From Off the Bench: The Potential Role of the U.S. Department of Education in Reforming Due Process in the NCAA

Joshua J. Despain[*]

ABSTRACT: The National Collegiate Athletic Association ("NCAA") is based on such ideals as amateurism, fairness, and healthy competition, and ensures compliance with those principles with a formalized system of investigation, infraction hearings, and penalties. Legal minds, as well as the direct participants in the college sports industry, have asserted that the NCAA's disciplinary proceedings deny constitutional rights, and have tried claiming those rights before various judges across the United States. Since the U.S. Supreme Court decided NCAA v. Tarkanian *in 1988, however, the NCAA is no longer a state actor, and not subject to the guarantee of due process in the U.S. Constitution. Though the NCAA has reformed and adapted its procedures, many student-athletes and others demand more. Two recent proposals in the U.S. House of Representatives, H.R. 2903 and H.R. 3545, require among their various provisions that any "athletic association" must enforce its bylaws with "any other due process procedure the Secretary [of Education] determines by regulation to be necessary." Student-athletes, coaches, and their supporters have never looked to the Department of Education ("DOE") before to correct the wrongs they perceive in the NCAA. This Note will show why, in the wake of failures in litigation and previous legislation, enhancing the role of the DOE is a viable option for NCAA reformists.*

* J.D. Candidate, The University of Iowa College of Law, 2015; B.A., Brigham Young University, 2011. Thank you very much to Brian Porto, Professor of Law at the Vermont Law School, who helped me arrive at this idea. I would also like to thank Jerold Israel, Alene and Allan F. Smith Professor of Law Emeritus at the University of Michigan Law School; Rodney Uphoff, Elwood Thomas Missouri Endowed Professor of Law at the University of Missouri School of Law and Member of the NCAA Division I Committee on Infractions; Daniel Matheson, Lecturer of Recreation & Sports Business at the University of Iowa and former NCAA Associate Director of Enforcement; and Monica Mims, Associate Director of Compliance at the University of Iowa Athletics Department, for providing their input and guiding me along the way. I also want to thank the editors and my fellow writers of the *Iowa Law Review*. And thanks most of all to my wife, Erin, and our children, Allisyn, Patrick, and Maggie.

I. INTRODUCTION

In October 2013, the National Collegiate Athletic Association ("NCAA") finally meted out its punishment to the University of Miami ("Miami") after a two-and-a-half-year investigation of "recruiting inducements and extra benefits" in the school's athletic program.[1] The penalties consisted of a three-year probation, a decrease of 12 scholarships for the football and basketball teams, and consequences for other sports, in addition to the punishments Miami already self-imposed.[2] Despite this severity, the NCAA would likely have imposed even more, if not for getting in its own way.[3]

In 2011, Nevin Shapiro, who a federal court later sentenced to 20 years in prison for his $930 million Ponzi scheme,[4] wrote to the NCAA from his jail cell to report his previous involvement as a Miami booster in offering improper benefits to Miami student-athletes, coaches, and prospective student-athletes.[5] After uncooperative witnesses held up its investigation, the NCAA Enforcement Staff resorted to paying Shapiro's attorney to leverage his federal bankruptcy depositions and obtain information for the NCAA's own purposes.[6] Regardless of the potential abuses, investigators purposefully evaded legal advice when they involved Shapiro's attorney in the name of a resourceful solution to their beleaguered investigation.[7] This and other

1. NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT 1, 63–74 (2013), *available at* http://hurricanesports.com/fls/28700/files/MiamiReport NCAA.pdf.

2. KENNETH L. WAINSTEIN ET AL., REPORT ON THE NCAA'S ENGAGEMENT OF A SOURCE'S COUNSEL AND USE OF THE BANKRUPTCY PROCESS IN ITS UNIVERSITY OF MIAMI INVESTIGATION 63, 67 (2013), *available at* http://www.kmbc.com/blob/view/-/18593534/data/1/-/8qjf7s/-/ NCAA-report-pdf.pdf; *see also Sanctions Levied Against Miami (Fla.)*, NCAA (Oct. 23, 2013, 4:11 PM), http://www.ncaa.com/news/ncaa/article/2013-10-23/sanctions-levied-against-miami-fla.

3. Steve Eder, *After Long N.C.A.A. Inquiry, Miami Loses 12 Scholarships*, N.Y. TIMES (Oct. 22, 2013), http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html (quoting an Ohio University professor who suggested that because of the NCAA's mistakes, Miami had a "trump card" against more severe penalties).

4. United States v. Shapiro, 505 F. App'x 131, 131–32 (3d Cir. 2012).

5. WAINSTEIN ET AL., *supra* note 2, at 10. Shapiro recounted to Yahoo! Sports that he spent millions of dollars on Miami athletes to provide cash; travel expenses; entertainment at restaurants, mansions, yachts, nightclubs, and strip clubs; bounties for injuries to opposing players; and even prostitutes and an abortion. Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011, 5:37 PM), http://sports.yahoo.com/news/renegade-miami-football-booster-spells-213700753–spt.html.

6. WAINSTEIN ET AL., *supra* note 2, at 7, 34.

7. *Id.* at 15, 32–37, 50.

NCAA missteps[8] led Miami to remark "we have suffered enough."[9] Even with this suffering and the NCAA's self-suppression of evidence originating from the bankruptcy depositions,[10] the NCAA censured Miami.[11]

By far, the most notable NCAA investigation concerned the Pennsylvania State University ("Penn State") scandal that broke in 2011. The tragic crimes that former assistant football coach Jerry Sandusky committed,[12] and the football culture that allegedly hid such crimes from view,[13] were unlike anything the NCAA had faced before and provoked the NCAA's uncommon reaction.[14] The NCAA reacted by circumventing *ad hoc* its own internal mechanisms for investigation and enforcement[15] and made an about-face from its original decision to let the criminal justice system run its course.[16] According to many observers, anything beyond a proportionate response to the actual violation of NCAA bylaws was clearly outside the NCAA's realm and

8. *See, e.g.*, Motion to Immediately Conclude Case Number M362 as it Relates to the University of Miami at 44, No. M362 (NCAA Committee on Infractions Mar. 29, 2013) (protesting the NCAA's vouching for Shapiro before a judge in his criminal case); WAINSTEIN ET AL., *supra* note 2, at 21 n.35 (citing the NCAA Enforcement Staff's $4500 transfer to Shapiro's prison commissary account to pay his phone bills); Miami Athletics, *University Statement on Notice of Allegations*, U. MIAMI (Feb. 19, 2013), http://www.hurricanesports.com/ViewArticle.dbml?ATCLID=206465483 (identifying flaws in the NCAA's investigation, including giving too much credence to Shapiro and neglecting to interview a former athletic director).

9. Miami Athletics, *supra* note 8. It should be noted that Miami attorneys were aware of this arrangement with Shapiro's attorney from the beginning, although they had misgivings from the onset and were never thoroughly apprised of what the Enforcement Staff was learning. *See* WAINSTEIN ET AL., *supra* note 2, at 13–14, 23, 37.

10. NCAA DIV. I COMM. ON INFRACTIONS, *supra* note 1, at 1–2. Of the incriminating evidence that Yahoo! Sports revealed in its August 2011 article, the NCAA's infractions report notes cash gifts, student-athlete visits to Shapiro's home, his yacht, and Miami restaurants, nightclubs, and strip clubs, among many other findings, but omits any mention of reports of paying for prostitutes, bounties, or an abortion. *Compare* NCAA DIV. I COMM. ON INFRACTIONS, *supra* note 1, at 7–30, 33–36, *with* Robinson, *supra* note 5.

11. Barry Petchesky, *The NCAA and Miami Prepare for Battle*, DEADSPIN (Feb. 20, 2013, 8:45 AM), http://deadspin.com/5985560/the-ncaa-and-miami-prepare-for-battle.

12. *See, e.g.*, Commonwealth v. Sandusky, No. CP-14-CR-2422-2011, 2012 WL 2369494 (Ct. Com. Pl. Pa., Centre Cnty. June 25, 2012).

13. *See* FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 17–18, 129–30 (2012), *available at* http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

14. Brian L. Porto, *Can the NCAA Enforcement Process Protect Children from Abuse in the Wake of the Sandusky Scandal?*, 22 WIDENER L.J. 555, 555–56 (2013).

15. *See* Complaint ¶ 50, Pennsylvania v. NCAA, 948 F. Supp. 2d 416 (M.D. Pa. 2013) (No. 13-CV-00006), 2013 WL 20316 ("[The NCAA] found a convenient path around the NCAA's due process protections."). The case was ultimately dismissed for insufficient allegations under the Sherman Act. *NCAA*, 948 F. Supp. 2d at 426–28.

16. Eileen Morgan, *To Tell the Truth. Would the Real Mark Emmert Please Stand Up?*, VOICE OF THE FREEHDOM FIGHTERS (Apr. 6, 2013, 8:55 AM), http://notpsu.blogspot.com/2013/04/eileen-morgan-to-tell-truth-would-real.html.

unacceptably seeping into criminal law.[17] Many involved, including the Governor of Pennsylvania, described NCAA President Mark Emmert's mandates as zealous overcorrections to portray that his organization was now tough on crime.[18] The ordeal shocked Penn State and other universities and still sends them reeling and wondering about the future.[19]

After Penn State, Miami, and many other highly criticized investigations,[20] it is easy for critics to point out that the NCAA's so-called "overreaching and unlawful"[21] mistakes are not isolated incidents. An attorney familiar with NCAA enforcement said the problems with the Miami investigation defy the "basic understanding that there is a notion of due

17. *See, e.g.*, Gary R. Roberts, *The Penn State Scandal Is for Law Enforcement, Not the N.C.A.A.*, N.Y. TIMES (July 16, 2012), http://www.nytimes.com/roomfordebate/2012/07/16/should-the-ncaa-punish-penn-state/the-penn-state-scandal-is-for-law-enforcement-not-the-ncaa.

18. *See, e.g.*, Complaint, *supra* note 15, ¶ 36.

19. Porto, *supra* note 14, at 556–57. Recently, "in an unexpected announcement," the NCAA immediately ended Penn State's ban on postseason eligibility and returned Penn State's pre-scandal number of football scholarships. Shirley Li, *NCAA Restores Penn State's Postseason Eligibility*, WIRE (Sept. 8, 2014, 3:01 PM), http://www.thewire.com/culture/2014/09/ncaa-restores-penn-state-postseason-eligibility/379814/. Then, in January 2015, the NCAA reinstated the 112 wins it had previously stripped from Penn State football coach Joe Paterno, and ended Penn State's probation, a move which a Pennsylvania state senator called "a victory for due process. . . . The NCAA has surrendered." *NCAA Agrees to Restore Wins to Penn State, Title to Paterno*, N.Y. TIMES (Jan. 16, 2015, 5:45 PM), http://www.nytimes.com/aponline/2015/01/16/us/ap-us-penn-state-abuse.html. George Mitchell, the former U.S. Senator leading the "Monitorship" over Penn State, recommended to the NCAA that his appointment end two years earlier than planned, due to Penn State's "current course of progress." GEORGE J. MITCHELL, SECOND ANNUAL REPORT OF THE INDEPENDENT ATHLETICS INTEGRITY MONITOR PURSUANT TO THE ATHLETICS INTEGRITY AGREEMENT AMONG THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE BIG TEN CONFERENCE AND THE PENNSYLVANIA STATE UNIVERSITY AND AS EXTERNAL MONITOR APPOINTED BY THE PENNSYLVANIA STATE UNIVERSITY 57–58 (2014), *available at* http://www.dlapiper.com/~/media/Files/Insights/Publications/2014/09/NCAAMonitorsSecondAnnualReport.pdf. For further discussion and analysis of the NCAA and the Penn State scandal, see generally Porto, *supra* note 14. For the argument that the NCAA's reaction to the Penn State scandal was not a due process concern (in part because the NCAA is not a state actor, *see infra* Part II.C), see Josephine R. Potuto, *NCAA as State Actor Controversy: Much Ado About Nothing*, 23 MARQ. SPORTS L. REV. 1, 8 n.38 (2012) and Letter from Mark A. Emmert, President, NCAA, to Rodney Erickson, President, Pa. State Univ. (Nov. 17, 2011), *available at* http://www.psu.edu/ur/2011/NCAA.pdf.

20. Greg Couch, *Auburn Mess Spotlights NCAA Flaws*, FOX SPORTS (June 6, 2014, 3:06 PM), http://msn.foxsports.com/collegefootball/story/ncaa-powerless-to-hammer-auburn-in-wake-of-selena-roberts-scandal-article-040413 (commenting on NCAA President Emmert's "edgy reaction" to criticism over NCAA's investigation into Auburn University); Eder, *supra* note 3 (mentioning criticism against NCAA cases involving Texas A&M University, Penn State, University of California Los Angeles, University of Southern California ("USC"), and University of North Carolina); Chris Smith, *NCAA Commits Severe Violations in Miami Investigation*, FORBES (Jan. 23, 2013, 3:30 PM), http://www.forbes.com/sites/chrissmith/2013/01/23/ncaa-commits-severe-violations-in-miami-investigation/ (listing NCAA action against West Virginia University and Ohio State University ("Ohio State")).

21. Steve Eder, *N.C.A.A. Admits Mishandling Miami Inquiry*, N.Y. TIMES (Jan. 23, 2013), www.nytimes.com/2013/01/24/sports/ncaa-admits-misconduct-in-miami-investigation.html (quoting Pennsylvania Governor Tom Corbett).

process to an N.C.A.A. investigation."[22] But the U.S. Supreme Court does not obligate the NCAA to obey the Due Process Clause in the Fifth and Fourteenth Amendments of the U.S. Constitution the same way it obligates the government.[23] The NCAA's freedom from constitutional due process is an obstacle for advocates who want to legally rein in the NCAA's discipline and prevent more "botched"[24] results. Instead of adding to protests against the judiciary, this Note will seek to avoid those obstacles by means of another branch of the federal government: the Executive Branch via the Department of Education ("DOE").

Part II will outline due process and how it applies to athletics, the history of due process in the NCAA, and how the Supreme Court, at least since its holding in *NCAA v. Tarkanian*, has continually strengthened the NCAA's power to determine its own rights, even to the detriment of student-athletes' rights. Part III will depict the mostly unfruitful efforts of Congress and state legislatures to reform the NCAA and overturn *Tarkanian*, but also the opportunity for change that House Bills H.R. 2903 and H.R. 3545 present by ushering in the DOE. Part IV proposes that the Executive Branch, through the DOE, can be the competent and effective solution that these student-athletes and coaches have been searching for.[25]

II. THE HISTORY OF DUE PROCESS IN THE NCAA

With its days as a "fledgling organization"[26] long gone, the NCAA is now a legitimate powerhouse with revenue exceeding $912 million a year and counting.[27] As the NCAA grows, its desire to maintain integrity among its student-athletes and coaches becomes more urgent.[28] Compared with many notions of due process, the NCAA's initial system for monitoring and punishing had flaws that drove student-athletes and coaches to the courts for

22. *Id.*

23. *See infra* Part II.C.2.

24. Charles P. Pierce, *The Keystone Kops*, GRANTLAND (Jan. 28, 2013), http://www.grantland.com/features/the-ncaa-botched-miami-investigation/.

25. This Note does not propose particular reforms to the NCAA infractions procedures, nor does it argue that reforms are necessary at all. Rather, the scope of this Note is limited to addressing the previously unexplored merits of the DOE as a vehicle for potential change in NCAA due process.

26. *See* JACK FALLA, NCAA: THE VOICE OF COLLEGE SPORTS 15 (1981).

27. DELOITTE & TOUCHE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2013 AND 2012, SUPPLEMENTARY INFORMATION AS OF AND FOR THE YEAR ENDED AUGUST 31, 2013, AND INDEPENDENT AUDITORS' REPORT 22 (2013), *available at* http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf; Eben Novy-Williams, *NCAA Revenue Grows for 14th Consecutive Year as Changes Loom*, CHI. TRIB. (Jan. 16, 2015, 11:20 PM), http://www.chicagotribune.com/news/sns-wp-blm-news-bc-ncaa-emmert16-20150116-story.html.

28. *See* NCAA CONST. art. 2, §§ 2.9–.10 (2014). All references to articles of the NCAA Constitution and to NCAA bylaws come from NCAA, 2014–2015 NCAA DIVISION I MANUAL (2014), unless otherwise noted.

relief.[29] Initially, many judges concurred with the student-athletes and coaches, and demanded the NCAA follow the same due process guarantees as the government.[30] This command, however, only lasted until the Supreme Court decided *NCAA v. Tarkanian* in 1988, and declared that the NCAA was not a state actor.[31] After *Tarkanian*, the NCAA no longer answers to the Fifth and Fourteenth Amendments as it manages its own enforcement regime. Regardless of this courtroom victory, the NCAA still acquiesced and made some due process reforms.[32] But even with these changes, many legal experts and sports fans want to see the NCAA become a state actor once more,[33] while courts continue to sustain the NCAA's *Tarkanian* shield against judicially imposed due process protection.[34]

A. Overview of Athletic Due Process

"Due process of law" traditionally conveys the same definition as the term "law of the land" as it was written in the Magna Carta of 1215,[35] and suggests obedience to "natural and inherent principles of justice."[36] Due process rights in practice mean a system of rules and procedures that protect individual rights against the government.[37] Besides the purely "procedural" aspect, due process doctrine encompasses "substantive due process," or the actual substance of government regulation, as well as its procedure.[38] The U.S. Constitution embodies due process in its Fifth and Fourteenth Amendments: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,"[39] "nor shall any State deprive any person of life, liberty, or

29. *See, e.g.*, Arlosoroff v. NCAA, 746 F.2d 1019, 1020 (4th Cir. 1984); Howard Univ. v. NCAA, 510 F.2d 213, 216 (D.C. Cir. 1975); Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1160 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1977); Buckton v. NCAA, 366 F. Supp. 1152, 1153 (D. Mass. 1973); Parish v. NCAA, 361 F. Supp. 1220, 1221 (W.D. La. 1973).

30. *Regents of the Univ. of Minn.*, 422 F. Supp. at 1162; *Buckton*, 366 F. Supp. at 1156.

31. NCAA v. Tarkanian, 488 U.S. 179, 193 (1988).

32. *See infra* Part II.D.

33. *See, e.g.*, Kadence A. Otto & Kristal S. Stippich, *Revisiting* Tarkanian*: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243 (2008); James Potter, *The NCAA as State Actor:* Tarkanian, Brentwood*, and Due Process*, 155 U. PA. L. REV. 1269 (2007); Robin Petronella, Comment, *A Comment on the Supreme Court's Machiavellian Approach to Government Action and the Implications of Its Recent Decision in* Brentwood Academy v. Tennessee Secondary School Athletic Association, 31 STETSON L. REV. 1057 (2002).

34. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303–05 (2001).

35. Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).

36. Holden v. Hardy, 169 U.S. 366, 390 (1898).

37. Pennoyer v. Neff, 95 U.S. 714, 733 (1877), *rev'd on other grounds*, Shaffer v. Heitner, 433 U.S. 186 (1977).

38. KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 467 (18th ed. 2013).

39. U.S. CONST. amend. V.

property, without due process of law."[40] The Supreme Court has widened "life," "liberty," and "property" beyond their literal definitions.[41]

In the context of sports, due process rarely involves the direct deprivation of life, but does deal extensively with the deprivation of liberty or property.[42] To apply substantive due process to athletic issues, one first asks what is the "liberty" or "property" at issue, and whether it requires protection from government interference.[43] Some examples of claimed violations of athletic liberty or property include a student's ineligibility to play a sport, a coach's suspension or dismissal, forfeited scholarships, or a team-wide ban from postseason play.[44] However, to the dismay of many athletes and their coaches, federal courts have almost uniformly declined to count athletic participation as a sufficiently fundamental or essential right to warrant substantive due process protection[45] (though there are differing opinions among state courts[46]). At the same time, some indirect liberty and property interests that

40. U.S. CONST. amend. XIV, § 1.

41. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572, 576 (1972). Other judicially recognized liberties, besides mere freedom from imprisonment, include the right to enter into contracts, to receive an education, to work, and to protect one's reputation. William G. Buss, *Due Process in the Enforcement of Amateur Sports Rules*, *in* LAW & AMATEUR SPORTS 1, 11 (Ronald J. Waicukauski ed., 1982) (citing *Roth*, 408 U.S. at 572). Property means not only tangible, possessed objects, but also "entitlement." *Id.* at 14 (citing *Roth*, 408 U.S. at 577).

42. GLENN M. WONG, ESSENTIALS OF SPORTS LAW 219 (4th ed. 2010).

43. *See* Buss, *supra* note 41, at 4, 10.

44. *Id.* at 2.

45. Angstadt v. Midd–West Sch. Dist., 377 F.3d 338, 344 (3d Cir. 2004); Seamons v. Snow, 84 F.3d 1226, 1234–35 (10th Cir. 1996); Hebert v. Ventetuolo, 638 F.2d 5, 6 (1st Cir. 1981); Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159–60 (5th Cir. 1980). *But see* Boyd v. Bd. of Dirs. of the McGehee Sch. Dist. No. 17, 612 F. Supp. 86, 93 (E.D. Ark. 1985) ("[P]articipation in high school sports is vital and indispensable to a college scholarship and, in essence, a college education.").

46. For state courts that do not consider athletic participation to be a fundamental right, see Smith v. Crim, 240 S.E.2d 884, 886 (Ga. 1977); Scott v. Okla. Secondary Sch. Activities Ass'n, 313 P.3d 891, 898–99 (Okla. 2013) (citing *Seamons*, 84 F.3d at 1234–35); NCAA v. Yeo, 171 S.W.3d 863, 869–70 (Tex. 2005); Mayo v. W. Va. Secondary Schs. Activities Comm'n, 672 S.E.2d 224, 229 (W. Va. 2008). For state courts that do say the right to play sports should be constitutionally protected, see French v. Cornwell, 276 N.W.2d 216, 218 (Neb. 1979); Duffley v. N.H. Interscholastic Athletic Ass'n, Inc., 446 A.2d 462, 467 (N.H. 1982) (holding that "the right of a student to participate in interscholastic athletics is one that is entitled to the protections of due process" under the New Hampshire Constitution).

Though not directly involving NCAA bylaws or enforcement, an Iowa state district court recently nullified Iowa State University's suspension of basketball player Yempabou "Bubu" Palo. In January 2014, the Iowa Supreme Court denied the university's motion for a stay of the state district court's decision and the university's request for an interlocutory appeal. Palo v. Iowa Bd. of Regents, No. 14-0085 (Iowa Jan. 24, 2014) (order denying stay of decision and request for interlocutory appeal). In August 2014, the district court judge ruled against Iowa State and called its complaint "unfounded." Order for Judgment, Palo v. Iowa Bd. of Regents, (Iowa Dist. Ct. Aug. 21, 2014) (No. 02851) (Story Cnty. No. CVCV048520). The legal battle between the university and the state courts continues. Beau Berkley, *Iowa Board of Regents Appeals Bubu Palo Decision*, IOWA ST. DAILY (Sept. 18, 2014, 12:00 AM), http://www.iowastatedaily.com/sports/article_462off42-

derive from sports occasionally find refuge in the courts, such as the preservation of one's reputation,[47] or the economic opportunity of turning a college athletic career into a professional one.[48]

Even if a court accepts these athletic interests as liberty or property worthy of *substantive* due process, there are varying degrees of *procedural* due process that the law will afford these interests. The Constitution's minimum requirements for general procedure are the right to a hearing and a right to notice of that hearing,[49] even if it is only a nominal hearing.[50] To add any more requirements, courts attempt to match the liberty or property at stake with its requisite procedural due process by means of the "*Eldridge* test."[51] The *Eldridge* test examines three factors: (1) the interest at the heart of the matter; (2) the danger of erroneously denying that interest, and any alternative protections to avoid that denial; and (3) the financial and bureaucratic

3eba-11e4-8cee-d7bbc696baaf.html; *National Group Urges Iowa Supreme Court to Uphold Palo Sanctions*, DES MOINES REG. (Jan. 2, 2015, 12:26 PM), http://www.desmoinesregister.com/story/news/crime-and-courts/2015/01/02/bubu-palu-sexual-misconduct-appeal-iowa-state/21190111; *see also* Allie Grasgreen, *Athlete's Expulsion Overruled*, INSIDE HIGHER ED. (Feb. 5, 2014), http://www.insidehighered.com/news/2014/02/05/district-court-decides-eligibility-athlete-expelled-sexual-assault ("Universities and the National Collegiate Athletic Association always argue that playing sports is a privilege, not a right. But cases like these conflict with that assertion.").

A similar case occurred in Oklahoma, but with opposite results. The University of Oklahoma suspended linebacker Frank Shannon for the entire 2014–2015 football season because of alleged sexual misconduct. A county district judge granted a stay against the university's action, but the Oklahoma Supreme Court "dissolved" that stay and upheld Shannon's suspension. Bd. of Regents of the Univ. of Okla. v. Schumacher, No. CV-2014-801 (Okla. Sept. 8, 2014); *see* Molly Geary, *Frank Shannon Suspension Upheld by Oklahoma State Supreme Court*, SPORTS ILLUSTRATED (Sept. 8, 2014), http://www.si.com/college-football/2014/09/08/frank-shannon-suspension-oklahoma-sooners-upheld.

47. Stanley v. Big Eight Conference, 463 F. Supp. 920, 928–29 (W.D. Mo. 1978); Buss, *supra* note 41, at 11–12.

48. *See* Kite v. Marshall, 454 F. Supp. 1347, 1349 (S.D. Tex. 1978); Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1161–62 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1977); Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972). *But see* Parish v. NCAA, 506 F.2d 1028, 1034 n.17 (5th Cir. 1975); Hall v. NCAA, 985 F. Supp. 782, 799 (N.D. Ill. 1997) ("Likewise, 'hoped for careers in basketball' are too speculative to comprise a constitutionally protected property right." (quoting *Parish*, 506 F.2d at 1034 n.17)); Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 894 (D. Colo. 1976) (stating that the Fourteenth Amendment "is not an absolute panacea for all harms which may be incurred"), *aff'd*, 570 F.2d 320 (10th Cir. 1978); McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 821–22 (N.C. Ct. App. 2013) ("Any further injuries Plaintiff alleges are too hypothetical and speculative to provide him with standing."), *denied review by* 740 S.E.2d 465 (N.C. 2013) (mem.).

49. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Earle v. McVeigh, 91 U.S. 503, 503–04 (1875); WONG, *supra* note 42, at 220.

50. *See* Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests."); Buss, *supra* note 41, at 19. *See generally* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

51. Buss, *supra* note 41, at 19.

burdens of those alternatives, and any other government interest.[52] Often, after the court applies the *Eldridge* test, even a legitimate liberty or property interest does not outweigh the procedure that squelched it,[53] unless the procedure was "unreasonable, arbitrary or capricious"[54] or "void for vagueness."[55]

Another limit on absolute due process comes from the Fifth and Fourteenth Amendments' jurisdiction over federal, state, and local governments only, and their hands-off approach to private action.[56] The amendments do not control private action per se, though constitutional boundaries do constrain public entities such as schools and colleges.[57] Private actors, then, are subject to the Fifth and Fourteenth Amendments only when their actions are aligned with or advance governmental goals.[58] A private actor is engaged in state action when states delegate governmental functions or powers to them,[59] and when private conduct is "so entwined with . . . or so impregnated with" the government that it invites the government's own obligation to constitutional limits.[60] As it pertains to the NCAA, case law through the 1970s deemed the NCAA a state actor partly because of its dependence on public universities.[61] But with *NCAA v. Tarkanian*, the Supreme Court revoked the NCAA's state actor classification.[62] Consequently, the NCAA is no longer within the reach of constitutional due process jurisprudence.[63] Would-be plaintiffs against the NCAA must persuade a court that their athletic interests are significant (substantive due process), that they warrant more intricate procedures to deal with them (procedural due process), and since *Tarkanian*, they must do so without the added strength that state actor expectations would give.[64]

---

52. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). For an explanation of how the *Eldridge* test could be applied to an athletic situation, see Buss, *supra* note 41, at 19–22.

53. *See* Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 159–60 (5th Cir. 1980); Fluitt v. Univ. of Neb., 489 F. Supp. 1194, 1203–04 (D. Neb. 1980); *Colorado Seminary (Univ. of Denver)*, 570 F.2d at 321–22.

54. Nebbia v. New York, 291 U.S. 502, 525 (1934).

55. Isler v. N.M. Activities Ass'n, 893 F. Supp. 2d 1145, 1150–51 (D.N.M. 2012).

56. *See* Corrigan v. Buckley, 271 U.S. 323, 330 (1926); The Civil Rights Cases, 109 U.S. 3, 11 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1879).

57. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.").

58. WONG, *supra* note 42, at 215.

59. Evans v. Newton, 382 U.S. 296, 299 (1966).

60. *Id.*

61. WONG, *supra* note 42, at 216.

62. *Id.*

63. *See infra* Part II.C.2.

64. This Note focuses on procedural due process in the NCAA, and leaves to others the question of whether access to college sports, etc., is a fundamental right deserving of substantive due process.

B. EARLY NCAA DUE PROCESS

The athletic due process for more than six million college students in the United States comes into play primarily under the watch of the NCAA and its member institutions.[65] After a few decades of the NCAA's existence, the NCAA realized it would be necessary to implement comprehensive systems of investigation and enforcement in order to keep college sports pure.[66] But from the beginning, the practices of both the NCAA's Committee on Infractions ("COI") and its Enforcement Staff faced criticism from student-athletes and coaches who felt the NCAA cheated them of constitutional due process.[67] This tension set the stage for the Supreme Court's decision in *NCAA v. Tarkanian*.

1. Origins of the NCAA, the Committee on Infractions, and the Enforcement Staff

In light of this Note's proposal, the fact that the Executive Branch brought about the NCAA is fitting.[68] President Theodore Roosevelt—concerned with the formidable epidemic of both fatal injuries on the football field[69] and corruption off the field[70]—invited coaches and athletic directors to the White House and ordered them to reform college football, or else he would abolish it.[71] The athletic directors' response eventually led to the creation of the NCAA (which would oversee not just football but all college sports), the approval of a constitution and bylaws in March 1906, and the NCAA's first convention that December.[72] But despite President Roosevelt's purpose of bringing order to madness, the NCAA originally acted only to coordinate schedules[73] and promote academics.[74] It relied on member

65. NCAA, 2009–10 NCAA MEMBERSHIP REPORT 15, 17, 21 (2010), *available at* http://catalog.proemags.com/publication/oaffe96d#/oaffe96d/1.

66. *See infra* notes 79–83 and accompanying text.

67. *See infra* Part II.B.2.

68. JOSEPH N. CROWLEY, NCAA, IN THE ARENA: THE NCAA'S FIRST CENTURY 9–10 (2006), *available at* http://www.ncaapublications.com/productdownloads/in_the_arena584e1fee-ea5d-4487-be73-cb2f718232d9.pdf.

69. In the 1905 season alone, football fans witnessed 18 fatalities and 149 serious injuries. FALLA, *supra* note 26, at 13.

70. CROWLEY, *supra* note 68, at 4–5.

71. CROWLEY, *supra* note 68, at 9–10; FALLA, *supra* note 26, at 13; ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 8 (1999); Kay Hawes, *NCAA Born from Need to Bridge Football and Higher Education*, NCAA NEWS (Nov. 8, 1999), http://fs.ncaa.org/Docs/NCAANewsArchive/1999/19991108/active/3623n27.html. *But see* KATHLEEN DALTON, THEODORE ROOSEVELT: A STRENUOUS LIFE 290 (2002) (claiming President Roosevelt was only motivated to reform college football in order to prevent Harvard University President Charles Eliot from "emasculat[ing]" it).

72. CROWLEY, *supra* note 68, at 10.

73. DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 13 (1991).

74. *See* CROWLEY, *supra* note 68, at 15.

institutions to uphold a "high standard of personal honor, eligibility, and fair play," and to be self-sufficient in correcting any impropriety.[75] The NCAA's policy requiring members to police themselves, the so-called "home rule,"[76] resulted in a quagmire,[77] causing one sports writer to call college football "the leader in the field of double-dealing, deception, sham, cant, and humbug, and organized hypocrisy."[78]

In 1940, the NCAA implemented its own investigative procedures to address violations against its principles,[79] and carried out enforcement with its Constitutional Compliance Committee starting in 1948.[80] The COI replaced the short-lived Constitutional Compliance Committee in 1951,[81] and continues to handle infraction hearings to this day as the NCAA's primary adjudicator.[82] The COI originally housed investigation activities as well, until 1973 when that responsibility shifted to the new Enforcement Staff.[83]

Even under this new scheme, the NCAA still maintained a shadow of "home rule," though now retitled the "cooperative principle."[84] Under this principle, the NCAA expected member institutions to accommodate the Enforcement Staff and contribute to the staff's investigations.[85] After allegations of misconduct arose, the NCAA would begin its investigation by sending the accused university a "preliminary inquiry letter," announcing the impending arrival of the Enforcement Staff to uncover more information.[86]

---

75. NCAA CONST. art. VIII (1906). For more information, see CROWLEY, *supra* note 68, at 10, 15.

76. CROWLEY, *supra* note 68, at 15.

77. *Id.* at 29 (referencing JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS 23 (1994)). The NCAA had lost control of its maintenance of amateurism largely because not every university president ensured loyalty to those values at his institution. *Id.* at 30 (quoting Thomas S. Gates, President of the University of Pennsylvania).

78. PAUL GALLICO, FAREWELL TO SPORT 208 (1938). "If we have any conception of the real meaning of the word 'amateur,' we never let it disturb us. We ask only one thing of an amateur and that is that he doesn't let us catch him taking the dough." *Id.* at 109.

79. CROWLEY, *supra* note 68, at 30.

80. After a wartime hiatus from reform and development during World War II, in 1948 the NCAA backed up its investigative efforts with the Constitutional Compliance Committee and wrote its "Principles for the Conduct of Intercollegiate Athletics" (otherwise known as the "Sanity Code"). *Id.*

81. NCAA members panned the Constitutional Compliance Committee because the only penalty it offered was an institution's expulsion from the NCAA, and it required a two-thirds majority vote among the membership before terminating the guilty school. Glenn Wong et al., *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, 49–50 (2009). In 1951, the NCAA repealed the "Sanity Code." *Id.*

82. *See* NCAA BYLAWS § 19.3 (2014); WONG, *supra* note 42, at 186.

83. WONG, *supra* note 42, at 185.

84. 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 104 (2d ed. 1993).

85. *See* NCAA BYLAWS § 19.2.3; BERRY & WONG, *supra* note 84, at 104.

86. BERRY & WONG, *supra* note 84, at 104; *see also* NCAA BYLAWS § 19.5.3.

This letter "[would] not specify the . . . allegations."[87] After the preliminary inquiry, the Enforcement Staff could choose whether to conduct an official inquiry,[88] although there was no standard to guide the Enforcement Staff's decision.[89] Here, the Enforcement Staff would send another letter, ordering the institution to undertake its own investigation and respond with supportive evidence.[90] It was not until this letter that the NCAA listed specific allegations and enumerated charges.[91]

After the university's fact-finding, the COI conducted a closed hearing with the university delegation and members of the Enforcement Staff.[92] Both sides gave opening statements, followed by a review of the allegations where the Enforcement Staff presented any and all evidence, whether that evidence expressly supported the allegations or not.[93] The university answered, and then the COI heard any closing statements before adjourning the hearing.[94]

Once the COI had deliberated and reached a consensus,[95] it wrote its findings in a confidential report to the university president, including applicable penalties.[96] The institution had the right to appeal to the NCAA Council, where the case was heard *de novo*.[97] The Council affirmed, reversed, altered, or elaborated on the COI's findings.[98] At the end of the process, the NCAA issued a press release to announce violations and penalties.[99] Until that point, the NCAA never disclosed any information (or even the fact that it was conducting an investigation or hearings) to the public.[100]

2. Criticisms Against the NCAA's Due Process Before *Tarkanian*

The COI structure and methods differed from procedural due process and "natural and inherent principles of justice"[101] in many important ways.[102]

87. BERRY & WONG, *supra* note 84, at 104; *see also* NCAA BYLAWS § 19.5.3.

88. BERRY & WONG, *supra* note 84, at 104; *see also* NCAA BYLAWS §§ 19.5.10, 19.7.1.

89. Gordon A. Martin, Jr., *Due Process and Its Future Within the NCAA*, 10 CONN. L. REV. 290, 293 (1978).

90. BERRY & WONG, *supra* note 84, at 104; *see also* NCAA BYLAWS § 19.7.1.1(b).

91. *See* BERRY & WONG, *supra* note 84, at 104–05.

92. *Id.* at 106.

93. *Id.*

94. *Id.*

95. *See* NCAA BYLAWS § 19.7.8.3 (prescribing the COI's standard of review).

96. BERRY & WONG, *supra* note 84, at 106.

97. *Id.* at 107.

98. *Id.*

99. NCAA BYLAWS §§ 19.8.1.2–.3; BERRY & WONG, *supra* note 84, at 106–07.

100. BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS 104 (2012); *see also* NCAA BYLAWS § 19.01.3. *But see* Charles Alan Wright, *Responding to an NCAA Investigation, or, What to Do When an Official Inquiry Comes*, 1 ENT. & SPORTS L.J. 19, 24 (1984).

101. Holden v. Hardy, 169 U.S. 366, 390 (1898).

102. Some courts were of the opinion that these COI procedures *did* afford due process. Howard Univ. v. NCAA, 510 F.2d 213, 222 (D.C. Cir. 1975); Colo. Seminary (Univ. of Denver)

Primarily, throughout the whole process, an involved student-athlete never had direct access to his or her own "litigation" or the chance to make his or her case because the COI did not consider student-athletes themselves as NCAA members, and considered them a degree removed from the institution in question.[103] Though the NCAA might find a student-athlete culpable, it did not itself pronounce ineligibility,[104] but instead remained behind a buffer zone and expected its member institutions to apply the NCAA's rules.[105] Student-athletes had to rely on their universities, which did not always share their interests.[106] Though a university may want to advocate for its student-athlete, it also has an interest in preventing further repercussions from the NCAA.[107] This conflict of interest meant the "cooperative principle" was, in practice, more like NCAA intimidation than NCAA cooperation.[108] One professor said the NCAA was "cooperative only in the same sense ancient Rome's system of capital punishment was cooperative—the condemned is expected to carry his cross to the crucifixion."[109]

Other distinctive procedural due process gaps in the COI's early days were: (1) an absence of a statute of limitations;[110] (2) the use of *ex parte* interviews as evidence;[111] (3) the already mentioned initial lack of notice;[112] (4) the purely subjective standard for advancing to the official inquiry stage;[113] (5) sequestered hearings;[114] and (6) the NCAA affiliation attached to both the Enforcement Staff and the COI, giving the NCAA "unbeatable 'home court advantage.'"[115]

---

v. NCAA, 417 F. Supp. 885, 896 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978). One reason that judges frequently offered as evidence of due process was the fact that law experts were participants in the COI. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352, 366 (8th Cir. 1977); NCAA v. Gillard, 352 So.2d 1072, 1082 (Miss. 1977); *see also infra* notes 203–06 and accompanying text.

103. Martin, *supra* note 89, at 292–93.

104. *Id.* at 291.

105. Jaffe D. Dickerson & Mayer Chapman, *Contract Law, Due Process, and the NCAA*, 5 J.C. & U.L. 107, 107 (1977–1978).

106. Kenneth J. Philpot & John R. Mackall, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 908–09 (1972). *But cf.* Potuto, *supra* note 19, at 20.

107. Philpot & Mackall, *supra* note 106, at 908.

108. H.R. REP. NO. 95-69, at 4 (1978) (statement of North Carolina State University basketball coach Norman Sloan); PORTO, *supra* note 100, at 105.

109. YAEGER, *supra* note 73, at 167.

110. H.R. REP. NO. 95-69, at 18.

111. *Id.* at 22. In these *ex parte* interviews, the NCAA would interview the source of the allegation without anyone present from the institution and without any recording or transcript. The identity of the source was often unknown to the institution until the hearing, when it was too late to prepare a defense or check the interrogation process. *Id.*; PORTO, *supra* note 100, at 107.

112. *See supra* note 87 and accompanying text.

113. *See supra* note 89 and accompanying text.

114. *See supra* notes 92 and 100 and accompanying text.

115. H.R. REP. NO. 95-69, at 32.

The most pervasive attack on the NCAA (and one that strongly persists today) has been its inconsistency.[116] Repeatedly, critics call out "some schools that will walk free after committing murder while others will go to Death Row for jaywalking."[117] Jerry "Tark the Shark" Tarkanian, the longtime basketball coach at the University of Nevada Las Vegas ("UNLV"), once wrote during the NCAA's 1973 investigation of Western Kentucky University that "[t]he University of Kentucky basketball program breaks more rules in a day than Western Kentucky does in a year,"[118] and quipped that "in the late 1980s the NCAA was so mad at Kentucky [that it] gave Cleveland State [University] two more years of probation."[119]

C. "SHARK" REPELLANT: NCAA V. TARKANIAN

Tarkanian was an outspoken critic of the NCAA,[120] and perhaps "an epic, David-and-Goliath battle" between the two was inevitable.[121] After staying one step ahead of the NCAA for nine years,[122] Tarkanian's feud eventually took the question of procedural due process for NCAA student-athletes and coaches to the highest court in the land.[123] Leading up to Tarkanian's lawsuit, other NCAA-adverse court decisions held the NCAA to the state actor standard.[124] But just before Tarkanian's case arrived, the Supreme Court turned another direction and restricted the state actor category and the law

116. *See, e.g.*, Pat Forde, *Penn State's Softened Sentence Is an Admission That the NCAA Went Too Far*, YAHOO! SPORTS (Sept. 24, 2013, 2:24 PM), http://sports.yahoo.com/news/ncaaf–penn-state-s-softened-sentence-is-an-admission-that-the-ncaa-went-too-far-182434121.html ("[I]t's . . . significant news that the NCAA has rapidly amended its biggest ruling since giving [Southern Methodist University] football the death penalty in the 1980s. . . . But it also shows that the penalties—and the process—were flawed to begin with."); Andy Glockner, *Seton Hall's Capture of Isaiah Whitehead Once Again Exposes NCAA Silliness*, SPORTS ILLUSTRATED (Sept. 20, 2013), http://www.si.com/college-basketball/one-and-one/2013/09/20/seton-hall-kevin-willard-isaiah-whitehead-ncaa-silliness/ ("[The NCAA r]unning inconsistent charades is what gets people the angriest about the overlords of college athletics."); Gary Klein, *Pat Haden Meets with NCAA to Seek Easing of Penalties Against USC*, L.A. TIMES (Sept. 26, 2013), http://articles.latimes.com/2013/sep/26/sports/la-sp-0927-usc-football-ncaa-20130927 (quoting USC athletic director Pat Haden's belief that "the penalties imposed on our football program in 2010 were unprecedented and inconsistent with NCAA precedent in prior cases").

117. YAEGER, *supra* note 73, at 41.

118. DON YAEGER, SHARK ATTACK: JERRY TARKANIAN AND HIS BATTLE WITH THE NCAA AND UNLV 79 (1992). *But see* Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 503 n.122 (1995) (giving reasons why Tarkanian's criticism might have been misplaced). Tarkanian passed away on February 11, 2015.

119. JERRY TARKANIAN & DAN WETZEL, RUNNIN REBEL: SHARK TALES OF "EXTRA BENEFITS," FRANK SINATRA, AND WINNING IT ALL 59 (2005).

120. Broyles, *supra* note 118, at 503–04.

121. PORTO, *supra* note 100, at 111.

122. *Id.*

123. *See infra* Part II.C.2.

124. *See* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 79 (5th ed. 2003) (noting that before *NCAA v. Tarkanian*, lower courts saw the NCAA as a state actor "almost without exception").

regarding state actors.[125] Tarkanian could no longer rely on history, and the Supreme Court's shift diminished Tarkanian's legal battle with the NCAA,[126] as well as the many coaches and student-athletes after him and their causes for more procedural due process.

Less than a week after Tarkanian started his tenure with UNLV in 1973, the NCAA reactivated a previously dormant investigation into UNLV.[127] By 1977, the NCAA's charges against UNLV were whittled down to 38, ten of them involving Tarkanian.[128] After a four-day hearing, the COI found UNLV guilty of all 38 violations, including the ten regarding Tarkanian, and punished the school with a two-year ban on postseason competition and television appearances.[129] In addition, the NCAA ordered UNLV, without precedent, to suspend the coach for two years unless it could show cause otherwise.[130] The NCAA Council affirmed the COI decision on appeal.[131]

UNLV complied and conducted its own investigation and hearing to determine Tarkanian's suspension.[132] As it did so, however, it found the basis for the NCAA's action doubtful because it was founded on inadequate proof and lacked due process.[133] However, even with results drastically different from the NCAA's,[134] the school had no choice but to comply with the directive

---

125. *See infra* Part II.C.1.

126. NCAA v. Tarkanian, 488 U.S. 179, 193, 195 (1988).

127. PORTO, *supra* note 100, at 111 ("Thus, the investigation of UNLV was personal as well as institutional.").

128. *Id.* Among them were allegations that Tarkanian persuaded a UNLV professor to give a basketball player a B grade, without the student-athlete being required to attend class or do homework. Joint Appendix at 184, *Tarkanian*, 488 U.S. 179 (No. 87-1061), 1988 U.S. S. Ct. Briefs LEXIS 1437; PORTO, *supra* note 100, at 112; *see also* Joint Appendix at 228–29, *supra*. Also, the NCAA alleged that Tarkanian paid for (or enlisted boosters to pay for) airplane tickets, housing, clothes, furniture, hotel rooms, and meals for student-athletes and prospective student-athletes, and arranged for jobs, and, on one occasion, the opportunity to try out with the Los Angeles Lakers professional basketball team. *Id.* at 145–52, 159–60, 168–72, 181–83, 192–94, 201; PORTO, *supra* note 100, at 111–14. Above all, the NCAA wanted to punish Tarkanian for covering up his actions, and "fail[ing] to report to University officials . . . his knowledge of and involvement in any violations of NCAA legislation." Joint Appendix at 203, *supra*; *see also id.* at 164–68, 170–73, 203–05, 231–32. "Further, the Committee believes this finding represents a most serious violation of NCAA legislation in that Tarkanian's actions are contrary to and reflect disregard for the cooperative principles of the NCAA enforcement program and the basic principles of ethical conduct." *Id.* at 173; *see also id.* at 228.

129. Mathew M. Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N. ILL. U. L. REV. 297, 312 (2005).

130. PORTO, *supra* note 100, at 115; *see also* NCAA BYLAWS § 19.02.3 (2014) (providing the NCAA's current definition of "show-cause order").

131. Keegan, *supra* note 129, at 312–13.

132. YAEGER, *supra* note 73, at 202.

133. *Id.* at 202–03 (quoting a written statement by UNLV Vice President Brock Dixon).

134. PORTO, *supra* note 100, at 115–16. For example, concerning its allegation that Tarkanian had convinced a professor to give a gratuitous B grade to a student-athlete, see *supra* note 128, the only evidence supporting the accusation was what the NCAA's enforcement officer

to suspend Tarkanian in order to maintain its NCAA membership.[135] In retaliation, Tarkanian sued UNLV in state court.[136] His case reached the Nevada Supreme Court two years later, where the court instructed him to amend and add the NCAA as an essential defendant.[137]

1. The Judiciary Shifts the State Actor Standard

In the era surrounding Tarkanian's initial suit in Nevada state court, the prevailing federal case law deemed the NCAA a state actor for purposes of constitutional due process rights.[138] The constitutional guarantee of due process, under the Fifth Amendment and the Fourteenth Amendment, only applies to the federal government and to state governments, respectively.[139] But case law considered another entity as falling within that Fifth and Fourteenth Amendment purview when that entity's conduct was "entwined" enough with the government to warrant the same constitutional check against it.[140] A federal court in Massachusetts[141] applied this reasoning to the NCAA because overseeing the nation's student-athletes was "sovereign in nature" and therefore rested on the Constitution.[142]

While *Tarkanian v. NCAA* was pending in Nevada, however, the U.S. Supreme Court moved the goalposts. The Court under the watch of Chief Justice Burger elevated the standard for state actor status and the Fourteenth Amendment's application, and Chief Justice Rehnquist's Court then continued that elevated standard.[143] Unlike before, where a private entity's resemblance to governmental functions was sufficient to evoke constitutional due process, this new interpretation required the government to be more clearly and directly integrated with the facts at hand—mere presence of

---

could recollect from his conversation with the professor. RICHARD HARP & JOSEPH MCCULLOUGH, TARKANIAN: COUNTDOWN OF A REBEL 153 (1984); PORTO, *supra* note 100, at 116. UNLV produced sworn affidavits from the professor, the student-athlete involved, and even the professor's polygraph test denying that Tarkanian's instruction ever took place. HARP & MCCULLOUGH, *supra* at 153–54; PORTO, *supra* note 100, at 116.

135. YAEGER, *supra* note 73, at 202–03 (quoting a written statement by UNLV Vice President Brock Dixon).

136. PORTO, *supra* note 100, at 117.

137. Univ. of Nev. v. Tarkanian, 594 P.2d 1159, 1163, 1165 (Nev. 1979), *appeal after remand*, Tarkanian v. NCAA, 741 P.2d 1345 (Nev. 1987), *rev'd*, 488 U.S. 179 (1988); *see also* PORTO, *supra* note 100, at 117 (explaining the state court judicial history).

138. YASSER ET AL., *supra* note 124, at 79.

139. U.S. CONST. amends. V, XIV; *see also supra* notes 56–60 and accompanying text.

140. Evans v. Newton, 382 U.S. 296, 299 (1966).

141. For other federal cases that designated the NCAA a state actor, see Howard Univ. v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1255 (9th Cir. 1974); Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1159 (D. Minn. 1976), *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1977); Parish v. NCAA, 361 F. Supp. 1220, 1225 (W.D. La. 1973).

142. Buckton v. NCAA, 366 F. Supp. 1152, 1156 (D. Mass. 1973).

143. Potter, *supra* note 33, at 1278.

government funding or regulation was not enough to reach state actor status.[144] Another factor in the Court's revamped analysis was whether the party's purpose is one for which the state has customarily been responsible.[145]

The U.S. Court of Appeals for the Fourth Circuit was the first to apply this new case law to the NCAA in 1984, with *Arlosoroff v. NCAA*. Chaim Arlosoroff was a star tennis player at Duke University ("Duke"), until the NCAA ruled him ineligible because he previously played on a national team for his native Israel.[146] Arlosoroff sought an injunction against the NCAA, and the U.S. District Court for the Middle District of North Carolina subsequently granted the injunction based on the Fourteenth Amendment.[147] But the Fourth Circuit reversed, and in doing so acknowledged that in the past the district court's decision would likely have been correct.[148] But the Supreme Court now required new, more stringent conditions, which meant a different result for Arlosoroff.[149] The Fourth Circuit also noted that the NCAA's role was not a traditional one for the state because the state had never regulated college sports before.[150]

Arlosoroff paved the way for other federal district courts and courts of appeals to remove the NCAA from the state actor arena.[151] Reassigned as a private actor, the NCAA was impervious to the Fourteenth Amendment in more and more regions across the country. According to these decisions, targets of NCAA investigations could only rely on the NCAA itself, not the Constitution, for fair treatment.[152]

2. Game Changer for *Tarkanian*

The *Arlosoroff* interpretation was slow to ultimately affect Tarkanian and UNLV because the Nevada Supreme Court declined to follow *Arlosoroff* in its 1987 decision, and rejected the U.S. Supreme Court's new state actor concept as the courts of appeals applied it to the NCAA.[153] To the Nevada court, state action was present in Tarkanian's case because the action affected the

144. Rendell–Baker v. Kohn, 457 U.S. 830, 840 (1982) ("[W]e conclude that the school's receipt of public funds does not make the discharge decisions acts of the State."); Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) ("There is no suggestion that those [private] decisions were influenced in any degree by the State's obligation . . . ."); *see also* PORTO, *supra* note 100, at 119–20.

145. Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974).

146. Arlosoroff v. NCAA, 746 F.2d 1019, 1020 (4th Cir. 1984).

147. *Id.*

148. *Id.* at 1021.

149. *Id.*

150. *Id.*

151. For federal cases that deny the NCAA state-actor status, see generally Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986); Hall v. NCAA, 985 F. Supp. 782 (N.D. Ill. 1997); McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974).

152. PORTO, *supra* note 100, at 122 ("In other words, persons whom the NCAA investigated would have to rely on the Association itself for procedural fairness.").

153. *Id.*

livelihood of a public employee.[154] As the responsible party in that decision, the NCAA was a state actor that deprived Tarkanian of liberty and property,[155] and did so by using a standard that fell below due process.[156]

The NCAA appealed to the U.S. Supreme Court, who granted certiorari in February 1988 on the question of whether the NCAA was a state actor.[157] Ultimately, the Court handed down a 5–4 ruling that reversed the Nevada Supreme Court and decided the NCAA was not a state actor with the corresponding due process requirements.[158] The Court also held UNLV's suspension of Tarkanian under the auspices of the NCAA was not state action.[159] The decision made *Arlosoroff* and the NCAA's private actor designation apply nationally.

Justice John Paul Stevens wrote the majority's opinion. He first concluded the NCAA was a private actor because its membership spanned every state, which in turn kept the NCAA unattached from Nevada or any state in particular.[160] And, in the interest of a limited federal government, it was important for courts to respect the division between state conduct and private conduct, "no matter how unfair that conduct may be."[161] Specifically, in analyzing whether the action involving Tarkanian still constituted state action, Justice Stevens noted that it was the mirror image of the usual situation, where a state builds the legal structure for, or loans its credibility to, a private action.[162] Here, the relationship was reversed, with a private entity delegating its power to a state.[163] Even though the state only acted under the direction of a private entity, the state had more than one option and came to its decision independently.[164] Nevada and the NCAA, even through a public university,

154. Tarkanian v. NCAA, 741 P.2d 1345, 1348 (Nev. 1987), *rev'd*, NCAA v. Tarkanian, 488 U.S. 179 (1988). *Arlosoroff* did not apply, according to the Nevada Supreme Court, because that case did not involve enforcement against a public employee. *Id.* at 1348–49.

155. *Id.* at 1349.

156. *Id.* at 1351.

157. *See* NCAA v. Tarkanian, 484 U.S. 1058, 1058–59 (1988) (granting certiorari). The Supreme Court did not address the appropriateness of the NCAA's allegations or punishment against Tarkanian. PORTO, *supra* note 100, at 127.

158. *Tarkanian*, 488 U.S. at 180–82.

159. *Id.* at 193, 195.

160. *See id.* at 193.

161. *Id.* at 191.

162. *Id.* at 192.

163. *Id.* at 199 ("It would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."). The NCAA's degree of separation from Tarkanian worked to its advantage. *See supra* notes 103–05 and accompanying text.

164. *Tarkanian*, 488 U.S. at 198 ("UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have withdrawn voluntarily from the Association."). These options were in fact offered in Dixon's statement after UNLV's internal investigation. *Id.*; *see also supra* notes 132–35 and accompanying text.

were not "entwined" enough to place state actor status on the NCAA, and make the NCAA liable for a lack of constitutional due process.[165]

In the *Tarkanian* decision, the Supreme Court ended the debate among federal and state courts over whether the NCAA was a state actor under the newly-heightened standard that Chief Justices Burger and Rehnquist developed.[166] Because the NCAA was a private actor, and its commands to member institutions did not convert into state action, the Court did not require the NCAA to follow the same due process rules as the government. The NCAA could now discipline its student-athletes in any manner it deemed appropriate, "no matter how unfair that . . . may be."[167]

D. DUE PROCESS IN THE NCAA IMPROVES—BUT BY ITS OWN RULES

Tarkanian remains good law, despite attempts by student-athletes and coaches to restore the protection that the judiciary and the Fifth and Fourteenth Amendments previously bestowed to them.[168] These student-athletes and coaches, however, can take some solace in how procedural due process has evolved in the NCAA, even after the NCAA's favorable ruling from the Supreme Court.[169] The NCAA created the Infractions Appeals Committee ("IAC") and added several components to its Enforcement Staff and COI procedures.[170] Still, while some legal experts say the due process problems are solved,[171] others see room for improvement.[172]

Though the Supreme Court has sheltered the NCAA from constitutionally-imposed reforms, the NCAA has made changes to its procedures on its own initiative.[173] Even with its victory in *Tarkanian*, student-athletes and coaches pressured the NCAA enough to force it to revise and

165. *See* Evans v. Newton, 382 U.S. 296, 299 (1966).

166. *See supra* note 143 and accompanying text.

167. *Tarkanian*, 488 U.S. at 191.

168. *E.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 297–98 (2001); Cohane v. NCAA *ex rel.* Brand, 215 F. App'x 13, 15 (2d Cir. 2007); Smith v. NCAA, 266 F.3d 152, 158–59 (3d Cir. 2001); Cureton v. NCAA, 198 F.3d 107, 117 (3d Cir. 1999); Auburn Univ. v. S. Ass'n of Colls. & Schs., Inc., 489 F. Supp. 2d 1362, 1372 (N.D. Ga. 2002); Matthews v. NCAA, 79 F. Supp. 2d 1199, 1207 (E.D. Wash. 1999); *see also* PORTO, *supra* note 100, at 158–61 (discussing *Brentwood* and its relation to *Tarkanian*).

169. PORTO, *supra* note 100, at 147–48, 155–56. The NCAA states its process "contain[s] a multitude of traditional due-process protections," and although it is not required to follow the Due Process Clause of the Fourteenth Amendment, the NCAA "believes its procedure provides a meaningful and fair opportunity for institutions and involved individuals to be involved in these processes." NCAA, *Frequently Asked Questions About NCAA Enforcement*, MINN. PUB. RADIO, http://news.minnesota.publicradio.org/features/199903/11_newsroom_cheating/enforce.shtml (last visited Jan. 17, 2015). Other than the changes outlined *infra* notes 173–206 and accompanying text, the NCAA still follows the operation described in Part II.B.1.

170. *See infra* notes 173–206 and accompanying text.

171. *See infra* notes 200–06, 216–25 and accompanying text.

172. *See infra* notes 207–15 and accompanying text.

173. *See supra* note 169 and accompanying text.

augment its appeals process.[174] In 1992, the IAC[175] took over the appellate role of the NCAA Council, and like the previous NCAA Council, the IAC has the final say in the infractions process.[176] The IAC gives deference to the factual findings of the COI, like most appellate courts, and will only overturn a COI penalty if it was "clearly [] contrary to the evidence presented," the facts do not show an actual breaking of NCAA rules, or a mishandled procedure contaminated the information that was the basis for the COI's finding.[177] Despite the high standard for a reversal and the high level of deference, the IAC has been "surprisingly independent" and proactive in altering or negating some of the COI's rulings, although it has not yet awarded complete exoneration to an institution that the COI punished.[178]

Apart from the COI or the IAC, a separate committee deals exclusively with athletic eligibility of individual student-athletes who are swept up in the violations that coaches or institutions commit.[179] Such students are automatically ineligible,[180] so the Committee on Student-Athlete Reinstatement ("SARC") provides an expedited process[181] for student-athletes so they will not have to endure an entire COI case before participating again

174. WONG, *supra* note 42, at 190.

175. Like the COI, the IAC is also made up of volunteers. *See infra* notes 202–03 and accompanying text.

176. NCAA BYLAWS § 19.4.5 (2014); WONG, *supra* note 42, at 190.

177. WONG, *supra* note 42, at 190; *accord* NCAA BYLAWS § 19.10.1.2(a).

178. *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 9 (2004) [hereinafter *Due Process and the NCAA*] (statement of Professor Gary R. Roberts); *see also* Richard R. Hilliard et al., *An Update on Recent Decisions Rendered by the NCAA Infractions Appeals Committee: Further Guidance for NCAA Member Institutions*, 28 J.C. & U.L. 605, 607 (2002). One specific example was the reversal in 2002 of the COI with regard to an assistant men's basketball coach at New Mexico State University, while still affirming penalties against the head coach. BERRY & WONG, *supra* note 84, at 79; NCAA INFRACTION APPEALS COMM., PUBLIC INFRACTIONS APPEALS COMMITTEE REPORT 6–7 (2002). So far, only four schools have ever experienced even a partially successful appeal to the IAC. BERRY & WONG, *supra* note 84, at 58, 79, 105, 137; Brett McMurphy & Andrea Adelson, *Central Florida Wins Bowl Ban Appeal*, ESPN (Apr. 22, 2013, 1:18 PM), http://espn.go.com/college-football/story/_/id/9190978/ucf-knights-bowl-eligible-2013-winning-appeal-sources-say.

179. NCAA BYLAWS §§ 18.4.1.2, 21.7.7.3.3; *see also* NCAA, NCAA DIVISIONS I, II AND III COMMITTEES ON STUDENT-ATHLETE REINSTATEMENT: POLICIES AND PROCEDURES 1 (n.d.), *available at* http://www.ncaa.org/sites/default/files/Policies%2Band%2BProcedures.pdf. The committee also handles requests for waivers that concern athletic eligibility. NCAA BYLAWS §§ 12.8.1.4–.5, 12.8.4–.6, 12.9.1; *see also id.* § 18.4.1.5 (outlining duties of the committee regarding eligibility after a student-athlete's failed drug test).

180. NCAA BYLAWS § 12.11; NCAA, *supra* note 179.

181. *See* NCAA, STUDENT-ATHLETE REINSTATEMENT: HOW IT WORKS (2009), *available at* http://www.ncaa.org/sites/default/files/SAR%2BBlue%2BDisk%2B%28web%2Bone%29.pdf ("Most requests for reinstatement are resolved in about a week . . . .").

in their respective sports.[182] The NCAA reinstatement staff[183] makes eligibility decisions by relying heavily on information that the student-athlete's school provides (without the staff conducting its own investigation),[184] as well as case precedent, SARC guidelines, and any mitigating factors.[185] An institution can appeal a reinstatement staff decision by advancing to the committee itself.[186] A student-athlete does not make his or her own case for reinstatement, though the institution may include written statements from the student-athlete in its submission to reinstatement staff.[187] Regardless, the SARC has a strong track record of reinstatement, granting 99% of annual reinstatement requests in the 2010–2011 academic year.[188]

Other post-*Tarkanian* guarantees in the NCAA infractions process[189] include: (1) a four-year statute of limitations;[190] (2) a prehearing conference;[191] (3) prior notice of any witnesses or information the enforcement staff intends to use;[192] (4) the right to interview those witnesses indirectly;[193] (5) a prohibition on information from confidential sources;[194] and (6) the right to record any interview the NCAA Enforcement Staff

182. *See* Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 286–87 (2010). This is especially warranted in light of the fact that each student-athlete's NCAA eligibility already has an expiration date, which could be further restricted by ineligibility status pending the COI process. *See* NCAA BYLAWS § 12.8.1.

183. NCAA BYLAWS § 21.7.7.3.3.1(a).

184. NCAA, *supra* note 179, at 2 ("[The staff's] primary purpose is not to act as a fact-finding body but rather to ensure that the facts are developed. It is the institution's responsibility to gather the facts necessary to process a reinstatement request."). At least part of the reason for foregoing a parallel investigation is to keep the process quick. *See* Potuto, *supra* note 182, at 286–87.

185. NCAA, *supra* note 181.

186. NCAA BYLAWS § 21.7.7.3.3.1(b); NCAA, *supra* note 179, at 7–14; NCAA, *supra* note 181.

187. Potuto, *supra* note 19, at 20.

188. NCAA, *supra* note 181. That tally includes reinstatements that carry conditions. *Student-Athlete Reinstatement Frequently Asked Questions*, NCAA, http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions (last visited Jan. 17, 2015). For further explanation and defense of the SARC process, see Potuto, *supra* note 19, at 18–22; Potuto, *supra* note 182, at 285–87.

189. NCAA, 2014–2015 NCAA DIVISION MANUAL, *supra* note 28, at 334–35 (showing a flowchart timeline and process of NCAA Division I infractions and appeals cases in figs. 19-2, 19-3).

190. NCAA BYLAWS § 19.5.11.

191. *Id.* § 19.7.4.

192. *Id.* § 19.7.5.

193. PORTO, *supra* note 100, at 169; NCAA, DIV. I COMM. ON INFRACTIONS: INTERNAL OPERATING PROCEDURES 4–7 (2014), *available at* http://www.ncaa.org/sites/default/files/2014%20COI%20IOPs_04_24_2014%20-%20Board%20Approved.pdf; NCAA, PROCEDURES FOLLOWED DURING HEARINGS BEFORE THE NCAA COMMITTEE ON INFRACTIONS 3 (2007), *available at* https://www.ncaa.org/sites/default/files/d1_coi_hearing_procedures.pdf ("If the institution, any involved individual or the enforcement staff wishes to ask a question of another party, that question should be directed to the committee, which will then decide if the question is appropriate and will direct it to the appropriate individual.").

194. NCAA BYLAWS § 19.7.7.3.1.

conducts.[195] Also, COI hearings (7) allow for any "involved individuals" to respond to the Enforcement Staff's opening statements.[196] In August 2013, more reforms took effect, including: (8) four tiers of violations rather than the previous two;[197] (9) a new structure for penalties to better match violations and their consequences;[198] and (10) a heightened expectation of accountability from the head coach of each team.[199]

Though critics see the COI as merely a façade for the NCAA's agenda to restrict student-athletes, coaches, and institutions, many of the COI's features highlight the entity's independence from the Enforcement Staff.[200] For one, COI members are obligated to recuse themselves from any hearing with even the appearance of a conflict of interest.[201] Also, the Enforcement Staff is on the NCAA payroll, while COI members fulfill their roles on a purely volunteer basis.[202] The NCAA also requires the COI's roster to include current or former college presidents and athletic directors, former coaches, conference representatives, university faculty, and sports administrators (who are no strangers to the plights of student-athletes), as well as legal experts from outside the world of college sports.[203] The current COI for NCAA's Division I consists of 18 members, including the director of investigations for the Federal Energy Regulatory Commission, a partner at Andrews Kurth LLP who focuses on white collar crime and corporate compliance, and an attorney from the general counsel office for Princeton University.[204] The "public" members are often retired judges or have some other judicial or legal career, and they are "particularly valuable" both because of their actual prior work

195. *Id.* § 19.5.7.

196. NCAA, PROCEDURES FOLLOWED DURING HEARINGS BEFORE THE NCAA COMMITTEE ON INFRACTIONS, *supra* note 193, at 3.

197. NCAA BYLAWS § 19.1.

198. *Id.* § 19.9.

199. *Id.* § 11.1.1.1.

200. The COI has been known to dismiss the Enforcement Staff's case on rare occasion, as it did in 2000 with allegations against an assistant football coach at Baylor University. Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 760, 767 n.106, 769 n.116 (2007).

201. NCAA BYLAWS §§ 19.3.4, 19.4.3.

202. Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 224–25 (2012); 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, 454 (2011).

203. NCAA BYLAWS §§ 19.3.1, 19.4.1.

204. *Investigations*, FED. ENERGY REG. COMMISSION, http://www.ferc.gov/enforcement/investigations.asp; NCAA, *Division I Committee on Infractions*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1INFRACTION (last visited Jan. 17, 2015); *Roscoe C. Howard, Jr.*, ANDREWS KURTH, http://www.andrewskurth.com/people-RoscoeCHoward.html (last visited Jan. 17, 2015); *Sankar Suryanarayan*, PRINCETON UNIV., http://www.princeton.edu/ogc/people/attorneys/sankar-suryanarayan/ (last visited Jan. 17, 2015).

and experience, as well as the prestige they bring to the infractions process.[205] These members are not beholden to the NCAA, and contribute their "seasoned objectivity and skepticism."[206]

Nevertheless, NCAA members still lobby for more procedural due process protections.[207] For one, the NCAA infractions process still does not employ a purely neutral, third-party decisionmaker,[208] and does not allow for the institution's cross-examination of hostile witnesses.[209] All of the COI's decisions are unanimous, which conveys unity and authority, but also denies the benefits that dissenting opinions provide,[210] and gives the impression that the COI simply "marches in step, rubber stamps the position of the enforcement staff, and defends the NCAA turf."[211] Before a COI hearing, an institution can forego contesting the charges against it, and agree with the Enforcement Staff on facts and the violations in a "summary disposition," along the lines of a plea bargain in criminal law or a settlement in civil law[212]—but unlike a plea bargain, an institution can only agree as to the charges, while any potential penalties are non-negotiable.[213] Also, the COI reserves the privilege of finding any violation based on information that came to light during the hearing, even if it was outside the previous notice of allegations.[214] And, unlike constitutional due process, COI hearings do not recognize Fifth

205. Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 707–08, 717 (2009).

206. *Id.* at 705.

207. *See* PORTO, *supra* note 100, at 169.

208. *Id.* at 172 ("In NCAA enforcement proceedings, however, the Association plays the roles of prosecutor (enforcement staff), judge (COI), jury (again, the COI), and appellate tribunal (IAC)."). *But cf. Due Process and the NCAA*, *supra* note 178, at 35 (testimony of Professor Josephine Potuto) ("That process, the infractions process and the enforcement process are all three separate and distinct, with no overlap of function, membership or even of NCAA administrative staff support. . . . The [infractions] committee is independent and impartial."); Parkinson, *supra* note 202, at 224 (using the same metaphor as PORTO, *supra* note 100, at 172, to highlight the COI's independence, not lack thereof).

209. PORTO, *supra* note 100, at 172. The NCAA's lack of cross-examination derives from the NCAA's lack of subpoena power. *See infra* notes 312–16 and accompanying text. Currently, to ask a question to the opposing party, an individual must first direct the question to the COI panel, who will then redirect to the opposing party if the panel deems the question appropriate. PORTO, *supra* note 100, at 166; NCAA, PROCEDURES FOLLOWED DURING HEARINGS BEFORE THE NCAA COMMITTEE ON INFRACTIONS, *supra* note 193, at 3.

210. Marsh, *supra* note 205, at 713–16; *see also* William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104, 105 (1948) ("Disagreement among judges is as true to the character of democracy as freedom of speech itself.").

211. Marsh, *supra* note 205, at 715.

212. NCAA BYLAWS §§ 19.6.1, 19.6.2 (2014); PORTO, *supra* note 100, at 163–64.

213. NCAA BYLAWS § 19.6.3. The institution can propose penalties to the COI, much like proposing jury instructions, but it does not confer or bargain with the Enforcement Staff on the issue and the Enforcement Staff itself does not propose any penalties. *Id.*; PORTO, *supra* note 100, at 163–64; Rogers & Ryan, *supra* note 200, at 770–71.

214. NCAA BYLAWS § 19.7.7.4.

Amendment protection from self-incrimination—both parties must reveal all pertinent information whether advantageous or not.[215]

At the same time, some legal experts say the uproar over the NCAA's revocation of state actor status is "[m]uch [a]do [a]bout [n]othing."[216] The COI and IAC hearings already meet or almost meet the minimum procedural due process standards for state actors,[217] or even surpass them,[218] so designating the NCAA as a state actor would change very little.[219] Also, the state actor label would attract "regular, protracted, and often frivolous litigation"[220] by NCAA non-members (i.e., student-athletes themselves[221]). Even if the NCAA were a state actor, claims of a right to play sports "are non-starters" as long as courts hold that right extra-constitutional and not deserving of substantive due process.[222] A coach can bring claims of other constitutionally cognizable interests, such as his or her employment or preservation of reputation, as contract or tort actions, regardless of the NCAA's status.[223] Efficiency is also valuable,[224] and due process rights always hang in the balance between justice and productivity.[225]

Though the NCAA's due process may be fair enough to remain intact after the Supreme Court's analysis, such a result does not necessarily end the discussion. *NCAA v. Tarkanian* and the NCAA's state actor label do not preclude other government action from lifting the NCAA above the floor the Supreme Court has set.[226] In areas other than college sports, lawmakers have

---

215. *Id.* § 19.7.7.3.2; PORTO, *supra* note 100, at 165.

216. Potuto, *supra* note 19, at 1.

217. *Id.* at 8.

218. *Due Process and the NCAA*, *supra* note 178, at 36 (testimony of Professor Josephine R. Potuto); *cf.* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true (calling Potuto's oral testimony before Congress "a circular argument" either "motivated by hostility for students . . . or by noble and paternalistic tough love").

219. Potuto, *supra* note 19, at 8. The COI has also been compared to an arbitration panel "in that it works from a formal agreement of the parties." Potuto, *supra* note 182, at 304; *see also* Potuto, *supra* note 19, at 14 (citing Lindland v. U.S. Wrestling Ass'n, 230 F.3d 1036, 1039 (7th Cir. 2000)). *But see* Cross & Brown Co. v. Nelson, 167 N.Y.S.2d 573, 576 (N.Y. App. Div. 1957) (holding that a party to a contract, "or someone so identified with the party as to be in fact, even though not in name, the party," cannot be an arbitrator to decide disputes arising from that contract); Paul Weiler & Gary Roberts, *How Arbitration Has Enhanced the Sports World*, DISP. RESOL. MAG., Spring 2007, at 14, 16.

220. Potuto, *supra* note 19, at 6.

221. *See supra* note 103 and accompanying text.

222. Potuto, *supra* note 19, at 11.

223. *Id.* at 11–12.

224. *Due Process and the NCAA*, *supra* note 178, at 36, 117 (written statement and testimony of Professor Josephine R. Potuto).

225. *See* Buss, *supra* note 41, at 19.

226. Bracy v. Gramley, 520 U.S. 899, 904 (1997) (citations omitted) ("[T]he Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.

chosen to specify legislative requirements for certain procedural safeguards, whether or not there are constitutional requirements or a state actor designation for them, when public policy so directs.[227] Under federalism, states will often build upon the rules the Supreme Court guarantees in order to grant more guarantees to their residents.[228] To proponents of college sports who are not satisfied with what the Supreme Court has settled on, the varying degrees of due process found in other areas of the law and government show that there is potential to add to the NCAA's criteria for procedural due process.

III. LITIGATION AND LEGISLATION: INACTION FOR NCAA DUE PROCESS

Despite *Tarkanian*'s durability, resistance against the NCAA is mounting.[229] Though not all of the campaigns against the NCAA wholly speak to due process concerns, they do look for weaknesses in the NCAA system and

---

Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar.").

227. *See, e.g.*, 20 U.S.C. § 1232g (2012) (students and parents); 26 U.S.C. § 6330 (2012) (taxpayers subject to levies); 29 U.S.C. § 411 (2012) (labor unions); 42 U.S.C. § 9501 (2012) (mental health); 42 U.S.C. § 15043 (disabled individuals).

228. *See* Rogers v. Okin, 738 F.2d 1, 7–8 (1st Cir. 1984) ("Procedural minima prescribed by the due process clause are not necessarily coextensive with procedures prescribed by state law."). *See, e.g.*, COLO. CONST. art. X, § 20 (2012) ("The Taxpayer's Bill of Rights"); N.J. Stat. Ann. § 18A:37–13 et seq. (West 2013) ("Anti-Bullying Bill of Rights Act"); R.I. Gen. Laws § 34–37.1–3 (2011) ("Homeless Bill of Rights"); Wis. Stat. § 164.01–.06 (2013) ("Law Enforcement Officers' Bill of Rights").

229. In August 2014, the NCAA yielded to complaints from its five richest conferences (the Atlantic Coast Conference, the Big 12 Conference, the Big Ten Conference, the Pacific-12 Conference, and the Southeastern Conference), and allowed them to create "an aristocracy in college sports" and grant more benefits to their student-athletes, such as more valuable scholarships, better health insurance, and permission to meet with agents. Marc Tracy, *N.C.A.A. Votes to Give Richest Conferences More Autonomy*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/sports/ncaafootball/ncaa-votes-to-give-greater-autonomy-to-richest-conferences.html ("The strongest supporters of autonomy say it allows the Big 5 to provide more benefits to athletes."); *see also* Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, WALL ST. J. (Aug. 7, 2014, 7:44 PM), http://online.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146. Those power conferences took action in January 2015 and voted to increase student-athlete scholarships to cover more than tuition, fees, room and board, and books. Natalie Pierre, *In Historic Vote, Power 5 Conferences Increase Value of Athletic Scholarships; Legislation Passes 79–1*, ALA. MEDIA GROUP (Jan. 18, 2015, 1:51 PM), http://www.al.com/sports/index.ssf/2015/01/in_historic_vote_power_5_confe.html.

In another example, Moody's downgraded the NCAA with a negative credit outlook in the summer of 2013, largely due to the NCAA's embroilment in *O'Bannon v. NCAA*. *Moody's Revises NCAA (IN)'s Outlook to Negative; Aa2 Affirmed*, MOODY'S (June 24, 2013), https://www.moodys.com/research/Moodys-revises-NCAA-INs-outlook-to-negative-Aa2-affirmed–PR_276458 ("Increased public discourse about the best interest of student athletes combined with highly publicized litigation could destabilize the current intercollegiate athletic system and negatively impact the NCAA and its member universities.").

hope to empower student-athletes.[230] While these movements are ongoing, both in the courts[231] and the court of public opinion,[232] legislators have also occasionally joined the fray to adjust *Tarkanian* or infuse more due process in the NCAA.[233] State legislators have had a few modest successes in state legislatures; however, their federal counterpart's efforts have been to no avail.[234] Two recent legislative proposals, however, show novel potential by petitioning the Executive Branch, the one branch still waiting in the wings of the athletic due process debate.[235]

A. STUDENT-ATHLETES CONTINUE TO TEST THE NCAA

Recent court cases and others on the horizon may have some promise of success in pleading for more due process in the NCAA, such as the right to

230. In late January 2014, football players from Northwestern University ("Northwestern"), led by former quarterback Kain Colter, filed a complaint against their university with the National Labor Relations Board ("NLRB"), the first instance of NCAA student-athletes making a real effort to unionize. Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html. After a hearing, a NLRB regional director in Chicago decided that Northwestern football players were employees under the National Labor Relations Act, and allowed the players to vote on unionization. Decision and Direction of Election at 2, 23, Nw. Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359 (N.L.R.B., Mar. 26, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f. The NCAA was "disappointed" with the decision. Donald Remy, *NCAA Disagrees with Union Decision*, NCAA (Mar. 26, 2014, 4:28 PM), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-disagrees-union-decision. The NLRB granted review in April 2014. Order, Nw. Univ. v. Coll. Athletics Players Ass'n, No. 13-RC-121359 (N.L.R.B., Apr. 24, 2014), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d45816ch1a5. Though not a direct party to the dispute, the NCAA filed an amicus brief in support of Northwestern on July 3, 2014. Brief of Amicus Curiae NCAA in Support of Nw. Univ., Nw. Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359 (N.L.R.B., July 3, 2014). The NLRB is expected to make a decision in early 2015. Tim Devaney, *Labor Board Readies Flurry of Decisions*, HILL (Jan. 10, 2015, 2:55 PM), http://thehill.com/regulation/labor/229101-labor-board-readies-flurry-of-decisions.

The Northwestern players are backed by the National College Players Association, an organization that started to gain traction during the 2013–2014 football season with its "All Players United" campaign. *See Mission & Goals*, NAT'L COLL. PLAYERS ASS'N, http://www.ncpanow.org/about/mission-goals (last visited Jan. 17, 2015) (including among its goals the desire to "[p]rohibit the punishment of college athletes that have not committed a violation. It is an injustice to punish college athletes for actions that they did not commit[,] i.e.[,] suspending a team's post-season eligibility for the inappropriate actions of boosters."); *see also* Chip Patterson, *All Players United Campaign Launched with 'APU' on Wrist Tape*, CBSSPORTS.COM (Sept. 21, 2013, 4:46 PM), http://www.cbssports.com/collegefootball/eye-on-college-football/23769680/all-players-united-campaign-launched-with-apu-on-wrist-tape ("They're taking the reform effort to television, which has never been done." (quoting NCPA President Ramogi Huma) (internal quotation marks omitted)).

231. *See infra* Part III.A.

232. *See supra* notes 229–30.

233. *See infra* Part III.B.

234. *See infra* notes 251, 254, 256, 259, 262–64 and accompanying text.

235. *See infra* notes 281–86 and accompanying text.

legal representation in connection with a potential professional career.[236] After the NCAA suspended Oklahoma State University pitcher Andrew Oliver for breaching its rule[237] against meeting with agents and attorneys to negotiate with professional baseball representatives, Oliver sued in Ohio, his home state.[238] The court found that the NCAA rule improperly restricted attorneys and encroached on the jurisdiction of the state bar association.[239] In the end, a settlement between Oliver and the NCAA vacated the court order, and so the question of legal representation in student-athletes' negotiations remains.[240]

The courts dealt a major blow to the NCAA in the much anticipated *O'Bannon v. NCAA* decision.[241] In 2009, former University of California Los Angeles basketball player Ed O'Bannon led a class of plaintiffs suing for control over what they alleged to be their own publicity and likenesses, which the NCAA sold to video game companies.[242] Five years later, Judge Claudia Wilken held that the NCAA's "commitment to amateurism . . . does not justify the NCAA's sweeping prohibition on FBS [Football Bowl Subdivision] football and Division I basketball players receiving any compensation for the use of their names, images, and likenesses."[243] Judge Wilken issued an injunction that prohibits NCAA schools from withholding money gained from student-athletes' names, images, and likenesses, but does allow the NCAA to

236. *See* Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the N.C.A.A.: Jeffrey Kessler Envisions Open Market for College Athletes*, N.Y. TIMES (Aug. 27, 2014), http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html; Jerry Hinnen, *Labor Attorney Jeffrey Kessler Files Antitrust Lawsuit vs. N.C.A.A.*, CBSSPORTS.COM (Mar. 17, 2014, 11:42 AM), http://www.cbssports.com/collegefootball/eye-on-college-football/24488838/labor-attorney-jeffrey-kessler-files-antitrust-lawsuit-vs-ncaa; Scott Soshnick, *NFL Free-Agent Lawyer to Unlock $16 Billion in NCAA Athletes*, BLOOMBERG (Oct. 2, 2013, 8:05 AM), http://www.bloomberg.com/news/2013-10-02/nfl-free-agent-lawyer-set-to-unlock-16-billion-in-ncaa-athletes.html.

237. *See* NCAA BYLAWS § 12.3.2.1 (2014) (prohibiting the presence of a lawyer at negotiations).

238. Oliver v. NCAA, 920 N.E.2d 203, 206–08 (Ct. Com. Pl. Ohio 2009), *vacated pursuant to settlement* (Sept. 30, 2009).

239. *See id.* at 213–16. For more commentary, see Dan Fitzgerald, *Oliver v. NCAA: Court Throws Out NCAA Baseball Lawyer-Agent Rule*, CONN. SPORTS L. (Feb. 25, 2009), http://ctsportslaw.com/2009/02/25/oliver-v-ncaa-court-throws-out-ncaa-baseball-lawyer-agent-rule/.

240. Pat Borzi, *Settlement Sheds Little Light on N.C.A.A. No-Agent Rule*, N.Y. TIMES (July 23, 2010), http://www.nytimes.com/2010/07/24/sports/baseball/24advisers.html ("The settlement in his case has left other players, as well as parents, advisers and college coaches and administrators, more unsettled than ever.").

241. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *see also Judge Rules Against NCAA*, ESPN (Aug. 9, 2014, 6:20 PM), http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case; Ben Strauss & Marc Tracy, *N.C.A.A. Must Allow Colleges to Pay Athletes, Judge Rules*, N.Y. TIMES (Aug. 8, 2014), http://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html.

242. *O'Bannon*, 7 F. Supp. 3d at 962–63.

243. *Id.* at 999.

cap that amount at $5000 per student-athlete per year.[244] Many sports and legal experts called the *O'Bannon* decision a "landmark ruling"[245] that will act as "a bellwether of sorts"[246] and "drastically reshape the world of college sports."[247] The NCAA's appeal is now before the U.S. Court of Appeals for the Ninth Circuit.[248]

B. LEGISLATURES TO THE RESCUE?

As the NCAA enjoys its current judicial exemption from state actor obligations, the NCAA has also largely been able to ignore any legislative activity against it. Both houses of the U.S. Congress have held probative hearings and published reports relating to the NCAA over the years, before and after *Tarkanian*.[249] To this point, Congress has generated awareness or made recommendations that indeed spurred the NCAA to self-reform.[250] But

244. *Id.* at 1007–08.

245. *Judge Rules Against NCAA*, *supra* note 241.

246. Rick Maese, *O'Bannon v. NCAA Ruling Could Set Up Larger Arguments over College Sports, Experts Say*, WASH. POST (Aug. 9, 2014), http://www.washingtonpost.com/sports/colleges/obannon-v-ncaa-ruling-could-set-up-larger-arguments-over-college-sports-experts-say/2014/08/09/5338ae4c-1fe2-11e4-9b6c-12e30cbe86a3_story.html.

247. Strauss & Tracy, *supra* note 241.

248. Order at 2, O'Bannon v. NCAA, Nos. 14-16601, 14-17068 (9th Cir. Jan. 22, 2015).

249. PORTO, *supra* note 100, at 148–50, 156–57, 192–93. For some examples of these hearings and reports, see generally *Due Process and the NCAA*, *supra* note 178; *Supporting Our Intercollegiate Student-Athletes: Proposed NCAA Reforms: Hearing Before the Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. (2004); *Intercollegiate Sports: Hearings Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the H. Comm. on Energy & Commerce*, 102d Cong. (1991); *National Collegiate Athletic Association—Enforcement Program: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Interstate & Foreign Commerce*, 96th Cong. (1979); NATHAN BROOKS, CONG. RESEARCH SERV., RL32529, THE NCAA AND DUE PROCESS: LEGAL ISSUES (2004); SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE COMM. ON INTERSTATE & FOREIGN COMMERCE, 95TH CONG., ENFORCEMENT PROGRAM OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: REPORT TOGETHER WITH MINORITY VIEWS, (Comm. Print 1978), *available at* https://archive.org/stream/enforcementprogroounit#page/no/mode/2up.

250. *See* Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 214 n.468 (discussing self-imposed reforms in anticipation of 1992 federal legislation); Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 806–08, 813–14, 821–22 (1992) (discussing self-imposed reforms after 1991 proposed federal legislation); Robin J. Green, Note, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 119 (1992) (discussing self-imposed reforms after 1978 Congressional hearings); Travis L. Miller, Comment, *Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings*, 20 FLA. ST. U. L. REV. 871, 900, 905 (1993) (discussing self-imposed reforms after 1991 state legislation); Russell W. Szwabowski, Note, *The Federal Courts Have Given the NCAA Back Its Home Court Advantage*, 67 U. DET. L. REV. 29, 92–94 (1989) (discussing self-imposed reforms after 1978 Congressional hearings).

so far, Congress has failed to actually enact any laws or reforms that significantly confront the NCAA's due process deficiency.[251]

In the immediate wake of *Tarkanian*, Congress proposed four bills, three in the House and one in the Senate.[252] All but one would have expressly overruled *Tarkanian* by declaring the NCAA a state actor when it came to sanctions against institutions, student-athletes, or coaches.[253] These three bills did not advance beyond their original House or Senate subcommittees.[254] The last of these four initial efforts, H.R. 3046, would give the NCAA an antitrust exemption in exchange for more constitutional guarantees of due process for student-athletes and coaches.[255] This bill lasted until it arrived at the House Committee on Ways and Means, but the committee never offered the bill to the floor for a vote.[256]

In the years since the aftermath of *Tarkanian*, legislators have made three more attempts to secure more due process rights for student-athletes.[257] One proposed bill in 2000 would have amended the Higher Education Act of 1965 to specifically order each university receiving federal funds to "provide the student athlete with separate independent legal counsel" and an "opportunity to be heard before an arbitrator, neutral party, or tribunal not associated with the [NCAA]," among other guarantees.[258] This bill also stalled in a House

---

251. Richard G. Johnson, *The NCAA Has Never Been Regulated by Congress, So Will Congress Finally Man-Up with Proposed New Legislation?*, SPORTS LAW BLOG (Aug. 22, 2013, 3:00 PM), http://sports-law.blogspot.com/2013_08_01_archive.html ("Going back almost five decades, since 1965, Congress has held about thirty separate formal hearings on the NCAA and/or amateur or collegiate athletics, and Congress has produced no less than seventeen reports regarding the NCAA and these related topics during that timeframe, yet Congress has enacted no legislation to regulate the NCAA.").

252. Collegiate Athletics Reform Act, H.R. 3046, 102d Cong. (1991); Coach and Athlete's Bill of Rights, H.R. 2157, 102d Cong. (1991); Coach and Athlete's Bill of Rights, H.R. 5464, 101st Cong. (1990); Coach and Athlete's Bill of Rights, S. 2996, 101st Cong. (1990).

253. H.R. 2157 § 4; H.R. 5464 § 3; S. 2996 § 3. For additional commentary, see PORTO, *supra* note 100, at 156–57.

254. *Bill Summary & Status, 101st Congress (1989–1990), H.R. 5464*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR05464:@@@X (last visited Jan. 19, 2015); *Bill Summary & Status, 101st Congress (1989–1990), S. 2996*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d101:SN02996:@@@X (last visited Jan. 19, 2015); *Bill Summary & Status, 102nd Congress (1991–1992), H.R. 2157*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR02157:@@@X (last visited Jan. 19, 2015).

255. H.R. 3046 § 104; PORTO, *supra* note 100, at 156–57.

256. *Bill Summary & Status, 102nd Congress (1991–1992), H.R. 3046*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d102:HR03046:@@@X (last visited Jan. 19, 2015).

257. National Collegiate Athletics Accountability Act, H.R. 2903, 113th Cong. (2013); Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (2013); Collegiate Athletics Due Process Act of 2000, H.R. 4117, 106th Cong. (2000).

258. H.R. 4117 § 3.

subcommittee.[259] The most recent proposals, H.R. 2903 and H.R. 3545, are discussed below.[260]

Various state legislatures have produced more affirmative results than their federal counterparts, although courts have struck down some of these statutes. In an explicit response to *Tarkanian*, Nevada passed a statute that delineated minimum procedures and required the NCAA to comply with those procedures.[261] The NCAA swiftly challenged the statute, and the U.S. Court of Appeals for the Ninth Circuit affirmed that the law infringed on federal authority over interstate commerce.[262] The U.S. District Court for the Northern District of Florida followed the Ninth Circuit's lead and struck down a similar statute in that state,[263] and the motivation to pass such statutes in other state legislatures died out.[264] Statutes in Illinois and Nebraska, however, remain unchallenged in the context of NCAA enforcement.[265] California recently passed an "Athletes' Bill of Rights" which includes a provision granting student-athletes the same due process rights as other students in state schools.[266] A similar "bill of rights" died in committee with the Connecticut General Assembly.[267]

C. *H.R. 2903 AND H.R. 3545: CONGRESS INVITES THE DOE TO REFORM*

In August 2013, two members of the U.S. House of Representatives introduced a new comprehensive bill, H.R. 2903, that would restrict the NCAA's prerogative without affecting its lack of state actor designation.[268] Representatives Charles Dent, a Republican from Pennsylvania, and Joyce Beatty, a Democrat from Ohio, sponsored the "National Collegiate Athletic

259. *Bill Summary & Status, 106th Congress (1999–2000), H.R. 4117*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.04117:@@@X: (last visited Jan. 19, 2015).

260. *See infra* Part III.C.

261. NEV. REV. STAT. § 398.225 (1991), *invalidated by* NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993). For commentary, see Young, *supra* note 250, at 804–05.

262. *Miller*, 10 F.3d at 638.

263. NCAA v. Roberts, No. TCA 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994).

264. PORTO, *supra* note 100, at 154.

265. 110 ILL. COMP. STAT. ANN. §§ 25/1 to /13 (2006 & Supp. 2014); NEB. REV. STAT. §§ 85-1201 to 1210 (2012).

266. CAL. EDUC. CODE ANN. §§ 67450–54 (West 2013). The California law became the model for the proposed H.R. 3545. *See* Steve Berkowitz, *Proposal Aims to Protect Athletes at Wealthiest Schools*, USA TODAY (Nov. 20, 2013, 6:10 PM), http://www.usatoday.com/story/sports/college/2013/11/20/ncaa-collegiate-student-athlete-protection-act-tony-cardenas/3649699/; *see also infra* note 273 and accompanying text.

267. *See An Act Concerning Scholarship for Student Athletes at Public Institutions of Higher Education*, Comm. B. No. 205, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013); *Connecticut Senate Bill 205 (Prior Session Legislation)*, LEGISCAN, http://legiscan.com/CT/bill/SB00205/2013 (last visited Jan. 24, 2015).

268. National Collegiate Athletics Accountability Act, H.R. 2903, 113th Cong. (2013).

Accountability Act," along with eight others.[269] This proposal would amend the Higher Education Act of 1965 by requiring any federally subsidized university[270] with an athletic program to only affiliate with "a nonprofit athletic association" that, in the event of the association's

> enforcing any remedy for an alleged infraction or violation of the policies of such association—
>
> (i) provides institutions and student athletes with the opportunity for a formal administrative hearing, not less than one appeal, and any other due process procedure the Secretary [of Education] determines by regulation to be necessary; and
>
> (ii) hold in abeyance any such remedy until all appeals have been exhausted. . . .[271]

Just three months after Representatives Dent and Beatty introduced House Bill H.R. 2903, Representative Tony Cárdenas from California led five co-sponsors in presenting the narrower Collegiate Student Athlete Protection Act, or H.R. 3545.[272] Also aimed at amending the Higher Education Act of 1965, the more limited mission of H.R. 3545 is to protect student-athletes only at universities that earn $10 million or more per year from media revenue, by: (1) preventing their scholarships from vanishing because of injury, exhaustion of NCAA eligibility, or being cut from the team (but not because of poor academic standing or disciplinary reasons); (2) educating student-athletes through "workshops" on concussions and other health risks, life skills like budgeting, and making academic resources available even when the student-athlete is no longer participating in athletics; and (3) requiring schools to cover medical insurance costs for lower-income student-athletes and to annually conduct baseline concussion tests.[273] Though not as far-

269. *Cosponsors: H.R.2903—113th Congress (2013-2014)*, CONGRESS.GOV, http://beta.congress.gov/bill/113th-congress/house-bill/2903/cosponsors (last visited Jan. 19, 2015). It is no coincidence that Representatives Dent and Beatty are from Pennsylvania and Ohio, respectively. Representative Dent represents the Pennsylvania 15th District, which is about 100 miles from the campus of Penn State. *See supra* text accompanying notes 12–19 (discussing the Penn State football scandal). Representative Beatty is a former senior vice president at Ohio State. Both schools have been recent targets of NCAA investigations. Jenna Johnson, *Ohio, Penn. Athletic Scandals Prompt Lawmakers' Call for NCAA Change*, WASH. POST (Aug. 1, 2013), http://articles.washingtonpost.com/2013-08-01/politics/40947948_1_sanctions-penn-state-stacey-osburn; Brad Wolverton, *Bill in Congress Aims to Give NCAA Athletes Greater Protections*, CHRON. HIGHER EDUC. (Aug. 1, 2013), http://chronicle.com/blogs/players/bill-in-congress-aims-to-give-ncaa-athletes-greater-protections/33327.

270. In 2014, colleges and universities are projected to take in $140 billion in federal funding under Title IV of the Higher Education Act of 1965. H.R. 2903 § 1(b)(2).

271. *Id.* § 2.

272. Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (2013).

273. H.R. 3545 § 2; *see also* Berkowitz, *supra* note 266; Press Release, U.S. Representative Tony Cárdenas, Cárdenas Introduces Law to Protect Collegiate Student-Athlete Academic Progress (Nov. 20, 2013), *available at* http://cardenas.house.gov/media-center/press-releases/c-rdenas-introduces-law-to-protect-collegiate-student-athlete-academic.

reaching as H.R. 2903, the bill does include a provision "for a formal administrative hearing" for student-athletes who lose their scholarship for disciplinary reasons, in language almost identical to that of H.R. 2903, including allowing "any other due process procedure the Secretary determines by regulation to be necessary."[274]

H.R. 2903 arrived at the House Subcommittee on Higher Education and Workforce Training on September 13, 2013,[275] while H.R. 3545 went to the overseeing House Committee on Education and the Workforce on November 20, 2013.[276] No further action or movements have occurred at the present time.[277] A bill tracking website currently puts both H.R. 2903 and H.R. 3545 as having "died" in committee[278]—and many of the factors that foiled earlier reform attempts are also present here.[279] H.R. 2903 and H.R. 3545, however, are potentially the first of many[280] to incite another wave of NCAA reforms[281] because they put forth an intriguing innovation.[282] Of all the attempts to

274. H.R. 3545 § 2(b).

275. *Summary: H.R. 2903—113th Congress (2013–2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/2903 (last visited Jan. 19, 2015).

276. *Summary: H.R. 3545—113th Congress (2013–2014)*, CONGRESS.GOV, http://beta.congress.gov/bill/113th-congress/house-bill/3545 (last visited Jan. 19, 2015).

277. *See Summary: H.R. 2903—113th Congress (2013–2014)*, *supra* note 275; *Summary: H.R. 3545—113th Congress (2013–2014)*, *supra* note 276.

278. *H.R. 2903: National Collegiate Athletics Accountability Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr2903 (last visited Jan. 24, 2015); *H.R. 3545: Collegiate Student Athlete Protection Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/hr3545 (last visited Jan. 24, 2015).

279. Some of these factors include: (1) college sports are a seemingly low or unserious priority for Congress; (2) even if it is a legitimate priority, many critics wonder why Congress would intervene in sports controversies in the midst of other more pressing issues; (3) an assumption that such legislation is motivated by a representative's personal vendetta against the NCAA; (4) a sense that the NCAA has grown too big at this point and any attempts at reform are futile; (5) a lack of familiarity with the NCAA's structure and operations; (6) a lack of familiarity with college life and higher education. These factors are outlined in ROBERT ZEMSKY, MAKING REFORM WORK: THE CASE FOR TRANSFORMING AMERICAN HIGHER EDUCATION 183–84 (2009); Potuto, *supra* note 19, at 38; Johnson, *supra* note 251; Peter Sullivan, *Amid Ailing Economy, Members of Congress Delve into Sports Issues*, HILL (Nov. 13, 2011, 11:00 AM), http://thehill.com/homenews/house/193231-amid-ailing-economy-members-of-congress-delve-into-sports-issues.

280. As the Higher Education Act of 1965 is up for renewal in 2014, there will likely be other education bills—including some to regulate college sports—coming forward. Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008); Johnson, *supra* note 269; Georgia Parke, *Higher Education Act Seeks Reauthorization*, DUKE CHRON. (Oct. 24, 2013), http://www.dukechronicle.com/articles/2013/10/24/higher-education-act-seeks-reauthorization; *see also Higher Education Act*, NAT'L ALLIANCE FOR PARTNERSHIPS EQUITY http://www.napequity.org/public-policy/current-laws-and-bills/higher-education-act/ (last visited Jan. 24, 2015) (giving status updates on the Higher Education Act and its proposed amendments).

281. *See supra* note 250 and accompanying text.

282. Sonny Vaccaro, a figure involved with *O'Bannon*, believes H.R. 2903 is a sign of more congressional interest in the NCAA to come. Jon Solomon, *Introducing the NCAA Accountability Act: Two Members of Congress Propose Bipartisan Bill*, ALA. MEDIA GROUP (Aug. 1, 2013, 3:30 PM), http://www.

address NCAA due process after *Tarkanian*, these are the first to invoke the DOE and its reformative capabilities[283] and "outsource" NCAA enforcement.[284] Through this proposal, advocates for due process reform in the NCAA can implore the federal executive to step in—an unprecedented option—and avoid the "Herculean" and "unpopular" task of overcoming today's state actor standard.[285]

IV. THE DOE CAN SOLVE THE NCAA'S DUE PROCESS PROBLEMS

The DOE is an untapped yet potential resource for student-athletes and coaches who desire more procedural due process within the NCAA. As it executes the President's policies and carries out Congress's laws, the DOE is already involved in investigations, enforcement, publicity, and other activities to improve American education.[286] The DOE could reasonably make room for student-athletes and their due process rights as part of its influence and responsibility, with or without H.R. 2903 or H.R. 3545.[287] With expectations from H.R. 2903, H.R. 3545, or another act that bolsters the DOE, however, the DOE would resolve this controversy with added clarity and force.[288] The DOE can do this efficiently and effectively,[289] without overstepping the bounds of separated powers among the branches.[290]

---

al.com/sports/index.ssf/2013/08/introducing_the_ncaa_accountab.html. Vaccaro's prediction was consistent with the advent of H.R. 3545 three months later.

283. *See supra* notes 252–56 and accompanying text. Of the seven congressional bills to address due process in the NCAA after *Tarkanian*, only one other than H.R. 2903 or H.R. 3545 mentions the DOE or the Secretary of Education. The Collegiate Athletics Reform Act of 1991 was to give authority to the Secretary regarding NCAA revenue from television broadcasts. H.R. 3046, 102d Cong. §§ 103(a)(2), 201(a) (1991).

284. The notion of "outsourcing" the NCAA's enforcement was approved by 45% of NCAA conference representatives at an annual convention in January 2014. NCAA, 2014 NCAA CONVENTION PROCEEDINGS: 108TH ANNUAL CONVENTION 53 (2014), *available at* http://www.ncaapublications.com/productdownloads/CONPRO14.pdf; Brad Wolverton, *NCAA Members Support Big-Conference Autonomy*, CHRON. HIGHER EDUC. (Jan. 17, 2014), http://chronicle.com/blogs/players/ncaa-members-support-big-conference-autonomy/34189; *see also* Cadie Carroll, *Should the NCAA Outsource Its Enforcement Process? Compliance Professionals and Experts Weigh In*, J. NCAA COMPLIANCE, Jan. 2013, at 5; Dennis Dodd, *Hey NCAA, Why Don't You Just Give It Up and Let Miami Go*, CBSSPORTS.COM (Jan. 23, 2013, 4:22 PM), http://www.cbssports.com/collegefootball/story/21604840/hey-ncaa-give-it-up; Stewart Mandel, *NCAA Needs to Reevaluate Entire Enforcement Model*, SPORTS ILLUSTRATED (Feb. 18, 2013), http://www.si.com/college-football/2013/02/18/ncaa-miami-investigation-julie-roe-lach/; Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, ATLANTIC (Oct. 23, 2012, 4:16 PM), http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012.

285. ZEMSKY, *supra* note 279, at 187.

286. U.S. DEP'T OF EDUC., OVERVIEW OF THE U.S. DEPARTMENT OF EDUCATION 1, 6–8 (2010).

287. *See infra* Part IV.A.

288. *See infra* Part IV.B.

289. *See infra* Part IV.C.

290. This strategy with H.R. 2903 or H.R. 3545 and the DOE presents a notable interplay among the three branches of the federal government and their doctrine of separation of powers. Such commingling might seem incompatible with the imperviousness each branch claims,

A. THE DOE CAN PROTECT DUE PROCESS, NOT JUST EQUAL PROTECTION

At present, the most significant interaction between the DOE and the NCAA occurs when the DOE challenges schools that practice or permit discrimination in their athletics programs (i.e., enforcing Title IX of the Education Amendments of 1972[291]), although the DOE is beginning to affect the NCAA in other ways[292]. The DOE actively administers (now more than

especially the Judiciary. The Court has explained that it not only resolves disputes but gives them utter finality, and the Legislative Branch is not allowed to effectively reopen final judgments. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) ("[T]he Federal Judiciary [has] the power, not merely to rule on cases, but to *decide* them. . . .").

However, not only do H.R. 2903 and H.R. 3545 avoid reopening *Tarkanian*, *see id.* at 217 (concluding that the federal statute at issue would require courts to reopen final decisions in dismissed suits), they do not alter *Tarkanian*'s holding: that the NCAA is a private party and is not "acting under color of state law." NCAA v. Tarkanian, 488 U.S. 179, 198–99 (1988). The Supreme Court narrowly ruled that the NCAA is not subject to a state actor's obligations of due process, and did not touch the NCAA's due process standards or say they are absolute and immutable. *See supra* note 157 and accompanying text. The other two branches of the federal government do not have to confer the state actor label upon the NCAA (thereby undoing *Tarkanian*) in order to influence the NCAA's due process. *See supra* notes 226–28, 268 and accompanying text. *Tarkanian* does not prevent Congress or the President from building upon an entity's due process minimum. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) ("Congress and the states, of course, remain free to impose more rigorous standards . . . than those we find mandated here today."); *see also supra* notes 226–28 and accompanying text.

291. *Compare* NCAA CONST. §§ 2.3.1, 2.6 (2014), *with* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., HELPING TO ENSURE EQUAL ACCESS TO EDUCATION: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 46–48 (2012).

292. A separate mission for the DOE comes from the Clery Act, a law that requires the disclosure of statistics on crime around college campuses and similar information. 20 U.S.C. § 1092(f)(18) (2012). The DOE has fined universities for not complying with the Clery Act, and is currently in the midst of "the most extensive Clery Act investigation ever conducted" to find the Clery Act implications of Penn State's alleged cover-up of the Jerry Sandusky scandal. Barbara Goldberg, *Penn State Could Incur Steep Penalty in Probe of Unreported Crime*, REUTERS (July 19, 2012, 6:48 PM), http://www.reuters.com/article/2012/07/19/us-usa-pennstate-cleryact-idUSBRE86I1No20120719 (internal quotation marks omitted). There is some discussion of whether the DOE will use its version of the NCAA's "death penalty" and deny federal funding, which in Penn State's case would equal $660 million annually. *Id.*; Graham Watson, *The Department of Education Could Be a Bigger Threat to Penn State than the NCAA*, YAHOO! SPORTS (July 12, 2012, 4:30 PM), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/department-education-could-bigger-threat-penn-state-ncaa-203019718–ncaaf.html. The DOE began its process in November 2011, and submitted its confidential preliminary report in July 2013. Mike Dawson, *Penn State Receives Preliminary Report of Clery Act Compliance*, CENTRE DAILY TIMES (July 15, 2013), http://www.centredaily.com/2013/07/15/3688570/penn-state-receives-preliminary.html; Letter from Nancy Paula Gifford, Area Case Dir., U.S. Dep't of Educ., to Graham B. Spanier, President, Pa. State Univ. (Nov. 9, 2011), http://www.psu.edu/ur/2011/DoE_Letter_110911.pdf. The DOE's Office for Civil Rights advised Penn State that it would begin a "compliance review" of the university in January 2014. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Rodney Erickson, President, Pa. State Univ. (Jan. 23, 2014), http://media.centredaily.com/smedia/2014/01/25/23/52/1boA3I.So.42.pdf; *see also* Mike Dawson, *Penn State Focus of Federal Probe: Department of Ed Investigating Whether University Responded Appropriately to Sexual Assault Reports Before Sandusky Case Hit*, CENTRE DAILY TIMES (Jan. 25, 2014), http://www.centredaily.com/2014/01/25/4002673/penn-state-aware-of-federal-review.html; Press Release, U.S. Dep't of Educ., U.S.

ever[293]) the equal protection from Fifth and Fourteenth Amendment doctrine in American public education through its Office for Civil Rights ("OCR").[294] As of yet, Congress has directed the OCR's vision to the "significant civil rights or compliance problems"[295] of discrimination based on race, sex, disability, and age.[296] To root out discrimination, the OCR conducts routine inspections of compliance systems[297] and promptly looks into complaints.[298] If the OCR cannot correct any discovered noncompliance informally, Congress authorizes the DOE to suspend or refuse federal subsidies to the offending school,[299] or even refer the case to the Department of Justice.[300]

Even now, the DOE could reasonably extend its investigative and prosecutorial power to enforce and ensure due process at federally supported institutions. Because due process is a Fourteenth Amendment counterpart to equal protection and antidiscrimination,[301] the DOE can begin improving due process rights for student-athletes and coaches independent of legislative pushes like H.R. 2903 or H.R. 3545. The OCR has already broadly interpreted its legislative directives under the discretion of the Department of Justice, the President,[302] or the OCR itself.[303] The OCR explicitly addresses discrimination against sexual orientation, religion, speakers of foreign languages, or immigration or citizenship status, which are beyond the congressional mandates of race, sex, age, or disability.[304] Though adding athletic due process to the OCR's mission is not as harmonious as simply attaching a subset

---

Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), *available at* http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

293. OFFICE FOR CIVIL RIGHTS, *supra* note 291, at v ("From 2009 to now, OCR [the Office for Civil Rights] has investigated and resolved a record number of complaints . . . . We have engaged in unprecedented proactive enforcement, revamped our technical assistance, and expanded our outreach to new levels.").

294. U.S. DEP'T OF EDUC., *supra* note 286, at 8.

295. 20 U.S.C. § 3413(b)(1).

296. *Id.* §§ 1681–82 (sex discrimination); 29 U.S.C. § 794 (2012) (disability discrimination); 42 U.S.C. § 2000d (2012) (race discrimination); *id.* §§ 6101–03 (age discrimination); 34 C.F.R. § 100.1 (2014) (race discrimination); *id.* §§ 104.1, 105.1 (disability discrimination); *id.* § 106.1 (sex discrimination); *id.* § 110.1 (age discrimination). Also in the code is a section for observing compliance with the Boy Scouts of America Equal Access Act. 20 U.S.C. § 7905; 34 C.F.R. § 108.1; *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 291, at 1 (visual aid showing all six statutes).

297. 34 C.F.R. § 100.7(a).

298. *Id.* § 100.7(c).

299. *Id.* § 100.8(a).

300. *Id.*

301. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

302. Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000).

303. OFFICE FOR CIVIL RIGHTS, *supra* note 291, at 33, 58.

304. *Id.* at 31, 33, 58.

of discrimination, due process is connected to equal protection, making it a natural fit with the OCR's current strategy.[305]

B. WITH H.R. 2903 OR H.R. 3545, THE DOE CAN CHANGE NCAA DUE PROCESS

With another act to reinforce the six acts already underpinning the scope of the OCR, the DOE could undoubtedly watch over the NCAA's due process by creating a preemptive administrative hearing.[306] If House Bills H.R. 2903 or H.R. 3545 were to pass as written, not only would the Secretary of Education be expected to "provide[] . . . any other due process procedure the Secretary determines by regulation to be necessary"—one viable method being the OCR—but Congress would expressly charge the DOE to first oversee the realization of "a formal administrative hearing" with "not less than one appeal" that would stay any NCAA ruling.[307] With this statutory authority, the DOE can detail its own regulations and procedures—with the import of law[308]—for what such a formal administrative hearing would entail.[309] Administrative law and courts regularly deal with questions of employment, reputation, and other questions similar to those present in a COI hearing,

305. Mathews v. De Castro, 429 U.S. 181, 182 n. 1 (1976) ("It is well settled that the Fifth Amendment's Due Process Clause encompasses equal protection principles."); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) ("Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment.").

306. The current sources for the OCR's inquiries are Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act. OFFICE FOR CIVIL RIGHTS, *supra* note 291, at 1; *see also supra* note 296. Placing emphasis on only student-athletes as a subset of entire campus populations—a likely effect of the OCR's carrying out H.R. 2903 or H.R. 3545—may seem underinclusive compared to the sweeping classifications of race, gender, age and disability already within the OCR's dominion. But the OCR is also charged with specifically ensuring school facility access to the Boy Scouts of America, a relatively narrow duty. *See* 20 U.S.C. § 7905 (b)(1) (2012); 34 C.F.R. § 108.1 (2014). Protecting due process for NCAA student-athletes would reasonably be located somewhere between supporting Boy Scouts and supporting racial minorities on the spectrum of the OCR's breadth.

307. H.R. 2903, 113th Cong. § 2 (2013); *see also* H.R. 3545, 113th Cong. § 2(b) (2013).

308. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency . . . .").

309. For one example of applying administrative law to the NCAA, see PORTO, *supra* note 100100, at 172–76. Another model for the DOE and the NCAA is to borrow from arbitration theory or another form of alternative dispute resolution. *See generally* Stephen F. Ross & S. Baker Kensinger, Judicial Review of NCAA Decisions: Evaluation of the Restitution Rule and a Call for Arbitration (May 2009) (unpublished manuscript), *available at* http://works.bepress.com/stephen_ross/1. *But see* Potuto, *supra* note 182, at 304–06 (explaining the COI process is already a form of arbitration). Some detractors of H.R. 2903 or H.R. 3545 worry that the right to an administrative hearing would be applied to even minor violations, which would encumber the NCAA's relatively quick and painless handling of them. *See* Solomon, *supra* note 283.

and so an administrative court's due process standard is compatible.[310] An administrative-style process would include an impartial judge[311] and the cross-examination of witnesses for the opposing party.[312]

Besides adapting student-athletes' proceedings to an administrative law framework, the DOE could also employ its subpoena power on behalf of the NCAA.[313] Though it seems counterintuitive to critics' wish to offset the NCAA's strength,[314] the DOE loaning this power to the NCAA would ensure more due process because it would compel otherwise uncooperative witnesses to the proceedings and require them to face cross-examination.[315] A number of college sports experts have recognized the value of subpoena power and have voiced their support for granting it to the NCAA.[316] Though neither H.R. 2903 nor H.R. 3545 grant subpoena power to the NCAA, the DOE can act as a proxy for the NCAA and compel witnesses to the new administrative hearing

310. PORTO, *supra* note 100, at 170.

311. *See* 5 U.S.C. § 554(d)(2) (2012); *see also* PORTO, *supra* note 100, at 170.

312. 5 U.S.C. § 556(d).

313. 20 U.S.C. § 1097a(a) (2012). The DOE has successfully used this power *against* the NCAA. *See* U.S. Dep't of Educ. v. NCAA, 481 F.3d 936, 938 (7th Cir. 2007).

314. One writer from SBNation.com tweeted, "Giving the NCAA subpoena power is like giving parking lot attendants flamethrowers." *Ryan Nanni*, TWITTER (July 22, 2013, 7:26 AM), https://twitter.com/celebrityhottub/status/359318495403577345.

315. NCAA v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992) ("Thus, since the NCAA does not have the ability to subpoena witnesses or otherwise require their cooperation, an infractions proceeding could not practicably be processed in compliance with the [cross-examination] provisions of the Nevada statute."); PORTO, *supra* note 100, at 172; Katherine Elizabeth Maskevich, Comment, *Getting Due Process into the Game: A Look at the NCAA's Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 311 (2005). *But see* NCAA BYLAWS § 19.2.3.2 (2014). Some critics say the NCAA already has an adequate method to compel unwilling witnesses, but justifies its lack of government-granted subpoena power to explain the lack of cross-examinations in its hearings. Broyles, *supra* note 118, at 513 n.175; Kenneth E. James, *College Sports and NCAA Enforcement Procedures: Does the NCAA Play Fairly?* National Collegiate Athletic Association v. Miller, 29 CAL. W. L. REV. 429, 449 (1993); Young, *supra* note 250, at 835–36 (1992); Scott A. Mitchell, Note, *Hit, Sacked, and Dunked by the Courts: The Need for Due Process Protection of the Student-Athlete in Intercollegiate Athletics*, 19 T. MARSHALL L. REV. 733, 761 (1994). If the NCAA had subpoena power, or could rely on the DOE's power, it would have prevented the grave mistakes committed during the Miami investigation in 2011. *See supra* notes 1–11, 21–22, 24, and accompanying text.

316. *Due Process and the NCAA*, *supra* note 178 (testimony of Professor Gary R. Roberts); YAEGER, *supra* note 73, at 244 ("The fact that they've never requested subpoena power, in my mind, means they shouldn't be using the lack of subpoena power as an excuse for bad enforcement." (quoting Duke Law professor John Weistart)); Graham Watson, *Urban Meyer Thinks the NCAA Should Have Subpoena Power. Can That Really Work?*, YAHOO! SPORTS (July 20, 2011), http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Urban-Meyer-thinks-the-NCAA-should-have-subpoena?urn=ncaaf-wp3915 ("The problem right now [is] the investigation process takes five years, four years. . . . The two areas that are missing in my mind are fear and lack of knowledge. Fear on the side of the coaches and lack of knowledge on the side of the NCAA. Why not combine the two?" (quoting Urban Meyer, current head football coach at Ohio State)).

that the Secretary will have created, witnesses who would not otherwise testify voluntarily in the NCAA's current infractions process.[317]

The DOE's direct actions could not expand beyond the universities that accept financial assistance from the federal government.[318] Because the NCAA is not a federally funded program,[319] the DOE would lack the jurisdiction to actually enter, inspect, and renovate COI hearings or other NCAA practices.[320] Furthermore, in light of the NCAA's status post-*Tarkanian,* the OCR and the DOE cannot expect the NCAA's procedures to automatically mirror those of a public university until the government officially labels the NCAA a state actor, which H.R. 2903 and H.R. 3545 do not.

But H.R. 2903 and H.R. 3545 are precise and forthright enough that, even indirectly, they could likely spark some NCAA reforms. Presently, in cases like UNLV's or Miami's, a school charged with a violation can either choose to: (1) follow through with NCAA instructions and dismiss a coach, etc., despite due process irregularities; or (2) to disobey the NCAA's order and maintain due process, but risk more NCAA sanctions or even expulsion, which would subsequently result in a virtually irrelevant athletic program.[321] But if H.R. 2903, H.R. 3545, or a similar bill passes, and the DOE implements due process policies and regulations, the choice becomes: (1) follow through with NCAA instructions, and *break the law*;[322] or (2) disobey the NCAA's order and risk expulsion, but *follow the law*.[323] Though members will still feel the

317. Most of the proposals to date call for federal and state legislatures to give subpoena power to the NCAA outright. YAEGER, *supra* note 73, at 244; Broyles, *supra* note 118, at 565; James, *supra* note 315, at 449–50; Aidan Middlemiss McCormack, Comment, *Seeking Procedural Due Process in NCAA Infractions Procedures: States Take Action*, 2 MARQ. SPORTS L.J. 261, 287 (1992); Mitchell, *supra* note 315, at 765.

318. 34 C.F.R. §§ 100.1, 104.1, 106.1, 108.2, 110.2 (2014). Some may argue that a university could simply do without the Title IV funding that is the gateway for H.R. 2903's and H.R. 3545's jurisdiction. But because Title IV covers such indispensable programs as Federal Pell Grants, the William D. Ford Federal Direct Loan Program, and Federal Perkins Loans, the prediction that some universities would forgo their Title IV funding is unrealistic. 20 U.S.C. §§ 1070a-1, 1087a to e, 1087h to j, 1087aa to ii (Supp. 2013).

319. Brief for Petitioner, NCAA v. Smith, 525 U.S. 459 (1999) (No. 98-84), 1998 WL 784591, at *3.

320. The NCAA does not receive federal funding. But the federal funding requirement also dictates the DOE's equal protection enforcement, which has not kept the NCAA from its reach. *See supra* Part IV.A.

321. *See supra* note 135 and accompanying text.

322. 34 C.F.R. § 100.8(a)(1); H.R. 2903, 113th Cong. § 2 (2013); H.R. 3545, 113th Cong. § 2(a) (2013). If H.R. 3545 were to become law, it would only apply to a select few institutions, and not all NCAA members. *See supra* note 273 and accompanying text.

323. H.R. 2903 § 2 ("[T]he institution will *not* be a member of273 a nonprofit athletic association unless such association . . . provides institutions and student athletes with the opportunity for a formal administrative hearing." (emphasis added)); H.R. 3545 § 2(a) ("In the case of an institution that has an athletic program and that annually receives $10,000,000 or more in income derived from media rights . . . for the athletic program of the institution, the institution *will comply* with the requirements under subsection (k)." (emphasis added)).

pressure that would come with straying from NCAA rulings, their threats to depart the NCAA (or their forcing the NCAA's threat of expulsion) would now have the weight of civil obedience behind them, and would send a more urgent and empowered message to the NCAA. Changes would then likely be forthcoming—possibly before a single institution actually relinquishes its membership—in the NCAA's interest of public policy, public image, and avoiding the appearance of circumventing federal law.

C. THE DEPARTMENT OF EDUCATION CAN BE AN EFFECTIVE VOICE

Of course, many lawmakers balk at the idea of an upstart executive agency, or of granting more responsibility to the government. But the OCR is one outpost of the vast American bureaucracy that has increased productivity and efficiency over time.[324] In the past three decades, OCR staff has downsized by half while its caseload has quadrupled, and yet it resolved thousands more cases in 2012 than in 2008.[325] Comparing President Obama's first term to President Bush's second term, 24% more cases came to the OCR,[326] yet the office resolved 38% more of them within 180 days of filing.[327] Adding another category of cases, similar to those that are already routine for the agency, would likely present a less strenuous burden than one might suppose.

If Congress restrains the DOE from enforcing reformative policies, because H.R. 2903 or H.R. 3545 do not pass or because Congress is wary of DOE intrusion into the NCAA, at the very least the DOE can perform one of its four main activities, that of a national spotlight.[328] As the Secretary of Education advises the President, gives speeches, publishes articles, appears in the media, or makes personal visits to colleges, he or she draws nationwide attention to education issues.[329] The incumbent Secretary, Arne Duncan, has already given such a platform to the graduation rates of NCAA basketball

324. OFFICE FOR CIVIL RIGHTS, *supra* note 291, at 21.

325. *Id.*

326. *Id.* at viii.

327. *Id.* at 21, exhibit 10.

328. U.S. DEP'T OF EDUC., *supra* note 286, at 7. The other three purposes are (1) "establish[ing] policies relating to federal financial aid for education"; (2) "collect[ing] data and oversee[ing] research on America's schools"; and (3) "enforc[ing] federal statutes prohibiting discrimination in programs and activities receiving federal funds and ensur[ing] equal access to education." *Id.* at 5–8.

329. *Id.* at 7.

teams.[330] More than just raising awareness,[331] his message was successful in exacting change, and contributed to the NCAA's announcement in August 2011 that it would ban teams with low graduation rates from postseason competition.[332] The Secretary has the attention of the President, media outlets, and the American people to impact social policy,[333] and armed with H.R. 2903 or H.R. 3545, could use these resources to advance student-athlete due process.[334]

V. CONCLUSION

In its almost 110-year history, the NCAA has generated legal interest on par with its exponentially increasing profits and proliferation through society. While constitutional rights related to athletes emerged, case law generally only found some derivatives of those rights essential. *NCAA v. Tarkanian* settled a significant question in this debate—at least in the courtroom—when the Supreme Court held that the NCAA was not within the reach of the Fifth and Fourteenth Amendments of the Constitution and their due process guarantees. But the debate is far from settled in classrooms and locker rooms, on fields and on courts, as student-athletes, coaches, and their advocates clamor for more constitutional defenses against the disproportionate power of the NCAA. These student-athletes have fought for procedural due process rights in courts and in congressional chambers. The NCAA itself has adapted

330. Arne Duncan, *Let's Clean Up College Basketball and Football*, HOMEROOM: OFFICIAL BLOG U.S. DEP'T EDUC., http://www.ed.gov/blog/2010/01/lets-clean-up-college-basketball-and-football (last visited Jan. 19, 2015); Arne Duncan & Tom McMillen, *Want to Change College Athletics? Financially Punish Coaches*, USA TODAY (Mar. 22, 2013, 12:04 AM), http://www.usatoday.com/story/sports/ncaab/2013/03/20/arne-duncan-tom-mcmillen-march-madness-education-coach-salaries/2004835; *Archived Information: Graduation Rates of NCAA Tournament Teams: Secretary Arne Duncan's Introductory Remarks in a Joint Press Call*, U.S. DEP'T EDUC. (Mar. 17, 2010), http://www.ed.gov/news/speeches/graduation-rates-ncaa-tournament-teams-secretary-arne-duncans-introductory-remarks-joi.

331. For examples of Secretary Duncan's message in the media, see Jenna Johnson, *March Madness of Graduation Rates: U-Conn. Loses, Notre Dame Wins*, WASH. POST (Mar. 13, 2012, 6:30 AM), http://www.washingtonpost.com/blogs/campus-overload/post/march-madness-of-graduation-rates-u-conn-loses-notre-dame-wins/2012/03/12/gIQARKHc8R_blog.html; Mike Melia, *In Different College Basketball Bracket, Study Finds Gap in Graduation Rate*, PBS NEWSHOUR (Mar. 14, 2012, 4:11 PM), http://www.pbs.org/newshour/rundown/2012/03/in-different-college-basketball-bracket-study-finds-gap-in-graduation-rate.html; Lynn O'Shaughnessy, *March Madness College Graduation Rates: How Many NCAA Basketball Players Are Graduating from College?*, U.S. NEWS & WORLD REP. (Mar. 22, 2011, 10:00 AM), http://www.usnews.com/education/blogs/the-college-solution/2011/03/22/march-madness-college-graduation-rates.

332. Michelle Brutlag Hosick, *DI Board Approves Increased Academic Performance Concept*, NCAA (Aug. 11, 2011, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/di-board-approves-increased-academic-performance-concept; Dana O'Neil, *Increase in Academic Cutline Approved*, ESPN (Aug. 12, 2011, 7:53 AM), http://espn.go.com/college-sports/story/_/id/6853878/ncaa-committee-approves-increase-apr-cutline.

333. U.S. DEP'T OF EDUC., *supra* note 286, at 7.

334. *See* H.R. 2903, 113th Cong. § 2 (2013); H.R. 3545, 113th Cong. § 2(b) (2013).

and progressed in supporting their student-athletes. But these student-athletes still hope for more.

Student-athletes have another, underutilized channel for achieving change: the Executive Branch. The DOE, especially reinforced with a legislative enactment like the proposed H.R. 2903 or H.R. 3545, has the ability to scrutinize due process in the NCAA's disciplinary hearings and make a lasting impact. This executive agency can become another factor—a game changer—in the campaign for more athletic due process.