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Seeking Procedural Due Process in NCAA Infractions Procedures: States Take Action

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COMMENT

SEEKING PROCEDURAL DUE PROCESS IN NCAA INFRACTIONS PROCEDURES: STATES TAKE ACTION

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SEEKING PROCEDURAL DUE PROCESS IN NCAA INFRACTIONS PROCEDURES: STATES TAKE ACTION

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") was formed in 1912[1] and has sanctioned colleges and universities since 1952.[2] Until very recently it seemed that schools dissatisfied with NCAA decisions would have no recourse outside the NCAA system. Today, however, aggrieved parties are fighting to impose mandatory procedural due process standards upon the NCAA. The NCAA claims that it grants fair procedures which comport with constitutional requirements[3] even though it should not be required to do so.

The NCAA is the monopoly of all intercollegiate sports.[4] These sports generate millions of dollars in revenues through the efforts of players who may not lawfully be paid and coaches who become legendary in their communities. The futures of these players and coaches depend upon their reputations as winners, reputations which can be destroyed by alleged infractions of NCAA rules.[5]

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1. DON YAEGER, UNDUE PROCESS THE NCAA'S INJUSTICE FOR ALL 5 (1991). The National Collegiate Athletic Association evolved from the Intercollegiate Athletic Association of the United States which was formed on December 28, 1905. *Id.* The NCAA seal, on the other hand, states that the founding year of the NCAA is 1906.

2. *Id.* at 271.

3. " 'You'll find that the NCAA has more due process than any other all-volunteer institution, more than the ABA (American Bar Association), more than the AMA (American Medical Association).' " Scott Horner, *Schultz Denies Vendetta Against Tarkanian*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, March 28, 1991, at C1 (quoting Dick Schultz, NCAA Executive Director).

4. National collegiate athletic associations are unincorporated associations consisting of public and private colleges and universities and are private monopolies that control intercollegiate athletics throughout the United States;

. . . .

National collegiate athletic associations exercise great power over member institutions because of their monopolistic control over intercollegiate athletics and their power to bar from intercollegiate competition those member institutions that do not comply with the rules of the association; . . . .

1991 Nev. Stat. § 398 (from the "findings" section of the now enacted Nevada Assembly Bill 204). The findings in the Nevada statute are virtually identical to the findings in due process statutes in several other states.

5. "Substantial monetary loss, serious disruption of athletic programs and significant damage to reputation and careers may result from the imposition of sanctions on a member institution, its employees, student athletes, students or boosters for violations of its rules . . . ." *Id.*

Fairly run, NCAA infractions procedures are the means by which collegiate sports are kept "amateur" and honest. Unfairly run, NCAA infractions procedures are a tool by which careers are ruined in the pursuit of power and wealth. It is imperative that NCAA proceedings be fair and just.

II. NCAA LIABILITY AS A "STATE ACTOR"

A. The Investigation and Adjudication of Coach Tarkanian

After an extensive investigation by the NCAA Committee on Infractions ("Committee") of the University of Nevada-Las Vegas ("UNLV"), an NCAA member, the Committee found thirty-eight violations of NCAA rules by the UNLV basketball team.[6] Ten of these violations were directly attributed to UNLV's head basketball coach, Jerry "Tark the Shark" Tarkanian ("Tarkanian").[7] The most serious allegation against Tarkanian was that he had not cooperated with the NCAA investigation.[8]

The Committee recommended a two year probation of UNLV's basketball team and demanded that UNLV show cause why further sanctions should not be imposed if UNLV did not suspend Tarkanian from his position as head basketball coach.[9]

Tarkanian was suspended by UNLV and promptly brought suit in the Nevada state courts against the NCAA and UNLV.[10] Tarkanian alleged that he was deprived of liberty and property without due process of law as

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6. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 181 (1988) [hereinafter *Tarkanian*].

7. *Id.* at 186.

8. *Id.* at 187. The NCAA Enforcement Policies and Procedures explicitly allows for proceedings where a member institution's representative fails to cooperate with an investigation. The relevant rule may be found in NCAA Administrative Bylaw Article 32 § 3.11, which provides:

> FAILURE TO COOPERATE. In the event that a representative of a member institution refuses to submit relevant information to the committee or the enforcement staff upon request, an official inquiry may be filed with the institution alleging a violation of the cooperative principles of the NCAA bylaws and enforcement procedures. Institutional representatives may be requested to appear before the committee at the time the allegation is considered.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1991-92 NCAA MANUAL 437 (1991).

9. The UNLV conducted its own investigation and found that Tarkanian had not violated any rules. However, rather than face further sanctions which could fundamentally damage UNLV's basketball program, the UNLV president authorized the suspension of Tarkanian despite the fact that Tarkanian, tenured, was not given adequate notice. *Tarkanian*, 488 U.S. at 179, 187-88.

10. *Id.* at 181 (citing Tarkanian v. NCAA, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 488 U.S. 179 (1988)).

guaranteed by the Fourteenth Amendment to the United States Constitution[11] which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[12]

Note that the Fourteenth Amendment prohibits State, not individual, action. Tarkanian argued that UNLV, a state university, delegated its authority to the NCAA and that the NCAA, acting jointly with UNLV, was engaged in traditional state action, thereby making the NCAA a "state actor" liable under 42 U.S.C. § 1983 which provides:[13]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[14]

This statute imposes liability only on persons who act "under color of" state action.[15] Therefore, for liability to attach it is required, in our present context, that the NCAA be determined to be a "state actor".[16] "Individual invasion of individual rights is not the subject matter of the [Fourteenth Amendment]."[17] "Nearly all the Constitution's self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals

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11. *Id.*

12. U.S. CONST. amend. XIV, § 1.

13. *See generally Tarkanian*, 488 U.S. 179 (1988).

14. 42 U.S.C. § 1983 (1982).

15. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 (1988).

16. *See Tarkanian*, 488 U.S. at 182 (citing Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922, 928-35 (1982) (the under color of law requirement of 42 U.S.C. § 1983 (1982) is equivalent to the state actor requirement)).

17. Burton v. Wilington Parking Auth., 365 U.S. 715, 722 (1961) (quoting The Civil Rights Cases, 109 U.S. 3, 11 (1883)).

> The *Civil Rights Cases*, the Supreme Court's first full dress treatment of the fourteenth amendment's state action requirement, provides a noteworthy illustration of the role of an affirmative theory of liberty in shaping the state action doctrine. The Civil Rights Act of 1875 declared illegal all racially motivated interference by private individuals with the exercise by other individuals of their right to make use of "the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres. . . ." The court held this statute to be unconstitutional on its face: congressional power under § 5 of the fourteenth amendment, Justice Bradley's majority opinion concluded, was confined to enforcing § 1's prohibitions of "state action." Significantly, however, the Court did not deny Congress all power to regulate private conduct under the fourteenth amendment. In some circum-

only from government action. Accordingly, when litigants claim the protection of such guarantees, courts must first determine whether it is indeed government action, state or federal, that the litigants are challenging."[18]

After defeat in the Nevada state court system,[19] the United States Supreme Court granted certiorari to the NCAA.[20] Justice Stevens, writing for a 5-4 majority, reversed the lower courts' rulings and held that the actions of the NCAA which led to the suspension of Tarkanian were not "state action" and that Tarkanian, therefore, had no redress under the Fourteenth Amendment via 42 U.S.C. § 1983.[21]

B. The Legal Principle of Private Actor Liability

There are three tests used by the Supreme Court to determine when a private organization is a state actor. First is the public function test to determine whether the organization's conduct is of a type traditionally performed by the state.[22] Second is the state compulsion test to determine whether the conduct is encouraged or required by the state.[23] Third is the nexus test to determine whether the entity is engaged in a partnership-like relationship with the state.[24]

The UNLV is a state university and, therefore, a state actor which must comply with the Due Process Clause of the Fourteenth Amendment when sanctioning coaches and athletes. "Thus when UNLV notified Tarkanian that he was being separated from all relations with the University's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983."[25] The Supreme Court, however, held that the NCAA was not a state actor, thereby allowing the NCAA to apply sanctions against its members which, in turn, affected the coaches and athletes serving those members without the availability of the due process guarantee.[26]

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stances, the majority opinion implied, a state's failure to regulate private conduct could constitute "state action" justifying federal intervention.

TRIBE, *supra* note 15, at 1695 (footnotes omitted).

18. *Id.* at 1688 (footnotes omitted).

19. The trial court ruled in Tarkanian's favor, granting an injunction against disciplinary action by NCAA and awarding attorneys' fees to Tarkanian. On appeal by NCAA, the Supreme Court of Nevada affirmed NCAA's liability as a state actor under 42 U.S.C. § 1983. Tarkanian v. NCAA, 103 Nev. 331, 741 P.2d 1345 (1987), *rev'd*, 488 U.S. 179 (1988).

20. *Tarkanian,* 488 U.S. at 182.

21. *Id.* at 196-99.

22. *See generally* Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

23. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 1079 (3d ed. 1986).

24. *See generally* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-73 (1972).

25. *Tarkanian,* 488 U.S. at 193.

26. *See generally id.* at 182-85.

The NCAA is an association of over 1000 colleges and universities.[27] A member institution can withdraw from the NCAA at any time. While retaining membership, an institution must obey the rules of the NCAA. An institution which violates an NCAA rule will, after review by the NCAA, suffer sanctions. The NCAA does not have the authority to sanction a school's athlete or employee directly. However, the NCAA may, as in Tarkanian's case, advise a school that it will suffer sanctions if an employee or athlete is not sanctioned by the school in the manner recommended by the NCAA.[28]

The NCAA has evolved into a monopoly that controls intercollegiate athletic program regulation.[29] It was that monopoly, often affecting state schools, on which other courts based their opinions that the NCAA was a state actor liable for violations of 42 U.S.C. § 1983.[30] With the Supreme Court's narrow construction of the state actor requirement in *Lugar v. Edmondson Oil Co., Rendell-Baker v. Kohn, Blum v. Yaretsky* and, now, *NCAA v. Tarkanian,*[31] the lower courts have begun ruling that the NCAA is not a state actor.[32] The Supreme Court's holding in *NCAA v. Tarkanian,* however, does not grant the NCAA complete immunity from being deemed a state actor.[33] Future cases claiming that the NCAA is a state actor will continue to be addressed on a case-by-case basis.[34] However, *Tarkanian* stands as an important decision permitting the NCAA to deprive athletes and coaches of Fourteenth Amendment due process protection.[35] In *Tarkanian,* the Court framed the issue as "whether UNLV's actions in compliance with NCAA rules and recommendations turned NCAA conduct into state action."[36] An actor is engaged in state action when a state creates the legal framework governing the conduct of the actor, delegates its

27. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1989-90 NCAA ANNUAL REPORT 29 (1991).

28. *Tarkanian,* 488 U.S. at 194.

29. Leading Cases, 103 HARV. L. REV. 137, 195 (1989).

30. *E.g.,* Howard University v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975).

31. Lugar v. Edmondson Oil Co. 457 U.S. 922, 928-35 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); *Tarkanian,* 488 U.S. 179.

32. *E.g.,* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986).

33. *See Tarkanian,* 488 U.S. at 203.

34. *Id.*

35. J. M. Schwartz, *NCAA v. Tarkanian: State Action In Collegiate Athletics,* 63 TUL. L. REV. 1703, 1709-10 (1989).

36. *Tarkanian,* 488 U.S. at 193.

authority to the actor, or knowingly accepts benefits derived from the unconstitutional behavior of the actor.[37]

In *Tarkanian*, the Court held that UNLV, but not the NCAA, was a state actor. It is interesting to note that the final act of suspending Tarkanian was committed by a state actor—UNLV. The Court stepped "through an analytical looking glass" to determine if the deprivation of Tarkanian's due process rights was "fairly attributable to the state."[38] That issue turns on the nature of the state's relationship with the private institution. Thus, in *Ludtke v. Kuhn,*[39] the United States District Court, Southern District of New York, held that a female reporter denied access to the locker room of the New York Yankees was entitled to protection under 42 U.S.C. § 1983. Although the Yankees are a private organization they became a state actor due to their "symbiotic" relationship with the state.[40] In particular, the court emphasized that the Yankees leased a city owned stadium.[41] *Ludtke* has limited precedential value,[42] but it demonstrates that a private team's relationship to the state can make that team a state actor.

Important to determining whether the NCAA is a state actor at any given time is the relationship between the NCAA and member schools and how, through that relationship, the NCAA enacts regulations. The NCAA rules are established by the collective membership of the NCAA, not by state law. The Supreme Court in *Tarkanian* posited that if the NCAA's membership was compiled from only one state and comprised primarily of state schools, the NCAA would be a state actor.[43] However, the breadth of membership in the NCAA includes almost every state and the NCAA is "independent of any particular state."[44] The Supreme Court decided that the small effect that UNLV had upon NCAA legislation was not enough to establish that the NCAA was a Nevada state actor.

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37. *Id.* at 192.

38. *Id.* at 193.

39. 461 F. Supp. 86 (S.D.N.Y. 1978).

40. *Id.* at 93-96.

41. *Id.*

42. *Ludtke* was decided by the Federal Court for the Southern District of New York. Neither the United States Supreme Court nor the Second Circuit Court of Appeals reviewed the Southern District Court's decision. Thus, the *Ludtke* decision has never been the "law of the land." Therefore, other federal and state courts are not bound by the rationale or the holding of *Ludtke.*

Gregory R. Lang, *Locker Room Access: A Constitutional Prospective,* FOR THE RECORD (National Sports Law Institute, Milwaukee, Wis.), Jan.-Feb. 1991, at 2, 8.

43. *Tarkanian*, 488 U.S. at 193 n.13.

44. *Id.* at 193.

The Court in *Tarkanian* held that although UNLV, like most schools, adopted the NCAA rules for its athletes and staff, that fact did not transform the NCAA into a state actor because UNLV retained the power to withdraw from the NCAA and formulate its own athletic rules.[45] That is comparable to the circumstances in *Bates v. State Bar of Arizona*[46] wherein the United States Supreme Court held that the Arizona Supreme Court's implementation of the American Bar Association Code, which had been adopted by Arizona word for word, was state action.[47] That did not necessarily make the American Bar Association ("ABA") a state actor because Arizona voluntarily chose to adopt the ABA rules and retained the power to invalidate them at any time. Similarly, UNLV's voluntary adoption of NCAA rules did not make the NCAA a state actor.[48]

The Court in *Tarkanian* also analyzed the question of whether the NCAA could be classified as a state actor because it acted as an agent of UNLV.[49] A state which delegates its authority to a private actor may cause that party to become a state actor.[50] For example, in *West v. Atkins*[51] the United States Supreme Court held that a private physician employed in a state prison was a state actor due to the delegation of state authority over the prisoners' health to the physician.[52] The *Tarkanian* decision, however, did not find that UNLV had delegated its authority over its employees to the NCAA.[53]

A final point stressed by the Supreme Court in *Tarkanian* was a response to the argument that the NCAA was engaged in conduct traditionally performed by the state and should, therefore, be considered a state actor.[54] The regulation of sports is not a traditional state function.[55] How-

45. In *Tarkanian*, the Court put great importance on the fact that membership in the NCAA was voluntary. Because States were not forced to join and adhere to the rules of the NCAA, the NCAA was not promulgating state rules. Rather, the NCAA was promulgating NCAA rules which the State, through UNLV, chose to accept as its own. *Id.* at 192-98.

46. 433 U.S. 350 (1977).

47. *Id.*

48. *Tarkanian*, 488 U.S. at 195.

49. *Id.* at 195-96.

50. *E.g.*, West v. Atkins, 487 U.S. 42 (1988).

51. *Id.*

52. *Id.*

53. The NCAA's authority only extended to imposing sanctions upon the university itself. In addition, the NCAA and UNLV were not joint participants seeking mutual benefit. If anything, the NCAA and UNLV were adversaries throughout the proceeding, the NCAA seeking to sanction Tarkanian with suspension and UNLV seeking to retain him as head basketball coach. *Tarkanian*, 488 U.S. at 180, 196.

54. *Id.* at 197.

55. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 545 (1987).

ever, discipline of state employees, such as Tarkanian, has been considered a traditional state function.[56] The Court held that the decision to discipline Tarkanian arose from UNLV and was not "fairly attributable" to the NCAA.[57] The fact that UNLV's other options were "unpalatable" does not render the options unavailable. Therefore, UNLV had retained authority over its employees.[58]

The Court's holding that the NCAA was not a state actor rested primarily upon the NCAA's inability to directly discipline a member school's athlete or employee and the member's option to drop its NCAA membership at any time.[59] However, as Justice White notes in his dissenting opinion, similar facts in *Dennis v. Sparks* did not preclude a finding of state action.[60] In *Dennis*, the Court observed that although an actor had the option of withdrawing from a conspiracy with a judge, it had not exercised that option and the conclusion that the actor was a state actor was permissible.[61]

The Supreme Court's emphasis on the availability of alternatives to UNLV is unrealistic.[62] The UNLV basketball team raises as much as six million dollars annually for UNLV.[63] This "big business" is important to the UNLV budget.[64] To retain this big business, UNLV must remain a member of the NCAA because "[m]embership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program."[65] With the growing importance of NCAA level competition to a school's overall prestige and income, even retaining Coach Tarkanian, the 'winningest coach in college basketball,' was not a realistic option in the face of the NCAA's threat of two year's probation for UNLV's basketball team.[66] The Court's reliance on this option to demonstrate that UNLV had not delegated its authority is refuted by the facts. The UNLV did not want to suspend Tarkanian, yet, at the NCAA's command, Tarkanian was suspended. The Court's formal analysis found that the NCAA did not have

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56. *Tarkanian*, 488 U.S. at 196-97.

57. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

58. *See Tarkanian*, 488 U.S. at 198 n.19, 199 (and accompanying text).

59. Leading Cases, *supra* note 29, at 191.

60. *Tarkanian*, 488 U.S. at 200 (White, J., dissenting).

61. *See generally id.*

62. *See* Schwartz, *supra* note 35, at 1709-10.

63. Bill Brubaker, *The Shark—He Could Be A Fish Out Of Water*, WASH. POST, May 13, 1990, at D1.

64. *See id.*

65. Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *modified*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1986).

66. *See* Leading Cases, *supra* note 29, at 195-96.

the power to suspend Tarkanian but, as a practical matter, that power existed.[67]

The Court's decision ignores the essential role that states play in the NCAA.[68] Without the state schools' membership, the NCAA would lose its monopoly over intercollegiate sports.[69] The NCAA relies heavily upon the membership of state schools.[70] When a school violates an NCAA rule, the NCAA is the means by which other members, including state schools, force sanctions and compliance upon the offending institution. Thus, the NCAA "involves states, both as makers of NCAA rules and as power brokers to ensure compliance with those rules."[71] The NCAA's unique features, a mixed membership and a monopoly over state schools' intercollegiate sports, should fulfill the state actor provisions of 42 U.S.C. § 1983.[72]

The Court in *Tarkanian* failed to provide a clear method of evaluating an organization such as the NCAA under the state actor provisions.[73] That failure will encourage further indecisive opinions in the lower courts on the liability of the NCAA for violations of the due process guarantee.[74] In addition, the power of the NCAA to have an employee suspended will still be at issue in some cases because state schools are bound by 42 U.S.C. § 1983.[75] The lack of finality in the Supreme Court's *Tarkanian* decision leaves much to be desired and still at issue, certainly for the four dissenters.[76]

III. STATE DUE PROCESS STATUTES—WHAT PROCESS IS DUE

A. The Elements of Due Process Legislation

Protection of individual rights does not stop where the United States Constitution does. State constitutions also protect these rights, sometimes

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67. *Id.*
68. *Id.* at 196.
69. *Id.* at 195.
70. A unique feature of the NCAA is its mixed membership, made up of both private and state institutions. Approximately one-half of the NCAA members are state schools. These state schools are involved in both the formulation of the NCAA legislation and are subject to that legislation. *Id.* at 192, 194.
71. *Id.*
72. *Id.* at 193.
73. Schwartz, *supra* note 35, at 1710.
74. *Id.*
75. Randy Harvey, *Time May Not Change NCAA's Mind*, L.A. TIMES, December 14, 1988, at 3-1.
76. *See id.* It should be noted that two of those dissenters, Justice Brennan and Justice Marshall, are no longer on the bench.

more completely than the federal constitution.[77] Both state legislatures and the Congress[78] have the power to create statutes that protect coaches and players. The limit to such statutory authority is that the statutes must not violate a provision of the federal or a state constitution. In addition, state legislation may not conflict with constitutionally sound federal legislation.[79]

Recently, several state legislatures have proposed or passed legislation calling for procedural due process by the NCAA. That legislation is not the result of a recently formed perception that there is a need to protect the due process rights of coaches, staff, and players. As early as 1977 a Congressional report on the NCAA, under the auspices of Representative John E. Moss, former Chairman of the United States House of Representatives Subcommittee on Oversight and Foreign Commerce, stated that:

> The picture is one of a sanctioning body with incredible power which may affect the careers and ambitions of coaches and student athletes, as well as the stature of virtually every institution of higher education in this country. This power is exercised by the NCAA without observance of what we all assume are minimal standards of fairness.[80]

Universities, their staffs and their athletes responded with caution to this congressional questioning of the NCAA sanctioning practices. Even though Tarkanian took the NCAA to court in 1987 and individuals spoke out against the NCAA's infractions procedures for many years, there was no appeal to legislatures until recently.[81] Now, however, the process of lob-

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77. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 75 (1980).

78. The power of the federal legislature to act has expanded tremendously in areas such as the commerce clause. *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The beginning of the trend to defer to the federal legislature with regard to commerce clause issues and the dangers to employees was the overriding concern which called for congressional action. In other areas, however, Congress is not granted constitutional power to act so pervasively. In these areas of less concern, power to legislate remains with the individual states pursuant to the Tenth Amendment of the United States Constitution. *See* U.S. CONST. amend. X.

79. The Tenth Amendment of the United States Constitution provides, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Where Congress has failed to act or has acted in a limited manner the state legislatures are not preempted from acting. The states' authority is referred to as the "police power." Under the police power a state may legislate for the "health, safety, morals and general welfare" of its people. NOWAK et al., *supra* note 23, at 335.

80. Organization For Understanding and Reform, Justice Denied 4 (1991) (Champaign, Ill.) (quoting John E. Moss, U.S. House of Representatives).

81. Persons have sought support from legislatures on other NCAA issues. The "Student Right to Know and Campus Crimes Act of 1990 (PL 101-542)," although successfully "whittled" down by the NCAA, will provide high school student athletes with the graduation rates of universities. Memorandum from the Honorable T. McMillen to the Honorable J. Dingell, Chairman, House Committee on Oversight and Investigations 2 (Feb. 1, 1991).

bying legislatures has begun and NCAA procedural due process bills are passing by large majorities.[82] The number of states addressing the issue is rapidly increasing.[83] The design of such legislation is to require the NCAA to grant certain procedural rights to the member-schools it investigates.

Nebraska was the first state to pass NCAA due process legislation when Governor Kay Orr signed such a bill into law on February 1, 1990.[84] Nevada also passed a law requiring the NCAA to comport with due process in April 1991.[85] Florida and Illinois also passed such laws in 1991. The Kansas Senate approved a bill in April 1991 and it will be considered by its House in 1992. A bill was introduced into the California Senate on March 8, 1991 and is still pending. In South Carolina, a bill was introduced into the Senate on January 8, 1991.[86] In addition, similar due process bills were introduced in Connecticut, New York, Minnesota and Ohio.[87] Kentucky has finalized a draft of a bill that will be introduced in the near future. Thus, twelve states may have NCAA procedural due process laws by 1993.

Congress has also begun to review the issue. On February 1, 1991, Representative Tom McMillen[88] called for congressional hearings on the impact of the NCAA on interstate commerce and higher education.[89] That movement was furthered by the NCAA's disregard of previous congressional recommendations. In January 1979, the Congressional Subcommittee on Investigations and Oversight recommended that the NCAA appoint an independent committee which would review and assess "the entire NCAA enforcement system."[90] That independent committee was to report its findings in January of 1980.[91] Until very recently, however, the NCAA made no effort to create such an independent review body. On May 1, 1991, Representative Towns[92] introduced federal legislation, HR 2157,

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82. Loren Tate, *Legislators Across the Nation Bucking NCAA*, THE NEWS-GAZETTE, May 9, 1991, at Sports. "You wouldn't think 30 Florida senators or 36 Kansas senators would agree on anything." *Id.*

83. *See id.*

84. Now codified as §§ 85-1201 to 85-1210 of the Nebraska Statutes and referred to as Article 12, Nebraska Collegiate Athletic Association Procedures Act.

85. Danny Robbins, *Enforcement Power of NCAA To Be Topic For State Legislature*, L.A. TIMES, May 12, 1991, at C3; Organization For Understanding and Reform, Reforming the NCAA, Summary of State Legislative Efforts 1-3 (1991) (Champaign, Ill.).

86. *Id.*

87. *Id.*; Letter from Daniel J. Tarkanian to the Author (June 28, 1991).

88. Fourth District of Maryland and member of the Knight Commission, which reviewed intercollegiate athletics.

89. McMillen, *supra* note 81, at 4 (regarding congressional hearings on the NCAA).

90. *Id.* at 1.

91. *Id.*

92. Democrat for New York.

which would require the NCAA to implement specific due process procedures. That legislation is now being considered.[93]

Not all due process legislative efforts have been successful. Iowa's bill, introduced in the House on March 11, 1991, died in committee. In Missouri, such a measure, added as an amendment to a House bill in 1990, died in a Senate committee.[94]

The controversy continues to rage in many legislative halls across the nation with the prospect of significant effect on NCAA procedures.

B. The Function of Due Process Legislation

Each state's legislation varies to some degree[95] but there are common features. The University of Illinois, like schools in many states considering due process legislation, underwent investigation by the NCAA.[96] The Illinois legislature drafted Bill 682 partly in response to that investigation.[97] Section two of that Bill consists of findings by the Illinois General Assembly that collegiate athletic associations are "essentially monopolies" with "great leverage" over local institutions.[98] The Bill was not explicitly directed at the NCAA as the definition refers to the "collegiate athletic association" generically.[99] There can be little doubt, however, what the Bill actually sought to curtail. In presenting the Bill to the Judiciary Committee of the Illinois House, Representative J. E. Miller stated that "the NCAA is a self-regulated monopoly exercising significant control over the lives and finances of individuals and institutions that are under public control."[100]

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93. Robbins, *supra* note 85, at C3.

94. *Id.*

95. The fact that state legislation varies is one of the chief concerns of the NCAA. The question arises as to how the NCAA will be able to operate in the many states where each state will hold the NCAA up to different standards. Judy Sweet, *Legislative Actions Only Complicate the NCAA's Task*, USA TODAY, March 12, 1991, at 10C.

96. In February of 1990, the NCAA sent the University of Illinois its third letter of inquiry in six years. That letter detailed eleven violations allegedly committed by the University of Illinois basketball team. FRANCIS X. DEALY, JR., WIN AT ANY COST 175-76 (1990) (citing CHI. SUN-TIMES, February 17, 1990).

97. *See* J. E. Miller, Co-Chair Government Committee, *Statement before the Judiciary I Committee Illinois House of Representatives*, April 24, 1991, at 1-5.

98. H.B. 682 § 2(b), 87th Leg., 1991-92 Illinois.

99. H.B. 682 defines athletic associations as follows: "In this Act, 'collegiate athletic association', 'athletic association', or 'association' means a collegiate athletic association that, in fact, monopolizes all or any significant part of an intercollegiate athletic sport on a national level." H.B. 682 § 3, 87th Leg., 1991-92 Illinois.

100. J. E. Miller, Co-Chair Government Committee, *Statement before the Judiciary I Committee Illinois House of Representatives*, April 24, 1991, at 5.

By not specifically directing the legislation at the NCAA, the proposers of such bills avoid two problems. The first problem is the possibility that the NCAA could form a different association with a new name or that new associations could develop the authority to dominate intercollegiate athletics. Under these circumstances new amendments would be needed to control the new institutions if procedural due process concerns continued. The second problem is that, if legislation is directed specifically against the NCAA, it might violate the NCAA's constitutional right to equal protection under the law.[101] A claim by the NCAA that it was denied equal protection would probably not succeed. The NCAA is not a member of a class subject to discrimination[102] and, therefore, courts would give deference to enactments of the legislatures.[103] However, by referring to collegiate athletic associations generally, state legislatures hope to avoid such litigation.

C. The Notice Requirement of Due Process Legislation

Many of the current and proposed laws require the NCAA to give notice to the accused. That requirement already exists under the NCAA rules. For example, Nevada's new statute states that there must be a notice of hearing. That "notice must include: (a) A statement of the time, place and nature of the proceeding; (b) A reference to the particular rules governing the proceeding; and (c) A short and plain statement of the violations alleged and the facts underlying the allegations."[104]

The NCAA does send an initial notification letter to institutions about forthcoming official inquiry. That letter must, pursuant to NCAA rules, contain the allegations against individuals, give the individuals an opportunity to respond and notify the individuals of their right to have counsel present when the committee considers the allegations.[105] In addition, the NCAA sends a separate letter to any individuals who may be affected by

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101. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

102. Typical claims involve individuals who are legislated against on the basis of their race or national origin and are looked upon with stricter scrutiny by the Court. *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating a law prohibiting African-Americans from serving on grand or petit juries); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating a law denying laundry licenses to Chinese-Americans); Hernandez v. Texas, 347 U.S. 475 (1954) (invalidating a law which discriminated against Mexican-American jurors).

103. The Supreme Court has adopted the "traditional test" in cases where there is no suspect class. That test grants great latitude to legislatures. *See* New York Transit Authority v. Beazer, 440 U.S. 568 (1979) (permitting a law denying employment to persons receiving methadone treatment).

104. 1991 Nev. Stat. § 398.155.

105. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 438 (explicating NCAA Administrative Bylaw Article 32 § 5.5).

the investigation but who are not associated with the institution under investigation.[106] An updated report is sent to the institution every six months giving the status of the investigation.[107] Thus, the NCAA's own procedures effectively notify all interested parties. Separate state legislation is not necessary on this point, although such legislation will ensure that the NCAA does not remove or violate the notice requirements.

D. The Hearing, Representation and Recording Requirements of Due Process Legislation

Illinois House Bill 682 requires a formal hearing before any penalty may be imposed against an Illinois school.[108] The findings of that hearing must be "in writing" and supported by "clear and convincing evidence."[109] Those requirements respond to allegations that NCAA investigators rely on their handwritten notes as evidence.[110] Indeed, present NCAA regulations permit the recording of interviews only in limited circumstances. NCAA Administrative Bylaw Article 32 § 3.8 provides:

> It shall not be permissible for any individuals involved in interviews conducted by the enforcement staff to record such interviews through the use of a court reporter or other individuals or the use of any mechanical device. However, it shall be permissible for all individuals involved in such interviews to take handwritten notes of the proceedings. At the request of the enforcement staff, the committee may grant permission to record an interview when information will not be provided unless it is recorded and the information is not otherwise available to the enforcement staff.[111]

Much of the criticism of the NCAA's procedures is a result of the above rule. Publications by interested groups attack NCAA Administrative Bylaw Article 32 § 3.8 as one of the major indications of the failure of the NCAA to provide procedural due process.[112] Legislative efforts would re-

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106. *Id.* (explicating NCAA Administrative Bylaw Article 32 § 5.6).

107. *Id.* at 435 (explicating NCAA Administrative Bylaw Article 32 § 2.2.4.1 and § 2.2.4.2).

108. H.B. 682 § 4, 87th Leg., 1991-92 Illinois; S.B. 1104 § 6(1), 1991 Florida; 1991 Nev. Stat. § 398.155.

109. H.B. 682 § 4(b), 87th Leg., 1991-92 Illinois.

110. *See* Organization For Understanding and Reform, Ten Things You Should Know About What the NCAA Calls "Justice", (1991) (Champaign, Ill.).

111. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 436.

112. For example, a recent piece of literature by proponents of due process legislation states:

> [T]he accused aren't even facing an accurate written record of what their accusers said. They must answer an investigator's hand-written summary of what the investigator thought he or she heard. The accused is also prohibited from obtaining a copy of their accuser's allegations. . . .
>
> . . . .

quire the NCAA to allow legal representation and to provide a certified record of interviews of witnesses. As stated in Illinois House Bill 682:

> [T]he person interrogated[113] is entitled to have counsel present at any further interrogation and need not respond further until provided with a reasonable time to obtain counsel. The person interrogated is entitled to a complete recording of any subsequent interrogation and a transcript of the full interrogation made at the expense of the association. The transcript shall be made by a certified Illinois court reporter.[114]

Currently, the NCAA does grant individuals the right to representation during some, but not all, interviews.[115] Further, if an interview is on campus and the subject matter of that interview directly relates to the school, the school may have its own representative at the interview.[116] However, in granting to persons being investigated the right to obtain a record of the proceedings, the Illinois Bill directly contradicts NCAA Administrative Bylaw Article 32 § 3.8 and therefore represents a new procedure with which NCAA investigators would be obliged to comply.

Perhaps the most frequently cited problem with NCAA procedures is the inability of the accused to cross-examine adverse witnesses. New legislation grants the right to cross-examine through the imposition of state civil rules of evidence upon the NCAA. The NCAA states that, without subpoena power, " 'the NCAA couldn't compel a witness to appear.' "[117] The NCAA fears that if it is forced to allow cross-examination of its witnesses, those witnesses will not be willing to testify.[118] On the other hand, pursuant to NCAA Administrative Bylaw Article 32 § 3.7,[119] the NCAA does have the ability to grant immunity to some witnesses. As the NCAA itself points out, there are no deep dark secrets as to who the witnesses are, and

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> Once you have given the NCAA a statement, you're not allowed to keep a copy of your own statement!

Organization For Understanding and Reform, Ten Things You Should Know About What the NCAA Calls "Justice", (1991) (Champaign, Ill.).

113. "Interrogated" is not defined by the Illinois House Bill 682. *See* Illinois H.B. 682, 87th Leg., 1991-92 Illinois.

114. H.B. 682 § 6(b), 87th Leg., 1991-92 Illinois.

115. NCAA Administrative Bylaw Article 32 provides, "32.3.5 REPRESENTATION BY LEGAL COUNSEL. When an enforcement staff member conducts an interview that may develop information detrimental to the interests of the individual being questioned, that individual may be represented by personal legal counsel throughout the interview." NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 436.

116. *Id.* at 436 (delineating NCAA Administrative Bylaw Article 32 § 3.3.1).

117. Ed Sherman, *Bill Governing NCAA Probes is a Waste of Time - and, if Passed, Money,* CHI. TRIB., May 12, 1991, at C13 (quoting Richard Hillard, a NCAA Director of Enforcement).

118. *See id.*

119. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 436.

the accused institution can request, but not compel, interviews with those persons.[120] Finally, the NCAA itself is considering new rules that would allow it to compel witnesses from any NCAA institution to testify and sanction those institutions that do not comply with ethical conduct violations.[121]

The NCAA has the power to compel witnesses to testify. If the NCAA will not allow witnesses to be cross-examined, those witnesses' statements should not be considered evidence of an infraction. A witness' refusal to testify is not a sufficient reason to forgo cross-examination. The imposition of cross-examination will probably have little effect on a witness' willingness to testify against a coach or institution. If it does, that witness is not credible enough to be allowed to testify.

A state's civil rules of evidence are often adopted by the new legislation.[122] This aspect of the legislation will create inconsistencies between NCAA procedures in different states due to variances between states' rules of evidence. Notable among the evidentiary provisions is the exclusion of any evidence improperly obtained during an interview.[123] Thus, the NCAA must assure that it conducts its interviews within the bounds of each state's requirements. Failure to do so causes the evidence obtained to be inadmissable at the hearing. The fact that a transcript of all the testimony was not made available to a party or that a party was not properly represented would nullify any information obtained during that interview.

The new legislation also places a limit on the time within which a proceeding may be brought by the NCAA against a school.[124] These "statutes of limitations" reflect the NCAA's own requirement that allegations must, with certain important exceptions, be made within four years of the violation.[125]

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120. Robbins, *supra* note 85, at C3.

121. Mark Asher, *NCAA Looks at Enforcement Changes*, WASH. POST, November 20, 1991, at B2.

122. H.B. 682 § 4(e), 87th Leg., 1991-92 Illinois; S.B. 1104 § 4(5), 1991 Florida; 1991 Nev. Stat. § 398.225.

123. "Any individual or institution may suppress at the hearing any evidence garnered from any interrogation of any party if the evidence was not procured in accordance with the provisions of section 6 or if the evidence was obtained indirectly because of interrogations not in conformity with the provisions of section 6." S.B. 1104 § 4(7), 1991 Florida.

124. H.B. 682 § 4(i), 87th Leg., 1991-92 Illinois; S.B. 1104 § 4(9), 1991 Florida.

125. STATUTE OF LIMITATIONS. Allegations included in a letter of official inquiry shall be limited to possible violations occurring not earlier than four years before the date the notice of preliminary inquiry is forwarded to the institution. However, the following shall not be subject to the four-year limitation:

(a) Allegations involving violations affecting the eligibility of a current student-athlete;

The NCAA's four-year statute of limitations contains exceptions for allegations against current student-athletes, allegations demonstrating a pattern of willful violation by the school, and allegations "that indicate a blatant disregard for the [NCAA's] fundamental recruiting, extra-benefit, academic or ethical-conduct regulations or that involve an effort to conceal the occurrence of the violation."[126] Also, the NCAA's four-year statute of limitations is tolled once the preliminary investigation begins.[127] Thereafter, the only time limitation is that "[t]he enforcement staff shall make reasonable efforts to process infractions matters in a timely manner."[128] Thus, in many instances a school can undergo an investigation although the coaches and students involved have left the institution.[129]

During this indefinite investigation period, coaches and student-athletes may find themselves restricted from athletic competitions or media exposure, thus damaging their careers.[130] States' statutes of limitations are tolled once a claim is made.[131] These statutes of limitation, like the NCAA's, allow a proceeding to continue for years after the initial claim.

(b) Allegations in a case in which information is developed to indicate a pattern of willful violations on the part of the institution or individual involved, which began before but continued into the four-year period, and

(c) Allegations that indicate a blatant disregard for the Association's fundamental recruiting, extra-benefit, academic or ethical-conduct regulations or that involve an effort to conceal the occurrence of the violation. In such cases, the enforcement staff shall have a one-year period after the date information concerning the matter becomes available to the NCAA to investigate and submit to the institution an official inquiry concerning the matter.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 438 (explicating NCAA Administrative Bylaw Article 32 § 5.2).

126. *Id.*

127. *Id.* "Preliminary inquiries have lasted in excess of three years, allowing the NCAA to bring charges against universities for up to seven years." Daniel Tarkanian, *NCAA Enforcement Procedures Do Not Afford Defendants Adequate Due Process Protection,* FOR THE RECORD (National Sports Law Institute, Milwaukee, Wis.), April-May 1991, at 4, 6.

128. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 435 (explicating NCAA Administrative Bylaw Article 32 § 2.2.1.4).

129. *See* Wint Winter, Jr., *NCAA's Actions Affect too Many to Let it Operate Above the Law,* USA TODAY, March 5, 1991, at 10C.

130. While the damage to student-athletes' careers due to the actions of their predecessors is not wholly within the scope of this article, it bears note. Often student-athletes will find that after they have selected a school as a crucial step in their hope of becoming a professional athlete, that school is sanctioned. If such sanctioning comes in the form of limited media exposure the student-athlete will not be seen by professional recruiters. A coach, on the other hand, gains respect through his or her team's overall success. Therefore, as long as the team plays the coach gains a reputation. *See id.*

131. *See, e.g.,* N.Y. CIV. PRAC. L. & R. [hereinafter C.P.L.R.] 215.3 (the one year New York intentional torts statute of limitations); C.P.L.R. 214.5 (the three year New York negligent torts statute of limitations).

Recent state legislation places an additional requirement on NCAA investigators beyond those requirements which a state law might ordinarily require for a tort claim.[132] State due process statutes require the NCAA to hold a hearing within a certain period of time in order to preserve its claim.[133]

E. The Appeal Process Requirements of Due Process Legislation

Legislative provisions for appeal will cause the greatest changes to NCAA procedures. Under current NCAA rules, a school against which sanctions are imposed has the right to appeal that decision.[134] However, that appeal is made to the very body that imposed the sanctions—the NCAA.[135] Never in the history of the NCAA has there been a successful appeal of a major penalty.[136] Thus, one author believes that the NCAA operates as "judge, jury, and prosecutor."[137] The NCAA institutes actions, decides what evidence is proper, and makes the final decision in both the first instance and on appeal.[138] Great criticism is directed at the NCAA for this, but such procedures are not unusual in administrative areas.[139] The new legislation specifically grants coaches, athletes, and institutions the right to appeal an NCAA decision to the state court system.[140] This opens the NCAA to the utmost scrutiny and will, undoubtedly, add greatly to the NCAA's litigation costs.[141]

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132. *See id.*

133. The proposed Illinois and Florida legislation would require that a hearing would be held within nine months of the first notice to the school that it is under investigation. The time period is extended to twelve months if the institution brings notice of the violation. H.B. 682 § 4(i), 87th Leg., 1991-92 Illinois; S.B. 1104 § 4(9), 1991 Florida.

134. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 442 (explicating NCAA Administrative Bylaw Article 32 § 8.1).

135. An appeal is made from the Infractions Committee to the "appropriate division steering committee of the Council." *Id.*

136. *Florida Legislature Acts on NCAA Due Process Bill*, PR NEWSWIRE, April 25, 1991.

137. Tom McMillen, *March Madness Time in More Ways Than One*, THE EVENING SUN, March 19, 1991.

138. *See id.*

139. For example, the actions and appeal processes of state landmarking commissions have been repeatedly attacked as biased and unconstitutional. *E.g.*, Penn Cent. Transp. Co. v. City of New York, 434 U.S. 983 (1978); St. Bartholomew's v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990); First Covenant Church of Seattle, Wash. v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990), *vacated*, 111 S. Ct. 1097 (1991); Society of Jesus of New England v. Boston Landmarks Comm'n, 409 Mass. 38, 564 N.E.2d 571 (1990).

140. H.B. 682 § 5(c), 87th Leg., 1991-92 Illinois; S.B. 1104 § 5(3), 1991 Florida; 1991 Nev. Stat. § 398.215.

141. It should also be noted that the additional burden on the court system of a state will be born by the citizens of that state.

F. The NCAA Response to Due Process Legislation

Perhaps the driving force behind efforts to pass due process legislation is the effect of years of sanctioning and unavailing attempts to contest that sanctioning. Over time, the NCAA has lost its opportunity to deny the allegations of problems within its infractions process.

> The only people who understand the abuses of NCAA "justice" are those who have gone through it; but afterwards, their credibility and motivation are suspect. The folks who haven't gone through an investigation—and are therefore more "credible"—don't understand the problem and have nothing to say. The NCAA doesn't see a problem at all. Pleased with its 100 percent conviction rate, it has no reason to complain. So whom do you believe? The answer became clearer only over time. If only a handful of those who had suffered through an investigation questioned the quality of the NCAA's work, they could be dismissed. When the same complaints, though, came from dozens of schools, the pattern was troubling. Maybe there was something to this chorus of complaints. Maybe someone should listen.[142]

It may be that the NCAA understands best how this conflict arose.[143] As the NCAA repeatedly points out, the true culprit may not be the NCAA executives but its member schools who should bring change from within the NCAA.[144] The members could cause such change by internal rule making which would alter the procedural requirements for NCAA investigations. Membership in the NCAA is indeed voluntary.[145] Nevertheless, proposers of NCAA rules, which would require that NCAA investigations fulfill due process requirements, assert that member institutions have lost control of the organization.[146]

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142. YAEGER, *supra* note 1, at viii (1991).

143. "The NCAA states that it recognizes that sanctions and the investigative process have been like a lightening rod — attracting much negative publicity not only to the NCAA but also to the individual universities and college athletics in general." M. G. Gomez, Consultant to the California Senate Committee On Business and Professionals, *The NCAA: Disciplinary Actions and Procedural Due Process, Prohibitions and Judicial Review*, May 13, 1991, at 10.

144. Sherman, *supra* note 117, at C13; " '[W]e believe the (NCAA) members should change the system, not the government.' " Robbins, *supra* note 85, at C3 (quoting David Price, Associate Commissioner and Chief Compliance Officer of the Pacific 10 Conference).

145. NCAA rule § 3.1.2.

146. McMillen, *supra* note 81, at 4 (requesting congressional hearings on the NCAA).

1. Special Committee to Review the NCAA Enforcement and Infractions Process

The NCAA responded to the criticisms. In April 1991, the NCAA Infractions Committee, for the first time, authorized investigators to tape interviews.[147] Although it is not yet known how this will affect the overall NCAA procedures, the taping of interviews is a significant step for the NCAA. Further, NCAA Executive Director, Richard D. Schultz, requested permission and was empowered by the NCAA Council to form a committee to review the NCAA enforcement and infractions process.[148]

> The purpose of the review is to make sure that the enforcement and infractions process is being handled in the most effective way, that fair procedures and due process are guaranteed, that penalties are appropriate and consistent, and also to determine ways to reduce the time needed to conclude the investigation and infractions process and to determine if there can be innovative changes that will make the process more positive and understandable to those involved, as well as to the general public.[149]

That committee was chaired by Rex E. Lee[150] and included several prominent members.[151] The report made, with commentary, eleven recom-

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147. Robbins, *supra* note 85, at C3.

148. *Committee Named to Review Enforcement Process,* THE NCAA NEWS, April 10, 1991, at 1.

149. *Id.* (quoting NCAA Executive Director Richard D. Schultz).

150. Mr. Lee is the President of Brigham Young University. His appointment to the committee has been attacked even by those not in favor of due process legislation.

> Lee, a former U.S. solicitor general, successfully argued the NCAA's case against Tarkanian before the U.S. Supreme Court earlier this year. In fact, he was paid more than $100,000 to defend the NCAA's current rules. . . . [W]ith so many capable candidates to direct the group, Lee's appointment appears to be a clear conflict of interest. At the risk of embarrassment, Schultz must remedy this situation immediately to ensure that the committee's work will be taken seriously.

Andrea Zani, *Due Process Is Up to the NCAA, Not Law Makers,* THE SPORTING NEWS, April 22, 1991, at 4.

151. The other committee members appointed were,

> Warren E. Burger, former chief justice of the United States [Supreme Court]; Reuben V. Anderson, a prominent Mississippi lawyer and former state supreme court justice; Morris S. Anderson, U.S. district judge for the Western District of Arkansas; Charles Cavagnaro, director of athletics at Memphis State University and a member of the NCAA Council; Charles W. Ehrhardt, faculty athletics representative at Florida State University; Becky R. French, general counsel for North Carolina State University; Robert R. Merhige Jr., senior U.S. district judge for the Eastern District of Virginia; William M. Sangster, dean of the college of engineering at Georgia Institute of Technology and a Council member, and Paul R. Verkuil, president of the College of William and Mary.

mendations.[152] Those recommendations are a step in the right direction, but they lack the strength of specificity. For example, the very controversial point of allowing cross-examination was addressed in the report's appendix which the Committee, instead of presenting possible solutions, dismissed as "simply beyond the NCAA's power to ensure since, as a private association, it lacks subpoena power."[153]

The NCAA should recognize that there is little value in evidence presented by witnesses who are unwilling to be cross-examined. The right to cross-examination should be a prerequisite for the use of direct examination as evidence. The Committee did make efforts to meet with several third parties, including Tarkanian, but generally those consulted were current or former NCAA employees.[154] The Committee did not make specific

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Committee Named to Review Enforcement Process, supra note 148, at 1.

The final report contains an altered list of the committee members. The final report does not include the names of Morris S. Anderson and Robert R. Merhige, Jr. and adds as members, Benjamen R. Civiletti of Baltimore, former U.S. Attorney General; Charles Renfrew of San Francisco, legal vice-president for Chevron Corporation, former Federal District Judge and a former Deputy U.S. Attorney General; and Philip W. Tone of Chicago, a former Federal District Judge and former Federal Appellate Court Judge. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS 1 (Oct. 28, 1991).

152. 1. Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer.
2. Establish a "summary disposition" procedure for treating major violations at a reasonably early stage in the investigation.
3. Liberalize the use of tape recordings and the availability of such recordings to involved parties.
4. Use former judges and eminent legal authorities as hearing officers in cases involving major violations and not resolved in the "summary disposition" process.
5. Hearings should be open to the greatest extent possible.
6. Provide transcripts of all infractions hearings to appropriate involved parties.
7. Refine and enhance the role of the Committee and establish a limited appellate process beyond that committee.
8. Adopt a formal conflict-of-interest policy.
9. Expand the public reporting of infractions cases.
10. Make available a compilation of previous committee decisions.
11. Study the structure and procedures of the enforcement staff.

Id. at 3-8.

153. *Id.*

154. The committee consulted with, among others: Thomas C. MacDonald, Jr., a Tampa attorney who served as counsel for the University of Florida; Jerry Tarkanian, head men's basketball coach at the University of Nevada-Las Vegas; D. Alan Williams, current chairman of the NCAA Committee on Infractions; Frank E. Remington, a former chair of the NCAA Committee on Infractions; Beverly E. Ledbetter, current member of the NCAA Committee on Infractions, Milton R. Schroeder, current member of the NCAA Committee on Infractions and David S. Berst, NCAA assistant director for enforcement.

The Committee heard statements from: Britton B. Banowsky, assistant commissioner and legal counsel, Southland Conference; J. Steven Becket, attorney, Champaign, Illinois; William C.

rule change recommendations but did point out areas that needed improvement.

Most importantly, the report recognizes the need for "procedurally fair" enforcement. Unfortunately, "procedurally fair" is not defined by the Committee. What is known is that "procedurally fair" does not reach the level of "procedural due process." The Committee does not believe that the NCAA is able or needs to comport with the constitutional procedural due process requirements.[155] Whether the NCAA will ever act on its Committee's recommendations remains to be seen. The NCAA has postponed consideration of those recommendations until 1993.[156]

2. The NCAA Suit Against Nevada

What the NCAA has done is file suit in federal court against the State of Nevada and Tarkanian.[157] The NCAA is seeking immediate injunctive relief so that it can complete an infractions case which it is currently pursuing against UNLV. In addition, the NCAA is seeking a court ruling that will declare the Nevada procedural due process law unconstitutional. The NCAA claims that the Nevada law is unconstitutional because it violates the interstate commerce clause by extending Nevada laws beyond its border, violates the right of NCAA member institutions to freedom of association, deprives NCAA institutions of their right to due process, is vague, and

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Carr III, vice-president, GNI Sports, Inc., Charlotte, North Carolina (former director of athletics, University of Florida); Collegiate Commissioners Association officers Thomas C. Hansen, commissioner, Pacific-10 Conference, and Thomas E. Yeager, commissioner, Colonial Athletic Conference; Bill Curry, head football coach, University of Kentucky; James E. Delany, commissioner, Big Ten Conference; Vincent J. Dooley, director of athletics, University of Georgia; George H. Raveling, head men's basketball coach, University of Southern California, and member of the board of directors of the National Association of Basketball Coaches; and Michael L. Slive, commissioner, Great Midwest Conference.

A number of written reports were received including suggestions from: Stanley O. Ikenberry, president of the University of Illinois System; Morton W. Weir, chancellor of the University of Illinois, Champaign; Congressman Tom McMillen and George H. Gangwere, former NCAA general counsel. *Id.* at 2.

155. *See id.* at appendix.

156. The busy month of December forced the cancellation of the hearing scheduled for December 12, 1991 to discuss the Report and Recommendations of the Special Committee to Review the NCAA Enforcement and Infractions Process. *Busy Month Scuttles Enforcement Hearing*, THE NCAA NEWS, December 9, 1991, at 1; Asher, *supra* note 121, at B2.

157. Tom Withers, *One Circus Comes, Another Goes As Tarkanian Closes the Rebel Show*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, November 23, 1991, at Sports News; *NCAA Fights Back; Challenges Nevada*, L.A. TIMES, November 13, 1991, at C1. NCAA executive director states that this action is being taken "very reluctantly." "I say reluctantly because the association since it was founded in 1906 has been in court many times, but this is only the third time the NCAA has ever instituted legal action. We're doing it only as a last resort." *Arena*, NEWSDAY, November 13, 1991, at 110.

interferes with the institutions' rights to freedom of contract.[158] Ironically, the NCAA fought all the way to the Supreme Court so that it would not be required to comply with procedural due process and now the NCAA claims in the same courts that its own right to procedural due process has been violated.

The NCAA faces an uphill battle[159] because there is a presumption of constitutionality attached to state statutes.[160]

IV. CONSTITUTIONAL LIMITATIONS ON STATE DUE PROCESS STATUTES

A. Constitutional Due Process—What Process Is Due

The United States Constitution prohibits a state actor from depriving a person of property without due process.[161] The NCAA states that it is not a state actor and that, in any event, its procedures comport with the procedural due process requirements of the federal constitution.[162] The Supreme Court has left open the possibility that the NCAA could be a state actor in certain circumstances.[163] Thus, the question arises: what more, if anything, would constitutional procedural due process require the NCAA to do?

The requirements of procedural due process are not settled. They will depend upon the nature of the right being taken from the individual and the necessity of protecting that right. The basic elements of procedural due process are:

> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individuals case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.[164]

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158. *NCAA Seeks Relief From Nevada State Law*, THE NCAA NEWS, November 18, 1991, at 1, 14.

159. *New Nevada Law Doesn't Suit NCAA*, USA TODAY, November 13, 1991, at 1C (quoting NCAA attorney James Beasley).

160. *Id.*

161. U.S. CONST. amend. XIV, § 1.

162. " 'You'll find that the NCAA has more due process than any other all-volunteer institution, more than the ABA (American Bar Association), more than the AMA (American Medical Association).' " Scott Horner, *supra* note 3, at C1 (quoting Dick Schultz, NCAA Executive Director).

163. *Tarkanian*, 488 U.S. 179, 203 (1988).

164. NOWAK et al., *supra* note 23, at 484.

The degree to which these elements are required will vary. Adequate notice must inform the other party that an action is pending against them.[165] What specific type of notice is required will depend upon the nature of the right being deprived. As held in *Greene v. Lindsey*,[166] posting an eviction notice on an apartment door is insufficient, but in *Texaco, Inc. v. Short*,[167] notice of termination of mineral rights by publication was sufficient. However, as previously discussed, the NCAA's notice to the accused by letter certainly fulfills the due process notice requirement.[168]

The requirement of a neutral decision maker is based on the principle that "a fair trial in a fair tribunal is a basic requirement of due process."[169] Yet, a neutral decision maker does not necessarily entitle the accused to a jury. The purpose of this requirement is to prevent bias from infecting the decision. The showing of bias must be clear and will usually succeed if the decision maker will benefit monetarily from a decision.[170]

The infractions decision is made by the Committee on Infractions independently of the member institutions.[171] The procedural due process requirement is therefore satisfied. However, a problem could arise if one of the members on that Committee or the NCAA was found to benefit from a Committee decision.

Opportunities to make oral presentations and to present witnesses and evidence to the Committee on Infractions are all currently provided for by

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Additionally there are six other procedural safeguards which tend to appear only in connection with criminal trials or formal judicial process of some type. Those are: (1) the right to compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial; (6) a burden of proof on the government greater than a preponderance of the evidence standard.

Id.

165. As stated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), fundamental to procedural due process is "notice reasonably calculated, under all circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections."

166. 456 U.S. 444 (1982).

167. 454 U.S. 516 (1982).

168. The notice requirement should not be confused with the termination notice requirement in employment contracts with coaches and other employees.

169. In re Murchison, 349 U.S. 133, 136 (1955).

170. Gibson v. Berryhill, 411 U.S. 564 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972).

171. "Any member of the Committee on Infractions or Council who is directly connected with an institution under inquiry shall not take part in any NCAA proceeding connected with the case before the Committee or Council." NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 433 (explicating NCAA Administrative Bylaw Article 32 § 1.3). It should be noted that this section does not prohibit representatives of rival institutions from taking part in the proceedings. *See also* Administrative Bylaw Article 32 § 6.4.5, which allows a party prohibited from attending to act as a witness at the invitation of the Committee. *Id.* at 440.

existing NCAA enforcement procedures.[172] Nonetheless, the NCAA hearings depart from the procedural due process requirements because of the inability of the accused to cross-examine adverse witnesses.

As expressed in *Mathews v. Eldridge,*[173] due process does not always require that a hearing be held before a party is deprived of certain rights. However, when a hearing is conducted it is often required that the accused be allowed to cross-examine the opponent's witnesses. Thus, in *Goldberg v. Kelly,*[174] it was held that before termination of a person's welfare benefits, he or she must have the right to confront and cross-examine adverse witnesses. At issue, then, is the type of hearing that procedural due process requires the NCAA to conduct. *Goldberg v. Kelly* held that, although a "quasi-judicial trial" was not required, the right to cross-examine must still be granted.[175] Other decisions do not require that right.[176]

The question of whether the NCAA should be required to allow cross-examination is best answered by application of the balance test set forth in *Mathews v. Eldridge.*[177] Three factors are considered by the Court in determining which procedures will be required.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.[178]

There is no doubt that university representatives have a significant interest in defending themselves in NCAA infractions proceedings. In addition, the inability to cross-examine witnesses leaves open the possibility that significant issues of credibility, completeness and competency will not be made known. The NCAA Committee on Infractions could well be misled if the interests of a witness are not presented to it. Accordingly, the NCAA damages substantial interests of the accused by not allowing cross-examination.

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172. *See* NCAA Administrative Bylaw Article 32 § 6.5.2 which grants the right to opening and closing arguments and § 6.5.5 which concerns the type of evidence which may be presented at the hearing. *Id.* at 440-41.

173. 424 U.S. 319 (1976) (hearing need not be held until after the termination of disability benefits).

174. 397 U.S. 254 (1970).

175. *Id.* at 266.

176. *E.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978) (due process fulfilled in academic dismissal where student was informed and given opportunity to respond).

177. 424 U.S. 319 (1976).

178. *Id.* at 335.

The NCAA does not allow cross-examination of witnesses because it claims that witnesses would not voluntarily appear if they were to be cross-examined.[179] The NCAA does not have subpoena power. Thus, if a witness will not voluntarily appear the NCAA cannot force the person to do so. This could be a significant administrative burden on the NCAA. Alternatives might include giving the NCAA subpoena power through state legislation or, at least, an agreement among the member institutions empowering the NCAA to call their students and employees as witnesses.[180] The Supreme Court has often decided that a hearing is not required before the deprivation of a right.[181] However, the inability to ever cross-examine is a heavy impediment on the accused and, therefore, does not comport with procedural due process.

The last two general elements of procedural due process call for the right to representation by an attorney and the right to have a decision based on a record with a statement of the reasons for the decision.[182] These requirements are fulfilled by the NCAA's current procedures.[183] State legislation requiring these rights would therefore impose no additional burden on the NCAA and would guarantee that the right to an attorney and the right to a written statement based on the record are not impaired or withdrawn.

The final element of procedural due process is the right of a party to appeal a decision. Where a state agency acts, "[t]he arbitrary refusal to allow individuals to use the established state court process would seem to be invalid under even the most minimal due process or equal protection standards."[184] Under NCAA rules, a party cannot appeal a decision of the Committee on Infractions to the state courts.[185] The Supreme Court's decision in *Bounds v. Smith*[186] held that access to the judicial process is fundamental in the criminal setting. The NCAA Committee on Infractions does not, however, issue criminal sanctions. Other decisions show a general

179. Sherman, *supra* note 117, at 13C (quoting Richard Hillard, a NCAA Director of Enforcement).

180. Such legislation or an agreement would very likely give the NCAA the kind of authority over persons as to make it a state actor. *See generally Tarkanian*, 488 U.S. 179 (1988).

181. *See* Board of Curators v. Horowitz, 435 U.S. 78 (1978).

182. NOWAK et al., *supra* note 23, at 484.

183. NCAA Administrative Bylaw Article 32 § 6.4.1 grants the right to have counsel at a hearing, § 6.6.2 requires a finding on the information presented and § 7.1 entitles the accused to a infractions report. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 439-42.

184. NOWAK et al., *supra* note 23, at 517 (citing Logan v. Zimmermann Brush Co., 455 U.S. 422 (1982)).

185. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 443 (explicating NCAA Administrative Bylaw Article 32 § 9).

186. 430 U.S. 817, 828 (1977).

right to access the civil court system.[187] However, the right to access the judicial system is not absolute. There are instances where the interest in maintaining low cost and informal proceedings weighs against allowing access to a full judicial proceedings. Such proceedings, like the NCAA's, will probably withstand a procedural due process attack which is based solely upon the fact that the NCAA does not allow access to the court system.[188] Legislation granting such access requires a significant change in NCAA procedures that is not required under the federal constitution.

B. State Due Process Statutes and Interstate Commerce

For reasons of maintaining an effective national economy, the federal government holds the authority to regulate interstate commerce.[189] That grant of power emanates from the commerce clause of the federal constitution.[190] There are circumstances in which, even though the federal legislation has not preempted the state's legislation, the state is not permitted to regulate commerce.[191] Generally, regulations that substantially burden interstate commerce are not permitted and will be struck down by the Supreme Court.[192]

The state due process regulations are not preempted by federal law.[193] Thus, the NCAA will argue that state due process statutes burden interstate commerce.[194] The threshold question is whether the NCAA is, in fact, en-

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187. Boddie v. Connecticut, 401 U.S. 371 (1971); NAACP v. Button, 371 U.S. 415 (1963).

188. *See* Walters v. National Association of Radiation Survivors, 473 U.S. 305, 335 (1985) (allowing limitation to representation in Veteran's Administration proceeding).

189. *See* TRIBE, *supra* note 15, at 403-08.

190. *Id.* at 403. The commerce clause states that "[t]he congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8.

191. Edwards v. California, 314 U.S. 160 (1941) (state statute which prohibited bringing nonresident indigent persons into state violates the commerce clause).

192. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state law prohibiting certain truck mudguards was a violation of the commerce clause where other states allowed those guards and there was no significant safety benefit).

193. Although legislation creating NCAA procedural requirements is being considered by the House of Representatives, no law has been enacted. Robbins, *supra* note 85, at C3.

194. [T]he NCAA is making noises about testing the constitutionality of [Illinois House Bill 682] in court -not only in Illinois, but also in Nevada and Nebraska, where similar bills have been passed. At issue is whether a state can regulate a national organization, one that is voluntary to boot.

Sherman, *supra* note 117, at 13C.

In an interview John J. Kitchin, general counsel for the NCAA, emphasized to the author the importance of uniform procedures within the NCAA and the burden conflicting state statutes would place on the NCAA's national activities. Telephone Interview with John J. Kitchen, NCAA General Counsel (June 1991). The NCAA has now filed a suit against the State of Nevada.

gaged in interstate commerce. The NCAA has an annual budget of $160,600,000[195] and members in almost every state.[196] With such a national presence there is little doubt that the NCAA is engaged in interstate commerce.[197]

Engagement in interstate commerce will not automatically grant protection to the NCAA from the states' due process legislation. The principal test applied to state due process legislation was expounded in *Southern Pacific Co. v. Arizona*,[198] which invalidated an Arizona state law limiting the length of trains in that state. The decision emphasized a test that would balance the state interest behind the regulation against the burden on interstate commerce.[199] Thus, the Court stated that the issue,

> is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematic as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have uniform effect . . . .[200]

In the more recent *Kassel v. Consolidated Freightways Corp.*[201] decision, the Supreme Court overturned an Iowa statute which barred the use of trucks with more than 60 foot single trailers or 65 foot double trailers on Iowa interstate highways. The Court noted that the commerce clause is a limitation on state action even where Congress has not acted.[202] Highway safety was traditionally a function of the state which would not be interfered with unless the Court found the safety concerns illusory.[203] The Court held, however, that the safety concern for long trucks was illusory[204] and, therefore, overturned the statute.

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195. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 8, at 43.

196. *See id.* at 29-31.

197. For example, in NCAA v. Board of Regents of the University of Oklahoma, et al., 468 U.S. 85 (1984), the NCAA's actions in putting together a television package for members was found to violate the Sherman Antitrust Act.

198. 325 U.S. 761 (1945).

199. *Id.* at 775-76.

200. *Id.*

201. 450 U.S. 662 (1981).

202. *Id.* at 669 (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977)).

203. "[S]ome burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in effective and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause." *Id.* at 671.

204. The Court made a detailed analysis of the safety variances between tandem and semi units. Backing up ability and jack-knifing prevention favored the semi units. However, other features such as braking, turning, maneuvering and off-tracking were better in a tandem unit.

It is unlikely that the Supreme Court will find state concern for due process illusory. Two compelling factors for the *Kassel* decision were that the Iowa law was "out of step" with other safety laws[205] and that the Iowa law contained exceptions which were advantageous only to Iowa residents. Neither factor is present in state due process legislation relating to the NCAA. Several states have taken it upon themselves to enact or propose such laws[206] and there are no exceptions for local entities. Nevertheless, *Kassel* is a decision which invalidated a state statute. The burden in *Kassel* was created by the inconsistency of Iowa law with the laws of other states and the effect such inconsistency had on an entity with interstate operations. Multi-state due process legislation is likely to place a similar burden on the NCAA.

State due process legislation will burden the NCAA because those laws are inconsistent. The legislation passed by Nevada[207] is different than that passed by Illinois.[208] Even in states such as Florida and Illinois, where the legislation is almost identical, the clauses which require the NCAA to apply that state's evidentiary rules will require different procedures in each state.[209] It is these inconsistent standards that will create a burden on the NCAA's interstate infractions activities. The issue is whether or not a state's interest in protecting its schools and their coaches and athletes can outweigh the burden the state legislation places on the NCAA.

State due process legislation does not discriminate in favor of athletic associations operating within the state.[210] In fact, the Nevada legislation is claimed to burden an organization established in that state—the NCAA. Therefore, state due process legislation will not be subject to strict scrutiny by the Supreme Court.[211] The findings of a state legislature will be given

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Thus, Iowa failed to establish its safety interest in prohibiting the larger tandem trucks because "the twin is as safe as the semi." *Id.* at 672.

205. *Id.*

206. Florida, Nebraska, Nevada and Illinois have enacted due process legislation and several other states are developing similar proposals. Jeff Shain, *NCAA Seeks to Overturn Nevada State Law*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL, November 12, 1991, at Sports News.

207. 1991 Nev. Stat. § 398.

208. H.B. 682, 87th Leg., 1991-1992 Illinois

209. H.B. 682 § 4(e), 87th Leg., 1991-1992 Illinois; S.B. 1104 § 4(5), 1991 Florida.

210. As noted earlier in section III.B., the definition in the due process legislation refers generically to collegiate athletic associations and, since the NCAA is the only such organization, the NCAA will not be discriminated against in favor of other institutions.

211. *See* Sporhase v. Nebraska, 458 U.S. 941 (1982) (state restriction on the export of ground water does not survive strictest scrutiny).

deference by the Supreme Court[212] and the fact that the NCAA is a national monopoly should justify the placing of the burden upon it.

Nevertheless, the state due process legislation may not pass the High Court's review. As held in *Flood v. Kuhn*[213] and *Partee v. San Diego Chargers Football Co.*,[214] even a state's interest in enforcing antitrust laws does not allow it to regulate professional sports because of the burden on the sports associations' interstate activities. Likewise, a state's interest in protecting its schools and their coaches and athletes with due process legislation may not outweigh the burden such legislation will place on the NCAA's interstate infractions activities.[215]

It must also be recognized that the burden upon the NCAA is limited. The NCAA infractions proceedings are not like a train or truck which travels through states. Infractions proceedings against a particular institution occur only within one state. The NCAA serves member institutions in many states in the same manner that any large corporation serves consumers in many states. The NCAA must, as would any large corporation bringing or defending a suit within a particular state, adhere to the constitutionally sound laws of that state.

V. A MODEL FOR NCAA REFORM

What follows are specific rules which the NCAA should adopt without delay. They are implementable and will create procedural fairness without stifling the infractions process.

1. No charge shall be brought unless it is within two years of the date of the act upon which the charge is based. Evidence of acts prior to two years before the date of the act upon which the claim is based may be presented to show a pattern of infractions.
2. All pretrial witness testimony shall be recorded and such recording shall be available to all parties.

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212. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (to preserve environment state may ban the sale of plastic milk containers).

213. 407 U.S. 258 (1972) (holding state antitrust law was not applicable against professional baseball on alternate grounds of preemption and unreasonable burden upon interstate commerce)

214. 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983) (holding state antitrust laws were not applicable against the National Football League).

215. From a practical standpoint, the Illinois bill would cause havoc within the NCAA. If every state passes the bill, the NCAA would find itself having 50 different sets of regulations for conducting an investigation. "Someone might say, 'It's not fair to do it this way in state X, because they do it this way in state Y,' .... There would be a real mishmash of conflicts arising all over the place."

Sherman, *supra* note 117, at 13C (quoting John J. Kitchen, general counsel for the NCAA). Also burdensome is applying the correct law when the NCAA interviews a witness from out of state. *Id.*

3. All witnesses shall be allowed the presence of counsel.
4. The hearing shall be conducted as a formal trial with evidence presented to a three-judge panel which makes a written decision based upon the facts in evidence.
5. The three-judge panel shall be made up of former judges or eminent legal authorities who are not members of the NCAA Infractions Committee.
6. The NCAA Infractions Committee shall show by clear and convincing evidence that the accused is guilty as charged for a finding of a violation.
7. All witnesses shall be subject to cross-examination.
8. All NCAA institutions' employees and players shall testify at the request of a party.
9. All testimony shall be made under oath.
10. All parties shall have the right to appeal to a single judge who may only remand for a new trial if that judge finds that there is new evidence or that the procedure in the trial was flawed such that it was fundamentally unfair.

In addition, states should grant subpoena power to the NCAA over all persons the NCAA reasonably requires to testify at an infractions hearing.

VI. CONCLUSION

The NCAA infractions process needs reform. The failure of the NCAA to provide a recording of interviews, cross-examination and a meaningful appeals process is improper and does not comport with constitutional procedural due process. Yet, in other areas the NCAA infractions process goes well beyond the requirements of procedural due process.

Criticism of the NCAA's infractions procedures has for too long been dismissed as the whining of cheaters. The NCAA infractions procedures cannot be allowed to continue as they stand if the NCAA is to maintain its credibility. Our student-athletes, their coaches, and the public must have the assurance that sanctions are not the result of misguided or malicious prosecution. Little can be said for a system that does not grant its own members their fundamental rights.

State legislatures are reacting in a rapid and varied manner to impose procedural due process requirements upon the NCAA. If the purpose of such legislation is to force the NCAA to catch the rule breakers—and only the rule breakers—then a compromise should be found that will allow for NCAA procedural reform while maintaining national uniformity.

If the NCAA is to return to our nation the confidence that "college ball is college ball," infractions proceedings must be smooth, uniform, and full of integrity. Reform cannot come without action. No change would be as

significant as that which is caused by the NCAA itself. However, time has shown that to guarantee to athletes, coaches, and schools the right to fair infractions proceedings, states must take action.

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