

Testimony of
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TESTIMONY OF SCOTT S. COWEN
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BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY
"BCS or Bust: Competitive and Economic Effects of the
Bowl Championship Series On and Off the Field"

Oct. 29, 2003

Chairman Hatch, Senator Leahy, and esteemed members of the committee:

Thank you for inviting me here today to address an issue about which I feel a great deal of passion and urgency. I am grateful that the Senate Committee on the Judiciary has deemed the issue of fairness and access--or lack thereof--in the Bowl Championship Series to be worthy of serious review.

I am here today representing a coalition of more than 50 universities, and the 5,000-plus student-athletes involved in their Division I-A football programs, who are not part of the BCS agreement. I hope you realize as you read the written testimony and listen to oral presentations today that the issue is really about creating a fair and equitable system for these 5,000-plus young men who believe anything is possible, even a national championship, if you are willing to work hard enough to make your dreams a reality. This is a human-interest story with real faces behind it. My commitment and passion for this subject is out of respect for these student-athletes.

I can state my position no more simply than this: The Bowl Championship Series is an unnecessarily restrictive and exclusionary system that results in financial and competitive harm to the 54 Division I-A schools--and their student-athletes--who are not part of the arrangement, even though all Division I-A schools must meet the same division membership requirements. The coalition of presidents I represent believes the current system is unjust, unjustifiable, and runs counter to the commitment to fairness and opportunity upon which our country and its system of higher education, including athletics, is based. The coalition also believes the current system should and can be replaced with a much less restrictive and harmful one that meets the goal of determining a national championship in the sport of Division I-A football. This is the goal of all non-BCS universities that I am representing today, and I must add that we are gratified that the presidents of the BCS schools with whom we met on September 8 have so far been willing to engage in a sincere and useful discussion about the changes that we so firmly believe are necessary.

Major Arguments Against the Current BCS System: A Review

In the past, on several occasions, I have articulated four arguments against the BCS. These include:

1) Unfairness. The BCS unfairly controls major postseason play in football, including the national championship game, by severely limiting access through its system of automatic qualifiers, biased ranking system, and interlocking arrangements with the major bowls and ABC Television. The net effect of this system is to make it virtually impossible for a non-BCS school to participate in the major bowls, including the national championship. This is true even though many non-BCS schools are more competitive than many schools in the favored BCS conferences.

2) Inconsistency. The current BCS system is inconsistent with how national championships are determined in all other NCAA-sponsored sports, including football at all levels other than Division I-A. This inconsistency in Division I-A football has existed for decades but has now taken on new dimensions under the BCS arrangement.

3) Harm. As a result of the two points articulated above, the BCS system has created significant financial, competitive and branding disparities between those schools in the BCS alliance and those outside it. For example, since the inception of the BCS arrangement in 1998, the BCS conferences' 63 schools have shared a pot of more than \$450 million while the other 54 Division I-A schools shared \$17 million. This trickles down far beyond money to affect recruiting, facilities, the public perception of schools, and the very survival of many athletics programs. Ironically, many of the 63 BCS schools who share in this largesse are much less competitive than their non-BCS counterparts yet will share in the BCS pie simply because they belong to a BCS conference. Finally, I should add that the impact of these disparities extend beyond football to all other sports, including making it more difficult for many non-BCS schools to provide equal and fair opportunities for female athletes as mandated by Title IX.

4) Less Restrictive Solutions. One of the stated major goals of the BCS system is to create a national championship game. We support this goal but strongly believe there are fairer, more effective, and less restrictive means of achieving this objective. Indeed, the limitations and biases in the BCS process and formula already have created significant controversy in some years over which two teams should play in the BCS version of a national championship game. Approaches are available that create more value for all Division I-A schools, our fans, the networks and the bowls. It is to this end that we are currently working with our BCS presidential colleagues to see if we can find a solution to satisfy everyone's concerns and issues. We expect to know in the next three weeks if we can find a mutually agreeable approach.

Fairness and Access vs. Power and Money

The cynics who have followed this debate between the BCS and non-BCS schools think this disagreement is all about money. However, that is an oversimplification of a complex situation. The issue for non-BCS schools is about what principles should guide postseason play in football, including the national championship. We believe the current system is inconsistent with the principles of fairness, consistency, inclusiveness and what is in the best long-term interests of all Division I-A schools and their student-athletes. We also want to develop a system that adheres to these principles and can endure because it is based on a sound legal and business foundation and is widely seen to be equitable.

With the above in mind, I would like to expand on the fairness arguments I have made today and

previously by addressing what I understand to be some of the legal and business issues inherent in the current BCS system. I offer these points not from the standpoint of an attorney but from the standpoint of a university president, professor of management, and longtime corporate director who, along with 50-plus presidents of other non-BCS schools, has educated myself on these issues.

The BCS is unjustifiably restrictive.

It is my understanding that the Supreme Court has made it clear that antitrust laws apply to the commercial aspects of college football, and that restrictions on competition in this area are unlawful without adequate justification.

There is no doubt that the BCS is restrictive, and we have heard no justification that adequately supports those restrictions.

? The BCS restricts competition among the bowls. In the past, each bowl decided for itself which teams to invite and they competed with other bowls to persuade teams to accept their invitations. Now, under the BCS agreements, the four bowls affiliated with the BCS have agreed to eliminate competition amongst themselves in the selection of teams. Similarly, they have agreed to sell their television rights as a group rather than individually, with one of the four bowls serving as the host of the national championship game each year. Further, the agreements among the four BCS bowls and the BCS conferences, plus Notre Dame, give the BCS bowls preferential rights to pick BCS teams and render it virtually impossible for a non-BCS bowl to compete for the most desirable games.

? The BCS restricts competition among individual schools and conferences. In the past, each school competed for spots in each bowl and each conference competed for affiliations with each bowl. Now, the schools and conferences in the BCS have agreed with the four major bowls to allocate spots to themselves, eliminating competition for bowl berths among themselves and excluding all other Division I-A schools and conferences.

To see the unnecessary restrictions in the BCS most clearly, we can set aside for the moment the national championship game and focus on the three other BCS bowls. The BCS will argue that two of the six other major bowl slots are open to non-BCS contenders if they earn them. This response ignores the fundamental point that there is no adequate justification for an agreement to grant any guaranteed berths to the favored conferences in these three non-championship bowls. And with respect to the spots theoretically open to non-BCS schools, in reality, the self-developed BCS ranking system makes it virtually impossible for a non-BCS school to be selected for any of the eight bowl slots, regardless of record.

A look at the Oct. 20 BCS rankings would confirm this. There were on that date five undefeated Division I-A football teams: Oklahoma, Miami, Virginia Tech, Northern Illinois, and TCU.

Virginia Tech has since lost, of course, but on that date, Oklahoma, Miami and Virginia Tech--all BCS schools--were ranked Nos. 1, 2 and 3, respectively. Northern Illinois and TCU, at 7-0 and not in the BCS, were Nos. 10 and 14. Ahead of Northern Illinois University were six BCS schools that had each posted at least one loss for the season.

Should any non-BCS team go undefeated and have a dream season such as Tulane had in 1998, their student-athletes will have the disappointment of knowing that, because they are not BCS schools, they will not be able to compete for a national title or play in a major bowl game. This result stems not only from the unfair preferential access discussed above, but also from the BCS

formula, which we believe discriminates against non-BCS schools in a number of ways that would be identified if the formula were analyzed by a neutral expert.

The BCS argues that its restrictions are necessary to create a national championship. In fact, these restrictions are not necessary to achieve that goal.

The BCS argument that its four-bowl system is necessary in order to determine an undisputed national championship in Division I-A football is simply not true.

? In any given year, there is only one bowl with a national championship game. The other three BCS bowls do not have a championship game--indeed, they do not even match up the next six most highly ranked teams under the BCS formula. Rather, the BCS agreement provides guaranteed berths to the champions of the BCS conferences, regardless of win-loss record, and preferential access to Notre Dame.

? Providing these guaranteed bowl berths does not improve the quality or entertainment value of the national championship game. Rather, they simply prevent other Division I-A schools from having a fair and equal opportunity to compete for those bowl berths and prevent non-BCS bowls from competing to host many of the most desirable games.

Nor is it any answer that the schools from the BCS conferences would be likely to receive invitations to these bowls in any event. If so, why do the favored conferences need a guaranteed berth?

The BCS creates a two-class system within Division I-A.

The BCS arrangement divides the schools playing Division I-A football into two classes, locking the BCS conferences and bowls into a favored position at the expense of the other Division I-A conferences, schools and bowls. The antitrust laws, as I understand them, require that the marketplace must make the determination of who does and does not succeed. That decision should not be made by an agreement among a finite group of competitors to the exclusion of the remainder of their peer institutions.

The BCS schools should not be the ones determining the system of postseason play in Division I-A football without the input of the NCAA or the full complement of Division I-A schools. Nor should the BCS be the self-appointed arbiters of Division I-A football, determining who can and cannot participate and who will and will not share in the benefits.

The net result of all these unnecessary restrictions is a system that does not meet any test or definition of fairness or equity. Who suffers from this system? The schools and student-athletes who are on the outside looking in, as well as their fans and the general public.

Where Do We Go From Here?

I cannot claim to know the precise structure that best balances all the interests at stake--although I have some opinions--but I do know that it is not the current BCS system. If Division I-A athletics is to survive, it must have a football system that is fair, inclusive and accessible to all who meet the Division I-A requirements.

A group of my colleagues, presidents of other non-BCS schools, have formed a Five-Conference Presidential Coalition. We are advocating a postseason football system, including a national

championship game, that is consistent with six key themes.

First, we want a system that adheres to the principles we stand for in higher education: fairness, inclusiveness and opportunity. The BCS system does not do this.

Second, we want a system that fosters a unified Division I-A and enhances the vitality of all Division I-A programs. The BCS system creates division and damages morale.

Third, we want a system that provides reasonable opportunity for all Division I-A football programs to have access to what are now referred to as the "BCS bowls," including the national championship. That reasonable access is currently not available outside the BCS.

Fourth, we want a system that is inclusive, enduring, meets the highest standards of legal soundness and is reasonably consistent with how national championships are conducted in all other NCAA-sponsored sports. A system that requires the involvement of legal or legislative inquiry to determine its legality is not the kind of system our higher education institutions should have.

Fifth, we want a system that enhances the value and interest of postseason play for our fans, the bowls and the networks. More meaningful bowl games at the end of a season would create greater interest among the fans of all of the schools involved.

Finally, we want a system that allows our student-athletes to realize their dreams if they have worked hard enough to achieve them. Artificial obstacles should not be placed in their way as currently exists in the BCS system.

The Presidential Coalition firmly believes there are structured solutions to the issue of postseason play, including the national championship, which are consistent with these themes.

We are cautiously optimistic that our colleagues in the BCS are open to significant change, and we will remain in discussions with them as long as it appears that constructive and significant progress is being made. However, if our differences cannot be resolved in a timely manner, we will resort to any and all legislative and legal means available to us to resolve an issue that seriously threatens the future of our athletics programs. Whether by negotiated settlement, litigation or legislation, the non-BCS schools are committed to changing the system in a way that works for student-athletes at all Division I-A schools. Anything less shortchanges our commitment to these student-athletes.

In the meantime, I want to again thank the Committee for its interest and for its willingness to get involved in this important issue.