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The NCAA and Due Process: Legal Issues

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Summary

Recent events surrounding sports scandals at several of the nation's major universities have sparked interest in the National Collegiate Athletic Association's (NCAA) procedures for investigating claims of rules violations, and the procedural protection afforded to the accused in such an investigation. This report examines the NCAA's current investigatory process and outlines two important court cases that have shielded the NCAA from attempts to require the NCAA to adhere to due process principles.

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Introduction

In the wake of increasing media scrutiny of the National Collegiate Athletic Association's (NCAA) enforcement and sanctions process regarding violations of NCAA rules,[1] there are reports that Congress may soon hold hearings to, among other things, consider whether or not federal government regulation of the NCAA is necessary.[2] This report examines the NCAA's current investigatory process and outlines two important court cases that have shielded the NCAA from attempts to require the NCAA to adhere to more rigorous due process principles.

Background

Under pressure to clean up college football from a number of prominent government figures — most notably President Theodore Roosevelt — sixty-two colleges joined together to form the National Collegiate Athletic Association (NCAA) in 1906 in order to establish uniform rules for intercollegiate sports.[3] Today, the NCAA exists as a voluntary, unincorporated association that counts over 1200 colleges and universities as members, 900 of which are active. These schools are divided into three divisions according to a wide variety of factors, including the

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[1] *See* Associated Press, *'They're Not Even-Handed': Congressional Panel to probe NCAA oversight of sports*, available at [http://sportsillustrated.cnn.com/2004 /more/05/13/bc.ncaa.congress.ap/index.html] (last visited, August 2, 2004). Interest in the NCAA's enforcement process has grown with the number of universities immersed in scandals regarding their sports teams. Over the last few years, the University of Alabama football team, the University of Auburn basketball team, and the University of Georgia basketball team, among others, have all been put on probation for violations of NCAA rules. The NCAA's investigation of the University of Alabama has drawn especially pointed criticism, as reports have surfaced alleging that Phillip Fulmer, football coach of Alabama's conference rival University of Tennessee, provided significant secret testimony harmful to the University of Alabama during the NCAA investigation. The whole affair is now the subject of a $60 million lawsuit. *See* John Zenor, *Fulmer Testified Against Alabama*, Cincinnati Enquirer, January 17, 2004, available at [http://www.enquirer.com /editions/2004/01/17/spt_sptfoot1bama.html] (last visited August 4, 2004).

[2] The House Judiciary Committee's Subcommittee on the Constitution may hold hearings in early fall, 2004, to probe the NCAA's process for enforcing its rules.

[3] Reform efforts were aimed mainly at curbing cheating and the number of injuries to college football players. One commentator has noted that "[I]n 1905 alone, there were over eighteen deaths and one hundred major injuries in intercollegiate football." *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L.J. 9 (2000).

level of competition and the level of financial aid the schools make available to student-athletes.[4]

Amidst concerns that the line between pro and college sports was beginning to blur, the NCAA in 1948 enacted rules to regulate recruiting and financial aid related to student athletes. Two years later, the NCAA adopted enforcement procedures, originally modeled after the procedures used in the academic community.[5] Over the years these procedures have been refined to produce a process that generally requires the cooperation of the school under investigation.[6] This is because the NCAA does not possess subpoena power or any other power to compel witnesses to appear to give sworn testimony. As NCAA members, the schools do not cede control of their athletic programs to the NCAA. Rather, the schools agree to apply and enforce the NCAA's rules. Consequently, it is the school, not the NCAA, that takes disciplinary action against a student-athlete or a school staff member. If the school refuses to take such action, then the NCAA moves against the school, not the student-athlete or staff member.[7]

Just as the fear of government action spurred colleges at the turn of the twentieth century to form the NCAA, Congress has to this day maintained an interest in the manner in which American college sports are governed.[8] One issue in which Congress has expressed repeated concern is the due process — or lack of it — afforded by the NCAA to those the Association investigates for wrongdoing.[9] While NCAA by-laws contain detailed rules for investigating alleged wrongdoing, critics of these procedures cite various instances that they view as arbitrary enforcement of some rules but not others.[10]

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[4] *See* John Kitchin, *The NCAA and Due Process*, 5 Kan J.L. & Pub. Pol'y 71 (1996).

[5] *See id.*

[6] Fear of NCAA sanctions has led to a growing trend among NCAA member schools to investigate themselves before the NCAA gets involved. These schools then report their findings and punishment recommendations to the NCAA, with an expectation of leniency that has not always been forthcoming. *See* Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 Va. Sports & Ent. L.J. 49, 56-57 (2003).

[7] *See id.*

[8] *See, e.g.*, S. Hrg. 108-462, *BCA or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the Senate Judiciary Committee*, 108th Cong. (2003).

[9] *See, e.g.*, S. Rep. 95-69, *Enforcement Program of the NCAA* (1978). Congress became concerned that the NCAA lacked procedures for avoiding arbitrary enforcement of its rules, and held hearings and published the aforementioned report suggesting future federal regulation of the NCAA. In response, the NCAA amended its enforcement procedures, tracking many of the report's recommendations. *See* Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. Rev. 1651, 1664 - 1666 (1994).

[10] *See, e.g.*,Roger I. Abrams, *Sports Law Issues Just Over the Horizon*, 3 Va. Sports & Ent. L.J. 49, 56 (2003). ("The NCAA lacks a systematic pro-active investigative capability. As a result, the NCAA cannot possibly identify and punish all those who violate its rules.")

(continued...)

The NCAA Investigatory Process

The infractions process utilized by the NCAA[11] involves the interaction between two entities, the Committee on Infractions and the enforcement staff. The Committee on Infractions, which is composed of ten individuals,[12] provides policy guidance to the enforcement staff and decides on the appropriate punishments for member institutions found to have violated NCAA rules. The enforcement staff, on the other hand, is comprised mainly of professional investigators who handle most of the investigations themselves and present their findings to the Committee on Infractions. What follows is a brief description of a typical NCAA infractions case, as described by the NCAA in its bylaws.[13]

When the NCAA receives a complaint about a member institution, the enforcement staff evaluates the claim to determine if it is reasonably substantiated. If so, then the enforcement staff notifies the institution that the staff will conduct a "preliminary investigation." If the staff determines, after conducting its preliminary inquiry, that the allegations are not supported by sufficient evidence, then the staff moves to close the case. If the Committee on Infractions concurs, then the institution is notified that the case is closed.

If the staff finds a violation at this preliminary stage, the complaint proceeds in one of two ways, depending on the severity of the infraction. If the violation is determined to be secondary in nature,[14] then the enforcement staff determines the appropriate penalty and submits it for the approval of one designated member of the Infractions Committee. If the penalty is approved, the institution has the option to appeal the penalty to the Infractions Appeal Committee.

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[10] (...continued)
One of the most often-cited examples of seemingly unequal treatment stems from the UNLV basketball program's long history of clashes with the NCAA. Facing penalties for recruiting violations, UNLV in 1992 was given the opportunity to choose the penalty the NCAA would impose on its defending national champion basketball team. One month earlier, the NCAA had placed the University of Missouri basketball program on probation (without a choice) for very similar recruiting offenses. *See* William F. Reed, *Rebel Reprieve: In a Turnaround, the NCAA Lets UNLV Defend its Title*, Sports Illustrated, Dec. 10, 1990, at 46. For some other examples, *see* Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. Rev. 1651, 1655 - 1656 (1994).

[11] The rules governing this process are set out in the NCAA Bylaws, Articles 19 (Enforcement) and 32 (Enforcement Policies and Procedure), which can be found at [http://www.ncaa.org/legisfront.html] (last visited August 3, 2004).

[12] Seven of these ten individuals must be currently or in the past have been affiliated with a member school or conference. At least two (and no more than three) must have no such affiliation. NCAA Bylaws, Article 19.1.1.

[13] *See id.* at Figure 32-1.

[14] A secondary violation is one that is isolated or inadvertant in nature, provides only a minimal advantage, with no significant recruiting inducement or extra benefit. All other violations are considered major violations, and multiple secondary violations may collectively constitute a major violation. NCAA Bylaws, Articles 19.02.2.1 - 19.02.2.2.

If the enforcement staff believes after its preliminary investigation that the institution committed violations believed to be major in nature, then the claim moves on to a second investigatory stage: the "official inquiry." The school then has two options. The school first has the option to participate in the "summary disposition" process. This is a collaborative process in which the involved parties and the enforcement staff conduct their own investigations and agree on a report with findings and recommendations to be submitted to the Committee on Infractions for approval.

If the institution does not want to participate in the summary disposition process — or if the Committee on Infractions does not accept the findings of the summary disposition report — then the Committee on Infractions conducts hearings to determine the appropriate findings and proposed penalties. The Committee's report is then forwarded to the school and all involved parties, at which point the school indicates either that it accepts the findings and penalties or that the school intends to appeal the determination to the Infractions Appeals Committee.

Once a school has exhausted its appeals options, the NCAA's penalty determination is final. For major violations, such a determination sometimes includes probation, which puts limits on the number of scholarships a sports program can offer and prohibits post-season activity (e.g., bowl games, tournament appearances) for a given number of years. A determination may also include a requirement that the school cut its ties with certain individuals — including coaches — found to have been key participants in the prohibited conduct. Failure to abide by the NCAA's penalty determinations can result in suspension of even termination of an institution's membership.[15]

The Courts and the NCAA's Due Process Issues

The Fourteenth Amendment of the United States Constitution provides that "No State shall...deprive any person of life, liberty, or property, without due process of law." This requirement acts as a prohibition against state — not private — conduct that denies due process of law.[16] Finding the requisite "state action" then, is crucial to establishing a successful claim for a violation of the Fourteenth Amendment's Due Process Clause. As state-sponsored institutions, public universities are clearly state actors, and so are likely required to provide hearings to individuals before taking action against them.[17] However, as the following discussion of *NCAA v. Tarkanian* and *NCAA v. Miller* will show, the NCAA's structure as a voluntary organization comprised of public and private universities scattered across the country has so far shielded the NCAA's investigatory and enforcement procedures from judicial intervention and regulation by the states.

***NCAA v. Tarkanian*.** In 1988, the Supreme Court dealt a serious blow to efforts to require the NCAA to follow the same due process standards as government

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[15] *Id.* at Article 19.5.3.1.

[16] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

[17] *See Goss v. Lopez*, 419 U.S. 565 (1975).

adjudicatory bodies in its 5 - 4 decision in *NCAA v. Tarkanian*.[18] Jerry Tarkanian, then coach of the very successful University of Nevada-Las Vegas (UNLV) basketball team, had battled with the NCAA for years over alleged recruiting violations. Following an investigation, the NCAA Infractions Committee found 38 violations — 10 by Tarkanian himself. The Infractions Committee imposed sanctions on UNLV's basketball program and ordered the school to show cause why it should not face more penalties if UNLV failed to suspend Tarkanian as coach.[19] Eventually, UNLV notified Tarkanian that it planned on suspending him, and Tarkanian subsequently filed suit, alleging that he had been deprived of his Fourteenth Amendment Due Process rights in violation of 42 U.S.C. § 1983.

The primary issues before the Court were whether the NCAA's actions constituted "state action" prohibited by the Fourteenth Amendment and were performed "under color of" state law in violation of 42 U.S.C. § 1983.[20] In analyzing other state action claims, the Court has repeatedly noted that, as a general rule, the protections of the Fourteenth Amendment do not extend to private conduct that abridges individual rights.[21] Further, the Court has defined conduct that is "under color of" state law as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[22] The ultimate question, then, is whether the conduct causing the alleged deprivation of rights can be fairly attributable to the state.[23]

Applying the test mentioned above, the Supreme Court has found state action where the state knowingly accepts the benefits derived from unconstitutional behavior of a private party.[24] The Court in *Tarkanian*, however, was faced with facts which presented a unique mirror image of the traditional state action case, in that the final act challenged by Tarkanian was committed not by a private party but by the state itself (i.e., UNLV). Whereas in the traditional state action case, an aggrieved

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[18] 488 U.S. 179 (1978). Prior to *Tarkanian*, many lower courts had held the NCAA to be a state actor and, therefore, subject to due process requirements. It is important to note that these cases generally found the NCAA's procedures to be adequate under the Due Process Clause. *See, e.g., University of Minnesota v. NCAA*, 560 F.2d 352 (8th Cir. 1977); *Howard University v. NCAA*, 510 F.2d 213 (D.C. Cir. 1975); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983).

[19] *See id.* at 181.

[20] *Id.* at 181-182. 42 U.S.C. § 1983 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivations of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...

[21] *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

[22] *United States v. Classic*, 313 U.S. 299 (1941).

[23] *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 928-935 (1982).

[24] *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

party must trace private conduct to some sort of state action or benefit, in *Tarkanian*, the plaintiff was trying to trace state conduct to the imprimatur of a private party.[25] This distinction was essential to the Court's analysis in *Tarkanian*. "Thus the question presented is not whether UNLV participated in a critical extent in the NCAA's activities," the Court stated, "but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."[26]

The Supreme Court recognized UNLV to undoubtedly be a state actor subject to the requirements of the Due Process Clause of the Fourteenth Amendment.[27] The NCAA, on the other hand, was made up of "several hundred other public and private member institutions each similarly effected by [the NCAA's] policies...the vast majority of which were located in States other than Nevada."[28] Further, while the Court acknowledged that UNLV's conduct was influenced by the NCAA's investigations and determinations, the Court refused to find that this influence turned the NCAA into a state actor. The Court found that the NCAA's greatest authority — as with any private membership organization — lies in its ability to expel members. The mere fact that UNLV may have acted out of fear of such an expulsion did not make UNLV's actions attributable to the NCAA.[29]

Essential to the Court's reasoning was the fact that it was the school itself, not the NCAA, that actually suspended Tarkanian — a voluntary act within the school's discretion, just as UNLV's membership in the NCAA is voluntary. As the Court put it, "UNLV retained the authority to withdraw from the NCAA and establish its own standards, the university alternatively could have stayed in the Association and worked through the Association's legislative process to amend rules or standards it deemed harsh, unfair, or unwieldy."[30] The Supreme Court further pointed out that the NCAA possessed no governmental powers (e.g., subpoena witnesses, contempt sanctions) to facilitate its investigations.[31]

Tarkanian also argued that the NCAA's actions constituted state action because the NCAA was acting under authority delegated to it by the State of Nevada. In essence, Tarkanian argued that UNLV's agreement to adhere to NCAA enforcement procedures constituted a delegation of authority. While the Supreme Court has found

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[25] *Tarkanian*, 488 U.S. at 192-193.

[26] *Id.* at 193.

[27] *Id.* at 192-193.

[28] *Id.* at 193.

[29] *Id.* at 198-199.

[30] *Id.* at 194-195. The Court's reasoning regarding UNLV's option to withdraw from the NCAA has drawn criticism. *See, e.g.*, Ronald J. Thompson, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. Rev. 1651, 1664 (1994) ("This option, while theoretically possible, is unrealistic in practice because the NCAA is, in effect, a private monopolist in the realm of intercollegiate athletics").

[31] *Tarkanian*, 488 U.S. at 197-198.

that a state can delegate authority to a private party such that that party's actions are deemed to be state actions, the Court in *Tarkanian* found no such delegation. The Court pointed out that the school never delegated any authority to take final actions against a university employee; those essential powers were retained by UNLV. Far from acting as partners, the Court further found, the NCAA and UNLV had been at constant odds throughout the investigatory process:

> The NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding. It is more correctly characterized as an agent of its remaining members which, as competitors of UNLV, had an interest in the effective and evenhanded enforcement of the NCAA's recruitment standards. Just as a state-compensated public defender acts in a private capacity when he or she represents a private client in a conflict against the State ... the NCAA is properly viewed as a private actor at odds with the State when it represents the interests of its entire membership in an investigation of one public university.[32]

Ultimately, the Court concluded that the NCAA was not acting under the color of Nevada law, but rather the opposite was true: "It would be more accurate to conclude that UNLV has conducted its athletic program under color of policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law."[33]

NCAA v. Miller. In the wake of the Supreme Court's decision in *Tarkanian*, four states — Nevada, Nebraska, Illinois, and Florida — passed laws purporting to require the NCAA to comply with certain procedural requirements in its investigatory process. Also soon after the Supreme Court's decision, Jerry Tarkanian and UNLV were again under investigation by the NCAA. Before the Committee on Infractions could hold its hearing, however, Tarkanian and several other UNLV employees demanded that the NCAA comply with the new Nevada law. The NCAA responded by filing suit in federal district court, arguing successfully to that court and on appeal to the Ninth Circuit that the Nevada law was an unconstitutional violation of the Dormant Commerce Clause and the Contracts Clause.[34]

The Constitution vests Congress with the power to regulate commerce between the states.[35] The Supreme Court has also recognized in this power an inherent limitation on the ability of the states to regulate with respect to interstate commerce.[36] Applying this so-called "Dormant Commerce Clause" to Nevada's requirements with regard to the NCAA, the district court found the Nevada statute unconstitutional. The court found the NCAA to clearly be involved in commerce, citing as an example

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[32] *Id.* at 196.

[33] *Id.* at 199.

[34] *Nat'l Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993).

[35] U.S. Const. art. I, § 8, cl. 3.

[36] *See, e.g., Hood & Sons, Inc. v. C. Chester Du Mond*, 336 U.S. 525, 535 (1949).

the fact that the NCAA "controls bids involving hundreds of millions of dollars for interstate television broadcasting of intercollegiate sports events."[37]

The court balanced Nevada's interest in ensuring fair hearings for its state schools and the employees of those schools against the burden Nevada's law placed on interstate commerce. While the court found Nevada's concern to be a legitimate one, the court held that the statute impermissibly burdened interstate commerce by preventing the NCAA from uniformly enforcing its rules across the nation.[38] Put simply, the Nevada law required the NCAA to apply certain standards in Nevada that differed from those generally applicable.

As mentioned above, the district court also found that the Nevada law violated the Contracts Clause of the Constitution, which prohibits states from impairing the ability of parties to enter into contracts.[39] The Supreme Court has held that, when examining Contracts Clause claims, courts must inquire as to the degree of contract impairment and the nature and extent of the state's interest in the law in question.[40] Analyzing these factors in light of the pre-existing contracts between the NCAA and Nevada's member schools and the importance of the NCAA's investigatory process to ensuring fair play, the district court found the degree of impairment effectuated by the Nevada law to be substantial. In addition, the court concluded that this substantial impairment was not justified by an important public purpose, and so could not withstand Contracts Clause scrutiny.[41] The Ninth Circuit affirmed the district court's holding on Dormant Commerce Clause grounds, but did not reach the Contracts Clause question.[42]

While the court in *Miller* did not rule on the validity of the other state statutes purporting to regulate the NCAA's procedures, the reasoning in that case casts serious doubt on the ability of the states to force the NCAA to adhere to more rigorous due process principles. As a result, it seems that any such direction must come from Congress.

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[37] *Miller*, 795 F. Supp. at 1482. The Supreme Court has in the past agreed, stating that the "product" marketed by the NCAA is intercollegiate competition. *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984).

[38] *Miller*, 795 F. Supp. at 1483-1484.

[39] U.S. Const. art. I, § 10.

[40] *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

[41] *Miller*, 795 F. Supp. at 1488.

[42] *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993). While the Ninth Circuit agreed with the district court's finding that the Nevada law violated the Dormant Commerce Clause, the Ninth Circuit ruled that the statute's interference with state commerce was extensive enough to constitute a *per se* violation and that, therefore, the balancing test applied by the district court was not necessary. *Id.* at 639-640.

After *Tarkanian* and *Miller*

While participation in the NCAA is voluntary and universities can withdraw, the virtual monopoly that the NCAA enjoys over intercollegiate sports is such that any school that withdraws from the Association is locked out from major college competition. Schools facing NCAA enforcement action are therefore left with little choice but to accept the penalty determinations of the NCAA.

The courts in *Tarkanian* and *Miller* have found the NCAA's investigatory and enforcement procedures to be beyond Constitutional scrutiny and beyond the ability of the states to regulate. Consequently, any government attempt to require the NCAA to adopt more protective procedural rules would likely require legislation. Further, the *Tarkanian* decision creates the potential showdowns — that some would view as unfair — between state-sponsored member schools and the NCAA. Specifically, because such schools are state actors, they are required to provide a certain amount of due process to any players or officials the schools plan to suspend or take action against. If, after providing such due process, however, the school finds that there is insufficient evidence to justify imposing disciplinary action on the individual in question, the school then has the option to appeal the decision once again to the Infractions Committee, but only if the institution can provide new evidence.[43] Otherwise, the school must choose between two options: a) complying with the NCAA and taking action against an individual the school believes to be innocent; and b) refusing to take action against the student and risking expulsion from the NCAA, effectively killing its intercollegiate athletic program.

Congress has acted previously to ensure that amateur athletes are protected from arbitrary determinations of their sports governing bodies. For example, in the Amateur Sports Act,[44] the statute establishing and governing the United States Olympic Committee (USOC), Congress inserted certain requirements to ensure that athletes, coaches, etc., are given an objective hearing. The USOC basically acts as the national governing body with respect to the participation of the United States in the Olympic Games and certain other international competitions.[45] One of the USOC's most important functions is to recognize various entities as the national governing bodies (NGBs) of their respective sports. These NGBs make recommendations to the USOC regarding athletes' eligibility, the hiring and firing of coaches, etc. The Amateur Sports Act requires that the NGBs submit to mandatory arbitration any controversy involving "the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition."[46] The USOC is also empowered to place NGBs on probation and, in certain cases, to replace a sport's NGB with a new entity. These

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[43] NCAA Bylaws, Article 19.5.2.8.

[44] 36 U.S.C. § 220501 et seq.

[45] For more information about the USOC, *see* CRS Report RL32208, *United States Olympic Committee Reform: An Overview of Proposed Legislation*, by (name redacted).

[46] 36 U.S.C. § 220522(a)(4)(B).

determinations are also required to be reviewed at arbitration upon the request of the aggrieved party.[47]

[47] *Id.* at § 220529.