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**THE TIPPING POINT: MAYHEM IN COLLEGE SPORTS  
REQUIRES CONGRESS TO FINALLY INTERVENE IN  
NCAA GOVERNANCE**

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**I. INTRODUCTION**

On April 25, 2018, the National Collegiate Athletic Association's ("NCAA") Commission on College Basketball released a report analyzing the operation of college basketball in America. The Commission on College Basketball determined that "the state of men's college basketball is deeply troubled. The levels of corruption and deception are now at a point that they *threaten the very survival of the college game as we know it.*"<sup>1</sup>

The report outlines a bleak existence for college basketball—one filled with lies, corruption and apathy.<sup>2</sup> Unfortunately, basketball is not the only NCAA sanctioned sport that threatens the existence of amateur athletics in America. This article scrutinizes the failed attempts by the NCAA to regulate the ever-growing commercialized nature of "big-time" Division I intercollegiate athletics and the resulting patchwork reform efforts Congress and the judiciary have implemented in response. The article then offers an alternative solution by means of Congress creating a federal intercollegiate athletics commission to implement consistent, governmental oversight. While congressional committees have researched and discussed problems facing intercollegiate athletics throughout its evolving

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<sup>1</sup> *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, NCAA 1 (Apr. 2018), [https://www.ncaa.org/sites/default/files/2018CCBReportFinal\\_web\\_20180501.pdf](https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf) (emphasis added).

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

industry,<sup>3</sup> a major overhaul from Congress has yet to come.<sup>4</sup> This article proffers why it is time for Congress to intervene in the business of big-time college sports.

Part II provides an overview of the problem with college sports today as encapsulated in recent issues headlined in the news. Part III argues that NCAA is not capable of managing big-time college athletics by exploring the failed attempts on their part to make institutional changes. Part IV reviews previous attempts by Congress to force institutional change and outlines national interests now at play that should prompt Congress to intervene in the NCAA's governance. Part V offers an alternative measure Congress may implement, through a federal commission controlled by the United States Department of Education ("Department of Education"), to reconcile the commercial nature of intercollegiate athletics with the educational purpose of American higher education institutions. Part VI concludes that intercollegiate athletics is an engrained part of the American higher education system and unless Congress acts to oversee the governance of intercollegiate athletics, then student-athlete welfare will remain compromised.

## II. THE PROBLEM WITH COLLEGE SPORTS TODAY

Beginning in the early 20<sup>th</sup> Century, the NCAA was charged with regulating college sports to preserve the educational purpose of intercollegiate competition.<sup>5</sup> Since the NCAA's inception, college sports have evolved from a niche pastime to a multibillion dollar industry.<sup>6</sup> The current standard in big-time college athletics requires student-athletes to devote more time to their sport than the national average of hours spent per work-week

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<sup>3</sup> See RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* 43–44 (U. Ill. Press ed. 2011).

<sup>4</sup> Doug Lederman, *College Sports Reform: Now? Never?*, INSIDE HIGHER ED (Jan. 10, 2012), <https://www.insidehighered.com/news/2012/01/10/calls-major-reform-college-sports-unlikely-produce-meaningful-change>.

<sup>5</sup> SMITH, *supra* note 3.

<sup>6</sup> Alex Kirshner, *Here's How the NCAA Generated a Billion Dollars in 2017*, SBNATION (Mar. 8, 2018), <https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017>.

for paid employees.<sup>7</sup> Yet, unlike paid employees, student-athletes are required to spend additional time on schoolwork to maintain a certain grade point average.<sup>8</sup> The physical demands of competition often cause exhaustion and hinder a student-athlete's ability to learn in the classroom and take advantage of social and professional development opportunities.<sup>9</sup> Reports consistently show these effects, yet the NCAA continues to assert that the opportunity for a formal college education is an adequate exchange for students who participate in revenue-producing sports.<sup>10</sup> Some have labeled this NCAA rhetoric as the "student-athlete illusion."<sup>11</sup>

While many realize that student-athletes are not being given an adequate opportunity for an education, the NCAA and its powerhouse institutions refuse to admit their system is insufficient.<sup>12</sup> Some argue that the NCAA fears formal professionalization of college sports because it would affect the loyalty and personal connection paying fans have with their alma mater's sports teams.<sup>13</sup> If a fan felt a student-athlete's primary motivation to play was a paycheck and not to honor the name on the jersey, then the colleges' biggest fan base, the alumni, would not be as willing to engage and support the teams.<sup>14</sup> So, instead of

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<sup>7</sup> Alison Doyle, *What is the Average Hours Per Week Worked in the US?*, THE BALANCE (Jan. 2, 2018), <https://www.thebalance.com/what-is-the-average-hours-per-week-worked-in-the-us-206063>; Dennis Dodd, *Pac-12 Study Reveals Athletes 'Too Exhausted to Study Effectively'*, CBS SPORTS (Apr. 21, 2015), <https://www.cbssports.com/college-football/news/pac-12-study-reveals-athletes-too-exhausted-to-study-effectively/>.

<sup>8</sup> *Id.*

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

<sup>10</sup> See Val Ackerman & Larry Scott, *College Athletes Are Being Educated, Not Exploited*, CNN (Mar. 30, 2016), <https://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/index.html>.

<sup>11</sup> Jake Novak, *Paying College Players Will Ruin the Game*, CNBC (Apr. 6, 2018), <https://www.cnbc.com/2015/04/06/ege-athletes-shattered-illusions.html>.

<sup>12</sup> William W. Berry III, *Employee-Athletes, Antitrust, and The Future of College Sports*, 28 STAN. L. & POL'Y REV. 245, 247–48 (2017).

<sup>13</sup> Novak, *supra* note 11.

<sup>14</sup> *Id.* Similar to the lackluster interest and publicity that minor league sports deal with right now. *Id.*

properly compensating student-athletes that garner big business, the NCAA and its member institutions funnel their money to coaches and other university administrators to incentivize recruitment of the best athletes to represent the name on the jersey—thus keeping the illusion going.<sup>15</sup>

Although the NCAA tried once before to cap coaching salaries, the rule was struck down as an unreasonable restraint on trade in *Law v. NCAA*.<sup>16</sup> The result of the *Law* decision opened the door for star coaches to compete for the highest salaries.<sup>17</sup> These exorbitant salary payments are just one part of the athletics “arms race”—a constant battle for institutions to build the best facilities, attract the best players, win the most championships, and ultimately garner the biggest paydays.<sup>18</sup> This athletics’ arms race consistently results in the failed management of education, amateurism, and illegal activity.

#### A. BIG BUSINESS MAKES THE NCAA COMPLICIT TO ILLEGAL BEHAVIOR: VIOLENCE AND SEXUAL ASSAULT ISSUES

With their focus turned on winning games to maximizing revenue and away from consistent regulatory enforcement

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<sup>15</sup> Current coaching salaries at schools across the country provide evidence for this cycle. Laura McKenna, *The Madness of College Basketball Coaches’ Salaries*, THE ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/>.

<sup>16</sup> *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998); see also Marc Edelman, *Why an NCAA Cap on College Coaches’ Salaries Would Be Illegal*, FORBES (Dec. 19, 2012), <https://www.forbes.com/sites/marcedelman/2012/12/19/why-a-salary-cap-on-ncaa-coaches-is-illegal/#35b9386355e5>.

<sup>17</sup> Edelman, *supra* note 16. Many think the Tenth Circuit decided the case incorrectly because college coaches exist in an “artificial marketplace” where this “student-athlete illusion” creates a false demand for coaches. McKenna, *supra* note 15. This is because, unlike professional leagues, college teams cannot attract the top talent needed to win with the promise of a big paycheck. *Id.* Instead, players often choose their school based on access to coaches who have a proven track-record of winning and getting athletes into professional leagues where the big payoffs occur, which drives up the market demand for well-connected coaches. *Id.* Pressure from donors and alumni furthers the problem because there are no stakeholders who want to efficiently control costs. *Id.*

<sup>18</sup> McKenna, *supra* note 15.

processes, the NCAA and its member institutions have repeatedly failed to protect students and community members from preventable assault. Notably, the media touted former USA Gymnastics and Michigan State University doctor Larry Nassar as the worst thing to ever happen to college sports.<sup>19</sup> More than 150 women came forward to testify in court that he sexually abused them.<sup>20</sup> These assaults lasted over the past two decades and continued even after students reported his misconduct.<sup>21</sup> Multiple accounts in the Nassar case detail the murmurs of misconduct that went on for years and how administrators chose to turn a blind eye.<sup>22</sup> These facts are similar to another harrowing scandal at NCAA football powerhouse Pennsylvania State University (“Penn State”). There, football and university administrators failed to prevent multiple sexual assaults of children on campus at the hands of former Penn State football coach Jerry Sandusky.<sup>23</sup> The Penn State scandal garnered headlines similar to that of the current Michigan State scandal and resulted in multiple criminal investigations.

Though the NCAA has launched an investigation on the university that employed Nassar during his time of abuse, few expect the NCAA to find wrongdoing on the part of Michigan State University.<sup>24</sup> This is in light of yet another egregious sexual assault scandal at Baylor University (“Baylor”) that was dismissed last year from NCAA investigation.<sup>25</sup> Student-athletes flagged Baylor’s football program for over fifty rape allegations by student-athletes, at least five of which were gang rape

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<sup>19</sup> Eric Levenson, *Larry Nassar Sentenced to up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html>.

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Penn State Scandal Fast Facts*, CNN (Nov. 28, 2107), <https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html>.

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

<sup>25</sup> Jon Solomon, *Why the NCAA May Never Punish Baylor for Its Rape Scandal the Way Fans Demand*, CBS SPORTS (Feb. 27, 2017), <https://www.cbssports.com/college-football/news/why-the-ncaa-may-never-punish-baylor-for-its-rape-scandal-the-way-fans-demand/>.

allegations.<sup>26</sup> The NCAA has yet to find wrongdoing on the part of the university or its athletics department.<sup>27</sup>

The pattern remains that each scandal regarding sexual assault and violence that is exposed under the NCAA's curtilage is more egregious than the last. And the implicit narrative of every story is always the same: the leaders of the university would rather sit back and hope the allegations of sexual assault and violence are not true rather than hurt their bottom line by acting to investigate and suspend a beloved coach or player. The decisions are made all for the sake of wins and losses and always at the expense of the victims. The NCAA then attempts to rectify its failure to properly monitor its member institutions by creating public relation campaigns<sup>28</sup> or a new policy of expectation for its member institutions.<sup>29</sup> But the attempts continue to fall short of ever creating meaningful change<sup>30</sup> because the member institutions creating the rules and policies all adhere to the "win at all costs" code of conduct.<sup>31</sup> This pattern makes clear that the NCAA has

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<sup>26</sup> *Id.*

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

<sup>28</sup> *Temple Wins Division I It's on Us Video Contest*, NCAA (Mar. 29, 2016), <http://www.ncaa.org/about/resources/media-center/news/temple-wins-division-i-its-us-video-contest>.

<sup>29</sup> *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture*, NCAA SPORTS SCI. INST. (Oct. 2016), [http://www.ncaa.org/sites/default/files/SSI\\_Sexual-Violence-Prevention-Tool-Kit\\_20161117.pdf](http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf).

<sup>30</sup> Diana Moskovitz, *The NCAA's Latest Sexual Violence Policy Is a Joke*, DEADSPIN (Aug. 11, 2017), <https://deadspin.com/the-ncaas-latest-sexual-violence-policy-is-a-joke-1797731779>.

<sup>31</sup> "True to its hypocritical form, the [NCAA] makes a dangerous problem such as domestic violence on campuses worse by shrugging its shoulders and leaving the universities to decide on punishment (often a tsk-tsk response to serious allegations). . . . The NCAA likes to pick and choose when it plays strict Big Brother. Deciding when an adult man should be allowed to become a professional in his chosen career? Check. Denying players' rights to make a profit off of their abilities but ensuring that college coaches and universities maximize their profits? Check. . . . The NCAA at times will stick so strongly to its rules, it will do things such as declaring former Baylor running back Silas Nacita, who was once homeless, permanently ineligible for accepting help from a well-meaning friend. But when it comes to things ranging from drug use to domestic violence to sexual assault, the NCAA takes a laissez-faire approach and

lost control of the business of college sports. If Congress does nothing to intervene and regain control, then student-athletes and the public at large will continue to be put at risk.

B. THE DOJ IS FED UP: CURRENT FBI INVESTIGATIONS INDICATE THE NCAA CAN'T KEEP CONDONING COLLUSION IN COLLEGE SPORTS

Recent FBI investigations have further uncovered the excessive, and often times illegal, dealings of college basketball—repeatedly by coaches who are pressured to recruit the best athletes to justify their enormous salaries.<sup>32</sup> In late 2017, the FBI unveiled a two-year investigation of coaches around the country who allegedly participated in a systemic bribery scheme.<sup>33</sup> The complaint, filed in September 2017, outlines alleged illegal conduct by basketball coaches at schools such as the University of Arizona, Oklahoma State University, and University of Southern California.<sup>34</sup> Specifically, the complaint asserts that these coaches defrauded the universities they worked for by misrepresenting their recruiting practices and exposing the universities to major NCAA violations.<sup>35</sup> The coaches allegedly used their influence to steer players to certain schools and then on to certain agents, financial advisors, and even certain athletic apparel companies.<sup>36</sup> In return, money was funneled to the coaches and players.<sup>37</sup> Prosecutors allege these practices created a thriving “black market” for teenage student-athletes.<sup>38</sup>

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lets the universities decide the appropriate punishment.” Shannon Ryan, *Why Doesn't the NCAA Take a Tougher Position on Domestic Violence?*, CHI. TRIBUNE (Jan. 5, 2016), <http://www.chicagotribune.com/sports/columnists/ct-ncaa-joe-mixon-domestic-violence-spt-0105-20160104-column.html>.

<sup>32</sup> Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html>.

<sup>33</sup> Sealed Complaint, *United States v. Chuck Connors Person* (S.D.N.Y. Sept. 25, 2017), <https://www.justice.gov/usao-sdny/press-release/file/999001/download/>.

<sup>34</sup> Tracy, *supra* note 32.

<sup>35</sup> Sealed Complaint, *supra* note 33.

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

Some reporters were initially surprised by the case filing.<sup>39</sup> The sudden involvement by the Department of Justice was peculiar because the sports realm views these practices as the norm in big-time college athletics.<sup>40</sup> Indeed, investigations by the NCAA regarding illegal payments to star athletes span many decades.<sup>41</sup> Yet, the NCAA has not imposed any punishment harsh enough to curb this behavior.<sup>42</sup> The only time the NCAA seriously attempted to stop under-the-table dealings is when it rendered the “Death Penalty” against Southern Methodist University.<sup>43</sup> The university’s athletics department nearly crumbled in the aftermath.<sup>44</sup> The department has yet to recover any semblance of the powerhouse athletics department it once was, and the NCAA has yet to use the Death Penalty again for fear of ruining more athletics departments.<sup>45</sup> But the recent complaint makes clear that the federal government views any conspiracy between coaches, agents and athletic apparel businesses to funnel student-athletes for monetary gain, whether customary behavior or not, to be fraudulent and illegal.<sup>46</sup>

Some proponents of NCAA reform see the federal investigations as an opportunity for the public to see how effective an investigation of wrongdoing in college athletics could be if an

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<sup>39</sup> See, e.g., Michael Rosenberg, *Defrauded? Universities Named in Justice Department Complaint Got What They Deserved*, SPORTS ILLUSTRATED (Sept. 26, 2017), <https://www.si.com/college-basketball/2017/09/26/ncaa-basketball-assistants-corruption-charges>.

<sup>40</sup> *Id.*

<sup>41</sup> Sally Jenkins, *As the FBI Uncovers a Shadow Economy, Let’s Be Clear Who Created It: The NCAA*, WASH. POST (Oct. 3, 2017), [https://www.washingtonpost.com/sports/as-the-fbi-uncovers-a-shadow-economy-lets-be-clear-who-created-it-the-ncaa/2017/10/03/9560f426-a853-11e7-b3aa-c0e2e1d41e38\\_story.html?noredirect=on&utm\\_term=.5ec2892cc91e](https://www.washingtonpost.com/sports/as-the-fbi-uncovers-a-shadow-economy-lets-be-clear-who-created-it-the-ncaa/2017/10/03/9560f426-a853-11e7-b3aa-c0e2e1d41e38_story.html?noredirect=on&utm_term=.5ec2892cc91e).

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

<sup>43</sup> See Dennis Dodd, *30 Years Later: The Legacy of SMU’s Death Penalty and Six Teams Nearly Hit With One*, CBS SPORTS (Feb. 22, 2017), <https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/>.

<sup>44</sup> *Id.*

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

<sup>46</sup> Sealed Complaint, *supra* note 33.



independent body outside the NCAA was charged with the task.<sup>47</sup> This is in part because the Department of Justice's subpoena power will allow a more thorough investigation to take place.<sup>48</sup> In any event, the federal investigations expose the fact that rising salaries, particularly at public institutions subsidized by taxpayer money, are impossible to justify amid illegal activity that is turning out to be the norm in big-time college sports.<sup>49</sup>

The NCAA has since expressed its outrage for the alleged behavior outlined in the Department of Justice's complaint and created a taskforce to examine the NCAA's place in allowing a culture of under-the-table dealings to thrive.<sup>50</sup> The NCAA's Commission on College Basketball was formed after the criminal complaint was filed and outlined its purpose to investigate whether the current NCAA model provides adequate investigative tools, cultural incentives, and structures to combat exploitation and corruption in college basketball.<sup>51</sup>

After a six-month period of fact-finding, the Commission on College Basketball released a report outlining suggested changes to NCAA governance.<sup>52</sup> Led by former Secretary of State

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<sup>47</sup> See Dylan Scott, *NCAA Basketball's Bribery Scandal and Its March Madness Conspiracy Theory, Explained*, VOX (Mar. 23, 2018), <https://www.vox.com/2018/3/13/17109874/ncaa-scandal-fbi-basketball-march-madness>.

<sup>48</sup> *Id.*

<sup>49</sup> To be sure, the exorbitant salaries of college coaches are not a new trend. Most states report that their highest earning public official is a college athletics coach—usually men's basketball or football. In some instances, college head coaches make at or above the average payment for head coaches in professional leagues. See Jason Kirk, *15 Reasons NFL Coaches Don't Want to Become College Football Coaches*, SB NATION (Dec. 2, 2014), <https://www.sbnation.com/college-football/2014/12/2/7317659/nfl-college-coaches-jim-harbaugh-chip-kelly>; Jonah Newman, *Coaches, Not Presidents, Top Public-College Pay List*, THE CHRON. HIGHER EDUC. (May 16, 2014), <http://www.chronicle.com/blogs/data/2014/05/16/coaches-not-presidents-top-public-college-pay-list/>.

<sup>50</sup> *Statement from President Mark Emmert on the Formation of a Commission on College Basketball*, NCAA (Oct. 11, 2017), <http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball>.

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

<sup>52</sup> Press Release, NCAA, Joint Statement on Commission on College Basketball (Apr. 25, 2018)

Condoleezza Rice, the Commission on College Basketball found that “radical changes are long overdue” in intercollegiate athletics.<sup>53</sup> Specifically, the report recommended that: 1) the NCAA add public members to its board of governors, 2) the National Basketball Association end the “one-and-done” rule, 3) the NCAA require member institutions to honor academic scholarships for student-athletes who do not complete their degree within their athletic eligibility, 4) the NCAA certifies agents who are able to advise student-athletes during high school and college, 5) student-athletes be allowed to reinstate their eligibility if they go undrafted, 6) the NCAA create its own summer basketball camps to take apparel companies out of the recruitment process, 7) the NCAA significantly increase enforcement penalties for coach non-compliance, and 8) the NCAA create an investigatory body independent of the NCAA to deal with the complex cases of NCAA rule violation.<sup>54</sup>

While each recommendation acknowledges a significant shortcoming in the NCAA’s treatment of college basketball, some experts say the recommendations are not likely to be implemented in their totality and will not alone stop the corruption in college sports.<sup>55</sup> Critics maintain that meaningful change will never come about unless the NCAA dismantles the root of all college sports evil: money.<sup>56</sup> Member institutions have unrestricted ability to throw money around for things such as new athletics facilities and enormous coaching salaries while college athletes go unpaid. Yet none of the powerhouse schools want to restrict spending because it would put them at a disadvantage in recruiting power.<sup>57</sup> The

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(<https://www.ncaa.org/about/resources/media-center/news/joint-statement-commission-college-basketball>).

<sup>53</sup> Matt Norlander, *Commission on College Basketball proposes major changes to NCAA to fix the sport's problems*, CBS SPORTS (April 25, 2018), <https://www.cbssports.com/college-basketball/news/commission-on-college-basketball-proposes-major-changes-to-ncaa-to-fix-the-sports-problems/>.

<sup>54</sup> NCAA, *supra* note 52.

<sup>55</sup> Ryan Boysen, *NCAA Report Not A Slam Dunk for Corruption Troubles*, LAW 360 (May 1, 2018, 3:11 PM), <https://www.law360.com/articles/1038955/ncaa-report-not-a-slam-dunk-for-corruption-troubles>.

<sup>56</sup> *See id.*

<sup>57</sup> *See* Allie Grasgreen, *Division I Divisiveness*, INSIDE HIGHER ED (Feb. 16, 2012),

NCAA, in turn, focuses all its efforts on increasing its monetary gain from the men's basketball championship tournament—its biggest revenue source.<sup>58</sup> The financial burden riding on college basketball every year is the reason exploitation and corruption in college basketball thrives.<sup>59</sup> And no matter what findings the Commission on College Basketball unveils, nothing will change in the culture of college athletics unless the NCAA is forced to be held accountable by an outside authority.

### III. THE PROOF IS IN THE PUDDING: NCAA NOT CAPABLE OF MANAGING BIG-TIME COLLEGE ATHLETICS

The NCAA oversees over 1,200 institutions across its three divisions.<sup>60</sup> This article focuses on institutions comprising the largest schools in Division I. Even within the Division I subsection there is great diversity in the almost 400 schools represented, including: public, private, non-sectarian, religiously affiliated, large land grant universities, and small liberal arts colleges.<sup>61</sup> The three-division spread was enacted in the 1970s so that institutions with similar demographic characteristics, such as student enrollment and operating budget, could be similarly managed.<sup>62</sup> In addition, the NCAA further divided Division I schools into Division I-A for larger, higher-resourced institutions participating in football and Division I-AA for schools with reduced resources.<sup>63</sup> These subdivisions have since been renamed the Football Bowl Subdivision and the Football Championship Subdivision.<sup>64</sup> Before the 1990s, the member institutions operated on a “one institution [school], one vote” model across all three

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<https://www.insidehighered.com/news/2012/02/16/ncaa-governance-brink-reform>.

<sup>58</sup> Kirshner, *supra* note 6.

<sup>59</sup> Boysen, *supra* note 55.

<sup>60</sup> *Membership*, NCAA.ORG, <http://www.ncaa.org/about/who-we-are/membership> (last visited Sept. 22, 2018).

<sup>61</sup> Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 66–67 (2017).

<sup>62</sup> *Id.* at 68.

<sup>63</sup> *Id.* at 68–69.

<sup>64</sup> *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Sept. 22, 2018).

divisions.<sup>65</sup> After larger schools became fed up with smaller schools blocking legislation, particularly concerning monetary spending, “Proposal 7” was approved as a compromise to give more authority to the larger Division I schools.<sup>66</sup> The NCAA and its revenue sharing model remain intact, but the largest universities are no longer placed on an equal voting footing as smaller schools.<sup>67</sup>

#### A. NCAA’S CURRENT REGULATORY AND ENFORCEMENT MECHANISMS ARE NOT ADEQUATE

In 2014, after the schools in the largest five conferences again became restless with their limited authority, the NCAA passed a new governance model that would allow the Southeastern Conference, Atlantic Coast Conference, Big Ten Conference, Pac-12 Conference and Big 12 Conference (“Power 5”) to create their own rules in certain areas to benefit their student-athletes.<sup>68</sup> Specifically, the new model allowed the largest member institutions to vote independently on issues such as: cost of attendance stipends to cover the gap between an athletic scholarship and what financial aid offices determine to be the actual cost of attending college, medical coverage for student-athletes, allowing schools to pay for families to attend games, loosening the rules on contact between student-athletes and

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<sup>65</sup> Grasgreen, *supra* note 57.

<sup>66</sup> Anthony G. Weaver, *New Policies, New Structure, New Problems? Reviewing the NCAA’s Autonomy Model*, 7 *Elon L. Rev.* 551, 557 (2015).

<sup>67</sup> *Id.* Proposal 7 created a new voting structure whereby a sixteen-member executive committee was created to oversee the policymaking powers of each division. *Id.* The executive committee, comprised of university presidents, in turn gave more control to Division I schools to decide issues affecting the NCAA overall. *Id.* Three-fourths of the executive committee was made up of Division I members. *Id.* In addition, three separate board of directors were created to represent each of the three major NCAA divisions. *Id.* Each level was given a higher degree of autonomy because each of the separate boards would vote on their own divisional issues. *Id.*

<sup>68</sup> Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014), <https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/>.

agents, and putting in dead periods when student-athletes cannot officially workout at their school.<sup>69</sup>

One major criticism of the NCAA's new regulatory structure is that it continues to allow the gap between the organization's "have" and "have-not" members to grow.<sup>70</sup> This continues to vest power disproportionately and unfairly in the universities with the biggest sports programs.<sup>71</sup> Critics allege that university leaders representing the wealthiest institutions in the Power 5 conferences commit to securing the largest shares of revenue for their own institutions to the detriment of other Division I institutions, particularly in men's basketball and football.<sup>72</sup> The NCAA governance leadership, comprised mostly of these Power 5 administrators, in turn, stands largely silent on crucial issues and offers no suggestions for improvement.<sup>73</sup>

The enforcement arm of the NCAA garners similar levels of criticism. The investigation and enforcement process is comprised of the Enforcement Staff, the Committee on Infractions ("COI"), and Infractions Appeals Committee ("IAC").<sup>74</sup> In addition to the Enforcement Staff, the NCAA requires its member institutions to assist the Enforcement Staff during each investigation.<sup>75</sup> Once evidence is garnered by the Enforcement Staff, the hearings on institutional infractions and various student grievances are performed by the COI.<sup>76</sup> The IAC acts as an appellate body to review decisions by the COI.<sup>77</sup>

The most pervasive attack on the NCAA's enforcement process is its inconsistency.<sup>78</sup> For example, the rape allegations

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<sup>69</sup> *Id.*

<sup>70</sup> Grasgreen, *supra* note 57.

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

<sup>72</sup> Gerald S. Gurney & B. David Ridpath, *Why the NCAA Continues to Work Against Athletes' Best Interests*, THE CHRONICLE (Feb. 29, 2016), <https://www.chronicle.com/article/Why-the-NCAA-Continues-to-Work/235522>.

<sup>73</sup> *Id.*

<sup>74</sup> Joshua J. Despain, *From Off the Bench: The Potential Role of The U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1295–99 (2015).

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

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., Matt Norlander, *NCAA Punishment is Inefficient, Inconsistent, Compromised; Here's How to Fix It*, CBS SPORTS (Oct. 25, 2012), <https://www.cbssports.com/college-basketball/news/ncaa->

scandal at Baylor in 2016 went unpunished by the NCAA while five years prior the NCAA came down with the hammer when evidence of child abuse was discovered to be intertwined in the football program at Penn State.<sup>79</sup> Many cited the fact that the NCAA was ridiculed for going outside of its normal enforcement procedures during the Penn State investigation as justification for Baylor's perceived "pass."<sup>80</sup> The NCAA did not want to make the same mistake twice.<sup>81</sup> However, this dialog just highlights the fact that the NCAA has no repercussions for deviating from its own procedures. This fact boosts the argument that the NCAA's infractions process needs to employ a different investigator and decisionmaker.<sup>82</sup>

Other criticisms include the conflict of interests created by the enforcement process.<sup>83</sup> The COI is composed of three independent members and seven representatives from member institutions.<sup>84</sup> In other words, the member institutions "basically judge one another."<sup>85</sup> A member institution is less likely to impose a severe punishment, even if it is warranted, for fear the same punishment may be made against itself one day. In addition, all the COI's decisions are unanimous, which denies the benefits of differing perspectives that dissenting opinions can provide.<sup>86</sup> The view many have come to develop is that the COI is not an equitable authoritative body; it instead "marches in step, rubber stamps the position of the enforcement staff, and defends the NCAA turf."<sup>87</sup>

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punishment-is-inefficient-inconsistent-compromised-heres-how-to-fix-it/.

<sup>79</sup> See Andy Staples, *Why the NCAA Isn't Going to Punish Baylor*, SPORTS ILLUSTRATED (May 17, 2017), <https://www.si.com/college-football/2017/05/17/baylor-sexual-assault-scandal-lawsuit-ncaa-death-penalty>.

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

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

<sup>82</sup> Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, THE ATLANTIC (Oct. 23, 2012), <https://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/>.

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

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

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

<sup>86</sup> Despain, *supra* note 74, at 1308.

<sup>87</sup> *Id.*

## B. NCAA'S PREVIOUS REFORM ATTEMPTS AND THE FAILURE TO MAKE MEANINGFUL CHANGE

While major criticisms of the NCAA governance model currently focus on commercialization in the policymaking process and lack of fairness in the enforcement process, the NCAA governance model has previously suffered attacks on a plethora of issues. Two major areas addressed by the NCAA in the past, academic monitoring and sexual assault, provide examples of how, even with the best intent, the NCAA's reform efforts come up short in truly providing meaningful change to its governance ability.<sup>88</sup> In addition, the 2014 structural changes to the NCAA's governance model may follow suit and fail to meet expectations of the member institutions and the public.

### 1. *Academic Progress*

In the early 2000's, the NCAA implemented sweeping academic reforms as a response to federal legislation such as the 1990 Student Right to Know Act.<sup>89</sup> The legislation in part addressed the heightened demand for accurate academic reporting on the behalf of student-athletes because many students were not graduating or, if they were graduating, they were not graduating with degree tracks and qualifications to prepare them for life.<sup>90</sup> The NCAA membership originally passed rules requiring schools to report graduation rates disaggregated by race, gender and sport.<sup>91</sup> This would evolve into the Graduation Success Rate ("GSR") measurement used by the NCAA today.<sup>92</sup> The GSR

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<sup>88</sup> See Jeremy Bauer-Wolf, *NCAA Clears Michigan State Over Nassar Case*, INSIDE HIGHER ED (Aug. 31, 2018), <https://www.insidehighered.com/quicktakes/2018/08/31/ncaa-clears-michigan-state-over-nassar-case>; see also Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html>.

<sup>89</sup> Greg Bischooping, *The NCAA: Legislating and Litigating the College Sports Government* (Apr. 2015) (unpublished B.S. thesis, Boston College) (on file with the Boston College University Libraries).

<sup>90</sup> Student Right-To-Know and Campus Security Act, S. 580, 101st Cong. (1989-1990) (enacted).

<sup>91</sup> Gary Brown, *NCAA Graduation Rates: A Quarter-Century of Tracking Academic Success*, NCAA (Oct. 28, 2014), <http://www.ncaa.org/about/resources/research/ncaa-graduation-rates-quarter-century-tracking-academic-success>.

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

calculates Division I graduation rates based on “the proportion of first-year, full-time student-athletes who entered a school on athletics aid and graduated from that institution within six years . . . [the rate] does not account for students who transfer from their original institution and graduate elsewhere; they are considered non-graduates at both the college they left and the one from which they eventually graduate.”<sup>93</sup>

Another such reform involved academic eligibility and progress.<sup>94</sup> The Academic Progress Rate (“APR”), holds institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term.<sup>95</sup> Institutions are penalized if teams do not meet the base APR standards.<sup>96</sup> Penalties range from loss of official practice time (to let student-athletes focus on their academic studies) to postseason bans.<sup>97</sup>

Although the NCAA’s intent was to improve transparency in academic performance and provide structure for improved academic success among student-athletes across the board, the result remains that the nation’s largest institutions continue to graduate student-athletes at a rate glaringly below the national average.<sup>98</sup> A major critique of the GSR and APR also includes its effect on students from different racial groups.<sup>99</sup>

One study found that when comparing federal graduation rates of only full-time students, the graduation gap for black football players in the largest five conferences was nearly five

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<sup>93</sup> *Graduation Rates*, NCAA,

<http://www.ncaa.org/about/resources/research/graduation-rates> (last visited Oct. 15, 2018).

<sup>94</sup> *Academic Progress Rate Explained*, NCAA,

<http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained> (last visited Oct. 15, 2018).

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

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

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

<sup>98</sup> *See, e.g.,* Jake New, *Graduation Gap for Black Football Players*, INSIDE HIGHER ED (Oct. 19, 2016), <https://www.insidehighered.com/news/2016/10/19/study-finds-large-gap-between-graduation-rates-black-white-football-players>.

<sup>99</sup> *See* Phillip C. Blackman, *The NCAA’s Academic Performance Program: Academic Reform or Academic Racism?* 15 UCLA ENT. L. REV. 225, 229 (2008).



times larger than that of white players.<sup>100</sup> White football players graduated at a rate five percentage points lower than other full-time students.<sup>101</sup> Black players graduated at a rate 25.2 percentage points lower than other full-time black male students.<sup>102</sup> In addition, researchers have found that Historically Black Colleges and Universities are disproportionately punished for APR infractions as compared to other schools.<sup>103</sup> These findings have been particularly concerning given the increasing economic exploitation of black football players at the NCAA's largest universities and the new understanding medical researchers have of the long-term medical damage student-athletes endure when participating in football.<sup>104</sup> Critics maintain that not only are student-athletes leaving without a sufficient education (black students at a disproportional rate), but the student-athletes are also leaving in a worse medical condition than when they entered school.<sup>105</sup> The coupling of the under-education and adverse medical conditions is hindering these student-athletes from living a fulfilled life as promised to them when they were recruited to these institutions.<sup>106</sup>

## 2. Modernized Title XI Policies

Over the past few decades, crimes of violence have been an issue on college campuses across the country.<sup>107</sup> Congress addressed the issue in 1990 when it passed the Clery Act, requiring all colleges and universities that participate in federal

<sup>100</sup> New, *supra* note 98.

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

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

<sup>103</sup> Blackman, *supra* note 99, at 242.

<sup>104</sup> Antonio Moore, *Football's War on the Minds of Black Men*, VICE SPORTS (Dec. 24, 2015, 8:05 AM), [https://sports.vice.com/en\\_us/article/eze4gj/footballs-war-on-the-minds-of-black-men](https://sports.vice.com/en_us/article/eze4gj/footballs-war-on-the-minds-of-black-men).

<sup>105</sup> See Lisa Rapaport, *25-Year-Old Former College Football Player Diagnosed With CTE*, HUFFINGTON POST (Jan. 5, 2016, 8:52 AM), [https://www.huffingtonpost.com/entry/25-year-old-cte-college-football\\_us\\_568bc7dfe4b014efe0db8c87](https://www.huffingtonpost.com/entry/25-year-old-cte-college-football_us_568bc7dfe4b014efe0db8c87).

<sup>106</sup> See Elisia J.P. Gatmen, *Academic Exploitation: The Adverse Impact of College Athletics on The Educational Success of Minority Student-Athletes*, 10 SEATTLE J. FOR SOC. JUST. 509, 510–11 (2011).

<sup>107</sup> Jayma M. Meyer, *It's on the NCAA: A Playbook For Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 358 (2017).

financial aid programs to keep and disclose information about crime either on or near their campuses.<sup>108</sup> The Department of Education monitors institutions' compliance with the law, and participation in federal student financial aid programs is dependent on compliance with the terms of the act.<sup>109</sup> Though the NCAA in particular does not have to comport with terms of the Clery Act, its member institutions do.<sup>110</sup> Although the Clery Act is supposed to provide all students on campus with information regarding sexual assault and due process rights in the event of a sexual assault accusation, many believe that student-athletes are not held to the same standard as other students on campus.<sup>111</sup>

The NCAA has attempted to address this issue of favoritism with a relatively new Title IX policy.<sup>112</sup> As part of the new policy, leaders on each NCAA campus — including the school president or chancellor, athletics director and Title IX coordinator — must attest annually that members of the athletic department were educated in sexual assault and violence prevention.<sup>113</sup> Specifically, the coaches, student-athletes and athletics administrators are required to complete education each year in sexual violence prevention.<sup>114</sup> The NCAA also provides resources for member institutions to assist in implementing a “culture” of inclusion to prevent and reduce incidents of sexual violence on campus.<sup>115</sup>

Reception of the policy has been overwhelmingly critical, with one reporter going so far as to call the policy “a joke.”<sup>116</sup>

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<sup>108</sup> Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, §§ 204, 485, 104 Stat. 2381, 2385 (1990).

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

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

<sup>111</sup> Meyer, *supra* note 107, at 384.

<sup>112</sup> *NCAA Board of Governors Policy on Sexual Violence*, NCAA (Aug. 8, 2017), <http://www.ncaa.org/sport-science-institute/topics/ncaa-board-governors-policy-campus-sexual-violence>.

<sup>113</sup> *Id.*

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

<sup>115</sup> *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture*, NCAA SPORTS SCIENCE INSTITUTE (Oct. 2016), [http://www.ncaa.org/sites/default/files/SSI\\_Sexual-Violence-Prevention-Tool-Kit\\_20161117.pdf](http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf).

<sup>116</sup> Diana Moskovitz, *The NCAA's Latest Sexual Violence Policy is a Joke*, DEADSPIN (Aug. 11, 2017, 9:49 AM),

Detractors of the new policy contend that the policy is nothing more than a reiteration of the requirements the schools must already follow under the Clery Act.<sup>117</sup> A 2011 “Dear Colleague Letter” published by the Department of Education’s Office of Civil Rights shows the criticisms contain merit.<sup>118</sup> In the Dear Colleague Letter, the department clarified that under the Clery Act schools were required to train all employees and administration to identify and report sexual harassment and violence.<sup>119</sup> The letter further required all schools to implement preventive education programs in the training of student-athletes and coaches, including: what constitutes sexual harassment and sexual violence; the school’s policies and disciplinary procedures; and the consequences of violating these policies.<sup>120</sup> With this 2011 letter in mind, it is clear the NCAA failed to pass any legislation that would likely improve the existing educational requirement regarding the issues of sexual assault and violence within their member institution’s athletics departments.<sup>121</sup>

### 3. *Power 5 Conference Autonomy*

As mentioned before, the NCAA’s member institutions voted in 2014 to form a new governance model that would allow the Power 5 conferences to create their own rules in certain areas to benefit their student-athletes.<sup>122</sup> Proponents of the new model indicated that it would allow the schools with the most resources to provide more support services to their student-athletes.<sup>123</sup>

While on the surface the new autonomy appeared to give large institutions the opportunity to provide their student-athletes

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<https://deadspin.com/the-ncaas-latest-sexual-violence-policy-is-a-joke-1797731779>.

<sup>117</sup> S. Daniel Carter & Katherine Redmond Brown, *NCAA’s New Sexual Violence Policy Underwhelming at Best*, HUFFINGTON POST (Aug. 12, 2017, 12:35 AM), [https://www.huffingtonpost.com/entry/ncaas-new-sexual-violence-policy-underwhelming-at\\_us\\_598e82a3e4b0caa1687a6031](https://www.huffingtonpost.com/entry/ncaas-new-sexual-violence-policy-underwhelming-at_us_598e82a3e4b0caa1687a6031).

<sup>118</sup> Office for Civil Rights, *Dear Colleague Letter from Assistant Sec’y for Civil Rights Russlyn Ali*, U.S. Dep’t of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

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

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

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

<sup>122</sup> Shannon, *supra* note 61, at 67.

<sup>123</sup> *Id.* at 72.

with better care, some saw it as the further establishment of a *quid pro quo* situation in big-time college athletics where “student-athletes are now expected to give more because they have been given a little.”<sup>124</sup> In addition, the newfound freedom may adversely impact student-athletes because the Power 5 conferences now have leverage to potentially schedule more games overall and schedule more national and international games that require excessive travel.<sup>125</sup> There is also now a greater opportunity for these schools to take advantage of strategic planning with each other to maximize revenues through things such as conference realignment and television deals.<sup>126</sup> This power may ultimately open up more opportunities to take advantage of student-athletes’ time and increase possibilities for more unethical behavior rather than provide student-athletes with more support services.

To be sure, early successes in the new Power 5 conference model do not show signs of overt exploitation on the horizon<sup>127</sup> because some think the Power 5 conferences have not used their newfound authority as aggressively as many anticipated.<sup>128</sup> But with the historical track-record of member institutions taking

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<sup>124</sup> Weaver, *supra* note 66, at 558.

<sup>125</sup> *Id.*; see also Jeff Goodman, *Around the World: Full List of International Trips*, ESPN (July 26, 2016), [http://www.espn.com/blog/collegebasketballnation/post/\\_id/115735/around-the-world-full-list-of-international-trips](http://www.espn.com/blog/collegebasketballnation/post/_id/115735/around-the-world-full-list-of-international-trips).

<sup>126</sup> Matt Hinton, *Division Zero: What the NCAA’s ‘Power Five’ Autonomy Decision Means for the Future of College Sports*, GRANTLAND (Aug. 8, 2014), <http://bit.ly/1oMpTjU>.

<sup>127</sup> The Power 5 conferences recently adopted legislation such as: precluding required athletics activities overnight for a continuous eight-hour period, generally prohibiting travel days as counting towards the “days off” calculation, and including events like team promotions, recruiting, media events, and fundraising as part of the “required athletically related activities” definition. Jake New, *‘A True Day Off’*, INSIDE HIGHER ED (Jan. 23, 2017), <https://www.insidehighered.com/news/2017/01/23/power-five-leagues-adopt-new-rules-lessening-time-demands>.

<sup>128</sup> Jon Solomon, *Power Five Passes on Tackling Big NCAA Issues to Help Athletes*, CBS SPORTS (Jan. 15, 2016), <https://www.cbssports.com/college-football/news/power-five-passes-on-tackling-big-ncaa-issues-to-help-athletes/>.

advantage of every loophole provided in the NCAA rules,<sup>129</sup> it is anyone's guess on how the autonomy will be used in the coming years.

#### IV. CONGRESS CAN FILL THE NEED FOR AN INDEPENDENT OVERSIGHT BODY

##### A. CONGRESSIONAL ACTION HAS WORKED BEFORE

Congress has historically taken more of an investigatory approach to issues in intercollegiate athletics.<sup>130</sup> Arguably one reason Congress has not acted as aggressively in overhauling college athletics is the influence the federal judiciary has had in identifying the legal limits on intercollegiate athletics. Landmark cases such as *NCAA v. Smith* and *NCAA v. Tarkanian* have outlined the NCAA as a non-governmental actor. *NCAA v. Board of Regents of the University of Oklahoma*, and *Law v. NCAA* defined the contours of anti-trust law by which the NCAA and its member institutions must abide. *White v. NCAA* again addressed anti-trust issues, but in the context of the NCAA's requirement to provide true full cost of attendance to athletes. *NCAA v. Miller* addressed the NCAA's place in interstate commerce and eliminated states' abilities to regulate NCAA action within their

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<sup>129</sup> See, e.g., Peter Jacobs, *Here's the Insane Amount Of Time Student-Athletes Spend On Practice*, BUSINESS INSIDER (Jan. 27, 2015), <http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>.

<sup>130</sup> For example, prompted by the rising revenues in college athletics, Illinois Representative Cardiss Collins lead a congressional subcommittee in 1991 through a series of hearings on the state of the NCAA. *Intercollegiate Sports: Hearings Before the Subcomm. on Commerce, Consumer Prot., and Competitiveness of the Comm. on Energy and Commerce*, 102d Cong. (1991). Specifically, the hearings focused on unequal revenue sharing with athletic departments housed at Historically Black Colleges and Universities and overall ambiguous reporting of athletic department revenues and coaching salaries. *Id.*; see also Mark Asher, House Official Questions Data on Coaches' Income, THE WASHINGTON POST (Sept. 12, 1991), [https://www.washingtonpost.com/archive/sports/1991/09/12/house-official-questions-data-on-coaches-income/7e392c88-7b3e-45bf-b3f3-402355805774/?utm\\_term=.3ea4c3de140d](https://www.washingtonpost.com/archive/sports/1991/09/12/house-official-questions-data-on-coaches-income/7e392c88-7b3e-45bf-b3f3-402355805774/?utm_term=.3ea4c3de140d); Lionel C. Barrow, Jr., Black Colleges Still Not Sharing in the Gold, CRISIS MAG., Nov. 1991, at 15–16. Though they lasted a series of days, the hearings were inquisitive in nature and led to no real reform or action on the part of Congress or the NCAA.

borders. These, and many more, piecemeal decisions have seemingly appeased Congress into underwhelming reform action. But, on rare occasions, Congress has successfully intervened in NCAA governance by passing legislation to protect overarching interests at the core of higher education and intercollegiate athletics. While this legislation proves Congress has the ability to change college sports for the better, Congress has not endeavored to completely balancing the promotion of a multi-billion-dollar entertainment business to comport with the American higher education system's mission of equity and opportunity.<sup>131</sup>

### 1. Racial and Gender Equity

Starting with the passage of the Civil Rights Act of 1964 (“Civil Rights Act”) and the Higher Education Act of 1965 (“Higher Education Act”), the NCAA was forced to reconcile college athletics’ internal issues with those of the institutions with which it was affiliated with—forming its place within the overall mission of higher education in America. The Civil Rights Act codified previous decades of litigation efforts to dispel segregation in education at all levels.<sup>132</sup> Though some institutions integrated the classroom and playing field well before the Civil Rights Act,<sup>133</sup> congressional action made the discrimination based on race, color, religion, sex or national origin the law of the land.<sup>134</sup> In addition, the Higher Education Act expanded opportunities for lower and middle-income families with program assistance for small and less developed colleges.<sup>135</sup> The expansion of federal funding for smaller universities allowed a wider access

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<sup>131</sup> Thomas J. Horton, Drew DeGroot & Tyler Custis, *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where is Congress?*, 26 MARQ. SPORTS L. REV. 363, 372 (2016).

<sup>132</sup> See e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>133</sup> Jimmy Robertson, *Civil Rights Act Helps Break Sports Boundaries*, INSIDE HOKIE SPORTS, Nov. 2014, at 18, [http://inside.hokiesports.com/issues\\_pdf/volume7/vol\\_7\\_no\\_4\\_nov\\_2014.pdf](http://inside.hokiesports.com/issues_pdf/volume7/vol_7_no_4_nov_2014.pdf).

<sup>134</sup> Civil Rights Act of 1964, Pub. L. No. 82-352, 78 Stat. 241 (1964).

<sup>135</sup> Pell Inst., *Do You Know TRIO? A TRIO History Fact Sheet*, NATIONAL TRIO CLEARINGHOUSE (Feb. 2003), [http://www.pellinstitute.org/downloads/trio\\_clearinghouse-The\\_Early\\_History\\_of\\_the\\_HEA\\_of\\_1965.pdf](http://www.pellinstitute.org/downloads/trio_clearinghouse-The_Early_History_of_the_HEA_of_1965.pdf).

to athletics, and the NCAA had to seriously contemplate economic considerations, such as grant-in-aid, that it previously did not have to address.

Almost a decade later, Title IX of the Education Amendments of 1972 (“Title IX”) demonstrated the sweeping effect congressional action could have on intercollegiate athletics.<sup>136</sup> A natural outgrowth of the Civil Rights Act, Title IX radically improved educational equality between the sexes.<sup>137</sup> Arguably the most influential federal legislation regulating the NCAA, the provision was famously enacted without sports in mind.<sup>138</sup> The amendment instead focused on the gender discrimination that was ostensibly left out of the Civil Rights Act.<sup>139</sup> Although the positive impact of the amendment was initially threatened in the 1984 United States Supreme Court case *Grove City College v. Bell*, the law was soon extended to athletics through the Civil Rights Restoration Act of 1988.<sup>140</sup>

Decades later in 2008, Congress passed the Equity in Athletics Disclosure Act (“EADA”) as a part of The Higher Education Opportunity Act (“HEOA”).<sup>141</sup> The HEOA reauthorized the Higher Education Act.<sup>142</sup> Specifically, the Equity in Athletics Disclosure Act extended disclosure requirements for co-ed higher education institutions accepting federal funds and participating in intercollegiate athletics.<sup>143</sup> The schools must

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<sup>136</sup> Ana M. Martinez Aleman & Kristen A. Renn, *Women in Higher Education: An Encyclopedia* 207 (2002).

<sup>137</sup> CRAIG A. HOROWITZ, *THE LEGISLATIVE LEGACY OF EDWARD M. KENNEDY: ELEVEN MILESTONES IN PURSUIT OF SOCIAL JUSTICE, 1965–2007* 49 (2014).

<sup>138</sup> Aleman & Renn, *supra* note 136, at 376.

<sup>139</sup> *Id.* at 237.

<sup>140</sup> *Grove City College v. Bell*, 465 U.S. 555 (1984), stood for proposition that Title IX only applied to those programs receiving direct federal aid, seemingly leaving intercollegiate athletics outside of the covered realm. The Civil Rights Restoration Act of 1988 extended coverage of Title IX to programs of any educational institution receiving both direct and indirect federal aid. Civil Rights Restoration Act of 1987, 1988, Pub. L. No. 100-259, 102 Stat. 28 (1988).

<sup>141</sup> Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

<sup>142</sup> *Id.*

<sup>143</sup> *Equity in Athletics Disclosure Act*, U.S. DEP’T OF EDUC. (Jan. 24, 2017), <https://www2.ed.gov/finaid/prof/resources/athletics/eada.html>.

disclose to the Department of Education statistics accounting for athletic participation, staffing, and revenues and expenses by men's and women's teams.<sup>144</sup> The EADA allowed for unprecedented transparency for gender equity in college sports.

## 2. Oversight of Amateurism

In the late 1960s and through the 1970s, a series of congressional hearings were held to resolve an ongoing issue between the NCAA and the Amateur Athletic Union (“AAU”).<sup>145</sup> The AAU had governed international amateur competitions and domestic amateur competitions since its inception in 1888.<sup>146</sup> With the creation of the NCAA, the AAU relinquished control of governing intercollegiate games but maintained control for international competitions.<sup>147</sup> The NCAA began to disrupt this model and looked to gain a voice in international competition by creating affiliate organizations to put on “open” competitions and encouraging students to participate only in NCAA sanctioned competitions.<sup>148</sup> The AAU responded by threatening athletes' membership in its organization (and thus eligibility to compete in the Olympics) if they competed in NCAA sanctioned events.<sup>149</sup> The argument created a national dialogue about the future of athletic eligibility in Olympic competition—an important subject in the midst of the Cold War.<sup>150</sup>

Congress initially intervened with a series of hearings to help arbitrate the dispute.<sup>151</sup> Ultimately, after fifteen years of congressional arbitration and litigation in federal court, the issue resulted in the Amateur Sports Act of 1978 (“Amateur Sports Act”).<sup>152</sup> The act, among other things, created the United States Olympic Committee (“USOC”), which ultimately took the ability to regulate Olympic eligibility out of the hands of both the NCAA and AAU and vested it in the USOC.<sup>153</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> Bischoffing, *supra* note 89.

<sup>146</sup> *Id.* at 13.

<sup>147</sup> *Id.* at 4.

<sup>148</sup> *Id.* at 13.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 14.

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

<sup>152</sup> Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (1978).

<sup>153</sup> *Id.*



Congress's legislative intervention to 1) provide equal access to intercollegiate athletics and 2) limit the NCAA's reach on international amateur athletic competition shows that legislative action can be an effective response to changing American social ideals. In addition to the Commission on College Basketball's recommendations for change, other issues developing in higher education necessitate Congress' involvement in NCAA governance.

#### B. THE NATIONAL INTERESTS THAT PROMPT CONGRESS' NEED TO ACT NOW

In recent years the lack of attention paid to safety has created many issues for the health of student-athletes. In addition, college athletics' negative public perception has greatly contributed to the American public's changing attitude toward the effectiveness of traditional higher education systems. The NCAA maintains a mission of "balancing [student-athletes'] academic, social and athletics experiences."<sup>154</sup> Yet, education has increasingly been pushed out of the equation to make room for profits from the college sports industry.<sup>155</sup> Instead of complementing the educational experience, many believe that athletic competition has instead diminished the educational opportunities for student-athletes and tainted the overall educational purpose of schools.<sup>156</sup> If the NCAA is allowed to operate on its current trajectory, the higher education system in America will greatly suffer.

##### 1. *Health and Safety of Student-Athletes*

Recent research shows that each year thousands of student-athletes playing college football are at risk of incurring traumatic brain injuries.<sup>157</sup> Increasingly, people examine the

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<sup>154</sup> *NCAA Core Values*, NCAA (Sept. 23, 2018, 6:30 PM), <http://www.ncaa.org/about/ncaa-core-values>.

<sup>155</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

<sup>156</sup> *Id.*

<sup>157</sup> Bryant Lee, *Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV. 613, 616 (2017).

inherent dangers of contact sports and the duty of the NCAA to protect student-athletes from these risks.<sup>158</sup>

For example, the Pennsylvania Supreme Court will soon determine what standard colleges within its jurisdiction must adhere to in order to satisfy their duty of care to student-athletes.<sup>159</sup> Although the defendant-college in the lawsuit is not a member institution of the NCAA, the ruling will apply to all colleges and universities in Pennsylvania that participate in intercollegiate athletic activities.

The ruling in *Lackawanna* will likely open the door for lawsuits to be filed in other state trial courts, prompting other state supreme courts to determine what safety standards must be met by colleges and universities offering athletic sports within their borders. Conflicting rulings between states on the standard of care issue may cause confusion and further issues in applying the various laws. Most intercollegiate athletics teams compete across many state borders throughout the school year. The opportunity for schools litigating health and safety issues to garner more favorable choice of law determinations in one state over another may hinder the effectiveness of those states imposing high standards of care to protect student-athlete safety. Without a uniform system to keep such forum shopping in check, the health and safety of student-athletes will continue to be compromised.

Recognizing the need to protect student-athlete interests, a few members in Congress have attempted, with no avail, to invoke change in intercollegiate athletics. In 2013, Representative Charlie Dent, a Republican from Pennsylvania, and Representative Joyce Beatty, a Democrat from Ohio, introduced legislation that would establish a presidential commission on intercollegiate athletics.<sup>160</sup> Again in 2015, three other House members joined Dent and Beatty to introduce another version of the bill that would have created a seventeen-member panel to review and analyze college sports issues, including the academics

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<sup>158</sup> *Id.*

<sup>159</sup> Max Mitchell, *Justices Take Up Case on Colleges' Duty of Care to Student-Athletes*, THE LEGAL INTELLIGENCE (Dec. 4, 2017, 3:29 PM), <https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/12/04/justices-take-up-case-on-colleges-duty-of-care-to-student-athletes/>.

<sup>160</sup> H.R. 2903, 113th Cong. (2013).

of student-athletes, the financing of college athletics, and safety protections.<sup>161</sup> The panel would regularly report their findings to the White House and Congress.<sup>162</sup> The majority of Congress has yet to come around to the idea of federal oversight in college sports. But the rapid developments in scientific research regarding contact sports should make them rethink that choice before it is too late.

2. *NCAA Shortcomings Increasingly Give Student-Athlete's the Opportunity for Legal Recourse*

In addition to addressing the potential inconsistencies in health and safety standards, recent litigation is forcing the NCAA to spend significant money addressing several other issues. Each case emboldens more students to use litigation as a tool to address NCAA shortcomings. For example, the landmark Ninth Circuit decision in *O'Bannon v. NCAA* determined the NCAA's then-existing compensation rules for revenue-producing student-athletes violated Section One of the Sherman Act.<sup>163</sup> Specifically, the NCAA could not license the name, image and likeness of a student-athlete without providing just compensation for the monetary benefit that student-athlete's persona created.<sup>164</sup> Other current litigation revolves around the NCAA's unwillingness to adequately protect the health and safety of its participants.<sup>165</sup> In *In re National Collegiate Athletic Association Student-Athlete Concussion Litigation*, the players alleged that the NCAA breached its duty to protect student-athletes by failing to implement appropriate rules regarding concussions and head injuries.<sup>166</sup> The NCAA recently settled the claim, agreeing to pay \$70 million and fund a program to monitor medical studies on concussion-related injuries and the medical effects.<sup>167</sup> Yet, new litigation regarding football-related head injuries continues.<sup>168</sup>

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<sup>161</sup> H.R. 2731, 114th Cong. (2015).

<sup>162</sup> *Id.*

<sup>163</sup> *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

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

<sup>165</sup> Jeremy Bauer-Wolf, *College Football's Avalanche of Lawsuits*, INSIDE HIGHER ED (Dec. 1, 2017), <https://www.insidehighered.com/news/2017/12/01/avalanche-football-related-concussion-lawsuits-against-ncaa-and-conferences-could>.

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

<sup>167</sup> *Id.*

<sup>168</sup> *Family of Late Pittsburg St. Player Sues NCAA*, USA TODAY (June 5, 2017, 5:04PM),

*O'Bannon* and *In re Student-Athlete Concussion Litigation* are important disputes because they show the ease of which student-athletes may certify a class against the NCAA. *O'Bannon* defined the class as:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as 'University Division' before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.<sup>169</sup>

Similarly, the court in *In re Student-Athlete Concussion Litigation* engaged in a lengthy discussion as to the various limitations student-athletes may face when attempting to certify a class across different schools and different sports teams.<sup>170</sup> The court ultimately concluded that class certification in such an instance was proper under Federal Rule 23(b)(2).<sup>171</sup> The court reasoned that the class of student-athletes sufficiently alleged that the NCAA "acted or refused to act on grounds that apply generally to the class."<sup>172</sup>

The broad definitions used in both cases show the potential that class action and multidistrict litigation may have in creating an appealing avenue for student-athletes to join forces and take matters into their own hands against the NCAA. If courts continue to allow student-athletes to pursue litigation under such broad class definitions, then the NCAA and its member institutions will be involved in significantly more expensive legal battles than in years past—which will waste government

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<https://www.usatoday.com/story/sports/ncaaf/2017/06/05/family-of-late-pittsburgh-st-player-sues-ncaa/102526844/>.

<sup>169</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1055–56 (9th Cir. 2015) (emphasis added).

<sup>170</sup> *In re Student-Athlete Concussion Litigation*, 314 F.R.D. at 592–600.

<sup>171</sup> *Id.* at 599–602.

<sup>172</sup> *Id.*

resources.<sup>173</sup> Instead of wasting time and money on litigation, the NCAA should instead be held accountable on the front-end to provide adequate educational and health services to its student-athletes.

### 3. Rapidly Changing Perceptions of Higher Education

It is no secret that higher education institutions feel they have been under attack in recent years.<sup>174</sup> Significant state and federal funding cuts coupled with the trillion-dollar student loan deficit have made headlines and are frequently cited as the reason for the rising cost of attendance.<sup>175</sup> In a globalized world where labor dynamics are rapidly changing,<sup>176</sup> the American public is slowly beginning to question traditional systems of higher education.<sup>177</sup>

Intercollegiate athletics is at the forefront of this shifting tide because many higher education institutions' use their athletics department as a marketing tool to attract high enrollment numbers.<sup>178</sup> The athletic prowess of a university arguably drives enrollment; the evidence of which is so prevalent that it has its own name—the “Flutie Effect.”<sup>179</sup> In a climate of decreased federal and state monetary support, colleges and universities

<sup>173</sup> See Daniel J. Capra, Thomas W. Jackson, & John Koeltl, *Financial Arrangements in Class Actions, and the Code of Professional Responsibility*, 20 FORDHAM URB. L. J. 831, 832 (1993).

<sup>174</sup> Thomas Ehrlich & Ernestine Fu, *Troubling Attacks on Public Higher Education*, FORBES (Mar. 23, 2015, 12:55PM), <https://www.forbes.com/sites/ehrllichfu/2015/03/23/troubling-attacks-on-public-higher-education/#9e8e1824e125>.

<sup>175</sup> Preston Cooper, *How Unlimited Student Loans Drive Up Tuition*, FORBES (Feb. 22, 2017), <https://www.forbes.com/sites/prestoncooper/2017/02/22/how-unlimited-student-loans-drive-up-tuition/#7b8d188552b6>.

<sup>176</sup> *The Global Search for Education: What Skills?*, CMRUBINWORLD (Nov. 1, 2016), <http://www.cmrubinworld.com/the-global-search-for-education-what-skills>.

<sup>177</sup> Jeb Harrison, *The Beginning of the End of Traditional Higher Education*, HUFFINGTON POST (July 28, 2015), [https://www.huffingtonpost.com/jeb-harrison/academia-redux-then-and-n\\_b\\_7829364.html](https://www.huffingtonpost.com/jeb-harrison/academia-redux-then-and-n_b_7829364.html).

<sup>178</sup> Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, 32 MARKETING SCI., no. 5, Sept.–Oct. 2013, at 679.

<sup>179</sup> *Id.*; see also Pappano, *infra* note 182.

depend on high enrollment numbers and athletic success to offset multi-million-dollar operating budgets.<sup>180</sup>

Despite many institutions' dependence on athletic marketing, the NCAA and its largest member institutions have increasingly gained a reputation for being "money-hungry" entities that profit off the backs of student-athletes who are not held accountable for their actions.<sup>181</sup> If Americans continue to internalize the perception that tuition and fee payments are simply subsidies for overpaid coaches involved in illegal activity and training athletes who are constantly rewarded despite bad behavior, the average household will be less willing to send their children to traditional, flagship institutions.<sup>182</sup> This festering public perception among fans could spell disaster for higher education funding.<sup>183</sup> The American public has a vested interest in keeping colleges and universities accountable in advancing education. Congress must take this accountability seriously and shift the NCAA's actions back to equally balancing educational opportunity and athletic competition.

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<sup>180</sup> U.S. Dep't of The Treasury & U.S. Dep't of Educ., THE ECONOMICS OF HIGHER EDUCATION, 22 (2012), [https://www.treasury.gov/connect/blog/Documents/20121212\\_Economics%20of%20Higher%20Ed\\_vFINAL.pdf](https://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf); Doug J. Chung, *How Much Is a Win Worth? An Application to Intercollegiate Athletics*, 63 MGMT. SCI., no. 2, Feb. 2017, at 548.

<sup>181</sup> See Diane Roberts, *College Football's Big Problem with Race*, TIME (Nov. 12, 2015), <http://time.com/4110443/college-football-race-problem/>.

<sup>182</sup> See Laura Pappano, *How Big-Time Sports Ate College Life*, THE NEW YORK TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html>.

<sup>183</sup> *Sharp Partisan Divisions in Views of National Institutions*, PEW RESEARCH CENTER (July 10, 2017), <http://www.people-press.org/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions/> (this group of voters is the fastest growing demographic who are turning against enrollment in traditional higher education systems). See generally Walter Hickey, *Your Politics Are Indicative of Which Sports You Like*, BUSINESS INSIDER (Mar. 19, 2013), <http://www.businessinsider.com/politics-sports-you-like-2013-3> (the majority of college football and basketball fans are Republican or Republican-leaning independent voters).

## V. NEW MODEL: A FEDERAL INTERCOLLEGIATE ATHLETICS COMMISSION

The shortcomings of the NCAA's self-governance model are clear. Yet, the NCAA consistently fails to address important issues regarding student rights in a meaningful way because of its commercialized nature at the highest levels of competition.<sup>184</sup> A consistent focus on revenue production from the NCAA's office<sup>185</sup> coupled with decades of unencumbered self-governance has allowed the NCAA to treat student-athletes in ways that often conflict with American moral and legal standards.<sup>186</sup> Nonetheless, the NCAA presses on, making structural changes on its whim and often only after public outcry threatens its bottom line. From the smallest Division III departments to the behemoths in the Power 5 conferences, the political climate of intercollegiate athletics reinforces the idea that it has become like the banking industry — “too big to fail.” Operating in this reality, Congress can either remain a spectator to NCAA governance and continue to allow sexual violence, fraud and health hazards to reign supreme in college athletics, or, Congress can act now to keep a consistent watch on the business of big-time college sports. This article attempts to assist Congress by offering a new model for institutional oversight.

### A. PURPOSE

The use of government agencies to regulate public and private industries is not a novel concept. Congress has created agencies such as the Equal Employment Opportunities

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<sup>184</sup> GERALD GURNEY, DONNA A. LOPIANO & ANDREW ZIMBALIST, UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 16 (Brookings Institution Press, 2017).

<sup>185</sup> See Richard Sandomir & Pete Thamel, *TV Deal Pushes N.C.A.A. Closer to 68-Team Tournament*, N.Y. TIMES (Apr. 23, 2010), [http://www.nytimes.com/2010/04/23/sports/ncaabasketball/23ncaa.html?\\_r=0](http://www.nytimes.com/2010/04/23/sports/ncaabasketball/23ncaa.html?_r=0).

<sup>186</sup> Joe Nocera, *The N.C.A.A.'s Ethics Problem*, THE NEW YORK TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/opinion/nocera-the-ncaas-ethics-problem.html>.

Commission (“EEOC”) to accomplish such tasks.<sup>187</sup> Often these agencies are created out of public pressure to provide additional protection to certain groups of people.<sup>188</sup> Creating a commission to oversee the athletic affairs of the largest NCAA institutions would provide a centralized and independent body to enforce the current federal laws addressing athletic affairs and provide a filtering system for student grievances. A uniform monitoring system is even more important in the wake of multiple higher education alternatives currently in development for the sake of athletic competition.<sup>189</sup>

In a similar vein as the bill introduced by Representatives Dent and Beatty in 2013,<sup>190</sup> this article proposes that Congress create a federal commission on intercollegiate athletics (the “Federal Commission”) to be housed in the Department of Education. Taking the Dent and Beatty bill further, the new Federal Commission should have the primary purpose of enforcing federal laws regulating intercollegiate athletics and monitoring the NCAA to ensure student-athlete rights and maintaining the educational component of intercollegiate athletics. In addition, the Federal Commission would be responsible for overseeing equitable rule application and providing feedback for institutional improvements and investigating complaints dealing with charges arising out of intercollegiate athletics.

## B. STRUCTURE

The Federal Commission would serve as an oversight body for all schools operating in the NCAA’s Division I. The Department of Education is a pertinent home for the Federal

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<sup>187</sup> See Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, EEOC (July 2, 2014), <http://www.eeoc.gov/eeoc/history/cra50th/index.cfm>.

<sup>188</sup> *Id.*

<sup>189</sup> See e.g., Patrick Hruby, *The Plot to Disrupt the NCAA with a Pay-for-Play HBCU Basketball League*, VICE SPORTS (June 20, 2017), [https://sports.vice.com/en\\_ca/article/59zejz/the-plot-to-disrupt-the-ncaa-with-a-pay-for-play-hbcu-basketball-league](https://sports.vice.com/en_ca/article/59zejz/the-plot-to-disrupt-the-ncaa-with-a-pay-for-play-hbcu-basketball-league); Tom Pelissero, *New developmental league could mark shift for college football*, USA TODAY (Jan. 11, 2017), <https://www.usatoday.com/story/sports/nfl/2017/01/11/pacific-pro-football-league-developmental-college-ed-mccaffrey/96416744/>.

<sup>190</sup> National Collegiate Athletes Accountability Act, H.R. 2731, 114th Cong. (2015).



Commission because it already offers limited oversight for federal laws addressing intercollegiate athletics. The Federal Commission would include an advisory board of 6–10 people appointed by the Secretary of Education to oversee the implementation of Federal Commission activities. Each board member would serve a limited term such as no more than 4–6 years. Similar to the NCAA’s Commission on College Basketball, a limited number of positions on the board should be comprised of members who are familiar with the NCAA’s culture and governance process. Unlike the Commission on College Basketball, the Federal Commission should not include any members whose professional responsibilities are directly affected by determinations made through the Federal Commission. For example, retired university presidents, athletic directors, coaches, agents and players would all be good candidates. Anyone currently participating in such roles would not be good candidates. This distinction will address the common complaints regarding conflicts of interest within NCAA decision-making because none of the decision-makers at the top of the chain would have outside pressures affecting their job security. The remaining majority of the board should be comprised of individuals with expert familiarity in areas such as higher education administration, governmental industry monitoring, financial auditing, and so forth. The varying perspectives would ensure considerations affecting college sports are analyzed from every angle.

The operation would be based out of the nation’s capital and administered through regional offices throughout the country. One effective method would be to create 4–6 regions similar to the NCAA’s existing competition regions.<sup>191</sup> In addition, each athletic conference who participates in Division I would be required to employ a federal-reporting officer who would be required to report information to its designated regional office.

As mentioned before, the main tasks would include monitoring intercollegiate athletic associations and their member institutions to: 1) enforce federal laws governing intercollegiate athletics, 2) ensure equitable rule application and provide feedback for institutional improvements, and 3) investigate complaints dealing with charges arising out of intercollegiate athletics. The board would maintain overall responsibility for the activities of the Federal Commission. This responsibility would

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<sup>191</sup> See *Men’s Basketball Regional Rankings*, NCAA (Feb. 26, 2018), <https://www.ncaa.com/rankings/basketball-men/d3/regional-rankings-0>.

include determining the functions that best execute the Federal Commission's three core responsibilities.

1. *Federal Law Enforcement*

Creating an agency that focuses solely on intercollegiate athletics would centralize the enforcement process and create an easier line of communication between the NCAA and the federal government. In addition, the Federal Commission would have the opportunity to advise any future congressional action regarding intercollegiate athletics. Thus, instead of various subcommittees calling sporadic hearings to gather disjointed information each time an issue arises in intercollegiate athletics, the Federal Commission would be a resource for Congress to provide expert analysis on current issues facing intercollegiate athletics.

2. *Monitoring and Feedback*

Though Congress has commissioned studies of the NCAA before, it has rarely required constant monitoring of the NCAA's activities outside of gender equity.<sup>192</sup> In addition, Congress has consistently asked the NCAA to self-report the data used for the reviews.<sup>193</sup> Instead of sporadic inquiry reports, the Federal Commission could create a type of auditing committee to provide consistent oversight.

In addition to monitoring the reporting requirements under laws such as the Equity in Athletics Disclosure Act, the Federal Commission would regularly review NCAA rules and bylaw changes, review all disciplinary actions taken against member institutions and individual student-athletes, and issue opinions on the efficacy of each decision. Although the NCAA and other intercollegiate governing bodies would still have the autonomy to create their own rules and bylaws, the Federal Commission would have authority to appoint neutral members, who must demonstrate their expertise in investigatory and enforcement processes, to the Committee on Infractions and the Infractions Appeals Committee. One of the biggest critiques of the

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<sup>192</sup> See Jon Solomon, *Congress Members Reintroduce NCAA Bill Seeking Presidential Commission*, CBS SPORTS (June 11, 2015), <https://www.cbssports.com/college-football/news/congress-members-reintroduce-ncaa-bill-seeking-presidential-commission/>.

<sup>193</sup> See Branch, *supra* note 155.

NCAA is its arbitrary disciplinary actions.<sup>194</sup> With monitoring in place, the NCAA will have to operate in a system with consequences for irregular rule application.

The Federal Commission would also provide an annual report on the state of intercollegiate athletics and recommend institutional changes when necessary at the national, conference and school levels. Again, although the NCAA would have the autonomy to set its own rules and bylaws, the recommendations ensure that a neutral party is consistently evaluating the systems for weakness and offering unbiased, concrete solutions. This reporting would further transparency in intercollegiate athletics and strengthen the public's trust in the NCAA and higher education institutions' management systems.

### 3. Grievances

The frequency of student-athletes, coaches, and other organizations suing the NCAA is unlikely to diminish anytime soon. Instead of allowing the federal judiciary to continue randomly determining the outline of the NCAA's legal responsibility, the Federal Commission may step in and 1) offer the opportunity for a neutral third-party investigation of alleged wrongdoing and 2) offer clarification for the legal responsibility of intercollegiate athletic associations. The United State Supreme Court's denial to review *O'Bannon v. NCAA* is an example of why a government function such as this is necessary.<sup>195</sup> Now, three years after *O'Bannon*, little clarification has been given about the status of student-athletes in revenue producing sports, and the litigation regarding similar issues continues.<sup>196</sup>

Like charges filed with the EEOC, the Federal Commission's grievance process would require a person suing the NCAA or a member institution for issues arising from federal laws governing intercollegiate athletics to file a charge with the Federal Commission. The Federal Commission would then independently investigate the issue and decide whether a valid claim exists. This

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<sup>194</sup> Sara Ganim, *NCAA Punishment is Anyone's Guess*, CNN (Aug. 12, 2015), <http://www.cnn.com/2015/08/12/us/ncaa-academic-fraud/index.html>.

<sup>195</sup> *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 U.S. 277 (2016).

<sup>196</sup> Ben Strauss, Steve Eder & Mac Tracy, *99-Page Ruling in O'Bannon Case Is Missing Something: Clarity*, N.Y. TIMES, Aug. 9, 2014.

would protect student-athlete interests and the NCAA's interests because it offers an unbiased record of an independent investigation and it could consolidate similar claims. It would also provide an opportunity for an objective assessment for the NCAA to determine if settling a claim is more prudent than litigation.

The Department of Education is a feasible agency to implement this grievance process because it already houses conflict resolution programs for some higher education students.<sup>197</sup> For example, the Federal Student Aid Ombudsman Group is a part of the Department of Education.<sup>198</sup> Its purpose is to resolve disputes relating to any of the loan programs originated by the federal government, such as the Direct Loan Program and the Federal Family Education Loan Program.<sup>199</sup> As a neutral and confidential department, the Ombudsman provides an avenue for borrowers to submit complaints and get help to resolve them before resorting to judicial action such as bankruptcy.<sup>200</sup> With this sort of framework already in place, creating an investigative process for intercollegiate athletic grievances would be achievable.

## VI. CONCLUSION

Two of the biggest reforms in college sports—expansion of women's sports and racial integration—have come from congressional efforts outside the NCAA. Following this history, it is not absurd to think that the next major intercollegiate reform will come from Congress. Many authors who argue for congressional intervention in intercollegiate athletics seek reform by way of anti-trust exemptions and stricter tax laws.<sup>201</sup> While both suggestions would likely change NCAA governance for the

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<sup>197</sup> Despain, *supra* note 74, at 1319.

<sup>198</sup> See FEDERAL STUDENT AID: AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, <https://studentaid.ed.gov/sa/> (last visited Oct. 12, 2018).

<sup>199</sup> *Getting Prepared Before Seeking Help*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/disputes/prepare> (last visited Sept. 22, 2018).

<sup>200</sup> *Id.*

<sup>201</sup> Patrick Michael Tutka & Dylan Williams, *The Expensive Truth: The Possible Tax Implications Related to Scholarship and Cost Of Attendance Payments For Athletes*, 27 J. LEGAL ASPECTS SPORT 145 (2017); William W. Berry III, *Employee-Athletes, Antitrust, And The Future Of College Sports*, 28 STAN. L. & POL'Y REV. 245 (2017).

better, the heart of the issue remains with the NCAA's unwillingness to create meaningful structural change. Some critics to regulatory control maintain that more rules will not in itself fix the issue.<sup>202</sup> Yet the truth remains that without the checks and legal pressures other governmental agencies must endure, the NCAA and its member institutions will continue to push the boundaries on acceptable moral and legal behavior in intercollegiate athletics.

Congress must take a realistic approach to intercollegiate athletics in America because it has grown to be an integral part of our higher education system. Dismantling the NCAA is not likely a feasible option. Instead, instituting a federal commission to monitor changes and assist in governance and conflict resolution would at least allow the public to regain confidence in the American higher education system. This article states a framework for such reform. Establishing a federal commission will not alleviate all issues within intercollegiate athletics—the pressure to win will always affect sports at all levels. Even so, government action is essential to form some semblance of uniformity in the face of a changing landscape of higher education in America.

One author summed up the effectiveness of congressional involvement in intercollegiate athletics by stating:

[o]ne can question the success of congressional intervention in college athletics. However, such activity, coupled with pressure from groups such as the media, state legislatures, the Knight Commission, and the Internal Revenue Service, has been important in the process of college athletic reform because it has nudged the NCAA to initiate some reform efforts of its own.<sup>203</sup>

It is time for the Congress to stop nudging and finally take the reins of big-time college sports.

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<sup>202</sup> Josephine R. Potuto, *Two, Four, Six, Eight; What Can We Now Regulate? The Regulatory Mentality and NCAA Satellite Camps (Et al)*, 35 QUINNIPIAC L. REV. 287, 317 (2017).

<sup>203</sup> Deborah Katz, Graduate Assistant, Ohio State Univ. *Government Attempts at Regulation*, 1995 Symposium on Intercollegiate Athletics Reform at Notre Dame University (Feb. 24-25, 1995), in 22 J.C. & U.L. 20, 24 (1995).