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**AN INTENTIONAL FOUL: CORRUPTION IN NCAA BASKETBALL & THE  
AFTERMATH OF THE 2017 SCANDAL**

*Seth Myers*

### Introduction

Corruption and scandal are commonplace in today's world. Since President Nixon's Watergate scandal, corruption has been at the forefront of the public eye.<sup>1</sup> While generally corruption has been reserved for politics and large businesses, the sports industry has not been exempt from the influence of corruption.<sup>2</sup> More recently, corruption and scandal in sports have become more prevalent.<sup>3</sup> In 2015, the soccer world and the Olympics both experienced scandal due to corruption from what has been titled the "FIFA scandal"<sup>4</sup> and the "Russian Doping Scandal."<sup>5</sup> These scandals rocked the sports world and led many to be concerned about the future of sports.

On September 26, 2017, college basketball fell victim to its own scandal as corruption and fraud were investigated by the FBI.<sup>6</sup> Coaches, players and apparel company executives were implicated in one of the biggest incidents of corruption in National Collegiate Athletic Association (NCAA) history.<sup>7</sup> This scandal, in addition to the FIFA and Russian Doping scandals, caught the attention of the world. In response to the impropriety found within sports throughout the world, the United Nations Educational, Scientific and Cultural Organization (UNESCO) developed a plan to help countries maintain the integrity of sports.<sup>8</sup> This plan calls for action by the member states of the United Nations (UN) to protect the integrity of sports in their respective countries.<sup>9</sup> This response was a world-wide recognition that sports are important for the stability of a country and not just for entertainment.<sup>10</sup>

The recognition by UNESCO accentuates the significance of corruption in sports. Corruption in sports, and especially collegiate athletics, is often marginalized<sup>11</sup> and considered trivial in comparison to the issues of corruption in the fields of business and politics. In reality, the impact of sports on society is considerable, and the effort to preserve the integrity of sports deserves more attention. Sports maintain a required relationship with societal values.<sup>12</sup> Societal values are incorporated into sports and reinforced when communities engage and participate in

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<sup>1</sup> See e.g. National Constitution Center Staff, *The Legacy of Watergate: Five ways life changed after the scandal*, CONSTITUTION DAILY, <https://constitutioncenter.org/blog/the-legacy-of-watergate-five-important-changes-after-the-scandal> (last visited Nov. 7, 2018).

<sup>2</sup> See e.g. GRAHAM BROOKS ET AL., *FRAUD, CORRUPTION AND SPORT* 4-8 (2013).

<sup>3</sup> See e.g. Sue Williams, *Corruption in sport: a "gold rush" with the law left behind*, UNESCO, <https://en.unesco.org/news/corruption-sport-%E2%80%9Cgold-rush%E2%80%9D-law-left-behind> (last visited Jan. 12, 2019).

<sup>4</sup> See e.g. Rebecca Ruiz & Victor Mather, *The FIFA Scandal: What's Happened, and What's to Come*, THE N.Y. TIMES, <https://www.nytimes.com/2015/09/26/sports/soccer/the-fifa-scandal-whats-happened-and-whats-to-come.html> (last visited Nov. 7, 2018).

<sup>5</sup> See e.g. Antoine Duval, *The Russian doping scandal at the court of arbitration for sport: lessons for the world anti-doping system*, 16 INT. SPORTS LAW J. 177 (2017).

<sup>6</sup> See Colin Ward-Henninger, *Report: High-profile NBA agency raided by FBI amid NCAA basketball investigation*, CBS SPORTS (Sept. 26, 2017), <https://www.cbssports.com/nba/news/report-high-profile-nba-agency-raided-by-fbi-amid-ncaa-basketball-investigation/>.

<sup>7</sup> Mitch Sherman, *Everything you need to know about the college basketball scandal*, ESPN (Feb. 23, 2018), [http://www.espn.com/mens-college-basketball/story/\\_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents](http://www.espn.com/mens-college-basketball/story/_/id/22555512/explaining-ncaa-college-basketball-scandal-players-coaches-agents).

<sup>8</sup> See UNESCO, *MINEPS VI – Kazan 2017*, <https://en.unesco.org/mineps6/kazan-action-plan> (last visited Nov. 10, 2018).

<sup>9</sup> UNESCO, *KAZAN ACTION PLAN* at 3 (2017) (hereinafter UNESCO, KAZAN PLAN).

<sup>10</sup> *Id.*

<sup>11</sup> See MATHEW J. MITTEN ET AL., *SPORTS LAW & REGULATIONS* 4 (Wolters Kluwer, 4th ed. 2017).

<sup>12</sup> *Id.* at 5-6.

them.<sup>13</sup> Sports also enable sustainable development and contribute to tolerance, peace, health, education and social inclusion in each location where they are found.<sup>14</sup> The lack of attention given to corruption in sports has left the corruption to grow and fester without the attention needed to hinder its existence. This is a mistake that needs to be addressed in order to protect societal values and ensure the continuing benefits that are derived from sports.

In the United States, the National Collegiate Athletics Association (NCAA) stands as the protector of college sports from corruption.<sup>15</sup> This protection comes with the pillar of amateurism which the NCAA clings to in order to maintain the status quo enabling much of its power.<sup>16</sup> This concept of amateurism has been discussed in various journal articles and is still in debate.<sup>17</sup> This article does not seek to contribute to this discussion but rather will discuss how corruption in college sports may be fought without discussing the amateurism principle.

The uniqueness of the NCAA brings about challenges and concerns, in fighting corruption, that have once again been emphasized by the FBI investigation and the plan that has been proposed by UNESCO. The NCAA with all of its supposed power does not currently have an effective mechanism to punish or deter the growth of corruption. This article will begin with a brief history of the formation of the NCAA and the current governance model to illustrate how the NCAA utilizes the power that it does have. It will then highlight the key issues brought to light by the FBI probe in the NCAA and discuss a proposal on how the NCAA, professional sports leagues and the United States government may come together to protect the integrity of college sports.

### I. Brief History of the Formation of the NCAA

In the beginning, college sports was without form and void; and darkness was on the face of college athletics.<sup>18</sup> In the 1840s football players at Harvard and Yale were competing for the

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<sup>13</sup> *Id.*

<sup>14</sup> See UNESCO, KAZAN PLAN *supra* note 9 at 1-4.

<sup>15</sup> See e.g. NCAA, *Fairness*, <https://www.ncaa.org/about/what-we-do/fairness-and-integrity> (last visited March 3, 2019).

<sup>16</sup> Amateurism is defined as the concept that college athletes should not be paid for their participation in intercollegiate athletics. See Elisa Kircher Cole, *Amateurism – Outdated or Still a Vital Concept*, 1 ARIZ. ST. U. SPORTS & ENT. L. J. 125, 127-29 (2011); See also Rick Volante, *Opinion – the Con that is ‘Amateurism’*, SPORTS LITIGATION ALERT (Aug. 31, 2018), <http://www.hackneypublications.com/sla/archive/003476.php>.

<sup>17</sup> The fight against amateurism is currently underway in the Northern District Court of California in *In Re: Grant-in-aid Cap Anti-trust Litigation*. In this case, the Plaintiffs and the class that they hope to represent are former college football and basketball players who claim to have been exploited by the NCAA through the concept of amateurism. See, Second Amended Complaint-Class Action Seeking Injunction at 1, *In Re: Nat'l Coll. Athletic Ass'n Grant-in-Aid Cap Antitrust Litigation*, No. 4:14-md-02541 (N.D. Cal. 2018). A key component of their argument is that there are valid alternatives to the NCAA competition rules that would adequately regulate college sports without the need for a uniform price cap by a national body. See, Defendant's Closing Brief at 46, *In Re: Nat'l Coll. Athletic Ass'n Grant-in-Aid Cap Antitrust Litigation*, No. 4:14-md-02541 (N.D. Cal. 2018). One of the alternatives suggested was that the conferences or even the schools take the responsibility of imposing price caps for the payment of student-athletes in return for services rendered. See, *Id.* at 47-50. Should the NCAA lose this case and the price-caps be determined at a conference or school level, there would still be those that would seek to exceed the price-caps through corruptive schemes in order to gain a competitive advantage. This note hopes to help address the problem of corruption in the NCAA and NCAA basketball in particular, regardless of whether athletes get paid more than the cost of attendance, or if the concept of amateurism is left intact.

<sup>18</sup> Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11-13 (2000) (hereinafter Smith, *Brief History*).

pride of the schools in regatta sponsored by Elkins Railroad Line.<sup>19</sup> Much like the rivalry games that we are accustomed to today, the events were highly commercialized and each team sought to find a competitive advantage.<sup>20</sup> This competition found itself into other sports beyond football and Harvard University went so far as obtaining a coxswain who was not a student.<sup>21</sup> Thus, as the commercialization of college sports was born, so too was cheating and corruption in college sports.

The cheating that existed was not reserved to adding non-student players. The methods of obtaining an unfair advantage that continue to plague college athletics today were alive and well. For example, a Yale student-athlete was purported to have received: (1) a suite of rooms at the dorms; (2) free meals at the University club; (3) a one-hundred dollar scholarship, (4) the profits from the sale of programs; (5) an Agency arrangement with the American Tobacco Company, under which he received a commission for the cigarettes sold in New Haven; and (6) a ten-day paid vacation to Cuba.<sup>22</sup> During this time, college athletics were run by students, but in light of the increase of cheating and injury, the university's faculty sought to take control and lead the charge in fighting corruption and promoting safety.<sup>23</sup> Even with faculty control, university presidents still had major concerns.<sup>24</sup> President Elliot at Harvard opined that the "lofty gate receipts from college athletics had turned amateur contests into major commercial spectacles."<sup>25</sup> President Walker of the Massachusetts Institute of Technology also lamented that same year claiming that the academics at colleges were being overshadowed by athletics and stated, "[i]f the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics."<sup>26</sup>

Understanding that faculty oversight was not enough to address these concerns, conferences were organized to bring more regulation and governance to these collegiate contests.<sup>27</sup> Unfortunately, the problems were still not solved and the issues in college sports came to its pinnacle when in 1905, there were eighteen deaths and one-hundred major injuries in college football alone.<sup>28</sup> To address this concern, the President of the United States, Theodore "Teddy" Roosevelt, met in the Oval Office with representatives of the major college football institutions to review football rules.<sup>29</sup> Notwithstanding President Roosevelt's input, deaths and injuries in college football continued.<sup>30</sup> New York University's president called another meeting with the representatives from major college football institutions that posed the question: was it possible for college football to be regulated or should football just be abolished at the intercollegiate level altogether?<sup>31</sup> What came out of that meeting was the formation of a Rules Committee.<sup>32</sup> President Roosevelt had the participants of the meeting in the White House to meet

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 *IND. L. J.* 985, 989 (1987) (hereinafter Smith, *Death Penalty*).

<sup>23</sup> Smith, *Brief History* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 12.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

with this Rules Committee and the result was the formation of the Intercollegiate Athletic Association (IAA). The IAA was an unprecedented organization of sixty-two university leaders that would take on the burden of regulating and enforcing rules to protect athletes. In 1910, the IAA was renamed to the National Collegiate Athletic Association.<sup>33</sup> Throughout the years, the role of the NCAA would be expanded from having minimal oversight to the organization of championships and eventually come to be the regulatory giant that we know today.<sup>34</sup> This structure has changed over time and has adjusted as new concerns arise.

## II. Current Structure and Governance of the NCAA

### **a. Legislative Process and Rule-Making**

The NCAA continues to be a member-led organization that is dedicated to college athletics.<sup>35</sup> Today, it is composed of over 1,200 schools, conferences, and other affiliate organizations divided into three divisions.<sup>36</sup> It was necessary to implement a governance structure to administer intercollegiate athletics while attempting to reconcile the interests of all stakeholders. The governance models are slightly different for each division.<sup>37</sup> This article will only address the governance of Division I as it is considered to be the most elite and most widely recognized division; and as such, many of these cases of corruption occur within this division.<sup>38</sup> The current structure was adopted in 2014 by the NCAA's board of directors from a proposal by the Division I Steering Committee on Governance.<sup>39</sup> In this model, the governance takes place between three main organizations: (1) the board of directors, (2) the council, (3) the council's substructure.<sup>40</sup>

The Board of Directors consists of twenty-four members in the following distribution: ten presidents from the Football Bowl Subdivision (FBS), five presidents from the Football Championships Subdivision (FCS), five presidents from Division I schools without football, one student-athlete, one athletics director, one faculty athletics representative, and one senior woman representative.<sup>41</sup>

The council is composed of thirty-two representatives from conferences.<sup>42</sup> These representatives can be an athletic director, a conference administrator, senior woman administrator, or faculty athletic administrator.<sup>43</sup> It is the intention of the NCAA that at least sixty percent of the thirty-two seats are athletic directors.<sup>44</sup> Additionally, the council has two

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 12-21.

<sup>35</sup> NCAA, *What is the NCAA?*, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Nov. 10, 2018).

<sup>36</sup> NCAA, *Membership*, <http://www.ncaa.org/about/who-we-are/membership> (last visited Nov. 10, 2018).

<sup>37</sup> *Id.*

<sup>38</sup> See NCSA, *The Difference in College Division Levels*, <https://www.ncsasports.org/recruiting/how-to-get-recruited/college-divisions> (last visited March 3, 2019).

<sup>39</sup> Michele Brutlag Hosick, *Board adopts new Division I Structure*, NCAA (Aug. 17, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

<sup>40</sup> DIVISION I STEERING COMMITTEE ON GOVERNANCE, RECOMMENDED GOVERNANCE MODEL at 5 (2014) (hereinafter D1 GOVERNANCE MODEL); see also Appendix I.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Hosick, *supra* note 31.

student-athletes, four conference commissioners, one 1A faculty athletic representative, and one faculty athletic representative association representative, all with full voting power.<sup>45</sup> It is the council that makes the day-to-day policy and legislative decisions for Division I.<sup>46</sup>

To assist the Council, the Council substructure places a high-level focus on sub-categories emphasizing the core missions of Division I.<sup>47</sup> Currently, there are two such subsets of the Council.<sup>48</sup> The first focuses on academics and the second on championships.<sup>49</sup> These subsets of these Council assist the Council in the creation of legislation and the day-to-day operations in these two categories.<sup>50</sup> The NCAA has a vested interest in both of these areas and rightly has chosen to keep both championships and academics under the purview of these specialized groups.

These organizations participate in the creation of legislation using two systems: (1) the autonomy system, and (2) the Council legislative system.<sup>51</sup> The Autonomy system grants authority to the five major conferences: Atlantic Coast Conference (ACC), Big 12 Conference, Big Ten Conference, Pac-12 Conference, and Southeastern Conference (SEC).<sup>52</sup> It allows the sixty-five member institutions that make up these conference in addition to fifteen student-athlete representatives to adopt legislation specific to the concerns and interests that affect their student-athletes.<sup>53</sup> However, the legislation enacted through this process is limited in scope.<sup>54</sup> The main purpose of the legislation from the Autonomy system is to allow the permissive use of resources to benefit student-athletes and includes other well-being issues.<sup>55</sup> In order to ensure that these purposes are fulfilled and not exceeded to the point of adversely impacting fair competition in Division I, a Governance Subcommittee of the Board monitors such legislation.<sup>56</sup>

Under the Council system, all conferences participate in the legislative process.<sup>57</sup> The legislation that comes out of this system is steered towards areas of focus that do not fit within the Autonomy system.<sup>58</sup> Such areas include: “championships administration and policy, oversight of membership standards, legislation that requires consideration by all conferences, and management of sports/topic specific studies to formulate recommendations for actions.”<sup>59</sup>

## **b. Enforcement**

The enforcement of the rules and legislation enacted by the NCAA is done primarily by three main regulatory organizations within the NCAA national office and is supplemented by the efforts of the member institutions themselves.<sup>60</sup> These three regulatory institutions are known as

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See D1 GOVERNANCE MODEL, *supra* note 32 at 6.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; see also Appendix II.

<sup>52</sup> *Id.*; see also Appendix I.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See NCAA, ROLES OF THE REGULATORY DEPARTMENTS (2016); see also Appendix III.

the Eligibility Center, the Academic and Membership Affairs (AMA), and the Enforcement Staff.<sup>61</sup> The Eligibility Center certifies the academic and amateur status of athletes that are about to enter college and seek to compete in NCAA contests but focuses on behavior before the student enrolls.<sup>62</sup> The AMA measures the academic performance of member schools and is responsible for the interpretation of NCAA legislation and waiving the application of these rules when appropriate.<sup>63</sup> It is the AMA that determines whether a student-athlete may be reinstated, along with any imposed conditions, when the student-athlete has compromised his or her eligibility.<sup>64</sup> The Enforcement Staff is charged with investigating alleged violations of the rules, such as corruptive schemes, that are committed by the members of the NCAA.<sup>65</sup>

During the investigation process, the Enforcement Staff and member-institutions work together to determine the facts surrounding each allegation.<sup>66</sup> Neither the Enforcement Staff nor the member-institutions have subpoena power to obtain evidence related to the alleged violations but instead, rely on informal interviews and questioning.<sup>67</sup> After the evidence gathering, the Enforcement Staff makes an initial determination on what level the alleged violations would constitute.<sup>68</sup> The alleged violation is leveled between I-IV based on the severity of the alleged violation.<sup>69</sup> A level IV violation is the least severe and is considered to be a minor violation that is technical in nature.<sup>70</sup> These violations are processed by conference offices without involvement by the NCAA.<sup>71</sup> Level III violations are resolved by the Enforcement Staff themselves.<sup>72</sup> Violations that are more severe and constitute a minimal recruiting competitive advantage or minimal impermissible benefits are considered Level II violations.<sup>73</sup> The most egregious of infractions are considered Level I infractions, which is what the majority of infractions regarding corruption would be classified.<sup>74</sup> These are infractions are those that constitute a substantial impermissible benefit or a substantial recruiting, competitive or other advantage.<sup>75</sup> Should the Enforcement Staff decide the allegations amount to a Level I or II infraction, the alleged violations are reviewed by the Committee on Infractions (COI).<sup>76</sup> The COI is an independent group of qualified representatives from member-schools and the public.<sup>77</sup>

The COI reviews the facts that were presented to them in order to determine if violations occurred and what penalties should be assessed.<sup>78</sup> After the presentation of evidence by the Enforcement Staff, the member-institution, and the involved individuals, the COI deliberates

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See NCAA, *INFRACTIONS PHASES AND PARTIES* (2016) (hereinafter *NCAA, PHASES*).

<sup>67</sup> See NCAA, *Why Can Infractions Cases Take a Long Time to Investigate?*,

<http://www.ncaa.org/enforcement/why-can-infractions-cases-take-long-time-investigate> (last visited March 3, 2019).

<sup>68</sup> See NCAA, *VIOLATION STRUCTURE* (2016).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See NCAA, *PHASES supra*, note 57.

privately.<sup>79</sup> A written decision is then released detailing the findings of the COI.<sup>80</sup> The decision is binding upon the parties and is considered to be precedent for future similar violations.<sup>81</sup> In the event that there is no dispute between the Enforcement Staff and the member-institution or individuals involved, the COI decides the case through an expedited process called summary disposition.<sup>82</sup>

When the member-institution or other involved parties do not agree with the findings of the COI, they may appeal violations or penalties to the Infractions Appeals Committee (IAC).<sup>83</sup> Upon the filing of the appeal, the COI takes over the role held by the Enforcement staff and defends its findings.<sup>84</sup> The IAC takes these arguments by the COI and the arguments presented by the schools or other parties to make a final determination on whether the findings of the COI should be affirmed or reversed.<sup>85</sup> The decision of the IAC is the end of the road, with its decision being final and binding upon all parties involved.<sup>86</sup>

### c. Penalties

The penalties available to be imposed on schools by the NCAA through the COI are enumerated in NCAA Bylaw 19.9.<sup>87</sup> Rather than enforce penalties arbitrarily, as some may believe, the NCAA is bound to enforce the penalties prescribed in its rules.<sup>88</sup> The NCAA has categorized penalties into three classifications: aggravated, standard, and mitigated.<sup>89</sup> Looking at precedent of similar cases and the enumerated aggravating and mitigating factors, the panel of the COI weighs the evidence presented to determine whether the facts call for a higher or lower range of penalties.<sup>90</sup> Some examples of aggravating factors include: multiple level I violations by the institution or involved individual; a lack of institutional control; obstruction of the investigation or an attempt to conceal the violation; violations were premeditated, deliberate, or committed after substantial planning; or conduct intended to generate pecuniary gain for the institution or involved individual.<sup>91</sup> On the other side, some mitigating factors include: prompt self-detection and self-disclosure of the violation; affirmative steps to expedite final resolution of the matter; or exemplary cooperation.<sup>92</sup>

Once the COI makes the classification for the penalty of aggravated, standard or mitigated, it may prescribe core penalties that then range in time.<sup>93</sup> The core penalties include seven penalties: (1) Competition Penalties, (2) Financial Penalties, (3) Scholarship Reductions, (4) Show-Cause Orders, (5) Head Coach Restrictions, (6) Recruiting Restrictions, and (7)

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> NCAA, INVESTIGATIVE RESPONSIBILITIES (2016).

<sup>88</sup> *See* NCAA Bylaw 19.9.2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* NCAA Bylaw 19.9.3.

<sup>92</sup> *See* NCAA Bylaw 19.9.4.

<sup>93</sup> *See* NCAA Bylaw 19.9.4.

Probation.<sup>94</sup> The COI may not depart from these core penalties except in the case of extenuating circumstances.<sup>95</sup> However, even in these circumstances, the NCAA has listed out the additional penalties that the COI may prescribe.<sup>96</sup> Even though the NCAA is restricted in the penalties that it may prescribe, the extenuating circumstances that allow it to add on to the core penalties are attenuated at best.

Recently within college basketball, the NCAA reached beyond its core penalties for a case involving impermissible benefits to a student-athlete from boosters.<sup>97</sup> Impermissible benefits are generally categorized as a level I or II violation.<sup>98</sup> The violation would likely be considered a level II violation if the benefit gained as a result of the violation is minor.<sup>99</sup> The Enforcement Staff and the member-institution, Brigham Young University (BYU) agreed to the

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<sup>94</sup> See NCAA Bylaw 19.9.5 (the NCAA provides definitions for each of these penalties in NCAA Bylaws 19.9.5.1-.4 as follows: (1) Competition Penalties: Competition limitations on the institution's participation in postseason play in the involved sport(s); (2) Financial Penalties: Financial penalties may include requirements that an institution pay a fine, return revenue received from a specific athletics event or series of events, or face reduction in or elimination of monetary distribution by the Association; (3) Scholarship Reductions: Limitations on the number of financial aid awards that that may be provided during a specific period; (4) Show-Cause Orders: If a determination is made by a hearing panel that an institution has not taken appropriate disciplinary or corrective action regarding an individual found in violation of the NCAA constitution and bylaws, the panel may issue an order that the institution take additional disciplinary or corrective action, including but not limited to, restriction of some or all athletically related duties, unless the institution appears before the panel to show cause why the additional penalties should not be applied. Decisions regarding disciplinary or corrective actions involving personnel shall be made by the institution, but the determination of whether the action satisfies the institution's obligation of NCAA membership shall rest solely with the COI).

<sup>95</sup> See NCAA Bylaw 19.9.6.

<sup>96</sup> See NCAA Bylaw 19.9.7 (the additional penalties are as follows: (1) prohibition against specified competition in the sport during the regular season; (2) Prohibition of all coaching staff members in the sport from involvement, directly or indirectly, in any coaching activities at the institution during the regular season; (3) Prohibition against institutional staff members serving on the Board of Directors, Council, or other committees of the Association for a prescribed period (or requirement that any institution staff members serving in leadership positions on any NCAA council or committee resign their leadership position); (4) Requirement that the institution relinquish its voting privilege in the Association for a prescribed period; (5) Recommendation that the institution's membership in the Association be suspended or terminated; (6) Public reprimand and censure; (7) Vacation of records in contests in which a student-athlete competed while ineligible, including one or more of the following: (a.) Vacation of individual records and performance, (b) Vacation of team records and performances, including wins from the career record of the head coach in the individual sport, (c) Return of individual or team awards to the Association; (8) Prohibition against television appearances of the institution in the sport in which the violation occurred. The penalty shall specify that the institution may not enter into any contracts or agreements for such appearances until the institution has been restored to full privilege of membership. The Board of Directors is authorized to permit a closed-circuit telecast, limited to the campus of the opponent of the ineligible institution, provided no rights fee is to be paid to the ineligible institution; (9) Pursuant to a show-cause order, disassociation of relations with a representative of an institution's athletics interests, including: (a) Not accepting any assistance from the individual that would aid in the recruitment of prospective student or the support of enrolled student-athletes; (b) Not accepting financial assistance for the institution's athletics program from the individual; (c) Ensuring that the athletics benefit or privilege is provided to the individual that is not generally available to the public at large; and (d) Taking such other actions against the individual that the institution determines to be within its authority to eliminate the involvement of the individual in the institution's athletics program; (10) Publicizing institutions on probation on the NCAA website, in appropriate NCAA publications and in NCAA championship game program of the involved sports; (11) Institutionally imposed suspension of a staff member from some or all athletically related duties for a specified period pursuant to a show-cause order, for a situation in which he or she engaged in or condoned a Level I or Level II violation; or (12) Other penalties as appropriate).

<sup>97</sup> See NCAA, Brigham Young University Public Infractions Decision (Nov. 9, 2018).

<sup>98</sup> See, NCAA, Most-Frequently Violated Rules (2016).

<sup>99</sup> *Id.*

facts and violations presented to the COI as set forth in their summary disposition report and the classification of the violations as level II.<sup>100</sup> The COI prescribed core penalties in the form of a two-year probation, and recruiting restrictions.<sup>101</sup> It also agreed with the core penalties self-imposed by BYU for a \$5,000.00 fine to the NCAA and one scholarship reduction.<sup>102</sup> On top of these core penalties, the COI also imposed the additional penalties including: public reprimand and censure, a disassociation from one of the boosters, a vacation of records for the time period that the student-athlete competed while ineligible, and a list of actions to be taken by BYU to ensure that compliance and educational programs are up to par.<sup>103</sup>

BYU only contested the additional penalty that required them to vacate the records for the competitions that the student-athlete competed in while ineligible.<sup>104</sup> One of the arguments that BYU presented in contesting this penalty was that the COI did not have the authority nor guidance necessary to prescribe such a penalty.<sup>105</sup> The COI determined for itself that it had the authority to impose a penalty vacating the records according to the Internal Operation Procedures (IOP).<sup>106</sup> The IOP detailed the appropriateness for a vacation of records penalty in the presence of six factors: (1) academic violations; (2) serious intentional violations; (3) direct involvement of a coach or a high-ranking school administrator; (4) a large number of violations; (5) a recent history of level I, level II or major violations; and (6) when a case involves a failure to monitor or lack of institutional control.<sup>107</sup> While this list seems as though it would qualify as the extenuating circumstances required by NCAA Bylaw 19.9.6, the COI did not indicate the presence of any of these factors.<sup>108</sup> Instead, the COI stated that none of the factors from the IOP are necessary to impose the penalty but that it may impose an additional penalty for the vacation of records from the interpretation of prior cases alone.<sup>109</sup> In the rest of its explanation, the COI failed to point to any extenuating circumstance that warranted the inclusion of an additional penalty outside of the core penalties and refers only to the fact that BYU committed a violation. While BYU may appeal this penalty to the IAC, the precedent from this case would allow the COI to impose additional penalties without the presence of additional extenuating circumstances and could possibly allow the imposition of any additional penalty outside of the core penalties.

The most extreme situation in which the NCAA imposes these additional penalties come in the form of what is known as the “death penalty.”<sup>110</sup> The death penalty refers to the ultimate culmination of the core penalties and additional penalties outlined in NCAA Bylaw 19, which effectively cripple an athletic program.<sup>111</sup> Specifically, the death penalty consists of: a prohibition from competition for a time period of one to two years; a prohibition of coaching activities at the institution; an elimination of scholarships and recruiting activities for a period of

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<sup>100</sup> *Id.* at 1.

<sup>101</sup> *Id.* 14.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 15-16.

<sup>104</sup> *Id.* at 8.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See*, NCAA, Division I Committee on Infractions: Internal Operating Procedures (2018).

<sup>108</sup> *See*, NCAA, *supra* note 97 at 8-9.

<sup>109</sup> *Id.*

<sup>110</sup> *See* NCAA, *Enforcement Process: Penalties*, <http://www.ncaa.org/enforcement/enforcement-process-penalties> (last visited Jan. 19, 2018).

<sup>111</sup> *See* Dennis Dodd, *30 years later: The legacy of SMU's death penalty and six teams nearly hit with one*, CBS SPORTS, <https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/> (Feb. 22, 2017).

up to two years; the requirement that all staff members serving in NCAA organizations must resign from their positions; and a requirement that the institution give up their voting rights for a four-year period.<sup>112</sup> This extreme option was last implemented on Feb. 25, 1987, to penalize the Southern Methodist University (SMU) football program for brazen instances of paying student-athletes under the table in one of the biggest scandals in college football.<sup>113</sup> The use of this penalty resulted in SMU losing its place as a premier football athletics program.<sup>114</sup> Since the penalty, SMU has yet to join one of the top conferences and has only had three winning seasons.<sup>115</sup>

The death penalty, and particularly its implementation on SMU, illustrates that the NCAA can effectively punish the institutions that compose its membership. The NCAA has a broad power to impose the penalties it has enumerated in its bylaws and has shown that it may impose additional penalties based primarily on its own discretion. The problem that remains is that the majority of these penalties, such as the death penalty, affect the institution as a whole, but do not directly punish coaches or third-party actors themselves. As a result, coaches and third-party actors are not disincentivized from engaging in corruption schemes and in turn college athletics suffers.

### Regulation of Agents

One particular group of third-party actors that has facilitated much of the corruption in college sports is agents.<sup>116</sup> Sports agents are generally associated with professional sports because of the prohibition of the use of agents by college athletes by the NCAA.<sup>117</sup> However, many student-athletes have been found to be working with agents and receiving benefits.<sup>118</sup> After a string of agent violations by student-athletes and various cases of agents taking advantage of athletes, legislatures implemented measures that would deter agents from wrongfully working with student-athletes.<sup>119</sup>

On the state level, legislatures implemented the Uniform Athlete Agents Act (UAAA) to protect universities and student-athletes.<sup>120</sup> The UAAA was created in 2000 by the National Conference of Commissioners on Uniform State Laws.<sup>121</sup> The purpose of the UAAA is to protect universities by protecting their financial investment in student-athlete scholarships and to protect student-athletes themselves through education about the sports-agent selection process.<sup>122</sup> To accomplish these goals, the UAAA required sports agents to register with the secretary of state in their respective jurisdiction in order to engage in correspondence with collegiate student-

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<sup>112</sup> See NCAA, *Enforcement Process: Penalties*, *supra* note 104.

<sup>113</sup> See Dennis Dodd, *supra* note 111.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See e.g., Thomas J. Arkell, *Agent Interference with College Athletics: What Agents Can and Cannot Do and What Institutions Should Do in Response*, 4 SPORTS LAW. J. 147 (1997).

<sup>117</sup> See e.g. NCAA Bylaw 12.3.1.

<sup>118</sup> See e.g. Ross Viltz et al., *An Analysis of Sports Agent Regulation in Intercollegiate Athletics: a Call of for Cooperation*, 24 J. LEGAL ASPECTS SPORT 62, 64-67 (2014).

<sup>119</sup> *Id.* at 68.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

athletes.<sup>123</sup> A registered agent then has the duty to disclose to the university if a student-athlete signs a contract with them before the student athlete's eligibility expires.<sup>124</sup> If an agent fails to perform any of these requirements from the UAAA, then the agent can be subjected to civil, criminal, and administrative penalties.<sup>125</sup>

While the UAAA addressed the concerns around agent misconduct, it wasn't without fault.<sup>126</sup> To begin with, the UAAA has a narrow definition of agent that did not include individuals who do not necessarily recruit or solicit agency contracts.<sup>127</sup> Additionally, even though the UAAA was enacted in 43 states, many states made amendments to the law and all of the states experienced difficulties in enforcement.<sup>128</sup> Because of these faults, there have been many agents who did not act within the bounds of the UAAA.<sup>129</sup> Thus, the National Conference of Commissioners on Uniform State Laws created the Revised Uniform Athlete Agents Act (RUAAA) in 2015.<sup>130</sup>

The goal of the RUAAA was to provide enhanced protection for student-athletes and educational institutions.<sup>131</sup> To reach this goal, the RUAAA expanded the definition of agent to other individuals who serve athletes for compensation in an advisory capacity relating to finances, business pursuits, or career management decisions.<sup>132</sup> The RUAAA also attempts to provide added standardization in the creation of a uniform body of agent registration information for use by state agencies.<sup>133</sup> An interesting alteration made to the RUAAA was the addition of criminal penalties for agents who encourage other individuals to engage in activity prohibited to the agent.<sup>134</sup> Since its creation, the RUAAA has been implemented in twelve states and proposed in three others while other states continue to utilize the UAAA.<sup>135</sup>

On the federal level is the Sports Agent Responsibility and Trust Act (SPARTA).<sup>136</sup> SPARTA was signed into law as a federal measure to assist the UAAA.<sup>137</sup> This law does not preempt the UAAA or any of its measures but instead fills in the gaps not addressed by the state-law directives.<sup>138</sup> Introduced by Representative Tom Osbourne in 2003, SPARTA seeks to protect student-athletes and universities from unscrupulous behavior that Representative Osbourne witnessed during his tenure as the head football coach at the University of

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Rev. Unif. Athletes Agent Act, Prefatory Note (UNIF. LAW COMM'N 2015).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Unif. Law Comm'n, *Athletes Agent Act, Revised*, <https://www.uniformlaws.org/committees/community-home?communitykey=4d46906c-2d24-4ede-84ab-a57b40fa5c37&tab=groupdetails> (last visited Jan. 20, 2019) (the RUAAA has been implemented in Alabama, Idaho, Iowa, Indiana, Kentucky, Minnesota, Nevada, North Dakota, Oregon, South Carolina, Tennessee, and Washington. The RUAAA has been introduced in Colorado, Delaware, Hawaii, Mississippi, Missouri, New Jersey, North Carolina, Oklahoma and West Virginia).

<sup>136</sup> See Michael L. Martin, *It's Not a Foul Unless the Ref Blows the Whistle: How to Step Up Enforcement of the UAAA and SPARTA*, 19 SPORTS LAW. J. 209, 2010 (2012).

<sup>137</sup> *Id.* at 213.

<sup>138</sup> *Id.*

Nebraska.<sup>139</sup> To do this, SPARTA prohibited conduct almost identical to the conduct prohibited under the UAAA and shares its definition for an "athlete-agent."<sup>140</sup> The biggest difference between these two attempts to regulate sports agents is the enforcement method.<sup>141</sup> Under SPARTA, violations are treated as unfair trade practice and can be prosecuted by the FTC at the federal level or by a state's attorney general.<sup>142</sup> The agent is the only party who can be held liable under SPARTA, unlike the RUAAA which extended penalties beyond agents to those who serve in an advisory capacity to the athletes.<sup>143</sup>

The UAAA, RUAAA, and SPARTA have all made efforts to stop the corruption in sports that is facilitated through agents. Unfortunately, these laws have been difficult to prosecute.<sup>144</sup> The Associated Press reported in 2010, that less than half of the states that enacted some form of sports agent laws had invoked any type of penalty.<sup>145</sup> The FTC, in comparison, has yet to undertake any enforcement action under SPARTA and has received very few complaints.<sup>146</sup> This lack of enforcement is regrettably not caused by a lack of activity that violates these laws but rather due to the difficulties associated with the enforcement.<sup>147</sup>

### Regulation of Coaches and Third Parties

Outside of agents, there is very little regulation over other third parties that are involved in collegiate athletics. The NCAA asserted its right to punish coaches in *NCAA v. Tarkanian* through a show-cause order.<sup>148</sup> A show-cause order is an order that compels a member-institution to demonstrate to the COI why it should not be subject to a penalty or additional penalty for the failure to take appropriate disciplinary or corrective action.<sup>149</sup> In practice, these orders are referred to as a "Scarlet Letter" that requires schools to convince the COI that it should not be penalized for hiring a coach that has previously been charged with a high-level infraction.<sup>150</sup> The show-cause order can vary in time from three years all the way up to ten years.<sup>151</sup>

Todd McNair, a former assistant football coach for the University of Southern California (USC), challenged the show-cause order in a suit against the NCAA in the Los Angeles Superior Court.<sup>152</sup> Coach McNair was a part of the USC scandal from 2010 in which student-athletes, most notably Reggie Bush, received impermissible benefits in connection with an aspiring sports agency.<sup>153</sup> The NCAA imposed a one-year show-cause order against McNair based on the

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Associated Press, *Report: State agent laws unenforced*, ESPN (Aug. 17, 2010), <http://www.espn.com/college-sports/news/story?id=5470067>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179 (1988).

<sup>149</sup> See NCAA Bylaw 19.02.3.

<sup>150</sup> See Zachary Zagger, *Calif. Ruling Hamstrings NCAA's Ability to Sanction Coaches*, LAW 360 (Oct. 17, 2018), <https://www.law360.com/articles/1092062?scroll=1>.

<sup>151</sup> See NCAA Bylaw Figure 19-1.

<sup>152</sup> See Zagger, *supra* note 150.

<sup>153</sup> See Kyle Bonagura, *What to know about Todd McNair vs. the NCAA*, ESPN (April 17, 2018), [http://www.espn.com/college-football/story/\\_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq](http://www.espn.com/college-football/story/_/id/23201815/todd-mcnair-vs-ncaa-reggie-bush-scandal-faq).

reasoning that he knew, or should have known, about the benefits that Reggie Bush was receiving.<sup>154</sup> McNair claims that this short show-cause order unfairly prejudiced him and essentially blackballed him from being hired as a coach at another university.<sup>155</sup> In the show-cause lawsuit, the judge held that the show-cause order violated California's Business and Professions Code, that maintains that any contract which restrains one from engaging in a lawful profession is void.<sup>156</sup>

The holding, in this case, places the show-cause order on equal-footing with other non-compete agreements that are regulated by states in many different ways. This ruling presents a danger to the NCAA in that it will lose a critical tool in the efforts to disincentivize coaches and other institutional staff members from breaking the NCAA rules. The president of the Pac-12 conference, Larry Scott, expressed this fear in his testimony to the court. He stated that by disarming the NCAA of the show-cause penalty, the ruling would reach beyond Coach McNair and deeply impact the Pac-12 and NCAA member institutions.<sup>157</sup> Scott opined that it would be difficult for the California schools that are members of the Pac-12 to continue their membership in the NCAA if the show-cause penalty was void in California.<sup>158</sup> In turn, this would cut off these schools from competitive and scholarship opportunities that stem from their participation in the NCAA.<sup>159</sup> The effects would then trickle down to the Pac-12 since one-third of its members are California institutions.<sup>160</sup> While the ruling of this case is confined to California for now, it may have far-reaching effects and effectively disarm the NCAA from being able to punish institutional actors with show-cause penalties, thus leaving no real penalties for actors aside from the institution itself.

### III. The FBI Investigation into College Basketball

In 2015, the FBI and the United States Attorney's Office began to investigate the criminal influence of money on coaches and athletes who participated in NCAA competition.<sup>161</sup> The investigation revealed multiple instances of bribes paid by financial advisors, business managers, and high-level apparel company employees which were facilitated by NCAA Division I coaches.<sup>162</sup> These payments were made to the athletes themselves and to the families of those athletes in exchange for the commitment to attend a specific university and a promise to be represented by the advisors once the athletes entered the National Basketball Association (NBA).<sup>163</sup> Such payments are prohibited by the NCAA and make the student-athlete ineligible

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<sup>154</sup> *Id.*

<sup>155</sup> See Zagger, *supra* note 150 (in comparison, last year the NCAA imposed a ten-year show-cause order on former University of Louisville assistant basketball coach Andre McGee for hiring female escorts and strippers for recruits at an on-campus dormitory).

<sup>156</sup> *Id.*

<sup>157</sup> See Kyle Bonagura, *Judge Rules NCAA's show-cause penalty violates California law*, ESPN (Oct. 9, 2018), [http://www.espn.com/college-football/story/\\_/id/24945390/judge-rules-ncaa-show-cause-penalty-violates-california-law](http://www.espn.com/college-football/story/_/id/24945390/judge-rules-ncaa-show-cause-penalty-violates-california-law).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See Complaint at ¶10, *United States v. Gatto*, No. 1:17-cr-00686 (S.D.N.Y. Sept. 25, 2017) (hereinafter *Gatto*: Complaint).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

to participate in NCAA competitions.<sup>164</sup> In order to shield the student-athletes that were being paid from punishment by the NCAA or their school, participants in the scheme took steps to conceal the payments by: (1) funneling them to student-athletes and/or their families through a third party or a non-profit institution run by the participants in the scheme; and (2) making or intending to make misrepresentations regarding the involvement of the student-athletes and coaches that violated the NCAA rules.<sup>165</sup> Utilizing wiretaps, surveillance videos, undercover agents, a raid on the offices of ASM (a prominent sports agency) and cooperating witnesses, the FBI gathered evidence against various people involved in these payment schemes.<sup>166</sup>

The FBI received help during the investigation into coaches and advisors paying NCAA student-athletes by a cooperating witness, Louis Martin Blazer III, the founder of Blazer Capital Management.<sup>167</sup> Blazer was accused of stealing \$2.35 million dollars by the Securities Exchange Commission for investing client funds without their knowledge in 2011 and 2012.<sup>168</sup> He entered into a plea agreement with the U.S. Attorney's Office and pled guilty to securities fraud, aggravated identity theft, false statements and documents, and two counts to commit wire fraud.<sup>169</sup> As a part of the wire fraud charges, Blazer was a part of a scheme to pay NCAA athletes to induce them to retain Blazer as a financial advisor.<sup>170</sup> With Blazer's cooperation, a domino effect occurred that led to the implication of many in this scheme to pay NCAA athletes.<sup>171</sup>

On September 26, 2017, the investigation came to fruition when the FBI and the United States Attorney for the Southern District of New York announced the arrests of ten men.<sup>172</sup> Among these ten were assistant basketball coaches for NCAA Division I teams.<sup>173</sup> Included in this group were coaches Chuck Person of Auburn, Lamont Evans of Oklahoma State, Emanuel "Book" Richardson of the University of Arizona, and Tony Bland of USC.<sup>174</sup> Each of these parties faces charges for bribery conspiracy, solicitation of bribes, honest services fraud conspiracy, honest services fraud, conspiracy to commit wire fraud, and Travel Act conspiracy.<sup>175</sup> In a press conference addressing these charges the acting United States Attorney for the Southern District of New York described the acts committed by these coaches and advisors as an exploitation of "the hoop dreams of student-athletes around the country, allegedly

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<sup>164</sup> See NCAA Bylaw 12.01; See also NCAA Bylaw 12.1.2; NCAA Bylaw 12.3; NCAA Bylaw 12.6; NCAA Bylaw 12.7.

<sup>165</sup> See *Gatto* Complaint ¶10, *supra* note 162.

<sup>166</sup> See Mark Schlabach, *NCAA basketball coaches among 10 charged with fraud, corruption*, ESPN (Sept. 26, 2017), [http://www.espn.com/mens-college-basketball/story/\\_/id/20824193/ncaa-basketball-coaches-10-charged-fraud-corruption](http://www.espn.com/mens-college-basketball/story/_/id/20824193/ncaa-basketball-coaches-10-charged-fraud-corruption) (hereinafter Schlabach, Coaches).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> See Mitch Sherman, *Everything you need to know about the college basketball scandal*, ESPN (Feb. 23, 2018), [http://www.espn.com/mens-college-basketball/story/\\_/id/2255512/explaining-ncaa-college-basketball-scandal-players-coaches-agents](http://www.espn.com/mens-college-basketball/story/_/id/2255512/explaining-ncaa-college-basketball-scandal-players-coaches-agents).

<sup>173</sup> *Id.*

<sup>174</sup> Also arrested were: James Gatto, the director of global marketing for Adidas; Merl Code, an Adidas employee; Christian Dawkins, a former NBA agent for ASM sports agency; Munish Sood, a financial advisor; Jonathon Brad Augustine, president of The League Initiative and program director of the Adidas-sponsored I Family AAU program (an amateur, club team of high-school athletes); and Rashan Michel, a former NBA official that founded Thompson Bespoke Clothing, a custom clothier for athletes. See Schlabach, Coaches *supra* note 166.

<sup>175</sup> *Id.*

treating them as little more than opportunity to enrich themselves through the alleged bribery and fraud schemes.”<sup>176</sup>

### a. The Gatto Trial

The first of three trials, *United States v. Gatto*, which ended October 25, 2018, involved James Gatto, Merl Code, and Christian Dawkins who faced charges of wire fraud and the conspiracy to commit wire fraud.<sup>177</sup> In this trial, it was demonstrated that the United States had an interest in the presence of corruption in college sports. The charges against Gatto and his co-defendants centered around the payment of high-level recruits to attend the University of Louisville and the University of Miami.<sup>178</sup>

The wire-fraud charge that associated with the University of Louisville, came from the attempt to pay recruit Brian “Tugs” Bowen to play for a Coach Pitino led Louisville Cardinal basketball team.<sup>179</sup> Tugs Bowen initially was interested in attending the University of Arizona and also had ties to the University of Oregon.<sup>180</sup> This all changed in May of 2017 when Gatto and Dawkins pressed Tugs to go to the University of Louisville, an “Adidas school,” by offering cash.<sup>181</sup> Twenty-thousand dollars was funneled to Tugs Bowen’s father as part of a promised hundred-thousand dollar payout.<sup>182</sup> When Bowen decided to attend the University of Louisville, Gatto left coach Rick Pitino a voicemail to congratulate him on Bowens committing to the University of Louisville.<sup>183</sup> The University itself was unaware of this plan to pay Bowens to attend the University of Louisville.<sup>184</sup>

The wire-fraud charge that was associated with the University of Miami, came with similar circumstances to the University of Louisville.<sup>185</sup> The defense argued by the defendants essentially detailed that while it was true that they were involved in this payment scheme, all that occurred was a violation of NCAA rules, not the law.<sup>186</sup> In fact, the defendants claimed that their actions were at the behest of the Universities and for their benefit.<sup>187</sup> They purported that it was the coaching staff at both universities that sought for the defendants to pay these athletes and therefore there could be no fraud.<sup>188</sup> The prosecution argued that it was not the Universities that were benefitting or seeking to benefit from these payment schemes but that instead, it was the coaches at those programs that were working in concert with the defendants in order to conceal the bribe payments from the officials at the University of Louisville and the University of

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<sup>176</sup> *Id.*

<sup>177</sup> See Gatto Complaint at ¶1, *supra* note 161.

<sup>178</sup> See Defendants’ Memorandum of Law in Support of Their Joint Motion to Dismiss the Indictment at 7-11, *United States v. Gatto*, No. 1:17-cr-00686 (S.D.N.Y. Sept. 25, 2018) (hereinafter Gatto: Motion to Dismiss).

<sup>179</sup> See Pete Brush, *Ex-NCAA Recruit’s Dad Breaks Down In Tears At Fraud Trial*, LAW 360 (Oct.4, 2018), <https://www.law360.com/articles/1089503/ex-ncaa-recruit-s-dad-breaks-down-in-tears-at-fraud-trial>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See Gatto Motion to Dismiss at 9-10 *supra* note 178.

<sup>186</sup> *Id.* at 12.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

Miami.<sup>189</sup> The jury agreed with the prosecution and convicted all defendants with conspiracy to commit wire fraud and wire fraud.<sup>190</sup> Both the federal government and the jury agreed that these payment schemes harm the universities and constitute fraud, illustrating that there is a clear interest in the regulation and protection of college athletics outside of the private non-profit institution that is the NCAA.

### **b. The NCAA's Response**

After the initial discoveries regarding the FBI investigation came to light, the NCAA let the FBI continue in its inquiry without interference.<sup>191</sup> As a result, the NCAA has yet to conduct its own investigation into the allegation brought forth and at the time of this article has yet to attempt any punishment of the actors involved.<sup>192</sup> Nevertheless, the president of the NCAA, Mark Emmert,<sup>193</sup> articulated the concern held by the NCAA and stated that, "The nature of the charges brought by the federal government are deeply disturbing. We have no tolerance whatsoever for this alleged behavior. Coaches hold a unique position of trust with student-athletes and their families and these bribery allegations, if true, suggest an extraordinary and despicable breach of that trust."<sup>194</sup>

To address this problem, the NCAA, at the behest of Mark Emmert, organized a commission on college basketball.<sup>195</sup> The commission was charged to examine the critical aspects of Division-I men's basketball and report back to the NCAA Board of Directors and President their findings and proposed solutions.<sup>196</sup> In doing so, the commission was encouraged to identify legislative, policy and structural modifications to improve the integrity of the NCAA processes and the well-being of student-athletes.<sup>197</sup> To accomplish these goals, Mark Emmert appointed Dr. Condoleezza Rice, former U.S. Secretary of State to chair the commission.<sup>198</sup> Other members of the commission included former Duke basketball star, Grant Hill; Former White House Counsel, Kathryn Reummler; and Mike Montgomery, a former college basketball coach.

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<sup>189</sup> See Government Brief in Opposition to Defendants' Motion to Dismiss the Indictment at 15, *United States v. Gatto*, No. 1:17-cr-00686 (S.D.N.Y. Sept. 25, 2018) (hereinafter *Gatto*: Government Brief).

<sup>190</sup> See Verdict Form, *United States v. Gatto*, No. 1:17-cr-00686 (S.D.N.Y. Oct. 28, 2018).

<sup>191</sup> See Pat Forde et. al., *Feds Give NCAA Go-ahead to Begin Investigating Schools Involved in College Hoops Scandal*, YAHOO SPORTS (Nov. 6, 2018), <https://sports.yahoo.com/feds-give-ncaa-go-ahead-begin-investigating-certain-schools-tied-college-hoops-scandal-030502043.html>.

<sup>192</sup> *Id.*

<sup>193</sup> Mark Emmert is the current and fifth president of the NCAA. He started his tenure in October 2010 and was the president when the present governance model for the NCAA was introduced. As president, Mark Emmert has placed his focus on academic success and student-athlete wellness. See NCAA, *NCAA President Mark Emmert*, <http://www.ncaa.org/about/who-we-are/office-president/ncaa-president-mark-emmert> (last visited Jan. 13, 2019).

<sup>194</sup> See Stacey Osburn, *NCAA statement from Mark Emmert on federal investigation*, NCAA (Sept. 26, 2017), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-mark-emmert-federal-investigation>.

<sup>195</sup> See Stacey Osburn, *Statement from President Mark Emmert on the formation of a Commission on College Basketball*, NCAA (Oct. 11, 2017), <http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball>.

<sup>196</sup> See NCAA, *Commission on College Basketball Charter*, <http://www.ncaa.org/governance/commission-college-basketball-charter>, (last visited Jan.28, 2019).

<sup>197</sup> *Id.*

<sup>198</sup> See NCAA, *Statement from President Mark Emmert on the Formation of a Commission on College Basketball*, *supra* note 195.

Around six months after its inception, the commission on basketball released its report on the current state of men's college basketball.<sup>199</sup> In its findings, it found the state of men's college basketball is deeply troubled.<sup>200</sup> The commission described the levels of corruption and deception to be, "at a point that they threaten the very survival of the college game as we know."<sup>201</sup> To fix these problems the commission sought change in four strategic areas.<sup>202</sup> First, the commission recommended a focus on creating realistic pathways for student-athlete success.<sup>203</sup> Part of this focus involves the ending of the one-and-done rule which prohibits athletes from entering the NBA until one year after the end of their high school career.<sup>204</sup> While the commission recognized that the power to end the practice was left to the NBA and the National Basketball Players Association, the commission maintained that young athletes should not be forced to attend college if that is not something that they are interested in.<sup>205</sup> Ending one-and-done would allow these players to turn professional and would take some of the pressure off of the collegiate model.<sup>206</sup> Additionally, the commission recommended that student-athletes be able to maintain their eligibility if they declare for the NBA draft and are not drafted.<sup>207</sup> This would add further protection to college student-athletes who misjudge their professional prospects and who are, at times, misled.<sup>208</sup>

Next, the commission recommended a focus on holding institutions and individuals accountable.<sup>209</sup> To do this, the commission advocated for the establishment of professional and neutral investigation and adjudication of serious infractions, and an increase in the core penalty structure.<sup>210</sup> It was critical of the fact that those who currently resolve and address serious cases violations of NCAA rules are volunteers from member institutions.<sup>211</sup> By bringing in professionals, the NCAA would be able to restore credibility to the adjudication of high stakes infractions.<sup>212</sup> The commission also recognized that there are very few risks to an institution should it choose to employ a coach with a show cause order and that the punishment in itself was generally weak.<sup>213</sup> An increase in penalties within the core penalty structure and individual accountability would make up for this weakness and would incentivize stakeholders to diligently comply with NCAA rules.<sup>214</sup>

Furthermore, the commission's third strategic area of focus related to mitigating non-scholastic basketball's sometimes harmful influence on college basketball.<sup>215</sup> The commission described youth basketball in this country as being ungoverned space and while there are good

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<sup>199</sup> See Commission on College Basketball, *Report and Recommendations to Address the Issues facing Collegiate Basketball*, REPORT (April, 2018).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

programs, there are many that condone illicit behavior.<sup>216</sup> To try and limit the risk, the commission recommended that the NCAA adopt and enforce criteria for certifying non-scholastic basketball events with a strict environment of financial transparency.<sup>217</sup> The commission also called for the same financial transparency from apparel companies speaking to the fact that they are public companies and should be concerned with how their money is being used.<sup>218</sup> With transparency, the risk of associating with those that blatantly disregard NCAA rules and put student-athletes' eligibility at risk would be mitigated.<sup>219</sup>

Lastly, the commission sought a final focus on the NCAA governance structure.<sup>220</sup> It claims that the current structure and system isn't working.<sup>221</sup> The commission recommends that the five independent public members with voting rights be inserted into the Board of Governors and for one of those five to also serve on the NCAA's executive board.<sup>222</sup> These independent members of the public would bring an outside, objective perspective and would assist the NCAA on correcting its current course.<sup>223</sup> In conclusion, the commission called for action from the members of the NCAA and for prompt action to take place.<sup>224</sup>

After the commission issued its findings and recommendations, the NCAA Board of Governors and the Division I Board of Directors promptly adopted a series of reforms that implemented many of the recommendations from the commission on basketball.<sup>225</sup> These changes to NCAA rules allow prospective student-athletes to have more paid visits to colleges, allows top prospects to obtain the advice of NCAA certified agents during the offseason, and places more restrictions on non-scholastic summer youth basketball tournaments.<sup>226</sup> Additionally, the investigations and enforcement process was updated and now allows the NCAA to rely on the conclusions of other bodies such as courts or administrative bodies.<sup>227</sup> These changes sought to implement the goals of the commission on basketball without instituting some of the more radical changes suggested by others such as payment of the athletes.<sup>228</sup>

#### **IV. Proposed Solution**

The recommendation from the commission on basketball and the changes implanted by the NCAA are a good start but are fall short of the mark. The commission is correct that the state of college basketball is troubled. Large scale corruption and deception call for large scale reforms to weed out the illicit behavior by many of the actors associated with college basketball. This is no longer a problem that can be left to the NCAA or its member institution alone. The state of affairs in college basketball calls for action from state and federal legislatures, USA basketball,

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See Zachary Zagger, *NCAA Adopts Series of Reforms Amid Hoops Bribery Probe*, LAW 360 (Aug. 8, 2018), <https://www.law360.com/articles/1071487/ncaa-adopts-series-of-reforms-amid-hoops-bribery-probe>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

and the NBA. This section suggests methods in which many of the parties that have an impact on college basketball can assist in correcting its current course.

### a. New Statutory Scheme

#### State Legislatures

The commission on basketball recommended greater punishments but its recommendations only focused on institutional actors. The NCAA does not have the power to punish non-institutional actors on its own and with the weakness of the show-cause order, has very little power to punish coaches. Thus, the NCAA would need help from outside sources to punish those who engage in corruption. This help could easily come from the states.

Many of the Division I member institutions are public schools and receive funding from the state governments.<sup>229</sup> Every time that a student-athlete becomes ineligible due to corruption schemes, the state's investment that leads to scholarships is put at risk. To protect their investment and more importantly to protect student-athletes from being exploited, state legislatures should implement a new statutory scheme that would disincentivize those that would exploit student-athletes through harsher punishments. Fortunately, the framework needed already exists in many states in the form of the RUAAA. Nonetheless, significant changes would have to be made to the RUAAA in order for it to effectively disincentivize non-institutional actors and coaches.

The first change that would need to be made would be an adjustment of the scope of the RUAAA. As it currently stands, the RUAAA regulates the actions of agents and those that perform work on behalf of agents in addition to those that would serve in advisory capacity to the student-athlete.<sup>230</sup> The change was a large improvement from the narrow scope of the UAAA that only applied to agents but should be broadened further. An appropriate scope would allow the RUAAA to apply to anyone that intentionally facilitates or contributes to the payment of student-athletes that would lead to the student-athletes ineligibility through extending the definition of "agent-athlete."<sup>231</sup> This broadened scope could then apply the punishments from the RUAAA, including both civil and criminal penalties, to non-institutional actors and coaches.

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<sup>229</sup> See e.g., Preston Cooper, *More Funding for Public Colleges, But no Tuition Relief for Students*, FORBES (March 30, 2018), <https://www.forbes.com/sites/prestoncooper2/2018/03/30/more-funding-for-public-colleges-but-no-tuition-relief-for-students/#4a57e16c6f91>.

<sup>230</sup> See Michael L. Martin, *It's Not a Foul Unless the Ref Blows the Whistle: How to Step Up Enforcement of the UAAA and SPARTA*, *supra* note 136.

<sup>231</sup> To effectuate this proposal, this note proposes amending section 2(2)(a) of the RUAAA to read:

"Means an individual, whether or not registered under this act, who: directly or indirectly facilitates, recruits, or solicits a student athlete to enter into a contract or, for compensation, procures employment or offers, promises, attempts, or negotiates to obtain employment for a student athlete as a professional athlete or member of a professional sports team or organization; for compensation or in anticipation of compensation related to a student athlete's participation in athletics: serves the athlete in an advisory capacity on a matter related to finances, business pursuits, or career management decisions; or in anticipation of benefiting from a purpose related to the athlete's participation in athletics: (i) gives consideration to the student athlete or another person; (ii) serves the athlete in an advisory capacity on a matter related to finances, business pursuits, or career management decisions; (iii) manages the business affairs of the athlete by providing assistance with bills, payments, contracts, or taxes; or (iv) as a result of the relationship causes the student athlete to become ineligible."

Another change that should be made to the RUAAA is an increase in civil penalties. Currently, the National Conference of Commissioners on Uniform State Laws recommends that the minimum amount for civil penalties should be fifty-thousand dollars.<sup>232</sup> In comparison, the top head coaches in college basketball make three-million dollars up to almost nine-million dollars.<sup>233</sup> The increasingly lucrative incentives that coaches and other actors have to engage in corruption should be outweighed by the potential penalty. Thus, the recommended mandatory minimum civil penalty should be increased to adequately disincentivize the head coaches and non-institution actors.

Lastly, the RUAAA should grant the NCAA standing to bring a civil action for damages for violation of the act. The NCAA is made up of the member institutions that are harmed each time that corruption prevails. Through the nature of its relationship and dependency on the institutions, the NCAA suffers the same harm. At this time, the RUAAA recognized the harms that colleges and universities suffer as a result of bad actors and gives the institutions the standing to bring a civil suit. This same opportunity should be extended to the NCAA. Many institutions choose not to pursue suit due to the resources involved and allowing the NCAA to bring suit on its own would shift some of the burdens from the schools.

The culmination of these changes to the RUAAA would result in added pressure on those that would seek to engage in corruption schemes. Head coaches and noninstitutionalized actors would be held accountable for their actions beyond the limited authority of the NCAA. These changes, in the end, serve the states themselves as they protect the public universities in their jurisdictions.

### Federal Legislature

The federal government also has an interest in protecting college basketball as billions of dollars flow from the federal government through the member institutions of the NCAA.<sup>234</sup> This interest is broadened by the new focus on integrity in sports from the United Nations. On the UN's 2030 agenda lies a sting initiative to work towards the creation of policy and a framework that supports the protection of sports from those that would seek to corrupt sports institutions. Leading up to the agenda, UNESCO has put the focus on the integrity in sports and the role that sports play in the stability of countries around the world. In response to the findings of UNESCO and the approaching the 2030 UN agenda, the federal government has the opportunity to take a proactive approach and institute measures to fix the problems of corruption within the United States. The federal government has acknowledged its interest and ability to impact the corruption in college basketball through the FBI investigations.

It is incumbent for the federal government to continue in its efforts to fight corruption in college sports and one way in which they might do that is through legislation. Similarly to the state legislatures, the federal government could enact better safeguards through the improvement of the current legislation governing agents, SPARTA.

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<sup>232</sup> See Unif. Law Comm'n, *Athletes Agent Act, Revised*, *supra* note 135.

<sup>233</sup> See Steve Berkowitz et al., *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach/> (last visited Feb. 4, 2019).

<sup>234</sup> See e.g., Kelli Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER ED (June 12, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments>.

The same edits as the ones proposed in this article for the RUAAA would greatly increase the efficacy of SPARTA in fighting corruption. However, a large problem would still remain in its enforcement. As previously mentioned, the FTC is responsible for the enforcement of SPARTA and violations are considered unfair trade practices. This method of enforcement has been largely ineffective, and a different methodology is necessary. It has been proposed that an independent, federal commission be created under the Department of Education so that enforcement measures could actually take place.<sup>235</sup> While this would likely improve enforcement measures, this article proposes a different solution.

Instead of leaving the enforcement measure to the FTC or an independent commission, the NCAA and individual institutions should be able to bring a statutory claim for civil damages. By allotting the NCAA and individual institutions standing, the burden placed on the FTC for investigation and enforcement would be eliminated. The NCAA would already have conducted their own investigation in which they could gather information to bring suit, and then could take advantage of the subpoena power and the discovery mechanisms when filing a statutory claim. These mechanisms would bolster the NCAA's ability to uncover a larger extent of corruption and would allow them redress for the wrongs committed to them as laid out in SPARTA.

Although the allotment of the NCAA or individual institutions to file a statutory claim under SPARTA would render the FTC's role in enforcement unnecessary, this article contemplates an enforcement method that would continue to involve the FTC and allow them to pursue a claim for unfair trade practice while allowing the NCAA to pursue claim itself. This process would run similar to filing a claim for workplace discrimination with the EEOC.<sup>236</sup> The NCAA would first file a claim with the FTC or an independent commission asserting its claim against the actor who purportedly violated SPARTA. The FTC could then choose whether or not to pursue its own claim against the bad actors for unfair trade practices. If they did not, then the NCAA could take their suit for civil damages themselves.

The dual threat of suit from the NCAA and the FTC would greatly deter those that would engage in corruption schemes and would solve the issues surrounding SPARTA regarding enforcement. Such a system is currently in place with labor disputes and could be easily implemented. By increasing the enforcement methods in SPARTA, the legislation would be effective in deterring those that would take advantage of student-athletes and defraud the universities. Thus, the interests of the federal government coming from its financial interests and UNESCO's Kazan Plan would be furthered as it protects the integrity of collegiate sports.

#### **b. De-regulation by NCAA**

The NCAA started on the right track with the new regulations implemented at the recommendation from the commission on basketball. However, more work is needed. The new regulations allow for greater access to agents for elite athletes but there is much to be desired when it comes to the education and counseling that student-athletes receive when they are considering going pro. The NCAA needs to address this need through deregulation. Instead of a rule favoring elite athletes, all athletes should be able to speak to an agent in the off-season. While the NCAA contemplates the necessary assistance in helping high school seniors, the

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<sup>235</sup> See Marha Durr, *The Tipping Point: Mayhem in College Sports Requires Congress to Finally Intervene in NCAA Governance*, ARIZONA ST. UNIV. SPORTS & ENT. L.J., 26-25 (2018).

<sup>236</sup> See e.g. U.S. EEOC, *Federal EEO Complaint Processing Procedures*, <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm> (last visited March 3, 2019).

option to transition to professional basketball can happen at any time during one's career. The access to agents, so long as it is monitored and regulated, would be beneficial to any of the student-athletes.

Deregulation in this area would undoubtedly be a risk as many impermissible benefits and relationships happen with agents. However, with the new rules regarding registration requirements for agents, the risks could be mitigated. Individual institutions would need to monitor agent interactions. Such interactions could be monitored by having them on campus or with institutional supervision. Regardless of the monitoring effort used, the benefits to the student-athlete would enable them to make a more educated decision when choosing whether or not to transition to professional sports. This would help lessen corruption efforts as students would be able to decide whether the college trek suits them and avoid it if it does not.

### c. Help from USA basketball and the NBA

Both USA Basketball and the NBA have an interest in college sports. The NBA is made up of many athletes who first competed on the collegiate level.<sup>237</sup> USA basketball is the national governing body for basketball in the United States.<sup>238</sup> The NCAA, USA Basketball, and the NBA have all agreed to work together to fix the issues facing college basketball but have yet to define what steps will be taken to address these issues.<sup>239</sup> This section will propose actions that each organization can take to have a substantial effect on college sports.

#### USA Basketball

The NCAA included USA Basketball in its legislation passed to address the recommendations from the commission on basketball.<sup>240</sup> USA Basketball is charged, through the legislation, with the responsibility of rating high school student-athletes.<sup>241</sup> Those students who are classified as "elite" would be able to communicate and develop a contractual relationship with agents that are registered with the NCAA during the summer of their senior year of high school.<sup>242</sup> The purpose of this legislation is to let these high school students decide whether they should pursue a professional career or play in college sports. In addition to this responsibility, USA Basketball should form a partnership with the NCAA in being the exclusive organizer for non-scholastic basketball tournaments.

<sup>237</sup> See Collegiate Basketball News, *Where NBA Players Come From*, <http://rpiratings.com/NBA.php> (last visited March 3, 2019).

<sup>238</sup> See USA Basketball, *About USA Basketball*, [https://www.usab.com/about/about-usa-basketball.aspx?gclid=EAIaIQobChMIINSI08Ln4AIVAh-tBh1VIQxBEAAYASABEGKBGPD\\_BwE](https://www.usab.com/about/about-usa-basketball.aspx?gclid=EAIaIQobChMIINSI08Ln4AIVAh-tBh1VIQxBEAAYASABEGKBGPD_BwE) (last visited March 3, 2019).

<sup>239</sup> See Brian Windhorst, *NBA, NCAA, players association align as a step toward one-and-done rule elimination*, ESPN (Oct. 18, 2018), [http://www.espn.com/nba/story/\\_/id/24513084/in-step-abolition-one-done-rule-basketball-stakeholders-align-support-usa-basketball](http://www.espn.com/nba/story/_/id/24513084/in-step-abolition-one-done-rule-basketball-stakeholders-align-support-usa-basketball).

<sup>240</sup> See, Adrian Wojnarowski, *Sources: NCAA's new proposed rules blindsided execs from NBA, USA Basketball*, ESPN (Aug. 9, 2018), [http://www.espn.com/nba/story/\\_/id/24324859/ncaa-new-proposed-rules-blindsided-nba-usa-basketball-officials](http://www.espn.com/nba/story/_/id/24324859/ncaa-new-proposed-rules-blindsided-nba-usa-basketball-officials).

<sup>241</sup> *Id.*

<sup>242</sup> Commission on College Basketball, *Report and Recommendations to Address the Issues facing Collegiate Basketball*, *supra* note 199.

The commission on basketball cited non-scholastic basketball tournaments as being an area of concern.<sup>243</sup> It is at these tournaments, where college coaches, agents, apparel company employees, and other converge on student-athletes.<sup>244</sup> In order to try and mitigate this problem, USA Basketball should be made the exclusive organizer for NCAA sanctioned basketball tournaments. Coaches would only be permitted to attend these non-scholastic tournaments and the actors that are involved with the tournament could be adequately vetted. The burden for ensuring transparency for these tournaments would fall on USA Basketball. This burden, while great, would still offer a benefit for USA Basketball. As the sole organizer for these tournaments, USA Basketball would be able to capitalize from sponsors and other entities that would want to be involved in the tournament. While USA Basketball is a non-profit organization,<sup>245</sup> it would still be able to further the goals of its organization through this extra flow of capital. In turn, the dangers of the non-scholastic tournaments could be diminished.

## NBA

The NBA is in a unique position as it is directly affected by the dealings that occur throughout college basketball. Many of the players in the NBA once demonstrating their athletic ability in the college setting. The NCAA has already called for the NBA to eliminate “one-and-done,” but the NBA could provide other assistance to the NCAA by developing its “G-League.”<sup>246</sup>

The G-League, currently, does not have a good reputation for being a stepping stone to enter the NBA.<sup>247</sup> In fact, the connotation of playing in the G-League is generally negative.<sup>248</sup> For high-school athletes who are not interested in going to college but do have a desire to play professionally, the G-League should be the ideal destination for these student-athletes. In order to make the G-League a more desirable option for the athletes, the NBA should focus on creating more incentives for athletes to start their professional careers in the G-league if they are unable to do so directly in the NBA.

The first way that the NBA should seek to do this is through its broadcasting rights. The G-League has very limited exposure and compared to the college scene, the G-league games are not discussed or even easily watched on television. To fix this, the NBA should aggressively pursue over-the-top media services.<sup>249</sup> With the growing interest in streaming services and the global phenomenon that came from Netflix, more and more people are switching from traditional

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See USA Basketball, *About USA Basketball*, *supra* note 238.

<sup>246</sup> “The NBA G League is the NBA’s official minor league, preparing players, coaches, officials, trainers, and front-office staff for the NBA while acting as the league’s research and development laboratory. “ NBA Gleague, *What You Need to Know About the NBA G League*, <https://gleague.nba.com/about/> (last visited March 3, 2019).

<sup>247</sup> See Cassandra Negley, *John Calipari Voices Concerns for Players who choose G League over College*, YAHOO SPORTS (Oct. 22, 2018), <https://sports.yahoo.com/john-calipari-voices-concern-players-choose-g-league-college-153233428.html>.

<sup>248</sup> *Id.*

<sup>249</sup> Over the top media services are video that is broadcasted over the internet instead of traditional cable and linear distribution. See Jim Wilson, *How OTT will Innovate 2018*, FORBES (Jan. 23, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/01/23/how-ott-will-innovate-in-2018/#1a9b3c5f526b>.

cable to streaming services.<sup>250</sup> This is an opportunity that the G-League should take advantage of and push as a way to watch the G-League. While the NBA is already doing this to an extent with streaming on twitch and the NBA app,<sup>251</sup> more opportunities now exist in the realm of sports with Hulu Live TV and ESPN+ services. A partnership with one of these entities would drastically increase the coverage of the G-League and further incentivize student-athletes to consider the G-League as a valid alternative to playing college basketball and could help build the market that the G-League has yet to capture.

Should the NBA continue to make efforts in creating OTT broadcasting relationships, the number of sponsorships and corporate partners that the G-League will receive would likely increase. In turn, this added revenue could be distributed to the players, increasing their salary. With more money and more exposure, the G-League would start to get rid of its negative connotations. Only when the G-League becomes a more incentivizing option for student-athletes will, high school athletes see it as a viable option. Thus, those that would engage in corruption schemes for money, while they stay in college begrudgingly, would have another way to earn money and avoid a college stint that they would rather avoid.

#### **IV. Conclusion**

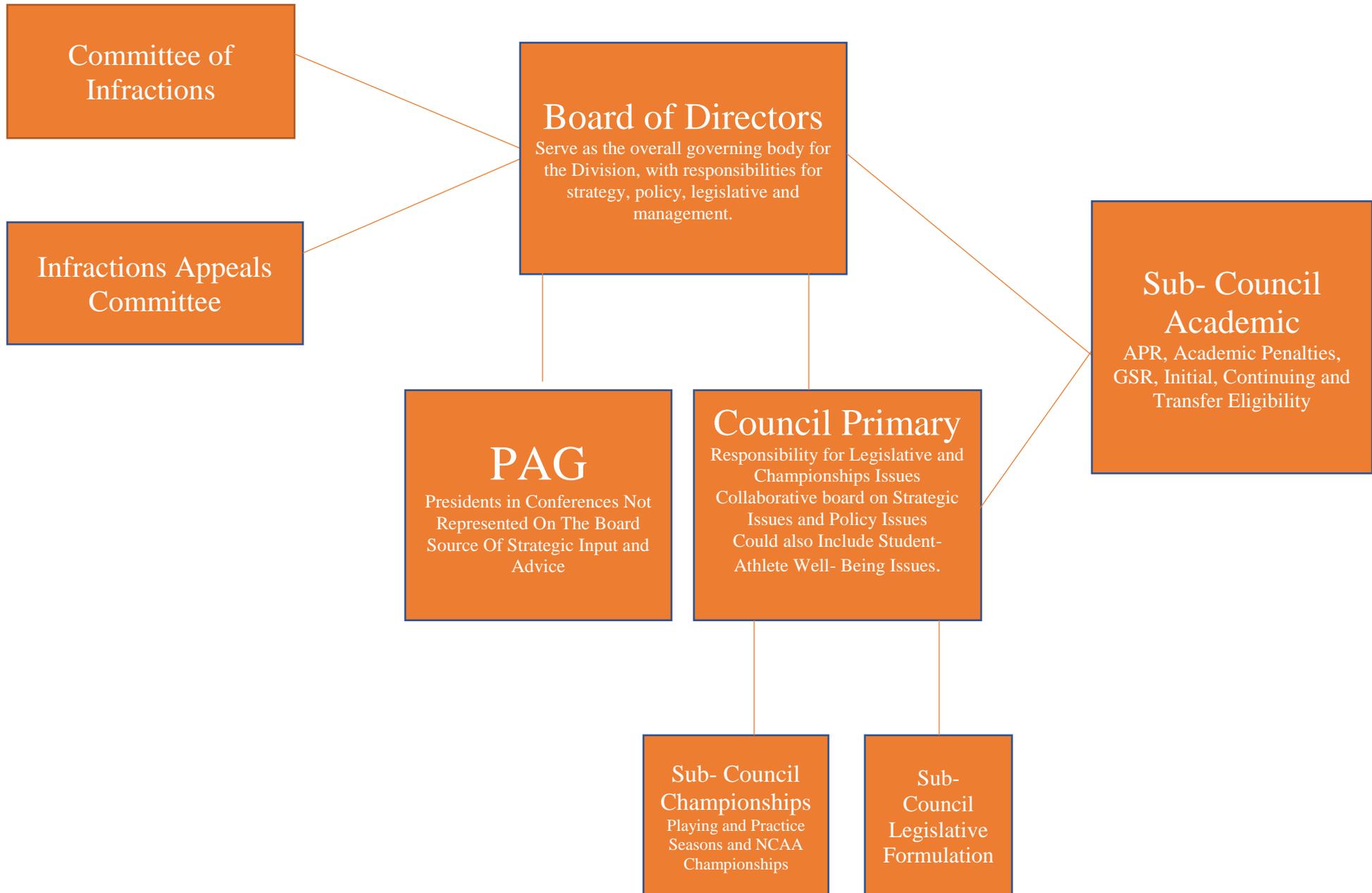
The current state of college basketball is unnerving. Without a change in the immediate future, the world could lose the current system of college sports that exists in the United States. This system is unique and allows students who could not otherwise afford to attend a four-year university the opportunity to pursue their educational dreams. The world has identified the need for integrity in sports and the United States government has demonstrated its interest through the FBI investigation of college basketball in 2017. Corruption in college sports must be fought and the NCAA does currently not have enough power to win that fight. Non-institutional actors and coaches are hard to punish with the lack of authority and punishments available to the NCAA. To fill this gap an assist is needed from state governments, the national government, USA Basketball, and the NBA. Through legislation that facilitates enforcement and punishment of bad actors, state governments and the national government can be deterrents while USA Basketball and the NBA create programs that incentivize the correct behaviors. Sports help contribute to the stability of countries and the development of societal values. It is time to give the deference needed to these issues and take steps to ensure that integrity in college sports survives.

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<sup>250</sup> See Steve Liesman, *Nearly 60% of Americans are streaming and most with Netflix: CNBC survey*, CNBC (March 29, 2018), <https://www.cnbc.com/2018/03/29/nearly-60-percent-of-americans-are-streaming-and-most-with-netflix-cnbc-survey.html>.

<sup>251</sup> See e.g., David Glasier, *NBA Finals: Television Ratings, Social Media, Indicate Popularity of Cavaliers-Warriors*, THE NEWS HERALD (June 6, 2016), [https://www.news-herald.com/sports/nba-finals-television-ratings-social-media-indicate-popularity-of-cavaliers/article\\_dbe1bc97-49ab-5c46-8e08-561045d1eb0f.html](https://www.news-herald.com/sports/nba-finals-television-ratings-social-media-indicate-popularity-of-cavaliers/article_dbe1bc97-49ab-5c46-8e08-561045d1eb0f.html).

## Appendix I



## Appendix II

### COUNCIL MEETING

Voting on all proposals. Simple majority required for adoption based on weighted voting. Results final after next Division I Board of Directions meeting.

Proposal adopted with 85% majority or greater:  
Final - Adopted

A proposal adopted with less than 85% majority: subject to 60 day period in which schools can request to rescind.

A defeated proposal may not be resubmitted for a two year period

Proposal receives minimum request to rescind (66.7% of eligible members).  
Final - Defeated

Proposal receives fewer than the required number of request to rescind.  
Final - Adopted

### Appendix III

