

THE NCAA: IT'S NECESSARY, BUT IT'S NOT THE FBI

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“Let me say this in general about all rules, whether it’s transfer rules or camp rules or any rules: We need to have the same rules in the Big Five. . . . If we’re going to compete for the championship and everybody is going to play in the playoff system and everybody’s going to compete for that, we need to get our rules in alignment so we’re all on a level playing field. These things need to be global, otherwise, we’re going to become a farm system for all the other leagues.”

Alabama Head Football Coach Nick Saban¹

INTRODUCTION

Coach Saban is right. For a competitive situation to exist around any sports league, the participants must agree on certain

¹ Dan Wolken, *New reality hits SEC coaches hard*, USA TODAY, (May 27, 2015), available at <http://www.pressreader.com/usa/the-arizona-republic/20150527/282308203700307/TextView>.

rules, and they must be held to those rules.² Those purposes were fundamental to the original formation of college conferences, and they remain a basic purpose of the National Collegiate Athletic Association (NCAA) today. Unfortunately, many people—including some who are in positions of power at the NCAA—seem to have forgotten this, and they have focused on issues that seem to concern little more than flexing the institution’s muscle. That is the fundamental failure of the NCAA in the recent past.

The NCAA is an association of over 1,000 member colleges, conferences, and universities.³ It is the governing body for intercollegiate sports.⁴ It was founded in 1906 to protect young men from dangerous and exploitative athletic practices at the time. Over the years, “[i]t has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.”⁵

The purpose of the NCAA “is to maintain intercollegiate athletics as an integral part of the educational program” and “retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁶ The NCAA’s constitution and bylaws strive to do just that. The U.S. Supreme Court has acknowledged “the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important.”⁷ The

² Saban was discussing the “Power Five” conferences, which includes the top sixty-four schools in the richest five conferences (the Atlantic Coast Conference (ACC), Big 12, Big Ten, Southeastern Conference (SEC) and Pacific-12 (Pac-12)) plus Notre Dame. In certain defined categories, this group can submit its own legislation and have it enacted by the NCAA. See Brian Bennett, *NCAA board votes to allow autonomy*, ESPN COLLEGE FOOTBALL, (Aug. 8, 2014), http://espn.go.com/college-sports/story/_id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences.

³ The NCAA is a voluntary unincorporated association composed of 450,000 student athletes attending over 1,000 universities. NCAA, www.NCAA.org (last visited Sep. 17, 2015); see Dan Wolken, *New reality hits SEC coaches hard*, USA TODAY, (May 27, 2015), available at <http://www.pressreader.com/usa/the-arizona-republic/20150527/282308203700307/TextView>.

⁴ *Amateurism and the Future of the NCAA*, Symposium Transcript, 3 MISS. SPORTS L. REV. 1, 4 (2013).

⁵ NCAA v. Board of Regents, 468 U.S. 85, 88 (1984).

⁶ 2014-2015 NCAA Division I Manual, art. 1.3.1 (2014), available at <http://www.ncaapublications.com/productdownloads/D115.pdf>. [hereinafter *NCAA Manual*].

⁷ In NCAA v. Board of Regents, at 117 (1984), the Court recognized that the product of intercollegiate athletics inherently requires some restraint: “[T]his case

NCAA formulates, oversees, and enforces the policies, rules, and regulations that govern all aspects of intercollegiate athletics.⁸ “By joining the NCAA, each member agrees to abide by and to enforce [NCAA legislation].”⁹ Despite much criticism,¹⁰ if the NCAA dissolved, a similar organization would have to take its place or the collegiate sports experience would cease to exist.

In trying to regulate amateurism in major programs with astronomical revenues, the NCAA has become overextended. This has ultimately led to the creation of a lengthy, complicated rulebook.¹¹ The rules are unpredictable and foster many of the highly publicized violations reported in the media today. They are also difficult to understand. Students, coaches, and staff members routinely seek out the institution’s compliance officers for NCAA rule interpretations. Sometimes the compliance officers, who often have juris doctor degrees, must request an official interpretation from the NCAA home offices.

This paper takes as an assumption that collegiate sports are worth retaining.¹² With that assumption, it also argues that the

involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.” *See also Amateurism and the Future of the NCAA, Symposium Transcript*, 3 MISS. SPORTS L. REV. 1, 6 (“amateurism is essential to the product of college sports and athletes must not be paid, they must go to class.”)

⁸ *See NCAA Manual*, *supra* note 6, at art. 1.2. The NCAA also sponsors national championships in all sports except Football Bowl Subdivision (FBS) football. Additionally, the Association devises a formula for distributing revenue to every member institution. The NCAA does not receive revenue produced from post-season bowl games. The FBS conferences contract with bowl organizers and directly receive the revenue resulting from these agreements.

⁹ *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

¹⁰ “The NCAA is a bully, and they’ve been beating up on these kids and these schools for years, and everybody’s been taking it. I can’t believe people put up with it, I really can’t,” said Rick Johnson, who mounted a successful multi-prong attack on the NCAA’s no-agent rule. Aaron Fitt, *Oliver Wins Suit Against NCAA*, *BASEBALL AM.*, (Feb. 12, 2009); *see also* Aaron Fitt, *Oliver Settlement Restores ‘No Agent’ Rule*, *BASEBALL AM.* (Oct. 8, 2009) <http://www.baseballamerica.com/college/oliver-settlement-reinstates-no-agent-rule/> (reporting the NCAA’s \$750,000 settlement with Andrew Oliver).

¹¹ The NCAA “has developed a complicated web of largely unenforceable rules and regulations that are unnecessary to maintain tax-exempt status in light of the regulatory environment.” Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 *DUKE L.J.* 555, 555 (2009).

¹² Participation in college sports provides several academic and future career benefits. According to a 2007 NCAA study of 8,000 former student-athletes, 88% of them earned baccalaureate degrees. Ninety-one percent of former Division I athletes

NCAA or a similar organization is necessary to keep collegiate sports viable. Recognizing that the NCAA has stumbled in recent years, often by overreaching, this paper argues that athletic leaders need to focus on the original purposes that led to the creation of the NCAA and refocus the organization on those purposes, in part by giving college faculty a greater role. Handled properly, this will help keep both the NCAA and college athletics relevant and important for decades to come.¹³

I. THE HISTORY OF THE NCAA

Rutgers and Princeton played the first intercollegiate football game on November 6, 1869, in New Brunswick, New Jersey.¹⁴ The sport soon grew and spread to other campuses. Mass-momentum plays marked the early years of American football, which often led to serious injuries.¹⁵ In the 1905 season alone, there were 18 fatalities and 149 serious injuries.¹⁶

The numerous injuries soon became a matter of public concern.¹⁷ President Theodore Roosevelt intervened by gathering college leaders together in an effort either to fix football or to shut it down permanently.¹⁸ College presidents accepted the

were employed fulltime and averaged higher income levels than non-student-athletes. Eighty-nine percent of them believed that the skills and values they learned through participating in intercollegiate sports helped them obtain their current employment. Twenty-seven percent of former Division I student-athletes earned postgraduate degrees. *Amateurism and the Future of the NCAA, Symposium Transcript*, 3 MISS SPORTS L. REV. 1, 10-11 (2013) (noting a “similar 1991 study with roughly the same results”).

¹³ One of the NCAA’s basic purposes is to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” *NCAA Manual*, *supra* note 6, at art. 1.3.1.

¹⁴ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY 2* (2006). The very first intercollegiate competition, which was a rowing competition between Harvard and Yale back in 1852, was sponsored by a railroad seeking to attract passengers to the lake where it was held. *Amateurism and the Future of the NCAA, Symposium Transcript*, 3 MISS. SPORTS L. REV. 1, 11 (2013).

¹⁵ CROWLEY, *supra* note 14, at 3.

¹⁶ *Id.* at 9.

¹⁷ *See discussion in* MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH, ROBERT C. BERRY, *SPORTS LAW AND REGULATION* 101, (Vicki Been et. al. eds., 2nd ed. 2009 at 100-101).

¹⁸ *Id.*

responsibility of leadership and took steps to implement new safety rules. They agreed to work together and deal with issues of concern for the future.¹⁹ The public sensed sincerity, and intercollegiate football averted the crisis. This collective effort laid the groundwork and provided the foundation upon which the NCAA could develop.²⁰

If the revised form of football were to succeed, colleges would need an organization to make sure the games were fair. Part of making sure the games were fair was making certain that paid professionals were not competing against amateur students.²¹ Clearly, this role needed to be filled. The NCAA undertook that task as part of its monitoring of the game.

The NCAA has modified its governance structure several times in order to effectively adapt to intercollegiate athletics.²² Most notably, in 1973 the NCAA's membership was divided into the three legislative and competitive divisions we know today: Divisions I, II, and III. Division I programs are the largest and provide the most athletically related financial aid for student-athletes. Division II programs offer limited financial assistance, and Division III programs offer no athletically related financial aid. Division I is further divided into three classes for membership: active, conference, and affiliated. Recently, the

¹⁹ *Id.* New York University convened a meeting of thirteen institutions in December 1905 to discuss reformation of college football playing rules. CROWLEY, *supra* note 14, at 10. Later that month, sixty-two member institutions founded the Intercollegiate Athletic Association of the United States ("IAAUS"), and in 1910, the IAAUS became the NCAA. *Id.*; see also Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (Sep. 6, 2012) <http://www.history.com/news/how-teddy-roosevelt-saved-football> (last visited May 28, 2015).

²⁰ *Id.* Complexity of the rules and regulations expanded over the next few decades. In 1948, the NCAA adopted the "Sanity Code," which aimed at establishing guidelines for recruiting and financial aid. Unlike previous NCAA regulations, the Sanity Code had teeth. It established a Constitutional Compliance Committee that could initiate expulsion proceedings for a violation of the Code. CROWLEY, *supra* note 14, at 30-31. The Sanity Code, however, was met with considerable opposition, and the NCAA repealed it in 1951.

²¹ Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 331 (2007) (citation omitted).

²² See *Principles and Model for New Governance Structure: As Developed by the 1A FAR Board*, at 3-4, available at https://www.insidehighered.com/sites/default/server_files/files/1A%20FAR%20Board%20Principles%20and%20Model%20for%20New%20NCAA%20Governance%20Structure.pdf.

NCAA formed a *de facto* fourth division by granting the five power conferences (Big Ten, SEC, ACC, Big 12, and Pac-12) autonomy to make certain rules for themselves.²³ These different divisions permit schools to compete against other schools with assurance that the other schools are devoting roughly the same amount of resources to their program so that the competitive balance will be fair.

The purpose of these rules, at their core, is to provide assurance that there is a rough balance between the programs. The athletes should be students, and they should not be paid for playing. Hopefully, this ensures that the athletes have a real college experience. The principal ways that the NCAA achieves these two goals is by setting and enforcing academic eligibility standards and by setting and enforcing amateurism rules.

II. ENTERING ELIGIBLE, STAYING ELIGIBLE, AND PROGRESSING ACADEMICALLY

A. Eligibility

The NCAA's constitution lists twin amateurism goals: to develop and ensure compliance with satisfactory standards of amateurism, and "[t]o cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events."²⁴ The "basic purpose" of the organization's "fundamental policy" is to retain a clear line of demarcation between intercollegiate athletics and professional sports.²⁵ The clear line of demarcation comes from the integration of the athlete into the student body and the placement of athletics within the entire education system.²⁶ The NCAA Manual (the

²³ See Ken Reed, *Big Five Have Changed College Sports Forever*, HUFFINGTON POST (Aug. 27, 2014, 6:18 PM), http://www.huffingtonpost.com/ken-reed/big-five-have-changed-col_b_5725772.html (last visited July 3, 2015).

²⁴ *NCAA Manual*, *supra* note 6, at art. 1.2(g).

²⁵ *Id.* at art. 1.3.1.

²⁶ See *id.* ("A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.")

association's constitution and bylaws) provides that each member school agrees to abide by and to enforce NCAA legislation.²⁷

To make certain that the athletes in question are actual students, the NCAA sets academic standards for entering eligibility and continuing eligibility, and it sets forth the progress toward degree requirements that students must meet in order to be eligible to participate in sports. Also, the NCAA assesses teams and university programs for the progress and graduation rates of their athletes, and programs are subject to sanctions if graduation or retention rates fall too low.²⁸

Initial eligibility is the term the NCAA uses to define the requirements that prospective athletes graduating from high school must meet to qualify for athletic scholarships.²⁹ NCAA bylaws explicitly prescribe that “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”³⁰ To regulate this requirement, the NCAA established an initial eligibility standard which describes the criteria that a prospective college athlete must meet in order to qualify to participate.³¹ While many universities have their own academic standards, the NCAA's uniform standard helps to maintain fair

²⁷ See *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988).

²⁸ Evidence of the longstanding practice of colleges and universities turning a blind eye to academic qualifications when a student has outstanding athletic ability can be found in the soundtrack of the 1949 motion picture version of the Broadway play *On the Town*. One song explains that a thoroughly unqualified student was pampered on campus because he could “throw the football.” *ON THE TOWN: THE MOVIE SOUNDTRACK* (Lumi Entertainment). A similar theme is found in the 1932 Marx Brothers movie, *Horse Feathers*. *HORSE FEATHERS* (1932).

²⁹ Walter Harrison, *NCAA Academic Performance Program (APP): Future Directions*, 5 J. OF INTERCOLLEGIATE SPORT 65, 67 (2012). This standard is based upon the principle expressed by Justice Stevens in *NCAA v. Board of Regents*. Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL SPORTS & ENT. L.J. 83, 98 (2000).

³⁰ *NCAA Manual*, *supra* note 6, at art., 12.01.1.

³¹ For those students unable to meet the higher standards, the NCAA created a new category: the academic redshirt. The NCAA allows academic redshirt students to receive athletically related financial aid and practice with the team; however, the NCAA does not allow these redshirts to compete in their first year. Harrison, *supra* note 29, at 76. Instead, they spend their freshman year concentrating on their education before they compete the following year. In order to qualify as an academic redshirt, the student must meet requirements of a 2.0 core GPA calculated from sixteen core classes and fit within the sliding scale of (400/3.55) and (1010/2.00). *Id.*

competition and prevent the exploitation of athletes who are academically unprepared for college.³²

Even if an athlete meets the initial eligibility requirements, he or she must also meet continuing academic eligibility standards in order to compete. The NCAA also adopted a series of objective measures of satisfactory progress toward a degree.³³ In Division I, students must earn at least six credit hours each term to retain eligibility for the following term.³⁴ They must also complete 40 percent of the required coursework for a degree by the end of their second year.³⁵ Students must choose a major leading toward a specific degree before their third year of enrollment in order to remain eligible.³⁶ They must complete 60 percent of the required coursework by the end of their third year and 80 percent by the end of their fourth year. Athletes can continue to receive athletically related financial aid for five years, thereby giving them five years to graduate.

In addition, athletes must maintain minimum grade-point average (GPA) requirements related to their institution's own GPA standards for graduation.³⁷ Athletes entering their second

³² Mathewson, *supra* note 29 at 104. In October 2011, the NCAA Board of Directors set new qualifying standards for initial eligibility, which goes into effect in August 2016. Harrison, *supra* note 29, at 75. In these new regulations, the NCAA created a new class of student athletes called "full qualifiers." Full qualifiers have demonstrated sufficient academic ability and have shown they can handle the rigor of college courses. For full qualifiers, the NCAA slightly increased the initial eligibility standards. *Id.* First, the committee raised the minimum core GPA from 2.00 to 2.30 and required the use of ten core courses completed prior to the senior year of high school to calculate this number. Second, they also moved the sliding scale up to reflect a rate approximately one half of a standard deviation below the national student mean, which set the endpoints as (SAT: 400/GPA: 3.55) and (SAT: 900/GPA: 2.30).

³³ In 1983, the membership passed Convention Proposition No. 48, which toughened the academic standards for prospective and enrolled college athletes. Michael R. Lufrano, *The NCAA's Involvement in Setting Academic Standards: Legality and Desirability*, 4 SETON HALL J. SPORT L. 97, 100-01 (1994). Georgetown basketball coach John Thompson famously walked off the court during a Georgetown-Boston College game to protest the new standards. John Gasaway, *How Walter Byers built, fought, lost, and wrote*, <http://johngasaway.com/2015/05/29/howwalterbyersbuiltfoughtlostandwrote/> (last visited June 3, 2015).

³⁴ *NCAA Manual*, *supra* note 6, at art. 14.4.3.1(c).

³⁵ *Remaining Eligible: Academics*, NCAA.ORG, <http://www.ncaa.org/remaining-eligible-academics> (last visited August 17, 2015).

³⁶ *NCAA Manual*, at art.14.4.3.1.7(b).

³⁷ *Id.* at art.14.4.3.3.

year of college must have a cumulative GPA that equals 90 percent of the institution's minimum overall GPA necessary for graduation. When entering the third year of college, an athlete's GPA must be at least 95 percent of the school's minimum GPA. When entering the fourth year or a later year, the athlete's GPA must be at 100 percent of the school's minimum GPA. In other words, if a 2.00 cumulative average is required for graduation, then an athlete must have a 2.00 by this stage in his or her academic career.

NCAA Bylaw 14.01.1 provides that “[a]n institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements.”³⁸ This rule imposes an affirmative obligation on universities to police athletic eligibility. The NCAA holds schools accountable by subjecting those who fail to follow the bylaw to stiff penalties, such as requiring the institution to forfeit all competitions in which that athlete participated. Moreover, even if a school is unaware of its use of ineligible players, the NCAA could subject the school to severe penalties.

Since 2003, the Academic Progress Rate (APR) has served to hold institutions accountable for the academic progress of their student-athletes through a team-based analysis that accounts for the eligibility and retention of each student-athlete for each academic term. The APR gives a quicker reading of the academic progress of a team than is available by waiting for the more traditional graduation rate. “The APR system includes rewards for superior academic performance and penalties for teams that do not achieve certain academic benchmarks. Data are collected annually, and results are announced in the spring.”³⁹

B. Amateurism

The principle of amateurism is a bedrock of the modern NCAA.⁴⁰ The NCAA defines amateurism in both normative and

³⁸ *Id.* at art. 14.01.1.

³⁹ Division I Academic Progress Rate (APR), NCAA.ORG, <http://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr> (last visited July 3, 2015).

⁴⁰ In 1906, the Intercollegiate Athletic Association, the organization that would eventually evolve into the NCAA, held its first convention to develop restrictive

positive terms: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student athletes should be protected from exploitation by professional and commercial enterprises.”⁴¹ The rules prohibit colleges from using financial inducements, except approved financial aid, in recruiting,⁴² and a complex web of regulations checks coach contact with students. Several rules limit professional negotiations, including barring attorney or agent contact with the professional team, prohibiting the presence of the agent during negotiations, and strictly limiting the provision of benefits from agents to student-athletes.⁴³

The “no pay” rules prevent the amateur athlete from using his or her athleticism “directly or indirectly” for pay in any form in that sport, accepting a promise of future pay (even if after college),

principles of amateurism. Kay Hawes, *Debate on Amateurism Has Evolved over Time: Association Prepares for Another Round of Talks on the Issue at 2000 Convention*, NCAA NEWS, (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate+on+amateurism+has+evolved+over+time+-+1-3-00.html>. There was to be no recruiting (termed “proselytizing”) of top preparatory school athletes, and no scholarships were permitted for athletic ability. *Id.* The early amateurism battle within the Intercollegiate Athletic Association revolved around baseball. *See Trying to Define Amateur Athlete: Intercollegiate Athletic Association Committee Suggests Strict Law*, N.Y. TIMES, Mar. 14, 1909, at 53 (describing a proposed definition of amateurism that would end the practice of college students playing baseball in summer leagues for pay). As it grew in popularity during the early twentieth century, baseball spawned opportunities for athletes to profit in major, minor, and summer leagues. *See Hawes* (“One of the first divisive issues in the NCAA involved amateurism. In the 1900s, professional baseball began to grow in popularity. Many college athletes began turning to minor-league baseball as a way to make money during the summer months, setting off a heated debate.”). The summer leagues, which attracted large numbers of intercollegiate baseball players, drew prompt criticism. According to some critics, those who participated in the summer leagues lost eligibility merely by associating with professionals, whether or not there was remuneration for play. To others, the motivation to participate in the summer leagues was more benign, and the intercollegiate players were analogous to other students who used their talents for pay, such as actors or perhaps musicians. *Id.* *See also Amateurism and the Future of the NCAA, Symposium Transcript*, 3 MISS. SPORTS L. REV. 1, 11 (2013) (“At the time the NCAA was founded in 1906 many college baseball players played in summer professional baseball leagues and that was okay.”)

⁴¹ NCAA Manual, *supra* note 6, at art. 2.9.

⁴² *See id.* at art. 13.2.1.

⁴³ *Id.* at 12.3.

and receiving any form of financial assistance from anyone with few exceptions.⁴⁴ The rules strictly limit the financial aid or benefits that the student may receive including academic aid, gifts after the completion of eligibility, outside aid entirely for educational purposes, research grants, and even basic travel or reimbursement of expenses.⁴⁵ The athlete cannot use his or her name, reputation, or athletic popularity for pecuniary gain.⁴⁶

The NCAA also limits the ability of students to hold themselves out as potential professional athletes through limitations on draft entry (the no-draft rule).⁴⁷ The organization prohibits the signing of a contract or any commitment of any kind to play professional athletics, competition on any professional athletics team in that sport (even without pay), and any agreement with an agent for representation and promotion.⁴⁸

III. LOSING FOCUS

Revenue in intercollegiate athletics is vital to institutions of higher learning and their athletic programs. Winning drives revenue, increases institutional pride, and builds careers. The problem is that in the quest to secure the largest media rights agreements and top name coaches, institutions can lose focus. For years, attention was put on coaches and athletics departments. Recently, concern has grown over academic departments and faculty.

The attempt to regulate amateurism—to fulfill its basic purpose—dragged the NCAA into areas beyond its expertise. When it comes to an organization charged with ensuring that institutions of higher education do not cheat in athletic competitions, a proper analogy would essentially be a meter maid—someone to note violations and impose minor sanctions. Unfortunately, too often, NCAA officials seem to act like FBI

⁴⁴ *Id.*

⁴⁵ Pending litigation may change much of this. See Patrick Vint, *Ranking the NCAA's 5 biggest legal battles, from least to most threatening*, SB NATION, (Mar. 20, 2014 9:00 AM), <http://www.sbnation.com/college-football/2014/3/20/5528032/ncaa-lawsuits-obannon-kessler-union> (last visited July 3, 2015).

⁴⁶ *See generally NCAA Manual*, at art. 12.3.

⁴⁷ *See id.* at art.12.2.4 (setting forth rules on draft entry).

⁴⁸ *Id.* at art. 12.1.2(e-g), 12.3.

agents, determined to root out major crime and impose severe sanctions.

Early in its history, the NCAA banned agents and decreed that players who entered a professional draft would lose their amateur status. The no-draft and no-agent rules have been upheld as “[p]rotection[s] of amateurism” that are resistant to antitrust challenges.⁴⁹ However, it is easy to see how the necessary purpose—protecting amateurism—has morphed into something much larger.

This whole amateurism idea is like the Blob - like the 1958 movie *The Blob* - that just keeps grabbing, consuming different things. They say you cannot have a lawyer to represent you in a contract negotiation with a club. You cannot sell your pants that you own title to, your football pants that you got from winning a game. You can't sell that because that violates amateurism. It just keeps growing and grabbing and pulling in things.⁵⁰

A similar development in NCAA authority is apparent in some of its recent rulings. These cases involve students who may have had assistance in writing a paper or completing an assignment. The NCAA is correct in reviewing academic dishonesty in any program: that cuts to the very core of the NCAA's fundamental purpose of assuring that the athletes are true students.⁵¹ What happens, however, when the college or university investigates a potential case of academic dishonesty and acquits the student?

In the recent Syracuse case, the university identified potential academic integrity violations, but the professors were unable to find the submitted works, and the school could not locate records because it shreds such documents on an annual

⁴⁹ See Benjamin A. Menzel, Comment, *Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857 (2002); see also, Kristin R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 269 (2003).

⁵⁰ *Amateurism and the Future of the NCAA*, Symposium Transcript, 3 MISS. SPORTS L. REV. 1, 25 (2013).

⁵¹ See Macy McCarty, *Academic Progress or Academic Failure?: Reform of the NCAA Academic Performance Program*, 4 MISS. SPORTS L. REV. 302 (2015).

basis. Accordingly, and perhaps only because of a lack of evidence, Syracuse determined the players did not violate the university's academic integrity policy. That did not appease the NCAA.

The NCAA cited the Legislative Council's April 2014 interpretation on academic misconduct. This permitted the NCAA to consider the alleged cheating to constitute an "extra benefit" that the athletes obtained due to their status. The university found no academic dishonesty, but the NCAA determined that Syracuse provided this cheating as a benefit to its athletes.

Syracuse appealed this decision, which came from the Academic Membership Affairs staff. The Legislative Review and Interpretations Committee and Legislative Council, however, upheld the interpretation. Syracuse chancellor Kent Syverud said that the university disagreed with the NCAA's decision,⁵² but under this interpretation, the NCAA has super-authority over universities, even on determinations of academic dishonesty. That is not the way to run an organization designed to assure that games played between institutions of higher education are fair.⁵³

A similar example is the Penn State/Jerry Sandusky situation. Sandusky, a former assistant coach, was charged and convicted of multiple counts of sexual abuse of young boys.⁵⁴ Three school officials, including President Graham Spanier and Athletic Director Tim Curley, were charged with perjury, obstruction of justice, failure to report suspected child abuse, and other related

⁵² Jon Solomon, *What Syracuse's NCAA case revealed about academic fraud*, CBS SPORTS (March 7, 2015, 12:31 PM) <http://mweb.cbssports.com/ncaaf/writer/jon-solomon/25096871/what-syracuses-ncaa-case-revealed-about-academic-fraud> (last visited July 14, 2015); see also Brad Wolverton, *NCAA Looks to Redefine Its Policy on Academic Fraud*, CHRONICLE OF HIGHER EDUCATION, April 15, 2014 (discussing the new interpretation that would eventually be used in the Syracuse case).

⁵³ Further evidence of the NCAA having forgotten its purpose can be seen in the series of television advertisements that depicted the NCAA as cheerleaders or a marching band that follows college athletes throughout the day. See *NCAA TV Spot, 'Marching Band'*, ISPOT.TV, <http://www.ispot.tv/ad/71Ra/ncaa-marching-band> (last visited July 14, 2015) ("Think of the NCAA as a marching band celebrating student athletes in everything they do, whether it is following them while they jog or work on an assignment in a lab. However you think of them as a marching band or a spirit squad of cheerleaders, NCAA is always there for student athletes"); Glen Hilzinger, *NCAA Spirit Squad*, YOUTUBE (Mar. 18, 2003), <https://www.youtube.com/watch?v=QC1aAGj34gs>

⁵⁴ Sandusky was convicted of forty-five counts of sexual abuse and sentenced to a minimum of 30 years and maximum of sixty years in prison.

charges. Shortly after the scandal broke, Spanier resigned, and the Board of Trustees fired Curley and legendary head football coach, Joe Paterno. Following Sandusky's criminal conviction, the NCAA announced serious sanctions against Penn State.⁵⁵

Criminal, civil, and administrative sanctions are all completely appropriate in this situation, and no one would fault the NCAA for trying to assure that no children are subject to assault from athletic department officials or anyone else. In this case, however, the sanctions the NCAA imposed (many of which were subsequently rescinded)⁵⁶ garnered more attention than did the criminal action. By doing this, the NCAA (perhaps unintentionally) elevated its stature and expanded its authority into another realm beyond its expertise and beyond its authority. To an outside observer, it appears that the tail (the NCAA) is wagging the dog (institutions of higher learning).

CONCLUSION

Intercollegiate athletics have risen to a level of enormous commercial success, and the NCAA has played an important role in that growth. In fact, it has played a critical role – one that must be carried out by some entity, and the NCAA is in as good a position as any other entity to do that. It must however, refocus on its core mission.

Colleges and universities are, first and foremost, institutions of higher learning. Athletic competition with other schools is a cherished part of the college experience. Athletics, however, must

⁵⁵ On July 23, 2012, NCAA President Mark Emmert announced the following sanctions against Penn State: Five years probation; a four-year postseason ban; vacating all wins from 1998 to 2011 (stripping Penn State shared Big Ten titles in 2005 and 2008); a \$60 million fine (proceeds of which were to go toward an endowment for preventing child abuse); loss of forty initial scholarships from 2013 to 2017 and a limit of sixty-five total scholarships instead of the typical eighty-five. Penn State was also required to enter into an "athletics integrity agreement" with the NCAA and Big Ten, appoint a university-wide athletic compliance officer and compliance council, and accept an NCAA-appointed athletic integrity monitor for the duration of its probation.

⁵⁶ See Jason Laughlin, *NCAA again defends handling of Sandusky*, PHILADELPHIA INQUIRER (June 20, 2015), http://articles.philly.com/2015-06-20/news/63621566_1_jerry-sandusky-institutional-control-paterno-wins (last visited August 12, 2015). Litigation challenging this extension of the NCAA's authority continues. *Id.*

not become the tail that wags the dog. The NCAA has a limited role. Rather than thinking of itself as an FBI-type agency overseeing college athletics, it should focus on keeping the playing field fair and the players safe. That means that institutions should maintain the ultimate authority, certainly over academic matters.

The truth of the matter, of course, is that the institutions do have that authority. It is up to them to rein in and refocus the institution that they control. As Prof. Richard Karcher explained: "I have a lot of good friends at the NCAA. I often disagree with them, but there are a lot of good people there. Just remember, as they will be quick to tell you, it's the schools that make the rules. They guide the process and have input, but at the end of the day it's the universities and colleges that make the rules."⁵⁷

⁵⁷ *Amateurism and the Future of the NCAA, Symposium Transcript*, 3 MISS. SPORTS L. REV 1, 26 (2013).