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Foreword

Introduction to Symposium: Should There be Some Form of Judicial or other Independent Review of NCAA Enforcement Actions?

Carl T. Bogus*

Pity the National Collegiate Athletic Association (“NCAA”). Everyone seems to believe that it does an atrocious job enforcing its rules. And yet its critics disagree about what it is doing wrong.

Some argue the NCAA is too soft. Top NCAA officials are too cozy with presidents of its most powerful members, that is, the universities with elite sports programs.¹ That is only to be expected, these critics argue. After all, the NCAA is not truly an independent body; it exists to serve its members. Those members may claim that they value education of their students and protecting the purity of amateur athletics by student-athletes above all else. But while university presidents undoubtedly have warm sentiments about those values in the abstract, powerhouse football and basketball universities have become so addicted to the revenue generated by those programs that, when push comes to shove and trade-offs must be made between integrity and money,

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1. See, e.g., Alexander Wolff, *The Institution Has Lost Control*, SPORTS ILLUSTRATED (June 17, 2013), <http://www.si.com/vault/2013/06/17/106334787/the-institution-has-lost-control>.

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money wins out. As a faithful servant of its members, the NCAA's job is to support the illusion of protecting integrity while not unduly interfering with the revenue streams. That, at least, is what some of the NCAA's critics claim.

Others argue that the NCAA engages in aggressive, witch-hunt investigations that unfairly destroy the careers of players and coaches whom it accuses of violating its incredibly complicated rules.² These two arguments may not be as diametrically opposite as they first appear. It is possible for the NCAA to be lenient on its member institutions while at the same time being severe on coaches and players—especially if they are at colleges with low-profile sports programs.³ Coaches at universities with elite sports programs earn millions of dollars a year and have the financial wherewithal to fight back. When the head coach of the University of Washington's football team was fired for participating in a March Madness office pool—from which he won \$20,000 after correctly predicting the tournament winner⁴—he hired top-gun lawyers and sued both the NCAA and the University of Washington, which paid him \$4.5 million in settlement of his claim.⁵ Incidents such as this have taught the

2. One of the principal critics from this point of view is New York Times, Op-Ed columnist, Joe Nocera. A few of his many columns on the topic include: Joe Nocera, *Day of Reckoning for the N.C.A.A.*, N.Y. TIMES, June 7, 2014, at A21, available at <http://www.nytimes.com/2014/06/07/opinion/nocera-day-of-reckoning-for-ncaa.html>; Joe Nocera, *More N.C.A.A. 'Justice'*, N.Y. TIMES, Jan. 14, 2012, at A21, available at <http://www.nytimes.com/2012/01/14/opinion/nocera-more-ncaa-justice.html>; Joe Nocera, *N.C.A.A.'s 'Justice' System*, N.Y. TIMES, Jan. 7, 2012, at A21, available at <http://www.nytimes.com/2012/01/07/opinion/nocera-ncaas-justice-system.html>; Joe Nocera, *Standing Up to the N.C.A.A.*, N.Y. TIMES, Mar. 24, 2012, A19, available at <http://www.nytimes.com/2012/03/24/opinion/nocera-standing-up-to-the-ncaa.html>. The NCAA rule book exceeds four-hundred pages in length. See Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce its Rules*, ATLANTIC (Oct. 23, 2012, 4:16 PM), <http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/>.

3. See Joe Nocera, *N.C.A.A.'s Double Standard*, N.Y. TIMES, April 9, 2011, at A21, available at http://www.nytimes.com/2011/04/09/opinion/09nocera.html?_r=0.

4. Ray Glier, *COLLEGES; A Coach is Ousted, This One for Betting*, N.Y. TIMES (June 13, 2003), <http://www.nytimes.com/2003/06/13/sports/colleges-a-coach-is-ousted-this-one-for-betting.html>.

5. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the->

NCAA not to tangle with people “who are apt to fight back and win,” says one commentator.⁶

Moreover, the Association has considerable financial incentives not to disqualify a coach or star player of a highly-ranked basketball team on the road to The Final Four — the basketball tournament owned by NCAA, which generates nearly \$900 million in television revenue for the Association and its members annually.⁷ The NCAA may also be reluctant to engage in investigations that would tarnish the reputations of the basketball-royalty programs. For example, the University of North Carolina, which has long had one of the premier basketball programs in the country, has admitted that, over a period of eighteen years, more than 3,100 of its students took sham courses and participated in fake independent study projects in its African American studies program, earning academic credit and high grades for little or no work.⁸ The objective was to boost the grade point average of athletes in order to keep them academically eligible to play basketball, football, and other sports.⁹ About half of these students were athletes, including those in the renowned basketball program.¹⁰ To add insult to injury, former students who one might say “benefitted” from that program sued the NCAA and the University of North Carolina for depriving them of a

shame-of-college-sports/308643.

6. *Id.*

7. Gary Jacobson, *Inside the Final Four finances: The march toward \$1 billion in revenue*, DALLAS NEWS (Apr. 4, 2014, 8:43 AM), <http://www.dallasnews.com/sports/college-sports/ncaa-tournament/the-scene/20140403-inside-final-four-finances-cuban-ncaa-tournament-won-t-get-fat-lik-e-nfl.ece>. See also Thomas O’Toole, *NCAA reaches 14-year deal with CBS/Turner for men’s basketball tournament*, USA TODAY (Apr. 22, 2010, 4:09 PM), http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbturner/1#.VNY_s_nF-So (reporting that the networks will pay the NCAA eleven billion dollars for a fourteen-year contract to broadcast the men’s basketball tournament).

8. Bill Dwyre, *A scandal at North Carolina land on the NCAA’s doorstep*, L.A. TIMES (Oct. 24, 2014, 7:05 PM), <http://www.latimes.com/sports/la-sp-north-carolina-dwyre-20141025-column.html>.

9. Editorial, *The NCAA should punish the University of North Carolina for cheating scandal*, CHI. TRIBUNE (Nov. 7, 2014), <http://www.chicagotribune.com/news/opinion/editorials/ct-north-carolina-sports-scandal-ed-1108-20141107-story.html>.

10. Dwyre, *supra* note 8.

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genuine educational instruction.¹¹ Their complaint states:

This academic debacle, at one of the nation's finest public universities, could not have come as a surprise to the NCAA. It had ample warning, including empirical evidence from numerous academic experts, that many college athletes were not receiving a meaningful education, including — disproportionately — African-American college athletes in revenue-producing sports. . . . [T]he NCAA sat idly by, permitting big-time college sports programs to operate as diploma mills that compromise educational opportunities and the future job prospects of student-athletes for the sake of wins and revenues.¹²

They allege that the fake classes began in 1989—when the legendary Dean Smith was head basketball coach. I happen to be writing these words on the day that front-page obituaries of Smith appear on newspapers across the country. What these laudatory obituaries stress is not Smith's spectacular success on the court, which includes 879 wining games (a record when he retired) and two national championships, but his values. The *New York Times* observes that unlike many coaches, Smith “ran a program that was never accused of N.C.A.A. violations, and about 97 percent of his players graduated.”¹³ Smith was head coach until 1997. It is possible that the program of sham courses operated for eight years without Smith's knowledge, and that those involved went to great lengths to conceal it from him.¹⁴ But one must nonetheless ask:

11. Susan Svrluga, *Lawsuit filed against NCAA, University of North Carolina in 'paper class' athletic scandal*, WASH. POST (Jan. 22, 2015), <http://www.washingtonpost.com/news/grade-point/wp/2015/01/22/lawsuit-file-d-against-ncaa-university-of-north-carolina-in-paper-class-athletics-scandal>.

12. Complaint at ¶5, *McCants v. NCAA*, No.15 CVS 1782 (N.C. Super. Ct. Jan. 22, 2015), available at <http://www.washingtonpost.com/news/grade-point/wp-content/uploads/sites/42/2015/01/UNC-Complaint-Filed-Copy-1-22-15.pdf>.

13. Richard Goldstein, *A Giant of College Basketball And a Champion of Equality*, N.Y. TIMES, Feb. 9, 2015, at A1. See also John Feinstein, *A Legacy at UNC Not Just as a Coach but as a Teacher*, WASH. POST, Feb. 9, 2015, at A1.

14. The lawsuit alleges that members of the athletic staff guided student-athletes into the fake-course program. See generally Complaint, *supra* note 12. Although the University of North Carolina has admitted that basketball players took fake courses, I do not know whether basketball

is it possible that, in part, this program was able to operate for eighteen years because the NCAA turned a blind eye to it? If so, was that because the NCAA thought it unwise to expose academic fraud of a program that was considered the epitome of everything good in college athletics?

But, one might observe, the NCAA had no hesitancy coming down fast and extremely hard on Penn. State when it was publicly revealed that University officials learned that Jerry Sandusky, a former assistant football coach, had sexually abused a young boy on its campus but failed to report that information to authorities. Seven months after the public revelation, the NCAA fined Penn. State \$60 million, banned the University's football team from postseason play, significantly reduced the number of football scholarships it could offer for four years, and vacated all football wins for both the University and Paterno from 1998 to 2011.¹⁵ The Penn. State football coach was Joe Paterno, a man who was just as admired for on-the-field excellence and off-the-field integrity and values, as was Dean Smith. Was this an instance of the NCAA acting fairly and fearlessly? Critics would say no; they would argue that the NCAA acted during the firestorm of the scandal to make itself look good even though it knew that it probably lacked jurisdiction over the matter.¹⁶ The Association reasoned that it could get away with this, but the scandal was such a public relations disaster for Penn. State that the University would have to capitulate.¹⁷ Joe Paterno was not going to fight

players did so during Smith's tenure.

15. *Penn. State Scandal Fast Facts*, CNN, <http://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts> (last updated Jan. 26, 2015 11:26 AM).

16. Internal emails reveal that NCAA staff considered its jurisdiction over the matter "a stretch." Audrey Snyder, *Internal emails show NCAA was unsure of jurisdiction when handing out Penn. State's sanctions*, PITTSBURGH POST-GAZETTE (Nov. 5, 2014, 1:10 PM), <http://www.post-gazette.com/sports/psu/2014/11/05/Internal-emails-show-NCAA-was-unsure-of-jurisdiction-when-handing-out-Penn-State-s-sanctions-Sandusky/stories/201411050220> (quoting e-mail from Julie Roe, V.P. of Enforcement, NCAA, to Kevin Lennon, V.P. of Academic & Membership Affairs, NCAA (July 14, 2012)) (internal quotation marks omitted).

17. "I know we are banking on the fact that the school is so embarrassed they will do anything," one staff member wrote in an internal email. *Id.* (quoting e-Mail from Kevin Lennon, V.P. of Academic & Membership Affairs, NCAA, to Julie Roe, V.P. of Enforcement, NCAA (July 14, 2012)) (internal quotation marks omitted).

back; he had died a few months earlier. Two and half years later, after Penn. State began questioning the severity of the sanctions, the NCAA restored Penn. State's right to participate in postseason play and both the University and Paterno's wins.¹⁸

If the NCAA is failing in its enforcement responsibilities, it is due, at least in part, to the Association's impossible conflicts of interest. To do its job, the Association is required to bite the hands that feed it. One commentator has suggested that the solution would be for the NCAA to outsource its enforcement responsibilities to a private entity such as a law firm or consulting agency.¹⁹ But it is difficult to see how that would help. The private entity would be just one step removed from the source of the conflicts: it would have to please the NCAA, or suffer the loss of an enormously profitable source of business; while the NCAA would, in turn, still have to please its university members.

Because the conflicts of interest cannot be made to dissolve, it is important to consider the unreviewable, unaccountable nature of NCAA power. That is why we decided to hold a Symposium that asks: Should there be some form of judicial—or other independent—review of NCAA enforcement decisions? It is not an easy question, either as a matter of practicalities or of law. For example, in 1988 the United States Supreme Court held that NCAA enforcement activity does not constitute state action under the Due Process Clause of the Fourteenth Amendment, even when its recommendation results in a public university firing a basketball coach for allegedly violating NCAA rules, thereby depriving private individuals of a potentially important mechanism for seeking judicial review.²⁰ Our distinguished Symposium participants included two law professors, a political scientist, a lawyer who represented a star football player who was barred from the NFL for allegedly violating NCAA rules in college, and a former director of women's athletics at the University of

18. Polly Mosendz, *NCAA May Restore Penn. State Wins Removed Over Jerry Sandusky Scandal*, NEWSWEEK (Jan. 16, 2015 1:53 PM), <http://www.newsweek.com/penn-state-wins-removed-over-sandusky-scandal-may-be-restored-300200>.

19. Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce its Rules*, ATLANTIC (Oct. 23, 2012 4:16 PM), http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else_enforce-it-s-rules/264012.

20. *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

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Texas-Austin who was also a former chief operating officer of the Women's Sports Foundation. They gathered for a lively conference at the Roger Williams University School of Law in Bristol, Rhode Island on March 21, 2014. We are sure you will both enjoy and learn much from their thoughtful articles in this Symposium Edition of the *Roger Williams University Law Review*.