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Playoff or Bust: The Bowl Championship Series Debate Hits Congress (again)

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PLAYOFF OR BUST: THE BOWL CHAMPIONSHIP SERIES DEBATE HITS CONGRESS (AGAIN)

LESLIE BAUKNIGHT NIXON*

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I. INTRODUCTION

It is no secret that newly elected President Barack Obama¹ has been very vocal about the need for a National Collegiate Athletic Association (NCAA)² Division I Football Bowl Subdivision (FBS)³ college football

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1. See The White House, President Barack Obama, http://www.whitehouse.gov/administration/president_obama (last visited Feb. 17, 2009). Barack Obama is the 44th president of the United States. *Id.* He is the first person of African-American descent to be elected president of the United States. See Alex Johnson, *Barack Obama Elected 44th President*, MSNBC.COM, Nov. 5, 2008, <http://www.msnbc.msn.com/id/27531033>.

2. For more information on the NCAA consider NCAA.org, <http://www.ncaa.org/wps/portal> (last visited Feb. 17, 2009).

playoff system.⁴ However, with the recent change in the economic climate, President Obama has focused his energies on addressing the current recession.⁵ But, President Obama is not the only politician that has been vocal about the need for a playoff system.

In the last two months⁶ it seems that the need for a college football playoff system has gone beyond just the complaints from jilted fans and alumni, internet blogs, and other media commentary, to the House of Representatives. Between December 2008 and January 2009, three bills have been introduced to the House of Representatives, each bill seeking the creation of a college football playoff championship series for Division I FBS college football.⁷ This recent influx of proposed legislation does not even include a recent resolution proposed to the House of Representatives in 2009.⁸

This paper will review the proposed legislation that seeks to revise the current Bowl Championship Series (BCS)⁹ format. It will discuss the strengths and weaknesses inherent in each legislation. Special attention will be given to the feasibility of implementing the requirements of each legislation and the effect it will have on the NCAA Division I FBS member schools.

3. NCAA Division I-A football was renamed the Division I Football Bowl Subdivision in 2006. See Randy Snow, *2006 Football Year in Review*, OUR SPORTS CENTRAL, Dec. 20, 2006, <http://www.oursportscentral.com/services/releases/?id=3407986>.

4. See Walter Alarkon, *Obama's Call for College Football Playoff Gains Momentum on Hill*, THE HILL, Jan. 15, 2009, <http://thehill.com/leading-the-news/obamas-call-for-college-football-playoff-gains-momentum-on-hill-2009-01-15.html>.

5. See, e.g., Chris Isidore, *It's Official: Recession Since Dec. '07*, CNNMONEY.COM, Dec. 1, 2008, <http://money.cnn.com/2008/12/01/news/economy/recession/?postversion=2008120113>.

6. This Article was written in February 2009. Things may have changed since the writing and printing of this Article.

7. See H.R. 7330, 110th Cong. (2008), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-7330&page-command=print>; H.R. 390, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.390;>; H.R. 599, 111th Cong. (2009), available at [http://www.thomas.gov/cgi-bin/query/z?c111:H.R.599.](http://www.thomas.gov/cgi-bin/query/z?c111:H.R.599;)

8. See H.R. Res. 68, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.RES.68.>

9. "The Bowl Championship Series (BCS) is a five-game arrangement for post-season college football that is designed to match the two top-rated teams in a national championship game and to create exciting and competitive matchups between eight other highly regarded teams in four other games." Bowl Championship Series, *The BCS Is . . .*, <http://www.bcsfootball.org/bcsfb/definition> (last visited Mar. 16, 2009).

II. UNDERSTANDING THE ISSUE

In recent years, many powerful people, who felt their collegiate team should have been in the BCS championship game, have decided that legislation is the only way to ensure that their team is not slighted in the future.¹⁰ These jilted supporters have complained incessantly, yet the institutions themselves seem happy with the current post season format.¹¹ According to the NCAA:

In order for a NCAA Division I-A Football Championship to be established, the NCAA Division I membership must consider such a proposal through its normal legislative process. As of this date, legislation to establish a I-A championship has not been considered by the membership.

Through the years there have been several efforts to address the subject. In 1976, a proposal to establish a Division I-A football championship was introduced on the recommendation of a special committee that had studied the feasibility of a playoff. This proposal, however, was withdrawn and there was no discussion on the Convention floor. A resolution was presented during the 1988 Convention that stated the Division I-A membership did not support the creation of a national championship in the sport of football, which passed by a vote of 98 in favor, 13 opposed and one abstention. *In 1994, a blue-ribbon panel was formed to gather information regarding the viability of establishing a Division I-A football championship. The panel forwarded a report to the NCAA Presidents Commission; however, it was decided that the Association would not pursue a Division I-A championship at that time.*¹²

Therefore, it appears that neither the NCAA nor its member institutions (including the ones left out of the national championship game) are unhappy with the current system.

Division I FBS football is the only NCAA sport whose season does not have a playoff series culminating in an official championship.¹³ There has actually never been a playoff in Division I college football.¹⁴ Because there is no championship, in 1998 the BCS formed with the purpose of crowning the champion.¹⁵ However, the BCS is not the first organization to

10. See Alarkon, *supra* note 4.

11. See Bowl Championship Series, *supra* note 9.

12. NCAA.org, Postseason College Football FAQs, <http://www.ncaa.org/wps/ncaa?ContentID=2222> (last visited Feb. 17, 2009) [hereinafter College Football FAQs] (emphasis added).

13. See H.R. Res 1120, 100th Cong. (2008), available at <http://www.statesurge.com/bills/115833-hres1120-federal>.

14. See College Football FAQs, *supra* note 12.

15. See ESPN.com, About the BCS, <http://espn.go.com/abcspports/bcs/about> (last visited

be formed for the purpose of administering bowl games and crowning a champion. The Bowl Coalition¹⁶ and the Bowl Alliance¹⁷ are the two BCS predecessors that once crowned the national champion.

However, in recent years, FBS teams have improved. Such improvements have led to there being more than two FBS teams qualifying for the championship game.¹⁸ But because the championship game only calls for two teams, inevitably one was left out of the championship game.¹⁹ There is more than a title at stake when a team is left out of the championship. The rejected institution will get less prize money as well, which affects scholarships, booster donations, compliance with NCAA requirements, recruiting abilities, and the list goes on.²⁰

III. UNDERSTANDING THE PLAYERS

In the debate for a college playoff system, it is important to understand the true players. The NCAA is the governing body for the collegiate sport under fire.²¹ The Division I FBS is solely an NCAA designation.²² The Division I FBS schools are colleges and universities that have football programs that participate in post season bowl games rather than a playoff system.²³ The BCS is a five-bowl game series that includes one championship game.²⁴ These are the major players in the controversy. Neither party has made a public appeal to Congress or any other political party requesting reform of this system.²⁵ In fact, the NCAA and its member institutions have recently passed new rules in support of the

Feb. 17, 2009).

16. See Bowl Championship Series, *supra* note 9.

17. See FiestaBowl.org, BCS History, http://www.fiestabowl.org/index.php/about/BCS_history (last visited Feb. 17, 2009).

18. See Associated Press, *Utah AG: Duty Is to Protect University*, ESPN.COM, Jan. 11, 2009, http://74.125.113.132/search?q=cache:Jed9hCjEp_IJ:sports.espn.go.com/ncf/news/story%3Fid%3D3825798+BCS+University+of+Utah&hl=en&ct=clnk&cd=5&gl=us.

19. See Bowl Championship Series, *supra* note 9.

20. See H.R. Res 1120, 100th Cong. (2008), *available at* <http://www.statesurge.com/bills/115833-hres1120-federal>.

21. It should be noted that the NCAA is not the only collegiate athletic governing body; however, it is the only collegiate sports governing body associated with this issue. See National Association of Intercollegiate Athletics, <http://naia.cstv.com> (last visited Feb. 26, 2009); National Junior College Athletic Association, <http://www.njcaa.org> (last visited Feb. 26, 2009).

22. See THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2008-09 NCAA DIVISION I MANUAL 239 (2008), *available at* http://www.ncaapublications.com/Uploads/PDF/Division_1_Manual_2008-09e9e568a1-c269-4423-9ca5-16d6827c16bc.pdf [hereinafter NCAA DIVISION I MANUAL].

23. See *id.* at 243.

24. See Bowl Championship Series, *supra* note 9.

25. See College Football FAQs, *supra* note 12.

Bowl Championship Series.²⁶

The NCAA “is a voluntary organization through which the nation’s colleges and universities govern their athletics programs. It is comprised of institutions, conferences, organizations and individuals committed to the best interests, education and athletics participation of student-athletes.”²⁷ While the NCAA governs the player eligibility rules for Division I FBS members,²⁸ the NCAA does not administer any postseason bowl game.²⁹ It does, however, govern the eligibility of FBS institutions and players seeking to participate in postseason bowl games.³⁰

A. THE NCAA DIVISION I FBS MEMBER INSTITUTIONS

The NCAA Division I FBS member institutions are colleges and universities in eleven collegiate athletic conferences.³¹ Those conferences are: Atlantic Coast Conference,³² Big 12 Conference,³³ Big East Conference,³⁴ Big Ten Conference,³⁵ Conference USA,³⁶ Mid-American

26. *See id.*

27. *See* NCAA.org, About the NCAA, <http://www.ncaa.org/wps/ncaa?ContentID=2> (last visited Feb. 26, 2009).

28. *See* NCAA DIVISION I MANUAL, *supra* note 22, at 287.

29. *See id.*

30. *Id.* at 61, 127, 187.

31. *See* NCAA.org, NCAA Sports Sponsorship: Football Bowl Subdivision, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=1&division=1A&sport=MFB> (last visited Feb. 26, 2009).

32. *Id.* The Atlantic Coast Conference consists of Boston College, Clemson University, Duke University, Florida State University, Georgia Institute of Technology, University of Maryland—College Park, University of Miami (Florida), North Carolina State University, University of North Carolina at Chapel Hill, University of Virginia, Virginia Polytechnic Institute & State University, and Wake Forest University. *Id.*

33. *Id.* The Big 12 Conferences consist of Baylor University, University of Colorado – Boulder, Iowa State University, University of Kansas, Kansas State University, University of Missouri – Columbia, University of Nebraska – Lincoln, University of Oklahoma, Oklahoma State University, Texas A & M University – College Station, Texas Tech University, and University of Texas – Austin. *Id.*

34. *Id.* The Big East Conference consists of University of Cincinnati, University of Connecticut, University of Louisville, University of Pittsburgh, Rutgers—State University of New Jersey—New Brunswick, University of South Florida, Syracuse University, and West Virginia University. *Id.*

35. *Id.* The Big Ten Conference consists of University of Illinois—Champaign, Indiana University—Bloomington, University of Iowa, University of Michigan, Michigan State University, University of Minnesota—Twin Cities, Northwestern University, The Ohio State University, Pennsylvania State University, Purdue University, and University of Wisconsin—Madison. *Id.*

36. *Id.* Conference USA consists of University of Alabama at Birmingham, University of Central Florida, East Carolina University, University of Houston, Marshall University, University of Memphis, Rice University, Southern Methodist University, University of Southern Mississippi,

Conference,³⁷ Mountain West Conference,³⁸ Pacific-10 Conference,³⁹ Southeastern Conference,⁴⁰ Sun Belt Conference,⁴¹ and Western Athletic Conference.⁴² There are also three institutions that are not part of a conference that are included in the FBS.⁴³ These institutions are Notre Dame, U.S. Military Academy, and U.S. Naval Academy.⁴⁴

B. THE BCS

Unlike the NCAA, the BCS is not a governing body for college football or college football bowl games.⁴⁵ Rather, the BCS is an entity formed and managed by the eleven NCAA Division I FBS conferences and Notre Dame.⁴⁶ The BCS consists of five games: the Rose Bowl,⁴⁷ Fiesta Bowl,⁴⁸ Sugar Bowl,⁴⁹ Orange Bowl,⁵⁰ and the BCS Championship Game.⁵¹

University of Texas at El Paso, Tulane University, and University of Tulsa. *Id.*

37. NCAA.org, *supra* note 31. The Mid-American Conference consists of University of Akron, Ball State University, Bowling Green State University, University at Buffalo—the State University of New York, Central Michigan University, Eastern Michigan University, Kent State University, Miami University (Ohio), Northern Illinois University, Ohio University, Temple University, University of Toledo, and Western Michigan University. *Id.*

38. *Id.* The Mountain West Conference consists of Brigham Young University, Colorado State University, University of Nevada—Las Vegas, University of New Mexico, San Diego State University, Texas Christian University, U.S. Air Force Academy, University of Utah, and University of Wyoming. *Id.*

39. *Id.* The Pacific-10 Conference consists of University of Arizona, Arizona State University, University of California—Berkley, University of California—Los Angeles, University of Oregon, Oregon State University, University of Southern California, Stanford University, University of Washington, and Washington State University. *Id.*

40. *Id.* The Southeastern Conference consists of University of Alabama—Tuscaloosa, University of Arkansas—Fayetteville, Auburn University, University of Florida, University of Georgia, University of Kentucky, Louisiana State University, University of Mississippi, Mississippi State University, University of South Carolina—Columbia, University of Tennessee—Knoxville, and Vanderbilt University. *Id.*

41. *Id.* The Sun Belt Conference consists of Arkansas State University, Florida Atlantic University, Florida International University, University of Louisiana at Lafayette, University of Louisiana at Monroe, Middle Tennessee State University, University of North Texas, Troy University, Western Kentucky University. *Id.*

42. *Id.* The Western Athletic Conference consists of Boise State University, California State University—Fresno, University of Hawaii—Manoa, University of Idaho, Louisiana Tech University, University of Nevada, New Mexico State University, San Jose State University, and Utah State University. *Id.*

43. NCAA.org, *supra* note 31.

44. *Id.*

45. See Bowl Championship Series, BCS Governance, <http://www.bcsfootball.org/bcsfb/governance> (last visited Feb. 25, 2009).

46. *Id.*

47. CityCenter Co., 2010 Citi BCS National Championship Game: Tournament of Roses, <http://www.tournamentofroses.com/bcs> (last visited Feb. 25, 2009).

48. Fiesta Bowl, <http://www.fiestabowl.org> (last visited Feb. 25, 2009).

The goal of the BCS championship game is to match “the two top-rated teams in a national championship game and to create exciting and competitive match-ups between eight other highly regarded teams in four other games.”⁵² The BCS makes clear that it does not hold itself out to be a college football playoff.⁵³

IV. THE PROPOSED SOLUTIONS

As mentioned above, several politicians have submitted resolutions or bills to the House of Representatives to eradicate the perceived ills of the BCS systems. In April 2008, Representative Neil Abercrombie⁵⁴ sponsored a resolution proposing to denounce the BCS and require the House of Representatives to take additional action to bring about a playoff system.⁵⁵ Representative Abercrombie reintroduced his resolution on January 15, 2009, again calling for the House of Representatives to take action against the BCS.⁵⁶ This resolution has yet to be passed by the House of Representatives.⁵⁷

In December 2008, Representative Joe Barton⁵⁸ of Texas co-sponsored a bill with Representative Bobby Rush⁵⁹ of Illinois and Representative Michael McCaul⁶⁰ of Texas.⁶¹ The proposed bill, House Bill 7330, called the College Football Playoff Act of 2008⁶² would “prohibit the marketing, promotion, and advertising of a postseason game

49. Sugar Bowl, <http://www.nokiasugarbowl.com> (last visited Feb. 25, 2009).

50. OrangeBowl.org—The Official Site of the FedEx Orange Bowl Championship, <http://www.orangebowl.org> (last visited Feb. 25, 2009).

51. Fox Bowl Championship Series, *supra* note 45.

52. *Id.*

53. *Id.*

54. U.S. Congressperson Neil Abercrombie—1st District of Hawaii, <http://www.house.gov/abercrombie/index.shtml> (last visited Feb. 25, 2009).

55. H. R. 1120, 110th Cong. (2008), *available at* <http://www.thomas.gov> (last visited Feb. 25, 2009).

56. *See* H.R. Res. 68, 111th Cong. (2009), *available at* <http://www.thomas.gov/cgi-bin/query/z?c111:H.RES.68.>

57. *See id.*

58. Joe Barton Congressman—6th District of Texas, <http://joebarton.house.gov/Default.aspx> (last visited Feb. 24, 2009).

59. Congressman Bobby Rush—Serving Illinois’ 1st District, <http://www.house.gov/rush> (last visited Feb. 24, 2009).

60. Representative Michael McCaul, Proudly Serving the People of the 10th District of Texas, <http://www.house.gov/mccaul> (last visited Feb. 24, 2009).

61. Anna M. Tinsley, *Barton Calls Foul. Files Legislation to Get Rid of BCS*, STAR-TELEGRAM, Dec. 11, 2008, at A03.

62. H. R. 7330, 110th Cong. (2008), *available at* <http://www.thomas.gov/cgi-bin/query/z?c110:H.R.7330> (last visited Feb. 25, 2009).

as a 'national championship' football game, unless it is the result of a playoff system. Violations of the prohibition will be treated as violations of the Federal Trade Commission Act as an unfair or deceptive act or practice."⁶³ In January 2009, Representative Barton reintroduced the College Football Playoff Act of 2008 calling it the College Playoff Act of 2009, House Bill 390.⁶⁴ Both Acts call for the prohibition of a bowl game calling itself the championship game that is not the result of a single elimination playoff system to cease after January 31, 2011.⁶⁵

A couple of days later,⁶⁶ Representative Gary Miller⁶⁷ of California proposed the Championship Fairness Act of 2009, House Bill 599.⁶⁸ This bill calls for the creation of a playoff series within three years after the enactment of the bill.⁶⁹ This proposed bill would allow the BCS and other bowl games to continue, but its series must now include a playoff system.⁷⁰ However, to date neither of the bills have been passed.⁷¹ A review of each proposed bill will provide some insight on whether Congress will pass either bill.

V. HOUSE RESOLUTION 1120

House Resolution 1120 was submitted to the House of Representatives on April 17, 2008, and again on January 15, 2009, as House Resolution 68. The text of the resolution is as follows:

Supports the establishment of an NCAA Division I Football Bowl Subdivision Championship playoff system in the interest of fairness and to bring parity to all NCAA teams.

Whereas the National Collegiate Athletic Association ('NCAA') has examined establishing a Division I A National Championship Football

63. T Kyle King, *U.S. Representative Joe Barton Attacks Superficial Problem with Petty, Idiotic Hypocrisy*, DAWG SPORTS, Dec. 11, 2008, <http://www.dawgsports.com/2008/12/11/689138/u-s-representative-joe-bar>.

64. H.R. 390, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.390> (last visited Feb. 25, 2009).

65. Compare H.R. 7330, with H.R. 390.

66. H.R. 599, 111th Cong. (2009), was introduced on January 16, 2009, seven days after H.R. 390 was introduced.

67. U.S. Congressman Gary Miller, <http://garymiller.house.gov> (last visited Feb. 25, 2009).

68. H.R. 599.

69. *Id.*

70. *Id.*

71. See THOMAS (LIBRARY OF CONGRESS) H.R. 390, <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.390> (last visited Feb. 24, 2009) (stating latest major action 1/9/2009 referred to House committee); THOMAS (LIBRARY OF CONGRESS) H.R. 599, <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.599> (last visited Feb. 24, 2009) (stating latest major action 1/16/2009 referred to House committee).

playoff system;

Whereas in 1976, a proposal to establish an NCAA Division I A football championship was introduced to the NCAA Division I membership on the recommendation of a special committee that had studied the feasibility of a playoff;

Whereas in 1994, a blue-ribbon panel was formed to gather information regarding the viability of establishing an NCAA Division I A football championship;

Whereas in 1998 the Bowl Championship Series ('BCS') was established through an agreement between the Fiesta, Orange, Rose, and Sugar Bowls and the University of Notre Dame along with the Atlantic Coast, Big East, Big Ten, Big 12, Pacific 10 and Southeastern Athletic Conferences;

Whereas the Presidential Coalition for Athletics Reform was established in 2003 by the presidents of 46 nonautomatic qualifying schools in an aggressive effort to alter the system that governed postseason play in college football;

Whereas on September 4, 2003, the House Judiciary Committee held the oversight hearing, 'Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series';

Whereas on October 29, 2003, the Senate Judiciary Committee held an oversight hearing, 'BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field';

Whereas the BCS adopted regulations to include more teams following the mobilization of the Presidential Coalition for Athletics Reform and the congressional committee hearings;

Whereas on December 7, 2005, the House Energy and Commerce Committee held an oversight hearing, 'Determining a Champion on the Field: A Comprehensive Review of the BCS and Postseason College Football';

Whereas on February 1, 2008, the Georgia House of Representatives adopted, by a vote of 151 to 9, H. Res. 1034, recognizing the BCS system as 'dysfunctional' and urging the NCAA to implement a playoff system to determine a national champion in the sport of college foot;

Whereas all the regular season champions of the automatic BCS qualified conferences, the Atlantic Coast, Big East, Big Ten, Big 12, Pacific-10, and Southeastern Conferences, are ensured a berth in a BCS bowl game each year;

Whereas no more than 1 team from the nonautomatic qualified conferences, Conference USA, the Mid-American, Mountain West, Sun Belt, and Western Athletic Conferences, shall earn a BCS bowl game berth in any year;

Whereas the automatic BCS-qualified conferences received an average of \$25,500,000 in postseason revenue for the 2006 and 2007 postseason, and the nonautomatic qualified conferences received an average of \$5,000,000;

Whereas the postseason revenue earned provides an advantage to the automatic BCS qualified conferences in recruiting, retention, facility maintenance, and other athletic programs, as well as alumni relations;

Whereas the BCS system makes it highly unlikely that a nonautomatic BCS qualifying conference team will ever compete for the BCS National Championship and rarely able to play in a BCS bowl game;

Whereas legal scholars have debated whether or not the BCS constitutes an unreasonable restraint of trade, in violation of section 1 of the Sherman Antitrust Act under the Rule of Reason test, where the procompetitive benefits are weighed against the anticompetitive effects;

Whereas the Rule of Reason test also requires there be a feasible less restrictive alternative that alleviates some of the anticompetitive effects;

Whereas the declaration of the winner of the BCS Championship Game as National Champion has annually instigated heated debate about whether the victor is actually the best team in the NCAA;

Whereas various solutions to fairly determine a champion have been proposed and should be investigated;

Whereas including more teams and players in deciding the national champion leads to more competition and fairness for the student athletes and fans;

Whereas the NCAA administers 88 team championships in 23 sports for its member institutions, including postseason playoff systems for the Division I Football Championship Subdivision (formerly Division I AA), as well as Division II and III football; and

Whereas the NCAA Division I Football Bowl Subdivision (formerly Division I A) is currently the only major college sport without an NCAA championship: Now, therefore, be it

Resolved, That the House of Representatives—

- (1) rejects the BCS system as an illegal restraint of trade that violates the Sherman Anti-Trust Act;
- (2) demands the United States Department of Justice Antitrust Division investigate and bring appropriate action to have the BCS system declared illegal and require a playoff to determine a national champion; and
- (3) supports the establishment of an NCAA Division I Football Bowl

Subdivision Championship playoff system in the interest of fairness and to bring parity to all NCAA teams.⁷²

A. THE ANTITRUST DEBATE

The NCAA is no stranger to Sherman Antitrust Act violations. In fact, the NCAA has been a part of much litigation defending its eligibility rules and bylaws against antitrust scrutiny.⁷³ The NCAA has found itself on the winning and losing side of the antitrust debate. The most notable antitrust case is *NCAA v. Board of Regents of the University of Oklahoma*.⁷⁴ However, before *Board of Regents* there was *Hennessey v. NCAA*.⁷⁵

Hennessey dealt with the issue of whether the NCAA's bylaw limiting the number of assistant coaches for football and basketball violated antitrust laws.⁷⁶ The Court found that the rule actually passed antitrust scrutiny because the NCAA bylaws are designed to protect the competitive integrity of its member institutions.⁷⁷ The Court noted that because of the commercial nature of some of the NCAA activities antitrust laws did apply to the NCAA.⁷⁸

In *Board of Regents*, the United States Supreme Court held that the NCAA regulations controlling the television contracts for college football violated the Sherman Antitrust Act.⁷⁹ In *Board of Regents*, the Supreme Court refused to fully classify intercollegiate athletics as commercial activities.⁸⁰ Instead, the Court found that the consumption of intercollegiate athletics is a commercial product and the eligibility rules that govern that product are not commercial in nature.⁸¹ Because the eligibility rules were

72. H.R. Res. 68, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.RES.68>.

73. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984); *Hennessey v. NCAA*, 564 F.2d 1136, 1141 (5th Cir. 1977).

74. See *Bd. of Regents*, 468 U.S. at 117.

75. *Hennessey*, 564 F.2d at 1136.

76. *Id.*

77. *Id.* at 1153.

78. *Id.*

79. *Bd. of Regents*, 468 U.S. at 98–99.

80. *Id.* at 100–01.

81. *Id.* at 101–02. Consider this:

[T]he NCAA seeks to market a particular brand of football-college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be

not a commercial product, it did not fall under the purview of the Sherman Antitrust Act.⁸² Furthermore, the Court held that the regulations over the football television contracts were within the constraints of and violated the Sherman Antitrust Act.⁸³

In *McCormack v. NCAA*,⁸⁴ the Court further expounded upon the ruling that the NCAA eligibility rules were exempt from antitrust scrutiny. The NCAA eligibility rules were again under scrutiny because it restricted college athletes from being compensated for their participation in college athletics outside of scholarships.⁸⁵ The Court found:

That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs cannot prove any set of facts that would carry their antitrust claim and that the motion to dismiss was properly granted.⁸⁶

Nonetheless, it seems that an antitrust challenge to the NCAA eligibility rules will not prevail.⁸⁷ In *Banks v. NCAA*, a former college player challenged the NCAA's no-draft⁸⁸ and no-agent⁸⁹ rules when the NCAA denied him the ability to play collegiate sports after failing to be selected in the NFL draft.⁹⁰ Again, the Court held that the NCAA eligibility rules did not violate the Sherman Antitrust Act.⁹¹

In *Law v. NCAA*, the Court held that the NCAA violated the Sherman Antitrust Act.⁹² The NCAA enacted a bylaw restricting the earnings of

destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as precompetitive.

Id.

82. *Id.* at 107–08.

83. *Id.* at 98–99.

84. *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir.1988).

85. *Id.* at 1344–45.

86. *Id.* at 1345.

87. *See United States v. Walters*, 711 F. Supp. 1435, 1441 (N.D. Ill. 1989).

88. *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1083–84 (7th Cir. 1992). “Rule 12.2.4.2, the ‘no-draft’ rule, provides that ‘[a]n individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport. . . .’ Rule 12.3.1, the ‘no-agent’ rule, states: ‘An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.’” *Id.* (alteration and omission in original).

89. *Id.*

90. *See id.* at 1086.

91. *Id.* at 1087–88.

92. *Law v. Nat'l Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1410 (D. Kan. 1995).

coaches that was challenged by a group of coaches as a violation of the Sherman Antitrust Act.⁹³ The Court held that:

Restricted Earnings Coach Rule specifically prohibits the free operation of a market responsive to demand and is thus inconsistent with the Sherman Act's mandates, it is not necessary for the Court to undertake an extensive market analysis to determine that the rule has had an anticompetitive effect on the market for coaching services.⁹⁴

The Restricted Coaches Earning Rule clearly concerned commerce and in no way related to the protected eligibility rules.⁹⁵ Thus, the NCAA was required to dissolve the Restricted Coaches Earning Rule.⁹⁶

B. THE BCS AND THE ANTITRUST DEBATE⁹⁷

The BCS has been verbally challenged on antitrust violations since its inception.⁹⁸ Had Congress thought that the NCAA, and specifically the BCS, violated the Sherman Antitrust Act, then such a determination could have been found during the September 2003 House Judiciary Committee hearing.⁹⁹ Later in October 2003, the Senate Judiciary Committee held another hearing reviewing the BCS.¹⁰⁰ This was yet another opportunity where Congress could have determined that the BCS violated the Sherman Antitrust Act, but failed to do so.¹⁰¹ Based on the lack of Congressional determination or other legal action, it can only be determined that the BCS

93. *Id.* at 1405.

94. *Id.*

95. *Id.* at 1409.

96. *Id.* at 1410.

97. Due to the similarities between the NCAA and the BCS, the BCS should rely on antitrust rulings in favor of the NCAA to prevail on an antitrust challenge should one arise. See Jason R. Corns, *Pigskin Paydirt: The Thriving of College Football's Bowl Championship Series in the Face of Antitrust Law*, 39 TULSA L. REV. 167, 182 (2003). It is worth considering whether the BCS rules actually concern eligibility rules or football as a commercial product. See Katherine McClelland, *Should College Football's Currency Read "In BCS We Trust" or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series*, 37 TEX. TECH L. REV. 167, 168–69 (2004). The BCS does not itself administer any bowl games; it reorganized five bowl games to be the more important ones and determine the eligibility for those FBS members chosen to play in the bowl games. See, e.g., Bowl Championship Series, *supra* note 9.

98. Other than major criticism from the media and individuals, there has not been a formal court case alleging that the BCS violates the Sherman Antitrust Act. See Beth Rosenberg, *Conferences Continue Postseason Football Talks: Division I-A Leagues Search for Solutions*, NCAA.ORG, Nov. 24, 2003, <http://www.ncaa.org/wps/ncaa?ContentID=10651>.

99. H.R. Res. 68, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.RES.68>.

100. *Id.*

101. *Id.*

system does not violate the Sherman Antitrust Act. Therefore, because the BCS does not violate the Sherman Antitrust Act, it seems highly unlikely that Congress will pass the resolution.

VI. COLLEGE FOOTBALL PLAYOFF ACT OF 2008/2009

On January 9, 2009, House Bill 390 was submitted to the House of Representatives.¹⁰² The text of the resolution is as follows:

To prohibit, as an unfair and deceptive act or practice, the promotion, marketing, and advertising of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “College Football Playoff Act of 2009”.

SEC. 2. FINDINGS.

Congress finds that—

- (1) college football games, including post-season football games, depend upon competition between college and university teams traveling in interstate commerce;
- (2) the competitions involve and affect interstate commerce and are therefore within Congress’s constitutional authority to regulate;
- (3) the total economic impact in the host cities from the 5 Bowl Championship Series (BCS) games in January 2008 was estimated at more than \$1.2 billion;
- (4) collegiate athletic conferences whose teams participate in each BCS bowl game share \$17.5 million in revenue;
- (5) the BCS system recognizes the important economic impact to a city hosting the BCS championship game and therefore rotates it among cities; and
- (6) the colleges and universities whose teams participate in the post-season football bowls experience significant financial windfall including increased applications for enrollment, recruiting advantages, increased alumni donations, and increased corporate sponsorship that provides a competitive advantage over universities whose teams are ineligible or statistically at a disadvantage from the BCS bowl competitions because of their conference affiliation.

102. H.R. 390, 111th Cong. (2009), *available at* <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.390>.

SEC. 3. PROHIBITED ACT.

(a) Promotion of Game- It shall be unlawful for any person to promote, market, or advertise a post-season National Collegiate Athletic Association (NCAA) Division I Football Bowl Subdivision (FBS) football game as a championship or national championship game, unless the game is the final game of a single elimination post-season playoff system for which all NCAA Division I FBS conferences and unaffiliated Division I FBS teams are eligible.

(b) Merchandising- It shall be unlawful for any person to sell, market, or advertise any merchandise related to a post-season NCAA Division I FBS football game that refers to the game as a championship or national championship game, unless the game is the final game of a single elimination post-season playoff system for which all NCAA Division I FBS conferences and unaffiliated Division I FBS teams are eligible.

SEC. 4. ENFORCEMENT BY THE FEDERAL TRADE COMMISSION.

(a) Enforcement Authority- A violation of section 3 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)). The Federal Trade Commission shall enforce this Act in the same manner, by the same means, and with the same jurisdiction as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act.

(b) Regulations- The Federal Trade Commission may promulgate regulations or issue interpretative guidelines as necessary to implement and carry out this Act.

SEC. 5. EFFECTIVE DATE.

The prohibition in section 3 shall apply to any post-season NCAA Division I FBS football game that occurs after January 31, 2011.¹⁰³

A. FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act gives the Federal Trade Commission the power to declare unlawful “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”¹⁰⁴ Representative Barton finds that the national championship as determined through the BCS is a deceptive practice

103. *Id.*

104. 15 U.S.C. § 45(a)(1) (2009). There are other powers granted by this act, but this is the power that most concerns the bill at issue.

because the championship is not determined by a single elimination playoff system.¹⁰⁵ It seems as if there may be some truth to Representative Barton's contention because all other collegiate sports national champions are determined by a playoff system.¹⁰⁶

The other side of this debate is that the national champion is determined by the actual participants in the FBS.¹⁰⁷ The BCS rankings are determined by "the Harris Interactive College Football Poll, USA Today Coaches Poll and computer rankings each compris[ing] one-third of the BCS Standings."¹⁰⁸ At the end of the season, the two top-ranking teams play for the national championship.¹⁰⁹ Because most playoff systems are designed to give the Number One and Number Two teams the best opportunity to make it to the championship, then the BCS just significantly streamlines that process.¹¹⁰ The definition of championship is a contest used to determine a champion.¹¹¹ A champion is defined as "a winner of first prize or first place in competition."¹¹² Nowhere does it state that a single elimination playoff is needed to be a champion. Therefore, BCS falls within the purview of this definition of championship.

Setting aside the challenges that this bill is overbroad, it can be easily complied with by the NCAA and the BCS if this bill is passed into law. The BCS must refrain from calling the actual game *the BCS National Championship game* and the winner *the National Champion*. Nothing in the bill prohibits post season bowl play or the games within the BCS series. By changing its name, yet again, maybe this time to Football Bowl Series, the winner of the bowl game would be the Number One FBS team in the country. Although the FBS may be a less attractive name, the BCS could continue to determine the number one team in college football as it has done since 1998.

This bill, as written, does little to actually compel change in the college football playoff system. Other than a name change, the newly enacted bill would do little to deter the current bowl system. It might actually provide some stimulus to the economy because branding marks

105. H.R. 390.

106. *See id.*

107. Bowl Championship Series, BCS Selection Procedures, <http://www.bcsfootball.org/bcsfb/eligibility> (last visited Feb. 26, 2009).

108. *Id.*

109. *Id.*

110. *See id.*

111. Merriam-Webster Online Dictionary, Championship, <http://www.merriam-webster.com/dictionary/championship> (last visited Feb. 26, 2009).

112. *Id.*

and logos, advertising plans, etc., would need to be changed to comply with the bill if enacted. However, it would eliminate the title of college football national champion until further notice. College football would then be the only sport without an official champion each year. The elimination of the designation *champion* does seem a bit overbroad.

VII. CHAMPIONSHIP FAIRNESS ACT OF 2009

The Championship Fairness Act of 2009 was submitted to the House of Representatives on January 16, 2009; it reads as follows:

To prohibit the receipt of Federal funds by any institution of higher education with a football team that participates in the NCAA Division I Football Bowl Subdivision, unless the national championship game of such Subdivision is the culmination of a playoff system.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Championship Fairness Act of 2009’.

SEC. 2. PROHIBITION.

(a) Prohibition- An institution of higher education shall not be eligible to receive any Federal funds for any fiscal year during which the institution has a football team that participates in the National Collegiate Athletic Association (NCAA) Division I Football Bowl Subdivision, unless the national championship game of such Subdivision is the culmination of a playoff system.

(b) Definitions- In this Act:

(1) INSTITUTION OF HIGHER EDUCATION- The term ‘institution of higher education’ has the meaning given such term in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002).

(2) PLAYOFF SYSTEM- The term ‘playoff system’ means a system by which the national championship game of the NCAA Division I Football Bowl Subdivision is the final game of a single elimination post-season playoff system for which all NCAA Division I Football Bowl Subdivision conferences and unaffiliated NCAA Division I Football Bowl Subdivision teams are eligible.

SEC. 3. RULES OF CONSTRUCTION.

(a) Other Sports Not Affected- Nothing in this Act shall be construed to affect the post-season playoff system of any sport, division, subdivision, or athletic program other than the NCAA Division I Football Bowl Subdivision.

(b) Bowl Games Permitted- Nothing in this Act shall be construed to

prevent—

(1) a playoff system that incorporates the post-season NCAA Division I Football Bowl Subdivision bowl games established before the date of the enactment of this Act, including names, sponsorships, and locations for such bowl games; or

(2) bowl games carried out independent of the playoff system required by this Act, including bowl games established before, on, and after the date of the enactment of this Act.

SEC. 4. EFFECTIVE DATE.

The prohibition in section 2(a) shall apply to any institution of higher education with a football team participating in an NCAA Division I Football Bowl Subdivision game on or after the date that is 3 years after the date of the enactment of this Act.¹¹³

A. LOSS OF FEDERAL FUNDING AND OTHER TITLE IX IMPLICATIONS

Proponents of the BCS think it would be very hard to administer a Division I FBS football playoff. One clear contradiction to this argument is that the NCAA administers a playoff for the Division I FCS.¹¹⁴ Division I FCS is about the same size as the FBS, boasting 119 member institutions.¹¹⁵ Division I FBS has 120 member institutions.¹¹⁶ There are fourteen conferences in the FCS: Big Sky Conference,¹¹⁷ Big South Conference,¹¹⁸ Colonial Athletic Conference,¹¹⁹ Ivy Group,¹²⁰ Metro Atlantic Athletic

113. H.R. 599, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.599>.

114. NCAA.com, 2008 NCAA Division I Football Championship Bracket, http://www.ncaa.com/brackets/2008/ncaa_bracket_FCS_football.html (last visited Mar. 16, 2009).

115. NCAA.org, Football Championship Subdivision, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=0&division=1AA&sport=MFB> (last visited Feb. 26, 2009).

116. NCAA.org, Football Bowl Subdivision, <http://web1.ncaa.org/onlineDir/exec/sponsorship?sortOrder=1&division=1A&sport=MFB> (last visited Feb. 26, 2009).

117. The Big Sky Conference consists of California State University, Eastern Washington University, Idaho State University, University of Montana, Montana State University-Bozeman, Northern Arizona University, University of Northern Colorado, Portland State University, and Weber State University. NCAA.org, *supra* note 115.

118. The Big South Conference consists of Charleston Southern University, Coastal Carolina University, Gardner-Webb University, Liberty University, Stony Brook University, and Virginia Military Institute. *Id.*

119. The Colonial Athletic Association consists of University of Delaware, Hofstra University, James Madison University, University of Maine—Orono, University of Massachusetts—Amherst, University of New Hampshire, Northeastern University, University of Rhode Island, University of Richmond, Towson University, Villanova University, and College of

Conference,¹²¹ Mid-Eastern Athletic Conference,¹²² Missouri Valley Football Conference,¹²³ Northeast Conference,¹²⁴ Ohio Valley Conference,¹²⁵ Patriot League,¹²⁶ Pioneer Football League,¹²⁷ Southern Conference,¹²⁸ Southland Conference,¹²⁹ and the Southwestern Athletic Conference.¹³⁰ In addition to the fourteen conferences, there are five independent members in the FCS: California Polytechnic State University, University of California-Davis, Iona College, Savannah State University, and Southern Utah University.¹³¹ However, the Division I FCS playoff only consists of sixteen teams. The FCS clearly shows that administering a college football playoff series is possible, but is that really in the best interest of the FBS members?

William and Mary. *Id.*

120. The Ivy Group consists of Brown University, Columbia University—Barnard College, Cornell University, Dartmouth College, Harvard University, University of Pennsylvania, Princeton University, and Yale University. *Id.*

121. The Metro Atlantic Athletic Conference consists of Marist College. *Id.*

122. The Mid-Eastern Athletic Conference consists of Bethune—Cookman University, Delaware State University, Florida A&M University, Hampton University, Howard University, Morgan State University, Norfolk State University, North Carolina A&T State University and South Carolina State University. *Id.*

123. The Missouri Valley Football Conference consists of Illinois State University, Indiana State University, Missouri State University, North Dakota State University, University of Northern Iowa, South Dakota State University, Southern Illinois University at Carbondale, Western Illinois University, and Youngstown State University. NCAA.org, *supra* note 115.

124. The Northeast Conference consists of University at Albany, Central Connecticut State University, Duquesne University, Monmouth University, Robert Morris University, Sacred Heart University, Saint Francis University (Pennsylvania), and Wagner College. *Id.*

125. The Ohio Valley Conference consists of Austin Peay State University, Eastern Illinois University, Eastern Kentucky University, Jacksonville State University, Murray State University, Southeast Missouri State University, Tennessee State University, Tennessee Technological University, and University of Tennessee at Martin. *Id.*

126. The Patriot League consists of Bucknell University, Colgate University, Fordham University, Georgetown University, College of the Holy Cross, Lafayette College, and Lehigh University. *Id.*

127. The Pioneer Football League consists of Butler University, Campbell University, Davidson College, University of Dayton, Drake University, Jacksonville University, Morehead State University, University of San Diego, and Valparaiso University. *Id.*

128. The Southern Conference consists of Appalachian State University, The Citadel, Elon University, Furman University, Georgia Southern University, Samford University, University of Tennessee at Chattanooga, Western Carolina University, and Wofford College. *Id.*

129. The Southland Conference consists of McNeese State University, Nicholls State University, Northwestern State University, Sam Houston State University, Southeastern Louisiana University, Stephen F. Austin State University, and Texas State University-San Marcos. NCAA.org, *supra* note 115.

130. The Southwestern Athletic Conference consists of Alabama A&M University, Alabama State University, Alcorn State University, University of Arkansas—Pine Bluff, Grambling State University, Jackson State University, Mississippi Valley State University, Prairie View A&M University, Southern University, and Baton Rouge Texas Southern University. *Id.*

131. *Id.*

Contrary to popular belief, there is no payout for Division I FCS teams that participate in the playoff series.¹³² Some teams can actually lose money during the playoff series¹³³ because there is a financial guarantee that accompanies hosting a playoff game.¹³⁴ Consequently, there is no financial benefit to participating in the FCS playoff series.

This begs the question: Where would all the bowl money go if there were no postseason bowl games?¹³⁵ Changing the bowl format would eliminate \$408,000¹³⁶ in revenue to the NCAA and more than \$68 million¹³⁷ to participating schools. More importantly, it is not clear how the FBS schools would support their athletic budget and meet Title IX requirements¹³⁸ without the infusion of postseason bowl cash.

By eliminating a major source of revenue, it poses the question of what athletic departments will do now to balance the budget. Compliance with Title IX requirements might even lead to the elimination of some sports, which could also require a change in status with the NCAA.¹³⁹ It is unlikely that the proponents of change in the administration of the BCS would welcome their alma mater being reclassified to a Division II or III

132. John O' Connor, *Afterglow of Richmond's FCS Championship Continues*, RICH. TIMES-DISP., Jan. 12, 2009, http://www.timesdispatch.com/rtd/sports/college/college_football/article/URFBGAT12_20090112-202617/176153.

133. *Id.*

134. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA FOOTBALL: 2008 DIVISION I FOOTBALL CHAMPIONSHIP HANDBOOK 7 (2008) [hereinafter 2008 NCAA HANDBOOK], available at http://web1.ncaa.org/web_files/champ_handbooks/football/2008/1_football_handbook.pdf.

135. Bowl Championship Series, *supra* note 9 (“Before the BCS was created, conferences without automatic berths in the ‘major’ bowl games received no revenue from those games. In the first nine years of the BCS system, more than \$70 million was distributed to conferences that do not have an annual automatic berth in the system.”).

136. The National Collegiate Athletic Association Application for License to Conduct Postseason Football Contest 2 (2008) [hereinafter Bowl Application], available at <http://www.ncaa.org/wps/wcm/connect/resources/file/ebc9f09a3695f5/FORMplicenseapp3.10.08.pdf?MOD=AJPERES>. This number represents the total amount of licensing fees paid to the NCAA annually by the current 34 bowl associations. *Id.*

137. Football Bowl Association, 2008-2009 Bowl Schedule, <http://www.footballbowlassociation.com/bowls.html> (last visited Feb. 27, 2009) [hereinafter FBS Schedule]. This figure is based upon the sixty-eight participating FBS institutions receiving the NCAA required \$1 million for participating in a postseason bowl game. *Id.*

138. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979) (“Section 901(a) of Title IX of the Education Amendments of 1972 provides: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

139. NCAA.org, NCAA Title IX Resource Center, <http://www.ncaa.org/wps/ncaa?ContentID=1488> (last visited Mar. 16, 2009).

member.¹⁴⁰ Instead, it is possible that an FBS member may decide to just play in a bowl game and get the guaranteed money rather than play in a playoff game where there would be seemingly no additional funds gained from participation.

As written, this bill does not solve the problem of the BCS. Rather, it adds a further complicated problem of making sure the school is Title IX compliant without the possibility of the influx of bowl season cash. Although the bill as written allows for the continuation of the postseason bowl games, it seems highly unlikely that a playoff system can be accomplished through bowl games. Because there is a large payout to bowl participants, it seems highly unfair that one FBS school would be able to participate in more than one bowl.¹⁴¹ This would condense the payout pool significantly. Such an action would undoubtedly result in antitrust objections—and the elimination of sports too—as a result of becoming Title IX compliant.

VIII. POSTSEASON BOWL GAMES OR PLAYOFF

One reason why these member institutions are content with the system is that the NCAA mandates that every bowl game pay its participant school at least \$1 million.¹⁴² In total, there are thirty-four college bowl games including the five featured in the BCS, making the payout at least \$68 million yearly to FBS-institutions.¹⁴³ Additionally, the NCAA must approve every bowl game played in by its member institutions.¹⁴⁴ The NCAA grants its approval via a formal application process complete with a \$12,000 license fee.¹⁴⁵ This licensing fee is paid to the NCAA annually.¹⁴⁶

140. The author notes that there is nothing wrong with schools in Divisions II or III, but a change in athletic status could decrease donors, recruiting ability, etc.

141. NCAA DIVISION I MANUAL, *supra* note 22, at 242–43. Current NCAA bylaws Rule 17.11.5.2 (e) provides that a FBS institution can only play in one post season bowl game. *Id.*

142. Bowl Application, *supra* note 136, at 1.

143. FBS Schedule, *supra* note 137. The thirty-four Bowl games that were held in the 2008–09 season are the Eagle Bank Bowl, New Mexico Bowl, St. Petersburg Bowl, Pioneer Las Vegas Bowl, R + L Carriers New Orleans Bowl, San Diego County Credit Union Poinsettia Bowl, Sheraton Hawaii Bowl, Motor City Bowl, Meineke Car Care Bowl, Champs Sports Bowl, Emerald Bowl, Independence Bowl, Papajohns.com Bowl, Valero Alamo Bowl, Roady's Humanitarian Bowl, Texas Bowl, Pacific Life Holiday Bowl, Bell Helicopter Armed Forces Bowl, Brut Sun Bowl, Gaylord Hotels Music City Bowl, Insight Bowl, Chick-fil-A Bowl, Outback Bowl, Capital One Bowl, Konica Minolta Gator Bowl, Rose Bowl presented by Citi, FedEx Orange Bowl, AT&T Cotton Bowl, AutoZone Liberty Bowl, Allstate Sugar Bowl, International Bowl, Tostitos Fiesta Bowl, GMAC Bowl, and the FedEx BCS National Championship. *Id.*

144. See Bowl Application, *supra* note 136, at 1.

145. *Id.* at 1–7.

146. *Id.* at 2.

In addition to the required participation fee paid to the member institutions, the NCAA requires that the bowl game have a title sponsor and a television contract, which can be an additional source of revenue for participants.¹⁴⁷ Although the NCAA refuses to allow any bowl game to be affiliated with the NCAA's logos, marks, or names,¹⁴⁸ and does not administer any of the post season bowl games,¹⁴⁹ it does ensure that its member institutions profit from post season play.¹⁵⁰

The NCAA actually allows any institution to join the FBS division.¹⁵¹ All it would have to do is meet a few simple requirements.¹⁵² The institution must have eight all male or mixed team sports and eight all female sports.¹⁵³ Other combinations of this rule include seven all male or mixed team sports and nine all female sports or six all male or mixed team sports and eight all female sports.¹⁵⁴ Institutions must play at least 60% of their games against FBS members and at least five home games must be against other FBS members.¹⁵⁵ The institution must have an "average of 15,000 in actual or paid attendance for home football games over a rolling two-year period."¹⁵⁶ In addition to meeting the Division I financial aid requirements,¹⁵⁷ the institution must "a) provide an average of at least 90% of permissible maximum number of football grant in aid over rolling 2 year period and b) annually offer a minimum of 200 athletic grant-in-aid or spend 4 million dollars on athletic grants in aid annually."¹⁵⁸ With the financial requirements of the FBS members, it is clear how the money received from participating in post season bowl games can help achieve these requirements.¹⁵⁹

147. *Id.*

148. *Id.* at 1–2.

149. College Football FAQs, *supra* note 12.

150. *See* Bowl Application, *supra* note 136, at 1.

151. Institutions must first meet the criteria to become an NCAA Division I school. NCAA DIVISION I MANUAL, *supra* note 22, at 287; *see also* NCAA.org, NCAA Membership Requirements,

http://www.ncaa.org/wps/wcm/connect/resources/file/eba6994a0d770f7/chart_memreq.pdf?MOD=AJPERES (last visited Mar. 16, 2009).

152. It should be noted that these requirements comply with Title IX rules. *See* NCAA.org, Gender Equity / Title IX Important Facts, <http://www.ncaa.org/wps/ncaa?ContentID=7498> (last visited Mar. 16, 2009).

153. NCAA DIVISION I MANUAL, *supra* note 22, at 323.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. As will be discussed later, participants in bowl games receive significant financial rewards. *See infra* text accompanying note 172.

The answer to why a Division I FBS playoff system will not work is expalined directly in the Division I FCS playoff series. Let’s examine the Division I FCS Championship in greater detail. There are eight conferences that get an automatic bid to the FCS playoff, which are the Big Sky Conference, Colonial Athletic Association, Mid-Eastern Athletic Conference, Missouri Valley Football Conference, Ohio Valley Conference, Patriot League, Southern Conference, and the Southland Conference.¹⁶⁰ The other eight teams are chosen by the Division I FCS committee.¹⁶¹

The selection criteria for the Division I FCS playoff team selection leaves much to be desired.¹⁶² Notably, the FCS selection committee uses computerized ratings to poll the coaches in its deliberations.¹⁶³ These two methods comprise two thirds of the BCS selection criteria.¹⁶⁴ Although it appears acceptable to apply the rankings in selecting teams for the FCS Championship, it is contradictory to submit the BCS team selection process

160. 2008 NCAA HANDBOOK, *supra* note 134, at 12.

161. *Id.* at 11.

162. *See id.* at 11–12.

The selection criteria is as follows:

At-large teams shall be selected by the Division I football committee, assisted by four regional advisory committees that serve in an advisory capacity only.

The following principles shall apply when selecting at-large teams:

1. The committee shall select the best teams available on a national at-large basis to complete the bracket;
2. There is no limit to the number of teams the committee may select from one conference;
3. The won-lost record of a team will be scrutinized to determine a team’s strength of schedule; however, less than seven Division I wins may place a team in jeopardy of not being selected;
4. The committee may give more consideration to those teams that have played all Division I opponents; and
5. If the team of a committee member is under consideration, the member may not vote for the team being considered and will not be in the room when a vote is taken.
6. For those conferences that qualify for automatic qualification but do not receive it, a guaranteed at-large position shall be awarded in any year in which its conference champion team meets all of the following conditions:
 - a. Team wins a minimum of eight Division I games during the season;
 - b. Team wins a minimum of two nonconference games against Division I teams representing a conference that has earned an automatic qualification in that year; and
 - c. Team finishes the season ranked 16 or higher in an average of the last regular season media, coaches and/or computer polls (which will be determined by the committee on an annual basis). For 2008, the media poll will be the Sports Network Poll, the coaches poll will be the FCS Coaches poll and the computer poll will be a variation of the Gridiron Power Index – using only the following computer rankings: The Massey Ratings, Wolfe Rankings, Ashburn Rankings, Self Rankings and the Laz Index.

Id.

163. *Id.*

164. *Id.*

to a stricter level of scrutiny.

If the FBS is to implement a playoff system like the FCS, it would still face the same sorts of challenges. Currently, the FCS uses ten people to decide who plays in the playoffs,¹⁶⁵ and the BCS has included 183 people/entities¹⁶⁶ in the decision making process.¹⁶⁷ There is a drastic difference between thirteen people electing their favorites (regardless of merit) to the playoffs and 183 interested people, including team coaches, selecting the championship teams. Because it is inherently difficult for 183 parties to agree on one team, it just makes that process seem fair. Yet the BCS continues to be scrutinized for its selection process of the top two teams.¹⁶⁸

Another bonus is the thirty-four post season bowl games provides sixty-eight FBS institutions the opportunity to participate in a postseason, whereas the FCS only allows sixteen.¹⁶⁹ Not many FBS schools are going to be willing to be left out of the fun. Additionally, if an FBS institution cannot compete for one of the coveted sixteen playoff spots, then it may find that there is no need to continue meeting the NCAA FBS requirements and eliminate some sports as a response.

IX. CONCLUSION

The most important point that all parties to this debate are overlooking is that the players are college students. The NCAA is there to promote, but also to protect, the student-athlete.¹⁷⁰ The bowl season is already long enough and it now ends in early January.¹⁷¹ Students are not paid in general and do not receive any additional compensation to participate in the post season bowl games.¹⁷²

165. 2008 NCAA HANDBOOK, *supra* note 134, at 8 (Sports Committee consists of 10 people). The Sports Committee is “assisted by four regional advisory committees that serve in an advisory capacity only” and that has 24 members. *Id.* at 9–10.

166. See Bowl Championship Series, BCS Standings, <http://www.bcsfootball.org/bcsfb/standings> (last visited Mar. 16, 2009). Computer rankings—6, USA Today Coaches Poll—63 participants, Harris Interactive College Football Poll—114 participants. *See id.*

167. *See id.*

168. See Jessica Bliss, *BCS System Gets Coach’s Scrutiny*, THE TENNESSEAN, Jan 13, 2009, <http://www.tennessean.com/article/20090113/SPORTS06/901130357>.

169. See NCAA.org, Behind the Blue Disk: Football Postseason – FCS, Division II and Division III, <http://www.ncaa.org/wps/ncaa?ContentID=37330> (last visited Sept. 26, 2008).

170. See NCAA.org, *supra* note 27.

171. See Bowl Championship Series, *supra* note 9.

172. See Bowl Application, *supra* note 136, at 7. Students are given gifts for participation, but gifts are not to exceed \$500. *See id.*

The reality is that eliminating the post season bowls would result in the elimination of hundreds of jobs and decrease the economic impact to numerous American cities. This is in addition to the ill financial effects that it would have on the FBS-members' budget, which could result in the elimination of jobs at colleges and universities across the nation. According to Representative Abercrombie, the bowl season represents an illegal restraint on trade.¹⁷³ Unfortunately, in these reeling economic times, preserving the BSC in its current form is the best option for the economy.

There is no solution yet to the BCS outside of possibly revising the ranking system. Neither of the proposed resolutions or bills will provide any clarity on the BCS administration. But it would undoubtedly assist in the unraveling of an already unstable economy.

173. See H.R. Res. 68, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.RES.68>.