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# Playing Cowboys and Indians

B. Glenn George

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## *Article*

# Playing Cowboys and Indians

Glenn George\*

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## INTRODUCTION

The use of Native American names and symbols in sports is longstanding, as is the controversy over their use. According to the National Collegiate Athletic Association (NCAA), calling a sports team the “Braves” may sometimes create a hostile and abusive environment. Other times, the name is acceptable. Specific tribal names have been permitted with approval, while generic names like “Warriors” and “Indians” have been rejected. Feathers are permitted in North Carolina, but not Virginia. The NCAA’s attempts to justify these dividing lines have proven to be only one of many problems plaguing its decision to sanction the use of Native American names and images in intercollegiate sports.

The NCAA sparked a storm of controversy with its decision last year to sanction any use of Native American images, nicknames, or symbols by college sports teams. Thirty-three institutions were identified as using such images and nicknames, and each school was asked to complete a “self-evaluation study” to

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explain and justify these uses.<sup>1</sup> From that original list, nineteen schools were sanctioned. The NCAA deemed those schools to have “hostile or abusive racial/ethnic/national origin mascots, nicknames, or imagery” and consequently prohibited them from hosting NCAA national championship competitions. At least one school has already experienced the effects of the new policy – the University of Illinois men’s tennis team was the only top ranked team denied the chance to play on its home courts for the opening round of the 2006 NCAA men’s tennis tournament.<sup>2</sup>

In response to both legal threats and public challenges, the NCAA revised its position almost immediately.<sup>3</sup> Having initially branded all Native American references as “hostile and abusive,” the NCAA quickly abandoned its bright-line rule and permitted some schools to retain their names and logos while others remained on the list of sanctioned institutions. The resulting maze of contradictions has become increasingly indefensible. Sustained scrutiny raises questions about the NCAA’s authority to adopt such a policy under the NCAA Constitution, about the NCAA’s ability to define and apply its own standard, and – finally – about the NCAA’s decision to impose sanctions on an issue of ill-defined moral judgment while eschewing a similarly aggressive approach for institutions which violate federal gender equity mandates.

At the outset, let me emphasize that I take no stand on the use of Native American nicknames or imagery in sports. I do not intend to resolve the debate about whether the use of Native American imagery or nicknames should or should not be allowed at all or only under specified conditions, such as tribal approval. This discussion offers no defense of these names or symbols; on the contrary, there is substantial evidence that many Native Americans find such

1 See discussion, *infra*, at notes 25-34.

2 The team was seeded seventh; the other teams ranked in the top sixteen began regional competition at home. Although the NCAA withdrew its objection to the name “Fighting Illini,” Illinois remains on the list of sanctioned schools because of the continued use of its mascot Chief Illiniwek. Emily Badger, *Despite Heat from NCAA, Some Schools Stick with Indian Nicknames*, *The Orlando Sentinel*, May 12, 2006, 2006 WLNR 8613072.

3 In spite of its reversal and outside criticism, the NCAA stands firm in its public statements. See, e.g., *id.* at 2, “[W]e’re confident we will prevail in any lawsuit because we feel that we have the authority and the responsibility to conduct our championships in an environment that’s free of racial stereotyping,” (statement by NCAA spokesman Bob Williams in response to threat of litigation by the University of South Dakota and/or the University of Illinois); statement by Bernard Franklin, NCAA Senior Vice-President for Governance and Membership, on University of Illinois, “The NCAA’s position on the use of Native American mascots, names and imagery has not changed, and the NCAA remains committed to ensuring an atmosphere of respect and sensitivity for all who participate in and attend our championships,” (*Champaign Review*, Nov. 11, 2005).

practices offensive and demeaning.<sup>4</sup> This article is, instead, a discussion about who has the right to make the decision and how the NCAA's new policy has been implemented. I also explore why vaguely defined issues of stereotypes have moved the NCAA with more force than thirty years of federal law mandating gender equity.

Part I of this discussion will briefly review the history of the controversy, including the NCAA's own recent decision to sanction schools that continue to use Native American images and nicknames. Part II will examine the various ways in which the foundations of the NCAA's position are beginning to crumble, plagued by issues of questionable authority and questionable application. Finally, in Part III, the article will contrast the actions of the Association on issues of Native American symbolism and gender equity.

### I. NATIVE AMERICAN NAMES AND IMAGES IN SPORTS

The use of Native American<sup>5</sup> names and symbols in sports has been criticized and challenged for decades. Nonetheless, the practice is alive and well, particularly in the professional sports arena. The most notorious of the Native American reference in sports is surely the Washington Redskins<sup>6</sup> football team. The team continues to defend the name as an important part of its history – former owner George Preston Marshall named the team in 1933 as a tribute to its head coach, William "Lone Star" Dietz, a Native American.<sup>7</sup> In spite of years of protests,<sup>8</sup> as well as litigation seeking to challenge the Redskin mark under U.S. patent and trademark law,<sup>9</sup> the Redskins retain the name and the Native American silhouette profile (with feathers) used on team helmets and

4 See, e.g., Alliance Against Racial Mascots, [www.allarm.org](http://www.allarm.org); National Coalition on Sports and Racism at [www.aimovement.org/ncrsm](http://www.aimovement.org/ncrsm) (last visited Sept. 25, 2006); Susan Shown (Harjo), Chief Offenders, Native American Times, Feb. 1, 2003, 2003 WLNR 13370176. The opposition to Native American names and images in sports is widespread in the Native American community, but is not universal. See generally, Daniel J. Trainor, Native American Mascots, Schools, and the Title VI Hostile Environment Analysis, 1995 U. Ill. L. Rev. 971, 994, n. 154.

5 "Native American" seems to be the preferred term in the literature, but "American Indian" remains the official racial classification term used by the U.S. Equal Employment Opportunity Commission. See <http://www.eeoc.gov/> (last visited Sept. 25, 2006).

6 "Redskins" is considered particularly offensive by the Native American community because of its reference to the bounty offered for scalps of Native Americans by the British Crown in 1755. See Stacie L. Nicholson, Indian Mascot World Series Tied 1-1: Who Will Prevail as Champion?, 29 Am. Indian L. Rev. 341, 343, (2004-05).

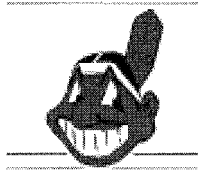
7 See *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96,104 (D.D.C. 2003), remanded, 415 F.3d 44 (D.C. Cir. 2005).

8 See, e.g., Protests Over Redskins' Nickname, NFL Notes, Associated Press, San Francisco Examiner, Nov. 4, 1991, 1991 WLNR 36394.

9 *Pro-Football, Inc.*, supra note 7.

merchandise.<sup>10</sup>

Similarly, the name “Indians,” used for almost a century by Cleveland’s major league baseball team, reportedly was selected to honor Louis Sockalexis, the first Native American to play major league baseball.<sup>11</sup> While the Redskins may claim the most objectionable of the Native American names, the Cleveland Indians are best known in this controversy for the most objectionable logo, Chief Wahoo – a grinning Indian face caricature with a feather and bright red face in use since 1948 (illustrated below).<sup>12</sup> In what was perhaps the first lawsuit to challenge the use of Native American names, the Cleveland Indian Center sued the Cleveland Indians baseball team in 1972 for “group libel,” primarily challenging the use of Chief Wahoo.<sup>13</sup> The action later settled, and the Cleveland Indians continue to use the name and Chief Wahoo logo (although the “live” mascot dressed as Chief Wahoo has since been retired).<sup>14</sup>



Cleveland Indians Chief Wahoo Logo<sup>15</sup>

The Atlanta Braves, another major league baseball team, acquired its name early in the last century as a tribute to the “braves” of Tammany Hall – a

10 See <http://www.redskins.com/> (last visited Sept. 25, 2006). “Redskins” was also used by Miami University of Ohio until 1997. The institution dropped the name at the request of local tribal leaders. Susan Aschoff, *Protecting Their History and Sharing Their Pain*, St. Petersburg Times, Feb. 6, 2000, 2000 WLNR 2483335 at 3.

11 The name “Indians” was selected as the winning entry in a naming contest in 1914, to honor of major league player Louis Sockalexis. Louis Sockalexis, a Penobscot Indian from Maine, played three seasons. Jack A. Guggenheim, *The Indians’ Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Mark*, 46 Clev. St. L. Rev. 211, 213-14 (1998). See also Nicholson, *supra* note 6, at 357.

12 The image of Chief Wahoo has been modified at least five times since its original creation. Guggenheim, *supra* note 11, at 213-14.

13 Daniel J. Trainor, *Native American Mascots, Schools, and the Title VI Hostile Environment Analysis*, 1995 U.Ill. L.Rev. 971, 975-76 (1995).

14 See the Cleveland Indians website at <http://cleveland.indians.mlb.com/> (last visited Sept. 25, 2006).

15 Image: Cleveland Indians logo, available at [http://cleveland.indians.mlb.com/NASApp/mlb/news/press\\_releases/index.jsp?c\\_id=cle](http://cleveland.indians.mlb.com/NASApp/mlb/news/press_releases/index.jsp?c_id=cle) (last visited Sept. 25, 2006).

political organization in New York City whose name derives from Native American Chief Tammanend.<sup>16</sup> The Braves no longer use mascot Chief Nok-a-Homa (who danced at home games to celebrate home runs)<sup>17</sup> and owner Ted Turner has discouraged the continued use of the tomahawk chop.<sup>18</sup> The Chicago Blackhawks of the National Hockey League were named by founder Frederic McLaughlin in honor of his World War I machine gun battalion – known as Blackhawks (after a well-known Native American chief).<sup>19</sup> The Blackhawk jerseys are emblazoned with a smiling Native American face (somewhere between the grinning Chief Wahoo and the arguably more dignified profile displayed on the Redskins' helmets).<sup>20</sup>

At the high school and college level, literally hundreds of schools have used Native American names and symbols.<sup>21</sup> Here, however, public pressure and escalating sensitivity to the use of Native American names and mascots has proven more successful in eliminating such references (perhaps fueled by the tradition of college protests sparked by discrimination and the Vietnam War in the 1960's).<sup>22</sup> The University of Oklahoma, for example – known as "Big Red" at the time – abandoned its Native American mascot "Little Red" in 1970 in response to protests and a sit-in by Native American students and supporters.<sup>23</sup> Stanford University responded to the issue in 1973 when it changed the name of its teams from the Indians to the Cardinal.<sup>24</sup> Hundreds of other schools followed suit in subsequent decades, but others retained their names and traditions. Many used generic versions – Braves, Warriors, Indians, etc. Some, like the Florida State Seminoles and the North Dakota Fighting Sioux, referenced specific Native American tribes.

The NCAA Executive Committee first undertook formal consideration of the use of Native American mascots, names, and images on April 27, 2001. The issue was referred for study to the Minority Opportunities and Interests

16 Nicholson, *supra* note 6, at 356-57.

17 Carol Spindel, *Dancing at Halftime: Sports and the Controversy Over American Indian Mascots*, 17 (New York University Press 2000).

18 Dan Burkhart, *Turner Defends "Braves" But He'd Like the Chop to Stop*, *Atlanta Journal and Constitution*, Dec. 3, 1991, 1991 WLNR 2206517.

19 Nicholson, *supra* note 6, at 357.

20 See <http://www.chicagoblackhawks.com/> (last visited Sept. 25, 2006).

21 See *War Against Warriors*, *U.S. News & World Report*, March 8, 1999, 1999 WLNR 5232484. One commentator reports that approximately 3,000 schools used Native American names and images in the early 1970's. See *Shown (Harjo)*, *supra* note 4, at 2.

22 *Shown (Harjo)*, *supra* note 4, at 2.

23 *Id.* "Little Red" was a student dressed in breechcloth who performed "Indian" chants and dances.

24 *Id.* at 3.

Committee (MOIC).<sup>25</sup> The Executive Committee's action reportedly was prompted by 1) a statement issued by the United States Commission on Civil Rights in 2001 condemning the use of Native American names in sports,<sup>26</sup> 2) a letter from President Roy Saigo of St. Cloud State University requesting a NCAA resolution denouncing the use of Native American names, and 3) the Executive Committee's consideration of and response to the continuing use of the confederate flag symbol in some states.<sup>27</sup>

In its 2002 report, the MOIC undertook a thorough review of the issue, including an examination of relevant articles and research, surveys distributed to NCAA member institutions using Native American mascots or symbols, and the solicitation of comments from Indian tribes, student-athletes, NCAA members, NCAA groups and committees, and the public. Results from each of these entities, groups, or individuals were reported and discussed. As institutional authority for proposed sanctions, the MOIC pointed to several articles of the NCAA constitution as its authority to address the issues at hand. The most relevant, arguably, is Article 2.2.2, which provides that "It is the responsibility of each member institution to establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and intercollegiate athletics department staff."<sup>28</sup> Other articles cited, specifically Articles 2.4<sup>29</sup> and

25 Minutes of the National Collegiate Athletic Association Executive Committee, April 27, 2001, part 3, available at [http://www1.ncaa.org/membership/governance/assoc-wide/executive\\_committee/docs/2001.04.minutes.htm](http://www1.ncaa.org/membership/governance/assoc-wide/executive_committee/docs/2001.04.minutes.htm) (last visited Sept. 25, 2006). Technically, the NCAA Minority Opportunities and Interests Committee reports to the NCAA Executive Subcommittee on Gender and Diversity Issues, which reports to the Executive Committee. For simplicity's sake, however, this discussion will refer only to the MOIC (the body responsible for the study and recommendations) and the Executive Committee (the body taking final action).

26 See Statement of the U.S. Commission on Civil Rights on the Use of Native American Images and Nicknames as Sports Symbols, April 16, 2001, available at <http://www.usccr.gov/press/prsndx.htm> (last visited Sept. 25, 2006).

27 NCAA Minority Opportunities and Interests Committee Report on the Use of American Indian Mascots in Intercollegiate Athletics to the NCAA Executive Committee Subcommittee on Gender and Diversity Issues, October 2002, available at [http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot\\_report/mascotreport.htm](http://www1.ncaa.org/eprise/main/membership/governance/assoc-wide/moic/2003/mascot_report/mascotreport.htm) (last visited Sept. 25, 2006) [hereinafter "MOIC Mascot Report"].

28 2006-2007 NCAA Division I Manual at 3 (2006), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2006-07/2006-07\\_d1\\_manual.pdf](http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf) (last visited Nov. 4, 2006).

29 "For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in

2.6,<sup>30</sup> speak to principles of sportsmanship and nondiscrimination.

The MOIC catalogued the primary arguments articulated both for and against the use of Native American symbols. As is true in many of the discussions of these issues, the report focused almost exclusively on the admittedly more troubling use of American Indian mascots. Arguments against the use of Native American symbols cited by the MOIC, for example, stated that “mascots are racist,” “use of these mascots creates a hostile environment,” “mascots give the public a stereotypical and historically incorrect perception of American Indians,” “feathers, paint costumes, and dances used by mascots are misappropriations of the feathers, paint, costumes, and dances used by American Indians in religious ceremonies,” and “mascots are in clear violation [of campus antidiscrimination policies].”<sup>31</sup> Missing from the report, however, as will be discussed below, is any serious discussion of whether terms like “braves” used without mascots create racist or hostile environments.

Armed with the report and findings of the MOIC, in November, 2004, the Executive Committee approved further inquiry of the thirty-three institutions then using Native American symbols or nicknames. These schools were asked to conduct a “self-evaluation study.” Once those evaluations were submitted, the Executive Committee, upon recommendation of the MOIC, was ready to take action. Several institutions (thirteen, to be exact) were removed from the list because they had either never used or had eliminated the use of Native American symbols or nicknames. An additional seven institutions claimed current and historical connections with local Native American communities. The MOIC accepted this justification only for the University of North Carolina at Pembroke (UNC-Pembroke), based on its heritage as a school for Native Americans, its continuing ties with the Native American community, and the significant number of Native American students attending the school. Pembroke thus earned the MOIC’s approval for the continued use of the name “Braves” for its sports teams. The MOIC rejected the arguments of the remaining six institutions that the use of Native American symbols or nicknames was intended “to honor Native American culture.”<sup>32</sup>

athletics participation but also in the broad spectrum of activities affecting the athletics program.” *Id.* at 4.

30 “The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies...” *Id.*

31 MOIC Mascot Report, *supra* note 27, at 9.

32 See NCAA Executive Committee Subcommittee on Gender and Diversity Issues Report on References to American Indians in Intercollegiate Athletics, August, 2005, at 2-3 (available at [http://www1.ncaa.org/membership/governance/assoc-wide/executive\\_committee/docs/2005/2005-](http://www1.ncaa.org/membership/governance/assoc-wide/executive_committee/docs/2005/2005-)



The recommendations of the MOIC were formally adopted by the NCAA Executive Committee on August 2, 2005. The eighteen institutions remaining on the NCAA sanctioned list were barred from hosting NCAA championships and barred from displaying any such symbols (through uniforms, mascots, etc.) while participating in any NCAA championship competitions.<sup>33</sup> As examples of “best practices,” the Executive Committee further urged member institutions to refuse participation in non-conference competition with institutions that use Native American symbols, remove all “hostile” references from campus publications, and engage in greater outreach to the Native American community.<sup>34</sup>

08/s08a\_ec-gender.htm. One institution, the College of William and Mary (Tribe), was granted an extension of time to respond to the Committee’s request for a self-evaluation. *Id.* See also Press Release, NCAA, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), available at [http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2005/august/20050805\\_exec\\_comm\\_rls.html](http://www2.ncaa.org/portal/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html) (last visited Sept. 24, 2006). (The NCAA Press Release lists UNC-Pembroke as a school that had eliminated or never had American Indian references as part of its sports program. *Id.* This statement contradicts the findings of the August 2005 Subcommittee report and appears to be in error.)

<sup>33</sup> The eighteen institutions remaining on the list included Alcorn State University (Braves), Arkansas State University (Indians), Bradley University (Braves), Carthage College (Redmen), Catawba College (Indians), Central Michigan University (Chippewas), Chowan College (Braves), Florida State University (Seminoles), Indiana University-Pennsylvania (Indians), McMurry University (Indians), Midwestern State University (Indians), Mississippi College (Choctaws), Newberry College (Indians), Southeastern Oklahoma State University (Savages), University of Illinois-Champaign (Fighting Illini), University of Louisiana-Monroe (Indians), University of North Dakota (Fighting Sioux), University of Utah (Utes). William and Mary (Tribe) was not included on the initial list because of an extension to complete its self-study, but was later added because of the two feathers used on its logo. See discussion, *infra*, at notes 53-56. See Press Release, NCAA, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events, *supra* note 32.

<sup>34</sup> Minutes of the National Collegiate Athletic Association Executive Committee (NCAA Executive Committee, Indianapolis I.N.) Aug. 4, 2005, at 8:

Native American mascots, names and imagery.

The Committee discussed racial/ethnic/national origin references in their intercollegiate athletics programs. Bristow noted that several institutions made changes that adhere to the core values of the NCAA constitution pertaining to cultural diversity, ethical sportsmanship and nondiscrimination. He said that these issues are very complex and that institutions need to retain institutional autonomy to address them.

However, while the NCAA understands institutional autonomy is necessary in order to adhere to the mission of the NCAA, the Association has a duty to address actions and behaviors that are not consistent with core values and principles of the NCAA constitution. Therefore, it is the responsibility of everyone associated with an athletics program and event, including student-athletes, fans and coaches, to maintain an environment that promotes an atmosphere of respect for and sensitivity to the dignity of every person.

(1) There are certain events in intercollegiate athletics, such as NCAA championship

competition, that are more of a public forum rather than home contests. Therefore, for those institutions that choose not to remove all references to Native American culture, the subcommittee outlined specific recommendations.

It was VOTED:

“That the Association shall implement a policy, effective February 1, 2006, that institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery will be prohibited from hosting any NCAA national championship competition.

“Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery must take reasonable steps to cover up any of these references at any predetermined NCAA championship competition site that has been previously awarded. The financial responsibility to take reasonable steps rests on each institution and these reasonable steps must be taken in timely manner.

“Effective August 1, 2008, institutions displaying or promoting hostile or abusive racial/ethnic/national origin references on their mascots, cheerleaders, dance teams, and band member uniforms or paraphernalia are prohibited from wearing this material at an NCAA championship competition site.

“Effective February 1, 2006, institutions with student-athletes wearing uniforms or paraphernalia with hostile or abusive racial/ethnic/national origin references must ensure that those uniforms or paraphernalia are not worn during NCAA championship competition.”

(2)Further, in the context of nonchampionship activities, the Committee strongly encouraged institutions that continue to use hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery to adopt the following best practices:

(a)Model specific institutions. Institutions should consider emulating the examples of institutions that do not support the use of Native American mascots or imagery such as the University of Iowa and the University of Wisconsin System, which do not schedule regular season, nonconference competition with institutions that use Native American nicknames, mascots or imagery.

(b)NCAA publications. Institutions should design their publications and campus materials in a manner that removes all hostile or abusive racial/ethnic/national origin references. The Committee noted that this is the current policy of the NCAA national office.

(c)Education/appreciation/outreach. Institutions should place an emphasis on understanding and awareness of the negative impact of hostile or abusive symbols, names and imagery. Further, institutions are encouraged to create a greater level of understanding and knowledge of Native American culture. Outreach to Native American tribes, organizations and students or faculty in their local areas is a start. However, further outreach beyond an institution's local area may be necessary in order to obtain a greater understanding and awareness of issues that concern the Native American community. In addition, the Committee recommends initiatives that would educate the membership via public service announcements and posters. It is important to note that the purpose of education and outreach is to provide institutions with an opportunity to disengage from the use of racial/ethnic/national origin mascots,

In the aftermath of the NCAA's decision, several high profile institutions immediately challenged the NCAA's authority. In particular, Florida State University (Seminoles) and the University of Illinois (Fighting Illini) registered both NCAA and public appeals. Less than a month after announcing its new policy, the Executive Committee recanted and retreated on the use of specific tribe names where an institution had a relationship with the tribe and permission to use the name in question. Consequently, the NCAA withdrew from its list of sanctioned institutions Florida State University (Seminoles),<sup>35</sup> Central Michigan University (Chippewas), and the University of Utah (Utes).<sup>36</sup> That same principle doomed the appeal of the University of North Dakota (Fighting Sioux) when two of the three recognized Sioux tribes in North Dakota opposed the continued use of the Sioux name and imagery by the University.<sup>37</sup>

nicknames or imagery in the near future.

(d)Conference-level collaboration. Institutions should develop a partnership with conference offices in order to address this issue at the institutional level, as well as with the media.

35 See Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review (Aug. 23, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/august/20050823\\_franklinstmntappeal.html](http://www2.ncaa.org/media_and_events/press_room/2005/august/20050823_franklinstmntappeal.html) (last visited Sept. 25, 2006), removing Florida State University from the list of sanctioned institutions, issued less than three weeks after the NCAA announced its restrictions. The MOIC was well aware of Florida State's arrangement with the Seminole tribe at the time of its original recommendations but noted that there were objections by Seminole tribe members living outside of Florida. See MOIC Mascot Report, *supra* note 27, at 10.

A recent visit to the official website of Florida State University Athletics (<http://www.Seminoles.com>) revealed the head of a Native American, including feather and face paint, in the upper left corner. In the upper right corner, there is a photograph of the Seminoles' mascot, Osceola – an individual attired in Native American dress, again with face paint. Osceola, born in 1804, was a Seminole war leader. See Spindel, *supra* note 17, at 16. Although there is no reference on the Florida State Athletics' homepage to explain or justify the use of the Seminole name and imagery, a defense of the symbols can be found under the link for "Traditions" under the heading "Seminoles – Heroic Symbol at Florida State," a column from USA Today on May 18, 1993, authored by former President of Florida State University, Dr. Dale W. Lick.

36 See Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan University and University of Utah Reviews (Sept. 2, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/september/20050902\\_cmu\\_utah\\_franklinstmnt.html](http://www2.ncaa.org/media_and_events/press_room/2005/september/20050902_cmu_utah_franklinstmnt.html) (last visited Sept. 25, 2006).

37 See Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005), available at [http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/september/20050928\\_franklinstmnt\\_und.html](http://www2.ncaa.org/media_and_events/press_room/2005/september/20050928_franklinstmnt_und.html) (last visited Sept. 25, 2006). The University of North Dakota has aggressively challenged the NCAA's ruling. In a letter to the NCAA, made available on the university's website, President Kupchella describes the University's close ties with a local Sioux tribe, the enrollment of over 400

The University of Illinois at Champaign (Fighting Illini) successfully argued that its use of the term “Illini” is defensible based on its close association with the state name, and the NCAA withdrew its objection to the team name. The University remained on the sanctioned list, however, because of its refusal to discontinue the use of “Chief Illiniwek” as a mascot or the logo of a Native American in headdress.<sup>38</sup> Chief Illiniwek has a long – and the University would contend distinguished – history at Illinois.<sup>39</sup> Nonetheless, the Chief’s role has diminished in recent years in response to the protests that continue to challenge the University’s use of a Native American mascot, and there are reports that the Chief may be retired at the conclusion of the 2006 football season.<sup>40</sup>

The NCAA seems to be standing by its original decision on the use of more generic names unconnected to a specific tribe, such as “Braves” or “Indians.”<sup>41</sup>

Native American students, and the favorable conclusion of an investigation by the Office of Civil Rights. See Open Letter of President Charles Kupchella to the NCAA, June 7, 2006, available at [www.universityrelations.und.edu/logoappeal/openletter\\_06-07-06.pdf](http://www.universityrelations.und.edu/logoappeal/openletter_06-07-06.pdf). Making good on its threat of legal action, the University of North Dakota filed suit against the NCAA on October 6, 2006. Brad Wolverton, “U. of North Dakota Sues NCAA Over Ban on American Indian Nicknames,” *The Chronicle of Higher Education*, Oct. 9, 2006, [www.chronicle.com/daily/2006/10/2006100906n.htm](http://www.chronicle.com/daily/2006/10/2006100906n.htm). The state Board of Education authorized the lawsuit in June, 2006, with the stipulation that no public funds could be used for the litigation. Bob Bergland, “UND v. NCAA,” *Grand Forks Herald*, June 16, 2006. The complaint filed by the University of North Dakota can be found

at <http://www.ag.nd.gov/NewsReleases/Complaint-State-Court.pdf>. The University has also requested a preliminary injunction; its memorandum in support of that motion is available at <http://www.ag.nd.gov/NewsReleases/Memorandum-Prelim-injunction-state-crt.pdf>

38 See Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of Illinois, Champaign Review (Nov. 11, 2005), available at

[http://www2.ncaa.org/media\\_and\\_events/press\\_room/2005/november/20051111\\_illinois\\_mascot\\_stmnt.html](http://www2.ncaa.org/media_and_events/press_room/2005/november/20051111_illinois_mascot_stmnt.html) (last visited Sept. 25, 2006).

39 See Neil Milbert, *Illinois Fighting to Remain “Illini,” Board of Trustees Appeals NCAA Policy*, *The Chicago Tribune*, Oct. 16, 2005; See generally Spindel, *supra* note 17, at 96-140. Chief Illiniwek is a fictional character originally created as a band mascot in 1926. *Id.* at 81. The dress of Chief Illiniwek comes from the Oglala tribe. *Id.* at 116-18.

40 Spindel, *supra* note 17, at 154. In the late 1990’s, approximately seven hundred Illinois faculty members signed a resolution demanding Chief Illiniwek’s retirement. *Id.* at 161. A recent visit to the University’s athletics website found little evidence of Chief Illiniwek, other than under the topic “traditions.” See Chief Illiniwek, at <http://fightingillini.cstv.com/sports/m-footbl/archive/FBTrad-ChiefIlliniwek.html> (last visited Sept. 25, 2006). According to one report, Chief Illiniwek likely will be quietly dropped by the University of Illinois as an official symbol at the end of the 2006 football season. Dave Newbart, “The Last Dance?: Under NCAA Sanction, U. of I. Plans to Drop Chief After This Year,” *Chicago Sun-Times*, August 31, 2006, at 3.

41 Eastern Connecticut State University is free to use the nickname “Warriors” apparently because of the absence of any other Native American references or symbolism. Its current logo is a large cat. See <http://www.ecsu.ctstateu.edu/depts/athletics/index.htm>. Winona State University uses “Warriors” as a

Bradley University, a small university in Peoria, Illinois, has been allowed to retain its nickname of "Braves" after it removed Native American symbols from its logo. According to the NCAA's statement, Bradley "demonstrated its ability to provide an environment that is not hostile or abusive and one that is consistent with the NCAA constitution and commitment to diversity."<sup>42</sup> In addition to the nickname "Braves," the University retained the name "Braves Club" for its athletic fund-raising organization<sup>43</sup> and continues to name recipients of the "Watonga Award"<sup>44</sup> for seniors who combine athletic ability, academic achievement, and community service.<sup>45</sup> The President's statement in response to the NCAA's ruling reinforced the school's intent to honor Native American culture:

"Bradley University has used the Braves name since 1937 and we are pleased that the many generations of Bradley athletes to come will continue to bear that name, representative of the pride and tradition of our University," said Bradley University President Dr. David Broski. "The University will continue to encourage in our student body the qualities of honor, courage, tenacity, loyalty, and endurance associated with the Braves name. Additionally, the University will continue its commitment to encourage our students to learn about and respect

reference to Greek Warriors, as illustrated by its sports logo. See <http://www.winona.edu/athletics/index.html>. See MOIC Mascot Report at p. 3 and Appendix D, *supra* note 27. The "Warriors" nickname was challenged, however, at California State University at Stanislaus, East Stroudsburg University, University of Hawaii at Manoa, and Lycoming College, and those schools have since abandoned "Warriors" as a team name. See NCAA Executive Committee Subcommittee on Gender and Diversity Issues Report on References to American Indians in Intercollegiate Athletics, August, 2005, at 2 (available at [http://www1.ncaa.org/membership/governance/assoc-wide/executive\\_committee/docs/2005/2005-08/s08a\\_ec-gender.htm](http://www1.ncaa.org/membership/governance/assoc-wide/executive_committee/docs/2005/2005-08/s08a_ec-gender.htm)).

42 "Full Text From NCAA: NCAA Denies UND's Appeal," Grand Forks Herald, Apr. 29, 2006, 2006 WLNR 7263292. Bradley, however, remains on the NCAA "watch list" for five years.

43 See Bradley Braves Club at

[http://www.bubraves.com/ViewArticle.dbml?DB\\_OEM\\_ID=3400&ATCLID=130234&KEY=&DB\\_OEM\\_ID=3400&DB\\_LANG=&IN\\_SUBSCRIBER\\_CONTENT](http://www.bubraves.com/ViewArticle.dbml?DB_OEM_ID=3400&ATCLID=130234&KEY=&DB_OEM_ID=3400&DB_LANG=&IN_SUBSCRIBER_CONTENT) (last visited Sept. 25, 2006).

44 According to the Chamber of Commerce website for Watonga, Oklahoma, Chief Watonga was a member of the Arapaho tribe, and "Watonga" means "black coyote." See Watonga Chamber of Commerce at <http://watonga.com/chamber/relocation.htm> (last visited Sept. 25, 2006).

45 See Press Release, Bradley University, LeBlanc, Marevic and Stalzer Share 2006 Watonga Award (May 2, 2006), available at

[http://www.bubraves.com/ViewArticle.dbml?SPSID=19447&SPID=1510&DB\\_OEM\\_ID=3400&ATCLID=273178](http://www.bubraves.com/ViewArticle.dbml?SPSID=19447&SPID=1510&DB_OEM_ID=3400&ATCLID=273178) (last visited Sept. 25, 2006); Watonga Award at

[http://www.bubraves.com/ViewArticle.dbml?DB\\_OEM\\_ID=3400&KEY=&ATCLID=123041](http://www.bubraves.com/ViewArticle.dbml?DB_OEM_ID=3400&KEY=&ATCLID=123041) (last visited Sept. 25, 2006).

Native American peoples and traditions.”<sup>46</sup>

The exception made for Bradley University was not extended to others. Alcorn State University and Chowan University remained on the NCAA sanctioned list for their use of the name “Braves.”<sup>47</sup> Both institutions have since abandoned the use of the nickname.<sup>48</sup> Openly acknowledging its lack of time and resources for an appeal of the NCAA ruling, Chowan University replaced “Braves”<sup>49</sup> with “Hawks.”<sup>50</sup> Its new logo displays a hawk head inside of a large “C” with two feathers attached (see below).<sup>51</sup> According to Chowan University President Christopher White, the University has retired the name but not the reference; the hawk was chosen with the explicit purpose of “pay[ing] respect to the region’s first inhabitants, the Native American tribes who hold the hawk in reverence.”<sup>52</sup> Furthermore, the Chowan Athletic Department website continues to include a link to the “Braves in Action” (providing recent news stories).<sup>53</sup>

46 Press Release, Bradley University, NCAA Allows Bradley to Keep Braves Nickname (Apr. 28, 2006), available at

[http://www.bubrades.com/ViewArticle.dbml?SPSID=19447&SPID=1510&DB\\_OEM\\_ID=3400&ATCLID=271847](http://www.bubrades.com/ViewArticle.dbml?SPSID=19447&SPID=1510&DB_OEM_ID=3400&ATCLID=271847) (last visited Sept. 25, 2006).

47 See Press Release, NCAA, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots, *supra* note 32.

48 As reported by a staff member of the university’s athletic department (telephone call with author, June 1, 2006). A perusal of the Alcorn State Athletic Department website yielded not a single Native American name or symbol. Alcorn State Sports, available at <http://alcornsports.com/home.php> (last visited Sept. 25, 2006).

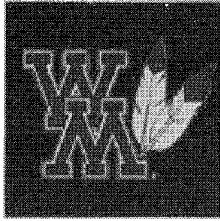
49 See Badger, *supra* note 2, at 3-4.

50 See Press Release, Chowan University, Chowan University’s Newly Named “Hawks” Take Flight (May 4, 2006), available at [http://www.chowan.edu/News/AthleticNews/05\\_06/5-4\\_06\\_mascot.htm](http://www.chowan.edu/News/AthleticNews/05_06/5-4_06_mascot.htm) (last visited Sept. 25, 2006).

51 *Id.*

52 *Id.*

53 See Chowan College News Services at <http://www.chowan.edu/News/AthleticNews/archive.htm> (last visited Oct. 9, 2006).

William and Mary Logo<sup>54</sup>Chowan University Logo<sup>55</sup>

At the same time, the College of William and Mary remained on the sanctioned list because of its own feathers. William and Mary abandoned the nickname “Indians” and its Native American mascot twenty years ago.<sup>56</sup> The College now uses the nickname “Tribe,” but utilizes no mascot or other Native American imagery.<sup>57</sup> Its logo “WM,” however, includes two feathers attached to the bottom of the “M” (see above). The NCAA acquiesced in the school’s continued use of “Tribe” but advised William and Mary to remove the feathers.<sup>58</sup> Although some of the local tribal leaders supported the College’s name and feathers, the Executive Committee found this evidence unpersuasive: “The Executive Committee’s policy reinforces the belief that stereotyping Native Americans through nicknames and imagery is wrong.”<sup>59</sup> The NCAA Executive Committee recently rejected William and Mary’s appeal to retain the feathers, and the College has decided not to pursue litigation.<sup>60</sup>

54 Image: William & Mary Logo, available at <http://www.tribeathletics.com/topstory.php> (last visited Sept. 25, 2006).

55 Image: Chowan University Logo, available at <http://www.chowan.edu/athlet/news/> (last visited Sept. 25, 2006).

56 See Marty O’Brien, Decision Gives W&M Half of What it Wanted on Mascot and Logo, *The Daily Press* (Newport News, VA), May 17, 2006, 2006 WLNR 8480529.

57 See William and Mary Athletics, <http://www.tribeathletics.com/> (last visited Sept. 25, 2006).

58 See O’Brien, *supra* note 56; James O’Connor, Chowan’s Feathery Touch Pleases NCAA, School Has New Mascot and Logo; Get OK Since Feathers Belong to Hawk, *Richmond Times Dispatch*, June 2, 2006, 2006 WLNR 9660702.

59 *Id.*

60 The NCAA Executive Committee rejected Williams and Mary’s appeal to retain the feathers as part of its logo on August 3, 2006. John O’Connor, “NCAA Turns Down Tribe’s Appeal of Logo,” *Richmond Times Dispatch*, Aug. 4, 2006, at D3. On October 10, 2006, President Gene Nichol announced the school’s decision to comply with the NCAA ruling and not to litigate the issue. In a letter to the campus community, President Nichol noted the irony of the NCAA’s decision to sanction an institution with a 95% graduation rate while much more pressing problems plague intercollegiate athletics. “It is galling that a university with such a consistent and compelling record of doing things the right way is threatened with punishment by an organization whose house, simply put, is not in order.” (Letter of President Gene Nichol, Oct. 10, 2006, available at

## II.A TEAM BY ANY OTHER NAME

The NCAA's decision to become involved in the movement to eliminate Native American names and imagery from sports is hardly surprising. Had the Executive Committee limited itself to a statement of opposition or condemnation, the leadership of the NCAA would have simply added itself to the growing list of organizations that continue to pressure both school and professional teams to abandon all Native American references. The decision to formally sanction its members, however, has left the NCAA in an indefensible position that undermines its original goal. First, the Executive Committee has acted in violation of NCAA constitutional authority by usurping its members' explicit right to determine and apply their own policies of nondiscrimination. Second, the Executive Committee has ignored the mandates of both relevant legal doctrine and the terms of its own policy by making no effort to distinguish between "offensive" and "hostile or abusive" practices. Finally, the Executive Committee's policy has lost any meaningful rationale because of the unexplained and enigmatic exceptions granted.

### A. Considering NCAA Authority

For some institutions, the NCAA Executive Committee's new policy has challenged decades of tradition almost as old as the NCAA itself.<sup>61</sup> One might question the appropriateness of NCAA Executive Committee action on this sensitive question without involvement of the full membership. Article 5.02.1.1 of the NCAA Constitution provides for full membership votes on "dominant provisions" – defined somewhat circularly as "a regulation that applies to all members of the Association and is of sufficient importance that it requires a two-thirds vote of all delegates present and voting in a joint session."<sup>62</sup> Nevertheless, the NCAA is an unwieldy group of over 1,000 members and much of the organization's governance power is delegated to the Executive Committee. Article 4.1.2(d) and (e) specifically authorize the Committee to identify and

<http://www.wm.edu/news/?id=6869>).

61 The NCAA was first founded as the Intercollegiate Athletic Association of the United States in 1905, and national championships were first held in 1921. See <http://www.ncaa.org/about/history.html> (last visited Sept. 25, 2006). Chief Illiwek at the University of Illinois, for example, dates back to 1926. Spindel, *supra* note 17, at 79.

62 2006-07 NCAA Division I Manual, *supra* note 28, at 37 ("It is the responsibility of each member institution to establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and intercollegiate athletics department staff.").



resolve core issues and other Association-wide matters.<sup>63</sup>

The authority of the NCAA governance structure to establish standards and sanctions on the Native American name issue is far more problematic, however. In the Executive Committee minutes of August 4, 2005, adopting the policy, the Committee makes no mention of specific NCAA constitutional authority for its actions; instead, the Committee references “core values and principles of the NCAA constitution” and a general responsibility to create “an atmosphere of respect for sensitivity to the dignity of every person.”<sup>64</sup> The MOIC’s report and the NCAA press release announcing the Executive Committee’s decision are more explicit in reliance on three NCAA constitutional provisions: Article 2.2.2,<sup>65</sup> concerning cultural diversity and gender equity; Article 2.4,<sup>66</sup> concerning sportsmanship and ethical conduct; and – most significantly – Article 2.6,<sup>67</sup> a general statement of nondiscrimination. All three articles were cited as establishing NCAA authority to consider and act on the issue.<sup>68</sup>

Inexplicably, neither the MOIC nor the Executive Committee reference what is arguably the most relevant provision of the NCAA Constitution – the concluding sentence of Article 2.6. Article 2.6 contains the NCAA Constitution’s “Principle of Nondiscrimination.” The MOIC’s report quotes this Article as part of its introduction, but omits the final sentence of that provision. Article 2.6 reads in its entirety:

The Association shall promote an atmosphere of respect for sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs,

63 *Id.* at 28.

64 See Minutes of the National Collegiate Athletic Association Executive Committee, *supra* note 34.

65 2006-07 NCAA Division I Manual, *supra* note 28 (“It is the responsibility of each member institution to establish and maintain an environment that values cultural diversity and gender equity among its student-athletes and intercollegiate athletics department staff.”).

66 *Id.* at 4 (“For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation but also in the broad spectrum of activities affecting the athletics program. It is the responsibility of each institution to: (a) Establish policies for sportsmanship and ethical conduct in intercollegiate athletics consistent with the education mission and goals of the institution; and (b) Educate, on a continuing basis, all constituencies about the policies in the Constitution 2.4-(a).”).

67 *Id.*

68 See MOIC Mascot Report, *supra* note 27, at 1-2; See NCAA Press Release, Aug. 5, 2005, *supra* note 32.

activities, and employment policies including on the basis of age, color, disability, gender, national origin, race, religion, creed, or sexual orientation. *It is the responsibility of each member institution to determine independently its own policy regarding nondiscrimination* [emphasis added].<sup>69</sup>

The MOIC's intentional exclusion of this sentence and any explanation of its inapplicability to the issue in question is puzzling at best and disingenuous at worst. Article 2.6 speaks to the NCAA's internal policy of nondiscrimination and in explicit terms leaves to each member the power "to determine independently" its own institutional policy of nondiscrimination.<sup>70</sup> Surely, such authority includes the right to interpret and apply that policy. Given such a clear reservation of authority to individual NCAA members, one is baffled to understand how the NCAA can claim the power to determine for an institution that a team nickname or feather on a logo constitutes a racially "hostile and abusive" environment. Each school that has been sanctioned by the NCAA has conducted its own self-study (as required by the Executive Committee)<sup>71</sup> and has concluded that its use of names, images, and/or mascots does not violate its own nondiscrimination policy. The NCAA members, through the NCAA Constitution, have prohibited the Executive Committee from enforcing its own contrary views.

#### B. Double Standards: "Hostile and Abusive" or Just "Offensive"?

Even if the NCAA had the power to second-guess its members' individual nondiscrimination policies and applications, the Executive Committee has veered significantly from its own established path in applying a meaningful standard. Although the NCAA's policy, by its terms, applies only to "hostile or abusive" names or logos, the policy has been applied to anything that the Executive Committee considers offensive – which turns out to be all Native American references of any kind. In interpreting and applying its policy, the NCAA thus ignores the boundaries that have been carefully drawn and respected by the

69 2006-07 NCAA Division I Manual, *supra* note 28, at 4.

70 The discrepancy between these two statements may have been a response to the NCAA's inclusion of "sexual orientation" as part of the Association's own nondiscrimination statement. Unlike the other enumerated categories, such as race and sex, sexual orientation is the only category that is not the subject of federal protective legislation. Many college campuses have struggled over the last two decades with the decision over whether to include protection on the basis of sexual orientation as a matter of institutional policy. Perhaps the original purpose of the last sentence of Article 2.6 was to leave that issue squarely in the hands of each NCAA member. This is, however, speculation by the author.

71 See discussion, *supra* note 31.

sources upon which the Executive Committee has based its actions. The appeals which triggered NCAA action, as well as applicable legal standards, differentiate between the concepts of “offensive” and “hostile or abusive.” The NCAA adopts the same distinction but repeatedly fails to apply it.

The NCAA points to two documents as the primary triggers for its initial inquiry and consideration of the Native American issue – the 2001 Statement of the U.S. Commission on Civil Rights and the March 15, 2001 letter and proposed resolution from President Roy Saigo of St. Cloud State University.<sup>72</sup> Both documents condemn the use of Native American names and mascots, yet neither goes so far as to label the practice “hostile and abusive” or unlawful. The Statement of the U.S. Commission on Civil Rights describes these practices as “insensitive,” “disrespectful and offensive,” “inappropriate,” and “stereotyping.”<sup>73</sup> While noting that “some Native American and civil rights advocates maintain that these mascots may violate anti-discrimination laws,” no authority is provided. Furthermore, the statement by its own terms is limited to the use of “mascots,” not team nicknames, and the Commission itself makes no such claim of unlawfulness. Rather, the Commission urges the elimination of such names and symbols as “offensive.”<sup>74</sup>

President Saigo’s letter and proposed resolution similarly stops short of declaring that any use of Native American names constitutes illegal behavior; rather, his proposed resolution states that the NCAA “will not tolerate any activity that constitutes *illegal discrimination*” [emphasis added] and “do[es] not condone the use of Native American logos and nicknames.”<sup>75</sup> Significantly, neither the U.S. Commission on Civil Rights nor President Saigo’s proposed resolution attempt to cross the line between condemning offensive behavior and stereotypes and charging unlawful discrimination due to a “hostile environment.”

By its own terms, the NCAA’s new rule purportedly adopts this distinction between that which is “offensive” and that which is “hostile or abusive.” The official policy adopted by the Executive Committee sanctions institutions “with hostile or abusive racial/ethnic/national origin mascots, nicknames, or imagery.”<sup>76</sup> In its press release announcing the new rules for NCAA Championships, the Executive Committee uses the terms “hostile” and “abusive” no less than eight times. Walter Harrison, Chair of the Executive Committee stated, “[W]e believe that mascots, nicknames or images *deemed hostile or*

72 See MOIC Mascot Report, *supra* note 27, at 1.

73 *Id.* at Appendix C.

74 *Id.*

75 *Id.* at Appendix B.

76 NCAA Executive Committee Minutes, Aug. 4, 2005, *supra* note 34.

*abusive* in terms of race, ethnicity or national origin should not be visible at the championship events that we control [emphasis added].”<sup>77</sup> As reported in the NCAA News:

“The Executive Committee adopted the standard of “hostile and abusive” in part from case law. Members cited such language as being applied in civil cases in which decisions were reached based on what “a reasonable person” would find to be hostile or abusive. *The “hostile and abusive” standard is also stronger than simply “offensive,” which courts have ruled is protected under the freedom of expression* [emphasis added].”<sup>78</sup>

The NCAA’s references to “case law,” “civil cases” and court rulings confirm the Executive Committee’s apparent attempt to conform its policy to a legal standard of “hostile environment.” Federal law squarely prohibits virtually all NCAA members from discriminating on the basis of race under the strictures of Title VI<sup>79</sup> and/or the Fourteenth Amendment, which governs public agencies. There is also little question that Title VI prohibitions would provide legal redress for a hostile environment based on race created by the institution.<sup>80</sup>

The legal concept of “hostile environment” is perhaps best developed in sexual harassment precedent.<sup>81</sup> Sexual harassment, a claim recognized under both Title VII of the Civil Rights Act of 1964<sup>82</sup> and Title IX of the Education

77 NCAA Press Release, “NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events,” *supra* note 32.

78 Gary T. Brown, “Policy Applies Core Principles to Mascot Issue,” *The NCAA News*, Aug. 15, 2005 (on file with the author).

79 42 U.S.C. §§ 2000d-2000d-4a (2001). Title VI, by its terms, applies to any educational institution receiving federal funding. (The Civil Rights Restoration Act of 1987 clarified that the entire institution is covered if any program receives funding. 42 U.S.C. § 2000d-4a.) Because most colleges and universities receive federal funding in some form, Title VI is applicable to most NCAA members. 42 U.S.C. § 2000d-3.

80 See, e.g., *Bryant v. Indep. Sch. Dist. No. 1-38 of Garvin County, Okla.*, 334 F.3d 928, 931 (10th Cir. 2003).

81 Some authors have proposed other possible legal avenues besides Title VI. One commentator has asserted that Title II of the Civil Rights Act of 1964, providing for “full and equal enjoyment” in places of public accommodation, might be used to challenge professional team names, like the Cleveland Indians and the Atlanta Braves. See Note, A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports, 112 *Harv. L. Rev.* 904 (Feb. 1999). This author goes so far as to equate all Native American team names with the racial epithet “n\_\_\_\_\_.” *Id.* at 911-12. Another commentator, targeting the Cleveland Indians and Chief Wahoo, characterizes Chief Wahoo as “state sponsored discrimination” and “racist speech” in violation of the Fourteenth Amendment. See Guggenheim, *supra* note 11, at 215-26.

82 42 U.S.C. §§ 2000e-2000e-17 (2001).

Amendments of 1972,<sup>83</sup> includes “hostile environment” claims. As defined by the Supreme Court, a valid claim for hostile environment requires “severe or pervasive” conduct that effectively poisons the work environment of the victim.<sup>84</sup> Courts routinely distinguish between conduct that is only “offensive” and conduct that creates a “hostile environment.”<sup>85</sup> As described by the Supreme Court, actionable hostile environment must be “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>86</sup> The same standard has been adopted by the Court in the context of racial harassment claims.<sup>87</sup>

In assessing the existence of a “hostile work environment,” courts repeatedly refuse to impose liability when the conduct could only be considered “rude” or “offensive.”<sup>88</sup> Even racial slurs are inadequate to justify a claim of a racial and hostile environment unless pervasive and regularly directed at the plaintiff.<sup>89</sup> Although many would agree that the use of Native American names and symbols in the context of sports may be offensive and demeaning, arguing that the practice meets the adopted legal standard of hostile environment seems an insurmountable task.

The Justice Department has implicitly considered this dividing line in the

83 Title IX of the Education Amendment of 1972, 20 U.S.C. §§ 1681-1688 (2001) (prohibiting sex discrimination by institutions who receive federal funds). See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

84 *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

85 *Meritor Sav. Bank*, 477 U.S. at 67; *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (“conduct that is merely offensive” does not constitute actionable harassment).

86 *Harris*, 510 U.S. at 21 (quoting *Meritor Sav. Bank*, 477 U.S. at 65 (internal quotation marks omitted)).

87 See *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) (“Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.”); See also *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067 (11th Cir. 1990); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264 (7th Cir. 1991); *Bolden v. PRC, Inc.*, 43 F.3d 545 (10th Cir. 1994).

88 *Nitsche v. CEO of Osage Valley Elec. Coop.*, 446 F.3d 841, 846 (8th Cir. 2006).

89 Compare *Powell v. Mo. State Highway and Transp. Dep’t*, 822 F.2d 798, 801 (8th Cir.1987) (there was no hostile environment where the plaintiff was target of “a few isolated racial slurs”), with *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 352, 354 (8th Cir. 1997) (the plaintiff was the target of “a steady barrage of racial name-calling at the [defendant’s] facility”). But see *Burkett v. Glickman*, 327 F.3d 658, 662 (8th Cir.2003) (concluding that “[o]ffhand comments and isolated incidents of offensive conduct (unless extremely serious) do not constitute a hostile work environment”). Thus, it has been concluded as a matter of law that there is no violation of Title VII when there is “no steady barrage of opprobrious racial comment[s].” *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981).

context of a sports team nickname. In response to a citizen complaint in 1999, the Civil Rights Division of the Justice Department initiated an investigation into the use of team nicknames at Erwin High School in Asheville, North Carolina. The men's teams were known as Warriors, while the women's teams were nicknamed the "Squaws."<sup>90</sup> While dictionaries define "squaw" as "[a] North American Indian woman,"<sup>91</sup> some Native American communities define the word as "whore" or a derogatory reference to female genitalia.<sup>92</sup> The Department notified the school of its intent to determine if these actions created a "racially hostile environment." Rather than devote its limited resources to the investigation, the school board voted to eliminate the "Squaw" nickname shortly afterwards.<sup>93</sup> The Justice Department immediately announced its withdrawal, apparently unconcerned (at least legally) with the "Warriors" nickname – which the school continues to use.<sup>94</sup>

Having justified its new policy as an adaptation of legal standards, the NCAA proceeds to ignore that standard entirely in the policy's application. First, the NCAA makes no operational distinction between "offensive" and "hostile or abusive." In contrast to the boundaries acknowledged by the U.S. Commission on Civil Rights, President Saigo, the courts, and its own policy, the Executive Committee avoids any difficult line drawing altogether. Rather, the Committee effectively concludes that *any* use of Native American names or images is inherently "hostile or abusive." Thus, all colleges and universities retaining Native American names of any kind were sanctioned in the policy's initial application.<sup>95</sup>

90 John Leo, War Against Warriors, U.S. News & World Report, Mar. 8, 1999. The school retired its mascot several years earlier. Spindel, *Dancing at Halftime*, supra note 17, at 231-46.

91 American Heritage Dictionary, Second College Edition (1985).

92 Andrea K. Walker, "Students Have to Decide on a New Mascot; Girls' Teams Can't be Squaws," Charlotte Observer, Mar. 5, 1999; Shown (Harjo), supra note 4, at 3. For a more complete discussion of the meaning of "squaw," see Spindel, *Dancing at Halftime*, supra note 17, at 235-36. Although there is some disagreement about its precise definition, it is generally understood as a term demeaning to women.

93 Walker, supra note 92.

94 Id. In addition to the team nickname, the school grounds included a 30 foot statue of a Native American with a tomahawk. Id. A visit to the school's athletic website on June 14, 2006, confirms that the school continues to use the "Warrior" nickname. See <http://northcarolina.ihigh.com/erwin/> (last visited Sept. 13, 2006). A picture of the Native American statue can be found in Spindel, *Dancing at Halftime*, supra note 17, at 233. The Justice Department's letter to the high school closing the investigation included permission to continue use of the statue, as well as two totem poles. Id. at 239.

95 The only school that escaped the initial list of offenders was UNC-Pembroke. See Gary T. Brown, "Policy Applies Core Principles to Mascot Issue," The NCAA News, Aug. 15, 2005.

In spite of initial reliance on the legal standard of “hostile environment,” the NCAA has avoided any attempt to adhere to that standard in the application of its policy. Nor has the NCAA explained any of its decisions in terms of the line between offensive and hostile. One may suspect that the NCAA avoids such language because of the absence of any cases which would or could support and justify its conclusions. If the use of “Braves” or “Indians” as a team name were, indeed, “hostile and abusive” race discrimination as the NCAA claims,<sup>96</sup> surely at least one court would have already banned the practice under Title VI. None have. In spite of this well-established body of law, no court has *ever* found an educational institution liable for hostile environment race discrimination based on a Native American team name, mascot or logo.

Without the use of a mascot – the target of the most ardent charges of hostility and racism – a nickname alone seems unlikely to rise above the “offensive” threshold that the courts have established. Even the research that the MOIC collected for its position offers little support for the proposition that the use of nicknames in isolation creates a hostile environment. The MOIC’s initial report makes a respectable case that the use of Native American mascots may be demeaning and even racist, but the MOIC and Executive Committee make an unsupported leap to conclude that all nicknames and symbols are equally reprehensible. In making that leap, the NCAA has left behind both the terms of its own policy and the legal grounding it claims to embrace. One may well be offended by calling a team “Braves” or using a couple of feathers, but labeling such practices “hostile and abusive” strains the standard beyond the breaking point.

### C. More Double Standards: Trying to Make Sense of the NCAA’s Policy Exemptions

The NCAA might have retained the high ground on principle, if not legality, had it remained steadfast in its initial decision to sanction the use of any Native American names, mascots or references in intercollegiate sports. Even at the time of its initial announcement, however, an exception was made for UNC-Pembroke, based on its history as a school established for Native Americans. Later exceptions were added, as various universities appealed and threatened litigation. All good intentions of consistency and rationality have now evaporated.

<sup>96</sup> While I make no claim to exhaustive research, I found only one scholarly assertion that the use of any Native American term or tribe name in this context is inherently hostile and abusive on its face. This particular commentator compares the use of Native American nicknames to the most despicable racial epithet, n\_\_\_\_. See Note, A Public Accommodations Challenge, *supra* note 81, at 911-12.

While the Executive Committee's initial exemption for the UNC-Pembroke Braves is superficially appealing, closer examination reveals inherent inconsistencies that undermine the new policy. UNC-Pembroke was founded as a school for Native Americans and it retains close ties with the Native American community. Native American students also comprise twenty percent of the student body, far higher than the national average of less than one percent.<sup>97</sup> While UNC-Pembroke can certainly claim historical status as a Native American school, that status no longer defines the university. A perusal of the UNC-Pembroke Web site finds no reference to this connection unless the browser specifically links to the history of the institution. For the casual observer (or sports fan or opponent), there is nothing that signals this historical connection. To all but those who are well versed in the school's origins, the UNC-Pembroke Braves appear to be no different from the Braves of Alcorn State or Chowan University. If the nickname "Braves" is offensive at those institutions, why would a Native American not be equally offended with UNC-Pembroke's actions, at least without a history lesson of explanation?

Compounding the mystery of its decisions and the process, the NCAA later decided that Bradley University could also use "Braves" even without the historical link of UNC-Pembroke. The Executive Committee provided no details about what made Bradley University's use of a Native American nickname acceptable while Chowan University was sanctioned for the same name.<sup>98</sup> One distinction is that Chowan University chose not to appeal, while Bradley did. Perhaps Chowan would have been equally successful, but that is surely not a defensible distinction between the treatment of the two schools. Perhaps there are other factual distinctions between the two cases but, without elaboration by the NCAA, it is impossible for an institution to evaluate its own position.

In cases of specific tribe names, the Executive Committee quickly reversed course. Within a matter of weeks after announcing its new policy, the Executive Committee reversed its decision to sanction Florida State University. This rapid

97 Of the 15.4 million college students enrolled in 2001, only 150,000 were Native Americans. See ACE Releases Its Annual Status Report on Minorities in Higher Education, Feb. 14, 2005, at <http://www.acenet.edu/AM/Template.cfm?Section=20052&CONTENTID=3701&TEMPLATE=/CM/ContentDisplay.cfm> (last visited Sept. 13, 2006); Undergraduate Enrollment, by Attendance Status, Age, Race, and Gender: Fall 2002, available at <http://www.acenet.edu/AM/Template.cfm?Section=InfoCenter&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=15864> (last visited Sept. 13, 2006).

98 Other schools with team names of "Indians" (Arkansas State, Indiana University-Pennsylvania, Midwestern State, Newberry College) or "Braves" (Alcorn State) either remained on the list or bowed to NCAA sanctions and changed their names.



about-face perhaps best illustrates the inconsistencies in the NCAA's current position. In addition to the use of a Native American profile as a logo (see below), the Florida State Seminoles open each football game with a long-standing tradition of the Seminole mascot (a student dressed in Native American garb as Osceola, a nineteenth century Seminole tribal leader<sup>99</sup>) riding onto the field on an Appaloosa with a flaming lance to thrust into the ground in front of the opposition's sideline.<sup>100</sup> With its highly successful football program, these games are often televised, and the Osceola spectacle can be observed by millions across the nation – few of whom know or care about the University's relationship with the Seminole tribe. Although the Seminole tribe in Florida has formally approved the use of its name, Native Americans across the country decry these theatrics,<sup>101</sup> and, according to the MOIC, there are Seminole members who oppose Florida State's actions.<sup>102</sup> Given the NCAA's conclusion that simply the names "Braves" and "Indians" (or a couple of feathers) are "hostile and abusive" to Native Americans generally, it seems impossible to distinguish the Florida State Seminoles – regardless of the "approval" of one tribe's leadership.



FSU Seminoles Logo

99 Spindel, *supra* note 17, at 16.

100 See *id.* at 257 (picture of the Florida State mascot Osceola).

101 See, e.g., Shown (Harjo), *supra* note 4, at 4.

102 MOIC Mascot Report, *supra* note 27, at 10.



FSU Mascot Osceola<sup>103</sup>

With respect to those schools that have the ability to obtain tribe approval, the NCAA has withdrawn its objection, perhaps because of second thoughts about whether the NCAA can reasonably object to practices authorized by the “injured” party, and fueled by threats of litigation. This decision leads to the arguably counter-intuitive result that those schools referencing specific Native American tribes may be free to continue that use while those schools using more generic names like “Braves” are punished because there can be no “permission” granted by a particular tribe. In terms of how the broader community of Native Americans may be perceived as a result of these nicknames or may be offended by the practice, there seems to be little difference between the two.

Similarly, it is also unclear how or when the casual fan would understand the difference, between the “hostile” use of “Sioux” by the University of North Dakota and the accepted use of “Chippewas” by Central Michigan State. There are also the “good” Braves of Bradley University and the “bad” Braves of Alcorn State. When hearing the latest reports on ESPN or reading about recent games, there are no readily available footnotes to assure the viewer or the reader that the NCAA has found one use “hostile” and the other use acceptable.

In an odd twist of logic, the NCAA has sometimes justified its sanction by the *potential* for a hostile and abusive environment, rather than the *existence* of a hostile and abusive environment. In concluding that the University of Illinois would remain on the sanctioned list because of Chief Illiniwek, for example, the NCAA referred to the institution’s logo/mascot as “offensive and insulting” – not “hostile and abusive.”<sup>104</sup> The name and mascot were sanctioned, however, because such images create an environment in which “[f]ans, opponents, and

103 Images from Florida State University’s athletics website at <http://seminoles.cstv.com> (last visited Sept. 20, 2006).

104 “Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of Illinois, Champaign Review,” *supra* note 38.

others can and will exhibit behaviors that indeed are hostile or abusive to Native Americans.”<sup>105</sup> Similar reasoning apparently doomed the feathers of William and Mary.<sup>106</sup> The potential of unlawful harassment has never justified a finding of actual hostile environment under Title VII or Title VI.

Why the problem of a potential hostile environment does not apply to the Bradley University Braves, the UNC-Pembroke Braves, the Mississippi College Choctaws, or the Florida State Seminoles is elusive. Even where there is explicit tribal approval for the use of the name, as in the case of Mississippi College and Florida State, the risk of “hostile or abusive” “behaviors” by fans and opponents seems identical. If an opponent is looking for an offensive way to ridicule the “enemy,” it is hard to imagine they would be dissuaded by – or even know about – the tribal approval of the name in question. If the NCAA is truly concerned about the potentially hostile environment created by such names and images, tribal approval is irrelevant.

Then there are the feathers. Chowan University bowed to NCAA pressure to eliminate the use of “Braves” as a nickname but remained steadfast in its Native American references. As noted, the school chose “Hawks” as a symbol revered by Native American culture and added feathers to its logo to enhance the connection. The “Braves Club” and “Braves Beat” remain in place to solidify the package.<sup>107</sup> Apparently the NCAA was untroubled by any of this, as Chowan University has been officially removed from the list of sanctioned institutions. At the same time, the College of William and Mary remained on the list because of two feathers attached to the school’s initials.

The NCAA’s resulting patchwork of positions and decisions leaves one puzzling over the logic and common sense that seems to have gone missing somewhere along the way. Regardless of its authority to ban all Native American names and symbols, the NCAA has lost all hope of legitimacy when it undertook to differentiate between “good” and “bad” uses. A standard ceases to be one when its applications are incapable of understanding or explanation.

#### D. More Double Standards: A Final Irony or Two

Notwithstanding the NCAA’s strong language denouncing Native American symbols and demeaning cultural stereotypes, the Association might be accused of selectivity in its choice of principles. As noted by one commentator, the NCAA’s deep concern for Native American symbols and names apparently does

<sup>105</sup> *Id.*

<sup>106</sup> See Appeal on Behalf of the College of William and Mary, available at <http://www.wm.edu/news/index.php?id=5975> (last visited Sept. 20, 2006).

<sup>107</sup> See *supra* notes 52-53 and accompanying text.

not extend to its financial well-being in the form of corporate sponsors.<sup>108</sup> Of its three “Corporate Champions”<sup>109</sup> – Cingular Wireless, The Coca-Cola Company, and Pontiac – two use Native American names and/or symbols. Until recently, the Coca-Cola Company sold Chippewa Water, and Pontiac continues to use the name of a well-known Native American chief<sup>110</sup> and an arrowhead as its corporate symbol (see below). Kraft was an NCAA “Corporate Partner” in 2005 when the Executive Committee announced its new policy.<sup>111</sup> That company markets Calumet Baking Powder with a symbol of a Native American in headdress. With its own revenue stream at stake, the NCAA apparently is willing to be less judgmental.



Pontiac Logo<sup>112</sup>



Kraft Calumet Baking Powder<sup>113</sup>

Along the same lines, one might also question the NCAA’s discerning concerns with stereotypes. Although only a handful of institutions use Native American names or mascots (out of the NCAA’s membership of over 1,000

108 Rob Daniels, “Sponsored by Debasing Depictions,” News & Record (Piedmont Triad, NC), Sept. 6, 2005, 2005 WLNR 14829075.

109 See <http://www.ncaa.org/partners/partners.html> (last visited Sept. 20, 2006), listing the NCAA Corporate Champions and Corporate Partners.

110 “Chief Pontiac (1720 - April 20, 1769) was a great leader of the Ottawa Indian tribe. He organized his and other tribes in the Great Lakes area to fight the British, in what is known as Pontiac’s War (1763-1764).” Enchanted Learning, available at <http://www.enchantedlearning.com/explorers/page/p/pontiac.shtml> (last visited Sept. 20, 2006).

111 Copy of 2005 NCAA Corporate Partner webpage on file with the author.

112 Image: Pontiac logo, taken from the NCAA website at <http://www.ncaa.org/partners/partners.html> (last visited Sept. 20, 2006)

113 Image: can of baking powder, available at [http://www.pwclub.com/en-us/dept\\_1514.html](http://www.pwclub.com/en-us/dept_1514.html) (last visited Sept. 22, 2006). A “calumet” is the term for the long-stemmed ceremonial pipe used by North American Indians. American Heritage Dictionary, Second College Edition (1985).

active member schools<sup>114</sup>), the MOIC discussed at length the ways in mascots can stereotype, misrepresent and denigrate Native Americans. One might raise the same issues about the far more common phenomenon of the dance team. Dance teams typically include only females who perform various routines during breaks or half time at sporting events. Costumes are usually skin-tight, exposing midriffs, cleavage or both.<sup>115</sup> Dances or moves might reasonably be characterized as sexually provocative in some instances. Such entertainment, usually sponsored by university athletic departments, perpetuates gender stereotypes with far more frequency than the racial stereotypes that may be evoked by the few remaining Native American nicknames. Indeed, some might find this “entertainment” offensive and demeaning to women, yet few are likely to argue that a dance team creates a hostile environment.

### III. THE NCAA ON GENDER EQUITY: LEAVING THE SQUAWS<sup>116</sup> BEHIND

“[T]he women . . . [are] left a home when the braves go to hunting or to battle.”  
(Winfield Newspaper Union, March 21, 1891)<sup>117</sup>

The use of Native American names and symbols in sports is an issue that deserves analysis and consideration by the NCAA – the organization that controls most aspects of intercollegiate athletics. The NCAA’s decision to address the issue is to be applauded, but the resulting mess, if not embarrassment, for the organization leaves one questioning the wisdom of the NCAA’s tactics. Had the Executive Committee followed President Saigo’s original proposal of a resolution condemning the practice and urging all schools to reconsider the issue, the results may have been much the same. Many of the thirty-three schools using Native American references at that time might have willingly joined the hundreds of schools that have voluntarily chosen to abandon these references in response to growing criticism. For those who have also focused their attention on gender equity issues in college athletics, one might question why concerns about sex discrimination have failed to move the Executive Committee to act with equal resolve.

114 According to the NCAA website, there are 1,024 active member schools. [http://www2.ncaa.org/about\\_ncaa/membership/](http://www2.ncaa.org/about_ncaa/membership/) (last visited Sept. 20, 2006).

115 See, e.g., a photograph of the Florida State Golden Girls (the Florida State University dance team) at <http://seminoles.collegesports.com/trads/fsu-trads-goldgirls.html> (last visited Sept. 20, 2006).

116 I use this term with full awareness of its derogatory meaning for many Native Americans (see *supra* note 92 and accompanying text). I believe it is appropriate in this context because of the inherent snub in the NCAA’s decision to pursue the issue of Native American names in sports with institutional sanctions, while leaving to a federal agency the enforcement of gender equity principles.

117 See <http://www.ausbcomp.com/~bbott/cowley/Oldnews/PAPERS/NEWSPAPE.HTM> (last visited Sept. 20, 2006).

Title IX,<sup>118</sup> enacted almost thirty-five years ago, prohibits sex discrimination by an institution that receives federal funds – a criterion that encompasses virtually all NCAA members. Applying the concept of sex discrimination in the context of sex-segregated sports has been a long-standing challenge. Nonetheless, with enforcement authority delegated to the Office for Civil Rights in the Department of Education, significant guidance is available in the form of agency regulations, policy interpretations, and numerous judicial opinions. An in-depth discussion of Title IX's parameters and mandates is beyond the scope of this article but is readily available in articles by numerous other commentators.<sup>119</sup>

The NCAA's demonstrated concern for gender equity is evident in various committees and reports,<sup>120</sup> as well as the inclusion of gender equity in the NCAA certification process.<sup>121</sup> Yet at no point has the NCAA suggested that an institution's failure to comply with Title IX would have any consequences, such as being barred from hosting NCAA championships. Even when a federal court has made a definitive legal finding that a university is in violation of Title IX,<sup>122</sup>

118 Title IX, *supra* note 83.

119 See, e.g., Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13 (Fall 2000); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 Seton Hall J. Sport L. 391 (1997); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 Wisc. L. Rev. 647; Ellen J. Vargyas, *Breaking Down Barriers: A Legal Guide to Title IX* (1994); Diane Heckman, *Woman & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. Miami Ent. & Sports L. Rev. 1 (1992). See also U.S. Dep't of Educ., *Sec'y's Comm'n for Opportunity in Athletics, Open to All: Title IX at Thirty* (2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> (last visited Sept. 22, 2006).

120 The NCAA governance structure includes the Executive Committee Subcommittee on Gender and Diversity Issues. See [http://www2.ncaa.org/portal/legislation\\_and\\_governance/committees/association\\_wide\\_committees.html](http://www2.ncaa.org/portal/legislation_and_governance/committees/association_wide_committees.html) (last visited Sept. 22, 2006). Gender equity related reports listed on the NCAA research website include the NCAA Gender-Equity Report, Race and Gender Demographics of NCAA Member Institutions Athletic Personnel, Race and Gender Demographics of NCAA Member Conferences Personnel Report, 1989 NCAA Study of Perceived Barriers to Women in Intercollegiate Athletics Careers. See [http://www2.ncaa.org/portal/media\\_and\\_events/ncaa\\_publications/research/index.html](http://www2.ncaa.org/portal/media_and_events/ncaa_publications/research/index.html) (last visited Sept. 22, 2006).

121 See generally reports available on the NCAA website, available at [http://www2.ncaa.org/portal/media\\_and\\_events/ncaa\\_publications/research/](http://www2.ncaa.org/portal/media_and_events/ncaa_publications/research/) (last visited Sept. 22, 2006); relevant committees listed at

[http://www2.ncaa.org/portal/legislation\\_and\\_governance/committees/](http://www2.ncaa.org/portal/legislation_and_governance/committees/) (last visited Sept. 22, 2006).

122 A number of universities have been sued privately by current or aspiring intercollegiate athletes, and many of these cases have resulted in judicial findings of noncompliance with Title IX. See, e.g., *Cohen v. Brown Univ.*, 809 F.Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *remanded to 879 F.Supp. 185* (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Roberts v. Colorado State Univ.*, 814 F.Supp. 1507 (D.Colo.), *aff'd in part and rev'd in part sub nom. Roberts v. Colorado State Bd. Of Agric.*, 998 F.2d 824 (10th Cir.), *cert.*

the NCAA has made no move to punish the school in any way.

Although gender equity is a consideration in the NCAA certification process,<sup>123</sup> the NCAA explicitly disavows any attempt to ascertain Title IX compliance:

It is critical to note that the [NCAA Certification] committee will not be evaluating, nor training peer reviewers to evaluate, whether an institution is in legal compliance with Title IX areas, rather, it and peer reviewers will be evaluating the institution in terms of whether the school has thoroughly addressed its standing in each Title IX area.<sup>124</sup>

Research has failed to locate a single example of the NCAA sanctioning an institution for Title IX violations. When contacted about possible sanctions for Title IX violations, an NCAA staff member responded, "The NCAA does not enforce Title IX. The Office for Civil Rights under the Dept. Of Education does."<sup>125</sup> The response is a reasonable one in the abstract; leaving legal issues to the courts or authorized enforcement agencies seems appropriate. The problem with such logic is that the Office for Civil Rights (OCR) also has enforcement authority for Title VI<sup>126</sup> – the applicable federal legislation that would provide

denied, 510 U.S. 1004 (1993). *Pederson v. Louisiana St. Univ.*, 213 F.3d 858 (5th Cir. 2000). For a more complete list of cases, see Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 551 (2003); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 *Seton Hall J. Sport L.* 391 (1997).

123 The ten-year certification cycle seems far too long to provide any serious ongoing enforcement. Having participated in two NCAA certifications at Division I programs, I would also suggest that the NCAA review teams have either too little time or too little expertise (or both) to conduct any serious oversight in this area.

124 See "NCAA Changes in the Certification Cycle," found on the NCAA's official website at [http://www1.ncaa.org/membership/membership\\_svcs/athletics\\_certification/changes](http://www1.ncaa.org/membership/membership_svcs/athletics_certification/changes) (last visited Sept. 22, 2006). A similar stance might have been a more dignified approach for the NCAA on the issue of Native American names and symbols. Just as it has included gender equity in NCAA certification, the NCAA could evaluate whether each institution has "thoroughly addressed its standing" on the potentially "hostile and abusive" use of Native American imagery. This would ensure that schools were forced to evaluate the possible negative impact of these names and symbols without having to answer the ultimate question, much in the way the NCAA avoids a determination of an institution's compliance with Title IX. Such an approach would have avoided the odd patchwork of logic and inconsistencies that the NCAA has been forced to accept in the current compromise.

125 Email from Rosie Stallman, June 8, 2006, on file with the author. Ms. Stallman is identified on the NCAA website as a director for NCAA education outreach. See [http://www2.ncaa.org/portal/media\\_and\\_events/press\\_room/2006/may/20060523\\_leadership\\_conf\\_rls.html](http://www2.ncaa.org/portal/media_and_events/press_room/2006/may/20060523_leadership_conf_rls.html) (last visited Sept. 22, 2006).

126 See applicable regulations at <http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr100.html#S1>

redress for a “hostile environment” based on race. The NCAA was unwilling to leave Title VI enforcement authority to OCR when considering the use of Native American names in sports, but it has distanced itself from the parallel problem of enforcing gender equity under Title IX. The NCAA’s willingness to engage the question of when nicknames like “Braves” and “Indians” are “hostile” or “offensive” undermines any argument that gender equity is not the NCAA’s responsibility. Having chosen to impose sanctions for team nicknames (using a standard far removed from applicable legal precedent), the NCAA similarly could choose to develop its own gender equity standards and require member compliance in a comparable fashion.

Committing itself to gender equity would not necessarily require the NCAA to engage in the complexities of Title IX analysis. Although Title IX covers a number of aspects of athletic program operations, the most controversial has been the issue of participation opportunities for women. Under OCR’s Title IX Policy Interpretation,<sup>127</sup> universities are given three alternatives for Title IX compliance in this area. The first option of proportionality is easily understood and readily applied – the demonstration that women are provided participation opportunities in the same proportion that women are represented in the student body. If women comprise fifty percent of the student population, for example, proportionality is satisfied when fifty percent of the school’s student athletes are also women. While the OCR has provided other alternatives for demonstrating compliance with Title IX, the proportionality standard remains a “safe harbor” for establishing equality of participation opportunities.<sup>128</sup>

(last visited Sept. 22, 2006).

127 44 Fed. Reg. 71,413 (Dec. 11, 1979).

128 See discussion in B.Glenn George, *Fifty-Fifty*, 63 Ohio St. L.J 1107, 1117-18 (2002):

“In 1979, the OCR sought to clarify the ambiguity on the participation question by issuing a Policy Interpretation, U.S. Dept. Health, Educ. And Welfare, Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979). purporting to explain the regulations it had issued four years earlier. The accommodation requirement of the 1975 regulations was translated into a test offering three alternatives for compliance. First, the institution could offer athletic opportunities “in numbers substantially proportionate to their respective enrollments.” In other words, if 50% of the student body at large is female, 50% of the student athletes should be female. Second, the institution could comply by establishing “a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of that sex.” Third, in an option that does little more than restate the original standard, a school may satisfy Title IX by demonstrating that “the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.” *Id.* at 71,418.

“As a practical matter, these alternatives have been interpreted and applied by the courts in such a way as to leave only the first alternative – proportionality – as a legally viable option. The second alternative (“a history and continuing practice of program expansion”) may have



Without delving into a full Title IX review, the NCAA could require as a matter of policy that proportionality be met by all member institutions as a condition of hosting NCAA championship events or perhaps even participating in post-season competition. The standard is simple and easy to apply, leaving schools with no ambiguities of what is required for compliance. As noted, the standard also places the institution in full compliance with Title IX participation requirements. The NCAA's adoption of a proportionality measure as its own standard for gender equity thus would serve the added function of encouraging

been intended to give some breathing room to those schools that had few women's teams in the early 1970's but were working towards expansion. Many schools added women's teams in the first decade of Title IX but that era of expansion – in the face of tighter budgets – has long since disappeared. Typical are the histories of Brown University and Colorado State University – both high profile defendants in Title IX lawsuits in the 1990's. [See *Cohen*, supra note 122; *Colorado State Board of Agric.*, supra note 122.] In each case, the schools in question planned to discontinue both men's and women's teams in order to address budget shortfalls – women's volleyball, women's gymnastics, men's golf, and men's water polo, in the case of Brown; women's softball and men's baseball in the case of Colorado State. Neither Brown nor Colorado State had added a woman's team since the 1970's (with the exception of women's track added by Brown in 1982). *Brown*, 809 F.Supp. at 981; *Colorado State*, 814 F. Supp. at 1514. Not surprisingly, the First Circuit concluded in *Brown* that, "The very length of this hiatus suggests something far short of a continuing practice of program expansion." 991 F.2d at 903.

"The third possible alternative for Title IX participation compliance has proved equally unattainable in litigation to date. Most courts have interpreted this option as effectively eliminated by the very fact of a lawsuit. In *Brown* and *Colorado State*, for instance, the gymnasts, volleyball players, and softball players sued to block the elimination of their teams in the proposed cuts. If the plaintiffs are sufficiently interested in playing a sport to litigate for that opportunity, the courts concluded, the schools obviously were not fully accommodating their interests. Litigants and commentators' efforts to define the third alternative more broadly so far have been unsuccessful. See, e.g., Julia Lambert, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. Mich. J.L. Reform 151 (2001); Brian V. Snow and William E. Thro, *Gender & Sports: Setting A Course for College Athletics: Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 Duke J. Gender L. & Policy 1 (1996).

"In a 1996 'Clarification,' OCR attempted one more time to define nondiscrimination in the context of intercollegiate athletics. The Clarification, as described by OCR, is intended as an 'elaboration' of the three-part test included in the 1979 Policy Interpretation, which, in turn, attempted to explain the duty to 'effectively accommodate' student interest required by the 1975 regulations. The 1996 Clarification fully embraces the three part test but seeks to emphasize the alternative nature of the three options. While the proportionality test remains a 'safe harbor' of compliance, OCR offers numerous suggestions about how a university might research and monitor female student interest under the third alternative."

Office for Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, available at <http://www.ed.gov/offices/OCR/docs/clarific.html> (Jan. 16, 1996) (last visited Sept. 22, 2006).

all of its members to meet the mandates of federal law. In one simple stroke, the principles of gender equity would be dramatically advanced on both the NCAA/policy and legal fronts.

#### CONCLUSION

The NCAA's interest in eliminating demeaning or hostile symbols of Native American culture from our intercollegiate athletic arena is a worthy topic of discussion and perhaps even a call for action. Defining what is "hostile and abusive," has proven elusive, however, and the NCAA's decision to cross the line between self-determination by individual schools and coercive mandate by the NCAA Executive Committee is even more troubling. By contrast, failure to demand compliance with Title IX is far less ambiguous. Unlike the question of Native American nicknames, the Title IX arena includes stacks of government regulations and judicial opinions to guide the NCAA on compliance options.<sup>129</sup> Far more concrete than the theoretical legal concept of "hostile environments" created by Native American team nicknames, Title IX is federal law that has been repeatedly applied to the collegiate sports enterprise.

To put the issue in perspective, based on the most recent statistics available from the American Council on Education, Native Americans comprise one percent of the undergraduate enrollment in higher education.<sup>130</sup> Women constitute 59 per cent of that group, or over eight million students.<sup>131</sup> Looking only at student athletes, Native Americans represent less than 0.5 percent of NCAA student-athletes, while women represent a much higher percentage of that group.<sup>132</sup> By any calculation, policies or enforcement efforts under Title IX will have far more impact on NCAA members and constituencies than the resources devoted to the handful of schools that use Native American names or symbols. This is not to suggest that concerns of Native American students or communities

129 See Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 *Seton Hall J. Sport L.* 391 (1997); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 *Wisc. L. Rev.* 647; Ellen J. Vargyas, *Breaking Down Barriers: A Legal Guide to Title IX* (1994); Diane Heckman, *Woman & Athletics: A Twenty Year Retrospective on Title IX*, 9 *U. Miami Ent. & Sports L. Rev.* 1 (1992).

130 ACE Fact Sheet on Higher Education - Undergraduate Enrollment, by Attendance Status, Age, Race, and Gender: Fall 2002, available at <http://www.acenet.edu/AM/Template.cfm?Section=InfoCenter&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=15864> (last visited Sept. 22, 2006).

131 *Id.*

132 See 1999-00 – 2004-05 NCAA Student Athlete Ethnicity Report, at p. 28, available at [http://www2.ncaa.org/portal/media\\_and\\_events/ncaa\\_publications/research/](http://www2.ncaa.org/portal/media_and_events/ncaa_publications/research/) (last visited Sept. 22, 2006).

are unimportant or should be ignored. Rather, the issue is why the possibility of race discrimination justifies the threat of NCAA sanctions while the possibility of sex discrimination does not. The issue is why the women continue to be left behind.