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Rethinking Penn State Sanctions and Executive Authority

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Abandoning NCAA established enforcement procedures, President Mark Emmert, through powers granted to him by the NCAA Executive Committee, levied unprecedented sanctions on Pennsylvania State University. In the process, the NCAA required Penn State to sign a consent decree that forfeited any rights to appeal, or Penn State would face a four-year death penalty that would decimate its storied football program. Questions arise as to whether the circumstances at Penn State rose to the level of requiring NCAA Executive Committee action and specifically whether such indiscretions challenged NCAA core values, such as academics or athletics competition, and the propriety and wisdom of Emmert's exercise of executive authority to change the culture of big time college sport. The authors offer a new model for adjudicating alleged rule violations that improves fairness to member institutions and accused professionals, while instilling greater public trust in the process.

In an astonishing departure from established procedure on July 24, 2012, NCAA President Mark Emmert announced unprecedented and crippling sanctions on Pennsylvania State University ("Penn State") using powers he claimed granted to him by the NCAA Executive Committee. In advance of his announcement, Emmert required the new Penn State President to sign a Consent Decree with no right to appeal. According to President Erickson, the NCAA's agreement was based upon the threat of a four-year death penalty sanction of the university's football program (Kercheval, 2012).

Emmert exercised his power of executive authority to convince the public that the NCAA retains control of big time college sports. In doing so, Emmert announced that the sanctions imposed by the NCAA were designed to change the athletic culture of the university because athletics had become too big to fail. If Emmert's goal was to isolate Penn State as the only institution with a need for cultural reform, he should consider affecting cultural change through

offering new NCAA legislation rather than executive action. Ironically, at Louisiana State University and University of Washington, Emmert presided over institutions that epitomize big time athletic culture. One could make a strong argument that each institution in the Bowl Championship Subdivision conferences are in immediate danger of similar cultures and have adopted a "too big to fail" philosophy. It is uncertain whether Penn State is the only or even the most egregious model. The recent major sanctions against the University of Southern California and the ongoing investigation of the University of Miami certainly challenge the notion of out of control athletic cultures. Certainly the laudable graduation rates of Penn State's football program and the absence of previous major infractions indicate something otherwise. Absent a formal NCAA investigation and prior to the adjudication of former Penn State administrators' criminal charges, Emmert relied upon the Freeh Report (Freeh, 2012), commissioned by Penn State, as evidence of a widespread cover-up from Penn State's top administrators and the former head football coach.

Emmert's announcement launched a great debate as to whether the NCAA's punishment was enough. Many sport commentators felt that the NCAA should have evoked the death penalty clause (Repeat Offender's Rule) from its legislative arsenal and close the doors on the program (Schultz, 2012). Others felt that the sanctions were incorrectly applied to the innocent current football student-athletes and staff who had nothing to do with the allegations (Staples, 2012). Some wonder what precise NCAA rule was broken and whether the Penn State issue should have been resolved in the court system. Still others wondered whether Mark Emmert had the authority to levy sanctions without offering those accused an opportunity to defend themselves or offer them any semblance of due process typically enjoyed by defendants in our justice system. Many have expressed exacerbation with a system they deem to be fundamentally flawed, unfair, and inconsistent through conflicts of interest in the makeup of the NCAA Committee on Infractions, inadequate funding for investigative staff, poor investigations, and inconsistent punishment (Miller, 2012).

This single unprecedented decision of abandoning the long established procedures of the NCAA's Committee on Infractions may lead to an outcry for future repeated presidential action over the next scandal that outrages the sensibilities of the public. What is the standard Emmert will use when he chooses to act unilaterally to change the athletic culture at the next institution? President Emmert has attempted to assuage the public criticism of what is perceived as a premature action and insists the nature of the Penn State case was so unusual that it required an immediate action. However, serious doubts linger regarding the future of the NCAA enforcement process and infractions procedures and protocol. According to Dan Matheson, a former NCAA investigator, the NCAA has always maintained an enforcement of matters pertaining to specific NCAA rules violations (Loh, 2012). Others including Gene Marsh, the former chairperson of the NCAA's Committee on Infractions, and athletic directors question the authority exercised by Emmert and a small group of college presidents to determine penalties (Jensen, 2012).

Executive authority has long been debated and litigated in professional sports. The most commonly known reported litigation relating to executive authority placed former Oakland A's owner Charlie Finley against longtime Major League Baseball ("MLB") Commissioner Bowie Kuhn (Finley v. Kuhn, 1978). In 1976, Finley and the Oakland A's set out on a plan to sell three of its top players to wealthier teams for amounts totaling $3,500,000.00. Before the transaction was consummated, Kuhn stepped in and stated the assignment of these contracts was "inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it." By doing so, Kuhn triggered the "best interests of baseball" clause

found in Article II, Section 2(b) of the MLB Constitution, which authorizes the commissioner to take action without legal process (Major League Baseball, Articles 1 and 2).

Over the course of the last six months, National Football League ("NFL") Commissioner Roger Goodell's authority to punish New Orleans Saints players for what has been dubbed "Bountygate" has come under great scrutiny. Under the NFL Personal Conduct Policy, it has been stated that Goodell serves as the judge, jury, and executioner of player conduct matters. Thus, he is given nearly unfettered authority to penalize football players for their actions, save and except any actions that violate the collective bargaining agreement negotiated and executed by the NFL and the National Football League Players Association. Even with such broad authority, Commissioner Goodell's rulings and decisions were submitted to neutral arbitrators for decisions, which ultimately were remanded for further review. Goodell appointed his predecessor, Paul Tagliabue to hear a second round of players' appeals and he vacated the penalties imposed (Battista, 2012).

In accordance with NCAA Bylaw 4.1.2(e), the NCAA Executive Committee may adopt and implement policies to resolve "core issues and other Association-wide matters." Unlike the MLB and NFL, however, President Emmert is not granted unilateral authority to punish administrators, coaches, student-athletes, boosters, or institutions (NCAA, 2012). The authority provided by the Executive Committee to President Emmert violated the system created to address institutional wrongdoings (*i.e.*, the NCAA enforcement procedures) and does not appear to address either a "core issue" or an "Association-wide matter." The action taken had negligible, if any, relation to athletic competition or academics (*i.e.*, not a core issue) and involves a single member institution (*i.e.*, not an Association-wide matter). It is difficult to argue that Penn State gained some competitive advantage in its football program by failing to report allegations of sexual abuse perpetrated by a former assistant coach to authorities. Hence the grant of executive authority to act was not only questionable, but also another expansion of codified legislation to side-step the NCAA enforcement process. This kind of violation could constitute grounds for breach of contract for the NCAA's failure to honor the membership agreement between an institution and the NCAA. In short, when an institution joins the NCAA at the Division I level, the parties enter into an agreement to abide by certain rules, namely those found in the NCAA Division I Manual (NCAA, 2012). The NCAA Division I Manual clearly provides for a structure and procedure for investigating, reviewing, and punishing alleged violators in its bylaws 19 and 32 (NCAA, 2012). By taking an unprecedented action in violation of codified procedures set forth in the NCAA Division I Manual, it can be argued that the NCAA breached its agreement with its member institution, Penn State, by not affording it the right of a hearing and appeal. However, in the unprecedented maneuver used by the NCAA, Penn State relinquished its right to challenge the Consent Decree (NCAA Consent Decree, 2012). The decree denied the institution and accused individuals any right of appeal, and was presented in a take it or leave it fashion (Van Natta, 2012).

In an interesting legal move, Pennsylvania Governor Thomas Corbett announced and later filed an antitrust suit against the NCAA challenging the penalties imposed on Penn State by the NCAA (Commonwealth of Pennsylvania v. NCAA, 2013). In light of the language in the Consent Decree that forbids Penn State from suing the NCAA, Corbett brought suit on behalf of the Commonwealth of Pennsylvania. The arguments set forth in the suit pertain primarily to the economic impact of the penalties imposed on Penn State and the harm to the local and state revenue. Although the arguments asserted appear to be novel and not those normally associated with antitrust litigation, the lawsuit further articulates the ire and outrage associated with the

historic penalties mandated by the NCAA and the effect on the Penn State family and community.

Since 1988, the NCAA has not been required to provide an institution or involved individuals due process. In *NCAA vs. Tarkanian*, (NCAA vs. Tarkanian, 1988) the United States Supreme Court held that the NCAA is a private actor and, thus, the United States Constitution does not afford individuals a right to due process. However, in a riveting case making its way through the judiciary, a former men's basketball coach at an NCAA member institution brought suit seeking due process from the NCAA (Cohane vs. NCAA, 2007). The plaintiff claims that NCAA investigators worked in concert with the institution to threaten and pressure student-athletes to falsely implicate the coach, resulting in a show cause sanction and effectively ending his career. In *Cohane v. NCAA*, Cohane argues, among other things, that the NCAA enforcement process is flawed, does not provide for due process protections, and makes coaches sacrificial lambs. The United States Second Circuit Court of Appeals, for the first time since the *Tarkanian* decision, found that a specific set of facts may exist that requires the NCAA to provide due process thereby distinguishing *Tarkanian*. Therefore, at least one court of appeals, may force the NCAA to provide due process when sanctions are looming.

The NCAA acted swiftly and without due process (or the NCAA's version of due process) to punish Penn State by using what seems to be a modified version of its summary disposition process found in NCAA Bylaw 32.7 of the NCAA Division I Manual. The summary disposition process is a streamline procedure where all involved individuals agree to the violations at issue, thus the parties do not have to be present before the NCAA Division I Committee on Infractions for a formal hearing. However, the summary disposition process, as written, could not be used to address the matters associated with Penn State, because all of the involved individuals, including former Penn State President Graham Spanier and the Paterno family, did not agree with the findings in the Freeh Report and the allegations set forth against them, claiming numerous inaccuracies, theories and conclusions not based on fact. At the time of this writing, the Paterno family has hired their own private investigator to challenge the assertions of the Freeh Report (Rubincam, 2012). To ensure Penn State would take no further action to dispute the mandated penalties or actions taken by the NCAA, the NCAA required that Penn State execute the Consent Decree under the threat of a four-year suspension of its football program (*i.e.*, death penalty), which is three years longer than the historic death penalty mandated by the NCAA on Southern Methodist University's football program in the mid-1980s for rampant violations of core NCAA legislation like recruiting and extra benefits. In relevant part, the decree states Penn State agreed "not to challenge the consent decree and waive[d] any claim to further process, including, without limitation, any right to a determination of violations by the NCAA Committee on Infractions, any appeal under NCAA rules, and any judicial process related to the subject matter of [the] Consent Decree."

In October 2011, a group of prominent intercollegiate athletics administrators including current Big 12 Conference Commissioner Bob Bowlsby requested in a letter to President Emmert, a number of changes to the way the NCAA operates (Weiberg, 2011). One of the changes requested related to the use of neutral third-party arbitrators to hear and decide major infractions cases. At present, the NCAA Division I Committee on Infractions is comprised of a group of athletics administrators, professors, and a few outside individuals. The current enforcement model has been discussed and debated for years with little substantive change. It is time to take the next step and follow the lead established by professional athletics. Arbitrators not only provide neutrality throughout the process, but also may provide a sense of ease for

involved individuals and institutions. Historically, many have argued that the NCAA investigates violations, prosecutes cases, serves as staff for the judges of the accused institutions and individuals, and finally punishes violators. Removing this power from the NCAA's umbrella of authority not only provides inherent fairness, but also establishes better trust in the process and gives involved individuals and institutions a semblance of due process.

While it is debatable whether Penn State actually committed violations of NCAA legislation, it is certainly clear that the NCAA has never used the NCAA legislation cited in the Consent Decree to punish an institution for similar acts. Penn State is not the first sexual abuse scandal on a college campus and unfortunately will not be the last. As recently as November 8, 2012, an internal investigation conducted at the University of Iowa revealed allegations that a senior member of athletics department academic staff employed for a span of 13 years, traded tickets for sex and inappropriately touched student-athletes. In an investigative report stemming from a formal harassment complaint, the alleged perpetrator left the university, but was rehired by the administration even though they were aware of troubling allegations of harassment. For years, the athletic administration failed to act to protect their student-athletes and potential victims (O'Leary, 2012). Thus, the question begs, whether the Iowa case involving athletic administration differs significantly from the Penn State case. While the facts may differ, the questions of gross administrative misconduct and lack of institutional control linger. Should Mr. Emmert evoke executive action or refer the Iowa case through the normal infractions method? With each future similar egregious act receiving significant publicity, questions will surely be posed by the public. Although the case has not drawn the level of media attention as the Penn State case, it is strikingly similar enough to wonder if the executive authority action against Penn State was primarily motivated by public outrage rather than NCAA rules enforcement. Would Penn State have argued against the historic sanctions handed down by the NCAA if the enforcement proceedings were conducted by a neutral third-party arbitration? The answer is unknown; however, when faced with the threat of an unprecedented four-year death penalty and presenting egregious facts to an NCAA committee, Penn State chose to abandon the opportunity to dispute the claims in the Freeh Report and their rights under NCAA legislation.

President Emmert's use of executive authority in the Penn State case will likely have chilling effects on the NCAA membership. As salaries of coaches continue to rise and the success or failure of athletic programs hinge on obtaining elite adolescent recruits and the success of celebrity coaches, the enticement for violating recruitment and academic rules will continue to grow. Member Division I institutions will not know when Mr. Emmert will chose to evoke his executive authority under the threat of a death penalty circumventing the enforcement process, or have the sense of confidence that the sanctions will be just.

The question remains: was there enough evidence to implicate and condemn the Penn State administrators prior to their criminal adjudication where evidence can be fully set forth and witnesses can be confronted. The basis of the NCAA's sanctions on Penn State relate to the individual who has been dubbed "Victim 2". Attorneys for Penn State administrators being charged with perjury and child endangerment are at the center of the rationale for NCAA sanctions have claimed that "Victim 2" has 1) never come forward; and 2) may not exist (Ganim, 2012). If there is any truth to the latter, then the facts derived from the Freeh Report that led to historic sanctions and penalties may be inaccurate. Penn State may have been punished for acts that have not occurred. If there is a question as to the validity of the penalties, then penalties must not be imposed until evidence has had the opportunity to unfold. Emmert's use of executive power to punish Penn State prior to the conclusion of criminal proceedings for Penn

State administrators without an opportunity to be heard is a core violation of the rights afforded to Penn State as an NCAA member and its administrators pursuant to the NCAA Division I Manual.

We are left with unprecedented penalties based on disputed facts. The Penn State sanctions are based upon a Consent Decree that is disputed by the accused individuals. The three key administrators are facing criminal charges and have not had an opportunity to fully respond to the Freeh Report that serves as the basis for the penalty. The full account of what occurred at Penn State University has not been told and the sanctions seem premature. As such, NCAA sanctions currently levied against Penn State should be suspended until the perjury and child endangerment cases have been completed. Should facts established in the court contradict the basis of the Emmert's actions, the entire case should be dropped and referred back to the NCAA enforcement staff. Given Emmert's rush to judgment and the enormous publicity associated with the Sandusky case, it is difficult to imagine a fair and impartial consideration of the Penn State case by the NCAA Committee on Infractions. If codified NCAA rules have been broken, the case requires a hearing before a neutral and unbiased body unassociated with college athletics. In any event, an appeal process for the institution and accused individuals before a neutral board should immediately be afforded to Penn State and those accused of wrongdoing.

Neutrality is not a new thought in the business of sports and is a commonly adopted process in professional sports as is the notion of waiting for due process to unfold in criminal matters. NFL Commissioner Roger Goodell will commonly wait for criminal proceedings to conclude prior to issuing sanctions to NFL players and recently recused himself in favor of former NFL Commissioner Paul Tagliabue to hear the "Bountygate" appeals (McCann, 2009). In an MLB arbitration case, an arbitrator overturned a suspension of former MLB player Pascual Perez for failing to consider all evidence before suspending him for a drug conviction in the Dominican Republic (MLB Arbitration, 1984). These examples make it clear that failing to allow Penn State to present its version of the evidence to an impartial panel has the grumblings of injustice.

The NCAA has categorically refused to establish parameters for this type of use of executive authority. While Emmert insists this action is unlikely to be repeated, another potentially egregious major violations case looms at the University of Miami ("Miami"). The allegations in the Miami case of massive extra benefits over a long period of time and inducements to recruits certainly fall within the NCAA's core values of athletic competition and appear to violate the NCAA's most coveted principle of amateurism. Coaches and administrators who knew the booster, may have participated in the violations, or did not act to stop or report rampant violations. How will the NCAA distinguish between egregious cases to be adjudicated or require an executive sanction? Whatever the NCAA's motive, it's eagerness to sanction Penn State appeared more like a demonstration of control and authority than the pursuit of truth.

At times, Mr. Emmert has expressed frustration with the NCAA's lethargic rate of change and slowly moving cultural shifts. His proposed $2,000 stipend to scholarship athletes, for example, has met resistance from the membership and has yet to be implemented. He has recommended that the NCAA Division I Manual be streamlined by removing nuisance rules and has named a Presidential Working Group to revise legislation. The premature NCAA sanctions against Penn State may be an expression of his frustration with the NCAA enforcement bureaucracy rather than a thoughtful and thorough consideration of whether there was an institutional cover-up by its administration.

A new NCAA enforcement model is necessary to provide better protections for institutions and involved individuals, which must begin with neutral third-party arbitrators appointed to hear and oversee the NCAA Division I Committee on Infractions process and procedures. We recommend the following protections for member institutions and individuals accused of wrongdoing:

1. NCAA infractions cases should be referred to one or more neutral third-party arbitrators with knowledge of sports industry arbitrations. Taking the lead from MLB's salary arbitration model, the NCAA and member institutions can locate a body of arbitrators to hear these cases that have been vetted and interviewed for arbitration talent, knowledge, and neutrality. This change will provide coaches, administrators, student-athletes, and institutions with a fundamental sense of fairness and likely will benefit the NCAA's public relations campaign. Neutral arbitrators who are not affiliated with an athletic program or institution, who are also well versed in arbitration procedures, will grant all involved individuals the opportunity to present their case to an impartial third-party without the cloud of the NCAA wearing multiple hats in the enforcement process (*i.e.*, investigator, prosecutor, judge, and executioner).

2. Appeals from the neutral third-party arbitration decisions should be appealed to an independent appellate body of arbitrators. Again, this procedure provides for a neutral appellate process that allows an extra layer of protection and fundamental fairness. Appointed arbitrators will have previously been vetted for neutrality and, thus, will create an open environment for appeals based on established procedures.

3. If expedited authority is required to address matters for the good of intercollegiate athletics or the specific sport, then the legislation to authorize the NCAA President to levy sanctions should be proposed and voted upon by NCAA member institutions. Appeals of executive action should be afforded through neutral third-party arbitration.

4. Penn State should receive a stay of any penalties imposed by the NCAA until the criminal matters of Penn State administrators are tried or resolved. With the argument that "Victim 2" does not exist and the basis of the Freeh Report predicated on "Victim 2", facts in the criminal proceedings may be proven that are contrary to the Freeh Report and the matters outlined in the Consent Decree. If this is not a matter of legal maneuvering and Penn State administrators are able to convince an impartial jury that they were not involved in wrongdoing, then the entire basis of the Consent Decree comes into question. The absence of voluntary testimony of NCAA witnesses may delay or cancel pending infractions cases. Like other major sports leagues, the NCAA should restrain judgment until the facts can be fully presented and the criminal matter concludes. In this matter, since the NCAA has already issued punishment prior to the conclusion of the criminal proceedings, the NCAA should abate the imposition of penalties until the conclusion of the criminal proceedings.

5. Penn State administrators and involved individuals should have the right to appeal the sanctions to a neutral third-party. Penn State administrators and involved individuals were not signatories to the Consent Decree. The penalties accessed in the Consent

> Decree and the accusations set forth in the Freeh Report have and will cause profound professional strife for the reputations and careers of those accused. These individuals have never been afforded the opportunity to address the allegations in the Freeh Report. Contracts were not renewed and individuals were terminated and left with the stain of a sexual abuse scandal on their resumes. Like other involved individuals accused of NCAA violations, the NCAA should, at a minimum, afford these individuals rights to appeal under NCAA Bylaw 19.6.3 to a neutral third-party. It is unlikely that an NCAA body can be impartial at this stage of the Penn State matter.

In a recent New York Times article, Himmelsbach (2012) argues that the Penn State sanctions are the defining moment of Emmert's presidency. If Emmert's goal was to affect the culture of college sport, his expeditious imposition of sanctions in the midst of spiraling commercialism and major infractions will be negligible. Had Emmert been interested in seeking the truth or fairness to its member, Penn State, a more measured response might have yielded more certainty over the nature of the infractions and acceptance by a skeptical public. We have seen many examples of past NCAA infractions cases waiting for the adjudication in the court system prior to moving forward with hearings. The 2003 Baylor investigation of the murder of men's basketball player Patrick Dennehey is the most prominent example of the NCAA waiting for adjudication prior to levying sanctions for failure to report drug abuse, impermissible financial assistance, and a cover-up (Kim, 2005). In the Penn State case, individuals are awaiting their day in court with their careers and reputations hanging in the balance. While the authority exercised by the NCAA's Executive Committee and Emmert to impose sanctions on a member institution is murky, such broad power to punish institutions and individuals without opportunities to appeal or defend themselves is a troublesome policy fraught with dangerous implications and inconsistencies. Emmert's effort to appear in control of big time college sport will almost certainly fail with the next inevitable major scandal on the horizon.

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