

# FLAGRANT FOUL OR FLAGRANT FRAUD? THE IMPLICATIONS OF HONEST SERVICES FRAUD PROSECUTIONS OF COLLEGE BASKETBALL COACHES ON STUDENT-ATHLETES

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# FLAGRANT FOUL OR FLAGRANT FRAUD? THE IMPLICATIONS OF HONEST SERVICES FRAUD PROSECUTIONS OF COLLEGE BASKETBALL COACHES ON STUDENT-ATHLETES

## I. INTRODUCTION

On September 26, 2017, the acting United States Attorney for the Southern District of New York unsealed complaints indicting ten individuals directly or indirectly affiliated with men's college basketball: four men's college basketball assistant coaches, two Adidas executives, an Amateur Athletic Union (AAU) high-school-aged team program director, a financial advisor, an aspiring sports agent, and an Atlanta clothier.<sup>1</sup> The prosecution later dropped the charges against the AAU program director.<sup>2</sup> The remaining individual defendants (collectively "Defendants") were charged in two separate, but related, schemes.<sup>3</sup> In the first scheme, financial advisors paid the four assistant college coaches for the coaches' assistance in securing student-athletes at their colleges as clients.<sup>4</sup> In the secondary scheme, the four assistant college coaches facilitated bribes on behalf of the two Adidas executives to high school athletes ("prospective student-athletes") in exchange for the prospective student-athletes' commitments to both attend those colleges and then sign apparel deals with Adidas upon going professional.<sup>5</sup>

These bribed payments to prospective student-athletes violated National Collegiate Athletic Association (NCAA) rules and made the players ineligible for competition.<sup>6</sup> The Defendants were charged with honest services fraud, conspiracy, bribery, and several other corruption-related crimes.<sup>7</sup> The federal

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1. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY ANNOUNCES THE ARREST OF 10 INDIVIDUALS, INCLUDING FOUR DIVISION I COACHES, FOR COLLEGE BASKETBALL FRAUD AND CORRUPTION SCHEMES (2017), 2017 WL 4278725.

2. Mark Schlabach, *Ex-Adidas Execs, Agent Want Federal Charges Dropped in Corruption Case*, ESPN (Feb. 14, 2018), [http://www.espn.com/mens-college-basketball/story/\\_/id/22443508/former-adidas-executives-sports-agent-seek-federal-charges-dismissed-men-basketball-corruption-case](http://www.espn.com/mens-college-basketball/story/_/id/22443508/former-adidas-executives-sports-agent-seek-federal-charges-dismissed-men-basketball-corruption-case).

3. See Complaint at 9 n.1, *United States v. Person*, 1:17-mj-07118 (S.D.N.Y. Sept. 25, 2017).

4. See *id.* at 3.

5. See Complaint at 6, *United States v. Gatto*, 1:17-mj-07120 (S.D.N.Y. Sept. 25, 2017), 2017 WL 4307459.

6. See generally NCAA, 2018–19 NCAA DIVISION I MANUAL § 12 (2018) [hereinafter NCAA DIV. I MANUAL], <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-a-vailable-august-2018.aspx> (follow "Download Now").

7. See U.S. DEP'T OF JUSTICE, *supra* note 1.

prosecutors asserted that the college coaches' actions defrauded their employers of the right to their honest services by knowingly making student-athletes ineligible and thus allowing the colleges to expend scholarships on student-athletes it may not have otherwise.<sup>8</sup> The federal prosecutors further asserted that the college coaches' schemes also opened the colleges to potential NCAA-imposed penalties including fines, forced return of revenue distributed from past NCAA events involving the potentially ineligible student-athletes, and disqualification from future NCAA events.<sup>9</sup> The federal prosecutors contended that each of these penalties clearly created a risk of economic harm to the colleges by causing either direct or indirect financial loss.<sup>10</sup>

The prosecutions have already yielded results.<sup>11</sup> In October 2018, a jury convicted the noncoach Defendants of fraud for their roles in the scheme.<sup>12</sup> In March 2019 the judge then sentenced each of these noncoach Defendants to imprisonment for terms ranging from six to nine months and also to pay restitution.<sup>13</sup> Additionally, three of the Defendant coaches (Tony Bland, Lamont Evans, and Book Richardson) agreed to plea deals that drastically reduced the prison terms they otherwise may have faced.<sup>14</sup> For example, Bland pleaded guilty to one count of federal funds bribery in exchange for probation,<sup>15</sup> as opposed to the up to eighty years he may have faced if convicted.<sup>16</sup> The remaining Defendant coach, Chuck Person, faces trial in June 2019.<sup>17</sup> Though commentators have cast doubt about the legitimacy of these prosecutions and whether the underlying actions are criminal,<sup>18</sup> this Note will explain why these commentators are mistaken.<sup>19</sup> Though it is not illegal for a coach to break NCAA rules by paying a player, it is illegal for a coach to take a bribe to do so. Significantly, the implications of these prosecutions extend far beyond

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8. *See id.*

9. *See id.*

10. *See id.*

11. *See* Kaelen Jones, *Gatto, Code and Dawkins Found Guilty on All Counts in College Basketball Corruption Trial*, SPORTS ILLUSTRATED (Oct. 24, 2018), <https://www.si.com/college-basketball/2018/10/24/ncaa-trial-verdict-fbi-james-gatto-christian-dawkins>.

12. *Id.*

13. Marc Tracy, *Defendants Receive Lenient Sentences in College Basketball Corruption Case*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/sports/college-basketball-scandal.html>.

14. *Lamont Evans Pleads Guilty to Bribery Charge*, ESPN (Jan. 31, 2019), [http://www.espn.com/mens-college-basketball/story/\\_/id/25885440/lamont-evans-pleads-guilty-bribery-charge](http://www.espn.com/mens-college-basketball/story/_/id/25885440/lamont-evans-pleads-guilty-bribery-charge).

15. Kaelen Jones, *Former USC Assistant Tony Bland Agrees to Plea Deal in College Basketball Bribery Case* (Dec. 20, 2018), <https://www.si.com/college-basketball/2018/12/20/ncaab-bribery-case-tony-bland-plea-deal-college-basketball>.

16. *See* U.S. DEP'T OF JUSTICE, *supra* note 1.

17. *See* ESPN, *supra* note 14.

18. *See, e.g.*, Michael A. McCann, *The 'Crime' of Paying College Basketball Stars: Form over Substance?*, HARV. L. REV. BLOG (Mar. 20, 2018), <https://blog.harvardlawreview.org/the-crime-of-paying-college-basketball-stars-form-over-substance/>; Matt Jones (@KySportsRadio), TWITTER (Oct. 24, 2018, 12:05 PM), <https://twitter.com/KySportsRadio/status/105517337670311168>.

19. *See infra* Part IV.

just college coaches and shoe company executives; particularly, the potential effects on student-athletes have gone relatively undiscussed.

This Note examines the reality that student-athletes risk prosecution for honest services fraud due to the growing movement to treat student-athletes as employees of their colleges and dispose of the NCAA's amateurism model. Many of the matters discussed in this Note continue to develop, but the discussion reflects their status as of the time of publication in early March 2019. Part II of this Note provides an overview of the NCAA's framework and the concepts of amateurism and institutional culpability. Part III outlines the elements and jurisprudence surrounding the statute and common law doctrine of honest services fraud. Part IV applies the inner workings of the concepts explained in Parts II and III to the Defendant coaches. Finally, Part V discusses the potential application of these concepts to student-athletes and explores potential solutions.

## II. OVERVIEW OF THE NCAA AND ITS REGULATIONS

The NCAA is a private association composed of over 1,200 public and private colleges that sponsor athletics programs.<sup>20</sup> These colleges must receive accreditation from their corresponding regional academic accrediting agencies to qualify for NCAA membership.<sup>21</sup> Membership entitles colleges to compete for NCAA championships, participate in the legislative rulemaking process, and “enjoy [all] other privileges of membership.”<sup>22</sup> The NCAA consists of three athletics divisions: Division I, Division II, and Division III. While these divisions largely do not intermingle competitively, they do employ similar structures and many similar competitive and amateurism models.<sup>23</sup> Division I athletics is the focus of most national attention, revenue, and the legal questions at issue in this Note.<sup>24</sup>

The NCAA exercises a great deal of control over the way that intercollegiate athletics is conducted.<sup>25</sup> Despite the fact that the NCAA is a private, voluntary organization and not a governmental agency, courts still typically afford

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20. See NCAA DIV. I MANUAL, *supra* note 6, § 3.02.3.1. While the NCAA refers to colleges and universities as “institutions” throughout its regulations, for consistency purposes, “colleges” will be used in place of reference to “institutions” or “universities” in this Note.

21. See *id.*

22. See *id.*

23. See generally *id.* § 4.

24. See *id.* As such, all general references in this Note to the NCAA specifically refer to Division I and its accompanying manual unless otherwise specified.

25. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984); Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 627 (Colo. App. 2004); Nat'l Collegiate Athletic Ass'n v. Brinkworth, 680 So. 2d 1081, 1084–85 (Fla. Dist. Ct. App. 1996); Nat'l Collegiate Athletic Ass'n v. Lasego, 53 S.W.3d 77, 83 (Ky. 2001).

official actions of the NCAA a great deal of deference<sup>26</sup> because the colleges join the NCAA voluntarily.<sup>27</sup> Furthermore, courts afford similar deference to the structure, mission, and amateurism model of the NCAA and emphasize the importance of their preservation, even in the face of legal challenges based on serious grounds like antitrust violations<sup>28</sup> or employment disputes.<sup>29</sup> Absent the NCAA arbitrarily enforcing or clearly violating its own policies, courts largely refrain from intervention.<sup>30</sup>

A. *The NCAA's Amateurism Model v. Student-Athletes*

Amateurism is considered to be one of the core principles of the NCAA.<sup>31</sup> Student-athletes are bound to compete as amateurs with their participation “motivated primarily by education and by the physical, mental and social benefits to be derived.”<sup>32</sup> The NCAA considers the student-athletes’ participation to be an “avocation,” more akin to a hobby than a job, and views the amateurism principles as protecting the student-athletes from “exploitation.”<sup>33</sup>

1. *The NCAA's Big Lead*

NCAA bylaws enforce the amateurism model by explicitly prohibiting student-athletes from profiting in any manner from their athletic performance or reputation.<sup>34</sup> Any violation of these rules results in a loss of “amateur status.”<sup>35</sup> Payment prohibition includes both direct and indirect forms of payment.<sup>36</sup> The NCAA defines “pay” broadly—cash, anything comparable to a salary, impermissible educational expenses, and any other impermissible benefits.<sup>37</sup> Explicitly prohibited behavior that deprives student-athletes of their amateur status includes any direct or indirect use of athletic skill for pay; accepting a promise of pay, even if such promise is deferred until after conclusion of participation in intercollegiate athletics; signing any agreement to play professional athletics, even if not legally binding; receiving any financial assistance from a professional sports organization based on athletic ability; com-

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26. See *Lasege*, 53 S.W.3d at 83.

27. See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988).

28. See *Bd. of Regents*, 468 U.S. at 101–02, 120.

29. See *Nw. Univ. & Coll. Athletes Players Ass'n*, 362 NLRB 167 (Aug. 17, 2015).

30. See, e.g., *Gulf S. Conference v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979).

31. See NCAA DIV. I MANUAL, *supra* note 6, § 2.9.

32. *Id.*

33. *Id.*

34. See *id.* § 12.

35. See *id.*

36. See *id.*

37. *Id.* § 12.1.2.1.

peting on any professional athletics team, even without pay; entering any professional draft; or entering an agreement with a sports agent.<sup>38</sup> The loss of amateur status results in student-athletes being ineligible for participation in any NCAA-sponsored competitions.<sup>39</sup> Additionally, it potentially forces student-athletes' colleges to vacate wins in competitions the student-athlete participated in or even potentially return revenue from NCAA-sponsored events.<sup>40</sup>

## 2. O'Bannon *Ties the Game for Student-Athletes*

Until recently, no legal challenges had ever succeeded against the NCAA's amateurism model,<sup>41</sup> likely due largely to the deference afforded by the judiciary.<sup>42</sup> That changed in 2015, when the United States District Court for the Northern District of California found for the first time that the NCAA's prohibition on member-colleges offering financial aid to cover the full "cost of attendance" violated federal antitrust law.<sup>43</sup> The district court's holding also approved member-colleges to hold up to \$5,000 in trust per year from revenue generated by use of the student-athletes' "names, images, and likenesses" (NIL)<sup>44</sup> for the student-athletes to access after concluding participation in intercollegiate athletics.<sup>45</sup>

Though many saw this case as potentially spelling the collapse of the NCAA's amateurism model,<sup>46</sup> the Ninth Circuit reversed the portion of the Northern District of California's decision allowing for capped NIL compensation via deferred trust fund payments but affirmed the portion allowing for cost of attendance payments.<sup>47</sup> Despite the attempted partial preservation of

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38. *Id.* § 12.1.2.

39. *Id.*

40. *Id.* §§ 19.9.5.2, 19.9.7(g).

41. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

42. See cases cited *supra* note 25.

43. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014), *aff'd in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015). The Sherman Antitrust Act of 1890 is the federal antitrust law prohibiting unreasonable restraints on trade. 15 U.S.C. § 1 (2012). The Ninth Circuit, affirming this portion of the trial court's holding, rejected the NCAA's argument that it was exempt from antitrust rules and ultimately found that the prohibition on cost of attendance payments was "more restrictive than necessary to maintain its tradition of amateurism." *O'Bannon*, 802 F.3d at 1079. A more nuanced understanding of the antitrust arguments in *O'Bannon* is unnecessary for the purposes of this Note, but for a more thorough analysis, see C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 931–36 (2016).

44. *O'Bannon*, 802 F.3d at 1052–53.

45. *Id.* at 1053.

46. See, e.g., Darren Heitner, *NCAA Loses Ed O'Bannon Case Along with Theory of Amateurism*, FORBES (Aug. 9, 2014, 10:06 AM), <https://www.forbes.com/sites/darrenheitner/2014/08/09/ncaa-loses-ed-obannon-case-along-with-theory-of-amateurism/#483777e3366c>.

47. *O'Bannon*, 802 F.3d at 1053.

the NCAA's amateurism model,<sup>48</sup> the Ninth Circuit's ruling may still very well mark the beginning of the end. While the Ninth Circuit did not rule completely in favor of either party, its holding required changes to the NCAA's amateurism model that undeniably represented a decline in the longstanding judicial deference afforded to the NCAA.<sup>49</sup> Though not a slam dunk for the plaintiffs, *O'Bannon* exposed major holes in the NCAA's defense.

### 3. Jenkins With A Buzzer Beater?

The measured victory in *O'Bannon* highlighted a new, potentially successful method for student-athletes seeking to challenge the NCAA's amateurism model.<sup>50</sup> By opening the NCAA to antitrust challenges, *O'Bannon* paved the way for the broader challenge of all rules prohibiting compensation in cases such as *Jenkins v. NCAA*.<sup>51</sup> *Jenkins* challenges the NCAA's compensation caps as an "unreasonable restraint of trade" and focuses on the NCAA's restraints on the labor market of student-athletes.<sup>52</sup>

Though filed in New Jersey, the Judicial Panel on Multidistrict Litigation transferred the case to the United States District Court for the Northern District of California.<sup>53</sup> Judge Claudia Wilken, who also oversaw the trial in *O'Bannon*, received presiding duties because of both her familiarity with legal challenges to the NCAA and the presence of similar litigation on her docket.<sup>54</sup> The case went through joint pretrial proceedings with several other cases formally consolidated as *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* (the "consolidated litigation").<sup>55</sup> Judge Wilken denied all the NCAA's motions for dismissal or summary judgment in both sets of litigation, requiring the NCAA to defend its regulations.<sup>56</sup>

The consolidated litigation then proceeded to a bench trial, with Judge Wilken staying *Jenkins* pending the outcome of the trial.<sup>57</sup> In early March 2019,

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48. *Id.* at 1076.

49. *Id.* at 1079.

50. *See id.*

51. *See* Complaint at 1–2, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-cv-01678 (D.N.J. Mar. 17, 2014).

52. *Id.* at 3.

53. *See* Transfer Order, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, Case MDL No. 2541 (J.P.M.L. June 4, 2014).

54. *Id.*

55. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment at \*3, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal. Mar. 9, 2019), 2018 WL 1524005.

56. *Id.*; *see* Steve Berkowitz, *Judge Rules NCAA Must Defend Limits on Compensation to College Athletes in New Trial*, USA TODAY (Mar. 28, 2018, 9:08 PM), <https://www.usatoday.com/story/sports/college/2018/03/28/ncaa-must-defend-limits-compensation-college-athletes/467495002/?src=rss>.

57. Minute Order at 1, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 14-cv-02758 (N.D. Cal. May 22, 2018).

Judge Wilken held that NCAA limits on grant-in-aid (i.e., athletics scholarships) violated antitrust rules to the extent that they limit noncash, education-related benefits.<sup>58</sup> This means that the NCAA cannot prohibit schools from providing students with “computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies.”<sup>59</sup> The injunction also allows schools to offer student-athletes “post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad that are not included in the cost of attendance calculation; and paid post-eligibility internships.”<sup>60</sup>

The court specified that the injunction’s list of education-related benefits is not exhaustive, and it left open the possibility of amending that list in the future upon the motion of either party.<sup>61</sup> The court left the NCAA discretion to both define “related to education” as it pertains to compensation and benefits and “limit academic or graduation awards or incentives” from schools or conferences “on top of a grant-in-aid.”<sup>62</sup> Further, individual athletic conferences remain free to set their own limits on athletic scholarships even for education-related benefits.<sup>63</sup> The ruling, though narrow, creates change in intercollegiate athletics and raises a number of questions regarding its application and effects.<sup>64</sup>

Though technically a win for plaintiffs over the NCAA, Judge Wilken did conclude that the NCAA rules barring noneducation-related compensation of student-athletes as employees serve a procompetitive effect.<sup>65</sup> Because she found that “blur[ring] the distinction between college sports and professional sports” could “negatively affect consumer demand” for intercollegiate athlet-

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58. Findings of Fact and Conclusions of Law at 1–3, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal Mar. 8, 2019). For a more detailed discussion of the consolidated litigation, see Michael McCann, *Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college-football/2019/03/08/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins>.

59. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541, slip op. at 1–2 (N.D. Cal Mar. 8, 2019).

60. *Id.* at 2.

61. *Id.*

62. *Id.* at 2–3.

63. *Id.* at 3–4.

64. For discussion of the decision’s widespread implications, see Michael McCann, *Examining the Broader Fallout After the Historic Grant-in-Aid Cap Ruling Against the NCAA*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college-football/2019/03/08/fallout-grant-aid-cap-ncaa-litigation-title-ix-sports-betting-law>; Michael McCann, *How the Players’ Antitrust Lawsuit Victory Impacts Schools, Conferences and the NCAA*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college-football/2019/03/08/ncaa-amateurism-antitrust-case-ruling-conference-scholarships>.

65. Findings of Fact and Conclusions of Law at 90, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal Mar. 8, 2019).

ics, Judge Wilken endorsed the NCAA's primary argument for its amateurism model.<sup>66</sup> Although the consolidated plaintiffs technically won a close game, it came with the loss of their superstar argument. Losing on the pivotal issue before a judge with a demonstrated willingness to strike down major NCAA regulations represents a setback for the hopes of student-athletes. Though an appeal will likely follow, it seems unlikely that the Ninth Circuit would expand Judge Wilken's ruling given its previous narrowing in *O'Bannon*.<sup>67</sup>

The unique posture of the *Jenkins* case leaves open the (slim) possibility that it could still threaten the amateurism model. Because *Jenkins* was not formally consolidated with the other grant-in-aid litigation, the court technically did not rule on *Jenkins* when deciding the consolidated case.<sup>68</sup> Though similarities between the cases could raise claim- or issue-preclusion problems, the *Jenkins* plaintiffs technically remain free to attempt to distinguish and litigate their claims. They could also seek remand to the District of New Jersey, as they requested earlier in the event that the NCAA prevailed on all claims in the consolidated litigation at the summary judgment stage,<sup>69</sup> to litigate their claims in a forum with more favorable case law. Regardless of what they decide to do next, the *Jenkins* plaintiffs undeniably must pull off an upset.

Despite the limited victory in the consolidated grant-in-aid litigation, ultimate success by either the *Jenkins* plaintiffs or some other set of litigants could still invalidate the NCAA's current amateurism model. Such invalidation may eventually lead to the transition of intercollegiate athletics to a model where student-athletes are employees of the colleges where they play. This transition would change college athletics as we know it, completely revolutionizing a multibillion-dollar industry by requiring colleges to compensate student-athletes who perform the vast majority of the labor expended, and accordingly without whom there would be no money to collect at all. The shift would be felt both socioeconomically and culturally, with both the details of implementation and long-term ramifications remaining unclear at this time.<sup>70</sup>

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66. *Id.*

67. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076–79 (9th Cir. 2015).

68. See Findings of Fact and Conclusions of Law at 9 n.5, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal Mar. 8, 2019).

69. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment at \*3 n.3, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal Mar. 8, 2019), 2018 WL 1524005.

70. For a more in-depth discussion of *Jenkins's* background and potential repercussions, see Marc Edelman, *A Prelude to Jenkins v. NCAA: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LA. L. REV. 227, 238–43 (2017).

*B. Institutional Control and Culpability*

The NCAA operates on the principle that each college program must exercise firm control of its athletics programs.<sup>71</sup> This general principle of control and responsibility by the colleges over their athletics programs is known as “institutional control.”<sup>72</sup> Ultimate authority for every aspect of the athletics program, including budgets, personnel, and compliance with NCAA regulations, rests with the college president or chancellor rather than with the athletic director or any individual coaches.<sup>73</sup> The colleges are deemed vicariously responsible for the conduct not only of their staff members but also for “any other individual or organization” that promotes their athletics interests.<sup>74</sup> This opens colleges to penalties from the NCAA’s Committee on Infractions if any of the colleges’ representatives or student-athletes fail to comply with NCAA guidelines.<sup>75</sup>

As such, the actions of the Defendant coaches here, in recruiting players they knew to be ineligible, opens their employing colleges to the risk of penalties under this vicarious liability standard.<sup>76</sup> The Defendant coaches’ alleged actions constitute Level I violations, the most severe form of violations under the NCAA’s violation structure,<sup>77</sup> and additionally meet several aggravating factors in the penalty determination phase.<sup>78</sup> Accordingly, their employing colleges, under the NCAA’s accountability principle,<sup>79</sup> are subject to severe penalties including: limiting the college’s participation in postseason competition; requiring the college to pay a fine; requiring the college to return revenue received from NCAA-sponsored events; limiting the number of scholarships the college can award student-athletes; ordering the college to either implement disciplinary action against an employee in violation of NCAA bylaws or face more severe penalties; and imposing probation.<sup>80</sup> Any of these penalties causes severe direct or indirect economic harms to the colleges, including harm to its reputation.

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71. NCAA DIV. I MANUAL, *supra* note 6, § 2.1.1.

72. *Id.* § 6.01.1.

73. *See id.* § 6.1.1.

74. *Id.* § 2.1.2.

75. *See id.* § 19.01.2.

76. *Id.*

77. *See id.* § 19.1.1.

78. *See id.* § 19.9.3.

79. *See id.* § 19.01.2.

80. *See id.* § 19.9.5.

### III. WHAT IS HONEST SERVICES FRAUD?

The doctrine of honest services fraud opens the door for the prosecution of the Defendant coaches, and potentially student-athletes, in a non-amateur model of intercollegiate athletics. But the historical concepts underlying the doctrine of honest services fraud are relatively misunderstood. This Part discusses the jurisprudence that shaped the present doctrine of honest services fraud, providing a better understanding of how the conduct of coaches or student-athletes might also be criminal.<sup>81</sup>

Congress codified the common law doctrine of honest services fraud in 1988 as explicitly criminal conduct and defined “scheme or artifice to defraud” as inclusive of any actions that “deprive another of the intangible right of honest services.”<sup>82</sup> Prior to this codification, the crime of depriving honest or intangible services arose purely from common law construction of existing mail and wire fraud statutes.<sup>83</sup> Currently, three different classes of individuals may be convicted of honest services fraud: public officials and public employees,<sup>84</sup> private employees,<sup>85</sup> and independent contractors or others with private sector contractual relationships besides employer–employee.<sup>86</sup>

Public officials and employees may be convicted of honest services fraud if they (1) participate “in a scheme to fraudulently deprive the public” of the official’s “honest services” through “bribery or kickbacks;” (2) with the “intent to defraud the public of the right” to the official’s “honest services;” through (3) the use of mails or wires.<sup>87</sup>

Substituting employers for the public, private employees may also be convicted of honest services fraud if they (4) foresee or reasonably should foresee that their employers might suffer “economic harm as a result of the scheme,” in addition to the three elements for public officials.<sup>88</sup>

Individuals involved in other private contractual relationships may also be convicted of honest services fraud if the potential offender, in addition to all four elements above, (5) “owed a duty of honest services to the victim.”<sup>89</sup>

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81. This Part provides an overview of the doctrine’s development. For an excellent and more thorough discussion, see generally Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY’S L.J. 645 (2011).

82. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)).

83. See *Skilling v. United States*, 561 U.S. 358 (2010).

84. See ELEVENTH CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL JURY INSTRUCTIONS OI O50.2, at 2 (2019).

85. See *id.* OI O50.3, at 2 (2019).

86. See *id.* OI O50.4, at 2 (2019).

87. See *id.* OI O50.2, at 1 (2019).

88. See *id.* OI O50.3, at 1 (2019).

89. See *id.* OI O50.4, at 1 (2019).

A. *The Historical Common Law Doctrine of Honest Services Fraud*

Congress first criminalized mail fraud in 1872 as part of the recodification of postal laws.<sup>90</sup> Congress was relatively vague, however, and the plain language of the statute did not provide any elaboration of the conduct it intended to criminalize other than “any scheme or artifice to defraud.”<sup>91</sup> Congress amended the mail fraud statute in 1909 to also criminalize “obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>92</sup> Many appellate courts have noted the implied distinctions in Congress’s amendment; as a result, the courts began to construe the statute as also prohibiting the deprivations of intangible rights in addition to the “money or property” rights clearly identified in the statute.<sup>93</sup>

The Fifth Circuit was the first court to embrace the intangible rights theory of the mail fraud statute in 1941 in *Shushan v. United States*.<sup>94</sup> *Shushan* involved the alleged bribery of a public official in return for the official encouraging city action that benefitted the bribers.<sup>95</sup> The court held that the intent to defraud may exist regardless of whether the defrauded party benefits from the deal.<sup>96</sup> The court went on to state that bribing a public official to obtain more favorable contract terms is clearly “a scheme to defraud the public” in direct violation of the mail fraud statute.<sup>97</sup>

*Shushan* led to the blossoming of the common law doctrine of honest services fraud.<sup>98</sup> Unlike more direct theories of fraud involving one party benefitting at the direct loss of the other, the common law doctrine of honest services fraud targets typical corruption cases involving three parties: the bribe-maker, the bribe-taker, and the defrauded party.<sup>99</sup> Even though the defrauded party may not have any damages to its “money or property” rights (and, in fact, may have objectively benefitted from the deal), the early appellate courts’ decisions held that there was an actionable harm in the deprivation of the defrauded party’s rights to the bribe-taker’s honest services.<sup>100</sup> Though initially the common law doctrine of honest services fraud focused almost solely on

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90. *McNally v. United States*, 483 U.S. 350, 356 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)), *as recognized in* *Skilling v. United States*, 561 U.S. 358, 402 (2010).

91. *Skilling*, 561 U.S. at 399.

92. *Id.* (emphasis omitted) (quoting 18 U.S.C. § 1341 (2012)).

93. *Id.* at 400.

94. *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941).

95. *Id.* at 114.

96. *Id.* at 119.

97. *Id.* at 115.

98. *Skilling*, 561 U.S. at 400.

99. *Id.*

100. *Id.*

the bribery of public officials, courts gradually accepted that the theory could also apply to private employment or contract arrangements.<sup>101</sup>

*B. McNally: Supreme Court: 1, Historical Doctrine: 0*

Despite the judiciary's 100-plus years of expanding the common law application of the doctrine of honest services fraud, the Supreme Court reversed course in 1987 in *McNally v. United States*.<sup>102</sup> *McNally* involved the typical case of honest services fraud where a public official defrauded the public of honest performance of the official's duties.<sup>103</sup> The situation arose upon Howard P. Hunt's elevation to chairman of the Kentucky Democratic Party following the election of Democrat Julian Carroll as Kentucky's Governor in 1974.<sup>104</sup> As chairman, Hunt gained "de facto control" to choose the insurance agent from whom Kentucky would purchase its policies.<sup>105</sup> Hunt conditioned his selection on the agent's agreement to funnel shares of its commissions to other insurance companies chosen by Hunt.<sup>106</sup> The fraud arose when these kickbacks were paid to a shell company controlled by Hunt and James Gray, a member of Governor Carroll's cabinet, and set up and operated by Charles McNally, a private businessman.<sup>107</sup>

Because the prosecution could not prove that Kentucky suffered harm from higher premiums or inferior coverage, the prosecution relied on the alternative theory that Kentucky suffered harm when public officials Hunt and Gray denied it of their honest services by conspiring with McNally.<sup>108</sup> Hunt pleaded guilty to both mail and tax fraud and was sentenced to three years' imprisonment.<sup>109</sup> Gray and McNally were both convicted at trial of one count of conspiracy to commit honest services fraud and one count of mail fraud premised on a scheme to obtain money through fraudulent pretenses arising from a mailed check.<sup>110</sup> The Sixth Circuit upheld each conviction on appeal.<sup>111</sup>

Unconvinced that Congress actually intended for the mail fraud statute to broadly cover intangible rights, honest services fraud, and fiduciary fraud theories of mail fraud, the Supreme Court struck down all prior circuit court

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101. *Id.* at 401.

102. *See McNally v. United States*, 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)), *as recognized in Skilling*, 561 U.S. at 402.

103. *See id.*

104. *Id.* at 352.

105. *Id.*

106. *Id.*

107. *Id.* at 353.

108. *Id.*

109. *Id.*

110. *Id.* at 355.

111. *Id.*

holdings and explained that the mail fraud statute only prohibited defrauding others of “money or property” rights.<sup>112</sup> The Court found that the right of citizens to public officials who would faithfully execute their offices and the right of employers to employees who would faithfully provide their services were insufficiently definite interests to warrant such a broad interpretation of the mail fraud statute.<sup>113</sup>

In relying primarily on potential federalism and vagueness concerns, the Court stated that such a broad application of the mail fraud statute would insert the federal government into the role of setting standards for local and state officials, which would require Congress to “speak more clearly” than it had in the statute.<sup>114</sup> Similarly, the Court declined to “construe the statute in a manner that leaves its outer boundaries ambiguous” and confined its interpretation of the statute to protect only “money or property” rights without additional action by Congress.<sup>115</sup> The Court found the 1909 amendment of little consequence in providing any additional coverage of the statute.<sup>116</sup> It reasoned that, in reading the clauses in light of one another, Congress only intended to clarify that the statute also covered future misrepresentations involving “money or property” rights.<sup>117</sup> In doing so, the Court applied the “money or property” rights requirement of the second clause to the first clause.<sup>118</sup> This application practically prevented future convictions of honest services fraud.<sup>119</sup>

In the same term, the Court affirmed its *McNally* holding in *Carpenter v. United States*.<sup>120</sup> In *Carpenter*, the three defendants were a Wall Street Journal reporter who wrote a column based on inside information that was recognized to affect stock prices and two stockbrokers who agreed to conduct their business based on the reporter’s inside information.<sup>121</sup> In obtaining convictions of honest services fraud against all three defendants, the prosecution emphasized the importance of the reporter’s deprivation of his honest services to the Wall Street Journal.<sup>122</sup> Following the issuance of the ruling in *McNally*, however, the prosecution amended its claim to add that the reporter’s trade of confidential business information caused a direct harm to the

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112. *Id.* at 359.

113. *Id.* at 360.

114. *Id.*

115. *Id.*

116. *Id.* at 359.

117. *Id.* at 358–59.

118. *Id.*

119. *See id.*

120. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)), *as recognized in Skilling v. United States*, 561 U.S. 358, 402 (2010).

121. *Id.* at 23–24.

122. *Id.* at 24.

Wall Street Journal's "money or property" rights by depriving it of the exclusivity of the reporter's information rather than merely just the deprivation of the reporter's honest services.<sup>123</sup>

The Court handed down a unanimous opinion simultaneously affirming the convictions of honest services fraud against the three defendants while distinguishing the case from *McNally*.<sup>124</sup> The Court held that "[c]onfidential business information" supported *McNally's* "money or property" rights theory as it had a long history in both precedent and corporate law as property.<sup>125</sup> In doing so, the Court veered slightly back on course of the common law doctrine of honest services fraud and held that "intangible property rights" were not strictly forbidden by *McNally* and would still be an actionable basis for fraud, so long as they affected the "money or property" rights of the defrauded party.<sup>126</sup>

### C. Congress Reacts to *McNally's* Big Win

Following *McNally's* reversal of the common law doctrine of honest services fraud, public corruption could no longer be effectively prosecuted under the mail fraud statute because it rarely entailed the *McNally*-required loss of "money or property" rights.<sup>127</sup> It also resulted in the vacating of prior convictions of both public- and private-sector actors that relied on the common law doctrine.<sup>128</sup> In response, Congress swiftly passed legislation to provide an explicit statutory prohibition of deprivation of the "intangible right [to] honest services."<sup>129</sup> However, Congress simply added a new provision to the mail fraud statute—18 U.S.C. § 1346—to include "a scheme or artifice to deprive another of the intangible right of honest services" in its definition of "scheme or artifice to defraud."<sup>130</sup> Congress declined to expound any further and left the meanings of "scheme or artifice to defraud" and "honest services" open to judicial interpretation.<sup>131</sup> As a result, the judiciary was left with the task to define those terms in light of *McNally*.<sup>132</sup>

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123. Supplemental Brief for the United States at 4, *Carpenter*, 484 U.S. at 19 (No. 86-422).

124. See *Carpenter*, 484 U.S. at 24–25.

125. *Id.* at 26.

126. *Id.* at 25.

127. See, e.g., *United States v. Huls*, 841 F.2d 109, 110 (5th Cir. 1988).

128. See, e.g., *United States v. Covino*, 837 F.2d 65, 72 (2d Cir. 1988), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)), as recognized by *United States v. Rybicki*, 287 F.3d 257, 261–62 (2d Cir. 2002); *United States v. Murphy*, 836 F.2d 248, 257 (6th Cir. 1988).

129. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7603, § 1346, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)).

130. 18 U.S.C. § 1346 (2012).

131. See *United States v. Brumley*, 116 F.3d 728, 742–43 (5th Cir. 1997) (DeMoss & Jolly, JJ., dissenting) (explaining that the provision was inserted into the Omnibus Drug Bill on the day it was passed by

Most courts accepted the passage of § 1346 as a rejection of *McNally* and restoration of the intangible right to the common law doctrine of honest services fraud.<sup>133</sup> Disagreement inevitably arose between courts as to whether the entirety of the pre-*McNally* common law doctrine of honest services fraud should be reinstated with the passage of § 1346.<sup>134</sup> Most courts limited the intangible rights to strictly honest services fraud and declined to extend it to other intangible rights that may have existed in the wide-ranging body of case law preceding *McNally*.<sup>135</sup> The Fifth Circuit emphasized that the pre-*McNally* common law doctrine of honest services fraud was not a “unified set of rules,” nor could Congress intend to “bless each and every pre-*McNally* lower court ‘honest services’ opinion.”<sup>136</sup> Ultimately, the pre-*McNally* common law doctrine of honest services fraud showed “disagreement regarding the fundamental elements of honest services fraud.”<sup>137</sup> From the 1988 enactment of § 1346 until the 2010 issuance of the Supreme Court’s opinion in *Skilling v. United States*,<sup>138</sup> the lower courts differed widely in their application of the doctrine of honest services fraud and on issues such as the required *mens rea*, foreseeability of harm, or pursuit of personal gain.<sup>139</sup>

#### D. *Skilling*: Supreme Court: 2, Historical Doctrine: 0

In 2010, the Supreme Court reconciled those twenty-two years of unresolved questions and intercircuit disagreements surrounding the doctrine of honest services fraud in *Skilling v. United States*.<sup>140</sup> Jeffrey Skilling began working for Enron Corporation in 1990, where he ascended the corporate ladder until being chosen as chief executive officer in February 2001—where he served until his resignation from Enron in August 2001.<sup>141</sup> In late 2001, Enron’s stock dropped to pennies per share, and the corporation plunged into

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both houses of Congress with very little discussion, although a statement from the floor by Representative John Conyers and a post-enactment committee report confirmed it as a response to *McNally*).

132. See, e.g., *id.* at 733–35.

133. See, e.g., *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000).

134. Compare *United States v. Sancho*, 157 F.3d 918, 922 (2d Cir. 1998) (per curiam) (holding that honest services is not defined by pre-§ 1346 “judicial decisions that sought to interpret the mail and wire fraud statutes”), overruled by *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003), with *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995) (“Congress’ purpose in enacting section 1346 was to restore the mail fraud statute to its pre-*McNally* position by allowing mail fraud convictions to be predicated on deprivations of honest services.”).

135. See, e.g., cases cited *supra* note 134.

136. *Brumley*, 116 F.3d at 733.

137. See *Mathy*, *supra* note 81, at 670.

138. 561 U.S. 358, 368 (2010).

139. *Mathy*, *supra* note 81, at 673–74.

140. *Id.* at 683.

141. *Skilling* 561 U.S. at 368.

bankruptcy. After the discovery of a scheme to inflate Enron's stock by exaggerating its financial wealth, Skilling and two other Enron executives were eventually indicted.<sup>142</sup> One charge included honest services fraud, asserting that Skilling had deprived the shareholders of his honest services by deceiving others as to the financial condition of the company while prolonging his own financial gain.<sup>143</sup> The trial court found Skilling guilty on nineteen of the charges, including conspiracy to commit honest services fraud.<sup>144</sup> On appeal, the Fifth Circuit unanimously affirmed Skilling's honest services fraud conspiracy conviction, but it did not address his contention that § 1346 was unconstitutionally vague.<sup>145</sup>

In a 9–0 vote, the Supreme Court unanimously reversed the Fifth Circuit and simply held that Skilling “did not commit honest-services fraud.”<sup>146</sup> While all the justices also agreed that § 1346 was unconstitutionally vague, they disagreed as to its proper interpretation.<sup>147</sup> The 6–3 majority opinion found that, while Congress intended § 1346 to reinstate the entirety of the pre-*McNally* common law doctrine of honest services fraud, the lack of clarity and consistency among the myriad cases opened § 1346 to challenges of unconstitutionally vagueness.<sup>148</sup>

Deemed worthy of salvage, the Court preserved congressional rejection of *McNally* and reinstatement of the pre-*McNally* common law doctrine of honest services fraud by limiting its “core” application to the “paradigmatic cases of bribes and kickbacks.”<sup>149</sup> The Court limited § 1346 to avoid any issues regarding unconstitutionally vagueness.<sup>150</sup> The Court held that the two primary concerns of constitutional vagueness—fair notice and arbitrary prosecution—are not an issue when an individual accepts “bribes or kickbacks.”<sup>151</sup> Quickly dispatching the fair notice concerns, the Court stated that “it has always been ‘as plain as a pikestaff that’ bribes and kickbacks constitute honest-services fraud” and that the intent requirement of § 1346 “blunts any notice concern.”<sup>152</sup> The Court rejected the government's prayer to expand that “core” to include self-dealing by officials or employees pretending to act only in the interest of the fiduciary, on the grounds of its “relative infrequency” and the “intercircuit inconsistencies they produced.”<sup>153</sup> Further, the Court

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142. *Id.* at 368–69.

143. *Id.* at 369.

144. *Id.* at 375.

145. *Id.* at 376.

146. *Id.* at 413.

147. *See generally id.* at 358.

148. *Id.* at 405.

149. *Id.* at 408, 411.

150. *Id.* at 408–09.

151. *Id.* at 412.

152. *Id.* (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)).

153. *Id.* at 410.

decided that arbitrary prosecutions were not perceived as an issue given the robust pre-*McNally* common law doctrine of honest services fraud and the other federal statutes prohibiting similar acts.<sup>154</sup>

#### *E. The Modern Doctrine of Honest Services Fraud*

Since *Skilling* was decided, courts have largely avoided applying the doctrine of honest services fraud in cases involving more flexible interpretations of traditional mail and wire fraud theories of tangible and intangible property.<sup>155</sup> Ultimately, federal prosecutors have adapted the common law doctrine of honest services fraud to cover even cases of undisclosed self-dealing that *Skilling* refused to include in the “core” of the doctrine.<sup>156</sup> Because these cases involve “money or property” rights that are property of the public body or employer, federal prosecutors have prosecuted employees without applying § 1346.<sup>157</sup>

A large area of inconsistency has also arisen in the judiciary’s interpretation of “bribes” in the wake of *Skilling*.<sup>158</sup> While some courts require a specific quid pro quo arrangement, other courts have not required the bribe-taker’s acceptance or have allowed showing a “stream of benefits” to show “bribery in the aggregate.”<sup>159</sup> However, the post-*Skilling* doctrine of honest services fraud continues to expand, and with the Supreme Court recently denying a petition for a writ of certiorari in *United States v. Silver* on other grounds,<sup>160</sup> additional clarification will have to wait.

### IV. APPLICATION OF THE HONEST SERVICES FRAUD DOCTRINE TO DEFENDANT COACHES

The indictments of the Defendant coaches created a wakeup call in college basketball. The Defendant coaches involved in this case likely envisioned

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154. *Id.* at 412.

155. See Devika Singh, Garrett Lyons & Terrence Scudieri, *Mail and Wire Fraud*, 54 AM. CRIM. L. REV. 1555, 1570–71 (2017).

156. *Id.* at 1571.

157. See Mathy, *supra* note 81, at 703.

158. See Singh, Lyons & Scudieri, *supra* note 155, at 1571.

159. *Id.* Compare *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013) (“The jury needed to find that [the defendant] agreed to accept things of value in exchange for official acts.”), with *United States v. Ring*, 706 F.3d 460, 467 (D.C. Cir. 2013) (“[A] defendant may be guilty of honest-services bribery where he offers an official something of value with a specific intent to effect a quid pro quo even if that official emphatically refuses to accept.”), and *United States v. Bryant*, 655 F.3d 232, 241 (3d Cir. 2011) (“[A] *quid pro quo* may come in the form of a ‘stream of benefits.’”).

160. 864 F.3d 102 (2d Cir. 2017) (vacating the guilty verdict of a former Speaker of the New York State Assembly due to erroneous jury instructions despite sufficient evidence to prove honest services fraud arising from receiving bribes for official acts), *cert. denied*, 138 S. Ct. 738 (2018).

punishment from the NCAA and potential loss of employment with their current institutions as the worst-case scenario. The harsh reality, though, is that some of the Defendants faced federal prosecution for felonies carrying potential sentences of up to eighty years.<sup>161</sup> The case at hand also illustrates that the years of whispers of corruption in men's basketball were valid.<sup>162</sup>

In addition to the Defendant coaches, other individuals have lost their employment in connection with this scandal: most notable among them is Rick Pitino, now-former Louisville Men's Basketball Head Coach and a member of the College Basketball Hall of Fame.<sup>163</sup> Though not outright indicted, numerous sources have confirmed that Pitino is the "Coach-2" mentioned in the indictments as discussing payments to recruits with the indicted Adidas executive James Gatto.<sup>164</sup> Louisville's Athletic Director Tom Jurich and several members of Pitino's staff were also fired in the wake of the scandal (though none face indictment and all have denied any wrongdoing).<sup>165</sup>

Additionally, current and former college basketball players at numerous other colleges—including the University of Alabama, the University of Arizona, Clemson University, Duke University, the University of Kansas, the University of Kentucky, Louisiana State University, the University of Maryland, Michigan State University, the University of North Carolina, North Carolina State University, San Diego State University, Seton Hall University, the University of South Carolina, the University of Southern California, the University of Texas, the University of Utah, Washington University, Wichita State University, and Xavier University—were implicated in a Yahoo Sports report alleging they had received payments from Christian Dawkins or his former employer, the ASM Sports Agency.<sup>166</sup> Though little action has taken shape publicly on these actions, it did shroud the 2018 NCAA Division I Men's Basketball Tournament in a cloud of scandal, specifically surrounding the claims that University of Arizona Men's Basketball Head Coach Sean Miller

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161. See U.S. DEP'T OF JUSTICE, *supra* note 1.

162. See Gentry Estes, *College Basketball's Trap: How Agents and Shoe Companies Team Up to Exploit Athletes*, LOUISVILLE COURIER JOURNAL (Feb. 25, 2018, 6:15 PM), <https://www.courier-journal.com/story/news/2018/02/25/college-basketball-recruiting-scandal-system-traps-players/370215002/>.

163. See, e.g., Scooby Axson, *Louisville Head Coach Rick Pitino Officially Fired*, SPORTS ILLUSTRATED (Oct. 16, 2017), <https://www.si.com/college-basketball/2017/10/16/louisville-rick-pitino-fired>.

164. See, e.g., Tom Winter & Phil McCausland, *Federal Bribery Indictments Unsealed Against NCAA Coaches*, NBC NEWS (Nov. 8, 2017, 7:29 PM), <https://www.nbcnews.com/news/sports/federal-bribery-indictments-unsealed-against-ncaa-coaches-n819156>.

165. See Jeff Greer, *Tom Jurich Fired with Cause by University of Louisville*, LOUISVILLE COURIER JOURNAL (Oct. 18, 2017), <https://www.courier-journal.com/story/sports/college/louisville/2017/10/18/tom-jurich-fired-cause-university-louisville/773362001/>; Gary Parrish, *An Ex-Louisville Assistant Fired Because of the FBI Investigation Is Joining La Salle's Coaching Staff*, CBS SPORTS (May 8, 2018), <https://www.cbssports.com/college-basketball/news/an-ex-louisville-assistant-fired-because-of-the-fbi-investigation-is-joining-la-salles-coaching-staff/>.

166. Henry Bushnell, *What to Know About the College Basketball Scandal and Its Fallout*, YAHOO! SPORTS (Mar. 9, 2018, 2:56 PM), <https://sports.yahoo.com/know-college-basketball-scandal-fallout-195645295.html>.

paid star player Deandre Ayton to play for him.<sup>167</sup> Miller, along with Louisiana State University Head Coach Will Wade, received notifications in February 2019 that they will be subpoenaed to testify regarding their communications with Christian Dawkins in Defendant noncoaches' federal bribery trial.<sup>168</sup> Additionally, text messages introduced as evidence during the Defendant noncoaches' trial for honest services fraud revealed that Bill Self, Kansas Basketball's Hall of Fame coach, was aware of payments made to recruits by an Adidas consultant who later pleaded guilty to wire fraud for making those payments.<sup>169</sup> Nonetheless, the Defendant coaches remain the only indicted coaches.<sup>170</sup> Even then, many have cast doubt as to whether the Defendant coaches' conduct truly rises to the level of a federal crime.<sup>171</sup> They are incorrect to do so.

It is undeniable that the conduct of the Defendant coaches satisfies the elements of honest services fraud. Applying the holding from *United States v. Frost*,<sup>172</sup> the Defendant coaches clearly fall under the second class of individuals who may be convicted of honest services fraud: private employees. In *Frost*, the Sixth Circuit affirmed convictions on counts of honest services fraud for college professors who assisted students in cheating to obtain their degrees in exchange for those students steering valuable government contracts to the professors and their associates.<sup>173</sup> The court held that the defendants were private employees and, as such, owed a fiduciary duty to protect their employers' property.<sup>174</sup> The court explained that the University's property harm at issue was the devaluation of the University's degrees and reputation.<sup>175</sup>

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167. Gary Parrish, *Sean Miller Stands Tall with Arizona's Support, but a Cloud of Scandal Still Hovers*, CBS SPORTS (Mar. 1, 2018), <https://www.cbssports.com/college-basketball/news/sean-miller-arizona-coach-press-conference-report-denial-gary-parrish/>.

168. Mark Schlabach, *Arizona's Sean Miller, LSU's Will Wade to Be Subpoenaed in College Hoops Corruption Trial*, ESPN (Feb. 26, 2019), [http://www.espn.com/mens-college-basketball/story/\\_/id/26078287/arizona-sean-miller-lsu-wade-subpoenaed-college-hoops-corruption-trial](http://www.espn.com/mens-college-basketball/story/_/id/26078287/arizona-sean-miller-lsu-wade-subpoenaed-college-hoops-corruption-trial).

169. See Mark Schlabach, *Texts Show Kansas Coaches Knew of Adidas Role in Silvio De Sousa's Recruitment* (Oct. 16, 2018, 6:57 AM), [http://www.espn.com/mens-college-basketball/story/\\_/id/24990651/texts-show-kansas-coaches-knew-adidas-role-silvio-de-sousa-recruitment](http://www.espn.com/mens-college-basketball/story/_/id/24990651/texts-show-kansas-coaches-knew-adidas-role-silvio-de-sousa-recruitment).

170. Matt Norlander, *Ultimate College Basketball Corruption Scandal Primer: Explaining the Latest with the FBI Probe*, CBS SPORTS (Apr. 12, 2018), <https://www.cbssports.com/college-basketball/news/ultimate-college-basketball-corruption-scandal-primer-explaining-the-latest-with-the-fbi-probe/>.

171. See, e.g., Joe Nocera, *Why Is the FBI Trying to Enforce NCAA Rules?*, N.Y. POST (Sept. 27, 2017, 5:01 AM), <https://nypost.com/2017/09/27/why-is-the-fbi-trying-to-enforce-ncaa-rules/>.

172. 125 F.3d 346, 365–66 (6th Cir. 1997) (holding that an indictment alleging university employees deprived the university as their employer of intangible rights, rather than the public, requires only a showing that the employees violated a fiduciary duty to the university).

173. *Id.* at 363–70.

174. *Id.* at 367.

175. *Id.* at 366–67.

The Defendant coaches satisfied the first element of the doctrine of honest services fraud when they accepted bribes to take official action as representatives of their employers, thus defrauding their employers of their honest services.<sup>176</sup> The Defendant coaches satisfied both the second element and the *mens rea* requirement, as they clearly intended to take the bribes and knew (or should have known) that doing so was in violation of their employment agreements.<sup>177</sup> As NCAA basketball coaches responsible for recruiting prospective student-athletes, the Defendant coaches also knew (or should have known) the NCAA amateurism requirements and knew (or should have known) that paying prospective student-athletes would result in the student-athletes' ineligibility. In turn, the Defendant coaches satisfied the third element of the doctrine of honest services fraud by subjecting their employers to some potential form of economic harm, whether in the form of wrongfully expended scholarship funds, potential lost revenues from vacation of wins, or other penalties imposed by the NCAA.<sup>178</sup> Finally, the indictments allege numerous uses of wires to further this scheme that, if accepted as true, would satisfy the fourth element of the doctrine of honest services fraud.<sup>179</sup> Though it is ultimately up to the jury to decide guilt in these cases, taking the federal prosecution's allegations on their face appears to show a clear case for violation of the doctrine of honest services fraud for the Defendant coaches.

Additionally, in *United States v. Gray*,<sup>180</sup> the trial court convicted coaches from Baylor University's men's basketball team of honest services fraud for assisting transferring student-athletes in cheating to establish academic eligibility.<sup>181</sup> In dispatching the coaches' arguments that they were attempting to assist Baylor University as irrelevant in light of the duty owed under the doctrine of honest services fraud, the Fifth Circuit affirmed the trial court's convictions.<sup>182</sup> The appellate court explained that the coaches' lack of disclosure as to the student-athletes' eligibility status itself was a violation of the doctrine of honest services fraud because Baylor University likely would have changed its conduct in light of the ineligibility of these athletes.<sup>183</sup> The court further opined that the deprivation of qualified, eligible student-athletes and the costs of a lengthy investigation caused direct harm to Baylor University.<sup>184</sup>

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176. See ELEVENTH CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL JURY INSTRUCTIONS OI O50.3, at 1 (2019).

177. *Id.*

178. See *supra* Subpart II.B.

179. See ELEVENTH CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL JURY INSTRUCTIONS OI O50.3, at 1 (2019).

180. 96 F.3d 769 (5th Cir. 1996).

181. *Id.* at 771–73.

182. *Id.* at 774–75, 777.

183. *Id.* at 775.

184. *Id.*

Here, the Defendant coaches' conduct violated the doctrine of honest services fraud more clearly than even the professors' action in *Frost*. Like the professors, the Defendant coaches were clearly private employees; but, the Defendant coaches accepted actual cash bribes rather than just potential future contracts. Furthermore, the Defendant coaches opened their employer colleges to direct financial penalties from the NCAA, as opposed to the more tenuous degree of devaluation proposed by the Sixth Circuit in *Frost*.<sup>185</sup> The conduct at issue in both cases, though, has nothing to do with the illegality of the underlying act on its face—it is not illegal to help students cheat or to give money to student-athletes. Such actions become illegal when committed in violation of a duty owed to another.

The Defendant coaches' conduct also goes far beyond the coaches in *Gray*. A pre-*Skilling* case, the Baylor University coaches were not even alleged to have received any bribes or kickbacks, unlike the Defendant coaches here. Otherwise, the essential facts of the cases are indistinguishable: the coaches took actions that made student-athletes ineligible, resulting in harm to their employer colleges.

There have been various iterations of counterarguments that the Defendant coaches have not violated the doctrine of honest services fraud: it is not illegal to pay athletes to attend certain colleges or high schools; the government's stake arises from federal funding; or the university-employers suffered no harm.<sup>186</sup> These counterarguments, however, ignore the vast repository of case law discussed in Part III. The case law is clear that a violation of the doctrine of honest services fraud does not arise from the legality of paying athletes on its face or from the federal funds provided to colleges; rather, the violation arises from an employee accepting bribes or kickbacks to take official action that *might* cause potential harm to the employer. Simply put: though it is not illegal for a coach to break NCAA rules by paying a player, it is illegal for a coach to take a bribe to do so. Most crucially, these counterarguments ignore the fact that coaches have already been successfully prosecuted on honest services grounds for tampering with player eligibility.<sup>187</sup>

The bottom line is that the conduct of the Defendant coaches, if identical to the assertions in the indictments, violates all elements of the doctrine of honest services fraud. The counterarguments made against this behavior rely on generalizations and are not based in the honest services fraud jurisprudence. Instead of the debate of whether the conduct *is* criminal, a more appropriate debate would be whether the conduct *should be* criminal. Such an

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185. *United States v. Frost*, 125 F.3d 346, 367 (6th Cir. 1996).

186. *See, e.g., McCann, supra* note 18.

187. *See, e.g., United States v. Gray*, 96 F.3d 769 (5th Cir. 1996).

argument, however, would require modification of the elements of the doctrine of honest services fraud and is beyond the scope of this Note.

## V. IMPLICATIONS OF THE DOCTRINE OF HONEST SERVICES FRAUD ON STUDENT-ATHLETES

The most interesting and yet unexplored repercussions of the prosecution of the Defendant coaches lie in how the prosecution potentially subjects student-athletes to similar criminal punishment. Though the student-athletes stand at center court of this matter, the focus of the scandal has largely been on the coaches, schools, and the NCAA. Even though the allegations of the secondary scheme involving the Defendant coaches and Adidas executives assert that the Defendant coaches took advantage of their own student-athletes by steering them to financial advisors in exchange for kickbacks, the student-athlete victims have received as little attention as if they sat the bench all season.<sup>188</sup> Brian Bowen—the student-athlete whose payment to attend the University of Louisville resulted in the firing of Rick Pitino—transferred to the University of South Carolina, never played a college game, left to play professionally in Australia, and faded almost completely from media discussion until he sued Adidas and some of the Defendant noncoaches.<sup>189</sup> As the student-athletes are the star players of college athletics, the fallout from this scandal and subsequent prosecution is more important to them than to any other single group.

### A. *Prosecuting Student-Athletes for Honest Services Fraud*

The indictment of the Defendant coaches shows that federal prosecutors are willing to delve into the inner workings of college athletics, and the potential consequences for student-athletes may ultimately include federal prosecution for felony convictions for honest services fraud. Federal prosecutors could likely pursue charges against student-athletes for accepting any impermissible benefits under NCAA regulations.<sup>190</sup> Through the combination of the prominence of student-athletes violating NCAA regulations by receiving impermissible benefits<sup>191</sup> and the relatively broad definition of “bribes and kickbacks” under the doctrine of honest services fraud, any receipt of impermissible benefits could likely also constitute receipt of a punishable “kickback.” If

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188. See Indictment, *United States v. Person*, 1:17-cr-00683 (S.D.N.Y. 2017).

189. Mark Schlabach, *Adidas Wants Judge to Throw out Lawsuit by Brian Bowen II*, ESPN (Feb. 6, 2019), [http://www.espn.com/mens-college-basketball/story/\\_/id/25938262/adidas-wants-judge-throw-lawsuit-brian-bowen-ii](http://www.espn.com/mens-college-basketball/story/_/id/25938262/adidas-wants-judge-throw-lawsuit-brian-bowen-ii).

190. See NCAA DIV. I MANUAL, *supra* note 6, § 12.

191. See, e.g., Doug Lederman, *The Rule Breakers*, INSIDE HIGHER ED (Jan. 11, 2016), <https://www.insidehighered.com/news/2016/01/11/96-division-i-colleges-violated-major-ncaa-rules-last-decade>.

the kickback was accepted in exchange for student-athletes performing official student-athlete actions, then this could subject student-athletes to potential federal prosecution for felony convictions of honest services fraud.

The primary issue with the feasibility of prosecuting student-athletes at present, however, is whether student-athletes owe their colleges a “duty [of] honest services.”<sup>192</sup> Courts have yet to hold that student-athletes and their colleges satisfy a functional employer–employee relationship<sup>193</sup> and have consistently denied that a fiduciary relationship exists between them both<sup>194</sup> or between student-athletes and the NCAA.<sup>195</sup> Although many arguments have been made that fiduciary or even lesser duties should exist between student-athletes and their coaches, colleges, or the NCAA,<sup>196</sup> the judiciary has refused to impose such duties. Accordingly, it is unlikely that federal prosecution for felony convictions of honest services fraud could succeed against student-athletes under the current system without a clearly defined duty existing between student-athletes and some other institution.

There is a more interesting possibility of prosecuting student-athletes: the interplay with the recent movement to strike down the NCAA’s amateurism model discussed in Subpart II.A of this Note. If *Jenkins*<sup>197</sup> or its progeny succeed in invalidating the NCAA’s current amateurism model, or if that model is otherwise abandoned, then colleges will likely begin compensating student-athletes in some form. This almost certainly would create an employer–employee relationship (or, at the very least, an independent contractor relationship between the colleges and the student-athletes). These new relationships then would likely subject student-athletes to the missing element of the duty owed to the colleges under the doctrine of honest services fraud. This subjects student-athletes to the same liability that the Defendant coaches are currently facing in the case discussed here. Any conduct student-athlete employees take involving impermissible “bribes or kickbacks” would simultaneously make them ineligible for NCAA participation and violate their employer-colleges’ intangible right to their honest services. This potential liability clouding the air provides the potential to drastically re-engineer the intercolle-

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192. See ELEVENTH CIRCUIT JUDICIAL COUNCIL, PATTERN CRIMINAL JURY INSTRUCTIONS OI O50.3, at 1 (2019).

193. See, e.g., Complaint at 1–2, *Jenkins v. Nat’l Collegiate Athletics Ass’n*, No. 3:14-cv-01678 (D.N.J. Mar. 17, 2014).

194. See, e.g., *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 717–19 (D. Vt. 2012); *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 986–87 (M.D.N.C. 2011), *aff’d in part and rev’d in part*, *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

195. See, e.g., *McCants v. Nat’l Collegiate Athletics Ass’n*, 201 F. Supp. 3d 732, 746–49 (M.D.N.C. 2016).

196. See Andrew Escher, Commentary, *Scandal in the NCAA: A Fiduciary Tale*, MINN. L. REV. DE NOVO (Nov. 12, 2017), <http://www.minnesotalawreview.org/2017/11/scandal-in-the-ncaa/>.

197. See Complaint at 1–4, *Jenkins*, No. 3:14-cv-01678.

giate athletics landscape. Though consumers are likely favorable to the idea of paying student-athletes to compete intercollegiately,<sup>198</sup> it is unlikely that society is ready to subject these young student-athletes to potential federal prosecution for felony convictions of honest services fraud for miniscule violations of NCAA regulations.

*B. Possible Sources of Resolution*

The resolution of this issue could come from various levels. Regardless of whether the plaintiffs in the *Jenkins* case or other cases eventually succeed in invalidating present compensation caps for student-athletes or the NCAA voluntarily retires the amateurism model, the NCAA and its member-colleges will ultimately determine the parameters of these relationships.

Though far from certain, allowing true, free market compensation of student-athletes as employees may curtail the potential for student-athletes to be bribed and offset its own risk. But with student-athletes likely to be in various financial positions, the less financially stable student-athletes may still be susceptible to the allure of impermissible monetary benefits from boosters. Allowing student-athletes to keep and profit from their NIL rights is the simplest solution to the problems that surround paying student-athletes. Because the student-athletes would merely retain and profit from intellectual property they already own (but are currently forbidden to use under NCAA regulations), profiting from NIL rights would not impose a legal duty upon the student-athletes to their colleges as would exist if the colleges were their employers.<sup>199</sup> This would allow student-athletes to market their own NIL rights and profit from their public worth in the marketplace.

If *Jenkins* or other cases successfully challenge the NCAA's payment caps as an "unreasonable restraint of trade" as restraints on the labor market of student-athletes, then both true, free market compensation would be available and the risks of student-athletes potentially falling victim to impermissible "bribes and kickbacks" would be mitigated (particularly given the present circumstances where the impermissible "bribes and kickbacks" are flowing from shoe companies looking to lock down future endorsements). Allowing student-athletes to receive paid endorsements or license their image will likely curtail the majority of impermissible "bribes and kickbacks." Even student-athletes who receive impermissible "bribes and kickbacks" would still not owe a sufficient duty to their colleges; thus, they would not be susceptible to federal prosecution for honest services fraud.

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198. See *O'Bannon v. Nat'l Collegiate Athletics Ass'n*, 802 F.3d 1049, 1083 (9th Cir. 2015).

199. See generally NCAA DIV. I MANUAL, *supra* note 6, § 12.5 (describing the many regulations of use of a student-athletes' NIL in promotions).

Allowing student-athletes to receive compensation by marketing their NIL rights has considerable support. In March 2019, Representative Mark Walker of North Carolina—Vice Chair of the House Republican Conference—and cosponsor Representative Cedric Richmond of Louisiana—a former Chair of the Congressional Black Caucus—introduced a bill to reform intercollegiate athletics by removing the tax-exempt status of any organization (namely the NCAA) that prohibits student-athletes from profiting from their NIL rights.<sup>200</sup> The bipartisan legislation seeks to achieve its goal through practical, rather than formal, means.<sup>201</sup> As the NCAA currently enjoys tax-exempt status as a nonprofit organization,<sup>202</sup> the bill would force the NCAA into choosing between either changing its own regulations to allow student-athletes to profit from their NIL rights or maintaining its current amateurism regulations and taking a substantial financial blow by forfeiting its tax-exempt status.<sup>203</sup> The bill's passage would thus represent a significant change in intercollegiate athletics, even in the unlikely event that the NCAA sacrificed its tax-exempt status. But regardless of whether the bill passes, it represents acknowledgment of the significance of the issues surrounding student-athlete compensation by those with the power to resolve such issues.

Additionally, many prominent intercollegiate athletics figures have advocated for student-athletes to profit from their NIL rights: North Carolina State University's Athletics Director Deborah Yow,<sup>204</sup> University of Kentucky men's basketball head coach John Calipari,<sup>205</sup> and the Chair of the NCAA's own Commission on College Basketball and former-Secretary of State, Condoleezza Rice.<sup>206</sup> Moreover, only 26% of Americans surveyed were opposed to allowing student-athletes to profit on their NIL.<sup>207</sup> Nonetheless, any potential resolution, including allowing NIL earnings, likely remains open to chal-

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200. H.R. 1804, 116th Cong. (2019); Brian Murphy, *NCAA Must Allow Players to Profit from Name and Image*, *NC Republican's New Bill Says*, NEWS & OBSERVER (Mar. 7, 2019, 3:45 PM), <https://www.newsobserver.com/sports/article227181209.html>; Drew Broach, *Cedric Richmond Cedes Chair of Congressional Black Caucus to Rep. Karen Bass of California*, NOLA.COM (Nov. 28, 2018), [https://www.nola.com/national\\_politics/2018/11/cedric-richmond-cedes-chair-of-congressional-black-caucus-to-rep-karen-bass-of-california.html](https://www.nola.com/national_politics/2018/11/cedric-richmond-cedes-chair-of-congressional-black-caucus-to-rep-karen-bass-of-california.html).

201. See H.R. 1804.

202. *Where Does the Money Go?*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Mar. 15, 2019).

203. See H.R. 1804.

204. *ACC Leaders See Big Challenges with Name, Image and Likeness Debate*, WRAL SPORTS FAN (May 17, 2018), <https://www.wralsportsfan.com/likeness-story/17559944/>.

205. Kyle Boone, *Kentucky's John Calipari: College Players Should Make Money off Their Likeness*, CBS SPORTS (Feb. 28, 2018, 11:21 AM), <https://www.cbssports.com/college-basketball/news/kentucky-john-calipari-college-players-should-make-money-off-their-likeness/>.

206. Scooby Axson, *Condoleezza Rice: NCAA Rules Are 'Incomprehensible'*, SPORTS ILLUSTRATED (May 10, 2018), <https://www.si.com/college-basketball/2018/05/10/ncaa-commission-report-condoleezza-rice>.

207. *Should College Athletes Be Paid?*, WASH. POST (Mar. 9, 2018), [https://www.washingtonpost.com/politics/polling/college-athletes-paid/2018/03/09/97acc61e-23a1-11e8-946c-9420060cb7bd\\_page.html](https://www.washingtonpost.com/politics/polling/college-athletes-paid/2018/03/09/97acc61e-23a1-11e8-946c-9420060cb7bd_page.html).

lenges on similar antitrust grounds as *Jenkins* unless that resolution allows for a true free market in the compensation of student-athletes.

Conversely, both Congress and the judiciary could limit the application of the doctrine of honest services fraud or exempt the NCAA from antitrust requirements. In such a situation, it would likely be up to Congress or the judiciary to define the scope of duty owed to colleges by student-athletes. Congress could also grant the NCAA a waiver of antitrust laws,<sup>208</sup> just as it has done with several other professional sports organizations, to ultimately circumvent the entire process, derail any push for the end of the NCAA's amateurism model, and likely negate the threat of student-athletes being subjected to potential federal prosecution for felony convictions of violating the doctrine of honest services fraud. Alternatively, Congress could reactively craft exceptions to § 1346 in potential student-athlete employee cases. To avoid the problem before it starts, the best-case scenario is to rely on solutions achieved by altering the current regime. Unfortunately, adopting these solutions without some catalyst remains unlikely.

## VI. CONCLUSION

The concerns of student-athlete employees being subjected to potential federal prosecution for felony convictions of honest services fraud may sit the bench for years. Federal prosecutors may await suiting up until a particularly egregious scenario arises, as they did with the Defendant coaches. The parameters of the doctrine of honest services fraud and NCAA regulations clearly allow federal prosecutors to pursue charges for those employees—whether coaches or student-athletes—involved in intercollegiate athletics who accept “bribes and kickbacks.” As public opinion pushes for intercollegiate student-athletes to be compensated in some form,<sup>209</sup> it also exposes student-athletes to the potential of federal felony prosecution for accepting any impermissible “bribes and kickbacks.”

Though the impending consequences of this issue may not currently seem pressing, the ultimate resolution could alter the course of American intercollegiate athletics. Society should learn from the present case and realize that student-athletes are waiting at the scorers' table to check into the game against federal prosecution. Policymakers should prevent blindly exposing student-athletes to this sort of criminal liability through either accepting a compensation model such as the NIL or creating a carve-out in the honest services fraud doctrine for student-athletes. Adopting the student-athlete employee model without this kind of consideration leads to a scenario where student-

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208. See, e.g., 15 U.S.C. § 1291 (2012) (amending antitrust laws to allow professional football, baseball, basketball, and hockey teams to enter into television contracts and for other purposes).

209. *Id.*

athletes may face ejection from the game before they even realize they committed a flagrant foul.

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