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Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes

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Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes

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ABSTRACT

The National Collegiate Athletic Association's current enforcement system and sanctioning process against member institutions that violate the NCAA's Bylaws punishes prospective and current student athletes for infractions committed by student athletes, coaches, or administrators no longer associated with the institution. This article reviews the injustices committed against prospective and current student athletes, as well as student athletes' inability to challenge punishments the NCAA levies against them. The NCAA's Committee on Infractions should increase its consideration of the current student athletes' welfare at violating institutions before implementing penalties. This article provides recommendations for the NCAA Committee on Infractions that would enable the NCAA to punish the violating member institutions and deter them from violating Bylaws in the future while still being fair to prospective and current student athletes.

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CONCLUSION 459

INTRODUCTION

The National Collegiate Athletic Association¹ (NCAA) must revise its current sanctioning process² because when the NCAA imposes penalties—including postseason restrictions³ and scholarship reductions⁴—it unfairly

¹ The National Collegiate Athletic Association is a voluntary association of over 1,200 colleges and universities which oversees 88 championships in 23 sports for more than 400,000 student athletes competing in three divisions. The Association is headquartered in Indianapolis, Indiana. NCAA Home, Who Are We, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/>.

² The current mission of the NCAA Enforcement Program was adopted by the NCAA's member institutions on January 11, 1994 and states that "[i]t shall be the mission of the NCAA enforcement program to eliminate violations of NCAA rules and impose appropriate penalties should violations occur. The program is committed to fairness of procedures and the timely and equitable resolution of infractions cases. The achievement of these objectives is essential to the conduct of a viable and effective enforcement program. Further, an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions." National Collegiate Athletic Association, 2010–2011 Division I Manual § 19.01.1 (Aug. 2010) hereinafter NCAA Division I Manual] available at <http://www.ncaapublications.com/DownloadPublication.aspx?download=D111.pdf>. The administration of the NCAA enforcement program is the responsibility of the Committee on Infractions which is appointed by the NCAA Board of Directors. NCAA Division I Manual § 19.1. The Committee on Infractions is composed of ten members with seven of whom are presently or have previously been on the staff of an active member institution or member conference of the Association, and with no more than three and no less than two of whom who shall be from the general public and shall not be associated with a college institution, conference, or professional or similar sports organization, or represent coaches or athletes in any capacity. NCAA Division I Manual § 19.1.1. The duties of the Committee on Infractions are: "(a) Consider complaints that may be filed with the Association charging the failure of any member to maintain the academic or athletics standards required for membership or the failure of any member to meet the conditions and obligations of membership in the Association; (b) Formulate and revise, in accordance with the requirements of Bylaw 19.3, a statement of its established operating policies and procedures, including investigative guidelines (See Bylaw 32); (c) Determine facts related to alleged violations and find violations of NCAA rules and requirements; (d) Impose an appropriate penalty or show-cause requirement on a member found to be involved in a major violation (or, upon appeal, on a member found to be involved in a secondary violation), or recommend to the Board of Directors suspension or termination of membership; and (e) Carry out any other duties directly related to the administration of the Association's enforcement program." NCAA Division I Manual § 19.1.3.

³ The NCAA mandates precluding an institution from participation in postseason competition, particularly those cases in which: "(1) Involved individuals remain active in the program; (2) A significant competitive advantage results from the violation(s); or (3) The violation(s) reflect a lack of institutional control" in cases of a major violation. NCAA Division I Manual, *supra* note 2, § 19.5.2.1 (f).

⁴ The NCAA may impose "a] limited reduction in the number of financial aid awards that may be awarded during a specific period in the sport involved to the maximum extent of 20 percent of the maximum number of awards normally permissible in that sport." NCAA Division I Manual, *supra* Note 2, § 19.5.1 (e). In cases of major violations there is a presumptive penalty that includes "a] reduction in the number of financial aid awards." NCAA Division I Manual, *supra* note 2, § 19.5.2.1 (e).

punishes current and prospective student athletes who have not committed any infractions. The NCAA ought to revise its sanctioning process to better fulfill its mission, to protect innocent student athletes and continue to provide additional opportunities for prospective student-athletes rather than reducing them. The NCAA could achieve its goals without negative side effects by removing the postseason competition ban, maintaining the number of scholarships an institution has to offer, increasing fines against the violating institutions, and holding violators liable with stronger personal implications.

Hypothetically, suppose a high school student has just finished a spectacular junior year season playing football at an inner-city public high school near downtown Los Angeles. Suddenly, he is being considered by the nation's top recruiting services⁵ as a potential prospect for college teams. Since his family background would not permit him to attend college without serious financial assistance and his academic record is not strong, the pressure to succeed in athletics and secure a college scholarship mounts. He comes to view football as his ticket off the streets to college and a better life. This prospective collegiate football recruit is then visited by an assistant coach at the local Division-I Football Bowl Subdivision ("FBS") university,⁶ a school he grew up dreaming of attending, and now realizes the dream could become a reality. This school is the only one that mentions the possibility of a scholarship. Then, rumors begin circulating of possible sanctions from the NCAA against the school stemming from an athletic department incident concerning two student-athletes roughly six years earlier. Finally, just before National Signing Day,⁷ the NCAA announces sanctions against the school. As part of the sanctions, the school's football

⁵ A recruiting service is an independent organization which has been developed to provide exposure to the top high school athletes in major college sports such as football, basketball and baseball. These services may collect personal information and athletic information, such as 40-yard dash time, bench press, etc. and provide the information to institutions provided that any fee paid is the same for all institutions and the fee is not based on placing the prospect in a collegiate institution as a recipient of institutional financial aid. Recruiting Service FAQ available at http://www.ncaa.org/wps/wcm/connect/5d84fb004c0b86a68637f61ad6fc8b25/Recruiting_Service_FAQ.pdf?MOD=AJPERES&CACHEID=5d84fb004c0b86a68637f61ad6fc8b25. Rivals.com and Scout.com. are examples of recruiting services.

⁶ The NCAA groups its member institutions into three divisions: Division I, Division II, or Division III. Division I is generally composed of the major athletic powers in the country as well as of many other institutions that choose to compete at the major college level. Division I is additionally divided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS). The FBS was formerly known as Division I-A and the FCS was known as Division I-AA for football purposes. NCAA Home, *What's the difference between Divisions I, II and III?* available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/membership/div_criteria.html.

⁷ The cultural phenomenon of National Signing Day (NSD) refers to the first day on which a high school senior can sign a binding National Letter of Intent to play college football with a member institution of the NCAA. College football's version of NSD takes place in February of each year.

program must operate under reduced scholarship limits.⁸ The recruit receives a call from the coach, informing him that as a result of the sanctions, the school can no longer offer him a scholarship, but that he is welcome to enroll at the school and walk-on to the team. Unfortunately, in reality this recruit cannot afford the tuition to enroll without a guaranteed scholarship. Overnight, attending college is no longer an option.

Next, consider a student athlete already enrolled at the university the NCAA sanctions. For example, the starting quarterback who just finished his freshman season after being the first true freshman to start the opening game of the regular season at his school, a traditional FBS football powerhouse team. Now the NCAA sanctions the school for violating NCAA Bylaws pertaining to the amateur status of one particular athlete who left the institution four years prior to this current quarterback matriculating at the school and presently plays in the National Football League (NFL). Because this former player broke the rules, the NCAA placed the school's athletic department on probation for four years,⁹ removed ten scholarships from the football program each year for the next three academic years,¹⁰ and stripped the football program's ability to participate in any postseason contests for the next two seasons.¹¹ The rising-

⁸ Each NCAA FBS football program has an annual limit of 85 full scholarships each year to allocate between players. NCAA Division I Manual, *supra* note 2, § 15.5.6.1. When a school's scholarship limit is reduced the institution is unable to offer an initial grant-in-aid to prospective student athletes who would have received financial aid under normal circumstances. The football program is then unable to attract the same caliber of athlete to the positions due to the intense recruiting environment in top level FBS football.

⁹ An example of the NCAA Committee on Infractions placing a member institution's athletic department on probation for four years occurred on March 6, 2009 when Florida State University (FSU) was punished for violations stemming from the actions of three former University Athletics Academic Support Services staff members who gave improper assistance resulting in academic fraud to numerous student athletes from multiple sports programs within the institution. Florida State University Public Infractions Report (2009) available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=665&publicTerms>.

¹⁰ An example of the NCAA Committee on Infractions reducing the available financial aid for the football program of a member institution by ten scholarships for three academic years is the June 10, 2010 punishment for the University of Southern California (USC) for violations of NCAA bylaws governing amateurism, failure to report knowledge of violations, unethical conduct, impermissible benefits for student athletes, violations of coaching staff limitations, impermissible recruiting contacts by a booster, impermissible inducements and extra benefits, and lack of institutional control. University of Southern California Public Infractions Report (2010) available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

¹¹ An example of the NCAA Committee on Infractions including a postseason ban for two seasons for the football program occurred on February 1, 2002 when the University of Alabama was cited for athletics representatives actively engaging in violations of recruiting and extra benefits with prospective student athletes as well as providing impermissible recruiting inducements through high school coaches. As a result the football program was not allowed to participate in the postseason in 2002 and 2003. University of Alabama Public Infractions Report (2002) available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=526&publicTerms>.

sophomore must now decide whether to attempt transferring to another FBS university and sit out for a season¹² for the opportunity to play in a prestigious bowl game, known to be the highest level of competition in FBS football.¹³ Or he may stay at his school, knowing he will be unable to advance to a bowl game for the next two seasons and that his team will be handicapped ten fewer scholarship athletes each of the next three seasons.

This article will not rehash the well-worn topic of NCAA sanctions generally, but instead will provide a fresh perspective on the NCAA sanctioning process specific to the events that took place at the University of Southern California (USC) from 2004 through 2007,¹⁴ the punishments the NCAA

¹² The general rule regarding transfer between four-year college institutions is that the "transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution," NCAA Division I Manual, *supra* note 2, § 14.5.5.1. The NCAA does allow for a waiver of the one full academic year residence requirement through bylaw 14.8.2(c) which states that "[t]he Legislative Council Subcommittee for Legislative Relief may waive the one-year residence requirement for student-athletes under the following conditions or circumstances: . . . (c) On the recommendation of the Committee of Infractions, for a student-athlete who transfers to a member institution to continue the student-athlete's opportunity for full participation in a sport because the student-athlete's original institution was placed on probation by the NCAA with sanctions that would preclude the institution's team in that sport from participating in postseason competition during all of the remaining seasons of the student-athlete's eligibility." NCAA Division I Manual, *supra* Note 2, § 14.8.2(c). This waiver would not apply to the quarterback in the hypothetical because he has three years of eligibility remaining and his institution has received only a two-year postseason ban, which means he would be eligible for the postseason during his senior season if he chooses to remain at the institution for three more seasons. Additionally, this general rule does not consider the Division-I, conference-specific rules that might limit the eligibility of the transferring student-athlete more stringently than the NCAA limits the transfer's eligibility. For example, in the Big East Conference, student athletes in the sports of men's basketball, women's basketball, and football, "are not permitted to transfer...from one Big East] institution to another Big East] institution and participate in any capacity in the sports of men's basketball, women's basketball, and football]" available at <https://http://www.msnsportsnet.com/content/BigEastTransfer.pdf>; see also <http://compliance.pac-12.org/ccacaitems/surveys/itransfers.pdf>.

¹³ There are currently 35 NCAA certified bowl games which take place following the FBS regular season continuing the tradition of college football bowl games that has been ongoing for over 100 years. Football Bowl Association Facts available at <http://footballbowlassociation.com/facts/index.php> (last visited April 29, 2011). In 2009–10, 1.77 million fans attended the bowl games and the bowl games made \$260 million in payouts to NCAA schools. Bowls Background—BCS Football available at <http://www.bcsfootball.org/news/story?id=4819399> (last visited April 29, 2011).

¹⁴ On June 10, 2010, the NCAA Committee on Infractions announced the findings from its four-year investigation into conduct within USC. The case centered on former football student-athlete, Reggie Bush, who attended USC from 2003 through 2006, and former men's basketball student-athlete, O.J. Mayo, who attended USC for only the 2007–08 academic year. University of Southern California Public Infractions Report (2010) 1 available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>. The NCAA found that Reggie Bush had received gifts from two sports marketers who had hoped to sign him to their firm when he left the school. Specifically, the NCAA found that the men had paid for hotel stays, a rent-free home for Bush's family to live in, and a new suit and a limousine trip to the 2005 Heisman Trophy presentation in New York. The NCAA Enforcement Staff found that Bush was ineligible beginning at least by

imposed on that institution in June 2010,¹⁵ and the effect those sanctions have on current and prospective student athletes. In particular, this article examines the effect on student athletes already enrolled at USC and unable to play on their sport's biggest postseason stage due to the acts of two previous student athletes within the program.¹⁶ This article also explores the adverse effect of reducing athletic scholarships on prospective student athletes from modest backgrounds who lose their opportunity to attend college at all¹⁷ because they are not able to

December 2004. The NCAA Public Infractions Report also condemned the star treatment that Bush and Mayo received while on campus, saying that USC's oversight of its top athletes ran contrary to the fundamental principles of amateur sports. Greg Beacham, *NCAA Drops the Hammer on USC Football*, NBC Sports (June 10, 2010, 8:24 PM), http://nbcports.msnbc.com/id/37621070/ns/sports-college_football/ (last visited April 29, 2011). The NCAA public infractions report specifically said that "[e]lite athletes in high profile sports with obvious great future earnings potential may see themselves as something apart from other student-athletes and the general student population" and that "[i]nstitutions need to assure that their treatment on campus does not feed into such perception." University of Southern California Public Infractions Report (2010) available at <https://web1.ncaa.org/LSDBI/excc/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

¹⁵ The punishments imposed by the NCAA Committee on Infractions on June 10, 2010 included: public reprimand and censure; four years of probation; a two-year postseason ban in football; vacation of all records in which an ineligible football student-athlete competed; vacation of all records in which an ineligible men's basketball student-athlete competed; vacation of all records in which an ineligible women's tennis student-athlete competed; limited initial grant-in-aid in football to 15 and to 75 total for 2011–12, 2012–13, and 2013–14 academic years; limited grant-in-aid in men's basketball to 12 for the 2009–10 and 2010–11 academic years; financial penalties in the amount of \$206,020 to be returned to the Pac-10 conference; one-year show-cause order placed on an assistant football coach; and an annual compliance report is required. University of Southern California Public Infractions Report (2010) available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

¹⁶ The student athletes who were enrolled at USC at the time of the NCAA Committee on Infractions public infractions report on June 10, 2010 and who continued to stay enrolled in the institution would be unable to participate in a bowl game during the 2010 and 2011 college football seasons. For example, quarterback Matt Barkley was entering his sophomore season at USC when the sanctions were announced and would be barred from participating in the postseason for the next two seasons but would still have one year of eligibility remaining when the team is again allowed in the postseason in 2012. NCAA Bylaw 14.8.2 allows for the possibility of a waiver of the one-year residency requirement for student athletes who are transferring following his original institution being placed on probation by the NCAA with sanctions that would preclude that institution from participating in the postseason in that student athlete's sport, would not apply to Matt Barkley because USC is not precluded from participating in the postseason in football during all of the remaining seasons of his eligibility. Because of this he must either stay at USC and not participate in the postseason for two years or transfer and sit out a season under NCAA Bylaw 14.5.5.1. After the announcement of the sanctions, Matt Barkley stated, "It does stink to possibly not play in a bowl game." Greg Beacham, *NCAA Drops the Hammer on USC Football*, NBC Sports (June 10, 2010, 8:24 PM), http://nbcports.msnbc.com/id/37621070/ns/sports-college_football/ (last visited April 29, 2011).

¹⁷ "Many players come from underprivileged, inner-city backgrounds, so when they finally receive large sums of money, family becomes an issue." Jordon Schultz, *NFL Lockout Means Players are Changing Spending Habits*, Huffington Post Sports (April 27, 2011, 3:05 PM), http://www.huffingtonpost.com/2011/04/27/nfl-lockout_n_854335.html.

afford college without the assistance of an athletic scholarship.¹⁸ When the NCAA reduces those opportunities because of the acts of a single former student athlete, it exacerbates inequity.

Lastly, this article suggests reforms for the NCAA's sanctioning process to better provide protections to innocent parties, including current and prospective student athletes. This reform can be achieved by removing the option of a postseason competition ban, removing the option to reduce scholarship numbers, increasing fines against violating institutions, and holding violators liable with stronger personal implications.

I. BACKGROUND OF THE NCAA AND ITS MISSION

To better understand the rationale of the current NCAA operations and, specifically, its sanctioning process, it is important to review the history of the association and the principles on which it was founded. The NCAA is a "voluntary"¹⁹ organization consisting of public and private institutions, with 338 members at the Division-I level, 295 in Division II, and 443 in Division III.²⁰

¹⁸ The 2011–12 undergraduate estimated cost of attendance at USC is \$57,876. Financial Aid—Applying and Receiving Financial Aid—Costs, University of Southern California, http://www.usc.edu/admission/fa/applying_receiving/undergraduates2/costs.html (last visited April 29, 2011). These costs of attendance are what a prospective student athlete would have to pay to attend USC if his potential scholarship is revoked when the institution's allotment of initial "counters" are reduced. When a prospective student athlete is recruited to an institution by a member of the football program's recruiting coordinator under the belief that he will be awarded an athletic scholarship, he will be included as a "counter" for the institution's athletic program when the student athlete enrolls in the institution and begins receiving financial aid based on his athletic ability. NCAA Division I Manual, *supra* note 2, § 15.5.1(a). In FBS football, there is an annual limit of 25 initial counters and an annual limit of 85 total counters for each institution operating in normal conditions. Athletic scholarships, both full and partial grants-in-aid are renewable on a yearly basis and amount of financial aid may be raised or lowered by the institution for each individual student athlete. NCAA Division I Manual, *supra* note 2, §§ 15.5.6–15.5.6.4.2.

¹⁹ It is not mandatory that any college or university seek admission to the NCAA. Instead, institutions choose to seek membership to the Association on their own initiative. "Membership into the NCAA" is available to colleges, universities, athletics conferences or associations and other groups that are related to intercollegiate athletics; that are accredited by one of the six regional accrediting agencies and that are located in the United States, its territories or possessions. Such institutions or organizations must accept and observe the principles set forth in the constitution and bylaws of the Association. For a four-year period beginning August 9, 2007, no institution may begin the Division I provisional or reclassification membership process (including the exploratory process), no institution may begin the multidivisional membership reclassification process, no institution shall be permitted to seek classification or reclassification in the Football Championship Subdivision, and no new single-sport or multisport conference shall be elected to Division I conference membership." NCAA Division I Manual, *supra* note 2, § 3.1.1.

²⁰ The numbers stated are the total members in each division as reported in NCAA Membership Report for 2009–10. 2009–10 NCAA Membership Report available at <http://catalog.procmags.com/publication/0affc96d#0affc96d/1>.

The NCAA was first organized as the Intercollegiate Athletic Association of the United States in 1906²¹ following a 1905 college football season that witnessed the deaths of eighteen players during play.²² It was renamed the National Collegiate Athletic Association in 1910.²³ The tradition of placing the wellbeing of student-athletes first is the foundation on which the association was founded,²⁴ but its current sanctioning process calls into question whether this tradition is still at the top of the NCAA's priority list.

Today the NCAA's stated goals place student-athlete welfare as its top priority.²⁵ A quick look at the first few pages of the NCAA Division-I Manual shows the association's expressed intention of safeguarding athletics and student-athletes.²⁶ The NCAA claims to seek to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."²⁷ Additionally, the NCAA seeks "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism [and] [t]o supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of [the] Association."²⁸ The mission of the NCAA enforcement program, found in Article 19 of the NCAA Bylaws, is to "eliminate violations of NCAA rules and impose appropriate penalties should violations occur."²⁹ While this mission is admirable, examining the full effect of

²¹ President Theodore Roosevelt promoted the creation of a joint committee for the regulation of college football. This brought together individuals from Dartmouth, Haverford, Minnesota, Nebraska, Oberlin, Vanderbilt, Army, Yale, Harvard, Princeton, Cornell, Pennsylvania, Navy and Chicago. The group was initially named the National Football Conference of Universities and Colleges and the group appointed an executive committee, which drafted a constitution and bylaws for a new entity. The conference later changed its name to assure that this new body would deal with more than one sport. The drafts were approved on March 1, 1906 and the first Convention for the organization was held in New York City in December 1906. During that Convention the Intercollegiate Athletic Association of the United States was born. Joseph N. Crowley, *The NCAA's First Century* 10 (2006).

²² There were 18 fatalities and 149 serious injuries during the 1905 college football season, which provided plenty of fodder for critics of the brutal sport. Jack Falla, *NCAA: The Voice of College Sports* 13 (1981). This included President Theodore Roosevelt who invited representatives from Harvard, Yale and Princeton (then known as "the Big Three") to the White House to try to bring some peace to college football. Joseph N. Crowley, *The NCAA's First Century* 9 (2006).

²³ Joseph N. Crowley, *The NCAA's First Century* 10 (2006).

²⁴ The growth of the NCAA stems from the large number of deaths and injuries in college football in 1905. The group of universities and colleges were brought together as a means to reform the sport and make it safer for the student athletes. Joseph N. Crowley, *The NCAA'S First Century* 9 (2006).

²⁵ NCAA Bylaw 2.2 states that "[i]ntercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student athletes." NCAA Division I Manual, *supra* note 2, § 2.2.

²⁶ NCAA Division I Manual, *supra* note 2, § 1.2.

²⁷ NCAA Division I Manual, *supra* note 2, § 1.3.1.

²⁸ NCAA Division I Manual, *supra* note 2, § 1.2(f).

²⁹ NCAA Division I Manual, *supra* note 2, § 19.01.1.

the NCAA sanctioning process³⁰ calls into question whether the current system imposes "appropriate" penalties.

NCAA Bylaw 19.01.1 states that "an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, and other institutions."³¹

Unfortunately, the NCAA is not doing enough to protect these innocent NCAA participants. Uninvolved student athletes, prospective student athletes, coaches, and administrators should not suffer longstanding and severe sanctions because of infractions committed by past student athletes, former coaches, or retired administrators no longer associated with the member institution. These prospective and current student athletes committed no violations of any NCAA Bylaws and many times had no knowledge of the violations. They especially did not expect to have their time as student athletes marred by NCAA sanctions against the university they chose to attend. The institution might be to blame and should be punished for acquiescing to, or failing to prevent, the violations, but the NCAA needs to realign with its stated principles to primarily protect innocent prospective and current student athletes who are unjustly paying the price for these violations.

II. HISTORY OF NCAA SANCTIONS

The sanctions brought against USC in June 2010 are a recent example of the NCAA holding current and prospective student-athletes and administrators liable for the actions of wrongdoers, who bear no consequences of the punishment themselves. Within this section, the severity of the sanctions at the disposal of the NCAA is examined through real life examples. This section also explores situations in the past where student athletes have taken a stand for themselves and tried to fight the unfair sanctions imposed against them by the

³⁰ One examination into the 1985 "death penalty" case at Southern Methodist University (SMU), discussed *infra*, estimated that the NCAA sanctions against the university cost SMU 10,000 fans per game for 19 seasons, roughly 55,000 fans per season. At a ticket cost of \$15 each this results in \$825,000 each season in lost ticket revenue. The inclusion of roughly \$1.50 per person of concession revenue brings the total to \$907,500 per year. The author continued to factor in inflation, sponsorship, advertising and other potential revenue and came to a final estimate that SMU had lost \$25 million over the time of the death penalty. This is just the tangible effect of the sanctions. It is also possible that if SMU had not been sanctioned so severely they would have ended up as a member of the Big 12 Conference, which makes much more money for its institutions than the school's current conference, Conference USA. The effect of a decrease in applications for the entire university will also stem from the bad press and lack of publicity that comes from a winning Division I football program. Darren Rovell, *SMU's "Death Penalty": What Price Did It Pay*, CNBC.com (Jan. 8, 2008, 9:55 AM), http://www.cnbc.com/id/22553608/SMU_s_Death_Penalty_What_Price_Did_It_Pay (last visited April 30, 2011).

³¹ NCAA Division I Manual, *supra* Note 2, § 19.01.1.

NCAA. The following examples are just a few in a long line of NCAA sanctions that punished the wrong people and hindered the wellbeing of the current student athletes without any reprimand for the wrongdoers who broke the rules. These examples show that the recent events at USC are not an isolated incident.

A. Examples of Sanctions

The most severe sanction the NCAA can bring is commonly known as the “death penalty.”³² This sanction involves the complete elimination of either a school’s entire athletic program or a single sport for at least one year.³³ The NCAA reserves this penalty for “repeat violators”³⁴ and has only applied it once in NCAA Division-I football history. It was applied to Southern Methodist University’s 1987 and 1988 football seasons for violations of the principles of amateurism and providing extra benefits to student athletes.³⁵ In total, the NCAA

³² The ‘death penalty’ is a phrase used by media to describe the most serious NCAA penalty possible. It is not a formal NCAA term. It applies only to repeat violators and can include eliminating the involved sport for at least one year, the elimination of athletics aid in that sport for two years and the school relinquishing its Association voting privileges for a four-year period. A school is a repeat violator if a second major violation occurs within five years of the start date of the penalty from the first case. The cases do not have to be in the same sport. NCAA Home, Rules Enforcement—Glossary of Term available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/Rules+Enforcement+glossary+of+terms>.

³³ The “death penalty” has been imposed three times at the Division-I level. The University of Kentucky had the 1952–53 season cancelled following a point shaving scandal that took place in the 1948–49 season. NCAA Public Report on University of Kentucky (1952) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=62&publicTerms>. The University of Southern Louisiana (now the University of Louisiana at Lafayette) had the basketball program eliminated for the 1973–74 and 1974–75 seasons following a finding of academic fraud, recruiting violations, and improper financial assistance. NCAA Public Report on University of Southern Louisiana, Lafayette, Louisiana (1973) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=270&publicTerms>. The most recent application of the “death penalty” was when Southern Methodist University had the football program eliminated for the 1987 and 1988 seasons for extra benefits given to football student-athletes. Southern Methodist University Infractions Report (1987) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=44&publicTerms>.

³⁴ “A school is considered a repeat violator if the Committee on Infractions finds a major violation has occurred within five years of the starting date of a major penalty. For this provision to apply, major violation must have occurred within five years after the starting date of the penalties in the previous case.” NCAA Home, Rules Enforcement—Glossary of Terms available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/Resources/Glossary>.

³⁵ SMU was found to have violated the principles governing amateurism and extra benefits to student-athletes. The NCAA found that between September 1985 and December 1986 there were monthly payments ranging from \$50 to \$725 made to numerous football players from funds provided by an outside representative of the university’s athletic interests. In total it was shown that thirteen football team members received payments during the 1985–86 academic year that totaled \$47,000, and eight team members continued to receive payments from September through December 1986 that totaled

Enforcement Staff found that during the 1985–86 academic year, thirteen members of the SMU football program had received payments of approximately \$47,000, and eight members of the football team continued to receive payments of approximately \$14,000 from September 1986 to December 1986.³⁶ At the time the NCAA sanctions were imposed and the football program was eliminated, only three of the student athletes that received extra benefits had not yet exhausted their eligibility.³⁷ The punishment left innocent student athletes scrambling to either transfer to a new institution or to stay at SMU without the opportunity to play football like they had expected.³⁸ Many of those student athletes did not take any extra benefits and were not even aware of the violations occurring within the program.³⁹

Another example of how the NCAA sanctioning process can punish innocent student athletes occurred in 2003 when the NCAA imposed sanctions on the University of Michigan men's basketball team for violations committed between the spring of 1992 and the spring of 1999.⁴⁰ The sanctions stemmed from payments made to players by a booster, Ed Martin,⁴¹ dating back to the "Fab Five"⁴² era. Sanctions included a postseason ban, probation, scholarships lost from 2004 to 2008, and censure.⁴³

\$14,000. Southern Methodist University Infractions Report (1987) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=44&publicTerms>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ SMU football had a rich history in college football including national championships in 1935, 1981 and 1982. Between the years of 1980–85 SMU had the most wins of any program in Division I football with a 55-14-1 record. Pete Dymek, National treasure: SMU's Forgotten, Yet Glorious Football History, (2008) available at <http://bleacherreport.com/articles/47192-national-treasure-smus-forgotten-yet-glorious-football-history>.

³⁹ The SMU infractions report found that thirteen members of the football team had received payments during the 1985–86 academic year. This means the remaining student-athletes within the football program were not receiving any extra benefits, but still faced punishment for the acts of others.

⁴⁰ In 2003, the University of Michigan was sanctioned by the NCAA for violation of amateurism regulations, a provision of impermissible recruiting inducements and extra benefits provided by an athletics representative. The sanctions stemmed from incidents arising between the spring of 1992 through the spring of 1999 when an athletics representative was found to have provided recruiting inducements and extra benefits in the form of cash, clothing, jewelry, transportation, lodging, meals and other like benefits totaling approximately \$616,000 in value to at least four student-athletes and members of their families and at least one former student athlete. University of Michigan Public Infractions Report (2003) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=539&publicTerms>.

⁴¹ Larry Lage, NCAA Nails Michigan Basketball, *The Lakeland Ledger*, May 9, 2003, at C1.

⁴² The "Fab Five" is the name that was given to the 1991 recruiting class for the University of Michigan men's basketball program that included Chris Webber, Jalen Rose, Juwan Howard, Jimmy King, and Ray Jackson. The five players first started together on February 9, 1992 as freshman and soon were regularly playing together as a unit. The Fab Five led Michigan to both the 1992 and 1993 NCAA Men's Division I Basketball Championship games when they were all freshman and sophomores respectively. The era drew to a close following the 1992–93 men's basketball season

These examples highlight the problem with the current NCAA sanctioning process: by the time the NCAA Enforcement staff conducts its fact finding and the NCAA Committee on Infractions imposes its sanctions on a violating institution, the offenders are often gone and unaffected, leaving the innocent current student athletes to suffer the harshest blows.⁴⁴

B. Students Fighting Imposed Sanctions

Innocent current student-athletes impacted by NCAA sanctions often have no viable option for seeking appropriate relief. Consider on May 20, 1983, when the NCAA Committee on Infractions announced its findings and brought sanctions against the University of Arizona.⁴⁵ The sanctions placed the

when Chris Webber left school following his sophomore season to enter the 1993 NBA Draft. Gabriel Kaufman, *Basketball in the Big Ten Conference* 23 (2008).

⁴³ In addition to vacating wins from seasons in which the four student athletes had participated, the NCAA imposed a two-year postseason ban on the men's basketball program and reduced the total athletically related financial awards in men's basketball by a total of four during the period beginning with the 2003-04 academic year and continuing through the 2006-07 academic year. University of Michigan Public Infractions Report (2003) available at <https://web1.ncaa.org/LSDb/exec/miSearch?miSearchSubmit=publicReport&key=539&publicTerms>.

⁴⁴ This unjust result also is not lost on the prospective and current athletes who have committed to attend a university, which later comes under scrutiny for allegations of wrongdoing. For example, in July 2011 top Ohio State football recruit Kyle Kalis switched his commitment to Ohio State's arch rival, Michigan, amid uncertainty that Ohio State would soon be receiving NCAA sanctions. On his decision, Kalis said, "I can't go there (Ohio State) and take penalties for something I never did. Ohio State is a great program. I'm just not sure how long it will take them to recover. I want a solid, grounded coaching staff with a safe environment. Where there aren't such tough decisions." Joe Schad, *Kyle Kalis Now Headed to Michigan*, ESPN.COM (JULY 12, 2011) available at http://espn.go.com/college-football/story/_/id/6757559/ohio-state-buckeyes-2012-recruit-kyle-kalis-now-headed-michigan-wolverines.

⁴⁵ NCAA Public Report on University of Arizona (1983) available at <https://web1.ncaa.org/LSDb/exec/miSearch?miSearchSubmit=publicReport&key=380&publicTerms>. On May 17, 1983, the Committee on Infractions of the NCAA issued Confidential Report No. 183(107). The report contained the results of the NCAA's investigation of the University of Arizona's football program, and detailed numerous violations of the NCAA constitution and bylaws by the University during the years 1975 through 1979 . . . The Infractions Committee's report documented numerous occasions on which staff members and representatives of the University football program—including the then head coach of the football team—provided compensation or extra benefits to student athletes who are either in the University's football program or being recruited for the program. Specifically, the football staff was found to have provided the student athletes with benefits such as free airline transportation between school and their homes, free lodging, and cash and bank loans for the athletes' car payments, rental payments, and personal use. *Justice v. NCAA*, 577 F. Supp. 356, 362 (D. Ariz. 1983).

university's athletic department on probation for two years,⁴⁶ banned the institution's football team from postseason play for the 1983 and 1984 seasons,⁴⁷ and prohibited the football program from appearing on television during the 1984 and 1985 college football seasons.⁴⁸

In 1983, student athletes on the University of Arizona football team brought suit against the NCAA, seeking an injunction to allow the team to participate in the postseason.⁴⁹ The student athletes who brought the suit did not commit the infractions for which NCAA was sanctioning the school, so they alleged an unconstitutional deprivation of a protected right without due process of law and a prior restraint of speech claim.⁵⁰ The Arizona District Court denied their request for an injunction even though it found that the NCAA could be a state actor for alleged constitutional claims.⁵¹

⁴⁶ "The University of Arizona shall be publicly reprimanded and censured, and placed on probation for a period of two years, effective May 19, 1983, it being understood that should any portion of the penalty in this case be set aside for any reason other than by appropriate action of the Association, the penalty shall be reconsidered by the NCAA; further, prior to the expiration of this period of probation, the NCAA shall review the athletic policies and practices of the university." NCAA Public Report on University of Arizona (May 20, 1983) available at <https://web1.ncaa.org/LSDBi/excc/miSearch?miSearchSubmit=publicReport&key=380&publicTerms>.

⁴⁷ "The university's intercollegiate football team shall end its 1983 and 1984 seasons with the playing of its last, regularly scheduled, in-season contest and the university shall not be eligible to participate in any postseason football competition following those seasons." *Id.*

⁴⁸ "During the 1984 and 1985 football seasons the university's intercollegiate football team shall not be eligible to appear on a television series or program subject to the administration or control of this Association or any other television program involving "live" coverage." *Id.*

⁴⁹ In *Justice*, four members of the University of Arizona football team filed a law suit against the NCAA seeking a preliminary injunction against the NCAA to prevent enforcement of the NCAA sanctions which would not allow the University of Arizona football team to participate in postseason competition following the 1983 or 1984 seasons or to make appearances on television during the 1984 or 1985 seasons. *Justice*, 577 F. Supp. at 360. The plaintiffs alleged that the imposition of the sanctions by the NCAA deprived them of their constitutionally protected rights to be free of punishment in the absence of guilt, to participate in intercollegiate athletic competition—including postseason bowl games—and receive the national exposition which is critical to securing a professional football contract, and to pursue the vocation of their choice and to exercise their freedom of expression without prior restraints. *Id.* at 362–63. The District Court held that the NCAA sanctions did not deprive the players of any constitutionally protected rights; under the "rule of reason" analysis, the sanctions did not violate antitrust laws; and that even assuming that balance of hardships tipped decidedly in favor of the players, they were not entitled to a preliminary injunction against the implementation of sanctions because none of the constitutional or antitrust claims raised "serious questions" on the merits. *Id.* at 384.

⁵⁰ The constitutional claims made by the football players from the University of Arizona were that the NCAA's imposition of sanctions deprived them of their constitutionally protected rights: (a) to be free of punishment in the absence of guilt; (b) to participate in intercollegiate competition—including postseason bowl games—and receive the national exposure critical to securing a professional football contract; and (c) to pursue the vocation of their choice and to exercise their freedom of expression without prior restraints. *Justice v. NCAA*, *supra* note 49, at 362–63.

⁵¹ "The federal courts, including the Ninth Circuit, have consistently held that the actions of the NCAA constitute "state action" for constitutional and jurisdictional purposes." *Justice*, *supra* note 49, at 363.

However, charging the NCAA as a state actor for the purpose of alleged constitutional claims against the association has become markedly difficult after the 1988 U.S. Supreme Court decision in *NCAA v. Tarkanian*,⁵² where the Court explicitly held that the NCAA was not a state actor.⁵³ This decision substantially insulated the NCAA from constitutional claims, making it significantly more difficult for punished innocent parties to protect themselves in courts of law against the NCAA on constitutional grounds.⁵⁴

The saga of Coach Jerry Tarkanian, the men's basketball coach at the University of Nevada-Las Vegas (UNLV), serves as another example of NCAA punishment against the wrong parties. On August 26, 1977, the NCAA's Committee on Infractions announced sanctions against the institution as a result of violations that occurred between 1971 and 1975 in the men's basketball program.⁵⁵ At that time, the NCAA found that UNLV committed violations through: improperly entertaining potential recruits, providing financial aid,

See, e.g., *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976); *Howard University v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1254 (9th Cir. 1974).

⁵² *NCAA v. Tarkanian*, 488 U.S. 179 (1988). After its investigation, the NCAA Committee of Infractions imposed sanctions against the University of Nevada, Las Vegas (UNLV) in part because of rules violations by then-men's basketball coach Jerry Tarkanian. In addition to the sanctions imposed, the NCAA ordered UNLV to show cause of why additional penalties should not be imposed if it failed to suspend and reassign Tarkanian from its athletic program. Tarkanian brought suit in Nevada state court, alleging he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983. *Id.* at 179. The U.S. Supreme Court held that the NCAA's order to show cause did not constitute "state action" and thusly, not action performed "under color of" state law within the meaning of 42 U.S.C. § 1983. The Court held that the NCAA was neither a "joint participant" nor did it exhibit the requisite "sufficiently close nexus" between it and a state actor (UNLV) for the NCAA to be a state actor under 42 U.S.C. § 1983. Therefore, the NCAA could not have deprived Tarkanian of his Fourteenth Amendment due process rights. *Id.* at 191-99.

⁵³ "Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State, *Polk County v. Dodson*, 102 S. Ct. 445, 450, 70 L.Ed.2d 509 (1981), the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university." *Id.* at 196.

⁵⁴ The Due Process Clause of the Fifth Amendment applies only to actions by the federal government, and is incorporated by the Fourteenth Amendment to apply to the several states' governments. Actions by government which require constitutionality are "government acts" or "state action." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). See *Civil Rights Cases*, 109 U.S. 3 (1883). See also *DeFrantz v. U.S. Olympic Committee*, 492 F. Supp. 1181, 1192 (D.D.C. 1980). The courts have fashioned two guidelines for defining state action. *DeFrantz v. U.S. Olympic Committee*, 492 F. Supp. at 1192. The first involves determining whether the state "has so far insulated itself into a position of interdependence with the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). The second requires a determination of whether "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

⁵⁵ *NCAA University of Nevada, Las Vegas, Placed on NCAA Probation*, (Aug. 26, 1977), available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=313&publicTerms>.

lodging and transportation, extra benefits, and inducements, engaging in an excessive number of visits, academic fraud, eligibility concerns, unethical conduct, questionable practice, and lack of institutional control.⁵⁶ The penalties that were imposed against the institution were public reprimand and censure, two years of probation, a postseason ban for two seasons, a two-year ban from appearing on television, a reduction in initial grant-in-aid scholarships for two seasons, and a show-cause provision.⁵⁷ The show-cause provision required that the institution show cause why additional penalties should not be imposed if the school did not take appropriate disciplinary action in regard to a former assistant basketball coach, a former head basketball coach, and the current head basketball coach, Terry Tarkanian.⁵⁸

Coach Tarkanian brought suit against the NCAA following the announcement, and the suit worked its way to the U.S. Supreme Court in 1988. Following the Supreme Court's ruling that the NCAA was not a state actor,⁵⁹ the NCAA later added a third year to the postseason ban and television restrictions for the 1990-91 season because UNLV did not follow through with the show-cause requirement.⁶⁰ UNLV appealed to the NCAA after the additional sanctions for the show cause requirement were imposed and the NCAA allowed the school to delay the additional postseason and television ban for one season until the 1991-92 season.⁶¹ This additional season allowed the men's basketball team to defend its 1990 NCAA national championship, but it punished innocent students even further removed from the violations.⁶²

In 1992, then-current players on the UNLV men's basketball team sought an injunction to allow them to participate in the postseason after the NCAA imposed sanctions on the university.⁶³ The players filed this case four years after

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (The NCAA was not a state actor because the facts did not present the necessary joint participation or nexus of participation necessary to conclude that the NCAA was acting under color of state law, and that imposing the sanctions against UNLV was not unconstitutional.).

⁶⁰ Danny Robbins, *In a Switch, UNLV Can Defend Title: NCAA decision: Given choice, school opts to play for 1991 championship. Rebels forego live TV appearances and postseason play in 1991-92*, *Los Angeles Times*, November 30, 1990 available at http://articles.latimes.com/1990-11-30/sports/sp-5610_1_tv-appearances.

⁶¹ *Id.*

⁶² *Id.*

⁶³ The UNLV men's basketball program was barred from participating in the 1992 NCAA Tournament as part of the sanctions resulting from the 1977 infractions case. The team had won the 1990 National Championship and had been scheduled to be barred from the 1991 postseason, but the NCAA Committee on Infractions had established a deal in which the penalty was delayed until 1992. The 1992 team finished the regular season with a 26-2 record, and its players filed suit for an injunction which would allow them to participate in the 1992 NCAA Tournament. 1991-92 UNLV Running Rebels Men's Basketball Schedule available at <http://www.fanbase.com/UNLV-Runnin-Rebels-Mens->

the U.S. Supreme Court held that the NCAA was not a state actor in *Tarkanian*. As expected, the district court in Nevada did not allow an injunction as Judge Donald Mosley said he could not find any legal grounds upon which to grant it.⁶⁴

The examples of the death penalty case at SMU and the sanctions brought against the University of Michigan, as well as the sanctions and resulting lawsuits brought against the NCAA by the football players at the University of Arizona and the basketball players at UNLV, each illustrate how the prospective and current student-athletes are the ones being punished for the actions that occurred years before they stepped foot on campus. The failed legal challenges highlight the difficulty that the NCAA and the court system create for the prospective and current student-athletes attempting to remedy the situation. The determination that the NCAA is not a state actor in *Tarkanian* created a large obstacle by virtually eliminating constitutional claims against the NCAA.

III. USC 2010 SANCTIONS CASE STUDY

The sanctions brought against USC provide a recent example of another situation where innocent prospective and current student-athletes had to withstand the worst of the punishments handed down by the NCAA enforcement committee while former student-athletes and administrators who were overseeing the programs had all moved on from the institution without punishment. On June 10, 2010, the NCAA completed its investigation into an

Basketball-1991-92/schedule. The injunction was denied by Nevada District Court Judge Donald Mosley who criticized the NCAA's enforcement procedure by saying that the players were being "unfairly punished for sins they did not commit," but went on to say that he did not believe that the UNLV players had a legal cause of action. Danny Robbins, Season Over for UNLV Players: Ruling: Judge refuses to provide injunction, seemingly closing (again) the 1977 case against Tarkanian, Los Angeles Times, March 12, 1992, http://articles.latimes.com/print/1992-03-12/sports/sp-5279_1; see also No Tourney for U.N.L.V., N.Y. Times (March 12, 1992), available at <http://www.nytimes.com/1992/03/12/sports/no-tourney-for-unlv.html>. On August 26, 1977, the NCAA announced sanctions against the University of Nevada, Las Vegas (UNLV) as a result of violations that occurred between 1971-75 in the institution's men's basketball program. UNLV was placed on two-years of probation, was barred from postseason play in the 1977-78 and 1978-79 basketball seasons, and was barred from appearing in television during the same 1977-78 and 1978-79 basketball seasons. NCAA Public Report on University of Nevada, Las Vegas (1977) available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=313&publicTerms>. The sanctions were delayed as a result of legal proceedings initiated by UNLV basketball coach, Jerry Tarkanian. This delay and additional show cause sanction resulted in the players on the 1992 team being unable to participate in the NCAA Tournament because of infractions committed between 1971-75, roughly 20 years earlier, before some of the players were even born.

⁶⁴ Danny Robbins, Season Over for UNLV Players: Ruling: Judge refuses to provide injunction, seemingly closing (again) the 1977 case against Tarkanian, Los Angeles Times, March 12, 1992 available at http://articles.latimes.com/print/1992-03-12/sports/sp-5279_1.

alleged impropriety within the USC Athletic Department.⁶⁵ The NCAA levied some of the harshest punishments to date for actions not stemming from impropriety by a booster to the program against a university's athletic department for actions by the USC athletic department.⁶⁶ The violations for which USC was cited involved contact by sports agents and marketers with football player Reggie Bush⁶⁷ and contact between sports agents and runners and basketball player O.J. Mayo,⁶⁸ in addition to other various infractions within the women's tennis program and the athletic department in general.⁶⁹ The NCAA charged USC with breaking the NCAA Bylaws governing amateurism, failure to by the athletic department to report knowledge of the violations, unethical conduct, impermissible benefits given to student athletes, violations of coaching staff limitations, impermissible recruiting contacts by a booster, impermissible inducements and extra benefits for potential recruits, and a lack of institutional control.⁷⁰

The NCAA placed the entire Athletic Department on probation from June 10, 2010, through June 9, 2014,⁷¹ and issued a number of sanctions including vacating the wins from previous athletic seasons.⁷² Before the NCAA's

⁶⁵ University of Southern California Public Infractions Report (2010), <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

⁶⁶ In addition to the self-imposed sanctions implemented by USC on its men's basketball program the committee also imposed the following: public reprimand and censure; four year of probation; two year postseason ban in football; vacation of all records in which an ineligible football student-athletes competed; vacation of all records in which an ineligible men's basketball student-athlete competed; vacation of all records in which an ineligible women's tennis student-athlete competed; limitation of initial grants-in-aid in football to 15 and to 75 total for 2011-12, 2012-13 and 2013-14 academic years; limitation of initial grants-in-aid in men's basketball to 12 for the 2009-10 and 2010-11 academic years; financial penalty in the amount of \$206,020 to be returned to the Pac-10 conference; one-year show-cause order placed on an assistant football coach; annual compliance reporting requirement. *Id.*; Stewart Mandel, With harsh USC penalties, NCAA sends warning to all elite programs, *Sports Illustrated.com*, (June 10, 2010, 10:06 PM), http://sportsillustrated.cnn.com/2010/writers/stewart_mandel/06/10/usc.penalties/.

⁶⁷ Greg Beacham, USC Hit Hard by Sanctions, *ABC News.com*, (June 10, 2010), <http://abcnews.go.com/Sports/wireStory?id=10873199>.

⁶⁸ *Id.*

⁶⁹ University of Southern California Public Infractions Report (2010) 1, <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

⁷⁰ *Id.* at 1.

⁷¹ The committee imposed four years of probation from June 10, 2010, through June 9, 2014. *Id.* at 57.

⁷² "Pursuant to NCAA Bylaws 19.5.2.2-(c)-(2) and 31.2.2.3-(b), the institution will vacate all wins in which student-athlete 1 competed while ineligible, beginning in December 2004." "Pursuant to NCAA Bylaws 19.5.2.2-(c)-(2) and 31.2.2.3-(b), the institution will vacate all wins in which student-athlete 2 competed during the 2007-08 regular seasons. (Institution imposed)" "Pursuant to NCAA Bylaws 19.5.2.2-(c)-(2) and 31.2.2.3-(b), the institution will vacate all wins in which the women's tennis student-athlete competed while ineligible between November 2006 and May 2009. (Institution imposed)" University of Southern California Public Infractions Report 57 (2010), available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

announcement, the institution had already imposed a number of sanctions on itself.⁷³ The self-imposed sanctions included: a postseason ban for the men's basketball team for the 2009–10 season; vacating all the wins the women's tennis student athlete obtained while ineligible between November 2006 and May 2009; a limit of 12 grants-in-aid in men's basketball for the 2009–10 and 2010–11 academic years; a reduction by one in the number of men's basketball coaches permitted to engage in off-campus recruiting during the summer of 2010; reducing the total number of recruiting days for the men's basketball program by 20 days for the 2010–11 academic year; and a \$5,000 fine for the amateurism violations committed by Reggie Bush.⁷⁴ The institution also disassociated itself from Reggie Bush, O.J. Mayo, and the sports agent who had been in contact with O.J. Mayo.⁷⁵ The institution also released three men's basketball prospective student athletes from their letters of intent.⁷⁶

Following a four-year NCAA investigation and a three-day hearing conducted by the NCAA,⁷⁷ the NCAA announced additional sanctions against USC. The Committee on Infractions took note of the institution's self-imposed sanctions,⁷⁸ but determined that additional sanctions were required. The committee then imposed the following penalties: public reprimand and censure; four years of probation from June 10, 2010 through June 9, 2014; a two-year postseason ban for the football team for the 2010 and 2011 seasons; vacating all the wins accumulated while Reggie Bush was ineligible, beginning in December 2004 and including the 2004 BCS National Championship;⁷⁹ vacating all wins in which O.J. Mayo competed as a member of the men's basketball program during the 2007–08 regular season; a limit of 15 grants-in-aid and 75 total grants in football for each of the 2011–12, 2012–13, 2013–14 academic years; a show-cause clause that required the institution show why it should not be penalized further if it failed to permanently disassociate Reggie Bush and O.J. Mayo from the school's athletics program; prohibiting all non-institutional personnel, including representatives of the institution's athletics interests, from traveling on football and men's basketball team charters, attending football and men's

⁷³ USC Announces Sanctions on Men's Basketball Team, USC News (Jan. 3, 2010, 6:57 AM), http://uscnews.usc.edu/university/usc_announces_self-imposed_sanctions_on_mens_basketball_team.html.

⁷⁴ University of Southern California Public Infractions Report, 57–59 (2010), available at <https://web1.ncaa.org/LSDBi/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

⁷⁵ *Id.* at 59.

⁷⁶ *Id.* at 60.

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 57.

⁷⁹ USC Sanctions; Football Team Banned From Postseason, Stripped of National Title Win, Huffington Post Sports, (Aug. 10, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/06/10/usc-sanctions-football-tc_n_607007.html.

basketball team practices, attending or participating in institutional football and men's basketball camps, and having access to sidelines and locker rooms before, during and after football and men's basketball games; a one-year show-case requirement for assistant football coach Todd McNair beginning on June 10, 2010, and running through June 9, 2011; and having to develop a comprehensive educational program on NCAA legislation and submit reports to the Committee on Infractions on compliance and education.⁸⁰

The impact of these additional sanctions against USC, including a postseason ban and reduced scholarship limits for the basketball and football programs,⁸¹ on the current and prospective student-athletes at USC has been strong and unfortunate. The sanctions have taken away current USC student athlete's opportunities to appear in bowl games for two seasons.⁸² The sanctions also affected numerous prospective recruits who had potential opportunities to attend USC taken away due to the actions of members of the athletic department years earlier.⁸³

IV. RECOMMENDATIONS

As stated above, the NCAA Committee on Infractions levied sanctions preventing the USC football program from participating in any postseason events in 2010 and 2011.⁸⁴ The institution's football program also lost ten scholarships

⁸⁰ University of Southern California Public Infractions Report (2010) 57–63 available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

⁸¹ The infractions committee imposed a limit of 15 initial grants-in-aid and 75 total grants in football for each of the 2011–12, 2012–13 and 2013–14 academic years. The institution had previously self-imposed a Limit of 12 grants-in-aid in men's basketball for 2009–10 and 2010–11 academic years. *Id.* at 58.

⁸² Karen Crouse, *Sanctions Leave Trojans Playing Just for Themselves*, Los Angeles Times, November 28, 2010 available at <http://www.nytimes.com/2010/11/29/sports/ncaafootball/29usc.html>; a result similar to the quarterback in our hypothetical at the beginning of this article.

⁸³ The innocent prospective student athletes who were considering attending USC to play football or men's basketball at the time of the sanctions have been affected through the reduction in scholarships for each sport by potentially not being offered grant-in-aid when they would have under normal conditions; similar to the prospect in our hypothetical at the beginning of this article. Fewer scholarship opportunities might result in the prospective student athlete not being able to attend college at all, which goes against the educational principles that the NCAA seeks to advance. The current student athletes who are already enrolled and participating in either football or men's basketball now must decide whether to stay at USC and not have the opportunity to play in the postseason or a FBS bowl game or to attempt to transfer to a different institution which may not be able to provide the opportunities for postseason play that USC had traditionally enjoyed, especially in football.

⁸⁴ Univ. of S. California Pub. Infractions Report (2010) 57, available at <https://web1.ncaa.org/LSDBI/exec/miSearch?miSearchSubmit=publicReport&key=691&publicTerms> ("The institution's football team shall end its 2010 and 2011 seasons with the playing of its last regularly scheduled, in-season contest and shall not be eligible to participate in any postseason competition, including a bowl game, following the season. Moreover, during the two years of this postseason ban, the football team

per year for three seasons⁸⁵ and the NCAA placed the entire Athletic Department on probation from June 10, 2010 through June 9, 2014.⁸⁶ Meanwhile, the school is operating with a new head football coach,⁸⁷ a new head basketball coach,⁸⁸ and a new athletic director since the infractions occurred.⁸⁹ These changes in the football and men's basketball rosters and the administration mean that even punishing the university's athletic department results in the wrong people paying the price for the violations while those student athletes, coaches, and administrators who actually committed the wrongs have moved on and are virtually unscathed. For example, Reggie Bush, who was found to have received improper benefits while a student-athlete at USC, is now a player in the NFL and earned eight million dollars in 2010 as a member of the New Orleans Saints.⁹⁰ He also was a member of the Saints when they won the Super Bowl XLIV Championship.⁹¹ O.J. Mayo moved on from the USC men's basketball program to become a member of the Memphis Grizzlies of the National Basketball Association (NBA).⁹² Meanwhile, when the NCAA imposed the sanctions, the entire football roster was comprised of players who had not yet set foot on

may not take advantage of the exceptions to the limit in the number of football contests that are provided in Bylaw 17.9.5.2, with the exception of a spring game as set forth in Bylaw 17.9.5.2-(a).").

⁸⁵ Id. at 58 (explaining that the football program was made to adhere to a limit of 15 initial grants-in-aid and 75 total grants in football for each of the 2011-12, 2012-13 and 2013-14 academic years from the usually 85 total grants allowed. Id. at 58.

⁸⁶ Id. at 57.

⁸⁷ Pete Carroll, the head coach of the USC football team for nine seasons, including each of the years in which NCAA violations occurred, left the institution in January 2010, just five months before the NCAA announced the findings of the ongoing investigation into the football program. He accepted a position as head coach of the Seattle Seahawks of the National Football League. Pete Carroll leaves USC Trojans, takes head coach job with Seattle Seahawks, *New York Daily News*, (January 11, 2010), available at http://articles.nydailynews.com/2010-01-11/sports/17944733_1_seahawks-chief-executive-tod-leiweke-usc-trojans.

⁸⁸ USC's head basketball coach at the time of the NCAA violations, Tim Floyd, abruptly resigned from his position on June 10, 2009 after four seasons as head coach. The NCAA had already opened an investigation into allegations of improprieties. Chris Foster, Tim Floyd resigns as USC's basketball coach, *Los Angeles Times*, (June 10, 2009), <http://articles.latimes.com/2009/jun/10/sports/sp-tim-floyd-usc10>.

⁸⁹ Mike Garrett, the athletic director at USC for 17 years, was fired in July 2010 after the announcement of the NCAA sanctions. He was replaced by Pat Haden. Billy Witz, U.S.C. President-Elect Cleans House, *The New York Times*, (July 20, 2010), <http://www.nytimes.com/2010/07/21/sports/21usc.html>.

⁹⁰ Mike Triplett, New Orleans Saints' six most pressing issues in offseason, *New Orleans Times-Picayune*, (March 2, 2010, 2:07 PM), http://www.nola.com/saints/index.ssf/2010/02/new_orleans_saints_six_most_pr.html.

⁹¹ Saints overcome slow start to capture first Super Bowl title in franchise history, *NFL.com*, (Feb. 2010), <http://www.nfl.com/gamecenter/2010020700/2009/POST22/saints@colts/recap/full-story>.

⁹² O.J. Mayo Info Page, *NBA.com*, http://www.nba.com/playerfile/oj_mayo/ (last visited May 1, 2011).

campus when the violations occurred.⁹³ Yet, current players and prospective student athletes are bearing the brunt of the punishment by being unable to participate in bowl games and having fewer scholarships available.⁹⁴

Punishing current and prospective student-athletes for violations of a few people years ago is unfair to those young student-athletes. These student athletes invested their future in attending that particular university. The NCAA should hold true to its mission to focus on the wellbeing of the current student athletes, even when enforcing sanctions for infractions. The NCAA has other options available for enforcing punishments that would lessen the effect on the current and prospective student-athletes while punishing the university and deterring future wrongs. The NCAA should remove the option for a ban on postseason competition⁹⁵ because it strips the current student-athletes of the opportunity to perform on their sport's highest stage.⁹⁶

The NCAA should also remove the option to reduce scholarship numbers because it eliminates opportunities for post-secondary education for many prospective student-athletes and decreases the depth of the roster, straining current student athlete resources. The NCAA should instead increase fines against violating institutions because the institution can then be held liable without a direct effect punishing the current student-athletes. Additionally, the NCAA should hold those individuals who commit the infractions liable with

⁹³ USC Trojans 2010 Team Roster, http://espn.go.com/college-football/team/roster/_id/30/usc-trojans.

⁹⁴ See Karen Crouse, *Sanctions Leave Trojans Playing Just for Themselves*, Los Angeles Times, Nov. 28, 2010, available at <http://www.nytimes.com/2010/11/29/sports/ncaafootball/29usc.html> (describing how innocent student athletes, who were members of the football program when the sanctions were announced in June 2010, are now unable to participate in a bowl game, which had been the tradition at USC due to the postseason ban that was imposed because of the NCAA violations committed by individuals who have all moved on from the program); Gary Klein, *There are limits to what they can do*, Los Angeles Times, Aug. 11, 2010 available at <http://articles.latimes.com/2010/aug/11/sports/la-sp-usc-football-20100811>. (demonstrating how the innocent prospective students who had sought to attend USC now must seek a grant-in-aid from a smaller pool of available money, meaning that some people who would have received money now will go without and may be unable to attend college at all.).

⁹⁵ Mathew M. Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N. Ill. U. L. Rev. 297, 337-38 (2005) ("A ban on postseason competition should never be imposed upon a member institution for major violations when those who committed the violations are no longer present at the university.").

⁹⁶ Another Banner Year for College Football, News—Allstate Sugar Bowl, Mar. 1, 2010, available at <http://www.allstatesugarbowl.org/site.php?pageID=19&newsID=148> (last visited May 1, 2011). ("Combined viewership for all bowl games also increased from 203,629,913 viewers (143,538,047 households) in 2008–09] to 225,399,846 (155,331,079 households) in 2009–10, or about an 11 percent jump.".) *Another Banner Year for College Football*, News—ALLSTATE SUGAR BOWL, Mar. 1, 2010 available at <http://www.allstatesugarbowl.org/site.php?pageID=19&newsID=148> (last visited May 1, 2011).

stronger personal implications⁹⁷ to punish the proper parties and provide a deterring effect while limiting the punishment levied against the current and prospective student-athletes.

A. Remove the Option for a Ban on Postseason Competition

The NCAA should remove the option for a ban on postseason competition because it strips the current student athletes of the opportunity to perform on their sport's highest stage. The NCAA's Board of Directors needs to review the enforcement process to protect the best interests of the student-athletes who have followed the rules and not committed any violations. A postseason ban deprives hard-working and talented current student-athletes of the opportunity to showcase their abilities at the national level.

A portion of the mission statement for the NCAA Enforcement Program is to "provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions."⁹⁸ This section is important because it explicitly states that the NCAA is working to provide fairness to the "uninvolved student-athletes," but by taking away the opportunity for a team to participate in the postseason the NCAA is not being fair to the current student athletes who are not involved with the infractions.

One reason the NCAA has instituted a postseason ban as a part of the presumptive penalty for major violations of the NCAA Bylaws⁹⁹ is because participation in postseason competition is a major revenue source for the institutions.¹⁰⁰ The NCAA Committee on Infractions aims to eliminate violations of NCAA rules¹⁰¹ by imposing punishments that will deter the member institution from committing the violations again in the future. Eliminating the huge revenue source of postseason competition causes the institution's athletic departments to pay greater attention to compliance with NCAA Bylaws.

However, these justifications fall short of balancing the hardships that a postseason ban places on current student-athletes. First, a student-athlete found to be in violation of the NCAA Bylaws regarding amateurism and determined to

⁹⁷ Id. at 339 (suggesting: "[h]olding] the c]oaches r]esponsible" as a means for reforming the NCAA Enforcement process and protecting innocent student athletes).

⁹⁸ NCAA Division I Manual, *supra* note 2, § 19.01.1.

⁹⁹ NCAA Division I Manual, *supra* note 2, § 19.5.2.1(g).

¹⁰⁰ Bows Background – BCS Football available at <http://www.bcsfootball.org/news/story?id=4819399> (last visited April 29, 2011)(In 2009–10 FBS "[b]owl gamcs made] \$260 million in annual payouts to NCAA schools.").

¹⁰¹ NCAA Division I Manual, *supra* note 2, § 19.01.1.

be ineligible cannot play in a postseason contest anyway.¹⁰² Second, removing the funds provided by postseason competition not only hurts the student-athletes who play in the sport affected by the violations but also hurts the student-athletes in non-revenue generating sports who rely on the profitable sports to support their funding within the athletic department.¹⁰³ If an institution is forced to survive without postseason play for one of its revenue-generating sports, such as football or men's basketball, the institution might be forced to eliminate non-revenue generating sports, such as swimming and rowing.¹⁰⁴

The USC postseason ban provides an example of the hardships the penalty imposes on current student athletes. USC's football program was not eligible to participate in a bowl game in 2010 or 2011.¹⁰⁵ The NCAA imposed these sanctions against USC for the actions of certain individuals within USC's football program during the 2004 and 2005 football seasons.¹⁰⁶ Even an incoming freshman at USC who matriculated in 2005 and redshirted¹⁰⁷ for one

¹⁰²NCAA Division I Manual, *supra* Note 2, § 14.11.4.2. "A student-athlete who practices or competes in intercollegiate athletics and/or receives institutional financial assistance (based in some degree on athletics ability) while ineligible for such aid, practice or competition per Bylaw 14.3 shall be charged with the loss of one year of eligibility for practice and varsity competition for each year gained improperly."

¹⁰³Paul Cloos, *The cost of recruiting: How non-revenue sports like baseball make do*, Alabama Press-Register, (July 21, 2009, 3:55 AM) available at http://blog.al.com/press-register-sports/2009/07/the_cost_of_recruiting_how_non.html ("With rare exceptions, most major college athletic budgets resemble that of the University of Alabama's. For the 2007-08 fiscal year, UA had only one sport budgeted to make a profit -- football, which was to make a whopping total of more than \$11 million.").

¹⁰⁴Graham Watson, *Programs in precarious position*, ESPN.com, (July 14, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4313320> (last visited May 1, 2011). For example, in 2000, the University of Miami discontinued its men's swimming team and its crew, fewer than five years after the institution was hit with sanctions that prevented the University of Miami football team from participating in the lucrative 1996 Orange Bowl and scholarship reductions in the 1996-97 and the 1997-98 years. See generally Michelle Kaufmann, *Miami bowled over by NCAA possible Orange bid ends as sanctions cut 24 scholarships, too*, Baltimoresun.com, (Dec. 2, 1995), http://articles.baltimoresun.com/1995-12-02/sports/1995336033_1_university-of-miami-orange-bowl-football.

¹⁰⁵University of Southern California Public Infractions Report, 57 (2010), available at <https://web1.ncaa.org/LSDBi/excc/miSearch?miSearchSubmit=publicReport&key=691&publicTerms>.

¹⁰⁶*Id.* at 4.

¹⁰⁷The term "redshirt" is used to describe a student-athlete who does not participate in competition in a sport for an entire academic year. If the student athlete does not compete in a sport the entire academic year, he has not used a season of competition. Each student is allowed no more than four seasons of competition per sport. NCAA rules indicate that any competition, regardless of time, during a season counts as one of the available seasons of competition in that sport. It does not matter how long the student athlete was involved in a particular competition (for example, one play in a football game, one point in a volleyball match); he will be charged with one season of competition. NCAA Home, *Frequently Asked Questions on Redshirts, Age Limits and Graduate Participation* available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Faqs/eligibility_seasons.html.

season would have left school following the 2009 season. The players now playing for USC have been stripped of the opportunity to participate in a bowl game even though the few players who committed NCAA infractions have long since moved on to careers beyond college after enjoying four seasons of postseason contests. This limitation is not “appropriate” and certainly not fair to these current student-athletes being punished for the actions of individuals no longer associated with the institution.

Consider again the hypothetical of the starting quarterback who became the first quarterback to start as a true freshman straight out of high school. He went to the school with dreams of winning national championships but must now play the next two seasons without the possibility of even playing in a bowl game. The NCAA does not have an exception to allow him to transfer because he will still have one year of eligibility remaining when the postseason ban expires.¹⁰⁸ The NCAA sanctions are punishing him even though he has not committed any infractions. Eliminating the postseason ban as a possible sanction prevents this outcome and allows this innocent current student athlete the opportunity to participate in the entire college athletics experience that he expected when he joined this prestigious football program.

The NCAA sanctioning process places blame on the current members of a program for the improper transgressions of those student athletes who came years before. If the NCAA’s top priority is student-athlete welfare, the NCAA should not use a postseason ban as an institutional punishment, when the violators are no longer part of the program.

B. Remove the Option to Reduce Scholarship Limits

The NCAA should remove the option to reduce scholarship numbers because it takes away opportunities for post-secondary education from many prospective student athletes and decreases the depth of the roster, thereby putting additional strain on the current student athletes.¹⁰⁹ On a basic level, reducing the amount of scholarships available in a particular sport primarily harms eligible student-athletes who must now either pay more out-of-pocket for their education or forego the opportunity for a post-secondary education at all. Also, a reduction

¹⁰⁸ See supra note 13; NCAA Division I Manual, supra note 2, § 14.8.2(c).

¹⁰⁹ The players who receive scholarship money from an institution for their athletic ability are generally the top skilled players on the roster. Being able to carry ten less scholarships for three seasons results in a general thinning of the roster and a talent gap between the top players and the rest of the roster. See Scott Wolf, USC Football Notebook: Depth perception worries coach Kiffin, Los Angeles Daily News, (April 6, 2011, 10:33 PM) available at http://m.dailynews.com/ladn/db_11052/contentdetail.htm?jsessionid=8D8D7A1D8168256570511E23CEDF99A9?contentguid=rqvxH59D&detailindex=0&pn=0&ps=3 (last visited May 2, 2011).

in scholarships can actually save the institution money by not expending scholarship funds, making it an ineffective deterrent to some institutions. It also hurts the current student-athletes in the program by decreasing the quality of teammates coming into the program for each of those years, and possibly even increasing injury hazards due to the lack of depth on the roster.

One argument in favor of keeping the reduction in scholarships as an available sanction for violation of NCAA bylaws is that it punishes the institution without causing direct harm to the current student-athletes within the program. According to the NCAA, "The intent of the penalties is to ensure they are sufficient enough to deter schools from breaking the rules again."¹¹⁰ In theory, a reduction in scholarships should only affect the prospective student-athletes and leave current student-athletes unaffected.

However, the idea that a reduction in scholarships does not impact current student-athletes is not entirely accurate. At USC, current head football coach Lane Kiffin has dealt with the reality of a decrease in roster depth.¹¹¹ During the spring practices in 2011, ten months after the announcement of the sanctions, coach Kiffin said, "We have some legitimate, NFL, star players, but there's such a gap between those guys [and], not just the bottom of the roster, but really some of the lower starters even."¹¹² The talent gap that Coach Kiffin has observed—that is, that with fewer scholarships to offer, those few scholarships go to the most talented prospects, and the rest of the team is made up of less talented players receiving no scholarships—very much affects the current-student athletes because the team is in worse condition without that second tier talent playing their integral roles on the squad. The innocent "legitimate, NFL, star players" lack the supporting talent to assist them in taking their careers to the next level.

The first hypothetical in this article provided an example of how scholarship limitations can eliminate educational opportunities for some students. In the hypothetical, the school that had mentioned the possibility of offering a scholarship to a potential recruit received NCAA sanctions including reduced scholarship limits and as a result was unable to offer a scholarship to the potential recruit. Without the prospect of a scholarship, the recruit could not afford to attend the school. As a result, his college dreams were crushed because of the violations of a few individuals in the program years before. This scenario is precisely the type of unwanted and unfair situation that could be remedied by removing the ability of the NCAA Committee on Infractions to reduce scholarship limits.

¹¹⁰ Enforcement Process: How does the process work?, NCAA.org, (2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/The+Enforcement+Process> (last visited May 2, 2011).

¹¹¹ Scott Wolf, *supra* note 109.

¹¹² *Id.*

C. Increase Fines against Violating Institutions

The NCAA should increase fines against violating institutions because the institution can be held liable without directly punishing current student-athletes. Increasing fines against violating institutions would punish the institution for infractions while limiting the impact on current student-athletes because the punishment is directed towards the institution and its administration rather than at the specific athletics programs in which the current student athletes are involved. A large fine will prevent future violations because university administrators would push the athletics department to comply with the NCAA rules, and in turn the athletics department would push the coaches to comply with the NCAA rules.

It is possible, however, that a violating institution faced with a hefty fine might reduce the number of scholarships it awards on its own as a way of cutting costs within the athletic department to make up for the loss. As described in subsection A, such a reduction in scholarships could hurt the innocent student athletes. The institution could also cut budgets for unrelated programs within the institution to keep funding the revenue-generating sports that may have been responsible for the NCAA violations. These cuts in funding would hurt student athletes and even other students at the institution. The institution could just shift funds around after receiving a hefty fine from the NCAA, and thus fines would still negatively affect current student-athletes. On a basic level, the money to pay the fines must come from somewhere. Unfortunately institutions might find those monies in the non-revenue producing sports because institutions place such a premium on their revenue-producing sports.

However, this outcome could be avoided by threatening greater sanctions against the institution if it opts to take funding or opportunities from blameless prospective and current student-athletes. There is also little doubt that increasing the amount of financial liability that an institution would face from violating NCAA Bylaws would create a greater deterrent effect for the institution as a whole than the current sanctions which primarily harm the current and future athletes. In the hypothetical situation outlined at the outset of this article, the institution was sanctioned with reduced scholarship limits. If increased fines were used, the sanctions would provide the punishing and deterring effects that the NCAA intended with the imposition of such penalties¹¹³ without taking away opportunities to prospective and current student athletes.

¹¹³ "The intent of the penalties is to ensure they are sufficient enough to deter schools from breaking the rules again." Enforcement Process: How does the process work?, NCAA.org (2011),

Thus, the NCAA should increase the fines imposed on the violating institutions and provide some requisite safeguards that the money must come from the violating program or programs within the athletics department and not from the athletics department generally or from the university generally.

D. Hold Violators Liable with Stronger Personal Implications

The NCAA should hold those coaches and administrators who commit infractions liable by having stronger personal implications to punish the proper parties and to create deterrence while limiting the effects on current and prospective student-athletes. Stronger personal implications would require the NCAA to increase their sanctions against individuals, such as head coaches and athletic directors who are supposed to be the heads of their programs. These increased personal implications would, among other things, include a period during which guilty coaches or athletic directors would be unable to work at another NCAA member institution.

The current NCAA enforcement process does allow for current and former head coaches to face some punishment if their program is involved in a major infractions case.¹¹⁴ The NCAA Committee on Infractions can already require that the violating institution take certain disciplinary action against individuals that could affect their athletically related responsibilities.¹¹⁵ If the coach or the violating individual is no longer with the institution where the infractions occurred, the Committee on Infractions may request that the current school where the coach or violating individual is employed take action against the individual, even if the school was not involved in the infraction.¹¹⁶ The current process also takes into account situations where the involved staff member is not employed at any NCAA member institution at the time. If the violating individual is not currently employed but is seeking employment at another NCAA member institution, the Committee on Infractions can request that the institution appear before the committee so that it can be determined what, if any, limitations should be imposed on the individual that the institution wants to hire.¹¹⁷

The current options available through the NCAA enforcement process are a good start, but they do not go far enough in holding the violating individuals liable for their actions. There is still a possibility of violating individuals moving

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Enforcement/The+Enforcement+Process>
(last visited May 2, 2011).

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

to a different professional level, such as the NFL or NBA, where the NCAA Committee on Infractions has no authority. This is precisely what has occurred in the USC situation, where Reggie Bush¹¹⁸ and O.J. Mayo¹¹⁹ have both moved on to the professional ranks playing in the NFL and NBA, respectively. Even former USC head football coach, Pete Carroll, has moved on to coach the NFL's Seattle Seahawks.¹²⁰ To address this scenario, the NCAA should have its member institutions include specific language in the contracts of its athletic leaders, namely head coaches and athletic directors, to include the possibility of personal sanctions and punishments being levied against the individuals in the event an infraction occurs during their time with the institution, even if the individual leaves before the sanctions are announced. These provisions would hopefully dissuade these individuals from committing infractions in the first place. Otherwise, the coaches at major college programs likely will operate under a win at all cost policy.

In the hypothetical in the beginning of this article, the institution was being sanctioned for infractions that occurred years prior to the current student-athletes recruitment onto campus. By including in the sanctions stronger personal implications against those who actually found to have committed the infractions, as determined by the NCAA's Infractions Committee, the NCAA could punish those parties directly without harming the prospective student athletes, such as the hypothetical recruit or the current student athletes, who are currently left to deal with the consequences of the penalties that are generally imposed by the NCAA.

CONCLUSION

The current system of enforcing sanctions against violating institutions often misses the target when it comes to those innocent prospective and current student-athletes who bear the brunt of the punishment. We call for reform within the NCAA of its sanction policies to afford those innocent student-athletes proper protections, even if the NCAA remains insulated from potential constitutional due process claims. Fairness to the current and prospective student-athletes of these institutions must be given greater consideration than the current process allows.

¹¹⁸ Reggie Bush, RB for the New Orleans Saints, NFL.com, <http://www.nfl.com/players/reggiebush/profile?id=BUS294963> (last visited May 2, 2011).

¹¹⁹ O.J. Mayo Info Page, NBA.com, available at http://www.nba.com/playerfile/oj_mayo/ (last visited May 1, 2011).

¹²⁰ Coaches, Seahawks.com, <http://www.seahawks.com/team/coaches/pete-carroll/495ab123-f3f3-4580-9f9b-83b8c587707f> (last visited May 2, 2011).