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Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings

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HOME COURT ADVANTAGE: FLORIDA JOINS STATES MANDATING DUE PROCESS IN NCAA PROCEEDINGS

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I. INTRODUCTION

FLORIDA'S colleges have enjoyed unparalleled success in intercollegiate athletics in recent years. These schools have displayed their excellence in events sponsored by the National Collegiate Athletic Association (NCAA). Schools such as Florida State University, the University of Florida, and the University of Miami join the NCAA voluntarily, hoping to excel in big-time college athletics. In turn, the schools subject themselves to the rules of the organization.[1] Critics of the NCAA have argued that procedures for enforcing these rules are unfair. Unfortunately, members have no real choice but to abide by these rules and hope for internal reform because the NCAA has virtual monopoly power over college athletics.[2] However, negative publicity surrounding the NCAA's enforcement program has prompted a number of reform movements designed to achieve increased fairness. These reform movements are the basis for this Comment.

Part II of this Comment provides a brief history of the NCAA, an overview of the enforcement process, and some of the complaints most often raised about NCAA proceedings. Part III discusses the role of the courts and Congress in the reform movement. Part IV describes the NCAA's efforts at internal reform and lists recommendations made by a special committee for enhancing the fairness of the NCAA enforcement procedures. The NCAA has already adopted some of these measures, while others will be on the agenda at upcoming NCAA conventions.

Dissatisfied with both congressional inaction and NCAA foot-dragging, several states have considered legislation requiring due process in

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1. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992).

2. *See* Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n, 422 F. Supp. 1158 (D. Minn. 1976), *rev'd*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); David F. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1082 (1981).

the NCAA enforcement program. Four states—Florida, Illinois, Nevada, and Nebraska—actually have passed such measures. Part V focuses on Florida's Collegiate Athletic Association Compliance Enforcement Procedures Act[3] and discusses a recent federal case holding a similar Nevada statute unconstitutional. The Comment concludes by acknowledging the NCAA's recent efforts to reform from within, efforts I believe are motivated in part by the threat of legislation from Congress and from states such as Florida.

II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

A. History of the Organization

In the early 1900s, football was a dangerous game, causing the death of at least eighteen student-athletes in 1905 alone.[4] Unfortunately, the money earned by the sport's top programs kept presidents of those schools from seeking reform, despite the request of President Theodore Roosevelt.[5] However, more open-minded presidents of less influential schools saw the need for safety and passed a resolution stating their intent to reform college football.[6] These presidents formed the Intercollegiate Athletic Association of the United States (IAAUS), which adopted rules making football both safer and more exciting.[7] The success of these changes ensured the authority of the IAAUS, which later became the NCAA.

Despite the early success, the NCAA played only a minor role in college athletics until after World War II.[8] For example, the NCAA lacked the means to prevent schools from offering illegal inducements to players.[9] Gradually, however, under the leadership of Walter Byers, the NCAA began increasing the dependence of schools on NCAA

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3. FLA. STAT. §§ 240.5339-.5349 (1991).

4. DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 3 (1991). Yaeger provides a well-researched account of problems within the NCAA. The book discusses not only these problems, but also reveals the impact of NCAA actions on individuals involved. Former United States Representative Tom McMillen praises the book as "the best source I have found for [the NCAA's] abuses," and states that "Mr. Yaeger's research clearly documents the extent of these problems." Letter from Tom McMillen, Representative, United States House of Representatives, to Wint Winter, Chair, Senate Judiciary Committee, Kansas State Senate 1 (Mar. 18, 1991) (including the testimony of Representative McMillen, Dem., N.Y., before the Judiciary Committee of the Kansas Senate) (on file with author).

5. YAEGER, *supra* note 4, at 5.

6. *Id.*

7. *Id.* at 5-6.

8. *Id.* at 8.

9. *Id.*

membership while at the same time creating enforcement provisions.[10] Today, an institution must be a member of the NCAA to participate in NCAA-sponsored activities,[11] including the lucrative NCAA basketball tournament. In effect, a school seeking to field a successful athletic program must belong to the NCAA.[12] In turn, the school must abide by the rules of the NCAA,[13] rules which have become more complicated as the importance of college athletics has increased.[14] This complexity has triggered problems among the NCAA, member institutions and their staffs, and athletes.

B. The NCAA's Enforcement Program

A brief look at the enforcement program of the NCAA will add meaning to the discussion in later sections of this Comment.[15] The NCAA is a voluntary association composed of more than 1000 members.[16] At annual NCAA conventions, these members determine the policies and rules that govern many aspects of collegiate athletics. By joining the NCAA, the member institution agrees to abide by the rules of the organization.[17] Further, the institution's staff and student-athletes are governed by these rules.[18] Thereafter, a member institution is subject to the enforcement procedures of the NCAA when it does not follow the rules of the organization.[19]

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10. *Id.* at 9-16.
11. Gaona, *supra* note 2, at 1070.
12. *See supra* note 2.
13. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1989-90 MANUAL § 1.3.2 (1989).
14. Louisiana State University basketball coach Dale Brown is among those calling for simplicity in the NCAA rules. Brown states, "[t]he NCAA has a 479-page book with rule after rule after rule. Every page is confusing." Dale Brown, *Sorry, Congress: Laws Won't Cure What Ails College Sports*, SPORTING NEWS, July 1, 1991, at 5. Brown adds that attorneys require several minutes to interpret some rules, which leaves athletes and coaches helpless in finding their meaning. *Id.* He states that the NCAA needs to promulgate "simple rules that everyone can understand and follow." *Id.*
15. This section discusses the major areas of the NCAA investigatory process. The information is drawn primarily from National Collegiate Athletic Association v. Miller, 795 F. Supp. 1476 (D. Nev. 1992). This case provides an excellent overview of the process. For further discussion of the enforcement program, see Burton F. Brody, *NCAA Rules and their Enforcement: Not Spare the Rod and Spoil the Child—Rather Switch the Values and Spare the Sport*, 1982 ARIZ. ST. L.J. 109; Gaona, *supra* note 2; David K. Miller, *The Enforcement Procedures of the National Collegiate Athletic Association: An Abuse of the Student-Athlete's Right to Reasonable Discovery*, 1982 ARIZ. ST. L.J. 133 (1982); John P. Sahl, *College Athletes and Due Process Protection: What's Left After* National Collegiate Athletic Association v. Tarkanian, ___ U.S. ___, 109 S. Ct. 454 (1988), 21 ARIZ. ST. L.J. 621 (1989).
16. *Miller*, 795 F. Supp. at 1479.
17. *Id.* (citing NCAA CONST. art. 2.5.1).
18. *Id.*
19. *Id.* at 1479-80 (citing NCAA CONST. art. 1.3.2).

The NCAA Committee on Infractions supervises the enforcement program.[20] Its duties include supervising an investigative staff,[21] making factual determinations, and imposing penalties.[22] The NCAA also encourages member institutions to conduct their own investigations and to report potential violations. Upon receiving information suggesting a potential rule violation, the enforcement staff may issue a preliminary inquiry. The NCAA then conducts a review to determine if an official inquiry is warranted.[23] The institution conducts its own review and reports its findings to the Committee on Infractions, after which the institution, the affected individuals, and the NCAA staff attend a prehearing conference.[24] At the conference, the NCAA staff tells the parties what information it intends to use, and the parties may review information about the alleged infraction before the official inquiry.[25]

The institution and the affected parties are allowed to attend the hearing before the Committee on Infractions, where the parties may present information and contest allegations.[26] However, the NCAA cannot compel witnesses to appear or to testify.[27] After the presentations are complete, the Committee on Infractions deliberates privately, issues written findings, and recommends disciplinary action.[28] Any disciplinary action is taken against the member institution because the NCAA cannot punish representatives or athletes directly.[29] The affected parties formerly appealed to the NCAA Council, and ultimately to the full membership of the NCAA.[30]

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20. *Id.* at 1480. For an analysis of due process notions as they apply to the NCAA, see Robin J. Green, Comment, *Is the NCAA Playing Fair?: An Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 106-13 (1992). Green states that the NCAA employs most, but not all, traditional due process concepts, and concludes that the organization's internal reform makes state and federal legislation unnecessary. *Id.*

21. Notice that the body responsible for overseeing the enforcement program and making factual determinations supervises the investigatory staff.

22. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1480 (D. Nev. 1992). *See also* Green, *supra* note 20, at 126.

23. *Miller*, 795 F. Supp. at 1480.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* The NCAA Council is an administrative body elected at annual conventions. Hearing appeals is just one of the Council's functions. The importance of this appeals process is questionable because in the 40 years of the enforcement program, the NCAA Council has never reversed a major penalty. FLA. LEGIS., JUSTICE IN THE NCAA: GUILTY UNTIL PROVEN INNOCENT, A BACKGROUNDER 2 (n.d.) [hereinafter JUSTICE IN THE NCAA]. However, at the 1993 NCAA Convention, members voted overwhelmingly to establish an Infractions Appeals Committee as the appellate body to which major findings of the Committee on Infractions are appealed. *Convention Voting Summary*, NCAA NEWS, Jan. 20, 1993, at 10, 14.

C. *Perceived Problems Within the NCAA*

Complaints about the NCAA are not new. Congress conducted hearings about the NCAA's enforcement process in 1978.[31] Courts have also heard numerous complaints about the NCAA since the early 1970s.[32] Fortunately, the NCAA has responded to some of the pressure by upgrading the fairness of its process.[33] However, the NCAA must continue to improve to satisfy the public's concern. A brief review of some of the complaints against the NCAA will help set the background and provide insight as to which aspects of the process state legislatures are trying to correct.[34]

Several complaints arise frequently among the NCAA's critics. First, detractors complain that those undergoing investigation are not allowed to face their accusers.[35] Second, until recently, interviews conducted by NCAA staff were not tape-recorded, leaving a record consisting of only handwritten notes and after-the-fact recollection.[36] Third, persons giving a statement to the NCAA are not allowed to keep a copy of their own statement.[37] The turnover rate of NCAA staff members is also very high, leading to disjointed investigations and an incomplete, inaccurate record.[38] This turnover also leads to inadequate training for new staff members.[39]

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31. *See infra* notes 93-109 and accompanying text.

32. *See infra* notes 46-92 and accompanying text.

33. *See infra* notes 110-49 and accompanying text.

34. In the interest of conserving space, this Comment does not recount specific abuses committed by the NCAA. For such criticism, see YAEGER, *supra* note 4.

35. FLA. LEGIS., TEN THINGS YOU SHOULD KNOW ABOUT WHAT THE NCAA CALLS "JUSTICE" 1 (n.d.) [hereinafter TEN THINGS]. The NCAA's primary response to this charge is that it does not have subpoena power and therefore cannot force accusers to appear. The NCAA can only require appearance by the representatives of the school and those accused of wrongdoing if associated with an NCAA school. *See* Andrew Bagnato, *Accusers Won't Have to Go to Hearings: NCAA*, CHI. TRIB., Jan. 11, 1992, at C3. However, at the 1992 NCAA convention, members voted down a possible solution by rejecting a proposal that would have increased the NCAA's ability to force accusers to appear at infractions committee meetings. *Id.*

36. For example, the NCAA conducted a two-and-one-half-hour interview of Illinois athlete Ervin Small. YAEGER, *supra* note 4, at 61-63. During the interview, NCAA investigators took three pages of notes. Because the interview could not be recorded, Small's attorney took notes on behalf of his client and ended up with 33 legal-size pages. The NCAA's report was a 13-page document written from the three pages of notes. Upon review, Small's attorney found the report to be replete with distortions and false statements. *Id.* The NCAA has since relaxed its stance on tape recording proceedings. *See infra* note 139 and accompanying text. However, parties may not "make a copy of the tape or a verbatim transcript of the hearing." Green, *supra* note 20, at 128.

37. TEN THINGS, *supra* note 35. In University of Nevada v. Tarkanian, 594 P.2d 1159, 1161 (Nev. 1979), the court stated that "[a] tape recording of the proceedings was made by the NCAA, but no other recording was allowed, and the tape was not made available for later transcription by the NCAA, although university attorneys were allowed *to travel to [NCAA headquarters in] Kansas City* to listen to it." (emphasis added).

38. TEN THINGS, *supra* note 35.

39. *Id.*

Perhaps the biggest complaint about the NCAA is the close working relationship of the investigatory staff with the Committee on Infractions, which makes factual determinations and imposes sanctions.[40] This collaboration has led many to accuse the NCAA of a guilty-until-proven-innocent mentality.[41] Further, the athletes committing the violations often escape punishment, sometimes by striking deals for immunity with the NCAA.[42] The NCAA may then sanction the member school, affecting athletes who had nothing to do with the infraction, while the athlete receiving immunity suffers no punishment.

In the discovery process, the NCAA requires institutions to cooperate fully and to provide all relevant information.[43] However, the NCAA has not been as willing to provide adequate information to the institution. From the NCAA's point of view, these proceedings are efficient because the NCAA enjoys a 100% conviction rate, and no one has ever won an appeal with the NCAA Council.[44] The unbalanced duties of the organization and its member schools have resulted in the NCAA's being forced to spend millions of dollars each year defending a process that it says is already fair.[45]

III. THE RATIONALE FOR STATE LEGISLATION

A. The Court System: All Talk and No State Action

Cases challenging the fairness of NCAA enforcement procedures usually involve charges that the organization has violated either the Fourteenth Amendment[46] or a constitutional right protected by 42

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40. *Id.* This provides the NCAA with an inherent advantage and has been compared to allowing collaboration between the prosecution and the judge hearing a case. *Id.*

41. JUSTICE IN THE NCAA, *supra* note 30.

42. *See* YAEGER, *supra* note 4, at 141-50. The power to grant immunity for providing information is important because the NCAA lacks subpoena power. As a tool for uncovering information, immunity power can be more valuable than subpoena power. *Id.* at 149.

43. Sahl, *supra* note 15, at 630 (citing NATIONAL COLLEGIATE ATHLETIC ASS'N, 1989-90 NCAA MANUAL § 19.01.2 (1989)).

44. TEN THINGS, *supra* note 35.

45. JUSTICE IN THE NCAA, *supra* note 30. The NCAA spends more than $1.5 million a year in legal fees. This is nearly the amount the organization spends on its entire enforcement process. YAEGER, *supra* note 4, at 159.

46. The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. In a suit against the NCAA, note that the individual must establish a liberty or property interest in intercollegiate athletics. Note also that the Fourteenth Amendment prohibits only state conduct.

U.S.C. section 1983.[47] The U.S. Supreme Court has stated that the "under color of law" requirement of section 1983 "has consistently been treated as the same thing as the state action requirement under the Fourteenth Amendment."[48] Under both provisions, only state conduct is prohibited; the statute generally does not reach private conduct, "however discriminatory or wrongful" it may be.[49] Thus, due process challenges against the NCAA revolve around whether the NCAA is properly classified as a state actor.[50] A finding that the NCAA is not a state actor eliminates the ability of athletes and institutions to recover under a claim that their right to due process has been abridged. However, a court could find that the NCAA is a state actor and reach the constitutional claims on the merits. Even then, the court could still find against the athlete or institution by finding that due process was not denied.

In early cases against the NCAA, courts reached the due process claims on the merits, but generally upheld the NCAA regulations.[51] Courts indicated a uniform unwillingness to interfere in the internal matters of a private association unless the association acted arbitrarily or in a discriminatory manner.[52] For example, in *Parish v. National Collegiate Athletic Association*,[53] the court acknowledged that virtu-

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47. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

48. Hawkins v. National Collegiate Athletic Ass'n, 652 F. Supp. 602, 606 (C.D. Ill. 1987) (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966)).

49. *Id.* (citing Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)).

50. This Comment does not fully discuss legal actions brought against the NCAA. Rather, the Comment provides background so the reader can see why state legislators have been forced to address the problems of the NCAA. For additional discussion of the relationship between the NCAA and the judiciary, see *id.* at 602; William T. McLain, *NCAA Actions Do Not Constitute State Action for Federal Constitutional Purposes:* NCAA v. Tarkanian, ___ U.S. ___, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988), 20 TEX. TECH L. REV. 1345 (1989).

51. *See generally* Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975), *abrogated by* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988); Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028 (5th Cir. 1975), *abrogated by* McCormack v. National Collegiate Athletic Ass'n (5th Cir. 1988) *and* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988); National Collegiate Athletic Ass'n v. Gillard, 352 So. 2d 1072 (Miss. 1977).

52. *See* Louisiana State Bd. of Educ. v. National Collegiate Athletic Ass'n, 273 So. 2d 912 (La. App. 1973); *Gillard*, 352 So. 2d 1072; *but see* Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n, 422 F. Supp. 1158 (1976), *rev'd*, 560 F.2d 325 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977).

53. 506 F.2d 1028 (5th Cir. 1975).

ally every previous federal court decision discussing the issue had found the NCAA to be a state actor.[54] In accepting this classification, the court stated that members of state-supported institutions play a substantial role in the NCAA.[55] The court also found that the federal and state governments have a "traditional interest in all aspects of this country's educational system."[56] The court then stated that the NCAA performs a traditional governmental function by regulating college athletics.[57] Nonetheless, the court upheld the NCAA's regulation under a lenient "minimum rationality" standard.[58] The court further rejected the due process challenge, stating that the appellants had not been denied any liberty or property interest through the enforcement of the NCAA regulation.[59]

The court in *Howard University v. National Collegiate Athletic Association*[60] agreed that the actions of the NCAA constitute state action. In *Howard* the court noted that about fifty percent of the institutions in the NCAA are state- or federally-supported.[61] The court referred to previous Supreme Court cases finding that private conduct may become so impregnated with governmental characteristics as to be considered that of a state actor.[62] The court bolstered its argument by stating that state action may be found even where the government's participation is indirect or one of several contributing forces to a constitutional violation.[63] However, the court rejected Howard's due process claim, finding that the NCAA had complied with any due process requirement it might have had.[64] Thus, courts had little trouble characterizing the NCAA as a state actor in early cases, but when reaching the merits of due process claims, they often deferred to the

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54. *Id.* at 1031-32. McDonald v. National Collegiate Athletic Association, 370 F. Supp. 625 (C.D. Cal. 1974), was the only exception noted by the court.

55. *Parish*, 506 F.2d at 1032.

56. *Id.*

57. *Id.* at 1032-33. In support of this claim, the court stated that "were the NCAA to disappear tomorrow, government would soon step in to fill the void." *Id.* at 1033. The court also found classifying the NCAA as a state actor to be logical, stating that "it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power." *Id.*

58. *Id.* at 1034.

59. *Id.* The court, citing Mitchell v. Louisiana High School Athletic Association, 430 F.2d 1155, 1158 (5th Cir. 1970), stated that "[t]he privilege of participating in interscholastic athletics must be deemed to fall . . . outside the protection of due process." *Id.*

60. 510 F.2d 213, 220 (D.C. Cir. 1975).

61. *Id.* at 214.

62. *Id.* at 217 (citing Evans v. Newton, 382 U.S. 296, 299 (1966)).

63. *Id.* (citing United States v. Guest, 383 U.S. 745, 755-56 (1966)).

64. *Id.* at 222. The court also had substantial doubts about whether the university or the athlete had a property interest subject to due process protection. *Id.*

NCAA regulations or found that no protected liberty or property interest existed.

After these early cases, the trend became to find that the actions of the NCAA did not constitute state action. This trend culminated in a U.S. Supreme Court decision that directly addressed the question of whether the NCAA was a state actor.[65] The earlier cases characterizing the NCAA as a state actor had been based upon "the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action."[66] However, the Supreme Court eliminated that possibility for finding state action in *Rendell-Baker v. Kohn*,[67] which freed states of liability for independently-made school decisions, and *Blum v. Yaretsky*, which declared that state permission for private action did not constitute state sanction.[68] These cases are generally recognized as the origin of a more restricted view of state action.

In *Arlosoroff v. National Collegiate Athletic Association*, the court applied these decisions to the NCAA and found the NCAA was not a state actor.[69] The court found that the regulation of intercollegiate athletics "is not a function 'traditionally exclusively reserved to the state.'"[70] Like earlier courts, the *Arlosoroff* court recognized that public institutions comprise one-half of the NCAA's membership and provide more than half of the NCAA's revenues.[71] However, the court found that this does not alter the status of the NCAA as a voluntary association of public and private institutions.[72] Thus, according to *Arlosoroff*, to establish NCAA action as state action, the NCAA must either be serving a traditional, exclusive governmental function or the state must control or direct the NCAA's action.[73]

The Supreme Court resolved all doubt about the proper classification of the NCAA in *National Collegiate Athletic Association v. Tarkanian*.[74] *Tarkanian* was the result of a long battle between the NCAA and former University of Nevada-Las Vegas (UNLV) coach Jerry Tar-

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65. *See infra* notes 74-88 and accompanying text.

66. Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019, 1021 (4th Cir. 1985).

67. 457 U.S. 830 (1982) (state regulation of school and school's receipt of public funds not enough to hold state responsible for decision of school).

68. 457 U.S. 991 (1982) (mere acquiescence to the actions of a private party not sufficient to hold the state responsible).

69. 746 F.2d at 1022.

70. *Id.* at 1021 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975)).

71. *Id.*

72. *Id.*

73. *Id.* at 1021-22. This requirement for state action was later summarized in Graham v. National Collegiate Athletic Association, 804 F.2d 953, 958 (6th Cir. 1986).

74. 488 U.S. 179 (1988).

kanian, college basketball's winningest coach.[75] The Supreme Court of Nevada had previously found that the NCAA was a state actor by distinguishing the *Arlosoroff* line of cases.[76] That court said the right to discipline an employee of a public institution is traditionally exclusively reserved to the states.[77] Thus, the Nevada court found that UNLV's action of dismissing Tarkanian at the "request" of the NCAA justified a finding of state action.[78] The court further found that Tarkanian's contract with UNLV created a property interest that was altered by the actions of UNLV and the NCAA.[79] After a discussion of the inadequacies of the NCAA's investigation of UNLV and Tarkanian, the Nevada Supreme Court upheld the lower court's favorable ruling for Tarkanian.[80]

Finding that the NCAA was not a state actor,[81] the Supreme Court reversed the Nevada court.[82] The Court stated that although the NCAA influenced UNLV's conduct,[83] the University was the entity that actually suspended Tarkanian.[84] The Court stated that UNLV was clearly a state actor, but separately determined "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[85] The Court answered this question negatively, stating that the source of the NCAA legislation prompting UNLV's actions was the collective membership of the NCAA, independent of the influence of any particular state.[86] These rules, according to the Court, did not become "state rules" because at

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75. The problems among UNLV, Tarkanian, and the NCAA began in 1972 when the NCAA initiated a preliminary inquiry into alleged violations by UNLV. Throughout the 1970s and 1980s, the relationship between Tarkanian and the NCAA became the most adversarial in NCAA investigation history. *Tarkanian* arose as a challenge to the NCAA demand that UNLV fire Tarkanian. *See generally* YAEGER, *supra* note 4, at 195-248.

76. Tarkanian v. National Collegiate Athletic Ass'n, 741 P.2d 1345 (Nev. 1987), *cert. granted in part*, 484 U.S. 1058, *rev'd*, 488 U.S. 179 (1988).

77. *Id.* at 1348.

78. *Id.* at 1349. The court stated that "both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA." *Id.*

79. *Id.*

80. *Id.* at 1353.

81. Several commentators have argued that *Tarkanian* was wrongly decided. *See, e.g.*, *Leading Cases*, 103 HARV. L. REV. 137, 188-98 (1989); McLain, *supra* note 50; Sahl, *supra* note 15.

82. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 199 (1988).

83. In reality, the NCAA did more than "influence" UNLV. Schools having no real alternative to NCAA membership are essentially forced to follow the NCAA's commands. *See* Sahl, *supra* note 15.

84. *Tarkanian*, 488 U.S. at 193.

85. *Id.*

86. *Id.*

any time during the process UNLV could have withdrawn from the NCAA.[87] Alternatively, the Court suggested that UNLV could have worked for change within the internal processes of the NCAA.[88] Therefore, by holding that the NCAA did not become a state actor by influencing state action, the Supreme Court essentially eliminated the court system—absent independent state law—as a method of reviewing allegations that NCAA enforcement process are unfair.

The court system is also closed to athletes seeking to recover damages from penalties imposed by the NCAA. The schools, not the athletes, belong to the NCAA. Thus, athletes have no direct influence in the organization. In May 1992 this problem surfaced when a New York trial court declared that Syracuse University basketball player Conrad McRae could not sue the NCAA.[89] The court stated that the NCAA had a relationship with Syracuse University but not with McRae.[90] Therefore, the court found that McRae could not sue because the NCAA owed him no duty.[91] The court reiterated the long-standing tradition of having NCAA disputes resolved within the organization and not in the court system.[92]

The U.S. Supreme Court has declared that the NCAA is not a state actor, eliminating the ability of schools, their personnel, and athletes to enjoin the NCAA from using unfair procedures. With the decision in the McRae case, the court system has also precluded athletes from suing for damages suffered as a result of those procedures. If the decision in the McRae case stands on appeal, the court system appears to be a closed circle, providing no relief to the athletes for whom the NCAA was created in the first place.

B. Congress: All Talk and No Action

Complaints about the NCAA's investigation and enforcement procedures have not gone unnoticed by Congress.[93] Since 1978, some

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87. *Id.* at 194-95. *See supra* note 80. This is a narrow view and does not take into account the pressures facing today's athletic programs. However, the Court is unsympathetic to reality, stating that just because "UNLV's actions were unpalatable does not mean that they were non-existent." National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 198 n.19 (1988).

88. *Id.* at 195. This method probably would not have benefitted UNLV because the influence of any one school is very small. Further, complaints of schools that have been investigated are often viewed as just sour grapes.

89. *Court Rules Syracuse's McRae Can't Sue NCAA*, TAMPA TRIB., May 14, 1992, at Sports 6. McRae sued the NCAA for $1.35 million for alleged damages for mental anguish resulting from a four-game suspension in the 1991-92 season. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Investigations by Congress date back to 1978. In that time, other authors have ad-

members of Congress have kept a watchful eye on the NCAA.[94] In 1978 a congressional subcommittee heard testimony and reviewed the NCAA enforcement programs.[95] The subcommittee suggested that "the NCAA revise and completely recodify its substantive rules with an eye to simplicity and clarity."[96] The subcommittee also recommended eighteen changes for the NCAA's enforcement process.[97] The

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dressed the hearings in more detail than will appear here. *See, e.g.*, Brody, *supra* note 15; Gaona, *supra* note 2; Brian L. Porto, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151 (1987).

94. For an article suggesting that the only meaningful change in NCAA procedures results from legislative, not judicial, review, see Russell W. Szwabowski, Note, *The Federal Courts Have Given the NCAA Back Its Home Court Advantage*, 67 U. DET. L. REV. 29, 80-94 (1989).

95. *NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 1 (1978) [hereinafter *NCAA Hearings*].

96. Porto, *supra* note 93, at 1172 (quoting STAFF OF THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 2D SESS., REPORT ON THE ENFORCEMENT PROGRAM OF THE NATIONAL COLLEGIATE ATHLETIC ASS'N 54 (Comm. Print 1978)).

97. NATIONAL COLLEGIATE ATHLETIC ASS'N, SUMMARY OF HOUSE SUBCOMMITTEE RECOMMENDATIONS IN 1978 AND NCAA RESPONSES THERETO 1 (n.d.) [hereinafter SUMMARY AND RESPONSES]. This summary listed the 18 recommendations of the majority, the views of the minority, and NCAA action taken. The majority recommendations are:

1. Specify statute of limitations (minority agreed) (adopted by NCAA at 1979 Convention—Bylaw 32.5.2);

2. Establish evidentiary standards (minority agreed) (adopted by NCAA at 1979 Convention—Bylaws 32.6.5.5 and 32.6.6.2);

3. Liberalize "gag" rule on institutions in enforcement procedures (minority agreed in principle, but noted that no "gag" rule existed) (NCAA stated that no action was necessary to comply);

4. Limit extent of Council review (minority agreed) (adopted by NCAA at 1984 Convention—Bylaw 32.8.2);

5. Appoint staff clerk to Committee on Infractions (minority agreed) (no action taken by NCAA. In 1990, one staff member assigned to provide support services);

6. Permit student-athletes access to enforcement hearing (minority agreed) (NCAA stated no action necessary to comply);

7. Eliminate *ex parte* contacts with Committee on Infractions or Council (minority agreed) (adopted by NCAA at 1979 Convention—Bylaws 32.5.1 and 32.6.6.1);

8. Provide transcript of hearing to institution (minority agreed in principle) (no actiofi taken by NCAA because of concern over public identification of individuals involved);

9. Eliminate Committee on Infractions supervision of enforcement staff (minority agreed in principle) (adopted by NCAA at 1979 Convention—Bylaw 32.5.1);

10. Specify time limit between preliminary inquiry and official inquiry (minority agreed this should come within a "reasonable time") (no action taken by the NCAA, which claims minority position is consistent with NCAA rules—Bylaw 32.2.2.1.4);

11. Give self-incrimination and "right-to-counsel" warnings (minority disagreed, except to extent already required by NCAA procedures) (no action taken by NCAA);

12. Establish procedure for advance eligibility determinations (minority agreed in principle, stated that the NCAA Council should study) (NCAA claims Eligibility Committee complied in

subcommittee's minority agreed with eleven of these recommendations.[98] Of these eleven recommendations, the NCAA immediately adopted four and partially adopted another.[99] Additionally, the NCAA claimed that three other recommendations were already encompassed by existing NCAA procedures.[100] Further, the NCAA recodified its substantive rules in the late 1980s and created a list of "major" and "minor" violations.[101]

After the 1978 hearings, Congress took no significant action until 1991. During that time, with several highly publicized NCAA investigations, the public continued to perceive NCAA proceedings as unfair.[102] Finally, in June 1991 a House subcommittee held hearings to discuss various aspects of the NCAA, including the enforcement process.[103] The hearings came at a time when U.S. Representative Ed Towns of New York introduced legislation that would require the NCAA to use due process during its investigations.[104] Further, former Representative Tom McMillen, a perpetual adversary of the NCAA, introduced a measure that would bring major reforms to college athletics.[105]

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early 1980s);

13. Permit participation by all former student-athletes and athletic representatives in Committee on Infractions proceedings (minority disagreed for most part) (NCAA disagreed, except as to student-athletes, and has taken no action);

14. Hold joint and parallel investigation with institutional personnel (minority disagreed) (NCAA disagreed and has taken no action, but permits flexibility if institution shows commitment to investigation);

15. NCAA, rather than institution, make ineligibility declarations (minority disagreed) (NCAA disagreed and has taken no action);

16. Revise and recodify substantive rules (minority disagreed) (NCAA originally disagreed, but recodified 1989-90 Manual);

17. Establish schedule of major/minor offenses (minority disagreed) (adopted by NCAA at 1983 Special Convention—Bylaws 19.3 and 19.4);

18. Appoint "blue ribbon" commission to study the enforcement program (minority disagreed) (no action taken by NCAA until Special Committee to Review the Enforcement and Infractions Process appointed in 1991); *see infra* notes 124-49 and accompanying text.

For an analysis of the effect of legislative review on NCAA regulations, *see* Szwabowski, *supra* note 94.

98. SUMMARY AND RESPONSES, *supra* note 97.

99. *Id.*

100. *Id.*

101. Letter from Richard Schultz, Executive Director, NCAA, to Cardiss Collins, Chair, Subcommittee on Commerce, Consumer Protection, and Competitiveness 1 (July 12, 1991) (on file with author) [hereinafter Letter to Collins].

102. *See generally* Ed Sherman, *NCAA: Reality vs. Perception: Schultz Decries Image Problems as Reform Continues*, CHI. TRIB., Jan. 8, 1992, at C3.

103. *See* Steve Wieberg, *Congress Takes Look at NCAA*, USA TODAY, June 12, 1991, at C1.

104. Robert Sullivan, *Watch Out, NCAA; Alarmed Politicians are Eyeing College Sports*, SPORTS ILLUSTRATED, July 1, 1991, at 9. Such legislation would be similar to state legislation discussed *infra* notes 174-263 and accompanying text.

105. Ed Sherman, *NCAA Hopes to Avoid Government 'Intrusion'*, CHI. TRIB., Aug. 4,

This revival of congressional interest[106] reveals that some of those interested in college athletics believe that the NCAA has not made enough progress since the swift kick of the 1978 hearings.[107] McMillen, for example, doubts that the bureaucracy of the NCAA will allow it to achieve significant change.[108] However, some believe that the very threat of congressional involvement may force the NCAA to take action. Jim Delany, Commissioner of the Big Ten Conference, has said Congress "can serve as a catalyst . . . . Sometimes outside pressure can bring about internal change."[109] Congressional interest has been instrumental in forcing the NCAA to review its own policies. Nonetheless, a federal law requiring the NCAA to use due process has not been passed and does not appear imminent.

IV. INTERNAL REFORM WITHIN THE NCAA

As discussed earlier, the NCAA took action after the 1978 congressional subcommittee hearings.[110] According to the NCAA, all but one of the joint recommendations of the majority and minority of the subcommittee have been adopted.[111] For example, the subcommittee recommended that the NCAA provide a transcript of hearings to the institution.[112] The NCAA decided not to take action on that recommendation to maintain the confidentiality of information disclosed at

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1991, at C1. Representative McMillen's proposal included more than just due process provisions. His plan also covered negotiation of television contracts and would have established a presidential panel to make rules and regulations. *Id.*

106. Some authorities believe that congressional involvement is the best way to correct wrongs within the NCAA. In addition to McMillen, Coach Jerry Tarkanian has long lobbied for congressional action. *See generally* Kelly Carter, *LSU's Brown Breaks Ranks on Due Process*, SPORTING NEWS, July 1, 1991, at 42. Further, U.S. District Judge Howard McKibben stated that Congress, not the states, should address NCAA problems. *Briefs*, CHI. TRIB., Mar. 14, 1992, at C3. However, some authorities, including Louisiana State University basketball coach Dale Brown and the Knight Commission (a private panel commissioned to study intercollegiate athletics), think that Congress should stand aside and let the NCAA reform itself. *See generally* Carter, *supra*; Jim Myers, *Knight Panel Urges Support for Presidents*, USA TODAY, Mar. 18, 1992, at C9. Nonetheless, the threat of congressional action, even without legislation, provides an incentive for the NCAA to review its own procedures. *See infra* text accompanying note 109.

107. Sullivan, *supra* note 104. Duke law professor John C. Weistart asserts that recent congressional activity was triggered by the inaction of the NCAA. *Id.* Weistart states that "[t]he beast [big-time college sports] is unwilling to kill itself, so federal involvement is coming." *Id.*

108. Sherman, *supra* note 105.

109. *Id.*

110. *See* SUMMARY AND RESPONSES, *supra* note 97.

111. *Id.* Note that the majority and minority concurred in only 11 of the 18 recommendations. *Id.*

112. *Id.*

hearings.[113] The adoption of other recommendations has taken place over the years following the subcommittee's recommendations. This includes the significant reform undertaken in 1985.[114] Thus, NCAA Executive Director Richard Schultz stated that "[t]o suggest that . . . the program has been static since 1978 would be simply to ignore the record."[115] Recognizing, however, that phasing in 1978 recommendations over a ten-year period was not enough to appease the critics, Schultz stated at the 1991 NCAA Convention that the NCAA should again review its investigative process.[116] Schultz's words obviously had an effect because the 1991 convention overwhelmingly passed landmark reform legislation.[117] Later in 1991, the Knight Commission, a private group commissioned to study the condition of intercollegiate athletics, suggested further reforms that the NCAA will consider over the next five years.[118] The Knight Commission stated several times in its report that if the institutions do not take control of their athletic programs, Congress will step in.[119]

The NCAA responds that laws from Congress or the states requiring due process are not necessary because the organization's policies already provide due process.[120] The NCAA further contends that it cannot provide the same rights to athletes as those granted in a criminal proceeding because the NCAA lacks the power to subpoena witnesses.[121] However, claiming that the system already provides due

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113. *Id.* The NCAA believes that this confidentiality is essential to receiving information in the absence of subpoena power. *Id.*

114. The 1985 reforms included toughening enforcement policies and adding the "death penalty," a prohibition against competing in one or more sports, for repeat violators. Danny Robbins, *NCAA Will Investigate Its Own Investigations*, L.A. TIMES, Jan. 8, 1991, at C1.

115. Letter to Collins, *supra* note 101.

116. Robbins, *supra* note 114. NCAA Executive Director Schultz suggested that allowing investigators to record interviews is a possible way to improve. *Id.*

117. Hunter R. Rawlings, III, *Why Did We Take So Long?: Reform, Says a College President, Was Overdue*, SPORTS ILLUSTRATED, Jan. 21, 1991, at 72.

118. Mark Asher, *Panel Asks NCAA for Reforms; Report Urges Colleges To Focus on Degrees, Shift Coaches' Power*, WASH. POST, Mar. 20, 1991, at A1. The Knight Commission report addressed many aspects of college athletics and generally calls for more control over the big business of athletic programs. *Id.*

119. *Id.*

120. *Schultz Defends NCAA's Legal Procedure*, L.A. TIMES, June 21, 1991, at C2. The Lee Committee, discussed *infra* at text accompanying note 124, agrees with this assessment. The Committee claims that, of the 10 due process guidelines in Goldberg v. Kelly, 397 U.S. 254 (1970), the NCAA's procedures already have seven. *See infra* note 126. Two of the remaining procedures are allegedly outside of the authority of the NCAA, including the opportunity to confront witnesses. The NCAA has also published a list of 28 due process considerations encompassed by the NCAA's procedures. NATIONAL COLLEGIATE ATHLETIC ASS'N, CURRENT DUE-PROCESS CONSIDERATIONS 1 (n.d.) (listing elements of the investigatory process that allegedly embody due process).

121. *Schultz Defends NCAA's Legal Procedure*, *supra* note 120. This is how the NCAA

process satisfies neither those who have recently been through the NCAA enforcement system nor the public. Accordingly, such claims do not satisfy legislators. Southern Illinois University law professor C. Peter Goplerud has noted the importance of the public, athletes, coaches, and schools believing that the procedures are fair.[122] Goplerud acknowledged that the NCAA must act promptly if it expects to keep state and federal legislatures from taking charge.[123]

The NCAA also recognized the need to hasten its reform process. In mid-1991, the NCAA established a special committee, known as the Lee Committee, to review the NCAA's enforcement procedures.[124] The chair of this Committee was Rex E. Lee, president of Brigham Young University and former U.S. Solicitor General. Interestingly, Lee was also an attorney for the NCAA in *NCAA v. Tarkanian*.[125] He served as chair of a committee designed to analyze the NCAA's enforcement process just three years after urging the U.S. Supreme Court that the NCAA is not a state actor and should not be held to constitutional due process standards at all.[126]

The NCAA directed the Lee Committee[127] to "[c]onduct a thorough review of the enforcement and infractions process" and "to make

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answers complaints that individuals are not able to face their accusers. However, the NCAA recently defeated a measure that would have increased the chances for individuals to face those making allegations. *See supra* note 35.

122. C. Peter Goplerud, *Reform the NCAA Process*, CHRISTIAN SCI. MONITOR, Aug. 1, 1991, at 19.

123. *Id.*

124. This also satisfied one of the recommendations of the 1978 House Subcommittee. *See* SUMMARY AND RESPONSES, *supra* note 97.

125. 488 U.S. 179, 180 (1988).

126. *See id.* at 191-99. This led to concern that the NCAA had set itself up for some "home cooking" by appointing Lee to the chair. Letter from Florida Representative James E. "Jim" King, Jr., Repub., Jacksonville, to Richard Schultz, Executive Director, NCAA (Apr. 17, 1991) (on file with author). Schultz addressed this concern by pointing out that Lee argued against the NCAA in a 1984 television rights case. However, this left Representative King unsatisfied because representing the NCAA in a due process case is much more related to the purpose of the Lee Committee than was the television rights case. *Id.* Nonetheless, Lee's appointment is an interesting choice for an organization that is trying to quiet public concern over allegedly unfair enforcement procedures. Other members of the Lee Committee were certainly qualified to serve as chair and would have created less of an impression of bias. *See infra* note 127 (listing Committee members).

127. Members of the Lee Committee were Rex E. Lee, president of Brigham Young University and former U.S. Solicitor General, chair; Reuben V. Anderson, former Mississippi Supreme Court judge; Warren E. Burger, former Chief Justice of the United States Supreme Court; Benjamin R. Civiletti, former Attorney General of the United States; Charles W. Ehrhardt, professor of law and faculty athletics representative at Florida State University; Becky R. French, university counsel at North Carolina State University; Charles Renfrew, vice president, legal, of Chevron Corporation, former U.S. district court judge, and former deputy U.S. Attorney General; Philip W. Tone, former U.S. district court judge and former U.S. appellate court judge; Paul R. Verkuil, president of the College of William and Mary; and two members of the NCAA

sure that the process is being handled in the most effective way, that fair procedures are guaranteed, [and] that penalties are appropriate and consistent."[128] The NCAA also asked the Lee Committee to "determine if there can be innovative changes that will make the process more positive and understandable to those involved and to the general public."[129]

In October 1991 the Lee Committee completed its work by making several findings and issuing eleven recommendations for consideration by the NCAA.[130] Among the findings, the Committee acknowledged the "quality and credibility of the efforts of both the Committee on Infractions and the enforcement staff."[131] The Committee also found that the "Association has a consistent history of willingness to review and adjust its enforcement and infractions procedures."[132] The Committee recognized that the NCAA is not bound by constitutional due process standards, but noted that the organization should provide procedural fairness protections in the interest of its members and in its own interest.[133] Despite the admiration for current practices, the Committee also stated that current NCAA procedures could be improved by adopting the Committee's recommendations.[134] Some of these proposals could be approved by the NCAA Council, while others would

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Council, Charles Cavagnaro, director of athletics at Memphis State University, and William M. Sangster, director of international programs and faculty athletics representative at Georgia Institute of Technology. SPECIAL COMM. TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS, NATIONAL COLLEGIATE ATHLETIC ASS'N, REPORT AND RECOMMENDATIONS 1 (Oct. 28, 1991) [hereinafter LEE REPORT].

128. LEE REPORT, *supra* note 127, at 1.

129. *Id.*

130. *Id.* at 2-8.

131. *Id.* at 3.

132. *Id.*

133. *Id.*

134. The 11 recommendations of the Lee Committee are:

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

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

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

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

5. Open hearings to the greatest extent possible;

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

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

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

9. Expand the public reporting of infractions cases;

10. Make available a compilation of previous committee decisions;

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

Id. at 3-8.

require a vote of the NCAA membership at its annual convention.[135]

In January 1992 the NCAA Council approved several changes in the enforcement procedures.[136] The enforcement staff will now provide enhanced preliminary notice of major rules violations to an institution's chief executive officer.[137] The Committee on Infractions will also develop a process for "expedited hearings," enabling the enforcement staff to propose earlier resolution of the case.[138] The NCAA will liberalize the use of tape recordings and make the recordings available at locations other than the NCAA's headquarters.[139] While maintaining provisions for confidentiality, the NCAA will also make transcripts of proceedings available to those with standing to appeal a decision of the Committee on Infractions.[140] In addition, the Committee on Infractions will adopt a formal conflict-of-interest policy for itself, its staff, and the enforcement staff.[141] The Chair of the Committee on Infractions will handle public announcements of committee decisions.[142] Finally, upon approval of the NCAA Executive Committee, an independent staff will be hired to assist the Committee on Infractions in scheduling and conducting hearings, writing reports, and handling public announcements.[143]

NCAA Executive Director Schultz was pleased that the Council adopted these recommendations, stating that taking prompt action shows the Committee on Infractions' "sincere commitment to the concept of due process by providing the fairest possible enforcement procedures."[144] However, the NCAA announced that using independent hearing officers and establishing open hearings would require action by the membership at a convention and could not be adopted by Council approval.[145] The Council also did not adopt changes in the appeals process because those changes also required approval at a convention.[146] Schultz acknowledged that a poor image is hard to

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135. The NCAA holds its conventions each January. Some of the recommendations of the Lee Committee did not make the agenda for the 1992 Convention and were scheduled for consideration in 1993.

136. NATIONAL COLLEGIATE ATHLETIC ASS'N, PRESS RELEASE, *NCAA Council Endorses Changes in Enforcement Procedures* (Jan. 11, 1992) [hereinafter PRESS RELEASE].

137. *Id.*

138. *Id.*

139. *Id.* NCAA headquarters are in Kansas City, Missouri.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 2.

145. *Id.* Letter from Samuel P. Bell, III, NCAA local counsel, to Florida Senator Fred R. Dudley, Repub., Fort Myers (Jan. 16, 1992) (on file with author).

146. PRESS RELEASE, *supra* note 136, at 2. The NCAA modified its appeals process at the 1993 Convention. *See supra* note 30.

overcome, but stated that the public perception of the NCAA will improve over the next two years as the public realizes that the NCAA has changed.[147] Regarding the threat of federal and state legislation, Schultz stated that the NCAA improvements "could go a long way toward forestalling that, especially on the state level."[148]

V. States Require Due Process in NCAA Proceedings

A. States Mandate Due Process

Schultz' prediction that NCAA changes would forestall state legislation turned out to be incorrect because on June 1, 1992, Florida became the fourth state to mandate due process in NCAA proceedings.[149] Moreover, although only four states have enacted such laws,[150] several other state legislatures have recognized problems in the NCAA enforcement process.[151]

The response to such legislative efforts has been predictable. For example, in speaking to Illinois' attempts to adopt due process requirements for NCAA disciplinary proceedings Shultz claimed that such laws are "meant to gut the enforcement process."[152] Others argued that the proposed law was unconstitutional and that due process legislation would harm the NCAA's ability to conduct business in the states with such measures.[153] Further, the NCAA has threatened that

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147. Sherman, *supra* note 102, at C3.

148. Jonathan Feigen, *NCAA Proposal Falls Short; Conduct Code Fails to Get Enough Votes*, Houston Chron., Jan. 11, 1992, at Sports 6. At the 1992 NCAA Convention, the NCAA Council and the enforcement staff supported a measure that would have allowed the infractions panel to sanction individuals for "unethical conduct" for refusing to provide information in an NCAA investigation. *Id.* This measure would have simulated subpoena power for individuals within the organization. Although supported by three-fourths of the NCAA's Division I (largest, most powerful) schools, the measure received a 64.4% affirmative vote, falling short of the two-thirds vote needed from the general membership. *Id.*

149. Fla. Stat. §§ 240.5339-.5349 (1991).

150. *Id.*; Ill. Ann. Stat. ch. 144, para. 2901-2913 (Smith-Hurd 1991); Neb. Rev. Stat. §§ 85-1201 to 1210 (Supp. 1992); Nev. Rev. Stat. §§ 398.155-.255 (Michie 1991).

151. States that have considered such laws include California, Iowa, Kansas, Minnesota, New York, and South Carolina. National Collegiate Athletic Ass'n, NCAA State Legislation Due Process Comparison (n.d.). A similar bill was also filed in Mississippi. *Colleges*, Wash. Post, Feb. 18, 1992, at C2.

152. *Sports Notebook; Schultz: Feud to Land in Supreme Court*, Houston Chron., Feb. 19, 1992, at Sports 8.

153. In response to the Illinois due process bill, for example, University of Illinois President Stanley Ikenberry agreed that state bills would hinder the NCAA's investigatory process. However, Representative Timothy Johnson, chief sponsor of the Illinois law, countered by stating that more states should pass due process measures to keep the NCAA from "foot-dragging" in internal reform. Hugh Dellios, *Edgar Signs Anti-NCAA Due Process Bill Into Law*, Chi. Trib., Sept. 13, 1991, at C6.

schools in states passing due process legislation run the risk of losing NCAA membership.[154] Schultz stated that "it might be impossible for that state's institutions to be a member of the NCAA because there would be no way for them to comply with the rules."[155] Schultz further noted that the legislation has surfaced in states with schools that have been put on probation by the NCAA,[156] thereby implying that in these states, a substantial element of revenge makes anti-NCAA legislation politically popular.[157] Finally, Schultz claimed that upon telling Illinois that its schools could lose NCAA membership, the Illinois Legislature withdrew consideration of its bill.[158] Again, Schultz spoke too soon, as Illinois later passed due process legislation.[159]

Although Florida's Collegiate Athletic Association Compliance Enforcement Procedures Act[160] became effective on June 1, 1992, the Act was originally scheduled to become effective one year earlier. In the 1991 legislative session, the Senate Education Committee approved the legislation.[161] However, after meeting with Schultz, the Legislature delayed the effective date of the bill until June 1, 1992, to give the NCAA time to make internal reforms.[162] The NCAA undertook some reforms at its 1992 convention, thereafter claiming that these reforms and the items to be considered at its 1993 convention warranted a repeal or delay of the Act.[163] Florida's legislators were not persuaded, leaving the Florida law to become effective in mid-1992. However, the NCAA has stated that it will challenge the Florida law if the opportunity arises.[164]

Initial consideration of the NCAA due process issue arose in Florida in 1991 when the Postsecondary Education Planning Commission (PEPC) reviewed collegiate athletic association procedures and policies.[165] PEPC recognized that individual state laws could be in con-

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154. David Davidson, *Politicians Take Aim at NCAA; States Concerned About Due Process*, ATLANTA CONST., Apr. 30, 1991, at E1.

155. *Id.*

156. *Id.*

157. David Davidson, *COLLEGE ATHLETICS; Schultz Warns States About Anti-NCAA Laws*, ATLANTA CONST., Feb. 20, 1991, at E7. The counter-argument is that only states that have been through an NCAA proceeding realize the unfairness of the process. YAEGER, *supra* note 4, at 133.

158. Davidson, *supra* note 157.

159. Governor Jim Edgar signed the Illinois bill on September 12, 1991. Dellios, *supra* note 153.

160. FLA. STAT. §§ 240.5339-.5349 (1991).

161. FLA. S. COMM. ON EDUC., *NCAA/S.B. 1248*, Feb. 10, 1992 (brief statement on the status of SB 1248).

162. *Id.*

163. *See supra* notes 136-48 and accompanying text.

164. Cynthia Barnett, *NCAA Asks Lobbyist To Fight State Law*, GAINESVILLE SUN, Nov. 24, 1991.

165. Staff of Fla. S. Comm. on Educ., SB 1104 (1991) Staff Analysis 1 (Apr. 10, 1991)

flict, leading to inconsistent application of NCAA procedures throughout the country.[166] Therefore, PEPC suggested that the Florida Legislature pass a resolution calling for the NCAA to adopt due process protections for member institutions.[167] However, believing that a resolution would not have any impact, some lawmakers decided to pursue legislation.[168]

Florida's due process law resulted from this pursuit. Although Florida's new law theoretically applies to any major collegiate athletic association,[169] only the NCAA currently qualifies for regulation under the Act.[170] The NCAA has made significant attempts at internal reform. However, these efforts fall short of the due process protections required by the Florida statute. Comparing the new law to existing NCAA procedures and the recommendations of the Lee Committee reveals the broad sweep of the Florida statute.

Beginning with the investigatory process, the Florida statute requires the NCAA to provide notice to an interviewee once the NCAA suspects the individual of violating its rules.[171] Under current NCAA practice, the interviewee is notified that an interview will be held to determine whether the individual has been involved in a violation of NCAA rules. Additional notice is given if ethical violations are suspected.[172] The Lee Committee made no recommendation about the notice given to individual interviewees. However, this is not surprising because the Florida provision does not materially alter current practice.

Under the Florida statute, individuals in Florida are entitled to counsel and to a complete recording and free transcript, prepared by a court reporter, of the interview.[173] The NCAA must inform the interviewee of these rights and obtain a written acknowledgement.[174] The

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(available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) [hereinafter "Staff Analysis"]. The Postsecondary Planning Commission is a subordinate of the Florida Department of Education.

166. *Id.* (citing Postsec. Educ. Planning Comm'n, Fla. Dep't. of Educ., *Due Process in Intercollegiate Athletic Association Policies and Procedures* (Mar. 1991)).

167. *Id.*

168. Letter from Representative James E. "Jim" King, Jr., Repub., Jacksonville, to Senator Fred R. Dudley, Repub., Fort Myers (Mar. 25, 1991) (on file with author).

169. Section 240.5340, *Florida Statutes* (1991), targets collegiate athletic regulatory associations that have at least 200 member institutions among 40 states. The organization must also receive at least $2 million in revenues from broadcasts of sporting events. *Id.* Currently, the NCAA is the only athletic association that meets these criteria.

170. Staff Analysis, *supra* note 165.

171. FLA. LEGIS., COMPARATIVE "DUE PROCESS" PROTECTIONS 1 (Feb. 14, 1992) [hereinafter PROTECTIONS].

172. *Id.*

173. FLA. STAT. § 240.5343(2) (1991).

174. *Id.*

NCAA currently allows individuals to obtain counsel if the interview may reveal information detrimental to the interviewee.[175] In interviews related to the institution, an institutional representative or legal counsel must be present.[176] The NCAA does not provide a transcript, but does allow recording of the interview with the consent of the interviewee.[177] However, access to this tape is limited. The interviewee may also take notes during the interview and may review and correct the report of the interviewer.[178] The Lee Committee suggested that the NCAA liberalize tape recording, explaining that a "persistent problem [in NCAA proceedings] is the lack of access to evidence held by the opposing side."[179] The Committee suggested that in most cases this could be remedied by tape recording statements from witnesses and making these tapes "discoverable" by any person or institution having an actual stake in the outcome of the case.[180]

The Florida statute contains the additional provision that any information obtained in violation of the Act may be suppressed by the interviewee.[181] Current NCAA provisions do not provide a right to suppress information, but generally, information collected by impermissible means is not considered in NCAA hearings.[182] The Florida statute has the advantage of providing a clearer standard for the use of information.

Comparing prehearing procedures, a Florida interviewee has the right to disclosure of all relevant facts to the same degree as a criminal defendant.[183] Under NCAA procedures, a prehearing conference is held, during which the parties share and discuss the information upon which the NCAA will rely.[184] The NCAA staff prepares a case summary before the hearing and identifies the allegations, as well as the information and individuals on which the NCAA will rely; it then pro-

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175. PROTECTIONS, *supra* note 171.

176. *Id.*

177. *Id.*

178. *Id.* However, this may not be the benefit that it appears to be. Even the opportunity to correct the report does not ensure that all errors and biases will be eliminated. *See* YAEGER, *supra* note 4, at 66-69.

179. LEE REPORT, *supra* note 127, at 5.

180. *Id.* However, in cases in which the recorded information could be detrimental to the institution or the investigation, the enforcement staff could request a protective order from the hearing officer. *Id.*

181. FLA. STAT. § 240.5343(3) (1991).

182. *But see* YAEGER, *supra* note 4, at 213-14. In the UNLV case, the NCAA accepted hearsay from NCAA investigators over UNLV's depositions, affidavits, receipts, and other documents. *Id.*

183. FLA. STAT. § 240.5341(6) (1991).

184. PROTECTIONS, *supra* note 171, at 2. Unfortunately, this conference has traditionally been too close to the hearing to do the respondent any good. *See* YAEGER, *supra* note 4, at 131-32.

vides that summary to the respondents, who may review the documents on which the enforcement staff will rely.[185] The NCAA Committee on Infractions has recently suggested that the case summary be given earlier in the procedure to allow institutions more time to conduct their own investigations.[186] However, the NCAA will have difficulty granting the same disclosure of facts as in a criminal proceeding because the NCAA lacks subpoena power and thus cannot compel witnesses to appear.

Individuals in Florida are also entitled to the same rights of discovery as those available in civil or criminal cases.[187] In an NCAA proceeding, the respondent may contact any individual upon whose statement the NCAA staff will rely.[188] The respondent may also review all documentary evidence to be relied upon by the staff.[189] If facts are in dispute, further joint interviews are conducted.[190] The Lee Committee recommended that mandatory tape-recorded statements should be discoverable, unless a protective order is granted by the hearing officer for good cause.[191] By adopting the recommendation of the Lee Committee, the NCAA could significantly improve its procedures; however, until the NCAA is given the ability to compel discovery, its procedures cannot assure the same degree of fairness provided by the courts.

In Florida hearings must begin within twelve months of notice of investigation to the institution.[192] This twelve-month period is tolled by any delay on the part of the institution or individual being investigated, whether or not for good cause.[193] The period for commencement extends to eighteen months if the institution reports its own violation to the association.[194] Under current NCAA procedures, allegations must be based upon violations occurring not more than *four years* before the NCAA gives notice of preliminary inquiry.[195] However, this provides no time limit for the investigation once the NCAA sends its notice of preliminary inquiry.[196] The NCAA's only obligation

185. PROTECTIONS, *supra* note 171, at 2.
186. *Id.*
187. FLA. STAT. § 240.5341(6) (1991).
188. PROTECTIONS, *supra* note 171, at 2. Again, this does not guarantee that the individual will provide any additional information or even stand behind previous statements.
189. *Id.*
190. *Id.*
191. LEE REPORT, *supra* note 127, at 6. The Lee Committee described "good cause" as information which would be detrimental to the institution or jeopardize the investigation. *Id.*
192. FLA. STAT. § 240.5341(9) (1991).
193. *Id.*
194. *Id.*
195. PROTECTIONS, *supra* note 171, at 2.
196. *Id.*

is to notify the institution of the status of the investigation.[197] In addition, the NCAA cannot extend an investigation beyond one year without approval by the Committee on Infractions and notice to the institution.[198]

Fortunately, the NCAA is in the process of adopting the Lee Committee's enhanced notice recommendation.[199] This would provide, in the initial notice, to the institution information as to the nature of the alleged violation and the part of the athletic program allegedly involved.[200] The NCAA staff and chief executive of the involved institution would then discuss a timetable for resolution, as well as joint investigative efforts.[201] The Lee Committee also supported a "summary disposition" provision for efficient handling of major violations.[202] The summary disposition would allow cases to be resolved more quickly when the NCAA and the institution agree on the facts. Essentially, the parties would negotiate a settlement and resolve the case within three to four months.[203] The NCAA Committee on Infractions agreed with this recommendation and has moved toward implementing it.[204] Nonetheless, the Florida statute provides the only definite limitation period.

Under the Florida statute, individual defendants, including employees and students, charged with misconduct must receive written notice at least two months before the hearing on specific charges.[205] The notice must include the date and time of the hearing and specify the charges and possible penalties and must also be delivered to the institution.[206] Current NCAA procedures do not specify an advance notice provision, but the time of the hearing is set by agreement between the Committee on Infractions and the institution.[207] If the allegations potentially affect individuals, the institution must inform the individuals that they have the opportunity to submit information orally or in writ-

197. *Id.*

198. *Id.* Thus, one could imagine a situation in which the NCAA sent notice of preliminary inquiry just before the four-year deadline. The investigation could consume another year before the Committee on Infractions comes into play. This puts the alleged violation almost five years removed from the proceeding. Moreover, with approval of the Committee on Infractions and notice to the institution, the proceeding could linger even longer.

199. *Id.*

200. LEE REPORT, *supra* note 127, at 4.

201. *Id.*

202. *Id.*

203. *Id.* at 5.

204. Memorandum from D. Alan Williams, Chair, NCAA Committee on Infractions, to Judith M. Sweet, President, NCAA (Jan. 8, 1992), at 2.

205. FLA. STAT. § 240.5341(3) (1991).

206. *Id.*

207. PROTECTIONS, *supra* note 171, at 3.

ing.[208] The institution must also notify the individual of the right to participate in the hearing with personal legal counsel.[209] The advantage of the Florida provision is that it specifies a minimum time period for preparation. In addition, the Florida statute places more of the notification burden on the NCAA.

Under the Florida law, the respondent has the right to a formal hearing, in which civil rules of evidence will apply.[210] In traditional NCAA proceedings the hearing takes place before the eight-member Committee on Infractions.[211] Opening and closing arguments are allowed, after which the enforcement staff presents information discovered during the investigation.[212] Individual respondents participate in portions of the hearing affecting them individually.[213] The Committee may receive any oral or documentary evidence unless the information is determined to be irrelevant, immaterial, or repetitious.[214] Information from individuals unwilling to be identified is not presented.[215]

The primary criticism of the NCAA system is the apparent lack of separation between the enforcement staff and the Committee on Infractions.[216] The Lee Committee suggested that the NCAA modify its program to allow a hearing officer to resolve factual issues and recommend penalties.[217] The Committee believed that this recommendation would be most effective if judges, eminent legal authorities, or other persons of stature were used in the adjudicative process.[218] This recommendation was not intended to make the process more adversarial, but to allow an independent person trained in weighing evidence to review the information.[219] However, the recommendation has not yet been adopted and would require approval by the membership.[220]

The Florida statute further provides that the hearing will be open to the public unless either a party charged with misconduct or the institution objects.[221] By contrast, current NCAA proceedings are not open,

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208. *Id.*
209. *Id.*
210. FLA. STAT. § 240.5341(1), (5) (1991).
211. Until the 1993 Convention, the Committee on Infractions consisted of six members. PROTECTIONS, *supra* note 171, at 3. However, at the 1993 Convention the membership increased this number to eight to allow the general public to serve. *Convention Voting Summary, supra* note 30, at 14.
212. PROTECTIONS, *supra* note 171, at 3.
213. *Id.*
214. *Id.*
215. *Id.*
216. LEE REPORT, *supra* note 127, at 6.
217. *Id.*
218. *Id.*
219. *Id.*
220. *See supra* note 135 and accompanying text.
221. FLA. STAT. § 240.5341(8) (1991).

and each case is treated as confidential until completed.[222] The Lee Committee disapproved of this practice and recommended that the hearings be open to the greatest extent possible.[223] Under the Lee proposal—which has yet to be adopted in convention—the hearing officer could still determine that some portions of the hearings should be kept confidential in the interest of privacy, fact-finding, and justice.[224] Therefore, both the Lee recommendation and the Florida statute provide for open hearings, but differ in which party is allowed to determine that the hearing should be closed.

Although both the Florida statute and current NCAA practices allow respondents to be represented by counsel, they differ in the right to interrogate witnesses. The Florida act provides this opportunity in section 240.5341(4), whereas the NCAA, lacking subpoena power, must provide other means. The enforcement staff must disclose all individuals and documents upon which it will rely.[225] The respondent may then interview the individuals or obtain affidavits or other information from them.[226] At the hearing, information may be exchanged between the parties, and the Committee on Infractions may question any person present.[227] The NCAA has recognized the need to make information available earlier in the process. Thus, the Committee on Infractions will recommend that access to information be permitted at the time notice of official inquiry is sent.[228] Earlier access to information will undoubtedly benefit those involved in the process, but falls short of allowing interrogation and cross-examination of witnesses.

The Florida statute[229] and NCAA procedures are similar in providing the respondent an opportunity to present a complete defense.[230] In addition, in Florida, respondents may suppress evidence resulting from interrogations that abridge the rights of full disclosure and discovery.[231] The NCAA does not have a provision for suppression of evidence, but the investigatory staff must follow certain procedures, violation of which will keep the evidence from being considered.[232]

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222. PROTECTIONS, *supra* note 171, at 4.

223. LEE REPORT, *supra* note 127, at 6. The Lee Committee was closely divided on this issue. *Id.*

224. *Id.* at 6-7.

225. PROTECTIONS, *supra* note 171, at 4.

226. Of course, there is no guarantee that the person will talk when approached. *See supra* note 188-90 and accompanying text.

227. PROTECTIONS, *supra* note 171, at 4.

228. *Id.*

229. FLA. STAT. § 240.5341(4) (1991).

230. PROTECTIONS, *supra* note 171, at 4. The NCAA allows respondents to present information subject to rules of relevance, materiality, repetitiveness, and confidentiality of sources. *Id.*

231. FLA. STAT. § 240.5343(3) (1991).

232. PROTECTIONS, *supra* note 171, at 4.

The Lee Committee recommended that interviews with witnesses be recorded in order for prehearing statements to be admissible.[233] According to the recommendation, the NCAA staff must also reveal the existence of the tape no later than the date on which it issues official notice of the charges.[234] The witness may also appear at the hearing if the witness' testimony will be used.[235] Again, the Florida provision has the advantage of clarifying the rights of individuals. The NCAA could lessen this advantage by adopting the Lee Committee's recommendation.

The Florida statute would require the NCAA, at its own expense, to provide a transcript prepared by a court reporter of the interrogation.[236] The NCAA tape records the hearings, but does not prepare or provide a transcript. The respondent may obtain this information by receiving permission from the Committee on Infractions to listen to the tape *at NCAA offices* and to take handwritten notes.[237] The Lee Committee suggested that transcripts or tape recordings of the hearings be sent to involved parties and institutions upon request and that anyone be allowed to purchase a copy of the tape or transcript after the conclusion of the case.[238] The Committee believed that the risk of transcripts becoming available to the public during the proceeding is outweighed by the interest in creating a cooperative spirit during the process.[239] The NCAA is in the process of adopting a modified version of this recommendation, which should address the problem resolved by the Florida statute.

In the weighing of evidence, the Florida statute provides that findings made by an association must be supported by clear and convincing evidence.[240] The NCAA's standard for weighing evidence is less clear. NCAA findings must be based upon evidence which the Committee determines to be "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs."[241] As with other provisions, the advantage of the Florida statute is that it creates a more precise standard on which a finding must be based.

The Florida statute also requires that penalties imposed by an association must be reasonable in light of the violation and must be com-

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233. LEE REPORT, *supra* note 127, at 5. The recommendation contains a special provision for using the "best evidence available" when taping is not possible. *Id.*

234. *Id.*

235. *Id.*

236. FLA. STAT. § 240.5343(2) (1991).

237. PROTECTIONS, *supra* note 171, at 5.

238. LEE REPORT, *supra* note 127, at 7.

239. *Id.* at 7.

240. FLA. STAT. § 240.5341(2) (1991).

241. PROTECTIONS, *supra* note 171, at 5.

parable to penalties applied for previous similar violations.[242] NCAA bylaws provide for broad and severe penalties for institutions showing a general disregard for NCAA rules.[243] On the other hand, penalties are specific and limited when the violations are isolated and insignificant.[244] The NCAA has further classified violations as "major" or "secondary." Secondary violations include those which are inadvertent or provide only a limited recruiting or competitive advantage to the institution.[245] The NCAA classifies all other violations as major, specifically including repeat violations and those that give a substantial advantage to the offender.[246]

The Lee Committee recognized the need for increased uniformity of sanctions. Thus, the Committee recommended that the NCAA enhance its reporting to the public and the news media.[247] The public would then be aware of the reasons behind the actions taken.[248] Additionally, the Lee Committee suggested that the NCAA should make available a compilation of past cases and the actions taken.[249] This would serve as a reference to institutions involved in the infractions process.[250] The NCAA has decided to follow this recommendation and to compile a book of past cases that will be made available for members to review.[251] Once implemented, this method for reporting precedents should appease those who claim that NCAA sanctions are handed out in a random or biased manner. Again, by adopting the recommendation of the Lee Committee, the NCAA is eliminating some of the problems the Florida statute was designed to prevent.

A final difference between the new Florida act and current NCAA procedure is the method of appeal. In Florida, any penalty imposed on the institution or imposed on an individual by direction of the NCAA is subject to review in the circuit courts.[252] In NCAA proceedings, members formerly appealed to the NCAA Council.[253] The limited usefulness of that appellate process is undoubtedly the impetus behind the Florida provision. In all the years of NCAA infractions

242. FLA. STAT. § 240.5342(1), (2) (1991).
243. PROTECTIONS, *supra* note 171, at 5.
244. *Id.*
245. *Id.* at 5-6.
246. *Id.*
247. LEE REPORT, *supra* note 127, at 8.
248. *Id.*
249. *Id.*
250. *Id.*
251. PROTECTIONS, *supra* note 171, at 5.
252. FLA. STAT. § 240.5342(3) (1991).
253. PROTECTIONS, *supra* note 171, at 6. The NCAA changed this procedure at its 1993 Convention. *See supra* note 30. The effectiveness of the new procedure in providing adequate review remains to be seen.

cases, the NCAA Council never overturned a decision on appeal.[254] Thus, the NCAA Council rubber-stamped the decision of the Committee on Infractions under the pretense of appellate review. However, as with any private organization, an individual or institution has the limited opportunity for judicial review if the respondent believes the NCAA has not followed its own procedures or has violated the respondent's legal rights.[255]

The Lee Committee recommended a change in the NCAA's appellate process.[256] Its recommendation would work in conjunction with the recommendation that hearing officers be used to determine factual issues in each case.[257] The findings of the hearing officer could be appealed to the Committee on Infractions, which would have the power to set aside "clearly erroneous" findings.[258] The Committee on Infractions would also have the authority to determine the appropriate penalty.[259] If this penalty is more severe than that recommended by the hearing officer, a special review body could be asked to review the increase.[260] The special review body could either affirm the Committee on Infractions' penalty or decrease it.[261] The reorganization of the NCAA appellate process will require approval by the Association's membership.[262] Further, this internal change will still not open the court system to parties feeling short-changed by the NCAA's proceedings. Thus, the NCAA proceedings, even as modified by the Lee Committee, fall short of the review provided by the Florida statute.

The overall comparison of the Florida statute to current NCAA proceedings shows that respondents in Florida would enjoy greater rights and protections than those in a state without a due process requirement. When the recommendations of the Lee Committee are added to the comparison, the NCAA procedures compare more favorably with the Florida law. Unfortunately, not all of these recommendations have been adopted. Also, they may not prove as effective in their application as they appear on paper. Nevertheless, they do reflect increasing organizational attention to the demands of due process, an attention which continually pushes the NCAA's adjudicatory processes more in line with due process norms.

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254. *See* YAEGER, *supra* note 4, at 133; TEN THINGS, *supra* note 35, at 2.

255. PROTECTIONS, *supra* note 171, at 6. However, the courts have not been responsive to such claims against the NCAA. *See supra* notes 34-92 and accompanying text.

256. *See supra* note 133.

257. *Id.*

258. PROTECTIONS, *supra* note 171, at 6.

259. *Id.*

260. *Id.*

261. LEE REPORT, *supra* note 127, at 7.

262. PROTECTIONS, *supra* note 171, at 6.

Although improvements in NCAA procedures may continue to erode the need for Florida's law, this law, as well the provisions in other states, has been instrumental in pushing the NCAA to change. There may soon come a time when state laws are no longer needed. This would be welcomed because it would indicate that the NCAA has achieved significant reform.

B. NCAA Challenges State Laws in Court

While some states consider due process legislation and others have already passed it, the NCAA has continued to declare that these laws violate the *United States Constitution*. The NCAA believes these laws represent an impermissible interference with the NCAA enforcement program, which falls under interstate commerce.[263] In support of this position, the NCAA cites *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[264] which indicates that states do not have the authority to regulate aspects of national commerce in which uniformity requires that regulation come from a single source.[265] The NCAA also cites *CTS Corp. v. Dynamics Corp. of America*[266] to suggest that state statutes creating inconsistent regulation of interstate commerce may be invalidated under the Commerce Clause of the *United States Constitution*.[267] Further, the NCAA suggests that the application of a state statute to commerce taking place wholly outside the borders of the state is unconstitutional, even if the commerce has effects within the state.[268] Applying this to its regulations, the NCAA contends that inconsistent state rules would destroy its national enforcement program.[269] According to the NCAA, local interference by state legislatures should not be allowed because the NCAA enforcement rules are voluntarily adopted.[270] The NCAA claims that state legislatures are interfering with the function of rules promulgation, which is reserved to a nationwide association of member schools; thus, the NCAA claims that these laws are "in all likelihood unconstitutional."[271]

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263. NATIONAL COLLEGIATE ATHLETIC ASS'N, UNCONSTITUTIONALITY OF STATE "DUE PROCESS" LAWS 1 (Aug. 1991) [hereinafter STATE LAWS].

264. 325 U.S. 761, 767 (1945).

265. STATE LAWS, *supra* note 263 (citing *Southern Pac. Co.*, 325 U.S. at 767).

266. 481 U.S. 69 (1987).

267. Article I, § 8, clause 3 of the *United States Constitution* provides, in relevant part: "The Congress shall have Power . . . to regulate Commerce . . . among the several States."

268. STATE LAWS, *supra* note 263 (citing Healy v. Beer Inst., Inc., 491 U.S. 324 (1989)).

269. STATE LAWS, *supra* note 263.

270. *Id.*

271. *Id.*

The NCAA acted quickly to challenge state due process legislation.[272] The first opportunity came in Nevada during an investigation of UNLV, where the Nevada due process law was challenged before the NCAA proceeded with its investigation. The NCAA sought an order enjoining the defendants, persons being investigated for possible rules violations, from invoking the Nevada due process statute.[273] The NCAA offered several theories in support of its claim. First, it challenged the statute on Commerce Clause[274] and Contracts Clause[275] grounds. It also alleged a violation of the First Amendment right to associate.[276] Finally, the NCAA claimed that the Nevada statute contained provisions that were vague or overbroad.[277]

The defendants first suggested that the court should abstain from addressing the constitutional issues and allow the case to be heard in a state court.[278] However, the court noted that abstention is an "extraordinary and narrow exception to the duty" of a court to hear the controversy before it.[279] The court then rejected the abstention request, stating that the Nevada statute does not involve a "sensitive area of social policy" and that a state court's construction of the statute would not eliminate the constitutional questions.[280] The court then reached the constitutional issues.

The court began with the Commerce Clause claim, noting that although the clause is phrased as an affirmative grant of power to Congress, courts have long construed the Commerce Clause as limiting the ability of states to regulate interstate commerce.[281] Thus, the initial inquiry was whether the enforcement rules of the NCAA are properly classified as interstate commerce. The court found that the NCAA's national scope clearly represents interstate commerce,[282] which led the

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272. These actions have taken forms ranging from court challenge against Nevada's legislation to attempts to have other state laws repealed. Letter from Samuel P. Bell III, NCAA local counsel, to Florida Senator Fred Dudley and Florida Representative James E. "Jim" King, Jr. (Mar. 6, 1992).

273. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992) (challenging NEV. REV. STAT. ANN. §§ 398.155-.255 (Michie 1991)). Not surprisingly, former UNLV coach Jerry Tarkanian was one of the defendants. *Miller*, 795 F. Supp. at 1479.

274. *See supra* text accompanying note 263.

275. Article I, § 10, clause 1 of the *United States Constitution* provides, in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

276. The First Amendment of the *United States Constitution* provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble."

277. *Miller*, 795 F. Supp. at 1479.

278. *Id.* at 1481.

279. *Id.* (citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)).

280. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1481 (D. Nev 1992).

281. *Id.* at 1482.

282. *Id.* (citing Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977)). The *Hennessey* court stated that the management of intercollegiate athletics is "clearly business, and big business at that." 564 F.2d at 1150.

court to ask whether the statute violated the Commerce Clause. The court found that the Nevada statute was not per se invalid because it did not facially discriminate against interstate commerce.[283] Thus, the court had to balance the state's interest in the statute against the burden on interstate commerce.

Although the court found that Nevada's interest in protecting the careers, livelihoods, and reputations of its citizens was legitimate, it concluded that the burden on the NCAA's uniform rules system outweighed this interest.[284] The court found that the statute had a substantial impact outside of Nevada.[285] Finally, the court considered the interaction of the Nevada statute with other regulatory schemes and the potential impact if many other states adopted similar statutes. The court hinted that Congress could pass NCAA due process legislation,[286] but found that a web of state laws would destroy the NCAA's uniform rules program.[287] Thus, the court held that the Nevada statute violated the Commerce Clause of the *United States Constitution*.[288]

The court next turned to the NCAA's claim that the Nevada statute impairs contractual relations between the organization and member schools in violation of the Contracts Clause. The court stated that the clause is not to be read literally, but requires a balancing of the degree of the impairment and the extent of the state's interest.[289] After the initial finding that the NCAA and its member schools shared a contractual relationship, the court discussed whether the statute's interference with the contract was substantial. The court agreed with the NCAA's claim that it could not comply with some of the provisions of the Nevada statute and thus would be precluded from investigating Nevada schools. The court found this to be a substantial impairment of the contract because it would give Nevada schools an unfair advantage and frustrate the NCAA's objective of ensuring a level playing field in intercollegiate athletics.[290] Because the statute altered the relations between an arm of the state government (UNLV) and a private party (the NCAA), rather than two private parties, the court stated that the impairment of contract must be "necessary to achieve an im-

283. *Miller*, 795 F. Supp. at 1483.
284. *Id.* at 1484.
285. *Id.*
286. The court stated that "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* at 1485 n.4 (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)).
287. *Id.* at 1485.
288. *Id.*
289. *Id.*
290. *Id.* at 1487.

portant public purpose."[291] The court found that the state did not meet this burden because the statute was aimed directly at the NCAA and was not designed to address a broad societal problem.[292] The court suggested that the Nevada schools could work for reform within the NCAA, or even seek congressional action. Nevertheless, the court held that the state could not interfere with the contractual relationship between the NCAA and its members.[293]

Having found sufficient grounds to resolve the case, the court did not discuss the First Amendment right to associate or the NCAA's claim that the Nevada statute was vague and overbroad. Because the court found the provisions of the statute invalid and unenforceable, the court enjoined the defendants from seeking protection under the Nevada due process statute.[294]

The matter is not final, however, because the defendants filed a notice of appeal in the circuit court soon after the initial ruling.[295] The NCAA has stated from the beginning of the Nevada case that the matter very likely must be resolved by the United States Supreme Court.[296] Although the NCAA could proceed with its investigation of UNLV after the favorable ruling, the NCAA has stated that it will wait until all appeals are exhausted before resuming the investigation.[297]

Although the Nevada case has no direct effect on the due process laws in other states, including Florida's new law,[298] the case serves as a precedent for suits in the other states. The strength of this precedent in Florida could have been resolved in a case in which a University of Florida athlete sued the NCAA to have a year of eligibility restored.[299] Gator football player Monty Grow alleged that the NCAA violated

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291. *Id.* (citing State of Nev. Employees Ass'n v. Keating, 903 F.2d 1223, 1228 (9th Cir. 1990)).

292. *Id.* at 1488.

293. *Id.*

294. *Id.*

295. *Jurisprudence*, L.A. TIMES, June 24, 1992, at C2.

296. Danny Robbins, *Court Voids Nevada Law*, L.A. TIMES, June 6, 1992, at C1.

297. *Id.*

298. However, the decision may cause other states to postpone consideration of similar bills.

299. Gator football player Monty Grow filed suit on September 25, 1992, seeking to gain another year of eligibility. Grow missed one season for use of a substance banned by the NCAA. Never having taken a redshirt season, one in which the athlete does not participate in games and does not lose a year of eligibility, Grow maintains that the year of suspension should count as a redshirt year. *Florida Linebacker Sues NCAA*, CHI. TRIB., Oct. 8, 1992, at C2.

The court could have chosen to ignore the Nevada precedent based upon a fundamental factual distinction. The Nevada case involved an NCAA investigation of a member institution and related individuals. However, Grow's case related only to his individual eligibility and did not involve the University of Florida. Deciding that the federal courts could not quickly resolve the issue, Grow dismissed his suit against the NCAA and opted to sue the University and Board of Regents in state court. *Briefs: College Football*, TALLAHASSEE DEMOCRAT, Mar. 17, 1993, at C2.

his right to due process and failed to comply with Florida's new statute.[300] In its motion for summary judgment, the NCAA asserted that Grow's due process claim was without merit because "[t]he NCAA is not engaged in state action . . . despite the declaration [of Florida law] to the contrary."[301] The NCAA further claimed that Florida's due process statute was unconstitutional under both the *United States Constitution* and the *Florida Constitution*.[302] Despite the NCAA's contentions, the Florida law remains in effect until someone else uses it to challenge NCAA action.

A case challenging Florida's law on that of another state need not find that the state due process statute is unconstitutional merely because the Nevada case so found. Illinois, for example, believes that its statute would stand a better chance of being upheld than the Nevada law.[303] Proponents of the Illinois law point out that the adversarial impact might not be as great with Tarkanian not involved.[304] Further, the Illinois legislation is more specific than the Nevada law.[305] This could be good news for the Florida law, as it too is more specific than the Nevada law. In fact, the NCAA lists the Florida and Illinois laws as similar in its comparison of the current and pending state due process laws.[306]

Meanwhile, the Nevada case will work its way toward the U.S. Supreme Court. Until then, Florida's law will only be removed if legislators are impressed enough with NCAA internal reform actions to repeal it.

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300. Complaint and Request for Injunctive Relief at 5-10, Grow v. National Collegiate Athletic Ass'n, No. 92-10159 (N.D. Fla. filed Oct. 19, 1992).

301. NCAA's Memorandum and Points and Authorities in Support of Its Motion for Summary Judgment at 5, *Grow* (No. 92-10159). The NCAA cites National Collegiate Athletic Association v. Tarkanian, 488 U.S. 179 (1988), in support of this claim. *Id.*

302. NCAA's Memorandum and Points and Authorities in Support of Its Motion for Summary Judgment at 1-2, *Grow* (No. 92-10159). The NCAA contends that the statute is unconstitutional under Article I, § 8, clause 3 (Commerce Clause) and Article I, § 10, clause 1 (Contracts Clause) of the *United States Constitution*. The NCAA also claims that the First Amendment right to associate renders the Florida statute unconstitutional. In alleging that the statute violates the *Florida Constitution*, the NCAA cites Article I, § 10 (the Contracts Clause). *Id.*

303. Ed Sherman, *NCAA Cheered by Latest Court Victory*, CHI. TRIB., June 9, 1992, at C4.

304. *Id.*

305. *Id.*

306. NATIONAL COLLEGIATE ATHLETIC ASS'N, NCAA STATE LEGISLATION DUE PROCESS COMPARISON (n.d.). Like Florida's law, the Illinois law allows the accused to confront and examine witnesses, applies rules of evidence normally found in trials, and has provisions for the suppression of evidence. The Illinois law also requires that penalties bear a reasonable relationship to the violation and are subject to judicial review. In contrast, the Nevada statute is less specific when defining the rights of the accused to confront witnesses and the evidentiary standard. The Nevada statute also is not as detailed in establishing notice and hearing requirements.

VI. Conclusion

Florida has taken the initiative by joining three other states in mandating due process in NCAA proceedings. These states have been prompted to act because Congress has not shown enough concern with the actions of the NCAA to pass federal legislation. The court system also has not provided relief to member institutions and athletes feeling slighted by the system. State legislatures finally broke the trend of inaction by individually passing laws forcing the NCAA to incorporate greater due process protections into existing procedures. Although the NCAA has successfully challenged the Nevada law, the significance of such laws cannot be overlooked. By taking the lead, Florida, Illinois, Nebraska, and Nevada have shown the NCAA that it must continually update its due process protections. The NCAA has responded to the public pressure by enhancing its investigative procedures at recent conventions. Even if these state laws are eventually removed from the books, their influence will still be apparent because they send a message that the NCAA must continue to develop better enforcement procedures.