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“Quasi-Governmental Power”: Examining Litigation Between the Southern Association of Colleges and Schools Commission on Colleges and Historically Black Colleges and Universities

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Abstract

In the United States, higher education accreditation is the process through which regional and specialized accreditors extend seals of approval to institutions and programs that meet specific standards for education quality and institutional stability. Regional accreditors, such as the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC), exercise significant authority over the institutions they accredit. This authority has been termed “quasi-governmental power” because accreditors work on behalf of the government to ensure education quality and determine access to federal aid. Accrediting organizations are also the final authority for accreditation decisions. If an institution disagrees with an accreditation outcome and has exhausted its options, litigation is its last resort. This essay investigates how Bennet College and Paine College, which are two Historically Black Colleges and Universities (HBCUs), sued SACSCOC after it removed their accreditation for failure to comply with a financial stability standard. Litigation is rarely successful for institutions, but Bennett College successfully demonstrated that SACSCOC did not follow its own procedures when it removed its accreditation. Although SACSCOC no longer accredits either institution, their cases against SACSCOC demonstrate that litigation is an important tool for checking accrediting organizations’ quasi-governmental authority. Additionally, the cases reveal that HBCUs rely on litigation to survive because automatic preliminary injunctions allow them to maintain their funding throughout litigation and pursue alternative accreditation in the event the cases are not resolved in their favor.

Keywords

HBCUs, accreditation, Bennett College, Paine College, SACSCOC

In the United States, higher education accrediting organizations monitor and evaluate the quality of colleges and universities. Accreditation is not mandatory, but it is a prereq-

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uisite that institutions must satisfy to access Title IV funding (United States Department of Education [USDOE], 2021b). Consequentially, accreditation functions as both a “gateway” and a lifeline to federal dollars because most institutions cannot survive without the tuition dollars and research grants they receive from the federal government (Burnett, 2020). As such, accrediting organizations’ status awards them “quasi-governmental power” (*Thomas M. Cooley Law School v. The American Bar Association* [Thomas M. Cooley Law School], 2006) because they enforce federal higher education requirements, which makes them an extension of the federal government even though they are non-profit organizations. Litigation, which usually focuses on common law due process procedures, is often the only avenue institutions can utilize to check accrediting organizations’ authority (Thomas M. Cooley Law School, 2006; Kelderman, 2016).

This essay examines accreditors’ quasi-governmental power through the lens of Bennett College and Paine College, which are two Historically Black Colleges and Universities (HBCUs) that sued their regional accreditor, the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). I begin this essay with an overview of accreditation in the United States. Then, I unpack the two cases to understand why the colleges sued SACSCOC and how they benefitted from litigation. Although it is uncommon for HBCUs to win accreditation lawsuits, the cases highlight the critical role litigation plays in checking accreditors’ quasi-governmental authority by evaluating the legitimacy of their decisions and buying HBCUs time to secure alternative, federally-recognized accreditation to maintain access to federal funds and remain open.

An Overview of Accreditation in the United States

The United States has two types of accreditors: national and programmatic (specialized). Before July 2020, the United States also had regional accreditors, but an amendment to federal regulations dissolved the regional barriers that required institutions to apply only to their regional accreditor (The Secretary’s Recognition of Accrediting Agencies, 2019). Now, institutions can seek accreditation with any of the seven regional accreditors. Currently, only the WASC Senior College and University Commission has accepted extra-regional institutions into its membership (Eaton, 2020).

Regardless of type, accrediting organizations serve the same role: they accept higher education institutions or degree programs into their membership to ensure the quality of institutions and/or degree programs (USDOE, 2021a). This essay focuses on one of seven regional accreditors in the United States: SACSCOC, which oversees institutions in 11 southern states (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia), Latin America, and several international locations (SACSCOC, 2021a; Council for Higher Education Accreditation [CHEA], 2021). Because SACSCOC oversees the southern United States, it, by consequence, has more than 80% of the HBCUs in the United States under its authority (Donahoo & Lee, 2008). Prior to the dissolution of regional accreditation barriers, the regional accreditors’ strict geo-

graphical jurisdictions awarded accrediting organizations regional monopolies, making it challenging for institutions to find alternative accreditors if they faced sanctions or removal of accreditation for non-compliance with accreditation standards. Paine College and Bennett College, the two HBCUs explored in this essay, were trapped within the SACSCOC region and explored alternative, national options. At the time of their lawsuits against SACSCOC, they could not legally seek accreditation with a different regional accreditor.

Accreditation Standards

Accrediting organizations rely on published standards to monitor and evaluate institutional and programmatic quality. Generally, all accreditors require institutions to adhere to standards related to degree program quality, faculty credentials, and financial stability, among others (USDOE, 2021a). SACSCOC calls its standards the Principles of Accreditation (“the Principles”). It has more than 70 standards, but this essay focuses on Principle 13.1 (financial resources) because it is one of the primary standards with which HBCUs struggle (Baylor, 2010). Principle 13.1 reads: “The institution has sound financial resources and a demonstrated, stable financial base to support the mission of the institution and the scope of its programs and services” (SACSCOC, 2017, p. 29). SACSCOC found Bennett and Paine in non-compliance with Principle 13.1. Both institutions chose to sue SACSCOC after their institutions’ accreditation was removed for failure to meet expectations for financial stability.

Using Litigation to Check Quasi-Government Power

This section examines the two separate court cases, *SACSCOC v. Bennett* and *SACSCOC v. Paine*. I selected these institutions because of their commonalities. They are private, Christian, liberal arts colleges. Bennett is located in North Carolina, and Paine is located in Georgia (Bennett College, 2021; Paine College, 2021). Each college had a history of financial difficulties that led to SACSCOC’s decision to remove accreditation, after which each HBCU sued SACSCOC. During litigation, each college sought accreditation with a national accreditor called the Transnational Association of Christian Colleges and Schools (TRACS). SACSCOC no longer accredits Bennett or Paine, but Paine is a member of TRACS and Bennett has achieved Candidacy Status with TRACS, which was effective in October 2020 (Watson, 2019; Bennett College, 2022). The following sections unpack the litigation between each HBCU and SACSCOC to understand why they sued, how each college benefitted from doing so, and whether the colleges were successful in checking SACSCOC’s quasi-governmental authority.

Bennett College: Successfully Checking Quasi-Governmental Power

Bennett College v. The Southern Association of Colleges and Schools Commission on Colleges, Inc. (2020) (hereafter Bennett College) provides an uncommon example in which an HBCU received a partial summary judgement² that remanded its case back to SACSCOC’s Appeals Committee, to which “applicant, candidate, and member institu-

²A summary judgment is a judgment entered by a court for one party and against another party without full trial” (Legal Information Institute, n.d.).

tions” can “appeal adverse decisions taken by the SACSCOC Board of Trustees” (SACSCOC, 2020a, p. 1) Prior to Bennett College, SACSCOC and Bennett had discussed the college’s finances for a number of years. Bennett’s financial issues culminated in 2018 after several years of probation for non-compliance with Comprehensive Standard (CS) 3.10.1³ (financial stability) (Bennett College, 2020). When Bennett’s probation ended, the SACSCOC Board of Trustees (BOT) determined that Bennett had not improved its financial situation and voted to remove its accreditation. Bennett appealed to the Appeals Committee, but despite Bennett’s completion of a successful, \$6 million fundraising campaign from December 2018 to February 2019, the SACSCOC Appeals Committee reaffirmed the original outcome. Then, Bennett sued SACSCOC, asserting that the Appeals Committee did not follow proper procedures when it reviewed the updated financial information, which included the fundraiser (Bennett College, 2020).

Bennett College Receives Partial Summary Judgement

Bennett College’s outcome resulted in a valid critique of SACSCOC’s failure to follow appropriate procedures for appeals. The court required SACSCOC to remand Bennett’s case “back to the [SACSCOC] Appeals Committee for materiality determination” (Bennett College, 2020), referring to the new, positive evidence highlighting Bennett’s improved financial status. After the December 2018 decision, Bennett submitted three new forms of information to the Appeals Committee to demonstrate financial improvement: 1) new financial information, 2) over \$6 million obtained through fundraising, and 3) over \$1 million in loan forgiveness (Bennett College, 2020). However, the Appeals Committee did not determine whether the new information was “material,” meaning that the Appeals Committee should have concluded whether the new information had the potential to change the BOT’s original decision to remove accreditation. Instead, the Appeals Committee chose to conclude that Bennett remained in non-compliance with CS 3.10.1. Consequently, the Appeals Committee “usurped the role of the Board and determined that Bennett’s supplemental information did not ultimately bring Bennett into compliance with CS 3.10.1. Since the Appeals Committee violated SAC’s own rules, it thereby violated Bennett’s due process rights” (Bennett College, 2020).

Of the two HBCUs, only Bennett obtained a partial summary judgment. Despite this success, Bennett College voluntarily removed itself from SACSCOC membership on March 20, 2021—two days before its Appeals Hearing (SACSCOC, 2021b). Newsom (2021) reported that Bennett’s Board voted to withdraw, but Bennett’s reasons for doing so are unclear. During litigation, Bennett achieved Candidacy Status with TRACS, which allowed Bennett to access Title IV funding. Bennett College has concluded, but it is an important area for additional research—especially if Bennett reveals why it rescinded its appeal.

³SACSCOC revised its Principles of Accreditation in 2017. Before this revision, Principle 13.1 (financial resources) was referred to as CS 3.10.1 (SACSCOC, 2017).

Paine College: Extending Accreditation through Litigation

As stated previously, Paine also sued SACSCOC when it removed its accreditation after years of financial struggles, but the institution's choice to pursue litigation was primarily a strategy for extending its accreditation status rather than winning the lawsuit. On April 24, 2012, SACSCOC asked Paine to complete a financial report after it learned of Paine's financial issues, which began in 2011 and ultimately led to a "\$10 million budget shortfall" in 2014, and negative publicity about financial mismanagement (*The Paine College v. The Southern Association of Colleges and Schools Commission on Colleges, Inc.* [The Paine College], 2020, p. 4). Then, the SACSCOC BOT placed Paine on warning. A four-year process followed in which Paine had to demonstrate compliance with the Principles during two years of warning status and two years of probationary status. At the conclusion of the probationary period, the SACSCOC Executive Council and BOT removed Paine's accreditation for failure to comply with the SACSCOC principles of accreditation. Paine appealed to the Appeals Committee on July 7, 2016, but was unsuccessful (The Paine College, 2020). Litigation followed.

Paine College Denied Summary Judgement

Similar to Bennett, Paine claimed that SACSCOC failed to follow common law due process procedures, which resulted in the unfair removal of its accreditation. The U.S. District Court for the Northern District of Georgia granted summary judgment to SACSCOC, which Paine appealed. However, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's decision to issue SACSCOC summary judgment (The Paine College, 2020).

The most important element of Paine's case is not the court's denial of summary judgment, but why Paine sued. Unlike Bennett, Paine did not have a successful fundraising campaign, and its demonstration of SACSCOC's due process violation was weak. Paine probably would have been unable to demonstrate financial stability even if the court had remanded its case back to the SACSCOC Appeals Committee because it lacked evidence of financial stability. Paine used the courts to obtain preliminary injunctions that allowed it to maintain its accreditation (and federal funding) through nearly four years of litigation (The Paine College, 2020). SACSCOC officially removed Paine from membership on May 29, 2020 (SACSCOC, 2020b). By then, Paine had achieved TRACS Candidacy Status and was fully accredited in October 2020 (Bennett, 2022).

Why Did Bennett and Paine Sue SACSCOC?

The preceding discussion of Bennett College and The Paine College is interesting in light of Kelderman's (2016) observation that institutions that sue their accreditors are often unsuccessful. Only Bennett received a partial summary judgment, and it still elected to withdraw its appeal, making it unknown if it would have succeeded in regaining its SACSCOC accreditation (SACSCOC, 2021b). If success is unlikely or colleges back out of the process,

why did Bennett and Paine sue SACSCOC? Ultimately, both institutions needed time. Litigation awarded Bennett and Paine automatic preliminary injunctions that ensured their continued accreditation and federal funding, which granted students access to federal financial aid and, consequently, continued to bring money into the institution. With funding secured for a few years, the colleges sought alternative accreditation (i.e., TRACS) due to the likelihood that the courts would not award them summary judgment. This strategy proved successful, as it has for other institutions that were in similar situations (Kelderman, 2016).

Discussion and Conclusion

Litigation is an important part of the accreditation process because the courts are the only third-party with the authority to check the accreditors' quasi-governmental power over all accredited American institutions—not just HBCUs (Kelderman, 2016; *Thomas M. Cooley Law School v. The American Bar Association*, 2006). This check is both fair and necessary based on how accreditation is structured in the United States. Accreditors, particularly regional ones, exercise monopolies within the regions of the United States they oversee. Bennett College reveals that litigation resulted in a fair scrutinization of SACSCOC's processes. (Though, it is unknown if SACSCOC has reevaluated its processes since Bennett College or provided training so that Appeals Committee operates within its role).

Considering the money and time accreditors and institutions invest in litigation, both parties must determine whether litigation is the best method for checking accreditors' authority (Kelderman, 2016). There may be alternatives. Currently, SACSCOC monitors its own appeals, as observed in Bennett College and The Paine College. Each case relied on a court to evaluate whether SACSCOC followed its procedures. Rather than litigate, accreditors could review each other's cases by establishing an unbiased federation of accreditors that would review appeals from colleges and universities represented within the federation. This type of system would provide an additional audit to ensure that accreditors follow their own policies and procedures while eliminating the accreditors' bias. If Bennett had petitioned a federation rather than the U.S. District Court for the Northern District of Georgia, it is possible that the federation would have remanded the appeal back to the SACSCOC Appeals Committee independent of litigation.

Was it wise for Paine to sue SACSCOC to maintain its ability to accept federal funding and keep its doors open? The additional time granted via litigation ultimately proved beneficial, but institutions in Paine's situation may want to seek alternative accreditation long before accreditation loss. Paine, for example, might have considered applying to TRACS in 2012 when SACSCOC began to monitor the institution—especially if institutional leaders had enough information to predict accreditation loss. Federal regulations do not prohibit institutions from holding multiple accreditations, so Paine would not have faced federal penalties if it maintained its SACSCOC membership and gained TRACS candidacy status.

Overall, Bennett College and The Paine College speak to the challenge of checking SACSCOC's quasi-governmental authority within the context of a critical accreditation standard: Principle 13.1 (financial resources). Yes, litigation forced the courts to determine whether SACSCOC violated common law due process procedures, but ultimately, the institutions' financial statuses—particularly in the case of Paine—reveal that litigation cannot rectify an institutions' financial struggles, but it does provide a way around them.

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