



7-1-2015

Game Changers: An Insider Look at a Volatile Year in Sports

Andrew Brandt

Peter M. Donohue

Vince Nicastro

Ramogi Huma

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Recommended Citation

Andrew Brandt, Peter M. Donohue, Vince Nicastro & Ramogi Huma, *Game Changers: An Insider Look at a Volatile Year in Sports*, 22 Jeffrey S. Moorad Sports L.J. 353 (2015).

Available at: <http://digitalcommons.law.villanova.edu/mslj/vol22/iss2/1>

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Jeffrey S. Moorad Sports Law Journal Symposium

GAME-CHANGERS: AN INSIDER LOOK AT A VOLATILE YEAR IN SPORTS

The 2015 Jeffrey S. Moorad Sports Law Journal Symposium—*Game-Changers: An Insider Look at a Volatile Year in Sports*—provides an in-depth look into current issues in sports. The panelists participated in frank discussions on numerous topics, including domestic violence and concussions in professional sports. The panels included former professional athletes, respected media personalities, and distinguished attorneys. The Symposium was a must-see event for anyone interested in sports law.

PANEL 3

NCAA CHANGES AND CHALLENGES: A LANDSCAPE IN FLUX

Panel 3 featured a behind-the-scenes discussion of the future of the National Collegiate Athletic Association. In Part I, moderator Andrew Brandt discussed the future of the NCAA from the NCAA's perspective with Villanova University President Reverend Peter Donohue, Villanova Athletic Director Vince Nicastro, and NCAA Executive Vice President Oliver Luck. In Part II, moderator Andrew Brandt discussed the future of the NCAA with Ramogi Huma, the Executive Director of the National College Players Association and President of College Athletes Players Association, and Jeffrey Kessler, partner at Winston & Strawn and lead counsel in *Jenkins v. NCAA*, who are leading the charge against the NCAA with and on behalf of college athletes.

PART I

INTERVIEWER: Andrew Brandt

PANELISTS: The Reverend Peter M. Donohue, Oliver Luck,
and Vince Nicastro

Brandt: This panel will deal with the NCAA from the governance structure. . . .

Since, as he just noted, he signs my checks, I'll start with Father Peter Donahue.

Donahue: I told you to be nice.

Brandt: The President of the University. And again I think that's important. As President so much focus is on athletics, coaches, players, athletic directors even, but here's a President. When we hear all about the money and the reforms and the business of the NCAA, ultimately it does come down to the student-athlete which you're responsible for. Talk about your role as President in dealing with the hundreds of student-athletes that you deal with here.

Donahue: Sure, well I'd like to first say that athletics for any university or college is an important element of that institution. It is a way of really bringing particularly the alumni back into the circle, keeping them connected. It's a very important element that continues to push our name forward. It takes the University's message and mission out to a number of different people who are involved in the sports world. But for us, and I think any president would probably agree with me, first and foremost is the student and what makes the student an important element of the University. We are here because our mission is to educate people. Any college or university exists to give every woman or man that is coming into the institution the ability to step forward or to step up in the world and to create a new identity for themselves, to create a new direction for themselves. So any student that comes into the university, our goal is to educate that whole person, and you'll hear every university or college say that; that they are in the business, so-to-speak, or the enterprise of educating the whole person and allowing them to mature, not only mentally but spiritually, physically as well.

So, I think for myself and for many other presidents throughout the country, first and foremost is the student and any student who is an athlete, they are a student first, they're an athlete second. They participate in the school in a variety of different ways, not just solely athletic people but many of our student-athletes participate in all kinds of student functions here that takes them into very different configurations of the school, but they are given a great deal of attention as athletes as well. It is a very expensive proposition and I think we also have to remember we have a number of athletes, both men and women, in different kinds of sports. They are not always the premier sport. We have at Villanova, we have 24 varsity sports that comprise both men and women's teams. Some of them are big, high profile sports, such as our basketball program or our football program. Our men and women's programs in basketball are very prominent, they play all over the country; they give us a

great deal of national attention. But we also have women's field hockey, we also have swimming, we also have men's lacrosse, we also have women's lacrosse. So there are other sports that don't get that same kind of attention but they're still important members of the community and still are very important in the world of athletics here at the University. So we have to look at how do we give equal attention to all of them in some way or another or take care of their needs both in the classroom, outside of the classroom and on the athletic fields as well. So, for me, they are first students and athletes second.

Brandt: And Oliver. By the way, Oliver and I go way back. We were general managers together in something called the World League overseas. He was Frankfurt Galaxy, I was Barcelona Dragons. He came down to Barcelona and had a little 2 year old running around named Andrew. Okay. He's more well-known for being Andrew's father than anything, as he'll tell you. But governance from above, what Father Peter talked about in terms of the attention on men's basketball, men's football, you've got to deal with athletes at all levels. But you told me last night, you were hired by the NCAA to be "the campus", coming from being athletic director at West Virginia. Describe what that means to the audience, to be "the campus" at the NCAA.

Luck: So like Vince, I was an athletic director for many years and we deal with a lot of the on-the-ground issues where the rubber hits the road. Whether it's coaching issues, student-athletes, parents—there's a lot of different constituencies that we have to deal with. And I think with any regulatory body, at the end of the day the NCAA is a regulatory entity, there sometimes can be a drift towards not realizing how a particular policy may get implemented on campus. And that's particularly important with the NCAA and with intercollegiate athletics because we have so many different schools—there's over, I think, 1100 members between Divisions I, II, and III, just in Division I alone, there's 351 schools. There's a wide variety of revenues amongst those schools, there's a variety of assets and how many compliance officers you may have. That varies even amongst the so-called 65, the Power 5, there's a pretty good disparity amongst the resources. So I think it's important that any regulatory body really have a pretty good realization of how those policies, how those rules—we had 5800 by laws in the NCAA rule book, that's a lot—how do they get implemented on campus and what can we really expect our coaches, our student-athletes, our boosters, or our compliance officers, our staff, what can we expect

them to do because there's a good bit of work. So, I've tried to be, at least in the few months that I've been there, a sort of representative of the difficult on-the-ground decisions that happen on a campus. Because that's really where the rubber hits the road.

Brandt: And you talked about Power 5, a lot of new implementations and we're going to hear about challenges and reforms that are being offered to the NCAA, but I'm not sure everyone knows what implementations have already taken place. Let's acknowledge those.

Luck: Right, maybe just a real quick summary of what just happened the last four or five months. The new governance structure has been put into place and right now there are effectively, in Division I two major governance groups. There's a so-called autonomous group, that's the Power 5 schools, the 65 schools: Pac-12, Big 12, Big Ten, ACC, SEC. And then there's the Division I Council. And the Division I Council represents all of Division I. The autonomous group does have the ability, in certain subjects, to make their own rules and they've done that starting at the NCAA Convention back in January. The autonomous group came together, they passed, I think a number of issues that will be beneficial to the student-athletes: the full cost of attendance, guaranteed scholarships, multi-year guaranteed scholarships.

Brandt: They *can* offer that?

Luck: They can and *will* offer that.

Brandt: They don't have to?

Luck: The 65 committed to offer, for example, the full cost of attendance to all of the student-athletes in the 65 and the guaranteed multi-year scholarships to the schools in the 65. And they did it in a permissive way that allows schools outside of the 65 in Division I, for example Villanova University, to do some, none, or something in the middle, because we want to make sure we give enough flexibility to some of the smaller schools that don't have the resources of the University of Texas or any of the big football schools.

Brandt: And Vince when you hear that, what's your reaction? You can spend up or not spend at all. How do you get involved?

Nicastro: Just to back up a little bit, we've been appropriately engaged in this discussion for a couple of years as this has been heading down the path of a new governance structure and this autonomous group. And frankly, a lot of the things that have already been adopted in this initial package of legislation are things we're very supportive of. There was some anxiety when things first started about it but in this first group of initiatives, you're looking at issues

that directly impact the students in a positive way and in large part, we had already been offering those things, four year scholarships and lifetime educational fund and who's not supportive of offering our student-athletes better and more nutrition during the course of their time here? The full cost of attendance allows us to provide more resources towards their education. They're *all* really positive for the students and we think that's really important and we've been supportive of that. There will be a cost to that; we think we can manage it at this point. We want to make sure we stay nationally competitive in certain sports, so we're going to try to compete, as this may evolve into a competitive issue, which most people speculate it will, but at this point, I think we have either already adopted these initiatives previous to this legislation or are very supportive and will moving forward because they have been really focused on supporting our students, which is critically important.

Brandt: With the cost though, for you or for Father Peter, is there a downside to some of the other sports we've talked about? I mean 24 sports with only a couple with some perhaps mandated changes, is there a downside consequence to other sports?

Nicastro: I will jump in. I think in the short term, no. But I think in the long term, not just speaking for Villanova, but I think the collective anxiety of schools in Division I, even schools at the highest level are—how slippery will the slope be? How much will it cost? And could that create some marginalization of some sports that aren't football and men's basketball? And as Father alluded to, on many campuses across the country those Olympic sports are *critically* important to the students' experience, to their overall development, and I think we all have some anxiety about the potential marginalization of those sports, access for those students to great universities, and that impacts both men and women potentially in the future. So, I think there's some anxiety in the industry about that and it's something we really need to stay focused on.

Brandt: And as governance, how do you address that anxiety of the athletic directors and Presidents?

Luck: Well there are a couple things. I think Vince is right, there is a little bit of an angst or anxiety that exists on campus regarding the sports that don't have much or any revenue attached to them. Historically, the NCAA has required, for example, 16 sports—you have to sponsor 16 to be a member of Division I, and, theoretically, there might be pressure to change that number downward to 14 or 12, who knows, it remains to be seen. I think as Vince pointed out, Olympic sport participation is important, I think it is

that broad-based programming that we really talk about a lot, but it's also providing access to higher ed for a lot of kids that otherwise may not be in a position to afford higher education. So it's important that we do what we can to make sure that we have a healthy diversity of sports on campus. I think, quite honestly, the worst thing that happens to an athletic director is when you have to drop a sport. As West Virginia was entering into the Big 12, we had a chance to add a sport, men's golf, a sport that we had for fifty years up until the 80s and we had to drop it for financial reasons and we just added it this season, which was the first time since 1982. And that's a great feeling, to bring some additional young men on campus that can participate. So I think it's important that we keep our eyes peeled for any issues that end up affecting sports that are a little bit lower on the food chain.

Brandt: Yeah and I think we hear a lot about, even a word such as, that has some of a derogative meaning, such as exploitation. And I think it's important for you to explain—talk about, Father, the value of a scholarship beyond participating on an athletic field.

Donahue: Well I think it's important to remember that an athlete, no matter what sport they play whether it be a high profile sport or an Olympic sport which is not as high profile, not as revenue generating, we expect, the coaches and the athletic program, expects the same kind of workout regimen, the same kind of equipment needs, there's all of those kinds of things. Just because you play men's basketball doesn't mean you're asked to do more in terms of your physical training than you would if you played women's field hockey; the same demands are on them. There are a lot of demands put on them. And we have to, I go back to the idea that they are students. These are 18 to 22 year olds that have come to an institution, first and foremost, I hope, to get an education and that scholarship provides them that opportunity to not only use their athletic abilities, but to also use their intellectual abilities and to develop their intellectual abilities that are going to be able to allow them to move on from college or university into another career, into another life. They are not all going to play professional sports. Very few of them will actually go on to play professional sports. So the scholarship gives them that opportunity to position themselves in the world in a very different way. And I think as an institution, *we value that*.

We give all kinds of scholarships: we give scholarships for athletics, we give scholarships for merit, we give scholarships for need. We recognize the abilities that we give to students, or the potential

that we give to students by offering them the opportunity to enter into a world of higher education or a world of a career that they are really suited for. So, the scholarship by its very nature helps them to do that. But we do that on many different fronts and we require and demand of our students many different things both, as I said, in the classroom as well as out of the classroom. Education happens in an institution sometimes more outside the classroom than inside the classroom, particularly at an institution like this or at any large college or university which has a large residential population. There is a maturing process that happens. And I think if all of you looked at your own college experience, when you entered and when you left, I hope, you were a very different person. If you weren't, something went wrong. So, the institution itself invests in the quality of our students and invests in the future of our students and the scholarships allow them to do that.

Brandt: Oliver, you've been at the NCAA two/three months I'd say?

Luck: Yes.

Brandt: Why the move? What's your vision as being one of the most senior people there and bringing a background of tremendous practical experience?

Luck: Well, I'm a big believer in college athletics. I think our enterprise, which doesn't happen anywhere else in the world, sometimes we forget that. My mother was born and raised in Germany, came over after the war, has a degree from a very good institution of higher education in Germany and she doesn't get alumni solicitations to come back and watch a soccer match or be a part of that glue that holds the alumni to their school. So, we do something that's very unique and it really goes back to that classical sound mind and sound body kind of an idea. And it's a great enterprise.

I think we provide \$2.7 billion every year of scholarship aid to student-athletes across all of our schools. I'm sure you all here have heard the numbers that there are 460-some thousand student-athletes, 19,000 teams—and I think it's a great enterprise. Sure we make mistakes because it's a people-driven business and we're all flawed in some form or fashion. But it's a great enterprise and I think that it's a challenging time right now in intercollegiate athletics, there's no question about that. So, because of my desire to see intercollegiate athletics continue, I believe in the amateur model. I think, quite honestly, in the 21st century, we may have to modify that amateur model a little bit because society changes and our institutions need to change with them. But I think it's an absolutely

great enterprise. I know what it did for me as a student-athlete. I have two kids who went as student-athletes through school, a football and a volleyball player, and I've seen the benefits for them. And I just believe in the core values that exist within our enterprise. And I think as an NCAA person, I can help maintain what's good about our enterprise and ideally fix some of the things we think can be fixed.

Brandt: I went to Stanford by the way. I went out a couple years ago when he was a junior, Andrew Luck. I'm in the student cafeteria and I see this guy eating a pizza hovering over his computer in the corner. It's the best player in the country. It's a real testament to Oliver. But in that, does that experience, having a superstar son who acts nothing like a superstar, influence the way you act in your role?

Luck: Well I think student-athletes at the end of the day, as Father Peter said, need to be students first and there's a pretty big inequality gap in terms of the preparedness that students have coming out of high school. It's a big country and sometimes can be a messy country in terms of secondary education, and some kids are prepared for a rigorous academic institution like Villanova, others that are not. But we have such a wide variety of higher ed institutions, 1,100 in all, 351 in Division I, that I think there's always a good spot for any student-athlete who is interested in academics and has the requisite physical skills to participate in that sport. So, I've been blessed with four great kids in total but everybody's a little bit different, but I think because of the diversity that we have in all our institutions, there should be a proper home literally for almost every high school graduate who wants to be a student-athlete because, again, the lessons that are learned during those four or five or even more years, I think, are really valuable lessons that I think are critical to develop leadership and teamwork and those types of attributes that we always talk about as being associated with college athletics.

Brandt: And finally Vince, when you get together with your athletic director brethren, what concerns you? What do you look out in the horizon and say, "this is something we got to get in front of?" And also mention the continuing growth of compliance. I know a lot of people are looking for growth opportunities in sports, compliance seems to be one of those.

Nicastro: So, I don't know where to start in terms of concerns. I mean, we're in a very dynamic environment obviously and I think this is a moment in time where there are a lot of things coming at

the industry as you'll talk about later. But, I think one is the collegiate model. I'm also a very firm believer in the collegiate model. I think that athletics can play a really, and I've seen it over many years, a very very critical role in the education, development, maturation of young men and women. It's really positive. You hear a lot about the negatives but the vast majority of men and women who participate in athletics, it's very clear, that it's a hugely positive experience for them in their development and I fear that we could lose that to some extent and I want to make sure that we find a model that works; the model may not be perfect but I think we're making changes towards finding a model that's more contemporary and works.

We've probably talked about this forever, but the commercialization, and we're all involved in this, this commercialization, because there's pressure for us to raise money and invest in our programs and stay competitive and reach all those strategic goals that we have in mind for our programs. But at some point, do we lose balance there? So it's always trying to keep that in balance. But I think, at the end of the day, it comes back to leadership on campuses and the national governing bodies and in other areas, whether it's presidents, or ADs, or other leaders to make sure that the core values are protected and can we preserve this model, which the three of us here feel is really valuable? Do it in a more contemporary way and establish it and set it up for the long term so that generations of students to come have access, have a great experience, and when they leave their universities, they leave, as Father said, more mature, more developed, and ready to go out into the world into their next chapters.

We really do talk about that, I think there are some people that think ADs just talk about how much money can we make, how many things can we get for our teams, what kind of advantages can we get competitively, but my experience has been that the ADs, by and large, working in this business are really committed to helping young people and I think it's coming up on us to try to maintain that.

PART II

INTERVIEWER: Andrew Brandt

PANELISTS: Ramogi Huma and Jeffrey Kessler

Brandt: We heard about the NCAA from leaders of the school, of the NCAA, and the structure that they are trying to preserve and

acknowledge that there has been some change. How do you respond to that? Where do you see change going? And, ideally what's your vision for CAPA?

Huma: First and foremost we have to recognize that there are a lot of unjust policies that college athletes are subject to. We have a system where college athletes in contact sports are not protected like they are in the NFL level and there's a lot that can be done for college football. The NFL and the NFLPA got together and created a very fitting blueprint to begin to protect athletes on the NFL level—has not trickled down into NCAA sports and that's a major problem.

Another thing is that anytime you see an athlete injured in a game—you guys might remember, a couple years ago, Kevin Ware in the March Madness Tournament, snapping his leg in half, and the questions arose, "What's going to happen? Is he going to be stuck with the medical bill? What about a few years down the line if he needs a surgery?" And the fact is that college athletes aren't guaranteed anything. Schools have the option to leave players with all the medical expenses even if they're hurt while they're wearing school colors in the NCAA Tournament.

You have graduation rates that still hover around 50% for football and basketball players, for players who fuel the multi-billion-dollar revenue stream. A lot of players come from low-income backgrounds and it's tough to get by. The universities recruit these players based on fully supporting their education, yet, they've been short-changed in terms of the cost of attendance. Most players have to pay out of pocket, for various educational expenses, \$3000-\$5000 a year, *unknowingly!* So, they walk into this thinking everything's covered, and it's so hard to get by. And, they wonder why, if someone gives them a free meal, they can be punished. A lot of due process issues as well.

So there are some compelling reasons for college athletes to mobilize, and really put the industry in a situation where it *has* to move. And, since 2001, we have been advocating with the non-profit, the National College Players Association—raising awareness, conducting studies, protests, petitions, you name it. We've even passed a couple bills on the state level, and yet, the industry just kind of took the hits and kept going—business as usual.

And really, the concussion issue, for me personally, was the reason I thought college athletes needed to assert more of their legal leverage, which included the option of collective bargaining. For me, the wakeup call was when Junior Seau killed himself and they

eventually found CTE. We knew on the college level, right here in Pennsylvania at Penn, Owen Thomas, a linebacker, at 21 years old hung himself. They found CTE in his brain at 21 years old. Not too long ago, Derek Sheely, Frostburg State, with obvious concussion-like symptoms, the coaches reportedly kept in him practice, pressuring him, cursing at him—well, he died. No NCAA investigation. The NCAA would instead investigate Johnny Manziel and Todd Gurley over whether or not they took a few bucks for selling their jerseys. That was investigation worthy, but not the death of a player.

We looked at what models are appropriate in this case—how do athletes protect themselves in a multibillion dollar sports industry, in *professional sports*? We looked to the pros, and we saw the unions and we saw the NFLPA *pressure* the NFL—a lot of talk today about how the NFL’s doing it right; they didn’t do it right on their own. The NFLPA backed them into a corner and it wasn’t even during collective bargaining. They shamed them into it. They were organized, they had power, and they got some concessions. They continued to improve. But, when I saw the NCAA Sports—that includes all the college commissioners who we asked to meet with to address this issue and the NCAA President—refused to meet and refused to address the issue simultaneously, for me, personally, that was the moment I realized, even in life and death situations, this industry will not move and we need something stronger than an advocacy group. We need a union.

Obviously, we went to Northwestern. Kain Colter, the quarterback at the time, contacted us right around the same time I was realizing this, and said, “college athletes need a union. We need something. we need some help. How can we be a part of it?” We set out to do that.

Not long after we won the ruling in Chicago that Northwestern football players are employees of the University, did we see the state of Ohio ban collective bargaining for Ohio athletes, proactively. We saw that just this year, earlier with Michigan. We saw Congress held hearings to demonize the players from Northwestern for exercising their rights as American citizens—how could they? Let’s have a hearing on it and demonize them and make sure that possibly we can sway the people up here or the National Labor Relations Board into thinking how we think. And, I would say this: there are a lot of opinions on how reform should come about, but I think we should agree on some ground rules.

Reform cannot come at the sacrifice of players’ rights—the rights that every American citizen has, whether it’s under labor law,

antitrust law, or any other law. The solution cannot be to carve them out of American society and treat them as second-class citizens. I think for institutions of high education to embark on that is the wrong way to go.

So, I think there are preferences—I think there are systems here. As we heard earlier, there is the collegiate model, the NCAA model—however it's termed—and there's a lot of preferences. But really, these preferences, as these lawsuits are emerging, you're seeing that these preferences are really less about the *values*—for instance, the concussion case, it came out as the NCAA's defense, the NCAA has no legal duty to protect college athletes. No legal duty to protect college athletes—the NCAA. And in a more recent court filing, they said the NCAA has no duty to prepare quality educational opportunities for college athletes. So, you're seeing the NCAA run away from these so-called values that it's standing to protect, but it's running toward *value*, and I think that's the problem. There's a moral compass. Whatever pays most is what the NCAA gravitates towards, and that's not a system where college athletes are going to be able to be treated fairly. College athletes need independent representation—*independent* representation, just like the other pros.

Brandt: Is unionization the answer?

Huma: Yes. It's not a mystery, because it's the answer in the NFL, the NBA, Major League Soccer, and baseball. The fact that they are also students does not negate the fact that they are athletes in professional industries. They are professional athletes. They are paid to play.

When I played at UCLA, they cut me a check for playing football and if I didn't show up to practice, that check would not be cut. It's conditional upon my athletic services when I was at UCLA—same with the players at Northwestern or anywhere else. So, is that the answer? Absolutely. And the idea that being a professional athlete on a college campus is somehow not compatible with also being a student on a college campus or an employee on a college campus is ridiculous.

I'm not sure how it works here, but at most universities, universities employ students all the time and none of them claim that it's detrimental to their education. In fact, it's how they pay for their education. According to Ellen Staurowsky from Drexel University, you have 65-80% of regular students who are employees and it doesn't harm education. You don't see universities mobilizing to

get rid of the “employee status” on their campus of the students who are putting themselves through school with a job.

Brandt: Jeff, before we get to litigation, your comments on unionization as someone who has been a counsel to so many sports unions.

Kessler: Well, I commend Ramogi’s efforts. It is a long and difficult battle that he has undertaken. I think it would be fantastic if players could have an independent voice like that to represent them. So, I have nothing but full support for those efforts.

Brandt: When you moved your practice into this area, what was your motivation going from representing so many professional athletes into the amateur phase?

Kessler: So, the factors that motivated my interest in getting involved to try to help out some of these athletes had to do with what Oliver Luck was referring to as the 21st century. And, looking how have two sports in particular completely morphed from the collegiate model in every single way except one—and that’s to give fair treatment to the athletes. So, I’m talking about Division I men’s basketball and the highest level of football and I’m really focused on the five power conferences plus—the plus being those who chose to behave like the five power conferences. And, when you look at that world what you see is you have educational institutions who have decided to become major businesses, and that’s a perfectly appropriate choice if they want to do that, and you can debate “should they do that?” and there’s some like the Drake commission who say they shouldn’t do that, but they *have* done that. And, the consequence is that they are now collectively—Division I men’s basketball and football—the second-largest professional sports in the United States. It’s only behind revenues of the NFL. It’s higher than the NBA. It’s higher than the National Hockey League. It’s higher than Major League Baseball, in terms of the billions of dollars they generate. They own their own sports cable television networks—doesn’t sound like an educational business to me; it’s just a business! It has nothing to do with being schools. They pay their coaches \$8 million, \$10 million—higher by far than any university president. Not even close to any university president—take five or ten university presidents to make what one of these coaches make. Now why is that? It’s because they’re awarding these coaches for engaging in these very substantial business operations.

So, what brought me into this is, why is it only the athletes, most of whom come from very difficult backgrounds in many cases

in these two sports, don't have much; many of whom do not get degrees, we can all say they should, but many of them will not get degrees; almost all of whom will not become pros. So, it's not like there is some payoff for them down the road. So their only opportunity to benefit from this, to be taken care of in any way, is if they're allowed to empower the schools to make decisions. And, I want to be very clear about that—what I'm seeking is not to require the schools to do anything. What I'm seeking is to empower the schools and the conferences to make their own decisions, to remove the shackles of the NCAA rules (which I believe are unlawful) and allow the University of Texas to decide, how is it fair to treat this athlete who's generating all these millions of dollars for this school? And, I trust that they will make good decisions. If there are schools who don't want to be in that business—which may be most schools in the NCAA—then they won't be in that business and they won't have to respond to these competitive pressures. I mean we have the collegiate model in this country; it's called Division III, it may even be Division II, and it may be a lot of the sports in Division I that have not morphed into these two businesses. But for these two businesses, to me, it is unconscionable and it is unfair that everyone benefits financially except these athletes.

Brandt: How do you respond to the gains that are being made that was discussed just before us?

Kessler: I think it is the start—a very small step—of down the road, getting to a fair system. But, let's not exaggerate how far down the road they have gone. For example, let's talk about the scholarships. Scholarships are wonderful. Most of these students are needs-students. If they were in the university, they would get scholarships whether or not they were athletes. Second, the scholarships themselves—if you say, well maybe they wouldn't get into the school at all if they weren't an athlete, which is true in some cases, which raises a different issue about whether it's about education or athletics, but let's put that aside—the marginal cost of not taking another tuition or not charging another room and board fee, is trivial. It's not the full cost of the scholarship, it's a marginal cost. They're not hiring a new instructor for that athlete. They're not building a new building for that athlete. It's marginal cost analysis, so it's a very small cost.

The University of Texas's goal, I believe, is to get to \$200 million in revenue, basically from football and basketball, and they're going to get there. They're getting very close to \$200 million dollars and then they'll move on from there. So, the idea that it's a major

move for them to go to the cost of full attendance for these athletes—I mean, it’s nice. It certainly will benefit those athletes. It’s nice that they’ll now provide nutrition so they don’t have athletes on national television saying they’re hungry at 10 o’clock at night because they literally have nothing in their pocket to go buy a slice of pizza. We heard about Andrew Luck who came from a nice family. He could afford the pizza. There are a lot of players who can’t. That’s all good, but it still so far from a fair system that we have a lot of work to do.

Huma: In terms of the change, first, is to recognize that this change was not done voluntarily and out of the goodness of their hearts. They are facing the *O’Bannon* suit. They are facing the *Jenkins* suit. They are facing a unionization movement. And, as an advocate for fifteen years now, I can clearly point out that those are the reasons why this industry has been taking it seriously. So, the answer for us is not to let up. It’s to pour it on and to keep the pressure up. The other thing is that what they give today, they can take away tomorrow, unless it’s legally guaranteed. They’ve done that. This stipend—this cost of attendance stipend—was approved in 2011 and within weeks it got rolled back, quietly. They announced it very loudly and it got rolled back quietly. So, what guarantee do players have? Northwestern said they have 4-year scholarship guarantees subject to a long list of things you have to abide by or it’s not a four year scholarship. There’s loopholes in everything they do. A collective bargaining agreement is a legally enforceable agreement that can provide sound protection for the players who are under that agreement.

Brandt: What about the Olympic sports? Cost has to come from somewhere, will it be taken from them?

Huma: There’s a couple things. Number one is to point out the *Sports Business Journal* in 2001 did a study that coincided with a lot of analysis that we have done with Ellen Staurowsky on TV deals. \$1.2 billion in brand new money is coming in *every single year*—very inconvenient for the NCAA apologists who say there is not enough money, and look we’re going to have to rip away the Olympic sports. Why would you have to rip away the Olympic sports? Where is this money going to go? We’ve seen it. We know where it’s going to go, because in 2000, there was a CBS deal that provided another influx of money and every last penny went to salaries and luxury boxes. All that money is going to go to salaries and luxury boxes unless we’re successful, unless Jeffrey is successful. And when I say successful, I mean redirecting these resources into medical cover-

age for current and former players, into an education trust fund to incentivize and support players to actually graduate and complete their degrees—what better use of the money should there be? Instead, the alternative, the current NCAA model allows that \$1.2 billion to go directly into the pockets of the coaches, administrators, luxury boxes, and leave the players high and dry, just like it's been.

Secondly, in addition to the revenue stream, there's wasted money—they call it gold plating in economics—where you have coaches that are making 5, 6, 7 million dollars because there's a lot of money out there and they don't know where else to put it. They can trim the fat.

And number three, it is helpful to point out that among all the schools that were mentioned in the previous panel, many of them are in Division II where there is no revenues. What happens to the Olympic or non-revenue sports in Division II? They exist! According to the doomsdayers, they shouldn't exist. They don't generate money, yet almost 300 schools participate in Division II where players have scholarships. I think the Reverend on the panel pointed out that they do exist because they have value to the University outside of the revenue streams.

So, to put that all together: they shouldn't go away unless and athletic director or university president has been hungry to put them to rest (and this would be a Trojan horse potentially for that, but that would be on a school-to-school basis).

Kessler: I want to elaborate on that last point. So, most of the university is not like men's basketball and football. It's not just the rest of the sports. How about the debate team? Or the newspaper? Or the radio station? Or the band? Or the glee club? Or the performing arts group? Or the English Department? Or the History Department? All parts of university depend on tuition, government assistance, other sources of revenue. Where is it written that the other sports somehow have some greater claim to be funded by starving men's Division I basketball players who are entitled to a little bit of this money? It just makes no sense! It's a construct to say this.

And why would the money if some of it went to the athletes—and I'm not saying all of it, but if some portion went to the athletes—why wouldn't the money, if you needed it for anything, it really should be—frankly, the English department has as big a claim as the newspaper does or the lacrosse team does—but, if it's to go anywhere, why wouldn't a little of it come out of Nick Saban's salary?

In other words, why is it written that it only can come by *not* paying these athletes anything when you have the revenues increasing in this phenomenal way—and by the way, as Ramogi said, that increase is not going to these sports. So, where is it going? It's not suddenly like crew has become a hundred times more expensive. Where are those increases going? We know where they're going. Some of it should be going to the athletes.

Brandt: Is it fair to say, Jeffrey, that you want a free market system for athletes?

Kessler: What I like to do is to have the same laws apply to these two business as apply to all other business. So what does that mean? Under our antitrust laws, if GM and Ford and Toyota and Mercedes got together and said we're going to fix the prices of our workers, they might be criminally prosecuted, because it's actually criminal price-fixing. But even if you put that aside, it clearly would subject them to a triple damage suit for violating the antitrust laws. So you have to ask yourself, why are these two businesses different? Why do they get to fix their labor cost at essentially zero? And the reason I say zero is because, as I said, most of these athletes would get scholarships anyway, whether they were athletes or not. I know they say, "the scholarship." That's what they give as a matter of need in virtually all of these institutions. So why do they get to do that? And they say the reason they get to do that is either (1) because they have to preserve the sanctity of the amateur model, or (2) that it will somehow lead to competitive balance or (3) that it will somehow disrupt their role as students. Those are the three justifications.

The first justification that there's something intrinsic about not paying the students is the same justification they used to make about the Olympics; it's the same justification they used to make in this country about the U.S. Open for tennis; it's the same justification they used to make about professional golf in this country. I could go on and on about sports that their intrinsic beauty was amateurism and they would have no value if the athletes got paid, and we now know that all of that is wrong. The opposite is true. The sports have become more popular since they have allowed people to actually get remunerated for some way. So, I just don't think that's right. Why people love college sports is that they are doing it for university, just like they like in the Olympics, they are doing it for the United States. It has nothing to do with who gets the money. The idea that you will stop watching Texas football if the current

coach is making less and the players are making more—not happening.

Number two, competitive balance—I’m sorry to say this. There is no competitive balance in sports. Does anyone think that Duke and Kentucky are balanced with the University of Delaware in men’s college basketball? Does anyone think that Columbia is balanced with Alabama or Oregon in football? There is no balance. It just doesn’t work as a justification.

And, the third one is that students have to be integrated into the school, because if they had money that would be corrupting. Well, no one told Jodie Foster when she was at Yale that it corrupted her when she made movies. Stanford has a program where they have a seed fund to try to make their students millionaires or billionaires by starting up internet companies while they’re on campus as students. No one says it’s going to disrupt their student life to be able to have that opportunity. And no one tells the other students that they can’t get jobs working for university—many of them do; it’s the only way they get through. So, again, I don’t think these justifications work. What is the justification? The justification is: the schools don’t want to pay the money to the athletes because you make more money if you don’t pay your labor. Same thing GM would like. Same thing Toyota would like. But, it’s illegal.

Brandt: Do you want the number one recruit in football being bid on?

Kessler: That’s up for the schools and the conferences to decide. It’s up for them to decide what they think is a rational system. If I was the NCAA, what would I do? I’d want to sit down and I’d want to negotiate a settlement which would provide a system that would fairly take care of my athletes and maybe also compromise in some of these other points. You can do that through a settlement. That’s why you have agreements in the NFL and in the NBA, with unions and without unions. We had litigation settlements where systems were put into place, which greatly advance the players’ rights. It gave them free agency. It gave them more money. But, it also did things like put in salary caps and other things, which was a compromise. You can *do* that in the legal system. Or, you can just say, “Let’s go to war! Let’s fight this until the bitter end. We’ll take this to the Supreme Court.” In the end, that’s a decision for the NCAA to make.

Brandt: Where does the suit stand today?

Kessler: We have on July 23, a hearing to certify the class. Once the class is hopefully certified, we will finish discovery. We are

in the discovery process. Then there will be a trial. I am hoping to get a trial in 2016.

Brandt: Where are you in terms of unionization?

Huma: We won the ruling by the Chicago Regional NLRB director that Northwestern players are employees and have the right to unionize. There was a vote taken last April. In the meantime, Northwestern asked for review from the full board, and that's where it sits. The full board has it. It is a complete and utter mystery as to when they will announce what they rule. It could be this afternoon. It could be six months from now. We have no idea when that will be announced.

The scenarios are that they rule for us and they rule against us. If they rule against us, it will be a pretty definitive ruling. If they rule in favor of us, then they will open up the votes that they players took a year ago—some of those players are no longer there—but, they would open it up and see whether the majority ruled in favor or against, and that would decide whether or not the players would have a union. What's most important here is that we win the ruling itself.

If we win the ruling that means that college athletes at private schools in football, Division I basketball are employees—that they have rights. And that's an important point in this whole transition of reform. And at that point, if the players happen to not vote for the union at that time, they can choose to join the union at any time in the future. Most important is establishing that college athletes are employees—the federal government defining football and basketball players in Division I as employees as a precedent. It is a very big way, an important way, to empower these players, who otherwise, without people like Jeff, without employee status, are subject to the preferences and conflicts of interest.