

1-1-2016

The Deeply Flawed College Football Playoff: A Call for Structural Changes to Protect against Undue Commercialization, to Ensure Transparency, and to Systematize Democratic Due Process

M. Mark Heekin
Charlotte School of Law

Bruce W. Burton

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Heekin, M. Mark and Burton, Bruce W. (2016) "The Deeply Flawed College Football Playoff: A Call for Structural Changes to Protect against Undue Commercialization, to Ensure Transparency, and to Systematize Democratic Due Process," *University of Dayton Law Review*: Vol. 40: No. 3, Article 5. Available at: <https://ecommons.udayton.edu/udlr/vol40/iss3/5>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

The Deeply Flawed College Football Playoff: A Call for Structural Changes to Protect against Undue Commercialization, to Ensure Transparency, and to Systematize Democratic Due Process

Cover Page Footnote

Both authors wish to express their appreciation to Professor Heekin's student Research Assistants M. Claire Donnelly, W. Marlowe Rary and Jennifer R. Coleman for their valuable assistance with this Article.

THE DEEPLY FLAWED COLLEGE FOOTBALL PLAYOFF: A CALL FOR STRUCTURAL CHANGES TO PROTECT AGAINST UNDUE COMMERCIALIZATION, TO ENSURE TRANSPARENCY, AND TO SYSTEMATIZE DEMOCRATIC DUE PROCESS

M. Mark Heekin and Bruce W. Burton¹

I. INTRODUCTION.....	383
A. BCS History and Structure.....	385
B. CFP Structure, Shortcomings, & Controversies.....	386
C. The Proper Place of the Student-Athlete in a CFP System.....	388
D. Goal of this Article	389
II. CFP'S FATAL FLAWS	390
A. CFP's Lack of Transparency.....	390
B. Transparency and Democracy.....	392
III. KEEPING THE <i>STUDENT</i> IN "STUDENT-ATHLETE"	393
A. The Myth of Pure Amateurism	394
B. Payment to Student-Athletes in Educational Currency, Not Cash Currency	395
C. Student-Athlete Impact Statements	397
IV. A PROPOSAL OVERVIEW: TRANSPARENCY AND DUE PROCESS	398
V. CFP SHOULD BORROW A PAGE FROM THE APA	400
A. Basic Procedural Elements.....	401
B. Timing of CFP Open Hearings.....	402
C. Potential CFP Discussion Topics: Selection Criteria	404
VI. CONCLUSION.....	405

I. INTRODUCTION

America's abiding passion for picking an annual college football champion began shortly after the Civil War with the official selection by the then-dominant National Championship Foundation that crowned Princeton

¹ M. Mark Heekin is an Associate Professor of Law at Charlotte School of Law in Charlotte, North Carolina. Bruce W. Burton is a semi-retired Professor of Law, former Dean, and frequent visiting professor at various law schools. Both authors wish to express their appreciation to Professor Heekin's student Research Assistants M. Claire Donnelly, W. Marlowe Rary and Jennifer R. Coleman for their valuable assistance with this Article.

University as the 1869 national gridiron champion.² Ever since 1869, America has named its annual college football champion by means of a variety of national organizations, overlapping systems, or—following World War II—by the advent of modern polls sponsored by media organizations.³ A mixture of polls and other procedures prevailed for 145 years until the advent of the new College Football Playoff (“CFP”) system in 2014.⁴

The Bowl Championship Series (“BCS”) was the dominant system from 1997 until replaced in 2014 by the CFP.⁵ During its brief existence, the BCS had annually selected two teams to meet in a national championship game by melding together a variety of national polls and attempting to add quantitative elements by means of a detailed computer program that compared a wide variety of team statistics.⁶ The ostensible purpose of the change from the BCS selection procedure to the CFP was quite moderate, to expand from two teams playing a single championship bowl game to a field of four teams selected to a playoff bowl series.⁷ At first blush, this goal was met.

After having the opportunity to examine two years of playoffs under the new system, the change brought about with the CFP system was far more radical than its purported goal. From actively seeking wide participation and consensus as existed under the BCS and previous systems, the CFP installed a narrow autocracy and needlessly decreased the level of transparency while substantially increasing the levels of uncertainty, human bias, politics, and an increased potential for undue commercialization of the student-athlete who has always resided at the foundation of college football.⁸ Throughout the regular season, both in 2014 and 2015, there have been numerous instances when the CFP-ESPN alliance seemed as interested in selling airtime and promoting itself as it did in determining the four teams to fill the four playoff

² *College Football National Champions*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/champions_national.html (last updated Jan. 8, 2010).

³ *Id.*

⁴ *Football Championship History*, NCAA, <http://www.ncaa.com/history/football/fbs> (last visited Mar. 5, 2015). From 1869 to 1882, the selections were made solely by the National Championship Foundation (“NCF”). *Id.* In 1883, the Helms Athletic Foundation joined the NCF until 1924, when these were joined by the Dickinson System (1924). *Id.* In 1936, the Associated Press first joined the group followed by the United Press International (1958), CNN/USA Today (1991), ESPN/USA Today (1997), then the USA Today Coaches Poll (2005), and the Harris Interactive (2005). *Id.* From 1998 to 2013, the various surviving groups were joined by the Bowl Championship Series and its national championship game. *Id.* For the origin of the BCS system in 1998, see *BCS Explained*, COLLEGE FOOTBALL POLL, http://www.collegefootballpoll.com/bcs_explained.html (last updated Nov. 14, 2014).

⁵ NCAA, *supra* note 4.

⁶ See Richard Billingsley, *The Road to the BCS has been a Long One*, ESPN, <http://assets.espn.go.com/ncaa/history/bcs.html> (last updated Oct. 22, 2001, 12:45 PM); COLLEGE FOOTBALL POLL, *supra* note 4.

⁷ *Presidents Approve Four-Team Playoff*, NCAA, <http://www.ncaa.com/news/football/article/2012-06-26/presidents-approve-four-team-playoff> (last updated June 29, 2012, 2:31 PM).

⁸ Dan Wetzell, *How the College Football Playoff Committee is Already Opening Itself Up to Criticism*, YAHOO! SPORTS (May 2, 2014, 4:33 PM), <http://sports.yahoo.com/news/how-the-college-football-playoff-committee-is-already-opening-itself-up-to-criticism-195637531-ncaaf.html>.

spots.⁹ These events were reminiscent of the passage in the screenplay “The Great Man,” which depicted the advertising industry in early television, in which the network president states that “in this business, anything goes, even integrity if it sells soap and toothpaste.”¹⁰ If selling soap and toothpaste is the paramount concern of the CFP, indeed, it is a success. The weekly CFP television show to announce the rankings and some of the CFP’s in-season rankings themselves seemed to serve no purpose except to market television air time.¹¹

From the vantage point of television ratings, some have declared the CFP a success and it cannot be argued that it was not a success in terms of viewership and advertising revenues.¹² With all the hype and salesmanship drummed up by the mysterious selection process and marketing efforts by the CFP and ESPN, one has to wonder if the true mission of the CFP from its very inception was to build marketplace dominance and increased revenue production for big time college football.¹³ If so, then the CFP is in need of procedural reforms protect against certain potential evils such as the over-commercialization of college football’s student-athletes and to institute such democratic virtues as transparency and due process that should lie at the heart of any selection process that seeks sustained popular acceptance. Particularly anything so historically revered in American culture as the national college football championship.

A. BCS History and Structure

From 1997 to 2014 the BCS was formed and governed by a committee of the ten college athletic conferences in the Football Bowl Subdivision plus the Athletic Director of then-independent Notre Dame.¹⁴

⁹ *Id.*; see also Scott Ostler, *Better System Needed for College Football’s Playoff*, SFGATE, <http://www.sfgate.com/sports/ostler/article/Picking-best-4-college-football-teams-requires-5889566.php> (last updated Nov. 12, 2014, 11:28 PM).

¹⁰ *Cinema: The New Pictures*, TIME, Jan. 21, 1957, at 84, <http://content.time.com/time/magazine/0,9263,7601570121,00.html>.

¹¹ See, e.g., Pat Forde, *10 Takeaways from the Buildup to the First College Football Playoff*, YAHOO! SPORTS (Dec. 7, 2014, 11:21 PM), <http://sports.yahoo.com/news/10-takeaways-from-the-buildup-to-the-first-college-football-playoff-042147496-ncaaf.html> (discussing the impact of the weekly rankings and the significant benefit to ESPN); *Roundtable: Analyzing the First Round of College Football Playoff Rankings*, SPORTS ILLUSTRATED (Oct. 29, 2014), <http://www.si.com/college-football/2014/10/28/college-football-playoff-roundtable> (discussing the usefulness of weekly TV rankings and how the process would improve if these shows were reduced or eliminated).

¹² See *Commentary: College Playoff Exceeds All Expectations*, WINSTON-SALEM JOURNAL (Jan. 4, 2015, 6:15 PM), http://www.journalnow.com/sports/colleges/football/commentary-college-playoff-exceeds-all-expectations/article_828830eb-0138-5557-9469-feeb277657bd.html; see also Dennis Dodd, *NFL may be Unbeatable, but College Football had a Better Year*, CBS SPORTS (Jan. 30, 2015, 9:26 AM), <http://www.cbssports.com/collegefootball/story/25009284/nfl-may-be-unbeatable-but-college-football-had-a-better-year>.

¹³ See Jason Kirk, *9 Potential Problems with the College Football Playoff Selection Committee*, SB NATION (Oct. 21, 2014, 9:11 AM), <http://www.sbnation.com/college-football/2014/10/21/6972235/college-football-playoff-selection-committee-members-list>.

¹⁴ See *BCS Governance*, ESPN, <http://www.bcsfootball.org/news/story?id=4809846> (last updated Mar. 27, 2014, 7:04 PM); see also *supra* notes 2 and 7.

During the era of the BCS, there arose a growing chorus of voices for change.¹⁵ The BCS system was asserted to be flawed because it resulted in only two teams admitted to a one-game championship.¹⁶ In addition, the BCS selection process was complex, involving a computation of the average of (i) two national college football polls and (ii) computerized mathematical formulae based on statistical data from a cluster of national groups that generate detailed college football data each season.¹⁷ The self-evident purpose of the complex BCS procedure was to create a system that was more objective than merely one person or one institution's opinion, or the opinion of one small committee, but to identify a broader national consensus. Always a work in progress, the BCS system was tweaked annually during its existence.¹⁸ However, despite all the criticisms and shortcomings of the BCS, what its selection process lacked in simplicity, it made up for in transparency and broad national input.

B. CFP Structure, Shortcomings, & Controversies

The CFP was born in June 2012 when the twelve college presidents of the then-existing BCS Presidential Oversight Committee voted to approve a new plan for a four-team playoff process to begin with the 2014 college football season.¹⁹ Ongoing public outcries against the lack of a multi-team playoff under the BCS system, which included influential congressmen and President Barak Obama, may have spurred along this change.²⁰ This vote by the BCS Presidential Oversight Committee led to the creation of the CFP and its structure, including its management by the college athletic conferences

¹⁵ Greg Bishop, *The End of the Much-Debated B.C.S.*, N.Y. TIMES (Jan. 7, 2014), http://www.nytimes.com/2014/01/08/sports/ncaafootball/rest-in-peace-bcs-a-maligned-system-that-sometimes-worked.html?_r=0.

¹⁶ *Id.*

¹⁷ Adam Rittenberg, *Transparency Needed in New BCS*, ESPN (June 19, 2012), http://espn.go.com/college-football/story/_/id/8065826/transparency-selection-process; see COLLEGE FOOTBALL POLL, *supra* note 4; see also *The BCS Formula*, BCS KNOW HOW, <http://www.bcsknowhow.com/bcs-formula> (last visited Feb. 11, 2015). For example, in 2013—the final year of the BCS system—the two polls used were the “USA Today Amway Coaches Poll” based on 62 voters who submitted ballots each week and ranked the college teams from 1–25. *Id.* Each ranked team on these 62 ballots received a weighted point total ranging from 25 points for each first place ranking, 24 points for each second place ranking, and so forth. *Id.* The other poll was the Harris Interactive Poll of 105 panelists drawn from former coaches, players, administrators, and current or former media members. *Id.* Teams to be ranked were 300 nominations received from the 10 Football Bowl Conferences plus some independent institutions. *Id.* The Harris Poll asserts that the process meets Harris’ criteria for design of the poll sample and is “statistically reliable representation of all ten conferences and independent institutions.” *Id.* The final component of the 2013 BCS rankings was a computer ranking of six different mathematical formulae applied to statistics drawn from six nationally prominent football data compilers Peter Wolfe, Wes Colley, Sagarin, Seattle Times/Anderson & Hester, Richard Billingsly, and Kenneth Massey. *Id.* Clearly, professionally conducted national polls help to add an element of broad consensus beyond the mere opinion of a small selection committee acting without published criteria and without the published weights to be attached to each criteria. *Id.*

¹⁸ Bishop, *supra* note 15.

¹⁹ NCAA, *supra* note 7.

²⁰ See Jill Martin, *BCS Panel Approves College Football Playoff Plan*, CNN SPORTS, <http://edition.cnn.com/2012/06/26/sport/football/college-football-playoff/> (last updated June 27, 2012).

within the NCAA's Football Bowl Subdivision.²¹ Bill Hancock ("Hancock")—for sixteen years Director of the NCAA Final Four basketball playoff system and more recently Director of the BCS football championship playoff game—was named Executive Director of the CFP.²² For many years prior to being named CFP Executive Director, Hancock was a vocal opponent of a college football playoff structure, advocating the benefits of the BCS and its selection process.²³ However, under Hancock's leadership, the nascent CFP devised a four-team playoff procedure with the four participating schools to be chosen by a Selection Committee, thereby concentrating the decision-making process in a handful of appointed Committee members.²⁴ This process established by the CFP excludes the broadly based elements found in the former BCS selection system, including any use of the national polls or the national football data compiled by six national football data collection organizations.²⁵

As established for the 2014 college football season, the initial CFP Selection Committee consisted of thirteen distinguished individuals, chaired by Jeff Long the current Vice Chancellor and Director of Athletics at the University of Arkansas, Fayetteville.²⁶ The Selection Committee also included other current or former college athletic directors, former coaches, former conference directors, former conference administrators, former players, plus a former military officer and a former cabinet officer.²⁷ However, one member of the inaugural CFP Selection Committee, Archie Manning, had to step down for medical reasons, leaving twelve members for the remainder of the 2014 season.²⁸ The CFP Selection Committee members'

²¹ See COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/overview> (last visited Feb. 11, 2015).

²² *Hancock Named Executive Director of New College Football Playoff*, ESPN (Nov. 14, 2012), <http://www.bcsfootball.org/news/story?id=8631453>.

²³ See, e.g., Bill Hancock, *BCS Chief: A College Football Playoff Would Increase Problems*, US NEWS (Dec. 31, 2009, 3:27 PM), <http://www.usnews.com/opinion/articles/2009/12/31/bcs-chief-a-college-football-l-playoff-would-increase-problems>; Bill Hancock, *Yet Again, College Football's BCS Works*, USA TODAY, http://www.usatoday30.usatoday.com/news/opinion/forum/2010-12-09-column09_ST2_N.htm (last updated Dec. 8, 2010, 4:32 PM); Jeff Metcalfe, *Q&A with Bowl Championship Series Executive Director Bill Hancock*, ARIZONA CENTRAL (Jan. 8, 2011), <http://www.azcentral.com/sports/articles/2011/01/08/20110108bcs-bill-hancock-interview.html>.

²⁴ See Kirk, *supra* note 13.

²⁵ See *id.*

²⁶ *Selection Committee*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/selection-committee> (last visited Apr. 24, 2015).

²⁷ *Id.* Besides Chairman Jeff Long, other current or former college athletic directors and/or coaches include Barry Alvarez (University of Wisconsin), Pat Haden (University of Southern California), Oliver Luck (West Virginia University), Tom Osborne (University of Nebraska), Dan Radakovich (Clemson University), and Tyrone Willingham. *Id.* Others include Condoleezza Rice (former Secretary of State and current Stanford University Professor), Lieutenant General Mike Gould (former Superintendent of the U.S. Air Force Academy), Tom Jernstedt (former NCAA Executive Vice President), Archie Manning (former player University of Mississippi and NFL), Mike Tranchese (former Commissioner, Big East Conference), Steve Wieberg (former college football reporter, USA Today). *Id.* It is not the position of this paper that this group is not savvy about college football and very distinguished, knowledgeable, and competent in their respective fields.

²⁸ Chris Mortensen, *Archie Manning Leaves Committee*, ESPN (Oct. 20, 2014), http://espn.go.com/college-football/story/_/id/11732136/archie-manning-leaves-steps-college-football-playoff-committee.

exemplary personal accomplishments, integrity, football interest, and knowledge of the sport by members of the CFP Selection Committee is unassailable.²⁹ Nevertheless, this Article will contend that there are fatal flaws inherent in the current organization of the CFP, or any system of governance which places the decision-making solely in the hands of a small group, lacks published selection criteria, meets without transparency, lacks a structure of due process in the group's deliberations, and has no established structure for adjusting and correcting the process as experience with operating the CFP may demand.³⁰

C. *The Proper Place of the Student-Athlete in a CFP System*

In addition to the undemocratic procedural flaws in the CFP as currently established, it is also a core position of this Article that the academic mission of colleges and universities should not be sacrificed to the potential excesses generated by an apparently unbridled pursuit of revenues under the CFP system.³¹ For some time there have existed growing budgetary pressures within American universities.³² The establishment of the CFP's promise to provide a cascade of new revenues flowing to the so-called "Five Power Conferences" and major independents.³³ There have arisen some troubling suggestions that the CFP system may tend to promote over-commercialization of college football.³⁴ No space is allocated to the educational benefits to the student-athletes.³⁵ Moreover, public remarks by Bill Hancock, Mark Parker, Eddie George, and others suggest that for many prominent figures in college sports, commercial hype trumps the concern with the student-athlete.³⁶

²⁹ Daniel Uthman, *Meet the College Football Playoff Selection Committee*, USA TODAY (Oct. 16, 2013, 3:35 PM), <http://www.usatoday.com/story/sports/ncaa/2013/10/16/meet-the-faces-behind-the-college-football-playoff-selection-committee/2993911/>.

³⁰ "[E]xperience has taught mankind" to more explicitly borrow from James Madison in THE FEDERALIST NO. 51. See THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961).

³¹ See, e.g., Chip Patterson, *"Air Force Coach Troy Calhoun Calls College Football Playoff 'Un-American'"*, CBS SPORTS (Dec. 12, 2014, 10:53 AM), <http://www.cbssports.com/collegefootball/eye-on-college-football/24882181/air-force-coach-troy-calhoun-calls-college-football-playoff-un-american>.

³² Cliff Peale, *Athletics Cost Colleges, Students Millions*, USA TODAY (Sept. 15, 2013, 12:02 AM), <http://www.usatoday.com/story/news/nation/2013/09/15/athletics-cost-colleges-students-millions/2814455/>.

³³ Jacob Pramuk, *Playoffs are a Revenue Bonanza for College Football*, NBC NEWS (Dec. 31, 2014, 1:12 PM), <http://www.nbcnews.com/business/business-news/playoffs-are-revenue-bonanza-college-football-n277641>.

³⁴ Ken Reed, *Another Sign College Sports Continue to Spin Out of Control*, HUFFINGTON POST, http://www.huffingtonpost.com/ken-reed/another-sign-college-sports_b_4892745.html (last updated May 3, 2014); Matthew J. Mitten & Stephen F. Ross, *Regulate, Don't Litigate, Change in College Sports*, INSIDE HIGHER ED (June 10, 2014), <https://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay>; Jeffrey H. Anderson, *Bowl Championship Splendor: The Golden Age of College Football*, THE WEEKLY STANDARD (Dec. 23, 2013), http://www.weeklystandard.com/articles/bowl-championship-splendor_770842.html; Jon Solomon, *How College Football Playoff Teams Make and Spend Money*, CBS SPORTS (Dec. 28, 2014, 11:51 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24919618/how-college-football-playoff-teams-make-and-spend-money>.

³⁵ See Peale, *supra* note 32.

³⁶ For CFP enhanced revenues, see Solomon, *supra* note 34 and accompanying text.

A glance at the athletic department budgets for 2012 of 130 schools engaged in big time college football and these same budgets from 2002 illustrates the ongoing economic necessity to increase football revenues.³⁷ In addition, there exists in its infancy a drive to provide college football players with scholarships that cover genuine educational costs, living expenses, medical insurance, and extended scholarship coverage.³⁸ The latter is a positive attempt to assure college student-athletes that despite delays due to redshirting, injuries, or other barriers their scholarship assistance will extend until they graduate. These beneficial proposals will obviously create significant added budgetary pressures on college athletic departments.³⁹

Despite such budgetary pressures, and despite the enthusiastic excesses of many involved with the CFP, there must be established genuine precautions to assure the academic mission. At the moment there are presently some hopeful signals that an informed national dialog, both in the courts, public discussion forums, and in NCAA governance, our culture is seeking to define college football as being something more than a revenue-producing enterprise played by exploited student-athletes.⁴⁰

D. Goal of this Article

At the dawn of the American Experiment, James Madison warned in Federalist 51 that formulating any process of human governance is a very tricky business: "If men were angels, no government would be necessary. If

³⁷ *Id.*

³⁸ Keith Sargeant, *Big Ten Announces Proposals to Provide Enhanced Benefits for Student-Athletes*, NJ, http://www.nj.com/rutgersfootball/index.ssf/2014/10/big_ten_announces_proposals_to_provide_enhanced_benefits_for_student-athletes.html (last updated Oct. 1, 2014, 5:26 PM); Joseph White, *NCAA President Calls for 'Scholarships for Life'*, ASSOCIATED PRESS (July 9, 2014, 6:35 PM), <http://collegefootbal.all.ap.org/article/ncaa-president-calls-scholarships-life>; Sid Hartman, *University President Kaler Supports More Aid for Athletes*, STAR TRIBUNE (Sept. 5, 2014, 6:43 AM), <http://www.startribune.com/printarticle/?id=274038661>.

³⁹ During the 2014 college football season, NCAA President Mark Emmert said, "(There's) enormous tension right now that's growing between the collegiate model and the commercial model[]" . . . "And, by the way, . . . [t]his tension . . . has gotten greater now because the magnitude of dollars has gotten really, really large." *NCAA President: Not a Good Idea*, ESPN (Sept. 17, 2013, 12:50 PM), <http://espn.go.com/espn/print?id=9682086&type=story>; see also Graham Couch, *Why Money Matters - Revenue, Spending Impact Big Ten Football Success*, LANSING STATE JOURNAL (July 15, 2013), <http://www.lansingstatejournal.com/article/20130714/COLUMNISTS15/307150013>; Derek Wetmore, *The Economics of Athletics*, MINNESOTA DAILY (Mar. 8, 2012), <http://www.mndaily.com/2012/03/08/economics-athletics>. University of Michigan President, Mark Schlissel, caustically indicted the reality that as to college football, rational way of decision-making has become "crazed or irrational approach." Nina Mandell, *Michigan President Expresses Concern About 'Sports Stuff'*, USA TODAY (Nov. 11, 2014, 11:57 AM), <http://ftw.usatoday.com/2014/11/mark-schlissel-michigan-brady-hoke>; Adam Rittenberg, *BIG Revenue, Expenses Among Highest*, ESPN (May 8, 2013), <http://espn.go.com/blog/bigten/print?id=76373>; Megan Kalmoe, *NCAA: Revenue vs. Non-Revenue Sports* (Jan. 24, 2011), <http://megankalmoe.com/2011/01/24/rev-vs-nonrev/>.

⁴⁰ See, e.g., Matthew J. Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837 (2014); Neil H. Buchanan, *College Sports Should be Treated as a Source of Funding for Nonprofit Universities, Not as a For-Profit Business*, VERDICT (Aug. 14, 2014), <https://verdict.justia.com/2014/08/14/college-sports-treated-source-funding-nonprofit-universities-profit-business>; *Student Athletes and Higher Education*, C-SPAN (Sept. 4, 2012), <http://www.c-span.org/video/?307921-1/student-athletes-higher-education>.

angels were to govern men, neither external nor internal controls . . . would be necessary. In framing a government which is to be administered by men over men[] . . . experience has taught mankind the necessity of auxiliary precautions.”⁴¹ In the same Madisonian spirit, this Article will explore the shortcomings of the current CFP system and propose a series of workable solutions—“auxiliary precautions,” to borrow Madison’s phrase—which will address each problem.

II. CFP’S FATAL FLAWS

With any new system of governance or ranking, regardless of how well planned, there will be problems, controversies, and unintended consequences. As college football under the CFP has progressed, there have been serious issues that must be addressed.⁴² The goal of addressing the issues is not to serve up negative criticism of the nascent CFP, but to offer potential solutions to improve upon the process.

A. CFP’s Lack of Transparency

Justice Louis Brandeis’ famous dictum—‘sunlight is the best disinfectant’—is applicable to the shrouded CFP system as it currently operates.⁴³ Until the material elements of CFP operations become exposed to the sunlight by means of true transparency being introduced into the selection process, suspicion, and confusion will, unfortunately, continue to poison the well of public trust and confidence necessary to a sustainable system. Perhaps the most fundamental issue that has fueled controversy is the lack of transparency in the CFP selection process.⁴⁴ This lack of transparency manifested itself in a variety of criticisms. Among the criticisms were the lack of published, comprehensive selection criteria, the telecast of the non-binding weekly ratings during the season, inconsistent explanations for changes in the weekly rankings, and claims of bias by those with a pecuniary interest in the playoff and in college football in general.⁴⁵ Further criticisms include claims of lobbying by certain powerful universities, claims of disproportionate influence by having the CFP Selection Committee membership heavily populated with current and former college athletic

⁴¹ THE FEDERALIST NO. 51, *supra* note 30, at 294 (James Madison). Speaking of Founding Fathers, it is pertinent to note James Madison’s dicta about eternal vigilance and democratic institutions. To paraphrase James Madison, “Eternal vigilance is the price of preserving the ideal of the [student-athlete].” See generally THE FEDERALIST NO. 46, *supra* note 30, at 304–12 (James Madison).

⁴² See generally Kirk, *supra* note 13; Marc Tracy, *Playoff Game Plan: Colleges Turn to Lobbying for a Berth*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/sports/ncaafootball/playoff-game-plan-colleges-turn-to-lobbying-for-a-berth.html>; Wetzel, *supra* note 8; Chip Scoggins, *First Playoff Bracket Brings Controversy, As Expected*, STAR TRIBUNE, <http://www.startribune.com/sports/gophers/285041751.html> (last updated Dec. 8, 2014, 9:52 AM).

⁴³ Louis Grumet, ‘Sunlight is the Best Disinfectant,’ THE CPA JOURNAL (Dec. 2003), <http://archives.cpajournal.com/2003/1203/nv/nv2.htm>.

⁴⁴ Rittenberg, *supra* note 17.

⁴⁵ Kirk, *supra* note 13.

directors, and commercial exploitation of the amateur student-athlete in the nascent playoff system.⁴⁶

The Commissioner of one of the Power Five Conferences, the Big 12's Bob Bowlsby was eloquently quoted on the importance of this issue when Ohio State surprisingly annihilated Wisconsin in the Big Ten title game and thereby vaulted itself into the in CFP final four.⁴⁷ Transparency is not merely a feel-good abstraction. Transparency is a matter of elementary fairness by providing the operative selection criteria and weight to teams, players, coaches from the various universities. Consider, for example, the dilemma of the Big 12 Conference and its co-champions TCU and Baylor. At no time was the conference or its schools given any advance information that failure to play a conference championship game, a thirteenth game, could penalize Big 12 schools. In the aftermath of the Committee's final rankings, which demoted TCU and Baylor, Conference Commissioner expressed this:

The one thing I'm disappointed in is it appears that we were penalized for not having a postseason championship game[] If that's the case . . . at least relative to 12 games versus 13 games, I wish we would have been advised that it was likely we were going to be penalized. Not that we could have done anything about it, but we at least would have been aware of it.⁴⁸

The authors believe that, until full transparency of CFP selection criteria and their respective weights are visible and publicly known in advance, the nub of Commissioner Bowlsby's indictment will be valid as to the next season of selections. Rather than decisive weight being given to a conference championship game, perhaps next time all may be surprised to discover that decisive weight will be attached to other factors such as the comparative schedules of non-conference games, or the early poll rankings of this week's opponents, or the final poll rankings of opponents from prior weeks, or the relative won-lost records of such prior opponents, or late-season injuries to key players, etc. It is the position of the authors that all material factors, and the weight attached to each, demand open disclosure and discussion to avoid teams or entire conferences feeling blindsided by the seemingly random and ad hoc nature of the Committee's operations.

⁴⁶ The lack of transparency is weird, at least. The Committee won't release rankings by each of its members, instead having [Jeff] Long explain the group's top 25. . . . [A]nalyzing individual ballots for whiffs of bias would get several fan bases through entire offseasons. [And] it is odd, considering the number of times [the old] BCS-turned-Playoff exec Bill Hancock has touted the process' transparency. The committee's protocol says, "Polls that are taken into consideration by the selection committee must be completely open and transparent to the public." Shouldn't that include the committee's own rankings from the week prior? *Id.*

⁴⁷ Jon Solomon, *Buckeyes' Final Push Impresses Committee While Big 12 Gets Left Out*, CBS SPORTS (Dec. 7, 2014, 3:44 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24872914/buckeyes-final-push-impresses-committee-while-big-12-gets-left-out>.

⁴⁸ See *id.* One of the authors remarked the irony that the final selections were announced by the Committee on December 7, 2014, the famed "Day of Infamy" of the surprise attack on Pearl Harbor.

B. *Transparency and Democracy*

Isn't transparency of decision-making a necessary and desirable feature of American? As one observer has put it, "[a] high level of openness is an identifying characteristic of democracy[. . .]"⁴⁹ The secrecy under which deliberations by the CFP Selection Committee were held certainly fueled concerns for transparency.⁵⁰ At its core this concern rested upon the lack of any formally established and publicly promulgated CFP selection criteria—and the weight assigned to each criteria—by means of which potential playoff teams are to be ranked—was perhaps the greatest impediment to transparency.⁵¹ Anyone affiliated with college football knows that an offside violation will result in a five-yard penalty; roughing the passer will result in a fifteen-yard penalty; pass interference will result in a fifteen-yard penalty and an automatic first down; and delay of game will result in a five-yard penalty.⁵² Football is premised on all teams abiding by known, established rules, yet the current selection system is ad hoc and un-transparent. Therefore, the present system is antithetical to the very premise that lies at football's foundation.

Despite efforts to connect the dots and display coherent reasons for the Selection Committee's rankings, Chairman Jeff Long's inconsistent explanations for the Selection Committee's weekly rankings of teams sounded reminiscent of Abbott and Costello's burlesque routine of "Who's on First."⁵³ Indeed, many who have an interest in college football were frustrated by the seemingly inconsistent actions of the CFP Selection Committee and explanations from Chairman Long.⁵⁴

⁴⁹ Grumet, *supra* note 43.

⁵⁰ Rittenberg, *supra* note 17.

⁵¹ Commissioner Bob Bowlsby's stinging indictment should settle the issue about the elemental fairness of operating the system by means of open criteria. *See generally* Solomon, *supra* note 47.

⁵² 2014 Rules and Interpretations, NCAA, <http://www.ncfafootball.com/resources/Rules/FR15.pdf> (last visited Mar. 21, 2015).

⁵³ *See* "Who's on First," PENNSYLVANIA STATE UNIV., http://www.psu.edu/dept/inart10_110/inart10/whos.html (last visited Mar. 21, 2015); *see also* George Schroeder, *Jeff Long Says 'Game Control' is Subjective, Not a Stat*, USA TODAY (Nov. 21, 2014, 3:54 PM), <http://www.usatoday.com/story/sports/ncaa/2014/11/21/college-football-playoff-committee-chairman-jeff-long-game-control/19347937/> ("As chairman of the College Football Playoff selection committee, Jeff Long is charged each week with explaining the sometimes shifting rationale behind the committee's Top 25. It's sometimes a difficult spot to be in. But Tuesday, when he used some variation of 'controlled the game' several times, it touched off some confusion. Was Long referring to some notion of 'game control,' the advanced statistic created by and promoted by ESPN? Or to some other similar (and new) metric used by the committee? 'There's absolutely no metric involved,' Long told USA TODAY Sports. 'It's a discussion amongst committee members about controlling the game.' And he added: 'The committee had not and does not and will not use that ESPN metric. Many of us were unaware of that ESPN metric.'"); *see also* Mike Herndon, *Controversial Choices Cloud this Week's College Football Playoff Rankings*, ALABAMA MEDIA GROUP, http://www.al.com/sports/index.ssf/2014/11/controversial_choices_cloud_th.html (last updated Nov. 12, 2014, 10:33 AM).

⁵⁴ *See* Paul Myerberg, *Ranking Reaction: Mixed Message from Playoff Committee*, USA TODAY (Nov. 19, 2014, 2:14 AM), <http://www.usatoday.com/story/sports/ncaa/2014/11/19/college-football-playoff-top-25-ranking-reaction/19256947/> ("Since the release of the first poll in late October, College Football Playoff executive director Bill Hancock and selection committee chairman Jeff Long have stressed how each new list stands alone, unbiased by the previous week's top 25. It's confusing, therefore, that Long used

Undue media influence, sought or unsought, over the CFP selection process is believed to be present.⁵⁵ Some have indicted ESPN for openly pushing a pro-SEC agenda in the CFP selection process.⁵⁶ Obviously, without openly established selection criteria and transparency of deliberations, the entire process is open to cynicism and suspicions such as those media issues raised by thoughtful commentators such as Jordan Burchette, thereby poisoning the well of trust and fairness in the public attitude towards college football.⁵⁷

III. KEEPING THE *STUDENT* IN “STUDENT-ATHLETE”

The entire history of America’s intercollegiate athletics from 1852 to the present has been marked with a continuous struggle between powerful cultural, budgetary, and marketplace forces that increasingly seek to drive big-time college football and basketball towards pure commercialization and the opposing forces that seek, as stated in the NCAA Constitution, “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and[] . . . retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁵⁸

To the first group “football matters” as measured by increased TV

last week’s poll to help explain Alabama’s rise from fourth into the top spot.”); Matt L. Stephens, *Jeff Long, CFP Failing Football Worse than BCS*, THE COLORADOAN (Nov. 20, 2014, 11:13 PM), <http://www.coloradoan.com/story/sports/csu/football/2014/11/19/college-football-playoff-marshall-csu/19260445/> (“The College Football Playoff is broken. Humans tend to ruin good things. Four weeks into the CFP’s rankings and the selection committee’s only constant is inconsistency, showing an inability to honor its word. When the latest rankings were released Tuesday night, Alabama was the new No. 1, followed by Oregon, Florida State and Mississippi State, which lost in Tuscaloosa last week. The Crimson Tide earned its spot by knocking off previously top-ranked MSU, but when explaining why the undefeated Seminoles remained at No. 3, Arkansas athletic director – and committee chair – Jeff Long said it’s because they haven’t controlled games.”).

⁵⁵ Brandon Larrabee, *College Football Playoff Rankings: Alabama Only SEC Team in the Top 4; Bowls Shaken Up*, SB NATION (Dec. 2, 2014, 9:47 PM), <http://www.teamspeedkills.com/2014/12/2/7324461/college-football-playoff-rankings-alabama-oregon-florida-st-tcu-baylor/> (“Many of us have said for a long time that having the selection committee release weekly rankings is a colossally bad idea. There is only one entity on the face of the planet that benefits from having weekly rankings is a colossally bad idea. There is only one entity on the face of the planet that benefits from having weekly rankings, and it’s ESPN, because Worldwide Leader has a show it can put on every Tuesday night that a lot of college football fans will watch. It is another example of ESPN’s business needs overriding the best interests of whatever sport is involved. Nothing that has happened this season has given me, at least, any reason to believe differently.”).

⁵⁶ Jordan Burchette, *The Worldwide Cheerleader: ESPN and the College Football Playoff*, ROLLING STONE (Oct. 28, 2014), <http://www.rollingstone.com/culture/features/the-worldwide-cheerleader-espn-and-the-college-football-playoff-20141028>.

⁵⁷ *Id.*

⁵⁸ 2009-10 NCAA Division I Manual, THE NAT’L COLLEGIATE ATHLETIC ASS’N (2009), <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx>. For a comprehensive history of this continuing struggle since 1852, see, e.g., Mathew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 781–99 (2010); *Knight Commission on Intercollegiate Athletics*, ART & SCIENCE GROUP LLC (Oct. 2009), http://www.knightcommissionmedia.org/images/President_Survey_FINAL.pdf; see generally SPORTS AND THE LAW: A MODERN ANTHOLOGY 215–59 (Timothy Davis et al. eds., 1999).

audience share, product marketing, and increasing gross revenues to relieve budgetary pressures among member schools.⁵⁹ To the second group “football matters” because of its lessons in teamwork, courage, perseverance, leadership, the anti-aristocratic ethos of a level field of competition where one is judged by personal effort, not family background or social status.⁶⁰

In 1984, the United States Supreme Court handed down its opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, which opened the door to expanded television broadcasting of collegiate athletic events and the lucrative revenue that accompanies television broadcasting.⁶¹ The advent of the CFP era seems to signal fresh cascades of money, causing society to enter a new phase in this ongoing struggle. A new high stakes era when society must redefine the proper role of the university’s educational program in relation to its athletes. Following a brief historic review, this Article will present some hopeful signs of change and a proposal for linking the CFP with a systematic structure of formal, regular academic impact statements.

A. *The Myth of Pure Amateurism*

From the time of the ancient Greek athletic competitions, to the twentieth century eruption in popularity of college football in America⁶² and on into the twenty-first century’s evolution of the NCAA’s Five Power Conferences, some form of compensation has always been afforded to athletes engaged in popular competitions.⁶³ Thus, the struggle, as always, is to implement that “clear line of demarcation” between professional sports entertainment and interscholastic competitions as called for by the NCAA Constitution.⁶⁴ Like Madison and the other Founders, interscholastic athletics needs to create structural mechanisms in CFP-era college football that will permit a sustainable response to the popular demand for interscholastic competition, generate the massive revenues that modern times require for college athletics programs, permit university administrations to exploit their sports offerings to benefit the campus in ways far removed from the athletics

⁵⁹ See *supra* note 58 and accompanying text.

⁶⁰ See, e.g., Michael Nelson, *Football as Metaphor*, THE WEEKLY STANDARD (Oct. 13, 2014); MARK EDMUNDSON, WHY FOOTBALL MATTERS: MY EDUCATION IN THE GAME 191 (The Penguin Press 2014) (Edmundson points out the real world fact that “Wall Street firms and high-powered law offices want to hire guys (and now women) who have played team sports These people can get together and form a group and the group can make something happen.”).

⁶¹ See generally *Nat’l Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 (1984).

⁶² See generally Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 10 (1991); J. Davenport, *From Crew to Commercialism—The Paradox of Sport in Higher Education*, in SPORTS AND THE LAW: A MODERN ANTHOLOGY 218 (Timothy Davis et al. eds., 1999).

⁶³ See Shropshire, *supra* note 62, at 18.

⁶⁴ See THE NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 58.

programs,⁶⁵ while at the same time keeping the educational mission forefront and material to the benefit of the college's student-athletes. One example of academe groping to find a way to recognize the underlying role of higher education during the FBS era is the Big Ten proposal outlined below, a current, worthy effort.⁶⁶ Other proposals, or refinements of those listed, will undoubtedly surface.

B. Payment to Student-Athletes in Educational Currency, Not Cash Currency

With ever-larger revenues pouring into the Power Five conferences during the CFP era, consideration is being given to the needs of student-athletes, particularly in the revenue-producing sports.⁶⁷ The traditional financial equation has shifted dramatically.⁶⁸ Recently, some institutions—for instance the schools of the Big Ten Conference—are currently seeking to re-tailor athletic scholarships and other support in such a fashion as to provide incentives and assistance to the “student” role of the student-athlete.⁶⁹ The principal elements of the Big Ten proposal:

1. Costs of Education: Redefine the full grant-in-aid to cover the actual costs of the student-athlete's education;
2. Guaranteed, Multi-Year Scholarships: Cover the costs of completing the student-athlete's degree even if the student is no longer able to complete for whatever reason;
3. Lifetime Education Commitment: The scholarship will remain available for life, in the event that the student-athlete leaves for a professional sports job (e.g., NFL, NBA, WNBA, NHL) before completing his/her degree, then upon completion of his/her career the former student-athlete may return to complete the degree;
4. Medical Insurance: Provide all student-athletes with improved, consistent medical coverage;
5. Improved Health and Safety: Move to improve health

⁶⁵ For an exploration of the consensus among college presidents and trustees regarding vitalization of non-athletics campus programs such as non-athletic grants, donations, alumni support, improved faculty recruitment and retention, improved student application credentials, greater political clout in state capitals, see Mitten & Ross, *supra* note 34; see also Mitten et al., *supra* note 58.

⁶⁶ *Big Ten's Big Move: More Money for Student-Athletes*, STAR TRIBUNE (Oct. 1, 2014, 2:06 PM), <http://www.startribune.com/printarticle/?id=277787901>.

⁶⁷ Dan Wolken, *Examining the Big Ten's Statement on Education, Athletics*, USA TODAY (Apr. 17, 2015, 4:24 PM), <http://www.usatoday.com/story/sports/college/2015/04/17/big-ten-jim-delany-education-athletic-memo/25933525/>.

⁶⁸ See *supra* note 12 and accompanying text.

⁶⁹ STAR TRIBUNE, *supra* note 66.

and safety of its student-athletes; and

6. Nationwide Reforms: Work with the other Power Five Conferences through the NCAA to achieve consistent reforms throughout the ACC, SEC, Big 12, Pac-12.⁷⁰

Note that the above proposal pays the student-athlete in what could be called “educational currency” and not in cash “pay for play” currency.⁷¹ Clearly, this distinction seeks to preserve the mission of education for student-athletes in the evolving new order of big-time interscholastic athletics.⁷² Paying salaries to student-athletes must have been considered and rejected by the Big Ten since at least one individual university president within the Big Ten Conference made it publicly clear that cash “pay for play” was not part of the proposed agenda, nor should it be.⁷³ Moreover, there may exist important maturational reasons for rejecting cash payments and using what we might designate “educational currency.”⁷⁴

The authors believe that if we assume the era of CFP will be accompanied by a tide of broadcast, ticket sales, and merchandising revenues to the Five Power Conferences and major independents, there will exist a powerful temptation to cause all interscholastic sports decisions to be based upon maximizing revenues. Nonetheless, controlling decisions need not be made solely on the basis of profit taking as in the private marketplace.

The first consideration by all educational institutions participating in big-time college football and basketball should be to act to preserve their principal mission of educating students. The first premise in all decisions that touch upon the student-athletes should be furthering the educational mission. When in conflict, furthering the educational mission should trump the drive solely to maximize profits—academe must differ from a for-profit business in this respect. The Ohio State University’s football program must not devolve into a mere junior version of the Cleveland Browns, nor should Michigan State University’s basketball program be a minor league imitation of the Detroit Pistons.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Hartman, *supra* note 38. As one leading sports law expert, Professor Matthew J. Mitten, the Director of the National Sports Law Institute at Marquette University, recently put it: “Unfortunately star athletes are lionized from a young age and don’t believe the normal rules of society apply to them. This entitlement attitude certainly will be fostered by paying college athletes in excess of the full cost of attendance when they are students.” This was in response to our e-mail discussion of the recent outbreak of sexual assault charges among several star college quarterbacks, including two from “power conferences” located in Florida. E-mail from Matthew J. Mitten, Professor of Law and Director, National Sports Law Institute, Marquette University Law School, to author Bruce W. Burton (Oct. 7, 2014) (on file with author).

⁷⁴ Wolken, *supra* note 67.

C. Student-Athlete Impact Statements

By its nature, the operation of any large-scale business enterprise (the Cleveland Browns, the Detroit Pistons) forces its managers into a constant focus upon marketplace issues such as finance, public relations, marketing, cost-benefit and related revenue-producing questions.⁷⁵ Interscholastic sports competition should differ. Since the core mission of higher education and the role of the student-athlete must not be lost sight of even in the glare of vastly increased revenues from CFP operations, this paper proposes the institution of a new formal mechanism—a special “auxiliary precaution” if you will—to keep the CFP focus properly centered.⁷⁶ A formal mechanism that would require that whenever the CFP considers a new or revised policy or procedure, such consideration should also be accompanied by formal consideration and adoption by the CFP of an impact statement addressing the effect of the policy or procedure on the core mission of higher education and the role of the student-athlete in relation to that core mission. This impact statement should be a part of any reformed CFP decision-making system.

More exactly, proposed below, as part of a necessary reform of CFP procedures is a system of regularly scheduled, open meetings by the CFP Selection Committee.⁷⁷ These proposed mandated, systematic, open meetings are modeled after the system of public notice, comment, and hearings envisioned by the rulemaking processes found in the Administrative Procedures Act (“APA”).⁷⁸ In order to address the problem of possible undue commercialization of the student-athlete, it is proposed that the impact on the educational mission be a formal part of an APA-style system of public comments, public discussions, and open voting upon CFP matters. In short, formal consideration and approval of any policy or change in policy should include a process for public comment and open Committee consideration of an impact statement as a necessary part of any scheduled public meeting. It is urged that this procedure would greatly help to safeguard the collegiate student-athlete against undue commercial exploitation.

Accordingly, our proposal is to require that each policy or procedure to be acted upon by the CFP be accompanied by open consideration and vote upon its impact on the student-athlete and the core mission of America’s

⁷⁵ Cost-Benefit Analysis:

A process by which business decisions are analyzed. The benefits of a given situation or business-related action are summed and then the costs associated with taking that action are subtracted. Some consultants or analysts also build the model to put a dollar value on intangible items, such as the benefits and costs associated with living in a certain town. Most analysts also factor opportunity cost into such equations.

Cost-Benefit Analysis, INVESTOPEDIA, <http://www.investopedia.com/terms/c/cost-benefitanalysis.asp> (last visited Apr. 19, 2015); F. John Reh, *Cost Benefit Analysis*, ABOUT MONEY, <http://management.about.com/cs/money/a/CostBenefit.htm> (last updated Dec. 16, 2014).

⁷⁶ THE FEDERALIST NO. 51, *supra* note 30 (James Madison).

⁷⁷ See *infra* note 78 and accompanying text.

⁷⁸ See generally 5 U.S.C. §§ 551–559.

system of higher education. Concretely, the proposed impact statement should force the CFP to openly address two questions: (1) the real-world impact upon student-athletes who participate in football at the schools constituting the CFP; and (2) the proposal's real-world impact upon the stated goal of the NCAA's Constitution, specifically to preserve a "a clear line of demarcation" between professional sports entertainment and interscholastic competitions.⁷⁹

IV. A PROPOSAL OVERVIEW: TRANSPARENCY AND DUE PROCESS

It is not the position of this Article that the CFP Selection Committee, the CFP governance, and its place in college football should be scrapped. No perfect system emerges full-born from the first attempts. Mankind and its creations have flaws and we have learned to address and remedy the problems. As one commentator described the CFP system, "College football will always have some level of debate and controversy attached to it. There is no perfect way to determine a national championship, not with so many powerful organizations and voices with different ideas."⁸⁰ It is the authors' position that the system should be modified and that the Selection Committee shall have a central role in establishing the operative rules, monitoring and adjusting those rules over time as experience dictates, and becoming a year-round focal point for the selection process of college teams to vie for the national championship playoff.

The central element of transparency is imperative to maintain the confidence of all interested parties in the selection process. "If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects."⁸¹ For the CFP to be fully trusted as the system by which the best team in college football is determined, an unbiased, objective, and transparent process of determining the teams to be seeded in the playoff must be established and adopted. First, there must be established criteria for determining how teams will be ranked.

From this notion follows a second consideration. Such established criteria must also be clearly weighted and then openly applied in a consistent, unbiased method. And on that follows a third. There must be transparency in the entire process to ensure its credibility. These steps could be accomplished in a way that would be of great interest to coaches, players,

⁷⁹ THE NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 58.

⁸⁰ Although arguing for and against expansion of CFP from four to eight teams, McGuire's comment has universal application to the entire CFP system. See Kevin McGuire, *The College Football Playoff does not Need to be Fixed Just Yet*, NBC SPORTS (Nov. 9, 2014, 1:40 PM), <http://collegefootbaltalk.nbcsports.com/2014/11/09/the-college-football-playoff-does-not-need-to-be-fixed-just-yet/>.

⁸¹ Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. (May 26, 2009, 10:47 AM), <http://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency/>; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 109 (Harvard University Press ed. 1980).

alumni, fans, media, and all who have a stake in college football. The following general reforms are essential:

1. A system of regularly scheduled open meetings, perhaps on a quarterly basis;
2. Receipt and discussion of public comments;
3. Establishing, and revising from time to time as needed, the operating criteria to be used in the CFP process;
4. Establishing, and revising from time to time as needed, the weight to be attached to each of the operating criteria used in the CFP process;
5. Discussing and considering the student-athlete impact statement noted above; and
6. All of steps 1-5 above shall be subject to full transparency.

As a marketplace feature, such a system could well result in placing college football at the media center stage on a year-round basis. The interest generated by a regular series of open meetings would result in legitimate news about college football as a series of year-round media events that could sell more toothpaste and soap than the much maligned in-season weekly rankings shows introduced in the CFP selection process.⁸²

As a substantive matter, formulating objective criteria football teams and their respective conferences will know far more precisely how their actions and inactions, their achievements and their missteps will impact the outcome of their season just as clearly as they know the impact of a personal foul or a delay of game call will have on the outcome of a game.

Assume for a moment that the Committee's identified selection criteria evolve eventually to include such items as (a) the strength of each team's nonconference schedule; (b) comparative scores among the teams' common opponents; (c) quality of a team's losses against significant opponents; (d) each team's rank within its conference; (e) the outcome of conference championship games; (f) pre-season or mid-season poll rankings by certain national polls; (g) post-season poll rankings; (h) existing NCAA rules violations established against any of the schools; (i) academic status of individual schools or conferences, perhaps expressed in the NCAA graduation statistics; (j) the role, if any, that will be permitted to lobbying by the schools or their supporters and the rules governing such activity; (k) other criteria as are considered relevant from time to time. Suppose, further, that the

⁸² The CFP's heavily televised and discussed weekly ratings shows drew much attention. See Wetzel, *supra* note 8; Kirk, *supra* note 13; Herndon, *supra* note 53; Burchette, *supra* note 56.

Committee will determine formulae for attaching weight to each of the established criteria. Obviously it is possible, sooner or later, that computer assistance may be helpful or even necessary—thus leading the CFP Selection Committee to approve the criteria for any applicable computer programs employed to evaluate and select the playoff teams. And, of course, the tweaking of all of the above as necessary in the light of real world experience will become an ongoing task.

Finally, a “hidden bias” problem may eventually need to be addressed. A casual observer looking at the rankings and the various statements on behalf of CFP by Messrs.⁸³ Long and Hancock might conclude the CFP Selection Committee apparently used, among other things, an imprecise “eye test” to evaluate teams.⁸⁴ The “eye test” was bereft of any criteria and left it up to the eye of the beholder to determine which teams deserved to be ranked and in which order they should be ranked. Realistically, the human whose eyes are doing the observation for the eye test can only watch so much college football during the season. If the Committee members are not watching all of the games, they would need to acquire information on games they did not watch from some source. Are they simply relying on box scores or are they relying on media reports about the games? Therefore, Selection Committee members may be susceptible to the potential bias of sports journalists, regardless of how innocently this was done by the Committee members or the reporters.

Discussed in the next section are some existing procedural models that the CFP can draw upon to formulate a process to address all of these matters.

V. CFP SHOULD BORROW A PAGE FROM THE APA

Before objective criteria can actually be established, workable procedures for establishing the criteria should be developed. Some useful models currently exist. Perhaps a good model to turn to for guidance for openly and systematically developing CFP rules would be the APA. The APA was enacted by Congress to regulate the development of rules and policies for federal administrative agencies and many states have patterned their local administrative procedure statutes after the federal APA.⁸⁵

⁸³ Interview with Bill Hancock, PAUL FINEBAUM SHOW ON ESPN (Oct. 29, 2014) (in answer to Finebaum’s questions about MSU and FSU: “Put Auburn 3 because they *were clearly* 3. Our group *felt like* [MSU] and FSU were pretty solid 1 and 2. And they also *felt like* Auburn was solid 3. And then they *felt like* Ole Miss and Oregon and Alabama were very close in that next group.”) (emphasis added). For Jeff Long’s inconsistent statements, see Solomon, *supra* note 34 and accompanying text.

⁸⁴ See Interview with Bill Hancock, *supra* note 83; see also Solomon, *supra* note 34 and accompanying text.

⁸⁵ Rui J. P. de Figueiredo, Jr. & Richard G. Vanden Bergh, *Protecting the Weak: Why (and When) States Adopt an Administrative Procedure Act* (Oct. 2001), <http://www.nyu.edu/gsas/dept/politics/seminars/rui2.pdf>.

Administrative agencies have missions similar to the mission of the CFP in that they must make rules, enforce those rules and have quasi-judicial proceedings to judge those parties who are bound by the administrative agency.⁸⁶ The CFP must make rules, enforce those rules, and have an assessment of competing interests.

It would seem nearly impossible for one human, much less one with a fulltime job, to watch all of the college football games from kickoff to the end of each game necessary to allow them to rate teams using an “eye test.” To further complicate the matter, the majority of the Committee members work as athletic directors.⁸⁷ One of the busiest times of the year for those athletic director members of the Selection Committee would seem to be football season. If, instead of a human Selection Committee, there were a computer program developed to rank teams based upon criteria as the Selection Committee deemed fit, that would emancipate the Selection Committee from the impossible task of watching thousands of hours of college football during the season, or more likely from relying on third party reports of college football game highlights or unidentified assistants to carry out much of the work evaluating and ranking teams.

Accordingly, the most prudent way to structure the process is to assign the Selection Committee to develop and approve the selection criteria and each criteria’s respective weight to be used in the decision-making process, rather than seeking to administer some ill-defined “felt like” test supported by the impossible task of viewing each fall’s tsunami of college games. In this connection, the authors’ believe that there exists a rough, but accurate, analogy between the proper, more inclusive, functioning of the CFP Selection Committee and the functioning of a government agency tasked with rulemaking, hearings, and rendering decisions under the guidance of the APA.⁸⁸ These principles are no less than an informed attempt at providing fundamental fairness in its decision-making.

A. Basic Procedural Elements

Clearly, because the CFP is a private institution, not a governmental entity, the procedural fairness sought by the APA (“procedural due process” if you wish) is not constitutionally or statutorily mandated upon the CFP. The CFP structure and procedures are mostly a matter of private covenants and voluntary association, not directly derived from civil or criminal legislation.⁸⁹ Nonetheless, some of the essential principles of the APA could readily be

⁸⁶ See 5 U.S.C. §§ 551–559.

⁸⁷ Uthman, *supra* note 29.

⁸⁸ See 5 U.S.C. §§ 553–557 (2012).

⁸⁹ See generally Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. NEW HAMPSHIRE L. REV. 443, 448 (2010).

adapted for the use in forming a more inclusive CFP process. These would include the following:

1. Open meetings (APA Section 552b);
2. Public information and notices (APA Section 552);
3. Rulemaking (in the CFP context, adopting and attaching weight to selection criteria—APA Section 553);
4. Hearings on all matters before the CFP Selection Committee (APA Section 556); and
5. Decisions (in the CFP context, fixing the selection criteria, the weight of each criteria, tweaking these based on experience, and the annual team selections for the playoff games) also require open meetings modeled on APA Section 557.⁹⁰

These procedures—designed to avoid autocracy and injustice by powerful agencies—are clearly in harmony with the concepts of due process and transparency in any important decision-making processes among democratic peoples.⁹¹

B. Timing of CFP Open Hearings

The Selection Committee's process of developing selection criteria, and any future computer programs as might seem desirable, would provide a specific workload during the offseason could fit well with the CFP's apparent desire to keep college football front and center in the media. With a process to establish selection criteria patterned after the rulemaking process in the APA, college football could be a year-round newsmaker without burdening the student-athletes any more than they already are and without being limited to employing a weekly ranking broadcast during the final weeks of each football season.

Each offseason, the prior season's criteria for selecting the playoff teams and determining the CFP rankings could be subject to revision thereby allowing the Selection Committee to analyze what went well and what didn't from the prior season's selection criteria and then make revisions and refinements based upon their analysis. This could be accomplished during three off-season meetings: Meeting One could follow national high school signing day, Meeting Two could occur after spring football has concluded, and the Final Criteria Meeting could occur in mid-summer. Each meeting could be a national convention of conference commissioners, university

⁹⁰ See 5 U.S.C. §§ 551–558.

⁹¹ See, e.g., Asimow, *infra* note 92 and accompanying text; see generally CARL A. AUERBACH ET AL., THE LEGAL PROCESS 14 (1961).

presidents, athletic directors, coaches and the Selection Committee. The meetings could be open to the media and could certainly be a media bonanza.

Each year, following the CFP championship game, the Selection Committee could begin the next cycle by publicly examining apparent strengths and weaknesses in that season's criteria. Meeting One could occur within a week after national signing day in February, there could be a weeklong notice and comment meeting so that any of the meeting's attendees could be able to address the Selection Committee and their peers with perceived weaknesses and recommended changes to the selection criteria. The Selection Committee could process the testimony of the speakers from Meeting One and develop a preliminary report of criteria for the upcoming season. The preliminary report of criteria could be given to all interested parties, including the media. Meeting Two could occur after the conclusion of spring football and would allow any interested party who attended Meeting One to enter rebuttals to testimony from Meeting One and also to comment on the preliminary report of criteria. The sheer media circus that would ensue from this meeting would keep America buzzing for weeks. The spectacle of some of the country's more sharp-witted coaches offering up sound bites would surely sell more soap and toothpaste. After Meeting Two, the Selection Committee would take the rebuttals and commentary and then revise the criteria, as they deem necessary at Meeting Three. Finally, the Selection Committee would then release the upcoming season's criteria at the Final Criteria Meeting—Meeting Four—in mid-summer. All interested parties including the media could be allowed to attend Meeting Four (the Final Criteria Meeting) to promulgate next seasons' rules and begin again the next cycle of receiving comments on the criteria.

By thus allowing systematic testimony, comment, and rebuttal in the rulemaking process by those governed, rules tend to be more effective.⁹² By allowing conference commissioners, athletic directors, coaches, and university administrators an opportunity to be heard and have input into the selection criteria, it will improve transparency, accuracy, and provide incentive for concurrence with the outcome of the playoff.

In formulating criteria for any future computer program, there exist a number of specific elements for consideration. Those governed must address how each element is defined, the weight attached to each, whether the weight of any element should be conclusive, how much weight overall should be attached to the computer program, or whether the Selection Committee should

⁹² Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707–08 (1999) (“Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are likely to be more effective and less costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations, and are more politically acceptable to the persons who must live with them.”).

retain some in-season judgment. Openly confronting these elements would provide transparency, consistency, and rationality to the CFP process.

C. Potential CFP Discussion Topics: Selection Criteria

Elements most likely to be considered by CFP in shaping the selection criteria are the following:

1. Strength of Schedule: Throughout the 2014 college football season the impact of this element upon the CFP selection process has been discussed.⁹³ How should strength of schedule be defined? How much weight assigned?
2. Quality of Losses: For example, Notre Dame's brilliant 2014 game against FSU—the Irish lost by a score of 31-27—might arguably be proof of Notre Dame's overall team strength. Should quality losses be defined as (i) strength of opponent, (ii) closeness of score, (iii) overtime, (iv) decisive points scored late in the game, and other similar criteria? Should any weight be attached to such losses? If so, how significant should those losses be weighed?
3. Conference Championship Games: It has been argued that those Power Five Conferences that have a conference championship playoff game (SEC, Big Ten, ACC, Pac 12) deserve to have weight attached to such games. The rationale is that the winner of such conference championship games has successfully run a more challenging gauntlet of competition than other teams, thus is more deserving of CFP status.⁹⁴ This would mean, of course, that all Big 12 teams and major independents such as Notre Dame and BYU would not have the opportunity to earn such weight. It is a question worthy of open discussion and decision whether or not such conference championship games should be ignored in the CFB selection process. Or should special weight be attached to such conference playoffs? How much weight? Conclusive weight?
4. Academic Status: Should schools or conferences where

⁹³ Mark Schlabach, *Right on Schedule*, ESPN (May 21, 2014), http://espn.go.com/college-football/story/_/id/10957438/no-clear-answers-how-teams-schedule-college-football-playoff; see Kirk, *supra* note 13.

⁹⁴ Clay Travis, *End Conference Title Games: Expand Playoff to Eight Next Year*, FOX SPORTS (Dec. 3, 2014, 11:02 AM), <http://www.foxsports.com/college-football/outkick-the-coverage/end-conference-title-games-expand-playoff-to-eight-next-year-120314>; Kirk, *supra* note 13.

NCAA targets for student-athlete academic performance is achieved, as well as targeted graduation rates, lack of academic scandals, etc., be awarded any special weight in the CFP selection process? Such an element would enhance college football's emphasis on keeping intact the *student* concept in the phrase "student-athlete" as discussed elsewhere in this Article.⁹⁵

5. Observing NCAA Rules: Similarly, should schools whose football programs (or perhaps any of the school's athletic programs) have been cited for NCAA rules infractions be given negative weight in the computer program? How much negative weight? Conclusive weight? Limit such negative impact only to schools who have formally received NCAA or conference sanctions? Only for the duration of any such official sanction? Including this element in the CFP selection process would have the effect of bolstering the concept that college football is serious about supporting rule-abiding programs and, perhaps, enhance the watchdog diligence among college administrators. Contrarily, why should the football players or coaches suffer for violations by basketball or hockey programs?
6. Other: The above list is not intended to exhaust all possible elements that should be discussed by the CFP Committee. The need for continual transparent revision of the elements and their assigned weights at regularly scheduled times and with full due process and public input—as discussed elsewhere in this paper—should be an ongoing feature of any CFP reform.⁹⁶

VI. CONCLUSION

The membership of the original 13 CFP Selection Committee members—or the 12 surviving members after Archie Manning withdrew—was uniformly of the highest integrity and quality.⁹⁷ But this fact is irrelevant to the fatal flaws in the CFP Selection Committee procedures. These procedural flaws included the lack of transparency in the secret deliberations of the Committee, the lack of any published formal selection criteria, the lack of national participation or input from outside the Selection Committee to

⁹⁵ See *supra* Part III; Simon Veness, *Michigan State's Superhero Coach Mark Dantonio puts Batman in Shade*, THE GUARDIAN (Oct. 23, 2014), <http://www.theguardian.com/sport/2014/oct/23/mark-dantonio-michigan-states-superhero-coach>.

⁹⁶ See *supra* notes 92–94 and accompanying text.

⁹⁷ Uthman, *supra* note 29.

bolster a national selection consensus, the lack of openly declared weights attached to each selection criteria—all this leading to the unpredictability of the process.

By creating a participatory process, loosely modeled on the federal APA, the CFP process could become transparent to universities and their players, coaches, fans and viewers, college football supporters, and the results would be predictable. To achieve this, the CFP Selection Committee's role should expand to fix and administer the process and tweak its elements, as experience requires—an “auxiliary precaution” in keeping with James Madison's prescription for a free people.⁹⁸

⁹⁸ THE FEDERALIST NO. 51, *supra* note 30 (James Madison).