

Collegiate Athletics Reform: Most likely up to the courts

a *CLIPS Guest Commentary*, 01-27-12

AFTERWORD: A Glimmer of Hope beyond the Courts, 02-02-12

By Frank G. Splitt

Our guest author points out that despite multiple appeals for action by the Legislative and Executive branches of the federal government, discussed in his previous CLIPS commentary, there has been no government action—leaving it up to the courts to resolve reform related issues.

Education Secretary Arne Duncan's remarks at the 2012 NCAA Convention and silence on the part of members of Congress have reaffirmed my earlier conclusion that the federal government will be of no help in bringing meaningful reform to big-time collegiate athletics—more later.

In retrospect, it was really a bit too farfetched to expect—as discussed in my previous *CLIPS* commentary¹—that members of Congress would look very differently than they historically have at the question of whether big-time sports is truly an amateur enterprise that warrants tax exemption as an educational activity. It was also too farfetched to expect the Education Secretary to turn up the heat on the NCAA and its member institutions to drive collegiate athletics reform.

The Senate Finance Committee – There has been no response to requests to have the issues outlined in previous commentaries and e-mails brought to the personal attention of SFC Chairman Max Baucus and SFC Ranking Member Orrin Hatch, even after highly recommending a reading of Doug Lederman's "Calls for major reform of college sports unlikely to produce meaningful change."²

It was hoped that thoughtful consideration would be given to the premise that intervention by the federal government is the only way to bring about desperately needed reform to help restrain the uncontrolled growth of big-time football and men's basketball programs with its potentially devastating impact on America's colleges and universities.

Also, there has been no response to a related request, to have the U.S. Congress' Senate Finance Committee follow up on the earlier efforts of House Committee on Ways & Means (then) Chairman Bill Thomas and (then) SFC Chairman Senator Chuck Grassley to get the NCAA to provide justification for the tax-exempt status of its big-time football and men's basketball programs.

This experience demonstrated that government officials practice their own Golden Rule when asked to respond to issues that could have a negative impact on their re-electability, to wit: silence is golden.

It is my view that the probability of the U.S. Congress emerging to rein in the runaway college sports entertainment industry is extremely low. Members of Congress will most likely avoid taking on the powerful NCAA cartel and their wealthy donors so will continue to deal with related problems by looking the other way—safeguarding their vested self interests. The same could be said about the U.S. Department of Education. Here's why.

The Education Secretary's 2012 NCAA Keynote Address – There follows my comment on the *Inside Higher Ed report*³ on Education Secretary Arne Duncan's Keynote address to the 2012 NCAA Convention.⁴

Duncan's Words for NCAA Not Harsh by a Long Shot – It is difficult for me to believe that these remarks did not originate in the NCAA's PR department. Furthermore, it appears that Secretary Duncan unwittingly served as a surrogate speechmaker for NCAA President Mark

Emmert—doing a superb job of delivering the NCAA's party line wrapped in bits of his own personal story with fulsome praise for the NCAA's shallow reform initiatives. It is even more difficult to believe that he could be so naive. Or is he?

Perhaps Duncan isn't naive at all but simply wants to help his boss who is now running a populist reelection campaign. How many votes would Obama lose if he announced that his administration is supporting a full-scale investigation of the NCAA and hugely popular big-time collegiate athletics?

Secretary Duncan's remarks reaffirmed my conclusion that the U.S. Department of Education will be of no help in promulgating meaningful reform in big-time collegiate athletics.

Furthermore, as Duncan said: "If any of us are looking for Congress to solve this, good luck." So, it is likely in this election year that no one with the responsibility and authority to act will do anything to provide corrective action—no matter how bad things may be.

After the election, it is a safe bet that neither the President nor Congress will take on the powers that be—the NCAA and the athletic conferences, as well as wealthy alumni and booster organizations. Governing boards will fire presidents who attempt to moderate their big-time football and men's basketball programs and won't hire candidates who could possibly threaten the status quo.

Today it seems that no one with real power cares enough about higher education to protect its colleges and universities from money-driven prostitution by the sports entertainment industry.

The above comment reflected deep disappointment with what appeared to be uninformed remarks and suggestions that avoid the real issues surrounding the professionalized college sports entertainment industry. These issues were discussed in two Open Letters to the President⁵ with Secretary Duncan and members of his staff copied on both letters. A thoughtful review these letters will cast a different light on the Secretary's remarks.

The Secretary's criticisms of the NCAA have certainly been in the right direction; however they are simply variations on the tepid themes of his previous remarks; see Duncan⁶ and my comment thereon. If the truth be told, the vast majority of coaches at colleges and universities supporting big-time football and men's basketball programs only pay lip service to academic values. They value winning above all else -- that's what they are paid \$-millions to do. NCAA, school, as well as conference officials, and a relatively small number of college athletes who make it to the pros, will also get rich; however, many of the athletes will likely pay a terrible price re: incipient damage to their long-term mental and physical well being.⁷

A Response and Further Comment – The following response to my January 17, e-mail message to Secretary Duncan and his staff was received on January 27, 2012:

Dear Mr. Splitt,

The Secretary received your latest note on January 17 with the link to your response to the Inside Higher Ed piece on the Secretary's recent speech to the NCAA. The Secretary continues to encourage college sports programs - especially major football and basketball programs - to strike a healthier balance between athletics and academics.

Thank you for continuing to share your concerns with us.

Sincerely,

Cynthia Dorfman
Director, Regional Operations
Office of Communications and Outreach

It seems that Secretary Duncan and his staff keep missing the main message: The college sports entertainment industry continues to operate as a very large, powerful, and politically connected enterprise that simply does as it pleases—seemingly not accountable to anyone, least of all the federal government—while **the** quality of higher education in America is declining relative to education in nations that prioritize academics over athletics.⁸

One wonders how Secretary Duncan can buy into the NCAA's shallow reform mechanisms and not take the opportunity to press the NCAA for answers to questions such as:

1. What is the NCAA's collegiate model and how does this model square with actual practice?
2. Why has the NCAA made a number of rule changes that have emphasized athletics over academics thus moving their big-time football and men's basketball programs to professional levels?
3. Why has the NCAA resisted reform efforts that would help realign big-time college sports with its stated mission of maintaining athletes as an integral part of the student body and retaining a clear line of demarcation between collegiate and professional sport?
4. More specific to the above, why has the NCAA resisted providing college athletes meaningful opportunities to function as real students by: a) Not restoring first-year ineligibility for freshmen with expansion to include transfer athletes; b) Not reducing the number of athletic events that infringe on student class time, with class attendance made a priority over athletics participation including game scheduling that won't force athletes to miss classes; c) Not restoring multiyear athletic scholarships—five-year scholarships that can't be revoked because of injury or poor performance?
5. Why should the federal government subsidize the athletic activities of educational institutions when that subsidy is being used to help pay for escalating coaches' salaries, costly chartered travel, and state-of-the-art facilities?⁹
6. Why has the NCAA forced everyone to take its word and the word of school administrators that athletes are really students on track to receive a bona fide, rather than a "pretend" college education by not agreeing to calls for transparency, accountability and oversight?
7. Why does the NCAA mask the suspected poor academic reports of many big-time college athletes by bundling the reports with those of the tens of thousands of other college athletes with good academic records who participate in a myriad of other non-revenue generating sports?
8. What is the NCAA doing to minimize incipient damage to the long-term mental and physical well being of college athletes?

Answers to these questions should be of interest not only to Secretary Duncan and other officials at the Department of Education, but also to members of Congress, the IRS, the media, reform-minded organizations, and American taxpayers above all.

Do-Nothing Government Officials – Milton Friedman once said “the proper role of athletic activity at a university is to foster healthy minds and healthy bodies, not to produce spectacles.” Nonetheless, the most important products from some of our nation's most prestigious colleges and universities appear to be entertainment venues for a sports-obsessed public and athletes that hope to graduate to the NFL or NBA, this rather than prioritizing the transmission of understanding, ideals and values to students while adding to the body of intellectual knowledge and know-how.

Members of Congress and Secretary Duncan are apparently unaware of the chilling evidence that America's colleges and universities are helping to lead the way as our country slithers toward second-rate

nationhood. There should be no mystery here. For all intents and purposes, government at all levels stands idle while many of its most prestigious schools prostitute themselves in a mostly futile quest for fame and fortune via their sports entertainment businesses.

Football is American religion, and for the few lucky enough to attend a game, it is a chance to see gods in action and miracles performed. — Nick Summers¹⁰

The Upshot – Based on the above, I would not recommend that anyone hold their breath waiting for a substantive reply from either the Department of Education or the Senate Finance Committee on the matter of college sports reform.

After almost nine years of effort to have these bodies address the manifold issues in big-time collegiate athletics, I have found that with but few exceptions government officials seem to abide by their own version of the Hippocratic Oath: First do no harm to the chances of keeping your job.

The vast majority of members of Congress have chosen to do nothing, apparently believing they would violate this 'oath' by mandating: 1) Compliance of big-time college sports with its stated mission of maintaining athletes as an integral part of the student body and retaining a clear line of demarcation between collegiate and professional sport and 2) Disclosure of data on the academic performance of big-time college athletes—making the continuation of the not-for-profit status of the NCAA and its member institutions contingent on this disclosure without which no one knows not only who is doing the work for college athletes in their exclusive academic resource centers, but also why the feds continue to put up with the charade of self-reported “graduation rates.”

Lacking help from the Education Department and the Congress, reform-minded individuals and organizations can only hope for meaningful corrective action via the courts—not a new conclusion as can be seen from the following excerpt from an earlier commentary.¹¹

So, in the end, it may very well be that the only hope for truth, justice, and reform in collegiate athletics will be via the courts, as in the March 10, 2010, Consolidated Amended Class Action Complaint captioned *In re NCAA Student-Athlete Name & likeness Licensing Litigation* in the District Court for the Northern District of California.¹²

Absent meaningful corrective action via the courts, college sports, like a runaway train, will continue to overwhelm everything in its way with the Legislative and Executive branches of the federal government operating in an irresponsible manner by looking the other way (not enforcing compliance and not requiring disclosure) while supporting minor leagues for the NFL and NBA by allowing NCAA programs to benefit from a lack of oversight, favorable tax policies, and unabashed pandering by top officials who live in fear of the NCAA since they recognize college sports are hugely popular with the American public (voters).

In the meantime, Asian countries are rapidly closing ranks on U.S. leadership and the U.S. will continue to lose high-tech jobs as R&D shifts toward Asia. The recent National Science Board report and Jim Hagerly's *Wall Street Journal* article are just the latest word on the subject.¹³ For the back story see Splitt.¹⁴

Concluding Remarks – Led by the NCAA and its member colleges and universities, the big-time college sports entertainment industry continues to distract the public, its elected officials, and others from serious issues confronting our nation. The industry continues to operate as a very large, powerful, and politically connected enterprise that simply does as it pleases—seemingly not accountable to anyone, least of all the federal government. The weak recommendations by Secretary Duncan and congressional silence are testaments to this fact.

Professionalized college sports entertainment rules, no matter how negative its impact on America's education system and how damaging its effect on our nation's future position on the world stage. The quality of higher education in America is declining relative to education in nations that prioritize academics over athletics. America could very well be losing its economic and technological preeminence.

The loss of academic primacy at all too many colleges and universities supporting big-time football and men's basketball programs has not gone unnoticed by America's Asian and Middle-eastern competitors. They have prioritized the education of their citizenry above all else as they build world-class universities with laser-like focus on academics, especially science, technology, engineering, and mathematics, rather than building facilities for the entertainment of spectators or the employment of 'student-athletes.'

Here's the take-away: Big-time college football has an ugly side, one that has been a perennial source of embarrassment for otherwise upstanding American universities and government officials. The many forms of collateral damage resulting from overzealous efforts to have winning teams and bowl invitations are a price these universities and officials are willing to pay. It's also the price the public is willing to pay for their entertainment. America needs to wake up and face reality; this nation cannot compete in the 21st-century global marketplace by being the least-educated industrial nation in the world ... a nation in which its colleges and universities serve as prostitutes for the sports entertainment industry—focusing resources on athletics at the expense of academics so its best and most important future products could eventually be limited to athletic sports entertainment venues and world-class athletic entertainers.

AFTERWORD: A Glimmer of Hope beyond the Courts

Subsequent to the January 27, 2012 posting of the commentary at *College Athletics Clips*, two articles were published that provide additional context for the 6-year old 'global-reality' message in the last paragraph of The Upshot and the Concluding Remarks sections. The first article appeared in the *New York Times*.¹⁵ The second article appeared in the *Wall Street Journal*¹⁶ with the following comment (reflecting the author's experience) posted January 30, at the *Journal's* online story site.

Don't hold your breath waiting for politicians

Mark Mills and Julio Ottino ask: What should our politicians do to help usher in this new era of entrepreneurial growth? With tectonic technological shifts promising a tech-led boom they believe the answer lies with politicians somehow assuring liquid financial markets, sensible tax and immigration policy, and balanced regulations that will allow the next boom to flourish. Unfortunately, U.S. politicians have a world view that does not comport with this answer.

U.S. politicians see the world as geographic blocs of voters and their jobs as not only maximizing the economic benefits for their bloc of voters, but also maximizing the chances of keeping their own jobs. The ongoing mortgage debacle and debt crisis are testaments to the inability of politicians to help resolve tough issues. So too are the sad states of K-12 and post secondary education in America and the shallowness of remarks by elected officials who are forever campaigning rather than working to learn what's really going on in the world.

Don't hold your breath waiting for politicians to deliver what it takes for the U.S to exploit the promise of new technologies. It will be left to the private sector to do what it does best—capitalize on its fecundity of innovation and developing global outreach.

Frank G. Splitt
Former McCormick Faculty Fellow of Telecommunications
McCormick School of Engineering and Applied Science
Northwestern University

It is disappointing to see the lack of leadership on the part of Catholic schools in collegiate athletics reform, particularly so re: the ethics of their continuing sponsorship of football programs in spite of growing concerns about the incipient damage caused by repeated blows to the head; see Briggs.¹⁷

“At stake is no less than the long-term physical and mental health of young Catholic men who naturally love sport,” said Dennis Coday, editor of *The National Catholic Reporter*.

As bleak as things may seem the situation is not entirely hopeless.

It was encouraging to see the faculty at Rutgers University make one of the strongest moves yet made by any university faculty against Div IA sports corruption by calling for cuts to athletic program subsidies; see Renshaw.¹⁸

Also, although partisan infighting and pre-election-year politics have led to political paralysis that could continue to keep Congress from acting on substantive issues there is always some hope that things will change. House GOP Chief Deputy Whip Peter Roskam (IL, 6th) believes that change can be brought about by building consensus. He pointed to history to suggest that the time might be ripe for major changes, including tax-code reform as he outlined his legislative and political priorities for the year ahead to the *Daily Herald*.¹⁹ Those priorities include guiding House members to consensus.

Roskam also serves on the House Ways and Means Committee’s Subcommittee on Select Revenue Measures—a position that allows him to focus effort on getting much-needed reform of the debilitating federal tax system. He said: “What we have right now is a tax code that nobody can defend. The whole concept is to make the tax code more competitive. There’s a real opportunity to reform the tax code and that will create jobs and buoyancy.”

Perhaps Congressman Roskam will see that everything is put on the agenda for tax-code reform—including the tax-exempt, nonprofit status for the NCAA and the sports entertainment businesses at colleges and universities supporting revenue-generating football and men’s basketball programs, as well as for end-of-season bowl games and the NCAA’s basketball tournaments.

The efforts of the Rutgers’ faculty and Congressman Roskam provide a glimmer of hope beyond the courts for collegiate athletics reform.

February 3, 2012

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THE AUTHOR

Frank G. Splitt is the former McCormick Faculty Fellow of Telecommunications, McCormick School of Engineering and Applied Science, Northwestern University, and Vice President Emeritus of Educational and Environmental Initiatives, Nortel Networks. He is a member of The Drake Group and the College Sport Research Institute's Advisory Committee, University of North Carolina at Chapel Hill, and recipient of The Drake Group's *2006 Robert Maynard Hutchins Award*.

A complete listing of links to his essays and commentaries on college sports reform can be found at <http://thedrakegroup.org/splittessays.html>