# NCAA Overhaul Needed After High Court Amateurism Ruling

By **Joseph Kish and Jordan Rosenberg** (June 23, 2021)

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While NCAA v. Alston initially appears to be a narrow ruling based on an equally narrow question presented, the U.S. Supreme Court on Monday unanimously sided with student-athletes and against the NCAA in a decision that signals the end of an era for the NCAA's amateur landscape.[1]

The question before the court was whether college athletes are permitted to receive payments and other benefits related to education.

However, Justice Brett Kavanaugh's concurrence was particularly pointed in its criticism of the NCAA's framework, suggesting that further changes are inevitable, particularly whether college athletes may receive compensation for the use of their names, images and likenesses.

All nine members of America's highest court agreed that the NCAA's limits on noncash payments to college athletes related to education, such as computers and other equipment, are anti-competitive under federal antitrust law.

As a direct result of the ruling in Alston, colleges will be able to recruit athletes by providing paid internships and graduate scholarships among other education-related benefits. Schools may now pay for academic tutoring, arrange paid post-eligibility internships, and provide scholarships for graduate school. Schools may also offer awards for academic achievement, currently with a $5,980 annual cap.

Justice Neil Gorsuch wrote in his majority opinion that the lower court had applied the correct fact-specific test, rejecting the more deferential standard requested by the NCAA. Justice Gorsuch said the trial order allowed the NCAA "considerable leeway" to define exactly what is considered education-related compensation and encouraged the NCAA, or its individual conferences, to propose its own rules to ensure academic awards are legitimately related to education.

In its decision, the Supreme Court assessed an injunction preventing the NCAA from denying payments for education-related benefits such as computers, postgraduate scholarships, tutoring, academic awards and internships but did not address direct payment of salaries.

While Alston does not allow colleges to pay for play and make direct payments to athletes, it does open the door for many other education-related benefits.

Significantly, the case did not involve the question of whether athletes have the ability to profit off their names, images and likenesses, an issue that has steadily gained national attention since the 2014 O'Bannon v. NCAA case in the U.S. District Court for the Central District of California. This issue will be the subject of state laws in Alabama, Florida, Georgia, Mississippi, New Mexico and Texas beginning this year.[2]

Historically, the NCAA has mostly stood its ground as federal antitrust challenges have slowly eroded its strict amateurism rules. Now, the concept of college athletes profiting off

their names, images and likenesses is so widespread that NCAA President Mark Emmert announced his commitment to working with Congress to implement a new framework in the wake of the Alston decision. The NCAA statement suggests it realizes it must become more proactive in its evolution or risk having the rules made for it by state and federal lawmakers.

The NCAA is now playing defense on multiple fronts. The existing NCAA model has been rebuked by both the liberal and conservative branches of the Supreme Court and inspired a barrage of legislation at the state and federal level from politicians across the ideological spectrum. In a time of stark partisan divide, nearly everyone seems to agree the NCAA must evolve beyond its current model.

The NCAA has found itself criticized as being at odds with both free-market capitalism and labor, not surprising when it justifies its current student-restrictive model as promoting amateurism while at the same time paying NCAA officials, coaches and others hundreds of thousands, if not millions of dollars in annual compensation.[3]

Looking forward, the Supreme Court has indicated a willingness to further erode the NCAA framework. Justice Kavanaugh's concurrence contemplated payment of fair-market rates and collective bargaining. Future litigation could open the door for more expansive medical benefits, compensation for name, image and likeness, and perhaps even salaries.

Meanwhile, politicians in 19 states have already passed laws in the last two years that challenge the NCAA's rules and will soon allow college athletes to earn money from third-party endorsements. Simultaneously, Congress is debating at least a half-dozen bills designed to reform the NCAA. The recent Supreme Court decision will only embolden reformers.

The immediate question is whether the NCAA will impose new rules of its own to prevent new laws being imposed upon it. Justice Kavanaugh suggested that the colleges and athletes could engage in collective bargaining, as the professional leagues do, to provide athletes with a negotiated share of the revenue generated primarily from the student athletes' efforts.

These decisions could also be made by the individual conferences within the NCAA now that its control has been weakened. But that would mean that individual conferences and colleges could use expanded scholarship programs and benefits to enhance their recruiting advantages.

Developments at the state level will begin providing competitive advantages to certain colleges if the NCAA fails to make changes to its nationwide framework. Several states home to powerhouse athletic programs including California, Florida, Alabama, Georgia and Texas are implementing laws that allow college athletes to earn money from their name, image and likeness. If other states do not pass laws of their own, their local colleges will be at an enormous recruiting disadvantage for top talent.

At the federal level, the Fairness in Collegiate Athletics Act proposed by Sen. Marco Rubio, R-Fla., calls for the NCAA to implement rules allowing athletes to be compensated for their name, image and likeness, and Sen. Cory Booker, D-N.J., has called for athlete compensation with a college athletes' bill of rights. There is also bipartisan legislation in Congress aimed at compensating student athletes. The NCAA will likely lobby Congress to allow it to have a hand in crafting the compensation framework, which is destined to undergo further changes in the near future.

Moreover, while the Gorsuch opinion was narrowly tailored to the question presented in the Alston case, the Kavanaugh concurrence was loud and clear that the Supreme Court is ready and willing to further erode the NCAA model in future antitrust challenges if they are presented.

Steve W. Berman, co-counsel in the Alston case, is already leading a challenge to the NCAA limits on future name, image and likeness opportunities for college athletes, and he indicated that his firm is considering amending its complaint to be more aggressive based on the signals sent in the Alston decision. It seems likely that future litigation will result in further erosion of the current limits imposed on athlete compensation.

Those advocating for expanded student compensation appear to have a Supreme Court inclined to accommodate their views despite their breaking with traditional notions of amateurism. As Justice Kavanaugh remarked, "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."

A new era has begun in college athletics. In the very near future, we can expect to see college athletes appearing in commercials, earning more expansive scholarships, and obtaining lucrative internships with companies connected to program boosters to drive recruitment efforts.

Ultimately, the NCAA and its member conferences have the ability to change their current compensation framework with a proactive approach, which, if implemented, might help them stay ahead of an avalanche of future litigation and legislation.

If a new national framework is not put in place, changes at the state level will allow certain schools an enormous competitive advantage. If the NCAA wants to preserve its pro-competitive formula, it must accept a new understanding of what amateurism means at the college level.

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[1] National Collegiate Athletic Association v. Alston, 594 US _ (2021)

[2] Beginning July 1, 2021, laws are scheduled to take effect in six states allowing athletes to make endorsements and monetize their social media presences. However, the NCAA has not granted an extension of these rights to schools nationwide nor is Congress expected to enact a federal law before the state laws are enacted in July.

[3] Justice Gorsuch cited a salary of nearly $4 million a year for the president of the organization, pay of up to $5 million a year for the commissioners of some conferences and annual salaries for football coaches that approach $11 million. The NCAA also negotiated an eight-year broadcast deal for March Madness worth $1.1 billion annually.