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## **Where Are the Presidents?** Leadership in the NIL Era

### **Executive Summary**

**Overview:** Intercollegiate athletics changed forever when the National Collegiate Athletics Association (NCAA) reversed its policy regarding student-athletes' name, image, and likeness (NIL) rights. While the reversal has been viewed as a positive for student-athletes, it also placed enormous pressure on institutions to generate new policies and resources dedicated to promoting NIL engagement. Such investments are expensive, and some analysts argue that they continue to pull the institution away from its educational (and tax-exempt) mission. Despite the challenges NIL poses to schools, university presidents have been noticeably quiet on the subject.

**Research Question:** What role do school administrators such as the institution's president play in the athletic department's decision-making regarding NIL policies and investments?

**Data Collection:** This inquiry is a conceptual research study focused on the case study of Linda Livingstone and the state of Texas.

**Analysis:** The sudden lack of NCAA governance has created a leadership vacuum. Presidents are aware of NIL and its repercussions, but are wary of the risks they take by making the wrong move, whether that be future lawsuits or tax implications. Thus, the role of the institutional president in the NIL era has been and continues to be focused on pressuring Congress to introduce federal regulations in place of the NCAA's oversight, while navigating NIL internally falls on the athletic director.

## Overview

### *Background on Name, Image, Likeness (NIL) Policy*

College athletics changed forever in 2021 when the NCAA revised its policy regarding student-athletes' ability to control their commercial use of their name, image, & likeness (NIL). Up until this point, the NCAA had maintained a strict rule prohibiting student-athletes from profiting off of their own NIL whether it was through monetizing their personal social media channels, brand sponsorships, paid appearances, etc. The intention was to uphold the NCAA's amateurism policy and reinforce the distinction between professional and collegiate athletes. Anyone who accepted compensation outside of the financial aid package provided by their institution risked losing their athletic eligibility. However, these limitations inspired multiple antitrust lawsuits against the NCAA that ultimately reached the Supreme Court. This included the *NCAA vs O'Bannon* in which multiple former student-athletes sued over the use of their NILs in popular NCAA-based video games (Novak, 2021). This was followed by *NCAA vs Alston* - a case questioning the viability of the NCAA's limits on which financial benefits could be justified as related to education or not (Novak, 2021). The 2020 decision rejected the idea that the novelty of NCAA's "product" depended on student-athletes not receiving added compensation, ultimately undermining the amateurism defense.

Meanwhile, multiple states had taken the initiative to introduce legislation that would allow collegiate student-athletes to profit from the commercial use of their NIL without penalty. Without the amateurism argument to fall back on, the NCAA relented and voted to update the NIL policy in favor of commercialization. The brief interim policy shared in a press release deferred to the institutions and state laws for the details -

"Individuals can engage in NIL activities that are consistent with the law of the state where the school is located...College athletes who attend a school in a state without an

NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.” (Hosick, 2021).

Such a dramatic reversal without much guidance led to a sense of chaos. Some states such as Florida, Georgia, and Louisiana passed legislation that went into effect just days after the NCAA’s June press release was published. Others, such as West Virginia or Wisconsin, have still yet to solidify any state guidance (Varsik et al, 2022). Institutions were left with a significant amount of autonomy to implement their own NIL policies in place of NCAA, state, or federal regulations. With few details and no pre-existing model, a range of responses emerged; some more cautious, others revolutionizing the face of the athletics department.

### *Adapting to Change*

New programming, partners, educational tools, and recruiting challenges were all on the table. Some schools partnered with third parties such as Opendorse or INFLCR to assist with NIL compliance reporting and providing educational tools. There was a wave of excitement around the opportunities for student-athletes to learn about marketing and entrepreneurship through managing their personal brands. However, there was also a wave of front page stories exposing NIL’s negative impact on recruiting. For example, the Athletic broke a story referring to a prospective college student-athlete who signed a contract with an NIL collective - independent third party dedicated to creating and managing NIL opportunities for student-athletes at a specific institution - worth \$8M (Mandell, 2022).

Educational programming and compliance tools logically fell within the athletic departments’ jurisdictions, but the large price tags and potential recruiting inducements raised red flags. Some schools, such as the University of Southern California (USC), even went as far as bringing in a marketing agency to assist student-athletes with NIL opportunities (Massi, 2022). The newfound emphasis on personal branding and cash flow begs the question: what is

the role of the university in all this? While school athletics are largely autonomous operations, the department is still an affiliate of the university and a crucial part of its national branding. While student-athletes, coaches, and athletics directors have been the primary voices speaking on NIL, the university leaders have been quiet by comparison. In particular, school presidents have been notably absent from the conversation. One could argue that NIL policy only directly affects athletics, so it's the athletics' leadership's problem. However, as a university entity, athletics is still tied to the institution's overarching mission. Thus any operations that may detract from that mission should be taken seriously. Honoring the school's mission is critically important because of the institution's limitations as a 501c3 organization. The red flags raised by growing NIL price tags, recruitment scandals, and non-educational operations such as internal marketing agencies could undermine an institution's ability to keep its tax exempt status in the long run.

## **Literature Review**

Before drawing any conclusions about the obligations of university leaders in regards to NIL, it is important to understand the relationship to their respective athletics departments in general. AthleticDirectorU explored the relationship between presidents and school athletics by interviewing four university presidents from different institutions in 2015 - Lou Anna Simon, President of Michigan State University; Jim Danko, President of Butler University; Michael Shonrock, President of Lindenwood University; and Biddy Martin, President of Amherst College. Their responses yielded plenty of interesting insights. President Michael Shonrock openly shared "presidents simply can't treat the athletics department as just another university unit, because the consequences of a misstep are far greater where all eyes congregate." (Belzer et al, 2022). He went on to explain that athletics' unique relationship to the administration may be due to the fact that "investing in athletics often has a higher ROI than in other university programs. Student-athletes on average have higher GPAs and graduation rates than the general student body, and so there's always a temptation to put money towards athletics first."

(Belzer et al, 2022). Speaking directly about the relationship to the athletics director, President Lou Anna Simon of Michigan State elaborated “That may be one of the biggest jobs of a president, trying to make sure there’s an appropriate balance in areas like university advancement and resource allocation. In any case, the AD is part of our core vice president group and is viewed as a university administrator, not just an athletic administrator.” (Belzer et al, 2022). The finances, the public appeal, and the devoted stakeholders are just a few reasons why university administrations are so invested in the success of their athletics departments.

Given the context of this close knit relationship, the silence regarding name, image, and likeness policy is that much more confusing. John Thelin of Inside Higher Ed put it best with a simple headline: “Where Are the Presidents?” (Thelin, 2021). The article goes on to explain that despite the perception that athletics departments are something of a wealthy, self-sustaining “golden goose,” the financial demands of college athletics have actually forced many departments to be dependent on support from the school. He gives the example of Rutgers University (a member of the Big 10 Conference), who reported a deficit of \$45.2 million for its athletics budget for 2018-19 and received \$14.5 million in university funds and \$12.1 million in student fees towards the debt (Thelin, 2021). This is not uncommon. Given the substantial flow of funds from the university’s pockets, presidents have that much more reason to be involved in the athletics department. So what is the reason for the lack of public input regarding NIL? Thelin spoke with legal scholar Michael A. Olivas who explained “for too long, the NCAA was the sole outlet for determining college athletic benefits, and it showed, as the billions earned by the athletes’ sweat was not invested in their welfare. Now, it has (too) quickly swung to the best-organized and most entrepreneurial athletes and their newly-installed representatives.” (Thelin, 2021). Olivas makes a great point: college athletics have been strictly dictated by the NCAA for decades, and the organization has hastily disappeared. Higher education administrations are still reeling from the sudden loss of leadership in this space. Presidents

have found themselves suddenly tasked with taking on more responsibility where they could once defer to the NCAA.

As a result, the immediate response seems to be to look for somewhere new to defer the responsibility. The presidents who have made public comments or statements tend to criticize the NCAA and call upon the federal government for legislative support. For example, Georgia University President Jere Morehead expressed

“I believe in the long term that we’re going to have to have a more formalized process whether that comes from Congress, or can come from the actions of the NCAA. We clearly need a strong framework that governs the conduct that every institution engages in when it comes to NIL. How we get there, and when we get there, is an open question.” (Weiszer, 2022).

It is understandable why some leaders may be hesitant to make any sudden moves: the stakes are high. Namely, the financial implications of leaning into Big Athletics and NIL could be severe. The majority of higher education institutions qualify as 501c3 non-profit organizations because their purpose is tied to education. This has a number of important benefits, including not paying taxes on large donations made through the associated fundraising foundations or endowments. However, these institutions can be subject to “unrelated business income tax (UBIT) which would mean paying taxes on “income from an activity, trade, or business that is not substantially related to their educational tax-exempt purposes.” (Tax Exempt Status of Colleges & Universities, 2022). Other aspects of collegiate athletics such as large coaches’ salaries and television contracts have spurred some discussion about athletics-related UBIT. Unless NIL-related investments are somehow justified as supporting the educational mission of the institution, they could be the spark that revolutionizes college athletics’ current funding (and spending) model.

## **Case Study: Baylor University & the State of Texas**

Baylor University (BU) provides a great case study for the role of administrators and potential direction for the future of NIL. The BU Athletics Department has been proactive in addressing the new needs of its student-athletes and recently formed a partnership with NIL-giant Opendorse to form a digital marketplace where today's Baylor Bears can report their NIL deals and connect with fans for sponsorship opportunities (Baylor University Athletics, 2022). As far as internal initiatives, Vice President and Athletics Director Mack Rhoades assembled a team of compliance directors, as well as student-development and professionals to coordinate the department's response (Werner, 2021). The diversity of this team reflects a well-rounded understanding of the NIL industry, as it is not simply a complex legal challenge but an opportunity for student growth and career development.

This is all happening under the indirect leadership of Baylor University President Linda Livingstone. Of all university administrators, Livingstone has been one of the one of the most prominent presidential voices urging for a federal response to NIL. A former collegiate basketball player herself, Livingstone is a proud advocate for student-athletes and was invited to testify at the "A Level Playing Field: College Athletes' Rights to Their Name, Image, and Likeness" legislative hearing held by the U.S. House Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce in September 2021. While other presidents have expressed support for NIL and called for federal legislation in media interviews, Livingstone's appearance in D.C. marks one of the bolder public commentaries coming from an institutional leader on this topic.

Her testimony pushes the urgency for federal legislation, summarizes her main concerns, and provides key policy recommendations for the future. She says "Congress should

have an important role in shaping the future of college athletics as well, and now is the time to establish a uniform national standard that addresses the many challenges becoming evident in the NIL space.” (Livingstone, 2021). The need for a comprehensive response is consistent throughout her speech, not for Baylor’s sake but for all of intercollegiate athletics. She explains

“...it is important to remember that the resources provided and the aspirational mission of Baylor Athletics, and those of our similarly situated institutions in the top handful of Division I athletic conferences, is vastly different than the resources and mission of hundreds of other academic institutions fielding thousands of student-athletes each year. Any legislation Congress passes on NIL must fully contemplate that a “one-size-fits-all” federal solution will have serious consequences for institutions of higher education across the nation.” (Livingstone, 2021).

Livingstone goes on to explain that any legislation must consider three key principles: safeguards that continue to link eligibility to “academic progress;” equity concerns among men’s and women’s sports so that schools do not compromise their “educational priorities;” and that “each IHE’s mission is preserved...” Ultimately, she recommends that any new policies begin by prioritizing student-athletes, including a state-law preemption, and clearly defining what NIL is (Livingstone, 2021). Her mention of preserving IHEs’ missions is intentional and essential here. After all, justifiable pursuit of the non-profit mission is what sustains the university’s all-encompassing tax-exempt status.

What makes Baylor University and the state of Texas an interesting case study is that President Livingstone could listen to her own advice. The key principles she mentions - academic safeguards, an emphasis on gender equality, and protecting the mission - are possible to implement on an institutional level. One may ask why she sees federal involvement as so urgent if Texas, unlike other states, has passed substantial NIL legislation and Baylor University has proven it has the resources internally and locally to provide its student-athletes with opportunities.



The answer lies in the end of her testimony, and in an analysis of Texas-at-large. Baylor University is one of many athletic-Texan-powerhouses, including University of Texas at Austin (“Texas”) and Texas A&M. Texas student-athletes were benefiting from access to multiple NIL collectives, three of whom recently condensed to combine their resources and secure a \$10M opening commitment to create opportunities (Clark Field Collective, 2022). Though collectives are not officially affiliated with the university, their presence still benefits coaches in the recruiting process by providing evidence of support for NIL in the community. Some collectives and coaches have taken the relationship with the recruiting process too far, such as Texas A&M. Texas A&M has been widely accused of using “NIL” money to induce commitments from high profile recruits. While nothing has been formally charged, Sports Illustrated recently published a story on an A&M football team representative discussing NIL with recruits and explaining how they could make money at A&M (BamaCentral Staff, 2022). Alabama head football coach Nick Saban even went as far to criticize them publicly, saying “A&M bought every player on their team.” (Driskell, 2022).

This is all to point out that Baylor is restricted by their competition. Introducing their own guardrails is a handicap in a competitive environment where football is king, and their fellow behemoth programs can capitalize on Baylor’s well-intended compliance. That’s why Livingstone concludes her testimony by calling for a “narrow safe harbor for compliant entities.” Referring to the threat of antitrust challenges that may undermine any NIL rules, she says “without a narrow safe harbor for entities that comply with a federal NIL law, universities are at risk of endless litigation that could threaten the core missions of our institutions simply for seeking to comply with NIL laws and the will of Congress.” She adds that this federal protection would encourage compliance with federal NIL legislation (Livingstone, 2022).

## Conclusion

Here we see a president who has resources, a state with formal legislation, and a vision for what the NIL era should look like. However, while Livingstone could work with her Athletics Director to introduce her key principles at home, she risks legal challenges to her own rules and there would still be the larger issues regarding the lack of uniform definitions or policies, not to mention the risk of falling behind while other institutions ignore the NCAA's guidelines. Given the level of athletic prowess and state involvement, Baylor and Texas should be the prime example of how NIL can work at the institutional and state level. Instead, President Livingstone has recognized that college athletics needs *more* than state laws and financial resources. It needs regulation. Thus, she apparently understands her role to be bigger than Baylor, which explains her external focus on pushing for national standards.

Livingstone is not alone, but her peers face different challenges. Some school presidents face a greater lack of resources, others are still waiting on legislation from their home state. While it is hard to know what conversations are being held behind closed doors, there is a consistent theme emerging from public commentary coming from presidents nationwide: NIL is here to stay, and the only hope for legitimate regulation is federal intervention. Up until now, presidents could defer to the NCAA's oversight, but the Association's decline has left a serious leadership vacuum. The silence from many leaders may simply be due to so-called "analysis paralysis" as various stakeholders have been waiting on someone else to make the first move. However, two years into the NIL Era with no word from the State, more presidents will look to follow Livingstone's example and assume the role of policy advocate as they continue to look for help from Congress. In summary, a university president's role in the NIL era of college athletics has been less focused on the internal decision-making and investments, and more so on replacing the NCAA's governance.

### *Limitations & Future Study*

There is a lot of interesting work to be done regarding presidential leadership in this new era of intercollegiate athletics. The natural progression is to look into the conversations happening behind closed doors between presidents and their athletics directors. A larger organization with more leverage or connections may have better luck gaining access to willing interviewees who are open to discussing the level of communication between the president's office and athletics at their institution.

One could also take a more extensive look at presidents at the opposite end of the spectrum from President Livingstone - those who have been completely silent. I am curious about the correlation between public support for NIL from the president and the amount of NIL investments such as athletic department partnerships or educational programming. Perhaps there is even a way to analyze the level of involvement in athletics from the president and respective athletic department success in all areas.

Finally, there needs to be some consideration given to other stakeholders in the university's mission. Some probing has been done already - the esteemed Drake Group recently hosted a panel titled "Where Are the Faculty?" The conversation addressed questions regarding faculty's role in "acting as guardians of academic integrity" versus "succumbing to significant internal pressures" allowing athletics to control the classroom (The Drake Group, 2022). Panelists such as Andrew Klein, a professor at Texas A&M and representative of the Coalition of Intercollegiate Athletics, raised great points about the faculty stepping in to question what the university is doing and hold the governance accountable (The Drake Group, 2022). Mary Willingham of the University of North Carolina Chapel Hill (known for helping to expose the UNC academic scandal that allowed athletes to partake in fake classes) also appeared on the panel.

She pushed that faculty need to be advocates for the student-athletes, especially considering that they are at the frontlines of providing and assessing the quality of education a student-athlete receives (The Drake Group, 2022).

College athletics has reached a transition stage. Higher education is coming to terms with the entity as a business, but must find a way to maintain a level of control and mission integrity in order to sustain the loveable product as we know it. I, like President Livingstone, believe there is a way for intercollegiate athletics to become a larger commercial enterprise while upholding its underlying educational mission and prioritizing student-athletes. However, the NCAA would be the first to tell university presidents that inaction and denial are the greatest ways to ensure chaos. There needs to be more dialogue between all stakeholders so that student-athletes' rights can be honored today without compromising their futures.

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