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American athletics and the law : the sports triangle

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Dr. John W. Outland, Sponsor

Brian Michael Sheahan

Independent Study

April 21, 1983

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Student writing book

By Steve Dear
Staff Writer

When you read the sports pages these days you have to know how laws affect athletics, according to senior Brian Sheahan, who is writing a book to prove his point.

The book, to be entitled "American Athletics and the Law: The Sports Triangle," will be composed of six chapters totaling more than 300 pages, he said.

In the fall of 1982 the political science department challenged Sheahan to do an extensive independent study on the influence of Congress and the courts on athletics, he said.

Sheahan now spends 40 hours a week in the library doing research and writing, he said. So far he has written four chapters.

The first chapter, Sheahan said, deals with the fact that scholarship athletes should be considered employees of their universities in part because they draw large crowd to games and make more money for their schools.

Another chapter deals with the

influence politics has on the Olympics. Governments, Sheahan said, have been using amateur athletes for political purposes.

"Being a former athlete, I don't like to see athletes used as pawns in the game of international politics," he said.

A political science major, Sheahan came to the University of Richmond on a basketball scholarship but cannot play on the team because of a heart problem, he said.

For the past two years, though, he has been assisting with the basketball team and is academic advisor this year. He has maintained a 4.0 GPA throughout his years at UR, he said.

A third chapter deals with the lack of equal opportunities for women in college athletics, Sheahan said. A 1972 law prohibits discrimination by colleges against athletes on the basis of sex. But, he said, colleges still grant unequal proportions of athletic scholarships to men and women.

Professional baseball, another chapter topic, is the only sport



photo by Leesa Graff

Brian Sheahan

which is exempt from antitrust laws, Sheahan said. Traditionally, baseball has not been regulated by federal laws and because of that it has been exempt. The players do not complain, Sheahan said, because they have been making huge salaries in recent years.

Sheahan plans on finishing the book by the end of the semester. But, he said, he will not try to get it published yet.

He wants to go to law school and after that he will "polish it [the book] up" and try to get it published and use it to get a doctorate. Sheahan said he wants to be a sports lawyer and represent teams.

Quest computes 'perfect' matches

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Department of Political Science

14. March 1984

MEMO TO: John T. Whelan, Chair, Faculty Library Committee
FROM: John W. Outland, Dept. of Political Science
RE: James Jackson Award

I am submitting, for your committee's consideration for the first James Jackson Award for Excellence in Library Research, chapter four of Brian Sheahan's anticipated 300-page plus study on American Athletics and the Law: The Sports Triangle. The entire manuscript is, of course, available to the committee if so desired; however, I feel chapter four is a representative sample of the quality of Brian's work and, in particular, exemplifies his broad and effective employment of library resources. Brian cites and makes use of court cases, congressional hearings, newspaper editorials, a cross-section of law and professional journals, and more standard secondary sources. Clearly he knows how to research a topic.

Brian's overall project has to do with what he calls "The Sports Triangle," that is, the interrelationships among competition, legislation, and litigation when it comes to the regulation of American Athletics. Particular chapters (other than chapter four) deal with such topics as the relationship of the scholar athlete to the university (i.e. Employer - employee?), baseball's peculiar anti-trust status, the positive and negative effects of Title IX of the Education Amendments of 1972, the dispute over who possesses broadcasting rights to college athletic events (i.e. the NCAA or the individual institutions), etc..

Needless to say I am most impressed with Brian's work. We've seldom had a project of this magnitude in Political Science. Also, knowing Jim Jackson as I did (including his interest in sports), I am sure that he too would be immensely pleased with Brian's accomplishments.

JWO:hh
encl.

INTRODUCTION:

Colleges and universities regularly award scholarships to outstanding young athletes. The standard financial aid agreement between the institution and the athlete is that in return for the athlete's active participation in the particular sport, he or she receives free tuition, room, board and books.

In addition to the educational and athletic involvements, the giving of financial aid has numerous implications on the relationship between the college or university and the athlete. Foremost among those implications, is the potential legal entanglement under the law of workmen's compensation.

The major questions which are in front of the courts today in conjunction with such legal entanglements are: 1) whether scholarship athletes are employees of the institution; 2) whether athletic grant-in-aid, conditioned upon athletic ability and participation, creates an employment relationship; and 3) whether an injured scholarship athlete is entitled to receive benefits under the various states' workmen's compensation acts.

Recently, the supreme court of Indiana was faced with these questions in the case of Fred W. Rensing v Indiana State University Board of Trustees.¹

Rensing was a scholarship football player at Indiana State University. On April 24, 1976 he was taking part in the team's spring practice when he tackled a teammate during a punt coverage drill. Upon impact, Rensing suffered a fractural dislocation of the cervical spine at the level of 4-5 vertebrae. He was rendered a quadriplegic as a result of the injury.

On August 22, 1977 Rensing filed a claim for workmen's compensation from the school's Board of Trustees through the full Industrial Board of Indiana. His claim was for recovery for permanent total disability as well as for medical and hospital expenses incurred due to the injury.

The Industrial Board rejected the claim on the grounds that an employer-employee relationship did not exist between the athlete and the institution. As a result, the Board ruled that he was not entitled to benefits under Indiana's Workmen's Compensation Act, Ind. Code 22-3-1-1 et. seq.

Rensing then appealed the Industrial Board's decision to the Fourth District Court of Appeals.² That Court reversed the Industrial Board's decision by holding that a scholarship athlete is indeed an employee protected under Indiana's Workmen's Compensation Act. Therefore, remedies under the statute are available for Rensing's injury since it was incurred during participation in football practice.

However, the Supreme Court of Indiana, on February 9, 1983, overruled the lower Court in finding that a contract of employment did not in fact exist between the athlete and the institution.

It is the objective of this chapter to determine whether the financial aid agreement between the student-athlete and the institution constitutes an employment relationship. If so, is an injured athlete ~~therefore~~ eligible to receive workmen's compensation?

In determining these questions, opinions from three related workmen's compensation cases are examined. Also analyzed are opinions from; scholarship athletes, college coaches, university professors, panelists from the "Law and Amateur Sports II" seminar, related scholarly materials, and the contrasting opinions of the two Courts in Rensing.

RELATED WORKMEN'S COMPENSATION CASES:

As far back as the early 1950's, the notion of college athletes as employees of the university has been argued in the courts. In University of Denver v Nemeth,³ a student-athlete was employed by the University as the manager of its tennis courts.⁴ "His continued employment depended on the quality of his performance in football."

Nemeth suffered an injury during spring football practice. Like Rensing, he

filed a claim for workmen's compensation. Nemeth differs from Rensing, though, in that he was not on scholarship. Nonetheless, he "had been hired by contract to perform on campus and was required to play football as an incident to that work." As a result, the court ruled that a contract existed requiring that the University employ Nemeth as long as he participated on the football team. In fact, one witness testified that, "the man who produced in football would get the meals and the job."

Thus, his injury was ruled to have been an incident of his employment "even if perhaps not in the course of employment." The State Supreme Court, therefore, affirmed the Industrial Commission award as compensable under the Colorado Workmen's Compensation Act.

It is important to note that although the student athlete was granted workmen's compensation, this is not a case involving an employment relationship through the signing of the familiar grant-in-aid scholarship.

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The Colorado Supreme Court once again addressed this issue concerning workmen's compensation in 1957. State Compensation Insurance Fund v Industrial Commission, involves the question of whether death benefits should be awarded to the widow of a scholarship athlete who was fatally injured while participating in a football game.

A student was induced to give up his part-time job in order to play football at Ft. Lewis A & M College. The young athlete consented after the coach arranged for an athletic scholarship covering his tuition. In addition, another part-time job was lined up for the athlete which would not conflict with his participation in football.

The Colorado State Supreme Court felt that "since the student was already enrolled [at Ft. Lewis], there was no inducement in connection with football either

in the job or for enrollment." Therefore, his scholarship and part-time job were not to be regarded as contingent upon his athletic ability or participation on the football team.

As a result of the Court's contention that no contract existed, the compensation claim was discharged. In essence, the Court decided that "since the evidence does not disclose any contractual obligation to play football, the employer-employee relationship does not exist and there is no contract which supports a claim for compensation under the [Colorado Workmen's Compensation Act]."¹⁰

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An athlete was killed in a plane crash while returning with his team from a regularly scheduled football game. The question before the Court in this case, (Van Horn v Industrial Accident Commission)¹¹, was whether the athlete had been an employee of the college within the meaning of the California Workmen's Compensation Act.

The Court emphasized the fact that, "the coach had told the player that if he would . . . [play] football, he would receive \$50 dollars each quarter plus rent money during the football season."¹² Therefore, there was a significant relationship between the athlete's receiving aid for his athletic abilities and participation. This, in essence, constituted a contract of employment.

As a result, the Court ruled that the widow and children of the deceased athlete were entitled to workmen's compensation death benefits. In its ruling on behalf of the athlete's dependents, the Court noted that, "[t]he only inference to be drawn from the evidence is that the descendant received the 'scholarship' because of his athletic prowess and participation. The form of remuneration is immaterial. A Court will look through form to determine whether consideration has been paid for services."¹³

This decision appears to open a "Pandora's box" for future workmen's compensation cases. However, the Court carefully limited its decision "to the facts in question and specifically noted that not all athletes who receive scholarships would

be considered as employees of the donor institutions." ¹⁴

* * *

In comparing these three cases with the Rensing case, one notes obvious differences. In Nemeth and Van Horn, both received a non-athletic job in return for his football prowess and participation. Rensing was given no such benefit. Likewise, Rensing only sought "recovery for permanent total disability as well as medical and hospital expenses incurred due to his injury." ¹⁵ Yet, the State Compensation Insurance Fund and Van Horn cases involved claims for death benefits.

However, these cases are important to examine because similarities can be drawn between them and the Rensing case. As noted by the Fourth District Court of Appeals, "in all three cases the 'student-athlete' received benefits from a university solely because of his athletic ability and participation on a football team. . . . [Likewise], the benefits received by Rensing were conditioned upon his athletic ability and team participation." ¹⁶

Although it is difficult to find a consistent view of the athlete-institution relationship through these Court decisions, a general rule may be made. "[A] college or university athlete will not be considered an employee simply because he or she is the recipient of an athletic scholarship or grant-in-aid. Where, however, the performance of athletic services is the quid pro quo for the scholarship or grant-in-aid award, the athlete will be an employee for purposes of workmen's compensation coverage." ¹⁷

TWO PERSPECTIVES ON COLLEGE ATHLETICS:

One of the most difficult aspects of sports law, is determining "whether the relationship between an athlete who receives financial aid and the college or university which grants it, is gratuitous or contractual." ¹⁸ What ~~makes~~ ^{aggravates} the problem of resolving this issue - and the related issue of determining the existence of an

employer-employee relationship within the bounds of workmen's compensation - is the lack of a consistent definition of "amateur" athletics.

In the cases already described, the Court has had to decide how "to characterize the relationship between a student-athlete and the institution that provides him or her with financial support." ¹⁹ This is because "the relationship can be viewed from ²⁰ either of two separate perspectives."

The first perspective is the traditional academic relationship whereby athletics are merely a part of the institution's educational program. As a result, the financial aid which is granted to the student-athlete, is seen solely as a vehicle for defraying the athlete's cost of an education.

The Supreme Court of Indiana unquestionably took this traditional perspective in the Rensing case. In his opinion of the Court, Justice Hunter emphasized that, "[t]he fundamental concerns behind the policies of the NCAA are that intercollegiate athletics must be maintained as a part of the educational program and student-athletes are integral parts of the institution's student body. An athlete receiving ²¹ financial aid is still first and foremost a student."

David Abrams was one of the panelists at the "Law and Amateur Sports II" seminar sponsored by the Indiana University School of Law. In the late 1970's, Abrams was a standout defensive back for the Indiana University football team. He describes his relationship with the University from this traditional perspective:

"The University used me for my football playing abilities. I knew that, and I accepted that. On the flip side of the coin, however, I looked at it this way: If I don't use them equally, then I'm going to be the one who loses in the deal. If I don't use every educational opportunity made available, what started out as a fair and equitable agreement ends up being very one-sided in the university's favor." ^{Fodwite}

What is noteworthy about Abrams' remarks, is that he accepted the fact that the University was going to make the most of his athletic prowess. Irregardless, he

was more concerned with taking advantage of the numerous educational opportunities the University could offer him in return for playing football.

That is the traditional perspective on college athletics - using the athletic scholarship as a means ~~to~~ receiving a college education.

* * *

While the first perspective is the one which educators would most like to see prevail, there are many critics who see it as being too idealistic. While it would be refreshing if athletes receiving financial aid were in fact students, first and foremost, that is simply not the case in a great many situations. The reason for this untraditional commentary, is that college athletic departments have become businesses (and in many cases very big and profitable businesses).

The proponents of this "college athletics as a business" perspective, do not view the athlete-institution relationship as merely using athletic participation as a vehicle to receiving a "free" education. Instead, they view it as a contractual arrangement in which the university receives the benefits of the athlete's talents in exchange for financial support given to the scholar-athlete. Therefore, athletics is not merely a part of the overall educational process. Rather, college athletics is a part of the overall business activities conducted by the institution.

22

The Court of Appeals took this perspective in its sympathetic decision for Rensing. Presiding Judge Miller made these observations in his opinion for the Court:

"It is manifest from the record in this case at bar that maintaining a football team is an important aspect of the University's overall business or profession of educating students, even if it may not be said such athletic endeavors themselves are the University's 'principal' occupation. . . .we believe football competition must properly be viewed as an aspect of the University's overall occupation."

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Ronald J. Waicukauski, Law Professor at the Indiana University School of Law, also sees the athlete-institution relationship in contractual terms. He notes that there are numerous specific terms set forth by the NCAA, a school's athletic conference, and/or the individual institution. These terms are defined in such contracts as the tender of financial aid,²⁴ the national letter of intent,²⁵ and other grant-in-aid documents. As a result, Prof. Waicukauski feels that, "the implications of all these terms is that there is a contractual agreement between the scholarship athlete and the institution through the financial aid agreements."

Prof. Waicukauski feels that this contractual relationship is very straightforward. He sees it as "an exchange, a transaction upon which both parties are bound. The exchange is for the services of the athlete for the reciprocal promise of the University to provide educational services to the athlete."

Even Abrams acknowledges that there is a contractual relationship within the business perspective of collegiate athletics. He recollected on the signing of his financial aid agreement with Indiana University in this way:

"When I signed the grant-in-aid . . . I felt that I was making a contract with the University. Basically it went like this: they made me an offer to provide me with a college education in return for my playing football for Indiana."

One of the most significant court cases in this area took place in 1972. In Taylor v Wake Forest University,²⁶ the Court characterized the athlete-institution relationship in the same perspective as enunciated by Prof. Waicukauski and Abrams.

Taylor quit playing football for the Demon Deacons because of low grades. Wake Forest responded by revoking his scholarship. However, the student-athlete sued the school because the financial aid agreement that he signed was for four years.²⁷ The Court for the first time ruled that athletic scholarships are indeed contracts. Nonetheless, the Court denied Taylor's suit because he was not "maintaining his athletic eligibility . . . both physically and scholastically."²⁸

Therefore, he was unable to receive damages since he "was not complying with his contractual agreement."²⁹

In addition to the contractual relationship within the business perspective, there are many who feel that college athletics have taken on an overtly professional perspective. They see university athletic departments as not only businesses, but as professional sports entities.

Allen Sack is a Professor of Sociology at the University of New Haven. In addition to his duties as an educator, Sack is Executive Director of the Center for Athlete's Rights and Education (CARE). He sums up this professional/business perspective in this statement: "Ninety per cent of the problems that we have in college sports today are related to the fact that we are imposing an amateur label on what is obviously an overt mass commercial entertainment business."^{Note}

When asked to respond to the decision of the Supreme Court of Indiana in the Rensing case, Prof. Sack said, "I see the Rensing decision as a major setback for athletes' rights."^{Note}

However, not all courts are unable to break from the traditional perspective. In fact, a Minnesota Court in two separate cases, a decade apart, has made these remarks about college athletics quite in line with the professional/business perspective. In Behagen v Intercollegiate Conference of Faculty Representatives,³⁰ the Court observed that:

"In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial note of the fact that to many, the chance to display their athletic prowess in college stadiums and arena throughout the country is more in economic terms than the chance to get a college education."³¹

Then, in Hall v University of Minnesota,³² the Court declared that:

"The bachelor of arts, while a mark of achievement and distinction, does

not in and of itself assure the applicant a means of earning a living. . . . His basketball career will be little affected by the absence or presence of a bachelor of arts degree. This plaintiff has put all of his 'eggs' into the 'basket' of professional basketball. The plaintiff would suffer a substantial loss if his career objectives were im-
33
paired."

What is significant about these remarks, although the cases were not involved with workmen's compensation specifically, is that the Courts are willing to look at disputes involving collegiate athletes and the institution from the perspective that participation in intercollegiate athletics has many professional and business oriented characteristics. Also of importance is the fact that the judiciary, like the educators and sports participants, is split between the two perspectives on college athletics.

As a result of the two substantially opposing perspectives on college athletics, it will be up to the courts to settle the disputes. However, before the judicial branch can come to grips with this problem, it must decide which perspective it is to use in order to consistently characterize the relationship between a scholarship athlete and the university. Only then will the Courts be able to resolve the issue of whether an employer-employee relationship exists between an institution and the scholarship athlete under the laws of workmen's compensation.

THE GRANTING OF SCHOLARSHIPS AND THE EMPLOYER-EMPLOYEE RELATIONSHIP:

The key question in this area is whether a financial aid agreement between a student-athlete and an educational institution establishes an employer-employee relationship. Such a relationship is required for an injured scholarship athlete to be eligible to receive benefits under workmen's compensation.

In other words, "workmen's compensation benefits in most jurisdictions are available to 'employees', so that a claimant must prove that he or she is an em-

ployee, and not an independent contractor, or person of other status, who is excluded from coverage." ³⁴ As a result, the Courts are faced with analyzing whether the injured scholarship athlete proves his or her employment.

In the Rensing case, the analysis of the lower Court was that the athlete sufficiently proved that he "and the Trustees bargained for an exchange in the manner of employer and employee of Rensing's football talents for certain scholarship benefits." ³⁵ However, the State Supreme Court overruled the lower Court on the grounds that, "the appellant shall be considered only as a student-athlete and not as an employee within the meaning of the Workmen's Compensation Act." ³⁶

Justice Hunter noted three reasons why an employer-employee relationship did not exist in the Rensing case: 1) "There was no intent to enter into an employee-employer relationship at the time the parties entered into the agreement." ³⁷ ; 2) "Rensing did not receive 'pay' for playing football at the University within the meaning of the Workmen's Compensation Act." ³⁸ ; 3) "Rensing's benefits could not be reduced or withdrawn because of his athletic ability or his contribution to the team's success. Thus, the ordinary employer's right to discharge on the basis of performance was also missing." ³⁹

Although the State Supreme Court's decision is persuasively written, there are many, like Prof. Waicukauski, who feel that "the decision is subject to some criticism." Likewise, author Harry M. Cross notes that "even when the institution takes steps to insure that its academic interests in its student-athletes is not perverted, critics will raise the issue of whether the athlete is not more appropriately regarded as an employee of the school." ⁴⁰ It is, therefore, important to note the critics' rebuttals to the three reasons the Supreme Court of Indiana denied Rensing his claim for workmen's compensation.

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With regard to the intent behind the award of financial aid in college athletics, the following Court opinion is of note: "The motivation behind [the]

aid is . . . at least sometimes, an effort to induce a good athlete to attend a particular school in order to be of assistance to the athletic program." ⁴¹

Indeed, many scholarship athletes feel that the University intended for them to come to their school for the express purpose of assisting their inter-collegiate teams much like an employer hires someone to assist in the operation of their business. Abrams says that, "the main reason Indiana sought me was for my football playing abilities. I can't think of any other reason why the University wanted me." Likewise, Ron Everhart feels that he was recruited to play basketball at Virginia Tech in a similar manner that corporations recruit possible employees. He feels that, "at a major college, sports is a business, not merely a game. As a result, the players on scholarship are like employees, not merely student-athletes."

Therefore, it is important to realize that while the University Trustees and administrators might argue that they do not intend to enter into an employment relationship, the reality of the situation is that the scholarship athletes often feel that they have indeed entered into one. As Prof. Sack puts it, "How can you have a business without employees? Sure they are student-athletes; but are they not employees also?"

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The second area in which the critics disagree with Justice Hunter's opinion, is the question of "pay." They feel that the benefits derived from an athletic scholarship are similar to other forms of remuneration which are protected under workmen's compensation.

Prof. Waicukauski says that, "the decision based on pay is not fairly reflective of prior decisions which do establish that when you give benefits (and in this case we are talking about benefits worth \$2000 - \$3000), regardless of whether you give cash or in some other form such as room, board, tuition and books . . . that constitutes pay."

Although the NCAA does not regard financial aid or any other authorized expense as pay, "athletically-related financial aid is viewed by some as mere 'pay', and the recipient, therefore, is an employee."⁴² Everhart feels that, "I'm getting paid to play basketball with my scholarship. However, it's not nearly enough compensation for what scholarship athletes have to go through."

Numerous other scholar-athletes feel the same way, although many do not go as far as to claim they are being undercompensated. Andrew Heher, scholarship basketball player at the University of Richmond, believes that, "I am a professional athlete by virtue of the fact that I am being 'paid' over \$8000 a year (the value of a full scholarship at Richmond) for putting in 25-30 hours a week on behalf of the Spider basketball program. In other words, my education is being 'paid' for while I, at least indirectly, help the school make money off of the sale of basketball tickets and alumni contributions to the athletic department."^{Note}

If financial aid is to be viewed as "pay", can it be brought within the umbrella of benefits protected by workmen's compensation?

Although the State Supreme Court overruled the lower Court's decision in Rensing, it is important to note the reasoning of the Court of Appeals. Presiding Judge Miller noted that "any benefit, commonly the subject of pecuniary compensation, which one, not intending it as a gift, confers on another, who accepts it, is adequate foundation for a legally implied or created promise to render back its value."⁴³ Prof. Waicukauski agrees with this line of reasoning. He says that "for purposes of the Indiana Workmen's Compensation Laws, these benefits are almost consistently regarded as pay."

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The third reason the Court gave in deciding that an employment relationship did not exist in Rensing, was that the institution did not have the ordinary employer's right to discharge an employee on the basis of poor performance.

Abrams agrees with the State Supreme Court in this part of the decision. He did not see himself completely as being an employee because "the University could not take away my scholarship for poor performance. That is simply a key factor in determining whether a person is an employee."

However, many people associated with college athletics feel quite differently. Prof. Waicukauski thinks that the Rensing decision "disregards the reality of the relationship established between a student-athlete and an institution." In agreement is Prof. Sack. He believes that "athletes are expected to take on all of the responsibilities of a professional athlete - practice, travel, adhere to the coach's policies, etc. If a college athlete refuses to follow the coach's policies, he is in effect fired."

These men are basing their opinions on the NCAA's practice of renewing financial aid after each year of participation. Therefore, Prof. Waicukauski does not think that "there is any question that under NCAA rules, the employer -
Indiana State University - could in fact fail to renew for no performance."⁴⁴

Or, as Prof. Sack remarks:

"What if an athlete does not perform up to expectations? The coach can take away his financial aid. The NCAA says, 'No he can't. They can't ^{take} away his aid for one year.' I see that as the grossest of hypocracies. Since they can take away the kid's aid after one year, that amounts to the school's ability to take the kid's aid."^{Note}

As Executive Director of CARE, Prof. Sack says he regularly receives calls from college athletes whose scholarships have been revoked for various reasons. One student from the University of Massachusetts claimed that he lost his aid because of poor performance. Sack says that the ruling from the athletic committee stated that, "he was not a basketball player of sufficient caliber to play intercollegiate basketball for the University of Massachusetts." Sack, therefore, contends that "in this case, financial aid was contingent upon ath-

letic performance. When the athlete failed to meet the employer's expectations, he was fired."

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The Supreme Court of Indiana concluded in Rensing that, "[s]ince at least three important factors indicative of an employee-employer relationship are absent in this case, we find it not necessary to consider other factors which may or may not be present." ⁴⁵ It is important, however, to briefly mention these other factors.

John N. Shanks, II, is a member of the Industrial Board of Indiana. However, he was not a member of the Industrial Board when it rejected Rensing's claim for compensation. In fact, he believes he would have dissented with his colleagues' rejection. Irregardless, Shanks reveals that when the Industrial Board is faced with a claim for compensation, "there are eight areas that we look to in determining if there is an employment relationship between the parties:

- 1) Right to discharge the employee for performance
- 2) The mode of payment
- 3) Supplying tools and equipment
- 4) Belief of the parties in an employer-employee relationship
- 5) Control over the means used and the results reached
- 6) Length of the employment
- 7) Establishment of work boundaries
- 8) Needs to a contract, either written or implied"

As noted earlier, Justice Hunter only noted that the first, second and fourth factors are missing in the Rensing case. Likewise, logical rebuttals to his reasoning have been noted. Therefore, it is important to analyze the other factors necessary in an employment relationship in order to determine if in fact scholarship athletes are employees of the institution.

The Fourth District Court of Appeals emphasized that it must "determine

whether [Rensing's] employment by the Trustees was 'casual and not in the usual course of the trade, business, occupation or profession of the employer' so as to bring it outside the coverage of the statute."^{45a}

Shanks says that the reason he disagrees with the Industrial Board's decision is that he agrees with the "Court of Appeals decision that the employment was not a casual employment." Indeed, the lower Court stated that, "it is apparent that Rensing's employment was not casual, since it clearly was 'periodically regular', although not permanent. The uncontradicted evidence revealed that for the team members, football is a daily routine for 16 weeks each year."⁴⁶ The opinion further noted the expected participation by scholarship athletes in daily "off-season" workouts. In addition, Rensing's participation at all at Indiana State was the result of Coach Thomas Harp's recruiting him to play for the school. "In light of these facts, Rensing's employment by the University was not 'casual'.⁴⁷" Coupling these remarks with the fact that the State Supreme Court chose to remain silent on this area, it is safe to conclude that the sixth factor of employment is met in the athlete-institution relationship.

Prof. Waicukauski discusses another one of the factors in determining an employment relationship:

"The primary factor, historically, under workmen's compensation law for determining whether an employment relationship exists, is how much control does the employer exert over the employee. . . I think when you are talking about the relationship between an athlete and a coach in intercollegiate athletics, there is a 'heck-of-a-lot' of control."

With regard to the need to a contract, the Trustees all along conceded that some manner of a contract existed between them and Rensing.⁴⁸ However, they contend that there was no contract for hire or employment. Nonetheless, the lower Court sided with Rensing since the financial aid agreement he signed with

the school contained the following stipulation: "In the event that you incur an injury . . . Indiana State University will ask you to assist in the conduct of the athletic program within the limits of your physical capabilities." ⁴⁹

The biggest criticism of the Rensing decision is that many people feel that the Court should have acknowledged a contract for hire because of the University adding this stipulation to the normal financial aid agreement. They contend that since he could have been required to perform services for the athletic department above and beyond normal participation in practices and games, he was an employee for hire.

What complicates matters is that most institutions' financial aid agreements do not carry such stipulations for extra assistance on behalf of the athletic department. As a result, many follow the line of reasoning set forth in State Compensation Insurance Fund v Industrial Commission: An athletic scholarship without further terms does not constitute a contract for hire. ⁵⁰

The remaining two conditions of employment - supplying tools and equipment and establishment of work boundaries - were not addressed by either of the two Courts in Rensing. Many feel that these are the two least important of the eight conditions of employment. Nonetheless, one can argue that by including books and athletic equipment in the normal grant-in-aid, that condition is met. Likewise, one can argue that coaches normally set some types of work boundaries for the players to follow.

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In summary, the debate over whether an employment relationship exists in college athletics as a result of the signing of a financial aid agreement is far from over. Obviously, it will be the role of the Courts to attempt to settle the dispute. As was mentioned in the last section, the Courts must first decide which perspective ^{to} to be used: in order to consistently characterize whether an employer-employee relationship exists between a scholarship athlete

and the institution. Similarly, the Courts must establish a consistent application of the eight factors or conditions in determining whether this employment relationship exists. Only then will the Courts be able to resolve the issue of workmen's compensation for injured scholarship athletes.

THE INJURED SCHOLARSHIP ATHLETE AND WORKMEN'S COMPENSATION:

With regard to professional athletics, the Courts have stated that workmen's compensation laws not only apply to industrial accidents, but are "broad enough to include within its coverage employees engaged in athletic business."⁵¹ In Metropolitan Casualty Insurance Company of New York v Huhn,⁵² the Court decided that, "the baseball player who was killed [in a car accident on the way to a game] was a person in the service of another under contract of hire, and therefore was an employee."⁵³

The question now before the Courts, then, is whether the financial aid agreement between the student-athlete and the institution constitutes a contract for hire within the broad range of accidents and injuries covered under workmen's compensation. As noted by Cym H. Lowell in The Law of Sports, "the most complex problem involved in the area of workmen's compensation liability for athletic injuries, is the extent to which college or university athletes may recover for their participation related injuries."⁵⁴

In analyzing this problem, the Court of Appeals reasoned in Rensing that:

"the central question is not whether our Legislature has specifically excluded college sports participants from the coverage of the Act, since it is apparent the Legislature has not expressed such an intention, but rather whether there was a 'written or implied' employment contract within the meaning of the Act which obligated Rensing to play football in return for the scholarship he received."⁵⁵

As noted, the lower Court decided that there was indeed a contract for hire between Rensing and the University. Consequently, that Court remanded the case back to the Industrial Board for further proceedings to establish the extent of the benefits he would receive.

However, the Supreme Court of Indiana took jurisdiction and overruled the Fourth District Court's decision. Justice Hunter's emphasized that "Courts in other jurisdictions have generally found that such individuals as student-athletes, student leaders in student government associations, and student resident-hall assistants are not 'employees' for purpose of workmen's compensation laws unless they are also employed in a university job in addition to receiving scholarship benefits."⁵⁶

Nonetheless, the stipulation in Rensing's financial aid agreement with the University made clear the possibility that if he were ever injured, he would be asked to perform other jobs for the athletic department. As Harry Pratter, Director of the Center for Law and Sports at Indiana University School of Law, says, "the [Rensing] case is a very sad result. There was a perfectly clear reason for including him under workmen's compensation without having to extend the coverage to all athletes. Since he could have been required to perform services for the athletic department . . . he was an employee and entitled to workmen's compensation."^{Note}

Due to the Rensing decision, it is safe to say that the issue of workmen's compensation has been resolved in Indiana. However, as Prof. Waicukauski says, "there is still a great deal of potential for further litigation in this area." In fact, there are similar cases pending in Illinois and Florida.

As a result, this question still remains to be answered by the Courts. Will the judiciary continue to be relatively inconsistent in its case by case interpretations of the Workmen's Compensation Laws with regard to injured scholarship athletes? As Lowell has written, "it cannot be said that the Court's conclusions

or reasoning provide a consistent view of the athlete-institution relationship." ⁵⁷

Or, will a consistent interpretation of the eight factors or conditions of employment be applied by the Courts in determining whether an injured scholarship athlete is eligible for workmen's compensation? It is the opinion of most that the Courts are a long way from resolving this issue unless the United States Supreme Court decides to hear a case in this area.

Sheldon F. Steinbach, author of "Workmen's Compensation and the Scholarship Athlete", sums up this present state of affairs with regard to this issue in the following statement:

"The schools must eliminate any contractual relationship which provides for the rewarding or renewal of scholarship aid only so long as the student plays on the team. . . . Should institutions of higher education persist in retaining a contractual employment relationship with their scholarship athletes, whereby financial aid is only dispersed as long as the student is a participating team member, it is only just that the student is protected and receive the benefits under Workmen's Com-
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pensation for any injuries sustained while employed by his school."

IN MY OPINION:

When I was a senior basketball player at DeMatha Catholic High School in Hyattsville, Maryland, I viewed the world of college athletics from the traditional perspective. To me, an athletic scholarship was nothing more than a vehicle for defraying the cost of a college education. After all, wasn't athletics going to be just a mere part of my overall educational experience?

Now that I have had the opportunity to participate for the past three years in a major college athletic program, I have come to see how naive my original perspectives were. Although the NCAA claims that athletes are students, first and

foremost, that simply is not the case a vast majority of the time. The reason for this is simple: Intercollegiate athletic programs are big businesses.

While I still view athletics as a means to receiving my degree from the University of Richmond, I can not help but feel that my scholarship represents a contractual agreement. In exchange for paying for my education, I am expected to perform to the fullest of my abilities on behalf of the basketball program at Richmond. As a result of this contract, I feel like the University is giving me over \$8000 a year for room, board, tuition and books while I help them in putting paying customers into the stands and hopefully increase their athletic endowment.

Likewise, I have grown to believe that when an athlete signs a financial aid agreement with an institution, the parties take on an employment relationship. Therefore, I disagree with the Supreme Court of Indiana's decision in Rensing v Indiana State University Board of Trustees, supra.

Without a doubt, the University of Richmond recruited me for the express purpose of helping their basketball team. Virtually from the first day of practice, I have felt that I am much more than just a student-athlete on campus. In addition, I have felt like an employee of the athletic department which is not only in the business of producing winning teams, but is in the business of making money.

I also feel that like any other employee, I am being remunerated for my services. I agree with the statements of Richmond assistant basketball coach Joe Gallagher:

"An employer-employee relationship does exist between the players and the college because the school asks the kids to perform in an athletic capacity in return for an education. Now, although the school does not pay the players in terms of cold, hard cash, they are being paid in the form of a \$40,000 education for their performance. To me, that is just like a job. The only difference is that the athlete doesn't get his 'pay' in the form of a weekly cheque." ^{Note}

Lastly, I feel that scholarship athletes do have to perform up to their ~~on-~~

employer's expectations or they can have their scholarships revoked. As Gallagher points out, "Schools have the ability to terminate a player's financial aid after one year. In fact, I know of a number of schools who have 'run players out' of their programs because they made mistakes in projecting that the players could participate for them." ^{Note}

Nonetheless, I think it is important to note that these instances of "running players out" of their programs are infrequent. Most schools adhere to the coaching philosophy that Gallagher espouses: "If the staff makes a mistake in signing a below adequate player, it is the responsibility of the coaches to live up to their end of the financial agreement." ^{Note}

Therefore, I wholeheartedly disagree with the three reasons given by Justice Hunter in denying Rensing workmen's compensation. Although the NCAA may not label it this way, the reality of the situation is that college athletes are signed by a school with the intent of helping its athletic program. As a result, they are "paid" for their participation. Finally, they can (although I feel that it is rare) be "fired" for poor performance.

With regard to workmen's compensation, I believe that the prerequisite contract for hire is established through the financial aid agreement. As a result, I feel that if an athlete is injured while participating in college athletics, he should be compensated.

As Abrams says, "the University has the obligation to see that the athlete is 'made whole' following an injury." However, Abrams does make the accurate assertion that, "usually the parties are able to work out a settlement compensating the injured athlete." ^{Note}

Indeed, from personal experience I can attest to the fact that most of the time the employer sees to it that the athlete is fairly compensated without requiring a filing of workmen's compensation. During my freshman season, I suffered an illness which prevents me from playing intercollegiate basketball. I

am fortunate that the University of Richmond, like most schools, paid all of my medical bills. In addition, the institution has renewed my scholarship as an undergraduate assistant coach. *(Was there a clause in your agreement similar to the one in Pennings'?)*

Nonetheless, not all schools are as ethical. As a result, I agree with Shanks. When discussing the Rensing decision, he says, "I am not pleased. There has to be an alternative. There has to be something to, as I perceive it, take care of a very tragic situation."^{Note}

The obvious alternative is to bring scholarship athletes within the bounds of workmen's compensation. If the Courts develop a consistent interpretation that the athlete-institution relationship does conform to the eight factors of employment, injured athletes should be assured that they will be compensated.

However, the litigation is not the only area which is involved in the debate over the employment relationship in college athletics and how that applies to the Laws of Workmen's Compensation. For as so often happens in the sports triangle which is increasingly enveloping American athletics, the Legislatures are making it their business to get involved.

One example of this is the recent bill sponsored by Sen. Ernest Chambers of Omaha, Nebraska. He has introduced a bill in the Nebraska Legislature that would classify University of Nebraska football players as state employees. Chambers contends that, "the bill merely would legitimize existing 'under-the-table' incentives (cash, cars, clothes, and special privileges) to perform on the grid-iron."⁵⁹

While this controversial bill will most likely expire in committee, it is noteworthy that the legislative branch is attempting to involve itself in the judicial and administrative problems of collegiate athletics.

The NCAA has also taken action in this area. "The NCAA Insurance Committee has developed guidelines for a plan that would provide catastrophic injury insurance for NCAA member-institutions and their student-athletes. While it should be noted that such insurance coverage would not constitute an acknowledgement

of any employer-employee relationship", it is noteworthy that the NCAA is responding to public concern and criticism over the handling of such injuries as incurred by Rensing.

In summary, I want to end this chapter on "Scholarship Athletes and the University: An Employer-Employee Relationship?", with the closing remarks from Allen Sack's presentation at the "Law and Amateur Sports II" seminar. He makes a very persuasive argument from the perspective that college sports is a business in which the scholarship athlete is an employee deserving of workmen's compensation:

"When it comes to responsibilities, universities and the Courts do not hesitate to define athletes as employees under contract. Like professionals, scholarship athletes must sacrifice time, effort and control over their bodies in return for financial compensation. In the process of meeting their contractual obligations, athletes make themselves vulnerable to physical and academic abuse. Unlike professional athletes, however, scholarship athletes are denied a wide range of rights and protections that are often taken for granted by other American employees. Therefore, when it comes to responsibilities, Universities should be made to act like employers. Yet when it comes to rights, athletes are magically transformed into rank amateurs. This is not only hypocritical, it's dangerous and exploitive.

"There are reasons for workmen's compensation laws in this country. The reasons are that you are putting yourself into a jeopardized situation when you go into an employment situation. Therefore, you should be protected by some sort of workmen's compensation.

"The financial exploitation that results from workers being defined as amateurs is obvious. Scholarship athletes help to generate millions of dollars in revenues for their Universities. Yet by insisting that these athletes are mere amateurs, the Universities can

pay a minimum of room, board, tuition and books. This may be a shrewd way of cutting costs, but it is exploitive, nonetheless." ^{Note}

Endnotes

- 1
No. 283 S 45, slip op. (Supreme Court of Indiana, 9 February 1983).
- 2
437 N.E. 2d 78 (Ind. App. 1982).
- 3
127 Colo. 385, 257 P.2d 423 (1953).
- 4
Harry M. Cross, "The College Athlete and the Institution", Law and Contemporary Problems, Vol.28, No. 1 (Winter-Spring, 1973), 165.
- 5
John C. Weistart and Cym H. Lowell, The Law of Sports (Indianapolis: The Bobbs-Merrill Company Inc., 1979), p.13.
- 6
127 Colo. at 390, 257 P.2d at 426.
- 7
Cross, op.cit., 165.
- 8
135 Colo. 570, 314 P.2d 288 (1957)
- 9
Cross, op.cit., 165.
- 10
135 Colo. at 572, 314 P.2d at 293.
- 11
219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (Dist. Ct. App. 1963).
- 12
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- 13
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- 14
Weistart and Lowell, op.cit., pp.13-14.
- 15
437 N.E. 2d at 79.
- 16
ibid, at 87.

17

Weistart and Lowell, op.cit., p.1013.

18

ibid, p.2.

19

ibid, p.18.

20

id.

21

No. 283 S 45, slip op. at 5-6.

22

Weistart and Lowell, op.cit., pp.8-9.

23

437 N.E. 2d at 89.

24

See Appendix A.

25

See Appendix B.

26

16 N.C. App. 117, 191 S.E. 2d 379 (1972).

27

Note: The NCAA has since made all athletic grants renewable after each year of participation.

28

16 N.C. App. at 120-122. 191 S.E. 2d at 382.

29

id.

30

346 F. Supp. 602 (D. Minn. 1972).

31

id.

32

530 F. Supp. 104 (D. Minn. 1982).

33

id.

34

Weistart and Lowell, op.cit., p.12.

35

437 N.E. 2d at 86.

36

No. 283 S 45, slip op. at 9.

37

ibid, at 5.

38

ibid, at 8.

39

id.

40

Cross, op.cit., 164-165.

41

Buckton v NCAA, 366 F.Supp. 1152 (D. Mass. 1973).

42

Cross, op.cit., 164.

43

437 N.E. 2d at 85, citing from 6 I.L.E. Contracts, Section 6 at 73 (1958).

44

See Taylor v Wake Forest University, 16 N.C. App. 117, 191 S.E. 2d 379.

45

No. 283 S 45, slip op. at 8.

45a

437 N.E. 2d at 88, citing from IC 22-3-6-1 (b)

46

ibid, at 88.

47

ibid, at 89.

48

ibid, at 83.

49

ibid, at 80.

50

135 Colo. 570, 314 P.2d 288 (1957).

51

Wiestart and Lowell, op.cit., p.1009.

52

165 Ga. 667, 142 S.E. 121 (1928).

53

ibid, ai 677.

54

Weistart and Lowell, op.cit., p.1013.

55

437 N.E. 2d at 84-85.

56

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57

Weistart and Lowell, op.cit., p.9.

58

Sheldon F. Steinbach, "Workmen's Compensation and the Scholarship Athlete," Cleveland State Law Review, 19 (1970), 527.

59

USA Today, 17 February 1983, p.1c.

60

The Sporting News, 11 April 1983, p.26.

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BIG TEN CONFERENCE
TENDER OF FINANCIAL ASSISTANCE
1981-82



From: VOID Date
(Name of University)
To: (Name of Applicant)
(Street Address)
(City and State)
Date of Entrance in University
Sport
College Period

- 1. This Tender is subject to your fulfillment of the admission requirements of this University, and its academic requirements for athletic competition and financial aid.
2. This Tender covers the following as checked:
(a) Full Grant: includes tuition and fees, room and board, and use of necessary books in your selected course of study.
(b) The following items as checked:
(1) Tuition and fees in your selected course of study
(2) Board
(3) Room
(4) Use of necessary books in your selected course of study
(5) Other explanation of award:
3. You will be eligible for a renewal of this Tender according to this University's renewal policies at the end of its term if you are academically eligible for intercollegiate athletic competition.
4. If you wish to accept this Tender please return two signed copies of this form to the financial aids office indicated below NO LATER THAN

Signed: [Signature] Director of Athletics Signed: [Signature] Financial Aids Director

ACCEPTANCE

I accept this Tender of Financial Assistance. In doing so, I certify that I have not accepted any other Tender of Financial Assistance from a Big Ten Conference member at any time.

I understand that:

- (a) I will forfeit my athletic eligibility if I receive any financial assistance from any source other than as provided for in this award, or my family or governmental agencies, or in the form of an award having nothing whatsoever to do with my athletic abilities or interests.
(b) Any employment earnings by me during term time and any other financial assistance, except from my family, but including academic scholarships, must be reported by me to the Conference Commissioner on forms he will provide. Any such earnings or assistance, in combination with the aid provided through this Tender, may not exceed NCAA basic educational costs at my University.
(c) The value of this Tender, together with a BEOG, and any employment earnings or other university administered financial aid, shall not exceed the value of a full Tender plus the permissible miscellaneous expenses approved by the US Office of Education in administering the BEOG program.
(d) The aid provided in this Tender will be cancelled if I sign a professional sports contract or accept money for playing in an athletic contest.
(e) This Tender may not be signed prior to November 1, 1980 for basketball, or prior to February 18, 1981 for football, or prior to March 1, 1981 for all other sports.
(f) After accepting this Tender, I may not thereafter receive from any other Conference member any form of financial assistance based upon my athletic ability or through the intervention of athletic interests without forfeiting my intercollegiate athletic eligibility at the other university.

Signed: Student Date and Social Security Number

Signed: Parent or Legal Guardian Date

If you wish to accept this Tender of Financial Assistance, sign all copies. Keep the original copy for your files and return the yellow and pink copies immediately upon signature to:

1983 MEN'S NATIONAL LETTER OF INTENT 1983

(Administered by the Collegiate Commissioners Association)

- FOOTBALL, MID-YEAR JUNIOR COLLEGE TRANSFER:** Do not sign prior to 8:00 a.m. December 15, 1982 and no later than January 15, 1983
- FOOTBALL:** Do not sign prior to 8:00 a.m. February 9, 1983 and no later than May 1, 1983
- BASKETBALL:** Do not sign prior to 8:00 a.m. November 10, 1982 and no later than November 17, 1982 OR do not sign prior to 8:00 a.m. April 13, 1983 and no later than May 15, 1983
- ALL OTHER SPORTS:** Do not sign prior to 8:00 a.m. April 13, 1983 and no later than August 1, 1983
(Place "X" in proper box above)

Name of student _____ **VOID** _____
(Type proper name, including middle name or initial)

Address _____
Street Number City, State, Zip Code

This is to certify my decision to enroll at _____
Name of Institution

IMPORTANT - READ CAREFULLY

It is important to read carefully this entire document, including the reverse side, before signing this Letter in triplicate. One copy is to be retained by you and two copies are to be returned to the institution, one of which will be sent to the appropriate conference commissioner.

1. By signing this Letter, I understand that if I enroll in another institution participating in the National Letter of Intent Program, I may not represent that institution in intercollegiate athletic competition until I have been in residence at that institution for two calendar years and in no case will I be eligible for more than two seasons of intercollegiate competition in any sport.
However, these restrictions will not apply to me:
 - (a) If I have not, by the opening day of its classes in the fall of 1983 (or the opening day of its classes of the winter or spring term of 1983 for a mid-year junior college entrant in the sport of football), met the requirements for admission to the institution named above, its academic requirements for financial aid to athletes, the NCAA 2.000 GPA requirement, and the junior college transfer rule; or
 - (b) If I attend the institution named above for at least one academic year; or
 - (c) If I graduate from junior college after having signed a National Letter of Intent while in high school or during my first year in junior college; or
 - (d) If I have not attended any institution (or attended an institution, including a junior college, which does not participate in the National Letter of Intent Program) for the next academic year after signing this Letter, provided my request for the originally specified financial aid for the following fall term is not approved by the institution with which I signed. In order to receive this waiver, I must file with the appropriate conference commissioner a statement from the Director of Athletics at the institution with which I signed certifying that such financial aid will not be available to me for the requested fall term; or
 - (e) If I serve on active duty with the armed forces of the United States or on an official church mission for at least eighteen (18) months; or
 - (f) If my sport is discontinued by the institution with which I signed this Letter.
2. I understand that **THIS IS NOT AN AWARD OF FINANCIAL AID.** If my enrollment decision is made with the understanding that I will receive financial aid, I should have in my possession before signing this Letter a written statement from the institution which lists the terms and conditions, including the amount and duration, of such financial aid.

I certify that I have read all terms and conditions on pages 1 and 2, fully understand, accept and agree to be bound by them. *(All three copies must be signed individually for this Letter to be valid. Do not use carbons).*

SIGNED _____
Student Date & Time Social Security Number

SIGNED _____
Parent or Legal Guardian Date Time

Submission of this Letter has been authorized by:

SIGNED _____
Director of Athletics Date Issued to Student Sport

NATIONAL LETTER OF INTENT REGULATIONS AND PROCEDURES

3. **I MAY SIGN ONLY ONE VALID NATIONAL LETTER OF INTENT.** However, if this Letter is rendered null and void under item 1 - (a) on page 1, I remain free to enroll in any institution of my choice where I am admissible and shall be permitted to sign another Letter in a subsequent signing year.
4. I understand that I have signed this Letter with the *Institution* and not for a particular sport.
5. I understand that all participating conferences and institutions (listed below) are obligated to respect my decision and shall cease to recruit me once I have signed this Letter.
6. If my parent or legal guardian fails to cosign this Letter, it will be invalid. In that event, this Letter may be reissued.
7. My signature on this Letter nullifies any agreements, oral or otherwise, which would release me from the conditions stated on this Letter.
8. This Letter must be signed and dated by the Director of Athletics or his authorized representative before submission to me and my parent or legal guardian for our signatures.
9. I must sign this letter within **14 days** after it has been issued to me or it will be invalid. In that event, this Letter may be reissued. (Note: Exception is November 10-17, 1982, signing period for basketball).
10. This Letter must be filed with the appropriate conference by the institution with which I sign within **21 days** after the date of final signature or it will be invalid. In that event, this Letter may be reissued.
11. If I have knowledge that I or my parent/legal guardian have falsified any part of this Letter, I understand that I shall forfeit the first two years of my eligibility at the participating institution in which I enroll as outlined in item 1.
12. A release procedure shall be provided in the event the student-athlete and the institution mutually agree to release each other from any obligations of the Letter. A student-athlete receiving a formal release shall not be eligible for practice and competition at the second institution during the first academic year of residence and shall have no more than three seasons of eligibility remaining. The form must be signed by the student-athlete, his parent or legal guardian, and the Director of Athletics at the institution with which he signed. A copy of the release must be filed with the conference which processes the Letters of the signing institution.

The following Conferences and Institutions have subscribed to and are cooperating in the National Letter of Intent Plan administered by the Collegiate Commissioners Association:

CONFERENCES

Atlantic Coast	Metropolitan	Ohio Valley	Southwest
Big East	Mid-American	Pacific Coast	Southwestern
Big Eight	Mid-Continent	Pacific-10	Sun Belt
Big Sky	Mid-Eastern	Southeastern	Trans-America
Big Ten	Midwestern City	Southern	West Coast
California Collegiate	Missouri Valley	Southern Intercollegiate	Western
Central Intercollegiate	Missouri Intercollegiate	Southland	Western Football
Lone Star	North Central		

INSTITUTIONS

Alabama State	Florida International	New Hampshire	St. Francis (Pa.)
Arkansas-Pine Bluff	Florida Southern	New Orleans	Saint Leo
Augusta	Fordham	Niagara	Slippery Rock
Baptist	Gannon	Nicholls State	South Carolina
Bellarmino	George Mason	North Carolina-Wilmington	Southeastern Louisiana
Boston College	George Washington	Northern Kentucky	Southern Illinois-Edwardsville
Brooklyn	Georgetown	Northern Michigan	Southwestern Louisiana
Campbell	Georgia State	Northwood Institute	Stetson
Canisius	Grand Valley	Notre Dame	Syracuse
Central Florida	Hofstra	Oakland	Tampa
Central State (Ohio)	Indiana State-Evansville	Pan American	Temple
Charleston	Iona	Penn State	Tennessee State
Chicago State	James Madison	Philadelphia Textiles	Texas-San Antonio
Connecticut	Kentucky Wesleyan	Pittsburgh	Transylvania
Dayton	Lake Superior	Providence	Troy State
Delta State	Liberty Baptist	Randolph-Macon	Utica
DePaul	Maine (Orono)	Rhode Island	Valdosta State
Duquesne	Marist	Richmond	Vermont
East Carolina	Marquette	Robert Morris	Wayne State
Eastern Montana	Miami (Florida)	Rollins	West Virginia
Fairfield	Michigan Tech	Rutgers	William and Mary
Ferris State	Minnesota-Duluth	St. Bonaventure	Wright State

AMERICAN ATHLETICS AND THE LAW:

The Sports Triangle

Chapter Two

"Baseball's Antitrust Exemption:
An Aberration in Statutory Law"

Dr. John W. Outland, Sponsor
Independent Study

Brian Michael Sheahan
November 1, 1983

INTRODUCTION:

In 1890, Congress passed the Sherman Act.¹ In it, restraint of trade or commerce as well as monopolizing any part of the trade or commerce among the several states was declared illegal.² Twenty-four years later, Congress passed another major piece of antitrust legislation, the Clayton Act.³ It provided a treble damage remedy and injunctive relief for Sherman Act violations.

Basically, the Sherman and Clayton Acts "prohibit business competitors from engaging in any activities which would inhibit the operation of a free enterprise system and consequently impair the nation's overall economic health and stability."⁴ At the time of their enactment, professional sports were understandably exempt since their economic impact was quite minimal. During this period, antitrust laws were best applied to the more highly developed industries.⁵

However, as professional athletics expanded and prospered, the federal government accordingly applied the antitrust laws to their activities. Remarkably, though, baseball has enjoyed the distinction of being one of the very few major interstate businesses - and the only professional sport - to be exempt from federal antitrust sanctions.

This chapter analyzes how professional baseball was accorded and maintains its anomalous antitrust exemption. This distinct status is examined from five perspectives: the judicial creation of the anomaly; criticisms of the judiciary; Congressional silence; non-judicial and non-legislative solutions; and baseball's opposing viewpoints.

While reading this chapter, keep in mind the overall theme of this book: the existence of a "sports triangle." Put simply, professional baseball has been fundamentally influenced by the judicial creation of an exemption from federal legislation. In addition, the "triangle" has taken on unique dimensions with regard to the antitrust laws in that the judiciary refuses to judge, the legislators refuse to legislate, and yet solutions to the problem have been remedied by those within the sport.

Section 2.1 - The Judicial Creation of the Anomaly

I. Federal Baseball and Toolson

As early as 1914, the judiciary was faced with resolving the status of baseball in conjunction with federal antitrust legislation.⁶ However, it was not until 1922 that the Supreme Court agreed to address the issue in the landmark case, Federal Baseball v. National League.⁷

In that case, seven clubs from the Federal League of Baseball were induced by the National League to join its organization. However, the Baltimore baseball club alleged that the National League had conspired to prevent the formation of a competitive league and was therefore in violation of the Sherman Act. It was further argued that the National League had destroyed the Federal League through its purchase of the latter's constituent teams. The plaintiffs felt that in addition to conspiring to form a monopoly in professional baseball, the antitrust provisions had been violated since the teams were located among several states.⁸

Nonetheless, the Court ruled that although "the players were transported across state lines, this movement was only incidental to, and not an essential part of, a baseball game which was played strictly within state boundaries."⁹ Instead of defining baseball in business terms, the Court emphasized that the "exhibitions of baseball did not engage in interstate commerce for the purposes of the federal antitrust laws."¹⁰

In his opinion of the Court, Justice Holmes stated that:

"the fact that, in order to give exhibitions, the League must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business . . . [T]he exhibition, although made for money, would not be called trade or commerce in the commonly¹¹ accepted use of those words."

Since professional baseball was not involved in interstate commerce, it was therefore deemed exempt from federal antitrust laws.

In the 20 to 30 years following the unanimous Court's decision in Federal Baseball, baseball changed significantly. Its business activities not only continued to involve interstate travel, but the advent of radio and television broadcasts carried the "exhibitions" all over the country.

The first notable challenge to the Court's reasoning in Federal Baseball occurred in 1949. In Gardella v. Chandler,¹² a three-judge panel was split over the antitrust issue. "Judges Learned Hand and Jerome Frank agreed that in view of the expanded concept of interstate commerce and the growth of organized baseball, the antitrust immunity conferred to Federal Baseball was perhaps no longer valid."¹³ Judge Frank concluded that:

"This court cannot, of course, tell the Supreme Court that it was once wrong. But one should not wait for formal retraction in the face of charges plainly foreshadowed."¹⁴

An out of court settlement prevented Gardella from advancing to the Supreme Court. It was not until 1953 that another case challenging baseball's antitrust exemption reached the highest court.

In Toolson v. New York Yankees, Inc. and its two companion cases,¹⁵ "several baseball players challenged the reserve system alleging damage by the unlawful control of their freedom to participate as players."¹⁶ The Court, in a per curiam decision,¹⁷ affirmed the lower court's decision upholding Federal Baseball since, "the business of providing public baseball games for profit . . . was not within the scope of federal antitrust laws."¹⁸

Of equal importance is the judiciary's deference to legislative remedies for the exemption:

"Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation

having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."¹⁹

By relying solely on Federal Baseball and Congressional silence, the Supreme Court issued their ruling "without re-examination of the underlying issues"²⁰ of the case. Many scholars are critical of this because unlike Federal Baseball, "Toolson did not hold as is commonly thought that in 1953 baseball was still not to be considered trade or commerce"²¹. This in fact was pronounced two years later in United States v. Shubert.²² Nonetheless, the Court refused to rule (in Toolson) on the alleged illegality of baseball's "reserve clause"²³ until 1972.

II. Antitrust and other professional sports

It was not until the late 1950's that baseball's exemption began to take on its anomalous characteristic. On the same day that it decided Shubert, the Court rejected the claim by the International Boxing Club that Toolson should apply to all professional sports.²⁴

Of greater significance is the 1957 case, Radovich v. National Football League.²⁵ In the late 1940's, Radovich played for the Detroit Lions of the N.F.L. He broke his contract with the Lions in order to play in the upstart All-American Conference. As a result, the NFL declared him ineligible. Years later, he was turned down when he applied for the job as coach of the San Francisco Clippers of the Pacific Coast League because it was an affiliate of the NFL. Radovich sued for treble damages alleging that the NFL was in violation of federal antitrust laws.

The Supreme Court formalized the anomaly by deciding that,

"Since Toolson and Federal Baseball are still cited as controlling authority in the antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of professional baseball. As long as Congress continues to acquiesce, we should adhere to - but not extend - the interpretation of the Act made in those cases."²⁶

The Court then acknowledged the inconsistency of this ruling and admitted that:

"Were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But . . . the orderly way to eliminate error or distinction, if any there be, is by legislation and not by court decision."²⁷

As a result, the Sherman Act is applicable to football while "the repercussions of overruling precedent precluded (the Court) ²⁸ from correcting its past errors" with regard to baseball.

In addition to being denied an antitrust exemption, the NFL saw its version of the reserve clause, the "Rozelle Rule", invalidated by the judiciary in the mid-1970's. First in Kapp v. National Football League, ²⁹ and finally in Mackey v. National Football League, ³⁰ the courts held that "the practices under the Rozelle Rule . . . are an unreasonable restraint of trade and therefore a violation of the antitrust prohibition." ³¹ Judge Larson's decision in Mackey "amounted to an emphatic rejection of the traditional justifications for player restraints." ³²

The contractual devices used to control player movement between member clubs was also invalidated on antitrust grounds in professional ³³ basketball and professional ³⁴ hockey in the 1970's. Even individual ³⁵ sports like golf and ³⁶ bowling have been brought under the purview of the Sherman and Clayton Acts. In sum, "it is clear that other types of sports and entertainment will not be allowed to share baseball's special status." ³⁷

III. Flood: The anomaly continues

Professional baseball's antitrust exemption was once again attacked in the early 1970's. In Salerno v. American League of Professional Baseball Clubs, ³⁸ the second circuit court ruled against two umpires who alleged to have been discharged because of their attempts to organize American League umpires for the purpose of

collective bargaining. By declining to overrule Federal Baseball and Toolson, "the judiciary once again diminished the likelihood of success in a lower court challenge to the baseball exemption."³⁹

However, the lower court issued a terse commentary on the Supreme Court's holdings:

"We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days, that the rationale of Toolson is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical' . . . However, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that Federal Baseball and Toolson has been overruled, we are not at all certain the Court is ready to give them a happy dispatch."

The Supreme Court agreed to hear for the third, and possibly last, time a case calling for the removal of baseball's antitrust

exemption in Flood v. Kuhn.

In 1969, the St. Louis Cardinals traded their co-captain and star center fielder, Curt Flood, to the Philadelphia Phillies. However, "Flood did something that transformed him immediately from just another big league baseball player into a crusader, a radical, a reformer. He refused to go."⁴²

Flood was appalled that he was traded without ever being consulted or given an opportunity to express his opinion on the matter. He even wrote a letter to Commissioner Bowie Kuhn claiming that he had a right to negotiate a contract with other clubs. In that letter, he stated that:

"after twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic right as a citizen and is inconsistent with the laws of the United States."⁴³

Flood then filed suit claiming that baseball's reserve system was a direct violation of the Sherman Act. In the petitioner's brief, the reserve system is depicted as:

"the scheme which binds every American professional baseball player to one team, and which compels team owners, whether competitors or not, to boycott the player property of another team owner - and to boycott any fellow owner to eliminate competition in the recruitment and retention of personnel."⁴⁴

Nonetheless, the Supreme Court in a 5-3 decision⁴⁵ ruled that it was up to Congress to eliminate baseball's anomalous exemption, thereby reaffirming Federal Baseball and Toolson.⁴⁶ Specifically, Justice Blackmun noted that, "(s)ince Toolson more than 50 bills have been introduced into Congress relative to the applicability or nonapplicability of the antitrust laws to baseball."⁴⁷ However, none of these bills have passed both houses. Therefore,

"the Court concluded that it was not dispositive that Congress had failed to act, for they had 'acted', in the Court's view, with no intention to subject baseball's reserve system to the reach of its antitrust statutes."⁴⁸

As noted, the Court believed that Congress had no intention of subjecting baseball and its reserve system to federal antitrust laws. Of equal importance was the majority's contention that the legislators were better suited to handle the problems of eliminating a 50 year aberration. This was summed up by Justice Blackmun:

"The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of Federal Baseball. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation."⁴⁹

There is another important reason why the Justices failed to eliminate what even they admitted to be an "anomaly" and an "aberration".⁵⁰ This is the Court's rigid adherence to stare decisis. Simply put, courts traditionally "refuse to overrule prior statutory interpretations."⁵¹ Often times, the judiciary feels that by not following precedent, they overstep their judicial powers by impinging upon the legislative branch. "If the legislature disagrees with the initial interpretation, the argument runs, then it has the sole mandate to change the law by amending the statute."⁵²

Thus, the Supreme Court was compelled to acknowledge that even though "professional baseball is a business and it is engaged in interstate commerce,"⁵³ it is still "deemed fully entitled to the benefit of stare decisis."⁵⁴

Many scholars feel that Flood closes the door on future litigation with regard to baseball's antitrust exemption. As Nancy Jean Meissner notes, Flood "makes it expressly clear that baseball's reserve system is not subject to antitrust attack in the courts."⁵⁵ In fact, "future plaintiffs would, thusly, not be well advised to return to the judicial system armed with only a bat and the Sherman Act to do battle with baseball's antitrust exemption."⁵⁶

However, there are other scholars that feel that "the latest Supreme Court pronouncement is not likely to be the last word regarding one of the last vestiges of human bondage in the United States."⁵⁷ In addition, there are numerous other aspects of this uniquely protected sport which may in fact be subjected to litigation. "Antitrust issues

might arise in connection with the movement of franchises, denial of franchises to interested investors or their cities, league or club control of stadiums, and intrusion by established clubs on newly formed leagues."⁵⁸ It is also feasible that the various types of league and club contracts pertaining to such business aspects as television, radio and concession revenues will fall within the purview of the antitrust laws.

In other words, the Supreme Court has granted baseball an anomalous antitrust exemption through its repeated adherence to the Federal Baseball decision and its deference to Congress to settle this issue. However, it seems unlikely that either the judicial or legislative branches of government "intended that every activity connected with baseball, no matter how tangential, enjoys the protection of the immunity umbrella."⁵⁹

Section 2.2 - Criticisms of the Judiciary

I. Dissenting Opinions of Supreme Court Justices

Criticism of the judiciary's handling of baseball's anti-trust exemption is widespread. Newspapers, periodicals, and scholarly journals continually chastise the judicial branch for creating and upholding this anomaly on the basis of stare decisis and deference to Congress. More importantly, there are those within the judiciary who also disagree with the Supreme Court. As a result, this analysis of the criticisms of the judiciary begins with an examination of the opinions of the dissenting

justices in Toolson and Flood.

Justice Burton, with whom Justice Reed concurred, wrote the dissenting opinion in Toolson. His main contention was that:

"it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution⁶⁰ of the United States and the Sherman Act."

He cited such interstate business activities as traveling between the states, purchasing materials in interstate commerce, radio and television broadcasts beyond state lines, and baseball's⁶¹ farm system which involves member teams in various states.

He also noted that in 1922, baseball was not involved in much interstate commerce and therefore he does not disagree with the Supreme Court's rationale at that time. However, Justice Burton emphasizes that:

"in the Federal Baseball Club case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt⁶² from the Sherman Act."

In fact, Justice Holmes, the writer of the Court's opinion in Federal Baseball, made this clear in an opinion written a year after that landmark antitrust case. He said that, "it may be that what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently"

in order to determine its legality within the Sherman Act. ⁶³

Justice Burton also gives weight to the fact that the judiciary, and not Congress, is responsible for baseball's antitrust exemption. As a result, he dissents from the majority for the primary reason that professional baseball is involved in "interstate trade or commerce and, as such, it is subject to the Sherman Act until ex-
⁶⁴empted" by Congress.

There were two dissenting opinions submitted by Justices Douglas and Marshall in Flood v. Kuhn. ⁶⁵ While these opinions focus on different aspects of professional baseball and its exemption, they represent interesting arguments for "bring(ing)
⁶⁶baseball within the coverage of the antitrust laws."

Justice Douglas called his brethren's continued upholding of Federal Baseball "a derelict in the stream of the law that we, its creator, should remove." This is due to the fact that "baseball is today big business that is packaged with beer, with broadcasting, and with other industries." ⁶⁷

He also attacks baseball's reserve clause which makes the players victims of the owners' "proclivity for predatory practices." ⁶⁸ Justice Douglas refers to the players as "victims" since according to the Sherman Act, "a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade." ⁶⁹

Using Congressional inaction as a guide to maintaining the inconsistent application of federal antitrust laws is also denounced by Justice Douglas. This is an aberration in itself since the

Supreme Court has already said that Congressional silence should not prevent judicial re-examination of its own doctrines.⁷⁰ As a result, "the unbroken silence of Congress should not prevent us from correcting our own mistakes."⁷¹

Justice Marshall's dissent takes homage in the fact that baseball's reserve system makes the players virtual slaves of the owners. "The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days."⁷² As a result, the reserve system acts as an unreasonable restraint of trade. Therefore, Justice Marshall felt compelled to make the following commentary:

"We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it."⁷³

Justice Marshall also gave a solution to the debate over retroactively solving the problem as court decisions usually do, or deferring to the Congress and its prospective effects on eliminating the exemption. Simply put, the Court can make its reversal prospective only. As Justice Marshall stated, "baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise."⁷⁴

II. Scholarly Criticisms

Scholars have tended to agree with Justices Burton, Douglas, and Marshall. The most frequent criticisms are aimed at the Court's: strict adherence to stare decisis; deference to a Congressional solution; and proclivity in upholding the exemption while the Court itself has classified it as being "unrealistic, inconsistent, or illogical."⁷⁵

Stare decisis is an important tool in maintaining consistency in judicial interpretations of the law. However, it should not be used to imprison reason. When faced with previous decisions that are out of sync with the present conditions, the Court should acknowledge this or fear falling out of step with the times.

C. Paul Roger believes that Flood v. Kuhn "illustrates the kind of illogical and inconsistent propositions that a strict adherence to the principles of stare decisis can produce."⁷⁶ In other words, is maintaining uniform and consistent interpretations of the law "justified when the result is the affirmance of a decision acknowledged to be an anachronism?"⁷⁷

Nancy Jean Meissner agrees. She says that the Supreme Court has "closed [its] doors and refused to right admitted wrongs." Instead of repealing the antitrust exemption it gave to baseball in 1922, the judiciary has chosen "to rely on an anomalous application of stare decisis in refusing to grant relief from a system which claimed perpetual control of employees in an industry rife with violation of the Sherman Act."⁷⁸

"While Flood possibly represents the Court's greatest

expression of deference to Congressional silence,"⁷⁹ many scholars espouse the opposite view which states that judicial decisions should not be influenced by legislative inactivity. Justice Frankfurter summed up this opposing viewpoint in the 1940 case, Helvering v. Hallock:

"It would require very persuasive circumstances enveloping Congressional silence to debar this court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture⁸⁰ into speculative unrealities."

Judicial deference to Congress is also criticized for its buck-passing nature which has no guarantee for success. As the Notre Dame Lawyer states, the Supreme Court could have resolved the "retroactivity difficulties by ruling prospectively instead of⁸¹ deferring to Congress." This would have rescinded the anomalous exemption. This is especially important since "there is no guarantee that Congress will act in the future to overrule the baseball⁸² decisions which the Supreme Court has now come to loathe."

The third major reason why scholars are critical of Toolson and Kuhn, is that baseball's exemption is an illogical aberration from the Court's rulings with regard to other professional sports and businesses.

Philip L. Martin feels that there are problems with the Court's rationale in Flood in lieu of the fact that it still classifies

baseball's present status as an aberration. He proclaims that, "this is rather strong language which indicates that the reserve system does not measure up to legal standards."⁸³ Martin adds that, "the anomalous baseball exemption constitutes a denial of individual rights being upheld by the exercise of some very dubious legal reasoning."⁸⁴

Perhaps the most stinging remarks on the judiciary's continuance of this anomaly were made by Lionel S. Sobel before the House Select Committee on Professional Sports in 1976. He said that, "professional baseball is the only exempt enterprise whose exemption is not derived from a statute enacted by this Congress, but rather from an exemption created by a court."⁸⁵

Section 2.3 - Congressional Silence

The sports triangle has taken on a new twist with regard to this issue of baseball's antitrust exemption. Although the Supreme Court originally acted in 1922 by granting the exemption to our national pastime, it has refused to re-examine the issue. In essence, the judges won't judge. Instead, the judiciary has passed the buck to Congress. However, the law makers have seen fit to remain silent by allowing over 70 bills to go unpassed in the last thirty years. Therefore, the legislators won't legislate.

This section chronologically reviews the "legislative history of baseball's antitrust exemption, for only in doing so is it possible to fully understand its current status and the reasons behind it."⁸⁶ The second part of this section attempts to explain

why Congress has been negligent in terminating this exemption.

I. Legislative History

A. The 82nd Congress

In 1951, Emanuel Celler's Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, began to extensively investigate whether all professional team sports should be exempt from federal antitrust laws or if baseball should come within the Sherman Act's parameter. Three identical bills⁸⁷ were introduced and provided that the federal antitrust laws "shall not apply to organized professional sports enterprises⁸⁸ or to acts in the conduct of such enterprises." However, Celler's subcommittee concluded that no legislative action should be taken since it was unsure whether baseball's reserve clause violated antitrust laws:

"It would . . . seem premature to enact general legislation for baseball at this time. Legislation is not necessary until the reasonableness of the reserve rules has been tested by the courts. . . . For these reasons, together with the Subcommittee's earnest desire to avoid influencing pending litigation, it is unwise to attempt to anticipate judicial action with⁸⁹ legislation."

An identical bill, S.1526, introduced by Senator Johnson of Colorado was also tabled when the Senate Judiciary Committee⁹⁰ "voted to postpone its consideration indefinitely."

B. The 83rd Congress

In 1954, Representative Celler changed positions when he introduced H.R. 7949. This bill would have made the antitrust laws applicable to baseball. Celler introduced this bill because the "Courts had given preferred treatment to baseball . . . because of the confusion confounded over what constitutes a business."⁹¹ However, the House Judiciary Committee did not act on H.R. 7949.

C. The 85th Congress

In the wake of the Supreme Court's decision in Radovich that "the orderly way to eliminate error or discrimination . . . is by legislation and not by court decision",⁹² the House of Representatives introduced in 1957 seven bills to eliminate discrepancies between professional team sports under the antitrust statutes. These bills were referred to the House Judiciary Committee and constitute three distinct solutions to the antitrust problem:

1. eliminate the judicially created exemption by placing professional baseball under the Sherman Act;⁹³
2. completely exempt all professional team sports;⁹⁴ and
3. place all professional team sports under federal antitrust laws, yet allow certain activities, unique to athletic competition and cooperation,⁹⁵ be exempted from those laws.

Although over 50 witnesses testified in the two weeks of hearings before Celler's Antitrust Subcommittee of the House Judiciary Committee, Congress maintained its silence by not acting on any of the bills.

In 1958, the House was again involved in antitrust legislation involving baseball's unique status. Representative Celler introduced

H. R. 10378 as a compromise solution to the antitrust debate.

The bill declared that:

"the professional team sports of baseball, football, basketball, and hockey come within the purview of the antitrust laws, but exempted from those laws such activities of team sports which were 'reasonably necessary' to these ends."⁹⁶

Celler cited three such activities: "(1) the equalization of competitive playing strengths; (2) the right to operate within specified geographic areas; or (3) the preservation of public confidence in the honesty in sports contests."⁹⁷

On June 24, 1958, H. R. 10378, as amended,⁹⁸ became the first piece of legislation pertaining to baseball's antitrust status to be passed by a house of Congress. However, S. 4070, Senator Henning's counterpart to Representative Celler's bill, was tabled by the Senate Antitrust Subcommittee. Thus, what promised to be a significant attempt by Congress to meet the judiciary's challenge to act on baseball's anomalous exemption, ended in typical congressional silence.

D. The 86th Congress

The Senate re-examined its tabling of the compromise antitrust legislation from the previous Congress in 1959. Senators Hennings, Dirksen, and Keating introduced S. 616 which was virtually identical to the tabled S. 4070. Senator Kefauver, chairman of the Senate Antitrust & Monopoly Subcommittee, intro-

duced his own bill, S. 886 which "made the exemptions of S. 616 effective only in the event of the agreement of each major league club to limit to 80 the number of players under its control."⁹⁹

Following hearings on S. 616 and S. 886, Kefauver abruptly reversed himself by introducing S. 2545. This bill was identical to S. 616 yet excluded professional baseball. Kefauver said that baseball was excluded because:

"the problem of baseball differs from that of the other three sports. The Subcommittee wishes to spend more time on the study of baseball's complexities so that there will be an orderly transition from its present status of almost complete exemption from the antitrust laws to a status of limited exemption similar to that of the three sports covered in this bill."¹⁰⁰

Not surprisingly, the Senate Judiciary Committee indefinitely postponed consideration of S. 616, S. 886, and S. 2545.

The Congressional trend of introducing bills and then failing to act on them continued throughout the 86th Congress. In the House, six bills¹⁰¹ were introduced pertaining to professional team sports' relationship with federal antitrust laws. Aside from hearings held by the House Antitrust Subcommittee on these proposals, no further action was taken. In the Senate, another bill introduced by Senator Kefauver, S. 3483, was tabled by the Judiciary Committee.

E. The 87th Congress

Senator Kefauver introduced S. 168, an identical bill to the

one (S.3483) that was tabled in the previous session. The club owners in professional baseball opposed it "to the extent that it discriminated against baseball by limiting player control to 40 players."¹⁰² However, the owners did support Senator Hart's bill, S.1856, since it did not contain a 40 player limit. Not surprisingly, these bills died in the Senate Judiciary Committee.

Also true to form,¹⁰³ the House introduced three bills similar to S.1856, yet failed to act on any of them.

F. The 88th Congress

Congress came very close to passing an antitrust bill regarding baseball's exemption during this session. In 1964, Organized Baseball voiced its support of Congressional sanction of its antitrust exemption and equal antitrust status of professional team sports in hearings before the Senate's Antitrust Subcommittee. The hearings were held on behalf of S.2391, a bill submitted by Senator Hart which was identical to the bill (S.1856) that he sponsored in the 87th Congress. The Senate Judiciary Committee favorably reported S.2391 without amendment on August 4, 1964.¹⁰⁴ However, "the full Senate was unable to act on it before the end of the session."¹⁰⁵

In the House, 14 bills identical to Senator Hart's S.2391 were introduced. However, no hearings were held and no action was taken on them by the House Judiciary Committee.¹⁰⁶¹⁰⁷

G. The 89th Congress

Congress took perhaps its biggest step toward acting on baseball's anomalous antitrust status in 1965. Senator Hart again

submitted a bill (S.950) which he said would:

"place the organized professional team sports of baseball, football, basketball, and hockey on equal antitrust footing and then [would] grant exemptions relating to the essential sports practices as opposed to the business practices of the sports involved."¹⁰⁸

As a result, S.950 would have eliminated baseball's distinct status by placing it within the purview of the Sherman and Clayton Acts. However, it also would have granted antitrust exemptions to such practices as drafting, the reserve clause, and restricting the geographic area in which team members operated.¹⁰⁹

What is most significant about S.950, is that the legislators openly recognized the need to end their history of silence on this matter. Senator Hart summed up this attitude in the "Statement" section of this bill:

"This legislation, then, is in response to the judicial decisions which have placed the responsibility for reconciling the conflicting cases directly in the hands of Congress."¹¹⁰

The full Senate passed S.950 on August 31, 1965. However, an identical bill (H.R.1785) was introduced in the House by Representative Hofton, but was never acted upon. Similarly, two other bills¹¹² "which would have made the antitrust laws applicable to baseball without specific exemptions, were also referred to the House Judiciary Committee in 1961 but were never acted upon."¹¹³

Alas, Congress again shunned its responsibility for reconciling baseball's antitrust aberration.

H. The 90th Congress

Only two bills dealing with professional baseball and the federal antitrust laws were introduced in this Congress. H. R. 6, introduced by Representative Zablocki, was intended "to make the Sherman and Clayton Acts fully applicable to baseball."¹¹⁴

H. R. 467, sponsored by Representative Davis, was similar to H. R. 6 "except that it also would have applied the Federal Trade Commission Act to baseball."¹¹⁵ Once again, no action was taken on either of these bills.

I. The 91st Congress

Representative Davis again introduced legislation intended to place baseball within the purview of the antitrust law. However, no committee action was taken on H.R. 2349.¹¹⁶

J. The 92nd Congress

Following the Flood decision, the House Antitrust Subcommittee held hearings on three separate solutions to baseball's antitrust distinction. Emanuel Celler, still chairman of House Committee on the Judiciary as well as the Antitrust Subcommittee, acknowledged that Justice Blackmun called upon Congress to resolve the established "aberration" that allows baseball to operate with an antitrust exemption while other interstate professional team sports do not. As a result, Representative Celler said that:

"It is for the Congress and for this committee

to remedy the illogic and put an end to this senseless anomaly. These hearings and considerations of the bills before us are a step in that direction."¹¹⁷

One solution was proposed in four identical bills¹¹⁸ supported by Representative Celler. The bills were designed "to end baseball's judicial exemption by providing that the words 'trade and commerce' as used in any provision of the antitrust laws shall include the interstate business of baseball."¹¹⁹ As Representative Celler emphasized:

"Enactment of legislation of this type would be appropriate as a long overdue statement of congressional intention to include this very lucrative business with the mainstream of American antitrust legislation. . . . The important thing is to once and for all end unwarranted privilege and place all professional sports on equal footing."¹²⁰

The second solution was put forward by Representative Horton in H.R. 2305. This bill proposed to place the four major organized professional team sports under the antitrust laws while exempting certain aspects of the sports industry.¹²¹ Representative Horton said that the goal of H.R. 2305 was to:

"place all four major professional sports under the antitrust laws. However, it would exempt from antitrust exposure those on the field

practices which, due to the unique character of these sports businesses, are necessary for the successful, competitive survival of the sports themselves."¹²²

The third type of solution was suggested by Representative Celler in H.R. 11033. Along with three identical bills¹²³, this piece of legislation proposed to place the business of organized professional team sports under the antitrust laws without exempting certain practices of the sports industry.¹²⁴ One such practice that Representative Horton's bill (H.R. 2305) would have exempted was the reserve clauses in professional sports contracts. However, Senator Sam J. Ervin, Jr. spoke at these hearings in favor of H.R. 11033 since it would not have exempted such sports practices. He said that:

"The reserve clause denies players their freedom of contract, a liberty guaranteed through both the Fifth and Fourteenth Amendments to the U.S. Constitution. The reserve clause reduces a human being to chattel, a possession like a piece of furniture."¹²⁵

Although these hearings were possibly the most extensive and all-encompassing with regard to baseball's antitrust status, the House failed to pass any of the three solutions.

K. The 94th Congress

On May 18, 1976, the House of Representatives established the Select Committee on Professional Sports "to investigate the

situation currently prevailing in the four major professional sports . . . and to assess the need for any recommended changes in the law." ¹²⁶ One of the areas that this select committee investigated was "the impact of federal anti-trust policy on sports business operations." ¹²⁷

In its Draft Report Prepared by the Staff Select Committee on Professional Sports, Chairman B. F. Sisk and his colleagues recommended that professional baseball be subject to the antitrust laws. ¹²⁸ However, this report was heavily criticized for failing "to analyze the impact that those laws would have on baseball." ¹²⁹ Consequently, no legislative action was taken.

L. The 97th Congress

On July 28, 1982, Senator DeConcini introduced S.2784, the "Major League Sports Community Protection Act of 1982." The bill was intended "to clarify the application of the antitrust laws to professional team sports leagues, to protect the public interest in maintaining the stability of professional team sports leagues, and for other purposes." ¹³⁰ However, the Congress took its most significant step toward cementing its 30 year silence with regard to the baseball exemption by defining for purposes of this Act the term 'professional team sports league' as "the organized professional team sports of basketball, football, hockey, or soccer." ¹³¹ By purposely omitting baseball, the legislatures have refused to examine and clarify the application of antitrust laws to professional baseball.

II. Why Has Congress Failed to Act?

In the past three decades, Congress has closely examined the application of the federal antitrust statutes to professional team sports through the introduction of over 70 bills. "Yet despite all this congressional attention, the law in this area remains, with few exceptions, essentially the same as the Supreme Court delineated it in the Toolson"¹³² and Flood cases. This is due to the fact that:

"Congress has not seen fit to 'unexempt' baseball, nor have they seen fit to reinforce the exemption, judicially conferred, in light of respected calls¹³³ for a congressional stand on the issue."

There are two reasons why the legislative branch has failed to act on the issue of baseball's antitrust exemption. The first is that the judicial decisions in Federal Baseball, Toolson, and Flood have been approved by a majority in Congress.

"The inaction of Congress in the face of these decisions, [all] of which invite Congress to act, would seem to indicate that there is a policy favoring the exemption of baseball from¹³⁴ antitrust laws."

Congress has continually recognized that:

"the structure of organized baseball, and the growth of its business relationships and internal agreements which have been in reliance on the federal exemption, are all integral components of organized baseball as it now exists."¹³⁵

As a result, legislators argue that it would be inappropriate to apply any type of antitrust provision.

Even though both Houses have never agreed on an antitrust bill, Congress has almost always "endorsed the view that professional team sports are unique enterprises which require business cooperation among competitors in order that fair and honest competition on the athletic field is preserved and promoted."¹³⁶
In fact, on the two occasions¹³⁷ that one house of Congress voted in favor of a sports antitrust bill, an antitrust exemption for certain activities pertaining to the sports industry "has been included and deemed necessary to maintain competitive equality among member teams."¹³⁸

The second reason for congressional inaction is that "there has been insufficient external pressure exerted upon the nation's legislative representatives to sustain any action to dissolve the exemption."¹³⁹ Put simply, organized baseball and its representative player's union lacks "an influential power base in any of the geographical areas where it operates."¹⁴⁰ Whereas other businesses have a larger number of employees concentrated in a particular state or district, baseball employees "are scattered sparsely throughout the country where an appeal to local representation would create minimal impact in comparison."¹⁴¹

As a result of Congress's inaction and silence, the judicially created and admitted anomaly continues. Nevertheless, it remains abundantly clear that "if the antitrust laws, in whole or in part,

should be applied to Organized Baseball, that decision [will] be made by Congress, not by the courts."¹⁴²

Section 2.4 - Non-judicial and non-legislative solutions

"Since the late 1800's, baseball players have literally served under the thumb of their economic 'owners' unable to enforce the antitrust¹⁴³ laws of our country against their employers." This inability to secure numerous basic employee rights through judicial or legislative resolution, has forced the players to unite in order to establish a more equitable reserve system. As a result, non-judicial and non-legislative functions are being used to resolve baseball's antitrust aberration. Since the judges won't judge and the legislators won't legislate, baseball players have turned to collective bargaining, arbitration, and free agency in order to eliminate the inequities of baseball's "monopolistic" reserve system. Nonetheless, there are those who argue whether these solutions are adequate.

I. Collective Bargaining

While the early 1970's marked the boom period for antitrust litigation, many knowledgeable observers believe that the 80's will witness a diminished resort to the antitrust courts. This is due to the fact that the past decade has:

"laid the groundwork for application of another exemption which may remove many significant issues from the purview of the antitrust laws. The exemption in question is that which is afforded to employment-related agreements arrived at

through collective bargaining."¹⁴⁴

In 1976, the Nation Labor Relations Board recognized the Major League Baseball Players Association as the exclusive bargaining agent for all members of the players association.¹⁴⁵ As a result, baseball players who had long been denied the ability to prevent certain mobility restraints through the use of antitrust litigation, "gained the power to bargain with club owners to establish the terms of a system of reserve."¹⁴⁶

Not only did the players gain the power to bargain with club owners, they used it (along with the threat of a season-long strike) to their advantage in revamping the reserve system. On July 12, 1976, it was announced that a four-year collective bargaining agreement had been reached by the baseball owners and players' representatives. As noted by baseball Commissioner Bowie Kuhn:

"This new labor pact was the product of compromise and intense negotiation. But, the significant point is that this settlement was achieved at the bargaining table, not in an anti-trust suit."¹⁴⁷

In general, the collective bargaining agreement of 1976 accommodated the owners' needs for player control while granting the players a more competitive market for their services. More specifically, the reserve system was fundamentally revamped with the elimination of the reserve clause which had allowed the owners to renew each player's contract for one-year periods. The key provisions of the agreement are:

"A player will have the right to demand to be traded after having played in the major leagues for 5 years. He will have a veto right over six clubs. If he is not traded, he will become a free agent.

Players who become free agents . . . will be able to negotiate with a maximum of 12 teams starting with the inverse order of the previous seasons standings. Each club will be limited in the number of free agents it may sign, being permitted a maximum of one if the free agent pool totals 1 to 14 players. However, a club will be able to sign as many free agents as it might lose in a season.

The only compensation for a lost player will be a draft choice. If one of the 12 lowest teams signs a free agent it will lose a second round draft choice. If one of the top 12 teams signs a player, it forfeits its No. 1 draft choice.

Salary arbitration is reinstated. But if a player is eligible to be a free agent, his dispute can go to arbitration only by mutual consent of the player and club.

The minimum salary is to be raised from \$16,000 to \$21,000 by 1979.

The owners agreed to add \$1.85 million to the
148
players pension fund."

II. Free Agency and Arbitration

The inclusion of free agency and grievance-arbitration procedures in the 1976 agreement stem from baseball's establishment of an arbitration system in the 1973 Basic Agreement which ended baseball's first season-delaying strike by the players.

According to the Basic Agreement, "all contract disputes are now to be settled by a three member board consisting of one representative selected by each party and a third mutual partici-
149
pant chosen by the two." As a result, arbitration of salary disputes by an impartial arbitrator "took many issues away from the sole province of the commissioner who is hired exclusively by the
150
club owners."

Controversy over this arbitration system did not evolve until the fall of 1974. Jim "Catfish" Hunter, star pitcher for the World Series Champion Oakland Athletics had a dispute with his owner, Charles O. Finley, about how deferred salary payments were to be made. Hunter contended that "because a stipulation in his contract had not been fulfilled, he should be declared a free
151
agent at liberty to negotiate with another team."

Peter Seitz, the impartial arbitrator who cast the deciding vote in this two-to-one decision, "found that Finley had indeed failed to live up to his agreement with Hunter, and that in such a case, baseball rules gave the player the right to become a free
152
agent." By the terms of his newly acquired status as a free agent,

Hunter was able to offer his services as a pitcher to any of the 24 clubs. As a result, he signed one of sports' first multi-million dollar contracts: a five-year \$3.5 million deal with the New York Yankees.

More importantly, were the grievances filed on behalf of Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos in October of 1975.

The owners historically maintained player control and avoided competitive bidding through paragraph 10(a) of the Uniform Players Contract.¹⁵³ The "Option Clause" allowed the club to extend the existing contract for one year if the player didn't agree to a new one. "The clubs interpreted this to mean that the one-year extension applied to all terms of the original contract - including another automatic one-year extension, which made it a 'perpetual' option."¹⁵⁴

However, Messersmith and McNally felt that since they played the 1975 season under the Option Clause (i.e. under the one year contract they had signed prior to the 1974 season), they had fulfilled all contractual terms and obligations and were thus free agents.

The grievances were submitted to arbitration with Seitz again in the role of impartial arbitrator. On December 23, 1975, a monumental interpretation of paragraph 10(a) of the Uniform Players Contract and the Major League Rules was handed down. Seitz ruled that:

"the relevant provisions did not renew the contract in perpetuity, thereby denying the

right of a club to perpetually control a player.

Messersmith and McNally are declared free
155
agents."

The club owners responded by firing Seitz and asking a federal court to rule that the arbitrator had exceeded his authority.

However, the district court in Kansas City Royals Baseball Corp.
156
v. Major League Baseball Players Ass'n. held that:

"the Messersmith-McNally grievances were within the scope of the [arbitration] panel's jurisdiction and neither the resolution of the merits, nor the relief awarded, exceeded the panel's
157
authority."

The United States Court of Appeals' affirmation of the district court's finding thus emancipated the players from a control system that had traditionally bound each player to the club with which he first signed a contract for the rest of his playing days.

As noted above, the result of the Hunter, Messersmith, and McNally grievances has been a fundamental revamping of baseball's reserve system through the inclusion of free agency and arbitration in baseball's collective bargaining agreement.

III. Are These Non-Judicial and Non-Legislative Solutions Adequate?

"It has been offered that as a by-product of the labor exemption, antitrust is no longer a predominate feature of disputes in professional athletics, primarily owing to the advent of collective

bargaining."¹⁵⁸ However, are the non-judicial and non-legislative solutions achieved through collective bargaining enough to justify baseball's antitrust exemption? Or for that matter, are they adequate in establishing and maintaining an equitable reserve system?

Commissioner Bowie Kuhn and Marvin Miller, executive director of the players' association from 1976-1982, have opposing views on these and other questions pertaining to baseball's antitrust exemption. Their opinions are extensively noted in Section 2.5. However, it is useful to preview their overriding positions with regard to the adequacy of these non-judicial and non-legislative solutions.

Kuhn thinks that collective bargaining has removed "the major irritant for antitrust liability over the course of the last three decades - the status of player rights."¹⁵⁹ Furthermore, the collective bargaining agreement reached in 1976, "is proof-positive that the present status of baseball under our [antitrust] laws is appropriate."¹⁶⁰ Similarly, the recently fired commissioner believes that:

"we have demonstrated that baseball is acting in a highly responsible fashion under the present law, and further that if problems exist in the present system they would not be solved through the application of the antitrust laws. Rather, I think it is quite clear that the application of those laws to baseball would only be counter-productive and detrimental to the public interest."¹⁶¹

Miller disagrees with this sanguine perspective of baseball's management. He contends that, "what turned things around, of course, was not the good will or fair-mindedness of the club owners, but rather the Messersmith case. . . . Then and only then were the owners first interested in modifying the reserve system."¹⁶² As a result, it is still necessary for the courts or Congress to remove baseball's antitrust exemption. Otherwise, the owners could return to "their oppressive reserve system with impunity"¹⁶³ after subsequent collective bargaining agreements terminate.

Others agree with Miller and suggest that "antitrust could still be an important device to maintain a checking influence on the bargaining process [of] baseball [in] the 1980's."¹⁶⁴ They point to such issues as player related rules not covered in collective bargaining, league decisions with respect to franchise location, and rules pertaining to league governance as being applicable to antitrust litigation.

Still others contend that baseball's non-judicial and non-legislative solutions are inadequate and inappropriate. The Sporting News, often referred to as the "Baseball Bible", wrote an editorial entitled "Something Out of Whack" to describe baseball's salary-arbitration system.¹⁶⁵ In it, they criticize the often illogical decisions of baseball's arbitrators who demonstrate: "(a) disregard for the dollar, or (b) ignorance of the game."¹⁶⁶

[See Appendix II]

Whether baseball's resolutions to its monopolistic reserve system are adequate in solving the problems associated with a

business exemption from federal antitrust laws is yet to be seen. However, one must commend the industry as a whole for its ability to rise above judicial and legislative inaction, in attempting to resolve its contractual inequities.

Section 2.5 - Baseball's Opposing Viewpoints

As noted in the previous section, the leading figures for baseball's management and players' association have diametrically opposing viewpoints with regard to baseball's antitrust exemption. On a number of occasions, Bowie Kuhn and Marvin Miller have appeared at congressional hearings to justify their opinions. This section presents the opposing viewpoints on baseball's distinct status that were voiced by the sport's leaders at hearings before the 92nd and 94th Congresses.

I. Bowie Kuhn: Maintain the Exemption

It is important to note that while Kuhn believes his primary concern as commissioner is "to protect the integrity of the game,"¹⁶⁷ many believe that his job is to protect the owners. Kuhn was hired by, and gets his power from, the club owners - not the players. As a result, his viewpoint quite obviously echoes that of the owners, who are the ones that benefit from an antitrust exemption.

168

Kuhn's remarks before the House Antitrust Subcommittee¹⁶⁹ and Select Committee on Professional Sports can be summed up in four justifications for maintaining baseball's exemption: professional baseball is unique; baseball's management has acted

responsibly; application of antitrust statutes would be counter-productive; and the solution to baseball's anomalous status should not be the removal of its exemption, but rather the granting of an antitrust exemption to all professional sports.

One of the reasons why those in baseball's management contend that their sport should maintain its distinct status, is that baseball's structure is unique when compared to other sports and even other businesses. Kuhn reiterated this point in 1972 when he said:

"It is a mistake . . . to think of professional sports as fungible in their problems. They are not. They are very different. There is no sport as different as baseball."¹⁷⁰

Specifically, Kuhn points to baseball's minor league system. Whereas professional football and basketball teams acquire their players directly out of college, baseball teams have to develop their players in an extensive and expensive minor league system:

"The average expense by major league clubs to develop players is \$1.5 million apiece per club. This is one of the reasons why baseball has argued that it has a right to a greater player control than other sports may have, because we are in a radically different position from other sports. There is simply no question about it."¹⁷¹

In lieu of its unique structure and problems, Kuhn takes "pride in the fact that we have tried to have a system of self-regulation which, while not perfect, we think has best suited the needs of our particular industry."¹⁷² As the recently fired commissioner stated in 1976, "baseball's conduct has been responsible."¹⁷³

In an outline of why baseball should not be brought under the antitrust laws which he presented before the House Select Committee on Professional Sports, Kuhn gave three examples of the responsibility of the club owners. First - baseball presents its product at a modest cost to the public and on an essentially break-even basis to the owners. Second - baseball's internal structure has provided a high degree of integrity in the game as well as fair procedures for resolution of disputes. And third - baseball's minor league system provides wholesome and popular sports entertainment for many cities throughout the country.¹⁷⁴

Kuhn goes a step further and claims that not only is baseball a unique industry whose management is responsible in resolving internal conflicts, but application of antitrust statutes would be counter-productive:

"I believe that a thorough-going study of the facts will demonstrate that the institution of baseball is fulfilling its public obligations quite fully under the present law, and that if any problems exist in our structure, they will not be solved in the public interest by the application of the antitrust laws."¹⁷⁵

Kuhn bases this line of reasoning on his contention that "the application of the antitrust laws may well threaten to upset the existing labor-management agreement and endanger the ability to solve future labor problems through collective bargaining."¹⁷⁶ In other words, the advent of collective bargaining has superseded

the need for antitrust application in improving player conditions:

"Indeed, placing baseball under the antitrust laws might actually unsettle the existing agreement between management and the players, and make resolution of the labor problems through collective bargaining more difficult in the future."¹⁷⁷

This is due to the fact that if the antitrust laws are made applicable to professional baseball, it will open a Pandora's box of court cases to decide the complex issue of "the extent of the exemption to be accorded baseball's labor agreement."¹⁷⁸ Such judicial decisions could "threaten the carefully balanced bargain that has been struck between the management and the union in baseball."¹⁷⁹ Therefore, Kuhn asks the proponents of applying the antitrust laws to baseball this question:

"Apart from years of litigation and tremendous expense, what indeed will be gained? What confidence have they that their approach is superior to the collective bargaining process and the Federal labor laws in resolving what are essentially labor-management problems."¹⁸⁰

Kuhn also attacks the logic behind those who criticize baseball's anomalous exemption on the grounds that it is unfair to apply antitrust laws to all other sports yet exempt baseball. He says that the call for equal application of federal statutes is a false issue:

"The fact that other sports are forced to live

under the antitrust laws is, by itself, no reason to apply those laws to baseball. Certainly no one would argue that the antitrust laws should apply to baseball, simply in the name of equality, unless the application of those laws is likely to result in some substantive benefit, or at least in the absence of predictable harm."¹⁸¹

Kuhn notes that baseball's unequal status has been the result of judicial interpretation and congressional silence. As a result, the sport has developed over the last 60 years in reliance on the antitrust exemption:

"On the other hand, the antitrust laws were applied to other sports at a relatively early point in their modern development, and their arrangements have been modified and worked out over several years with antitrust liability in mind. . . . The fact that those sports might continue to survive under the regime of anti-trust is no assurance that baseball could."¹⁸²

According to Kuhn, the solution to baseball's anomalous status should not be the removal of its exemption. Instead, if it was up to him to solve the antitrust inequalities between professional sports, he "would ask Congress to put all sports in the same position that baseball now finds itself."¹⁸³

II. Marvin Miller: Remove the Exemption

Just as Bowie Kuhn is the voice of the owners, Marvin Miller's viewpoints must be weighed in terms of his previous role as head of the players' union whose members would benefit the most from an application of antitrust laws to baseball.

Miller's remarks before the House of Representatives can also be summed up in four justifications for removing baseball's exemption: the owners have a history of monopolistic control of the players; the owners were forced to act responsibly; the courts have urged Congress to act; and the exemption prohibits the players of equal protection of the law.

At the outset of his first appearance before a congressional subcommittee in 1972, Miller acknowledged that:

"Professional baseball players have an obvious and direct interest in the application of the anti-trust laws to the industry in which they are employed. At the present time, no other Americans in any walk of life are as tightly restricted by monopoly control of their services as professional baseball players."

Even though these remarks were made prior to baseball's restructuring of its reserve system, it is important to note how monopolistic the owners have been with regard to player control. As stated in Section 2.1, once a player signs a contract with the club that drafted him, he becomes the property of that employer's club for life - unless otherwise disposed of by that club. As Miller defined the reserve system prior to 1976:

"The player may be traded, sold, optioned or otherwise assigned to other employers at the will of the employer club. Such assignments may be made without consultation or notice. . . . If a player doesn't care for that system, his only option is to retire from his calling."¹⁸⁵

Therefore, Miller contends that the owners have not always been as responsible to the player's and public's interests as Kuhn would have one believe. In fact, Miller says that:

"This comprehensive, monopolistic, lifetime control of the services of a human being in his chosen profession clearly is unduly restrictive and excessively anticompetitive and should be determined to be against public policy."¹⁸⁶

Kuhn, however, believes that such monopolistic control was eliminated in the 1976 collective bargaining agreement. Shortly after its passage, he said that, "it is quite clear that the major irritant for antitrust liability over the course of the last three decades - the status of player rights - has now been removed from the scene"¹⁸⁷ by the good will of the owners.

Ten days after Bowie Kuhn made this remark, Marvin Miller gave his rebuttal to the House's Select Committee on Professional Sports:

"I would like to provide clarification [of] Mr. Kuhn's argument to this committee that collective bargaining on baseball's reserve system has

worked because of baseball's peculiar antitrust immunity. He suggested that the club owners agreed to loosen the reserve system out of good will and because the union could not subject them to antitrust liability through litigation. In fact, quite the opposite is true. Collective bargaining in baseball has been impeded because of its antitrust status."¹⁸⁸

Continuing his assault on Kuhn's praise of the fair-minded owners who altruistically redesigned the reserve system, Miller told the legislators that:

"What turned things around, of course, was not the good will or fairmindedness of the club owners, but rather, the Messersmith case. By utilizing impartial arbitration, subsequently enforced by the courts, the players association obtained the ruling that baseball's reserve system was not as airtight as the owners had been led to believe. . . . Then and only then were the owners first interested in modifying the reserve system."¹⁸⁹

Miller concluded his remarks before Congress by calling for our nation's law makers to remove baseball's anomalous exemption in order to give baseball players equal protection of the law. In again attacking Kuhn's viewpoint, the ex-director of the baseball union said:

"In Kuhn's view baseball is fulfilling its public obligations and, ergo, under his logic Congress

has no basis for removing baseball's privileged status. Needless to say, that falls far short of establishing a basis for special treatment accorded to no other unregulated sector of our economy."¹⁹⁰

Furthermore, Miller criticized the Supreme Court for passing the buck to Congress in order to correct an error made by the judiciary. Nevertheless, the Court has said that Congress has the power to change the status quo, and in Miller's opinion:

"that clear invitation should not be ignored.

The professional baseball player no longer should be denied equal protection of the law."¹⁹¹

III. Unanswered Questions

In summing up this section on baseball's opposing viewpoints, there are four main issues for justifying either a maintenance or a removal of this sport's antitrust exemption. 1. Does baseball's unique nature and structure justify its history of monopolistic control of the players? 2. Have the owners acted responsibly enough to justify non-application of federal laws? 3. Would an application of antitrust statutes be counter-productive to, or enhance, the gains made through collective bargaining? And 4. Should an equal antitrust status between the professional sports be reached through an across-the-board exemption or through the removal of baseball's distinct privilege?

Section 2.6 - In My Opinion

I. The Judges Should Judge

After the Supreme Court announced its refusal to reverse its earlier decisions in Flood v. Kuhn, Senator Sam Ervin, Jr. denounced the judiciary. He said that:

"Baseball enjoys this exemption because of a 50 year old decision by the Supreme Court that it was not an interstate activity and therefore not subject to federal law. The Supreme Court could make mistakes [in 1922], but obviously with teams travelling 3000 miles to play one another and with T.V. spanning the nation, the notion that baseball is not interstate commerce is nonsense."¹⁹²

I believe that the Supreme Court's "refusal to reexamine prior statutory interpretations results in the application of stare decisis by each succeeding court to the original mistake."¹⁹³ Although stare decisis is admirable for the stability and consistency it gives to judicial decisions, "a judicial unwillingness to reevaluate prior statutory interpretations impedes rather than assists the development and refinement of the law."¹⁹⁴ As a result, I totally disagree with the Court's strict adherence to stare decisis when the justices themselves recognize their decision as "unrealistic,

inconsistent, or illogical."¹⁹⁵

As C. Paul Roger states:

"Courts are obliged to reach the merits of any dispute when feasible to fulfill their role as arbitrators of disputes and to ensure the progression of the law. Courts, by reaching the merits, may affirm earlier decisions or interpretations as well as reverse them. But by failing to review the merits, . . . courts affirm existing interpretations without regard¹⁹⁶ for their worth."

Likewise, I disagree with the judiciary's insistence that "if there is any inconsistency or illogic in all of this, it is an inconsistency and illogic of long standing that is to be remedied¹⁹⁷ by the Congress and not by this Court."

Since the days of Chief Justice John Marshall, the Supreme Court has been recognized as, and prided itself on being, the final arbiter of our nation's legal conflicts. However, by deferring to the silent legislators, the justices have removed themselves from their legal responsibilities. As a result:

"instead of having two interdependent bodies responsible for improving and advancing statutory law, only the legislature has responsibility after a court has once spoken on the subject. The judiciary is put in the anomalous position of¹⁹⁸ being unable to correct its own errors."

Organized Baseball has changed dramatically since Federal Baseball. Its games can no longer be described as mere exhibition not engaged in interstate commerce. ¹⁹⁹ Therefore, the Supreme Court has been grossly negligent in its responsibility to "adopt a philosophy that takes cognizance of the effects that change can have on the propriety of prior statutory interpretations." ²⁰⁰

II. The Legislators Should Legislate

Whereas I disagree with the Court's refusal to reexamine baseball's exempt status, I also disagree with the legislators' inability to respond to the Toolson and Flood decisions which have placed the responsibility for reconciling this issue in their hands.

Unquestionably, professional baseball is a business involved in interstate commerce. It also is a business that practices various forms of restraint of trade or commerce, monopolistic control of its employees, and anticompetitive balancing of teams. Therefore, Congress must enact some type of legislation "to include this very lucrative business within the mainstream of American antitrust legislation." ²⁰¹

However, I am in favor of the type of legislative response to baseball's antitrust exemption as proposed by Representative Horton during the 92nd Congress. ²⁰² It would: place all professional sports within the purview of the antitrust laws; make the business aspects of professional sports applicable to antitrust regulation; yet "exempt from antitrust exposure those on-the-field practices which, due to the unique character of these

sports businesses, are necessary for the successful, competitive survival of the sports themselves."²⁰³

My reasons for removing baseball's exemption, yet allowing certain aspects of the industry to be exempt are threefold. First, it would place all professional sports on an equal antitrust footing and thereby make them all accountable to the federal statutes. In other words, this type of legislation would remove baseball's anomalous antitrust status - by bringing its obvious interstate business affairs within the Sherman and Clayton Acts.

Second, professional team sports are entirely different from other types of businesses. Congress enacted antitrust legislation on the grounds that:

"the public will be best served by vigorous competition between companies so that those that are able to give the public the best product at the best price will be those that prosper."²⁰⁴

However, when dealing with professional athletics, the public is best served when the sports' teams are evenly balanced. Otherwise, "it is generally agreed that the wealthier teams would absorb the best talent and force the dissolution of the poorer teams and of the leagues themselves."²⁰⁵

Third, antitrust laws insist that individual businesses act independently of their competitors. "However, professional team sports must, of necessity, be organized into leagues."²⁰⁶ As a result, they are dependent on one another and must be permitted to work together. This type of legislation would recognize the need

for collusion between the teams which in the long run benefits the public.

The problem, however, with this type of legislative remedy to the antitrust conflict, is how to distinguish between the business and on-the-field practices. The courts would therefore be brought back into the "triangle" as it would be up to the judiciary to resume its position as the final arbiter.

III. The Sports Triangle

An analysis of professional sports and the antitrust laws, with emphasis on baseball's anomalous exemption, sheds new light on the "sports triangle." There is no doubt that the courts and Congress have been directly involved in, and had a tremendous impact on, athletic competition. However, it has not been the result of usual judicial, legislative, and athletic actions. As Nancy Jean Meissner puts it, "the lower courts have refused to act in deference to the Supreme Court; the Supreme Court has refused to act in deference to implied congressional intent; and Congress has refused to act, period." ²⁰⁷ Only those within baseball itself have attempted to resolve the inequities associated with this aberration.

Lionel S. Sobel summed up this unique representation of the "sports triangle" when he spoke before the House of Representative's Select Committee on Professional Sports. He said that the terms:

"anomaly, inconsistency, and illogic are really words which, in my judgment, understate the significance of baseball's exemption, for baseball continues to be exempt from the antitrust laws only as a result of something which I view as

Endnotes

Introduction:

¹15 U.S.C. Secs. 1-7.

²15 U.S.C. Secs. 1-2.

³15 U.S.C. Secs. 12-15, 19-22, 27, 44; and 29 U.S.C. Secs. 52,53.

⁴Philip L. Martin, "The Aftermath of 'Flood v Kuhn': Professional Baseball's Exemption from Antitrust Regulation." 3 Western State University Law Review (1976), p. 262.

⁵"Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism." 12 William and Mary Law Review (1971), p. 860.

Section 2.1:

⁶86 Misc. 441, 149 N.Y.S. 6 (1914).

⁷259 U.S. 200 (1922).

⁸ibid, at 207.

⁹Martin, op.cit., p. 264.

¹⁰"Antitrust Law - Baseball Reserve System - Concerted Conspiracy - Stare Decisis - Congressional Inaction - Baseball Remains Exempt from Federal and State Antitrust Laws." 48 Notre Dame Lawyer (1972), p. 462.

¹¹259 U.S. 200, 208-209.

¹²172 F. 2d 402 (1949).

¹³Nancy Jean Meissner, "Nearly a Century in Reserve: Organized Baseball - Collective Bargaining and the Antitrust Exemptions Enter the '80s." 8 Pepperdine Law Review (1981), p. 318.

¹⁴172 F. 2d 402, 409. (citations omitted)

¹⁵Toolson v New York Yankees, 346 U.S. 356 (1953); Corbett v Chandler, 202 F. 2d 428 (6th Cir., 1953); and Kowalski v Chandler, 212 F. 2d 413 (6th Cir., 1953).

¹⁶Meissner, op.cit., p. 319.

¹⁷Whereas Federal Baseball was decided upon unanimously, Toolson was a 7-2 decision. Excerpts from the dissenting opinions of Justices Burton and Reed are found in Section 2.2.

¹⁸346, U.S. 356, 357.

¹⁹id.

²⁰id.

²¹Hearings before the House Select Committee on Professional Sports entitled "Inquiry into Professional Sports," 94th Cong., 2d Sess. Part I (1976), p. 428.

²²348 U.S. 222 (1955).

²³The "reserve clause" is in actuality a system made up of various clauses in the player contract and league rules. At the time of Toolson and Flood, paragraph 10 (a) of the Uniform Player Contract allowed the clubs to renew the contract for one year periods. Major League Rules 4 - A and 3 (g) authorized that the clubs could reserve 40 players and prohibited tampering with other players. The Major League Rules are incorporated into the Uniform Player Contract by paragraph 9 (a).

²⁴International Boxing Club v United States, 358 U.S. 242 (1959).

²⁵352 U.S. 445 (1957).

²⁶ibid, at 451.

²⁷ibid, at 452.

²⁸Meissner, op.cit., p. 321.

²⁹390 F. Supp. 73 (N.D. Cal. 1974).

³⁰543 F. 2d 606 (8th Cir., 1976).

³¹Martin, op.cit., p. 276.

³²John C. Weistart and Cym H. Lowell, The Law of Sports (Indianapolis: The Bobbs-Merrill Company, Inc., 1979), p. 608.

³³Robertson v National Basketball Ass'n, 389 F. Supp. 867 (S.D. N.Y. 1975); Haywood v National Basketball Ass'n, 401 U.S. 1204 (1971); and Denver Rockets v All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

³⁴Philadelphia World Hockey Club v World Hockey Ass'n, 351 F. Supp. 462 (E.D. Pa. 1972).

³⁵Deesen v Professional Golfers Ass'n, 358 F. 2d 165 (9th Cir., 1966); and Blalock v Ladies Professional Golfers Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973).

³⁶Washington State Bowling Proprietors Ass'n v Pacific Lanes, Inc., 356 F. 2d 371 (9th Cir., 1966).

³⁷Weistart and Lowell, op.cit., p. 491.

³⁸429 F. 2d 1003 (2d Cir., 1970).

³⁹Meissner, op.cit., p. 322.

⁴⁰429 F. 2d 1003, 1005. (citations omitted)

⁴¹407 U.S. 258 (1972).

⁴²"Whatever Happened to . . . Curt Flood?" Ebony, March, 1981, p. 55.

⁴³Brief for Petitioners at 5, Flood v Kuhn, 40 U.S.L.W. 4747 (U.S. June 20, 1972).

⁴⁴id.

⁴⁵Excerpts from the dissenting opinions of Justices Douglas and Marshall are found in Section 2.2. (Justice Powell took no part in the consideration or decision of the case)

⁴⁶Excerpts from Justice Blackmun's summary in his Opinion of the Court are found in Appendix I.

⁴⁷407 U.S. 258, 281.

⁴⁸Meissner, op.cit., p. 325.

⁴⁹407 U.S. 258, 283.

⁵⁰ibid, at 282.

⁵¹C. Paul Roger, "Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws." 14 Houston Law Review (1977), p. 611.

⁵²id.

⁵³407 U.S. 258, 282.

⁵⁴id.

⁵⁵Meissner, op.cit., p. 331.

⁵⁶ibid, p. 326.

⁵⁷"The Labor Controversy in Professional Baseball: The 'Flood' Case." 23 Labor Law (1972), p. 571.

⁵⁸Weistart and Lowell, op.cit., p. 496.

⁵⁹id. See also Wisconsin v Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W. 2d 1, 15.

Section 2.2:

⁶⁰346 U.S. 356, 358.

⁶¹ibid, at 357-358.

⁶²ibid, at 360.

⁶³Hart v Keith Vaudeville Exchange, 262 U.S. 271, 274 (1923).

⁶⁴346 U.S. 356, 365.

⁶⁵Justice Brennan joined in both dissents.

⁶⁶407 U.S. 258, 291.

⁶⁷ibid, at 286.

⁶⁸ibid, at 287.

⁶⁹id. (citations omitted)

⁷⁰309 U.S. 106, 119-121.

⁷¹See 407 U.S. 258, 288.

⁷²ibid, at 289. (citations omitted)

⁷³ibid, at 292-293.

⁷⁴ibid, at 293. (citations omitted)

⁷⁵352 U.S. 445, 452.

⁷⁶Roger, op.cit., p. 620.

⁷⁷id.

⁷⁸Meissner, op.cit., p. 331.

⁷⁹Roger, op.cit., p. 622.

⁸⁰309 U.S. 106, 119-121.

⁸¹48 Notre Dame Lawyer, op.cit., p. 474.

⁸²id.

⁸³23 Labor Law, op.cit., p. 570.

⁸⁴ibid, p. 568.

⁸⁵"Inquiry into Professional Sports," op.cit., Part II, p. 470.

Section 2.3:

⁸⁶"Inquiry into Professional Sports," op.cit., Part II, p. 426.

⁸⁷H.R. 4231 (introduced by Rep. Herlong), H.R. 4230 (Rep. Price), and H.R. 4229 (Rep. Mills).

⁸⁸"Inquiry into Professional Sports," op.cit., Part II, p. 427.

⁸⁹H. Rep. No. 2002, 82d Cong., 2d Sess. (1952), pp. 231-232.

⁹⁰S. Rep. No. 462, 89th Cong., 1st Sess. (1965), p. 7.

⁹¹ibid, p. 8.

⁹²352 U.S. 445, 452.

⁹³H.R. 5319 (Rep. Celler) and H.R. 5307 (Rep. Hillings).

⁹⁴H.R. 5383 (Rep. Harris).

⁹⁵H.R. 6876 (Rep. Keating), H.R. 6877 (Rep. Byrnes), H.R. 8023 (Rep. Hillings), and H.R. 8124 (Rep. Byrnes).

⁹⁶S. Rep. No. 462, op.cit., p. 9.

⁹⁷Press Release of the Antitrust Subcommittee of the House Judiciary Committee; "Celler Committee Recommends Sports Bill." January 30, 1958.

⁹⁸The amendments eliminated the words "reasonably necessary" and included in the areas of exemption, control over player contracts and the regulation of television broadcast rights.

⁹⁹"Inquiry into Professional Sports," op.cit., Part II, p. 433.

¹⁰⁰Press Release of the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee; "Sen. Kefauver Announces Subcommittee Approval of Sports Bill, S. 2545." September 3, 1959.

¹⁰¹H.R. 2266 (Rep. Whitener), H.R. 2370 (Rep. Walter), H.R. 2371 (Rep. Luller), H.R. 2372 (Rep. Harris), H.R. 2373 (Rep. Byrnes), and H.R. 2374 (Rep. Cramer).

- ¹⁰²"Inquiry into Professional Sports," op.cit., Part II, p. 435.
- ¹⁰³H.R. 178 (Rep. Walter), H.R. 323 (Rep. Byrnes), and H.R. 1147 (Rep. Collier).
- ¹⁰⁴S. Rep. No. 1303, 88th Cong., 2d Sess.
- ¹⁰⁵"Inquiry into Professional Sports," op.cit., Part II, p. 436.
- ¹⁰⁶H.R. 10906 through H.R. 10918, and H.R. 11728.
- ¹⁰⁷S. Rep. No. 462, op.cit., p. 11.
- ¹⁰⁸ibid, pp. 2-3.
- ¹⁰⁹ibid, p. 13.
- ¹¹⁰ibid, p. 12.
- ¹¹¹III Congressional Record 22329 (1965).
- ¹¹²H.R. 6 (Rep. Zablocki) and H.R. 3412 (Rep. Stalbaum).
- ¹¹³See note 110, supra.
- ¹¹⁴"Inquiry into Professional Sports," op.cit., Part II, p. 438.
- ¹¹⁵id.
- ¹¹⁶id.
- ¹¹⁷Hearings on H.R. 1206 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 92d Cong., 2d Sess. (1972), p. 3.
- ¹¹⁸H.R. 1206, H.R. 10825, H.R. 10902, H.R. 11154.
- ¹¹⁹Hearings on H.R. 1206, op.cit., p. 3.
- ¹²⁰ibid, pp. 3-4.
- ¹²¹ibid, p. 6.
- ¹²²ibid, p. 159.
- ¹²³H.R. 11224 (Reps. Celler and Sisk), H.R. 11937 (Rep. Long of MD), and H.R. 12401 (Rep. Garmantz).
- ¹²⁴Hearings on H.R. 1206, op.cit., p. 11.
- ¹²⁵ibid, p. 244.

¹²⁶House Resolution 1186.

¹²⁷A Study for the House Select Committee on Professional Sports entitled "Professional Sports and the Law," 94th Cong., 2d Sess. (1976), p. 27.

¹²⁸"Inquiry into Professional Sports," op.cit., Final Meetings, p. 25.

¹²⁹id.

¹³⁰Hearings on S. 2784 and S. 2821 before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982), p. 7.

¹³¹ibid, p. 10.

¹³²"Inquiry into Professional Sports," op.cit., Part II, p. 438.

¹³³Meissner, op.cit., p. 327.

¹³⁴James A. Thorpe, "Constitutional Law - Preemption - Baseball's Immunity From State Antitrust Law." 13 Wayne Law Review (1967), p. 424.

¹³⁵Meissner, op.cit., p. 327.

¹³⁶"Inquiry into Professional Sports," op.cit., Part II, p. 439.

¹³⁷H.R. 10378, 85th Cong., 2d Sess. (1958), and S. 950, 89th Cong., 1st Sess. (1965).

¹³⁸"Inquiry into Professional Sports," op.cit., Part II, p. 439.

¹³⁹Meissner, op.cit., pp. 332-333.

¹⁴⁰ibid, p. 333.

¹⁴¹id.

¹⁴²"Inquiry into Professional Sports," op.cit., Part II, p. 439.

Section 2.4:

¹⁴³Meissner, op.cit., p. 314.

¹⁴⁴Weistart and Lowell, op.cit., p. 478.

¹⁴⁵National Labor Relations Act Sec. 9 (a), 29 U.S.C. Sec. 159 (a) (1976).

- 146 Meissner, op.cit., p. 314.
- 147 "Inquiry into Professional Sports," op.cit., Part I, p. 17.
- 148 New York Times, July 12, 1976, p. 1, col. 1.
- 149 Martin, op.cit., p. 281.
- 150 Leonard Koppett, "Antitrust in the Ballpark: What the Rhubarb is All About," 222 Nation, May 15, 1976, p. 590.
- 151 Martin, op.cit., p. 281.
- 152 Koppett, op.cit., p. 590.
- 153 See note 23, supra.
- 154 Koppett, op.cit., p. 590.
- 155 Meissner, op. cit., p. 338.
- 156 409 F. Supp. 233 (W.D. Mo. 1977).
- 157 Meissner, op.cit., p. 338.
- 158 *ibid*, p. 341.
- 159 "Inquiry into Professional Sports," op.cit., Part I, p. 350.
- 160 *ibid*, p. 17.
- 161 *ibid*, p. 372.
- 162 *ibid*, p. 368.
- 163 *id*.
- 164 Meissner, op.cit., p. 341.
- 165 The Sporting News, February 28, 1982, p. 6, col. 1.
- 166 *id*.

Section 2.5:

- 167 "Inquiry into Professional Sports," op.cit., Part I, p. 38.
- 168 Hearings on H.R. 1206, op.cit.
- 169 "Inquiry into Professional Sports," op.cit.

- 170 Hearings on H.R. 1206, op.cit., p. 184.
- 171 *ibid*, p. 185.
- 172 *ibid*, p. 175.
- 173 "Inquiry into Professional Sports," op.cit., Part II,
p. 351.
- 174 *ibid*, pp. 351-357.
- 175 *ibid*, p. 349.
- 176 *ibid*, p. 350.
- 177 *ibid*, p. 357.
- 178 *ibid*, p. 359.
- 179 *id*.
- 180 *id*.
- 181 *ibid*, p. 369.
- 182 *ibid*, p. 370.
- 183 Hearings on H.R. 1206, op.cit., p. 188.
- 184 *ibid*, p. 215.
- 185 *ibid*, pp. 216-217.
- 186 *ibid*, p. 217.
- 187 "Inquiry into Professional Sports," op.cit., Part II,
p. 350.
- 188 *ibid*, p. 367.
- 189 *ibid*, p. 368.
- 190 *ibid*, p. 452.
- 191 *ibid*, p. 218.

Conclusion:

- 192 Hearings on H.R. 1206, op.cit., p.243.
- 193 Roger, op.cit., pp. 624-625.
- 194 *ibid*, p. 625.

- ¹⁹⁵407 U.S. 258, 282. See also 352 U.S. 445, 452.
- ¹⁹⁶Roger, op.cit., p. 634.
- ¹⁹⁷407 U.S. 258, 284.
- ¹⁹⁸Roger, op.cit., pp. 625-626.
- ¹⁹⁹259 U.S. 200, 207-209.
- ²⁰⁰Roger, op.cit., p. 634.
- ²⁰¹Hearings on H.R. 1206, op.cit., pp. 3-4.
- ²⁰²H.R. 2305.
- ²⁰³Hearings on H.R. 1206, op.cit., p. 159. See also note 122, supra.
- ²⁰⁴S. Rep. No. 462, op.cit., p. 12.
- ²⁰⁵id.
- ²⁰⁶id.
- ²⁰⁷Meissner, op.cit., p. 332.
- ²⁰⁸"Inquiry into Professional Sports," op. cit., Part II, p. 471.

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APPENDIX "A"

Flood v. Kuhn, 407 U.S. 258, 282

Summary of Justice Blackmun's Opinion of the Court:

"In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball.

3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see Radovich, 352 U.S., at 452, the aberration is an established one, and one that has been recognized not only in Federal Baseball and Toolson, but in Shubert, International Boxing, and Radovich, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate - football, boxing, basketball, and, presumably, hockey and golf - are not so exempt.

APPENDIX "A" CONTINUED

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of Federal Baseball and Toolson.

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. Cf. Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 241-242 (1970).

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of Federal Baseball. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in Radovich, 352 U.S., at 452, that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after Federal Baseball and

APPENDIX "A" CONTINUED

almost two decades after Toolson, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Accordingly, we adhere once again to Federal Baseball and Toolson and to their application to professional baseball. We adhere also to International Boxing and Radovich and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in Toolson and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency."

APPENDIX "B"

TELL IT TO THE JUDGE

Major league baseball clubs won 17 of 30 salary arbitration cases this year (88 players originally filed; 58 settled before arbitration).

In arbitration, the judge decides whether the player's demand or the team's offer is the fairer salary.

The Winners

Player	Team	1982 salary	Team Offer	Player demand
Fernando Valenzuela	Dodgers	\$350,000	\$750,000	\$1,000,000
Mario Soto	Reds	\$295,000	\$450,000	\$ 625,000
Ron Davis	Twins	\$300,000	\$360,000	\$ 475,000
Doug Bair	Cardinals	\$200,000	\$325,000	\$ 450,000
Damasco Garcia	Blue Jays	\$130,000	\$300,000	\$ 400,000
Dan Petry	Tigers	\$175,000	\$350,000	\$ 390,000
Tony Pena	Pirates	\$ 72,500	\$260,000	\$ 365,000
Mookie Wilson	Mets	\$ 90,000	\$215,000	\$ 325,000
Tim Lollar	Padres	\$ 50,000	\$200,000	\$ 300,000
Jim Barr	Giants	\$135,000	\$165,000	\$ 280,000
Rudy Law	White Sox	\$ 37,500	\$130,000	\$ 220,000
Joe Price	Reds	\$ 85,000	\$130,000	\$ 210,000
Bobby Clark	Angels	\$ 79,000	\$105,000	\$ 145,000

The Losers

Player	Team	1982 salary	Team Offer	Player demand
Broderick Perkins	Indians	\$ 97,500	\$125,000	\$185,000
Bruce Berenyi	Reds	\$ 75,000	\$150,000	\$229,000
Mike Scioscia	Dodgers	\$136,500	\$150,000	\$215,000
Dave Goltz	Angels	\$ 33,500	\$150,000	\$320,000
Roy Lee Jackson	Blue Jays	\$ 75,000	\$155,000	\$225,000
Bobby Castillo	Twins	\$ 65,000	\$185,000	\$350,000
Bill Sample	Rangers	\$162,500	\$215,000	\$300,000
Kirk Gibson	Tigers	\$200,000	\$220,000	\$275,000
Aurelio Lopez	Tigers	\$285,000	\$250,000	\$315,000
Tony Bernazard	White Sox	\$152,000	\$252,000	\$400,000
Bill Gullickson	Expos	\$200,000	\$275,000	\$365,000
Dennis Lamp	White Sox	\$250,000	\$312,500	\$750,000
Steve Howe	Dodgers	\$100,000	\$325,000	\$450,000
Julio Cruz	Mariners	\$375,000	\$425,000	\$500,000
Len Barker	Indians	\$365,000	\$475,000	\$805,000
Lonnie Smith	Cardinals	\$240,000	\$500,000	\$580,000
Pedro Guerrero	Dodgers	\$275,000	\$600,000	\$750,000

AMERICAN ATHLETICS AND THE LAW:

The Sports Triangle

Chapter three

"Title IX and Intercollegiate Athletics:
It's Positive and Negative Effects"

Dr. John W. Outland, Sponsor
Independent Study

Brian Michael Sheahan
December 14, 1983

Section 3.1 - Introduction:

A. Title IX and Intercollegiate Athletics

Discrimination against women in our nation's educational institutions became an issue of national concern in the early 1970's. The legislators were inundated by numerous groups seeking equal opportunity for women with regard to admissions policies, employment practices, financial aid, and treatment in extracurricular programs. Dunkle and Sandler, who did extensive research in the area of sex discrimination in educational institutions, summed up the attitudes of those seeking equal opportunities for women:

"Differential treatment of men and women exists in almost every segment and aspect of our society. Perhaps it is most damaging, however, when it appears and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy. In the past twenty years, it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced Federal legislation."¹

2

Title IX of the Education Amendments of 1972 was intended to be that Federal legislation which would curb sex discrimination in educational institutions. Specifically, Title IX provides that:

"No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance."³ (see Appendix I)

The history of Title IX reveals that Congress modeled the above language on that of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.⁴

However, the controversy which has embroiled Title IX for the past decade is that unlike Title VI which is applied institution-wide, many feel that Title IX "is limited in its coverage to educational institutions, particularly (and, some would say, exclusively) to those educational programs or activities which receive federal funding."⁵ As a result, it is uncertain whether specific programs which do not themselves receive federal assistance are affected by Title IX when other programs at the college or university receive such funding.

The federal government took its first stand on this issue in 1974 when it was announced that specific programs, such as intercollegiate athletics, were explicitly included in the Title IX regulations. The following year, the Department of Health, Education, and Welfare (HEW) issued its Title IX implementing regulations. While HEW was specific in its scope of Title IX's anti-discriminatory provisions and warned that failure to comply could result in an institution's loss of federal funds, "the schools and universities argued that they needed a more detailed explanation of what the government would consider compliance with the law."⁷ In 1979, HEW responded to these requests and listed in its final policy interpretations guidelines for Title IX's coverage of athletics. (See Appendix II)

Mark A. Kadzielski says that "the repercussions of the HEW regulations under Title IX . . . have been felt most keenly by institutions of higher education in the area of athletics."⁸ While these regulations caught many athletic directors by surprise and for the most part have been extremely unpopular, "changes, both significant and cosmetic, have been made in athletic programs at postsecondary institutions."⁹

Title IX has had its most significant impact in intercollegiate

athletic departments in the area of women's athletics. Almost every college athletic program has experienced vast increases in the number of women participating, the number of sports offered for women, the amount of money available to these programs, and the salaries for female coaches.¹⁰ (See Appendices III and IV)

In addition, the number of scholarships available to female athletes has gone up. This is due to the fact that "according to Title IX, scholarship money for the men's and women's programs, theoretically, should be awarded on a proportional basis according to the number of athletes in each program."¹¹ Before Title IX, no college or university offered athletic scholarships to women. Yet in 1975, 5000 were offered¹² and in 1980, 10,000 athletic grant in aids were awarded to women.

Although there continues to be large disparities in total budgets, coaches' salaries, and scholarships, women's athletics have undergone a revolution in the past decade and Title IX can be viewed as its impetus. However, it remains to be seen whether women's athletics will ever reach parity with the men's programs or if in fact future interpretations of Title IX will reverse its applicability to specific programs thereby nullifying the advances made by women in intercollegiate athletics.

One corollary to the advances made in women's athletics as a result of Title IX's emphasis on proportional equality, is that men's non-revenue producing sports have frequently suffered from the redistribution of budgetary and scholarship funds to the women's programs. As a result of athletic departments being forced to upgrade the funds allocated to women's programs while generally not being reimbursed in an equal amount by the respective boards of trustees, reductions have to be made in other programs. These programs are rarely football and basketball, and instead

are such non-revenue producing sports as golf, wrestling, and swimming.

B. The Sports Triangle

In the past decade judicial litigation, arising out of the anti-sex discrimination legislation known as Title IX, has had a preponderous^{out} affect on American athletics. No longer is it permissible to relegate women's athletics to second-rate status. However, the judicial and legislative branches have been inconsistent and often times in conflict with regard to the scope of Title IX's application to educational programs in general, and intercollegiate athletics in specific.

The judiciary has been faced with the question of whether Congress intended Title IX to be applied institutionally or only to the specific programs that receive direct federal assistance. In North Haven Board of Education v. Bell¹³, the Supreme Court rejected the institutional interpretation. However, the Supreme Court is presently deciding on a case, Grove City College v. Bell¹⁴, in which a lower court ruled in favor of the institutional scope.

Likewise, there have been conflicting interpretations as to Congress' intentions with regard to this issue. There are some congressmen, like Senator Birch Bayh¹⁵ who believe that HEW's institutional application includes all educational programs as being within the purview of Title IX and is in line with the original congressional intent. However, there are others who disagree. Senator Jesse Helms, in fact, says that HEW's regulations:

"are far in excess of the goal of insuring an equal educational opportunity for members of both sexes, and they go far beyond the intent¹⁶ of Congress as expressed in that legislation."

Although it is still undetermined whether Title IX will continue to be applied to such programs as intercollegiate athletics which do not receive direct federal funding, Congress and the courts have had a major impact in the revolution occurring in women's athletics. In addition, whereas Title IX is at the root of this revolution and can be hailed "as a long overdue opportunity to alleviate discriminatory practices"¹⁷, it has also had the negative affect of reducing the funds allocated to men's non-revenue producing sports.

The sports triangle is in the midst of a critical year with regard to defining the scope of Title IX's application to intercollegiate athletics. The Grove City decision which should be handed down in early 1984 and the inevitable congressional response could result in a dramatic restructuring of intercollegiate athletics. As summed up by Kadzielski:

"no one is yet sure of the extent to which changes are mandated by the regulations. Pending lawsuits and proposed HEW interpretive guidelines will serve to shape the parameters of Title IX's real impact on intercollegiate athletic programs."¹⁸

Section 3.2 - Inconsistent Judicial Interpretations:

In the early 1970's, the judiciary became heavily involved in litigation involving sex discrimination. Cases were tried, in this area, primarily on the contention that certain rights guaranteed by the equal protection clause of the Fourteenth Amendment had been violated. However, with the advent of Title IX, "whose avowed purpose is the elimination of sex discrimination in education," women had another avenue¹⁹ to achieve equality in athletic opportunity.

While the courts are receptive to try cases arising both out of

the Fourteenth Amendment and Title IX, they have been extremely inconsistent in their interpretations of these laws. (For a summary of the litigation arising out of Title IX, see Appendix V)

This judicial inconsistency has been most evident in the five most recent Title IX cases. Specifically, the courts have been unable to produce a consistent conclusion as to the scope of Title IX's application to educational programs:

"Some courts have used an institutional approach, applying Title IX to any program in an institution receiving federal aid; other courts have taken a programmatic approach, limiting Title IX to individual programs receiving federal aid."²⁰

21

In Bennett v. West Texas State University, six female students who participated in the school's intercollegiate athletic program brought a class action suit against the University contending that certain policies and practices violated Title IX.²² "The school argued that its athletic program received no direct federal financial assistance and thus was not subject to Title IX regulations."²³

The Texas district court held that Title IX is programmatic in scope and, therefore, only those programs or activities specifically receiving financial assistance fall within the ambit of this legislation.²⁴ This ruling is similar to that issued by the Michigan district court in Othen v. Ann Arbor School Board.²⁵ In addition, the court denied the plaintiff's claim that the University's athletic department was the indirect beneficiary of federal financial aid. "In so doing, it rejected the argument that indirect benefits to an athletic program may bring it within Title IX."²⁶

Justice Robert W. Porter, in his summary judgment for the court,

made a definitive justification for interpreting Title IX programmatically:

"The precise selection of the terms 'programs' and 'recipient' throughout the various sections of Title IX evidence the clear intent of Congress that Sections 1681 and 1682 and the regulations thereunder apply only to specific programs or activities which receive direct financial assistance."²⁷

In ruling that the federal aid must be directly allocated to the program in question, Justice Porter emphasized that:

"In order for the strictures of Title IX to be triggered, the federal financial assistance must be direct. . . . The type of indirect aid received by the university athletic program does not bring them within the ambit of Title IX."²⁸

A couple months after Bennett was decided, a similar case arose in Pennsylvania. In Hoffer v. Temple University,²⁹ women students alleged that the school discriminated against female athletes as regulated by Title IX. The university contended that its intercollegiate athletic program was exempt from application of this statute since it received no federal funds earmarked for that program.³⁰

The Hoffer court ruled in direct contrast to the decisions handed out in Othen and Bennett. "Adopting the institutional interpretation of the legislative history of Title IX", this district court held that Title IX prohibits sex discrimination in all programs at an educational institution when that school receives federal funds.³¹

Chief Judge Joseph S. Lord, III, held that civil rights statutes, such as Title IX, are entitled to broad interpretations in order to facilitate their remedial purposes.³² As a result, the court based its institutional decision on an expansive reading of the phrase "receiving federal financial assistance" in Title IX.³³

The U. S. Supreme Court first considered the scope of Title IX

in 1982. North Haven Board of Education v. Bell³⁴ dealt with a sex discrimination case involving employment practices within an educational institution. In addition to governing athletics, Title IX contains employment regulations. The plaintiffs, however, filed suit seeking to invalidate alleged discriminatory hiring practices as covered under Title IX.³⁵

The Supreme Court interpreted the language of Title IX as being program-specific, although the opinion of the court did not examine the legislative history of this statute in determining its program-specific scope.³⁶ "Furthermore, the North Haven court upheld HEW's regulations as consistent with the program-specific scope of Title IX and thus found the regulations valid."³⁷

While the Supreme Court was definitive in its interpretation of Title IX as being program-specific with regard to employment discrimination, there exists uncertainties as to the decision's effect on Title IX in other areas, specifically intercollegiate athletics.³⁸ This is the result of the North Haven court's failure to define the term "program".

The apparent program-specific interpretation in North Haven had significant effects on the Virginia district court's ruling in University of Richmond v. Bell.³⁹ In this case, the university sought injunctive and declaratory relief to prevent the Department of Education (DOE) from investigating its athletic department since it was not the recipient of direct federal assistance.⁴⁰

While the Richmond court stated that the Supreme Court "did not resolve what is meant by Title IX's reference to an 'educational program or activity receiving federal financial assistance'," it did adopt a⁴¹

program-specific interpretation of Title IX. Thus, the district court ruled that the "defendants have failed entirely to establish a nexus between federal financial assistance and the athletic program at ⁴²(Richmond)."

Finally, the Richmond court rejected the benefit theory as espoused by the DOE. Citing Othen and Bennett as precedents, the district court denied the contention that the athletic department comes within the jurisdiction of Title IX simply because it "benefits from various funds which are received by the university on other programs which in turn release university funds to be used in the athletic department."⁴³

Despite the Richmond court's rejection of both the benefit theory and the institutional interpretation, the 3rd circuit court embraced them "as a means of bringing under Title IX's guidelines programs that do not directly receive federal funds."⁴⁴ In Grove City College v. Bell,⁴⁵ the judicial branch proved just how inconsistently it can interpret Title IX.

While the 3rd circuit court acknowledged that North Haven interpreted the sex discrimination statute in question as being program-specific in its scope of application, it adopted an institutional approach in defining the concept of program:

"We concede, as we must, that Title IX's provisions, on their face, are program-specific. We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions. Rather, we believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve, and that the program-specific terms of Title IX must therefore be construed realistically and flexibly. By so doing, . . . complete accomodation can be achieved between the concepts of 'indirect federal financial assistance' and 'program-specific' requirements."⁴⁶

The Grove City court also decided that when an academic institution receives federal funds, each program within that institution indirectly benefits from the assistance. As a result, all programs within the school must comply with Title IX's regulations.⁴⁷ As a result, the 3rd circuit court ruled that "when the federal government furnishes indirect or general aid to an institution, the institution must be the 'program' referred to in Title IX."⁴⁸ In other words, the Grove City court rationalized that the Supreme Court actually adopted an institutional approach to the term "program" which gives credence to the benefit theory.⁴⁹

While the Grove City case is pending in the U. S. Supreme Court, it is not known if the justices are going to decide on the specific question of whether Title IX covers all programs at an institution receiving financial assistance or only those specific programs directly aided. If, though, the Supreme Court rules definitively on this matter, it could restructure college athletics and end the judicial inconsistencies that have marred Title IX litigation.

Until our nation's highest court hands down such a decision, the words of Kevin A. Nelson will continue to define the situation which confronts the judiciary:

"The diametrically opposing decisions of the district court in University of Richmond and the Third Circuit in Grove City and Hoffer reflect the confusion surrounding Title IX and the law's applicability to collegiate athletic programs. The Supreme Court's reluctance to issue a comprehensive decision that will define the scope of Title IX in all areas has resulted in an inconsistent application of the law to athletic programs. Although the University of Richmond court ruled that North Haven eliminated Title IX's applicability to athletic departments, the Hoffer (and Grove City) decisions present valid arguments for the prohibition of gender discrimination in collegiate athletics."⁵⁰

Section 3.3 - Conflicting Congressional Intentions:

In 1972, Congress enacted Title IX of the Education Amendments of 1972 for the purpose of prohibiting gender discrimination in educational programs that receive federal financial assistance. While this is an obvious statement of congressional intent, it is not at all obvious if our nation's legislators intended the statute to apply to educational programs, specifically intercollegiate athletics, when the programs are not the direct beneficiaries of federal aid.

This inconclusiveness with regard to congressional intent is primarily due to the fact that Title IX was ushered into law without adequate public hearings. In the House, it was made a part of the Educational Amendments of 1972 in the full Committee on Education and Labor, rather than working its way through one of the subcommittees. As a result, it was not debated in public hearings.⁵¹ Likewise, the Senate adopted Title IX without benefit of the subcommittee or hearing process.⁵² As Jesse Helms notes:

"no adequate record of the legislative intent of Title IX exists. Senators, Representatives, and bureaucrats alike must view and construe this legislation in a virtual vacuum."⁵³

While there is inconclusive proof as to Congress' intent in 1972 in applying Title IX either institutionally or on a program-specific scope, there are proponents of both interpretations. In attempting to analyze the two sides to this controversy over congressional intent, specifically as it pertains to Title IX's application to intercollegiate athletics, this section takes three approaches: 1st. It analyzes, retrospectively, the attitudes and activities of the members of Congress at the time of Title IX's implementation; 2nd. It explains the Department of Health, Education,

and Welfare's (HEW) policy interpretations as well as the responses that it elicited; and 3rd. It describes the types of legislative amendments to Title IX that have been sponsored since the HEW's 1979 final policy interpretations.

A. Congressional Intentions: The Early 1970's

Newspaper columnist Judy Mann wrote in a recent article:

"Thirty-seven words written into legislation more than 10 years ago are about to reopen an explosive argument over what Congress intended when it passed the law forbidding sex discrimination in federally subsidized education."⁵⁴

In attempting to analyze the controversy over whether Congress intended Title IX to be applied institution-wide or on a program-specific basis, it is important to begin with a recapitulation of the events leading up to passage of the Education Amendments of 1972.

The Nixon administration, in 1971, proposed a gender discrimination amendment "which would have applied across the board to all programs or activities operated by a recipient of federal assistance."⁵⁵ This was supported by Senator Birch Bayh, who introduced an amendment to the Higher Education Bill of 1971.⁵⁶ When introducing his amendment, Senator Bayh remarked:

". . . as we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other more subtle but still pernicious forms of discrimination. . . . Today I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves."⁵⁷

While the 1971 Bayh proposal was not passed, it is significant to note that it was undoubtedly institutional in its applicability to

educational institutions. In addition, it did not apply to private institutions:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education which is a recipient of federal financial assistance for any education program or activity . . ."⁵⁰

The district court in University of Richmond v. Bell, emphasized the fact that Bayh's 1971 amendment was struck down by Congress in issuing its program-specific ruling:

"In essence the (Department of Education's) 'benefits' and 'injections' theories are but theories, or arguments, that Congress should not have rejected the initial institutional approach introduced by Senator Bayh. However, Congress did reject that approach and that should have been the end of it."⁵⁹

On February 28, 1972, Senator Bayh introduced an altered version of his 1971 amendment. This proposal was clearly program-specific since it only prohibited the actual educational programs or activities receiving federal funds.⁶⁰

Nonetheless, the federal government, in its brief submitted to the Supreme Court in Grove City College v. Bell, argues that the change Senator Bayh made in his amendment was not intended to narrow the scope of the sex discrimination regulations in educational institutions. It is their contention that any other conclusion would run counter to Bayh's intention to eradicate gender discrimination.⁶¹

Senator Bayh agrees with these statements. In hearings held in 1975 before the House Subcommittee on Postsecondary Education, he stated that it is incorrect to interpret the changes in language that he made in

sponsoring Title IX as being more narrow in its application of this statute to regulate only the particular programs receiving federal assistance:

"In maintaining that the proper Congressional intent was the narrow definition of program, the critics are making the assumption that the scope of Title IX . . . (is) distinct from those of Title VI of the Civil Rights Act of 1964 . . . This assumption is totally inaccurate."⁶²

Senator Bayh is not the only one who believes that although the language of Title IX appears to be program-specific, the intent of Congress was to apply this statute to all programs at a federally funded educational institution. In fact, 50 members of Congress filed an amicus brief to the Supreme Court in the current Grove City College case. It is their contention that Congress intended to:

"prohibit gender discrimination in all aspects of the American educational system, to include entire institutions where students receive federally funded tuition assistance."⁶³

While the 1975 remarks of Senator Bayh and the recent contention by 50 congressmen that Congress, in 1972, intended to apply Title IX institutionally are noteworthy, they do not carry much legal weight. This is due to the fact that although such post-enactment remarks provide "additional evidence", the Supreme Court has consistently ruled that post-enactment remarks or events "are unreliable guides to congressional intent."⁶⁴

B. HEW's Policy Interpretations

Although it is unclear whether it was the intent of Congress to apply Title IX to all educational programs (specifically intercollegiate athletics) at the time of this legislation's passage, congressional intent

subsequent to its passage is much clearer.⁶⁵ This is due to Congress' numerous responses to the HEW policy interpretations.

In 1974, when it was first learned that HEW intended to specifically apply Title IX to intercollegiate athletics, Congress considered and rejected several proposals which would have exempted athletic departments from Title IX's regulations.⁶⁶

What Congress did enact was the Javits' Amendment which required the HEW to publish policy interpretations regarding the implementation of Title IX and include reasonable provisions to bring intercollegiate athletic activities within the purview of this statute.⁶⁷ As noted by Thomas A.

Cox:

"From the process by which these matters were considered, it seems reasonable to conclude that by 1974, Congress agreed that Title IX applied to intercollegiate sports and sought to assure only that HEW regulate with particular care in this area."⁶⁸

The first policy interpretation issued by HEW, "The Title IX Regulations", became effective on July 25, 1975.⁶⁹ It contained a three year moratorium on its application and subsequent enforcement with regard to intercollegiate athletic programs.⁷⁰ This policy statement is extremely significant because HEW interpreted "programs" that qualify as receiving federal aid in the broad, institutional scope. HEW stated that a program "will be subject to the requirements of (the Title IX) regulation if it receives or benefits from (federal financial) assistance."⁷¹

Under HEW's "benefiting" approach, Title IX applies to intercollegiate athletic programs irregardless of whether or not it receives direct federal funding.⁷² As long as any program or activity at an educational institution receives federal aid, the athletic department is culpable to

this legislation's regulations.

HEW's 1975 regulations also called for "equity for men and women athletes in scholarships, equipment, facilities, coaching and other components of sports programs."⁷³ Such broad interpretations of the original legislation is also significant since Congress refused to invalidate them in the face of angry responses from those involved with intercollegiate athletics.⁷⁴

John A. Fuzak, President of the National Collegiate Athletic Association, argued before a congressional subcommittee that HEW's regulations are inconsistent with the provisions of Title IX:

"I have read both Title IX and the HEW regulations, and if I may be permitted to say so, I find incredible disparities - in plain English - between what Title IX actually says and what HEW says Title IX says."⁷⁵

The focal point of his argument is that Title IX is to applied to any program or activity that receives federal assistance. However, intercollegiate athletic programs are not the recipients of aid from the federal government.⁷⁶ As a result, he is unable to justify how HEW can expand "the literal language of Title IX, to cover not only education programs which receive federal assistance, but also those which benefit from that assistance."⁷⁷

Furthermore, he contends that while Title IX is designed to be a prohibition of gender discrimination, HEW has converted it into an affirmative requirement of social action:

"If Congress wants to write or mandate such a social action program, it can surely do so to the extent permitted by our Constitution, but we submit most urgently that such a program is not consistent with the statute now on the books."⁷⁸

Although Congress, as a whole, supported the HEW regulations, there

were members who opposed the departmental interpretations. Representative Ronald Mottl even went so far as to say that "the bureaucrats in HEW are all wet on this proposal."⁷⁹ While he claims to be in favor of sex discrimination and equal opportunities for women in our educational institutions,⁸⁰ "this is not the way to go about it."

In the Senate, Jesse Helms led the opposition to the HEW's 1975 regulations. He said that the regulations published by HEW bear little resemblance to Title IX:

"Through overbroad interpretation inconsistent with the congressional enactment, HEW has extended the meaning of the term 'education' to embrace programs, activities, and services which are not actually part of the educational curriculum, such as athletics, student housing, medical care, et cetera."⁸¹

He was also opposed to HEW's inclusion of a benefit theory since it brings within the coverage of Title IX programs or activities which do not receive direct federal assistance:

"Thus, the Department has made vague that which was precise, and with the nebulous legal environment that it has intentionally created, the Department now has the latitude to arbitrarily dictate 'law' that will affect every schoolchild and student in America."⁸²

However, Caspar W. Weinberger, who was Secretary of HEW at the time of its 1975 regulations, refuted the statements made by those in opposition to its broad interpretations. He said that the HEW regulations encompass only "those matters we were advised the Congress included."⁸³ In addition, Weinberger justified his department's interpretations as⁸⁴ being consistent with Title IX, Title VI, and the Javitts' Amendment.

Due to pressures exerted upon the Office of Civil Rights (OCR) and HEW by the universities and colleges, a new set of guidelines were issued

for public comment in December of 1978.⁸⁵ Due to controversies over the
drafted version, they were not implemented until December 11, 1979.⁸⁶

The final policy interpretations issued by HEW again institutionally apply Title IX to college athletic programs. However, it does acknowledge the historical emphasis on male intercollegiate sports, and therefore includes a two-stage approach to compliance and affirmance.⁸⁷

The goal of the first stage is to eliminate gender discrimination in intercollegiate athletics. It requires the allocation of "substantially equal average per capita funds" to participating male and female athletes.⁸⁸ In lieu of college football's unique status with regard to number of participants and cost of funding a team, HEW provides collegiate athletic departments with a loophole:

" . . . discrepancies in average per capita expenditures for males and females will not be considered a violation of Title IX if the institution can show the differences are due to 'non discriminatory factors' such as the nature or level of competition of a particular sport."⁸⁹

The second stage requires schools to continue affirmative steps to encourage the growth of women's athletic programs. In addition, educational institutions are to eliminate the discriminatory effects of the historic emphasis on men's athletics within a "reasonable time".⁹⁰

Specifically, the final HEW policy interpretations set forth a new statement respecting the scope of Title IX's coverage. It addresses the areas of athletic financial assistance and other athletic benefits and opportunities.⁹¹

With respect to athletic financial assistance, HEW will determine compliance in regard to scholarship aid in accordance with the total financial aid provided to male and female athletes:

"Neither a proportionate number of scholarships nor individual scholarships of equal dollar value are required. Rather, the total amount of scholarship aid must be substantially proportionate to participation rates by sex."⁹²

In evaluating the area of other athletic benefits and opportunities, HEW bases compliance on a number of non-financially measurable factors. These range from travel and per diem expenses, to provisions of housing and dining services and facilities. (For a complete listing of benefits required in HEW's 1979 final policy interpretations, as well as the complete wording of the section relating to intercollegiate athletics, see Appendix II).

As with HEW's requirement of proportionate rates of athletic financial assistance, identical benefits and opportunities are not required. However, the overall effect of any differences in the treatment of male and female athletes must be negligible.⁹³

While the goal of HEW's 1979 interpretations was to clarify its regulations in conjunction with the Title IX's application to athletics, it failed in many ways. As a result of its often vague and ambiguous language, "it likely confused institutions as to their responsibilities and obligations under Title IX as much as it guided them."⁹⁴

Tom Hansen, assistant executive director of the NCAA, echoes the less than enthusiastic response by those representing educational institutions. He characterizes HEW's 1979 policies as, "quite demanding, quite complicated, and difficult to administer because of their complexity."⁹⁵ In addition, he is especially disturbed by the scholarship provision because it fails to "take account of ability."⁹⁶ Or, as Thomas J. Flygare, the author of numerous articles on Title IX, states:

"It does not appear that this proposed policy interpretation clears up any of the difficult questions that have existed since Title IX was enacted."⁹⁷

Although the final policy interpretations issued in 1979 by HEW still contain ambiguous and confusing provisions, it does offer more clarity and guidance than the HEW's earlier regulations.⁹⁸ What is most significant about the two policy interpretations, is that they represent the efforts of a departmental agency to impose a regulatory bridle over the previously unregulated programs involved in intercollegiate athletics.⁹⁹ In addition, while HEW's final interpretations concede certain accommodations to revenue producing sports, it maintains strong concerns on behalf of anti-discriminatory groups:

"Whether the overall effect of this balancing act has been to tip the scales in favor of the interests of the status quo over those of change, only time and enforcement will tell."¹⁰⁰

C. Congressional Intentions: The Early 1980's.

While debate continues over specific provisions of the final HEW regulations, the controversy surrounding Title IX persists on a more basic point: should intercollegiate athletics be covered by Title IX?¹⁰¹ As noted, the legislative history of Title IX is inconsistent and inconclusive. However, an analysis of the last three years demonstrates a gradual hardening of congressional attitudes that Title IX even if not intended so in 1972 should now be made applicable to all educational programs on an institution-wide basis.

In 1981, three separate bills were in Congress dealing with Title IX. All three were concerned with narrowing the scope of its application, especially with regard to college athletics. It is noteworthy that all three were rejected.

Senator Orrin Hatch introduced the first bill which directly attacked HEW's institutional interpretations. Under his proposal, Title IX would be:

- 1) narrowly defined in order to exclude student financial aid from the definition of federal assistance.
- 2) limited in its scope of protection to students.
- 3) limited in its coverage to only those specific programs directly receiving federal aid.¹⁰³

This proposal was struck down because it would have left faculty, staff, and administrators vulnerable to gender discrimination.¹⁰⁴ In addition, congressmen were concerned that Title IX would be made practically useless. This is due to the fact that while 12 to 15 per cent of most school budgets come from federal sources, only 4% of federal money supports programs or activities directly.¹⁰⁵

In that same congressional session, Senator Roger Jepsen and Senator Paul Laxalt introduced the Family Protection Act.¹⁰⁶ (Representative Albert Smith introduced an identical bill in the House¹⁰⁷). The pertinent part of these proposals was the implicit call for "the repeal of Title IX by removing from federal jurisdiction the right to determine whether the sexes can intermingle in athletics or any other school activity."¹⁰⁸ These proposals were overwhelmingly rejected as running contrary to both the original and present intent of Congress.

The third bill intended to alter Title IX's application was co-sponsored by Senator Edward Zorinsky and Senator Hatch.¹⁰⁹ It called for the Office of Civil Rights (OCR) to reimburse schools for the costs incurred during investigations for possible Title IX violations. This, too, was rejected by Congress because the institution would be reimbursed

irregardless of whether OCR found the school in violation. In addition, OCR's budget would not have been increased in order to reimburse these schools, thereby decreasing the amount of money OCR would have to spend¹¹⁰ for other anti-discriminatory actions.

In lieu of these Congressional rejections of bills intended to narrow Title IX's application, it can be argued that Congress began leaning toward a broader interpretation of Title IX. Coupled with the legislative branch's refusal to negate the institutional policy interpretations issued in 1979 by HEW, it is even more apparent that Congress presently intends Title IX to apply to all programs at a federally assisted institution.

This is especially evident in the congressional response to the Reagan administration's position with respect to this statute. Beginning in August, 1981, the Presidential Task Force on Regulatory Relief announced that it will review the HEW policy interpretations with respect to inter-collegiate athletics.¹¹¹ Claiming "overwhelming" public support for its review of the Title IX athletic policies, the task force has begun to¹¹² consider the repeal of the intercollegiate athletic regulations.

In addition, on August 1, 1983, President Reagan remarked that he was committed to "assure that every woman has an equal opportunity to achieve the American dream."¹¹³ However, four days later, his administration petitioned the Supreme Court in the pending Grove City College case to decide only that the financial aid department at this college is covered by Title IX. In other words, Title IX should be interpreted on a program-specific basis.

This has raised the ire of women's groups and sent a collective shudder through the halls of Congress. As Representative Claudine Schneider,

who immediately submitted a brief to the Supreme Court contrary to the Reagan administration's position, says:

"Congress intended in its wording to prohibit gender discrimination in all aspects of the American educational system, to include entire institutions where students receive federally funded tuition assistance. . . . Unless a class was directly funded by the government, and that is rare, you could exclude women or give preference to men."¹¹⁴

On November 16, 1983, Congress wrote its most recent passage in the turbulent legislative history of Title IX. Repudiating the Reagan administration, the House approved Representative Schneider's resolution granting the broadest possible application of Title IX. The resolution expresses the sense of the House that Title IX "not be amended or altered in any manner which will lessen comprehensive coverage" of equal opportunities for females in education.¹¹⁵

While the early legislative history of Title IX suggests that Congress originally intended it to be program-specific, HEW's policy interpretations and the subsequent congressional actions denote that the legislators presently propose this statute to be applied institutionally. The impact that an institutional application of Title IX and its policy regulations would have on intercollegiate athletics is twofold. Most obviously, it would continue and, in fact, increase the growth in women's athletics. However, it could also have a detrimental effect on men's non-revenue producing sports. The following section examines the positive and negative impacts that Title IX has, and may continue to have, on intercollegiate athletics.

Section 3.4. - Title IX's Impact On Intercollegiate Athletics:

A. The Revolution In Women's Athletics

Title IX was originally enacted in 1972. However, it was not until

1974 that HEW first included intercollegiate athletics within the scope of its regulations. Furthermore, congressional approval of the HEW policy interpretations was not finalized until December of 1979. Nonetheless, many intercollegiate athletic departments felt obliged to begin complying with Title IX in the early 1970's. Faced with the prospect of having all federal financial assistance cut off because of gender discrimination in athletics, "many schools made the changes prior to the release of the regulations."¹¹⁶

The remarks of Dick Schultz, Cornell University Athletic Director, are representative of the responses to Title IX's threat of losing federal aid for noncompliance:

"without (Title IX), we'd have difficulty going to the administration for additional funds just on the merits of building a better women's sports program. It's always easier when they have to do it. Title IX supplies the impetus".¹¹⁷

The belief that Title IX is the driving force behind the ongoing revolution in women's athletics is also held by Gail Bigglestone. The Women's Director of Athletics at the University of New Hampshire credits Title IX for the strides made in women's athletic programs. She says that although the administration of New Hampshire wanted to increase the aid given to women's athletics, "Title IX was the impetus behind the whole effort of the university."¹¹⁸

Remarks are not the only evidence that Title IX has had a positive impact on the growth of women's athletics. Statistics also reveal a definite revolution is taking place, one that coincides with the history of this statute.

In the three year period (1974-1977) following HEW's inclusion of intercollegiate athletics as falling within Title IX's regulations:

- the money budgeted by colleges and universities for athletics that was allocated to women's programs rose from 2% to nearly

8%.¹¹⁹

- the number of colleges offering athletic scholarships increased from 60 to more than 500.¹²⁰

The gains made in women's sports are even greater when viewed from the time Title IX was passed to Congress' approval of the final policy interpretations (1972-1980):

- the budget for women's athletic programs as compared to the total athletic budget has risen from less than 1% to over 16%.¹²¹
- Before passage of Title IX, no colleges or universities offered athletic scholarships to women. In 1975, 5000 were offered and in 1980, 10,000 athletic grant-in-aids were awarded to women.¹²²
- Participation by women in intercollegiate athletics has increased 250% in this time period.¹²³

These overall statistics describing the growth of women's athletics are substantial indicators of an ongoing revolution in college sports. However, data obtained from individual colleges and universities present additional evidence of the tremendous impact that this legislation has had on their women's programs. The following are statistics compiled from five different institutions:

- University of California, Berkeley=

In 1972-73, the entire women's athletic budget was only \$5,000. This was increased 1000% the following year to \$50,000. However, this represented only 2% of the total athletic budget. In 1976-77, the women's share increased to 14% of the total budget (\$448,000).¹²⁴

- Cornell University=

Before Title IX there were only three sports operating on a \$12,000 a year budget. In 1979-80, the figures had ballooned to 16 team sports (plus 4 club sports) with an annual budget in excess of \$340,000.¹²⁵

- University of New Hampshire=

The year Title IX was passed, women's programs could boast only eight sports, no scholarships, and only part-time coaches. In 1981-82, the number rose to 13 sports, 24 of the 190 women athletes on scholarship, eight full-time coaches, two full-time trainers, a part-time sports information director, and a women's assistant athletic director.¹²⁶

- U.C.L.A.=

Women's athletic budget almost tripled from 1974-75 to 1976-77, \$180,000 to \$450,000. The number of head coaches, assistant coaches, and staff positions also doubled during this period. In 1976-77, 23% of the women participating in intercollegiate athletics (65 of 200) were on athletic scholarships.¹²⁷

- Washington State=

Judge Philip Faris recently awarded between \$157,000 to \$400,000 to be distributed among 12 coaches and 485 women athletes in compensation for discriminatory practices by the school's athletic department. More importantly, the judge set financial guidelines that require 37.5% of all athletic funds be allocated to women's programs. This figure is to grow at 2 per cent a year until it equals 44%, the percentage of women at the university.¹²⁸

While these figures constitute great strides made in the area of women's athletics, many feel that they are not enough. Especially since the HEW interpretations dictate proportional allocation of scholarships, coaches salaries, and general funds. As Gail Bigglestone notes, according to this proportional interpretation, Cornell women athletes should be allocated 35 to 40 scholarships instead of the 24 presently awarded. She says, "we're still not where we should be. We've made progress, but it's very, very slow."¹²⁹

These figures, based on the 1974-75 academic year, are evidence of the long road ahead in the women's revolution for proportional equality in intercollegiate athletics:

- at the University of South Alabama, the men operated on a \$200,000 budget; women received \$8,000.

- at the University of Utah, the women's budget rose from \$3,000 to \$53,000; the men's remained at \$1.1 million.
- at Memphis State, the men's budget was \$1.5 million; the women asked for \$21,000 yet were allocated only \$15,500.¹³⁰

More up-to-date figures reveal that while women's programs are steadily increasing, as is their per cent of the overall budget, they still have a long way to go. This is most evident by this 1980 national statistic: while 30% of all intercollegiate athletes are women, the average women's program receives only 16.4% of the total athletic budget.¹³¹

These figures represent the fact that there are obviously a lot of institutions not in full compliance with the HEW regulations. Indeed, the Women's Equity Action League has compiled a list of over 133 complaints accusing colleges and universities of sex discrimination in athletics.¹³² While it is rare for a judge to penalize an athletic department, as occurred in the Washington State case, the real penalty for non-compliance has never been handed out: loss of all federal financial assistance. Until the Office of Civil Rights does penalize an institution in this fashion, Ewald B. Nyquist's prediction may hold true:

"Equity for women in collegiate athletics may not be achieved for some time. . . . The problem women must overcome (is) the aforementioned reluctance of university presidents to comply fully with Title IX."¹³³

B. The Demise of Non-Revenue Sports

Grave concern has been expressed that HEW's policy regulations incorporating intercollegiate athletics into Title IX's prohibitions has had a damaging impact on non-revenue producing sports.¹³⁴ Fearing that they could be cut off from federal assistance, colleges and universities have been reallocating budgetary and scholarship funds from men's to women's programs. Since athletic departments rarely increase the allotment of

scholarships, coaches' salaries, and other funds to the department's money makers, football and basketball, the minor sports are the ones being penalized.¹³⁵

This "robbing Peter to pay Paula" rationale is at the heart of the complaints issued by numerous representatives of America's intercollegiate athletic programs. At a time when athletic departments are increasingly under pressure to make every dollar count, many feel that Title IX's impact on men's non-revenue sports is fiscally disastrous.¹³⁶ The following is a sampling of remarks made by those involved with college sports which forecast the demise of these sports:

Darryl Royal, President, Association of College Football Coaches:

"Some of the men's programs are being eliminated and dropped from our college campuses today simply because they are not self-supporting. . . . (when) we take the profit from the revenue producing sports and give it to women's intercollegiate athletics, we have to drop the programs of track, baseball, golf, and tennis for the men. . . . Eventually I can see a dying process for all athletics."¹³⁷

Tom Osborne, football coach, University of Nebraska:

"We are 100% for women's athletics. The point is that we don't see where the money is going to come from. . . . The solution has been widespread proposals to eliminate athletic grants for (the sports) that do not make money."¹³⁸

Mike White, football coach, University of California:

"In our conference, there is a real difference of opinion as to whether they want to continue with a broad spectrum of intercollegiate athletics. Several of the universities in our conference have had to give up sports, either the scholarships for these sports or just give up participation in these sports altogether."¹³⁹

Representatives of intercollegiate athletic programs are not the only ones predicting negative results for men's non-revenue sports. Newspaper editorials have also been printed prognosticating the demise of these programs:

From the Monroe (La.) News Star:

"At a time when many schools find it difficult enough to balance their books, they may simply decide the easy answer to a highly charged situation is to cut the athletic program down to that part which can pay its own way."¹⁴⁰

From the Tulsa World:

"If women's sports have to be given as much money, personnel and emphasis as men's, it's going to be - in the vernacular - a new ball game. More money will have to be raised or funds will have to be taken from the present sports program."¹⁴¹

From the Chicago Daily News:

"The (HEW) rules will have an effect on the strapped financial circumstances many colleges find themselves in. Either more funds will have to be raised for women's athletics or the present funds will have to be diverted from the men to the women."¹⁴²

While these opinions and editorial comments present, for the most part, subjective speculations on the state of college athletics, the harsh realities of Title IX's impact on men's programs has claimed various intercollegiate programs. Two such non-revenue sports adversely affected are the wrestling program at Georgia and the men's swimming team at Washington.

Georgia Athletic Director Vince Dooley said that the decision to drop wrestling was "strictly a matter of economics" brought on by the Title IX regulations.¹⁴³ He said that it was either drop one sport or "water down" several sports in order to divert funds to the women's programs.¹⁴⁴

At the University of Washington, the school decided to eliminate scholarships for male athletes in non-revenue producing sports. When the State Attorney General reviewed the HEW regulations, "he immediately advised the University of Washington to cancel all grant-in-aid to all male athletes except in football and basketball. The university did so."¹⁴⁵

While the "they're-going-to-rob-Peter-to-pay-Paula" theory is gaining momentum on college campuses, there are many who believe it is a fallacy to believe that Title IX will result in the ruination of men's athletics.¹⁴⁶ For every example of a men's program being dropped, they cite an athletic director who says that a school can comply with Title IX without hurting the men's sports. In fact, Yale Athletic Director Frank Ryan says that in making Yale's women's budget the biggest in the Ivy League,¹⁴⁷ no significant changes were made in the men's sports budget.

The following is a sample of the rebuttal arguments made with regard to this theory that Title IX has a negative impact on men's non-revenue producing sports:

The Women's Equity Action League:

"There is no evidence that men's programs nationwide are being cut to accommodate women's athletics. In fact, among the NCAA's top division schools, the entire sum allocated to women's sports between 1972 and 1978 came to less than half of the budget increases in men's sports programs."¹⁴⁸

Senator Birch Bayh:

"I don't think it is necessary for us to presume that in order to give the women students in an institution adequate participation in physical education, this is going to destroy the men's program."¹⁴⁹

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"I don't think it is necessary for us to presume that in order to give the women students in an institution adequate participation in physical education this is going to destroy the men's program."¹⁴⁹

Representative Blouin:

"I am not as concerned, frankly, about the effect it has on men's collegiate sports. So what if it does hurt. That in itself is an indication there has been discrimination for years, and that it is time we balance things off."¹⁵⁰

Ann Uhler, former Executive Director, Association for Inter-collegiate Athletics for Women:

"It's like saying I have enough money to feed my boy children, but not my girl children. Parents have to find a way to feed both their sons and daughters."¹⁵¹

Even the newspapers have written editorials refuting those that claim HEW's policy regulations endanger men's programs:

From the Philadelphia Evening Bulletin:

"The ominous warnings that the regulations will imperil male sports programs are questionable. There is little chance that the guidelines will affect the big-time programs . . . and some of the smaller ones are already in trouble because they're over-extended."¹⁵²

From the Cleveland Plain Dealer:

"What the NCAA and the congressmen seemed to have overlooked is HEW's point-blank statement that it's regulations do not require exactly equal expenditures for male and female students or for men's and women's teams. It does not seem to us that the regulations endanger any existing programs."¹⁵³

Whether or not this statute has had a negative impact on non-revenue producing sports is a topic of hot debate which requires a statistical study in order to examine Title IX's impact on both women's and men's athletics. However, it is doubtful if even a highly sophisticated research design could prove or disprove a causal relationship between this legislation's emphasis on women's athletics resulting in the demise of men's programs.

Additional funds are being sought to expand women's intercollegiate athletic programs to comply with Title IX's regulations. This has fabricated new dilemmas in educational institutions "at a time when student enrollments are leveling off, legislative support is limited, and the inflationary spiral is continuing upward."¹⁵⁴ Nonetheless, the HEW regulations can be seen as a long overdue opportunity to alleviate gender discrimination in our colleges and universities. Even if Title IX adversely affects men's athletic programs, thereby threatening the favored position of male sports,¹⁵⁵ there are many who view this as a result of societal trends. Or, as Representative Shirley Chisholm states:

"I think we have to recognize that Title IX will go against certain basic traditions in our nation. Many have been quite comfortable, and many do not desire to rock the proverbial boat. However, this does not mean that we should not be responsive to the large segment of society which is now demanding their fair share."¹⁵⁶

Section 3.5 - In My Opinion:

A. Title IX's Impact On Intercollegiate Athletics

Some people argue that providing equal educational opportunities to women threatens an American tradition. However, a tradition offered to only half our population is not very American.¹⁵⁷

The benefits associated with Title IX that have provided the impetus for the revolution in women's athletics must unfortunately come at the expense of certain men's programs. Since the funds necessary to upgrade women's athletics are usually obtained from the men's programs, male non-revenue producing sports are often negatively affected. Nevertheless, achievement of equality of opportunity in educational institutions, the major thrust of the Title IX stipulations, is an extremely praiseworthy

goal which should be strived for at all costs.

As with gender discrimination, the prohibition of race discrimination has been unpopular with many people. Southern plantation owners cried "foul" when President Lincoln signed the Emancipation Proclamation because it had adverse financial and social effects on them. Policies that promote social change often have certain drawbacks to certain groups. But when the policy is designed to abolish something that is wrong, it should be carried out irregardless of the negative side-effects it elicits.

Sex discrimination in American colleges and universities is also wrong. Even though many people involved in intercollegiate athletics emphasize its adverse implications, equal athletic opportunities should be "supported by strong and vigorously enforced federal legislation."¹⁵⁸ Title IX is that legislative enforcer of equity in educational programs and activities. However, its goals will not be fully met until the courts and Congress can consistently define their positions.

Congress took a significant step in that direction last month. Overwhelmingly supporting Representative Claudine Schneider's institutionally interpreted proposal, the legislative branch has indicated its intention that Title IX "not be amended or altered in any manner which will lessen comprehensive coverage" of equal opportunities for women in educational programs and activities.¹⁵⁹

Now, it is up to the Supreme Court to decide whether Title IX is to be applicable to all programs and activities at a school receiving federal financial assistance. Due to the Justice Department's decision to seek only a narrow ruling in the pending Grove City College case, it is doubtful that the high court will issue a broad institutional interpretation. Thus, until the Supreme Court does address this important issue,

athletic directors will continue to avoid full compliance with the Title IX regulations.

B. The Sports Triangle

Judicial litigation and congressional legislation have had an incredible impact in American athletics as a result of Title IX. Due to Congress' passage of this act and the subsequent HEW policy regulations, colleges and universities have been forced to restructure their athletic programs. As a result, there is a current revolution in women's athletics that is allowing women the opportunities once available to men only. Gone forever are the days when a Donna deVaronna must retire from competition the year after winning an Olympic gold medal because no one will offer her a scholarship.

However, the sports triangle has not completed its interpretation of this anti-discriminating statute. While Congress has recently cemented its position with regard to Title IX's scope of application, the courts have not. Still hung up over deciphering the ambiguous congressional intentions at the time of Title IX's passage, the judiciary is mired in its own conflicting interpretations. As a result, it is still undetermined "whether Title IX will be an effective force for sex equity in the schools or a discarded federal experiment in education reform." As Kevin A. Nelson states:

"The uncertainty of Title IX's continuing impact on collegiate athletic programs threatens the further growth of women's college sports. If the courts find that Title IX does not proscribe gender discrimination in college sports programs, no currently recognized federal controls requiring significant expenditures for women's athletics will remain. Without governmental restraints, colleges are unlikely to continue to increase the amounts of money appropriated to women's athletics."¹⁶¹

In conclusion, Congress demonstrated a clear policy against gender discrimination with the enactment of Title IX. While the early history of this legislation denotes conflicting and ambiguous congressional intentions, the legislators have recently focused their intentions on a broad, institutional application of Title IX's regulations. The courts have also articulated a desire to ensure equal educational opportunities. However, the judicial branch has not resolved its conflict over Title IX's scope of application. As the courts reconcile their conflicting interpretations, "the paramount consideration should be the goal of alleviating¹⁶² past inequities while providing full athletic opportunity for both sexes." Only then will the goals of this statute reach its full fruition.

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APPENDIX "I"

Public Law 92-318 (June 23, 1972)

TITLE IX - PROHIBITION OF SEX DISCRIMINATION

Sex Discrimination Prohibited

Sec. 901.(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons

APPENDIX "I" CONTINUED

of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

APPENDIX "II"

Section 86.41 provides as follows:

86.41 Athletics.

(1) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex. . .and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purpose of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

APPENDIX "II" CONTINUED

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex.

APPENDIX "III"

GROWTH IN COLLEGE PARTICIPATION, 1971 - 76

SPORTS	NUMBER OF SCHOOLS				
	'71-72	'72-73	'73-74	'74-75	-75-76
Basketball	215	346	466	600	640
Volleyball	181	285	396	467	594
Tennis	198	300	417	506	560
Softball	120	175	254	303	342
Swimming & Diving	135	213	265	298	327
Track & Field	76	138	180	226	283
Field hockey	165	213	249	284	256
Gymnastics	123	182	238	263	246
Golf	77	132	145	155	165
Badminton	70	98	124	125	117
TOTAL AIAW MEMBER SCHOOLS	301	409	603	739	843

From a December 1976 survey by the Association for Intercollegiate Athletics for Women of the number of its member schools offering intercollegiate competition for women.

Reprinted from: Kadzielski, Mark A. "Postsecondary Athletics in an era of Equality: An Appraisal of the Effect of Title IX." 5 Journal of College and University Law (1979). pp 132-133. See 45 C.F.R. Part 86, Sect. 86.41.

APPENDIX "IV"

*SCHOOLS	WOMEN'S ATHLETICS	MEN'S ATHLETICS	WOMEN'S % OF TOTAL
Indiana	\$218,000	\$3,500,000	5.86%
Iowa	\$250,000	\$2,000,000	11.11%
Michigan	\$180,000	\$5,000,000	3.47%
Michigan State	\$256,000	\$4,500,000	5.38%
Minnesota	\$400,000	\$3,400,000	10.53%
Ohio State	\$300,000	\$5,700,000	5.00%
Wisconsin	\$209,000	\$2,217,000	8.62%
Average	\$259,000	\$3,759,714	7.14%

*Figures unavailable for Illinois, Purdue, and Northwestern. Budgets listed may not include the total money spent since some salaries and administrative costs may be reflected in other budgets.

Reprinted from: Kadzielski, Mark A. "Postsecondary Athletics in an era of Equality: An Appraisal of the Effect of Title IX." 5 Journal of College and University Law (1979). pp 132-133. See 45 C.F.R. Part 86, Sect. 86.41.

APPENDIX "V"

Inconsistent Judicial Interpretations of Title IX

1. Cape v. Tennessee Secondary School Athletic Ass'n., 424 F. Supp. 732 (1976), revised per cuffiam F. 2d 793 (6th Cir. 1977).

Female high school basketball player claimed that six-player, half-court basketball rules denied her full benefits of the game and prevented her from obtaining a college athletic scholarship. Contended that this was in violation of equal protection clause of Fourteenth Amendment. Also claimed right to relief under Title IX. District court ruled in favor of girl although not interpreting Title IX as granting a private right of action. However, 6th Circuit Court reversed the lower court's decision to strike the rules as being a deprivation of Fourteenth Amendment right.

2. Jones v. Secondary School Activities Ass'n., 453, F. Supp. 150 (W.D. Okla. 1977).

Same issue as Cape. Court dismissed those portions dealing with Title IX on the grounds that plaintiff had not exhausted all administrative remedies. Likewise, ruled that six-player rules do not constitute equal protection deprivation of the Fourteenth Amendment.

3. Aiken v. University of Oregon, 39 OR. App. 779 (1979).

Parents of members of women's basketball team claimed University of Oregon's intercollegiate athletic department violated Title IX with regard to unequal: transportation, officiating, coaching, and commitment on behalf of the university. Court ruled that all programs within the institution are subject to Title IX regulations.

4. Leffel v. Wisconsin Interscholastic Athletic Ass'n., 444 F. Supp. 1117 (E.D. Wisconsin 1979).

APPENDIX "V" CONTINUED

Female high school baseball player claimed that rule prohibiting girls the opportunity to play contact sports in mixed competition is contrary to equal protection clause of Fourteenth Amendment. HEW's policy interpretations of Title IX, which permits educational institutions from excluding girls and women from contact sports, was also contended. Court ruled in favor of the girl stating that congressional enactments cannot preempt constitutional provisions.

5. National Collegiate Athletic Ass'n. v. Califano, 444 F. Supp. 425 (1978), revised 622 F. 2d 1382 (1980).

The NCAA instituted declaratory and injunctive relief in an attempt to invalidate the HEW regulations which include intercollegiate athletics within the purview of Title IX. District court ruled that the NCAA lacked standing to sue. Appeals court reversed, and sent the case back to the Kansas City district court where litigation is pending.

6. Hutchins v. Board of Trustees of Michigan State University, C.A. No. G 79-87 (1979).

Women's basketball team filed complaint that university violated Title IX's sex discrimination prohibitions by giving the men's basketball team more money for travelling, better facilities, etc. Although litigation is pending, the court issued a temporary restraining order barring Michigan State from giving its men's teams better treatment than its women's teams.

7. Dodson v. Arkansas Activities Ass'n., 468 F. Supp. 394 (1979).

Female basketball player sought an injunction to stop the high school association from imposing the six-player rules in games. Although she won the case on Fourteenth Amendment grounds, the court used a program-

APPENDIX "V" CONTINUED

specific interpretation of Title IX thereby throwing out the Title IX contention since the programs and activities concerned in this case were not the beneficiaries of federal financial assistance.

8. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (1979).

Different type of Title IX litigation as a male athlete sought injunctive relief against the school district to allow him to play on an all-girls' volleyball team since there was no boys' volleyball team. The court ruled in favor of the boy, thus interpreting HEW's regulations, which prohibit the disallowing of members of one sex from participating with members of the other sex when there is no team for the excluded sex, as working in favor of either sex.

9. Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1981).

Female high school student sought a permanent injunction prohibiting sex discrimination on the school's golf team. Although the district court acknowledged the need to provide women with an equal opportunity in all aspects of life, including athletics, it ruled against the female athlete. The court held that the HEW regulations adopted under Title IX were invalid since they contained an institutional application of this legislation, when its original language required only a program-specific application.

10. Bennett v. West Texas State University, 527, F. Supp. 77 (N.D. Tex. 1981).

Six female students who participated in the university's intercollegiate athletic program sued the school for alleged discriminatory policies and practices which are prohibited by Title IX. University officials

APPENDIX "V" CONTINUED

claimed that since the athletic department did not directly receive federal funds, the athletic program was outside the scope of Title IX. The district court issued a program-specific ruling in favor of the university.

11. Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981).

Similar to Bennett, as women at Temple claimed the university's athletic department was in violation of Title IX. Likewise, the university argued that its athletic program should not be required to comply with Title IX regulations since intercollegiate athletics are not directly assisted by federal funds. However, this district court gave an institutional interpretation of Title IX thus ruling in favor of the women.

12. North Haven Board of Education v. Bell, 102 S. Ct. 1927 (1982).

This case did not involve intercollegiate athletics, per se, but it did deal with Title IX. The U.S. Supreme Court ruled that Title IX prohibits sex discrimination in educational institutions receiving federal assistance and is applicable to employees as well as students. However, it did not specifically address the question of whether Title IX covers all programs at an institution receiving federal assistance, or only those programs directly assisted.

13. University of Richmond v. Bell, 543 F. Supp. 321 (G.D. Va. 1982).

It had been reported to the Department of Education (DOE) that the university was in violation of Title IX regulations. The university sought injunctive and declaratory relief to prevent DOE from investigating its intercollegiate athletic program since it did not receive direct aid. The court

APPENDIX "V" CONTINUED

interpreted North Haven to be program-specific and thereby ruled in favor of the university.

14. Grove City College v. Bell, 687 F. 2d 684 (3d Cir. 1982).

Private coeducational institution which receives no federal assistance other than aid to its students filed suit seeking an order to declare void the DOE's termination of student financial assistance based on the institution's failure to comply with Title IX. The appeals court reversed the district court's decision, ruling that North Haven should be interpreted institutionally thereby stating that Title IX's regulations are not limited to those programs which receive direct federal assistance.

This appendix consolidates information obtained from:

Atkins, Jeanne. "Courts Say What Schools Must Do For Girls' Sports."

In the Running. February, 1982. insert

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