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## Northwestern Football and College Athletes: Be Careful What You Wish For, 49 J. Marshall L. Rev. 655 (2015)

Patrick Johnston

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# NORTHWESTERN FOOTBALL AND COLLEGE ATHLETES: BE CAREFUL WHAT YOU WISH FOR

PATRICK C. JOHNSTON\*

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## I. INTRODUCTION

There is a distinct group of young adults in this nation whom are offered full scholarships to attend four-year universities, but must put in an overwhelming amount of hours to non-academic activities to maintain their scholarships. This group wants a fairer process to obtain their degrees, but in doing so, may be exposing themselves to consequences from our nation's tax system.<sup>1</sup> These young adults are college student-athletes. In particular, college football players have an especially demanding, year-round schedule.<sup>2</sup> In the height of the year, their coaches can require them to spend more than forty hours per week dedicated to their football duties.<sup>3</sup> Players' teams also may restrict them from obtaining outside jobs, taking class during certain times, using certain social media platforms, and other things.<sup>4</sup>

The Northwestern University football team (the Players) has recently taken action regarding this control in their lives, having filed a complaint with the local office of the National Labor Relations Board (NLRB).<sup>5</sup> They have argued that their athletic scholarships are rightly compensation for their football services,<sup>6</sup> and that they are employees of the university.<sup>7</sup> The local office of the NLRB agreed with them, and stated they are indeed employees under the National

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\* J.D. 2016, The John Marshall Law School; B.S. in Civil Engineering, 2009, University of Illinois at Urbana-Champaign. I would like to thank my family, especially my parents and wonderful wife, who never stopped supporting me throughout law school and the writing of this comment.

1. Ford, Harrison LLP, *Hey Coach, I Need a Raise*, 24 No. 11 Ill. Emp. L. Letter 5 (June 2014) (asking what the tax implications might be if scholarships are compensation).

2. See Post-Hearing Brief of Petitioner College Athletes Players Ass'n at 5–19, Northwestern University, Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner, 2014 WL 1922054 (N.L.R.B. Mar. 26, 2014) (No. 13-RC-121359) [hereinafter Post-Hearing Brief of Petitioner] (detailing the duties of the football players throughout the year).

3. See *id.* at 13 (explaining that Players effectively dedicate more than 40 hours per week to required football activities).

4. See *id.* at 21–22 (listing several restrictions on players). Note, the demanding lives of college football players is ubiquitous throughout the system. See Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 227 (2004) (stating that unfair NCAA rules subject players to intolerable treatment). The examples in this comment, though, will only focus on the Northwestern University football Players.

5. See Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES, Jan. 28, 2014, at B10, [www.nytimes.com/2014/01/29/sports/ncaafotball/northwestern-players-take-steps-to-form-a-union.html?\\_r=0](http://www.nytimes.com/2014/01/29/sports/ncaafotball/northwestern-players-take-steps-to-form-a-union.html?_r=0) (stating that this is the first time college athletes have attempted to join a union).

6. See Post-Hearing Brief of Petitioner at 22 (arguing that Players receive athletic aid in the form of an athletic scholarship as compensation for their football-related services).

7. See *id.* at 26 (arguing in part II of their brief that they are employees).

Labor Relations Act (NLRA).<sup>8</sup> This argument that the Players put forth, however, stands in contrast to Internal Revenue Service (IRS) rules that allow athletic scholarships to remain tax-free.<sup>9</sup>

Whether college athletes, especially football players at the Division I level, are employees and thus able to form unions is indeed a divisive topic that writers have extensively commented on over the years.<sup>10</sup> This Comment, however, will neither criticize nor support the Regional Director's ruling, nor will it take a stance on whether the Players are employees or not. Rather, it will analyze the arguments the Players have made to the NLRB and discuss potential adverse tax consequences to the Players as a result of those arguments. It will further propose a different solution that should satisfy each party.

Section II.A.1 gives background on the scholarships themselves and how the Players obtain and retain them. Section II.A.2 describes the rigorous schedule and requirements of the Players throughout the year as members of the football team. Section II.A.3 discusses the Players' petition to the NLRB and the NLRB Regional Director's findings. The rest of Section II reviews the Regional Director of the NLRB's decision in the case, relevant IRS rules, and past court rulings. Section III compares the Players' arguments to the reasons why athletic scholarships have not been taxed up to this point. First, it analyzes the arguments against Section 117 of the Internal Revenue Code, then against other IRS statements, such as Revenue Ruling 77-263. Finally, the Comment analyzes the arguments against certain case law which touches on taxation of scholarships. Finally, section III.C discusses other potential impacts that taxation on scholarships could have, such as state and local taxation, as well as imbalances in competitiveness among the college football landscape. This comment then proposes that the National Collegiate Athletic Association (NCAA) establish

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8. See *Northwestern Univ.*, No. 13-RC-121359, 2014 WL 1246914, at \*1 (N.L.R.B. Mar. 26, 2014) (in which the Regional Director found that Players who receive scholarships from Northwestern are "employees" under Section 2(3) of the Act), *review granted* 2014 WL 1653118 (N.L.R.B. 2014). Note, that when a group is found as "employees" under the NLRA, this finding only applies to that group under the NLRA. See National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (specifying that the definitions provided are limited to when used in the Act).

9. See, e.g., Rev. Rul. 77-263, 1977-2 C.B. 47 (ruling that athletic scholarships are predominantly for aid in pursuing studies and are therefore excludable from the recipients' gross incomes under Section 117 of the Code).

10. See, e.g., Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 727 (2007) (arguing "that the NLRB should not allow college athletes to unionize"); Justin C. Vine, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 235, 266 (2013) (stating that NCAA athletes who receive scholarships are employees of their schools).

an independent player advocacy department in which actual professionals represent player interests.

## II. THE NORTHWESTERN PLAYERS' PREDICAMENT

### A. *The Northwestern Players Believe That Their Scholarships Are Compensation for Services*

#### 1. *Northwestern Offers Prospective Athletes Athletic Scholarships*

When colleges recruit potential scholarship athletes, they offer the recruit what is called a “tender,” which consists of a National Letter of Intent and a four-year scholarship offer.<sup>11</sup> The terms of the tender explain:

The scholarship can be reduced or canceled during the term of the award if the player: (1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent. The “tender” further explains to the recruit that the scholarship cannot be reduced during the period of the award on the basis of his athletic ability or an injury.<sup>12</sup>

The National Letter of Intent (NLI) is an agreement between the institution and the student-athlete that the NCAA manages.<sup>13</sup> Certain provisions within the NLI state that the “student-athlete agrees to attend the designated . . . university for one academic year.”<sup>14</sup> Another provision is that the student-athlete is assured of a minimum of one-year athletic scholarship, provided the university admits him/her.<sup>15</sup> The grant-in-aid for the scholarship athletes typically totals \$61,000 per year.<sup>16</sup>

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11. *Nw. Univ.*, No. 13-RC-121359, 2014 WL 1246914, at \*2.

12. *Id.*

13. National Letter of Intent, *About the National Letter of Intent (NLI)* [www.nationalletter.org/aboutTheNLI/index.html](http://www.nationalletter.org/aboutTheNLI/index.html). The NLI is, as its name implies, applied nationally and not specifically to any school. *Id.*

14. *Id.*

15. *Id.*

16. *Nw. Univ.*, No. 13-RC-121359, 2014 WL 1246914, at \*2. If the player enrolls in summer classes, this number can go up to about \$76,000 per year. *Id.* at \*23 n.4. For purposes of this comment, the \$61,000 figure will be used.

## 2. *The Duties of Northwestern Football Players*

The Northwestern coaches give the Players a special handbook for the football team that sets forth the team policies.<sup>17</sup> Coaches tell the Players what they can or cannot say on social media, their housing must be approved by the coaches, they cannot profit off their image, they are subject to a drug and alcohol policy, and they have a dress code.<sup>18</sup> The Players are also subject to large time commitments throughout the year.<sup>19</sup> They have training camp in August which requires days that begin as early as 6:30 am and can go as late as 10:00 pm.<sup>20</sup>

The regular season then extends from September through November, during which Players devote forty to fifty hours per week to football and are required to travel for away games.<sup>21</sup> During the off-season in January and February, Players must attend workouts for twelve to twenty hours per week.<sup>22</sup> In spring football, Players practice in full pads and helmets, as well as watch film and workout, totaling twenty to twenty-five hours per week.<sup>23</sup> Finally, during the summer, Players participate in drills, film sessions, and further workouts for twenty to twenty-five hours per week.<sup>24</sup>

Coaches expect Players to be at practice and at the team's games. If they do not, the coach could take their scholarship away, according to Kain Colter, the team's quarterback.<sup>25</sup> Colter further stated that the time commitment to their football duties also inhibits the Players' academic success.<sup>26</sup> Colter believes the Players were "brought to the University to play football," as opposed to academics.<sup>27</sup> Nonetheless, Players do have to "meet academic standards throughout their careers on campus to remain eligible to participate" including minimum grade point averages.<sup>28</sup>

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17. Official Report of Proceedings Before the N.L.R.B. at 150, *Nw. Univ., Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner*, 2014 WL 1246914, <http://apps.nlr.gov/link/document.aspx/09031d4581603b6a>.

18. *Id.* at 151–64 (stating how player Kain Colter explained some of the policies football players are subject to under the handbook).

19. *Id.* at 63 (player Kain Colter stating it is a "year-round gig").

20. *Nw. Univ.*, No. 13-CR-121359, 2014 WL 1246914, at \*4.

21. *Id.* at \*5.

22. *Id.* at \*7.

23. *Id.*

24. *Id.* at \*8.

25. See Official Report of Proceedings Before the N.L.R.B. at 298 (answering to what would happen if a player stopped going to practice).

26. See *id.* at 170 (stating that playing football makes it hard for players to succeed academically, and that the "number one thing" that exiting seniors from the team state is that Players cannot reach their potential because of the time demands of playing football).

27. See *id.* (explaining why the players could not sacrifice football in order to achieve their academic potential).

28. See NCAA, *Remaining Eligible: Academics*, [www.ncaa.org/remaining-](http://www.ncaa.org/remaining-)

### 3. *The Players' NLRB Petition*

The Northwestern University football team recently petitioned the NLRB to be deemed employees within the meaning of the NLRA, which would make them eligible for collective bargaining.<sup>29</sup> The Players argued this through their union, the College Athletes Players Association (CAPA).<sup>30</sup> CAPA is “a labor organization established to assert college athletes’ status as employees with the right to collectively bargain for basic protections.”<sup>31</sup> CAPA wishes for the NLRB to call for an election to certify CAPA as the Northwestern football Players’ bargaining representatives.<sup>32</sup> CAPA’s collective bargaining goals would touch on items such as sports-related medical expenses, traumatic brain injury risk management, and graduation rates.<sup>33</sup>

CAPA argues that the Players’ athletic scholarships are actually compensation for the services the Players perform.<sup>34</sup> They argue that “[t]he ‘athletic aid’ provided to the Players is explicitly provided in return for their services to the football team.”<sup>35</sup> They further contrast the athletic aid from the types of financial assistance that other students at Northwestern receive.<sup>36</sup> It should also be noted that Players do not receive employment benefits, the University does not process scholarships through payroll, the Players do not receive payroll checks, and the scholarships are not taxed.<sup>37</sup>

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eligible-academics (explaining the NCAA’s academic standards student-athletes must maintain in order to be eligible).

29. Strauss, *supra* note 5. If found to be a proper employee unit, this would mean the university would be obligated to negotiate with the employee unit’s chosen representative, usually a union. See 29 U.S.C. § 159(a) (2012) (stating that representatives selected by the employee unit “shall be the exclusive representatives” of such employee unit).

30. See CAPA, *What We’re Doing*, [www.collegeathletespa.org/what](http://www.collegeathletespa.org/what) (last visited Sept. 25, 2014) [hereinafter *What We’re Doing*] (stating that CAPA, on behalf of the Players, has petitioned the NLRB to assert the Players’ labor rights).

31. CAPA, *More Information*, [www.collegeathletespa.org/more](http://www.collegeathletespa.org/more) (last visited Sept. 25, 2014).

32. *Id.*

33. *What We’re Doing*, *supra* note 3030.

34. See Post-Hearing Brief of Petitioner at 39 (arguing that when the Players perform their football duties, they are performing services for Northwestern under Northwestern’s control, and are compensated for it).

35. *Id.* at 22.

36. *Id.* at 37–38 (contrasting how athletic aid differs from other financial assistance in nature because it is not need-based, amount because it provides at least a full-ride equivalency, and purpose because it is not given for those who would otherwise not be able to afford tuition).

37. See Nw. Univ.’s Brief to the Board on Review of Regional Director’s Decision and Direction of Election at 34, Nw. Univ., Employer, & Coll. Athletes

*B. The Regional Office of the NLRB Has Ruled  
on the Matter*

The NLRA states that “[t]he term ‘employee’ shall include any employee . . . .”<sup>38</sup> This essentially leaves the term undefined, allowing the Board and courts to construe the term broadly.<sup>39</sup> If a body of individuals allege that they are actually employees and that they wish to form or join a union, at least thirty percent of the employees must show interest, and the body of individuals can then file a petition with the nearest NLRB Regional Office.<sup>40</sup> A hearing officer will then conduct a hearing. Afterwards, the record of the hearing is sent to the Regional Director, who issues a decision.<sup>41</sup> If the Regional Director finds the unit to be employees and appropriate, he/she calls for an election, in which all the members in the unit decide on representation.<sup>42</sup> The Regional Director’s decision is then appealable to the Board, who issues a decision “affirming, modifying, or reversing [the] Regional Director.”<sup>43</sup>

The Northwestern Players filed a petition through CAPA with the Regional Office of the NLRB, which held a hearing in the manner described in the previous paragraph, and issued a decision directing election.<sup>44</sup> The Regional Director “found that all grant-in-aid scholarship Players for the Employer’s football team who have not exhausted their playing eligibility are ‘employees’ under Section 2(3) of the Act.”<sup>45</sup> Northwestern University appealed the Regional

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Players Ass’n (CAPA), Petitioner, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014), *review granted*, 2014 WL 1653118 (N.L.R.B. 2014) (No. 13-RC-121359) (arguing that the athletic scholarships are not compensation for services).

38. 29 U.S.C. § 152(3) (2012). The NLRB states that the NLRA was enacted by Congress in 1935, its purpose “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.” NLRB, [www.nlr.gov/resources/national-labor-relations-act](http://www.nlr.gov/resources/national-labor-relations-act).

39. *See* N.L.R.B. v. Gluek Brewing Co., 144 F.2d 847, 855 n.7 (8th Cir. 1944) (explaining that the Act’s definitions are broad and so should be applied broadly by underlying economic facts).

40. NLRB, Conduct Elections, [www.nlr.gov/what-we-do/conduct-elections](http://www.nlr.gov/what-we-do/conduct-elections) (last visited Sept. 25, 2014) (explaining process of elections on NLRB website).

41. *See* NLRB, The NLRB Process, [www.nlr.gov/resources/nlr-process](http://www.nlr.gov/resources/nlr-process) (last visited Sept. 25, 2014) (showing flowchart of steps in NLRB process). The entire process is generally laid out in the NLRA. 29 U.S.C. §§ 151–69.

42. *Id.*

43. *Id.*

44. *See* Nw. Univ., Employer, & Coll. Athletes Players Ass’n (CAPA), Petitioner, 2014 WL 1246914, at \*21 (directing that the Players shall conduct an election by secret ballot, and that eligible voters include all Players who receive “football grant in aid scholarships” and who still have playing eligibility).

45. *Id.*

Director's decision to the Board, which granted review.<sup>46</sup> In the meantime, the Players voted whether to certify a union on April 25, 2014. The results of this vote have been impounded by the Board, pending the Board's decision.<sup>47</sup>

### *C. There Are IRS Rules and Interpretations That Consider the Taxation of Athletic Scholarships as Income*

Section 117 of the Internal Revenue Code states that if one working toward a degree receives a qualified scholarship, this is not included in gross income.<sup>48</sup> It defines "qualified scholarship" as "any amount received by an individual as a scholarship . . . to the extent the individual establishes that . . . such amount was used for qualified tuition and related expenses."<sup>49</sup> The Rule goes on to state that the Rule does not apply to portions of scholarships received as payment for "teaching, research, or other services."<sup>50</sup> In other words, if a student is performing services in return for the scholarship, it is not a "qualified scholarship" under the Internal Revenue Code.<sup>51</sup>

In a Revenue Ruling in 1977, the IRS stated that athletic scholarships are excludable under Section 117 of the Internal Revenue Code.<sup>52</sup> The ruling stipulated that the scholarships were excludable so long as: (1) the university expected but did not require the student to participate in a particular sport; (2) required no particular activity in lieu of participation in the sport; and (3) did not cancel the scholarship if the student could not participate, "either because of injury or the student's unilateral decision not to participate."<sup>53</sup> After the Regional Director's ruling finding that

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46. Nw. Univ., Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner, 2014 WL 1653118 (Apr. 24, 2014) (granting review).

47. See Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES, Apr. 26, 2014, at D4, [www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html?\\_r=0](http://www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html?_r=0) (reporting that the election took place and that the votes will only be counted if the Board upholds the Regional Director's decision).

48. 26 U.S.C. § 117(a) (2012).

49. 26 U.S.C. § 117(b)(1) (2012).

50. 26 U.S.C. § 117(c)(1) (2012).

51. *Id.*

52. Rev. Rul. 77-263, 1977-2 C.B. 47. This Ruling was based on a university with an intercollegiate program that provided scholarships to incoming freshman who expect to participate in the program. *Id.* The awarding of the scholarships was controlled by rules that required a student to be accepted to the university according to the admissions requirements applicable to all students and that the student be a full-time student. *Id.* Once awarded, the scholarship could not be terminated in the event the student could not participate in the program, and the student was not required to participate in other activities in lieu of the sport. *Id.*

53. *Id.* at \*1.

Northwestern football Players are employees that could form a union, Senator Richard Burr issued a letter to the IRS Commissioner, John Koskinen, to ask him to confirm “federal tax treatment of athletic scholarships.”<sup>54</sup> Senator Burr also asked the Commissioner what the tax implications may be in light of the Regional Director’s decision that Northwestern’s scholarship football players fall under the definition of “employee” under the NLRA.<sup>55</sup> The Commissioner confirmed Section 117’s exclusion of qualified scholarships from gross income.<sup>56</sup> He further referenced the previously discussed revenue ruling, stating that, under the ruling, because the scholarship is “primarily to aid the recipients” in their studies, the scholarship is excludable under Section 117.<sup>57</sup> Then again, he also quoted the same qualifications that the revenue ruling took, namely, that (1) student athletes are expected to partake in the particular sport, (2) the scholarship cannot be cancelled if the student athlete can no longer participate in the sport, and (3) the school does not require the student athlete to participate in other activities if he cannot participate in the sport.<sup>58</sup> Thus, the IRS still takes the same stance on taxation of athletic scholarships as it did in 1977.

#### *D. The Courts Have Adjudicated Matters Regarding Taxability of Scholarships*

A leading case in the area of taxability on students’ scholarships is *Bingler v. Johnson*.<sup>59</sup> In *Bingler*, the taxpayers’ employer offered a program in which they could get a doctoral degree.<sup>60</sup> For half of the program, they are required to continue working for the employer, and the other half they can have a leave of absence.<sup>61</sup> In return, their employer reimburses them for tuition, and they must go back to work for the employer after the degree.<sup>62</sup> After trying to deduct the tuition reimbursements as scholarships, the Supreme Court found that such reimbursement were not excludable scholarships, but rather taxable compensation.<sup>63</sup> The Court further clarified “[t]he thrust . . . is that bargained-for payments, given only as a ‘quo’ in return for the quid of services

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54. I.R.S. INFO 2014-0016, 2014 WL 2958209 (Apr. 9, 2014) (referring to Senator Burr’s letter).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Bingler v. Johnson*, 394 U.S. 741 (1969).

60. *Id.* at 742–43.

61. *Id.* at 743.

62. *Id.* at 743–44.

63. *See id.* at 756 (citing main factors being the employer-employee relationship, as well as a quid pro quo).

rendered—whether past, present, or future—should not be excludable from income as ‘scholarship’ funds.”<sup>64</sup> The Court understood scholarships as educational grants not requiring anything substantial in exchange from the recipient, essentially having no strings attached.<sup>65</sup> It also reiterated that courts are to construe tax exemptions narrowly.<sup>66</sup>

In a ruling under the Federal Insurance Contributions Act (FICA), the Supreme Court held in *Mayo Found. for Med. Educ. & Research v. U.S.* that the employer must pay FICA taxes on wages earned by medical residents.<sup>67</sup> The question was whether doctors who work as medical residents are “students,” whom Congress had exempted from FICA taxes.<sup>68</sup> The Court made this decision interpreting a treasury regulation. Such regulation prescribes that “an employee’s service is ‘incident’ to his studies only when ‘[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, [is] predominant.’”<sup>69</sup> Stating that the Treasury’s “full-time employee rule” under FICA regulations was reasonable, the Court held that the employer must pay the FICA taxes as the residents work forty or more hours per week.<sup>70</sup>

Regarding the student-athletes in the present case, given the outcome of the Regional Director’s ruling, some are saying this could lead to tax implications for the players.<sup>71</sup> Any tax implications would not be automatic, though, as the IRS is not bound by NLRB decisions.<sup>72</sup> For example, the NLRB and IRS use different tests to

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64. *See id.* at 757–58 (referring to Treasury Regulation 1.117-4, which states that payments or allotments to, or on behalf of, any person for the purpose of assisting him in studies or research, but which is “primarily for the benefit of the grantor” shall not be considered a scholarship, but rather compensation. 26 C.F.R. § 1.117-4 (2014)).

65. *Id.* at 751 (referring to the definitions given in Treasury Regulation 1.117-4).

66. *Id.* at 751–52. *See also, e.g.,* *Atl. Coast Line R. Co. v. Phillips*, 332 U.S. 168, 173 (1947) (stating that exemptions are to be read in the narrowest rational manner).

67. *Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704, 716 (2011).

68. *Id.* at 708 (quoting 26 U.S.C. § 3121(b)(10)).

69. *Id.* at 710 (quoting 26 C.F.R. § 31.3121(b)(10)-2).

70. *Id.* at 714 (finding the full-time employee rule reasonable under *Chevron* deference). The full-time employee rule states that an employee who is normally scheduled to work forty or more hours per week is a full-time employee whose services “are not incident to and for the purpose of pursuing a course of study.” 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii).

71. *See* Danny Ecker, *Northwestern Football Union Ruling: What Happens Next?* CHICAGO BUSINESS (Mar. 27, 2014), [www.chicagobusiness.com/article/20140327/BLOGS04/140329801/northwestern-football-union-ruling-what-happens-next#](http://www.chicagobusiness.com/article/20140327/BLOGS04/140329801/northwestern-football-union-ruling-what-happens-next#).

72. *See* I.R.S. INFO 2014-0016, 2014 WL 2958209 (Apr. 9, 2014) (explaining that the tax treatment of scholarships is governed by the Internal Revenue

determine whether a worker is an employee or an independent contractor, which may lead to differing conclusions.<sup>73</sup> Nonetheless, given the background on IRS interpretations, taxation of these scholarships is a real possibility.

### III. A LOOK AT THE POTENTIAL IMPACTS OF THE NORTHWESTERN PLAYERS' ARGUMENTS

#### A. *The Regional Director's Decision Leads Some to Believe the Scholarships May Be Taxed*

The Players' arguments for why they should be deemed employees appear to describe their scholarships in such a way that contradicts the very reasons the IRS has not previously taxed the scholarships.<sup>74</sup> As a result, some are saying the IRS may (or should) review this area for tax implications in light of the Players' arguments and determine if they are indeed employees.<sup>75</sup> If the IRS reopens this issue and looks closely at the Players' arguments, then the Players may receive a hefty tax bill.<sup>76</sup> In other words, if the Players want to be considered employees, they should be careful what they wish for.

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Code, and is not controlled by NLRB decisions).

73. See Andrew E. Tanick, *Independent Contractor or Employee? The Focus Shifts Again* (Sept. 20, 2010), BENCH & BAR OF MINN., <http://mnbenchbar.com/2010/09/independent-contractor-or-employee/> (explaining how the IRS uses one version of the "control test" while the NLRB uses a modified version).

74. See Darren Rovell, *Players Could Get Big Tax Bill*, ESPN (Mar. 27, 2014), [http://espn.go.com/college-football/story/\\_id/10683398/tax-implications-create-hurdle-players-union](http://espn.go.com/college-football/story/_id/10683398/tax-implications-create-hurdle-players-union) (quoting Garrett Higgins stating that the reason why players' scholarships were not taxed before is because the players were not considered employees in the past).

75. *Id.* The article quotes Garrett Higgins when he says that the IRS could possibly make an argument that the scholarships are really payment for services, making them taxable compensation. *Id.*

76. See *2013 Tax Tables*, [www.irs.gov/pub/irs-pdf/i1040tt.pdf](http://www.irs.gov/pub/irs-pdf/i1040tt.pdf) (showing the tax for an individual filing singly on \$61,000 income is \$11,185); see also Nw. Univ., Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner, 2014 WL 1246914, at \*17 (explaining that Northwestern expends \$61,000 to \$76,000 per scholarship per year).

*B. If We Accept the Players' Arguments as True and Follow the IRS Guidelines for Taxability of Scholarships, the IRS Could Tax These Athletic Scholarships*

*1. The Players' Arguments Clash with Section 117 of the Internal Revenue Code*

When comparing the various factors set forth by the IRS regarding taxing scholarships versus the Players' arguments and claims, many of the Players' arguments clash with the IRS factors.<sup>77</sup> Section 117 of the Internal Revenue Code rules that "qualified scholarships" are not taxable because they are not a part of gross income.<sup>78</sup> A qualified scholarship is defined as "any amount received by an individual as a scholarship . . . to the extent the individual establishes that . . . such amount was used for qualified tuition and related expenses."<sup>79</sup> As such, athletic scholarships would be considered qualified scholarships not subject to taxation, and are at least considered as such by the University.<sup>80</sup>

The Players' arguments that their scholarships are actually compensation for services would not initially seem to clash with Section 117. However, Section 117(c) puts a limitation on these qualified scholarships it describes.<sup>81</sup> This limitation states that any portion of a qualified scholarship granted as payment for the student's required services shall not be included in gross income.<sup>82</sup>

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77. See Rovell, *supra* note 74 (stating that a good amount of the arguments before the NLRB directly oppose the reasons why scholarships are not taxed today).

78. 26 U.S.C. § 117(a). The Internal Revenue Code defines "gross income" as "all income from whatever source derived, including . . . [c]ompensation for services." 26 U.S.C. § 61(a)(1). "Taxable income" is gross income minus any deductions allowed. 26 U.S.C. § 63. Therefore, by not being included in gross income, qualified scholarships are not a part of taxable income. *Id.*

79. 26 U.S.C. § 117(b)(1). "Qualified tuition and related expenses" are defined as "tuition and fees required for the enrollment or attendance of a student at an educational organization," as well as "fees, books, supplies, and equipment required for courses of instruction at such an educational organization." 26 U.S.C. § 117(b)(2).

80. See Nw. Univ.'s Reply Brief to the Board on Review of Regional Director's Decision and Direction of Election at 12, Nw. Univ., Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014), *review granted*, 2014 WL 1653118 (N.L.R.B. 2014) (No. 13-RC-121359), <http://apps.nlr.gov/link/document.aspx/09031d458183321d> (explaining that financial aid offices directly administer the athletic scholarships, which are "applied directly to a student's tuition account").

81. See 26 U.S.C. § 117(c) (describing the limitation on the general rule that qualified scholarships are not included in gross income).

82. *Id.* Note, there are exceptions to this limitation for the National Health Service Corps Scholarship Program and the Armed Forces Health Professions Scholarship and Financial Assistance Program, but these exceptions are not applicable in this case. 26 U.S.C. § 117(c)(2).

In short, a scholarship given in exchange for services shall be included in gross income which and is taxable unless there is a specific deduction for the scholarship.<sup>83</sup>

The Players' arguments, which are given through testimony and briefs to the Board, do not include any discussion on taxation.<sup>84</sup> Instead, they focus primarily on the *services* they perform and the *compensation* received in the form of a scholarship.<sup>85</sup> In its Post-Hearing Brief to Region 13 of the NLRB, CAPA uses the word "services" thirty-nine times in the main body of the brief, and the word "compensation" twenty-eight times.<sup>86</sup> In its Brief to the NLRB (regarding Northwestern's appeal to the Board), CAPA uses the word "services" thirty-six times in the main body of the brief, and the word "compensation" fourteen times.<sup>87</sup> In the hearing prior to the Regional Director's rendering of the decision being rendered, CAPA's attorney argued that the Players are "paid for their *services* in the form of scholarships . . . and other *compensation*."<sup>88</sup> The Regional Director found that the Players' scholarships were clearly *compensation* for the Players' athletic *services*.<sup>89</sup> CAPA agreed, stating in its appellate brief that the Regional Director's decision should be affirmed because it was reasonable and fully-supported by the law.<sup>90</sup> The repetition of the Players and CAPA in calling the scholarships compensation for services, as well as the call for

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83. *Id.* See also IRS Pub. 970 at 5, Tax Benefits for Education (Jan. 1, 2013) (stating one who receives scholarships or fellowships for "teaching, research, or other services" cannot generally exclude such scholarships or allotments from gross income).

84. See Rovell, *supra* note 74 (stating that the Players' case seems to focus on items other than tax issues).

85. See generally, Post-Hearing Brief of Petitioner, *supra* note 2 at \*26–39.

86. Post-Hearing Brief of Petitioner, *supra* note 2. "Main body" is considered all parts of the brief not included in the table of contents, table of authorities, or endnotes.

87. Brief for Petitioner College Athletes Players Association, Nw. Univ., Employer, & Coll. Athletes Players Ass'n (CAPA), Petitioner, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014), *review granted*, 2014 WL 1653118 (N.L.R.B. 2014) (No. 13-RC-121359) [hereinafter Brief for Petitioner College Athletes Players Association]. It should be noted that CAPA has written two briefs in this matter: one to Region 13 as a post-hearing brief, *supra* note 2, and the other to the NLRB under Northwestern's appeal from the Regional Director's decision, referenced in this endnote.

88. Official Report of Proceedings Before the N.L.R.B. at 7. CAPA's attorney also argued that the Players "provide valuable services to the University." *Id.* at 30.

89. *Nw. Univ.*, No. 13-CR-121359, 2014 WL 1246914, at \*12.

90. Brief for Petitioner College Athletes Players Association at 1–2. Kain Colter, Northwestern football's quarterback, stated that he was "ecstatic" and "excited" when asked about his reaction to the Regional Director's decision. Rohan Nadkarni, *Q&A: Kain Colter, Former Northwestern quarterback, on NLRB Ruling*, THE DAILY NORTHWESTERN (Mar. 29, 2014), <http://dailynorthwestern.com/2014/03/29/sports/qa-kain-colter-former-northwestern-quarterback-on-nlr-ruling/>.

affirmation of it, solidifies the fact, or at least what they claim as fact, that their athletic scholarships are clearly and without-a-doubt compensation for services. Juxtaposing this with the language of Section 117 of the Internal Revenue Code, the Players effectively arguing that their scholarships fall under the limitation in Section 117(c), and are thus a part of their gross income. This would therefore render the scholarships taxable.

## 2. *The Players' Arguments Conflict with the Internal Revenue Service's Interpretations of Taxation of Athletic Scholarships*

In 1977, the IRS issued Revenue Ruling 77-263, entitled "Athletic Scholarships."<sup>91</sup> The ruling was issued in response to a request for advice on whether athletic scholarships under a particular program were excludable from gross income.<sup>92</sup> The IRS concluded that under the circumstances described in the ruling, the scholarships were excludable from the scholarship recipients' gross income because they were "primarily to aid" in studies.<sup>93</sup> Accordingly, the IRS's test used for taxability was whether the scholarship was primarily to aid in the student-athlete's studies.

The above analysis would be a detriment to the Players if one looks at their arguments. Kain Colter testified that the Players were brought to Northwestern to play football.<sup>94</sup> He stated that football was their first priority and that they must finish their football requirement before they could fit in the academic requirements, if they could.<sup>95</sup> Instead of students, he claimed they were primarily athletes who provided athletic services.<sup>96</sup> By arguing that the university made football a priority over academics, the IRS could argue that the scholarships are not primarily to aid in the recipients' studies, and are therefore taxable. When adding in the Players' and CAPA's arguments regarding the scholarships as compensation for services, they have essentially made the case for the IRS under the revenue ruling's test that those scholarships are taxable.<sup>97</sup>

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91. Rev. Rul. 77-263. Revenue Rulings are issued by the IRS as official interpretations and "are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned." 26 C.F.R. § 601.201(a)(6).

92. Rev. Rul. 77-263, 1977-2 C.B. 47, 1977 WL 43568 at \*1. Revenue Rulings take a specific set of facts which serve as the Internal Revenue Service's conclusion on how the law applies to those facts. Internal Revenue Manual § 32.2.2.2. Such revenue rulings may be used as precedents for use in other cases. Internal Revenue Manual 32.2.2.10.1.

93. Rev. Rul. 77-263, 1977-2 C.B. 47, 1977 WL 43568 at \*3.

94. Official Report of Proceedings Before the N.L.R.B. at 177.

95. *Id.*

96. *Id.* at 166.

97. See, e.g., Post-Hearing Brief of Petitioner, *supra* note 2 and text accompanying notes 34-36 (arguing that the scholarships are compensation to the Players for their football services and that their athletic scholarships differ

The Players may be able to argue that the revenue ruling should not control here, though. The revenue ruling is in response to a specific set of circumstances regarding the athletic scholarships at a specific university.<sup>98</sup> The relevant details of this scholarship were as follows<sup>99</sup>: once the scholarship for the year is awarded, it cannot be taken away “in the event the student cannot participate in the athletic program, either because of injury or the student’s unilateral decision not to participate.”<sup>100</sup> The student also does not have to participate in another activity in lieu of the sport.<sup>101</sup>

The Players could argue that the circumstances described in the revenue ruling are distinguishable with their circumstances at Northwestern. To begin with, the scholarships in the revenue ruling applied to one-year scholarships that had to be renewed each year.<sup>102</sup> Whereas the Northwestern Players’ scholarships were four-year scholarships that did not have to be renewed each year.<sup>103</sup> Furthermore, if the students in the revenue ruling decided not to participate in the sport, the scholarships could not be terminated.<sup>104</sup> At Northwestern, however, the Players can lose their scholarships if they choose to withdraw from the team.<sup>105</sup> The Players may argue, then, that since this key aspect of the scholarships is different, the revenue ruling is not persuasive.<sup>106</sup> However, by highlighting this

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from other athletic aid in nature, amount, and purpose).

98. Rev. Rul. 77-263, 1977-2 C.B. 47, 1977 WL 43568 at \*1–2.

99. The additional details the ruling described for this scholarship are that there is a university with an intercollegiate athletic program, which is a member of a collegiate athletic association. *Id.* at \*1. This university provides certain incoming freshman athletes with scholarships. *Id.* There are rules established by the association that control the awarding of these scholarships. *Id.* These rules govern intercollegiate athletics, and the awarding and value of athletic scholarships. *Id.* To be eligible for participation in athletics and for a scholarship, the student “must be accepted at the university according to the admissions requirements applicable to all students at the university.” *Id.* All student-athletes must “demonstrate academic ability,” but the university requires no minimum grade-point average once admitted in order to retain the scholarship. *Id.* at \*2. The association, however, does require a minimum grade-point average to be eligible for the scholarship to be renewed in succeeding years. *Id.*

100. *Id.* at \*1.

101. *Id.*

102. *Id.*

103. *Nw. Univ.*, No. 13-CR-121359, 2014 WL 1246914, at \*2. The multi-year scholarship is actually a new concept allowed by the NCAA in 2012. Michelle Brutlag Hosick, *Multiyear Scholarships to be Allowed*, NCAA R18.2.2(a) (Feb. 17, 2012), [www.ncaa.com/news/ncaa/article/2012-02-17/multiyear-scholarships-be-allowed](http://www.ncaa.com/news/ncaa/article/2012-02-17/multiyear-scholarships-be-allowed).

104. Rev. Rul. 77-263, 1977-2 C.B. 47, 1977 WL 43568 at \*1.

105. *See Nw. Univ.*, No. 13-CR-121359, 2014 WL 1246914, at \*14 (stating that when a player “repeatedly misses practices and/or games,” the University may deem that player “to have voluntarily withdrawn” from membership on the team and may lose his scholarship).

106. Revenue rulings are not binding authority, but only persuasive. *See*

difference, the Players would only accentuate their argument that there must be a quid pro quo for them to receive their scholarships; i.e., that their scholarships are compensation for services rendered to the University.<sup>107</sup>

### 3. Analysis of Past Case Law Would Tend Toward Taxing These Scholarships

If taxability of scholarships depends on a quid pro quo<sup>108</sup> kind of relationship, as set forth in *Bingler*, previously discussed in section II.D, then the Players' arguments would certainly lean toward the scholarships being of a taxable nature.<sup>109</sup> The Players' primarily focused their arguments on quid pro quo relationships with the University, in which their scholarships are given as the *quo* to the *quid* that is their football services.<sup>110</sup> This quid pro quo relationship which they claim exists would tend toward taxing the scholarships. The narrow interpretation of exemptions to taxation should be noted as well.<sup>111</sup> Narrowly construing the exemption would likely result in taxation, as it allows less room for interpreting tax exemptions.<sup>112</sup> Regarding *Mayo Foundation*, the Northwestern Players would argue that the service aspect of their relationship with the University predominates over the educational aspect.<sup>113</sup> For this reason, and all the reasons described in this Analysis, Northwestern football Players may get stuck with a hefty tax bill if they want to be considered employees.

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Sealy Power, Ltd. v. C.I.R., 46 F.3d 382, 395 (5th Cir. 1995) (stating that revenue rulings do not have the force of law, but rather are persuasive as an "official interpretation" of the statute).

107. Section II.A.3, *supra*.

108. A quid pro quo relationship arises when one thing is exchanged for another. BLACK'S LAW DICTIONARY 619 (4th Pocket Ed. 2011).

109. Rev. Rul. 77-263, 1977-2 C.B. 47, 1977 WL 43568 at \*3. The Commission also confirmed this quid pro quo relationship in Revenue Ruling 77-263 when the Commissioner was discussing *Bingler* in the context of athletic scholarships.

110. *See, e.g.*, Brief for Petitioner at 18 Section B(3), titled "The Players' Services Are Provided in Return for Payment."

111. *See Atlantic Coast Line R. Co.*, 332 U.S. at 173 (explaining that exemptions to taxation are to be construed narrowly).

112. *See Moorhead v. United States*, 774 F.2d 936, 941 (9th Cir. 1985) (stating that courts construe tax exemptions narrowly, as against the taxpayer and for the taxing authority).

113. *See, e.g.*, Official Report of Proceedings Before the N.L.R.B., *supra* note 17, at 166 (reading that the team quarterback testified that the Players were first and foremost athletes).

*C. There Could Be Farther Reaching Impacts Than Just  
Taxation on Income If the Scholarships Are Treated as  
Taxable Compensation*

If the scholarships are deemed taxable income, then this decision could produce many effects. According to the IRS tax tables, if the average compensation for a typical Northwestern football player is \$61,000 per year,<sup>114</sup> then the federal income tax would be about \$7,685.<sup>115</sup> If the Players argue they are employees, then they, as well as the University, would additionally have to pay FICA taxes on the compensation at a rate of 6.2% each for Social Security and 1.45% each for Medicare.<sup>116</sup> This would come to an additional tax on the player of \$4,666.50,<sup>117</sup> totaling \$12,351.50 in tax liability for each player.<sup>118</sup> The University would also have to pay \$4,666.50, its share of the FICA taxes.<sup>119</sup>

There is also state income tax to consider. In Illinois, where Northwestern University is located, the tax is 5% of income.<sup>120</sup> In fact, the Players may have to pay income taxes in each state they

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114. *Supra* note 16.

115. This assumes the typical player just has income of \$61,000, takes the maximum deduction for 2014 for tuition of \$4,000, and the standard deduction of \$6,100, and the exemption of \$3,900. IRS Form 1040, [www.irs.gov/pub/irs-pdf/f1040.pdf](http://www.irs.gov/pub/irs-pdf/f1040.pdf); IRS Form 8917, [www.irs.gov/pub/irs-pdf/f8917.pdf](http://www.irs.gov/pub/irs-pdf/f8917.pdf); [www.irs.gov/pub/irs-pdf/f1040tt.pdf](http://www.irs.gov/pub/irs-pdf/f1040tt.pdf). Note, the latest versions available from the IRS at the time of writing this are the 2013 forms.

116. Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101(a) (2012) (stating that an additional tax on income equal to 6.2 percent of the individual's wages is hereby imposed for "Old age, survivors, and disability insurance"); 26 U.S.C. § 3101(b) (imposing an additional individual income tax of 1.45 percent of wages for "hospital insurance"); 26 U.S.C. § 3111(a) (stating that an additional tax on income equal to 6.2 percent of an employee's wages is hereby imposed on the employer for "Old age, survivors, and disability insurance"); 26 U.S.C. § 3111(b) (imposing a tax on employers of 1.45 percent of the wages such employer pays for "Hospital insurance").

117. Multiplying the income of \$61,000 by 6.2% and 1.45%. Note, the FICA excludes from its definition of employment "services performed in the employ of . . . a university." 26 U.S.C. § 3121(b)(10)(A). However, for reasons analyzed in the Analysis section of this comment, the Players would not be included in this exemption because they argue that their football services are predominant over their studies. See *Student Exception to FICA Tax*, Internal Revenue Service, [www.irs.gov/Charities-&-Non-Profits/Student-Exception-to-FICA-Tax](http://www.irs.gov/Charities-&-Non-Profits/Student-Exception-to-FICA-Tax) (stating that FICA taxes are not imposed in regards to students in the employ of a university when pursuing a course of study, and that whether students are employees depends on the employment relationship and whether employment or education is the predominant factor).

118. This is again assuming the player is filing singly, takes the maximum allowed deduction for tuition, the standard deduction, and exemption. Other tax amounts would follow if the player were married, had dependents, or other income, e.g., *2013 Tax Tables*, *supra* note 76.

119. FICA, 26 U.S.C. § 3111(a), *supra* note 116.

120. 35 Ill. Comp. Stat. 5/201 (2014).

play in, similar to professional athletes.<sup>121</sup> The 2014 regular season schedule has Northwestern football playing in six cities in five states.<sup>122</sup>

There could be other consequences across the college football landscape that affect the Players, the NCAA, the universities, and the football programs themselves. One issue could be lack of competitive balance. All states are free to set state income tax as they choose, and so some have higher or lower rates than others.<sup>123</sup> This could lead to football recruits choosing certain schools based on that school's state's income tax rate, and thus those schools will have a competitive advantage in obtaining the best recruits, which can lead to the disadvantaged schools having revenue disparities.<sup>124</sup> Due to these adverse consequences of potential taxation on Players, complicated state income accounting, competitive imbalances, and others that are not discussed in this comment, the NCAA and the Players should find a better way to resolve this problem. These parties should undertake to develop a win-win situation in which the Players have more autonomy over their lives without potential costs, and in which the NCAA does not worry about competitive imbalances and the like.

#### IV. STUDENT-ATHLETES NEED MORE OF A SAY IN NCAA MATTERS

Exploiting college athletes has been discussed for at least a few decades.<sup>125</sup> The fact that such exploitation is still being discussed

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121. See Jay McDonald, *Taxes: Cost of Being a Professional Athlete*, BANKRATE.COM (last visited Oct. 22, 2014), [www.bankrate.com/finance/taxes/taxes-cost-professional-athlete.aspx#slide=1](http://www.bankrate.com/finance/taxes/taxes-cost-professional-athlete.aspx#slide=1) (stating that professional athletes are taxed in most cities and states in which they play and that professional athletes typically pay income taxes in 10–26 cities and states).

122. *2014 Northwestern Wildcats Football Schedule*, FB Schedules, [www.fbschedules.com/ncaa-14/big-ten/2014-northwestern-wildcats-football-schedule.php](http://www.fbschedules.com/ncaa-14/big-ten/2014-northwestern-wildcats-football-schedule.php) (last visited Mar. 4, 2016).

123. The State of Florida, for example, does not have a state income tax for individuals. Tanya Moreno, *List of Income Rates for Each State*, ABOUT.COM, <http://taxes.about.com/od/statetaxes/a/highest-state-income-tax-rates.htm> (last visited Oct. 22, 2014).

124. See *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. of Ed. and the Workforce*, 113th Cong. 15–17 (2014) (statement of Bradford L. Livingston) (explaining how differences in state statutes applying to various universities could lead to a competitive imbalance).

125. See, e.g., Robert W. Lee, *The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency*, 37 U. FLA. L. REV. 591 (1985) (discussing this issue in 1985); see also Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 985 (1987) (discussing the increasing commercialization of college athletics in 1986); see also Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L.

means that things have yet to develop enough for the Players' satisfaction. Perhaps that is why they have resorted to legal remedies and seeking union representation. At this point, the Players would have several paths to choose from. They could stay the course seeking union representation, but that may result in the adverse consequences discussed in the previous sections. The Players could drop their arguments in order not to risk taxation, but then the system would continue to their dissatisfaction. Some have suggested Congress get involved.<sup>126</sup> Then again this could politicize college sports and Congress may not be able to single out athletic scholarships without discriminating against other kinds of scholarships.<sup>127</sup>

The Players should not have to forget about fighting for improvements. The NCAA would also probably prefer these matters to stay out of the legal and judicial realms.<sup>128</sup> So the NCAA should concede some to prevent this. Setting up an independent department, committee, or commission for player advocacy could suit both parties' needs well.

#### A. *The NCAA Does Have a Student-athlete Advisory Committee*

In fairness to the NCAA, there is currently a committee to advocate for student-athlete positions.<sup>129</sup> This committee is called

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REV. 206, 206 (1990) (citing how many athletes say the money they have is inadequate).

126. See, e.g., Robert W. Lee, *The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency*, 37 U. FLA. L. REV. 591, 613 (1985) (suggesting that Congress should revise Section 117 to allow broader exemptions for scholarships).

127. There are many types of scholarships given for varying reasons. If a court gave treatment to, e.g., an athletic scholarship different than it would a scholarship for a minority, this would be held to the "strict scrutiny" standard of review under Equal Protection jurisprudence. See Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted A "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 477 (1997) (discussing the heightened level of scrutiny for items such as race or ethnicity).

128. See Bob Groseth, Comment, NCAA.ORG, Dec. 8, 1997, <http://fs.ncaa.org/Docs/NCAANewsArchive/1997/19971208/comment.html> (quoting the Northwestern University men's swimming coach stating that colleges are strongly prone to avoid litigation, especially against a government agency). Furthermore, a legally recognized union could cause competitive disadvantages. *Big Labor on College Campuses*, *supra* note 124. The NLRA does not apply to public universities, as states regulate public-sector collective bargaining. *Id.* Therefore, private schools and public schools could all be operating under separate collective bargaining agreements, which could lead to a competitive imbalance. *Id.*

129. NCAA, *Division I SAAC*, (last visited Nov. 10, 2014), [www.ncaa.org/governance/committees/division-i-saac](http://www.ncaa.org/governance/committees/division-i-saac) [hereinafter *Division I SAAC*].

the “Student-athlete Advisory Committee,” and its purpose is “to enhance the total student-athlete experience by promoting opportunity, protecting student-athlete welfare and fostering a positive student-athlete image.”<sup>130</sup> It represents all 160,000 Division I student-athletes.<sup>131</sup> The committee is made of student-athletes themselves, “one representative from each of the 31 Division I conferences.”<sup>132</sup> To become a member of the committee, a student-athlete puts his/her name forward to his/her school and conference, which nominates them to the NCAA.<sup>133</sup> The NCAA then selects the representatives, who serve for two-year terms.<sup>134</sup>

Although it is commendable that the students have a voice to give their concerns to the NCAA, this committee has not been able to effectuate enough change or protection for the student-athletes. The NCAA formed the committee in 1989.<sup>135</sup> Since then, things have not much improved for the student-athletes.<sup>136</sup> Throughout the twenty-five years since the inception of this committee, there have been complaints of abuse of student-athletes, and that “student” comes after “athlete” for many of them.<sup>137</sup>

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130. See NCAA, *Division I Student-Athlete Advisory Committee General Information*, (last visited Nov. 10, 2014), [www.ncaa.org/governance/committees/division-i-student-athlete-advisory-committee-general-committee-information](http://www.ncaa.org/governance/committees/division-i-student-athlete-advisory-committee-general-committee-information) [hereinafter *SAAC General Information*] (describing the general duties of committee members).

131. *Division I SAAC*. Note, there is a student-athlete advisory committee for each of the three major divisions in the NCAA, Division I, II, and III. See NCAA, *SAAC Mission Statement, Guiding Principles, Governing Rule*, (last visited Nov. 10, 2014), [www.ncaa.org/sites/default/files/Mission%20Statement%20Guiding%20Principles.pdf](http://www.ncaa.org/sites/default/files/Mission%20Statement%20Guiding%20Principles.pdf) [hereinafter *SAAC Mission Statement*]. This comment will only reference the Division I committee.

132. *SAAC General Information*, *supra* note 130.

133. See NCAA.org, *How to Become a DI SAAC Member*, (last visited Nov. 10, 2014), [www.ncaa.org/governance/committees/how-become-di-saac-member](http://www.ncaa.org/governance/committees/how-become-di-saac-member) [hereinafter *How to Become a DI SAAC Member*] (describing the steps necessary to become a member of the committee). A member of the committee “can serve up to two, two-year terms.” *Id.* Members are expected to have informed opinions by being active at their schools and in their conference student athlete advisory committees. *Id.*

134. *Id.*

135. *SAAC Mission Statement*, *supra* note 131. The original committee represented all student-athletes in the NCAA. *Id.* In 1997, the NCAA divided into the current structure of three divisions, and there is currently a student-athlete advisory committee for each division. *Id.*

136. See, e.g., Scott A. Mitchell, *Hit, Sacked, and Dunked by the Courts: The Need for Due Process Protection of the Student-Athlete in Intercollegiate Athletics*, 19 T. MARSHALL L. REV. 733, 734 (1994) (stating in 1994 that student athletes are not students). See also *id.* at 735 (citing “the clear use and abuse of student-athletes”). Compare these 1994 statements, made five years after the formulation of the student-athlete advisory committee, with the arguments made by the Northwestern Players above in section II.A.3.

137. See *Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes: Hearing Before the H. Comm. of Ed. and the Workforce*, *supra* note 124 (discussing various complaints of student athletes).

*B. The Student-Athlete Advisory Committee Has Shortcomings That Prevent Meaningful Change for the Student-athletes*

Shortcomings from the Student-Athlete Advisory Committee could stem from several factors. To begin with, the NCAA chooses the committee members.<sup>138</sup> To be truly effective and truly the voice of the student-athletes, the student-athletes themselves should pick their representatives. Although this comment is not stating that the NLRA governs the relationship between student-athletes, their universities, and the NCAA, ideas from the labor law that has come from the NLRA would be helpful in informing this debate.<sup>139</sup>

The problem with the NCAA picking committee representatives is analogous to an employer's prohibition in "dominating" its employees union. Section 8(a)(3) of the NLRA states that "[i]t shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization . . . ." Congress included this provision to deal with what it called the "company-union problem."<sup>140</sup> Congress stated that, among other reasons, this arises when a company participates in the management and/or elections of labor organizations, or when it supervises the agendas or operations of meetings.<sup>141</sup> It comes down to the notion that the employer itself may not control "what purports to be the employees' voice."<sup>142</sup> One way to dominate a labor organization is when the company mandates the organization, as well as controls its composition and meetings.<sup>143</sup> With the student-athlete advisory committee's current structure, the NCAA has mandated the committee, has set its composition, and controls when it meets.<sup>144</sup> This means that the

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138. *How to Become a DI SAAC Member*, *supra* note 133.

139. The Northwestern football Players, as well as CAPA, believe the relationship is governed by the NLRA, as evidenced by their petition to the NLRB, whose role it is to administer the NLRA. *See*, 29 U.S.C. § 153 (2012) (laying out the tasks of the NLRB). Although this comment does not weigh in on whether the NLRA governs the relationship at issue, it does recognize comparisons between the relationship here versus those governed by the NLRA and that there is an argument that the NLRA does govern.

140. S. Rep. No. 573, at 7 (1935).

141. *Id.* at 10.

142. *See* STANLEY H. HENDERSON, LABOR LAW 159 (Robert C. Clark et al. eds., 2d ed. 2005) (discussing how employers are not allowed to "dominate, interfere with, or support 'any labor organization'").

143. *NLRB v. Streamway Div., Scott & Fetzer Co.*, 691 F.2d 288, 291 (6th Cir. 1982) (discussing how § 8(a)(2) of the NLRA "prohibits domination or support of a 'labor organization'").

144. *See SAAC General Information*, *supra* note 130 (stating that members of the committee must follow deadlines set by the national office and review agendas sent prior to meetings). The committee members are also told when

NCAA controls too much of the student-athletes' voice. The student-athletes therefore are hindered in effecting true change.<sup>145</sup>

Another example of the committee's ineffectiveness is that the representatives of the student-athletes are, at the end of the day, students. They usually have not even completed their college degrees or begun their careers.<sup>146</sup> On the other hand, the people at the NCAA that the committee would be "negotiating" with have many more accolades and experience. For example, the president of the NCAA has a Ph.D. in public administration, and formerly held positions as a university president, chancellor, chief operating and academic officer, provost, and vice president.<sup>147</sup> The executive committee of the NCAA is comprised of chancellors and presidents from various member institutions.<sup>148</sup> Surely the playing field between these student-athletes and the accomplished personnel at the NCAA is not a level one.<sup>149</sup>

A last factor leading to the committee's ineffectiveness is that it does not have true power. The Committee does not have a vote when it comes to NCAA legislation or divisions.<sup>150</sup> It does not seem to have any recourse for unfair or abusive practices either. It exists merely to "comment and react to legislative proposals, issues of interest and actions of the Division."<sup>151</sup> For the student-athletes to have the proper underpinning requisite to make effective change, they should have a "hook" they can use in negotiations, that being something the NCAA cannot ignore or put down easily.

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and where to meet. *See id.* (describing the time, location, and length of meetings).

145. *See* T.J. Moe, *Student Athletes Are Right to Demand a Voice, But Unions Should Be a Last Resort*, Huffpost Sports (June 7, 2014), [www.huffingtonpost.com/tj-moe/student-athletes-ncaa\\_b\\_5104842.html](http://www.huffingtonpost.com/tj-moe/student-athletes-ncaa_b_5104842.html) (stating how the Regional Director's decision finding the Players employees "finally" gives the student athletes some kind of influence over the NCAA).

146. The term "usually" is used here because committee members are allowed to serve for one year after their eligibility has expired. *How to Become a DI SAAC Member*, *supra* note 133.

147. Office of the President: History, NCAA (last visited Nov. 12, 2014), [www.ncaa.org/about/who-we-are/office-president/office-president-history](http://www.ncaa.org/about/who-we-are/office-president/office-president-history).

148. *See* NCAA Executive Committee, NCAA (last visited Nov. 12, 2014) (describing the NCAA Executive Committee). The Executive Committee roster is at [www.ncaa.org/governance/committees/ncaa-executive-committee](http://www.ncaa.org/governance/committees/ncaa-executive-committee).

149. The student-athletes representing themselves is analogous to a pro se litigant who does not have an attorney speaking on its behalf. As the saying goes, "he who is his own lawyer has a fool for a client;" but when one has no other option but to represent himself, such as the student-athletes here, this would not be foolish, but merely an unfortunate necessity.

150. *See SAAC Mission Statement*, *supra* note 131 (stating that committee members are non-voting members).

151. *Id.*

*C. The NCAA and the Student-athletes Should Work Together to Create a Department or Committee That Has Enough Influence to Bring About Change*

The student-athlete advisory committee was a good start, but because of the factors listed above, has not been truly effective in helping the major problems concerning the student-athletes they represent. Therefore, something different should be formed to represent the student-athletes concerns. The NCAA and the student-athletes should work together to form a new department or committee that can liaison between the two. Once formed, this department should be able to function on its own, without mandates from the NCAA on when or where to meet, or what the agendas should be. This will solve the problem of “domination” that has hindered the existing committee.<sup>152</sup>

However, it should not just be the student-athletes sitting down with the NCAA to develop this department. As stated above, this creates an uneven playing field between inexperienced students and skilled, practiced executives. The students should have professionals representing them at the negotiating table. Whether it be attorneys or some other trained negotiators, someone who is “on the same level” as those across from the table should be standing in for the students.

What’s more, this department should have enough authority so that the NCAA cannot ignore its requests.<sup>153</sup> This would mean at the least a vote on legislative matters within the NCAA; but it could also mean other options for significant issues. This may come in the ability to strike or have control on some other economic means.<sup>154</sup>

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152. This new department would essentially be a replacement for a recognized union. The members of the department would be the equivalent of union representatives, and the department bylaws would be analogous to a collective bargaining agreement. This would also avoid having to legally call the student-athletes “employees,” which could lead to the heavy tax bills.

153. Requests that could be expected are given on CAPA’s website. *What We’re Doing*, *supra* note 30. These include medical coverage; reducing contact in practices and having concussion experts at games; funds for former players to complete their degrees; increasing athletic scholarship aid; allowing players to be paid for sponsorships; and reforms so that players cannot be punished for merely being accused of violating a rule. *Id.*

154. The strike is a tactic used by labor unions in which employees organize “a cessation or slowdown of work . . . to compel the employer to meet the employees’ demands.” BLACK’S LAW DICTIONARY 1810 (9th ed. 2009). This would be another tactic the Players would have to be careful in using though, as strikers are not usually paid. *See id.* (defining a strike fund for union members on strike who are not receiving wages). So if players went on strike, they may have to forfeit some of their scholarships.

## V. CONCLUSION

Such a department would solve many of the problems that would have remained or arose as a result of the Players' seeking representation through the NLRB. If the Players continue down their current path, they may be hit with a heavy tax bill, and competition throughout the NCAA may get very skewed.<sup>155</sup> They should handle the problem "in-house," with a department or committee that allows professional representation for the student-athletes, as well as has enough power to make its recommendations meaningful. By having a department such as this, the student-athletes and the universities should be able to solve their issues with as few major ramifications as possible, including taxation. In other words, before resorting to major government agencies such as the National Labor Relations Board, college athletes should be careful what they wish for—or else they may be hit with a hefty bill from the government.

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155. The NCAA does have an interest in preventing competitive disadvantages. *See* Frequently-Asked Questions About the NCAA, NCAA (last visited Nov. 12, 2014), [www.ncaa.org/about/frequently-asked-questions-about-ncaa](http://www.ncaa.org/about/frequently-asked-questions-about-ncaa) (stating that all schools should abide by NCAA rules to prevent competitive disadvantages).