April 21, 1997

Statement Of Donald C. Collins

Mr. Chairman, my name is Donald C. Collins, I am an attorney from San Francisco.

I have an extensive involvement in amateur athletics. I spent two years as the director of a regional youth program. That program had over 4,000 participants from six cities participating in five sports. I am currently the president of a high school basketball officials association, the Northern California Basketball Officials Association in San Francisco. Also, I serve as a public interest attorney, drafting legislation on behalf of amateur sports officials, amateur sports officials associations, and interscholastic, intercollegiate, municipal and other sponsors of amateur athletic activities throughout the country.

I will divide my testimony into three parts. In Part A, I will address some of the USOC's proposed amendments to the Amateur Sports Act (the Act). As you know, the Act is codified at 36 U.S.C. Sections 371 et. seq.. In Part B, I will propose some modifications to the Act. In Part C I will identify some non-Act legislative proposals which can benefit the athletic community.

Part A: A Discussion Of The USOC's Proposals

First, the USOC proposes changing the title of the Amateur Sports Act to the "Olympic Sports Act." I don't have a problem with this proposal.

Second, the USOC asks this Committee to clarify the extent to which it is obligated to send a complete team to the Olympic or Pan American games. The USOC claims a financial constraint due to sending athletes with little possibility of being competitive, but appears to feel constrained by Sections 104(4) and (8) of the Act.

Section 104(4) states that one of the USOC's objects is to "obtain for the United States … the most competent amateur representation possible in each competition and event of the Olympic Games and of the Pan American Games." Section 104(8) states that one of the USOC's objects is to "provide for the swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete … to participate in amateur athletic competition."

At the time the Act was passed, there were bitter feuds between the leading sponsors of amateur activities. Some of these organizations would punish their rivals by writing rules which precluded athletes under their jurisdiction from participating in international events governed by their competitors. Of course, this created a need to have a law which allowed the USOC access to all of the best possible athletes and a simultaneous need for the best athletes to have the right to participate in the Olympics and the Pan American games despite any feuds between their governing organizations. Sections 104(4) and 104(8) fill those needs.

However, other subsections of Section 104 of the Act require the USOC to assist in the development of amateur athletic programs, promote women's sports, promoted sports opportunities for the disabled and promote participation of minorities in sports where they are under represented. These sections of the Act recognize that sports' long term interests, including our interest in having strong Olympic and Pan American teams, require some investment in areas with great potential for development.

The Act sets out numerous goals for the USOC and trusts the USOC to make the difficult decisions on how to allocate its scarce resources. The USOC does face a legitimate conflict between the short term goal of producing the best possible current Olympic team and the long term goal of investing in developmental programs and underdeveloped pools of prospective athletes in order to ensure the strongest possible future Olympic teams. Yet, the Act does not require the USOC to favor its short term interests over its long term interests. Indeed, the congressional intent appears to give the USOC discretion in making such decisions.

The USOC's obligation to field the best possible Olympic team is no greater than its obligation to develop sports and promote women, minorities and the disabled community's ability to participate. Indeed, in light of the fact that the USOC appears to argue that it may have spent excessively on its short term interests I would encourage the USOC to take the strongest possible steps to pursue the long term goal of ensuring that more money and resources flow down to the youth levels, the interscholastic levels (governed by the fine people from the National Federation of High School Associations) and the intercollegiate levels. Further, I would encourage the USOC to place an even greater emphasis on meeting its statutory obligations to developing women and minority and disabled athletes. In the long run, such an investment will reap the best possible future Olympic teams.

Let me conclude my statements on section 104 by pointing out that professional athletes quite obviously participate in the Olympic and Pan-American games these days. Some may argue that this should lead Congress to strike the word "amateur" from this section of the Act. However, in light of the fact that the USOC is still needed to eliminate problems caused by governing bodies in competition with each other, it is still necessary to keep the word "amateur" in section 104 of the Act. What we should do is add the word "professional" as opposed to deleting the word "amateur."

Third, the USOC seeks the broadest possible immunity from suit. I must point out that such a broad grant of immunity would exceed the immunity of the federal and state government as their immunity is limited by state and federal tort claims acts, and private civil rights or Bivens actions (Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), provides for private civil rights actions to be brought against the federal government). On the other hand, it is clearly against public policy to have Olympic money dispersed to litigants.

Absolute immunity from suit would not be fair. After all, there have been valid actions brought against the USOC. Indeed, in U.S. Wrestling Federation v. Wrestling Div. of The AAU, 545 F. Supp. 1053, 1058 (N.D. Ohio 1982), aff'd, 711 F.2d 1060 (6th Cir. 1983), the district court found that the USOC's failure to recognize the U.S. Wrestling Federation as the national governing body for wrestling was counter to a statutory mandated arbitration decision and, consequently, in violation of the Act. On the other hand, the numerous unsuccessful attempts by individuals to assert a private right of action under the Act are the types of futile and expensive litigation which the USOC can properly claim wastes time and money.

A reasonable solution would be the following: grant the USOC absolute immunity from actions for damages while allowing actions for injunctive relief; allow appeals to be entertained in federal court from the arbitration decisions authorized under the Act; finally, create a strict statutory proscription against the bringing of suits which are frivolous because they raise issues which are indistinguishable from frequently litigated issues resolved against the positions of the plaintiff. An example of such an issue would be a plaintiff asserting a private right of action under the Act on grounds virtually similar to the grounds which have been unsuccessful in previous federal court litigation. Of course, attorneys fees and damages should be assessed frivolous litigants and the legislature can make a strong statement to this effect in order to help the USOC be more productive and spend less time involved in needless litigation.

Fourth, the USOC proposes jurisdictional limitations on suits, exclusive jurisdiction over broadcasting and the elimination of the requirement that it report on grants authorized under Section 211 of the Act. I have no comment on these proposals.

Fifth, the USOC proposes the deletion of the Act's requirement that it file annual reports on its activities with the President and Congress. The USOC argues that nobody reads these reports.

I oppose this proposed modification. I believe these reports should be expanded so as to require the USOC and each national governing body to provide participation information. Because the statute requires the USOC to develop lower levels of sports and provide meaningful opportunities for disabled individuals, women and minorities to participate in sports, the USOC and each national governing body should use these reports to inform the public on how well it is meeting its statutory charge.

Future reports should inform us on total participation as well as how many disabled people, females and minorities participate in each sport. This participation should be broken down by age group. If the reports contained such information, they would be read and they would be a vital research and information tool for Congress and for groups such as the Women's Sports Foundation and the Northeastern University Center For The Study Of Sport In Society.

Finally, I agree with the idea of allowing contributions to the USOC to be provided for on IRS Form 1040. However, I must caution that the effectiveness of Form 1040 check-offs will be marginally reduced with each addition to the form. I will not comment on the stamp and property proposals.

I must raise a note of caution regarding the USOC's proposal to conduct a national lottery with the proceeds directly benefiting the USOC. While the idea has an initial surface appeal, it could have the unintended effect of reducing participation in state lotteries. This could reduce the lottery revenue which goes to state school systems. This is an idea which should be studied carefully so that a fully informed decision can be made. Also, let me emphatically state that any lottery conducted under this proposal must never be a sports lottery; sports betting is simply not in the best interest of sports.

Part B: My Proposed Modifications To The Act

1. Provide A Role For NASO

I suggest the Act be modified to provide a role for the National Association of Sports Officials (NASO), which represents sports officials. The one common element in every sports event is the presence of a game official – be it an umpire, referee or judge. As the official is a part of every athletic contest, the official should be represented in every aspect of the USOC's business. The most logical entity to provide this representation is the National Association of Sports Officials (NASO), located in Racine, Wisconsin.

NASO membership consists of 18,000 officials. These officials officiate amateur and professional sports. Every Olympic sport has some official who is a member of NASO. There are baseball, football, field hockey, lacrosse, shooting referees, etc… You name the sport, some NASO member officiates it.

The presence of a sports officials organization in the USOC and national governing body administrative positions will facilitate instruction, discussion of rules and rules changes and other aspects of sports. Further, NASO's presence will certainly assist in increasing the emphasis on sportsmanship. For the benefit of sports, I propose this Committee amend the Act so as to provide sports officials with meaningful representation.

2. Strike A Balance Between Athletes Rights and NGB's Rights

The Act needs to be modified so as to strike a reasonable balance between athletes' right to market themselves and national governing bodies' rights to solicit sponsors and condition athletes' performance on the use of the sponsors' equipment. This is a difficult issue to resolve.

I believe that reasonable people would agree that a baseball player with a Nike contract should wear a Champion Athletics uniform where Champion Athletics makes the official Olympic baseball uniform on behalf of the national governing body for baseball. On the other hand, I believe that reasonable people would also agree that the national governing body for baseball would be wrong to require a baseball player who uses a Nike catchers mitt to use a Champion Athletics mitt because of a contract between the national governing body and Champion Athletics. I would ask this Committee to ensure that the athletes' marketing rights are protected and to give definition to the gray areas which fall in between the two examples which I have presented. As a neutral body, Congress is the appropriate body to provide this guidance.

3. Provide For A Census

The Act should be amended to require each national governing body to take a census. The Act requires the USOC to develop lower levels of sports, and provide meaningful representation in sports for disabled individuals, women and minorities. A census is needed in order to gather the information that will allow the public to know whether the USOC is meeting its statutory requirements.

Part C. Non-Act Legislative Proposals

1. Independent Contractor Legislation

Federal legislation classifying amateur sports officials as independent contractors is needed. Remember, we are not talking about officials of professional sports contests. We are talking about the many people who work on a per game basis with organizations sponsoring events ranging from the 3d grade CYO softball to the NCAA basketball finals.

Under federal law every employer must pay social security taxes, deduct employee taxes, and pay unemployment taxes pursuant to FICA and FUTA. However, employers retaining the services of independent contractors do not have to pay these taxes as independent contractors are not employees for federal tax purposes.

There are compelling reasons to classify amateur sports officials as independent contractors. Amateur sports officials have no daily nexus with the schools, leagues, teams and sports governing bodies whose games they officiate. Amateur sports officials believe they are and have always conducted themselves as independent contractors. They buy their own equipment, form associations in order to train themselves, work for multiple employers – they even work for multiple sports governing bodies – and their only interaction with a paying client is to perform a special service which requires their special skill.

Even though amateur sports officials are required to wear special uniforms, meet criteria set out by sports governing bodies and comply with the conduct codes set out in their rule books none of the schools, governing bodies or other entities which employ them may assume control of the means by which an amateur sports official conducts his or her work of enforcing compliance with the rules of a game. Further, even though an amateur sports official frequently receives his or her game/work assignments from an assigning association, he or she is free to select when, where and how often he or she will work. There are certainly no situations where anyone can compel an amateur sports official to work. Also, once hired, there are no situations where anyone has the right to fire an amateur sports official. It is of particular importance that the officials believe themselves to be independent contractors.

Further, the law is on the side of the amateur sports officials. While there is no federal law on the employment status of amateur sports officials for tax purposes, federal courts have considered the above facts to be strong indicia of independent contractor status in other industries. Additionally, eight state courts have published opinions on this issue. All have held amateur sports officials to be independent contractors for employment tax purposes. There are no published opinions holding an amateur sports official to be an employee of a team, league, sports officials association or sports governing body.

Unfortunately, state tax agencies in states lacking a published opinion as well as the URS have taken aggressive steps to assess employment taxes against the schools, teams, leagues, officials associations and sports governing bodies which pay amateur sports officials. This leads to extensive and expensive litigation. Often, smaller organizations cannot afford this litigation and simply settle – losing money even though the law favors them.

In California, the state Employment Development Department (EDD) assessed more than $200,000 in back employment taxes against a governing body responsible for running high school sports in the Northern part of the state. The EDD also went after small (less than 30 members) sports officials associations and even a men's senior baseball league. These organizations all

paid sports officials as independent contractors rather than paying them as employees and withholding their workers compensation and unemployment taxes.

I worked with Mr. Bob Summers, a college baseball umpire, Mr. Jim Jorgensen, a college conference commissioner, and Mr. Tim Heenan, a member of the National Federation of High School Associations, to enact legislation making amateur sports officials independent contractors. We had grass roots support from all California high school governing bodies, college conferences, municipal recreation departments and sports officials associations in the state. We successfully passed California Assembly Bill 1655 in 1995.

I was subsequently approached by groups in Virginia and Georgia. The Virginia Bill passed and the Georgia Bill is awaiting the governor's signature. Currently, eight states have enacted legislation classifying sports officials as independent contractors for employment tax purposes. Combined with the eight states with published judicial opinions, there are sixteen states holding amateur sports officials to be independent contractors.

At the federal level, I worked with a group which had a problem with the IRS. The IRS made the rather unique argument that sports officials hired by the group were independent contractors during the regular season but not during the playoffs. The group incurred enormous legal fees in battling the IRS. It ultimately prevailed. Yet, to beat the IRS it had to divert money from student athletic activities to pay accountants and tax attorneys.

If ever there were an area of law where it is clear that the tax agencies are wrong it is this one. Each dollar spent fighting this issue is a dollar that should be spent conducting sports contests and creating participation opportunities. Consequently, I ask you to enact federal legislation classifying amateur sports officials as independent contractors.

I suggest amending the Internal Revenue Code as follows:

I

FICA AMENDMENT: Exception for amateur sports officials.

Paragraph (b) of Section 3121 of the Internal Revenue Code is amended by adding subparagraph (22) Any person providing services as a sports official at any interscholastic, intercollegiate or other sports event in which the players are not compensated. In this subparagraph, "sports official" includes an umpire, referee, judge, scorekeeper, timekeeper, organizer, or other person who is a neutral participant in a sports event. This exception does not apply where the sports official is a regular employee of the school, association of schools or other organization sponsoring the sports contest.

II

FUTA AMENDMENT: Exception for amateur sports officials.

Paragraph (c) of Section 3306 of the Internal Revenue Code is amended by adding subparagraph (21) Any person providing services as a sports official at any interscholastic, intercollegiate or other sports event in which the players are not compensated. In this subparagraph, "sports official" includes an umpire, referee, judge, scorekeeper,

timekeeper, organizer, or other person who is a neutral participant in a sports event. This exception does not apply where the sports official is a regular employee of the school, association of schools or other organization sponsoring the sports contest.

2. Sports Agent Legislation

The transgressions of sports agents are well documented. I will not address them here. Unscrupulous sports agents have caused damages to amateur and professional athletes.

The only solution to the problems caused by unscrupulous sports agents is to regulate the industry. Sports agents should abide by a code of conduct and there must be some means of enforcing the code of conduct.

Many states have tried to regulate sports agents. Over twenty states have enacted sports agent legislation. Still the problems continue.

The state law have been unsuccessful for three reasons. First, they're often poorly written. Indeed, many of them are written not to regulate sports agents but to protect local or state colleges. Second, the states attempt to provide the enforcement and lack the resources to properly do it. It would be far better to provide for either federal government enforcement or to provide damages and criminal penalties so severe that the sports industry can self-enforce. Third, the agents operate in interstate commerce and really are not easily regulated by the states. Indeed, as the agents operate in interstate commerce it is possible that state regulation of them violates the commerce clause.

Federal regulation is necessary here. However, the failure of state legislation to do the job should demonstrate the need for the federal intervention to be done correctly.

There has been one federal Bill regarding sports agents. It was not enacted. It should not have been. That Bill simply borrowed language from a state Bill. It would have resulted in the same failings as the state Bill.

The NCAA has recently informed me that it is opposed to sports agent legislation. Their lobbying power could make it difficult to pass such legislation. Of course, in light of the fact that all of the current state statutes do not solve the problem and the only federal Bill was flawed it is difficult to blame the NCAA for its opposition. Nevertheless, steps must be taken to show the entire sports industry that a Bill which will work is going to be drafted. This needs to be done and it needs to be done now.

I am convinced that the NCAA will be receptive to a legislative plan that will really solve the industry's problems; after all, NCAA member schools and college athletes subject to the NCAA's regulation suffer the most from the transgressions of unethical sports agents. However, the federal plan will have to be sufficiently good to convince a skeptical organization.

I have spoken with other sports attorneys and high school and college administrators on this matter. Those people are convinced that federal legislation is the way to go and they would be in total support of such a Bill.

3. Legislation Criminalizing Batteries Upon Sports Officials

As I previously mentioned, sports officials are the constant at every sports event. They give a lot to us, particularly at the lower levels of sports. We can give something back to sports officials very easily. Batteries are frequently committed upon sports officials by our athletes, our coaches and our spectators. This is an appalling thing: there's no place for it in sports. NASO has helped pass legislation criminalizing batteries upon sports officials in eleven states. We can give something back to sports officials by pushing for legislation criminalizing batteries upon sports officials when we return to our home states.

Part D. Concluding Comments

Today, I have addressed some of the USOC's proposed amendments to the Amateur Sports Act, proposed some modifications to the Act and identified some non-Act legislative proposals which can benefit the athletic community. I reached out extensively to the amateur sports community for guidance and assistance in preparing this testimony.

I would like to thank the numerous sports officials and representatives from high school sports governing bodies who advised me. I would like to especially thank Mr. Bob Summers and Mr. Barry Mano for their assistance.

Let me conclude by thanking the Committee for this opportunity to testify today.

_____
Donald C. Collins