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## If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process

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# If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process

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\* Josephine (Jo) R. Potuto is the Richard H. Larson Professor of Constitutional Law at the University of Nebraska College of Law and the University's faculty athletics representative (FAR). For a description of the work of a FAR, see *infra* note 30. Jerry R. Parkinson is the William T. Schwartz Professor of Law and former dean of the University of Wyoming College of Law. Both are former members of the NCAA Division I Committee on Infractions. The authors acknowledge and thank the first-rate colleagues with whom they were privileged to serve on the committee and the NCAA staff members who provide superb support to the committee and work in often stressful circumstances—Shep Cooper, Cheryl DeWees, Jim Elworth, and Karen Martin. Shep, the long-time director of the Committees on Infractions, is the committee's institutional memory. Together with Jim, the assistant director, they handle with aplomb their interactions with committee members, NCAA enforcement staff, coaches and their lawyers, presidents, general counsels, athletics directors, FARs, and other senior university officials.

This Article reflects the views of the authors and is not intended to represent the position of the NCAA or the NCAA Division I Committee on Infractions.

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## I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) Division I Committee on Infractions (Infractions Committee)<sup>1</sup> hears and resolves cases involving institutional culpability for major violations of NCAA rules.<sup>2</sup> Its work is among the most important done by any NCAA committee, cabinet, or council.<sup>3</sup> Its decisions have substantial import for institutions and involved individuals<sup>4</sup> alleged to have committed violations. Its decisions also have substantial import for other institutions looking to the committee to uphold competitive equity and to deter cheating and other behaviors injurious to student-athletes and detrimental both to individual institutional integrity and to the public perception of varsity athletics as part of the greater university. The Infractions Committee is one of the most public “faces” of the NCAA, with its work regularly tracked and reported by media outlets. What it does, and how it does it, has been the subject of numerous law review articles.<sup>5</sup> It is a focus of litigation against the NCAA—by media

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1. Separate committees handle Division II and Division III infractions cases. The composition and processes of those committees are not addressed in this Article.
  2. NAT'L COLLEGIATE ATHLETIC ASS'N, *Operating Bylaws, in 2010–11 NCAA DIVISION I MANUAL*, arts. 19.1, 19.1.3 (2010) [hereinafter *NCAA Bylaws*], available at <http://www.ncaapublications.com/productdownloads/D1111.pdf> (art. 19.1 concerns the Committee on Infractions generally, while art. 19.1.3 addresses the duties of the committee specifically). “Major” violations are distinguished in the NCAA bylaws from “secondary” violations. *Id.* art. 19.02.2 (Types of Violations). A secondary violation is a violation that is “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.” *Id.* art. 19.02.2.1 (Violation, Secondary). Any violation that is not secondary is “major.” *Id.* art. 19.02.2.2 (Violation, Major).
  3. Because of the importance of its work, the Infractions Committee is one of the few NCAA committees that reports directly to the NCAA Division I Board of Directors. *Id.* art. 21.7.8 (Committees Reporting to Board of Directors).
  4. Institutional culpability, of course, results from the misconduct of *individuals* who represent an institution. Those individuals—coaches, other institutional staff members, student-athletes, and boosters—may be subject to sanctions as well, but these sanctions are imposed indirectly through penalties imposed on the institution.
  5. See, e.g., Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99 (1992); John Kitchin, *The NCAA and Due Process*, 5 KAN. J.L. & PUB. POL'Y 71 (1996); Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695 (2009); Gene A. Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667 (2003); Michael Rogers &

outlets seeking its records,<sup>6</sup> by coaches and other involved individuals challenging its decisions,<sup>7</sup> and by boosters and others claiming injury to reputation.<sup>8</sup> With such high stakes, it matters a great deal who serves on the Infractions Committee and how they conduct the committee's business.

Since at least the time when Jerry Tarkanian sued the NCAA,<sup>9</sup> there have been calls for changes to NCAA enforcement and infractions processes.<sup>10</sup> The particular focus of this Article is the composi-

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Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749 (2007); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000); Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651 (1994).

6. See Paul Flemming, *Appeals Court Rules NCAA Must Release Florida State Documents*, TALLAHASSEE DEMOCRAT (Florida), Oct. 1, 2009, [http://www.usatoday.com/sports/college/2009-10-01-ncaa-florida-state\\_N.htm](http://www.usatoday.com/sports/college/2009-10-01-ncaa-florida-state_N.htm); Todd Jones & Jill Riepenhoff, *Hiding Information; NCAA Has Ways to Dodge Scrutiny; Privacy Law, Secure Web Site Used to Skirt Public-Records Laws*, COLUMBUS DISPATCH (Ohio), June 22, 2009, [http://www.dispatch.com/live/content/local\\_news/stories/2009/06/22/NCAA\\_FERPA.ART\\_ART\\_06-22-09\\_A1\\_55E8IP4.html](http://www.dispatch.com/live/content/local_news/stories/2009/06/22/NCAA_FERPA.ART_ART_06-22-09_A1_55E8IP4.html).
7. NCAA v. Tarkanian, 488 U.S. 179 (1988); Bassett v. NCAA, 428 F. Supp. 2d 675 (E.D. Ky. 2006); Cohane v. Greiner, No. 04-CV-943S, 2006 WL 625842 (W.D.N.Y. Mar. 10, 2006); Cottrell v. NCAA, 975 So. 2d 306 (Ala. 2007); Neuheisel v. Univ. of Washington, No. 03-2-34268-8SEA, 2004 WL 5216751 (Wash. Super. Ct. Dec. 10, 2004).
8. Keller v. NCAA, No. CV-2004-28 (Ala. Cir. Ct. Nov. 29, 2007).
9. *Tarkanian*, 488 U.S. 179. Tarkanian was the head men's basketball coach at the University of Nevada, Las Vegas (UNLV). *Id.* at 180. He was suspended by UNLV after findings by the Infractions Committee that he had committed NCAA violations. *Id.* at 180–81. He sued the NCAA, claiming a failure of due process in the infractions hearing. *Id.* at 181.
10. Subsequent to *Tarkanian*, the NCAA appointed a special committee to review and make recommendations regarding the enforcement and infractions processes. SPECIAL COMM. TO REVIEW THE NCAA ENFORCEMENT & INFRACTIONS PROCESS, NAT'L COLLEGIATE ATHLETICS ASS'N, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS (1991) [hereinafter LEE REPORT] (on file with the authors). The committee was chaired by Rex Lee, a former United States Solicitor General, and included as members Warren Burger, former Chief Justice of the Supreme Court of the United States; Benjamin Civiletti, a former United States Attorney General; a former state supreme court judge; a former federal circuit court judge; former federal district court judges; university administrators; athletics administrators; and faculty athletics representatives. *Id.* The special committee made numerous recommendations, *id.* at 3–8, all but a few of which were incorporated into enforcement and infractions processes. One recommendation not adopted was to have a special hearing officer independent of NCAA institutions act as fact finder in assessing violations in infractions cases not resolved by summary disposition. *Id.* at 5–6. For more discussion, see *infra* text accompanying notes 58 and 59.

More recently, the NCAA hired a special consultant, James Duff, to review enforcement and infractions processes and make recommendations for changes. Duff submitted his report in 2006. See JAMES DUFF, EXECUTIVE SUMMARY: RE-

tion of the Infractions Committee and its consensus decision-making process. We conclude that the current committee structure and processes effectively serve the purposes and interests of NCAA member institutions and are better suited to meet all of the roles and responsibilities of the Infractions Committee than any proposed model we have seen.

The authors of this Article both recently completed nine years of service on the Infractions Committee. One (Potuto) chaired the Infractions Committee and also served on an NCAA Special Internal Review Committee that worked with a consultant whose charge was to evaluate and make recommendations regarding the enforcement and infractions processes.<sup>11</sup> The other (Parkinson) was the Infractions Committee's first coordinator of appeals and also chaired a subcommittee whose recommendations regarding committee penalties were presented to the NCAA Division I Board of Directors.

## II. COMPOSITION OF THE INFRACTIONS COMMITTEE

### A. Role of Infractions Committee and NCAA Structure

To be effective, the Infractions Committee must command the confidence of member institutions, their staffs and constituencies, as well as NCAA staff. While the committee must work with sensitivity toward and in cooperation with a member institution appearing before it, its work ultimately must be independent of the institution and its conference and also independent of NCAA senior administration, NCAA enforcement staff, and other NCAA committees and the staffs assigned to them.<sup>12</sup> Moreover, the Infractions Committee must conduct its business without bias and uninfluenced by criticism from media reports and otherwise.

Fundamentally, the job of the Infractions Committee is to exercise reasoned and informed judgment in hearing and deciding cases and in imposing penalties. Critical components of such reasoned and informed judgment are that the Infractions Committee adheres to its role within NCAA processes as adjudicative, not legislative; that it decides cases and imposes penalties as prescribed by NCAA bylaws that govern its operations; that its members know, understand, and appropriately apply bylaws that set forth substantive standards governing conduct; that its decisions are based exclusively on the record before

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PORT AND RECOMMENDATIONS TO THE NCAA SPECIAL INTERNAL REVIEW COMMITTEE (2006) (on file with the authors). Several of Duff's recommendations were incorporated into the *NCAA Bylaws* in January 2008.

11. DUFF, *supra* note 10, at 1. The special consultant, James Duff, currently is Director of the Administrative Office of the United States Courts.

12. For further discussion of the committee's independence, see *infra* text accompanying notes 52–85.

it; that it acts with neither favoritism toward nor animus against particular institutions or individuals; and that it assesses violations and penalties with an understanding of how they influence the world of intercollegiate athletics, competitive equity among institutions, and rules compliance.

Through adoption of bylaws, NCAA member institutions set the boundaries and rules by which the Infractions Committee operates, define what constitutes violations, dictate the type and scope of penalties to be imposed, articulate the processes by which members are appointed to the Infractions Committee, and establish the criteria for membership on it. As with any legislative authority, member institutions may change the infractions process prospectively by amending or repealing current bylaws or adding new ones. What they cannot do is intervene to influence the outcome of any particular infractions case. The prime ways in which member institutions assess the work of the Infractions Committee are by review of its published reports,<sup>13</sup> by the caliber of its individual members, and by how suited the Infractions Committee is, taken as a whole, to perform the work assigned to it.

## B. Membership Requirements

Membership requirements are both formal—described in the black letter of NCAA bylaws—and informal. Formal requirements may be stated quickly. There are ten members of the Infractions Committee.<sup>14</sup> Of these, eight members hear and decide cases (the hearing committee) and two members are appointed specifically as coordinators of appeals<sup>15</sup> to represent the Infractions Committee in proceedings before the Infractions Appeals Committee.<sup>16</sup> At least seven committee members “shall be at present or previously on the staff of an active member institution or member conference” of the NCAA.<sup>17</sup> These seven members may not all be from the same NCAA subdivision of Division I.<sup>18</sup> At least two committee members, but no more than three, must be “public” members.<sup>19</sup> Public members not only are un-

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13. This aspect of the Infractions Committee's work is beyond the scope of this Article.

14. *NCAA Bylaws*, *supra* note 2, art. 19.1.1 (Composition of Committee).

15. *Id.* The coordinators of appeals attend infractions hearings but are not active participants in either hearings or committee deliberations. *Id.* art. 19.1.1.4.

16. *Id.* art. 19.1.1.4 (Duties of the Coordinators of Appeals).

17. *Id.* art. 19.1.1 (Composition of Committee).

18. *Id.* Division I institutions are divided into three parts. The Division I Football Bowl Subdivision (FBS) fields football teams that compete in post-season bowl games. The Division I Football Championship Subdivision (FCS) fields football teams that compete in an NCAA football championship. The third subdivision does not offer football as a varsity sport. In practice, the subdivision restriction means that there must be at least one member of the hearing committee from the FCS or from a Division I institution that does not compete in football.

19. *Id.* One of the public members may serve as a coordinator of appeals. *Id.*

associated with a member university or athletics conference, but they also may neither represent coaches or athletes nor be affiliated with a professional or similar sports organization.<sup>20</sup> At least two positions on the committee must be held by men, and at least two must be held by women.<sup>21</sup> Finally, members of the Infractions Committee are term-limited out after serving three three-year terms, either on the hearing committee or as a coordinator of appeals.<sup>22</sup>

In addition to these formal membership requirements, the Infractions Committee operates pursuant to informal requirements that are critical to the functioning and public perception of the committee. These requirements cover two bases. One set of requirements focuses on the experience, background, stature, and work habits of each individual member of the Infractions Committee. The other set of requirements focuses on the Infractions Committee in its entirety to assure a balance of perspectives and a range of relevant experiences.

### 1. *Individual Member Qualifications*

Clearly, members of the Infractions Committee must know and understand NCAA bylaws and processes.<sup>23</sup> They also must understand the role of the Infractions Committee as delineated in those bylaws and adhere to that prescribed role. But service on the Infractions Committee demands far more.

#### a. *Time Demands*

Infractions Committee service entails considerably more time than any other NCAA service. Annually there are six hearing weekends, typically with two cases heard during each weekend. Getting “up to snuff” on all the materials in the record likely entails at least twenty hours of preparation time. When a case involves a large number of violations, and especially when a coach or other involved individual is

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20. *Id.*

21. *Id.*

22. *Id.* art. 19.1.1.3 (Term of Office). Following a three-year hiatus, a hearing committee member who is term-limited out after nine years of service may return to the committee to serve as a coordinator of appeals. *Id.* For further discussion of committee term limits, see *infra* text accompanying notes 46–51.

23. This is not meant to imply that each new appointee to the committee must have such knowledge and experience prior to committee service. Public members do not have deep experience in the collegiate athletics world, and that is a good thing—members without such experience often bring healthy perspectives and insights as “outsiders” that otherwise would be lost. See, e.g., Marsh, *supra* note 5, at 705. Nonetheless, there must be limits on the number of members who come to the committee in need of “on-the-job training,” and it is imperative that those needing “on-the-job training” have both the ability and the diligence to develop, rather rapidly, a thorough understanding of applicable NCAA bylaws and processes.

at risk of findings of commission of violations, preparation time easily may exceed forty hours.<sup>24</sup> Each case also entails additional time associated with post-hearing deliberations and the production of an infractions report. Production of the report also is time-intensive.<sup>25</sup>

In addition to cases adjudicated by hearing, the Infractions Committee resolves cases by summary disposition,<sup>26</sup> hears appeals from secondary case dispositions,<sup>27</sup> and reviews annual reports regarding compliance with penalties by institutions on probation.<sup>28</sup> The chair, and on occasion the hearing committee, also resolves procedural and other issues that may arise prior to a hearing. Finally, there are matters that arise independent of individual hearings that require the Infractions Committee's time and attention, including, for example, recommendation of bylaw changes and oversight of the schedule and processing of cases by the NCAA enforcement staff.

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24. The record before the Infractions Committee contains the NCAA enforcement staff's allegations, with a description of how the violations were committed and inclusion of the information on which the staff relied in bringing each allegation. It also includes an institutional response, including supportive documentation. The response requires several large binders. When a coach or other involved individual is at risk of findings of commission of violations, there also will be a response from that individual, including supporting documentation.
  25. Each case is assigned to a hearing committee member who is responsible for drafting an infractions report with the assistance of the director or assistant director of the Infractions Committee. The draft report may go through several revisions before the committee member believes it is ready for review by the full committee. There is at least one conference call during which the full committee conducts a line-by-line analysis of the draft. Once a report is approved by the full committee, it is published.
  26. See *NCAA Bylaws*, *supra* note 2, art. 32.7. Summary disposition occurs, without a hearing, when the institution, the NCAA enforcement staff, or both conduct a thorough investigation of possible violations and both sides stipulate to proposed findings of violations and penalties. *Id.* arts. 32.7.1.1 (Thorough Investigation), 32.7.1.2 (Written Report), 32.7.1.3 (Proposed Penalties). The proposal is reviewed by the Infractions Committee, which may accept the findings and penalties as proposed or reject them and set the case for a full hearing. *Id.* arts. 32.7.1.4 (Committee on Infractions Review), 32.7.1.4.1 (Approval of Findings and Penalties), 32.7.1.4.2 (Findings Not Approved), 32.7.1.4.3 (Penalties Not Approved). The Infractions Committee also may review an institutional appeal from the refusal of the enforcement staff to resolve a case through the summary disposition process. *Id.* art. 32.10 (Appeal Procedure).
  27. See *id.* arts. 19.6.1 (Appeal of Secondary Violations), 32.4.4 (Appeal of Secondary Cases). Cases involving only secondary violations are resolved by the NCAA's Vice President for Enforcement Services. *Id.* art. 19.5.1 (Penalties for Secondary Violations). Certain of these secondary violations require approval of the chair or another member of the Infractions Committee designated by the chair. *Id.* Not all violations are clearly major or secondary. Those on the cusp require committee approval to be treated as secondary violations. Another category of secondary violations involves penalties such as fines. *Id.* Articles 19.6.1 and 32.4.4 of the *NCAA Bylaws* give institutions the right to appeal actions taken in these latter secondary cases to the full Infractions Committee. *Id.* arts. 19.6.1, 32.4.4.
  28. See *id.* art. 19.5.2.4 (describing probationary periods and conditions of probation).



With all these responsibilities falling on the Infractions Committee, it is critical that each member of the committee can devote the necessary time to the task. Because all committee members are unpaid volunteers, generally with full-time, high-level positions back on campus, in a conference office, or in a law firm or judge's chambers,<sup>29</sup> this is a tall order. It is not surprising, then, that most committee member resignations prior to completion of a full term (or the completion of three full terms) come from members who cannot devote the necessary time and attention to the Infractions Committee's work.

*b. End-Line Professional Responsibility*

In addition to devoting the time required to manage such a heavy workload, Infractions Committee members must have the judgment that comes with experience and the gravitas and stature that comes with end-line professional responsibility and achievement. The committee is entrusted by NCAA member institutions to deal with sensitive and important subject matters; to treat in complete confidence private information regarding institutions, their staffs, and student-athletes; to pay heed to the demands of competitive equity; to impose penalties that underscore and encourage rules-compliant behavior; and to be and be perceived to be fair to institutions and involved individuals who appear before it. The Infractions Committee expects the presence at every infractions hearing of the president or chancellor of the university, its athletics director, its faculty athletics representative,<sup>30</sup> and the head coach of any sport subject to penalties. Usually present are a university's general counsel and outside counsel. When a coach or other individual is at risk for findings of involvement in major infractions, that individual is almost always represented by counsel. For the smooth functioning of hearings, Infractions Committee members must match these hearing participants in professional accomplishment. The public perception of decisions of the Infractions

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29. Occasionally a committee member is not engaged in full-time employment away from committee work, but that is certainly the exception rather than the rule.

30. Each NCAA member institution must have a faculty athletics representative (FAR). *NCAA Bylaws*, *supra* note 2, art. 6.1.3 (Faculty Athletics Representative). The FAR is typically a full professor with tenure but also may be a senior campus administrator outside of athletics with faculty rank. At most institutions the university president or chancellor appoints the FAR, often with the advice and consent of the Faculty Senate. *Id.* art. 4.02.2 (Definitions: Faculty Athletics Representative). FARs represent their respective institutions and faculties in NCAA and conference governance. *Id.* Each FAR also has campus duties as assigned by the president or chancellor. FACULTY ATHLETICS REPRESENTATIVES ASS'N, NAT'L COLLEGIATE ATHLETIC ASS'N, FACULTY ATHLETICS REPRESENTATIVE HANDBOOK (2010), *available at* [www.farawebsite.org/files/FARAHandbook.htm](http://www.farawebsite.org/files/FARAHandbook.htm). Most typically, FARs have campus oversight or direct responsibility for NCAA rules compliance, academic standards related to student-athlete performance, athletics academic integrity, and student-athlete well-being.

Committee is bolstered by the caliber and background of committee members. The professional credentials of committee members also are a component of the NCAA defense to lawsuits challenging committee decisions. Finally, to attract public members of the caliber and backgrounds needed, institutional members must match their credentials.

Typically members of the Infractions Committee have been exceptionally prominent in their fields.<sup>31</sup> It is imperative that members continue to have the type of substantial supervisory and decision-making experience and superior analytical skills associated with full professors with tenure, athletics directors, conference commissioners, and general counsel of universities.<sup>32</sup>

## 2. *The Infractions Committee in Its Entirety*

Each individual Infractions Committee member brings a bundle of experiences and strengths. No one member embodies all the characteristics needed in the full committee. Appointment of individual members, therefore, must be effected with recognition of the needs of the full committee. To be able effectively to perform its responsibilities, the Infractions Committee, through the totality of the experiences and backgrounds of individual members, must have (1) athletics experience, (2) a faculty presence, (3) legal knowledge and skills, and (4) a predominant campus presence. Other characteristics are less prominent, but nonetheless important.

Ideally, the hearing committee would have two public members, five members from the campuses, and a conference commissioner. At least two members would be full professors with tenure who are FARs or former FARs, and at least two members would be senior athletics administrators with broad-based, end-line experience and responsibilities. Finally, at least six, and certainly no fewer than four, members of the hearing committee would be lawyers.

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31. Among those who served were Charles Alan Wright and Frank Remington. Wright was co-author of a multi-volume treatise on federal practice and procedure, CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (4th ed. 2008), and president of the American Law Institute. Remington was a chief architect of the American Law Institute's *Model Penal Code*, MODEL PENAL CODE (1962), and a director of the American Bar Foundation. More recently, Jack Friedenthal both served on and chaired the Infractions Committee. Friedenthal was faculty athletics representative for Stanford University when he was on the law faculty there. He has served as dean of the George Washington University Law School and is co-author of the most widely used civil procedure text, JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* (10th ed. 2009).

32. It may be advisable to amend article 19.1.1 of the *NCAA Bylaws*, which addresses the composition of the Infractions Committee, to state explicitly that committee members should have this experience. *NCAA Bylaws*, *supra* note 2, art. 19.1.1.

*a. Athletics Experience*

The Infractions Committee as a whole must have substantial experience with and understanding of the collegiate athletics enterprise as experienced on the campuses. That understanding must include the nature of the relationship between coach and student-athlete—what is common practice, what is appropriate or necessary, and what crosses the line. From the perspective of the institution or individuals appearing before the Infractions Committee, campus athletics experience of committee members assures a sensitive appreciation of the athletics enterprise and the particular pressures generated by college athletics. From the perspective of the NCAA membership as a whole, this athletics experience assures that the Infractions Committee will be able properly to evaluate claims that might seem persuasive or compelling to one with little or no knowledge of the athletics world, but which may be entirely unpersuasive to one with such knowledge.

The athletics experience needed most typically will come from an athletics director.<sup>33</sup> Athletics directors are part of campus life. They bring critical on-the-ground experience, with day-to-day supervision and oversight responsibilities in their athletics programs. Athletics experience in compliance and eligibility matters can come from FARs<sup>34</sup> and, to a lesser extent, from university general counsel who have dealt with athletics issues on campus, faculty members who have served on athletics planning or oversight committees, and even public members who have had substantial athletics experience.<sup>35</sup>

Since the restructuring after *Tarkanian*, at least one member of the Infractions Committee has been a conference commissioner. Conference commissioners offer a unique and valuable perspective. They bring insight regarding how conferences track and administer campus compliance activities as well as coach behavior. They understand distribution formulas and how penalties may impact conference teams and institutions not before the Infractions Committee.

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33. Athletics directors (and, on occasion, conference commissioners) often also are former student-athletes or coaches, and, as such, bring added dimension to their consideration of infractions matters. An argument could be made that representation on the Infractions Committee by a currently active coach would infuse the committee with particularly valuable insight, but the coach's practice and competition schedules almost inevitably would conflict with committee responsibilities, particularly the ability to attend all hearings. It also is likely that a coach's active status would generate a concern regarding her ability to distance herself from parochial interests in reviewing infractions matters.

34. FARs bring an understanding of NCAA rules and rules compliance deriving from their campus oversight responsibilities. On occasion, athletics directors and conference commissioners also have such experience.

35. One former public member, for example, had represented an institution in a prior infractions case. A current public member is general counsel for the National Federation of State High School Associations, which deals regularly with issues analogous to those confronted in intercollegiate athletics.

*b. Faculty Presence*

In the pre-*Tarkanian* days, nearly all members of the Infractions Committee were members of the tenured faculty at member institutions. As recently as when the authors of this Article joined the Infractions Committee, four of the eight members of the hearing committee were members of the faculty.<sup>36</sup> Faculty status brings a focused appreciation of the academic mission and speaks to the perception on campus and in the public regarding the extent to which college athletics are part of that mission. Although there is no question that the Infractions Committee acts independently of NCAA, conference, or institutional influence in deciding cases, faculty members—at least in public perception—bring an extra dose of independence to the task.

Faculty members may evaluate the gravity of violations according to a different calculus than that employed by athletics administrators or others who are embedded in the athletics enterprise. They also may have a different perspective on circumstances argued to mitigate institutional responsibility. Without faculty members on the Infractions Committee, there is risk that obvious soft spots in an enforcement staff, institution, or coach argument will be overlooked or missed. These may be complex or hidden, but they also may be simple and straightforward. For example, designation of the wrong campus building or administrator with regard to a particular issue, if noted, may lead to holes in an explanation or the context of a violation. Knowing how exams are administered, graded, and recorded, and campus and professional organization requirements for retaining exams and other graded papers, may expose a deficiency in protocol needing explanation.

FARs bring an added dimension. They not only have faculty status and perspective, but they also have a close understanding of campus athletics. They generally have oversight responsibilities in rules compliance as well as academic standards and integrity. They frequently write waiver requests and report violations and are involved in campus investigations of potential violations. They also are active in athletics conference governance and have experience with a host of NCAA committees, often committees whose members do not include athletics administrators with broad-based supervisory experience.<sup>37</sup>

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36. At the time the authors served on the committee, it had three faculty members on the eight-member hearing committee, including two who served as faculty athletics representatives and a third who served as an athletics director. In addition, a faculty member served as one of the committee's two coordinators of appeals.

37. These committees include the initial eligibility and progress-toward-degree waiver committees. *NCAA Bylaws*, *supra* note 2, arts. 21.7.5.1.3.1, 21.7.5.1.3.2.

*c. Legal Knowledge and Skills*

Legal knowledge and skills are critical attributes of the Infractions Committee as a whole. Presentations of cases by institutions and coaches generally are handled by lawyers. Procedural issues routinely arise at hearings. Frequently allusions are made to legal processes outside NCAA infractions, most often to the criminal justice system. Lawyers are needed both to respond to these claims and, perhaps more importantly, to understand that the legal context of infractions hearings is different in kind from criminal and even civil trials.<sup>38</sup> Lawyers also are needed to protect the hearing record, particularly as infractions cases increasingly trigger litigation against the NCAA.

The Infractions Committee has had outstanding non-lawyer members, and their contributions are critical as well. It is important that infractions processes and hearings do not become so legalistic that they are inaccessible to laypersons. Often the non-lawyer members of the Infractions Committee play a vital role in ensuring a proper balance between legalese and “straight talk,” particularly as they bring other needed expertise to the table.<sup>39</sup>

Over the years, the Infractions Committee has averaged six lawyers among the eight members of the hearing committee. We believe it is important that this ratio continue and imperative that at least half of the hearing committee members are lawyers. In addition, both coordinators of appeals must be lawyers as it is critical in this position to be able thoroughly to understand an appellate record and to respond effectively to institutions and involved individuals in their appeals. Most of the members of the Infractions Appeals Committee are lawyers, and legal issues arise frequently during appellate hearings.

Finally, we believe that the public members of the Infractions Committee must be judges or lawyers who have attained prominence in their fields. Judges or former judges offer a uniquely helpful perspective. They bring not only gravitas but also the experience of managing dockets and lawyers appearing before them. They also bring automatic status to the Infractions Committee that is helpful in hearings and in litigation against the committee.<sup>40</sup>

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38. A description of the conduct of infractions hearings is beyond the scope of this Article. For a general description of infractions processes, as well as student-athlete reinstatement, see Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257 (2010).

39. In recent years, for example, non-lawyer members often are athletics directors or conference commissioners.

40. From 1993, when public members first were made part of the Infractions Committee, and until recently, all have been former state or federal judges or justices. Prior judicial experience clearly has been a savory ingredient in the mix of hearing committee backgrounds and experiences, but it is not essential. Currently three public members sit on the ten-member full committee; none are former

*d. Campus Presence*

Campus life, both academic and athletic, is in fundamental ways a world unto itself. A campus presence brings regular interactions with students, an important component of committee expertise. Varsity athletics competition produces many benefits, but it also compresses and strains academic goals. Obvious stresses result from student-athlete class absences caused by competition on the road, the effect on the classroom environment produced by academically at-risk student-athletes, and class enrollment oddities produced by student-athletes whose practice and training schedules likely dictate avoidance of mid- and especially late afternoon classes. There is also the perception held by some faculty that significant numbers of student-athletes are not serious students and the impact these perceptions have on campus governance and the psyches of student-athletes. Campus academic protocols and requirements may be byzantine and certainly appear to be so to those who are not active participants. The Infractions Committee must understand campus life—academic, athletic, and all aspects of student life and campus governance—to place in context the circumstances involved in an infractions case.

*e. Additional Factors*

*Conference Affiliation.* Information related to particular cases or issues is confidential within the Infractions Committee. However, there are other matters—for example, areas in which violations recur or areas of particular sensitivity about which institutions should be on the alert—that may and should be shared. Although Infractions Committee reports discuss these matters, it is helpful to have someone who interacts regularly with conference governance groups. For these same reasons, athletics conferences have an interest in someone serving on the Infractions Committee who comes from an institution in their conference.

There should not be more than one nonpublic member of the Infractions Committee from the same athletics conference. This requirement redounds in matters of perception. More fundamentally, however, it responds to efficiency and experience concerns. Athletics conferences sit in different areas of the country. They have different rules of operation and conference governance structures, including different processes to effect rules-compliance oversight of their member universities. Some have more lucrative media contracts than others. In some conferences member institutions have substantially larger

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judges, but all are lawyers who have had distinguished careers and who bring special expertise to the committee. Of the ten members of the current committee, nine are lawyers, including seven of the eight members of the hearing committee and both coordinators of appeals.

athletics budgets as compared to institutions in other conferences. All of these differences argue for broadening experience by having members from different conferences (or from institutions that are independent from any athletics conference).

Practical considerations also are at least equally important. As with members of all other NCAA committees, Infractions Committee members do not participate in matters related to an institution in the athletics conference of which their institution is a member.<sup>41</sup> Members of the committee act independently of their institutions and conferences; nonetheless, recusal avoids any perception that a committee member may favor or disfavor certain institutions or conferences. Were there to be more than one member from a conference on the committee, then there would be more than one necessary recusal any time an institution from that conference appeared before the committee.

*Gender and Racial Diversity.* As noted earlier, at least two positions on the Infractions Committee must be held by men, and at least two must be held by women.<sup>42</sup> In addition to this formal membership requirement, the committee for many years has sought out persons of color to serve. At present, there are two such persons on the Infractions Committee. These membership criteria reflect a longstanding NCAA commitment to diversity and inclusion.<sup>43</sup>

*Geographical Diversity.* The final informal requirement for the Infractions Committee, that there be geographical diversity reflected in the home bases of members, is desirable, but by no means as important as any of the other requirements.<sup>44</sup> Some violations are more likely to happen in certain geographical areas. For example, prospective student-athletes are much more likely to take an unofficial cam-

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41. *NCAA Bylaws*, *supra* note 2, art. 32.1.3 (stating that a member of the Infractions Committee “shall neither appear at the hearing nor participate on the committee when the member is directly connected with an institution under investigation or has a personal, professional or institutional affiliation that reasonably would result in the appearance of prejudice”). While that standard does not explicitly address conference affiliation, it is standard practice for committee members to recuse themselves any time a case involves an institution within their conference.

42. *Id.* art. 19.1.1 (Composition of Committee).

43. A Minority Opportunities and Interests Committee, whose duties are to “review issues related to the interests of ethnic minority student-athletes, NCAA minority programs and NCAA policies that affect ethnic minorities,” was established in 1991. *Id.* art. 21.2.4.2 (Duties). Article 2.2.2, addressing the responsibility of each member institution “to establish and maintain an environment that values cultural diversity and gender equity,” was added to the *NCAA Constitution* in 1995. The NCAA’s commitment became even more pronounced in 2005 when President Myles Brand created a new Office of Diversity and Inclusion at NCAA headquarters in Indianapolis. An overview of that office’s “core values” and initiatives can be found at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Diversity+and+Inclusion/>.

44. Some geographical diversity, of course, is attained naturally from the committee members’ conference diversity.

pus visit<sup>45</sup> to institutions proximately located to their homes. The result is that more unofficial visits are taken to institutions located in heavily populated geographical areas. The experiences and expertise of members from such an area may offer targeted insight in particular major infractions cases. In addition, geographical diversity, like conference diversity, facilitates wide dissemination of information concerning committee decisions.

### C. Term Limits

Infractions Committee members may serve a maximum of three three-year terms, either on the hearing committee or as a coordinator of appeals.<sup>46</sup> “Fresh blood” generally is good for any organization, and the Infractions Committee is no exception. Term limits provide an ongoing opportunity to revitalize the committee by appointing new members with different perspectives and attitudes who are unburdened by socialization into doing things the way they have been done in the past.

Term limits also provide a definite end-date so that members may make a full commitment to the Infractions Committee’s work with the knowledge that they ultimately can return to a more balanced work life. As noted earlier, the work of the Infractions Committee is extremely time-consuming, and it can be difficult to find members who have both the required gravitas and the willingness to devote the time necessary for the task. Difficulties are compounded by formal and informal membership requirements related to gender, race, geography, and conference affiliation. Difficulties are compounded again by a need to have a committee that in its entirety has the requisite backgrounds and experiences—athletic, academic, campus, and legal—to understand the dynamics and parameters of information in an infractions case. With all of these challenges, it is critical to recruit members with “the right stuff,”<sup>47</sup> and a fixed term may encourage more individuals to consider service on the committee, despite the burdens.

On the other hand, term limits can have unintended consequences.<sup>48</sup> Departures from the Infractions Committee do not always

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45. See *NCAA Bylaws*, *supra* note 2, art. 13.02.15.2 (Unofficial Visit). An unofficial visit is one financed by a prospective student-athlete and not by the institution. *Id.*

46. *Id.* art. 19.1.1.3 (Term of Office). A hearing committee member who is term-limited out after nine years of service may return to the committee, following a three-year hiatus, to serve as a coordinator of appeals. *Id.*

47. See TOM WOLFE, *THE RIGHT STUFF* (1979) (recounting the qualifications of the individuals recruited to become the nation’s first astronauts).

48. As has been pointed out by commentators, term limits enhance the range of responsibility and authority of staff and bureaucracy, depriving bodies of experienced members regardless of competence and contribution. See Linda Cohen & Matthew Spitzer, *Term Limits*, 80 *Geo. L.J.* 477, 482–83 (1992); Morris Fiorina,



occur at regular, anticipated intervals, and term limits can result in an experience void on the committee. For example, in a nine-year period spanning the time that the authors served on the Infractions Committee, six members resigned prior to completion of a full nine-year period of service, in large part because of workload. An additional two members left the committee because a change in professional status rendered them ineligible to continue serving. These changes were not evenly distributed over the nine years, but came in clusters. The current term limit prevented a reinsertion of experience into the Infractions Committee through reappointment of a former member.<sup>49</sup> Cluster departures, moreover, create an experience issue going forward because they continue to skew the organized rotation that occurs when members complete their terms and new members are appointed.

One option to address the experience void caused by cluster departures would be to permit reappointment for a fourth or even additional terms and leave it to the sound discretion of the nominating body (i.e., athletics conferences) and appointing body (i.e., the Division I Board of Directors) whether to reappoint. This option, however, may open the door to reappointment of a current member interested in reappointment, even when there is a perceived need for “fresh blood” or a perception that the committee member seeking reappointment is no longer devoting the requisite time and attention to the work.<sup>50</sup> Perhaps a better option to address the experience issue would be to permit a committee member who has served a full nine years to be reappointed to the committee after a three-year hiatus. Such a mechanism already exists in a limited fashion—a hearing committee member who is term-limited out after nine years of service may return to the committee, after a three-year hiatus, to serve as a coordinator of appeals.<sup>51</sup> That provision could be modified to allow reappointment to the hearing committee as well (or to allow a coordinator of appeals to return as a hearing committee member). Permitting reappointment after a three-year hiatus would avoid permanent disqualification, per-

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*Term Limits: Wrong Diagnosis, Wrong Treatment*, ALLEGHENY, Winter 1992, at 23–25; Nelson W. Polsby, *Some Arguments Against Congressional Term Limits*, 16 HARV. J.L. & PUB. POL'Y 101, 104–05 (1993); Julia C. Wommack, Comment, *Congressional Reform: Can Term Limits Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1407–08 (1993).

49. Former committee members may be brought back as temporary substitutes when current members are unable to sit for a particular hearing because of schedule difficulties or recusal due to conflict. *NCAA Bylaws*, *supra* note 2, art. 19.1.1.2 (Temporary Substitutes). This option helps in isolated cases, but it does not respond to a continuing void of experience on the Infractions Committee brought on by cluster departures.
50. This impact may be ameliorated, however, by authorizing fourth-term reappointment only when cluster departure creates an experience void.
51. *NCAA Bylaws*, *supra* note 2, art. 19.1.1.3 (Term of Office).

mit reappointment of a member with exemplary prior service, avoid situations in which the committee lacks needed experience, and yet relieve any pressure to reappoint a sitting member who seeks to continue to serve. It would leave to the sound discretion of the NCAA Board of Directors how the Infractions Committee is best configured. At the very least, a system should be implemented to ameliorate cluster departures.

#### **D. Independence, Neutrality, and Infractions Committee Composition**

There can be no disagreement that independence and neutrality are critical to effective functioning of any adjudicative body. In the context of Infractions Committee hearings, the committee must be independent from the NCAA enforcement staff, which investigates allegations of NCAA violations and presents evidence of violations to the committee, and neutral toward specific schools and individuals who appear before it. The composition of the Infractions Committee can contribute to perceptions of independence and neutrality or the lack thereof. For example, if several members of the Infractions Committee were from institutions within one particular conference, there predictably could be a perception that the committee would favor that conference, even though members recuse themselves from cases involving institutions within their conference.

Over the years, calls have been made for a reconfiguration of the Infractions Committee, or even abandonment of the committee entirely, to address issues of independence and neutrality. In 1991, for example, the *Lee Report* recommended that the Infractions Committee relinquish its role as fact finder and serve instead to review dispositions recommended by an independent hearing officer or agreed to by institution and enforcement staff.<sup>52</sup> A more recent, and more modest, recommendation has been to increase the number of public members on the Infractions Committee.<sup>53</sup> Either proposal, in our view, is a mistake.

What must be remembered is that the NCAA is a multi-party, multi-subject association in which member institutions control its scope, contours, and administration. They determine the obligations of membership and what constitutes transgressions—in other words, NCAA violations. They also determine how and by whom infractions cases are to be resolved.

As delineated in NCAA bylaws, the NCAA membership has a concrete and particular conception of the infractions process and the role to be played by the Infractions Committee. The Infractions Commit-

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52. LEE REPORT, *supra* note 10, at 3–8.

53. Marsh, *supra* note 5, at 702–10.

tee created under the bylaws (1) is independent of the NCAA enforcement staff, (2) understands and appreciates the various aspects of administering an intercollegiate athletics program, (3) understands the various facets of campus life and upholds the primacy of academic standards and integrity in varsity athletics, (4) provides a full and fair opportunity to be heard by member institutions and staff members alleged to have committed major violations, (5) provides an appeal opportunity for those found to have committed violations, (6) provides equal treatment between and among member institutions and their staffs, (7) is committed to the proper application of the rules and bylaws adopted by the membership to govern intercollegiate athletics and the conduct and behaviors of institutions and their staffs, and (8) is mindful of the interests of the membership as a whole in competitive equity and in rules-compliant behaviors when assessing the gravity of violations and imposing penalties.

The independence of the Infractions Committee within NCAA governance is assured structurally through formal lines of demarcation that make its work separate and distinct from the work of other NCAA committees or staffs. Most important is the fact that the composition and role of the Infractions Committee are separate and distinct from the NCAA enforcement staff.<sup>54</sup> The failure to understand this distinction more often than not underlies *misperceptions* about Infractions Committee independence.<sup>55</sup> If there is any point that bears repeating, it is this: NCAA enforcement staff members are salaried employees of the NCAA whose job it is to investigate allegations of NCAA violations and present evidence of major violations to the infractions committee, typically at an infractions hearing.<sup>56</sup> Infractions Committee members, on the other hand, are unpaid volunteers whose job is to hear and evaluate evidence presented by all parties in an infractions hearing. The enforcement staff bears the burden at every hearing of proving that violations occurred, and their presentations are subject to critical examination by an Infractions Committee that is an “equal opportunity” hearing body in its pointed examination of presentations by all parties.

After *Tarkanian*, NCAA member institutions made substantial changes to the processes governing enforcement staff investigations

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54. The Infractions Committee also operates separately and distinctly from the NCAA's student-athlete reinstatement committee and its staff and from the Infractions Appeals Committee and its staff.

55. See Marsh & Robbins, *supra* note 5, at 677 (“Simply put, people usually do not understand that the NCAA enforcement staff is an entirely separate enterprise from the Committee on Infractions.”).

56. As noted earlier, some infractions cases are resolved through the summary disposition process, without a hearing, and cases involving only secondary violations are resolved by the NCAA's Vice President for Enforcement Services. See *supra* notes 26–27.

and infractions hearings. Those changes were intended to address concerns that enforcement and infractions processes did not meet minimum standards of fairness. The changes included incorporation of most of the recommendations of the *Lee Report*,<sup>57</sup> including the creation of a summary disposition process and an appeals process overseen by an Infractions Appeals Committee. A prime recommendation that was *not* adopted was to sunset the Infractions Committee's role as fact-finder.<sup>58</sup> Instead, NCAA member institutions responded to this *Lee Report* recommendation by adding two public members to the hearing committee and also by creating a process by which an institution or involved individual could request a hearing before a hearing officer rather than before the Infractions Committee. This hearing officer alternative was in effect for more than ten years but was never once utilized. Ultimately, the provision was removed.<sup>59</sup>

No document exists to explain why member institutions chose to continue with an Infractions Committee, adjusted to include two public members, rather than move to a hearing officer process. Moreover, there is no document that explains why in a ten-year period the hearing officer alternative was not used. One obvious conclusion is that the NCAA membership was satisfied that the Infractions Committee model of dispute resolution adequately served the needs and predilections of the members. There are many models of dispute resolution, and the Infractions Committee process falls well within the parameters of these models.

Alternative dispute resolution as a way to handle disputes is hardly unique to the NCAA. It is particularly popular where disputes likely will arise regularly and frequently, and even more so if there is a large, specific body of rules to be applied for which a close understanding of the enterprise and its common practices is useful, if not critical. It is employed in university disciplinary proceedings for faculty, staff, and students; trade associations; housing associations; and "fraternal" associations, among others.<sup>60</sup> It is the dispute resolution process of choice in labor-management collective bargaining

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57. See LEE REPORT, *supra* note 10.

58. *Id.* The membership also rejected a recommendation to make hearings public. *Id.*

59. Compare NAT'L COLLEGIATE ATHLETIC ASS'N, *Operating Bylaws*, in 1994-95 NCAA DIVISION I MANUAL, art. 19.2 (noting bylaw change adding hearing officer provision on Jan. 11, 1994), with NAT'L COLLEGIATE ATHLETIC ASS'N, *Operating Bylaws*, in 2001-04 NCAA DIVISION I MANUAL, art. 19.2 (making no reference to hearing officer). In this model, the role of the Infractions Committee was to review proposed summary dispositions and dispositions recommended by the hearing officer.

60. See 4 AM. JUR. 2D *Alternative Dispute Resolution* § 28 (2010).

agreements.<sup>61</sup> It also is used to resolve disputes arising out of national team and Olympics competition and for drug-testing appeals.<sup>62</sup>

A *sine qua non* of hearing bodies is that they are neutral. Yet, neutrality means different things in different contexts and does not always mean that members of a hearing body must be separate from the members of an association. In university disciplinary proceedings, for example, hearing bodies typically are composed of other staff and faculty at the institution.<sup>63</sup> Trade associations are another example.<sup>64</sup> Often an arbitrator is required to have expertise in the subject area, both in the formal requirements and in the operation and the understanding of its members.<sup>65</sup> This is particularly so when, as with the NCAA, controversies involve a large and complex subject matter that references numerous rules and policies specific to the association.

Formal associations such as the NCAA develop because of purposeful decisions by their members, not happenstance. The NCAA incorporates an interrelated network of mutually assumed obligations. In a real sense, it is a world unto itself, with arrangements and rules understandable to those within but perhaps less easily parsed by those outside. NCAA bylaws bind institutions formally through their consent as association members and directly through their participation in the adoption of bylaws and policies. Staff members and student-athletes are bound formally through their association with member institutions and directly through their agreement in writing to be bound.<sup>66</sup> They are also educated about NCAA bylaws that affect

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61. See Gerald M. Moody Jr., *Writing is Reading is Writing: Two Applications of the Parol Evidence Rule to Collective Bargaining Agreements*, 2009 COLUM. BUS. L. REV. 326, 328 (2009).

62. See *General Information*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/history> (last visited Dec. 22, 2010).

63. This is the case even though public universities are state actors subject to the strictures of minimum due process.

64. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CALIF. L. REV. 313 (2006). In prison disciplinary hearings, the hearing body may be comprised of prison officials, even wardens. *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974).

65. There is even a growing body of commentary questioning whether corporate governance is best effected by independent directors. See, e.g., Eric M. Fogel & Andrew M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, 32 DEL. J. CORP. L. 33 (2007); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

66. All staff members annually affirm in writing their compliance with NCAA bylaws. *NCAA Bylaws*, *supra* note 2, art. 30.3.5 (Report of NCAA Violation Involving Institution). An institution's president or chancellor independently certifies annually that staff and boosters are rules-compliant and that they are provided NCAA rules education. *Id.* arts. 30.3 (Certification of Compliance), 30.3.1 (NCAA Rules Review), 30.3.3 (Certification of Policies, Procedures and Practices). Coach

them.<sup>67</sup> Holding those within this world to rules to which they certify agreement, and about which they receive additional and focused instruction, lends itself most appropriately to a dispute resolution body that itself is fully familiar with the course of dealings of the group.

It is no surprise, then, that NCAA member institutions look to a dispute resolution process whose decision-makers understand the world whose disputes they are to resolve. For the Infractions Committee, this means a majority of committee members who come from universities and athletics conferences. Moving to a model with decision-makers wholly outside the membership might enhance the perception of objectivity and fairness. Perception clearly is important. If a move to a new model would enhance perception of the process *and* retain the advantages of the present model, it might be worthwhile to make such a move. But in a zero-sum world there are always trade-offs. The loss here would be substantial and would offset any potential gain, because it would run directly to the breadth of critical expertise needed for the Infractions Committee to operate effectively. This impact would affect the scope of infractions hearings and the ability to ferret out all relevant facts. Equally serious, it would adversely affect deliberations, which invariably benefit from the variety of perspectives and first-hand experiences of the current mix of committee members.

The same can be said for a more modest proposal advanced by a former member and chair of the committee—to increase from two to four the public members on the eight-member hearing committee<sup>68</sup> who hear and deliberate cases.<sup>69</sup> There is no question that public members of the committee have been extremely valuable to the infractions process. Those who have served over the last seventeen years have brought sharp intellects and incisive questioning to the process, and both the committee and the process are richer for their presence.

We disagree, however, that changing the mix of public and nonpublic members of the hearing committee would better serve the interests of the NCAA membership and produce better results. Our primary rationale is that the addition of more public members to the committee would come at the expense of valuable insight and perspective

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contracts must contain a statement regarding rules compliance. *Id.* art. 11.2.1 (Stipulation That NCAA Enforcement Provisions Apply). Student-athletes annually sign a statement affirming compliance with NCAA bylaws that affect them. *Id.* arts. 3.2.4.6 (Student-Athlete Statement), 14.1.3 (Student-Athlete Statement), 30.12 (Student-Athlete Statement).

67. *Id.* arts. 22.2.1.2(c) (Rules Compliance), 30.3.1 (NCAA Rules Review). Coaches who recruit off-campus annually must pass a standardized national test developed by the NCAA national office covering NCAA recruiting legislation. *Id.* art. 11.5 (Certification to Recruit Off Campus).

68. See *supra* text accompanying notes 19–20.

69. Marsh, *supra* note 5, at 702–10.

from a strong mix of individuals from NCAA member institutions and conferences. For reasons we discussed previously,<sup>70</sup> we believe it is critical that there be substantial athletics experience and a strong faculty and campus presence on the committee. To require four hearing committee members to be public members would hamstring the Infractions Committee in its ability to take advantage of the special skills and backgrounds of individuals from NCAA member institutions and conferences.<sup>71</sup>

We also believe that the current public–nonpublic member mix on the hearing committee better advances the goals of a voluntary association that polices itself.<sup>72</sup> Considering the heavy workload associated with service on the Infractions Committee,<sup>73</sup> it may be more realistic to expect the requisite level of commitment from committee members whose service generally is seen as a valuable, if not expected, component of their job responsibilities. University faculty members, for example, typically have a significant service component within their job descriptions. Pro bono service, of course, also is valued within the legal profession, but public members of the Infractions Committee undoubtedly face pressures from their employers that are different in kind from those faced by employees of NCAA member institutions and conferences.<sup>74</sup>

We do not deny that the positions institutional members hold within their universities and conferences, at least those with positions within athletics, may lead to perceptions that these Infractions Committee members are not as independent as they might otherwise be. We note, however, that not all institutional members serve in athletics positions at their universities—the more removed from positions within athletics departments, the less active the perception of non-independence. Perceptions aside, it is also true there is a natural alignment of some nonpublic members of the Infractions Committee

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70. See *supra* text accompanying notes 33–37.

71. See *supra* text accompanying notes 32–34. In the early years of the Infractions Committee, nearly every member was a faculty member, and when the authors joined the committee in 1999 and 2000, only four members of the hearing committee were faculty members. At present the hearing committee includes two conference commissioners and two current or former athletics administrators (one former athletics director, who is also a faculty member, and one senior deputy athletics director).

72. See Marsh & Robbins, *supra* note 5, at 679 (“[T]his enforcement process was created by member institutions, for representatives of the membership to sit in judgment of each other.”).

73. See *supra* notes 24–29 and accompanying text.

74. “Premature” departures from the Infractions Committee (resignations occurring prior to the completion of a full nine-year period of service)—again, generally because of an inability to devote the necessary time and attention to committee work—come from both public and nonpublic members, but within the last two years, two public members have stepped down before the end of their terms.

with the NCAA. Yet, “aligned with” means neither “part of” nor “co-opted.” FARs, for example, are charged with the oversight of NCAA rules compliance on their campus. It would be passing strange to consider their “alignment” with the NCAA problematic at the infractions hearing level but not on their campuses.<sup>75</sup> Although we agree that public members on the Infractions Committee “bring a sense of seasoned objectivity and skepticism to the process,”<sup>76</sup> we disagree that there is a significant, qualitative difference between public and non-public members in how much they speak during hearings and deliberations, in how often they question the fairness of bylaws or investigative practices, or in how direct their questioning may be.<sup>77</sup> We also suspect that public members, by virtue of continued service, also begin to “align with” the NCAA and certainly are so perceived. Moreover, and fundamentally, such alignment is an inevitable by-product of the requisite experience needed for committee service and is entirely appropriate in the infractions environment of a voluntary, self-policing association.<sup>78</sup>

In any event, alignment with the NCAA is not the issue—for example, if the NCAA membership as a whole believes Infractions Committee penalties are too light or too harsh, the committee must pay heed and comply with the goals and objectives of the association within which it operates. The real issue is the independence of the Infractions Committee from the NCAA *enforcement staff*. Here the Infrac-

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75. University counsel are also “aligned with” their respective institutions.

76. Marsh, *supra* note 5, at 705. Although we agree with Professor Marsh that there have been occasions when issues raised by public members have “changed the direction of a hearing and even the outcome in the case” and have “helped [the committee] to get to more just results,” *id.* at 707–08, we believe that the same can be said for the nonpublic members.

Another point perhaps deserves mention as well. Professor Marsh bases some of his rationale on the *judicial* experience of public members: “Public members who are former judges tend to surface issues concerning the fairness of the system and investigation with more regularity than other members.” *Id.* at 707. At the time Professor Marsh wrote, all of the current and former public members of the committee *had* been judges. That is no longer the case—the three current public members of the Infractions Committee, including the two that serve on the hearing committee, are not former judges.

77. *See id.* at 707–08.

78. *See id.* at 705–06. Professor Marsh states:

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

*Id.*



tions Committee, by its words and actions, must be continually vigilant—not only to ensure that its work is separate and independent from that of the enforcement staff, but also to educate observers of the infractions process about those separate roles. In that regard, we note that the Infractions Committee has reduced major allegations to secondary violations,<sup>79</sup> failed to find violations that were alleged,<sup>80</sup> found violations not alleged,<sup>81</sup> stated it would have found violations had they been alleged,<sup>82</sup> and also included in reports discussion and disapproval of investigative processes.<sup>83</sup>

We recognize the difficult balance that must be struck between athletics experience, which generally comes from university or conference members of the Infractions Committee, and distance from the athletics enterprise, which carries with it at least a perception of added independence. Ultimately, however, we believe the balance must tip in favor of relevant experience.<sup>84</sup>

For us, the decision comes down to two important factors: (1) the benefits accrued from adding more public members would come at the cost of losing considerable on-the-ground experience in intercollegiate athletics that institutional or conference members bring to the committee; and (2) the infractions process is a *member-driven* process that is designed to have member institutions—via their employees—police each other. We believe the NCAA membership has struck the appropriate balance—in 1993 when it added public members to the committee rather than adopt the *Lee Report* recommendation to employ hearing officers who were wholly independent from the NCAA membership, and again in 2002 when it increased the size of the Infractions Committee to accommodate a second coordinator of appeals and decided that “no more than three” public members should serve on the committee (including one who could serve as a coordinator of appeals).

Finally, we believe that current NCAA bylaws and committee custom adequately address concerns about Infractions Committee neu-

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79. *E.g.*, NCAA Div. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 171 (2000) (Murray State University). Public Infractions Committee reports are available on the NCAA website at <https://web1.ncaa.org/LSDBi/homepage> (follow “Search” link; then follow “Major Infractions” link).

80. *E.g.*, NCAA Div. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 248 (2006) (Florida A&M University).

81. *E.g.*, NCAA Div. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 287 (2008) (Indiana University).

82. *E.g.*, NCAA Div. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 193 (2002) (University of Alabama).

83. *E.g.*, NCAA Div. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 265 (2007) (West Virginia University).

84. This is particularly true in light of bylaw restrictions that public members “shall not be associated with a . . . professional or similar sports organization, or represent coaches or athletes in any capacity.” *NCAA Bylaws*, *supra* note 2, art. 19.1.1 (Composition of Committee).

trality toward participants in the infractions process. It is inevitable that on occasion nonpublic members will know or have worked with representatives of an institution or a coach involved in an infractions case. In this respect, it is no different from any other alternative dispute resolution process or, for that matter, client representation and court appearance in areas that are not large population centers. When relationships are close enough to raise the appearance of bias or animus, Infractions Committee members recuse themselves.<sup>85</sup> In cases where there was no such close relationship, in our years on the Infractions Committee, we neither detected even a hint that acquaintance affected decision-making, nor are we aware of any case in which there was even a thread of evidence of bias or animus. In addition, with an eight-member hearing committee, any such potential for an individual member's bias to have an impact on a decision is extraordinarily unlikely. In any event, such a bias could impact decision-making only if embodied in a cogent argument independent of bias and independently persuasive.

### III. INFRACTIONS COMMITTEE DECISION-MAKING PROCESS

The fundamental role of the Infractions Committee is to listen to and evaluate evidence presented at an infractions hearing, to determine whether the evidence presented is sufficient to conclude that NCAA violations occurred, and to impose appropriate penalties if findings of violations are found. The committee does not investigate allegations of major violations, conduct prehearing witness interviews, or participate in prehearing conferences. These functions are left exclusively to the NCAA enforcement staff, which then bears the burden of "making its case" at the infractions hearing that violations occurred. If the enforcement staff presents sufficient evidence to make its case, the Infractions Committee will make findings of violations; if the enforcement staff fails to meet its burden, the committee will find that the alleged violations were not proved.

Typically the Infractions Committee will hear two cases during a hearing weekend, with one hearing on Friday and a second hearing on Saturday. The committee then will deliberate on both cases on Sunday.<sup>86</sup> During those deliberations, the committee will discuss each al-

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85. *See supra* note 41. Recusals have occurred when a member attended or was previously employed at the university appearing before the Infractions Committee, even when the member had no interaction with that university's athletics department. Recusals also have occurred when an Infractions Committee member knew a coach at a rival school because of athletics conference governance.

86. Occasionally hearings will be concluded within a few hours and the Infractions Committee will deliberate the same day. Typically, however, hearings last for several hours, and sometimes well into the evening, so Sunday is the only time available for deliberations. In rare circumstances, a case may be so involved that

leged violation and the evidence in the record that tends either to support or to disprove the allegation. The record includes both testimony at the hearing and written materials submitted by the enforcement staff, institution, and, if involved, coaches or other staff members alleged to have committed major violations.<sup>87</sup> During its deliberations, the committee will make preliminary decisions regarding findings of violations and, if violations are found, penalties to be imposed. Each case is assigned to a committee member who works with an Infractions Committee staff director to draft a preliminary infractions report.<sup>88</sup> Once the preliminary report has been completed (sometimes after several drafts), the full committee will reconvene on a telephone conference call to review and finalize the report.<sup>89</sup>

Infractions Committee deliberations are governed by NCAA legislation, which states that after the infractions hearing has been completed, the committee “shall excuse all others from the hearing” and “make its determinations of fact and violation in private.”<sup>90</sup> In other words, Infractions Committee deliberations and case-relevant discussions are confidential within the committee. The committee is to base its findings “on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.”<sup>91</sup> The finding of a violation or the imposition of a penalty must be “by majority vote of the members . . . present and voting.”<sup>92</sup> If the full hearing committee of eight

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only one hearing will be scheduled, with the hearing lasting two or even three days.

87. The written materials include the enforcement staff’s “notice of allegations,” which “shall list the NCAA legislation alleged to have been violated, as well as the details of each allegation,” *NCAA Bylaws*, *supra* note 2, art. 32.6.1.2 (Contents of Notice of Allegations); any responses to the notice of allegations that have been submitted by the institution and involved individuals; and an enforcement staff “case summary,” which “indicates the status of each allegation and identifies the individuals on whom and the information on which the staff will rely in presenting the case,” *id.* art. 32.6.7 (NCAA Enforcement Staff Case Summary). Typically the case summary goes well beyond outlining the enforcement staff’s case and also includes a summary of the other parties’ evidence, including evidence tending to refute the staff’s allegations.

Any written materials that are not formally made part of the record will not be seen or reviewed by the Infractions Committee. That includes correspondence between the enforcement staff and institutions or other involved parties, transcripts of interviews, and any other information surfaced by the parties.

88. The two NCAA staff directors (and their staff support personnel) work exclusively with the Committees on Infractions for Divisions I, II, and III. They are not members of the enforcement staff.

89. *See supra* note 25.

90. *NCAA Bylaws*, *supra* note 2, art. 32.8.8 (Posthearing Committee Deliberations).

91. *Id.* art. 32.8.8.2 (Basis of Findings).

92. *Id.* art. 32.8.8.4 (Voting Requirements).

members is not present, “a favorable vote of at least four members” is required for committee action.<sup>93</sup>

The bylaws do not address one aspect of the Infractions Committee’s decision-making process—whether its decisions are to be “consensus” decisions or whether members will write concurring or dissenting opinions. The committee always has operated by consensus and reports its decisions “per curiam”—meaning that infractions reports have the names of all committee members present and voting, even in the exceptional case in which a member may have been on the short end of a particular vote. The Infractions Appeals Committee also operates by consensus, and we suspect that neither committee seriously has considered departing from the practice, perhaps in part because the issue never has been fully discussed.

Another recent recommendation brings squarely to the fore the question whether there should be a change in the Infractions Committee’s consensus decision-making process and the introduction of concurring and dissenting opinions.<sup>94</sup> Three principal arguments are advanced in support of what might be called “fractured” opinions: dissenting opinions would (1) produce better majority opinions; (2) provide more information and generate discussion among the NCAA membership, which could enhance the legislative process; and (3) instill more public confidence in the infractions process.<sup>95</sup>

Our first objection to a system of concurring and dissenting opinions is grounded in our concern that the added time and effort to prepare, circulate, and examine such opinions would be detrimental to the process in other ways. First, it would add an extra burden to the workloads of all committee members, and, in light of the burdens that already exist,<sup>96</sup> we wonder what impact such added workload would have on the willingness to serve, and more importantly, what impact there would be on the quality of and attention to other aspects of the job. Second, the preparation and circulation of dissenting opinions inevitably would slow down the report-drafting process considerably, which would be a substantial detriment to institutions and involved individuals seeking to know their futures following an infractions case. Indeed, a major and recurring criticism of the current system is that the Infractions Committee processes cases too slowly, with con-

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93. *Id.* This provision can come into play when the hearing committee is short-handed due to recusals or schedule conflicts of committee members. The committee can conduct its business with a quorum of “[f]our members present and voting . . . it being understood that the chair shall make a special effort to have full committee attendance when major infractions cases involving violations are to be considered.” *Id.* art. 19.1.1.1 (Quorum).

94. Marsh, *supra* note 5, at 710–17. Professor Marsh focuses specifically on dissenting opinions, but his arguments may be applicable to concurring opinions as well.

95. *Id.*

96. *See supra* text accompanying notes 24–29.

tinued detrimental impact not only on those against whom findings of violations may be made but also on student-athletes and staff not involved in the violations and often not even at the school when violations were committed.

A much more significant objection to fractured decisions is the detrimental impact such a process would have on committee decision-making. We do not disagree that majority opinions can be strengthened by the preparation and circulation of thoughtful, well-written dissenting opinions, as they can cause members in the majority to reconsider and refine their position. We believe, however, that by its nature consensus decision-making already forces such discussion, rethinking, and reconsideration, and at the same time also provides other important positives. Under the current system, committee members take time to consider and discuss opposing points of view, sometimes again and again. Information in the record is examined closely to review the different views of committee members. The process forces members to consider the grounds for their opinions and to weigh carefully opposing views—a process similar and, we believe, superior to that engendered by the circulation of dissenting opinions. One major advantage of consensus decision-making is that it results from in-person discussion and resolution. In fractured opinion-making, by contrast, a dissenting opinion will be circulated to each committee member for review; any full committee review likely will occur by email exchange or at best by phone.

Consensus in Infractions Committee decisions offers the theoretical possibility of a member “giving in,” but it has the real and concrete virtue of pushing careful, considered debate. Concurring or dissenting opinions might affect the process by leading too easily to a failure of full deliberation. This would be a significant loss to the process, particularly because the different experiences, backgrounds, and perspectives of committee members are critical to a full understanding of a case and its ramifications. Consensus decision-making can help to ensure that attention to viewpoint breadth on the front end—through appointment of a committee with a diverse array of experiences and characteristics—is carried through on the back end, at the time of decision.

Like a jury, the Infractions Committee is a finder of fact. A common requirement of juries in civil and particularly in criminal cases is that their decisions be unanimous. Among the reasons offered for jury unanimity are that it enhances the accuracy of decisions, is a component of assuring a fair trial,<sup>97</sup> provides that the different views and

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97. See generally LESTER B. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 347–51 (1947); William Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 *MISS. L.J.* 185, 191 (1950); James B. Thayer, *The Jury and Its Development*, 5 *HARV. L. REV.* 249, 295–96 (1892).

experiences of jury members who represent a “cross section” of the public will be heard, and assures that minority viewpoints will not be given short shrift.<sup>98</sup> These same goals are furthered by consensus Infractions Committee decisions.

One change that likely would ensue were there to be concurrences, dissents, or both, is that the opinions and conclusions of individual hearing committee members would be disclosed. This would be a major departure from current practice. A positive outcome would be more accountability for decisions, but it would be accountability focused on particular members and not the committee as a whole. This may lead to other consequences more difficult to predict and far less salutary to the process. Concurrences and dissents not only identify the particular members writing them, but they also more clearly identify those in the majority as responsible for the positions stated therein. There is a theoretical possibility that nonpublic committee members in the majority might be less willing to join in majority opinions that take positions contrary to what their institutions or conferences might prefer.

We do agree that there might be one practical, and important, advantage to concurring and dissenting opinions—they are more likely than consensus opinions to highlight clearly when there are legitimate differences of viewpoint among committee members on what constitutes the commission of a violation, the extent to which evidence supports a finding and why, the gravity of a violation as committed, and the appropriateness of penalties imposed by the committee. While infractions reports typically discuss areas in which there may be reasonable differences of opinion regarding the requirements of NCAA legislation (and sometimes indicate if a committee decision was a “close call”), they do not explicitly expose disagreement among committee members. Concurring and dissenting opinions would do that, and the result might be a greater likelihood of membership discussion about NCAA policy choices and the possibility that a bylaw change should be considered.<sup>99</sup>

It is much less clear that dissenting opinions would strengthen public confidence in the infractions process. To the extent that there is a perception that the committee acts perfunctorily in deciding cases

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98. See *William v. Florida*, 399 U.S. 78, 99–100 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The United States Supreme Court has concluded that there is little difference between decisions made by juries required to act unanimously and those permitted to convict or acquit by votes of 11–1 or 10–2. *Apodaca v. Oregon*, 406 U.S. 404 (1972). The Court, however, reached this conclusion in the context of a beyond-a-reasonable-doubt burden of proof standard and the specter of hung juries and retrials, neither of which is applicable to Infractions Committee proceedings.

99. See *Marsh*, *supra* note 5, at 716 (stating that publication of dissenting opinions would “further the legislative process”).

or acts in lock-step with the position of the NCAA enforcement staff, concurrences and dissents certainly would underscore that this is not the case. However, any perception that the committee does not work hard cannot, we think, be well informed or widely shared—not when committee decisions are lengthy and rationale is developed at length. All one has to do is to read infractions reports to realize that they are far from perfunctory. Some go on for dozens of pages, and all detail thoroughly the rationale underlying the committee’s findings and penalties. If the concern is a perception that the Infractions Committee “rubber stamps” the position of the NCAA enforcement staff,<sup>100</sup> that perception may be addressed in other ways—by regularly reminding observers of the separate and distinct roles performed by the committee and the enforcement staff and by writing infractions reports that clearly distinguish between committee positions and enforcement staff positions. In this light, we note that it is not uncommon for the Infractions Committee to reject the position of the enforcement staff.<sup>101</sup>

One other point deserves mention—the NCAA enforcement staff is comprised of dedicated, responsible, and hardworking professionals who are committed to conducting thorough and fair investigations and presenting strong cases. If they are doing their jobs well, which is typically the case, it should come as no surprise that Infractions Committee decisions often track the “position” of the enforcement staff.

We also disagree with the notion that there is something “dishonest” about consensus opinions.<sup>102</sup> To those who make an effort to understand the process, a decision joined by all members of a deliberative body does not signal that the members value collegiality over the reasoned judgment demanded by their role. To the contrary, a consensus decision typically means that members ultimately

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100. *Id.* at 715.

101. *See supra* notes 79–83 and accompanying text; *see also* Marsh, *supra* note 5, at 712–13 (“[D]isagreements do occur, both at hearings and in Committee deliberations. Sometimes, the focus of the disagreement is between the Committee and the enforcement staff because allegations are being presented at the hearing. Committee members who are skeptical of whether the evidence supports a finding of an allegation made by the enforcement staff are not timid in saying so immediately upon learning of such evidence, rather than waiting to make the point in deliberations. Committee members will also press the staff on why a particular allegation is being made in the case being heard, but not in prior cases where the violations appeared to be more systematic and egregious. Occasionally, when the enforcement staff is facing brisk questioning from the Committee and can see the handwriting on the wall regarding whether the violation will be found, the staff will withdraw the allegation right on the spot, to the great relief of the institution or involved coach. In a few rare cases, the Committee has found all violations in a case to be only secondary, where the staff presented the case as major. This further underscores the point that the hearings actually do matter and the Committee does not rubber-stamp allegations brought by the staff.”) (footnotes omitted).

102. *See* Marsh, *supra* note 5, at 715.

reached agreement. Again, juries provide a good example—just because a jury returns a unanimous verdict does not indicate to anyone with an understanding of how juries work that the members of the jury were docile, timid, or averse to meaningful, perhaps contentious, discussion of opposing viewpoints. Moreover, the committee in consensus reports nonetheless may signal areas of concern even if there is a consensus decision. Further, “strong differences of opinion in [infractions] cases are remarkably uncommon. . . . Many of the violations are self-reported by the schools, and in most cases the institutions and involved individuals agree that the violations occurred.”<sup>103</sup> Because committee deliberation almost always leads, ultimately, to agreement by all members, it is true that even if concurring and dissenting opinions became a part of the Infractions Committee’s decision-making process, they would be relatively rare. However, that fact cuts both ways. There is no need to get worked up about either the existence or nonexistence of such opinions. Nonetheless, on balance we believe the disadvantages of concurring and dissenting opinions so far outweigh the advantages that a change is unwarranted.

Clearly one can marshal an impressive body of literature, including the perspectives of former United States Supreme Court Justices, extolling the virtues of dissenting opinions.<sup>104</sup> We note again, however, that the Infractions Committee is a fact-finder, not an appellate body, and these decisions may be seen as inapposite. Ultimately, however, we believe that in the NCAA infractions world, there are good reasons for the Infractions Committee to speak with one voice in making findings and imposing penalties. Justice Ruth Bader Ginsburg has remarked that “concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately.”<sup>105</sup> We believe that the authority and respect that Infractions Committee decisions should command are enhanced by consensus decisions and that fragmented opinions would undermine the strength and legitimacy of the infractions process. The Infractions Committee and the process within which it works already are easy targets both for institutions and coaches unhappy with findings and penalties against them and also for the public and other institutions believing penalties were too light. Dissenting opinions that signal a divided committee easily could provide even more fodder to critics of the system.

In that respect, we find it doubtful that the often fragmented opinions of a divided United States Supreme Court, regularly including multiple concurring and dissenting opinions of individual Justices,

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103. *Id.* at 711.

104. *See id.* at 713–16.

105. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990).



have enhanced public confidence in, or respect for, the Court. Further, we do not believe they have led to clarity of principle permitting ease of understanding and a clear roadmap for future conduct<sup>106</sup>—elements that are particularly critical in the NCAA world where rules compliance depends on voluntary cooperation. There are times, moreover, when a consensus decision signals that a body felt it important to speak with one voice, even if there was disagreement and even when there were remaining differences among members. We point to the case of *Brown v. Board of Education*,<sup>107</sup> which involved remarkable behind-the-scenes efforts by Chief Justice Earl Warren to ensure a unanimous decision of the Court.<sup>108</sup> As a recent biographer put it, Chief Justice Warren believed strongly that public confidence in, and acceptance of, the ultimate decision would come about only if the Court spoke with “a single, clear voice on a matter of moral urgency.”<sup>109</sup> While we do not begin to compare NCAA infractions cases to *Brown* in terms of “moral urgency,” major infractions cases nonetheless can have very serious implications for institutions and involved individuals, and a strong, cohesive message from the Infractions Committee can help to strengthen public confidence in the process.

As to the suggestion that a “fear of litigation” may be reason for the Infractions Committee’s use of consensus opinions,<sup>110</sup> we can state emphatically that, in our years on the committee, not once did a threat of potential litigation influence the committee’s decision-making process. The same can be said for the possibility of appeal to the Infractions Appeals Committee. While the Infractions Committee certainly was cognizant of the prospects of an appeal in any particular case, the consistent message within the committee was that it simply needed to do what it believed was right, regardless of the potential for appeal or litigation.

With that said, however, we do believe that one potential disadvantage of dissenting opinions is that there might be an increase in the number of cases appealed to the Infractions Appeals Committee and perhaps even increased litigation. From the standpoint of member institutions before the Infractions Committee, this would mean less efficiency to the process and increased costs, particularly in cases involving findings of violations against coaches and other staff members. Most of the “action” on appeal relates to penalties, not findings of violations. Based on our experience with the appeals process, we

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106. See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989).

107. 347 U.S. 483 (1954).

108. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 682–99 (1975); JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 309–25 (2006).

109. NEWTON, *supra* note 108, at 313.

110. See Marsh, *supra* note 5, at 711.

have little doubt that appellants would seize upon dissenting opinions, particularly dissents as to penalties, both as a reason to appeal and as an arguing point on appeal.<sup>111</sup>

#### IV. CONCLUSION

The work of the Infractions Committee is high-profile and often subject to close scrutiny by NCAA member institutions; coaches, staff members, and student-athletes of those institutions; the media; and intercollegiate sports fans in general. The result is a stream of recommendations for change. In this Article we examined proposals specifically focused on changes to the composition of the Infractions Committee and the committee's decision-making process. That examination offered an opportunity to articulate clearly the reasons supporting what currently is done. In turn, that articulation prompted our conclusion that the current committee structure and processes work quite well, thank you, and should be retained. We hope that we do not sound like a modern version of the tutor Pangloss, who shouts with blind optimism and more than a little thick-headedness that "all is for the best in the best of all possible worlds."<sup>112</sup> We certainly do not contend that the current configuration of the Infractions Committee and its current decision-making process represent the best possible resolution in the best of all possible worlds. We do know, however, that the Infractions Committee and the infractions and enforcement processes operate in a world bounded by finites, and in that world there can be no perfect resolution. We conclude that the current composition and decision-making process of the Infractions Committee carry the least negative consequences to the purposes and interests of NCAA member institutions and are better suited to meet all of the roles and responsibilities of the Infractions Committee than any other proposed model we have seen. Not perfect, then, but optimum.

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111. On the other hand, it is possible that the Infractions Appeals Committee, whether by design or not, might consider cases involving no dissents to be those that could be dealt with on an expedited basis, with the end result being fewer reversals. Another possibility might be a bylaw change to restrict appeals to those cases in which there is a disagreement among committee members, or, alternatively, to permit in-person appearances and arguments only in cases in which there is a dissent, an approach employed by some intermediate appellate courts.

112. VOLTAIRE, *CANDIDE, OR OPTIMISM* (Henry Morley trans., Barnes & Noble Books 2003) (1759).