COURTS LEAVE LEGISLATURES TO DECIDE THE FATE OF THE NCAA IN PROVIDING DUE PROCESS

*Kevin M. McKenna**

I. INTRODUCTION

> [B]y joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no

---

* B.A., 1983, Villanova University; J.D., 1986, Villanova University School of Law. Currently an Associate with the law firm of Kleinbard, Bell & Brecker in Philadelphia; former law clerk for the Honorable Randy J. Holland of the Supreme Court of Delaware. Mr. McKenna has published numerous articles in the area of sports law: *Age Limitations and the NCAA: Discrimination or Equating Competition?*, 31 ST. LOUIS U. L.J. 379 (1987); *A Proposition with a Powerful Punch; the Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43 (1987); *The Tarkanian Decision: The State of College Athletics Is Anything but State Action*, 40 DEPAUL L. REV. 459 (1991); The author would like to thank Judy Weglarz, for her assistance in preparing the manuscript, and Steven Miriani, Esq., for his editorial comments.

> way a substitute for the investigative functions of the NCAA itself . . . We must accept their findings of fact as in some way superior to our own.[1]

A hearing officer for the University of Nevada Las Vegas (UNLV) recognized and agreed with the above quoted remark made by counsel for UNLV and thus recommended that the school suspend basketball coach, Jerry Tarkanian, for alleged violations.[2] The president of UNLV reluctantly accepted the hearing officer's recommendation, noting that "the University was simply left without recourse."[3] Thirteen years later, university officials and coaches as well as state legislatures across the country have begun to openly question whether member institutions of the National Collegiate Athletic Association[4] (NCAA) should be left without redress when the NCAA investigates, holds hearings or imposes sanctions.[5] All too often,

---

1. University of Nev. v. Tarkanian, 594 P.2d 1159, 1162 (Nev. 1979). Though the hearing officer also noted that the standards of proof and due process adhered to by the NCAA were inferior to to what "we might reasonably expect," he recommended executing the proposed NCAA sanctions. The following day Dr. Baepler, the president of UNLV, notified Tarkanian that the hearing officer's recommendation would go into effect on September 9, 1977. *Id.*

2. *Id.* at 1162.

3. *Id.*

4. Judge Birciaga in Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *rev'd*, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 463 U.S. 1311 (1983), described the NCAA as follows:

> [The] National Collegiate Athletic Association [hereinafter, "NCAA"] is a private non-profit association organized in 1905. [The] NCAA consists of approximately [1056] members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, . . .
>
> [The] NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment by the members. . . . When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. [The] NCAA has a professional staff located at its headquarters in Shawnee Mission, Kansas. Some 80 employees execute NCAA policy under the supervision of [an executive director].

Board of Regents, 546 F. Supp. at 1282. The NCAA's constitution, bylaws, and procedures are set out at length in its manual, National Collegiate Athletic Association, 1991-92 NCAA MANUAL (Laura Bollig, ed., 1991) [hereinafter cited as NCAA MANUAL]. *See also Another Increase Pushes Membership to 1056*, NCAA NEWS, Sept. 9, 1991, at 1. The NCAA enjoyed its fifth consecutive year of one-thousand-plus membership. *Id.* This marked "an all-time high with a net growth of 21 new active member institutions, conferences, affiliated organizations and corresponding members in the past year." *Id.*

5. For example, the NCAA imposed sanctions on the University of Maryland's basketball program by placing the University on three years' probation, prohibiting them from participation in post season play for two years, and banning them, for one year, from live television appearances. *NCAA Refuses to Alter Sanctions on Maryland Basketball*, PHILA. INQUIRER, Aug. 4, 1990, at 6C. As a result of the sanctions the University could lose close to $3.8 million in revenues. *Id.*

NCAA sanctions have been imposed indiscriminately, arbitrarily and without due process of law.[6]

Granted, the United States Supreme Court ruled in *Tarkanian v. National Collegiate Athletic Association*[7] that the NCAA was a private organization and not subject to due process requirements even though over half of its members were public institutions receiving public funding.[8] However, the *Tarkanian* decision along with the subsequent decision by the NCAA to place UNLV on probation for alleged violations occurring prior to 1977 have been widely questioned.[9] As a result, in the end, those two decisions may have done more to harm the power structure of the NCAA than to help it. Congress and state legislatures have now begun to propose and enact laws requiring the NCAA to comply with due process when investigating colleges.[10] Four states, Nebraska, Nevada, Florida and Illinois have already enacted such legislation and six states are presently considering such bills.[11]

The ultimate reason for the sudden flurry of federal and state bills is not a surprise; it is money. There is a lot of money to be made as an NCAA member, and NCAA probation, in some forms, means

---

Another example occurred when the NCAA barred the University of Kansas from defending its national basketball title. Despite its being the fourth winningest team in NCAA history, the University of Kentucky could not keep itself from becoming the eighteenth school to be placed on probation at that time. Dick Patrick, *NCAA's Next Sneaker to Drop: Kentucky*, USA TODAY, Nov. 3, 1988, at 1A.

6. *See Lobbying Groups Continue Efforts against the NCAA*, NCAA NEWS, July 31, 1991, at 10 [hereinafter *Lobbying Groups*]; Mark Asher, *Coaches: NCAA Can Solve Its Problems without Congressional Intervention*, WASH. POST, June 20, 1991, at C1; Danny Robbins, *Enforcement Power of NCAA to be Topic for State Legislature*, L.A. TIMES, May 12, 1991, at C3; Nancy Scannell, *Policies of NCAA Defended: 'Due Process' under Probe*, WASH. POST, Sept. 29, 1978, at E1 [hereinafter *NCAA Defended*]; Nancy Scannell, *Congress Asked to Protect Athletes*, WASH. POST, Apr. 18, 1978, at D5 [hereinafter *Congress Asked*]; Nancy Scannell, *2 Schools Complain of NCAA; Hill Hears Complaint on NCAA*, WASH. POST, Mar. 1, 1978, at D1 [hereinafter *2 Schools*]. For a critical analysis of the problems in college athletics see DON YAEGER, UNDUE PROCESS THE NCAA'S INJUSTICE FOR ALL (Sara Chilton, ed., 1991).

7. 488 U.S. 179 (1988).

8. *Id.* at 196. For a detailed discussion see *infra* notes 85-131 and accompanying text.

9. *See Lobbying Groups, supra* note 6, at 10-11; Asher, *supra* note 6, at C1; Robbins, *supra* note 6, at C3.

10. *See* H.R. 2157, 102d Cong. 1st Sess. (1991) (requiring the (NCAA) to provide due process in connection with its regulatory activities affecting coaches, players and institutions engaged in sports in interstate commerce); *Lobbying Groups, supra* note 6, at 10-11 (reviewing the status of current state due process legislation).

11. *Lobbying Groups, supra* note 6, at 10. California, Iowa, Kansas, Minnesota, New York and South Carolina have state due process legislation pending. *Id.*

the loss of revenues.[12] This article examines the genesis and constitutionality of federal and state law which force the NCAA to comport with due process of law during its investigations and hearings involving member institutions.

II. Constitutional Limitations and the Courts

Although numbers of member institutions have been placed on probation by the NCAA Infraction Committee, few have challenged the legality of the sanction in a court of law. Often, such challenges are quelled by the difficult obstacles encountered when bringing a suit of this nature. Member institutions are discouraged because they do not want to unnecessarily antagonize the NCAA which acts as both judge and jury in all its proceedings.[13] This unwillingness is ex-

---

12. For example in H.R. 2157, introduced by Rep. Edolphus Towns (D-N.Y.), § 2(5) recognizes that "collegiate athletics generate approximately $1,000,000,000 in interstate commerce each year." *Id.* Additionally, as a result of the NCAA revenue distribution plan for 1990-91, a total of $72,874,699 was disbursed to 34 Division I conferences and 16 independent institutions. *Final Revenue Checks from 1990-91 Delivered*, NCAA News, Sept. 9, 1991, at 1. Division I members received their share of the revenue in five separate installments. *Id.* They were as follows:

> Basketball fund. $31,250,000, mailed April 19. The money was distributed to Division I conferences based upon their teams' performance in the 1985-1900 NCAA basketball tournaments.
>
> Academic enhancement fund. $7,375,000 mailed June 28. Each Division I member received $25,000 to be used for academic programs for student athletes.
>
> Needy student-athlete fund. $2,999,896, mailed August 2. This money was distributed so Division I student-athletes receiving a Federal Pell Grants may apply for a grant to be used in emergency situations. There is no obligation to repay the money.
>
> Sports-sponsorship fund. $10,416,673 mailed August 16. Division I members received money based upon the number of men's and women's sports they sponsored in 1989-90.
>
> Grants-in-aid fund. $20,833,130 mailed August 30. The money was distributed among Division I institutions based upon the number of grants-in-aid they awarded to both men and women during 1989-90.

Id. The distribution plan, developed by the Special NCAA Advisory Committee to Review Recommendations Regarding Distribution of Revenues and approved by the NCAA Executive Committee, coordinated how revenue from the Association's new seven-year $1 billion television contract with CBS should be distributed. *Id.*

13. For analysis of other lawsuits challenging regulations of the NCAA, and a more in depth discussion of the due process issues presented by the cases, see Kevin McKenna, *Age Limitations and the NCAA: Discrimination or Equating Competition?*, 31 St. Louis U. L.J. 379, (1987) [hereinafter *Age Limitations*]; Kevin McKenna, *A Proposition with a Powerful Punch: The Legality and Constitutionality of NCAA Proposition* 48, 26 Duq. L. Rev. 43 (1987) [hereinafter *Powerful Punch*].

acerbated by the fact that the NCAA has a 100% conviction rate.[14] However, the most difficult hurdle to overcome in this pursuit is the jurisdictional barrier of "state action."

The Fourteenth Amendment is the vehicle by which the institution, player or coach contests the NCAA actions as a denial of their Due Process or Equal Protection rights.[15] However, before the plaintiff can prove that the NCAA violated the Fourteenth Amendment, he must first prove the threshold issue, that "state action" existed.[16]

A. History of Due Process

The Supreme Court has stated that "[e]mbedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the [a]mendment's Due Process Clause, and private conduct, against which the [a]mendment affords no shield, no matter how unfair that conduct may be."[17] The protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights."[18] According to the Court, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and avoids the imposition of responsibility on a state for conduct it could not control."[19]

---

14. YAEGER, *supra* note 6, at viii. In short, the NCAA has found at least one allegation in each proceeding.

15. "No state shall . . . deprive any person of life, liberty, or property, without due process of the laws." U.S. CONST. amend. XIV, § 1.

16. J. NOWAK, R. ROTUNDA & J. N. YOUNG, CONSTITUTIONAL LAW 497-99 (2d ed. 1983).

17. Tarkanian v. National Collegiate Athletic Ass'n, 488 U.S. 179, 191(1988). For a further discussion of the distinction between "private" and "public" conduct, see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974). *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (explaining that governmental conduct, not private action, is subject to constitutional limits of fifth and fourteenth amendments).

18. *Tarkanian*, 488 U.S. at 191 (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)). When a private organization acts, the existence of state action ultimately depends upon whether the circumstances fit one of several rationales for the application of constitutional restraint to private entities. *See* NOWAK et al, *supra* note 16, at 497-99. The various rationales ask: has the private entity assumed a "public function?" *Id.* at 502-05; does a "symbiotic relationship" or "nexus" exist between the private organization and if it does, ought it be subject to the same restraints as the government? *Id.* at 516-18 and is the impact of the private organization's activity upon rights so significant that the restraint is necessary in order to preserve those rights? *Id.* at 516-518.

19. *Tarkanian*, 488 U.S. at 191 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982)). The Court in *Tarkanian* stated:

> [W]hen Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of

For many years, federal courts, hearing NCAA related issues, consistently acknowledged the existence of state action in the challenged conduct of the NCAA.[20] For example, in *Buckton v. National Collegiate Athletic Ass'n*,[21] the court determined that the NCAA's action, in ruling that two Boston University hockey players were ineligible to compete, involved state action.[22] The district court maintained that because the NCAA had engaged in a public function and it enjoyed a symbiotic relationship with public institutions, i.e. the member schools, the requisite state action existed.[23] Upon resolution of this threshold issue, the court concluded that the plaintiff hockey players had been denied equal protection of the law, a right extending to resident aliens and American citizens alike.[24]

---

authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it . . .

Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

Id. (citations omitted).

20. *But see,* McDonald v. National Collegiate Athletic Ass'n, 370 F. Supp. 625, 631 (C.D. Cal. 1974)(holding that the action of the NCAA in enforcing penalties upon the university for infractions of NCAA bylaws, resulting in the university's declaring athletes ineligible to participate in athletics, did not involve state action). *Compare id. with* Howard Univ. v. National Collegiate Athletic Ass'n, 510 F.2d 213, 219 (D.C. Cir. 1975) (stating that the *McDonald* analysis contains fatal flaws).

21. 366 F. Supp. 1152 (D. Mass 1973).

22. *Id.* at 1156-57. The plaintiffs resided in Boston, but were Canadian Nationals. *Id.* at 1154. Boston University (BU)informed them that they were declared ineligible pursuant to the NCAA regulations because they had participated in the Canadian Junior Amateur leagues before attending BU. *Id.* While playing in these leagues, both plaintiffs received a small amount of money for room, board and expenses because they lived away from their respective homes. *Id.* Based on these circumstances, the NCAA ruled that the plaintiffs had violated the eligibility rules with respect to amateur status. *Id.*

23. *Id.* at 1156-57. The court explained:

The N.C.A.A. in supervising and policing the majority of intercollegiate athletics and athletes nationwide performs a public function, sovereign in nature, that subjects it to constitutional scrutiny. . . . that state universities make up one-half the membership of the N.C.A.A.; that these public institutions pay dues to the N.C.A.A.; and that state involvement in the N.C.A.A. includes the support, control and regulation of member institutions. . . .

Id.

24. *Id.* In reviewing the plaintiffs' equal protection claims, Judge Tauro observed that critical to an understanding of such claims is an appreciation of the differing nature of the American and Canadian athletic systems. *Id.* at 1158. The court further noted that in Canada's secondary school system, there is no organized interscholastic hockey program. *Id.* Rather, the court explained that the Canadian program is established by recreational departments and civic organizations. *Id.* Thus, the court stressed that the NCAA's conduct emphasizes form over substance by making the source, and not the character of the aid, the deciding factor in plaintiffs'

In a similar manner, the Ninth Circuit Court of Appeals in *Associated Students, Inc. v. National Collegiate Athletic Ass'n*,[25] found the presence of state action in the NCAA's activities.[26] The Ninth Circuit affirmed the district court's finding of state action and became the first federal appellate court to acknowledge state action in the context of NCAA litigation.[27] In *Associated Students*, a contingent of students challenged the enforcement of NCAA "1.600" Rule which limited competitive athletic participation to students with a 1.600 grade point average.[28] The court summarily concluded that the NCAA's regulatory action in enforcing its eligibility rule constituted state action.[29] Like the court in *Buckton*, the Ninth Circuit based this finding on the fact that public funds had been utilized to pay NCAA membership dues and that the NCAA exercised control over state members.[30]

Later that year, the same result was reached in *Howard University v. National Collegiate Athletic Ass'n*.[31] In *Howard University*, the plaintiff school and one of its premier soccer players challenged the NCAA's enforcement of the "Five-year" Rule, the "1.600" Rule and the "Foreign-student" Rule.[32] The court of appeals emphasized

---

case. *Id.* at 1158. Based on these findings, the court reasoned that the NCAA's regulations create disparate eligibility standards. *Id.* at 1157.

25. 493 F.2d 1251 (9th Cir. 1973).

26. *Id.* at 1254.

27. *Id.* at 1252.

28. *Id. See also* Parish v. National Collegiate Athletic Ass'n, 506 F.2d 1028, 1030 (1975). At the time that these cases were pending, NCAA 1.600 rule stated:

> A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: (1) limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have predicted minimum grade point averages of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables.

Id. (citing NCAA Bylaw 4-6(b)(1), A).

29. *Id.* at 1254.

30. *Id.* at 1254 (quoting Parish v. National Collegiate Athletic Ass'n, 361 F. Supp. 1241, 1219 (W.D. La. 1973)).

31. 510 F.2d 213 (D.C. Cir. 1975).

32. *Id.* at 216. The "Five Year" Rule provides:

> An institution shall not permit a student-athlete to represent it in intercollegiate athletic competition unless he meets the following requirements of eligibility: He must complete his seasons for participation within five calander years from the beginning of the semester or quarter in which he first registered at a collegiate institution. . . .

Id. at 216 n.2 (citing NCAA CONSTITUTION, art. III, at 9(a), A.156).

The "Foreign-Student" Rule in pertinent part provides:

that the actions of the NCAA are "impregnated with a governmental character" via the significant government involvement of its state institutional members.[33] The court examined the NCAA's size, influence and wealth, and explained that the NCAA's extensive regulation and supervision of the member institutions is indicative of the fact that the NCAA engages in a relationship sufficient to trigger constitutional scrutiny.[34]

After establishing the presence of state action in the NCAA's conduct, the court concluded that the Five-year Rule and the 1.600 Rule did not abridge the plaintiffs' equal protection rights.[35] Both rules were deemed to be reasonably related to their respective objec-

---

> Any participant in a National Collegiate Athletic Association event must meet all of the following requirements for eligibility. . . . He must not previously have engaged in three seasons of varsity competition after his freshman year, it being understood that: . . . Participation as an individual or as a representative of any team whenever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of competition.

Id. n.1 (citing NCAA By-law 4-1(f)(2), A.173). *See supra* note 28 for an explanation of the 1.600 Rule.

33. *Howard Univ.*, 510 F.2d at 219-20. The court noted that almost half of the NCAA's members are publically funded and thus, they provide the NCAA with the majority of its capitol. *Id.* Further, the court stated that the representatives of the members elect the NCAA's governing Council and its principal officers, and thus, the state members are influencial in determining NCAA policy. Finally, the court pointed out that the President and Secretary-Treasurer of the governing Council were representatives of public members. *Id.* The court relied on these findings to support its conclusion that acts of the NCAA are "impregnated with a governmental character." *Id.* Interestingly, the *Howard* court analogized the NCAA cases to cases involving high school athletic associations. *Id.* at 218 (citing Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); Mitchell v. Lousiana High School Activities Ass'n, 362 F. Supp. 730 (D.S.D. 1973)). The court noted that in the high school association cases, the courts consistently found that the challenged organizations were private associations and based their findings of state action on the fact that the membership was made up of mostly public schools. *Id.* The court observed that such findings were also based on the fact that the private organizations "significantly regulated and affected" the public schools. *Id.*

In National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1987), the Supreme Court cited similar case law involving high school associations. *See id.* at 193 n.3 (citing *Louisiana High School*, 396 F.2d 244). However, the Court distinguished this line of cases, explaining that the situation is different when the challenged institutions are within the same state. *Id.*

34. *Howard Univ.*, 510 F.2d at 219-20. The court emphasized that the extensive NCAA regulation and supervision is evident from the fact that the NCAA among other services runs championship events, regulates amatuer status, sets minimum academic standards, and negotiates television contracts. *Id.* Although the court noted that drawing a clear line indicating when public participation implicates the protections of the fourteenth amendment is difficult, it found it unnecessary in this instance because "the degree of public participation and entanglement between the entities is substantial and persuasive." *Id.*

35. *Id.* at 221.

tives.[36] However, the court did find that the Foreign-Student Rule created an impermissible alienage classification.[37]

The Fifth Circuit also addressed the issue of whether there was state action in the NCAA's imposition of the 1.600 Rule. In *Parish v. National Collegiate Athletic Ass'n*,[38] the court of appeals, like the circuit courts in *Associated Students* and *Howard University*, acknowledged that the requisite state action existed.[39] The Fifth Circuit based its conclusion on the premise that the NCAA, as the coordinator of college athletics, performs "a traditional governmental function."[40] The court then analyzed the 1.600 Rule under the equal protection clause.[41] After a determination that the constitutional standard to be employed in this analysis was the "minimum rationality" test, the court opined that the 1.600 Rule passed constitutional muster.[42]

The early judicial approval of state action in NCAA related litigation was bolstered by the addition of *Rivas Tenario v. Liga Athletica Interuniversitaria*[43] and *Regents of the University of Minnesota v. National Collegiate Athletic Ass'n*.[44] This support is evident in the subsequent finding of state action in the conduct of smaller athletic conferences as well. For example, in *Stanley v. Big Eight Conference*,[45] the District Court for the Western District of Missouri adopted the reasoning of the federal appellate courts in *Regents* and *Howard University*.[46] Relying on similar findings of state action in

---

36. *Id.* The court noted that the "Five Year" Rule was designed to reflect the average time needed to receive a college degree. *Id.* With this objective in mind, the court concluded that the rule is a reasonable method to achieve this goal. *Id.* (citing *Reed v. Reed*, 404 U.S. 71 (1971)). With respect to the 1.600 Rule, the court pointed out that its objective is to prevent schools from awarding scholarships to athletes who could not realistically attaining a degree. *Id.*

37. *Id.* at 222. The court explained that the Foreign-Student rule treats foreign athletes differently than American athletes and thus arbitrarily discriminates against aliens. *Id.*

38. 506 F.2d 1028 (5th Cir. 1975). The plaintiff, Robert Parish, went on to play professional basketball with the Golden State Warriors, and then the Boston Celtics.

39. *Id.* at 1032.

40. *Id.* The court noted that the state-supported institutions play a substantial role in the program of the NCAA. *Id.* Additionally, the court suggested that the NCAA by engaging in the regulation of education through organized athletics fulfills a role that is beyond the reach of one state and thus performs a "traditional governmental function." *Id.* at 1032-33.

41. *Id.* at 1033.

42. *Id.* at 1032.

43. 554 F.2d 492, 496 (1st Cir. 1977) (holding that Puerto Rican athletic association's regulatory conduct, in enforcing its eligibility rules, constitutes state action).

44. 560 F.2d 352 (8th Cir. 1977) (holding that NCCA's declaration of ineligibility constitutes state action).

45. 463 F.Supp. 920 (W.D. Mo. 1978).

46. *Id.* at 922.

NCAA activities, the court held that "because the Big Eight is composed solely of state supported public universities" which have delegated supervisory functions to the conference, the actions of the Big Eight Conference amounted to state action.[47]

The trend toward finding state action in NCAA cases culminated in *Stanley* as subsequent Supreme Court decisions have significantly limited the state action doctrine. The Court's opinions in *Blum v. Yaretsky*,[48] and *Rendell-Baker v. Kohn*,[49] set forth the proposition that the receipt of governmental or public funds does not automatically render the challenged activity "state action."[50]

In *Blum*, the Supreme Court considered whether a private nursing home was transformed into a state actor.[51] The Court opined that the extensive governmental funding and regulation did not convert the actions of the private hospital, such as decisions to transfer patients without notice or an opportunity for a hearing into state action.[52] Thus, the Court held that the discharge decisions lacked state action.[53]

Similarly, in *Rendell-Baker*, a privately-operated school discharged a vocational counselor and five teachers without a hearing.[54] The petitioners asserted that because public funds accounted for

---

47. *Id.* In *Stanley*, the court granted the plaintiff's application for an injunction against the Big Eight Conference and the NCAA to prevent them from conducting a hearing regarding alleged rule violations. *Id.* The finder's of fact proposed to rely upon, as evidence of violations, an investigator's eighteen page report, detailing seventy-five inteviews. *Id.* at 924. The court expressed its concern with this procedure, observing that "the author of the investigative report is free to draw certain inferences beyond those statements of fact made to him in his interviews. . . . It is this unconcious subjective coloring of the statements that troubles the Court. . . ." *Id.* at 931. Therefore, the court intimated that this is not an insignificant matter, as coaching personnel, found to have violated rules, are often unable to find comparable employment, and thus, suffer hardship. *See id.* at 927, 931. The court opined that the interests of the coach are too great to be decided by this type of investigative report. *Id.* at 931.

Interestingly, the Nevada Supreme Court relied heavily on the *Stanley* opinion in Tarkanian v. National Collegiate Athletic Ass'n, 741 P.2d at 1345, 1351 (1987). Obviously, it did so because of the numerous similarities between *Tarkanian* and *Stanley*, such as the substantial investigations, and the denial of allegations by the plaintiff coach.

48. 457 U.S. 991 (1982).

49. 457 U.S. 830 (1982).

50. *Blum*, 457 U.S. at 1011; *Rendell-Baker*, 457 U.S. at 840-41.

51. *Blum*, 457 U.S. at 991.

52. *Blum* at 993.

53. *Id.* at 1011. Respondents asserted that state subsidization of more than 90% of the patients and the licensing by the state amounted to state action. *Id.* The Court explained that neither substantial funding of a private entity,nor its regulation, is persuasive in showing that the state is responsible for a private entity's decisions. *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974)).

54. 457 U.S. at 834-35.

ninety percent of the school's operating budget and the school had to meet certain state regulations to receive the funds, the actions of the school constituted state action.[55] The Court relied on *Blum*, finding that the school's receipt of public funds did not render the discharge decisions acts of the state.[56]

The Supreme Court further narrowed the state action doctrine in *Lugar v. Edmonson Oil Co.*[57] The Court opined that prior case law indicates that in order for state action to be present, the challenged action must be "fairly attributable" to a state actor.[58] The Court articulated a two-pronged test to determine fair attribution: 1) the deprivation of a federal right "must be caused by the exercise of some right or privilege created by the State" and 2) the challenged entity must be "fairly said to be a state actor."[59]

Prior to *Blum*, *Rendell-Baker* and *Lugar*, nearly all the lower federal courts had based a finding of state action, with regard to NCAA conduct, on the state support received by the private universities of the NCAA.[60] However, in the aftermath of these Supreme Court decisions, it was unclear whether the principle advanced in *Blum* and *Rendell-Baker* - finding that mere receipt of public funding does not constitute state action - was extended to cases involving the NCAA. If this principle was extended, any state action argument would have been similar to those theories accepted in *Parish*, where the court held the NCAA performs a traditional public function, or *Howard University*, where state action was based on the size, wealth and influence of the NCAA and the member institutions' significant governmental entanglement.[61]

---

55. *See id.* at 832-35.

56. *Id.* at 840-41. The Court analogized the school to a private corporation which depends on government contracts, and explained that the private contractors acts do not result in state action because of significant engagement in performing the public contracts. *Id.*

57. 457 U.S. 922 (1982).

58. *Id.* at 937.

59. *Id.*

60. *See e.g.*, Spath v. National Collegiate Athletic Ass'n, 728 F.2d 25, 28 (1st Cir. 1984); Howard University v. National Collegiate Athletic Ass'n, 310 F.2d 213 (D.C. Cir. 1975); *Associated Students, Inc.*, 493 F.2d 1251, 1254-55; (9th Cir. 1973); Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp 1152 (D. Mass. 1973).

61. *See supra* notes 31-42 and accompanying text. The United States Supreme Court later rebuked these theories in National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 182 n.5 (1988) (explaining that since the Court's decisions in *Lugar*, 457 U.S. 922, *Blum*, 457 U.S. 991, and *Rendell-Baker*, 457 U.S. 830, all of the lower courts have held that the NCAA is not a state actor).

After *Blum*, *Rendell-Baker* and *Lugar*, it was contended that the Supreme Court's decisions would not preclude the application of the state action doctrine to the NCAA's regulatory conduct.[62] One argument asserted that *Blum* and *Rendell-Baker* could be distinguished from NCAA cases on the facts alone.[63] Another argument suggested that "[i]f the state explicitly approves the rules complained of and cooperates in their implementation, then sufficient state action may exist to impose constitutional restraint."[64]

In the decisions following this Supreme Court trilogy, the courts of appeals tenuously approached the issue of state action.[65] For example, the Fourth Circuit failed to acknowledge the presence of state action in *Arlosoroff v. National Collegiate Athletic Ass'n.*[66] In *Arlosoroff*, the plaintiff challenged the NCAA's adoption of its eligibility rule.[67] The court opined that mere state subsidization and regulation was not sufficient to support a finding of state action.[68] Moreover, the court noted that unless the state orders or causes the challenged action and the function performed is one traditionally reserved to the state, no state action exists.[69]

---

62. *See* Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?* 28 ST. LOUIS U. L.J. 101 (1983).

63. *See Age Limitations*, *supra* note 13, at 387 n.37. Professor Greene stated:

> The Court's recent decision involved the application of the state action doctrine to varied fact situations: (1) to a private school that was both state regulated and funded, (2) to a private nursing home that was both state regulated and funded, and (3) to a corporation that utilized state law attachment procedure to seize property for the payment of an overdue debt. (footnotes omitted).

Id. (citing Greene, *supra* note 62, at 124-125). Professor Greene emphasized that none of the recent Supreme Court decisions was unanimous and an indepth reading reinforces the position that state action findings are based on factual idiosyncrasies and not clear principles. *Id.*

64. *Id.*

65. *But see, e.g.*, McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that the NCAA is not a state actor); Karmanos v. Baker, 816 F.2d 258, 260-61 (6th Cir. 1987) (finding that the plaintiffs failed to establish state action); Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 957-58 (6th Cir. 1987) (holding that recent Supreme Court decisions compell conclusion that actions of NCAA are not state action).

66. 746 F.2d 1019, 1021 (4th Cir. 1984).

67. *Id.* at 1020. Arlosoroff, an Israeli citizen, at the age of twenty-two, played in amateur tennis tournaments. *Id.* At the age of twenty-four, he entered Duke University and gained a starting position on the varsity tennis team. *Id.* The NCAA, however, declared him ineligible pursuant to NCAA Bylaw 5-1-(d)-3 which provided:"[O]rganized competition in a sport during each twelve month period after the student's 20th birthday and prior to marticulation with a member institution shall count as one year of varsity competition in that sport." *Id.*

68. *Id.* at 1022.

69. *Id.* The court explained that such factors as state regulation and funding did not support findings of state action in *Rendell-Baker* or *Blum*. *Id.* The court then cited the Supreme Court's finding of state action in Lugar v. Edmonson Oil Co., and noted that the public

In finding a lack of state action, the court reasoned that the earlier NCCA decisions, such as *Parish* and *Howard*, were premised on the notion that "indirect involvement of State governments could convert . . . private conduct into state action."[70] However, the court opined that the Supreme Court's recent decisions compel a different conclusion.[71] Rather, the court stressed that the relevant inquiry is whether the challenged conduct is "fairly attributable to the state."[72]

The court noted that the NCAA does introduce order into the athletic programs and uniformly enforces its eligibility rules.[73] Notwithstanding this acknowledgement, the court continued: "The regulation of intercollegiate athletics, however, is not a function 'traditionally exclusively reserved to the states.' "[74]

In *Spath v. National Collegiate Athletic Ass'n*,[75] the First Circuit declined to decide the issue of whether the NCCA's conduct constituted state action and instead commented that "recent trends have limited that concept" of state action.[76] The court did, however, conclude that the University of Lowell as a publicly funded entity, may be a state actor and moved on to address the constitutional merits of the plaintiffs' claims.[77] Similarly in *Butts v. National Collegiate Athletic Ass'n*,[78] both the district court and the Third Circuit failed to pursue the threshold issue of state action.[79]

---

employees in *Lugar* were "active participants" with the private party. *Id.* (citing *Lugar*, 457 U.S. 922 (1982)). *See also* Greene, *supra* note 172, at 125 n.122 (expressing notion that explicit state approval of challenged rule coupled with state cooperation in implementation was responsible for lack of state action in *Blum*, 457 U.S. 991 and *Rendell-Baker*, 457 U.S. 830, and finding of state action in *Lugar*, 457 U.S. 922).

70. *Id.* at 1021.

71. *Id.* (citing *Blum*, 457 U.S. at 991; *Rendell-Baker*, 457 U.S. at 830).

72. *Id.* (citing *Lugar*, 457 U.S. 922).

73. *Id.*

74. *Id.* at 1021. Further, the court provided that this would be true notwithstanding the "fact that the NCAA's regulatory function may be of *some* public service." *Id.* (emphasis added).

75. 728 F.2d 25 (1st Cir. 1984). Robert Spath, a Canadian hockey player, had participated on an amateur team after his twentieth birthday and before his college career. *Id.* at 27. Lowell informed Spath that he could not participate on the team his senior year pursuant to NCAA Bylaw 5-1-(d)(3). *Id.* at 26-27.

76. *Id.* at 28 (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982)).

77. *Id.*

78. 751 F.2d 609 (3d Cir. 1984).

79. *Id.* at 612. This was surprising since the court of appeals was familiar with the issues surrounding the state action debate. McKenna, *supra* note 13, at 387 . Indeed, in his opinion, Judge Higginbotham quoted Professor Greene's article:

Three years later, the Eastern District of Louisiana handed down its decision in *Barbay v. National Collegiate Athletic Ass'n.*[80] In *Barby*, the NCAA determined that the plaintiff football player was ineligible to compete in the Sugar Bowl.[81] The district court dismissed the plaintiff's claims against the NCAA on the ground that plaintiff failed to demonstrate state action.[82] The court reasoned that state regulation or subsidization alone is insufficient to constitute state action.[83] Rather, the court theorized that the plaintiff must demonstrate that the state institution "caused or procured" the implementation of the NCAA rules.[84]

In the wake of uncertainty regarding the status of the NCAA, the Supreme Court of the United States was given the opportunity to address the issue. The result, however was that the plaintiff coach, institution or player's burden was now rendered virtually impossible.

B. The Tarkanian Decision

1. Procedural History

The NCAA Committee on Infractions[85] (Committee) conducted a two and one-half year investigation of the basketball program at UNLV.[86] This extensive investigation resulted in the Committee issu-

---

> Subjecting the NCAA to the reach of the Constitution would not be inconsistent with recent Supreme Court decisions. Those decisions have not undermined the principle that closely intertwined joint ventures between private and public entities must abide by constitutional principles. Even if the foregoing principle is limited by the tentatively emerging requirement that the state must explicitly approve of private rules and cooperation in their implementation, it is nonetheless appropriate to subject the NCAA to the constitutional limitations.

Id. (quoting Greene, *supra* note 62, at 127).

80. *Barbay v. NCAA*, No. 86-5697, 1987 WL 5619 (E.D. La. Jan. 20, 1987).

81. *Id.*

82. *Id.* The court emphasized that the NCAA's adoption, implementation and enforcement of its drug testing program did not meet Section 1983's "state action" requirement. *Id.* at 7 (citations omitted).

83. *Id.*

84. *Id.*

85. Tarkanian v. National Collegiate Athletic Ass'n, 741 P.2d 1345, 1346 (1987). The NCAA Council, elected at annual conventions, is authorized to adopt administarative regulation which are designed to implement NCAA policy in a manner consistent with the constitution and bylaws. 1991-92 NCAA MANUAL, Bylaw, Art. 30.01 (Laura E. Bollig ed., 1991). The administarative regulations are subject to review at an annual or special conventions. *Id.* The NCAA Committee on Infractions is appointed by the Council and is responsible for administering the NCAA enforcement program. *Id.* at 332 (citing Bylaw, Art. 19). The actions of the Committee, in those case involving major violations, are subject to review by the Council. *Id.* (citing Bylaw, Art. 19.1.2).

86. 741 P.2d at 1346.

ing to UNLV an Official Inquiry outling seventy-eight rule violations allegedly occurring over a six year period.[87] Upon the Committee's request, UNLV conducted its own investigation and responded by denying all of the allegations.[88]

During approximately three days of hearings, the Committee considered the allegations and concluded that thirty-eight of the original seventy-eight allegations were indeed NCAA rule violations.[89] Additionally, the Committee implicated Tarkanian in ten of the thirty-eight violations.[90] Ultimately the Committe issued its conclusions in a Confidential Report instructing UNLV "to show cause why additional penalties should not be imposed against it if it did not suspend Tarkanian . . . ."[91] Thus, UNLV was left with two "alternatives": suspend Tarkanian or be penalized with additional sanctions.

Next, UNLV appealed to the NCAA Council (Council) contesting certain Committee findings and penalties, including those implicating Tarkanian.[92] The Council, however, accepted the findings and recommended imposition of the Committee's penalties.[93] Backed up against a wall, UNLV conducted its own hearing to decide whether to adhere to the NCAA's directive to suspend Tarkanian.[94] UNLV's President suspended Tarkanian, commenting that "the University was simply left without alternatives."[95] Consequently, Tarkanian sought relief in the courts.

---

87. *Id.* Originally, the Official Inquiry was fifty-four pages, highlighting seventy-two rule violations. *Id.* Later six additional allegations were added. *Id.*

88. *Id.* UNLV commissioned the Nevada State Attorney General's office to commence an investigation. *Id.* The Attorney General interviewed those individuals deliniated in the Official Inquiry. *Id.*

89. *Id.* at 1347.

90. *Id.*

91. *Id.* Confidential Report No. 123(47)A disclosed the findings of the Committee. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* The hearing officer, appointed by UNLV, agreed with the University's counsel that "by joining the NCAA we delegated to that organization the establishment of governing standards and their enforcement as well. We are allowed and encouraged to make our own investigations, but this is in no way a substitute for the investigative functions of the NCAA itself. . . ." University of Nevada v. Tarkanian, 594 P.2d 1159, 1161-62 (1979). Although he concluded that UNLV must accept the NCAA's findings of fact as superior to those of UNLV, he noted that in Tarkanian's case, "the NCAA's standards of proof and due process were inferior to what we might reasonably expect. . . ." *Id.* at 1162.

95. *Id.* For the United States Supreme Court's response to Tarkanian's assertion that UNLV had no other alternative but to suspend him see Tarkanian v. National Collegiate Athletic Ass'n, 488 U.S. 179, 198 (1988).

Tarkanian brought suit against UNLV in September, 1977, and the Nevada trial court granted him injunctive relief.[96] The Nevada Supreme Court, however, reversed the trial court's decision for failure to join the NCAA as a necessary party.[97] Two years later, Tarkanian commenced a second suit, this time against both the NCAA and UNLV.[98] Ultimately, the Nevada Supreme Court held that Tarkanian had been deprived of his due process rights.[99] In so doing the court found that the requsite state action existed.[100] The court disagreed with the argument advanced by the NCAA, and adopted by the courts in *Arlosoroff* and *Spath* that the recent Supreme Court decisions required a finding that NCAA regulatory activity lacks state action.[101] Rather, the court noted that in accordance with both *Blum* and *Rendell-Baker*, state action is present "if the entity has exercised powers that are 'traditionally the exclusive prerogative of the state.' "[102] Thus, the court rationalized that because Tarkanian is a public employee and the disciplining of public employees is traditionally reserved to the state, the NCAA's action constituted state action.[103]

The NCAA then appealed to the United States Supreme Court. In the final contest of the tournament, the stakes had become much higher.

2. United States Supreme Court Decision

Now the very existence of the NCAA was being threatened, as were its investigative procedures and its enforcement methods. Before the United States Supreme Court, Tarkanian argued that the

---

96. University of Nevada v. Tarkanian, 594 P.2d 1159 (1979).

97. *Id.* at 1161. The Court wrote:

In the case at hand, it is clear from the pleadings, the evidence presented at trial, and the judgment, that the NCAA should have been joined in this action. First, the interest of the NCAA in the subject matter of this litigation was such that either the university would be affected, or the NCAA's ability to protect its interest would be impaired, and in either case further litigation on the controversy would be likely, should it proceed without joinder of the NCAA.

Id. at 1163.

98. Tarkanian v. National Collegiate Athletic Ass'n, 741 P.2d 1345, 1347 (1987).

99. *Id.* at 1350-51.

100. *Id.* at 1347-48.

101. *Id.*

102. *Id.* at 1348 (citing Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker, 457 U.S. 830 (1982)).

103. *Id.* The court contended that Tarkanian is a public employee by the nature of the fact that he worked for UNLV, a public entity. *Id.*

NCAA violated the coach's due process right during its 1976 investigation of rule violations at UNLV.[104] The NCAA, on the other hand, relied on the "public" conduct versus "private" conduct distinction, assserting that as a private, voluntary association consisting of approximately 960 public and private education institutions, it had no obligation to comply with procedural safeguards when it ordered UNLV to suspend Tarkanian.[105]

a. Majority Opinion United States Supreme Court

The United States Supreme Court began its analysis of Tarkanian's case by addressing his first contention that UNLV, a state entity, had clothed the NCAA with the authority to adopt and enforce regulations concerning UNLV's athletic program.[106] In response, the Court explained that in the usual case involving state action, the private party has behaved decisively, causing injury to the plaintiff.[107] In such a case, the Court pointed out that the critical inquiry is whether there was sufficient state involvement to deem the private conduct state action.[108] However, in this instance, the Court suggested that it was UNLV, not the private NCAA, that committed the final challenged act - Tarkanian's suspension.[109] Consequently, the Court announced that the relevant inquiry is whether UNLV's conduct in its adherence to the NCAA regulations transformed the action of the NCAA into state action.[110]

After a thorough evaluation of the respective roles of the NCAA and UNLV in the promulgation of NCAA rules, the Court noted that UNLV is only one of the NCAA's several hundred members.[111]

---

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

105. *Id.*

106. *Id.* at 192.

107. *Id.* The Court provided examples of when state entanglement in the conduct of a private party is substantial enough to implicate the state action doctrine. *Id.* This situation is present when a State establishes the legal framework regulating the conduct, North Georgia Fishing, Inc v. Di-Chem., Inc., 419 U.S. 601 (1975); the State delegates authority to a private entity, West v. Atkins, 487 U.S. 42 (1988), or the State knowingly assents to the benefits resulting from the challenged behavior, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 193.

111. *Id.* at 193-94. The Court stated that because "UNLV was among the NCAA's members and participated in promulgating the Association's rules; it must be assumed, therefore, that Nevada had some impact on the NCAA's policy determinations." *Id.* Yet, the Court noted, ". . . the NCAA's several hundred other public and private member institutions each similarly

Therefore, the Court reasoned that although UNLV, and thus Nevada law, may have had some impact on the NCAA rulemaking process, the other member institutions "did not act under color of Nevada law" in this formulation.[112] Rather, the Court found that the source of the NCAA's legislation is the collective membership, which has as its mouthpiece the NCAA, an entity independant of any *one* State.[113]

Notwithstanding the fact that the Court acknowledged that UNLV had engaged in state action by adopting NCAA's regulations, it suggested that it does not follow that the formulation of such rules is state action.[114] Moreover, the Court opined that neither UNLV's decision to adhere to NCAA regulations nor its small role in their formulation justifies a conclusion that the NCAA acted under color of Nevada law.[115]

The Court also addressed the assertion that UNLV had delegated to the NCCA the power to engage in the challenged conduct, thereby rendering the NCAA's actions state action.[116] Responding that UNLV had not delegated power to the NCAA to take particularized action against Tarkanian, the Court explained that UNLV's committment to follow the enforcement procedures of the NCAA was "enforceable only by sanctions that the NCAA might impose on UNLV itself."[117] Further, the Court rejected the premise that such a committment amounted to a transfer or delegation of UNLV's powers to the NCAA.[118] In fact, the Court found the direct opposite: that the NCAA "is properly viewed as a private actor at odds with the

---

affected those policies," and that "[t]hose institutions, the vast majority of which were located in states other than Nevada, did not act under color of Nevada law." *Id.*

112. *Id.*

113. *Id.* (emphasis added).

114. *Id.* at 194. The Court analogized the situation presented in *Tarkanian* to that in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). *Id.*

115. *Id.* at 194. The Court stated:

> UNLV retained the authority to withdraw from the NCAA and establish its own standards. The university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy. Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility and academic performance.

Id. at 194-195.

116. *Id.* at 195.

117. *Id.*

118. *Id.* at 196.

State when it represents the interests of its entire membership in an investigation of one public university."[119]

Tarkanian put forth the proposition that the NCAA has undertaken the traditional state function of disciplining employees.[120] However, the Court rebuked this contention on the basis that the NCAA's regulations themselves prevent the NCAA from taking direct action against an employee.[121] Moreover, the Court emphasized that "[t]he recommendations were intended to bring UNLV's basketball program into compliance with NCAA rules. Suspension of Tarkanian was but one means toward achieving that goal."[122]

Finally, the Court rejected Tarkanian's assertion that the omnipotent NCAA left UNLV with no real alternative but to comply with its demands.[123] The Court explained that assuming a private monopolist can impose its will on a state entity through a refusal to associate with it, it does not necessarily follow that a private party is engaging in state action.[124] The Court ultimately contended that "[i]t would be more appropriate to conclude that UNLV has conducted its athletic program under the color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."[125]

b. The Dissent

The dissent declared that the critical question in this case is "whether the NCAA acted jointly with UNLV in suspending Tarkanian and became a state actor."[126] In undertaking its analysis, the minority stipulated that contrary to the majority's view, the

---

119. *Id.* The Court observed thhat UNLV's goal in retaining its "winning coach" was diametrically opposed to the interests of the NCCA: determining the truth of the investigator's report. *Id.* Thus, the Court concluded that the relationship in question was more akin to adversaries than partners. *Id.*

120. *Id.* at 197 n.18. Tarkanian argued "as to state employees connected with intercollegiate athletics, the NCAA requires that its standards, procedures and determinations become the State's standards, procedures and determinations for disciplining state employees . . . ." *Id.* (citations omitted).

121. *Id.* at 197. "[C]ontrary to the premises of the Nevada Supreme Court's opinion, the NCAA did not—indeed, could not—directly discipline Tarkanian or any other state university employee." *Id.*

122. *Id.* at 197-98 n.18.

123. *Id.* at 198.

124. *Id.* at 192.

125. *Id.* at 199.

126. *Id.* (White, J. dissenting). Justice White was joined in his dissent by Justice Brennan, Justice Marshall, and Justice O'Connor.

Court has previously addressed this issue and concluded that private parties could be acknowledged as state actors in the event that they "jointly engaged in the challenged action."[127]

The minority continued, finding that the NCAA did act jointly with UNLV.[128] Its conclusion was based on the fact that UNLV had embraced the NCAA's rules pursuant to which Tarkanian was suspended, that the parties had jointly agreed to allow the NCAA to conduct the hearings, and that the parties had agreed that the NCAA's factual findings would be binding on UNLV.[129] Justice White, however, pointed out that after the Court's trilogy of state action decisions, the lower courts have held consistently that the regulatory conduct of the NCAA is not state action.[130] Notwithstanding this acknowledgment, Justice White explained that none of the previous cases dealt with the specific issue of "joint action" as advanced by Tarkanian.[131]

III. Congress, Due Process And The NCAA

The current status of the NCAA as a private actor for purposes of judicial review has not completely immunized the organization from the requirement of affording due process to alleged violators. Pending federal and state legislation may force the NCAA to change its investigative and enforcement procedures.[132] However, attempting to subject the NCAA to due process requirements is not necessarily a recent phenomenon.

In 1978 the House Subcommittee on Oversight and Investigations (Subcommittee) held hearings to determine whether federal legislation was necessary to afford due process rights to individuals or institutions who are accused of violating NCAA rules and regula-

---

127. *Id.* at 200 (White, J. dissenting). The dissent relied on the Court's precendents set in Adickes v. Kress & Co., 398 U.S. 144 (1970), and Dennis v. Sparks, 449 U.S. 24 (1980). In both the *Adickes* decision and the *Dennis* decision, the Court held that application of the state action doctrine to private conduct requires that the defendant is a "willful participant in joint actions with the State or its agents." *Adickes*, 398 U.S. at 152; *Dennis*, 449 U.S. at 27-28. Thus, if private parties are jointly cooperating with state entities, the state action is present. *Dennis*, 499 U.S. at 27-28.

128. *Tarkanian*, 488 U.S. at 200 (White, J. dissenting).

129. *Id.* at 201 (White, J. dissenting).

130. *Id.* at 202 n.2 (White, J. dissenting).

131. *Id.* Justice White offered Arlosoroff v. National Collegiate Athletic Ass'n, as an example, and noted that in *Arlosoroff*, the "joint action" theory was not advanced. *Id.* Furthermore, as Justice White explained, this theory would not have arisen because the plaintiff in that case challenged a private, and not a public university. *Id.*

132. *See e.g., supra* note 10.

tions.[133] At the initial hearing, representatives of Michigan State University and Mississippi State University,[134] who were subpoenaed to appear before the Subcommittee, claimed that their respective schools were not afforded due process during investigations and hearings conducted by the NCAA which resulted in both schools being placed on probation.[135] A member of the panel set up by Michigan State to investigate the alleged violations, criticized the NCAA for failing to provide evidence on which the allegations were based.[136] The attorneys for Mississippi State asserted that the NCAA's enforcement procedures had "no effective checks and balances to prevent arbitrary selection of institutions to be investigated or to prevent arbitrary charges, procedures, findings and sanctions against institutions and individuals."[137]

The need to pass legislation guaranteeing student-athletes' due process rights in cases where they were accused of violating the rules of the NCAA was first mentioned forty-eight days after the initial

---

133. *2 Schools*, *supra* note 6, at D1. The Subcommittee consisted of Rep. John E. Moss (D-Calif), chairman, Rep. Jim Santini (D-Nev.), and Rep. Norman Lent (R-N.Y.). *Id.*

134. The representatives of Michigan State included Clifton Wharton, then chancellor of the university, and Frederick D. Williams, a history professor and member of the "blue-ribbon" panel established by the university to investigate the allegations against it. *Id.* Appearing on behalf of Mississippi State were Erwin C. Ward and Dixon L. Pyles, attorneys for the university, and Bob Tyler, the school's football coach. *Id.*

135. *Id.* Chancellor Wharton, who appointed a four-man "blue-ribbon" panel to investigate the 90-odd violations that the university was charged with, expressed his thoughts about the NCAA's enforcement proceedings:

> I would point to the lack of due process, the free admission and consideration of hearsat evidence, reliance upon investigator's handwritten, unverified notes of interviews, the inability of those involved to face their accusers or even know their identity and, at least until recently, the refusal to permit thode accused or witnesses to have legal counsel present.

Id. It is important to note that though school officials were eager to vent their concerns of what they considered to be a lack of due process, other witnesses were not as bold. Bob Tyler, then Mississippi State football coach, voiced his apprehensions about testifying by explaining that Mississippi State still had a pending charge of which it needed to appear before the NCAA Executive Council. *Id.*

136. *Id.* Mr. Williams claimed that the NCAA's granting of immunity to student-athletes who testified against the school was questionable and charged "that one investigator used 'threats, intimidation and vulgarity' to secure information." *Id.* Nonetheless a coach, who was accused of letting students use his credit card, was found guilty regardless of the facts that the students admitted to stealing the credit card and the coach passed a polygraph test. *Id.*

137. *Id.* Mississippi State illustrated their point by citing to the allegations against a football player. Larry Gillard, a defensive tackle for Mississippi State, lost a full year of eligibility because a store owner gave Gillard a discount on clothing. *Id.* Granted, on the surface the transaction is suspect, however, during the hearing in front of the Committee on Infractions would not allow Howard Miskelly, the owner of the store, to testify to the fact that he gives this discount to *all* students, athletes and non-athletes alike. *Id.*

Subcommittee hearing.[138] An attorney representing a football player from Oklahoma State University petitioned the Subcommittee to legislate and create a property right for student athletes who compete in intercollegiate athletics.[139] If Congress legislated a property right, then student athletes would have to be afforded due process, in its constitutional sense, throughout NCAA enforcement proceedings.[140] The witnesses at the hearings listed the lack of rights afforded to student athletes as 1) the right to be informed of charges; 2) the right to confront and cross examine accusers; 3) the right to present defense witnesses; 4) the right to have counsel present and 5) the right to avoid self incrimination.[141]

In September of 1978, members of the NCAA's Infractions Committee had the opportunity to defend the enforcement procedures and maintain that all alleged violators were afforded sufficient due process rights.[142] Though most of the hearing was devoted to discussion involving NCAA investigative and adjudicative procedures, the witnesses failed to convince the subcommittee members that guarantees of due process were readily available or commonplace.[143] Despite

---

138. *Congress Asked, supra* note 6, at D5. Lana Tyree, an attorney who represented Mike Edwards, an Oklahoma State football player who lost his senior year of eligibility, stressed that this was the time for Congress to get involved and protect student-athletes' rights. *Id.*

139. *Id.* Tyree suggested when the NCAA tries a case it "has its fingers on the scales of justice." *Id.*

140. *Id.* Rep. Jim Santini (D-Nev.), who encouraged the investigative hearings, had two colleges from Nevada, UNLV and the University of Nevada at Reno, placed on NCAA probation. Santini and John E. Moss (D-Calif.), subcommittee chairman, supported the need for legislation to remedy NCAA procedural abuses. *Id.* On the other hand Rep. Norman Lent (R-N.Y.) was the NCAA's sole defender. *Id.* The verbal clashes among the members of the subcommittee were numerous, especially when the NCAA' appeal process was discussed:

> Lent said Wright [an OSU booster] could have appealed if the judgment [was] wrong.
>
> 'Appeal to what - a kangaroo court?' Moss responded.
>
> Lent countered a few minutes later, 'The prisons are filled with people who say they-re not guilty.'
>
> 'And the prisons are filled,' Santini answered, 'with people who got a lot more rights than anybody who went before the NCAA.'

Id.

141. *Id.*

142. *NCAA Defended, supra* note 6, at E1. The bulk of the session was spent describing NCAA procedures for investigating and adjudicating cases of alleged rules violations. *Id.*

143. *Id.* One of the witnesses, Charles Alan Wright, an expert on constitutional law, testified that he believed the NCAA procedures comported with due process requirements. Despite Wright's statements Chairman Moss said: "Due process, as I understand it, is not in fact available . . . I don't find there is the kind of due process we've been assured exists." *Id.*

the advocacy of two former chairmen of the Committee,[144] each witness acknowledged that reforms could be made.[145]

Additionally, the conversations at the two-day hearing involving NCAA officials focused on the creation of a property right for student-athletes and the placement of authority to declare an athlete ineligible.[146] The subcommittee chairman encouraged the recognition of some form of a property right to an athlete so that a student-athlete would have stronger legal standing in court and thus, not be denied certain rights without a due-process hearing.[147] There was sharply divided opinion on the issue of universities being forced to declare athletes ineligible because of NCAA rule violations.[148] Most of the subcommittee members believed that the universities would be placed in a somewhat hypocritical position if the onus of declaring a player ineligible was placed with the schools because, in many cases, the colleges—which conduct their own investigations—have disagreed with the findings of the Committee.[149] The universities are also placed in a "catch-22" situation because failure to apply the Committee's recommended discipline can mean more charges by the NCAA against the colleges and compliance by the colleges, on the other hand, can result in lawsuits from athletes and coaches.[150]

Thirteen years later, the NCAA set up a Special Committee to Review the NCAA Enforcement Process (Special Committee).[151] The blue-ribbon committee was made up of prominent members of the legal, educational and athletic communities to study the enforcement process.[152] In October of 1991, the Special Committee proposed eleven recommendations to "afford procedural fairness" to those ac-

---

144. Charles Alan Wright was the chairman at the time the hearings took place and Arthur Reynolds was a former chairman of the Committee on Infractions. *Id.*

145. *Id.* The witnesses informed the subcommittee that the hearings were having a beneficial impact on the NCAA by prompting the staff to reevaluate current procedures, as well as implement some changes. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* Although the NCAA defended its position that universities should be self-policing by asserting that it did not have the staff or subpoena power to conduct probes of alleged violations, it was a completely repugnant concept to Chairman Moss and "an outrageous imposition on an institution, particularly when it has to go counter to its own, more orderly procedures," to declare an athlete ineligible. *Id.*

151. *Schultz Empowered to Call Enforcement Process Study*, NCAA NEWS, Jan. 9, 1991, at 3.

152. Michael Janofsky, *N.C.A.A.'s Panel Recommends Updated Rules for Investigation*, N.Y. TIMES, Oct 29, 1991, at B9. The committee was chaired by Rex E. Lee, former United

cused of violating NCAA rules.[153] Among the Special Committee's recommendations were: 1) improve initial notice to a school of an investigation; 2) establish a summary disposition to allow an early exit from the enforcement process; 3) use former judges as impartial decision makers; and 4) liberalize the use of tape recordings throughout the investigative and enforcement proceedings.[154]

Notwithstanding the fact that the NCAA took internal measures to reform its enforcement proceedings, the congressional hearing exercise revisited. In May of 1991, New York Congressman Edolphus Towns (D-N.Y.) sponsored a bill in the House of Representatives cited as the "Coach and Athlete's Bill of Rights."[155] This bill would declare the NCAA to be a state actor.[156] In June of the same year, the House Subcommittee on Commerce, Consumer Protection and Competitiveness opened its hearings on the question of who controls college sports and finances and whether Congress should intervene in the NCAA.[157] However, most witnesses and members of the Subcommittee do not want Congress making the rules for the NCAA; coach Jerry Tarkanian and Representative Tom McMillen (D-Md.) were noted exceptions.[158] Former University of Kentucky president David Roselle cited the central issue as how each institution polices or

---

States Solicitor General and current president of Brigham Young University. Also on the committee was former Chief Justice of the United States Supreme Court, Warren Burger. *Id.*

153. *Id.*

154. *Id.*

155. H.R. 2157 102d Cong. 2d Sess. (1991).

156. *Id.* at § 4. The bill in pertinent part reads:

> The NCAA shall be held to be a State actor when the final or decisive act of suspending or reprimanding a coach, player, or institution of higher education is carried out as a result of sanctions imposed, or the threat of sanctions, by the NCAA upon such coach, player, or institution.

Id.

157. Asher, *supra* note 6, at C1. The subcommittee was chaired by Rep. Cardiss Collins (D-Ill.). Other members included Rep. Edolphus Towns (D-N.Y.), Rep. Alex McMillan (R-N.C.), and Rep. Tom McMillen (D-Md.). The witnesses included basketball coaches Jerry Tarkanian, formerly of UNLV and recently named as head coach for the San Antonio Spurs, and Dale Brown of Louisiana State; Creed Black, the Knight Foundation President; David P. Roselle, former University of Kentucky president; and Dave Cawood, NCAA assistant executive director. *Id.*

158. *Id.* Chairman Collins' position was that Congress need not get fully involved in NCAA procedures but "with the right kind of support, they can do much to bring about needed improvements." *Id.* Dale Brown and Dave Cawood appeared to agree that the NCAA has taken steps to improve on its enforcement proceedings. Mr. Cawood suggested that the subcommittee focus on where the NCAA is going rather than where it's been. *Id.* Both Jerry Tarkanian and Rep. Tom McMillen had doubts as to the NCAA's ability to reform internally.

monitors its own compliance within NCAA,[159] but the hearings also touched upon due process avilable to athletes and coaches under NCAA probe, and various state legislatures' interest to pass federal legislation.[160]

At the federal level the due process issue is prominent in a more recently introduced bill sponsored by Maryland Congressman Tom McMillen labeled as "Collegiate Athletics Reform Act."[161] This is a comprehensive piece of legislation that is meant to deemphasize college athletics and drastically reform the NCAA structure as we know it today.[162] The bill sets up an antitrust exemption for the NCAA, however the exemption only applies if the NCAA meets certain qualifications. For the NCAA to receive the antitrust exemption it must, among other things, provide for due process.[163] Failure by the NCAA to follow the mandates will negate its opportunity to negotiate under the antitrust exemption.

In any event, the federal legislation that is currently under consideration is still a long way off from becoming the law of the land. The hearings and investigations held by the congressional subcommittees have prodded the NCAA to look within and acknowledge inherent faults in its enforcement policies. Needless to say, based on the *Tarkanian* decision and Congress' failure to enact legislation the torch has been passed to the state legislatures to protect the due process rights of those alleged to have violated NCAA rules.

---

159. *Id.* Mr. Roselle found the NCAA "enforcement procedures to be understandable and fair, the enforcement staff cooperative and responsible and the actual hearing before the Committee on Infractions entirely consistent in method and content with those normally found in academic settings." *Id.*

160. *Id.*

161. H.R. 3046, 102d Cong. 2d Sess. (1991).

162. *Id.* The purpose of this bill is "to exempt from the antitrust laws certain conduct engaged in by the National Collegiate Athletic Association (NCAA) jointly with member institutions for the purpose of allowing the NCAA exclusively to negotiate certain contracts , and for other purposes." *Id.*

163. *Id.* Section 104 of the bill provides:

(a)IN GENERAL.—The requirements of this section are met if the NCAA has in effect and enforces rules which provide for due process before the NCAA suspends—

(1) a coach or student athlete from a team representing a member institution or reprimands such a coach or student athlete;

(2) or prohibits a member institution from participating in an amateur athletic event; or

(3) the telecommunications privileges of a member institution

Id. at § 104.

IV. THE STATES RESPOND

A. The Nebraska Collegiate Athletics Association Act

In 1990, the Nebraska State Legislature enacted the Nebraska Collegiate Athletic Association Procedures Act.[164] In short, the Act

164. 1990 Neb. Laws 397. Be it enacted by the people at the State of Nebraska:
SECTION 1. [This act] shall be known and may be cited as the Nebraska Collegiate Athletic Association Procedures Act.
SECTION 2. The Legislature hereby finds and declares that:
(1)The National Collegiate Athletic Association is a national unincorporated association consisting of public and private colleges and universities and is a private monopolist that controls intercollegiate athletics throughout the United States;
(2)The National Collegiate Athletic Association adopts rules governing member institutions' admissions, academic eligibility, and financial aid standards for collegiate athletes;
(3)A member must agree contractually to administer its athletic program in accordance with National Collegiate Athletic Association legislation;
(4)National Collegiate Athletic Association rules provide that association enforcement procedures are an essential part of the intercollegiate athletic program of each member institution;
(5)The National Collegiate Athletic Association exercises great power over member institutions by virtue of its monopolistic control of intercollegiate athletics and its power to prevent a nonconforming institution from competing in intercollegiate athletic events or contests;
(6)Substantial monetary loss, serious disruption of athletic programs, and significant damage to reputation may result from the imposition of penalties on a college or university by the National Collegiate Athletic Association for what the association determines to be a violation of its rules; and
(7)Because of such potentially serious and far reaching consequences, all proceedings which may result in the imposition of any penalty by the National Collegiate Athletic Association should be subject to the requirements of due process of law.
SECTION 3. Every stage and facet of all proceedings of a collegiate athletic association, college, or university that may result in the imposition of a penalty for violation of such association's rule or legislation shall comply with due process of law as guaranteed by the constitution of Nebraska and the laws of Nebraska.
SECTION 4. No collegiate athletic association shall impose a penalty on any college or university for violation of such association's rule or legislation in violation of the due process requirements of the Nebraska Collegiate Athletic Association Procedures Act.
SECTION 5. No collegiate athletic association shall impose a penalty on any college or university for failure to take disciplinary action against an employee or student for violation of such association's rule or legislation in violation of the due process requirements of the Nebraska Collegiate Athletic Association Procedures Act.
SECTION 6. A collegiate athletic association that violates the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the aggrieved college or university in an action at law, suit in equity, or other proper proceeding for redress. No penalty shall be threatened against or imposed upon an aggrieved college or university for seeking redress pursuant to this section.
SECTION 7. In addition to costs and a reasonable attorney's fee, a collegiate athletic association that violates the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the aggrieved college or university for an amount equal to one hun-

requires the NCAA to comply with due process of law as guaranteed by the Nebraska Constitution.[165] The legislation was offered as a result of recent sanctions against the University of Oklahoma and Oklahoma State University.[166] The sanctions against these two Big Eight rivals could cost the Cornhuskers as much as $500,000 a year from cancelled television and bowl games.[167]

However, it is unclear whether the Nebraska Act will pass constitutional muster due to its vagueness.[168] For example, the Nebraska Act fails to state what is required of the NCAA to afford a member institution fair proceedings in the way of due process.[169] Fortunately, the Illinois state legislature has improved on the Nebraska example.

B. The Illinois Collegiate Athletic Compliance Procedures Act

On September 12, 1991 Illinois Governor Jim Edgar signed into law the Athletic Association Compliance Procedure Act (Act). The Act affords due process protection to college athletes in Illinois during investigations by the NCAA.[170] John Cullerton, a state represen-

---

dred percent of the monetary loss per year or portion of a year suffered during the period that any monetary loss occurs due to a penalty imposed in violation of the act. For purposes of calculating monetary loss, one hundred percent of the yearly loss shall be equal to the gross amount realized by the affected athletic program during the immediately preceding calendar year.

SECTION 8. A collegiate athletic association, college, or university which subjects, or causes to be subjected, any employee or student to a penalty in violation of the Nebraska Collegiate Athletic Association Procedures Act shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. No penalty shall be threatened against or imposed upon an aggrieved party for seeking redress pursuant to this section. In addition to any other relief granted, an aggrieved employee or student shall be awarded costs and a reasonable attorney's fee.

SECTION 9. Any penalty imposed by any collegiate athletic association, college, or university shall be subject to judicial review in the district court.

SECTION 10. The remedies provided in the Nebraska Collegiate Athletic Association Procedures Act are cumulative and in addition to any other remedies provided by law.

165. *Id.*

166. *Neb. Bill Would Require Due Process in NCAA Cases*, PHILA. INQUIRER, Jan. 13, 1989, at 3D.

167. *Id.* Nebraska state senator Ernie Chambers stated: "I think some recent cases have made people wake up and realize that when the NCAA punishes one school, it can result in many other schools being punished as well." *Id. See also* 1990 Neb. Laws 397, *supra* note 164, §§ 3, 4 & 5.

168. *Sports in Brief*, PHILA. INQUIRER, June 16, 1990 at E-4.

169. *Id.*

170. *Pay for Play*, N.Y. TIMES, May 20, 1990, § 8, at 8 [hereinafter *Pay for Play*]. *See generally* Appendix A of this article for the wording of Ill. Public Act 87-462 (1991). There are thirty-seven colleges and universities in the State of Illinois who are active members of the

tative from Chicago, was a co-sponsor of the act that had passed the Illinois House by a vote of 71-37 on May 18, 1990.[171] At one time, the proposed legislation also included a stipend provision which would have allowed athletes to receive compensation.[172] "The bill points out

---

NCAA. See *NCAA Directory*. Ironically, according to John J. Kitchin, General Counsel for the NCAA, all 37 Illinois member institutions have gone on record as opposing the Act. Letter from NCAA General Counsel John J. Kitchin to Illinois Governor Jim Edgar (July 3, 1991) (on file with the Seton Hall Journal of Sport Law) [hereinafter Letter from NCAA General Counsel].

171. The bill was effective immediately. *Pay for Play*, *supra* note 170, at 8. It was also quite popular as evidenced by the fact that most Illinois legislators jumped on the political bandwagon and joined Cullerton in its introduction. *Id.* Joining Cullerton were the 86th General Assembly, State of Illinois, 1989 and 1990, introduced March 28, 1990. After being amended, the bill was reintroduced on April 20, 1990 by Representatives Johnson, Cullerton, Williams, Weaver, Black, Ackerman, Barger, Barnes, Bowman, Brunsvold, Bugielski, Churchill, Countryman, Cowlishaw, Curren, Currie, Davis, DeJaegher, Didrickson, Doederlein, Dunn, Edley, Ewing, Farley, Frederick, Giglio, Goforth, Granberg, Hannig, Harris, Hartke, Hensel, Hicks, Homer, Lou Jones, Shirley Jones, Kirkland, Kubik, Lang, Leitch, Levin, Matijevich, Mautino, McCracken, McGann, Morrow, Bob Olson, Myron Olson, Parcells, Parke, B. Pederson, Petka, Piel, Preston, Regan, Rice, Ropp, Ryder, Saltsman, Satterthwaite, Shaw, Sieben, Stephens, Stern, Tenhouse, Trotter, Turner, Wait, Weller, Wennlund, Wojcik, Wolf, Woolard, W. Younge and Zickus. *Id.*

172. Ill. H.B. 3182. The stipend provision would also have allowed colleges in the state to begin paying athletes the value of their scholarships. *Id.* However, it would have limited the amount to $250 a month and the athletes would have been paid only if five nearby states enacted similar legislation. *Id.* Article II stated:

SECTION 2-1. This Article may be cited as the Scholarship Athlete Incidental Living Expenses Law. As used in the Article, "Act" means "this Article".

SECTION 2-2. As used in this act:

"College or university involved in intercollegiate athletics" means a college or university that participates in six varsity intercollegiate sports, of which at least two are team sports.

"Scholarship athlete" means a student receiving a full scholarship in exchange for participating in an intercollegiate sport.

SECTION 2-3. The General Assembly finds:

(a)That colleges or universities involved in intercollegiate athletics provide scholarships to athletes that pay for tuition, room and board, books, and fees.

(b)That scholarship athletes incur many incidental living expenses that are not paid for by the scholarship.

(c)That scholarship athletes are not allowed to obtain employment or other outside income due to prohibitions imposed by intercollegiate athletic associations.

(d)That this places a great hardship upon scholarship athletes and their families because many scholarship athletes cannot afford these incidental living expenses without an additional income source.

(e)That it is incumbent upon the State of Illinois to do everything in its power to rectify this injustice.

SECTION 2-4. Notwithstanding any rule of any college athletic association to which a college or university involved in intercollegiate athletics may belong, scholarship athletes may be paid by the college or university a monthly amount during the school year to be determined by the college or university, but not to exceed $250 per month, to cover incidental living expenses of scholarship athletes. A university shall keep complete records of amounts paid to its scholarship athletes.

accurately that the NCAA is in a monopoly position," Cullerton stated.[173] "Schools aren't always treated fairly."[174]

In addition to other protection, the Act gives colleges or other such associations under investigation by the NCAA rights similar to those now enjoyed by defendants in criminal cases.[175] This includes the right to confront accusers and the right to suppress illegally obtained evidence.[176]

The Act was obviously motivated by the NCAA investigation of the University of Illinois.[177] However, to avoid the appearance of a whitewash, the Act specifically exempted the NCAA investigation into possible recruiting irregularities at the University of Illinois.

The Act requires clear and convincing evidence before an athletic association can impose penalties for violations.[178] In addition, it provides for judicial review of athletic association enforcement actions[179] and imposes liability for damages upon athletic associations that violate the Act.[180] Section 4(j) states: "Any findings made pursuant to the hearing under this Section are subject to review in the

---

SECTION 2-5. No college athletic association may impose any sanction or penalty upon a college or university involved in intercollegiate athletics or its athletic program for paying amounts to scholarship athletes for incidental living expenses. If an athletic association attempts to impose a sanction or penalty for paying amounts for incidental living expenses, the university or scholarship athlete may bring suit to, and the court shall, permanently enjoin the athletic association from imposing such sanctions or penalties.

SECTION 2-6. This Act shall become operative only when provisions requiring or allowing similar payments for incidental expense become law in five of the following States:

(a) Indiana;
(b) Iowa;
(c) Kansas;
(d) Michigan;
(e) Minnesota;
(f) Nebraska;
(g) Ohio;
(h) Oklahoma;
(i) Pennsylvania;
(j) Wisconsin.

173. *Id. Pay for Play*, *supra* note 170, at 8.

174. *Pay for Play*, *supra* note 170, at 8. *See* Ill. Public Act 87-462 § 2 (e), (f) & (i), *infra* Appendix A.

175. *Pay for Play*, *supra* note 170, at 8. *See* Ill. Public Act 87-462, Rights in Interrogations, § 6 (a), (b) & (c), *infra* Appendix A.

176. *See* Ill. Public Act 87-462, § 4 (d), *infra* Appendix A. "Any such person or institution has a right to have counsel present, to interrogate and cross-examine witnesses, and to present a complete defense." *Id.*

177. This is made evident by § 2 (c), (d), (i) & (k) of the Act. *See infra* Appendix A.

178. Ill. Public Act 87-462, § 4 (b). *See infra* Appendix A.

179. Ill. Public Act 87-462, § 4 (k).

180. *Id.* § 9 (a) & (b).

circuit court based on the standard of whether the findings are consistent with the manifest weight of the evidence."[181]

The key section of the Illinois Act is Section 4. It requires a hearing as a prerequisite to a finding of a violation which must be made in writing and supported by clear and convincing evidence.[182] Procedural safeguards which apply at hearings for an individual and an institution include notice in writing within at least two months prior to the hearing of the specific charges as well as the date and time of the hearing.[183] The Illinois Rules of Evidence for civil trial apply at the hearings.[184] An accused individual is also entitled to full disclosure and discovery of all facts and relevant matters.[185] Section 4 also includes the right to have counsel present, to interrogate and cross-examine witnesses, to present a complete defense,[186] and a right to a "speedy trial."[187] Under another provision of the Act "[n]o hearing may be held on any given charge unless commenced within six months of the date on which the institution . . . first receives notice"

---

181. *Id.* § 4 (j).

182. *Id.* § 4 (b).

183. *Id.* § 4 (c).

184. *Id.* § 4 (e). The original bill cited to § 14-2 of the Illinois Criminal Code of 1961 or any substantially similar statute of the jurisdiction in which the conversation was recorded. Criminal Code of 1961, § 14-2 states:

> § 14-2. Elements of the offense; affirmative defense states. A person commits eavesdropping when he:
>
> (a)Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all the parties to such conversation or (2) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963," approved August 14, 1963 as amended; or
>
> (b)Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963," approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.
>
> (c)It is an affirmative defense to a charge brought under this Article relating to the interception of a privileged communication that the person charged:
>
> 1. was a law enforcement officer acting pursuant to an order of interception, entered pursuant to Section 108A-1 or 108B-5 of the Code of Criminal Procedure of 1963; and
>
> 2. at the time the communication was intercepted, the officer was unaware that the communication was privileged; and
>
> 3. stopped the interception within a reasonable time after discovering that the communication was privileged; and
>
> 4. did not disclose the contents of the communication.

185. Ill. Public Act 87-462, § 4 (f). *See infra* Appendix A.

186. *Id.* § 4 (d).

187. *Id.* § 4 (i).

from the association or "within nine months of the institution bringing the possibility of a violation to the association."[188]

Under Section 3, any individual or institution has the right not to have illegally obtained evidenced used against them.[189] This includes the right to suppress evidence obtained during or as a result of the interrogation if the interrogation was not conducted in accordance with Section 6.[190] In esssence, Section 6 is the Act's version of the Miranda Rights with all its safeguards that apply to the criminally accused.[191]

Liability strikes right at the heart of the Act.[192] Without a doubt, the chief concern of the drafters of this Act is money.[193] The Act references the loss of potential revenue generated from athletic programs fives times.[194] Section 1 (c) encompasses revenue received from participation in national sports right down to alumni contribution.[195] The Act notes that an "institution may suffer a substantial monetary loss and serious disruption of its athletic programs" and "[a]ny such consequences upon an Illinois public institution of higher learning also has a direct impact on the amount of taxpayer support that must be provided to that institution."[196] Furthermore, the bill adds a local flavor in that it aims to also "[protect] the communities in which its schools are located from losing the economic benefits reaped from hosting major sporting events."[197]

---

188. *Id.*

189. *Id.* § 4 (g).

190. *Id.* § 6. Rights in Interrogations.

191. *Id.* Prohibitions in the Act offer further protection. *See* Ill. Public Act 87-462, § 8, *infra* Appendix A. Under the provision, an association may not impose a penalty against any member institution because of any student or employee seeking redress under this Act. *Id.*

192. *Id.* § 9.

193. *See id.*

194. *See generally* Ill. Public Act 87-486, *infra* Appendix A.

195. *Id.* § 1 (c).

196. *Id.* § 2 (i). While "the state has a right to feel pride in the accomplishments and reputations of its institution of higher learning," it is a lot easier to be proud when your school's athletic budget is in the black rather than in the red. For example, Penn State's football program pays the bills for every other intercollegiate sport on the Nittany Lion campus. Parillo, *For Penn State and Syracuse, One Last Rumble*, PHILA. INQUIRER, Oct. 13, 1990, at, 3D. In order to achieve this, Penn State decided it must play six home football games every season to meet its fiscal needs. *Id.* When Syracuse was unwilling to play at Penn State six times every decade and host only four games, the 60 year series ended. *Id.*

197. *Id.* at § 2(k).

V. THE NCAA'S VIEWPOINT

It was not surprising that the NCAA opposed the Act. In a letter to Illinois Governor Jim Edgar, John J. Kitchin, General Counsel (General Counsel) for the NCAA outlined the association's opposition to the bill.[198] By way of introduction, the General Counsel stated that for several reasons the Act mischaracterized the NCAA as a "monopoly" from which the thirty-seven Illinois member institutions need protection.[199] First, according to General Counsel's definition, a monopolist is "one who acquires or maintains the monopoly by *illegal means*."[200] Second, there is nothing in the Findings of the Act that evidences a monopoly acquired or maintained by illegal means.[201] Finally, General Counsel noted that in the antitrust sense, the United States Supreme Court had held in *NCAA v. Board of Regents*[202] that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. . . ."[203] According to General Counsel the Act raises specific constitutional and other legal questions such as:

> 1.Does the Act violate the commerce clause of the U.S. Constitution where there is a need of an athletic association to have uniform enforcement of rules throughout the states?
>
> 2.Would the Act be in violation of a private association's and its members' substantive due process or equal protection rights?
>
> 3.Does the Act prohibit an association from disciplining its members in a consistent manner?
>
> 4.Does the Act amount to an improper interference in the internal affairs of a private entity without the usual showing of arbitrary or capricious conduct on the part of the association?
>
> 5.Does the Act improperly constitute special legislation?
>
> 6.Does the Act improperly interfere with the existing relationship between an association and its members?

---

198. Letter from NCAA General Counsel, *supra* note 170.

199. *Id.* According to General Counsel, "the Act provides that the member institutions need protection from themselves, as it is the members that enact all the NCAA legislation, including the NCAA Enforcement Procedures. It is not the collegiate athletic association itself, but the members, that 'exercise(s) great power'." *Id.*

200. *Id.* (emphasis in original).

201. *Id.*

202. 468 U.S. 85 (1984).

203. Letter from NCAA General Counsel, *supra* note 170, (quoting *Board of Regents*, 468 U.S. at 101-102). General Counsel also pointed out that the Act's jurisdictional basis in the Findings Section 2(h) is directly contradicted by the holding in *Tarkanian*. *Id.*

> 7.Is the recitation of the jurisdictional basis for the Act contrary to the ruling of the United States Supreme Court?[204]

The NCAA's position has always been that the NCAA Enforcement Procedures, adopted by the member institutions and applied by the members themselves, contained the elements required for fair hearings.[205] In addition, the NCAA has consistently pointed to the fact that the members of the Committee are prominent educators.[206] With regard to the latter, General Counsel stated that "[t]he members of the Committee are independent-minded educators of the highest caliber who would not be a party to any 'kangaroo court' or 'star chamber.' "[207] In addition he stated:

> Finally, there are procedures in place providing for an appeal to the NCAA Council of both the findings and penalty assessed by the Committee on Infractions. All of these procedures have been enacted by the member institutions and are designed to provide notice, the opportunity to present the facts, a fair hearing and a just result.[208]

In closing, General Counsel advised Governor Edgar of the existence of the Special Committee.[209] The Special Committee conducted

---

204. *Id.* In connection with item 7 General Counsel stated:

> [T]he Supreme Court has ruled that the NCAA's activity as set forth in its Enforcement Procedures should be considered in the same manner as other private entities such as stock exchanges. In looking at the fundamental policies of the NCAA, the manner in which the members adopt rules, how the members agree to abide by and enforce such rules, the Court concluded that the NCAA's function of fostering amateur athletics at the college level did not amount to state action.

Id.

205. The letter of General Counsel to Governor Edgar supports this position.

206. *Id.* The members of the committee include authors and law professors Charles A. Wright and John E. Nowak. *Id.* Both have also testified on behalf of the NCAA at congressional hearings.

207. *Id.*

208. *Id.* General Counsel also stated:

> Provisions are present for requiring that notice of charges be given with detailed facts underlying the alleged violations included in the notice. Institutions, coaches, and student-athletes have the right to have an attorney represent them at all stages of the proceedings. Attorneys may interview any witnesses the NCAA staff has interviewed. Institutions and individuals are given the names and addresses of all witnesses interviewed by the NCAA. Institutions are urged to separately investigate and present evidence to the Committee on Infractions. No evidence developed by the NCAA can be submitted to the Committee that has not previously been given to the institutions or individuals charged.

Id.

209. *Id. See supra* notes 151-54 and accompanying text.

hearings and gathered information in order to make recommendations concerning the NCAA enforcement and infractions processes.[210]

VI. Discussion

A. General Questions

There are several unanswered questions regarding the Act, in particular Section 4. For instance, Section 4(a) is vague as to whether the Act is meant to apply only to institutions located in the State of Illinois.[211] It is unclear whether the phrase "operating in the State of Illinois" is meant to include visiting teams who come to Illinois to participate in an athletic event.[212] If the phrase is meant to impose Illinois legislation on other state teams, it would be a violation of the interstate commerce provisions of the Federal Constitution.[213] It should also be noted that the standard of "clear and convincing evidence" for a hearing's findings required by Section 4(b) is a higher standard of proof than is required in civil lawsuits or administrative hearings.[214]

---

210. *Id.*
The Special Committee members were former Chief Justice of the United States, Warren E. Burger; two U.S. district judges, Morris S. Arnold of the Western District of Arkansas and Robert R. Merhige, Jr. of the Eastern District of Virginia; a former Mississippi state supreme court judge, Reuben V. Anderson, Jackson, Mississippi; Paul R. Verkuil, president of the College of William and Mary and former law school dean at Tulane University; Charles Ehrhardt, professor of law and faculty athletics representative at Florida State University; Becky R. Frency, general counsel for North Carolina State University, and two members of the NCAA Council—Charles Cavagnaro, a former newspaper editor who is now director of athletics at Memphis State University, and William M. Sangster, dean of the college of engineering and faculty athletics representative at Georgia Institute of Technology and a former president of the American Society of Civil Engineers.
Id.

211. Ill. Public Act 87-462, § 4(a), *infra* Appendix A.

212. The language in Section 4(a) also refers to "any institution of higher education" and "any student or employee" when mandating that no penalty may be imposed without following the rules of this Section. *Id.*

213. *Id.* Section 6(b) requires that when any person suspected of a violation is interrogated, only a certified Illinois court reporter is authorized to make the transcript of such proceeding. This requirement is too restrictive as it may be necessary to obtain information from a person who may not be within the jurisdiction of Illinois. Suffice it to say, any state certified reporter should be allowed to take a statement under oath or the NCAA can pay an Illinois court reporter to take such a statement.

214. The standard of clear and convincing proof is applied to measure the necessary persuasion for a charge of fraud or providing the existence and content of a last will or deed or constructive trust.

Section 4(d) allows for the cross-examination of witnesses.[215] Because the NCAA, as a private association, does not have the power to compel witnesses to attend a hearing, General counsel argued that this section alone could prevent any association from enforcing its rules.[216] It is true that the NCAA can neither subpoena nor force a witness to appear at a hearing. However, this has not stopped the NCAA in the past from interviewing witnesses during its investigative procedure.

Section 4(h) requires an association to hold public hearings.[217] The NCAA is opposed to holding public hearings as required in 4(h) for two reasons.[218] First, the NCAA cannot force someone to be interviewed.[219] Second, names of institutions, student-athletes and employees of institutions are frequently mentioned during a hearing, but are not found to be in violation of any rule.[220] Thus, the line of reasoning is that a witness would be less inclined to cooperate with either the institution or the NCAA for fear that his or her name would be the subject of media exposure.[221] The NCAA has argued that a stigma would attach to these persons or entities if the media were allowed to attend.[222] However, the NCAA seems to miss the point. As one judge stated:

> Even the most blase and hardened campus observer would recognize the obvious stigma that attaches to a declaration of athletic ineligibility, particularly when such ineligibility is based on alleged professionalism, as opposed to more routine academic insuffiency. A reasonable if not necessary implication would be that plaintiffs lacked moral fiber because they took money under improper circumstances. Such an implication would scar their reputations, not only on their own campus but in athletic circles throughout the country, in a way that no subsequent finding of eligibility would ever fully erase.[223]

---

215. Ill. Public Act 87-462, § 4(d), *infra* Appendix A. General counsel admitted that there is nothing wrong with requiring that any person or institution charged with an alleged violation of an association's rules be entitled to counsel and be given an opportunity to defend against such charges. Letter from NCAA General Counsel, *supra* note 170.

216. Ill. Public Act 87-462, § 4(d), *infra* Appendix A.

217. Ill. Public Act 87-467, § 4(h), *infra* Appendix A.

218. Letter from NCAA General Counsel, *supra* note 170.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152, 1159 (D. Mass. 1973).

There are also questions regarding those provisions relating to the reviewing power of the court. First, as General Counsel pointed out, a reviewing court ordinarily cannot substitute its judgment for that of the lower court.[224] Nor can appellate courts disturb a lower court's findings unless those findings are manifestly against the weight of the evidence. However, Section 4(j) requires that the finding be "consistent with the manifest weight of the evidence."[225] Second, paragraphs (a), (b) and (c) of Section 5 require that any penalty bear a reasonable relationship to the violation committed, that it be commensurate with those applied in "similar situations for similar violations," and that any penalty be subject to review in circuit courts.[226] Thus, it is unclear whether this section allows the circuit court to substitute its judgment for the judgment of the NCAA membership which has enacted legislation enumerating penalties.

B. The Rule of Non-Review

It is evident that the Act makes several references to economic consequences for constitutional reasons, specifically, the rule of non-review.[227] The key constitutional question is whether the actions of a private organization are subject to review. The rule of non-review was first addressed in *Mauer v. Highland Park Hospital Foundation.*[228] The court held a private hospital's refusal to appoint a physician to its medical staff is not subject to judicial review.[229] The rationale behind the rule is that a court is unwilling to substitute its judgment for that of private hospital authorities.[230] However, two exceptions to the rule of non-review have developed in Illinois.[231] First, courts can

---

224. Letter from NCAA General Counsel, *supra* note 170.

225. Ill. Public Act 87-467, § 4(h), *infra* Appendix A.

226. Ill. Public Act 87-467, § 5. Section 5 allows for various interpretations about "similar situations" and "similar violations." *Id.*

227. Since the Illinois appellate courts adopted the rule of non-review of a private hospital's denial of a physician's application of staff membership, it is free to modify and interpret the doctrine to correspond with prevalent consideration of public policy and social needs. *See* Nudd v. Matsoukas, 131 N.E.2d 535, 531 (1956) (holding that doctrine of parental immunity is subject to modification).

228. 232 N.E.2d 776 (Ill. 1967). In *Mauer*, the appellate court first recognized the rule of non-review. Other appellate courts have acknowledged the rule in several subsequent cases. *See, e.g.*, Rao v. Saint Elizabeth's Hosp. of the Hosp. Sisters of the Third Order of Saint Francis, 488 N.E.2d 685 (Ill. 1986); Knapp v. Palos Community Hosp., 465 N.E.2d 554 (Ill. 1984); Spencer v. Community Hosp. (1980), 408 N.E.2d 981 (Ill. 1980).

229. *Mauer*, 232 N.E.2d at 778.

230. *Id.* at 779.

231. *Id.*

review the application procedures of a private association when membership in the organization is an economic necessity.[232] Second, where a private hospital revokes or reduces a physician's existing staff privileges, the hospital must follow its own bylaws in so doing or be subject to limited judicial review.[233]

The Illinois Supreme Court addressed whether the actions of a private, voluntary organization are subject to judicial review in *Van Daele v. Vinci*.[234] In *Van Daele*, the plaintiff sought to permanently enjoin Certified Grocers of Illinois, Inc. (Certified) from enforcing resolutions of Certified's board of directors (Board) to expel plaintiffs from membership in Certified.[235]

Certified was a private, voluntary organization of independent retail grocers doing business under the Illinois Cooperative Act[236] and the Illinois Business Corporation Act.[237] Hickory Hills Super Mart, Inc. (Hickory), Sparkle Food Center, Inc. (Sparkle) and other shareholders of Certified had filed a derivative class-action suit against the chairman and other members of the Board.[238] The suit averred that the defendants was aware or should have been aware of the alleged activities of a Certified employee whose malfeasance in the operation of Certified's building program resulted in a substantial loss to Certified.[239]

Certified's Board then sent notices to plaintiffs, Hickory and Sparkle, notifying them of a special Board meeting.[240] The reason for the special meeting was to determine, pursuant to the corporate by-

---

232. *See* Treister v. American Academy of Orthopaedic Surgeons, 396 N.E.2d 1225, 1231 (Ill. 1979).

233. Jain v. Northwest Community Hosp., 385 N.E.2d 108, 112 (Ill. 1978).

234. 282 N.E.2d 728 (Ill. 1972), *cert. denied sub nom.* Certified Grocers of Illinois, Inc., et. al. v. Sparkle Food Ctr., Inc., et. al., 409 U.S. 1007 (1972). *See also* 72 A.L.R.3d 412 (1976).

235. *Van Daele*, 282 N.E.2d at 729. The plaintiffs also sought to prevent the defendants from taking "any punitive action against [p]laintiffs by reason of the resolutions." *Id.*

236. ILL. REV. STAT. ch. 32, paras. 305-31 (1969).

237. ILL. REV. STAT. ch. 32, paras. 157.1-167 (1969).

238. *Id. Van Dade*, 282 N.E. at 729. The case just happened to be pending at the time.

239. *Id.* Hickory and Sparkle requested injunctive relief to prevent the defendants from taking actions which would censure, suspend or expel them from membership in Certified. *Id.* The trial court continued disposition of the equitable request until the board had acted on the pending charges. *Id.* Plaintiffs amended their complaint adding a count alleging, *inter alia*, that they would not receive a fair hearing before the board because many of the board members were defendants in the present action and because the board was seeking retribution instead of acting in good faith when it initiated the disciplinary proceeding. *Id.*

240. *Id.* at 730.

laws, whether Hickory and Sparkle should be censured, suspended or expelled as members of Certified.[241]

The plaintiffs argued that the expulsion proceedings were so grossly unjust that they violated fundamental principles of due process of law.[242] Specifically, they contended that the Board could not have fairly decided the plaintiffs' case as many of its members were involved in the events which resulted in the lawsuit.[243]

The defendants disagreed maintaining that plaintiffs were allowed all appropriate protections in that they were granted every request for information or production of documents and were given notice of the pending charges and were permitted to discredit these charges at the hearings.[244] The defendants also argued that the Board was not precluded from hearing the allegations merely because the Board had brought the charges.[245] Finally, the defendants asserted that the Board was not biased as the corporate bylaws exclusively authorized expulsion by Board action.[246]

The court rejected the defendants' contention noting, "[t]here are too many factors indicating that the proceedings were in fact not good faith disciplinary hearings, but in reality, an attempt to silence and censure dissident members of the association."[247] The *Van Daele*

---

241. *Id.* The stipulated facts were that

> [t]he charges against Hickory and Sparkle arose from the alleged activities of Adolph Kalchbrenner, a shareholder and president of Hickory, and Frank R. Guinta, a shareholder and officer of Sparkle. It was alleged that Kalchbrenner and Guinta associated with the Certified Stockholders Committee for Fair and Better Management, disrupted Certified's business, impeded the resolution of problems associated with Certified's construction program, spread false rumors and made untrue statements which were intended to and which did injure Certified's directors and officers, and engaged a public relations firm to publicize charges against Certified for the purpose of aiding the election of the Stockholders' Committee's nominees to the Board of Directors of Certified.

Id. (citation omitted).

242. *Id.* at 731.

243. *Id.* Certified's bylaws stated that expulsion can only occur by "the affirmative vote of not less than two-thirds of the directors present at a board meeting." *Id.* The resolutions to expel Hickory and Sparkle were passed by eleven board members, seven of which were defendants in the pending lawsuit. *Id.* Since Hickory and Sparkle were expelled by ten affirmative votes, apparently at least six defendants voted to expel each plaintiff. *Id.* In addition, plaintiffs claimed that the evidence against them was introduced by the same attorney who was representing the seven board members in the derivative case, thereby placing the directors in the contradictory position of being both prosecutors and judges. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* The court agreed that the board did follow the procedure for the disciplinary hearings set forth in the bylaws. *Id.*

247. *Id.* The court stated:

court acknowledged that Illinois had traditionally refused to interfere in the internal operations of associations.[248] However, since an important economic interest of the plaintiffs was affected by an improper administrative proceeding, the court determined that it had the power and the duty to act.[249] The court stated:

> We recognize that strict adherence to judicial standards of due process would be arduous and might seriously impair the disciplinary proceedings of voluntary associations such as retail grocers. . . . However, one subjected to such disciplinary actions should be accorded a hearing before a fair and impartial tribunal. To hold otherwise would be a denial of essential rights. We agree "that a private organization, particularly if tinged with public stature or purposes, provided for in organization bylaws, carried forward in an atmosphere of good faith and fair play."[250]

> The record clearly shows that the Board was comprised of seven members that were also defendants in the pending derivative action. The allegations against the plaintiffs were supported entirely by the depositions, excerpts of record, and statements taken for use in the suit which were introduced in an attempt to authenticate various exhibits. The Board's decision to expel plaintiffs was based on at least six of the defendants voting against the plaintiffs. The bylaws provide that a commission could be appointed to investigate the conduct of members and report to the board independently to avoid the possibility of bias in situations where the board members report to the Board independently to avoid possibility that the plaintiffs were not given a fair hearing.

Id.

248. *Id.*

249. *Id.* The *Van Daele* court agreed with the view expressed by the Supreme Court of New Jersey in Falcone v. Middlesex County Medical Soc'y., 170 A.2d 791 (N.J. 1961). The *Falcone* court wrote:

> We are here concerned with and therefore deal solely with an organization, membership in which may here, in the language of *Trautwein* [Trautwein v. Harbourt, 123 A.2d 30 (N.J. 1956)], be viewed as an economic necessity; in dealing with such an organization the court must be peculiarly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objective of the organization.

Falcone, 170 A.2d at 796-97.

250. *Van Daele*, 282 N.E.2d at 732 (quoting McCune v. Wilson, 237 So.2d 169, 173 (1970)). The court stated that "[t]he rationale for this position as enunciated in *McClune* results from the character of the organization, i.e., its assumption of a purpose which exceeds merely that of a social organization and its endeavor to benefit from various State and Federal laws." *Id.* The court also stated:

> We are mindful of the caveat . . . that one who faces disciplinary proceedings before a tribunal in a voluntary association need only vilify the entire organization thereby rendering all members of that body incompetent to try him, and, consequently, rendering the group totally incapable of defending itself against the vicious, unwarranted attacks of a member. If such a situation were to develop, however, we believe that the association is capable of formulating proper disciplinary procedures.

Id. (citations omitted).

The court held that under the facts presented surrounding the disciplinary hearings, the plaintiffs were denied due process of law.[251] Consequently, the court invalidated the resolution expelling plaintiffs from Certified affirming that the circuit court properly enjoined Certified from enforcing the resolutions.[252]

In *Barrows v. Northwestern Memorial Hospital*,[253] the plaintiff alleged that the defendant denied him staff privileges because he did not have a pre-existing business relationship with a doctor already on defendants' staff.[254] The plaintiff alleged that as a result of this unwritten policy, the defendants admitted two other physicians to the hospital staff with qualifications that were no better than those of plaintiff, at the same time that defendants denied the plaintiff staff privileges.[255]

The plaintiff alleged in the complaint that the defendants were aware of his relationship with the hospital's physicians yet the defendants denied him staff privileges in order to interfere with this pre-existing relationship and to deprive the plaintiff of his source of patients.[256] Plaintiff sought to have defendants enjoined from enforcing their unwritten policy.[257] Defendants invoked the rule of non-review, upon which the trial court based its dismissal.

The *Barrows* court noted that those courts that had adopted the rule of non-review had found that private hospitals were private institutions and that as a general rule, "courts of equity would not interfere with the internal management of a corporation unless the act

---

251. *Id.*

252. *Id.* Plaintiffs had also contended that the expulsions should be enjoined because there was no evidence was introduced at the board hearings to support the five charges brought against Hickory and Sparkle. *Id.* However, the court did not address this issue or the other contentions because of its disposition of the primary issue. *Id.*

253. 505 N.E.2d 1182 (Ill. 1987).

254. *Id.* at 1184.

255. *Id.*

256. *Id.* Plaintiff also maintained that defendants conspired to deprive him of patients who would have chosen him to treat their children. *Id.* This conspiracy, the plaintiff alleged, deprived him of his legitimate expectation of business relationships with those patients. *Id.*

257. *Id.* Plaintiff further sought actual damages of $15,000 and an amount of punitive damages for the trial court to determine. *Id.* Plaintiff asked the trial court to find that the defendants had acted wilfully, and therefore, the court should award treble damages under counts II, III, and IV, pursuant to Section 7 of the Illinois Antitrust Act (ILL. REV. STAT. ch. 38, paras. 60-67 (1985)). *Id.* On appeal, the plaintiff presented two alternate arguments contending first, that his action fell within the economic-necessity exception to the rule of non-review and second, that the court should reevalutate the efficacy of the rule itself. *Id.*

complained of was fraudulent, illegal, or *ultra vires*."[258] As a result, those courts have concluded that " 'a private hospital has the right to exclude any physician from practicing therein, and such exclusion rests within the sound discretion of the managing authorities.' "[259] However, the *Barrows* court disagreed with past precedent stating: " 'The better rule provides that such review be available as to whether the doctor excluded was afforded procedural due process, and as to whether an abuse of discretion by the hospital board occurred, resulting in an arbitrary, capricious or unreasonable exclusion.' "[260]

---

258. *Id.* at 1186. The Illinois Supreme Court recognized the distinction between public and private institutions in an early case. *See* Washingtonian Home of Chicago v. City of Chicago, 41 N.E. 893 (Ill. 1895). The difference between a public and private hospital is key to the rationale of the rule of non-review. *Barrows*, 505 N.E.2d at 1185. By definition, "a public hospital is one that a governmental unit owns, maintains, operates, and supports with government funds." *Id.* In contrast, a private hospital "is one that a corporation or an individual owns, maintains, and controls without any participation by any governmental agency." *Id.* (quoting Shulman v. Washington Hosp. Ctr., 222 F. Supp. 59, 61 (D.D.C. 1963)). The *Barrows* court noted that "[t]he test is whether, under the charter or corporate powers that the legislature grants, the hospital has the right to elect its own officers and directors, with the power to manage its own affairs." *Id.* (quoting Edison v. Griffin Hosp., 144 A.2d 341, 344 (Conn. 1958)).

259. *Barrows*, 505 N.E.2d at 1186 (quoting Levin v. Sinai Hosp., 46 A.2d 298, 301 (Md. 1946)). The *Barrows* court agreed that with the New Jersey Supreme Court that "while the managing officials [of a private hospital] may have discretionary powers in the selection of the medical staff, those powers are deeply imbedded in public aspects, and are rightly viewed, for policy reasons . . . as fiduciary powers to be exercised reasonably and for the public good." *Id.* (quoting Greisman v. Newcomb Hosp., 192 A.2d 817 (1963)). The *Barrows* court also agreed with the Hawaii Supreme Court stating that "the discretionary power of a hospital is not absolute and that a decision of a private hospital in refusing to grant a licensed physician staff privileges is subject to judicial review." *Id.* (quoting Silver v. Castle Memorial Hosp., 497 P.2d 564, 568 (Haw. 1972)).

260. *Id.* (quoting *Silver*, 497 P.2d at 588). Although the *Barrows* court recognized the distinction between public and private institutions set forth in *Washingtonian Home of Chicago*, it once again agreed with the decision of the Supreme Court of New Jersey in *Greisman*. *Id.* In *Greisman*, New Jersey's high court stated:

> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good.

Greisman, 192 A.2d at 85.

More importantly, the *Barrows* court decided that judicial review does not require a prior find or deprivation of all economic opportunity.[261] Ultimately the *Barrows* court reversed the trial court's dismissal of the complaint.[262]

Another illustrative example is *Treister v. American Academy of Orthopedics*.[263] In *Treister*, plaintiff sued the defendant academy challenging its denial of his application for membership.[264] The plaintiff argued that the Illinois courts have explicitly approved the modern rule enunciated in *Falcone v. Middlesex County Medical Society*[265] and *Pinsker v. Pacific Coast Society of Orthodontists*[266] which

---

261. *Barrows*, 505 N.E.2d at 1187. The *Barrows* court stated: "*Greisman* indicates that since the function of the private organization in question is public, judicial review is available to hold said organization to conduct becoming a fiduciary." *Id.* (quoting Sussman v. Overlook Hosp. Ass'n, 222 A.2d 530, 537 (1966), *aff'd*, 231 A.2d 389 (1967)).

262. *Id.*

263. 396 N.E.2d 1225 (Ill. 1979).

264. *Id.* at 1226.

265. 170 A.2d 791 (N.J. 1961). In *Falcone*,the court directed the Middlesex County Medical Society to grant the plaintiff full membership. *Id.* at 800. The society had rejected the plaintiff's application based upon an unwritten membership requirement. *Id.* at 794. The court characterized the exclusion of plaintiff "as patently arbitrary and unreasonable and beyond the pale of the law." *Id.* at 800. The court explained that

> [w]hen courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were involved. The intimate personal relationships which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration. Here there have been persuasive indications . . . that in a case presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership.

Id. at 799.

266. 460 P.2d 495 (Cal. 1969). In *Pinsker*, plaintiff sought an injunction to require orthodontics associations to grant him membership. *Id.* at 497. Plaintiff argued that his exclusion from these associations deprived him of educational, financial and professional advantages. *Id.* at 498. The California Supreme Court held that "an applicant for membership has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection. *Id.* at 499. The court explained:

> Because of the unique position in the field of orthodontics occupied by the defendant AAO [American Association of Orthodontists] and its constituent organizations, membership therein, although not economically necessary in the strict sense of the word (as was the case in *Falcone*), would appear to be a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty.

mandates fair procedures and reasonable standards in the processing of applications for membership into private associations.[267] For this argument, plaintiff relied in part on *Virgin v. American College of Surgeons*[268] where the court stated:

> Whether the "interest of substance" which accrues to members of a professional association is called a "property right," "contract right" or merely the "member's relation to the association," there is a growing awareness that wrongful expulsion from a voluntary professional association has such a serious effect on the ability of the professional man to successfully pursue his livelihood and that it is a judicially protectable interest. Courts annul expulsion from voluntary associations when they are (1) not in accordance with the constitution and bylaws of the association, (2) influenced by bias, prejudice or lacking in good faith, or (3) contrary to rudimentary due process of natural justice.[269]

In *Treister*, the plaintiff asserted that since the Illinois courts essentially made no distinction between expulsion and exclusion, the law in cases dealing with expulsion should be applicable to cases involving exclusion from membership in a private association.[270] However, the court disagreed with this argument. The court stated: "[A]lthough Illinois courts will require a hospital to follow its bylaws in revoking a physician's staff privileges, . . .[271] they will not review the denial of an application for appointment to the medical staff."[272] In determining whether judicial review of the denial of the plaintiff's membership application should be permitted, the court wrestled with two competing interests.[273] While it recognized the necessity of judicial restraint from interfering with decisions of a private, voluntary association, the court acknowledged that it would be unconscionable

---

Id. The California Supreme Court remanded the case to the trial court to allow the defendants to show that the circumstances surrounding the review of plaintiff's application comported with the minimal standards for fair procedure required by common law principles. *Pinsker*, 526 P.2d at 253. On remand the defendants presented their explanation for refusing membership to plaintiff. *Id.* However, plaintiff was not permitted to rebut to the charges. *Id.* The California Supreme Court held that whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair. *Id.* The court also asserted that "fair procedure" requires that before denial of an application, the applicant must be notified of the reason for the proposed rejection and must be given a fair opportunity to defend himself. *Id.*

267. *Treister*, 396 N.E.2d at 1231.

268. 192 N.E.2d 414 (Ill. 1963).

269. *Id.* at 422-23 (citations omitted).

270. *Treister*, 396 N.E.2d at 1231.

271. *Id.* (citing Nagib v. Saint Therese Hosp., Inc., 355 N.E.2d 211 (Ill. 1976)).

272. *Id.* (citing Jain v. Northwest Community Hosp., 385 N.E.2d 108 (Ill. 1978); Mauer v. Highland Park Hosp. Found., 232 N.E.2d 776 (Ill. 1967)).

273. *Id.*

for a private association to arbitrarily deprive an individual of the right to pursue his or her profession.[274]

Thus, the *Treister* court held that where membership in the organization is an economic necessity, Illinois courts may review the application procedures of a private association.[275] In reaching this conclusion, the *Treister* court approved of the opinions in *Falcone*[276] and *Blende v. Marisopa County Medical Society*[277] which hold that if denial of membership in a society will deprive an applicant hospital staff privileges, then the society may not arbitrarily deny applicant membership.[278] The plaintiff in *Treister* had not alleged that membership in the Academy was an economic necessity.[279] The *Treister* court stated that while "we sympathize with the plaintiff's frustration with the academy's refusal to give him the courtesy of an explanation of the denial of his application, we believe the courts must refrain from interfering in the affairs of a private association absent a showing of economic necessity."[280]

Given the Illinois case law, it would appear that an Illinois institution could have a finding by the NCAA judicially reviewed pursuant to the Collegiate Athletic Association Compliance Enforcement Procedures Law. An institution can make a solid argument under a theory of economic necessity. The question is whether the Illinois Supreme Court is willing to expand upon *Van Daele v. Vinci* to include reprimand as well as expulsion.

VII. Conclusion

If the purpose of the Illinois legislature is to push the NCAA to reform its past ways, the present Act would seem to have accom-

---

274. *Id.*

275. *Id.*

276. *See supra* note 265 and accompanying text for a discussion of this case.

277. 96 Ariz. 240, 393 P.2d 921 (1964). In *Blende*, the court held that the plaintiff's membership application to the society could not be denied arbitrarily if such a denial would deprive the plaintiff of his staff privileges at the hospital. *Id.*

278. *Treister*, 396 N.E.2d at 1231.

279. *Id.* at 1232. The plaintiff's complaint had alleged that membership in the academy is a "practical necessity . . . to realize maximum potential achievement and recognition in his specialty," restating language used by the California Supreme Court in *Pinsker*. *Id.* However, the *Treister* court refrained from following *Pinsker*, "because such a holding would result in complaints for judicial review of every application rejection by a voluntary association since membership in most organizations results in some professional or economic benefits." *Id.* (citing Blatt v. University of Southern California, 85 Cal. Rptr. 601 (1970)). In *Blatt*, the plaintiff sought to compel membership in the Order of the Coif, a national honorary legal society. *Id.*

280. *Id.* at 1232.

plished it. There is no question that the Act addresses due process concerns whose time were long overdue. Presently, the only procedural safeguards available during any NCAA enforcement hearing are notice of the charges, the right to have counsel present, and an opportunity to appear at the hearing. In addition to these, the following rights should be incorporated for member institutions and student-athletes:

1. The right to a fair and impartial hearing.
2. The right to a public hearing.
3. The right to present a complete defense involving the right to cross-examine witnesses.
4. The right to full disclosure and discovery of all facts and matters relevant.
5. The right to a speedy trial.

The NCAA should also be required to tape and transcribe all interviews. Conversely, formal rules of evidence should not be used with the exeption that hearsay be inadmissible.

It should be noted that only NCAA member colleges and universities themselves can adopt legislation of the NCAA that governs the conduct of the association during the Association's Annual Convention.[281] Furthermore, the membership of all Committees of the NCAA is comprised of only individuals who are full-time staff members of the institutions.[282] No NCAA staff person is a voting member of any NCAA Committee or the NCAA's forty-six member Council which directs the policies of the NCAA between Conventions.[283]

281. NCAA Constitution § 5.3 et seq. As few as eight active members of the NCAA can introduce such legislation. *Id.*

282. *Id.* at § 4.6. These Committee members are elected by the members from the various institutions, with further provisions in the Association's constitution requiring representation from various membership divisions and from various regions throughout the United States, as well as requiring that a specified member of Divisional Representatives consist of chief executive officers and women members from the member institutions. *Id.*

283. *Id.*

APPENDIX A

AN ACT concerning athletic associations and the rights of member institutions.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

§ 1. This Act may be cited as the Collegiate Athletic Association Compliance Enforcement Procedures Act.

§ 2. Findings. The General Assembly finds that:

(a) All parties to any type of contract in Illinois are entitled to certain protections under law in the making of contracts and the resolution of disputes under those contracts. The duty of the State and its institutions to protect its citizens, institutions of higher learning, businesses, and other entities is especially strong where the parties have greatly unequal bargaining power and one party is essentially a monopoly providing a needed product, service, or relationship which cannot be obtained elsewhere.

(b) Collegiate athletic associations are national unincorporated associations consisting of both private and public colleges and universities and are essentially monopolies controlling intercollegiate athletics throughout the United States, giving them great leverage in dealing with local Illinois institutions who need membership to participate in sports on a national level.

(c) Participation in sports on a national level is essential because it brings recognition to the university or college. It also creates a greater sense of pride and loyalty among students, faculty, alumni, and other citizens who may contribute more to the school of their choice because of its sports successes or support it more intensely in other ways. Further, participation in national sports brings in revenue to the university that helps to fund its various programs.

(d) Membership in a national collegiate athletic association of schools of similar size or function is essential for Illinois institutions of higher learning to compete on a national level in all sports of any significance.

(e) Collegiate athletic associations adopt rules governing member institutions' admissions, academic eligibility, and financial aid standards for collegiate athletes. Any member institution must agree contractually to administer its athletic program in accordance with a collegiate athletic association's legislation.

(f) Obviously, collegiate athletic associations exercise great power over member institutions by virtue of their monopolistic control over intercollegiate athletics and the power to prevent a nonconforming

institution from competing in intercollegiate athletic events or contests.

(g) Again, obviously, the procedures employed to determine whether violations of association rules have occurred are of paramount significance. Present collegiate athletic association rules provide that association enforcement procedures are an essential part of the intercollegiate athletic program of each member institution. This can provide an inadequate method of protecting Illinois institutions and their students and employees, such as coaches or athletic directors, if the procedures are not fair to all those charged with violations.

(h) Collegiate athletic associations engage in a governmental or regulatory type of activity amounting to State action over all member institutions. Further, when the regulation is of a State-created institution funded by taxpayer dollars, it should be obvious that the association receives its authority from the State or its agents. By force of their rules, applicable only by agreement with the public institution, they can cause such an institution to take certain actions necessary to remain in the association, with all that entails. Any sanction against a public institution, then, must be effectuated by the joint action of that association and the public institution.

(i) The State of Illinois has a deep public interest in ensuring that the procedures for determining whether violations of association rules have actually occurred are fair to its students, university or college employees, institutions of higher learning, and the communities in which the institutions operate.

The individual student athlete or employee, such as a coach or athletic director, risks serious damage to his or her reputation, the means to make a livelihood, and personal and professional aspirations.

The institution may suffer a substantial monetary loss and serious disruption of its athletic programs. Any such consequences upon an Illinois public institution of higher learning also have a direct impact on the amount of taxpayer support that must be provided to that institution. Moreover, the State has a right to feel pride in the accomplishments and reputations of its institutions of higher learning and seek to protect its institutions' reputations from harm inflicted by unfair means.

(j) If fairness and due process are not required in the determination of whether violations have occurred, the possibility exists of imposing penalties in an arbitrary and capricious manner resulting in

the unwarranted tarnishing of the reputations of great institutions of higher education and of many individuals associated with those institutions.

(k) The State has an interest in protecting the communities in which its schools are located from losing the economic benefits reaped from hosting major sporting events.

(l) The present procedures of collegiate athletic associations do not reflect the principle that one is innocent until proven guilty. Because of such potentially serious and far-reaching consequences, the procedures used to determine whether a violation of substantive association rules has occurred should reflect greater fairness and due process considerations than now apply and should provide for a speedier determination than at present of whether a violation of association rules has occurred.

§ 3. Definitions.

"Collegiate athletic association", "athletic association", and "association", for purposes of this Act shall mean any organization of colleges and universities whose major function is the promotion and regulation of collegiate athletics which also meets the following criteria:

(a) such organization has at least 200 member institutions in the United States;

(b) such organization has members in at least 40 states; and

(c) the members of such organization collectively receive at least $2 million annually in revenue from the telecast or broadcast of their athletic activities.

§ 4. Hearing required as prerequisite to finding of violation; Procedures applying at hearing.

(a) No penalty may be imposed by a collegiate athletic association on any institution of higher education operating in the State of Illinois, nor shall any collegiate athletic association require or cause any institution of higher education to impose a penalty on any student or employee, unless the findings upon which the penalties are based are made at a formal hearing in conformity with the rules of this Section. Any association may adopt rules prescribing the procedures for such a hearing, including the method of selecting a presiding officer, provided that such rules are not inconsistent with this Act.

(b) Any finding must be made in writing and supported by clear and convincing evidence.

(c) Any individual employee or student who is charged with misconduct must be notified, in writing, at least two months prior to the hearing of the specific charges against that individual, that a hearing will be held at a specific date and time to determine the truth of the charges, and that a finding that the misconduct occurred may result in penalties imposed on the institution or imposed by the institution on the individual. The institution shall also be notified in writing of the hearing on the charges.

(d) Any such person or institution has a right to have counsel present, to interrogate and cross-examine witnesses, and to present a complete defense.

(e) Except as otherwise provided in this Act, the rules of evidence applying at civil trials in Illinois shall apply at such hearings. Further, no recording of any conversation is admissible where the recording was made in violation of Section 14-2 of the Criminal Code of 1961 or any substantially similar statute of the jurisdiction in which the conversation was recorded. Moreover, no transcript of the recording nor any evidence directly or indirectly derived from such recording is admissible.

(f) Any individual charged with misconduct which might result in a penalty, and the institution with which he or she is associated, shall be entitled to full disclosure of all facts and matters relevant to the same degree as a defendant in a criminal case and shall have the same right to discovery as applies in criminal and civil cases.

(g) Any individual or institution may suppress at the hearing any evidence garnered from any interrogation of any party if the evidence was not procured in accordance with Section 6 or if obtained indirectly because of interrogations not in conformity with Section 5.

(h) Any hearing shall be open to the public unless any party charged with misconduct or the institution involved objects.

(i) No hearing may be held on any given charge unless commenced within 6 months of the date on which the institution of higher education first receives notice of any kind from the association that it is investigating a possible violation of its rules, or, in a situation in which the institution itself brings the possibility of a violation to the attention of the association, unless commenced within nine months of the date such notice is provided to the association. The running of the six or nine month period shall be tolled because of any delay occasioned by the institution or individual being investigated, whether or not for good cause. Any individual charged with a violation or the institution with which he or she is affiliated may petition

the circuit court for a determination of whether the provisions of this subsection (i) have been violated prior to proceeding with the hearing. The filing of any such petition tolls the running of the six or nine month period.

(j) The association conducting the hearing shall cause a complete transcript of any hearing to be made at its expense by a certified Illinois court reporter. If an individual charged with a violation or the institution with which he is associated so requests, a copy of the transcript shall be provided to the requesting party within 21 days of the request and the cost of providing the transcript shall be assumed by the association.

(k) Any findings made pursuant to the hearing under this Section are subject to review in the circuit court.

§ 5. Penalties.

(a) Any penalty imposed upon an institution by an association or any penalty required by the association to be imposed on a student or employee must bear a reasonable relationship to the violation committed.

(b) Any penalty must be commensurate with those applied in similar situations for similar violations.

(c) Any penalty imposed on an institution or, because of an association directive, on an individual shall be subject to review in circuit court.

§ 6. Rights in interrogations.

(a) In any interrogation of any person suspected of a violation of association rules, at the point at which the association should reasonably believe the person might have violated association rules, it shall inform the person that it is investigating him or her for misconduct which might result in the imposition of a penalty on such individual or his or her institution.

(b) At such point, the person interrogated is entitled to have counsel present at any further interrogation and need not respond further until provided with reasonable time to obtain counsel. The person interrogated is entitled to a complete recording of any subsequent interrogation and a transcript of the full interrogation made at the expense of the association. The transcript shall be made by a certified Illinois court reporter.

The association or its agent shall inform the person to be interrogated of those rights before proceeding and shall obtain written acknowledgement of such provision.

(c) In any proceeding or hearing held to determine whether a violation has occurred under Section 1-4, any party who has been subject to an interrogation, or the institution with whom he or she is associated, may seek to suppress evidence obtained during or as a result of the interrogation if the interrogation was not conducted in accordance with this Section.

§ 7. Nothing in this Act limits the right of any individual or institution to claim the abridgement of any other due process right not enumerated in this Act.

§ 8. Prohibitions.

(a) No association shall impose a penalty on any institution for a violation of the association's rules or legislation unless the findings which are the basis for the penalty are made, and the penalty itself is imposed, in accordance with this Act.

(b) No association shall impose a penalty on any college or university for failure to take disciplinary action against any employee or student for the violation of association rules or legislation unless the findings which are the basis for the penalty are made, and the penalty itself is imposed, in accordance with this Act.

(c) No association may terminate the membership of any institution because of the enactment or application of this Act, nor shall any association impose a penalty upon any institution for seeking redress under this Act.

(d) An association may not impose a penalty against any member institution because of any student or employee seeking redress under this Act.

§ 9. Liability.

(a) An association that violates this Act is liable for damages to an aggrieved institution or individual incurring injury as a result of the violation of this Act. Damages shall include, but are not limited to, all financial loss incurred due to the imposition of a penalty in violation of this Act. Any association found guilty of violating this Act is also liable for the costs, litigation expenses, and attorney's fees of any party prevailing against it.

(b) Any institution or individual aggrieved as a result of this Act shall also be entitled to appropriate equitable relief.

§ 10.

(a) Any rights created under this Act shall apply only to any matter of investigation commencing on or after the effective date of this Act.

(b) The provisions of this Act apply notwithstanding any contract or agreement entered into before, on, or after the effective date of this Act. Any contractual provision to the contrary is invalid and unenforceable. No provision of this Act may be waived by any member institution as a condition of continued membership in the association or otherwise.

§ 11. Exclusions. This Act shall not apply to investigations relating solely to academic qualifications.

§ 12. Cumulative remedies. The remedies provided in this Act are cumulative and in addition to any other remedies provided by law.