STATEMENT OF RONALD S. KATZ

Knight Commission Meeting

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Responding to Change: Alternative Regulatory Schemes for College Sports (why the student-athlete concept is flawed)

I. Introduction

The invented noun “student-athlete” should be abandoned. It suggests an equivalence between academics and athletics that should not exist because it has led in many cases to what, in effect, are professional college sports.

This Statement makes six suggestions to end this flawed equivalence. They revolve around the core duty of a college or university – education – and the hallmark of that education: graduation.

These suggestions are straightforward and simple. Complexity simply has not worked to regulate college sports, e.g., see the NCAA Bylaws. As this Commission stated in its 2001 publication, “The evidence strongly suggests that it is not enough simply to add new rules to the NCAA’s copious rule book.”

Finally, if these suggestions are implemented, they will greatly ameliorate the antitrust case losses that have dogged the NCAA. Emphasizing education over commerce is the most effective way for the NCAA to win antitrust cases.

II. Six Suggestions to Change the College Sports Focus From “Student-Athletes” to Students

(i) Change the designation "student-athlete" to "student."

This simple change, which has no downside, clarifies that institutions of higher education have as their core mission the provision of education rather than athletics or entertainment. Indeed, although it has been suggested that the term “student-athlete” was coined in order to make sure the student-athletes would not be eligible for Workers’ Compensation, the term "student" is much more likely to achieve that aim.

No college sports regulatory scheme will work if the focus is incorrect. In my opinion, the current focus on the student-athlete is incorrect.

Even the 2010 report of this Commission—Restoring the Balance—illustrates the problem. With all due respect, balancing is not called for: if academics do not have primacy at all times, then anti-educational phenomena like “one-and-done” will occur, giving college sports a black eye. Indeed, “balance” is a misleading word in this context because of the gross imbalance at the
FBS schools: according to the 2010 report of this Commission, median spending per athlete at FBS schools exceeded median spending per student by a factor of six.\(^5\)

Student-athletes are the only group that has a hyphenated designation. Members of the student band are not called student-musicians, chemistry majors are not called student-chemists, and so on. In and of itself, this hyphenation implies that student-athletes will be treated differently. This different treatment is precisely the problem that needs to be addressed.

Student-athletes should be treated like every other student. In the current environment, this suggestion will probably be perceived as radical. In reality, it is just a proposal to go back to basics. There is evidence that such a return to basics will not lessen revenue from football and men’s basketball.\(^6\)

Under this proposal, for example, scholarships should not exceed the cost of attendance for students, whether or not they are athletes. Then all of the NCAA Bylaws regarding educational requirements could be dispensed with, because those requirements would be the same as those set by the college or university for all students on a track for graduation, i.e., taking at least the minimum course load required by the university for graduation and achieving the minimum grades required by the university.

(ii) Require that all students be on track for graduation in order to play a sport. Playing a sport is a privilege, not a right. If a student is not progressing toward the primary goal of an institution of higher education – graduation – then that student should not be able to partake of this privilege. This rule would make it clear that education is the top priority of institutions of higher education. The rule would also be easy to apply because standards of progressing toward a four-year graduation would, under this proposal, be the same for all students.\(^7\)

This proposal would solve problems like scheduling for the sake of television rather than for the sake of academics. Obviously, such scheduling, which includes week-night football games, does not help athletes to progress towards graduation because it lessens study and class time. Universities, under this proposal, would have to lessen or eliminate such scheduling because it would lessen an athlete’s chance of graduating on a normal track.\(^8\) Practice time would also have to be lessened to permit more time for study, which the shortening of schedules would also help.

(iii) Requiring recipients of athletic scholarships to sign a contract committing to four years of study. An athletic scholarship should be awarded to someone who, in exchange for the scholarship, is willing to commit to the hallmark of an institution of higher education – graduation.\(^9\) If the athlete is not willing to make that commitment, he or she should not receive a scholarship. If the athlete voluntarily leaves college before four years have passed in order to play professional sports, he or she should have an obligation to return the scholarship money.\(^10\)

(iv) Disallow redshirting. Redshirting is not consistent with the educational mission, which has a norm of four years to graduation. Redshirting benefits only athletics. It permits greater commitment to athletics and less commitment to academics. By transforming student-
athletes back to students, the educational mission of the university, which culminates with the granting of a degree, will be returned to its rightfully core position.

(v) Simplify the NCAA Bylaws.

Many of the NCAA Bylaws relate to academics. For example, virtually all of Article 14 of the Bylaws ("Eligibility: Academic and General Requirements") could be eliminated if these suggestions were accepted. Academic requirements would simply be the same as they are for all students on a normal track to graduation, athletes and non-athletes alike. Entrance requirements could be set by individual institutions, but these institutions would be constrained by the knowledge that an athlete could not play if he or she were not progressing normally toward graduation.

(vi) Judging infractions should be assigned to retired judges. Although simpler, the NCAA Bylaws would obviously require enforcement. For example, it is important to ensure that students are legitimately progressing toward graduation.

My proposal for enforcement is to resuscitate a proposal made by some of the most distinguished jurists in our country in 1991 to the NCAA at the NCAA’s request (see attached, Recommendation No. 4). This wise proposal, for reasons difficult to fathom, was not accepted by the NCAA.

At that time the NCAA asked, among others, the former Chief Justice of United States Supreme Court, the former Solicitor-General of the United States and numerous other luminaries including college presidents and retired trial and appellate judges to make proposals for the NCAA's discipline system. Among other things, that distinguished group recommended that the judgment aspect of the disciplinary system be handled by retired judges without any formal connection to the NCAA.

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I respectfully suggest that that proposal should now be accepted. No system – not the NCAA's or any other – can be prosecutor, judge, jury and appellate court. Such a system offends our most basic tenets of fairness and creates numerous conflicts of interest. Passing judgment is not an expertise of the NCAA, nor should it be.

However, the NCAA does have expertise in amateur college athletics, and part of this proposal in this Statement is that the final appeal of any decision rendered by a retired judge would be to the President of the NCAA. In that way, due process would be served, but also the unique interests and expertise of the NCAA would be brought to bear on the situation.

III. Acceptance of the Above Suggestions Will Lessen or Potentially Eliminate the NCAA's Antitrust Problems.

The chances that the NCAA, which the U.S. Supreme Court has described as a cartel, will receive an antitrust exemption from Congress are nil, in my opinion. Only one sports organization, Major League Baseball, has such an exemption, and that has been widely criticized and is currently the subject of a petition for certiorari to the U.S. Supreme Court.

If, however, the NCAA argued educational rather than economic values in its antitrust cases, it
would be much more likely to win those cases. The *Regents of the University of Oklahoma* case, cited above, is the best example of the NCAA’s misguided economic argument approach, which appears in virtually every NCAA antitrust case. In the *Oklahoma* case, the NCAA argued two non-education-related justifications for its policy to limit collegiate football games on television: protection of gate attendance and competitive balance.\(^ {14} \) Not surprisingly, the Supreme Court ruled against the NCAA.

Had the NCAA argued educational justifications for its policy, however, the dissent by Justice Byron White (formerly an All-American football player at the University of Colorado) suggests that the NCAA would have prevailed: "The primarily non-economic values pursued by educational institutions differ fundamentally from the 'overriding commercial purpose of [the] day-to-day activities' of engineers, lawyers, doctors, and businessmen."\(^ {15} \) He goes on to articulate what is the main point of my presentation to this Commission:

> In short, '[the] restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement rather than inhibit, educational achievement.' (emphasis added; internal quotation citations omitted)\(^ {16} \)

Justice White’s argument did not garner a majority in the *Oklahoma* case because gate attendance and competitive balance are commercial—not educational—justifications, and therefore should be treated no differently from other commercial justifications. The result today, in my opinion, would be different, if, for example the NCAA prohibited week-night football games because they cut into the athletes’ study and class time. Such a justification goes to the non-commercial core of what the NCAA should be all about, and it would carry the day, in my opinion, in a rule-of-reason analysis.

**IV. Conclusion**

The vested financial interests resulting from the professionalization of college football and men’s basketball have brought college sport to the tipping point. What Justice White predicted in 1984—that the very existence of college athletics might be “threatened by unbridled competition in the economic sphere”\(^ {17} \)—has come to pass. Unless this process is rolled back to basics with a regulatory scheme that has graduation as its hallmark, the academic mission of colleges and universities will continue to be tarnished and diminished.

An intense focus on graduation in four years is a simple solution to the current difficulties of college sports, one that could be implemented unilaterally today by any college or university. I would urge this Commission to re-emphasize a key principle enunciated in its initial report in 1991: "‘No pass, no play’ will be the byword of college sports in admissions, academic progress and graduation rates.”\(^ {18} \)
ENDNOTES

1 Chair Emeritus, Santa Clara University Institute of Sports Law and Ethics; adjunct lecturer in Sports Law at Santa Clara University; Chair, Sport Law Practice Group at Manatt, Phelps and Phillips, LLP. (see www.manatt.com and www.law.scu.edu/sportslaw)


3 Byers, Walter, Unsportsmanlike Conduct; Exploiting College Athletes, p. 69 (University of Michigan: 1995).


5 Id. at p. 5. The Report’s main recommendation is on p. 14: “We repeat the Commission’s 2001 recommendation that a team should be on track to graduate at least 50% of its players to be eligible for postseason championships.” This recommendation, which apparently had not been accepted by the NCAA for nine years at the time that it was re-made in 2010, is unambitious at best. Similarly, unambitious is Principle III at p. 46 of this Commission’s first report in March, 1991 – “Keeping Faith With the Student Athlete: A New Model for Intercollegiate Athletics”: “This institution will provide student-athletes with the opportunity for academic experiences as close as possible to the experiences of their classmates.” Emphasis added.

6 I do not believe that this proposal will lessen revenues from college sports. For example, although the quality of college basketball has gone down since the inception of “one-and-done,” viewership and interest have gone up. This Commission’s June 2001 Report – “A Call to Action: Reconnecting College Sports and Higher Education” – agrees. Page 30 of that Report states: “There are no downsides to thoroughgoing reform. When and if accomplished, athletic contests would still be attended by their fans and covered by the media even if the players were students first and athletes second.”

7 Some may argue that this rule would bear most harshly on students from underprivileged backgrounds. Such students, however, can receive tutoring in order to bring them up to the appropriate standard. That tutoring, of course, would have to be available to any student–athlete or not – from an underprivileged background.

8 This proposal, however would not solve the problem of "one and done", because all that is needed to comply with "one and done" is to be academically on track for graduation for one term only (more accurately it should be called "1/2 and done"). Therefore, solving "one and done" is left to Proposal iii below.

9 The Oxford English Dictionary defines “hallmark” as a “marked stamped on articles of gold, silver or platinum… certifying their standard of purity.”

10 One potential problem with this proposal is that professional teams could reimburse the college on behalf of the athlete, because such a reimbursement would be only a small percentage of what the professional team was paying to the athlete. A solution for the problem of professional team reimbursement would be a liquidated damages clause to the scholarship contract, which would require a scholarship recipient leaving school for a professional team to pay an enhanced amount of money to the college, sufficient to discourage such professional team reimbursement.


12 City of San Jose v. Office of the Commissioner of Baseball; No. 14-15139 (9th Circuit, January 15, 2015).


14 Board of Regents, supra, at 96.

15 Id. at 135.

16 Id.

17 Id. at 122.

18 “Keeping Faith With the Student-Athlete: A New Model For Intercollegiate Athletics”, p. 18 (Knight Commission on Intercollegiate Athletics: March, 1991).