

CONTENTS

[Abstract](#)
[Introduction](#)
[Due Process Considerations](#)
[The NCAA Enforcement Process](#)
[Criticisms of the NCAA Enforcement Process](#)
[The NCAA as a Voluntary Association](#)
[Internal and Legislative Investigation of the NCAA Enforcement Process](#)
[Judicial Intervention in the NCAA's State Actor Status](#)
[Recent NCAA Enforcement Activities](#)
[Discussion and Recommendations](#)
[References](#)
[Table of Cases](#)
[Web Links](#)

New Rules for a New Ballgame: Legislative and Judicial Rationales for Revamping the NCAA's Enforcement Process

B. David Ridpath, Ohio University; Mark Nagel,
University of South Carolina; Richard Southall,
University of Memphis¹

ABSTRACT

The NCAA is the largest and most well-known of four independent organizations that regulate intercollegiate athletics and part of its self governance structure is its membership-approved enforcement and infractions process used for assessing penalties for violation of the association's bylaws. This process has often been criticized in the media, by the NCAA

members themselves, and in the federal and state court system. One of the primary criticisms of the NCAA and its administrative law process has been that it does not provide any due process and procedural protection for those accused of NCAA rules violations. This article explores the history of the NCAA and the enforcement and infractions process, the many legal and legislative challenges to the process, and a template for reform to make the system impartial for all stakeholders involved.

KEYWORDS

National Collegiate Athletic Association – due process – membership - legislation

INTRODUCTION

The NCAA is the largest and most well-known of four independent organizations that regulate intercollegiate athletics (Depken & Wilson, 2005, p. 3)¹. According to information posted on its website, 'The National Collegiate Athletic Association (NCAA) is a voluntary organization through which the nation's colleges and universities govern their athletics programs. It comprises more than 1,250 institutions, conferences, organizations and individuals committed to the best interests, education and athletics participation of athletes' (NCAA, 2007b, para. 1). As a voluntary membership organization, the NCAA proposes, passes, and enforces its own rules and regulations governing topics ranging from academics to recruiting. In 2006 the NCAA conducted 88 championships, in three divisions, for 23 sports and over 375,000 college athletes (NCAA, 2007c, para 1). 1

Although the NCAA is often seen as an organization that primarily conducts and markets intercollegiate athletic competition, it also acts as an investigative and enforcement agency. Some observers perceive the enactment and enforcement of NCAA regulations as solely originating from the NCAA offices (Chabot, 2004; Crowley, 2007). However, the NCAA Website notes, 'The entire organization [is] comprised of members and staff. [I]t is actually a bottom-up organization in which the members rule the Association' (NCAA, 2007d, para. 4). Although the NCAA office initiates, stimulates, and alters intercollegiate athletics by proposing, passing, and enforcing rules designed to protect the integrity of the sports experience, the member schools (primarily through their presidents' votes) ultimately determine NCAA policy (Due Process and the NCAA, 2004a). These membership-developed rules are published in each division's bylaws and the NCAA Manual. The extensive nature of these rules is evidenced by the size of the NCAA's *Division I 2006-2007 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws*, which consists of 476 pages of approved rules and regulations (NCAA, 2007a). 2

Despite the existence of NCAA rules, recruiting scandals, academic fraud and impermissible eligibility certifications have been frequent occurrences since the establishment of the NCAA as the first governing organization for intercollegiate athletics in 1909 (Crowley, 2007; Falla, 1981). Initially, NCAA-member institutions and affiliated athletic conferences enjoyed a high level of autonomy with regard to enforcing NCAA rules and regulations. In a sense the NCAA adopted a similar policy to the legislative policy commonly known as 'home rule.'² In 1952, in an effort to create a more 'level playing field' and encourage a sense of fair play among institutions, the NCAA membership created a mechanism to enforce the Association's legislation, which all members pledged to observe. This decision established an enforcement program designed to be a cooperative undertaking in which member institutions and conferences worked together through the NCAA for improved administration of intercollegiate athletics and punishment of those who violated Association rules. The NCAA, under the direction of longtime Executive Director Walter Byers, developed and formalized the enforcement process through the national office (Byers, 1995; 3

Crowley, Falla).

The NCAA national office - which currently consists of '...350 paid professionals that [sic] implement the rules and programs established by the membership...and are located primarily at the headquarters office in Indianapolis, Indiana' (NCAA, 2007d, para. 3) - has frequently been criticized for a lack of fairness and objectivity in some enforcement decisions (Otto, 2005; Porto, 1985; Ridpath, 2004b). In addition, the NCAA has faced protests and litigation related to *due process* complaints (*NCAA v. Tarkanian*, (1988) 488 U.S. 179; Otto; Porto). Since the courts presently view the NCAA as a private organization (See *NCAA v. Tarkanian*), even though the NCAA receives significant public funds from state university members, and, at times, appears to perform quasi-governmental functions, the NCAA is not currently viewed as a 'state actor' and is therefore not required to provide due process in its enforcement proceedings (*NCAA v. Tarkanian*, 1998; *Smith v. NCAA*, 2001). Within this setting, 'accused' individuals and institutions are not afforded the constitutional protections enjoyed by parties in civil and criminal courts (*NCAA v. Tarkanian*; *Smith v. NCAA*).

In light of the courts' present view of the NCAA, this paper investigates recent NCAA policy decisions, Congressional hearings, and pending and past civil litigation and criminal prosecutions. We also argue that contrary to existing interpretations, the NCAA is a 'state actor' and therefore should be subject to compulsory due process procedures in its investigations and adjudication of allegations. Finally, we offer suggestions regarding alterations to the current NCAA enforcement process that would ensure due process.

This paper details a) due process considerations, b) the NCAA enforcement process, c) criticisms of the NCAA's enforcement process, d) the NCAA's status as a voluntary association e) internal and legislative investigations of the NCAA enforcement process, f) judicial intervention in the NCAA's voluntary status and enforcement process, and g) discussion and recommendations.

DUE PROCESS CONSIDERATIONS

The first step in a discussion of the NCAA and due process considerations is to articulate what is meant by the term due process. This necessitates presenting a rudimentary primer covering the constitutional basis for due process. The Fifth and Fourteenth Amendments to the United States Constitution seek to guarantee due-process rights (life, liberty, or property) for all citizens in their dealings with government entities or agencies acting as governmental branches (United States Constitution – V and XIV Amendments). The Fifth Amendment applies to the federal government, while the Fourteenth Amendment extends due process requirements to actions of each of the states (Schoonmaker, 2003; Wong, 1994). Private entities are not required to adhere to due process guidelines, since the remedy for participants who perceive injustice by such entities is to end their associations with those groups (Rogers & Ryan, 2007; Wong). It is also relevant to note that a plaintiff pursuing a due-process claim must demonstrate that: (1) a loss of life, liberty, or property has occurred; (2) the defendant behaved as a state actor in depriving the plaintiff of one or more of those rights; and (3) the defendant violated either *substantive* or *procedural due process* (Schoonmaker; United States Constitution; Wong).

Schoonmaker noted that substantive due process is concerned with the fairness of rules and regulations established by government entities specifically pertaining to two questions: (a) Does the rule have a proper purpose? and (b) Does the rule relate to the accomplishment of that purpose? Within this legal framework, a voluntary organization can create, implement, and enforce rules without government scrutiny as long as it does not commit fraud, encourage collusion among its members, or arbitrarily enforce its rules upon its membership (Schoonmaker).

Procedural due process concerns the enforcement of governmental rules. If a person's life, liberty or property is at stake, that person is entitled to notice of a hearing before an impartial party, adequate time to prepare for the hearing, and an opportunity to present evidence and cross examine witnesses (Wong). The amount of preparation time and the formality of the hearing usually are related to the seriousness of the right at stake (*Goldberg v. Kelly*, 1970; *Mathews v. Eldridge*, 1976; *Morrissey v. Brewer*, 1972).

Determining whether due process is afforded requires courts to balance three factors, namely (i) the private interest that will be affected by some official state action; (ii) the risk that if certain procedures are used, such interest will be erroneously deprived – particularly if there is a potential benefit to utilizing different procedures; and (iii) the government's interest in the matter at hand (*Mathews v. Eldridge*, 1976). Over time, courts have held that a person entitled to procedural due process should minimally receive written notice of the grounds for the action, be informed of the evidence supporting that action, and be made aware of the right to present supporting witnesses, confront adverse witnesses, and be represented by counsel. Such an accused person is also entitled to be heard by a fair and impartial decision-maker who will provide a written decision that outlines the rationale and evidence on which the decision was based (*Brown v. City of Los Angeles*, 2002). Analyzing the current NCAA enforcement process in light of U.S. Constitutional Law and judicial decisions allows NCAA procedures to be compared

and contrasted with due-process guidelines applicable to state actors.

THE NCAA ENFORCEMENT PROCESS

The current NCAA enforcement process begins with allegations of rules violations, either self-reported by the institution or garnered by other means, such as through media or anonymous reports. A joint institutional and NCAA preliminary investigation is then initiated. This process is entitled a *Notice of Inquiry*, to determine if an official inquiry - called a *Notice of Allegations* - is warranted to determine whether a secondary (minor) or a major violation has occurred. The institution involved is notified promptly and may appear on its own behalf before the NCAA Committee on Infractions (COI), the primary fact finder in the NCAA enforcement process (Crowley, 2007; NCAA 2007a; Rogers & Ryan, 2007). 11

As of 2007 the NCAA enforcement staff consists of 28 investigators. The enforcement staff is further grouped into seven investigative teams with a Director of Enforcement and at least four field investigators. According to NCAA policy, at no time is an investigative team allowed to have a case-load greater than four (NCAA, 2007a). In addition to these enforcement teams, three investigators are assigned to the Agent, Gambling, and Amateurism Activities Division, one is assigned to Basketball Certification, and two administrators are attached to Secondary Infractions (NCAA, 2007a). With such a limited staff, the NCAA has long acknowledged that it relies on information and cooperation from member institutions and conferences to initiate many investigations (Crowley; Yaeger, 1991). 12

As with other NCAA administrative areas, such as recruiting and eligibility, the NCAA Enforcement staff functions primarily under Operating Bylaw 19 and Bylaw 32. These bylaws outline the general enforcement principles primarily for Division I athletics and detail enforcement policies and procedures (NCAA, 2007a, p. 303, 407). The general expectation that '[a]ll representatives of member institutions shall cooperate fully with the NCAA enforcement staff, Committee on Infractions, Infractions Appeals Committee and Management Council to further the objectives of the association and its enforcement program' is outlined in Article 19.01.3 (NCAA, 2007a, p. 333). Specific enforcement policies and procedures are delineated in Administrative Bylaws, Article 32 (NCAA, 2007a). For example, Article 32.2.1.1 stipulates that the NCAA enforcement staff may initiate a 'preliminary review of information' (NCAA, 2007a, p. 441) - the first step in the investigation process - when it receives what it considers to be 'credible information' that an institution is (or has been) in violation of NCAA legislation (NCAA, 2007a). The Association encourages member institutions to self-disclose violations committed by their athletes or staff, noting that such self-disclosure '...shall be considered in establishing penalties, and if an institution uncovers a violation prior to being reported to the NCAA and/or its conference, such disclosure shall be considered a mitigating factor in determining the penalty' (NCAA, 2007a, p. 440). 13

The NCAA enforcement staff is 'responsible for evaluating information reported to the NCAA office' (NCAA, 2007a, pg. 440). In addition, since '[t]he enforcement staff has a responsibility to gather basic information regarding possible violations...it may contact individuals to solicit information' (NCAA, 2007a, pg. 440). This Notice of Allegations (formerly called Letter of Preliminary Inquiry), triggers the *Cooperative Principle*, outlined in Article 32.1.4, which '...imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred' (NCAA, 2007a, p. 439). The cooperative principle also '...requires that all individuals who are subject to NCAA rules protect the integrity (i.e. confidentiality) of an investigation. Failure to cooperate may be a violation of the association's principles of ethical conduct' (NCAA, 2007a, p. 439). While any member institution being investigated must fully disclose any and all relevant information to the NCAA investigative staff, the NCAA has no *discovery* or *disclosure* obligation to an individual or institution being investigated (Porto, 2007; Roberts, 2004). While the NCAA does not have subpoena power, meaning it cannot compel persons to testify during its investigations, persons retaining athletically-related positions at NCAA member schools or athletes with eligibility remaining have reportedly felt they must testify or provide information during an NCAA hearing (Roberts, 2004). In fact, such individuals are required under the cooperative principle to participate fully or they face potential repercussions (NCAA, 2007a ; Roberts, 2004). 14

After the NCAA enforcement staff completes its on-site visits, interviews, and evidentiary analyses, a pre-hearing conference is conducted to determine agreed-upon facts (NCAA, 2007a). Shortly after the pre-hearing conference, the NCAA requests representatives of the accused institution and any 'involved individuals' (including university staff or athletes) to appear at a hearing before the COI (NCAA, 2007a). The NCAA investigative staff presents its allegations and evidence first, and then the institution responds. During this conference, participants can ask questions and other exchanges of information can occur (NCAA, 2007a). The COI then considers all relevant information in making its 'determinations of fact' and evaluates potential penalties (NCAA, 2007a, pg. 448). 15

According to Potuto, the COI is to give equal weight to the evidence and arguments presented by the enforcement staff and the institution (Potuto, 2004). This evidentiary obligation is outlined specifically in Bylaw 32.8.8.2 (established in 1977 as the standard of proof for determining if an NCAA rules violation 16

has occurred), which states that the COI will 'base its findings on information which it determines to be credible, persuasive and of a kind which reasonably prudent persons rely on in the conduct of serious affairs' (NCAA, 2007a, p. 448). Based on the severity of the violations uncovered, presumptive penalties are available to the COI (Depken & Wilson, 2005; Falla, 1981). Available penalties include: (a) reprimand and censure, (b) probation for one year or more than one year, (c) ineligibility for one or more NCAA championships, (d) ineligibility for other invitational and post season meets and tournaments, (e) television restrictions under the NCAA's control, (f) ineligibility to vote and/or serve on NCAA Committees, (g) probation from all outside competition (e.g. 'The Death Penalty'), (h) reduction in financial aid, (i) potential return of monies earned in NCAA controlled events, (j) removal of all records, team, and individual awards, and (k) Show Cause.

Of the potential penalties, probation from all competition (death penalty) and show cause occur rarely. As a member organization, the NCAA hopes to avoid ever shutting down a member's athletic department, unless the transgressions are egregious and continual (as was the case with Southern Methodist University's (SMU) football program when in 1987 the university became the only NCAA member institution to have ever received the death penalty). Since SMU received the death penalty punishment under NCAA bylaw 19.5.2.3 (pp. 308), there have been 29 programs (as of October 2007) in various sports that have been eligible to receive the death penalty. All potentially affected institutions were spared even though they had been found to have committed at least two sets of major violations within a five-year period. Due to the long-lasting effect on SMU and the evisceration of its once winning football program, many familiar with NCAA investigations question whether the penalty ever will be imposed again (Prisbell, 2007, p.E01, October 10). The unique nature of the show cause penalty also makes it a rare occurrence: 17

A show cause order is one that requires a member institution to demonstrate to the satisfaction of the Committee on Infractions (or the Infractions Appeals Committee per Bylaw 19.2) why it should not be subject to a penalty (or additional penalty) for not taking appropriate disciplinary or corrective action against an institutional staff member or representative of the institution's athletics interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee (NCAA, 2007a, p. 337). 18

A show cause can have an adverse affect on present and/or future employment opportunities for anyone affiliated with a sanctioned athletic department, since colleges or universities who wish to hire a 'show-cause' applicant must convince the COI why NCAA penalties should not be imposed on the department if it should hire someone under a show cause provision. Typically, when a 'show cause' is issued by the COI, the university will terminate the affected individual, although it is under no obligation to do so. However, if an institution chooses to retain a 'show-cause' employee, it must convince the NCAA that further penalties are not justified (Depken & Wilson, 2005; Falla, 1981; NCAA, 2007a). 19

The COI currently has nine members, seven of whom are drawn from NCAA-member institutions. Typically, these individuals are athletic directors, conference commissioners, or faculty athletic representatives (Potuto, 2004). The two additional members are from outside the NCAA membership and usually are lawyers or retired judges (Potuto, 2004).³ COI findings, including imposed penalties, are reported to the institution, which may appeal the findings or the penalty to the NCAA Infractions Appeals Committee (IAC) (NCAA, 2007a). After considering written reports and oral presentations by representatives of the COI and the institution, the IAC acts on the appeal. Actions may include accepting the COI's findings and penalty, altering either one, or making its own findings and imposing an appropriate penalty (NCAA, 2007a). 20

CRITICISMS OF THE NCAA ENFORCEMENT PROCESS

Despite the intricacies of the NCAA's enforcement activities, certain elements of its procedures have been criticized (Bloom, 2004; Broyles, 1995; Porto, 2007; Ridpath, 2003, 2004a, 2004b). Certainly, critics have often accused the NCAA of overtly controlling the investigative and enforcement process with little or no recourse for accused individuals or institutions (Bloom, 2004; Porto, 2007; Ridpath, 2003; 2004a; 2004b). Throughout any investigation, NCAA enforcement staff and committee members serve as prosecutors, judges, and jury members; the only independent appeal process available to accused NCAA members is to solicit support from another NCAA entity or to sever ties with the NCAA (Bloom, 2004). Specifically, the NCAA's enforcement staff 'prosecutes' those accused of violating its rules, its Committee on Infractions serves as both judge and jury during enforcement hearings, and its Infractions Appeals Committee (IAC) hears and decides appeals from the decisions of the COI (Porto). Under these circumstances, one critic has charged that 'there are no external checks on the NCAA to ensure [the] accuracy and fairness of findings and penalties imposed on private citizens' (Thompson, 1994, p. 1651). Moreover, even assuming that members of the COI and IAC generally act fairly and honorably, the perception remains that they favor the NCAA's position in enforcement proceedings, since they are employed at NCAA-member institutions and owe their committee posts to the NCAA (Bloom, 2004; Ridpath, 2004a). This perception has prompted Broyles (1995) to observe that 'the biggest problem with 21

the NCAA's enforcement program is the lack of an independent decision-making body' (p.517). Broyles also noted that 'as long as the Infractions Committee and [the] investigative staff owe their allegiance to the same organization, members will always feel—and justifiably so—that the prosecutor, judge/jury, and executioner are all the same entity' (p. 517).

Critics also contend the NCAA denies a meaningful opportunity to be heard by permitting its enforcement staff (i.e. investigators) to present summaries of testimony from *ex parte* witnesses as evidence at COI hearings (Bloom, 2004; Potuto, 2004; Roberts, 2004; Ridpath, 2004a). Since such witnesses do not then attend further meetings, there is no opportunity for the accused to address their testimony or directly confront a possible accuser. The NCAA almost always utilizes narrative accounts offered by its enforcement staff in presenting incriminating evidence against accused institutions and individuals (Porto, 2007; Roberts, 2004). Such accounts are supported by written transcripts of witness interviews and the witnesses' signed statements (Roberts, 2004). As early as 1992, Young contended such a narrative account 'deprives the institution of its right to confront and cross examine adverse witnesses and should no longer be employed by the NCAA' (p. 747). Possible inaccuracies inherent in summative procedures are exacerbated by the NCAA's refusal to require witness interviews to be tape recorded; investigators only record interviews of witnesses who agree to be recorded (NCAA, 2007a; Porto, 2007). When a witness refuses to be recorded and then provides potentially conflicting statements, the institution's ability to confront the credibility of the witness is severely restricted (Young, 1992). 22

The many lawsuits in which colleges, universities, coaches and athletes have challenged NCAA rules or the means of enforcing them provide compelling evidence of the widespread perception of the NCAA as an adversary who holds an unfair position when disputes arise (*Arlosoroff v. NCAA*, 1984; *Buckton v. NCAA*, 1973; *Howard University v. NCAA*, 1975; *NCAA v. Tarkanian*, 1988; *NCAA v. Yeo*, 2005; *Parish v. NCAA*, 1975). In today's highly professionalized and commercialized college sport world, the financial consequences (e.g. lost television, bowl game, or tournament revenue, lost livelihood in coaching or as a professional athlete, or negative publicity surrounding being placed on NCAA probation) of NCAA-imposed penalties are sufficiently severe that the accused are understandably likely to perceive the enforcement process as confrontational. During any NCAA investigation, accused players, coaches or staff members may understand that technically 'it is the institution that must declare him or her ineligible' (Kitchin, 1996, p. 158) and that their institution may not agree with the NCAA's decision or its choice of penalty (*NCAA v. Tarkanian*). However, those individuals know their institutions will most likely completely adhere to NCAA decisions because the institutions dare not incur the NCAA's wrath for fear of swift and severe retribution against them – particularly since at the highest levels of Division I, there are no commercialized college sport opportunities outside of the NCAA (Porto, 2007; Ridpath, 2003, 2004b). Given this administrative and financial landscape, the NCAA is unlikely to institute due process considerations for accused individuals unless compelled through some outside source, such as through the reclassification of its volunteer organization status to that of a state actor. 23

THE NCAA AS A VOLUNTARY ASSOCIATION

The NCAA's status as a voluntary association or state actor has changed during its history. In the 1970s, the NCAA was typically considered a state actor by the United States judicial system and therefore subject to Fourteenth Amendment limitations (*Board of Regents of the University of Minnesota v. NCAA*, 1977). In addition, the courts held the NCAA performed a public function in regulating college athletics (*Parish v. NCAA*, 1975) and noted a substantial interdependence between the NCAA and the state institutions that comprised approximately 50% of its membership (*Howard University v. NCAA*, 1975). 24

It was not until *Arlosoroff v. NCAA* (1984) that courts began to entertain the notion that the NCAA's actions were not necessarily equivalent to state action. The *Arlosoroff* court wrote, 'the fact that the NCAA's regulatory function may be of some public service lends no support to the finding of state action, for the function is not one traditionally reserved to the state' (p. 7). The Court also added: 25

Those facts [that approximately one-half of the NCAA's members are public institutions] do not alter the basic character of the NCAA as a voluntary association of public and private institutions....If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action (p. 8).

Subsequent to *Arlosoroff* the seminal ruling regarding the NCAA's status occurred in *NCAA v. Tarkanian*, where the United States Supreme Court framed the discussion of private party state action around a central question: 26

whether the state was sufficiently involved to treat that decisive step [that caused the harm to the plaintiff] as state action—that is, whether the state has provided a mantle of authority that enhanced the power of the harm-causing individual actor—a result which may occur if the state (1) creates the legal framework governing the conduct, (2) delegates the state's authority to the private actor, or (3)

sometimes, knowingly accepts the benefits derived from unconstitutional behavior (p. 3).

Based on this reasoning, the United States Supreme Court reversed the Nevada Supreme Court's judgment that the NCAA engaged in state action when it (i) investigated allegations of improper athletic recruiting practices at the University of Nevada-Las Vegas (UNLV); (ii) issued a report that found numerous NCAA violations by UNLV men's basketball coach Jerry Tarkanian; (iii) proposed a series of NCAA sanctions against the university; and (iv) requested the University to show cause why additional NCAA penalties should not be imposed if it did not remove Tarkanian during the probation period (*NCAA v. Tarkanian*, 1988). The Court added, 'the source of the legislation adopted by the NCAA is not Nevada but the collective membership, speaking through an organization that is independent of any particular State' (*NCAA v. Tarkanian*, p. 12). The Court held that neither UNLV's decision to adopt the NCAA's standards, nor its role in formulating these standards, was sufficient to make the legislation an act of the State of Nevada instead of the NCAA. 27

The Supreme Court ruled the NCAA did not directly discipline Coach Tarkanian and the university retained options other than suspending or firing the coach. While UNLV's options might not have been attractive, they still existed. The University's 'desire to remain a powerhouse among the Nation's college basketball teams was understandable, and non-membership in the NCAA obviously would thwart that goal, but that UNLV's options were unpalatable does not mean that they were nonexistent' (*NCAA v. Tarkanian*, 1988, pg. 15 – footnote 19). According to the Court, one of UNLV's available options was 'to withdraw from the NCAA and establish its own standards' (*NCAA v. Tarkanian*, pg. 12). 28

Consistent with the concept of *stare decisis*, *Tarkanian's* due-process ramifications have been longstanding. According to one sports-law textbook: 29

The *Tarkanian* decision makes judicial review of the NCAA enforcement process problematic. It would appear that utilizing a public function analysis, only a challenge to the procedures utilized in a particular investigation under the laws of private associations would have a chance for success' (Yasser et al, 2003, p. 97).

Indeed, in light of *Tarkanian*, it seems that public function theory is not likely to be applied to any judicial scrutiny of NCAA actions. Since *Tarkanian*, courts have continued to view the NCAA as a voluntary association, not a state actor (*Brentwood Academy v. TSSAA*, 2007). As a result, individuals subject to NCAA investigations are not afforded due-process rights as defined and guaranteed under the U. S. Constitution. 30

INTERNAL AND LEGISLATIVE INVESTIGATION OF THE NCAA ENFORCEMENT PROCESS

Despite *Tarkanian* establishing the NCAA as a private entity able to implement and execute investigations without due process considerations, the NCAA examined its internal enforcement practices soon after the Court's decision. Inquiries from state legislatures and Congress may have contributed to the NCAA's internal review (Chabot, 2004; Porto, 2007). Then NCAA Executive Director Dick Schultz established a blue ribbon panel in 1991 to review the NCAA's enforcement process. Former Solicitor General Rex Lee chaired the Special Committee to Review the NCAA Enforcement and Infractions Process, and the committee generated a series of recommendations to improve the process and provide greater protections for involved institutions and individuals (Chabot, 2004). 31

At the time of the Lee Committee's review, the NCAA Council was the primary decision-making body in the NCAA governance structure. Currently, the Management Council and Board of Directors format is used for NCAA Divisions I and II (NCAA, 2007a). The NCAA Council adopted the following recommendations from the Special Committee: 32

1. Provide Initial Notice of Allegations. The NCAA membership agreed to enhance its notice of inquiry process to insure all parties are notified prior to an investigation.
2. Establish a summary disposition process. This was suggested as a method for accelerating the infractions process by adjudicating major violations at a reasonably early stage in the investigation.
3. Allow tape recordings and shared documentation of interviews.
4. Use former judges or other eminent legal authorities as hearing officers in cases involving major violations not resolved at the summary disposition process -partially adopted.⁴
5. Create an appellate process. An NCAA Infractions Appeals Committee was developed in 1993 as

an independent and separate body from the COI with its own administrative staff.

6. Implement a Conflict of Interest Policy. Conflict of interest statements were adopted for the enforcement staff, the COI, and the Infractions Appeals Committee.
7. Allow public reporting of cases by the COI. The NCAA permitted the Chair of the COI or Infractions Appeals Committee to release the findings of facts to the public.
8. Document and release previous COI decisions. All public infractions reports are now available on the NCAA website.
9. Improve the structure and procedures of the NCAA enforcement staff. The Council continually evaluates and revises procedures promulgated in NCAA Bylaw 32, which governs the NCAA enforcement and infractions process (Due Process and the NCAA, 2007, p. 77-78, Hilliard, Pearson & Shelton, 2002; Kitchin, 1996)

However, not all of the Lee Committee's recommendations were adopted. Those not adopted included: 33

1. Permit a witness to appear in person at any hearing at which the witness's statements were to be used.
2. Allow open hearings.
3. Release hearing transcripts to involved parties

The NCAA council opposed these measures in order for it to retain custodial control over all documents and recordings of hearings (Due Process and the NCAA, 2004, p. 77-78). In turn, the NCAA membership did not adopt these recommendations since they would have relinquished control of the documents and recordings of testimony related to enforcement hearings (Due Process and the NCAA). In addition, although the NCAA has cited concerns regarding costs and time if their enforcement proceedings were executed in public, critics have noted that those claims may be superseded by concerns over granting public access to NCAA practices that might be viewed by some as arbitrary and unfair (Crowley, 2007; Potuto, 2004; Ridpath, 2004a, 2004b). Public concerns would certainly be exacerbated if public hearings occurred and witnesses were not permitted to be cross-examined by accused parties. 34

Public attention regarding the NCAA's enforcement actions has spurred the United States Congress to hold three separate hearings regarding the NCAA's investigation and enforcement practices during the past 20 years (Crowley, 2007). The NCAA's enforcement activities, combined with the *Tarkanian* (1988) decision, prompted some to call for Congressional intervention in the NCAA's voluntary organization status (Due Process and the NCAA, 2004; Ridpath, 2004a, 2004b). Most recently, in September 2004, the United States House Judiciary Committee's Subcommittee on the Constitution held hearings to investigate the NCAA's enforcement process (Chabot, 2004). Even though the NCAA implemented some changes recommended by the Lee Committee, members of the House Judiciary Committee pressed the NCAA for information regarding the areas it failed to address (Chabot, 2004). The NCAA initially responded to the three concerned areas with the following information (Potuto, 2004): 35

1. The NCAA does not necessarily allow a witness to appear at any hearing at which the witness's statements are to be used because the NCAA desires to remain the custodian of any and all documents. It does not feel that it should have to disclose documents and testimony to all parties.
2. The NCAA continues to prohibit open hearings during its investigations because it feels it would damage the enforcement process and would potentially cause involved personnel unnecessary exposure and publicity.
3. The NCAA has consistently maintained that it will continue to retain custodial control of all hearing transcripts rather than make them available to the public

The NCAA's responses to the initially-posed questions elicited further questioning and testimony during the 2004 House Judiciary Committee's hearings. At times, questioning became contentious as some committee members noted that even though the NCAA had made significant improvements since the *Tarkanian* (1988) decision, its reforms still did not provide due process to accused individuals and institutions (Bloom, 2004; Chabot, 2004; Potuto, 2004; Ridpath, 2004a; Roberts, 2004). As subcommittee chair Steve Chabot (R-Ohio) noted, 'merited or not, the NCAA at least has the perception of a fairness problem' (Due Process and the NCAA, 2004, p. 2). The questions and comments by Representative Chabot and the committee garnered significant attention, but Congress did not conduct 36

any further actions as a result of the hearings (Crowley, 2007). Certainly, specific legislation from Congress could establish the NCAA as a state actor required to provide due process, but at no point has Congress brought such legislation to committee, let alone a full vote.

JUDICIAL INTERVENTION IN THE NCAA'S STATE ACTOR STATUS

With imminent Congressional intervention unlikely, potential changes to the NCAA's status, though unlikely at this time, must come through the courts. The Fourteenth Amendment's state-action requirement reflects the Supreme Court's recognition that citizens' constitutional rights only afford them protection against government/state actions. There has traditionally been a two-part 'fair attribution' approach to governmental (state actor) infringements on these rights: 37

1. the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible, and
2. the party charged with the deprivation must be one who may fairly be said to be a state actor (*Lugar v. Edmondson Oil Co.*, 1982, sec 1).Sss

Therefore, reclassifying the NCAA as a state actor will most likely only occur if the courts determine the NCAA is, in fact, undertaking activities substantially similar to those performed by the government. 38

Two legal theories can support the reclassification of a voluntary organization as a state actor: a) the *public function theory* and b) the *nexus or entanglement theory* (Cotten and Wolohan, 2003; Wong, 1994). Using the public function theory, courts have analyzed the actions of a private actor in order to determine if such actions are those that have traditionally been reserved for governmental entities. If so, then the private actor is deemed to be functioning as a governmental entity (Altman, 2003). Initially, public function theory was applied in civil rights cases, such as *Smith v. Allwright* (1944) and *Terry v. Adams* (1953), which involved 'private' political parties and the process of nominating candidates for public office. The plaintiffs in these cases argued that even though a political party was a private entity, it performed a *public function* (nominating candidates for public office) and therefore should be considered a state actor. In *Smith v. Allwright* the Court stated: 39

a political party, although making its selection at a primary election conducted by party officers at the expense of members of the party, is in so doing an agency of the state, and may not, consistently with the Fifteenth Amendment, exclude negroes (sic) from voting in primary elections by adopting a resolution restricting party membership to white citizens (p. 321).

However, the Court has not broadly construed a public function; instead it has applied public function theory only if: a) the function is one that is traditionally the exclusive domain of the state; and b) a statute or constitutional provision actually requires the state to perform the function (Altman, 2003). 40

Nexus-entanglement theory examines the extent of government's involvement or entanglement with the activities of a private organization. This theory considers the extent to which government is involved in or benefits from the private organization's action (Altman, 2003; United States Constitution). In *Dennis v. Sparks* (1980) the Supreme Court offered guidance in determining the nexus/entanglement between private and state actors. It held that private actors who operate 'under color of' state law may be deemed state actors if they participate willfully in joint action with the State or its agents: 41

Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions . . . ; [a]nd it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators. . . [P]rivate parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases (p. 1).

The Court clarified 'under the color of state law' in describing joint action between private persons or entities and government entities in *Lugar v. Edmondson Oil Co.* (1982). The Court, referring to *U.S. v. Price* (1965) observed: 42

Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents (p. 17).

In *Blum v. Yaretsky* (1982), the Court expounded on this theme, writing: 43

The required nexus to make a private entity's action into state action under the Fourteenth Amendment

may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state...The complaining party must also show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself'...State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State (p. 13).

Ultimately, nexus-entanglement theory postulates that if the government directly or indirectly provides money, services, facilities, permission or 'encouragement' to private organizations, or if the government 'directly or indirectly benefits' from the actions of a private organization, then the private organization should be bound by Fourteenth Amendment due process requirements (Yasser, et al.). If today's NCAA, amid the changing landscape of corporate college sports (Southall, Nagel, Amis, & Southall, in press), and as a result of several organizational changes enacted since 1988, is not the same voluntary organization scrutinized by the Supreme Court in *NCAA v. Tarkanian* (1988), then nexus/entanglement theory offers a plausible rationale that the NCAA is more properly seen as a state actor. 44

One can argue that today the private actor (the NCAA) described in *Tarkanian* no longer exists, since the NCAA is so enmeshed in *corporate college sport* (Sack, 1987; Sperber, 1998; Southall et al, in press). As far back as *Justice v. NCAA* (1983) courts have expressed the belief that college sport is a business and the NCAA is deeply involved in this commercialized enterprise. While *Justice* involved questions of athletic eligibility and rulemaking, the court recognized the NCAA's metamorphosis from an organization involved solely in amateur eligibility issues to a monopoly also concerned with protecting its commercial and business interests. The *Justice* court observed: 45

[I]n sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose (*Justice v. NCAA*, 1983, p. 28).

The key, from a nexus/entanglement theoretical perspective, to the NCAA having to abide by due process guidelines that apply to a state actor is for the court to hold that the NCAA is no longer a private, voluntary association, but, in fact, is now a state actor. The NCAA's metamorphosis from a voluntary association to a state actor is a potentially viable basis for a claim, based on nexus/entanglement theory that the NCAA is a state actor. Interestingly, a case involving the Internal Revenue Service (IRS) may provide the basis for such a rationale. 46

Mathis v. United States (1968) defined how and when an organization can become a 'state actor' in administrative law proceedings. A routine Internal Revenue Service (IRS) investigation resulted in criminal charges against Mathis. During its investigation of Mathis, an IRS agent who interviewed Mathis failed to inform him of his right to be silent and to have a lawyer present. The Court held that the possibility of criminal prosecution when a person is being questioned is enough to invoke a defendant's *Miranda rights* (See *Miranda v. Arizona*, 1966). As detailed earlier, the NCAA has maintained that many due process considerations, such as administering *Miranda rights*, have been and will continue to be absent from its enforcement proceedings, primarily because it is not a state actor (NCAA, 2005). However, if NCAA investigations, conducted without traditional due process rights for the accused, were later utilized by the government to conduct criminal prosecutions, the courts may be forced to reexamine, under nexus/entanglement theory, its voluntary status. 47

RECENT NCAA ENFORCEMENT ACTIVITIES

Even though the NCAA contends it does not have authority to make arrests or conduct criminal investigations (Yaeger, 1991), its enforcement activities are increasingly entangled with government investigations, indictments, and criminal proceedings (*U.S. v. Gray*, 1996; *U. S. v. Wolf*, 2004; *U.S. v. Young*, 2004). Ryan Wolf, former Barton County (Kansas) Community College men's basketball coach, was indicted on 36 counts of federal fraud, in part, from information uncovered during an NCAA investigation of former University of Missouri-Columbia basketball player, Ricky Clemons (*U.S. v Wolf*). The NCAA was concerned that Wolf's activities may have resulted in academic improprieties involving numerous NCAA athletes as well as several university athletic programs such as the University of Missouri-Columbia, St. John's University, and San Jose State University (*U.S. v. Wolf*). 48

University of Alabama football booster Logan Young was found guilty of racketeering in the spring of 2005 following the Albert Means recruiting scandal (*U.S. v. Young*, 2004). The decision sent shockwaves through the college athletic community (Schlabach, 2005, p. D01, November 3), but some of the court's actions during the trial may have the greater impact upon future NCAA operations. The district court's decision to grant Young motion for leave to issue *subpoenas* supports the argument that NCAA and government actions are entangled: 49

The requested records and documents that Young seeks [from the NCAA] are relevant and evidentiary. 50

The NCAA investigation of the University of Alabama's football program and recruiting practices *focused on the same allegations and activities that gave rise to the indictment against Young* (authors' emphasis)...The investigation culminated in an [NCAA] Infractions Report issued in February 2002. Fulmer and Culpepper [*Phillip Fulmer is the head football coach at the University of Tennessee and Tom Culpepper was a noted recruiting analyst. Both were used as secret witnesses in the NCAA's case against the University of Alabama*] have been identified as the confidential sources referenced in the NCAA report. The University of Alabama officials and coaches were allowed access to most of the materials but others implicated in the NCAA report [sic] who were not directly affiliated with the University were not allowed access. Clearly, the subject matter of the items sought by Logan in the subpoenas are directly related to the allegations in the pending indictment against him, and the witnesses interviewed provided information to the NCAA about the subject matter at issue in this case (*U.S. v. Young*, 2004, p. 3).

Further evidence of entanglement can be found in the court's reasoning in granting Young's motion. 51
Basing its rationale on *United States v. Nixon* (1974), the court felt the NCAA documents sought by Young were admissible as business records useful in refreshing the memory of prospective witnesses and could also provide substantive matters for use by Young as part of his defense. In addition to NCAA documents, Young also asked for access to records in the possession of Coach Fulmer, since he might call Fulmer as a defense witness and those records could be used to refresh Fulmer's memory (*U.S. v. Young*, 2004).

The court granted Young's motion for two reasons: (1) since both the NCAA and Fulmer had already 52
denied his request for access to the documents, he would not be able to procure the items except by subpoena, and (2) without the documents Young's trial preparation and defense would likely be impeded (*U.S. v. Young*, 2004). The NCAA-government entanglement is evident in the judge's recognition that even though during the process of discovery the government had provided Young with a NCAA memorandum of meetings, this was not necessarily an adequate substitute for *all* (authors' emphasis) the memoranda and notes of interviews in the possession of the NCAA and Fulmer (*Young*).

The *Wolf* and *Young* cases demonstrate that the NCAA and the federal government seem to be 53
investigating some of the same people. This may not be a coincidence. If the NCAA - a private entity - can be used as an investigative agent of the government, it may be able to uncover information that the government, constrained by notions of due process, equal protection, privacy, freedom from unreasonable searches and seizures, the right to confront one's accuser, and the right not to be forced to incriminate oneself, may not be able to discover. That the NCAA is not constrained by due-process considerations may benefit both the NCAA and the government. This fact has been recognized by defenders of the present-day NCAA structure, who contend, '[I]t would be unwise and do far more harm than good to impose traditional notions of fairness appropriate for the criminal justice system on the NCAA' (*Due Process and the NCAA*, 2004, p. 5).

DISCUSSION AND RECOMMENDATIONS

The lack of substantial legislative or judicial intervention has permitted the NCAA to continue to exercise 54
its rights as a voluntary organization. However, judicial intervention and reclassification could occur if the NCAA were to be deemed a state actor. Certainly, the U.S. Supreme Court changed the government's position on the NCAA's state actor status with the 5-4 decision in *NCAA v Tarkanian* (1988). We contend that, utilizing nexus/entanglement theory, the Court can and will revisit and overturn *Tarkanian*.

Certainly, the NCAA will fight any attempt to reclassify its voluntary status, but perhaps the organization 55
could learn from other sports entities faced with judicial intervention. Major League Baseball (MLB) long denied free agency to players and when presented with an opportunity to implement free agency on its own terms in the 1970s, it completely rejected the notion (Miller, 1991). Instead, eventually an arbitrator ruled for free agency rights and the players, to their benefit, were able to participate in the creation of free agency rules (Miller). The NCAA currently maintains that the due process it provides is sufficient, citing procedural guarantees that include: (1) notice of the existence of an inquiry and of allegations; (2) the right to counsel for institutions and individuals; (3) tape-recorded interviews unless the interviewee objects; (4) a four-year statute of limitations (subject to exceptions); (5) notice of the witnesses and information on which the enforcement staff will rely; (6) no consideration of information from confidential sources; (7) tape recording and transcription of COI hearings; (8) assignment of the burden of proof to the NCAA; and (9) an opportunity to appeal the COI's decision to the IAC (NCAA, 2007a). However, these guarantees were deemed insufficient by the Lee Committee and would certainly fall short of close scrutiny if the NCAA were deemed a state actor. The NCAA should consider revising its due process procedures while it controls the process, rather than after a judicial decision or congressional intervention forces the NCAA to alter its practices.

Even if the NCAA does not provide full due process considerations, at the least it should adopt procedures 56
akin to those followed by state and federal administrative agencies in 'contested cases,' where proceedings are less formal than in court but still honor the most important requirements of due process. For example, the administrative procedure statutes of the federal government and the states,

respectively, provide for three things that the NCAA enforcement process lacks, namely, an independent decision-maker, subpoena power for the decision-maker, and the right of each party to confront adverse witnesses during hearings. Certainly, these changes would likely be embraced by many NCAA critics and they would be less expensive to implement than providing full due-process considerations.

Independent decision-makers for NCAA enforcement hearings and appeals are readily available. The Association should create a fund from which to hire, preferably as independent contractors to ensure their autonomy, retired or former judges and hearing examiners (i.e. administrative law judges) to conduct and decide enforcement cases. A single 'hearing judge' could preside at a hearing, with an appeal to be heard by a panel of three 'appeals judges,' just as administrative matters like workers' compensation and Social Security disability cases are resolved by state and federal agencies (Porto, 2007). In the unlikely event of the NCAA not finding a large enough pool of judges in its home state of Indiana it could expand its search to neighboring states, thereby expanding the potential number of candidates without greatly increasing travel costs. This change would likely increase the goodwill of member institutions toward the NCAA without sacrificing the Association's capacity to identify and punish individuals and institutions that break its rules. 57

The two other changes to the enforcement process suggested above, namely, subpoena power for the NCAA and the right of accused parties to confront adverse witnesses, are closely related and, happily, rather easily made. Typically, once the NCAA has notified an institution that it is the subject of NCAA scrutiny, the Association and the institution conduct parallel investigations at approximately the same time. Young noted that whenever a witness 'gives conflicting information to the parties, recants a statement, or alleges misconduct on the part of an investigator' (1992, p. 835-36) the NCAA and the institution should conduct a joint interview to give both sides a chance to assess the credibility of the witness's statements. Building on this idea, Congress should provide the NCAA limited subpoena power, enabling the 'hearing judge' to require the witness who gives conflicting testimony, recants testimony, or alleges investigator misconduct to appear at the hearing and be subject to questioning by both parties. 58

In other words, only evidentiary issues that could not be resolved by conducting a joint interview would result in the issuance of a subpoena to a witness. A transcript of the joint interview would be admissible as evidence at the hearing (Young, 1992). Both the joint interviews and the subpoena power would enable an accused individual or institution to 'confront' an adverse witness and to challenge his or her testimony, whether that testimony appears in a transcript or is given in person under a subpoena. At the same time, this arrangement would respect the NCAA's private status by not requiring a full-dress legal proceeding in which all testimony came from live witnesses subject to cross-examination. And it would ensure that hearings are executed quickly, rather than extended for weeks or even months. 59

These changes would make the NCAA enforcement process fairer for both accused institutions and individuals without issuing a 'get out of jail free' card to guilty parties. The NCAA must certainly retain the capacity to investigate and punish those who would pursue a competitive advantage by flouting its rules. Legislation providing for independent decision-makers, limited subpoena power, and greater confrontation of adverse witnesses will ensure that both the innocent and the guilty are treated as fairly as possible in NCAA enforcement proceedings. Considering the financial repercussions for the accused in the proceedings, anything less should be unacceptable. 60

Despite the changes proposed in this paper, in other articles, and in hearings before the U.S. Congress, the NCAA will fight to retain its voluntary status and current enforcement procedures. Despite the extensive media attention paid to the 2004 Congressional hearings, little to no action has resulted (Bloom, 2004; Chabot, 2004; Crowley, 2007; Potuto, 2004; Ridpath, 2004a; Roberts, 2004). In addition, a recent U.S. Supreme Court opinion regarding the voluntary nature of athletic leagues and oversight of schools and their athletic departments leave little immediate hope that changes to the NCAA's voluntary association status could occur (*Brentwood v. TSSAA*, 2007). However, despite the government's current position, the NCAA would be wise to revisit and revise its enforcement rules and proceedings. Numerous other sport and non-sport entities long enjoyed limited government interference and intervention. However, once financial incentives became too great and the opinions of arbitrators, judges, Congress, and the general public shifted, those organizations often faced strict alterations to business practices. If the NCAA fails to address a lack of due process considerations, some future event will trigger legislative or judicial changes to its investigative system. Those modifications may not be nearly as palatable for the NCAA or its member institutions as the changes currently recommended. 61

REFERENCES

Altman S (2003) 'State action' in D. J. Cotten & J. T. Wolohan (Eds.), *Law for Recreation and Sport Managers* (3rd ed.) (Dubuque, IA: Kendall/Hunt Publishing Company).

Bloom J (2004) 'Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>

Broyles K (1995) 'NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan' 46 Alabama Law Review 487-517.

Byers W (1995) *Unsportsmanlike Conduct*. (Ann Arbor, MI: The University of Michigan Press).

Chabot S (2004) 'Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>.

Cotten DJ & Wolohan JT (Eds.) (2003) 'Law for Recreation and Sport Managers' (3rd ed.) (Dubuque, IA: Kendall/Hunt Publishing Company).

Crowley J (2007) *The NCAA's First Century in the Arena* (Digital Edition) (NCAA: Indianapolis, IN).

Depken C & Wilson D (2005) 'NCAA Enforcement and Competitive Balance in College Football' 72 *Economics of Collegiate Sports* 4.

Due Process and the NCAA written transcript. (2004) 'Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>

Falla, J (1981) *The NCAA: The Voice of College Sports* (Mission, KS: NCAA)

Hilliard R, Shelton A & Pearson, K (2002) 'An Update on Recent Decisions Rendered by the NCAA Infractions Appeals Committee: Further Guidance for NCAA Member Institutions' 28 *Journal of College & University Law* 605-627.

Kitchin J (1996) 'The NCAA and Due Process' 5 *Kansas Journal of Law & Public Policy* 71-72.

Martin K (1999) 'The NCAA Infractions Appeals Committee: Procedure, Precedent and Penalties' 9 *Seton Hall Journal of Sport Law* 123-158

Miller M (1991) *'A Whole Different Ballgame'* (New York: Carol Publishing Group)

National Collegiate Athletic Association (2002) 'University of Alabama, Tuscaloosa Public Infractions Report' (Indianapolis, IN: NCAA)

National Collegiate Athletic Association (2005) '2005 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws' (Indianapolis, IN: NCAA)

National Collegiate Athletic Association (2007a) '2007 NCAA Division I Manual: Constitution, Operating Bylaws, Administrative Bylaws' (Indianapolis, IN: NCAA)

National Collegiate Athletic Association (2007b) 'About the NCAA' (Indianapolis, IN: NCAA)

National Collegiate Athletic Association (2007c) 'Championships' (Indianapolis, IN: NCAA)

National Collegiate Athletic Association (2007d) 'Overview' (Indianapolis, IN: NCAA)

Otto K (2005) 'Major Violations and NCAA Powerhouse Football

Programs: What are the Odds of Being Charged?' 15(1) *Journal of Legal Aspects of Sports*. Winter Symposium Issue: Legal Issues and Reform in Intercollegiate Athletics 39-57

Porto B (1985) 'Legal and Constitutional Challenges to the NCAA: The Limits of Adjudication in Intercollegiate Athletics' in Johnson A & Frey J (Eds) *Government and Sport: The Public Policy Issues* (Totowa, NJ: Rowan & Allanheld)

Porto B (2007) *Unforced Errors: The Supreme Court, the Death of Amateurism, and the Denial of Due Process in College Sports* (unpublished manuscript).

Potuto J (2004) 'Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>.

Prisbell E (2007, October 10) 'Death Penalty' a Relic of the Past: After SMU, NCAA Shows

Leniency' (Washington Post, p.E01)

Ridpath B (2003) 'It is Time to Slay Another Sacred Cow: A Critical Look at the NCAA Enforcement and Infractions Process' The National Institute for Sports Reform Annual Summit, November 2003

Ridpath B (2004a) 'Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>

Ridpath B (2004b, October 28) 'The NCAA Enforcement and Infractions Process is Broken' Sports Litigation Alert 11-14.

Roberts G (2004b) 'Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 108th Congress', September 14, 2004 <http://www.house.gov/judiciary>.

Rogers M & Ryan R (2007) 'Navigating the Bylaw Maze in NCAA Major Infractions Cases' 37(3) Seton Hall Law Review 749-797.

Sack A (1987) College Sport and the Student-Athlete 11(1) Journal of Sport and Social Issues 31-48

Schlabach M (2005, February 3) 'Alabama Booster Convicted; Guilty Verdict Sets Precedent in Wake of \$150K in Improper Payments' (The Washington Post, p. D01)

Schoonmaker L (2003) 'Due Process' in Cotton D & Wolohan J (eds) Law for Recreation and Sport Managers (3rd ed.) (Dubuque, IA: Kendall/Hunt Publishing Company)

Southall R, Nagel M, Amis J, & Southall C (in press) 'A Method to March Madness: Institutional Logics and the 2006 National Collegiate Athletic Association Division I Men's Basketball Tournament' Journal of Sport Management

Sperber M (1998) 'Onward to Victory: The Crises That Shaped College Sports' (New York: Henry Holt and Company)

Thompson R (1994) 'Due Process and the National Collegiate Athletic Association: Are There any Constitutional Standards?' 41 UCLA Law Review 1651-1663

United States Constitution, Amendment V.

United States Constitution, Amendment XIV.

Wong G (1994) 'Essentials of Amateur Sports Law' (2nd ed.) (Westport, CT: Praeger)

Yaeger D (1991) 'Undue Process: The NCAA's Injustice for All'(Champaign, IL. Sagamore Publishing)

Yasser R, McCurdy J, Goplerud C & Watson, M (2003) Sports Law: Cases and Materials (5th ed.) (Cincinnati, OH: Anderson Publishing Company)

Young S (1992) 'The NCAA Enforcement Program and Due Process: The Case for Internal Reform' 43 Syracuse Law Review 747-834

TABLE OF CASES

Arlosoroff v. NCAA, 746 F.2d 1019 (1984).

Blum v. Yaretsky, 457 U.S. 991 (1982).

Board of Regents of University of Minnesota v. NCAA, 560 F.2d 352 (1977).

Brentwood v. TSSAA, 531 U.S. 288

Brentwood v. TSSAA, U.S.C, 06-427, (2007)

Brown v. City of Los Angeles, 102 Cal. App.4th 155, 125 Cal. Rptr.2d 474, 487 (2002).

Buckton v. NCAA, 366 F. Supp. 1153 (D. Mass. 1973);

Dennis v. Sparks, 449 U.S. 24, 28-29 (1980).

Goldberg v. Kelly, 397 U.S. 266 (1970).

Howard University v. NCAA, 166 U.S. App. D.C. 260; 510 F.2d 213 (1975).

Justice v. NCAA, 577 F. Supp. 356 (1983).

Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982).

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Mathis v. United States, 391 U.S. 1 (1968).

Miranda v. Arizona, 384 U.S. 456 (1966).

Morrissey v. Brewer, 408 U.S. 471 (1972).

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

NCAA v. Yeo, 171 S.W.2d 863 (Tex 2005).

Parish v. NCAA, 506 F.2d 1028 (1975).

Smith v. Allwright, 321 U.S. 649 (1944).

Smith v. NCAA, 266F.3d 152 (2001).

Terry v. Adams, 345 U.S. 461 (1953).

United States v. Gray, 96 F.3d 769 (1996).

United States v. Nixon, 418 U.S. 683 (1974).

United States v. Price, 383 U.S. 787 (1965).

United States v. Ryan Wolf, Case No. 6:04-cr-10257-WEB-1 (D. Kan.)

United States v. Young, No. 03-20400 BV, U.S. Dist. LEXIS 6301 (2004).

WEB LINKS

http://www.ncaa.org/library/general/in_the_arena/in_the_arena.pdf

www.uta.edu/depken/P/newsanc.pdf

http://www2.ncaa.org/legislation_and_governance/compliance/major_infractions.html

http://www2.ncaa.org/legislation_and_governance/rules_and_bylaws/

http://www2.ncaa.org/legislation_and_governance/rules_and_bylaws/

http://www2.ncaa.org/about_ncaa/

<http://www.ncaa.org/about/champs.html>

http://www2.ncaa.org/about_ncaa/overview/

<http://www.washingtonpost.com/wpdyn/content/article/2007/10/09/AR2007100902068.html>

<http://www.washingtonpost.com/wp-dyn/articles/A58965-2005Feb2.html>

<http://www.house.gov/judiciary>

http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?risb=21_T1930944306&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUriKey=29_T1930944315&cisb=22_T1930944314&treeMax=true&treeWidth=0&csi=8075&docNo=1

1 There are several organizations that govern intercollegiate athletic competition. The four main organizations referred to in this article are the NCAA, which is comprised of three divisions (I, II, and III). One of the primary differences between these divisions is the amount of athletic financial aid potentially offered to the athletes. In NCAA Division III, there is no athletic aid offered to college athletes. The National Association of Intercollegiate Athletics (NAIA) is typically comprised of smaller institutions who do not desire to compete at the NCAA level of competition. The National Junior College Athletic Association (NJCAA) encompasses two year colleges that have competitive athletic programs, and the National Christian College Athletic Association (NCCAA) governs schools grounded in a religious base which desire to compete against each other in athletic competition

2 The basic concept of home rule is relatively simple. The basic authority to act in municipal affairs is transferred from state law, as set forth by the General Assembly, to a local charter, adopted and amended by the voters. This basic point has been explained . . . [as follows]. 'Home rule mean shifting of responsibility for local government from the State Legislature to the local community . . . a borough choosing home rule can tailor its governmental organization and powers to suit its special needs (*Home Rule in Pennsylvania*, 7th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2003). Essentially the NCAA placed its power with an individual member institution or 'local government.'

3 Membership on all NCAA committees is considered prestigious, especially considering the power of the NCAA Division I Committee on Infractions. NCAA Division I Committee on Infractions *candidates must be nominated by their institution's multisport conference. This usually is done through the athletic director and the President of the institution.*

4 This was only partially adopted as the NCAA felt the employment of legal authorities would make the enforcement process more time consuming, adversarial and costly since it would more closely mirror a litigation model. The NCAA did give the COI authority to refer a case to a hearing officer to resolve disputed facts. Also, in 2003, two independent members of the COI - typically former judges - were added and the hearing officer position was eliminated. During the U.S. House of Representatives subcommittee hearings in 2004, Professor Josephine Potuto, then the Vice-Chair of the NCAA COI, stated that the process provides the ability for those facing sanctions to enlist an independent hearing officer as the arbitrator of fact. She noted that only one institution has ever taken this option since it became available after the NCAA enacted several of the Lee Committee recommendations.

[i ridpath@ohio.edu](mailto:ridpath@ohio.edu); nagelm@gwm.sc.edu; southall@memphis.edu. The authors wish to thank Ellen Staurowsky, David McArdle, the reviewers, Brian Porto of the Vermont School of Law and Robert and Amy McCormick of Michigan State University for their invaluable assistance with this manuscript.