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The NCAA Commission's report and recommendations on college basketball - some layups, some airballs

On 11 October 2017, resulting from the arrests of numerous college coaches, Adidas representatives, and a recruiter for a now defunct sports agency in connection with the United States Attorney's Office for the Southern District of New York's ('DOJ') investigation into corruption in "the dark underbelly of college basketball" - paying coaches, players and/or their families - the National Collegiate Athletic Association ('NCAA') President Mark Emmert announced the formation of the Commission On College Basketball ('Commission') to examine Division I basketball². In this article, Ryan P. Mulvaney, Esq., Partner at McElroy, Deutsch, Mulvaney & Carpenter, LLP, provides his analysis of the resulting report and recommendations ('R&R') published by the Commission to address the issues in collegiate basketball in the US.

Introduction

In its R&R, the Commission noted that those it interviewed not only confirmed the DOJ's allegations but highlighted concessions of actual knowledge: "everyone knew what was going on³" and "many informed [the Commission] that when the U.S. Attorney's Office announced the charges that led to this Commission, the reaction was that 'everyone knows' that these payments occur⁴."

To be sure, a literal pay-to-play environment has knowingly existed at the intersection of education and athletics. Why? The lure of money. Money generated and earned by the 'student-athletes' for the NCAA, universities, broadcast and cable television companies, and apparel companies has grown to epic proportions and, with it, pressures on coaches to win for their programs and temptations by all to profit off players while they can. Rather than make recommendations concerning the root of the problem - money in basketball, and coincidentally, a stance on whether players should receive monetary recognition for their efforts - the Commission took no position despite recognising that "Division I men's basketball... [is a] multi-billion dollar enterprise⁵." Odd, because although the Commission lacks jurisdiction to change the NBA's 'one-and-done' rule, it began its R&R and devoted ten pages to opining how the rule has "significant[ly] corrupt[ed] and destabilize[d] college basketball⁶." Yet,

when it comes to opining on monetarily rewarding players who are targeted by Division I programs in grammar and high school not for their academic prowess but for their athleticism (ability to earn universities and conferences money), the Commission's silence is deafening.

Although the Commission casts blame on the NCAA for its kangaroo court-like and inconsistent adjudications of investigations, it largely shifted responsibility to third parties to fix the NCAA's problems. To assess the recommendations, however, we must discuss from where we came.

The investigation and indictments

After a two year investigation⁷ that included a cooperating witness, undercover agents and wiretaps, the FBI arrested ten people for their alleged participation in a widespread conspiracy to commit and solicit bribes, wire fraud, honest services fraud, and to defraud the US⁸. The investigation started with the assistance of a cooperating witness, Louis Martin Blazer III⁹, a financial advisor who pleaded guilty to securities fraud for misappropriating money from clients including professional athletes. Blazer coincidentally possessed and offered his personal knowledge of the alleged corruption in college basketball to cooperate for a lesser sentence in his case.

Those arrested were Chuck Person, Lamont Evans, Emanuel Richardson, and Anthony Bland ('Coach Defendants')¹⁰;

Christian Dawkins of now defunct ASM Sports, a financial advisor, Munish Sood, and a suit maker, Rashan Michel ('Agent/Advisor Defendants')¹¹ and an executive, James Gatto, and representatives, Merl Code and Jonathan Augustine¹², of Adidas ('Adidas Defendants')¹³. The universities identified in the indictments are all public universities (because they receive federal funding) to which players were influenced to commit through improper payments - Auburn¹⁴, NC. State, Louisville, Miami, Kansas¹⁵, South Carolina, Oklahoma State, Arizona, and U.S.C¹⁶.

The DOJ's allegations of the two-pronged scheme are plentiful, substantive, and set forth in particularised fashion¹⁷. In the first prong, the 'Coach Bribery Scheme,' Agent/Advisor Defendants allegedly paid Coach Defendants and sometimes players or their parents in exchange for Coach Defendants exerting pressure over players and parents to retain Agent/Advisor Defendants¹⁸. In the second prong, the 'Sportswear Company Bribery Scheme,' Agent/Advisor Defendants worked with Adidas Defendants, including high school and Amateur Athletic Union ('AAU') coaches whose teams were sponsored by Adidas, to pay players or their parents in exchange for the players to commit to universities sponsored by Adidas and a promise to sign with Agent/Advisor Defendants¹⁹.

The Commission and R&R

The Commission was established to

examine Division I basketball and ‘to identify bold legislative, policy and structural modifications to improve the integrity of our processes and the well-being of our student-athletes²⁰.’ The Commission focused on the relationships of the NCAA, its universities, student-athletes and coaches with apparel companies, with AAU programs, and with agents or advisors; the relationship between the NCAA and the NBA, including the one-and-done rule; and ‘promot[ing] transparency and accountability’ between the NCAA and its universities²¹. In April 2018, the Commission issued its R&R.

End one-and-done

The Commission recommended that the NBA and NBPA end the 2006 collectively-bargained rule that prohibits high school players from being immediately eligible for the NBA Draft. According to the Commission, ‘[o]ne-and-done has played a significant role in corrupting and destabilizing college basketball, restricting the freedom of choice of players, and undermining the relationship of college basketball to the mission of higher education²².’ The Commission considered, but did not recommend, that the NBA and NBPA adopt the ‘baseball rule [...] which would make student-athletes who attend college ineligible for the draft of the G-League for two or three years²³.’

Ultimately, ending one-and-done is correct because it will allow those who are skilled enough to immediately and freely pursue their chosen profession. To be sure, not every high school player is LeBron, Kobe, or Kevin Garnett, but as the Commission recognised, some are uniquely qualified to immediately play in the NBA²⁴. To suggest one-and-done ‘has played **a significant role in corrupting and destabilizing college basketball**,’ [emphasis added] however, incorrectly presupposes college basketball was not already significantly corrupted and destabilised before one-and-done and that payments are funneled only for lottery picks (1 through 14) and not for others. Based on the documents obtained in the investigation, the alleged payments from ASM Sports included players not selected in the first 14 selections of the 2016 and 2017 NBA Drafts, thereby demonstrating that one-and-done is not why the NCAA finds itself in the crosshairs of the DOJ²⁵. Moreover, the suggestion is disingenuous because one-and-done

involves only approximately 10 to 20 of the thousands of Division I basketball players. The Commission’s opinion disguised as recommendation simply jumps on the bandwagon of recent public sentiment, and supports the appearance that the R&R largely blames others because, as the Commission acknowledged, ending one-and-done is not within the NCAA’s jurisdiction²⁶.

No real reform can be had without a position and recommendation on the false notion of ‘amateurism.’ Although the Commission briefly reviewed the arguments involving financially compensating players for the NCAA’s and universities’ use of their name, image and likeness, and financially recognising players for the untold billions generated by them for others, the Commission took no position and chose to await the outcome of pending litigation. The Commission missed an opportunity to set forth an opinion in support of the players.

Allow student-athletes to test professional prospects with the assistance of agents sooner while maintaining eligibility

While declaring that the NCAA ‘should provide both high school and college players with additional flexibility in retaining collegiate eligibility while assessing their professional prospects,²⁷’ the Commission recommended that the NCAA should allow players to declare for the NBA Draft but maintain their eligibility if they do not sign a professional contract. The Commission’s recommendation here is valid and should be adopted by the NCAA.

Currently, underclassmen may declare for the NBA Draft, attend the Draft Combine (if invited), and even work out for NBA teams, but must timely choose between staying in the Draft or returning to school to maintain collegiate eligibility. As the Commission correctly noted, ‘student-athletes who are wrong about their professional prospects should retain the opportunity to work toward the degree they were promised²⁸.’

The Commission qualified its recommendation by suggesting that the NBA and the NBPA agree ‘that players who are not drafted become ineligible for the NBA until they enter the draft again’ the following season²⁹ because, currently, any player who is not drafted is a free agent who can sign with any NBA team or G-League affiliate³⁰.

Indeed, student-athletes should not be punished for staying in the Draft but not being drafted. The Commission’s recommendation is a good start (as is its recommendation that players who leave college after two years be allowed to complete their degree with funds designated for them)³¹, but that would significantly limit players’ potential to sign undrafted free agent contracts, Summer League contracts, and two-way and G-League contracts and would compel players to return to school. The NCAA, NBA and NBPA should therefore establish a deadline beyond the Draft for undrafted players’ ability to be signed and still maintain collegiate eligibility.

“If we take care of everybody and everything is done, we control everything... You can make millions off of one kid³².”

The Commission also recommended that the NCAA ‘develop strict standards for the certification of agents, and authorize and make opportunities for those certified agents to engage with student-athletes at school at specific times³³.’ To do so, the Commission suggested that the NCAA develop an agent certification program³⁴ separate from existing NBPA agent certification to ‘create opportunities for ‘good’ agents to talk with high school and collegiate players and make their cases so that players would have all available options before they enter the professional market’ and ‘intends NCAA-certification to provide these opportunities for “good” agents³⁵.’ The Commission also recommended that ‘high school players considering entering the draft should be allowed to engage NCAA-certified agents and advisors just as high school baseball [and hockey] players may engage agents for advice about the draft³⁶.’

This recommendation has disastrous consequences. First, the Commission’s recommendation presupposes that agents and ‘runners’ are not already lingering around high schools, AAU programs, and open practices at universities³⁷. Second, it validates the very conduct with which the Commission is already concerned and knows is happening - agents ‘courting elite players from an early age³⁸.’ Third, it simply pushes the problem off the NCAA’s lap onto the laps of high schools and AAU programs (or, at least to those high school and AAU programs where the problem does not already exist)

continued

thereby fostering or solidifying existing improper relationships with them.

Moreover, the Commission mistakenly relies on its example of high school hockey and baseball players using the services of agents when considering entering drafts to suggest that will eradicate the existing problems in basketball. None of us can recall the last hockey or baseball recruiting scandal or tales of little league baseball coaches, or peewee hockey coaches selling their players to bidding universities, apparel companies, and agents. The money in those collegiate sports is simply not enticing enough. Additionally, although high school seniors who play hockey or baseball may be drafted from high school, there are multiple layers of minor league baseball and hockey leagues in which the players can professionally hone their skills. In basketball, there is only the G-League. Finally, if the NCAA, NBA and NBPA considered adopting an early entry player draft model from another collegiate sport, the flexible hockey rule works best because it allows players to be drafted from high school and either play with the NHL team, a minor league affiliate, or attend college and the team that drafted the player retains rights to the player for a certain period of time.

Furthermore, agents do not determine whether players will be drafted, nor are they the only ones who can assist players and families with making more informed decisions on their professional prospects. The decision to draft a player lies exclusively within the sound discretion of NBA personnel. The answer to the problem of agents lurking around youth and college players is, therefore, not to now make ethical what was previously unethical (and unlawful) conduct by officially introducing them to players, families and coaches at a younger age regulated by the same entity - NCAA - that either could not or chose not to regulate the problems set forth in the DOJ's indictments about which everyone except the NCAA knew was happening. The NCAA should remove agents from (who are incentivised purely by the player declaring and signing a professional contract) and limit college

coaches in (who are incentivised by their players either not declaring at all or, if they do declare, to return to school) the process, and instead allow experts from the NBA and USA Basketball to evaluate and provide guidance to players, as they currently do, through individual team workouts, the Draft Combine, and through the Undergraduate Advisory Committee.

Moreover, requiring agents already certified by the NBPA to also be certified by the NCAA - when the purpose of certification is to determine expertise in the Collective Bargaining Agreement and the regulations governing the conduct of agents - is a meaningless requirement and nothing more than bureaucracy. Coincidentally, labeling, to use the Commission's words, those who obtain NCAA agent certification as 'good agents,' simply because they obtain certification, ignores the allegations about ASM Sports - certification does not constitute 'good,' 'ethical,' or even 'competent.'

Establish neutral investigation and adjudication of infractions; accountability

The Commission declared the NCAA's investigative, enforcement and penalty process 'broken' and lacking 'tools and authority necessary to investigate complex cases and effectively prosecute violators of rules³⁹.' 'The state of affairs - where the entire community knows of significant rule breaking and yet the governance body lacks the power or will to investigate and act - breeds cynicism and contempt⁴⁰.' The Commission recommended implementing a two track system (one for complex cases and a second for all other cases), using neutral professional adjudicators with authority to impose real punishment, and that the investigative arm be independent and empowered to require cooperation of witnesses and production of documents⁴¹.

Implementing the Commission's recommendations are necessary if the NCAA takes seriously the issues in the indictments. Investigations must be real; sanctions must have teeth, and be extraordinarily punitive across the board

to have a deterrent effect. Moreover, the neutral adjudicators can and should be retired federal jurists, or the matter should be arbitrated before JAMS⁴², who are not alumni of the universities (or their law schools) involved in the investigation.

Mitigating AAU's damaging influence, and apparel company transparency

Here, the Commission suggested reforming AAU or disassociating with it entirely. As those with whom the Commission met acknowledged, empowered AAU coaches selling players to high schools, colleges, and agents occurs and unethical conduct runs amok. All coaches - AAU, high school and college - should not have a personal stake in the future earning potential of their players and should genuinely care for a player's wellbeing and future. Some, however, see their players as meal tickets and seek to profit off them while they can. Parents, and the players themselves, place their trust in their coaches who are supposed to safeguard the players and act in the players' best interests free from conflict. Unfortunately, that does not always happen. Indeed, too often the very people who are charged with the responsibility to genuinely care about and protect unsuspecting children simply exploit and sell them for their own financial gain. As the DOJ noted: "coaches at some of the nation's top programs taking cash bribes, managers and advisors circling blue-chip prospects like coyotes, and employees of a global sportswear company funneling cash to families of high school recruits⁴³" and "exploited the hoop dreams of student-athletes... treating them as little more than opportunities to enrich themselves through bribery and fraud[.]⁴⁴" Even Kobe, while criticising AAU coaches for failing to teach fundamental basketball, suggested that "the coaches who are teaching the game are getting rewarded in one fashion or another⁴⁵."

The Commission's recommendation that the NCAA, with assistance from the NBA and USA Basketball, run its own recruiting events for high school prospects would help eliminate some of these problems. In addition, the NCAA, with the assistance of the NBA and NBPA, should take it a step further;

Implementing the Commission's recommendations are necessary if the NCAA takes seriously the issues in the indictments.

either assume control of AAU or start its own non-scholastic league and staff it with NBA and G-League coaches, basketball operations personnel, former coaches, and former NBA players.

Oddly enough, despite the DOJ's indictment of an Adidas executive and others, the Commission spends only half a page on its 'recommendation' addressing apparel companies, suggesting simply that they be financially transparent⁴⁶. As the Commission recognised, apparel companies fund AAU programs, youth basketball tournaments, give out untold millions in free sneakers and athletic clothing (for the express purpose of monetary gain at a later date), and through long term deals sponsor collegiate basketball programs in the hundreds of millions of

dollars. The NCAA permitted apparel companies entry and unchecked growth in college sports. All one needs to do is read *The Last Shot*⁴⁷ to see that college basketball has arguably turned a blind eye to the overall problems it has had for decades and now seeks to place at the feet of the NBA and NBPA.

Conclusion

The R&R contains some good suggestions, but nothing revolutionary. Frankly, the Commission missed a golden opportunity to take a stand on the underlying problem - money, amateurism and name/image/likeness. And, while money continues to pour in to universities and conferences from long term television and apparel contracts, those who are targeted as high school prospects (the NCAA's

word is more polite - 'recruited' - but let's call it what it really is) to actually generate the revenue are left out of the equation save an academic scholarship. Although adopting the changes in the R&R may provide more opportunities for high school players, harsher penalties for rules violations, independent investigations, and transparency in AAU and apparel companies, nothing will ultimately change unless the elephant in the room is addressed.

Indeed, "it is time for coaches, athletic directors, University Presidents, Boards of Trustees, the NCAA leadership and staff, apparel companies, agents, pre-collegiate coaches - and yes - parents and athletes - to accept their culpability in getting us to where we are today⁴⁸."

1. Joon H. Kim, Acting U.S. Attorney, S.D.N.Y. (Press Conference 26 Sept. 2017).
2. Statement From President Mark Emmert (<http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball>).
3. Remarks by Dr. Condoleezza Rice, p.1.
4. R&R, p.9.
5. R&R, p.18.
6. R&R, p.3.
7. DOJ press release, p.2 (Sept. 26, 2017); see also U.S. v. Gatto, et al., Sealed Compl., ¶ 13, n.4.
8. U.S. v. Person, et al. (17-cr-683) ('Person Superseding Indictment'); U.S. v. Evans, et al. (17-cr-684) 'Evans Indictment'; U.S. v. Gatto, et al. (17-cr-686) ('Gatto Superseding Indictment').
9. <https://www.cnbc.com/2017/09/26/key-witness-in-ncaa-basketball-scandal-is-fallen-investment-adviser.html>
10. Evans Indictment, para. 1-4, 10-12; Person Superseding Indictment, para. 2-4, 6.
11. Evans Indictment, para. 9, 13; Person Superseding Indictment, para. 7.
12. Although Augustine was a defendant in the Gatto Sealed Complaint, he was not named in the subsequent indictments.
13. Evans Indictment, para. 14; Gatto Superseding Indictment, para. 1-4, 10-12.
14. Person Superseding Indictment, para. 10.
15. Gatto Superseding Indictment, para. 5-9.
16. Evans Indictment, para. 5-8.
17. In Gatto, the DOJ alleges that an unidentified co-conspirator is an AAU coach whose team was sponsored by Adidas. Gatto Superseding Indictment, para. 14.
18. DOJ Press Release, p.2 (26 Sept. 2017); Person Superseding Indictment, para. 1-3; Evans Indictment, para. 1-4.
19. DOJ press release, p.2 (Sept. 26, 2017).
20. Commission on College Basketball Charter (<http://www.ncaa.org/governance/commission-college-basketball-charter>).
21. Id.; see also R&R, p.15.
22. R&R, p.3.
23. Id.
24. The Commission recognised that, '[o]ver the past decade, the number of one-and-done players has ranged from 5 to 18[]' and growing with each NBA draft with '9 in 2014, 13 in 2015, 14 in 2016, and 18 in 2017.' R&R, p.19.
25. <https://www.yahoo.com/amhtml/sports/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html>
26. The one-and-done rule was negotiated between the NBA and NBPA in the 2006 Collective Bargaining Agreement.
27. R&R, p.32.
28. Id.
29. Id.
30. Id.
31. Id. p.35.
32. Evans Sealed Compl., para. 82(b) (quoting Defendant Dawkins).
33. R&R, p.33.
34. Id. pp.33, 34.
35. Id. p.34.
36. Id. (citing NCAA Division I Bylaw 12.3.1 (Exception - Baseball and Men's Ice Hockey - Prior to Full-Time Collegiate Enrollment), which provides: 'In baseball and men's ice hockey, prior to full-time collegiate enrollment, an individual who is drafted by a professional baseball or men's ice hockey team may be represented by an agent or attorney during contract negotiations. The individual may not receive benefits (other than representation) from the agent or attorney and must pay the going rate for the representation. If the individual does not sign a contract with the professional team, the agreement for representation with the agent or attorney must be terminated prior to full-time collegiate enrollment.'
37. "I can go to [University 4's [Arizona]] practices like I'm on the team... The coaches, that's the easy, that's the easiest thing because they all, I know them all anyway. We're friends." (Evans Sealed Compl., para. 83(c)) (Defendant Dawkins explaining on wiretapped telephone conversation the ease with which he gains team access).
38. R&R, p.32.
39. R&R, p.39.
40. Id. at p.9.
41. Id.
42. JAMS is the largest private alternative dispute resolution provider in the world with a panel of over 350 retired judges and attorneys.
43. Joon H. Kim, Acting U.S. Attorney, S.D.N.Y. (Press Conference Sept. 26, 2017).
44. Id.
45. <https://bleacherreport.com/articles/2610640-kobe-bryant-comments-on-aa-basketballs-impact-on-sport>
46. Id. at p. 46-47.
47. Frey, Darcy, *The Last Shot: City Streets, Basketball Dreams* (Houghton Mifflin Co. 1994).
48. Remarks by Dr. Condoleezza Rice, p.1.