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DIVISION I STUDENT-ATHLETES: THE EVOLUTION OF THEIR VOICE AND VOTE

Lissa L. Broome^{1*}

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I. INTRODUCTION

At the NCAA Annual Convention in San Diego in January 2014, Division I members engaged in a “Governance Dialogue” that resulted in a total revamp of the NCAA Division I Governance Structure, including legislative authority for the ACC, Big Ten, PAC-12, Big 12, and the SEC (the “Autonomy

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Conferences”)² on a series of topics. The new structure was approved in August 2014 and the first legislative activity of the Autonomy Conferences took place at the NCAA Annual Convention in January 2015. Since then, the Autonomy Conferences have adopted significant legislation that has positively impacted student-athletes, such as the cost of attendance allowance³ and the time management legislation.⁴

To me, however, one of the most important aspects of this new governance structure has been the involvement of student-athletes. Following approval of the new structure in August of 2014, one student-athlete serves on the Division I Board of Directors and two student-athletes serve on the Division I Council.⁵ Most significantly, in the Autonomy Conference governance structure, three student-athletes from each of the five conferences cast votes on autonomy legislation, resulting in fifteen student-athlete votes to complement the sixty-five votes of the schools that make up the Autonomy Conferences.⁶

As a result, in the Atlantic Coast Conference (ACC) five student-athletes (the three autonomy representatives and the incoming and outgoing ACC Student-Athlete Advisory Council (SAAC) chair) now attend the ACC’s spring meeting. A subset of these students participate in the conference’s fall governance meeting and legislative conference calls. At my school, and I assume others, student-athletes now serve on the athletic committee and other school committees that relate to athletics.

² The Autonomy Conferences are sometimes referred to as the Power 5, with the other Division I conferences, other than the Ivy League, referred to as the Group of 5 (AAC, C-USA, MAC, MWC, and Sun Belt).

³ Mitch Sherman, *Full cost of attendance passes 79-1*, ESPN (January 18, 2015), http://www.espn.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

⁴ Jake New, *‘A True Day Off’*, INSIDE HIGHER ED (Jan. 23, 2017), <https://www.insidehighered.com/news/2017/01/23/power-five-leagues-adopt-new-rules-lessening-time-demands>; Jake New, *What off-Season?*, INSIDE HIGHER ED (May 8, 2015), <https://www.insidehighered.com/news/2015/-5/08/college-athletes-say-they-devote-too-much-time-sports-year-round>.

⁵ 2018-19 NCAA DIVISION I MANUAL §§ 4.3.1(g) (Division I Council), 4.4.1. (Division I board of Directors).

⁶ *How the NCAA Works: Division I*, http://www.ncaa.org/sites/default/files/2018DINCAA-HowTheNCAAWorks-DI_20180313.pdf.

The involvement of student-athletes has enriched the debate and discussion. Having student-athletes at the table provides important information and perspective that may not have otherwise been considered. Why, I wonder, did it take us so long to do this? This paper explores the evolution of the student-athlete voice and vote in the NCAA Division I governance structure.

II. THE EVOLVING NCAA GOVERNANCE STRUCTURE FOR DIVISION I

The governance changes effective at the 2015 NCAA Annual Convention mark the first time student-athletes have been represented in the NCAA governance structure, other than in advisory capacity or through the Student-Athlete Advisory Council (SAAC). The NCAA was created in 1910, but did not have a regulatory function until the Committee on Infractions was formed in 1951, the same year that Walter Byers was named the NCAA's first Executive Director.⁷ In 1973, Divisions I, II, and III were created to provide rules specific to – and presumably favorable for – those institutions that were engaged in “major college football.”⁸ This arguably marked the beginning of the governance challenge raised by the variety of schools in the NCAA and the disparate level of resources that they devote to intercollegiate athletics. The brief history of the evolution of the NCAA governance structure recounted below demonstrates that this struggle is part, if not all, of the motivation behind each successive governance change. In each iteration of the governance discussion, the challenge has been addressed by granting the schools that can and wish to devote more resources to athletics the ability to do so for the greater goal of keeping the institutions united under one banner, particularly the banner that operates the lucrative NCAA Division I Basketball Championship.⁹

The creation of Division I did not ease the frustration of the “major” college football schools with NCAA governance for long. The College Football Association was formed in 1976 by the big

⁷ Anthony G. Weaver, *New Policies, New Structure, New Problems? Reviewing the NCAA's Autonomy Model*, 7 ELON L. REV. 551, 554 (2015).

⁸ *Id.*

⁹ Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/>.

football schools and at the 1976 NCAA Convention there was talk that eighty-one of these “major” schools might split from the NCAA because they wished to devote more resources to football than the other schools in Division I.¹⁰ The solution was the 1979 subdivision of Division I into Division I-A for the major football schools and Division I-AA for those Division I institutions that did not wish to devote as much financial support to football.¹¹ In 1996, the next governance restructuring took place with the elimination of the one school, one vote policy and the advent of greater governance responsibility given to college presidents.¹² A twelve-member Executive Committee, with eight members from Division I-A, was created to oversee three separate boards, one for each of the NCAA Divisions.¹³ A Legislative Council for Division I was created to consider legislation which could also be reviewed by the Board of Directors.¹⁴ Schools were represented on the Legislative Council by their conference representative who cast a weighted vote, depending on a prescribed conference pecking order, designed again to appease the better resourced conferences and to help ensure their continued commitment to NCAA membership.¹⁵ In 2006, the former Division I-A was renamed the Football Bowl Subdivision (FBS) and the former Division I-AA was renamed the Football Championship Series (FCS).¹⁶

The latest governance restructuring talk surfaced in part by the failure of the Division I Legislative Council to adopt a proposal to provide a stipend of \$2,000 to student-athletes as an additional component for the athletics grant-in-aid.¹⁷ As a general matter, the major football schools supported the proposal and the other

¹⁰ Weaver, *supra* note 6, at 556.

¹¹ *Id.* at 553-55.

¹² Brian D. Shannon, *The Revised NCAA D1 Governance Structure After Three Years: A Scorecard*, 5 TEXAS A&M L. REV. 69 (2017).

¹³ Weaver, *supra* note 6, at 557.

¹⁴ NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 7-8 (July 18, 2014), <https://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf>.

¹⁵ Shannon, *supra* note 11.

¹⁶ *Id.*

¹⁷ See 2014-15 NCAA DIVISION I MANUAL § 15.02.5 (excluding from the grant-in-aid “the incidental costs of attending college . . . [such as] transportation and miscellaneous personal expenses”).

Division I schools voted against it because of financial resource concerns.¹⁸

Again, the NCAA considered governance reform in an effort to keep the larger, better resourced schools from “breaking away to form their own organization.”¹⁹ The NCAA engaged Ideas for Action, LLC and one of its principals, Jean Frankel, to assist in a governance review. For the first half of 2013, the consultants talked to over 200 stakeholders, including student-athletes.²⁰ An eight-member Presidential Steering Committee was created to oversee the governance overhaul.²¹ A second board of eighteen—including university presidents, senior NCAA staff, and other leaders from NCAA councils and committees—also provided guidance. A draft governance proposal was discussed at the Division I Governance Dialogue at the 2014 NCAA Convention.²² Heading into the Dialogue, there was a sense that governance reform should include more representation by “practitioners,” which seemed to be understood to mean athletic directors and perhaps senior athletic administrators including the senior woman administrators. A focal point of the discussion was determining what set of issues would be within the legislative control of the five Autonomy Conferences, with the understanding that the other Division I conferences and schools could opt into legislation adopted by the Autonomy Conferences if they wished.²³

In January 2014, the President of the NCAA Division I Student-Athlete Advisory Council was Duke Lacrosse player, Maddie Salamone. The first day of the Division I Governance Dialogue had come and gone, but student-athletes did not appear

¹⁸ Weaver, *supra* note 6, at 559.

¹⁹ Jean S. Frankel (with Nancy Alexander), *Think it's Hard for Your Board to Work Effectively?* Blog Post, Ideas for Action (Jean Frankel and Ideas for Action were engaged by the NCAA to help it examine its governance structure).

²⁰ Shannon, *supra* note 11, at 70-73.

²¹ *Id.* at 101.

²² *Division I Steering Committee on Governance: Recommended Governance Model* 29 (July 18, 2014), <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf> (describing how the NCAA Division I Board of Directors began an initiative in August 2013 to redesign the “governance structure for Division I”).

²³ Michelle B. Hosick, *DI Members Provide Feedback on Restructuring Ideas*, NCAA (Jan. 18, 2014); see Jake New, *‘Autonomy’ Arrives at the NCAA*, Inside Higher Ed (Jan. 19, 2015).

in the proposed structure. Indeed, when the question about the role of student-athletes was first raised, “[s]eemingly taken by surprise then, Division I Board of presidents chairman Nathan Hatch had said, ‘That’s not something we’ve wrestled with.’”²⁴ Maddie, after discussion with some of her SAAC cohorts, came armed the next day (like any good student of the time) with her notes on her cell phone. She spoke first, galvanized the room, and literally changed the structure going forward by her powerful remarks. As reported by the press, she said:

There has been a lot of rhetoric around this room that student-athlete well-being is the most important concern. . . . How could anyone truly know how student-athletes are being affected by the rules without actually talking to student-athletes? Anybody that is going to create and pass legislation related to student-athletes must have a student-athlete on that body with a voting or advisory role, at every level.²⁵

She won the room that day with a straw poll indicating a strong majority in favor of student-athlete representation on the Council.²⁶ Not only did these remarks help to ensure for the first-time that student-athletes would be granted two votes on the Council, but they also led to a student-athlete voting representative on the Division I Board of Directors, and, in the greatest representation of all, gave student-athletes fifteen out of eighty votes in the new Autonomy Conferences’ governance structure.²⁷

²⁴ Nicole Auerbach, *NCAA Athletes Demand Greater Influence, Inclusion*, USA Today (Jan. 17, 2014); see Allie Grasgreen, *What About the Athletes?*, Inside Higher Ed (Jan. 17, 2014) (reporting that when the question about student-athletes was first asked there was “awkward silence” prior to President Hatch’s response that it had not been considered, although he did add “I think the whole goal of the board is on behalf of the student-athletes”).

²⁵ Hosick, *supra* note 22; see Auerbach, *id.*

²⁶ Hosick, *supra* note 22 (“sixty-seven percent supported some form of student-athlete participation on a proposed high-level council that would do the day-to-day work of the division”).

²⁷ On May 16, 2017, I had the pleasure of presenting Maddie Salamone with the ACC President’s Award for her contributions to this important change in the NCAA’s governance structure.

III. STUDENT-ATHLETE PARTICIPATION IN NCAA DIVISION I GOVERNANCE TODAY

A. NCAA Division I Board of Directors

There are 351 colleges and universities in the NCAA's Division I.²⁸ Division I is subdivided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).

There are 129 schools from ten conferences and several independents in the FBS.²⁹ The NCAA Division I Board of Directors serves as the highest governing body—with responsibility over “big picture” “strategy, policy, legislative oversight and membership oversight,” setting the overall agenda for Division I Athletics.³⁰ The Board of Directors can, however, ratify or adopt legislation concerning academic affairs, or other items that show an extraordinary adverse impact on D1 membership.³¹ The Chair of the NCAA Division I Student-Athlete Advisory Committee (DI SAAC) sits on the NCAA D1 Board of Directors (Board) with voting privileges.³² There are twenty-four members on the Board, twenty are Presidents or Chancellors (one from each FBS Conference and ten who rotate from among the remaining twenty-two Division I conferences).³³ The other three

²⁸ *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions>.

²⁹ See NCAA FBS Football, <http://www.ncaa.com/standings/football/fbs>.

³⁰ 2018-19 NCAA Division I Manual § 4.2.2; (Aug. 2018) [hereinafter NCAA Manual 2018-19]; DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 7-8 (July 18, 2014) (explaining how the Board addresses future challenges of athletics, sets parameters that determine present and future goals, procedures and strategies, monitors membership standards and legislation to make sure it does not conflict with the policies or goals of the NCAA).

³¹ NCAA MANUAL 2018-19 § 4.2.2(d) & (e); NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 7-8 (July 18, 2014) (explaining how the Board addresses future challenges of athletics, sets parameters that determine present and future goals, procedures and strategies, monitors membership standards and legislation to make sure it does not conflict with the policies or goals of the NCAA).

³² NCAA MANUAL 2018-19 § 4.2.1; This student-athlete is the Chair of the NCAA's Student Athletic Advisory Committee. *Id.* at § 4.2.1(g).

³³ NCAA MANUAL 2018-19 § 4.2.1(a), (b) & (c); *How the NCAA Works: Division I*, (outlining that the overall composition of the Board of Directors is: 1 student-athlete; 1 athletic director (Chair of the Council); 1 faculty-athletic-representative; 1 senior-woman-administrator (appointed by National Association of Collegiate Women

members of the Board are an athletic director (AD), senior woman administrator (SWA), and a faculty athletics representative (FAR).³⁴ The presidents/chancellors on the Board retain the right to exclude the four non-president voting members (FAR, AD, SWA, and student-athlete) “to meet in limited circumstances in president-only executive sessions when necessary and appropriate.”³⁵ The student-athlete vote is one of twenty-four (or 4.2% of the total votes) and the student-athlete may be excluded with other non-presidents from the Board’s executive sessions. Nevertheless, a student-athlete is at the table of the NCAA’s top governance group.

B. Division I Council

The Council is the body that has primary responsibility for Division I legislation.³⁶ Out of the forty total members that make up the Council, two are student-athletes with voting privileges.³⁷ The two student-athletes are Vice Chairs of the D1 SAAC, nominated by the SAAC. One of these student-athlete representatives must be male and one must be female.³⁸ Before the 2014 modified governing structure, there were no student-athletes serving on the equivalent body.³⁹

Another two of the forty seats are designated for FARs, one representing the D1A FAR group and one representing the

Athletics Administrators); and 20 presidents/chancellors (1 from each FBS conference and 10 rotating among the remaining 22 conferences)).

³⁴ NCAA MANUAL 2018-19 § 5.4.2.1; *How the NCAA Works: Division I*, (showing that the AD representative is the Chair of the NCAA Division I Council who is always an A.D., and the SWA representative is appointed by the National Association of Collegiate Women Athletics Administrators).

³⁵ NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 18 (July 18, 2014) (showing that the Board of Directors can, however, ratify or adopt legislation concerning academic affairs, or other items that show an extraordinary adverse impact on D1 membership); NCAA Manual 2018-19 § 4.2.6.

³⁶ NCAA MANUAL 2018-19 § 4.3.2(a); § 5.3.2 (describing the Division I legislative process); NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL21 (July 18, 2014).

³⁷ NCAA MANUAL 2018-19 § 4.3.1; *How the NCAA Works: Division I*.

³⁸ DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 21 (July 18, 2014).

³⁹ *Id.*

Faculty Athletic Representatives Association (FARA).⁴⁰ Four conference commissioners have Council seats – a commissioner from the Autonomy Conferences, the Group of 5 (AAC, C-USA, MAC, MWC, and Sun Belt), and two commissioners from the remaining twenty-four Football Championship Subdivision (FCS) conferences.⁴¹ The remaining thirty-two Council members represent each of the thirty-two conferences and may be athletics administrators or FARs.⁴² However, a minimum of sixty percent of these thirty-two members (or twenty) must be ADs.⁴³

Although the student-athletes are two of forty Council members,⁴⁴ voting is weighted. The votes of each Autonomy Conference representative counts as four votes, the votes of each Group of 5 representative counts as two votes, and the votes of the twenty-two other conference representatives, student-athletes, and the two designated FAR representatives each count as one vote.⁴⁵ The two student-athletes thus have 3.1% of the Council votes because of this weighted voting.⁴⁶

C. Division I Student-Athlete Advisory Committee and Other Division I Committees

Prior to the 2014 NCAA governance revamp, the main student-athlete voice came from the Division I Student-Athlete

⁴⁰ NCAA MANUAL 2018-19 § 4.3.1(f); NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 21 (July 18, 2014).

⁴¹ NCAA MANUAL 2018-19 § 4.3.1; NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL (July 18, 2014).

⁴² NCAA Manual 2018-19 § 4.3.1(a); NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 21 (July 18, 2014).

⁴³ NCAA Manual 2018-19 § 4.3.1(a); NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 18 (July 18, 2014); Brian Shannon, *The Role of the Faculty Athletics Representative in NCAA Division I Governance Circa 2018-19*. Shannon explained that it is disheartening that only two FARs are currently serving as conference representatives, and that “given that higher education is intended to be a key part of the overall endeavor, this disparity is striking and markedly imbalanced. Indeed, under the former governance structure FARs comprised 20% of the leadership.”

⁴⁴ NCAA MANUAL 2018-19 § 4.3.1.

⁴⁵ NCAA MANUAL 2018-19 § 4.3.4(a), (b) & (c). Voting on FBS issues and legislation is weighted differently, increasing the student-athlete voice somewhat; § 4.3.4, and voting on scholarship limitations is not weighted; § 4.3.4.1.1.

⁴⁶ NCAA Manual 2018-19 § 4.3.4; NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 22 (July 18, 2014) (outlining the weighted voting for the Council’s: 4-2-1 model).

Advisory Committee (D1 SAAC), which is a thirty-two-member committee that is entirely comprised of student-athletes, with one student-athlete representative from each conference nominated by their respective Conference SAAC.⁴⁷ The D1 SAAC remains an important voice in Division I governance today. Its purpose is to participate in debate on issues, respond to proposed legislation, and advocate on behalf of student-athletes.⁴⁸ The updated post-2014 governance model did not change the role of the SAAC; it acts primarily as an advisory body.⁴⁹ The SAAC has its own planned meetings where it is given presentations on pending legislation and formulates positions on potential legislation.⁵⁰

On each of the other eight committees within the Council governance structure, there is one student-athlete member,⁵¹ other than the Nominating Committee, where no student-athlete sits.⁵²

Committee	Total Voting Members	Voting Members - FARs	Voting Members - SAs	Nonvot ing Members - SAs
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⁴⁷ NCAA MANUAL 2018-19 § 21.7.6.9; *NCAA Student-Athlete Advisory Committees (SAACs)*, <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs> (stating that a student-athlete must be a member of his or her school's SAAC to be on the Conference SAAC).

⁴⁸ See *NCAA Student-Athlete Advisory Committees (SAACs)* *supra* note 46; NCAA MANUAL 2018-19 § 21.7.6.9.3 (The Committee shall receive information and explanations of divisional activities and legislation, review and react to topics referred to it by other governance entities and comment to the governance structure on any divisional subject of interest.); Scott Krapf, *From the Seat of the Chair: An Insider's Perspective on NCAA Student-Athlete Voices*, 90 IND. L.J. 63-68 (2015).

⁴⁹ *NCAA Student-Athlete Advisory Committees (SAACs)*, *supra* note 46.

⁵⁰ *Id.*

⁵¹ *How the NCAA Works: Division I*, *supra* note 6 (showing that one student-athlete sits on: Legislative Committee, Competition Oversight Committee, Student-Athlete Experience Committee, Strategic Vision and Planning Committee, Women's Basketball Oversight Committee, Men's Basketball Oversight Committee, Football Oversight Committee).

⁵² The chart below is an expanded version of the chart presented in Brian Shannon, *The Role of the Faculty Athletics Representative in NCAA Division I Governance Circa 2018-19*.

Student-Athlete Experience ⁵³	11	1	2	
Strategic Vision & Planning ⁵⁴	10	2	1	
Legislative ⁵⁵	18	3	1	
Competition Oversight ⁵⁶	16	1	1	2
Football Oversight ⁵⁷	15	0*	1	2
Men's Basketball Oversight ⁵⁸	12	0*	1	1
Women's Basketball Oversight ⁵⁹	11	0*	1	1

⁵³ See *Division I Student-Athlete Experience Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1SAEXP (roster) (last visited July 25, 2018).

⁵⁴ See *Division I Strategic Vision and Planning Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1STRATVISION (last visited July 25, 2018). One of the two FARs, Steve Perez, is also the current Chair.

⁵⁵ See *Division I Legislative Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1LEGSCOM (roster) (last visited July 25, 2018). One of the two FARs, Brian Shannon (the Author), is also the current Chair.

⁵⁶ See *Division I Competition Oversight Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COMPOVE (roster) (last visited July 25, 2018).

⁵⁷ See *Division I Football Oversight Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1FBOVERSIGHT (roster) (last visited July 25, 2018).

⁵⁸ See *Division I Men's Basketball Oversight Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1MBBOVERSIGHT (roster) (July 25, 2018).

⁵⁹ See *Division I Women's Basketball Oversight Committee*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1WBBOVERSIGHT (roster) (last visited July 25, 2018).

* The Football, Men's Basketball, and Women's Basketball Oversight Committees each have one *non-voting* FAR member.

D. Autonomy Conferences Governance Structure

Following the January 2014 Autonomy Governance Dialogue, a recommended governance model was circulated by the Division I Steering Committee on Governance⁶⁰ and approved by the Division I Board of Directors in August 2014, to become effective in January 2015. The student-athlete voice and vote is the most significant in the new Autonomy governance structure. There are five autonomy conferences composed of sixty-five individual schools. Each school has one vote.⁶¹ In addition, there are fifteen voting student-athletes (three from each of the five conferences) and each of their votes counts the same as that of one of the sixty-five institutions.⁶² So, out of the total eighty votes, student-athletes hold fifteen or almost 18.75% of the votes, as compared to student-athletes' 4.12% of the Board of Director's votes, and 3.1% of the Council's votes.⁶³

A simple majority vote, however, is not sufficient to adopt Autonomy legislation. There are two ways to pass autonomy legislation. First, sixty percent or more of the 80 votes (48 or more votes) *and* approval of three of the five conferences (by a simple majority vote of the institutions within the conference).⁶⁴ Or, a simple majority of the 80 votes (41 or more) and approval of four of the five conferences (by a simple majority vote of the institutions within the conference).⁶⁵ If the student-athletes voted as a bloc, they would still need to garner additional votes from the Autonomy Conference schools to adopt legislation.

At the Autonomy Conference Governance Forums held in the spring of each year to develop Autonomy legislation, each

⁶⁰ NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 29, 42-44 (July 18, 2014),.

⁶¹ NCAA MANUAL 2018-19 § 5.3.2.1.7.1 ("president or chancellor of each institution shall appoint one representative").

⁶² *Id.* § 5.3.2.1.7.1 ("each of the five conferences shall appoint three student-athlete representatives to cast votes").

⁶³ NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 29, 42-44 (July 18, 2014).

⁶⁴ NCAA MANUAL 2018-19 § 5.3.2.1.7.2(a).

⁶⁵ *Id.* at § 5.3.2.1.7.2(b).

conference is encouraged to send ten representatives – two presidents/chancellors, two ADs, two SWAs, two FARs, and two SAs.⁶⁶ Assuming all conferences send all representatives, student-athletes represent twenty percent of the voices in the room and can have a significant impact in shaping the Autonomy legislative agenda for the coming year.

At the first Autonomy Forum in January 2015, a number of significant issues were discussed. The vote to permit Autonomy schools to augment the grant-in-aid award with an additional amount equaling the cost of attendance as calculated by each school for its general student body was adopted, with only one vote against the cost of attendance.⁶⁷

A second vote to prohibit a student's athletics aid from being reduced or eliminated for athletics performance reasons was more divided; it passed with fifty votes (forty-eight were needed for passage).⁶⁸ One might have thought the fifteen student-athletes would have been united in support for this legislation, but in fact they were split.⁶⁹ Some students argued the rule would restrict coaches from cutting players who were "a cancer to the team."⁷⁰ Josh Tobias, a student-athlete who played baseball at the University of Florida said, "People forget that our job is to perform," while student-athlete Kene Orijoke, a football player at UCLA, shot back, "This isn't supposed to be our job."⁷¹ Other student-athletes spoke in favor of the measure arguing that permitting scholarships to be reduced for athletics reasons undermined the NCAA's claim that student-athletes are to be treated as students first.⁷²

A third vote on a proposal to require colleges to adopt a new concussion policy passed, although many student-athletes and some Big 12 schools voted against it because they felt the legislation did not go far enough to protect the health and safety of

⁶⁶ Brian Shannon, *The Role of the Faculty Athletics Representative in NCAA Division I Governance Circa 2018-19*, 7.

⁶⁷ Sherman, *supra* note 2.

⁶⁸ New, *supra* note 22.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

student-athletes.⁷³ Some of those opposing the legislation said it did not give medical personnel “unchallengeable authority” in deciding whether a student-athlete should be allowed to return to practice or competition after sustaining an injury.⁷⁴ One of the student-athletes, Ty Darlington, a football player at the University of Oklahoma, moved to refer the proposal to a committee, which would have tabled the legislation for at least another year. Thirty-two votes in favor of this motion were recorded, indicating that this student-athlete’s motion gained support outside of the ranks of just the other fourteen student-athletes. But, even in defeat the student-athlete voice was heard. Darlington said he felt more confident that the policy would be improved now that the membership had heard so many student-athletes speak against it, and Dr. Brian Hainline, the NCAA’s Chief Medical Officer, sought out Darlington after the vote to assure him that the policy would be improved.⁷⁵

Darlington also astutely understood the public perception issues around opposing any legislation that seems to improve student-athlete welfare.

I was worried that some of the members might vote for the legislation because they were worried about public perception. Nobody wants to look like they’re against protecting the safety of student-athletes. It’s hard to stand up and make that motion. But as a student, I could do that.⁷⁶

The 2016 Autonomy legislative session dealt with a number of proposals described by one journalist covering the meeting as “a series of milquetoast proposals” that were “thoroughly non-controversial and rooted largely in NCAA minutia.”⁷⁷ Ty Darlington was again one of the Big 12’s student-athlete representatives. He told the assembled group that he didn’t feel like the session “accomplished anything to significantly impact the student-athlete experience.”⁷⁸

⁷³ *Id.*; Sherman, *supra* note 2..

⁷⁴ New, *supra* note 22.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Dan Wolken, *Small, Positive Steps, but no Fireworks at NCAA Convention*, USA TODAY, Jan. 15, 2016.

⁷⁸ *Id.*

Student-athletes were also heavily engaged in the discussion at the 2017 Autonomy Forum regarding time management legislation that would provide additional days off throughout the academic year from required athletically related activities.⁷⁹ The student-athlete representatives had split views on an amendment to the legislation that would permit department-wide life skills activities on a student-athlete's day off.⁸⁰ The amendment was just barely approved in a 48-32 vote.⁸¹ The student-athlete voice was more united in opposing a second amendment to permit student-athlete host duties for recruits to occur on a student-athlete's day off and that amendment received only twelve favorable votes, with fourteen of the fifteen student-athlete votes opposed to the amendment.⁸² Student-athletes also spoke in support of the time management plan's requirement that they be given adequate notice of any schedule changes, with one student-athlete commenting that it was common for coaches to give students just thirty minutes notice before an unscheduled athletically related activity.⁸³

The student-athlete voice may have again influenced the Autonomy vote when at the 2018 Autonomy Forum two student-athletes asked voters to reject a proposed increase in the expense allowance for student-athletes hosting recruits from \$40 per day to \$50 per day, and to vote instead for an increase to \$75 per day. The \$75 per day expense allowance proposal then passed 64-15.⁸⁴

E. Conferences and Schools

In the Atlantic Coast Conference (ACC) five student-athletes (the three autonomy representatives and the incoming and outgoing ACC SAAC chair) now attend the ACC's spring meeting. A subset of these students participate in the conference's fall governance meeting and legislative conference calls. At the other

⁷⁹ New, 'A True Day Off', *supra* note 3.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Michael Marot, *Power Five Conferences Approve 11 New Measures, Including Medical Benefits Extension and Holiday Break for Hoops*, CHI. TRIB. (Jan. 19, 2018), <http://www.chicagotribune.com/sports/college/ct-power-five-conferences-approve-medical-benefits-extension-20180119-story.html#>.

four Autonomy Conferences, student-athletes have similar participatory roles at conference governance meetings. At my school, student-athletes now sit on the athletic committee and other school committees that relate to athletics, although they are not voting members. The anecdotal information I have received confirms a similar practice at most schools.

IV. MAXIMIZING STUDENT-ATHLETE IMPACT

As Big Ten Commissioner Jim Delaney said following the 2015 Autonomy Forum, the student-athlete “voice is even more powerful than their number.”⁸⁵ He continued, the student-athletes “clearly impacted people. I would say, going forward, if you’re interested in your proposal having a good chance of passing, you need to bring [student-athletes] into the construction of the proposal process.”⁸⁶ Further, as student-athlete Ty Darlington observed, public perception makes it hard to vote against something that student-athletes have advocated.⁸⁷ The voice and vote of student-athletes have great impact. Student-athletes should be at the table, but it is important that we ensure their contributions to NCAA governance are maximized. First, we should consider whether the voice and vote could be further increased. Are student-athletes included in meaningful ways in our campus committees and in our conference governance structures? Is a handful of student-athlete participants at the conference level sufficient, or should each school send a student-athlete representative to participate in conference governance meetings (paralleling the representation from each school for athletic directors, FARs, and Senior Woman Administrators), particularly those meetings held in the late spring after most schools have finished exams and most teams have finished competition?⁸⁸

⁸⁵ Sherman, *supra* note 2, http://www.espn.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

⁸⁶ *Id.*

⁸⁷ New, *supra* note 3.

⁸⁸ Thanks to Joel Pawlak (FAR at North Carolina State University) and Adam Broome (my husband) for independently suggesting further improving the participation of student-athletes in the governance structures of the conferences.

No matter how student-athletes are represented, they have some unique challenges. Student-athletes will necessarily have a shorter-tenure on these governance committees than most of the other members. Moreover, they need to learn and understand the existing rules to be able to effectively advocate for changes to them. They also are expected, through their collective voice, to endeavor to represent all student-athletes and understand how specific rules impact all the NCAA-sponsored sports. Outside of the Autonomy governance structure, the student-athlete voice on the Board of Directors and Council could be marginalized, given the small percentage of votes they control. These are daunting hurdles to maximizing the student-athlete voice and vote. How might the student-athlete voice and vote be made the most effective?

It is imperative that other members of the NCAA governance structure invest time and effort into helping student-athletes overcome these obstacles so that the student-athlete representatives may be as effective as possible in presenting the views of student-athletes. This may include:

- Investing time in the education of student-athletes about the issues on which they will be voting. The Division I SAAC, conference SAACs, and school SAACs all do this. The education process for the student-athletes voting in the Autonomy structure is evolving as that structure is so new, but education is most important for the student-athletes who cast fifteen of eighty votes on Autonomy issues. The schools and the conferences of the student-athlete representatives have a special responsibility which may involve time additional preparation with the student-athlete representatives prior to each meeting or conference call.
- Appointing student-athlete representatives who can serve two or three years in their positions. Ty Darlington attended at least three Autonomy legislative forums. His voice was clearly heard at all three.⁸⁹
- Advising student-athletes to try to understand how issues impact sports other than the one in which they compete. The Division I SAAC should have a broad representation of sports and to the extent that a sport is not represented on the SAAC, SAAC

⁸⁹ See *supra* notes 74, 75, & 77.

members should reach out to student-athletes in non-represented sports to understand their issues and how potential legislation may affect their sports.

- Providing that at least one of the five Division I SAAC representatives from the Autonomy conferences is on the Division I NCAA SAAC so a student-athlete Autonomy representative can be informed by the views of the student-athletes from non-Autonomy conferences.⁹⁰

- Ensuring that on the Division I Board of Directors and Council the student-athlete representatives are not tokens. Their views should be sought out on each issue even if the student-athlete has not volunteered to speak and the Division I SAAC should assist them in providing feedback from all NCAA Division I sports.

- Educating the student-athlete representatives about the financial implications of legislation and how intercollegiate athletics is funded at the NCAA, conference, and institution level. As Jerry Maguire said, “Show me the money.”⁹¹

- Assisting student-athletes in devising systems to retain institutional memory and train and transfer knowledge to their successors in the governance structure by preparing written materials and guides, repositories of minutes and prior materials, and passing down an agenda of items for consideration, a list of contacts within the governance structure, and onboarding new student-athlete representatives are important steps to help ensure that student-athlete representatives build upon the work of their predecessors rather than start over each year.

- Considering a formal mentor structure, pairing student-athlete representatives with another governance member, perhaps outside of the student-athlete’s conference to provide additional guidance and support.

The irony of this is all that I have described takes time and effort and further compounds the time demands on student-athletes. We want student-athletes who participate at the highest

⁹⁰ Thanks to Christine Copper (FAR, The U.S. Naval Academy) for this suggestion.

⁹¹ Bryan Alexander, *20 Years After ‘Jerry Maguire,’ ‘Show me the Money!’ Still Makes Bank*, USA TODAY (December 12, 2016), <https://www.usatoday.com/story/life/movies/2016/12/12/jerry-maguire-anniversary-tom-cruise-show-me-money/95300458/> (describing how the phrase “show me the money” made cinematic fame).

level of athletics to share their perspectives and then for some of them we add on to the time demands of their sport and academic work this additional NCAA governance burden. Nevertheless, what we have seen so far suggests the students are more than up for these challenges.

V. CONCLUSION

The 2014 Governance Dialogue brought the student-athlete's voice to the forefront, thanks to Maddie Salamone and the rest of her Division I SAAC colleagues. Student-athletes like Ty Darlington have shown the impact the student-athlete voice can have on Autonomy legislation and student-athlete welfare. This change to the NCAA Division I governance structure has been one of the most important changes in helping the NCAA maximize student-athlete welfare. We need to consider how we can include student-athletes at our individual schools and in conference governance and ensure that they participate fully. Let's pledge to consider how we can work with our student-athlete representatives to help them maximize their contributions to the NCAA Division I governance structure.

COLLEGE COACHES, COLLEGE ATHLETES, AND THE FIRST AMENDMENT

*Josephine (Jo) R. Potuto**

A relatively new phenomenon in sports is the exercise of free speech rights by athletes and coaches.¹ The 24/7 news cycle and the explosion of social media provide them multiple platforms to advance their agendas, whether charitable, political, social, or simply self-aggrandizing.²

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¹See, e.g., Oller, *Athletes Finding Their Voices on Key Issues*, Columbus Dispatch (July 29, 2018), <http://www.dispatch.com/sports/20180728/rob-oller—athletes-finding-their-voices-on-key-issues?rssfeed=true>.

There are isolated instances of athletes taking political positions in the past. Perhaps the most famous was the black power salute by Tommie Smith and Juan Carlos, members of the United States track and field team, during the playing of the national anthem at the medal ceremony at the 1968 Mexico Olympic Games. Brown, *They Didn't #Take the Knee: The Black Power Protest Salute that Shook the World in 1968*, Washington Post, (September 24, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-](https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.d5565d69a1c7)

[1968/?utm_term=.d5565d69a1c7](https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.d5565d69a1c7). A protest that did not happen was the planned wearing of black armbands by 14 African-American athletes on the 1969 University of Wyoming football team. Wyoming was playing BYU at a time when it discriminated against African-Americans. The Wyoming head coach dropped the players from the team when they told him they planned to protest. His action was upheld by the university. Mullen, *Do Politics Go With Football? 50 Years Ago Wyoming's Black 14 Said Yes*, KUNC.org.

(August 12, 2018), <http://www.kunc.org/post/do-politics-go-football-50-years-ago-wyomings-black-14-said-yes>.

² Martina Navratilova, a world-class tennis player, addressed controversial subjects at a time when most athletes were silent. She believes that social media makes activism much more possible by giving players an independent outlet to get their stories out. See Wertheim, *Sports Illustrated* (July 2, 2018).

The Fourteenth Amendment to the U.S. Constitution governs the actions of state actors,³ including, of course, public universities, as those actions affect First Amendment and other constitutional protections guaranteed by the Bill of Rights.⁴ In this article I address the First Amendment parameters of government regulation of “issues” speech⁵ by athletes and coaches⁶ at state universities.⁷

I. THE FIRST AMENDMENT AND CITIZEN SPEECH: “FREEDOM OF EXPRESSION IS THE MATRIX, THE

³ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *The Civil Rights Cases*, 109 U.S. 3 (1883). Primarily to guarantee equal protection to racial minorities, the Supreme Court expanded the definition of state actor to include private entities that perform a traditional state function or whose functions and authority are pervasively intertwined with public functions. See, e.g., *Constitutional Law: Cases and Materials* 1017 to 1034 (14th ed. 2009); Varat, Amar, Cohen, ed.); *Weise v. Syracuse University*, 522 F.2d 397, 405-06 (2d Cir.), cert. denied, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974); *Wahba v. New York University*, 492 F.2d 96, 101(2d Cir. 1974). See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 *Colum.L.Rev.* 656, 661-62 (1974).

⁴ Bill of Rights protections apply to the states through the doctrine of incorporation. See, e.g., *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

⁵ As discussed in the article, “issues” speech is speech, and expressive activity treated as speech for purposes of the First Amendment, that addresses general public policy concerns and interests rather than matters that primarily involve individuals and their particular situations and predilections.

⁶ Coach and athlete speech also sit in other areas for which specific First Amendment rules apply. These include libel and slander actions by and against coaches and players and the ability of college players to market their names/images/likenesses. See Josephine (Jo) R. Potuto et al., *The Collegiate Mark, The Collegiate Model, and the Treatment of Student-Athletes*, 92 *Ore. L. Rev.* 879 (2014).

⁷ The NCAA is an unincorporated association of public and private universities; it is not a state actor. *Tarkanian v. NCAA*, 488 U.S. 179, 196-97, (1988); *NCAA Const. art. 4.02.1*. Its bylaws apply to nonmember coaches and student-athletes through enforcement by a university. By contrast to the NCAA, state high school associations, although also unincorporated associations, are state actors for purposes of the Fourteenth Amendment. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303, (2001). The Court distinguished the Tennessee High School Association from the NCAA on the ground that virtually all its members were public and, because all of them were sited within the boundary of one state, they could be seen as acting for and with a state in ways that a multi-state NCAA could not. See note 3 *supra* for the standard by which formally private actors are treated as state actors for purposes of the fourteenth amendment.

INDISPENSABLE CONDITION, OF NEARLY EVERY OTHER
FORM OF FREEDOM⁷⁸

The Supreme Court evaluates a number of factors to decide whether speech restrictions imposed by a state actor are constitutional. It looks at content and viewpoint restrictions,⁹ speech treated as conduct,¹⁰ and conduct treated as speech.¹¹ The Court evaluates the type speech – commercial speech,¹² libel and slander,¹³ speech disclosing private facts,¹⁴ fighting words¹⁵ and hate speech,¹⁶ political speech, and obscenity. Among them, political speech warrants the most protection¹⁷ while obscenity is unprotected speech.¹⁸

In addition to articulating First Amendment protections based on the type and content of speech, the Court has articulated the constitutional parameters for imposing time, place, and

⁸ *Palko v. Connecticut*, 302 U.S. 319, 327. *Palko's* holding, that the double jeopardy clause was not an incorporated right applicable to the states, was overruled by *Benton v. Maryland*, 395 U.S. 784 (1969).

⁹ *See, e.g., Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2229-30 (2015).

¹⁰ *See, e.g., Feiner v. New York*, 340 U.S. 315 (1951) (disorderly conduct).

¹¹ *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

¹² *See, e.g., Virginia State Bd v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980); *Lorillard Tobacco Co. V. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

¹³ *See, e.g., N. Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Welch*, 418 U.S. 323 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹⁴ *See, e.g., U. S. v. Caldwell*, 408 U.S. 665, (1972); *Bates v. City of Little Rock*, 361 U.S. 516, (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). Speech invading privacy interests includes invasion of privacy torts. *Compare Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) with *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940).

¹⁵ *See, e.g., Houston v. Hill*, 482 U.S. 451 (1987); *Lewis v. New Orleans*, 415 U.S. 130, (1974); *Cohen v. California*, 403 U.S. 15 (1971).

¹⁶ *Compare R.A.V. v. City of St. Paul*, 505 U.S. 377 (1972) with *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). There also is sexual harassment speech under Title IX. *See, e.g., Allison Gas Turbine Div. v. Gen. Motors*, 32 F.3d 1007 (7th Cir. 1994). *See also, Kingsley R. Browne, Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 Ohio N. U. L. Rev. 563 (2001).

¹⁷ *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Snyder v. Phelps*, 562 U.S. 443, (2011); *Near v. Minnesota*, 283 U.S. 697, (1931).

¹⁸ *See, e.g., Miller v. California*, 413 U.S. 15 (1973).

manner restrictions on speech.¹⁹ It also treats differently the ways in which government regulates speech. These include fines, license requirements or other government-required permission in advance of speech,²⁰ zoning or other limits on the situs of speech,²¹ injunctions,²² and censorship.²³ Finally, even when speech constitutionally may be regulated, the government still must describe in advance with sufficient specificity the speech to be proscribed,²⁴ and it also must avoid restricting more speech than needed to achieve its government purpose.²⁵

The Supreme Court tests for regulating citizen speech are keyed to the public nature of a site or facility.²⁶ A common misconception is that because a facility is state-owned – i.e., a state university's football stadium – that it necessarily must be a traditional public forum open to all comers on all subjects for speech purposes.²⁷ Not so. Instead, the question is whether a forum has been opened purposefully and specifically for citizen

¹⁹ See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

²⁰ A licensing or permit scheme must include clear standards to guide the exercise of discretion for granting or denying. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Kunz v. New York*, 340 U.S. 290 (1951).

²¹ See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

²² See, e.g., *Schneck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 2d 1 (1987); *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S. Ct. 2516, 129 L.Ed. 2d 593 (1994).

²³ See, e.g., *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, (1931); *Freedman v. Maryland*, 380 (1965).

²⁴ See, e.g., *Grayned v. Rockford*, 408 U.S. 104 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974).

²⁵ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *Gooding v. Wilson*, 405 U.S. 518 (1972).

²⁶ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). When owners of private property such as shopping malls open their property to the public, states may require them to provide speech opportunities to the public without violating the First Amendment right of the property owner. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

²⁷ See Steele, *The Resurgent, First Amendment Protects Kneeling In Church and On Football Field* (September 24, 2017), https://www.themaven.net/theresurgent/contributors/first-amendment-protects-kneeling-in-church-and-on-football-field-MFxcyJSCzEmW2kitfz_RnA.

speech, and in what way.²⁸ Different tests apply to a traditional public forum,²⁹ a public forum designated as open for all speech purposes,³⁰ a limited public forum,³¹ and a non-public (for speech or expressive conduct) public forum.³² A common element in government regulation of citizen speech in all these public fora is the neutrality principle.

The neutrality principle is a critical underpinning of First Amendment doctrine because it otherwise is too easy for government to censor speech. The neutrality principle guards against government overreaching because it requires that government may squash speech it dislikes only when it also

²⁸ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The *Perry* Court described the applicable tests governing all public fora.

²⁹ A traditional public forum is one that from time immemorial has been accessible to and used by the public for speech purposes. The classic examples are public streets and parks. See *id.*

³⁰ The scope of speech in a designated public forum is equivalent to that in a traditional public forum. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (university meeting facilities); *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Emp't Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, (1975). In a traditional or designated public forum, government may restrict the content of the speech only if the restriction is neutral for content and viewpoint and the government can show a compelling government purpose for the speech restriction and that no other action will satisfy its purpose and have less impact on speech. The government may impose time/place/manner restrictions so long as they are content and viewpoint neutral, fulfill a compelling interest, and leaves open ample alternative ways to communicate.

³¹ A limited public forum is open for speech, but the speech is tied to a specific purpose; access is available only to a class of speakers or a category of speech that fits within the forum's limited use. See, e.g., *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998). Government may not discriminate on the basis of viewpoint unless it can show a compelling government purpose and that no other action will satisfy its purpose and have less impact on speech. The government also may impose time/place/manner restrictions so long as they are content and viewpoint neutral, narrowly tailored to serve the government's interest, and leave open ample alternative ways for the speech to occur. *U. S. Postal Serv. v. Council of Greenburgh*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535–536 (1980); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S. 147 (1939).

³² See e.g., *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 112, 74 L.Ed.2d 794 (1983). A non-public forum is a public site or facility that is not open for speech. Here the government may reserve the forum for its intended use and may regulate or even prohibit speech or expressive activity so long as the regulation is reasonable and not done with the purpose to suppress content or viewpoint because the government disapproves. *United States Postal Service v. Greenburgh Civic Ass'n*, supra, 453 U.S., at 129, 101 S.Ct., at 2684.

squashes speech it likes. This is a much more difficult exercise of regulatory authority and one likely to increase the voices protesting the regulation. The second misconception regarding government regulation of citizen speech is that the general rules governing freedom of speech apply to all subclasses of speakers. Again, not so. The First Amendment permits greater speech regulation for prisoners,³³ military personnel,³⁴ government employees,³⁵ and students.³⁶ The rules also are different when the government is the speaker.³⁷

II. THE FIRST AMENDMENT AND COLLEGE ATHLETICS

Context matters, both with speech generally and with speech in college athletics. For athletes and coaches, speech takes place on the field (or track or court or in the pool), on the greater campus, or when athletes and coaches are on their own. Speech may relate to matters of general social or political significance or matters specific to athletics – unsportsmanlike conduct, for example.

*A. COACH SPEECH: “[I]T CANNOT BE GAINSAID THAT THE STATE HAS INTERESTS AS AN EMPLOYER IN REGULATING THE SPEECH OF ITS EMPLOYEES THAT DIFFER SIGNIFICANTLY FROM THOSE IT POSSESSES IN CONNECTION WITH REGULATION OF THE SPEECH OF THE CITIZENRY IN GENERAL.”*³⁸

The rights and prerogatives of government employers are equal to private employers³⁹ when government employers deal

³³ See e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119 (1977).

³⁴ *Parker v. Levy*, 417 U.S. 733 (1974).

³⁵ See cases and authorities cited at note 40 *infra*.

³⁶ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393 (2007).

³⁷ See e.g., *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

³⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

³⁹ While private employers are not constrained by the First Amendment, they of course are subject to state statutes, collective bargaining agreements, or individual employment contracts.

with employee speech that does not involve matters of public concern.⁴⁰ For such speech, the First Amendment does not insulate government employees from adverse job consequences.

By contrast, government employees are within the ambit of the First Amendment when they speak on matters of public concern, but, even so, First Amendment protection only covers their speech when it does not interfere with a government employer's ability to maintain an efficient and effective workplace.⁴¹ To decide whether employee speech interferes with an efficient and effective workplace, the court looks at the content, form, and context of the speech.⁴² Among the factors it considers are how far up the administrative food chain are the employees, whether the speech occurs at the workplace or at some other venue, whether government employees claim to be speaking for

⁴⁰ See, e.g., *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1983); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 679 (1996). The Court extended the government-as-employer speech test to cover the bylaws of a state-actor association that its members must enforce against their employees. *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) ("an athletic league's interest in maintaining an efficient and effective workplace may warrant curtailing the speech of its voluntary participants").

⁴¹ See cases and authorities cited at note 40 *supra*. As with any line-drawing, the line between speech on a matter of public concern, and speech that is not, is sometimes blurred. On one side is a government employee who speaks on matters unrelated to the government agency that employs him or the particular job for which he is employed. On the other side is the employee who criticizes a particular supervisor or workplace environment. Two Supreme Court cases illustrate the poles: *Pickering v. Bd. of Educ.*, 391 U.S. 563, (1968); and *Connick v. Myers*, 461 U.S. 138, (1983). *Pickering* involved a public school teacher who was fired for publicly criticizing the local school board for mismanagement of resources; the Board claimed the statements were factually untrue. The Court held that the constitutionality of firing *Pickering* for claimed misstatements of fact should be assessed by using the same First Amendment standard that would apply had *Pickering* been sued for defamation. The Court also held that *Pickering's* statements were on matters of public concern even though he was a school teacher with a personal employment interest in how school funds were spent. 88 S. Ct. at 1736. In *Connick* an assistant district attorney who objected to a job reassignment was fired after she distributed at work a questionnaire to other assistant district attorneys that sought their views on the administration of the office. The Court characterized all but one of the questions as related to personnel matters, not the administration of a public office. The one question that related to a matter of public concern was whether staff felt pressured to work in partisan political campaigns. *Connick*, 461 U.S. at 149-50.

⁴² *Id.* at 138.

their employers or are perceived as speaking for them, and the actual workplace disruption caused by the speech.

A head coach might write an opinion piece for a newspaper in which that coach attacks a United States resident as incompetent to hold office.⁴³ Another head coach might tweet information about a United States president that is demonstrably false.⁴⁴ Their state university employer may not sanction these head coaches because their speech is offensive to the majority or even factually inaccurate. A university's authority to act depends on whether the speech substantially interferes with its ability to maintain an efficient and effective workplace.

A head coach likely is akin to a college dean, or at least a department chair, in a university's administrative structure. Speech by high-level administrators may bear on the public perception of a university. That possibility is heightened with a head coach. A major university in an Autonomy Five Conference⁴⁵ typically has a highly visible athletic program. At these universities, and many others in the NCAA's Division I Football Bowl Subdivision,⁴⁶ head coaches garner much public attention in the media—traditional, new, and social.

⁴³ See Gleeson, Steve Kerr Blasts "Blowhard" Trump, Says He's 'Ill-Suited' for Presidency, USTA Today Sports (May 18, 2017), <https://www.usatoday.com/story/sports/nba/2017/05/18/steve-kerr-blasts-president-donald-trump/101828914/>. The particular example in fact occurred, but the speech was by a coach of a professional, not college, team.

⁴⁴ See Crockett Jr., Washington State Football Head Coach Tweets Fake Obama Video and Then Proves His Ignorance by Arguing About It, The Root (June 18, 2018), <https://www.theroot.com/washington-state-football-head-coach-tweets-fake-obama-video-1826920397/>; Calkins, Q&A: Days After Posting Doctored Obama Video On Twitter, WSU Coach Mike Leach Has Much More To Say, The Seattle Times (July 31, 2018), www.seattletimes.com/sports/wsug-cougars-football/qa-days-after-posting-doctored-obama-video-on-twitter-wsu-coach-mike-leach-has-much-more-to-say/.

⁴⁵ The Autonomy Five Conferences are the Atlantic Coast Conference, the Big Ten Conference, the Big 12 Conference, the Pacific Athletic Conference, and the Southeastern Athletic Conference. These conferences include virtually all of the historic major football programs. See NCAA Bylaw 5.02.1.1, 5.3.2.1.

⁴⁶ NCAA Bylaws 3.01.2, 20.01.2. The football bowl subdivision includes the autonomy five conferences as well as a few outlier major football programs such as Brigham Young University that are not members of an Autonomy Five Conference. The football bowl subdivision does not have an NCAA championship in football; instead

In the opinion piece and tweet described above, each head coach explicitly might have said that he spoke for himself only, and not his university. Alternatively, each might have avoided identifying himself as a head coach. Nonetheless, at least for head coaches in football and men's basketball, it is unlikely that their university connection and status will go unnoticed or unremarked.

Even when it is crystal clear that head coaches are speaking on their own dimes, fans, donors, and state officials may blame a university for failing to stop the speech. Speech critical of government operations may sour a university's relationship with state officials. Speech expressing a viewpoint that state officials, or their constituents, abhor may prompt efforts to decrease university funding or to limit university discretion in how to spend state funds. Donors may threaten to withhold support. Fewer fans may attend games.⁴⁷

These impacts of head coach political speech may dissipate with time as new matters capture public attention. Even if there is a real and substantial likelihood that over the long run a university's ability to maintain its programs and operations will be affected, these impacts do not appear to be the type of impact to which the Supreme Court directs attention in the government-as-employer speech cases. The Court's focus is on a speech's immediate impact on day-to-day operations and the degree to which they are adversely affected by workplace distraction caused by the speech. If projected downstream consequences were sufficient to sanction head coaches for off-campus speech, then the balance of employer and employee rights would be weighted so heavily in favor of employer workplace disruption that there would be little room left for coaches to speak on matters of public concern.

Not all consequences of coach speech are downstream, however. The expressed disapproval of state officials, even if ultimately it will dissipate, cannot be ignored by university administrators in real time. The faculty senate may debate a

these football programs compete in bowl games and are eligible for the College Football Playoff.

⁴⁷ See, e.g., Beaton, Poll Shows NFL Fan Interest Remains Lower, Stark Divisions Over Anthem Protests (August 31, 2018), www.wsj.com/articles/poll-shows-nfl-fan-interest-remains-lower-stark-divisions-over-anthem-protests-1535709600.

coach's speech and pass a resolution seeking administrative action against the coach. Students may protest. Fans will phone and write letters, email and tweet. Local and national news outlets may pick up the story. Advocacy groups likely will be energized to attempt to influence administrative action. University trustees may exert pressure. Dealing with the aftermath of head coach political speech, therefore, could well entail substantial time and attention from university administrators and, in turn, trigger constitutional university action against a coach.

A question regarding the constitutionality of employee speech regulation is the extent to

which a university must adhere to the neutrality principle. One might argue that the government-as-employer speech test, by including factors such as the administrative rank of the employee and the situs of the speech, already accounts for the degree to which a government employer needs to be neutral. A test so focused on workplace disruption – in other words, focused on the effects of an employee's speech – likely always will have disproportionate impact on employees with viewpoints that do not reflect prevailing norms or whose viewpoints differ from their government employer.

Speech that toes the prevailing lines of political and social orthodoxy needs little constitutional protection. Unpopular speech or unpopular speakers do. In the context of citizen speech, this reality translates to constitutional doctrine that prioritizes the rights of speakers when speech provokes listener reaction.⁴⁸ It also led the Supreme Court to describe narrowly the elements needed to permit government to proscribe or punish either fighting words⁴⁹ or speech that presents a clear and present danger of violence.⁵⁰ This reality also should inform the balancing test used in the government-as-employer speech test.

Now consider another example of coach speech on a matter of public concern. A head football coach at a public university also is

⁴⁸ See *Feiner v. New York*, 340 U.S. 315, 321-30 (1951) (Black, J., dissenting); Owen Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Frisby v. Schultz*, 487 U.S. 474, 484-84 (1988).

⁴⁹ See cases cited at notes 15 and 48 *supra*.

⁵⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

a lay minister. In a sermon he states his opposition to gay marriage and describes as sinful same-sex sexual relations. The university at which he is employed is subject to federal and state anti-discrimination strictures that include discrimination based on sexual orientation. The university is a firm and public adherent of these anti-discrimination policies in general and in their particular application to protection of gay and lesbian students. The university has an active LGBTQIA⁵¹ student organization and has sponsored programs for staff and students aimed at fostering a campus environment open to all.

The head coach's sermon was delivered off campus, and it is clear that he did not speak for the university. At the same time, his sermon is directly counter to the university's message and policies. A head coach's job is to coach, teach, advise, and generally interact with student-athletes. One might argue that a university constitutionally could fire this head coach on the presumption that his known position regarding gays will permeate his relationships with student-athletes and lead either to his unfair treatment of gay athletes or to gay athletes uncomfortable with being coached by him.

Firing head coaches for holding certain public policy views, or speaking about them, however, clearly implicates their free speech right and, in the case of this head coach, possibly also his right to the free exercise of his religion. In the absence of evidence that he discriminated against gay athletes, it would appear that this head coach should have First Amendment protection from employment sanctions because of his views.⁵²

Now consider the result had this head coach shared his views at a team meeting. In this situation he would have interjected his viewpoint during the performance of his job and done so when speech on the subject was not relevant to his job responsibilities. It seems clear that under the government-as-employer First Amendment test, the university now may sanction the head coach.

Suppose now that a gay head coach is a vocal gay rights advocate. He shares his views at a team meeting, criticizing as

⁵¹ LGBTQIA refer to lesbian, gay, bisexual, transgender, queer or questioning, intersex, and asexual or allied.

⁵² See generally, Bernstein, Defending the First Amendment from Antidiscrimination Laws, 82 N. C. L. Rev. 224 (2003).

discriminatory those who oppose gay marriage, including adherents of religions that advocate against gay marriage and gay sex. This coach also interjected his viewpoint during the performance of his job and when the speech was not relevant to his job responsibilities. His speech implicates the university's non-discrimination policies and its efforts to be inclusive. By contrast to the lay minister coach's sermon, however, this head coach's speech is consonant with the public policy and message of his university. The demographics of his university also may predict greater sensitivity for gay rights than the rights of religious adherents. If so, then his speech also may cause less campus disruption among faculty and students.

Although there may be room for dispute regarding whether, and the extent to which, the neutrality principle applies generally to cabin a government employer's authority to sanction employee speech, there should be no dispute regarding its applicability when the particulars of employee speech are similar both in the administrative status of the employee speaker and in the situs of the speech. In this situation, a government employer should be obliged to treat the employees similarly. Indeed, a failure to be viewpoint neutral seems likely to increase the external pressures on a university administration.

A useful way to think about the neutrality principle in the context of head coach speech is to compare it to a professor's classroom lectures and interaction with students. A professor can teach Shakespeare in an English Literature class from the viewpoint that he was a closet Catholic, or that he was a loyal Elizabethan. The professor also may choose to teach the plays and sonnets without reference to Shakespeare's supposed biographical profile. By contrast, academic freedom does not cover a math professor teaching Shakespeare, no matter what tack the professor chooses to take. In that sense, then, the math professor who teaches Shakespeare, the coach who talks against gay rights, and the coach who talks in favor, all are operating outside their teaching brief. They all three constitutionally may suffer job consequences, and, moreover, the job consequences for the two

head coaches should be the same.⁵³ Similarly, neither professor nor coaches should have First Amendment protection if they direct epithets at students, whether anti-gay, or anti-religion, even if those epithets would be protected speech, not fighting words, for citizen speech.⁵⁴ In this case, all three warrant equal treatment because their conduct is similar in all respects except the point of view that led to the epithets.

A head coach who kneels during the national anthem adds another nuance to the question of government employee speech. The first element of an analysis centers on whether a university requirement that a head coach be on the field and stand for the national anthem translates to government-compelled endorsement of a point of view.⁵⁵ The Supreme Court has described saluting the flag as “touching matters of opinion and political attitude”⁵⁶ and held unconstitutional a state requirement that school children salute the flag on pain of expulsion.⁵⁷ Standing silent at the anthem requires less conduct than a flag salute. Establishment clause jurisprudence, although it raises different constitutional concerns, nonetheless may be instructive on this point. The Supreme Court calls it compelled endorsement of religion when a non-believing fan stands silent during a religious invocation delivered before a high school game as the invocation puts pressure on the non-believing fan to be silent rather than to

⁵³ The professor’s situation is different from the two head coaches. His speech is not related to the subject addressed by the two head coaches so different treatment based on viewpoint will not be an issue. In addition, his professorial status may mean a faculty committee will need to deal with his speech. The requisites of tenure also may trigger different treatment.

⁵⁴ Coach speech in this area might be treated as conduct for purposes of the First Amendment – for example, bullying – and, in consequence, would not be protected under the First Amendment. See Maese and Stubbs, Maryland Football Program under Fire in Wake of Reports on Toxic Culture, Washington Post, (August 11, 2018), https://www.washingtonpost.com/news/sports/wp/2018/08/11/maryland-football-program-under-fire-in-wake-of-reports-on-toxic-culture/?noredirect=on&utm_term=.05cdf582aa25; Dinich, Rittenberg, VanHaaren, The Inside Story of a Toxic Culture at Maryland Football, ESPN (August 11, 2018), http://www.espn.com/college-football/story/_/id/24342005/maryland-terrapins-football-culture-toxic-coach-dj-durkin.

⁵⁵ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Bd of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁶ *Id.* at 635-636

⁵⁷ *Id.*

object.⁵⁸ If being compelled to be on the field and stand for the national anthem is seen as a compelled, though modest, endorsement of a university's viewpoint, then coaches have a constitutionally protected right to decline to be present during the playing of the national anthem.⁵⁹

Now move to an analysis of government employer authority if requiring a head coach to be present and stand for the national anthem is not compelled endorsement of viewpoint. Kneeling during the anthem is speech on a matter of public concern. It also is speech that occurs at the workplace while a coach is performing job responsibilities. In addition, the speech occurs in front of fans who purchased tickets to see a game, not a political protest, however brief.

A prime dividing line in evaluating the reasonableness of citizen speech regulation is whether listeners are free to walk away.⁶⁰ It is unclear whether fans will be treated as a captive audience in assessing their rights,⁶¹ particularly given the extreme brevity of the on-field demonstration. But their presence in the stands is at least an element in assessing whether the coach speech creates workplace disruption. Under the government-as-employer First Amendment test, it appears that a university constitutionally could regulate this coach speech, a conclusion that is reinforced if the university is viewpoint neutral in enforcing its policy.

As noted above, one consideration the court employs in deciding the reasonableness of a government speech regulation is the sanction imposed. It may well be that under the government-as-employer First Amendment test, a university could fire the head coach. That being so, it is clear a university constitutionally could require either that a coach stay in the locker room while the

⁵⁸ Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000).

⁵⁹ Including such a requirement in a coach's contract, moreover, does not avoid the impact of the law of unconditional consequences.

⁶⁰ See, e.g., Consol. Edison Co. v. Pub. Serv. Comm'n, 1000 S.Ct. 2325, 2335-36 (1980).

⁶¹ See note 47 supra.

anthem is played⁶² or that a coach be on the field and refrain from kneeling – again with the caveat regarding viewpoint neutrality in enforcing a policy of anthem demonstrations.⁶³

A complication in assessing the impact of government employee speech is government's right to engage in its own speech.⁶⁴ Government is an artificial construct that can only act – or speak – through those it employs. When government conducts public policy it is not neutral, nor can it be. It is nonsense of epic proportions, for example, to expect that a city that designates a street as one way going east must also designate that same street as one way going west.

Government also may advocate for the public policies it adopts, and, in doing so, it will, and should, express only those viewpoints that support its policy choices. It is not always easy to decide when employee speech expressing one viewpoint only is the employee speaking as the government, when no neutrality obligation applies, or when, by contrast, employee speech expressing one viewpoint is that of employees speaking for themselves,⁶⁵ where the government-as-employer speech rules apply and, in turn, neutrality of application might be required. Because characterizing employee speech as that of the government employer avoids any potential obligation to be neutral in permitting similarly situated opposing viewpoints, the identification of speech as employer speech should be closely circumscribed.

So far I have discussed coach speech on matters that clearly are of public concern. Other examples of coach speech are not so clear. Take limits on coach recruiting speech, for example.

Tennessee Secondary School Athletic Association v. Brentwood Academy involved a high school coach who wrote

⁶² Another alternative, eschewing playing the national anthem, seems a doubtful resolution as it would raise some of the same negative consequences for a university, perhaps even enhanced, as a coach's kneeling would.

⁶³ For what viewpoint neutrality might mean in this context, see text accompanying note 88 *infra*.

⁶⁴ *See, e.g., Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

⁶⁵ Compare, *e.g., See, e.g., Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015) with *Wooley v. Maynard*, 430 U.S. 705 (1977). *See Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995).

personal notes to prospective student-athletes and was sanctioned for violating the state high school association's rule that prohibited "undue influence" in recruiting.⁶⁶ A near-unanimous Supreme Court⁶⁷ concluded that the rule fostered a salutary government purpose of managing athletic competition and, therefore, the coach could be punished for violating the rule despite the fact that there are important First Amendment values in providing full information to prospective students helpful to their choice of high school.⁶⁸ Also relevant to the court's decision was its characterization of coach speech abridging a recruiting rule as "nowhere near the heart of the First Amendment."⁶⁹

Criticism of referees and game officials by head coaches is perhaps the most common instance of coach speech. Such criticism falls within the realm of "issues" speech since one can argue that game officiating implicates the integrity of the game.

The NCAA and college athletic conferences penalize head coaches for publicly criticizing game officials, conference staff, or competitors.⁷⁰ Head coaches are expected to be positive role models for student-athletes as well as for youth generally.⁷¹ The

⁶⁶ *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.* 551 U.S. 291, 294 (2007). The *Brentwood* litigation involved two visits to the Supreme Court. In the first case, the Court concluded that a state high school association was a state actor for purposes of the fourteenth amendment. *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001).

⁶⁷ The lone holdout, Justice Thomas, believed the Court erred by deeming the high school association a state actor in the first place. *Tennessee* 551 U.S. at 306 (Thomas, J., concurring).

⁶⁸ *Id.* at 300. The NCAA also regulates recruiting. See NCAA Bylaw Article 13.

⁶⁹ *Id.* at 296. In *Brentwood*, the party before the Court was the high school, not the head coach whose speech violated the rule. That likely makes no difference, because otherwise, as the *Brentwood* Court said, there could be easy circumvention of athletic rules that are constitutional and policy-defensible. *Id.* at 296, 300.

⁷⁰ The NCAA and college athletic conferences have rules governing coach criticism of officials. For an illustration of conference restrictions on coach comments – in this case of other coaches in a conference – see Jones, SEC Coaches' Remarks to Be Limited, News-Press (Fort Myers), May 29, 2009, at 2C. See also Pedro Moura, Lane Kiffin Apologizes for Comments, ESPN LA (Nov. 2, 2011), http://espn.go.com/los-angeles/nfl/story/_/id/7178722/usc-lane-kiffin-apologizes-point-ripping-refs (discussing the PAC-12 imposing public reprimand and \$10,000 fine on head coach for criticizing game referees). NCAA sportsmanship policies also prohibit coaches from using expletives, obscene or racist speech. See Jeff Rabjohns, NCAA Swears It Will Put a Stop to Coaches' Cursing, Indianapolis Star, Oct. 22, 2007, at A1.

⁷¹ NCAA Manual §§10.01.1, 11.1.2.1, 19.01.2 (2009-10).

rationale for rules prohibiting criticism of officials extends beyond the role model responsibility of a head coach to the need to maintain confidence in the competence and neutrality of referees, umpires, and other game officials. Prohibiting public criticism also relates to attracting quality individuals to take these jobs and the cost of getting them.

No doubt watching athletes compete is a central preoccupation of many citizens, and head coaches' public criticism might help them decide whether games are administered by competent officials in an unbiased way. Even so, there is little doubt that a head coach's criticism is impelled by dismay at a game result or adverse calls, not by general public-spiritedness. Prohibiting criticism of officials may be seen as necessary to maintain effective competition. It promotes civil discourse and respect for process, an appropriate educational goal.⁷² It also is comparable to recruiting speech in its distance from the First Amendment's "heart." It therefore seems that a university's enforcement of conference and NCAA sportsmanship bylaws is a constitutional exercise of its authority as an employer.⁷³

*B. STUDENT ATHLETE SPEECH: "[C]ONDUCT BY THE STUDENT, IN CLASS OR OUT OF IT, WHICH FOR ANY REASON . . . MATERIALLY DISRUPTS CLASSWORK OR INVOLVES SUBSTANTIAL DISORDER OR INVASION OF THE RIGHTS OF OTHERS IS, OF COURSE, NOT IMMUNIZED BY THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF SPEECH."*⁷⁴

As with government regulation of its employees, there is wider scope for constitutional regulation of student speech than government regulation of citizen speech. For students, the operative test derives from *Tinker v. Des Moines Independent Community School District*, in which the Court upheld the right of high school students to wear black armbands to protest the

⁷² *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681-86 (1986).

⁷³ Cf. *Connick v. Myers*, 461 U.S. 138 (1983). An additional consideration: coaches contractually agree to be bound by NCAA bylaws. NCAA Bylaws §§ 11.2.1, 3.2.4.6, 14.1.3.1, 30.12, 30.3.1, 30.3.3.

⁷⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

Vietnam War.⁷⁵ Under *Tinker*, it is constitutional for school administrators to regulate or prohibit student speech when it materially and substantially disrupts the academic environment, campus community, or the need for discipline.

The Court articulated the *Tinker* test in the context of political speech by high school students.⁷⁶ The Supreme Court has never directly described how or whether *Tinker* should be applied to university students. In another context, the Court disavowed the notion that “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”⁷⁷ Although one justly might argue that the scope and purpose of university education and the greater maturity of university students should lead to greater protection for university student speech than that afforded high school students, the *Tinker* test nonetheless is applied by universities to describe student rights and govern student discipline.⁷⁸ When it comes to student-athletes, moreover, *Tinker* may be inapplicable as providing greater First Amendment protection than constitutionally is required when evaluating the athletic-only consequences to student-athletes for their speech. First, students have no constitutional right to compete in a varsity sport.⁷⁹ Second, the reasons that permit regulation of head coach speech – fostering the administration of competition, managing

⁷⁵ *Id.* at 508

⁷⁶ *Id.* See *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007).

⁷⁷ *Healy v. James*, 408 U.S. 169, 180 (1972). *Healy* involved a college’s refusal to recognize Students for a Democratic Society as an official campus student group.

⁷⁸ See, e.g., *University of Nebraska Bd. Of Regents Policy* 5.1.2 (c).

⁷⁹ See, e.g., *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom v. NAA*, 93 P.3d 621, 624 (Colo. App. 2004); *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that “the overwhelming majority of jurisdictions” find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 85-86 (W. Va. 2001). Their participation may be conditioned on, for example, consent to drug testing. *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995); *Bd of Educ. of Indep. School District No. 92 of Pottawatomie Cty v. Earls*, 536 U.S. 822 (2002). For a discussion of the limits on the constitutionality of conditioning athletic participation on foregoing otherwise available constitutional rights, see text accompanying notes 79 to 83 *infra*.

games, and promoting the goals of higher education⁸⁰ – also are relevant to student-athlete speech. Finally, the most severe sanctions a university may impose on student-athletes qua student-athletes are those to which they have no constitutional right in the first place – exclusion from athletic participation and revocation of an athletic scholarship.⁸¹ Those sanctions neither prevent them from enrolling at another school and competing, nor prevent them from competing in noncollegiate athletic competition.

Much of the discussion of student-athlete political speech tracks the discussion earlier regarding head coach speech. One prime difference is that student-athlete speech would never be confused as the speech of the university at which a student-athlete is enrolled.⁸²

A student who expresses off campus an opinion that white hegemony and privilege are evils that may be eradicated only by restricting the opportunities of whites to go to college or get jobs has not substantially and materially disrupted the academic environment or interfered directly with the rights of other students. The same is true of a student who publicly touts the

⁸⁰ See, e.g., NCAA Manual §§31.02.3, 31.1.1'0; see also NCAA.org, Public Reprimand and Suspension Issued to Lehigh University Football Student-Athlete, NCAA (Dec. 8, 2011), [http://www.ncaa.org/wps/wcm/connect/publicNCAA/Resources/Latest+News/2011/December/Public+reprimand+and+suspension+issued+to+Lehigh+University+football+student-athlete.Football's "excessive celebrating" rule governs game participation. See NCAA, 2011 NCAA Football Rules Committee Action Report 1 \(2011\); Ben Watanabe, Excessive Celebration Penalties in College Football Are Getting Out of Hand, NESN \(Oct.16, 2011\), <http://www.nesn.com/2011/10/excessive-celebration-penalties-in-college-football-are-getting-out-of-hand.html>. The school cases that generated the test, moreover, arise out of student exercise of political speech, the core of the First Amendment.](http://www.ncaa.org/wps/wcm/connect/publicNCAA/Resources/Latest+News/2011/December/Public+reprimand+and+suspension+issued+to+Lehigh+University+football+student-athlete.Football's+\)

⁸¹ A university might also take action against a student-athlete qua student. In this case, the law governing student speech would apply. See generally, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed. 2d 290 (2007). For student speech generally, the Court expressly has stated that viewpoint discrimination has no place in student speech regulation unless a school can demonstrate that that singling out a particular viewpoint is required to avoid material and substantial interference with schoolwork or discipline. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508, 510-13 (1969).

⁸² There are occasions when their universities may ask student-athletes to speak for them, but in these cases there will not be a conflict between a university and student-athlete regarding the content or viewpoint of the speech.

success and achievements of the white race and opposes affirmative action initiatives that continue more than 60 years after the Supreme Court mandated public school integration as an essential component of equal protection.⁸³ The Supreme Court has underscored that an educational environment is a prime place for the marketplace of ideas that underpins First Amendment doctrine, that in the educational environment “a multitude of tongues” must be heard, and that authoritative selection of a particular viewpoint has no place.⁸⁴ Expression of each of these viewpoints in a classroom, therefore, by students, even student-athletes, should be permitted when relevant to the subject matter and expressed in ways of polite and respectful discourse.

If the students who made the off campus remarks are student-athletes, an additional analysis is needed to decide whether the speech constitutionally may trigger their dismissal from a varsity athletic team. Even though competing in varsity athletics is a benefit or privilege and not a constitutional right, it is not automatically true that government may condition receiving the benefit on the relinquishment of the right to freedom of speech.⁸⁵

Relevant to the question whether student-athletes may suffer athletic competition consequences because of their speech is how separate was the speech from the student-athletes’ status as student-athletes. In the example provided, the speech was off campus and not part of any athletic activity. Assume the student-athletes neither were in uniform nor identified themselves as student-athletes. In this situation, dismissing them from varsity competition because of their speech appears to impose an unconstitutional condition on their status as student-athletes.

Student-athletes, as well as coaches, are held to sportsmanship requirements. As is the case with coaches, and for much the same reasons, these requirements for student-athletes will pass constitutional muster.

⁸³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 510-13 (1969).

⁸⁵ *See, e.g., Perry v. Sinderman*, 408 U.S. 593, 596-98, 92 S. Ct. 2694, 2697-98, 33 L. Ed. 570 (1972); *Elrod v. Burns*, 427 U.S. 347, 360-61 (1976).

Analysis as to whether a university may sanction student-athletes for kneeling at the national anthem also raises many of the same considerations discussed regarding coaches who kneel. The possibility that being required to be on the field and stand is compelled endorsement of viewpoint is heightened with student-athletes as they are still within the educational system and may be seen as more subject to pressure than an adult employer.. That said, and as was the case in the discussion of coaches, kneeling at the national anthem moves the needle closer to a conclusion that university regulation would be constitutional.

Kneeling takes place on university property during a university activity. A football field is a non-public forum for speech.⁸⁶ Regulation of speech activities in a non-public forum is constitutionally permitted so long as the regulation is reasonable and is not done in an effort to squash speech with which government disagrees.⁸⁷ Student-athletes are on the field only by virtue of their participation in that activity, and their speech is not a component of that participation. Prohibiting speech not relevant to athletic participation is reasonable, particularly as the most severe sanction that may be imposed is exclusion from participation in a varsity sport.

The second component that permits speech regulation in a non-public forum is that the regulation is not done out of antagonism for the viewpoint expressed. A university would have more difficulty meeting this part of the test. The basic point is the same as described in the discussion above regarding coach speech, viewpoint neutrality, and the effect of the speech on workplace efficiency.⁸⁸ If a negative impact on fans is enough to exempt a university from a conclusion that it targeted a student-athlete because of disagreement with viewpoint, then unpopular speech always is disadvantaged.

Moreover, viewpoint neutrality at a minimum should mean that if kneeling is prohibited then so too must other anthem demonstrations, such as crossing one's arm over one's heart. There also is a tenable argument that the scope of speech regulation must cut a broader swath than what happens at the national

⁸⁶ See cases cited at note 33 *supra*.

⁸⁷ See cases cited at note 33 *supra*.

⁸⁸ See text accompanying notes 47 to 53 *supra*.

anthem and might need to cover other points of free expression during pregame activities.

Consider, again, a university that wants to prohibit kneeling during the playing of the national anthem. Such action may be constitutional, but it also will be controversial,⁸⁹ and much more so if crossing one's arm over one's heart also must be prohibited.⁹⁰ It is far, far easier simply to play the national anthem before coaches and student-athletes take the field.

Anyone who has attended a collegiate sporting event knows that there are a myriad of instances of speech unrelated to the game. These might include, for example, a PA announcement urging fans to support the military or to honor 9/11 victims or to contribute to the United Way. To the extent these require no participation by student-athletes (or coaches) they constitute university expression of viewpoint and may go forward as instances of employer speech.

One final area of student-athlete speech regulation relates to their use of social media. The constitutional considerations governing university regulation of student-athlete speech on social media are no different in kind from government regulation of other ways that student-athletes speak. The proliferation of social media, its ease of use, and the immediacy of posting before thoughtful consideration make it a fertile area, however, for student-athlete speech that universities may seek to regulate.

Some collegiate athletic programs prohibit student-athletes from using social media⁹¹ or monitor their use.⁹² In part,

⁸⁹ Gay, SIU Players Banned from Displays of Activism While in Salukis Uniform, WSPD Local 6 News (August 29, 2018), www.wpsdlocal6.com/2018/08/29/siu-players-banned-from-displays-of-activism-while-in-salukis-uniform/;

⁹⁰ Munoz, SIU Athletics Rescinds Activism Ban, Legal Experts Weigh in on Code of Conduct Addition, SIU Daily Egyptian (August 30, 2018), dailyegyptian.com/85792/showcase/siu-athletics-rescinds-activism-ban-legal-experts-weigh-in/.

⁹¹ Rovell, Coaches Ban of Twitter Proves College Sports Isn't about Education, CNBC (August 8, 2011), <https://www.cnbc.com/id/44058540>.

⁹² Coaches follow their athletes on face book and twitter. Coaches also monitor what recruits are posting. *See, e.g.,* Voigt et al., Be careful on Twitter, Recruits: College Coaches Are Watching for Bad Social Media Behavior, Fox News Sports, (August 11, 2014), <http://www.foxnews.com/sports/2014/08/11/be-careful-on-twitter-recruits-college-coaches-are-watching-for-bad-social.html>.

universities do this to protect student-athletes from unpleasant or virulent messages from unruly fans.⁹³ In part, they do this to protect student-athletes from negative impacts on job prospects from ill-considered posts.⁹⁴ In part, they do this to demonstrate institutional control as student-athletes posts may point to their commission of NCAA violations.⁹⁵ Protecting students from interactions with virulent fans, and acting proactively to uncover NCAA violations are sufficient justification for a university to monitor student-athletes social media, particularly as much of what is posted is in the public domain. Whether these reasons also justify an outright ban on the use of social media is not clear, and many argue they do not.⁹⁶

III. GOOD SENSE

The constitution sets minimum standards below which government may not act; a constitutional minimum does not necessarily equate with wise or good policy. Concomitantly, the fact that speech is protected from government regulation does not mean it is socially beneficial to give the speech, or to give it at a particular time and place. An increasingly multicultural society brings dividends in terms of the vibrancy and added texture to society. But it also adds to the difficulty of amicable communication. Today's society is less polite, less tolerant of opposing views. Issues that might be handled amicably, and by

⁹³ Auerbach, The Good and Bad of Twitter and College Athletes, USA Today Sports (January 10, 2013), www.usatoday.com/story/sports/college/other/2013/01/10/college-athletes-twitter-criticism-johnny-manzel-kentucky/1823959/.

⁹⁴ Social media comments can haunt a player many years after they were posted. Tasch, Other Athletes Like Josh Hader Who Came Under Fire For Controversial Social Media Posts, Daily News.com, (July 18, 2018), <http://www.nydailynews.com/sports/ny-sports-athletes-controversial-social-media-20180718-story.html#>

⁹⁵ A tweet by a North Carolina student-athlete triggered an NCAA investigation and, ultimately, the suspension of several student-athletes for commission of NCAA violations. Giglio, Austin's Twitter Account Sheds Light on UNC Player, News and Observer (July 20, 2010) <http://www.newsobserver.com/2010/07/20/v-print/589864/austins-twitter-account-sheds.html>.

⁹⁶ See, e.g., Gay, Note, Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional? 39 Fla. St. Univ. L. Rev. 781 (2012); Walsh, All a Twitter: Social Networking, College Athletes, and the First Amendment 619 20 William & Mary Bill of Rts. J. 619 (2011).

compromise, instead result in entrenched opposing camps, especially when a speaker challenges prevailing norms.

In describing the scope of constitutional speech regulation in this article, I by no means endorse university regulation in general nor any fact-specific application. Although I lean quite heavily in favor of permitting speech, I nonetheless recognize that the arguments on each side are not frivolous when it comes to coach and student-athlete speech. A university should balance all interests and project what next may happen depending on how it decides. It should not make a decision based on what is politically most palatable or least likely to generate criticism. Rather, it should do what it thinks is right based on all the variables at play. Hard questions and passionate advocacy means no decision will be immune to criticism.⁹⁷

⁹⁷ Smith, Saluki Athletics to 'revisit' Protest Clause in Athlete Handbook, Carbondale Southern Illinoisan (August 31, 2018), https://thesouthern.com/news/local/siu/saluki-athletics-to-revisit-protest-clause-in-athlete-handbook/article_a5b5f7e7-e13b-519d-a587-c7d1b22beeeb.html.

A HISTORICAL PERSPECTIVE ON THE ROLE OF FACULTY ATHLETICS REPRESENTATIVES: THE SMU EXPERIENCE

C Paul Rogers III^{1}*

I. INTRODUCTION

The role of Faculty Athletics Representative has changed over the years, as has the governance of intercollegiate athletics within our institutions. In some ways that has been a mixed bag for faculty reps, since, at least in some conferences and in some institutions, the role of the faculty rep has diminished somewhat. But in other ways, the changes have arguably enhanced the position. Although the position of faculty athletic representative is often ill-defined and little understood, it can be a highly visible position on our campuses and with the press, and it can be a lightning rod for criticism when things go awry.² Given my long tenure in the role through SMU's membership in four conferences,³ I hope to offer some insights into the job, with reflections on the past and present and consideration of the challenges faculty reps collectively face.

II.

SMU President A. Kenneth Pye appointed me faculty athletics representative in the early fall of 1987, right on the heels

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² See, e.g., Brad Wolverton, *Faculty Reps Botch Sports Oversight Role*, Chronicle of Higher Education, October 31, 2010.

³ They are the Southwest Conference, the Western Athletic Conference (the WAC), Conference USA, and the American Athletic Conference (AAC). The number of conferences is five if one counts SMU's brief membership in the Big East before it splintered.

of SMU's infamous football scandal. And I have served in that role ever since, now 32 years and counting. I was appointed so long ago that the popular acronym FAR did not exist; we were simply known as faculty reps.

One positive and necessary change in my tenure has been the engagement of university presidents in the governance of athletics, on campuses, within conferences, at the Knight Commission, in the Drake Group, and within the NCAA. That engagement, while indispensable, has, at least at some institutions and in some conferences, resulted in a diminished role for faculty reps.

The old Southwest Conference is perhaps the extreme example of this trade-off. In its governance structure, the faculty reps had the institutional vote on all conference matters, whether related to academics or not. Faculty reps served, by rotation, as president and vice-president of the conference. Thus, at conference meetings, the faculty rep who was serving as president was in charge. As it happened, I served as President of the Southwest Conference from 1991 to 1993 before its breakup in 1995, leading conference meetings attended by SWC Commissioner Fred Jacoby, associate commissioners, athletic directors and faculty reps.⁴ Occasionally associate ADs attended meetings. For example, when Jackie Sherrill was Athletic Director at Texas A&M, he attended, but always brought along the irrepressible John David Crow, his associate Athletic Director.⁵

The senior women's administrator position had not been invented during my early years as faculty rep. All the ADs, the faculty reps, and commissioners in the SWC were men, so the conference governance was an entirely male and, as I recall, white male preserve. The sole exception was the University of Texas

⁴ The faculty reps and ADs formed the SWC Council with the Commissioner and associate commissioners serving as ex officio members.

⁵ Since Sherrill was also head football coach at A&M, it was our assumption that John David ran the Aggies day-to-day operations. Of course, Crow succeeded Sherrill as Athletic Director when Sherrill resigned and served in that role for five years. Having John David, the 1957 Heisman Trophy winner, attend meetings had collateral benefits since in the evenings after an adult beverage or two it was relatively easy to persuade him to hold court and tell stories from his fabled college and professional football career.

where the women and men's athletic departments were separate. My memory may be faulty here, but I do not believe Jody Conradt, the UT women's AD, initially attended conference meetings, but I know she did later during my tenure.

Conference meetings could become volatile, although Commissioner Jacoby was outstanding at reaching compromise and quelling tempers.⁶ UT and Texas A&M frequently were at loggerheads and the University of Arkansas, as the sole conference school not in Texas, often had its disagreements.⁷ Further, the SWC had five large public schools and four smaller private institutions, and that made for contention and many closely divided votes.⁸

During my term as President of the SWC, Commissioner Jacoby encountered a serious health issue and thus the conference officers had more active roles in the day-to-day operation of the conference, typically through weekly conference calls with staff. Fred was thankfully able to return to the job, but did eventually retire and was succeeded as commissioner by the very able Steve Hatchell.

Of course, what is missing from all of this are the presidents of the universities that made up the SWC. It is today startling to realize that the SWC presidents historically had no role in the governance of the conference and never met as a group. That changed immediately after Ken Pye became SMU's president and orchestrated a change in the operation of the conference. The presidents began meeting together and independently of the SWC Council, and any significant action by the Council required their approval.

The question remains, however, as to why the old SWC had historically operated without the presidents' direct involvement. I

⁶ Fred Jacoby was also outstanding at identifying and hiring bright young people to serve as associate commissioners and then helping them develop. During the time I was involved in the SWC, associate commissioners included Kevin Lennon, Britton Banowsky, Kyle Kallander, Rick Chryst, and Bo Carter among others, all who have gone on to have significant careers in college athletics.

⁷ Of course, Arkansas left the Southwest Conference to join the SEC in 1992 and many believe that was the beginning of the end for the SWC.

⁸ The public schools were the University of Texas, Texas A&M University, the University of Arkansas, Texas Tech University, and the University of Houston. The private institutions were Baylor, Rice, SMU, and TCU.

am not sure but I suspect that the SWC was not atypical. It may be that since presidents selected their faculty athletic reps and hired their Athletic Directors, they felt like they had delegated authority over conference issues to those individuals. Since university presidents have broad responsibilities then and now, and at least then had no expertise in athletics, they were probably comfortable with the arrangement. Some may have believed athletics were not central to the academic mission of their universities and that their time was better spent elsewhere, where they did have experience and expertise.

As a result, faculty athletic reps in the SWC had significant stature, although then as now the role varied widely from campus to campus. As an example, when I was appointed, *The Dallas Morning News* ran a substantial story on me in the sports section. That was due in large part to the fact that the FAR I was replacing, Dr. Lonnie Kliever, had in many ways been the face of the university during the NCAA's investigation of our football program that led to its suspension, but more about that later.

It should be obvious to anyone with a sense of the history of the SWC that its governance structure did not stem the scandals plaguing the conference in the 1970s and 1980s. At the time, many believed the rampant violations resulted because its member institutions were in such close proximity to each other and were thus always recruiting the same blue-chip Texas athletes. That intense competition and institutional rivalries, it was thought, engendered cheating and the payment of recruits and players.

III.

Would the history of the SWC have changed if the presidents had become active and wrested, as it were, control of the conference from the faculty reps and athletic directors much earlier? I, for one, do not think so. For one thing, those SWC faculty reps were outstanding in every respect. They were all appointed by their presidents and took their jobs seriously. They were thoughtful, thorough, and cared about the welfare of

student-athletes.⁹ The group worked tremendously well together and its members were not afraid to disagree with their own athletic directors.¹⁰

It is my educated guess that the SWC's issues stemmed not from its governance, but rather from the lack of control and oversight of athletics at the institutional level. Initially, it is important to remember that for the most part athletics compliance offices did not exist. Sometimes faculty reps were the *de facto* compliance officers, but for the most part they were full-time faculty members or in a few cases university administrators without release time.

Additionally, athletics departments tended to be much more siloed than they are today. For example, at SMU prior to the death penalty, even the university's vice-president for legal affairs had no role with or oversight of athletics. Further, there was no independent oversight body such as an Athletics Council and no formal structure for oversight within the Board of Trustees. In those days, university presidents perhaps did not fully understand how quickly an athletics scandal could taint the entire university, impact his legacy, and even his job. They tended to become involved in athletics only in times of crisis. And faculty reps were often on the outside looking in, and worse than that, intentionally excluded during those same crises.¹¹

IV.

I had a very different and probably unique experience during my first couple of years as the SMU faculty rep as we sought to rebuild our athletics program from the ashes. It is well known that SMU received the so-called Death Penalty in 1987 after the

⁹ They were Jim Vick of the University of Texas, Tom Adair of Texas A&M University, Jim Castenada of Rice University, Joe Helmick of TCU, Bob Sweazy of Texas Tech University, David Guinn of Baylor University, and Al Witte of the University of Arkansas. The University of Houston had a couple of FARs after I joined the SWC but Richard Scannell was appointed just before the demise of the SWC and still holds the position. Together, they were among the finest group of individuals I have had the privilege to work with.

¹⁰ I remember, for example, Al Witte, the long-time FAR at Arkansas, disagreeing in conference meetings on more than one occasion with Frank Broyles, the legendary Arkansas Athletic Director.

¹¹ That was certainly the case at SMU with my predecessor, Lonnie Kliever.

NCAA found repeat serious rules violations in our football program within five years.¹² After the scandal, SMU had no permanent president or athletic director, and had no football coach. As I mentioned, the reconstituted Board of Trustees first named A. Kenneth Pye of Duke University to the presidency. One of President Pye's first tasks when he arrived in August 1987 was to conduct a search for an athletic director, so that we would have a permanent AD in place to hire a football coach. The appointment of an AD was so important that President Pye decided to chair the search committee himself. The president of the faculty senate, my law school colleague Peter Winship, asked me to serve on the search committee and I agreed. It was my first formal involvement with SMU athletics.

We hired Doug Single who was then Athletic Director at Northwestern to become our AD. Early in the fall, Lonnie Kliever announced his resignation as faculty athletics representative. Dr. Kliever had been treated unfairly by many on campus, who somehow thought the scandal was his fault.¹³ President Pye, who at the time knew few SMU faculty but did know me because of my service on the AD search committee, asked me to succeed Lonnie.

I did not fully realize it at the time, but I was presented with a unique opportunity to help rebuild and fashion an athletic program from the ground up. And that is what we tried to do. President Pye and I drafted a Manual of Governance that established fundamental Athletic Department policies and created an Athletics Council to oversee athletics from outside the department. It functions to this day and is made up of faculty, administrators, student-athletes, students, alumni, former Letter-

¹² Both involved the illicit payment of players. The NCAA suspended SMU's football program for the 1987 season and for 1988 restricted the program to seven games, all on the road against conference opponents. Subsequently, SMU decided to suspend football for the 1988 season as well. *See generally* David Blewett, *The Pony Trap: Escaping the 1987 SMU Football Death Penalty* (2012); David Whitford, *A Payroll to Meet: The Story of Greed, Corruption and Football at SMU* (1989); *The Bishops' Committee Report on SMU*, Friday, June 19, 1987: Report to the Board of Trustees of Southern Methodist University from the Special Committee of Bishops of the South-Central Jurisdiction of the United Methodist Church.

¹³ It bears repeating that the then powers that be at SMU excluded Kliever from knowledge that anything untoward was continuing.

winners, and trustees.¹⁴ We revamped the admissions policies and procedures for student-athletes, required them to live on campus for two years, and integrated their academic support and advising into the mainstream university programs.

In some cases, we probably went too far in trying to assure the integrity of our athletics programs. For example, we did not allow coaches to bring a prospective student-athlete (PSA) on campus for an official recruiting visit until he or she was “deemed admissible” by the university’s admissions office. We were trying to ensure that athletics brought to campus only PSA’s capable of succeeding academically at SMU. After a few years, however, we realized we were inadvertently placing our coaches at a distinct recruiting disadvantage. So, we were compelled to revisit and revise our admissions procedure, but not our policy of admitting only student-athletes with a reasonable chance of graduating from SMU.¹⁵

We fervently wanted our student-athletes to be fully integrated into campus life and treated like any other student. Sometimes, however, our zealousness carried us too far, and we eventually had to realize, that as good as complete integration sounds, student-athletes have inherent differences from other students on campus. For example, we initially did not provide any special registration status for student-athletes and purposely had no separate academic advising or tutoring, expecting that student-athletes simply use the services available to the general student body. Gradually, over a period of years, we have revised those policies, although we still require that student-athletes use the university academic advising services for their formal advising.

After we hired Doug Single as our AD, I served on the search committee that eventually hired SMU alum Forrest Gregg to be our head football coach, as well as on other head coach search committees as vacancies occurred.¹⁶ The larger point is, however,

¹⁴ I served as the first chair of our Athletics Council, but in recent years other university faculty members have chaired the Council while I have remained as a member. Dan Orlovsky of History is the current long-serving chair.

¹⁵ SMU does still have a faculty athletic admissions subcommittee that reviews some PSA admissions files.

¹⁶ I have served on every head football search since, numbering seven altogether thus far. Of course, football search committees today tend to be largely ceremonial

that as a new faculty athletics representative I had an almost unprecedented role in reconstituting SMU athletics and attempting to develop a model program.

V.

I also had a couple of memorable experiences in my external roles during my first year as Faculty Athletics Representative. I have already described the governance of the old Southwest Conference, but the first conference meeting I attended in the fall of 1987 with our new AD was anything but cordial. In fact, some schools in the conference greeted the new SMU “team” with open hostility. They were upset with SMU for the public approbation they believed we had brought on the conference and for representations SMU had apparently made to the conference membership about our compliance with NCAA rules.¹⁷ In subsequent meetings however, we were able to establish our credibility and good faith and the animosity abated.

We encountered even greater hostility when we appeared before the NCAA’s Infractions Committee the following spring. Because of the severity of our sanctions, the Infractions Committee required SMU to reappear before it within a year to report on our compliance with the sanctions and the requirements of our probation. As a result, early in 1988 President Pye, AD Single, VP for Legal Affairs Leon Bennett, and I traveled to Chicago to meet with the committee. When we entered the hearing room, the tension was palpable because a few months earlier it had become public knowledge that SMU may have been less than forthcoming in its earlier appearance before the committee.

The committee members were livid and sought to hold us all accountable, even though none of us, apart from Leon Bennett, were in our current positions at the time of the earlier hearing.

since coaches must often be hired very quickly and the hiring decisions are really made by the president and athletic director.

¹⁷ I also believe that some public institutions resented SMU then because SMU had tended to vote with the public schools in the SWC previously, but it quickly became apparent that the reconstituted SMU would tend to side with the other private SWC institutions.

We all felt blindsided. The committee took particular aim at Bennett who, as I mentioned, had no role or contact with athletics under SMU's previous structure. That had of course now changed, but the committee, incensed that previous institutional representatives had been less than truthful, was looking for a scapegoat. As a result, President Pye spent most of the hearing having to backtrack and defend the institution rather than report on the substantial progress we had made.

VI.

After the breakup of the SWC in 1996, SMU joined the Western Athletic Conference under the strong leadership of Commissioner Karl Benson. In the WAC, and subsequently after SMU joined Conference USA in 2005 at the invitation of Commissioner Britton Banowsky, the faculty rep roles were somewhat diminished, at least as compared to the old SWC. Of course, the university presidents in both conferences had active roles and met separate and apart from the Councils that consisted of the ADs, Senior Women Administrators, and Faculty Reps. The model was bottom up with the Council making recommendations to the presidents for their approval. However, in both conferences the ADs had the institutional vote rather than the Faculty Reps.

In looking back, I suspect my early experience both within the Southwest Conference and at SMU was likely not the norm. Today faculty athletic reps are easily marginalized and are in the position of constantly attempting to assert themselves, whether on their campuses, within their conferences, or within the NCAA's governance structure. For example, when SMU joined the Big East in 2013 I was informed that faculty reps did not have a role in the conference governance structure and did not even meet with the Presidents, Athletic Directors, and Senior Women's Administrators, but rather met separately with the Directors of Compliance.

The Big East soon splintered and the American Athletic Conference was born quickly after in 2013. At first faculty reps again had no real role in the conference governance, but with the help of SMU President Gerald Turner, we were included in the annual spring meeting which also included the head football and men's and women's basketball coaches. However, last year the

conference hierarchy decided to, as a cost-cutting measure, dispense with the traditional spring meeting and accommodate the conference football coaches who all meet as part of the Fiesta Frolic in Phoenix. The faculty reps met apart from the rest of the conference for a day at the DFW Grand Hyatt.

We as faculty reps have often had to claw our way into the NCAA governance structure as well as struggle to retain our appointments. The DI FAR organization has been an important force in keeping us in the national conversation on college athletics and in securing our representation on important NCAA committees.¹⁸ For example, thanks to that organization, I currently serve as the only faculty rep on the NCAA's Football Oversight Committee as well as the new Football Competition Committee, both in *ex officio* roles¹⁹

VII.

One might fairly ask why faculty reps are so easily marginalized, or so often treated as second-class citizens. I think it is in part because we are part-timers. That is, our primary job responsibility is teaching and research, not athletics.²⁰ For that reason, full-time athletic administrators and coaches often believe that since our livelihood is not derived from athletics, our roles are less important and should be more limited. Since our careers are not dependent on athletics, I have occasionally encountered resistance when asserting a student-athlete welfare issue because as an outsider, I have been told that I simply do not understand the real issue or that I am perhaps naïve.

¹⁸ The DI FAR organization was founded by Percy Bates, long-time faculty rep at the University of Michigan and subsequently very ably chaired by Jo Potuto, faculty rep at the University of Nebraska. Brian Shannon of Texas Tech University and now Kurt Zorn of Indiana University have continued excellent leadership for the group.

¹⁹ As an example of our challenge to remain in the conversation within the NCAA governance structure, recently when the FBOC was considering its future makeup, one committee member openly questioned whether the committee needed a FAR.

²⁰ University administrators who serve as FARs similarly have other primary responsibilities at their universities. Of course, some FARs receive some release time (generally a one-course reduction) for their roles, but many do not. In my case, I have never had release time and in fact continued to serve as faculty rep during my nine years as dean of the law school. In recent years, I have received a small summer research allowance from the President's Office for serving as FAR.

Of course, university presidents are also outsiders but they are in a very different position than FARs. They are in-charge of and responsible for the entire university and are the individual to whom the AD usually reports directly. We do not have that hierarchal leverage nor do we have the responsibility for oversight that our presidents have. Our roles tend to be less well-defined and more amorphous. The fact that we are typically appointed by the president and report directly to her certainly gives us some credibility and influence and is our saving grace on campus. In fact, if a faculty rep is to be at all effective, it is imperative for him or her to have regular access to the president.

The campus role of today's FARs can vary greatly but, as I noted, it is easy for us to become marginalized internally as well. In my experience, the attitude of the Athletic Director towards the faculty rep is crucial. Some ADs view faculty reps with some suspicion or even disdain. When that is the case, communication becomes more difficult and it is much easier for a FAR to fall out of the loop. However, when the AD has respect for the role of the FAR and does not necessarily see her as a foe, it is much easier for a faculty rep to keep herself informed.²¹

In my experience, it is almost equally important for the faculty rep to have good communication with the Director of Compliance and the VP for Legal Affairs. I view oversight of compliance quite seriously, as I regard myself as the eyes and ears of the faculty in assuring that we have a strong rules and compliance program. Even so, over the years I have sometimes felt like an afterthought when we are investigating a potential serious rules infraction or dealing with a response to an NCAA inquiry. One mechanism that helps is that the Associate AD for Compliance, the VP for Legal Affairs, and I meet quarterly with the President before each Board of Trustees meeting for the sole purpose of covering everything relating to compliance for the prior quarter.

The real value of FARs on campus is our role as independent voices outside our athletic departments who are concerned with athletics compliance, academics as it relates to student-athletes,

²¹ I am very fortunate in that Rick Hart, SMU's AD, always returns my phone calls and emails promptly. I also have a standing once-a-month meeting with him and the chair of our Athletics Council, which aids immeasurably in my staying informed.

and student-athlete welfare, not wins and losses. The fact that we are academics first who teach students and student-athletes should serve to enhance that role. The fact that we do not depend on the athletic department for our paychecks, but presumably appreciate the role of college athletics on our campuses, should enable us thoughtfully to help achieve balance between athletics and academics.

It may be an obvious point, but it is important for faculty reps to develop good working relationships with all the senior athletic department staff, from the AD down, to effectively fulfill our role. Regular lines of communication can certainly foster that. Just as in any working relationship, if the FAR earns credibility and trust it makes it much easier to disagree or assert an unpopular position from time-to-time without damaging that relationship. For example, FARs often set forth positions favorable to student-athletes that may be contrary to a coach or administrator's take on an issue.²² A faculty rep who has developed credibility with the athletic department and takes a reasoned approach contrary to the department's position is more likely to influence the ultimate decision. In sum, good working relationships are key to a FARs ability to perform his or her job effectively.

VIII. CONCLUSION

Faculty reps face on-going challenges in striving to continue to be an important voice in college athletics. As so-called part-timers, it is incumbent upon us to take our roles seriously and to insert ourselves wherever we can have influence, whether on campus, within our conferences, or within the NCAA governing structure. We can easily be marginalized and it is sometimes tempting for us to accept a lesser role, since we all have significant responsibilities apart from athletics. Thus, it starts with a commitment that we should all have made when we accepted our FAR appointment to be an active and positive force for student-

²² I am thinking, for example, where a coach wishes to reduce or non-renew a student-athlete's financial aid on questionable grounds and secures the backing of the athletic department.

athlete welfare, as well as academic integrity and rules compliance within athletics. While each of our campus roles differ, we can maximize our effectiveness by establishing good working relationships and formal and informal lines of communication with key members of the athletic department and, of course, our presidents. If we can do so, we will assure that our voice is one that continues to have significant influence in intercollegiate athletics.

THE FACULTY ATHLETICS REPRESENTATIVE AND THE ASSOCIATE ATHLETICS DIRECTOR FOR ACADEMIC SUPPORT: AN IMPORTANT TEAM FOR SUCCESS

Derek Cowherd^{1} & Ronald J. Rychlak^{2**}*

I. INTRODUCTION

Athletics programs at major universities strive to provide educational and athletic opportunities for all of their student-athletes. As an old NCAA commercial states, “there are over 430,000 student-athletes and just about all of them will be going pro in something other than sports,”³ so it is important that they receive a true education while competing in their respective sports. There are many plans and guidelines in place to help assure that student-athletes have a full opportunity to obtain a college education. These typically include compliance with university, conference, and NCAA rules as well as best practice plans developed within the Athletics Department.

On the academic side, a great deal of responsibility falls to both the Faculty Athletics Representative (FAR) and the Associate

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³ See BURTON, HIRSHMAN, O’REILLY, DOLICH, & LAWRENCE, 20 SECRETS TO SUCCESS FOR NCAA STUDENT-ATHLETES WHO WON’T GO PRO (Ohio University Press, 2018).

Athletic Director for Academic Support (AADAS).⁴ A good working relationship between the two is important, if not essential, for success in their shared goals and those of the program. This paper seeks to provide guidance in building that relationship.

The first step for developing a good working relationship is to make sure that the respective parties understand the departmental goal. An academic support mission statement can help with that first step. An example, taken from the University of Mississippi (Ole Miss), sets forth the mission as follows:

*To promote academic excellence and provide quality developmental and need-based programs to help student-athletes become independent and self-reliant learners. In an environment that promotes student development, the staff provides programming and support for all student-athletes from the time they arrive on campus through graduation and beyond.*⁵

The FAR and the AADAS should both know the mission statement and be willing and able to support it.

Knowledge of the rules is also fundamental to establishing a good relationship. The Academic Support staff and auxiliary staff such as tutors must regularly be briefed by compliance officers regarding NCAA regulations, and the Academic Support staff should also regularly conduct briefings for coaches and other staff on NCAA and similar rules.⁶ At Ole Miss, the Academic Support staff meets bi-monthly with the compliance staff and attends the monthly coaches' compliance meetings. The compliance staff trains tutors, mentors, and academic strategists on NCAA legislation prior to each term. Additional training is provided by the Academic Enrichment staff.⁷

⁴ See Symposium, *Reflections on the Role of a Law Professor as Faculty Athletics Representative*, 2 MISS. SPORTS L. REV. 251 (2013).

⁵ The Mississippi Director of Athletics has explained: "Like any other program, we have a vision statement and a purpose statement. We have core values. We have a commitment to developing our students to their full potential through athletics." Ross Bjork, *Akeem Judd*, in IF NOT FOR ATHLETICS: A COLLECTION OF STORIES THAT DEMONSTRATE THE POWER AND IMPACT OF SPORTS (2017, Zac Logsdon, ed.).

⁶ NCAA enforcement is a serious concern for all member institutions. See Ronald J. Rychlak, *The NCAA: It's Necessary, but it's not the FBI*, 5 MISS. SPORTS L. REV. 83 (2015).

⁷ The Academic Support Department also provides a comprehensive Tutor Manual to each tutor, mentor, and academic strategist prior to orientation.

The FAR and Academic Support staff should attend monthly coaches' meetings and regularly receive materials from the compliance office.⁸ The Ole Miss FAR addresses the tutors on behalf of the faculty at the start of each semester. These activities help the FAR develop a full understanding of the issues facing the Academic Support staff and helps lay the foundation for the relationship with the AADAS and his or her staff, which is so important for the success of the overall program.

II. TAKING STOCK OF THE PROGRAM

There are many aspects of an academic support program, and while the AADAS is well acquainted with them all, it is important for the FAR also to develop a working knowledge of them.⁹ This requires the Academic Support staff to be fully transparent and include the FAR in important matters where tough decisions must be made. Among the most important areas to review within academic services are:

1. Organization
2. Involvement in Various Processes
3. Academic Progress and Monitoring
4. Tutorial/Learning Assistance Programs
5. NCAA Reporting Responsibilities
6. Other Academic Services Operations

One of the first decisions for the institution is to establish a desired level of support. This will be influenced, if not determined, by the level of financial support the institution is able to provide to the program. The analysis should begin with a determination of

⁸ It is also helpful for the FAR to attend the annual NCAA meeting, meetings of the Faculty Athletics Representatives Association (FARA), 1A FAR meetings, and well as any relevant meetings sponsored by their conference. See *About 1A FAR* <https://oneafar.webtest.iu.edu/about/> (last visited April 26, 2019). Both the FAR and the AADAS benefit from attending the annual meeting of the National Association of Collegiate Directors of Athletics (NACDA) and NCAA Regional Rules meetings.

⁹ In 2017, the chancellor of the University of Mississippi directed the FAR to arrange for an outside evaluation of the Academic Support program. The university was pleased with the outcome of the report, but some adjustments were made in response to it. The purpose of this paper is not to address the specifics of that confidential report, but to share insights about the process and the issues that were investigated so that FARs and AADASs at other schools can improve their programs for the benefit of their students.

what activities are essential and what additional activities can reasonably be provided given the current resources. In all instances, each program should work within its university's mission and core values, with the utmost integrity and transparency. In essence, three questions should be asked:

1. What support activities are currently being conducted?
2. What additional support (if any) does the department want to provide?
3. What resources (i.e., staffing, facilities, etc.) are needed to provide the additional support?

These are questions that the AADAS is well familiar with and may have discussed with the Athletic Director. The FAR, however, should make a special effort to become well-informed on these matters.

Realistically, fiscal decisions determine the level of support that can be provided. As such, the department must prioritize available services. AADASs certainly have thoughts about these decisions, but FARs are much less likely to know about them. As such, AADASs should help inform FARs so that they can provide sound advice when decisions that impact academic outcomes are being made.

The FAR and the AADAS may have to work together to influence the department or the university to provide appropriate levels of support. This can sometimes take a long time, and it may involve various supervisors and chains of authority. However, positive outcomes can come from cross-collaboration between departments on campus, and this often leads to improvements for the entire student body, not just athletes. Sometimes the FAR can clarify the issues with faculty who are not involved in matters that affect student-athletes and also get the proper attention from the main administration, perhaps by pointing to NCAA standards, conference standards, or other best practices.

III. THE TOPICS

Once there is an agreement as to the desired level of academic services that the department is willing and able to

provide, the FAR and the AADAS can begin to review the Academic Support program, focusing on certain key elements.¹⁰

A. Organization

Academic support services can be problematic due to factors both in and out of the institution's control. Recurring issues include scheduled missed class time, improper tutorial assistance, and academically underprepared student-athletes. Motivation can also be a concern, making unexcused absences a more serious matter.

Within each student-athlete cohort, there is a broad range of academic support needs and expectations. To ensure that they all have reasonable access to services, it is important for the FAR as well as the AADAS to first know the level of student that is being admitted, what learning concerns they may have and know what support is available within the department and on campus. Coaches are likely to be most concerned about eligibility to play, but the FAR and the AADAS should be concerned about the academic performance of all student-athletes, including those who want to attend a good graduate program and are working hard to maintain a very high GPA.

Ole Miss conducts an annual analysis of the level of academic support services designed to: (i) identify which services are being offered by the Academic Support staff; and (ii) determine whether those services are effective. Analyses like these should begin with consideration of what services the department is able to offer given the current resources.

In addition, the University of Mississippi annually monitors the number of "underprepared" or "at-risk" student-athletes and the impact of that number on the services required of the Academic Support staff. Even though they may be "qualifiers" as defined by the NCAA,¹¹ some students are at-risk, requiring more

¹⁰ One possibility is establishing a set of performance metrics that measure current and trending progress, provide peer-benchmarking data, and help the Academic Support department improve its services and display the academic success of its student-athletes. The FAR should regularly review this data and be prepared to make recommendations based upon it.

¹¹ See NCAA, *Play Division I Sports*, (last visited July 18, 2018) <http://www.ncaa.org/student-athletes/play-division-i-sports>.

time with the academic counselors, assistance from learning specialists, mentors, and an increased number of tutorial sessions. A part of this analysis is determining whether these demands indicate the need for an expansion of staff and services.

Finally, Ole Miss conducts an annual workload analysis for each full-time Academic Support staff member to determine the appropriate student-athlete need relative to the staff contact hours. It is important for the department, the institution, and the FAR to understand both the needs of its student-athletes as well as what resources exist to serve those needs. Much of the work conducted in Academic Support requires human interaction or contact hours, which are limited resources. A workload analysis assists leadership in making assignments for the most objective and efficient use of assets.

Once this data is collected, either on an ongoing basis for an individual student-athlete or for sport or departmental trends, the information needs to be communicated to appropriate constituents. The Director of Athletics, the Provost, and the President or Chancellor certainly should be included. The same goes for the FAR, who needs to be knowledgeable about this information.

B. Involvement in Various Processes

All universities should have procedures in place to evaluate incoming and continuing student-athletes. This is done both for regular eligibility matters and to assess the need for any special accommodation in the classroom. In some cases, student-athletes have learning disabilities, mental health concerns, or physical injuries that call for accommodations. It is important for both the FAR and the AADAS to understand and perhaps be involved with these eligibility evaluations on the front end.

This situation highlights the importance of institutional integrity and the value of multiple levels of oversight. Sometimes a coach's passion to land a star athlete can be perceived as pressure to overlook some flaws in his or her record. It is not hard to imagine that one way to get around academic requirements would be to have special accommodations granted to an athlete who does not really qualify for them. Multiple sets of eyes—

including those of the FAR and the AADAS—can assure that accommodations are given to student who truly need them.

The precise way in which advice unfolds will vary from one campus to another, but both the FAR and the AADAS should be aware of the committees that evaluate initial and continuing eligibility, and they should at least review the work of such committees. Better yet, one or both of them should serve on each such committee.

When AADASs or FARs review documents for eligibility matters, it is important that they not simply act as a rubber stamp. The same is true for anyone on the Academic Support staff who serves on such a committee or who may independently undertake such a review for the institution. One way to assure an independent analysis is to develop a specific protocol using certain analytical tools that are not used by others across campus. This helps assure not only different sets of eyes, but different perspectives as well.

C. Academic Progress and Monitoring

The ever-present concern, of course, is academic fraud.¹² Academic Support (or Athletic) Departments should develop and implement guidelines to help academic advisors identify situations that either: (i) endanger the academic progress/eligibility of a student-athlete, or (ii) reflect risky academic behavior by the student-athlete that calls for a special communication to the head coach and sport administrator. When academic counselors have concerns they feel warrant action by the head coach, they should inform the AADAS, who should follow university procedures and keep the FAR in the loop.

Working together, these officials can have a profound impact on a student-athlete intervention strategy. As such, each Academic Support and Compliance Department should develop and implement a set of guidelines to facilitate the flow of communication between academic counselor, head coach, and sport administrator. A plan for how to identify which academic

¹² See generally JAY M. SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG TIME COLLEGE SPORTS (2015); FRANCIS X. DEALY, JR., WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS 78 (1990) (chapter on academic fraud).

incidents should be highlighted, and a communication and action plan for how to get that valuable information to the appropriate parties is the first step towards implementation.

An area that might warrant special attention is student-athletes who take online, non-traditional, or off-campus classes. It is important for the institution to develop a means to identify and monitor specific courses taken off-campus by student-athletes. Academic advisors should be aware of any such courses taken by their student-athletes. If several student-athletes enroll in a particular off-campus course, the FAR and the AADAS should both be made aware, and the classes should be investigated. There may be logical reasons to take off-campus classes, but they also present a significant risk.

D. Systems to Reduce Academic Impropriety

The proliferation of online classes has created a level of scheduling flexibility for students that is a welcome alternative to missed class time for competition. On the other hand, the threat of academic impropriety in online courses has become a new challenge for institutions. Currently, Ole Miss student-athletes are permitted to enroll in no more than 50 percent online classes per term, but sometimes exceptions are made (so as not to hinder students from graduating on time or similar concerns).

The concern, of course, is assuring that the enrolled student is really doing the work in an online course and that the work is not being done in concert with someone else. To a certain extent, that is a university-wide issue, not just one for the Athletics Department.¹³ One way to minimize impropriety is by requiring

¹³ Any Athletics Department should be an active participant in campus-wide discussions regarding reducing academic improprieties for all online students. Possible areas to be addressed, taken from the National Association of Academic Advisors for Athletics (N4A) position paper on academic accountability and integrity, are as follows:

1. Enrollment guidelines and any restrictions for student-athletes
2. Academic support strategies for non-traditional courses (i.e., tutorial)
3. Proctoring of online exams and assignments
4. Access/completion of online assignments and exams in athletic facilities
5. Restrictions on non-academic athletics department personnel from providing certain services (i.e., coaches, operations staff, etc.)
6. Evaluation of academic outcomes for student-athletes in non-traditional courses as compared to overall student body
7. Education and training for students and staff

that all online tests be taken at a physical testing center. Other options include a lockdown browser or engaging an online test monitoring company (such as ProctorU).¹⁴ Additionally, departments can require that all work be done through student Blackboard accounts, which can be investigated when needed.¹⁵

In addition, in order to make certain that the student-athletes in question really did the work, Academic Support staff should do at least some minimal investigation, such as asking the students about their classes. Sample questions could include:

1. What is the name of your online course, and who is the instructor of your course?
2. Do you interact with your instructor or the class?
3. What types of assignments are you graded on (e.g., discussion board, quizzes, only tests)?
4. What was your grade on your first test?
5. Do you get tutoring/academic enrichment for this course?
6. Do you have a final exam in the course?
7. Why are you taking this course? Is it a requirement or an elective?

8. Syllabus collection

9. Annual reporting structures

10. Off-campus testing procedures

11. General security standards

12. Education of staff in recognizing questionable activities

¹⁴ One approach suggestion posted on the Blackboard Community discussion board (<https://community.blackboard.com/thread/2031>) is to set up computers in the testing center so that:

1. There is only one usable browser, and the only accessible website would be Blackboard. The browser would be limited to having only one window/tab open at a time.

2. Warning messages would be set to appear if students try to navigate outside a test before completing it.

3. Monitoring software could determine whether students visited any non-test URLs while their exam was in progress.

4. An IP filter would be set on the desired test to make sure no one else logs in to take the test.

5. For extra security, a password could be set on the test and only given out in the room once all phones and devices have been collected.

¹⁵ The Academic Support staff can obtain “see only” access to review the student’s work without having the ability to make changes (thus avoiding the risk of unauthorized work by the staff). In fact, the staff should be prohibited from asking for or retaining any student-athlete Blackboard login information.

The answers should be compared to a syllabus from the instructor, which the students should be required to supply.

In order to help students concentrate and to prevent unauthorized assistance, schools that have a study hall or study lab should develop an alert system or signal that will inform the staff and other students when someone is working on graded assignments while at a station or on a computer in the hall or lab. Some institutions use items as simple as a flag that gets posted atop a computer to identify a student who is working on material to be submitted for a grade. Of course, today almost all such work is graded.

Both full-time and part-time staff members must be well-trained on the permissible level of academic assistance. One challenge is knowing whether a student-athlete is working on graded or non-graded work while at the work station. The flag system can help staff members quickly identify when graded work is being completed. Of course, having a camera recording system can facilitate evaluation if an issue is identified.¹⁶

E. Clustering

There is serious concern by university administrators about clustering in classes and in majors.¹⁷ Too often, student-athletes find themselves pigeon-holed into certain classes or majors either through no fault of their own or from lacking the motivation to pursue more difficult majors. This can be due to pressure from coaches who influence students to take easy courses to remain eligible or their own poor attitudes toward higher education.¹⁸ For that reason, the AADAS and the FAR should monitor classes and majors for clustering.

The information to be gathered would include:

¹⁶ See also *infra*, § 3 F (Academic Integrity).

¹⁷ E.g., Ray G. Schneider, Sally R. Ross, & Morgan Fisher, *Academic Clustering and Major Selection of Intercollegiate Student-Athletes*, 44 COLLEGE STUDENT J. 64 (Mar. 2010).

¹⁸ Of course, sometimes, the timing of classes and practices precludes students in some team sports from enrolling in certain classes. Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMBERG BUSINESSWEEK (Mar. 3, 2014).

1. Courses in which a significant number of student-athletes are enrolled in proportion to the number of non-student-athletes in the course;

2. A review of student-athlete grades versus non-student-athlete grades in these courses and the number of student-athletes and non-student-athletes in each course;

3. The identification of all internships, the instructor, and the location of the internship; and

4. The identification of non-traditional courses (online, independent study) in which a significant number of student-athletes are enrolled.

Most of this information should be collected after the semester or academic year has concluded, though some information should be requested at the beginning of the semester.¹⁹

The FAR should work with the AADAS to develop a formal process for the review of this type of academic information, including course clustering, major clustering, non-traditional course enrollment, patterns in grading, internships, etc. The Academic Support and the Compliance Office staffs should be involved in the process, but it is a good idea to have the information reviewed and any follow-up done by entities outside of the Athletics Department. At most institutions, the provost's office would fill that role well.

F. Academic Integrity

Academic integrity is central to the role of FARs and AADASs. Precise procedures might vary based upon campus policies, but if information arises within the Athletics Department

¹⁹ The analysis would be based on information gathered after the academic year. There are, however, a few questions to be asked at the beginning of the semester to determine what, if any, monitoring activities need to be put in place during the term. For example, if a student-athlete has an internship within the Athletics Department, that might warrant questions about how the supervisor within the athletics department is monitoring the required number of hours. Another example would be if an independent study course has a very high percentage of student-athletes compared to the total student population in the class, it might merit a discussion between the FAR, the AADAS, and the Compliance Office regarding the reasons for the high percentage. If follow-up is necessary, entities outside of the Athletics Department and the FAR should be involved.

concerning academic impropriety involving student-athletes, that information needs to be forwarded to both the FAR and the AADAS. First and foremost, the department should follow the school's honor code or follow the policies for academic dishonesty which often are initiated by faculty. If there is not already a protocol for this, they should demand that one be put in place to cover situations such as the following:

1. An instructor contacts the Academic Support staff about alleged improprieties that he or she has identified concerning a student-athlete;

2. The Academic Support staff has identified possible academic impropriety involving student-athletes.

3. The Academic Support staff is informed by a student-athlete or tutor/mentor about academic impropriety.

Such a protocol should be communicated as an expectation for the entire Athletics Department, and it should be included in Athletics Department manuals. The protocol should ensure that: (i) the FAR and the Compliance Office receive such information; (ii) the information is forwarded to the Office of Student Conduct, if warranted, by the FAR or Compliance Office; and (iii) a written record of the potential misconduct, including the outcome, is maintained. Upon development of the policy, the Compliance Office should educate the Academic Support staff, FAR, and other applicable personnel on the policy.

When academic dishonesty charges are filed against a student-athlete by a faculty member, the FAR and the AADAS should both be informed. This is important for several reasons. The AADAS wants to be certain that the student is aware of the charges and of where, how, and when to answer them. Academic Support Staff can aid in making sure student-athletes follow through on all requirements and understand all of their rights. In some cases they may also serve as advocates. The AADAS may also need to let a coach know about a developing issue that may affect his or her team. The FAR should pay particular attention to any groupings of athletes in a class where charges have been made. No one wants to encounter a team-wide cheating scandal, but that is a risk.²⁰

²⁰ See JAMES BLACKWELL, *ON BRAVE OLD ARMY TEAM: THE CHEATING SCANDAL THAT ROCKED THE NATION: WEST POINT, 1951* (Presidio Press, 1996).

Related to this, after each semester, the AADAS should prepare a report to the FAR regarding any grade changes for student-athletes. This would include the changing of an incomplete to another letter grade. The information should be forwarded by the Academic Support staff, and it should identify whether the grade change was needed by the student-athlete to retain eligibility. The FAR should follow-up with any faculty members who changed grades (with, for instance, a simple email) but pay special attention (such as a phone call) to any professors who changed grades that affected eligibility.

IV. CONCLUSION

Obviously, this paper cannot cover all aspects of the jobs of an AADAS or a FAR.²¹ It is, however, important to understand the areas of overlap of responsibility between the positions as well as the ways in which they can work together. Collegiate athletics has evolved into a complex, multi-faceted entity which focuses on competitive success, financial stability, and—at its core—student-athlete development and education. The AADAS and the FAR have great responsibilities relating to those latter two points. Working together, they can help not only the Athletics Department and the university; they can play a vital role in helping student-athletes succeed along their chosen path of life.

²¹ With the 2018 case *Murphy v. National Collegiate Athletic Association*, __ U.S. __ (2018), federal law no longer prohibits betting on college sports, and many states are legalizing it. This will open up many new issues that are hard to foresee at this time. For background on the federal law that was ruled unconstitutional in *Murphy*, see Ronald J. Rychlak, *A Bad Bet: Criminalizing Nevada's College Sports Books*, 4 NEV. L. REV. 320 (2003-04).

THE ROLE OF THE FACULTY ATHLETICS REPRESENTATIVE IN NCAA DIVISION I GOVERNANCE CIRCA 2018-19

*Brian D. Shannon**

- I. Introduction
- II. FARs in NCAA Division I Governance Today
 - A. *Council Governance*
 - B. *Autonomy*
 - C. *Contrasts with Campus and Conferences*
- III. Future Challenges and Opportunities
 - A. *The Value of a FAR Voice*
 - B. *A Challenge to Continue to Provide a Voice*
- IV. Conclusion

I. INTRODUCTION

I have had the fortunate opportunity to serve as the Faculty Athletics Representative (FAR) for Texas Tech University since 2008. In addition, for the last six years, it has been my great privilege to serve as President of 1A FAR, our national association of FARs at the 129 institutions and ten conferences comprising the NCAA Division I's Football Bowl Subdivision (FBS), formerly known as Division 1A.¹ My third and final two-year term as

* Paul Whitfield Horn Professor, Texas Tech University School of Law; J.D., with high honors, University of Texas School of Law, 1982; B.S., *summa cum laude*, Angelo State University, 1979. Professor Shannon also holds the appointment as the NCAA Faculty Athletics Representative ("FAR") for Texas Tech University. In that role, he has served three terms as President of 1A FAR, which is an organization of the FARs at the 129 institutions and 10 conferences comprising NCAA Division I's Football Bowl Subdivision (FBS), formerly known as Division IA. The mission of 1A FAR "is to advocate for effective interaction and ... balance between an institution's academic mission and its intercollegiate [athletics] program." See 1A FAR, <http://www.oneafar.org/>. Shannon is also the 1A FAR representative on the NCAA Division I Council and chairs the NCAA Division I Legislative Committee. The views expressed in this Paper are my own, however, and do not necessarily reflect those of 1A FAR, the NCAA, or Texas Tech University.

President of 1A FAR will end following our national conference in Washington, D.C., in late September 2018, and Kurt Zorn, the FAR at Indiana University, will succeed me.² It has been an interesting and, on occasion, exciting time to serve as President of 1A FAR, particularly given the transitions in the NCAA's governance structure.

All is not good news, however. As I step down from the President's role for 1A FAR, I have been reflecting on the current opportunities for engagement by FARs in policy-setting for the NCAA. In particular, this presentation will focus on the role of FARs in the current NCAA governance structure for Division I, including an examination of FAR involvement in both Council governance matters and areas under the jurisdiction of the five Autonomy conferences (the "Autonomy 5").³ Unfortunately,

¹The NCAA is a private membership association that numbers 1117 colleges and universities as members across three divisions. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited July 17, 2018). Among the three divisions, there are 351 colleges and universities within NCAA Division I. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> (last visited July 17, 2018). Division I schools typically "have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships." *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited July 17, 2018). Division I is further "subdivided based on football sponsorship" or the lack thereof. *Id.* The Football Bowl Subdivision (FBS) includes 129 member schools from across ten conferences and including several independents. *See* NCAA FBS Football, <http://www.ncaa.com/standings/football/fbs> (last visited July 17, 2018) (listing the 129 FBS institutions by conference or as independents). As Professor Jo Potuto, the FAR at the University of Nebraska-Lincoln, has described, FBS institutions are public and private, non-sectarian and religiously affiliated, large land grant universities with big budgets and big endowments, and small liberal arts colleges. Some FBS institutions offer extensive graduate and professional programs, others concentrate exclusively on undergraduate education. Josephine (Jo) R. Potuto, *Two, Four, Six, Eight; What Can We Now Regulate? The Regulatory Mentality and NCAA Satellite Camps (Et al)*, 35 QUINNIPIAC L. REV. 287, 292 (2017).

² Per the 1A FAR Bylaws, I will remain on the Executive Committee of the 1A FAR Board of Directors as the immediate past president. *See* Bylaws of 1A Faculty Athletics Representatives, http://www.oneafar.org/1AFAR_Bylaws.html.

³ As I have described in greater detail elsewhere, in August 2014 the NCAA Division I Board of Directors significantly restructured the governance system for Division I institutions. *See generally* Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 65-76 (2017) (discussing governance restructuring process); Michelle B. Hosick, NCAA, *Board Adopts New Division I Structure* (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i->

following the last round of Division I governance restructuring, the extent of FAR participation opportunities was reduced in national governance for most Division I subject areas, but it remains robust within the realm of Autonomy 5 governance. The overall reduction, however, is both unfortunate and at odds with

structure (last visited July 17, 2018) (discussing the Board's vote in favor of adopting new governance model).

A key aspect of the August 2014 governance restructuring, which became effective in January 2015, was the determination by the NCAA Division I Board of Directors to grant certain autonomous decision-making powers to the five Autonomy conferences and their 65 member institutions. NCAA, Division I Steering Committee on Governance: Recommended Governance Model 29, 42-44 (July 18, 2014) [hereinafter RECOMMENDED MODEL],

<http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf> (last visited July 17, 2018).

Specifically, beginning in 2015 the revised NCAA bylaws have authorized members of the Atlantic Coast Conference ("ACC"), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference ("SEC") to "have the authority to adopt or amend [NCAA] legislation that is identified as an area of autonomy." See NCAA Constitution § 5.3.2.1, NCAA Division I Manual 2018-19 (August 2018) [hereinafter NCAA MANUAL 2018-19],

<http://www.ncaapublications.com/productdownloads/D119.pdf> (granting autonomous authority to the five conferences) (last visited July 17, 2018). The areas of legislative autonomy "permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being." *Id.* § 5.3.2.1.2 (also identifying the various areas of autonomy enjoyed by the Autonomy 5). More specifically, the subject matters of the bylaws that fall within the exclusive province of the Autonomy 5 conferences include the following: health and wellness, *id.* § 16.4; meals and nutrition, *id.* § 16.5; certain financial aid matters, *id.* §§ 15.01.5-15.2.8.2, 15.3-15.3.5.2; expenses and benefits pertaining to student-athlete support, *id.* § 16; expenses and benefits relating to pre-enrollment support, *id.* § 13.2; insurance and career transition, *id.* §§ 12.2-12.3; career pursuits, *id.* § 12.5; time demands, *id.* § 17; academic support, *id.* § 16.3; recruiting, *id.* § 13.1; and personnel *id.* § 11.7. See also *id.* § 5.3.2.1.2 (identifying and summarizing the eleven general "areas of autonomy").

In addition to authorizing the 65 institutions comprising the Autonomy 5 to have the exclusive authority for adopting NCAA legislation in these areas of autonomy, the Division I governance restructuring also created a new structure for adopting policies for all other topical areas set forth in the NCAA bylaws. For NCAA policies and legislation in bylaw areas not under the exclusive authority of the Autonomy 5 conferences, the current governance structure for Division I includes a forty-member governing Council. The Council must include representatives from each of the thirty-two conferences, a minimum of 60% athletics directors, conference commissioners, FARs, senior woman administrators, and student-athletes. See RECOMMENDED MODEL, *supra* at 21 (providing the breakdown of representation on the Council). For all areas of shared, non-autonomy, governance, the Division I Board of Directors intends for the Council to have primary legislative authority. NCAA MANUAL 2018-19, *supra* §§ 4.3.1, 4.3.2(a).

typical FAR involvement at the campus and conference levels and runs counter to a critical premise that college athletics should be a part of the overall educational mission of our universities. In this presentation, I will highlight some of the changes we have seen in the last several years, but also emphasize that FARs should remain assertive in endeavoring to provide a strong voice in the governance of Division I athletics.

II. FARs IN NCAA DIVISION I GOVERNANCE TODAY

In contrast to campus leadership responsibilities and even previous NCAA governance processes, FARs today from the vast majority of Division I institutions and conferences have an overall reduced level of authority and involvement in NCAA governance. This is not necessarily the case, however, for FARs from the Autonomy 5 conferences, at least with respect to autonomy governance subject areas and issues. In this section, I will address the roles of FARs in today's Division I governance at both the Council level and within the autonomy structure.

A. Council Governance

As I have chronicled elsewhere, in terms of numbers and percentage representation, there currently exists a relative dearth of FARs in the NCAA Division I Council governance process.⁴ The revised governance model included an aspirational goal that the Division I Board would be less operational and, instead, “focus chiefly on oversight and strategic issues, while leaving much of the day-to-day policy and legislative responsibility to the council.”⁵ In addition, the drafters intended the new Council to “be the final voice on shared-governance rule-making decisions” but also be “composed of at least 60 percent athletics directors.”⁶ Of the forty-

⁴ See Brian D. Shannon, *supra* note 3, at 90-95 (discussing the dearth of FARs in the revised Council governance structure).

⁵ Michelle B. Hosick, *DI Board Endorses Restructuring, Seeks Feedback from Schools*, NCAA (Apr. 24, 2014), <http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools> (last visited July 23, 2018).

⁶ *Id.* The governance redesign also emphasized that because the Board had “focused too often on legislative matters,” the Board should primarily be engaged in “oversight, policy and strategic issues.” See RECOMMENDED MODEL, *supra* note 3, at 7 (comparing the former governance model to the new model).

member Council, in addition to the sixty percent target for athletics directors, the bylaws now require representatives from each of the thirty-two Division I conferences from among conference commissioners, FARs, senior woman administrators, and student-athletes.⁷ Ostensibly, the sixty-percent athletics director mandate stemmed from a purposeful decision to empower “practitioners” in the governance system.⁸ As Professor Potuto has pointed out, however, the NCAA DI Manual does not include a definition of the term “practitioner.”⁹ One could easily contend the term “practitioner” in college athletics should broadly include FARs along with athletics directors.¹⁰ In that regard, even the Division I Board appeared to recognize that FARs should be at the table among the practitioners at the Council level. Indeed, in the Board’s rationale statement for the redesign, the Board observed, “Primary legislative responsibility will include directors of athletics, faculty athletics representatives and other *practitioners*, including student-athletes.”¹¹ And, FARs do hold appointments on the Council, but the overall representation is scant.

If one does the arithmetic connected with the Board’s structuring of the forty slots for the Council, it is quickly apparent that there exists the potential for FARs to populate a reasonable, if not significant, percentage of Council seats. First, the bylaws designate that each of the thirty-two conferences within Division I is entitled to a representative on the Council who must be either an “athletics administrator or faculty athletics representative from each of the conferences”¹² But, as noted earlier, a minimum of sixty percent of these thirty-two conference-only seats must be filled by athletics directors.¹³ This equates to a requirement that there be a minimum of twenty slots for athletics

⁷ See *id.* at 21 (identifying the expected positional diversity).

⁸ See *id.* at 7–8 (indicating that practitioners were not fully represented or involved in the former governance structure).

⁹ See Josephine (Jo) R. Potuto, *supra* note 1, at 292 n.33.

¹⁰ See *id.* (commenting that “[i]n theory, practitioners are both athletic administrators and faculty athletic representatives”).

¹¹ See RECOMMENDED MODEL, *supra* note 3, at 8 (emphasis added).

¹² See NCAA MANUAL 2018-19, *supra* note 3, § 4.3.1 (a) (requiring that each of the Division I conferences is to be represented by an “athletics administrator” or a FAR).

¹³ See *id.* (specifying that a minimum of “60 percent of these representatives shall be directors of athletics”).

directors on the Council.¹⁴ Assuming no other athletics directors were to be appointed, that would of course leave twenty remaining seats ($40 - 20 = 20$). Of those remaining seats, four of the slots are designated for conference commissioners and two for student-athletes.¹⁵ After subtracting those six positions, that results in there being fourteen additional seats ($20 - 6 = 14$). Two of these slots are specifically designated for FARs,¹⁶ but the bylaws contain no further specific guidance as to any positional diversity for the remaining twelve seats ($14 - 2 = 12$) other than they be conference representatives who are athletics administrators or FARs.¹⁷

In practice, despite there being twelve “wild card” seats available on the Council, very few FARs have been named to the Council. In theory, per the bylaws, the Board is required to appoint only twenty athletics director representatives among the thirty-two conference seats.¹⁸ The other twelve conference seats could all be filled by FARs or a mix of FARs and other athletics officials such as senior women administrators (“SWAs”).¹⁹ But, that has not been the case. The initial make-up of the Council included the appointment of only three FARs, and two of those were in the designated FAR slots.²⁰ Accordingly, only one of the twelve “wild card” appointments went to a FAR. Following the public announcement of the initial Council appointments, the 1A FAR Board of Directors issued a statement expressing disappointment and chagrin regarding the naming of only three FARs out of the total forty seats.²¹ In our statement, “the 1A FAR Board questioned whether the configuration reflected ‘a

¹⁴ Note that 60 percent times 32 equals 19.2. Because there cannot be a fractional percentage of an athletics director, I have rounded 19.2 up to 20.

¹⁵ See *id.* § 4.3.1 (b)-(e), (g) (specifying conference commissioner representatives from four different groups of conferences and two representatives from the Student-Athlete Advisory Committee).

¹⁶ See *id.* § 4.3.1 (f) (specifying that one of the FARs be appointed by 1A FAR and the other by the Faculty Athletics Representative Association (“FARA”)). Unfortunately, in the weighted voting structure set forth in this bylaw, the two designated FAR members have only one vote each. *Id.* § 4.3.4 (d).

¹⁷ See *id.* § 4.3.1 (a) (requiring that each of the Division I conferences is to be represented by an “athletics administrator” or a FAR).

¹⁸ *Id.*

¹⁹ See *id.* § 4.02.4 (defining “senior woman administrator”).

²⁰ See Brian D. Shannon, *supra* note 3, at 94 (indicating that only three FARs were appointed in January 2015).

²¹ *Id.* at 90-91.

commitment to the collegiate model,' and observed that '[i]f academic values are to have significant relevance in intercollegiate athletics, it strikes us as inconsistent to include only minor representation by faculty.'"²² In response to an array of comparable concerns, the Division I Board of Directors expressed some apparent concern about the overall diversity of the Council regarding gender, race, and positional experience, and has subsequently required conferences to submit slates of Council nominees for open positions that must "include at least one person who isn't an athletics director."²³ To date, however, not much has changed. As of late July 2018 only four of the current forty members of the Council are FARs.²⁴ Two of the four FARs fill the designated slots for 1A FAR and FARA, respectively, and the other two FARs are among the thirty-two conference representatives. The remainder of the thirty-two conference appointees are spread among athletics directors, SWAs, and additional commissioners.²⁵ Indeed, there are more SWAs (six) than FARs (four).²⁶ In sum, FARs currently comprise 10% (four out of forty) of the total number of Council members while, in contrast, senior athletics administrators (commissioners, athletics directors, and SWAs) hold 85% of the seats.²⁷ Given that higher education is intended to be a key part of the overall endeavor, this disparity is striking and markedly imbalanced. Indeed, under the former governance structure FARs comprised 20% of the leadership.²⁸ As Professor Potuto has declared, under the revamped structure FARs have by and large been marginalized.²⁹

²² *Id.* (quoting 1A FAR press release).

²³ *Id.* at 95 (quoting Michelle B. Hosick, *New Board Starts Discussion on Future of Division I*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/new-board-starts-discussions-future-division-i> (last visited July 24, 2018)).

²⁴ *See Division I Council*, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COUNCIL (last visited July 24, 2018) (providing the roster of the forty Council members).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The remaining two seats (5% of the total) are designated for student-athletes.

²⁸ *See* Josephine (Jo) R. Potuto, *supra* note 1, at 292 n.33. Moreover, in the mid-1980's, the NCAA Council included an even greater percentage of FARs. *See* WALTER BYERS AND CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 24-25 (Univ. of Michigan Press 1995) (discussing SMU's 1985 appeal of its death penalty sanction for football from the NCAA Infractions Committee to the NCAA Council, and observing that "the council was composed of 5 college presidents, 10

The relative dearth of FARs has extended beyond the Council to the primary committees that report to the Council. On the positive side, the revamped structure requires there be one FAR on the Division I Board of Directors.³⁰ In addition, the bylaws require the Board-appointed Committee on Academics to include a minimum of four FARs out of a total of twenty members (25% minimum).³¹ In contrast, however, the FAR representation on the seven primary committees that report directly to the Council is, in general, far less satisfactory or sufficient. These seven committees include the Football Oversight Committee, the Men's and Women's Basketball Oversight Committees, the Competition Oversight Committee (for all other sports), the Student-Athlete Experience Committee, the Strategic Vision and Planning Committee, and the Legislative Committee.³² The following chart

faculty athletics representatives, 14 athletics directors, 13 women athletic administrators, and 3 conference commissioners"). Accordingly, 10 of the 35 council members were FARs, comprising 28.6% of the membership.

²⁹ Josephine (Jo) R. Potuto, *Professors Need Not Apply*, INSIDE HIGHER ED. (May 19, 2014), <https://www.insidehighered.com/views/2014/05/19/new-ncaa-governance-structure-marginalizes-faculty-members-essay> (criticizing NCAA leadership for failing to include a greater number of FARs in the structure and urging readers to "[t]ry defining a university without mentioning faculty. It can't be done."). The same lack of FAR inclusion holds true with regard to the governance structure for the College Football Playoff ("CFP". Although not a part of the NCAA, the members of the College Football Playoff "company are the 10 FBS conferences and ... Notre Dame." Governance, College Football Playoff <https://collegefootballplayoff.com/sports/2016/10/11/131504729614425311.aspx> (last visited Sep. 7, 2018). There are no FARs among the CFP's Board of Managers (who are all university presidents or chancellors), Management Committee (who are the ten FBS conference commissioners and the Notre Dame athletics director), or Selection Committee (although the latter committee currently includes a faculty member from Arizona State, Paola Boivin). See *id.* (listing the 11 members of the Board of Managers and 11 members of the Management Committee), and *Selection Committee*, College Football Playoff <https://collegefootballplayoff.com/sports/2017/10/16/selection-committee.aspx> (last visited Sep. 7, 2018) (listing the committee members).

³⁰ See NCAA MANUAL 2018-19, *supra* note 3, § 4.2.1 (specifying the composition of the Board of Directors).

³¹ *Id.* § 4.4.1. As of late July 2018, the Committee on Academics actually included six FARs and one former FAR among its members. See Division I Committee on Academics, NCAA, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1ACADCOM (last visited July 25, 2018).

³² See *id.* § 4.9 and Figure 4-1 (depicting an organizational chart with a listing of the seven committees that report to the Council). Note that the Committee on Academics reports directly to the Board, but recommends academically related legislative proposals to the Council. *Id.* § 4.4.2 (a), (c) and Figure 4-1.

compares the number of FARs to the total number of voting members on each of these committees as of late July 2018:

Committee	Total Voting Members	Voting Members - FARs
Student-Athlete Experience ³³	11	1
Strategic Vision & Planning ³⁴	10	2
Legislative ³⁵	18	3
Competition Oversight ³⁶	16	1
Football Oversight ³⁷	15	0*
Men's Basketball Oversight ³⁸	12	0*
Women's Basketball Oversight ³⁹	11	0*

* The Football, Men's Basketball, and Women's Basketball Oversight Committees each have one *non-voting* FAR member.

³³ See Division I Student-Athlete Experience Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1SAEXP (roster) (last visited July 25, 2018).

³⁴ See Division I Strategic Vision and Planning Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1STRATVISI ON (roster) (last visited July 25, 2018). One of the two FARs, Steve Perez, is also the current Chair.

³⁵ See Division I Legislative Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1LEGSCOM (roster) (last visited July 25, 2018). One of the two FARs, Brian Shannon (the Author), is also the current Chair.

³⁶ See Division I Competition Oversight Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1COMPOVE RSIG (roster) (last visited July 25, 2018).

³⁷ See Division I Football Oversight Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1FBOVERSI GHT (roster) (last visited July 25, 2018).

³⁸ See Division I Men's Basketball Oversight Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1MBBOVER SIGH (roster) (July 25, 2018).

³⁹ See Division I Women's Basketball Oversight Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1WBBOVER SIGH (roster) (last visited July 25, 2018).

As the forgoing table reflects, these numbers are paltry and appalling. Out of 93 total voting members on these seven principal committees, there are only seven FARs who have full representation, equating to 7.5%. Similarly, only one of the twelve members of the Division I Nominating Committee is a FAR.⁴⁰ Thus, except for FAR representation on the Committee on Academics, the primary governing body for the policy-setting for most Division I issues (the Council), the seven primary committees that report directly to the Council, and the Nominating Committee for all Division I committees all have de minimus FAR representation.⁴¹

B. Autonomy

In contrast, FARs from Autonomy 5 institutions enjoy greater governance responsibilities and opportunities with regard to legislation and policy-setting in the bylaw areas ceded to the Autonomy 5 conferences.⁴² There are eighty possible votes on any Autonomy 5 legislation.⁴³ Each of the sixty-five member institutions from the Autonomy 5 conferences has a vote, and fifteen student-athletes (three from each of the five conferences) have votes.⁴⁴ Given that each member institution has an equal

⁴⁰ See Division I Nominating Committee, NCAA http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1NOM (roster) (last visited July 25, 2018). The sole FAR member, Martha Putallaz, is the current Vice-Chair.

⁴¹ Individually, I have enjoyed having the opportunity to serve as one of the initial FAR members of the Council and as Chair of the Legislative Committee, but having only a handful of FAR members is inadequate. As any faculty member who has attended a departmental or college faculty meeting can attest, there are often numerous diverging points of view. Having only a handful of FARs on key committees that set and shape policy limits the opportunity to include robust campus-wide and academic considerations.

⁴² As described above, institutions from the Autonomy 5 conferences have exclusive authority to adopt and revise policies in certain designated portions of the NCAA Manual primarily to allow “the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being” See NCAA MANUAL 2018-19, *supra* note 3, §§ 5.02.1.1 & 5.3.2.1.2 (specifying the various areas of Autonomy 5 authority).

⁴³ See RECOMMENDED MODEL, *supra* note 3, at 6–7 (authorizing “the five conferences and their 65 member institutions and 15 student-athlete representatives (80 total) to act on legislation” in the areas of autonomy).

⁴⁴ *Id.* See also NCAA MANUAL 2018-19, *supra* note 3, § 5.3.2.1.7.1 (directing that the “president or chancellor of each institution shall appoint one representative and

vote, the FARs from Autonomy 5 universities play a larger role in developing and approving autonomy concepts than for Council governance matters. For example, each spring the Autonomy 5 conferences hold an “Autonomy Governance Forum.”⁴⁵ At these forums, each conference may be represented by two Presidents, two FARs, two athletics directors, two SWAs, and two student-athletes.⁴⁶ Thus, FARs comprise 20% of this informal structure. Typical FAR participation is often greater, however. At the most recent forum in early April 2018, ten FARs participated (two from each conference) while only three Presidents and seven athletics directors were present.⁴⁷ Similarly, as the sixty-five member institutions develop their positions on autonomy legislation, FARs are typically very engaged in the process. In addition, there are typically far more FARs than Presidents who attend the annual autonomy business sessions during the annual NCAA conventions (when autonomy votes are cast). Accordingly, at least within the autonomy realm, the FAR voice is significant for the Autonomy 5 member institutions.

C. Contrasts with Campus and Conferences

On our institution’s campuses and within conference governance structures, the FAR tends to enjoy a significantly greater voice than in national governance. At the campus level, the FAR generally works closely with the athletics director, top athletics staff, and the campus President on policy issues. Moreover, these are not limited solely to academic matters, but instead extend to most major issues. For example, I meet regularly with my President, athletics director, deputy athletics director, SWA, and directors of compliance and academic services. There are typically multiple such meetings every week, and often daily interaction. Our positions on NCAA legislation (for both Council-governance and autonomy proposals) are developed jointly between the athletics director, the associate athletics director for

each of the five conferences shall appoint three student-athlete representatives to cast votes on proposed” autonomy legislation).

⁴⁵ See, e.g., Autonomy Governance Forum Materials (April 3, 2018) (copy on file with Author).

⁴⁶ See *id.* Supplement 1.

⁴⁷ See *id.* (identifying attendees at the April 3, 2018, forum).

compliance, and the FAR. For significant legislative issues, we also engage the President. As FAR, I am also involved in the development, drafting, and review of most athletics department institutional policy. My peers within the Big 12 Conference and the 1A FAR Board report comparable levels of engagement at their respective campuses.

Similarly, FARs tend to be significantly involved in conference-wide governance, at least within the ten FBS conferences. For example, in the Big 12 Conference, the FARs review policy recommendations from the athletics directors and SWAs (or develop proposals) and forward those to the conference's board of directors (the Presidents), a FAR chairs and sets the meeting agendas for the Joint Council of FARs, athletics directors, and SWAs, and the FARs hold the institutional votes at such meetings.⁴⁸ I understand that other FBS conferences have similar structures. Indeed, within the Southeastern Conference, a FAR is a designated member of the conference's Executive Committee.⁴⁹ Accordingly, as at the institutional level, FARs play a key role in conference-wide governance.

III. FUTURE CHALLENGES AND OPPORTUNITIES

Notwithstanding that the FAR voice is prominent at the campus and conference levels, particularly within FBS conferences and their member institutions, the NCAA governance restructuring efforts reduced the percentage of FAR representation within the Council governance structure and correspondingly diminished the role of FARs as a whole in national governance for Council-related matters.⁵⁰ This outcome was disappointing and continues to be demoralizing to many FARs. Nonetheless, it is my firm view that FARs should continue to speak out about the need for inclusion in NCAA governance. In

⁴⁸ See Big 12 Conference 2017-18 Conference Handbook §§ 5.1.2 & 5.3.7 http://www.big12sports.com/attachments1/files/10410/614136.pdf?DB_OEM_ID=10410 (last visited July 26, 2018) (identifying FAR role and Joint Council responsibilities).

⁴⁹ See SEC Constitution and Bylaws 2017-18 § 4.3.1 <http://a.espncdn.com/photo/2018/0217/2017-18%20SEC%20Constitution%20and%20Bylaws.pdf> (last visited July 26, 2018) (describing the Executive Committee).

⁵⁰ See *supra* notes 27-29 & 40 (identifying the current percentages of FARs on the Council and on committees reporting directly to the Council).

this final Section, I will emphasize the value of including the FAR voice, and issue a challenge to all of us to continue to provide that voice.

A. *The Value of a FAR Voice*

Of course, I have a decided bias in this regard, but in my view it is critical that the FAR have a voice not only on campus, but also within conference governance and at a national level. Although the definition of the FAR role in the NCAA bylaws is minimal, there is an expectation that the FAR be a key representative of a university in its relationship with the NCAA.⁵¹ Indeed, FARs “have long been thoroughly integrated into the infrastructure of the NCAA.”⁵²

As the NCAA went through the governance redesign process several years ago, the 1A FAR Board repeatedly urged that the new governance model include a significant opportunity for FAR involvement.⁵³ As we contended at the time:

Policy for intercollegiate athletics should be vetted and considered through both an athletics and a campus/academic lens

⁵¹ See NCAA MANUAL 2018-19, *supra* note 3, §§ 4.02.2 & 6.1.3 (requiring each member institution to name a FAR who will “represent the institution and its faculty in the institution’s relationships with the NCAA and its conference ...” and must “be a member of the institution’s faculty or an administrator who holds faculty rank and shall not hold an administrative or coaching position in the athletics department.”).

⁵² See FARA, Faculty Athletics Representative Handbook, at 6 http://farawebsite.org/wp-content/uploads/2015/07/FARA_Handbook_15.pdf (last visited July 27, 2018). See also THE STUDENT-ATHLETE, ACADEMIC INTEGRITY, AND INTERCOLLEGIATE ATHLETICS, AM. COUNCIL ON EDUC. 4 (2016), <http://www.acenet.edu/news-room/Documents/ACE-Academic-Integrity-Athletics.pdf> (addressing “the important ‘connective tissue’ and watchdog role FARs can play on campus when it comes to academic integrity and intercollegiate athletics ...” and urging that “the FAR should have regular access to the president”) (last visited July 27, 2018).

⁵³ See, e.g., Letter from Brian D. Shannon, President, 1A FAR Board, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors, Feb. 4, 2014, http://www.oneafar.org/archive/2014_archive/letter_to_President_Hatch.pdf (urging that there be an equal number of FARs and athletics administrators on the Council to assure that policy “issues are vetted and considered through both an athletics and a campus/academic lens.”) (last visited July 27, 2018); Letter from Brian D. Shannon, President, 1A FAR Board, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors, May 12, 2014, at 3 http://www.oneafar.org/archive/2014_archive/Comments_on_NCAA_Governance%20%200_May12_2014.pdf (urging “a greater inclusion of FARs on the Council as the representative of the broader campus”) (last visited July 27, 2018).

and challenges should be addressed in a manner that not only embodies – but, equally, is *seen* to embody – the values of higher education and the enhancement of all facets of the collegiate student experience, including those directly related to the student-athlete experience. Few, if any, collegiate athletics issues are either exclusively athletic or exclusively academic. The inclusion of both ADs and FARs with significant representation ... serve[s] to demonstrate that intercollegiate athletics is a shared partnership between athletics and the greater campus and ... [would demonstrate] a renewed commitment to the collegiate model.⁵⁴

Unfortunately, of course, we were unsuccessful in persuading the Division I Board to include significant numbers of FARs in the Council governance structure. Nonetheless, the campus voice as represented by FARs continues to be critical. We as an association of universities committed to the collegiate model, with an overarching focus on student-athlete well-being and the ability to provide opportunities for success not only on the field or court but also in the classroom, should continue to insist that current and future policy issues, as well as problems, should be addressed and solved in a manner reflective of the values of higher education. To do so in a meaningful manner unquestionably requires FAR engagement, in tandem with senior athletics administrators, to tackle the many challenges facing college athletics.

B. A Challenge to Continue to Provide a Voice

As I step down from serving as President of 1A FAR, I would challenge all of us to continue to urge the inclusion of a broad voice for FARs in NCAA governance. The minor representation of FARs on both the Council and the key committees that report directly to the Council undercuts the premise that academic and campus values have a particularly significant relevance in intercollegiate athletics. We must continue to be vocal in insisting that FARs be at the table. In that regard, it will be necessary to

⁵⁴ *Id.* (emphasis in original). For a more detailed discussion of this topic, see the subsection entitled, “Dearth of FARs” in my 2017 article. See Brian D. Shannon, *supra* note 3, at 90-95 (discussing the ultimately unsuccessful efforts by the 1A FAR Board to urge the inclusion of a significant number of FARs in the redesigned governance structure).

persuade key presidents and chancellors on the NCAA Division I Board of Directors. Those FARs who do get the opportunity to serve in Council governance roles must not only carry out their governance responsibilities in a thoughtful and dedicated manner, but also be advocates for additional FAR involvement.⁵⁵

IV. CONCLUSION

FARs at large institutions within the FBS subdivision of NCAA Division I typically play a significant role in policy development and oversight at the institutional and conference level. That is also largely the case with regard to autonomy governance issues for FARs from universities within the Autonomy 5 conferences. In contrast, however, the FAR role has been diminished across Division I for division-wide Council governance matters. Individual FARs within the Council governance structure have had the opportunity for significant involvement, but overall the representation of FARs is now minimal. FARs must continue to speak out about this shortfall. To assure that governance and policy-setting for a body that is intended to self-regulate *college* athletics and *student*-athletes, the Council should visibly reflect a commitment not only to the administration of sports, but also give recognition to the inclusion of collegiate sports within the broader university setting. To carry out that mission in a transparent, inclusive, and effective manner necessitates more representation from our institutions of higher education through our FARs.

⁵⁵ When my term on the Council ends in June 2019, other non-FAR members might be glad to no longer hear my constant refrain in this regard.

POST AUTONOMY INVESTMENTS IN STUDENT-ATHLETE WELL-BEING

*Professor David E. Shipley**

“The term ‘faculty athletics representative’ derives from NCAA [National Collegiate Athletic Association] usage and denotes the perceived need on the part of the NCAA to involve a faculty viewpoint in the administration of intercollegiate athletics programs.”¹ Faculty athletics representatives (FARs) provide oversight and advice to the Presidents and Athletic Directors of their colleges and universities about the operation of their intercollegiate athletics programs in respect to matters such as academic integrity, the academic performance of student-athletes (SAs), the academic services provided to SAs, monitoring the overall experience of SAs,² and being “alert to conditions that affect the health of student-athletes, being ready to aid in referral to university resources that provide advice and counsel on all types of physical and psychological problems.”³ After all, one of the reasons for the founding of the NCAA was the widespread concern about the safety and health of college football players at the beginning of the 20th Century.⁴

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¹Faculty Athletics Representative Handbook, National Collegiate Athletics Association 2004, at 9

² *Id.* at 12-14.

³ *Id.* at 15. A brochure titled ‘What College Presidents and Chancellors Need to Know About Faculty Athletics Representatives’, prepared by FARA, the Faculty Athletics Representatives Association, states that “[t]he FAR should be involved in the monitoring and maintenance of the personal well-being of student athletes.” *See also* Amy Schwabb, *The More Things Change ... Faculty reps’ athletics involvement predates the NCAA, and their organization is just 25 years old*, *Champions Magazine* (October 2014)

⁴ Dr. Carol Barr, *History of Faculty Involvement in Collegiate Athletics* (1999), edited and reprinted in a 2008 report on the FAR survey prepared by Dr. Daniel Fulks. This article states that “in December of 1905, facing a disturbing increase in the

I am starting my ninth year as FAR at the University of Georgia (UGA) which is a member of the Southeastern Conference (SEC). The SEC is one of the five autonomy conferences.⁵ The intercollegiate athletic program at UGA is administered by the University of Georgia Athletic Association (UGAA) and the Association has operated in the black for many years. It is self-sustaining and does not receive public funding but for \$3.24 million from a student athletic fee that is 2.2% of the Association's 2019 budget.⁶ The Athletic Association's annual revenues come from many sources including: gate receipts; seat licenses; donations; endowment income; distributions from bowl games, the SEC and the NCAA; and, revenue from broadcasts.⁷ These revenues fund UGA's 21 teams; athletic scholarships and cost of attendance stipends; sports medicine; strength and conditioning; food and nutrition; academic support programs; improvements to facilities; competitive salaries for coaches and staff;⁸ and, enhancing the overall experience and well-being of UGA's SAs.⁹ This paper is about the substantial increase in the UGAA's investment in the student-athlete experience and well-being over the last eight years.

The substantial investment in the SA experience at UGA and many other universities in the autonomy conferences is sometimes forgotten or ignored in the on-going national debates over whether SAs should be allowed to monetize their names, images and

number of serious injuries and deaths resulting from student-led football contests, Chancellor Henry McCracken of New York University called a meeting of faculty athletics representatives from Eastern colleges.”

⁵ The autonomy conferences are sometimes referred to as the Power Five. In addition to the SEC, the other autonomy conferences are the Atlantic Coast Conference, the Big Ten, the Big Twelve and the Pac 12. Notre Dame is an independent for football but competes in the ACC for all other sports.

⁶ The UGAA's FY 2019 budget of \$143 million includes \$3.24 million distributed to the Association by the University that is collected from a student fee. Treasurer's Report, FY 2019 UGAA Budget, May 25, 2018.

⁷ *Id.*

⁸ *Id.* For instance the compensation allocation for football in 2019 is \$19.1 million and the compensation allocation for men's basketball is \$4.7 million.

⁹ Overall revenue was projected to be \$84.8 million in FY11 and it is projected to be \$143.3 in FY19 – an increase of 69%.

likenesses (NIL),¹⁰ and whether SAs should be entitled to compensation above and beyond their scholarships and cost of attendance stipends.¹¹ This paper does not weigh-in on those challenging issues. Instead, it discusses the resources that UGA and many of the other 64 schools in the autonomy conferences are investing in the overall experience and well-being of SAs. These investments are made not only to help these young men and women be successful in their academic endeavors and in their sports, but also to enhance their physical and mental health and overall well-being. In my opinion, today's SAs at UGA and other autonomy conference schools are earning a high rate of return on their investments of time, effort and energy to get a great education and simultaneously compete at the highest level of intercollegiate athletics thanks to student-focused spending.

I. WHAT MIGHT BE DRIVING THE INVESTMENTS

As an old history major¹² I like to speculate about why things happen and ask myself what things might have been like if certain decisions had not been made, so I will try to explain why the UGAA has ramped up its investment in the SA experience and well-being since 2010. For many years the University of Georgia has been committed to the overall success of SAs, but in my opinion, the UGAA and other athletic associations in the autonomy conferences have been investing more resources to guarantee SA success and well-being, especially in the last five or six years. Listed below are several developments since 2010 which might be driving this increased investment in the well-being of SAs.

¹⁰ See, e.g., The Drake Group Press Release of May 4, 2018 and its criticism of the Rice Commission on College Basketball for its failure to make a recommendation on allowing athletes to earn money to market their own names, images and likenesses.

¹¹ See, e.g., Jon Solomon, The History Behind the Debate Over Paying NCAA Athletes, The Aspen Institute (April 28, 2018) (recognizing SAs' value beyond their athletic scholarships).

¹² I was born in 1950 and earned my BA in American History from Oberlin College in 1972. While at Oberlin I ran cross country and was on the swimming team all four years, and was Sports Editor for the *Oberlin Review* for two years. My late father was a professor at the University of Illinois and served on the U of I's athletic board in the 1960s, so I grew up following intercollegiate athletics.

The NCAA started discussions about the association's role in preventing sexual assault in 2010, and an association-wide policy was adopted in 2017 that requires annual sexual violence prevention education for athletics administrators, coaches and SAs.¹³

In 2010 the NCAA required member institutions to develop concussion management plans for athletes who were or might have been concussed.¹⁴ The first lawsuit against the NCAA over concussions was filed in 2011. The plaintiff, a former college football player, claimed negligence in the handling of several head injuries he sustained during his playing career.¹⁵ By June 2018 the NCAA was facing 111 class-action suits related to how Division I football programs handled concussions.¹⁶ These suits are ongoing¹⁷ although a major one settled on June 15, 2018.¹⁸

The NCAA established its Sports Science Institute (SSI) in 2013 and hired Dr. Brian Hainline to lead the institute and be the association's point person on the physical and mental health and well-being of the nation's SAs. The SSI, in collaboration with NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports, has been collecting and analyzing data, issuing policy statements, and announcing best practices since 2013. The Institute's studies and pronouncements cover a variety of topics including nutrition, sleep, performance data, concussions, alcohol and substance abuse, and sexual assault.¹⁹ The SSI's health and safety priority areas are cardiac health; concussions; doping and substance abuse; mental health; nutrition, sleep and performance; overuse injuries; sexual assault and interpersonal violence;

¹³ Michael Miranda, FARA Division I Update, (March 2018).

¹⁴ Jeremy Bauer-Wolf, A Verdict Could Have Changed the Tide, Inside Higher Education, June 26, 2018.

¹⁵ Ben Strauss, *Judge Approves Settlement in Head Injuries Suit Against the N.C.A.A.*, New York Times, January 26, 2016.

¹⁶ Jeremy Bauer-Wolf, *supra* note 14; Associated Press, *NCAA facing 43 concussion lawsuits after latest filings*, Denver Post, October 5, 2016.

¹⁷ Shrader & Associates, Blog, Discovery Continues in Ploetz v. NCAA CTE Lawsuit, March 7, 2018, <https://www.shraderlaw.com/blog/2018/march/discovery-continues-in-ploetz-v-ncaa-cte-lawsuit/#~U6e2C61>.

¹⁸ Jeremy Bauer-Wolf *supra* note 14. The NCAA agreed to settle an earlier suit for \$75 million with most of the money going to set up a monitoring system.

¹⁹ www.ncaa.org/sport-science-institute/mental-health-best-practices; *id.*/nutrition; *id.*/nutrition-sleep-performance; *id.*/

athletics health care administration; and data-driven decision making.²⁰ The goal for each campus is to provide an environment that promotes the safety and well-being of college athletes on and off the field and their playing venues.²¹

Related to the work of the SSI, the NCAA passed Independent Medical Care legislation that requires member schools to designate an athletics health care administrator in carrying out a broader obligation to build a structure that supports the delivery of independent medical care for SAs.²²

On April 15, 2014, the NCAA approved action to allow unlimited meals and snacks for SAs in conjunction with their athletic competitions. The new rules for meals incident to participation apply to walk-ons as well as scholarship athletes.²³

The establishment of the five autonomy conferences became effective in August 2014. Along with greater flexibility to regulate their programs, the 65 schools in these conferences also gained flexibility in spending without being tightly restricted by the principle of maintaining competitive equity with all other NCAA Division I programs.²⁴

The 65 schools in the five autonomy conferences have given SAs a meaningful role in developing new policies. Not only are SAs being heard, they have a vote on autonomy legislation with three SAs from each conference voting at Autonomy Business Sessions. The 2018 NCAA Autonomy Business Session was the fourth year that athletes were allowed to debate and vote during

²⁰ NCAA SSE Athletics Health Care Administrator Handbook 9 (2017). There is also a Committee on Competitive Safeguards and Medical Aspects of Sports.

²¹ *Id.* at 9.

²² *Id.* at 13.

²³ These meals are in addition to a meal plan provided to a SA as part of his/her full scholarship. Michelle Brutlag Hosick, *Council Approves Meals, Other Rules: New Model Provides Unlimited Meals and Snacks*, NCAA, April 15, 2014 (NCAA website).

²⁴ Dan Wolken, *Power 5 Conferences Get What They Want in NCAA Governance Proposal*, USA Today (July 18, 2014) <http://usat.ly/1mnXdr4>; Brian Bennett, *NCAA Board Votes to Allow Power 5 Autonomy*, ESPN (Aug. 8, 2014) http://www.espn.com/college-sports/story/_/id/11321551.

the sessions.²⁵ Those 15 SAs can have a big impact on how new policies are shaped when they vote as a block.²⁶

The NCAA DI Council and the autonomy conferences approved time demand rules in January 2017. These rules went into effect for 2017-18 and prohibit athletically related activities during certain time periods, require days off, mandate vacation periods, and require schools to create time management plans for each of their sports/teams.²⁷

In January 2018 the autonomy conferences adopted a medical care proposal which gives schools discretion on how to provide medical insurance coverage for student-athlete injuries for a period of two years after the SA graduates or leaves school.²⁸

Finally, UGA and many other schools in the autonomy conferences have resources to invest in their SAs. Overall revenue for the UGAA was \$84.8 million in FY11 and it is projected to be \$143.3 in FY19 – an increase of 69%. Of course, expenditures have increased during this period but the UGAA's revenues are well in excess of expenses.²⁹

II. CHANGES AT THE UNIVERSITY OF GEORGIA: 2010/11 TO 2018/19

A. *The financial investments:*

Scholarships and the cost of attendance: The total number of SAs at UGA has remained relatively stable since 2010

²⁵ Michelle Brutlag Hosick, *Autonomy Conferences Adopt Medical Care Proposal: Student Athletes Support Proposal That Mandates Expanded Coverage*, NCAA (January 19, 2018) (detailing the voting session).

²⁶ See, e.g., Jake New, *A True Day Off*, Inside Higher Education January 23, 2017 (the article's discussion of the debate surrounding proposed amendments to the new time management rules summarizes the concerns raised by 'outspoken athletes' and how 14 of the 15 SAs voted against a proposal allowing an exemption for participating in recruiting activities on their days off).

²⁷ Jake New, *A True Day Off*, Inside Higher Education, January 23, 2017

²⁸ Michelle Hosick, *Autonomy conferences adopt medical care proposal* (January 19, 2018) www.ncaa.org/about/resources/media-center/news/autonomy.

²⁹ The Athletic Association has been making annual contributions to the University to support faculty and students since before I became FAR: FY 11 - \$2 million; FY 12 - \$2 million, FY 13 - \$4 million, FY 14 - \$4 million, FY 15 - \$5 million, FY 16 - \$4 million, FY 17 - \$4.5 million; and FY 18 - \$4 million.

at approximately 550 men and women on 21 teams.³⁰ Accordingly, the total number of athletic scholarships awarded by the UGAA, both head count and equivalency, has not changed in my years as FAR. However, the cost of a full-ride in a head count sport has increased from \$17,816 in 2010-11 (FY 11) to \$24,108 in FY19. That's a 35% increase.³¹ In addition, effective in 2014 UGA and other schools were allowed to award cost-of-attendance stipends to their SAs. In 2018-19 a SA in an equivalency sport on a full grant-in-aid is receiving a \$4,104 miscellaneous expense stipend while one receiving a half grant receives half of the stipend and a SA on a 1/4th scholarship receives 1/4th of that miscellaneous expense stipend.³² When that cost-of-attendance stipend is added to the full grant-in-aid (\$24,108 + \$4,104 = \$28,212) and compared to the amount of a full-ride in 2011 (\$17,816), the increase is \$10,396 (58%). Overall, the UGAA's spending for this direct support of SAs has increased 62.8% from \$8,730,000 in FY11 to \$14,221,314 in FY19 due in large part to being able to award the cost-of-attendance stipends starting in 2014.

Academic counseling: The UGAA's investment in academic counseling for SAs has gone up 36%; from \$2.1 million in FY11 to \$2.885 million in FY19. The increase is due both to an increase in staffing and to higher salaries for counselors, mentors, learning specialists, and tutors.

Compliance and student services: The investment in compliance and student services has increased from \$302,254 in FY11 to \$1.875 million in FY 19 – that's a 520% jump. This investment covers a wide variety of activities such as supporting the Student Athlete Advisory Committee (SAAC), career counseling, mentoring, leadership training, Learn Play Excel, and

³⁰ UGA had 564 SAs in the fall semester 2017, and 513 in the spring semester 2018. The variations year to year are not substantial.

³¹ This covers in-state tuition, room, board and books. In-state tuition includes several fees charged to all UGA undergraduates. Board – the meal plan – provides 3 meals each day, with no closing on Sunday night. For an out-of-state SA in a head count sport, the grant in aid has increased from \$35,024 to \$42,682 during this period – a 21.8% increase.

³² The cost-of-attendance stipends vary somewhat depending on whether the SA is in-state or out-of-state and whether he or she is living off-campus or on-campus at the East Campus Village.

a variety of other SA focused programs as well as paying higher salaries and having a larger staff in the compliance office.

Sports medicine and nutrition: The investment in sports medicine, nutrition, the training table, and meals incident to participation increased by 245% from \$2.3 million in FY11 to \$8.05 million in FY18. The nutrition, training table and meals, and meals incident to participation portion of this \$8.05 million in FY18 was \$4.18 million. That is 52% of the total. This investment should be compared to the FY11 sports medicine budget of \$2.3 million that dedicated only \$37,900 (1.6%) to nutrition. The UGAA is feeding its SAs much better now than in FY11.

B. The Impact of the Investments:

Physical health, mental health and nutrition: The UGAA's approach to meeting, implementing and developing protocols for the NCAA's health and safety priorities³³ is under the leadership of Georgia's Senior Associate Athletic Director for Sports Medicine, Ron Courson. He had a Sports Medicine Staff of ten in 2011 and worked with a budget of \$2.33 million. He now has a staff of over a staff of 16 full-time trainers, five full-time nutritionists, and a mental health professional. In addition, a psychiatrist and a clinical social worker – both affiliated with the Piedmont Athens Regional Health Center – are part of his team. As noted above, the overall Sports Medicine budget, including the training table and nutrition, increased to \$8.05 million in 2018. That's a 245% increase from 2011.

How does this investment impact SAs? All SA are now receiving a full-physical when they matriculate including a battery of tests to detect any heart conditions. This pre-participation evaluation includes an ECG and complies with the NCAA's cardiovascular care best practices checklist.

Testing is also done to provide a baseline for each SA against which cognition can be assessed in the event of any kind of head injury or trauma. This is part of the UGAA's concussion protocol, and this pre-participation concussion assessment also complies with the NCAA's concussion care best practices checklist.

³³ See text and notes at notes 19 to 21 *supra*.

The increased revenues also fund programming for SAs on drug and alcohol abuse, eating disorders, mental health awareness, and sexual assault/bystander intervention. In addition, there is programming on these topics for coaches, counselors, trainers, and other members of the UGAA staff. The goals of this programming for SAs and the staff includes breaking down the stigma that is often associated with reaching out for help to deal with issues like depression and anxiety as well as to sensitize SAs, coaches, counselors and others to notice changes in a SA's academic performance, attendance, mood, attitude and other forms of behavior. In the terms of the NCAA's Mental Health Best Practices Checklist, all SAAC representatives, SAs, coaches and others are receiving information about the signs and symptoms of mental health disorders, programing about preventing and responding to sexual assault, interpersonal violence and hazing, and programming about peer intervention in the event of a teammate's mental health distress. Everyone is being educated to recognize the "importance of understanding and helping to minimize the possible tension that can exist in student-athletes about adverse consequences for seeking mental health care."³⁴

As for food and nutrition, the financial investment has increased dramatically so the SAs at UGA are much better fed today than in 2010-11. Moreover, the UGAA did not employ a nutritionist in 2010-11 and it now has 5 full-time nutritionists³⁵ who understand that the food and fuel needs of SAs vary considerably from sport to sport, from in-season to off season, and between individual SAs. Moreover, this nutrition expertise goes hand in hand with greater awareness of mental health issues that impact some SAs such as eating disorders, body image concerns, and substance abuse. The work of the nutrition staff is coordinated with the work of the strength and conditioning staffs for the Olympic sports and the football team. The strength training, conditioning, and feeding of a defensive lineman, a gymnast, a golfer, a distance runner, and a shot-putter are

³⁴ NCAA Mental Health Best Practices Checklist, July 2017.

³⁵ There is also a small army of undergraduate and graduate student interns from the University's food, nutrition and dietetics program in the School of Family & Consumer Sciences.

different, and the UGAA now has the expertise and the resources to tailor these regimes for each of its SAs.

Academic Support: UGA's academic support program for SAs has not changed substantially since 2010-11. The counseling staff and the number of mentors and learning specialists is larger now than eight years ago. UGA hires tutors carefully, their training is rigorous, they are evaluated regularly, and the director of the Tutorial Program is not reluctant to replace them.

There has been some turnover among the senior academic support staff, but several of the coordinators and counselors have more than decade of experience with the UGAA including the professionals in charge of the writing and math labs, and the professional who coordinates the life skills program. The counselors, assigned to specific teams, work hard to find study-abroad and experiential learning opportunities for SAs. UGA has an experiential learning requirement for all undergraduates as well as many popular study-abroad programs, and it is often a challenge for SAs to fit these learning experiences into their schedules. Finally, like all athletic programs, the UGAA closely monitors APRs, GPAs, GSRs and lots of other metrics for assessing academic success and progress; and gives public recognition to both individual SAs and to teams for outstanding academic achievements.³⁶

Career Counseling: There have been substantial enhancements in the areas of career planning and career development as well as leadership training. The 'Director of Student Development' position was created and filled in 2015. This staff member hired for this position previously worked in the UGAA's compliance office. She has a JD, practiced law for several years, and she helps SAs with networking, internships (paid and unpaid), connecting SAs with alumni, job-shadowing, interviewing, learning about careers, and initial employment. Prior to creating and staffing of this position the SAs at UGA were much more dependent on the University's Career Development

³⁶ Shortly before the opening kickoff at UGA's first home football game against Austin Peay on Saturday, September 1, 2018 awards were presented to the rising senior male and female SAs with the highest GPAs among all SAs, and the Women's Cross Country team received an award for being the team with the highest team GPA for 2017-18 among the UGAA's 21 teams. The FAR presented these awards on the 50 yard line of Sanford Stadium.

Office. This guidance for life after college sports is much appreciated by SAs at UGA.³⁷

Related to this investment in career counseling are the many opportunities the UGAA provides to high achieving SAs for leadership training and opportunities for community service through LEAD. This is an innovative leadership, education and development program that is under the direction of an experienced administrator from the UGAA's Student Services department.

Time Demands – A True Day Off: Legislation designed to reduce the time demands on college athletes was adopted by the autonomy conferences in January 2017 and implemented for the first time in the 2017-18 academic-year.³⁸ In a nutshell, the rules give SAs one day off per week during a season, 14 days off at the end of a season, and two days off per week during the off-season. The five conferences also adopted a rule that prohibits 'athletically related activities' between 9 pm and 6 am as well as a requirement that schools develop time management plans for each team/sport.³⁹

I doubt a figure can be placed on the amount of time coaches, the UGAA administrators responsible for particular teams/sports, and the compliance office have dedicated to explaining, implementing, and monitoring the new SA time demand rules in 2017-18. The compliance staff explained the new rules to the University's Committee on Intercollegiate Athletics (COIA) at a meeting in February 2017. They also gave similar but much more in-depth presentations to each of the UGAA's teams before specific plans for each were developed and implemented.⁴⁰ In May 2018 the head of compliance, the UGAA coordinators for each team, the Director of Athletics and the FAR conducted a sport by sport, team by team, assessment of how things went in this first year of the time management plans.

All in all, but for an occasional glitch and some uncertainty on the margins about what constitutes a countable athletically

³⁷ See generally, Rachel Stark, When the Playing Days End, *NCAA Champion Magazine* 40-47 (Spring 2018)

³⁸ Jake New, A True Day Off, *Inside Higher Education*, January 23, 2017.

³⁹ *Id.*

⁴⁰ Plans had to be developed by the first day of classes or the first day of Countable Athletic Related Activity (CARA), whichever comes first.

related activity, implementation was relatively smooth. Most importantly, the reactions of UGA's SAs to the time management plans and days off during annual exit interviews with the COIA were very positive. They like having the true day off. These reactions were reinforced in discussions with the two SAs who serve on the UGAA Board of Directors and with a panel of SAs who addressed the Board at its regular spring meeting. Similar opinions were voiced by the half dozen SAs from several different SEC schools who attended the SEC's spring meeting in Florida in late May. SAs appreciate these time management rules, and they like having a true day off.

A time demand issue that remains unsettled concerns how SAs spend their summers. Many SAs at autonomy conference schools stay on campus to take summer session classes while training for their sports. Others are competing in summer leagues, entering tournaments and competing. For many, there is not much down time, few opportunities for summer employment or internships, and little or no time for travel or a family vacation. It is not evident whether anything can or should be done. After all, many of the elite SAs at autonomy conference schools have been competing and training year-round since they were in middle school or earlier, and often with very substantial investments of time, energy and resources by their parents or guardians.

Sexual Assault and Bystander Intervention: The UGAA has been doing regular programs on sexual assault and alcohol abuse since June 2011 starting with orientation for the new freshman on the football team, and orientation for new SAs generally. These programs were repeated in August 2011 for new SAs, and there was programming for returning SAs as well as presentations on drug and alcohol issues. These education programs were repeated in the Spring semester of 2012. In the following years programming was added on self-defense to sexual assault, eating disorders, bystander intervention, sports-medicine generally, what constitutes consent, relationship violence, personal safety, reporting obligations, It's On Us, and mental health awareness with a focus on sexual assault. There were also special speakers on several occasions. Of course, UGA's President, Athletic Director, and Title IX Coordinator, pursuant to NCAA policy, must attest annually that coaches, athletics

administrators, and SAs are being educated about sexual violence prevention. This had to be done by May 15, 2018 for the 2017-18 academic-year.

Athletic Board Involvement: The UGAA Board of Directors established a Student-Athlete Wellness Committee in 2014-15 in order to educate the entire Board about the Association's commitment to SA health and well-being, and to keep the Board informed about initiatives in these areas. The Committee is chaired by the FAR – who is also the Board's Secretary and a member of its Executive Committee – along with a mix of the Board's elected and appointed Faculty, an alumni member of the Board, and the Board's two appointed SA members. This Committee meets three times during the academic year and the Chair/FAR reports to the entire Board at the UGAA's three regular meetings during the year. The Committee's charge/definition of wellness is expansive: it includes not just physical and mental well-being but also life skills, leadership training, networking, interviewing skills, public/community service, strength and conditioning, nutrition, academic support, and the transition to life after graduation and the end of eligibility – jobs, interviews, internships and the like. One member of this Committee recently stated that a more appropriate name for it might be the Student Athlete Well-Being Committee.

The Committee's meetings since the fall of 2015 have covered mental health and related behavioral medicine issues three times including discussions about diagnosing and treating eating and sleep disorders, substance abuse, depression, and anxiety. The Committee also heard a presentation about the new rules on time demands as well as how the UGAA has shifted much of the responsibility for behavioral medicine away from UGA's Counseling and Psychiatric Services Center to a partnership with Piedmont-Athens Regional Hospital (PAR) and having a Psychiatrist and a Clinical Social Worker employed by PAR working full-time at the UGAA.

Some of the other topics that the Student-Athlete Wellness Committee has learned about include the strength & conditioning, cardio training, nutrition and the overall SA assessment done for the football team and UGA's Olympic sports. The Committee also heard a presentation by the Director of Student Athlete

Development about her efforts to help SAs plan for careers outside their sports, to explore internship opportunities, to develop networking skills, and to make the transition to the workforce from being a SA. This presentation complemented presentations about SAAC and the programming that the UGAA provides for leadership training, career development and service learning including an in-depth look at the L.E.A.D. program. Last but not least, the SA Wellness Committee learned how the UGAA was handling the distribution of the cost-of-attendance stipends to SAs while providing financial literacy programs to SAs in hope that they would spend those stipends wisely.

CONCLUSION

Many universities in the five autonomy conferences have made substantial investments in the SA experience since 2014. These investments are sometimes forgotten or ignored in the ongoing national debates over whether SAs should be allowed to monetize their names, images and likenesses, and whether SAs should be entitled to compensation above and beyond their scholarships and cost of attendance stipends. This paper does not weigh-in on those challenging issues. Instead, it discusses the resources that the University of Georgia and many of the other 64 schools in the autonomy conferences are investing in the overall experience and well-being of SAs. These investments are made not only to help these men and women be successful in their academic endeavors and in their sports, but also to enhance their physical and mental health and overall well-being. Today's SAs at Georgia and many other autonomy conference schools are earning a high rate of return on their own considerable investments of time, effort, and energy to get great educations and simultaneously compete at the highest level of intercollegiate athletics thanks to their athletic associations' student-focused spending and programming.