

---

## COMMENTARY

# Playing the 2020 College Football Season: An Authorized, Lawful, and Reasonable Decision by NCAA Division I FBS Universities

Matthew J. Mitten<sup>1</sup>

1: MARQUETTE UNIVERSITY LAW SCHOOL, MILWAUKEE, WI, USA.

**Keywords:** Covid-19, College Football, 2020 Season, NCAA Division I FBS, Intercollegiate Athletics

“In Decisions about College Football during Covid-19: An Ethical Analysis,”<sup>1</sup> the authors note that while most American universities eliminated in-person classes and on-campus social gatherings during the 2020 summer and fall and no other intercollegiate sports were played during this time, a subgroup of National Collegiate Athletic Association (NCAA) Division I FBS universities chose to play fall 2020 intercollegiate football games, apparently motivated in significant part by financial considerations as well as political and public pressures. Acknowledging that whether to play intercollegiate sports during a pandemic is not simply a scientific decision, they correctly assert “universities have obligations to protect the health of athletes and the community [that] must trump political demands that emanate from other motivations and that threaten health harms.” Accurately pointing out the decentralized nature of the decisions of each NCAA Division’s member universities (and athletic conferences) in deciding whether to play fall 2020 college football, they assert (incorrectly) that the NCAA is “an exter-

nal oversight agency” with “the authority to make and enforce health and safety rules” governing all its member universities. They express legitimate concern that the “importance of football revenue to universities arguably creates a conflict of interest for university decisionmakers when protecting athletes’ safety involves financial loss.” The authors then identify, summarize, and use the primary ethical issues from the 2020 Division I FBS football season as the basis for their recommendations to “help institutions balance values to make thoughtful and ethical decisions” with “broad health implications in the future.”

Despite being the product of a decentralized process, the individual decisions by virtually all Division I FBS universities (except the Connecticut Huskies, Old Dominion Monarchs, and New Mexico State Aggies) to play intraconference college football games during the fall 2020 season were authorized, lawful, and reasonable in accordance with applicable state and local laws; public health authority requirements and recommendations; NCAA Board of Governors directives; Sport Science Institute (SSI) return-to-sport guidelines; and individual athletic conference Covid-19 prevention protocols regarding intercollegiate sports participation during the pandemic as well as apparently consistent with the authors’ first, third, fourth, and fifth recommendations to facilitate ethical decision-making by NCAA member universities.

The U.S. Constitution’s federalism principles have been judicially construed to establish that protection of public health and safety is primarily a state and local government matter,<sup>2</sup> with the federal government serving in an advisory capacity (e.g., Centers for Disease Control and Prevention). As a result, despite the same CDC public health guidance, state and local

---

**Matthew J. Mitten, J.D.**, is a Professor of Law and Executive Director, National Sports Law Institute at Marquette University Law School (Milwaukee, WI). This Commentary is based on his op-ed “In Defense of Big Ten Decision to Play Fall Football” published in the *Sports Business Journal College Sports Newsletter*, October 1, 2020.

government decisions regarding whether to permit or to prohibit sports competition during the Covid-19 pandemic at particular time periods were different rather than uniform and were based on politics as much as or more than medical data or public health agency recommendations.

Although interscholastic competition in all or some fall 2020 interscholastic sports was prohibited, state and local governments generally permitted intercollegiate and professional sports competitions during

cal Aspects of Sports (CSMAS)).<sup>6</sup> Within Division I, football-playing universities are divided into Football Bowl Subdivision (FBS) (no NCAA championship competition) and Football Championship Subdivision (FCS).<sup>7</sup> Within Division I FBS, the “Power Five” conferences (i.e., ACC, Big Ten, Big 12, Pac-12, and SEC) have self-autonomous governing authority regarding their student-athletes’ health and wellness issues.<sup>8</sup>

On August 5, 2020, pursuant to its authority to adopt and implement policies regarding core issues

**During 2020 fall football season, approximately 1,000 college football games were played among NCAA Division I FBS universities without any reported hospitalizations or significant harm to participating players caused by football-related Covid-19 infections. Because the pandemic and its effect on intercollegiate sports are continuing (e.g., the January 18, 2023 Iowa-Northwestern men’s basketball game was postponed “due to Covid-19 health and safety protocols within the Northwestern program”), future ethical decision-making would be facilitated if all NCAA member universities and athletic conferences followed the authors’ second recommendation by disclosing Covid-19 case counts to the CDC or NCAA.**

this time within their borders. Finding a rational basis for this different treatment, a Minnesota federal court concluded that collegiate and professional sports “are not similarly situated to youth sports in all relevant respects” because “professional and collegiate sports organizations are able to exercise significant, centralized control over athletes’ and coaches’ behavior, allowing them to ‘enforce isolation requirements’ and ensure frequent testing” as well as have greater economic resources and medical personnel to monitor athlete health.<sup>3</sup>

Similarly, the relationship between the NCAA, a voluntary private association of its member educational institutions and athletic conferences, and its members regarding the allocation of individual institutional responsibility vs. centralized governing authority is analogous to the legal relationship between the US and the 50 States. The NCAA constitution establishes a federated three division autonomous governance structure<sup>4</sup> with express individual member school institutional responsibility to protect their respective student-athletes’ health and safety,<sup>5</sup> with guidance and recommendations provided by Association entities (e.g., SSI) and membership committees (e.g., Competitive Safeguards and Medi-

and other Association-wide matters,<sup>9</sup> the NCAA Board of Governors, a group of 25 chancellors or presidents of Division I, II, or III member universities, directed schools and athletic conferences to satisfy certain requirements to conduct fall 2020 sports and each Division to determine its ability to meet them if championships were conducted for these sports, including following SSI return-to-sport guidelines; adhering to federal, state, and local Covid-19 guidelines; permitting student-athletes to opt out of participation in a sport because of concerns about contracting Covid-19 and honoring their athletic scholarships if they did so; not requiring them to waive their legal rights regarding Covid-19 of a condition of intercollegiate sports participation; and providing insurance coverage for Covid-19 medical expenses.<sup>10</sup>

For example, in compliance with the requirements of the Board of Governors’ directive, on September 16, the Big Ten Council of Presidents and Chancellors (COP/C) — whose members included one with a Harvard M.D. and infectious diseases background, and another with a Johns Hopkins Ph.D and immunology background — unanimously decided to play a 2020 fall intraconference football season of nine games beginning on October 23rd without public spectators

in attendance. This decision reversed its August 11 indefinite postponement of all fall sports, which generated an in-person protest at the Big Ten's Chicago office by approximately 30 parents of students who play football for six different member universities; an online petition started by Ohio State quarterback Justin Fields urging its reconsideration because "They're not forcing us to play. We want to play."<sup>11</sup>; and a lawsuit challenging its validity under Big Ten Conference bylaws by several Nebraska football players.

A May 15, 2020 United Nations report<sup>12</sup> observed that Covid-19's spread throughout the world had disrupted most aspects of life, including sport and physical activity. It concluded: "Young people are particularly affected by social and physical distancing, considering sport is commonly used as a tool to foster cooperation and sportsmanship, promote respectful competition, and learn to manage conflict. Without sport, many young people are losing the support system that such participation provided."<sup>13</sup> Two NCAA intercollegiate athlete well-being survey results conducted during the 2020 spring and fall confirmed the United Nations report's conclusion. These surveys, which along with an NCAA fall 2021 survey, collectively generated more than 70,000 responses from student-athletes, found that their rates of mental exhaustion, anxiety, and depression were 150-200% higher than before the Covid-19 pandemic.<sup>14</sup> In the fall 2020 survey, 33% of all respondents listed lack of access to sport as one of the top factors adversely affecting their mental health; 42% of male athlete respondents and 53% of female athlete respondents stated that time away from college sports during the 2020 spring and summer had a "somewhat negative/strong negative" impact on their mental health.<sup>15</sup>

No national, state, or local laws or public health regulations prohibited college football games from being played in any of the eleven states in which Big Ten universities are located during the 2020 fall football season. Despite recently rising infection rates in some states at that time, athletes' participation in football games did not create any significantly increased risk of Covid-19 infection to the local community. The OCP/C adopted stringent new medical protocols for all Big Ten sports teams recommended by the conference's Return to Competition Task Force (RTCTF)'s medical subcommittee, including daily rapid antigen testing of all football players, coaches, and other staff; comprehensive cardiac testing of a Covid-19 positive athlete and a 21-day period before his return to competition; and required discontinuance of football practices and games for at least seven days if team players' Covid-

19 positivity rate exceeds 5% on a seven-day rolling average.

Big Ten Commissioner Kevin Warren stated that the "health and safety of student-athletes [was] put on top of our list"<sup>16</sup> and the decision was to "follow the medicine."<sup>17</sup> Morton Shapiro, Northwestern University's president and OCP/C chair, explained: "The medical advice change[d]. The facts changed and our minds changed. For me, it wasn't about political pressure. It wasn't about money. It wasn't about lawsuits. It wasn't about what everyone else was doing. It was the unanimous opinion of our medical experts."<sup>18</sup> The most important medical factor underlying the OCP/C's decision was the development of readily available low-cost rapid antigen testing approved by the FDA after August 11. Another important factor was comprehensive cardiac testing of all Covid-19 positive players to detect myocarditis and required medical clearance by a cardiologist before returning to play. Dr. Jim Borchers, co-chair of the RTCTF's medical subcommittee and Ohio State University Head Team Physician, characterized the Covid-19 medical protocols adopted by the OCP/C as "groundbreaking steps... to better protect the health and safety of [Big Ten] student-athletes and surrounding communities."<sup>19</sup>

During 2020 fall football season, approximately 1,000 college football games were played among NCAA Division I FBS universities without any reported hospitalizations or significant harm to participating players caused by football-related Covid-19 infections. Because the pandemic and its effect on intercollegiate sports are continuing (e.g., the January 18, 2023 Iowa-Northwestern men's basketball game was postponed "due to Covid-19 health and safety protocols within the Northwestern program"),<sup>20</sup> future ethical decision-making would be facilitated if all NCAA member universities and athletic conferences followed the authors' second recommendation by disclosing Covid-19 case counts to the CDC or NCAA.

#### Note

The author has no conflicts of interest to disclose.

#### References

1. C. M. Baugh, L. Glantz, and M. M. Mello, "Decisions about College Football during Covid-19: An Ethical Analysis," *Journal of Law, Medicine & Ethics* 51, no. 1 (2023): 104-118.
2. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
3. *Let Them Play MN v. Walz*, 517 F. Supp.3d 870, 881 (D. Minn. 2021).
4. Article 3.01, 2020-21 NCAA Constitution.
5. Articles 2.1 and 2.2, 2020-21 NCAA Constitution.
6. Article 21.2.2, 2020-21 NCAA Operating Bylaws.
7. Article 20.01.2, 2020-21 NCAA Operating Bylaws.

8. Article 5.3.2.1.2(i), 2020-21 NCAA Constitution.
9. Article 4.1.2(e), 2020-21 NCAA Constitution.
10. Board directs each division to safeguard student-athlete well-being, scholarships and eligibility, *available at* <[www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility](http://www.ncaa.org/about/resources/media-center/news/board-directs-each-division-safeguard-student-athlete-well-being-scholarships-and-eligibility)> (last visited Feb. 24, 2023).
11. D. Hope, "Justin Fields Never Considered Opting Out, Determined to 'Show the World What I Can Do,'" *Eleven Warriors*, Sept. 18, 2020, *available at* <<https://www.elevenwarriors.com/ohio-state-football/2020/09/116686/justin-fields-never-considered-opting-out-determined-to-show-the-world-what-i-can-do>> (last visited Feb. 24, 2023).
12. "The Impact of Covid-19 on Sport, Physical Activity, and Well-Being, and Its Effects on Social Development," *United Nations*, May 15, 2020, *available at* <<https://www.un.org/development/desa/dspd/2020/05/covid-19-sport/>> (last visited Feb. 24, 2023).
13. *Id.* at 2 and 4.
14. "NCAA Releases Student-Athlete Well-Being Study," *The National College Athletic Association*, May 24, 2022, *available at* <[https://www.athleticbusiness.com/operations/governing-bodies/article/15292444/ncaa-releases-student-athlete-wellbeing-study?utm\\_source=Newsletter&utm\\_medium=email&utm\\_campaign=ATHLCD220525003&utm\\_term=&oly\\_enc\\_id=0684G6204356E4U](https://www.athleticbusiness.com/operations/governing-bodies/article/15292444/ncaa-releases-student-athlete-wellbeing-study?utm_source=Newsletter&utm_medium=email&utm_campaign=ATHLCD220525003&utm_term=&oly_enc_id=0684G6204356E4U)> (last visited Feb. 24, 2023).
15. *NCAA Student-Athlete Well-Being Study* (Fall 2020), *available at* <[https://ncaaorg.s3.amazonaws.com/research/other/2020/2021RES\\_NCAA-SA-Well-BeingSurveyPPT.pdf](https://ncaaorg.s3.amazonaws.com/research/other/2020/2021RES_NCAA-SA-Well-BeingSurveyPPT.pdf)> (last visited Feb. 24, 2023).
16. S. Marsdale, "Everything Kevin Warren Said on College GameDay," *247 Sports*, Sept. 19, 2020, *available at* <<https://247sports.com/LongFormArticle/Big-Ten-fall-football-schedule-Kevin-Warren-ESPN-College-Game-Day-151689710/>> (last visited Feb. 24, 2023).
17. B. Gulick, "Ohio State Football 2020 Schedule Released," *Buckeyes Now*, Sept. 19, 2020, *available at* <<https://www.si.com/college/ohiostate/football/ohio-state-football-schedule-released-2020>> (last visited Feb. 24, 2023).
18. "How Big Ten Presidents Found Unanimity and Reversed Course on Fall Football," *The Athletic*, *available at* <<https://theathletic.com/2071906/2020/09/16/big-ten-fall-football-presidents-vote-medical-rules/>> (last visited Feb. 24, 2023).
19. "The Big Ten Conference Adopts Stringent Medical Protocols; Football Season to Resume October 23-24, 2020," *Big Ten*, *available at* <<https://bigten.org/news/2020/9/16/the-big-ten-conference-adopts-stringent-medical-protocols-football-season-to-resume-october-23-24-2020.aspx>> (last visited Feb. 24, 2023).
20. L. Reardon, "Northwestern-Iowa Game Postponed Due to COVID-19 Protocols," *NBC Sports*, January 17, 2023, *available at* <<https://www.nbcsports.com/chicago/northwestern-basketball-game-vs-iowa-postponed-due-covid-19-protocols>> (last visited April 13, 2023).