

A CALL FOR DISSENT AND FURTHER INDEPENDENCE
IN THE NCAA INFRACTIONS PROCESS**

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* This Essay reflects the view of the author and is not intended to represent the position of the NCAA or the NCAA Division I Committee on Infractions.

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I. INTRODUCTION

The NCAA Division I Committee on Infractions (the "Committee") makes factual findings and imposes penalties related to violations of NCAA rules. In this article, I call for the incorporation and acceptance of dissenting opinions in Committee decisions, and for greater representation on the Committee of individuals who are not affiliated with collegiate institutions or conference offices. I have just completed nine years of service as a member of the NCAA Division I Committee on Infractions, serving two years as vice-chair and two years as chair.¹ Before joining, I was the lead spokesperson for The University of Alabama in an infractions hearing before the Committee, in a case involving our men's basketball program.² I also served as the Faculty Athletic Representative ("FAR") to the NCAA for The University of Alabama, and was involved in investigating allegations involving the institution.³ Additionally, I was involved in a number of compli-

¹ Committee members are appointed for an initial three-year term, subject to reappointment for two additional terms. A member shall not serve more than nine years on the Committee. See NCAA Bylaw 19.1.1, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 2008-09 DIVISION I MANUAL 296 (2008) [hereinafter NCAA MANUAL]. The two-year term limit for chair is governed by an unpublished, internal Committee rule. My term on the Committee started on September 1, 1999, and ended on August 31, 2008. My term as chair began on September 1, 2004, and ended on August 31, 2006. Committee members whose terms of service expire are called back to "duty" from time to time in the event a current Committee member has a schedule conflict or is recused from the case due to such things as a conference affiliation with the institution charged in the case. The requirement and considerations for recusal are discussed in NCAA Bylaw 32.1.3, *id.* at 395, and the provision for temporary substitutes is described in NCAA Bylaw 19.1.1.2, *id.* at 296.

² The date of the Committee report is February 9, 1999. See Press Release, NCAA, University of Alabama Public Infractions Report (Feb. 9, 1999), available at https://goomer.ncaa.org/wdbctx/LSDBi/LSDBi.MajorInfPackage.MI_Search_Input?p_Cmd=Go_Search (input "Feb. 9, 1999" in "Date 1" tab and "Public Infractions Report" in "The case must contain the phrase" in "Any" tabs to run the above search).

³ The extent to which the Faculty Athletic Representative is involved in the investigation of infractions varies across institutions. Article 6.1.3 of the NCAA Constitution describes the position of FAR as follows:

A member institution shall designate an individual to serve as faculty athletics representative. An individual so designated after January 12, 1989, shall be a member of the institution's faculty or an administrator who holds faculty rank and shall not hold an administrative or coaching position in the athletics department. Duties of the faculty athletics representative shall be determined by the member institution.

NCAA MANUAL, *supra* note 1, at 43.

In my nine years of service on the Committee on Infractions, I have been impressed by some FARs, and disappointed in others. All FARs are requested to attend Committee hearings. It is clear from studying the written response of institutions to NCAA allegations, and from observing many FARs at hearings, that they range from effectively involved to entirely neutered at their institutions. Some institutions only pull them out of the closet when there is a need to show that the faculty is "engaged" in having a voice in the experience of student-athletes at the campus. If a FAR starts to become perceived as an athletics administrator, the faculty has lost out. The first word in the title should serve as a constant reminder of the role – *Faculty Athletics Representative*.

For an extensive discussion of the role of the FAR, the need for independence, and the view that service of the FAR should be restricted by term limits, see Gene A. Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Repre-*

ance efforts at the Southeastern Conference ("SEC"), including service as reporter and author of a report of a compliance task force appointed by Commissioner Mike Slive and chaired by Robert Kayat, Chancellor at Ole Miss.⁴ Thus, through my various roles, I have experienced the NCAA infractions process from nearly every side.

Although the subject of deterrence is not a focus of this essay, I note before moving on that I question the deterrent effect of the penalties self-imposed by the institutions and those additional penalties imposed by the Committee.⁵ The NCAA infractions process is no better or worse than the IRS is a deterrent to tax cheating or the Securities and Exchange Commission is to securities fraud. In fact, the NCAA enforcement process may be weaker than other compliance programs run by administrative agencies because the NCAA lacks subpoena power. In a recent meeting with the Knight Foundation Commission on Intercollegiate Athletics,⁶ I noted that although the Committee is being pressured to

sentatives in an NCAA Investigation, 55 U. FLA. L. REV. 667, 687-95 (2003). Concurrent with my appointment to the FAR position at The University of Alabama, the President approved a recommendation for a limit of two, three-year terms for the FAR. The written position description, which includes directives on appointment and length of service (approved by the Faculty Senate), general job description and specific responsibilities of the FAR, is on file with the author.

At many institutions, the faculty has been silent for too long on academic integrity issues as they relate to athletics. See, e.g., KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (2001), available at http://www.knightfoundation.org/research_publications/detail.dot?id=178173.

⁴ The report issued by the Southeastern Conference Compliance Task Force is the REPORT OF THE TASK FORCE ON COMPLIANCE AND ENFORCEMENT (on file with author). For a recent article identifying the Southeastern Conference as ranking "No. 2" for the most NCAA infractions since the NCAA began tracking major infractions cases in 1953, see Doug Segrest, *SEC No. 2 For Most NCAA Infractions*, BIRMINGHAM NEWS (AL), Mar. 9, 2008, at C1 (describing the purpose of the task force and changes implemented among the member institutions in the Southeastern Conference for the investigation of alleged NCAA rules violations).

⁵ For a recent article capturing my views on whether "the bad guys and girls" are deterred by the penalties imposed in the process, see Ray Melick, *NCAA Only as Tough as Its Presidents*, BIRMINGHAM NEWS (AL), June 19, 2008, at C1.

A more expansive treatment of my opinion of the NCAA infractions process and deterrence was stated as follows:

I don't think the NCAA infractions process is any better or worse than the IRS is a deterrent to tax cheating or the Securities Exchange Commission is to securities fraud . . . You catch some. It scares some people and they act better because of it.

But there's a full boat-load of people not affected at all. They weigh what they stand to gain vs. what they lose if they get caught and decide to go on and do what they do . . . If people were really scared of the infractions process, we wouldn't have so many repeat cases. In nine years on the [C]ommittee, we've had (programs) in front of us again before the ink is dry on the last opinion (ruling against them).

Id.

⁶ The title of the panel at the meeting of the Knight Foundation Commission on Intercollegiate Athletics, held on June 17, 2008, in Washington, D.C., was *NCAA Infractions: An Examination of Trends, Recommendations to Restructure Penalties and Challenges*. The other panelists were Mike Glazier (Attorney, Bond, Schoeneck & King PLLC), Professor Jose-

develop tougher penalties, at the request of some university presidents, most university presidents sing an entirely different tune before the Committee and in their public announcements of appeal from the penalties imposed by the Committee. This is no big shame or revelation. It is entirely consistent with the behavior of individuals and institutions in other regulated markets. There is general support for regulators getting tougher when behavior in a market is getting out of control, but an individual or entity pulled into the process as a target pleads for the toughness to come in the *next* case. As I noted in a previous article, “[f]or many people, happiness is the news that an NCAA enforcement representative is visiting another campus, most especially a competitor.”⁷ So if deterrence is a concern and tougher penalties are thought to be the cure, chief executives of academic institutions should prepare to accept the consequences with greater grace as the Committee and NCAA membership ramp up the penalties. It is certain that tougher penalties are in the works.⁸

phine Potuto, (member of the NCAA Committee on Infractions and Professor of Law at the University of Nebraska), and Dr. Chad McEvoy (Illinois State University). An audio podcast of the session is available at the website for the Knight Foundation, *available at* <http://www.knightcommission.org/>.

The media advisory for the June 2008 meeting includes the following passage regarding the history and goals of the commission:

The Knight Foundation Commission on Intercollegiate Athletics was formed by the John S. and James L. Knight Foundation in October 1989 in response to more than a decade of highly visible scandals in college sports. The goal of the Commission was to promote a reform agenda that emphasized academic values in a climate in which commercialization of college sports often overshadowed the underlying goals of higher education. The Commission, which presented recommendations in a series of reports in the early 1990s and in the subsequent *A Call to Action* in 2001, continues to monitor and report on progress in increasing presidential control, academic integrity, fiscal integrity and independent certification of athletics programs.

(on file with author).

For additional information and commentary on the recent Knight Commission session on NCAA infractions and penalties, see Doug Lederman, *Crime and Punishment, College Sports Style*, INSIDE HIGHER ED.COM, June 18, 2008, <http://insidehighered.com/news/2008/06/18/knight> (noting that the NCAA walks a line in which it tries to persuade skeptics – members of Congress, faculty leaders, and others – that it has a grip on the professionalism and potential graft in big-time college sports, while at the same time keeping coaches and athletics and sports officials – its primary constituents – satisfied that it is looking out for their well-being and is not a tyrant); Doug Lederman, *When NCAA Penalties Are No Vacation*, INSIDE HIGHER ED.COM, June 19, 2008, <http://insidehighered.com/news/2008/06/19/vacate> (noting comments from me that if the NCAA penalties are designed to take away “ill-gotten gains,” such as wins achieved with ineligible players, you would never know it because coaches, athletic directors and presidents often scream the loudest when the Committee on Infractions vacates (erases) wins achieved with ineligible players); Libby Sander, *In Talk of Tougher Penalties for Breaking NCAA Rules, No Easy Answers*, CHRON. HIGHER EDUC., June 18, 2008, *available at* <http://chronicle.com/daily/2008/06/3429.htm> (noting that it has been fourteen years since the NCAA last revised the punishments it doles out to institutions that run afoul of its intricate rules).

⁷ See Marsh & Robbins, *supra* note 3, at 682.

⁸ In 2008, a subcommittee of the Committee on Infractions began working on a project to clean up, clarify, and ramp up penalties in major infractions cases. The chair of the subcommittee is Dean Jerry Parkinson of the University of Wyoming College of Law. At the

Because of the high profile of college athletics and the colorful and outlandish nature of some of the individuals and violations at the center of NCAA infractions cases, it has been suggested to me by professional colleagues in the NCAA, law professors, news reporters and others, that I should "write a book." No thanks. First, NCAA infractions cases are, in one sense, a story of professional failings, damaged careers, embarrassment, and financial loss for institutions and individuals. Writing anything that would tell the story of these cases is repugnant to me, given my role in the process. Second, members of the Committee are bound by a duty of confidentiality in the proceedings,⁹ and the confidentiality extends beyond the termination of the case.¹⁰

I have written and commented on the infractions *process* in a previous essay,¹¹ and in many interviews with the press and at professional gatherings.¹² Several other authors have written excellent

time of this writing, Dean Parkinson serves as one of two coordinators of appeals for the Committee. The coordinators of appeals represent the Committee in proceedings before the Infractions Appeals Committee. See NCAA Bylaw 19.1.1.4, NCAA MANUAL, *supra* note 1, at 296. Some see the current penalty structure as too weak and failing to deter wrongful behavior. For comments from NCAA President Myles Brand, myself, and others regarding the need for tougher penalties, see Steve Weiberg, *NCAA's Watchdogs Wonder If Penalties Pack Enough Bite*, USA TODAY, Feb. 26, 2008, http://www.usatoday.com/sports/college/2008-02-25_ncaa_sanctions_N.htm.

For commentary on why the NCAA's ultimate sanction – the "death penalty" – may not be the way to go, see Steve Weiberg, *NCAA Remains Reluctant to Levy Death Penalty*, USA TODAY, Feb. 26, 2008, http://www.usatoday.com/sports/college/2008-02-25_ncaa_death_penalty_N.htm. For the story of the only case in which the Committee imposed the death penalty, see generally DAVID WHITFORD, *A PAYROLL TO MEET* (1989) (telling the story of the case of the Southern Methodist University football team's major infraction).

In my two years as chair of the Committee, reporters often asked if we considered the death penalty in deliberations on cases. Reporters can not seem to get over the drama of the death penalty, even though it has been issued only once in the history of the NCAA.

In 2005, the Committee imposed a one-year ban on non-conference play for infractions by the Baylor basketball program. The penalty was described by some as a "partial death penalty." I chaired the Committee at the time. For an analysis of the case, including my public comments made at the press conference, see Doug Lederman, *Partial Death Penalty for Baylor Basketball*, INSIDE HIGHER ED.COM, June 24, 2005, <http://insidehighered.com/news/2005/06/24/baylor>.

⁹ The Committee on Infractions, the Infractions Appeals Committee per Bylaw 19.2, and the enforcement staff shall treat all cases before them as confidential until they have been announced in accordance with the prescribed procedures. NCAA Bylaw 32.1.1, NCAA MANUAL, *supra* note 1, at 395.

¹⁰ In Committee hearings, the chair gives what are identified as Opening Instructions and Closing Remarks (a complete copy of the Hearing Instructions are on file with the author). Included in the Closing Remarks is the following passage: "The public release of the report is followed by a press conference with a member of this committee, usually the chair. There will be no other statements by members of the committee about this case."

¹¹ See Marsh & Robbins, *supra* note 3.

¹² In addition to the recent proceedings involving the Knight Commission, described *supra* note 6, I have participated in numerous professional panels where the NCAA infractions process was discussed. Among them are the following: *Panel, Handling Crisis Situations, National Association of Collegiate Directors of Athletics, Dallas, Texas* (2008); *Symposium Panelist, Vanderbilt Journal of Entertainment Law and Practice, The State of Division I Athletics, Nashville, Tennessee* (2005); *NCAA Regional Compliance Seminar, Panel on Handling Major Infractions Cases, Anaheim, California* (2004); *Intercollegiate Athletics Representative Fall Forum, Panel on Current Academic Research on Intercollegiate Athletics, New Orleans, Louisiana* (2003); *Forum,*

articles on the NCAA infractions process.¹³ My purpose here is not to write another "how-to" piece on the process, but to offer two specific recommendations for change in how the Committee goes about its work. Imbedded in the recommendations are mild criticisms, borne of many years of experience, both on the Committee and at my institution – an institution which has struggled with the NCAA infractions process for more than a decade, and continues to do so. I have been on the butt and barrel end of the NCAA enforcement gun more than any member of the Committee.

In my nine-year span of service, the Committee has processed over 100 major cases,¹⁴ either through a hearing or through the summary disposition process.¹⁵ During that same period, the Committee handled twenty-nine appeals of penalties imposed in secondary cases.¹⁶ Over 100 major cases and 29 secondary appeals convert to a mountain of ring binders read by my colleagues and I, in an entirely "volunteer" enterprise. It is important work, but often thankless, as some regulatory jobs are.

Over time, I have found myself drifting toward some of the positions of those I would describe as "honest critics" of the system.¹⁷ In part, I know my views reflect the greater distance and ob-

Division 1A Athletic and Faculty Athletic Representatives, Annual Meeting of the Division 1A Athletics Directors, Dallas, Texas (2000).

¹³ A former chairman of the Committee, the late Charles Alan Wright wrote an essay in 1984 that provides great insight into the handling of infractions cases. See Charles Alan Wright, *Responding to an NCAA Investigation, Or, What To Do When An Official Inquiry Comes*, 1 ENT. & SPORTS L.J. 19 (1984). Although there have been some changes made in the process since Professor Wright published the piece, it should be required reading for any university president who receives notice of an investigation from the NCAA. Another more recent article is Michael Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major – Infractions Cases*, 37 SETON HALL L. REV. 749 (2007). This is an excellent modern how-to piece on the NCAA infractions process. Professor Rogers has served as Faculty Athletic Representative for Baylor and has served on several committees and cabinets, both for the Big 12 Conference and the NCAA.

For a thorough treatment of NCAA enforcement and eligibility issues in a leading sports law casebook, see RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 82-115 (6th ed. 2006).

¹⁴ Mr. Shep Cooper, the NCAA's Director of the Division I Committee on Infractions, provided the author with a meeting history (1990-present) (on file with author). Mr. Cooper is one of the most under-appreciated and valuable assets in the NCAA enforcement process. The same should be said for Ms. Cheryl DeWees, who is the Administrative Coordinator for the Committee. Mr. Cooper and Ms. DeWees work behind the scenes to make things move along in the process. In my opinion, they each deserve a plaque in the NCAA Hall of Champions, located at NCAA headquarters in Indianapolis, Indiana.

¹⁵ The summary disposition process is a cooperative endeavor in which the Committee reviews infractions cases submitted in written form. The process is used in lieu of a formal hearing when the NCAA enforcement staff, the member institution, and involved individuals agree to the facts of an infractions case and that those facts constitute major violations. For a more complete description of the summary disposition process, see NCAA Bylaw 32.7, *NCAA MANUAL*, *supra* note 1, at 401.

¹⁶ The information on secondary appeals was provided to the author by Ms. Cheryl DeWees. E-mail from Cheryl DeWees, Administrative Coordinator for the Committee, to Gene Marsh, Professor of Law, The University of Alabama (June 30, 2008) (on file with author).

¹⁷ For my description of honest (and dishonest) critics, see Marsh & Robbins, *supra* note 3, at 681 n.37 and accompanying text.

jectivity that naturally flows from some experience. It is hard to honestly disagree with much when you are new to a game and have little, if any, knowledge of it. But with experience and time, I started to become uneasy with some of what I have seen in the infractions process. Nevertheless, I entirely reject the position of naysayers and some blowhard lawyers who wail against the NCAA system because they love the attention their criticism brings. In my state, several otherwise unknown lawyers have become smitten by the media attention that follows suing the NCAA. They have brought weak-tea cases that have resulted in no recovery to their clients as of this publication, years after the lawsuits were filed. These lawyers give interviews to sports writers and regularly appear on talk-show radio, appealing to the Bubba crowd. Members of the media rarely challenge the lawyers. In one case, a sports editor criticized the NCAA investigation of a booster, without disclosing that the editor had a loan cosigned by the booster before the NCAA investigation started.¹⁸ The sports editor remains employed by the newspaper.

In making a call for dissent and further independence in the NCAA enforcement and infractions process, I respect and value the work and opinions of my colleagues on the Committee, who have given countless hours, without compensation, in trying to regulate an industry that has gone mad at some institutions across the country. Members of the NCAA enforcement staff and Committee members have their thumbs in the dike, but there are greater forces at work. At many institutions, though not all, the industries of football and men's basketball have overshadowed the underlying goals of higher education and corroded the ethic of individuals and institutions impacted by those programs.

At the same time, I come away from this experience impressed by most of the people I have dealt with at the NCAA and at the institutions across the country. The positives far outweigh the negatives, and the character and integrity of most people associated with college athletics are inspirational and provide a perfect tonic for the negative experiences and impressions that sometimes come from working in the NCAA infractions process.

In nine years of Committee hearings, I can recall only one case where a student-athlete was in attendance. Thus, like so many activities in the NCAA, the input of, and impact on, student-athletes is often forgotten in the process.¹⁹ In countless commit-

¹⁸ See Anna Marie Del Costa, *Keller Cosigned Loan for Hurt in 2000*, TUSCALOOSA NEWS.COM, Nov. 29, 2007, <http://www.tuscaloosaneews.com/article/20071129/NEWS/71129008> (noting that the executive editor of the newspaper said the sports editor made some bad decisions and should have disclosed the cosigning arrangement).

¹⁹ There are several good reasons why student-athletes would not be participants in infractions hearings generally. Issues of confidentiality of the academic records and the finan-

tees, commissions, panels, cabinets, forums, sessions, hearings, and the occasional task force, I have been surprised by how often folks make decisions without a trace of input from student-athletes.²⁰ The greatest reward in college athletics and in teaching comes from working with students and forming lifelong friendships. It is a shame they have virtually no voice in the infractions and penalty process.

II. A RECOMMENDATION TO INCREASE THE NUMBER OF PUBLIC MEMBERS ON THE COMMITTEE

My first of two recommendations is to increase the number of positions on the Committee filled by individuals who are not affiliated with collegiate institutions or conferences. Among the members of the club, we refer to these individuals as the "public members" of the Committee.²¹ This is a proposal for a modest change in the existing model. In order to understand the thought behind

cial aid status of other students are only a few of the reasons. There are many others, including the desire of most institutions to limit the circle of people who hears a discussion of the infractions before the Committee. However, in cases where an institution is charged with lack of institutional control on matters that directly impacted students, I have often thought institutions and their lawyers missed a good opportunity to show effective live evidence, albeit brief, from student-athletes if the educational efforts of the institution were sufficient. That is, if institutional and NCAA rules compliance education were a regular part of the student's experience at the institution, the student-athletes could tell the story far more effectively than an administrator who is under the gun. What the student-athlete learned, as opposed to what the "teacher" claims they taught, is a more effective measure of a good compliance program.

Just because one or two student-athletes may have knowingly taken an extra benefit or engaged in some other rules violation does not mean that the institution should be branded with a lack of institutional control. Such a finding is perceived by many to be the most damning because it represents the failure within the institution, rather than a specific act – although major and important – which may have been committed by a distant booster, renegade coach, or some other variety of "independent contractor" who has little or no connection to the program. For a more thorough discussion of the charge of lack of institutional control and the impact on institutions and presidents, see Marsh & Robbins, *supra* note 3, at 670-73.

²⁰ For my argument that a consideration of the impact of penalties on student-athletes should be a focus of the Committee, see Michelle Hosick, *Committee Role Important, But Not Sole Focus of NCAA*, Sept. 25, 2006, available at <http://www.ncaa.org/wps/ncaa?ContentID=9418>.

Tom McMillen, whose credentials include a Rhodes Scholarship, eleven years in the NBA, and service in the U.S. House of Representatives, has been a bitter critic of the NCAA and the enforcement process, especially as they impact the lives of student-athletes. See TOM McMILLEN, *OUT OF BOUNDS: HOW THE AMERICAN SPORTS ESTABLISHMENT IS BEING DRIVEN BY GREEN AND HYPOCRISY – AND WHAT NEEDS TO BE DONE ABOUT IT* 116 (1992). Mr. McMillen states:

The NCAA has acted against the interests of student-athletes in countless other ways. The enforcement apparatus of the NCAA falls heaviest upon innocent student-athletes. By the time the NCAA has levied penalties against a transgressing athletic program, the guilty parties (coaches and players) have moved on, leaving behind innocent student-athletes to suffer from a ban on postseason play or TV coverage.

Id.

²¹ In the opening instructions and closing remarks made by the chair at a Committee hearing, the Committee members who are not employed by a member institution or conference are introduced as the "public" members.

this proposal, a reading of the relevant NCAA Bylaw²² and discussion of a bit of background on the current makeup of the Committee are in order.

In short, the Committee is composed of ten members, and at least two, but no more than three, are "public" members – not employed by an academic institution or athletic conference. Two of the ten members are coordinators of appeals, and although these members read all the information received by the other Committee members and are present during the hearing, they are not active participants in the hearings or Committee deliberations.²³ That is, they do not have a speaking role at the hearings, do not sit at the same table with the other Committee members, and do not have a vote in deliberations. They do, however, *observe* the deliberations.

I was new to the Committee when the positions of coordinators of appeals were created. Prior to the creation of these positions, the chair of the Committee handled appeals, both in providing a written response on behalf of the Committee and in hearings before the appeals committee. This presented a considerable burden on the chair, who was also handling the regular workload that comes from being a member of the Committee, the extra workload of dealing with matters that are unique to the chair's position (separate from appeals), and at the same time holding down the "day job" of being a law school professor, athletic director, or conference commissioner. I estimate that I spent at least twice as much time each month on Committee work in the two years I was chair than in any months within the other seven years of service. *Some of the additional duties that fall to the chair include dealing with interim actions between meetings of the Committee,*²⁴ and ex-

²² NCAA Bylaw 19.1.1, NCAA MANUAL, *supra* note 1, at 296, provides:

The Committee shall be composed of 10 members, seven of whom shall be at present or previously on the staff of an active member institution or member conference of the Association, no more than three and no less than two of whom shall be from the general public and shall not be associated with a collegiate institution, conference, or professional or similar sports organization, or represent coaches or athletics in any capacity. One of the members shall serve as chair and one member shall serve as vice-chair. Two members shall be elected as coordinators of appeals, one of whom may be a public member. Two positions shall be allocated for men, two for women and six unallocated. There shall be no subdivision restrictions except that all nonpublic members may not be from the same subdivision; however, the coordinators of appeals shall not be considered in determining whether such a requirement is satisfied.

²³ NCAA Bylaw 19.1.1.4, NCAA MANUAL, *supra* note 1, at 296, provides:

The coordinators of appeals shall be responsible for processing appeals to infractions cases on behalf of the Committee. The coordinators of appeals will be present during institutional hearings before the Committee deliberations, but will not be active participants in either. The coordinators of appeals shall represent the Committee in proceedings before the Infractions Appeals Committee.

²⁴ NCAA Bylaw 19.1.2.2., NCAA MANUAL, *supra* note 1, at 296, gives the chair the authority to act on behalf of the Committee between meetings, subject to Committee. This is a

tensive preparation for the press conferences that are held when Committee decisions are released to the public.²⁵

The second and more important reason for the creation of the two coordinators of appeals positions was to establish a separation between those who make the decision at the "trial court" level, and those who defend the decision on appeal. That is why the coordinators of appeals are not active participants at the hearings (but instead are mere observers) and do not have a vote in

power I exercised sparingly, without consultation with the full Committee. The Committee reviews and approves what are referred to as "interim actions" by the chair, but only the unwise would make substantive decisions without bringing everyone else along. Some minor matters are appropriate for interim action, such as granting a request for a deadline extension of a few days in filing a response on behalf of an institution or a coach.

²⁵ Early on in my nine years of service on the Committee, and again when I became chair, I argued against having press conferences. Although we are not a court and we operate with less formality than under the rules imposed in civil litigation, we come close to being a court. We make findings of fact, conclusions of "law" (in the occasional interpretation of NCAA bylaws), and we impose penalties. We place institutions on probation. No other court with which I am familiar makes public announcements of decisions through a press conference. If I thought the press conferences did much good in helping the public understand the system or the particulars of the case being announced, I would be in favor of them. The people in public relations at the NCAA rarely understand the cases, or at least that is my impression based on their attempts to explain the infractions process to the media.

Additionally, in order to fashion a decent question at a press conference, members of the media need to have time to read the report and time to understand the findings of fact, conclusions, penalties, and nuances. Under the current system, they have neither. Instead, members of the media are stuck with working off of a brief news release distributed shortly before the press conference goes "live," and a full copy of what is often a lengthy and complicated report that no one can thoughtfully digest in short order. Members of the media who participate range from major, national newspapers to local city newspapers to the student campus newspapers. Often, the questions at the press conference reflect a poor understanding of the NCAA bylaws, the infractions process and the facts of the case. I find no fault here, because the process is unusual and the written opinions are often lengthy and complex.

In making the public announcement of the case and responding to questions at a press conference, some former chairs have let go with a "zinger" – a colorful description or a damning statement that is nowhere to be found in the full report that is carefully drafted, edited, and combed through by the full Committee. These zingers have led to heartburn, bad feelings, and litigation. They become the meat of headlines and stories in the electronic and print media outlets. When a Committee chair chooses to stray from the written opinion, he or she does a disservice to the process and the Committee members who have carefully drafted an opinion.

Once the press conference is over, Committee members will make no further comments regarding the case. After having an hour or two to read and digest the full report, the best and most thoughtful questions will be ready to be asked. But by that time, the "show" is over, and no access is available to Committee members. So then the media goes in search of quotes from "sports experts" who did not decide the case and often have not read the Committee opinion. Even former members of the Committee will occasionally weigh in with their own zingers, even though they are months and even years removed from the process, and certainly removed from the facts of the particular case. As I say to my law students, if you come to the table with strong opinions and no facts, you do not have much to add to the discussion.

Some major infractions cases attract national attention and national media participation on the day of the announcement, but most are very local in interest and participation. In my nine years of service on the Committee and two years of making the public announcements as chair, media coverage of most cases was over in a day, with only a trickle of follow-up stories. I always found that to be refreshing, because the infractions process is only a small part of what the NCAA is all about. If the public face of the NCAA became infractions and penalties, the institution would have a serious problem.

the deliberations. In civil litigation in state and federal courts, the trial judges do not make appearances before the appellate body, defending their decision. The system works better when the roles are separated. The same is true in the NCAA infractions process. The result is that those who serve as coordinators of appeals are not "deliberative" members of the Committee at the first stage. Should an institution or coach appeal a decision made by the Committee, the coordinators of appeals provide a written response (a brief) and represent the Committee. In my time of service on the Committee, these individuals have performed an extraordinary service for the membership and the process by writing briefs and making oral arguments long after the other Committee members have moved on to the next case. At the same time, the coordinators of appeals have to digest the new information (usually weighty ring binders) that has come in for the next scheduled hearing.

With two Committee slots reserved for the coordinators of appeals, eight members participate in deliberations and vote in a case. Although the relevant NCAA bylaw allows for up to three individuals of the full Committee to be public members,²⁶ at no time in my nine years of service have more than two of the eight voting slots been filled by public members.²⁷ My recommendation is to increase that number from two to four. The recommendation is based on my belief that the public members of the Committee are especially valuable in two respects. First, they have no relationship with the NCAA and thus are not "beholding" to the NCAA in their day jobs; second, they bring a sense of seasoned objectivity and skepticism to the process that the other Committee members do not bring, or at least not with the same frequency.

The first point goes to independence from the NCAA as an entity. A Faculty Athletic Representative, athletic director, or conference commissioner has a direct tie to the NCAA and professional, regular dealings with the NCAA. He or she will likely serve on NCAA committees, attend NCAA conventions and regional compliance meetings, and from time to time have dealings with the NCAA enforcement staff and other NCAA staff members on matters relating to their own student-athletes and institutions. They are naturally aligned with the NCAA, either expressly or by drift or gravity. They certainly are aligned in appearance. For all the right reasons, they feel like they are a part of the NCAA be-

²⁶ NCAA Bylaw 19.1.1, NCAA MANUAL, *supra* note 1; at 296. Bylaw 19.1.1 is produced in its entirety *supra* note 22.

²⁷ Mr. Shep Cooper, Director of the NCAA Committees on Infractions, has confirmed this. E-mail from Shep Cooper, Director of the NCAA Committees on Infractions, to Gene Marsh, Professor of Law, The University of Alabama (July 2, 2008) (on file with author).

cause they *are* the NCAA.²⁸ In addition to their own institutions' respective brand, they sometimes sport the NCAA logo on their britches, shirts, laptop bags, beach towels, and umbrellas. In these positions, your paycheck does not come from the NCAA, but you sure feel a part of the NCAA.

Both in appearance and in mindset, non-public members are more closely aligned with the NCAA than they are with the parties (especially coaches who have been fired) when those parties are complaining about the actions of the enforcement staff or the fairness of the system. Non-public members have more regular dealings with the enforcement staff over the long haul than any coach who is charged in a major infractions case. And once a FAR, athletic director, or conference commissioner becomes a member of the Committee, the relationship with the enforcement staff becomes even more regular and tighter. Relationships are formed, even if for no other reason than repetition – you see each other at least six weekends a year for hearings, usually one on Friday and one on Saturday, six weekends a year. And typically on

²⁸ Although most readers will have some familiarity with the NCAA, the following passage is provided for those who are new to the game:

The NCAA was founded in 1906 in response to excessive violence in college football. President Theodore Roosevelt, concerned about deaths and injuries resulting from mass-momentum plays such as "The Flying Wedge," summoned college athletics leaders to two White House conferences to encourage reform. In early December 1905, Chancellor Henry M. MacCracken of New York University convened a meeting of 13 institutions to initiate changes to football playing rules. On December 28 in New York City, the Intercollegiate Athletic Association of the United States (IAAUS) was founded. The IAAUS was officially constituted March 31, 1906, and became the National Collegiate Athletic Association in 1910.

The Association served solely as a discussion and rules-making body in the early years, but in 1921, the NCAA established its first championship – the National Collegiate Track and Field Championships. Over the next 25 years, more rules committees and championships were established, including the National Collegiate Basketball Championship in 1939.

After World War II, abusive practices involving student-athletes became prevalent, and the NCAA responded with the "Sanity Code," an attempt to create guidelines for recruiting and financial aid. Other issues added to the unrest. The membership was increasingly concerned about the effect that unrestricted television might have on football attendance. The number of postseason football games began to climb out of control.

Faced with a large number of new and complex issues, the rapidly growing membership chose to develop a full-time staff. Walter Byers was named the Association's first executive director in 1951, and he established a national office in Kansas City, Missouri, in 1951. The Byers years were marked by monumental changes involving television, rules enforcement, and membership structure. The NCAA established 10 women's championships beginning in the 1981-82 academic year. In 1981, the NCAA adopted an extensive governance plan to include women's athletics programs, services and representation.

Byers retired in October 1987 and was replaced by Richard D. Shultz, who served until 1993. Schultz was replaced by Cedric W. Dempsey, whose title was changed to "president" in 1998. Today, the national office is based in Indianapolis.

those weekends, the enforcement staff and Committee will meet together for what are described as “agenda items,” where such things as scheduling of cases and possible changes in legislation are discussed. Individual cases are *not* discussed in those agenda sessions, and both the members of the enforcement staff and the Committee are careful to stay from *any* discussion of matters that relate to active cases.

Again, this is a modest proposal, calling for a shift from two public members to four, among those who make the decisions. The recommendation is based in part on appearances – how individuals who appear before the Committee *perceive* the alignments and affiliations as their case is processed in the system. Those individuals are right to perceive a lack of independence from the position of the NCAA. So a part – although a lesser rationale – for my proposal on changing the mix of the Committee is based on appearances, and looks at the Committee through the eyes of the individuals (and their lawyers) who are at the barrel end of the gun.

However, the larger part of the rationale is based on what I have seen in the actual performance of the public members of the Committee over time. What I have witnessed is encouraging and impressive. The former and current public members who deliberate on cases came to us with judicial experience, either in state or federal court. What they bring to the process is years of judicial experience, seasoned by all the experience such service brings. At the same time, they are not card-carrying members of the NCAA. It is the legal experience *and* the independence that makes them so valuable in the process. They bring to the process the same perspective, independence, and integrity that outside directors bring to corporate governance. And although this is purely a seat-of-the-pants observation, it is clear that although those individuals tend to speak less and engage in fewer exchanges in Committee hearings and deliberations, when they have something to say, it is typically important and worth hearing. While the confidentiality of the process does not allow me to cite specific examples with reference to an institution, I can think of several cases where an important point or question raised by one of the public members changed the direction of a hearing and even the outcome in the case.

Public members who are former judges tend to surface issues concerning the fairness of the system and investigation with more regularity than other members. They also occasionally cause us to step back, by pointing out that either a particular rule, or more likely the application of the rule based on particular facts, makes little or no sense. Their questioning and skepticism – often

bluntly stated – have helped us to get to more just results along the way. Thus, my view is that the process would be made better, both in process and perception, were the composition of the Committee to be shifted to allow for more participation from public members.

I have had many conversations and written exchanges with individuals who have been involved in the infractions process. They include lawyers who represent coaches and institutions before the Committee, coaches who have been named in major allegations, athletic conference commissioners, university presidents, compliance coordinators, and many members of the media. I include among them very thoughtful people, who do not have an axe to grind since they believe they were fairly treated in the NCAA infractions process. They uniformly feel that the Committee is more closely aligned with or disposed to the position of the enforcement staff and the NCAA than to the position of the coaches and institutions. I agree with them. I think we are, and I say that as a former chair for two years and member of the Committee for nine years.²⁹ My proposal gets at that problem, both in real terms and in perception.

At the same time, I believe that four of the eight voting positions should be filled by individuals who are on the payroll of an academic institution or conference. The more experience these individuals have in college athletics and compliance, the better. Although I worked in NCAA compliance at my own institution before and after my appointment to the Committee, I had no experience as a coach or athletic administrator. Often was the case,

²⁹ The NCAA is never shy in cranking up the public relations machine in responding to critics. My observation that the Committee lacks sufficient independence brings folks out swinging, citing all the situations where the Committee did not make a finding where the enforcement staff made an allegation. True enough. I participated in no small number of cases where we rejected allegations made by the staff. No Committee member I served with rubber-stamped the position of the enforcement staff. My point is that it is the public members who tend to more regularly get us to those positions and conclusions, proving their worth and value on a regular basis. And I believe the perception problem (relating to non-public members leaning or tilting to the position of the NCAA) is at least as important as the substantive issue of whatever Committee members are too closely aligned with the NCAA.

The fact that the Committee sometimes does not make a finding in an allegation brought by the enforcement staff shows that there is independence between the groups, but it also proves that the hearings matter. It is nothing but good news that coaches and institutions are able to convince the Committee that the evidence does not support a finding recommended by the enforcement staff. Were that not so, there would be no reason to have hearings.

Clearly, many institutions wrongly conclude that the enforcement staff and the Committee will see a case the same way. There is a strong presumption of like-minded thinking between the two groups. My proposal is to increase the separation, both real and perceived. Many institutions, including those involved in some recent prominent cases, have been shocked to learn that the Committee views a case as being more serious than how it has been framed by the enforcement staff. For a discussion and warning that institutions need to understand that the Committee has the final say, and not the enforcement staff, see Marsh & Robbins, *supra* note 3, at 677-78.

especially at the penalty stage, where Committee members who had experience as coaches, university athletic administrators, and conference commissioners, provided invaluable help in analyzing proposed penalties, with a realistic assessment of whether proposed penalties relating to such things as scholarships, official visits, and recruiting restrictions were warranted and fair. Not many law school faculty members, unless they have lost their identity and drifted toward the role of an athletic administrator (some faculty athletics representatives have so drifted) will have the feel for a case at the penalty stage that the folks who work in athletics do. So, working together as a Committee of eight, the public and non-public members have a diversity of experience and knowledge that strengthens the system.

Having individuals on the Committee who are, or were, *coaches, athletic administrators, or faculty members involved in NCAA rules compliance* also adds credibility in the eyes of individuals who are judged and penalized in the process. I draw this conclusion not based on my own view, but based on numerous conversations I have had with individuals who have gone through the process. Their view is that the credibility of the process is enhanced where some of the “judges” are people who do the same thing that they do on a daily basis. For most people, serving time in the trenches of a major college athletics program trying to tame the beast tempers the perspective of the judge, as it should.

As is true in all areas of rules compliance, whether it be in athletics, banking, securities markets or elsewhere, the harshest critics and judges tend to come from people who “have never been there.” At many points in our deliberations over the years, Committee members who have actually held the positions and done the work of those we are judging have given us a refreshing and needed dose of reality, explaining what any single individual can and cannot do when greater forces are at work. At the same time, real experience in recruiting, coaching, and compliance can also cause that same individual to be a harsh judge of an individual who has failed miserably. Being judged by your peers cuts both ways. Some of the toughest and most frank exchanges between Committee members and coaches accused of major violations have come from members of the Committee who have coaching experience. That is probably as it should be. Similarly, faculty members of the Committee tend to get more on point when a case involves academic fraud.

My bottom line – a call for more participation from public members – is a far cry from a more radical proposal that was made by a special committee whose members were extraordinary, both in credentials and their experience. A special committee to review

the NCAA enforcement and infractions process was appointed in April 1991 to examine the enforcement procedures in order to ensure that the process was fair, effective, timely, and consistent.³⁰ That committee made eleven recommendations, one of which is relevant to my proposal for more independence in the process. The committee stated that it believed

there is a widely held perception of inadequate separation of the functions between the enforcement staff and the ultimate decisional authority (the perception is that the infractions committee serves as the prosecutor and judge under the current system). The use of an independent jurist would enhance the public's perception of fairness and confidence in the system.³¹

The committee called for the use of a hearing officer who is an experienced legal expert, *who is not connected with the NCAA in any way*, and who would determine the facts in a case and make findings.³² Thus, the special committee recognized, even as early as 1991, that the involvement of individuals who are not connected to the NCAA *in any way* was an important ingredient in striving to have a system that is fair, and that the perception of an inadequate separation between the "judges" and the NCAA was a view widely held. The involvement of public members is an important and positive step, but the process would be made better and more defensible with even greater participation from public members.

III. A CALL FOR DISSENT IN THE INFRACTIONS PROCESS

A. *Are Committee Decisions Unanimous?*

Under the current system, Committee opinions are released

³⁰ Members of the special Committee were the following individuals: Rex E. Lee, president of Brigham Young University and former U.S. Solicitor General, chair; Warren E. Burger, former Chief Justice of the United States Supreme Court; Reuben V. Anderson of Jackson, Mississippi, a former state supreme court judge; Paul R. Verkuil, professor at the Benjamin N. Cardozo School of Law, former president of the College of William & Mary, and former dean of the Tulane University Law School; Charles W. Ehrhardt, professor of law and faculty athletics representative at Florida State University; Becky R. French, university counsel at North Carolina State University; Benjamin R. Civiletti of Baltimore, Maryland, former U.S. Attorney General; Charles Renfrew of San Francisco, California, vice-president, legal, for Chevron Corporation, a former federal district judge and a former Deputy U.S. Attorney General; Philip W. Tone of Chicago, Illinois, a former federal district judge and former federal appeals court judge, and two current members of the NCAA Council, Charles Cavagnaro, director of athletics at Memphis State University, and William M. Sangster, director of international programs and faculty athletics representative at Georgia Institute of Technology.

The final product of the Committee is the REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS [hereinafter the LEE REPORT] (on file with author).

³¹ *Id.* at 5.

³² *Id.*

under the names of the eight members who attended the hearing and deliberated on the case. It has been the custom that all the names are listed, and the written opinion does not reflect differences of opinion among Committee members on particular findings or penalties. In nine years and over 100 major NCAA infractions cases,³³ what are the odds that eight Committee members are in agreement on all the findings and penalties in every case? Near zero. Yet the written opinions never reflect those differences. Committee members who are outvoted do not write dissenting opinions. They simply join the majority.

In press conferences, members of the media sometimes ask whether decisions are unanimous or were split in the particular case. The "membership" and the general public occasionally ask the same question. They are right to ask. Their instincts are right. They question how eight people could see the case the same way. The answer is, they sometimes do not, but those differences are lost, or at least not acknowledged, in written opinions. Are we extraordinarily collegial, or have we just become entirely too tame?³⁴ Or is it the fear of litigation that has caused the process to become one which projects the notion of like-minded thinking, even where there are occasional differences of opinion?

Before getting too excited about the idea of epic written dissents in NCAA infractions cases, it is important to understand and acknowledge that strong differences of opinion in these cases are remarkably uncommon. Sorry to disappoint the critics and sports talk-show radio zealots, but the fact is that most NCAA infractions cases and deliberations are like a day on Walden Pond. The occasional goose (usually a lawyer) will honk, but otherwise, things are often very still. Many of the hearings are what I would describe as a walk-through, and compared to some civil and criminal trials, Committee hearings are sometimes more like a proceeding before the local zoning board than an epic legal battle.³⁵ Many of the violations are self-reported by the schools, and in most cases the institutions and involved individuals agree that the violations occurred. As the enforcement staff presents the case allegation-by-allegation, there are often no remaining issues to be discussed because the institution and coaches have submitted extensive responses in writing that are read by the Committee as the hearing date approaches. Committee members do not need to hear "oral argu-

³³ See *supra* note 14 and accompanying text.

³⁴ Occasionally, a written opinion will reflect the fact that the Committee found a particular case or finding to be "close," but the opinions of individual members are not disclosed.

³⁵ See John Kitchen, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL'Y 71, 73 (1999) (noting that the NCAA infractions process is neither a criminal prosecution nor an adversary proceeding in the usual sense of the term; rather, the primary issue is whether a member, a member's employee, or a student-athlete violated a rule).

ment" on what they have previously read, usually more than once, particularly when there are no facts in dispute.³⁶ So any discussion or recommendation regarding the utility and place for written dissents in infractions cases needs to be tempered by the reality that in most cases, Committee members are in agreement because there is no place or reason to disagree.³⁷

However, disagreements do occur, both at hearings and in Committee deliberations. Sometimes, the focus of the disagreement is between the Committee and enforcement staff because allegations are being presented at the hearing. Committee members who are skeptical of whether the evidence supports a finding of an allegation made by the enforcement staff are not timid in saying so immediately upon learning of such evidence, rather than waiting to make the point at deliberations. Committee members will also press the staff on why a particular allegation is being made in the case being heard, but not in prior cases where the violations appeared to be more systematic and egregious.³⁸ Occasionally, when the enforcement staff is facing brisk questioning

³⁶ Lawyers who are new to the NCAA infractions process – especially trial lawyers who feel the need to "educate" their juries through endless repetition of arguments – often fail to understand that the Committee on Infractions is an educated jury, particularly when facts are not in dispute. A former public member of the Committee would often remind a stem-winding lawyer that "brevity would not be penalized" in the process. Some lawyers got the message. Others did not.

For a discussion on the role of lawyers in an NCAA investigation, see Marsh & Robbins, *supra* note 3, at 685-87 (noting that lawyers who approach an NCAA infractions case often come at it with the perspective they bring to civil and criminal litigation, which may or may not be consistent with how institutional staff members, such as compliance directors and athletic directors, approach an NCAA investigation).

³⁷ The allegations that tend to create the most discussion and trigger a stout defense are those involving lack of institutional control, failure to monitor, and a charge of unethical conduct against a coach or other staff member. Institutions are especially likely to contest a charge of lack of institutional control, because the allegation represents a failure within the institution, rather than an act – although major and important – which may be committed by a distant booster, renegade coach, or some other variety of "independent contractor" who has little or no connection to the program. A finding of lack of institutional control sometimes suggests a climate of noncompliance, a lackadaisical approach to NCAA rules compliance, or a failure to instruct employees, student-athletes and boosters on compliance matters.

Under the NCAA rule book, an institution's chief executive officer is assigned the ultimate responsibility and final authority for the conduct of its intercollegiate athletics program. NCAA CONST. art 6.1.1, NCAA MANUAL, *supra* note 1, at 43. However, the reality is that no university chief executive officer can possibly control a major athletics program on his or her own. At the same time, there is no question that when an institution comes before the Committee on Infractions, the president is at the wheel, feels the heat, and will almost certainly be held accountable by the governing board if major, crippling sanctions follow from a finding of lack of institutional control. Marsh & Robbins, *supra* note 3, at 673.

³⁸ These disputes between the Committee and the enforcement staff sometimes arise where the issue is whether the institution lacked institutional control or failed to monitor the athletic program. Unfortunately for the institutions, the wind can also blow in the other direction. That is, the enforcement staff may not have alleged a lack of institutional control or a failure to monitor, but the Committee, at the hearing, may challenge the staff on why the allegations were not brought, based on the evidence. This is a particularly grim moment for the institutions and involved individuals, which may or may not have a happy ending.

from the Committee and can see the handwriting on the wall regarding whether the violation will be found, the staff will withdraw the allegation right on the spot, to the great relief of the institution or involved coach. In a few rare cases, the Committee has found all violations in a case to be only secondary,³⁹ where the staff presented the case as major. This further underscores the point that the hearings actually do matter and the Committee does not rubber-stamp allegations brought by the staff.

But where an individual Committee member fails to turn the tide of an allegation at the hearing, he or she will voice the difference of opinion during deliberations. Failing to persuade colleagues on the Committee, he or she joins the full Committee in the written report. This is where the NCAA infractions process fails in recognizing and valuing the importance of dissenting opinions.

B. *The Value of Dissenting Opinions and a Call for Their Acceptance by the NCAA*

There is a large body of interesting and outstanding legal scholarship on the subject of dissenting opinions.⁴⁰ It is a vain task

³⁹ A secondary violation is one that is "isolated or inadvertant [sic] in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit." NCAA Bylaw 19.02.2.1, NCAA MANUAL, *supra* note 1, at 295. Most large institutions self-report ten or more secondary violations a year, and most do not become public knowledge.

⁴⁰ To take only a few examples of the literature on dissenting opinions, one might look at Frank X. Altieri, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275 (1993) (noting that dissents are not unwarranted annoyances, but rather contribute to the marketplace of ideas); Loren P. Beth, *Justice Harlan and the Uses of Dissent*, 49 AM. POL. SCI. REV. 1085 (1955) (noting that a dissenting opinion calls attention to defects in the position of the majority, forcing a rethinking, and perhaps strengthening of that position); Paul Brace & Melinda Gann Hall, *Integrated Models of Judicial Dissent*, 55 J. POL. 914 (1993) (concluding that institutional arrangements exert an important influence on judicial choice, serving to induce individual justices to cast votes differently than they would if acting in isolation from institutional structures); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 438 (1986) (observing that "the right to dissent is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births"); Gregory S. Fisher, *The Greatest Dissent?*, 50 FED. LAW. 30 (2003) (noting that the United States government dropped a criminal charge against a defendant based on a dissenting opinion authored by Judge Alex Kozinski); Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 423 (1999) (observing that the "substance of appellate judging . . . must never be sacrificed to appease the unslakable gods of collegiality and civility, whatever blandishments their professed votaries may offer to dampen or extinguish the fires of dissension"); Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative Judicial Civility*, 28 VAL. U. L. REV. 583 (1994) (noting the critical need to maintain civility in an atmosphere characterized by lively and serious dissent); Heather K. Gerken, *Dissenting By Deciding*, 57 STAN. L. REV. 1745 (2005) (noting that dissenters can often get the majority to soften its views, or at least obtain concessions, wielding power through participation rather than persuasion); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990) (noting that "concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately"); John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137 (1999) (noting that United States Supreme Court justices have not always had the same attitude toward the

to catalog all that has been written on dissenting opinions, and no such review is undertaken here. Judges, justices, legal practitioners, political science professors and others have written many scholarly pieces on how dissenting opinions strengthen our legal system and help to develop the law over time. I draw particular attention to only two brief, but eloquent, pieces, written by former justices of the United States Supreme Court – Harlan F. Stone and William O. Douglas.

Justice Stone, in an address delivered at the twelfth annual conference of judges of the Federal Fourth Circuit, noted: “No court can satisfy the public need for faith in the process of justice, or can function with the highest efficiency without the support of public confidence.”⁴¹ The NCAA infractions process and the Committee’s part in it suffers from some of the inevitable unpopularity of any regulatory system that results in sanctions against individuals and institutions, but I think the “honest critics”⁴² make a good point and are right in wondering how it is that a large committee with a significant diversity in experience and perspectives

expression of dissent); Meredith Kolsky, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069 (1995) (noting that written dissents support both evolution and stability in the American judicial system); Allison Orr Larson, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008) (describing the views of dissenters who cling to a losing position in subsequent cases because of a continued distaste for the controlling precedent); Kermit V. Lipetz, *Some Reflections on Dissenting*, 57 ME. L. REV. 313 (2005) (describing the functions of dissent as improving the majority opinion, damage control, possibly shaping future law, calling for reform, and providing a forum for debate); Steven A. Peterson, *Dissenting in American Courts*, 43 J. POL. 412 (1981) (noting that American political scientists have a fascination with dissent in our judicial system); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001) (comparing the occurrence of dissent during the Taft Court and the Rehnquist Court in the 1990s, and focusing on the conflict between dissent and acquiescence); C. Herman Pritchett, *Dissent on the Supreme Court, 1943-44*, 39 AM. POL. SCI. REV. 42 (1945) (noting the particularly frequent and bitter divisions during the 1943-44 term); Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307 (1988) (noting that justice Brennan used his dissents to signal state courts that their constitutions may provide alternatives to the United States Supreme Court’s restrictive reading of the federal Constitution); Solomon Resnick, *Black and Douglas: Variations in Dissent*, 16 POL. Q. 305 (1963) (providing an analysis of Black’s and Douglas’ conceptions of the First Amendment); Antonin Scalia, *The Dissenting Opinion*, 1994 J. SUP. CT. HIST. 33 (1994) (noting that not often, but much more than rarely, an effective dissent or concurrence, once it is circulated, changes the outcome of the case, winning over one or more of the justices who formed the original majority); Randall T. Shepard, *Perspectives: Notable Dissents in State Constitutional Cases*, 68 ALB. L. REV. 337 (2005) (discussing some of the strategy in play in dissent writing); Walter Stager, *Dissenting Opinions – Their Purpose and Results*, 11 VA. L. REG. 395 (1925) (describing various grounds relied on as “excuses” for filing dissenting opinions); Kenneth M. Stroud, *Justice DeBruer and the Dissenting Opinion*, 30 IND. L. REV. 15 (1997) (a tribute to an Indiana Supreme Court justice who wrote over 500 dissenting opinions); Indraneel Sur, *How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 WIS. L. REV. 1315 (2006) (discussing, among other things, the pros and cons of panel dissent); Joseph C. LaValley III, Note, *The Calculus of Dissent: A Study of Appellate Division*, 64 ALB. L. REV. 1405 (2001) (reporting the results of an empirical study of dissents in New York’s Appellate Division).

⁴¹ Harlan F. Stone, *Dissenting Opinions Are Not Without Value*, 26 J. AM. JUDICATURE SOC’Y 78, 78 (1942).

⁴² For a description of honest (and dishonest) critics, see Marsh & Robbins, *supra* note 3, at 681 n.37 and accompanying text.

continues to produce unanimous opinions. Opinions from a large body that never reflect a dissenting view reinforces the position of critics (honest and dishonest critics) who argue that the Committee marches in step, rubber stamps the position of the enforcement staff, and defends the NCAA turf. Consensus opinions that mask differences do not further public confidence.

Dissenting opinions accomplish many things and send important signals. Although a dissenting opinion may not have any discernable influence on a case as it is announced, its real influence may come later.⁴³ But separate from the outcome of an individual case, an important element of a dissenting opinion and a system that tolerates a dissenting opinion is to assure the parties and public that the decision has not been perfunctory.⁴⁴ For years, the Committee has been issuing opinions, not one of which reflects the real differences of opinion (although infrequent) that surfaced at hearings and in Committee deliberations. Separate from intellectual and scholarly discussions on signals, perceptions and the value of dissents, the problem with the current system of no dissents is even simpler. It is not honest. The current system is tidy and uncomplicated. It may also be faster than it otherwise would be were dissenting opinions circulated and published. It is also unreal. My experience has taught me that there are cases that are close, facts that are muddled, and NCAA bylaws that are unclear. These become discussion points at hearings and in deliberations of the Committee. But the public would never know it from reading our opinions.⁴⁵

Justice William O. Douglas defended dissenting opinions with force, eloquence, and passion.⁴⁶ He embraced the humanity of judges, the uncertainty of the law, and the critical importance of the judiciary and our courts in reconciling honest differences between competing interests. Justice Douglas wrote: "Disagreement among judges is as true to the character of democracy as freedom of speech itself."⁴⁷ But separate from his elegant prose and defense of dissenting opinions in strengthening public opinion in the independence of our judges, Justice Douglas made the simpler point that dissenting opinions simply reflect the reality of any de-

⁴³ Stone, *supra* note 41, at 78. Justice Stone wrote: "Although in my time there have been some opinions of the court which were originally written as dissents, the dissenting opinion is likely to be without any discern influence in the case as it is written." *Id.*

⁴⁴ Justice Stone noted: "It is some assurance to counsel and to the public that the decision has not been perfunctory, which is one of the most important objects of opinion writing." *Id.*

⁴⁵ Regarding the untidiness of dissenting opinions, Justice Stone noted: "While the dissenting opinion tends to break down a much cherished illusion of certainty in the law and of infallibility of judges, it nevertheless has some useful purposes to serve." *Id.*

⁴⁶ See William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE SOC'Y 104 (1948).

⁴⁷ *Id.* at 105.

liberative process, where a body of individuals are called on to weigh facts and apply law where the facts may be muddled and the law unclear. Justice Douglas not only spoke to encourage individuals to hold on to and voice their differences, but also encouraged the individuals who tinkered with and administered our judicial systems to maintain an atmosphere where differences of opinion were tolerated.⁴⁸ I think the Committee and the membership of the NCAA would be better served by having a system where differences of opinion are on display, allowing all the involved individuals and the public to appreciate that the system tolerates dissent and that all views on a particular matter in the NCAA infractions process may be recognized and embraced by one or more Committee members. With the system we have in place now, we pay no homage to those differences, and do nothing to elevate and respect honest differences of opinion. In accepting dissenting opinions, the NCAA would join other agencies in allowing and publishing dissenting opinions in an administrative setting.⁴⁹

Publishing dissenting opinions would also further the legislative process, where a position taken by the Committee in a particular case is contrary to the position of the majority of the membership of the NCAA after the case is circulated, reviewed, and discussed. Reading a thoughtful dissent from a Committee member would allow the membership to weigh competing views and determine whether the majority opinion is the preferred outcome.⁵⁰ With no access to views of an "honest critic," the motivation and ability to do so is impaired.⁵¹

⁴⁸ Justice Douglas wrote: "Judges, like other leaders of thought, must be free to choose - and, being free, must have the daring to let their inner conscience cast their votes. They must be free to speak their minds - and the legal profession must help create an atmosphere of understanding and tolerance for others." *Id.* at 107.

⁴⁹ A provision of the Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (2006), provides that each agency, in accordance with published rules, shall make available concurring and dissenting opinions for public inspection and copying. Dissents appear in opinions from the Federal Election Commission, the Federal Trade Commission, and others.

⁵⁰ Meredith Kolsky Lewis has published an article noting that the World Trade Organization ("WTO") actively discourages dissents and concludes that keeping a lid on dissents may ultimately erode the strength of the dispute settlement system, thus hindering the ability of the WTO members to make appropriate changes to agreements. See Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895 (2006).

⁵¹ Although the work of Meredith Kolsky Lewis is focused on the WTO, her observations on the impact of "no dissent" on the legislative process apply to the NCAA, which is regularly developing and entertaining new legislation. Lewis observes:

In addition to later panels and the Appellate Body benefitting from access to previous dissents, WTO members would also benefit from having serious differences of opinion or interpretation made transparent. Members would then have the opportunity to consider the competing views and to determine whether the majority interpretation is the preferred outcome. Although members have the ability to amend WTO Agreements to in essence overrule panel or Appellate Body reports, their impetus and ability to do so is impaired without ready access to alternative visions of the same issue.

IV. CONCLUSION

In my nine-year span of service, the Committee on Infractions has processed over 100 major cases, either through a hearing or through the summary disposition process. Through service on the Committee and other roles in college athletics, I have experienced the NCAA infractions process from nearly every angle. I come away from this experience impressed by most of the people I have dealt with at the NCAA and at institutions across the country. The positives far outweigh the negatives. The dedication and character of most people involved in college athletics, especially the student-athletes, provide a perfect tonic for some of the negatives that surround college athletics today.

The Committee on Infractions is comprised of ten members, eight of whom deliberate and vote on cases. In my time on the Committee, only two of the eight deliberative members have been individuals who were not affiliated with collegiate institutions or conferences. My recommendation is to increase the seats filled by these public members from two to four. Public members are typically retired judges. Their judicial experience and independence from the NCAA make them particularly valuable, both in their substantive work in infractions hearings and deliberations, and also in how the public and membership perceive the infractions process. The substantive work of the Committee and public confidence in the system would be improved through additional involvement from public members.

My second recommendation is for Committee on Infractions decisions to incorporate dissenting opinions when Committee members differ. The current practice of consensus decisions that paper over differences does not reflect the reality of how Committee members analyze and decide some cases.

Dissenting opinions in NCAA infractions cases would be infrequent. Many infractions cases do not involve factual disputes, and in many matters, the only issues up for discussion are the penalties imposed. But the current system, where differences of opinion are not reported and are lost in the process, belies the reality that eight individuals are not of one mind in some important cases. Dissenting opinions can help to temper and shape majority positions. Dissenting opinions also offer hope to the NCAA membership and the public that their skepticism regarding some NCAA bylaws and the infractions process is being weighed, considered, and, in some cases, accepted. Implementing a system where serious differences of opinion are made transparent would make the NCAA infractions process better and would result in more public confidence in the system.