

University of Southern California

**Rebuttal To The Response Submitted By The
NCAA Division I Committee On Infractions**

(Appeal From Infractions Report No. 323)

I. Introduction

The penalties imposed against the University of Southern California's ("USC") football program arise largely from the actions of institutional outsiders who clandestinely provided improper benefits to a single USC student-athlete –student-athlete 1– and his parents. These benefits were provided without the assistance or actual knowledge of a single USC employee. Based upon these facts, the Committee on Infractions ("Committee") abused its discretion in imposing a two-year post-season ban and substantial scholarship reductions against USC's football program. The Committee's response to USC's appeal ("Response") fails to show that these penalties are consistent with comparable precedent or supported by the record evidence in this case.

The Committee employs several faulty premises in an attempt to justify penalties and findings that are inconsistent with the record evidence and past precedent. Most significantly, however, the Committee does not even address, much less distinguish, the 1995 University of Miami case, which demonstrates clearly the excessiveness of the penalties imposed in this case. Instead, the Committee has focused or relied up findings or issues that are immaterial, erroneous, speculative or after-the-fact justifications.

II. The Penalties Imposed Against USC's Football Program Are Inconsistent With Comparable Cases And Based Upon An Incorrect Legal Standard.

The primary issue in this appeal is not whether violations occurred, but whether the substantial penalties levied against USC's football program are appropriate. The penalties the Committee imposed against USC's football program include a two-year post-season ban and scholarship reductions limiting initial grants-in-aid to 15 and total grants to 75 during the 2011-12, 2012-13 and 2013-14 academic years. The Committee has never before imposed on a

football program a two-year post-season ban **and** at the same time taken away 30 or more scholarships, even under factual circumstances far more egregious and wide-ranging than those found in this case, which involves a single football student-athlete.¹ With regard to the institution, the most the Committee could say was that, “at least” by a date after which student-athlete 1 last competed for USC, an assistant coach had knowledge that student-athlete 1 had “likely” engaged in NCAA violations.

Even if all of the Committee’s findings against USC are accepted as correct, the Committee abused its discretion because these penalties are grossly excessive, patently inconsistent with applicable precedent and were imposed under an incorrect legal standard. Nothing in the Committee’s response compels a different conclusion.

A. The Penalties Are More Severe Than Those Imposed In Cases Involving Significantly More Egregious Violations.

The Committee concedes that “[c]omparable cases ought to receive comparable penalties.” Response at 11. The Committee does not dispute that in all of its prior decisions where post-season bans and significant scholarship reductions were imposed, a staff member or traditional booster was involved in the violations, factors not present in this case. Here, the Committee cannot demonstrate **any** institutional link to the benefits agency partner A and agency partner B provided to student-athlete 1 other than the assistant football coach allegedly learning of the benefits “at least” by a date after student-athlete 1 last competed for USC.

USC demonstrated in its original appeal brief that a comparison of the penalties imposed on USC with the lesser penalties imposed in prior cases involving similar violations shows that

¹ The findings regarding football which did not involve student-athlete 1 were a failure to monitor contact between prospects and a booster that the Committee described as “relatively innocuous,” resulting in a secondary violation, and a failure to monitor the use of a consultant during the 2008 football season. Neither of these findings was cited by the Committee as a basis for the penalties imposed. Report at 56.

the Committee abused its discretion here. *See* Appeal, Ex. 23. The Committee treated USC much more harshly than it has other institutions, for no reason other than this is a “high profile” case. Response at 15. While the Committee tried to justify the penalties by attributing them to USC’s “lax compliance efforts,” Response at 7, the Committee cannot dispute that in prior cases where the Committee imposed severe penalties, the penalties were directly attributable to knowing or intentional violations by institutional staff members or traditional boosters.

A key and glaring omission is that the Committee ignores the fact that the penalties imposed in this case exceed even those in the 1995 University of Miami case, the facts of which are some of the most egregious in NCAA history. This omission is telling. In the Miami case, which also involved violations in multiple sports, the institution was found to have direct culpability in providing more than \$630,000 in impermissible benefits over a five-year period (1989-1994) to student-athletes (primarily football). *See* University of Miami Public Infractions Report (1995), Ex. 5 to Appeal. Unlike USC’s case, Miami’s violations arose, in part, from the direct participation of an athletics staff member who assisted with the completion of \$220,000 in fraudulent Pell Grant forms. The institution also provided an additional \$412,000 in direct extra benefits to student-athletes, and fifty-five football student-athletes competed while ineligible. In addition, the head football coach and head of compliance failed to report their knowledge of a “pay for play” pool in which student-athletes were paid for big plays. The institution also failed to follow its student-athlete drug testing policy, allowing elite football student-athletes who tested positive for drugs to continue to compete.

Although Miami lost 31 initial scholarships over three years (one more than USC’s 30), its total scholarships were only reduced to 80 (as opposed to USC’s 75), and it received only a one-year post-season ban. The penalties imposed against USC cannot be reconciled with those

imposed in the Miami case given the extraordinarily egregious misconduct in that case in terms of financial amount, number of student-athletes involved and institutional intent. The Committee makes no argument to the contrary.

Additionally, the Committee also failed to address or to distinguish the Texas Tech University (1998) case. That case involved 76 student-athletes in eight sports, including football, who competed while ineligible. Texas Tech University Public Infractions Report (1998), Exhibit 25. Members of the Texas Tech football coaching staff provided tuition assistance and committed academic fraud by completing significant portions of student-athletes' course work. Finally, a Texas Tech booster provided free bail bonding and legal services to three football student-athletes. The Committee found a total of 42 instances where a football student-athlete competed while ineligible during the university's four bowl appearances in this period. The Committee further found that the football staff provided money to a student-athlete before and after his enrollment and also found an assistant football coach guilty of unethical conduct. In the face of the direct institutional conduct, which caused the violations, a finding absent in USC's case, the Committee imposed a one-year bowl ban and reduced initial scholarships by eight, six and four (a total of 18) over three years with a total cap on scholarships of 80 for two years. Again, the Committee has no justification for the disparity between the Texas Tech case and this case.

The Committee falls short in its attempt to distinguish the numerous prior cases where significantly less severe penalties were imposed for more egregious violations. Prior cases establish beyond dispute that the Committee has imposed severe sanctions only in cases involving **deliberate and intentional** violations by traditional boosters, coaches, or institutional staff members, where the violations took place over an extended period of time. USC's case

differs significantly in that there are **no allegations of deliberate or intentional violations by USC's staff members or representatives who were promoting USC's athletics interests.**

As discussed in USC's appeal brief, cases such as the University of Miami (1995), Florida State University (1996), University of Alabama (2002), University of Kentucky (2002) and University of Michigan (2003) all demonstrate that USC's penalties are much more severe and its violations much less serious and lacking in intentional institutional culpability than those instances in the past where the Committee has imposed a post-season ban and significant scholarship reductions.²

B. Findings Against Former Assistant Football Coach Cannot Serve As The Basis For Penalties Against USC.

In its Response, the Committee repeatedly refers to the findings against the assistant football coach in section B-1-b of the Report as a basis for the penalties imposed against the institution. Response at 10-11. Those findings, however, cannot be used to justify the appealed penalties as the COI failed to list the assistant football coach findings as a predicate for its lack of institutional control determination.

The Legislative Review and Interpretation Committee (LRIC) determined that USC lacked standing to appeal any of the assistant football coach findings. LRIC agreed with the NCAA staff's position that an institution does not have standing to appeal a penalty or a finding imposed against an individual because the violation is "attached" only to the individual. If the facts of the finding of violation contributed to a violation attached to the institution (e.g., lack of institutional control, failure to monitor), it would be noted in another section of the report and the

² The Committee's argument that the penalties against USC were "tailored" to the issue of agents accessing student-athletes is not well founded. The practice/sideline/travel/camp restrictions, which are not being appealed, have some nexus to agent access to student-athletes. The post-season ban and scholarship reductions do not directly impact agents' access to student-athletes.

institution would have an opportunity to appeal that finding. The Legislative Council affirmed that decision. As set out in USC's supplement to its appeal, because it is precluded from challenging the assistant football coach findings on appeal (i.e., the assistant football coach's violation was not part of the basis for finding lack of institutional control), there is no legitimate basis for the IAC to take that finding into account in ruling on this appeal.

The cornerstone of fair process is the right to be heard. To consider findings against an individual that the institution is not allowed to contest on appeal as the basis for sustaining a penalty against the institution transforms the appeals process into no process at all. The Committee's reliance on findings against the assistant football coach, therefore, is improper and does not justify the penalties imposed against USC in this case. Given the NCAA's determination that USC has no standing to appeal the unethical conduct findings against the assistant football coach, the Committee's imposition of penalties against USC for the findings against the assistant football coach is a clear abuse of discretion, is arbitrary and capricious, and proves that an incorrect legal standard was applied. The Committee cannot have it both ways.

C. The Committee Used An Incorrect Legal Standard To Impose A Two-Year Post-Season Ban.

The two-year post-season ban was imposed under an incorrect legal standard. It is undisputed that, on the day the Report was released in this case, the Chairman of the Committee was asked, "In, regarding the two-year bowl ban, um, how much consideration was given to being less than that, how did you exactly come up with that particular number of years to ban the football team, uh, for the post seasons?" Appeal Brief, Ex. 10 at 15. In response, the Chairman announced publicly in clear, unambiguous terms the Committee's rationale for imposing a two-year post-season ban: "Well, frankly . . . , it was the number of bowl games that the individual

[i.e., student-athlete 1] participated in.” Appeal Brief, Ex. 10 at 16.³ The Committee concedes that this is not a proper legal standard for use in assessing penalties. Response at 9. The Committee attempts to downplay this statement, however, by claiming it was an “off the cuff response by one member of the Committee,” and that it is “obvious” the Chairman’s representation “does not represent the standard used by the COI in this case.” Response at 9.

The Committee is unable to cite to any portion of the Report reflecting the standard it used, because the Report is silent on that point. The only evidence of the standard that was actually used is the Chairman’s public statement made for and on behalf of the entire Committee. The use of such an incorrect legal standard departs from the bylaws and case precedent, and therefore constitutes an abuse of discretion.

III. The Committee’s Findings of Violations B-2, B-2-A and B-7 Should Be Vacated.

A. Sports Marketer A, Sports Marketer B and their Sports Marketing Agency Did Not Become Representatives Of USC’s Athletics Interests By Providing Permissible Summer Internships To Three USC Student-Athletes.

The Committee takes the unfounded and speculative position that the summer 2005 internship was created solely for USC football student-athletes when the record was devoid of any evidence to support such a finding.⁴ Contrary to the Committee’s position in this appeal, the Report does not contain any finding that the former head football coach approached sports

³ The chair is the official spokesperson for the Committee. During the official NCAA press conference on June 10, the chair was speaking on behalf of the Committee. *See* NCAA Bylaw 32.9.2.2. The purpose of the press conference was to answer questions and give clarity as to the Committee’s decision and rationale. The chair’s comment was also used in an NCAA News article titled “Infractions committee chair addresses USC case” dated June 11, 2010. *See* Ex. 26.

⁴ The evidence the Committee cites at page 16 in its Response is taken from two sentences in a multi-page discussion of the internship within the former director of compliance’s interview. Notably, that interview reveals that the former director of compliance never stated the internship was created solely for USC student-athletes nor did the NCAA staff ever ask if the internship was available to non-student-athletes.

marketer A to establish an internship exclusively for USC student-athletes. In fact, the former head football coach specifically made clear at the hearing that he had no involvement with the creation of the internships at the sports marketing agency. Hearing Tr. at 240-42. The Committee omits this information from its response. Moreover, the internship program was not limited only to USC student-athletes. It is undisputed that, in subsequent years, the sports marketing agency hired summer interns (student-athletes and non-athletes) from other schools across the country. The fact that the first interns at the sports marketing agency were USC student-athletes does not mean the internships were created solely for USC student-athletes.

In addition, based upon subsequent events that occurred from November 2005 to January 2006, the COI incorrectly found sports marketer A, sports marketer B and their agency became representatives of USC's athletics interests when they provided an undeniably permissible summer internship to the three USC student-athletes. At the hearing, the enforcement staff conceded that the summer 2005 internship relationship between student-athlete 1, sports marketer A, sports marketer B and the sports marketing agency was permissible and that sports marketer A, sports marketer B and the sports marketing agency did not become representatives of USC's athletics interests at that time:

CHAIRMAN: Okay. We are way beyond what I was looking for, because in a way it doesn't matter if he was an agent or not. It has to do with the relationship that was created between sports marketer A and student-athlete 1, and that is what I would like you to address.

MEMBER OF THE ENFORCEMENT STAFF: **That relationship was permissible.** We want to make that clear. That was not a problem. Obviously, our position is that **it became a problem once impermissible benefits were provided by sports marketer A to student-athlete 1 and his family,** and that's the point, where sports marketer A and the sports marketing agency and sports marketer B became representatives of the institution's athletics interests.

Hearing Tr., at 221. The improper benefits that sports marketer A, sports marketer B and the sports marketing agency were accused of providing to student-athlete 1 as set out in Finding B-2-b(1)-(6) occurred in November and December 2005, more than four months after student-athlete 1's admittedly permissible summer internship with the sports marketing agency ended.

The Committee's attempt to justify its finding is unavailing. It is undisputed that nowhere in the NCAA bylaws does it state that any person or entity that hires student-athletes from one institution for a permissible position automatically becomes a representative of that institution's athletics interests. Therefore, sports marketer A, sports marketer B and the sports marketing agency did not become representatives of USC's athletics interests by providing summer employment to three student-athletes. Yet, that is precisely the rule the Committee fashioned through its finding in this case. Accordingly, the finding that the summer internship was an impermissible benefit must be vacated.

B. The Committee's Internship Monitoring Finding Cannot Support A Lack Of Institutional Control Determination.

The Committee's response confirms the flawed nature of its lack of institutional control finding. The Committee's analysis is one of strict liability, whereby a failure to monitor and a lack of institutional control exist wherever violations occur that are not prevented or detected. Such an analysis employs an improper legal standard because it ignores the requirement that "there must be some nexus between a failure to monitor finding and an underlying violation." University of Oklahoma Infractions Appeals Committee Report (2008). The Committee does not even attempt to articulate such a nexus in its response.

1. There Is No Nexus Between The Alleged Failure To Monitor Employment And An Underlying Violation In The Football Program.

In the sport of football, the Committee found a lack of institutional control related only to monitoring student-athlete 1's automobile registration and summer employment with the sports marketing agency, sports marketer A's involvement in student-athlete 1's procurement of disability insurance coverage during the fall of 2005, a failure to investigate adequately the relationship between student-athlete 1 and sports marketer A following the publication of a November 14, 2005, article by Liz Mullin in *Street & Smith's Sports Business Journal*, "relatively innocuous" booster contact in the recruiting process, and monitoring the number of countable coaches. Report at 48-51, 55.⁵ Without question, the Committee based its finding of a lack of institutional control, in part, upon facts and issues that involved **no** violations of NCAA legislation or a violation that is being appealed, which constitutes the application of an improper legal standard.

The Committee continues to criticize USC's monitoring of student-athlete 1's summer employment and disability insurance, but would have the IAC ignore the fact that the enforcement staff did not allege a violation regarding either one. Significantly, the Committee found sports marketer A, sports marketer B, and the sports marketing agency committed no violations during the summer internship; instead, it found they gave impermissible gifts to student-athlete 1 and his family months **after** the internship ended. Report at 31-36. It is nonsensical to argue, as the Committee does, that further monitoring of the summer 2005 internship would have prevented the improper benefits provided in November and December of that year. There simply is no nexus between any failure to monitor student-athlete 1's

⁵ In its Response, over five months after the Report was released, the Committee attempts to retreat from its stated rationale for the lack of institutional control finding and invoke a vague "fair reading" standard so as to expand the basis for its finding. Response at 18. This belated attempt to invoke a standard found nowhere in the bylaws underscores the lack of a legitimate factual basis for the lack of institutional control finding as it relates to the football program.

employment with the sports marketing agency and any subsequent violation of NCAA legislation.

Likewise, no violations were alleged or found relating to student-athlete 1's disability insurance policy. Because there is no underlying violation of NCAA bylaws related to the disability policy, there is no nexus with a failure to monitor, and thus the activities related to the disability policy cannot be the basis for a finding of a lack of institutional control.

The Committee also departs from the grounds stated in the Report and now argues the findings and penalties are justified because USC did not ask questions when student-athlete 1's parents and a "teammate" were able to go to New York for the Heisman Trophy presentation. Response at 18. Importantly, these findings are not mentioned at all in the Committee's rationale in the Report for its lack of institutional control finding and thus cannot be relied upon on appeal as support for that finding.⁶ Moreover, these are two more examples of erroneous findings based upon the Committee's misunderstanding of the evidence and allegations. The Committee omits the fact that the enforcement staff made no allegation regarding the student-athlete 1's parents' travel and lodging expenses during the Heisman trip because the enforcement staff and USC both confirmed prior to the Notice of Allegations being issued that the Heisman Trust paid these expenses, as it has done for many years. The Committee's response makes clear, however, that the Committee raised this new allegation on its own and found a violation based upon an entirely incorrect and speculative assumption, and then relied upon this defective finding to justify the harsh penalties. The Committee clearly erred, at several different levels, when it based its lack

⁶ The Committee improperly attempts to expand the basis for its lack of institutional control finding beyond that stated in the Report by referring for the first time to the attendance of student-athlete 1's parents at away games and a recruiting visit by a top prospect as support for its finding. Response at 18.

of institutional control finding on the Heisman Trust's provision of expenses permissibly provided to Heisman finalists and their families.

Similarly, the Committee did not rely upon an alleged failure by USC to question how Student-athlete 1's "teammate", friend B, was in New York during the Heisman weekend as support for the lack of institutional control finding. Further, there is not a single shred of evidence that anyone from USC knew friend B was in New York that weekend, and therefore, there is no factual basis for the finding. In addition, the Committee erred by misidentifying friend B as student-athlete 1's "teammate." Friend B was a track student-athlete who was not enrolled at USC in December 2005; he was never a member of USC's football team and was never student-athlete 1's teammate. Hearing Tr. at 1053-54. These clear errors and selective omissions highlight the insufficiency of the evidence on which the Committee based its lack of institutional control finding.

In its response, the Committee attempts to cure this deficiency through rank speculation. For example, the Committee states that a "fair reading" of the report establishes a nexus between USC's supposed failure to monitor and violations of NCAA rules. Response at 18. According to the Committee, the outside wrongdoers who provided improper benefits were "emboldened" to act as they did because "they believed they would not be caught." Response at. 18. The Committee does not cite to a single piece of evidence in the record for these bold statements. The reason is clear – there is none.

The Committee also asserts, again without citation to any record evidence, that if USC had followed up on student-athlete 1's living arrangements and the amount of his rent, "it should have raised concerns as to whether he was living beyond his means." Response at 20. This statement is an entirely speculative attempt to justify the findings and crushing penalties by

coming up with new “findings” found nowhere in the Public Report. There is not a single mention anywhere in the Report regarding student-athlete 1’s living arrangements while enrolled at USC or that he was “living beyond his means.” The issues that are mentioned in the Report are insufficient to support a finding of lack of institutional control in the sport of football.⁷

Finally, the Committee does not dispute that its new and undefined “heightened duty” standard for equally undefined “elite athletes” does not exist in NCAA bylaws. It is fundamentally unfair to allow the Committee to articulate a new duty in vague terms, apply it retroactively to a university, and then penalize the university for failing to meet this new standard. Such a conclusion is all the more apparent when the Committee accuses the institution of failing to monitor activities that do not constitute a violation of NCAA rules as the Committee has done in this case.

2. Findings Regarding The Men’s Basketball And Women’s Tennis Program Cannot Justify A Finding Of Lack Of Institutional Control Against The Football Program.

The evidentiary basis on which the Committee relies for its lack of institutional control finding cannot withstand scrutiny. When the record evidence is considered as contrasted with the Committee’s speculation and conjecture, it is clear that the lack of institutional control finding should be set aside. To divert attention from the evidentiary shortcomings, the Committee chooses to improperly rely upon findings regarding the men’s basketball and women’s tennis programs in justifying the penalties against the football program. Response at 17-18 & 20-21.

⁷ The Committee’s discussion of student-athlete 1’s ten-year old Chevrolet Impala is inaccurate. The vehicle appeared on a magazine cover approximately 10 months **after** student-athlete 1 left USC and **after** the magazine paid for an overhaul of the car. Hearing Tr. at 143.

The Committee agreed with the penalties USC self-imposed for violations in the men's basketball and women's tennis programs. In its response, the Committee confirmed that agreement, stating "the COI did not impose any additional penalties with respect to the basketball program because the COI recognized that USC took appropriate action regarding basketball. Thus, the university's corrective actions constitute a significant mitigating factor that the committee properly took into account in determining the penalties in this case." Response at 10. There is no authority in the bylaws, case precedent or elsewhere that permits the Committee now, in this appeal, to rely upon facts pertaining to a sport in which the Committee accepted the institution's self-imposed penalties as a basis for enhancing the penalties against an entirely different sport. The Committee's admitted reliance on facts related to the basketball program as the basis for the lack of institutional control finding as to the football program and the penalties imposed against it is a blatant abuse of discretion.

IV. Conclusion

USC has acknowledged that violations occurred in its football, men's basketball and women's tennis programs and accepts responsibility for those infractions. As USC has well demonstrated, however, the Committee abused its discretion in imposing unprecedented penalties on the football program. To correct this error, USC respectfully requests that the IAC reduce the two-year post-season ban on the football program to one year, and reduce the loss of 10 initial football scholarships per academic year to a loss of 5 initial scholarships per year over the next three academic years (2011-12, 2012-13 and 2013-14). USC also asks the IAC to increase the total scholarships from 75 to 80 during this time.