He would telephone at odd hours and resume a harangue from weeks before as if he'd never stopped. But as irritating as he was, he was more influential. He will be marked by a small headstone at Arlington Cemetery and an enormous impact on the profession of arms.

[From King Features Syndicate, Mar. 18, 1997]

DEFENDING AMERICA, A GREAT AIRMAN'S FINAL FLIGHT

(By David H. Hackworth)

Col. John R. Boyd of the United States Air Force is dead.

Future generations will learn that John Boyd, a legendary fighter pilot, was America's greatest military thinker. He's remembered now by all those he touched over the last 52 years of service to our country as not only the original ''Top Gun,'' but as one smart hombre who always had the guts to stand tall and to tell it like it is.

He didn't just drive Chinese fighter pilots nuts while flying his F–86 over the Yalu River during the Korean War, he spent decades causing the top brass to climb the walls and the cost-plus, defense-contractor racketeers to run for cover.

He was not only a fearless fighter pilot with a laser mind, but a man of rare moral courage. the mission of providing America with the best airplane came first, closely followed by his love for the troops and his concern for their welfare. Many of the current crop of Air Force generals could pull out of their moral nose dive by following his example.

After the Korean War, he became known as ''40-Second'' Boyd because he defeated opponents in aerial combat in less than 40 seconds. Many of his contemporaries from this period say he was the best fighter pilot in the U.S. Air Force.

Not only was he skilled and brave, but he was also a brain. The Air Force recognized this and sent him to Georgia Tech, not to be a ''rambling wreck,'' but to become a top graduate engineer. It was there that he developed the fighter tactics which proved so effective during the Vietnam War, and the concepts that later revolutionized the design of fighter aircraft and the U.S.A.'s way of fighting wars, both in the air and on the ground.

He saved the F–15 from being an 80,000-pound, swing-wing air bus, streamlining it into a 40,000-pound, lean and mean fixed-wing fighter, which Desert Storm proved still has no equal.

Boyd was also a key player in the development of the F–16, probably the most agile and maneuverable fighter aircraft ever built, and costing half the price of the F–15. The top brass didn't want it. To them, more expensive was better. Boyd outfoxed them by developing it in secret.

Chuck Spinney, who as a Pentagon staffer sweated under Boyd's cantankerous, demanding tough love says, ''The most important gift my father gave me was a deep belief in the importance of doing what you think is right—to act on what your conscience says you should act on and to accept the consequences. The most important gift Boyd gave me was the ability to do this and survive and grow at the same time.''

Boyd never made general—truth-tellers seldom do in today's slick military because the Pentagon brass hate the truth, and try to destroy those who tell it. They did their best to do a number on John. But true to form, he always out-maneuvered them.

Norman Schwarzkopf is widely heralded as the hero of Desert Storm, but in fact, Boyd's tactics and strategy were the real force behind the 100-Hour War. Stormin' Norman simply copied Boyd's playbook, and the Marines were brilliant during their attack on Kuwait.

As USMC Col. Mike Wyly tells it, Boyd ''applied his keen thinking to Marine tactics, and today we are a stronger, sharper Corps.''

His example inspired many. He affected everyone with whom he came in contact. He trained a generation of disciples in all the services, and they are carrying on his good work, continuing to serve the truth over self.

For those who know, the name Boyd has already become a synonym for ''doing the right thing.'' His legacy will be that integrity—doing the hard right over the easy wrong—is more important than all the stars, all the plush executive suites and all the bucks.

God now has the finest pilot ever at his side. And He, in all His wisdom, will surely give Boyd the recognition he deserves by promoting him to air marshal of the universe.

For sure, we can all expect a few changes in the design of heaven as Boyd makes it a better place, just as he did planet earth.

The PRESIDING OFFICER. The Senator from Kentucky.

ANTITRUST IMPLICATIONS OF THE COLLEGE BOWL ALLIANCE

Mr. MCCONNELL. Mr. President, Senator BENNETT of Utah, Senator THOMAS and Senator ENZI of Wyoming, and I have been working on a matter that we wish to discuss with our colleagues in the Senate for the next few moments. Senator THOMAS needs to leave so he is going to lead off.

I yield the floor.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. THOMAS. I thank the Chair.

● Mr. President, I rise today to speak about the college football Bowl Alliance. I am concerned that under the Bowl Alliance structure, athletic excellence is not being recognized in postseason I–A college football play.

Fresh in the minds of Wyoming football fans is the last game of regular season play when the nationally ranked Cowboys played against No. 5-ranked Brigham Young University for the Western Athletic Conference [WAC] championship title. Both teams went into the game believing the winner would be selected for major postseason bowl action. UW and BYU delivered a terrific conference championship game. BYU won 28–25 over Wyoming in overtime play. It was the first WAC title game won in overtime. Unfortunately, neither WAC team was invited to a major New Year's bowl.

The 1996 selections to the New Year's bowl games shed revealing light on the college football Bowl Alliance. Invitations to the most lucrative major bowls games—the Orange Bowl, the Sugar Bowl, and the Fiesta Bowl—were largely sent to high-profile, highly marketable teams instead of worthy teams. Many sports fans were disappointed at the postseason New Year's bowl matchups. I am concerned about the closed selection process that has developed and the impact the Bowl Alliance structure will have on I–A collegiate football.

The Bowl Alliance operates outside the purview of the National Collegiate Athletics Association [NCAA]. The Bowl Alliance was created in 1993 when the Atlantic Coast Conference, the Big East Conference, the Big 12 Conference, the Southeastern Conference and Notre Dame came together and took it upon themselves to provide and acquire teams to participate in the major bowl games. These Bowl Alliance conferences have contracts with the television networks and large corporate sponsors—Federal Express, Tostitos, and Noika. Champions from each alliance conference are automatically guaranteed a berth in one of the major bowl games. The nonalliance conferences remaining out in the cold are the Western Athletic Conference [WAC], the Big West Conference, Conference USA, the Mid American Conference and the 11 Independent teams.

The Bowl Alliance claims its purpose is to create optimal matchups and identify and national champion. Considering the 1996 selections for the bowl games, I question if quality matchups is the true goal. Last season, TV viewers saw No. 20 Texas lose to No. 7 Penn State 38–15 in the Fiesta Bowl. Texas' record was 8–4. The Orange Bowl showcased No. 9 Virginia Tech losing to No. 6 Nebraska 41–21.

Appearance in a Bowl Alliance game pays well. Each participating team takes approximately $8,000,000 back to its school. In addition, the teams get the national visibility and prestige that leads to strong athletic recruitment. Conferences outside the alliance have a remote chance of participating in one of the Alliance Bowls. Over time it will hurt the quality of the nonalliance teams who will have difficulty in recruitment. The Alliance Bowl structure will make the alliance teams stronger and relegate the nonalliance teams to a second-tier status.

The alliance ensures its monopoly through the use of the at-large rule. Although the champions of the self-selected Alliance Bowl conferences automatically appear in one of the major bowl games there are two remaining at-large spots. It is questionable as to whether those two spots are truly at-large and open to any high-quality team that can play their way into one of the spots. A team from the WAC was deserving of one of those at-large spots last year, but the invitation never came.

I am concerned for the future of the athletes and schools in the nonalliance conferences. That is why I joined with Senators MITCH MCCONNELL, ROBERT BENNETT, and MIKE ENZI in writing to the Department of Justice [DOJ] and the Federal Trade Commission [FTC] to request an investigation of the Bowl Alliance. We suspect possible violations of the Sherman Antitrust Act. In 1996, the eight Alliance Bowl participants, including the Rose Bowl participants, went home with a total of $68 million. The 28 teams that played in the minor bowl games shared a pot of

$31 million. We requested a formal investigation of the matter. If there is wrong-doing we want to see the DOJ and the FTC use their statutory enforcement powers to break this lock on college football.

We are not asking for special consideration for any one team. We would like to see genuinely open competition restored to college football postseason bowls. Postseason play should be about recognizing achievement. Letting the best teams play is in the best interest of our student athletes and our schools.●

I wish to associate myself with the efforts of the Senator from Kentucky, the Senator from Utah, and my friend from Wyoming in doing some things that we think have impact in football. The Bowl Alliance has a great effect on small schools, particularly the University of Wyoming, BYU, Louisville, and others, and so we think this is an issue which needs to be discussed. I am very proud to be associated with the comments my friends will make.

I thank the Chair.

Mr. MCCONNELL. I thank my friend from Wyoming for his contribution to the matter that we will now proceed to discuss with our colleagues.

Mr. President, at a time when the country is swept away by March madness—particularly, I notice the occupant of the chair has a fine team in March madness that will probably, no doubt, come in second to Kentucky in the end—and the excitement of competitive college basketball, we are nevertheless reminded of the fundamental unfairness of college football's pseudo playoffs. Specifically, I am talking about the College Bowl Alliance.

The alliance is a coalition of top college football conferences and top postseason bowls. Over the past few years, the alliance has entered into a series of restrictive agreements to allocate the market of highly lucrative postseason bowls. By engaging in this market allocation, the coalition bowls and the coalition teams have ensured that they will receive tens of millions of dollars, while the remaining teams and bowls are left to divide a much smaller amount. The alliance agreements have the purpose and effect of making the already-strong alliance teams stronger while relegating the remaining teams to a future of, at best, mediocre, second-class status.

Mr. President, in college football, there can be no Cinderella stories. There can be no unranked, unknown Coppin State going to the playoffs and beating the SEC regular season champion, South Carolina, and going down to the wire with a Big 12 power like Texas.

A team like Coppin State could never make it to the lucrative college football postseason. You see, a team like that would be excluded because it's not in the College Bowl Alliance and its fans don't travel well. It doesn't even have its own band.

College football has no room for a Sweet 16 that includes teams like St. Joseph's and the University of Tennessee at Chattanooga. The opportunity to be in college football's Elite Eight and Final Four is essentially determined before the season begins.

The basic message, Mr. President, is that—if David wants to slay Goliath—he'd better do it during basketball season. He won't be allowed to play Goliath when the football postseason rolls around.

College football has no room for the underdog. In fact, as evidenced by the 1997 New Year's bowls, college football doesn't even have room for top-ranked teams—unless those teams are members of the exclusive Bowl Alliance.

I first raised this issue in 1993 when my alma mater, the University of Louisville, had a 7–1–0 record and a top ranking, but was automatically excluded from the most lucrative New Year's bowls. I contacted the Justice Department and explained that the alliance agreements constituted a group boycott, and, thus, violated the Sherman Act.

The Justice Department promised to promptly review the matter.

Shortly thereafter, the College Bowl Alliance entered into a revised agreement whereby the 1997 New Year's bowls would be open to any team in the country with a minimum of eight wins or ranked higher than the lowest ranked—alliance—conference champion.

Despite this pledge, the alliance continued its apparent boycott of nonalliance teams. During the 1996 season, Brigham Young University and the University of Wyoming, both members of the nonalliance Western Athletic Conference [WAC], met the alliance criteria. Wyoming finished the season 10–2 and ranked 22d in the country, while BYU won 13 games and was ranked the fifth best team in the country.

Neither team, however, was afforded an opportunity to play in the alliance bowls. In fact, BYU's record and ranking was superior to nearly every alliance team, including four of the six teams who participated in the high-visibility, high-payout alliance bowls.

Mr. President, this issue is about more than football, apple pie, and alma mater. This is about basic fairness and open competition. This is about a few conferences and a few bowls dividing up a huge multimillion-dollar pie among themselves.

In 1997, the eight participants in the alliance bowls, including the Rose Bowl participants shared an estimated pot of $68 million while the 28 nonalliance bowl participants were left to divide approximately $34 million. In short, the market has been divided such that eight teams rake in 70 percent of the postseason millions, while 28 teams get nothing more than the leftover 30 percent.

This chart may have printing that is too small for the camera to pick up, but it illustrates the nature of the problem.

The Alliance bowls—Fiesta, Sugar, Orange, and Rose—totaled $68.2 million. That is eight teams that benefited from the $68.2 million. The nonalliance bowls—and here is a whole list of them—collectively shared $34 million. Clearly, most of these teams never had an opportunity, no matter how good they were, to participate in the New Years Day payout bowls. Therein lies the antitrust problem, a clear antitrust problem I might say.

These short-term millions lead to long-term benefits for the alliance conferences. Guaranteed appearances in high-visibility bowls directly translate to: more loyal fans, more generous alumni, and much more willing athletic recruits.

If you don't believe it's easier for alliance teams to recruit, just pick up the phone and call the coach at an independent school like Central Florida, or the coach at the University of Louisville or BYU. These coaches will tell you time after time that the top high school athletes don't want to play for teams that don't have a shot at the top New Year's bowl games.

Mr. President, in summary, there is substantial evidence that the most powerful conferences and the most powerful bowls have entered into agreements to allocate the postseason bowl market among themselves and to engage in a group boycott of nonalliance teams and bowls. The effect of these agreements is to ensure that the strong get stronger, while the rest get weaker.

I have joined with my colleagues—Senator BENNETT, Senator ENZI, and Senator THOMAS—to request that both the Justice Department and the Federal Trade Commission investigate the intent and effect of the alliance agreements. I ask unanimous consent that the Justice Department letter be printed in the RECORD at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. MCCONNELL. In closing, I'd like to point out that this effort is much more than just a few Senators cheering for their home teams. The Supreme Court has said it much more clearly than we ever could. So, I quote the Court, which I seem to be doing quite often these days:

> [O]ne of the classic examples of a *per se* violation of section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . This Court has reiterated time and time again that ''horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.''

This fundamental principle of antitrust law should guide the review of the Justice Department and the Federal Trade Commission. In the words of the D.C. Circuit, ''the hallmark of the [unlawful] 'group boycott' is the effort of competitors to 'barricade themselves from competition at their own level.' ''

Today, we are calling on all interested parties to break the barricade.

We are challenging the NCAA, the Bowl Alliance commissioners, and the Alliance bowl committees to take action to bring about genuine competition to college football and the postseason.

Postseason playoffs can be a reality for college football. It works for college basketball, college baseball, and it works for college football—at the Division I–AA, Division II, and Division III levels. They all have a playoff system, all of them except Division I.

The opportunity to compete in postseason bowls should be based on merit, not membership in an exclusive coalition.

So, Mr. President, I thank my good friend and colleague from Utah, Senator BENNETT, for his fine work on this issue. And also Senator ENZI for his great work on this. We are hoping for the best. Obviously, the solution to this problem that we would all prefer is for the organizations themselves to solve the problem. But, if they do not, it seems pretty clear to each of us that this is an antitrust case the Justice Department should pursue.

With that, Mr. President, I yield the floor.

EXHIBIT 1

U.S. SENATE,
Washington, DC, March 14, 1997.

Hon. Joel I. Klein,
Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, DC.

DEAR MR. KLEIN: We believe that there is substantial evidence of serious violations of Section 1 of the Sherman Act (15 U.S.C. 1) by the College Bowl Alliance (''Alliance'').

The Alliance is a coalition of top college football conferences and representatives of top postseason college football bowls. Over the past few years, the Alliance has entered into a series of restrictive agreements to allocate the market of highly-lucrative New Years' bowls. By engaging in this market allocation, the coalition bowls and the coalition teams have ensured that they will receive tens of millions of dollars, while the remaining teams and bowls are left to divide a much smaller amount. In 1996, for example, the eight Alliance bowl participants (including the Rose Bowl participants) went home with a total of $68 million, while the 28 non-Alliance bowl participants shared a pot of $31 million. Moreover, the Alliance agreements have the additional purpose and effect of making the already-strong Alliance teams stronger while relegating the remaining teams to a future of, at best, mediocre, second-class status.

As you will recall, the Antitrust Division commenced a review of this coalition in late 1993. Shortly thereafter, the Alliance agreed that the top bowls would be open to all teams based on merit. The 1997 New Year's Bowls, however, proved to the contrary. We are writing to advise you of these recent material events and to urge that you initiate a formal investigation into this matter.

I. BACKGROUND

Courts have routinely declared that agreements among competitors to allocate territories and exclude would-be competitors are a violation of Section 1 of the Sherman Act. See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Circuit 1978). As the D.C. Circuit has explained:

''The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seeks to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates. . . . [The hallmark of the 'group boycott' is the effort of competitors to barricade themselves from competition at their own level.' ''

Id. This fundamental principle should be kept in mind while reviewing the facts surrounding the College Bowl Alliance.

A. ORIGINAL COLLEGE BOWL ALLIANCE AGREEMENT

In 1991, five college football conferences (ACC, Big East, Big Eight, Southeastern, and Southwestern conferences) and the independent University of Notre Dame, formed a coalition with the prestigious College Bowl Committees of the Federal Express Orange, USF&G Sugar, IBM Fiesta, and Mobil Cotton Bowls (''Alliance bowls'').[1] The Pac-10 and Big Ten also participated in the coalition, although their champions played in the Rose Bowl under a separate agreement.

The coalition agreement was expressly designed to reduce competition in the postseason match-ups of teams and bowls, and to guarantee every coalition team an opportunity to vie for a lucrative, high-visibility bowl. The contract specifically guaranteed that each coalition team participating in any of the Alliance bowls would receive a minimum payout based on similar terms. Typically, an Alliance bowl team has taken home a purse in excess of eight million dollars. Moreover, the original Request for Proposal contained a clause requiring that no Alliance bowl or Alliance team could compete in time slots opposite other Alliance bowls.

The agreement also stipulated the procedure by which the top-ranked and lesser-ranked Alliance teams were matched up with participating Alliance bowls. Three conferences were guaranteed berths at a specific Alliance bowl regardless of the ranking of their champion team. Any team not in the Alliance, however, was precluded from competing in any of the Alliance bowls, regardless of its record or ranking.

The Alliance conferences and Notre Dame received substantial benefits from the coalition agreements. They were assured a berth at a major postseason bowl—regardless of their topmost ranking. Further, all of the participants in the Alliance bowls were guaranteed to receive a substantial minimum payment and national visibility. Such visibility in turn enhanced fan support, alumni fund-raising, and athletic recruiting for the bowl teams.

By dividing the lucrative market of major postseason bowls among themselves, the Alliance Conferences and Notre Dame expressly and effectively excluded a substantial number of the other Division 1A teams from any of the prestigious New Year's Bowls. The excluded teams were those which were either independent or in non-Alliance conference such as the Western Athletic Conference, the Big West, and the Middle America Conference.

B. INITIAL REQUEST FOR ANTITRUST INVESTIGATION

In response to these market allocations, Senator Mitch McConnell formally requested that the Justice Department investigate the intent and effect of the Bowl Alliance agreements. Specifically, Senator McConnell pointed out that the Bowl Alliance agreements precluded a non-Alliance team from going to the significant and lucrative Alliance Bowls—even when the non-Alliance team had a better record and a better ranking than an Alliance team. In response, the Justice Department commenced a review of the Bowl Alliance.

C. ''REVISED'' COLLEGE BOWL ALLIANCE

Thereafter, the College Bowl Alliance entered into a revised agreement whereby the 1997 New Year's bowls would supposedly have two of the six Alliance slots ''open to any team in the country with a minimum of eight wins or ranked higher than the lowest-ranked conference champion from among the champions of the Atlantic Coast, The Big East Football, The Big Twelve and Southeastern conferences.''

At that point, Senator McConnell concluded that the ''new arrangement seems to open competition to the top tier bowl games.'' (Letter from Honorable Mitch McConnell to the College Football Association, December 21, 1995.) The Justice Department apparently made a similar determination.

Notwithstanding the promise of open competition, the Alliance announced that it would consider non-Alliance teams for the ''at-large'' openings only if they signed a special restrictive agreement. The Alliance demanded that the terms of this ''participation agreement'' be kept confidential. Nevertheless, a key term of this agreement apparently was that the at-large participants had to promise to accept an offer from an Alliance bowl over any offers from non-Alliance bowls. In the words of the Alliance, ''[t]here are no 'pass' or withdrawal options.''[2]

D. CONTINUED BOYCOTT OF NON-ALLIANCE TEAMS

The potential antitrust fears became a reality after the 1996 regular season when the Alliance continued its apparent boycott of non-Alliance teams. During the 1996 season, Brigham Young University and the University of Wyoming, members of the non-Alliance Western Athletic Conference, had ''a minimum of eight wins or [were] ranked higher than the lowest-ranked [Alliance] conference champion. . . .''

BYU, in fact, met both of the Alliance criteria by compiling a remarkable 13–1 record and earning a ranking of the fifth best team in the country. This record and ranking was superior to nearly every Alliance team, including the University of Texas, 8–5 record and a No. 20 ranking; Pennsylvania State University, 11–2 record and a No. 7 ranking; Virginia Tech, 10–2 record with a No. 13 ranking; and Nebraska, 11–2 record and a No. 6 ranking. Nevertheless, BYU did not receive an at-large invitation to play in any of the prestigious Alliance bowls; while Texas, Penn State, Virginia Tech, and Nebraska all were invited to play in various Alliance bowls, with the attendant financial and recruiting benefits. Similarly, Wyoming finished with an impressive 10–2 record and a No. 22 ranking, but was not afforded an offer to play in the Alliance bowls.

E. FORMATION OF THE ''SUPER ALLIANCE''

In June 1996, the Alliance lock on college football power was strengthened as the Rose

[1] The Bowl Alliance was originally called the Bowl Coalition. Additionally, pursuant to the dissolution of the Southwest Conference, the Big Eight became the Big 12, and the Cotton Bowl dropped out of the coalition.

[2] In the fall of 1996, the Alliance sent out ''participation offers'' to presumably all of the non-Alliance teams. Both Brigham Young University and the University of Wyoming signed the restrictive participation agreements, but included a proviso stating they would not agree to all of the restrictive terms. Specifically, the University of Wyoming explained that ''the University . . . and the Western Athletic Conference will not comply with any expressed or implied provision that prevents other members of the WAC from participating in bowls that compete with any Alliance Bowl, or with any other provisions that might violate antitrust laws.''

Bowl agreed to join the Alliance, which guaranteed the Big Ten and Pac–10 conferences automatic berths in an Alliance bowl. The Alliance has officially renamed itself the ''Super Alliance.''

II. SHERMAN ACT PROHIBITS MARKET ALLOCATIONS AND GROUP BOYCOTTS

The Sherman Act prohibits the Alliance agreements. Section 1 of the Sherman Act is violated where: (1) there is an agreement, (2) that unreasonably restrains trade, and (3) affects interstate commerce. 15 U.S.C. 1. It is beyond dispute that interstate commerce is affected by the millions of dollars that flow through the Alliance bowls to the Alliance conference teams. Thus, our analysis focuses on the existence of agreements and the unreasonable restraint of trade.

A. THE ALLIANCE IS LINKED BY AT LEAST THREE AGREEMENTS

The Alliance coalition is linked by a minimum of three agreements that limit competition. First, the Alliance conferences—the ACC, Big East, Big 12, Big Ten, Pacific 10 and the Southeastern conferences—have horizontally agreed not to compete with each other for the top postseason bowls. Next, the Alliance bowls—the Sugar, Fiesta, and Orange bowls—have horizontally agreed not to compete with each other for the top-ranked teams. Third, the Alliance conferences and the Alliance bowls have vertically agreed to further their horizontal agreements by limiting participation with non-Alliance teams and non-Alliance bowls. These agreements individually and in their totality demonstrate ''a conscious commitment to a common scheme designed to achieve an unlawful objective.'' *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

Moreover, strong evidence suggests the existence of an ''anti-overlap'' agreement. The coalition's original Request for Proposal contained an explicit ''anti-overlap'' clause. Under the terms of such an agreement, no Alliance bowls or teams could compete in time slots opposite other Alliance bowls. Although this clause was officially removed following a letter of protest from the Holiday Bowl, the Alliance's exclusive prime television slots are strong indicators of an anti-overlap agreement. Such circumstantial evidence may be used to prove the existence of an agreement. *See id.*

B. THE ALLIANCE AGREEMENTS UNREASONABLY RESTRAIN TRADE UNDER EITHER A PER SE TEST OR A RULE OF REASON TEST

The effect of these interlocking agreements is to unreasonably restrain trade. Courts determine the reasonableness of a restraint by applying either a *per se* test or a rule of reason test. *See, e.g., NCAA* v. *Board of Regents*, 468 U.S. 85, 100–01 (1984). The Alliance agreements fail under either analysis.

(1) PER SE ANALYSIS

The facts underlying the Alliance warrant the stringent *per se* analysis. Although courts have often analyzed regulations of sports organizations under a rule of reason, *see, e.g., Justice* v. *NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983) (citations omitted), such a lenient review is inappropriate where the purpose of the regulations is to eliminate business competition. *See, e.g., id.* (citing *M & H Tire Company, Inc.* v. *Hoosier Racing Tire Corp.*, 560 F. Supp. 591, 604 (D. Mass. 1983); *Blalock* v. *Ladies Professional Golf Assoc'n*, 359 F. Supp. 1260, 1264–68 (N.D. Ga. 1973)). The Alliance cannot cloak its purpose and effect under the garb of NCAA self-regulation, *cf., Justice*, 577 F. Supp. at 379 (rule of reason is appropriate where NCAA enforced rules against compensating athletes), where the underlying facts demonstrate that business-minded entities acted with the clear intent to exclude non-Alliance bowls and non-Alliance teams from multi-million dollar opportunities.

Courts have routinely condemned such market allocations and group boycotts under the *per se* rule. *See Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312, U.S. 457 (1941) (group boycott); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *mod.*, 175 U.S. 211 (1,899) (market division). As the Supreme Court has explained:

[o]ne of the classic examples of a per se violation of section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that ''horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.''

United States v. *Topco Associates*, 405 U.S. 596, 608 (1972) (citations omitted).

For example, in *United States* v. *Brown*, 936 F.2d 1042 (9th Cir. 1991), the Ninth Circuit held that an agreement between two billboard advertising companies providing that each would not compete with the other's former billboard leaseholds for one year was *per se* illegal. Similarly, the agreement among the Alliance bowls not to compete with each other for teams should be *per se* illegal. *Id.* Likewise, the agreement among the Alliance teams not to compete with each other for the Alliance bowls should be struck down. *Id.*

(2) RULE OF REASON

The Alliance agreements also fail under a rule of reason analysis. Under the rule of reason, courts require a plaintiff to show that there are significant anti-competitive effects. *See NCAA* v. *Board of Regents*, 468 U.S. 85, 100–01 (1984). Once this burden has been met, the defendant must show that there are pro-competitive effects, which then shifts the burden back to the plaintiff to demonstrate that such effects can be achieved in a less restrictive manner. *Id.* at 120 (striking down restraint on broadcast of college football where there was no sufficient pro-competitive justification).

(A) ANTI-COMPETITIVE EFFECTS

As set forth above, the anti-competitive effects of the Alliance on college football generally and the New Year's bowls specifically are undeniable. Instead of having all the bowls bidding for all the teams, a super-coalition of powerful bowls and powerful teams has divvied up the prized opportunities among themselves. As the Supreme Court stated in *NCAA* v. *Board of Regents*, ''[t]he anti-competitive consequences . . . are apparent . . . [when] [i]ndividual competitors lose their freedom to compete.'' 468 U.S. at 107–08.

The facts of the 1996 season indicate that non-Alliance teams were not allowed to genuinely compete for one of the lucrative Alliance bowls. For example, BYU was not invited to an Alliance bowl in spite of having a ''minimum of eight wins'' *and* being ''ranked higher than'' four of the Alliance teams participating in Alliance bowls. Moreover, non-Alliance bowls were unable to genuinely compete for the Alliance teams in light of the anti-overlap rule and the ''no-pass'' rule—the latter of which mandated that all Alliance-eligible teams must accept offers from Alliance bowls—regardless of how lucrative a non-Alliance bowl offer might be.

These anti-competitive effects are in direct contravention of well-established Supreme Court precedent. In *NCAA*, the Court explained that '''[i]n a competitive market, each college fielding a football team would be free to sell the right to . . . its games for whatever price it could get.'' '' *NCAA*, 468 U.S. at 106 (quoting district court and striking down restraints). The Alliance agreements clearly restrict such a right for both the non-Alliance bowls and the non-Alliance teams. *See also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 154 (1948) (striking down block booking because it ''eliminate[s] the possibility of bidding for films theater by theater. [Such agreements] eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit.'')

(B) NO PRO-COMPETITIVE EFFECTS

The Alliance cannot establish that its restrictive agreements produce any pro-competitive effects. In fact, the Alliance's own language reveals that it did not have *even* a pro-compeititve *purpose*. The Alliance states that its ''framework enhances the quality of postseason college football match-ups, increases the likelihood of pairing the two highest ranked teams in the nation in a bowl game, and provides excitement for the coaches, players, and fans.'' According to a recent *Sports Illustrated* article, the purpose and effect of the Alliance is not to determine the true national champion, but rather ''is to avoid the creation of NCAA-run national playoffs. . . . The Alliance exists to keep the power and the money in the hands of the Alliance bowls and the four conferences that receive guaranteed berths in those bowls. . . . Any national championship games that result are a bonus.'' Layden, Tim, ''Bowling for Dollars,'' *Sports Illustrated*, Dec. 16, 1996 at 36.

The Alliance goals fall far short of actually allowing the best teams to compete in the best bowls. The 1996 season is a painful reminder of this fact. Instead of consumers getting to watch a highly-competitive match-up between No. 5 ranked BYU and another top-ranked team, they were forced to endure two blow-outs in the Alliance: the Fiesta Bowl where No. 7 Penn State defeated No. 20 Texas 38–15, and the Orange Bowl, where No. 6 Nebraska trounced No. 9 Virginia Tech 41–21. These match-ups were based on membership in the Alliance, not on merit.[3]

In short, the Alliance ''framework'' fails to enhance competition, as well as failing to meet its own stated goals. The rule of reason inquiry must end here where the anti-competitive restrictions are ''not offset by any pro-competitive justifications sufficient to save the plan . . . .'' *NCAA*, 468 U.S. at 97–98.

III. CONCLUSION

Based on the facts available at this time, it is clear that the Alliance agreements fail under either *a per se* rule or a rule of reason. As the Supreme Court has explained, ''the essential inquiry remains the same—whether or not the challenged restraint enhances competition.'' *NCAA*, 468 U.S. at 104. The restrictive Alliance agreements reduce competition in the lucrative New Year's bowls, and guarantee every Alliance team an opportunity to reap the short- and long-term profits of a high-visibility bowl. The Alliance not only perpetuates the current power structure, but, in fact, exacerbates it. The strong get stronger, while the rest get weaker.

As policymakers and football fans, we urge the Justice Department to use its statutory enforcement powers to break this lock on

[3] Additionally, there is evidence which indicates that the decision was not based on consumer preference. One poll is reported to have shown that fans would have preferred the following teams in an Alliance bowl: BYU—48%, Penn State—22%, and Colorado—21%. As the Court has stated, ''[a] restraint that has the effect of reducing the importance of consumer preference . . . is not consistent with [the] fundamental goal of anti-trust law.'' *NCAA*, 468 U.S. at 107 (citation omitted).

college football. We have every reason to believe that your investigation will reveal additional evidence of the Alliance's anti-competitive purpose and effects. Action must be taken to restore genuinely open competition to college football and to postseason bowls.

Sincerely,

MITCH MCCONNELL.
CRAIG THOMAS.
ROBERT F. BENNETT.
MIKE ENZI.

The PRESIDING OFFICER. The Senator from the home State of the BYU Cougars, the Senator from Utah.

Mr. BENNETT. Mr. President, I thank you for that commercial. I must, in the spirit of full disclosure, report that I am not a graduate of Brigham Young University but of the University of Utah, which happens to be ranked in the top three in the current basketball season along with the University of Kansas and the University of Kentucky. I wish the Final Four could include Utah, Kentucky, and Kansas, but I am afraid Utah and Kentucky will have their showdown prior to the Final Four and only one of the two will make it. If it is not Utah—as I am confident, of course, that it will be—I hope, for the sake of my friendship with the Senator from Kentucky, that it will be Kentucky that goes to the Final Four with Kansas.

But the very fact that we can have this conversation about the NCAA underscores the importance of what we are talking about with respect to football. These teams will get to the Final Four in basketball on the playing field and not in the boardroom. The decision will be made on the basis of how good they are and how entertaining they can be on television by virtue of their skill, rather than how sharp the negotiators were that put together the stacked deck in advance of the final event.

I have a chart here that reports what happened in the last bowl circumstance. Every team in color, whether it is the two in yellow, the two in orange, or the two in red, appeared in an alliance bowl.

The two teams in white, No. 2 and No. 4, that did not appear in an alliance bowl, appeared in the Rose Bowl, which is now part of the alliance. Only one of the top seven teams did not appear in a lucrative alliance bowl—and that happens to be the team from BYU.

Rather than go on in a parochial fashion, as the Senator from the State in which BYU appears, I would like to summarize this circumstance from a source that is clearly not parochial and not particularly biased to BYU as a school.

I am quoting from the article that appeared in Sports Illustrated on the 16th of December, 1996, entitled, ''Bowling For Dollars.'' In the article they made it very clear what the real criteria was here. Quoting from the article:

Sunday's selections shed revealing light on the alliance. . . , It was the shunning of Brigham Young, however, despite the fact that the Cougars have a higher ranking and a better record than either of the at-large teams chosen (Nebraska and Penn State) by the alliance, that served to trash two widely accepted myths.

Myth No. 1: The purpose of the alliance is to determine the true national champion.

Sports Illustrated says:

Not even close. The purpose of the alliance is to avoid the creation of NCAA-run national playoffs. Such playoffs would put the NCAA in charge of the beaucoup dollars the event would generate. The alliance exists to keep the power and the money in the hands of the alliance bowls and the four conferences that receive guaranteed berths in those bowls.

A fairly direct statement to the point raised by my friend from Kentucky.

Now, Sports Illustrated goes on:

Myth No. 2: The alliance bowls exist to give fans the best possible games.

Bowls are businesses, with major corporate sponsorship and huge television deals. Their purpose is to fill stadiums, generate TV ratings, and create precious ''economic impact'' on their communities in the days leading up to the games.

Now, Mr. President, comes the paragraph that makes it clear that Sports Illustrated is not necessarily friendly to BYU in every circumstance, but summarizes why this decision was made.

BYU fails, not only on the strength-of-schedule issue but also on the economic-impact side. Bowls, particularly the Sugar Bowl, thrive on bar business. One of the tenets of the Mormon faith is abstinence from alcohol. You do the math. In the French Quarter, they don't call the most famous thoroughfare Milk Street. ''We used to go to the Holiday Bowl, and our fans would bring a $50 bill and the Ten Commandments, and break neither'' says BYU Coach LaVell Edwards. Nebraska fans, on the other hand, travel like Deadheads, and spend like tourists.

Choosing bowl teams based in significant part on the rabidity and spending habits of their fans isn't fair to the audience watching the bowls at home. For all its flaws, BYU would even be a more intriguing opponent for Florida State than a team the Seminoles have already beaten. Unfortunately, money rules all matchups.

Mr. President, BYU did go to a postseason game—the Cotton Bowl. The Presiding Officer from Kansas and this Senator from Utah entered into a friendly wager, which fortunately this Senator from Utah won when BYU beat the team from Kansas.

Satisfying as that victory was for Brigham Young University, the point made by Sports Illustrated is still important. It is the fans on television who support the tremendous amount of money available to these alliance bowls, by tuning in and being available as an advertising audience.

It is those fans who were deprived of the opportunity of seeing the best game available on New Year's Day.

So for that reason, I am delighted to join in this effort to see to it that we do something to see that the antitrust laws apply here and that a conspiracy in a boardroom does not take place to siphon off the heavy money to one group at the expense of not only the other group but also of the fans.

Mr. MCCONNELL. Will the Senator yield for a question?

Mr. BENNETT. Yes, I yield.

Mr. MCCONNELL. I am not sure it is a question, but rather an observation. Also, the BYU Cougars, as a result of the Cotton Bowl appearance probably—I don't have the figure in front of me, maybe staff does—probably got about $2.5 million as opposed to the roughly $8 million that would have been available had they been selected, as they obviously should have been selected, for an alliance bowl. We are talking not just about bragging rights here, we are talking about real money. We are talking about a $6 million differential, Mr. President. So this is not just putting a trophy in the school gym. This is a big business with huge economic implications.

Mr. BENNETT. The Senator from Kentucky is exactly correct. One of the reasons, I am sure, why the Senators from Wyoming are joining in this effort is that under the rules of the Western Athletic Conference, Brigham Young would not take that money home by itself. It would be shared with the other schools in the conference, one of whom posted a sterling record themselves, the Wyoming Cowboys. They were frozen out of any bowl appearance at all on New Year's Day. They cannot even salve that particular wound with the money Brigham Young would distribute throughout the Western Athletic Conference with participation in an alliance bowl.

As I said before, the money comes primarily from television revenues, and by creating a restraint-of-trade circumstance to hold those television revenues for a certain set of conferences, the leaders of the alliance have damaged every other conference in the country, including schools like Wyoming, which would have received a significant amount of money had it been available to the Western Athletic Conference.

The message out of the alliance is: WAC need not apply, regardless of how their teams are or have ever been.

I yield the floor.

Mr. ENZI addressed the Chair.

The PRESIDING OFFICER. The Senator from Wyoming.

Mr. ENZI. Thank you, Mr. President. Today, I am pleased to join my colleagues, Senator THOMAS from Wyoming, Senator MCCONNELL from Kentucky, and Senator BENNETT from Utah, in urging the Justice Department to exercise its enforcement powers to break the current anticompetitive lock on college football, if football does not do it itself.

I have a special interest in college athletics. I followed college athletics for some years, and I enjoy the excitement and competition of college basketball and football. I especially enjoy the competition in the Western Athletic Conference. My son, Brad, played basketball at the University of Wyoming, and so I watched numerous WAC games, both as a Cowboy fan and as a father. I am disappointed to see the University of Wyoming and other very

competitive WAC teams kept out of the top college bowl games because of the anticompetitive College Bowl Alliance. These clandestine agreements keep our players on the bench and in the grandstand when they should be out there on the field.

I think it is interesting we are discussing the anticompetitive effects of the college football alliance in the midst of the NCAA college basketball tournament. The NCAA basketball playoff system, while not perfect, aims to include the finest 64 college basketball teams in the Nation. In this tournament, any of those 64 teams has the possibility of winning the national championship. This arrangement is designed to maximize competition for the benefit of all the players, the fans, and the schools involved. In contrast, the College Bowl Alliance has decreased the competitiveness of college football to the detriment of the fans and schools involved.

The alliance is a coalition of top football college conferences and representatives of the top post-season college football bowls. Over the past few years, the alliance has entered into a number of restrictive agreements designed to divide the market of the most highly lucrative New Year's football bowls. These agreements effectively preclude the nonalliance teams from having access to the most prestigious and lucrative bowl games, even when one of the nonalliance teams has a better record and a higher national ranking than any of the alliance teams. These restrictive agreements are bad for football, and they violate Federal antitrust law.

Just this last January, as you have heard, 2 of the top 25 ranked football teams in the country fell victim to this anticompetitive alliance. Brigham Young University, a member of the nonalliance Western Athletic Conference, finished the year with a remarkable record of 13 and 1 and was ranked 5th in the Nation. Another member of the WAC, the University of Wyoming, finished its regular season with a formidable 10 and 2 record and a national ranking of 22, but it was not given an offer to play in any of the alliance bowls. In fact, as has been mentioned, despite its excellent year, the University of Wyoming was not given the opportunity to play in any post-season bowl game. This came as a great disappointment to the Cowboy fans nationwide.

The alliance is bad for football since, as a practical matter, it prohibits teams from outside the alliance playing the top bowl games. The football games are now taking a back seat to the money games being played behind doors closed to both players and the fans. This has resulted in alliance teams having an institutional advantage in both bowl receipts and future recruiting.

In 1996, the eight alliance bowl participants, including the teams playing in the Rose Bowl, split a total of $68 million. That was eight teams. In contrast, the 28 nonalliance participants divided a total of $31 million. This disparity in financial return is not good business. It results in a built-in advantage for alliance teams in the areas of future recruiting and program development.

The alliance agreement provides unlawful economic protection for its members to the detriment of college football generally. The alliance's market allocation agreements have, in turn, hurt consumers. One poll has shown that college football fans would have preferred to have seen several nonalliance teams, including Brigham Young University and the University of Colorado, in top bowl games. These agreements amounted to changing the rules with 2 minutes left in the fourth quarter. These are precisely the type of market allocation agreements the Sherman Antitrust Act was passed to prohibit.

I strongly urge the Justice Department and the Federal Trade Commission to use their statutory powers to end the alliance's anticompetitive stranglehold on college football if they cannot do it on their own.

I thank the Chair and yield the floor.

Mr. GRAMS addressed the Chair.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. McCONNELL. Will the Senator from Minnesota just allow me a couple minutes?

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. McCONNELL. Mr. President, I thank my good friend from Wyoming for his important contribution to this issue and express to our colleagues that we intend to stay interested in this. There is some indication in today's paper that some accommodation to the WAC and to the Conference USA may be forthcoming. But I want to reassure all of those who have been left out that the antitrust case is clear and that the four of us plan to continue our interest in this, if the problem is not solved by the organizations themselves. I thank my friend from Wyoming for his important contribution.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Mr. President, I would like to add one more statement for the edification and information of Senators. The Senator from Wyoming referred to his team's record of 10 and 2. One of those two was a loss to Brigham Young University literally in the last seconds with a field goal that no one expected anybody could make that caused the game to go into overtime, and then Brigham Young won in overtime.

If that had gone the other way, it would have been Wyoming that would have earned the position that BYU was denied. They would have beaten the fifth ranked team, would have had a 10 and 1 record and would have been a clear choice for an alliance bowl. It was BYU's victory over Wyoming that pulled BYU to that level. That is why I am happy to join with him in saying we both got robbed.

The PRESIDING OFFICER. The Senator from Minnesota has the floor.

Mr. GRAMS. Thank you very much, Mr. President.

Not to take away from the debate of my fellow Senators and friends here, I still have to just root on our Minnesota Gophers tonight as they take on Clemson in the ''Sweet Sixteen'' and hope and wish them the best.

THE 90TH BIRTHDAY OF HAROLD STASSEN

Mr. GRAMS. Mr. President, I rise today to pay tribute to the accomplishments and contributions of a great Minnesotan, Harold Edward Stassen, as he approaches his 90th birthday.

Harold Stassen began to make his mark on our Nation's history when he was elected Governor of Minnesota in 1938 at the young age of 31. He was known as the Boy Governor, he was twice reelected and remained the youngest chief executive of any State until 1943.

In 1943, Mr. Stassen resigned from office as Governor to accept a commission in the U.S. Navy. There, he served honorably on the staff of Adm. William Halsey until 1945 and attained the rank of Captain. During World War II, Mr. Stassen earned the Legion of Merit award, was awarded six major battle stars, and was otherwise decorated three times.

One little known fact about Harold Stassen is that he was personally responsible for freeing thousands of American prisoners of war in Japan shortly before that country surrendered in World War II.

According to a 1995 newspaper account, Mr. Stassen spent 2 weeks planning the evacuation of some 35,000 prisoners from POW camps scattered throughout Japan. At the time, there was considerable anxiety that Japanese soldiers would choose to retaliate against the prisoners for their country's loss in the war.

On August 29, 1945, before the official surrender date, Mr. Stassen actually set foot in Japan and began what would be the largely successful implementation of his evacuation plan.

After World War II, Harold Stassen was appointed by President Franklin Roosevelt as a delegate to the 1945 San Francisco conference on the founding of the United Nations. He is now the only living American who participated in the drafting, negotiating, and signing of the United Nations Charter.

Mr. Stassen went on to become an influential advisor throughout the administration of President Eisenhower. This included serving as a member of the National Security Council, as the Director of the Foreign Operations Administration, and as the Deputy Representative of the United States to the United Nations Disarmament Commission.