

NCAA, MARK EMMERT, UNITARY EXECUTIVES & THE DEATH OF DUE PROCESS



Once
you
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beyond
the
tragedy
of
Aurora
, the
big
news

today centers on Penn State and the aftermath of Jerry Sandusky, Joe Paterno and Louis Freeh. There is a lot of news, and implications to come, from today's events.

First, and unsurprisingly, Penn State yesterday took down the fabled statue of JoePa. Abandoning larger than life symbols, whether human or otherwise, is never easy. And it is not just the specter of human faces in this regard either, witness the difficulty (irrespective of which side of the equation you reside on) of moving beyond "Redskins" and "Seminoles" as team mascots. But Paterno's statue at PSU, by now, was more a testament and reminder of gross and wanton failure, not success. A defeating duality if there ever was one for a supposedly inspirational piece of art. The statue had to go the way of JoePa himself, and it now has.

The second part of the news, and discussion thereof, however, will have far greater repercussions. That, of course, is the actual penalties handed down to the Penn State football program. They have just been announced and are as follows:

- 1) A \$60 Million fine to be applied to

anti-child abuse charity and organizations

2) A four year ban on bowl appearances

3) A scholarship reduction of 10 initial scholarships year one and 20 overall scholarships per year for a period of four years.* Current athletes may transfer without penalty or limitation

4) Imposition of a five year probationary period

5) Mandatory adoption of all reforms recommended in the Freeh Report

6) Vacation of all football wins from the period of 1998 through 2011. A loss of 111 wins from the record book (109 of which were from Paterno)

These are extremely harsh penalties. In some terms, competitively anyway, the scholarships are the key element. A loss of twenty per year for for four years, when prospective players know they will never see a bowl game in their career, is crippling. It will be fascinating to see how PSU survives this blow.

USC provides the best analogy, as it is just finishing up its sanction of a two year bowl ban and loss of ten scholarships per year for three years. While the Trojans will be eligible for a bowl game again this year, they still have one more year of the scholarship reduction to get through. USC has remained competitive and, in fact, is considered to be a major contender for the championship this coming year. Penn State, however, has much longer terms, especially as to the critical bowl ban, and cannot offer the glitz of Southern California. It is going to be very tough, but likely passable, sledding for the Nittany Lions. We shall see.

To some extent before, but certainly ever since the release of the Freeh Report, there were plaintive wails for the imposition of the death penalty for the PSU football program. The cries

came from all corners, none more pronounced than the ranks of sports journalists who make a living off of the disingenuous sham that is big time "student athletics". The examples are rampant, but Michael Ventre of NBC Sports and Stephen A. Smith of ESPN are but two examples of the bloviation that has occurred on "death" for PSU football. There were a plethora of others from all over the spectrum.

It has been amusing watching the very press and pundits who make a living creating the aura of people like Joe Paterno, and the godliness of football programs such as he ran at Penn State, howl at how wrong it all was and must be killed. They are physicians that should heal themselves.

What was the basis for such mob clamoring for death – or worse! – to Penn State? Well, shocking as it may be that such erudite legal minds as Stephen A. Smith could be wrong, I can find no express jurisdiction for direct NCAA action, much less the "unprecedented sanctions" rendered, under the factual situation presented. Emmert claimed the inherent authority, but the rules themselves belie his claim, as does historical precedent of NCAA enforcement. What occurred today was not just "unprecedented", it was *never contemplated*.

The NCAA Division One Manual and Bylaws is incredibly long, convoluted and poorly written. The one unmistakable takeaway from a review of it, though, is that it was designed for regulation of student athletes and the sanctioned competition they engage in. It is not a regulatory, nor enforcement, scheme designed to deal with criminal acts and morality, whether direct or tangential. In fact, the word "criminal" appears on exactly one out of the 426 pages of the manual (see: Manual, p. 393), and that is, somewhat hilariously, only in relation to defense and indemnification of NCAA employees – the masters and overlords – who might get called to testify or participate in civil and/or criminal proceedings. That is the full extent of the contemplated jurisdiction of the NCAA in

relation to overt criminal acts, whether they be acts of commission or omission, both of which were present in the Sandusky/PSU set of facts.

So, what is the actual original intent of the NCAA? It has been stated, and restated, over the years, but this, from the NCAA itself, is pretty much as good a synopsis as there is of the designed intent and jurisdiction:

The original 1906 constitution of the NCAA (IAAUS at that time) reflected a desire of the first delegates (primarily college professors) to regulate college athletics and ensure that athletic contests reflect the "dignity and high purpose of education" (Falla, p.21). During the early years of the NCAA, this was carried out by assuming a role as the chief rulesmaking body for many sports, promoting ethical sporting behavior, suggesting that athletic departments be recognized as units of instruction within each university, and debating issues such as amateurism and eligibility for competition. Many of these functions and issues are still foci for the NCAA. However, the organization's role has expanded substantially over the years to include administration of national championships, education and outreach initiatives, marketing, licensing and promotion, communications and public affairs, membership/legislative services, and rules enforcement.

An admirable set of goals indeed, but it does not contemplate regulation of felonious criminal behavior, even if it is tangential to a major college sports program. And, unsurprisingly, never – at least until today – has the NCAA sought to insert itself into such weighty concerns of society as a whole, as opposed to conduct in and around the "student-athlete" relationship to member universities and "competition" among them. Not until today, not

until Mark Emmert arrogated upon himself the authority. But that is what unitary executives do, isn't it? They arrogate power and abrogate due process.

Read the Freeh Report; the only possible student-athlete/competition offenses that appear to exist are extremely minor infractions on which Paterno did not discipline players appropriately or fully. That, of course, has nothing whatsoever to do with the Sandusky facts, and in no way could serve as an appropriate basis for the serious "major infraction" level penalties imposed today. PSU may morally deserve these penalties, or even maybe the death penalty, but that does not mean the path to it is legitimate or should have been taken in the absence of competent jurisdiction.

The NCAA rules and bylaws do not apply on their face, and are clearly not intended for the type of application just imposed against PSU. The only possibility was to contort "lack of institutional control" but, again, the design of the regime is to regulate student athlete and competition elements, and this is simply not that.

There was no statutory investigation by the NCAA enforcement arm, no infractions, whether minor or major, found, no improper recruiting, no academic cheating, no sex, drugs nor rock and roll found present. Nothing. Punishment without crime or bylaw due process. And Emmert had the temerity to jam Penn State into a consent decree so that there would be no appeal. It is just stunning arrogance and belligerence.

It should also be noted that one of the stated goals previously encouraged and respected by the NCAA is the self reporting and remediation by a target university. It is hard to imagine a case where a university has done a better job in that regard. PSU fired Paterno long ago and severed the other administrative personnel actively involved in the cover up. The coaching staff has been effectively cleansed and replaced with new and squeaky clean souls. Most notably, Penn

State conducted their own hard hitting investigation, on their own dime, and resolved to implement its recommendations. And they removed the damnable statue. It would be impossible for a university to do more given what Penn State faced.

But none of that was enough for the NCAA.

What was found? Apparently a "lack of institutional control" based on....well...the golden egg of the NCAA has been tarnished, and that just cannot maintain. So, Mark Emmert and the 22 high holy men that are the NCAA Board of Directors arrogated upon themselves the grandstanding pulpit and power to decree from on high the moral judgment necessary to save their own souls and shine their egg. It was an egregious claim of power by a unitary executive via the abrogation of normal procedural due process. Apparently that phenomenon is not limited to the Article II branch of the federal government. The wave is catching, watch out.

It is a grotesque farce of epic proportion. The NCAA is, historically, one of the most malignant, arbitrary, capricious and self serving organizations in the history of man; that they sit in judgment as they have today is criminal in its own right.

You know what else you did not hear from the lips of judge, jury and executioner Mark Emmert today? Words about how the paradigms of reform imposed on PSU will be spread to all the other member institutions, most all of whom have many of the same institutional infirmities Penn State did. This is a cover your ass move for the NCAA, and it is sick.

As Dave Zirin notes, less than two years ago, Mark Emmert engaged in hyperbolic grandstanding by saying Joe Paterno was "the definitive role model of what it means to be a college coach". Same Emmert, different grandstand today. And both completely shameless efforts. Zirin also said:

What Penn State did was commit horrific violations of criminal and civil laws and they should pay every possible price for shielding Sandusky, the child rapist. This is why we have a society with civil and criminal courts. Instead we have Mark Emmert inserting himself in a criminal matter and acting as judge, jury and executioner, in the style of NFL commissioner Roger Goodell. As much as I can't stand Goodell's authoritarian, undemocratic methods, the NFL is a private corporation and his method of punishment was collectively bargained with the NFL Players Association. Emmert, heading up the so-called non-profit NCAA, is intervening with his own personal judgment and cutting the budget of a public university. He has no right and every school under the auspices of the NCAA should be terrified that he believes he does.

Speaking anonymously to ESPN, a former prominent NCAA official said, "This is unique and this kind of power has never been tested or tried. It's unprecedented to have this extensive power. This has nothing to do with the purpose of the infractions process. Nevertheless, somehow (the NCAA president and executive board) have taken it on themselves to be a commissioner and to penalize a school for improper conduct."

I could not agree more. Once unitary power is claimed, it is never relinquished, nor applied evenly and fairly. Go read Dave's article this morning, it is excellent, as was his piece last week after the release of the Freeh Report.

Where does this new frontier of moral jurisdiction lead for the NCAA and college athletics? I for one would like to know if the High Holy Mark Emmert plans to do anything about the Lizzy Seeberg scandal at Notre Dame:

The blood of a 19-year-old girl spills like an oil slick over the football team and the school administration. They should still be thinking about what happened in the chill of the Sun Bowl. They should be thinking about what Tom and Mary Seeberg must have felt like when they received the news that their daughter, Elizabeth "Lizzy" Seeberg, a freshman at neighboring St. Mary's College, had died.

Not from natural causes. Not in a car accident. But by suicide 11 days after making an allegation of sexual assault against a university football player at the end of August. The school administration and the Notre Dame police department should be ashamed about an inexcusably sloppy investigation at best and a deliberate coverup at worst. But there is no shame when a football game is to be played, however meaningless, and this Sun Bowl is completely meaningless. There is still money to be made.

Where were the "moral priorities", "institutional control" and "concern for victims" at Notre Dame? Warped as it may be, at least the victims at Penn State were not made so by athletes, and are alive today to tell their story. The same cannot be said of Lizzy Seeberg and Notre Dame. And it is not just Seeberg either, there is other death directly tied to the football program and under the "institutional control" affiliated with Notre Dame. Where is the heavy hand of the vainglorious Mark Emmert when it comes to the Golden Dome of college football? Nowhere to be found.

But that is the way of unitary executives, isn't it? Due process dies while the elite are protected at all human and moral cost. That's also the once and future way of the NCAA.

* Updated to reflect distinction between initial scholarship loss the first year and overall figures for the remaining years

[graphic by ArtVoice and Coalition for Economic Justice]