year graduation would, under this proposal, be the same for all students.<sup>7</sup>

This proposal would solve problems like scheduling for the sake of television rather than for the sake of academics. Obviously, such scheduling, which includes week-night football games, does not help athletes to progress towards graduation because it lessens study and class time. Universities, under this proposal, would have to lessen or eliminate such scheduling because it would lessen an athlete's chance of graduating on a normal track.<sup>8</sup> Practice time would also have to be lessened to permit more time for study, which the shortening of schedules would also help.

(iii) *Requiring recipients of athletic scholarships to sign a contract committing to four years of study.* An athletic scholarship should be awarded to someone who, in exchange for the scholarship, is willing to commit to the hallmark of an institution of higher education – graduation.<sup>9</sup> If the athlete is not willing to make that commitment, he or she should not receive a scholarship. If the athlete voluntarily leaves college before four years have passed in order to play professional sports, he or she should have an obligation to return the scholarship money.<sup>10</sup>

(iv) *Disallow redshirting.* Redshirting is not consistent with the educational mission, which has a norm of four years to graduation. Redshirting benefits only athletics. It permits greater commitment to athletics and less commitment to academics. By transforming student-

athletes back to students, the educational mission of the university, which culminates with the granting of a degree, will be returned to its rightfully core position.

(v) *Simplify the NCAA Bylaws.*

Many of the NCAA Bylaws relate to academics. For example, virtually all of Article 14 of the Bylaws (“Eligibility: Academic and General Requirements”) could be eliminated if these suggestions were accepted. Academic requirements would simply be the same as they are for all students on a normal track to graduation, athletes and non-athletes alike. Entrance requirements could be set by individual institutions, but these institutions would be constrained by the knowledge that an athlete could not play if he or she were not progressing normally toward graduation.

(vi) *Judging infractions should be assigned to retired judges.* Although simpler, the NCAA Bylaws would obviously require enforcement. For example, it is important to ensure that students are legitimately progressing toward graduation.

My proposal for enforcement is to resuscitate a proposal made by some of the most distinguished jurists in our country in 1991 to the NCAA at the NCAA’s request (see attached, Recommendation No. 4). This wise proposal, for reasons difficult to fathom, was not accepted by the NCAA.

At that time the NCAA asked, among others, the former Chief Justice of United States Supreme Court, the former Solicitor-General of the United States and numerous other luminaries including college presidents and retired trial and appellate judges to make proposals for the NCAA’s discipline system. Among other things, that distinguished group recommended that the judgment aspect of the disciplinary system be handled by retired judges without any formal connection to the NCAA.

I respectfully suggest that that proposal should now be accepted. No system – not the NCAA’s or any other – can be prosecutor, judge, jury and appellate court. Such a system offends our most basic tenets of fairness and creates numerous conflicts of interest. Passing judgment is not an expertise of the NCAA, nor should it be.

However, the NCAA does have expertise in amateur college athletics, and part of this proposal in this Statement is that the final appeal of any decision rendered by a retired judge would be to the President of the NCAA. In that way, due process would be served, but also the unique interests and expertise of the NCAA would be brought to bear on the situation.

**III. Acceptance of the Above Suggestions Will Lessen or Potentially Eliminate the NCAA’s Antitrust Problems.**

The chances that the NCAA, which the U.S. Supreme Court has described as a cartel,<sup>11</sup> will receive an antitrust exemption from Congress are nil, in my opinion. Only one sports organization, Major League Baseball, has such an exemption, and that has been widely criticized<sup>12</sup> and is currently the subject of a petition for *certiorari* to the U.S. Supreme Court.<sup>13</sup>

If, however, the NCAA argued educational rather than economic values in its antitrust cases, it

would be much more likely to win those cases. The *Regents of the University of Oklahoma* case, cited above, is the best example of the NCAA's misguided economic argument approach, which appears in virtually every NCAA antitrust case. In the *Oklahoma* case, the NCAA argued two non-education-related justifications for its policy to limit collegiate football games on television: protection of gate attendance and competitive balance.<sup>14</sup> Not surprisingly, the Supreme Court ruled against the NCAA.

Had the NCAA argued educational justifications for its policy, however, the dissent by Justice Byron White (formerly an All-American football player at the University of Colorado) suggests that the NCAA would have prevailed: "The primarily non-economic values pursued by educational institutions differ fundamentally from the 'overriding commercial purpose of [the] day-to-day activities' of engineers, lawyers, doctors, and businessmen."<sup>15</sup> He goes on to articulate what is the main point of my presentation to this Commission:

In short, '[the] restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement rather than inhibit, educational achievement.' (emphasis added; internal quotation citations omitted)<sup>16</sup>

Justice White's argument did not garner a majority in the *Oklahoma* case because gate attendance and competitive balance are commercial – not educational – justifications, and therefore should be treated no differently from other commercial justifications. The result today, in my opinion, would be different, if, for example the NCAA prohibited week-night football games because they cut into the athletes' study and class time. Such a justification goes to the non-commercial core of what the NCAA should be all about, and it would carry the day, in my opinion, in a rule-of reason analysis.

#### IV. Conclusion

The vested financial interests resulting from the professionalization of college football and men's basketball have brought college sport to the tipping point. What Justice White predicted in 1984—that the very existence of college athletics might be "threatened by unbridled competition in the economic sphere"<sup>17</sup>—has come to pass. Unless this process is rolled back to basics with a regulatory scheme that has graduation as its hallmark, the academic mission of colleges and universities will continue to be tarnished and diminished.

An intense focus on graduation in four years is a simple solution to the current difficulties of college sports, one that could be implemented unilaterally today by any college or university. I would urge this Commission to re-emphasize a key principle enunciated in its initial report in 1991: " 'No pass, no play' will be the byword of college sports in admissions, academic progress and graduation rates."<sup>18</sup>



## ENDNOTES

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<sup>2</sup> “A Call to Action: Reconnecting College Sports and Higher Education,” p. 11 (Knight Commission on Intercollegiate Athletics: June, 2001).

<sup>3</sup> Byers, Walter, *Unsportsmanlike Conduct; Exploiting College Athletes*, p. 69 (University of Michigan: 1995).

<sup>4</sup> “Restoring the Balance: Dollars, Values, and the Future of College Sports” (Knight Commission on Intercollegiate Athletics: 2010).

<sup>5</sup> *Id.* at p. 5. The *Report’s* main recommendation is on p. 14: “We repeat the Commission’s 2001 recommendation that a team should be on track to graduate at least 50% of its players to be eligible for postseason championships.” This recommendation, which apparently had not been accepted by the NCAA for nine years at the time that it was re-made in 2010, is unambitious at best. Similarly, unambitious is Principle III at p. 46 of this Commission’s first report in March, 1991 – “Keeping Faith With the Student Athlete: A New Model for Intercollegiate Athletics”: “This institution will provide student-athletes with the opportunity for academic experiences *as close as possible* to the experiences of their classmates.” Emphasis added.

<sup>6</sup> I do not believe that this proposal will lessen revenues from college sports. For example, although the quality of college basketball has gone down since the inception of “one-and-done,” viewership and interest have gone up. This Commission’s June 2001 Report – “A Call to Action: Reconnecting College Sports and Higher Education” – agrees. Page 30 of that Report states: “There are no downsides to thoroughgoing reform. When and if accomplished, athletic contests would still be attended by their fans and covered by the media even if the players were students first and athletes second.”

<sup>7</sup> Some may argue that this rule would bear most harshly on students from underprivileged backgrounds. Such students, however, can receive tutoring in order to bring them up to the appropriate standard. That tutoring, of *course*, would have to be available to any student– athlete or not – from an underprivileged background.

<sup>8</sup> This proposal, however would not solve the problem of “one and done”, because all that is needed to comply with “one and done” is to be academically on track for graduation for one term only (more accurately it should be called “1/2 and done”). Therefore, solving “one and done” is left to Proposal iii below.

<sup>9</sup> *The Oxford English Dictionary* defines “hallmark” as a “marked stamped on articles of gold, silver or platinum... certifying their standard of purity.”

<sup>10</sup> One potential problem with this proposal is that professional teams could reimburse the college on behalf of the athlete, because such a reimbursement would be only a small percentage of what the professional team was paying to the athlete. A solution for the problem of professional team reimbursement would be a liquidated damages clause to the scholarship contract, which would require a scholarship recipient leaving school for a professional team to pay an enhanced amount of money to the college, sufficient to discourage such professional team reimbursement.

<sup>11</sup> *NCAA v. Board of Regents of the U. of Oklahoma, et al.*, 468 U.S. 85, 96 (1984).

<sup>12</sup> *City of San Jose v. Office of the Commissioner of Baseball*; No. 14-15139 (9<sup>th</sup> Circuit, January 15, 2015).

<sup>13</sup> Petition for Writ of Certiorari, *City of San Jose v. Office of the Commissioner of Baseball* (April 15, 2015, No. 14-1252).

<sup>14</sup> *Board of Regents, supra*, at 96.

<sup>15</sup> *Id.* at 135.

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

<sup>17</sup> *Id.* at 122.

<sup>18</sup> “Keeping Faith With the Student-Athlete: A New Model For Intercollegiate Athletics”, p. 18 (Knight Commission on Intercollegiate Athletics: March, 1991).

REPORT AND RECOMMENDATIONS  
OF THE  
SPECIAL COMMITTEE TO REVIEW THE  
NCAA ENFORCEMENT AND INFRACTIONS PROCESS

The Special Committee to Review the NCAA Enforcement and Infractions Process was appointed in April 1991 to examine the enforcement procedures to ensure that this important function of the Association is fair, effective, timely and consistent. Its establishment was initiated by NCAA Executive Director Richard D. Schultz a year earlier in a document outlining his goals for 1990-91, which were accepted by the NCAA Executive Committee in its August 1990 meeting.

Specifically, the special committee's charge, as extended by the executive director, was as follows: "Conduct a thorough review of the enforcement and infractions process, including (a) the investigative process by the enforcement staff; (b) the function of the Committee on Infractions, including the hearing process and the method used to determine penalties if guilty, and (c) the release of information to the public regarding sanctions and the conduct of press conferences at institutions announcing sanctions. The purpose of the review is to make sure that the process is being handled in the most effective way, that fair procedures are guaranteed, that penalties are appropriate and consistent; to determine ways to reduce the time needed to conclude the investigation and the infractions process, and to determine if there can be innovative changes that will make the process more positive and understandable to those involved and to the general public."

The special committee attempted to accomplish two important objectives in its resultant study and recommendations: maximizing fairness to institutions and individuals accused of wrongdoing, while preserving the effectiveness of the Association's ability to investigate and take corrective measures expeditiously in infractions cases.

The Special Committee

The special committee comprised the following individuals: Rex E. Lee, president of Brigham Young University and former U.S. solicitor general, chair; Warren E. Burger, former Chief Justice of the United States; Reuben V. Anderson of Jackson, Mississippi, a former state supreme court judge; Paul R. Verkuil, president of the College of William and Mary and former dean of the Tulane University law school; Charles W. Ehrhardt, professor of law and faculty athletics representative at Florida State University; Becky R. French, university counsel at North Carolina State University; Benjamin R. Civiletti of Baltimore, Maryland, former attorney general of the United States; Charles Renfrew of San Francisco, California, vice-president, legal, for Chevron Corporation, a former Federal district judge and a former deputy U.S. attorney general; Philip W. Tone of Chicago, Illinois, a former Federal district judge and former Federal appeals court judge, and two current members of the NCAA Council, Charles Cavagnaro, director of athletics at Memphis State University, and William M. Sangster, director of international programs and faculty athletics representative at Georgia Institute of Technology.

### The Work of the Special Committee

The special committee conducted five meetings during the course of its work -- May 29, June 30-July 1, July 26-27, September 5 and October 16.

In certain of its meetings, the special committee consulted in person with invited individuals to obtain their views of the issues being considered by the special committee. Included in this category were Thomas C. MacDonald Jr., a Tampa, Florida, attorney who has served as counsel for the University of Florida; Jerry Tarkanian, head men's basketball coach at the University of Nevada, Las Vegas; D. Alan Williams, University of Virginia, current chair of the NCAA Committee on Infractions; Frank E. Remington, University of Wisconsin, Madison, a former chair of the infractions committee; Beverly E. Ledbetter, Brown University, and Milton R. Schroeder, Arizona State University, current members of the infractions committee, and S. David Berst, NCAA assistant executive director for enforcement.

In early summer, invitations were extended to the general public and a cross section of the constituencies in college athletics to participate in a public hearing and to express their views regarding the NCAA's enforcement and infractions process. The hearing was held in conjunction with the special committee's July 26-27 meeting in Washington, D.C.

At that meeting, the special committee heard from the following individuals: Britton B. Banowsky, assistant commissioner and legal counsel, Southland Conference; J. Steven Beckett, attorney, Champaign, Illinois; William C. Carr III, vice-president, GNI Sports, Inc., Charlotte, North Carolina (former athletics director, University of Florida); Collegiate Commissioners Association officers Thomas C. Hansen, commissioner, Pacific-10 Conference, and Thomas E. Yeager, commissioner, Colonial Athletic Conference; Bill Curry, head football coach, University of Kentucky; James E. Delany, commissioner, Big Ten Conference; Vincent J. Dooley, director of athletics, University of Georgia; George H. Raveling, head men's basketball coach, University of Southern California, and member of the board of directors of the National Association of Basketball Coaches, and Michael L. Slive, commissioner, Great Midwest Conference.

The special committee also received a number of written submissions during its work, including specific suggestions from Stanley O. Ikenberry, president of the University of Illinois System; Morton W. Weir, chancellor of the University of Illinois, Champaign; Congressman Tom McMillen (D-Maryland), and George H. Gangwere, now retired after years as the NCAA's longtime general counsel.

### Findings

During the course of its study, the special committee made certain findings that formed the basis for its recommendations (detailed later in this report). Among them:

- \* The conduct of the NCAA's enforcement and infractions process has been, since its inception 40 years ago, a serious effort to achieve, fairly and

equitably, compliance with NCAA principles and regulations. The Association, its membership and its Committee on Infractions through the years are entitled to appreciation and credit for having the willingness to establish a system by which the member institutions can police themselves in their intercollegiate athletics activities. That continued self-enforcement is essential to successful compliance. Similarly, the special committee wishes to acknowledge the quality and credibility of the efforts of both the Committee on Infractions and the enforcement staff. The Association has a consistent history of willingness to review and adjust its enforcement and infractions procedures in an effort to improve those procedures. In this spirit, the special committee believes that the process can be improved further and enhanced in the areas reflected by the recommendations of this report.

- \* The process must be procedurally fair, as expeditious as possible, and effective in uncovering and correcting wrongdoing while affording adequate protection to institutions and individuals. In this respect, the existing distinction between major and secondary violations is appropriate and useful in processing and resolving infractions cases.
- \* The U.S. Supreme Court has determined that the NCAA is not a state actor for purposes of the Fourteenth Amendment to the U.S. Constitution. Nevertheless, the special committee is of the view that the NCAA, in the interest of its members and in its own interest, should afford procedural fairness protections. These protections should be provided and administered by the NCAA itself, in order to assure uniformity across all member institutions and all parts of the nation. Also, it is essential, in the special committee's view, that the identification and correction of NCAA rules infractions remain a cooperative, joint effort, involving both the Association and also the affected member institutions.

[Attached as Appendix A is a statement regarding the NCAA enforcement procedures vis-à-vis components of due process.]

#### Recommendations

Effectively improving the system will require both structural and procedural changes. The special committee's specific recommendations, which will be reviewed by the NCAA membership and then submitted to the NCAA Council and the NCAA Presidents Commission for approval and any necessary membership action, are as follows:

1. Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer.

Among the problems the special committee identified are the inadequacy of the initial notice of an impending investigation and the desirability of affirming a spirit of joint investigation by the NCAA and by the institution. The most effective investigations are those characterized by cooperation, rather than adversarial positioning, and the initial steps in the investigative process are pivotal in establishing the appropriate relationship.

The special committee is convinced that in the vast majority of instances, the institutions affected are as vigilant in their attempts to determine the truth as is the NCAA enforcement staff. Joint investigative efforts, involving the cooperation of both the Association and the institution, benefit all parties and speed the process. In those cases that do not fit this pattern, however, the enforcement staff should retain the option of abandoning a joint investigation and proceeding on its own to the extent required by the needs of the case. In light of the greatly increased cooperation currently being exhibited by institutions in the enforcement process, however, it is desirable to pursue the benefits of joint investigation whenever possible.

Toward that end, the special committee recommends that instead of simply sending a preliminary letter of inquiry to an institution, the enforcement staff personally should visit the institution's chief executive officer with the preliminary notice in hand in each major case as defined in NCAA legislation. Further, the letter should provide some indication of the nature of the potential violation and the portion of the athletics program where the potential violation occurred. The staff thus would advise the chief executive officer of its intention to work with the institution in a joint investigation unless the staff did not believe that a joint investigation would be appropriate in that instance, in which case it would so inform the institution and state its reasons for that position. This in-person visit also would provide an opportunity for discussion of procedural matters, alternatives for disposing of the case and a time frame.

Using in-person delivery of the preliminary letter as the occasion to discuss the matter with the institution's representatives also should assure that the institution receives a more informed view of the inquiry than it now receives in a brief written notice.

2. Establish a "summary disposition" procedure for treating major violations at a reasonably early stage in the investigation.

One of the most serious problems identified by the special committee is the period of time that frequently elapses from the beginning of an investigation of a major violation by both the institution and the NCAA enforcement staff, to the hearing before the infractions committee and the subsequent imposition of sanctions. The special committee believes there is a need to speed the process and assist institutions in resolving matters without an extended period of adverse publicity and a considerable commitment of institutional time, attention and resources.

Frequently, all parties are in agreement at a fairly early stage of the investigation as to the facts. When this is the situation in the case of secondary violations, there is no reason to hold a hearing, and the case is quickly resolved by the enforcement staff in accordance with established guidelines and procedures.

Agreement as to the facts and an opportunity for an expeditious resolution also should be available in the case of major violations. The special committee recommends that a "summary disposition" procedure be established for treating major violations. This, in essence, would be a



negotiated agreement by which the enforcement staff's preliminary findings would be provided directly to the involved institution's chief executive officer, who could agree at that point to negotiate mutually acceptable findings and remedies. In these cases, the assistant executive director for enforcement would be empowered to enter into a summary disposition with any or all parties involved in the case at any time after the preliminary inquiry has begun, subject to general guidelines established by the infractions committee.

Specifically, the staff would share with the chief executive officer its information regarding rules violations. If the chief executive officer concurred, an agreement would be reached regarding the statement of facts and a proposed penalty (the latter to be approved by the infractions committee), and the agreed-upon summary disposition would end the matter. In most cases, it is anticipated that the time necessary to conclude this procedure would not extend beyond three or four months. When the circumstances of the case and the agreed-upon disposition of the matter are beyond the authority granted by the infractions committee to the enforcement staff, the case would move into the regular infractions process. In cases where all involved parties do not agree to the summary disposition of the case, the regular infractions process would be available to those who are not in agreement (it being understood that the agreed-upon disposition would be available for those parties who are in agreement).

In order to provide appropriate oversight of the summary disposition procedure, the agreed-upon sanction(s) would be subject to expeditious review by the infractions committee for the purpose of determining whether the penalty is consistent with the guidelines.

3. Liberalize the use of tape recordings and the availability of such recordings to involved parties.

A persistent problem is the lack of access to evidence held by the opposing side in an infractions case. The special committee is encouraged by the fact that the infractions committee has recommended a liberalization of the tape-recording procedure for action at the 1992 Convention, but in the interest of openness, it believes that additional steps should be taken in this regard.

The special committee recommends that as a condition of using a pre-hearing statement from any witness, any interview with that witness must be tape-recorded, and the enforcement staff must disclose the existence of the tape recordings on or before the date on which the official letter of inquiry is issued that states the basis upon which the allegations are made. Upon a showing that a tape-recorded statement could not be obtained (e.g., witness refusal) other "best evidence available" statements (e.g., signed statements, interview memos) would be admissible in a hearing. Under any circumstance, a witness would be permitted to appear in person at any hearing at which the witness' statements are to be used.

The tapes and other evidence would be "discoverable" by any person or institution having an actual stake in the outcome of the case; however, the enforcement staff would be permitted to request a protective order



(from the hearing officer, as identified in a subsequent recommendation) in appropriate cases in which disclosure may be detrimental to the institution or may jeopardize the investigation. Finally, institutions or individuals also would be permitted to submit affidavits in support of their positions.

The special committee believes that the liberalized use of tape recordings and the emphasis on discovery would benefit both the staff and those subject to inquiry by enhancing the reliability of the evidence and by allowing expeditious sharing of the facts of the case.

4. Use former judges or other eminent legal authorities as hearing officers in cases involving major violations and not resolved in the "summary disposition" process.

The special committee believes there is a widely held perception of inadequate separation of the functions between the enforcement staff and the ultimate decisional authority (i.e., the perception is that the infractions committee serves as the prosecutor and judge under the current system). The use of an independent jurist would enhance the public's perception of fairness and confidence in the system.

The special committee recommends, therefore, that in cases involving charges of major violations not resolved by the summary disposition procedure, a hearing officer be used to review stipulated facts, resolve factual issues that are in dispute and recommend an appropriate disposition to the infractions committee. The recommended disposition would be based on information discussed in the hearing and an independent review of past cases. The hearing officer preferably would be a former Federal judge, state court judge, or other eminent legal authority or person of stature whose integrity and impartiality are beyond question.

It is not intended that the use of an independent hearing officer would make the process more adversarial; indeed, the special committee believes that hearings essentially would be conducted as in the past, except that an experienced legal expert who is not connected with the NCAA in any way would determine the facts in a case and make findings. Such individuals are trained in weighing conflicting evidence, judging credibility and determining whether the burden of proof has been satisfied. A pool of such individuals, trained to make certain that they have sufficient background in NCAA regulations, would be necessary to assure the availability of a sufficient number of hearing officers. The special committee recommends that the NCAA Administrative Committee, consisting of the five elected NCAA officers and the executive director, be responsible for selecting and maintaining the pool of hearing officers.

5. Hearings should be open to the greatest extent possible.

In general, the special committee prefers that all hearings in the NCAA infractions process be open, with the exception of deliberations. It should be emphasized that the committee is closely divided on this issue, but the majority holds a general preference for open hearings unless the hearing officer determines that a portion or portions of the proceedings,

in the interest of privacy, fact-finding and justice, should be kept confidential for good cause shown (e.g., information pertaining to test scores, drug use, medical records).

Another factor supporting open hearings is the committee's position regarding the availability of transcripts of hearings, set forth in a subsequent recommendation in this report.

Any interested party could be represented by legal counsel before the hearing officer and at all relevant stages of the proceedings, as is the case now.

6. Provide transcripts of all infractions hearings to appropriate involved parties.

The special committee recommends that tapes or transcripts of open infractions hearings be sent upon request to parties named in the case and to the involved institutions under circumstances providing protection of confidentiality of appropriate information. In addition, anyone interested would be permitted to purchase a tape or transcript of the open hearings when the case has been concluded.

The committee believes that the sharing of tapes, transcripts or other records of enforcement proceedings would enhance the spirit of cooperation that is growing in the membership. Concerns regarding such tapes or transcripts becoming available to others (e.g., the news media) are, in the special committee's opinion, outweighed by the benefits that can accrue in a more cooperative procedure.

7. Refine and enhance the role of the Committee on Infractions and establish a limited appellate process beyond that committee.

The present appellate process, in which the infractions committee decision is subject to appeal to the appropriate steering committee of the NCAA Council, is largely ineffective.

Therefore, the special committee recommends that a special review body of three to five members, the majority of whom would be representatives of NCAA member institutions and conferences, be appointed to serve as the appellate group to consider appeals of increased penalties only. The appellate process would be available only in instances in which the Committee on Infractions has increased a proposed penalty. The facts in the case would be frozen, and the appellate body would have the option of affirming the Committee on Infractions' penalty or decreasing it.

Thus, the infractions committee no longer would serve as the hearing panel to determine the facts in a case. That would be the role of the hearing officer as noted above. The committee could set aside a factual finding by the hearing officer only on a "clearly erroneous" standard. The committee's role would be redefined as that of supervising the summary disposition process (i.e., it would review the penalty agreement and approve it, unless it found the proffered penalty to be demonstrably inconsistent with NCAA rules and/or contrary to the interests of the Association); it would consider appeals of findings made by, and assess

penalties after receiving the disposition recommendation of, the hearing officer, and it would monitor the entire enforcement system. The committee's role would be refined and enhanced because the committee would remain responsible for all portions of the enforcement and infractions process, and it would do so without the burden of also filling the role of fact-finder.

8. Adopt a formal conflict-of-interest policy.

The special committee recommends that a conflict-of-interest policy be adopted formally. This would require simply an identification of the circumstances in which a member of the enforcement staff would not be permitted to be involved in a given case.

9. Expand the public reporting of infractions cases.

The special committee recognizes that the perception of the infractions process is a major problem. It believes that the Association should do everything possible to enhance the reporting of information to the public and the news media regarding the reasons for actions taken in infractions cases. The committee's recommendation regarding open hearings would assist in this regard.

The NCAA also should do more to inform the public and the media of the fact that the enforcement and infractions process is established, maintained and strongly supported by the member institutions themselves.

Accordingly, the special committee recommends that public announcements of infractions cases include a more ample, but clear and concise, statement of the reasons for the actions taken. It believes that many of the steps recommended earlier will further enhance the nature and completeness of the information.

10. Make available a compilation of previous committee decisions.

One important feature of the enforcement and infractions system should be the availability of complete and comprehensive information as to past infractions cases and actions of the infractions committee.

The special committee recommends that a publication or other type of document be developed that compiles such information and that it be made available as a reference for institutions and individuals involved in infractions cases.

11. Study the structure and procedures of the enforcement staff.

The NCAA enforcement staff should be responsible directly to the NCAA executive director and, through the executive director, to the NCAA Executive Committee, as prescribed in existing NCAA legislation. The NCAA administration should study carefully the enforcement staff structure, qualifications and procedures in light of the recommended changes in the process. It also should study the allocation of resources to the enforcement effort.

#### Implementation

The NCAA approval mechanism is such that certain of the special committee's recommendations can be effected upon approval by the NCAA Council, while others will have to await a membership vote at the appropriate NCAA Convention. That is inevitable in the Association's procedures, all of which are designed to protect the legislative interests of the member institutions.

The special committee urges that its recommendations be implemented as soon as is practicable under NCAA procedures. In pending infractions cases, involved parties should be permitted to avail themselves of the proposed changes in procedures to the extent possible under NCAA legislation. Otherwise, it is the special committee's belief that the current process, modified as appropriate by the Council under its existing authority, should apply to those cases currently in process. This should not cause undue concern on the part of an involved member institution. Such institution should not be permitted to use the pendency of new procedures as a means of delaying the effective conduct of the process during this interim period. The new procedures should apply to cases that are commenced after each such procedure is put into effect.

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Statement on Due Process

In the last 20 years, the concept of due process in the administrative setting has undergone substantial change. With Goldberg v. Kelly, in 1970, the Supreme Court set detailed standards for determining when there were sufficient procedural ingredients to satisfy due process. Many informal government functions and programs never provided the full panoply of Goldberg ingredients, and with Mathews v. Eldridge, in 1976, the Court recognized that it must balance government and private interests before deciding whether a particular government program satisfied due process standards.

The NCAA, which, as a private association, is not even required by the Constitution to provide due process, has been responsive in its enforcement and infractions process to the standards of fair hearings established by the Supreme Court. Of the 10 procedural ingredients identified in Goldberg, the NCAA traditionally has provided at least seven. One of the three remaining ingredients (cross-examination of adverse witnesses) is simply beyond the NCAA's power to ensure since, as a private association, it lacks subpoena power. Thus, even under Goldberg's demanding standards, the NCAA hearing process arguably only failed to meet two ingredients (adequacy of notice and statement of reasons). This comes closer to satisfying Goldberg than did the informal administrative process of many Federal agencies in the 1970s. Certainly, the NCAA process would meet the standards implicit in the Mathews balancing test.

Under the new process recommended by this special committee, the NCAA enforcement and infractions program should satisfy whatever procedural challenges might be posed under any reasonable set of due process standards applicable to the world of administrative decision-making, whether emanating from Goldberg v. Kelly, Mathews v. Eldridge or state constitutional law.

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## CURRENT NCAA DUE PROCESS PROTECTIONS

Although the United States Supreme Court determined in the Tarkanian case that the NCAA is not a "state actor" and therefore is not subject to the due process clause of the Federal Constitution, NCAA enforcement regulations contain a multitude of traditional due process protections. Some of the most important are the following:

- The institution is formally advised of any preliminary inquiry into its athletics policies and practices.
- The institution's representative may be present at all on-campus interviews of enrolled student-athletes or athletics department staff members.
- Throughout the entire enforcement procedure, individuals and institutions are entitled to be represented by legal counsel.
- There is in general a four-year statute of limitations concerning alleged violations that may be processed.
- If after preliminary investigation the NCAA enforcement staff determines that an allegation or complaint warrants an official inquiry, the institution's chief executive is formally advised of such inquiry, including the details of each allegation.
- The institution is advised of all individual witnesses and information upon which the staff intends to rely and has the right to interview those witnesses.
- The primary NCAA investigator is made available to the institution on request to discuss the development of its response.
- Institutions are required to advise potentially affected student-athletes or institutional staff members of allegations related to them, and to provide such individuals with the opportunity to submit information, to be represented by personal legal counsel and to appear before the Committee on Infractions.
- Information from confidential sources may not be considered by the Committee on Infractions.
- The proceedings of the Committee on Infractions are tape-recorded.
- The burden of proving allegations rests with the NCAA enforcement staff.
- Actions of the Committee on Infractions are by majority vote.



- The Committee on Infractions prepares a formal report of its findings and any determined penalties and forwards it to the institution in question and to individuals receiving the official inquiry.
- The institution and affected staff members are authorized to appeal to an NCAA Council subcommittee.

SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT  
AND INFRACTIONS PROCESS  
RECOMMENDATIONS

## Initial Notice.

Recommendation -- The committee recommended that a member of the NCAA enforcement staff personally visit the institution's chief executive officer with the letter of preliminary inquiry in hand.

Current Procedure -- Upon receiving or uncovering information about possible rules violations, the NCAA merely sends a letter of preliminary inquiry to the school suspected of a violation. This letter does not describe the nature of the possible violation and often does not identify the sports program that is involved.

## Tape Recordings.

Recommendation -- All interviews must be tape-recorded and tapes will be provided to involved parties.

Current Procedure -- Interviews are tape-recorded, but the tapes are available for review only by involved parties.

## Summary Disposition.

Recommendation -- The committee recommends joint investigation by the institution and NCAA staff of possible major violations. If the institution and/or individuals affected and NCAA enforcement staff stipulate to findings and penalties, the Committee on Infractions may approve the agreement without a hearing.

Current Procedure -- The NCAA enforcement staff conducts an independent investigation of the alleged wrongdoing and the institution often initiates a separate investigation of its own. A hearing then is conducted before the Committee on Infractions, usually several months after the NCAA initiated its investigation.

## Hearing Officer.

Recommendation -- The committee recommends that in cases involving major violations not resolved by the summary disposition process, a hearing officer, probably a Federal or state court judge or other eminent legal authority, would make findings of violations and would recommend penalties for consideration by the Committee on Infractions.

Current Procedure -- The Committee on Infractions makes findings and imposes penalties, subject to appeal to an NCAA Council subcommittee.

## Open Hearing.

Recommendation -- The committee recommends that hearings be open to the public (with the exception of deliberations), except for good cause shown in the interests of privacy, fact-finding, or justice.

Current Procedure -- Hearings are closed.

## Transcripts.

Recommendation -- The committee recommends that transcripts of hearings be provided to all involved parties and be made available to the extent possible to the public.

Current Procedure -- Transcripts are not made available to any party or the public. Tape recordings are maintained by the NCAA for review by affected parties.

## Appeal Process.

Recommendation -- The Committee on Infractions considers appeals of findings and determines penalties; if the committee increases the penalty recommended by the hearing officer, a special appellate committee will consider appeals of such actions.

Current Procedure -- The infractions committee's findings and penalties are subject to appeal to the appropriate steering committee of the NCAA Council.

## Public Report.

Recommendation -- The committee recommends that the hearing officer or the committee acting on an appeal make a public announcement of infractions cases that includes a more ample statement of reasons for actions taken.

Current Procedure -- Infractions reports are prepared by the Committee on Infractions.

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In addition to these recommendations, the special committee suggested the following change in responsibility for the NCAA Committee on Infractions:

The committee believes the duties of the Committee on Infractions should include:

1. Supervise summary disposition process and review penalty agreements;
2. Consider appeals of findings; institution, individuals or enforcement staff can appeal;
3. Assesses penalty after receiving recommendation from hearing officer, and
4. Monitor entire enforcement procedure.

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Legislative Requirements.

Procedures requiring an open hearing and a hearing officer would require NCAA Convention action. All of most of the remaining recommendations may be implemented by the NCAA Committee on Infractions or NCAA Council to supplement or replace current procedures.

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## NCAA ENFORCEMENT PROCESS

### BACKGROUND

The NCAA created its enforcement department in 1952 as a mechanism to enforce the Association's legislative efforts to foster integrity in intercollegiate sports.

The enforcement program was designed to be a cooperative undertaking involving member colleges, universities, institutions and conferences working together through the NCAA for an improved administration of intercollegiate athletics.

Procedures for the enforcement department were written by an NCAA committee comprising representatives of member institutions. Since that time, NCAA members have modified and amended the enforcement procedures at NCAA Conventions as deemed necessary by the membership.

The enforcement department follows a detailed and complex process to ensure fairness and due process in its enforcement procedures. The steps include notice of an NCAA investigation, an official inquiry, preconference hearings, a Committee on Infractions hearing and, should the party in question choose, an appeal.

Following is a brief synopsis of the process:

#### Step I - Initial Notice.

Upon receiving or uncovering information about possible rules violations, the NCAA sends a letter of preliminary inquiry to the institution suspected of a violation.

The letter notifies the institution that the NCAA enforcement staff will conduct an inquiry and begin an investigation. The institution will be notified at six-month intervals whether the inquiry will be continued or dropped.

#### Step II - Letter of Official Inquiry.

This letter, detailing allegations against the school and individuals, is sent once the enforcement staff has completed its investigation and has concluded that there is a reasonable expectation that violations will be found by the Committee on Infractions.

The institution and individuals are given a period of time (usually 60-120 days) to respond to the allegations in writing. Often, following the letter of preliminary inquiry, the institution already will have initiated its own independent investigation through outside legal counsel.

If an institution needs more time to complete its investigation or formulate a response, it may request an extension of time from the Committee on Infractions.

#### Step III - Prehearing Conference.

At this meeting, institutional representatives, coaches and student-athletes named in the allegations review the evidence that will be presented in a hearing by the enforcement staff.

During this meeting, allegations may be withdrawn by the enforcement staff, areas of agreement are identified and individuals that should be interviewed jointly in order to attempt to resolve conflicting statements are identified.

Following the prehearing conference, all parties know exactly what information will be presented during the Committee on Infractions hearing.

Step IV - Committee on Infractions Hearings.

Though the burden of proof for each allegation rests with the enforcement staff, the six-member Committee on Infractions, which is composed of administrators from member institutions and conferences, discuss with all parties the various written responses and information presented verbally during the hearing. The committee deliberates in private, makes findings of violations and determines the appropriate penalty, if any.

Members of the Committee on Infractions are appointed by the NCAA Council, a 44-member group of college administrators that serves, in effect, as a board of directors. Though the composition may vary, the committee usually includes a minimum of three lawyers or law professors and at least one individual who has had experience as a coach or athletics director. A majority vote is necessary to make a finding or to impose a penalty.

The Committee on Infractions issues an infractions report in writing following the hearing (approximately four weeks), which is released to the public with names deleted.

Step V - Appeal.

An institution or affected individual may appeal the committee's findings and penalties to the subcommittee of the NCAA Council in which the institution holds membership.

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