Approved _____
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Representative Kathleen Sebelius at
Chairperson

1:30 ~~x.m.~~/p.m. on Thursday, February 20, 1992 in room 519-S of the Capitol.

All members were present except:
Representative Joan Hamilton - Excused
Representative James Cates - Excused
Representative Joan Wagnon - Escused
Representative Betty Jo Charlton - Excused
Representative Elizabeth Baker - Excused

Committee staff present:
Mary Torrence, Office of the Revisor of Statutes
Lynne Holt, Kansas Legislative Research Department
Connie Craig, Secretary to the Committee

Conferees appearing before the committee:

OPPONENTS - SB 234
Randy Forbes, Kansas High School Activities Association
Patrick Hurley, NCAA
Judith Sweet, President, NCAA
Benjamin R. Civiletti, Lee Committee
Bob Frederick, Athletic Director, University of Kansas
Richard Schultz, Executive Director, NCAA

Chair Sebelius called the meeting to order, and opened the public hearings for opponents of SB 234.

Randy Forbes appeared before the Committee and stated in light of what happened at the public hearing for the proponents of SB 234, his purpose became limited. He explained that what he will do now is support the proposal of the author of this bill, Senator Winter, to exclude from his coverage the Kansas State High School Activities Association. He added that the Association concurs with the analysis that Senator Winter went through to reach the conclusion that the State High School Activities Association should be excluded from the bill. He did express the concern that when the deleted language is taken out of the bill, will there be a question solely on the language that is left whether or not the High School Activities Association is in included within the definitions found in Sections 2(a) and 2(b). He suggested the Committee consider what is done in other states, and rather than refer to athletic associations, use collegiate athletic associations.

Pat Hurley gave testimony, Attachment #1, strongly opposing SB 234.

Judith Sweet read testimony, Attachment #2, stating the NCAA's opposition to SB 234.

Robert Frederick, an opponent to SB 234, read testimony urging the Committee to not pass the legislation, Attachment #3.

Pat Hurley handed out statements from five Kansas state universities, Attachment #4, and Jack Hartman, Attachment #5.

Benjamin Civiletti testified to the Committee, Attachment #6, as a representative of the Special Committee to Review the NCAA Enforcement and Infractions Process.

Stephen Morgan, an opponent of SB 234, gave to the Committee a description of the NCAA's enforcement program and its due process protections, Attachment #7.

Richard Schultz, an opponent of SB 234, appeared before the Committee to give a description of the actions taken by the Association in response to the Lee Committee's recommendations, Attachment #8.

Questions from Committee members:

- What kinds of things did the Lee Commission to address the infraction side of the NCAA or was that not seen as a problem?
- Would anyone disagree that when a sanction is imposed on a university program that there is a penalty on individual players in that system?
- Could someone substantiate why a different standard of due process is allowed to be practiced at a national level from that practiced on a local level in our universities?
- Didn't the Lee Commission try to establish a nation-wide due process?
- There doesn't appear to be any student athletes who sat on the Lee Commission or had any input to it?
- If we were to amend SB 234 to indicate to the University that it should cast its vote in favor of adopting this new due process system of the NCAA or within a period of time, say three or four years, remove itself from the NCAA, would that be the appropriate way to give an indication to you that perhaps we would like the NCAA to take some action?
- This current due process protection, is this already in effect right now?
- How often does the option of transferring to another school from a school that has been penalized work?
- The person that wasn't involved with the violation can play, he just can't win in a NCAA championship?
- Wichita State University at one time was the most penalized institution in the United States, so it seems misleading to say that it just precludes playing post-season. Aren't there other actual penalties, whether they are imposed or not imposed, like loss of television revenues or recruiting?
- If the school gets due process, than by virtue of that innocent student's association with the school plus his ability to take his own access as a participant in the school's due process hearing, that somehow constitutes due process?

- It seems the NCAA is often punishing after the fact, and the punishment falls on people who may or may not be involved. There is really no due process, in a lot of cases, for the kids that the punishment falls upon, is that correct? Their only other alternative is to go to another school. Mr. Civiletti agreed but added that many of the proceedings are remedial proceedings, they're not punishment and disability proceedings. Also, those remedial proceedings are preventative, designed to prevent further occurrences.
- in response to Mr. Schultz's comment that penalties on one sport, such as football, will not have an impact upon any other sport, those penalties are directed at that sport, a Committee member asked about the NCAA's rule of no recruiting?

Chair Sebelius announced that SB 234 will be assigned to a subcommittee chaired by Representative Krehbiel and including Representatives Sprague and Smith.

Chair Sebelius adjourned the meeting.

TESTIMONY

OF

PATRICK J. HURLEY
OF
PETE MCGILL & ASSOCIATES

ON BEHALF OF
THE
NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

PRESENTED BEFORE

THE

HOUSE FEDERAL AND STATE
AFFAIRS COMMITTEE

FEBRUARY 20, 1992

RE: SB 234

House Federal & State Affairs
February 20, 1992
Attachment # 1

Madam Chairperson and Members of the Committee:

I am Patrick Hurley of Pete McGill & Associates and am appearing on behalf of the N.C.A.A. with the other conferees today in total opposition to the passage of S.B. 234 in any form.

The purpose of my remarks is two-fold:

First - to urge your most careful consideration of the scope and magnitude of what is contained in S.B. 234;

Second - to urge you to listen just as carefully to the different reasons given by each witness today for their opposition to the bill.

In regard to the bill itself, please consider this: you are being asked to enact in Kansas a law which would mandate due process for all 800 institutions located in all 50 states; in essence a National Due Process Act, passed by one state legislature.

I dare say none of you has ever before dealt with any bill purporting to impact residents in 49 other states; nor would you want other legislatures enacting laws which dictated to Kansas citizens and Kansas educational institutions. Just yesterday, it was proposed to radically modify S.B. 234 by limiting its national scope to penalties only.

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But even more complex legal questions were raised by adding prohibitions on any sanctions by the N.C.A.A. which "affect the educational activities of any institution or impairs their ability to finance education."

We do not intend to demean the interest of the sponsors of the bill nor to question the sincerity of those witnesses who testified yesterday. Rather we urge that you keep these questions in mind as you listen to the witnesses today for each of these major legal questions would have to be answered satisfactorily before you could ever enact such legislation. We believe after you have heard the testimony today you will conclude that no legislation is needed.

The first witness you will hear from today is Judy Sweet. She is the current elected president of the N.C.A.A. and she serves as the Director of Athletics at the University of California of San Diego. She will give you the perspective of all 800 colleges and universities who belong to the N.C.A.A. in opposition to this legislation.

Then you will hear from Mr. Bob Frederick, the current Athletic Director and former student athlete at Kansas University. He will express his university's opposition to any such legislation.

And he will be joined in this opposition to the bill by Kansas State University, in the person of Athletic Director, Dr. Milt Richards; and they in turn will be joined

by every other Kansas institution which belongs to the N.C.A.A. in their unanimous opposition to the passage of the bill.

You will also receive the perspective of a nationally renowned and respected basketball coach with his reasons for opposing any such legislation as you will be read a letter from Jack Hartman, long time coach at Kansas State.

And then you will hear the perspective brought to this issue by the distinguished Lee Commission in strong support of the current N.C.A.A. procedures and against any state legislation dictating such procedures. This testimony will be delivered by the Honorable Benjamin Civiletti, a practicing attorney in Baltimore, Maryland and former Attorney General of the United States from 1979 to 1981.

And finally you will hear the N.C.A.A.'s own perspective on these matters from Mr. Dick Schultz, the N.C.A.A.'s current Executive Director. A former athletic director and basketball coach in a major institution for several years, Mr. Schultz has been the driving force behind recognizing the need for the N.C.A.A. to address these issues and seeing that they are being implemented by the N.C.A.A.

After you have heard all of this testimony we believe that you will conclude that S.B. 234 is, not only unnecessary, but counter productive, and in fact could be destructive of the legitimate goal of the reasonable regulation of collegiate athletics in this country.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

6201 College Boulevard • Overland Park, Kansas 66211-2422 • Telephone 913/339-1906

STATEMENT OF
JUDITH M. SWEET, PRESIDENT
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

before the

FEDERAL AND STATE AFFAIRS COMMITTEE
KANSAS HOUSE OF REPRESENTATIVES

on the

Athletic Association Procedures Act (S.B. 234)

February 20, 1992

I am Judith M. Sweet, President of the National Collegiate Athletic Association, an unincorporated association of approximately 800 four-year colleges and universities and 200 related organizations. The NCAA proudly calls Kansas its home with our national headquarters and over 200 employees located in Overland Park. I am also Director of Athletics of the University of California at San Diego, located in La Jolla.

I am accompanied here today by Dick Schultz, our Executive Director, who also will present testimony to the committee and Steve Morgan, our Associate Executive Director responsible for the NCAA enforcement program, who will submit a written statement and is available to answer your questions.

The NCAA is a national athletic association dedicated to the promotion and regulation of intercollegiate athletics. By action of its members, it adopts common rules for the

House Fed. & State Affairs
February 20, 1992
Attachment #2

conduct of intercollegiate athletic competition. Seven four-year Kansas post-secondary institutions are NCAA members: the University of Kansas; Kansas State University; Wichita State University; Fort Hays State University; Pittsburg State University; Washburn University of Topeka; and Emporia State University.

We appreciate the opportunity to appear before the Committee to state the NCAA's opposition to S.B. 234, the purpose of which is to define the procedures by which the NCAA may impose penalties upon one of its member institutions alleged to have violated NCAA rules. We also welcome this opportunity to discuss with you our current enforcement procedures and to focus your attention on the report of a distinguished committee of jurists and educators whom we asked to review those procedures.

Our opposition to this bill stems not from a lack of commitment to due process for our members, their employees and their student-athletes, but from the recognition that we simply cannot operate an even-handed and effective national program of enforcement of the rules of competition, as demanded by our members, if the various states are going to impose differing local standards on our enforcement procedures.

As the Committee is certainly aware, Kansas is not the only state in which legislation of this kind has been considered. Among some legislators in other states, there seems to have been fostered a perception that because the Supreme Court in the Tarkanian case ruled that NCAA enforcement action was not "state action" for due process

constitutional purposes, there is a need for state legislatures to fill the "due process" void. This misperception, unfortunately, bespeaks either a bias against vigorous enforcement of our rules -- which both the public and our members have demanded -- or, more frequently, a lack of understanding of the facts.

It is a fact that NCAA enforcement procedures have been held by several federal courts -- prior to the Tarkanian decision -- to be entirely consistent with constitutional due process requirements. For example, in the words of the Court of Appeals for the District of Columbia Circuit in 1975:

> "The requirements of due process are flexible and vary as the situation demands .... [The institution] was given notice and full particulars of the charges against it, the right to participate and defend its actions before the [NCAA Infractions] Committee and the [NCAA] Council, and the right to appeal .... We think that the NCAA has complied with any due process responsibilities it might have had."

It is also a fact that the NCAA enforcement procedures are today substantially more protective of institutional and individual rights than they were when tested before the Court of Appeals, and that they have not been changed at all since the Tarkanian decision. Mr. Schultz will expand upon this point in a few minutes; a summary of our procedures is contained in Mr. Morgan's statement.

In further fact, just over a decade ago -- when the NCAA was still deemed by most federal courts to be a "state actor" -- a Congressional committee exhaustively reviewed the NCAA procedures and came up with only modest recommendations for change -- virtually all of which were

readily adopted by the NCAA and remain a part of our program today.

I firmly believe that any objective review will indicate that the NCAA's due process protections are as comprehensive as those found in the rules of any private organization in the country. If current NCAA procedures are carefully compared against the proposed requirements of S.B. 234, it is obvious that to a very significant extent, we already provide the basic procedural protections that are contemplated by the bill. The essential difference relates to the formality of the hearing itself: the authors of S.B. 234 would require all the trappings of a judicial-type adversary proceeding, whereas the NCAA's hearing is more informal and far more consistent with disciplinary proceedings as they are traditionally carried on at academic institutions.

Stated otherwise: no-one can argue that the NCAA does not give the fundamental notice and hearing which are the hallmarks of "due process" and the essential mandates of the bill; where we differ is in the way the hearing is conducted.

In short, the NCAA believes that our procedures fully comport with the basic principles of fairness required by law and equitable concepts in non-criminal proceedings. The Association is only too aware that on some occasions, when an institution is dissatisfied with the result of a particular proceeding, its first claim will be that the proceeding was somehow unfair. This has been so particularly since the membership, a few years ago, increased the severity of penalties that could be leveled

against an institution for rules violations. It is not appropriate, however, to equate an unfavorable result with unfairness of the process, particularly when the process and the possible sanctions have been approved by the entire NCAA membership and the institution itself.

The NCAA has been charged by its members, and indeed the public, to deal vigorously with violations of rules adopted by the membership for the conduct of intercollegiate athletics. That is being done, but at the same time, the NCAA is fully aware of its responsibility to its membership, to enrolled student-athletes and employed staff to conduct its enforcement proceedings in a fair and even-handed manner.

In this connection, I think it important that you understand that the enforcement procedure which our membership has put into place is based upon the concept of institutional responsibility for compliance with NCAA substantive rules, and upon the concept that any infractions investigation is a cooperative venture between the NCAA staff and Infractions Committee, and the arm of the NCAA membership, and the institution itself.

What appears to be a common thread of criticism of the current NCAA procedure is that it is not sufficiently formal and is not based upon the adversary system of fact-finding and sanction determination which characterizes the traditional criminal litigation context. These critics tend to overlook the fact that the NCAA does not possess, and indeed does not seek, the power to subpoena witnesses or to compel testimony under oath. If one assumes institutional acceptance of the principle that the primary responsibility

for enforcing the rules lies with the institution itself, a strictly adversary proceeding simply is not necessary and indeed is undesirable.

As some members of the Committee are undoubtedly aware, the NCAA, as part of an ongoing process of review of its various practices, appointed a commission of distinguished individuals to review the current enforcement program and make recommendations for change. The panel is chaired by Rex Lee, President of Brigham Young University and former Solicitor General of the United States, and includes among its membership former United States Supreme Court Chief Justice Warren Burger, a former State Supreme Court Justice, a former United States Attorney General and a former Federal Judge. The committee's report was released in October 1991, and will be discussed by Mr. Civiletti and Mr. Schultz.

The NCAA and I are only too aware that there are very significant institutional interests at stake at any NCAA infractions proceeding. Please bear in mind, however, that those interests include not only those of the institution under investigation, but also those of <u>all</u> our member institutions -- who are entitled to expect us to enforce, vigorously, the rules of competition to which they have all subscribed.

The NCAA, its Committee on Infractions and its Council take no pleasure in imposing sanctions against one of our members, but I submit to you that pursuant to the mandate of the membership, we are discharging this unpleasant function as honestly, even-handedly and fairly as is possible for a private organization. Enactment of differing state laws,

subject to differing interpretations by local courts, will make this task extremely difficult, if not impossible, on a national basis.

For the foregoing reasons, we believe that S.B. 234, however well-intended, is unnecessary, and we urge this Committee not to act favorably thereon. We nonetheless welcome the comments and suggestions of members of the Federal and State Affairs Committee. We realize that our internal structure and procedures are not fully understood outside the intercollegiate athletics and post-secondary education communities, and we regard hearings such as these as valuable opportunities to exchange information and views. Thank you.

STATEMENT OF
ROBERT E. FREDERICK, ATHLETICS DIRECTOR
THE UNIVERSITY OF KANSAS

before the

FEDERAL AND STATE AFFAIRS COMMITTEE
KANSAS EOUSE OF REPRESENTATIVES

on the

Athletic Association Procedures Act (S.B. 234)

February 20, 1992

Madam Chairperson and members of the committee. My name is Bob Frederick; I am the Athletics Director at the University of Kansas in Lawrence. I appreciate the opportunity to speak before your committee about Senate Bill No. 234.

On its own volition the University of Kansas became a member of the National Collegiate Athletic Association. As a member of that voluntary organization we are well aware of our obligations to the Association. Our institution accepts full responsibility for the conduct of our intercollegiate athletics program and accepts the enforcement procedures which have been adopted by the membership of the Association.

I have experienced the NCAA's enforcement proceedings both as a student-athlete at KU and as athletics director. In both situations the problem preceded me and I experienced the feeling of dealing with someone else's rules violations. As an institution we have had in the past concerns about the enforcement procedures but we are strongly opposed to Senate Bill 234 for the following reasons.

First, we believe it is ill-advised and inappropriate for the

House Federal & State Affairs
February 20, 1992
Attachment #3

legislature of this State (or any other state) and the Federal government to become involved in the affairs of our voluntary association. Second, we believe in Executive Director Dick Schultz and the leadership he has provided on this important matter. Mr. Schultz asked the membership to create a special committee which would allow experts to examine the due process issues and they did. Following the NCAA Convention the Council approved most of the recommendations of that committee and authorized the Infractions Committee to implement them as soon as possible. Many changes have already occurred. We are confident that with Dick Schultz's leadership we will continue to address these matters and make changes when appropriate in the future.

We applaud the original sponsor of this bill, Senator Winter, for his concern for the state's intercollegiate athletics programs and the student-athletes who represent them. We simply believe, however, the best way to govern the NCAA is from within. We have the power to make the necessary changes and we are in the process of doing that now.

I am joined today by Milt Richards, Athletics Director at Kansas State University in Manhattan. His institution joins mine in opposing Senate Bill 234. We urge its defeat.

Thank you very much for this opportunity to present my views.

February 18, 1992

TO: Madame Chair and
The Kansas State House Federal and State Affairs Committee

FROM: Mr. William Quayle, Director of Athletics
Emporia State University
Mr. Tom Spicer, Director of Athletics
Fort Hays State University
Mr. William Samuels, Director of Athletics
Pittsburg State University
Mr. Richard Johanningmeier, Director of Athletics
Washburn University of Topeka
Mr. Tom Shupe, Director of Athletics
Wichita State University

RE: Kansas Senate Bill No. 234 - NCAA Regulations

This is to advise that the athletics administration of Emporia State University, Fort Hays State University, Pittsburg State University, Washburn University, and Wichita State University are opposed to Senate Bill No. 234.

Emporia State University, Fort Hays State University, Pittsburg State University, Washburn University, and Wichita State University applied for membership in the National Collegiate Athletic Association well aware of our obligations of membership. As members of the Association, our institutions accept full responsibility for the conduct of the athletics programs and accept that the enforcement procedures of the Association shall be applied when an institution fails to fulfill this obligation.

Please note that as members of the Association, we have elected to place upon ourselves, legislation regarding the enforcement procedures, as well as all other NCAA legislation. Any member of the Association can propose legislation. Thus, if member institutions are not satisfied with the enforcement procedures, the appropriate changes can be enacted by the membership.

Senate Bill No. 234 is legislation that is not needed. This legislation would not be beneficial to the institutions in the state of Kansas. Senate Bill No. 234 would not enhance the principles in which we believe intercollegiate athletics programs should be conducted.

Therefore, Emporia State University, Fort Hays State University, Pittsburg State University, Washburn University, and Wichita State University oppose enactment of Senate Bill No. 234 or any related legislation.

House Federal & State Affairs
February 20, 1992
Attachment #4

KANSAS STATE
BASKETBALL

Dana Altman
Head Coach

Jim Kerwin
Ken Turner
Greg Grensing

Ahearn Field House
Kansas State University

Manhattan, KS 66506-0304
(913) 532-6531

February 20, 1992

The Honorable Kathleen Sebelius
Chairwoman, Kansas House Federal
and State Affairs Committee
State Capitol, Room 526 South
Topeka, KS 66612

Dear Chairwoman Sebelius:

Enclosed please find a copy of my statement concerning Senate Bill No. 234 (SB 234). I am submitting this statement on my own behalf and not as a representative of any organization, and request that it be included in the record of the February 20, 1992, hearing on SB 234. I regret that a preexisting commitment will preclude my appearing in person before the committee on February 20 to give this testimony.

If you have any questions or would like additional information, please do not hesitate to call me.

Very truly yours,

Jack Hartman

Jack Hartman

bh

Enclosure

House Federal & State Affairs
February 20, 1992
Attachment #5

STATEMENT OF
JACK HARTMAN
FORMER HEAD BASKETBALL COACH
KANSAS STATE UNIVERSITY

before the

FEDERAL AND STATE AFFAIRS COMMITTEE
of the
KANSAS HOUSE OF REPRESENTATIVES
February 20, 1992

Madam chairwoman and members of the committee, my name is Jack Hartman. I was head basketball coach at Kansas State University for 16 years and have coached college basketball for 31 years. Thank you for the opportunity to submit this statement to discuss my views on due process, the National Collegiate Athletic Association (NCAA) enforcement procedure, and Senate Bill No. 234.

I firmly believe that federal or state intervention in the NCAA enforcement program is ill-advised and inappropriate. The NCAA is a private, nonprofit association whose member colleges and universities propose, debate and adopt the rules governing both the conduct of their intercollegiate athletics programs, as well as the process for investigating violations of those rules. People are fond of talking about the NCAA as if it were an entity distinct from its member institutions. The athletes, coaches and administrators -- are the NCAA. The NCAA members vote on the rules and are responsible for adhering to them. If we are dissatisfied with some of these rules, we have the ability to propose legislation to change them.

A related point that often is overlooked in the due process debate is that the enforcement staff is only enforcing the rules that the member institutions have adopted. Moreover, it does so in accordance with procedures that have been chosen by and are within the control of NCAA members. If modifications to the NCAA enforcement process are appropriate, it is the membership, not a state legislature that should approve them.

In fact, the NCAA is reviewing its enforcement procedures and the adequacy of the due process protections it affords through the distinguished Lee Committee, whose members included Warren E. Burger, former Chief Justice of the United States Supreme Court; Benjamin R. Civiletti, former Attorney General of the United States, and Rex E. Lee, former Solicitor General of the United States. This committee issued its report in October 1991 and I understand that the NCAA and coaching organizations are in the process of implementing a majority of the Lee Committee recommendations.

As appointment of the Lee Committee illustrates, college presidents and athletics administrators are in a reform mode, ready to examine the principles underlying NCAA substantive and procedural rules. The NCAA should be given the opportunity to work out its own problems, and I am confident that it can do so.

In particular, the NCAA should be afforded the opportunity to consider the Lee Committee report and to implement changes the

NCAA membership believes are appropriate before this or any other state legislature takes action to impose standards on the colleges and universities that make up the NCAA.

I know that several other states have enacted legislation requiring the NCAA to provide due process protections in its enforcement proceedings. What they are creating, and what I urge you not to exacerbate, is a patchwork of procedural rules that undermines the enforcement process by creating different requirements in different states, thereby making it impossible to operate a national enforcement program.

As a former coach of a Division I basketball team, I believe that it is essential to have a workable national enforcement program. The enforcement process is intended to make sure that all NCAA members are observing those rules and are competing fairly. Division I sports are competitive, and outside checks are essential to make sure that some institutional players do not ignore the rules in their quest for success. Rather than promoting the enforcement effort, the legislation that this committee is considering will impede the enforcement process.

Although I cannot speak for my colleagues, I think my views are representative of those of the coaching community at large.

Indeed, in September 1990, Division I football and basketball coaches issued a joint statement, following one and one-half days

of debate, wholeheartedly supporting the NCAA enforcement process. While each of us can identify improvements we believe should be made in the enforcement program (I, for one, favor stronger penalties), it is up to us to bring them before the NCAA membership where they can be fully debated and considered. The Lee Committee made it especially easy for individuals to make their views known by inviting anyone interested in presenting views about the enforcement process to appear at its hearings, and several coaches appeared before the committee to recommend changes.

Perhaps if any mistake has been made, it has been that there has not been a periodic review of NCAA enforcement procedures. But the NCAA has recognized the need for such a review in appointing the Lee Committee.

In closing, I ask that you let us keep our own house in order. I do not have to be a lawyer to understand fairness. I believe the NCAA rules are fair; if the member institutions and universities do not, it is for them, not outside bodies who do not understand intercollegiate athletics, to address the problem.

Thank you very much for this opportunity to present my views.

STATEMENT OF BENJAMIN R. CIVILETTI, ESQ.

before the

FEDERAL AND STATE AFFAIRS COMMITTEE

KANSAS HOUSE OF REPRESENTATIVES

on the

Athletic Association Procedures Act (S.B. 234)

February 20, 1992

Madam Chairwoman, members of the Committee. My name is Benjamin R. Civiletti; I am a member of the Baltimore law firm of Venable, Baetjer and Howard with offices in Baltimore and Washington, D.C. From 1979 to 1981, I served as Attorney General of the United States. I appear here today as a representative of the Special Committee to Review the NCAA Enforcement and Infractions Process.

The Special Committee, known as the "Lee Committee" by virtue of the fact that it was chaired by Rex E. Lee, former Solicitor General of the United States and now President of Brigham Young University, was appointed in April 1991 and was comprised of a number of former federal and state judges including former Chief Justice Burger, professors, lawyers and educators both within and without the NCAA membership. Its charge was to examine the NCAA enforcement procedures to ensure that they are "fair, effective, timely and consistent."

The Committee met five times between May and October of last year. During the course of its meetings, the Committee received oral and written testimony from a large number of witnesses, including representatives of the NCAA Committee on Infractions and enforcement staff, educators and athletics administrators, lawyers, coaches and a member of the United States Congress. The Committee was careful to issue invitations to testify to several of those individuals who in the recent past had been critical of the NCAA enforcement process, including legislators from a number of states.

Following review of this testimony and a host of written materials relating to NCAA enforcement procedures, the Committee formulated proposed findings and recommendations after extensive discussion among the members, caused a draft report to be prepared based thereon, and then met in person and by telephone to refine its report. The report was issued October 28, 1991; a copy is attached to this statement.

Perhaps most significant for purposes of this hearing, the Committee found that the conduct of the NCAA's enforcement and infractions process has been a "serious effort to achieve, fairly and equitably, compliance with NCAA principles and regulations." We noted that in our view, the NCAA process would meet -- even though the NCAA is not subject to a constitutional due process standard -- the standards implicit in recent Supreme Court decisions related to administrative proceedings. We further found that the Association has a consistent history of willingness to review and adjust the enforcement and infractions process in order to make improvements.

We also concluded that notwithstanding the fact that the NCAA, as a nongovernmental body, is not subject to every constitutional requirement applicable to government, it should in fact afford fair process in the interest of its members and its own interest. We finally concluded that process protections should be provided and administered by the NCAA itself, in order to afford uniformity across the nation, and that the process of correction should involve both the NCAA and its members. That is to say that to a large extent the enforcement rules should be self-enforcing and, in any event, a cooperative joint investigative effort was critical to the rules effectiveness.

Against the backdrop of these findings, we made a number of recommendations for improvement. They are set forth in the attached report, and I will not list them now. I will note, however -- in light of the terms of the bill now before you -- that our recommendations included the concept that a transcript of an infractions hearing be provided, that independent fact finders be used as part of the process, and by a divided vote, that Infractions Committee hearings be open. I understand that the NCAA Council has endorsed a number of our recommendations in principle, and that procedures are now under way to implement them.

The two major points I would like to make are these. First, the NCAA enforcement process is designed and intended to be substantially a cooperative and non-adversarial process unlike civil and criminal litigation, which is adversarial from its initiation. Therefore, rules and procedures appropriate in an adversarial process are inappropriate in a cooperative and administrative process. My second point is that within the past year, the NCAA has commissioned a very serious independent study of its procedures by a group of individuals who were by experience well qualified for the task. The Committee found in place a significant commitment to procedural fairness, and a history of willingness to change for the better when indicated. In light of these findings, and of the obvious fact that a series of state laws on this subject will prevent even-handed

enforcement of the rules as to all NCAA members, I am constrained to say -- and I think my colleagues on the Committee would fully agree -- that however well intentioned, the legislation before you is both unnecessary and counterproductive. I urge you not to report it favorably.

I will be happy to answer your questions. Thank you.

REPORT AND RECOMMENDATIONS

OF THE

SPECIAL COMMITTEE TO REVIEW THE

NCAA ENFORCEMENT AND INFRACTIONS PROCESS

The Special Committee to Review the NCAA Enforcement and Infractions Process was appointed in April 1991 to examine the enforcement procedures to ensure that this important function of the Association is fair, effective, timely and consistent. Its establishment was initiated by NCAA Executive Director Richard D. Schultz a year earlier in a document outlining his goals for 1990-91, which were accepted by the NCAA Executive Committee in its August 1990 meeting.

Specifically, the special committee's charge, as extended by the executive director, was as follows: "Conduct a thorough review of the enforcement and infractions process, including (a) the investigative process by the enforcement staff; (b) the function of the Committee on Infractions, including the hearing process and the method used to determine penalties if guilty, and (c) the release of information to the public regarding sanctions and the conduct of press conferences at institutions announcing sanctions. The purpose of the review is to make sure that the process is being handled in the most effective way, that fair procedures are guaranteed, that penalties are appropriate and consistent; to determine ways to reduce the time needed to conclude the investigation and the infractions process, and to determine if there can be innovative changes that will make the process more positive and understandable to those involved and to the general public."

The special committee attempted to accomplish two important objectives in its resultant study and recommendations: maximizing fairness to institutions and individuals accused of wrongdoing, while preserving the effectiveness of the Association's ability to investigate and take corrective measures expeditiously in infractions cases.

The Special Committee

The special committee comprised the following individuals: Rex E. Lee, president of Brigham Young University and former U.S. solicitor general, chair; Warren E. Burger, former Chief Justice of the United States; Reuben V. Anderson of Jackson, Mississippi, a former state supreme court judge; Paul R. Verkuil, president of the College of William and Mary and former dean of the Tulane University law school; Charles W. Ehrhardt, professor of law and faculty athletics representative at Florida State University; Becky R. French, university counsel at North Carolina State University; Benjamin R. Civiletti of Baltimore, Maryland, former attorney general of the United States; Charles Renfrew of San Francisco, California, vice-president, legal, for Chevron Corporation, a former Federal district judge and a former deputy U.S. attorney general; Philip W. Tone of Chicago, Illinois, a former Federal district judge and former Federal appeals court judge, and two current members of the NCAA Council, Charles Cavagnaro, director of athletics at Memphis State University, and William M. Sangster, director of international programs and faculty athletics representative at Georgia Institute of Technology.

The Work of the Special Committee

The special committee conducted five meetings during the course of its work -- May 29, June 30-July 1, July 26-27, September 5 and October 16.

In certain of its meetings, the special committee consulted in person with invited individuals to obtain their views of the issues being considered by the special committee. Included in this category were Thomas C. MacDonald Jr., a Tampa, Florida, attorney who has served as counsel for the University of Florida; Jerry Tarkanian, head men's basketball coach at the University of Nevada, Las Vegas; D. Alan Williams, University of Virginia, current chair of the NCAA Committee on Infractions; Frank E. Remington, University of Wisconsin, Madison, a former chair of the infractions committee; Beverly E. Ledbetter, Brown University, and Milton R. Schroeder, Arizona State University, current members of the infractions committee, and S. David Berst, NCAA assistant executive director for enforcement.

In early summer, invitations were extended to the general public and a cross section of the constituencies in college athletics to participate in a public hearing and to express their views regarding the NCAA's enforcement and infractions process. The hearing was held in conjunction with the special committee's July 26-27 meeting in Washington, D.C.

At that meeting, the special committee heard from the following individuals: Britton B. Banowsky, assistant commissioner and legal counsel, Southland Conference; J. Steven Beckett, attorney, Champaign, Illinois; William C. Carr III, vice-president, GNI Sports, Inc., Charlotte, North Carolina (former athletics director, University of Florida); Collegiate Commissioners Association officers Thomas C. Hansen, commissioner, Pacific-10 Conference, and Thomas E. Yeager, commissioner, Colonial Athletic Conference; Bill Curry, head football coach, University of Kentucky; James E. Delany, commissioner, Big Ten Conference; Vincent J. Dooley, director of athletics, University of Georgia; George H. Raveling, head men's basketball coach, University of Southern California, and member of the board of directors of the National Association of Basketball Coaches, and Michael L. Slive, commissioner, Great Midwest Conference.

The special committee also received a number of written submissions during its work, including specific suggestions from Stanley O. Ikenberry, president of the University of Illinois System; Morton W. Weir, chancellor of the University of Illinois, Champaign; Congressman Tom McMillen (D-Maryland), and George H. Gangwere, now retired after years as the NCAA's longtime general counsel.

Findings

During the course of its study, the special committee made certain findings that formed the basis for its recommendations (detailed later in this report). Among them:

* The conduct of the NCAA's enforcement and infractions process has been, since its inception 40 years ago, a serious effort to achieve, fairly and

equitably, compliance with NCAA principles and regulations. The Association, its membership and its Committee on Infractions through the years are entitled to appreciation and credit for having the willingness to establish a system by which the member institutions can police themselves in their intercollegiate athletics activities. That continued self-enforcement is essential to successful compliance. Similarly, the special committee wishes to acknowledge the quality and credibility of the efforts of both the Committee on Infractions and the enforcement staff. The Association has a consistent history of willingness to review and adjust its enforcement and infractions procedures in an effort to improve those procedures. In this spirit, the special committee believes that the process can be improved further and enhanced in the areas reflected by the recommendations of this report.

* The process must be procedurally fair, as expeditious as possible, and effective in uncovering and correcting wrongdoing while affording adequate protection to institutions and individuals. In this respect, the existing distinction between major and secondary violations is appropriate and useful in processing and resolving infractions cases.

* The U.S. Supreme Court has determined that the NCAA is not a state actor for purposes of the Fourteenth Amendment to the U.S. Constitution. Nevertheless, the special committee is of the view that the NCAA, in the interest of its members and in its own interest, should afford procedural fairness protections. These protections should be provided and administered by the NCAA itself, in order to assure uniformity across all member institutions and all parts of the nation. Also, it is essential, in the special committee's view, that the identification and correction of NCAA rules infractions remain a cooperative, joint effort, involving both the Association and also the affected member institutions.

[Attached as Appendix A is a statement regarding the NCAA enforcement procedures vis-á-vis components of due process.]

Recommendations

Effectively improving the system will require both structural and procedural changes. The special committee's specific recommendations, which will be reviewed by the NCAA membership and then submitted to the NCAA Council and the NCAA Presidents Commission for approval and any necessary membership action, are as follows:

1. Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer.

   Among the problems the special committee identified are the inadequacy of the initial notice of an impending investigation and the desirability of affirming a spirit of joint investigation by the NCAA and by the institution. The most effective investigations are those characterized by cooperation, rather than adversarial positioning, and the initial steps in the investigative process are pivotal in establishing the appropriate relationship.

The special committee is convinced that in the vast majority of instances, the institutions affected are as vigilant in their attempts to determine the truth as is the NCAA enforcement staff. Joint investigative efforts, involving the cooperation of both the Association and the institution, benefit all parties and speed the process. In those cases that do not fit this pattern, however, the enforcement staff should retain the option of abandoning a joint investigation and proceeding on its own to the extent required by the needs of the case. In light of the greatly increased cooperation currently being exhibited by institutions in the enforcement process, however, it is desirable to pursue the benefits of joint investigation whenever possible.

Toward that end, the special committee recommends that instead of simply sending a preliminary letter of inquiry to an institution, the enforcement staff personally should visit the institution's chief executive officer with the preliminary notice in hand in each major case as defined in NCAA legislation. Further, the letter should provide some indication of the nature of the potential violation and the portion of the athletics program where the potential violation occurred. The staff thus would advise the chief executive officer of its intention to work with the institution in a joint investigation unless the staff did not believe that a joint investigation would be appropriate in that instance, in which case it would so inform the institution and state its reasons for that position. This in-person visit also would provide an opportunity for discussion of procedural matters, alternatives for disposing of the case and a time frame.

Using in-person delivery of the preliminary letter as the occasion to discuss the matter with the institution's representatives also should assure that the institution receives a more informed view of the inquiry than it now receives in a brief written notice.

2. Establish a "summary disposition" procedure for treating major violations at a reasonably early stage in the investigation.

One of the most serious problems identified by the special committee is the period of time that frequently elapses from the beginning of an investigation of a major violation by both the institution and the NCAA enforcement staff, to the hearing before the infractions committee and the subsequent imposition of sanctions. The special committee believes there is a need to speed the process and assist institutions in resolving matters without an extended period of adverse publicity and a considerable commitment of institutional time, attention and resources.

Frequently, all parties are in agreement at a fairly early stage of the investigation as to the facts. When this is the situation in the case of secondary violations, there is no reason to hold a hearing, and the case is quickly resolved by the enforcement staff in accordance with established guidelines and procedures.

Agreement as to the facts and an opportunity for an expeditious resolution also should be available in the case of major violations. The special committee recommends that a "summary disposition" procedure be established for treating major violations. This, in essence, would be a

negotiated agreement by which the enforcement staff's preliminary findings would be provided directly to the involved institution's chief executive officer, who could agree at that point to negotiate mutually acceptable findings and remedies. In these cases, the assistant executive director for enforcement would be empowered to enter into a summary disposition with any or all parties involved in the case at any time after the preliminary inquiry has begun, subject to general guidelines established by the infractions committee.

Specifically, the staff would share with the chief executive officer its information regarding rules violations. If the chief executive officer concurred, an agreement would be reached regarding the statement of facts and a proposed penalty (the latter to be approved by the infractions committee), and the agreed-upon summary disposition would end the matter. In most cases, it is anticipated that the time necessary to conclude this procedure would not extend beyond three or four months. When the circumstances of the case and the agreed-upon disposition of the matter are beyond the authority granted by the infractions committee to the enforcement staff, the case would move into the regular infractions process. In cases where all involved parties do not agree to the summary disposition of the case, the regular infractions process would be available to those who are not in agreement (it being understood that the agreed-upon disposition would be available for those parties who are in agreement).

In order to provide appropriate oversight of the summary disposition procedure, the agreed-upon sanction(s) would be subject to expeditious review by the infractions committee for the purpose of determining whether the penalty is consistent with the guidelines.

3. <u>Liberalize the use of tape recordings and the availability of such recordings to involved parties.</u>

A persistent problem is the lack of access to evidence held by the opposing side in an infractions case. The special committee is encouraged by the fact that the infractions committee has recommended a liberalization of the tape-recording procedure for action at the 1992 Convention, but in the interest of openness, it believes that additional steps should be taken in this regard.

The special committee recommends that as a condition of using a prehearing statement from any witness, any interview with that witness must be tape-recorded, and the enforcement staff must disclose the existence of the tape recordings on or before the date on which the official letter of inquiry is issued that states the basis upon which the allegations are made. Upon a showing that a tape-recorded statement could not be obtained (e.g., witness refusal) other "best evidence available" statements (e.g., signed statements, interview memos) would be admissible in a hearing. Under any circumstance, a witness would be permitted to appear in person at any hearing at which the witness' statements are to be used.

The tapes and other evidence would be "discoverable" by any person or institution having an actual stake in the outcome of the case; however, the enforcement staff would be permitted to request a protective order

(from the hearing officer, as identified in a subsequent recommendation) in appropriate cases in which disclosure may be detrimental to the institution or may jeopardize the investigation. Finally, institutions or individuals also would be permitted to submit affidavits in support of their positions.

The special committee believes that the liberalized use of tape recordings and the emphasis on discovery would benefit both the staff and those subject to inquiry by enhancing the reliability of the evidence and by allowing expeditious sharing of the facts of the case.

4. Use former judges or other eminent legal authorities as hearing officers in cases involving major violations and not resolved in the "summary disposition" process.

The special committee believes there is a widely held perception of inadequate separation of the functions between the enforcement staff and the ultimate decisional authority (i.e., the perception is that the infractions committee serves as the prosecutor and judge under the current system). The use of an independent jurist would enhance the public's perception of fairness and confidence in the system.

The special committee recommends, therefore, that in cases involving charges of major violations not resolved by the summary disposition procedure, a hearing officer be used to review stipulated facts, resolve factual issues that are in dispute and recommend an appropriate disposition to the infractions committee. The recommended disposition would be based on information discussed in the hearing and an independent review of past cases. The hearing officer preferably would be a former Federal judge, state court judge, or other eminent legal authority or person of stature whose integrity and impartiality are beyond question.

It is not intended that the use of an independent hearing officer would make the process more adversarial; indeed, the special committee believes that hearings essentially would be conducted as in the past, except that an experienced legal expert who is not connected with the NCAA in any way would determine the facts in a case and make findings. Such individuals are trained in weighing conflicting evidence, judging credibility and determining whether the burden of proof has been satisfied. A pool of such individuals, trained to make certain that they have sufficient background in NCAA regulations, would be necessary to assure the availability of a sufficient number of hearing officers. The special committee recommends that the NCAA Administrative Committee, consisting of the five elected NCAA officers and the executive director, be responsible for selecting and maintaining the pool of hearing officers.

5. Hearings should be open to the greatest extent possible.

In general, the special committee prefers that all hearings in the NCAA infractions process be open, with the exception of deliberations. It should be emphasized that the committee is closely divided on this issue, but the majority holds a general preference for open hearings unless the hearing officer determines that a portion or portions of the proceedings,

in the interest of privacy, fact-finding and justice, should be kept confidential for good cause shown (e.g., information pertaining to test scores, drug use, medical records).

Another factor supporting open hearings is the committee's position regarding the availability of transcripts of hearings, set forth in a subsequent recommendation in this report.

Any interested party could be represented by legal counsel before the hearing officer and at all relevant stages of the proceedings, as is the case now.

6. Provide transcripts of all infractions hearings to appropriate involved parties.

The special committee recommends that tapes or transcripts of open infractions hearings be sent upon request to parties named in the case and to the involved institutions under circumstances providing protection of confidentiality of appropriate information. In addition, anyone interested would be permitted to purchase a tape or transcript of the open hearings when the case has been concluded.

The committee believes that the sharing of tapes, transcripts or other records of enforcement proceedings would enhance the spirit of cooperation that is growing in the membership. Concerns regarding such tapes or transcripts becoming available to others (e.g., the news media) are, in the special committee's opinion, outweighed by the benefits that can accrue in a more cooperative procedure.

7. Refine and enhance the role of the Committee on Infractions and establish a limited appellate process beyond that committee.

The present appellate process, in which the infractions committee decision is subject to appeal to the appropriate steering committee of the NCAA Council, is largely ineffective.

Therefore, the special committee recommends that a special review body of three to five members, the majority of whom would be representatives of NCAA member institutions and conferences, be appointed to serve as the appellate group to consider appeals of increased penalties only. The appellate process would be available only in instances in which the Committee on Infractions has increased a proposed penalty. The facts in the case would be frozen, and the appellate body would have the option of affirming the Committee on Infractions' penalty or decreasing it.

Thus, the infractions committee no longer would serve as the hearing panel to determine the facts in a case. That would be the role of the hearing officer as noted above. The committee could set aside a factual finding by the hearing officer only on a "clearly erroneous" standard. The committee's role would be redefined as that of supervising the summary disposition process (i.e., it would review the penalty agreement and approve it, unless it found the proffered penalty to be demonstrably inconsistent with NCAA rules and/or contrary to the interests of the Association); it would consider appeals of findings made by, and assess

penalties after receiving the disposition recommendation of, the hearing officer, and it would monitor the entire enforcement system. The committee's role would be refined and enhanced because the committee would remain responsible for all portions of the enforcement and infractions process, and it would do so without the burden of also filling the role of fact-finder.

8. Adopt a formal conflict-of-interest policy.

The special committee recommends that a conflict-of-interest policy be adopted formally. This would require simply an identification of the circumstances in which a member of the enforcement staff would not be permitted to be involved in a given case.

9. Expand the public reporting of infractions cases.

The special committee recognizes that the perception of the infractions process is a major problem. It believes that the Association should do everything possible to enhance the reporting of information to the public and the news media regarding the reasons for actions taken in infractions cases. The committee's recommendation regarding open hearings would assist in this regard.

The NCAA also should do more to inform the public and the media of the fact that the enforcement and infractions process is established, maintained and strongly supported by the member institutions themselves.

Accordingly, the special committee recommends that public announcements of infractions cases include a more ample, but clear and concise, statement of the reasons for the actions taken. It believes that many of the steps recommended earlier will further enhance the nature and completeness of the information.

10. Make available a compilation of previous committee decisions.

One important feature of the enforcement and infractions system should be the availability of complete and comprehensive information as to past infractions cases and actions of the infractions committee.

The special committee recommends that a publication or other type of document be developed that compiles such information and that it be made available as a reference for institutions and individuals involved in infractions cases.

11. Study the structure and procedures of the enforcement staff.

The NCAA enforcement staff should be responsible directly to the NCAA executive director and, through the executive director, to the NCAA Executive Committee, as prescribed in existing NCAA legislation. The NCAA administration should study carefully the enforcement staff structure, qualifications and procedures in light of the recommended changes in the process. It also should study the allocation of resources to the enforcement effort.

Implementation

The NCAA approval mechanism is such that certain of the special committee's recommendations can be effected upon approval by the NCAA Council, while others will have to await a membership vote at the appropriate NCAA Convention. That is inevitable in the Association's procedures, all of which are designed to protect the legislative interests of the member institutions.

The special committee urges that its recommendations be implemented as soon as is practicable under NCAA procedures. In pending infractions cases, involved parties should be permitted to avail themselves of the proposed changes in procedures to the extent possible under NCAA legislation. Otherwise, it is the special committee's belief that the current process, modified as appropriate by the Council under its existing authority, should apply to those cases currently in process. This should not cause undue concern on the part of an involved member institution. Such institution should not be permitted to use the pendency of new procedures as a means of delaying the effective conduct of the process during this interim period. The new procedures should apply to cases that are commenced after each such procedure is put into effect.

# # # # #

Statement on Due Process

In the last 20 years, the concept of due process in the administrative setting has undergone substantial change. With Goldberg v. Kelly, in 1970, the Supreme Court set detailed standards for determining when there were sufficient procedural ingredients to satisfy due process. Many informal government functions and programs never provided the full panoply of Goldberg ingredients, and with Mathews v. Eldridge, in 1976, the Court recognized that it must balance government and private interests before deciding whether a particular government program satisfied due process standards.

The NCAA, which, as a private association, is not even required by the Constitution to provide due process, has been responsive in its enforcement and infractions process to the standards of fair hearings established by the Supreme Court. Of the 10 procedural ingredients identified in Goldberg, the NCAA traditionally has provided at least seven. One of the three remaining ingredients (cross-examination of adverse witnesses) is simply beyond the NCAA's power to ensure since, as a private association, it lacks subpoena power. Thus, even under Goldberg's demanding standards, the NCAA hearing process arguably only failed to meet two ingredients (adequacy of notice and statement of reasons). This comes closer to satisfying Goldberg than did the informal administrative process of many Federal agencies in the 1970s. Certainly, the NCAA process would meet the standards implicit in the Mathews balancing test.

Under the new process recommended by this special committee, the NCAA enforcement and infractions program should satisfy whatever procedural challenges might be posed under any reasonable set of due process standards applicable to the world of administrative decision-making, whether emanating from Goldberg v. Kelly, Mathews v. Eldridge or state constitutional law.

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THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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STATEMENT OF
STEPHEN R. MORGAN, ASSOCIATE EXECUTIVE DIRECTOR
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

before the

FEDERAL AND STATE AFFAIRS COMMITTEE

KANSAS HOUSE OF REPRESENTATIVES

February 20, 1992

on the

Athletic Association Procedures Act (S.B. 234)

My name is Stephen R. Morgan. I am Associate Executive Director of the National Collegiate Athletic Association and am responsible for administration of the Association's enforcement program.

I truly welcome this opportunity to describe to the Committee the essential features of our enforcement program and its due process protections. President Sweet, in her statement, noted the widespread misperception that because the Supreme Court has held the NCAA to be a non-governmental organization, the NCAA does not afford due process to our member institutions, their employees and their student-athletes in the course of enforcement proceedings. Nothing could be further from the truth.

An enforcement proceeding resulting from allegations of violation of NCAA rules essentially divides itself into four phases: our preliminary inquiry and investigation; issuance

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of an official inquiry and development of the institution's response; a hearing before the Committee on Infractions; and appeal to the NCAA Council. For a variety of reasons, a case may not progress through all these stages: attached to my written statement are the current enforcement procedures and flow-chart showing the potential courses a case may take.

In the initial stage, if the NCAA staff receives credible information that a possible violation(s) has occurred, then the chief executive officer of the institution is advised in writing, by the preliminary inquiry letter, that an investigation is underway. The staff will then undertake an investigation, usually principally through the use of tape-recorded interviews with individuals who are willing to give information. At on-campus interviews with student-athletes or institutional employees, institutional representatives are permitted to be present. The institution and all individuals are permitted to be represented by counsel, if that is their wish.

If, after the initial investigation, the NCAA staff determines that the matter warrants further action, the institutional chief executive officer is formally sent an official inquiry. This document includes the details of the allegations, and invites the institution to conduct its own investigation and to prepare a formal written response, prior to a hearing before the Committee on Infractions. Except in certain unusual circumstances, a four-year statute of limitations applies to the inclusion of allegations in an official inquiry.

In any recitation of the elements of due process, the concept of notice of the charges is always present: the NCAA's official inquiry, coupled with the original preliminary inquiry letter, are designed to fully satisfy this requirement. Notice to potentially-affected student-athletes and institutional personnel is required under our rules to be given by the institution in question.

During development of the institution's investigation and response, the primary NCAA investigator is made available to the institution for assistance in developing the response. The institution is advised at that time of the identity of all individual witnesses and information upon which the NCAA staff intends to rely at the hearing on the matter. The staff may not use information disclosed by confidential sources as evidence at the hearing. Thus, by the time of the hearing, the institution will have had an opportunity to interview individuals on whose statements the staff intends to rely, and to review all information proposed by the staff for use at the hearing. The same rights and opportunities are accorded potentially-affected student-athletes and institutional personnel.

The hearing is conducted, pursuant to written notice of time and place, by the NCAA Committee on Infractions -- a six-person committee principally composed of non-athletics-related personnel drawn from the faculty or staff of member institutions. Current membership includes two law professors, an institutional in-house lawyer, a history professor, a conference commissioner, and an athletics staff member; four men and two women.

Hearings are conducted informally. Institutional representatives, including counsel, may be present throughout the hearing; individuals potentially affected by the proceedings, and their counsel, may participate during discussion of allegations involving them. In general, as to each allegation, the NCAA staff presents the statements and other evidence upon which it is relying to establish the alleged violation, and the institution presents additional evidence it feels is pertinent. Committee members may ask questions, but there is no examination or cross-examination of "live witnesses." Proceedings of the Committee are tape-recorded; although for confidentiality reasons no transcript is prepared, all participants are permitted subsequent access to the tapes.

After completion of the presentations of all allegations, the Committee meets in closed session to reach a finding on each allegation, and to determine the appropriate penalty if violations have been found. Actions are by a majority vote; findings are based upon information determined "to be credible, persuasive and of a kind on which reasonable prudent persons rely in the conduct of serious affairs."

Upon completion of its deliberations, the Committee prepares a formal report of its findings and any determined penalties. That report is forwarded to the institution and any individuals who received the official inquiry. The committee's report is made public only after it has been received by the institution; in the report as released, names of all individuals are deleted.

Within fifteen days after receiving the Committee's report, the institution may file an appeal to the NCAA Council. The NCAA Council is a 44-member body, elected by the NCAA membership at the annual convention, and has the power to establish and direct general policy of the Association between conventions. In this event, the Committee prepares an expanded report, detailing the basis for its findings and noting factors that it deemed relevant to determination of the proper penalty. Appeals may be dealt with on the basis of written submission or supplemental oral presentation, at the option of the institution. The Council is empowered to alter the findings or the penalty, as it sees fit. Council action on the matter is final.

As the Committee will note, the NCAA procedures are replete with traditional due process protections -- notice of the allegations, the right to counsel, a right to review evidence in advance of the hearing, a hearing before an impartial panel of one's peers, a statute of limitations, and a right of appeal. A major rallying cry of proponents of legislation such as the one before you is the criminal law concept of the "right to confront one's accuser." Aside from the obvious fact that these are not criminal proceedings, I draw your attention to the fact that under our procedures, the institution and affected individuals have access to all the NCAA staff's evidence before the hearing, and have the right themselves to interview and seek affidavits from the staff's sources of information.

I hope you will also note that in many respects, the protections contemplated by S.B. 234 are satisfied by our existing procedures. In general, the major differences rest in the formality of the hearing required under the bill -- even a cursory review suggests that the drafters contemplated a proceeding closely akin to a civil or criminal trial. Such an approach would be enormously burdensome both for the NCAA staff and the various member institutions -- and indeed, in the absence of the subpoena power -- is virtually impossible as a practical matter. It is not, moreover, what the NCAA members have chosen as the means by which they wish NCAA rules to be enforced.

Beyond the actual terms of the bill, an even more serious difficulty would be the very existence of a Kansas statute specifying the procedures to be followed in this state. By definition, the NCAA's program of enforcement must operate equally and evenly with respect to all member institutions, and if individual states are going to enact differing procedural and evidentiary rules, the basic task of fairness to all becomes impossible. Equally significant, each differing state statute would be subject to judicial interpretation in the enacting state, and there is little likelihood that courts in the various states would interpret even similar statutes in equal terms.

The difficulty in administering our enforcement program under differing state statues can be illustrated by our current situation in Nevada. In November 1991, the NCAA initiated a law suit in Federal District Court in Nevada

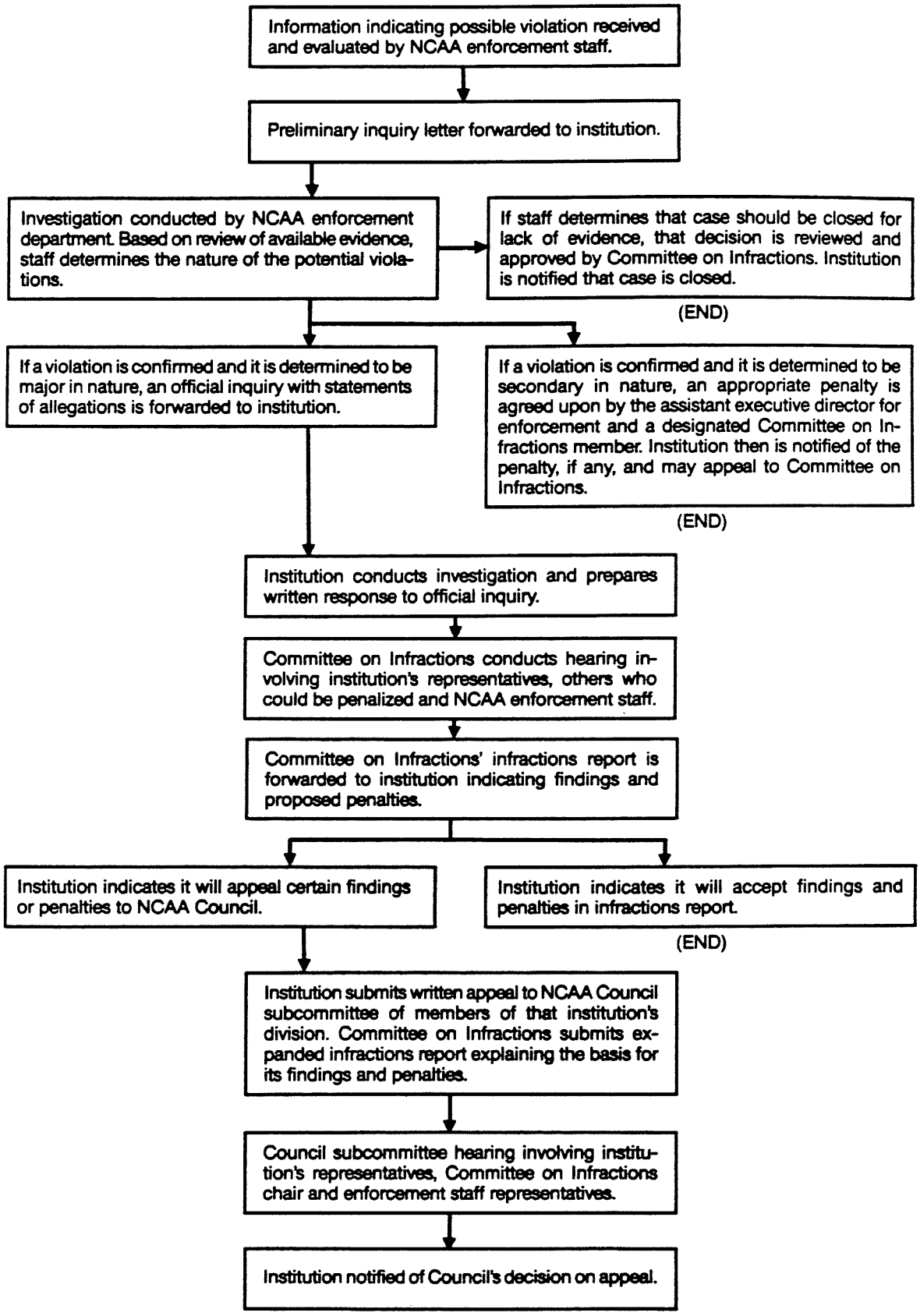
seeking a declaratory judgment and injunctive relief from a similar Nevada "due process" statute. In simple terms, the Association can not comply with the rules put into effect by its member institutions without violating the Nevada law. The case is scheduled to be heard in Federal District Court in Las Vegas on March 13.

NCAA rules relating to the enforcement procedure are essentially determined by the NCAA membership itself, as the consensual basis for assuring compliance with substantive requirements by each member. The rules are regularly subjected to scrutiny, and are changed when the membership deems it appropriate. Several years ago, a committee of the United States Congress extensively reviewed our rules, and made a number of recommendations for change. The NCAA did make a number of those changes, and has made additional changes at the initiative of the Infractions Committee or the membership. As President Sweet noted, a special committee was appointed to evaluate our current procedures, and that committee issued its report last October. Through the NCAA Council and the Committee on Infractions, we are in the process of implementing a majority of the recommendations made by the Special Committee. In his testimony, the Association's Executive Director, Dick Schultz, will brief you on the the status of the Committee on Infractions' work.

I close by reiterating my sincere appreciation for this opportunity to describe our enforcement procedures. Although the NCAA strongly opposes enactment of the bill

before you, we welcome your questions and comments. No system of enforcement is perfect, and hard choices must sometimes be made in balancing the interests of our membership as a whole and those of individual institutions and individuals under investigation. The observations of state legislators are always helpful to us in assuring public understanding of how our program in fact works.

FIGURE 32-1
Processing of a Typical NCAA Infractions Case



THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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STATEMENT OF
RICHARD D. SCHULTZ, EXECUTIVE DIRECTOR
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

before the

FEDERAL AND STATE AFFAIRS COMMITTEE
KANSAS HOUSE OF REPRESENTATIVES

February 20, 1992

on the

Athletic Association Procedures Act (S.B. 234)

Madam Chairwoman, members of the Committee. My name is Dick Schultz. I am the Executive Director of the NCAA. I appreciate the opportunity to appear here today.

Judy Sweet has already outlined our reasons for strongly opposing S.B. 234, and I do not plan to cover that ground again. Rather, I thought the Committee would be interested -- after having heard a description of the procedural protections contained in our existing enforcement programs from my Associate Executive Director Steve Morgan -- and a summary by Benjamin R. Civiletti of the actions of the "Lee Committee" -- to hear a description of the actions taken by the Association in response to the Lee Committee's recommendations.

While finding the existing system fundamentally fair and sound, the Lee Committee recommended several structural and procedural changes designed to enhance the existing

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process. In response, on January 7, 1992, the NCAA Council approved in concept a majority of the recommendations made by the Lee Committee and authorized the Committee on Infractions to develop procedures for implementing those recommendations. At its January 31 - February 2, 1992 meeting, the Committee on Infractions began the process of drafting appropriate changes as directed by the Council. I will briefly summarize the work of the Committee on Infractions:

1. Enhanced Preliminary Inquiry Notice. The committee has enacted this procedure for immediate implementation. Drafts of a proposed notification letter were reviewed and an additional draft will be re-circulated to members of the committee prior to its February 28 meeting. An in-person meeting with the chief executive officer of an institution that will be investigated is viewed as appropriate.

2. Transcripts of Committee on Infractions Hearings. Use of a court reporter will be implemented as early as the committee's April meeting (if approved by the NCAA Executive Committee). In addition, tape recordings will continue to be used and a procedure will be designed to ensure that involved individuals and institutions receive convenient access to tape recordings and transcripts. On February 28, the committee will continue discussion of procedures to identify custodial offices in the locale of affected parties where NCAA recordings and transcripts can be stored for review.

3. Conflict-of-Interest Policies. Drafts of appropriate conflict-of-interest policies beyond those currently applicable to the Council and Committee on Infractions are being prepared and will be included in the report to the Council.

4. Public Announcement of Infractions Cases. The chair or a member of the committee intends to make future public announcements regarding infractions cases. The committee does not believe it is appropriate for the NCAA enforcement staff to continue to participate in such announcements.

5. Tape Recordings of Enforcement Staff Interviews. The enforcement staff will continue to tape-record investigative interviews as approved by the committee last summer.

6. Access to NCAA Materials. Although full access to NCAA documentation concerning an infractions case currently is not guaranteed under the Bylaw 32 procedures until the pre-hearing conference stage (which follows the institutional investigation and receipt of written responses to allegations) the committee intends to recommend that access be guaranteed much earlier -- at the time the NCAA enforcement staff submits its allegations (official inquiry) to the institution and the individuals involved. It is anticipated that this well be a significant improvement in expediting institutional investigations and the preparation of written responses.

7. Summary Disposition. The committee adopted a summary disposition procedure and discussed appropriate elements of it that will ensure that institutions fulfill the obligation for a comprehensive evaluation of the matter under inquiry, ensure that unresolved issues between the parties and enforcement staff are reported to the committee, and provide appropriate protections for all parties who stipulate to a list of findings. It is to be hoped that hearings and possibly official inquiries are avoided in cases that are resolved under this procedure.

8. Committee Membership. The committee intends to enlarge the existing committee and allot positions from the public.

9. Formation of Separate Staff. The committee intends to propose the establishment of its own staff (probably an administrator and secretary), which would function separately from the NCAA enforcement department.

10. Appellate Panel. The committee intends to recommend that a new separate appellate group be established, probably with representation from the Council, the membership and the public.

The Committee on Infractions will meet again February 28 to advance the implementation further, and to prepare a report for the Council's consideration in April.

Two other significant recommendations were made by the Special Committee: the use of an independent hearing officer and the initiation of open hearings. A separate vote of the membership will be necessary to change the

Association's by-laws with respect to these two issues. I will not attempt to pre-judge the membership's thinking or predict the final disposition of the two recommendations. However, leading up to and during the 1993 convention, every member of the Association will have an opportunity to express their views on the merits of the proposals and, in the finest tradition of the Association, I expect the debate to be lively.

Madam Chairwoman, the process of analyzing the strengths and limitations of one's own programs is never an easy one, but for an organization like ours, it is a very significant one. At the very least, the Lee Committee's work heightens the public's awareness of our procedures and the difficult issues with which we must deal in balancing the legitimate interests of our members as a whole with those of individuals and institutions involved in infractions proceedings. The Lee Committee has given us a fresh look at those procedures. Needless to say, the views of this Committee, and other legislative bodies representing the public's interest, are important to us as we continue the process of introspection and change which has always characterized our enforcement program.

Before I close, there is one more important issue I would like to discuss with the Committee. Some individuals have expressed concern that innocent student-athletes can be punished or not allowed to play in post-season competition for the actions of their coaches -- in some cases after the coach has left the institution.

I would like to make three comments:

First, while these concerns are very important, I submit to the Committee that they have very little to do with the due process legislation being considered today.

Second, the NCAA must punish its member institutions because they, not coaches, students or boosters, are members of the Association.

Third, everyone involved with this process deeply cares about the well-being of our student-athletes. It is important to understand that the membership of the Association, including the institutions being punished, decided to hold the institutions themselves responsible for every aspect of the athletics programs. We call this "institutional responsibility."

I close by echoing the comments of my NCAA colleagues. We believe that state legislation in this area will ultimately prove counterproductive, and in light of the meaningful steps now occurring in the intercollegiate athletics community, I hope the Committee will resolve not to report favorably on the bill now before it. I will be happy to respond to your questions. Thank you.