WYOMING LAW REVIEW

VOLUME 12 *2012* NUMBER 1

ESSAY

SCOUNDRELS: AN INSIDE LOOK AT THE NCAA INFRACTIONS AND ENFORCEMENT PROCESSES

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> How can you people impose such a stupid penalty on a major university that you have already KILLED before with your decisions, just to set an example? Why haven't you all checked into the larger, richer programs that are committing far worse violations than these? Why have you chosen SMU to KILL? You must be getting an awful lot of compensation for looking the other way. This school tried to do what's right and conduct an inhouse investigation, and impose sanctions on itself, yet you still have to bury a hatchet in our spine with probation. How can you live with yourselves? You will be held accountable some day, if not judgement day, for your actions. This will go down in history, just as the death penalty did, as the most unfair, hiddeous thing in the world. I sure hope you enjoy your little

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The bulk of this essay is derived from a CLE presentation on September 24, 2011, in conjunction with the inauguration of the William T. Schwartz Professorship at the University of Wyoming College of Law. The professorship was created by an endowment provided by the family of William T. Schwartz, a long-time friend of the law school and one of the most esteemed members of the Wyoming State Bar during a sixty-year legal career.

> power now while you have it, because GOD will deal with you ALL for your part in ruining a good ! institution. Thanks for Nothing, Nathan Darrell Ford.[1]

I begin with this quote because it illustrates several things about intercollegiate athletics and fans' perceptions about the NCAA infractions and enforcement processes. First is the *passion* people have for college sports generally and for their favorite teams in particular. I have no doubt that Mr. Ford truly believes the NCAA Division I Committee on Infractions handed down an unfair penalty against "his" school, Southern Methodist University (SMU), but honestly, "the most unfair, hiddeous [sic] thing in the world"? Language like this is long on passion, but short on perspective.

The most striking thing about Mr. Ford's message is that the Committee on Infractions[2] had just imposed a run-of-the-mill set of penalties, at least on SMU as an institution, in a major infractions case.[3] The case involved violations in SMU's football program related to recruiting, extra benefits,[4] academic fraud, and unethical conduct by an assistant coach.[5] The infractions committee imposed several penalties on the institution, including a two-year period of probation, a vacation of records in games in which a student-athlete competed while ineligible,

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[1] E-mail from Nathan Darrell Ford to author and other members of the NCAA Div. I Comm. on Infractions (Dec. 13, 2000 16:10 MST) (on file with author) (emphasis and misspellings in original).

[2] The Division I Committee on Infractions is a ten-member committee of volunteers, drawn from both NCAA member institutions and the public, that hears evidence regarding alleged NCAA rule violations, makes findings of violations, and imposes penalties on institutions and individuals that have been involved in violations. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2011–12 NCAA DIVISION I MANUAL, Bylaw 19.1 (Aug. 1. 2011) [hereinafter NCAA MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D112.pdf. There are separate infractions committees for NCAA Divisions I, II, and III. The focus of this essay is on Division I.

[3] The NCAA Manual defines a "major" violation as any violation that is not "secondary." *Id.*, Bylaw 19.02.2.2. A secondary violation is one that is "isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including, but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid)." *Id.*, Bylaw 19.02.2.1.

[4] Recruiting violations, of course, involve *prospective* student-athletes that are being recruited to attend an institution. "Extra benefit" violations, on the other hand, involve an institution's enrolled student-athletes. The NCAA defines an extra benefit as "any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation." *Id.*, Bylaw 16.02.3.

[5] NCAA, SOUTHERN METHODIST UNIVERSITY PUBLIC INFRACTIONS REPORT 1–2 (Dec. 13, 2000) [hereinafter SMU INFRACTIONS REPORT], https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "Southern Methodist University" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "12/13/2000" in the "Date 1" field).

and a reduction in the number of expense-paid recruiting visits for prospects.[6] None of these sanctions was the least bit extraordinary, particularly the two-year probation, which Mr. Ford likened to a "hatchet in [the] spine." *Every* school found to have committed major violations gets probation, and a two-year probationary period at the time was a "presumptive" penalty for any major violation.[7]

An assistant football coach at the center of the SMU case, however, did receive a very severe sanction: a seven-year "show-cause" penalty.[8] The Committee on Infractions does not prohibit individuals involved in major rule violations from coaching at NCAA institutions, but it does impose penalties that can effectively operate as a coaching ban. A show-cause penalty permits the infractions committee to require any NCAA member institution that employs a coach subject to a show-cause penalty to appear before the committee to "show cause" why that institution should not be penalized if it does not take "appropriate disciplinary or corrective action" against the coach.[9] Naturally, schools would rather avoid sanctions imposed for their employees' actions at *other institutions*, so the safest route for most schools is simply not to hire the "tainted" coach.

The seven-year show-cause penalty imposed on the assistant football coach in the SMU case is extraordinary; most such penalties are much shorter in duration. In my nearly ten years on the infractions committee, I could count on one hand the number of coaches who received show-cause penalties of seven years or more. On the other hand, the coach's conduct in the SMU case (along with the conduct of other individuals in the life of an involved student-athlete) was particularly reprehensible, as suggested by the following excerpt from the public infractions report:

> In early December 1997 the assistant football coach visited the prospective student-athlete at his high school and discussed his status as a qualifier. The assistant football coach suggested that the prospect find someone to take the ACT for him. After the prospect met with the assistant football coach he had a conversation with his mother and told her he was thinking of having someone else take the ACT for him. His mother told him that she did not think it was the right thing to do, but left the decision to him. The prospect decided to follow the assistant football coach's suggestion.

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[6] *Id.* at 18–19. SMU had self-imposed a scholarship reduction, which the Committee on Infractions accepted. *Id.* at 18.

[7] The two-year probationary period remained a "presumptive" penalty until April 28, 2011, when the penalty bylaws were amended to delete language of "presumptive" penalties. *See* NCAA Manual, *supra* note 2, Bylaw 19.5.2 (noting revisions on Apr. 28, 2011).

[8] SMU Infractions Report, *supra* note 5, at 19.

[9] *See* NCAA Manual, *supra* note 2, Bylaws 19.02.1, 19.5.2(k).

> The assistant football coach told the prospect that when he (the prospect) found someone to take his test, he should tell the individual to meet with [his high school] assistant football coach. The prospect met with the high school assistant football coach, disclosed his decision to find someone to take his ACT and discussed several potential candidates with the high school assistant coach. The prospect suggested a fellow classmate (hereafter referred to as "classmate") who happened to be enrolled in a course taught by the assistant football coach. The high school assistant football coach concurred with the decision. . . . The assistant high school football coach told the prospect that he (the coach) would inform the classmate that if he took the test for the prospect and achieved a qualifying score, the high school assistant coach would give the classmate an "A" in the course he taught. The classmate was promised $100 for taking the test and another $100 for achieving a qualifying score by the high school assistant football coach.
>
> The classmate agreed to take the test for the prospect. The SMU assistant football coach told the prospect where he and the prospect's classmate could obtain a fraudulent identification card to enable the classmate to pass for the prospect. . . . Approximately five weeks after taking the test, the high school assistant football coach contacted the classmate and provided him five $20 bills and then informed the classmate that the money had come from the prospect's recruiter [the SMU assistant coach].[10]

And it gets worse: after the university began an investigation into potential rule violations, the SMU assistant football coach encouraged the student-athlete to lie to investigators.[11]

I have included this lengthy excerpt from the SMU infractions report for another purpose: to illustrate the fact that the public infractions reports of the Division I Committee on Infractions include fascinating stories. A lot of people are interested in major infractions cases, but most do not know that the details of these cases are readily accessible to the public on the NCAA's website. I encourage anyone with an interest in a particular infractions case to read the public report rather than to rely on the accounts of sports bloggers or others who may not always have the full picture of what happened in a particular case. To search for major infractions case reports, (1) go to the NCAA's main website, www.ncaa.org; (2) click on "Resources"; (3) click "Search NCAA Legislation & Major Infractions

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[10] SMU INFRACTIONS REPORT, *supra* note 5, at 2–3.

[11] *Id.* at 15–17.

Cases," which takes one to the Legislative Services database; (4) click "Search," then "Major Infractions"; (5) type in the name of the school (or conference), set any parameters you wish (for example, dates, sports, types of penalties), and click "Go Search"; and (6) access the case summary and/or the full infractions report.

Some readers will understand why Mr. Ford was so upset about the Committee on Infractions "killing" SMU, the last Division I school to receive the so-called "death penalty." The NCAA bylaws permit the imposition of very harsh penalties on "repeat violators," institutions for whom a major violation occurs within five years after the starting date of penalties in a previous major infractions case involving the same institution.[12] Among the authorized penalties for repeat violators is "[t]he prohibition of some or all outside competition in the sport involved in the latest major violation for a prescribed period as deemed appropriate by the Committee on Infractions."[13] In other words, the athletics program involved in the latest major violation can be shut down completely. The last time such a sanction occurred at the NCAA Division I level was in 1987, in a case involving the SMU football program. The penalty had a devastating effect on the program, and only now, after nearly twenty-five years, is SMU football returning to a level of respectability as a competitive program.[14]

Misperceptions abound about the NCAA infractions and enforcement processes, and one of the most common is included in Mr. Ford's e-mail message to the Committee on Infractions—that the NCAA plays favorites in its enforcement of rules. Most commonly the charge is that expressed by Mr. Ford: the NCAA "looks the other way" when "larger, richer programs" have committed violations because the NCAA does not want to rock the boat.[15] Jerry Tarkanian, the former UNLV basketball coach who had his fair share of run-ins with the NCAA, including a lawsuit that went all the way to the United States Supreme Court,[16] famously stated in the late 1980's: "The NCAA is so mad at Kentucky, it's going to give Cleveland State two more years' probation."[17] In more recent years, the NCAA was criticized for letting the University of Southern California off the hook for years after alleged violations in the university's national championship football year—until the institution ultimately was sanctioned severely by the

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[12] NCAA MANUAL, *supra* note 2, Bylaw 19.5.2.1.1.

[13] *Id.*, Bylaw 19.5.2.1.2. The bylaw also permits the prohibition of any coaching or recruiting activities in the sport and the elimination of initial scholarships. *Id.*

[14] For a comprehensive look at SMU's "death penalty" case, see generally DAVID WHITFORD, A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION, AND FOOTBALL AT SMU (1989).

[15] *See supra* text accompanying note 1.

[16] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

[17] Pat Forde, *Is NCAA Selective Enforcement Real?*, ESPN.COM (June 2, 2010), http://sports.espn.go.com/ncb/columns/story?columnist=forde_pat&id=5242104 (citing Tarkanian's quote as "a classic in the annals of American sport," but also suggesting that perceptions of selective enforcement by the NCAA are off-base).

infractions committee for those violations.[18] When the University of Memphis was penalized for competing with an ineligible player during a record thirty-eight-win season, including an appearance in the 2008 national championship game, fans of that university suggested that the NCAA pursued Memphis because it was a "mid-major," and the NCAA would not have done the same thing to more prominent programs.[19]

Interestingly, the argument goes the other way as well—that the NCAA targets prominent programs because of their success—so perhaps that is the answer to whether the NCAA selectively enforces the rules. One recent example involved the University of Arkansas track and field program. Under the leadership of head coach John McDonnell, Arkansas teams won forty national championships in cross country, indoor track, and outdoor track in McDonnell's thirty-six years of coaching[20]—a legacy to rival that of the most prominent athletics programs in NCAA history. The Committee on Infractions vacated the Razorbacks' 2004 and 2005 outdoor track and field national championships after finding violations involving the ineligible competition of world-class sprinter Tyson Gay.[21] After the penalties were upheld by the Infractions Appeals Committee,[22] Coach McDonnell was quoted as saying: "It has just been more of the same. They made up their minds what they were going to do and nothing was going to change it. That goes with winning. This has to do with the visibility of our program."[23]

One need only look at this season's football polls to dispel any notion that prominent programs are treated leniently. At the time I delivered this essay in person in mid-September 2011, the Associated Press rankings listed the following top eleven teams in the Football Bowl Subdivision. I included eleven rather than

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[18] NCAA, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT (June 10, 2010), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Southern California" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "06/10/2010" in the "Date 1" field).

[19] *See, e.g.*, wheresthebeef, Comment to Eddie Pells, *Final Four: Coaches 'Cal' Renew Old Rivalry*, THE COMMERCIAL APPEAL (Apr. 2, 2011, 4:52 PM), http://www.commercialappeal.com/news/2011/apr/02/coaches-cal-renew-old-rivalry (quoting a fan as saying the NCAA's decision against Memphis was "clearly directed to bury a 'mid major'").

[20] *See* Marty Cook, *UA's Appeal to Save National Titles Denied*, ARKANSAS DEMOCRAT-GAZETTE (Jan. 9, 2009), http://www.lexis.com (by subscription).

[21] *Id.*; *see also* NCAA, UNIVERSITY OF ARKANSAS, FAYETTEVILLE PUBLIC INFRACTIONS REPORT (Oct. 25, 2007), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Arkansas, Fayetteville" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "10/25/2007" in the "Date 1" field).

[22] The Infractions Appeals Committee is a five-member committee of volunteers that reviews findings and penalties of the Committee on Infractions after a penalized institution or coach appeals. NCAA MANUAL, *supra* note 2, Bylaw 19.2.1.

[23] Cook, *supra* note 20.

ten because Florida State had been ranked very high in the previous week's poll and dropped all the way to the eleventh ranking following a loss to then top-ranked University of Oklahoma. The asterisks denote schools that are currently on probation for major NCAA violations. Note that these are *institutions* on probation; the major violations that led to probation may have been in sports other than football.[24] The numbers in parentheses after the schools' names reflect the number of major infractions cases in the institution's history.

1. * Oklahoma (8)
2. * LSU (3)
3. * Alabama (5)
4. * Boise State (1)
5. Stanford (0)
6. Wisconsin (6)
7. Oklahoma State (4)
8. Texas A&M (7)
9. Nebraska (4)
10. Oregon (2)
11. * Florida State (7)

The history of these institutions collectively paints an unattractive picture, and certainly suggests that the NCAA does not "look the other way" when prominent institutions are suspected of major violations. These eleven schools have averaged four major cases per school, and if the two outliers, Boise State and Stanford, are excluded, the average number of major cases per school increases to five.[25]

I have used the term "scoundrels" in the title of this essay deliberately. Plenty of people, like Mr. Ford,[26] think the scoundrels are at the NCAA and that they selectively enforce the rules, conduct poor investigations, impose ridiculous penalties, and engage in a variety of other nefarious deeds that undermine the fair administration of intercollegiate athletics. Well, actually they don't, they're just a bunch of dedicated folks trying to get it right—yes, occasionally failing, but not without a lot of hard work, diligence, and good-faith motives.

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[24] The University of Oklahoma, for example, went on three years' probation on November 10, 2011, for violations in its men's basketball program. NCAA, UNIVERSITY OF OKLAHOMA PUBLIC INFRACTIONS REPORT (Nov. 10, 2011), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Oklahoma" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "11/10/2011" in the "Date 1" field).

[25] In case one is wondering, the leaders in the clubhouse are Arizona State and SMU with nine major cases each. Oklahoma recently moved into third place with eight major cases, leaving behind a pack of seven schools with seven major cases each. These figures come from a search of the major infractions database on the NCAA website, available at https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink).

[26] *See supra* note 1 and accompanying text.

I served on the Division I Committee on Infractions for nearly ten years. In that time, I participated in approximately ninety major infractions hearings, briefed twenty-eight appeals on behalf of the infractions committee, and presented twenty-two oral arguments before the Infractions Appeals Committee. Why did I continue to serve so long in such a time-consuming, unpaid capacity, even though I had more than a full-time job as dean of a law school? Precisely because I observed the dedicated efforts of many individuals (not only from the NCAA national office, athletics conferences, and member institutions, but also from the public and from a cadre of private lawyers and other representatives of schools and individuals at risk in infractions cases) working toward fairness in infractions cases, and I was proud to be a part of those efforts. These individuals definitely are *not* the scoundrels to whom the title of this essay refers; that appellation I reserve for the rule breakers, particularly those who break the rules deliberately.

I am not a complete apologist for those who have worked for the NCAA in the infractions and enforcement processes. We have made mistakes, and there may be plenty of changes to NCAA operating bylaws that are worthy of consideration.[27] But the NCAA is such an easy target,[28] and if there is any education effort I try to make, it is to urge people to learn just who "the NCAA" is before slinging criticism its way. This is particularly important for those critics within the NCAA membership, who often are among the most strident. As one of my former Committee on Infractions colleagues put it in a law review article: "It is all too convenient to bash the regulatory agency in an attempt to divert attention away from the wrongdoing. The NCAA is not 'them.' The NCAA is 'us' when it comes to the promulgation of rules."[29]

The NCAA has over 1000 member institutions, and it is the *membership* that establishes the rules, sets policy, and oversees the entire athletics enterprise. I have

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[27] In late October 2011, for example, the NCAA Board of Directors approved several major changes, including an increase in the value of scholarships, the opportunity to award multi-year scholarships, more stringent academic standards for recruits, and changes in summer basketball recruiting. Michael Marot, *NCAA Approves Major Scholarship Changes at Meeting*, ASSOCIATED PRESS, Oct. 27, 2011, *available at* http://www.signonsandiego.com/news/2011/oct/27/ncaa-approves-major-scholarship-changes-at-meeting.

[28] *See, e.g.*, Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 81 (criticizing the NCAA in almost a shrill tone); Buzz Bissinger, *Heisman Hypocrisy*, THE DAILY BEAST (Dec. 12, 2010, 6:54 PM) http://www.thedailybeast.com/articles/2010/12/12/heisman-hypocrisy-cam-newton-his-father-cecil-and-the-ncaa.html ("Like the Mafia, the National Collegiate Athletic Association, ostensibly there to sanction college sports and keep the game clean, is really in the business of finding fall guys to protect the multimillion-dollar empire."); Frederic J. Frommer, *Congressman Rush Compares NCAA to Mafia*, BOSTON GLOBE, Nov. 3, 2011 (quoting U.S. Congressman Bobby Rush of Illinois as saying the NCAA is "just one of the most vicious, most ruthless organizations ever created by mankind" and "I think you would compare the NCAA to Al Capone and to the Mafia").

[29] Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 698 (2003).

been asked often during the last decade why Committee on Infractions penalties are too light (or too harsh, in particular cases), and why the committee does not just "send a message" by reinstating the "death penalty" (for Miami, for example, if recent allegations prove true[30]) or at least imposing harsher penalties such as post-season competition bans and TV bans. My answer is always the same: if the membership demands it, and really thinks it *has the stomach for it*, the Committee on Infractions will respond. This is a ground-up association.

So far, however, the membership has not shown the stomach for any significant shift toward harsher penalties. In part this is because the natural tendency is for institutional leaders to complain, often loudly and widely, of penalties that are perceived to be too harsh when their own institutions are involved in infractions cases. The last two cases I handled on appeal—Florida State and Memphis—provide good examples. Both cases involved allegations of academic fraud and vacation-of-records penalties, when the Committee on Infractions requires team and individual records to be vacated in contests in which ineligible student-athletes have competed.[31]

One might think that vacation of "wins" achieved in part through the efforts of student-athletes who should not have been competing because of eligibility defects would be a natural consequence in virtually all such cases.[32] Nonetheless, in the Florida State case, the university's president asserted that the unfairness in imposing a vacation penalty against his institution demanded the creation of a "blue-ribbon committee" to conduct public hearings on the Committee on

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[30] Allegations against the University of Miami include booster-provided impermissible benefits for more than seventy student-athletes over several years, and some commentators have suggested that the charges will provide a good test case for whether the death penalty will ever be used again. *See, e.g.*, Jon Solomon, *Ultimate Penalty: Will the NCAA's Death Penalty Ever Return?*, THE BIRMINGHAM NEWS (Aug. 28, 2011), http://www.al.com/sports/index.ssf/2011/08/ultimate_penalty_will_the_ncaa.html.

[31] *See* NCAA, FLORIDA STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (Mar. 6, 2009), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "Florida State University" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "03/06/2009" in the "Date 1" field); NCAA, UNIVERSITY OF MEMPHIS PUBLIC INFRACTIONS REPORT (Aug. 20, 2009), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Memphis" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "08/20/2009" in the "Date 1" field).

[32] That is the presumptive rule at the high school level. *See, e.g.*, WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION, 2011–12 HANDBOOK 14 (July 18, 2011), *available at* http://www.whsaa.org/handbook/Handbook.pdf (rule 1.4.2 provides for forfeiture "when a school plays an ineligible participant"). A vacation of records differs from a forfeiture in that the loser does not move up into the winner's place under a vacation penalty, but the loser is awarded the "win" under a forfeiture penalty.

Infractions' use of such a penalty.[33] Similarly, after a vacation penalty was imposed in the Memphis case (resulting in the vacation of a record thirty-eight-win men's basketball season), the university's president publicly decried the unfairness of the penalty.[34]

Not only have I used the term "scoundrels" deliberately in the title of this essay, I also have deliberately made a distinction between "infractions" and "enforcement." Obviously, the two concepts are interrelated, but it is important for anyone observing these processes to understand a fundamental distinction between the Committee on Infractions and the NCAA enforcement staff. The committee is composed of ten unpaid volunteers who conduct "infractions" hearings, make findings of rule violations, and impose penalties.[35] The NCAA "enforcement staff" members, like a few hundred of their colleagues at the NCAA national office in Indianapolis, are paid employees of the NCAA. The enforcement staff is charged with investigating allegations of rule violations and later presenting evidence of violations at the infractions hearing.[36]

The fundamental point to be made is the *independence* of the Committee on Infractions, which acts as the "judge" in an infractions hearing, from the enforcement staff, which serves in the role of "prosecutor." The enforcement staff conducts its investigations without involvement of the Committee on Infractions and follows the evidence wherever it leads. The staff then presents its case before the infractions committee, as does the institution and any individuals (most commonly, coaches) involved in alleged rule violations. The burden of proof is on the enforcement staff to prove that violations have occurred. If the staff proves its case, the Committee on Infractions will make findings of violations.[37] If the staff does not prove its case, the committee will not make findings, and plenty of examples exist in the "case law" in which the committee has determined that the enforcement staff did not meet its burden of proof.[38]

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[33] *See NCAA Responds to FSU President*, ESPN.COM NEWS SERVICES (Mar. 21, 2009, 3:57 PM), http://sports.espn.go.com/ncaa/news/story?id=4003347.

[34] Dana O'Neil, *Memphis Also Gets 3 Years' Probation*, ESPN.COM (Aug. 21, 2009, 12:45 PM), http://sports.espn.go.com/ncb/news/story?id=4412279.

[35] NCAA MANUAL, *supra* note 2, Bylaw 19.1. For a more complete examination of the composition and decision-making process of the Committee on Infractions, see Josephine R. Potuto & Jerry R. Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437 (2011).

[36] NCAA MANUAL, *supra* note 2, Bylaws 32.2.1, 32.8.7.2.

[37] The committee's findings must be based on information that it determines to be "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." *Id.*, Bylaw 32.8.8.3.

[38] Among the more recent examples is the Committee on Infractions' determination on August 24, 2011 that the enforcement staff had not proven that the former head football coach at the University of Tennessee committed major violations. NCAA, UNIVERSITY OF TENNESSEE, KNOXVILLE PUBLIC INFRACTIONS REPORT 2 (Aug. 24, 2011), https://web1.ncaa.org/LSDBi/exec/

If the infractions committee does make findings of violations and imposes penalties,[39] institutions and individuals found in violation of NCAA rules have the opportunity to appeal to a five-member Infractions Appeals Committee. That committee, also composed of volunteers, then makes its best judgment as to whether the findings of the Committee on Infractions were "clearly contrary to the evidence" or whether the infractions committee "abused its discretion" in imposing "excessive" penalties.[40]

Thus, there are many actors in the infractions and enforcement processes, so when people take "the NCAA" to task for what happened in a particular infractions case, they should be sure to focus their frustrations on the appropriate body—and often that body is the membership as a whole, which ultimately is responsible for establishing the rules and overseeing the infractions and enforcement processes.[41] In addition, observers should understand how a typical infractions case proceeds. The following outline of the steps involved in the process may be instructive:

1. Information is reported to the NCAA enforcement staff, from virtually any source.[42]

2. The enforcement staff conducts a preliminary investigation.[43]

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homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Tennessee, Knoxville" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "08/24/2011" in the "Date 1" field).

[39] The enforcement staff does not make recommendations regarding penalties. The determination of penalties is solely within the purview of the Committee on Infractions, which "shall impose an appropriate penalty" in any case in which it makes a finding of a major violation. NCAA MANUAL, *supra* note 2, Bylaw 32.8.8.4.

[40] *Id.*, Bylaws 19.2 (composition and duties of Infractions Appeals Committee), 32.10.4 (bases for setting aside findings and penalties).

[41] The NCAA membership is represented by an 18-member Board of Directors composed exclusively of university presidents and chancellors. The duties and responsibilities of the Board of Directors include establishing "general policy," enacting legislation (bylaws), and reviewing and approving "policies and procedures governing the enforcement program." *Id.*, Bylaw 4.2.

[42] In 2007, David Price, former NCAA Vice President of Enforcement, stated that his staff typically received seven or eight tips a day regarding potential rules violations, and that his investigators pursued "about one of every 15 leads." Brad Wolverton, *NCAA Says Infractions Cases Will Reach Record High This Year*, 54 CHRON. OF HIGHER EDUC. 5, Sept. 28, 2007, at A28. Institutions are expected to "self-report" violations if evidence of violations becomes known to institutional staff members. Responsible self-reporting and diligent internal investigation by the institution may serve as mitigating factors in the penalty phase of the case.

[43] The enforcement staff has no subpoena power, so it must rely on the voluntary cooperation of involved individuals. That, of course, poses difficult investigative problems in many cases, particularly when key witnesses are no longer enrolled students or employed staff members at an institution. The NCAA took heat for the length of its investigation into the USC football program, but one can imagine that the investigation would have been furthered significantly had Reggie Bush, the *former* student-athlete at the heart of the case, cooperated with investigators. Similarly, in the recent Ohio State case, the attorney for Terrelle Pryor, the school's star quarterback who played a

3. When the enforcement staff has developed "reasonably reliable information indicating that an institution has been in violation of NCAA legislation that requires further investigation," it will provide a Notice of Inquiry to the university's president or chancellor.[44] That notice signals the beginning of a formal investigation, which is conducted on campus and wherever else the evidence leads. Often the enforcement staff's investigation is conducted jointly with institutional and/or conference representatives.

4. If the enforcement staff determines that sufficient evidence exists "to conclude that the Committee on Infractions could make a finding" of a violation, the staff issues a Notice of Allegations to the institution's president or chancellor, specifying "the NCAA legislation alleged to have been violated, as well as the details of each allegation."[45] A similar Notice of Inquiry is sent to any "involved individuals"—any current or former institutional staff member who is asked to respond in writing and appear before the Committee on Infractions.[46]

5. The institution and involved individuals submit written responses to the Notice of Allegations.[47]

6. The enforcement staff prepares a Case Summary that outlines its allegations and supporting evidence.[48] Typically the Case Summary also will include a summary of any refuting evidence submitted by the institution or involved individuals.

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central role in the case, made it clear that investigators would get no cooperation from his client: "He doesn't need a reason. . . . He's no longer a student-athlete." Erick Smith, *Lawyer Says Terrelle Pryor Will Not Talk to NCAA About Ohio State*, USA TODAY (June 9, 2011, 8:05 PM), http://content.usatoday.com/communities/campusrivalry/post/2011/06/terrelle-pryor-not-talking-ncaa-ohio-state-investigation/1 (quoting Larry James, Pryor's attorney).

[44] NCAA MANUAL, *supra* note 2, Bylaw 32.5.

[45] *Id.*, Bylaw 32.6.1.

[46] *Id.*, Bylaw 32.6.2. Typically "involved individuals" are those who may be subject to a "show-cause" penalty. *See supra* text accompanying note 9. Even though student-athletes also may be "involved individuals," they are dealt with by the "membership services"/reinstatement staff of the NCAA, a group (separate and apart from the enforcement staff) that focuses on the reinstatement of student-athlete eligibility. In nearly ten years on the infractions committee, never once did I observe a student-athlete testify at an infractions hearing.

[47] Those responses, particularly from institutions, often include dozens of exhibits, comprise hundreds of pages, and fill multiple three-ring binders.

[48] NCAA MANUAL, *supra* note 2, Bylaw 32.6.7 (describing the enforcement staff case summary).

7. The enforcement staff conducts a prehearing conference with institutional representatives and, separately, with any involved individuals (and their representatives, often attorneys).[49] This conference allows the parties to hash out disagreements and make necessary corrections to the Case Summary prior to the infractions hearing.

8. A hearing is conducted before the Committee on Infractions. All parties are provided an opportunity to submit relevant evidence.[50]

9. Following the hearing, the Committee on Infractions deliberates and issues a public infractions report, outlining any findings of violations and penalties.

10. Any appeals are submitted to the Infractions Appeals Committee. If the appellant requests an in-person appearance, the appeals committee conducts oral arguments. Any decision of the Infractions Appeals Committee is final, with no further review.[51]

The Committee on Infractions conducts hearings only in cases involving "major" infractions,[52] so it is important to understand the difference between major and "secondary" violations. A major violation is defined in terms of what it is *not*—that is, a major violation is anything other than a secondary violation.[53] A secondary violation is a violation that meets all three of the following conditions: (1) the violation is "isolated *or* inadvertent in nature"; (2) the violation "provides or is intended to provide only a minimal recruiting, competitive or other advantage"; and (3) the violation "does not include any significant impermissible benefit (including, but not limited to, an extra benefit, recruiting inducement,

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[49] *Id.*, Bylaw 32.6.6 (describing the prehearing conference).

[50] *Id.*, Bylaw 32.8 (describing Committee on Infractions hearings).

[51] *Id.*, Bylaw 32.11 (describing oral argument procedures on appeal and finality of appeals committee decisions). In an interesting twist not common to other types of appellate proceedings, the "judge" below—the Committee on Infractions—becomes a party to the appeal and, through one of its members (an appeals coordinator), presents argument before the Infractions Appeals Committee to uphold the infractions committee's findings and penalties. The enforcement staff is not a party to the appeal, in part because most appeals revolve around penalties, not findings, and the enforcement staff makes no recommendations regarding penalties and plays no role in determining penalties.

[52] The enforcement staff handles secondary violations on its own. The bylaws do permit an institution to appeal a *penalty* imposed by the enforcement staff for a secondary violation to the Committee on Infractions, and to request an in-person appearance before the committee. *Id.*, Bylaw 32.4.4. In my years on the committee, however, no such appearances were granted.

[53] *Id.*, Bylaw 19.02.2.2.

preferential treatment or financial aid)."[54] I italicized the word "or" in the first prong to highlight the fact that one may commit an intentional (that is, not "inadvertent") violation, but still have it classified as a secondary violation if the violation is "isolated" and meets prongs two and three as well.[55]

I have studied all of the major infractions cases in the ten-year period from January 2000 through December 2009 to determine which violations and which sports are most frequently involved. In that span, there were 109 cases in which major violations were found by the Committee on Infractions. Of those 109 cases, the committee conducted 90 infractions hearings,[56] and decided 19 cases by "summary disposition," in which the Committee on Infractions can accept findings and penalties agreed to by the enforcement staff, the institution, and any involved individuals following a thorough investigation of possible violations.[57] The following summary, gleaned from the major infractions database on the NCAA's website,[58] indicates that several violations (what I called the "Big Eight," in honor of the day when conference alignments were simpler) and two sports—men's basketball and football—predominate.

NCAA Major Infractions Case Summary (January 2000–December 2009)

Violations

The "Big Eight":

Recruiting[59] (67 cases)
Extra Benefits (62)

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[54] *Id.*, Bylaw 19.02.2.1 (emphasis added). As noted previously, an "extra benefit" involves an impermissible benefit to an enrolled student-athlete rather than a recruit. *See supra* note 4.

[55] Later in this essay I argue that the NCAA leadership should consider whether any intentional violation should be considered secondary. *See infra* notes 82–83 and accompanying text.

[56] One school, Howard University, was involved in a "double hearing" that spanned over two different weekends, but I have counted those two hearings as one.

[57] NCAA MANUAL, *supra* note 2, Bylaw 32.7 (describing the summary disposition process, including the requirement that "a complete and thorough investigation has been conducted and . . . the institution fully cooperated in the process").

[58] Information on all major infractions cases is available at https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; from the "Division" drop-down menu select "Division I"; then under "Decision made" select the "between two dates" radio button and enter "01/01/2000" in the "Date 1" field and "12/31/2009" in the "Date 2" field). The cases are not explicitly categorized by nature of violation or sport, so one must read the full report to get the full flavor of the case. I have made some subjective categorizations in the summary, focusing on the types of violations and sports that played a *significant* role in the case.

[59] Recruiting violations run the gamut: impermissible contacts (e.g., during quiet period, too many contacts per week, contacts of student-athletes from other schools); inducements; tryouts; booster/representative contacts; presence during National Letter of Intent signing; benefits to high school coaches; excessive entertainment; use of impermissible recruiter; improper publicity; use of student-athletes in recruiting; etc.

Unethical Conduct (58)
- Knowing Involvement in Violations (52)
- Provision of False & Misleading Information (29)
- Failure to Cooperate (9)

Failure to Monitor (50)
Lack of Institutional Control (37)
Eligibility (Ineligible Competition, Improper Certification, etc.) (30)
Financial Aid (Over-Award of Grants-in-Aid, etc.) (27)
Academic Fraud (25)

Miscellaneous:

Impermissible Out-of-Season Activities (e.g., coach observation; mandatory practice; improper skill instruction) (15)
Exceeding Practice Limitations (10)
Exceeding Coach Limit (7)
Failure to Report Violations (5)
Violation of Supplemental Pay Restrictions (5)
Failure to Promote Atmosphere of Compliance
Failure to Report Outside Income
Impermissible Employment of Non-Qualifiers
Contract for Future Employment of High School or Junior College Coach (for delivering a recruit)
Impermissible Compensation to Volunteer Coach
Violation of Amateurism Rules
Excess Number of Coaches Recruiting Off-Campus
Violation of Scouting Legislation
Gambling

Sports Involved in Major Infractions Cases

*Note: If multiple sports were involved, "Multiple" is indicated, plus the most significant sport if there was one. If major violations occurred in two or three sports, each sport is listed.

Men's Basketball (40 cases) [37% of cases]
Football (37) [34% of cases]
Multiple (18)
Women's Basketball (10)
Men's Tennis (6)
Baseball (4)
Men's Soccer (3)
Men's Track & Field (3)
Women's Tennis (3)
Women's Volleyball (3)

Men's Swimming & Diving (2)
Women's Golf (2)
Softball (2)
Women's Track & Field (2)
Men's Ice Hockey (1)
Men's Volleyball (1)
Wrestling (1)
Women's Gymnastics (1)
Women's Rowing (1)
Women's Swimming & Diving (1)

A few general comments are in order following this summary. First, the breadth of unethical conduct shows that most violations are not "inadvertent" violations resulting from an outrageously complex set of rules. Unethical conduct violations are the most serious that can be committed by individuals, and such violations typically lead to a "show-cause" penalty against the individual.

Academic fraud has been present in a significant percentage of cases. The NCAA has adopted several substantial academic reforms in recent years, including the measurement of academic progress rates (APR) of student-athletes. Poor APR performance can result in significant penalties, including the loss of scholarships and ineligibility for postseason competition.[60] While NCAA leaders regularly tout the success of these academic reforms, it must be remembered that greater pressures revolving around academic progress, including sanctions for poor performance, also carry with them greater incentives for individuals to engage in academic fraud.

Numerous institutions involved in major infractions cases have been "repeat violators"—those with major violations occurring within five years after the starting date of penalties in a previous major infractions case involving the same institution.[61] Indeed, several schools in recent years have been "multiple" repeat violators, with successive major cases occurring within the applicable five-year window.[62] The penalties authorized for repeat violators include the so-called

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[60] See NCAA MANUAL, *supra* note 2, Bylaws 23.01–23.4 for an overview of the Academic Performance Program, including definitions of APR and GSC (graduation success rate) and penalties for unsatisfactory performance.

[61] *Id.*, Bylaw 19.5.2.1.1 (defining a repeat violator).

[62] In 2009, the University of Alabama became a three-time repeat violator, meaning it has been involved in four major infractions cases within a relatively short period of time, with each successive case occurring within five years of the start of penalties in the previous case. NCAA, UNIVERSITY OF ALABAMA PUBLIC INFRACTIONS REPORT (June 11, 2009), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Alabama" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "06/11/2009" in the "Date 1" field) (noting prior infractions cases in 1995, 1999, and 2002).

"death penalty,"[63] but that penalty seems unlikely to be used in the absence of the kind of systemic corruption and flouting of NCAA rules that occurred in the 1987 SMU case.[64] Both the Committee on Infractions and the Infractions Appeals Committee have recognized that repeat-violator status can enhance penalties generally, but that does not always happen. Perhaps it is time to send an even stronger message to those institutions that repeatedly find themselves before the infractions committee.

The above summary does not list *appeals* of Committee on Infractions decisions, but observers should know that there have been many appeals since 1993, when the current appeals structure was put into place. Appeals were made in thirty-four of the ninety major infractions cases that went to a hearing from January 2000 through December 2009.[65] Some of those cases involved multiple appeals (for example, appeals by the institution and a coach, or by two coaches), so overall in that ten-year period there were forty-six appeals, with two dismissed prior to hearing and two separate appeals by a single coach. From 1993, when the Infractions Appeals Committee was created, until January 2000, there were twenty-four appeals.

Perhaps one reason for a high number of appeals is the fact that appellants have realized considerable success before the Infractions Appeals Committee. Virtually all of the "action" on appeal relates to penalties rather than findings, and appellants won some relief in 43% of the appealed cases from 2000 through 2009. During one five-year stretch from 2003 through 2007, only four of thirteen appealed decisions were upheld in their entirety by the Infractions Appeals Committee. In January 2008, however, the NCAA membership approved new legislation amending the standard of review, making it more difficult for the Infractions Appeals Committee to set aside penalties imposed by the Committee on Infractions. Prior to the amendment, the Infractions Appeals Committee was authorized to set aside penalties anytime it determined a penalty to be "excessive

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[63] NCAA MANUAL, *supra* note 2, Bylaw 19.5.2.1.2 (authorized repeat-violator penalties); *see also supra* notes 13–14 and accompanying text.

[64] *See generally* WHITFORD, *supra* note 14.

[65] Appeals data also can be compiled from the NCAA major infractions database: https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; select "Division I" for the "Division" field; check the "Search for Appealed Cases" box; then under "Decision made" select the "between two dates" radio button and enter "01/01/2000" in the "Date 1" field and "12/31/2009" in the "Date 2" field). One appeal does not appear in the database because it was dismissed by the Infractions Appeals Committee before hearing when the appellant did not submit timely filings. Typically, summary disposition cases involve findings and penalties agreed to by the parties and by the Committee on Infractions, so there would be no appeal. The bylaws do permit a hearing if the Committee on Infractions does not accept either the findings or penalties agreed upon by the enforcement staff and the institution and/or involved individuals during the summary disposition process. In such cases, an appeal could occur following a hearing. NCAA MANUAL, *supra* note 2, Bylaw 32.7.1.4.

or inappropriate." The 2008 amendment removed the word "inappropriate," and imposed a standard that allows reversal only if the Committee on Infractions' penalty is "excessive such that it constitutes an abuse of discretion."[66] This legislative change has had a dramatic impact: since February 2008, fifteen of seventeen appealed decisions have been upheld in their entirety by the Infractions Appeals Committee.

During the Infractions Appeals Committee "reign of reversal," one theme that reared its head repeatedly was whether the Committee on Infractions gave enough credit for institutional cooperation during an infractions investigation. Despite the fact that institutional representatives and involved individuals have an *affirmative duty* to cooperate,[67] the Infractions Appeals Committee granted a penalty reduction in some cases in which it determined that the Committee on Infractions should have given more credit for cooperation.[68] The two committees seem to have reached an understanding that "extraordinary" cooperation may warrant mitigation in penalties, but that standard, of course, leaves much room for varying interpretations.

One trend may be related to an emphasis on institutional cooperation in NCAA investigations. In my years on the infractions committee, I observed an increasing trend for institutions to portray their coaches involved in infractions cases (typically, by the time of the infractions hearing, *ex*-coaches) as "rogues" operating completely outside the knowledge of institutional superiors. Part of that motivation may lie in an attempt to exhibit full "cooperation" with investigators, including quickly "cleaning house" (firing the rogues) when violations were discovered. Sometimes the institutions' portrayal of their ex-coaches rings true; sometimes it does not. In either case, it leaves at-risk coaches to their own devices, without institutional resources in their defense against infractions allegations.

That is not to say that such coaches are left completely defenseless. Another trend has been the "lawyering up" of infractions cases. Seldom do institutions or involved individuals appear at infractions hearings today without legal

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[66] *Id.*, Bylaw 32.10.4.1 (noting adoption in January 2008).

[67] Institutions have an "affirmative obligation . . . to assist the enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof." *Id.*, Bylaw 32.1.4. Individuals face a potential unethical conduct violation for "[r]efusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution." *Id.*, Bylaw 10.1(a).

[68] *E.g.*, NCAA, DIVISION I INFRACTIONS APPEALS COMMITTEE REPORT NO. 270: UNIVERSITY OF OKLAHOMA 7–8 (Feb. 22, 2008), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "University of Oklahoma" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "07/11/2007" in the "Date 1" field); NCAA, DIVISION I INFRACTIONS APPEALS COMMITTEE REPORT NO. 175: HOWARD UNIVERSITY 30–32 (July 16, 2002), https://web1.ncaa.org/LSDBi/exec/homepage (follow "Search," then "Major Infractions" hyperlink; enter "Howard University" in the "Institution" field; then under "Decision made" select the "on Date 1" radio button and enter "11/27/2001" in the "Date 1" field).

representation. A handful of experienced law firms represent most institutions, and prominent coaches typically have high-powered counsel as well. Even not-so-prominent individuals typically have legal representation today, an occurrence that was not so common when I joined the infractions committee in 2000. Presumably that trend will continue and possibly provide employment opportunities for law school graduates interested in collegiate athletics legal work. Those graduates, of course, also have increasing opportunities at NCAA institutions, which have been consistently building rules-compliance programs within their athletics departments.

So where are we today in this infractions and enforcement world? Headlines from all quarters would suggest that intercollegiate athletics is in a state of crisis. That perception has been fueled in part by a spate of high-profile infractions cases, including the vacation of USC's BCS championship during the Reggie Bush era; infractions investigations of both Auburn and Oregon, the teams that played for the BCS championship in 2011; an infractions case involving Ohio State, which won the Sugar Bowl *after* violations came to light (though before investigators learned of Coach Tressel's deep-sixing his information about potential infractions); and a penalized UConn winning the men's national basketball title.[69] And that is before we even get to the Fiesta Bowl fiasco (where bowl executives are under federal and state investigation for possibly illegal campaign finance contributions),[70] alleged point-shaving at the University of San Diego,[71] the mess unfolding at Miami,[72] or the ugliness at Penn State.[73]

Clearly the high-profile nature of the teams under scrutiny has generated heat this past year, but does it mean that rule violations are more rampant than they have been in the past? I hesitate to draw that conclusion. The confluence of trouble at the pinnacle of collegiate athletics certainly is a cause for concern, but we tend to forget even high-profile cases after the latest scandal diverts our attention. The list of high-profile institutions that have been involved in major violations since 2000 indicates that the NCAA enforcement staff and the Committee on Infractions have had *plenty* of action with the "big boys": Alabama (two major

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[69] *See, e.g.*, Ryan McGee, *The Most Scandalous Year Ever in College Sports . . . Until Next Year*, ESPN: THE MAGAZINE, May 30, 2011, at 52 (cataloguing the various scandals of the 2010–2011 academic year and asserting that "no team inspired more headlines in college sports than the NCAA's enforcement division").

[70] *Id.* at 54–55.

[71] Pete Thamel, *Suspected Point-Shaving Scheme Shows Gambling Remains Persistent Issue*, N.Y. TIMES (Apr. 12, 2011), http://www.nytimes.com/2011/04/13/sports/ncaabasketball/13gamble.html.

[72] Pete Thamel, *Hurricane Players and Recruits Accused of N.C.A.A. Violations*, N.Y. TIMES (Aug. 16, 2011), http://www.nytimes.com/2011/08/17/sports/ncaafootball/miami-hurricanes-accused-of-ncaa-violations.html.

[73] Steve Weiberg & Jack Carey, *Penn State Abuse Scandal Chilling in Details, Reach*, USA TODAY (Nov. 7, 2011, 4:55 PM), http://usatoday.com/sports/college/football/bigten/story/2011-11-06/penn-state-abuse-scandal-chilling/51100830/1.

cases and a three-time repeat violator), Arkansas (twice), Arizona, Arizona State, Auburn, Baylor (twice), Cal-Berkeley (twice), Colorado (twice), Connecticut, Florida State, Georgetown, Georgia, Georgia Tech (twice), Illinois, Indiana, Iowa, Kansas, Kentucky, LSU, Maryland, Miami, Michigan (twice), Minnesota (twice), Missouri, Mississippi State, Nebraska, Ohio State (twice), Oklahoma (three times), Oregon, Purdue, South Carolina, Tennessee, Texas, Texas Tech, USC (twice), Washington (twice), West Virginia (twice), and Wisconsin (as a two-time repeat violator).

Those teams are from the BCS conferences; the list, of course, is considerably longer when one adds in the "mid-majors" and other institutions in Division I.[74] Since 2000, when I joined the Committee on Infractions, there has been a steady stream of cases, roughly a dozen a year, requiring two infractions hearings every other month. That consistency in cases has not changed, so I doubt that the situation has gotten worse.

Nonetheless, a steady stream of major violators is cause for concern. So where do we go from here? NCAA President Mark Emmert recently released a statement entitled "Cheating Will Not Be Tolerated."[75] That statement suggests four actions: (1) tougher academic standards[76]; (2) simplification of the rulebook[77]; (3) increased aid to student-athletes, including scholarships that cover the full cost of attendance (e.g., spending money), multi-year scholarships, and more summer school support[78]; and (4) a change in "enforcement practices and . . . penalties" to ensure that the cost of cheating "outweighs any benefit."[79]

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[74] At one time, for example, half of the institutions in the Mountain West Conference were on probation at the same time. BYU, New Mexico, San Diego State, TCU, and Utah all were before the Committee on Infractions between 2003 and 2008.

[75] Mark Emmert, *NCAA: Cheating Will Not Be Tolerated*, USA TODAY (Aug. 31, 2011, 8:10 PM), http://usatoday.com/news/opinion/story/2011-08-31/NCAA-cheating-will-not-be-tolerated/50208444/1.

[76] High academic standards, of course, are consistent with the educational goals of NCAA member institutions. I would only caution, once again, that tougher standards, including sanctions for poor academic performance, may carry with them greater incentives for individuals to engage in academic fraud. *See supra* notes 60–61 and accompanying text.

[77] I wish the president success with this objective; all of the rules have come from the membership, and most of the rules regarding enforcement have evolved to respond to specific concerns of competitive equity. Clearly there is room for improvement. As chair of a penalty subcommittee of the Committee on Infractions, I drafted proposed revisions to the penalty bylaws to make them clearer and to conform to reality, but even that work did not make a significant dent in the length of the rules. It is easy to get on the "rules are too convoluted" bandwagon, but in working with the Manual for ten years, I did not see a lot of unnecessary bylaws.

[78] These recommendations were approved recently by the NCAA Board of Directors. *N.C.A.A. Changes Scholarship Rules*, N.Y. TIMES (Oct. 28, 2011), http://www.nytimes.com/2011/10/28/sports/ncaa-changes-scholarship-rules.html.

[79] Emmert, *supra* note 75.

I am particularly interested in the last call to action, and I will be eager to learn what it means. In the meantime, I would make a few modest suggestions, or at least observations. President Emmert also has proposed the creation of as many as five different categories of violations, suggesting that the major-secondary dichotomy is insufficient.[80] In 2010, a delegation of the American Football Coaches Association made a similar proposal, essentially to create a category of "primary" violations between "secondary" and "major" violations.[81] My modest suggestion is to start by changing the word "or" to "and" in the first prong of the secondary violation definition: a violation cannot be secondary unless it is isolated *and* inadvertent.[82] Quite simply, why should we tolerate coaches who commit *intentional*, though "minor," violations?[83]

In 2008, a "penalty subcommittee" of the Committee on Infractions, which I chaired, recommended a series of harsher penalties for major violations, including the use of television bans,[84] greater use of postseason competition bans, and more scholarship reductions. The recommendations were presented to the Board of Directors, but to date the Board has not acted on the recommendations. The more I have thought about it, the more I am inclined to include automatic enhanced penalties for repeat violators. I still question, however, whether the membership has the stomach for stronger sanctions.[85]

Under NCAA bylaws, presidents and chancellors of NCAA member institutions are ultimately responsible for the administration of their athletics programs.[86] The recent mania surrounding conference realignments (not to mention continued escalation in coaching salaries and athletics spending

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[80] *Mark Emmert Wants Stiffer Penalties*, ESPN COLLEGE SPORTS (May 11, 2011, 5:01 PM), http://sports.espn.go.com/ncaa/news/story?id=6522478.

[81] Letter from Grant Teaff, Executive Director of Am. Football Coaches Ass'n to Bernard Franklin, NCAA Exec. Vice President (Aug. 4, 2010) (on file with author). This proposal was made to a task force charged with clarifying the roles of the Committee on Infractions and the Infractions Appeals Committee. I was a member of the task force, and I admit that I was not a fan of the proposal.

[82] *See supra* notes 53–55 and accompanying text.

[83] My views on this matter were influenced by several infractions cases involving improper phone calls from coaches to recruits. The prevailing view seems to be that these are "minor" violations, but I still have little empathy for any coach who knowingly violates rules.

[84] The last time a TV ban was imposed was in 1996, on the University of Maine hockey program. The last TV ban in football was imposed against the University of Mississippi in 1994. The penalty has been avoided largely because of concerns about penalizing innocent institutions within a conference, particularly since conferences have negotiated their own television packages, with sizable revenues at stake. But is it time to resurrect the TV penalty and let the conferences sort out how to minimize the impact on innocents?

[85] *See supra* notes 30–34 and accompanying text.

[86] NCAA MANUAL, *supra* note 2, Bylaw 2.1.1 ("The institution's president or chancellor is responsible for the administration of all aspects of the athletics program . . . .").

generally), however, makes one wonder if college presidents are well-positioned to resist the forces that create an environment in which those associated with athletics programs make cost-benefit analyses regarding rule violations. Tom McMillen, a former United States Representative and University of Maryland and NBA basketball star, recently wrote in an opinion piece in the *New York Times* that "[t]here is just too much money involved in the multibillion-dollar industry that is college athletics to expect the participants to police themselves."[87] McMillen, a regent of the University System of Maryland, proposes that university boards of trustees "take charge."[88] His suggestion has merit; we will see whether the University of Maryland is the first major Division I athletics program to disarm unilaterally.

I will close as I began, with a love note from a fan. It serves as yet another reminder that in the NCAA infractions and enforcement business, passion often prevails over perspective.

> [Y]ou guys are "screwed up", your sanctions given to alabama are ludicrous! they do NOT fit the crime! you want to compare the kentucky case to alabama's? well it doesnt compare, NOT at all, alabama's charges are way less! but the penalties are more, and do NOT give me this "repeat offender" bull! wisconsin was a 3 time offender, who the hell do you think you are fooling? AND WHO THE HELL DO YOU THINK YOU ARE! YOU THINK YOU DONT HAVE TO FOLLOW GUIDELINES? I HOPE EVERYONE OF YOU IDIOTS GETS THE SHIT SUED OUT OF YOU AND YOU ALL HAVE TO LIVE ON WELLFARE, AND EAT OUT OF TRASH CANS LIKE THE RATS YOU ARE![89]

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[87] C. Thomas McMillen, *Accountability on the Quad*, N.Y. TIMES (Aug. 31, 2011), http://www.nytimes.com/2011/09/01/opinion/how-to-referee-college-sports.html.

[88] *Id.*

[89] E-mail from Dewayne McCann to author and other members of the NCAA Div. I Comm. on Infractions (Feb. 11, 2002, 15:12 EST) (on file with author) (emphasis and grammatical errors in original).