

STATEMENT OF

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BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

*EXPLORING A COMPENSATION FRAMEWORK FOR INTERCOLLEGIATE
ATHLETES*

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Chairman Wicker, Ranking Member Cantwell, and Members of the Committee:

My name is Dionne Koller, and I am a Professor of Law, the Director of the Center for Sport and the Law, and the Associate Dean for Academic Affairs at the University of Baltimore School of Law. I am also a former athlete and the proud parent of an NCAA Division III athlete. Thank you for inviting me here today to speak with you about the important issue of allowing intercollegiate athletes to enjoy the same rights that we all hold to earn income from our name, image, and likeness (NIL). As I explain below, while a national policy solution through federal legislation could benefit college athletes, a solution that simply defers to the NCAA and its member institutions, and insulates them from antitrust scrutiny, is an unwarranted step in the wrong direction. In my view, such a step would not only hurt college athletes, it would substantially harm college sports. I urge this Committee instead to adopt a solution that rejects the NCAA's overreach in regulating athletes and reinforces the voice of athletes and the value of the free market in the enterprise that is college sports.

The Current Issue in Context

In considering the NIL issue, it is important to situate it in the legal and policy landscape that has shaped intercollegiate and Olympic sports in the United States. To do so, this Committee should start with an understanding of the traditional view of Congressional involvement in sports. This is perhaps best captured by a quote from the late Senator John McCain. When asked how much the government should be involved in sports, Senator McCain answered: “[A]s little as possible.”¹ Senator McCain’s statement reflects the traditional view that the government—Congress, executive branch agencies, courts, and state legislatures—should defer to sports

¹ *The Dan Patrick Show*, NBC Sports Network television broadcast, May 2, 2014.

administrators such as the NCAA to regulate themselves. This view underlies today's efforts by the NCAA to seek a federal legislative solution to the NIL issue.

Yet despite the mantra that the government should stay out of sports, the reality is that the government is very much a part of our current intercollegiate and Olympic sports models. This is because, for decades, Congress and courts largely have left entities such as the NCAA and the United States Olympic and Paralympic Committee (USOPC) to regulate athletes and manage their respective athletic spheres with little oversight or accountability. Staying on the sidelines has amounted to an endorsement that the prevailing model represents the best policy choice. I urge this Committee to take a new approach.

Congress has deferred to the NCAA and its member institutions to regulate college sports since President Theodore Roosevelt responded to the crisis of violence and deaths in college football by calling a White House summit to urge colleges and universities to make the game safer. This deference continued through decades of persistent concerns—often the subject of Congressional hearings—over the treatment of athletes, involving issues from basic due process rights to athlete traumatic brain injury. Lack of Congressional regulation has provided powerful space for the NCAA and its member institutions to structure their programs, restrict athletes' rights, and profit from the results in such a way that what is often referred to as the "American Model" of sports is widely considered unjust. "Amateurism," as self-servingly defined and re-defined by the NCAA, has become synonymous with a model that exploits athletes more than it educates.

Traditionally, the NCAA has advanced several rationales for why it should be insulated from government regulation. Drawing on athletic programs' relationship with colleges and universities, the NCAA and its member institutions have resisted regulation by arguing that intercollegiate sport is not commerce, and Congress and courts should not interfere with the education process. The

NCAA also has argued that regulation will make administering sports too costly or burdensome, thereby limiting participation opportunities and undermining gender equity. The NCAA regularly invokes patriotic values, stating that the collegiate sports model is a uniquely American phenomenon and an example to the world. Most frequently, the NCAA and its member institutions simply assert that they must have regulatory deference to freely administer intercollegiate sports to “preserve amateurism”—an ever-changing, elusive concept that often serves to burden and disempower, and not protect, athletes.

Congress’s decades-long “hands off” approach to intercollegiate sports has provided the NCAA an opportunity to build a multi-billion-dollar model for sports that is popular and profitable. It is also a model that is breaking under the weight of the unfairness and injustice it perpetuates.

The Results

Today’s issue once again features the NCAA arguing for deference, and it must be evaluated in light of the decades of examples of harm to athletes and the state of intercollegiate athletics today. To be sure, intercollegiate sports participation has significant benefits. Many athletes receive scholarships that cover tuition and the cost of attendance, avoiding the enormous student loan debt burden carried by many of their peers. Sports participation can provide important short and long-term health benefits and teach important life lessons. More broadly, intercollegiate sports programs can contribute to campus unity, alumni engagement and fundraising, and student recruitment. There is no doubt, and courts have regularly recognized, that some horizontal restraints and athlete regulation must occur to produce intercollegiate sports. There is also no doubt that intercollegiate sports are an important, long-standing feature of American culture.

Unfortunately, the NCAA model is one that too often works for everyone in the intercollegiate athletics enterprise except the athletes whose labor makes it possible. The excesses

and abuses are documented and well known, including through Senator Murphy's series of reports released last year. The excesses and abuses are persistent and not likely to change with further deference to the NCAA. The NCAA and its members schools bring in billions every year in athletics related revenue—little of which is shared with the athletes whose labor makes it possible. Athletes under current NCAA rules receive no pay beyond their cost of attendance and are denied the right to profit in any way from their athletic talent. Instead, the intercollegiate sports “arms race” drives bloated budgets that include multi-million-dollar coaches' and administrators' salaries (often far exceeding the salaries of those in professional sports), millions in severance packages, lavish facilities, and layers of highly compensated support staff. While expenses for coaches, facilities, and non-athlete administrators make up nearly two-thirds of athletics spending, according to a Knight Commission report, only a little over 1% of the spending is on athlete health care. This over-spending is not only unfair to athletes, it has enormous consequences for all students. Mandatory student fees to support college and university athletic departments are bundled into student loans. Some estimates are that the nation's non-athlete students borrow as much as \$4 billion per year to pay athletic fees.

Yet the approximately \$14 billion a year in revenue generated by college sports is not buying a better experience for athletes. The NCAA and its member institutions have done little to hold schools accountable for wide-ranging, persistent harms to athletes. The NCAA asserts that it has no legal duty to protect athletes from sexual predators such as former Michigan State University team physician Dr. Larry Nassar. There is little meaningful enforcement of sideline concussion protocols, with surveys of athletic trainers showing that athletes who suffer traumatic brain injuries are often not removed from play or are prematurely cleared to return to play. Athletes are not protected from abusive coaching and workouts that in some cases have required hospitalization, and in extreme and particularly tragic cases, resulted in death. Most recently, with the COVID-19 pandemic still widely

active, the NCAA and its member institutions are bringing athletes back to campus (in many cases while non-athlete students and staff remain at home) to begin training for fall football season. While it is not at all clear that it is safe, athletes are reportedly being asked to sign liability waivers and “pledges” that purport to immunize their institution from any virus-related liability.

Beyond health and safety, athletes’ access to a full education, particularly in the revenue-generating sports of football and men’s basketball, is substantially curtailed. The NLRB’s 2015 decision on the Northwestern University football players’ petition to form a collective bargaining unit noted that players spent up to 50-60 hours per week in team activities, practices, and games. Participation on a team often means an athlete is limited in the ability to register for certain classes, major in certain subjects, and even attend courses for which the athlete is registered. Athletes’ educations have in some cases been so undermined by their participation in sports it has amounted to outright academic fraud. The NCAA and its member institutions have no duty to provide an adequate education, and graduation rates in revenue-generating sports show that schools often fail to adequately support students in even attaining a degree.

Athletes have little ability to change these circumstances. They are not members of the NCAA or represented by unions and have no meaningful administrative or legal recourse if their athletics experience is physically and emotionally harmful. They have little choice but to comply with the directives of coaches and administrators. They have no recourse if the demands of sports participation prevent them from getting the education for which they purportedly enrolled. They share in none of the revenue, beyond their scholarship, that is claimed by coaches’ and administrators’ salaries, and they often face long-term, uncompensated health expenses. Seen in this light, the NCAA’s “amateurism” model is one that is profoundly unfair.

The unfairness of the NCAA model is even more apparent when we consider who provides the labor that generates the billion-dollar revenues. In Division I, 56% of men's basketball players are Black. In contrast, most coaches and administrators are White. Similarly, in football, nearly half the players are Black, while the vast majority of coaches and staff, down to graduate assistants, are White. Moreover, there is a persistent graduation rate disparity between Black and White players, and there is also a troubling graduation rate disparity between Black male athletes and Black male non-athlete undergraduates (despite athletes having the benefit of financial and academic supports). These Black athletes frequently come from socio-economically disadvantaged backgrounds, so that the reality of their athletics experience is that they earn millions for White coaches and administrators while the athletes' own families often cannot afford to even travel to watch them play.

Indeed, our current circumstances illustrate well the impact the NCAA model has on Black male athletes. Although evidence shows that communities of color are being the most severely impacted by the COVID-19 pandemic, Black male athletes are forced to return to campus to train for the upcoming season. To many, this is yet another example of the NCAA model using Black male labor (and in this case risking Black men's lives) to generate the revenue that generously supports White coaches and administrators. Thus, while participation in intercollegiate athletics is frequently touted as a way to uplift and advance Black men and their families, it can also be seen as part of an American culture plagued by systemic racism. In this way, the current model for intercollegiate sports is not simply an NCAA regulation issue, it is a social justice issue.

Put in its proper context, then, the continued deference to the NCAA in the face of decades of evidence of harm to athletes can no longer be characterized as simply taking a "hands off" approach to sports regulation. Instead, such deference puts Congress's thumb on the scale to weight

the interests of sports administrators—those who manage and profit from sports—ahead of the athletes who play the games. The time has come for a different approach.

The NCAA Argument for Federal Legislation

The NCAA’s arguments around the NIL issue represent a troubling extension of the “hands off” logic. Through the NIL issue, the NCAA is not only asking Congress for deference, it is asking for an unprecedented level of insulation from legal accountability and the free-market rules that nearly every other important American industry must follow. It is also asking for an endorsement of a model that perpetuates multiple levels of injustice in the name of “amateurism.” Importantly, Congress need not defer to or endorse the NCAA’s formulations of “amateurism” and the “American Model” to ensure that our country enjoys the many benefits of college sports.

There is No Urgency. While a national solution to the NIL issue supplied by federal law could be useful, it is not nearly as urgent as the NCAA would suggest. States are taking common sense steps to protect athletes’ rights in this area. While the NCAA and its member institutions and affiliated conferences argue that state legislation would threaten competitive balance, and by extension, the very model for intercollegiate sports, there is little evidence that this is true. The NCAA has had decades to craft rules to promote competitive balance, and very few would claim that it has been achieved. There is also little evidence that regulating athletes’ use of their NIL would do anything more to restore balance to a college athletics landscape that is characterized by schools and conferences who are clearly divided by the haves and have-nots. Similarly, regulating athletes’ use of their NIL or capturing revenue from athletes’ NIL is in no way necessary to “preserve” the current model or for intercollegiate sports to exist.

NCAA-Crafted “Guardrails” Are Not Necessary. Explicitly deferring to the NCAA to craft so-called “guardrails,” or rules for athletes to market their NIL is also not necessary. Athletes

can, like other students on campus, enter the free market and strike deals for the use of their NIL. Athletes are no less capable of managing this process than any other student, and NCAA-crafted “guardrails” can easily become unreasonable barriers to the free market. In fact, the only “guardrails” needed in this situation are those which prohibit unreasonable restraints on trade that the NCAA and its member institutions have too often imposed in the name of “amateurism.”

Similarly, the rationale that the NCAA and its member schools can best protect athletes from unscrupulous boosters or agents is also misplaced. The NCAA has failed (and indeed denies it has such a duty) to protect students’ health, safety, wellbeing, and education. Seeking legislation to protect athletes should be viewed skeptically where athletes themselves are not asking for it. In contrast, athletes are asking for the types of protections that support their health and safety—from concussions, from abusive coaches, and most recently, from the COVID-19 pandemic. Indeed, if athletes are currently able to sign waivers to facilitate their return to practice during a global health pandemic, they should be trusted and permitted to make deals to market their NIL.

Title IX/Gender Equity is Not Threatened. The NCAA also often vaguely asserts that allowing athletes free access to the market for their NIL would somehow threaten gender equity and the gains made by Title IX. Of course, Title IX has no applicability to athletes’ transactions with third parties who would compensate them for their NIL. Full NIL rights also would promote, and not undermine, gender equity. Because women have fewer opportunities to participate in professional sports than men, their years as college athletes often provide the only opportunity they will have to earn income from their athletic participation. In addition, NIL marketing by female athletes can raise the profile of their sports, building interest along with women’s brands. Rather than limiting with “amateurism” restrictions women athletes’ use of their NIL, the NCAA and its

member institutions should focus on Title IX compliance, something that has yet to be fully realized.

In short, if the NCAA and its member institutions were to ask Congress for federal legislation to protect athletes and promote gender equity, it would do well to start with the issues described above that are of the most importance to athletes. Focusing now on NIL rights does little to protect them, but it stands a strong chance of perpetuating the many harms the NCAA “amateurism” model engenders.

An Antitrust Exemption is Not Warranted. The NCAA has long sought an antitrust exemption and granting one now, purportedly for the limited area of NIL rules, is particularly troubling. Antitrust exemptions can be statutory or non-statutory (judicially created). The statutory antitrust exemptions Congress has granted in sports were targeted and important to facilitating the growth of nascent sports leagues through legislation such as the Sports Broadcasting Act (permitting joint television broadcasting agreements) and the legislation permitting the creation of the modern NFL. The Curt Flood Act of 1998 specifically limited baseball’s historic common law antitrust exemption by providing that major league players’ issues were no longer covered (though they may claim the protection of the non-statutory labor exemption).

The rationale for granting the NCAA a statutory antitrust exemption is not nearly as clear. Such an exemption would not be to enhance consumer welfare by supporting the market power of smaller firms who face competition from a dominant market player. The NCAA, of course, is the dominant market player in intercollegiate sports. An exemption also would not enhance efficiency but would instead further entrench a system where artificially above-market salaries are possible because revenue is not shared, beyond the scholarship, with athletes. Viewed in light of recent antitrust decisions on the NCAA’s “amateurism” restraints, it is clear that an exemption would

simply serve to shield an industry that has struggled to demonstrate that its anti-competitive restraints on athletes are in fact necessary to produce college sports. In this way, the NCAA is no different than the many industries throughout history that have sought an antitrust exemption to avoid the critical accountability that the Sherman Act guarantees.

It is, however, of course true that an antitrust exemption in sports can be used to promote important countervailing interests. In professional sports, the non-statutory labor exemption serves to insulate unionized sports leagues from antitrust litigation to allow collective bargaining to take place. In this context, athletes' rights and voices are protected through the operation of labor law and overall athlete wellbeing is enhanced. Here, intercollegiate athletes have no union or meaningful voice in the process that will result in NIL rules. An antitrust exemption would give the NCAA unchecked power to restrict athletes' free market rights far more than necessary without any accountability.

In addition, any NCAA argument that it should not be subject to the burden of antitrust suits or court rulings that could invalidate its rules is highly troubling given the recent history of antitrust litigation which found that the NCAA in fact violated antitrust law and adopted rules that were more restrictive than necessary to achieve their stated purpose of "protecting amateurism." Far from impeding the NCAA's ability to manage college sports, the integrity of the enterprise is enhanced, and positive change has resulted, from judicial checks on unfettered NCAA overreach. Under these circumstances, where an antitrust exemption is not coupled with unionization, the danger is far too great that the NCAA will once again abuse its power and unreasonably restrain athletes' rights. Moreover, while the NCAA often submits that an antitrust exemption and its overly restrictive restraints on athletes' rights are necessary to prevent vague, unsubstantiated claims of

harm to the “amateurism model,” antitrust cases have documented the very real, demonstrable harm that such restraints have on athletes and the free market.

Unchecked Power Leads to Abuse. Finally, this Committee is well aware that unchecked power by sports regulators too often does not enhance athlete welfare, but instead can lead to cultures of inequality, abuse, exploitation, and persistent athlete harm. The example of the USOPC is instructive. Decades of Congressional deference and a lack of accountability fostered a culture where the USOPC’s monopoly over U.S. Olympic Movement sport produced high medal counts with an even higher price: years of mismanagement, scandals, and generous administrative salaries while athletes suffered sexual and other forms of abuse and pervasive gender inequality. I applaud this Committee for its work to address these issues by enacting meaningful reform such as the Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, and more recently with bills such as the Equal Pay for Team USA Act that would guarantee equal pay and benefits for our Olympic athletes. Through the important leadership of this Committee, Congress has taken significant steps to replace wholesale deference to the USOPC with targeted, appropriate regulation that has improved the lives of our Olympic Movement athletes and strengthened public confidence in Olympic Movement sports. Congress has an opportunity to do the same thing for intercollegiate sports.

How Should Congress Respond

If Congress chooses to legislate, it should do so in a way that seeks to promote the rights, health, and wellbeing of athletes. For too long, the deference to the NCAA and its member institutions has fostered a so-called “amateurism” model that privileges everyone but the athletes who generate the revenue. Congress therefore should use its power to enact comprehensive

legislation that will address intercollegiate athletes' health and wellbeing and fully protect their rights to market their name, image, and likeness.

- Legislation should include a uniform, enforceable standard for athlete safety to ensure that intercollegiate athletes receive quality health care (including the payment of all athletics related medical expenses), particularly in the management of concussions and heatstroke, the prevention of abusive workouts, and protection from forced participation during public health crises such as that posed by COVID-19.

- Congress should affirm athletes' right to market their name, image, and likeness. To the extent any "guardrails" are deemed necessary, they should be written into legislation and not left for the NCAA to craft with the protection of antitrust immunity. Thus, Congress could, for instance, prohibit NIL deals used for inducements to recruits or prohibit colleges and universities from coordinating NIL deals for their athletes.

- If Congress is not prepared to act now to address the myriad problems with NCAA regulation of intercollegiate athletes, Congress would do better by doing nothing and allowing states to continue to legislate in this area. A so-called "patchwork" of state laws that provide athletes with rights is not a threat to the NCAA intercollegiate sports model, and it can provide important data that Congress can use to craft a future national solution if warranted. A rushed federal response that takes power from states and athletes to once again privilege the NCAA is not warranted.

Conclusion

In nearly every context where athletes have advanced arguments for fundamental fairness, equality, and the protection of their health and wellbeing, sports regulators like the NCAA and USOPC have countered with dire predictions that their very model for sport will be threatened. The arguments always center on vague predictions of harm and shifting definitions of "amateurism" and

“competitive balance.” Across all levels of sport, the arguments are the same and the predicted harm never materializes. The NCAA argued for years against Title IX, on the grounds that it would destroy, among other things, football. Major League Baseball argued that eliminating the reserve clause to permit free agency would irreparably harm the game. Olympic regulators argued that allowing professionals into the Games would kill the Olympic model within a few years. The PGA Tour argued that Casey Martin’s clam to protection under the Americans with Disabilities Act would deal a mortal blow to golf, if not all sports. None of these dire predictions have materialized. Importantly, advances which serve to promote athletes’ rights have strengthened the integrity, sustainability, and popularity of sports. I have no doubt that allowing intercollegiate athletes the right to market their name, image, and likeness—without unnecessary restriction by the NCAA—will do the same. Thank you and I look forward to your questions.