Testimony of

William Monts

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STATEMENT OF WILLIAM L. MONTS III BEFORE THE ANTITRUST SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

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Chairman Kohl, Senator Hatch, and members of the Subcommittee, I am William Monts. I am a partner with the law firm of Hogan & Hartson, LLP in Washington, D.C., and have practiced in the firm's Antitrust, Competition, and Consumer Protection group for nearly twenty years, primarily litigating antitrust cases. For roughly 18 years, I have had the privilege of working on various matters related to the post-season in college football. For several years, we presented the Cotton, Fiesta, Orange, and Sugar Bowls in connection with the Bowl Coalition, the first arrangement that attempted to facilitate a pairing between the top two teams in the nation in a bowl game. Since 1994, we have advised the Atlantic Coast Conference, Big East Conference, Big Ten Conference, Big 12 Conference, Pacific-10 Conference, Southeastern Conference, and University of Notre Dame first in connection with the old Bowl Alliance and now with the Bowl Championship Series ("BCS"). It is an honor to appear before the Subcommittee today to discuss antitrust analysis of the BCS.

I have thought a great deal about the issues that bring us here today over the past 18 years. My interest in college football is not merely as a lawyer. I have been a fan of the game all my life. I grew up in South Carolina in a family of college football fans. My grandfather played football at Clemson University in the late 1920s and early 1930s. I spent many fall Saturdays during my grade school and high school years traveling the roughly 140 miles from my home in Columbia to the foothills in northwestern South Carolina to watch the Tigers play. I worked in the Yale athletic department during my college years, much of that time spent promoting the football program. These experiences in my formative years gave me a great appreciation for the history and traditions of the game.

So I speak to you today not merely as someone who has thought about the issues as a legal advisor but as an avid fan who loves the game, understands where it is has been, and has studied the history, economic, and legal developments that have affected it. All of that informs my statement today.

ANTITRUST ANALYSIS OF THE BCS MUST BEGIN WITH AN UNDERSTANDING OF THE HISTORY OF THE GAME

No antitrust analysis of the BCS can begin until one has an understanding of the development and history of the game. Perhaps the signal feature that defines college football more than any other sport in America is the primacy of its regular season. Unlike professional football, college

football has been organized not as a single league but in several distinct conferences, each of which is comprised of several universities. Historically, each conference's membership consisted of institutions that were relatively close geographically and had similar academic and athletic standing. Each of these conferences produces a distinct brand of football and crowns its own league champion. Great rivalries have developed between institutions within these leagues, which has enhanced conference games and their respective championship races to the benefit of fans. Throughout the history of the game, the goal for the vast majority of schools playing at the highest level of college football has been to win their conference championships.
For both economic and legal reasons brought about by the United States Supreme Court's decision in NCAA v. Board of Regents, 468 U.S. 85 (1984), that is not likely to change.

To the extent that there has been any post-season in the game, it has been created not by the conferences themselves or by the National Collegiate Athletic Association ("NCAA"), the governing body for intercollegiate athletics, but by independent organizations located around the country that have sponsored college football "bowl" games during the holiday season. The purpose of these bowl games has largely been two-fold. From the perspective of the organizers, they are designed to create economic benefits for the host community by attracting visitors who will fill hotels and restaurants and take advantage of other attractions in an area during a period when business would otherwise be slow. From the perspective of the participating universities, they reward teams for a successful regular season. Teams travel to a city to do more than play a game. Players, coaches, and fans stay in the host city for several days enjoying its attractions as well as festivals, parades and other functions. Bowls, then, are not merely games but events that celebrate college football.

The growth of bowl games owes much to the close relationships that have developed between various conferences and bowls. Through individually negotiated arrangements, certain bowls hosted certain conference champions each year. These arrangements enabled bowls to promise their patrons highly regarded teams annually, thus enhancing their "product." Similarly, these arrangements provided a tangible prize to schools for winning a conference championship, thus enhancing the championship races conducted by their conferences.

One final aspect of the history of the game that must be considered is the concept of a "national championship." Because college football consists of many different leagues, no single conference can crown a "national champion" or what might be thought of as a "champion of champions." From the earliest years of the game - even before the development of conferences - there were rankings of teams by third parties based on regular season performance. At the end of the regular season, sponsors of these rankings would crown a "national champion." Today, the most widely recognized of these rankings are the Associated Press poll of sports writers and other media members, which began in 1936, and the American Football Association poll that was originally published by United Press International in 1950 and is today published by USA Today. These two polls still crown national champions today. For many years they crowned "national champions" based solely on regular season results. Beginning in the late 1960s or early 1970s, however, they began conducting polls after the bowl games, meaning that the bowls began to play a role in crowning a "national champion."

With this development, it became clear that the crowning of a "national champion" by the polls could be facilitated if the two highest ranked teams in the nation could be paired in a bowl contest. Yet the historical bowl system had never been very good at doing that. Only nine times between the end of World War II and the 1991 season had the top two teams in the polls been matched in a bowl game. With the spate of conference formation, expansion, and realignment prompted by the NCAA decision and the demise of the College Football Association, a group of major football-playing institutions that collectively sold television rights for a number of universities until the early 1990s, the likelihood of the bowls being able to create such a matchup diminished even further. At that point, a number of the major bowls expressed concern that their games may not be able to match highly ranked teams against one another. Several conferences had the same concerns. Thus, the participants in college football - the bowls and the conferences, along with the University of Notre Dame, one of the few remaining independents, began an evolutionary process designed to enhance the possibility of creating a pairing between the top two teams in a bowl game. Those efforts led first to the Bowl Coalition, then the Bowl Alliance, and today the BCS. Each of these arrangements built upon its predecessor, but the architects of each took the only rational approach to their development. They took the game with its existing assets and relationships - bowls, conference-bowl affiliation agreements, and polls - as they found them and fashioned systems that would use those assets to facilitate the crowning of a "national champion."

As a matter of practical necessity, I have only covered this history in abbreviated fashion. The history of the game, and the economic and legal developments that have shaped it, are far more detailed than presented here. No antitrust analysis of the BCS arrangement can be undertaken without a full grasp of this historical record.

THE BCS ARRANGEMENT COMPLIES WITH THE ANTITRUST LAWS
A. Some Threshold Considerations.

The principal federal antitrust statute, the Sherman Act, has two main provisions: section 1 of the Act, 15 U.S.C. § 1, prohibits any "contract, combination . . . or conspiracy" - in other words, agreements - in restraint of trade. Section 2 of the Act, 15 U.S.C. § 2, prohibits monopolization or attempted monopolization of trade or commerce and conspiracies to monopolize.

I am going to limit my remarks to analysis of the BCS under section 1 of the Sherman Act for two reasons. First, it is my understanding that the focus of this hearing is a claim that the BCS is an unlawful agreement because of (a) its effect on certain conferences and
(b) the revenue distribution. Second, the alleged anticompetitive harms that are focus of the criticism are the same regardless of whether one analyzes the arrangement under section 1 or section 2. Since the standards governing antitrust liability under section 2 are generally more stringent than those under section 1, if the BCS passes muster under section 1, then, in my view, it easily passes muster under section 2 as well.

Before delving into the analysis in more depth, a few other prefatory remarks are worth noting. As the Supreme Court has stated, the purpose of the antitrust laws is to protect competition, not competitors. In other words, the Sherman Act does not exist to shelter some producers of goods and services from competition, even aggressive competition, from other producers of goods and services or to equalize marketplace outcomes or redistribute income. Rather, the Sherman Act

guards the competitive process so that consumers benefit from competition. The Act, therefore, bars agreements that restrict marketwide output of goods and services because such agreements result in higher prices or reduced quality of goods and services to consumers.

In addition, there are a number of threshold issues that are often decided in antitrust cases under section 1. Most notably, there is the question of agreement. Under the Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), section 1 of the Sherman Act prohibits only commercial agreements that restrain trade among independent economic entities.

Applying the Copperweld rule to sports leagues has led to much debate over the years. While sports leagues usually consist of independent franchises that compete on the field, they cannot produce the league product, namely, games and a championship season, individually. That is true both at the professional and collegiate level. NFL franchises cannot produce a championship season or even single games on their own. But for the cooperation of the teams, there would be no NFL football. Thus, there is a threshold question about whether sports leagues have the requisite multiplicity of independent economic actors to create a section 1 agreement. The BCS, or for that matter any alternative post-season arrangement designed to determine a national champion in college football, stands on the same footing. It can only exist by virtue of cooperation among the various conferences, universities, and bowls. No single conference, institution, or bowl organization can produce a national championship arrangement, no matter how it is structured, on its own.

The Supreme Court has recently granted certiorari in a case, American Needle, Inc. v. Nat'l Football League, No. 08-661, that concerns the application of the Copperweld doctrine to sports leagues. The Court will hear the case next term, and its decision should cast considerable light on the question. Any antitrust challenge to the BCS would have to confront this issue at the outset. For purposes of my remarks today, however, I will assume for the sake of argument that the BCS consists of the requisite number of independent actors and thus is the product of an agreement subject to section 1 of the Sherman Act.

I will also assume for the sake of argument that the BCS is considered a commercial arrangement so that it is subject to reach under the Sherman Act. Furthermore, for purposes of my remarks, I will set aside any other threshold arguments that might be raised in favor of the arrangement, although a court would have to address all of these matters in any litigation.

If we assume that the BCS arrangement is the product of a section 1 agreement, then it will be analyzed as a joint venture among the various conferences and institutions. Joint venture arrangements are reviewed under the rule of reason. As I noted, the BCS creates a product - an annual national championship game between the top two teams in the nation and other bowl games between highly ranked teams - that no conference or institution (or bowl organization for that matter) could create on its own. These types of arrangements must be analyzed under the rule of reason in which a court looks at all of the facts, history, and circumstances surrounding an agreement to determine whether it restricts output and harms consumers. The usual shorthand description is that an antitrust court looks at the procompetitive benefits of the arrangement and its anticompetitive effects, if any, and declares the agreement unlawful only if the complainant shows that latter outweigh the former.

Rule of reason analysis can be complex because it involves a number of difficult economic determinations and requires review of considerable economic evidence. The first step is usually to define the relevant market in which competition has allegedly been restrained. Once the relevant market is defined, the next step is a determination whether the parties to the challenged agreement have market power in that relevant market. Market power is the ability profitably to raise prices to consumers above those that would exist in a competitive market. As a number of courts note, unless the antitrust defendants have market power in a properly defined relevant market, the challenged agreement has no ability to harm competition and thus is not unlawful. These initial steps in the rule of reason analysis would be controversial in any litigation. Yet to simplify the analysis and focus today on what I understand to be the major criticisms of the BCS, I will set those matters aside for purposes of my remarks. Instead, I will again assume for the sake of argument that an antitrust plaintiff could define a proper relevant market and show that the parties to the BCS agreement have market power in that market.
Even with these significant concessions, the BCS still passes muster under the antitrust laws. Let me now turn to the analysis of the competitive effects of the arrangement to show why this is so.

B. The BCS Has Substantial Procompetitive Benefits.

The procompetitive benefits of the BCS arrangement are readily apparent. I will not attempt to catalog all of the benefits, but will highlight four ones.

First, the BCS creates an annual national championship game. Until the formation of the BCS, college football had never had any mechanism for guaranteeing an annual match up of the two highest-ranked teams in a bowl game to decide the national championship. The BCS creates such a game only because the conferences and institutions that have historically turned out highly ranked teams annually in the hunt for the national championship participate in it.

This game is a boon both for consumers and for college football generally. In looking at the college football post-season from the antitrust perspective, the immediate "consumers" of the teams are the bowl organizations who host games and the television networks who buy the rights to broadcast the games. Bowls use teams as "inputs" to produce their "output," which are games. Television networks use bowl games as a form of programming that they show to viewers, who are fans of the game and who are the ultimate "consumers" of the product. Without the BCS, there would be no annual national championship game, and thus no such product for the bowls, television networks, and ultimately the fans. There would be a game between the top two teams in the nation only if a bowl game were able to arrange such a matchup on its own. That occurred by happenstance in the old bowl system and would be even less likely were the BCS to disappear. Thus, the creation of an annual national championship game is a procompetitive benefit of the arrangement.

Second, the BCS arrangement enhances the quality of non-championship BCS bowls by allowing them to delay their team selections until completion of the regular season. In the bowl system that existed before the 1992 season, most bowls, including the Orange and Sugar Bowls, had at least one open slot that they hoped to be able to fill with highly ranked and attractive teams. The Fiesta Bowl had two open slots.

To ensure that they did not miss out on attractive teams, bowls with open slots would often effectively commit to pick highly ranked teams after seven or eight games in the season. The problem, of course, was that a team that was highly ranked after seven or eight games might lose two or three of its final games and thus be far less attractive to the bowl and the fans at the end of the regular season than it had appeared during the middle of the year.

Nonetheless, because other attractive teams had paired off with other bowl games, a bowl often had no choice but to select the team to which it had effectively committed. These early commitments led to games that were not as attractive to fans or television viewers and did not have as much effect on the final rankings as might have been the case had team selection been delayed.

Today, because of the BCS and its predecessors, the major bowl games are able to delay their team selections until after the regular season, thus ensuring that they are made on the basis of a full season's results. This aspect of the BCS is procompetitive because it provides the bowls and television networks and thus ultimately the fans of the game with better matchups than would otherwise exist without it.

Third, by creating a national championship through the bowls, the BCS preserves and strengthens that broad-based bowl system and thus maximizes the number of post-season playing opportunities for student-athletes and the number of post-season college football games for bowls, television networks, and fans.

Fourth, it preserves and enhances the college football regular season and thus allows conferences and institutions to reap maximum benefits from their regular season games and sale of their regular season television rights. Today, college football is praised almost universally as having the most exciting and meaningful regular season in all of American sport. Attendance at games has grown substantially since the formation of the BCS, and that growth is attributable to the fact that the BCS arrangement and the existence of a broader-based bowl system makes virtually every regular season game meaningful. No other sport in the United States can make that claim.

C. The BCS Has No Anticompetitive Effects.

There are two concerns that critics seem to identify as anticompetitive effects of the BCS arrangement. First, there is a claim that the arrangement "excludes" certain conferences from the BCS bowls and the national championship game. Second, there is a contention that the arrangement is anticompetitive because the revenues derived from it are not shared equally. Neither of these is an anticompetitive effect for reasons I shall describe below, but at the outset, both suffer from a significant flaw - they have no connection to the purposes of the antitrust laws. Antitrust law protects consumers by preventing agreements that restrict output and either raise prices or reduce quality. Neither of these arguments shows that output has been restricted or that consumers have been harmed in any fashion.

Indeed, one market fact demonstrates this point better than any economic or legal reasoning. Before formation of the BCS, college football had tried to enhance the possibility of creating a national championship game in a bowl through two short-lived arrangements: the Bowl Coalition and the Bowl Alliance. While both arrangements increased the possibility of the bowls matching

the top two teams in a game, they did not guarantee such a matchup annually. The principal flaw in both was the lack of participation of the Big Ten and Pacific-10 conference champions. Both of those conferences had committed their champions to play in the Rose Bowl annually under a separate contract. Without those two champions, the Coalition and Alliance arrangements could not create a national championship game in 1994, 1996, or 1997 because in all three years, either the Big Ten or Pacific-10 champion ranked first or second and was unable to play in a different bowl against a team from another conference.

ABC Sports had the rights to telecast the Rose Bowl in those years, just as it does today, and under its agreement with the Tournament of Roses, the operator of the Rose Bowl, it had been promised an annual matchup between the Big Ten and Pacific-10 champions. To make the original BCS possible, ABC not only agreed to alter its arrangement with the Tournament of Roses but also purchased the rights to the Fiesta and Orange Bowls for substantially more than had been paid by those bowls' previous broadcasters. ABC also increased the rights fees for the Sugar Bowl game, which it had previously telecast. Now, as I previously noted, the immediate "consumers" of teams in the college football post-season are bowls and television networks. Had the BCS restricted output in any way, ABC would have been a victim of the arrangement. Rather than encouraging the formation of the BCS, ABC would have simply insisted that the Tournament of Roses and Big Ten and Pacific-10 conferences live up to their contract obligations. Consumers who are harmed by anticompetitive agreements do not readily go along with them, especially when they have enforceable contract rights that could otherwise prevent the harm. The fact that ABC was willing to alter its agreement with the Tournament of Roses and to pay additional rights fees to make the BCS possible demonstrates that the arrangement benefits consumers and does not restrict output.

The general retort of BCS critics when this point is raised is that, if there were some other cooperative arrangement, usually some hypothetical "playoff," then these harms to competitors could be avoided. That argument fails because it starts from the wrong baseline. When antitrust law looks at whether output has been restricted and consumers injured, it does not measure that putative harm by comparing the challenged agreement to some hypothetical world that (a) has never existed and (b) would not exist but for a different and more restrictive form of cooperation between the parties to the challenged agreement. Rather, antitrust law measures output restriction by comparing what exists under the challenged agreement versus what would exist in the absence of the challenged agreement - that is, in a world in which the parties to the challenged agreement did not cooperate but competed against one another. In college football, we do not have to guess what the post-season would look like in the absence of the BCS; we know. We would return to the old bowl system. Any antitrust argument, therefore, that is built on the contention that the alternative to the BCS is a playoff system or some other post-season arrangement other than the old bowl system rests on a demonstrably false assumption.

1. The BCS Enhances "Access" to the BCS Bowls to the Mountain West and to Every Conference without an Annual Automatic Berth.

With the proper analytical baseline, it is clear that the claim that any conference without an annual automatic berth is "excluded" from a BCS bowl or denied fair opportunity to compete for the national championship is incorrect. Prior to the formation of the BCS and its predecessor

arrangements, each college football conference competed with the others for bowl slots for their respective champions and other teams.

Absent the BCS, the five conferences without annual automatic berths would seek the best bowl arrangements that they could make on their own. There is no market evidence that any of the current BCS bowls would jettison their current host teams to take the Mountain West champion or the champion from any other league without an annual automatic berth. In fact, if any one of those bowls wanted to have a champion from one of those leagues on an annual basis, it could either demand such team as part of the arrangement or select such a team each year with one of its at-large picks. The fact that no bowl has done so is further market evidence that those conferences are not being denied BCS bowl berths that would otherwise come their way.

Teams in those five conferences are, in essence, "free agents." They are able to participate in a BCS bowl when selected or when they qualify for an automatic berth, but they also have the opportunity to contract with any of the 29 other bowls games that are not part of the BCS for a host arrangement for their respective champions. Presumably those conferences seek such bowl arrangements aggressively and do their best to obtain the most attractive and lucrative bowl arrangements for their teams.

In other words, they compete as every other conference for bowl berths. Under the antitrust laws, the courts are likely to view the bowl affiliation contracts that they make for their champions outside the BCS arrangement as the best that they can arrange. For the Mountain West Conference, the best alternative bowl arrangement is the Las Vegas Bowl. Without the BCS, Utah, the Mountain West champion last year, would have presumably played in Las Vegas Bowl because that is what its conference contracted for it to do. Thus, the BCS has not "excluded" the Mountain West champion from any bowl game; it has offered the Mountain West an enhanced opportunity. It guarantees to the Mountain West and to every other conference without an annual automatic berth an opportunity to play in a bowl game that it would not otherwise have.

The "exclusion" argument is usually coupled with an attack on the guaranteed slots in BCS bowls for six conference champions. This argument also fails because those slots are necessary if the BCS is to exist at all. Each of the conferences with a host arrangement in a BCS bowl would be able to get such a slot or a comparable one on its own. None of those conferences is going to forego such an arrangement to make the BCS possible unless it gets from the BCS at least what it could obtain without the BCS. Furthermore, the BCS bowls desire to have these teams host their games. These host arrangements give them teams with strong fan followings to anchor their games that are from conferences with records of historical achievement that offer some assurance to bowl patrons and regular ticket purchasers that the bowl is likely to have a highly ranked squad in its game annually. In short, without the guaranteed slots, there would be no BCS, no national championship game, and none of the additional guaranteed bowl opportunities that the arrangement creates for the five conferences without annual automatic berths.

The claim that the BCS agreement "excludes" certain conferences from the national championship game likewise has no basis in fact. There is only one standard for playing in the BCS National Championship Game: a team must be ranked first or second in the Final BCS Standings. The teams that do so play in the national championship game regardless of conference affiliation. In the absence of the BCS, of course, there is no BCS National Championship Game.

Instead, each bowl will compete to host the most attractive teams that it is able to get. Maybe a bowl will be able to pair the top two teams periodically; the historical track record, however, is not promising.

Certainly, there is no guarantee of such a game. In any event, without the BCS, the national champion will be crowned solely by the polls. Indeed, an undefeated team, such as Utah this year, could finish second in the nation in the polls after the regular season, win its bowl game, and still not win the national championship because another team that ranked first in the polls after the regular season played in a different bowl game and also won. There is no evidence of which I am aware that would show that the old bowl system without the BCS would enhance the possibility of a team in one of the five conferences winning a national championship, and certainly the Mountain West, for all of its recent criticism of the BCS, has not suggested a return to that structure.

2. The Revenue Distribution to the Five Conferences Vastly Exceeds What They Would Get in the Absence of the BCS.

The second anticompetitive effect asserted by BCS critics is the alleged disparate revenue distribution. According to the critics, because the BCS revenues are not divided equally, certain conferences and institutions cannot compete as effectively as others. As the "access" discussion demonstrates, none of the five conferences without annual automatic berths would earn from the bowl system the revenues that are available to them today from the BCS. Since they could not obtain these revenues on their own, the BCS revenue distribution is not a detriment to them but a subsidy.

From an antitrust perspective, however, the revenue distribution argument is irrelevant. As Judge Frank Easterbrook has pointed out, a "claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up." Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994). The issue, again, is output. Unless the BCS arrangement restricts marketwide output, there is no antitrust violation. The revenue distribution arrangements within a joint venture arrangement, such as the BCS, have no effect whatsoever on market output. The revenue derived from the BCS reflects the income of the arrangement. Either the arrangement is lawful, in which case the revenue distribution among members of the venture is of no consequence under antitrust law, or it is not. If it is not, the remedy is to enjoin the arrangement in the first instance, and there will be no revenue whatsoever to divide.

D. No Antitrust Remedy Can Improve the Market Position of Any of the Conferences that are the Focus of this Hearing.

Finally, even if one were to concede everything that the BCS's antitrust critics assert and assume a violation, that avails them nothing. At the end of the day, the remedy for a violation of section 1 of the Sherman Act is an injunction against the challenged agreement. Thus, even if the BCS were found unlawful, the only remedy a court would impose would be to prohibit the agreement on a going-forward basis. There could conceivably be treble damages remedies available to parties harmed in their business or property by the arrangement, but for the reasons that I have already mentioned, none of the five conferences would fall into that category because they have,

in fact, benefited financially from the arrangement. The harmed parties from a damages perspective could only be the BCS bowls and television networks, none of whom are complaining about the arrangement. Indeed, they all want to be a part of it.

But assuming for the sake of argument that the BCS were declared unlawful, what would the complaining side get? Certainly, the BCS arrangement would cease. The agreement creating it would be enjoined. But no court is going to create a playoff system or some other alternative post-season arrangement out of whole cloth. With rare exception, injunctions are prohibitory, not mandatory. They halt unlawful conduct but rarely mandate different conduct.

Furthermore, antitrust courts do not sit as super-regulators or as public utility commissions drafting contracts for parties, determining the structure of the post-season (including the selection procedures, automatic qualification provisions, and the like), establishing venues for the games, negotiating telecasting and other media arrangements, allocating costs and parceling out profits, if any, ordering teams and conferences to participate in the judicially-created arrangement, and then enforcing all of this handiwork. That is not the function of antitrust courts but of central planners. The Supreme Court has twice in the last several years admonished the lower courts to avoid such judicial misadventures.
Concerns about such an effort would not be rooted solely in the antitrust laws. To be sure, nothing in the federal antitrust laws grants the authority for such broad mandatory injunctive remedies.

ut more significant problems exist. The effect of a judicial decree attempting to create a playoff or some other alternative post-season structure and to enforce compliance with it, although nominally directed against conferences, would in actual effect operate directly against universities. After all, universities, not conferences, field football teams. Most institutions in the NCAA Football Bowl Subdivision are state universities. States are not "persons" under the Sherman Act, and even if they were, a federal antitrust decree with mandatory conduct requirements enforceable under penalty of contempt directly against state institutions would raise significant constitutional issues.
So what would be the end result? Even if an antitrust plaintiff filed a case against the BCS arrangement, spent millions of dollars and several years litigating these numerous issues, overcame the substantial factual and legal hurdles that I have described, and ultimately prevailed, the prize for those Herculean efforts would be a return to the old bowl system in which every conference negotiates bowl arrangements for itself. For BCS critics, that would have to rank as one of the greatest pyrrhic victories in the history of antitrust litigation.

Let me address one other point on this matter. I have heard certain BCS critics claim that an injunction against the BCS might indeed worsen the lot of the five conferences without annual automatic berths, but that it may impel all conferences to create a playoff system to replace it. That I suggest to you is sheer folly.

The BCS is a very mild form of cooperation. It does not harm television networks or bowls and does not upset traditional conference-bowl relationships. It is not restrictive in the least. But if it were declared unlawful, it is very difficult to conceive of how a playoff system that requires cooperation among exactly the same conferences and institutions that have exactly the same market power could possibly survive antitrust scrutiny. A playoff would surely have a

detrimental effect on the bowls, which are the immediate "consumers" of the teams, and the antitrust peril to a playoff in a world in which the BCS had been declared unlawful would be greater than the BCS faces today. In my view, no antitrust counselor would advise his or her client that the endeavor was risk-free. Instead, he or she would likely advise that the playoff was an invitation to private litigation from any injured or defunct bowls and perhaps from television networks as well.

This concern is grounded in real-world experience. The NCAA faced exactly such a claim with respect to the basketball tournament from the former operators of the National Invitational Tournament ("NIT"). The NIT brought an antitrust claim against the NCAA alleging that the Association's rule mandating that teams play in the NCAA basketball tournament when invited violated the Sherman Act. The claim survived a motion for summary judgment, at which point the NCAA settled the case by purchasing the NIT for a reported $57 million. See Metropolitan Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545 (S.D.N.Y. 2004). The bowls would be in the exact same position as the NIT in a case against a football playoff.

In other words, that litigation playbook has already been written. But unlike the NIT case in which the NCAA faced suit from only one tournament operator, there are more than 20 bowl organizations in college football, each of whom might potentially have a claim. I doubt that any institution, conference, or group of conferences would have the stomach for multiple antitrust cases challenging a playoff in a legal environment in which the BCS has been enjoined. But even if I were wrong about that, if even one bowl could prevail on such a challenge, the central features that would make a playoff system workable would almost certainly be enjoined. In short, an adverse antitrust judgment against the BCS may well sound the death knell for a college football playoff regardless of the educational or institutional reasons that underlie why most university presidents oppose such a radical restructuring of the post¬season today. When that is understood, antitrust criticism of the BCS from those who supposedly favor the interests of the conferences without annual automatic berths, with all due respect, makes no athletic or economic sense.

Once again, Mr. Chairman, Senator Hatch and members of the Subcommittee, thank you for the honor of permitting me to address these matters today. I look forward to answering any questions that may arise.