

The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others

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INTRODUCTION

The American people take their sports very seriously. This seriousness, coupled with an ever-increasing commercialization of organized amateur sports at the intercollegiate level,¹ has led to a series of crises and has caused a continuing mass of criticism to be directed at the National Collegiate Athletic Association.²

Indeed, by 1984, after the NCAA's control over the broadcasting of football was successfully challenged by the College Football Association in

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1. In a recent study of revenues and expenses of football programs at institutions belonging to the National Collegiate Athletic Association (hereinafter "NCAA"), it was reported that aggregate revenues totaled an estimated \$1,064,749,000, an increase of over 48% over just four years. Aggregate expenses, in turn, were estimated at \$1.2 billion. See NCAA News, Nov. 3, 1986, at 14, col. 1. Indeed, the average income for football at Division I member institutions had reached \$3.4 million in 1984, with some programs generating in excess of \$10 million in gross income. See Christian Sci. Monitor, June 25, 1985, at 20. Intercollegiate basketball is also a major revenue producer, as evidenced by the NCAA is recently negotiated \$166 million, three-year television contract with CBS for the right to televise the NCAA (Division I) basketball tournament. See NCAA News, Jan. 14, 1987, at 2, col. 4. As Professor Scanlan has noted, it is clear that "amateur sports in many important respects is a business, a highly specialized industry which converts the raw material of athletic skill into a product which is customarily sold in the competitive television market." Scanlan, *Antitrust Issues in Amateur Sports, Introduction: Antitrust—The Emerging Legal Issue*, 61 IND. L.J. 1, 3 (1985).

2. United States Representative Thomas Luken of Ohio, for example, recently stated that:

[t]he unhappy fact is that the NCAA is not primarily concerned about kids who pass through its sports factories. Athletics departments are expected to be financially self-sustaining, so the profit motive supercedes any concern for the intellectual development of the athletes. This breeds a corrupting and destructive drive to win, regardless of the emotional, spiritual or educational cost to the student. The hope of meaningful reform within the NCAA is chimera.

NCAA News, Nov. 3, 1986, at 2, col. 2 (citing N.Y. Times, Oct. 4, 1986, at 23, col. 1). Criticism is not solely, or even primarily, directed at the NCAA, of course. Chancellor L. Jay Oliva of New York University has emphasized that, "The University that allows itself to feed off its sports program financially becomes dependent on the feeding—even *addicted*, if you will. Breaking that addiction is a first responsibility." Oliva, *A Challenge to Coaches: Special Opportunities Must Not be Wasted*, Sporting News, Dec. 1, 1986, at 32, col. 5.

NCAA v. Board of Regents of University of Oklahoma,³ and after the NCAA had been severely criticized by the United States District Court of Nevada in *Tarkanian v. University of Nevada*,⁴ one commentator noted that the NCAA was in a crisis and "seemed to be on the ropes."⁵ There was some threat of a secession or exodus from the NCAA in light of the United States Supreme Court's decision regarding the NCAA's control over the televising of college football.⁶ Even Walter Byers, Executive Director of the NCAA, had suggested that perhaps the time had come to form an "open division" in intercollegiate athletics.⁷ Byers implicitly recognized that sports had become so commercialized at some institutions of higher learning that it no longer was possible to assert that the amateurism goal of the NCAA was viable or desirable at all levels of intercollegiate athletic competition.⁸ In January of 1984, however, the Presidents Commission of the NCAA, a group of chief executive officers from member institutions within the NCAA,

3. 468 U.S. 85 (1984).

4. No. A173498 (D.C. Nevada 1984). In *Tarkanian*, the court summarized its critical view of the NCAA, noting that, "what started out as an association whose members met and exceeded certain lofty goals, ended up as the NCAA bureaucracy which looks upon its friends (sycophants) with feigned pleasure, and its enemies (those who still recognize the U. S. Constitution) with barely-concealed malevolence." *Id.*, cited in Wong & Ensor, *Recent Developments in Amateur Athletics: The Organization's Responsibility to the Public*, 2 ENT. & SPORTS L.J. 123, 164 (1985).

5. McCallum, *In the Kingdom of the Solitary Man*, Sports Illustrated, Oct. 6, 1986, at 64. McCallum argues that:

In 1984, the N.C.A.A. seemed to be on the ropes, as body blows rained down from the Supreme Court (which had limited the NCAA football television monopoly), the rival College Football Association (whose challenge led to the Supreme Court's decision) and the district court in Nevada (which had ruled in favor of UNLV Coach Terry Tarkanian in the well-publicized due process case).

Id. at 68.

6. The secessionist sentiment was perhaps higher in 1984, but it persists even today. The College Football Association ("CFA"), for example, recently commissioned a blue-ribbon committee to develop a long range plan for itself and its members, a plan which would examine the possibility of having the "CFA expand its scope to include matters affecting all intercollegiate athletics and other long-range issues." NCAA News, Oct. 13, 1986, at 4, col. 3. See also Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 23 (1985), for a discussion of the steps that necessarily would have to be taken to initiate a successful secessionist movement from the NCAA.

7. Byers felt that an open division which essentially would professionalize amateur athletics at some intercollegiate institutions, in a manner much like the increasing professionalization of the Olympics, was a "valid proposal" and might be "in the best interest of . . . those programs that develop world-class athletes, forgoing all the administrative and enforcement strain that is put on the system by the [current] rules of amateurism." McCallum, *supra* note 5, at 68.

8. The fundamental policy of the NCAA has been stated as follows:

The competitive athletics programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports.

NCAA CONST. art. II, § 2(a), reprinted in NATIONAL COLLEGIATE ATHLETIC ASS'N., 1986-87 MANUAL OF THE NAT'L. COLLEGIATE ATHLETIC ASS'N. 7 (1986) [hereinafter NCAA MANUAL].

was formed for the purpose of serving as an effective vehicle for addressing policymaking and reform issues in intercollegiate athletics.⁹ This body consistently has emphasized its commitment to ensuring the "integrity" of amateur athletics at the intercollegiate level.¹⁰

When the Presidents Commission initially was formed it was not given veto power over NCAA actions, and, as a result, many believed that it would remain "little more than an advisory panel, with limited authority to review NCAA activity, sponsor changes in rules at conventions, and call special conventions."¹¹ Such doubts, however, quickly were dispelled. Acting promptly upon its formation, the Presidents Commission circulated a survey to the chief executive officers of all NCAA member institutions.¹² Based on the results of their survey,¹³ the Presidents Commission proposed a seven-point plan for consideration at a special Convention to be held during the summer of 1985, which plan was designed as a major step toward restoring integrity to amateur athletics within the NCAA's jurisdiction.¹⁴ A major component of that seven-point plan came to be referred to as the "death penalty," a sanction only to be applied to repeat offenders and which could, if invoked in its most restrictive sense, suspend a particular athletic program at an institution for up to two years.¹⁵

This "death penalty" was designed to bolster the NCAA's enforcement capability. As such, it is intended to operate as a significant disincentive to cheating by the personnel of member institutions in recruiting and other activities designed to enhance and render more profitable the disobedient institution's program. This Article discusses the content and ramifications

9. John W. Ryan, the first Chair of the Presidents Commission, stated that, "the Commission will demonstrate or fail to demonstrate . . . that it is an effective vehicle for addressing policymaking and reform issues in intercollegiate athletics." 1984-85 ANNUAL REPORTS OF THE NAT'L. COLLEGIATE ATHLETIC ASS'N. 229 (1986) [hereinafter ANNUAL REPORTS].

10. NCAA News, Sept. 22, 1985, at 4, col. 1. In this address, Walter Byers, the Executive Director of the NCAA, stressed how critical the role of the Presidents Commission would be in the future given their avowed effort to maintain "integrity" in intercollegiate athletics.

11. Chron. Higher Educ., Jan. 21, 1987, at 33, col. 2.

12. ANNUAL REPORTS, *supra* note 9, at 188. This survey was circulated to get a sense of the direction which the Chief Executives of the NCAA membership felt the Presidents Commission should take in its reform efforts and to ascertain the level of commitment of the Chief Executive Officers to the reform effort generally.

13. The legislation ultimately drafted for presentation at the special Convention in June of 1985 "all was based on the results of th[is] survey . . ." *Id.* at 227.

14. *Id.* at 260.

15. Barry Switzer, head football coach at the University of Oklahoma, recently emphasized that, "They talk about the 'death penalty' being a two-year (maximum) proposition, but it's more like a decade or more. It could put them (penalized programs) in doormat status for 10 years." NCAA News, Mar. 4, 1987, at 2, col. 1. *See, e.g.*, summary of penalties invoked against Southern Methodist University ("SMU") in a recent 'death penalty' determination by the NCAA Committee on Infractions. *Id.* at 13, col. 1. David Berst, chief enforcement officer of the NCAA, adds that, "It would be difficult to start even a threshold program in the wake of the death penalty." *See* Chron. Higher Educ., Feb. 11, 1987, at 35.

of this "death penalty" provision and related legislation adopted during the special Convention in June of 1985.

In Part I, I will examine the history of intercollegiate athletics. In so doing, it will become evident that many tensions, such as excessive commercialization versus amateurism, have plagued intercollegiate athletics from its inception. Understanding those tensions, and their enduring quality, helps to put recent efforts by the Presidents Commission in perspective and will provide a touchstone from which to draw certain conclusions with regard to what direction future reform should take.

I will turn in Part II to an examination of the specifics of the "death penalty" and related legislation adopted by the Presidents Commission during the special Convention. In that section I will discuss the legislative history, the language of the provisions and interpretations that have been and might be drawn from a close examination of those provisions.

In Part III, I will analyze how the Presidents Commission punished themselves and others in promulgating the "death penalty" and related legislation. This part of the Article will comment on the nature, extent and ramifications of the punishment applied to: (1) the presidents themselves (and their institutions); (2) athletic departments, athletic directors and coaches; and (3) student-athletes.

Finally, in Part IV, I will draw some basic conclusions and will offer a brief prognosis and a prescription for the future of intercollegiate athletics generally and the role of the Presidents Commission and the NCAA specifically. In that conclusion, it will become clear why I believe there is room for guarded optimism regarding the future of the NCAA and its goal of amateurism in intercollegiate athletics. It also will be argued that in their willingness to make collective changes and reform the presidents must also be attentive to the interests and rights of the various parties involved in the enforcement process, particularly the student-athletes.

I. A GENERAL HISTORY OF THE NCAA AND THE PRESIDENTS COMMISSION

A. *Intercollegiate Athletics: The Early Years*

In the 1840's, intraschool athletic competition was emerging as a significant part of campus life.¹⁶ During this time, for example, a regatta between Harvard and Yale Universities was organized and commercially sponsored

16. GEORGE MASON UNIV. & THE AMERICAN COUNCIL ON EDUC., ADMIN. OF UNIV. PROGRAMS: INTERNAL CONTROL AND EXCELLENCE 18 (1986) [hereinafter ADMINISTRATION OF UNIV. PROGRAMS].

by the Elkins Railroad Line.¹⁷ It has been noted that even this event, "[l]ike modern collegiate contests . . . was characterized by commercialization, crowds of spectators, prize money and an eligibility question."¹⁸ In its zeal to win this first intercollegiate athletic event, Harvard obtained the services of a coxswain who was not currently a student.¹⁹ Eligibility questions thus literally have been with us from the inception of intercollegiate athletics. Indeed, one author has emphasized that, "[t]he problem of misrepresentation, illegal recruiting, and payment of athletes isn't a new one for big-time college athletics Gymnasium walls have echoed with similar cries ever since the humble beginnings of college sports"²⁰

With the growth of intercollegiate athletics in the mid-nineteenth century, questions arose with regard to the issue of control over intercollegiate athletic events. Intercollegiate athletics initially were largely run by the students themselves, with the team captain and the team manager serving in significant capacities.²¹ As financial demands and demands on the student-participants' time increased, however, faculty members endeavored to exercise some control over the intercollegiate athletic program at their institutions.²²

The commercialization of intercollegiate athletics, including the payment of compensation to the best athletes, was well entrenched by the latter part of the nineteenth century.²³ Faculty members, nevertheless, continued to try to exert control over their burgeoning athletic programs. Such efforts, predictably, encountered staunch and frequent resistance from presidents and administrators who saw intercollegiate athletics as a profitable means of

17. *Id.*

18. *Id.*

19. *Id.*

20. J. EVANS, *BLOWING THE WHISTLE ON INTERCOLLEGIATE SPORTS* 7 (1974).

21. See *ADMINISTRATION OF UNIV. PROGRAMS*, *supra* note 16, at 18, stating that:

The rowing clubs had set a precedent for student-run organizations in the early days of intercollegiate athletics, raising their own funds, purchasing equipment, and constructing facilities. In the 1850s the boating organizations were initiated, coached, administered, and financed by students. The captain was indispensable. He assured the continuance of the organization, served as its coach and administrator, organized fund raisers, and promoted his club; he was the sole arbiter of the athletic program, although the team managers controlled the scheduling of contests and the purse strings.

22. It has been pointed out that "With all the new activities, however, sports began to challenge the academic curriculum for students, taking their time, interest, and effort. Faculty then attempted to place student-run athletics programs under tighter educational control, and the conflict over control of athletics began." *Id.*

23. It has been chronicled that during the latter part of the nineteenth century:

Hogan [a successful athlete at Yale] had a suite of rooms in the dorm, free meals at the university club, a one-hundred-dollar scholarship, he could sell programs and keep the profit, and was made an agent of the American Tobacco Company, receiving a commission on cigarettes sold in New Haven, plus a 10-day paid vacation to Cuba.

B. SPEARS & R. SWANSON, *HISTORY OF SPORT AND PHYSICAL ACTIVITY IN THE UNITED STATES* 208 (1978), *cited in ADMINISTRATION OF UNIV. PROGRAMS*, *supra* note 16, at 19.

placing their institution in the limelight, with resultant increases in admissions and economic support.²⁴ There were, no doubt, many faculty members during this era, as there are today, who reveled in the emergent material and related success of intercollegiate athletics at their institutions, just as there surely were presidents who opposed such excesses. It is clear, however, that by the latter part of the nineteenth century, when initial efforts to control the excesses of intercollegiate athletics first were promulgated, that the very tensions facing reform efforts in intercollegiate athletics today—commercialization, institutional pride and vacillation among faculty and administration relating to the purposes of intercollegiate athletics—constituted significant impediments to those early reform efforts. Despite this fact, efforts to form conferences and develop rules appropriate for intercollegiate athletics were underway by 1895 and, in some sense, established initial precedent for the ultimate creation of a national organization to regulate athletics.²⁵

Early in the twentieth century the reform movement received support from an unsuspected source. In 1905, there were eighteen deaths and over one hundred injuries in intercollegiate football.²⁶ As a result, President Roosevelt called a White House conference for the purpose of reviewing football rules and invited officials from selected major football programs to participate. This first meeting did little to lessen the heavy toll, in terms of deaths and injuries among athletes, in intercollegiate football. Thereafter, Henry McCracken, Chancellor of New York University, pushed for a second national meeting of representatives of the nation's major intercollegiate football teams to discuss reforming or abolishing football as it was being played at institutions of higher learning in America. A group of representatives accepted McCracken's invitation and formed a Rules Committee. President Roosevelt sought to have officials from the White House conference meet with the McCracken group.²⁷ This solicitation ultimately led to a mutual discussion and a combined effort to reform intercollegiate football rules.

24. This point is emphasized by ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 19, in the chapter regarding the history of intercollegiate athletics:

Faculty had difficulty gaining control of athletic associations. At the time athletic departments were forming, college presidents were in tune with materialism and took the approach that athletics advertised the university and directly correlated with increased enrollment. College presidents became active marketing agents for athletics, attending games, speaking to victorious teams, and soliciting funds from alumni and boards of trustees, while institutions began to provide money for teams, absorb their debts, and grant scholarships. College presidents often sided with development of athletics rather than with faculty.

25. *Id.*

26. *Id.*

27. *Id.* at 20. The officials from the White House conference initially refused to meet with the McCracken group. A representative from Harvard finally left his group and went to attend the McCracken meeting. See also G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 1-2 (1986).

The association thus formed, the Intercollegiate Athletic Association of the United States, had sixty-two original members and, in 1910, was officially renamed the NCAA.²⁸ As initially formed, the NCAA was only a rulemaking body, formulating rules that would apply in various sports. It was, nevertheless, organized to eliminate "unsavory violence" and "preserv[e] amateurism."²⁹

B. *The NCAA: 1910 to the Present*

In its early years the NCAA remained but a minor force in the governance of intercollegiate athletics. Indeed, by 1921, when the NCAA began sponsoring its first national championship event, it had turned much of its energy to its role in organizing and promoting championship events.³⁰ The actual governance and running of intercollegiate athletic events remained largely in the hands of the students until after World War I.³¹

In the 1920's, intercollegiate athletic participation truly became an integral part of higher education in America.³² Owing to its new found identification with the higher educational system and with increasing commercial possibilities and pressures,³³ intercollegiate athletics once again was subjected to a period of significant outside criticism. In 1929, in a three-year study by the Carnegie Foundation for the Advancement of Education, the following finding was made:

[A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth . . . to exercise at once the body and the mind and to foster habits [of] both bodily health and . . . high qualities of character . . .³⁴

The Carnegie Report essentially concluded that, if the college presidents so desired, they "could change the policies permitting commercialized and professionalized athletics that boards of trustees had previously sanctioned."³⁵

During the 1920's and 1930's, little of real significance transpired in terms of gaining control over the commercial and related excesses already plaguing

28. ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 20.

29. Koch, *supra* note 6, at 12.

30. By 1941, the NCAA offered championship events in ten different sports. See G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 27, at 2.

31. ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 21.

32. *Id.*

33. In 1930, for example, Notre Dame University's football program had a gross income of \$689,000. See CONG. Q., Aug. 15, 1986, Vol. 11: No. 6, at 591.

34. Cited in ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 22.

35. This conclusion arguably was and presumably is naive. *Id.* I agree with the conclusion of the Carnegie Report, however, that the presidents are well-suited to make needed educational reforms in intercollegiate athletics.

intercollegiate athletics. The NCAA, nevertheless, still attempted to restructure recruiting rules to maintain some semblance of educational integrity in their programs.³⁶ During this period, coaches and administrators also began to take a major role in operating and recruiting for their intercollegiate athletic programs.³⁷ Throughout the 1930's, the federal government under the New Deal also took an active role in promoting athletics.³⁸

After World War II, intercollegiate athletics expanded at a frenetic pace fueled by the return to the college ranks of many servicemen, the era of post-war prosperity and the introduction of television. In the midst of this apparent boon, college athletics faced a series of major gambling scandals.³⁹ During this turmoil, the NCAA took a number of steps that ultimately enabled it to exercise greater control over rapidly expanding athletic programs at many institutions of higher learning.

In 1948, the NCAA enacted what has come to be known as the Sanity Code, which was promulgated to "alleviate the proliferation of exploitive practices in the recruitment of student-athletes."⁴⁰ In order to enforce the Sanity Code, the NCAA initially created a Constitutional Compliance Committee to interpret the rules and to investigate possible violations.⁴¹ The Sanity Code and the Compliance Committee enjoyed little success, however, because expulsion from the NCAA was the only penalty provided for in the

36. *Id.* at 23.

37. Red Grange, a football coach, is generally given credit for "starting the competition for football talent through . . . recruiting." *Id.* at 21. Additionally, it has been pointed out that:

The 1930s also brought a demand for graduate work to develop coaches for particular sports. The new emphasis on preparing athletes in physical education also fostered the need for coaches trained in particular areas. Physical education instructors were being replaced by professionals trained for a particular sport, thus perpetuating the professionalization of intercollegiate athletics.

Id. at 23.

38. *Id.*

39. Referring to gambling scandals:

The first case surfaced in 1945, when a team was caught shaving points to keep the spread margin down. The worst incident, however, was in 1951, when a major gambling scandal involving thirty players and seven schools came to light. The schools had conspired to fix games (although coaches all denied any knowledge of the incident).

Id. at 23-24.

40. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Problem*, 23 ARIZ. L. REV. 1065, 1070 (1981). Gaona summarizes these developments:

For over forty years, the NCAA had existed as an advisory association prior to its engaging in the business of regulation. The presence of elements such as gambling, financial aid to student-athletes, and the development of air transportation made a rules enforcement mechanism necessary. The "Sanity Code" (Code) thus was adopted in 1948 to alleviate the proliferation of exploitive practices in the recruitment of student-athletes.

Id.

41. *Id.*

event that a violation was uncovered.⁴² Repealed in 1951, the Sanity Code was replaced with a new set of enforcement procedures and with the creation of the Committee on Infractions, an enforcement body given additional authority to penalize members involved in rules violations.⁴³

Two other significant factors in the NCAA's formative development occurred during the 1950's: (1) in 1951, the NCAA began to function as a wholly separate organization, and Walter Byers commenced his tenure as Executive Director of the NCAA;⁴⁴ and (2) in the early 1950's, the NCAA negotiated its first contract to televise intercollegiate football, valued at over one million dollars.⁴⁵ By 1952, Byers also had helped establish the enforcement division of the NCAA which was formed for the purpose of working with the Committee on Infractions in the enforcement process.⁴⁶

Armed with a new power base, the NCAA began to exercise greater control over intercollegiate athletics. With financial support provided by its share of the television contracts and with its increasingly forceful role in infractions matters, the NCAA came to play a dominant role in the governance of intercollegiate athletics. The early seventies witnessed the divisionalizing of college athletics. Ostensibly, this effort at federation was conceived as a means of enhancing enforcement by placing institutions of similar size in the same division and for the purpose of maintaining a similar level of competitiveness among member schools in a given division.⁴⁷

With each increase in its power base, the NCAA seemingly was confronted with criticism from a new quarter. Whereas the NCAA initially was criticized as being little more than an advisory figurehead, by 1971 members were beginning to voice concerns regarding alleged unfairness in the rules and the enforcement process.⁴⁸ By the 1970's the NCAA thus found itself effectively

42. *Id.*

43. *Id.*

44. McCallum, *supra* note 5, at 70. McCallum adds that:

Whatever anyone thinks of Byers' long reign, there can be no doubt that the beginning of his administration also marked the beginning of the NCAA's modern era. "The NCAA prospered, in my opinion, because of these factors," says Big Ten Commissioner Wayne Duke, who was the first NCAA employee Byers hired in 1952. "Enforcement, football on television and the basketball tournament. And Walter was the architect of all three."

Id.

45. G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 27, at 2.

46. McCallum, *supra* note 5, at 70.

47. See ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 24. I say "ostensibly," because it is clear that federation has contributed to some problems that may well have been unanticipated by the NCAA (e.g., ultimately, the creation of Division I-A status in football and basketball, placed additional stress on some programs to maintain lucrative and competitive programs).

48. Gaona summarizes this criticism as follows: "In 1971, major institutions voiced concern regarding the unfairness of the procedures and tactics by which the Committee on Infractions operated. The major complaint was that the Committee's involvement in the entire investigative and basketball placed additional stress on some programs to maintain lucrative and competitive programs).

caught in a crossfire of converging criticism. On the one hand, the NCAA was criticized on the ground that their enforcement efforts were unfair. When, in 1976, the NCAA was given additional power to enforce the rules by penalizing schools directly and therefore administrators, coaches and student-athletes indirectly,⁴⁹ this line of criticism grew in force. On the other hand, criticism surfaced anew asserting that intercollegiate athletics had been commercialized to the point that it was little more than a big business masquerading as an educational enterprise.⁵⁰ In some respects, particularly with regard to the apparent dehumanizing effect of "unfair" rule enforcement and extreme commercialization on student-athletes, and less so coaches, these lines of criticism converge.⁵¹

Concerned with this criticism of its enforcement procedures, the NCAA formed a special committee to study the enforcement process. This committee, in turn, recommended amendments designed to divorce the prosecutorial role from the investigative role in the Committee on Infractions. These recommendations were adopted in 1973.⁵² These efforts at internal reform, however, did not quell the criticism. By 1978, at the insistence of Representative James Santini of Nevada and seventy other Representatives,⁵³ a seventeen member U.S. House Subcommittee on Oversight and Investigation held hearings to investigate the NCAA and the alleged unfairness of its enforcement procedures and processes.⁵⁴ The Subcommittee heard a parade of witnesses who were generally critical of the NCAA. The NCAA ultimately responded to the thrust of much of this testimony by amending portions of its procedures.⁵⁵ Again, however, criticism did not abate. Commentators⁵⁶ and Congress⁵⁷ alike have continued to harangue the NCAA

49. See ADMINISTRATION OF UNIV. PROGRAMS, *supra* note 16, at 24.

50. See, e.g., J. EVANS, *supra* note 20, J. MICHENER, SPORTS IN AMERICA (1976); G. SHAW, MEAT ON THE HOOF: THE HIDDEN WORLD OF TEXAS FOOTBALL (1972); J. SCOTT, THE ATHLETIC REVOLUTION, for books of this genre written during the 1970's. Each of these books also raised the dehumanizing effect of commercialized athletics on the participants, the student-athletes.

51. There is a good deal of ambivalence in the criticism directed against the NCAA. Some argue the NCAA is weak and lacks the resolve to do what is necessary to ensure integrity in intercollegiate athletics while others claim that the NCAA is too strong and exercises power unfairly. To some extent these criticisms converge in that it is evident that the NCAA and its members wield extensive power relative to student-athletes but may lack the power and resolve necessary to deal with the powerful groups that reap the rewards of a highly commercialized role for intercollegiate athletes.

52. See Gaona, *supra* note 40, at 1071.

53. *Id.* at 1067, n.15.

54. McCallum, *supra* note 5, at 77.

55. See NCAA Enforcement Program: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95 Cong., 2d Sess. (1978).

56. See, e.g., Brody, NCAA Rules and Their Enforcement: Not Spare the Rod and Spoil the Child—Rather Switch the Values and Spare the Sport, 1982 ARIZ. ST. L.J. 109; Miller, The Enforcement Procedures of the National Collegiate Athletic Association: An Abuse of the Student-Athlete's Right to Reasonable Discovery, 1982 ARIZ. ST. L.J. 133; Wong & Ensor,

enforcement process. During the spring of 1986, with the drug-related death of Len Bias, and the revelations regarding classroom attendance by Mr. Bias and other athletes at the University of Maryland, the clamor for reform reached a heightened pitch.⁵⁸ Indeed, with the issue of academic integrity in intercollegiate athletics in the media on virtually a daily basis, a critical report from the Carnegie Foundation for the Advancement of Teaching was issued. That report called on faculty and students to "organize a day of protest" over abuses in athletic programs and also urged major sports powers to cut their athletic budgets.⁵⁹

Such clamor and criticism again evoked a reform-oriented response from the NCAA and also from the presidents of a number of its major members. In 1984, during an era when funding for higher education from all sources was tightening and many institutions were faced with the spectre of decreasing enrollments, numerous presidents found themselves under intense pressure leveled from opposing camps. On the one hand, the presidents have been subjected to significant pressure from alumni and boosters, from influential members of their boards of trustees and from some state legislators, who in large measure control the budgets of public institutions, to produce winning athletic programs.⁶⁰ On the other hand, the presidents have been accosted on occasion by irate faculty and other groups demanding that the institutions recognize their academic mission by de-emphasizing major, "winning" athletic programs which had become all too commercial in appearance and function.⁶¹ Caught in the vice between these and similar pressure

The NCAA's Enforcement Procedure—Erosion of Confidentiality, 4 ENT. & SPORTS LAW. 1 (1985).

57. See, e.g., Representative Luken's addition to the recent Omnibus Drug Bill providing for a special Commission to study intercollegiate athletics, discussed *infra* note 295 and accompanying text. See also NCAA News, Jan. 21, 1987, at 3, col. 1, for an article discussing Representative James Howard's bill, as introduced in the 99th Congress, which challenges the NCAA relative to graduation rates for student-athletes.

58. See, e.g., Chron. Higher Educ., July 2, 1986, at 17.

59. NCAA News, Nov. 10, 1986, at 20, col. 1. The NCAA, with the Presidents Commission as henchman, recently has taken steps to ensure cost containment in the runniug of intercollegiate athletic programs. See, e.g., *infra* notes 256-58 and accompanying text.

60. In the words of Walter Byers, "[t]he one serious factor that interferes with institutional resolve and management integrity is the pressure brought to bear by certain influential douors, some members of boards of trustees and an occasional important state legislator, who believe that athletics success at at their favored institution is worth whatever it takes." NCAA News, Sept. 22, 1986, at 4, col. 3.

61. Faculty members at SMU, for example, have remained adamant in their desire to have SMU's economically successful, but NCAA violation-riddled, football program dismantled. See Chron. Higher Educ., Feb. 11, 1987, at 35-36. Similarly, the faculty at Auburn University voted to censure Pat Dye, the university's successful football coach, for permitting a student-athlete to play in a holiday football game, despite the fact that the athlete had not attended class since October. Chron. Higher Educ., Jan. 18, 1987, at 30.

Byers recognized this dilemma facing presidents when he stated that:

It is difficult sometimes for a chief executive who longs for funds to build a

groups, and no doubt desiring to ensure at least a preponderance of academic integrity in their athletic programs, the presidents determined that they should take an active, collective role in the NCAA. The presidents noted further that reform efforts at the institutional level—where the pressure to maintain highly profitable winning athletic programs was clearly at odds with a growing sentiment opposing the commercialization of intercollegiate sports—were likely to be successful at many institutions only if there was a collective effort at the national level.⁶² In an early meeting of the Presidents Commission, one of its members echoed this sentiment by emphasizing that:

Some observers ask why, if the C.E.O.s want to take over, they don't start by dealing with the problems on their own campuses; however, anyone who is cognizant of the competitive pressures of major athletics programs realizes that effective controls cannot be implemented individually or unilaterally and all-encompassing actions are needed.⁶³

In a provocative article criticizing the NCAA's enforcement process, Professor Burton Brody argued that the NCAA operated under the "association syndrome," which was defined as "the ability of a group [the NCAA] to hold values that no single member of the group has or, at least, would admit to having. . . . Under the 'association syndrome,' the sum is not greater than the parts; it is *different* from any of the parts."⁶⁴ It seems that just as the NCAA membership might use the "association syndrome" in a pernicious way to promote collectively values that no individual institution would admit to holding, it can also, as in the case of the Presidents Commission, use that same syndrome to promote collectively values, such as academic

new science building to offend one of those power-brokers by directing him not to have a hand in the operations of the athletics program. And it is because of this leverage situation that the popular, unprincipled head coach gets what he wants by dealing directly with the big-time supporter, bypassing the university and athletics administration. The work of the NCAA Presidents Commission and the forces it has brought into play provide a unity of purpose for chief executive officers to deal with this longstanding problem.

NCAA News, Sept. 22, 1986, at 4, col. 4. It also has been stated that "Many Presidents will be opposed and attacked by powerful forces of great influence. Real courage will be required to overcome their increased sense of vulnerability. Their strength to act and persevere will have to come from their unified front and an appreciative public." Harwood, *The Presidents Will Need Courage, Determination*, NCAA News, Jan. 1, 1987, at 3, col. 1. I doubt that many vocal and partisan members of the public will appreciate the presidents' efforts to present a unified front against athletic abuses if such efforts mean that the winning tradition of their individual programs suffer. Indeed, the threatening nature of this win-at-all-costs phenomenon recently was illustrated by the death threats received by President Joab L. Thomas of the University of Alabama when he hired Bill Curry of Georgia Tech University. Curry, who is reputed to be an excellent coach, had a losing record of 31-43-3 at Tech. Curry had been hired, in part, because of his record on academic and related issues of integrity. Some groups, nevertheless, were impervious to Curry's excellent credentials as a coach, choosing to focus solely on his won-lost record.

62. See *infra* notes 69-73 and accompanying text.

63. ANNUAL REPORTS, *supra* note 9, at 258-59.

64. Brody, *supra* note 56, at 110 n.5 (emphasis in original).

integrity in their athletic programs, that could not be promoted as a political matter in individual cases on their campuses, where the pressure of powerful alumni, boosters, legislators and trustees is intense and where such powerful individuals occasionally use their positions to coerce or cajole "wayward" presidents.⁶⁵

In 1984, the presidents therefore resolved to act collectively at the national front. At first there were serious doubts that the presidents would exercise anything but the most rudimentary advisory power in the councils of the NCAA. Such sentiment was a natural reaction to the fact that the presidents had failed to win veto power over NCAA legislation in their formative efforts.⁶⁶ Nevertheless, after circulating a survey to its members seeking input as well as political and moral support on various issues confronting the NCAA, the Presidents Commission exercised its power to call a special convention to be held in June of 1985. The presidents were committed to and did in fact take steps during that special Convention to ensure "academic integrity" in their athletic programs.⁶⁷ Shortly thereafter Doug Tucker, a sportswriter for the Associated Press, indicated that, "[t]here is no doubt who is running the show in college sports. It's the college presidents."⁶⁸ In that article, President Gene Budig of the University of Kansas was quoted as saying that he believed, "presidential unity is essential. . . . University presidents and chancellors must sound a clear message of the importance of propriety in intercollegiate athletics."⁶⁹ President John W. Ryan, Chair of the Presidents Commission, reflected that the presidents should "think about the impossibility of what the Presidents Commission [had] done in just one year."⁷⁰ Indeed, the Presidents Commission had taken a major step toward

65. Former SMU President Paul Hardin, for example, stated that he effectively was forced from his position as president because he supported efforts to "clean up" the SMU football program. Hardin's assertion was denied by Ed Cox, ex-chairman of the Board of Governors during Hardin's tenure. See *A Fine Kettle of SMU Fish*, *Sporting News*, Mar. 23, 1987, at 43. Regardless of which version is accurate, it is clear that presidents often perceive an intense pressure to "look the other way" if that is what is necessary to provide a "winning" athletic program for their institution on a regular basis.

66. See *supra* note 11 and accompanying text.

67. Reacting to these early efforts by the Presidents Commission, the NCAA Council "agreed that the success of [the Presidents Commission's] proposals [adopted during the special Convention in June of 1985] represented a meaningful first step in the effort to address the integrity issue in college athletics." *ANNUAL REPORTS*, *supra* note 9, at 305. Some members suggested, however, that no "integrity problem exists in college athletics, noting that 'the closer a CEO is to the facts, the less concerned he is.'" *Id.* at 232. But this position was countered by the fact that "the survey data, in effect, show that 75 percent of the chief executives perceive that 25 percent have a problem." *Id.* See also *ADMINISTRATION OF UNIV. PROGRAMS*, *supra* note 16, at 3, for reference to a study indicating that 92% of the CEO's believe there are major problems, with 33% believing that there are problems at their institution and with 22% acknowledging that there are serious problems at their institutions.

68. Associated Press, June 22, 1985.

69. *Id.*

70. *ANNUAL REPORTS*, *supra* note 9, at 300.

exercising control over intercollegiate athletics. It is now unlikely that the presidents will be able to ignore their responsibility regarding the governance of intercollegiate athletics.⁷¹ It is little wonder, therefore, that Walter Byers recently referred to the Presidents Commission in emphasizing:

That's where the big effort is being made right now . . . with the Presidents' Commission. This involvement augers well for the future, but it [also] marks one of the most significant developments in a number of years. The C.E.O.s are determined to change the course of intercollegiate athletics. I feel good about this, and, if this effort maintains momentum, the future looks better than it [did], say, five years ago.⁷²

Today the Presidents Commission clearly is a dominant force in the NCAA. While I tend to share some of Walter Byers's sanguine views regarding the influence of the Presidents Commission, the future is somewhat uncertain. This is so because the resolve of the presidents to deal collectively with economic and related pressures at the institutional and the national levels remains unclear. Historically, it would appear that the presidents tend to serve best, or at least most often, as crisis managers and worst, or least often, as overseers of the "nuts and bolts" of their various programs, particularly intercollegiate athletics.⁷³ Without attention to detail it is conceivable that the presidents' power may slip through their hands as they no longer sense the exigency of a crisis in need of their intervention. Unless major institutional changes are implemented in a largely irreversible manner, intercollegiate athletics may return, as it has in the past, to its highly commercial pre-crisis status in which academic concerns are subordinated to economic values and under which academic institutions will be criticized anew for hypocritically abandoning their academic mission in the pursuit of economic splendor in athletics. Finally, as will be indicated in the remainder of this Article, it is not clear what impact the reforms promulgated during the summer of 1985 will have, nor is it clear that all of those reforms will have a salutary effect or that they can have such a beneficial impact without significant, continuing presidential attention and increased resolve to finish a task half-done.

II. THE NCAA'S VERSION OF THE DEATH PENALTY—ITS HISTORY AND CONTENT

A. *The History Prior to the Special Convention of 1985*

At the Presidents Commission Executive Committee meeting on March 21, 1985, in Chicago, Illinois, John W. Ryan, Chair of the Presidents

71. The Presidents Commission during the January 1987 Convention of the NCAA again called for a special Convention during the summer of 1987 to consider cost containment issues. See *infra* note 241 and accompanying text for a fuller discussion of this assertion of the Presidential prerogative.

72. McCallum, *supra* note 5, at 68.

73. ANNUAL REPORTS, *supra* note 9, at 305. The presidents must depend on others for "nuts and bolts" analysis.

Commission, summarized the recent accomplishments of the presidents.⁷⁴ President Ryan then added that the chief executives of member institutions, through the Presidents Commission, intended to continue to take an active role "in integrity issues."⁷⁵ On April 3, 1985, at the next Presidents Commission Executive Meeting, "[i]t was emphasized that the suggested legislation for possible sponsorship by the Commission all was based on the results of the survey [that had recently been circulated to the chief executive officers of NCAA member institutions]"⁷⁶

As President Ryan noted, prior to forming the Presidents Commission in 1984, the presidents began by taking an active role in supporting Proposal 48. Proposal 48, which was adopted by the NCAA membership in January of 1984, amended NCAA Bylaw 5-1-(j). As amended, this bylaw sets forth academic eligibility requirements for participation in intercollegiate athletics by high school graduates in their first year of college. Proposal 48 requires that high school graduates have maintained a 2.000 grade point average (based on a maximum of 4.000) in a successfully completed core curriculum, as well as a 700 combined verbal and math S.A.T. score or a 15 composite score on the A.C.T.⁷⁷ The presidents supported Proposal 48 as an initial step in their effort to ensure academic standards by requiring that basic academic requirements be met before a freshman athlete would be permitted to participate in intercollegiate athletics at the Division I level. The adoption of that provision provoked criticism on the ground that it violated the fourteenth amendment because its enforcement would have a disparate impact on Black and other minority student-athletes.⁷⁸

In 1984, the chief executive officers took a major step toward gaining a significant degree of direct control over the governance of intercollegiate athletics by organizing the Presidents Commission and having it formally recognized by the NCAA. As initially organized, Commission members were elected by a mail vote of the chief executive officers of all NCAA member institutions. Forty-four members were elected, twenty-two representing the Division I membership, eleven representing Division II members and eleven representing Division III members.⁷⁹ A minimum of three women must be included on the Commission, preferably with at least one from each divi-

74. *Id.* at 225-26. By way of example, President Ryan cited the adoption of "Proposal 48," establishment of the Presidents Commission and completion of the most comprehensive survey in history of presidential views regarding athletics.

75. *Id.* at 226.

76. *Id.* at 227.

77. See NCAA Bylaw 5-1-(j), reprinted in NCAA MANUAL, *supra* note 8, at 95-96.

78. See, e.g., Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983). As discussed *infra* notes 286-303 and accompanying text, in their zeal to protect the value of academic integrity, the Presidents Commission and the NCAA must be particularly sensitive to the interests of student-athletes, who tend to be particularly under-represented in the NCAA rule promulgation and enforcement processes.

79. ANNUAL REPORTS, *supra* note 9, at 14.

sion.⁸⁰ The representatives of each division are to be elected to four-year terms by the chief executive officers of that division, and the officers of the Commission are to be elected by a majority vote of the other members of the Commission and are to serve for two year terms.⁸¹

When formed in 1984, the Presidents Commission was given the following powers:

- (1) Review any activity of the Association;
- (2) Place any matter of concern on the agenda for any meeting of the Council or for any NCAA Convention;
- (3) Commission studies of intercollegiate athletics issues and urge certain courses of action;
- (4) Propose legislation directly to any Convention;
- (5) Establish the final sequence of legislative proposals in any Convention agenda, within the provisions of Section 2-(e) of the Special Rules of Order; and
- (6) Call for a special meeting of the Association under the provisions of Constitution 5-7.⁸²

In January of 1985 a seventh power was added: the power to "[d]esignate prior to the printing of the notice of any Convention, specific proposals for which a roll-call vote of the eligible members will be mandatory."⁸³ The Presidents Commission, furthermore, "in cooperation with the NCAA Council, shall determine appropriate arrangements for liason and exchange of information between the two bodies."⁸⁴ The Presidents Commission held all of these powers prior to the special Convention in June of 1985. Indeed, it was under article V, section 4(d)(6) that the Presidents Commission exercised its power to call the special Convention. Since that special Convention the Presidents Commission's power has been further augmented that chief executive officers now attend and participate in NCAA meetings on a regular basis, thus becoming informed as to the work of the NCAA.⁸⁵

As President Ryan noted, the Commission's first significant move was to prepare a survey in October of 1984 to determine the views of chief executive

80. *Id.* It is clear that women have been under-represented at all levels within the NCAA hierarchy although there have been some efforts, as in the case of the election of members of the Presidents Commission, to ensure proportional representation. *See, e.g., Tokarz, Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201 (1985), for an article depicting the extreme under-representation of women in all facets of intercollegiate athletics.

81. *Id.* *See also* NCAA CONST. art. V, § 4, *reprinted in* NCAA MANUAL, *supra* note 8, at 40-43.

82. NCAA CONST. art. V, § 4(d), *reprinted in* NCAA MANUAL, *supra* note 8, at 42.

83. NCAA CONST. art. V, § 4(d)(7), *reprinted in* NCAA MANUAL, *supra* note 8, at 42.

84. NCAA CONST. art. V, § 4(f), *reprinted in* NCAA MANUAL, *supra* note 8, at 43.

85. The Presidents Commission, for example, recently was given veto power over the selection of Executive Director of the NCAA. Given the power of the Executive Director, and with the pending retirement of Walter Byers, this veto power is significant and indicates a trend toward augmentation rather than diminution of the Commission's power.

officers regarding the governance of intercollegiate athletics.⁸⁶ The survey, which was completed early in 1985, served as the basis for legislation presented at the special Convention, including the so called "death penalty."⁸⁷

After the call for the special Convention was issued in January of 1985, and with receipt of the survey results in March of that year, the Executive Committee of the Commission met on March 21, 1985, and outlined the basic legislative proposals which it would support in the upcoming special Convention. The Executive Committee then directed the NCAA staff to prepare draft legislation to effectuate those proposals.⁸⁸

The Executive Committee met again on April 3, 1985, and re-emphasized that the draft legislation was based on the results of the recent survey and further agreed that "the executive committee should be authorized by the Commission [at its meeting on April 3-4, 1985] to approve any revisions in the proposed legislation by the April 21 deadline for submission of legislation [to be considered at the Special Convention]."⁸⁹ In turn, the Presidents Commission itself met on April 3-4, 1985, to review the draft legislation prepared by staff at the direction of the Executive Committee at its March 21, 1985 meeting. At that April meeting the Commission considered the reactions of various division subcommittees to fifteen items of proposed legislation.⁹⁰

The first change suggested by the respective subcommittees concerned the "repeat violator" legislation designed to punish habitual offenders.⁹¹ Considerable discussion ensued in each subcommittee over this provision, the so-called "death penalty." At one point, during the Division I subcommittee meeting, it was "emphasized that the point of the proposal was to streamline the enforcement procedure, resulting in actions that are more prompt and decisive, and to provide more stringent penalties in cases of major and repeated violations."⁹² Much dialogue centered on the issue of defining or

86. ANNUAL REPORTS, *supra* note 9, at 246.

87. *Id.* at 227, 246.

88. *Id.* at 229. In that March 21, 1985 meeting, the Executive Committee also discussed issues regarding the hiring and firing of coaches and the need to have coaches report outside income. These issues resurfaced in January of 1987, when the Presidents Commission again called for a special Convention to be held during the summer of 1987 to consider economic or cost-containment issues and to commence a dialogue regarding the appropriate role of athletics in the academic environment. During 1985, however, the presidents did not promote the consideration of economic issues, focusing rather on "integrity" issues related to enforcement and control of intercollegiate athletic programs.

89. *Id.* at 227-28.

90. *Id.* at 230.

91. This provision, in its entirety, was ultimately adopted in June of 1985 as § 7-(d) of the NCAA Enforcement Procedures and has been referred to as the "death penalty."

92. ANNUAL REPORT, *supra* note 9, at 234. Elsewhere,

[i]t was noted that [the] proposal was intended to establish distinctions between 'major' and 'secondary' violations of NCAA rules and regulations, to establish specific penalties for certain categories of violations and to authorize the assistant

clarifying "major" and "secondary" violations under the proposed legislation. In this regard, "[i]t was clarified that the references to 'secondary' and 'major' in the proposal did not anticipate dividing NCAA rules and regulations into such categories, but [was merely intended] to differentiate between major and lesser violations."⁹³ At the Division I subcommittee meeting, several members "suggested that the need may develop to provide sample cases or examples of the differing types of violations."⁹⁴ With regard to the nature of the penalty for violations, one member also suggested that a monetary fine should be imposed, but this suggestion was rejected on the ground that "institutions in the past have expressed a willingness to 'pay to get out of trouble,' as a 'cost of doing business.'"⁹⁵ The subcommittees suggested that the "repeat violator" provisions should "be applied to an institution with a second major violation in a five-year period, regardless of whether it was in the same sport as the initial violation. Sport-specific penalties in the repeat-violator provisions would be applied to the sport involved in the second violation."⁹⁶ The Division I subcommittee also favored adjusting the legislative draft "to specify that repeated secondary violations should be considered a major violation."⁹⁷ It also asked that "major violations be more specifically defined in the legislation."⁹⁸ Additionally, the Division I subcommittee advocated that:

a penalty be added to the minimum package of penalties in major violations to specify that all institutional staff members who were found to have engaged in or condoned a major violation would be subject to termination, suspension without pay for at least one year, or reassignment to institutional duties that do not involve contact with any prospective or enrolled student-athletes or any representatives of athletics interests for at least one year.⁹⁹

executive director for enforcement to impose penalties for secondary violations, subject to an appeal to the committee on Infractions.

Id. at 236. Albert Witte of the NCAA Council subsequently questioned this "authority for the staff to impose penalties," but his uneasiness was countered by the proposition that the Committee on Infractions would review every staff decision in this regard and the institution "could appeal any staff action to the Committee on Infractions." *Id.* at 247.

93. *Id.* at 233.

94. *Id.* at 234. These members also agreed that, "a more precise definition of 'major violations' should be included in the proposed amendment." *Id.*

95. *Id.*

96. *Id.* at 230.

97. *Id.* See also *id.* at 234.

98. *Id.* at 230.

99. *Id.* At the Division I subcommittee meeting:

It was noted that 86% of the chief executives responding to the Commission sponsored survey favored procedures that would require suspension or dismissal of coaches found guilty of major or repeated violations, and President Peter Likins urged that such a procedure be added to the proposal as a penalty in both major and repeated violations.

Id. at 234. The subcommittee agreed "to recommend such a provision for major violations, but not for repeated violations." *Id.*

After some discussion, during which "[O]ne member spoke against the proposed change in the repeat-violator provisions, and another spoke against the proposed penalty on institutional staff members,"¹⁰⁰ the Presidents Commission voted to sponsor the proposed repeat-violator legislation together with the suggested changes, each of which served to strengthen the provision as a whole in terms of the stringency of its punitive effect.

The Commission also discussed and supported minor modifications regarding the academic reporting (requiring reporting of academic information)¹⁰¹ and the self-study (requiring institutions to prepare a self-study of their athletic programs on a regular basis)¹⁰² legislative proposals. During the April meeting the Commission further agreed that "the results of the self-study must be available for examination upon request by an authorized representative of the NCAA," and I.M. Heyman, Chancellor of the University of California at Berkeley, "expressed the hope that the self-study will be the first step in moving toward some type of visitation review or accreditation procedure."¹⁰³

The Division I subcommittee also spent time discussing "a proposed resolution regarding student-athlete eligibility, restoration of eligibility and granting of immunity to student-athletes."¹⁰⁴ After it was pointed out that "limited immunity" for student-athletes was only granted by NCAA personnel when the information could not be obtained from any other source, the subcommittee recommended that the resolution be revised and that the council be directed "to prepare legislation regarding student-athlete accountability in cases of knowing involvement in violations."¹⁰⁵

All three division subcommittees supported Commission sponsorship of "amendments to *Bylaw* 5-6-(d)-(3) and *Enforcement Procedure* 7-(b)-(12) to require that any restrictions imposed upon an institution's coaching staff member by the Committee on Infraction or as a result of the Association's 'show cause' provisions must be applied to the coach even if the individual is employed at some other institution."¹⁰⁶ The Commission supported this amendment, but decided to postpone consideration of whether or not such a provision should also apply to any athletic department member.

The Commission likewise supported amendments requiring that the annual budget for the athletic department be controlled by the institution and that

100. *Id.* at 230.

101. It was agreed that graduation data for student-athletes would be accumulated on a sport-by-sport basis and according to field of study. *Id.* at 234.

102. One alternative self-study proposal would have put off implementation of the self-study proposal until 1986, while another called for immediate implementation. The latter prevailed. *See id.* at 234-35, 237, 247.

103. *Id.* at 231.

104. *Id.* at 235.

105. *Id.* *See also id.* at 248 for Council action on this resolution.

106. *Id.* at 231. There was also some discussion regarding the belief that presidents should exercise more authority in the hiring and firing of coaches. *See, e.g., id.* at 238.

an annual audit be performed by an outside party.¹⁰⁷ Finally, the presidents voted to support a resolution opposing any increase in the permissible number of contests or dates of competition in any sport.¹⁰⁸ In his closing remarks at the April Presidents Commission meeting, President Ryan reiterated that the "university presidents have very serious concerns regarding the conduct of intercollegiate athletics, that presidents are going to be involved in the solutions to the concerns, and that the presidents are able to dictate principles and policies in that regard."¹⁰⁹

Indeed, in their April meeting, the presidents had indicated their commitment at the national level to specific and potentially quite stringent legislation designed to bolster integrity in intercollegiate athletics. As previously noted, the Council,¹¹⁰ in turn, met on April 15-17, 1985, and agreed to co-sponsor each of the eight proposals proffered by the Presidents Commission for submission to the NCAA membership at the upcoming special Convention.¹¹¹ At that meeting, the Council also reviewed a document regarding integrity and compliance in intercollegiate athletics, which document outlined a seven-point program: (1) to rejuvenate the members' resolve to abide by the applicable rules of intercollegiate athletics; (2) to help put into place the necessary institutional, conference and national machinery and administrative techniques necessary to support the efforts of the presidents; and (3) to reiterate the Council's commitment to the NCAA's amateurism rules.¹¹² The first portion of the recommended program suggested that the Council support all eight of the proposals of the Presidents Commission.¹¹³ The second segment provided for a one-time affidavit to be signed by head coaches and student-athletes to attest to current compliance with applicable rules.¹¹⁴ In support of this proposal, it was noted that difficulties in achieving compliance with the NCAA's financial aid rules are exacerbated by successful coaches of major programs and powerful boosters who are inclined to ignore or bend rules in the interest of providing a winning program.¹¹⁵ President John R. Davis also stated that:

107. *Id.* at 231.

108. *Id.* at 231-32.

109. *Id.* at 232.

110. The NCAA Constitution provides that, "[t]he establishment and direction of the general policy of the Association in the interim between conventions is committed to a Council of 46 members, which shall be elected at the Annual Convention of the Association." NCAA CONST. art. V, § 1, reprinted in NCAA MANUAL, *supra* note 8, at 36. The Council is clearly a major force in effectuating NCAA policy.

111. ANNUAL REPORTS, *supra* note 9, at 246-48.

112. *Id.* at 258.

113. *Id.* at 259.

114. *Id.* It also was noted that the affidavit would require more detailed information than the current coaches' Certification of Compliance with NCAA rules. The Division I Steering Committee voted to recommend Council sponsorship of the proposed legislation. *Id.* at 260.

115. *Id.* at 259.

the efforts of those attempting to suggest that student-athletes are employees of the institution, or otherwise increase markedly the aid and benefits the athletes receive, could contribute to institutions losing control of their athletics programs and would directly contradict the clear message from the chief executive officers that the Association's current amateurism precepts should be maintained.¹¹⁶

The third phase of the program provided for mandatory compliance and on-campus visitation program by all Division I conferences to alleviate problems arising from inconsistent attention to rules adherence by the conferences.¹¹⁷ In a related context, step four provided for a substantial and more detailed revision of the compliance certification and student-athlete statement forms which would involve appropriate interrogation of each head coach and each student-athlete regarding athletic financial aid issues.¹¹⁸ The fifth and sixth points dealt with health, gambling and drug issues and supported a drug-testing program as a conceptual matter.¹¹⁹ The seventh and final point dealt with possible "deregulation" or moderation of some of the NCAA rules.¹²⁰ With its co-sponsorship of the eight-proposal package of the Presidents Commission, and the Division I Steering Committee's support of this seven-point program on integrity and compliance, the Council also went on record in support of the efforts to reform the enforcement and compliance process to ensure that integrity could be retained or recaptured. This strong statement by the Council made clear that there would be a unified effort on the part of the Presidents Commission and the Council at the upcoming special Convention on June 20-21, 1985.

B. The Special Convention: The Proposals of the Presidents Commission Are Enacted

By June of 1985, the Presidents Commission was prepared to take a historic first step toward asserting control at the national level over issues confronting intercollegiate athletics. While this Article focuses on the so-called "death penalty," it is also necessary to examine the other proposals adopted in conjunction with that proposal at that summer meeting to better understand the Presidents Commission's intentions in developing a system designed to ensure integrity and compliance in intercollegiate athletics at the NCAA level.

116. *Id.* It also was mentioned that "only 13 percent of the respondents (12% in Division I and 17% in Division I-A) favored any increase in the grant limitation." *Id.*

117. *Id.* at 260. This program was discussed at some length and was favored as a means of securing compliance of the conferences with the Presidents Commission in implementing this program.

118. *Id.* The Steering Committee also supported this concept.

119. *Id.* at 260-61. The Steering Committee also endorsed these proposals.

120. *Id.* at 261. This proposal also was favored by the Steering Committee.

In examining what transpired at this historic meeting, it is helpful to look at the proposals presented and the debate that ensued on each proposal in a seriatim fashion. The first proposal considered at the special Convention amended article IV, section 2, of the NCAA Constitution by adding a new paragraph (b), which would require NCAA members:

To conduct a comprehensive self-study and evaluation of their intercollegiate athletics programs at least once every five years in a form prescribed by the NCAA Council. Subjects covered by the self-study shall include institutional purpose and athletics philosophy, the authority of the chief executive officer in personnel and financial affairs, athletics organizations and administration, finances, personnel, sports programs, recruiting policies, services for student-athletes and student-athlete profiles. The report of the self-study and supporting documentation shall be available for examination upon request by an authorized representative of the NCAA.¹²¹

This legislation was to be effective August 1, 1986, and was approved by a vote of 418-6.¹²² As adopted, the expressed intent of this proposal was "[t]o require an institution as a condition and obligation of membership in the Association to conduct a self-study of its intercollegiate athletics program at least once every five years, with the form and supporting information to be available for examinations by an authorized representative of the Association."¹²³

The self-study proposal had been a near-unanimous item of concern to the presidents.¹²⁴ As such it stimulated limited discussion. The major point raised was the hope that ultimately the athletic self-study would become a component of the accreditation process.¹²⁵ There was also some concern over the timing issue—when the self-study should be completed—but doubts in this regard were allayed by noting that the self-study could be completed at any time within five years after August 1, 1986, the effective date of the proposed amendment. It, nevertheless, was clearly the hope of many members that the self-study would be completed the first year after the forum was made available.¹²⁶

The second proposed amendment,¹²⁷ dealing with academic reporting as amended by Proposal No. 2-1,¹²⁸ was approved by a vote of 283-4. The

121. NCAA CONST. art. IV, § 4(2)(b), reprinted in NCAA MANUAL, *supra* note 8, at 31.

122. NATIONAL COLLEGIATE ATHLETIC ASS'N, 5TH SPECIAL CONVENTION PROCEEDINGS, June 20-21, 1985, at app. 1 [hereinafter CONVENTION PROCEEDINGS].

123. *Id.*

124. *Id.* at 35.

125. See, e.g., *id.* at 37; ANNUAL REPORTS, *supra* note 9, at 298-99.

126. See, e.g., CONVENTION PROCEEDINGS, *supra* note 122, at 36; ANNUAL REPORTS, *supra* note 9, at 302.

127. This proposed amendment to NCAA Bylaw 5-6-(e), which was to be effective Aug. 1, 1986, provided in pertinent part as follows:

(e) A member institution's chief executive officer shall provide the following

express intent of this proposal was stated as follows: "[t]o establish an academic reporting program that would require Division I member institutions to report annually information concerning entering freshman, compli-

information annually [not later than October 1] on a form approved by the NCAA Council.

....

(1) A statement of the institution's regular, published entrance requirements for admission of regularly matriculated, degree-seeking students, including any authority for the acceptance of students who could not be enrolled in the institution if special action is not taken on their admissions applications; the total number of entering recruited student-athletes, the number of entering recruited student-athletes accepted under the special authority, the total number of entering students and the number of entering students accepted under the special authority;

(2) In the sports of football and men's basketball, the following information for each entering recruited student-athlete (listed individually but anonymously): (i) the student's specific high school grade-point average utilized to meet the 'qualifier' definition set forth in Bylaw 5-1(j); (ii) the student's score on the SAT or ACT; (iii) an indication of whether the student was a regular or special admittee, and (iv) the specific school, college or department of the institution to which the student is admitted;

(3) The total number of recruited student-athletes in each sport who represented the institution in intercollegiate competition during the previous academic year and the number who either graduated, left the institution in good academic standing and having met the satisfactory-progress requirements for eligibility if the student had returned for the current academic year, or returned to the institution and met the satisfactory-progress requirements for continuing eligibility;

(4) The institution's graduation rate for recruited student-athletes in each sport and the graduation rate for students generally for the entering freshman class that began attendance as full-time, regularly matriculated, degree-seeking students at the institution five years prior to the regular term that includes the October 1 deadline established in paragraph (e) . . . ;

(5) Identification of the specific baccalaureate degree programs of studies pursued by the student-athletes, included in the graduation rate information under subparagraph (4), who graduated and an indication of the number that obtained a degree in each of those programs;

(6) The NCAA Council shall compile promptly the reported information (with institutions listed individually but anonymously) and shall distribute the compilation annually to all member institutions of Division I . . . ;

(7) Failure to file the form by the appropriate deadline shall render the institution ineligible to enter a team or individual competitors in an NCAA-sponsored meet or tournament.

CONVENTION PROCEEDINGS, *supra* note 122, at app. 2-3; NCAA Bylaw 5-6(e), *reprinted in* NCAA MANUAL, *supra* note 9, at 113-14.

128. Proposal No. 2-1, NCAA Bylaw 5-6(e)-(3), amending Proposal No. 2, provided that:

(3) The total number of recruited student-athletes in each sport who represented the institution in intercollegiate competition during the *previous* academic year that began two years before and the number who either graduated, left the institution in good academic standing and having met the satisfactory-progress requirements for eligibility if the student had returned for the *current following* academic year or returned to the institution and met the satisfactory-progress requirements for continuing eligibility

CONVENTION PROCEEDINGS, *supra* note 122, at app. 4 (emphasis in original).

ance with continuing eligibility requirements, and graduation rates for recruited student-athletes and students generally to the Association in order to be eligible for NCAA championship competition."¹²⁹ In presenting this proposal on behalf of the Presidents Commission, the Very Reverend J. Donald Moran of Boston College noted that:

This proposal responds to the desires of more than 70 percent of the Division I presidents requesting the establishment of an academic reporting system. I personally believe it is going to contribute dramatically toward understanding what should be our greatest concern as presidents—namely, the academic status of our student-athletes from the day of their arrival to their hoped-for graduation and of the quality of academic programs they pursue.

I do not believe it is understood publicly that within the American educational system, and consequently among our members, there is extraordinary heterogenous academic mission and goals of academic programs. *I believe that the information provided in this proposal will provide a new understanding of the commonality of our academic interests and of their immense differences sometimes within the same institution. It will enable us to determine to what extent the academic treatment accorded athletes fits nationally within the diversity of our academic programs and clientele, or whether they compromise our fundamental academic standards.*¹³⁰

Based on Father Moran's comments, the statement of intent, the language of the proposal itself and the data that will be gathered as the proposal is implemented, this proposal may provide fodder for further changes in the governance of intercollegiate athletics at the Division I level.

During the consideration of this second proposal two concerns were voiced. First, there was concern over the timing of the reporting requirement. The Pac-Ten Conference argued that it would be unable to supply the information when required since classes do not start at some of its member institutions until October and it would not, therefore, be able to report whether or not their student-athletes were enrolled.¹³¹ This problem ultimately was resolved by amending the proposal to provide that the information regarding recruited student-athletes would refer to "the previous academic year *that began two years before.*"¹³² Second, questions were raised as to whether the reporting of graduation and related statistics on a sport-by-sport basis would lack anonymity and would, therefore, violate the privacy rights of individual student-athletes under the Buckley Amendment.¹³³ This potential problem

129. *Id.* at app. 1.

130. *Id.* at 62-63 (emphasis added).

131. *Id.* at 37-38.

132. See *supra* note 128.

133. CONVENTION PROCEEDINGS, *supra* note 122, at 40. As D. Alan Williams of the University of Virginia noted:

This is precisely a question that we had because of the Freedom of Information

was deflected by noting that the NCAA Council would review this issue and by adding that it might be possible to lump basketball and football players together for such reporting purposes, thereby assuring anonymity.¹³⁴

After adopting Proposal No. 2, as amended, the members began consideration of Proposal No. 3, the "death penalty." The expressed intent behind this proposal was:

[t]o establish distinctions between "major" and "secondary" violations of NCAA rules and regulations, to establish specific penalties for certain categories of violations (including repeated violations), to authorize specific disciplinary or corrective actions for institutional staff members found in violation of NCAA regulations and to authorize the assistant executive director for enforcement to impose penalties for secondary violations subject to an appeal to the Committee on Infractions.¹³⁵

The essence of this proposal was set forth in a proposed amendment which would add sections 7-(c) and (d) to the NCAA Enforcement Procedures. The first paragraph, section 7-(c), provides for a minimum penalty for a "major" violation:

(c) The minimum penalty for a major violation, subject to exceptions authorized by the Committee on Infractions in unique cases on the basis of specifically stated reasons, shall include:

(1) A two-year probationary period (including a periodic in-person monitoring system and written institutional reports);

(2) The elimination of all expense-paid recruiting visits to the institution in the involved sport for one recruiting year;

(3) A requirement that all coaching staff members in the sport be prohibited from engaging in any off-campus recruiting activities for one recruiting year;

(4) A requirement that all institutional staff members determined by the Committee on Infractions knowingly to have engaged in or condoned a major violation be subject either to termination of employment, to suspension without pay for at least one year or to reassignment of duties within the institution to a position that does not include contact with prospective or enrolled student-athletes or representatives of the institution's athletics interests for at least one year;

(5) One year of sanctions precluding postseason competition in

Act in the state of Virginia. All Division I institutions in Virginia now have been requested by one of the newspapers to provide precisely this information without regards to this particular one. What we have discovered is it is exceedingly difficult if you have a small category, in this case basketball, where you have one, two or three recruits in a given year, and then you add to that other special requirements such as those who might be specially admitted.

Id. It is unfortunate that the involved universities only appear to be concerned about issues of student-athletes' rights (e.g., privacy) when these rights have immediate legal implications for the institution itself. See *infra* notes 268-302 and accompanying text for a discussion of this and related issues.

134. CONVENTION PROCEEDINGS, *supra* note 122, at 41.

135. *Id.* at app. 3.

the sport;

(6) One year of television sanctions in the sport; and

(7) Institutional recertification that the current athletics policies and practices conform to all requirements of NCAA regulations.¹³⁶

The second paragraph sets forth a stringent punishment scheme for "repeat," "major" violators and contains provisions whose severity has caused them to be referred to as the "death penalty," providing as follows:

(d) An institution shall be considered a "repeat" violator if any "major" violation is found within the five-year period following the starting date of a "major" penalty. The minimum penalty for a repeat violator, subject to exceptions authorized by the Committee on Infractions in unique cases on the basis of specifically stated reasons, shall include:

(1) The prohibition of some or all "outside" competition in the sport involved in the latest major violation for one or two sports seasons and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities at the institution during a two-year period;

(2) The elimination of all initial grants-in-aid and all recruiting activities in the sport involved in the latest major violation in question for a two-year period;

(3) The requirement that all institutional staff members serving on the NCAA Presidents Commission, Council, Executive Committee or other committees of the Association resign those positions, it being understood that all institutional representatives shall be ineligible to serve on any NCAA committee for a period of four years; and

(4) The requirement that the institution relinquish its voting privilege in the Association for a four-year period.¹³⁷

Given the severity of the penalty scheme set forth in this portion of the proposal, it is surprising that it did not elicit significant negative response, and the entire proposal, as amended, was approved overwhelmingly by a vote of 427-6.¹³⁸ There were, however, occasional objections to the effect that the penalties were too stringent.¹³⁹ Chancellor Heyman commented on these objections when he stated:

I have heard people talk about the heaviness . . . of the minimum penalties that are put forth in this legislation, especially the ones for repeated major violations. They are heavy penalties . . . The survey of the presidents clearly indicated that . . . [harsh] penalties for violations were very much desired.

In fact, No. 3 probably does not go as far as a number of presidents wished with respect to penalties. That survey indicated to me that stiff penalties, meaning full penalties, . . . were essential to protect the integ-

136. *Id.* at app. 6.

137. *Id.* at app. 6-7.

138. *Id.* at app. 7.

139. *See, e.g.*, ANNUAL REPORT, *supra* note 9, at 299; CONVENTION PROCEEDINGS, *supra* note 122, at 43, 66.

rity of our institutions, and after all that is really what the special Convention is about.¹⁴⁰

This argument, based on the survey results, seemed to quiet, if not satisfy, detractors who had argued that the penalties were unduly severe.¹⁴¹

Other issues, however, particularly with regard to how and by whom the provisions would be interpreted, were raised and discussed at length. The major question posed centered on the distinction between "major" and "secondary" violations, and the generality of language used to define them. The only definition offered in the legislation itself was in the form of an amendment adding paragraph (d) to NCAA Enforcement Procedure section 2:

(d) Upon review of information developed by the investigative staff or self-reported by the member institution, the assistant executive director for enforcement shall identify the charges as involving alleged "major" or "secondary" violations. A "secondary" violation is one that provides only a *limited recruiting or competitive advantage*, and which is isolated or inadvertent in nature. All other violations, specifically including those that provide an *extensive recruiting or competitive advantage*, shall be considered "major." Further, the assistant executive director for enforcement may identify repeated "secondary" violations by a member institution as "major" violations.¹⁴²

In this regard, Chancellor Heyman recognized that the language of Proposal No. 3 was "not very precise, in fact, quite imprecise, with regard to distinguishing between secondary and major situations, defining the line between the two because we know there are minimal penalties stated here; and the penalties for major violations, and, certainly repetitive major violations, are stiff indeed."¹⁴³

The response to these objections was essentially twofold. First, Chancellor Heyman noted that:

When the President Commission was considering this proposed legislation it found it very difficult to definitively decide what acts are secondary

140. CONVENTION PROCEEDINGS, *supra* note 122, at 43. See also *id.* at 66, where Chancellor Heyman again addressed the severity objection by reemphasizing the results of the recent survey: There was overwhelming support for really stiff penalties in the presidents' survey. That was at the 80-to-85 percent level. So, there was very little doubt in our minds in drafting this legislation that such penalties were needed.

The reason for that overwhelming support was the perception by the Presidents Commission and those completing the survey instrument that such major penalties are essential to protect the integrity of intercollegiate athletics.

141. I am struck by the fact that neither at the Presidents Roundtable nor during the debate on the floor itself were there any discussions of an academic nature regarding the theory of punishment being invoked. See *infra* notes 235-44, 286-87, and 305 and accompanying text, for a fuller discussion of this and related issues.

142. CONVENTION PROCEEDINGS, *supra* note 122, at app. 5. (emphasis added).

143. See *id.* at 42-43, for Chancellor Heyman's comments at the General Round Table on Tuesday afternoon, June 19, 1985. Chancellor Heyman also recognized similar concerns at the Business Session on Friday morning, June 22. *Id.* at 65.

and what acts are major, especially without being able to see those acts in the context in which they would occur.

Consequently, the staff, the Committee on Infractions and the Council, all of whom will be involved in these deliberations and determinations over time, [in] really a common law way, will build up the list of things that are secondary and the things that are major.¹⁴⁴

Second, recognizing that because he was a "presenter" his comments would "become part of the legislative history of this proposal if it is passed,"¹⁴⁵ Chancellor Heyman endeavored to clarify the meaning of the distinction between "major" and "secondary" violations, by stating that:

The determination of the classification would be based not only upon a review of the particular regulation that has been violated and the extent of the violation, but also would depend upon other relevant and mitigating factors in this specific case, such as the reasons why the violations occurred, the intent of the individuals involved, the previous record of findings and more.¹⁴⁶

In discussing mitigating and relevant factors, Chancellor Heyman pointed out that:

Such factors include the reasons why the violations occurred, the intents of the individuals involved, the previous record of findings of violations involving the individual or institution and the corrective or disciplinary actions taken by the institution or its conference. I think that is very important because we do not want to undercut the active involvement of conferences with respect to endorsement [sic] and policing. The distinction between secondary and major violations is to be based in part on the analysis of those infractions cases during the past 10 years that have resulted in actions by the Committee on Infractions to impose penalties involving both a period of probation and sanctions relating to television appearances in postseason events.

Those cases that have resulted in penalties involving a probationary period of no more than one year with no television or postseason sanctions would be considered generally to involve findings of secondary violations.¹⁴⁷

Even this explanation was so general that Chancellor Heyman felt compelled to offer additional examples. He began by describing scenarios of what

144. *Id.* at 43. In this regard, Paul Regel of the College of William and Mary stated that: [i]t might be wise if the Council would accept this not only to develop a common law with respect to the nature of violations that are secondary rather than major, but also to publish from time to time, rules that indicate what those violations are and how they look, because they will change over time.

Id. at 46. See also comments regarding the development of such a common law, *id.* at 65.

145. *Id.* at 43.

146. *Id.* Elsewhere, Chancellor Heyman added that, "[a] secondary violation is defined as one that provides only a limited recruiting or competitive advantage and which is isolated or inadvertent in nature. All other violations, specifically including those that provide the extensive recruiting and competitive advantage, are to be considered as major." *Id.* at 65.

147. *Id.* at 65-66.

“we” (evidently referring to the Presidents Commission), consider to be “secondary” violations:

Those would include but would not be limited obviously to, first, the provision of local automobile transportation in the hometown of the prospective student-athlete, or a clerical error that resulted in limited practice for competition of a student-athlete while enrolled in less than a full-time academic load; the entertainment of the prospective student-athlete with the prospect’s family members for a meal under circumstances unrelated to an expense-paid visit to the institution; improper publicity regarding the commitment of a prospective student-athlete, or a clerical error or misinterpretation of an NCAA rule that results in practice or play during the first year in residence by a nonqualifier or transfer student; the incorrect calculation of the starting date of the preseason practice season; the failure to notify a student-athlete that the individual’s grant-in-aid will not be renewed; the failure to notify the individual of the appropriate hearing opportunities related to the financial aid renewals; isolated or inadvertent violations of NCAA regulations governing recruiting contact and evaluation periods, or technical violations of the NCAA tryout rule, and limited violations of the NCAA’s out-of-season practice regulations. Those are a good enough set of examples.

You can see that if we really had to codify all of these in the legislation, the legislation would be endless. But that gives you a course set of what we have in mind with regard to secondary violations.¹⁴⁸

Then, referring to cases decided by the Committee on Infractions during the past ten years, he said that:

major violations would include, but not be limited to, such things as the following: violations of the provision of NCAA Constitution 3-3-6-(a), that is ethical [sic] conduct by student-athletes, institutional staff members or athletics representatives that are designed to conceal the disclosure of the active information regarding alleged violations; the promises or arrangement of benefits involving substantial material value for prospective or enrolled student-athletes; an extensive pattern of secondary violations that resulted in a substantial recruiting advantage to the institution; the alteration of academic records to the purpose of circumventing institutional, conference or association eligibility standards, and institutional decisions to refuse to apply applicable eligibility regulations in accordance with the conditions and obligations of membership. Those are examples of what we would consider major.¹⁴⁹

148. *Id.* at 66. It is unfortunate that Chancellor Heyman included “the failure to notify a student-athlete that the individual’s grant-in-aid will not be renewed” and the “failure to notify the individual of the appropriate hearing opportunities related to financial aid” as examples of secondary violations. Such disregard of student-athletes’ basic due process rights are regrettable and the institutions should not be informed that such violations are so insignificant as to be examples of secondary violations. With the move to reduce the number of scholarships, problems with regard to nonrenewal will be exacerbated and the need for a modicum of due process will be intensified. See *infra* notes 286-302 and accompanying text for a further discussion of due process and related objections.

149. CONVENTION PROCEEDINGS, *supra* note 122, at 66 (emphasis added).

An examination of Chancellor Heyman's comments clearly leads to the conclusion that the distinction between "major" and "secondary" violations remains nebulous, perhaps necessarily so.¹⁵⁰ At one point, for example, Chancellor Heyman noted that "[a] secondary violation is defined as one that provides only a *limited* recruiting or competitive advantage and which is isolated or inadvertent in nature. All other violations, specifically including those that provide an *extensive* recruiting and competitive advantage, are to be considered major."¹⁵¹ There is a broad spectrum between "limited" and "extensive," but the gap between these two qualifying terms is not filled with differing degrees of violations—a violation only can be "major" or "secondary." Of course one might argue that this ambiguity supplies the Committee on Infractions necessary latitude to mete out justice; however, particularly in the case of student-athletes and coaches, who can now be directly punished under these provisions,¹⁵² there is little notice and limited precedent regarding the nature of given violations.¹⁵³ Chancellor Heyman, nevertheless, was able to minimize concerns of the membership on this issue and the legislation was passed overwhelmingly. It is, however, an area that will surely provoke future problems as the anticipated common law develops.

In a related sense, there was concern over the extent of power delegated to the NCAA staff to ascertain whether a given violation was "major" or "secondary."¹⁵⁴ Initially, there was concern that, "in the definition of the processing of secondary violations . . . the NCAA staff has [been given] too much authority, and that the staff is both the investigat[or] and also the judge with regard to what are classified as secondary violations."¹⁵⁵ In response to this objection, the Council:

proposed an amendment . . . requiring that the chair of the Committee on Infractions or another member of that Committee designated by the chair has to approve [such] actions by the assistant executive director for enforcement before they become operative.

In other words, this will bring the Committee on Infractions in through the chair or representative so that it requires the consensus of the two in order to proceed with regard to violation and punishment.¹⁵⁶

150. I say necessarily because it is clear that there needs to be ample flexibility in the application of these rules to achieve justice in individual cases by taking into consideration mitigating factors, institutional and conference efforts, the cooperation of the institution, the intent of the parties, the needs of student-athletes, etc.

151. *Id.* at 65.

152. See *infra* notes 264-82 and 286-302 and accompanying text.

153. See *id.* for a discussion of the grave need on the part of the NCAA to be sensitive to due process and fundamental fairness concerns, particularly in the formative years as precedent develops.

154. CONVENTION PROCEEDINGS, *supra* note 122, at 42, 66.

155. *Id.* at 42.

156. *Id.*

Most staff-related objections were satisfied by the adoption of these amendments¹⁵⁷ and by adoption of an amendment to NCAA Bylaw 9-5-(d), which provided for notice and appeal to involved institutions of any specific charges related to an investigation by staff for secondary violations.¹⁵⁸

Another key issue arose over the question of timing. Issues were raised as to whether the five year period would apply retroactively, and, if so, in what manner. President Davis, in answering a question regarding to what extent the repeat violator provisions of Proposal 3 would apply if the legislation were adopted, indicated that:

These provisions would apply under certain circumstances to previous infractions cases. This would be any institution that has been involved in a major case prior to this special Convention, and a major case is defined as a case that resulted in a penalty involving at least a one-year probationary period and sanctions prohibiting either television or post-season appearances, those institutions that have that case countable toward the double major penalty if the second major infractions case is processed to completion by the Committee on Infractions within five years of the date the penalties started in the first case.

For example, an institution that received a major penalty in November 1980 could fall into the double major category only if a second major case involving the institution was processed to completion by the Committee on Infractions by November 1985. We intend to report this interpretation directly to every institution involved in a major infractions case during the five years. Every institution should know where it stands.

An appeal of an infractions case to the NCAA Council would not set aside the timing element in this interpretation unless the Council determined not to uphold the findings, i.e., the penalty imposed by the Committee on Infractions. But in any case, the double major legislation would not be applicable until the second case was initiated by official inquiry filed after September 1, 1985.¹⁵⁹

Edward T. Foote II, of the University of Miami, noted that he was surprised to learn of the Council's interpretation regarding retroactive application of the severe penalties in Proposal 3.¹⁶⁰ Foote stated that he had "assumed that the normal principles governing the changes in the law in the retrospect to application of the law would apply,"¹⁶¹ and added that:

157. *See id.* at app. 4 for sections amended.

158. This amendment provided, in pertinent part, that:
a member under investigation for secondary violations:

(1) Shall be given notice of any specific charges against it and the facts upon which such charges are based, and

(2) Shall be given an opportunity to provide a written response to the assistant executive director for enforcement (or appear before the Committee on Infractions upon appeal) to answer such charges by the production of evidence.

Id.

159. *Id.* at 44.

160. *Id.* at 47.

161. *Id.*

I am particularly surprised now to learn that the interpretation of the Council itself that has now suggested formally on behalf of the institution that these penalties, which most people would agree are indeed severe and are proposed for the first time, would apply retrospective in the nature of *ex post facto* application of the law. This may well be one of the most important points that we debate tomorrow.

Therefore, I would like to know . . . what were the reasons that prompted the Council to come up with this retrospective interpretation of what I would say on its face appear to be something else.¹⁶²

President Davis responded by discussing and quoting from the opinion of legal counsel on the matter:

In the law of status, it generally is held that remedial or procedural status, which do not affect investigated rights, operate retrospectively and are applicable to pending actions or proceedings. Proposal No. 3 is remedial or procedural legislation even though substantial interests may be affected because no member could have a vested right arising out of violations of Association rules. There also are cases in the securities field that hold that where a statute is remedial in purpose it should be broadly construed to effectuate its purpose. Thus, the new legislation could on the basis of those principles be applied to any pending cases.

Then counsel goes on to say it is inappropriate to apply the new legislation to cases where the old procedures have been initiated. So, it should be understood that the effective date of September 1, 1985, has this effect on institutions generally throughout Proposal 3. If an institution has received its official notice prior to September 1, 1985, then the old policies apply. On the other hand, if an institution receives its official notice of violations subsequent to September 1, 1985, then the new procedures and penalties are applicable.

The counsel goes on to say with regard to the major violations: "In applying the new procedure, major violations occurring prior to September 1, 1985, should be considered in determining whether or not a member is a repeat violator, otherwise, there would be a lengthy or unnecessary delay in the implementation of that legislation and many repeat violators would escape the stiffer penalties. This would seem in the minds of the counsel to be contrary to the intent of the members in making the legislation effective September 1, 1985."¹⁶³

Chancellor Charles Young of the University of California at Los Angeles offered an amendment that had been unanimously adopted by the Pac-Ten Conference limiting what that conference believed to be questionable aspects of retroactive application of the strictures of Proposal 3.¹⁶⁴ Chancellor Young stated that:

162. *Id.* at 47-48.

163. *Id.* at 48.

164. With as many as five member schools in the Pac-Ten Conference affected by potential retroactive applications of Proposal No. 3's penalty provisions regarding repeat violators, it was not surprising that the conference opposed the Council's initial interpretation. *See, e.g.*, Associated Press, Aug. 17, 1985; L.A. TIMES, June 21, 1985, § 3, at 1, col. 1.

We in the Pac-10 have discussed this matter and believe that retrospective application is at least questionable, if not inappropriate, and have proposed an amendment to the amendment that would add at the end of the first sentence in subparagraph (d), "which it is imposed after September 1, 1985" to make clear that the period would begin running September 1, 1985, and any two major infractions occurring after that date within a five-year period would result in the penalty that would be required for a repeat offense but would not take into account actions that had occurred in the past when this penalty did not exist and was not known to those, therefore, who might have been involved in some kind of problem.¹⁶⁵

Chancellor Young and the Pac-Ten subsequently agreed to withdraw their proposed amendment opposing the Council's initial interpretation regarding the retroactivity in the belief that "the most onerous aspects of the retroactivity have been eliminated."¹⁶⁶ As revised and accepted by the Pac-Ten, the Council's interpretation was summarized as follows: "[T]o be considered as a repeat violator the second major offense must be one that occurs after September 1, 1985, and within five years from the starting date of the major penalty. That is the interpretation that was adopted by the Council with the concurrence of the Presidents Commission."¹⁶⁷ This interpretation made clear that the second major violation would have to occur after September 1, 1985, whereas under the initial interpretation questioned by the Pac-Ten, the second major violation need only be "*processed to completion* by the Committee on Infractions within five years of the date the penalties started in the first case." Questions remain, however, regarding the fairness of such retroactivity, together with possible double jeopardy issues, particularly as to a coach who may be penalized in a more stringent fashion for being involved in a second major violation even though the coach was not involved in the first major violation. In such a situation, the coach would effectively be punished more severely for the violation than she would if the violation had been the institution's first violation within a five year period.¹⁶⁸

This observation raises two further, related objections proffered at the special Convention: (1) the fact that the provisions applied directly to coaches, and (2) potential due process problems. Coaches were to be directly covered for the first time under an amendment to article 3, sections 2-(d) and (e) of the NCAA Constitution:

(d) Institutional staff members found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedure, whether such violations occurred at the certifying institution or during the individual's previous employment at another member institution.

165. CONVENTION PROCEEDINGS, *supra* note 122, at 44.

166. *Id.* at 65.

167. *Id.* at 64-65.

168. *See infra* notes 269-70 and accompanying text.

(e) Contractual agreements between a coach and an institution shall include the stipulation that a coach who is found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedure.¹⁶⁹

NCAA Enforcement Procedure section 7-(d)-(1) also would reach coaches and provides that the following penalty might apply:

The prohibition of some or all 'outside' competitions in the sport involved in the latest major violation for one or two sports seasons and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities at the institution during a two-year period.¹⁷⁰

The latter provision prohibiting coaching activities puzzled Chancellor Young who noted that he read it to mean:

that the coaching staff would be prohibited from coaching for the full two year period even if the penalty in terms of outside competition was only part of a season, which would mean that if that is correct, that you would be able to participate but you could not have the coaching staff that you have hired to do that.¹⁷¹

Secretary-Treasurer Bailey agreed that such an interpretation was plausible,¹⁷² and asked Steve Morgan, legal counsel, to respond. Morgan noted that he thought:

the intent [was] to mean not through the entire period, but to coordinate the assessment against the number of games or seasons that the institution would not be able to compete—to coordinate that with the period of time that the coaching staff would not be able to coach. The Committee would have the flexibility to make the coaching staff restrictions consistent with the game restrictions.¹⁷³

Questions also were raised as to whether or not the provisions regarding coaches were to apply in such a manner as to restrict a coach's faculty status at a campus granting such status. Bailey responded that it was only meant to apply where the coach had contractual, as opposed to faculty, status with an institution.¹⁷⁴

Another issue related to Proposal No. 3 that sparked significant discussion was the due process concern. Donna A. Lopiano of the University of Texas spoke on behalf of the sponsors (the Southwest Conference) of Proposal 3-3, stating that "a resolution that calls for development of due-process leg-

169. CONVENTION PROCEEDINGS, *supra* note 122, at app. 3.

170. *Id.* at app. 7.

171. *Id.* at 47.

172. *Id.*

173. *Id.* At the suggestion of Chancellor Young, that interpretation was entered as part of the record. *Id.* See also *id.* at 69.

174. *Id.* at 45-46.

islation be considered [at] the 1986 Convention."¹⁷⁵ Lopiano argued, on behalf of the proposed resolution, that the NCAA was "obligated to refine existing investigatory and due-process mechanisms to protect those who want to be able to prevent major violations and wish to be immediately informed when staff members or other institutional representatives appear to be acting contrary to NCAA rules and regulations,"¹⁷⁶ and that:

it is too late for integrity, it is too late for accountability, it is too late for the chief executive officer to control athletics when we do not immediately inform an institution of a potential violation and do not allow that institution to clean its own house in a timely and constructive fashion.¹⁷⁷

Chancellor Heyman countered on behalf of the Presidents Commission. He emphasized that they are "very sympathetic to the concerns that are

175. *Id.* at 69. The resolution provided that:

Whereas, the ultimate objective of N.C.A.A. rules is to maintain integrity and fairness in intercollegiate athletics competition; and

Whereas, the Association is considering amendments which increase the range and severity of penalties levied for violations of N.C.A.A. rules; and

Whereas, the prospect of such a penalty system has increased member institutions' concern for fairness and due process in investigation and enforcement procedures;

Now, Therefore, Be It Resolved, that the Council shall prepare legislation for submission to the 1986 N.C.A.A. Convention which will provide for inclusion of the following as requirements under the "Official Procedures Governing the N.C.A.A. Enforcement Program," and which will encourage communication among the administrative staff and member institutions.

Be It Further Resolved, that it shall be the responsibility of member institutions to inform prospective student-athletes in writing, upon commencement of recruiting each of those student-athletes, of the specific penalties that may be imposed on them for violations of N.C.A.A. rules and regulations.

Be It Further Resolved, that the N.C.A.A. shall send immediately, to the principal athletics administrator(s) and/or chief executive officer of each member institution, copies of all documents of inquiry or allegations relating to possible violations of N.C.A.A. rules and regulations received by the N.C.A.A. pertaining to their institution.

Be It Further Resolved, that every inquiry or allegation that relates to possible violations by a member institution shall be submitted in writing and shall be investigated promptly. The institution shall be notified that the investigation is underway. Decisions to commence inquiries or investigations shall not be based on any theory of accumulation. [Note: This shall not preclude the imposition of penalties based on cumulative violations.]

Be It Further Resolved, that the chief executive officer of each member institution shall be given a copy of all investigative reports and other documents prepared with reference to that institution.

Be It Finally Resolved, that any member institution which submits a request for inquiry or alleges a violation on the part of another member institution, shall be informed of the resolution of that inquiry/investigation within 12 months of the submission of such inquiry/allegation.

Id. at app. 9.

176. *Id.* at 69.

177. *Id.* at 69-70.

evidenced by [the] proposal” and that they recognize that, “the procedures that attend enforcement processes of the Association meet legal and moral responsibilities with respect to those people in those institutions who are accused,” but he added that it was “premature” to instruct the Council “to prepare legislation that embodies those principles that are stated in this [resolution].”¹⁷⁸ Chancellor Heyman further indicated that he felt it was premature because some of the ideas set forth in the resolution, “should be thought through further before the legislation is drafted for the consideration of this body.”¹⁷⁹ Chancellor Heyman offered two illustrations to support this position. First, he noted that the resolution’s directive to force the NCAA to “send immediately to the principal athletics administrators and the chief executive officer of each institution copies of all documents of inquiry or related allegations” might be a good idea but it needed further thought before legislation was drafted. Second, Chancellor Heyman felt the reference to delivering “all investigative reports” might be too broad.¹⁸⁰ Finally, in an effort to placate concerns over the due process issue, Chancellor Heyman moved that the resolution be referred to the Presidents Commission and the Council with the assurance that attention will be given, “to these due process problems in the very near future for consideration probably at the January Convention.”¹⁸¹ While Heyman’s remarks satisfied most members,¹⁸² and the motion to refer Proposal 3-3 was adopted,¹⁸³ it did not satisfy Lopiano, who continued to assert her belief that, “it is important that we not leave here without making a due-process statement.”¹⁸⁴

Having successfully deflected the due process argument by referring the matter to the Council and the Commission, and having mustered over-

178. *Id.* at 70.

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., statements supporting the motion to refer made by Russell J. Poel, *id.*; Asa N. Green, *id.* at 71; and Tom Farer, *id.* Of particular interest were Poel’s comments to the effect that,

Although some of the suggestions in this resolution are of value, there are others, particularly those that talk about immediate disclosure of all data, that would impair and seriously damage the effectiveness of the enforcement program. . . . [T]he Council is concerned that the Convention might direct the Council to prepare amendments that it believes in some instances would gravely weaken the effort to reduce cheating and violations in college athletics.

Id. at 70-71.

183. *Id.* at app. 10.

184. *Id.* at 70. Frank E. Vandiver of Texas A & M University also opposed referral of the resolution. Vandiver felt that the disclosure called for in the resolution would be part of “a healthy process to let [members] know what is going on and possibly [would constitute] a chance to give [institutions] a shot at in-house cleaning up.” *Id.* at 71. Vandiver added that he did not feel the resolution had the effect of directing the Council to draft legislation based on its specific provisions.

whelming support for Proposal No. 3, the Convention turned to Proposal 4. The express intent behind that Proposal was:

[t]o require that restrictions imposed upon an institution's coaching staff member by the Committee on Infractions or as a result of the show-cause provision of the enforcement procedures be applied to the coach even if he or she is employed by an institution other than the one at which the violations occurred.¹⁸⁵

This legislation, which elicited no discussion in the Business Meeting, was passed by a total vote of 431-1.¹⁸⁶

The Convention next considered Proposal No. 5, a resolution regarding the eligibility of student-athletes.¹⁸⁷ That proposal would have held student-

185. *Id.* at app. 10. As such, Proposal 4 would amend NCAA Bylaw 5-6-(d)-(3) by deleting its present language and substituting the following:

(3) At the time of such certification, no current member of its coaching staff has been within the past two years:

(i) Temporarily or permanently suspended from coaching duties by another member institution; or

(ii) Prohibited as a result of violations occurring while employed by another member institution from participating in certain identified coaching-related activities, unless the prohibition has been equally applied by the certifying institution with respect to the individual's coaching-related activities on behalf of it; or

(iii) Permitted to perform any coaching-related activities for the certifying institution that were prohibited after determination by the Committee on Infractions of an "appropriate disciplinary action" for the individual in accordance with the show-cause provision of Section 7-(b)-(12) of the NCAA enforcement procedure, as a result of involvement in a violation of the Association's legislation as determined by the Committee on Infractions or the Council, provided the period of suspension or prohibition is in effect and provided the coaching staff member has been given through the appropriate institution notice of an opportunity to be heard at both the NCAA hearing resulting in the finding of involvement in the violation and the institutional hearing resulting in suspension or prohibition.

Id. at A-10.

It would also amend NCAA Enforcement Procedure § 7-(b)-(12) to provide as follows: "Requirement that a member institution that has been found in violation, *or that has an athletics department staff member who has been found in violation of the provisions of the NCAA legislation while representing another institution*, show cause . . ." *Id.* at A-10 (emphasis in original).

186. *Id.* at 72, A-10.

187. As proposed, the resolution stated that:

Whereas, concern has been expressed that prospective and enrolled student-athletes who are involved in serious violations of NCAA rules and regulations should be held accountable and should remain ineligible for intercollegiate athletics competition; and

Whereas, although institutional staff members and representatives of athletics interests have the greatest responsibility to ensure that violations do not occur and experience indicates that staff members and representatives are the primary impetus for violations of NCAA regulations, prospective and enrolled student-athletes are not without blame in the violations; and

Whereas, it is the present policy of the NCAA Eligibility Committee and N.C.A.A. Council not to restore the eligibility of an improperly recruited student-

athletes involved in serious violation of NCAA rules and regulations blameworthy and "accountable," such that they "should remain ineligible for intercollegiate athletics competition." Prior to its consideration, Charles L. Sewall of Robert Morris College moved for the adoption of Proposal No. 5-1.¹⁸⁸ In behalf of his amendment, Sewall argued that:

Resolution 5 would broaden the responsibilities of students with compliance. Certainly, we support this philosophy generally and we think that the Council and the Presidents Commission ought to be commended for their solid and encouraging work.

However, there does appear to be a significant omission in Proposal No. 5. . . . [W]ith the amendment to 3-3, Paragraph 5, it has answered some of our objectives, namely that this information is now made available or suggested to be made available to the recruit upon his acceptance. Our amendment addresses another need.

[W]e propose that the Council be directed to prepare a summary of NCAA rules and regulations that all members would be required to distribute to their recruits and student-athletes and that each varsity team would be required to meet as a group at least once each season to review the summary. We think this apparatus would be helpful for two reasons. First, as I have mentioned, it would help familiarize student-athletes who want what is expected or required of them.

Speaking for myself, I think also it applies to the presidents. . . . As educators, it is our duty to educate them in this area among others.

Secondly, this educational process should preempt any argument that we have acted unfairly to students misled by others. If we provide our students with the informational tools they need, most of the observers

athlete who attends the institution involved in the violation if the committee concludes that the violation resulted in a recruiting advantage for the involved institution or a substantial material benefit to the prospect;

Now, Therefore, Be It Resolved, that the Eligibility Committee restore the eligibility of student-athletes involved in violations only when circumstances clearly warrant restoration; that the NCAA Council be directed to develop legislation for consideration at the 1986 Convention to ensure that student-athletes are held accountable for serious violations of NCAA rules and regulations in which they knowingly participate, and that the proposed legislation be available for review by the Presidents Commission in its October 1985 meeting.

Id. at A-10-11.

188. Sewall's proposal would have amended the fourth paragraph to provide as follows:

Now, Therefore, Be It Resolved, that the Eligibility Committee restore the eligibility of student-athletes involved in violations only when circumstances clearly warrant restoration; that the NCAA Council be directed to develop legislation for consideration at the 1986 Convention to ensure that student-athletes are held accountable for serious violations of NCAA rules and regulations in which they knowingly participate; *that such legislation include provisions for mandatory distribution to all recruits and student-athletes of a summary of applicable NCAA rules and regulations, such summary to be developed by the Council, and for mandatory review of the summary by each varsity team meeting as a group at least once in each season*, and that the proposed legislation *and summary* be available for review by the Presidents Commission in its October 1985 meeting.

Id. at A-11-12 (emphasis in Sewall's amendment).

likely will agree that we have acted responsibly and without failure of sanctions, whatever sanctions may be imposed.

[W]e believe that educating our students to our rules and regulations each and every year is an important area that must be addressed Ignorance of rules may be no defense for cheaters, but if we permit our student-athletes to remain ignorant, our conduct must be just as indefensible.¹⁸⁹

Sewall's amendment was defeated, without debate, by a 202-205 margin.¹⁹⁰ In opposing the amendment, the Commission again evidenced some insensitivity to the due process and related rights of student athletes.¹⁹¹

Having defeated Sewall's amendment, the Convention adopted, by a vote of 436 to 0, and without further discussion, the resolution contained in Proposal 5. In supporting the Resolution, President Singletary declared that it affirms that:

member institutions expect student-athletes to be held responsible for their actions. It directs the Eligibility Committee to restore student-athletes' eligibility only when circumstances clearly warrant restoration [and] directs the [Council] to develop legislation for consideration at the 1986 Convention to ensure that student-athletes are held accountable for serious violations of NCAA rules and regulations¹⁹²

The Convention then turned to Proposal No. 6 dealing with the principle of institutional control and responsibility. This proposal was intended to "require that a member institution's annual intercollegiate athletics budget shall be controlled by the institution and subject to its normal budgeting procedures and that it be approved by the institution's chief executive officer or his or her designee."¹⁹³ This amendment was approved by a vote of 438-1,¹⁹⁴ and the Convention next considered Proposal No. 7.

Proposal No. 7 was intended to "require an annual audit of all expenditures for an institution's intercollegiate athletics program by an individual from outside the institution selected by the institution's chief executive officer

189. *Id.* at 72.

190. The vote was 202 for and 205 against. *Id.* at A-12.

191. See *infra* notes 286-302 and accompanying text.

192. CONVENTION PROCEEDINGS, *supra* note 122, at 73.

193. *Id.* at A-12. The proposal would amend art. 3, § 2 of the NCAA Constitution by adding paragraph (b), which would provide as follows:

(b) An institution's annual budget for its intercollegiate athletics programs shall be controlled by the institution and subject to its normal budgeting procedures. The institution's chief executive officer or an institutional administrator from outside the athletics department designated by the chief executive officer shall approve the annual budget in the event that the institution's normal budgeting procedures do not require such action.

CONVENTION PROCEEDINGS, *supra* note 122, at A-12.

194. *Id.* at 73.

or his or her designee."¹⁹⁵ Some discussion ensued, and concern was voiced over a few points. There was a question as to whether booster groups would have to submit their entire budgets to an audit. This concern was mitigated when it was pointed out by John B. Slaughter of the University of Maryland, the presenter on behalf of the Commission, that only athletic expenditures would be covered.¹⁹⁶ There were also some logistical concerns, particularly among public universities with established external audit procedures, as to whether this legislation would require a separate or additional external audit. President Davis responded by stressing that the language only requires a "qualified auditor who is not a staff member."¹⁹⁷ After these and related minor concerns were addressed, Proposal No. 7 was adopted by a vote of 422-14.¹⁹⁸ Proposal No. 7, together with Proposal 6, serve as further evidence of the intent of the Presidents Commission to gain control over their respective athletic budgets and to begin to exercise control over booster groups.

The next resolution, Proposal No. 8, dealt with the presidents' desire to limit the number of athletic contests generally, and to limit specifically the number of basketball games an institution may play each year that do not count toward the limitations in that sport.¹⁹⁹ This resolution was approved

195. *Id.* at A-12. The proposal would also amend art. 3, § 2 of the NCAA Constitution and would provide that:

(c) All expenditures for or in behalf of an institution's intercollegiate athletics programs, including those by any outside organization, agency or group of individuals (two or more), shall be subject to an annual financial audit conducted for the institution by a qualified auditor who is not a staff member of the institution and who is selected either by the institution's chief executive officer or by an institutional administrator from outside the athletics department designated by the chief executive officer (in addition to any regular financial audit policies and procedures of the institution). The audit report shall be presented to the chief executive officer.

196. CONVENTION PROCEEDINGS, *supra* note 122, at 74.

197. *Id.* at 75.

198. *Id.*

199. As adopted, Proposal No. 8 provides that:

Whereas, the proliferation of contests and competitive dates in various sports contributes significantly to the spiraling costs of conducting intercollegiate athletics programs; and

Whereas, restrictions on the number of contests or dates of competition in each sport are necessary to preserve an adequate period of time for participating student-athletes to meet academic commitments and requirements; and

Whereas, member institutions have adopted legislation to exempt certain basketball competition from counting toward the permissible number of contests; and

Whereas, at the 1985 NCAA Convention, the members of Division I and Division II adopted limitations on the number of competitive opportunities in all sports;

Now, Therefore, Be It Resolved, that this Association does not favor an increase in the permissible number of regular-season intercollegiate contests or dates of competition in any sports, including football or basketball; and

Be It Further Resolved, that the NCAA Council be directed to develop legislation

by a vote of 429-3 and expressed concern over "the spiraling costs of conducting intercollegiate . . . programs" and the time expended by student-athletes on athletics, depriving them of adequate time to meet their academic responsibilities.²⁰⁰

The Convention next considered Proposal No. 9, which was presented by the Council,²⁰¹ and was based upon the results of the Presidents Commission's survey. That survey indicated a strong desire on the part of the presidents to maintain "the Association's current financial aid and related amateurism rules"²⁰² In furtherance of these ends, the resolution resolved that:

prior to the beginning of the 1985-86 academic year or shortly thereafter, through direction of their chief executive officers, [member institutions] shall administer affidavits to all varsity and recruited new student-athletes, the form and content of the affidavit to be prescribed by the NCAA Council and to include specific questions and require specific information concerning financial assistance and athletically related benefits currently being received or to be received by said student-athletes

. . . .²⁰³

The one-time use of this resolution was but another indication of the commitment of the Convention to ensure academic integrity in intercollegiate athletics. It also foreshadowed the cost-containment concerns that were to become significant in the next concerted legislative effort by the Presidents Commission in 1987. At that meeting, the Commission called for another special Convention to deal with economic issues.²⁰⁴ The remaining proposals, Nos. 10-12, dealt with administrative matters and are insignificant for the purpose of this Article.

As the preceding examination illustrates, the Presidents Commission wanted to go on record as having taken a dramatic first step toward gaining a measure of control over their athletic programs and restoring a sense of academic integrity to those programs. Much that transpired was salutary, at least for those who desire a reassertion of academic responsibility in intercollegiate athletics. Questions, nevertheless, linger as to whether the presidents can maintain a high level of continuing control over academic integrity and related issues in intercollegiate athletics, and as to whether the

for consideration at the 1986 Convention to permit a member institution's intercollegiate basketball team to participate in any one year in no more than one of the opportunities, including a foreign tour, for competition that do not count toward the maximum number of contests.

Id. at A-13.

200. *Id.* at 75-76.

201. The prior Proposals, Nos. 1-8, were initiated by the Presidents Commission. Proposals No. 9 and 10-12 all originated with the Council.

202. CONVENTION PROCEEDINGS, *supra* note 122, at A-13.

203. *Id.* at A-14.

204. See, e.g., Lederman & Farrell, *Mood of Reform Dominates NCAA Meeting; Presidents' Group Sets a 'Whole New Agenda'*, Chron. Higher Educ., Jan. 21, 1987, at 33-35.

course charted in the summer of 1985 was in some measure misdirected. The remainder of this Article primarily examines the latter issue, particularly as it applies to presidents and their institutions, coaches and athletic administrators, and finally the student-athletes themselves. The Article concludes with some observations regarding the future of the reform movement initiated by the Presidents Commission in the summer of 1985.

III. HOW THE PRESIDENTS PUNISH THEMSELVES AND OTHERS: AN EVALUATION

A. *The Presidents Punish Themselves*

In this portion of the Article, I first will look at how the presidents punished themselves as chief executive officers and then I will turn to an examination of how they punished their institutions, thereby indirectly punishing themselves. In engaging in this analysis, I will address both practical and theoretical problems and possibilities.

1. How the Presidents Commission Punished Chief Executive Officers

At first blush, it would appear that the presidents engaged in a bit of self-preservation by refraining from punishing themselves directly in adopting the "death penalty" legislation. For example, while the presidents proposed and the Special Convention passed legislation designed to punish institutional staff,²⁰⁵ coaches²⁰⁶ and student-athletes²⁰⁷ directly, the presidents never expressly mentioned themselves while designing the punishment scheme adopted at the special Convention. There are, however, two provisions that might be construed to apply to the presidents individually, at least under certain circumstances.

In setting a minimum penalty for a major violation, NCAA Enforcement Procedure section 7-(c)-(4) provides that except in unique cases, the penalty shall require "that *all institutional staff* members determined by the Committee on Infractions knowingly to have engaged in or condoned a major

205. See, e.g., Proposal No. 3, *supra* text accompanying note 136, severely punishing all "institutional staff members" who "knowingly . . . engaged in or condoned a major violation." See also *id.* at § 7-(d)-(3).

206. See, e.g., Proposal No. 4, *supra* note 185, at 5-6(d)-(2) and NCAA Enforcement Procedure *supra* text accompanying note 136, at § 7-(c)-(3), expressly punishing coaches. Additionally, the reference to personnel in NCAA Enforcement Procedure, §§ 7-(c)-(4) and 7-(d)-(3) discussed in the preceding footnote also presumably refers to coaches.

207. See, e.g., Proposal No. 5, *supra* text accompanying note 185, dealing with the eligibility of student-athletes. See also CONVENTION PROCEEDINGS, *supra* note 122, at A-11-2.

violation be subject either to termination of employment, to suspension without pay . . . or to reassignment of duties within the institution"²⁰⁸ While the term "institutional staff" conceivably might not be interpreted to include presidents who have knowledge of or condone major violations, the NCAA apparently may take the position that it refers to all those connected with the university or college, including chief executive officers.²⁰⁹ Indeed, with adoption of proposals requiring academic reporting,²¹⁰ institutional self-study,²¹¹ institutional control over the budget process²¹² and an independent audit of all expenditures related to an institution's intercollegiate athletic program,²¹³ it is evident that the chief executive officer generally should be in a position to have at least constructive knowledge of potential problems in the institution's athletic program. Additionally, it is certainly conceivable that a chief executive officer may possess actual knowledge of violations. With access to this information or knowledge, the chief executive might be held accountable in some measure for excesses in the athletics program that ultimately lead to violations of the NCAA rules. This conclusion is further buttressed by the increasingly active role the presidents are taking in controlling their athletic programs and by the fact that Official Inquiries have, as a matter of past practice, expressly named the president.²¹⁴ In exercising

208. NCAA Enforcement Procedure, *supra* text accompanying note 136, at § 7-(c)-(4) (emphasis added). See also NCAA Enforcement Procedure, *supra* text accompanying note 137, at § 7-(d)-(3).

209. Telephone conversation with Charles E. Smrt, Assistant Director of Enforcement of the NCAA (March 19, 1987).

210. Proposal No. 2, as adopted, amended Bylaw, see *supra* note 127, at 5-6-(e) and applied only to Division I institutions. Under this provision the chief executive officer is required to accumulate and provide annual information regarding entrance requirements, academic status of current students athletes, graduation rates and programs of study. With such information the chief executive officer might well gain actual or constructive knowledge of certain improprieties.

211. Proposal No. 1, amending art. 4, § 2(b) of the NCAA Constitution, see *supra* note 121 requires each institution to conduct a comprehensive self-study of its athletic program, examining the institutional purpose and athletic philosophy, the authority of the chief executive in personnel and financial affairs, athletics organization and administration, etc. Access to such information might be deemed to give a chief executive officer constructive, or perhaps even actual, knowledge of a problem in her athletic program.

212. Proposal No. 6, amending art. 3, § 2(b) of the NCAA Constitution, see *supra* note 193, provides in pertinent part that "[a]n institution's budget for its intercollegiate athletics programs shall be controlled by the institution and subject to its normal budgeting procedures," and further supports the notion that the chief executive officer should have at least constructive knowledge of potential problems.

213. Proposal No. 7, amending art. 3, § 2(c) of the NCAA Constitution, see *supra* note 195, would give the chief executive officer access to information related to other potential problem areas (e.g., audits of booster organizations).

214. In the words of Charles Alan Wright, former Chair of the Committee on Infractions: If the president feels somewhat queasy after reading the substantive part of the official inquiry, he will not be helped by the final series of questions and allegations, which provide a blazing coda to the document They will almost always include allegations in which the president himself is named. Since 1974,

their legislative prerogative at the special Convention, the presidents arguably subjected themselves to the punishment scheme if they are found to be individually culpable. Given recent revelations by Texas Governor Clements that as a member of the Board of Governors at Southern Methodist University he and other board members approved illicit payments to SMU football players, it is arguable that there might be instances when members of the Board of Governors or Trustees should also be punished, at least to the extent that their involvement in matters related to the athletic department should be curtailed.²¹⁵ It would not be unthinkable to begin to demand at least a modicum of individual responsibility on the part of chief executives and perhaps even members of the Board of Trustees. But, as previously noted, it may be necessary either to interpret broadly existing language in the punishment scheme adopted in the summer of 1985 or adopt an explicit provision holding such parties accountable in the future. Such a move would have the beneficial effect of encouraging chief executives to continue to take an ongoing active role in governance of intercollegiate athletics at their respective institutions and at the national level rather than merely reacting periodically as crisis managers.

There are at least two other senses in which a chief executive officer could be punished for knowingly condoning violations in her institution's athletic department. First, the chief executive might be punished by the conference or the institution in its effort to cooperate with the NCAA and thereby lessen the institutional penalty imposed by the NCAA. Second, the chief executive, and other responsible individuals, could be sued personally by aggrieved parties for their involvement in such violations as illustrated by the numerous threats of law suits arising out of the recent debacle at Southern Methodist University.²¹⁶

NCAA bylaws have required the chief executive officer of each member institution to certify that the institution is complying with NCAA rules insofar as he can determine.

Wright, *Responding to an NCAA Investigation, Or, What to Do When an Official Inquiry Comes*, 1 ENT. & SPORTS L.J. 19, 21 (1984).

215. See Thomas, *SMU Governors Allowed Illicit Athlete Pay*, N.Y. Times, March 4, 1987, at A1, col. 3. Specifically, Governor Clements is quoted as having said that:

We—with a capital we—made a considered judgment over several months that commitments had been made and in the interest of the institution, the boys, their families and to comply with the NCAA, that the program would be phased out and that we would comply in a full sense of integrity to all the rules and regulations.

Id. at A1, col. 4. SMU administrators issued a statement stressing that they "deplored" the making of illegal payments to student-athletes and called on board members who participated to resign. *Id.* at A1, col. 5. Students and others also considered bringing a lawsuit against the Board and other responsible parties.

216. See, e.g., *Texas Governor Admits Role in SMU Scandal*, Sporting News, Mar. 16, 1987, at 49, col. 1, pointing out that "the SMU Student Senate . . . voted, 19-5, to authorize student body president Trevor Pearlman to discuss the possibility of a lawsuit against all responsible parties for injuries incurred upon the student body due to the handling of the football situation by SMU leaders"; *S.M.U.'s Board Considers Suit*, N.Y. Times, Mar. 18, 1987, at B12, col. 6.

It is likely that a push toward making presidents individually responsible would be resisted by some athletic administrators who would feel that such a move would have the effect of causing the presidents to be unduly intrusive as to the internal management and operation of their athletic programs and by some presidents who would resist penalizing themselves individually, particularly since they indirectly are being punished in a rather severe fashion for excesses and violations in their athletic programs. These presidents would argue, for example, that the penalties prescribed for major and for repeat violations are so severe that the whole institution, together with the president, suffers whenever a major penalty is invoked.²¹⁷

2. How the Presidents Commission Punished Their Institutions

Whatever may be done in the future in terms of holding the presidents individually responsible, the real pressure will continue to be indirect—as the institution is penalized, so is its chief executive officer who will be deemed responsible by powerful internal and external groups other than, or in addition to, the NCAA. Indeed, it would appear that the presidents have created a system that ultimately will punish themselves; given their increased involvement in controlling the excesses of their athletic programs, they will be held personally responsible by their constituencies—by state legislatures, boards of trustees, alumni, faculties and students—for violations that bring infamy or economic malaise to their institutions. As such, having assumed renewed responsibility for oversight of intercollegiate athletics, the presidents have set a course that may mandate, as a matter of personal prudence,

217. It is reported, for example, that in a normal season SMU's football program would show a profit of \$1.2 million. The 1985 probation resulted in an initial profit cut of \$700,000. Additional penalties imposed will further slash expected receipts (e.g., SMU reportedly earns \$500,000 per home game, a portion of which is shared with the opponent, but in invoking the "death penalty," the Committee on Infractions eliminated all home games during 1988). Goodwin, *Action on SMU is Swift and Decisive*, N.Y. Times, Feb. 27, 1987 at D21, col. 5. Referring to even a one year suspension, like that received by Southern Methodist, Barry Switzer, football coach at the University of Oklahoma, argued that:

[The NCAA] will kill a program if they suspend it for a year or two. . . . And if the football program dies, most of the other sports in that department are going to die, too, because it's football that pays for it. This thing is so far-reaching, it will affect everybody from the groundskeeper to the local banker. The groundskeeper will probably lose his job because there won't be any money to pay him. And people in the financial community are probably going to sue because they are involved with the university in bond issues or expansion of the facilities and who's going to pay for all that if the program is suspended?

Tucker, *NCAA Death Penalty*, Associated Press, June 29, 1985. Certainly this will damage the institution economically and will, therefore, indirectly penalize its president. Dr. James Zumbege, President of the University of Southern California, and former President at SMU, indicated that even an NCAA-imposed ban upon football television for a first major offense (a penalty far less severe than the "death penalty" for repeat violators) would cost USC several million dollars. See Koch, *supra* note 6, at 18.

continuing involvement in the operation of their respective athletic programs. This will be particularly true if the presidents resist the self-preservationist urge to dismantle the system of presidential responsibility they have created. The stringency of the penalties adopted at the special Convention of June, 1985, thus may have surprised some industry observers.²¹⁸ It will, therefore, be helpful to examine the manner in which the presidents punished their own program and institutions.

3. How the Presidents Commission Punished Their Programs

In an era when fixed or mandatory sentences represent the current vogue in criminal law,²¹⁹ the Presidents Commission followed suit with its own version of harsh, essentially fixed sentences. In amending NCAA Enforcement Procedure section 7(c), and setting forth minimum applicable penalties for major violations, the Presidents Commission delineated a series of rather specific, fixed penalties.²²⁰ This, no doubt, was done in an effort to minimize discretion. Too much discretion in sentencing has been the bane against which many proponents of fixed sentencing have fought.²²¹

It is also recognized, however, that justice can often be achieved only when there is sufficient discretion to treat genuinely unique cases differently. The Presidents Commission thus responded to the tension between fairness in the individual case and the certainty and uniformity of a clear and fixed rule of law by providing for some discretion. Indeed, while on first reading the penalties provided in Proposal No. 3 seem to be fixed and quite severe, fine distinction appear on a closer examination. For example, while the seven prescribed penalties in NCAA Enforcement Procedure sections 7-(d)-(1) to-(7) are fairly tight and offer little room for manipulation, there are two issues that must be decided before those provisions are triggered: (1) a "major" violation(s) must be found to have occurred; and (2) the Committee on Infractions must decline to classify the case before it as "unique," and deserving of being excepted from the stringency (or perhaps in rare and very extreme cases, comparative leniency) of the seven mandated penalties in that section.²²² It will be recalled that there was extensive debate at and before

218. It will be recalled that the President's Commission strengthened rather than weakened the penalties initially proposed by staff in the first draft of the legislation. See *supra* notes 97-99, 103 and accompanying text.

219. See, e.g., Frankel & Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225 (1984).

220. See, *supra* note 136 and accompanying text.

221. See, e.g., M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973); Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6, 12 (1983).

222. It also should be noted that *Enforcement Procedure* § 7(d)(1) provides, in the case of repeat violators, for the "prohibition of some or all 'outside' competition in the sports involved in the latest major violation for one or two sports seasons . . ." (emphasis added). This

the special Convention over the issue of defining a violation as "major" or "secondary" and that it generally was concluded that resolution of these issues would have to await the case-by-case, and necessarily discretionary, development of a "common law."²²³ Such case-by-case development ultimately would clarify the meaning of the terms "major" and "secondary."²²⁴

It is certain that every case is in some sense "unique," and it will be interesting to observe how the Committee on Infractions will choose to define and implement this term. If the Committee chooses to construe it broadly, they could give themselves much discretion, so much in fact that the mandatory appearance of the penalties would be little more than a facade. In this regard, it should be noted that NCAA Enforcement Procedure section 7(d) also provides that the Committee on Infractions may except "unique cases on the basis of specifically stated reasons" and, therefore, offers a similar source of discretion. In the case of both section 7-(c) and section 7-(d), the Committee, nevertheless, must specify its reasons for finding a given case to be "unique." It often has been asserted that a way of limiting discretion over time is to require written reasons for a sentence imposed.²²⁵ This would be equally true with regard to deciding whether cases are "unique" and would serve to interject a sense of certainty back into an otherwise amorphous provision over time. Providing an actual sentencing hearing or a system whereby more input could be given at the sentencing stage by those who will be punished would also be very helpful in terms of assuming fairness in imposing penalties.²²⁶

Another somewhat related concern that occasionally was raised during the special Convention was the due process issue.²²⁷ Institutions have long asserted that both as a matter of excessive regulatory discretion—the extensive discretion placed in the NCAA staff—and as a matter of process—in terms

provision, therefore, also provides discretion to the Committee on Infractions after the finding of a repeat, major violation. In fact, the Committee on Infractions exercised that discretion in the SMU case by suspending competition for a single year and by limiting competition in the following season to seven games (none of which would be at home). Even given that exercise of discretion, however, the Committee on Infractions action was said to be "swift [and] decisive." See, e.g., Goodwin, *supra* note 217, at D24, col. 5.

223. See *supra* notes 144-52 and accompanying text.

224. See *supra* note 144 and accompanying text.

225. Written reasons develop a more solid and somewhat less discretionary body of common law over time. It therefore would appear that the Commission was again seeking to balance uniformity and discretion in this punitive scheme.

226. I discuss this point at greater depth with regard to the sentencing process as applied to the student-athlete who is held culpable. See *infra* notes 303-05 and accompanying text. The points made regarding coaches, administrators and student-athletes might apply as well to the Presidents and other officials. It is clear, however, that, as a matter of degree, the Presidents and other officials are in position to command less solicitude in this regard than student-athletes, because the student-athletes are underrepresented in this system while the Presidents are able to exert substantial power both at the legislative action stage and at the NCAA investigative and enforcement stages in a specific proceeding.

227. See *supra* notes 175-84 and accompanying text.

of the ability to be heard and to have notice—institutions have been deprived of due process in the NCAA enforcement procedure. For instance, although the NCAA has asserted that its enforcement process is built upon the principles of “cooperation” and “disclosure,” it often has been argued by detractors of the NCAA that cooperation and disclosure have tended to run on a one-way street from the institutions to the NCAA but not back again.²²⁸ Similar arguments were raised at the special Convention by the Southwest Conference in support of Resolution 3-3, which ultimately was referred to the Council and the Presidents Commission.²²⁹ These efforts to force more disclosure on the part of the NCAA were criticized as being premature, as well as being criticized on the ground that such disclosure would hinder enforcement efforts and would also import into the current enforcement process, “the burdensome complexities of the criminal law that almost inevitably [interfere with enforcement]”²³⁰ Given the severity of the penal provisions adopted at the special Convention and the high cost attendant with the imposition of those penalties, it is likely that due process objections will increase. There are, however, two senses in which they may be ameliorated: (1) the January, 1987 Convention recently acted to liberalize disclosure and related rules, giving the institutions access to more information earlier in the proceedings;²³¹ and (2) the presidents and the institutions themselves are well represented in the NCAA legislative process and can change rules they consider unfair.²³² Indeed, the Presidents Commission expressed some concern regarding institutional due process in the NCAA enforcement procedure. The Presidents Commission felt, however, that it was necessary at that time to act quickly to allay fears that intercollegiate athletic programs lacked academic integrity by going on record as being committed to eliminating cheating in intercollegiate athletics.

In this rush to act decisively,²³³ the Presidents Commission regrettably neglected to discuss the academic or theoretical implications of their actions.

228. See, e.g., Miller, *supra* note 56.

229. See *supra* notes 175-84 and accompanying text.

230. CONVENTION PROCEEDINGS, *supra* note 122, at 71 (summary of statement of Tom Farer of the University of New Mexico).

231. See *Rules Charges Passed at the NCAA Convention*, Chron. of Higher Educ., Jan. 21, 1987, at 35. The NCAA does appear inclined to try to balance the cost of disclosure with the added that even more changes in the investigative process could be forthcoming. *Boosters Barred from Recruiting; Coaches' Income to be Watched*, Chron. of Higher Educ., Jan. 21, 1987, at 35. The NCAA does appear inclined to try to balance the cost of disclosure, with the serious need to disclose as much information as possible to the institution in the interests of due process and cooperation.

232. Some commentators disagree with this point. See, e.g., Gaona, *supra* note 40. There is a sense, however, particularly with the strengthening of the hand of the Presidents Commission in the NCAA's legislative process, that the institutions are in a position to do much to assure that their rights to due process are protected.

233. The President's Commission acted with dispatch to initiate the legislative process. This

Just as they failed to consider the interplay between the rule of law and discretion in developing their punishment system, the Presidents Commission also failed to discuss the theoretical underpinnings of sentencing and punishment. The Presidents Commission never, for example, fully clarified the purpose(s) of their punishment system other than to say it was to restore integrity.²³⁴ President Ryan, however, did note that the "Presidents are heart sick about the serious violations of rules that are occurring by coaches, alumni and booster clubs and are determined to stop them."²³⁵ This statement and others like it implies that the primary purpose of the punishment system was to deter future cheating and perhaps even rehabilitate cheaters—although there were also statements which implied that the purpose was retributive, to inflict some suffering on wrongdoers.²³⁶

Thus, while there were some very basic discussions regarding the theoretical purposes or underpinnings of the legislation by the presidents, this discussion was superficial and lacked coherence. The discussion as to purposes was confused or potentially inconsistent because the presidents attributed at least two differing purposes for the legislation: (1) deterrence of future crime; and (2) retribution. One author has differentiated these theories by referring to them as consequentialist and nonconsequentialist²³⁷ and has noted that there ought to be a third theory, the "moral good theory of punishment."²³⁸ Professor Lipkin describes this third possible theory by stating that:

[t]he moral good theory of punishment is intriguing because it promises to explain and justify punishment by showing how punishment restores the moral identity of the offender. Rather than focusing on socially desirable benefits or abstract notions of justice, the moral good theory

served as an indication of their resolve to do something about perceived excesses in intercollegiate athletics. Indeed, within a little over a month after completion of the survey they were discussing actual legislative proposals, and within four months they were adopting somewhat refined versions of those proposals.

234. See, e.g., *supra* notes 10, 14 & 15 and accompanying text.

235. CONVENTION PROCEEDINGS, *supra* note 122, at 61.

236. Frankel notes that there are "two ultimate purposes to be served by criminal punishment: the deserved infliction of suffering on evildoers and the prevention of crime." M. FRANKEL, *supra* note 221, at 36. There was much talk of deterrence during the special Convention, but statements also were made implying that retribution was an intended purpose of the legislation. On one occasion, for example, when the special Convention was discussing punishment of student-athletes, President Singletary noted that they were seeking to "affirm that member institutions expect student-athletes to be held responsible for their actions. . . . [S]tudent-athletes are [to be] held accountable for serious violations of NCAA rules and regulations." CONVENTION PROCEEDINGS, *supra* note 122, at 73. Similarly, discussion ensued regarding inflicting punishment on coaches. See *supra* notes 169-73 and accompanying text.

237. See R. Lipkin, *The Moral Good Theory of Punishment* 1-2, (unpublished manuscript available in Delaware Law School Library of Widener University.) Professor Lipkin notes that, "Generations of scholars have divided theories of punishment into two categories. Theories of the first type explain and justify punishment by appealing to the socially desirable consequences of punishing wrongdoers. Theories of the second type explain and justify punishment, not in terms of its consequences, but rather because justice demands punishing the guilty." *Id.* at 1.

238. *Id.*

grounds punishment in something fundamental to the offender: his identity as an autonomous, responsible moral agent.²³⁹

Whether one believes there are two primary theories of punishment, as does Judge Frankel, or three, as does Professor Lipkin, it is clear that the Presidents Commission's treatment of theoretical matters was inadequate. Certainly, whatever their number, these theories are not mutually exclusive in terms of analyzing and ultimately justifying any system of punishment.²⁴⁰ While the presidents should not be unduly criticized for failing to distinguish clearly between various theories and purposes of punishment, they may be criticized for having failed to examine properly the various theoretical implications of their legislative choices and actions. Just as Judge Frankel could criticize Congress and the state legislatures for having "failed even to study and resolve the most basic of the questions affecting criminal penalties, the questions of justification and purpose,"²⁴¹ the Presidents Commission can be legitimately criticized for failing to consider similar issues.

Such criticism will be viewed with disfavor by some. There are those who will argue that the Presidents Commission had to deal with political exigencies that simply did not permit the luxury of expending the time necessary for examining and reflecting upon the theoretical underpinnings of their system of punishment.²⁴² Certainly the presidents had to act decisively to strengthen the integrity and academic image of their institutions.²⁴³ The presidents could and should, however, engage in a theoretical evaluation of the punishment system created by the special Convention in 1985. Congress, ironically, a clearly political body, which Judge Frankel and others have criticized for failing to consider the theoretical underpinnings of their system of criminal punishment, recently has engaged in considerable conceptual analysis in evaluating their own version of fixed or mandatory sentencing.²⁴⁴ If Congress can take the time and expend the energy and resources necessary to evaluate the theoretical underpinnings of its proposals for changes in the federal criminal justice system, the Presidents Commission and the NCAA membership, as educators, can do as much.

239. *Id.*

240. *See, e.g.,* M. FRANKEL, *supra* note 221, at 60-61, noting that "any unitary theory of punishment is inadequate."

241. *Id.* at 7.

242. I acknowledge that the Presidents must deal with political crises, but I also believe they are inclined to consider, as a matter of training if nothing else, the theoretical or academic side of their decisionmaking. I, unfortunately, must concede that the Presidents Commission's act in converting their survey into the basis for a transformation of the NCAA's penal system smacks of being political rather than educational or theoretical. Even this, however, does not obviate my belief that the Presidents are academicians, in some measure, and are at least inclined to consider theoretical questions.

243. *See, e.g., supra* notes 1, 2 and accompanying text.

244. *See* discussion regarding Congressional action in Frankel & Orland, *supra* note 219, at 243-46.

Indeed, the presidents may well have set just such a mechanism in place by increasing their access to information and by creating a self-study system. The self-study system whereby the institutions must examine their "institutional purpose and athletics policy"²⁴⁵ on a regular (five-year) basis, should provide the institutions an opportunity to explore the more theoretical dimensions of their programs. In this regard, the institutions should analyze the ramifications of various theories of punishment in the intercollegiate athletic context. In addition, the institutions should analyze various theories of sport to assure that their athletic programs are founded on a theory fully compatible with their educational mission. These self-studies should in time help provide the fodder for more theoretical introspection at the national level as well. In the interim, the Presidents Commission and the Council should take the next step and commission a study at the national level to explore just such theoretical issues, examining, for example, what the purposes of their system of punishment are and how successful their punishment system is in effectuating those purposes relative to their institutions, institutional personnel and the student-athletes. If the presidents and the Council do not take such steps, I am afraid, rather paradoxically, that Congress or more aggressive state governments may intervene and perform their own studies or hold hearings, which will in turn lead to an increase in government control over intercollegiate athletics. In light of Congressional approval of the Lukens' Commission to study intercollegiate athletics, this specter is genuine.²⁴⁶

In summary, while the Presidents Commission has taken sincere and perhaps even surprising steps to punish their institutions and themselves at least indirectly, for violation of the NCAA rules, they have left some matters unattended. In the future these issues must be addressed. The Presidents Commission has taken the necessary steps to meet this challenge given that they maintain their commitment to ensuring the integrity of their athletic programs as a part of their academic mission. The implementation of such corrective measures is likely to continue, particularly given the past and present involvement of Congress. The impetus for reform at the national level continues to be present. As academicians, the presidents and members of the NCAA are by their nature better suited to perform the theoretical tasks necessary to refine and justify their athletic programs than are members of Congress.²⁴⁷ Ironically, however, if the presidents and others fail to

245. See Proposal No. 1, discussed *supra* notes 121-26 and accompanying text.

246. See *infra* note 295 and accompanying text for a brief discussion of the National Commission created under legislation prepared by Representative Luken.

247. A Congressional Committee, of course, can call upon experts in developing regulatory legislation. Such governmental committees are nevertheless by their nature political and presumably less inclined to rely on theoretical and educational purposes than are those directly involved in education.

address these issues as educators, choosing rather to respond to the commercial and political pressures that have plagued individual institutions in the past, they may lose by default to Congress or some other regulatory body that is willing and able to act despite those pressures.

From its inception, intercollegiate athletics has been characterized by an excess of commercialization. The fact that the presidents have assumed an active role in the governance of intercollegiate athletics, coupled with their collective willingness to punish even themselves in definitive ways, may in time be considered the critical or most effective movement during the past 140 years of intercollegiate athletics to restore academic integrity to the intercollegiate athletic world. It is not enough, however, that the Presidents Commission appears to be well positioned to exercise leadership and general control over intercollegiate athletics by punishing themselves. Since the Presidents Commission also have undertaken to punish others—personnel (administration, coaches, and so on) and student-athletes—the nature of that punishment also must be appraised.

B. The Presidents Punish Others

The Presidents Commission took decisive steps during the summer of 1985 to restore the integrity of their athletic programs by punishing themselves, their institutions and others involved in their athletic programs found to have violated NCAA rules. Since coaches and student-athletes have differing interests and influences, this portion of the Article has been divided into two parts: (1) an examination of the manner in which coaches and administrators or other related personnel are punished; and (2) the manner in which student-athletes are punished.

1. Punishing Coaches and Administrators

As the subsequent analysis shall demonstrate, the interests of coaches and administrators in the punishment scheme adopted at the special Convention in 1985 are not always identical. There is, nevertheless, sufficient overlap in terms of their respective interests to warrant lumping them together for analytical purposes.

Both coaches and administrators are under intense pressure to win, particularly at many Division I institutions. It is explicitly understood that winning breeds commercial success, financial support from alumni, and even increased enrollment and related support to the institution.²⁴⁸ Coaches have

248. Winning programs in the major sports of basketball and football produce revenues in the millions of dollars for their institutions. The University of Michigan's football program, for example, produces revenues in excess of \$10 million each year, and the average Division I

tended to be very susceptible to these pressures. Turnover among men's basketball coaches at the Division I level was 23.1% last year,²⁴⁹ and two winning—but evidently not winning enough—football coaches were fired, Ted Tollner at the University of Southern California,²⁵⁰ and Fred Akers at the University of Texas.²⁵¹ In a related vein, Coach Ben Lindsey recently sued the University of Arizona for failing to renew his multiyear contract after he failed to rebuild their basketball program in his first season as coach at Arizona.²⁵² Without any difficulty, one could amass one such story after another of “less-than-successful” coaches being fired in an institution's pursuit of the notoriety and dollars that accompany a winning program. Gene Bartow, currently a highly “successful” basketball coach at the University of Alabama at Birmingham, warned would-be coaches that it is a “high-risk profession.”²⁵³ Similarly, Lou Campanelli, coach at the University of California at Berkeley, added “[y]ou've got to be willing to move. You've

football program brings in revenues of approximately \$3.4 million. See DONNELLY, *College Sports Under Fire*, CONG. Q., Aug. 15, 1986, II:6 at 591. During the course of the proceedings against SMU's football program, it was revealed that during the years prior to its probation it generated substantial profits. See Goodwin, *supra* note 217, at D24, col. 5. Indeed, average profits of successful programs continually have been rising over the past few years. Since 1977, for example, the average profit increased by \$400,000 in major athletic programs posting a profit. *Fewer I-A, I-AA Programs are Reporting Profits*, NCAA News, Nov. 3, 1986, at 1, col. 1. During that same time period, however, the number of programs posting a profit dropped and the less successful programs experienced an increase in their annual deficit of \$318,000. *Id.* at 14, col. 1 (emphasis added). It thus is clear that pressure to win and maintain an economically viable program is intense. Winning programs entail other advantages, such as expanded applicant pools. During the Doug Flutie era, for instance, Boston College's applicant pool expanded between 25-40%, despite the fact that Flutie played during a period of time when many schools were experiencing a drop in enrollment. See, e.g. Craig, *Colleges Can't Resist the Lure of TV Bucks*, Sporting News; cf. Schubert & Gilley, *The Student-Athlete's Predicted Monetary Value to an Institution*, 41 ACAD. ATH. J. 4 (Fall 1986).

249. It recently was noted that, “Entering the 1987 season, sixty-seven men's Division I teams had changed head basketball coaches since last season. That is a turnover rate of 23.1% (for 290 teams), which is a record high since coaching compilations began in 1950.” Van-Valkenburg, *Turnover Rate Among Basketball Coaches Hits All-Time High*, NCAA News, Jan. 7, 1987 at 4, col. 1.

250. Under Tollner in 1986, the Trojans of U.S.C. enjoyed moderate success, posting a record of 7-4 and attending the Florida Citrus bowl. Coach Tollner also was selected to coach in the East-West Shrine game. Tollner, nevertheless, was fired for failing to maintain U.S.C.'s winning tradition. Felsher, *Well-Traveled Ted Tollner Is A Real Survivor*, Sporting News, Mar. 30, 1987, at 42, col. 1.

251. Fred Akers was the football coach at Texas for 10 years and was fired in 1986. His record over that 10 year period was 86-13. When Akers was fired, DeLoss Dodds, the Athletic Director at Texas, simply noted that, “sometimes it becomes necessary to bring in new energy and leadership.” Chron. of Higher Educ., Dec. 10, 1986, at 34.

252. Coach Lindsey, who was hired to rebuild the basketball program at the University of Arizona, was fired after a single losing season. Lindsey ultimately was awarded \$695,000 in a breach of contract suit against the University. Chron. of Higher Educ., Oct. 15, 1986, at 46.

253. Wieberg, *Uncertainty Becomes a Way of Life for Coaches*, NCAA News, Dec. 1, 1986, at 2, col. 1. That article noted that there were five new basketball coaches in the eight-team Metro Atlantic Conference and four each in the Big Eight, Big Ten and ECAC North Atlantic Conferences.

got to be flexible. It's a risk of the job, and it's getting riskier each year. Everyone wants to win now. No one wants to [or can afford to] be patient."²⁵⁴ The pressure on coaches and athletic administrator to produce "winners" is intense.²⁵⁵ Given the massive capital investment in costly facilities and the need to support numerous economically dependent sports with one or two successful ones, generally basketball and football, coaches in those major sports and athletic directors alike know they must deliver a winner.

Few coaches in major programs have tenure, and their job security is correspondingly limited.²⁵⁶ Athletic directors and related personnel enjoy a bit more security, but they too are expected to produce commercially successful "winners" because the bottom-line of their athletic budget must balance. It might be argued, of course, that since successful coaches often make far more money than even the presidents of their universities²⁵⁷ they should be willing to accept the additional risks that attend their profession. This point, however, misses the mark, particularly if one believes that academic integrity is a matter of the highest priority. Indeed, the argument that coaches should simply assume the risk of job insecurity merely serves as a further reminder of how deeply entrenched the profit-motive is in intercollegiate athletic programs.

Against this background, the Presidents Commission acted at the special Convention of 1985 to ensure the integrity of their athletic programs by passing stiff penalties applicable against those involved in violating the NCAA rules and acted again at the annual Convention in 1987 to promote cost containment measures in their athletic programs. These efforts were designed to constitute a major first step in the direction of economic and related retrenchment. In the interim coaches and administrators, nevertheless, face a dilemma—they *must* win (either build, maintain or expand the success of a major program) and they *must* do so without bending the rules. Somewhat like incumbents in Congress, established programs have a distinct advantage over newcomers in this process—they have a winning tradition, a strong reputation with recruits, and the economic basis upon which to maintain

254. *Id.* at 2, col. 1.

225. *Id.* at 3, col. 1. That article stressed that athletic directors must support a number of economically weak programs with a few successful ones.

256. Vince Dooley, head football coach at the University of Georgia, recently stated that, "[i]t should be remembered that relatively few coaches enjoy the security of tenure that is bestowed upon faculty. In fact, surprisingly few coaches remain at one institution long enough even to enjoy retirement benefits." *Its a Misconception That Cheating in Athletics is Widespread*, NCAA News, Nov. 3, 1986, at 2, col. 1.

257. See, e.g., Stevenson, *Athletic Supplies: Stakes are High*, N.Y. Times, June 10, 1986, at B9, col. 1. It is pointed out that a basketball coach at a major program can earn as much as \$100,000 on a shoe contract alone; Oliva, *supra* note 2, at 32, col. 1. Chancellor Oliva refers to coaches as "corporate managers."

their programs. Even those institutions, however, are susceptible to similar forms of pressure, since there are always ambitious coaches and programs desirous of stepping into the winning limelight.

One can easily view this dim picture as evidence that the presidents are being hypocritical in demanding strict compliance with the rules while also requiring that their coaches provide winners and their athletic administrators provide an athletic budget that is perpetually in the black. There are, however, some indications that the presidents and others in the NCAA sincerely may be sensitive to addressing these countervailing pressures. The Presidents Commission,²⁵⁸ for example, with the support of the athletic directors,²⁵⁹ recently took steps to engage in cost containment related to their athletic programs. While one might view this cost containment effort as little more than another thinly veiled effort by chief executive officers to suck greater profit out of their athletic programs, such austerity also might be viewed as a genuine effort to deal with the pitfalls that economic pressures place on intercollegiate athletic programs. If this latter purpose accurately reflects the presidents' intent, it could have the beneficial effect of lowering economic pressures on athletic programs. Similarly, the presidents' efforts to obtain information regarding the sources of income for coaches²⁶⁰ may be viewed as more than just a jealous ploy to restrict a coach's income—it rather may be seen as an effort to reach all potential excesses under control. If, however, the presidents are serious about the latter course, they should be willing to reduce some of the risk faced by coaches. Indeed, the high remuneration

258. The special Convention to be held in the summer of 1987 is limited to "those issues that relate to containing costs of intercollegiate athletics programs and to maintaining a proper balance between intercollegiate athletics programs and other institutional programs." *Schedule of Meetings Set for Special Convention*, NCAA News, Feb. 25, 1987, at 1, col. 1. See also Farrell & Ledermau, *NCAA Presidents Call New Meeting in Sports Reform*, Chron. of Higher Educ., Jan. 14, 1987, at 1. In that article Chancellor Heyman is quoted as having said that, "The balance [between intercollegiate athletics and the academic missions of some institutions of higher learning] has gotten out of hand, in part because the tremendous costs of maintaining athletics programs often means that allocations of resources overshadow what are necessarily the institution's intention in having a sports program." *Id.* at 42.

259. While there was some tension at the Convention in January of 1987 between the athletic directors and the Presidents Commission, the athletic directors generally agreed with the cost containment efforts of the Presidents. See Farrell, *Mood of Reform Dominates NCAA Meeting*, Chron. of Educ., Jan. 21, 1987, at 33, col. 2.

260. See *Boosters Barred From Recruiting; Coaches Income to Be Watched*, Chron. of Higher Educ., Jan. 21, 1987, at 34, col. 4. Under legislation passed by the 1987 general Convention, coaches were: (1) required to report all athletically related income to their chief executive officer; (2) limited in their use of the university logo for economic purposes; (3) required to receive prior approval before receiving individual compensation from equipment manufacturers; and (4) prohibited from receiving compensation for scheduling arrangements.

Implementing this scheme may not, however, be an easy task. Recently, for example, the University of Arizona offered their present basketball coach, Lute Olson, a five-year, \$85,000 per year contract, but Olson resisted because he opposed the inclusion of a provision in the contract requiring disclosure of outside income. See *Coaches' Corner*, Sporting News, Mar. 23, 1987, at 19, col. 4.

received by major coaches is easily viewed as a function of the high-risk nature of their employment, and alterations must be made that would lower the job security risk at the same time that excessive incomes are brought under control.

If the presidents are sincere, they could take additional steps to indicate their commitment in this regard. The presidents could seriously evaluate a coach's ability as an educator and not simply as an effective corporate manager who is able to build and market a major product using student-athletes as the utilitarian means to that end.²⁶¹ In so doing, the presidents could grant tenure, or at least as a middle-ground, they could extend (and honor) long-term contracts to their coaches. This would help mitigate the risk involved in coaching and might lower both the pressure to win-at-all-costs and the income expectations of coaches. A move toward economic austerity is always painful to some in its initial stages, although it is less painful when all parties understand that they must sacrifice for a higher or better cause (or even just for survival). The presidents apparently recognize that such cost containment is part of the prescription for what ails over-commercialized intercollegiate athletic programs.²⁶² Such a move might be a step toward restoring dignity and reason to the burgeoning big business attitude that prevails in intercollegiate athletics, particularly when the facts suggest that much of the economic success often comes at the expense of the careers and lives of the individuals (administrators, coaches and student-athletes) involved in the program. Some participants, of course, may be willing "victims," but one will never know until the reactions to a long-term effort toward economic retrenchment in the interest of academic values can be gauged.²⁶³

261. See, e.g., Oliva, *supra* note 2. The recent hiring of Bill Curry as football coach at the University of Alabama was a bold move on the part of President Joab Thomas that should be applauded. Unfortunately, in some circles in Alabama, the only fitting response was a death threat to President Thomas. See *Curry's Hiring by Tide Brings Death Threats*, *Sporting News*, Jan. 19, 1987, at 45.

262. In this regard, it would be appropriate to hear more debate and perhaps even more negative response on campus when a new building project or other expansion of an athletic program is proposed. See, for example, the effort of the faculty at the University of Tennessee, to stop a construction project initiated by the athletics department at their institution. See Wong & Ensor, *supra* note 4, at 152-55.

263. The initial reaction on the part of students, faculty and administrators of SMU to the dismantling—retrenchment of that program may be a good barometer. It can only be hoped that SMU will receive additional support from constituencies approving SMU's effort to "clean up" their program. It would be fitting, for example, if students offered to assume more of the costs of the athletic programs that they are or sought to be the intended beneficiaries of, by accepting modest increases in student fees to run the athletic program.

I, unfortunately, am not heartened by some of the response that seems to have occurred at SMU. A recent article discussing SMU's woes noted that:

The school is going to suffer grievously in financing because of the football scandal. A United Methodist Church panel with the power to sever church ties

The ramifications for coaches and athletic administrators of the commercialization of intercollegiate athletics helps put the penal reforms adopted at the special Convention in June of 1985 in perspective. Coaches were punished in a number of ways. For the first time coaches, as individuals, were punished directly with the passage of Proposal No. 4. This provision provided for direct punishment of coaches, irrespective of whether or not the coaches still were employed at the school where the violations occurred.²⁶⁴ Under the provisions of that NCAA Bylaw, coaches could be temporarily or permanently suspended from coaching. This is an onerous penalty in and of itself; it was, however, but part of a larger system. Coaches and other personnel also were punished under Proposal No. 3, particularly that portion amending NCAA Enforcement Procedure sections 7-(c)-(d).²⁶⁵ Additionally, in an effort to cooperate with the NCAA and to demonstrate a willingness to clean up its program, it is conceivable that an institution may occasionally sacrifice its coach or an athletic administrator as evidence of a good faith (to the NCAA or the Conference, not necessarily to the coach) compliance effort.²⁶⁶

It is therefore clear that the legislation adopted at the special Convention constitutes a harsh punishment system for any coach or administrator. Among the punitive provisions adopted which apply with particular force against coaches and administrators are: (1) NCAA Enforcement Procedure section

with SMU was scheduled to meet in emergency sessions to discuss the school's football program. The panel could remove SMU from its umbrella, thereby depriving the school of church funding.

But that's only part of the picture.

The loss of the football program will result in the underfunding of other school sports, all of which are supported by football.

Still worse, according to a copyright story in the Dallas Morning News, is that high school seniors and wealthy contributors have pulled back from SMU. Donations to the school may be off \$10 million to \$20 million this fiscal year and the admissions department may have to lower its standards to attract an adequate number of freshmen, the newspaper reported.

A Fine Kettle of SMU Fish, Sporting News, Mar. 23, 1987, at 43, col. 3. I certainly would hope that the reaction would be otherwise. Given the stringency of the penalties already invoked against SMU's program, there is little need for more. The systemic canker in all likelihood cannot survive the penalties invoked; the program will have to be rebuilt, hopefully on a sounder academic model. I would argue, therefore, that the supporters of SMU's academic program should respond with added support in this time of crisis, rather than a plethora of threatened lawsuits.

264. See *supra* notes 185-86.

265. See *supra* notes 136-37 and accompanying text.

266. Objections to using institutional personnel as "sacrificial lambs" to satisfy the NCAA or the Conference are usually raised with regard to using student-athletes for such purposes. See generally Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 907-08 (1972); Chron. of Higher Educ., Oct. 29, 1986, at 37, col. 1. It is clear, however, that institutions often are enticed to use their coaching staffs in the same sacrificial manner. This has prompted the NCAA to take steps to assure that coaches and personnel are accorded a measure of due process to avoid the institutional proclivity to find an appropriate sacrifice.

7-(c), providing for a "minimum penalty" for "major violations," except in unique cases based on specified reasons set forth by the Committee on Infractions; and (2) NCAA Enforcement Procedure section 7-(d), the so-called "death penalty," which requires that restrictions imposed on a coach by the Committee on Infractions for Violations will be applied against that coach, even if she is employed at a new institution.

NCAA Enforcement Procedure section 7-(c)²⁶⁷ deals with "major" violations and applies to both coaches and administrators. It specifies certain mandatory or fixed sentences ranging in severity from termination to suspension or reassignment of duties for at least one year. These penalties are to be applied directly against institutional staff members (this term clearly applies to coaches and administrators) who knowingly have engaged in or condoned a major violation. Even in its least severe form, the prescribed penalty in section 7-(c)—"[r]eassignment of duties within the institution to a position that does not include contact with prospective or enrolled student-athletes or representatives of the institution's athletics interest for at least one year"—would have an immense impact on a coach's or administrator's career. Reassignment of a coach within an athletic department effectively might require that the institution hire another individual to fill the reassigned coach's or athletic administrator's prior duties, ultimately leaving the coach involved in the violation without a job in the area in which she originally was hired.

It is unclear whether, and to what extent, the Committee on Infractions will apply this provision. There are, of course, two escape routes for the Committee should it decide to impose less draconian measures: (1) it could specify the reasons why the present case is unique; or (2) it could find that the coach or administrator did not "knowingly engage in or condon[e] a major violation." As to the former matter, it remains to be seen whether the Committee, in specifying exceptions, will develop a comprehensive common law related to what types of cases are "unique." As to the latter point, it will be interesting to note whether the Committee (and the Council in event of an appeal) will find that constructive knowledge is enough to constitute "knowingly engaging in or condoning a major violation."

The application of the "death penalty" is, for the most part, more indirect in its effect on coaches and administrators than is section 7-(c). This is true because it is directed at "institutions" involved in repeat, major violations. But, given that section 7-(d)-(1) prohibits all members coaching in a sport from participating in some or all 'outside' competition in the sport involved for one or two sports seasons,²⁶⁸ the effect can be quite direct with respect

267. See *supra* note 136 and accompanying text.

268. Section 7-(d)-(1) actually provides for, "[t]he prohibition of some or all 'outside' competition in the sport involved in the latest major violation for one or two sports seasons

to coaches. As such, the implementation of section 7-(d) as to coaches raises two potential issues. First, a coach, in some measure, is being punished for the prior violations of the institution or its staff (the first major violation that is necessary to trigger application of section 7-(d) may well have occurred in a different sport or prior to the arrival of the coach being punished under the "death penalty."). It will be recalled that two major violations are required in a five-year period to invoke section 7-(d); for example, if the football program at an institution was involved in the first violation and the basketball program was involved in the second violation, the basketball coach could receive an increased penalty attributable, in part, to the past violations of the football program. Indeed, the basketball coach or coaching staff being punished under section 7-(d) may not have even been employed by the institution at the time the first violation occurred. This raises troublesome retroactivity²⁶⁹ and perhaps even double-jeopardy problems.²⁷⁰ Second, if the penalty imposed on the coach by the institution, the conference or the NCAA is more stringent than that imposed on the institution itself (even though the coach may have only been involved in one of the two major violations occurring at the institution in the applicable five-year period), the effect of the penalty may be to exclude her from coaching. Such a result could be quite unfair in that the coach may become the scapegoat for the past as well as for the present sins of an institution. In this regard,

and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities during a two-year period." As such, the provision limits the institution's participation in 'outside' competition for "one or two seasons," while coaching responsibilities are limited "during a two-year period." This apparent discrepancy was qualified, however, when it was pointed out that the limitation on the coaches will normally be of the same duration as that imposed against the institution, although the Committee would have authority to impose a more stringent penalty on a more culpable coach.

269. The debate over the retroactivity problem is discussed at length *supra* notes 159-68 and accompanying text. See also NCAA News, July 3, 1985, for a legislative interpretation clarifying that "for an institution in a previous major case [it will be recalled that the "major"/"secondary" distinction was itself first drawn in the legislation adopted during the 1985 special Convention] to be considered as a repeat violator, the second major offense must be one that occurs after September 1, 1985, and within five years of the starting date of the initial major penalty." In cases in which an official inquiry is issued subsequent to the conclusion of the special Convention in June of 1985, coaches, in turn, will be covered, even if they move elsewhere. *Id.* A coach, therefore, could suffer the full impact of penalty for a major violation in some instances where the violation in which the coach was involved took place prior to the convening of the special Convention. Furthermore, in instances in which the "death penalty" could be invoked for a repeat violation, the coach can be punished to a greater extent even though the coach was not involved in the first violation. The potential for inequity in such situations, particularly in light of the likelihood that some institutions may be inclined to use the coach as a scapegoat to lessen the punishment for themselves as institutions, is obvious.

270. Mike McGee, athletic director at the University of Southern California, noted that, "[a] program that already satisfied the sanctions imposed earlier are [sic] being exposed to double jeopardy." L.A. Times, Part 3, at 1. Even David Berst of the NCAA has noted that the possibility of "double jeopardy" exists in cases like SMU's, where the death penalty is applied retroactively. See *Death Penalty Hint in New Woes at Southern Methodist*, Sporting News, Nov. 24, 1986, at 32, col. 1.

those meting out the penalty should be quite sensitive to the various and often conflicting interests of the coach and the institution in the infractions enforcement process.

Finally, Proposal No. 4, as adopted at the special Convention amending NCAA Bylaw 5-6-(d)-(3), requires that restrictions imposed under NCAA Enforcement Procedure section 7 follow the coach to a new employing institution. Application of this provision may create some difficult problems for the institution that hired the coach without knowledge of the former violations. It would not be surprising to find that institutions hiring new coaches will add a condition in their contract with the new coach limiting their obligations in the event that the strictures of section 7 are applied against that coach following her arrival to the new institution. If the new institution fails to do so, it may find itself in the precarious position of having hired a new coach that is unable to serve in that capacity. Even absent the presence of such a provision in the coach's contract, the contract might be voidable by the institution.²⁷¹

Beyond the preceding interpretive problems, the legislation passed during the special Convention raises other general concerns. It is arguable that, given the severity of these provisions and others that have been or might hereafter be appended to them, coaches and administrators may feel compelled to seek a much more active role in the legislative process generally. Indeed, administrators already have taken this route. During the 1987 annual Convention a battle of sorts erupted between the athletic directors and the presidents.²⁷² The athletic directors, recently having been charged with ex-

271. The coach may be held to have a duty to disclose past violations or the contract may be held to have been frustrated in its essential purpose. *See, e.g.*, Professor Farnsworth's discussion of temporary impracticability or frustration in E. FARNSWORTH, *CONTRACTS* § 9.9, at 700-02 (1982). It is clear, however, that such a risk would be better handled at the drafting stage.

272. *See supra* note 259. Ken Denlinger, a correspondent with the Washington Post, is quoted as stating that, "A welcome scene at the NCAA Convention [January, 1987] was athletic directors and presidents fussing at one another. For ever so long, there was no dialogue at all." Denlinger, *Now, There's Hope for College Sports*, NCAA News, Feb. 4, 1987, at 2, col. 1. Elsewhere it was noted that:

Led by a handful of prominent athletic directors, the membership voted to reject the presidents' call for withdrawal of 6 of the 15 proposals, igniting what some predict will become a battle of wills. . . . "I think this sends a message to the presidents," said Homer Rice, athletic director at the Georgia Institute of Technology. "They need to listen to us, the athletic directors, before they set up the agenda for the special convention [in June of 1987]. . . . [W]e want cost-cutting. We know there are problems. This is not a battle with the presidents' commission. But we want to be consulted."

It appears that they will be. Before the convention got under way, the NCAA council appointed a committee of athletic directors, headed by Eugene F. Corrigan, athletic director at the University of Notre Dame, to work with the presidents commission, in developing legislation for the special convention.

Lederman & Farrell, *Mood of Reform Dominates NCAA Meeting; President's Group Sets a*

exercising control over the NCAA as "a trade association,"²⁷³ have had to exert pressure to counterbalance what they consider to be the potentially more extreme efforts of the Presidents Commission.²⁷⁴ The athletic directors are generally well positioned to do so based on their historical status within the NCAA²⁷⁵ and since they maintain an active national organization, the National Association of Collegiate Directors of Athletics.²⁷⁶ Coaches, on the

Whole New Agenda, Chron. of Higher Educ., Jan. 21, 1987, at 34, col. 1. See also Gleason, *infra* note 278.

It is clear, however, that not all athletic directors view the reform movement positively. Frank Broyles, athletic director at Arkansas, reacted to the penalty imposed by the Committee on Infractions in the SMU case by noting that he was "disappointed" and that he felt the penalty was "unduly harsh." Broyles added that the NCAA's action [and, presumably, other efforts to reform the NCAA enforcement system] sent a "signal to the rest of the members that nothing can be gained by cooperation with the NCAA, and it would be best for a member to stonewall any investigation." Marcin, *Does the Penalty Fit the Crime?*, Sporting News, Mar. 9, 1987, at 42, col. 1. While it is clear that Broyles is responding primarily to the disincentive to cooperate in NCAA investigations, I believe his comment runs deeper, and criticizes the current effort to obtain balance in intercollegiate athletics by decommercializing aspects of it as the Committee on Infractions at least indirectly sought to do in the SMU case. It furthermore appears that SMU's cooperation may well have contributed to a lessening of the force of the penalty imposed on their program by the Committee on Infractions. In all the clamor related to the stringency of the penalty invoked against SMU, it often was forgotten that the Committee clearly could have imposed even a more stringent penalty.

273. In a letter dated July 24, 1986 and directed to his colleagues in the House of Representatives, Representative Luken referred pejoratively to the NCAA as a "trade association of athletic directors."

274. See *supra* notes 261, 275 and the articles cited therein. Robert James of the Atlantic Coast Conference recently recognized the potential for compromise among athletic directors, coaches, faculty representatives, the presidents and the conferences when he stated that, "When you get the athletic directors and the coaches and the faculty reps and the presidents all talking, and the conferences talking to each other, all of us combined should be able to come up with a reasonable, mutually acceptable program." Lederman, *Athletic Directors Block Reform*, Chron. of Higher Educ., Feb. 18, 1987, at 32, col. 5. Unfortunately, but perhaps not surprisingly, James failed to mention the need for some input from student-athletes, who also will be severely affected by any collective action taken by other more powerful forces at the institutional, conference and NCAA levels.

275. Certainly Representative Luken's declaration that the NCAA is but a trade association for athletic directors is overstated. See *supra* note 273. By virtue of their proximity to issues affecting athletic departments as a whole, however, they will continue to be a viable force simply owing to their knowledge of and interest in these issues.

276. See Gleason, *The Benefits of Athletic Participation Are Many*, NCAA News, Dec. 8, 1986, at 3, col. 1 (discussing the achievements of the National Association of Collegiate Directors of Athletics (NACDA) during the past few years). Gleason, the assistant executive director of NACDA argues that:

We [the NACDA] have laid more groundwork for improvement in intercollegiate athletics in the past three years than in any similar period in our history. [The NACDA] has led the assault [on the drug issue] with numerous drug-education and testing clinics and audio-visual materials. The NCAA has organized a Presidents Commission to combat issues of academic integrity and recruiting concerns. Third, major college directors of athletics have founded an autonomous organization to seek more control over legislative matters.

Though the mechanism for improvement is in place, we'd be fooling the public and ourselves to suggest that all is well and good in our industry. College athletics

other hand, are not quite as well positioned. In the past, coaches largely have been willing to rely on the athletic director for input in the legislative process and have tended to be less concerned with unifying at the national level.²⁷⁷ If coaches are placed under increasing pressure, however, it is conceivable that they will assume a more cohesive front in an effort to influence legislation. It has been suggested, for example, that the coaches should form a union.²⁷⁸ While I generally oppose such a move, I would acknowledge that its effect would not be wholly unsavory. If coaches were to unionize, they might be able to aid efforts designed to ensure that intercollegiate athletics resist further trends to become overly commercial by requiring institutions to offer coaches long-term contracts or perhaps even tenure. Rather than securing high incomes for coaches at risk, a move to unionize might lower the income potential attending coaching at the highest levels while lessening the risks currently attendant with coaching at those levels.²⁷⁹ Regardless of these developments, it is clear that coaches will seek a greater role in the decisionmaking process in the future. If the coaches' input is significantly resisted, they may be compelled to unionize or take other more drastic steps to influence the legislative process.

If the Presidents Commission and the NCAA refuse to respond to the legitimate interests of coaches and administrators, a major conflict may arise during the coming decade, particularly if the due process interest of coaches and administrators is waylaid. In the past, individual coaches and administrators (and student-athletes) occasionally have served as convenient scapegoats for institutions in their efforts to placate the Committee on Infractions. By firing or removing an offending coach who participated in or permitted her program to be involved in a major infraction, the institution trusts that it will receive a more lenient sentence or penalty.²⁸⁰ To some extent, as

is becoming more and more complex. Administrators and coaches need to do a little more soul-searching and add some legislative bite to our moral bark.

Id. at 3, col. 2.

277. Coaches have for the most part tended to maintain separate coaching organizations designated by sports to protect their interests in their individual sport rather than a general national organization established to protect interests of coaches as a collective matter.

278. In response to the pressure placed on coaches, Florida State University basketball coach Pat Kennedy recently went on record by stating, with obvious ambivalence, that, "[as Al McGuire proposed years ago] coaches need to form a union to protect themselves. At the same time, I just don't think that's what coaching is all about." Wieberg, *Uncertainty Becomes a Way of Life for Coaches*, NCAA News, Dec. 1, 1986, at 2, col. 1.

279. See *supra* notes 248-57 and accompanying text. Unions of this sort, such as the professional sports unions, tend to protect the interests of the rank-and-file membership while leaving some latitude for the interests of the higher paid members. The union, therefore, would in all likelihood address the interests of the whole, which might be quite different from the interests of the most powerful and economically secure coaches, while permitting the few—the wealthier coaches—a modicum of latitude. The union no doubt would leave higher paid coaches with some freedom if for no other reason than that many rank-and-file coaches may foresee themselves as one day joining the ranks of the well-to-do, secure few.

280. See *supra* note 266 and accompanying text.

coaches and administrators are given a greater opportunity to articulate their interests in the enforcement process—this input logically should expand with the establishment of more severe and direct penalties in 1985—such concerns are abated. I, however, would assert that the NCAA should remain sensitive to the scapegoat syndrome and should weigh institutional and individual culpability with care. While the offending coach or administrator initially may appear most culpable, the NCAA should look very closely at institutional pressure placed on the coach in balancing the culpability between the institution and its personnel.²⁸¹ At least from a distance it would appear that the Committee on Infractions could focus a bit more, as it did recently in the SMU case,²⁸² on systemic commercial issues and pressures instead of the symptomatic transgression of coaches.

More specifically, institutions, conferences and the NCAA need to be vigilant in offering enhanced due process protections to coaches and administrators. Institutions ought to be willing to extend more than the modicum of due process required by law when a property or liberty interest is or potentially may be implicated.²⁸³ It is regrettable that educational entities seem inclined merely to follow the rather ill-defined letter of the law of due process, rather than endeavoring to establish procedures exemplifying the spirit of the law by voluntarily providing the highest level of due process possible. This is particularly important given the broad discretion provided in the applicable

281. As the recent revelations regarding the possible direct involvement of members of the Board of Governors at SMU in the illicit pay-offs to student-athletes indicate, culpability may extend well beyond the coaches and administrators, and occasionally beyond the presidents themselves. See Thomas, *SMU Governors Allowed Illicit Athlete Pay*, N.Y. Times, Mar. 4, 1987, at A1 col. 3. But see Frank, *SMU's Board Rebuts Clements on Payments*, N.Y. Times, Mar. 5, 1987, at B25, col.5. Indeed, as the SMU case illustrates, the problem may in some part be attributable to the community at large, and to the powerful role of boosters and other dominant forces within that community. See Applebome, *Troubles at SMU Reflect 'Ethos' of Dallas*, N.Y. Times, Mar. 9, 1987, at A11. col. 1.

Unfortunately, many others, some of whom are less culpable, will be injured directly and indirectly by the actions of some officials within and without the institution. Innocent staff will, no doubt, have to be laid off, as the program or dependant programs suffer cuts in revenue, and student-athletes and students alike suffer. The student-athletes will have to transfer elsewhere or cease to participate for a period of time, and the students and student-athletes will have to suffer some sense of a reputation loss.

282. See Lederman *NCAA Bars Football at Southern Methodist for Year; Penalties Are the Toughest Ever*, Chron. of Higher Educ., Mar. 4, 1987, at 1, col. 2; *Text of NCAA Infractions Panel's Report on Southern Methodists's Rule Violations*, Chron. of Higher Educ., Mar. 4, 1987, at 33, col. 1. In that report the Committee on Infractions noted that SMU, with the help of outside individuals and a booster who had supposedly been disassociated from the program, engaged in a systematic effort to gain a competitive edge to enhance its program. Frank Remington, Chair of the Committee on Infractions, stated that, "Our purpose was to send a very strong message. . . . SMU wants to build a program gradually. Now it has that chance." Goodwin, *supra* note 217, at D21, col. 2. The nature of the penalties, which effectively dismantle SMU's program, is such that the commercial impetus to build a competitive program is lessened.

283. See G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 27, at 66-73.

penal provisions, where the rule of law (which provides perhaps the best form of notice) is sacrificed in significant measure for the fairness that is believed to attend discretion to decide "unique" cases on an individual basis. As such, I do not advocate a full-blown legal hearing, but I do favor greater sensitivity to and respect for the rights and dignity of personnel and student-athletes at all levels of the enforcement process. Certainly the processes utilized by an institution are or ought in some measure to be educative, and academic institutions cannot escape their moral and educational responsibility in this regard by simply doing what is minimally required by the law. This is particularly true when student-athletes are involved. Indeed, if extending greater due process protection to athletic employees and students could help ameliorate a perceived drift toward unionization and internecine conflict, an institution could reap substantial long term benefits from such actions. I, therefore, would recommend that the NCAA take to heart its expressed commitment to due process,²⁸⁴ and commission an extensive study focusing in significant part on student-athlete and employees rights issues. In pursuing this course of action, the NCAA should examine means by which they could extend or offer more notice and fairer hearings to those impacted by their enforcement and legislative processes.

Following this course, the NCAA also might consider ways in which it could modify its current sentencing enforcement process to give coaches, administrators and student-athletes greater input into the process. Given the institution's ability to make encompassing suggestions or proposals preliminary to the imposition of penalties by the Committee on Infractions, employees and student-athletes, whose interests are often in opposition to those of their institution, should be given an opportunity to be heard and to react to proposals at all stages during the process. Indeed, an actual sentencing hearing might be an effective means of assuring that input is received. Currently there is no separate sentencing hearing prior to the unilateral imposition of penalties by the Committee on Infractions. If institutions, conferences and the NCAA do not become increasingly sensitive to due process and related issues, we may well anticipate a proliferation in legal costs at all levels²⁸⁵ and possible intervention by governmental or related entities in the enforcement process to insure that the rights and interests of

284. It will be recalled that, in referring Proposal No. 3-3, some members of the NCAA noted that they were wholly committed to due process even though they did not expressly support Proposal 3-3. See *supra* notes 175-84 and accompanying text.

285. Litigation costs have become a major concern at the NCAA level. See, e.g., ANNUAL REPORTS, *supra* note 9, at 322-23 for a discussion regarding ever-increasing legal costs, which in 1984-85 alone stood at \$1.45 million. These costs are almost certain to increase in the future as severe penalties are imposed and resisted. Litigation costs may soon exceed the entire enforcement budget, which recently was stated to be \$1.86 million. Whitford, *Why This Man Can't Stop the Cheating*, Sport, Sept. 1986, at 52, col. 1.

employees, student-athletes and other under-represented groups are adequately protected.

These reflections on due process naturally lead to more theoretical inquiries. As to the presidents' theory of punishment, it is clear upon examination of the terms of NCAA Enforcement Procedure sections 7-(c),-(d) and Proposal No. 4, that the Presidents Commission sought both to deter and to punish offending coaches and administrators. Nearly all the punitive provisions that apply to coaches and administrators, for example, may be read as seeking to deter violations at the outset as well as to rehabilitate offenders. As applied, however, penalties for violations also may be imposed in a purely nonconsequentialist manner, seeking to impose suffering on the wrongdoer. Such overlapping purposes do not necessarily render the punitive provisions unacceptable as a theoretical matter; such purposes and justifications are rarely unitary. The apparent failure to consider the individual interests of institutions, athletic administrators, coaches and student-athletes, and the manner in which the provisions are applied to those respective and sometimes differing interests, however, is subject to legitimate criticism. Particularly in the case of groups which are under-represented in the NCAA hierarchy and in the enforcement and legislative processes at all levels—the student-athletes and to some extent personnel—it would not be too much to ask that the Presidents Commission more clearly articulate the purposes behind and the justifications for establishing and imposing harsh penalties on those under-represented individuals. Ongoing empirical studies of the relationship between the penalties imposed and the results achieved are in order. The flexibility included in the penalty provisions, of course, ultimately may permit the Committee on Infractions, and perhaps even the Council, on appeal, to do a better job of expressing the purposes of and justification for penalties in specific cases (for example, NCAA Enforcement Procedure sections 7-(c),-(d) require that the Committee on Infractions specify its reasons in making exceptions in unique cases). In any event, general reflection upon the deeper theoretical issues related to punishment are needed. The seriatim determination of individual cases by the Committee on Infractions may not be the best means of explicating such theory²⁸⁶ and it certainly should not be the exclusive means utilized to delineate the theoretical underpinnings of the NCAA's enforcement process. The broad discretion provided under the applicable penal provisions,²⁸⁷ moreover, creates additional problems at the theoretical level. Typically, neither a clear effort to explicate the underlying theory in the form of the purpose, justification or intent of

286. In the past, it would appear that the Committee on Infractions merely has articulated the nature and extent of the applicable penalty when it imposed a specific penalty in a specific case without intentionally and explicitly discussing either theories of basic punishment generally or sentencing theory in particular.

287. For a discussion of the discretion issue, see *supra* notes 222-26 and accompanying text.

the provisions adopted in the summer of 1985 nor a clear explication of precise rules has occurred. Indeed, given that the penal system created was merely designed in response to a general survey of the presidents, the punitive measures have a largely political, as opposed to theoretical, origin; unless, of course, the presidents individually weighed the theoretical implications of their answers prior to answering each survey question. Even in that unlikely event, the presidents did not explicate that theory in a manner that might offer additional notice and direction to the parties subject to that process. Even the Committee on Infractions lacks insight as to what, as a theoretical matter, was in the minds of the presidents. Parties at all levels are left in some doubt. Further explication is certainly warranted and would assist both the parties in protecting and articulating their interests under the punishment scheme and the Committee on Infractions in applying its provisions.

In summary, problems remain with regard to commercialization, lack of access to the decisionmaking process, lack of finely tuned process provisions and a failure to explicate theory as related to the enforcement of the penal provisions against coaches and athletic administrators. Given these shortcomings, it should be noted that the punitive provisions adopted by the special Convention apply to the student-athlete in even greater force than they do to athletic administrators and coaches who, by virtue of their positions, have greater power than do under-represented and often naive student-athletes. I therefore turn next to a discussion of the ramifications of the work of the special Convention for student-athletes.

2. Punishing Student-Athletes

If the work of the Presidents Commission during the special Convention of 1985 is evaluated from an academic perspective, the most important issue raised would be how that work affected student-athletes. Charged with the obligation of educating their students, the presidents maintain a special fiduciary relationship with their student-athletes.

It is in this regard that the over-commercialization of intercollegiate sports has had its most pernicious effect. In this sense, student-athletes occasionally have been looked at as little more than products to be packaged and sold to an avid consuming public.²⁸⁸ As a result, educational institutions often

288. For antitrust purposes, for example, student-athletes are often considered "inputs." See Koch, *supra* note 6, at 11, where the author states that:

the key to understanding the development of modern intercollegiate athletics is an understanding of the competition for, and use of inputs such as student-athletes. The development of the NCAA . . . has primarily come about because most university-firms have desired to limit competition between themselves concerning how they may hire and utilize their student-athlete inputs.

Recent articles delineating the purported worth of premier college athletes emphasize this point. See sources *supra* note 248.

find themselves in a dilemma relative to their student-athletes. While they are commissioned to teach values and to elevate other academic objectives above pure commercialism, institutions are under mounting pressure to perpetuate the profit-motive in intercollegiate athletics.²⁸⁹ Thus, rather than emphasizing some educational values or a basic theory of sport in organizing and administering their athletic program, many institutions involved in big-time athletics must take a sometimes hypocritical, or at least ambivalent, stance regarding their student-athletes. These institutes must ensure that their product is marketable—that it must be a “winner”—while simultaneously rationalizing that it serves some educational value or values.²⁹⁰ While winning and educational values may not always be mutually exclusive, it is certain that at times they are; and at those times, the institution must make a choice. Unfortunately, all the contemporary pressure on athletic programs to remain economically productive is not counterbalanced by consideration of the student-athletes’ interests since the student-athletes are woefully under-represented at all decisionmaking levels. Their interests often are not heard at any level in the dialogue over the various issues confronting intercollegiate athletics.

There are, it would appear, two ways in which these often related problems of commercialization and under-representation can be minimized from the student-athlete’s perspective. First, and as previously noted, efforts to contain costs related to athletic programs will help by relieving some of the economic pressure that currently plagues many major programs. Second, steps can be taken to increase student and faculty input into the decisionmaking process at all levels.

In this regard, I would make a couple of suggestions. At the institutional and the conference levels, and perhaps ultimately even at the NCAA level, the interests and views of student-athletes should be actively sought and considered. The self-study process at the institutional level could be an important step in that direction.²⁹¹ In determining the “institutional purpose and athletics philosophy” in that self-study, the interests of the student-athlete and students generally should be considered. Students should be

289. See, e.g., *supra* notes 1, 2 and accompanying text, for a general discussion of the influence of commercialization on the institutions. I have some misgivings regarding the current efforts of the NCAA, and for that matter, the CFA, to recognize, in a federated sense, a super, quite commercial, division in intercollegiate athletics. In federating, these institutions may simply be admitting that commercialization is an inevitable reality at some institutions—a reality that cannot be reversed.

290. Indeed, Proposal No. 1, as adopted at the 1985 special Convention, calling for a self-study requires that a topic of the self-study be a delineation of the “institutional purpose and athletics philosophy” of the institution. See also Oliva, *supra* note 2, for an examination of some of the values of coach-student relationships in the academic as opposed to commercial athletic context.

291. For a discussion of the Proposal No. 1, the self-study process, see *supra* notes 121-26 and accompanying text.

represented in the group making such decisions. If, however, institutions are unwilling to permit students to participate in such a process, they should at least consider the interests of student-athletes in discussing and preparing the self-study, and, in those instances, students should be encouraged to react to the document produced by the more exclusive group. Faculty, themselves stewards of the academic mission of an institution, should be actively concerned with their institutional self-study. If faculty members fail to react at this juncture, they may find themselves in the precarious position of students and faculty at SMU.²⁹²

I also would suggest that student participation, both in terms of the enforcement and the decisionmaking or legislative processes, be considered at the NCAA level. Such participation could be effectuated in a number of ways. The students could actually form a committee²⁹³ or elect representatives who would be permitted to offer input and possibly even vote at various levels in the decisionmaking process. Such a proposal would no doubt be criticized on the ground that student activity might be shallow and counter-productive, and that such input would require too much of a time commitment on the part of student-athletes. The former objection seems insufficient because the NCAA would not have to follow the students' advice or input; rather, they would only have to listen to it. The latter objection, however, may be more substantial in that such input would require additional expenditures of time and effort on the part of student-athletes. Indeed, it was just such an objection on the part of faculty members that helped create the impetus for moving control of intercollegiate athletics away from the student-athletes to other entities and ultimately to the NCAA in the nineteenth and early twentieth centuries.²⁹⁴ If this is a concern of educators, however, they should also recognize the importance of remaining particularly sensitive to the needs of student-athletes in every stage of their considerations, from determining the athletic budget to administering the program. In this regard, it is clear that student activity in the decisionmaking process could itself be quite educational for student-athlete participants. If, nevertheless, the presidents opt for not encouraging participation at a formal level by actual students, they nonetheless should encourage it informally. They might, for example, even consider creating a staff position or ombudsman at the conference or the NCAA level which, much like the public defender system

292. For a discussion of the problems caused by SMU's recent debacle, see *supra* notes 217, 263.

293. Danny Manning, a talented basketball player at the University of Kansas, recently was quoted as saying "[w]e [student-athletes] are the nucleus of the NCAA. I guess I basically feel left out. I think they should take some time to listen to us. I think the athletes ought to form a committee and create a full program" Kaul, *Sportsmanship Has Little Place in Big-Time Collegiate Football*, NCAA News, Dec. 8, 1986, at 3, col. 4.

294. See *supra* notes 23, 25 and accompanying text for a brief discussion of that movement as an historical matter.

in criminal law, would be designed to represent the interests of student-athletes. Indeed, given the actual participation by a student-athlete on the Lukens Commission,²⁹⁵ there is some contemporary precedent, to assure student-athlete representation in the decisionmaking process at all levels.

Whatever course the presidents and others may take, it is certain that even their own immediate interests would be well served by action on behalf of student-athlete input in the contemporary dialogue regarding the reform of intercollegiate athletics. Already there is much talk about increasing the compensation received by student-athletes.²⁹⁶ Such a move would run counter

295. Section 912 of Subtitle C, the Advisory Commission on the Comprehensive Education of Intercollegiate Athletes of the Omnibus Crime Control Act—the Lukens Commission—provides for a Commission made up of 17 members to investigate and advise Congress regarding issues in intercollegiate athletics. One of the 17 members is to be “a current student-athlete at a college or university.” *Id.* at § 912(7). One membership each is also reserved for a member of the NCAA, a college or university coach and a college or university athletic director. The recognition of participation by student-athletes and the rights of student-athletes is certainly one of the positive aspects of the legislation authored by Representative Lukens. *See id.* at § 911. It is a first step toward student participation in the development, evaluation and enforcement processes that ought to be duplicated at the institutional, conference and NCAA levels. Indeed, if those other groups fail to recognize a role for the student-athlete, they will run a greater risk of having some outside entity, governmental or otherwise, intervene to protect the rights of student-athletes.

In this regard, A. Bartlett Giamatti, president of baseball’s National League and former president of Yale University, recently argued that it is critically important that institutions of higher education have an academic philosophy that encompasses athletics and added that:

[Institutions of higher learning] think they are taking athletics very seriously because they are making a lot of money from them. They are taking athletics not very seriously at all, because they have emptied them of any educational content

If the National Collegiate Athletic Association does not begin to regulate these places, the federal government will. There are, after all, a number of bills in the House of Representatives today—some of them coming out of the drug program that was passed by both the House and the Senate about six months ago and others independent—which call for setting up commissions on the problems of intercollegiate athletics.

The country is finally getting sick of the fact that the very people who have been charged with the education of the young have been unable or unwilling to regulate their own standards, to clean up their own drug problem, and to live up to their own high principles. If there is anybody that will run intercollegiate athletics less well than the NCAA, it will be the federal government. The federal government is about three years away from stepping into the mess that the colleges and universities have created for themselves.

If the NCAA Doesn’t Begin to Regulate Athletics, Chron. of Higher Educ., Mar. 11, 1987, at 43.

296. Perhaps the most surprising piece of advocacy for increased compensation for student-athletes was written by Professor Robert L. Mahon, who declared that:

The lesson is this: we put the pressure on; we make the athletes play, so we should see that they are properly rewarded. Fans—including the fans in college administration—make the college sports system possible. We should stop pretending that going to college on an athletic scholarship is the just reward for college sports. A start: athletes can be hired by a college team and given the option to attend classes; those who don’t graduate can be given a lump-sum

to recent declarations at the national and NCAA level.²⁹⁷ If, however, the presidents fail to adopt measures to de-commercialize their athletic programs, they will one day face stronger and more vocal efforts to increase student-athlete compensation on the ground that student-athletes should share in the "profits" they help produce. It even has been suggested that the student-athletes unionize.²⁹⁸ Indeed, in the fall of 1986, in front of a national television audience, players demonstrated their support for unionization ef-

payment for their athletic performance.

Mahon, *Life is Like Basketball*, Newsweek, Feb. 23, 1987, at 10.

In a recent letter to the editor by Paul R. Lawrence appearing in the *Wall Street Journal*, Lawrence argued that:

Why not pay the athletes for their performances? Under such a system the marketplace, not the N.C.A.A., would determine the wages of athletes. Such a plan has two appealing features.

First, recruiting would become more open and honest. Schools could readily bid for athletes much as they do for professors, and competition similar to that for research funds would emerge. This would end secret alumni deals and bring more honesty to the recruiting process.

Second, the cost of administering intercollegiate athletics would decrease. Less time and effort would be devoted by schools to recruiting and by the N.C.A.A. to investigating its members. These savings could be devoted to ensuring that athletes graduate.

End Cheating—Pay College Athletes, Wall St. J., Mar. 6, 1987, at 30, col. 3

This notion of compensating student-athletes is hardly new. Historically, in fact, players have received compensation from the very inception of intercollegiate athletic participation. See ADMINISTRATION OF UNIVERSITY PROGRAMS, *supra* note 16, at 8, 19. Indeed, in a recent study of Division I players, 60% of those who filled out the questionnaire "said they had no problem with breaking payment regulations set by the NCAA . . ." *Some Athletes Not Averse to Being Paid*, NCAA News, Nov. 3, 1986, at 3, col. 3. That article also points out that "a majority of lower-class athletes in all divisions, particularly lower-class black athletes, see nothing wrong with accepting money to play college sports." *Id.* at 3, col. 4. Of course, if institutions in fact merely use student-athletes for noneducational and commercial purposes, then there certainly would not be anything improper with regard to demands for greater compensation of student-athletes. In the 1985 special Convention, however, the NCAA reasserted its commitment to the Association's "current financial aid and related amateurism rules." See Proposal No. 9, *supra* notes 201-04 and accompanying text. If the NCAA's reason for reasserting this principle was merely to save money in operating their programs by collectively limiting competition in the market for players, the players would be morally and legally (under antitrust law) justified in asserting their rights to greater compensation. See, e.g., Comment, *Compensation for College Athletes: A Run for More than the Roses*, 22 SAN DIEGO L. REV. 701 (1985); Koch, *supra* note 6. If, however, the NCAA membership is sincere in its effort to re-emphasize the academic side in the balance between academics and highly commercialized athletic competition in intercollegiate athletics, such an action for increased compensation by a student-athlete would not seem to be of merit. I doubt, moreover, that compensating student-athletes more would limit that which is pernicious in college athletics—it would merely legalize it—and I am convinced that it would do little to ensure higher graduation rates.

297. For a discussion of Proposal 9, adopted at the 1985 Special Convention, see *supra* notes 201-04.

298. Dick DeVenzio, a former basketball player at Duke University, is the head of the Revenue Producing Major College Players Association and "is trying to form a union of college athletics." Chron. of Higher Educ., Dec. 3, 1986, at 34.

forts.²⁹⁹ Such a move would be regrettable in that it would constitute but another step toward recognizing the apparent irrevocability of the commercialization of intercollegiate athletics. Yet if steps are not taken to limit the movement in the direction of student unionization, such a move may become more than just another idea.

Given these general statements, I next turn to a discussion of how the various proposals adopted during the 1985 special Convention specifically have affected, or may affect, the rights and interests of student-athletes. Proposal No. 5, by terminating the eligibility of student violators, indicates the resolve of the NCAA to hold student-athletes accountable for violations of the NCAA rules. Resolution 5-1, however, which was narrowly defeated at the special Convention, would have required "mandatory distribution to all recruits and student-athletes of a summary of applicable NCAA rules and regulations . . . and for mandatory review of the summary by each varsity team meeting as a group."³⁰⁰

These actions collectively demonstrate the resolve on the part of the NCAA membership to punish college athletes individually. Additionally, student-athletes are often punished indirectly when their institution is punished. It is clear, for example, that the student-athletes and students generally at SMU, regardless of whether or not they were involved in the violations, are being punished or adversely affected by invocation of the "death penalty." This is true even though provision was made for football players to transfer to another institution without being forced to "red shirt," the normal practice for transfers by student-athletes.³⁰¹

Given the direct and indirect punishment imposed on student-athletes when an individual or institutional penalty is imposed, heightened concern must be shown in terms of the protection afforded by the due process rights of student-athletes. As with the administrators and coaches, it is clear that more solicitude for the interests of student-athletes must be demonstrated, particularly at the enforcement level where penalties are assessed. Since student-

299. DeVenzio had called for a thirty-minute sitdown by the players. The student-athletes instead chose to demonstrate their support in a somewhat less dramatic form—five players from each team simply joined hands at midfield, dropped to their knees, and bowed their heads as evidence of support for the effort to unionize major college athletics. *Id.* In addition to the compensation and commercialization issues which serve as the major impetus behind the unionization effort, it is clear that drug testing and related issues regarding the rights of student-athletes may also ultimately contribute to a movement in the direction of unionization.

300. See *supra* note 188.

301. Both the NCAA and the Southwest Conference have permitted SMU's football players to be immediately eligible at transferee institutions. See *SMU Transfers to Be Eligible*, N.Y. Times, Mar. 3, 1987, at A24. SMU also has agreed to honor their scholarship commitments to student-athletes at their institution. Even with these efforts to lessen the impact of the penalties on innocent student-athletes, however, it is clear that the student-athletes will suffer more than the mere inconvenience of transferring, both academically and athletically. See, e.g., *NCAA's Tough Stance on SMU's Violations Shocks Many on Campus, Surprises Others*, Chron. of Higher Educ., Mar. 4, 1987, at 32-33.

athletes have even less input into the enforcement and decisionmaking processes of the NCAA than coaches and administrators, their interests run a greater risk of being unfairly jeopardized. While this fact would seem to require greater legal solicitude in terms of due process, it unfortunately has attracted little attention, with the majority of courts rejecting student-athlete pleas of due process in most cases.³⁰² The institutions, the conferences and the NCAA consequently have little legal incentive to extend due process to student-athletes. That may change, however, if the trend toward commercialization continues and courts begin to recognize a property right in participation by student-athletes in intercollegiate athletics or if courts recognize that punitive action stigmatizes an involved student-athlete thereby depriving her of a liberty interest. All educational entities, nevertheless, ought to be inclined, as a matter of moral and educational responsibility, to extend more process to the student-athletes at every stage of the proceedings.

In this regard, I would suggest offering legal representation or advice to student-athletes when their rights might be impinged. Given a potential conflict of interest between the institutions and the student-athletes, institutions have some moral and perhaps even legal responsibility to see that the rights and interests of their student-athletes are adequately represented.³⁰³ Short of providing adequate legal representation, institutions must at a minimum show greater solicitude for the student-athletes' interests, as must the NCAA, particularly with regard to sentencing.³⁰⁴ The student-athletes are afforded little input in the sentencing process, unless they can afford an attorney or are supplied one by an institution (either their school or conference), which may well have interests that conflict with the rights and interests of the student-athlete. As such, steps must be taken to assure greater input by and elucidation of the interests of affected students in the enforcement and legislative processes of the NCAA.

There is also a special need on the part of student-athletes, both as a matter of due process and as a matter of protecting and defining their interests, for institutions, conferences and the NCAA to articulate clear theories of punishment and sentencing. At the broader theoretical level, it is at least arguable that neither the consequentialist nor the nonconsequentialist theories fit as well as a moral good theory.³⁰⁵ While the need to deter

302. See G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 27, at 63-73.

303. The NCAA has shown an increased willingness to recognize the institution's right to offer such representation to student-athletes. It may be possible to facilitate the student-athlete's rights in this regard by utilizing an ombudsman at the conference or national level. See *supra* notes 293-95 and accompanying text.

304. See *supra* notes 286-87 and accompanying text. What applies to institution, administration and coaches, applies with much greater force to student-athletes.

305. For a fuller explication of the moral good theory of punishment, see Lipkin, *supra* note 237. While that theory perhaps can be criticized on the ground that it is unrealistic or overly idealistic in the conventional criminal context, it is certainly defensible in the context of the

and even punish is important in enforcing the NCAA rules and regulations, it is clear that institutions have an additional role with regard to their students—that of educating them as autonomous individuals. To rashly punish that student-athlete as a scapegoat for the institution's own failures is a reprehensible act. Care therefore must be taken to recognize the rights of the student-athlete in the NCAA's enforcement process. Student-athletes should have the opportunity to participate in some form at the hearing and sentencing phases of the enforcement process. The student-athlete also should be given a role in the decisionmaking process at all levels. When such participation is facilitated, a long and meaningful step will have been taken toward enshrining academic integrity in intercollegiate athletics. The Presidents Commission and the NCAA are well-positioned to take such a dramatic move—it can only be hoped that they will not shirk their responsibility as educators in this regard. If they do, they will have done much to abdicate their legitimate right to rule in the world of intercollegiate athletics.

IV. CONCLUSION

The general efforts on the part of the Presidents Commission and the NCAA to restore academic integrity to intercollegiate athletic programs, commencing in significant measure with the special Convention of 1985, are to be applauded. In that special Convention, the presidents, with overwhelming support from the NCAA membership body, collectively sought to implement a series of reforms in the governance of intercollegiate athletics. Those initial reform efforts, which are largely punitive in nature, were adopted to counter-balance commercial and related non-academic pressures that have plagued intercollegiate athletics from its inception.

These initial efforts have been followed recently by proposals designed to ensure cost containment in intercollegiate athletics,³⁰⁶ to initiate a national dialogue regarding the compatibility of intercollegiate athletics with the

student-athlete, where the institution and at least indirectly the NCAA and the conference have a fiduciary, educative function to fulfill with regard to their student-athletes.

To permit the autonomous concerns and interests of implicated student-athletes to be considered would constitute, at the very least, a great lesson in the importance of fairness and due process for the students. It would do much to teach the importance of participation as well as reinforcing the role of personal responsibility on the part of the student-athlete. It would seem that self-reliance and procedural fairness are two very important values that educators are commissioned to teach.

306. See Lederman, *NCAA Presidents Panel, Unable to Agree on Reforms, Proposes Few Rule Changes*, Chron. of Higher Educ., April 8, 1987, at 35. This article discusses the agenda of the special convention to be held in June of 1987. It is noted that the members of the Presidents Commission, unable to agree among themselves, offered a "small and somewhat watered-down package of cost-containment recommendations for the association's special convention in June." *Id.*

educational values of colleges and universities³⁰⁷ and to authorize a series of comprehensive studies regarding the effects of participation in intercollegiate athletics on the student-athlete and the collegiate institution.³⁰⁸ While heartening, these combined efforts are but a beginning, and doubts necessarily persist as to whether the resolve of the presidents and other supporters of such reform measures can sustain their effort in light of countervailing economic and political pressures. In the highly commercialized and popularized milieu of intercollegiate athletics, exuberant and often powerful boosters of a win-at-all-costs philosophy continue to place intense pressure on administrators, coaches and student-athletes. Indeed, presidents will have to resist the allure that generally attends the financial success accompanying a winning athletic tradition. A failure to resist this temptation will result in a dissipation of the reform movement initiated during the summer of 1985.

If the Presidents Commission and other supporters of reform can maintain their resolve to complete a task just begun, and can encourage like-minded individuals and groups to support them in resisting the seemingly natural inclination toward commercialization, this coalition may yet succeed in fully restoring a sense of academic integrity to intercollegiate athletics at all levels. To do so, these individuals will need support from students, faculty and alumni who are committed to an academic orientation. Given the visibility and media attention that supplements an "athletics first" mentality, the

307. Unable to agree on a number of issues, the Presidents Commission decided to initiate a national dialogue regarding the compatibility of intercollegiate athletics with the values of higher education. This notion of a national debate or dialogue was presented to the Presidents Commission in a draft of a white paper presented in April of 1987 by Chancellor Heyman of the University of California at Berkeley. *See Commission Adds New Dimension to Special Convention*, NCAA News, Apr. 8, 1987, at 1. With regard to this dialogue, Chancellor Slaughter of the University of Maryland at College Park and current chair of the Presidents Commission, stated that, given broad disagreement among the Presidents on a number of critical issues, "We [the Presidents Commission] need input from a variety of people: athletic directors, coaches, athletes. It will be an opportunity for all of us to receive some edification on these issues." Lederman, *supra* note 306, at 36. He added that, "It is our belief that this is a dialogue that will go on for some time. There's a sense that most of the easy things have been done." *Id.*

308. This resolution, which was presented to the Special Convention in June of 1987, asks the membership to authorize a series of studies "of a magnitude and consequence heretofore not undertaken," calling for the indepth examination of a number of issues. *See Commission Adds New Dimension to Special Convention*, *supra* note 307, at 1, 10. The subjects to be studied include, but are not necessarily limited to, a comparison of student-athletes' college experience with that of students in general, student-athlete graduation rates, student-athletes' opinions of their college experience and the effect of athletic programs on institutions of higher education. *Id.* at 10.

These studies provide an exciting prospect. With the information obtained as a result of these studies, the Presidents will be well positioned to effectuate the kinds of reforms that will insure academic integrity in intercollegiate athletics. It is particularly heartening that student input will be sought and considered. Indeed, such a process may well enable the Presidents to consider and ultimately resolve a number of the issues raised in this Article.

challenge to maintain academic integrity in intercollegiate athletics is immense.

Recent efforts to penalize violations of NCAA rules and to contain future costs suggest a positive move toward ensuring academic integrity in intercollegiate athletics. In one sense, even the presidents' willingness to punish themselves and their institutions for involvement in infractions may indicate a long-term, collective commitment to the value of academic integrity. The job has just begun, however, and there are many sensitive issues that still must be resolved before a final verdict can be rendered.

To succeed in facilitating meaningful reform, the presidents and others ultimately will have to employ the self-study procedure, budgetary control and other related processes that are now in place to ascertain what the academic purposes of their athletic programs are or should be and how those purposes can best be effectuated. In initiating reform proposals, the presidents and others must be careful to take into account the rights and interests of personnel and student-athletes.

Student-athletes are often under-represented in the enforcement and legislative processes related to intercollegiate athletics at the institutional, conference and national levels. This underrepresentation effectively means their rights and interests frequently are discounted by those wielding power. In particular, these powers must be sensitive to the academic interests of their students. To compromise those interests is to abdicate one's responsibility as an educator and would constitute a moral, if not a legal, breach of the presidents' fiduciary responsibility to their students.