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## Fixing Enforcement and Due Process Will Not Fix What Is Wrong with the NCAA

**Donna A. Lopiano, Ph.D.\***

When I was asked to contribute an article to the *Roger Williams University Law Review* Symposium Edition on fixing the due process and enforcement rules and regulations of the National Collegiate Athletic Association (“NCAA”), I immediately responded with a counterproposal. I requested permission to explore why so much more than investigatory, adjudication, and enforcement processes need to be fixed; why the NCAA has been incapable of significant reform; and the conditions under which truly educational reform might occur. Enforcement and due process are important, but constitute such a small part of what is wrong with the NCAA, including: weak eligibility regulations that permit exploitation of academically underprepared athletes (especially those who are admitted without meeting normal admissions standards), lack of tenured faculty oversight of athlete academic practices (enrollment in easy majors and classes and suspect tutor support administered by the athletic department), lack of whistle-blower protection to protect athletes or faculty who report rules violations or mistreatment, disproportionate salaries for coaches and athletic directors, expensive and excessively lavish facilities available only to athletes, high student fees used to

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support athletics, athletes putting in more hours at practice and competing than studying to pass their courses, and more.

My premises are simple: (1) the members of the NCAA have lost control of the commercialism of Division I (“D-I”) athletics due to changes it allowed in the NCAA governance structure that gave legislative control to the institutions with the most commercialized athletic programs; (2) the blame for increasingly unregulated and commercialized Division I athletics is a direct result of a small number of the most powerful and successful athletic programs bullying a much larger NCAA membership to succumb to their legislative wishes by threatening to leave the organization, thereby removing the NCAA’s primary funding source; and (3) given the current Division I Football Bowl Subdivision controlled structure of the NCAA, only action by Congress using the penalties of higher education institutions’ loss of federal Higher Education Act funding or tax preferences and the incentive of a limited antitrust exemption can produce sustainable reform.

#### I. THE COMPOSITION OF THE NCAA MEMBERSHIP

In order to fully comprehend how a small minority of highly commercialized athletic programs are being allowed to engage in highly questionable activities, it is important to first understand the composition of the NCAA membership and the huge financial differences among members of various competitive divisions, as well as to dispel the myth of self-supporting athletic programs. The NCAA is a not-for-profit organization governed by its member institutions and conferences.<sup>1</sup> In 2012–13, there were 1,076 four-year institutions that were active voting members and an additional 26 members categorized as provisional or candidate non-voting members.<sup>2</sup> Ninety-seven of 141 conference members had voting rights, and there were 37 affiliated non-member

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1. See *Frequently-Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Jan. 3, 2015).

2. *Composition and Sports Sponsorship of the Membership: 2012–2013 Composition*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/composition-and-sport-sponsorship-membership> (last visited Jan. 3, 2015) [hereinafter *Composition of Membership*].

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organizations.<sup>3</sup> Of the 1,076 active member institutions, 346 were members of Division I, the highest competitive division; 291 were members of Division II (“D-II”), which is mandated to offer fewer scholarships and impose other athletic program operations restrictions compared to Division I; and 439 were members of Division III (“D-III”), the non-scholarship division.<sup>4</sup> The philosophy of Division I is openly “commercial,” in that these institutions seek to maximize athletic program generated revenues in order to have their athletic programs pay for themselves.<sup>5</sup> In addition to serving the student-athlete, Division I programs seek to provide a larger institutional audience (faculty, staff, student), as well as the general public,<sup>6</sup> with an entertainment product that enhances the affinity of these audiences with the educational institution.

Only 100 Division I members do not sponsor football (e.g., Marquette, St. John’s, DePaul, and Georgetown).<sup>7</sup> The remaining 246 Division I members are divided into two subdivisions for the sport of football, the Football Championship Subdivision (“FCS”) (e.g., Grambling State, Missouri State, Illinois State, Cornell, and University of Delaware) with 126 members and the Football Bowl Subdivision (“FBS”) (e.g., University of Texas, Ohio State University, University of Alabama, and University of Southern California) with 120 members.<sup>8</sup> FBS institutions sponsor higher-

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3. *Id.*

4. *Id.*

5. See Gary T. Brown, *Division I self-sufficiency expected—but most often not realized*, NCAA NEWS (Aug. 29, 2005, 1:24 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2005/Division+I/division%2Bi%2Bself-sufficiency%2Bexpected%2B-%2Bbut%2Bmost%2Boften%2Bnot%2Brealized%2B-%2B8-29-05%2Bncaa%2Bnews.html>.

6. See NCAA, 2014–15 NCAA DIVISION I MANUAL art. 20.9.2(c), at 347 (2014), [hereinafter D-1 MANUAL] available at <http://www.ncaa.com/publications/productdownloads/D115.pdf>.

7. *Composition of Membership*, *supra* note 2.

8. *Id.* From the inception of the NCAA in 1906 through 1955, there were no separate membership divisions representing different levels of competition. See Brian D. Shannon & Jo Potuto, Presentation at the Division I-A Faculty Representative Annual Meeting on NCAA Governance: Now & In the Future 8 (Sep. 22, 2013), available at <http://www.cbssports.com/images/collegefootball/NCAA-Governance-FAR.pdf>. From 1956 to 1972, there were two divisions: college (smaller schools) and university. *Id.* In 1973, the NCAA adopted the current three-division structure and, in 1978, split Division I into the current FBS, FCS, and non-football subdivisions. *Id.*

budget athletic programs and are committed to competing in basketball and football “at the highest feasible level of intercollegiate competition.”<sup>9</sup> All FBS members sponsor spectator-oriented, revenue-producing basketball programs, and 246 sponsor spectator-oriented, revenue-producing football programs.<sup>10</sup> FBS athletic programs must also meet minimum requirements in four areas: (1) sports sponsorship (must sponsor at least 16 NCAA championship sports including football, with each sport also meeting participant and regular season contest criteria minimums in order to count against the sponsorship standard); (2) scheduling (must play at least 60% of their football schedules, at least 5 home contests against other FBS members, all but four men’s and women’s basketball games against Division I opponents, and 50% of contests in other sports against Division I opponents); (3) attendance at football games (must average 15,000 people in actual or paid attendance per home game over a rolling two-year period); and (4) scholarship allocations (must award 90% of the maximum number of football scholarships allowed and 200 grant-in-aids, or \$4 million in total scholarship expenditures).<sup>11</sup> Total operating expenses at FBS institutions range from \$11.4 to \$146.8 million.<sup>12</sup>

Notably, in 2013, only 20 Division I programs—all FBS institutions, but representing only 1.9% of all NCAA active members and 16% of FBS—actually produced more revenues than they spent.<sup>13</sup> Operating losses of the remaining institutions

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9. D-1 MANUAL, *supra* note 6, art. 20.9.2(e), at 347.

10. *Composition of Membership*, *supra* note 2. See also D-1 MANUAL, *supra* note 6, art. 20.9.2(e), at 347 (“A member of Division I . . . [s]ponsors at the highest feasible level of intercollegiate competition one or both of the traditional *spectator-oriented, income-producing* sports of football and basketball.” (emphasis added)).

11. D-1 MANUAL, *supra* note 6, art. 20.9.9, at 353–54.

12. NCAA, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: 2004 – 2013 REVENUES & EXPENSES 45 (compiled by Daniel L. Fulks, 2014) [hereinafter D-1 REVENUES & EXPENSES REPORT] (contains data for fiscal years 2004–2013), *available at* <http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf>.

13. *Id.* at 8. Revenues for this calculation exclude institutional subsidies (such as transfers from the institution’s general fund and mandated student fees allocated to support athletics), capital costs, and debt service expenditures.

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ranged from a high of \$49 million to a low of \$256,000<sup>14</sup> with a median of \$11.6 million, representing a 2% increase over the previous year.<sup>15</sup> The overt expression of a commercial and entertainment sport philosophy—commemorated in the NCAA rules manual—and the practice of excessive spending has fueled an FBS arms race and a system of student-athlete exploitation, which serves as the primary focus of this Article.

NCAA FCS teams have somewhat lower competitive subdivision criteria than the FBS and lack a football game attendance requirement. FCS institution athletic programs must meet minimum requirements in the areas of: (1) sports sponsorship (must sponsor at least 14 NCAA championship sports including football, with each sport also meeting participant and regular season contest criteria minimums in order to count against the sponsorship standard); (2) scheduling (must play at least 50% of regular season football contests against FBS or FCS members, all but four men's and women's basketball games against Division I opponents, and 50% of contests in other sports against Division I opponents); and (3) scholarship allocations (lower number of scholarships allowed in football).<sup>16</sup> The athletic program annual budgets for these institutions range from \$4.4 to \$42.2 million.<sup>17</sup> The financial status of these institutions is significantly more precarious than FBS institutions. No institution generates more revenues than it spends.<sup>18</sup> They are heavily subsidized by institutional allocations (71% of total operating budgets).<sup>19</sup> Median operating losses of \$10.8 million represent an 83% increase since 2004,<sup>20</sup> with losses ranging from a high of \$32.8 million to a low of \$2.8 million.<sup>21</sup>

The 100 non-football playing Division I institutions must meet minimum requirements in three areas as well: (1) sports sponsorship (must sponsor at least 14 NCAA championship sports including football, with each sport also meeting participant and

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14. *Id.* at 47.

15. *Id.* at 12.

16. D-1 MANUAL, *supra* note 6, arts. 15.5.6.2, 20.9.7.1, 20.9.8.1, 20.9.10, at 202, 352, 355.

17. D-1 REVENUES & EXPENSES REPORT, *supra* note 12, at 70.

18. *Id.* at 14.

19. *Id.* at 8.

20. *Id.* at 13.

21. *Id.* at 72.

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regular season contest criteria minimums in order to count against the sponsorship standard); (2) scheduling (must play all but four basketball contests against other Division I opponents and at least 50% of their schedules in other sports against Division I opponents); and (3) scholarship allocations (must award a minimum of 50% of the maximum allowable grants in 14 sports, an equivalent number of full scholarships, or an equivalent amount in aggregated total scholarship expenditures).<sup>22</sup> Total operating budgets of these schools range from \$3.7 to \$35.8 million.<sup>23</sup>

The financial status of these institutions is as precarious as FCS institutions, if not more so, despite having significantly smaller operating budgets. Like FCS institutions, none of these institutions operate at a profit either.<sup>24</sup> They are heavily subsidized by institutional allocations (77% of total operating budgets).<sup>25</sup> Median operating losses in 2013 were \$10.7 million, ranging from a high of \$31.2 million to a low of \$2.8 million.<sup>26</sup>

Key to understanding the financial relationships between the three Division I subdivisions is that they are all engaged in recruiting the same elite level athletes, except that the FCS has accepted its second class position in football. Thus, the so called “arms race” affects all member institutions. If lavish locker rooms, computer centers exclusively for athletes, and other special benefits are provided by FBS institutions, the rest of the subdivisions are then pressured to match these investments. Particularly important to all Division I members is access to the 68 team, Division I national men’s basketball championship, commonly referred to as “March Madness” or the “Final Four.” The one-loss-and-out nature of this championship makes “Cinderella” teams possible, and as detailed later, the significant largess of the media rights associated with the tournament gets returned to all Division I member institutions. Even within the FBS, there is segmentation between the 65 institutions comprising the so-called “Big Five” conferences,<sup>27</sup> which consist of

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22. D-1 MANUAL, *supra* note 6, arts. 20.9.3, .6–8, at 348–49, 352.

23. D-1 REVENUES & EXPENSES REPORT, *supra* note 12, at 95.

24. *Id.* at 14.

25. *Id.* at 8.

26. *Id.* at 96.

27. The “Big Five” conferences include the Atlantic Coast Conference

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the richest athletic programs, as well as the other 60 institutions in the FBS. Thus, recruiting, financial aid, and other rules that result in differing treatment of athletes within the subdivisions affect the financial integrity of the entire Division I system.

In contrast to the Division I philosophy, Divisions II and III make no mention of maximizing athletic program revenues. Division II centers its philosophical statement on the role of athletics, athlete “growth opportunities through academic achievement, learning in high-level athletics competition and development of positive societal attitudes in service to community. The balance and integration of these different areas of learning provide Division II student-athletes a path to graduation while cultivating a variety of skills and knowledge for life ahead.”<sup>28</sup> Division II institution athletic programs must meet minimum requirements in only two areas: (1) sports sponsorship (must sponsor at least 10 NCAA championship sports with one sport in each of three sport seasons, with each sport also meeting participant and regular season contest criteria minimums in order to count against the sponsorship standard) and (2) scholarship allocations (have lower limits on the number of scholarships that can be awarded in each sport and, generally, must award the equivalent of 50% of these lower maximum limits).<sup>29</sup> Total operating expenses at Division II institutions with football range from \$1.8 to \$13.3 million, with fewer than 10% of these programs spending over \$10 million.<sup>30</sup> Division II institutions without

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(“ACC”), the Southeastern Conference (“SEC”), the Big 12 Conference, the Big Ten Conference, and the Pacific-12 Conference (“Pac-12”). See Kent Babb, *NCAA board of directors approves autonomy for ‘Big Five’ conference schools*, WASH. POST (Aug. 7, 2014), [http://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1\\_story.html](http://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1_story.html).

28. *Division II Strategic Positioning Platform*, NCAA, <http://www.ncaa.org/governance/committees/division-ii-strategic-positioning-platform> (last visited Jan. 3, 2015).

29. NCAA, 2014–15 NCAA DIVISION II MANUAL art. 20.10.2, at 305–06 (2014) [hereinafter *D-II MANUAL*], available at <http://www.ncaa.com/publications/productdownloads/D215.pdf>.

30. NCAA, NCAA DIVISION II INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: 2004–2013 REVENUES & EXPENSES 42 (compiled by Daniel L. Fulks, 2014) (contains data for fiscal years 2004–2013), available at <http://www.ncaapublications.com/p-4345-division-ii-revenues-and-expenses-20042013.aspx?CategoryID=0&SectionID=0&ManufacturerID=0&DistributorID=0&GenreID=0&VectorID=0&>.

football programs have operating budgets ranging from \$709,400 to \$16.9 million.<sup>31</sup> These programs are almost entirely supported by institutional allocations.<sup>32</sup> The median athletic program generated revenue for institutions with football is \$640,000<sup>33</sup> and \$336,000 for programs without football.<sup>34</sup>

Division III athletic programs,

place highest priority on the overall quality of the educational experience and on the successful completion of all students' academic programs. They seek to establish and maintain an environment in which a student-athlete's athletic activities are conducted as an integral part of the student-athlete's educational experience, and in which coaches play a significant role as educators.<sup>35</sup>

The Division's central qualifying premise is not providing any "award of financial aid to any student on the basis of athletics leadership, ability, participation or performance."<sup>36</sup> In addition to the prohibition of athletic-based financial aid, the only other membership criteria is sports sponsorship based on the size of the institution—institutions with enrollments of 1,000 or fewer must have 10 NCAA championship sports, and institutions with greater than 1,000 students must have at least 12 NCAA championship sports.<sup>37</sup> Total operating expenses at Division III institutions with football programs range from \$784,800 to \$14.1 million, with fewer than 10% of these programs spending over \$7 million.<sup>38</sup>

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31. *Id.* at 67.

32. *Id.* at 6. Institutional allocations fund 88% of athletic programs with football and 93% of those without football. *Id.*

33. *Id.* at 11.

34. *Id.* at 12.

35. NCAA, 2014–15 NCAA DIVISION III MANUAL art. 20.11, at 187 (2014) [hereinafter D-III MANUAL], available at <http://www.ncaapublications.com/p-4357-2014-2015-ncaa-division-iii-manual-august-version.aspx?CategoryID=0&SectionID=0&ManufacturerID=0&DistributorID=0&GenreID=0&VectorID=0&>.

36. *Id.*

37. *Id.* at 188.

38. NCAA, NCAA DIVISION III INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: 2004 – 2013 REVENUES AND EXPENSES 31 (compiled by Daniel L. Fulks, 2014) (contains data for fiscal years 2004–2013), available at <http://www.ncaapublications.com/p-4348-division-iii-revenues-and-expenses-2004-2013.aspx?CategoryID=0&SectionID=0&ManufacturerID=0&DistributorID=0>

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Athletic budgets at institutions without football programs range from \$421,600 to \$9.2 million, with fewer than 10% of these programs spending over \$4.5 million.<sup>39</sup> Like Division II but even more so, the bulk of these programs are funded through institutional allocations.<sup>40</sup> The NCAA does not gather data on revenues produced in this division.

## II. THE INSTITUTIONALIZATION OF DIVISION I SELF-INTEREST

The institutionalization of Division I FBS self-interest, and now particularly the 65 institutions of the Big Five conferences which have legislative autonomy, is all about keeping as much national championship and other non-regular season and non-conference championship revenue as possible for themselves. Thus, it is important to understand the sources of this national championship revenue, how it is distributed, and who determines the distribution. The NCAA makes most of its money by owning and selling marketing rights to its national championships; most of the remainder derives from national championship gate receipts.<sup>41</sup> The NCAA currently sponsors 89 championships in 23 sports.<sup>42</sup> Some of these post-season tournaments are restricted to competitive division members and some are “open” to teams from any member institution.<sup>43</sup> The bulk of current NCAA revenues is derived from the 68-team, single elimination, Division I national basketball championship, branded as “March Madness,” which culminates in a four-team championship playoff weekend, the “Final Four.”<sup>44</sup> This property generates approximately \$770 million annually in NCAA media rights fees, gate receipts, and

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39. *Id.* at 46.

40. *Id.* at 10.

41. *See infra* Table 1.

42. *See Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Jan. 3, 2015) [hereinafter *NCAA Finances*].

43. Open championships include women’s bowling, men’s and women’s fencing, men’s and women’s gymnastics, women’s ice hockey, men’s and women’s rifle, men’s and women’s skiing, men’s volleyball, and men’s and women’s water polo. *See D-1 MANUAL*, *supra* note 6, art. 20.8.1, at 346.

44. *See* Mark Alesia, *NCAA Approaching \$1 Billion Per Year Amid Challenges by Players*, INDYSTAR (Mar. 27, 2014, 11:06 PM), <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/>.

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sponsorships.<sup>45</sup> From 2012–13, 84% of the NCAA's total revenues of \$912 million were derived from March Madness.<sup>46</sup>

TABLE I. NCAA Revenues for the Year ending August 31, 2013<sup>47</sup>

Championship Television and marketing rights fees	\$726,391,860
Championships and NIT tournaments gate receipts/ sponsorships	\$110,631,867
Investment income	\$41,398,750
Sales and services	\$27,307,562
Contributions-facilities net	\$7,074,007
TOTAL	\$912,804,046

A small percentage of that revenue is used to operate the NCAA's national office, including the operation of championship events.<sup>48</sup> But in the end, more than 90 cents of every dollar the NCAA generates is returned to member institutions either for specified purposes to support student-athletes or unrestricted in the case of revenues distributed based on Division I basketball championship participation.<sup>49</sup>

TABLE 2. NCAA Expenses for the Year ending August 31, 2013<sup>50</sup>

Revenues	Expenses	% of
Distribution to Division I members	\$527,432,377	58%
Division I championships, programs, NIT tournament	\$97,407,498	11%
Division II championships, distribution, and programs	\$35,650,808	4%
Division III championships and programs	\$27,531,406	3%
Association wide programs	\$122,244,138	13%
Management and general	\$41,785,827	5%
TOTAL	\$852,052,054*	

\*\$60,751,992 difference from total revenues represents funds invested/reserves (6% of revenues)

45. *Id.*

46. *Id.*; see also NCAA AND SUBSIDIARIES, INDEPENDENT AUDITORS' REPORT & CONSOLIDATED FINANCIAL STATEMENTS 4 (2013) [hereinafter NCAA AUDIT & FINANCIAL STATEMENTS], available at [http://www.ncaa.org/sites/default/files/NCAA\\_FS\\_2012-13\\_V1%20DOC1006715.pdf](http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf).

47. NCAA AUDIT & FINANCIAL STATEMENTS, *supra* note 46, at 4.

48. See *infra* Table 2.

49. NCAA Finances, *supra* note 42.

50. NCAA AUDIT & FINANCIAL STATEMENTS, *supra* note 46, at 4.

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The Division I revenue distribution to member institutions is for the following specified purposes: basketball fund (39%), student-athlete athletic grants in aid (26%), special student assistance (15%), sports sponsorship (13%), academic enhancement (5%), conference grants (2%), and supplemental support (>1%).<sup>51</sup> The basketball fund is a pay-off system to conferences based on the finish of their teams in the Final Four over a six-year rolling period.<sup>52</sup> The conferences subsequently determine how to distribute this money among their member institutions.<sup>53</sup> To its credit, the NCAA has significantly reduced the amount of distribution that is based on winning post-season basketball games and increased amounts dedicated to reimbursing institutions for their athletic program expenditures on important student-athlete benefits, such as academic support programs, scholarships, and sport operating costs.<sup>54</sup> However, the \$100 million portion based on basketball tournament participation is still very substantial. The non-basketball fund distributions are fixed amounts in some cases, such as for academic enhancement (same amount to each Division I member), and based on program size in other cases, as is the case for sport sponsorship and scholarships dedicated distributions.<sup>55</sup>

The bottom line of this explanation is that the NCAA has established a revenue distribution system that is dominated by the philosophy of returning the most money to the members responsible for earning that money, a for-profit business mentality, rather than acting as a non-profit association. The NCAA, a non-profit organization, owns its national championships. The revenues derived from these championships

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51. NCAA, 2013–14 DIVISION I REVENUE DISTRIBUTION PLAN 3 (2014) [hereinafter D-1 REVENUE DISTRIBUTION], available at <http://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf>.

52. *Id.* at 7, 8.

53. *Id.* at 8.

54. Prior to 1991, NCAA Final Four revenues were distributed among only those teams that participated in the Final Four. See *Distributions*, NCAA, <http://www.ncaa.org/about/resources/finances/distributions> (last visited Jan. 3, 2015). In 1991, broad-based distributions to all Division I institutions were initiated to help support academic, scholarship, and operating expenses. *Id.*

55. D-1 REVENUE DISTRIBUTION, *supra* note 51, at 10.

should be used to best advance the mission of the organization, benefitting *all* of its members and *all* student-athletes, not just the athletes participating in commercialized programs. The NCAA has *not* adopted the non-profit philosophical position—for instance, that all national Association revenues should be used in a way that contributes to the education, health, and welfare of the greatest number of student-athletes. Institutions with commercialized athletic programs earn significant revenues from their own regular season contests and shares of conference championships. National championships revenues should assist all NCAA member institutions, just as conference championship revenues are split among all conference members.

Notably, the NCAA does not sponsor a FBS football championship. The College Football Playoff, a four-team play-off accepted by the public as the FBS national championship, begins in the fall of 2014<sup>56</sup> and is the sequel to the Bowl Championship Series and its two-team championship, which existed from 1998 through 2013.<sup>57</sup> The value of the new four-team College Football Playoff is approximately \$470 million per year, and it is owned jointly by all FBS conferences plus Notre Dame, rather than the NCAA.<sup>58</sup> These College Football Playoff proceeds are not equally shared among all FBS members. The 65 Big Five conference members take home 75% of the proceeds, and the remaining 25% is distributed to the 60 remaining institutions *via* other FBS conferences.<sup>59</sup> The NCAA FCS championship is a 16-team tournament. Thus, it is reasonable to assume that it is only a matter of time before the College Football Playoff is expanded to eight teams or more, which would most likely increase its approximate value to more than \$1 billion per year.

The fact that almost half of all NCAA revenues and 75% of all College Football Playoff revenues go to the Big Five conferences

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56. See *Chronology*, COLL. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/chronology> (last visited Jan. 3, 2015) [hereinafter *Chronology*].

57. See Richard Billingsley, *The road to the BCS has been a long one*, ESPN, <http://assets.espn.go.com/nfl/s/historybcs.html> (last updated Oct. 22, 2014, 12:45 PM).

58. See George Schroeder, *Power Five's College Football Playoff revenues will double what BCS paid*, USA TODAY (July 16, 2014, 5:57 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/127344897/>.

59. See *id.*

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reveals the source code of highly commercialized and educationally questionable Division I football and basketball programs. These conferences have intentionally acted to control NCAA distributions and keep most of the revenues from the College Football Playoffs for themselves. The goal of the 65 Big Five conference institutions is clear; they want to win and will spend whatever it takes to win, all while maintaining a resource advantage over 94% of all other NCAA member institutions.

Until 1997, the NCAA generally operated as a one-institution/one-vote association.<sup>60</sup> Members convened annually in a deliberative assembly requiring a two-thirds vote to adopt legislation that was constitutional in importance and voting as a whole or by Division (generally by majority vote) on legislation of lesser importance.<sup>61</sup> In 1997, Division I moved from a one-institution/one-vote assembly to a conference based Legislative Council, subject to review by a Division I Board of Directors.<sup>62</sup> Concomitant with this separation from Division II and III in 1997, using the threat of FBS institutions leaving the NCAA, FBS schools were successful in accomplishing three goals key to perpetuating the competitive dominance of the Big Five conferences: (1) getting NCAA members to agree to a federated structure—which gave more autonomy to each division but gave FBS 50% of all voting positions on the NCAA Executive Committee (the governance structure that has final authority over the Association’s budget and the power to call for a two-thirds vote of the entire membership to overturn the action of any division or subdivision) and 61% control of the Division I Board of Directors;<sup>63</sup> (2) passage of a legislative provision approved by the entire NCAA membership that relegated Division II and Division III’s share of NCAA national championship and organization revenues to no more than 8 to 11% and gave Division I control of the remaining lion’s share of the NCAA’s revenue distribution;<sup>64</sup> and (3) specifying that if any new NCAA subdivision

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60. See Allie Grasgreen, *Division I Divisiveness*, INSIDE HIGHER ED (Feb. 16, 2012), <http://www.insidehighered.com/news/2012/02/16/ncaa-governance-brink-reform>.

61. D-1 MANUAL, *supra* note 6, art. 4.6.4, at 23.

62. See *id.* art. 4.6, at 23–24.

63. *Id.* arts. 4.1–4.2.2, at 20–21.

64. *Id.* arts. 4.01.2, 4.01.2.2.2.3, at 17.

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championship was initiated (practically meaning an FBS national championship), all of its revenue belonged to and would be under the control of that subdivision.<sup>65</sup>

These actions fully protected the revenues from the then-new football Bowl Championship Series (the predecessor to the current College Football Playoff National Championship), a property not owned by the NCAA that was about to launch.<sup>66</sup> Even if the NCAA started an NCAA FBS national championship in the future, the FBS institutions would not share these NCAA revenues with other NCAA members, and the FBS would determine any such distribution among FBS institutions.<sup>67</sup> However, given FBS control of the NCAA's primary legislative mechanisms, it is highly unlikely that the FBS would permit the development of a competing product to its College Football Playoffs. The institutionalization of this plutocracy—giving voting control to a minority of the wealthiest athletic programs—is without precedent in either amateur or professional sports worldwide.

The financial support of Division II and III legislation actually reads, “[m]embers are guaranteed revenue through allocations made to each division from the Association’s general operating revenue. Division II shall receive at least 4.37 percent of the Association’s annual general operating revenue. Division III shall receive at least 3.18 percent of the Association’s annual general operating revenue.”<sup>68</sup> The use of “at least” was disingenuous. In most years, Division II and III (68% of NCAA active members) receive 8% to 11% of NCAA distributions.<sup>69</sup> In

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65. *Id.* art. 4.01.2.2.1, at 17.

66. *See BCS governance*, BCS BOWL CHAMPIONSHIP SERIES, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Mar. 27, 2014, 7:04 PM). Following the adoption of this NCAA legislation in 1997, it was no accident that in 1998 the FBS conferences created the Bowl Championship Series (“BCS”) with five bowl games among the top 10 teams. *See Billingsley*, *supra* note 57. In 2006, the FBS conferences added a #1 vs. #2 national championship game the week after New Year’s, effectively starting their own national championship. *See id.* The BCS was the predecessor to the four-team FBS College Football Playoff, which began in the fall of 2014. *See Chronology*, *supra* note 56.

67. D-1 MANUAL, *supra* note 6, art. 4.01.2.2, at 17.

68. *Id.* art. 4.01.2.1, at 17.

69. NCAA, MEMBERSHIP REPORT 19 (2006), *available at* [http://s3.amazonaws.com/ncaa/web\\_video/membership\\_report/2008/content/p](http://s3.amazonaws.com/ncaa/web_video/membership_report/2008/content/p)

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contrast, members of Division I (32% of NCAA active members<sup>70</sup>) received 69%<sup>71</sup> of 2012–13 NCAA revenues, and members of the Big Five conferences (6% of NCAA members) received 31% of the Division I distributions.<sup>72</sup> The likely intent of the legislation was to make clear to the rest of the membership that Division I-earned revenues would stay with Division I, and Division II and III should not expect support beyond the payment of expenses for their teams to participate in NCAA national championships and the benefits of limited association wide programs, such as providing catastrophic insurance for all NCAA athletes.

The Big Five conferences achieved further restructure of the NCAA that gave them even greater legislative autonomy in 2014.<sup>73</sup> They claim that with such autonomy, they will use revenues from the College Football Playoff to enhance athletes' welfare by providing athletic scholarships covering the full cost of college attendance and lifelong scholarship support for former athletes wishing to complete undergraduate degrees<sup>74</sup>—both of which were legislative provisions previously rejected by the NCAA.<sup>75</sup> However, that claim is disingenuous because it gives the impression that only Big Five conference institutions have the financial ability to provide such benefits. For instance, the Big Five conferences have not proposed that the NCAA, rather than the FBS, own the College Football Playoff in the same way the NCAA owns the Final Four basketball and all other national championships, thereby creating the funding source to provide such expanded scholarship support to *all* Division I athletes. Instead, the Big Five seeks to enhance their existing advantage by providing only their athletes with benefits that members of other

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df/2006\_NCAA\_Membership\_Report.pdf.

70. NCAA AUDIT & FINANCIAL STATEMENTS, *supra* note 46, at 4. The remaining funds are for association-wide programs and management expenses not broken down by division. *Id.* at 4; *see also Composition of Membership*, *supra* note 2.

71. NCAA AUDIT & FINANCIAL STATEMENTS, *supra* note 46, at 4.

72. *Id.*

73. *See* Brian Bennett, *NCAA board votes to allow autonomy*, ESPN (Aug. 8, 2014, 1:22 PM), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences).

74. *See id.* Not all college athletes are on “full” scholarships; however, the highest percentage of athletes on full scholarships are in Division I basketball and football. *See id.*

75. *See id.*

FBS or Division I conferences cannot match due to more limited financial resources. It is clear that the overriding goal of the Big Five conferences is to keep as much revenue as they can so they gain the greatest advantage in being able to attract prospective student-athletes, thereby increasing the likelihood that they will win football and basketball games. In short, these institutions will spend as much as they can earn to achieve athletic dominance.

### III. THE THREAT OF FBS OR BIG FIVE DEPARTURE FROM THE NCAA

Given the aforementioned restructure of the NCAA to give the FBS full license to act in its own self-interest, educators and the public should ask why non-FBS NCAA members do not unite to oppose such a governance imbalance, or why the membership allowed this in the first place. The answer is that the FBS, and now most recently, the Big Five conference institutions, threatened to leave the NCAA if the other divisions or subdivisions did not give them what they wanted.<sup>76</sup> The implication of this threat was, and is, that without these top revenue-producing FBS institutions, Division II and III institutions would not receive their current benefits, including fully paid travel, hotel, and meals for those athletes and coaches participating in NCAA championships, catastrophic injury insurance for all student-athletes, and the benefits of other NCAA association-wide programs. In addition, the non-FBS members of Division I fear that a pullout by the FBS institutions would undermine the value of the Division I Basketball Final Four, which is their most significant revenue source.

But what would actually happen if the FBS or the Big Five conference institutions pulled out of the NCAA? Is this really a viable threat, or is it an empty one? It seems reasonable to

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76. See Tim Tucker, *Slive threatens move to 'Division 4' if autonomy isn't approved*, ATLANTA J. CONST. (May 30, 2014, 2:11 PM), [http://www.ajc.com/news/sports/college/slive-threatens-move-to-division-4-if-autonomy-isn/nf9xH/#\\_federated=1](http://www.ajc.com/news/sports/college/slive-threatens-move-to-division-4-if-autonomy-isn/nf9xH/#_federated=1). Choosing to leave the NCAA or becoming a member of Division IV result in the same outcome because of the regulations implemented in 1997 that allow new subdivisions to keep their revenues. The practical effect of leaving the NCAA and becoming Division IV would be to undermine the NCAA Final Four basketball championship revenue distribution and all Division I institutions.

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assume that such a departure is unlikely for three reasons. First, given the number of collegiate institutions that would be negatively affected by such a move, it is reasonable to assume that those institutions would pressure their congressional representatives to act to stop such a possibility. In such case, Congress could use either withdrawal of its substantial athletic program tax preferences or institutional non-qualification for Higher Education Act funding to dissuade such a move. Such congressional actions would financially cripple the FBS athletic programs and their larger institutional hosts, and the threat of such action would probably be enough to deter their departure.

Second, the most commercialized athletic programs need the philosophical protection of the significantly larger number of Division II and III athletic programs that allows the NCAA to defend itself in court against antitrust suits, positioning that their members conduct educational sport programs in which amateurism is a critical element. These notions of Division I football and basketball programs being educational rather than professional sport operations are currently being attacked by a number of antitrust lawsuits.<sup>77</sup> Also, a recent ruling by the regional office of the National Labor Relations Board on the request of Northwestern University football players to unionize classified these players as employees.<sup>78</sup> However, the courts have, at least up to the date of publication of this Article, largely supported the NCAA's position in most cases.<sup>79</sup> Even the recent ruling in the *O'Bannon v. National Collegiate Athletic Ass'n*, while undermining the NCAA's definition of amateurism, acknowledges the need to keep compensation of student-athletes within the range of federal, student financial aid maximum limits, plus modest additional financial aid from group licensing fees.<sup>80</sup>

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77. See, e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, MDL No. 2541, 2014 WL 2547809 (J.P.M.L. June 4, 2014) (consolidating *Alston v. NCAA*, No. 4:14-01011 (N.D. Cal. June 6, 2014) and *Jenkins v. NCAA*, No. 3:14-01678 (D.N.J. June 18, 2014)).

78. *Nw. Univ.*, No. 13-RC-121359, 2014 WL 1922054, at \*22-24 (N.L.R.B. Mar. 26, 2014).

79. See, e.g., *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Hennessy v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983).

80. See *O'Bannon*, 7 F. Supp. 3d at 1008.

Because they control the bulk of media rights revenues, if the FBS or the Big Five conferences were to depart, they would find themselves in the crosshairs of these lawsuits and unionization efforts and, arguably, much weaker with regard to an educational-sport defense.

Third, it is unlikely that college presidents would allow their institutions to depart from the NCAA. Most college presidents agree that they cannot control their athletic programs.<sup>81</sup> Presidents of institutions and athletic directors who are perceived to be acting in ways that make their athletic teams less competitive put their jobs in jeopardy. It only takes one powerful donor, trustee, or legislator to raise the guillotine. It appears reasonable to assume that college presidents would recognize that creating an independent, national governance association consisting of only the most commercialized athletic programs would exacerbate current problems and result in further loss of presidential control.

#### IV. IS REFORM POSSIBLE?

It is clear that the NCAA in general and Division I in particular are incapable of major reform because of the previously described institutionalization of FBS legislative self-interest at both the organizational and Division I governance levels. Depending on the FBS to navigate the return to a student-centered focus runs counter to a history deeply devoted to pursuing commercial, sport revenue outcomes. The current lack of appetite for non-FBS NCAA members to rise in opposition to recent FBS proposals for more legislative autonomy and power appears to reflect an environment of resignation. NCAA members will most likely go along with continued FBS efforts to solidify a plutocracy.<sup>82</sup> Thus, it is unrealistic to imagine that this wealthy,

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81. See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, QUANTITATIVE AND QUALITATIVE RESEARCH WITH FOOTBALL BOWL SUBDIVISION UNIVERSITY PRESIDENTS ON THE COSTS AND FINANCING OF INTERCOLLEGIATE ATHLETICS, REPORT OF FINDINGS AND IMPLICATIONS § 3(A), at 7 (2009) [hereinafter KNIGHT COMM.].

82. See Bob Kustra, *NCAA Reforms a Subterfuge for Fueling the Arms Race in Intercollegiate Athletic Spending*, CBS SPORTS, <http://www.cbssports.com/images/collegefootball/Bob-Kustra-Boise-State-Division-I-NCAA-Reform.pdf> (last visited Jan. 3, 2015).

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ruling class will voluntarily give up power.

Therefore, in the author's view, there are only two realistic possibilities for changing course, one a consequence of the courts and the National Labor Relations Board classifying college football and basketball players as professional athletes, and the other a proactive return to sports as bona fide, higher-education, extracurricular activities appropriate for a non-profit, educational enterprise. The former possibility is that the NCAA Division I financial model of not paying athletes gets blown up by the current spate of antitrust suits still outstanding. If the athletes who are currently involved in the litigation win, Division I institutions would face a tsunami-like financial catastrophe. The current system is based on non-taxable student scholarships, rather than payment to employees. A collegiate-professional sport model based on paying student-athletes as employees in an open marketplace would put the current institutional funding model at incredible risk.

The current financial system is demonstrably unstable. As previously stated, in 2012–13, only 20 institutions were making more than they spent.<sup>83</sup> In 2012–13, at least 70 of the 121 FBS head football coaches and 35 of the 68 head basketball coaches whose teams qualified for the 2014 Final Four were under long term contracts making a \$1 million or more in annual salaries.<sup>84</sup> These salaries are possible only because of a rigged marketplace, which is characterized by a low-pay labor force of athletes (limited scholarship awards rather than an open marketplace), budgets that are bolstered by non-profit, educational institution general funds, student fee subsidies, and inflated revenues due to tax benefits available to donors. Further, expenses continue to rise faster than revenues,<sup>85</sup> and the entire system is operating below normal professional sport business costs because non-profit organizations are exempt from taxes. Other than the prediction of an inevitable crash, no one knows exactly what would happen if institutions were suddenly faced with any of the following

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83. D-1 REVENUES & EXPENSES REPORT, *supra* note 12, at 8.

84. See Steve Berkowitz et al., *2014 NCAAF Coaches Salaries*, USA TODAY, [www.usatoday.com/sports/college/salaries/](http://www.usatoday.com/sports/college/salaries/) (last visited Jan. 3, 2015). However, no salary information was provided for private institutions. See *id.*

85. See Steve Berkowitz et al., *NCAA Finances*, USA TODAY, <http://www.usatoday.com/sports/college/schools/finances/> (last visited Jan. 3, 2015).

realities: (1) paying basketball and football player salaries; (2) paying unemployment insurance and workers compensation; (3) loss of tax preferences for donors contributing to the athletic department or purchasing tickets tied to seating preferences; or (4) NCAA determination of athlete scholarship limits and benefits being replaced with collective bargaining with athlete unions.

The second alternative, and one that would surely be ignited if a financial crash were to occur, is congressional intervention. Congress could condition receipt of billions of dollars of student financial aid and other federal funds distributed *via* the Higher Education Act of 1965<sup>86</sup> on the reform of the NCAA's highly commercialized athletic programs. Congress could also establish a federally chartered non-profit organization, similar to the United States Olympic Committee, to replace the NCAA, and require that all higher-education institutions with commercialized, athletic programs be members or risk losing Higher Education Act funding for noncompliance. Congress, in effect, could force a resetting of the educational sport moral compass much like Title IX did for women in sports.<sup>87</sup> Such congressional action would likely target institutions with athletic programs that generate more than \$1 million in annual revenues and require these programs to afford specific protections and benefits to student-athletes. Granted, the prospect of congressional action given the current dysfunction of that entity would be extraordinary. However, historically, there has been government action when the wellbeing of so many young athletes is at stake. Indeed, the origination of the NCAA in 1906 was due in part to government pressure to stop football-related deaths.<sup>88</sup> The Ted Stevens Olympic and Amateur Sports Act in 1978, which established the United States Olympic Committee as a federally chartered non-profit organization, addressed the

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86. 20 U.S.C. § 1058 (2012) (defining eligibility to receive funds under the Act).

87. Title IX conditions receipt of federal funds on conducting educational programs or activities that do not discriminate on the basis of sex. 20 U.S.C. § 1681 (2012). This law, which was adopted in 1972, effectively negated close to a century of discrimination against women in scholastic and college athletic programs. *See generally* Cassandra Jones, Book Review, 22 MARQ. SPORTS L. REV. 613 (2012) (reviewing DEBORAH BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* (2010)).

88. *See* Bob Green, *The president who saved football*, CNN (Feb. 5, 2012, 8:25 AM), <http://www.cnn.com/2012/02/05/opinion/greene-super-bowl/>.

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dysfunction of the Amateur Athletic Union and its lack of due process and fair treatment for amateur athletes representing the United States on our national teams.<sup>89</sup> In fact, government threats to amend the Ted Stevens Olympic and Amateur Sports Act to reorganize the Board of Directors forced the United States Olympic Committee to eliminate its large Board of Directors, which at the time consisted of self-interested organizational members, and replaced it with a Board consisting primarily of independent directors.<sup>90</sup>

Congressional action appears to be the only reasonable alternative, not only for the aforementioned reasons, but also for a number of additional reasons:

1. Research by the Knight Commission on Intercollegiate Athletics has demonstrated that 80% of college FBS presidents believe they are unable to control the excesses of FBS commercialized sports.<sup>91</sup>
2. The NCAA's historical record of not having demonstrated the ability to initiate significant reforms, especially those that control commercial excesses and address the educational exploitation of academically underprepared athletes.
3. The challenges of reform are so complex, including, significantly, requiring FBS institutions to remain a part of the larger NCAA community (which could be a requirement of congressional action), such that it is reasonable to believe that only the threat of loss of federal, Higher Education funding will move the needle toward meaningful change; and
4. Only Congress has the power to grant a limited antitrust exemption to stop the financial bleeding from antitrust lawsuits, and only Congress can give subpoena authority to help fix a broken NCAA enforcement system that must afford better due process to its members. Moreover, it is

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89. See 36 U.S.C. § 220503 (2012).

90. See *Reform of the United States Olympic Committee: Hearing Before the Comm. on Commerce, Sci., and Transp.*, 108th Cong. 8–10 (2003) (statement of Donald Fehr, Co-Chairman, Indep. Comm. on Reform, U.S. Olympic Comm.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg87340/pdf/CHRG-108shrg87340.pdf>.

91. KNIGHT COMM., *supra* note 81, at 25.

reasonable to believe that Congress will not grant an antitrust exemption or subpoena power without the assurance of immediate, meaningful, and sustainable reform.

#### V. WHAT WOULD MEANINGFUL REFORM LOOK LIKE?

The author and others,<sup>92</sup> believe that the minimum provisions of such a congressional bill should address the need for:

- A limited antitrust exemption for the governance organization (either the NCAA or a replacement, federally chartered, non-profit organization) that permits the national governance organization to control sport operating costs, including coaches' salaries and other commercial elements, but conditioned on compliance with all reform provisions;
- Exclusive ownership of national championships by the national governance organization (which would preclude the current FBS conference ownership of the College Football Playoffs) in order to generate revenues to be distributed to member institutions so they could provide academic, health, and welfare benefits to the greatest number of athletes, rather than a select few (i.e., FBS and particularly the Big Five conferences);
- More stringent due process protections for member institutions and binding arbitration for student-athletes faced with significant loss of privileges or benefits, including giving subpoena power and the power to require statements under oath to professional judges hired as third party contractors to oversee the adjudication of alleged serious rule violations;
- An independent board of directors responsible for legislating educational sport conditions for the good of all athletes, rather than the commercial interests of a limited

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92. In 2013–14, a subcommittee of The Drake Group, of which the author was a member, developed such a model congressional action. See Collegiate Athletic Association of the United States (Aug. 8, 2014) (unpublished manuscript) (on file with Roger Williams Univ. Law Review). Other members of the subcommittee were Brian Porto, Gerald Gurney, Allen Sack, and Andrew Zimbalist. The remainder of the paper describes the congressionally mandated minimum reforms suggested by that group.

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number of the wealthiest athletic programs (e.g., removal of the current commercial athletic program self-interest legislative system);

- Institutional, conference, and national governance organization media revenue set-asides to establish an academic trust fund dedicated to the provision of long-term health and educational benefits to injured athletes and the provision of educational assistance to those unable to complete their degrees;
- Freshman ineligibility and mandatory remedial programs for specially admitted or other athletes whose high school GPA or SAT scores are below one standard deviation from the mean academic profile of their entering classes;
- Caps on sport operating costs, salaries, and wages;
- Tenured faculty oversight of athlete academic achievement and academic counseling and support practices, including academic authorities, rather than athletic departments controlling tutoring, advising, and other academic support programs;
- Whistle-blower protection for those who report rule infractions;
- Scholarship awards that are guaranteed for five years or until graduation and cannot be graduated or terminated based on injury, athletic performance, or disciplinary measures not applicable to non-athlete students;
- Specified athlete rights related to medical care, baseline neurological testing, preventive health education for life-threatening conditions, catastrophic injury insurance coverage provided by the institution/athletic governance organization at no cost to the athlete or athlete's parents, transfer to other institutions without the current athletics eligibility penalty, respectful and professional treatment by coaches, and licensed physician determination of return to play following injuries;
- Prohibition of construction of athlete-only facilities;
- Post-season ineligibility for institutions not in compliance with Title IX; and
- Annual reports to Congress open to the general public.

These mandates deserve additional explanation.

*A. Limited Antitrust Exemption*

As collegiate athletic event media rights revenues rise into the stratosphere and the prospect of treble damages under antitrust law appeals to contingency lawyers, a national governance organization limited antitrust exemption appears to be a necessity. Without it, any national governance organization will be unable to fulfill a primary function: control of interstate collegiate athletics commerce in order to limit spending on athletics. Any spending limits related to commercial activity (e.g., sport operating, or salaries and wages caps, or not permitting contests on weekdays) will be challenged.

Before 1984, the NCAA controlled the number of football games that could appear on television during the season.<sup>93</sup> Generally, an NCAA “game of the week” was televised nationally, and several games were televised regionally.<sup>94</sup> In the early 1980s, major football powers began to complain because of viewer demand for their games, arguing that they should be able to sell their television rights to the highest bidder without interference from the NCAA.<sup>95</sup> This led to an antitrust lawsuit against the NCAA.<sup>96</sup> In 1984, the Supreme Court ruled in favor of the major football powers, holding that the NCAA was acting like a classic cartel—producers who gather together to control sale, price, or production of any product in order to restrain competition.<sup>97</sup> In the decades following this landmark ruling the number of football games on television grew dramatically. Games are now played on just about any night of the week with little regard for the impact on athletes’ educations or the thousands of non-athlete students skipping classes to attend such contests. College football and basketball began to radically alter schedules to meet the needs of the networks. Universities now jump from one conference to another in hopes that such realignment will allow them to penetrate new markets.<sup>98</sup> Athletes who are now playing during

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93. See Andrew Zimbalist, *Inequality in Intercollegiate Athletics: Origins, Trends and Policies*, 6 J. INTERCOLLEGIATE SPORT 5, 6–8 (2013).

94. See *id.* at 6.

95. See *id.* at 7.

96. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

97. *Id.* at 95–96, 120.

98. See Ivan Maisel, *Conference peace has arrived*, ESPN (Feb. 14, 2014), [http://espn.go.com/college-football/story/\\_/id/10452933/college-football-realign](http://espn.go.com/college-football/story/_/id/10452933/college-football-realign)

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the week have the added burden of long trips to play games across the country because of these conference realignments. Only a limited antitrust exemption can allow the national governance organization to address such scheduling problems without fear of being sued. Faculty senates also need to address this scheduling issue. What started as a football problem has become a problem for all college sports at just about every level.

The significant legal cost of responding to such lawsuits and the multimillion-dollar cost of settling or losing these lawsuits will undermine the legislative and financial stability of intercollegiate athletics if such a limited exemption is not forthcoming. Such an antitrust exemption can be narrowly crafted to focus on specific categories of rules in order to avoid the legal morass of any broad “educational purpose” standard that would require court interpretation. Further, the granting of such a limited exemption would be conditioned on the adoption and continued enforcement of a full slate of reform mandates.

*B. National Governance Organization Ownership of National Championships*

Any bill must mandate that the national governance organization will own all national championship competitions, and the proceeds from such events are to be used to advance the health and academic welfare of all student-athletes and all member institutions. In other words, ownership of national championships by the national governance organization must include the College Football Playoffs, which is currently owned by the FBS conferences. The media and other revenues from any national football championship should be used like that of the Division I Basketball Final Four revenues, with the bulk of those revenues designated for specified athlete benefit purposes and a portion used to benefit all NCAA student-athletes, like, for example, the NCAA’s catastrophic injury insurance program.<sup>99</sup> The current 4-team FBS playoff, which will yield at least \$440 million annually beginning in 2014–15,<sup>100</sup> could and should be

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ment-era-ended.

99. See NCAA CATASTROPHIC INSURANCE PROGRAM BENEFIT SUMMARY, <http://www.ncaa.org/sites/default/files/14-16%20Cat%20Benefit%20Summary.pdf> (last visited Jan. 3, 2015).

100. See Schroeder, *supra* note 58.

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used for:

- The provision of basic injury insurance coverage for all 450,000 NCAA athletes, rather than the current practice of using student and parent policies, at an estimated annual cost of \$230 to 260 million;
- Regular review and enhancements to the current catastrophic injury policy, an estimated \$15 to 20 million in annual cost;
- Subsidies to all Division I institutions that would allow them to afford higher cost of attendance athletic scholarship limits (using the same federal standards used for all students), which would benefit all scholarship athletes at every Division I institution instead of just the 65 Big Five conference members, at an estimated \$150 to \$170 million annual cost; and
- Hiring and using judges and investigators to preside over severe and significant breach of rules cases and other NCAA enforcement system due process improvements, such as binding arbitration for college athlete appeals, at an annual cost of \$5 to \$6 million.<sup>101</sup>

This distribution of revenue is focused on benefitting athletes and is very different from the current system, under which the Big Five conferences are allowed to keep 75% of these proceeds to fuel astronomical coaches' salaries and lavish facility excesses of the football and basketball arms race. It should be noted that the FBS institutions retain 100% of all of their non-national championship post-season bowl events, conference championships, and regular season football television media rights fees.<sup>102</sup> FBS institutions could continue to retain all of these non-national championship event revenues, which could be specifically protected as institutional property rights under the provisions of such a bill.

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101. These estimates were developed as part of a working paper by The Drake Group. See *Answers to the Most Commonly Asked Questions About the Collegiate Athletic Association of the United States Act* app. C, at 46–47 (Sep. 13, 2014) (unpublished manuscript) (on file with Roger Williams Univ. Law Review).

102. See Schroeder, *supra* note 58.

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The bill could specify more stringent due process requirements before suspending a coach, athlete, or other athletics personnel from participating in athletics events; suspending the institution's athletics events telecommunications privileges; or suspending a member institution from participating in a collegiate athletics event. In severe cases, these processes might include:

- pre-hearing discovery;
- confrontation and cross-examination of opposing witnesses;
- subpoena and statements under oath by third party witnesses;
- binding arbitration of athlete eligibility issues; and
- provision of an athlete welfare advocate to provide legal assistance to athletes facing such penalties.

The current perceptions of enforcement processes favoring the largest athletic programs or conflict of interest in adjudication by peer member institutions could be removed by the required use of judges and third party investigators. Subpoena and statements under oath by third party witnesses, powers that could be granted by Congress, would solve the uncooperative witness issue now plaguing an ineffective NCAA enforcement system.

D. *Independent Board of Directors*

Adoption of a fiduciary responsible for the membership as a whole and advancing educational sport conditions for the good of all athletes, rather than representing the narrow interests of a wealthy few, is only possible if members of the Board of Directors are not employed or currently serving member institutions and not charged with representing a membership subset. Members could be nominated based on their expertise, past experience in athletics, and integrity.

E. *Academic Trust Fund*

The bill could also include a mandate that 5% or some designated amount of all media revenues derived from institutional, conference, and national governance organization athletic events be set aside to fund an Academic Trust Fund—providing assistance with degree completion, graduate program,

or other educational benefits to student-athletes. An Academic Trust Fund is a sensible way to provide benefits beyond athletic scholarships and a sound alternative to paying players to participate in athletics. Former athletes could apply for and justify requests for funding, rather than institutions making a blanket promise that sends the message: *Don't worry about studying now. Focus on athletics, and we'll make sure you can complete your degree later.*

*F. Freshman Ineligibility and Required Remediation of Underprepared Athletes*

Particularly in Division I, but in other competitive divisions as well, coaches knowingly recruit high-academic-risk athletes into highly competitive academic environments. When they do so, huge pressures are created for underprepared students to be steered into the easiest majors and courses. Further, a college athlete recruited into such a situation faces an uphill battle to maintain self-esteem and remain academically eligible.

If an incoming recruit falls one standard deviation below the high school grade point average or standardized test scores of an institution's incoming class, this is a good predictor of future academic difficulty or ineligibility. Athletes in such challenging situations should become established academically before being allowed to participate in athletics, and institutions should be required to provide academic support programs to assist them in overcoming identified academic deficiencies during that pivotal first year. Retention studies on both athletes and students who are not athletes repeatedly demonstrate the importance of the first year of college.<sup>103</sup> Further, the at-risk athlete should not be under the same time demands as an athlete who is eligible to participate. Thus, a requirement limiting athletic participation to 10-hours per-week of athletics practice is justifiable. The at-risk athlete would not be "penalized" for this forced academic redshirt year in that he or she would be eligible for athletics financial aid and limited practice and will still have four years of athletics eligibility and financial aid remaining. The one-year of residency in such circumstances is an investment in the athlete's future

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103. See ANDREW ZIMBALIST, *THE BOTTOM LINE: OBSERVATION AND ARGUMENTS ON THE SPORT BUSINESS* 233–34 (2006).

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academic success. The issue is not whether academically at-risk athletes are admitted. The issue is one of exploitation. If the institution provides remediation and fulfills the promise of a college education, there can be no allegation of exploitation. If the institution knowingly admits an underprepared student and fails to remediate and provide a college education, allowing that student to play a sport whose success benefits the institution, it can be justifiably said that he or she is being exploited.

The standard-deviation methodology is tied to the academic profile of each NCAA member institution. Thus, an athlete with poor high school academic performance or low standardized test grades may be immediately eligible if he or she matches up (is within one standard deviation) with an institution's general student body profile. Such an approach would reinforce sound admissions practices by promoting consideration of the athlete's academic fit. Recruited athletes may opt for institutions that offer a better fit and increased chances of academic success.

#### G. *Caps on Athletic Program Expenditures*

Current NCAA membership division criteria focuses primarily on minimum conditions and sets no expenditure ceilings except for athlete scholarships, inviting an unlimited expenditure "arms race." Athletic program operating expenses can be capped, and such caps can accommodate flexibility regarding team travel. Costs can be further limited with more stringent limits on the number of contests and length of playing seasons. Salaries and wages of coaches and administrative personnel could be capped commensurate with non-profit, educational marketplace practices. For instance, there could be a rule limiting coach compensation to no more than two or three times the 95th percentile salaries of full professors at doctoral institutions. Coupled with stringent definitions limiting the numbers of head and assistant coaches and other support personnel, the practice of highly excessive salaries could be brought under control. Something is very wrong with the system when in 40 of the 50 states, the highest paid public employee is a head athletics coach.<sup>104</sup>

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104. See Reuben Fischer-Baum, *Infographic: Is Your State's Highest Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228>.

It should be noted that current compensation for coaches and athletic directors is the result of a rigged marketplace. Coaches reap extraordinary salaries because there is no paid labor force—no athlete employees—yet, they maintain that they should be treated as if they operate in the professional, sports marketplace. They actually operate in a non-profit, educational environment in which salaries are lower than in the for-profit world.

Further, the number of professional sports teams is limited; therefore, competition for coaches is also limited. Higher education has created an artificial environment that has no comparator in the commercial marketplace. Andrew Zimbalist, noted sport economist, has criticized this manufactured “economic rent”—the portion of a coach’s salary in excess of what is needed to keep a coach employed in a rigged market:

Consider the multimillion-dollar compensation packages offered to dozens of college football and basketball coaches. There are thirty-two NFL and thirty NBA head coaching jobs. These jobs are already taken. What would be the most remunerative alternative employment [for these college coaches if they did not coach at these universities] . . . for argument’s sake, suppose there was an NCAA rule stipulating that no head coach could be paid more than the university president at the school. Would [these coaches] find another job that paid them more than \$500,000? Probably not.

. . . I don’t begrudge people seeking whatever the market will pay them. But given that (1) the market for college coaches is rigged by tax exemptions, subsidies, etc.; (2) paying the coach more than the school president sends the wrong message about a university’s priorities; (3) the star athletes on the basketball and football teams are not allowed to receive cash salaries; and (4) resource allocation would not be affected by a salary-limit rule for coaches, it would make eminent sense for the NCAA to pass such a rule limiting head coach compensation.

The solution seems straightforward, but there are two significant impediments. First, its elevated rhetoric notwithstanding, the NCAA basically functions as a trade association of athletics directors and coaches. Why would

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they vote to reduce their own compensation?

Second, such a rule would require Congress to pass an antitrust exemption for this market restriction. I can think of no good reason why Congress would not cooperate on this, if asked by the NCAA. There's the Catch 22.<sup>105</sup>

When former private business workers choose to become higher education faculty or private attorneys choose to work as public defenders (another non-profit environment), they willingly accept compensation commensurate with that of public servants. Many expert faculty members can make much more as full-time consultants, and many public defenders can make much more in private practice. Coaches can also do so if they can access the small number of high paying jobs that are available each year in professional football and basketball. This is always an option for coaches. But choosing to work in higher education should mean foregoing professional coaching salaries.

#### H. *Tenured Faculty Oversight of Academic Matters*

One of the National Labor Relations Board criteria for determining whether Northwestern University football players were paid employees was supervision by academic faculty.<sup>106</sup> Establishing a tenured faculty athletics oversight committee elected by the institution's highest faculty governing body would resolve this concern.

In higher education, the faculty is ultimately responsible for the academic integrity of the institution. The national athletic governance organization should have a requirement for such oversight. The NCAA does not currently have such a requirement. If an institution voluntarily has an athletics council or committee, though, the NCAA requires that a majority of its members be administrators or faculty members.<sup>107</sup> Yet, such committees do not have responsibilities that specify the mechanisms of oversight or accountability, and faculty

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105. ZIMBALIST, *supra* note 103, at 282.

106. Nw. Univ., No. 13-RC-121359, 2014 WL 1922054, at \*19 (N.L.R.B. Mar. 26, 2014).

107. D-1 MANUAL, *supra* note 6, art. 6.1.2.1, at 41.

appointments are usually made by the president with the approval of the athletic director in order to ensure that strong athletic supporters occupy these positions.<sup>108</sup> Requiring a higher education institution to have a tenured faculty-only committee elected by the highest faculty governance entity at the institution, mandating that such a committee produce an annual report from that committee to the institution's faculty senate, and assigning this group specific committee oversight activities would reduce the possibility of academic fraud by athletic programs. This oversight committee should be charged with tasks like regularly examining the academic progress and qualifications of athletes, comparing average SAT and ACT scores and Federal Graduation Rates by sport with average scores for the student body, reporting graduation success rates, examining athlete registration in independent studies and their average grade assigned, compiling admissions profiles of athletes compared to the student body, tracking athletes' progress toward a degree, and examining trends in selected majors by sport. This data represents areas in which athletic programs have experienced integrity violations in the past.<sup>109</sup> This oversight mechanism would guarantee the level of transparency necessary to identify integrity concerns.

#### I. *Whistle-blower Protection*

It has been an embarrassment to higher education to watch the "shooting of the messenger" in cases of clear academic fraud. For example, the University of North Carolina's ("UNC") tutoring improprieties, failure to report student-athlete plagiarism, and bogus classes (20% of all students enrolled in independent studies at UNC were athletes) were well documented.<sup>110</sup> The learning specialist in the athletic department's academic support program who reported the violations was dismissed from that position.<sup>111</sup> Yet, the NCAA has no rule that prohibits retaliation against those

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108. *See id.* (providing for only a majority by generally-defined administrators and requiring an administrator or faculty as chair).

109. *See, e.g.,* Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMSBURG BUSINESSWEEK (Feb. 27, 2014), <http://www.businessweek.com/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower>.

110. *See id.*

111. *See, e.g., id.*

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who report rule violations or unethical conduct. Reform attempts should address this vacancy by providing some level of protection for individuals who report infractions.

J. *Athletic Scholarship Guarantees*

Multiyear scholarships that cannot be gradated or canceled on the basis of athletic ability, performance, or contribution to team success clearly indicate that the athlete is not being paid for his or her athletic performance. Rather the athlete, in recognition of extraordinary athletic skill, is being awarded a college education. The relationship between coaches and athletes would no longer be perceived as a contractual *quid pro quo*, thus helping the national governance organization retain a clear line of demarcation between collegiate and professional sports. Universities would signal that players they recruit are valued as students first, regardless of performance on the athletic field. Because coaches would have to work with their “recruiting mistakes,” these athletes would have a chance to mature into players who can contribute to team success and, perhaps, get significant playing time. Besides raising graduation rates, these scholarships would allow athletes to become an integral part of the student body and benefit from the human capital often associated with a prestigious university. No court in the country would mistake a college athlete on scholarship for a university employee, thus significantly cutting the time and money the national association spends on antitrust lawsuits or challenging adverse decisions by the National Labor Relations Board.

K. *Athlete Rights*

The power imbalance between young athletes and their coaches and athletic administrators is significant. Thus, it is critical that the national governance organization Board of Directors be specifically charged with promulgating and enforcing regulations in the area of protecting the basic health, freedom, and welfare rights of athletes. At a minimum, athletes should have the right to:

1. Transfer to another institution without athletic participation ineligibility or other penalty, at least once during that athlete's undergraduate enrollment and conditioned on that athlete meeting all academic and

athletic participation eligibility requirements at the current institution at the time of transfer;

2. Receiving institutionally financed prevention education and baseline and/or monitoring assessments for sports-related injuries and risks (e.g., neurological baseline assessments related to concussion, presence of sickle cell trait, review of susceptibility to dehydration, etc.), for those athletes predisposed to injury risk due to the nature of their sports participation, as recommended by the American College of Sports Medicine, the U.S. Centers for Disease Control and Prevention, or other national associations of specialist physicians.
3. Receive athletic program adopted exercise and supervision guidelines to identify potentially life-threatening health conditions (such as in the case of sickle cell trait, susceptibility to heat or cold related illness, or dehydration);
4. Receive licensed physician determination for return-to-play following any injury or other medical decision affecting the athlete's safe participation;
5. Receive initial and continuing treatment for any injury directly resulting from participation in his or her institution's athletic program at no cost to college athletes or their parents with such requirement not applicable to any preexisting medical condition that predates the athlete's participation in the institution's athletic program;
6. Be treated with respect and protected from sexual or professional relationship misconduct, physical, verbal, or mental abuse, and other pedagogy practices that endanger their health and welfare;
7. Report any alleged misconduct by a coach, athletics personnel, or another athlete to a non-athletics institutional employee with an assurance of "whistle blower protection;" and
8. Receive stringent due process protections.

L. *Prohibition of Construction of Athlete-Only Facilities*

No small subset of the student body should receive the extraordinary privilege of exclusive access to university facilities,

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whether they are paid for by athletics revenues or private donations. It is particularly irresponsible in the current economic climate to engage in such practices. Numerous institutions use public bonds to finance such athletic department projects.<sup>112</sup> Despite the fact that NCAA rules have long prohibited exclusive housing units for athletes,<sup>113</sup> no rules prohibit the construction of facilities used only by athletes, which has led to extravagances such as:

- The (Oregon) Ducks' Football Performance Center is a 145,000 square-foot building that cost a reported \$68 million.<sup>114</sup> Amenities include a lobby with 64 55-inch televisions that can combine to show one image, a weight room floor made of Brazilian hardwood, custom foosball tables where one team is Oregon and the other team has 11 players each representing the rest of the Pac-12, a barber shop, and a coaches' locker room with TVs embedded in the mirrors.<sup>115</sup> Athletes already had access to an indoor practice field, an athletic medical center, a brand-new basketball arena, and an academic study center for athletes.<sup>116</sup> Oregon's new football program complex contains, among other things, movie theaters, an Oregon football museum, a players' lounge and deck, a dining hall, and private classrooms for top players.<sup>117</sup>
- Athletic-only practice facilities at West Virginia University, utilized only by the Mountaineer men's and women's programs, allows Mountaineer basketball players

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112. See Kristi Dosh, *Multiple ways to finance college stadiums*, ESPN (June 14, 2014, 11:08 AM), [http://espn.go.com/blog/playbook/dollars/post/\\_/id/743/multiple-ways-to-finance-college-stadiums](http://espn.go.com/blog/playbook/dollars/post/_/id/743/multiple-ways-to-finance-college-stadiums).

113. D-1 MANUAL, *supra* note 6, art. 16.5.1, at 214.

114. See Tony Manfred, *Oregon's New \$68 Million Football Facility is like Nothing We've Ever Seen in College Sports*, BUS. INSIDER (July 31, 2013, 10:41 AM), <http://www.businessinsider.com/new-oregon-football-building-photos-2013-7>.

115. See *id.*; see also Dan Greenspan, *Oregon unveils eye-popping new Football Performance Center*, NFL (Jul. 31, 2013, 12:58 PM), <http://www.nfl.com/news/story/0ap1000000224020/article/oregon-unveils-eyepopping-new-football-performance-center> (last modified Aug. 2, 2013, 2:52 PM).

116. See Steven Davis, *University of Oregon Athletics Unveils Latest Technology in Facility Makeover*, SPORT TECHIE (July 26, 2012), <http://www.sporttechie.com/2012/07/26/university-of-oregon-170/>.

117. See *id.*; see also *Casanova Center*, GO DUCKS, <http://www.goducks.com/ViewArticle.dbml?ATCLID=205174793> (last visited Jan. 3, 2015).

to have access to the best performance training tools available, top tier practice areas, strength and conditioning space, sports medicine needs, team meeting and video rooms, and facility equipment.<sup>118</sup> Adding all the elements of performance training and providing first class locker room facilities, player's lounges, and study areas, the basketball practice facility provides a distinct advantage in recruiting top tier student-athletes and showcasing the best Mountaineer Basketball and WVU can offer.<sup>119</sup>

- The Texas A&M University football players' lounge and academic center is 5,000-square feet and conveniently located one floor above the locker room, training room, and meeting rooms, and is across the hall from the new state-of-the-art, athletic-only academic center.<sup>120</sup> It is outfitted with ample leather seating, tables, and oversized leather lounge chairs that recline to a full prone position so players can watch the huge widescreen high-definition television.<sup>121</sup> Other activities include ping-pong, foosball, pool, and gaming tables, as well as several arcade-style gaming stations that feature the latest video game systems.<sup>122</sup> Several flat-screen TVs are mounted in each corner of the room.<sup>123</sup> Immediately to the left of the lounge's entrance is a marble-top bar that contains soft drink and candy machines for the players' use.<sup>124</sup>

Academic support facilities for athletes are often of higher quality than those available to the student body. Weight training facilities are often larger and include higher quality equipment than what are available to the student body. Gymnasiums or fields that are used only for basketball or team practices and left unused for the majority of the day should be unacceptable, especially in the current stressful economic environment for higher education.

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118. See *Basketball Practice Facility*, W. VA. MOUNTAINEERS, <http://www.wvusports.com/page.cfm?section=18089> (last visited Jan. 3, 2015).

119. See *id.*

120. See *Bright Football Complex*, TEXAS A&M, <http://www.12thman.com/ViewArticle.dbml?ATCLID=209603262> (last visited Jan. 3, 2015).

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

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Such issues are not only a matter of excessive expense, but also a matter of impropriety as a relatively small percentage of the overall student body participates in athletics.

Further, facilities and practices should not isolate athletes from the rest of the student body. Athletes can be provided with nutrition education and, if necessary, even be provided with unlimited meal cards at student dining facilities. They do not need or benefit from a separate eating facility, game rooms, or lounges.

## VI. INELIGIBILITY FOR POST-SEASON PLAY IF NOT IN COMPLIANCE WITH TITLE IX

Over forty years have passed since the adoption of Title IX, yet many collegiate athletic programs are still not in compliance with this federal law.<sup>125</sup> Lack of Title IX compliance and data revealing backsliding in participation and other benefits is disturbing. A recent NCAA report revealed:

- Intercollegiate athletic participation levels are at all-time highs, but these participation rates are increasing faster for men than for women at both high schools and colleges.<sup>126</sup> Since 2001–02, men have gained 5,526 more intercollegiate opportunities than women.<sup>127</sup>
- Division I has the best participation rate for women, but at 54% male student-athletes and 46% female student-athletes, D-I is still 7% away from mirroring the undergraduate female population.<sup>128</sup> D-II has a 17% difference between female athletes and undergraduates, while D-III has a 14% gap.<sup>129</sup>
- In 2010–11, women had a net gain of 113 intercollegiate teams, and men experienced a net gain of 112 teams.<sup>130</sup> But more women's teams (69) than men's (59) were

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125. See NATIONAL COALITION FOR GIRLS & WOMEN IN EDUCATION, TITLE IX: WORKING TO ENSURE GENDER EQUITY IN EDUCATION 7–8 (2012), available at <http://www.ncwge.org/PDF/TitleIXat40.pdf>.

126. AMY WILSON, THE STATUS OF WOMEN IN INTERCOLLEGIATE ATHLETICS AS TITLE IX TURNS 40 6 (2012), available at <http://www.ncaa.com/publications.com/DownloadPublication.aspx?download=TITLEIX.pdf>.

127. *Id.*

128. *Id.*

129. *Id.* at 7.

130. *Id.* at 10.

dropped, a disturbing development because women continue to be underrepresented in intercollegiate athletics.<sup>131</sup>

- Division I has the greatest gap in expenditures between men's and women's athletic programs.<sup>132</sup> Analysis of median expenses indicates that FBS institutions are spending 2.5 times more on their men's programs than on their women's programs.<sup>133</sup>
- Spending on men's sports still exceeds that of women's sports by a considerable amount: a 20% difference in median expenses at D-I, 14% in D-II, and 16% in D-III.<sup>134</sup>
- From 2006 to 2010, all Divisions showed a greater increase in spending on men's athletic programs than women's, most noticeably at FBS universities where expenditures increased by over \$5 million for men and by just under \$2 million for women.<sup>135</sup>
- 2010 NCAA figures indicate that D-I spends more on each male student-athlete than each female student-athlete: over \$30,000 more at FBS; \$3,000 more at FCS; and \$1,000 more at D-I institutions without football.<sup>136</sup> In contrast, the most recent available data for D-II and D-III schools show slightly higher expenditures for each female student-athlete, a result affected by the male advantage in participation opportunities.<sup>137</sup>
- Since Title IX was passed, the number of female head coaches and female athletics directors ("AD") has steadily declined.<sup>138</sup> Over the past decade, the percentage of female coaches of women's teams has leveled off at around 40, and since 1980, the percentage of female ADs has remained around 20.<sup>139</sup>
- Women hold only around 20% of all NCAA head coaching,

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131. *Id.*

132. *Id.* at 12.

133. *Id.* at 14.

134. *Id.* at 12–14.

135. *Id.* at 15.

136. *Id.* at 16.

137. *Id.*

138. *Id.* at 17, 19.

139. *Id.*

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AD, and conference commissioner positions.<sup>140</sup>

- In 2010–11, women occupied 34% of Associate AD and Assistant AD positions, and more men (51%) than women (49%) were assistant coaches for women’s teams.<sup>141</sup>
- Men are now coaching female student-athletes in great numbers, but women have experienced meager increases in opportunities to coach men.<sup>142</sup> The most recent figures indicate that only 4% of head coaches for men’s teams are women.<sup>143</sup>

The federal penalty for non-compliance with Title IX is removal of all federal funds from the institution,<sup>144</sup> but this penalty has never been levied because it is simply too onerous. Instead, the Office of Civil Rights has negotiated resolution agreements in response to complaints.<sup>145</sup> Unfortunately, the Office of Civil Rights does not have the resources to oversee athletics compliance at 4,500 institutions of higher education<sup>146</sup> and over 26,000 high schools.<sup>147</sup> The national athletic governance organization, however, has the power to enforce its own rules. It

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140. *Id.* at 26.

141. *Id.* 18, 21, 23.

142. *Id.* at 17.

143. *Id.*

144. 20 U.S.C. § 1682 (2012).

145. See Office of Civil Rights, *Title IX: Sexual Harassment: Tufts University (01-10-2089)*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089.html> (last modified July 25, 2014); Office of Civil Rights, *Title IX: Interscholastic Athletics: Wake County Public School System (NC) (11-11-1040)*; *Houston Independent School District (TX) (06-11-1061)*; see also *Columbus City Schools (OH) (15-11-1036)*; *Deer Valley Unified School District (AZ) (08-11-1030)*, K., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/20120701.html> (last modified Oct. 5, 2012); Office of Civil Rights, *Title IX: Sexual Harassment: Yale University (CT): (01-11-2027)*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027.html> (last modified Nov. 19, 2012). The Office for Civil Rights (“OCR”) undertook each of these investigations in response to Title IX violations. In each case, either during or at the conclusion of the OCR’s investigation, a resolution agreement was reached requiring the offending institution to implement measures to correct its violations.

146. See *FAST FACTS: Educational Institutions*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=84> (last visited Jan. 3, 2015).

147. See *High School Facts at a Glance*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ovae/pi/hs/hsfacts.html> (last modified June 18, 2014).

is reasonable to condition membership in the national athletic governance organization and eligibility for post-season championships on compliance with federal gender equity requirements, just as an athletic association may require a minimum annual progress rate for post-season eligibility.<sup>148</sup> This post-season eligibility gender equity stance is particularly appropriate when a national athletic governance organization, such as the NCAA, has adopted gender equity as a “guiding principle.”<sup>149</sup> Attaching eligibility for post-season championships to the national association commitment to gender equity is stronger than merely voicing words.

Just as the NCAA requires review of rule compliance once every four years by entities outside the institution,<sup>150</sup> with athletic conferences often performing this service, it is reasonable to assume that a similar mechanism can be used for Title IX. As an illustration, high schools in Kentucky have been subject to such a provision, namely, post-season ineligibility and compliance review by the state high school athletic association, since 2001.<sup>151</sup> Further, it is appropriate for Congress to insist on compliance with federal laws as a condition of granting a limited antitrust exemption and continued tax preferences.

#### A. *Annual Reports to Congress and the Public*

The strongest impetus for accountability in the conduct of athletic programs is transparency. Congress could require that an annual report be transmitted simultaneously to the President, to

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148. D-1 MANUAL, *supra* note 6, art. 18.4.2.2.2, at 309.

149. *Id.* arts. 2.3.1–3, at 3 (“2.3 The Principle of Gender Equity. [\*] 2.3.1 Compliance with Federal and State Legislation. [\*] It is the responsibility of each member institution to comply with federal and state laws regarding gender equity. (*Adopted: 1/11/94*). 2.3.2 NCAA Legislation. [\*] The Association should not adopt legislation that would prevent member institutions from complying with applicable gender-equity laws, and should adopt legislation to enhance member institutions’ compliance with applicable gender-equity laws. (*Adopted: 1/11/94*). 2.3.3 Gender Bias. [\*] The activities of the Association should be conducted in a manner free of gender bias. (*Adopted: 1/11/94*)”); D-II MANUAL, *supra* note 29, arts. 2.3.1–3, at 4 (same); D-III MANUAL, *supra* note 35, arts. 2.3.1–3, at 4 (same).

150. D-1 MANUAL, *supra* note 6, art. 22.2.1.2, at 380.

151. See KENTUCKY HIGH SCHOOL ATHLETIC ASS’N, HANDBOOK 115–16 (2009–10), *available at* [www.khsaa.org/httpdocs/titleix/titleixpolicies.pdf](http://www.khsaa.org/httpdocs/titleix/titleixpolicies.pdf) (outlining Kentucky’s Title IX policy).

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each House of Congress, and posted on the national athletic governance organization's web site. Such a report should contain the following data:

1. Audited financial data of each member institution's athletic program to include:
  - student fee revenues
  - direct institutional support
  - indirect institutional support
  - direct governmental support
  - net generated revenues or negative net revenue, whichever is applicable
  - net sport operating expenses
  - total salaries, wages, and benefits
  - percentage of operating budget devoted to coaching and administrative salaries
  - salaries, wages, and benefits paid to the top five employees by position
  - capital construction and other debt service
  - the department's total outstanding debt
  - revenues from media rights fees
  - academic trust fund transfers and expenditures
2. Audited academic data of each member institution's athletic program to include:
  - federal graduation rate for all students overall, all athletes overall, and athletes by sport
  - number of recruited freshmen or transfer athletes whose average high school GPA or SAT scores falls more than one standard deviation below that of his/her entering class
  - institutions ineligible for national championships due to (a) deficiencies in academic performance, (b) non-compliance with Title IX, or (c) disciplinary or other reasons
3. Financial data for the national association that separately shows:
  - funds expended for direct support of college athlete benefits (e.g., college athlete assistance programs, athletics injury insurance or medical subsidies,

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catastrophic injury insurance, Academic Trust Fund, etc.)

- aggregated amount distributed to member institutions by purpose
- amount of direct distribution of national association funds to each member institution

#### VII. CONCLUSION

The evidence is clear and compelling. Members of the NCAA have lost control of Division I sport commercialism due to changes that were allowed in the NCAA governance structure that gave legislative control to the institutions with the most commercialized athletic programs. The blame for increasingly unregulated and commercialized Division I sport is a direct result of a small number of the most powerful and successful athletic programs bullying a much larger NCAA membership to succumb to their legislative wishes by using the threat of leaving the organization. Given the current Division I FBS controlled structure of the NCAA, only action by Congress using the penalties of higher education institutions' loss of federal, Higher Education Act funding or tax preferences and the incentive of a limited antitrust exemption can produce sustainable reform. It is time for Congress to act.