

College Sports Reform: Present status and future direction

a CLIPS GUEST COMMENTARY

By Frank G. Splitt, *The Drake Group*, 10-17-08

With a Commentary by Amy and Robert McCormick, *Michigan State University College of Law*

Ed.-As he has done many times, our guest author ambitiously calls for Congressional intervention "to significantly improve the transparency, accountability, and oversight of the operations of the NCAA."

We would like to remind our readers that we constantly strive to make College Athletics Clips a bi-partisan e-publication (that is, articulating both sides of an issue, rather than none). In the commentary below, Frank Splitt of the Drake Group unambiguously states his case for Congressional intervention into college athletics oversight. One might say that this is an Obama-like initiative (i.e.-more regulation). There are surely Clips readers out there who have a different viewpoint (maybe a McCain-like, non-regulation solution?) We'd love to hear from you. As always, we welcome those with opposing viewpoint to any of our guest commentaries to state their case as well. Please submit your commentaries to: nick@collegeathleticsclips.com

After some 80 years of failed reform, it appears that America's sports culture has triumphed over the academic mission of its colleges and universities as well undermined the educational mission of our nation's high schools. As evidenced by the plethora of scholarly articles and books on college sports reform, there can be little doubt as to the fraudulent, tax-avoiding nature of big-time collegiate athletics—especially in the football and men's basketball programs franchised by the National Collegiate Athletics Association (NCAA)—and that unless Congress gets involved, America's system of higher education will continue to be held hostage to the professionalized collegiate sports entertainment industry.

There has been a growing sense of frustration among reform-minded faculty and organizations stemming from the lack of responsiveness from the U.S. Congress re: a bipartisan follow up on the effort of Rep. Bill Thomas (R-CA, Ret.), the House Ways and Means Committee Chairman for the 109th Congress, to have the NCAA provide justification for its tax-exempt status, as well as to the effort of Senator Chuck Grassley (R-IA), the past Chairman and now Ranking Member of the Senate Finance Committee, to significantly improve the transparency, accountability, and oversight of the operations of the NCAA and the athletic programs at its member institutions. However, today's financial crisis could very well precipitate a dramatic shift away from the federal government's laissez-faire 'oversight' of America's financial system and business enterprises.

There are striking parallels between the uncontrolled, greed-driven, anything-goes, operations and the excesses on Wall Street with their misrepresentation of material assets in the form of disadvantaged financial instruments and those in the NCAA's college sports business with their misrepresentation of material assets in the form of disadvantaged academic instruments—so-called student-

athletes. There has been a mantra-like repetition in the articles exploring the roots of America's financial crisis of TAO—Transparency, Accountability, Oversight—as a path to help ensure business integrity. This could very well mean more intense scrutiny and rule setting to curb excessive commercialization and corruption in college sports.

In the near term, sporting events sponsored by the NCAA, will serve as convenient distractions—diverting the public's attention from our nation's economic woes. In the long-term, Congressional scrutiny of the tax-exempt status of the NCAA and its franchisees would explode the student-athlete myth and thus have a negative impact on the professional level of play in their big-time athletic programs—forcing the NBA and NFL to operate their own minor leagues.

With but few exceptions America's colleges and universities are in the process of deteriorating while on their government subsidized quest for sports related revenues—abandoning their souls, compromising their integrity, and warping their academic missions. There are no visible means to reverse what appears to be a downward spiral into a pervasive 'beer and circus' modus operandi at many of America's colleges and universities. This scenario and its long-term, deleterious consequences are either invisible to, or ignored by, the general public as well as those in the highest circles of the U.S. Government

Meaningful reform in collegiate athletics will certainly not be led by the NCAA, or athletic conferences, or the Knight Commission, or college/university presidents and their governing boards, or the U.S. Department of Education, or state/regional accreditation boards. Faculty-based, reform-minded organizations such as the The Drake Group and the Coalition on Intercollegiate Athletics (COIA) can help lead the way, but simply do not have the wherewithal to confront the collegiate sports entertainment industry by themselves, more specifically without the help of the U.S. Congress.

The history of college sports reform tells us that no matter how compelling the arguments for the institution of corrective measures, market and political realities dictate that nothing of consequence will be done for a variety of reasons, none the least of which are the facts that there is an abundance of corrupting, tax-free money and related benefits at stake. Also, members of Congress—like sitting school presidents—want to keep their jobs so look the other way separating what they think is right from what they think will work. George Stephanopoulos once opined: "Judging how the world will judge what you do—how a position will "play"—is an essential political skill. If you can't predict what will work, you can't survive in office." This is especially so in this election year when circumstances dictate a focus on more dire concerns such as the financial crisis and terrorism.

There is little public outrage over drugs and corruption in college sports—likely a combination of public apathy and the superb job done by the NCAA's Public-Relations Department. In the end, tolerating cheating in college sports via

performance-enhancing drugs and academic corruption appears to be preferable to confronting the formidably resourced NCAA and its member institutions. As Stephen Ross, chairman of Penn State's Sports Law Institute, has put it: "Congress only cares if the people they talk to care." So, if their constituents aren't complaining, they aren't either.

Consequently, the slow but sure decline of America's educational system will continue, unless and until the Congress restrains the growth of the professionalized college sports entertainment industry by forcing the NCAA and its member schools to comply with their tax-exempt purpose of keeping sports as "an integral part of the educational program and the athlete as an integral part of the student body"—demanding measures of transparency, accountability, and oversight that are adequate to this task. Since these measures strike at the very core of an enterprise built on myths and falsehoods that are best shrouded in secrecy, they would be strongly resisted by the NCAA by admitting nothing and denying everything, but obfuscating and litigating if need be.

Under normal circumstances, it is most likely that Senator Grassley's congressional colleagues would simply continue to ignore the issue—leaving him to stand alone in his effort to have the NCAA provide justification for its tax-exempt status. Under this circumstance, reform would not come anytime soon, *if ever*, no matter how corrupt, fraudulent, and debilitating the operations of the collegiate sports industry continue to be.

In spite of this pessimistic view, reform is not dead, for these are definitely not normal times. Today's epic financial crisis coupled with the rise of intense global competition may serve as a loud and compelling wake-up call for Americans at all levels to rise above their obsession with professional-level college sports entertainment—coming to understand that the continuation of this obsession would not bode well for the future of higher education in America as well as for America's stature on the world stage. This understanding could eventually pave the way for America's colleges and universities to reprioritize their values—making capital and human resource investments that place academics above athletics.

The persistent efforts of Senator Grassley and reform-minded faculty organizations such as The Drake Group and the Coalition for Intercollegiate Athletics could help catalyze a process whereby college sports reform would come sooner rather than later. Only time will tell if the Congress and the American public hears and responds to the wake-up call.

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The opinions, intimations, conclusions and inferences made in this commentary are solely those of the author; they do not reflect the opinions or endorsement of College Athletics Clips.

Supporting Commentary by Amy and Robert McCormick, Professors of Law at the Michigan State University College of Law and authors of a recently published San Diego Law Review article, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*" (available at SSRN, <http://ssrn.com/abstract=1281648>):

We agree wholeheartedly with Frank Splitt's observations. It took the current, Wall-Street- inspired, financial crisis to force ideological opponents of regulation to rethink their traditional positions and to support oversight and regulation in the financial markets. Often, it is only when important constituents feel pain directly that Congress and the President will act to do that which is obviously right (in this case to regulate credit default swaps and lenders' risky lending practices so that "buyer beware" is not the only protection in place for investors and other economic actors).

If widespread voter pain is the only effective trigger for proper government regulation, it seems to us that Congress will not take action to regulate College Sports effectively unless and until its constituents feel pain and demand regulation. What will cause the college sports fan to feel the damage wrought by the commercialization of college sports?

Of course, Splitt points to the deterioration of academic institutions—which harms everyone. Getting people to see and understand that this deterioration affects them personally and economically is vital to moving them to demand reform. The fact is that this country spends more on education than any other, and yet delivers sub-standard returns. Perhaps it will take another impending crisis—that their college degrees, for example, will no longer ensure employment in the world economy—to prompt the ideological opponents of regulation to take a fresh look and conclude that the NCAA and its member universities' athletic programs should be subject to wise regulation.

In our recent article, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, we detail how some college sports can no longer fairly be called amateur, but instead have become deeply commercial enterprises. We argue not for new laws to apply, only that many of the rules already enacted for commercial entities be applied to college sports as well. Specifically, we point out that major college football and men's basketball enjoy unwarranted shelter from the full application of labor law, antitrust law, and tax law based upon the myth of amateurism, and we argue those laws should apply to these vastly commercial sports as they do to any commercial enterprise.

Of course, as Splitt suggests, such regulation should be enforced to safeguard the quality of higher education in advance of, and to avert, a major crisis, but the difficulty of making progress in this area lies in personalizing the harm to the general public. As with the current financial crisis, they support regulation only when the problems affect them directly and personally. The erosion of education is slow but ultimately even more devastating than the financial crisis we now experience.

Amy and Robert McCormick
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