

The NCAA: Legislating and Litigating The College Sports Government

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**BOSTON COLLEGE
DEPARTMENT OF HISTORY**

**THE NCAA: LEGISLATING AND LITIGATING THE COLLEGE SPORTS
GOVERNMENT**

By

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Table of Contents:

Introduction	2
Historiography	7
Chapter 1: The AAU Dispute	11
Chapter 2: Enforcement Procedure	29
Chapter 3: Education for Student-Athletes	51
Chapter 4: Student-Athlete Regulation	65
Chapter 5: Football, Television, and Antitrust Laws	79
Chapter 6: Title IX and Diversity	97
Conclusion	112

Introduction:

In 1968 Jerry Tarkanian began his Division I basketball coaching career at Long Beach State. In 1972 Jerry wrote a guest column for *The Press-Telegram*, in Long Beach, California, disparaging the National Collegiate Athletic Association's (NCAA's) sanctioning process. These columns expressed Tarkanian's belief that the NCAA used sanctions vindictively and arbitrarily. While many coaches would have agreed with Jerry, usually only those who had already been punished spoke out. Either Tarkanian was more courageous than his contemporaries or he wasn't smart enough to know better. Whichever the case, Tarkanian paid the price over the next twenty one years.

The NCAA began investigating Long Beach State in 1972 for recruiting violations. Long Beach State was placed on three year disciplinary probation in 1974, a year after Tarkanian was hired by UNLV. The wrath of the NCAA missed its mark, but the association continued to stalk its prey. Months before the 1975 season the NCAA placed the UNLV Runnin' Rebels on two year probation. This sanction was a punishment for violations from 1971, before Tarkanian's time, but the NCAA claimed to be unhappy with how the coach assisted with the investigation. UNLV was informed that in order to avoid further sanctions they should immediately cut all ties with Tarkanian. UNLV promptly fired the coach, and he sued both the NCAA and UNLV for denial of due process. In a case that lasted ten years, the Supreme Court ultimately ruled in a way that temporarily saved Jerry Tarkanian his job but gave the NCAA unmitigated power. (UNLV still couldn't fire him without providing due process, because it was a public institution, but the NCAA was found to be a private and voluntary institution and therefore not bound by the Constitution.) *Tarkanian v NCAA* was decided in 1988, and the coach remained with UNLV.

In 1990, barely two years after the case concluded, Tarkanian led the Rebels to the final four and a national championship. Excited about the prospect of repeating as champions, two star players decided to remain for senior year instead of declaring for the NBA draft. Tarkanian had recruited one of the best freshman classes of his career, including Ed O'Bannon (future NCAA national champion and ninth overall NBA draft pick). Two months before the start of the school year the NCAA decided that Jerry Tarkanian had not yet paid the piper. UNLV was placed on a one year ban from post season play because of thirteen-year-old violations. The timing was impossible to ignore. The athletic program was debilitated and O'Bannon transferred to UCLA with others in the recruiting class. A year later Tarkanian was forced out of UNLV amid new scandal and allegations (three players were photographed in a hot tub with Richard "Richie the fixer" Perry). In 1998 Tarkanian took the NCAA to court for intentionally attempting to ruin his career. The parties settled outside of court for \$2.5 million but the NCAA never admitted guilt. In a congressional hearing Norman Sloan, a basketball coach at NC State, quoted Bill Hunt the then assistant director of NCAA enforcement as saying "We are not only going to get him, we are going to run him out of coaching."¹

The example of Jerry Tarkanian highlights one of the many issues that have plagued NCAA procedures: that it has the potential for arbitrary action without the guidelines of due process. Consistently the courts have decided that the NCAA is a private and voluntary organization without the requisite nexus of closeness to public institutions to bind it to the US Constitution. Enforcement proceedings are just one of many areas of concern both ethically and legally for the preeminent college sport's governing body. The association has faced legal and

¹ United States. Cong. House. Committee on Interstate and Foreign Commerce. Hearings on NCAA Enforcement Program, Part 2. 95th Cong., 2nd sess. Washington: GPO, 1978. 1441. ProQuest. Web. 19 Dec. 2014. < HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-fch-0052?accountid=9673 1978>

moral challenges on issues including diversity, equal opportunity for women, amateurism and eligibility restrictions, student-athlete academics, and antitrust violations. The court system, supported by a handful of Supreme Court decisions, has slowly created a loose legal box within which the NCAA is free to act. Certain tools have been used to restrain the Association, including the Civil Rights Act of 1964, Americans with Disabilities Act, the Sherman Anti-Trust Act and others. Generally the size of the box increased from the 1960s into the early 2000s and has very recently begun to shrink. Even with increasing judicial restraints, the NCAA and universities are still allowed to act in a way many Americans would consider unethical or unfair. It has become clear over time that Congress is one of the only bodies capable of influencing or forcing change within the NCAA.

Congress became involved in the battle between the NCAA and the Amateur Athletic Union (AAU) in 1965, and spent the next fifteen years arbitrating and ultimately deciding who would control domestic amateur athletics. Through adept lobbying and stubborn resistance to compromise the NCAA eventually won this war. Congress passed the Amateur Sports Act of 1978 virtually destroying the last vestiges of AAU control over domestic sports. From this lengthy confrontation the NCAA learned that Congress would be extremely reluctant to impose legislation on the field of amateur athletics. The NCAA also learned that dogmatic lobbying coupled with a rigidly defensive attitude could sway the national government. On the other hand the AAU battle revealed the dedication and persistence of certain congressmen toward bettering amateur athletics in America. It proved that legislation could effectively regulate amateur athletics without being overly intrusive.

Over the past fifty years Congress has chosen specific matters to pressure the NCAA. While many of these issues involved the basic principles of fairness, Congress has overlooked

other areas which needed attention. Usually congressional pressure came in the form of hearings, exposure, and threats of legislation, but in a few rare instances Congress actually passed bills forcing change. In the late 1970s and lasting into the 1990s Congress held hearing after hearing on the enforcement procedures of the NCAA. Although Congress showed considerable interest on the subject, the NCAA wasn't fully coerced to improve until states began passing laws in the 1990s. Although Congress encouraged change, it trusted that the NCAA would change from within and decided not to pass legislation. Beginning later into the 1980s, the topics of education for athletes, amateurism restrictions, and equal opportunity for women were addressed. Congress held hearings on each of these topics, but emphasized the need for change in some areas more than others. As the millennium turned new issues began appearing before Congress, including gambling on college sports, agent – athlete interactions, and reform of the BCS Bowl system. Minimal congressional interest was seen in the areas of racial diversity in coaching and enforcement of title IX. Congress imposed change only when the force of national attention or a hotbutton issue appeared. By looking at college sports through the lens of Congressional interest one can readily understand where and why change occurred.

Court cases in recent years have reversed the fifty year trend of expanding the freedoms that the NCAA has enjoyed. These changes are occurring in the right direction but are small in their impact. It is impossible to know how much the courts will shrink the box within which the NCAA is allowed to function. The burden of responsibility remains squarely on Congress's shoulders. I will argue that Congress bears more responsibility than ever to maintain fairness in College Sports. The NCAA serves an oft cited and commendable purpose of promoting amateurism in College Sports and integrating athletes into the university environment. This is no

trivial pursuit: diligence, precision, and subtlety are needed when placing restrictions on the NCAA while allowing it to fully perform these necessary functions.

Historiography:

Secondary sources on the NCAA generally fit into two categories: those that explore the economic significance of college sports, and those that look at the institutional effects of intercollegiate athletics. This latter camp is divided into two parts, those that look at personalized accounts of injustice and those that examine broader collegiate purposes and their alignment or misalignment with intercollegiate athletics. Finally, certain books and a multitude of law reviews analyze the NCAA from the perspective of the Supreme Court. My thesis is unique in that I use Congress as the primary lens through which I analyze how the NCAA has changed over time. Using the court system as a vantage provides an incomplete picture because no significant change has been forced by the courts. Looking at the NCAA from the inside is useful but inadequate because we have seen over forty years that the NCAA will not initiate significant change. Finally many of these secondary sources do mention Congress as the potential solution to many collegiate athletic problems, but I go further in analyzing why Congress has or hasn't acted in the past, and how that has affected the NCAA.

A Study in Cartel Behavior is part of the first type of analysis which looks at the NCAA economically. On page one the author says that “The purpose of this book is to study the National Collegiate Athletic Association as a cartel.”² The authors chose this approach because through this lens many NCAA practices that are otherwise incomprehensible now appear logical. In doing so the book is very internally focused on the workings of the NCAA: i.e. how schools are targeted by the enforcement committee, what is the process of enforcement, what are the rules, and who composes the committees of the NCAA. It proceeds to discuss the immobility in

² Arthur Fleisher. *The National Collegiate Athletic Association : A Study in Cartel Behavior*. Chicago, Ill: University of Chicago Press, 1992. 1.

the football hierarchy, and why there is little interest in economic reform. The authors believe that analyzing how the NCAA works (internally) will lead to a more fully informed reform movement.

A later book, *The Economics of College Sports*, entertains more discussion about how college sports interact with a learning environment, while still focusing on economic analyses of important questions. For instance the book analyzes the costs and benefits of athletics programs, economic interaction between football and funding for women's sports, and marginal returns of star athletes. Like the first book, the purpose is to "provide insights that will generate significant discussion about policies necessary to sustain the vitality and integrity of the university education-sports coalition."³

The second camp, focused on institutional effects rather than the economics of college sports, is similar in that it attempts to illuminate for the purpose of discussion. *In Undue Process: The NCAA's Injustice for All*, Don Yaeger writes "This is a profoundly sad and starkly illuminating book. Sad because it is an account of a system gone awry in heaping injustice after injustice upon one part of our society. Illuminating because it casts a strong light upon dark places that all of us knew existed but few of us even dared whisper about."⁴ From my own research this book appears to be a somewhat exaggerative retelling of the worst abuses of the NCAA, focusing on infractions procedure. The point of the book is that an overhaul of the infractions procedure is necessary. One particular point I found useful and enlightening was when the author quotes Mike Gilleran, an NCAA investigator from 1976 to 1984, as saying "At

³ John FizeL, and Rodney D. Fort. *Economics of College Sports*. Studies in Sports Economics. Westport, CT: Praeger, 2004. 7.

⁴ Don Yaeger. *Undue Process : The NCAA's Injustice for All*. Champaign, Il: Sagamore Pub, 1991. vi.

the NCAA if anybody ever threatens lawsuit, you don't care."⁵ This only furthers my point that the problem is real but the solution lies in Congress.

Putting Yaeger's *Undue Process* in conversation with *Unsportsmanlike Conduct*, written by the forty-year Executive Director of the NCAA, Walter Byers, develops a more complete image of the NCAA. Byers' basic premise is that the infractions committee possesses great integrity and thus survived the Tarkanian ordeal with unchanging resolve. This is a problem, because Byers agrees with Yaeger that the NCAA needs to adapt to the times. Instead, following the Tarkanian battle the NCAA became more bureaucratic, increased public relations expenditures, and expanded inspection services. While Yaeger lambasts the entire organization, Byers argues for the integrity of the individuals but criticizes the whole. "Today the NCAA Presidents Commission is preoccupied with tightening a few loose bolts in a worn machine."⁶ His parting shots are to indict the NCAA calling it a 'plantation system' where the overseers (NCAA and universities) receive the enormous payout from college athletics while the plantations workers (athletes) are exploited. This is a more radical position than I am willing to adopt in my thesis, but the point is clear: change is necessary.

The Supreme Court and the NCAA takes the typical legal vantage of focusing on the Tarkanian case as well as the Board of Regents case (football television case before the Supreme Court), in arguing that the court negatively impacted the state of Intercollegiate athletics. The book points out that Byron White was the only justice to dissent in both cases and was also the only former big time college athlete on the bench. The author proceeds to suggest legislative solutions to the problems, similar to what I would suggest. While I agree with many of this

⁵ *Ibid.*, 159

⁶ Walter Byers. *Unsportsmanlike Conduct : Exploiting College Athletes*. Ann Arbor: University of Michigan Press, 1995. 2.

author's conclusions, I find that a legislative focus is more useful than a Supreme Court based study. The court has maintained the precedent set by cases roughly thirty years in the past; it is therefore important to understand this precedent, but more important to understand why Congress has not acted to adjust the framework.

The Political Economy of College Sports, The Game of Life, and Reclaiming the Game all focus on a growing divide between the academic missions of universities and the influence of college sports. Each book points out different indicators of the destruction of amateurism and uses different methods to show that college sports are often antithetical to academic initiatives. All three tend to deal in more abstract discussion and statistics rather than anecdotes. Interestingly these books span eighteen years (1985 – 2003); clearly the NCAA is an organization in need of reform. I take the conclusions of these books, that change is needed, as an underlying presumption of my thesis. From there I ask, why hasn't this change occurred and where should/could it have come from?⁷

⁷ Nand E. Hart-Nibbrig. *The Political Economy of College Sports*. Lexington, Mass: Lexington Books, 1986.

James Lawrence Shulman. *The Game of Life : College Sports and Educational Values*. Princeton, NJ: Princeton University Press, 2001.

William G. Bowen. *Reclaiming the Game : College Sports and Educational Values*. Princeton, NJ: Princeton University Press, 2003.

Chapter 1: The AAU Dispute

During the 75 years of its existence the AAU has spearheaded America's participation in the Olympic games, provided much of the competition which has developed the athletes for our Olympic teams, maintained the highest ideals of amateurism and through its thousands of dedicated volunteer workers instilled and developed in the youth of our country the qualities of courage, self-reliance, honesty, tolerance, and like virtues. It is unthinkable to ask such an organization to turn over its authority to one composed almost entirely of professionals some of whom have not been too successful in their role of character builders.

-Louis Fisher; former president of the AAU; before the Senate Committee on Commerce, 1965

The battle between the National Collegiate Athletic Association (NCAA) and the Amateur Athletic Union (AAU) ostensibly began over a conflict regarding the 1960 Olympic basketball team. More fundamentally it emerged due to the NCAA's desire to accumulate and consolidate power. The battle appeared before Congress in 1965 and would not be resolved until 1978. To terminate the conflict Congress passed legislation introducing a whole new organization for amateur athletics. This chapter will explore how the AAU battle was both formative and precedent setting for Congress's and the courts' relationship with the NCAA.

The AAU battle would set a standard of limited Congressional involvement in college sports, as well as inform the NCAA's resistance to Congressional pressure. The entirety of the dispute established a relationship between the NCAA and Congress which would prove to be an impediment to future reform of the NCAA. The NCAA learned it could manipulate Congress via steadfast lobbying and stubborn reiteration of principles, and Congress proved reticent to legislate in the private domain of amateur athletics without the influence of hot button issues making the regulation of student athletes a national interest. Eventual Congressional involvement was permanently effective at resolving the dispute. The result was a decided victory for the

NCAA and the organization of American amateur athletics improved while remaining privatized. Congress proved that it could fix the problem without becoming overly involved.

Before it clashed with the AAU, the NCAA had existed in an organized form since 1905. In that year Teddy Roosevelt called the presidents of thirteen colleges (mostly Ivy League) to the White House because of an intolerable level of death and serious injury in college football. Under the leadership of New York University, new football regulations were instituted and the Intercollegiate Athletic Association of the United States was established. This body officially became called by its present name, the NCAA, in 1910. For most of its early history the NCAA lacked teeth to enforce its regulations, and therefore lacked any real power. It was forced to rely on individual schools to voluntarily maintain amateurism and safety in college sports. This was rarely the case; schools would recruit professional athletes to play for their programs with little to no consequence. The Carnegie Foundation detailed the commercial nature of football as early as 1929, a trend that accelerated with the dawn of television. This business oriented nature of college sports lead to abuses of amateurism and exploitation of athletes.

Internally the NCAA recognized the need for reform, but waited until World War II passed to begin implementing amendments. In 1948 the NCAA adopted what would be called the Sanity Code, giving the association the ability to enforce its rules by punishing violators. This first sanity code made expulsion from the NCAA the only means of punishment. NCAA members quickly realized that this could not work and a new twelve point code was passed in 1952 providing a more fluid system of enforcement. In 1954 a Committee of Infractions was established to administer this code.⁸ Though the NCAA was and is a voluntary organization of colleges and universities, it provided the best sources of competition and the only avenue to

⁸ Gary T Shulman, "NCAA Answers Call to Reform." *The NCAA News* 22 Nov. 1999: Digital file.

revenue from college sports. If a school wanted to remain a member (as every school did) it had to abide by the code.

From the NCAA's inception through the adoption of regulatory teeth, a status quo existed with the AAU in which the AAU handled all open and international competition while the NCAA handled closed collegiate competition. The AAU was founded in 1888, prior to the NCAA, in order to create standards within amateur sports. As the main United States amateur sports body at the time, the AAU quickly took on the responsibility of preparing and presenting American athletes for Olympic competition. The association was officially designated as the sole representative of the United States in international competition by the International Amateur Athletic Federation (IAAF). The IAAF was the ruling international body and it was on this authority that the AAU would base its claims for power. For seventy years the AAU exercised this right/responsibility, until the burgeoning NCAA attempted to usurp the AAU's traditional roles.

Flush with the newfound power of the sanity codes, the NCAA first clashed with the AAU in 1959 over an Olympic basketball tryout. The NCAA attempted to prevent the AAU from including the National Association of Intercollegiate Athletics (NAIA) athletes in the Olympic tryout. (The NAIA was similar to the NCAA but much smaller and provided a lower level of competition). Immediately after this disagreement the NCAA formed or encouraged the formation of new amateur governing bodies, designed to regulate open meets (for college or non-college amateurs). For example the US Track and Field Federation (USTFF) was designed by the NCAA to regulate open track and field meets, infringing on an area previously run exclusively by the AAU. The AAU was quick to retaliate by requiring that athletes maintain sole membership in their organization and by refusing to allow the NCAA to sanction AAU meets.

Sanctioning was the method of the athletic warfare; it was the stamp which each association placed on their respective meet, representing control over the meet. While the NCAA asserted their responsibility to protect their athletes from potential exploitation, the AAU cited the power granted to it by the International Amateur Athletic Federation (IAAF) as the sole United States supervisors of international competition. Both sides threatened to expel athletes that competed without the proper jurisdictional sanction, an effective and inflammatory tactic. According to the 1962 AAU contracts, those meets desiring AAU sanction must “confirm that the AAU is the sole United States governing body in the sport for which sanction is applied.”⁹

Both sides steadfastly refused to compromise and the United States government began to fear that United States Olympic hopes would be compromised. President Kennedy appointed General MacArthur as arbitrator, and he negotiated/imposed a moratorium beginning in 1963 and lasting through the 1964 Olympics. MacArthur ruled that “open meets are under the sole sanctioning power of the AAU... These latter groups have complete control over their own college meets and in open meets have administrative jurisdiction over their own participating athletes, subject only to the limitations contained in the January agreement,”¹⁰ reaffirming the previous status quo. The federal government was motivated to intervene primarily due to cold war anxiety (desire to defeat the Soviets in the Olympics), with the secondary concern for athletes caught in the crossfire of the war for American amateur athletics.

With the expiration of MacArthur’s moratorium, controversy flared up again in 1965, primarily over the running of track and field meets. For the first time Congress shouldered some

⁹ United States. Cong. Senate. Committee on Commerce. *Hearings on the NCAA-AAU Dispute*. 89th Cong., 1st sess. Washington: GPO, 1965. 82. *ProQuest*. Web. 27 Oct. 2014.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1965-com-0031?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1965-com-0031?accountid=9673)>.

¹⁰ *Ibid*, 249.

responsibility in reaching a solution. Before the Committee on Commerce, on August 16, 1965, Chairman Magnuson stated; “At issue is our administration of amateur track and field events, both at home and abroad. At stake, ultimately, is our continued ability to demonstrate in the Olympic Games that fitness and zest for voluntary competition are the hallmarks of a free and democratic Society.”¹¹ This amateur sports battle was no small hurdle to overcome, the committee met every day for two weeks to hear out the issue. The purpose, clearly stated by the chairman, was to protect Olympic ambitions and not to get involved in amateur sports government. The immediate question at hand was whether or not joint sanctioning of meets by the AAU and NCAA should be used as a potential solution.

Each party was given their chance to speak before Congress. The AAU argued first of all that for seventy years the status quo had worked, and that reforming international competition was under the sole authority of the International Amateur Athletics Federation (IAAF) not the US Congress. The NCAA responded with three concerns: “1) controlling excesses in recruiting practices 2) eliminating practices which might have overtones of professionalism, and 3) controlling the degree to which college athletes may be exploited.”¹² Despite the NCAA’s rhetoric of protectionism, the athletes were the ones to suffer.

At this hearing the central witness and prime example was Gerry Lingdren, a reigning Olympic Champion. He had been asked to participate in a qualifier meet in San Diego (run by the AAU), but received significant pressure from the NCAA not to compete. “Right now I am very worried that every other athlete that is coming up and has a decision to make whether to go into an NCAA school, or continue track, is going to have pretty rough going if he has to fear running in open competition or in NCAA competition because he is going to lose his eligibility. I

¹¹ *Ibid*, 1.

¹² *Ibid*, 7.

don't think it is right, and I don't think that any athlete should have the fear of running.”¹³

Lingdren chose not to compete, as well as many others in the same position. Another example is Randy Matson, a shot putter at Texas A&M who did not find out from the NCAA until 7:30 am the day of the meet that he would be allowed to participate. Tom Farrell, a runner from St. Johns, received notice directly from Walter Byers, the executive director of the NCAA, that his school would be penalized if he chose to compete in the San Diego meet.

Although the battle may have been instigated by the NCAA, pressure on the athletes and the venues hosting meets came from both the AAU and the NCAA. William Henry, president of Southern Cal Committee for Olympic Games, stated before Congress, “We [the LA Coliseum Relays] received a rather harsh note... from the local AAU, in which they demanded we have three affidavits which we would positively guarantee that we would not receive a sanction from any other body of any kind.”¹⁴ Senator Bass hit the nail on the head when he colorfully described the issue. “It sounds like two kids arguing, ‘If you play in Joe’s backyard you can’t play in my backyard, because I own the balls and bats, and if you want to play on my team, you have to play with my ball and bats.’”¹⁵

The Congressmen were both slow to understand the issue and openly unwilling to get involved. Their initial understanding of the issue revolved around the fact that the sanctioning body received a portion of the gate receipts. While many issues before the Senate Committee on Commerce boil down to a question of money, this was not one of them. Gate receipts for track meets were inconsequential; the struggle was for influence over the lives of American athletes. These athletes had things to say in support of both sides, the NCAA found athletes critical of the

¹³ *Ibid*, 29

¹⁴ *Ibid*, 77

¹⁵ *Ibid*, 55

AAU, and vice versa. One example, Bobby Morrow, was an Olympic sprinter: “It seems rather odd to me, and to many of the other track people, that we are raised, trained, developed and given an opportunity to become track athletes through the school system... then put under the administration of men of the Amateur Athletic Union.”¹⁶ He went on to criticize AAU leadership, funding and organization during meets abroad. These complaints had grounding in reality. Bill Easton the president of US Track Coaches Association (college track coaches) expressed frustration and disenchantment with “the AAU’s total lack of understanding for our sport.”¹⁷

James Luck, a Yale graduate and Olympic athlete succinctly summarized the issue to date. “I don’t believe it is really a war between AAU and NCAA. I think it is more the AAU operating in the fashion it has been accustomed to in the last few years and NCAA trying to usurp the power that has been given to AAU by the International Amateur Athletic Federation (IAAF).”¹⁸ While this was very true, there also existed legitimate concerns with the AAU’s leadership abilities, as well as the reasoning that America should blindly accept the IAAF’s decisions. Senator Pearson, one of the few and leading proponents of athletics legislation over the next twenty years, understood the issue as containing four parts: (1) Desire of colleges to protect the welfare and control the activities of college athletes (2) The AAU has provided weak management and leadership (3) An elementary power struggle (4) Money.¹⁹

In 1965 the national Olympic organization structure was built around the US Olympic Committee (USOC), a federal body. The AAU held one third of the voting power and two thirds were needed to change the USOC constitution, effectively maintaining the status quo and

¹⁶ *Ibid*, 123

¹⁷ *Ibid*, 115

¹⁸ *Ibid*, 130

¹⁹ *Ibid*, 149

frustrating critics of the USOC and the AAU. Some of the complaints against the AAU were justified, but the NCAA had no desire to encourage improvement and usually chose to level “bitter, destructive criticism.”²⁰ Jesse Abramson of the *New York Herald Tribune* said of the NCAA; “I don’t know what they want – except one thing I do know, they want to supersede the AAU, get them out of business entirely and usurp the powers.”²¹ In his testimony before Congress Walter Byers effectively confirmed Abramson’s assertion. His tone carried an air of manifest destiny, the theme being that progress was inevitable. “We shall do this not because we wish to promote conflict but because there can be no moving backward, there can be no ignoring the increasing fund of knowledge about the development of amateur athletics and the improvement of amateur athletic competition; rather, we must use our best knowledge and always seek to improve it.”²² Dunlap Warner, executive director of the US Track and Field Federation, painted a picture of reasonable accommodation toward the AAU in an environment where change was necessary.

At the conclusion of the 1965 hearing the committee resolved to authorize the Vice President to “appoint an independent board of arbitration to consider the issues and render a final and binding decision.”²³ Unwilling to legislate, Congress attempted to find a solution via peaceful arbitration. Given the antagonism existing between them, neither side proved willing to compromise. Arbitration resulted in a new status quo, compromising between the two parties by requiring dual sanction for open meets. This was a decided victory for the NCAA, who previously had no control over non collegiate meets. Despite their gain in power the NCAA chose to continue to fight the AAU.

²⁰ *Ibid*, 250

²¹ *Ibid*, 254

²² *Ibid*, 384

²³ *Ibid*, 603

In 1966 two cases gave the courts the possibility of limiting NCAA authority over its athletes. This precedent was ignored, as we will see, but it is important to understand the options that were open to the court. In *Washington State Bowling Proprietors Association v Pacific Lanes* and *People v Santa Clara Valley Bowling Proprietors Association* the courts ruled similarly on bowling association bylaws. These eligibility bylaws closely paralleled the tactics the NCAA used to control its athletes. The general idea of these bylaws was that bowlers were forced to sign an agreement stating that they would only bowl at member establishments of the respective association. In both cases the court found that this rule was an unreasonable restraint of trade and therefore properly put before a jury to determine whether or not the defendant violated the Sherman Anti-Trust Act. The Act was meant to limit unfair restrictions of trade, like keeping new bowling lanes from entering the market by preventing consumers from frequenting them. Both the AAU and the NCAA were presently engaging in the exact same practices. However courts would come to decide that the anti-trust suits should not go to a jury, because unlike the Bowling bylaws, NCAA eligibility restrictions were reasonable. In effect the courts bought the rhetoric of the NCAA that these bylaws and their application were meant to protect athletes not drive the AAU out of business.²⁴

In 1967 the Senate Committee on Commerce reconvened to review the progress made by the arbitration board during their first year and a half of work. The Senate committee had three bills requiring consideration, two of which were written by Senator Pearson. The committee members explicitly stated their lack of desire to investigate legislation due to the possibility that

²⁴ *Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc.* 356 F.2d 371. 9th Cir. 1966. *LexisNexis Academic*. Web. 27 Oct. 2014. <<http://www.lexisnexis.com.proxy.bc.edu/hottopics/lnacademic/?>>. *People v. Santa Clara Valley Bowling Proprietors*. 238 F.2d 225. Court of Appeal of California, First Appellate District, Division Two. 1965. *LexisNexis Academic*. Web. 27 Oct. 2014. <<http://www.lexisnexis.com.proxy.bc.edu/hottopics/lnacademic/?>>.

the arbitration panel succeeded in its mission. The chairman of the arbitration board, Theodore Kheel, appeared before the committee to explain its progress. “We have in our files all of the information we need to make an intelligent decision. We have been delayed mainly because we have tried to bring about a negotiated settlement rather than to impose one. The reason for this is simple. Under the best of circumstances, our decision will be useful if, and only if, the organizations involved are disposed to make it work.”²⁵ In effect the board had accomplished very little at this point. Arbitration just wasn’t effective with these two organizations, though Congress remained hopeful and Kheel spoke optimistically. His optimism was tempered by the qualifications both parties had made to the power of the arbitration board. The AAU asserted that IAAF rules were not subject to arbitration and NCAA reserved from arbitration the ability for colleges to control which competitions present students could participate in. The conclusion of the arbitration board at this point was that a means of deciding conflicts should exist on an ad hoc basis rather than via a rigid set of rules.

Still, arbitration was not a complete failure. First of all during the 1967 hearing an uneasy truce existed between the associations in hopes that with the conclusion of arbitration (sixty days away) a final solution would be reached. Arbitration crystalized the issue and clarified the sides of the war. The allied powers, the USTFF and the NCAA, were opposed to the axis powers of the National Association of Intercollegiate Athletics (NAIA) and the AAU. As a whole, however, the arbitration was detrimental because it prevented Congress from becoming involved. The year and a half of meeting provided just enough hope to stave off a legislative solution for another ten years. The battle that had begun a decade before was still in progress in 1967.

²⁵ United States. Cong. Senate. Committee on Commerce. *Hearings on Track and Field Dispute*. 90th Cong., 1st sess. Washington: GPO, 1967. 14. *ProQuest*. Web. 27 Oct. 2014.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1967-com-0003?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1967-com-0003?accountid=9673)>.

Six months later, in 1968, the committee met once more to review the final results of the arbitration board. The board at first attempted to establish an umbrella amateur sports organization either inside or outside the AAU, but discovered that they could not force the creation of a governing body. The board did succeed in defining the word student in terms of when the NCAA had control over its athletes: from the summer before freshman year until graduation. The NCAA won another decided victory when the arbitration board decided that the USTFF was an independent sports organization and thus a more powerful ally. The board attempted to give both sides what they wanted, saying that if neither side found fault with track meet conditions then both sides must sanction the meet. A coordinating committee was established to arbitrate on an ad hoc basis when trouble arose. This coordinating committee consisted of four AAU members, four NCAA members and an impartial chairman. This arbitration was officially binding through the 1972 Olympics. Congress accepted this as a solution and temporarily exited the arena of amateur athletics.²⁶

Despite the supposedly binding arbitration, conflicts did not go to the coordinating committee and athletes suffered. In 1973 Frederick Samara, a senior at the University of Pennsylvania, ran in an AAU Russian-American meet in Richmond Virginia. This was an event that did not have NCAA sanction and thus jeopardized Samara's eligibility. The case came before a district court, with the plaintiffs seeking to enjoin the NCAA from reprisal for participating in the AAU meet. Despite issuing a temporary restraining order, the case was later dismissed and the court chose not to apply the precedent of the bowling cases. They found no malice on the part of the NCAA, no evidence of economic detriment to the athletes, and that the

²⁶ United States. Cong. Senate. Committee on Commerce. *Hearings on Sports Arbitration Board Report*. 90th Cong., 2nd sess. Washington: GPO, 1967. *ProQuest*. Web. 27 Oct. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1968-com-0001?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1968-com-0001?accountid=9673)>.

rule was based on a legitimate purpose. This case began a forty year trend of trusting the reasonableness of NCAA rules. While Congress adopted a laissez – fair attitude, the courts also decided not to interfere.²⁷

From May 22 to the twenty-fourth the Committee on Commerce reconvened to hear more on the troubles in amateur sports. It was not the breakdown of arbitration that refocused their attention, but the catastrophe of the 1973 Olympics. Tragedy struck the Israelis (eleven athletes were taken and killed by a Palestinian terrorist group) and meanwhile the US Olympic Committee displayed incompetence and a breakdown of leadership. At this hearing the Senate Committee considered four bills, meant primarily to reform the US Olympic Committee with the side job of ending the war for domestic amateur athletics. One bill called for a national commission to review and make recommendations on the sports organization structure, the second bill would create a Foundation to effectively replace the AAU, another bill called for a federal amateur sports commission as an overarching coordinating committee, and the last bill would create the US Amateur Sports Association board. This Sports Association board would give a charter to one National Governing Organization (NGO) in each sport. The NGO would have the sole authority to sanction open amateur athletic meets in its sport. It is this last bill (to be known as the Pearson Bill) that received the most support and is of the most interest.

Every individual that appeared before the Congress condemned the USOC. A slew of organizations representing a variety of Olympic Competitions spoke, for example Harold Connolly, president of the Beverly Hill Striders, complained of the disorganization and the conservative preservation of the status quo of the USOC, and strongly supported the Pearson

²⁷ *Frederick Samara v NCAA*. 74,536 P. U.S. District Court for the Eastern District of Virginia, Alexandria Division. 1973. *LexisNexis Academic*. Web. 28 Oct. 2014.
<<http://www.lexisnexis.com.proxy.bc.edu/hottopics/lnacademic/?>>.

Bill. The NCAA for the first time supported government action. Walter Byers stated that “Our position is as an organization we cannot subscribe to the USOC’s being managed, the way it is.”²⁸ He came out strongly in favor of the Pearson Bill, with the caveat that amendments be added to protect the NCAA’s control over athletes. David Rivenes, the president of the AAU, appeared next before the Committee. It was clear from his testimony that AAU was fighting to remain relevant. “We did object; we did feel that it [the result of arbitration] constituted a signal victory for the NCAA and arbitrarily stripped the AAU of many of its traditional and legal prerogatives.”²⁹ After complaining about the results of arbitration, the AAU proceeded to vehemently object to most of the new legislation. With the NCAA now sided with Congress and AAU opposed to Congress, the end of the battle was in sight.

It is clear from the conversation that Congressional criticism, which once was equitably distributed between the NCAA and AAU, now pointed directly at the AAU. The questioning took on a snippiness not previously seen: Mr. Cassell (executive director of the AAU): “The system of the AAU is a democratic system because people are elected” Senator Pearson “No sir.” Mr. Cassell: “Pardon?” Senator Pearson: “No Sir.”³⁰ From this conversation it must have been clear to every NCAA representative in the room that victory was theirs. It took Congress five more years to come to a conclusion, but external factors bolstered by NCAA persistence had resulted in AAU defeat.

That same year (1973) the Subcommittee on Education in the House of Representatives met in an effort to protect student athletes from the abuses of the ruling organizations. The

²⁸ United States. Cong. Senate. Committee on Commerce. *Hearings on Amateur Sports*. 93rd Cong., 1st sess. Washington: GPO, 1973. 225. *ProQuest*. Web. 27 Oct. 2014.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-com-0054?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-com-0054?accountid=9673)>.

²⁹ *Ibid*, 238

³⁰ *Ibid*, 256

subcommittee considered a few bills, the O'Hara bill would prevent the suspension of athletes for participating in outside meets and the Peyser Bill would promote rules, regulations, safety, health, etc. Both the AAU and the NCAA were brought before Congress and both presented strong rhetoric condemning each other. Beyond the mudslinging, the strongest argument for the NCAA came from Harry Cross, a law professor and athletic representative to the pacific eight conference: "I think to permit him [the college athlete] to do both [follow and break the rules] inhibits the development of the sense of responsibility that athletics can develop for youngsters and for others who will become aware of what is going on."³¹ While it is clear that Congress was leaning in the NCAA's direction, their frustration with both sides is evident. Senator Peyser concluded the hearing by saying "I am wondering why we are, in effect, trying to treat with kid gloves at this point two organizations that have been absolutely devoid of any feeling when it came to penalizing an athlete or an institution."³² Throughout the course of this thesis I will be asking this very same question of Congress. Despite this sentiment of frustration the hearing ended with no formal resolution and none of these bills come to a vote.

In November of 1973 the Senate Committee on Commerce met again, this time to consider the Amateur Athletic Act of 1973. This Act will be referred to as the Tunney Bill, but it was a derivative of the previously discussed Pearson Bill (creating an organization to appoint NGOs). Beyond creating a board to choose NGOs, the bill had a second part to create a National Sports Development Foundation to develop facilities, health, safety, and opportunities in sports. The NCAA was not ready to fully support the bill, given that it did not give colleges' broad

³¹ United States. Cong. House. Special Subcommittee on Education, Committee on Education and Labor. House Committee on Education and Labor. *Hearings on Protection of College Athletes*. 93rd Cong., 1st sess. Washington: GPO, 1973. 233. *ProQuest*. Web. 27 Oct. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-edl-0019?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-edl-0019?accountid=9673)>.

³² *Ibid*, 252

authority over athletes. This was because the bill included an athletes' bill of rights, unacceptable to the NCAA. During the hearing Senator Tunney begrudgingly acknowledged the efficacy and influence of the NCAA. "I must confess, I have never known any group that is a more effective lobby than the NCAA. I state that with a certain amount of admiration, even though they have taken a position contrary to mine."³³ Ollan Cassel, executive director of the AAU, at this point voiced nostalgia for the Kheel arbitration, something that the AAU once opposed. The AAU realized that it would not regain lost power; its only hope was in making some sort of compromise with the NCAA.

After four years and no action on the part of Congress, the Senate Committee on Commerce, Science, and Transportation met in 1977 to discuss an adapted version of the Amateur Sports Act of 1973. This Amateur Sports Act of 1977 would make a retrofitted USOC into the coordinating authority for amateur sports, i.e. responsible for appointing NGOs. The bill also designated the American Arbitration Association to resolve disputes between organizations vying to become an NGO. Of critical significance, this bill contained an athletes' bill of rights, preventing organizations from disciplining athletes for participating in any NGO sanctioned competition. The bill was a result of extensive investigation by a President Ford appointed commission (which began meeting in 1975). This commission conducted two years of research and put forward a number of recommendations and findings, mostly reflected in the 1977 bill. The chairman of Ford's commission, Gerald Zornow, summed up the findings saying "I for one was shocked to hear, and often repeated, such words and phrases as disorganized, lack of harmony, struggles for power, in-eligibility, ill-equipped, poorly coached, outlawed, and

³³ United States. Cong. Senate. Committee on Commerce. *Hearings on Amateur Athletic Act of 1973*. 93rd Cong., 1st sess. Washington: GPO, 1973. 71. *ProQuest*. Web. 27 Oct. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-com-0012?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1973-com-0012?accountid=9673)>.

fragmented.”³⁴ Zornow’s conclusion was that America lacked a clear policy or direction, college opportunities were great for men and not for women, sports medicine research was ignored, and organizational squabbles existed unnaturally and were wasteful. The solution lay in a national governing body. During the Senate hearing the AAU clung to the past era of sole authority, refusing to cast any form of support for the bill. Meanwhile the NCAA was nearly ready to accept change, with the stipulation that it could not accept an athletes’ bill of rights.

Finally, in 1978, the Amateur Athletics Act reached its final form. This adjusted bill had already passed in the Senate when it was heard before the subcommittee on Administrative Law and Governmental Relations in the House. The 1978 bill was very similar to the 1977 version, though it included a thirty million dollar authorization to improve Olympic training centers, sports medicine, and sports information dissemination. It continued the system of the USOC appointing NGOs, with arbitration to resolve disputes, but it did not include an athletes’ bill of rights! David Maggard, a spokesman for the NCAA, said that while the previous bill made the USOC into “some kind of amateur sports superbody,” now the NCAA could fully support the bill.³⁵ With full NCAA support, it was the AAU versus everyone else. Their rhetoric had grown stale, exemplified by Congressman Danielson interrupting the AAU spokesmen part way through his plea for the old era. “The AAU, for 90 years, was operated without federal funds and federal interference. If this legislation wasn’t passed, it would continue to operate the same way

³⁴ United States. Cong. Senate. Committee on Commerce, Science, and Transportation. *Hearings on Amateur Sports Act*. 95th Cong., 1st sess. Washington: GPO, 1977. 38. *ProQuest*. Web. 27 Oct. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1977-cst-0010?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1977-cst-0010?accountid=9673)>.

³⁵ United States. Cong. House. Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary. *Hearings on Amateur Sports Act of 1978*. 95th Cong., 2nd sess. Washington: GPO, 1978. 57. *ProQuest*. Web. 27 Oct. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-hjh-0019?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-hjh-0019?accountid=9673)>.

because—” Mr. Danielson: “Thank you.”³⁶ Even the NAIA switched sides and conceded that this legislation would do a reasonable job at improving track and field in America. The president of the Association for Intercollegiate Athletics for Women showed overwhelming support, adding another dimension to the Act. Jimmy Carter signed the bill into law later that year, dealing the AAU its final blow.

The AAU refused to go down without a fight. Many NCAA affiliates won NGO charters from the USOC, and the AAU decided to challenge these decisions in court. In *United States Wrestling Federation v The Wrestling Division of the AAU* the AAU challenged a ruling of the American Arbitration Association (AAA). After the USOC had appointed an organization as NGO of a particular sport, complaints could be taken to the AAA. In this case the AAA ruled in favor of the US Wrestling Association (affiliated with the NCAA). The AAU argued that one of the arbitrators was biased due to a business relationship with an NCAA school and was the decision therefore void. The court unequivocally supported the arbitration decision and with it the NCAA. The majority opinion stated, “The record that was generated here refutes any contention that both parties were not given a full and fair hearing before the tribunal of arbitrators.”³⁷ The AAU breathed its last breath.

Through stoic adherence to its ambitions and opportunistic use of history the NCAA took control over amateur athletics from the AAU. Hearing by hearing, inch by inch, the NCAA asserted its dominance. Meanwhile Congress acted patient and reserved, hoping that diplomatic discussion would lead to a compromise and resolution. Fifteen years of hearings with intermittent arbitration solved very little. This experience taught the NCAA that Congress would

³⁶ *Ibid*, 89

³⁷ *UNITED STATES WRESTLING FEDERATION v. WRESTLING DIVISION OF THE AAU*. 711 F.2d 1060. 6th Cir. 1983. *LexisNexis Academic*. Web. 28 Oct. 2014.
<<http://www.lexisnexus.com.proxy.bc.edu/lnacui2api/api/version1/>

avoid involvement. It also bolstered their confidence in an ability to lobby the Congress, to persuade Congress of the efficacy and good intentions of the NCAA. These simple lessons created a confidence which would impede expeditious reform when internal NCAA problems appeared before Congress. When Congress did succeed at enacting reform, either external events created a national interest, or the NCAA lobbied for legislation. Simultaneously, the courts began the process of trusting the reasonableness of NCAA and legally exempting the association from litigation. With the American system of amateur athletics within its domain, the NCAA would next proceed to consolidate power amongst universities via its enforcement committee. This consolidation of power at times infringed on what many would consider fair, and soon Congress became involved.

Chapter 2: Enforcement Procedure

For the fact is, Mr. Chairman, far from being the cooperative effort the process purports to be, it is truly adversarial. That would be all right too, but for the fact that all the cards are in the hands of only one of the adversaries, the NCAA. The hapless victim of the process – the school or individual involved – has practically nothing going for him but his largely uninformed wits.

-Brent Clark, Former Special Investigator for the NCAA Infractions Committee before House of Representatives Subcommittee on Oversight and Investigations, 1978

Before the issue of NCAA enforcement tactics reached Congress, it appeared in federal district and circuit courts. Judges often noted the unfairness of the NCAA's process in *dictum*, but they felt unable to use the law to rule against the NCAA. In 1978 Congress held a series of hearings on enforcement tactics, but unlike with the AAU dispute there existed no national interest comparable to Olympic ambition. NCAA lobbying dominated, and Congress delayed passing any form of legislation. In the early 1980s the Supreme Court heard cases that began the process of weakening the already loose restrictions on the NCAA. These decisions were imprinted permanently as precedent in the *Tarkanian* case which the Supreme Court heard in 1988. After this case Congress once again put pressure on the NCAA, but proved incapable of passing legislation. Instead states passed laws and private organizations emerged to pressure the NCAA. Although reform occurred in small doses, these state laws were struck down by the courts, and to this day no specific law protects the rights of individuals from unfair action by the NCAA enforcement committee. The problems with NCAA enforcement procedure highlight both the association's propensity for unfair action and Congress's unwillingness to legislate without help from a hot button issue.

Buckton v NCAA (1973, Federal District Court of Massachusetts) was one of the earliest cases addressing NCAA enforcement, and the result limited the NCAA. Two Boston University hockey players were declared ineligible for violation of amateur standards because they received

compensation for playing in Canadian Junior Hockey. Plaintiff Marzo received twenty-four dollars a week (directly to his landlord), ten dollars per week for expenses, fifty-one dollars for books, and a 300 dollar sum for commuting expenses so he could stay at his old school. The majority decision reads:

A Canadian boy who wants to play hockey at a pace more challenging than at a pick-up level must join one of these teams. Often, this requires a boy to transfer his residence and schooling to the metropolitan area where the team is located. When he does, it is customary for him to receive room, board and limited educational expenses from his team, as did the plaintiffs in this case.

The court ruled that declaring Canadian athletes ineligible because they played in a Junior A League (Canadian youth competition) was a violation of the fourteenth amendment because it involved disparate treatment of athletes of different nationalities. The court weighed the serious and irreparable harm to players' reputations and future careers if relief wasn't granted, and enjoined the NCAA from disciplining the athletes.³⁸

The next year, 1974, courts began questioning whether or not the NCAA could be considered a state actor, a designation with great significance. A state actor is held to be similar enough to the government that its actions are regulated by the Constitution. The test for determining similarity has changed over time, but in 1974 the NCAA was usually found to be a state actor, because many members were state institutions. In *McDonald v NCAA* (1974) the US District Court for Central California ruled that NCAA action may or may not be state action, but state university action definitely is state action.³⁹ One month later the 9th Circuit ruled in *Associated Students of California State University v NCAA* that the actions of NCAA definitely

³⁸ *Buckton v. National Collegiate Athletic Association*. Ed. F. Supp. 436th ed. CA No. 73-3475-T Vol. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1973. Print.

³⁹ *McDonald v. National Collegiate Athletic Association*. Ed. F. Supp. 370th ed. No. CV 74-87-LTL. Vol. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, 1974. Print.

constituted state action. This came in response to the NCAA disciplining Cal State for violating academic standards for athletes. (Freshman athletes must maintain a GPA that predicts a 1.6 out of 4.0 GPA.) Even though the court decided that the NCAA could be limited by the Constitution, it decided that in this instance the rule was reasonably related to the purpose of reducing the “possibility of exploiting young athletes by recruiting those who would not be representative of an institution's student body and probably would be unable to meet the necessary academic requirements for a degree.” This case was representative of cases around this time period; the court found the NCAA to be a state actor but that the bylaw in question was reasonable.⁴⁰

In *Howard University v NCAA* (1975) the Washington DC Circuit Court agreed that NCAA action constituted state action because “the degree of public participation and entanglement between the entities is substantial and pervasive.” The court based this judgment on the fact that a majority of NCAA funds were derived from public universities. Based on this decision, the court decided to investigate one of the NCAA bylaws in question, the “Foreign Student Rule.” While the court determined that this rule violated the strict construction of the constitution, in application the requirements of due process were not breached by the NCAA. Despite the fact that the NCAA was bound by the Constitution and implemented a bylaw determined to be discriminatory, its application of that bylaw did not entail a breach of due process required by the constitution.⁴¹

By the late 1970s United States appellate courts solidified their view that the NCAA was definitely a state actor. However, they found that participation in intercollegiate athletics was not

⁴⁰ *Associated Students, Inc. of California State University v. National Collegiate Athletic Association*. Ed. F.2d. 493rd ed. No. 73-2278 Vol. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1975. Print.

⁴¹ *Howard University v. National Collegiate Athletic Association*. Ed. F.2d. 510th ed. Nos. 74-1166, 74-1169 Vol. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 1975. Print.

a property right and therefore barring athletes from competition did not infringe on due process despite unfairness in the procedure. In *Colorado Seminary v NCAA* the Colorado Federal District Court ruled in 1976 that it was permissible to sanction the University of Denver without due process because the right to athletic competition was not a property right. This case involved Canadian hockey players, and in it the NCAA successfully defended arguments of nationality discrimination seen in *Buckton*.⁴² In *Joe Hunt v NCAA and Michigan State* (1976) an athlete argued denial of due process because he was not allowed to attend his amateurism violation hearing. The Federal District Court for Western Michigan found that the interest at stake, football, was not sufficient to require a full judicial procedure. In *dicta* the judge wrote, “In addition to my concern for the student-athletes, my difficulty with this decision was occasioned largely by the serious shortcomings I see in the NCAA's enforcement program.”⁴³

Regents of University of Minnesota v NCAA (1977) was the most notable eligibility case of the 1970s (in the 8th Circuit Court) and affirmed the trend of decade: Despite the apparent unfairness, athletic competition was not a property right and thus NCAA was not legally compelled to provide due process before sanctioning athletes. If football was a property right then the NCAA would have been bound by due process because the court still maintained that it was a state actor. In this instance the University of Minnesota refused to declare three basketball players ineligible after violating NCAA standards. The university argued that the players have “a liberty interest in that the "stigmatizing" allegations against them were "highly publicized.”” Further Minnesota believed that the punishment set by the NCAA was preordained and did not

⁴² *Colorado Seminary (University of Denver) v. National Collegiate Athletic Association*. Ed. F. Supp. 417th ed. Civ. A. No. 76-A-510 Vol. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, 1976. Print.

⁴³ *Hunt v. National Collegiate Athletic Association*. G76-370 C.A., G76-408 C.A. Vol. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, 1976. Print.

fit the nature of the athletes' crimes. The university held its own hearings in which it found the athletes not guilty, and the NCAA proceeded to penalize Minnesota, who brought the case to court. As one might guess the court ruled in favor of the NCAA. It found that the NCAA's interpretation of its own rules prevailed over Minnesota's and that Minnesota was bound to exact the punishment prescribed by the NCAA or face whatever sanction the NCAA chose to levy. Once again, in dicta, the opinion provided hesitance at the apparent unfairness of the situation. "We cannot say that this task will always be an easy one, nor can we deny that the member institution will occasionally find itself in a position where fairness to the individual and adherence to contractual obligations may seemingly conflict."⁴⁴ Representatives from the University of Minnesota would later appear before Congress and argue for the side of fairness over strict adherence to legal principles.

The House Subcommittee on Oversight and Investigations met on February 28, March 13-14, April 17-18, and June 9, 1978 to discuss specifically the NCAA enforcement program. Chairman John Moss began the hearing by posing the question, "Does the organization that regulates and polices virtually all serious intercollegiate athletic activity in the country operate in a way that does not offend our sense of fair play?"⁴⁵ He explained that the allegations facing the NCAA included unfairness, arbitrariness, inequality, secrecy, and abuse of power. Interestingly, the chairman was shocked at the defensive and controversial air that was present at the hearing. "What we did not fully appreciate at the time was the extraordinary attention our effort would receive, the passions it would generate, and the high pitched air of controversy in this room

⁴⁴ *Regents of University of Minnesota v. National Collegiate Athletic Association*. Ed. F.2d. 560th ed. No. 77-1028 Vol. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, 1977. Print.

⁴⁵ United States. Cong. House. Committee on Interstate and Foreign Commerce. Hearings on NCAA Enforcement Program, Part 1. 95th Cong., 2nd sess. Washington: GPO, 1978. 1. ProQuest. Web. 19 Dec. 2014. < [HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-fch-0052?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-fch-0052?accountid=9673) 1978>

today.”⁴⁶ The subcommittee found that member institutions were afraid to cooperate for fear of reprisal from the NCAA, a confirmation of the purpose of the hearing. The House Committee also once again encountered defensive and powerful lobbying from the NCAA.

The primary and star witness before Congress was Brent Clark, a former NCAA investigator who had resigned two years before. From start to finish Clark’s testimony indicted the NCAA: “Enforcement practices inadequately protect individuals and their institutions from abuses through either misfeasance or, sadly in some cases, malfeasance.”⁴⁷ He compared the NCAA to the Frankenstein monster, because coaches lose livelihoods and players lose professional opportunities, creating a source of unregulated terror. Brent laid out the enforcement procedure; in an official investigation the school was asked to work hand in hand with NCAA: this was the bedrock of the investigation. In the hearing before the NCAA enforcement committee the institution and investigative staff presented the facts and then the committee met and decided. The institution could appeal to the eighteen member ruling council or to the committee on eligibility if it disagreed with the verdict.

From beginning to end, according to Clark, the process was fraught with injustice. The institution wasn’t actually informed of the preliminary investigation until months of investigation, sometimes after the news had leaked to the press. This created a form of probation before a verdict was even reached. The source of accusations was not revealed until the day of the hearing. Institutions were supposed to be able to counsel athletes, but athletes were often approached during holidays or summers while alone. Brent alluded to athletes being cajoled or bribed into an interview, citing an instance of a baseball player being offered a tryout with the Kansas City Chiefs. In the trial the cases were built on investigator’s notes and recollections,

⁴⁶ *Ibid*, 2

⁴⁷ *Ibid*, 4

verbatim records of interviews were not allowed. The unfairness of this rule was exacerbated by the fact that investigators lacked training and restraint but were given broad powers.

The worst abuses occurred during the committee on infractions' hearing process. Supposedly the committee on infractions heard the details of case for the first time during formal hearing in front of institutional representatives. In actuality the committee was intimate with investigative staff and was always briefed on the nature of the evidence before the trial, and therefore biased toward the prosecution. Using what must have been dripping sarcasm, Brent Clark explained that "After a school is dismissed [from the hearing], NCAA staff and committee members commonly adjourn to a hotel room, open a richly deserved store of liquor, and begin to discuss the case in earnest."⁴⁸ Appeals to this initial verdict were exercises in futility.

Beyond the looseness and unfairness of the process, Clark noted a vengefulness and lack of professionalism on the part of the individuals involved. The most flagrant example of unprofessionalism came when Clark quoted David Berst, a director of enforcement, as describing Gerry Tarkanian as "the one that looks like a rug salesman."⁴⁹ Many examples shed light on the vindictive nature of NCAA enforcement. In 1974 Southern Methodist University (SMU) was put on two year football probation after self-reporting violations and taking corrective measures. After the probation was applied by the NCAA, the school re-contracted with the same football coach, causing the NCAA to deem SMU uncompliant. With instructions to investigate the coaching staff, the NCAA pursued trumped up charges of recruiting bribery by an assistant coach. The assistant coach had bought an athlete dinner, and then made the mistake of lying about it. The NCAA forced the university to fire this assistant coach, and the newly instituted president of SMU decided to play it safe by firing the entire football staff. In a different example

⁴⁸ *Ibid*, 7

⁴⁹ *Ibid*, 7

the NCAA imposed sanctions on Mississippi State who took the case to the courts (and eventually lost). During the sanction period the NCAA found violations by Ole Miss, a rival to Mississippi State, but chose not to pursue any action because punishing a competitor would dilute Mississippi State's punishment. Brent Clark, the provider of these examples, claimed that he had spoken up multiple times about concerns with the procedure, but his concerns were ignored.

Senator Santini was one of the most outspoken opponents to the NCAA during these hearings, likely due the fact that he represented Nevada, home of Tarkanian and UNLV. He summed up Clark's testimony by saying "So you are being told to go out and allege some more violations to get to a university because it had the temerity to question, through one of its players in court, the correctness of a finding of guilt already imposed."⁵⁰ Apparently the NCAA, in their defensive zest, personally targeted Senator Santini to prove his bias. David Berst found photos of Senator Santini wearing a UNLV beanie at the Final Four Tournament and Walter Byers accused the senator of being a member of the UNLV booster club "which sat together and wore similar attire."⁵¹

Returning to the Mississippi State case, Dixon Pyles, their legal representative, was put on the stand. He put his complaint in strong rhetorical terms: "Most member institutions bow down without a whimper; those that stand up against the NCAA do so with trembling and continuing fears of retaliatory retribution that can be dispensed without warning by a powerful arm of arbitrary force."⁵² His complaint was that the MSU investigation committee gathered sworn evidence which was completely disregarded by the NCAA enforcement committee. Pyles

⁵⁰ *Ibid*, 31

⁵¹ *Ibid*, 60

⁵² *Ibid*, 125

suggested sweeping legislation by Congress to direct the NCAA to improve. A more moderate representative of MSU suggested that the NCAA provide an outline on how to respond/cooperate because schools just do not know. Mr. Gillard, the athlete who had received an illegal discount on clothing from the MSU school store, wasn't warned that his statements could be used against him and was eventually suspended for three years. In the court case the Mississippi Supreme Court ruled that Gillard did not have a property right to football within the due process clause of the state constitution (in this regard the state and federal constitutions were identical).

Another contentious case occurred at Michigan State University (also MSU). In this case Frederick Williams, Professor at Michigan State and a member of the MSU select committee (investigated the violations) stated that the "the principal investigator of the NCAA had resorted to threats, intimidation, and vulgarity to secure information detrimental to MSU."⁵³ Overall the members of the select committee noted a sense of hostility and that the burden of proof fell on Michigan State to prove their innocence. At the hearing they were denied a court reporter and the assistant coach was denied representation when his career was put in danger. Greater weight was given to secondhand evidence from NCAA investigators than polygraph tests which the coaches passed. Senator Santini once again summarized, saying "So your impression and conclusion was that not only were you presumed guilty, but you were also presumed to be either lying or misinformed."⁵⁴

Representatives from the University of Minnesota, who at the time was in the midst of a previously discussed federal court case, next appeared before Congress. This Minnesota case involved one of the most powerful complaints against the NCAA enforcement procedure: the fact that a public school was simultaneously required to carry out NCAA verdicts and provide

⁵³ *Ibid*, 218

⁵⁴ *Ibid*, 239

fairness and due process for its students. At the University of Minnesota three players lost eligibility according to the NCAA decision, one sold basketball tickets at greater than face value, another made a phone call on a university line and stayed overnight at a coach's basketball camp, and the last spent two holiday weekends at the vacation home of a coach.⁵⁵ Minnesota refused to subscribe to the NCAA's version of due process, conducted their own trial, and found the players still eligible. In response the NCAA threatened to sanction the entire athletic department and Minnesota took the case to the courts. Walter Byers, executive director of the NCAA, ominously stated; "I suggest that if Minnesota is ultimately successful, that University and the membership generally will regret the result in many ways and for many reasons."⁵⁶ From these examples a clear picture forms of the NCAA as a vindictive, powerful, and wholly unrestrained governing body. A few members of Congress (led by Senator Santini) called for action, but most believed in the NCAA rhetoric of internal change and inherent fairness.

Even the former president of the NCAA, John Fuzak, questioned some of the procedures, calling the comfortable relationship between committee and investigators 'inappropriate.' Fuzak subtly explained that a lack of change resulted from the intimidation the NCAA exerted over its members: "Part of that occurs because there are those who feel it unwise to express their concerns about what has happened and about their impression of fairness."⁵⁷ Fuzak was not a full-fledged opponent to NCAA procedure but saw the problem as deriving as much from a perception of unfairness as actual unfairness in the system. He believed that "the problem became much more intense relatively few years ago when the shift was made to holding student

⁵⁵ *Ibid*, 250

⁵⁶ *Ibid*, 428

⁵⁷ *Ibid*, 475

athletes accountable.”⁵⁸ The former NCAA president may not have found serious fault in the enforcement procedure, but clearly he was not satisfied with it.

Many individuals desired change, but felt strongly that change should come from within not from Congress. Mickey Holmes, the commissioner of the Missouri Valley Conference, stated “I feel confident the membership will take appropriate action, which is a direct form of stating that I firmly oppose direct intrusion of the Federal Government.”⁵⁹ He proceeded to show evidence that a Big Eight (NCAA conference) resolution resulted in an internal special committee which investigated NCAA enforcement procedure and came out with new guidelines and amendments. Charles Neinas, the commissioner of the Big Eight Conference then appeared and suggested a conciliatory attitude where Congress should encourage the formation of a special outside committee (as opposed to the internal one which had already occurred) to investigate the NCAA procedure. The chairman of the subcommittee ended the hearing by saying that many individuals had expressed support for the purpose of the hearing but refused to testify out of fear of reprisal.

After a three month interval the House Committee reconvened, this time beginning with testimony from the current NCAA leadership. J. Neils Thompson, the then current president, carefully explained that an amendment was in progress to fix the appearance of an improper relationship between the enforcement committee and investigative staff. This amendment would put the burden of proof on investigators not institutions. However, Thompson defended the enforcement committee’s commitment to even application of the rules and said that the NCAA governing council would not recommend a commission to study the enforcement committee. The lack of transcripts at hearings was once again defended for the purpose of maintaining

⁵⁸ *Ibid*, 503

⁵⁹ *Ibid*, 509

confidentiality. Finally Thompson drove home the message that the NCAA exercised due process and it should be left to the NCAA to internally perfect the system.⁶⁰ Congressman Vento was slightly taken aback by the statement of Thompson, saying, “The NCAA has come before the subcommittee with the attitude that it has done nothing wrong. As evidenced in the testimony there is a siege mentality.”⁶¹

While J. Thompson maintained a defensive tone, Walter Byers decided to subtly jab at Congress: “A great deal of time, it seems to me has been spent on apparently slight violations of rules and the seeming reaction of you gentlemen is that it is an absurdity to invoke penalties on what, in this town, must seem to be picayune excess aid.”⁶² Byers blamed Congressional concern, in not so many words, on the fact that Congress got away with much more than what the NCAA tolerated from its members. Overall Byers’ basic stance was an open mindedness to suggestions but ready to fight tooth and nail against anything that would weaken the effectiveness of the enforcement program.

Members of the NCAA enforcement committee then spoke before Congress, and defended themselves with the strongest possible language. Arthur Reynolds, former chairman of the enforcement committee said “The charges which have been leveled against the NCAA enforcement program are tantamount to an allegation that the committee on infractions and its individual members are guilty of either malfeasance or the grossest kind of misfeasance imaginable. I deny this in the strongest possible terms.”⁶³ He went further to say that institutions were in fact advantaged by the process because the committee saw evidence before the trial, and

⁶⁰ United States. Cong. House. Committee on Interstate and Foreign Commerce. Hearings on NCAA Enforcement Program, Part 2. 95th Cong., 2nd sess. Washington: GPO, 1978. 901. ProQuest. Web. 19 Dec. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-fch-0052?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1978-fch-0052?accountid=9673) 1978>

⁶¹ *Ibid*, 959

⁶² *Ibid*, 991

⁶³ *Ibid*, 1059

hearsay evidence is often helpful to the institution. His indignation is apparent: “I suggest that their complaints are self-serving justifications conceived to bolster positions taken in litigation or simply to save face in what for them is an extremely embarrassing situation.”⁶⁴ Charles Wright, the present chairman, agreed wholeheartedly with Reynolds; “If I thought we were denying due process to the institutions and to the individuals which come before us, I would resign from the committee in a moment.”⁶⁵ Wright explained that due process is a ‘coat of many colors’ and that unique version of it is required by the NCAA. He did concede that ‘cosmetic’ changes were necessary to fix the appearance of improper conduct between the committee and investigative staff. Finally Bill Hunt, the assistant executive director of enforcement concluded the hearing using general terms to say that sports are unique in the emotional response they elicit and if institutions were willing to police themselves then there wouldn’t be an issue at all.

A year later, in 1979, the House Subcommittee on Oversight and Investigations reconvened “to determine both the desire of the association to meet that challenge and its ability to achieve self-reform.”⁶⁶ Congress had issued a report in January of 1979 detailing recommendations for reform. This report revealed the ineffective initial response of Congress, in that it contained a majority and minority opinion with different sets of recommendations. NCAA felt pushed but not prodded to make the changes it chose off the Congress’s list of suggestions. At this 1979 hearing William Flynn, the president of the NCAA acted affronted by the report and defensively said “Even without these changes, however, we still believe that the NCAA enforcement procedure is intrinsically fair and evenhanded.”⁶⁷ He elaborated that eleven of

⁶⁴ *Ibid*, 1066

⁶⁵ *Ibid*, 1277

⁶⁶ United States. Cong. House. Committee on Interstate and Foreign Commerce. Hearings on National Collegiate Athletic Association - Enforcement Program. 96th Cong., 1st sess. Washington: GPO, 1979. 1. ProQuest. Web. 20 Dec. 2014. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1979-fch-0050?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1979-fch-0050?accountid=9673)>

⁶⁷ *Ibid*, 30

eighteen recommended proposals ‘have received affirmative responsive action,’ six have been implemented already, two were partially implemented, and four were not supported. Only one recommendation of both the majority and minority opinions in Congress’s report was not supported; creating a transcript of the hearings. Flynn finished with a conclusive and self-righteous tone: “In my personal judgment, any objective view of this information demonstrates that the NCAA Council has approached the recommendations of the subcommittee in an open-minded fashion.”⁶⁸

One cannot help but feel as though the NCAA succeeded on pulling one over on Congress; they made rule adjustments, catered to the suggestions, but did anything actually change? Congressman Luken puts this sentiment into more eloquent words: “Your implacable opposition to the warnings and the transcripts, to the major and minor infraction definitions, unbending and unyielding, shows the sort of benevolent despotism in your approach and the approach of the NCAA in these matters.”⁶⁹ Chairman Eckhart concluded the hearing with a warning which the House failed to follow through on, that “we will continue watching with interest what your organization does.”⁷⁰

In the early 1980s the Supreme Court heard a series of cases which permanently changed the definition of state actor and had implications for future NCAA related cases. In *Blum v Yaretsky* (1982) a patient questioned whether or not a nursing home was a state actor, in so far as due process was required for transferring patients. The Supreme Court ruled that “even though the State subsidizes the cost of the facilities, pays the expenses of the patients, and licenses the facilities, the action of the nursing home is not thereby converted into “state action.”” The role of

⁶⁸ *Ibid*, 32

⁶⁹ *Ibid*, 99

⁷⁰ *Ibid*, 137

the nursing home is not ‘traditionally the exclusive prerogative of the State’ nor coercively governed by the state, leading the court to not find the requisite nexus of closeness.⁷¹ The new definition for state actor was solidified in the Supreme Court case *Rendell-Baker v Kohn* (1982). In this case employees were fired from a private school which received at least ninety percent of funding from public source and was publically regulated. Once again the court said “that a private entity performs a function which serves the public does not make its acts state action.” Ultimately the decision making process resided with the private school officials not the state leading the court to find no state action.⁷² In the NCAA cases of the 1970s, the decision to find the NCAA a state actor was often predicated on the source of funding and these new rulings would have significant implications for reversing that precedent.

In *Steve Justice v. NCAA* (1983) the Arizona Federal District Court did not yet apply the new precedent, instead basing their case off *Shelton v NCAA*⁷³. While the plaintiff lost because the right to participate in bowl games was not a property right under the constitution, the court maintained that the NCAA was a state actor.⁷⁴ In *Arlosoroff v NCAA* (1984), based on NCAA suggestion, the 4th Circuit Court decided to apply *Blum* and *Rendell – Baker* to overturn the trial court grant of preliminary injunction against the NCAA. The argument of the plaintiff was that a bylaw of the NCAA unfairly excluded aliens from competition. The court did not look into the constitutionality of the bylaw, but instead decided, for the first time, that the NCAA was not a state actor. “The fact that NCAA's regulatory function may be of some public service lends no

⁷¹ *Blum v. Yaretsky*. Ed. U.S. 457th ed. No. 80-1952 Vol. SUPREME COURT OF THE UNITED STATES, 1992. Print.

⁷² *Rendell-Baker v. Kohn*. Ed. U.S. 457th ed. No. 80-2102 Vol. SUPREME COURT OF THE UNITED STATES, 1982. Print.

⁷³ In *Shelton* the court refused to interfere with a rational rule of a voluntary organization. In this case the dispute was over an athlete losing eligibility because he declared for the NBA draft.

⁷⁴ *Justice v. National Collegiate Athletic Association*. Ed. F. Supp. 577th ed. No. 83-552 TUC ACM Vol. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, 1983. Print.

support to the finding of state action, for the function is not one traditionally reserved to the state.”⁷⁵ This decision was mirrored in *Stephen Graham v NCAA* (1986). Graham withdrew from his football team and the school cancelled his scholarship without holding a hearing, he rejoined the team the next year but went to court. The 6th Circuit Court found that neither of the possible requirements for state action was met: it failed to find that “(1) the NCAA was serving a function which was traditionally and exclusively the state's prerogative, or (2) the state or its agencies caused, controlled or directed the NCAA's action.”⁷⁶

In *Harry Hawkins v NCAA* (1987) the Central District of Illinois District Court explained the decision making process for finding the NCAA to not be a state actor. This three part test was very subjective in nature:

(1) To what extent the business is subjected to state regulations. However, the court asserted that the mere fact that a business is subject to state regulations does not by itself convert its actions into that of the state for purposes of the Fourteenth Amendment; (2) The sufficiency of a close nexus between the state and the challenged action of the regulatory entity, so that the action of the entity may be fairly treated as that of the state itself; (3) Whether the private decision involves such coercive power or significant encouragement, either overt or covert, by the state that the choice must in law be deemed to be that of the state.

The *Hawkins* case involved basketball players denied from postseason play. In 1988 in *Kneeland v NCAA*, the court continued the trend of finding the NCAA to not be a state actor.⁷⁷

⁷⁵ *Arlosoroff v. National Collegiate Athletic Association*. Ed. F.2d. 746th ed. No. 83-1702 Vol. UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, 1984 Print.

⁷⁶ *Graham v. National Collegiate Athletic Association*. Ed. F.2d. 804th ed. No. 85-5980 Vol. UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 1986. Print.

⁷⁷ *Hawkins v. National Collegiate Athletic Association*. Ed. F. Supp. 652nd ed. No. 86-1246 Vol. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, 1987. Print.

By the late 1980s two separate sets of case law existed regarding the NCAA as a state-actor, the 1970s precedent of the NCAA as state actor and the post *Blum* and *Rendell-Baker* precedent of private association. The Supreme Court had yet to weigh in. Clearly there existed a divisive body of case law to choose from, and the court had an important decision to make. In 1988 that case came, with *NCAA v Jerry Tarkanian*. The details of this case are laid out in the introduction, but to recap, the case already spanned ten years by 1988. The NCAA had recommended that the UNLV fire Tarkanian based on circumstantial evidence and a personal vendetta, and UNLV had attempted to comply. Tarkanian took his suit to court claiming a lack of due process. The Supreme Court found the NCAA to not be a state actor because UNLV chose to suspend Tarkanian, but was not forced to do so. “Moreover, UNLV's decision to adopt the NCAA's rules did not transform them into state rules and the NCAA into a state actor, since UNLV retained plenary power to withdraw from the NCAA and to establish its own standards.” The court decided that the NCAA was not held under the color of any state law because its rules emerged from a collection of states. The court did prevent UNLV from firing Tarkanian without providing due process, because UNLV was a state institution, but threat of NCAA sanction did not cause the extension of state action to the NCAA. This case spelled doom for almost any plaintiff seeking to challenge NCAA penalty enforcement. It was ridiculous to assume that a school would ever withdraw from the NCAA, but this was the bedrock of the court’s decision. In the wake of this precedent setting case, it seemed reasonable for Congress to take action.⁷⁸

A bill was attempted in 1991, titled Coach and Athlete’s Bill of Rights. It would have imposed due process on the NCAA while sanctioning coaches and players, stripped the NCAA of the ability to impose sanctions which inhibit interstate commerce, and made the NCAA a state

⁷⁸ *National Collegiate Athletic Association v. Tarkanian*. Ed. U.S. 488th ed. No. 87-1061 Vol. SUPREME COURT OF THE UNITED STATES, 1988. Print.

actor when it forced a state official to carry out a sanction. This bill never came to a vote. Only those schools that were currently under investigation were willing to advocate for legislation, and this advocacy was taken with a grain of salt given that those schools were in fact under investigation. The question boiled down to Congressional desire for fairness against vehement NCAA lobbying. Without external pressure Congress failed to institute reform. From June to September of 1991 the House subcommittee on Commerce, Consumer Protection, and Competitiveness met to readdress concerns with NCAA enforcement. While some representatives advocated legislation, this hearing quickly lost focus on the topic of enforcement and led to nothing conclusive.

Discussion focused on the signs of change from within. For example a commission of university presidents had been created and given power within the NCAA organization, to create at the very least the appearance of fairness. The Knight Commission, a private organization designed to study issues and make suggestions for the NCAA, had been founded in 1989 and claimed to be having an impact. For example Bill Friday, the President Emeritus UNC and co-chair of the Knight Commission, proposed the need for standards of admission for athletes and presidential leadership. These materialized in Proposition 48 by the NCAA. Not all feedback was positive, the usual gripes with the NCAA remained prevalent: “Ironically the enforcement procedures of the NCAA are so oppressive that the cheaters more often than not are pitied rather than condemned.” (Burton Brody University of Denver Professor of Law) Toward the end, the hearing lost focus, wandering around educational requirements, television rights, and many other topics in a conversational rather than directed manner. Congress bought the NCAA assertion that it had changed, and showed no interest in continuing to fight for reform.⁷⁹

⁷⁹ United States. Cong. House. Committee on Interstate and Foreign Commerce. Hearings on Intercollegiate Sports. 102nd Cong., 1st sess. Washington: GPO, 1991. 62. ProQuest. Web. 20 Dec. 2014.

Unlike Congress, many state legislatures decided to limit the power of the NCAA. These laws were examined before the courts and one by one found to be unacceptable. The first of these occurred in Nevada in *NCAA v Robert F Miller, governor* (1993). The Nevada legislature passed a statute requiring any intercollegiate governing body to provide the Nevada school, employee, student athlete, or booster accused of an infraction with certain procedural due process protections during enforcement proceedings. The 9th Circuit Court decided that this law couldn't stand because statutes in other states could subject NCAA to conflicting requirements. "The Nevada legislature enacted the Statute in order to regulate interstate commerce. If we were to invalidate all of the provisions of the Statute that directly regulate interstate commerce, nothing of consequence would remain." One line of the decision must have made every authority in the NCAA jump for joy. The court said that "the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out." In essence the only body that could regulate the NCAA was Congress, and Congress was currently placated.⁸⁰ In *NCAA v Carolyn Roberts* (1994) Florida enacted a very similar piece of legislation. The Northern Florida District Court found that this act violated both the commerce and contract clause of the constitution: "Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad."⁸¹

Six years passed and in 2000 another bill to give student-athletes due process rights failed in Congress. Another seven years passed and in 2007 the 2nd Circuit Court, in *Cohane v NCAA*,

<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1991-hec-0062?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1991-hec-0062?accountid=9673)>

⁸⁰ *National Collegiate Athletic Association v. Miller*. Ed. F.3d. 10th ed. No. 92-16184, No. 92-16227, No. 92-16234 Vol. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1993. Print.

⁸¹ *NCAA v. Roberts*. TCA 94-40413-WS Vol. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION, 1994. Print.

questioned previous precedent. A former coach of the University of Buffalo filed a suit claiming denial of liberty rights without due process by the university and NCAA. Instead of immediately clearing the NCAA as a non-state actor, the court found a difference from the Tarkanian case. In this case the University Buffalo worked in collusion with the NCAA whereas UNLV acted as an adversary. While the court never decided that the NCAA was a state actor, it said that if proven that the two colluded then it could be possible. It is unclear whether this decision will be reflected in future decisions, but it is a step in the right direction.

The courts also began allowing state legislatures to regulate the NCAA to a limited degree. In *NCAA v The Associated Press* (2009), the 1st District of Florida Court of Appeals upheld a Florida law making transcripts and records of official state business (in this case Florida State University) public record. Florida State was being sanctioned and the AP sought access to the records. The NCAA alleged that law was unconstitutional because it regulated interstate commerce. David Berst of the NCAA quoted the *Miller* case saying the law ripped the heart out of the NCAA. The court found this argument to be excessive and responded that the “Florida law is not so distinctive that it would force the NCAA to change the way it does business. This case arose in Florida, but it is likely that the NCAA would be dealing with the same issue had it arisen most anywhere in the United States.”⁸² A slightly more extreme question appeared in *Corman v NCAA* (2014). Here Pennsylvania passed The Institution of Higher Education Monetary Penalty Endowment Act in order to prevent the NCAA from imposing a monetary penalty on Penn State. The commonwealth court of Pennsylvania, however, found the law to not be specially addressing the penalty levied on Penn State (and thereby an illusory class) because other institutions of higher learning could be subject to the same penalty and join suit. “It is reasonable to conclude

⁸² *NCAA v. AP*. Ed. So. 3d. 18th ed. CASE NO. 1D09-4385 Vol. COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, 2009. Print.

that the General Assembly was concerned with the burden on the Commonwealth's taxpayers resulting from such fines and, thus, drafted the Endowment Act.”⁸³

Over forty years the courts have, for the most part, deregulated the NCAA. The issue went to Washington, and Congress heard tales of unfairness and vindictive action by the NCAA. The NCAA succeeded in intimidating member institutions from testifying; everyone knew what happened to Jerry Tarkanian for speaking out. The association simultaneously convinced Congress of the integrity of its procedure. Many in Congress understood that no law prevented unfair action, but could not rally enough support to force change. The NCAA allowed just enough internal change to take the pressure off, and the issue faded away from national attention. In recent years certain courts have allowed for minor increases in constitutional restraints on the NCAA. No major case has come before the Supreme Court since *Tarkanian*, and it remains to be seen what the legal future holds for the NCAA.

Unlike the AAU dispute there were no external factors encouraging Congress to act (i.e. Olympic ambition). Certain Congressmen expressed indignation, and all members shook their fingers at the NCAA, but the NCAA lobbied, and amended, and waited out the Congressional pressure. A few times a bill was drafted to impose due process, but to this day the NCAA defense has been successful. A policing body is imperative for today's competitive and economically charged intercollegiate environment, and as a whole the NCAA is effective. In this chapter I do not mention the cases of small to egregious violations where the NCAA punishment was fair and just. However, there should be mechanisms in place to keep the NCAA from going too far. It is easy to get carried away by zest of purpose, or by the emotionally charged situation,

⁸³ *Corman v. NCAA*. Ed. A.3d. 93rd ed. No. 1 M.D. 2013 Vol. COMMONWEALTH COURT OF PENNSYLVANIA, 2014. Print.

or just because of human error. Legislation requiring due process would go a long way in preventing the most serious abuses by the NCAA.

Chapter 3: Education for Student-Athletes

I asked one of the witnesses at our recent hearing how coaches and athletic departments view the students when they come to them. His response was that they are looked upon as meat, not as students who are to be educated, not as young people who have been placed in their care by their parents, and not even as human beings. Instead they are regarded, in the words of our witness who was in academia, as meat. What a sad, disgraceful commentary on the lack of esteem, the lack of understanding, the lack of concern, and the lack of fairness with which our young people are being regarded when they are in the sports athletic programs in these various universities.

-Cardiss Collins, Representative of Illinois before House of Representatives, June 26 1991

From the 1970s through the 1990s the NCAA and Congress were active in trying to improve education for its athletes. The problems with education included the lower rates of graduation for athletes, the disparity in majors selected, and the creation of special, simplified courses only for athletes. Overall the effect of these problems was the existence of a separate world within the university for athletes, contrary to the basic tenants and purpose of the NCAA. In a unique instance of activism, Congress passed legislation in order to force reform. This action induced positive change beyond the scope of the bill; the following year the NCAA undertook sweeping reforms, likely to prevent future involvement by Congress. Despite lobbying and arguments for patience, Congress acted causing a ripple effect. Problems persist with the educational system for athletes today, but much of the fault and responsibility resides at the university and high school level, beyond the scope of this thesis. Progress was achieved because Congress took action.

While the issue played out in Congress, the academic requirements set by the NCAA were often brought to the courts, and on nearly every occasion the courts upheld the NCAA's academic regulation. Into the late 1990s and early 2000s formidable legal challenges to the academic regulations emerged, including the Americans with Disabilities Act, and the Civil

Rights Act of 1964. As a whole the federal courts allowed for strict regulation of academic standards by the NCAA. Problems remain today with education for college athletes, but these stem from cultural paradigms often beyond the power of the NCAA. The cooperation of the legislative and judicial branches of government with the NCAA should serve as a model for other problems facing intercollegiate athletics.

In 1975 the 5th Circuit Court heard *Parish v NCAA*, in which the plaintiff challenged the NCAA's 1.6 rule. This rule required that incoming freshman have high school records which predict a 1.600 GPA at college. This was calculated using a combination of GPA in high school courses and SAT scores. The plaintiffs, Centenary College and Robert Parish, alleged that the rule was a violation of the due process clause of the Constitution. Centenary chose to admit and play Parish (future NBA all-star) with prior warning from the NCAA that he did not meet the academic regulation. The 5th Circuit found that the NCAA was a state actor (typical for pre-1980s cases) but that participation in interscholastic sports was not a property interest therefore the court would not apply strict scrutiny to this rule. The court proceeded to affirm the basic fairness and purpose of the 1.6 rule. For Robert Parish this meant that despite accomplishing record breaking statistics, his own name and Centenary College were absent from NCAA record books from 1972 to 1976. The court said, "The NCAA adopted the 1.600 rule as a means of insuring that the athlete be an integral part of the student body and to maintain intercollegiate athletics as an integral part of the education program." Future cases mirrored this precedent, *Parish* being the most cited, and various adaptations of the 1.600 rule were upheld in district and circuit courts.⁸⁴

⁸⁴ *Parish v. NCAA*. Ed. F.2d. 506th ed. No. 73-3748 Vol. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, 1975. Print.

In 1984 the Senate subcommittee on Education, Arts and humanities met in order to resolve academic problems facing big time college sports. The three questions to be discussed according to the chairman were the “exploitation of athletes who clearly have the academic ability to succeed in college but do not because of the time demands placed upon them by athletic pursuits... the dilution of academic standards to accommodate the student athlete... to what extent do athletic scholarship programs respond to the educational needs of student athletes no longer able to participate for any number of reasons in college athletic programs.”⁸⁵

The first witnesses before the subcommittee were athletes who had been wronged or abused by the system. Kevin Ross was a basketball player for Creighton who could barely read when he arrived at college. “The courses were selected for me by the athletic director and coaches at Creighton. And of course these courses were easy courses, such as the theory of first aid, the theory of tennis, and basketball-courses that require not one lofty thought.”⁸⁶ Ross injured his knee during his junior year and Creighton stopped providing for him academically, leaving him no choice but to drop out. While he was in school, the administration made sure he succeeded: “If I had a paper to turn in for my classes these were done for me by the secretaries of the college. If I failed a class this was taken care of for me by the coach or athletic director.”⁸⁷ While Kevin Ross wasn’t exactly the standard of the time, he also wasn’t an unusual example.

Michael Potts, a former student of Northwestern University, was promised enrollment in the engineering school, but upon arrival was instead placed in the college of arts and sciences by the athletic department. Potts sustained multiple injuries, making him unable to continue with

⁸⁵ United States. Cong. Senate. Subcommittee on Education, Arts and Humanities. Hearings on Oversight on College Athletic Programs. 98th Cong., 2nd sess. Washington: GPO, 1984. 2. ProQuest. Web. 8. Jan. 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1984-lhr-0056?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1984-lhr-0056?accountid=9673)>

⁸⁶ *Ibid*, 4

⁸⁷ *Ibid*, 7

football, and was instructed by the school to petition the NCAA to continue his aid without being counted as an athlete. The petition was successful but at the end of the first trimester of his junior year Michael Potts was kicked out of school. Apparently he was not progressing toward a degree after taking the courses that his academic advisors instructed him to take. “I feel pressure was put on me in an effort to remove me from my academic program after I was no longer of use to them, football wise.”⁸⁸

The subcommittee next interviewed Howard Cosell of ABC sports beat. Cosell described multiple examples illustrating the deplorable condition education for college athletes. The first case involved Norm Ellenburger, a basketball coach at the University of Mexico. A jury convicted Norm of mail fraud (fixing high school athletes’ transcripts) but the judge threw out the conviction and put Ellenburger on one year probation. The judge reasoned that “Everybody cheats; it is part of the fabric of big time college sports.”⁸⁹ In another case Billy Jackson, a lineman for UCLA, was convicted of manslaughter freshman year and at the trial the judge noted that “This man cannot even read ‘see spot run’.”⁹⁰ At Cal State – LA, the basketball team sued the school and won 10,000 dollars per player and a public apology for being systematically excluded from academics with classes like backpacking, mountain climbing, badminton, and theory of movement. Cosell’s testimony illuminated the worst outcomes of the system, and with the evidence mounting the subcommittee began prying at the roots of the problem.

Dean Smith, the head basketball coach at University of North Carolina spoke next, surprising Congress by saying that inappropriate passing grades were not the real problem. He thought that the major problem was initial eligibility, and explained that the NCAA was

⁸⁸ *Ibid*, 10

⁸⁹ *Ibid*, 16

⁹⁰ *Ibid*, 15

currently in the process of fixing the system to require that certain classes be taken in high school. The then current system required a C average in high school no matter which classes the athlete took. John Underwood, a reporter for *Sports Illustrated*, differed from Dean Smith, saying that the main problem resided in the College education system in general. He believed that too low of standards were set as students traveled through college, and he suggested raising these standards and increasing coaches job security (creating less pressure to win). As a whole, Underwood explained that the process undervalued education and overvalued stardom. It is visible from this diverse testimony, that the problem wasn't (and still isn't) one dimensional. Improvement and reform should be spearheaded by the NCAA, but some changes were beyond its power.

John Toner, the president of the NCAA, spoke to the actions that the NCAA was taking. Two years earlier (in 1982) the NCAA had instituted academic eligibility reforms which would be instituted in 1986. This new standard would require eleven core curriculum classes be taken in high school, a 2.0 GPA achieved in high school, and an SAT score of at least 700 on two parts. During college, athletes had to obtain twenty-four credits per year toward a specific degree in order to remain eligible. The NCAA required that scholarships be renewed on a year by year basis (to be the same as scholarships for non-athletes) but due process was required before the scholarship could be withdrawn. Toner's overall message was that the NCAA could not directly affect the graduation rate, and therefore focused on increasing eligibility standards for initial and ongoing eligibility.⁹¹ Harry Edwards, Professor Emeritus of Sociology at UC Berkley, and others criticized the NCAA and this testimony because these minimum requirements could become maximum goals for athletes. Edwards also complained that the NCAA did not provide

⁹¹ *Ibid*, 57

stipulations for why to terminate scholarships, schools pressured athletes who didn't meet athletic expectations to give up scholarships, and schools did not fully cover injury insurance.

The problems and solutions talked about in this hearing were diverse but pressing. There was no clear consensus on the steps which should be taken, but all parties, including the NCAA, seemed to be in agreement that the status quo was not good enough. Congress itself did not have a clear idea of how it could or should act, and the chairman concluded the meeting by saying "I would hope that this hearing, if nothing else, would serve as a prod to the NCAA to give its early attention to some of these problems."⁹²

In 1986, in a statement before the House, Representative James Howard suggested the passage of a bill to require reasonable graduation numbers. The bill, HR 2620, would take away tax deductions from athletic departments that did not graduate the adequate number. Three years later, in 1989, the House subcommittee on postsecondary education met to consider the issue without a specific legislative agenda, although a few ideas for bills were circulating. "The question being asked is, has the short-term excitement and revenues of athletics blinded some colleges and universities to their long-term responsibility of educating students?"⁹³ The subcommittee was addressing the astounding and depressing fact that despite one in 500 odds, one in five senior basketball or football players expected to become professionals. At the same time, according to Representative Miller, twenty to thirty percent of high school football and basketball players were functionally illiterate.

⁹² *Ibid*, 102

⁹³ United States. Cong. House. Subcommittee on Postsecondary Education. Hearings on the Role of Athletics in College Life. 101st Cong., 1st sess. Washington: GPO, 1989. 1. ProQuest. Web. 8 Jan. 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-edl-0020?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-edl-0020?accountid=9673)>

That same year the Senate Committee on Labor and Human Resources narrowed in on the Student-Athlete Right-To-Know Act as the topic of discussion. In response to these concerns Robert Atwell, the president of the American Council on Education, voiced the most effective, but radically impractical suggestions. The theme of his suggestions was to cut the connection between winning and money, something that then, as now, was virtually impossible. To do this he recommended that they cut the length of the basketball and football seasons, and do away with any football playoff. He suggested ending freshman eligibility and eliminating athletic scholarships altogether. Finally Atwell recommended hiring coaches for long term contracts dependent on adherence to codes of conduct rather than win loss records. Though obviously extreme, these rules would undoubtedly have had the effect of elevating education above athletics, thus guaranteeing equal educational opportunities for athletes. They would also destroy the big business establishment of college athletics and were therefore unfeasible.

Richard Shultz, the executive director of the NCAA, was a more moderate voice of reform. He advocated for new programs “to establish complete integrity in intercollegiate athletics” by comparing athletes to all other students in admission requirements, academic progress, and graduation rates.⁹⁴ However, Shultz argued that the real solution must come from an institutional level commitment to integrity. He cited a series of studies showing the worsening academic performance of athletes, greater concentration of majors in business, professional occupations, and physical education. These statistics were even more exaggerated for football and basketball players. This was in large part due to the fact that in season these athletes spent about thirty hours per week at practice or games and missed two classes a week. Out of season they missed one class a week and still spent more time playing sports than preparing for or

⁹⁴ *Ibid*, 28

taking classes. Despite these disheartening statistics, Shultz cited a recent study showing that the median grad rate for all division one recruits (not just football and basketball) barely exceeded that of all students. Shultz gave the oft repeated but truthful mantra of the NCAA: “I think the NCAA has been drawn into the educational side of it, which really should not be their basic responsibility because of a perceived need.”⁹⁵ The NCAA agreed with Congress that there was a problem but denied personal responsibility.⁹⁶

At this point the conversation turned toward possible legislation. Ed Towns, a Representative from New York, argued for a bill (the Right-To-Know Act) that would allow high school athletes to know the graduation facts of the university they were considering attending; the bill would require that schools release this information. Timothy Healy, the president of Georgetown University, agreed with this legislation but suggested something even farther, that schools be punished if athletes didn’t graduate at the same rate as the student body. Larry Hawkins, the Director of special programs for disadvantaged students at the University of Chicago, supported the bill but thought that a lasting impact would only come from change at the primary and secondary school level, supporting the NCAA’s argument. Most parties favored letting the NCAA implement internal reform before Congress passed a bill.

Four months later, in September of 1989, the Senate Committee on Labor and Human Resources met to discuss the Student Athlete Right-To-Know Act. The General Accounting Office had recently published a survey which this bill was designed to address: for students who entered in September of 1982, twelve percent of schools graduated less than twenty percent of

⁹⁵ *Ibid*, 67

⁹⁶ United States. Cong. House. Committee on Labor and Human Resources. Hearings on the Student Athlete Right-To-Know Act. 101st Cong., 1st sess. Washington: GPO, 1989. ProQuest. Web. 8 Jan. 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-lhr-0034?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-lhr-0034?accountid=9673)>

football players and thirty-six percent of schools graduated less than twenty percent of basketball players. Many schools provided decent educational opportunities for athletes, but those that did not failed miserably. The Student-Athlete Right-To-Know Act forced schools to publish and distribute the graduation rates of scholarship recipients based on sport, sex, and race, as well as the field of study and type of degree received. Patricia Lucas, the Principal of Southeast High and President of the Florida Association of Secondary School Principals spoke in strong support of the bill saying “With a ratio of 580 students to each counselor, the availability of easily understandable comparative information on colleges is vital to the advising process.”⁹⁷ Many, including Dick Shultz of the NCAA, asked for more time for the NCAA to institute internal reform. Shultz did not criticize the wording, purpose, or effect of the bill, but stated his belief that the NCAA would shortly pass something equal to or stronger than it. Since the 1960s the NCAA fought any form of interference by Congress.

In a unique instance of proactive legislation, the Student-Athlete Right-To-Know Act was signed into law on November 8th 1990. Even more surprising than Congressional action was the response by the NCAA. In a speech before the Senate floor in March of 1991 Senator Cochran boasted that the NCAA amended its constitution to reflect the legislation and would begin publishing graduation rates two years before the law required them to do so.

But in truth the NCAA's actions on graduation rate disclosure at its recent convention were of modest significance when compared with the package of reforms that were adopted by its membership in a variety of other areas. These included placing limits on playing and practice time for student-athletes, elimination of athletic dormitories, cutting back of training tables for athletes, requiring that athletes complete at least half the

⁹⁷ *Ibid*, 78

*credits needed for graduation by the end of the third year, cutting the sizes of coaching staffs and the number of permissible scholarships, and placing substantially more stringent limits on recruiting activities.*⁹⁸

A combination of zealotry for reform and anxiety over government intrusion spurred the NCAA to take strong action in the wake of the Right-To-Know Act. Not only did they placate the demands set by the recent legislation, but the NCAA attempted to preempt future concerns with sweeping reforms. Congressional involvement had wide ranging benefits, in large part because of the tremendous fear the NCAA had and has of governmental involvement.

In 1991 the House subcommittee on Commerce, Consumer Protection, and Competitiveness met to hear about a wide range of NCAA problems including education for athletes. The discussion lacked any form of legislative threat, and seemed to emerge from Congressional curiosity. Past problems were brought up, with increased emphasis on the racial dichotomy: according to Bill Friday, the President Emeritus of UNC, black student athletes graduated at 26.6%, half that of white student-athletes. His recommendation was that schools require five year scholarships but have semesterly academic requirements. Gerald Turner, the Chairman of the NCAA Presidents' Commission announced that based on recent survey results the NCAA would institute new legislation at the 1992 convention. This would require a 2.5 high school GPA, thirteen core courses in high school, and a 700 on two parts of the SAT. The NCAA was in the midst of its largest reform movement, not coincidentally in the wake of the Right-To-Know Act. Even these actions taken by the NCAA were not enough for some. Digger Phelps, the former basketball coach of Notre Dame, suggested a rule which would make scholarships unusable for another student until the student before graduated. His other

⁹⁸ Mr. Cochran before Senate March 5th 1991

recommendations included eliminating freshman eligibility and rewarding coaches whose athletes achieve academic success. After Phelps spoke the discussion took a tangential turn, and the topic of education for athletes has yet to return to Congress.⁹⁹

Congress ignited the NCAA to action by proving its capability to legislate, and in response the NCAA undertook a series of major reforms, vigorously attempting to improve their image and prevent future legislation. These internal reforms achieved the Association's goals to a degree, but did not completely cure the problem. NCAA regulations were upheld at the district and circuit court level, having been challenged on the grounds of the Americans with Disabilities Act (ADA) and racial discrimination.

In 1996 Chad Ganden was an eighteen-year-old freshman at Michigan State University with a learning disability who did not meet the core course or GPA requirements of high school athletes to qualify as an NCAA athlete. Instead, taking into account his disability, the NCAA had granted Ganden partial-qualifier status, meaning he was eligible to practice with the team and receive aid, then possibly compete sophomore year if he achieved high enough grades. The District Court for Northern Illinois first of all found that the NCAA was subject to the ADA because "NCAA certification functions as a "ticket" to use of the swimming facilities [public accommodation]."¹⁰⁰ Although the court found a strong prima facie case linking the denial of qualifier status and Ganden's learning disability, the facts revealed that NCAA made reasonable accommodations given his disability status (i.e. Ganden was made a partial qualifier). The District Court for Eastern District of Missouri heard a similar case in 1998: In *Tatum v NCAA* the

⁹⁹ United States. Cong. House. Committee on Labor and Human Resources. Hearings on Intercollegiate Sports. 102nd Cong., 1st sess. Washington: GPO, 1991. ProQuest. Web. 8 Jan. 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-lhr-0034?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1989-lhr-0034?accountid=9673)>

¹⁰⁰ *Ganden v. NCAA*. No. 96 C 6953 Vol. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, 1996. Print.

plaintiff also alleged violation of the ADA. Tatum was diagnosed with anxiety disorder and testing phobia so he took the ACT in a nonstandard format which the NCAA refused to recognize. Once again the court found that the NCAA was subject to Title III of the ADA because it controlled a place of public accommodation. However, the court decided in favor of the NCAA because the plaintiff did not meet the criteria of having a disability: he was not evaluated until the second semester of his senior year only after not meeting NCAA's required ACT score. Further, there existed contradictory reports from psychologists.¹⁰¹

In *Cole v NCAA* (District Court of the Northern District of Georgia, 2000) the NCAA barely survived an ADA challenge to an NCAA denial of eligibility. After the trial began the NCAA suggested that the plaintiff reapply for eligibility based on 'new evidence.' Cole alleged this was a "voluntary cessation of allegedly illegal conduct" by the NCAA which the court found to not be the case.¹⁰² The Eastern District Court of Washington ruled in favor of the plaintiff in *Anthony Mathews v NCAA*. Mathews did not progress toward degree by taking enough credits and was therefore ruled ineligible by the NCAA. The court found that a waiver of this specific rule for Mathews (who had a learning disability) "would not alter an essential aspect of the NCAA's purpose to promote academics and athleticism."¹⁰³ The ADA therefore required that the NCAA accommodate Mathews. However, the plaintiff was entering his fourth year of eligibility so court action was moot.

In two cases, *Tai Kwan Cureton v NCAA* (1999) and *Kelly Pryor v NCAA* (2002), the 3rd Circuit Court ruled that the NCAA academic eligibility rules could be challenged on the grounds

¹⁰¹ *Tatum v. NCAA*. Ed. F. Supp. 992nd ed. No. 4:97CV2592-DJS Vol. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, 1998. Print.

¹⁰² *Cole v. NCAA*. Ed. F. Supp. 2d. 120th ed. 1:99-cv-2170-CAM Vol. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, 2000. Print.

¹⁰³ *Mathews v. NCAA*. Ed. F. Supp. 2d. 179th ed. NO. CS-99-0264-WFN Vol. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, 2001. Print.

of intentional discrimination but not deliberate indifference. In *Cureton* the plaintiffs were black student athletes who did not score high enough on standardized tests to meet NCAA eligibility requirements. They argued disparate impact of the requirements under Title VI of the Civil Rights Act of 1964. In this case the court agreed with the NCAA argument that “there is no private right of action for unintentional discrimination under Title VI or its accompanying regulations”¹⁰⁴ Three years later the same circuit court modified its judgment in *Pryor v NCAA*. “Liberally construed, the complaint maintains that Proposition 16 [NCAA’s newest eligibility requirements] achieves the NCAA’s stated goal of improving graduation rates for black athletes relative to white athletes by simply screening out greater numbers of black athletes from ever becoming eligible in the first place, i.e., from ever receiving athletic eligibility and scholarship aid.” The district court originally dismissed the case finding no grounds for suit, but the 3rd Circuit Court reversed the dismissal because the district court missed the allegation of purposeful discrimination. While the circuit court opened up the possibility of suit, upon remand the district court found no evidence to prove the existence of a suspect class (i.e. race, ethnicity, or gender) which would be necessary to prove discrimination.¹⁰⁵ In conclusion, no NCAA academic regulation has ever been struck down by a court for any reason although in rare instances the NCAA is required to grant leeway to athletes with disabilities.

As was usual, the courts chose not to interfere with the NCAA’s academic regulations. Shockingly, Congress acted proactively to pass legislation forcing the publication of graduation and causing the NCAA to reform. As was seen in chapters one and two, this type of action was unheard of without decades of debate and the influence of external factors. The NCAA did not

¹⁰⁴ *Cureton v. NCAA*. Ed. F.3d. 198th ed. No. 99-1222 Vol. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 1999. Print.

¹⁰⁵ *Pryor v. NCAA*. Ed. F.3d. 288th ed. No. 01-3113 Vol. UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 2002. Print.

oppose the effect of this legislation, but it favored internal reform instead of legislation. The NCAA was shocked at the bill's passage: it marked the first unsuccessful lobby of the NCAA in thirty years. In the wake of the Right-To-Know Act the NCAA began its largest internal reform movement in history in large part to preempt and persuade Congress from taking future action. This incident exposes the power that Congress has to inspire change within the fabric of intercollegiate sports. Unfortunately this was a unique occurrence; perhaps education rises to the level of Congressional concern while other intercollegiate athletic problems do not. However, one cannot help but question why Congress was so uninvolved before and after the early 1990s.

Chapter 4: Student-Athlete Regulation

N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding. Any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals. Its conduct does not, therefore, rise to the level of a violation of section 1.

-Decision of the United States District Court of Massachusetts in 1975 in *Jones v NCAA*

This chapter is designed to prove the trust which both the courts and Congress placed in NCAA regulation. Education, as seen in Chapter 3, was a unique instance of distrust and intervention on the part of Congress. In areas such as drug testing, agent – athlete relations, recruiting regulations, practice time, and gambling, Congress tended to trust the decisions and opinions of the NCAA. Eventually Congress passed an agent interaction bill, but only with the support of the NCAA. In the area of gambling Congress remained torn between the lobbying of the NCAA and Nevada representatives, with the end result being a stalemate. This trust was not necessarily unfounded, but distrust would have been more useful in inciting improvement and reform. Although the areas discussed in this chapter were not the most pressing, we will see in later chapters how Congress's trust impeded reform.

As we have seen in previous chapters, courts from common pleas to the US Supreme Court usually trusted and upheld the regulations of the NCAA. The courts did not necessarily believe that NCAA regulations always resulted in fair outcomes, but they did trust that these regulations were based principally on upholding the virtues of amateurism. In 1974 the Texas 5th District Court heard *Southern Methodist University (SMU) v Mike Smith*. Although this case would not set precedent for higher courts, the Texas district court articulated a principle which would underlie many later decisions. SMU was forced to declare Smith ineligible based on

acceptance of financial aid above the allowed amount. In the salient part of the opinion, the judge wrote: “The NCAA has unrestricted power to make the final decision affecting the eligibility of student athletes, and would not be bound by the result of any hearing which SMU might have with respect to Smith.”¹⁰⁶ A year later the Federal District Court in Massachusetts heard *Jones v NCAA*. Once again the plaintiff sought to enjoin the NCAA from declaring him ineligible, citing denial of due process (based on wealth discrimination) and anti-trust claims. Once again the court upheld the regulation finding a ‘rational relationship to legitimate objectives.’¹⁰⁷

Higher courts continued to justify and uphold the NCAA’s regulation and discipline of its student athletes. In *Shelton v NCAA* in 1976 the US 9th Circuit reversed a preliminary injunction on the NCAA from declaring a basketball player ineligible. Shelton had signed a pro basketball contract, but claimed that he was induced to sign via fraud and undue influence. The circuit court found for the NCAA because the rule stated that signing a contract regardless of enforceability was a breach of amateurism, and therefore a rational rule.¹⁰⁸ The Mississippi Supreme Court ruled in 1977 in *NCAA v Gillard* for the NCAA in its punishment of a football player who received clothing at a discount.¹⁰⁹ In *Wiley v NCAA* in 1979, the plaintiff challenged the NCAA’s restriction on financial aid before the 10th Circuit Court. Wiley had been declared ineligible because his award exceeded the allowed amount. The court found no breach of equal protection, and observed that “the case does not implicate the right to a college education, or even to participate in intercollegiate athletics. Wiley's interest is instead the right to attend college and

¹⁰⁶ *Southern Methodist University v. Smith*. Ed. S.W.2d. 515th ed. No. 18519 Vol. Court of Civil Appeals of Texas, Fifth District, Dallas, 1974. Print.

¹⁰⁷ *Jones v. NCAA*. Ed. F. Supp. 392nd ed. Civil Action No. 74-5519-T Vol. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1975. Print.

¹⁰⁸ *Shelton v. National Collegiate Athletic Assn.* Ed. F.2d. 539th ed. No. 75-3578 Vol. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 1976. Print.

¹⁰⁹ *National Collegiate Athletic Association. v. Gillard*. Ed. So. 2d. 352nd ed. No. 49739 Vol. Supreme Court of Mississippi, 1977. Print.

play sports under a certain favorable financing arrangement i.e., a full athletic scholarship plus a full BEOG grant.”¹¹⁰

In 1990 Bradford Gaines declared for the NFL draft but went undrafted. The NCAA declared him ineligible in violation of its amateurism rules, and Gaines proceeded to sue. The US District Court for the middle district of Tennessee heard *Gaines v NCAA*, and as was expected, upheld the amateurism regulation. “There is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football by enforcing the eligibility Rules.”¹¹¹ In 1994, for the first time, the drug testing program of the NCAA appeared before the courts, as an alleged invasion of privacy. The California State Supreme Court ruled in favor of the NCAA in *Jennifer Hill v NCAA*. The court found, under the California constitution, that there existed no right to participate in intercollegiate competition and an expectation of less privacy due to consent. Finally, drug testing was found to maintain integrity and safety in competition because it followed four guidelines: “(1) advance notice to athletes of testing procedures and written consent to testing; (2) random selection of athletes actually engaged in competition; (3) monitored collection of a sample of a selected athlete's urine in order to avoid substitution or contamination; and (4) chain of custody, limited disclosure, and other procedures designed to safeguard the confidentiality of the testing process and its outcome.”¹¹²

¹¹⁰ *Wiley v. National Collegiate Athletic Association*. Ed. F.2d. 612th ed. Nos. 76-1985 to 76-1987 Vol. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 1979. Print.

¹¹¹ *Gaines v. National Collegiate Athletic Association*. Ed. F. Supp. 746th ed. No. 3:90-0773 Vol. UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, 1990. Print.

¹¹² *Hill v. National Collegiate Athletic Association*. Ed. Cal. 4th. 7th ed. No. S018180. Vol. SUPREME COURT OF CALIFORNIA, 1994. Print.

Later that year the House Subcommittee on Commerce, Consumer Protection, and Competitiveness held a hearing titled stipends for student athletes. Although the committee did not attack the NCAA, it approached the issue with a questioning tone. Chairwoman Cardiss Collins began the hearing by saying “The continued succession of these violations suggests that perhaps enforcement of the rules is not the only problem. Instead, the rules themselves must be open to question.”¹¹³ This hearing came in the wake of and centered on punishment levied on Florida State players for breaking the rules by purchasing clothing at a discount. The team had won the national championship in football the year before and the championship rings were withheld as punishment for the infractions. Talbot D’Alemberte, president of Florida State, said “in our zeal to insure that our athletes do not violate NCAA rules, I do not want to see us descend into a police state mentality.”¹¹⁴ In order to prevent this type of violation in the future, D’Alemberte suggested a revision of the laws guiding agents.

A series of speakers followed Florida State, each arguing for less restrictions on athletes, both monetarily and in terms of daily college life. For example Jo Miller, president of the Organization for Understanding and Reform, said “Can you imagine the furor in a music department should... a music student not be allowed to practice more than 20 hours a week and restrict the time spent with their music coach?”¹¹⁵ Robert Kerrigan, the chairman of Florida’s postsecondary education planning commission, approached the issue from a more reasonable vantage, complaining that athletes lacked any voice in whether this was the system that they

¹¹³ United States. Cong. House. Subcommittee on Commerce, Consumer Protection, and Competitiveness. Hearings on Stipends for Student Athletes. 103rd Cong., 2nd sess. Washington: GPO, 1994. 1. ProQuest. Web. 31. March 2015. < [HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1994-hec-0039?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1994-hec-0039?accountid=9673)>

¹¹⁴ *Ibid*, 13

¹¹⁵ *Ibid*, 45

want. The overall attitude was one of dissatisfaction, not only with NCAA restrictions, but also with the system of laws, especially those governing agents.

Jack Mills, the president of the Sports Lawyers Association explained that there were various state laws governing agents, and little incentive to comply with these laws. Furthermore, the NCAA had no power to regulate agents. His association intended to promote better ethics, not discipline unethical members. His preference and suggestion was federal legislation to unite the various and ineffective state laws. The Professional Sports Agency Act of 1985 did just this but was never passed. In 1990 there were twenty-two states with agent laws, fourteen required agent registration, eight required post surety bonds, sixteen had criminal sanctions for agents, two made athletes criminally liable, seven required that agents notify schools of agreements with athletes, and the list of inconsistencies continued. The NCAA chose not to appear at the hearing, so as not create the impression that it had reached a decision regarding Florida State discipline. In its letter to Congress the NCAA reemphasized that its basic purpose is to maintain the athlete as part of the campus life and to protect amateurism.

Seven years later, in 1997, the Protection of Student Athletes Act was brought before Congress and never acted on. The bill prohibited agents from initiating contact or soliciting representation with athletes under the NCAA, NAIA, or NJCAA (National Junior College Athletic Association). The act was punishable by suspension and/or a class C felony. The bill required specific warnings to athletes about risk of loss of eligibility. Another five years passed, and in 2002 House Subcommittee on Commerce Trade and Consumer Protection met to discuss SPARTA, the Sports Agent Responsibility and Trust Act. After nearly twelve years since the issue was first brought to Congress, action was finally approaching. The bill made it unfair and deceptive business to give student athletes items of value in exchange for an agency contract and

prohibited giving misleading information to athletes or not informing them that they may lose NCAA eligibility. In effect it made agent fraud or deception punishable by the Federal Trade Commission (FTC).

It is clear that this bill fit perfectly into the NCAA's plan from the testimony of Howard Beales, director of the bureau of consumer protection in the FTC. Beales expressed concern that this legislation would bolster private (NCAA) regulation, specifically the loss of eligibility as a punishment. Beales' point was that it was not Congress's job to back private regulation. Instead he suggested the creation of a private right to action and fuller disclosure principals. Just as Beales predicted, William Saum, the director of agents, gambling, and amateurism activities in the NCAA, expressed strong support for the bill. He especially appreciated the clause pushing states to adopt the uniform athlete agent act, creating a registration process. "We believe that this bill would be a very good federal backstop to help prop up the state laws and work with our elite student athletes to assist them in working against the agents"¹¹⁶ The final bill was introduced into the Senate in June, 2003 and was signed into law in September of 2004. It included everything mentioned above and also that the institution is entitled to civil damages wrought by the agent. As a result athletes were perhaps better protected, but the NCAA strengthened its leverage and regulatory apparatus. As usual Congress wasted twelve years pondering the issue, and eventually gave the NCAA that which it lobbied for. SPARTA was very likely the right decision, but it also was a reflection of the trust and deference which Congress consistently afforded the NCAA.

¹¹⁶ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce. Hearings on Sports Agent Responsibility and Trust Act. 107th Cong., 2nd sess. Washington: GPO, 2002. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2002-hec-0044?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2002-hec-0044?accountid=9673)>

Congress spent much of the early 2000s debating the pros and cons of allowing Vegas to hold bets on college sports. In 2001 the Senate Committee on Commerce, Science, and Transportation met to discuss the Amateur Sports Integrity Act, which would make gambling on Olympic, college and high school sports illegal. In this hearing, as well as the later ones, two powerful foes clashed before Congress, the Nevada and the NCAA lobby. Senator John Ensign of Nevada spoke early, saying “I believe the facts are on my side of the debate, but the emotion is on yours.”¹¹⁷ His points were threefold, 1) the current betting rules were safe, regulated, and restricted 2) the NCAA was not doing enough; it only spent 229,000 on prevention out of a 300 million dollar budget and 3) eliminating legal betting would mean the loss of the control board, the only existing oversight. Harry Reid of Nevada followed with the states right argument, and also pointed out the strong demand for sports betting.

Reputable sources spoke in favor of the bill as well. Tom Osborne, representative of Nebraska and former football coach, argued that fans no longer fully appreciated the game because they rooted for spreads not teams. South Carolina representative Lindsey Graham believed it was not an issue of states’ rights because Congress had banned all sports betting in all but four states. Gary Williams, the basketball coach at Maryland and former assistant at Boston College, spoke to the severity of the point shaving scandal at BC. One coach went to federal prison for five years and another went to the witness protection program. Next, Congress brought in their token student athlete, Titus Ivory of Penn State. Ivory spoke vehemently against the anticompetitive effects of gambling in sports. Perhaps the most eloquent speaker was Howard Shaffer, associate professor at Harvard Medical School, division of addictions. He told Congress

¹¹⁷ United States. Cong. Senate. Committee on Commerce, Science, and Transportation. Hearings on Amateur Sports Integrity Act, S. 718. 107th Cong., 1st sess. Washington: GPO, 2001. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2001-cst-0087?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2001-cst-0087?accountid=9673)>

that youth had not become more addicted to gambling over the past twenty-five years while legal gambling expanded, and that the bill could stimulate the underground market having a negative effect. Instead Shaffer suggested a broad review of gambling in college sports followed by a consortium of presidents. Ed Looney, the Director of the Council on Compulsive Gambling agreed with Shaffer. : “I just want to say, this bill, to eliminate sports betting, in my opinion, will not effectively stop gambling on college campuses. It’s not really worth putting this kind of legislation in if you really want to attack the problem. Ninety-eight percent of betting is actually, as we know, illegal.”¹¹⁸

A very mixed and contradictory image appeared out of this hearing. Terry Hartle, the senior vice president of the American Council on Education supported the bill because the last two point shaving scandals involved Las Vegas sports book. Hartle called for “no loopholes. No mixed signals. No uncertainty. A clear unambiguous message.”¹¹⁹ William Saum of the NCAA agreed completely with Hartle. He also defended the NCAA’s actions to prevent gambling and placed responsibility on schools to self-police. In 2001 a joint meeting of the House committee on judiciary and Senate committee on Judiciary urged Congress to pass the bill. Once again, at the very least a significant part of Congress trusted the judgment of the NCAA. Still, the Nevada lobbying bloc was the toughest the NCAA had faced yet.

In 2002 the House subcommittee on Commerce Trade and Consumer Protection held a hearing addressing multiple challenges facing amateur athletics, including and emphasizing intercollegiate gambling. Several congressmen began the meeting by identifying different problems, including lax penalties for violations of the Right-to-Know act and exploitation of

¹¹⁸ *Ibid*, 62

¹¹⁹ *Ibid*, 65

athletes by schools and corporations. Shelley Berkley, a Nevada representative gave a largely anti-NCAA speech, citing examples of coaches and presidents thinking the gambling ban would not have an effect but refusing to testify out of fear of the NCAA. Congressman Tom Osborne once again spoke in support of the legislation. William Saum, the perennial NCAA representative, said “legalized amateur sports wagering in Nevada continues to blunt efforts of the NCAA and higher education to combat college sports wagering.”¹²⁰ Michael Aguirre, of the NCAA DI student athlete advisory committee spoke to various concerns although none dealing with gambling. The hearing ended with little fanfare, although Tom McMillan astutely noted that Congress could not depend on the NCAA to change from within, because too much momentum was in place. With the end of this hearing came the end of concerted Congressional efforts to regulate gambling, a major victory for Vegas, and a symbolic though insignificant defeat for the NCAA.

Following the gambling battle, Congressional involvement in student athlete regulation became fragmented. In 2004 the House Subcommittee on Commerce, Trade, and Consumer Protection convened to discuss reform in the NCAA. Each Congressman seemed to have his or her own agenda about what mattered most, including educational issues and recruiting practices. Most of Congress remained supportive of the NCAA. Barbara Cubin voiced this sentiment when she said “I truly believe this association is founded upon a desire to craft policies and regulations designed to protect collegiate athletes and guide their academic progress.”¹²¹ Further trust was

¹²⁰ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection. Hearings on Challenges Facing Amateur Athletics. 107th Cong., 2nd sess. Washington: GPO, 2002. 31. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2002-hec-0005?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2002-hec-0005?accountid=9673)>

¹²¹ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce. Hearings on Supporting Our Intercollegiate Student-Athletes: Proposed NCAA Reforms. 108th Cong., 2nd sess. Washington: GPO, 2004. 8. ProQuest. Web. 31. March 2015.

expressed for the NCAA by William Friday, President emeritus of the University of North Carolina and co-chair of the Knight Commission. Friday said that he was happy with recent reform, for instance the NCAA adopted a package tying scholarships and postseason play to academic performance. Despite the positive actions of the NCAA, conditions were not good: for example of the 2003 basketball tournament, three quarters of the “sweet 16 teams” graduated less than fifty percent of their players and three quarters of final four teams graduated less than thirty percent of their basketball players. The Knight commission also gave recommendations for lowering extravagance of recruiting practices, including explicit wording against inducement via sex and drugs. Friday finished by commending President Brand of the NCAA for increasing the enforcement staff by fifty percent.

The hearing was brief, and can be summarized by some closing remarks by Representative Tom McMillan. “I like to have an all-powerful NCAA. I like them to control it based on academic values not commercial values.”¹²² The underlying assumption of this statement was that the NCAA did not act based on commercial values. The point of this thesis is not to show that commercial values were present, but to show that Congress made assumptions. Because of these assumptions and the resulting trust, they put less pressure on the NCAA and less reform occurred as a result.

Throughout the early 2000s examples accumulated of the courts trusting the NCAA. In May of 2004 The Colorado Division Five Court of Appeals heard *Jeremy Bloom v NCAA and Regents of University of Colorado*. Bloom, the athlete was denied a waiver from the NCAA to do endorsements and media activities as a skier while he competed in intercollegiate football for

<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2004-hec-0028?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2004-hec-0028?accountid=9673)>

¹²² *Ibid*, 33

Colorado. Bloom sued for injunctive release claiming media activities were necessary for his pro skiing career and that the rule was arbitrarily applied because his amateur status as football player was not affected. The court found that Bloom had standing to sue as a third party beneficiary of the NCAA constitution. However the judge ruled that “paid entertainment activity may impinge upon the amateur ideal if the opportunity were obtained or advanced because of the student's athletic ability or prestige, even though that activity may further the education of student-athletes such as Bloom, a communications major.” Therefore the court found no evidence of unfair or arbitrary treatment and denied the injunction.¹²³

In 2005 the House Subcommittee on Commerce, Trade, and Consumer Protection convened to discuss steroids in sports. Donald Hooton, a Professor of sports medicine at Oregon University, spoke regarding the steroid related suicide of his son and recommendations to prevent steroid use. The main weapons according to Hooton were testing and education, aimed at coaches and students. Sandra Worth, the head athletic trainer at Maryland University, expanded Hooton’s recommendation to include education for parents, whom she found often supplied their children. The hearing proceeded along this track, mostly focusing on steroid use with little focus on the NCAA.

Time was eventually given to the NCAA to explain its procedure. Mary Wilfert, chief liaison to the committee on competitive safeguards of the NCAA, explained that her committee served to “assist the NCAA in the development of drug education and testing policies, and provide medical and policy review and adjudication for any student athlete who wishes to appeal

¹²³ *Bloom v. NCAA*. Ed. P.3d. 93rd ed. Court of Appeals No. 02CA2302 Vol. COURT OF APPEALS OF COLORADO, DIVISION FIVE, 2004. Print.

a positive drug test.”¹²⁴ She went on to explain that the NCAA provided 500,000 dollars in funding to schools for educational programs and four million for drug testing programs. Institutions also provided funds. Beyond this the NCAA provided a website, call center, and two testing programs based in UCLA’s Olympic analytical lab, with a longer list of banned substances than nationally required. One failure meant a one-year ban and loss of one year of eligibility and a second failure meant athletic suspension forever. Wilfert claimed that the NCAA had been effective. In 1989 9.7% of athletes used anabolic steroids, in 1993 5.0%, 1997 2.2%, and in 2001 3.0%. In the end Congress congratulated the NCAA on being superior to pro sports organizations like the MLB. “Amateurs appear to be at the top.”¹²⁵ Trust in the NCAA’s drug procedure extended to the court system as well, as seen earlier in *Hill v NCAA*.

Toward the end of the 2000s, a few courts began to find problems with NCAA restraints on amateurism. The Ohio Court of Common Pleas, in 2009, ruled in favor of the plaintiff in *Oliver v NCAA*. Andrew Oliver attended a meeting with the Minnesota twins and rejected their offer in favor of attending Oklahoma on full scholarship. The NCAA found out during Oliver’s sophomore year when he fired his attorney, and the attorney went to the NCAA alleging violations. In this case Oliver argued that restriction of legal counsel can only be regulated by the Ohio Supreme Court, making the NCAA bylaw void. He also argued that the bylaw limited an athlete’s ability to negotiate contract. In a unique case, the court found for Oliver, finding that the allowing of an athlete to hire an attorney but limiting that attorney is impossible to enforce and therefore arbitrarily enforced. “For a student-athlete to be permitted to have an attorney and

¹²⁴ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection. Hearings on Steroids in Sports: Cheating the System and Gambling Your Health. 109th Cong., 1st sess. Washington: GPO, 2005. 101. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2005-hec-0046?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2005-hec-0046?accountid=9673)>

¹²⁵ *Ibid*, 116

then to tell that student-athlete that his attorney cannot be present during the discussion of an offer from a professional organization is akin to a patient hiring a doctor, but the doctor is told by the hospital board and the insurance company that he cannot be present when the patient meets with a surgeon because the conference may improve his patient's decision-making power.”¹²⁶

Some of this distrust spread to Congress, but not enough to cause actual change. The National Collegiate Athletics Accountability (NCAA) Act was introduced to the House in 2013 but never acted on. The NCAA Act would have not allowed schools to be a part of a non-profit intercollegiate athletic association unless that association required annual concussion testing before participation in drills. The bill would have provided due process during infractions procedure. It prevented cutting scholarships during the first four years of college due to skill or injury, and it did not prohibit paying stipends to athletes. The bill had support, it was introduced by nine house members, but not enough of Congress had the requisite level of distrust of the NCAA to make the bill viable. Even the threat of passage would have sparked serious internal reform, like the Right-to-Know act did in the early 1990s.

As we will continue to see, the NCAA realized that hearings before Congress were just talk: Congress trusted the NCAA to do what was best. Without the threat of intervention, reform was somewhere between slow and nonexistent. The courts also failed to be a source of pressure on the NCAA, although they were and are more limited in their ability to create equitable solutions. Congress managed to force change in a few hot-button issues, and the result was a landslide of other changes. These areas of Congressional action were few and far between, and

¹²⁶ *Oliver v. NCAA*. Ed. Ohio Misc. 2d. 155th ed. Case No. 2008 CV 762 Vol. STATE OF OHIO, COURT OF COMMON PLEAS, ERIE COUNTY, 2009. Print.

as we will see in the last two chapters, were not always the most pressing in terms of justice and equity.

Chapter 5: Football, Television, and Antitrust laws

I'm going to throw my weight around a little bit, I think it's the right thing to do

-President Obama on 60 minutes regarding a college football playoff, November 2008

I think it is about time that we had playoffs in college football. You know, I'm fed up with these computer rankings and this and that and the other. Get eight teams, the top eight teams right at the end, you've got a playoff; decide on a national champion.

-President Obama to ESPN's Chris Berman, February 2009

I just want to point out that I was pushing for a playoff system — we got a playoff system. One more promise kept for those of you who are following college football.

-President Obama at a campaign event at Ohio University, October 2012¹²⁷

In 1984 the Supreme Court ruled in *NCAA v Board of Regents* that the NCAA could not negotiate on behalf of its members collectively for television contracts. Previously, the NCAA had carefully regulated who could be televised, and when, in order to create equity in revenue and television time. Following this case Congress failed to act to restore distributive power to the NCAA, in spite of convincing arguments to do so. Nearly twenty years later, supposedly in the name of fairness of competition, Congress and the federal government became inextricably involved in the formation of a college football playoff. The different levels of action can only be explained by the general popularity of a playoff system and not the interest of fairness.

Following the 1984 case the courts did not continue to regulate NCAA action. The line was drawn between commercial and non-commercial action, and in almost every instance NCAA action was found to be non-commercial. When a business was dramatically injured by a new NCAA rule it would argue monopolistic activity, and every time the court decided that the

¹²⁷ Wogan, J. B. "A New Playoff is Coming." The Tampa Bay Times 2012. Web.

"Remarks by the President at Ohio University, Athens, OH." 2012. Web. The White House.
<<https://www.whitehouse.gov/the-press-office/2012/10/17/remarks-president-ohio-university-athens-oh>>.

new rule was rational and non-economic in nature. In recent years the courts have begun to waver, in some cases siding with athletes challenging economic activity of the NCAA. Congress has remained silent regarding these recent issues dividing courts.

Before the *Board of Regents* case, the courts rarely found NCAA economic activity to be a violation of antitrust laws. One example occurred in 1974 when the United States District Court for New Jersey heard *College Athletic Placement Service v NCAA*. The College Athletic Placement Service found scholarships for student athletes in less popular sports in return for a fee. The company relied on a letter from the NCAA saying athlete eligibility would not be jeopardized for using the company. In this case the placement service was challenging the fact that the NCAA drafted legislation, without warning the company, which made athletes who used the company ineligible. The district court found in favor of the NCAA because the action was merely a byproduct of the decision to prevent the compromising of admission standards of member universities, not intent to discriminate or exclude the company. Despite the fact that NCAA legislation drove business out of the market it did not violate antitrust laws because there was no anticompetitive intent.¹²⁸

College Athletic Placement Service v. NCAA was the standard of the time, making *NCAA v Board of Regents of the University of Oklahoma* a surprise in 1984. In 1983 the Universities of Georgia and Oklahoma contracted to air more games on TV than the NCAA allowed, and the association threatened sanctions so the schools filed suit. The District and Circuit Courts both held that the NCAA regulation of television rights was *per se* price fixing. The Supreme Court also found the action illegal, but used the less harsh rule of reason test. Previously the NCAA had negotiated agreements with ABC and CBS for all of college football.

¹²⁸ *College Athletic Placement Service v. NCAA*. Civil Action 74-1144. Vol. United States District Court for the District of New Jersey, 1974. Print.

*The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is affirmed.*¹²⁹

While the court acknowledged the important role the NCAA plays, it decided that in this case the NCAA was acting predominantly out of economic interest. Only two justices dissented, and these two focused on the pro-competitive purpose of NCAA control over television rights. They believed that NCAA control allowed the maintenance of an economically competitive and equitable environment among universities. The dissent argued that ultimately NCAA control maintained amateurism in college football.

This decision created immediate tidal waves in the world of college sports, and one month later the House Subcommittee on Oversight and Investigations met to discuss the implications. John Toner, the president of the NCAA, explained that the TV plan which the Supreme Court voided was voted on 220 to six with twenty-eight abstentions by the membership. He explained in detail the specifications of the plan, which allowed flexibility and

¹²⁹ *National Collegiate Athletic Association v. Board of Regents*. Ed. U.S. 468th ed. No. 83-271 Vol. SUPREME COURT OF THE UNITED STATES, 1984. Print.

some individual negotiation and televised more games than ever before. According to Toner the NCAA had been sued before for price fixing and had always won in court under the rule of reason. Following the suit the NCAA and more so the universities lost considerable revenue: the previous agreement would have meant seventy-eight million dollars and the disjointed negotiations netted around thirty-one million dollars. Furthermore, new restrictions were imposed on intra-conference games. “My dismay stems from the fact that there is no one now looking after the welfare of college football as a whole.”¹³⁰ Toner believed that this decision would unbalance college football: certain programs would gain most of the revenue and TV networks would dictate development.

Wiles Hallock, former chairman of the NCAA football television committee, agreed that TV networks needed to be held in check: “Preserving the integrity of the great game of college football is more important than all the money in the world.”¹³¹ The dissatisfaction with the decision was felt at every level. John Crouthamel, the director of athletics at Syracuse University, said “when it appeared that the NCAA television plan could be struck down, there was near unanimous opinion among Division IA that nationally imposed controls of football television was highly desirable.”¹³² Of the seventy-eight million dollars, NCAA would have taken five percent for the purpose of providing for postgraduate scholarship programs for graduating football players, the enforcement program, and other costs of football services. While this is a very significant amount of money, as we have seen throughout the NCAA’s history, more important to the NCAA was control.

¹³⁰ United States. Cong. House. Subcommittee on Oversight and Investigations. Hearings on Televised College Football. 98th Cong., 2nd sess. Washington: GPO, 1984. 9. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1984-hec-0055?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1984-hec-0055?accountid=9673)>

¹³¹ *Ibid*, 68

¹³² *Ibid*, 69

One of the plaintiffs in *Board of Regents*, Fred Davison (the president of the University of Georgia), argued that his school needed more power because football revenue had to support all other sports and that it was inconsistent that football was the only sport in which the NCAA regulated television time. “NCAA control of the commercial aspects of the property interests of its member institutions is not that organization’s purpose.”¹³³ As energetically as Davison argued against NCAA control, many more argued for it. For example Charles Young, Chancellor of the University of California, said “The NCAA football television plan or one very much like it was not only appropriate but essential to the maintenance of any degree of fairness and rationality in the telecasting of regular season college football.”¹³⁴ Joe Paterno of Penn State University took a more rational middle ground and stated his belief that it would be more helpful to come back in a year after everything shook out.

Charles Neinas spoke next as the executive director of the College Football Association (CFA), the organization stepping into the vacuum left by the NCAA. Neinas said that in 1979 the CFA gained a four year contract where each of its sixty-one schools were guaranteed a million dollar payout and two nationally televised games, the NCAA attempted to prevent this plan which was what sparked law suits. He argued, illogically, that more teams would appear on television than before, including teams in lesser known divisions. James Delaney, the commissioner of the Ohio Valley Conference explained that DIAA members (smaller football programs) suffered financially in response to the Supreme Court decision, and were looking to cut aid in nonrevenue sports and reduce coaching. “In a totally laissez faire marketplace it

¹³³ *Ibid*, 87

¹³⁴ *Ibid*, 87

appears that [Division] I-AA II and III institutions will find TV and cable opportunities few and far between.”¹³⁵

Neal Pilson, the executive Vice President of CBS argued for the free market and explained that this year would not be a good representation because plans were hastily made. He believed it best that market forces drive down the price television companies paid for games because there existed more supply than the NCAA negotiated for. Only the large television organizations were for the new plan: Robert Wormington of KSHB TV in Kansas City, Missouri said “Whereas at least the NCAA had justification in its historical role in the preservation and encouragement of intercollegiate amateur athletics, new associations, like CFA, have no reason for existence except to increase profits by artificially restricting the number of games that can be telecast.”¹³⁶

Following up on Paterno’s advice, the Senate Committee on Judiciary met in late November of 1984 to discuss the repercussions of *NCAA v Board of Regents*. According to Senator Chuck Grassley the hearing addressed three primary questions: Should Congress grant the NCAA an exemption from antitrust laws? What effect has the Supreme Court decision had? And has it increased or decreased viewership of college football? James Hedlund, the VP of Independent Television Stations (INTV consisted of 130 TV stations around the country who bought or produced broadcasting time), sued the CFA and a collection of large television companies for breaching the same antitrust laws which the NCAA violated. “Essentially the CFA is doing exactly what the court found the NCAA guilty of doing, which is conspiring to reduce output and increase prices.”¹³⁷ However the CFA, unlike the NCAA, was not guided by equity.

¹³⁵ *Ibid*, 109

¹³⁶ *Ibid*, 139

¹³⁷ United States. Cong. Senate. Committee on the Judiciary. Hearings on Supreme Court Decision in "NCAA v. University of Oklahoma". 98th Cong., 2nd sess. Washington: GPO, 1984. 8. ProQuest. Web. 31. March 2015.

Despite these gripes, most parties agreed that there now existed more viewing options and ratings were up.

While Division IA viewership rose, DIAA, DII, and DIII became less marketable. Even in Division I, crossover games between conferences remained an economic and legal concern. Richard Snider, the director of communications of the CFA, said that attendance was up at games, networks were getting a great product for cheap, and schools were making good revenue. What Snider did not mention is that he was only referring to those sixty power-conference schools that the CFA represented. John Kurtt, athletic director of Wartburg College, testified that he could no longer market his team or compete with big name schools in Iowa. Furthermore the DIII playoff dropped from sixteen to eight schools following the TV shift. Max Urick, the athletic director of Iowa State, also disliked the new system despite working for a powerhouse school: he was especially distressed by the juggling of and disorganization of start times for games.

That year a judge refined the decision to allow the NCAA to sanction schools using football television time as a weapon. With this restoration of power the NCAA became a less vocal advocate of Congressional action to restore the balance. The victims were lower division football programs, and Congress was not incentivized to act on their behalf. In 1991 Congress introduced but failed to pass a bill that would grant the NCAA a five year exemption from antitrust laws. This bill was unacceptable to the NCAA because it came with the requirement of due process for disciplinary action. By the end of the 1990s the CFA had lost all power and in its place conferences negotiated television deals, creating a permanent status divide between the five DIA power conferences and the rest of college football.

Despite the Supreme Court's ruling in *Board of Regents*, the courts were loath to find NCAA action economic in nature. In 1988 the 5th Circuit Court of Appeals heard *David R. McCormack v. NCAA*. The plaintiffs in this case were football players and cheerleaders from Southern Methodist University challenging the NCAA imposed death penalty on their football program. "While we give the loyal students and alumni credit for making a college try, we affirm the judgment dismissing their complaint, for we hold that some of the plaintiffs lack standing and the others have failed to state a claim for which relief can be granted to them." SMU students argued that restricting compensation was price fixing and that suspension of the football program amounted to a group boycott. In the end the 5th Circuit agreed with the NCAA argument: "The NCAA argues that, despite the holding in *Board of Regents*, its eligibility rules are not subject to the antitrust laws because, unlike the television restrictions in *Board of Regents*, the eligibility rules have purely or primarily noncommercial objectives."¹³⁸

The power of the NCAA before the courts mostly grew through the late twentieth century. In 1988 the NCAA won the case *NCAA v Paul Hornung* before the Supreme Court of Kentucky. In this case the NCAA rejected an announcer the TV networks submitted for a selection of football games because the association didn't approve of his reputation. The court found no evidence of malice and therefore determined that the action was legal.¹³⁹ In 1990, in *NCAA v Commissioner of the IRS*, the NCAA defeated the IRS. By proving that the selling and preparing of advertising for the college basketball tournament was not long lasting, the NCAA escaped taxation.¹⁴⁰ In *Norman Law v NCAA* in 1998 the 10th circuit court ruled in favor of the

¹³⁸ *McCormack v. National Collegiate Athletic Association*. Ed. F.2d. 845th ed. No. 87-2802 Vol. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, 1988. Print.

¹³⁹ *National Collegiate Athletic Association. v. Hornung*. Ed. S.W.2d. 754th ed. No. 87-SC-580-DG Vol. Supreme Court of Kentucky, 1988. Print.

¹⁴⁰ *National Collegiate Athletic Association v. Commissioner*. Ed. F.2d. 914th ed. No. 89-9005 Vol. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 1990. Print.

plaintiff, this time finding NCAA activity to be more economic in nature. The NCAA rule in question limited entry level division I coaches' salaries to \$160,000 per year, in an effort to balance the playing field between richer and poorer programs. The 10th circuit unequivocally found a horizontal attempt to fix prices, giving rise to an anticompetitive effect on the market. The NCAA rule was, under the rule of reason, illegal.¹⁴¹ A more indicative case for this era was *Pocono Invitational Sports Camp v NCAA* (2004, US District Court for Eastern Pennsylvania). In this case the plaintiffs challenged a rule stating that division I coaches can only evaluate prospects if the camps are certified. Instead of focusing on the economic effects, the court concluded that "when the NCAA promulgated these rules it was acting in a paternalistic capacity to promote amateurism and education. Thus, for the same reasons the Third Circuit found eligibility rules immune from antitrust scrutiny, I find that these recruiting rules are also immune."¹⁴²

Whereas Congress did not choose to act in response to *Board of Regents*, in 1997 it became a strong proponent of the college playoff system. The House subcommittee on antitrust business rights and competition met first to discuss problems with the bowl system. At that time there were four major conferences, the SEC, Big 12, ACC, and Big East, with three major bowls, the sugar, orange, and fiesta. Each conference was guaranteed one spot and the remaining two teams were chosen at large. Beginning in 1998 the Pac 10 and Big 10 would be included as power conferences in the BCS with representation in the Rose Bowl. One BCS bowl each year, beginning in 1998, would host the two top teams in a national championship. The complaints with the system were highlighted the year before when BYU was ranked fifth and not invited to

¹⁴¹ *Law v. NCAA*. Ed. F.3d. 134th ed. Nos. 96-3150, 96-3186, No. 96-3200 Vol. UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 1998. Print.

¹⁴² *Pocono Invitational Sports Camp, Inc. v. NCAA*. Ed. F. Supp. 2d. 317th ed. 00-CV-5708 Vol. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 2004. Print.

a major bowl. Each competitor in an alliance (BCS) bowl received about \$8,000,000 while non-alliance bowls maxed out at \$2,000,000.

Everyone agreed with Representative Mitch McConnell when he said that “The opportunity to compete in college football should be based on merit, not membership in an exclusive coalition.”¹⁴³ Where many disagreed was over whether or not the current system provided that opportunity. In their opening statements there was a near unanimous agreement among Senators that the system helped the rich get richer: In 1997 the four alliance bowls totaled sixty-eight million dollars while the twenty-eight non-alliance bowls totaled thirty-four million. Ron Cooper, head football coach for Louisville, confirmed that the alliance bowl system hurt his program financially and in terms of recruiting. As a part of Conference USA he felt limited in his opportunities. Richard Peace, a football player for University of Wyoming, complained that his school went ten and one with a loss in the WAC championship and was the only ranked team to not be invited to a bowl, while thirteen unranked teams were invited. “Somewhere along the line, the focus shifted from rewarding successful teams to lining the pockets of successful corporations.”¹⁴⁴

The executive director of the NCAA, Cedric Dempsey, spoke in defense of his organization and of postseason football. Every decade the playoff system was discussed: in 1988 it was voted down ninety-eight to thirteen, and in 1994 the association carried out an exhaustive study and didn’t recommend a playoff despite its merits. Dempsey emphasized that time and again the university presidents decide that they do not want a playoff. The role of the NCAA in

¹⁴³ United States. Cong. Senate. Subcommittee on Antitrust, Business Rights, and Competition. Hearings on Antitrust Implications of the College Bowl Alliance. 98th Cong., 2nd sess. Washington: GPO, 1997. 9. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1997-sjs-0002?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1997-sjs-0002?accountid=9673)>

¹⁴⁴ *Ibid*, 30

the process is to supervise finances, require a distribution system with every team getting a certain amount, and do five random audits per year. Still, the NCAA had minimal to no authority over game time, team selection, television, or marketing. It had fought for this power fifteen years earlier but now used its lack of authority to avoid responsibility. Dempsey summarized the overall reasoning against changing the status quo: “disruption of student athletes’ academic calendars, lengthening the season, [and] increased pressures to win.”¹⁴⁵ Schools also did not want to cause a negative impact on yearly bowl games.

To conclude the hearing it was discovered that only two out of ten DIA representatives to the president’s council were from non-alliance schools, and that this body had the power to decide the future of post season play. Congress was temporarily appeased with the introduction of the national championship in 1998, but the issue would appear before the House Committee of the Judiciary in 2003. The purpose of the hearing was to ensure that “merit prevails over money, fundamental fairness trumps the fundamentals of good marketing, hard work triumphs over cash, and the noble aspirations of amateur athletes do not yield to the cold reality of corporate and university profits.”¹⁴⁶ The president of the NCAA, Myles Brand, explained that there were four possible changes (all with minimal role from the NCAA) including the creation of a post season tournament, an additional championship game after bowl season, broader criteria for the top four bowls, or increased number of bowls in the BCS (Bowl Championship Series) contract.

The NCAA remained against a playoff system for academic reasons and against redistribution of BCS wealth for free market reasons. Still, it agreed to host a discussion between

¹⁴⁵ *Ibid*, 46

¹⁴⁶ United States. Cong. House. Committee on the Judiciary. Hearings on Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series. 108th Cong., 1st sess. Washington: GPO, 2003. 3. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2003-hjh-0002?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2003-hjh-0002?accountid=9673)>

BCS and non-BCS schools as a neutral party to reach a mutually beneficial agreement. James Delaney, now the commissioner of the Big Ten Conference, spoke next and explained that opposition to playoffs came from university presidents collectively. He personally contended that conferences that have the BCS system depend on the money to pay for programs while non BCS schools already provide subsidies to football. Why shift the paradigm? To answer that question Scott Cowen, president of Tulane University and Chairman Presidential Coalition for Athletics Reform, said “The current system simply does not meet any test of fairness and is anathema to everything we stand for in higher education.”¹⁴⁷ He also made the argument that fans love seeing the underdog, and the inclusion of non-BCS schools would draw crowds.

The next month the Senate Committee on the Judiciary held a hearing titled *BCS or Bust* to address the same question. Senator Bennett began by stating his belief that eventually the public would get bored of the system because it did not allow for enough variety. Like the House Representatives, the Senators agreed that the system was not fair. According to President Brand of the NCAA, the meeting between BCS and non-BCS schools “accomplished more than anyone would have expected” and the parties would meet again in another month to discuss postseason options.¹⁴⁸ As always, internal reform was the preferred method by the NCAA. From the testimony at the hearing it appeared unlikely that the major conferences would concede power to smaller football programs. “What critics are asking is to share in money they did not produce... But even with such sharing, the amount of funds in the BCS is insufficient to make a noticeable dent in any disparities that exist,” said Harvey Perlman, the chancellor of the University of

¹⁴⁷ *Ibid*, 16

¹⁴⁸ United States. Cong. Senate. Committee on the Judiciary. Hearings on BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series on and off the Field. 108th Cong., 1st sess. Washington: GPO, 2003. 14. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2003-sjs-0029?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2003-sjs-0029?accountid=9673)>

Nebraska.¹⁴⁹ Keith Tribble, CEO of the Orange Bowl, argued against any change for fear it would disrupt the historic and profitable bowl system. It seemed at the end of this hearing that the status quo was perhaps unfair, but thoroughly entrenched.

Two years later, in 2005, the House Subcommittee on Commerce, Trade, and Consumer Protection reviewed the BCS system once again: Congress was not going to relent on this issue. Kevin Weidberg, coordinator of the BCS and Commissioner of the Big 12 reiterated the same arguments as before, and argued that a playoff went against the “the nature and mission of bowl games.”¹⁵⁰ According to Weidberg the current system maximized postseason opportunities, regular season impact, and academic concerns. He also threatened that eleven out of twelve SEC presidents would prefer to terminate the BCS system and return to the pre-championship era than go to a playoff system. John Junker, President and CEO of the Fiesta Bowl, agreed with Weidberg: “Although I won’t claim perfection, I will tell you that independent business units that are represented by bowl games are by their nature very effective at serving the interests of our customers and the athletic conferences and other member universities who utilize our service.”¹⁵¹ Derrick Fox of the Alamo Bowl mirrored this sentiment. Towards the end of the hearing Weidberg conceded that the plus-one model (adding a post bowl season national championship) deserved review, though Delaney called this a slippery slope.

This marked the end of Congressional hearings dedicated to the BCS system, but not the end of Congress’s involvement. In 2008 Congressman Neil Abercrombie issued a resolution demanding that the Justice Department take action to investigate and end the BCS system and

¹⁴⁹ *Ibid*, 14

¹⁵⁰ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection. Hearings on Determining a Champion on the Field: A Comprehensive Review of the BCS and Postseason College Football. 109th Cong., 1st sess. Washington: GPO, 2005. 17. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2005-hec-0106?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2005-hec-0106?accountid=9673)>

¹⁵¹ *Ibid*, 33

encourage a playoff system. In 2008 the College Football Playoff Act failed to escape the House, but would have prohibited the marketing and advertising of post season NCAA football games as a championship without a playoff system. In 2009 the Championship Fairness Act also failed and would have prohibited colleges from receiving federal funds during any year in which its football team played in a NCAA football Division I bowl subdivision unless there was a final playoff system. Finally the College Football Playoff Act of 2011 failed to achieve its purpose of prohibiting marketing of a championship without a playoff.

If this was like every other Congress-NCAA interaction the story would have stopped here. Instead the Department of Justice sent a letter to the NCAA questioning the BCS system. It was not part of a formal investigation but used a clearly probing tone. The letter was from the assistant attorney general of the antitrust division, Christine Varney, to the NCAA president, Mark Emmert. She asked three questions: why there is no playoff when other sports have it, what steps the NCAA has taken to create a playoff and why these failed, and what the NCAA plans to do now. She concluded the letter with the ominous but noncommittal statement: "Your views would be relevant in helping us determine the best course of action with regard to the BCS."¹⁵² The letter was copied to Bill Hancock, executive director of the BCS.

Emmert's response can best be described as testy: "Inasmuch as the BCS system does not fall under the purview of the NCAA, it is not appropriate for me to provide views on the system... As a result, your request for views on how the BCS system serves 'the interest of fans, colleges, universities, and players' is better directed to the BCS itself."¹⁵³ He proceeded to explain the bowl system in general and said that no proposal had come to the NCAA floor to add

¹⁵² Carey, Jack. "Justice Department Asks NCAA Why it Doesn't have Football Playoff." USA Today 2011. Web. <http://usatoday30.usatoday.com/sports/college/football/2011-05-04-justice-department-ncaa-bcs_N.htm>.

¹⁵³ Emmert, Mark. "Letter to the Department of Justice." May 18, 2011 2011. Web. USA Today. <<http://usatoday30.usatoday.com/sports/college/football/2011-05-18-ncaa-letter.pdf>>.

a playoff. In an interview Bill Hancock said, “We're confident the BCS complies with the law and we know it has been very good for college football. We're always happy to answer any questions.”¹⁵⁴ Despite the defensive response, within a year the NCAA and BCS had approved a college football playoff system.

The new system was implemented on New Year's Day of 2015. The BCS added two more alliance bowls, the new six including the Orange, Cotton, Sugar, Rose, Peach, and Fiesta. Each year two of these would serve as semi-finals in a four-team playoff while the other four bowls would host the champions of each of the power conferences: SEC, Big 12, ACC, Big 10, and Pac 12 as well as five at large bids. The highest ranked team of the five non-power conferences was also guaranteed a birth in an alliance bowl. A series of complex rules determined which conference champion would play in which bowl in order to account for every possible scenario of who made the four team playoff. At long last Congress had succeeded in its noble mission to bring playoffs to college football. Even Barack Obama was involved, as seen in the opening quotes of this chapter, although the extent of his influence is impossible to know.

While the federal government battled for a playoff in college football, the courts were hearing cases addressing another form of unfairness perpetrated by the NCAA, economic exploitation of athletes. In 2007 The United States district court for the Western District of Washington heard *In re NCAA I-A Walk-On Football Players Litigation*. In this hearing the NCAA sought summary judgment against the plaintiffs. These plaintiffs were walk on football players seeking a class designation in an antitrust suit challenging the NCAA bylaw limiting the number of football scholarships. These walk on athletes alleged that they would receive a full grant in aid if not for the NCAA limitation. The court denied the motion for summary judgment

¹⁵⁴ "NCAA: BCS can answer DOJ questions." 4/18/11 Web. Associated Press. <<http://sports.espn.go.com/nca/news/story?id=6563305>>.

finding “(1) that Plaintiffs had sufficiently alleged that the scholarship limit implicates the Sherman Act in a way that eligibility rules do not, (2) that Plaintiffs are entitled to the opportunity to prove that there is a relevant market to which a rule-of-reason analysis can be applied, (3) that Plaintiffs had sufficiently alleged injury to competition, and (4) that Plaintiffs should have the opportunity to demonstrate that the NCAA has monopoly power over the alleged market.”¹⁵⁵ However, the court rejected the plaintiffs’ amendment to add a current walk-on-athlete, as every athlete represented had already graduated, making the case less viable.

A similar case rose to the 7th Circuit Court of Appeals in 2012: In *Agnew v NCAA* the plaintiffs challenged both the NCAA bylaw preventing multi-year scholarships and the bylaw limiting the total number of scholarships per school. While the athletes contended that this was a violation of the Sherman anti-trust act, the district and circuit court agreed that the plaintiffs did not specify a cognizable market. The circuit court stated that the Supreme Court had created presumption in favor of NCAA rules in *NCAA v Board of Regents*, but admitted that in this case “The proper identification of a labor market for student-athletes, on the other hand, would meet plaintiffs’ burden of describing a cognizable market under the Sherman Act.”¹⁵⁶

In 2013 the 9th Circuit Court heard *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, challenging NCAA use of players’ names and likenesses. Court found that use of player’s likeness did not qualify the NCAA for first amendment protection because the challenged media (a video game) recreated the player in a setting of the player’s renown. The question boiled down to “whether the work in question adds significant creative elements so as

¹⁵⁵ *In Re NCAA I-A Walk-on Football Players Litigation*. CASE NO. C04-1254C Vol. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, 2007. Print.

¹⁵⁶ *Agnew v. NCAA*. 1:11-cv-0293-JMS-MJD Vol. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, 2011. Print.

to be transformed into something more than a mere celebrity likeness or imitation.”¹⁵⁷ While the court did not issue an injunction against Electronic Arts (EA), 2012 was the last year the company released a new NCAA sports game, likely out of fear of future litigation.

In *John Rock v NCAA*, 2013, the US District Court of Southern Indiana heard another case against the NCAA bylaws regulating scholarships. Rock lost his football scholarship before senior year because of a coaching change, but his initial suit was dismissed without prejudice and he was told need to amend the complaint to include detailed facts on the relevant market. For the first time the court found that the “complaint at issue pleads the rough contours of a relevant market that is plausible on its face and in which anticompetitive effects of the challenged regulations could be felt.” However the court stipulated that “this ruling should not be read too broadly. The burdens at the subsequent stages of litigation are significantly higher than they are in opposing a motion to dismiss, and Mr. Rock may struggle to identify admissible evidence.”¹⁵⁸ In this case Rock used the structure of NCAA Division I football to prove a cognizable market. The result at this stage was survival over a motion to dismiss.

In 2014, in *O’Bannon v NCAA*, the NCAA suffered one of its largest legal defeats. The United States District Court for the Northern District of California issued an injunction against the NCAA’s use of athlete likenesses without compensation for the athlete. The court found that the bylaw preventing compensation of athletes was an unfair restraint on price and competition in the market of Division I football and basketball. Furthermore, the NCAA’s amateurism reasons did not justify such a restraint because the same purposes could be achieved via less restrictive means. As evidence of a cognizable market, the court wrote, “Between 2007 and

¹⁵⁷ *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*. No. C 09-1967 CW Vol. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 2013. Print.

¹⁵⁸ *Rock v. NCAA*. 1:12-cv-1019-JMS-DKL Vol. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, 2013. Print.

2011, more than ninety-eight percent of football recruits classified as four- or five-star recruits (the two highest ratings available) by Rivals.com accepted offers to play FBS football. None of the five-star recruits and only 0.2% of four-star recruits chose to play football at an FCS school and none chose to play at a Division II or III school during that period.”¹⁵⁹ This proved that there was no market that could compete with Division I NCAA athletics. And despite the termination of the NCAA’s agreement with EA (after *In Re Student Naming and Likeness*) nothing would prevent the formation of a new agreement, making the injunction justified.

While Congress battled for a playoff system, athletes scrapped for equity in the courts. Why would Congress hold three consecutive hearings on the injustices of the BCS and ignore the legal struggles of athletes who believed themselves to be exploited? It seems especially pertinent for Congress because of the multiplicity of sometimes contradictory opinions. There is still time for Congress to act, or at least investigate the question, but this is unlikely to happen. Congress has historically been guided, in regards to the NCAA, by what is visible, popular, or lobbied for by the NCAA. In the next chapter we will look at the problems with NCAA practices which have been completely overlooked by Congress. The NCAA has no interest in Congress advocating for athlete compensation, and would far prefer to slowly defeat its opposition in the courts. Despite the injunction imposed by *O’Bannon* it is unlikely that the courts will continue to impose on the NCAA. Ever since NCAA bylaws were first legally challenged, a precedent developed of trusting the NCAA’s purposes.

¹⁵⁹ *O’Bannon v. NCAA*. Ed. F. Supp. 3d. 7th ed. No. C 09-3329 CW Vol. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 2014. Print.

Chapter 6: Title IX and Diversity

*I think this is a problem that has languished far too long. It is a problem that needs to be corrected. It is a problem that needs to be exposed so that the American people will actually see what goes on in the area of college athletics, particularly at the athletic director, the head coaching levels, and also really at the athlete's level. I am concerned about student-athletes also. But this is just the first foray into this area of investigation and area of inquiry.*¹⁶⁰

-Chairman Bobby Rush, in Congress's only hearing on diversity in college sports, 2007

When confronted with the lack of opportunities for woman and minorities in college sports, Congress failed to take any form of decisive action. And while the NCAA was not to blame for causing disparate opportunities, it was also not putting significant effort toward a solution. Congress could have pressured the NCAA to force its members to make adjustments, but instead Congress held a few hearings and believed that the industry would reform itself. The result of this indifference was that during the mid-2000s Title IX requirements on Colleges became more relaxed. It is difficult to analyze the changing opportunities for minorities within college athletic leadership, because Congress only held one brief hearing on the subject.

In 1984 the NCAA drove the Association for Intercollegiate Athletics for Women out of business and usurped the power of women's intercollegiate athletics. A decade later the NCAA survived litigation attempting to place it under the rules of Title IX. What emerged was a system where the underactive Office of Civil Rights possessed full responsibility for investigating and disciplining Title IX infractions by universities. In response to legal discipline many universities fought back, arguing that rulings were unfair, that Title IX forced the destruction of men's

¹⁶⁰ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection. Hearings on Lack of Diversity in Leadership Positions in NCAA Collegiate Sports. 110th Cong., 1st sess. Washington: GPO, 2007. 45. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2007-hec-0007?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2007-hec-0007?accountid=9673)>

programs, and that money-making sports should be exempt because they funded women's sports. Congress listened idly to these arguments and let history happen around it.

A negligible number of cases regarding racial discrimination in athletic leadership went to court. The few NCAA race discrimination cases were discussed in previous chapters and usually involved challenges to academic regulations based on disparate impact. The decisions always favored the NCAA. Since the college sports have existed universities have perpetuated disparate opportunities for women and minorities, and the NCAA has failed to incentivize change. Neither the courts nor Congress has forced the NCAA to lead reform.

In 1984 the Circuit Court of Appeals for the District of Columbia heard *Association for Intercollegiate Athletics for Women (AIAW) v NCAA*. The AIAW argued that the NCAA used its monopoly power in men's sports to enter women's sports government and force the AIAW out, violating the Sherman Antitrust Act. During the 1981 – 1982 season the NCAA introduced twenty-nine women's championships causing the AIAW to lose twenty-two percent of dues, and many of the schools who stayed in the women's association competed in NCAA not AIAW events. The AIAW lost its NBC contract, its level of competition, and Kodak and Broderick sponsorships. It shut down on June 30 1982 and sued the NCAA on October 9, 1981.

In order to enter the field of women's sports the NCAA had reallocated its resources: it did not increase dues for schools who wanted to compete in women's championships, instead it just decreased the benefits and reimbursements given to men's programs. With the AIAW charging dues this made it economically untenable to remain a member. After reviewing the evidence the court concluded that the "AIAW voluntarily ceased operations in June 1982, not because of current bankruptcy, but due to a business estimation of accelerating economic

hardship in 1982-83.” It decided that the NCAA takeover was not an attempt at monopolization but that the NCAA viewed the AIAW as “a healthy alternative”¹⁶¹

While the NCAA accrued the power of sole administrator of women’s sports, it did not fully embrace the responsibility of providing equal opportunities for women in sporting. The Senate Subcommittee on Commerce Consumer Protection and Competitiveness met in 1992, twenty years after the passage of Title IX, to discuss inequalities. The chairwoman opened by saying “the GAO report today, as does the NCAA’s recent survey on gender equity, shows schools still do not carry out either the letter or the spirit of title IX which calls for equal opportunity for men and women in athletics.”¹⁶² At that time forty percent of women’s coaches were men, while none of the men’s coaches were women. This, among many other statistics, caused the Senate Subcommittee to demand to know what the NCAA had done to encourage compliance. Senator Alex McMillan predicted that the NCAA would claim to be making efforts, but believed twenty years after the fact was too little too late. This is why he introduced the Collegiate Athletic Reform Act in 1991 to distribute revenue based on academics and gender equity, although this bill was never acted on.

The NCAA was not completely passive, it had recently released a study and created a gender equity task force. The association contended that many high profile athletic directors and the NCAA president were women. Furthermore Title IX had only practically applied to athletics since the 1988 Civil Rights Restoration Act. Clarence Crawford, Associate Director of Education and Employment Issues at the General Accounting Office (GAO), surveyed all 298 Division I

¹⁶¹ *Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association*. Ed. F.2d. 735th ed. No. 83-1342 Vol. UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 1984. Print.

¹⁶² United States. Cong. House. Subcommittee on Commerce, Consumer Protection, and Competitiveness. Hearings on Intercollegiate Sports (Part 2). 102nd Cong., 2nd sess. Washington: GPO, 1992. 1. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1992-hec-0034?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1992-hec-0034?accountid=9673)>

schools; of the eighty-seven percent response only one woman served as athletic director and none coached football or men's basketball. Dick Shultz, the executive director of the NCAA, explained that the NCAA was working hard but believed that funds should come from the government to support women's athletic programs.

Many women leaders within the NCAA spoke, including Merrily Dean Baker, Athletic Director of Michigan State: "Much has been accomplished but much more needs to be done."¹⁶³ Phyllis Howlett, chair of the NCAA committee on women's athletics, took a slightly less complimentary tone: "We have a long way to go in achieving overall compliance with the law, not to speak of embracing the simple moral imperative of fairness and the provision of opportunity."¹⁶⁴ Dick Shultz acknowledged disparities, for example that more money was spent on men's than women's recruiting and that female coaches were paid less. Although he wouldn't elaborate as to why, the answer was obviously the profit difference between men's and women's athletics. In response to a suggestion of sanctions for non-compliance with Title IX, Shultz gave the evasive answer that sanction changes must come from the voting body.

Ellen Vargyas served as Senior Counsel for Education and Employment at the National Women's Law Center and litigated for *Haffer v Temple University*, one of the biggest Title IX cases. Her point was that the failure in the leadership of the university community was "exacerbated by the Office for Civil Rights' abandonment of a strong enforcement role and the practical difficulties inherent in bringing private litigation."¹⁶⁵ Christine Grant was one of the few to criticize despite being an insider (athletic director of the University of Iowa). She said that as a whole little has been achieved in twenty years, including on her campus; the failure to

¹⁶³ *Ibid*, 25

¹⁶⁴ *Ibid*, 24

¹⁶⁵ *Ibid*, 90

reform included the NCAA Presidents' Commission and the Knight Commission. According to Grant the 70s and 80s saw a five-fold increase in men's athletic funding. More troubling was the drop from 1972 to 1992 from ninety percent to seven percent of women administering women's athletic programs. She felt that colleges were complacent with thirty percent of college women participating in sports, but that number should be pushed.

In 1992 the rules guiding universities had emerged from *Blair v Washington State University* and *Haffer v Temple*, and did not implicate the NCAA in any way. Colleges could determine athletic interest of female and male athletes by a non-discriminatory method of their choice. The university had to provide a women's sport for every contact sport and every non-contact sport in which women were disadvantaged to compete. The college had to prove that athletic interests were fully accommodated and that scholarships were distributed proportionally to the number of athletes. Athletic benefits for men and women had to be equivalent but not identical. Finally equity was required in equipment, supplies, hiring, and pay. Finally the programs had to stand up to a wholesome comparison.

In 1993 the Senate Subcommittee on Commerce Consumer Protection and Competitiveness reconvened, this time introducing legislation requiring institutions receiving federal money to disclose expenditures on men's and women's programs, participation rate, and sports offered (modeled after the Student-Athlete Right-to-Know Act). The subcommittee was disappointed with the NCAA's response to the hearing the year before. Naturally the NCAA defended action it had taken. Thomas Hearn, the president of Wake Forest, said that the NCAA was in an era of reform, and that at this year's convention it had introduced a new certification process requiring institutions to make steady progress towards equity. Phyllis Howlett was on the task force assigned to gender equity and vouched for a change in the NCAA's school

certification process (to include gender equity) as well as other reforms in motion. The NCAA asserted that the final package of reforms would be put together by June.

The defensive attitude of the NCAA and its members was slowly shifting towards the attack. Grant Teaff, the athletic director of Baylor, said that his program had lost money over the past four years despite football operating with a half million dollar surplus. His point was that equity needed to be approached carefully, without tearing down old programs. Donna Lopiano, Executive Director of the Women's Sports Foundation, lashed back against this cautionary tone: "I think we are being naïve if we think that the NCAA is going to legislate anything that will require title IX compliance."¹⁶⁶ She recommended better training and more funding for the Office of Civil Rights (OCR) as well as the passage of legislation. Congresswoman Cardiss Collins was surprised at the force of this suggestion: "Well, among this panel you seem to have the minority view." "It is probably because I am no longer an athletic director and there's nobody that can yell at me,"¹⁶⁷ Lopiano responded.

Despite the prescient predictions of those like Donna Lopiano, Congress chose to listen to Wake Forest's President Hearn: "My belief is that there will be very substantial changes coming, and I think the efforts that are taking place at the institutional level... are going to continue across the country."¹⁶⁸ He rationalized that without factoring in football, schools provided equity in scholarships, and it was only fair that football not be included because fifty-five percent of Division I schools made money on football.

¹⁶⁶ United States. Cong. House. Subcommittee on Commerce, Consumer Protection, and Competitiveness. Hearings on Intercollegiate Sports. 103rd Cong., 1st sess. Washington: GPO, 1993. 18. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1993-hec-0001?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1993-hec-0001?accountid=9673)>

¹⁶⁷ *Ibid*, 37

¹⁶⁸ *Ibid*, 37

In 1995 the House Subcommittee on Post-Secondary Education, Training and Life-Long Learning held a broader and more conservative hearing on the subject. Emphasis was shifted away from the NCAA and more time was given to those who argued that Title IX was causing the destruction of men's programs. Congresswoman Patsy Mink proudly began by saying that before Title IX women were two percent of college varsity athletes and received 0.5% of the funding. Now women represent thirty-five percent of college athletics. Dan Hastert, the Olympic Swim Coach, then aired his concerns about schools dropping sports like swimming due to the opportunities test. "Has this in fact become a quota system that we have imposed on athletic systems in this country?"¹⁶⁹ He called for reform to Title IX in order to prevent the destruction of men's programs. Representative Cardiss Collins defended Title IX, saying the wording was not that of a quota system, but that schools must improve over time or meet the demand for participation in sports. Further she contended that forty-five percent of Division IA football teams reported a deficit; they weren't paying for women's sports. Collins suggested jolting the NCAA into action and that the OCR take some cases to court.

Norma Cantu, the assistant secretary for the Office of Civil Rights, explained the criteria given to schools and the history of Title IX enforcement. After her uneventful testimony, Vartan Gregorian, the president of Brown, spoke angrily against the Title IX litigation against his university. "These rules and guidelines are so ambiguous, so inconsistent, and so imprecise that they leave judges with total discretion and rob institutions of any flexibility in meeting OCR's tests of proportionality, history of continuous improvement, and meeting the interest and abilities

¹⁶⁹ United States. Cong. House. Subcommittee on Postsecondary Education, Training, and Life-Long Learning. Hearings on Title IX of the Education Amendments of 1972. 104th Cong., 1st sess. Washington: GPO, 1995. 12. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1995-eeo-0023?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-1995-eeo-0023?accountid=9673)>

of men and women athletics.”¹⁷⁰ Naturally he claimed to support Title IX, but wanted a clear cut definition. Brown had been convicted on March 29, 1995 of a Title IX infraction, even though only Harvard offered more sports. Brown cut funding to men’s teams, water polo and golf, as well as women’s gymnastics and volleyball. The changes affected sixty kids in the same ratio as student body, but the school was prosecuted by the OCR and found guilty.

David Jorns, president of Eastern Illinois University, mirrored this sentiment of dissatisfaction with the OCR. The settlement offered to his school would force him to cut two men’s sports and the women’s sports he was being told to add were without desire. Wrestling Coach at Cal State, TJ Kerr, extolled the crisis for male sports: this year alone fifteen to twenty wrestling programs would be lost. Kerr argued against the proportionality system saying that it would not be used for nursing or engineering.

In 1994 the NCAA voted to support gender equity as a basic principle, although it added no measures to ensure compliance. This was a way of showing progress to Congress without enacting any sort of meaningful change. Charles Neinas, executive director of the College Football Alliance, put the conservative backlash against Title IX into reasonable words: “What we do seek is practical, reasonable interpretations and guidelines from OCR to keep colleges and universities from becoming prisoners of strict proportionality.”¹⁷¹ What Neinas wanted was for legislators to take into account the unique size of the college football team without necessarily exempting football from Title IX proportionality. The NCAA did not choose to appear at the hearing, but instead Cedric Dempsey, executive director, mailed in a statement. The statement said that the NCAA had adopted legislation to encourage women’s athletics via new financial aid practices, and had incorporated gender equity in its constitution, but did not choose to include

¹⁷⁰ *Ibid*, 79

¹⁷¹ *Ibid*, 200

gender equity in the college certification process as had been promised. Congress did not meet to discuss Title IX for ten years; the NCAA had successfully avoided any pressure to reform.

Shortly after Congress refused to burden the NCAA with Title IX responsibilities, the Supreme Court did the same. In 1999, in *NCAA v R.M. Smith*, the highest court heard a suit alleging sexual discrimination, in which Smith was joined by the United States in an attempt to apply Title IX to NCAA procedure. Smith sued under Title IX saying the NCAA denied her the right to play volleyball at a federally assisted school. The circuit court had found that the receipt of funds from public school members brought the NCAA within the scope of Title IX. However, because the NCAA benefited economically from funds but did not receive them directly, the Supreme Court reversed this decision, finding that the NCAA was not bound by Title IX. Finally, the Supreme Court followed the precedent set by *Tarkanian* (that the NCAA did not have controlling authority over its institutions) in deciding that Title IX did not transfer from public institutions to the NCAA.¹⁷²

In 2006 the last hearing on Title IX in College Sports was held by the Senate Committee on Commerce, Science, and Transportation. This hearing, while including the NCAA, focused on inequality perpetuated in women's sports in general, not just college. It is unlikely that the NCAA felt any pressure as a result of the hearing. Donna Varona, an Olympian and President of the Women's Sports Foundation, highlighted some statistics in a critique of college sports: Women made up fifty-four percent of college students but received forty-three percent of participation opportunities, thirty-eight percent of operating dollars, and thirty-three percent of recruitment money. Her largest complaint was not with the current status but the changes happening in college sports. In March 2005 the Department of Education announced an

¹⁷² *NCAA v. Smith*. Ed. U.S. 525th ed. No. 98-84 Vol. SUPREME COURT OF THE UNITED STATES, 1999. Print.

additional clarification to Title IX. This clarification would allow schools to gauge female interest with an email survey, with no response is taken as no interest. According to Varona this would “perpetuate the cycle of discrimination to which women have been subjected.”¹⁷³ This policy was not revoked until 2010 when the determination of female interest again became based on a plethora of factors.¹⁷⁴

Congress did not address this very serious concern, but shifted focus to discussing opportunities in the international arena. Later, Judith Sweet, Senior VP Championships and Education Services NCAA, spoke: “I have seen firsthand the commitment of the NCAA and many universities to promote equity and, consequently, the resulting strides which have been made in the pursuit of gender equity on campuses and NCAA programs.”¹⁷⁵ Sweet said that in 1972 30,000 women participated in college sports but in 2006 160,000 women participated. She agreed that much work still needed to be done, and called the recent clarification pernicious, saying that the NCAA had notified the Department of Education with its concerns. She also defended the NCAA saying it had progressively increased the standards for schools as well as the number of women’s championships.

Christine Grant, the former athletic director and current Professor of Health and Sports Studies at Iowa was not as optimistic about college sports. She believed that women’s sports were trending downward because more money was being pumped into football and basketball

¹⁷³ United States. Cong. Senate. Committee on Commerce, Science, and Transportation. Hearings on the Promotion and Advancement of Women in Sports. 109th Cong., 2nd sess. Washington: GPO, 2006. 14. ProQuest. Web. 31. March 2015. <[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2006-cst-0025?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2006-cst-0025?accountid=9673)>

¹⁷⁴ The Department of Labor Puts the Teeth Back in Title IX by Revoking a Damaging 2005 Athletics Policy. National Women's Law Center, 2010. <<http://www.nwlc.org/sites/default/files/pdfs/FactSheeton2010TitleIXPolicy.pdf>>.

¹⁷⁵ Hearings on the Promotion and Advancement of Women in Sports. 45

than ever before. In 1985 football and basketball accounted for forty-nine percent of male sports budgets but in the latest analysis these two got seventy-four percent of athletic funding.

In 2007 the House Subcommittee on Commerce, Trade, and Consumer Protection met for the first and only time to discuss a lack of diversity in leadership positions in college sports. Previous hearings had mentioned racial issues, for example the disparate television rights for historically black colleges, but never had a hearing focused primarily on race. The hearing began by calling attention to several troubling statistics: In Division IA only sixteen athletic directors, twenty-five percent of basketball coaches, and seven of 119 head football coaches were black. Of the 616 football programs in the NCAA (not including historically black colleges) only fourteen head coaches were black. Not one Division I conference commissioner was of color. The chairman said that many members of the committee expressed cynicism about this hearing. They did not believe that the issue warranted a hearing. Of course in their opening statements all Representatives seemed to be supportive and in agreement that this was important.

Reverend Jesse Jackson, the president of the Rainbow/PUSH coalition, provided evidence of winning black coaches being blackballed in college football. For example when the Colorado head coach resigned he recommended his defensive coach Bob Simmons, whose defense was credited with the team's success, for the job. Instead the school went with a less experienced coach from UCLA and Simmons took over a lower budget program at Oklahoma State from which he defeated Colorado. Another example was Sylvester Croom, an Alabama native passed over by the University of Alabama for Don Shula. Despite these instances, and his critique of college football, Jackson was supportive of Myles Brand's leadership of the NCAA.

Brand, the NCAA president, agreed with Jackson that race was a problem in football: "But we also have challenges. Chief among them, in my view is the dismal record of hiring

people of color as head coaches, especially in football.”¹⁷⁶ Brand had worked with the Black Coaches Association (BCA) to publish report cards on schools’ hiring processes. He found that over the past three years thirty percent of interviewees for coaching positions were minorities and seventy-six percent of openings had a minority interview, but only nine out of the eighty-one openings in DI were filled by minorities. Unfortunately, according to Brand, the NCAA had no power in the area. Instead the NCAA developed the report card and formed three coaching academies, which had supplied three of the past four minority coaching hires. According to Brand, in order to improve the process, it would be necessary to “mitigate the risk-averse nature of those who make football hiring decisions and we have to improve the informal network so that minority coaches are included.”¹⁷⁷

In terms of higher level leadership, Brand was more optimistic. Roughly a quarter of NCAA jobs (300 at the headquarters) were held by minorities, and the situation for athletic directors was improving. “We are at the beginning of seeing some serious movement and in particular several African-American athletic directors are now at the very best jobs and are moving between positions, so we are close to the tipping point.”¹⁷⁸ While they agreed it was a problem, Jackson and Brand disagreed over whether race was a critical factor in the hiring process.

Fitzgerald Hill, president of Arkansas Baptist College, was approached by boosters after replacing a black defensive coach with a white defensive coach saying that they think he will win more now that he’s going whiter with the program. Floyd Keith, the Executive Director of the

¹⁷⁶ United States. Cong. House. Subcommittee on Commerce, Trade, and Consumer Protection. Hearings on the Lack of Diversity in Leadership Positions in NCAA Collegiate Sports. 110th Cong., 1st sess. Washington: GPO, 2007. 14. ProQuest. Web. 31. March 2015.
<[HTTP://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2007-hec-0007?accountid=9673](http://congressional.proquest.com.proxy.bc.edu/congressional/docview/t29.d30.hrg-2007-hec-0007?accountid=9673)>

¹⁷⁷ *Ibid*, 16

¹⁷⁸ *Ibid*, 23

Black Coaches Association explained that it was an unspoken myth that hiring black coaches negatively affects corporate sponsorships and donations. His opinion was that Title VII of the Civil Rights Act could be employed to improve the situation. Nolan Richardson, the former coach of University of Arkansas, discussed what he described as repeated discrimination, as well as his eventual firing for a comment he made. As the assistant AD he was never invited to meetings, during seventeen years of coaching he never received bonuses, and it was always difficult to fill his contract. He was eventually fired for making two racial statements: “My great-great-grandparents came over on the boat; I did not. I expect to be treated differently than they were” and “that there was no one in that room that looked like me.”¹⁷⁹ When he refused to resign he was fired and not allowed to coach the last basketball game of the season.

In order to inspire change Tim Weiser, the athletic director for Kansas State, suggested a financial incentive from the NCAA to grow the pool of minority coaches. For unknown reasons the opportunities for minorities were even worse in Division II and Division III than Division I. Weiser complained of a brain drain: the best coaches were jumping to the NFL because colleges didn't hire black coaches. For example Mike Tomlin had been recommended for three coaching jobs, only one of the three contacted him and he ended up as head coach of the Pittsburgh Steelers instead. Weiser believed the problem was that too many people controlled the money at the college level. This meant that every party had to be open to diversity while recruiting a coach, including the AD, search committee, president, board of trustees, and boosters. In the NFL just the owner and general manager made the decision. The NFL also had something called the Rooney Rule which said that for every coaching opening one minority had to be interviewed.

¹⁷⁹ *Ibid*, 33

The discrimination was so entrenched in part because many were blind to its existence. Tyrone Willingham of the University of Washington was one of the only black head coaches to be terminated from one school and hired elsewhere at the division I level, while white coaches were “frequently recycled.”¹⁸⁰ According to Fitzgerald Hill the solution was to end secrecy in hiring, slow down the search process, expand the interview process to include more than just AD and maybe the president, emulate the NFL Rooney Rule, have specific academic criteria for coaches, create more opportunities (i.e. graduate assistant jobs required to be filled by minorities), and educate the boosters. Despite these recommendations and the seriousness of the disparity, if not discrimination, taking place, this was the last action taken by Congress. In the opening of this chapter Chairman Rush promised that this was “just the first foray into this area of investigation”¹⁸¹ but due to the apathy of Congress it was also the last foray.

In the area of Title IX in college sports Congress listened to the problems over a series of hearings, but decided to do nothing. Congress was more understanding of the concerns of lost men’s programs than continued inequality with women’s programs. And while both sides expressed legitimate concerns, with the proper motivation Congress could have pushed for a creative solution. However, the overall ambivalence led to the shrinking of Title IX enforcement during the mid-2000s.

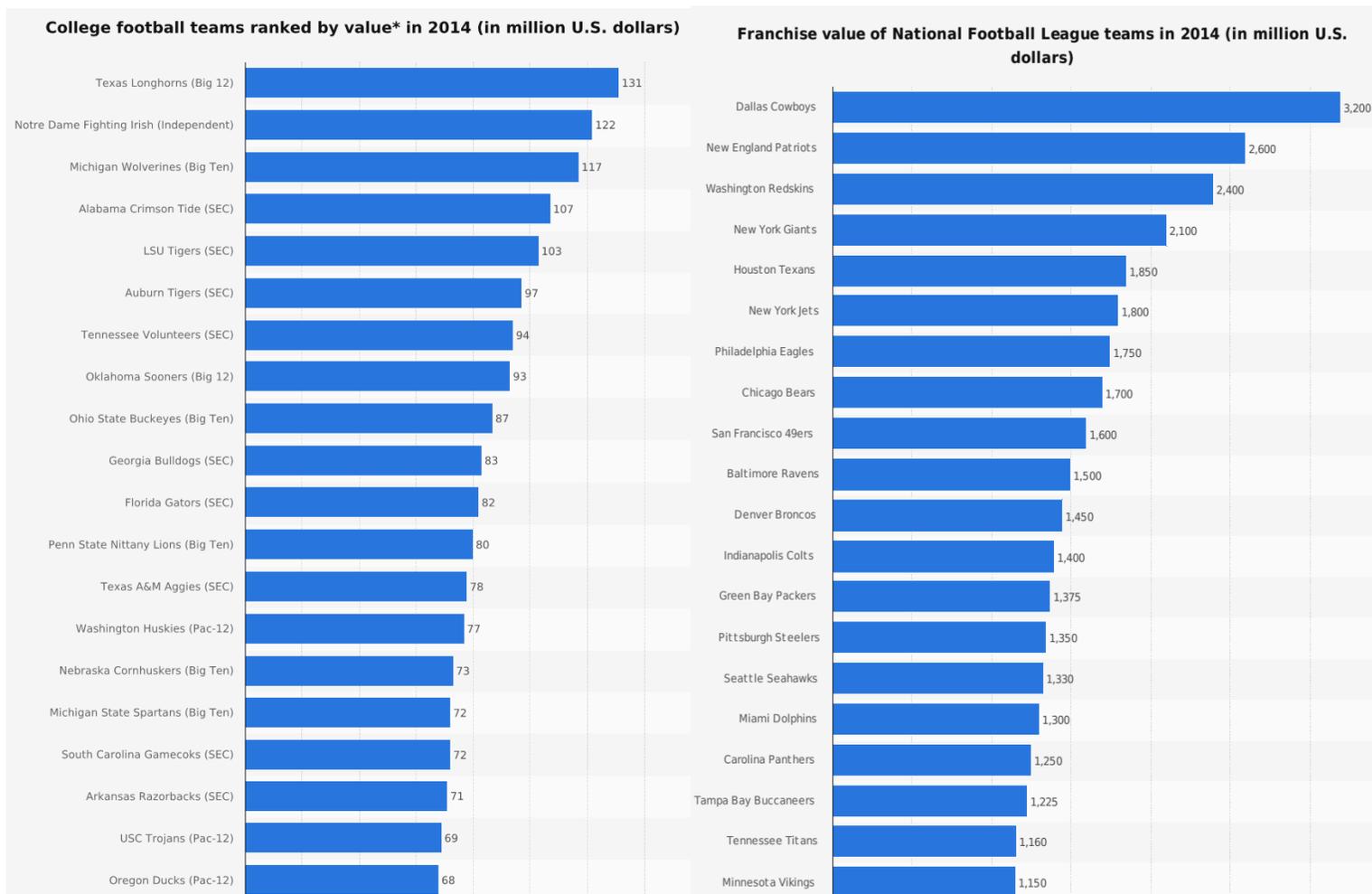
In the area of diversity in college sports Congress barely even listened to the problems. It packed the entire issue into one information gathering hearing and took no subsequent action. Not a single congressman or woman introduced legislation, whereas in other areas of concern legislation was often introduced but not passed. While the NCAA leadership likely cared about the problem, major reform needed to be initiated and voted on by the membership, who was

¹⁸⁰ *Ibid*, 97

¹⁸¹ *Ibid*, 47

responsible for perpetuating inequalities. As was typical in college sports problems, the NCAA was not the cause of the problem but was also not a big enough part of the solution. The only way to spark change was pressure from Congress or the courts. For racial and gender inequality this pressure was non-existent.

Conclusion:



-Top twenty college football teams vs. top twenty NFL teams by value according to Forbes, 2014

The above graphs illustrate the challenge faced by the NCAA in maintaining amateurism in college athletics. The goal of amateurism is worthwhile: student-athletes should be spending his or her time studying, participating in the college environment, and improving as a human being, as well as playing sports. Given the financial incentives of a successful program, the NCAA plays a necessary role in preventing the professionalization and overemphasis of

athletics. While its success or failure in achieving this is debatable, the ideal of promoting amateurism is generally accepted.

The courts have unequivocally accepted the purpose of the NCAA as noble, and therefore have avoided regulating the NCAA in any way. This has led to abuses and exploitations perpetrated by the NCAA. It is able to discipline its members without providing due process, has attacked and usurped the power of the AAU and AIAW, and is not held responsible for gender or racial inequality in college sports. While the courts trusted and sided with the NCAA, Congress developed a trusting and hands-off attitude. Although the influence of hot-button issues has sparked Congressional action, i.e. the cold war and education, Congress usually chooses to trust that the NCAA will reform from within.

Following the Right-to-Know Act in 1991, the NCAA began an era of reform, in part to prevent continued interference from Congress. In response to a Department of Justice letter of inquiry the NCAA reorganized the BCS, creating a college football playoff. Every legitimate threat from Congress sparked frantic reform: the NCAA and its membership want nothing more than to operate without federal intervention. Despite the few instances of pressure, NCAA's Congressional lobby has an impeccable record of convincing the government of its point of view.

Today college athletics and the NCAA are frothing with controversy. Syracuse basketball, a perennial powerhouse, has been sanctioned and its coach, Jim Boeheim, suspended for nine games. However it is generally thought that most major programs commit similar infractions. As of January 21, 2015 the NCAA was in the process of investigating twenty schools for academic misconduct.¹⁸² Celebrity-ism (i.e. Johnny Football) in college sports is larger than

¹⁸² Axson, Scooby. "NCAA Investigating 20 Schools for Academic Misconduct." *Sports Illustrated Wire* 2015.

ever and NCAA rules are stricter than ever. Many of the other problems discussed in this thesis remain unaddressed. But to expect a perfect or uncorrupted system is unreasonable; there is too much money involved.

What I hope for and suggest is Congress take a more active and powerful role in encouraging the NCAA to improve and encourage fairness in college sports. There are problems in college sports which originate at the institutional level not the NCAA. Some of these problems the NCAA fights, while for others it claims no responsibility. Congress should force the NCAA to actively engage these later problems, including diversity and gender equality. Finally a few abuses originate from the NCAA, such as lack of due process for athletes. These areas have experienced significant reform over the past twenty years, but they continue to require but not receive Congressional attention and pressure.