

EXAMINING THE COMMITTEE ON INFRACTIONS'S
AFFIRMATION RATE OF NCAA ENFORCEMENT STAFF
ALLEGATIONS OF RULES VIOLATIONS

*Josh Lens, J.D.**

Abstract

The NCAA, the national governing body for college athletics, is in a precarious position. Battered by recent lawsuits, the NCAA is undergoing a self-initiated review designed to modernize and transform its operations through updating its constitution and rules.

The enforcement process through which the NCAA enforces its myriad regulations has proven central to this review and is likely subject to substantial changes. One aspect of the process that deserves consideration is the fact that the Committee on Infractions (COI), which serves as the independent adjudicator when the enforcement staff alleges that coaches and staff members violate NCAA rules, affirmed ninety-three percent of the staff's allegations over a recent three-year period.

Critics have questioned the COI's independence, accusing it of serving as a rubber stamp for the enforcement staff's rules violations allegations. This seemingly high affirmation rate could bolster that criticism. However, after examining the Federal Trade Commission's similar enforcement process, comparably high affirmation rate, and the likely reason for the high rate, this Article does not take issue with the COI's high affirmation rate. Instead, the Article suggests that the NCAA's self-review of, and changes to, its enforcement operations is an opportune time to increase enforcement staff resources to better enable it to pursue additional potential NCAA rules violations. Doing so would benefit college athletics constituents by providing additional insights into COI expectations of NCAA rules compliance through the infractions process.

* Assistant Professor of Recreation and Sport Management at the University of Arkansas, Fayetteville (J.D., University of Iowa College of Law). Prior to entering academia, Lens worked on Baylor University's athletics compliance staff for eight years. In addition to his academic duties, Lens consults for college athletics conferences and university athletics departments regarding legal and NCAA matters. The views this Article expresses are the author's and not necessarily representative of the University of Arkansas or Baylor University. University of Arkansas School of Law student Sydney Adams contributed valuable research to this piece.

INTRODUCTION	
I. THE CURRENT NCAA DIVISION I ENFORCEMENT PROCESS AND REVIEW OF IT	
A. <i>The Current NCAA Division I Infractions Process</i>	
B. <i>The NCAA's Review of, and Potential Changes to, its Enforcement Process</i>	
II. COMPARATIVE ANALYSIS OF THE FEDERAL TRADE COMMISSION'S ENFORCEMENT PROCESS AND AFFIRMATION RATE	
III. LESSONS LEARNED FROM THE FTC PART 3 PROCESS: SHOULD THE ENFORCEMENT STAFF MORE AGGRESSIVELY BRING ALLEGATIONS?.....	
CONCLUSION.....	

INTRODUCTION

The oft-criticized NCAA enforcement process¹ is currently under review as part of the NCAA's historic and self-initiated overhaul of its constitution and governance structure.² The group many view as the enforcement process's judge and jury—the Committee on Infractions (COI)—has been a frequent target of this criticism.³ Most relevant to this Article, some feel that the COI, though meant to be independent of the NCAA, rubber stamps the allegations made by the NCAA's prosecutor—the enforcement staff—that a coach, staff member, or university violated

1. See Dennis Dodd, *Group of Athletic Directors Suggests Sweeping Changes to NCAA Enforcement Model*, CBS SPORTS (Nov. 1, 2021, 5:44 PM), <http://cbssports.com/college-football/news/group-of-athletic-directors-suggests-sweeping-changes-to-ncaa-enforcement-model/> [https://perma.cc/4DFY-2SYN] (describing group of athletic directors' proposed changes to the NCAA enforcement model).

2. See Dennis Dodd, *NCAA Unveils Modernized Constitution Draft with Divisions Granted Increased Governing Power*, CBS SPORTS (Nov. 8, 2021, 12:45 PM), <http://cbssports.com/college-football/news/ncaa-unveils-modernized-constitution-draft-with-divisions-granted-increased-governing-power/> [https://perma.cc/QR2B-2TKL] (describing draft of updated NCAA constitution's contents, which would include changes to the enforcement process).

3. See Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process*, 26 CARDOZO ARTS & ENT. L.J. 695, 710, 712 n.36 (2009) (describing the COI as “an educated jury” and describing widely held perception that the COI should be separated from the NCAA due to its role as “judges”).

NCAA rules.⁴ On the surface, the NCAA's disclosure that the COI affirmed ninety-three percent of the enforcement staff's allegations over a recent three-year period bolsters this criticism.⁵

The NCAA's unprecedented review of its operations could result in transformative changes, including to its enforcement process.⁶ Thus, it is an opportune time to examine the propriety of the COI's seemingly high affirmation rate. Section I of this Article details both the current enforcement process and the NCAA's review of it. Section II provides context and rationale for the COI's high affirmation rate by examining another administrative body—the Federal Trade Commission—with a high affirmation rate in its similar enforcement process. Section III suggests that, given the COI's importance and role in college athletics, constituents would benefit from additional cases in front of it, which requires additional resources for the enforcement staff.

I. THE CURRENT NCAA DIVISION I ENFORCEMENT PROCESS AND REVIEW OF IT

To effectively analyze the propriety of the COI's affirmation rate of enforcement staff rules violation allegations, it is important to understand the NCAA enforcement process. Thus, this section describes the current NCAA Division I enforcement process and the review that will likely result in changes to it.

A. *The Current NCAA Division I Infractions Process*

The NCAA describes itself as a member-led organization that consists of over a thousand colleges and universities.⁷ Through the NCAA's legislative process, its member universities propose and adopt rules

4. *See id.* at 715 (explaining that the COI's presentation of its decisions as unanimous feeds the perception and criticism that the COI “marches in step, [and] rubber stamps the position of the enforcement staff”); *see also* Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979, 992–93 (2014) (stating that some question the COI's neutrality and describe it as an enforcement staff arm that will not deviate from the enforcement staff's recommendations).

5. Jon Duncan, *Enforcement Self-Study Operations and Compliance*, NCAA 5, 7 (2019), https://ncaaorg.s3.amazonaws.com/infractions/guides/2019ENF_SelfStudyOperComp.pdf [<https://perma.cc/3MDM-XU77>] (contending that data from the 2016–17 through 2018–19 academic years shows that the enforcement staff makes well-supported charges).

6. *See* Ralph D. Russo, *NCAA Rewrites Constitution, Sets Stage for Transformation*, ASSOCIATED PRESS (Nov. 9, 2021), <https://apnews.com/article/college-football-sports-college-sports-football-constitutions-ee36666757898a3e71df856938258954> [<https://perma.cc/96FF-26DW>] (explaining that the stage is set for “a dramatic restructuring” of college athletics through “approval of a new, streamlined constitution”).

7. *What Is the NCAA?*, NCAA, <http://ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<https://perma.cc/ZD6Q-KFEV>] (last visited Feb. 28, 2021) (providing basic information regarding the NCAA).

regarding college athletics and implement them on campus.⁸ The NCAA notoriously does not lack for rules.⁹ For example, one such rule in the NCAA Division I Manual defines the term “business day” while others regulate when and how often coaches can call or write prospective student-athletes or even answer incoming calls from them.¹⁰

NCAA member universities and staff members that abide by NCAA legislation should not be disadvantaged by so doing.¹¹ Thus, universities created the enforcement process to ensure fair play and integrity among members.¹² One group of NCAA employees in particular bears this responsibility: the NCAA’s enforcement staff.¹³ The enforcement staff consists of a few dozen individuals,¹⁴ including former coaches, campus

8. *Id.* (noting these rules include “everything from recruiting and compliance to academics and championships”).

9. Glenn M. Wong et al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 12 (2015) (“The NCAA’s Division I Manual of rules and regulations is notoriously thick: 417 pages separated into 33 Articles.”).

10. NCAA, 2020–21 DIVISION I MANUAL §§ 13.02.1, 13.1.3.1.2, & 13.4.1 (2020), <http://ncaapublications.com/productdownloads/D121.pdf> [https://perma.cc/F5KB-YCHA] [hereinafter MANUAL]. Division I is the highest of the three divisions in the NCAA’s structure. Wong et al., *supra* note 9. Division I’s brand name universities and revenues shape public perceptions of college athletics. Alan Blinder, *How College Sports May Change Under Proposed NCAA Rule Revisions*, N.Y. TIMES (Nov. 15, 2021), <http://nytimes.com/2021/11/15/sports/ncaafotball/ncaa-constitution.html> [https://perma.cc/555P-F9D4].

11. See Elizabeth Lombard, *Changes Are Not Enough: Problems Persist with NCAA’s Adjudicative Policy*, 95 NOTRE DAME L. REV. 925, 928 (2019) (describing “[t]he purpose of the NCAA’s infractions process”); see also Duncan, *supra* note 5, at 17 (stating that every infractions case moves “toward a state where compliant schools are not disadvantaged by their commitment to compliance”).

12. See *Division I Infractions Process*, NCAA, <http://ncaa.org/enforcement/division-i-infractions-process> [https://perma.cc/AJ5Q-TGWE] (last visited Feb. 28, 2021) [hereinafter *Division I Infractions Process*] (illustrating the four means by which an infractions case involving a Division I member university is resolved, three of which end with COI decisions). The author acknowledges, yet avoids contributing to, the trend of criticizing the overall infractions process and structure.

13. See *Division I Infractions 2019–20 Annual Report*, NCAA 9 (2020), https://ncaaorg.s3.amazonaws.com/infractions/d1/2019D1Inf_AnnualReport.pdf [https://perma.cc/Q3E6-MM5N] [hereinafter *2019–20 Ann. Rep.*] (describing the enforcement staff’s role in the infractions process).

14. *Evaluations Show Infractions Process Improvements*, NCAA (Aug. 1, 2016), <http://ncaa.org/about/resources/media-center/news/evaluations-show-infractions-process-improvements> [https://perma.cc/T69U-BGCP] (describing efforts to improve the infractions process and noting the enforcement staff consisted of 57 individuals in 2016).

administrators, compliance staff members, student-athletes, and attorneys.¹⁵

Many have described the enforcement staff as the NCAA's prosecutor.¹⁶ It is the NCAA entity responsible for reviewing information about potential violations.¹⁷ The enforcement staff receives information regarding potential rule violations from many sources (e.g., self-reports or third-party sources).¹⁸ If a situation warrants further investigation, the enforcement staff issues a notice of inquiry to the involved member university and works with it to discover the facts.¹⁹ By sending a notice of inquiry to the university, the enforcement staff signals the commencement of a formal, joint investigation of and with the university.²⁰ The enforcement staff must review information regarding potential violations in a fair, accurate, collaborative, and timely manner.²¹

If the enforcement staff believes the information may substantiate violations, it alleges potential Level I or Level II violations (Level I is the more significant of the two).²² The enforcement staff makes its allegations in a formal document directed to the university called a notice of

15. *Inside the Division I Infractions Process: Who's Who in the Infractions Process*, NCAA (2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionWhoisWho.pdf [<https://perma.cc/F8VX-3PDU>] (describing individuals and their roles in the infractions process).

16. *See* Davis & Hairston, *supra* note 4, at 988 (describing the enforcement staff's actions to include presenting information to support allegations of rules infractions to the COI); *see also* Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 753–54 (2007) (noting that enforcement staff members are full-time NCAA employees).

17. *See Division I Infractions Process*, *supra* note 12.

18. *Inside the Infractions Process: Paths for Handling Potential Violations*, NCAA (2020), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_ResolutionPathsforViolations.pdf [<https://perma.cc/P9XH-F9PH>] (illustrating various resolution paths for potential violations).

19. *See Division I Infractions Process*, *supra* note 12.

20. *See* Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 226 (2012) (explaining that the investigation will go “wherever else the evidence leads”). “The Notice of Inquiry is not an allegation . . . ; rather, it merely informs the institution of a formal investigation” Rogers & Ryan, *supra* note 16, at 765.

21. *See 2019–20 Ann. Rep.*, *supra* note 13, at 9 (characterizing trust and collaboration between the enforcement staff, universities, and conferences as “vital” to the process).

22. *See id.* at 6–7 (providing overview of infractions process). There are three levels of violations. *See id.* at 5. The COI will hear and determine cases involving alleged Level I and II violations, whereas, “[f]or the most part, the enforcement staff and schools handle Level III violations.” *Id.* at 9. For context, the enforcement staff alleged an average of ninety-one Level I or II violations per year between 2017 and 2019. *See id.* at 11 (providing data regarding enforcement staff allegations). For further context, the COI hosted six hearings over disputed allegations in 2019. *See id.* at 12.

allegations (NOA).²³ The enforcement staff bears the burden of proving its violation allegations.²⁴

There are four means by which an infractions case involving a Division I member university resolves, and three of them conclude with a decision by the COI.²⁵ The COI is an independent administrative body that includes volunteers from NCAA member universities and conferences, as well as individuals with legal training from the general public.²⁶ More specifically, COI members' professional profiles include current and former university presidents and chancellors, athletics directors, conference commissioners, former NCAA coaches, and professors.²⁷ Thus, the COI touts the infractions process as peer reviewed.²⁸ There are up to twenty-four COI members at any given time, a smaller panel of which considers each case on the COI's behalf.²⁹

If the university and any other parties (e.g., coaches) agree with the enforcement staff on the facts, violations, level(s) of violations, and penalties, the enforcement staff and parties may pursue "negotiated resolution" to resolve the matter.³⁰ The enforcement staff and parties draft a report and submit it to the COI for review.³¹ The COI reviews the appropriateness of the parties' agreed-upon penalties.³²

When the parties agree to the facts and violation level but disagree on penalties, they may elect to forgo participating in a COI hearing and

23. Parkinson, *supra* note 20, at 226 (explaining that the enforcement staff directs the notice to the university's president or chancellor).

24. *Id.* at 224 (noting that the COI has concluded that the enforcement staff has not met its burden "plenty" of times).

25. *See Division I Infractions Process*, *supra* note 12 (illustrating that three of the four means through which the process resolves allegations involve the COI).

26. *Division I Committee on Infractions*, NCAA, <http://ncaa.org/governance/committees/division-i-committee-infractions> [<https://perma.cc/WV3A-YKGU>] (last visited Dec. 21, 2020).

27. *See Inside the Division I Infractions Process: Division I Committee on Infractions Composition*, NCAA (2019), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_COIComposition-FactSheet.pdf [<https://perma.cc/8HP9-LBAH>] [hereinafter *Inside: Division I Committee on Infractions Composition*] (noting that a panel's size is between three and seven COI members for each case).

28. *2019–20 Ann. Rep.*, *supra* note 13, at 5 (describing infractions process framework). For a discussion regarding the benefits of judgment by peers, see Marsh, *supra* note 3, at 709–10 (recommending, among other things, the inclusion of more COI members who are independent of member universities).

29. *See Inside: Division I Committee on Infractions Composition*, *supra* note 277.

30. *Division I Infractions Process*, *supra* note 12 (describing means of resolving infractions cases).

31. *Id.* (noting there is no opportunity to appeal a negotiated resolution).

32. *Inside the Division I Infractions Process: Negotiated Resolution*, NCAA (2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessNegotiatedResolution-FactSheet.pdf [<https://perma.cc/M4MP-S7PV>] (describing the negotiated resolution track).

attempt to resolve their case via the “summary disposition track.”³³ When doing so, the enforcement staff, university, and any individual subject to a violation allegation submits a report to the COI.³⁴ If the COI accepts the report, it issues penalties.³⁵ However, the COI may reject the report and order a full hearing if it feels the enforcement staff failed to allege a pertinent violation.³⁶

In cases involving disputed allegations, a panel of COI members conducts a hearing and determines whether the enforcement staff’s allegations are accurate and, if so, imposes penalties on the involved university and any staff member(s) accordingly.³⁷ The COI also has the authority to conclude that violations occurred even when the enforcement staff did not allege them.³⁸ A COI hearing combines elements of a legal trial, an administrative agency hearing, and an academic misconduct hearing on a university campus.³⁹

In summary disposition or contested cases, the COI follows NCAA member-legislated guidelines when issuing penalties.⁴⁰ “The penalties range from financial penalties and vacation of records to [athletics] scholarship reductions and postseason bans.”⁴¹ The COI ultimately produces a written decision detailing the facts, violations, and penalties.⁴²

33. See *Inside the Division I Infractions Process: Infractions Process Overview*, NCAA (Jan. 2019), http://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_InfractionsProcessOverview-FactSheet.pdf [<https://perma.cc/GP4L-RCGK>] [hereinafter *Inside: Infractions Process Overview*] (illustrating different paths to resolve infractions cases). The summary disposition process should be streamlined and cooperative. Edward O’Brien, *NCAA Announces Results of Its Investigation into UM’s Athletics Department*, MONT. PUB. RADIO (July 26, 2013, 10:17 AM), <http://mtpr.org/montana-news/2013-07-26/ncaa-announces-results-of-its-investigation-into-ums-athletics-department> [<https://perma.cc/3PB7-FACL>] (quoting University of Montana President Royce Engstrom following the University’s summary disposition case).

34. See *Inside: Infractions Process Overview*, *supra* note 33.

35. See *id.*

36. See *Division I Committee on Infractions: Internal Operating Procedures*, NCAA §§ 4-10-2-3, 4-10-3 (July 20, 2021), http://ncaaorg.s3.amazonaws.com/committees/d1/infraction/D1COI_IOPs.pdf [<https://perma.cc/Z5SB-7NRV>] [hereinafter *Internal Operating Procedures*].

37. See *Division I Infractions Process*, *supra* note 12.

38. See *Internal Operating Procedures*, *supra* note 36, § 5-12.

39. See Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 678 (2003) (describing a COI hearing as “a unique process”). For a comparison between NCAA infractions proceedings and legal proceedings, see Rogers & Ryan, *supra* note 16, at 754–61.

40. See 2019–20 *Ann. Rep.*, *supra* note 13, at 15 (describing penalty guidelines as increasingly serious).

41. Nathaniel Richards, *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115, 1116 (2019) (citing relevant NCAA legislation).

42. 2019–20 *Ann. Rep.*, *supra* note 13, at 7.

A law review article co-authored by former COI Vice Chair Gene Marsh describes the COI as “the thousand-pound gorilla, with the final word in the case.”⁴³

Finally, the enforcement staff, member universities, and other parties to an infractions case may choose to resolve a disputed case through the independent accountability resolution process (IARP).⁴⁴ The IARP was created in August 2019 and seeks to draw on the expertise of independent experts—with no university affiliation—to review, hear, and decide select “complex” Division I cases.⁴⁵ Complex cases may include those involving allegations of core NCAA values, such as failing to prioritize academics or student-athlete well-being, the possible imposition of significant penalties, or conduct that is contrary to the NCAA’s cooperative principles.⁴⁶ Universities, the COI chair, or the vice president of the enforcement staff may request the independent review of a case.⁴⁷ The University of Louisville, University of Arizona, Louisiana State University, University of Kansas, and North Carolina State University chose to resolve recent cases involving their men’s basketball programs through the IARP.⁴⁸

B. *The NCAA’s Review of, and Potential Changes to, its Enforcement Process*

In July 2021, the NCAA Board of Governors (BOG) announced the formation of a Constitution Committee that includes university presidents, conference commissioners, athletics directors, and student-athletes.⁴⁹ The BOG charged the Committee with identifying core

43. See Marsh & Robbins, *supra* note 39, at 677 (describing the COI’s vast authority in cases that a party does not appeal).

44. See *Division I Infractions Process*, *supra* note 12.

45. *Independent Accountability Resolution Process*, IARP, <http://iarpc.org> [<https://perma.cc/7AQG-KM7G>] (last visited Sept. 13, 2021) (describing IARP).

46. *Id.*

47. *Id.* (noting the Infractions Referral Committee reviews the request for referral).

48. IARP, NCAA, <https://www.ncaa.org/tags/iarp> [<https://perma.cc/6JKA-FUH5>] (last visited Mar. 1, 2021) (providing links to IARP-related stories). In January 2022, the NCAA paused additional referrals to the IARP to help alleviate its backlog of cases. See Michelle Brutlag Hosick, *DI Board of Directors Pauses Referrals to Independent Infractions Process*, NCAA (Jan. 20, 2022, 3:30 PM), <https://www.ncaa.org/news/2022/1/20/media-center-di-board-of-directors-pauses-referrals-to-independent-infractions-process.aspx#:~:text=The%20Division%20I%20Board%20of%20Directors%20on%20Thursday%20temporarily%20suspended,2022%20NCAA%20Convention%20in%20Indianapolis> [<https://perma.cc/P8HV-LSY5>] (noting that six cases are in the IARP, which is more than the one to two per year anticipated).

49. Megan Durham, *NCAA Board of Governors to Convene Constitutional Convention*, NCAA (Jul. 30, 2021, 4:00 PM), <http://ncaa.org/about/resources/media-center/news/general-ncaa-board-of-governors-to-convene-constitutional-convention> [<https://perma.cc/UU4B-PQT8>]

principles that define college athletics and proposing a new governance model in a draft of a revised NCAA constitution.⁵⁰ NCAA President Mark Emmert described the effort as “not about tweaking the model we have now” but rather as a “wholesale transformation so we can set a sustainable course for college sports for decades to come.”⁵¹

The Constitution Committee released a draft of its proposed new constitution in November 2021.⁵² Under the eighteen-and-a-half page draft, reduced from the original version’s forty-three pages, changes included permitting each division to determine how to enforce its rules, likely resulting in changes to the NCAA enforcement department’s current structure.⁵³ The NCAA relinquishing its role as a powerful and often heavy-handed overseer of NCAA rules is significant and leaves questions regarding how Division I rules enforcement would look and work.⁵⁴

In an event later in November 2021 that the NCAA described as “historic,” over 2,500 NCAA conference and member university representatives met to discuss and provide feedback on the Constitution Committee’s draft constitution.⁵⁵ Most Division I member university representatives voiced support of the draft constitution, seeking only minor changes.⁵⁶ A December 2021 draft of the constitution incorporated this feedback, including more explicitly stating that rules enforcement

(describing the Committee’s formation as “historic”). The BOG consists mainly of presidents and chancellors from each of the NCAA’s three divisions and is the NCAA’s highest governing body. *Governance*, NCAA, <http://naaa.org/governance> [<https://perma.cc/VZL9-6MCQ>] (last visited Dec. 12, 2021) (describing the BOG’s role as including strategic planning and adopting and implementing policies to resolve core issues).

50. Durham, *supra* note 49 (noting the BOG’s desire for a new governance model that permits quicker change without sacrificing broader values).

51. *Id.* (quoting Emmert).

52. Maria Carrasco, *The New NCAA Constitution Hints at Big Changes Ahead*, INSIDE HIGHER ED (Nov. 9, 2021), <http://insidehighered.com/news/2021/11/09/ncaa-draft-constitution-aims-restructure-divisions> [<https://perma.cc/V372-32TZ>] (describing the draft constitution as offering “a glimpse into the future of college athletics”).

53. *Id.* (explaining that the draft constitution provides each division the authority to govern itself and determine its governing structure).

54. *See* Dodd, *supra* note 2 (noting that it would be the first time the NCAA would leave rules enforcement to the three divisions).

55. Corbin McGuire, *NCAA Members Discuss Draft Constitution at Virtual Special Convention*, NCAA (Nov. 15, 2021), <http://naaa.org/about/resources/media-center/news/general-naaa-members-discuss-draft-constitution-at-virtual-special-convention> [<https://perma.cc/V3SA-PLAK>].

56. Dan Murphy & Heather Dinich, *Most D-I Reps at NCAA Convention Say Only Minor Changes Needed to Proposed New Constitution, Per Straw Poll*, ESPN (Nov. 15, 2021), https://www.espn.com/college-sports/story/_/id/32640051/most-d-reps-ncaa-convention-say-only-minor-changes-needed-proposed-new-constitution-per-straw-poll [<https://perma.cc/VM46-FT9X>] (quoting Emmert as describing the revised constitution as “scaffolding for rebuilding the NCAA in a new and exciting fashion for the 21st century”).

would become a divisional responsibility with the NCAA providing support upon request.⁵⁷

The draft constitution will continue to receive feedback and undergo revisions.⁵⁸ By August 1, 2022, the three divisions will adopt any changes to the constitution.⁵⁹

II. COMPARATIVE ANALYSIS OF THE FEDERAL TRADE COMMISSION'S ENFORCEMENT PROCESS AND AFFIRMATION RATE

The Federal Trade Commission (FTC) utilizes an enforcement process with similarities to the NCAA's. The FTC's process likewise results in a high affirmation rate. To better understand likely reasons for, and takeaways from, the COI's seemingly high affirmation rate, this section explores the FTC's process and outcomes, and likely reasons for the high affirmation rate.⁶⁰

To further its mission to protect consumers and promote competition, the FTC enforces federal antitrust and consumer protection laws that prevent fraud, deception, and unfair business practices.⁶¹ Among the FTC's enforcement mechanisms is what is commonly referred to as Part 3, "an administrative litigation procedure through which [it] can challenge anticompetitive conduct and unfair or deceptive acts or practices."⁶²

In Part 3 proceedings, the FTC serves both prosecutorial and adjudicative roles.⁶³ More specifically, FTC staff investigate and

57. See Charlie Henry, *Committee Shares New Constitution Draft*, NCAA (Dec. 7, 2021), <http://naaa.org/about/resources/media-center/news/general-committee-shares-new-constitution-draft> [https://perma.cc/Q3ZE-W3NJ].

58. See McGuire, *supra* note 55 (describing the process through which the NCAA constitution will update).

59. See Carrasco, *supra* note 52.

60. Other enforcement proceedings yield similarly high rates at which an adjudicator affirms allegations and charges. For example, in the 2019 fiscal year, out of 85,478 criminal defendants with cases in U.S. District Courts, 78,767 (92.15%) were convicted and sentenced. *U.S. District Courts—Criminal Defendants Disposed of, by Method of Disposition*, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, http://uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2019.pdf [https://perma.cc/H6V8-EMUL] (last visited Dec. 27, 2021). Likewise, the Environmental Protection Agency's criminal program opened 247 cases in its 2020 fiscal year and convicted 94 percent of defendants who it charged and prosecuted. *EPA Enforcement Annual Results FY 2020*, ENVIRONMENTAL PROTECTION AGENCY, <http://epa.maps.arcgis.com/apps/Cascade/index.html?appid=9dfe57199392498f872bac6bf2e4867c> [https://perma.cc/YZH3-XSKE]. However, the FTC enforcement process has more parallels to the NCAA's and thus serves as this section's focus.

61. *Enforcement*, FTC, <http://ftc.gov/enforcement> [https://perma.cc/BTN5-WC9A] (last visited Dec. 23, 2021).

62. Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 624 (2016).

63. *Id.* at 625.

recommend charges.⁶⁴ The FTC commissioners then review and vote to pursue charges, on which an independent administrative law judge (“ALJ”) rules after a full trial.⁶⁵ In this trial-type proceeding, FTC “complaint counsel” prosecute the matter.⁶⁶ The ALJ renders an “Initial Decision” that includes fact findings and legal conclusions.⁶⁷ Upon appeal, the FTC commissioners decide a case’s merits without deference to the ALJ’s factual or legal findings.⁶⁸

Despite recent Part 3 successes, some describe it as a rigged system.⁶⁹ Commentators have expressed concern that liability inevitably follows Part 3 complaints no matter the ALJ’s ruling. Commentators’ concerns are proven by the fact that commissioners nearly always rule in the complaint counsel’s favor.⁷⁰ In fact, between 2007 and 2016, the FTC commissioners found liability in eleven out of twelve Part 3 decisions, thus affirming 92% of the complaints.⁷¹ This data begs the question whether FTC commissioners perform objective and rigorous appellate review of the ALJs’ initial decisions or if it is simply a kangaroo court that always rules for complaint counsel.⁷²

However, there is a likely and plausible explanation for the FTC commissioners’ high affirmation rate of FTC complaints. FTC commissioner Maureen K. Ohlhausen’s examination of individual cases, data, and trends in the FTC’s “checkered history” suggests that the FTC

64. *Id.*

65. *Id.* Five commissioners head the FTC. *Commissioners*, FTC, <http://ftc.gov/about-ftc/commissioners> [<https://perma.cc/73CU-TJN9>] (last visited Dec. 26, 2021). The President nominates the commissioners, and the Senate confirms them. *Id.* ALJs are recruited and examined by The Office of Personnel Management and do not answer to the FTC. *The Administrative Law Judge System: Testimony Before the Consumer Subcomm. S. Comm. on Com., Science and Transp.*, FTC 2–3 (1980) (testimony of Michael Pertschuk, Chairman, FTC) (contending that the FTC “quite properly” applies its perspective to evidence in appealed cases).

66. *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FTC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/RDV6-UYS7>] (last visited Dec. 26, 2021) [hereinafter *A Brief Overview*]. Staff from the relevant bureau or a regional office serve as complaint counsel. *Id.*

67. D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, & Future*, 71 ANTITRUST L.J. 319, 322 (2003).

68. Ohlhausen, *supra* note 62, at 625 (explaining that the process results in due process objections). A party may appeal the commission’s decision with a United States court of appeals. *A Brief Overview*, *supra* note 66.

69. Ohlhausen, *supra* note 62, at 624–25 (noting recent successes include winning a high percentage of cases before the Supreme Court and advancing the law on healthcare merger enforcement, dominant firm misconduct, pay-for-delay agreements in the pharmaceutical industry, state action immunity, and deceptive acts or practices).

70. *Id.* at 625 (exploring criticism’s accuracy).

71. *See id.* at 626 (noting that the one case that the commissioners dismissed in this time period was due to a change in the law). Note, however, that the criticism that liability is inevitable in these cases reflects data from recent cases that “are few in number.” *See id.* at 628.

72. *Id.* at 630–32.

has *not* demonstrated systemic bias in favor of complaint counsel.⁷³ Instead, a main reason for the high affirmation rate between 2007 and 2016 is that the commissioners became increasingly selective, pursuing only the most meritorious cases. Such selectivity would result in a higher rate of liability findings.⁷⁴ In addition, the FTC's largely successful record in appealed cases, including in front of the Supreme Court, suggests that the cases had merit.⁷⁵ Thus, despite FTC commissioners serving as investigator, prosecutor, judge, and jury, a review of data and cases suggests that the commissioners' selectivity is a valid and defensible reason for their high affirmation rate of FTC complaints over a recent period.⁷⁶

Not only is there a plausible reason for the FTC commissioners' high affirmation rate, the FTC's enforcement process is also performing as intended. When President Woodrow Wilson and Congress established the FTC over a century ago, they strategically permitted it to serve an adjudicative role, trying its own cases and rendering its own decisions, in order to facilitate development of antitrust policy and enhance certainty and accuracy in antitrust cases.⁷⁷ The FTC has utilized its Part 3 process aggressively to apply its expertise and advance antitrust law's development in complex cases.⁷⁸ In fact, Part 3 has become the forum through which many of the most important, complex, and interesting antitrust issues are litigated.⁷⁹

73. *See id.* at 634, 655–56 (examining information including empirical data, case merits, and appellate court affirmation rates of FTC decisions). Interestingly, it was not until Congress's enactment of the Administrative Procedure Act ("APA") in 1946 that ALJs became part of the process. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the ABA Section of Antitrust Law Fall Forum (Nov. 8, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf [<https://perma.cc/8M78-76D3>] [hereinafter *Three Questions*]. Thus, between the FTC's 1914 inception and 1946, hearing officers were often subordinate FTC employees whose decisions in enforcement matters could jeopardize their employment. *Id.*

74. Ohlhausen, *supra* note 622, at 626–27 (noting the role of the FTC's embrace of modern industrial organization economics).

75. *Id.* at 657 (emphasizing the FTC's impressive track record over a recent ten-year span that included federal courts affirming 100 percent of FTC administrative final orders challenged on appeal).

76. *See id.* at 644 (quoting former FTC commissioner Philip Elman). The FTC's Part 3 structure has withstood legal attacks on constitutional grounds. *Three Questions*, *supra* note 732 (citing unsuccessful due process claims stemming from the FTC lodging the legislative, prosecutorial, and judicial functions in one agency).

77. Hoffman & Royall, *supra* note 676, at 319.

78. *Id.* at 319–20 (citing example cases having to do with pharmaceuticals, mergers, and horizontal restraints).

79. *Id.* at 320, 328 (listing cases in which the commissioners have weighed in on "several important antitrust issues").

III. LESSONS LEARNED FROM THE FTC PART 3 PROCESS: SHOULD THE ENFORCEMENT STAFF MORE AGGRESSIVELY BRING ALLEGATIONS?

Given the seemingly high rate at which the COI has recently affirmed the enforcement staff's allegations, what of the criticism that the COI rubber stamps them?⁸⁰ This section suggests that a couple of significant factors weigh against this criticism and suggests that college athletics constituents should be less concerned with the affirmation rate and more so with getting additional cases in front of the COI.

First, the makeup and background of the individuals who serve on the COI suggests that its review and consideration of allegations is, in fact, appropriate.

You're talking about retired judges and deans of law schools. They're volunteering their time to sit in a room all weekend in Indianapolis and make the best judgment[s] they can make. There's so much scrutiny of the cases. These folks aren't putting their names and reputations on anything unless they think they can support it and stand by it. They aren't going to just willy-nilly come to conclusions.⁸¹

--Tom Yeager, former COI chairperson and commissioner of the Colonial Athletic Association who presided over more than 100 infractions cases.⁸² Thus, the fact that COI members enjoy successful, high-profile careers lessens the likelihood that they would simply rubber stamp enforcement staff allegations and, in doing so, subject themselves to scrutiny.

Another factor weighing against the criticism that the COI lacks independence from the enforcement staff is its decisions in recent high-profile cases. Consider, for example, the COI's decisions in recent cases involving the University of North Carolina, Chapel Hill (UNC) and Baylor University.⁸³ The UNC case featured academic courses that the enforcement staff felt were less-than-rigorous and unfairly benefited

80. See Marsh, *supra* note 3, at 715 (noting perception that the COI "marches in step, (and) rubber stamps the position of the enforcement staff"); see also Davis & Hairston, *supra* note 4, at 992–93 (explaining that there are questions regarding the COI's neutrality and whether it will deviate from the enforcement staff's recommendations).

81. Pat Forde, *Is NCAA Selective Enforcement Real?*, ESPN (June 2, 2010), http://espn.com/mens-college-basketball/columns/story?columnist=forde_pat&id=5242104 [<https://perma.cc/NF9W-AQPQ>] (evaluating whether the infractions process and outcomes are selective).

82. *Id.*

83. See Pat Forde, *Baylor's Slap on the Wrist Doesn't Feel Right, But There's Not Much NCAA Rules Could Do*, SPORTS ILLUSTRATED (Aug. 11, 2021), <http://si.com/college/2021/08/11/baylor-football-ncaa-sanctions-investigation> [<https://perma.cc/8PTX-RML8>] (describing the UNC and Baylor cases as two of the "most significant scandals of the past decade").

student-athletes.⁸⁴ The enforcement staff's allegations in Baylor's case portrayed an unchecked culture of violence, including against women, within its football program.⁸⁵ The COI disagreed with the enforcement staff's most salient allegations in both cases.⁸⁶ The enforcement staff's lack of success in its "last two investigations of note"⁸⁷ detracts from criticism that the COI is the enforcement staff's rubber stamp.

Like the FTC, the enforcement staff only brings allegations when it feels confident about their success. In fact, when describing the COI's recent ninety-three percent affirmation rate, the enforcement staff stated that the high rate shows "that enforcement brings well-supported charges, and also that committee members provide meaningful review and apply appropriate scrutiny to every allegation."⁸⁸

With the COI providing fair and appropriate review of allegations, it is fair to consider, however, whether college athletics would benefit from the enforcement staff more aggressively bringing additional allegations. More enforcement staff allegations would result in more COI written decisions. Similar to how Woodrow Wilson intended for the FTC to use its expertise when adjudicating complex issues and create a sound body of antitrust law,⁸⁹ college athletics constituents would benefit from additional instances in which the COI's applied NCAA legislation. Though written with the benefit of hindsight, COI decisions provide valuable insight into its application of NCAA legislation and expectations.⁹⁰ When the COI affirms enforcement staff allegations, it

84. *Id.*

85. *Id.*

86. *See id.* (explaining that the COI did not apply fair or meaningful sanctions in either case, contributing to the NCAA's lack of credibility). Emmert admitted that Baylor's case outcome demonstrates "why the (NCAA) needs transformational change to create alignment between authority and responsibility to address the most critical issues in college sports." Stephen Hawkins, *Baylor Infractions Decision Comes Amid Scrutiny of NCAA Role*, ASSOCIATED PRESS (Aug. 12, 2021), <http://apnews.com/article/sports-college-football-baylor-bears-football-a556ce58155480c529fadb29bd9aa4bb> [<https://perma.cc/TN2L-MXPT>].

87. John Buhler, *NCAA Letting Baylor Off Easy for the Art Briles Scandal is Their Latest Failing*, FANSIDED (Sept. 2, 2021), <http://fansided.com/2021/08/11/baylor-football-program-ncaa-ruling/> [<https://perma.cc/6DLC-AEVJ>].

88. Duncan, *supra* note 5, at 7. Bringing forth only the strongest cases is not unique to the enforcement staff. For example, perceived likelihood of success is a factor affecting pursuit of cases involving the wilderness and federal environmental legislation. *See* Joseph M. Feller, *Have Judges Gone Wild? Plaintiffs' Choices and Success Rates in Litigation Against Federal Administrative Agencies*, 44 ENV'T L. 287, 318 (2014). Likewise, a prosecutor's high criminal conviction rates may say less about the strength of the prosecutor's cases generally and more about their unwillingness to prosecute more difficult cases. *See* Eric Rasmussen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 (1) AM. L. & ECON. REV. 47, 47 (2009).

89. Hoffman & Royall, *supra* note 676, at 319.

90. *See* Martin J. Greenberg & Alexander W. Evrard, *Athletics Directors*, 26 MARQ. SPORTS L. REV. 735, 823–24 (2016) (explaining that athletics directors can use COI written decisions "to fix weaknesses in compliance").

provides coaches and athletics department staff members the opportunity to learn from their colleagues' mistakes and improve NCAA rules compliance strategies on their campuses.⁹¹ Further, if the COI continues to affirm the enforcement staff's additional allegations at a high rate, there could be a deterrent effect that dissuades coaches and staff members from violating NCAA rules. Coaches who abide by the rules would appreciate knowing that their rule-violating competitors are at real risk.

Conversely, if the COI began disagreeing with the enforcement staff's additional allegations, its written decisions would still shed light on rules compliance expectations and lessen any suspicion that it serves as a rubber stamp for enforcement staff allegations. Thus, other than the additional resources it would take to investigate and bring more allegations, there are no disadvantages to additional enforcement staff allegations. This is not to suggest that the enforcement staff should bring meritless allegations; rather, by increasing the resources at its disposal, the enforcement staff would have the ability to further pursue cases where information proves difficult to discern while upholding its current standards of quality.⁹² The enforcement staff receives 700 reports of potential serious violations annually.⁹³ It does a remarkable job with its current resources, yet it is simply unreasonable for a staff of a few dozen people, performing what has been described as one of the toughest jobs in sports, to adequately handle its caseload and responsibilities.⁹⁴

CONCLUSION

Hard work on college athletics' culture remains.⁹⁵ As violative behaviors continue and stakes rise, it is important to universities that the enforcement staff investigates and processes meaningful cases.⁹⁶

The NCAA's self-review of its governance system provides an opportunity to add resources to its enforcement staff and system. This would permit the enforcement staff to investigate and allege additional

91. *See id.* (explaining that scandals are a way to lose jobs, donor support, reputation, and integrity).

92. The enforcement staff acknowledges that even despite proactive efforts, violations can prove difficult to substantiate with admissible, attributable, on-the-record information. *See* Duncan, *supra* note 5, at 4.

93. *See* Duncan, *supra* note 5, at 13 (explaining that the enforcement department receives approximately 700 reports of potential serious violations annually).

94. *See* Jeff Eisenberg, *Toughest Jobs in Sports: NCAA Enforcement Staff Member*, YAHOO! NEWS (July 27, 2014), <http://news.yahoo.com/blogs/ncaab-the-dagger/toughest-jobs-in-sports--ncaa-enforcement-staff-member-163826437.html> [https://perma.cc/5S7M-MHK3] (explaining that the 60-person department is under immense pressure to prosecute cheating in college athletics, yet is handicapped by things like insufficient investigative authority).

95. Duncan, *supra* note 5, at 8 (noting that 15 percent of all infractions cases since the system's 1953 inception were decided between 2014 and 2019).

96. *Id.*

rules violations, a high percentage of which the COI currently affirms. These additional allegations would provide the COI the opportunity to provide more insight into its rules compliance expectations, which would benefit all college athletics constituents.⁹⁷ Providing the enforcement staff with additional resources is especially appropriate as the NCAA enters a new era in which student-athletes may now permissibly profit from their name, image, and likeness (NIL) and the enforcement staff attempts to find its role and footing in investigating potential violations in this arena.⁹⁸ Thus, college athletics constituents should be less concerned with the COI's independence, and more concerned with getting more cases in front of the COI so it can apply its expertise and provide insights into its expectations.

97. This would not be the first time the enforcement staff size increased. It increased in size from 40 to 60 ten years ago. *See* Eisenberg, *supra* note 943.

98. *See* Daniel Libit & Eben Novy-Williams, *NCAA Probes BYU, Miami NIL Deals for Potential Pay-for-Play Violation*, SPORTICO (Dec. 10, 2021), <https://www.sportico.com/leagues/college-sports/2021/ncaa-byu-miami-nil-probe-1234650215/> [<https://perma.cc/4DG3-ZASD>] (describing enforcement staff's review of NIL deals involving football student-athletes at Brigham Young University and the University of Miami).