Summer 1991

A Commentary on Professor Goplerud's Article, "NCAA Enforcement Process: A Call for Procedural Fairness"

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A COMMENTARY ON PROFESSOR GOPLERUD'S ARTICLE, "NCAA ENFORCEMENT PROCESS: A CALL FOR PROCEDURAL FAIRNESS"

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Professor Goplerud's article presents criticism of the current NCAA procedure for investigating and resolving rules violations by member institutions, coaches, and players. Professor Goplerud argues for a system of "justice" that would provide for procedural fairness in the complicated and often confusing world of intercollegiate self-governance.

The need for quasi-judicial process complete with "due process" is demonstrated by what Goplerud refers to as "flaws" in the investigation and enforcement process that destroy even the appearance of fairness.[1] More specifically, Professor Goplerud points to five due process flaws that certainly would not be tolerated in formal judicial process.[2]

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1. C. Peter Goplerud III, *NCAA Enforcement Process: A Call for Procedural Fairness,* 20 CAP. U. L. REV. 543 (1991) [hereinafter Goplerud].

2. Professor Goplerud discusses the following major shortcomings in the NCAA process:

(1) The relationship between the enforcement staff and the Committee on Infractions is too close to insure the appearance of fairness. The enforcement staff serves the investigative arm of the NCAA. In this way, the role is similar to that of the police/prosecutor in the criminal process. The Committee, on the other hand, is the fact determining part of the process and must determine the existence of a violation. Thus the Committee serves as factfinder, in much the same way as a judge or jury might. The Committee nonetheless relies upon the enforcement staff to not only investigate but also to serve as staff to the Committee. A relationship in which the investigative staff has a vested interest in having the Committee vindicate the results of their investigation is akin to intermingling of the adversarial function with factfinding. In the criminal context, such relationships present conflicts and have been frowned upon. *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975).

(2) The practice of the NCAA staff of often interviewing individuals alone, particularly student-athletes, often denies the "accused" individuals the right to confront accusers or to even know the allegations made against them. Such a practice, in Professor Goplerud's view, is not consistent with a desire to assure that the truth be determined.

(3) The prohibition against recording interviews (recently abandoned by the NCAA subsequent to Professor Goplerud's article) prevents an accurate keeping of records and effectively prevents external review of the factfinding process. The integrity of the investigation is often undermined by the strongly felt suspicion of arbitrariness in the NCAA's handling alleged violations.

(4) The NCAA enforcement process lacks anything akin to discovery as attorneys know it in the judicial process. The inability to discover the basic evidence relied upon by the investigative staff effectively denies any opportunity for any meaningful defense against such evidence.

(continued)

Professor Goplerud is not the first to raise these and other concerns regarding the NCAA enforcement process. Don Yaeger's popular book on the NCAA mentions many of the same problems and expands on them in much greater detail.[3] In June, 1991, a new coalition, known as FIFE, and composed of coaches, college administrators, athletes, business leaders, and legal scholars, was formed to voice its concern for fairness and due process regarding the NCAA enforcement process.[4]

FIFE indicates that the need for NCAA reform is a result of (1) a presumption of guilt that pervades the staff's investigative approach and is evidenced by the fact that every team investigated by the NCAA has been found guilty of something; (2) a one-sided discovery process, since only the institution under investigation is required to provide early documentation in defense of any allegations made against it, with no corresponding obligation on the part of the investigating body; (3) lack of a meaningful appeals process, demonstrated by the fact that, in the forty years of the NCAA's existence, no major penalty has ever been reversed; (4) the use of intimidation, in that student-athletes are coerced and sometimes threatened with expulsion from NCAA events in order to produce the student's cooperation with the investigation; (5) a lack of a statute of limitations—institutions are often asked to defend themselves years after accused individuals are gone; and (7) punishment of the innocent—the student-athlete is often the one who suffers the penalty even though the particular infraction is an institutional one.[5]

Professor Goplerud and other critics of the NCAA enforcement process are disturbed by the failure of the NCAA to follow a course of fair dealing consistent with the commonly understood characteristics of due process. However, as Professor Goplerud points out, due process as a constitutional doctrine does not directly apply to the NCAA because it is not a state or governmental institution.[6] Traditional due process remedies are not likely to be mandated as a matter of judicial edict, unless some rationale other than due process can be successfully put forth.

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(5) The NCAA, by failing to establish clear precedent and consistent adherence to prior decisions, fuels the widely held belief that the enforcement process is arbitrary and irrational. The lack of precedent gives universities, coaches, and students little guidance in determining future behavior.

3. *See* DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL (1991).

4. The Federation for Intercollegiate Fairness and Equity (FIFE) was formed as a citizen group designed to call for NCAA reform. Don Yaeger and Senator Wint Winter Jr. serve as co-chairmen. Recently, in a press release, FIFE stated, "The well-documented abuses in the NCAA's arcane investigation and enforcement procedures are clear examples of why reform is needed." FIFE press release, June 19, 1991.

5. *See* Justice In The NCAA: Guilty Until Proven Innocent (1991)(position paper on file with FIFE).

6. Professor Goplerud notes that the United States Supreme Court in NCAA v. Tarkanian, 488 U.S. 179 (1988), concluded that, despite the extensive regulation of both public and private institutions, the NCAA was not bound by the constitutional restrictions of due process.

The problem of achieving fairness in the NCAA's dealings with colleges, students, and coaches has drawn attention from various state legislatures. Several states have enacted legislation as an alternative to judicial reform.[7]

Professor Goplerud appears in his article to dismiss both the judicial and legislative forums as inappropriate vehicles to reform the abuses discussed above. He would opt for internal reform in the NCAA as the best avenue for change. This commentator is not, however, as willing to give up so quickly on the traditional reform ability of the legal system.

Professor Goplerud sees *Tarkanian* as the major obstacle to meaningful judicial regulation of the massive and complex NCAA rules

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7. Professor Goplerud discusses in some detail the enactments of Nebraska (Neb. Rev. St. §§ 85-1201 to -1210 (1990 Supp.)) and Nevada (1991 Nev. Stat. 398). In addition to these states, the following states are currently considering, or have enacted, NCAA enforcement legislation:

FLORIDA-H.B. 845 (Fla. 1991) - Effective June 1, 1992—Entitles colleges and universities as members of the NCAA to protection in the making and enforcing of contracts. It further provides for regulation of penalties imposed by the NCAA and rights during interrogations.

CALIFORNIA-S.B. 97—Introduced March, 1991 and scheduled for hearings in May, 1991. It provides for an opportunity for hearing and notice in instances of alleged infractions of NCAA rules. The bill also provides for judicial review.

ILLINOIS-H.B. 682 (Ill. 1991)—Introduced in March, 1991, this bill would require the collegiate associations to provide due process in the rule enforcement process. It would also require that a standard of clear and convincing evidence be followed before a sanction can be imposed.

SOUTH CAROLINA-S.B. 16—Introduced January 8, 1991, this bill requires compliance with due process standards regarding all proceedings that may result in the imposition of penalties for collegiate association rule infractions.

KANSAS-S. Bill No. 234 (Kan. 1991)—Introduced in 1991 but held over until the 1992 legislative session. Under this bill, no penalties may be imposed by collegiate associations unless the enforcement process is found to comply with due process.

IOWA-House File 450—Introduced March 11, 1991, but did not pass out of committee. This proposal would prohibit sanctions, unless there is proven compliance with due process.

MISSOURI (un-numbered)—Introduced in 1990 but not voted on in 1990. This bill would have required that every facet of a collegiate association's enforcement process comply with due process under the constitution of the state of Missouri.

MINNESOTA-Senate Bill (un-numbered)—Introduced May 10, 1991, will be considered in the 1992 legislative session. All parties under investigation by the NCAA must be afforded a hearing that complies with minimum procedural standards set forth in the act.

NEW YORK-S.B. 6020—Introduced May 21, 1991, this bill would amend the education law to require compliance with due process in investigation and imposition of sanctions.

CONNECTICUT—House Amendment (LCO 7246)—Attached to a Department of Education bill, this amendment will not be voted upon until 1992. It requires due process, including notice and a hearing regarding any alleged infraction of an intercollegiate sports organization rule.

infraction process.[8] He is quite correct in pointing out that, unless state action can be found to exist, courts can do nothing under the aegis of federal due process. However, Professor Goplerud notes, there is some indication that state courts may apply state constitutional due process provisions to achieve the same end.[9] Also, the anti-trust cases cited by Professor Goplerud are further evidence that the judicial system may provide an additional avenue for reform.[10] Most importantly, however, is the recognition that these two avenues are indicative of the more general judicial attitude, grounded in public policy, of assuring fairness in any conflict in which one side has the substantial ability to destroy the other side through position and power.

The future of judicial reform in the NCAA may lie with new applications of traditional doctrines. This commentator has written elsewhere that fairness principles, long a part of contract law, have application in intercollegiate athletics.[11] If one accepts that the law of contracts may govern the relationship between the university and the NCAA, then principles relating to unconscionability may suggest grounds for judicial scrutiny of the NCAA's dealings with its contract partners. Courts, in some instances, have noted that certain concepts associated with unconscionability have application in the world of intercollegiate athletics.[12] While it is true that a college or university may not share the contractual disadvantage of the student, the relative power and control of any college in comparison with the NCAA might well lead to the conclusion that colleges have little choice but to bow to the will of the NCAA. Such a theory may be far from certain to succeed; still, when considered in light of other possibilities, it leads me to be more optimistic than Professor Goplerud when he states that "member institutions, coaches, or student-athletes no longer have ready access to the courts to challenge, on constitutional grounds, actions of the NCAA; . . . [t]here are arguably other judicial avenues left open to these institutions and individuals, but success is not likely there either."[13]

Professor Goplerud also finds little comfort in attempts at legislative reform. Although all proposals call for application of due process principles, the various state acts do vary in language and specific provisions. These differences trouble Professor Goplerud and lead him to state that "[i]f the NCAA is to function effectively, the enforcement staff and the member institutions must be able to operate according to a single set of rules."[14]

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8. Goplerud, *supra* note 1, at 553-54.

9. *See* Hill v. NCAA, 273 Cal. Rptr. 402 (1990) cited in Goplerud, *supra* note 1, at 555 n.78.

10. Goplerud, *supra* note 1, at 554 n.79.

11. LeRoy Pernell, *Drug Testing of Student Athletes: Some Contract and Tort Implications*, 67 DEN. U. L. REV. 279, 281-86 (1990).

12. *See* Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984) noting, "[T]he contract is on printed form prepared by one party, and adhered to by another who has little or no bargaining power. . . ." *Id.* at 533.

13. Goplerud, *supra* note 1, at 554.

14. *Id.* at 558.

While I tend to agree with Professor Goplerud, his point does not argue against uniform legislation. Such legislation is not only possible, but it has been proposed on the federal level. Representative Ed Towns (D-N.Y.) has introduced H.R. 2157, which would require the NCAA to develop and implement due process procedures.[15] H.R. 2157 would appear to meet all of Professor Goplerud's specific concerns regarding

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15. See H.R. 2157, 102d Cong., 1st Sess. (1991):

A BILL

To require the National Collegiate Athletic Association to provide due process in connection with its regulatory activities affecting coaches, players, and institutions engaged in sports in interstate commerce.

* Be it enacted by the Senate and House of Representatives of the
* United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This act may be cited as the "Coach and Athlete's Bill of Rights".

SEC. 2. FINDINGS.

The Congress finds—

(1) the National Collegiate Athletic Association (hereafter in this act referred to as "NCAA") has member institutions in the 50 States,

(2) such institutions conduct extensive interstate travel to perform in athletic events,

(3) broadcasting of such events involves telecommunications between the 50 States,

(4) the NCAA has a direct and substantial effect on interstate commerce in its regulation of institutions, athletic events and broadcasting of such events, and

(5) collegiate athletics generate approximately $1,000,000,000 in interstate commerce each year.

SEC. 3. DUE PROCESS PROCEDURES.

(a) IN GENERAL—The NCAA shall not take any action against—

(1) a coach or player for a team associated with the NCAA, or

(2) an institution of higher education associated with the NCAA, without due process in accordance with rules adopted pursuant to subsection (b), including any action which would adversely affect such institution's commercial activities.

(b) ADOPTION OF RULES—Not later that 90 days after the date of the enactment of this act, the NCAA shall adopt rules to provide due process in taking action referred to in subsection (a). Failure to adopt such rules shall prohibit the NCAA from imposing any sanctions or penalties limiting the interstate commerce telecommunications of such sporting events.

(*continued*)

legislation. A federal law, enacted pursuant to the commerce clause, eliminates the problems of different and inconsistent standards and provides clear guidance to the NCAA and all schools.

Professor Goplerud warns, however, that legislation "may open the door for further more damaging . . . intrusions into the NCAA's day-to-day activities."[16] Given the extent of the problems noted by both Professor Goplerud and Don Yaeger,[17] this commentator is not sure why such a result is undesirable.

The approach favored by Professor Goplerud is to allow the NCAA to reform itself by adopting procedural standards consistent with his recommendations. There is no question that, if the NCAA were to do so, the problem of procedural due process would be largely remedied. The problem with this approach, however, is that in its forty-year history, the NCAA has shown little ability or interest in self-reform in this area. I see nothing to indicate that there will be a change in philosophy.

Finally, although the issues raised by Professor Goplerud are important and well presented, the major question he leaves unaddressed is the arbitrary and capricious nature of the NCAA rules, infractions, and penalties. What outrages the public and the players is not so much the lack of a fair hearing when an infraction is alleged, but whether an infraction should exist at all. Equally troublesome is the severity of penalties in comparison with the "offense." It is hard to accept that an athlete can be banned from participation because he sells a ticket to a friend or family member. It is equally amazing that a coach and an institution can be penalized severely for giving a student, or a student's parents, a ride to or from school during recruitment. The ease with which NCAA sin may be committed, particularly in the name of preserving "amateurism," is an outrage that cannot be corrected by procedural due process.

NCAA reform will occur. Reform will occur because of strong public and institutional reaction to a long history of abusive regulation and process. Professor Goplerud clearly sets forth a well-thought out plan for procedural change. While I might not agree that avenues other than self-reform are unrealistic, I do agree that the time for control and a course of fair dealing is now.

SEC. 4. NCAA STATE ACTOR.

The NCAA shall be held to be a State actor when the final or decisive act of suspending or reprimanding a coach, player, or institution of higher education is carried out as a result of sanctions imposed, or the threat of sanctions, by the NCAA upon such coach, player, or institution.

SEC. 5. STUDY.

Not later that 6 months after the date of the enactment of this act, the Secretary of Commerce shall submit to the Congress a report on the impact of NCAA sanctions upon the telecommunications and commercial activities of intercollegiate sporting events and the revenue loss caused by such sanctions.

16. Goplerud, *supra* note 1, at 558.

17. YAEGER, *supra* note 3.