



**Testimony of Jack Swarbrick  
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**Before the U.S. Senate Judiciary Committee**

**October 17, 2023**

Thank you, Chairman Durbin, Ranking Member Graham, and distinguished Members of the committee.

I am honored to represent the first university in the country to call for the NCAA to eliminate its prohibition on the ability of student-athletes to benefit from the value of their name, image, likeness, and ideas. When Notre Dame's President John I. Jenkins advanced that argument in a 2015 interview with *The New York Times*, his rationale for doing so was clear; it is a principle that lies at the heart of Notre Dame's approach to collegiate athletics. We believe student-athletes are first and foremost students. And because we do, we believe anytime a rule is made or a policy developed that draws a distinction between a student-athlete and his or her fellow students, the rationale for doing so must be compelling. Denying students-athletes the rights enjoyed by all other students to exploit their name, image, likeness or idea under some misguided pursuit of competitive equity did not pass that test.

This principle of normalizing the experience of the student-athlete against the experience of other students is central to Notre Dame's approach to college athletics. It is why the decision to admit a student-athlete rests exclusively with our university's admissions office, and it is why our student-athletes live in our residence halls, dine in our student cafeterias, and take the same courses as all other students.

Similarly, we also firmly support comprehensive care and protections for our nation's student-athletes. Notre Dame takes very seriously its commitment to our student-athletes, and ensuring their long term well-being and success, to include degree completion and increased medical support.

## THE STATUS OF THE STUDENT-ATHLETE

This notion of athletics, and the athletes who participate in them, being integrated fully into the college or university is at the heart of the uniquely American model that is intercollegiate athletics. Virtually everywhere else in the world, elite athletic activity for 18-24 year-olds is conducted in private or state-sponsored club systems. The consequence of America's unique approach has been extraordinary. It has made possible the education of many first-generation students, helped to lead the integration of America's colleges and universities, fostered an unprecedented growth in women's sports, and largely underwritten the country's Olympic success.

We recognize that not all colleges and universities are equally committed to this model of the athlete as student – a reality that has been reinforced by institutions where transactions that are being characterized as NIL arrangements might best be classified as talent acquisition deals. And because they are not, these deals and relationships have led to a host of legislative, administrative, and litigation efforts to declare student-athletes as employees. This, we would respectfully submit, is the place ***where Congressional intervention is most needed – to resolve, once and for all, the status of student-athletes as students rather than employees.***

Why is this issue so important to Notre Dame and other colleges and universities that choose to pursue a similar commitment to the student-athlete model? The answer lies first and foremost in the preference of our student-athletes. This is not just a matter of asking our student-athletes what they prefer, which we have. It is about knowing that our recruiting and admissions processes ask students to affirmatively commit to a model that requires full participation in the university, in the same manner as all students who choose Notre Dame.

It is important to note, there are sports like baseball and hockey that offer all students a version of this choice, in that talented athletes may elect to go directly to the professional ranks out of high school rather than continuing to pursue their sport in college. Perhaps that is the reason why the legal efforts to reclassify student-athletes as employees elect not to focus on these sports. Professional sports team rules should not undermine the commitment Notre Dame has to its students. The fact that the NBA's eligibility rules may force individuals who have little interest in being students to nevertheless enroll in college for a year or that the NFL offers no alternative to college (relying instead on America's colleges and universities to underwrite its player development function) are not reasons to require Notre Dame to abandon its model.

Notre Dame treats its students who participate in varsity athletics as students, not employees. And those individuals view themselves as students. But the risk that an administrative agency, legislative body, or court will rule otherwise has become so significant that we believe federal legislation is necessary to protect the traditional model of college athletics and the student status of our student-athletes that is at the core of that model.

In arguing that student-athletes are first and foremost students, we do not mean to be understood as arguing that the unique experiences of student-athletes should not be recognized. Just as student-athletes should never have been excluded from the benefits afforded other students in terms of name, image, likeness, and idea rights or the benefits available to other students as part of scholarships offered by a university (e.g. full cost of attendance), there are differences between students and student-athletes that should be recognized. For example, student-athletes that participate in sports like hockey, lacrosse, and football may face risk of long-term medical issues that ought to be able to be covered by the college or university after the student-athlete has graduated. Similarly, grant-in-aid student-athletes who leave school early to pursue professional sport opportunities ought to have the assurance that their scholarship will be honored if they return to school. ***Ultimately, we need to foster a system that supports and protects student-athletes.***

## **STATE PREEMPTION**

State legislative incursions into the structure of college athletics, especially with regard to state laws attempting to limit the authority of the NCAA and to regulate NIL transactions, are increasingly prevalent. Given that intercollegiate athletic competition largely involves interstate commerce, these state efforts are especially disruptive and inappropriate. For that reason, ***we believe it is reasonable to also request that Congress exercise its authority to preempt state legislatures when it comes to the regulation of college athletics.***

## **FUTURE REGULATION OF COLLEGIATE ATHLETICS**

Notre Dame's final request of Congress is the most far reaching. In order to be fair to participants and of interest to fans, athletic competition requires some measure of competitive equity. That is why youth and scholastic sport organizations have strict age and residential rules. Professional sports employ player entry drafts, salary caps, transfer fees, luxury taxes, limitations on free agency, and a host of other devices designed to ensure a level playing field, regardless of market size. These rules allow the players and fans of teams like the Milwaukee Bucks, Kansas City Chiefs, and Tampa Bay Devil Rays know that it is possible to win a championship.

The lone exception to this fundamental principle of athletic competition is American collegiate sports. Virtually every effort to create even modest degrees of competitive equity – efforts that typically involve attempting to limit the amount that colleges and universities can spend to field a team – have run afoul of the country's antitrust laws. The NCAA's "greatest hits" of misguided attempts in this regard include: the attempt to regulate the sale of broadcast rights; a restriction on how much a certain class of coaches could earn; and, limitations on what could be included in an athletic scholarship.

Currently, collegiate sports are unable to create rules for competitive equity like those employed elsewhere simply because enterprises sponsoring the competition are colleges and universities

and the participants are students. They are not entities organized for the purpose of conducting sporting events, and the participants are not merely competitors.

The response to this dilemma, for some, is to argue the solution lies in designating student-athletes as employees in order to deliver an acceptable measure of competitive equity. Ignoring, for the moment, the challenge of negotiating across a competitive landscape that involves individual schools, ever-shifting conferences, and the NCAA, the potential for traditional collective bargaining to solve rule-making challenges is not a basis to justify calling students something they are not, namely employees.

There are at least two alternatives to a traditional collective bargaining approach. First, is to authorize the NCAA to adopt rules and regulations reasonably related to producing an acceptable measure of competitive equity, such standards that: govern the conduct of competition; squad size (including number of student-athletes, coaches, and support staff); participant eligibility; season-length; practice time; and, postseason format and selection. As part of this approach, Congress could require significantly greater involvement of student-athletes in the governance of the NCAA.

The second, admittedly more radical approach, would be to craft legislation articulating the rights of student-athletes, including the right to negotiate with the conferences in which they compete over the terms and conditions of their athletic participation. Such an approach would protect the rights of student-athletes while also preserving their essential status as students, first.

## **COLLEGE ATHLETICS IS IN CRISIS**

College athletics are a treasured national institution, and our student-athletes are worth fighting for. Without action, we risk losing one of our nation's strongest college scholarship programs, eliminating opportunities for many to partake in a collegiate atmosphere, and eroding America's cherished Olympic sports model.

Most importantly, without action, America's student-athletes will surely suffer. Greater support to our country's student-athletes must be pursued. Several Members of this committee have advanced legislative proposals that do just that. Notre Dame welcomes and supports your continued leadership on these fronts, to include the incorporation of evidence-based health, safety and wellness standards; sustained attention on improved educational outcomes and opportunities; and, longer term medical and scholarship assurances.

We call on universities to reaffirm that student-athletes are students first, and to ensure their athletic programs serve the schools' broader educational mission, not the other way around. We call on the NCAA and athletic conferences to set policies that support that goal. And we urge Congress to protect the NCAA's ability to regulate the competition for new players to ensure it remains fair and above board.