IS THE FEDERAL GOVERNMENT SUITING UP TO PLAY IN THE REFORM GAME?

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INTRODUCTION

A recent Louis Harris poll revealed that seventy-five percent of the American public believes that college athletics are a mess.[1] Certainly, if you had read such books as *College Sports Inc.*,[2] *Undue Process*,[3] *Major Violation*,[4] and *Backboards & Blackboards*,[5] the Harris poll result would be of little surprise to you. If you happen to be a college athlete, a college student, or a college professor or administrator, it is likely that one or more of the concerns presented in the above mentioned books have arisen on your campus or on the campus of one of your close friends. If, like myself, you are a devoted follower of university athletics and its role and interaction with the mission and function of college, you are certainly aware that the voices of reform in college athletics are both loud and growing in number. College sports reform is now a reality. The questions remaining are how will reform be accomplished and by whom? This brief article will attempt to shed some light on these questions.

While many people and organizations have entered into the college athletic reform picture, there presently appear to be three big-time players. The in-house candidate is the National Collegiate Athletic Association (NCAA).[6] The NCAA, which actually governs most college athletics in the United States, has felt the heat of the reform movement and is moving with great speed to attempt to clean up its own house. It could be said that the second candidate is the public, which might well be represented by the now famous Knight

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1. John Hawkins, *Major College Reforms Backed*, WASH. TIMES, Mar. 20, 1991 at D1.

2. MURRAY SPERBER, COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990).

3. DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL (1991).

4. GARY D. FUNK, MAJOR VIOLATION: THE UNBALANCED PRIORITIES IN ATHLETICS AND ACADEMICS (1991).

5. PATRICIA A. ADLER AND PETER ADLER, BACKBOARDS & BLACKBOARDS: COLLEGE ATHLETES AND RULE ENGULFMENT (1991).

6. The NCAA has made some attempts toward reform from within. It passed a number of amendments at the 1991 convention directed at reducing the size of staffs, altering the practice time, and restricting recruiting activities. In addition, a host of new proposals await the next convention geared towards academics. Also, the NCAA has agreed to publish modified graduation rates and will shortly begin a certification program.

Commission.[7] This twenty-two member blue ribbon panel has recently released its blueprint for reform. Finally, the government itself must be considered a viable candidate for instigating intercollegiate athletic reform. While some state governments have enacted legislation, the more active participation has come from the federal government, with six bills pending, committee hearings being conducted, and one bill actually enacted into law.[8] It appears that some members of Congress

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7. The Knight Commission, which was created on October 19, 1989 by the Trustees of the Knight Foundation, was charged with creating a reform agenda for intercollegiate athletics. Members of the Commission include—

Lamar Alexander	U.S. Secretary of Education
Creed C. Black	President, Knight Foundation
Douglas S. Dibbert	General Alumni Association, University of North Carolina
John A. DiBiaggio	President, Michigan State University
William C. Friday	President Emeritus, University of North Carolina
Thomas K. Hearn	President, Wake Forest University
Theordore M. Hesburgh, C.S.C.	President Emeritus, Notre Dame
J. Lloyd Huck	Chairman, Pennsylvania State University
Bryce Jordon	President Emeritus, Pennsylvania State University
Richard W. Kazmaier	President, Kazmaier Associates
Donald R. Keough	President, Coca-Cola Co.
Martin A. Massengale	President, University of Nebraska
Rep. Tom McMillen	United States House of Representatives
Chase N. Peterson	President, University of Utah
Jane C. Pfeiffer	Former Chairman, NBC-TV
A. Kenneth Pye	President, Southern Methodist University
Richard D. Schultz	Executive Director, NCAA
Donna E. Shalala	Chancellor, University of Wisconsin-Madison
Leroy T. Walker	Treasurer, United States Olympic Committee
James J. Wharton	Chairman and CEO, TIAA-CREF
Charles E. Young	Chancellor, UCLA.

8. The six pending bills are: H.R. 969, H.R. 2157, H.R. 2243, H.R. 2433, H.R. 2464, and H.R. 3046. The Student Athlete Right-to-Know Act has been passed, and Rep. Cardiss Collins (D-Ill), chairwoman of the House subcommittee on Commerce, Consumer Protection and Competitiveness, has been holding a series of public hearings on various topics pertaining to the problems in college athletics. *See NCAA: Who's In Control of Intercollegiate athletics?*, 102d Cong., 1st Sess. (1991); *The Graduation Rates of Student Athletes,* 102d Cong., 1st Sess. (1991); *An Issue of Fairness, Intercollegiate Athletics and Historically Black Colleges and Universities,* 102d Cong., 1st Sess. (1991).

are serious about government intervention in this problem area. This article will examine the government's proposed game plan as it appears in the six pending bills and the bill already passed.[9]

I. THE GOVERNMENT'S GAME PLAN

In the belief that the NCAA cannot police itself and that the public, through the Knight Commission, is moving too slowly and without focus, certain members of Congress have become involved in college sports reform. At present, six bills have been introduced in the U.S. House of Representatives, and only one bill has been enacted into law that deals with college athletics programs.[10] These bills take widely varying approaches and differ significantly in their philosophical underpinnings and, thus, will be described individually.

A. *H.R. 969*

On February 19, 1991, Representative Paul B. Henry[11] introduced H.R. 969,[12] which would affect college athletics in two important ways. First, § 2 of H.R. 969, which is entitled "Exclusion From Gross Income for Scholarships for Travel, Research and Living Expenses," would expand the definition of qualified scholarship that was created by the Tax Reform Act of 1986.[13] Under § 117(b) of the Internal Revenue Code of 1986 (Code), a qualified scholarship is defined as "any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and related expenses."[14]

The Code continues by defining qualified tuition and related expenses as "tuition and fees required for enrollment or attendance of a student at an educational organization described in section 170(b)(1)(A)(ii)"[15] and "fees, books, supplies, and equipment required for

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9. The article will focus on the six pending bills and the one bill already passed.

10. *See supra* note 8.

11. Representative Henry is a Republican from Michigan.

12. H.R. 969, 102d Cong., 1st Sess. (1991).

13. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

14. I.R.C. § 117(b)(1) (1986).

15. I.R.C. § 117(b)(2)(A) (1986). Section 170(b)(1)(A)(ii) is set forth below:

> (b) percentage limitations
> (1) Individuals: In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.
> (A) General Rule: Any charitable contribution to
> (ii) An educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

courses of instruction at such an educational organization."[16] The significance of this definition is that any amount of a scholarship or fellowship that rises to the level of a "qualified scholarship" is excluded from the gross income of the recipient if he or she is a candidate for a degree at a § 170(b)(1)(A)(ii) organization.[17]

What is not excluded from gross income is the portion of the scholarship or fellowship grant that is attributable to, or used for, living expenses and travel. Therefore, a college athlete on an athletic scholarship that covers tuition, fees, books, and room and board will actually have gross income and a possible tax liability for the year in question. Consider the following example:

> Tommy, a member of State University's varsity football team, is the recipient of a football scholarship. The scholarship covers tuition ($3200), fees ($500), books ($300) and room and board ($6000). Therefore, the value of this scholarship to Tommy is $10,000. Of the $10,000, only the $4000 portion for tuition, fees, and books is classified as a qualified scholarship and, therefore, excluded from his gross income. The remaining $6000, which is attributed to room and board, must be included in Tommy's gross income and subject to federal income tax. Remember, Tommy has actually received no cash money, even though he may have tax liability from this scholarship.[18]

As stated above, H.R. 969 would expand the definition of "qualified scholarship." Under this bill, a qualified scholarship would include any amount used for "qualified educational expenses," as opposed to

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16. I.R.C. § 117(b)(2)(B) (1986).

17. I.R.C. § 117(a) (1986). To illustrate, if Mary, a student at State University, receives a scholarship worth $5000, that $5000 represents an accession to wealth for Mary and, therefore, income. Section 117(a) states that this income will be excluded from gross income and, thus, not subject to federal taxation if it represents a qualified scholarship. If Mary uses all $5000 for her tuition, then she has met the test and will have no tax consequences arising from this situation.

18. Two comments must be made about this example. First, few, if any, colleges explain to their student-athletes that a portion of their scholarship may be subject to taxation and that they may be required to file a tax return. In fact, the former student-athletes who appear in my basic tax course in their second year of law school are actually surprised to know that they may have already violated federal tax law before actually ever going to work. Two of my most recent student research clerks were members of the women's basketball team at one of Ohio's state universities. Both were on scholarship. Neither was informed about this possible inclusion of income. The other thing that should be noted about this situation involves the actual tax liability that may or may not flow from this situation. If the portion of the scholarship attributable to room and board is below the taxpayer's personal exemption amount ($2050 for 1990) plus the standard deduction (at least $2500), and the taxpayer has no other income, then there will be no tax liability and no requirement to file a tax return.

"qualified tuition and related expenses."[19] Of course, the bill would classify living expenses, such as room and board, as "qualified educational expenses,"[20] thereby reducing the potential tax burden for scholarship recipients.

While the part of H.R. 969 that expands the excludable portion of a scholarship from gross income is a boost for college athletics as well as for college students in general, the other part of the bill could have a significant negative impact. Section 1 of H.R. 969, which is entitled "Application of Unrelated Business Tax to Broadcasting and Certain Other Athletics Related Revenues of Colleges and Universities," would amend § 512(b)[21] of the Code by adding the following paragraph:

> (16) In the case of a college or university, there shall be included
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> (A) All income derived directly or indirectly from the radio or television broadcasting of any athletic event,
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> (B) Amounts which would not (but for section 170(m)) be allowable as a deduction under section 170 to the contributor,
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> (C) Amounts contributed by a booster club or similar organization to, or for the use of, the athletic department or activities of such college or university, and
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> (D) All deductions directly connected with amounts included under the preceding provisions of this paragraph.[22]

The effect of this amendment would be to significantly expand the way that the Code classifies certain things as unrelated business taxable income. In the past, this was generally a "facts and circumstances" analysis. If adopted, the three elements in this amendment would be defined as unrelated business income, not by any factual determination, but by law.

First, any amounts contributed by a booster club or similar organization to, or for the use of, the athletic department activities of

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19. *See* H.R. 969, *supra* note 12, at § 2(b).

20. *Id.* The Bill also would classify travel and research expenses as qualified educational expenses.

21. While a discussion of unrelated business taxable income is beyond the scope of this article, a brief explanation is in order. Colleges and universities are generally tax-exempt; therefore, their income is generally not subject to taxation. However, § 511 does impose a tax on the unrelated business income of a tax-exempt organization. Section 512(a) defines unrelated business income as gross income derived from any unrelated trade or business, regularly carried on, less the deductions directly connected with carrying on the trade or business. Section 513 defines an unrelated trade or business as one in which the conduct of business transactions is not substantially related to the exercise or performance of the exempt purposes of the organization.

22. *See* H.R. 969, *supra* note 12, at § (1)(a).

a college or university would be unrelated business taxable income and subject to tax. This would be true even if these funds were designated and used to assist a minor or club sport team. Second, any amounts donated to a school that would give rise to a § 170(m)[23] deduction for the contributor would also be classified as unrelated business taxable income and subject to tax. As much as the athletic departments of colleges and universities dislike these two provisions, the third provision is the real blow. It would bring within the scope of unrelated business taxable income all income derived, directly or indirectly, from any radio or television broadcasting of any athletic event. For a university like Notre Dame, which recently signed a mega-dollars television deal, this provision would cost dearly.[24]

While the sale of television rights to athletic events has been the subject of a great deal of controversy in the past, the Internal Revenue Service (hereinafter the Service) conceded its non-taxability in *Rev. Rul. 80-296*.[25] Acknowledging that college and university athletic programs promoting athletic competition are themselves educational and an integral part of the educational process,[26] the Service has held that the broadcasting rights to these athletic contests also contributed greatly to the school's exempt purpose.[27] Therefore, not only income derived from the actual game, but also income from the sale of broadcast rights, is not income from an unrelated business. Therefore, neither is subject to taxation. H.R. 969 would change this and would classify the broadcast income as income from an unrelated business that is subject to federal taxation.

B. *H.R. 2157*[28]

In response to the United States Supreme Court's decision in *Tarkanian v. NCAA*,[29] Representative Edolphus Towns[30] introduced

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23. Section 170(m) allows a partial deduction for amounts contributed to an organization of higher education given through the contributor, received directly or indirectly as a result of paying the amount for the right to purchase tickets for seating at an athletic event in an athletic stadium of such institution.

24. Steve Nidetz, *Notre Dame, NBC Win Big with TV Deal*, CHI. TRIB., Sept. 1, 1991, at C28.

25. Rev. Rul. 80-296, 1980-2 C.B. 195.7

26. *See* Rev. Rul. 67291, 19672 C.B. 184; Rev. Rul. 64275, 19642 C.B. 142; Rev. Rul. 58502, 19582 C.B. 271.

27. *See* Rev. Rul. 80-296, note 25.

28. H.R. 2157, 102d Cong., 1st Sess. (1991).

29. 488 U.S. 179 (1988). While the outcome and effect of the *Tarkanian* case is beyond the scope of this article, it is important to note that the Court found that for the purpose of affording due process to University of Nevada at Las Vegas Head Basketball Coach, Jerry Tarkanian, the NCAA was not a state actor. For a discussion of this case, *see* Wintehn K.T. Park, Comment, *NCAA v. Tarkanian: The End of Judicial Review of the NCAA*, 12 U. HAW. L. REV. 383 (1990); Branden J. Tedesco, *NCAA v. Tarkanian, A Death Knell For the Symbiotic Relationship Test?*, 18 HASTINGS CONST. L.Q. 237 (1990); Stephen R. VanCamp, Note, *NCAA v. Tarkanian: Viewing State Action Through the Analytical Looking Glass*, 92 W. VA. L. REV. 761 (1990); Susan Westover, Note, *NCAA v. Tarkanian: If NCAA Action is Not State Action, Can Its Members Meaningfully Air Their Dissatisfaction?*, 26 SAN DIEGO L. REV. 953 (1989).

30. Representative Towns is a Democrat who represents New York.

H.R. 2157 on May 1, 1991. H.R. 2157, entitled the "Coach and Athlete's Bill of Rights,"[31] delivers a powerful combination in four quick punches.

First, the bill enumerates five important findings, including that

(1) the NCAA has member institutions in all fifty states;
(2) these member institutions conduct extensive interstate travel for the purpose of performing in athletic events;
(3) the broadcasting of these events involves telecommunications between the fifty states;
(4) the NCAA has a direct and substantial effect on interstate commerce in its regulation of its member institutions, the athletic events, and the broadcasting of such events; and,
(5) collegiate athletics generate approximately $1 billion in interstate commerce each year.[32]

Second, the bill prohibits the NCAA from taking any action against a coach or player of a member institution, or the institution itself, without affording the individual or institution due process. This bill would target actions which would adversely affect the commercial activities of such institution.[33] This part of the bill further requires the NCAA to adopt rules to provide for due process within ninety days of enactment.[34] If the NCAA fails to adopt such rules, then the bill would prohibit the NCAA from imposing any sanctions or penalties limiting the interstate commerce telecommunications of sporting events.[35]

The next part of the bill would effectively overrule *Tarkanian*. It would mandate that the NCAA would be held to be a state actor when, as a result of sanctions imposed, it issues any final or decisive act of suspending or reprimanding a coach or player of a member institution or the institution itself.[36] Since a federal constitutional action cannot be maintained unless the alleged violator is a state actor, the significance of this provision is huge. Finally, the bill would require the Secretary of Commerce to conduct a study on the impact that NCAA sanctions have on the telecommunications and commercial activities of intercollegiate athletic events and the revenue loss by such sanctions.[37] It should be noted that as of August 2, 1991, H.R. 2157 had obtained sixty-seven co-sponsors.[38]

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31. *See* H.R. 2157, *supra* note 28, at § 1.
32. *Id. See* § 2.
33. *Id. See* § 3.
34. *Id.*
35. *Id.* The importance of this interstate commerce telecommunications goes directly to the NCAA's power to sanction a member institution by prohibiting it from making any television appearances for a specific period of time. Presently, the NCAA has the power to restrict its member institutions from appearing on television or in Bowl games and other championship events.
36. *See* H.R. 2157, *supra* note 28 at § 4.
37. *Id.*
38. However, it should also be noted that of the 67, only five are Republicans.

C. *H.R. 2433*[39]

Only weeks after Representative Towns introduced H.R. 2157, Representative Henry[40] introduced his second bill pertaining to college athletics. H.R. 2433, the "National College Athletics Accountability Act,"[41] begins by providing the following findings:

(1) the fiscal and operational integrity of intercollegiate athletic programs and the relationship of such programs to the educational purpose of higher education are of increasing concern to the public, students, and to Congress;

(2) there is a lack of adequate information regarding the operation and control of intercollegiate athletic programs, including the revenues and expenditure associated with such programs; and,

(3) such information would be helpful in ensuring that intercollegiate athletic programs are adequately controlled by, and accountable to, the institutions that sponsor them.[42]

Based on these findings, the bill seeks to amend § 487(a) of the Higher Education Act of 1965[43] to require that any institution offering athletically-related student aid must

(1) have an annual audit conducted, in accordance with prescribed guidelines, by a person certified to perform such financial audit of,

  (a) the total revenues, and the revenues by sport, derived by the institution's athletic departments and its intercollegiate athletic activities;

  (b) the total expenditures, and the direct expenditures by sport derived by the athletic departments and its intercollegiate activities; and,

  (c) the total revenues and expenditures of the institution for the same period.

(2) make this report of such audit available for inspection by the government and the public.[44]

Representative Henry, a former associate professor of political science, states that the purpose of his bill is to restore balance to the athletic academic equation.[45] He contends that too often the budgets

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39. H.R. 2433, 102d Cong., 1st Sess., (1991.)

40. *See supra* note 12.

41. *See* H.R. 2433, *supra* note 40.

42. *See id.* at § 2.

43. *See* 20 U.S.C. § 1094(a), which establishes the guidelines for institutions to be eligible for using financial assistance.

44. *See supra*, note 39, at § 3.

45. *Two Congressmen Lead the Charge Against the NCAA and Big Time Sports*, CHRON. OF HIGHER EDUC., Aug. 7, 1991, at A25.

relating to sports given to trustees and legislators omit important information, or bury it in an "All Other Expenses" category.[46] In addition, Representative Henry feels that his bill will make accurate data available to the university's constituents, such as legislators, governing boards, faculty members, and the public, so that they might begin to ask the tough questions needed to bring big-time athletics in line with what he sees as its proper place in higher education.[47]

D. *H.R. 2243*[48]

Having set forth twelve important findings, which are discussed at length below, this bill would establish a commission to be known as the "National Commission on Intercollegiate Athletics."[49] The Commission's duties would be

(1) to examine the distribution of television broadcasting revenues among colleges and universities engaging in revenue-producing athletic programs;

(2) to study the economic impact of college and university athletic programs on the geographic region in which such programs are located; and,

(3) to develop and implement informational programs for the use of colleges, universities, and the public related to

  (a) promoting compliance by college and university athletic programs with Title IX; and

  (b) promoting awareness of the vital role of both academic and athletic programs as a means for all college and university student-athletes to live a productive and healthy life.[50]

This Commission would be composed of fifteen members appointed by the President of the United States with the advice and consent of the United States Senate.[51] In order to carry out its charge, the Commission would have the power to hold hearings, take testimony, receive evidence,

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46. *Id.*

47. *Id.*

48. H.R. 2243, 102d Cong., 1st Sess. (1991).

49. *See id.* at § 3.

50. *See id.* at § 4. It should be noted that Title IX (20 U.S.C. § 1691) prohibits discrimination on the basis of sex under any educational program. For discussion and reference to that topic, *see* Wendy Olson, *Beyond Title IX: Toward An Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105 (1990); Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality* 1 BERKELEY WOMEN'S L.J. 201 (1985); Virginia P. Croudace and Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?* 58 SO. CAL. L. REV. 1425 (1985).

51. *See id.* at § 5. In addition, not more than eight of the 15 members could be from the same political party. With the exception of travel expenses, none of the members would receive any pay.

delegate authority, and hire a director, staff, experts, and consultants.[52] Within two years of the enactment of this bill, the Commission would submit to Congress and the President a report revealing its findings and make specific recommendations for legislative and administrative action to improve college athletics.[53]

To better understand Representative Mervyn M. Dymally's[54] purpose in sponsoring this bill, the twelve findings attributed to Congress by the bill are very important. Section 2 of the proposed bill states that the findings are as follows:

> (1) the athletic programs of most colleges and universities do not allocate funds and other resources to women's athletic programs in a manner that adequately reflects the proportion of women in the general student body, in noncompliance with Title IX;
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> (2) women and minority student-athletes will be adversely affected by limitations on the number of college and university coaches imposed by the NCAA;
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> (3) less than five percent of all college and university coaches are minorities and less than twenty-five percent are women;
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> (4) the NCAA will receive more than $1.1 billion in broadcasting revenue during a seven-year period from one major television network;
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> (5) historically, black colleges and universities that are participants in NCAA Division I basketball have received none of such revenues which have been paid to other such participants;
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> (6) major college and university athletic departments receive considerable financial benefits from such revenue;
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> (7) the NCAA monthly allotment for incidental expenses to needy college and university student-athletes who have athletic scholarships is only $25.00 per student;
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> (8) statistics compiled by the NCAA suggest that college and university student-athletes graduate at nearly the same rate as students who are not athletes;
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> (9) college and university student-athletes who participate in revenue-producing athletic programs, such as football and basketball, graduate at a considerably lower rate than students who are not athletes;
>
> (10) graduation rates for college and university black student-athletes who participate in revenue-producing athletic programs are lower than the graduation rates for white student-athletes who participate in such programs;

52. *Id.*
53. *See id.* at § 8.
54. Representative Mervyn M. Dymally is a Democrat from California.

(11) since 1971, historically black college and university athletic teams have not appeared in a nationally broadcast athletic event on any of the major television networks; and,

(12) the problems associated with intercollegiate athletic programs are of a national concern and must be resolved by a nationwide effort.[55]

E. *H.R. 3046*[56]

On July 25, 1991, Representative Tom McMillen[57] introduced what must be considered as the most ambitious and sweeping congressional bill relating to college athletics. The bill, the "Collegiate Athletics Reform Act,"[58] touches so many areas that it has been referred to the Committees on Judiciary, Education and Labor, Energy and Commerce, and Ways and Means. As with most of the other bills, it starts by stating certain findings attributable to Congress. These findings include the following:

(1) the National Collegiate Athletic Association (NCAA) and intercollegiate athletics have a direct and substantial effect on interstate commerce;

(2) NCAA member institutions conduct amateur athletic events in all fifty states;

(3) revenue is received from these amateur athletic events through a variety of means, including broadcasting rights, cable television rights, sponsorship of amateur athletic events, endorsement of products, event ticket sales, and advertising;

(4) revenue from such amateur athletic events is estimated to be in the hundreds of millions of dollars each year;

(5) competition for products related to intercollegiate athletic events is increasing every year, and this competition is resulting in a variety of new commercial ventures, including the sale of team logos, unique advertising contracts, and the sale of amateur athletic event programs;

(6) such commercial ventures are having a variety of negative effects on the higher education system, including lower graduation rates for student-athletes on revenue-producing sports teams, a reduction in the credibility of the higher education system as measured by public opinion polls, and an over-emphasis on the recruitment of student-athletes to increase revenues at a member institution;

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55. *See supra* note 48.

56. H.R. 3046, 102d Cong., 1st Sess. (1991).

57. Tom McMillen is a Democrat from Maryland. Rep. McMillen is also a former college and professional basketball player.

58. *See* H.R. 3046, *supra* note 56.

(7) most collegiate athletic programs do not allocate appropriate funds to women's athletics in accordance with the provisions of Title IX; and,

(8) NCAA member institutions have been reluctant to enact the necessary reforms to correct these efficiencies, either through annual conventions or through other means.[59]

Citing these findings, Representative McMillen stated that Congress must become involved. He stated, "The NCAA has already failed the 'we can do it ourself' test. Title I would not have occurred without Congress. The NCAA would not have published graduation rates without Congress."[60]

To accomplish this reform, the bill seems to make a deal with the NCAA, which has historically opposed attempts at regulations. In Title I of the bill, the NCAA would be given a limited antitrust exemption. In essence, for certain concessions, the bill provides that during a five-year period the antitrust laws would not apply to any conduct engaged in by the NCAA, or jointly with any member institution, for the purpose of allowing the NCAA to negotiate and carry out a contract with any person involving

(1) the use or sale of the name or logo of a commercial sponsor in association with a post-season amateur athletic event engaged in by a member institution;

(2) the sale of the right to telecast an amateur athletic event engaged in by a member institution; or,

(3) both activities listed in (1) and (2) above.[61]

This exemption would, for the time period specified, effectively repeal the 1984 United States Supreme Court ruling in *NCAA v. Board of Regents*.[62]

In return for this limited exemption, the bill requires that the NCAA comply with a number of outlined rules and procedures. First, the NCAA must consent to be governed by a board known as the "Board of Presidents."[63] This Board, whose thirty-three members must be

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59. *See id.* at § 2. For a survey of graduation rates among Division I basketball schools, *see School-by-School comparison of white, minority player graduation rates*, USA TODAY, June 19, 1991, at 8C.

60. *House Bill Would Dramatically Alter the NCAA's Governance and Finances*, CHRON. OF HIGHER EDUC., July 31, 1991, at A24.

61. *See* H.R. 3046, *supra* note 56, at Title I, § 101.

62. *NCAA v. Board of Regents of the University of Okla.* 468 U.S. 85 (1984). The Court found that the NCAA's television plan violated § 1 of the Sherman Antitrust Act. In practical terms, this case took away from the NCAA the power to regulate the broadcasting of college athletics. For discussions of this case and its effects, *see* the articles listed in GARY A. UBERSTINE, COVERING ALL THE BASES: A COMPREHENSIVE RESEARCH GUIDE TO SPORTS LAW 155-64 (2d ed. 1988).

63. *See* H.R. 3046, *supra* note 56, at Title I, § 102.

presidents of NCAA member institutions, will have direct decision making responsibility and authority over college athletics. The Board would have the power to delegate authority, hire staff, and make decisions relating to the governance of college athletics. The procedures for overruling the board's decisions would rely upon the non-board member presidents of the remaining member institutions.[64] This requirement seems to be similar to that recommended by the Knight Commission.[65] In its report, *Keeping Faith with the Student Athlete: A New Model For Intercollegiate Athletics*, the Commission suggested a new "One-Plus-Three" model for college athletic reform. The "one" in that proposed equation is actually presidential control.[66]

The second condition that the bill mandates is a defined revenue distribution plan.[67] The bill would require the NCAA board to develop, implement, and carry out a net contract revenue distribution plan that has been certified by the Secretary of Education and that complies with the following four rules:

(1) the plan must encourage each member institution to decrease the number of
   (a) its revenue-producing sports teams, and
   (b) its facilities used specifically for revenue-producing sports teams;
(2) the plan must encourage each member institution to decrease the amount of funds it expends for the administration of its athletic department, other than funds expended to improve compliance with Title IX;
(3) the plan must encourage each member institution to increase the level of academic performance of student-athletes who

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64. *Id.* In 1983, a Committee of the American Council of Education recommended that a President's Panel be created to set NCAA policy; however, the NCAA's membership rejected it in favor of the much weaker President's Commission, which is merely an advisory panel.

65. *See supra* note 7.

66. KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS (*Report of the Knight Foundation Commission on Intercollegiate Athletics, March, 1991*) The Commission suggested five recommendations in order for presidential control to take place:

(a) trustees should explicitly endorse and reaffirm presidential authority in all matters of athletics governance;
(b) presidents should act on their obligation to control conferences;
(c) presidents should control the NCAA;
(d) presidents should commit their institutions to equality in all aspects of intercollegiate athletics;
(e) presidents should control their institution's involvement with commercial television.

Id. at 12-14.

67. *See* H.R. 3046, *supra* note 56, at Title I, § 103.

participate on its revenue-producing sports teams to a level not less than the mean level of the academic performance of the general student body of such member institutions; and

(4) the plan must develop a method of allocating net contract revenue to each member institution in direct proportion to the extent of its compliance with Title IX.[68]

In addition, the NCAA would be prohibited from distributing any net contract revenue to a member institution based on that institution fielding winning sports teams.[69] Five years after the enactment of this bill, the Secretary of Commerce would be required to submit to Congress a report on the impact that this new net contract revenue distribution plan has had on

(1) the diversity of amateur athletic events on broadcast television and pay television services;
(2) the financial integrity of institutions of higher education;
(3) the television networks and their affiliates, and the revenue received by such networks or affiliates, resulting from contracts for telecasting amateur athletic events; and
(4) the nation's higher education system as a whole.[70]

Further, the bill would require the NCAA to impose and enforce rules that would provide due process before the NCAA could

(1) suspend a coach or student-athlete from a team representing a member institution or reprimand such coach or student-athlete;

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68. *Id.* Net contract revenue is any revenue received by the NCAA under a contract relating to

(1) the use or sale of the name or logo of a commercial sponsor in association with a post-season amateur athletic event; and,
(2) the sale of the right to telecast an amateur athletic event.

Minus:

(1) any amount paid to a member institution to reimburse such member institution for travel expenses and other expenses incurred by a sports team representing such member institution in a post-season amateur athletic event; and,
(2) any amount paid for administrative and overhead expenses incurred by the NCAA to carry out the net contract revenue distribution plan.

69. *Id.* The NCAA has made some progress in this direction with its new television contract with CBS covering championship events. The revenue distribution adopted by the NCAA would reward colleges with broader sports programs and more scholarships, as opposed to just winning teams.

70. *Id.*

(2) prohibit a member institution from participating in an amateur athletic event; or,

(3) suspend the telecommunications privileges of a member institution.[71]

As with H.R. 2157,[72] the effect of this bill would be to overrule the *Tarkanian* case.[73] Within 180 days after this bill would become law, the Chairman of the Federal Communications Commission (FCC) would submit a report to Congress on the impact on member institutions of NCAA suspensions of telecommunication privileges and the loss of funds to these institutions due to such suspensions.[74]

Finally, the bill would require the NCAA to either create or modify its present student-athlete scholarship plan.[75] The plan would encourage each member institution to allow each athletic scholarship recipient to retain that scholarship during the period of that individual's enrollment at such institution, but not to exceed five years, if such individual

(1) maintains acceptable academic performance;

(2) makes a good faith effort to participate in the athletic program for which such individual is awarded the athletic scholarship;

(3) complies with all regulations and policies of the member institution; and,

(4) is not convicted in a court of law of

(a) a felony, or

(b) a drug or alcohol-related offense.[76]

This part of the bill would also require the FCC to do two additional things involving college athletics and telecasting. First, the FCC must submit, within five years of enactment of this bill, a report to Congress that

(1) specifies the number of NCAA athletic events available on free, broadcast, cable, television, and "pay-per-view" television systems; and,

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71. *Id.*

72. *See supra* notes 28-38 and accompanying text.

73. *See Tarkanian*, 488 U.S. 179, *supra* note 29 and accompanying text.

74. *See* H.R. 3046, *supra* note 56, at Title I, § 104.

75. *See id.* at Title I, § 105. A student-athlete is defined as an individual who

(1) is enrolled at a member institution in an academic program that leads to a degree; and,

(2) is a member of a sports team that represents a member institution and competes against sports teams that represent other member institutions.

76. *Id.*

(2) evaluates the shift in the telecasting of amateur athletic events from broadcasting television to cable television and "pay-per-view" television systems.[77]

Next, the FCC would be required to promulgate regulations that would prohibit any television network, or any affiliate network, from broadcasting an amateur athletic event involving a sports team representing a disqualified college[78] at the same time, and in the same viewing area, as a broadcast of an amateur athletic event involving a member institution.[79]

Title II of the bill would add some important modifications to tax rules that affect college athletics. First, the bill would amend § 512 of the Internal Revenue Code, adding two new subsections.[80] New subsection (d) would actually act as a penalty for any member institution or university athletic organization that fails to adopt the policies or procedures outlined above.[81] If the institution does not adopt these polices or procedures, then, for the purposes of determining the institution's unrelated business taxable income, all the gross income with respect to the following activities will be included:

(1) the sale of tickets for an amateur athletic event;
(2) the use or sale of merchandise related to an amateur athletic event;
(3) the use or sale of the name or logo of a commercial sponsor in association with an amateur athletic event; and,
(4) the sale of the right to telecast an amateur athletic event.[82]

While the offending party would be allowed deductions from this gross income, the expenditures must be directly connected with the "tainted" income in order to rise to the level of a deduction.[83] In addition, this inclusion rule would only come into effect after the so-called "disqualification date."[84] This date is the earliest date during the five-year period specified in the antitrust exemption portion of the bill[85] in which the institution, or organization of institutions, fails to meet any requirements in sections related to the Board of Presidents,[86] the

77. *See id.* at § 106.
78. A disqualified college is defined later in the bill, as another addition to the Internal Revenue Code.
79. *See* H.R. 3046, *supra* note 56, at Title I, § 107. A member institution means, with respect to an existing national athletic organization of colleges and universities, those colleges and universities that are members of such organizations and that are engaged in interstate commerce.
80. *See id.* at Title II, § 102.
81. *See supra* notes 56-79 and the accompanying text.
82. *See* H.R. 3046, *supra* note 56, at Title II, § 102.
83. *Id.*
84. *Id.*
85. *Id. See also supra* notes 61-62 and the accompanying text.
86. *Id. See also supra* notes 63-66 and the accompanying text.

Revenue Distribution Plan,[87] the Due Process Rules,[88] or the Student-Athlete Scholarship Plan.[89]

New subsection (e) would basically make new subsection (d) applicable to any college or university that becomes a "disqualified college." In this case, a disqualified college is any college or university that either

(1) was a member institution at any time during the three-year period ending on the date of the enactment of this bill and which ceases to be a member institution; or,

(2) whose sports team engages in an amateur athletic event with a disqualified college.[90]

However, any former member institution that could establish, to the satisfaction of the Secretary, that its cessation was not for the purpose of negotiating and carrying out a contract for the "tainted activities" would be able to escape disqualified college status.[91]

The effect of both of these new subsections would be to take income from activities that are now deemed related to the educational function of the university, and therefore not taxable, and to reclassify these activities as "unrelated" by law.[92] These provisions would make that income fully taxable and provide a serious incentive to comply with the other portions of the bill.

The second tax provision of this bill would actually create a new Internal Revenue Code section entitled "Certain Student Athlete Benefits."[93] This new section would allow any individual who is a

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87. *Id.* *See also supra* notes 67-70 and the accompanying text.
88. *Id.* *See also supra* notes 71-74 and the accompanying text.
89. *Id.* *See also supra* notes 75-76 and the accompanying text.
90. *Id.*
91. *Id.* The tainted activities are

(1) sale of tickets for an amateur athletic event;
(2) use or sale of merchandise related to an amateur athletic event;
(3) use or sale of the name or logo or a commercial sponsor in association with an amateur athletic event; and,
(4) sale of the right to telecast an amateur athletic event.

92. Generally, the "related" and "unrelated" status is a fact and circumstance determination. However, the IRS has been much more aggressive in this area. For instance, the IRS has charged The Ohio State University with a tax bill of $300,000 on the $1,000,000 of revenue generated by the selling of advertisements on its scoreboard. The IRS claims that this income is unrelated business taxable income and is subject to taxation. *See Buckeyes are billed 300,000 by the IRS*, NCAA NEWS, May 22, 1991, at 20: and Douglas Lederman, *IRS Tells Ohio State U. to Pay Taxes on Money It Receives From Advertising in Sports Arenas*, CHRON. OF HIGHER EDUC., May 15, 1991, at A32. Also, I am presently working on an article that will discuss the concept of unrelated business taxable income and college athletics that will hopefully be available sometime in Fall, 1992.

93. *See* H.R. 3046, *supra* note 56, Title II, § 202. This would be done by redesignating § 136 of the Code as § 137 and making this new provision § 136.

student-athlete at any member institution of any national college or university athletic organization to exclude from its gross income any amounts received, whether in kind or as a reimbursement, for room and board, tuition expenses, personal counseling, tutorial services, and medical expenses.[94]

In addition, the individual student-athlete would also be able to exclude from gross income any amount, up to $300 per month, received if the individual qualifies on the basis of need.[95]

F. *H.R. 2464*[96]

The final bill concerning athletics under consideration by Congress is H.R. 2464, which was introduced by Representative Ed Jenkins on May 23, 1991.[97] Simple and straightforward in its approach, it is clearly designed to assist amateur athletics, whether at the college level or elsewhere.[98] In essence, this bill would amend § 513 of the Internal Revenue Code[99] by adding a new subsection (i).[100] New § 513(i) would be entitled "Amateur Athletic Events," and would provide that for any § 501(c) organization,[101] the term "unrelated trade or business" would not include any of the organization's qualified amateur athletic event activities.[102]

The term "qualified amateur athletic event activities" would be defined as any activity in connection with the conduct of an amateur athletic event, including, but not limited to the following activities:

(1) the receipt of revenues from such events;
(2) the use of the name or logo of a sponsor in association with the amateur athletic event and related activities;
(3) the sale of the broadcasting rights for the amateur athletic event and related activities;
(4) the licensing to an unrelated third party of the right to produce and sell the program for the amateur athletic event and related activities; and,
(5) the licensing to an unrelated third party of the right to use the name or logo of the organization on the amateur athletic event and related activities.[103]

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94. *Id.* For the definition of a student-athlete, *see* note 75.

95. *Id.* Need is determined by procedures outlined in the Higher Education Act of 1965.

96. H.R. 2464, 102d Cong., 1st Sess. (1991).

97. Representative Jenkins is a Democrat from Georgia.

98. Organizations such as the United States Olympic Committee and the governing bodies for track, swimming, and other olympic sports are interestingly following this bill, as are colleges and universities.

99. Section 513 defines unrelated trade or business. *See* I.R.C. § 513 (1986).

100. *See* H.R. 2464, *supra* note 96.

101. A § 501(c) organization actually provides a list of tax exempt organizations.

102. *See* H.R. 2464, *supra* note 96.

103. *Id.*

G. *The Student Athlete Right-to-Know Act*[104]

On November 8, 1990, the Student Athlete Right-to-Know Act, sponsored by Senator Bill Bradley[105] and Representatives McMillen and Towns, became law. To be effective on July 1, 1992, the new law requires colleges and universities that award athletically-related student aid[106] to make certain disclosures to certain interested parties. First, the institutions must annually submit in report form to the Secretary of Education the following statistics:

(1) the number of students at the institution of higher education who received athletically-related student aid, broken down by race and sex for the following sports:
   (a) basketball,
   (b) football,
   (c) baseball,
   (d) cross country and track, and
   (e) all other sports combined;
(2) the number of students at the institution of higher education broken down by race and sex;
(3) the completion or graduation rate for students at the institution of higher education who received athletically-related student aid, broken down by race and sex in the following sports:
   (a) basketball,
   (b) football,
   (c) baseball,
   (d) cross country and track, and
   (e) all other sports combined;
(4) the completion or graduation rate for students at the institution of higher education, broken down by race and sex;
(5) the average completion or graduation rate for the four most recent completing or graduating classes of students at the institution of higher education who received athletically-related student aid, broken down by race and sex in the following categories:
   (a) basketball,
   (b) football,

104. Pub. L. No 101-542, Title I, § 104, 104 Stat. 2383 (1990).

105. Senator Bradley is a Democrat from New Jersey and a former college and professional basketball player.

106. *See supra* note 104. Athletically-related student aid is any scholarship, grant, or other form of financial assistance, the terms of which require the recipient to participate in a program of intercollegiate athletics at an institution of higher education, in order to be eligible to receive such assistance.

(c) baseball,

(d) cross country and track, and

(e) all other sports combined;

(6) the average completion or graduation rate for the four most recent completing or graduating classes of students at the institution of higher education, broken down by race and sex.[107]

In addition, each institution must supply the same information to every potential student-athlete to whom the institution offers athletically-related student aid, as well as to the student-athlete's parents, guidance counselor, and coach.[108] The institution may omit from both disclosure requirements the completion or graduation rates of students and student-athletes who leave school to serve in the armed services, to join official church missions or to participate in a recognized foreign aid service of the federal government.[109] Furthermore, the institution will be allowed to provide supplemental information to the potential student-athlete and the Secretary, which shows the completion or graduation rate when such completion or graduation rate includes students transferring into and out of the institution.[110] Any institution of higher education that is a member of an athletic association or athletic conference can have these requirements waived if the association or conference has voluntarily published completion or graduation rate data, or has agreed to publish data that is substantially comparable to the information required under this bill.[111]

After receiving this information, the Secretary of Education will compile and publish a report containing all the data broken down by individual institutions of higher education and athletic conferences recognized by the NCAA and the National Association of Intercollegiate Athletics.[112]

CONCLUSION

While most observers feel that the six proposed bills presently before Congress have little chance of passing, the fact that the government has entered the playing field brings mixed, but powerful, feelings. Many commentators think that Congress should leave the governance of college athletics to those most knowledgeable about its problems. They believe that the motives behind this new wave of intervention are nothing more than grandstanding, politics playing, and NCAA bashing.[113] In fact, Richard D. Schultz, the Executive Director

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* To a degree, this is what the NCAA has started to do.
112. *Id.*
113. Douglas Lederman, *With Spate of Bills, Congress Turns Up the Heat on NCAA,* CHRON. OF HIGHER EDUC., Aug. 7, 1991, at A25.

of the NCAA, stated, "If anybody questions whether the presidents are in charge of intercollegiate athletics, they are not doing a very good job keeping up with what's going on.... Change had been taking place for a good number of years before it became vogue for members of Congress to talk about it."[114]

However, some higher education officials, such as University of Wisconsin Chancellor, Donna E. Shalala, see the intervention as justified. Chancellor Shalala states, "We ought to have no complaints; we came too slow to the issue and there is clear evidence that we have not sufficiently cleaned up our act.... We're finally waking up and paying attention to it, and I think that prodding from Congress is useful."[115]

Other college officials who oppose federal involvement nonetheless admit that pressure from Congress has helped the reform leaders by alerting others that, if the status quo remains, and change does not come from within, intervention would come from outside.[116] In fact, Thomas K. Hearn, Jr., President of Wake Forest University and a member of the Knight Commission, said, "There was a time when many people thought the presidents were waving the red flag of Federal intervention merely as a scare tactic to support reform issues.... Those are people who don't have a very good idea of what's going on at the federal level."[117]

Richard D. Schultz adds, "If anybody thought the idea of Congressional intervention was hocus pocus, that the threat wasn't there, they should see that it is."[118]

In truth, the threat has always existed. In 1917 and 1945, Congress sought to tax admission to college events. In 1972, Congress adopted anti-bias laws to deal with the lack of gender equality in college sports, and it held congressional hearings later in the decade to examine the fairness of NCAA enforcement procedures.[119]

Well, Congress is back. They have suited up and are standing ready to enter the game in what many believe is the fourth quarter. The game is on the line, in the form of integrity and fairness, and the opponent appears to be winning. Will the present team, the NCAA, college presidents, university athletic councils, and athletic officials themselves, save the game, defeat the opponent, and clean up the mess? Or will the new quarterback, the federal government, continue playing, throw the winning touchdown, and become a fixture in the life of college athletics? Has the opponent already sealed its victory? Only time will tell, but the fourth quarter is certainly winding down.

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*