

POSITION STATEMENT

Need for Congress to Initiate a Comprehensive Review of College Athletics¹

The Drake Group urges Congress and the general public to understand the need for comprehensive federal reform legislation that goes beyond the current singular focus on college athlete name, image, and likeness rights or a slight nod to athlete health and protection. There is a clear need for an independent Congressional Commission that examines the multi-faceted problems that have plagued and created upheaval in college sports. Increasingly commercialized athletic programs pose a real danger to the academic integrity of our institutions of higher education and the education, health and well-being of college athletes.

I. **Loss of Institutional Control and Disintegration of NCAA Governance**

All the talk about the NCAA and conferences restructuring to better protect athlete health and wellness, realize gender equity and achieve improved academic outcomes among college athletes should be viewed as “lip service”. The recent retreat by the NCAA from enforcing its anachronistic “amateur status” rules that will finally allow college athletes to monetize their own names, images and likenesses (NILs) with outside third parties without fear of losing their eligibility to compete in college athletics is not the result enlightened action of the NCAA or its institutional members. In fact, the NCAA has been backed into a wall by state legislatures mandating such athlete economic rights and court decisions that undermine NCAA control of outside athlete economic activities. There are numerous indicators of the academic integrity and athletics governance crisis that must be addressed:

- **Academic fraud.** In 2017, after the University of North Carolina (UNC) escaped punishment for a two decades long massive academic scandal designed to manage and maintain the eligibility of underprepared athletes, the cumulative outrage from the public, media, and athletics watchdog groups demanded that the NCAA establish stronger rules and standards for the widespread fraud within American college programs. In the summer of 2019, the NCAA Division I Board of Directors under pressure from the Division

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I Presidential Forum, [quietly dropped important academic integrity recommendations](#) advanced by two NCAA groups that would have modified and strengthened rules to address systematic and widespread academic fraud on member institution campuses. Member institutions now *self-police* their own academic fraud. The NCAA surrendered on the issue of athletic program academic integrity at the behest of college presidents.

- **Athlete health and protection.** [Hundreds of concussion lawsuits](#) are confronting the NCAA and its member schools with no long-term medical fund to deal with the inevitable future of dementia, Parkinson's, ALS or CTE for thousands of athletes who have and will continue to suffer brain trauma or post-insurance covered effects of chronic joint injuries. No NCAA rule exists mandating that institutions pay for athletic injury insurance and medical expenses. Further, college athlete mental health and wellness issues continue to be largely ignored by NCAA member institutions.
- **Sex discrimination.** Athletic directors, university presidents and conference leaders are well aware of the unlawful sex discrimination existing in their athletic departments. As recently as June of 2020, Conference Commissioners and their member presidents and athletic directors received [legal memos and summary letters](#) detailing the sex discrimination in their athletic departments, along with free legal memos regarding their institutional obligations to treat male and female athletes equally to comply with Title IX. This effort was led by *Champion Women*, an organization dedicated to providing legal advocacy for girls and women in sport. These materials described current athletic program [sexism and second-class treatment at each of their member institutions](#); they were signed and supported by a consortium of advocates for women and girls in sports. This [data revealed](#) that 90 percent of institutions with athletic programs were still discriminating against women in sport; women were missing out on \$1 billion in scholarship dollars annual and overall, institutions were short-changing women on 148,030 participation opportunities.
- **Sexual violence and other abuse.** [Coach and athletic staff misconduct](#) resulting in sexual and other abuse of college athletes is regularly exposed by the media with the common themes of the institutions of higher education failing to act or actively participating in cover-ups. Similarly, college athletes valued for their contribution to winning teams and who [commit acts of sexual violence or harassment](#), evade institutional disciplinary action with the help of administrator enablers and athletic department personnel who put pressure on local police and/or arrange legal counsel for them.
- **Academic exploitation of athletes of color.** As recently as November of 2020, the [NCAA reported](#) that 90 percent of athletes in Division I graduated according to its Graduation Success Rate (GSR), a metric which cannot be compared to the graduation rates of non-

athlete students. When using the Federal Graduation Rate (FGR) which does allow a non-athlete comparison, Division I athletes aggregated in all sports graduated at the same 69% rate as other college students. Such NCAA reports have consistently not examined the graduation rates of Division I men's football and basketball which are revenue sports in which a majority of participants are athletes of color. For example, [data on the 64 NCAA Final Four teams](#), the mean FGR for non-athlete students was 71% compared with the mean FGR for Division I male basketball athletes of 45%, 25 percentage points LOWER than their student bodies. Demonstrating the incredible inflation of the NCAA's misleading GSR metric, 40 of the 64 institutions had men's basketball GSRs that were 30 to 86 percentage points HIGHER than men's basketball FGRs.

- **Athletic governing organization sexism.** On March 18, 2021, Sedona Prince, a University of Oregon basketball player participating in the NCAA Division I Women's Basketball Championship took to [TikTok and Twitter to reveal inequities](#) in the treatment of male and female players at the 2021 Division I basketball championship events. After going viral and igniting the call for the ouster of NCAA President Mark Emmert, the NCAA was forced to commission an independent investigation. On August 3, the NCAA released the long-awaited "Phase I" of its [Kaplan gender equity report](#) that focused on the differences between the treatment of male and female athletes participating in the NCAA's Division I Men's and Women's Basketball championships. The report identified massive inequities in almost every aspect of the event from workout amenities, financial payouts based on team performance, and broadcasting rights fees among other issues. Kaplan added, "The results have been cumulative, not only fostering skepticism and distrust about the sincerity of the NCAA's commitment to gender equity, but also limiting the growth of women's basketball and perpetuating a mistaken narrative that women's basketball is destined to be a 'money loser' year after year."
- **Failure to control the cost of athletics programs.** On June 30, 2021, the NCAA adopted a uniform interim policy "suspending NCAA name, image and likeness rules for all incoming and current student-athletes in all sports" in response to the July 1 implementation of new NIL laws in seven states, NIL laws with later implementation dates in 16 states, and NIL bills pending in seven other states. All bills would give college athletes in these respective states the right to monetize their NILs without the loss of collegiate athletics eligibility. The NCAA withdrawal from governing college athlete NIL employment was precipitated by a June 21, 2021 [U.S. Supreme Court decision](#) that effectively gutted basic NCAA "amateur status" restrictions related to third party employment of college athletes. SCOTUS sent a clear message to the NCAA – any governance rule with an economic impact will likely precipitate antitrust scrutiny from the federal courts. Thus, the NCAA is unlikely to do anything to control the cost of intercollegiate athletics without federal legislation mandating such guardrails.

- **Denial of governance responsibility.** On July 20, 2021, the NCAA Board of Governors announced a [special constitutional convention](#) in November to propose “dramatic changes to the NCAA Constitution to reimagine aspects of college sports so the Association can more effectively meet the needs of current and future college athletes.” Dr. Robert Gates, a former college president and U.S. Secretary of Defense and chair of the Constitution Committee that will guide this process, appears to have put his finger on the source of the problem, “The NCAA has significant responsibility but little authority to fulfill those responsibilities.”
- **Chasing the “golden ring.”** On July 26, the University of Texas at Austin and the University of Oklahoma [announced their intent](#) to leave the Big 12 conference and join the SEC in 2025. The action was a catalyst for many Division I institutions and conferences to consider realignment opportunities. Most agree that these realignments will only accelerate and amplify the Division I football and men’s basketball arms races.
- **Continued platitudes and few if any “fixes”.** On August 24, 2021 the ACC, Big Ten and Pac-12 announced an [alliance](#) that would characterize a collaborative approach between 41 institutions of higher education that would provide “thought leadership” in eight areas: student-athlete mental and physical health, safety, wellness and support, strong academic experience and support, diversity, equity and inclusion, social justice, gender equity, future structure of the NCAA, federal legislative efforts and postseason championships and future formats.” Following every crisis exposed by the media, institution, conference or governance association leaders step forward to promise reform. Committees or commissions or alliances are dangled to assure the public that they can be confident the problem will be fixed. Months or years pass and there is no fix.

II. **Why the NCAA, Conferences and College Presidents Cannot be Trusted to Solve These Issues**

Athletic governance organizations are simply aggregations of higher education institutions who agree among themselves to adopt and abide by the same rules. The NCAA has been in existence since 1906 and with 1,100 institutions, is the largest national governance entity. Many regional athletic conferences have long and storied histories of athletic program conference alignment. The NCAA and these conferences are nothing more than higher education institutions themselves acting in concert. How should the selected “facts” listed in Part I of this paper be interpreted? The Drake Group believes that overwhelming evidence exists that a majority of college presidents and their governing boards (trustees, regents) have refused to address the issues detailed above.

With regard to the magnitude of higher education failure, just take an issue such as gender equity. Compliance with Title IX athletics regulations could have been imposed as a

condition of NCAA and or conference membership. No such rule exists within any athletic governance organization. Similar equity rules and policies could govern the treatment of male and female athletes at NCAA championship events, the distribution of proceeds from those events or the structural composition and operations of the NCAA as a non-profit organization. These policies do not exist. At the institutional level where gender equity and policy making is under the complete control of the President, institutions show no signs of remedying Title IX inequities plaguing close to 90 percent of these institutions while continuing to give priority to the favorable treatment of men's revenue sports. The following evidence should be considered:

1. We know of no Division I institution that is providing an equal proportion of female athletes (not number of sports) with the promotional exposure afforded men's basketball and football: television exposure, billboards, schedule cards, local advertising, and promotion of season ticket sales. We note that television exposure does not require a third-party payment for media rights and that all Division I institutions have the capability for production, internet streaming and/or provision of content through other forms of public media distribution. We know of no institution that does so and urge any institution who does so to offer such an example of best practice.
2. We know of no Division I institution offering scholarships that is spending equal dollars per capita on recruiting male and female athletes.
3. In the current chaotic NIL space in which the NCAA has pulled back for developing and enforcing any meaningful NIL rules, athletic departments barely masking their preference for supporting the NIL success of male athletes with co-licensing (schools granting athletes permission to use their logos/marks/color schemes, etc. for third-party agreements), group licensing (schools and groups of athletes entering into respective agreements with the same sponsor to promote the same product., e.g., video games, bobbleheads or trading cards with both the school mark/logo and athlete name and both schools and athletes separately profiting from the respective agreements), and other imaginative sponsorship agreements. These deals in which institutions are directly or indirectly involved may appear to be gender neutral but they are designed to, and in fact are only supporting priority football or men's basketball programs to date.

Examples of this institutional emphasis on NIL support for male athletes are numerous and in plain sight. BYU recently announced with great fanfare an agreement with Utah-based Built Brands, a protein bar company, that would provide all 123 members of the BYU football team the opportunity to be paid to promote its protein snack product. [It was reported](#) that scholarship athletes could earn up to \$1,000 while those not on scholarship should earn up to the annual cost of tuition (\$6,120 to \$12,300). The deal requires BYU football players to wear a decal with the company's logo on their practice helmets and make at least one appearance at a company event. The school did not

negotiate the agreement but the arrangement was vetted by the institution's legal counsel and it is assumed that the institution has to cooperate by allowing decals on its practice helmets. Similarly, [UNC announced a group licensing deal](#) with The Brandr Group in which Brandr seeks licensing opportunities and sponsorships and is given the right to use the UNC name/logo in conjunction with any UNC athlete NIL deal. UNC athletes and UNC get royalties from co-branded programs such as sale of jerseys with athletes' names on the back. Michigan State, Texas, Indiana, Alabama, Ohio State and Appalachian State quickly followed suit with Brandr deals. There are other examples of entire teams of football and men's basketball players entering into deals with local sponsors. Significantly, 80% of early NIL endorsement monies are going to football players. For example, at U. of Miami, everyone on the football team will receive \$500 a month for promoting an MMA gym and every basketball player will receive \$500 a month from Yummy Crypto, a new cryptocurrency company, for promoting its product through social media and personal appearances. And, not to be outdone by its conference rival, every Florida State football player will receive \$500 during the first month of the season, with possible extensions, from Yummy Crypto for similar promotions.

Significantly, the examples above demonstrate a few of both the direct and indirect ways that schools can influence men's NIL opportunities. Just like one cannot be an accomplice, accessory or abettor to a bank robber, schools are openly ignoring their risk for violating Title IX. Indeed, the Office for Civil Rights has admonished schools in a different context regarding the avoidance of Title IX obligations through the use of third parties. In 2017, when a group was considering the formation of a men's collegiate basketball league for HBCU's, the OCR responded:

[A] recipient institution may violate Title IX when it assists an outside organization that engages in sex discrimination. As part of its broad prohibition on sex discrimination, the Title IX regulations prohibit recipients from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit or service to students or employees. 34 C.F.R. § 106.31(b)(6). Similarly, a recipient that assists an outside organization in making employment available to any of its students must "assure itself that such employment is made available without discrimination on the basis of sex" and "not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices." 34 C.F.R. § 106.38(a).

The same massive failure is apparent with regard to the issue of exploitation of athletes of color and other issues related to [racial inequities](#). Rather than acknowledge and confront the racial disparities in academic outcomes for college athletes, especially those athletes in Division I revenue-producing sports of the NCAA in which a majority of participants are athletes of color, college presidents and leaders have turned a blind eye and installed [bogus academic metrics](#) that

obscure such exploitive practices. Institutions continue to recruit and give special admission to predominantly men's basketball and football players who do not meet published academic standards for admission without conditioning such admission on remediation of academic deficiencies. We know of no institution that does so. The institutions could agree to install NCAA rules which require all members to provide such remediation as a condition of athletics eligibility but no such rule exists within any national athletics governance organization or athletics conference.

We could continue with a detailed recitation of how institutions of higher education have individually or in concert with their athletic governing organizations failed on the numerous fronts mentioned in Part I of this paper. But the main point should be clear, individual institutions, athletic conferences or alliances of conferences, and national governance organizations cannot be trusted to remedy these failures.

III. Making Money and Winning Will Continue to Trump Educational Sport Values

With regard to the NCAA Constitutional Convention and efforts by conferences to create alliances between conferences or to change the institutional membership of a conference, such actions are primarily motivated by one factor: money. The following is clear:

- The NCAA is risk adverse. Pulling back from its amateur status rules is directly related to having spent and continuing to spend hundreds of millions of dollars defending antitrust and concussion lawsuits. By getting out of the business of regulating amateur status, the NCAA is shifting liability to schools and conferences who dare to step into the void. The NCAA has already committed to defending concussion lawsuits by throwing member institutions under the litigation bus – adopting a “don't sue us, sue them” modus operandi. The NCAA denies that it has any obligation to mandate that its members conform to a reasonable standard of care to protect athletes. The Constitutional Convention is not about values. It's about avoiding NCAA bankruptcy and a collapse of the governance organization.
- Institutions want to be in the conference that makes the most money from television media rights fees or distribution of championship proceeds. There should be little doubt that among the Power Five conferences in particular, the chase for the “golden ring” is an all-consuming quest to win the “arms race”. The NCAA's failure to enact expenditure controls (read “failure of college presidents to insist upon”) gives license to this quest. The current big spenders and big earners are not about to give up their winning advantage.

The NCAA and its member institutions have been caught in the crosshairs – unclothed. After years of national governing organizations, conferences and higher education institutions professing their commitment to higher order values like giving amateur athletes a great education, gender equity, racial equality, and ensuring athlete health and protection, the truths

have caught up. There is no indication that college presidents or the NCAA will act differently in the future. Look at the new world of NILs. College and university presidents will not rein in powerful coaches or athletic directors seeking to do whatever it takes to create a winning advantage. They are already in the midst of creating the recruiting message that “If you come to my school, our NIL connections will make you richer.” Just as presidents have not stepped up to the proverbial plate to confront gender inequities, racial exploitation, protection of athletes from abuse and physical harm and other failures, they will not rise to this occasion.

IV. Will Congress Step in to Demand Higher Education Integrity, Financial Accountability and Athlete Protection in the Conduct of Intercollegiate Athletics?

Congress has faced a similar issue before. In 1975, our Olympic non-school sports system was broken when President Ford appointed a blue-ribbon Presidential Commission on Olympic Sports. The result of the Commission’s 3-year study was comprehensive reform legislation: the 1978 Ted Stevens Olympic and Amateur Sports Act. The Amateur Athletic Union, a dysfunctional national governing body, was replaced by the United States Olympic Committee and strong guardrails were put in place to guarantee athletes’ right to compete, due process protections and other rights, including 20% athlete representation on all committees as voting members. Now is the time for a similar massive reset of the course of intercollegiate athletics – a reset that cannot be accomplished by the dysfunctional institutions or their governance organizations that have consistently failed to recognize and address these multiple issues. College presidents have been fully complicit in such failure.

No single federal NIL or narrow athletes’ right bill will “right the ship.” The issues are too numerous and the remedies too complicated for any quick legislative process. Just reflect on how long and arduous the federal legislative process has been on the singular issue of NILs. The Drake Group opines that the United States Congress must engage in a wholly transparent, careful, and comprehensive study of athletics within our higher education system as a predicate to adopting legislation that would fix college athletics. A blue-ribbon Congressional Commission on Intercollegiate Athletics Reform would provide the opportunity to assemble national experts to address these complex issues in a comprehensive way without the “conflict of interest” barriers that prevent the NCAA from doing so.

Another reason why Congressional action is needed is to take advantage of solutions not within the power higher education entities. Only the threat of losing federal Higher Education funding appears likely to move the needle toward meaningful change. Congress controls funding under the Higher Education Act. Given the recent SCOTUS decision that has frozen athletic governance association rule-making on economics-related issues, only Congress can grant a limited antitrust exemption that would permit the NCAA or any governance organization to legislate cost controls without facing antitrust lawsuits. Such an exemption should be conditioned on meeting Congressional mandates to protect the academic and physical wellbeing of college athletes and should not protect institutions or organizations from antitrust lawsuits based on college athlete economic or other harm. Only Congress can grant subpoena power to help fix a broken NCAA enforcement system that denies due process to institutions and athletes. And only Congress can mandate the establishment of a federally chartered non-profit

organization to replace an existing organization. The NCAA will not or cannot consider these possibilities.

Last, Congress has both the right and responsibility to make this course correction because it is underwriting the subsidies that fuel [98.8 percent](#) of the 2,000 higher education athletic programs that operate in the red. Universities plug these budget holes with the mandatory athletics fees they charge all students and/or general fund subsidies derived from student tuition despite the fact that students are leaving college with [record debt](#). Both of these funding sources directly tap into the federal government's \$130 billion per year in Higher Education Act student loans and grants. It long past time when Congress should address what is truly and a higher education integrity issue. The Drake Group urges Congress to do so.