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INCREASING PRESIDENTIAL ACCOUNTABILITY IN
BIG-TIME INTERCOLLEGIATE ATHLETICS

RODNEY K. SMITH*

I. INTRODUCTION

The 1980s and 1990s evidenced an increased acceptance of responsibility for the oversight of intercollegiate athletics on the part of chief executive officers ("presidents") at major universities. This Article examines the historical development and implications of increased presidential accountability. Section II summarizes the development of presidential involvement in the National Collegiate Athletic Association (NCAA). Section III outlines developments in the NCAA's rules and infractions process, intimating that presidents may be held personally accountable for oversight of big-time intercollegiate athletics at their home institutions. Section III further argues that increasing presidential accountability is a positive trend that will complement constructive developments in terms of presidential involvement in the NCAA and at the institutional level. Finally, Section IV offers concluding observations and a call for increased presidential accountability in major intercollegiate athletics.

II. PRESIDENTIAL INVOLVEMENT IN GOVERNANCE OF BIG-TIME INTERCOLLEGIATE ATHLETICS

University presidents have become increasingly involved in the governance and oversight of intercollegiate athletics, especially at the NCAA Division I level. Such contributions have been enhanced for several reasons. First, presidents are striving to maintain

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1. This Article focuses on presidential involvement and accountability at major universities at the Division I-A level (major intercollegiate athletics) -- universities with significant revenue-producing intercollegiate athletic programs. These revenue-producing programs primarily include football and men's basketball at the Division I-A level, although other sports, such as men's hockey and some women's basketball programs at the Division I level, also can generate significant revenue.
the academic quality of all their programs, including athletics. In particular, presidents believe there are serious academic issues that must be addressed in the governance of major intercollegiate athletics, and that athletic directors, who historically have exercised primary oversight of intercollegiate athletics, have not been effective in addressing these issues. Moreover, presidents have increased their involvement for financial reasons. Specifically, increased expenses associated with intercollegiate athletics necessitate presidential involvement in order to contain costs, increase revenue generation, and balance budgets in the highly commercialized world of intercollegiate athletics. Today, revenues

2. See Myles Brand, Editorial, Presidents Have Cause, Means to Reduce Arms, NCAA News, Feb. 12, 2001 (discussing role of university presidents in academic reform movement), available at http://www.ncaa.org/news/2001/20010212/comment.html. Myles Brand, former President of Indiana University–Bloomington and current Chief Executive Officer of the NCAA, explained that “[u]niversity presidents believe their primary job is to preserve and create environments where new knowledge can be discovered, transmitted, and preserved. But often, the public sees the university differently. For them, the most visible and vital role played by these institutions is as a sponsor of athletics teams.” Id.

3. See id. (suggesting coaches and athletic directors are part of recent negative trends in college sports). Myles Brand noted:

   Despite increased revenue, athletics departments tend to overreach. In pursuit of more entertainment dollars, many universities have launched an “arms race” in the building of new facilities. But athletics success cannot substitute for academic success. Universities must be judged by their achievements as academic institutions, not as sports franchises. I believe now is the right time to renew the athletics reform movement. Call it “Academics First.” Presidential control of athletics must be a cornerstone of this effort. Presidents must work to eliminate the excesses of commercialism, to ensure the academic success of student-athletes, and to make certain that athletics programs enhance and support the larger academic mission of the university.

   Id.

4. See generally Rodney K. Smith, Reforming Intercollegiate Athletics: A Critique of the Presidents Commission’s Role in the NCAA’s Sixth Special Convention, 64 N.D. L. REV. 423, 423 (1988) [hereinafter Presidents Commission] (discussing series of cost-containment measures offered by presidents to keep spiraling costs of intercollegiate athletics programs at major universities). Since 1988, the need for cost containment has intensified, with increased pressure in tight budgetary times to provide sufficient revenue to cover the costs of major intercollegiate athletics programs. See James L. Shulman & William G. Bowen, The Game of Life: College Sports and Educational Values 267 (Princeton Univ. Press 2001) (“Athletic budgets, seen on a ‘net’ basis, should be regarded as expenditures by the institution that must be justified in terms of the contribution they do or do not make.”). As one commentator recently noted:

   A tiny number – most observers think fewer than 20 – make enough money from athletics to provide all their teams with the best coaches, facilities, uniforms, and travel opportunities money can buy. The other 300 or so teams in Division I try their best to keep up, but often must dip into institutional coffers to try to keep up with the top teams.

   Welch Suggs, Minnesota’s Golden Gophers Face a Financial Hole, CHRON. HIGHER EDUC., Feb. 8, 2002, at A39. Financial challenges require the attention of the presi-
generated by intercollegiate athletic programs are substantial. In reality, however, such revenues are usually offset and often overcome by the net costs of maintaining such programs, unless a school consistently has fielded successful teams.

Overall, the two preceding reasons for increased presidential involvement in college athletics typically coincide. Nonetheless, situations arise where such concerns conflict and place enormous pressure on presidents, athletics departments, coaches, and student-athletes. Therefore, as demands upon financial resources and academic integrity have increased, it is not surprising that presidents have become increasingly involved in controlling intercollegiate athletics at the Division I level during the past two decades.

See Kay Hawes, A Presidential Era: Institutional CEOs Launch Reforms in College Athletics, NCAA News, Dec. 20, 1999 [hereinafter Presidential Era] (“[P]resident[s] are those ultimately responsible for the bottom line at universities.”), available at http://www.ncaa.org/news/1999/19991220/active/3626n25.html. Indeed, a vicious cycle develops: in order to provide sufficient funds from the few revenue-producing sports to cover the costs of those that produce little or no revenue and to remain competitive in the revenue-producing sports, it is necessary to emphasize winning because revenue-producing programs generally must win in order to remain commercially viable. See Shulman & Bowen, supra note 4, at 267 (noting correlation between continued sports success and revenue generated).


6. See Shulman & Bowen, supra note 4, at 267. Even when big-time athletic programs are consistently successful, “most schools lose money, and it is unlikely that any school comes close to covering its full costs if proper allowances are made for the capital intensive nature of athletics.” Id.

7. See id. at 295 (exemplifying such conflict in setting of men’s college basketball and football). In fact:

Given the great pressures to win, it is hardly surprising that it is in football and men’s basketball that we find the most widely publicized scandals and other forms of bad behavior: cheating, falsification of academic records, point shaving, gambling, violence, and other blatant abuses that attract the attention of the media. Such incidents, even if infrequent and sometimes presented out of context, call into question the core values of the institutions where they occur and, most important of all, send wrong messages to aspiring athletes, high schools, coaches, members of campus communities, and society at large. The attendant bad publicity for higher education is a genuine concern, but the underlying challenges to educational values are of still greater importance.

Id.
A. The Rise of Presidential Involvement in the Governance of Intercollegiate Athletics Within the NCAA: 1980-2000

Prior to the 1980s, presidents generally were willing to defer to athletics personnel for the decision-making and basic operation of major intercollegiate athletic programs. In the early 1980s, however, presidents started to become more sensitive to economic pressures and issues of academic integrity stemming from the operation of their respective athletic programs. As a result, presidents collectively sought to assert increasing power in the governance of the NCAA.

1. The 1980s and the Rise of Presidential Involvement

By 1984, the rise of presidential involvement in college athletics was apparent, as reflected by D.J. DiJulia, Commissioner of the Metro Atlantic Athletic Conference, who stated that “[t]he best change in intercollegiate athletics over the past five years has been the increased involvement of chief executive officers at many, many institutions.”

In the early 1980s, a group of presidents, largely from institutions with major intercollegiate athletic programs, saw the need to collaborate at a national level. After becoming concerned about academic integrity and economic issues related to the operation of intercollegiate athletics at their individual institutions, presidents recognized the need to exercise more collective control within the NCAA governance structure. This phenomenon has been summarized as follows:

In the 1980s, during an era when funding for higher education from all sources was tightening and when many institutions were faced with the possibility of decreasing enrollments, a group of presidents or chief executive officers from a number of major institutions belonging to the NCAA found themselves under intense pressure to deal with a perceived crisis with integrity in the operation of intercollegiate athletics programs at their respective institutions. Successful athletics programs arguably brought material rewards to institutions in the form of increased alumni support and increased applications for admissions. However, while zealous alumni and boosters reveled in their respective alma mater’s success on the athletic field, and prospective students were enticed or at least encouraged by the same success, faculty and related academic organizations were often troubled by what they viewed to be an imbalance or perhaps even a perversion in emphasis between athletic and academic values. Caught between the demands of these various constituencies, the presidents resolved to enter the regulatory fray in the intercollegiate athletics context. In doing so, they acknowledged that reform efforts devised and implemented solely at the institutional level would not suffice to ensure the academic integrity of intercollegiate athletics at the most com-
presidents concerned established the Presidents Commission of the NCAA ("Commission"). At its inception, the Commission's effectiveness was questioned due to a lack of authority; however, active perseverance and diligence by the group dispelled such beliefs.

In fact, the Commission's presidents exerted their influence and were able to convene a special convention of the NCAA in June 1985. There, they took significant steps designed to achieve greater academic integrity in the operation of intercollegiate athletics. Specifically, President John W. Ryan of Indiana University-Bloomington, who presided over the Commission and ultimately became president of the NCAA, reflected on the successes of the 1985 convention: "[T]hink about the impossibility of what the Presidents Commission [did] in just one year." Moreover, Doug Tucker, a sportswriter for the Associated Press, also acknowledged the ascendancy of the Commission, as evidenced in the special convention of 1985, by emphasizing, "[t]here is no doubt who is running the show in college sports. It's the college presidents."

Finally, in 1986, Walter Byers, who then served as Executive Director of the NCAA, acknowledged the increasing influence of the Commission by suggesting that college presidents were begin-

petitive levels. Rather, concerted and cooperative effort on the part of all similarly situated institutions was required.

Smith, Presidents Commission, supra note 4, at 427 (footnotes omitted).


11. See id. at 987. Notably:

When the Presidents Commission initially was formed it was not given veto power over NCAA actions, and, as a result, many believed that it would remain "little more than an advisory panel, with limited authority to review NCAA activity, sponsor charges in rules at conventions, and call special conventions." Such doubts, however, quickly were dispelled. Acting promptly upon its formation, the Presidents Commission circulated a survey to the chief executive officers of all NCAA member institutions. Based on the results of their [sic] survey, the Presidents Commission proposed a seven point plan for consideration at a special Convention to be held during the summer of 1985, . . . designed as a major step toward restoring integrity to amateur athletics within the NCAA's jurisdiction.

Id.

12. See id. at 997. In particular, the presidents strengthened sanctions for improper conduct of intercollegiate athletics and set in motion the concept of what eventually became the institutional certification or review process as we know it today. See id. at 1026-56 (describing specific punishments for all intercollegiate athletic actors).

13. Id. at 997.

14. Id.
ning to change the course of college athletics. Director Byers was correct when he nonetheless questioned whether the Presidents Commission could maintain the momentum necessary to sustain its influence.

Emboldened by its successes in helping to ensure academic integrity through strengthened sanctions adopted during the 1985 convention, the Commission turned to the second major issue it believed must be addressed—cost-containment—and called another special convention in the summer of 1987. The Commission proposed a series of cost-containment techniques and sparked national dialogue concerning the future of college sports. In professing its cost-containment proposals, which included cutting coaches and scholarships in certain sports, the Commission faced strong opposition from well-known coaches and powerful athletics directors, and thus, was unsuccessful in achieving its objectives. The Commission, comprised of college presidents with experience in crisis management and quick decision-making skills required by their roles at the campus level, was nonetheless unsuccessful in its cost-containment efforts due simply to lack of preparation, both substantively and organizationally. From this setback, it became

15. See Jack McCallum, In the Kingdom of the Solitary Man, SPORTS ILLUSTRATED, Oct. 6, 1986, at 68. See id. In particular:

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

Id.


17. See id. at 430-36 (describing how, despite such efforts, 1987 convention thought to be less successful as opposed to 1985 convention).

18. See id. at 436. The presidents were inadequately prepared on the substance of the issues raised:

It is clear from reading the minutes of the proceedings [of the special Convention in the summer of 1987] that the coaches and others directly affected by the cost cutting proposals were far better prepared than the presidents . . . . Indeed, the best argument that the presidents seemed to offer was an argument based on a recent survey in which seventy-two percent of the presidents of Division I schools favored cutting the number of coaching personnel. While such an argument is little better than an *ipse dixit*, the presidents seemed incapable of offering much more in support of their legislative proposals.

Id. (footnotes omitted). On the organization front:

When the momentum of the meeting turned against [the presidents], they were unable or unprepared to react. The only portion of their proposed legislative agenda that they were able to salvage was the postponement of the ultimate determination of a number of issues pending
evident that the Commission had to strengthen its organizational presence in the NCAA and find efficient ways to obtain the kind of substantive information that would enable it to have greater influence on both the academic integrity and economic (cost-containment) fronts.

Despite the fact that the Commission enjoyed some success in the 1987 convention, its defeat on cost-containment issues made it clear that the presidents had to establish a process that would enable them to obtain the kinds of information they knew to be vital in sustaining their leading role in the governance of intercollegiate athletics. The presidents also knew that they needed organizational support to assist them in this effort. President Wilford Bailey opened the 1987 convention by indicating that the Commission was initiating an "eighteen-month [national dialogue] designed to address questions relating to fundamental principles [in] intercollegiate athletics." This dialogue commenced during the convention and continued throughout the 1980s and the 1990s. In addition to addressing related fundamental principles of college sports, the proposed dialogue also assisted in gathering and evaluating information pertinent to governing big-time intercollegiate athletics.

As a result, the scope of difficulties that the NCAA and its members were facing, both academic and economic, became increasingly evident from the Commission's stimulated empirical research into problems raised by concerned parties. Indeed, "[i]n 1989, the Knight Foundation, supported by a $2 million grant from the Knight-Ridder newspaper chain . . . called for significant reforms that included more presidential involvement and control." Further studies (an effective admission that they failed to do their homework before the meeting). As to their lack of organizational preparation, Robert Atwell, President of the American Council on Education, pointed out the presidents' faux pas of having put to a vote an issue without first having their "votes counted" and their "precincts organized." Atwell added that in order to pass their legislative program, the presidents should have done a great deal of lobbying beforehand.

19. See id. at 437 n.64. Presidents typically need significant organizational or personnel support in obtaining and processing information on a myriad of fronts, one of which is the operation and governance of intercollegiate athletics. As presidents, they have so much on their administrative plates that they must be highly informed generalists—generalists who have the personnel support necessary to provide them with and help evaluate information that must be processed in making critical decisions.

20. Id. at 439 (stating sixth special convention opened on June 29, 1987).


The Knight Commission, which included individuals who were powerful both inside and outside the NCAA, "was [co]-chaired by William C. Friday, president emeritus of the University of North Carolina[-]Chapel Hill, and Theodore M. Hesburgh, president emeritus of the University of Notre Dame . . . ." Ultimately, the Knight Commission prepared three reports. Kay Hawes recently pointed out that "[t]he commission's first report laid out the problems facing college sports and proposed a new model, known as the 'one plus three,' which consisted of presidential control directed three ways: toward academic integrity, financial integrity and accountability through independent certification." In its final report, the Knight Commission also called for cooperation between college sports administrators and university presidents. Accordingly, the Knight Commission recommended some specific substantive reform proposals, including a series of proposals related to academic integrity, financial integrity, and certification of athletic programs at the institutional level. The work of the Knight Com-

23. Id. (describing how Knight Foundation Commission promoted presidential activity in college sports throughout 1990s).
24. See id. (averring that reports initiated reform).
25. Id. The Knight Commission’s proposed actions to increase presidential power included endorsements and the reaffirming of presidential control in governing the athletic department. See id.
26. See SHULMAN & BOWEN, supra note 4, at 1. The authors concluded: "It was once possible for college sports administrators on the one hand, and university presidents and trustees on the other, to evade responsibility for the difficulties of intercollegiate athletics. Each side could plausibly claim the other possessed authority to act. That claim no long holds water." Id.

[1.] The NCAA should strengthen initial-eligibility requirements. The NCAA should study the feasibility of requiring the range of abilities of the entire freshman class.
[2.] The NCAA should strengthen initial-eligibility requirements. By 1995, initial eligibility should be based on a 2.000 average in 15 units of high-school academic work and a combined score of 700 on the SAT or 17 on the ACT.
[3.] The NCAA should strengthen initial-eligibility requirements. Junior college transfers who did not meet Proposition 48 requirements (initial-eligibility standards) on graduating from high school should "sit out" a year of competition after transfer.
[4.] The NCAA should strengthen initial-eligibility requirements. High-school student-athletes should be ineligible for reimbursed campus visits (or signing letters of intent) until they show reasonable promise of being able to meet degree requirements.
[5.] The letter of intent should serve the student as well as the athletics department.
mission bridged the 1980s and the early 1990s and was a harbinger of increasing presidential involvement in the NCAA during the 1990s.

2. The 1990s: The Momentum Toward Presidential Accountability Continues

In the early 1990s many of the specific reforms recommended by the Knight Commission were adopted by the NCAA. Those

[6.] Athletics scholarships should be offered for a five-year period. . . .
[7.] Athletics eligibility should depend on progress toward a degree. . . .
[8.] Graduation rates of student-athletes should be a criterion for NCAA certification. . . .

Id. at 5-9. The Knight Commission’s financial integrity issues included:
[1.] Athletics costs must be reduced, and cost control measures adopted in 1991 must not be “fine tuned” out of existence. . . .
[2.] Athletics grants-in-aid should cover the cost of attendance for the very needy. . . .
[3.] The independence of athletics foundations and booster clubs must be curbed. . . .
[4.] The NCAA formula for sharing television revenue must be reviewed by university presidents. . . .
[5.] All athletically related coaches’ income should be reviewed and approved by the university. . . .
[6.] Coaches should be offered long-term contracts. . . .
[7.] Institutional support should be available for intercollegiate athletics. . . .

Id. at 10-13. Three issues related to certification of athletics programs were highlighted by the Knight Commission: “[1.] The NCAA should extend the certification process to all institutions granting athletics aid[,] . . . [2.] Universities should undertake comprehensive, annual policy audits for their athletics program[; and] . . . [3.] The certification program should include the major themes advanced by the Knight Commission (i.e., the ‘one-plus-three’ model).” Id. at 14-15.

28. See id. at 1-15 (delineating Knight Commission’s recommendations and the response of NCAA to each of them). While introducing such achievements, Cedric Dempsey, NCAA President, stated:

In 1991, the Knight Foundation Commission on Intercollegiate Athletics issued a landmark report in which it called for a new model for the governance of college sports. Since then, the NCAA has addressed the Commission’s “one-plus-three” model that uses presidential control to achieve academic integrity, fiscal integrity and independent certification of intercollegiate athletics programs. This report will show what the concerns of the Knight Commission Foundation were when the original report was developed and what the NCAA has done in response. I am proud of the reform initiatives that have been implemented by our Association. In the last decade, we have fundamentally changed our system of governance in a way that makes presidents directly responsible for the administration of college athletics. We have made positive changes to our academic eligibility standards that have resulted in higher graduation rates. We created a Division I athletics certification program that has resulted in self-examination and outside review of the athletics program at every Division I member institution.

Id. at 2.
reforms further enhanced presidential involvement in the governance and operation of big-time intercollegiate athletics.

Prior to the publication of the Knight Commission Report, the Commission received the results of a study it initiated in 1989, which indicated that the major complaint of student-athletes was that practices, travel, and conditioning schedules made it difficult for athletes to be successful as students. The results of that survey invoked the calling of a major summit in June 1990. That summit included thirty-eight of forty-four members of the Commission and the NCAA’s Student-Athlete Advisory Committee. Armed with the information provided by the survey and acting in concert with student-athlete leaders, the Commission was determined to adopt a series of reforms at the January 1990 and 1991 annual NCAA meetings.

The Commission enjoyed some success in the 1990 NCAA Convention, including the adoption of the requirements to reduce time demands on student-athletes and to publish the graduation rates of Division I student-athletes by 1991. In the January 1991 annual meeting, the Commission continued to make progress by initiating the passage of legislation focusing on cutting costs, reducing time demands on student-athletes, and strengthening division membership criteria. After the 1991 convention, Richard Schultz, who was then serving as Executive Director of the NCAA concluded: “I don’t think this is a shot in the dark for the presidents... I think they have genuine enthusiasm to see that important changes are made in intercollegiate athletics and that intercollegiate athletics takes its rightful position in higher education.” When the graduation rates became available in July 1991, they told a sobering story:

29. See Hawes, Presidential Era, supra note 4 (indicating that 1989 study initiated reform).
30. See id. (explaining how historic plan to restore “academic integrity” in college meetings marked first time in NCAA history that student-athlete formally represented).
31. See id. “After listening to the concerns of the student-athletes, the presidents left the meeting vowing to present legislation at the 1991 NCAA Convention in Nashville that would help limit time demands on student-athletes.” Id.
32. See id. Indeed, this convention has been referred to as the “Reform Convention,” marking the birth of the “20-hour rule,” which limited a student-athlete’s time spent each week in athletics-related matters to twenty hours. See id. Moreover, cost-containment legislation limited the size of coaching staffs, established a “restricted-earnings” coaching position (which was successfully challenged in a significant lawsuit), phased-in a reduction in the number of scholarships, and restructured legislation that more clearly defined the divisions between institutions participating in intercollegiate athletics at varying levels of competitiveness. See id.
33. Id.
In July 1991, NCAA research verified the fears of many people: just because student-athletes received a scholarship and played ball did not mean they graduated. Football and men's basketball student-athletes graduated at a 42.1 percent rate, compared to 45.7 for the rest of student-athletes. For minority students, the problem was more alarming; only 26.6 percent of black student-athletes graduated, compared to 52.3 percent for whites.34

In 1992, the Commission responded by advocating a reform agenda that included Proposal 16, calling for an initial-eligibility index that was eventually approved by a substantial majority.35 Moreover, graduation rates for student-athletes increased after the passage of Proposal 48, which was strongly supported by the Commission and required more stringent entrance and participation requirements for student-athletes.36

Furthermore, in NCAA v. Tarkanian,37 the United States Supreme Court held that the NCAA was not a state actor for purposes of the Fourteenth Amendment.38 The Court's holding freed the NCAA from defending against allegations that it had violated Coach Jerry Tarkanian's due process rights under the Fourteenth Amendment of the Constitution. Even though the NCAA was victorious in Tarkanian, concerns over the NCAA's moral and legal obligations in the due process area persisted.39 Given these concerns, the Commission decided to form a "Special Committee" ("Committee") to make recommendations regarding changes afforded to coaches, student-athletes, and institutions in the infractions process.40 It is not surprising that the presidents picked Rex Lee, one of the leading scholars on intercollegiate athletics.41

36. See id.; see also Hawes, Concerns over Standards, supra note 34 (describing how Proposal 48 required student-athlete to maintain set minimum GPA and post set standardized test scores).
38. See id. at 198 ("NCAA enjoyed no governmental powers to facilitate its investigation . . . to subpoena witness, to impose contempt sanctions, or to assert sovereign authority over any individual.") (footnote omitted).
40. See id. at 17-19 (explaining that over time, presidents were compelled to reform NCAA's enforcement process).
of their own number, to chair the Committee. Subsequently, the Committee made major recommendations to the NCAA, which transformed the infractions process.

In the 1993 convention, the Commission was again successful in guiding a few major reforms through the legislative process, including the development “of a Division I athletics certification program; and the establishment of an NCAA Initial-Eligibility Clearinghouse.” The central purpose of the certification process, which serves a function similar to that of accreditation, is “to validate the fundamental integrity of member institutions’ athletics programs through a verified and evaluated institutional self-study. The involvement of peer reviewers external to the institution shall provide the verification and evaluation of the methodology and results of the self-study.”

This certification process, which is now in its second round of site visits, requires that Division I universities take a close institutional look at the operations of intercollegiate athletics programs on their campuses. This process also provides other means, at the institutional level, for presidents to obtain necessary information. In 1993, presidents took an active role in a number of other matters, including the hiring of a new Executive Director for the NCAA, the accepting of a major report from the Gender-Equity Task Force, and the creation of a committee chaired by Chancellor Charles E. Young of the University of California at Los Angeles, to determine the advisability of developing a Division I-A football championship.

The presidents continued to be quite active in 1994, although their major efforts were at the committee level, where they were involved in studying the organizational structure of the NCAA. Ultimately, the Division I Task Force recommended a structural

41. See id. at 17-18.
42. See id. at 18-19 (stating that report was issued in 1991 containing basic recommendations concerning infractions process).
43. NCAA Time Line, supra note 35 (noting Clearinghouse became operational in August of 1993).
45. See NCAA Time Line, supra note 35 (stating definitive goal of Gender-Equity Task Force is male/female athletics participation substantially proportionate to overall student body, but noting that participation, efforts, and interests tests of Title IX regulation are appropriate tests for equitable participation).
46. See id. In 1994, the Special Committee to Review Initial-Eligibility Standards also recommended new Division I standards essentially based on eliminating test-score endpoints. See id. The proposal, however, was defeated at the 1995 convention. See id.
model that moved away from the one-institution, one-vote means of governance to a model that provided for federation among the three divisions—Divisions I, II, and III.47 When finally adopted in 1997, this restructured model provided more presidential input regarding major intercollegiate athletics at the Division I level. In 1994, the Division I presidents also worked with the NCAA and entered a $1.725 billion, eight-year television contract with CBS. This lucrative agreement, and the even more lucrative one that followed it in 2001, provided a substantial source of funds, which could be used to fund the expanding operations of the NCAA, as well as major Division I conferences and institutions.48 It also ensured that the commercialization of big-time intercollegiate athletics would continue unabated.

Issues regarding gender equity drew much of the presidents' and the NCAA's attention in 1995 and 1996, and continued to be of substantial concern at the campus level. From 1992 through 1996, a highly publicized gender equity case involving Brown University captured the attention of those involved in the administration of intercollegiate athletics. In 1996, the First Circuit issued an opinion upholding the lower court's determination that Brown University had violated Title IX by failing to provide sufficient opportunities for women in its intercollegiate athletics programs. The court also provided Brown University with an opportunity to submit a further gender equity plan for consideration by the lower court.49 With the court's decision, it became clear that institutions would have to provide greater opportunities, with their attendant economic costs, to women student-athletes.50 With increased budgetary demands in many areas, presidents had to face the spiraling costs attendant with achieving gender equity in their intercollegiate

47. See id. (noting Division I Task Force to Review NCAA Membership Structure suggested structural model with almost total federation among three divisions).

48. See Rodney K. Smith & Robert D. Walker, From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student Athletes, 1 Nev. L.J. 160, 160-61 (2001) (stating NCAA had entered into contract that more than doubled annual payment that it was to receive for television rights to tournament).

49. See Cohen v. Brown Univ., 101 F.3d 155, 187-88 (1st Cir. 1996) (holding Brown University's proposed plan fell short of good faith effort to meet requirements of Title IX, but noting court's respect for academic freedom and reluctance to interject into university affairs, and suggesting that universities be given as much freedom as possible in conducting their operations consonant with constitutional and statutory limits).

50. See Rodney K. Smith, When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics, 61 Mo. L. Rev. 329, 354-62 (1996). The economic implications of such litigation and the demand for gender equity are noted in that article. See id.
athletics programs. Few women's athletic programs are revenue-producing in any significant sense and these costs have placed increased pressure on revenue-producing sports (largely men's basketball and football at the Division I level) to generate sufficient revenues to cover much of the expense associated with other non-revenue-producing sports, including women's sports, which are being added in response to Title IX. These budgetary issues have necessitated that all presidents, including those who have been disinterested or disinclined, to keep a close watch on their intercollegiate athletics programs.

With the rise of the budgetary issues associated with achieving gender equity in intercollegiate athletics and proliferating administrative and capital expenses in athletics, the effort by presidents to gain further control of the NCAA's governance process intensified. In the annual meeting of the NCAA in January 1996, a series of proposals to restructure the process of governance in earnest were presented and were supported overwhelmingly by the presidents. The remainder of the significant restructuring proposals, which would give presidents even more power within the NCAA, were adopted and became effective on August 1, 1997. With this restructuring, the presidents institutionalized their power base in the NCAA. In particular, the presidents became the exclusive members of the NCAA Board of Directors. This eighteen-member board of directors was given the following significant duties and responsibilities:

(a) Establish and direct general policy;
(b) Establish a strategic plan;
(c) Adopt administrative bylaws and regulations;


52. See 2002-03 NCAA Division I Manual, supra note 44, at art. 4 (stating NCAA's administrative structure includes Executive Committee, comprised of institutional chief executive officers (CEOs), that oversees Association-wide issues and ensures that each division operates consistent with basic purposes, fundamental policies, and general principles of Association). Furthermore, the new "administrative structure of each division . . . empower[s] a body of institutional chief executive officers (CEOs) to set forth the policies, rules and regulations for operating the division." Id. at art. 4.01.1.

53. See id. at art. 4.2.1 (establishing minimal goal that NCAA Board of Directors composition include at least one person who is ethnic minority and at least one person of each gender).
(d) Adopt operating bylaws and rules and/or delegate limited legislative powers to the Management Council;
(e) Delegate to the Management Council responsibilities for specific matters it deems appropriate;
(f) Ratify, amend or rescind the actions of the Management Council;
(g) Assure that there is gender and ethnic diversity among its membership, the membership of the Management Council (see Constitution, Article 4.5) and the membership of each of the other bodies in the administrative structure;
(h) Require bodies in the administrative structure to alter (but not expand) their membership to achieve diversity;
(i) Approve an annual budget;
(j) Approve regulations providing for the expenditure of funds and the distribution of income consistent with the provisions of [the] Constitution;
(k) Approve regulations providing for the administration of championships; and
(l) Advise the Executive Committee concerning the employment of the Association’s chief executive officer (e.g., president) and concerning the oversight of his or her employment. 54

It is clear that restructuring made the presidents the sole participants in the major governing body in the NCAA, giving them ultimate control over rules, the budget, and even the hiring of the NCAA’s chief executive officer. After restructuring, no one doubted that the presidents were firmly in control of big-time intercollegiate athletics within Division I of the NCAA. 55

Once power within the NCAA was formally consolidated in the presidents, they increasingly assumed control of the NCAA’s legislative and administrative processes. 56 Changes in rules or other ma-

54. Id. at art. 4.2.2.
55. See id. at fig. 4-1 (placing board of directors at top of NCAA’s governance hierarchy).
56. A recent NCAA publication notes:
For more than 90 years, college presidents have sought to ‘take charge’ of intercollegiate athletics. The NCAA has met that challenge in two primary ways: by creating an Executive Committee composed entirely of college chief executive officers and by establishing boards of institutional CEOs to oversee the business of each division. College presidents, who are responsible for the fulfillment of their institutions’ missions, now are mandated by the NCAA constitution to lead and influence the activities of the Association. Intercollegiate athletics and higher education – for
Major actions all have to be approved or ratified by the board of directors. The rise of presidential power within the NCAA has been summarized as follows:

In each subsequent year of the 1990s, the presidents seemingly exercised more influence as they supported changes in academic standards, financial aid and gender equity. Then with the completion of NCAA governance restructuring in 1997, presidents found their role expanded again with the creation of Presidents Councils (called the Board of Directors in Division I) in each newly federated division, where they would wield more control over the Association than ever before.\(^\text{57}\)

These changes in the governance structure have been characterized as follows:

Though the structure is designed to enhance the role of college and university presidents, athletics administrators will continue to play the primary role for the maintenance of college sports and, in most cases, for developing the legislation that presidents will consider. The change from the previous governance structure is greatest in Division I, where the one-institution, one-vote principle has been set aside in favor of a legislative system based on conference representation. Legislation in the future will be approved by a Board of Directors, composed entirely of Division I presidents, rather than by a vote of the entire Division I membership at the NCAA Convention.\(^\text{58}\)

Directors of athletics, faculty athletics representatives, and others have expressed concern regarding the concentration of legislative and other power in the presidents and conferences under this new governance structure within the NCAA. For example, the Division I-A Athletic Directors Association recently released the results of a "governance study" (a survey of Division I-A athletic directors and faculty athletics representatives), which noted dissatisfaction on the part of directors of athletics and faculty athletics representatives decades, a strained alliance often compromised by conflicting objectives - now share common leadership and an uncommon opportunity to move forward as one.


57. Hawes, Presidential Era, supra note 4.

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with the 1997 changes in the NCAA's governance structure. A summary of that memorandum noted that "[a] high percentage of respondents are satisfied with the president-driven Board of Directors having final authority to approve legislation."60 Nevertheless, the survey found that "[a]lmost 100 percent of the respondents are not comfortable with the current legislative process, and an equally high percentage of respondents prefer the former legislative process that was in place before 1997."61 Interestingly, "[a]lmost 100 percent of [the] respondents indicated their president/chancellor is less informed and involved now than . . . before 1997, and that a majority of the presidents/chancellors did attend the NCAA Convention before restructuring."62 Thus, while there was apparent satisfaction with having a board of directors made up of presidents, it is clear that directors of athletics and faculty athletics representatives at the Division I-A level are endeavoring to develop a case for returning to the pre-1997 legislative process, which involved individuals other than the presidents.

Despite these objections to the new governance structure, particularly on the grounds that the conferences have gained undue power, the presidents remain firmly in control.63 The presidents have moved forward on a number of fronts since 1997. In addition to efforts in the legislative area, the presidents, through the board of directors and the Executive Committee, have been very involved in the budgetary and revenue-producing aspects of the NCAA. On August 9, 2002, the NCAA Executive Committee, made up of presidents from the membership of the Association, approved a $422,233,000 budget for the 2002 to 2003 fiscal year.64 This constitutes a $75 million increase over the budget for the 2001 to 2002


60. Id.

61. Id. The survey also revealed that "[a]lmost 100 percent of the respondents believe[d] their institutional vote was more meaningful in the former legislative process [prior to 1997]." Id.

62. Id.

63. Presidents exert significant power at the conference level in all major areas, including hiring of the conference commissioner, adopting rules and regulations for the conference, and allocating conference funds.

64. See Executive Committee Approves Operating Budget of $422.2 Million, NCAA News, Aug. 19, 2002 (stating Division I distributions, which include newly established $17 million student-athlete opportunity fund, will increase by about $63.3 million or thirty-five percent), available at http://www.ncaa.org/news/2002/20020819/active/3917n01. The championship revenue budget is also expected to increase by about $1.5 million generated by ticket revenue in men's and women's basketball, baseball, men's ice hockey, and wrestling. See id.
year. This dramatic 17.76% increase was fueled by a $6 billion agreement with CBS Sports for the right to televise the NCAA Men’s Basketball Championship and other championship events, and the agreement provides for significant increased payments to the NCAA on an annual basis.65

The presidents have exercised their new power within the NCAA in both an economic and a legislative sense. What is less clear is whether they will be held accountable for the governance of big-time intercollegiate athletics at the institutional level also.

III. PRESIDENTIAL RESPONSIBILITY AT THE INSTITUTIONAL LEVEL

Growth of presidential responsibility for the governance of intercollegiate athletics within the NCAA has not been matched by a concomitant increase in responsibility at the institutional level. Presidents ultimately control economic and legislative matters within the NCAA governance hierarchy, but historically, they have not been held directly responsible within the NCAA’s infractions process for the operation of their athletics program at the institutional level. There are, however, some encouraging indications that presidents increasingly will be held accountable and may eventually be sanctioned directly in the infractions process for failure to take responsibility at the institutional level.

A. Presidential Responsibility for Lack of Institutional Control

The most likely grounds for which a president will be held accountable in the NCAA infractions process—the process by which the NCAA has penalized and effectively required the removal of coaches and other personnel—is lack of institutional control. There are other areas in which a president may be penalized, including academic fraud and inappropriate work with boosters or donors, but the greatest area of direct responsibility for the office of the president is that of institutional control.

Article 2.1.1 of the NCAA Division I Manual indicates that a president is responsible for maintaining control of the athletics program at the institutional level:

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65. See EXECUTIVE SUMMARY OF CBS AGREEMENT (Dec. 9, 1999), available at http://www.ncaa.org/databases/reports/1/200004bd/200004_d1_board_agenda_s04_a01.htm. The report states that $40 million would be payable upfront, with the first year of the contract totaling $360 million. See id. This figure will escalate eight percent per year through the final year of the contract (2012-2013) to approximately $800 million. See id.
It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution's chief executive officer is responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditures.\(^66\)

The scope of that responsibility is extensive: "The institution's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution."\(^67\) Institutional control is further delineated in Article 6.01.1: "Administrative control or faculty control, or a combination of the two, shall constitute institutional control."\(^68\) Article 6.1.1 adds: "A member institution's chief executive officer has ultimate responsibility and final authority for the conduct of the intercollegiate athletics program and the actions of any board in control of that program."\(^69\) These provisions make it clear that the president is responsible for maintaining institutional control, which is broadly defined.

The principle of rules compliance, set forth in Article 2.8 of the NCAA Division I Manual, provides that:

Each institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletics programs. It shall monitor its programs to assure compliance and to identify and report to the Association instances in which compliance has not been achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate corrective actions. Members of an institution's staff, student-athletes, and other individuals and groups representing the institution's athletics interests shall comply with the applicable Association rules, and the member institution shall be responsible for such compliance.\(^70\)

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\(^{66}\) 2002-03 NCAA Division I Manual, supra note 44, at art. 2.1.1 (emphasis added).

\(^{67}\) Id. at art. 2.1.2.

\(^{68}\) Id. at art. 6.01.1.

\(^{69}\) Id. at art. 6.1.1.

\(^{70}\) Id. at art. 2.8.1. The Association has the additional responsibility of "assist[ing] the institution in its efforts to achieve full compliance with all rules and regulations and . . . afford[ing] the institution, its staff and student-athletes fair
Article 2.8.3 further provides: "An institution found to have violated the Association’s rules shall be subject to such disciplinary and corrective actions as may be determined by the Association."\textsuperscript{71} Violations by institutional staff members "shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual’s previous employment at another member institution."\textsuperscript{72} Institutional staff, including presidents, may be penalized: (1) by corrective action taken by the institution, in conjunction with the institution’s or a conference’s self-reporting of a violation; and (2) by penalties imposed in the NCAA’s enforcement process after an infraction of the Association’s rules is reported or discovered.\textsuperscript{73}

A lack of institutional control is generally considered to be a major infraction and, as such, carries with it an array of possible penalties, including for example: (1) prohibition on off-campus recruiting; (2) suspension of a head coach or other staff member for one or more competitions; (3) public reprimand (only in situations where it has been determined that a penalty, in addition to any institutional-determined or conference-determined penalty, is warranted); and (4) when a staff member (e.g., a president) has been found to be in violation at a prior institution (an institution where the president previously served and committed a violation), the new institution must show cause why a penalty or additional sanction should be imposed on that new institution if it does not take appropriate disciplinary or corrective action against the institutional employee (the president in our case).\textsuperscript{74} Under the rules,
presidents may be penalized personally or through the imposition of further sanctions on their athletics programs. To date, this has not occurred in any formal sense, although presidents at programs that have committed major infractions, such as a lack of institutional control, have resigned or retired, perhaps because they were under pressure to do so. Under such circumstances, however, if they take a position at another institution, formal penalties will not follow them because they were not penalized directly in the infractions process.

The Committee on Infractions ("COI") and the Infractions Appeals Committee ("IAC") have been edging in the direction of imposing formal penalties on a president or an institution because of an action (or inaction) of a president. A brief look at the cases that characterize this movement evidences this trend.

In its public appeals report for its decision in a 1996 New Mexico State University case, the IAC of the NCAA referred to the COI's principle of institutional control:

Not only directors of athletics, but other officials in the athletics department, the faculty athletics representative, the head coaches and the other institutional administrators... are expected to assume a primary role in ensuring compliance. Even though specific action has been taken to place responsibility elsewhere... [t]heir failure... to prevent violations of NCAA rules will be considered the result of a lack of institutional control.\textsuperscript{75}

The assistant coach argued that, as an individual, he could not violate the principle of institutional control. The IAC expressed some sympathy for the logic of the coach's argument, but it noted, "the Committee on Infractions has made several findings of a lack of institutional control against individuals, primarily head coaches, none of which has been appealed to the Infractions Appeals Committee prior to this case." Rather than disturb those findings of failure to exercise institutional control by individuals, the IAC refused to extend liability for lack of institutional control below the level of head coach, and summarized its view that "[t]he Infractions Appeals Committee believes that the principle of institutional control is intended to place responsibility on the institutional administration to establish reasonable procedures, to provide sufficient personnel and support to make these procedures functional, and to monitor the procedures in a reasonable manner." Thus, individual head coaches and administrators, including presidents, may be held accountable for failure to exercise institutional control.

In a 2001 case involving New Mexico State University, a president came very close to being held to have violated the institutional control principle. In that case, the university hired an assistant basketball coach despite expressions of concern by the university's compliance director that the coach was tainted by a prior major violation. After the director of athletics opted to hire the coach, believing that the two junior college players whom the assistant coach would bring to New Mexico State made the risk well worth taking, the compliance director forwarded his strong reservations to the president, who simply ignored him. The COI:

[F]ound such a lack of response on the part of both officials [the athletics director and the president] to be astonishing, especially in light of the fact that the university had just concluded a major infractions case, at the heart of which were violations associated with men's basketball junior college transfers and correspondence courses. 

76. Id. ("Those findings have blurred the line between 'institutional control' and individual violations."). The New Mexico State case is the first in which the COI found an institutional control violation by an assistant coach. See id.

77. Id. (acknowledging that history of institutional control findings against head coaches exists while also maintaining reservations about applying institutional control findings to any individual). The IAC subsequently determined that institutional control findings cannot be extended to include assistant coaches, and vacated the institutional control violation finding against the former New Mexico State assistant men's basketball coach. See id.

78. See NEW MEXICO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (June 20, 2001) (stating further revelation that president and director of athletics privately
Shortly thereafter, the newly hired assistant coach engaged in serious academic fraud related to his improper efforts, including arranging to have others complete coursework for the athletes, to ensure that the two athletes would be eligible to play at New Mexico State University. Despite the egregious nature of the assistant coach’s actions, the presence of other improprieties associated with the operation of the basketball program, and the clear failure on the part of the president to exercise institutional control related to the program, the COI did not make a formal finding of lack of institutional control. In refusing to find a lack of institutional control, the COI acknowledged the strong efforts of some university personnel, adding “[h]ad the president and director of athletics, who were in office at the time the assistant coach... was hired, remained in their positions, the committee would likely have made a finding of a lack of institutional control.” Therefore, the COI made it clear that the resignation of the president and the director of athletics made a major difference in the COI’s decision not to find a lack of institutional control. This decision certainly implies a willingness on the part of the COI to find that a president failed to exercise institutional control. It also implicitly encourages institutions finding themselves in difficult straits, as was the case with New Mexico State University, to consider removing top administrators, including perhaps the president, in taking corrective action as a part of its effort to self-impose penalties prior to subjecting itself to a hearing before the COI.

In a later case, the IAC did not deal with the issue of lack of institutional control in an appeal by the former head basketball coach at the University of Minnesota, but the IAC affirmed the imposition of very stringent penalties that effectively ended the collegiate career of the head coach. It noted:

The most severe penalties are appropriate when the academic mission of the university has been compromised. The former head coach was not the only one who bears responsibility for the damages; as the Committee on Infractions’ report demonstrates, others in the program, and Minnesota itself, also failed in their responsibilities. The

79. Id. (emphasis added).
former head coach's appeal is the only one before us. We have no doubt that his conduct, fully established by the evidence in this case, justifies the penalty imposed.\textsuperscript{80}

Failure to exercise adequate institutional control certainly has been recognized by the IAC, but it was not at issue in the head coach's appeal. It should be noted also that the president and the director of athletics at the University of Minnesota had either resigned or had been asked to resign their positions, which had been done prior to the IAC's hearing of the case. Their departure was, at least implicitly, a part of the university's corrective action.

In a recent case involving Bucknell University, the COI and the IAC made it clear that they were willing to look closely at a president's actions in conjunction with their analyses of the institutional control issue. In the Bucknell case, the COI made a finding of lack of institutional control. In reaching that conclusion, the COI observed that:

In March 1992, the former president of the institution secured a five-year pledge for annual contributions of $5,000 to the institution's Grappler Club from an athletics representative [donor to the athletics program]. The athletics representative made his first $5,000 payment to the president at the time. In February 1994, the president again visited the athletics representative to discuss his continued willingness to support the wrestling program. During this meeting, the athletics representative gave the president the impression that he was continuing to support the wrestling program consistent with his earlier pledge of $5,000 per year, but, for some reason, the contributions were not being recorded on the institution's records. In a follow-up letter to the athletics representative dated March 7, 1994, the former president wrote:

"It was a relief to me to learn that your philanthropic involvement with a young wrestler did not directly include Bucknell. I know that sounds strange, but the NCAA is a litigious organization and the relationship between Bucknell and its other athletic competitors is a very complex one. Because Bucknell has drawn

\textsuperscript{80} FORMER HEAD MEN'S BASKETBALL COACH UNIVERSITY OF MINNESOTA, TWIN CITIES PUBLIC INFRACTIONS APPEALS COMMITTEE REPORT (Apr. 6, 2001) [hereinafter UNIV. OF MINN. IAC REPORT], available at http://www.ncaa.org/releases/makepage.cgi/infractions/2001040601in.htm.
significant attention to itself by being one of the 'cleanest of the clean,' some of our rivals would enjoy catching us in even a very small infraction of the rules.”

The committee found implausible the president's explanation that this language did not refer to the wrestling student-athlete.81

The COI also noted other questionable actions by the university's development office, which was subject to the oversight of the president's office.82

The IAC agreed with the COI's finding of lack of institutional control. In doing so, the IAC pointed out that:

[T]he committee found there was no institutional process in place for adequate control of donor contributions and the award of financial aid to student-athletes. Indeed, very senior administrative officials working in the development area became or should have become aware of possible improprieties that should have been subjected to an investigative and reporting process and timely action was not taken.

From 1992 to 1994, an athletics representative pledged annual contributions of $5,000 to the Grappler Club. Although the [donor to the athletics program] insisted that he was supporting the wrestling program through donations to the Grappler Club, the contributions were not being recorded in the institution's records.

In a letter from the university's president to the [donor], the president indicated that he had knowledge of the possibility of improper payments to a student-athlete as early as March 1994.83

The president's knowledge of the possibility of improper payments to a student-athlete certainly contributed to the IAC's holding that Bucknell lacked institutional control. Indeed, in its concluding observations regarding the institutional control issue, the IAC stated,


82. See id. (detailing rumors circulating in development office that student-athlete had received $5,000 from wrestling program athletics representative for work not actually performed).

83. Id. (adding university unduly delayed its reporting of problems to NCAA even when serious questions arose).
"[m]any high-ranking university officials in control of university policies and procedures were alerted at one time or another to the questionable activities surrounding the wrestling program but chose not to deal directly with the situation or to develop procedures to oversee the program."84

The president involved in the lack of institutional control in the Bucknell case was no longer in office at the time of the hearing, and was not penalized formally for his involvement. Nevertheless, the message that presidents may be held personally accountable and directly penalized for an action or inaction is becoming clearer.

It is also unlikely that presidents will simply be able to distance themselves from the financing and operation of their athletics program by arguing that they should not be personally penalized due to a lack of actual or subjective knowledge on their part. The IAC has addressed this knowledge issue in a slightly different context:

We believe that the objective, "should have known" standard may well be appropriate to assess the responsibility of a person, such as the head coach of an athletics program, who is expected to know what those in the program are doing. To conclude otherwise would be to encourage coaches or others in similarly responsible positions to close their eyes and ears to what is happening in areas for which they are accountable. It would be irresponsible for this committee, the NCAA, or any other member institution to tolerate, let alone encourage, such intentional ignorance.

A head coach's responsibility goes beyond merely acting upon academic fraud that comes to his attention. A coach should take reasonable steps to see that it does not happen in the first place. This is not to say that he is absolutely liable for every instance of academic fraud that might occur; it is to say, however, that his accountability should be measured by more than what he actually knew. It should be measured by what a reasonably vigilant, observant, and diligent person in his position should have known. If he does nothing to discourage academic fraud, nothing to observe those circumstances in which it might be occurring, and nothing to see that those in the program are carrying out their responsibilities honestly, he

84. Id. (emphasizing committee's decision that university's violations in combination constitute lack of institutional control is not clearly contrary to evidence).
should not be shielded from accountability merely because his inaction insulates him from knowledge of what is happening. To do so would be to encourage the evasion of responsibility on the part of those of whom the institution, the NCAA, and the public expect responsibility. 85

While this case dealt with academic fraud, its reasoning applies in the context of lack of institutional control or other areas in which a president might be held responsible. Certainly, a president should not be permitted, in a similar case, to avoid responsibility by arguing a lack of actual knowledge regarding a significant series of rules violations. Indeed, the lack of institutional control principle surely requires, at a minimum, that a president will endeavor affirmatively to obtain such information. The very principle of institutional control, therefore, implies that knowledge must be assumed when a president fails to obtain information and act upon it. In areas of presidential responsibility for the governance of intercollegiate athletics at the NCAA and institutional levels, such as the area of institutional control, presidents should not be able to avoid responsibility by creating a veil of “institutional ignorance.”

It appears evident that the COI and IAC are increasingly open to the possibility of formally penalizing a president for failing to exercise his or her responsibility of overseeing intercollegiate athletics at the institutional level. A major area of presidential responsibility is that of institutional control of intercollegiate athletics. If a president has endeavored, intentionally or otherwise, to distance him or herself from the operations of intercollegiate athletics at the institutional level (e.g., ignoring budgetary or academic irregularities or failing to establish effective administrative mechanisms that can aid in discovering possible infractions), the president should be held personally accountable and penalized, by at least being publicly censured. 86

85. UNIV. OF MINN. IAC REPORT, supra note 80 (emphasis added) (stressing that head coach’s accountability derives from relationship with student-athletes and responsibility for integrity of program, and not from any relationship with wrongdoers).

86. If presidents fail to set up an effective monitoring system to oversee expenditures with the athletics budget, they should be held responsible for any infractions that occur in that area. Compare this with the Gonzaga University Public Infractions Report of 1998, in which the university was held to lack institutional control because it failed to: (1) detect or prevent the director of athletics from misappropriating over 100 university-directed checks totaling over $178,000; (2) identify and monitor instances when the director of athletics misappropriated gate receipts, parking fees, and program sales receipts received by athletics personnel; and, (3) otherwise identify and monitor the director of athletics’ manipulation of the departmental budget. See GONZAGA UNIVERSITY PUBLIC INFRACTIONS REPORT

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Presidents might argue that the NCAA should not penalize them or hold them personally and formally responsible for lack of institutional control. They could assert that penalizing the institution effectively, albeit indirectly, penalizes them because they are the institution’s chief executive officers. They might also argue that, given their ultimate responsibility for the entire institution, they will be held responsible by the board of trustees or other governing authority, and by the broader public. Indeed, this might explain why many presidents resign, under pressure or otherwise, when their institution is involved in a major infraction of the NCAA’s rules.

There is much irony in these arguments against presidential accountability and personal penalty. Student-athletes, coaches, and administrative staff are regularly held responsible and punished for their involvement in an infraction, even though none of them has more ultimate responsibility for the oversight of the athletics program and budget than an institution’s president does. Student-athletes, coaches, and administrative staff are convenient scapegoats, especially when the institution (under the guidance of the president) is endeavoring to make its case that it has engaged in sufficient corrective action and should not be further penalized by the COI. Sadly, one senses that the lower one is in terms of status or power within the institutional structure, the more likely it is that he or she will be made a scapegoat and formally penalized, in hopes that the NCAA will refrain from penalizing the institution more aggressively. Presidents must accept their fair share of accountability in the infractions process.

IV. CONCLUSION

Historically, university presidents have exerted increased control over the governance and operation of intercollegiate athletics within the NCAA and on their respective campuses. Despite this dramatic increase in presidential power in the governance of big-time intercollegiate athletics over the past two decades, the NCAA has not held the presidents personally and formally accountable for their actions or inaction in the governance of intercollegiate athletics at the institutional level. Presidents, ostensibly the most powerful and responsible individuals on campus, are, at least in terms of formal penalties, seeking free rider status—they want the benefits

(July 30, 1998), available at http://www.ncaa.org/releases/makepage.cgi/infractions/1998070301in.htm. The university was held to have lacked institutional control, but the president also should have been held personally accountable. See id.
of responsibility in the governance of intercollegiate athletics at the Associational and institutional levels, without having to accept full responsibility for infractions in their own operations.

As one who grew up in Indian Country, I learned a great lesson about leadership from Paiute history. Among the Paiute, the Chief would not eat until all had been fed. As a consequence, starvation was relatively rare among the Paiutes. This lesson should not be lost on presidents of Division I institutions. As the individuals who are ultimately responsible for the institution’s operations, including the athletics department, presidents must be the first to accept responsibility for the consequences of failing to run their athletics programs with integrity. If they would accept such responsibility, perhaps we could worry less about the integrity of big-time intercollegiate athletics in the future.

Either the NCAA, through the infractions process, or a Board of Trustees, through the corrective process at the institutional level, will one day muster the courage to penalize the most powerful—the presidents—and hold them personally accountable for institutional failure to exercise control over their athletics programs. Given the power of presidents, and the likelihood that they will oppose efforts to hold them personally accountable, that move will not be an easy one. The day when a president is held personally accountable, however, will be an important day in the history of the NCAA, and will provide a much-needed incentive at the highest institutional level to ensure that intercollegiate athletics programs are operated with integrity. It will herald a new era—an era in which the laudable rise of presidential responsibility in the governance of intercollegiate athletics at all levels will be matched by an equally praiseworthy and much welcome recognition of personal accountability on the part of presidents at the institutional level.