

Expanded Written Testimony of Andy Schwarz
Before the Committee on Education and the Workforce
United States House of Representatives

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Hearing on Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes

Chairman Kline, Ranking Member Miller, and Members of the Committee, thank you for allowing me to testify on these issues related to College Football. My name is Andy Schwarz. I'm an economist who specializes in antitrust economics. I have also spent a good part of my career studying and writing about the economics of college sports. I am a small business owner, a Stanford, Johns Hopkins, and UCLA graduate, and a proud Californian. Among other things, I am the author of "Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes." I am a partner with the firm OSKR, but I am speaking only for myself, and not for my firm or any of our clients.

As the members of the committee know, the NLRB authorized an election for Northwestern FBS football athletes, and so to start I want to provide a few facts from those proceedings:

- Scholarship Football Athletes at Northwestern devote 40 to 60 hours per week during a five-month season, and 15 to 25 hours the rest of the year.
- They receive no academic credit, are not supervised by faculty, and football is not a direct part of the curriculum of their undergraduate majors.

I understand this panel is focused on unintended consequences of unionizing college football, so I am here to explain that the biggest threat to college sports from collective action is the current price-fixing cartel called the NCAA. By price-fixing, I am focused on how the 351 Schools in Division I stifle healthy economic competition through collusion to impose limits on all forms of athlete compensation.

College Football Is Big Business

College football is an enormously popular consumer product, generating passion from fans and billions in revenue for schools, broadcast television networks, merchandisers, and apparel companies. As Americans, many of us love college sports, especially college football and basketball, and that's an important economic fact to recognize. In our vibrant capitalist economy, popular products generate large revenues, so the fact that FBS football is a successful, professional sports industry is nothing to be ashamed of. We should celebrate that FBS Football programs alone reported \$3.2 billion in revenue in the most recent federal filings and that D1 basketball programs added another \$1.4 billion. College football is great entertainment which is

why individual athletic departments regularly generate more revenue than almost all NHL and NBA teams.

Former NCAA President Myles Brand explained that maximizing revenue was the only responsible path for college sports. He stated that college athletics

“... has an obligation to conduct its revenue-generating activities in a productive and sound business-like manner. Anything less would be incompetence at best and malfeasance at worst.”

As a free-market oriented antitrust economist, I agree with Mr. Brand's view: the economic success of college sports is fantastic for the American economy and the NCAA's efforts to commercialize the sport are exactly how a vibrant business like College Football should behave. Bravo for the NCAA's pursuit of profit!

College Football is Produced by a Price-Fixing Cartel

There is an economic dark-side to the process by which this product is produced. It's called Price Fixing. Annually, 351 Division 1 schools come together and agree to stifle economic competition. They take a market that would normally be extremely competitive, with many buyers and many sellers, and create what amounts to a buyers monopoly, what economists call a monopsony, where every school agrees to fix the price offered to the athletes who help to create this beloved American sport.

In our economy, the NLRA and the Antitrust laws work together to ensure that when sports leagues and athletes form partnerships, negotiations are fair, whether done through collective or individual bargaining. Either choice is valid – a unionized, collective bargaining path or a more free market approach, where the antitrust laws prohibit collusion among teams. Given the one-sided market power imposed by collusion, it's not surprising that the players have turned to labor law and unionization for a modicum of countervailing bargaining power.

I believe very strongly in the power of economic competition to create the best economic outcomes -- that is why I work in antitrust. As a country, we should enforce our antitrust laws just as vigorously with respect to college football (and other college sports) as we do other examples of price or wage fixing. Whether it's through an Act of Congress, intervention by the Department of Justice, or through a legal decision in the Courts, the long-standing Cartelization of college sports needs to end.

Most American Team Sports Involve Partnerships between Leagues and Unions

Other American Sports involve a League negotiating with a Union to achieve a competitive outcome. Leagues generally encourage unionization. This is because in the context of collective bargaining, restrictions on economic competition that would generally be illegal under the antitrust laws can be exempt. Consider that in 2011, NFL players sought to end their Union, but the NFL demanded the Courts re-form the NFLPA against the players' wishes. The NFL's

teams may have gone to Court for their right to continue its partnership with the NFLPA because of evidence from major European soccer leagues, Europe's football, where there are no collective bargaining agreements and player pay reaches 60-70% of total revenue rather than the 50% athletes in the NFL get.

So if garden-variety American-style economic competition through a free market is too much to expect from the 128 schools that produce FBS college football at great profit, or from all 351 Division I schools, they have a second alternative open to them, the collective bargaining outcome chosen by the NFL, NBA, MLB, and NHL. From the point of view of an industry that is currently price fixing, a legally negotiated collective bargaining agreement that brings with it an antitrust exemption with respect to labor issues may be a far more palatable alternative than unfettered, non-collusive economic competition.

Instead we have neither true market competition nor collective bargaining. We have the worst economic outcome, a monopoly formed through collusion. The NCAA creates artificial market power that permits price fixing which in turn distorts the market, and this imposes a high cost on young men, many of whom come from families who do not have the luxury of shrugging off that economic loss. The valid economic options to correct those distortions are either to break up the NCAA's union power by enforcing the antitrust laws, or to choose a collective bargaining approach where both sides negotiate as collectives, and in exchange, the antitrust laws are suspended in favor of a collectively bargained partnership.

The Term Student-Athlete is a Term of Art Created in an Attempt to Evade Legal Liability

In some ways, the NCAA has turned its founding purpose upside down. The NCAA was famously organized at the behest of trust-buster Republican Teddy Roosevelt to address health and safety issues, but today we live in a world where the NCAA devotes millions to investigate suspicions of possible market compensation while it denying it has any legal responsibility to protect the heads or bodies of its athletes.

The NCAA's former Executive Director Walter Byers has acknowledged that the NCAA coined the term "student-athlete" to specifically to dodge legal responsibilities for athlete safety and medical expenses. In time, that term has also served to disguise its economic collusion.

That perversion of the original mission remains to this day: Athletes like Louisville's Kevin Ware, who broke his leg during last year's NCAA basketball tournament, are excluded from workers compensation benefits that would provide immediate and long-term medical care. Far more effort was spent to determine whether Johnny Manziel received a market rate of compensation for his autograph than was spent investigating whether Matt Scott of Arizona, who showed clear signs of concussion during a televised game (that I myself watched), was put at risk by quickly returning to play in the same game.

FBS Football is a Full-Time Endeavor

The athletes who play College Football in FBS work at their craft as a full-time job, and they pull this off while also juggling the difficulty of being a full-time student. One thing NCAA president Mark Emmert and Northwestern graduate Kain Colter agree on is that FBS football athletes put in over 40 hours per week into their craft. Colter laid out facts that people who study college sports already know: FBS athletes put in 40 to 60 hours per week from August through January, 15-25 hours for the rest of the year with only 3 weeks off. Northwestern's head football coach Pat Fitzgerald acknowledged in the press and under oath that football players' responsibilities amount to a full time job.

Just as FBS athletes work outside the classroom, many non-athlete students also work at jobs during college, often for the university itself. Whether working full- or part-time, it's silly to think that having a job undermines one's college education or that the number of hours spent studying changes your employee status. In the classroom, college athletes are students. On the field, they are valuable contributors to an economic engine that generates billions. Being a student, an athlete, and employee are not mutually exclusive.

Like other employees, FBS Football players are already compensated for what they do. They are paid, sometimes in cash, for their room and board, and they receive tuition remission and their required books. Because this compensation, unlike that of a student who is not an athlete, is subject to price fixing, they receive far below their actual market value.

As with all university employees, universities exert significant control over college athletes and their time. Because of the demands of classes and of their craft, what is often sacrificed are all of the soft benefits that non-NCAA students like me got from college -- a chance to study abroad or the luxury of time to hang out with friends in the dorms, friends who go on to be valuable business connections.

The Antitrust Laws Protect Workers' Rights to Competitive Markets

Like almost every employee in America, athletes who play FBS football come to their craft voluntarily. Like you or me, they could always pursue a different career, but the same is true for employees everywhere in America. One critical difference however is that other employees have access to competitive markets for their service, and if they do not, the Courts and the Executive Branch step in to protect those rights.

Just last week, the Department of Justice and eBay agreed that eBay would stop colluding with its competitors to limit the employment choices of their high tech employees, and Apple and Google settled similar charges by paying affected workers hundreds of millions of dollars. In banning eBay's collusive conduct, the DOJ explained that when firms collude to limit employment choices, the American worker and the American economy suffers:

“These actions by the Antitrust Division remind us all that the antitrust laws guarantee the benefits of competition to all consumers, including working men and women. The agreements we challenged here not only harmed the overall competitive process but, importantly, harmed specialized and much sought after technology employees who were prevented from getting better jobs and higher salaries. Stifling opportunities for these talented and highly-skilled individuals was bad for them and bad for innovation in high-tech industries.”

The same is true when the colleges collude to limit the economic freedom of athletes.

A Seat at the Table

College Athletes undertake the rigorous twin tasks of being a full-time student and also being a full-time athlete, and I do not envision that either a free market or a union solution to the current NCAA collusion will likely change that -- being great at something requires a tremendous investment of time, and time is a scarce commodity. But what a market or union outcome would do is provide athletes with a voice in determining how best to make that tradeoff. For example, a player in a free market or a union could negotiate for a guarantee that no matter how long it takes, that student could finish his degree, and could study abroad in the years after his football eligibility were up. An athlete who has bargained, individually or collectively, to ensure he is well fed, given real access to the full range of majors and programs at a school, and provided with health and safety rules that lower the risk of serious head trauma or life-long disability is going to be in a better position to benefit from a true education than a hungry or concussed athlete forced into dead-end majors.

Although as an economist I focus on the mismatch between the current fixed price and athletes' free market value, as a union CAPA has a very different focus. CAPA's goals aim to enhance the educational component of what FBS football athletes receive in trade for their services, through better medical coverage for sports-related injuries, a focus on reducing head trauma, improved graduation rates, and educational trust funds to ensure that athletes can finish their degrees after their sports eligibility is done. Giving athletes a say in their own education, allowing them to exercise their basic economic rights as Americans to negotiate the terms and conditions by which they will provide their skills and revenue-generation potential in exchange for, among other things, the promise of a college education will tend to enhance their educational AND economic outcomes.

Collusion Harms Athletes, Taxpayers, and Consumers

In the rest of my testimony, I would like to focus on some of the ways the current system, where a Cartel imposes its rules on the industry without negotiating with anyone but themselves, harms athletes, harm taxpayers, and harms the country as a whole.

- Because most athletes do not go on to work in the NFL, the current system denies more than 95% of college football players access to the four best earnings years of their sports careers.

I am sure you have heard that fewer than 5% of college athletes, even in sports like football, go on to receive a salary as athletes after they leave college. This is often trotted out as a reason why receiving an education and a degree is so important for the other 95%-plus. And that's true -- education plays a tremendous role in all of our lives and in our lifetime earning power. But stop for a second and think about that statistic: if 95% or more of the enormously talented young men with rare skill who play college football or college basketball will not earn money from sports after college, then the current collusion among colleges not to compete economically is robbing those highly skilled college athletes of what will be their four or five highest earning years in their sports careers, and possibly for their entire life.

If we had a true market for college football players, most major colleges would find it economically profitable to provide greater levels of compensation than they do currently. Economic research by Dan Rascher of USF and Chad McEvoy of Syracuse has shown that consumer demand for winning, as measured by attendance and TV ratings, is actually greater at the college level than in the NFL. College Athletes are Americans with unique skill that the market would reward handsomely, but-for the collusion among the schools that profit from their skills.

- The current tax code exempts from taxation the tuition portion of athletic scholarships, and tuition remission paid to university employees as part of broader compensation. Nothing in the NLRB ruling should change that, and if it did, Congress itself can prevent that.

The specific proposals by the Union at Northwestern do not involve compensation beyond the current scholarship, and thus would not likely change the current compensation or tax status with respect to athletic scholarships. Through Revenue Ruling 77-263, the IRS has long recognized that the tuition piece of an athletic scholarship is not taxable as long as that scholarship is not cancelled in the event of injury. Similarly, Section 117 of the tax code exempts from taxation tuition remission provided to a university employee if that employee is compensated with a mix of pay and tuition remission, just as athletes receive cash for room and board in addition to having their tuition price waived or reduced.

And of course, to the extent you in Congress are specifically worried that somehow IRS policy would change, you -- Congress - have the power under our Constitution to ensure such an unintended consequence is avoided.

Though it is not part of CAPA goals, as an economist I can envision that the market that would arise through market competition would likely involve increased compensation. Holding down that aspect of competition is part of much greater set of negative consequences, intended or not,

that the current system has generated as a result of our nation's failure to enforce our antitrust laws against price fixing by colleges.

- Collusion denies young men with valuable skills the opportunity for to be fairly compensated for their football skills while they are students, shifting the burden to taxpayer-funded Pell grants and food stamps or forcing students to leave school to support their families.

One negative consequence is to deny many athletes a path to lift themselves out of poverty and their dependence on government handouts. Approximately 40 to 45% of all FBS football athletes come from families with low enough means that they receive Pell Grants. As one example, in 2006, 65% of UCLA's Football Athletes received these government grants. In other cases, athletes qualify for food stamps. If collusion among major colleges were ended, economic competition would turn those Pell Grant recipients into skilled earners. As pay rose, these hard working young men would taxes on the portion of their earnings above and beyond the athletic scholarship instead of being recipients of taxpayer-funded welfare. I can't imagine Congress would be in favor of private institutions like Northwestern colluding with their competitors for the purpose of pushing would-be taxpayers onto government assistance.

- One negative consequence of collusion in the market for male athletes is that money that would go to male athletes is funneled to their coaches and into elaborate recruiting palaces. College Football coaches make as much as \$7 million.

One direct and unintended consequence of price fixing for male athletes is that the market price for coaches has risen precipitously albeit artificially. Effectively the money the market would channel towards male athletes is diverted into coaching pay and all other substitutes for direct compensation that can be used to recruit athletes. This includes the large and lavish practice facilities, which I refer to as Recruiting Palaces. There is a reason why FBS locker rooms are more ostentatiously appointed than NFL locker rooms – in the NFL, pay is the primary recruiting tool, while in FBS it is construction and coaching.

As an example, in the NFL and NBA, the best paid coaches earn about 7% of the total payroll of the team. Coaching pay is also not rising nearly as fast in the NFL as in FBS. In college, football coaches can earn as much as \$7 million -- more than double the total listed value of the entire team's compensation in the form of athletic scholarships. In basketball, the highest coach earns over \$9 million and the ratio of coach-to-athlete compensation is far higher than in football. It is a settled matter of antitrust law that it is illegal for schools to collude on coaching pay and that is good. Collusion against any workforce is harmful to the American economy. But enforcing that same law with respect to athletes would bring coaching pay back to a more realistic level because the balance would shift and money would flow to male athletes instead of to their coaches.

- Collusion shunts money to coaches in lieu of increased financial aid to male athletes. Thus capping compensation to male athletes also deprives female athletes of their Title IX matching funds. Caps also limit opportunities for male athletes outside of football and basketball.

This current system's emphasis on coaching pay also harms female athletes. As I am sure members of this committee know, Title IX has provisions that provide that financial aid provided to male athletes must be substantially proportional to financial aid provided to women. However, Courts have ruled there is no similar Title IX requirement to match male and female coaching pay. Thus, after football and basketball athletes, the next biggest victim of NCAA collusion are female athletes, who find their matching funding reduced proportionally by each dollar that shifts from male players to their coaches or to investments in Recruiting Palaces.

For those who say the NCAA is deeply concerned with Title IX enforcement, I would ask you to judge them by their own rules. The NCAA has no minimum requirements for women's scholarships, either in terms of the value or number of scholarships given. To the contrary, the NCAA actually impose limits, both to the total value of any one woman's scholarship and to how many scholarship equivalents can be given out. If the NCAA were genuinely interested in ensuring an increase in scholarship aid to women, schools would impose a minimum rather than maximum number and value of women's scholarships. The same NCAA rules that limit economic competition for men also hinder women's economic and educational opportunity.

Similarly, for men's sports other than football and basketball, rather than requiring that schools fully fund scholarships, the NCAA actually prevents its member schools from doing so. As one example, it takes six men to form a full men's volleyball team, but NCAA rules punish a school if it provides more than 4.5 scholarships for the entire team. Soccer is similar, with a team requiring at least 11 players (and rosters are typically larger than that) but the NCAA prohibiting a school from granting for than 9.9 full scholarships. If the NCAA were truly concerned with the potential reduction in men's non-revenue sports, they could easily allow or even require its members to field teams where every athlete has a full scholarship rather than forbidding that outcome.

Even to call these sports "non-revenue" is a misnomer. Like other elements of a campus -- such as the drama, music or art department, men's sports other than football and basketball generate interest from would-be students, generate excitement on campus that makes for a better campus community, and also generate successful alumni who serve as the backbone of contributions to the school, in terms of their success, their involvement after graduation, and their financial contributions.

We know that even if all of the billions that FBS football generates were to vanish, schools derive value from a thriving non-revenue sport community. And as we see from Division II and Division III schools that sponsor these sports, even those with little or no football revenues, that

the fate of men's wrestling, lacrosse, or volleyball does not rest on continued collusion against men's football or basketball athletes.

Now is the Opportunity to Move Away from a Command-and-Control Economy

College football is currently enjoying healthy revenue growth. The Sports Business Journal estimates that by 2020, FBS annual revenue will have grown by more than a billion dollars. The resources exist for an orderly transition from a command-and-control economy to a market-based one. As Americans, we all have a legal right to economic markets free of collusion. The Sherman and Clayton Antitrust Acts enshrine those rights into law. Until those rights are respected for college athletes, of course they will seek collective alternatives. This is the unforeseen consequence of collective action by the schools that comprise Division 1 athletics. If you must be outraged, look no further than collusion by 351 Division 1 colleges and universities, which denies athletes a free-market alternative to unionization.

If the NCAA were no longer able to violate the antitrust laws without consequence, schools might find they actually would prefer to negotiate with a nationwide union, as is the case in the NFL and NBA, and it should also be the choice of athletes to follow that path as well. That choice is their right, as is their right to choose a collusion-free market for their talent if they opt not to unionize.

There is an Economic Consensus that NCAA Price Fixing Harms the Market

The Supreme Court has made clear that the Sherman Act is the "Magna Carta of Free Enterprise." The economic harm of the NCAA's current collusive system may be an unintended consequence, but economists have long understood the harm brought about by the Cartelization of Intercollegiate Sports. Among those economist's work is that of Nobel Prize winner Gary Becker, who passed away just last week. Becker, who in addition to receiving the Nobel Prize for Economics was also given our nation's highest civilian honor, the Presidential Medal of Freedom in 2007 by President George W. Bush quoted the Supreme Court about NCAA price-fixing, saying: "good motives alone will not validate an otherwise anticompetitive practice."

Becker went on to dissect some of the unintended consequences of this anticompetitive behavior:

"A large fraction of the Division I players in basketball and football, the two big money sports, are recruited from poor families; many of them are African-Americans from inner cities and rural areas. Every restriction on the size of scholarships that can be given to athletes in these sports usually takes money away from poor athletes and their families..."

Becker concluded with a simple diagnosis of how competition would improve the market:

"It is time for the court to apply the same valid reasoning to the restrictions on scholarships and other aspects of the competition by colleges for athletes, and to declare these restrictions also a

violation of the Sherman Act. Were that done, both student-athletes and schools with greater concern for academic performance of their athletes would gain at the expense of colleges that put athletic competition before academic achievements.”

So if this panel wants to improve the economic and educational outcomes for college athletes I would suggest you focus on the root of the problem: price-fixing and the distortions to the American economy it brings.

Thank you for the opportunity to present this testimony.