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BASEBALL'S ANTITRUST IMMUNITY

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

ON

THE VALIDITY OF MAJOR LEAGUE BASEBALL'S EXEMPTION FROM THE ANTITRUST LAWS

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BASEBALL'S ANTITRUST IMMUNITY

THURSDAY, DECEMBER 10, 1992

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room SH–216, Hart Senate Office Building, Hon. Howard Metzenbaum (chairman of the subcommittee) presiding.

Also present: Senators Simon; Kohl; Thurmond; Specter; Brown; Leahy, ex officio; Simpson, ex officio; Graham, ex officio; Feinstein, ex officio; and Mack, ex officio.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The subcommittee will come to order. Mr. Vincent, please be seated.

This morning, the Antitrust Subcommittee holds an oversight hearing on the validity of major league baseball's exemption from the antitrust laws. All of us recognize that today's hearing does not involve one of the critical problems facing the new President and the new Congress, but there is, nevertheless, intense interest in this subject among the public, the press, and my colleagues.

The reason for this interest is simple. Baseball has been a special part of American life for over a century. It provides millions of fans with a well-deserved break from the rigors of everyday life. Americans from all walks of life and from all parts of the country have grown up with this game. It has been a bridge of tradition and nostalgia that connects the past with the present and parents with their children.

But while the game of baseball remains a simple pleasure, the business of baseball has become complicated and, at times, cutthroat. As a consequence, there has been a certain element of disenchantment as to the fans. Major league baseball is not just a sport. It is also a billion-dollar big business, and it is a big business which enjoys unique treatment under the law.

Unlike any other big business in America, major league baseball is a legally sanctioned, unregulated cartel. The Supreme Court conferred that extraordinary privilege upon baseball 70 years ago when it granted major league baseball a complete exemption from the antitrust laws. Justice Holmes reasoned that the antitrust laws did not apply because baseball could not be considered interstate commerce. Although the soundness of this ruling has often been questioned even by the Court itself, it has never been overturned.

Instead, the Court has tossed the ball to Congress, which is why we are here today.

While Congress did not create baseball's blanket antitrust immunity, we do have the authority to remove it. Many in this body now believe that it is time to repeal the exemption. The burden is on major league baseball to demonstrate that the exemption is in the public interest.

Baseball's antitrust exemption is a privilege that the baseball owners may be abusing. I am particularly concerned that their ouster of Fay Vincent, who is with us this morning, and their plans to weaken the commissioner's powers invites more abuse of that privilege. Fay Vincent understood that the antitrust exemption placed a special obligation on the commissioner to govern the sport in a manner that protected the public interest. Vincent had independent authority to put the interests of the fans and the interests of the sport of baseball ahead of the business interests of the team owners. That is no longer the case.

Jerry Reinsdorf, the owner of the Chicago White Sox, and one of the key participants in Vincent's ouster, has stated that the job of the next baseball commissioner will be to "run the business for the owners, not the players or the umpires or the fans."

Many observers believe the owners removed Vincent because they feared he might use his authority as commissioner to prevent a labor dispute from interfering with the upcoming 1993 season. Vincent helped facilitate a quick end to the 1990 lockout, and the hard-line owners did not want a repeat of that episode. So far, the hard-liners have carried the day.

Three months ago, they forced out Vincent. Three days ago, they succeeded in reopening the labor agreement with the players, which many people view as a prelude to a possible lockout. The implications for fans are ominous. Every time there has been a labor negotiation in baseball, there has been either a strike or a lockout.

It appears that the owners don't want a strong and independent commissioner who can act in the best interests of the sport or act as a potential check against abuse of their monopoly power. Instead, they want a commissioner who will function as the cruise director for their cartel. If decisions about the direction and future of major league baseball are going to be dictated by the business interests of team owners, then the owners should be required to play by the same antitrust rules that apply to any other business.

Even if the owners give the next commissioner a fig leaf of authority, Vincent's ouster sends a clear signal that he or she should not cross them. It also raises questions about whether baseball can respond credibly and effectively to allegations of misconduct by an owner or league official.

The owners' response to the Marge Schott controversy will offer some insight on that score, but I believe that the public would have more confidence in the outcome if the matter was being handled by an independent commissioner rather than by a group of owners sitting in judgment of one of their own.

There are other issues that need to be explored aside from the question of the commissioner's authority. The other three major professional sports—football, basketball, and hockey—function

quite well without the blanket exemption from the antitrust laws enjoyed by baseball. Why should baseball be treated differently?

A number of commentators assert that baseball uses its privileged status to maintain an artificial scarcity of franchises. The recent tug of war between Tampa Bay and San Francisco is a perfect illustration. It is clear that the number of cities which can support baseball franchises greatly exceeds the number of franchises established by the owners.

A scarcity of franchises inflates the resale value of existing teams and increases each owner's share of baseball's national broadcasting revenue, the total of which is about $380 million annually. It also enables owners to squeeze concessions and subsidies from their home cities by threatening relocation to another city. Many cities badly in need of revenues for schools, hospitals, their police and fire forces, and other vital projects have been forced to obtain public funding of elaborate new stadiums or risk having their team move to another city. This blackmail game is unseemly and a disservice to the fans.

The baseball owners trumpet their commitment to franchise stability even though they routinely threaten to abandon their home city whenever it suits them financially, and the owners reportedly have refused to permit municipal ownership of teams, which is probably the most effective way to protect fans from franchise relocations. When Joan Kroc tried to give the Padres to the city of San Diego, baseball's barons said no.

For decades, the owners also used their antitrust exemption to suppress players' salaries and stifle player mobility through the use of the reserve clause. As it now stands, the reserve clause can bind a player to a single team for 6 years. Players have gained a limited amount of movement through the collective bargaining process, but the reopening of the labor agreement means that the players will once again have to bargain for some semblance of a free market. Moreover, minor league players who constitute the vast majority of professional ballplayers still labor under conditions reminiscent of indentured servitude.

Baseball's special treatment under the antitrust laws also has helped to inflate the value of its TV contracts. The baseball owners have agreed among themselves to impose territorial restrictions on the broadcasting of games by local TV stations. These restrictions can facilitate the movement of games to pay TV and hurt fans who can't afford or don't have access to cable.

The sport of baseball is a national treasure, and both Congress and the team owners must be careful not to take actions that would hurt the game and alienate fans. But if the antitrust exemption does provide some benefit to the fans and the game, the owners are going to have to prove it. If the public does not benefit, then the exemption should be restricted or repealed. I look forward to hearing from today's witnesses.

I want to say to my colleagues who are sitting with me this morning, good morning, Senator Feinstein, good morning, Senator Graham, and good morning, Senator Leahy. We are happy to see all of you here this morning. And Senators Simpson, Specter, Mack, we are happy to see each of you. I am going to ask you, if you don't mind, to withhold your opening statements so that we

may hear from Mr. Vincent, who has a time commitment. I looked right over my good friend, Paul Simon. I didn't say good morning to Paul. Excuse me. I apologize.

We will hear from Mr. Vincent, and at the conclusion of Mr. Vincent's comments and questions we will then ask for opening statements from the members of the committee, and I hope my colleagues will indulge me in that respect. Mr. Vincent has to get away and I think his testimony is particularly important to this committee.

Mr. Vincent, we are very happy to welcome you here this morning. I know that there is a group of distinguished members of baseball who are also here and we will welcome them at a later point. Please proceed.

STATEMENT OF FAY VINCENT, FORMER COMMISSIONER OF BASEBALL

Mr. VINCENT. Senator, I prepared a short statement which I gave to you. Let me just say at the outset that I appreciate your courtesies in helping me with the arrangements here today and acknowledging that I have a commitment in New York at 1:30.

I would stand or sit by the statement I prepared. I think at the outset I would only remind you that I am at present an unemployed former bureaucrat without formal standing in baseball and if I find questions that, in my humble opinion, are really more relevant to those with authority, I hope you will indulge me in finessing those questions. I say so openly and without apology.

I think the people who have responsibility in baseball are really better suited to deal with some of the problems that are you are addressing, but I am at your service and I am prepared to be useful to you, in large measure because I think your role in baseball, the role of oversight and supervision, is critically important.

Senator METZENBAUM. Mr. Vincent, your statement that you submitted is very direct; it is short. And because I don't think it is a privileged matter between the former commissioner and the Members of the Senate, I am going to ask you if you would be kind enough to read it. Would you be willing to do that, please? Do you have a copy of it?

Mr. VINCENT. I would if you would provide a copy to me, yes, sir.

Senator METZENBAUM. Would staff please provide Mr. Vincent with a copy of his statement, please?

Mr. VINCENT [reading]:

Senator Metzenbaum, distinguished members of the Senate, I am grateful to have this opportunity to share my views on the continued viability of the existing antitrust exemption enjoyed by major league baseball. It is my opinion that the current exemption should be retained so long as major league baseball, by which I mean the owners, can justify the privilege of the special status the exemption affords. In light of recent developments, I believe baseball must be pressed to persuade Congress that the antitrust immunity is warranted, and whether baseball presently deserves this special treatment is surely open to question.

In my view, the antitrust immunity baseball enjoys is not essential either to the economic health or the legal integrity of the game. For years, Congress has considered the threat to remove the exemption as the principal weapon with which to pressure baseball, but the threat to remove the exemption reminds one of the cry of wolf. As my predecessor, Bart Giamatti, once reminded the Senate, if you take away the exemption, what do you threaten to do next?

And yet the exemption has important significance. The immunity permits baseball or the commissioner to prevent the migration or transfer of a franchise if the move

is not in the best interests of baseball. Eliminating the immunity would have some unattractive consequences, and there is no evidence that the immunity has been abused by baseball. Thus, the immunity issue tends to be overblown when, in fact, the significance of the antitrust status of baseball may be more symbolic than vital. Again, the question is whether baseball deserves or requires this special status.

One of the major issues in baseball is whether baseball is or should view itself as anything other than a business like any other business. When I was being attacked by various owners, I was told that they wanted the commissioner to be their commissioner. They did not agree that the commissioner should have any obligation to the public or to represent any other interest than the interests of the owners. One owner said the players had their union leader, as did the umpires, but no one represented the owners' interests.

Another view widely held by owners is that baseball should be run like any other major corporation. The CEO or commissioner should report to the owners, who would be able to fire the commissioner as the CEO in the corporate world can be fired.

The corporate analogy has great appeal to owners who have difficulty accepting or understanding why baseball is such a difficult enterprise. Thus, there is within baseball a major debate taking place over how baseball is to see itself and what obligations, if any, baseball has to the public. My confidence in the wisdom of the resolution of this debate is well under control.

In my view, one, the existing antitrust exemption for major league baseball should be retained only so long as baseball can persuade you that it is a unique institution with special public interest obligations and not merely another business.

Two, to the extent major league baseball acknowledges the exemption is only justified by continuing recognition that baseball is a national trust with obligations to this Congress and to the public that are not carried by ordinary businesses, the exemption should be continued and the performance of baseball closely monitored.

Three, if the owners of baseball continue on their stated course of making baseball into their business, and at the same time insist that the commissioner is their CEO to be fired at will, I would no longer support the preservation of the exemption. If the exemption is to be surrendered, let it be by action of the owners. Only a strong commissioner acting in the interests of baseball, and therefore the public, can protect the institution from the selfish and myopic attitudes of owners.

Baseball is not seriously dependent on the continuation of the antitrust exemption. This Congress has other alternatives available to it that seriously threaten baseball. If you wish to get the attention of owners and to recapture their commitment to larger public interests, you may wish to consider expanding the range of legislative options. The exemption has become, as I said, more of a symbol than a vital baseball interest. It does symbolize that baseball is different. The question for you and for baseball is whether major league baseball is willing to continue to carry the burden of being different in order to preserve the exemption.

Senator METZENBAUM. Thank you very much, Mr. Vincent. As I understand it, you must leave in how much time, Mr. Vincent?

Mr. VINCENT. Well, I am at your service, sir. I mean, I will leave when I can. If we are doing useful work, I won't leave.

Senator METZENBAUM. Thank you very much. We appreciate that and the imposition upon your own personal commitments.

We will have 10-minute rounds for members of this panel.

Mr. Vincent, why, in your own words, were you forced out of the job as commissioner of baseball?

Mr. VINCENT. I don't know, sir. I think you would have to ask the people who made that judgment.

Senator METZENBAUM. In your letter of resignation, you stated that "Ownership of a baseball team is more than ownership of an ordinary business. Owners have a duty to take into consideration that they own a part of America's national pastime in trust. This trust sometimes requires putting self-interest second."

Do you believe that, on their own, and without a strong and independent commissioner, baseball fans can be confident that the owners will put aside their own self-interest when it conflicts with the best interests of the sport?

Mr. VINCENT. Senator, I live as an optimist. I believe that baseball owners, when they consider the restructuring of the commissioner's office, will come to the conclusion that the commissioner's office has served baseball well over 70 years. I would hope they would not make major changes in the governance and the constitution of baseball, and I would hope they would hire somebody who is going to be independent, who represents the public interest, recognizes that baseball is unique.

And, by the way, baseball is unique quite apart from its legal status. It is unique because it is what it is, because it is so well-grounded in our history, because it is part of our culture. Baseball is unique, and I think if you are, as I am, an optimist, I believe that baseball will do the right thing.

Senator METZENBAUM. You often have testified, and you have done so again today, that the antitrust exemption obliges the leadership of baseball to govern the sport in a manner that protects the public interest. But today you have noted that some of the owners who opposed you "did not agree that the commissioner should have any obligation to the public or to representing any interests other than the interests of the owners." How widespread would you say that view is among the 28 owners?

Mr. VINCENT. Well, I don't know and I don't believe that it is terribly widespread. I would think that one of the benefits of a hearing like this, frankly, is to remind people in baseball of what you represent and of this special calling that all of us had in baseball. I believe that there are 28 owners. It is very difficult to characterize a group of 28 to speak generally. Their views differ, as you will hear, and my own sense is that while some owners may speak out, they don't necessarily represent baseball, and the views that you are addressing may, in fact, not be the views of the majority of owners in baseball.

Senator METZENBAUM. As I noted in my opening statement, Jerry Reinsdorf, the owner of the Chicago White Sox, was recently quoted as saying that the job of the next baseball commissioner will be to "run the business for the owners, not the players or the umpires or the fans." If the next commissioner is simply going to be a CEO for the owners, don't you believe there is no longer justification for retaining the antitrust exemption?

Mr. VINCENT. Yes.

Senator METZENBAUM. Let us say the owners, contrary to all indications which we have received up to this point, decide to invest the next commissioner with the same degree of authority which you had. Wouldn't the fact of your ouster send a strong signal to your successor that he or she had better not do anything that goes against the wishes of the owners even if it is in the best interests of the game and the fans?

Mr. VINCENT. Well, you are right. That is a problem, and I think that is one of the issues that baseball has to address. In order to give a commissioner the kind of authority that he or she requires, there has to be assurance that the person can act independently in a fixed term. It is not unlike a judgeship or any other calling where you are obviously going to make judgments that will disappoint people, and as you make those judgments the number of disappointed people increases and it is a very difficult calling.

I am disappointed that I wasn't able to persuade more owners that I was doing the right thing, but I am not surprised. My predecessors had somewhat the same problem. It is a very difficult problem for baseball, and my advice to the owners is to give the commissioner the widest grant of authority with the most comfort and security, but my example and the precedent of my circumstances is certainly a difficult one.

Senator METZENBAUM. You have also testified that "Baseball is not seriously dependent on the continuation of the antitrust exemption," and that the exemption is not "essential to the economic health or the legal integrity of the game." If that is the case, why do you think the owners continue to believe that the exemption is critical to baseball?

Mr. VINCENT. Well, I am not sure they do, sir. I think that it is helpful, and like most things in baseball there is a reluctance to change—I think reluctance in this body, among other things. And I am not in favor of taking the exemption away, as I testified, unless it is clear that baseball wishes the exemption to go, and the only way baseball can speak on that subject is by the way they establish the governance mechanism.

My view is that it is really up to baseball to show you, to prove to the Congress and to the Senate, whether it believes the exemption is important. My point is I think that economically the threat to baseball of removal of the exemption is overstated. One of the reasons is that anybody wise has to be very careful. We are never sure how far the exemption goes. So operating baseball, as I did, I never relied on it to any great extent because I was never sure of the breadth and extent of its viability. It is very important to baseball in terms of migration of franchises, but apart from that I can't recall that I ever thought I was using it.

Senator METZENBAUM. Now, in your testimony you suggested that Congress consider "expanding the range of legislative options." Can you give us some examples of possible legislative options that you——

Mr. VINCENT. Well, with all due respect, sir, I would leave that to you. I am suggesting that if Congress wishes to address baseball, it ought not always to think in terms exclusively of the antitrust option. I think there are other ways in which Congress can look at baseball.

Senator METZENBAUM. Mr. Vincent, the Marge Schott matter has disturbed many people, and there is no question about it; it has been an embarrassment to baseball. The owners have set up a committee to look into the situation and suggest possible actions in response to it. Do you think that the owners can handle this matter themselves, or wouldn't it be better to have a strong and independent commissioner dealing with a matter of this kind?

Mr. VINCENT. Well, in my judgment, those aren't exclusive. I think the owners may be able to handle the problem properly. We will have to see. I think obviously it would be better, and I think probably the owners would agree it would be better to have this sort of thing dealt with by a sitting commissioner.

I think the original authority of the commissioner arose from a belief among owners that there were some things owners could not do, and the existence of the office was originally and historically

grounded in that conviction. Owners need a commissioner from time to time because there are some issues that are very difficult for owners to deal with. This happens to be one. There is an interregnum and a hiatus in governance in baseball, and I think that is unfortunate, but I don't think one should come to the conclusion necessarily that the owners can't deal with this problem. My own view is we ought to wait to see what they do.

Senator METZENBAUM. Now, you have been credited with spurring more minority hiring in team front offices. A baseball writer for the New York Times suggested that some owners may have been rankled by the pressure that you applied on that issue. Do you have an opinion as to why some teams have been slow to open up front offices to minorities?

Mr. VINCENT. I don't, sir. I come from the corporate world, as you know, and I recognize it is a problem throughout our society. Why are some corporations slower than others? Leadership makes a difference. I think one of the things I tried to persuade owners of is that there are dimensions of this that go beyond equity and fairness and the law.

Part of the concern I have for the long-term viability of baseball is that Afro-Americans do not go to baseball games. The percentage attendance represented by that fast-growing part of our society is very small. So just cast in economic terms, which is, of course, not the way to do it, but just cast in those terms I would think baseball would be wise to move more swiftly. The pace is not attractive; it is not what it ought to be, though some progress has been made.

Senator METZENBAUM. Three days ago, the owners voted to reopen the labor agreement. Many observers believe that that action, coupled with other moves made by the owners in recent months, might interfere with the start of the 1993 season. You know the two sides in this matter better than anyone else. Do you believe there will be a lockout or a strike during the 1993 season?

Mr. VINCENT. Senator, this is one of those questions to which I will now invoke my original statement.

Senator METZENBAUM. Take the fifth?

Mr. VINCENT. There are people following me to whom I heartily recommend that question. [Laughter.]

Senator METZENBAUM. Even though baseball remains our national pastime, one gets a sense that fans are disenchanted with the way in which greed and monetary matters are interfering with the sport. Instead of being a relief from the stresses of daily life, baseball today is often simply a reminder of those pressures. Do you think there is some way to reverse the trend, or are we past the point of no return? What can we do to make baseball the national pastime that it was in yesteryear?

Mr. VINCENT. Well, again, with respect, Senator, I don't think it ever was what we think it was. My own recollection is that the business of baseball has always been an annoyance. I said one time the business of baseball is like the Sun; you can't look at it for very long without turning away. But I have read enough of the history of baseball to recognize that there are distinguished historians who believe that was the case in the 19th century.

The business of baseball has always involved questions of compensation, economic realities. Fans do not like that part of baseball,

and I think baseball is wise to try to sublimate that part to the extent it can. But I don't think we ought to be romantic about the history of baseball or the realities of the future of baseball. It is a big business. There is no real hope that it is going to change. I think what we have to do is protect the wonderful game and keep the business from being unduly intrusive.

Senator METZENBAUM. Thank you very much. My time has expired, and I would say to my colleagues that I have taken 10 minutes. I would hope that they might confine themselves to 5, but not wanting to be unfair, if they need something more than that, please go forward, but certainly not in excess of 10.

We will recognize members of the committee based upon seniority on the committee. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator, I had indicated that at this point we would use questions of Mr. Vincent and hold our opening statements to a later point, if you would, please.

Senator THURMOND. All right. Mr. Vincent, what is your view of the appropriate role of the baseball commissioner, given the antitrust exemption, and would your answer be different if the exemption were eliminated?

Mr. VINCENT. I think my view of the role and authority of the commissioner is that it is one of the American institutions which by and large, with some exceptions, has worked. I don't see a particular reason to tinker with it or to change it radically, and I don't think its viability is affected one way or the other by the existence of the antitrust immunity.

Senator THURMOND. Mr. Vincent, you also state that the antitrust exemption should be retained only if it can be justified by baseball owners. Can the owners justify the exemption, and if so how?

Mr. VINCENT. Well, I think they can, sir, and I think the way they can do it is by acknowledging that baseball does have an obligation that goes beyond their own economic interest, that there is something special about baseball. After all, the antitrust immunity is a privilege; it can be removed by you. To the extent there is a privilege, privileges ought to be justified. The privilege can be justified in baseball, in my judgment, but whether it will be justified, at least to satisfy you gentlemen and ladies, is another matter.

Senator THURMOND. Mr. Chairman, in order to save time and give the other Senators a chance, I won't ask any more questions right now.

Senator METZENBAUM. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. First, I think there is a sentiment here and a sentiment in the American public that the next commissioner has to be both independent and strong, and I think that is one clear message that is here today.

My concern is the commitment to communities, and if I can use an example from football, the movement of the St. Louis Cardinals to Phoenix, I think, did a great disservice to the St. Louis community and to that area. I understand that football, like baseball, is a business, but it is more than a business, as you know, Commissioner. I have to tell you I don't shed any tears when I see Phoenix down at the bottom of their division now in the NFL.

Tell me what the difference is because of the antitrust exemption in how the NFL operates and how baseball operates.

Mr. VINCENT. Well, I am not an expert on the NFL. Let me just tell you that from my own personal experience, the existence of the authority within baseball to prevent migration of franchises—the existence of that authority in the commissioner's office was used by me, and I think should be taken into account very carefully by you as you think about this immunity.

The ultimate ability of the commissioner to say to a franchise owner, you may not move that franchise until additional steps have been taken or additional efforts have been undertaken in the community, is a very forceful and, I think, helpful asset to the commissioner.

If you look at the history of baseball, when teams have moved, including from this great city, the immediate effort is to replace the team. If you look at the move from Kansas City to Oakland, Kansas City went out and replaced the team. From Seattle to Milwaukee, Seattle replaced the team. From Milwaukee to Atlanta, Milwaukee replaced the team; here, twice, and we are still trying to replace the team in Washington.

I think the history of baseball shows that the migration of franchises has not been baseball's most distinguished moment, and therefore migration should be looked at very skeptically. After all, if an owner runs a team poorly and is having difficulty in the community, it is tempting to say I want to move to x, I will do better there, or they will make me an offer which is economically very significant. That ignores the reality of the fans and the community. It doesn't take into account that part of the problem may be that particular owner and the way he is managing the team. Those are things which I think a commissioner, in the proper course, ought to be able to take into account.

So I would urge you to look very carefully at the migration issue in terms of whose ox is being gored. When you leave, as you say, the fans left behind immediately coalesce around an effort to get a new franchise. Is that the way an institution should properly be functioning?

Senator SIMON. And as far as the differences with football, can you just roughly outline that?

Mr. VINCENT. The principal difference is that it is clear that the commissioner of baseball and baseball have the ability to prevent migration, to prevent transfers. The other leagues may, in fact, prevent transfers. The courts have not said that is illegal, but there are procedural standards imposed by the courts which don't apply in baseball's case. At least that was our view.

So I think it is easier, put it this way, for baseball to interfere in the migration of franchises than it is for football or basketball, though, in fact, those sports may also interfere. But the Al Davis case in Oakland is another clear case where a franchise was moved over the opposition of the league. There was litigation and the transfer was valid.

Senator SIMON. Just a comment or two, Mr. Chairman, and then I will yield to my colleagues. First, the Jerry Reinsdorf quote that you have there, I assume, was not put together by a public relations firm. Let me say, in fairness to Jerry Reinsdorf, he is one who

has stuck with the city of Chicago when, financially, I think it would have been beneficial for him to move to the Tampa-St. Petersburg area.

Let me note also, Mr. Chairman, that I believe this is the first committee meeting that our new colleague from California has attended, and we welcome you here, Senator Feinstein. And let me also note, Mr. Chairman—I think it is not inappropriate—that Saturday our colleague, Strom Thurmond, celebrated his 90th birthday, and we wish you the very best.

Senator METZENBAUM. Hear, hear.

Senator THURMOND. I feel like I am 45. [Laughter.]

Senator METZENBAUM. Thank you very much, Senator Simon.

Senator SIMON. And I thank you, Commissioner.

Senator METZENBAUM. This subcommittee hearing is a little bit unusual, and I think maybe one of the few that I have participated in in the many years I have been in the Senate, because we have with us this morning not only members of the subcommittee, but we have members of the full committee and we have others who are members of the Senate who are not members of the committee.

Normally, it is not the practice to extend the opportunity for questioning to those who are not members of the subcommittee, and sometimes permitting it if they are members of the full committee; very seldom, Members who are not members of either committee. I feel that there is such tremendous interest in this subject and that the time pressures are not of such a nature, other than Mr. Vincent's time pressures, that it would be inappropriate for me to deny those who are not members of the committee an opportunity to question. So I will permit them to do so. I would again emphasize the need for brevity.

Let me now turn to a longtime member of this committee and one who has indicated his interest in the whole subject of the antitrust exemption over a period of many years, and who is recently reelected, for which we congratulate him, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I believe that these hearings are very important as they relate to sports and also to very major financial interests. In my own State, Pennsylvania, baseball, football, hockey, and basketball have an enormous impact on the emotions and on the finances of the State, and I think that applies to the Nation as a whole.

I believe that baseball has never recovered since the move of the Dodgers from Brooklyn to Los Angeles in 1958. I say that as a longtime baseball fan who became excited at the age of 8 and grew up in the State of Kansas, where the most important morning activity was reviewing the box scores from the previous day.

I have to say to you, Mr. Vincent, that I don't quite agree with you that we shouldn't be romantic about the history of baseball. I am romantic about the history of baseball. I think it is an overwhelming passion of the American people. America is in love with baseball. In addition, baseball has a unique business status with an exemption from the antitrust laws while seeking, like every other business, to exact the maximum profits. You have that triangle and it is a very serious issue.

As Senator Metzenbaum has alluded to, I have been involved with this issue for many years. In 1982, this committee took up the

move of the Oakland Raiders to Los Angeles, and in that year Senator Thurmond convened very prompt hearings to take up the subject. At that time my studies led me to conclude that sports are affected with a public interest; that is the way I articulate it. Football is; baseball is. In your opening statement, you comment about baseball as a national trust, which is another way of stating the same thing.

We are now seeing the flight of players—Bonilla, and now Barry Bonds leaving Pittsburgh for example, which will decimate Pittsburgh as a city. While the franchise remains there, when the key players are taken away, a significant part of that franchise departs.

Let me pick up on a first question, Mr. Vincent: the subject of baseball as a national trust or being affected with the public interest. Permit me to state a proposition to you and ask you if you agree with it. My own view is that a team ought not to be able to move because of the fans' interests and because baseball is unique, not simply another business. Thus I believe that the Oakland Raiders should not have been permitted to move from Oakland to Los Angeles, where the team was making money and had keen fan support, simply to gain a bigger market in order to make more money. But the Philadelphia Athletics, which moved to my hometown, should have been permitted to move from Philadelphia to Kansas City when they were not being supported.

I would ask if, as you define "national trust" or "affected with the public interest," you would agree that a team ought to be limited in moving simply to make more money, when it is a solid financial operation in its current home city.

Mr. VINCENT. I would agree with that. I made a suggestion in baseball which was as follows. I said if you are in a smaller market and you try to move to a larger market, why should you, the owner in the smaller market, be entitled to the benefits of the larger market? After all, the larger market theoretically is an expansion opportunity for baseball, and I thought that any premium which was built into a transfer from a smaller to a larger market should accrue to the institution generally.

That is another way of saying that I think if you make more difficult and less financially attractive the transfer of franchises from smaller to larger markets and you spread throughout baseball generally any benefit of Philadelphia moving to a larger market, let us say, you make the issue one with much broader considerations.

But I would agree with you. I think that my conclusion is that there has to be the possibility of transfer. There are times, I suppose, when it becomes absolutely essential, but I think the hurdle rate—that is, the degree of difficulty that should be put to the owners before they can transfer a franchise—ought to be fairly high.

Senator SPECTER. Well, we considered an antitrust exemption for the NFL, the National Football League, to enable the owners to limit franchise moves to overrule, in effect, the court decision based on that proposition; and we have a good bit of tension here between baseball and Congress. Nobody knows what Congress is going to do, including Congress, but the possibility of a revocation of the antitrust laws does have an effect on baseball.

When legislation is proposed and it comes close, that may be some signal to sports, that sports should follow the rule that you

don't maximize profits to the extreme, that when a team is making money in a city like Oakland, where the fans have an interest, you simply can't pick up and move to a bigger city with bigger profits; that you can't move away from Brooklyn; but let me move to another subject because of the limitation of time.

There is talk of a lockout, and I respect your situation in not wanting to speculate about that. There has been talk of revenue sharing among the baseball teams, as there is revenue sharing in other sports for the limited antitrust exemption on television revenues. There has also been talk of a baseball cap which would turn on a percentage of profits.

Before asking you about that as a possibility to head off what looks like potential problems in 1993 or 1994, let me ask you about the subject of having sports teams pay for their own stadiums. When you talk about profits and a division between players and owners, one cost is the operation of the stadium. In an era when tickets cost as much as they do, some players are making as much as they do, and some teams are making as much as they do, why should the arrangements be made resulting in the blackmail Senator Metzenbaum articulated which I don't think is far off, although maybe a little strong. But why should the arrangements in sports be such that the burden is placed on cities to finance these expensive stadiums instead of financing coming out of profits, which can be divided between the players and the owners?

Mr. VINCENT. Well, Senator, I don't mean to be disrespectful, but what I have tried to do since I left the position is be careful about expressing my views on issues that are current. I think you have witnesses who really are better qualified than I. I have views on those subjects. I think I have spoken to them in the past, but I would ask your indulgence on that question because it does seem to me that is a current issue for baseball and I wonder whether I am really in a position to address that.

Senator SPECTER. Well, Mr. Vincent, with all due respect, I would not grant any indulgence on that subject. I think that you have experience in this field. You have been the commissioner. You know about the subject. Perhaps none is more knowledgeable in the country, certainly in the room, on the subject. If you don't want to express a view, I won't press you on it, but I don't think——

Mr. VINCENT. Well, I think what I have said in the past I would repeat to you, and that is that the issue of municipal support for a franchise is, it seems to me, a marketplace issue. There are franchises where the stadia are owned by the owner of the team. Los Angeles is a clear example. When the team moved to Los Angeles, obviously the Los Angeles community gave the Dodgers considerable benefits.

I don't know that I think that it is necessarily totally inappropriate for a community, for a variety of reasons, to consider a sports facility as it considers other entertainment facilities or other things in the public interest. It seems to me that is a legislative rather than a legal or sports issue.

I think sports people ask franchise cities to support facilities. The cities are in a position to say yes or no. Some say yes and some say no. I mean, the San Francisco votes in the past are clear examples of cities saying, no, we don't choose to do that. I don't have

strong feelings about that issue from a legal or legislative point of view. I think it really to a very large extent depends on the community.

Senator SPECTER. Well, Mr. Vincent, I do not agree that it is a marketplace issue in a context where baseball has an antitrust exemption. If baseball did not have that unique status, then perhaps you could argue a marketplace issue.

Let me move to one other subject.

Mr. VINCENT. Could I make one rejoinder?

Senator SPECTER. Well, let me move ahead because we are—well, go ahead, go ahead.

Mr. VINCENT. No.

Senator SPECTER. Television. In light of the antitrust exemption which baseball enjoys, and the limited exemption which football, basketball, and hockey enjoy, I am very much concerned, and have expressed it many times in the past, with movement to pay television. The commissioner of football, Commissioner Rozelle, and afterward Commissioner Tagliabue, made a commitment that they would not put the Super Bowl on pay TV, but now a number of games are moving to cable, which is pay.

All away games of the Philadelphia Phillies used to be available to the public; something that I have discussed with the Philadelphia ownership. I am concerned about the public being forced to pay for television. Maybe "forced" is too strong a word, but when the Super Bowl is on or the World Series is on, we find very heavy payments there. I would be interested in your view as to whether you think baseball and football—in light of their special treatment with the antitrust exemption, ought to have some special consideration for the fans and not move to pay television.

Mr. VINCENT. Well, I don't think it is an issue that necessarily prescients from the antitrust immunity because, as you point out, the issue exists in football.

Senator SPECTER. Well, now, wait. Football has the antitrust immunity for revenue sharing.

Mr. VINCENT. And television, yes, as baseball would by statute, I take it. From my point of view, it seems to me the World Series and the Super Bowl and certain postseason events are unique, and I think the sports people have made very serious commitments to you that those events have to be, at least in the foreseeable future, available generally, which means on network television.

The thing that makes this issue so difficult is not the political point, sir, but the business point, which is the network business. Television is changing so rapidly. The proliferation of channel availability is changing. The availability of over-the-air television signals is greater than it was.

So I think one of the difficulties we have, perhaps, is drawing a distinction for all time between free television and pay television. I think ultimately we will find that that distinction blurs, and in time my guess is this issue will become diffused. I think for the short term baseball—and I committed to you—has no interest in putting post-season games on anything other than over-the-air television, for the reason you suggest. But I wouldn't be straight if I didn't tell you that I think over the long term, as the television dis-

tribution business changes, so will the way in which sports address the problem.

Senator SPECTER. Thank you, Mr. Vincent. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Specter.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman, and I am pleased that you are holding these hearings. Mr. Vincent, I come from the small State of Vermont, so at least I am one of the people here who will be asking questions who does not have a baseball team in his State, and will never have a baseball team in his State, and I am here simply as somebody representing a lot of baseball fans who are really very, very concerned about what is happening to the game.

You have touched on many of the problems and many of the issues here today. Certainly, we see attendance going down. The reference you made to the small attendance of African-Americans, the concerns being expressed by people all over the country about baseball—anybody who cares anything about baseball has to pay attention.

We have a case where there are strong antidrug rules on the books, but then the league reinstates a player who has flunked his drug test, I believe, seven times. I mean, what kind of a double-standard image does that give? Or when you have the owner of a team make racist remarks that never had a place, or shouldn't have had a place in this country at any time, but especially not today, you see the baseball community sort of sitting around dithering about, saying gee, what should we do about this, at a time when, if they asked their fans, they would find the vast majority of them are shocked and wouldn't have much problem in deciding what should be done and are wondering what kind of another world do some of the owners live in that they are still trying to figure out what to do.

Or the player who complains that he is only making $6 million and therefore, of course, he has got to charge kids if they want his autograph—well, if you are one of these kids out playing little league and you are worried about baseball, you can imagine what kind of an impression you have.

Do you feel, as I do, that the best way to address these problems—maybe never to fully solve them—but at least the best way to address these problems is to have a very strong and very independent commissioner of baseball?

Mr. VINCENT. I do.

Senator LEAHY. Do you think that the way the baseball restructuring committee that is now reviewing the role of the commissioner—do you think that that has a real chance of establishing a commissioner's office that is going to look out for the true interests of the fans in the future?

Mr. VINCENT. Well, I hope so, Senator. As I said earlier, I really believe that when the baseball owners look carefully at baseball governance, they will conclude as you have concluded. I am an optimist. I think that some of the recent developments in baseball have been very unattractive, but I am optimistic that people learn and that the experience is relevant to the future. I hope that out of the

restructuring will come not major change, but reaffirmation of what you believe and I believe to be in the best interests of baseball.

Let me just say for the record on the drug issue with the person who has been reinstated, baseball did not reinstate that person, nor did anybody in authority in baseball. He was reinstated by an arbitrator who was acting pursuant to a collective bargaining agreement. Mr. Howe was thrown out of baseball by me for life. He challenged that judgment in front of an arbitrator, a system set up by collective bargaining. The arbitrator has the right to overturn the judgment of the commissioner of baseball, and in this case he did.

Senator LEAHY. I might say that in that case he certainly did not send a signal that, in my estimation, is the kind of signal we should be sending either to baseball fans, or especially to young people, at a time when we have drug problems running rampant through our schools and when we are trying to change as much by example and education as we ever could by law enforcement.

Mr. VINCENT. Yes, I agree with that, and I must say I have said publicly that commissioners make mistakes, but so do arbitrators.

Senator LEAHY. Now, you mentioned many times about the best interests of baseball, a term that brings out, obviously, differing views in different people's mind. But as commissioner, that was your No. 1 charge. If you had to talk about the single most important issue facing the game today in the best interests of baseball, what would it be?

Mr. VINCENT. Well, I think the single most challenging issue affecting baseball is to structure the game so that there is a partnership between the ownership and the players with continuing viability so that the disruption that occurs every 4 years with the confrontation is eliminated. That, from a business point of view, is clearly the most significant challenge.

From the social point of view, the nonbusiness point of view, though they blur, I think the issue of dealing effectively with the minority issue is vital. It is vital both in terms of equity and fairness, but as I said earlier, it is also vital in terms of business. I think that baseball is faced with some terrifically difficult problems, not unlike the rest of a number of major institutions, and perhaps the country. Baseball is not unique, but I think I do have confidence that the owners and new leadership will address those issues.

Senator LEAHY. One of the problems is we have a lot of cities that don't have a major league baseball team and they would like to have one. If you remove the antitrust exemption, would that have any effect on expansion?

Mr. VINCENT. I don't think so. You know, again, coming back to an issue I touched on earlier, one of the difficulties with expansion is that expansion, despite what has been thought of generally, in my view, was not in baseball's economic interest. It was very sound policy to bring baseball to new areas. It was sound in terms of the future of baseball. It may have been sound politically, but there were substantial economic reasons not to expand.

When baseball is having its——

Senator LEAHY. If you could elaborate on that, I am just curious how much expansion you could undergo—and you were probably going to say this in your answer anyway, but I am curious how much expansion you could undergo without diluting the quality of the product.

Mr. VINCENT. Well, there is clearly a question of the quality of the product and the number of players, but I was really addressing a much more simple issue, which is dilution of the equity of baseball, dilution of the ownership.

Senator LEAHY. I see.

Mr. VINCENT. I think that this body and the Senate task force had an enormous role in promoting expansion of baseball, and I have said publicly I think Senator Wirth played a significant role historically in having that happen. But from a pure economic point of view in baseball, further expansion is not attractive, and I think it is unlikely that baseball will expand again in the foreseeable future, not because there aren't cities qualified, not because people aren't interested in baseball in other parts of the country, but because baseball simply has to deal with its economic problems and come to grips with those first before additional expansion, in my judgment, will be approved. I don't believe the owners in baseball will vote to expand again in the near term.

Senator LEAHY. When you talk about those economic problems, I look at the projections of CBS and others who carry baseball games. I think one of the groups is estimating losses of $150 to $200 million. Those contracts come up again when?

Mr. VINCENT. Right now.

Senator LEAHY. Obviously, they are going to offer a lot less money.

Mr. VINCENT. That is right.

Senator LEAHY. Or are we going to go to pay-to-view TV for baseball and sort of hit the fans one more time?

Mr. VINCENT. I don't think so. I think network television is still going to be the carrier of essential baseball games, certainly the postseason, for the foreseeable future. But I think you are right. The amount paid for baseball games by the networks, and for that matter by ESPN or by cable, is going to be substantially less, which puts economic pressure on the ownership. There is going to have to be major adjustment because revenues will decrease in baseball without any question.

Senator LEAHY. A friend of mine said to me that the lesson of the free agency era is that smart, frugal teams can win and make money and dumb teams can overspend and still lose. Any truth in that? I thought I would give you something fun to answer here.

Mr. VINCENT. Was it Chesterton who said about Wagner's music it sounds better than it really is? I have that comment with respect to that remark.

Senator LEAHY. Why does a major media market such as Florida—and I don't want to step in on Bob Graham's concerns here, but that is a major media market. They couldn't get a major league team until 1993. Is that part of the same thing you are saying about expansion or is there more to it?

Mr. VINCENT. I think so, Senator. I think that the pressure to expand, frankly, was very largely political. I think it was appropriate,

certainly, and it had its consequence; that is, it produced expansion. But I think that one of the lessons of expansion, and I think baseball owners have seen it, is that expansion carries a substantial burden, economic and certainly in terms of the game itself.

So as I said to you earlier, I don't believe expansion is in baseball's short-term future.

Senator LEAHY. Certainly a lot of my constituents, and I think others, are hearing the same thing. They are just hearing this general frustration with baseball, and it seems the frustration level is the highest with those who love baseball the most. There is a lot of fear that there might not be baseball for our children or their children, certainly not the way we grew up. I think I saw my first baseball game when I was 7 years old in Fenway Park. I think that is also driving a lot of feeling, people saying, well, just get rid of the antitrust exemption, and that may happen, that may well happen.

Do you feel, as I do, that baseball is reaching a critical point that could actually determine whether there is a future for baseball?

Mr. VINCENT. Well, I don't. Let me state it a little differently. I think that baseball will be played in the major cities in this country a hundred years from today.

Senator LEAHY. I hope so.

Mr. VINCENT. Well, I believe it will. I said major cities. I think the question for baseball is, can baseball be preserved as a national sport in a number of cities of medium to smaller size, baseball preserved as we know it. In my judgment, baseball will surely survive in some form, but the question really is what form. I think it is simply overstating the case to say baseball is threatened, its viability or its continued existence as a major sport. I don't believe that to be the case, but there are threats to baseball that are very serious.

Senator LEAHY. Thank you, Mr. Chairman. Thank you, Mr. Vincent.

Senator METZENBAUM. Thank you, Senator Leahy. Our next Senator is Senator Simpson, and I am getting some indications from some members of the committee that it would be helpful if everybody didn't use their full 10 minutes, but I won't deprive you of doing so. I would just urge you pleasantly, if you can, to cut it a bit.

Senator SIMPSON. Thank you, Mr. Chairman. I have seen you do it the other way. [Laughter.]

I will take it this way. That is all right with me.

Senator METZENBAUM. You certainly would be the last that ought to be cut back because you were one of those who raised the question at the Judiciary Committee hearing as to whether or not we were going to go forward on this subject, and so please proceed. If you can cut it, we would appreciate it, but if you can't, you will have the full 10 minutes.

Senator SIMPSON. Mr. Chairman, I do appreciate that. Howard, you have been very quick to establish this hearing. It arose from a question in my mind before we left the last session as to Mr. Vincent's dismissal from baseball. That rankles me. I thought I don't understand why that has taken place. I had come to know Bart Giamatti, a wonderful, wonderful, splendid man, and then had

come to know Fay Vincent and saw him as a strong, independent commissioner and then saw him sacked.

I asked the question, well, if the owners are now running the business—and it is a business, but it is also a game—what is the situation? Do they still require the exemption in order to exist? I think you have said very clearly you think that they could get along without that if that were the case.

Because Howard has a passion for the game and a sense of fairness about these things, this hearing is taking place, and Connie Mack has his own serious issues with regard to expansion, as does Senator-elect Feinstein. These are not the things that I am focusing on. I am focusing on the fact that a commissioner was set up because of the Black Sox scandal which nearly destroyed baseball.

I seem to recall that when Kennesaw Mountain Landis came to the game, he came and demanded almost dictatorial authority to do what he had to do, and he had it and he did it and baseball prospered. It is certainly simple enough for us in Congress to take the step to eliminate the exemption. I can't imagine a more simple legislative step. All we have to do is have a congressional finding that baseball, professional sports, does affect interstate commerce. That is all we have to do, and existing antitrust laws should then be sufficient to regulate the sport because it affects interstate commerce, period. Nothing really too fancy need be done here. So maybe that is what we will have to do or will do.

I had a view that I see nothing wrong, in the abstract, with baseball occupying a higher ground and being treated that way under the law, but the business of baseball depends upon the game of baseball.

So let me just ask you a couple of questions. Isn't it fair to say that the Black Sox scandal involving the throwing of the Series by the White Sox in 1919 was the prominent reason for the creation of the office?

Mr. VINCENT. That is correct, and you should know that Judge Landis came from a Federal judgeship and one of the things he did was he drafted what is known as the major league agreement, one of the clauses of which says the commissioner during his term may not have his authority diminished or his compensation decreased.

Now, would Judge Landis have written that clause if he weren't convinced that he couldn't be fired and he didn't want to be fired by indirection? He didn't want people to say, Your new office in some small community. In this body, one is very careful about picking out such a community, so I think I will leave it just at that. [Laughter.]

And that his compensation is reduced—he put that clause in because he knew he couldn't be fired. After all, if you could fire a commissioner, why would you worry about his place of business or his authority or his compensation? I believe strongly that, as a matter of law, had I challenged the owners and litigated this case I would have been successful. and I feel strongly that a commissioner should not be subject to being fired, short, I think, of cause. I mean, I certainly think there are things subject to impeachment that we could all agree are appropriate.

But I think if you put a commissioner in for a fixed term, you ought to agree that he has the authority to act in the interests of

the game. And if you think about the corporate analogy—I am prescienting on this question, Senator Simpson, but I have an interest—the analogy is that a commissioner should be like a corporate CEO with a board of directors who can fire him. That, with all due respect, is really absurd thinking.

What chief executive is in business to discipline his board? After all, owners in baseball are subject to sanction by the commissioner. If the owners in baseball were colluding—let us suppose three-quarters plus one were colluding and the commissioner were subject to dismissal by a three-quarter vote. What do you suppose the poor commissioner could do? If he proceeds to deal with collusion, which is wrong, he will, by definition, offend three-quarters plus one. If three-quarters plus one can dismiss him, I submit to you he won't do anything.

The only way a commissioner can function is with the security, as with a Federal judge, of his appointment, subject to impeachment for felonies, and short of that a fixed term. I can understand why people might say, well, you are not subject to reelection. Maybe the term should be fixed. You are dealing with that kind of issue in this body. I think that is an issue for baseball.

But a commissioner who is subject to being in a position I was put in simply is not going to do what I did. The lesson, I think, of my circumstance is that if you do a number of things, by definition, you are going to insult people and they will be annoyed with you.

Senator SIMPSON. Well, I think that that is the act of grace and forbearance that attracted us to what you did. Rather than litigate, you said that you would not do that because you didn't want to drag baseball as a national institution, or the national pastime, as Howard refers to it, through that litigation to prove you are right, and I think you would have had one extraordinarily tight case on that one.

Let me just ask a final question so that my colleagues can enter in here, too. In that creation of the commissioner's office, there was a phrase called "the best interests of the game." That was the creation of the "best interests of the game," powers which were given to the commissioner relating to the broad authority that Kennesaw Mountain Landis had. Tell us about that and how you felt about that particular phrase.

Mr. VINCENT. Well, in some respects it is very difficult phrase. If the phrase weren't there, I suppose the job would be easier, but it is there and it was put there by Judge Landis because he wanted to be free to act in the best interests of baseball quite apart from owners' interests. I think it is a power which, like a number of powers in this country, ought to be respected and not heavily used. I said it was like having a major cannon in my office. I ought to polish it regularly, I ought to show people that it existed, but it ought not to be used.

On the other hand, there are occasions when I think it simply has to be used, and unfortunately perhaps as a matter of bad luck, I saw or was confronted with more of those issues than I guess others had been. I think it is a power which is important, but it is subject to being overused, and I think some of the criticism of me probably was that I did overuse it.

Senator SIMPSON. Well, I will be listening for the issue of the CEO relationship, the corporate board relationship. I like those analogies, and there is one ancillary matter I tend to hang in and listen to about what happened to you when you suggested realignment, a simple act of moving the Cubs to where they ought to be in geographical areas and the basis of the opposition. The basis of the opposition was who owns the Cubs, and that is the most curious business relationship to begin with because it is a baseball team contracting for air time on a station owned by the same people. That is the kind of pro-business, anti-fan state of affairs that will continue to be upheld in the absence of a commissioner, and it will only harm the game.

These are some of the things. I thank you, Mr. Chairman. The yellow light has not even shown.

Senator METZENBAUM. You did well and you get two brownie points.

Senator SIMPSON. Thank you. I deserve that.

Senator METZENBAUM. Senator Graham? Senator Brown, I want to apologize to you. You are a member of the committee, I know, and therefore have some priority, but in the effort go back and forth——

Senator BROWN. No, no, Mr. Chairman. You did exactly right.

Senator METZENBAUM. Thank you. Senator Graham.

Senator GRAHAM. Thank you very much, Mr. Chairman. I also express my appreciation to you for holding these hearings, and to the very distinguished witnesses who are going to illuminate us on the economics and policy of baseball.

I have a particular interest that I would like to use as a focus of trying to get some greater clarity on baseball's policy, particularly as it relates to what Mr. Selig in his testimony and you have indicated is the principal use of the antitrust exemption, and that is relative to the migration of franchises.

You have both in your testimony used phrases that talk about the franchises that were having substantial degrees of local community support should not be subject to relocation. Do you apply that policy, or do you think it should be applied similarly to a city which has a single franchise as distinct from a community that has two or more franchises?

Mr. VINCENT. Well, I think it certainly is more likely that the problem would come up in the situation where there is one franchise because, by definition, there are very few communities with two—Los Angeles, San Francisco, New York, Chicago—not many.

I, early on in my tenure, developed some criteria for migration that were very severe because I thought the test should be severe, and they were four. One was that the franchise was losing substantial money and had been losing money over a reasonably long period of time. Second, there was a continuing decline in attendance which was persistent and not obviously correctable. Third, there was a substantial defect with the facility. The stadium was inadequate and not likely to be corrected in the near term; and, fourth, that the situation, the community, if you will, had made it clear that it was unwilling to address or deal with the problems.

Now, those criteria are very difficult to satisfy. Cleveland, if you will, met the criteria early on at the time when Cleveland was con-

sidering a new stadium. I went to Cleveland, made the point. We got the vote and the stadium is being built. But the fact of the matter is that, in my judgment, the characteristics that justify migration ought to be characteristics that basically are last resort. The community has voted, the stadium is uninhabitable, the attendance is subpar, and there is no likelihood of corrective measures. Those criteria, if they persist, will not be met in most cases.

Senator GRAHAM. How would you apply those four criteria to the situation in San Francisco as you saw it in that two-team metropolitan area in the summer of 1992?

Mr. VINCENT. San Francisco met the criteria at the time the vote in San Jose was negative. I think the criteria I spelled out were satisfied, and at that stage I told Mr. Lurie that he could look around.

Senator GRAHAM. Could you expand on what your statement was to Mr. Lurie and to potential suitors of the Giants in the summer of 1992?

Mr. VINCENT. Well, you understand that my ability as commissioner to approve or authorize a transfer was different from my ability to authorize an owner to consider a transfer. Up until that point, I had not permitted owners to investigate transfers. I was difficult on the Seattle ownership investigating transfers because I didn't think the criteria were met in Seattle.

I told Mr. Lurie he could look around. I must say I distinguished—at least I thought I was clear to distinguish that from the ultimate authority to move, which was not mine to give. That has to come from the ownership generally. But in my view, it was appropriate at that time for Mr. Lurie to look around. Among other things, at the same time I was talking to Mayor Jordan, who was being energetic about keeping the team, and I think one of the realities of this is that the process of considering options certainly has some effect on a community like San Francisco responding as it did to the problem.

Senator GRAHAM. As the commissioner, when you gave Mr. Lurie the indication that he was at liberty to look for ownership and purchasers outside of the San Francisco Bay area, did you have any expectation that the National League owners would concur in that?

Mr. VINCENT. I wouldn't have known, and I would have been more doubtful about whether the American League owners would concur. On the question of whether Mr. Lurie was going to find a home away, whether San Francisco would ultimately solve its problems, those were for the future and I really had no idea what was going to happen.

The only thing I was in a position to do was to say to Mr. Lurie, the vote has been negative, what options do you have. Candlestick is a major problem, and I think in fairness and equity, it is not unreasonable for me to say it is appropriate for you to look around.

Senator GRAHAM. You indicated that one of the aspects of that opening to look around was the impact on the San Francisco Bay community, and the mayor is going to be making some comments and we have a former mayor who has now joined us. There has been concern that one of the uses of the no-migration policy has been somewhat of a bait-and-switch process. First, it is indicated that the franchise can leave, such as the White Sox were given

some indication that they might be able to leave Chicago, and then the local community is dragooned into making commitments to keep them there, such as the building of the new Comiskey Park in Chicago and other benefits, and then the franchise is denied the right to leave.

Mr. VINCENT. Well, I wonder whether it matters. As I said to you earlier, Senator, suppose the franchise moved, as the franchise moved from here twice, as it has moved from a variety of other communities. What happens is the community left behind from which baseball departs does, in fact, respond, and history tells you the response is to generate a new team.

So I think what happens is that the threat of the departure does have an effect. In some cases, as in San Francisco, it may have had an effect before the departure. Certainly, that has been true in other communities. But even if the franchise had moved, my sense is there would have been, and there has been in other instances, a galvanizing effort to immediately replace our beloved team, which only calls into question the policy of migration generally.

Senator GRAHAM. Well, that statement has been less true where you are dealing with a community that had multiple franchises. My history tells me that there used to be two franchises in Boston and when the Braves left, at least there was no successful effort to replace the Braves. When the Athletics left Philadelphia, there was no successful effort to replace them. When the Browns left St. Louis, there was no successful effort to replace them. When the Dodgers and the Giants left New York, there was a successful effort to replace them with one expansion franchise.

So it seems to me that the history of how well expansion has served to replace a city that lost a franchise is significantly a function of whether there was another team still in place in that community at the time that one left.

Mr. VINCENT. Well, but think about Washington. I mean, is this a community in which there are two teams? I mean, do you consider Baltimore to be part of this megalopolis or not? I think you make a point. I am not sure that I agree that that is the discerning point. I think from a baseball point of view, from a management of baseball point of view, it is better, I think, to put new baseball teams via expansion in communities than to move—somebody mentioned the Dodgers' migration to California. While it was eminently successful, there are lots of fans in New York—I see them regularly—who are still bitter. Now, they are getting older, but they are still bitter.

So I think migration is not necessarily the answer to the yearning of people for new teams. We did expand. There are two communities that didn't previously have baseball and we have disappointed people behind. After all, some 2 million people saw baseball in Seattle and one of the questions I dealt with was should we permit Seattle to move, and I think we were right to resist that. The solution occurred and those 2 million fans have got to be happier.

Senator GRAHAM. I want to pursue the implications of that, but before that, you talked about making it more difficult to relocate possibly by charging some relocation fee, and I know that was an issue that came up in the question of the Giants. Has there ever

been any formal decisionmaking process within major league baseball that would lead to the development of a relocation fee being charged?

Mr. VINCENT. I suggested it. I think there are people in baseball who agreed that it was a good idea. You would have to ask other gentlemen who follow me. I don't know that anything has occurred on that subject. You understand the premise for the suggestion is the difference in value of baseball in a small market and a large market.

Let us suppose you are an owner doing poorly in a small market and you have an offer to move to a large market. The difference in value of your franchise will be considerable. The question I raised is why should you be permitted to race to the door and, because you get there first, capture that premium when, in fact, it is a baseball asset. Since baseball has the right to approve the transfer, baseball should have the right to recapture the difference between what your team is worth in your community and what it is worth in the Meadowlands, for example. I mean, there is no question that if you moved a team to one of the major megalopolises, you would get a substantial increase over the value for most smaller market teams.

Senator GRAHAM. What concerns me is that there seems be a pattern, a bait-and-switch pattern, in which baseball at least stands passive, or in the case of the Giants more than passive—actually indicates through the commissioner's office that it is acceptable to consider relocation, creates a flurry of activity, and then in some cases, as in Chicago, pounds the local community for substantial benefits beyond those that had earlier been available from that community, but in the final hour draws in issues such as the relocation fee which had never been formalized or suggested at the beginning of this process, and ultimately denies——

Senator METZENBAUM. Senator, can you wind up, please?

Senator GRAHAM [continuing]. The right of the franchise to relocate. It seems to me that that raises very serious questions as to whether the migration policy is being used to serve some broader interest or is being used just to gain economic advantage.

Mr. VINCENT. Well, I see your question. I understand your point. I don't think bait-and-switch is an appropriate characterization to the extent I participated, and I would cite to you the fact that there have been a number of franchises that have, in fact, moved.

Senator GRAHAM. When was the last relocation?

Mr. VINCENT. Well, not recently; that is correct.

Senator GRAHAM. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much. Senator Brown.

Senator BROWN. Thank you, Mr. Chairman. Mr. Vincent, we appreciate your joining us today and I think you bring a unique perspective that will be very helpful to the committee.

You had mentioned that perhaps the decision on whether or not baseball loses the antitrust exemption might ultimately be up to the baseball owners. In hearing that, it wasn't clear to me if you are suggesting that the baseball owners should change the original Landis agreement or should abide by the original Landis agreement.

Mr. VINCENT. I apologize.

Senator BROWN. Were you suggesting changes or are you suggesting adherence to the original agreement?

Mr. VINCENT. I regret the ambiguity. What I was suggesting to you was that if the owners can demonstrate to you satisfactorily their concern and sensitivity to the kind of considerations that you think are vital, then I would think continuance of the antitrust immunity and exemption and continuance of the status quo is appropriate.

To the extent that the owners are unwilling to acknowledge the burden of the privilege, if you will, then I think the owners are making the judgment that they don't care that seriously about the immunity because they are making judgments which, in effect, say we are heading elsewhere, we want to be treated differently, or we are willing to be treated differently as a result of these decisions.

I suggested that it is up to the owners only because I think it is early to know how they are going to respond; it is premature. I think depending on how the ownership functions, this committee and others may address the issue.

Senator BROWN. As you know, putting your fate in the hands of a particular committee is a somewhat chancy enterprise. For some, it might depend on whether or not you provide a new franchise for Florida or Colorado. What actions do you have in mind when you suggest that? Are you saying it is simply a matter of the attitude that they go forward with? Is there something specific the owners ought to do or ought not to do?

Mr. VINCENT. I think governance is very important. I happen to think that the immunity is relevant to the role of the commissioner. I think a commissioner gives this organization and the public interest some comfort in terms of the independence of that incumbent. So I would watch very carefully the way in which baseball restructures and alters its basic constitution. After all, the immunity attached 70 years ago. Things have changed, but the central governance of baseball remarkably hasn't.

Now, there is talk about major changes in the way baseball is to be governed. If those changes in governance come out in a way that I suggest you should pay attention to, then I think the response of the Congress might be to confront the antitrust immunity directly.

Senator BROWN. If I am hearing you correctly, you are saying the commissioner, as it is now structured, has a great deal of independence and has a responsibility to the public or a responsibility that is broader than just his responsibility or her responsibility to the owners, and that if baseball changes that basic agreement to where you lose that responsiveness or independence to the public, you would trigger it on that.

Mr. VINCENT. One of the things you have to bear in mind is I take the view that the commissioner can't be fired, but anybody who thinks I wasn't fired is naive. So there has to be some conscious addressing of what do you expect from the next commissioner. If you leave things precisely as they are, there is considerable ambiguity in this person's mind as to whether he may suffer the same fate. So I think there is more work to be done by baseball before—at least this is my own view—before you can really, or I submit, before you might want to really think seriously about baseball.

Senator BROWN. The key being to ensure the independence of a commissioner, I take it.

Mr. VINCENT. Well, I think that is absolutely right. I think, after all, Congress is saying baseball is unique, it has a unique cachet. But what makes baseball unique? One of the things that makes it unique is the commissionership, somebody who has to come here who responds to your importuning or suggesting and who is responsible for that special standing.

So I think baseball governance has worked. I think commissioners have been sensitive to the Congress and to public interest issues, even if owners have not universally been sensitive, and I don't see any reason to make a major change. And put it another way; if there are major changes, then I think it is appropriate for you to consider what those mean.

Senator BROWN. I don't mean to put you in an uncomfortable situation and if you would prefer not to respond, I would certainly understand, but I think part of the point of this whole discussion comes down to whether or not you were fired or resigned. Obviously, in a formal nomenclature, my understanding is you resigned, but you have referred to it and others have suggested that you were, in effect, forced out. Were you forced out?

Mr. VINCENT. Yes, Senator, I was forced out.

Senator BROWN. Let me ask you specifically, were you paid to leave? Did you receive compensation in addition to your normal salary to leave?

Mr. VINCENT. No, no, and that factor fortuitously in my circumstance is not relevant. But from my point of view, the ownership made it clear that they were unhappy with me as commissioner. They were going to vote to fire me, which would have resulted in litigation challenging their right to do so, and I decided not to precipitate that litigation in view of the fact that it was very clear that litigation was going to result.

After all, you know very well one can't govern without the consent of the governed. Here was a case where people were no longer willing to accept my leadership, and I was perfectly willing to move aside once I recognized that it was not in my interest or baseball's interest, particularly, to litigate.

Coming back to a point Senator Simpson made, the one thing that I think is going to be true about baseball in the future is it is going to be replete with litigation. Like all of American life, I think litigation is going to become absolutely dominant in baseball because every decision of substance will be challenged.

The Cubs' decision to challenge the realignment points the way. If the Tribune Co., certainly a respectable, distinguished company, thought it appropriate to challenge, then a number of decisions will be challenged. So I predict to you that litigation is going to be a way of life.

Yes, I was forced out. The ownership would have voted to fire me, I was told some time soon after I resigned, and I made the judgment that if I won the litigation, I would lose. I mean, what would have been proven? I think what would have been proven is important, but it wasn't important enough to pursue.

Senator BROWN. Is the Landis agreement, the basic framework of baseball—does it permit the owners to fire you?

Mr. VINCENT. Well, that, of course, is the legal question we would have tested. In my judgment, no. Other people disagree.

Senator BROWN. And you chose to leave rather than embroil baseball in that controversy. You did not request nor receive special compensation for doing that?

Mr. VINCENT. No.

Senator BROWN. What would happen to minor league baseball if the baseball antitrust exemption were changed or eliminated?

Mr. VINCENT. Matters would become somewhat more complicated, and I have to tell you, Senator, I think that is a question—this is one I am not finessing. I really am not totally satisfied that I could give you a complete answer. Minor league baseball, in my judgment, is threatened, and I think the immunity helps baseball deal in a collective way with the minor league institutions and it is probably marginally helpful from that point of view.

But there is a problem with minor league baseball; namely, the major league clubs are going to have to cut back on the subsidies to minor league baseball and there is going to be in the future a contraction of minor league franchises.

Senator BROWN. You have been faced—I say you—I mean in your previous role, and baseball in general, has been faced with some very tough problems in disciplining players—Pete Rose. Baseball is embroiled right now in a very painful process of perhaps disciplining an owner or a major shareholder of one of the clubs. How would the elimination of the antitrust exemption impact baseball's ability to deal with those problems?

Mr. VINCENT. I don't think it would at all, Senator.

Senator BROWN. It would not change it?

Mr. VINCENT. Not in my judgment.

Senator BROWN. So baseball would still have the same ability, or could have the same ability to deal with owners, for example, that embarrass the game?

Mr. VINCENT. Yes. As I said, the reason the corporate analogy falls apart is just that point. No chief executive is authorized or in business to supervise the conduct of his directors and discipline them if they misbehave. Moreover, they all are faithful to his enterprise. Baseball has all those conflicts at the ownership level, conflicts with the institution. The corporate analogy just won't hold up, but it is a very popular one among owners.

Senator BROWN. You know, one of the things that I, and I suspect others on this committee and perhaps the public in general, have had trouble understanding is the reluctance to expand. The Colorado Rockies feel very fortunate to have a franchise. My understanding is the Colorado Rockies now have sold more season tickets than any team in baseball, with the exception of one, and we expect to pass them.

Why was it so difficult to get a franchise in a town that wants baseball, and why is it so difficult to get a franchise in a lot of other communities in America that want and will support baseball?

Mr. VINCENT. Because you are basically diluting the equity of ownership at a time when baseball is having its financial problems. It is not financially attractive to expand, despite the substantial franchise fees that are paid by expansion clubs. You are diluting the revenue of the other clubs permanently. It is a little bit like

selling stock in a company when the stock is very low; people do not do that. I think you have got a time in baseball when the equity is not as solid as it may be at other times, and therefore this is not, in the short term, a time to expand.

As I said to you earlier, I think the decision may have been a sound baseball decision, political decision, a variety of other things. From a pure financial point of view, it was always my view expansion was not financially or economically sound.

Senator BROWN. Thank you. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Vincent, I would just like to indicate to you my admiration and respect, and thank you very much for your service to baseball.

Mr. VINCENT. Thank you.

Senator FEINSTEIN. I would like to ask you this question. You pointed out the public interest that is served by a strong and independent commissioner, and I must say I would tend to agree with that. My question to you is—and you also find that there is an interest to be served, to which I agree, in maintaining the exemption of baseball. Would it be advisable, in your opinion, for this Congress to pass legislation which might, in fact, condition the exemption based upon a strong and independent commissioner who could then respond to the public interest without fear of dismissal?

Mr. VINCENT. Well, it is a thought I hadn't really considered. It does seem to me that that is a possibility. I don't necessarily have any opposition to that. I wonder whether it is necessary. I would wonder whether you might not be satisfied by other assurances or other kinds of indicia as to the way baseball is going to be governed. But, again, with the regret that I hadn't thought about it, I wouldn't have any personal difficulty with that.

Senator FEINSTEIN. Could you point out what those assurances might be or how they could be obtained?

Mr. VINCENT. Well, I think when the new commissioner is elected, it will be important to know what his or her authorities are, what the governance conditions are, what the commissioner's perception of his independence and power—I can imagine a circumstance in which the next commissioner could appear before you and give you sufficient assurances that would satisfy you about what he considers or she considers the authority that the commissioner is going to pursue. I can imagine that. I am not sure that I could predict that, but I certainly can imagine it.

Senator FEINSTEIN. If a commissioner were to appear before a Senate committee or any other committee and give those assurances, what capability would the commissioner have of carrying out the assurances if it ran counter to a majority of the owners?

Mr. VINCENT. Well, as I say, I think a lot would depend upon the governance arrangements that the commissioner is operating under. If the next commissioner has the kind of authority that satisfies you, then, by definition, he has very considerable authority. If the commissioner is in a position where, in your judgment, it is unlikely that the commissioner is going to be independent or effective or viable or aggressive, then I think you might come out with a different conclusion.

I guess what I am saying is it is just premature, in my judgment, because all the talk about restructuring baseball has not resulted in any restructuring taking place in terms of essential governance, and I think that from an optimist's point of view I would hope that baseball would realize—and these hearings may make the realization more likely—that the kinds of commissionerships that historically have been in place ought to be preserved.

Senator FEINSTEIN. But I take it you do agree that the public interest is best served with a strong and independent commissioner.

Mr. VINCENT. Yes. You know, I think it is clear that the baseball owners established the commissionership because they couldn't deal with problems themselves. I mean, that is the history of it, and I think those problems occur. You see them in the disciplinary area; there are lots of others. It is very difficult for owners to do some things within baseball, and therefore it seems to me wise, to say nothing of politically prudent, to continue a system which by and large has worked.

I am not suggesting that commissioners are any better than any other group. We did dumb things, we made mistakes, and we have our faults. But by and large, I think there have been eight commissioners and I think the record is a decent one in terms of the kinds of interests that baseball requires.

Let me remind you that baseball integrated not because owners voted, but because a commissioner ordered the integration. That occurred in 1947, and anybody who thinks that that kind of change in baseball would have occurred by owners' vote is wrong. There are times in baseball history when the commissioner has made judgments which you and I now, with the benefit of hindsight, would agree were magnificent.

Happy Chandler ordered Jackie Robinson into baseball, on the sponsorship of Branch Rickey and the Dodgers, to be sure, but without that order, there would be no wonderful event preceding all of the other things like *Brown* v. *Board of Education*. So I think much can be said for my colleagues, my predecessors.

Senator FEINSTEIN. One last question along the lines of Senator Leahy's in pointing out the incident that I think has precipitated a major loss of public confidence in major league baseball. If there were a strong commissioner and that commissioner were to take that action, as you see baseball today, would the owners support the action?

Mr. VINCENT. Well, I don't know how to answer that. I think my own experience is that, by and large, a vast majority of the owners will support intervention in that kind of situation and some will be critical. I mean, there are 28 owners. It is, it seems to me, almost inconceivable that a commissioner can do something to universal applause.

Senator FEINSTEIN. It will be very interesting to see the result. Thank you very much, Mr. Vincent.

Mr. VINCENT. Thank you very much. I appreciate it.

Senator METZENBAUM. Thank you very much, Senator Feinstein. Senator Mack is the last Senator to have an opportunity to inquire, but he has been one of those Senators who has been most prominent and most concerned about this issue. At one point, he actually was moving forward to conduct some hearings in another commit-

tee and I indicated that I thought this committee had jurisdiction. I appreciate his cooperation and we are very happy to have him sit with us this morning. Senator Mack.

Senator MACK. Well, thank you, Senator Metzenbaum, and I want to express my appreciation to you for holding this hearing. Second, I want to express my sadness and sympathy to the family of Carl Barger, who died yesterday during the baseball meetings. I want to express my sympathy not only to his family, but to his colleagues with the Marlins, and also to major league baseball. He was someone respected in the game and spent his life at it, so I want to express those concerns at this point.

Fay, let me first say thank you for the time, also, that you have spent with us over the last several years in trying to work through the issues about expansion and where teams go, and so forth. I want to start my questions really kind of clarifying, if I could, where you stand on the issue about the antitrust exemption.

In your statement, you noted that the antitrust immunity baseball enjoys is not essential either to the economic health or to the legal integrity of the game. Several sentences later, you argued that the exemption has important significance, as it prevents the migration or transfer of a franchise, and then later said that the significance of the antitrust status of baseball may be more symbolic than vital, and I really want to try to just pin you down a little bit more.

It sounds to me what you are saying is that the most significant area of impact with the exemption has to do with the movement of franchises.

Mr. VINCENT. That is correct.

Senator MACK. And would you confine it to that?

Mr. VINCENT. Well, as I said to you earlier, I think the lawyers in baseball and people like me are cautious, and where we are not sure how broadly the exemption really applies, one has to be careful about invoking it. So I think from my own experience the major area in which the antitrust immunity has a special relevance is in the area of franchise migration.

Senator MACK. And obviously that is the reason I have such interest in it.

Mr. VINCENT. I understand.

Senator MACK. And, again, I can understand—in fact, in almost any legal issue there is always a question about how broad it is and what it really does impact. I wonder if, in your opinion, the process that major league baseball went through with respect to the transfer of the San Francisco Giants after an offer was made—that is, in essence, developing an offer within San Francisco—would have been covered by the exemption. In other words, if there had not been the exemption, do you think major league baseball would have been able to do what they did after an offer had been made to Bob Lurie, and an offer accepted, I might add?

Mr. VINCENT. I am not being coy here. I simply don't know enough about really what happened after I left. I would say this to you, that I think it is likely that baseball in the area of franchise migration could construct approval conditions and terms and conditions under which baseball could prevent migration that would be legally valid. Football and basketball have had some experience in

this area. I don't think the immunity is coextensive with baseball's inability to prevent migration. I think it helps.

Senator MACK. But there are those of us who believe that since there are not specific criteria—and I will go back to that in a moment, but the reality that there is not a clear framework sets up situations which Tampa and St. Pete have now experienced for the last 8 years. And I can't help but believe that the comments that were made by you—and I think that you pretty much stayed that course while you were commissioner—were really a statement that said to Bob Lurie—and, again, I think you made the specific statement about all options are open to you, and that was clearly a statement to the people in Tampa-St. Petersburg that things were a little bit different this time; that while you weren't excited—and in my discussions with you, you have been very clear about your lack of excitement about moving franchises, but you did open up that opportunity and the people of Tampa-St. Pete took that very seriously.

When the offer was made and accepted by Bob Lurie, then to have major league baseball come back in and say, wait a minute, we would like to see if we can't work out some other arrangement, would go to what Senator Graham referred to, the bait and switch. "Blackmail" was used. Let me tell you, there are other terms used in the State of Florida that are much, much tougher than that.

So what can a person like me who is representing all of those folks in Florida—I can't any longer sit back and say, well, let us just let the exemption take place because everything remains the same and Tampa-St. Pete doesn't get a team.

Mr. VINCENT. Well, Senator, there were some things done that were untidy, and from my point of view the difference between saying to someone you may go consider options and saying it would be all right for you to sign a binding agreement to transfer the franchise is obvious. I don't believe that Mr. Lurie had my approval to sign an agreement with Tampa-St. Pete. I know he didn't. So, therefore, that particular step was out of line with the ordinary processes of baseball.

Before an owner can make an agreement to sell, much less to move his franchise, there are all sorts of procedural steps within baseball that must be met. Those were not met. I take it it was a mistake, a misunderstanding, but that untidiness causes you and others difficulty, and I understand that, but that is different from the kinds of orderly procedures that really should be followed.

So I think it is probably appropriate to apologize for that untidiness, though I had nothing to do with it, and yet it seems to me it is unfair to take the untidiness as indicia of a really serious bait-and-switch attempt. I don't, from my personal knowledge, believe anybody in baseball intended a bait-and-switch proposition with respect to franchises.

Senator MACK. Let me just say again, Fay, depending on your perspective and where one sits, it is very, very hard for me to believe, it is very, very hard for the people of Tampa-St. Petersburg to believe that there was not some inside maneuvering that went on, using Tampa-St. Pete once again to craft an outcome that major league baseball wanted to see take place.

Mr. VINCENT. Well, yes, I can understand that. I am just telling you as a matter of fact just one gentleman to another, I don't know of it, and while I was around, it did not occur.

Senator MACK. Yes, I understand that. Let me go back now again to the criteria because you were pretty clear, I think, in kind of laying out the framework in which you were looking at the possible move. The criteria I establish, the Giants fit squarely. The first was a franchise that has to be losing money. The second is a franchise where attendance is a problem. The third is a franchise where the facility is inadequate without prospect of being improved, and the last is a community which has by vote or otherwise indicated that baseball is no longer important.

And I would say that there were four votes in this particular circumstance, and as I view what has happened since then, it is very hard for me to understand how anyone can come to the conclusion that any one of those four criteria have, in fact, been addressed. In other words, we are going to have a team that is going to remain in San Francisco with a new ownership group that is going to pay $95 million and nothing else has changed.

Mr. VINCENT. But, Senator, I think there is a difference between saying these are criteria which would permit a move and saying these are criteria which require a move. What happened in San Francisco, to be sure, took place after I left, but obviously the San Francisco mayor and the business community made a determined effort to retain the franchise.

Senator MACK. Let me ask you this. Do you believe that there would have been a San Francisco group that would have come forward if there had not been the $115 million offer from the Tampa Bay group?

Mr. VINCENT. I don't know how to answer that. I would think your question is appropriate. I can certainly understand why that offer made the departure look very imminent.

Senator MACK. Yes. I think most people would agree that the offer would not have been made if it hadn't been for the Tampa Bay group. Let me ask some questions that are broader in nature, and again it really kind of develops from an unfortunate, cynical position that I have developed over the last several years in watching this thing unfold.

Mr. VINCENT. I have noticed, Senator. [Laughter.]

Senator MACK. I was trying to figure out how you explain this very complicated thing of antitrust to the average person on the street, and what I came up with was the idea that if 28 of us sitting around this table all were owners of major league baseball teams and you as an owner were going to sell to——

Mr. VINCENT. Heaven forbid.

Senator MACK. Yes, heaven forbid—would sell that team to a group down in the Tampa Bay market, and the 28 of us would sit around and say, you know, that $115 million is going to go to Bob Lurie, it is not going to go to us. If we don't allow this sale to go through, that market is still there and some time in the future the 28 of us can sell that market for $115 million and we get to share it.

Maybe that didn't take place, but I see that as somewhat of a driving incentive, and it raises this question which I think is fun-

damental. Whose market is Tampa-St. Pete? Is it the people of Tampa and St. Petersburg, or does it, in fact, belong to the 28 owners of major league baseball?

Mr. VINCENT. Well, I think to the extent franchises can be granted in the future and expansion can take place, a community which is a prime candidate for future expansion represents, if you will, a baseball asset because baseball could put a new franchise, not San Francisco, in Tampa-St. Pete and obviously get from that community a substantial amount of money.

So the extent there is the possibility of using that city as an expansion site, and to the extent that baseball's vote or approval is required for a move, which I take it does prescient to some extent from the immunity, then baseball has a particular role to play and, in my judgment, the asset should be a baseball, if you will, asset, so that the price—if Tampa-St. Pete were willing to pay a substantial premium to get the team from, let us say, Boston or Milwaukee or Minnesota, that premium, it seems to me, because of baseball's involvement, should not go to the transferor owner, but rather to baseball generally, which makes the point you are trying to make.

This asset, the expansion possibility of Tampa-St. Pete, is a valuable asset. To let an owner who is in a particularly grave circumstance get to Tampa-St. Pete first, capture whatever economic emoluments are available for his or her benefit without regard to the interests of baseball generally, it seems to me at least raises a policy question, at least.

Senator MACK. It also seems to me that——

Senator METZENBAUM. Thank you very much, Senator Mack.

Senator MACK. Thank you, Senator Metzenbaum.

Senator METZENBAUM. Thank you. Senator Specter has twisted my arm to get 2 additional minutes, and then we will not have a second round with respect to Mr. Vincent because we have other witnesses who are waiting and I don't think this hearing ought to go beyond 8 tonight.

Senator Specter, for 2 minutes only.

Senator SPECTER. Thank you, Mr. Chairman. I think your last answer, Mr. Vincent, is very revealing when you say that Tampa-St. Petersburg is a baseball asset. I think the fact is that baseball is an American asset. If baseball is going to regard an area as a way to maximize its profits, and if it is going to function just like any other business, I then believe that baseball is going to really face rejection of its antitrust exemption.

Senator Feinstein makes an interesting observation when she suggests conditioning an antitrust exemption on a strong commissioner, but then we would condition it on no pay TV and condition it on letting other markets go. I do not think that is going to happen. I think that if it gets to the floor that it is very likely the exemption is going to go.

Mr. VINCENT. But, Senator, let me make a point to you that——

Senator SPECTER. Let me ask my two questions. Then you can respond to that.

Mr. VINCENT. Yes.

Senator SPECTER. The two questions I have for you that we didn't get to finish before turn on the very substantial talk of a lockout in 1993 or 1994, and I would appreciate it if you would ad-

dress question No. 1. Why shouldn't there be revenue sharing in baseball like there is on the antitrust exemption for football on television receipts, and a salary cap like there is in basketball?

The second question relates to the issue of Marge Schott, which we can't go into here, but the second question is this: I would like to know what you did during your tenure as commissioner of baseball to bring in minorities—African-Americans, Hispanics, women—because baseball does not have a very good record at this moment on that important subject.

Mr. VINCENT. Well, on the first question with respect to labor, revenue sharing occurs in baseball to a very substantial extent. It is not, I think, as you suggest a case where baseball does not share substantial revenues. It does. All national contracts, all national television contracts in baseball are shared just the way they are in football. The issue in baseball is largely a matter of local revenue, and basketball and baseball generate some local revenue. Football basically does not, so baseball is in a different circumstance.

Revenue sharing is an important subject. It is not an all-or-nothing proposition. There is a lot of revenue sharing going on. The question is should there be more, and the answer is probably yes. I think, in time, there will be more, but that is a complicated subject relating to labor negotiations which is frankly beyond my ken at the moment.

On the issue of minorities, Senator, with all due respect, I think my record was—and I am being immodest here—pretty good. In the commissioner's office where I was in charge of employment, 24 percent of the people I hired or had the ability to hire were minorities. That number would match any well-run, distinguished operation from that regard. Two of the nine senior people in baseball—the third highest ranking person in my office was black.

I think the problem in baseball is basically on the field. Baseball's numbers with respect to front office personnel—lawyers, marketing people, business people—are pretty good. The numbers are up substantially. The deficiency in baseball is in the most visible areas, on the field and general manager.

The fact that we are going to have more minorities managing next year should not be misunderstood as a sign that the problem is coming under control. We need much more progress in the minor leagues. There were no AAA managers who were minorities the year before last. Lots of people have to be employed in the system to be sure that the chain will produce the kinds of people we want.

I think there has been progress in the areas that frankly I could make progress in. I think the numbers that I generated are numbers that I am proud of. Look, we established a winter league in Arizona. I said three of the six managers of that league should be black. We hired three black managers. One of them didn't take the job; he decided not to travel. But the other two, Jerry Royster and Dusty Baker, have called me and said, thank you, that has given us a chance to be in the major leagues this year in positions of prominence. That is progress. There is progress being made, but you and others ought to keep an eye on that. There should be considerable vigilance on baseball, and the ownership has to continue to believe that it is an issue both of fairness and equity and of sound business practice.

Senator METZENBAUM. Thank you very much, Mr. Vincent. I want to say on behalf of the committee and on behalf of the American people, thank you for your testimony, thank you for your patience with this committee. We may be back to you for further consultation and advice. I know you discomforted yourself somewhat for other appointments in New York to be here with us today and we are very grateful to you.

Mr. VINCENT. Thank you. I wish you well. Thank you for your courtesy.

[The prepared statement of Mr. Vincent follows:]

STATEMENT BY

FORMER COMMISSIONER OF BASEBALL

FAY VINCENT

BEFORE THE

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

DECEMBER 10, 1992

SENATE JUDICIARY COMMITTEE

I am grateful to have this opportunity to share my views on the continued viability of the existing antitrust exemption enjoyed by Major League Baseball. It is my opinion that the current exemption should be retained so long as Major League Baseball -- by which I mean the owners -- can justify the privilege of the special status the exemption affords. In light of recent developments, I believe baseball must be pressed to persuade to Congress that the antitrust immunity is warranted. And whether baseball presently deserves this special treatment is surely open to question.

I. Significance of the Exemption

In my view the antitrust immunity baseball enjoys is not essential either to the economic health or the legal integrity of the game. For years, Congress has considered the threat to remove the exemption as the principal weapon with which to pressure baseball. But the threat to remove the exemption reminds one of the cry of wolf. As my predecessor Bart Giamatti once reminded the Senate, if you take away the exemption, what do you threaten to do next.

And yet the exemption has important significance. The immunity permits baseball (or the Commissioner) to prevent the migration or transfer of a franchise if the move is not in the best interest of baseball. Eliminating the immunity would have some unattractive consequences. And there is no evidence that the immunity has been abused by baseball. Thus, the immunity issue tends to be over-blown when in fact the significance of the antitrust status of baseball may be more symbolic than vital. Again, the question is whether baseball deserves or requires this special status.

II. Baseball as Ordinary Business

One of the major issues in baseball is whether baseball is or should view itself as anything other than a business like any other business.

When I was being attacked by certain owners, I was told that they wanted the Commissioner to be their Commissioner. They did not agree that the Commissioner should have any obligation to the public or to represent any other interests than the interests of the owners. One owner said the players had their union leader as did the umpires but no one represented the owners' interests.

Another view widely held by owners is that baseball should be run like any major corporation. The CEO or Commissioner should report to the owners who would be able to fire the Commissioner as the CEO in the corporate world can be fired.

The corporate analogy has great appeal to owners who have difficulty accepting or understanding why baseball is such a difficult enterprise. Thus, there is within baseball a major debate taking place over how baseball is to see itself, and what obligations, if any, baseball has to the public. My confidence

in the wisdom of the resolution of this debate is well under control.

Conclusion:

It is my view that:

1. The existing antitrust exemption for Major League Baseball should be retained only so long as baseball can persuade you that it is a unique institution with special public interest obligations and not merely another business.

2. To the extent Major League Baseball acknowledges that the exemption is only justified by continuing recognition that baseball is a national trust -- with obligations to this Congress and to the public that are not carried by ordinary businesses -- the exception should be continued and the performance of baseball closely monitored.

3. If the owners of baseball continue on their stated course of making baseball into their business and at the same time insist that the Commissioner is their CEO to be fired at will, I would no longer support the preservation of the exemption. If the exemption is to be surrendered let it be by the action of the owners. Only a strong Commissioner acting in the interests of baseball, and therefore the public, can protect the institution from the selfish and myopic attitudes of owners.

4. Baseball is not seriously dependent on the continuation of the anti-trust exemption. This

Congress has other alternates available to it that seriously threatens baseball. If you wish to get the attention of the owners and to recapture their commitment to larger public interests, you may wish to consider expanding the range of legislative options. The exemption has become more of a symbol than a vital baseball interest. It symbolizes that baseball is different. The question for you and for baseball is whether Major League Baseball is willing to continue to carry the burdens of being different in order to preserve the exemption.

Senator METZENBAUM. Thank you.

The Chair will now announce the procedure that we will follow. We will take a 5-minute recess, at which time we will return for opening statements. Many of the members have already indicated their view with respect to this subject. I will therefore ask the members of the committee to confine themselves to opening statements not in excess of 2 minutes each, and if they don't have to make them at all, it would be appreciated. Following that, we will hear from Mr. Selig, representing baseball ownership.

We stand in recess for 5 minutes.

[Recess.]

Senator METZENBAUM. The subcommittee will come to order. At this time, we will hear opening statements from the members of the committee. I would ask them to limit their statements to a maximum of 3 minutes, and I think many of them have probably already covered the subject and indicated their concerns. If they can waive the opening statement, so much the better, but certainly I don't wish deny anyone the opportunity to make such an opening statement.

Senator Thurmond, I had indicated that we were going to limit opening statements to 3 minutes, but hoped that some would waive opening statements and other would speak for a shorter period of time.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I will speak only about 2½ minutes. Mr. Chairman, the hearing this morning addresses an issue that is unique to baseball. No other professional sport enjoys the privilege of a complete exemption from the antitrust laws as baseball does. This exemption dates back to the 1922 Supreme Court decision in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs.*

In that case, the Court reasoned that professional baseball was local in nature and did not involve interstate commerce within the meaning of the Sherman Act. Subsequent decisions, although questioning the wisdom of the blanket immunity and the reasoning behind it, have affirmed the *Federal Baseball* decision because of historical precedents and Congressional silence and inaction.

Mr. Chairman, in my view, the privilege of having an antitrust exemption carries with it certain responsibilities, especially to consumers. This responsibility is particularly important when addressing issues concerning franchise relocation, such as the proposed move of the San Francisco Giants to Tampa Bay-St. Petersburg, player salaries, and league expansion.

Each of my colleagues is no doubt aware of the controversy surrounding the resignation of Mr. Fay Vincent, the former commissioner of baseball. Given the historic view that the baseball commissioner is to act in the best interests of baseball, I am concerned that any attempts to undermine the independence and effectiveness of this office will have a detrimental effect on consumers.

Mr. Chairman, in addition to the role of the baseball commissioner, I am particularly interested in hearing from the witnesses why baseball should enjoy an antitrust exemption when other sports do not. I want to assure each of the witnesses that I have an open mind on these issues and that I appreciate their willing-

ness to appear and debate these issues at the hearing this morning.

Mr. Chairman, I have a statement from Senator Hatch that I would like to put in the record.

Senator METZENBAUM. It will be so included.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN HATCH

Like millions of Americans, I enjoy our national pastime of baseball. Like many other Utahns, I am pleased that minor league professional baseball has found a home in Utah.

In 1922, the United States Supreme Court ruled that professional baseball was not subject to the antitrust laws. The Supreme Court reaffirmed that ruling in 1953 and again in 1972. In the 70 years since the Court's 1922 ruling, professional baseball has well served the interests of hundreds of millions of baseball fans, and Congress has therefore seen fit not to repeal baseball's antitrust immunity.

In my view, this history places a very heavy burden on those who would now advocate a blanket repeal of baseball's antitrust immunity. This is not to say that professional baseball has been error-free. But whether a repeal of the antitrust immunity would, in the grand scheme, help rather than hurt the consumer—the baseball fan—is speculative at best.

I am committed to ensuring that professional baseball continues to serve the interests of the fans. But to the extent that any problems currently exist, it is by no means clear that repealing baseball's antitrust immunity would be an effective remedy.

Senator METZENBAUM. Senator Simon.

Senator SIMON. I have no opening statement. I would observe there is one modest member of the U.S. Senate who has declined to come up and join us, our colleague, Senator Herb Kohl.

Senator METZENBAUM. We are very happy to have him. I assumed that he preferred not to. He is a member of this committee and we certainly would be very——

Senator SIMON. He is going to join us. I apologize for saying he is modest. [Laughter.]

Senator METZENBAUM. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Mr. Chairman, I will be brief and will submit, instead, for the record an extensive statement that I made when I introduced a resolution on August 2, 1991, to have the Senate consider a rescission or modification of the antitrust exemption for baseball, football, basketball, and hockey.

I believe that these are important hearings and that the issue of availability of franchises is one which baseball, as well as the other sports, will have to take up very seriously if baseball is to retain its antitrust exemption. When you compare the size of the country and the baseball industry in 1901, when there were little more than 76 million Americans with 16 major league teams, to today, when there are 28 teams and a population in excess of 250 million Americans, it is obvious that there ought to be many, many more franchises.

The issue of pay television—a subject, I think, of great sensitivity to the American people—is another which baseball will have to take up very seriously if it is to receive its antitrust exemption. While there has been a commitment from professional football not to televise the Super Bowl, professional football is moving into pay TV in a number of ways on the cable channels, and as I noted earlier, so is baseball, including the team in my own home city.

Revenue sharing in professional football, at least with the TV on professional football, is also something which I think has to be examined very closely by baseball, including the salary caps.

There is nothing that the Congress would rather do than do nothing and not become involved in this tremendously complicated subject, but that really requires self-regulation by the sports themselves. I think these hearings are very useful in highlighting some of the issues which we look to baseball and other major league sports to solve without any action on our part.

Thank you, Mr. Chairman.

[Senator Specter submitted the following excerpt from the Congressional Record:]

Court for the District of Columbia, the plaintiff, former Judge Alcee L. Hastings, has named the United States Senate as a defendant and has placed in issue the constitutionality of his impeachment trial, conviction, and removal from office:

Whereas, pursuant to section 703(a) and 704(a)(1) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a)(1), the Senate may direct its counsel to defend Senate parties in civil actions relating to their official responsibilities;

Whereas, pursuant to sections 703(c), 706(a), and 713(a) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(c), 288e(a), and 288k(a), the Senate may direct its Counsel to appear as amicus curiae in the name of the Senate in any legal action in which the powers and responsibilities of Congress under the Constitution are placed in issue: Now, therefore, be it

Resolved, That the Senate Legal Counsel is authorized to represent the Senate and any other Senate parties in Alcee L. Hastings v. United States of America, et al., filed in the United States District Court for the District of Columbia, or in any similar lawsuit filed by former Judge Alcee L. Hastings to challenge his impeachment trial, conviction, or removal from office.

Sec. 2. That the Senate Legal Counsel is authorized to appear as amicus curiae in the name of the Senate in Alcee L. Hastings v. United States of America, filed in the United States Claims Court, and in Alcee L. Hastings v. United States of America, et al., filed in the United States District Court for the District of Columbia, or in any similar lawsuit filed by former Judge Alcee L. Hastings, in order to defend the Senate's sole constitutional power to try impeachments and to defend, to the extent necessary, the decisions and procedures of the Senate in the course of his impeachment.

SENATE RESOLUTION 168—AUTHORIZING REPRESENTATION BY THE SENATE LEGAL COUNSEL

Mr. WIRTH (for Mr. MITCHELL, for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to:

S. RES. 168

Whereas, in the case of Perkins v. United States Senate, No. 90-5330, pending in the United States Court of Appeals for the District of Columbia Circuit, the appellant is seeking reversal of a district court order dismissing as frivolous his complaint against the United States Senate;

Whereas, pursuant to sections 703(a) and 704(a)(1) of the Ethics in Government Act of 1978, 2 U.S.C. 288b(a) and 288c(a)(1), the Senate may direct its counsel to defend the Senate in civil actions relating to its official responsibilities: Now, therefore, be it

Resolved, That the Senate Legal Counsel is directed to represent the Senate in the case of Perkins v. United States Senate.

SENATE RESOLUTION 169—FORMALIZING MEMBERSHIP ON THE SELECT COMMITTEE ON ETHICS

Mr. WIRTH (for Mr. MITCHELL, for himself and Mr. DOLE) submitted the following resolution; which was considered and agreed to:

S. RES. 169

Resolved,

SECTION 1. For purpose of matters relating to the preliminary inquiries into the conduct of Senators Cranston, DeConcini, Glenn, McCain and Riegle, including the investigation into the conduct of Senator Cranston, the membership of the Select Committee on Ethics shall be Senator Heflin (Chairman); Senator Rudman (Vice Chairman); Senator Sanford; Senator Helms; Senator Lott; and a Senator to be named in accordance with section 1 of Senate Resolution 338 (88th Congress, 2d Sess., 1964).

SEC. 2. For all other purposes, the membership of the Select Committee on Ethics shall be Senator Sanford (Chairman); Senator Rudman (Vice Chairman); and Senator Bingaman; Senator Bryan; Senator Lott; and Senator Gorton.

SENATE RESOLUTION 170—TO REFER THE BILL S. 1652 TO THE COURT OF CLAIMS

Mr. FORD submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 170

Resolved, That the bill (S. 1652) entitled "A bill for the relief of land grantors in Henderson, Union, and Webster Counties, Kentucky, and their heirs," now pending in the Senate, together with all accompanying papers, is referred to the Chief Judge of the United States Court of Claims. The Chief Judge shall proceed with the same in accordance with the provisions of sections 1492 and 2509 of title 28, United States Code, and report back to the Senate, at the earliest practicable date, giving such findings of fact and conclusions that are sufficient to inform Congress of the amount, if any, legally or equitably due from the United States to the claimants individually.

SENATE RESOLUTION 171—TO REFER THE BILL S. 1657 TO THE COURT OF CLAIMS

Mr. KOHL submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 171

Resolved, That S. 1657 entitled "A bill for the relief of the Menominee Indian Tribe of Wisconsin" now pending in the Senate, together with all the accompanying papers, is referred to the chief judge of the United States Claims Court. The chief judge shall proceed according to the provisions of sections 1492 and 2509 of title 28, United States Code, and report back to the Senate, at the earliest practicable date, providing such findings of fact and conclusions that are sufficient to inform the Congress of the nature, extent, and character of the damages referred to in such bill as a legal or equitable claim against the United States or a gratuity, and the amount, if any, legally or equitably due from the United States to the Menominee Indian Tribe of Wisconsin by reason of such damages.

SENATE RESOLUTION 172—RELATING TO THE ANTITRUST EXEMPTION NOW ACCORDED BASEBALL, FOOTBALL, AND HOCKEY

Mr. SPECTER submitted the following resolution; which was referred to the Committee on the Judiciary.

S. RES. 172

Whereas baseball has enjoyed an antitrust exemption since 1922 when the Supreme Court of the United States held that baseball was a sport and not a business;

Whereas baseball today is admittedly a business;

Whereas baseball's recent moves to pay cable television and baseball's recent announcement that only two new franchises would be created by the National League shows disregard for the public's interests compared with the owners' financial interests;

Whereas recent moves by football, basketball and hockey to pay cable and/or pay-per-view demonstrates disregard for the public's interests compared with the owners' financial interests;

Whereas football, basketball and hockey enjoy a special limited exemption from the antitrust laws as provided in the Sports Broadcasting Act (15 U.S.C. 1291-95);

Whereas only 84.8 percent of United States households have purchased cable service and only 37.4 percent of United States households have access to cable service;

Whereas big league sports franchises may function as businesses extracting whatever profit the market will bear, existing antitrust exemptions should be limited or rescinded unless big league sports franchise owners demonstrate reasonable concern for the public's interest: Therefore be it

Resolved, That Congress should limit or rescind the antitrust exemptions now accorded football, baseball, basketball and hockey.

Mr. SPECTER. Mr. President, baseball's decision to limit expansion to only two cities and the numerous shifts of sporting events from free TV to pay cable are the most recent of many decisions by franchise owners to elevate their profit interests over the public's interests. The NFL has announced plans for pay-per-view on cable television by 1992, and it is likely that eventually there will be pay-per-view for the super bowl. Basketball has moved from free TV for away games to pay television on cable.

The Philadelphia Phillies, who used to be available on away games on free TV, now require viewers to pay for two separate cable channels to see away games. The traditional Phillies Sunday afternoon game is now available on occasion only on a premium pay cable channel. Former Baseball Commissioner Ueberroth reportedly asked cable operators if they would be interested in exclusive rights to the league championship series.

The sports franchise owners argue it is their business what they charge for the privilege of watching their teams. However, those entrepreneurs enjoy a special privilege in being exempt from the antitrust laws. Baseball won that exemption in 1922 because it was then regarded as a sport and not a business. Although no one today doubts that big league sporting events are a business—and big business at that—the Congress and the courts continue to allow the sports entrepreneurs special exemptions from the antitrust laws which govern all other businesses in America.

Simply stated, if the sports entrepreneurs want to run their businesses without the special privilege of antitrust exemption, then let them do so.

If, on the other hand, they want to enjoy the benefits of antitrust exemption, then, in my opinion, they should show more concern for the public interest without extracting every last dollar through pay TV and limitation of franchises.

Baseball's indifference to its fans was demonstrated in 1958 when the Dodgers deserted Brooklyn and the Giants abandoned New York for California's megabucks. When professional football teams like the Dallas Cowboys sell for $140 million and expansion baseball teams cost $175 million, which includes the expansion fee of $95 million plus estimated startup costs of $80 million, the focus of the future becomes clearer: More pay television is coming closer and closer into view.

In addition to special consideration which franchise owners owe fans arising from the antitrust exemption, in my judgment sports teams are affected with a public interest. There is something unique about teams for hometown fans which has created America's love affair with sports. My own views have been molded by being an enthusiastic sports fan as well as my appreciation, as a lawyer, for the property rights of sports entrepreneurs.

My personal perspective developed from living in Kansas as a youngster where the sports ticker tape each half inning and the morning box scores relieved the solitude of rural life. As a city resident, I now regularly attend sporting events and have been a season ticket holder since the mid-1950's. Anyone who sees the frenzy of 80,000 fans in an NFL stadium or the passion of spectators for baseball, basketball, or hockey games knows that the fan deeply feels a keen emotional interest—arguably as important as a proprietary interest—even though not equally assertable in courts.

My populist views on Congress' role in protecting America's sports fans did not arise as a volunteer. In the summer of 1982, Mr. Dan Rooney of the Pittsburgh Steelers and then-Commissioner Pete Rozelle asked for assistance in arranging hearings by the Senate Judiciary Committee on the prospective move of the Oakland Raiders to Los Angeles. Senator STROM THURMOND, chairman of the Judiciary Committee, promptly honored my request and those hearings were held within a few days.

Legislation was introduced to grant the NFL authority to limit franchise moves without violating the antitrust laws. The NFL ultimately solved the problem without the necessity for such legislation but those hearings opened a broader inquiry by the Judiciary Committee into professional sports. When the Philadelphia Eagles contemplated a move to Phoenix in 1984, Judiciary Committee hearings contributed to abandonment of that proposal. Later Judiciary Committee hearings extracted a commitment from then-Commissioner Rozelle and the NFL's current Commissioner Tagliabue not to have pay-per-view for the Super Bowl until at least the year 2000.

Evidence is mounting, however, that the NFL is moving toward telecasts on a pay-per-view basis. First there was the NFL's decision in 1987 to take some 13 games off ABC-TV and move them to ESPN on cable, although it did require ESPN to sell broadcast rights to the game in the markets of the teams involved in each game. Now there are press reports, in particular a February 24, 1991 article in the New York Times entitled "NFL Planning to Add Pay TV to Its Package" in which NFL Commissioner Paul Tagliabue was quoted as saying that the NFL was considering putting some games on pay-per-view because "it's a fact of life now."

These reports are disturbing because the NFL has publicly guaranteed no move to pay-per-view for the Super Bowl until at least the year 2000, if ever. At a May 9, 1989, hearing before the Judiciary Committee, then-Commissioner Pete Rozelle confirmed that "the National Football League will not embrace pay television before 2000, if then." (Tr. at 73). Commissioner Tagliabue confirmed this commitment at a November 14, 1989, hearing before the Subcommittee on Antitrust, Monopolies, and Business Rights (S. Hrg. 101-1209 at p. 93).

According to media expert Jay Blumer, the $100 million pay-per-view business is projected to be a $6 billion business by the end of the 1990's. The NFL obviously wants a piece of this action. While the recent actions by the NFL are not an explicit breach of its public promises, they indicate the direction the league is moving and are contrary to the spirit of their prior assurances.

Sports franchises are money-making businesses and much of their value is derived from the monopoly position of the leagues, as evidenced by major league baseball's expansion franchise price of $95 million. The June '' issue of Financial World pegged the value of the New York Yankees at $225 million, the Miami Dolphins at $205 million, and the Green Bay Packers, L.A. Dodgers, L.A. Lakers all at $200 million. Financial World reported also that professional sports franchises averaged 15 to 20 percent in annual appreciation in recent years, grossing a total of receipts topping $3.7 billion each year, $1.7 billion of which comes from broadcasting fees.

Only 2 years ago, the Baltimore Orioles team was sold for $70 million and today Financial World estimates the Orioles' value at $200 million. Other recent sales show that limiting team expansions can up the price of existing franchises: The Montreal Expos agreed to a sale in November 1990 for a reported figure of $86 million; the San Diego Padres were sold last year for $75 million; the Seattle Mariners were sold in 1989 for $76 million, the Dallas Cowboys sold for an estimated $140 million in 1989; the Denver Nuggets for $65 million in 1985; the Denver Broncos for $75 million in 1984; the New Orleans Saints for $70.3 million in 1985; and the New England Patriots for $85 million in 1988.

What is clear in all this is the harm that the public will suffer if professional football games are available on cable only. Apart from the extra cost of pay-per-view on cable, there is the simple matter of access to cable. According to Broadcast magazine and the Television and Cable Factbook (1989-90 ed.), only 77.4 percent of households with televisons nationwide can obtain cable if they want it. Only 58.6 percent have chosen to purchase cable service. In Pennsylvania, 81.5 percent of households with televisions could get cable if they want it, but again only 63.8 percent have chosen to sign up for it. In other words, even if all those who could get cable purchased it, over 20 million households with TV's nationwide and some 1 million in Pennsylvania would still be locked out of viewing sports if this trend toward cable continues. And then there is the very real fact that, for many people, cable and in particular, pay-per-view is simply too expensive.

Most recently, professional basketball has joined the march toward pay-per-view. The Philadelphia 76'ers have concluded a contract to have almost all of their games broadcast by a premium cable network, Prism. Prism had been broadcasting 76'ers home games, while channel 17 had been broadcasting away games. Thus, except for a relatively few games, the 76'ers will be available only on premium cable service. Only 16 percent of the homes in the Philadelphia market subscribe at additional cost to Prism. Moreover, it is estimated that one-third of the homes in the Philadelphia television market will be unable to see any 76'ers games on TV, even if they could pay for them.

On the issue of baseball, population statistics decisively show the Americans in 1901, when the American League was first formed, had greater access to watching a baseball game in the stands than they do today. In 1901, the population of our country was approximately 76,212,168 and there were 16 major league baseball teams. In the National League in 1901, there were franchises in Pittsburgh, Philadelphia, Brooklyn, St Louis, Boston, Chicago, New York, and Cincinnati. In the American League, there were franchises in Chicago, Milwaukee, Cleveland, Detroit, Washington, Boston, Baltimore, Philadelphia. In all, in 1901, there were 16 teams for a per capita of 4,763,298 people for every team. If that per capita were projected against the population today, the United States, with a 1990 population of 248,709,873, should have approximately 52 teams, nearly twice the 26

baseball teams that the latest expansion would allow. Put another way, today there are 8,883,496 people for every team, in sharp contrast with the figures of 1901.

Similarly, we can compare the population of a city with an American League franchise in 1901 with cities today. The population of Milwaukee in 1901 was 285,315. As the U.S. population has increased approximately 3.3 times since 1901, a comparable city today would be one with a population of 941,539. By that test, every city that was turned down for an expansion team would have gotten a team in 1901: Washington, DC, with a metropolitan area population of 3,923,574; Tampa/St. Petersburg with a metropolitan area population of 2,067,959; Buffalo with a metropolitan area population of 968,532; and Orlando with 1,072,748 people in its metropolitan area. Included also would be such metropolitan areas as Phoenix, Portland, Vancouver, Norfolk, Sacramento, New Orleans, Indianapolis, Buffalo, Providence, Charlotte, Hartford, and Salt Lake City.

Some suggest that having many more teams would diminish competition because it would bring in less qualified players. I think people overestimate the effect that new teams would have on the quality of players just as some overestimate the effect higher salaries would have on the quality players baseball could attract. Back in the "good old days," when salaries were not in the multi-million-dollar range, you had some of the all-time greats: Cy Young pitching 7,377 innings and winning 511 games; Walter Johnson pitching 5,924 innings and winning 416 games and Christy Mathewson pitching 4,789 innings and winning 373 games. The skyrocketing increase in salaries has not attracted any greater talent these days: Pitchers are still trying to break those old records. An increase in the number of teams should not have a negative effect on the quality of baseball any more than salaries have had a positive effect. Quality is in the individual player—it does not matter how much he is paid or how many there are. Indeed, a contrary argument can be made that the addition of new teams would allow new talented ballplayers to come up who would not otherwise have a chance at the big leagues.

For many years, we on the Judiciary Committee concerned about this issue have been assured that professional sports will act responsibly, that it will not go the way of pay TV and that it will respond responsibly on the issue of expansion of sports franchises. But the evidence of the last decade, and in particular the actions of this year, have convinced me that professional sports is bent on elevating their financial interests at the expense of the people's interests. If that is their attitude, and professional sports wants to be a business, then it should be treated like any other business and bear the full force of the antitrust laws.

There is obviously no way that Congress could or should regulate professional sports. However, a display of congressional interest and the possibility of our action to limit or rescind antitrust exemption is likely to produce restraint by franchise owners in moving to pay TV or otherwise abusing the public interest. Last year, a few congressional inquiries led to settlement of a dispute between the Major Leagues and minor league owners. Hearing by the Senate Judiciary Committee on the resolution to limit or rescind antitrust exemptions will provide guidance on the proper congressional course on this important subject. It is recognized that in addressing this issue, there are many, many other matters of overriding national and international concern, but the American people have a love affair with sports and the American people have contributed greatly to the success of sports franchises. At the moment, there is a relatively limited public reaction to the moves to pay TV, but that will expand exponentially if, as and when the World Series or the Super Bowl move to pay-per-view. In my judgment, we have come to a point where it is worth the time of the Congress to consider the implications of pay television and the limitations on new franchises in professional sport like baseball.

SENATE RESOLUTION 173—ESTABLISHING AN ALBERT EINSTEIN CONGRESSIONAL FELLOWSHIP PROGRAM

Mr. SMITH (for Mr. HATFIELD) submitted the following resolution; which was considered and agreed to:

S. RES. 173

Whereas a need exists to facilitate understanding, communication, and cooperation between Congress and the science education community;

Whereas the science education community includes a cadre of nationally recognized outstanding secondary school science and mathematics teachers; and

Whereas secondary school science and mathematics teachers can provide insight into education programs that work effectively: Now, therefore, be it

Resolved,

SECTION 1. FELLOWSHIP PROGRAM.

(a) IN GENERAL.—The President pro tempore of the Senate are authorized to enter into an agreement with the Triangle Coalition for Science and Technology Education to establish an Albert Einstein Congressional Fellowship Program (referred to in this concurrent resolution as the "fellowship program"), which provides for each fiscal year, beginning with fiscal year 1991, three fellowships within the Senate (referred to in this concurrent resolution as the "Senate fellowships").

(b) RESPONSIBILITIES.—The President pro tempore of the Senate may enter into the agreement described in subsection (a), and fund fellowships as specified in section 4(a), only if the Triangle Coalition for Science and Technology Education—

(1) undertakes the application responsibilities referred to in section 3(a);

(2) participates in the evaluation referred to in section 5; and

(3) provides the funding for administration and evaluation costs referred to in section 4(b).

SEC. 3. SELECTION PROCESS.

(a) APPLICATION.—The Triangle Coalition for Science and Technology Education shall—

(1) publicize the fellowship program;

(2) develop and administer an application process; and

(3) conduct an initial screening of applicants for the fellowship program.

(b) SELECTION.—

The President pro tempore and the Majority Leader and the Minority Leader of the Senate, in consultation with the chairmen and ranking minority party members of the Committee on Labor and Human Resources of the Senate and the Committee on Commerce, Science, and Transportation of the Senate, shall each select one of the recipients of the Senate fellowships.

(c) PLACEMENT OF FELLOWSHIPS.—

The President pro tempore of the Senate, in consultation with the Members referred to in subsection (b), may place one fellowship recipient on the staff of the Committee on Labor and Human Resources, and one recipient on the staff of the Committee on Commerce, Science, and Transportation, and one recipient may serve on the personal staff of a member of the Senate.

(d) ELIGIBLE RECIPIENTS.—Recipients shall be selected from a pool of nationally recognized outstanding secondary school science and mathematics teachers. The pool shall include teachers who have received Presidential Awards for Excellence in Science and Mathematics Teaching, as established by section 117(a) of the National Science Foundation Authorization Act of 1988 (42 U.S.C. 1881b), or other similar recognition of skills, experience, and ability as science or mathematics teachers.

(e) COMPENSATION.—

The President pro tempore of the Senate shall fix the compensation of each recipient of a Senate fellowship.

(f) LENGTH OF TERM.—Each fellowship recipient shall serve for a period of up to 1 year.

SEC. 4. EVALUATION.

The Chairmen of each committee and member of the Senate referred to in section 2(b) and the Executive Director of the Triangle Coalition for Science and Technology Education shall submit to the President pro tempore of the Senate an annual report evaluating the fellowship program, and shall make recommendations concerning the continuation of the program.

SEC. 5. FUNDING.

(a) FELLOWSHIPS.—

For fiscal years 1991 and 1992, the funds necessary to provide any Senate fellowships shall be paid from the contingent fund of the Senate, but not to exceed a total of $46,000 in fiscal year 1991 and $43,500 in fiscal year 1992 for the Senate fellowships.

(b) ADMINISTRATION AND EVALUATION.—The Triangle Coalition for Science and Technology Education shall provide the funds necessary for the administration of the fellowship program and for the evaluation referred to in section 3.

Senator METZENBAUM. Thank you very much, Senator Specter.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. You know, it is interesting, Mr. Chairman. When we have these hearings, we are really talking about a very conservative game in the best sense of the word. In baseball, the traditions get passed down from generation to generation in a way that we don't see in many other customs in our country. They don't change much and I don't think they should.

I remember listening to Red Sox games on the radio when I was growing up in Vermont, and I mentioned earlier the thrill of being 7 years old in 1947 and being in Fenway Park and watching games. These are great memories and they are memories that include going to games with my own children, which I still do. They are not really children anymore, but I still go to baseball games with them, and some day if I have grandchildren, I hope to do that with them, too, because we know it is the same game.

You don't countenance experiments in baseball lightly. You don't have the equivalent of a three-point shot or instant replay. That doesn't work with baseball. A run is a run; you get three strikes, you are out. It is pretty simple and straightforward. But I do wonder whether baseball's longstanding antitrust exemption is one of those traditions that is worth preserving. Let me be clear. I don't stand on the side of the owners, nor on the side of the players. I am standing on the side of the fan.

Our interests in Vermont are different than most of the other States seen represented around this table. We don't have a professional sports team. We are not wooing a team. We weathered the relocation of the AA Burlington Reds. We are not being jilted or suffering because we are not being wooed by any major league. But Vermonters care deeply about the good of the game.

Now, Mr. Vincent, who incidentally gave some of the best testimony I have heard before the Judiciary Committee, hit the nail on the head in his resignation letter when he said, "Baseball is more than ownership of an ordinary business. Owners have a duty to take into consideration that they own a part of America's national pastime in trust, and this trust sometimes requires not putting self-interest first." I agree. The owners have a broader responsibility than treating baseball like an exclusive rotisserie league. Baseball belongs to all of us, not just to the owners.

Baseball is going through some tough times now. Marge Schott's comments were disgraceful, absolutely disgraceful, inexcusable. They damaged the integrity of the game. A respected commissioner was ousted. The money chase continues, and a lockout may be on the horizon. Nobody in this room can tell me with a straight face that the lockout is going to help the fans. It is going to help some financial interests, that is all.

So the question I ask to be answered from this hearing is essentially this: Does antitrust immunity protect the quality of the game for the benefit of the fans or does it merely protect a cartel of owners? And if it is the latter, then we have no need to continue this immunity and we ought to just get rid of it.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Leahy. At this point, I will put into the record a statem nt from Senator Brown.

[The prepared statement of Senator Brown follows:]

STATEMENT OF SEN. HANK BROWN
ANTITRUST SUBCOMMITTEE HEARING
"BASEBALL'S ANTITRUST IMMUNITY"
DECEMBER 10, 1992, 9:00 A.M.
226 DIRKSEN

Mr. Chairman, thank you for allowing me to join your subcommittee today. While, I do not serve on the Antitrust Subcommittee, we have had the pleasure of working on a number of antitrust issues together -- resale price maintenance, modification to international antitrust laws and antitrust relief for production joint ventures, to name a few.

Mr. Chairman, the people of Colorado are anxiously awaiting the 1993 Baseball season and the beginning of a long and satisfying relationship with one of Baseball's two 1993 expansion franchises, the Colorado Rockies. The remarkable enthusiasm of the people of Colorado for Major League Baseball is reflected by the fact that the Rockies have already sold 30,000 season tickets, the second highest total in the Major Leagues. The removal of baseball's antitrust exemption would dramatically change the ground rules before the game starts for the Colorado Rockies.

For the last several years, Coloradans have worked hard to assemble a potential Baseball ownership group, build a stadium and position Colorado as one of the two best expansion candidates. After going through a long and exhausting application procedure, Colorado was chosen as a 1993 expansion site. The investors in the Colorado franchise paid $95 million just to cover the franchise fees. Start-up costs in Colorado could make the total investment over $125 million. A new stadium is being built in Denver and the people of Colorado are picking up part of the costs related that new stadium.

Bill Brubaker's recent article in the Washington Post, entitled, "Income Disparity Tugs at Baseball's Seams," describes the economics of professional baseball today and is very informative in this regard. I would ask that a copy of his article be made a part of the hearing record.

This enormous capital investment, and the time and effort expended in the application process were based on a number of critical assumptions. Not the least of those assumptions was the fact that Major League Baseball had a time-tested system of self-governance that is exempt from endless court challenges under the antitrust laws.

It was of utmost importance to Coloradans that franchises, and in particular the Rockies' National League opponents, were stable and were not likely to relocate unless Baseball's procedures were followed. The fact that the Rockies' National League opponents include three natural rivals on the West Coast and only one time zone away has caused great anticipation and excitement for the team and its fans.

To change the rules that have been relied on for 70 years without considering the needs of the fans and new potential franchises would be unfair.

In sports it's generally agreed that the rules should not be changed after the game has started. Colorado played by the rules and it has become part of the great sport of Major League Baseball. To change the very nature of that sport without insuring that we move to something better would be a mistake.

I would hope that this subcommittee will exercise caution when considering changes in Baseball's antitrust exemption.

Senator METZENBAUM. Since Senator Brown isn't here, I am going to turn to a member of this committee who just joined us and I think does have a statement he cares to make. We are very happy to have you with us, Senator Kohl, for as long as you care to remain, and I assume you have a statement.

Senator KOHL. Well, thank you, Senator Metzenbaum. I have no opening statement. I am here to introduce Bud Selig when he becomes your witness.

Senator METZENBAUM. Very good, thank you. Senator Graham, do you have an opening statement?

Senator GRAHAM. Yes, Mr. Chairman, a very brief statement. I think the fundamental question that we have before us today is whether the behavior of major league baseball has been so supportive of the national pastime as to justify a continuation of an exemption from basic laws which in other areas of commerce prevent collusive and anticompetitive practices.

There are a number of issues which raise this question. Many of those have already been discussed by this committee and by our first witness. Since the issue of franchise migration has been cited as the principal utility of the antitrust exemption, I think it is appropriate, therefore, that it be a primary focus of the question of whether there is a justification for a continuation of this exemption.

The statements that have been made by Mr. Vincent seem to draw a distinctly different economic standard for expansion and relocation. Mr. Vincent stated that he believed that it was unlikely that there would be expansion of major league baseball in the near term because it was not in the economic interest of baseball to expand; that the dilution of ownership was adverse to the current ownership of baseball. Therefore, free market principles are being applied to negate expansion.

On the other hand, as it relates to relocation, we seem to have a socialized set of standards, a set of criteria that essentially says that if a city, whether it has one or more current franchises, is able to meet minimal standards, it will be protected to keep that franchise, whereas other communities that may be expansive in terms of their demographics and economics and their indication of their ability to support major league baseball will be frozen out.

My State of Florida, which, when the major leagues were established, was a State of under 500,000 people and today has a population of in excess of 13 million people, has had to wait almost—well, has had to wait over 100 years from the beginning of the establishment of major league baseball to have its first franchise. We feel as if our interests in this socialization of relocation—and Adam Smith economics as applied to expansion has resulted in millions of fans who would like to be able to see a baseball game close to their hometown being denied the right to do so.

Mr. Chairman, I am going to be pursuing the kinds of questions that I asked of Mr. Vincent relative to what are the criteria that major league baseball uses—are they being used in both the interests of a mobile fan base which is increasingly moving to States like Florida and to the economic best interests of baseball itself—and whether the antitrust exemption is advantaging or retarding the ability of baseball to serve those national interests.

Senator METZENBAUM. Thank you very much, Senator Graham. Senator Simpson, I think I goofed a bit in not calling upon you.

Senator SIMPSON. Thank you, Mr. Chairman, and 2 minutes and I thank you for that. I do think it is very important what we are about here today. I have given you my view of why I am here, why I think we either say to baseball, if you want to have a good, strong, independent commissioner, that is what I would prefer to see, and if you do, then you keep the exemption; if you don't want to have an independent commissioner and want to draft up a pile of language that doesn't give him any authority and makes him removable at will for any whim, well, then I don't think you need the exemption. It is kind of that simple for me. So I look forward to it.

I was interested in the passage while preparing for this from the case of *Flood* v. *Kuhn*. That was the 1972 case in which the great outfielder, Curt Flood, challenged baseball's reserve clause, and Judge Irving "Ben" Cooper said this. He said,

> It would be unfortunate indeed if a fine sport and profession which brings circes from daily travail and an escape from the ordinary to most inhabitants of this land were to suffer in the least because of undue concentration by anyone or any group on commercial or profit considerations. The game is on higher ground. It behooves everyone to keep it there. That is as good as any politician could do, that statement, and so let us see if it is on higher ground. If it is, we won't cut the ground out. If it is not on higher ground, there is certainly no reason for it.

The lifeblood of baseball is the fan. There is no real other thing. In my mind, it depends on how much fascination this game will have for the American fan, and that is the lifeblood of baseball. The business of baseball depends on the game of baseball.

So thank you for bringing this to our attention, and the yellow light has still not expired and I think I should receive another fine grade.

Senator METZENBAUM. You get two kudos and——

Senator SIMPSON. Two kudos and one hurrah.

Senator METZENBAUM. You may have the next week off. You do not have to attend any Senate sessions next week.

Senator SIMPSON. Yes, thank you, Howard.

Senator METZENBAUM. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I will try and go fast. I would like to, by unanimous consent, submit a statement by my colleague, Senator-elect Barbara Boxer, and indicate that she wishes to concur in the statement I am about to make.

Senator METZENBAUM. We are happy to have it and, without objection, it will be included in the record.

[The prepared statement of Senator Boxer follows:]

Senator FEINSTEIN. Thank you very much.

I would like to begin by introducing a number of leaders who have come from California for this hearing; specifically, San Francisco Mayor Frank Jordan, who has led the effort to retain the Giants in San Francisco and will testify later this afternoon to those efforts; second, Supervisor Jim Gonzalez, who is chairman of the finance committee of the board of supervisors, which is giving consideration to reducing a $750,000 a year lease fee to $1 for the Giants; and, third, City Attorney Louise Rennie, whose office has taken a forceful legal stand to defend what San Francisco believes is a legal lease.

I would like, if I can, to respond very respectfully to Senator Mack's comment that San Franciscans have said that baseball is not important. In fact, that is not correct. San Franciscans believe that baseball is very important, and an unprecedented effort is underway—legal effort, financial effort, fan effort to retain the San Francisco Giants in San Francisco. The vote in 1989, it should be pointed out, came within 700 votes of passage directly following a major earthquake, which incidentally took place when Candlestick Park had 60,000 people in it in the first game of the World Series.

There are those that would say that baseball is a business and, as such, should enjoy the freedom of the marketplace as any other business. I would submit to you, Mr. Chairman and members, that baseball is not a box of Tide on a supermarket shelf. Baseball is unlike any business or corporation that can be sold willy-nilly to the highest bidder.

Baseball is part of the fabric and unity of the American city. Baseball draws its support from decades of developing a loyal fan base, a fan base that celebrates by the millions when its team wins and inundates the pubs to bemoan the fate of major losses. Communities, chambers of commerce, fan clubs all work to see that baseball survives. I believe that baseball is not a business. I believe it should maintain its exemption. I am here to say that this morning, and I thank you very much for the time. I will submit a written statement.

Senator METZENBAUM. The balance of your statement will be included in the record.

[The prepared statement of Senator Feinstein and an excerpt from the Congressional Record follow:]

DIANNE FEINSTEIN
CALIFORNIA

United States Senate
WASHINGTON, DC 20510-0504

Senate Judiciary Committee
Subcommittee on Antitrust, Monopolies and Business Rights
"Baseball's Antitrust Immunity"
December 10, 1992

STATEMENT OF SENATOR DIANNE FEINSTEIN

Mr. Chairman, before I begin my statement, I would like to ask for unanimous consent to submit for the record the testimony of my colleague, Senator-elect Barbara Boxer, who has indicated that she wishes to associate herself with the comments I am about to make.

Now, I would like to introduce a number of leaders from California: San Francisco Mayor Frank Jordan, who has led the effort to keep the Giants in San Francisco; Jim Gonzalez, chair of the Finance Committee of the Board of Supervisors; and City Attorney Louise Renne, whose office has taken a forceful legal stand to see that San Francisco's legal rights are protected.

In testimony later this morning, Mayor Jordan will detail the integral relationship between the Giants and San Francisco and the steps that have been taken to keep this key 35-year resident of our city at home.

As a former Mayor and a new Senator from California, my objective here today is quite clear: without baseball's exemption from the antitrust laws, San Francisco could have lost the Giants. So, my choice is clear. I support the exemption.

Some will say the exemption should go and that baseball is a private business that should be freely subject to the

marketplace. But in California we have seen what can happen in the free marketplace. Oakland, California, lost the Raiders in a devastating blow to thousands of diehard fans in a major American city.

Major League Baseball is more than just another business. It is deeply linked to the psyche and fabric of the American city.

Baseball requires stability to build fan support. Fans identify with their teams. This loyalty stretches over years, through changes in roster and management, and over the ups and downs of the win-loss column. Families have an opportunity to enjoy wholesome, relatively inexpensive entertainment. Young boys and girls play in little league games every afternoon, using the professional players as their role models.

For 35 years, the Giants have been part of the rich mosaic of San Francisco. The Giants have given us one of the greatest rivalries in baseball with the Los Angeles Dodgers, and this team has produced many of the greatest players of all time -- including Willie Mays, Willie McCovey, Juan Marichal, Will Clark, and now -- hopefully -- Barry Bonds.

Fan clubs, communities, governments, and Chambers of Commerce all become deeply involved in supporting a team.

For example, in San Francisco, the Giants are exempted from an admissions tax. While I was Mayor, the city remodeled Candlestick Park building 110 luxury suites, improving concessions and restrooms, and expanding Candlestick's capacity by 10,000 seats. The city initially built the stadium with bond funds, and the Candlestick Park Fund contributed $30 million to its remodeling. The stadium is under the jurisdiction of the City and County's Recreation and Park Department. The field and

stadium are maintained by the city. The city has a real interest in retaining the team.

Some are calling for the removal of baseball's anti-trust exemption saying that the sport is a private business engaged in interstate commerce and should be treated like any other business. However, no other private business is really comparable to a major sports franchise. In my view, major league sport franchises are a good deal different than any other corporate asset that can sold willy nilly to any highest bidder. A major league sports franchise is not a product like a box of Tide that can be sold in a supermarket.

It is absolutely proper for the League to consider a number of factors when determining whether or not to approve the sale of a franchise.

Baseball should not be stripped of its ability to ensure that the owners are of good reputation, will keep teams in America, and keep a good geographical spread to the organization.

The League has taken these steps to protect the city and fans of San Francisco when it rejected the proposal to sell the Giants to St. Petersburg after considering scheduling difficulties, media markets, divisional realignment issues, and fan support.

It makes no sense to me for this Congress to be involved in legislation that would permit the type of devastation that occurred in Oakland when the Raiders moved to Los Angeles and in Baltimore when the Colts were stolen in the darkness of the night from their fans.

In the end, Major League Baseball made a <u>baseball</u> decision and not simply a business decision. In my opinion, baseball cannot

be faulted for making decisions in the best interests of the sport and in the best interests of the fans in Major League cities.

In conclusion, stability is not a new issue. In 1985, I joined more than 20 Mayors in supporting a resolution by the United States Conference of Mayors which supported S. 259 -- a measure that would have protected team stability. A copy of that resolution is attached.

I appear today to support baseball's anti-trust exemption.

Again, Mr. Chairman and men of the committee, thank you for this opportunity.

SENATOR DURENBERGER'S REMARKS TO THE AMERICAN PUBLIC HEALTH ASSOCIATION

Mr. ANDREWS. Mr. President, protecting the health of the American people is one of our greatest national purposes. In these times of escalating budget deficits and cost-cutting, this body's concern for this purpose is evidence of our commitment to a healthy America.

As chairman of the Senate Finance Health Subcommittee and cochairman of the Senate Rural Health Caucus, my colleague, Senator DURENBERGER, is a leader in carrying out this purpose. As a chief national spokesman and advocate for protecting and promoting health, we should look to his recent remarks to the American Public Health Association for leadership and guidance in how we can cut excess cost and still maintain high quality health care for the American people.

Mr. President, I ask unanimous consent that the text of Senator DURENBERGER's speech be printed in the RECORD.

There being no objection, the speech was ordered to be printed in the RECORD, as follows:

AMERICAN PUBLIC HEALTH ASSOCIATION RALLY

Seven years ago I was elected to the U.S. Senate to fill some very big shoes, those of the late Hubert H. Humphrey. Hubert had an unusual empathy and compassion for the less fortunate in our society. And I often think of the observation he made back in 1977, not long before his death, at the dedication of the Department of Health, Education and Welfare.

He said, "The moral test of government is how that government treats those who are in the dawn of life, the children . . . those who are in the twilight of life, the elderly . . . and those who are in the shadows of life—the sick, the needy and the handicapped."

That is the moral mandate that Hubert Humphrey charged us with, as we come to work every morning inside this building. It is a mandate shared in State Capitols and city halls across this nation. You have come here to help us do what we must to meet that mandate, to lend us your advice, your experience and your understanding—and for that we welcome you.

Given that quotation from Senator Humphrey, it's especially meaningful that we meet this year, during the 54th anniversary of Title V—the Maternal and Child Health program—and the 20th anniversary of Medicare and Medicaid.

These programs are ongoing proof of our commitment to health care. We will continue to push for reforms to make them more effective, and we will take our share of the budget cuts—only our share. But we will not break our commitment, our promise to the American people: That every individual will have access to quality health care, regardless of region, age or income.

But the nation's health care system is facing major changes if not a revolution, certainly an evolution. It's becoming a marketplace, a system more competitive, more efficient and more responsive to the needs of individuals. Americans are learning to be smart health care consumers, and the biggest consumer of all is the federal government. Millions of Americans depend upon us for access to proper health care.

Thirty million of those individuals are covered by Medicare. Last year we spent more than $70 billion on the Medicare program alone. We're trying to spend that money more wisely. That's why we created the prospective payment system, reimbursing hospitals for Medicare patients based on fixed fees. And we've set up a voucher program, giving the elderly choices by allowing them to use their Medicare entitlement to join health maintenance organizations.

The Maternal and Child Health Block grant is another success story. Since 1850, we've cut the national infant mortality rate by more than 250 percent. By turning the program into a block grant, we've given the states even more leeway in targeting the money where they need it most.

Later today I will be joining with my colleagues, Senators Bumpers, Beniken and Dole, in introducing legislation to commemorate the achievements of Title V, and to designate the first week in June as "National Maternal and Child Health Week."

No investment is better, wiser, more significant, than the investment in our children. In the words of James Agee "In every child who is born, the potentiality of the human race is born again." There is no stronger imperative than protecting healthy children. Without that, we are simply legislating ourselves into an empty future.

If we can learn from our success with the Maternal and Child Health program, the chief lesson should be the importance of preventive health services. Those services can range from prenatal care to wellness programs for the elderly. It's a lesson we in Washington are learning only slowly.

Only 3 percent of all federal health dollars are spent on prevention. Look at our infant mortality rate. Despite the advances, it's still higher than a dozen developed nations, and the rate for blacks and American Indians is as much as triple the national average. Look around you: Take this group here today and multiply it by 20. That's how many American kids died last year before their first birthday.

Better prenatal care could have saved a lot of those kids, and thousands more whose lives are touched by handicaps and chronic illnesses. Yet, only now are we talking about allowing states to expand their prenatal care services for poor women under the Medicaid program. Only now are we realizing that we spend up to $8,000 a day to treat a critically ill newborn in a neonatal unit, while we spend a pittance to keep a child in the best incubator of all, the mother's womb.

How much money—and how many lives—can we save if we put our investment up front, to give our kids a running chance at a healthy life before they're born? And how much could we improve the length of our lives and the quality of our lives by teaching Americans how to lead healthy lifestyles?

As all of you well know, prevention is only part of the story. Quality is only part of the story. The other part is access. As the health care system becomes more competitive for the consumer's dollar, those who can't afford health care—preventive or otherwise—are being squeezed out.

Many Americans, including one out of every five children, have no health insurance of any kind, public or private. Not all of them are poor. Some are self-employed people or seasonal workers. But many of them are falling between the cracks. They may even be turned away from hospitals for critical treatment.

At a recent public hearing here in Washington, I heard the story of a pregnant woman in a battered women's shelter in Minnesota. She was ineligible for Medicaid. The only way she could ensure the proper medical care was to go back to the husband who had abused her. She was soon beaten again, and her unborn child was injured in the womb.

We should all feel our stomachs turn when we hear those stories. But they remind us of our compelling mandate—federal, state and local governments alike—to give all Americans somewhere to turn for adequate health care . . . those in the dawn of life, those in the twilight of life, and those in the shadows of life.

We in this building are here to give you what you need to make that mandate a reality. You are the eyes, the backs, the hands that turn public health policy into healthy human beings. Help us do our jobs better, so we can help you do yours.

PROFESSIONAL SPORTS BILL

Mr. EAGLETON. Mr. President, last week the full Senate made great progress toward finishing its work on S. 250, the Professional Sports Community Protection Act of 1985. We have studied the issue of sports franchise stability since 1980 when the Oakland Raiders announced plans to move to Los Angeles. Several bills were introduced that provided a variety of approaches to the problem. After thorough and careful deliberations, the Senate Commerce Committee decided that S. 259 merits full Senate consideration.

I would like to congratulate my colleague from Missouri, Senator DANFORTH, who joined me as a cosponsor of S. 259. As chairman of the Senate Commerce Committee, Senator DANFORTH held extensive hearings on this legislation this year. Two days of hearings were also held by the Commerce Committee during the 84th Congress. Under Chairman DANFORTH's leadership, the Senate Commerce Committee favorably reported S. 259. It is my view that this bill, which is the product of long and thoughtful consideration, merits the Senate's unqualified support.

At the time of the introduction of S. 259, I detailed the state of chaos that reigns over professional sports leagues, as a result of the unwarranted relocation of professional sports teams. I also described how S. 259 will protect our cities from the hardships and economic dislocations that can occur when a professional sports team decides to relocate to greener pastures in a new area.

We have witnessed the problems that can occur when a team leaves a city without any regard for the fans and local government who have provided it with loyal emotional and financial support over the years. In Oakland, the Raiders were one of the most profitable teams in the National Football League and enjoyed strong fan support. Also, the city of Oakland and Alameda County built a stadium for the Raiders which was financed by local bonds. Despite these commitments the Raiders chose to move to Los Angeles, leaving thousands of disappointed fans and the local govern-

ment to pay the debts for the stadium without the revenues provided by the Raiders.

Recently, the city of Philadelphia had a similar but, ultimately, more fortunate experience. Last year, after over 50 years in Philadelphia, the Eagles announced their intention to relocate. However, the last minute efforts of Mayor Wilson Goode led to the Eagles staying in Philadelphia to continue their long-standing tradition and identification with that city.

Thus, when considering these incidents, it is not surprising that mayors across the country want a solution to this growing problem and are circulating a resolution in support of S. 259. To date, over 30 mayors have signed the resolution and the number of signatories is growing. The resolution has been signed by such distinguished mayors as Dianne Feinstein of San Francisco, Andrew Young of Atlanta, Richard Caliguiri of Pittsburgh, Vincent Schoemehl of St. Louis, W. Wilson Goode of Philadelphia, Ernest Morial of New Orleans, George Latimer of St. Paul, Henry Maier of Milwaukee, A. Starke Taylor of Dallas, Henry Cisneros of San Antonio, Richard Reckett of Memphis, Bud Clark of Portland, and Jake Godbold of Jacksonville.

Mayors, as the chief executive officers of our cities, know the financial and civic contributions that professional sports teams make to our urban areas. Mayors are also aware of and extremely sensitive to the hardships and economic dislocations that can occur when a well-supported team decides to seek a more profitable location. Moreover, many of the mayors I listed are also seeking expansion teams and want to improve chances for expansion. Once expansion occurs they want to ensure stability. Most mayors have enough problems running our cities and can ill afford the added pressures created by the musical chair movement of professional sports franchises.

S. 259 will relieve our mayors of these unnecessary added pressures. This bill will ensure that the substantial interests of local communities who have supported a team will receive proper consideration when that team decides to relocate. Professional sports teams will have to adhere to a specific process and professional sports leagues will be required to consider specific factors, such as the adequacy of a team's present playing facility, teams' revenues, the extent of fan support and any publicly financed financial support provided to the team. Local governments and stadium owners will also have the right to seek judicial review of league team relocation decisions.

The mayors have also endorsed this bill because it will give professional sports leagues the authority to enforce their revenue-sharing rules and agreements. Revenue sharing is extremely important to medium-sized cities with professional sports teams because it provides the financial means to achieve competitive balance with teams in the major metropolitan areas. The use of revenue-sharing has allowed cities like Green Bay, Kansas City, Seattle, and New Orleans to field teams that are competitive with teams from Los Angeles, Chicago, and New York.

Finally, the mayors recognize that S. 259 will restore franchise stability and enable teams to expand to those cities that wish to acquire professional sports teams. Presently, it would not be prudent for many professional sports leagues to expand to a new city. Generally, an expansion team often faces financially difficult times in its early years and the pressures to relocate could be great during that time. Recent court decisions have added to this problem by impeding the ability of leagues to enforce their team relocation rules. Hence, a league may not be able to prevent an expansion team from relocating after it has just arrived in its new home. S. 259 solves this problem by restoring the authority of professional sports leagues to enforce their rules governing team location. Thus, leagues can expand with the knowledge that a team will remain in its new home.

Moreover, by signing the resolution in support of S. 259, these mayors have expressed their disagreement with the advocates of forced expansion who contend that much of the problem of franchise instability can be attributed to an "artificial scarcity" of professional sports franchises. According to this view, professional sports franchises relocate because certain professional sports leagues have intentionally withheld franchises in order to maintain the high value of existing franchises. This proposition was specifically put to the Commerce Committee in the form a forced expansion amendment that was rejected by a vote of 14 to 5.

Further, an examination of the number of professional sports teams reveals the true nature of the myth of artificial scarcity. For example, the National Football League currently has 28 teams that play in 19 States. In addition, the United States Football League operates another nine football franchises. This is a total of 37 professional football teams that are currently operating throughout the country, with many clubs playing to less than stadium capacity audiences. The notion of artificial scarcity of professional football franchises is difficult to support given these facts.

When you compare football with the other professional sports, the scarcity argument seems even more transparent. Professional baseball has 24 teams in 14 States; basketball has 23 teams in 17 States; hockey has 14 teams in 11 States. Thus, whether you count the nine USFL teams or not, it is clear that professional football has more teams in more States than any other professional team sport.

The real issue is not artificial scarcity but rather whether professional sports leagues will be able to pursue consistent and orderly expansion policies based on sound business judgments. Decisions relating to team relocation and expansion are not judgments to be made on the spur of the moment based on emotional or other short term considerations. Such decisions require extensive planning and study because they affect the well being of the entire league and all league sports communities. Professional sports leagues, not the Congress, possess the expertise and facts necessary to make these decisions. Just as Congress would not tell an automobile manufacturer when and where to locate an automobile plant, it should not tell a professional sports league when and where to place a team.

The Justice Department shares the view that there is no justification for legislatively-mandated professional sports league expansion. In recent testimony before the Senate Judiciary Committee, Assistant Attorney General Charles Rule of the Justice Department's Antitrust Division stated:

[T]he Department believes that there is no justification for the legislatively-mandated expansion of Major League Baseball and the NFL . . . In a free market system, firms—not regulators or legislators—are generally considered the best judges of how and where their products are marketed.

Mayors across the country are urging us to enact S. 259 to solve the problem of franchise instability. It is a problem that plagues our cities, and they deserve our help. I urge my colleagues to support this important measure when we return to this issue next year.

Mr. President, I ask unanimous consent for the reprinting of the mayoral resolution in its entirety in the RECORD.

There being no objection, the resolution was ordered to be printed in the RECORD, as follows:

SPORTS COMMUNITY PROTECTION LEGISLATION

Whereas the public interest is served by the successful and stable operation of professional sports teams in communities throughout the Nation;

Whereas, the United States Congress is considering legislation that would clarify the application of federal law to professional sports leagues and promote the public interest in such matters;

Whereas, there has been strong support from local government officials and others for legislation that restores sports league authority to retain teams in communities where they are successfully operating and to share league revenues in a manner that enables teams to operate in many communities;

Whereas, legislation of this character is set forth in Senate bill S. 259 as well as other equivalent Senate and House bills, and the Senate Commerce Committee may shortly report S. 259 to the full Senate for consideration; and

Whereas, it is in the best interest of communities to support the foregoing community protection legislation that would clarify federal law with respect to team stability

and revenue sharing within professional sports leagues.

Now, Therefore, be it resolved, by the undersigned local government officials in support of stable relations between professional sports teams and communities:

1. That the local government officials lend their wholehearted support to the enactment of S. 250 or other constituent Senate and House legislation containing the essential team stability and revenue sharing features noted above.

2. That the local government officials direct that this Resolution be sent to all members of the United States Congress as evidence of their support for the passage of the aforementioned legislation.

SIGNATURES ON MAYORAL RESOLUTION

Richard Bertley, Mayor, Kansas City, Mo.
Dianne Feinstein, Mayor, San Francisco, Ca.
George Latimer, Mayor, St. Paul, Minn.
Samuel J. Habeck, Mayor, Green Bay, Wisc.
Jim Madden, City Councilman, Atlanta, Ga.
Richard G. Hatcher, Mayor, Gary, Ind.
Jurian C. Pina, President, Nevada League of Cities
Andrew Young, Mayor, Atlanta, Ga.
Richard Caliguiri, Mayor, Pittsburgh, Pa.
Vincent Schoemehl, Mayor, St. Louis, Mo.
O. Thane Akins, Mayor, Midland, Texas
Palomo Gil, Mayor, San Leandro, Ca.
Henry Maier, Mayor, Milwaukee, Wisc.
Jake M. Godbold, Mayor, Jacksonville, Fla.
Gary Patell, Mayor, Fairfield, Ca.
Richard Hatchel, Mayor, Memphis, Tenn.
Ernest W. Morial, Mayor, New Orleans, La.
Federico Pena, Mayor, Denver, Co.
J.E. "Bud" Clark, Mayor, Portland, Ore.
Eugene "Gus" Newport, Mayor, Berkeley, Ca.
Henry Cisneros, Mayor, San Antonio, Texas
Barbara J. Pelta, Mayor, Independence, Mo.
W. Wilson Goode, Mayor, Philadelphia, Pa.
A. Starke Taylor, Mayor, Dallas, Texas

U.N. REPORT ON SOVIET ATROCITIES IN AFGHANISTAN

Mr. DOLE. Mr. President, the United Nations—never known for its forthrightness in criticizing the Soviet Union—has issued a devastating report documenting massive Soviet human rights violations in Afghanistan.

As a result of that report, the U.N. General Assembly, by an overwhelming 78 to 23 vote, expressed its "profound concern" over what the Russians are doing in Afghanistan. When you read the report, you realize that "profound concern" hardly characterizes what any civilized person should feel about the Russian tactics.

The Russian invasion has driven more than 4 million Afghans from their country and another 2 million from their homes—a refugee situation of unprecedented proportions. The main Soviet military tactic is that of mass terror—the use of indiscriminate bombings of villages, homes, hospitals, and even funeral processions, and the widespread use of torture against anyone suspected of opposing the Russians.

One particularly Soviet trick is so abhorrent that it is literally sickening—the Russians have taken to dropping toys out of airplanes, which village children of course rush to pick up and play with. These "toys," tragically, conceal bombs timed to go off in the childrens' hands, literally tearing them limb from limb.

Our President once called the Soviet Union an evil empire, and for that he has been criticized and ridiculed by some in this country and even some in this body. In my dictionary, though, an empire includes invading and occupying neighboring countries, and evil certainly would encompass the practice of enticing innocent children to death and dismemberment with booby-trapped toys. Perhaps some owe our President an apology.

Mr. President, I would like to include in the Record at this point and commend to all of my colleagues an editorial which appeared recently in the Washington Post, discussing the U.N. report. That editorial says that what the Russians are doing is so abhorrent that it goes beyond questions of human rights violations—"the word that comes to mind," says the Post, "is genocide."

There being no objection, the editorial was ordered to be printed in the Record, as follows:

AFGHANISTAN: THIS IS GENOCIDE

"Human rights violations" is a phrase used so often and so casually that even the most compassionate among us can take it as routine. The quick meaning in most people's minds, we suspect, centers on police abuses, roughing and beating people up, perhaps killing some of them. Something like that is what you may expect to find in a new United Nations report entitled "Situation of Human Rights in Afghanistan."

But it's different. The second report on Afghanistan by Austrian parliamentarian and academic Felix Ermacora and a companion report on Iran mark the first time the United Nations has debated human rights in those countries on the basis of official U.N. reports. By a vote of 78 to 23 with 35 abstentions—India lamentably, was the lone democracy holding Moscow's hand—the General Assembly registered its "profound concern." Afghanistan was singled out not just because a Third World Moslem country is the victim of aggression but also because of the terrible and deepening intensity of its ordeal.

Soviet troops with their Afghan clients have driven 4 million people out of the country and perhaps another 2 million out of their homes. Massively and indiscriminately, they bomb civilians—they bomb farms. They destroy villages, crops and agricultural facilities. For the children, they drop cute, limb-shattering booby traps disguised as harmonicas and toys. Torture is "commonplace" and the operation of the judicial system "creates an atmosphere of insecurity and anguish." "There is apparently no health care for the majority of the population. As a consequence, the infant mortality rate has reached 300 and 400 per 1,000." Civilian deaths number "approximately 500,000."

When half the population is uprooted and a third driven into exile, when infant mortality reaches plague levels, when half a million civilians die and uncounted millions of others are maimed and malnourished, when as Prof. Ermacora reports the situation is getting worse, all this moves Soviet conduct well beyond what is ordinarily called "human rights violations." The word that comes to mind when one reads this report is genocide.

Soviets who talk about Afghanistan with foreigners sometimes solicit a certain sympathy for their policy dilemma and their costs. This is callous and arrogant. The people who deserve the sympathy are the Soviet Union's victims. Says a desperate Prof. Ermacora, "every hour lost is detrimental to the population"—the Afghan population. Moscow is committing one of the great crimes.

DEMONSTRATIONS PROTEST STATUS OF JEWS IN SOVIET UNION

Mr. SARBANES. Mr. President, on May 1 of this year a demonstration to protest the Soviet Government's treatment of its Jewish population took place near the Soviet Embassy. There have been other demonstrations for the same purpose in the past, and indeed for many years a silent vigil of protest has continued in the vicinity of the Embassy. The May 1 demonstration was different from the others, however, because the participants peacefully but deliberately moved within 500 feet of the Embassy, thereby violating the law. As a result of this action, 24 rabbis and a Lutheran minister were arrested.

The decision to violate the law was not taken lightly. Those involved in the demonstration have long been concerned, as indeed we all must be, about the status of Jews in the Soviet Union. Thousands upon thousands of Soviet Jews are truly prisoners in their own country even when they are not actually confined to camp or prison. They are not permitted to live openly in the Soviet Union as Jews, or freely to practice their religion, or to learn Hebrew or see that their children learn it. Refused these liberties at home, they are also refused permission to emigrate; and once having taken the courageous step of applying to emigrate they are generally denied gainful employment and forced to live a marginal existence where they are subject to harassment, abuse and, always, the threat of arrest and imprisonment on spurious charges. Emigration rose consistently in the 1970's and exceeded 51,000 in 1979. But in 1984 only 896 persons were permitted to leave, and this year the total is expected to be even lower. Families continue to be torn apart, and lives destroyed.

The plight of Soviet Jewry is an issue that must continue to be raised with the Soviet Government at the highest levels. That is our challenge and our responsibility. On May 1, 24 rabbis and a Lutheran minister chose to demonstrate their concern by gathering peacefully within 500 feet of the Soviet Embassy, for which they were arrested and charged. Following their example, others have similarly demon

Senator METZENBAUM. Senator Mack.

Senator MACK. Thank you, Mr. Chairman. I also have a more detailed statement that I would like to have included in the record.

Senator METZENBAUM. Without objection, the entire statement will be included in the record.

Senator MACK. As Rick Dodge from St. Petersburg will attest, and as every good citizen of Florida knows, the barons of baseball have treated the people of Tampa Bay with disdain, utterly disregarding their hopes and their dreams for a future with a baseball team.

The owners claim baseball acted to protect fans by upholding its policy of locking teams into their present homes when it refused the legitimate sale and movement of the Giants to the Tampa Bay area, while there are at least 1.2 million households in the Tampa-St. Petersburg metropolitan area filled with broken-hearted fans whose interests major league baseball didn't protect. In fact, major league baseball showed no respect for them at all. I deeply regret that baseball has turned its back on these deserving people. Millions of fans deserve to be a part of our national pastime. Instead, they have been unfairly left out.

The antitrust exemption represents an artificial legal framework which the courts have set up around major league baseball to protect it. This has made the owners' pursuit of their self-interest inconsistent with the basic interests of baseball fans. This is the opposite of what happens when a free market competition is allowed to work. Why won't the owners accept a system which has brought so much good to every other industry in America?

Instead, their system is a fraud, an emotionally wrenching fraud. The people of Tampa-St. Petersburg were used, demeaned, and insulted. Owners should be ashamed of what they did, but they aren't. Tampa-St. Petersburg has on seven occasions in the last 8 years tried unsuccessfully to secure a team through expansion or by purchase. We always played by the rules. We made bona fide offers. We had commitments and promises from owners and commissioners. The taxpayers built a stadium, 30,000 season tickets were sold, and in the end nothing.

Major league baseball has used us as a pawn. Owners hold the Tampa Bay area as if it were their market, not ours. Then they use it for leverage on current host cities and fans to extract new stadiums, tax benefits, and the like. This is a game in which only baseball owners win while everyone else loses. Enough is enough. Since the courts refuse to act and major league baseball is committed to its present course, the exemption from the antitrust laws must be removed. The Congress must act.

A common question asked about antitrust exemption is will removing it really solve the problems of major league baseball. Only time will tell, but I believe it will solve many of the problems, and in the end more cities will have teams, more of our kids will have an opportunity to play, and more fans will enjoy the game firsthand.

Mr. Chairman, I have a long family tradition in the game of baseball. I love the game. I hope this hearing is only the first definitive and positive action toward bringing the public interest back

into the decisionmaking process of major league baseball. I thank you.

[The prepared statement of Senator Mack follows:]

PREPARED STATEMENT OF SENATOR CONNIE MACK

Mr. Chairman thank you for holding this hearing and for allowing me to participate; to speak for the millions of baseball fans around this country who deserve and badly want a team they can call their own. I believe recent events show the importance of this hearing to the future of baseball.

Now is a very uncertain time for Major League Baseball. As Dick Dodge from St.Petersburg will attest and as every good citizen of Florida knows, the Barons of Baseball have treated the people of the Tampa Bay area with disdain and without regard to their hopes and dreams for a future with a baseball team. We had the highest offer. It's unAmerican not to accept the highest offer.

The owners said baseball acted to protect fans by upholding its policy of keeping teams in their home ports when it refused the move of the Giants to Tampa Bay area. Well, there are at least 1.2 million households in the Tampa/St. Petersburg metropolitan area filled with broken-hearted, would-be baseball fans in the Tampa/ St. Petersburg metropolitan area whose interest Major League Baseball didn't protect. Major League Baseball had no respect for them. Most assuredly, the people of San Francisco feel the same way. For they, too, have been used by the very same baseball barons whom we have charged with the privilege of custodianship over our national pastime.

Tampa deserves baseball. Orlando deserves baseball. Jacksonville deserves baseball. San Francisco deserves baseball. Cities from Phoenix all the way to Buffalo deserve baseball -- teams they can call home teams -- but the owners lock those cities out because they want to maintain the artificially high value of the few teams in existence today. What other business would leave so many hungry fans, customers, in the lurch?

Personally, I deeply regret baseball has turned its back on so many deserving people. Millions of fans deserve to be a part of our national pastime, and they aren't. They want to catch a foul ball, get an autograph, holler at the ump for a call which we all know we can make better from the stands than he can make by being right on top of the play, but they can't. I can't help thinking this occurred because Baseball alone has an antitrust exemption and that exemption must have some bearing on this curious behavior.

I can tell you as Florida's United States Senator the brides' maid towns are tired of their insults. They're tired of dashed hopes and of being left at the altar. Perhaps they're most tired of not knowing or understanding why they can't have a team. They know darn well the free-market would allow them the opportunity to have a team and keep a team. But no free-market principles exist in baseball. And that is ironic because it is the free market which allowed the owners to make so much money in their other endeavors and the free market would solve so many of Baseball's problems. Why won't the owners accept the system which has brought so much good to every other industry in this country?

I'm here today to stand up for the people of my state who have no recourse against Baseball. I'm here to say the leveraging of city over city must stop. It's mean and it's unfair. I'm here to say nobody ever again should be treated by baseball the way my constituents have been treated for nearly a decade.

I am particulary hurt and angry because I know first-hand the people of Tampa Bay acted in earnest and in good faith. They went above and beyond the League's "criteria" to bring baseball to the area. Over 31,000 people have already purchased season tickets. They envisioned the Suncoast dome bustling with activity and alive with the sounds of cheering fans.

They are proud there is a team in Miami and happy for their fellow Floridians to the South. That franchise will one day become one of the most successful

franchises in sports history. I'm sure of it. When I'm in Miami I can see the fire in peoples' eyes when they speak of the Marlins. It's the same way in Tampa Bay when they speak of their soon-to-be team and, oh my, what a rivalry could develop between the two teams. Folks in Florida are pretty competitive, you know. They look forward, whether it be in the National League Championship Series or the World Series to slugging it out with their cross-state rivals.

But it appears their interest, the public interest, carries little or no weight in the decision-making process of the league's owners and currently there is no commissioner to reverse that trend. I'm not sure a strong commissioner could do it in any event. What Major League Baseball needs immediately is the discipline to serve its customers, the fans, which only a strong dose of free-market principles can provide.

You see, its anybody's guess why the Giants didn't move to Florida: whether it's because the owners wanted the franchise fees as opposed to Mr. Lurie getting them or if the American League blocked the deal because they didn't want to be shut out of Florida. We can be sure Baseball did not base its decision on free-market principles or sound economic reasoning for the long-term viability of the game. If that were the case, Florida would have three or four teams.

So, the question is: What will get Major League Baseball owners to focus on fan interest? How do we right the wrongs which Major League Baseball has perpetrated on the people of Tampa and on cities around the country who deserve baseball but can't get it. Better yet, what is it that will make owners consider something other than their own short-term, financial gain when reaching decisions on things such as player relations, expansion, the new commissioner, realignment and the ugly specter of bigotry and anti-semitism.

To answer that question thoroughly, to compensate the people of Florida and to act in a prudent fashion we need to gather some information through this hearing and in subsequent efforts and then, the Congress must act. We must review audited, financial data of the teams. If a subpoena is necessary, then so be it. Congress also needs to investigate what actions Major League Baseball is taking which violate the Sherman Antitrust Act. Finally, it would also be beneficial for the Congress to study what special tax advantages we have given to owners over the years.

A common question asked about the exemption is: will removing it really solve the problems of Major League Baseball? Only time will tell, Mr. Chairman, but at the very least it seems to be a necessary first step. It would sure make real the possibility of a competing league with access to minor league talent.

If Tampa and Orlando and other cities have to go outside Major League Baseball to get a big-league team, we're willing, but that new league must have access to minor league talent. Removing the antitrust exemption will speed up the process.

I'm putting Major League Baseball on notice as of today. We will have more, big-league baseball in Florida and it will be sooner rather than later. Those markets belong to the fans and to the investors who want to quench fan desire for a big-league team. Baseball must not belong solely to 28 Major League Baseball owners. Removing the antitrust exemption will help make expansion or a new, competing league a reality. If we need to go further, then we will go further.

I do not want other cities, teams and avid fans to go through the nightmare Tampa/St. Petersburg has gone through over the last decade. It is simply wrong to have the commissioner of baseball promise thousands of fans one thing, when the other owners never had any intention of letting a baseball team move to Tampa/ St. Petersburg. It was a fraud, an emotionally-wrenching fraud. The people of Tampa/St. Petersburg were used, demeaned and insulted. Baseball should be ashamed of what they did, but I believe they are not.

Tampa/St. Petersburg has on seven occasions in the last eight years tried unsuccessfully to secure a team through expansion or by purchasing another team. We always played by the rules. We made bona ride offers. We had commitments and promises from owners and commissioners. The taxpayers built a stadium. 30,000 season tickets were sold. In the end, nothing. Our only utility to Major League Baseball has been as a pawn. Owners hold St. Pete as a bargaining chip over the heads of their current, host cities and fans to get new stadiums, tax benefits, and etc. That game is a game in which baseball owners win and everybody else loses. Enough is enough.

I have a long family tradition in the game of baseball. I love the game. My interests are far greater than parochial. But I am disturbed about the future of the game. I hope this hearing is just the first step in definitive action to bring the public interest back into the decision-making process of Major League Baseball. I hope legislation is not necessary, but believe that thinking is wishful at best. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Mack.

We have with us this morning three Members of the House who would like to be heard—Congressman Schumer of New York, Michael Bilirakis of Florida, and Bill Young of Florida. Would you please come to the table. I think you know the understanding to limit your statements to 3 minutes, if you would, please.

Congressman Schumer, we are always happy to welcome you.

STATEMENT OF HON. CHARLES E. SCHUMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. SCHUMER. Thank you, Mr. Chairman, and it is always a pleasure to come before this august committee and before your subcommittee. I speak as a member of your sister committee in the House, and I first want to thank all of you for the opportunity to speak before you briefly today.

Mr. Chairman, major league baseball is striking out. It is not the quality of the play on the field. Our players today, it seems to me, are as good or perhaps better than they have ever been, although some nostalgists might debate me on that. Many in my district think there was no better team than the 1955 Brooklyn Dodgers.

It is not the fans who are the problem either. Baseball's loyal fans are enthusiastically packing the stadiums each summer and soaking up every play on television and radio in numbers that boggle the mind. It is not even the ballpark food that is the problem, although I will say their hot dogs set me back more than they did a few years ago.

What ails baseball in America, Mr. Chairman, is irresponsible team ownership, ownership that with each passing year increasingly acts as if baseball is its personal fiefdom to be operated for one purpose: profit for the owners. They are truly out of control.

Let us look at the record. For years, they have tried to take more and more of the games away from the fans by moving the broadcasts off the free airwaves and onto pay cable channels, many of which are not available to my constituents. When Commissioner Fay Vincent, the supposedly independent official charged with managing the game in the best interests of baseball, took action that the owners didn't like, they beheaded him.

Their record on the treatment of minorities is the worst of all the major league sports. Their labor relations record and treatment of the players in recent times has been a disaster, with simple contract negotiations resulting in owner lockouts in 1973, 1976, and 1990, and we learned earlier this week that the owners have voted once again to reopen labor negotiations next month.

As if this were all not enough, allegations have recently appeared about pejorative racial and anti-Semitic slurs attributed to Marge Schott, owner of the Cincinnati Reds, allegations that have been greeted with a suspicious silence by the owner fraternity at their annual meeting in Louisville.

But we don't have to sit idly by and allow these disgraces to our national pastime. We have the power to demand change. The owners have been able to get away with their outrageous behavior largely because baseball is the only professional team sport to enjoy complete immunity from the antitrust laws. It has been that way

since 1922, but as Senator Simpson noted, we are not bound to preserve this exemption.

In large part, Congress has not subjected major league baseball to the antitrust laws in exchange for an understood agreement that the owners of baseball would operate the game for the public good. The owners are dropping their end of the bargain.

Senator METZENBAUM. Thank you very much, Mr. Schumer.

Mr. SCHUMER. I appreciate it, and if I might, with the permission of my colleagues, I must excuse myself.

[The prepared statement of Mr. Schumer follows:]

STATEMENT OF CHARLES E. SCHUMER
MEMBER OF CONGRESS (D-NY)
BEFORE THE
SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
DECEMBER 10, 1992

THE TROUBLE WITH MAJOR LEAGUE BASEBALL

MR. SCHUMER. I WOULD LIKE TO THANK CHAIRMAN METZENBAUM AND THE OTHER MEMBERS OF THIS SUBCOMMITTEE FOR THE OPPORTUNITY TO SPEAK BEFORE YOU TODAY ABOUT A SITUATION THAT IS BOTH TROUBLING AND SAD TO ALL OF US.

MAJOR LEAGUE BASEBALL IS STRIKING OUT. NO, IT'S NOT THE QUALITY OF PLAY ON THE FIELDS. OUR PLAYERS TODAY ARE AS GOOD OR PERHAPS BETTER THAN THEY HAVE EVER BEEN (ALTHOUGH SOME NOSTALGISTS MIGHT DEBATE ME ON THAT). IT'S NOT THE FANS. BASEBALL'S LOYAL FANS ARE ENTHUSIASTICALLY PACKING THE STADIUMS EACH SUMMER AND SOAKING UP EVERY PLAY ON TELEVISION AND RADIO IN NUMBERS THAT BOGGLE THE MIND. IT'S NOT EVEN THE BALLPARK FOOD, ALTHOUGH A HOT DOG WILL SET YOU BACK MORE THAN IT DID A FEW YEARS AGO.

WHAT ILLS BASEBALL IN AMERICA IS IRRESPONSIBLE TEAM OWNERSHIP. OWNERSHIP THAT, WITH EACH PASSING YEAR, INCREASINGLY ACTS AS IF BASEBALL IS ITS PERSONAL FIEFDOM TO BE OPERATED FOR ONE PURPOSE: PROFITS FOR THE OWNERS.

THEY ARE TRULY OUT OF CONTROL. LOOK AT THE RECORD. FOR YEARS THEY HAVE TRIED TO TAKE MORE AND MORE OF THE GAMES AWAY FROM THE FANS BY MOVING THE BROADCASTS OFF THE FREE AIRWAVES AND ON TO PAY CABLE CHANNELS. WHEN COMMISSIONER FAY VINCENT, THE SUPPOSEDLY INDEPENDENT OFFICIAL CHARGED WITH MANAGING THE GAME

IN THE BEST INTERESTS OF BASEBALL, TOOK ACTION THAT THE OWNERS DIDN'T LIKE, THEY BEHEADED HIM. THEIR RECORD ON THE TREATMENT OF MINORITIES IS THE WORST OF ALL MAJOR LEAGUE SPORTS. THEIR LABOR RELATIONS RECORD AND TREATMENT OF THE PLAYERS IN RECENT TIMES HAS BEEN A DISASTER, WITH SIMPLE CONTRACT NEGOTIATIONS RESULTING IN OWNER LOCK-OUTS IN 1973, 1976 AND 1990. AND WE LEARNED EARLIER THIS WEEK THAT THE OWNERS HAVE AGAIN VOTED TO REOPEN LABOR DISCUSSIONS NEXT MONTH.

AS IF THIS WERE NOT ENOUGH, ALLEGATIONS HAVE RECENTLY APPEARED ABOUT PEJORATIVE RACIAL AND ANTI-SEMITIC SLURS ATTRIBUTED TO MARGE SCHOTT, OWNER OF THE CINCINNATI REDS. ALLEGATIONS THAT HAVE BEEN GREETED WITH A SUSPICIOUS SILENCE BY THE OWNER FRATERNITY AT THEIR ANNUAL MEETING IN LOUISVILLE.

BUT WE DON'T HAVE TO SIT IDLY BY AND ALLOW THE OWNERS TO FLEECE AND DISGRACE OUR NATIONAL PASTIME. WE HAVE THE POWER TO DEMAND A CHANGE. THE OWNERS HAVE BEEN ABLE TO GET AWAY WITH THEIR OUTRAGEOUS BEHAVIOR LARGELY BECAUSE BASEBALL IS THE ONLY PROFESSIONAL TEAM SPORT TO ENJOY COMPLETE IMMUNITY FROM THE ANTITRUST LAWS. IT'S BEEN THAT WAY SINCE 1922. BUT WE ARE NOT BOUND TO PRESERVE THIS EXEMPTION.

IN LARGE PART, CONGRESS HAS NOT SUBJECTED MAJOR LEAGUE BASEBALL TO THE ANTITRUST LAWS IN EXCHANGE FOR AN UNDERSTOOD AGREEMENT THAT THE OWNERS OF BASEBALL WOULD OPERATE THE GAME FOR THE PUBLIC GOOD. THE OWNERS ARE DROPPING THEIR END OF THE BARGAIN.

THE TIME HAS COME FOR CONGRESS TO STAND UP TO THE OWNERS AND

GIVE A STERN WARNING THAT, UNLESS THEY CLEAN-UP THEIR ACT, ESPECIALLY BY APPOINTING A STRONG, INDEPENDENT COMMISSIONER, WE CAN PASS LEGISLATION TO FULLY SUBJECT THEM TO THE SAME ANTITRUST LAWS APPLICABLE TO OTHER PROFESSIONAL SPORTS, SUCH AS FOOTBALL.

THE OWNERS KEEP THROWING THE FANS A CURVE AND HAVE GROWN RICH OFF OF AN ANACHRONISTIC ANTITRUST EXEMPTION. IT IS TIME TO GIVE THE NATION'S PASTIME BACK TO THE PEOPLE TO WHOM IT BELONGS - THE AMERICAN PEOPLE. THE COUNT IS FULL, THREE BALLS, TWO STRIKES. WE ARE WAITING FOR THE OWNERS TO STEP BACK UP TO THE PLATE.

Senator METZENBAUM. Thank you.

Mr. Bilirakis, we are happy to have you with us.

Mr. BILIRAKIS. Mr. Chairman, thank you. With your indulgence, may I yield to my other colleague from Florida, Mr. Young, at this point, who has business over in the House committee?

Senator METZENBAUM. Congressman Young.

STATEMENT OF HON. BILL YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. YOUNG. Mr. Chairman, thank you very much to you and the members of the committee for giving us an opportunity finally to vent some frustration on this entire issue of how certain parts of America are being treated by baseball. I associate myself with the remarks of my Senator, Bob Graham, and my Senator, Connie Mack, and I would like permission to submit a written statement because much of it would repeat what Senator Mack has already said.

Senator METZENBAUM. Without objection, we will include the statement in the record.

Mr. YOUNG. I hope that the members of the committee will know that the brevity of my statement is no indication of a lack of intensity in my feelings about this because I think we in St. Petersburg—and I am the Representative from St. Petersburg in the House of Representatives—I think we have been had by baseball. I think they have used us to try to develop situations that were beneficial to baseball owners and not to baseball as a game.

We have been thrown four balls pitched right to us by baseball, but when they came to the plate they were considered strikes and we were out, and that is not right. They shouldn't lead us on as they have. I stayed out of this, and the city of St. Petersburg stayed out of this argument on the antitrust discussion, but I am here today to say that I am no longer out of it and I am here as part of any effort to make the owners of baseball be responsible to the fans and to the players and to the game which belongs to America and not to the owners.

I thank you very much for this opportunity to make these brief remarks.

Senator METZENBAUM. Does your statement indicate or imply that you support the concept of repealing the antitrust exemption, or do you think it ought to remain as is?

Mr. YOUNG. Mr. Chairman, my statement will indicate that I think we should seriously consider removing that antitrust exemption, and I give specific reasons why I think that should happen.

Senator METZENBAUM. Thank you very much.

Mr. YOUNG. If I had the time, I would have presented them to you orally, but I understand the time constraints.

Senator METZENBAUM. Thank you.

Mr. YOUNG. In the House, we are busy making committee assignments and I want to make sure that the five freshman from Florida don't lose out on good committee assignments.

Senator METZENBAUM. I understand your point.

Mr. YOUNG. Thank you very much.

[The prepared statement of Mr. Young follows:]

Testimony of U.S. Rep. C. W. Bill Young

Before the Senate Judiciary Subcommittee on

Antitrust, Monopolies and Business Rights

December 10, 1992

Mr. Chairman, I want to commend you and the members of the Committee for holding this very in depth hearing today on the issue of Major League Baseball's antitrust exemption and to thank you for allowing me this time to share my thoughts.

As the Representative of St. Petersburg, Florida, a city which has a long and proud baseball history and up until recently has had a very good relationship with league officials, I share with you the frustration and bewilderment of the thousands of residents of our community and the millions of people of the Tampa Bay area. Over the course of the past 15 years, the prospect of a major league team playing in St. Petersburg has been dangled in front of our community on no less than seven occasions. The last four cases have perhaps been the most publicized and frustrating for our community.

The Chicago White Sox, in 1988, nearly came to terms with the city to relocate to the Suncoast Dome, but with the leverage provided by St. Petersburg's offer, the state of Illinois, literally at the final hour, approved a legislative package to fund the building of a brand new stadium to keep the White Sox in Chicago.

Last year there was the hotly contested effort to win one of two National League expansion franchises. St. Petersburg was one of the finalists but just missed out, once again disappointing Tampa Bay area baseball fans.

Earlier this year there was the highly controversial bid to move the Seattle Mariners to St. Petersburg, which was blocked by major league owners who voted to support an offer by a group of Japanese investors that kept the team in Seattle.

Then there was the August 6th agreement between a group of Tampa Bay area investors and Bob Lurie, the owner of the San Francisco Giants, to buy the Giants and move the team to St. Petersburg. The city saw this as perhaps its best chance to bring a team to the Suncoast Dome.

Over the next three months, however, we watched as Major League Baseball took full advantage of its antitrust exemption to block the sale of the Giants to the Tampa Bay group. The league also worked directly with another prospective ownership group to restructure a counterproposal which the league owners subsequently approved to keep the Giants in San Francisco. This was three weeks after National League President Bill White said the league would allow no further changes to the competing proposals. When the Tampa Bay ownership group asked for permission to alter their proposal in light of the league's last minute changes to the competing proposal, they were turned down by league officials.

In the end, the owners forced Bob Lurie, the owner of the Giants, to accept a package that paid him $15 million less for his team than the package offered by the Tampa Bay group.

The Sherman Antitrust Act would not allow any other U.S. business or industry to prohibit an owner from selling a business to another person or group. It would not allow a business or industry to block the movement of a franchise to another area. It even covers other major league sports leagues, such as the National

Football League, the National Basketball Association, and the National Hockey League, which are all prohibited from allowing a committee of owners to block the free enterprise rights of on an individual team's owner to sell or relocate a franchise. The federal courts have considered this issue and have upheld the rights of individual team owners in these other professional sports leagues.

Mr. Chairman, it has been 70 years since the Supreme Court ruling gave major league baseball the antitrust exemption it has wielded to frustrate and disappoint the people of St. Petersburg. Our city, however, is not alone. Other communities have shared similar disappointing experiences at the hands of a small committee of major league owners, or will share such an experience in the future.

The time is now for the Judiciary Committees of the House and Senate to take a hard look at the history of this antitrust exemption to determine if it has outlived its useful life and if it should be repealed entirely or significantly modified through legislation.

The strength of our nation's economy rests upon our fervent protection of a free enterprise system which ensures fair access to markets and competition for all, not just a few businesses and entrepreneurs. The owners of the teams which make up "America's Game" should abide by these same rules.

Mr. Chairman, I look forward to working with you and the members of the Committee to provide whatever information I can about St. Petersburg's experience with Major League Baseball and its antitrust exemption so that you might have a thorough case history to review and evaluate.

Thank you again for this time today to discuss this important matter which threatens to undermine the integrity and support for our great national pastime.

Senator METZENBAUM. Mr. Bilirakis.

STATEMENT OF HON. MICHAEL BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. BILIRAKIS. Thank you, Mr. Chairman and members of the subcommittee. I, too, appreciate this opportunity to appear before you today as a member of the House Energy and Commerce Committee and also a sponsor of the legislation in the previous Congress to eliminate the antitrust exemption for major league baseball, and I fully intend to reintroduce this legislation in the 103d Congress because I feel strongly that competition and fairness is as important in the boardrooms of professional baseball as it is on its diamonds.

Currently, Federal antitrust law prohibits businesses from taking actions that unreasonably constrain interstate commerce. However, as we know, in a 1922 decision that I can only term capricious, the U.S. Supreme Court exempted professional baseball from these Federal antitrust laws as an amusement and not a business.

I am a great fan of the game, Mr. Chairman. My wife rightly calls me a baseball nut. Life starts for me when spring training starts, but I must tell you frankly that I do not find many of the actions of the major league baseball owners amusing these days. Their treatment of the fans, the players, host cities, and cities seeking that opportunity, even of their own commissioner, whom we heard from here earlier today, militates against them, I think.

No other professional sport enjoys this kind of blanket exemption, something that this committee cannot overlook. What possible standard, we must ask ourselves, can be advanced to support such a circumstance in this day of multimillion-dollar player salaries and telecommunications contracts? What possible difference sets major league baseball's owners apart from their peers in other professional sports? I maintain that there is none.

This monopoly is unhealthy and needs to be modified. In fact, as we all know, 50 years after its initial ruling the Supreme Court went so far as to call baseball's exemption an anomaly and an aberration. More significantly, and this was referred to earlier by Senator Simpson, the Court stated that this was a problem that could best be solved by the Congress. In *Flood* v. *Kuhn,* it was noted that the inconsistency or illogic of the situation would have to be remedied by Congress and not by the Court.

In fact, baseball's antitrust exemption has been the subject of detailed study by the Congress, as we know. In the 82d Congress back in the early 1950's, several bills were introduced in the House to grant a blanket antitrust exemption to all professional sports. They were studied by the House Judiciary Committee's Subcommittee on the Study of Monopoly Power which recommended against their passage. In 1976, a report by the House Select Committee on Professional Sports also concluded that there was no justification for baseball's special exemption.

We have as a body, Mr. Chairman, studied this issue repeatedly and in detail. Today, the time has come for action. We can deliver a great big Christmas present all tied up with a bow for the Nation's many fans of major league baseball. The time has run out on

the House of Lords that presently controls major league baseball, Mr. Chairman. Thank you very much again for this opportunity.

[The prepared statement of Mr. Bilirakis and a letter to Senator Metzenbaum follow:]

TESTIMONY OF
CONGRESSMAN MICHAEL BILIRAKIS
ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS SUBCOMMITTEE

U.S. SENATE

PROFESSIONAL BASEBALL ANTITRUST EXEMPTION
DECEMBER 10, 1992

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, I DEEPLY APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY AS A MEMBER OF THE HOUSE ENERGY & COMMERCE COMMITTEE, AND SPONSOR OF LEGISLATION IN THE PREVIOUS CONGRESS TO ELIMINATE THE ANTITRUST EXEMPTION FOR MAJOR LEAGUE BASEBALL.

I FULLY INTEND TO RE-INTRODUCE THIS LEGISLATION IN THE 103RD CONGRESS BECAUSE I FEEL STRONGLY THAT COMPETITION AND FAIRNESS IS AS IMPORTANT IN THE BOARDROOMS OF PROFESSIONAL BASEBALL AS IT IS ON ITS DIAMONDS.

CURRENTLY, FEDERAL ANTITRUST LAW PROHIBITS BUSINESSES FROM TAKING ACTIONS THAT "UNREASONABLY" CONSTRAIN INTERSTATE COMMERCE. HOWEVER, IN A 1922 DECISION THAT I CAN ONLY TERM "CAPRICIOUS," THE U.S. SUPREME COURT EXEMPTED PROFESSIONAL BASEBALL FROM THESE FEDERAL ANTITRUST LAWS AS AN "AMUSEMENT" AND NOT A BUSINESS.

I AM A GREAT FAN OF THE GAME, MR. CHAIRMAN, BUT I MUST TELL YOU FRANKLY THAT I DO NOT FIND MANY OF THE ACTIONS OF THE MAJOR LEAGUE BASEBALL OWNERS AMUSING THESE DAYS.

THEIR TREATMENT OF THE FANS, THE PLAYERS, HOST CITIES AND CITIES SEEKING THAT OPPORTUNITY -- EVEN OF THEIR OWN

COMMISSIONER, WHOM WE HAVE HEARD TESTIFY HERE TODAY – MILITATES AGAINST THEM.

NO OTHER PROFESSIONAL SPORT ENJOYS THIS KIND OF BLANKET EXEMPTION. WHAT POSSIBLE STANDARD CAN BE ADVANCED TO SUPPORT SUCH A CIRCUMSTANCE IN THIS DAY OF MULTI-MILLION-DOLLAR PLAYER SALARIES AND TELE-COMMUNICATIONS CONTRACTS? WHAT POSSIBLE DIFFERENCE SETS MAJOR LEAGUE BASEBALL'S OWNERS APART FROM THEIR PEERS IN OTHER PROFESSIONAL SPORTS? I MAINTAIN THAT THERE IS NONE.

THIS MONOPOLY IS UNHEALTHY AND NEEDS TO BE MODIFIED.

IN FACT, AS WE ALL KNOW, 50 YEARS AFTER ITS INITIAL RULING, THE SUPREME COURT WENT SO FAR AS TO CALL BASEBALL'S EXEMPTION AN "ANOMALY" AND AN "ABERRATION."

MORE SIGNIFICANTLY, THE COURT STATED THAT THIS WAS A PROBLEM THAT COULD BEST BE SOLVED BY THE CONGRESS. IN FLOOD V. KUHN, IT WAS NOTED THAT THE "INCONSISTENCY OR ILLOGIC" OF THE SITUATION WOULD HAVE TO BE "REMEDIED BY CONGRESS AND NOT BY TH[E] COURT."

IN FACT, BASEBALL'S ANTITRUST EXEMPTION HAS BEEN THE SUBJECT OF DETAILED STUDY BY THE CONGRESS. IN THE 82ND CONGRESS, SEVERAL BILLS WERE INTRODUCED IN THE HOUSE OF REPRESENTATIVES TO GRANT A BLANKET ANTITRUST EXEMPTION TO ALL PROFESSIONAL SPORTS. THESE WERE STUDIED BY THE HOUSE JUDICIARY COMMITTEE'S SUBCOMMITTEE ON THE STUDY OF MONOPOLY POWER, WHICH RECOMMENDED AGAINST THEIR PASSAGE.

IN 1976, A REPORT BY THE HOUSE SELECT COMMITTEE ON PROFESSIONAL SPORTS ALSO CONCLUDED THAT THERE WAS NO JUSTIFICATION FOR BASEBALL'S SPECIAL EXEMPTION.

WE HAVE, AS A BODY, STUDIED THIS ISSUE REPEATEDLY AND IN DETAIL. TODAY, THE TIME HAS COME FOR ACTION. WE CAN DELIVER A GREAT, BIG CHRISTMAS PRESENT ALL TIED UP WITH A BOW FOR THE NATION'S MANY FANS OF MAJOR LEAGUE BASEBALL.

TIME HAS RUN OUT ON THE "HOUSE OF LORDS" THAT PRESENTLY CONTROLS MAJOR LEAGUE BASEBALL. TIME HAS RUN OUT ON THE IMPERIAL FORCES THAT HAVE LIFE AND DEATH CONTROL OVER THE DECISIONS OF TEAM EXPANSION OR RELOCATION. THE TIME HAS COME TO GIVE AMERICA'S GAME BACK TO THE PEOPLE.

IN THE NEXT CONGRESS, WE CAN REMOVE THE SPECIAL STATUS THAT PROTECTS THE GRINCHES THAT STOLE BASEBALL.

I HAVE HEARD IT SAID THAT THIS WILL NOT BE EASY. MR. CHAIRMAN, I HAVE SPENT ENOUGH TIME ON CAPITOL HILL TO KNOW THAT THINGS INSIDE THESE WALLS RARELY ARE. I ALSO RARELY HEAR THIS GIVEN AS A REASON NOT TO ACT.

I AM CERTAIN THAT MAJOR LEAGUE BASEBALL WILL PULL OUT ALL THE STOPS TO PREVENT MY LEGISLATION OR ANY OTHER EFFORT FROM RECEIVING A FAIR HEARING. HOWEVER, I BELIEVE OUR EFFORTS CAN AND WILL BEAR FRUIT. WE CAN ACT ON THIS MATTER FOR THE BENEFIT OF THE AMERICAN PEOPLE AND IN THE NAME OF JUST TREATMENT UNDER OUR LAWS IF WE HAVE THE WILL TO DO SO.

I INTEND TO CONTINUE WORKING WITH ALL INTERESTED REPRESENTATIVES TO RESOLVE THIS ISSUE, HOWEVER LONG IT TAKES.

THE HIGH COURT HAS ABANDONED ITS INITIAL NARROW DEFINITION OF COMMERCE IN THIS REGARD AND HAS OPENED THE DOOR FOR THE CONGRESS TO RECTIFY THIS INSUPPORTABLE ERROR. WE MUST SEE OUR WAY CLEAR TO DO THAT, NO MATTER THE OBSTACLES. IT IS RIGHT, IT IS FAIR, AND THE FANS OF THE GREAT GAME OF BASEBALL DESERVE NOTHING LESS.

THANK YOU.

MICHAEL BILIRAKIS
9TH DISTRICT, FLORIDA

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Congress of the United States
House of Representatives
Washington, DC 20515-0909

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December 3, 1992

Senator Howard M. Metzenbaum
Chairman, Subcommittee On Antitrust, Monopolies and Business Rights
308 Hart Senate Office Building
Washington, DC 20510-6278

Dear Senator Metzenbaum:

It is my understanding that you will be chairing a December 10 hearing regarding professional baseball's exemption from federal antitrust laws. This is an issue of special importance to me.

As you may already know, during the 102nd Congress I was the House sponsor of legislation to eliminate professional baseball's exemption from antitrust laws. The bill number was H.R. 5489 and I have included a copy of its text.

As a representative from the Tampa Bay area in Florida, I proposed this legislation in order to remove the artificial barriers to league expansion and allow qualified areas such as Tampa and St. Petersburg to obtain a baseball franchise. Baseball has been singled out for a complete exemption from the antitrust laws that no other professional sport enjoys. This monopoly is unhealthy and needs to be rectified. The United States Supreme Court in 1972 called the situation an "anomaly" and an "aberration" but said it was a problem best solved by the Congress.

While my legislation did not come up for consideration in the 102nd Congress, I plan to reintroduce it in the 103rd Congress when we convene next month. I feel strongly that we need to bring competition and fairness to baseball, and, therefore, I respectfully request the opportunity to testify at your important hearing on this matter.

Warmest regards.

Sincerely yours,

Michael Bilirakis
Member of Congress

MB:ddl

Enclosure

Senator METZENBAUM. Thank you, Mr. Bilirakis.

Now, our next witness will be Mr. Bud Selig, and I ask him to come to the witness table. At the same time, I would like to introduce some who have accompanied him just for introduction purposes only. I think they are in the audience. I would like to ask them to stand as I mention their names: Mr. George Bush of the Texas Rangers, Mr. Bill Bartholomew of the Atlanta Braves, Mr. Fred Kuhlman of the St. Louis Cardinals, Mr. Jerry McMorns of the Colorado Rockies, and Mr. Heywood Sullivan of the Boston Red Sox. Thank you. We are happy to have each of you with us.

Senator Kohl, all of us are aware of the fact that you not only have a major constituent of yours with us today, but a very close personal friend, and I wonder if you wouldn't like to say a few words of introduction.

Senator KOHL. Thank you very much, Mr. Chairman. Mr. Chairman, baseball is an important part of the American way of life. It reflects the character, the history, and the competitiveness of our society. From Babe Ruth to Hammerin' Hank Aaron to the heroes of today, as much as any other single activity baseball is America, and our love for the game has united us for generations. So when baseball hurts, America hurts, and that is why all of us are concerned about the problems that the game faces today.

Smaller cities like Milwaukee, Seattle, and Pittsburgh struggle to generate enough revenue to stay profitable. They know that if they do not make enough money, if they cannot pay their players enough, then their hometown heroes will be lost to cities with more money. For example, just this past Monday Paul Molitor signed with Toronto after spending all of his 15-year career in Milwaukee where he was indeed a real hero. For the money he got, you can't blame him, but fans in Milwaukee have lost one of their stars.

None of the key participants in this struggle—the owners, the players, and the cities—is without blame for baseball's problems, and none, not the cities, not the players, not the owners, is exclusively to blame for the difficulties threatening the game.

As you may know, Mr. Chairman, I am fortunate enough to have enjoyed a long association with professional sports—primarily basketball, but also major league baseball. Because of these past and present ties, I will recuse myself from taking a role in this matter before the U.S. Senate, but I cannot and I do not want to recuse myself today from the opportunity to say a few words about my good friend, Bud Selig.

Bud Selig and I grew up on the same block in Milwaukee. Our families were close friends. Bud and I played baseball together when we were kids. He could not then, nor can he today, hit my curve ball. [Laughter.]

Bud and I went to high school and college together and we roomed for a year at the University of Wisconsin. We were then and we remain today best friends.

Like many of us, Bud Selig has worked very hard to improve the city that he calls home. In 1965, when the then Milwaukee Braves left Milwaukee, Bud devoted himself to bringing major league baseball back to our community. In 1970, he was successful in getting the Seattle Pilots to move to Milwaukee. But to view Bud's actions as only those of an owner would be wrong. In fact, he is first and

foremost a fan with a great love for the game of baseball and he knows what it means to the people of a community to have pride in their team, to win or lose with their team, and potentially to be the equals of New York and Los Angeles because of their team.

Since 1970, in perhaps the smallest of the franchise cities, Bud Selig and the Milwaukee Brewers have not only survived, but they have been winners. Earlier this fall in a time of some turmoil, his fellow owners selected Bud Selig to chair the executive council of baseball. Never one to duck responsibility, he agreed to accept that assignment and he is now, in essence, the commissioner of baseball. As recent events in Louisville show, he is faced with a difficult task. I am certain he will discharge his responsibilities with skill, intelligence, and sensitivity just as he has done since he was a young man.

As I have said, I will recuse myself from this hearing and from any debate or vote on this issue, but I do want to express the hope that my colleagues will be fair with Bud Selig. Bud Selig did not cause the problems the game faces today, but he is trying to help resolve them and if we all work together, I am sure that can be done.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

With that introduction, Mr. Selig, we are very happy to hear from you.

STATEMENT OF ALLAN H. SELIG, OWNER, MILWAUKEE BREWERS BASEBALL CLUB

Mr. SELIG. Thank you, Mr. Chairman. Thank you, Senator Kohl. Mr. Chairman, before I start today—and I appreciate Senator Mack acknowledging baseball suffered a terrible loss yesterday. Carl Barger, the president of the Florida Marlins and the former president of the Pittsburgh Pirates, died during our annual winter meetings. On behalf of major league baseball, we offer our sincere sympathy to his family, to his friends, to the Marlins, and to the community.

Senator METZENBAUM. I think the members of this committee join in expressing the same sentiments that you have just expressed, Mr. Selig.

Mr. SELIG. Thank you. Mr. Chairman, my name is Bud Selig and I am pleased to appear before the subcommittee today on behalf of major league baseball. For the last 23 years, I have been the president of the Milwaukee Brewers. I currently serve in the position of chairman of baseball's executive council.

I understand that this hearing is the result of concern over the National League's decision not to approve the relocation of the Giants from San Francisco to Tampa-St. Petersburg and over the circumstances surrounding the departure of former Commissioner Vincent. I will address both issues.

Let me say first to the many loyal baseball fans of Tampa-St. Pete that I genuinely understand the disappointment that you feel. I was in your shoes in the 1960's when it took me 6½ years to bring baseball back to Milwaukee, but the National League's decision to keep the Giants in San Francisco was simply a reaffirmation of baseball's long-established policy against the relocation of

franchises that have not been abandoned by their local communities.

My vivid memory of the devastation caused when the Braves left Milwaukee convinces me that baseball's preference for franchise stability is plainly in the public interest. The Boston Braves moved to my home town of Milwaukee in 1953. Their stay in Milwaukee was one of the great success stories in baseball. Milwaukee supported the team spectacularly. Despite their success in Milwaukee, the Braves moved to Atlanta at the end of the 1965 season, and I was personally heartbroken and the entire State of Wisconsin was traumatized.

The void in the community drove me to devote the next 6½ years of my life to bring baseball back to Milwaukee. Several deals with existing teams fell through and we were passed over when baseball expanded in 1969. Our break finally came when one of those expansion franchises failed after just 1 year. Baseball, acting responsibly and properly, in my view, went to great lengths to keep the failing Pilots in Seattle, but the Pilot owners put the team into bankruptcy and a bankruptcy judge ordered the sale of the club to my group.

My experience in Milwaukee has convinced me that the appropriate policy for sports leagues is to prohibit franchise relocations except in the most dire of circumstances when the local community has over a sustained period demonstrated that it cannot support the team. This, I am happy to report, is baseball's policy.

But if baseball were not exempt from the antitrust laws, a decision protecting franchise stability such as the one made in San Francisco would subject baseball to costly and unpredictable treble damage litigation. Without its exemption, baseball might not even have attempted to save the Giants for the people of San Francisco. Ever since a court concluded that the NFL was powerless to stop Al Davis from abandoning Oakland, no sports league other than baseball has been able to stop a franchise from relocating.

I am very proud of baseball's record on franchise stability. Because of baseball's exemption, it has by far the best record of professional sports in this area. No baseball club has been permitted to relocate since the Washington Senators moved to Texas in 1972. In contrast, football and basketball have each had three franchise relocations since 1980 and hockey has had two.

As the record demonstrates, baseball has not abused its antitrust exemption. While we have not prohibited all franchise moves, we do not allow a club to relocate simply so that the owner can earn greater profits. Indeed, the National League rejected the move to Tampa-St. Pete despite the fact that it would have netted Bob Lurie an additional $15 million. This shows that profit is not the driving force in baseball's decisionmaking process.

Let me now address the circumstances of Fay Vincent's departure and what that departure means for the future of baseball. The owners did not, as some have suggested, summarily dismiss Mr. Vincent for protecting the best interests of the game. When Mr. Vincent took office, he acknowledged that if he had ever lost the confidence of a majority of owners, he would resign.

While Mr. Vincent had the full support of owners when he took office in September 1989, by September 1992, 18 teams requested

his resignation. The vote made it apparent to Mr. Vincent that he had lost the confidence of a majority of the teams and he honored his initial pledge and resigned. I cannot speak for all of the teams. The clubs lost confidence in Mr. Vincent for many reasons. However, the concern heard most often was his inability to develop a consensus on the vital issues that faced the game. Rather than pulling together under his leadership, the teams were drawing further apart.

In the opinion of the clubs, Mr. Vincent was simply not the person to lead baseball during this very challenging period. Since his departure, we have appointed a restructuring committee which is hard at work. Although the restructuring committee has not yet completed its work, I can say to you today that there will be a commissioner who will continue to have strong powers—the same strong powers, I may add, to protect the integrity of the game.

In my personal view, Mr. Chairman, baseball has continued to uphold its unique covenant with its fans, and it deserves to retain its status under the antitrust laws. I sincerely thank the subcommittee for the opportunity to appear before you today. I understand that my full written statement will be placed in the record. Thank you.

Senator METZENBAUM. Thank you very much, Mr. Selig. Your entire statement will be placed in the record. At this point, the committee will go into a question-and-answer period. The Chair will allot 10 minutes to himself and to the ranking member, and 5 minutes each to other members of the committee. If necessary, we will have a second round.

Mr. Selig, in his prepared testimony Fay Vincent stated that he would no longer support the antitrust exemption if the owners of baseball continue on their course of making baseball into their business and at the same time insist that the commissioner is their CEO, to be fired at will. Press statements by your fellow owner, Mr. Reinsdorf, and others suggest that you intend to do just that and turn the commissioner into a CEO answerable solely to the owners.

If that happens, my concern is that there won't be anyone with independent authority to protect the fans. If you are going to weaken the power of the commissioner, and it is apparent that you already have, then who will be there to protect the fans when the business interests of the owners conflict with the public interest and the interests of the sport?

Mr. SELIG. Mr. Chairman, let me try to answer that in the context, sir, of my almost now 2½ decades in this game. One needs to understand the history of baseball. All of us who have been raised in the business—and let me say this to you, sir, right from the beginning—understand the need for a strong commissioner. There is no question about that.

Whatever the reports have been—and this very sensitive issue that the restructuring committee that has gone to work on September 9 in St. Louis, MO, has been composed of clubs, big markets, small markets, pro-Fay Vincent people, people not for Fay Vincent who have worked together—all of us in the game understand the need for centralized authority. We also understand that on the integrity issues there will be no change, there will be no change.

But let us understand that on other parts of the document, Senator Metzenbaum, the document is 71 years old. We live in a new era, we live in a new society, and why shouldn't this document at least be looked at to make baseball and bring baseball, the rest of its functions and the structure of the office, into an era that it now exists in? That doesn't mean the office is being weakened. On the contrary——

Senator METZENBAUM. Mr. Selig, how do you explain this? You say you want a strong commissioner. Eighteen members join together and fire Fay Vincent and indicate they no longer have confidence in him. A strong commissioner is either independent and, when you are not happy with him, stays there regardless of that fact—we give Federal judges lifetime appointments so that they may be totally independent and not subject to the will of the people.

Here is a situation where Fay Vincent, apparently based upon his comments here and what we have read about him previously, was a balanced individual. He was concerned about the future of baseball and the presence of baseball. Reinsdorf is out there talking about we want a commissioner who will be the CEO for baseball.

How can you convince the American people and how can you convince this committee that you really mean what you say? What indication is there that you really want a strong commissioner? You have fired several of them in the past many years.

Mr. SELIG. Many years, Senator. Let me suggest to you, sir, that if you go back through the Happy Chandler episode in the late 1940's, there was a situation with Commissioner Eckert in the 1960's. There was even a situation with Commissioner Kuhn in the early 1980's, but somehow, for whatever the reasons, the office stayed intact, those powers intact.

Senator METZENBAUM. But the commissioners lost their jobs.

Mr. SELIG. Well, OK. Let me answer that, but the fact of the matter remains that what is a commissioner's job. The integrity issue, there is no question about, but the ability to lead, the ability to develop a consensus—after all, Senator Specter and others asked very, very penetrating questions today about a lot of the economic issues that confront this industry today.

Mr. Chairman, it was the view of the 18 clubs that there was not a consensus, and instead of joining together to begin to solve those problems which are clearly in the interests of clubs not only in markets like Milwaukee, but in the big markets, we were breaking down further. Now, Senator, that is in no one's best interest, and so whether the 18 clubs were right or wrong, the fact of the matter is that the best interests of the game, they believed, because of the lack of consensus, were being served by asking Commissioner Vincent to resign.

Senator METZENBAUM. Well, baseball's antitrust exemption is truly an extraordinary privilege. It insulates baseball from the normal rules that govern our free market system. To the best of my knowledge, it is maybe the only industry in America that has an exemption. This Senator and I worked out some exemption for industry with respect to research and development some years ago, but that was a limited kind of exemption under prescribed rules.

Whenever Congress examines this subject, the leaders of major league baseball come before us and say that the sport of baseball is unique and deserves special treatment under the law. You tell us, well, 18 members didn't agree to it. When Happy Chandler made a decision, if my recollection is right, having to do with integrating baseball, that didn't sit very well at that time with the baseball owners, as I understand.

But baseball also acts not very much like a business; it is a business, it is very big business. Fay Vincent was forced out because he believed that the business interests of the owners should be subordinate to the best interests of the sport. He was concerned about the fans. Some owners have threatened to leave their home cities unless the public subsidized the cost of new stadiums, and that, to me, is counterproductive to really what this whole Nation needs. I mean, with the communities striving so hard to keep their schools open, to pay their police and fire forces, to provide for an infrastructure, there is this extraction; either you do this or you don't get the team to stay.

Players, especially the minor league players, are forced to accept restrictions on their mobility as a condition of employment. How can anybody sit before us and justify the reserve clause, which has some limitation by reason of the contract that you have with the Baseball Players Association, but would have none if you didn't have that restriction, and would therefore make baseball subject to the antitrust laws if there were no exemption?

And the whole concept of the reserve clause with respect to minor league baseball players who are held by a team—when I learned what baseball does to the minor league players, I absolutely couldn't believe my ears. I am not an authority on how baseball conducts itself, but the inability for a minor league player to move from team to team or to be sold to a major league team because he is being held by one minor league team—baseball seems to play the kind of hardball you see in most other businesses. Under those circumstances, what conceivable reason is there for us to continue to give baseball this unique privilege that no other sport, no other business in America has?

Mr. SELIG. Well, Senator, I think there are a lot of reasons. I think that baseball has, as I said in my statement—and you have made a lot of points and I would like to cover as many of them as is possible. The San Francisco situation is illustrative of a point, and with all due respect to Senator Mack—and I know how he feels, and Senator Graham. I can understand it because I have been there. I lived, as I said, 6½ years of my life trying to find a team, being passed over four or five times.

But here we are with the best record on franchises, Senator. We believe in stability. A lot of us who came into the business, and as this policy really came into being in the 1970's, we believe in doing the right thing.

Senator METZENBAUM. If you believe in stability, why did you refuse San Diego the opportunity to get the team for free from Ms. Kroc?

Mr. SELIG. Because a public entity, Senator Metzenbaum, is not in the community's best interest. For interest——

Senator METZENBAUM. They own a football team in Green Bay, don't they?

Mr. SELIG. No, they don't, sir. I am on the board of the Green Bay Packers and the community does not own the Green Bay Packers. The shareholders own the Green Bay Packers. The shareholders have nonvoting stock, sir, and I happen to be a shareholder. It doesn't pay any dividends, but it is not owned by the community. There is no entity in sports that is owned by that, and the city of San Diego which now has a viable ownership group, Senator, a local group—one of the great guidelines that we have, a local group who—after all, if a public entity owns the team, No. 1, the team starts losing money, as many baseball teams do today, and the San Diego Padres are losing money.

Senator METZENBAUM. Didn't Ms. Kroc also offer San Diego $100 million in order to provide for continuing expenses and funds?

Mr. SELIG. It never got to that fact, Senator, because there would be no stability in that situation. After all, you would understand this better than I. Elections come and go, administrations change. We have people trying to run a ball clubs. You have clubs that begin to lose money and become a burden to the taxpayer. There is no professional league, Senator, no professional league—by the way, the other leagues don't have antitrust exemptions and they don't allow that type of ownership. I don't believe, sir, that is reflective of any deficiency in baseball.

Senator METZENBAUM. Mr. Selig, I have many more questions, but frankly as we sit here today, I think the public would have much more confidence in the ultimate outcome of the issue that is now hanging over the head of baseball, the Marge Schott controversy, if the matter was being handled by a strong and independent commissioner.

A story in Tuesday's USA Today reported that 1 week after the owners had appointed a committee to look into the matter, five people who said they heard Ms. Schott make racial slurs still had not been contacted. The question is, what is going on? Why all the delay, and wouldn't it be better if the Schott matter were being handled by a strong and independent commissioner?

Al Campanis was banned from baseball for making racially insensitive remarks similar to those made by Ms. Schott. If Ms. Schott is somehow treated more leniently than Mr. Campanis, won't it appear that the owners are coddling one of their own, and isn't it an issue that calls for urgent action rather than this long, drawn-out delay?

Mr. SELIG. Let me suggest, No. 1, that the Al Campanis remarks in 1987 on "Nightline" were done in public and Peter O'Malley, the owner of the Dodgers, took appropriate action. I would say to you that I don't think that any of you would have handled it any differently, Mr. Chairman, than I have.

Bill White, the president of the National League, and I were in constant communication from day one when these allegations surfaced. We appointed a committee of two of our owners, plus the two league presidents and the National League attorney. After all, there is a spirit of fairness, there is a spirit of due process, there is a spirit of thoughtfulness, there is a spirit of thoroughness. And, sir, that is the period we are engaged in, and I must tell you that

I do—I would suggest to all of you that knowing the facts as I know them, I have every confidence that all of you would have reacted the same way that I did.

Senator METZENBAUM. My time has expired. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Selig, we are glad to have you with us.

Mr. SELIG. Thank you, Senator Thurmond.

Senator THURMOND. Mr. Selig, given your emphasis on franchise stability, what would be your reaction to a legislative proposal to limit the antitrust immunity only to franchise relocations?

Mr. SELIG. Senator Thurmond, I think that would not be in the best interests of the public. That certainly is one issue, but there are other issues relative to the minor leagues, relative to television, that I think are very, very important, and I do believe that if one studies our history—and I have lived a lot of it and studied it for a long time—that they would believe and understand that the public's interest is really being served by that exemption.

Senator THURMOND. Mr. Selig, do you believe there are reasons other than franchise stability that justify the antitrust immunity, and if so what are they?

Mr. SELIG. Well, television, labor, discipline matters. I think there are a host of functions, Senator Thurmond, that are best served by the antitrust exemption.

Senator THURMOND. Mr. Selig, how do you defend the antitrust immunity for baseball when other sports appear to operate successfully without such an immunity?

Mr. SELIG. I think there is a uniqueness to baseball that there isn't to the other sports. Just, if you will, sir, consider the minor league operations, the fact that baseball subsidizes its minor league operations to the extent of well over $100 million. There is a difference in television policy. There are other things that I think that baseball has done, and I think, frankly, the antitrust exemption, again going back to franchise shifts, but it can get into television and other things, has protected the public good.

Senator THURMOND. Mr. Selig, several commentators and one of the witnesses this morning cite minor league player rules as particularly onerous. They claim these rules would not exist if there were no antitrust exemption. Can you explain the leading rationale for these rules?

Mr. SELIG. Well, let me cover, Senator Thurmond, if I may, sir, the minor league situation. We are unique in this area, as I said. You know, hockey has a small farm system, and obviously football and basketball have built-in farm systems. We subsidize the minor league clubs well over $100 million a year. There are 17 leagues, 173 clubs, 4,300 minor league players. The minor league clubs are subsidized.

I would remind you, and it will sure come up in other questions, the major leagues in this year, in 1992, are a virtual break-even industry just on operations alone, pre-interest and pre-tax and pre-depreciation. So the fact of the matter is this is an industry straining now to meet its commitments and there are many clubs, especially in the small and medium-sized markets, who are having an extremely difficult time. So the minor league subsidization is already at the limit.

Senator THURMOND. Mr. Selig, what is your view of the role of the baseball commissioner, especially as to his relationship with the owners? Mr. Vincent has stated that some of the owners believe the commissioner should represent the owners, similar to a CEO who could be hired and fired at will.

Mr. SELIG. As I said earlier, and I really believe this, there is no doubt in my mind, Senator Thurmond, that baseball needs a strong commissioner. The integrity issues should not be touched at all; they will not. I have every confidence they won't be. The restructuring committee is sensitively looking at all parts of that operation, and I can assure you all of us who have been raised in baseball and who love it and participate in it on a daily basis understand the need for a very strong commissioner.

Senator THURMOND. Mr. Selig, I note that you cite an article written by Mr. Gary Roberts concerning professional sports and antitrust laws. As you know, Mr. Roberts will be one of the witnesses this morning on another panel. Do you agree with his analysis that the underlying structural problems with baseball—lack of adequate revenue sharing, fewer than justified number of franchises, and the shifting of telecasting practices—require solutions other than repeal of the antitrust laws?

Mr. SELIG. I do, sir; I do.

Senator THURMOND. For example, he proposes breaking the league into four separate leagues that could not generally engage in joint activities.

Mr. SELIG. Well, we all have different views on things. We have a committee today that is looking at different schedules and different things, and that is all part of the process that quite frankly has begun. There are a lot of ideas that we need to look at and are in the process, sir, of looking at.

Senator THURMOND. Thank you very much. I have no more questions.

Mr. SELIG. Thank you.

Senator METZENBAUM. Thank you. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman. First, one minor correction. There was a farm hockey team owned by the city of Peoria, IL, a farm team of the St. Louis Blues.

Mr. SELIG. Well, I meant major league clubs. There are some minor league baseball clubs, too.

Senator METZENBAUM. That are owned by the public?

Mr. SELIG. Yes. There are no major league clubs in any of the sports is what I said.

Senator SIMON. I guess this is just a word of admonition to your restructuring committee and, frankly, you make a good impression, you come on strong. I hope you get a commissioner that has the same kind of approach. Gary Roberts—and I regret I won't be able to stay here to hear him, but he has indicated in his writings that over the last two decades the NFL has had over 60 suits filed on the basis of the antitrust laws. Baseball doesn't need that, but baseball may be headed for significant change if that restructuring committee and the owners don't make very clear the strength and the independence of the commissioner.

You have problems in baseball, as you have pointed out, but those problems will be compounded if baseball is run by the Fed-

eral courts or, with all due respect to my colleagues, by the U.S. Senate. What I would like to see is that baseball's commissioner be strong and independent. That is kind of the basic message that I hope will come out of this hearing.

Mr. SELIG. And I share that view and we share that view, Senator Simon.

Senator SIMON. Thank you. I have no other questions.

Senator METZENBAUM. Thank you, Senator Simon. Senator Mack.

Senator MACK. Thank you, Mr. Chairman. Welcome. We have had a chance to chat a couple of times.

Mr. SELIG. Thank you, Senator.

Senator MACK. I appreciate your point of view, but let me kind of take issue with it, if I could.

Mr. SELIG. Well, I knew that you would, sir. I am not surprised.

Senator MACK. In your statements with respect to your commitment to maintaining stability as opposed to abandoning one side or another, originally Milwaukee had a baseball team because it moved a franchise from Boston. Milwaukee has a baseball team today because of your efforts to move a team from Seattle. In short, you acted contrary to the very message that you are giving us. Milwaukee would not have a team today if it had not been for your doing exactly the kinds of things that the people in Tampa and St. Pete want to get done.

So I guess my question to you is, it seems like stability is important, but by the same token there are other things that come up from time to time that indicate that a franchise ought to be moved, and the question is do you agree or disagree with the criteria that basically were outlined by the former commissioner.

Mr. SELIG. I agree. I would also like to, if I may, comment on the Milwaukee characterization, which obviously I have lived now for almost 40 years through the Braves and, of course, my own involvement with the Brewers. The Braves moved from Boston because at that time there was a very strong feeling back in the 1950's that Boston couldn't support two baseball teams—a different era.

When the Braves left for Atlanta, you know how I felt about that; everybody in the world does. You know, it is gone and it is done, but it was a very traumatic and, I thought, regrettable and unfair thing. That doesn't mean we have to keep repeating regrettable and unfair things, not that Atlanta shouldn't have a baseball team because it should have had. When we got a team back——

Senator MACK. Let me just ask——

Mr. SELIG. I am just going to finish my thought.

Senator MACK. OK.

Mr. SELIG. When we got a team back, Senator Mack, we had been turned down five times. We brought a team on October 10, 1969—I can still remember it—in Baltimore. Both leagues and then-Commissioner Bowie Kuhn kept going back to that community and giving it a chance, and they gave it one chance after another to come up with a local group.

Now, I had met Bowie Kuhn 4 years earlier in a baseball trial in Milwaukee. Yet, in 1969 I never resented him giving Seattle every chance in the world to buy that team, and I submit what I

and we did for San Francisco was clearly consistent with that because I do believe—and then I will keep quiet—I do believe, sir, we really do have a moral obligation.

As I think I told you one day, when the change came and I took over, I was inundated with letters from kids in northern California who had grown up with Willie Mays and Willie McCovey. It may be naive and it may be trite, but I take that very seriously, and I also take that seriously as part of our social responsibility. I understand the heartbreak in Tampa, but we are in a situation where we can't please everybody at one time. So our policy has been the same in Montreal, San Diego, Seattle. I mean, this wasn't anything new.

Senator MACK. Well, are you suggesting, then, that the commissioner was misleading the people of Tampa-St. Pete? I understand your concern about the interests of young fans being able to go to the game and see their stars play. You know, we all understand that. So, obviously, there has to be some criteria around which you make decisions about when a team can leave, and the commissioner laid out, I thought, some fairly specific things.

I want to ask you this question. Do you believe that the group that has now indicated its willingness to purchase Bob Lurie's team for $95 million has changed any of the four criteria that were outlined as a result of the commissioner's statement?

Mr. SELIG. I believe they have; I do believe they have. I think if Peter McGowan were here today, he could answer that a little more directly than I can, but the fact that they are willing, sir, to spend, I think it was $100 million to buy the team which they now have—they certainly have plans for a new stadium and will work at that. It is not something that is going to come overnight, but they have faith.

After all, one of the criteria that should always exist is when viable local ownership doesn't exist, and with all due respect, if that wasn't the case in Cleveland, OH, there wouldn't be a baseball team. I am merely saying if the people of San Francisco and that ownership group, all of whom are very prominent citizens, very respected businessmen, have the faith and judgment that they believe they can make it work, why should I tell them that they are wrong?

Senator MACK. Yes, but that would never have come about if it hadn't been for the offer that was made by the people in Tampa-St. Petersburg. There was no one willing to step forward until there was a commitment made from some place else to move the team to Tampa-St. Pete, and that gets me into my next question to you. Will you pledge to the people of Tampa and St. Pete that they won't be used again? We have gone through this 8 years.

Mr. SELIG. Well, let me—and believe me, I am very sensitive to that. That is a perfectly valid point and I do understand that. I could have said the same thing when we tried to buy the White Sox. We were turned down by the National League expansion, we were turned down by American League expansion. We bought the Seattle club. Then we were turned away for another 6 months.

Believe me, I can understand the sensitivity and the heartbreak and frustration in Tampa-St. Pete, but in that particular situation, Senator Mack, we have to deal with where the club was. Tampa-

St. Pete is clearly a major league area and should get a major league baseball team.

Senator MACK. We have heard that for 8 years now. We have gone through expansion. We have attempted to purchase, I think, seven different teams and it just doesn't happen. And saying to the people, you know, just be patient once again is not good enough.

The other message that you all are sending is, No. 1, keeping the franchises where they are is, in fact, No. 1, which is a message of saying you are going to have to wait to expand. We just got through hearing what the former commissioner thought with respect to expansion. Are you then saying to me that the people of Tampa-St. Pete may, in fact, get an expansion team in the next year or two?

Mr. SELIG. No, no, I wouldn't—I couldn't say that to you because I think that expansion, especially what I like to term undigested expansion, is the worst thing for all parties. Certainly, Commissioner Vincent this morning, I think, enunciated the reasons as to why. Even if one is quarrelsome about the talent level—and people can argue about that and say, well, you know, they haven't had pitching for 80 years and they haven't done this and that. Well, there is no question, though, that significant dilution is not helpful to anybody.

But keep something in mind, also, Senator. You have an industry—everybody has talked this morning and a lot this week—I have heard in Louisville all week about the problems that beset baseball, and they are there. You have a far longer tradition and history in baseball than I do, but we have an industry today that is a virtual break-even industry. Further expansion, weakening the teams, especially teams in markets like Pittsburgh or Milwaukee or Cleveland or San Diego or Seattle, is not helpful to anyone.

Expansion is always looked at as the panacea to solve all the ills. The fact of the matter is that here we are with an antitrust exemption, but you have the NBA and the National Hockey League and the National Football League without it, and yet we have as many teams as they do.

Senator METZENBAUM. Thank you very much, Mr. Selig. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman. Mr. Selig, you were reading from your submitted testimony in which you speak on the future role of the commissioner. In the written testimony it says, "The commissioner will continue to have strong powers to protect the integrity of the game."

I think to underscore that, you emphasized that he will have the same strong powers, and you were very emphatic about it. Are you saying that the restructuring committee is not going to make any changes in the authority of the commissioner?

Mr. SELIG. Certainly, on the integrity issues, from my understanding in talking to two cochairmen and other members of the committee, yes, Senator Leahy, I am absolutely saying that.

Senator LEAHY. Well, what are the areas of authority that will be changed by the restructuring committee?

Mr. SELIG. I don't know if "change" is the right word, but may I cite an example for you which, unfortunately, last year during the summer, I think was quite misunderstood. If I give you the exam-

ple, I think you will understand why. In 1921, this agreement was written. There were many things that didn't exist. In 1967, the major league clubs started what is called the player relations committee. Unfortunately, I am also chairman of that, and that was to handle labor.

Now, what you created because of the 46-year difference between the two documents was an enormous ambiguity. It has never been dealt with, Senator Leahy. That is why this restructuring committee is meeting. It is meeting really to clear up ambiguities. After all, there was no television in 1921. There weren't a lot of things in 1921.

Senator LEAHY. Well, let us go to more recently. You are talking about the player relations committee. Some could argue that the owners effectively gutted the commissioner's office before Mr. Vincent's resignation by transferring the responsibility for labor talks, which is one of the commissioner's most important functions, to the head of the player relations committee; having done that, the owners then voted no confidence in Mr. Vincent, 18 to 9, and demanded his resignation.

He pointed out rightly that you couldn't fire him until his term expired in, I believe, it was March 1994, and he threatened to litigate the issue. And I believe to his credit—I realize there were a lot of other things going on—but to his credit he said he would resign and avoid a protracted legal battle that wouldn't be good for baseball. With all the other things that baseball seems to be doing to shoot itself in the foot at the moment, I tend to agree with that decision.

I think you will hear as you listen to us on this committee that we want a commissioner who can stand up to the owners on an issue that is important to the fan. I think that that sort of follows through almost all the questions and statements I have heard here. Can you tell us as a result of this Restructuring committee that what happened to Fay Vincent is not going to happen to the next commissioner?

Mr. SELIG. I can, but let me go back to something, if I may, Senator Leahy.

Senator LEAHY. Sure.

Mr. SELIG. You said that, as a result of labor, we had effectively gutted the office. Sir, the player relations committee has had the same function since 1967, so you have it through Commissioner Eckert. There was no change made.

Senator LEAHY. Did they have the commissioner's responsibility for labor talks?

Mr. SELIG. No.

Senator LEAHY. That was a change?

Mr. SELIG. Once the PRC was formed, the commissioner at that point, sir, did not have a direct role in labor. That was the ambiguity that I spoke about before. That is one of the things that the restructuring committee is properly dealing with right now.

Senator LEAHY. Won't it go back to the commissioner?

Mr. SELIG. That is something that they are debating. You know, that certainly——

Senator LEAHY. But it is on the table?

Mr. SELIG. Oh, absolutely. It certainly is on the table and is a matter that they are very clearly discussing because life has changed and a whole different era has changed. So you asked what restructuring is doing. That is the type of thing that the restructuring committee is looking at with great specificity. That, in my judgment, Senator Leahy, strengthens that office because there are clear lines of authority, and because of history, and there have been so many changes, what you really have now, you really have a document that needs just what it says, some restructuring.

But I have every confidence that, as I said earlier, the integrity issues will not be changed, and I think when the restructuring committee is done, some day, and hopefully in the very near future, the new commissioner will be sitting here, and I hope much sooner than later, quite frankly. I think that you will understand what I have said here today that there is no question.

Senator LEAHY. But it is not just the integrity issue, which, of course, undergirds everything else, but it is whether he has got the independence to stand up for the fans' interest, at least in my mind. Senator Metzenbaum, I believe, already quoted what Jerry Reinsdorf was quoted as saying, that the commissioner should be a CEO of the owners, not the players or the umpires or the fans. He would handle issues involving integrity or discipline. In issues involving business, he would answer to the board of directors, the owners.

I understand the analogy to a typical business. But there is one whopping difference from a typical business—they don't get this antitrust exemption. If we are going to use this as an analogy that this is a business and you respond to the board of directors—you are a CEO, you respond to them, and so on—then why not just go all the way and make it a real analogy to business and get rid of the antitrust exemption and make baseball just like any other business?

Mr. SELIG. Because, Senator, I must tell you I will go back into all the reasons for that, but I would like to say to you that there is no question, as somebody who has been raised in this industry and this business, the sport of baseball, that I agree with you, and all of us agree with you, on the need for a strong commissioner. I don't think there is really any disagreement on that.

Senator LEAHY. But when you consider the possible lockout coming up next, I am wondering how anybody is going to stand and say, well, you know, this is really good for baseball, this is good for the fans. All I am thinking about over and over again here is we give this antitrust exemption; it is supposed to be something that is going to be good for baseball, good for the fans. Certainly, what we have seen in the last few months doesn't strike me as being good for the fans. If we go to a lockout next, I don't see where that benefits the fans.

I realize my time is up. Thank you for your testimony. Mr. Chairman, I want to commend you for having these hearings.

Senator METZENBAUM. Thank you very much, Senator Leahy.

Mr. SELIG. Thank you, and I wish I had time to respond.

Senator METZENBAUM. I am not going to deny you an opportunity to respond.

Senator LEAHY. Yes. Please respond.

Senator METZENBAUM. Try to be reasonably brief.

Mr. SELIG. As far as the labor situation, Senator Leahy, I merely would like to say to you that the clubs, after what I have kept saying over and over—have had a spirited 2- or 3-month debate in the most democratic of processes—did two things the other day. The first vote they took was in the event we reopen and wanted a work stoppage that it had to be a three-quarters vote, as opposed to a simple majority, to do that. That vote passed unanimously, 28 to nothing.

Then after a very spirited debate—and I want to say to you again, in an industry with significant economic problems—we could get into the whole situation with television, whatever, and we could be here for a hundred hours discussing it. The vote was 15 to 13 to reopen. Nobody talked about lockout. Hopefully, Don Fehr, who is here today, and Dick Ravage, the president of the player relations committee, will sit down and, in my judgment, begin to construct a system that is responsive, and that is where we are today.

I don't think there is anything threatening about that, in my judgment. On the contrary, I think if you look at these actions and you understand the statements of people, I think that, frankly, we have acted very responsibly and very sensitively.

Senator METZENBAUM. Mr. Selig, Senator Specter is up next.

Senator THURMOND. Mr. Chairman, I have a longstanding engagement in South Carolina. I am going to have to leave now to catch a plane to meet that engagement. I ask unanimous consent that Mr. Fehr be allowed to answer for the record two questions I have.

Senator METZENBAUM. Without objection, so ordered.

Senator THURMOND. I also ask unanimous consent that the members of panel four be allowed to answer four questions I have prepared.

Senator METZENBAUM. Without objection, so ordered. Would it be all right with you if they answer them in writing subsequent to the hearing?

Senator THURMOND. Yes, sir.

Senator METZENBAUM. All right.

Senator THURMOND. I also ask unanimous consent that the members of panel five be allowed to answer three questions I have prepared for the record.

Senator METZENBAUM. Without objection, so ordered.

Senator THURMOND. Mr. Chairman, since I have to go and I am the ranking member, I ask unanimous consent that Senator Specter be allowed to act as acting ranking member in my absence and have the privileges that I would have as ranking member.

Senator METZENBAUM. Without objection, so ordered.

Senator Specter.

Senator SPECTER. Mr. Selig, I have had to step out, so that I have not heard all of your testimony, but I will try not to be repetitious. In reading your prepared statement, I was very much impressed and congratulate you on your efforts to bring back the baseball team to Milwaukee after the Braves moved away even though, as you articulated it, the Braves were making money and had enormous attendance.

I understand that you testified that there will be no immediate plans in the future for expansion, and I would urge you to reconsider that. In taking a look at the statistics which I mentioned briefly in my opening statement, in 1901 there were a little over 76 million Americans and 16 baseball teams; now, there are more than 250 million Americans and 28 baseball teams. On a pro rata basis, there ought to be about twice that many teams. I commend the league for not allowing the Giants to be moved from San Francisco, although as I said earlier, I think that they shouldn't have been moved from New York to San Francisco in the first place. But I do believe that the forcefulness of your antitrust exemption, precluding moves from other cities, really underscores the necessity to open new markets.

I know you were here when I disagreed with what former Commissioner Vincent had to say about Tampa-St. Pete being an asset of baseball. Baseball is an asset of America. So my question to you is why shouldn't you consider right away opening new markets like Tampa-St. Pete?

Mr. SELIG. Well, Senator Specter, let me try to answer it again in the context—Tampa-St. Pete is a marvelous market and there is no question that it can support a major league baseball team, but I go back to something I did say earlier. I call it undigested expansion. Let me try to explain it in this regard.

You have an industry today, as I said earlier, that is struggling. It is struggling as an industry mightily. If you expand, there is further dilution. Forget the playing talent thing. We can debate that all day long, and there are those in this room who will disagree with that and there are those in this room who will agree, and most baseball people will agree that we can't stand the dilution.

After all, Senator Specter, we are just in the process of creating two teams now. In fact, we are trying to figure out how we replace a relief pitcher that we just lost and we don't have anybody, and every club goes through that. But that, I understand, can go on forever.

But what I am saying to you, as an economic matter, Commissioner Vincent said this morning that it didn't make sense economically. Now, we have expanded by two teams. The further dilution of that and the strain it puts on the Cleveland Indians and the Milwaukee Brewers and the Pittsburgh Pirates and the San Francisco Giants is something that would create, Senator Specter, more hardships than problems it would solve.

Senator SPECTER. Why is that true, Mr. Selig? Take a look at some of the players in the past: Cy Young won 511 games, Walter Johnson won 416 games, Christie Matthewson won 373 games, and Ty Cobb played for, as I recall, 24 years. Why not take a look at Pittsburgh, which lost Bonilla last year and which is about to lose Barry Bonds?

Mr. SELIG. You are making my point here, though. That is exactly the point.

Senator SPECTER. Well, OK, but there are other ways to deal with that. Why not go to revenue sharing? I have talked with the owners and executives of the Pirates and the Phillies, and have tried to talk to other people to get a practical grounding beyond just a reading of the cases.

Doug Danforth says there ought to be revenue sharing. Bill Giles would like to see revenue sharing if it is in conjunction with a cap. I don't mean to speak for these men, but I am accurately quoting them on recent conversations. The National Football League enjoys that wonderful antitrust exemption on pooling of television receipts. You pool national receipts for baseball, but you don't for local receipts, and there is an enormous imbalance where the Yankees get, I have heard, in excess of $50 million and the Pirates get a tiny fraction of that. Why not go to revenue sharing and some form of a salary cap to try to deal fairly with teams like the Pirates?

Mr. SELIG. Well, I will try and answer that. First of all, let me state, coming from the smallest market in baseball, you may know how I feel, Senator Specter, about revenue sharing. I said earlier that baseball itself is an industry that in 1992 is virtually a breakeven industry just on operations. So revenue sharing, per se—and I am not being quarrelsome about it because it is a very legitimate and a very sensitive issue that needs to be and will be discussed.

But revenue sharing, per se, without a player compensation system, cap—call it whatever you want—will not solve the problems. If what you are suggesting is that you need to establish a player compensation with different forms of revenue sharing, they must be interlocked. We have no disagreement, sir.

Senator SPECTER. Are the leagues going to move to consider revenue sharing and a cap?

Mr. SELIG. Well, there has been a lot of conversation about it, Senator Specter, and I feel quite a bit better about it. I think there has been in the last 3 or 4 months a lot of discussion on both of these issues, understanding, sir, that they need to be interfaced and interlocked.

Senator SPECTER. How soon do you think you will come to grips with that?

Mr. SELIG. Well, I am not a good prognosticator because I said I would only be in this job 2 to 3 months and it is almost 4, so I am not sure. But I think the issues of the day are forcing us to confront them immediately.

Senator SPECTER. I want to get into a couple of other subjects. Will there be a second round, Mr. Chairman?

Senator METZENBAUM. I think not.

Senator MACK. Mr. Chairman——

Senator METZENBAUM. Well, no, no; I want to change that. There will be a second round of 5 minutes.

Senator SPECTER. Well, let me broach—my time is still running—the issue of television. Former Commissioner Rozelle and his successor, Commissioner Tagliabue, have made a commitment that the Super Bowl will not go to pay TV until the year 2000. Would you be in a position to say that baseball will not go to pay TV for the World Series or the league championship series until the year 2000?

Mr. SELIG. I guess one should never say never to anything, but I can't foresee any circumstances today, Senator Specter, that we would put any of our postseason games on pay television.

Senator SPECTER. I will resume this on my next round. I thank you, Mr. Chairman. Thank you, Mr. Selig.

Senator METZENBAUM. Thank you. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. Mr. Selig, I am concerned about the word "we" that has appeared several times in your responses to questions, and there seems to be a "we" that is left out of that and that is the "we" of the millions of Americans in growth areas like Florida who have been denied access to major league baseball.

Do I interpret what you say that major league baseball at this time does not have any timetable for expansion of franchises?

Mr. SELIG. That is right, Senator Graham. We are just expanding now, as you know. I mean, the Marlins are going to play next year for the first time, and so are the Colorado Rockies.

Senator GRAHAM. Peter Uebberoth, when he was commissioner, had a vision that there would be two 16-team leagues——

Mr. SELIG. I know that.

Senator GRAHAM [continuing]. Many rationales for that—and indicated that had he continued as commissioner there would have been some schedule to achieve that goal. Is there any schedule likely to provide for the additional four teams that would be necessary in order to have two 16-team leagues?

Mr. SELIG. There is not, but if I could just briefly elaborate on that, Senator Graham, I said in my discussions with Senator Mack that, in my view, having gotten an expansion team and lived through a lot of expansions now, the worst thing that can happen to an industry is what I call so-called undigested expansion.

I submit to you that for us to rush into further expansion, with as many clubs having financial difficulty as they are having today, and the industry itself in a position that is far different from when Peter Uebberoth talked about his—is not only unreasonable and could have some devastating consequences for us; it is not fair to the people coming in with new teams.

Senator GRAHAM. What concerns me is that you seem to be applying marketplace principles to the issue of expansion; that is, that expansion would not be economically in the interests of major league baseball. Mr. Vincent said that and gave reasons that were both somewhat self-serving in terms of dilution of television revenue to the current ownership as well as the reasons that you give of digestion.

Then you seem to apply Socialist principles to the issue of relocation. If you are not going to expand into markets that clearly have the capacity to support major league baseball and you are not going to consider the relocation of teams that are in weaker markets, particularly multiple-team markets, isn't the effect of that to say that I have got to go back and Senator Mack has to go back to our citizens in growth areas, as well as communities such as this one, such as Phoenix, such as Buffalo, and say, you know, forget it, major league baseball has decided that it is not in its economic interests to expand and it is not going to apply marketplace principles to relocation?

Mr. SELIG. No, Senator, I really don't think so, and I will tell you why. I mean, I understand what you are saying and, believe me—I said to Senator Mack and I want to say the same thing to you. I understand the frustration because I remember the heartbreak that I went through, and it was hard for people to keep telling me

to hang in there when it looked like there was no end to the journey.

But I say to you, with the clubs in many places now struggling under this type of economic environment to be able to survive, I am not sure that creating more franchises that will have the same trouble in surviving will do anybody a great favor. I am not saying that there will not be expansion some day in an orderly way, but this thing that they could create 10 or 15 more franchises, or 4 or 6 or 8—I mean, I have read that, I have heard it. Look, the only thing that isn't honed with, frankly, is any pragmatism. It is in neither party's, in my judgment, sir, best interests.

Senator GRAHAM. Frankly, Mr. Selig, your economic arguments aren't very compelling when major league baseball continues to make decisions that are adverse to its economic interests and then looks to somebody else to pick up the costs, like you want local communities to pick up the costs. San Francisco is being asked now to, I think, get $1 a year for the use of the stadium, as opposed to $750,000. You are going to ask the players to take a cap on salaries rather than do those things that are within your own ability.

In your testimony, it is interesting to note that you say that in the first era of the Milwaukee major league experience, the Braves era, that the two most economically successful teams in the National League, the two with the highest attendance, were the Milwaukee Braves, the former Boston Braves, and the Los Angeles Dodgers, the former Brooklyn Dodgers.

I think it is instructive that major league baseball in the 1950's was making decisions based on what was in its best economic interest to take teams out of multiple-team cities and put them into fresh markets, and got the benefit of that, but today you are saying that major league baseball is not going to take that position.

It is interesting. In 1990, the combined attendance of the San Francisco Giants and the Oakland Athletics was 4.9 million. Last year, 1992, the current season, the combined attendance was 4.1 million. There has been a dramatic decline in the attendance in that two-city baseball franchise. The commissioner said that every criteria that he had set—declining attendance, losses by the franchise, an inadequate facility, and an indication of community support to provide adequate facilities—had been met, and therefore indicated to Mr. Lurie and to the public at large that the Giants were going to be available to relocate, leaving the Oakland Athletics, just as the Philadelphia Phillies, the Boston Red Sox, and the St. Louis Cardinals had previously been left.

Senator SPECTER. The Philadelphia Athletics, please.

Senator GRAHAM. No, no. The Philadelphia Phillies were left, as were the Boston Red Sox, as were the St. Louis Cardinals, to have the benefit now of a single franchise in a metropolitan area. What economic tears——

Senator METZENBAUM. I am going to have to cut you off, Senator Graham.

Senator GRAHAM. I just want to ask—and maybe my question doesn't need an answer, but what economic tears of sympathy are required for baseball when baseball has acted so adversely to its interests in the 1990's, as compared to an enlightened period in the 1950's and 1960's?

Mr. SELIG. Well, let me suggest to you, Senator Graham, that that does surprise me a little bit, and I will tell you why. Here we are, we are discussing social responsibility. All the people who have talked about the people who are still mad in New York because the Dodgers left—I have read and heard for years how irresponsible baseball was in the 1950's and in the 1960's because they allowed teams to move. I don't pass judgment. That was obviously long before my time.

We have desperately tried to keep teams, whether they are in Cleveland or Pittsburgh or somewhere else, and now you are going to say to me that they were more enlightened in the 1950's when a cab driver who drove me in New York last week told me that he never went to the baseball game because the Dodgers moved, because we had no conscience.

Senator GRAHAM. I mean, do you think major league baseball would be better off today if we returned to the era where the westernmost team was St. Louis and——

Mr. SELIG. No, no, I didn't say that. No, no, I didn't say that, but I also want——

Senator METZENBAUM. I am going to have to cut this off. This hearing is going to go on until tonight at midnight if the Chair doesn't take some strenuous action.

Mr. SELIG. I apologize.

Senator METZENBAUM. This hearing is going to have to conclude by 3, and I am actually going to change the rule that I previously made saying to Senator Specter that we would have a second round. I have many questions. We are going to have to submit some questions because I have, I think, eight or nine more witnesses and I can't be unfair to them, some of whom came from as far as San Francisco.

Senator Feinstein.

Senator FEINSTEIN. May I just quickly, Mr. Chairman——

Senator METZENBAUM. Excuse me, Senator Feinstein. Senator Simpson is here and I am going back and forth. I apologize.

Senator SIMPSON. Mr. Chairman, does the record reflect properly that on each occasion when you have admonished me I have stringently kept within the time constraints?

Senator METZENBAUM. Senator Simpson, on this one occasion particularly with this hearing, your conduct has been exemplary.

Senator SIMPSON. Just a damn jewel, right?

Senator METZENBAUM. Yes, a damn jewel.

Senator SIMPSON. Just a jewel. I knew you would say that.

Well, I have myriad questions, and I missed the first round and I thank Senator Feinstein, and I apologize sincerely. I think I referred to her earlier as Senator-elect, and yet I was right there the moment she was sworn in. So it shows you that I do need a good Christmas vacation. I think I was out on the road too long in the last endeavor.

I understand, though, that you took—and it is good to see you here. I know you through reputation. Many have contacted me and said, you know, listen to this man, he is trying his best. I think you come with the good will of many, as you all do. We are just concerned about how it is going to be with a commissioner in the future. Will this be an independent, free commissioner or, if not,

as Fay described it, a CEO-type thing, which certainly those of us who know business and reality know that when you have high-powered business people who have accumulated capital and bought a ball team, that is the way they think. They think of it like running their business.

I understand you took issue with the characterization of the Green Bay Packers as publicly owned, and you described it as a shareholder-type arrangement. How are they controlled? Is that kind of a public trading of stock? Would that be something in baseball? If not, why not?

Mr. SELIG. No, it is not publicly traded stock. In fact, it is stock that people bought in the 1950's, and occasionally there are people in their family who may give a share of stock away, Senator. It has obviously been grandfathered by the NFL. There is no other ownership like it. It is run by an executive committee and then a board, which I happen to be a member of, and it has been a remarkable entity that I think the NFL deserves a great deal of credit for preserving.

Senator SIMPSON. Well, I guess my problem is in hearing and trying to learn, and your issue of franchise relocation—and, boy, that is a hot one, obviously, right here with my colleagues——

Mr. SELIG. Yes, sir.

Senator SIMPSON [continuing]. And your review of matters with Senator Metzenbaum. Just a final question, then. What about this rule of providing a right of first refusal for cities? What we see, we who are from the Wild West who will never see a baseball team—that is why everybody in Wyoming will go to Denver and see the Rockies, and they will love that like they do with the Broncos in the NFL. But where are we when we see the attempt to, we are going to leave and if you will build us this we will stay?

This, to me, seems like an eternal conflict, and I am simply going to say what about a right of first refusal and you say, OK, you said you were going to leave and now the community is going to buy you up or people are going to gather together and buy you up?

Mr. SELIG. OK. Let me, if I can, Senator—we are going to build a new stadium in Milwaukee that, frankly, the Brewers are very hopeful to build. We have worked out a relationship with the public sector where they have committed to take care of the infrastructure costs and the Brewers are going to build a stadium. That is unique, in a sense, but I think this. I know that people say that sports teams will hold cities hostage.

However, I would also say to you that if you go to Baltimore Stadium, which I know you have been to many times, and you see the renaissance of that area and you see what that stadium has done for Baltimore—you go even to the new Comiskey Park, and even though there are those who say the White Sox held the city hostage, and I don't believe that was so, I think that is a great partnership. I think a city believes it is a major league city because it has it. It brings in millions.

Senator for instance, there is not a weekend of the 13 weekends that the Milwaukee Brewers are home you can get a hotel room in that area in that entire weekend. It brings, according to a study we did, well over $200 million into our area. Economists can debate all that. I merely submit to you that each city has to make its own

judgment, and I think the people in Baltimore are very proud of what they have done. I think the people in Chicago are very proud of what they have done. We are working out a different arrangement, Senator. We have held a gun to nobody's head because I wouldn't threaten.

Senator SIMPSON. Well, thank you. It is the issue of conflict and the issue of the power of the commissioner that attracts me to see whether we have something we should do. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Simpson. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Selig, it seems to me as I listen and also try to learn that these hearings come down essentially to three things. One is the role of the commissioner in the sport and the public interest and the element of social responsibility which you yourself referred to. The second is the issue of the Giants and Tampa Bay–St. Pete, and the third is the issue of an expansion policy. If this is, in fact, the American tradition, the American game, why can't we see more of it in America?

I would like to ask you a question on each of those. It is very difficult for me to understand, if you take the Ms. Schott incident and you take what baseball is supposed to be in this country, that there can be any delay in taking an action. You have got to ascertain the facts. It is difficult for me to see how owners are going to pass judgment one on the other; that the role of a strong, independent commissioner is really part of an antitrust exemption because if you don't have the strong, independent commissioner able to move rapidly and forcefully to protect social responsibility and the public interest, you are just a mere business. Would you respond to that, please?

Mr. SELIG. I certainly will, Senator Feinstein, and I agree with you. I have said several times today—I want to say it again—having been raised in this business by people who really understood back in the late 1960's and early 1970's when I came in, who really sublimated their own interests to the best interests of baseball, all of us understand the need for a strong commissioner.

I have expressed my feelings on our investigation of Ms. Schott. I will still submit that all of you would be doing it the way I am doing it and the executive council is doing it, given the circumstances.

Senator FEINSTEIN. So you would have no objection if that were attached to an antitrust exemption?

Mr. SELIG. Well, the integrity issues of the commissioner are certainly not going to be touched by restructuring, and I agree with you that they should be there and that baseball is best served by having a strong commissioner in those areas. There is no question.

Senator FEINSTEIN. The second point on the Giants, would you describe the procedure that you undertook to decide the Giants controversy?

Mr. SELIG. Well, after September 9 and 10 when the change took place, that was really the—you know, that is when I got involved in the issue, and I must say in all candor that Bob Lurie is a very close friend of mine. I do have this historical view of franchise

shifts which I guess I have to apologize to Senator Mack and Senator Graham for, but I do really believe—when talking to Bill White, the president of the National League at that time, and all the parties involved, I really felt we had a great responsibility to San Francisco.

So there was at that point in time an effort undertaken in which we really tried to see if there was a viable option. You know, when you go back and study baseball's relocation policy, Senator Feinstein, you will see that we always insist on local ownership and we always say when viable and available to us, and that was true, as I said, if you go back to Montreal, you go back to San Diego. This isn't the first time that has happened. Everybody is acting like, you know, this was some foreshadowing event, that our policy changed. Wrong, wrong, it did not change. It has been consistent.

While I can understand the heartbreak—and I understand it very well, having lived through some of it myself—I say to you that baseball acted in the socially responsible way and the McGowan group came forward and they have kept the team in San Francisco, and it is consistent with everything else that we have done. So that was the objective in the month of September and October, and as you know, fortunately, it had, for one group, a happy ending.

Senator FEINSTEIN. Yes, yes. Obviously, I am very happy about that, and I think Mayor Jordan will explain at what point the Giants decided that there might be outside ownership or be on the market for sale because I think that is part of the time line here. But I would like to go to the third point.

Mr. SELIG. Well, that is right. Excuse me. You know, after all, Commissioner Vincent had some discussions with Mr. Lurie and, frankly, there is a divergence of opinion on what took place. But I wasn't there, so there is no sense in me commenting on those.

Senator FEINSTEIN. Right. On the point of expansion, you have Tampa-St. Pete; they have built a stadium. They want a team, they have got a market for a team. It is hard for me to understand in this vast Nation, with all of the enthusiasm about baseball, why an expansion team couldn't be granted in this case. You made some comment earlier, well, we even have trouble getting a relief pitcher. Are you saying that there isn't talent available?

Mr. SELIG. Well, I don't want to get into the talent thing, but I would like to remind you of something. Everybody keeps saying why can't you do this and why can't you do that. Now, here is the NBA and the NFL, and I am not being the least bit critical, but they have a farm system that is quite sophisticated in terms of the colleges. I mean, players leave the colleges, have had great training, and come right to the big leagues. Yet, the NFL has the same number of teams, and the NBA has one less than we do.

So this matter of talent, this matter of economics—of course, we are concerned. Of course, we ought to be sensitive to Tampa-St. Pete and, of course, we are and it is up to us to try to work something out in the future. But I can't sit here today, with candor, and say to you that we have a plan and the plan is going to be x and y because there are many difficulties and you must understand all the internal difficulties, especially where you have an expansion just starting right now and you start to think of another expansion and what that does to them, and it sets off myriad problems. But

it wouldn't be in the two or four new cities' best interest if we willy-nilly expand without having thought it through.

Senator FEINSTEIN. But are you saying you are willing to take a look at it?

Senator METZENBAUM. Thank you very much. I am going to have to cut this off. I have just got too many witnesses, one of which, I know, wants to get back to San Francisco.

Thank you very much, Mr. Selig. Each of us, including myself and Senator Specter——

Senator GRAHAM. Excuse me, Mr. Chairman, but some of us who had anticipated there being a second round—now that there is not going to be, can we submit further questions, and also requests for documents and other information which will be necessary to answer the questions?

Senator METZENBAUM. Absolutely. I am sure Mr. Selig will cooperate. I myself have a number of questions; I know that Senator Specter does, and Senator Mack.

Mr. Selig, you have been very, very helpful. It is understandable why the major league owners have chosen you to be their spokesperson and their leader. We still have some questions, notwithstanding the very able answers that you provided us with. Thanks a lot.

Mr. SELIG. Thank you very much.

[Mr. Selig submitted the following material:]

STATEMENT OF ALLAN H. SELIG, PRESIDENT
OF THE MILWAUKEE BREWERS BASEBALL CLUB

Mr. Chairman, I am pleased to appear before the Subcommittee today on behalf of Major League Baseball. For the last 23 years I have been the President and Chief Executive Officer of the Milwaukee Brewers Baseball Club. I currently serve in the position of Chairman of Baseball's Executive Council. The Executive Council consists of myself, eight other Club owners (four from each League) and the two League Presidents. Baseball's governing documents provide that during a vacancy in the Office of the Commissioner all of the powers and duties of the Commissioner shall be exercised by the Executive Council. Those powers and duties include, of course, the Commissioner's authority to act "in the best interests" of Baseball.

Although I am confident that you requested that I appear today because of my interim position as Chairman of the Executive Council, I must candidly tell you that I necessarily bring with me all that I have learned and experienced during my 23 years of operating a baseball franchise in Milwaukee. My own views with respect to the unique role that our National Pastime plays in American society and the covenant that Baseball has with the millions of Americans who support our great game are all shaped by my personal experiences in Baseball, which began even before the Brewers were born in 1970. As I will explain in some detail, I was deeply and personally affected by what I consider to be a flagrant breach of that special covenant that Baseball

has with its fans when the Braves were allowed to move from Milwaukee to Atlanta in 1966. This is the type of breach of the public trust that Baseball might not be able to prevent if those upset with the decision to save baseball in San Francisco succeeded in stripping Baseball of its 70-year antitrust exemption. My personal experiences in Baseball leave no doubt in my mind that the public interest was served in San Francisco by Baseball's strong preference for franchises staying where they are. I am confident that you will agree that no legitimate public policy would be served by legislation that would force Baseball to constantly defend before antitrust juries the reasonableness of its efforts to promote franchise stability.

I understand that this hearing was called today for two reasons. The first is the concern of some over the National League's decision not to approve the relocation of the Giants from San Francisco to Tampa Bay/St. Petersburg that I have just touched on. The second is some concern over the circumstances surrounding the departure this Fall of former Commissioner Vincent and what Baseball's governing structure will look like in the future. I will address both issues. After you have heard from all of the witnesses scheduled to appear today, I am confident that you will conclude that in neither area did Baseball abuse its status under the antitrust laws or the special trust that exists between the Game and the American people.

BASEBALL'S STRONG PREFERENCE FOR FRANCHISE STABILITY

Let me first say to the many, many loyal baseball fans in the Tampa Bay/St. Petersburg area that I genuinely understand and appreciate the disappointment and the anger that you feel as a result of the National League's decision not to approve the relocation of the Giants to your fine city. As I will explain, I was in your shoes on several occasions in the 1960's when it took me 6½ years to bring a baseball team back to Milwaukee. But the National League's decision to keep the Giants in San Francisco, where they have successfully operated with loyal support from millions of fans for the past 35 years, was simply a reaffirmation of Baseball's long established policy against the relocation of franchises that have not been abandoned by their local communities. So although I understand the disappointment of the people of Tampa Bay/St. Petersburg, my vivid memory of the devastation caused in Milwaukee when the Braves went to Atlanta leaves me firmly convinced that Baseball's preference for franchise stability is not only an appropriate policy, but the only policy that is in the public interest.

The Boston Braves moved to my hometown of Milwaukee in 1953. Ironically, this was the first franchise relocation permitted in Baseball since the 1903 Agreement between the National and American Leagues. The Braves' stay in Milwaukee was, until their abrupt departure 12 years later, one of the great success stories in Baseball. Though a small town compared to most other Major League cities, the Milwaukee community

immediately embraced the Braves and supported them spectacularly. Immediately, the Braves became a part of the basic fibre of the Milwaukee community. The Braves drew 1.83 million fans in their inaugural season in Milwaukee, which was an all-time National League record. With increased seating the following year, the Braves became the first National League Club to attract more than 2 million fans, and then duplicated this feat in 1955, 1956 and 1957. Although these attendance figures are certainly high by today's standards for a market like Milwaukee, they were phenomenal back in the 1950's, when there were fewer home dates and when Milwaukee's County Stadium was smaller than it is today. In fact, the Braves led the League in attendance in 6 out of their 12 years in Milwaukee, and only the Dodgers drew more people over this 12-year period. As a result of this tremendous support, the Braves were also profitable in Milwaukee.

As a young man growing up in Milwaukee, I was one of the many ardent fans of the Braves. When the Braves put some shares of the Club on the public market, I bought 2,000 shares and was actually the largest public shareholder of the Club (although I owned only a very small percentage of the team). But in 1963 we started to hear rumors that, despite the success of the franchise in Milwaukee, future Hall-of-Famers Hank Aaron, Eddie Mathews and the rest of the Braves would be moving to Atlanta. The people of Milwaukee were outraged and they set about to do everything they could to keep their beloved team in town. I was the co-chairman of a local campaign formed to save

the Braves. The owners of the Club tried to move the Club after the 1964 season, but their stadium lease forced them to stay one more year. While the team played in Milwaukee during the 1965 season, the Club's management essentially abandoned them. I became a vice president of a Milwaukee civic group that actually ran the Braves during that season.

But despite our best efforts, the Braves did move to Atlanta at the end of the 1965 season. I was personally heartbroken and I can tell the Subcommittee that the city of Milwaukee and the state of Wisconsin were traumatized by the loss of that franchise. The people in my town felt hostility, bitterness and a deep sense of betrayal towards Major League Baseball for allowing the Braves to abandon us. Our loyal financial and emotional support of Baseball was rewarded with a slap in the face. The years of drawing more than 2 million fans per season were forgotten. The Club simply got up and moved to what it considered to be an even greener pasture and no one from Major League Baseball stopped them.

The void left in the community by the Braves' departure drove me to devote the next 6½ years of my life to trying to bring Major League Baseball back to Milwaukee. As I mentioned, I understand the disappointment and frustration felt by the people of Tampa Bay because I was there. On several occasions during those 6½ years I was certain that I had reached an agreement to purchase an existing franchise. Each time the deal eventually

fell through and the franchise stayed put. We also lost out when four expansion franchises were awarded to begin play in 1969.

Our break finally came when one of those expansion franchises failed after just one year of operation. By the end of that 1969 season, the ownership group of the Seattle Pilots concluded that it could not successfully operate a franchise in Seattle and so they began looking to sell the team. I led a group that signed a contract to buy the Pilots in October of 1969. But for the next six months, Baseball, acting responsibly and properly in my view, did everything it could to keep the Pilots in Seattle. It was not until the Pilots' owners put the team into bankruptcy and the bankruptcy judge ordered the sale of the Club to my group that Baseball reluctantly allowed the Club to move to Milwaukee. We actually purchased the Club on March 31, 1970, just days before the opening of the 1970 season. After 6½ years of heartbreak, the people of Milwaukee finally got back something that should never have been taken from them in the first place.

And that is the abridged version of how I became involved in Major League Baseball. The moral of my experience in Milwaukee is, to my mind, that the professional sports leagues in general and Baseball in particular should vigilantly enforce strong policies prohibiting Clubs from abandoning local communities which have supported them. The Milwaukee experience confirms for me that the appropriate policy of every professional sports league is to prohibit franchise relocations except in the

most dire circumstances where the local community has, over a sustained period, demonstrated that it cannot or will not support the franchise. This, I am happy to report to you, is precisely Baseball's policy. It is also the reason why the loyal supporters of the San Francisco Giants will continue to enjoy the performances of Will Clark and his teammates next year and for (we hope) many years after that.

But if Baseball were not exempt from the antitrust laws, a decision protecting franchise stability such as the one made in San Francisco would have certainly subjected Baseball to a costly and unpredictable treble damage lawsuit. Indeed, without its exemption, Baseball might not have even attempted to save the Giants for the people of San Francisco. Ever since a court concluded that the antitrust laws left the NFL powerless to stop Al Davis from abandoning the remarkably supportive (and profitable) Oakland market for greener pastures in Los Angeles,[1/] no professional sports league other than Baseball has been able to stop a franchise from abandoning its local community for what the owner perceives to be greater riches elsewhere.

This misguided application of the antitrust rules is why Oakland is today without its famed Raiders, although it does still have the publicly financed stadium it built for the team with its annual debt service of $1.5 million through the year 2006. It is also why Baltimore no longer has its beloved Colts,

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1/ See Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1986).

the football Cardinals now play in Phoenix rather than St. Louis, the basketball Clippers are in Los Angeles rather than San Diego and the basketball Kings play in Sacramento rather than Kansas City. From a purely personal standpoint, I feel for all the loyal fans in those cities who lost such important parts of their communities because of the Davis decision. I think it is a sad commentary that the NFL and the NBA could not prevent the hurt that these communities have had to endure.

In a thoughtful article recently published in a compilation of articles on the business of professional sports, Professor Gary Roberts, who I understand will also testify today, explained that the rash of NFL franchise moves following the Al Davis case after decades of franchise stability in the NFL is a "dramatic example" of the type of inevitable "chaos and inefficiency" caused by allowing juries and judges to second guess the "reasonableness" of a sports league's governance decisions under antitrust conspiracy doctrine.[2/] I heartily agree with Professor Roberts' conclusion that "[s]uch cases essentially have created a prescription for turning the business of running leagues over to hundreds of federal judges with vastly

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2/ The Business of Professional Sports 146 (P. Staudohar & J. Mangan ed. 1992). I have attached a copy of Professor Roberts' article to this statement for the Subcommittee's benefit. I believe that it persuasively and conclusively debunks the arguments of those who assert that the antitrust laws would solve all of Baseball's problems.

different philosophies and interests. In the long run nobody gains from such an unpredictable and irrational system."[3/]

Those who suggest that Baseball's problems would be solved by subjecting the Game's decisionmaking to the antitrust principles developed in the other professional sports simply ignore the undeniable fact that the application of antitrust laws has been the cause of the many problems, including franchise instability, that exist in the other professional sports today. Even Professor Zimbalist has recognized that "[a]pplying antitrust has hardly been a godsend to the erstwhile NFL cities of Oakland and Baltimore. . . . From the metropolitan perspective, antitrust is not the preferred remedy."[4/]

In fact, Congress was so appalled by the Raiders' abandonment of Oakland and the Colts' subsequent midnight move out of Baltimore that several members introduced a number of bills in 1984 and 1985 designed to promote franchise stability. These bills would have given the professional sports leagues the authority that only Baseball now has to stop franchises from leaving communities that have supported them. (See, e.g., S. 172, S. 259, S. 298). Although differences in proper approach to the problem prevented the passage of any of these bills, all sides of the legislative debate recognized the vital public interest in franchise stability. The only bill that was reported

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3/ Id. at 148.

4/ A. Zimbalist, Baseball And Billions: A Probing Look Inside The Big Business Of Our National Pastime 166 (1992).

out of Committee was S. 259, the Professional Sports Community Protection Act of 1985. The preamble to S. 259 reflects this public interest:

> [This bill is intended] to protect the public interest in stable relationships among communities, professional sports teams and leagues and in the successful operation of such teams in communities throughout the Nation, and for other purposes.

While S. 259 was not ultimately voted on by the full Senate, the debate made clear that a vast majority of the legislators agreed with the bill's finding that "it is in the public interest to preserve stability in the relationship between professional sports teams and the communities in which such teams may successfully operate. . . ." It is that same public interest that Baseball took into account when it kept the Giants in San Francisco and it is the same public interest that Baseball has successfully preserved for the last 20 years.

I am extremely proud of Baseball's record on franchise stability. Because Baseball's internal governance decisions have not been subjected to the antitrust laws, Baseball has by far the best record of the professional sports in the area of franchise stability. No baseball franchise was permitted to relocate between 1903 and 1952. While several franchises moved between 1953 and 1972) (including the Braves' move to Atlanta in 1966 and the two relocations out of Washington, first to Minnesota in 1961 and then to Texas in 1972) no Club has been permitted to relocate since the Senators' last move in 1972. The recent attempted relocations of the Seattle Mariners and the San Francisco Giants

are just the latest of a long list of potential relocations over the last 20 years that were prevented by Baseball's strong policy in favor of stability and against abandonment. In contrast to Baseball's unblemished record over the last 20 years, football and basketball have each had three franchise relocations since 1980 and hockey has had two.

As Baseball's franchise relocation record amply demonstrates, Baseball has in no way "abused" its antitrust exemption. While we have not flatly prohibited all franchise relocations, we do not allow a franchise to relocate simply so that the owner can earn greater profits. Indeed, the fact that the National League rejected the relocation to Tampa Bay/St. Petersburg despite the fact that it would have netted Bob Lurie a reported $15 million more than he was able to get in San Francisco shows that profit has not been the driving force in Baseball's decisionmaking. The San Francisco decision certainly cannot be said to be evidence that Baseball has abused its antitrust exemption. Accordingly, there is obviously nothing about Baseball's most recent decision in favor of franchise stability in San Francisco that provides a legitimate basis for altering Baseball's antitrust status.

Although the effects of eliminating Baseball's exemption cannot be thoroughly anticipated by anyone, it seems inevitable to me that the most immediate consequence would be that a number of teams in small markets would attempt to abandon some of Baseball's existing cities for what they think are better

economic conditions elsewhere. This is particularly likely today because Baseball has moved into an extremely difficult economic time. As more and more small market Clubs continue to lose money year after year, the temptation to move to a city that appears to offer a "quick fix" is likely to become overwhelming. Indeed, Baseball could be faced with Clubs jumping from town to town to take advantage of the "honeymoon" period that relocated teams enjoy in their first few years. It would obviously not be in the public interest to render Baseball impotent to stop such conduct.

THE RESIGNATION OF FAY VINCENT AND THE FUTURE GOVERNANCE OF BASEBALL

Some members of the Subcommittee have expressed concern over Fay Vincent's departure and what that departure means for the future of Baseball's Office of the Commissioner. Let me first say that the owners did not summarily dismiss Mr. Vincent for protecting the best interests of the Game and the public. When Mr. Vincent took office, he acknowledged that if he ever lost the confidence of a majority of the owners, he would resign. While Mr. Vincent had the full support of the owners when he took office under very difficult circumstances after the death of Bart Giamatti, he gradually lost that support. By September, 1992, 18 teams requested his resignation. Since he needed a majority of the Clubs to be re-elected to a second term, and since the decision on a second term could have been made as early as

January 1993, Mr. Vincent recognized that he had become a lame duck Commissioner and that he had lost the confidence of two-thirds of the teams. As a result, he honored his initial pledge and resigned.

I cannot speak for all of the teams which lost confidence in Fay Vincent. Many Clubs had many reasons. However, perhaps the most commonly articulated concern was his inability to develop a consensus among the owners on the vital issues that face the Game today. Rather than pulling together under his leadership, the teams were drawing further and further apart, and were advancing their parochial interests. In the opinion of an overwhelming majority of the Clubs, Mr. Vincent was simply not the person to lead Baseball during what they all realized would be a very difficult and challenging period. Since his departure, we have appointed a restructuring committee which is hard at work and we are attempting to face the difficult issues and build consensus. It does not help the Game to have numerous teams for sale and to have teams on the verge of bankruptcy. Nor will it help if eventually only a few teams can afford all of the top players; fans will soon lose interest.

The Executive Council is now exercising the powers of the Commissioner's Office, including its "best interests" powers. Moreover, although the restructuring committee has not yet completed its work, I can say that there will still be a Commissioner who will continue to have strong powers to protect

the integrity of the Game. There is in my view no reason to change the current laws to do something more.

In the meantime, Baseball's responses to the two most recent relocation attempts demonstrate that Baseball remains committed to upholding the public's trust in the Game. As the Subcommittee is aware, there was an effort to move the Seattle Mariners to Tampa Bay prior to the time Commissioner Vincent resigned. That effort was stopped and a new owner was found who made a commitment to keep the Mariners in Seattle. The proposed move by the San Francisco Giants took place after Mr. Vincent's resignation. It also was stopped by Baseball and a new ownership group was found that made a commitment to keep the Giants in San Francisco. And I can assure you today that this consistent policy of favoring stability over abandonment will continue regardless of the ultimate conclusion of the current restructuring deliberations.

CONCLUSION

When the Supreme Court reaffirmed Baseball's antitrust exemption in the Flood case in 1972, it noted that over 50 bills had been introduced with respect to Baseball over the previous 20 years. The Court found it significant that the only bills that passed either the House or the Senate would have acted to expand the antitrust exemption to the other professional league sports. Those bills stripping Baseball of its exemption never made it out of Committee. Since 1972, Congress has considered scores of

additional bills regarding Baseball and the antitrust status of professional sports. Again, the only bill to make it out of Committee would have expanded the antitrust exemption for all professional sports leagues. In short, Congress has often looked at Baseball's position with respect to the antitrust laws and it has always reaffirmed Baseball's status because Baseball's conduct has always been consistent with the public interest.

Club owners and the governments and communities in which Baseball currently operates have all relied on Baseball's antitrust immunity which has now existed for 70 years. As explained above, nothing has happened recently to suggest that Baseball has abused its exemption so that Congress should reverse its long-held position on this issue. If anything, recent events such as Baseball's decision to preserve the National Pastime in Seattle and San Francisco make it all the more clear that Baseball's status should remain as it has for the last 70 years. Baseball's critics who have advocated for the removal of Baseball's exemption have consistently failed to describe the ways in which the performance of Baseball would better serve the public interest if it operated under the antitrust rules which the courts have unfortunately applied to the other professional sports leagues. The same is true today. The fact of the matter is that the threat of antitrust liability has caused nothing but confusion and instability in the other professional sports for both the franchises' investors and the communities in which they operate. Baseball has continued to uphold its unique covenant

with its fans and it deserves to retain its current status under the antitrust laws.

I sincerely thank the Subcommittee for the opportunity to speak before you today on these extremely important issues.

Professional Sports and the Antitrust Laws

7

Gary R. Roberts

Perhaps no area of law has impacted professional sports more over these past twenty years than antitrust. Since 1966 the National Football League alone has had to defend over sixty antitrust suits. The National Basketball Association, and the National Hockey League, and even upstart leagues like the now-defunct World Hockey Association (WHA), American Basketball League, and the United States Football League (USFL), have also been frequently hit by such suits. Only major league baseball, which enjoys a broad antitrust immunity as a result of three U.S. Supreme Court decisions, has been able to operate without the substantial risk and expense of antitrust litigation.[1]

Although antitrust law seems mysterious and complex, its source is surprisingly simple. Except for the statute governing mergers of two firms, the overwhelming bulk of antitrust law derives from the first two sections of the 1890 Sherman Act. Section 1 prohibits "every contract, combination, . . . or conspiracy in restraint of trade or commerce," while section 2 makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" trade or commerce. Virtually all sports antitrust cases involve one or both of these vague statutory proscriptions—conspiracies to restrain trade and monopolization.[2]

Antitrust cases against professional leagues or their member clubs generally are of two types. The first involves disputes between two different leagues or between member clubs of different leagues. The second, and more significant, category includes all cases brought by anyone having a dispute with a league and alleging that a league rule or decision constitutes an unlawful section 1 conspiracy among the individual member clubs of the league. It is the second type of cases—those involving so-called intraleague conspiracies—that has been the most frequent and problematic, and it has had the greatest impact on professional sports.

The Interleague Dispute Cases

The interleague type of case is typically brought by a young struggling league claiming that an older and more established league monopolized or attempted to monopolize some part of the sports entertainment market in violation of Sherman Act section 2. To win such a claim the plaintiff must prove two things: (1) that the defendant has, or is close to having, monopoly market power in some relevant market or line of commerce, and (2) that the defendant has acted improperly in acquiring or maintaining that monopoly power. Because these issues are economically complex and often very difficult to prove, plaintiffs also often allege that the defendant league's conduct involved a section 1 conspiracy in restraint of trade. But regardless of the legal theory, the essential claim is always that a well-established league or its teams acted to cripple or destroy a rival league or teams in order to maintain a monopoly position.

As suggested above, antitrust cases between leagues have been few and have had relatively little impact on the structure or operation of professional sports. The most recent example is the highly publicized case the USFL brought against the NFL, which primarily claimed that the NFL's contracts with the three major television networks unlawfully monopolized professional football. After a lengthy trial in 1986, a Manhattan jury found that the NFL had monopolized professional football; however, apparently because the jury believed that the USFL went bankrupt primarily because of its own mismanagement, it awarded the USFL damages of only one dollar (which by law were automatically trebled to three). When the verdict was affirmed on appeal, the demise of the USFL became permanent (*USFL v. NFL*, 842 F.2d 1335 [2d Cir. 1988]). In a similar case in 1962, the old American Football League claimed that the NFL monopolized professional football by putting teams in Dallas and Minnesota and threatening to expand in other cities in order to disrupt the AFL's initial operations. The case resulted in a verdict for the NFL (*AFL v. NFL*, 205 F. Supp. 60 [D. Md. 1962], aff'd, 323 F.2d 124 [4th Cir. 1963]).

The WHA was more successful in its suit against the NHL in the early 1970s. The essence of this claim was that the NHL monopolized professional hockey by including a clause in all of its clubs' player contracts giving the club a permanent renewable option on the player when the contract term ended, which prevented a player from playing for any other hockey club until his NHL club no longer wanted him. Thus the WHA was unable to employ good hockey players if they had ever played in the NHL and, as a result, could never seriously compete with the NHL. In 1972 shortly after the case was filed, the district judge issued a preliminary injunction against the NHL's enforcement of these "lifetime reserve clauses" based on his finding that at trial they would probably be found to constitute unlawful

monopolization (*Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 [E.D. Pa. 1972]).

Unfortunately, the injunction was of little help to the WHA; by 1979 all of its clubs were insolvent and had disbanded except for the teams in Hartford, Winnipeg, Edmonton, and Vancouver, all of which joined the NHL. The case did, however, lead to a settlement between the two leagues and their player unions under which the NHL's lifetime reserve clause was replaced with a much less onerous "free agent compensation system" that allowed a player to sign with any hockey team when his contract expired, subject only to the new club giving some arbitrated compensation to the old club, but only if both clubs were NHL members.[3]

Another group of interleague cases has involved stadium lease or arena lease provisions that give the leasing club an exclusive right to use the facility for its sport. If a facility is realistically the only one in the area capable of housing a professional team, the exercise of the exclusive rights clause forecloses other leagues from putting a competing team in the city. Several cases have involved plaintiffs who were trying to obtain franchises in upstart leagues who alleged that such lease provisions allowed the established local team to monopolize the local market in its sport. These plaintiffs have generally been unsuccessful, either because alternative facilities were available or because the team could not show that they would have obtained a franchise in the new league even if the stadium had been available. The only such case to result in a published opinion was eventually settled for $200,000 after thirteen years of litigation. The ruling in this case makes it reasonably clear that the Sherman Act is violated if a new league is excluded from a city because of such a lease provision, at least unless very strong business justifications exist for restricting the newcomer's access to the facility (*Hecht v. Pro-Football, Inc.*, 570 F.2d 982 [D.C. Cir. 1977], cert. denied, 436 U.S. 956 [1978]).

Another interleague case involved a challenge by the North American Soccer League (NASL) to the NFL's proposed by-law that would have prohibited majority owners or chief executive officers of NFL teams from owning an interest in franchises of other sports leagues. Specifically at issue was the NFL's efforts to force Lamar Hunt, who owns the NFL's Kansas City Chiefs, and Joe Robbie, who owns the Miami Dolphins, to divest their interests (or in Robbie's case, his wife's interest) in NASL franchises. Because of the shaky financial position of the NASL, the divestment, combined with the paucity of non-NFL owners willing to invest in the NASL, might have pushed the NASL over the financial edge (over which it eventually went anyway). Curiously, the primary claim in the case was not that the NFL monopolized any relevant market, such as the league sports autumn entertainment market, but that the NFL clubs unlawfully conspired among themselves under section 1 to restrain trade. After the district court

in New York granted a summary judgment for the NFL, the court of appeals reversed and entered a judgment for the NASL on the grounds that the NFL clubs had conspired to restrain the previously unheard-of sports capital investment market (*NASL v. NFL*, 670 F.2d 1249 [2d Cir.], cert. denied, 459 U.S. 1074 [1982]).

The *NASL* decision has been severely criticized, not only because of its result but because of its doctrinal justification. Justifying the decision on conspiracy grounds rather than monopolization grounds seems totally at odds with standard section 1 principles, which encourage vigorous independent competition between separate entities, such as two different leagues. Thus, although the decision clearly invalidated the NFL's cross-ownership ban when applied against the struggling NASL, it is probably limited to its specific facts—that is, the ban probably does not violate the law when applied by the NFL against cross-ownership in established sports leagues like the NHL, NBA, or major league baseball, or rival leagues in the same sport, like the WFL or USFL.

Generally, with the possible exception of the anomalous *NASL* case, the decisions in these interleague cases have been unsurprising and unremarkable, and they have had little impact on either the law or the structure of professional sports. Most doctrinal principles relating to monopolization are reasonably clear and have not changed, and in each of the cases the outcome primarily turned not on the interpretation or application of the law but on what the juries believed were the real facts of the case. While jury findings of fact usually are significant for a particular case, they generally have little or no impact on future cases or the general state of the law.

The one legal issue in these sports monopolization cases that is problematic, and will probably remain so, is how to define the relevant market that the plaintiff claims has been monopolized. The market definition must include both a product and a geographic dimension—for example, professional football entertainment in the United States; ticket sales for football entertainment (high school, college, and professional) in the New York metropolitan area; network television rights for all kinds of entertainment in the United States; television rights for all sports entertainment in New England and so on. The possibilities are almost endless. The general rule for making this determination is that the proper market includes all the different brands and products sold within the appropriate geographical area that are economically competitive with one another—that is, those that serve approximately the same purpose for the average consumer so that consumers can switch from one to the other if price or quality materially changes.

Defining the proper relevant market is extraordinarily difficult. For example, how can one identify everything that meaningfully competes with NFL football in a single market description? What percentage of people who

now buy tickets to New York Giants football games would, if the Giants' ticket prices increased by a certain amount, spend their entertainment dollars attending college football games? Would they attend Yankee baseball games or Broadway shows or watch cartoons on television? Adding in the geographic dimension, how far would disgruntled Giants fans be willing to travel to find a substitute activity? How many would choose gambling in Atlantic City or skiing in Vermont? Then again, what effect would the amount of the ticket price increase have on all these factors? No one can possibly know. Nonetheless, based on whatever information is available, a plaintiff must establish that some group of actual or potential product alternatives exists that is generally substitutable to a sufficient number of consumers within an identified geographic area so that they comprise a relevant market that the defendant has monopolized.

The market definition problem is not unique to sports cases. Defining a relevant market is a nightmare in almost all monopolization cases. Because of the complexity and conceptual difficulty (if not impossibility) of doing the necessary economic analysis, courts generally either have reached a knee-jerk conclusion (camouflaged by confusing rhetoric), or have ducked the issue by leaving the question to juries to do what they instinctively feel is just. But the fact that a defined relevant market is an essential element of a monopolization case always injects a great deal of unpredictability into these interleague cases.

This problem could be greatly reduced in cases between two leagues in the same sport, like the USFL and the NFL, simply by identifying the relevant market as the labor market in which the leagues employ their players instead of focusing on some market in which the leagues sell their entertainment products against one another. The labor market is undoubtedly the proper market for relevant concern. If the NFL wanted to drive the USFL out of business, by whatever method, it was not because it was seriously concerned about NFL ticket buyers or television networks switching over to the USFL. It wanted to stop the rapid escalation in player salaries caused by the USFL's competition in the market for hiring football players. If the NFL was trying to monopolize anything, it was this labor market. This market is easy to define, and a plaintiff could probably prove that an established league like the NFL or NBA has enormous market power in it.[4] By focusing on the player market in cases between two leagues in the same sport, plaintiffs would greatly increase their chance of success.

Ultimately, however, these types of cases will probably never be very significant in altering the shape of professional sports because of the great likelihood that in each sport no more than one established league will ever exist for more than a brief period. Since World War II, one hockey, two basketball, and four football leagues have sprung up to compete against the

NHL, NBA, and NFL, respectively, and not one has survived more than a few seasons. The public's demand for a single acknowledged "world champion," and the need over the long run to control player costs and competitive balance among teams (which cannot be done effectively in either league if two are competing in the same sport), make it quite likely that the established league in each sport will never face permanent competition or be supplanted by an upstart league. Thus no matter what legal doctrines are developed or what the outcome of any interleague monopolization cases may be, it is unlikely that these cases will ever be of long-term or structural significance.

The Intraleague Conspiracy Cases

The second type of sports antitrust case involves challenges to any league rule, decision, or action ("league conduct") by some dissatisfied person claiming that the conduct constituted a section 1 conspiracy of the league's member clubs to restrain competition among themselves. These cases are by far more frequent, more unpredictable, and doctrinally more problematic than the interleague monopolization cases.

Cases in this category have involved virtually every type of league conduct. For example, league rules barring players from the league for a variety of reasons[5] and rules assigning each player to a specific league member (like the player drafts and reserve rules)[6] have been attacked by individual players, player unions, and rival leagues. Persons disappointed with not being able to own a team have brought cases challenging league decisions not to expand the league membership[7] and not to approve the sale of a franchise.[8] Stadiums seeking league tenants and even league members have challenged league decisions not to allow teams to relocate their home games to a new city.[9] The Justice Department, fans, and television stations have sued over league broadcasting contracts and practices.[10] Equipment manufacturers and players have even challenged playing-field rules.[11] In each case, the allegation was that the league's action had involved a conspiracy of the individual league members to restrain competition among themselves in some commercial market.

Although the defendant leagues have won the overwhelming majority of these cases, a few widely publicized cases in which leagues lost have had an enormous impact on the structure and operation of professional sports. The most notable are the *John Mackey* and *Yazoo Smith* cases from the mid-1970s, which invalidated respectively the NFL's reserve system and college player draft as they were then structured, completely altering the shape of labor relations in professional sports. In the infamous *Los Angeles Memorial Coliseum* case the court found the NFL's efforts to require the then

Oakland Raiders to play its home games in Oakland (as it had contractually agreed to do) instead of in Los Angeles to be an unlawful conspiracy of the other NFL clubs. What was so significant about these decisions was not only the way they dramatically and directly changed the face of the game but how they were based on legal principles that were confusing, aberrational, and inconsistent both with other antitrust decisions and with antitrust doctrine generally. The legacy of these cases is that today there is virtually no conduct of any sports league (other than baseball) involving any matter that cannot conceivably be challenged successfully in the right court.

In order to understand why these conspiracy cases are so doctrinally confounding and troublesome for league operations, it is necessary first to understand what section 1's condemnation of conspiracies is all about. The basic theory of free enterprise is that the products consumers want will be produced in the greatest quantity, at the highest quality, and at the cheapest price if production decisions conform to the dictates of supply and demand forces. This equilibrium will be achieved when independent producers of the same or functionally interchangeable products compete with each other to attract customers. It is through competition and each firm's desire to attract the greatest number of customers that prices are kept to a minimum and quality maintained. It is for this reason that antitrust law seeks to maximize competition by outlawing both (a) one firm driving all competitors out of business (monopolization) and (b) groups of competitors getting together to agree on the price or quality of their otherwise competing products (conspiracies).

But section 1's condemnation of "every conspiracy in restraint of trade" is not as simple as it might seem. Obviously, totally independent companies like General Motors, Ford, and Chrysler cannot agree on the price or design of pickup trucks without illegally conspiring, but what about the Chevrolet, Buick, and Cadillac divisions of GM agreeing on the price of their cars? Because these are merely different divisions of the same company, it is undisputed that they constitute a single legal person whose internal actions are not "conspiracies." This distinction underscores a critical aspect of antitrust doctrine that many courts have failed to appreciate in sports league cases—namely that every type and form of cooperative action between separate persons cannot possibly be illegal.

It thus becomes crucial for section 1 cases that the law define in some rational way which persons or entities are to be considered independent of each other—or, put another way, which persons or entities the law will require to be competitors of each other. When such independent persons or entities, who ought to be competitors of each other, reach agreements on how to conduct their business or sell their products, they may unlawfully conspire to restrain competition. But when persons or entities that are

merely employees, partners, or divisions of a single business firm make agreements or joint decisions in an effort to operate the firm profitably, their actions are clearly ordinary lawful cooperation.

In most factual contexts, making this distinction has not been a significant problem for courts. Clearly, the different employees of a single corporation cannot illegally conspire with respect to carrying on the corporation's business. The partners in a recognized partnership (whether individual people, corporations, or other partnerships) never illegally conspire when making decisions about the partnership's business. Different divisions, and even different subsidiary corporations that are wholly owned by the same parent corporation (since the Supreme Court's *Copperweld v. Independence Tube* decision in 1984), can never illegally conspire.[12] There is only one type of business entity that continues to give the courts fits—the joint venture. Unfortunately, this category includes sports leagues.

It is curious that for virtually every other legal purpose, joint ventures and partnerships are treated identically. In fact, under standard business organization law principles, joint ventures are merely a kind of partnership different from more typical partnerships only in that joint ventures are created by their partners for a narrow specific purpose or for a limited period of time. Thus the special fiduciary obligations of partners to the business, the liability of partners for the business's debts, and the authority of partners to bind the business and the other partners are all exactly the same whether the business is a joint venture or a more typical partnership. For seemingly arbitrary reasons, federal antitrust courts have singled out joint ventures and generally treated the internal business agreements of their partners as conspiracies subject to condemnation if found to be "unreasonable," whereas agreements among traditional partners have never been held to be unlawful conspiracies.[13]

From the standpoint of antitrust policy (namely, the advancement of consumer welfare), the distinction between joint ventures (like sports leagues) and traditional partnerships and corporations is not justified. It is simply nonsense to allow judges or juries unfamiliar with the industry to second-guess the wisdom of business decisions made by persons whose business is affected. When the members of General Motors' corporate board of directors collectively decide where GM's factories will be located, or when the partners in a law, medical, or accounting firm collectively decide where to locate their offices, nobody in his right mind thinks the decision should be considered a conspiracy and tested for reasonableness by some judge or jury. But when the governing board of the NFL collectively decides that eight league games every year will be produced in Oakland instead of Los Angeles, the decision is treated as a conspiracy, which a Los Angeles judge

and jury can render illegal if they believe it to be unreasonable (as happened in the *Los Angeles Coliseum/Raiders* case).

This distinction also has been made with respect to the hiring standards and employment practices of corporations, partnerships, and sports leagues. If IBM (corporation) or a major national accounting firm (partnership) decided not to hire anyone who had not completed college or insisted that employee John Doe would have to agree to work at the company's Kansas City Office if he wanted to be hired, nobody would question the policy as a potentially unlawful conspiracy. But when a sports league declines to employ players who have not completed their years of college training or requires quarterback John Doe to play for the team in Kansas City, courts condemn these decisions as unreasonable conspiracies (as in the *Denver Rockets*, *Mackey*, and *Smith* cases).[14]

The reason generally given by courts and plaintiffs for this distinction is that, unlike corporations and partnerships, sports leagues are not really single business firms; they are a group of separately owned teams with distinct legal identities that maintain their own separate books and have different profits and losses. While these points are superficially true, they are wholly irrelevant to antitrust policy because they overlook the fundamental nature of the business of a sports league and the relationship among a league's member teams. In fact, the antitrust policy of maximizing consumer welfare can be furthered only by treating league conduct in exactly the same way as the law treats corporate and partnership conduct. To understand why this is so, one must first recognize that the unique product a sports league produces is athletic (not economic) "competition," which requires separate teams as a necessary camouflage for the inherent partnership nature of a league.

Sports leagues produce a unique type of entertainment product—team athletic competition. At a bare minimum two different teams are always necessary to produce this product. Every game is the product of at least a two-team joint venture. Although game tickets and television broadcasts are often marketed as, for example, "Washington Redskins football," this single reference is quite misleading. The Redskins team alone is incapable of producing any football entertainment; the proper designation is "NFL football."

Furthermore, although a single NFL game may be a discrete entertainment event for some marketing purposes, it is not a separate product for any meaningful economic or antitrust purpose. The product is actually the league's annual series of 224 regular season games leading to a post-season tournament and a Super Bowl champion. It is only because each game is ultimately connected to the championship that it has substantial value. An

isolated scrimmage game between two teams that did not count in any league standings or statistical rankings would be far less attractive to consumers, and it certainly could not command millions of dollars in television fees or twenty or more dollars a ticket from tens of thousands of fans.

A league's product is thus jointly produced, and no team produces anything by itself. Furthermore, no individual game is solely the product of even the two participating teams; the value of every game is largely generated by the trademark and imprimatur of the league and the cooperation and participation of all league members, each of which must recognize and accept the results of every game. Each individual team's fortunes, no matter how the league elects to divide total league revenues and expenses, are to a greater or lesser extent inherently affected by the success or failure of every single league game. Thus decisions affecting the structure of the league or the production or marketing of any league game affect the entire league, and every member has a stake and an inherent right to participate in those decisions, just as a partner in a law firm has a stake and a right to vote in his firm's business decisions. For example, although the location of the Raiders' home games will most greatly affect the Raiders (but only because of the league's pragmatic decision to give the majority of locally generated revenues to the home team), it also affects every other NFL member.[15] Without the acceptance, recognition, and occasional participation on the field of the other NFL members, those Raiders home games would be of very little economic value.

Accordingly, no individual sports team is capable of any production without the full cooperation of the other league members, and each team's economic existence, as well as its profits, depends entirely on its being an integral part of the league. It logically follows that these members are all inherent partners in the business of producing the league's wholly integrated entertainment product, and thus the teams are not and cannot be independent economic competitors of one another unless they voluntarily allow themselves to be for practical business reasons.[16] In short, it is the league, not the individual club, that is the relevant business firm for proper economic and legal analysis, and cooperation or agreements among the members should be indistinguishable from those among the members of any partnership or the directors of any corporation.

From this perspective, a Minnesota Vikings home game is not a Vikings product that the team is entitled unilaterally to produce and market any way it chooses; it is always the product of at least one other team, and, as part of the integrated NFL season, it is also the joint product of every member club. If one league member has a right to determine when, where, against whom, or under what rules it will play home games, logically the same set of rights should exist for each team regarding road games. But obviously

under such a disorganized regime no league product could be produced. Only when all the teams agree to some method for deciding these production issues can there be a league schedule and a valuable entertainment product. Clearly, there is no economic justification for legally requiring any of these decisions to be made by individual teams unilaterally.

Because every NFL game is necessarily the product of the entire league, the structural, production, and marketing decisions about every game are by definition league decisions. The league may elect for pragmatic reasons to have some of these decisions made by the individual teams (e.g., setting home game ticket prices or player salaries); by the hired commissioner (e.g., hiring game officials, drawing up the schedule of games, or negotiating network television contracts); or by some percentage vote of the member partners (e.g., determining the location of teams, setting the size of team rosters, or agreeing to collective bargaining agreements). But regardless of what decision-making methodology the league elects to use for any given matter, it is undeniable that the inherently joint nature of the league and its product makes every decision, expressly or tacitly, a decision of the collective league membership. For example, when the Raiders decided to play its home games in Los Angeles, it necessarily imposed a leaguewide decision on every NFL team to play extra road games there and to recognize and accept the results of the relocated games.

Despite the inherently joint or partnership nature of a sports league, many are skeptical. The reason is, as noted earlier, that in some ways leagues do not look like typical partnerships because each club has its own owner(s), maintains separate books, and earns its own profit or loss. In short, the teams look like independent and vigorous competitors. It is difficult for many to believe that the owners and employees of the various league teams, who often publicly insult and deride each other and threaten to commit mayhem on one another, are really business partners. But the economic reality is that they are and that these appearances are merely deceptive reflections of the unusual nature of the league product—athletic competition.

Because the league's product is athletic competition, it must ensure at least the appearance of honest and vigorous athletic rivalry among league members. Thus member teams are allowed to operate with a great deal of autonomy. It would look very suspicious to many fans and greatly diminish their enthusiasm if the clubs were largely controlled from league headquarters and seemed to lack financial incentive to perform well on the field and efficiently in the front office. But the fact that the league must create both the appearance and reality of intense athletic competition does not lead to the conclusion that the teams should be treated under the law like unrelated business competitors, which they clearly are not.

The economic competition that many mistakenly think exists between the teams because of their separate identities and limited operational autonomy is not unlike the internal rivalries within any company operating through semiautonomous profit centers. The only real difference is that leagues openly advertise and promote this internal rivalry because they want to heighten the appearance of vigorous athletic competition, whereas more typical businesses have no incentive to create a public appearance of "infighting." But the law should recognize that deliberately created athletic competition and internal rivalry in the league does not mean that the league members must treat each other like independent business competitors who are engaging in a conspiracy every time the league acts.

Furthermore, the fact that the individual teams make different profits or losses is not material to the antitrust issue: if all league revenues were put in a single common pot and all league expenses paid out of that pot, with the remainder being distributed evenly among the clubs, nobody would doubt that the league was a true partnership. The reason leagues do not operate in that fashion is that it would destroy any incentive for the clubs to field a top-quality team or keep costs down. To run the day-to-day operations of every team from central headquarters would be foolish from a management standpoint because it would destroy the necessary appearance (and perhaps the reality) of honest athletic competition.[17] It is clearly good business for each club to be responsible for its own expenses and the quality of its team.

The practice of having many decisions made and profits determined at a decentralized level certainly should not distinguish leagues from partnerships or corporations, many of which have the same profit-center type of management structure. In a law firm, an unequal profit-sharing arrangement or one that allows the lawyer members great latitude to develop their own practices is not grounds for treating every decision of the firm as an internal "conspiracy" subject to review by a jury for reasonableness. The decentralized sports league structure should be treated no differently.

It should be clear that treating every league rule, decision, or act as a conspiracy of the member teams is pure folly. It is, of course, true that a league may make bad business decisions from time to time, just as any business might. A league may even act irrationally or with improper motives. In short, league conduct may occasionally injure consumers or be unreasonable. But the business decisions of every corporation and partnership are sometimes foolish or injurious to consumers, yet that does not mean that antitrust policy is furthered by treating their every decision as a conspiracy. If every time a business acts it is an antitrust conspiracy of the people making the decision, then every rule, decision, or act can be challenged by any disgruntled person. Business entities that are truly single pro-

ductive firms simply could not survive the cost and uncertainty of a system in which they had to defend the economic reasonableness of every company decision to a jury whenever an employee, customer, supplier, or competitor did not like that decision.

This is the very reason why there is no question that the decision of a corporation or a partnership to locate a branch office in Oakland instead of Los Angeles, to require employees to have a college degree, or to require employee John Doe to work in the company's Kansas City office does not constitute an illegal conspiracy of the company's partners or board members. It is also the reason why a sports league decision to have its franchises located in specific cities, to require players to have exhausted college eligibility requirements, or to force its players to play for designated teams should not be considered an illegal conspiracy of the teams. It is simply preposterous to presume that juries can generally make such league business decisions more wisely than can the very partners whose profits depend on acting wisely. It is for this reason that the legal doctrine allowing every league action to be reviewed by a court as a Sherman Act section 1 conspiracy of the league partners is irrational and contrary to antitrust policy and should be permanently scrapped.

Nevertheless, a few remaining policy concerns cause some to insist that courts should continue to use anticonspiracy law to review the business decisions of sports leagues. These concerns flow from the fact that in each sport there has always been, except for brief intermittent periods, only one league. For many purposes, this situation allows the league virtually to dictate terms to many with whom it deals. For example, a player excluded from the league, assigned to a team he strongly desires not to play for, or paid a salary he believes is unfair may have no alternative except not to play at all. A stadium, city, or equipment supplier with whom a league decides not to do business is often simply out of luck. Few corporations or traditional partnerships have that kind of power to impact the lives of its employees, customers, or suppliers so severely. Thus the notion persists that courts should exercise authority to review the decisions of leagues under section 1 in order to ensure that league power is exercised fairly.

This concern is certainly not frivolous. The problem, however, is that the underlying cause of the ability of leagues to wield such power is that for some purposes, leagues usually possess monopoly power—for example, in the labor market for players. Monopoly power in any industry is problematic from the standpoint of social and economic policy, which is precisely why Sherman Act section 2 proscribes monopolization and attempts to monopolize. But the law does not, and should never, make it unlawful for a business firm that has lawfully acquired monopoly power to operate, and it should never subject that firm's every business decision to a review on

vague reasonableness grounds by a judge or jury. What is illegal is conduct designed to achieve or maintain monopoly power, not conduct that merely exercises it.

If a league has acted unlawfully to become or stay the only major league in its sport, it can and should be found in violation of section 2. That is what the interleague cases have all been about. However, if a league has not improperly become a monopoly or improperly remained one (perhaps because it is a natural monopoly), the antitrust laws should leave it alone. To try to correct a problem of monopoly power by allowing courts to review every league business rule or decision under irrelevant section 1 conspiracy doctrine, and to strike down on an ad hoc basis any decision with which the court disagrees or which it believes to be unfair, inevitably engenders chaos and inefficiency. The rash of NFL franchise moves and the frequent threats of moving by individual NFL owners that have followed the *Los Angeles Coliseum* case, after decades of total franchise stability in the NFL, is a dramatic example. Such cases essentially have created a prescription for turning the business of running leagues over to hundreds of federal judges with vastly different philosophies and abilities. In the long run nobody gains from such an unpredictable and irrational system.

If leagues do exercise their market power in ways that are unfair or otherwise contrary to public policy, perhaps Congress should consider legislative solutions. For example, if unreasonable player practices cannot be corrected through collective bargaining or under existing labor laws they could be corrected in the same manner that various types of unfair discrimination in employment have been dealt with in civil rights legislation. But such a decision to regulate league conduct must come from Congress if the regulation is to achieve established policy goals and still be fair and consistent. The courts should apply existing law vigorously and creatively to correct evils that Congress has declared should be corrected; they should not manipulate a law condemning conspiracies to set themselves up as the arbitrator of every dispute between a league and its actual or potential employees, customers, or suppliers, based on wholly unpredictable ad hoc standards. No other business firm in the United States, monopoly or not, is so saddled with such constant judicial interference (unless Congress has specifically given the regulators the power to further specific policies and to follow specific standards and procedures). Neither should sports leagues be.

NOTES

1. These three decisions were *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); and *Federal Baseball Club v. Ntl. League*

...l Baseball Clubs, 259 U.S. 200 (1922). The scope of the "baseball exemption" is somewhat unclear. See *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975) (both cases limiting the exemption to league structure and operations and player rules). Generally the scope of the exemption is thought to be quite broad, and it clearly covers all cases involving alleged conspiracies between the member clubs in a league.

2. One exception is a group of cases brought against the NFL teams that included both regular season and preseason game tickets in their season ticket package. Season ticket buyers in several cities alleged that this practice violated section 3 of the 1914 Clayton Act, which prohibits selling one product conditioned on the buyer's purchase of a second product. Although the courts have not been uniform in their reasoning, these cases have all been won by the defendant teams. See *Driskill v. Dallas Cowboys Football Club*, 498 F.2d 321 (5th Cir. 1974); *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir. 1974); *Laing v. Minnesota Vikings Football Club*, 492 F.2d 1381 (8th Cir. 1974); *Pfeiffer v. New England Patriots*, 1973-1 Trade Cases ¶74,267 (D. Mass. 1972).

3. The NHL reserve system that emerged from this settlement is described in detail in a 1979 antitrust case brought by a player who was awarded to the Los Angeles Kings as "compensation" by an arbitrator after his old team, the Detroit Red Wings, signed the Kings' star goaltender. The NHL eventually won the case on the ground that the reserve system had been agreed to by the union in a collective bargaining agreement and was therefore exempt from antitrust attack. *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979).

4. When a defendant has enormous economic power in a market in which it purchases inputs used to produce its product, as opposed to one in which it sells its output, it is said to have a "monopsony." Although a monopsony is conceptually somewhat different than a monopoly and is relatively rare in antitrust cases, the economic evil of misallocated resources in either case is essentially the same, and section 2 of the Sherman Act probably applies equally to both.

5. Examples include *Neeld v. NHL*, 594 F.2d 1297 (9th Cir. 1979) (ban on one-eyed players found legal); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971); *Linseman v. WHA*, 439 F. Supp. 1315 (D. Conn. 1977) and *Boris v. USFL*, 1984-1 CCH Trade Cases ¶66,012 (C.D. Cal. 1984) (minimum age or college eligibility requirements found unlawful); *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961) (suspension of player connected with gambling found lawful); *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975) (ban on WFL players coming into the NFL past mid-season found unlawful).

6. For example, see *Mackey v. NFL*, 453 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) (commissioner-determined compensation for free agents found unlawful); *Smith v. Pro-Football Inc.*, 593 F.2d 1173 (D.C. Cir 1979) (NFL draft found unlawful); *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974) (draft and reserve rules were found unlawful, but the NFL eventually won a jury verdict on the grounds of no injury); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (NBA reserve system found probably unlawful).

7. In *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984), the court found the NFL's decision not to give a former Memphis team in the WFL an NFL franchise lawful.

8. In *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1974), the court found the NBA's decision not to allow a sale of the Boston Celtics to plaintiffs lawful.

9. See *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir.), cert. denied, 469 U.S. 990 (1984) (NFL refusal to schedule Raiders game in Los Angeles found unlawful); *San Francisco Seals v NHL*, 379 F. Supp. 966 (C.D. Cal. 1974) (NHL's refusal to schedule Seals game in Vancouver lawful). Also see *NBA v. SDC Basketball Club*, 815 F.2d 562 (9th Cir.), cert. dismissed, 108 S Ct. 362 (1987) (NBA has a right to consider and vote on whether Clippers could move from San Diego to Los Angeles).

10. In *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953), the court found NFL blackouts of one team's games in another team's city lawful when the other team is playing at home but unlawful when not playing at home. In both *WTWV, Inc. v. NFL*, 678 F.2d 142 (11th Cir. 1982) and *Blaich v. NFL*, 212 F. Supp. 319 (S.D.N.Y. 1962), the courts ruled that NFL blackouts of television signals within a 75-mile radius of a game is lawful.

11. For example, the court in *Carlock v. NFL*, an unpublished decision in case SA-79-CA-133 (S.D. Tex., Aug. 13, 1982), found the NFL decision not to use the plaintiff's laser gun to spot the ball after each play to be lawful. In *Smith v. Pro-Football Inc.*, an unpublished decision in case no. 1643-70 (D.D.C., June 27, 1973), *aff'd without opinion*, case no. 74-1958 (D.C. Cir., September 25, 1975), the court found the NFL rule requiring the team of an injured player to take a time-out if there is over a one-minute delay to be lawful.

12. Although no one disputes that the internal cooperation of corporations and partnerships is not illegal, the doctrinal basis for this conclusion is not necessarily the same in both cases. Corporate behavior is lawful clearly because a corporation is a single firm incapable of conspiring with itself, and its employees and directors are considered merely parts of the same legal person. See *Copperweld*, 467 U.S. 752 (1984). Partnership conduct, on the other hand, is more probably immunized by a different legal explanation—that although partners may be legally separate persons, their cooperation in running the partnership is always per se lawful. This position is referred to as the doctrine of ancillary restraints. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.D.C. 1986).

13. Although Sherman Act section 1 expressly prohibits "every" conspiracy in restraint of trade, since the Supreme Court's *Standard Oil* decision in 1911 the courts have read this language to proscribe only unreasonable restraints. Thus, if an agreement between two persons or entities is considered to be a conspiracy, it is then subject to the so-called Rule of Reason and condemned only if it is found to be unreasonable. Although for decades courts believed this rule allowed them to make subjective assessments about what they intuitively felt was fair and unfair, the U.S. Supreme Court has made it clear since the late 1970s that antitrust reasonableness is a term of art defined as being whatever is beneficial for consumer welfare. Thus conspiracies that benefit consumers are not illegal; conspiracies that injure consumers are.

14. In many of the cases involving restrictions on players, frequently an overriding issue has been present that obscured the underlying antitrust issues. Courts have held that when the players' union agrees to a league rule in collective bargaining, the rule is then immune from antitrust attack because of the so-called nonstatutory labor exemption. See *Powell v. NFL*, 888 F.2d 559 (8th Cir. 1989); *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986). While the precise scope and application of the labor exemption is far from clear and is a fascinating issue of great importance to sports leagues today, it is well beyond the scope of the present discussion.

15. All sports leagues allow their member clubs to keep a majority or all of the revenues collected from the sale of tickets to home games, although most leagues also require that some of this revenue be shared with other league members. Giving the home team most of the locally generated revenue is done solely in order to create an incentive for each club to promote its home games vigorously and to develop an exciting winning team. But because each game requires the complete cooperation of the other league members, the league always has the inherent power to require that all gate revenues be divided equally (or any other way) among the members, just as the NFL divides the network television revenues from all NFL games equally. If any team refused, the other teams could simply refuse to play it or include it in the league standings. And if a league did require equal sharing of gate revenues, each member club would be indifferent as to which NFL game any fan attended since its share of the revenue would be the same either way. Any incentive the Raiders or any other team has to "compete" with other clubs or to move to a more lucrative market exists largely because the league allows home teams to keep most of their locally generated revenue.

16. This voluntary competition is not the type of competition required by the antitrust laws, and an entity's controlling such voluntary internal competition is not a "conspiracy" for section 1 purposes. This phenomenon is nothing more than internal firm rivalry similar to that encouraged by all companies between employees or divisions as an incentive for them to perform as efficiently as possible—for example, competition engendered by performance bonuses, sales awards, promises of promotion, and so on. But when internal rivalry between a company's employees or divisions becomes so cutthroat that it threatens to injure the company's profits, the company's efforts to control or eliminate the counterproductive behavior would never amount to illegal conspiracy.

17. Many decisions in any business are always better made at the local level, where people are best able to judge what is involved. For example, league executives in New York would be far less able than local executives to judge what an individual player is worth to a club, what rent is appropriate for each stadium, how best to market the local team, or how to cultivate good relationships with local political and business leaders.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Bud Selig
c/o Tom Korologos
Timmons & Company
1850 K Street, N.W.
Suite 850
Washington, D.C. 20036

Dear Bud:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your testimony is greatly appreciated.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions by no later than Monday, January 25, 1993:

Chairman Metzenbaum's questions:

1) Mr. Selig, the primary argument you make in support of the exemption is that Baseball needs antitrust immunity in order to prevent franchises from routinely relocating from one city to another.

In your testimony, you pointed to the NFL's failure to stop the Oakland Raiders from moving to Los Angeles, as proof of the importance of the antitrust exemption. But the court which ruled in favor of the Raiders did not hold that any effort by a sports league to limit franchise relocations would violate the antitrust laws. The court simply did not like the particular manner in which the NFL tried to stop the Raiders. In fact, the court in the Raiders case indicated that reasonable rules governing franchise relocations could withstand antitrust scrutiny. Los Angeles Memorial Coliseum Commission v. National Football League,

726 f.2d 1381, 1396-97 (9th Cir. 1984)[hereinafter "Raiders I"].

Three years after the 9th Circuit's decision in the Raiders case, the court reiterated its view that the antitrust laws do permit a sports league to impose restrictions on franchise relocations. National Basketball Association v. SDC basketball club, 815 f.2d 562 (9th Cir. 1987). In that case, the court specifically rejected the argument that Raiders I stood for the proposition that the antitrust laws prevent a sports league from devising rules which limit franchise relocations. The court stated that "neither the jury's verdict in the Raiders case, nor the court's affirmance of that verdict, held that a franchise movement rule, in and of itself, was invalid under the antitrust laws." Id. at 567. The court went on to say that "a careful analysis of the Raiders case makes it clear that franchise movement restrictions are not invalid as a matter of law." Id. at 568.

Given these statements by the 9th Circuit, please explain why you continue to take the position that the Raiders case stands for the proposition that the operation of the antitrust laws would prevent Baseball from imposing reasonable restrictions on franchise relocation.

2) For years, the Baseball owners have agreed among themselves to divide and allocate territories for local television broadcasting. In some instances, these territorial allocations are exclusive. For example, the Red Sox have the exclusive right to show their games on local television stations in four New England states. In other instances, these territorial agreements limit the number of teams who can sell games to local stations in a particular state. For example, only the Houston Astros and the Texas Rangers can sell games to local TV channels in Texas and Louisiana.

In essence, the baseball owners are agreeing among themselves to divide markets and limit output in an apparent effort to maximize their revenues from broadcasting. It is certainly a tremendous advantage for the owners to be able to engage in these kinds of agreements without fear of antitrust exposure.

There may be some pro-consumer benefits to these restrictions. If so, the Supreme Court has made it clear in the NCAA case that if the pro-consumer effect of a sports league's TV agreements outweighed their harm to consumers and competition, then they would pass muster under the antitrust laws. NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984). That seems to be a reasonable test. Wouldn't the public be better off if the owners' territorial restrictions and local TV contracts were subject to antitrust scrutiny under the NCAA test?

Senator Bob Graham's questions:

1) The Basic Agreement between the American League and the National League and the Major League Baseball Players Association, effective January 1, 1990, makes reference in Article XXIV to the work of the Baseball Economic Study Committee (Pages 62-64). Please provide the Subcommittee with information developed by this group.

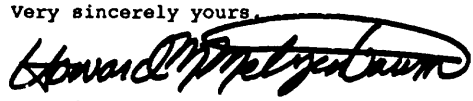
2) In testimony to the Subcommittee on December 10, 1992, Mr. Allan H. Selig (representing Major League Baseball owners) stated that when Mr. Fay Vincent took office as commissioner he did so with the understanding that he would resign if he lost the confidence of a majority of owners.

   Was such an understanding a pre-condition of Mr. Vincent's employment as commissioner? If so, was such an understanding also a pre-condition in the employment of previous commissioners?

Please forward your answers to the attention of Erin O'Connor, of my Subcommittee staff, at 308 Hart Senate Office Building, Washington, D.C. 20510. If you have any questions, please contact Ms. O'Connor at (202)224-5701, FAX# (202)224-5474.

Again, thank you for your contribution.

Very sincerely yours,



Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

MILWAUKEE BREWERS
BASEBALL CLUB

MILWAUKEE COUNTY STADIUM, MILWAUKEE, WI 53214 (414)933-4114

ALLAN H. (BUD) SELIG
President - Chief Executive Officer

January 29, 1993

The Honorable Howard M. Metzenbaum, Chairman
Subcommittee on Antitrust, Monopolies & Business Rights
c/o Erin O'Connor
308 Hart Senate Office Building
Washington, D. C. 20510

Dear Senator Metzenbaum:

I would like to thank you again for the opportunity to appear on behalf of Major League Baseball before the Subcommittee on Antitrust, Monopolies & Business Rights on December 10, 1992. As I hope I made clear during my testimony, Major League Baseball Takes extremely seriously its obligation to uphold the public's trust in our great national game. We, therefore, take to heart the concerns raised by the Subcommittee members at the December 10 hearing. Because I strongly believe that the public interest would be poorly served by the repeal of Baseball's antitrust exemption, I appreciate this opportunity to answer the Subcommittee's additional questions.

I will first respond to the Chairman's two questions.

1. I certainly agree with the chairman's observation that Baseball's ability to protect the interests of its loyal fans by maintaining stability and continuity in its franchises is the area in which the exemption has the greatest significance. I must respectfully disagree, however, with the suggestion that the few legal decisions applying the antitrust laws to franchise relocations in professional sports (all of which were decided by the Ninth Circuit) would allow Baseball confidently and successfully to impose reasonable restrictions on franchise relocations absent its exemption.

As I indicated on several occasions during my testimony, I am neither a lawyer nor an expert on the complexities of the antitrust laws. But, as I understand it, the Chairman is absolutely correct that, as a purely legal matter, there is no absolute rule that says that every decision by a professional sports league to block a franchise relocation is unlawful under the antitrust laws. What I said in my testimony, and what I sincerely believe to be the case, is that the confusion and inherent unpredictability caused by the decisions mentioned in your letter mean that, as a practical matter, a sports league subject to the antitrust laws simply cannot stop a franchise from relocating.

The fundamental problem under the current law, from the leagues' perspective, is that there are no clear cut rules, or "safe Harbors", that can be followed when faced with a proposed franchise relocation. As the Chairman noted, the Ninth Circuit in the Raiders cases, and in the Clippers case, did not tell the NFL and NBA that their franchise relocation rules were invalid in all cases. Instead, I understand that the court left it to a jury to decide, after considering a myriad of different factors, whether a league's application of its rules to the specific facts and circumstances of each particular relocation is an "unreasonable" restraint of trade. I also understand that the party complaining of the league's decision can prove the league's action was "unreasonable" if it can merely convince the jury that there was a "less restrictive" way for the league to address its legitimate concerns. I know there are many clever economists and lawyers who, for a hefty fee, can think up a less restrictive alternative to virtually every league rule.

All of this analysis of the "reasonableness" of the league's decision, of course, necessarily takes place after the fact. When faced with a proposed move, a league has no way of knowing which factors a jury (which will almost always be a local jury) will ultimately find persuasive. Nor does it know whether a jury will find that an alternative proposed by some "expert" which the league has never even considered, is a less restrictive one. As a result, the league is in an untenable position at the time when it must make its decision. Even if it is firmly convinced that rejection of the proposed move is reasonable in light of the unique facts and circumstances, the risks of a jury reaching the opposite conclusion in a treble damage antitrust action are so high that it cannot afford to block the move.

Our recent experience with the San Francisco/St. Petersburg situation provides a compelling illustration of the realities that would confront Baseball if its exemption were revoked. As the Subcommittee heard from the many energized advocates from California and Florida, Baseball was presented with powerful arguments on both sides of the San Francisco/St. Petersburg debate. But, despite the many compelling reasons in favor of keeping the Giants where they have played for the last 35 years, Baseball certainly could not have had absolute (or even reasonable) confidence that an antitrust jury (probably sitting in Florida) would agree with the reasonableness of a decision to keep the Giants in San Francisco.

And if, after years of costly litigation, we found out that our decision was not "reasonable" in the eyes of the Florida jury, the very existence of our league could be in jeopardy. That the risks of losing an antitrust action on a relocation decision are this grave is shown by the lawsuits filed in the aftermath of the National League's Giants decision. Notwithstanding our exemption, Baseball has been sued by several different groups in several courts under a variety of theories. The plaintiffs in one of those lawsuits, filed in Florida, have said that the National League's decision caused them $3 billion in damages. In light of the enormity of

claims such as these and the wholly unpredictable nature of litigation before juries under the Ninth Circuit standard, it is easy to understand why Baseball almost certainly would not have attempted to stop the Giants move if it did not have its antitrust exemption. It is also easy to understand why Baseball would be virtually powerless to stop any proposed franchise move -- regardless of the merits of the move.

I think that history subsequent to the Raiders case proves that the antitrust decisions mentioned in the Chairman's letter have, as a practical matter, made the other leagues unwilling to try to prevent relocations. Despite overwhelming opposition within the league, the NFL did not even attempt to take actions against Robert Irsay when he moved the Colts form Baltimore to Indianapolis under the cover of the night. Likewise the NBA did not even attempt to stop the Clippers from moving to Los Angeles because it was threatened with an antitrust lawsuit that it could not afford to lose. Instead, it filed a declaratory judgment action after the fact and sought money damages from the Club. The Clippers, of course, still play in Los Angeles. Indeed, as I indicated in my testimony, no sports league other than Baseball has successfully prohibited a franchise from moving since the Raiders case.

In sum, although I agree with the Chairman that there is no bright line rule of law that sports leagues cannot stop franchise relocations, I strongly disagree that, absent its exemption, Baseball could continue to apply the pro-stability policies that have served the game and the public so well over the past twenty years. The lack of any safe harbors and the enormous cost of being wrong have combined to make the leagues that are subject to the antitrust laws impotent to protect the interests of their fans. I strongly believe that it would not be in the public's interest to render Baseball equally helpless to protect its fans.

2. Before responding to the Chairman's question regarding Baseball's broadcasting rules, I want to clear up any confusion that might have resulted from my response to Senator Specter's question on pay television. Senator Specter asked if Baseball could commit that it would not put World Series or League Championship Series games on pay television through the year 2000. I indicated that I could not foresee the circumstances under which we would put any of our post-season games on pay television during that time frame. In responding in this matter, I understood Senator Specter to be referring to pay-per-view television and not cable television. After reading the transcript of the entire hearing, however, I am not sure how Senator Specter was defining "pay". I, therefore, want to address the cable issue. Although Baseball has no current plans to move post-season games to cable television, it is at least possible that some post-season games could be sold to a cable broadcaster before the year 2000 if our play-offs are expanded or if the over-the-air networks show no interest in certain play-off games. Having said that, I cannot foresee the circumstances under which World Series games would be on cable television before the year 2000.

With respect to the substance of the Chairman's second question, I must first respectfully take issue with the statement that Baseball has placed territorial restrictions on the Clubs' broadcasting rights in an effort to maximize broadcasting revenues. Our territorial restrictions are not intended to, nor in fact do they, maximize broadcasting revenues. Rather, the restrictions are a necessary result of the interdependence of our teams. Because all of our teams depend on the success of the other teams in the league for their own success (quite unlike "competitors" in the normal industry setting), Baseball must adopt policies that ensure that all of its Clubs, even those in small markets, have the economic wherewithal to compete on the field. As explained below, the territorial restrictions play a critical role in this effort.

First the territorial restrictions allow Baseball to sell television packages to national broadcasters who will show the games of all of our clubs in all parts of the country. We have been criticized by some for having too few games on "free" national television. But, without our territorial restrictions, we would be unable to sell any national games -- on free or cable television. If the individual Clubs were able to sell the rights to broadcast their games wherever they desired, we could not give national broadcasters the exclusivity they demand. Although our national broadcasting contracts have benefitted all of our member Clubs, they have been critical in keeping our small market Clubs afloat. Without the revenues from these packages, several small market Clubs would be unable to survive.

Moreover, the "home market" protections provided by the territorial restrictions enable our smaller market Clubs to sell not only their local broadcasting rights, but also tickets to their games. If all of the other Clubs could sell their television rights in the Cleveland metropolitan market, for instance, the Cleveland broadcasters might find that there is more consumer interest in teams other than the Indians. Those broadcasters could find it more lucrative to buy rights from the Yankees and the Dodgers, and the Indians could find themselves unable to sell their television rights in their own home market. Not only would this leave the Indians without a major revenue source, it would greatly hamper their ability to foster the type of local following that is necessary for successful home attendance. Following the home team on television develops an allegiance in fans who will then go out and watch the team play in person. Without the protection of the territorial restrictions, the special relationship that develops between baseball fans and "their" hometown team would be at risk.

My own situation in Milwaukee is instructive. Despite the territorial restrictions, we have been unable to secure a cable contract for the Brewers ' games. Without the restrictions, we might not be able to secure any local television package. If that happened, we obviously could not survive in Milwaukee. We could not generate the type of revenues necessary to put a competitive team on the field. Clu. s in

other small market cities would be in the same predicament. Further expansion in Baseball has been suggested by this Subcommittee. But if Baseball were unable to provide Clubs with the home market protections afforded by the restricted broadcasting territories, Baseball could not survive in many of its existing cities, let alone expand into additional markets. Such a result, I submit, is not in the public interest.

The Problem with the NCAA test mentioned in the Chairman's question is that Baseball's concern for the survival of franchises in cities that have supported teams for as long as 100 years is not a concern of the antitrust laws. As the Chairman indicated in his question, the NCAA decision made clear that "consumer welfare" is the only concern of the antitrust laws. Consumer welfare in this context means only the welfare of the consumers of televised baseball games. The Court in the NCAA case said that broader interests such as those Baseball seeks to protect with its territorial restrictions are irrelevant to the antitrust inquiry. In fact, professional sports leagues' legitimate need to protect interests other than those of the broadcast consumers was one of the reasons why Congress passed the limited antitrust exemption in the Sports Broadcasting Act of 1961.

While "consumer welfare" might be enhanced, I do not believe that the public would be better off if they could watch as many as ten different baseball games on television on any given night if it meant that baseball was actually played in only the five or six largest cities in our country. The many baseball fans in cities like Cleveland, Pittsburgh and San Diego would certainly not agree that their interests were served by a decision that threatened the continued viability of the franchise in their city, no matter how many choices they had with respect to televised baseball. So I strongly disagree with the suggestion that the public would be better off if Baseball's television rules were subject to the NCAA test.

I now turn to Senator Graham's two questions.

1. At my insistence, Baseball has made the entire Report of the Baseball Economic Study Committee available to the public. I have attached a copy of the Report to this letter for Senator Graham. Please let me know if the Subcommittee needs any additional copies.

2. The answer to this question is no. Fay Vincent was elected to serve out the remainder of Bart Giamatti's term under the most difficult circumstances. Most owners knew very little about Fay at the time of Bart's death. In recognition of the unique circumstances the led to his election, Fay stated that he would need to gain the owner's confidence in his leadership to successfully complete Bart's term. At the suggestion of the owners, Fay told the Clubs at the time of his election that he would step down if he lost their confidence.

I hope that I have been fully responsive to your questions. If you or Senator Graham need any further information with respect to any of these issues, or if any Subcommittee member has any additional questions, please let me know. As I indicated at the outset, I appreciate the Subcommittee's concern and I want to provide all of the information that you deem relevant to your inquiry. I am confident that once the Subcommittee reviews all of the material it has gathered, it will conclude that the continuation of Baseball's antitrust exemption is truly in the public's interest.

Sincerely,

Allan H. Selig

AHS:lsk

Senator METZENBAUM. Our next witness is Donald M. Fehr, executive director of the Major League Baseball Players Association.

Mr. Fehr, we are happy to have you with us. Please proceed.

STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NEW YORK, NY

Mr. FEHR. Thank you, Mr. Chairman. I have been privileged to be, first, the general counsel and then the executive director of the Major League Baseball Players Association for 15 years, and I think it is fair to say that the players have considerably more experience in a more direct way over a longer period of time with baseball and its owners and how the antitrust exemption operates than anyone else does.

With all due respect to the witnesses that we have had, I want to suggest at the outset that I don't think these issues are all that involved or all that complicated or all that difficult to understand, and what I would like to do is just take a couple of minutes to outline what I believe are the overriding structural causes of the discussions that we have heard here today.

The first thing is that, as has been noted, baseball is an unregulated, antitrust-exempt—if it is not a cartel, it is cartel enough like that it might as well be one. States may not regulate it because of the peculiar way the Supreme Court acted in the *Flood* case. So to the extent that public policy is being made, it is being made in owners meetings.

Second, I suggest the issue is not at all whether there is a strong commissioner or weak commissioner, something to which I will return in a few moments, but simply whether or not, regardless of what the commissioner thinks, the law should permit what could be considered unreasonably anticompetitive behavior.

I suggest that if any other industry came before you and said don't apply this statute to us, whatever it is, which applies to everyone else because we will hire and pay someone that we will select because we like his or her views and he will take care of it all, it would not be given a serious response.

I would also point out that David Stern of the NBA is generally considered to be the strongest commissioner of any sport in the modern era—a view that I share. That has been accomplished quite apart from any necessity to have protection from the antitrust laws.

The question that I would ask is one that I posed in my written statement, which is, is there any explanation at all why a market the size of Florida is not filled by an industry catering to consumers unless there was an interest on behalf of those controlling the industry in not filling it and they were unafraid that anyone else would do so? There is no alternative source of supply, so the individuals responsible for marketing baseball need not fill the markets. No one else will get a toe-hold.

We have a circumstance in baseball in which the public policy must be, it seems to me, on the expansion issue—more teams rather than less, more opportunities for more fans to watch games up close and personal than less. At the moment, that matter is decided

entirely in owners meetings, as it always has been, and is not reviewable by anyone on any basis.

Just a moment on the structure of baseball. In case there are any members of this subcommittee or other Senators in attendance who don't know, this is not an industry in which you can come into the industry, you can open up a business and, if you sell a good product, you can do well; you can satisfy the consumer.

The facts are that the number of teams, where they play, what the area of territorial and broadcast exclusivity will be, and indeed who the owners will be, are all determined by the existing members of organized baseball. It is an extraordinary proposition.

There are problems in some small markets because the existing revenue sharing agreements, if you will, are out of date. The revenue streams have changed. The revenue sharing agreements haven't been maintained, and so some markets now generate vastly more revenue than others, and that has effects like it would in any other business. But the problem, I suggest, is not with anything except the structure that the owners created themselves, and they can change that structure if they have the will to do that or it could be examined by someone to determine if it was unreasonably anticompetitive.

I must say that on the situation in San Francisco/Oakland, it was a rather perplexing circumstance for the players. The owners have been taking hard positions with the players in bargaining for years, and in every negotiation beginning with 1981 through and including 1990, one of the reasons has been that the San Francisco Bay area is too small to support two teams; we won't revenue-share. Therefore, the players must make concessions to support that. This is an extraordinary proposition, I think.

On the expansion and market issues, again, I believe that matters are much more simple than they have been described. In reading some of my prior testimony in 1985 on one of the relocation bills, I noticed that I predicted that expansion would be long in coming, even though it had been recently promised, and that eventually baseball would whittle it down to two markets at high prices a long time from 1985. Regrettably, I was right. I suggest that Commissioner Uebberoth, who was a very strong commissioner during his tenure, did substantially nothing about expansion that could be considered significant.

You get an idea of the attitude created by this special privilege in connection with a couple of the statements that are made. One has been talked about a lot here today. Is Tampa Bay baseball's market? Well, it obviously shouldn't be, but it is equally obvious the owners believe it to be, to be served when and as they choose. It is not something that we would ordinarily in this country expect to happen.

The second is Commissioner Vincent's comments about diluting equity as a reason not to do that. Well, of course, you dilute equity is a reason not to do that. If you have 28 owners that own all of the country for baseball purposes and you add more, each one owns less, so the equity is diluted.

Senator Biden in 1982, in one of these hearings, I think, summed up the situation very well, better than I certainly have ever been able to. He asked a witness if it weren't true that franchise reloca-

tion was a zero sum game, the suggestion being, of course, that as long as you have a limited number of teams, someone must lose, and that is obviously the case.

I was struck listening to the comments of Senator Feinstein and remembering a call I had from Mayor Jordan when the matter first arose, which reflect both the anguish that they felt as public officials at the suggestion the team would be lost and then the joy and the relief that was felt by themselves and their constituents when that didn't happen. But wherever there is the joy and the relief, there must necessarily be the anguish. That is what the zero sum game is.

Senator METZENBAUM. Can you wind up?

Mr. FEHR. I just have one other comment, if I could, on commissioners. I would point out that the longest commissioner in recent baseball history in terms of tenure was Bowie Kuhn. The current football commissioner is Paul Tagliabue. The current basketball commissioner is David Stern. What they all have in common is very simple. They were all the owners' lawyers and chief negotiators before they became commissioner. There is no suggestion these were independent people or people they were not otherwise familiar with, or that they indeed did not develop the very positions which guide the owners' positions in things.

Senator METZENBAUM. Thank you very much, Mr. Fehr. We will have 5-minute rounds and only one round.

Mr. Fehr, even though baseball has an antitrust exemption, major league players have prospered during the last 16 years under your union. This year, average salaries for baseball players will be $1 million. Some baseball owners attribute their financial problems to these high player salaries.

My concern is that ultimately it is the fans who get stuck with the bill for high player salaries. Mr. Fehr, why should the fans believe that they would be better off if baseball's antitrust exemption were lifted and the players could negotiate directly with the owners in a free market?

Mr. FEHR. First of all, what the players do now under the terms the union has been able to negotiate for most of the higher priced players, certainly, is that they do negotiate in a free market, and that, after all, is what anyone else does in this country. You have the freedom to look for a job. That is not something we take as special or unusual, and the market determines what value is.

The situation that you have now, though, means that there aren't very many teams compared to the potential markets. Fans can't watch games compared to what they might otherwise be able to do, and they are disadvantaged because the product they want to buy is not as readily available as it might otherwise be.

The last comment I would make is on ticket prices, and that is that I have never seen a study which demonstrates a positive correlation between player salaries and ticket prices or anything else. There is a reason for that. The reason is that the territorial exclusivity provides each team with what amounts to a local monopoly. There isn't any baseball competition for that team, and so prices tend to be set simply upon marginal revenue product determinations.

Senator METZENBAUM. When the owners voted to reopen the collective bargaining agreement in the past, there has been a lockout or a strike every time you have had to meet at the bargaining table. Speaking as a fan, I would hope that it won't happen this time. However, in light of the reopening, I am particularly concerned about your testimony that the antitrust exemption has "contributed to the continued labor strife between the owners and the players." Can you give us some specific examples of how it has contributed to labor strife?

Mr. FEHR. I will give you two specific ones—three. In 1976, admittedly at a time when the development of the law and the labor exemption was different than it is now, the players became free agents through an arbitration decision. The owners responded with a lockout which lasted most of spring training. Eventually, there was an agreement reached that summer.

It strikes me that it would have been vastly less likely that the issue of whether a player can look for another job at appropriate points in his career if his contract is over would have to be resolved in a labor confrontation had the antitrust laws applied. It is not perfect. They still have fights in football. But in basketball, every collective bargaining agreement in recent years has been wrapped up in a consent decree in an antitrust case. They have had no strikes and they have had no lockouts.

The last thing is the worst problem the players have had in the last several years was massive collusion, or simply boycotting of free agents and then price fixing by the owners in the late 1980's. It strikes me as immensely less likely that the owners would have engaged in that process had they been subject to a risk of treble damages. That has contributed more than anything else in recent times to extremely bad labor relations.

Senator METZENBAUM. I understand that baseball's antitrust exemption gives the owners a unique advantage during collective bargaining. Incidentally, I think I agree with you that this idea that owners can collectively agree not to do business with a baseball player strikes me as rather shocking and contrary to what I think the free enterprise system is about.

In other professional sports, if the two sides reach an impasse and the owners try to impose rules on the players unilaterally, players have the option of suing them under the antitrust laws. You describe that as a safety valve. If the owners and players were to reach an impasse during the upcoming negotiations, could the owners impose terms on the players unilaterally at any point, and if so wouldn't that put the players in the position of either having to work under terms dictated by the owners or to strike because they don't have the safety valve of the antitrust laws?

Mr. FEHR. It removes that option, certainly, Senator. As you know, under the labor law, if a bona fide impasse is reached in collective bargaining, at some point management can choose, if it wants to, to implement conditions equivalent to its last offer in bargaining. The employees may strike at that point or later on if they want to.

What happened in football after the 1987 strike, quite bluntly, was that for all practical purposes the union was broken. But as recent events have shown, there was a safety valve for the players

which has provided a way for them to not suffer the continuation of the anticompetitive practices. In baseball, if the owners were ever able to break the union, they could rest, unless the law was changed, on the notion that their problems were over.

Senator METZENBAUM. Under the circumstances that you have just described, can you give the committee any assurance that the players won't strike during the 1993 season?

Mr. FEHR. I can give the committee the assurances that the players don't want to. It is for any union or anyone that has ever represented them the last alternative you come to when others are exhausted. Nobody wants to do that; people want to go to work. The problem is that we did not reopen the agreement. The owners did, and once that process starts and you are in bargaining, what has to happen is dictated by the course of the bargaining. All I can say is it is not something the players will do unless they believe it is absolutely necessary. It would not and could not have happened absent the reopener.

Senator METZENBAUM. Mr. Selig testified that the owners have used their antitrust immunity to prevent franchise relocations. However, the owners have also used their antitrust immunity to approve franchise relocations. My point is that the owners can use their antitrust immunity as they see fit to either block or approve a franchise relocation. The decision seems to depend on what is in their best interest at the time.

Wouldn't the cities, the players, and the fans be better off if the owners didn't have unfettered discretion on franchise relocations, but instead were forced by the antitrust laws to develop reasonable rules and procedures to govern those decisions?

Mr. FEHR. I certainly would agree with that general sentiment, Senator, yes, and if there would be a way, in addition, to have some vehicle for there to be more than one entity so there could be competition for vacant markets, I suggest most of these discussions would have been long since academic.

Senator METZENBAUM. Senator Mack.

Senator MACK. Thank you, Mr. Chairman, and welcome, Mr. Fehr.

Mr. FEHR. Thank you.

Senator MACK. It is good to see you again. I appreciate the conversations that we have had over the last several years. In listening to the responses that Mr. Selig gave to my questions about Tampa-St. Pete getting a team, it kind of went something like this. Expansion, no; voluntary movement, no; bankruptcy, yes. Really, the message was just wait until a team is bankrupt and then you folks down in Tampa-St. Pete probably will get a team. I would suggest that there should be some alternative to that, and both you and I, I think, share the same perspective.

In my opening comments, I referred to free markets. I am convinced that, while it won't solve every problem facing major league baseball, if the owners would accept the concept of free markets, I think we would see more teams, more players, more fans, and, I would make the argument, more profits. I mean, I heard Mr. Selig over and over and over again talk about this terrible condition that major league baseball finds itself in.

As my colleague, Senator Graham, pointed out, I think one of the reasons for that is because they have refused to go to the markets on a timely basis, so I guess really kind of several things in there. Do you agree with that basic approach? Second, if the exemption were lifted, would that, in fact, open up the player market so that the possibility of another league could come forward and expansion could take place that way?

Mr. FEHR. There are lots of questions there. Let me try and take them in some sort of a logical order. First, the artificial scarcity of franchises does create the current problem, and if I may be so bold, I think that San Francisco and Tampa have the same problem. They know that one of them will lose. There are desperate attempts not to be the one that loses, and so, to say the least, you have civic decisions made in circumstances more extreme than they might otherwise be. You both would have been better off, both areas, were there more teams.

Second, one of the effects of eliminating the exemption, I think, would be to put pressure on the minor league system and the locking up of all the players. That would give rise to the possibility that there could be additional leagues in a way that is not realistic now. I assume that it is at least possible that someone would examine whether or not there is a section 2 issue as to whether there should be the existing league and it be the only one that could come up and be discussed.

The third benefit, I think, that the minor league issue would have is that I am one of those people that believes we don't have college baseball simply because the minor leagues exist. The major league clubs draft 18-year-old kids, tell them that this is their one and only chance to sign with major league baseball with this one and only club and, in effect, pressure them not to go to college, which strikes me as peculiarly not in the public interest, but that is the way the system works.

I don't know that I got all your questions, but if I missed one——

Senator MACK. I think you did.

Mr. FEHR. OK, thank you.

Senator MACK. Let us just explore that minor league thing for just a moment. Again, when we have been in discussions about expansion, one of the things we were told—you know, I heard somebody say there are not enough left-handed pitchers. The impression that we get is that we are a country that really just barely has enough ball players to take care of the 28 teams that we now have. Is there another approach that we ought to take a look at with respect to what is going on with the minor leagues that, in fact, will strengthen major league baseball?

Mr. FEHR. One of the things that the interlocking major league-minor league system with a limited number of franchises produces is limited opportunities. People understand that. Everybody would understand there are more major league jobs if there were 10 or 15 or 25 percent more teams than there are now.

I have been of two views with respect to the player availability issue. The first one is that I just don't believe it is true that we can have a population vastly larger, that blacks can play now, as they did not before 1947, that significant numbers of players can come from Latin America and more recently from Canada, and nev-

ertheless the proportion of teams to the population has fallen dramatically. That strikes me as implausible.

Second, however, I think there is a pragmatic approach which makes sense, and that is that if that is true, test it out by a series of additions of teams, and when and if that problem occurs and the product is no longer commercially viable, that will become apparent. I would not want to assume that before the process begins.

Senator MACK. Just one last question because I see my time is about up. What happens to player salaries, though, as a result of lifting the exemption, increasing the number of teams, increasing the number of players that are available? What happens in that kind of a market?

Mr. FEHR. I don't think there is any way to tell what happens there. I think that it will depend a lot more on the overall economy and how the game is marketed and what happens with what I in shorthand call the telecommunications revolution than anything else.

Having said that, I do want to make one point clear. We have not—the players have never taken the position that the union's goal should be to march in and determine what all the salaries should be, although the clubs have asked us to from time to time. What we have said is that the market ought to determine that both in the individual case and in the aggregate case.

If you assume you will have a market level of salaries, whatever that turns out to be, it can't be something, I suggest, by definition, which causes major economic problems unless the industry is structured in such a way that you have people that just can't compete with others.

Senator MACK. I probably should know this, but have you all taken a position on the exemption? Do you favor the lifting of the exemption?

Mr. FEHR. Yes. We have had that position for a very long time both for some pragmatic, safety-valve reasons and for what we believe are sound public policy reasons.

Senator METZENBAUM. Thank you, Mr. Fehr.

Senator MACK. Thank you, Mr. Chairman.

Senator METZENBAUM. Senator Graham.

Senator GRAHAM. Don, I am curious as to what has motivated baseball's activities in the last 20 years. In the period from the mid-1950's, which was about when the first relocation and then subsequently expansion—until the mid-1970's, attendance at major league baseball almost doubled. Actually, attendance had dropped from 1950 to 1955 from 17.5 million to 16.6 million, then surged over the next 20 years up to 31.3 million. So that period could be characterized as one of instability, using the standards of our first two speakers. It was actually a period of significant fan growth and general prosperity.

Then beginning in the mid-1970's, the period of opposition to relocation—and but for the last two expansions into Colorado and Florida, no expansion has occurred. What happened in the early to mid-1970's that caused such a radical shift in baseball's assessment of what its best interests would be?

Mr. FEHR. I think a couple of reasons. I am doing some speculating here, but I think a couple of things are reasonably obvious. The

first one is that something happened at the same time, we believe, caused by the coming of free agency in 1976, which is that overall revenues and franchise values and attendance and television revenues began to skyrocket, and that had its effect on player salaries, in addition to catching back up to the free market.

As that began to happen, I think it is natural that owners would say if there are more of us and that doesn't increase the revenue proportionately, then my proportional share might not be as great. At the same time, you had the relocation of the Raiders to Los Angeles. That produced a result, which was that the NFL wanted to come to the Congress and say we need antitrust freedom at this point, too, having left Los Angeles without a market.

I think that, as Senator Feinstein would agree, most people in Los Angeles would not consider Anaheim and Los Angeles the same place. Why shouldn't there be two? Why shouldn't there be three, including Oakland? And the reason was the league wasn't ready to yet. I have always viewed the Raiders case as who gets to sell the Los Angeles market, Al Davis or the league, and not really about much of anything else. That slowed down, I believe, all of the efforts toward expansion toward additional markets, and the franchise values began to grow even more, the potential benefits of restricting the number of franchises grew proportionately.

Simply put, a threat to relocate the White Sox, for example, to St. Petersburg is not credible unless there is a St. Petersburg to threaten to relocate to. I know Senator Simon isn't here now, but I was struck by his comment earlier. I seem to recall the Illinois Legislature literally stopping the clock so they would have extra time in the session so that they could provide the necessary funding so the team wouldn't leave. Whatever they were under, it was not a lack of pressure.

Senator METZENBAUM. Thank you very much, Mr. Fehr.

Senator GRAHAM. Don, one final question which really draws from that Illinois experience—and, Mr. Chairman, I would like to put into the record a page from a book.

Senator MACK. I thought you were going to submit the whole book.

Senator GRAHAM. Its author is going to be with us later.

Senator METZENBAUM. If we ever get to him.

[An excerpt from the above-mentioned book follows:]

other team should not be allowed to relocate just the same way that a Coca-Cola plant can relocate at will. Testifying next, broadcaster Howard Cosell was asked what he thought of Turner's comment. Cosell responded without subtlety: "I find that argument really could not appeal to anybody over the age of six . . . they talk out of both sides of their mouths. They have developed an everspinning spiral of hypocrisy and deceit that ascends up to the heavens."[24] Less poetically, Bill Veeck made a similar appraisal of the Braves' move, calling it baseball's "latest testimonial to the power of pure greed."[25]

Although no MLB team has packed its bags since 1972, a number of teams threatened to do so in 1990 and 1991, including the Montreal Expos, the Houston Astros, the Detroit Tigers, the Chicago White Sox, the Milwaukee Brewers, the Cleveland Indians, the San Francisco Giants, and the Seattle Mariners. The White Sox talked about moving to St. Petersburg, Florida, which was offering a generous package of financial incentives as well as a new domed stadium. Chicago rewarded the White Sox for their loyalty with a new stadium, equipped with modern luxury boxes projected to yield additional revenues over $5 million annually.

Under the original agreement for a new White Sox stadium, the Illinois State Legislature created the Illinois Sports Facilities Authority (ISFA) and authorized the expenditure of up to $120 million to build the new ballpark. After St. Petersburg sweetened its offer, Chicago was compelled to reciprocate. The final plan called for $150 million for stadium construction, financed by revenue bonds and a 2 percent hotel tax. Strong neighborhood opposition from the low-income residents who would be forced from their homes was eventually quieted by offering homeowners market price for their homes plus a $25,000 cash bonus toward moving expenses. Renters got moving expenses plus a $4,500 bonus plus $250 per month as a rent differential for one year.[26] The city, of course, bore these extra expenses. Chicago and the State of Illinois agreed to split any operating losses on the stadium of up to $10 million per year. From 1991 to 2001 the ISFA will pay the Sox $2 million as a maintenance subsidy, to be increased in later years; if attendance falls below 1.5 million per year in the second decade of operations, the ISFA is obligated to buy 300,000 tickets per year.[27] Asked if the White Sox painted the state legislature into a corner, Representative Jim Stange replied: "Absolutely, they held us up."[28]

The Tigers are involved in politically charged negotiations with Detroit for a new stadium. Domino's Pizza entrepreneur Thomas Monaghan owns the Tigers and is using ex–Michigan Wolverine coach Bo Schembechler as his point man with the city. Despite Detroit's $34-

Senator GRAHAM. And that is the extraordinary lengths that the Illinois Legislature and the city of Chicago went to in order to keep the White Sox there. If this policy of no relocation and the sanctity of stability were the case, what credible threat did the White Sox have to wield over the head of the State and the city? Why didn't they just dismiss this as an idle menace and seek their protection from the stability of major league owners against relocation?

Senator METZENBAUM. Very briefly, Mr. Fehr.

Mr. FEHR. I believe that your presumption is right that the policy didn't really work, and its purpose, in my judgment, was not to work in this fashion. You will notice that major league baseball's officials did not complain about the potential relocation of the White Sox unless and until it got to the point of an actual relocation. That is for a reason, because you can't have a bidding process if you are suggesting that there is not going to be any sale.

Senator METZENBAUM. Thank you, Mr. Fehr.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Fehr, there is a limited amount of time, so let me go the heart of the question relating to a possible lockout, and caps and revenue sharing. There have been suggestions about revenue sharing for baseball like there is revenue sharing for the National Football League on television, and there has been talk that revenue sharing alone will not work without a salary cap.

I understand that this goes right into the heart of your concern representing players, but what can be done realistically, if anything, on a franchise like the Pittsburgh Pirates, where Bonilla has already left and Barry Bonds is on his way out? There is not much left of the franchise if, one by one, you strip away all the best players. And there is not much prospect for the future of the Pirates if that is to be the habit, players bought by wealthy owners or by teams in big markets with a lot of money. What can be done to stop that kind of an exodus from Pittsburgh?

Mr. FEHR. Two or three things come up. First of all, I must suggest it is Bonilla. Bobby would be upset with me if I didn't make that correction. In the overall situation, you have always had baseball teams that stripped themselves because they thought it was in their short-term economic advantage to do that. The Oakland A's stripped a championship team in 1975 and 1976. There was no free agency. There was nothing yet at that point that would have suggested any need to do that.

Senator SPECTER. But they did it themselves.

Mr. FEHR. Yes. Second, what Barry Bonds or Bobby Bonilla or any other player finds himself in is the following situation. He is drafted out of high school or college, signs with an organization, and until he gets to 6 years in the major leagues, by which point you have eliminated 99-plus percent of all players who ever play professional baseball, he has never once had the opportunity to go and look for a job somewhere. That is all free agency is, this miraculous term; it is "I would like to go and look for a job like anyone else does."

The question then becomes is baseball structured in such a way so that, given the revenue streams in the 1990's, is it not very likely that Pittsburgh is going to be able to have the assets and the

income that some of the other markets will. The answer to that may well be yes. The question that we see is then the revenue sharing agreements need to be revisited.

The other point I would say on the question of caps is really a very simple one. Here is the question when it is put to the players: We would like you to agree to a salary cap. Why? Well, Pittsburgh doesn't have a lot of money. Why won't the big markets give them any money? Well, they don't want to give them any money, and that then leads to the following question. Would the players be paid more or less if you had a salary cap, and the answer is they would be paid more if you didn't have a salary cap. That makes bargaining extremely difficult.

Senator SPECTER. With the yellow light still on and about to turn to red, you have players like Barry Bonds with a very high salary and you have a lot of players with a lower salary. I am not suggesting a conflict of interest because you represent them all, but don't you have very substantially competing interests between the players at the lower end of the salary scale and those at the upper end of the salary scale in representing the association as a whole?

Mr. FEHR. Yes, we do, as any union does. The job of the union and the responsibility it has under Federal law is, in a democratic fashion, to meld those interests and to come up with a position. When and if the players feel that the current position is not the one that they any longer want to adopt, it will change. It is their decision.

Senator METZENBAUM. Thank you very much.

Senator FEINSTEIN. I have no questions.

Senator METZENBAUM. Senator Feinstein has no questions. I want to thank you, Mr. Fehr. I think some of us do have additional questions. I am sorry we don't have more time, but we are sort of starting to run out of it. Thank you. Your testimony has been extremely helpful.

Mr. FEHR. I understand. I appreciate the opportunity to be here.

[Mr. Fehr submitted the following material:]

STATEMENT OF DONALD M. FEHR

Executive Director, Major League
Baseball Players Association

BEFORE THE SUBCOMMITTEE ON
ANTITRUST, MONOPOLIES, AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

102nd Congress, Second Session

10 December 1992

Oversight Hearing on Baseball's Antitrust Exemption

Mr. Chairman and Members of the Subcommittee:

My name is Donald M. Fehr. I became the General Counsel of the Major League Baseball Players Association (MLBPA) on August 1, 1977, and its Executive Director in December, 1983. The MLBPA is the exclusive collective bargaining representative of all Major League Players, on whose behalf I appear here today. I welcome the opportunity to appear before this Subcommittee and present the Players' views with respect to baseball's antitrust exemption. For the reasons set forth below, baseball's unique and privileged status should be eliminated.

Over the last decade, various Congressional committees and subcommittees have looked into antitrust issues in the context of professional sports, particularly with respect to the location and relocation of franchises. However, in my fifteen year tenure with the MLBPA, this is the first oversight hearing directly concerned with baseball's exemption. While recent events, such as the proposed relocation of the San Francisco Giants to St.

Petersburg and the owners' firing of Commissioner Vincent, no doubt sparked the interest which led to this hearing, its focus should be more comprehensive than an inquiry, no matter how detailed, into those events. Rather, I respectfully suggest that the focus of your attention should be and remain on one fundamental question: What is the public policy basis upon which an antitrust exemption for baseball's owners should be continued? If an appropriate public policy basis cannot be found - and it is my strong belief that no such justification exists - then the special privilege enjoyed by baseball's owners should fall.

I. The Historical Basis for the Exemption

The starting point is the Supreme Court's decision in Federal Baseball Club v. National League, 259 US 200 (1922). In short, the Court determined that baseball, although a business, neither operated interstate nor was the subject of commerce, and that as a result, the federal antitrust laws did not apply to baseball. Thus was the exemption born. That such a sweeping holding also threw into question whether at that time the Congress could regulate baseball at all seems not to have been noticed. That is, however, of considerable interest in light of the Court's subsequent ruling exempting baseball from the ambit of state antitrust laws.

In essence, Federal Baseball gave to baseball's owners the right to operate their business in cartel-like fashion. Long ago, the Supreme Court recognized its mistake. In subsequent cases, the Ccurt refused to extend baseball's exemption to any other professional sport or business, and specifically noted that baseball would be held subject to the antitrust laws if the Court were to consider baseball's status for the first time. See, e.g., Radovich v. National Football League, 352 US 445 (1956).

But while the Court has confessed its error it has refused to remedy it by overruling Federal Baseball. In Flood v. Kuhn, 407 US 258 (1972), the most recent baseball case to come before it, the Supreme Court flatly held, as it had nearly twenty years earlier in Toolson 346 US 356 (1953), that the business of baseball was interstate commerce, and that the rationale of Federal Baseball was simply wrong. In his majority opinion, Justice Blackmun wrote that baseball's exemption was "in a very distinct sense, an exception and an anomaly. Federal Baseball . . . [has] become an aberration. . . ." [Emphasis added.] Notwithstanding these strong words, the Court nevertheless permitted the exemption to stand, on stare decisis grounds. Justice Blackmun cited Congressional "inaction" as the reason that the Court should decline to remedy the effects of Federal Baseball. The "illogic" of the Court's decision, he wrote, could only be remedied by the Congress. Concurring, Chief Justice Burger wrote that the time had come for "the Congress [to act] to solve this problem." (See also the dissenting opinions of Justices Douglas and Marshall.)

By rejecting the rationale of Federal Baseball, but then holding that the need for uniformity and the potential for burdening interstate commerce precluded the application of state antitrust laws, the Court compounded its mistake. Federal Baseball, which originally had stood for the proposition that the Congress lacked the power to legislate with respect to baseball, had become instead an expression that Congress alone had the power to regulate baseball. It is difficult to imagine a more convoluted course to an illogical result. But for the owners it was the perfect result: they were subject to the legislation of neither the federal nor any state government.

Accordingly, twenty years ago the Court made clear that there was no legal basis upon which the exemption should have been granted or should be permitted to continue, except that the

Congress had preserved the Court's error through its inaction. In this way the Court avoided coming to terms with its prior decision, and cast the blame for baseball's exemption upon the Congress, as well as the responsibility to do something about it. But the Congress has done nothing about it. Baseball's exemption was last examined in 1976 by the House Select Committee on Professional Sports (Sisk Committee). The Clubs, predictably, urged the Select Committee to conclude that the exemption was justified and should be retained. However, in its final report, the Committee's judgment was otherwise:

> Based on the information available to it, the Committee has concluded that adequate justification does not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of overall sports antitrust reform. [Emphasis added.]

Similarly, the Department of Justice has consistently expressed the view that baseball's exemption should be eliminated. For example, Deputy Assistant Attorney General Lipsky testified before the House Judiciary Committee on July 14, 1981, that the exemption "is an anachronism and should be eliminated." Yet today, more than seventy years after Federal Baseball, baseball's owners continue to enjoy the freedom to operate their business as a shared monopoly, without antitrust scrutiny or governmental regulation.

The Congress has not acted. The exemption has not been legislatively eliminated. No up or down vote on the exemption has been taken. Baseball remains the only unregulated cartel around. The aberration, the anomaly, the anachronism remains. And through it all, no public policy basis has been articulated for the existence of the clubs' antitrust exemption, much less for its continuation. The continuation of the exemption simply cannot be justified in the absence of the Congress articulating

and adopting a public policy rationale sufficiently compelling to justify this unique treatment.[1]

II. Baseball's Internal Structure

How do baseball's owners organize the industry? The answer to this question is important; it illuminates the circumstances in which baseball operates in the last decade of the 20th century. In considering this question, it is important to keep in mind the behavior of the now twenty-eight owners with respect to one another, as compared to their behavior with respect to the rest of the world.

Baseball's structure can be easily described. The main factors at work are relatively few, and easily understood. In essence, baseball is a shared monopoly, of which all major league and all minor league teams are a part. The major league teams are bound to one another through the Major League Agreement, and the rules and regulations that the owners choose to enact under the Major League Agreement (the Major League Rules) in their internal meetings. Every minor league club is bound up with the major league clubs through the Professional Baseball Agreement and the rules and regulations enacted under it and the National Association Agreement, and is subject to the Major League Agreement. Each minor league club is also bound to the other minor league clubs through these same agreements. These agreements, together with certain others (e.g., the American and National League Constitutions and Rules) determine the boundaries

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[1] In Flood, the Court asserted that the baseball antitrust exemption "rests on a recognition and an acceptance of baseball's unique characteristics and needs." What are those "unique characteristics and needs?" Baseball's only unique characteristic is that it benefits from an antitrust exemption granted by a case that was, concededly, wrongly decided. Its only "unique need" is to unreasonably restrain trade. Any other alleged "need" is of a kind which can be and is routinely addressed by Congress through enactment of legislation that is prospective only.

within which each club will be permitted to operate. Taken together these agreements and understandings provide the framework within which the cartel-like behavior occurs. The club owners act as one would expect the members of a shared monopoly to jointly act: they strive to artificially control to their advantage the market prices both of what they sell, and of what they buy. The operating premises of this arrangement are simply that, to the greatest extent possible, no club will economically compete against another, and that consumers will have no alternative source of supply.

The owners first agree among themselves on the number and location of baseball franchises. Thus, the club-owners divide geographical markets, effectively giving each club territorial exclusivity, and thereby making each club, as a practical matter, a local monopoly. Similar arrangements divide up local broadcasting rights. National over-the-air broadcast rights are negotiated centrally by and on behalf of all clubs. Accordingly, for all practical purposes, competition, whether at the local, regional, or national level is eliminated. Moreover, a Major League Club cannot be sold on the open market. As we have recently seen in the San Francisco situation, the sale of a club is subject to the approval of all of the other owners, in all material respects, including the sale price and the identity of the new owner(s). Teams may not be relocated absent the consent of the other clubs. As a condition of ownership, each new owner is required to agree to all of the agreements by which major league baseball operates, including the territorial exclusivity, local broadcasting rights division, and revenue sharing agreements. A sale and/or relocation can be disapproved for a good reason, for a bad reason, or for no reason at all. Membership in the club of Major League baseball owners is membership in a very exclusive club indeed. In an antitrust sense, the barriers to unwanted entry are effectively absolute.

Similarly, the owners' agreements with one another determine how the revenue from baseball is divided up. Certain receipts are shared by the clubs, but others are not. To briefly summarize, gate receipts are shared between the home and visiting club to a limited degree. Local broadcast revenue is not shared to any meaningful degree. National broadcast revenue is shared equally, as is certain licensing revenue. Plainly, revenue disparities between the clubs (which can be significant) can be traced directly to and, in effect, are the necessary consequence of the revenue sharing agreements which govern the relationships by which the clubs have elected to operate. And it is the club-owners themselves, by there agreements, who determine whether, and to what extent, revenue is shared.

The foregoing summarizes the manner in which baseball's rules eliminate competition with respect to the selling of its product. In establishing and implementing these operating agreements, regulations and procedures, baseball's owners are accountable to no one but themselves, and their actions are not limited by any obligation to refrain from engaging in unreasonably anticompetitive behavior.

III. The Size of the Industry

At the time that Federal Baseball was decided, it is fair to say that baseball was not a large industry. Although baseball in 1972 was a much larger business than it had been in 1922, twenty years ago baseball was a small fraction of its current size. Indeed, in the period beginning with 1975, baseball's total revenues have grown tenfold (unadjusted for inflation), to more than $1.5 Billion.

For ease of comparison, one can look at the total industry revenue numbers compiled by baseball for the years 1975-1992. In

1975, total revenue was approximately $162.5 Million (24 teams). By 1980, that figure more than doubled, to more than $350 Million (for 26 teams). By 1985, only five seasons later, total revenue exceeded $715 Million, more than doubling the figure of 1980. Revenue was slightly more than $1 Billion in 1988, only three years later, and then reached nearly $1.25 Billion in 1989. During negotiations with the MLBPA in the winter of 1989-90, the clubs projected 1990 revenue at $1.315 Billion, 1991 at $1.412 Billion, 1992 at $1.52 Billion, and 1993 at $1.64 Billion. 1990 actual revenue exceeded the projection, and 1991 revenue was nearly 1.54 Billion, or more than $100 Million ahead of the projection. 1992 revenue should comfortably exceed $1.6 Billion.

In short, baseball has become a large business in the last several years. Moreover, many baseball clubs are now owned by or otherwise affiliated with large corporations including Turner Communications (Atlanta Braves), the Chicago Tribune (Chicago Cubs), which also holds broadcasting rights to seven teams beginning 1993, Anheuser-Busch (St. Louis Cardinals) and LaBatt's (Toronto Blue Jays). Other clubs are owned by the principal owners of other corporations, such as Levi-Strauss (Oakland A's), Nintendo, and others. It is an industry of this magnitude that the club-owners operate free from antitrust scrutiny.

IV. Effects on the Players

If baseball games are what the owners sell, then the services of players are what the owners buy. In this respect, too, the club-owners have traditionally organized their relationships in order to artificially control (lower) the market price they would have to pay. Their vehicle to do so was the so-called "Reserve System". The central purpose of the reserve system was to make it impossible for one club to compete with another club for a player.

Under this arrangement, each club exclusively "reserved" the right to contract with and employ certain players, and the other clubs agreed to honor that exclusive reservation, provided only that they exacted the same promise in return. Every club agreed to keep "hands off" any player except those on its own reserve list. In other words, the clubs simply divided up the players among themselves, agreed that they would not compete for players, and gave the players a single choice: play for what you are offered, or find some other line of work. In baseball, a player was not permitted to look for a job, and weigh the benefits and detriments of more than one potential offer of employment (if he was good enough to be able to secure more than one offer), as would an employee in virtually any other industry. When signed to his first professional contract, a player was stuck in that single organization for the balance of his career. He could only move to another organization if he were unconditionally released (baseball's euphemism for being fired), or if he were traded. (Only in professional sports - following the lead of baseball - are employers permitted to involuntarily assign a contract of employment to a different employer in another location.) In such circumstances, it is not surprising that salaries were held down to well below the levels that a free market for player services would have otherwise produced. And that, after all, was the purpose of the reserve system.

The MLBPA was reconstituted as a functioning labor union in 1966, when Marvin Miller was selected by the players to be Executive Director.[2] The task facing the newly formed union was to secure, through collective bargaining, the agreement of the major league clubs to do that which they most desperately did not want to do; compete with one another for players in a free

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[2] All-Star pitcher Jim Bunning, now a Member of Congress from Kentucky, was one of the four players most instrumental in re-forming the MLBPA and hiring Marvin Miller.

market. In other words, the Players Association had to collectively bargain the existence of a free market for players' services, and then be able to enforce and maintain that free market. And it had to do this without recourse to the fundamental laws which prohibit unreasonable restraints on competition, the anti-trust laws.[3]

Given the foregoing, it was not a surprise that the clubs' resisted the players' efforts to bargain for free agency. Rather, free agency came to baseball in December, 1975, by virtue of a grievance arbitration decision, the Messersmith-McNally case. The arbitrator ruled that the language of the uniform player's contract and certain Major League rules did not after all give the club a perpetual right to the player. The clubs tried first to enjoin the arbitration hearing from going forward, and then attempted to overturn the arbitrator's award, but failed. See Professional Baseball Clubs, 66 LA 101 (1975), aff'd sub nom. K.C. Royals vs. MLBPA, 532 F2d 615 (8th Cir. 1976). The clubs then promptly locked out the players in the Spring of 1976, the first shot of what has proven to be endless conflict over this issue. The subsequent bargaining between the players and clubs (in 1976, 1980, 1981, 1986 and 1990) can be seen merely as a continuation of the owners' desire to drive down player salaries by eliminating or restricting free agency.

In the years following the 1976 settlement, by which free agency (albeit with length of service and many other restrictions) became a part of the Basic Agreement between the MLBPA and the clubs, players' salaries began to rise toward market levels. The clubs responded by unilaterally imposing costly "compensation" on a club that signed a free agent. This compensation (which was designed to and would have virtually

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[3] The idea that a player should be able to seek work with another club(s) when his contract is over was such an extreme notion that baseball adopted a special term for it: "free agency".

ended the free market for players)[4] provoked the fifty day strike which almost ended the 1981 season. In the next bargaining round, in 1985, the clubs were not so subtle. They insisted on a so-called "salary cap", which would have lowered player salaries in the face of exploding revenues.[5] The players struck in August, and a settlement was quickly reached which preserved free agency, at least on paper.

Immediately following the 1985 World Series, in flagrant violation of the new Basic Agreement that they had just negotiated with the MLBPA, the Major League clubs organized and implemented a virtually complete and total boycott of free agents. For all practical purposes, the market for players ceased to exist. The clubs acted uniformly and in lockstep. This was the beginning of what came to be known as free agency "collusion". The collusion was to last a very long time, and its bad effects even longer.

The MLBPA filed a grievance alleging a violation of the collective bargaining agreement, but as that matter progressed the conspiracy just continued. In breach of their agreement with the players, the clubs in effect had reinstituted the old, pre-free agency reserve system. Management officials scoffed at the players' claims, confidently asserting that "fiscal responsibility" had at last returned to baseball. When the clubs

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[4] "Compensation" for a free agent is another baseball term with a hidden meaning. It does not refer to how much a player is paid. On the contrary, a payment of compensation (here, a player and a draft choice) is made from the team signing the free agent to his former employer, to "compensate" the other club for the "loss" of the free agent. In other words, part of the value of the free agent is paid to his former team, not to him. This reduces the value of his new contract by the amount of the compensation. If the compensation is high, as in the clubs' 1981 proposal, free agency becomes just a memory, so the players struck.

[5] A "salary cap" is a device by which the players are to agree to "cap" their own salaries at a lower level than the clubs would pay players absent the cap. It is simply another mechanism to constrain competition for players' services.

found the arbitration hearing not to their liking, they tried to fire the arbitrator in the middle of the case, hoping to derail the process. A separate grievance was filed and heard, resulting in the arbitrator being reinstated.

Following the 1986 season, the boycott continued with even more strength. A second grievance was filed, this time before a new arbitrator. Finally, near the end of the 1987 season, the players prevailed in the liability phase of the first collusion case. This did not, however, stop the conspiracy. The clubs simply shifted from a boycott of free agents to price fixing the free agent market. Yet a third grievance was filed.

Late in the 1988 season, the MLBPA prevailed in the second collusion case. Subsequently, the players also won the third case. In later opinions the arbitrators awarded damages for the first three seasons at more than $100 Million dollars. Eventually, in December, 1990, the cases settled. The Clubs paid the players $280 Million (in an industry that only employs about 700 players) plus provided much other very valuable, although not specifically quantifiable relief.

This staggering amount -- it may be the largest settlement in the history of American labor arbitration -- demonstrates how pervasive and successful the collusion was. Most significant, however, were the arbitrators' findings that the clubs violations of the Basic Agreement had been intentional and deliberate. And the players were forced to contend with this massive premeditated invasion of their rights without the fundamental protections of the antitrust laws. There can be little doubt that the clubs would have refrained from this behavior had they been subject to treble damages. But, without question, the collusion cases demonstrate the behavior of which the clubs are quite capable. (Copies of the three decisions by the arbitrators finding the collusion have been provided to the Subcommittee staff.)

It is quite clear that the owners' antitrust exemption has contributed to the continual strife between owners and players in baseball. The media often talk about the positive labor relations between the National Basketball Association and the Basketball Players Association. But while there have been no work stoppages in the NBA, the basketball players have been able to do what the baseball players have not: they have instituted antitrust litigation, the settlement of which was wrapped up in their collective bargaining agreements. In short, there was a safety valve in the system. It is at least possible that, if baseball players had the same protection as the basketball players, one or more of the several strikes and lockouts (one or the other of which has taken place in every bargaining round beginning with 1972) could have been avoided.

Moreover, it is fundamentally unfair to deny to baseball players the protection of the antitrust laws that is afforded to virtually all other individuals. It is sometimes suggested that baseball players do not need the protection of the antitrust laws because their union has to date been successful. But are not baseball players entitled to the protection of the law as are all others? As was noted in Justice Marshall's dissent in Flood, at 407 US 292:

> The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors or members of any other class of workers.

The current circumstances of the minor leagues make this clear. Minor league baseball players, clearly the majority of all professional players, for all practical purposes remain subject to the traditional, pre-free agency reserve system. Essentially, such players have no recourse. Consider just one facet of the reserve system, the amateur player draft, by which

the clubs tell each potential player the one, single baseball organization with whom he can negotiate or contract. The Major League Clubs direct, organize and conduct the draft, and enforce the exclusive negotiating rights of the clubs as against the players. What if that draft restrains the market unreasonably, to the injury and damage of the players? They have no recourse but to submit, or to give up a baseball career. Is that fair?

The most recent example of the clubs' behavior in this area is illuminating. Last year, the clubs simply changed the rules relating to the amateur draft, to make it virtually impossible for a high school graduate to have any leverage in negotiations with the clubs. Not wanting the world to know that was the reason for the rule change, the Clubs concocted the ridiculous suggestion that they really were doing this to encourage young poeple to go to college! Because it violated a provision of the Basic Agreement relating to compensation for free agents, the MLBPA challenged the rule change and in his subsequent decision, the arbitrator had no difficulty concluding that the rule change was designed to and did shift greatly the leverage in favor of the club in its negotiations with drafted amateur players and was designed to save the Clubs money. It was about money, nothing more or less. But the kids themselves have no effective remedy. We do not and cannot represent them and cannot seek a monetary remedy on their behalf. As the arbitrator found, the kids would have to pursue such remedies on their own in court. Is that fair? Young people pressured into signing contracts, in consequence of an improperly enacted rule, losing their collegiate eligibility, which would restor their leverage, and yet having no remedy other than to sue Major League Baseball?

Finally, players are also adversely affected by the artificial scarcity of franchises maintained by the owners, an issue with which this Committee should be vitally concerned.

V. Number and Location of Franchises

Over the last ten years or so, the Congress has been repeatedly concerned with issues relating to the number and location of professional sports franchises. Numerous bills have been introduced and considered (at least in committee) on various aspects of this problem, and an ad hoc "Task Force" was formed on baseball expansion. I have previously testified at some length on such issues.[6]

Yet the problem remains, as events over the last several years relating to the efforts to secure a team to play in St. Petersburg so poignantly demonstrate. Baseball's owners control absolutely the number of franchises and where each franchise will play. The difficulty is that because the absolute number of franchises is artificially scarce, some deserving cities will always have to do without teams, and the owners will decide which ones. The number of teams (the supply) is limited because that has the effect of pushing up the value of the existing teams as well as the price which is paid to the owners of the existing teams for an expansion club. A threat to relocate an existing club, which is not a believable threat unless there is a qualified city without a team to threaten to move to, provides great leverage to the owners against both cities. Thus, all

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[6] See Statement of Donald M. Fehr, before the Energy and Commerce Committee, Subcommittee on Commerce, Transportation and Energy, April 4, 1985, On Professional Sports Team Relocation Legislation; Hearings before the Committee on Commerce, Science, and Transportation United States Senate, April 27 and May 12, 1984; Hearings before the Committee on the Judiciary United States Senate, August 16, September 16, 20 and 29. And See Professional Sports Franchise Relocation: Introductory Views from the Hill, 9 Seton Hall Legislative Journal (1985), by Senator Slade Gorton, in which he recounts his experiences in this regard as the Attorney General of Washington State, and as a Senator.

efforts to secure a team by expansion or relocation in the end will benefit the owners of the existing teams.

Consider: What economic forces were at work that resulted in an entire industry - major league baseball - electing not to market its product in Florida, one of the most quickly growing, attractive areas in North America, until next year? What kind of consumer business could be expected to ignore for the nearly fifty years after World War II the burgeoning Florida population? To ask such questions is to answer them. Only an enterprise interested in restricting the supply of its product and absolutely unafraid that a competitor will establish itself in such a market would so behave.

Moreover, it is important to remember that it is the entire industry - all of the owners - who effectively act together with respect to decisions regarding the number and location of franchises. Each have-not city seeking a team must satisfy the owners as a group before it can succeed. And, while it is certainly not uncommon for one locale to compete with another for a particular factory or company headquarters, cities are not required, as they are in baseball, to petition an entire industry. Budweiser, LaBatts and Coors do not get together and jointly agree to limit the production of beer and the number of facilities, each one protecting the others by refusing to locate a plant except when and as the other two agree. But that is how it works in baseball.

The current situation works to the advantage of team owners and to the disadvantage of cities in two different ways. In the first, a club that considers relocating is in a position to secure concessions from its local area, desperate to keep the team where it is, as well as from the "have-not" city trying to entice the team to move. In the second, have-nots effectively

bid against one another to acquire a scarce expansion franchise. Moreover, in nearly every situation, the owners permit, if not encourage the courtship to play out, so that the best possible terms can be secured.

The most basic point is this: the markets always compete for the teams; the owners do not compete for the markets. And it is the absence of the antitrust laws' proscription against unreasonably restraints and the exercise of monopoly power which allows the owners to proceed as they see fit. In the case of St. Petersburg, this situation has played itself out many times in the last several years (e.g., the proposed relocation of the White Sox and then of the Giants, as well as expansion). Clearly, this situation continues because the clubs have agreed not to compete with one another for territorial markets. Can it be seriously questioned that Florida would have had one or more teams long ago if the National and American Leagues were competing with each other for new markets? What is the public policy basis upon which such a situation is permitted to continue?

In addition to cities and fans, players are also hurt when the number of franchises is artificially held down. Players lose jobs. Careers are shortened. There is less competition for players than there should be. In short, to the extent that the number of franchises is artificially limited, players careers are limited. A player's opportunity to engage in his profession is thus constrained.[7]

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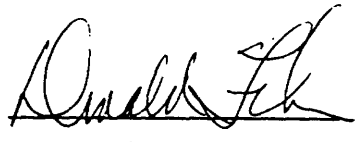
[7] Owners often say that there cannot be additional clubs because there are not enough players for more teams. The owners have always said that, no matter how many teams there were, how large the population grew, or whether blacks were permitted to play. The players have always believed that there are more than enough players for a significant number of additional teams. However, that judgment need not be made. Rather than assuming that there are not enough players, let the number of teams increase until it can be determined that such is the case. And let the market determine whether the players are good enough.

VI. Conclusion

No one can be certain what would happen in the event that baseball's antitrust exemption were to be eliminated. But this much is certain: whatever the result, baseball's owners would be faced with the same the state of affairs every other American business is compelled, in the interests of pro-consumer competition, to confront every day. All (save those which are regulated) must abide the antitrust laws and refrain from anticompetitive and monopolisitic behavior. Why not the owners of the 28 baseball teams?

That final question returns to the first. Minimally, if baseball's literally unique exemption from the antitrust laws, which themselves are at the foundation of our free economic society, is to be continued, the Congress must identify, articulate and endorse the public policy principles upon which baseball's owners should receive such special, preferred treatment. In baseball's case, what is that public policy justification? No one has ever been able to find one -- not the Supreme Court, not predecessor Congressional Committees, no disinterested economists, no one except the Clubs themselves. But the inability to articulate a public policy basis for an exemption of this magnitude itself undermines the clubs' views, and demonstrates why the exemption should be repealed. It does not serve anyone's interest -- except of course those upon whom it was improvidently, and mistakenly bestowed.



Donald M. Fehr

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Donald M. Fehr
Executive Director
Major League Baseball
Players Association
805 3rd Avenue
New York, New York 10022

Dear Mr. Fehr:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions no later than Monday, January 25, 1993:

Chairman Metzenbaum's questions:

1) Mr. Fehr, how would the application of the antitrust laws to Major League Baseball affect labor relations and contract negotiations between the players and the owners?

2) In your testimony, you stated that "the issue is not at all whether there is a strong Commissioner or weak Commissioner." Do you believe the owners can restructure the Commissioner's office so that Fay Vincent's successor can freely exercise independent judgment or address critical issues such as expansion in a manner that promotes the long-term interests of the sport and the fans?

Senator Thurmond's questions:

1) How do you answer Mr. Selig's point that the antitrust exemption is important to protect franchise stability, and thus the "covenant" that baseball has with its fans?

2) How would you react to an antitrust exemption that was limited to franchise relocation only?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

DONALD M. FEHR
EXECUTIVE DIRECTOR
GENERAL COUNSEL

29 January 1993

Hon. Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
Monopolies and Business Rights
Committee on the Judiciary
United States Senate
Washington, D. C., 20510-6275

Dear Senator Metzenbaum:

This will reply to your letter of 11 January posing questions by Senator Thurmond and you relative to baseball's antitrust immunity. Before turning to the four questions asked, however, I would like to make one preliminary observation, which I believe should be kept in mind.

Baseball's current antitrust immunity does not run to some abstract, amorphous institution, or to a "game", or to the "national pastime." Rather, it is to baseball's 26 (now 28) owners that the exemption runs. The exemption means that the owners may operate as a cartel; nothing more, but nothing less. Thus, those institutions charged with the making of public policy have no role in baseball. The right to make public policy has been effectively shifted from elected officials (federal, state and/or local) to the owners themselves. Public policy is made in the confines of owners' meetings. Accordingly, the exemption should be removed, and baseball's owners subjected to the law of the land, unless the Congress can identify, articulate and endorse a public policy basis upon which the owners special, preferred treatment should be permitted to continue. I strongly believe that no such basis can be found.

805 THIRD AVENUE, NEW YORK, NY 10022
TEL: (212) 826-0808 FAX: (212) 752-3619

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

Chairman Metzenbaum's Questions

Question 1: Mr. Fehr, how would the application of the antitrust laws to Major League Baseball affect labor relations and contract negotiations between the players and the owners?

Answer: Application of the antitrust laws to baseball would improve collective bargaining in this industry. The reason is straightforward. In baseball, as in the other professional team sports, the team owners' goal is, and since the advent of free agency has always been, to restrict or eliminate competition among clubs for players. This is classic monopoly behavior. Because the antitrust laws do not apply, baseball's owners have a built-in incentive to try to break the union, because if they were to suceed in doing so, they would once again be able to totally eliminate competition for players.

There has been a work stoppage (lockout or strike) in baseball in every negotiation for more than 20 years (1972, 1973, 1976, 1980, 1981, 1985, 1990). Contrast this record with that of professional basketball, which has not had a stoppage, but in which every agreement since the 1970's has been wrapped up in an antitrust case consent decree. Or consider pro football, where the NFL owners have recently learned that they may not unreasonably restrain competition for players even if there is no union. Simply put, the manner in which the parties negotiate would be different if the antitrust laws applied. The owners would be much less likely to force a confrontation with players over free agency issues (the heart of every dispute beginning with 1976) if the players had recourse to the antitrust laws to ensure competition. Accordingly, the likelihood of a work stoppage over this issue would be reduced.

Question 2: In your testimony, you stated that "the issue is not at all whether there is a strong Commissioner or weak Commissioner." Do you believe the owners can restructure the Commissioner's office so that Fay Vincent's successor can freely exercise independent judgment or address critical issues such as expansion in a manner that promotes the long-term interests of the sport and the fans?

Answer: I do not believe that the office of the Commissioner can be so restructured. To suggest that it can ignores certain realities of the situation:

-- The Office of the Commissioner is established by the Major League Agreement, an agreement entered into and amended by the owners alone. The very raison d'etre of the Office of the Commissioner is to serve the owners joint ends. The powers and limits of the Office of the Commissioner are established entirely by the owners.

-- The owners hire, re-hire and pay the Commissioner. And, as we have seen, they can fire the Commissioner.

-- The owners determine the pay of the Commissioner, and set the budget for his office.

Given these facts, it is extremely unlikely that any Commissioner can or would be independent of the owners. The owners will surely select someone who will act on their collective behalf, and who will know and remember who has employed him. One simply cannot reasonably expect the owners to do otherwise, or a Commissioner, so selected and paid, to act in a manner inconsistent with the interests of the owners as a group, who are, after all, his employers and constituents. Moreover, a Commissioner is "independent" only to the extent and so long as there is no working majority of owners in opposition. A Commissioner may be able to mediate and/or arbitrate disputes between owners, or to act if the owners as a group are unwilling or unable to do so. Of such things, and only of such things consists the Commissioners vaunted independence, as Fay Vincent discovered.

As is evident from Bud Selig's oral testimony, the public's interests, which is in more rather than fewer major league teams and in reducing the owners' power to exact public support for facilities, etc., are not those of the owners, whose interests are in artificially restricting the number of teams, thereby increasing the value of each club by making it an artificially scarce commodity, and to secure public subsidies by implicit or overt threats to relocate. For example, Mr. Selig testified why it is emphatically not in the owners' interests to expand (e.g., to the Tampa Bay area). A Commissioner selected and paid by the owners will come down on the owners' side; it would be astonishing were he to act otherwise. And he would be ignored (or fired, or both) if he did so.

A Commissioner can be expected to act independently of the owners and in the interests of the fans only if he were not selected and paid by, and did not receive his authority from the owners. In short, a Commissioner cannot be independent of the owners unless he does not owe his job, his salary or his authority

to them. In all probability, it would take regulation to achieve such a result. Removing the exemption, and thereby requiring the owners to refrain from anti-competitive behavior is a much easier, more certain way to go.

Senator Thurmond's Questions

Question 1: How do you answer Mr. Selig's point that the antitrust exemption is important to protect franchise stability, and thus the "covenant" that baseball has with its fans?

Answer: Mr. Selig is simply wrong. To begin with, the pressure on franchise stability stems primarily, if not exclusively, from baseball's owners maintaining an artificial scarcity of franchises. This produces "have-not" cities, such as Tampa - St. Petersburg, that seek to entice an owner to move by offering more lucrative stadium leases and other concessions. (This is, of course, the only way such a city can reasonably expect to secure a franchise.) It is the shortage of teams that allows existing owners to play one market against another to secure ever more concessions. Baseball permits - if not overtly encourages - threats to relocate in order to secure concessions from the existing city. Thus, the "franchise stability" question is created by the exemption, which permits the artificial scarcity of teams. Indeed, this entire situation is one which the owners have created and maintained for their own benefit. Many an owner has reaped the reward which followed public consideration of relocating his team. Do baseball's owners object when an owner threatens to relocate his team in order to maximize bargaining leverage with the city where the team now plays? Did baseball tell the White Sox they could not relocate to Tampa? Of course not: the owners want the ability to threaten to move. That is what the artificial scarcity is all about.

Second, the notion that if the exemption were removed teams would move about willy-nilly is simply nonsense. Case law clearly permits a league to have reasonable rules regarding franchise location and relocation issues. The suggestion that under the antitrust laws there can be no effective bar to relocation is a simple scare tactic unworthy of serious consideration. * See also my answer to the next question.

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* During and after the Raiders litigation the NFL raised such fears. But it did so both to avoid pressure to expand and to try to pressure the Congress into giving it broader antitrust immunity. Under the NFL's rules, of course, the result would have been that the Rams would have left Los Angeles, and the Raiders would have stayed in Oakland, leaving Los Angeles without a team.

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

Question 2: How would you react to an antitrust exemption that was limited to franchise relocation only?

Answer: While, for the reasons previously set forth, eliminating the exemption with respect to everything except franchise location issues would be helpful in terms of labor relations, it would clearly do nothing to address the concerns of the have not cities. (If this question has not been put to the owners, I hope that it will be. The owners claim only that the exemption is needed with respect to franchise location issues. Hence, they should not oppose this concept.) Moreover, a bill of this type would serve as the endorsement of the Congress to baseball's owners' current practices with respect to the number and location of teams. Such a bill would perpetuate the pressures on localities that currently exist. From the point of view of the fan, this would only continue the current situation of too many cities and too few teams. By endorsing this concept, without more, the Congress would, implicitly, be approving the artificial scarcity of franchises the owners have maintained.

There is, however, a solution to franchise scarcity. If baseball were split into two or more competing leagues, such leagues would no doubt compete for vacant and attractive markets, rather than the reverse, as now occurs. Such competition would likely increase the number of teams, and decrease the number of "have-not" cities, thereby reducing the pressure to relocate, and increasing franchise stability. There is no way around it: pressure on teams to relocate will abate only as and to the extent that the number of teams increases. Alternatively, legislation could provide a measure of antitrust protection for the owners in this area, provided that the owners first were able to establish that the number of teams was not artificially restricted. While difficult to write, such a bill could provide a measure of relief for fans in the "have-not" cities. On balance, however, I submit that legislation forthrightly placing baseball under the antitrust laws remains the best, most simple and most direct course.

Sincerely,

Donald M. Fehr

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

DONALD M. FEHR
EXECUTIVE DIRECTOR
GENERAL COUNSEL

29 January 1993

Hon. Howard M. Metzenbaum
c/o Chris Harvie
Subcommittee on Antitrust,
Monopolies and Business Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Metzenbaum:

Enclosed please find my reply to your letter of 11 January. In addition, I know that certain members of the Committee have been interested in the report of Baseball's Economic Study Committee. For the record I will forward a copy of that report, including the separate report by member Henry Aaron, under separate cover.

Yours very truly,

Donald M. Fehr

DMF/mc

805 THIRD AVENUE, NEW YORK, NY 10022
TEL. (212) 826-0808 FAX: (212) 752-3649

Report

of

Independent Members
of the
Economic Study Committee

on

Baseball

December 3, 1992

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Staff Analysis

December 3, 1992

Mr. Donald Fehr
Executive Director and General Counsel
Major League Baseball Players Association
805 Third Avenue
New York, NY 10022

Mr. Allan "Bud" Selig
Chairman
Major League Baseball Players Relations Committee
350 Park Avenue
New York, NY 10022

Dear Don and Bud:

With the transmittal of the enclosed report to you the independent members of the Baseball Economic Study Committee conclude their work. We wish to thank you both for the opportunity to participate in baseball's effort to think through its approach to the challenges ahead and to share with you a few of the broader observations we have reached in the process of our work together over the past year and a half.

This document reports many facts and trends; the interpretation of this information is controversial. On some matters the independent members were divided. The report language reflects our efforts to bridge these divisions. No one of us, had he been writing alone, would have worded the report exactly this way. But we found enough common ground in the conclusions found herein to join in signing the report.

Henry Aaron
David Feller
Peter Goldmark
Paul Volcker

PREFACE

The world of baseball provides our country with some of its most wonderful moments of athletic competition. Baseball is part of our history, part of our character -- a never exhausted outlet for hope, and a continuing drama of grace, timing and achievement on the field of our dreams.

It is also filled today with money, conflict, and distrust.

The history of relations between owners of Professional Baseball Clubs and the Major League Baseball Players Association has been characterized by repeated and acrimonious disputes. Six rounds of collective bargaining have been marked by three strikes and three lockouts.

We believe that prolongation of the past pattern of strikes and lockouts in baseball would inevitably damage the short and long term interests of both the clubs and the players. Unseemly contests between club owners and players would only sour public attitudes toward the game as a whole, with a consequent long-term reduction in both profits and salaries.

While public attention will shortly focus on the preliminary skirmishing surrounding collective bargaining between the clubs and the players, we believe that baseball faces a challenge far broader and more critical than simply reaching a labor agreement. That challenge is to arrest the decline and embitterment of baseball in American life, and to forge a framework in which owners and players can go beyond their individual financial interests to pursue constructively, fruitfully and together their shared interests.

Baseball must be reconceived by its participants, the owners and the players, as a genuine partnership which pursues competitive excellence, leads by moral and athletic example, resolves labor disputes through negotiation rather than by insulting the public with lockouts and strikes, and tempers financial greed with a sense of mutual cooperation and accountability to the public.

The independent members of the Committee believe that a confluence of developments makes such a partnership both more urgent and more possible than at any time in the recent past. These developments include:

- an imminent end to the heady increases in financial returns for both owners and players that marked the 1980's;

- the likelihood of wrenching readjustments in the terms of national broadcasting contracts with baseball;

- the particular threat posed to the financially weaker clubs by these and associated trends;

- the recognition by owners and players alike that something is amiss, as reflected by the very appointment of an independent committee such as this for the first time in baseball's history.

Baseball has existed for more than a century in America. In the process it has brought pleasure and pride to generations. But it is now being tested, perhaps as strongly as ever before, as to whether it can muster the trust and the vision to build a true partnership for the future. We think now is a good time to start.

I. Introduction

Assessment of the economic performance of baseball and of the forces bearing on its future outlook are at the heart of our assignment. While some issues are clear, the overall task is difficult and potentially confusing for the following reasons:

- Forecasting of revenues, expenses, profits and asset values in any industry is subject to many uncertainties. It is complicated in baseball by important structural changes in recent years in revenue and cost trends.

- Owners, players, and others differ as to the relative importance of operating income, net profits, cash flow, and franchise values. In particular, owners are interested in return on their past investment and maintaining franchise values. From other points of view emphasis on current and prospective operating income or cash flow is more useful.

- Because baseball is a business and a sport at the same time, and has important community values and interests, the condition of this industry, more than that of other industries, involves intangible and indirect returns and satisfactions in addition to the direct monetary returns of owners.

Our primary concerns are whether, and to what extent, the health of baseball is threatened by economic pressures, and the possible implications of these pressures for owner-player relations. We do not believe that health can be determined simply by analyzing whether the returns available to baseball owners are comparable to those in other industries, or even whether the returns justify the prices paid for particular franchises in the past. What does matter is whether there is a continued interest by existing owners in building their franchises and maintaining their competitiveness and whether owners who wish to sell can find responsible and willing buyers.

In other words what is critical for baseball over time is not maintaining particular franchise values, but that there be reasonably stable ownership able and willing to maintain the continuity of their clubs and franchise location, to pay enough to attract exceptional athletes to baseball and to their team, to justify the large capital expenditures for stadiums (whoever directly bears that cost), and to maintain fan interest and healthy competition.

As the history of baseball suggests, this does not require every club to be profitable every year. As in the past, the overall profitability of baseball may vary over cycles. But to have any reasonable assurance that owners, existing and new, will be willing to operate and acquire baseball clubs, and be able to make the requisite investment, there should be some reasonable prospect of achieving revenues in excess of expenditures most of the time.

For civic or avocational interests owners or ownership groups may sometimes be willing to support a particular club through even extended periods of losses. However, we believe that a healthy outlook for baseball does require the prospect that with effective management the industry

as a whole be able to cover operating expenses, with a reasonable margin to cover necessary investments and to maintain continuity during inevitable difficult years. That situation would usually be reflected in significant franchise values. The absence of such franchise value for a significant number of clubs, reflecting an inability to "earn their way" over the long haul, would be disruptive not just for those clubs, but for the stability of baseball as a whole and thus to its appeal to the public.

A wide range of motives impels people to own and operate baseball teams. Running a club has a romantic appeal for many Americans. Others derive immeasurable benefits, such as prestige and public approbation, from owning a baseball team, or capitalize on synergy with other enterprises they own. Community leaders and civic bodies often come forward to finance the acquisition of franchises because of the benefits major league baseball brings to a city. It is not possible to determine what mix of financial, altruistic, civic, competitive or avocational interests impels club owners to do what they do. What is important for the game and for the public interest is that they continue to do so, i.e. that there be clubs, that games and seasons be competitive, and that the continuation and the viability of the sport be supported by the existence of a market which can assure the transfer of a club to new and responsible investors. There is every reason to believe that this is the condition of baseball today. What is at issue is whether this situation can be expected to continue in the future.

This test does not require that franchise values rise continuously or that higher values need cover past losses. In that light, the information available to this Committee indicates that there have been to this point buyers and communities willing to acquire and support clubs whose present owners decide they cannot continue to operate them.

Information submitted to the staff indicates that sales prices of clubs rose sharply in the 1970's and '80's, and may have stabilized in real terms since the late 1980's. Whether prices will be maintained in the future will depend upon trends in revenues and costs of individual clubs, of baseball as a whole, and upon whether and how rules governing both the distribution of revenues among clubs, in large markets and small, and player compensation may be changed in the future. Because the reasons for investing in a major league baseball team include more than financial gain the fact that profit rates are below those of other U.S. industries does not mean in itself that baseball as a whole has a problem or that the condition we have described as necessary for its continued health will not continue.

While the Committee makes some recommendations on changes that should be considered, we are aware that the parties through collective bargaining are in the best position to decide the specific contract terms that will govern their relationship. Baseball's economic system is intricate and interdependent. As a result, any changes must be carefully analyzed. For the benefit of the fans, the players, and the clubs, it is imperative that the parties address the issues facing the game on a timely basis.

The atmosphere between the parties has been marked in the past by hostility and distrust. It is the strong conviction of the Committee that if the clubs and players cooperate to deal with

the problems they confront -- if they approach these challenges in a spirit of genuine partnership -- they can cope with any trend or event in sight and operate baseball profitably for both owners and players and enjoyably for the public. Overall, baseball generates more than enough revenue to thrive; only greed, rashness, or a lack of reasonable cooperation can preclude economic viability for both owners and players.

II. The Economic Condition of Baseball

The Committee is charged to study and report on the "overall economic condition of the industry" but also current and impending problems, if any. In approaching this task, the Committee examined revenues and expenses, operating income, and franchise values.

The Committee believes that more information about the financial operations of baseball can and should be made public. Accordingly, this report includes as Attachment B a summary report of financial operations for 1991 prepared for the clubs by the accounting firm of Ernst & Young. This report is known as "The 8-10-8 Report" because it presents information reported by the clubs in three groupings of the eight largest, ten middle-size, and eight smallest clubs respectively in terms of contribution to overall operating income.

Revenues

Gross real revenues rose at an average annual rate of 9 percent from 1985 through 1991.[1] Several factors strongly suggest that revenues will not grow as fast in the first half of the 1990's as they did in the late 1980's and may even decline.

Average game receipts per club have grown from $14 million in 1985 to $20 million in 1991, or nearly 6 percent per year in real terms, as attendance reached new records and ticket prices increased significantly. Some additional growth in attendance is possible in the years ahead as new stadiums replace old ones but the rate of growth seems bound to slow. (1992 attendance was approximately 2 percent below 1991 attendance.)

Much greater uncertainty surrounds future growth of revenues from national television contracts which now account for 23 percent of total revenues. Current contracts with CBS and ESPN will expire at the end of the 1993 season. Both CBS and ESPN have reported sizable losses on their contracts. ESPN now has exercised its option, at a cost of $13 million, not to extend its contract beyond 1993. Some of these losses may be attributable to the current recession, some to the perceived attractiveness of baseball, some to secular declines in advertising expenditures, some to competing programming, and some, perhaps, to business misjudgments. The concern of the clubs that national television revenues will decline is understandable in the light of current circumstances.

Local television and radio revenues constitute nearly the same proportion of gross receipts as network television. This source of revenue, which varies a great deal by individual club and size of market, increased greatly between 1984 and 1991. Changes are not likely to be so abrupt as in national television. Given the pressures on advertising generally over the past few years, growth

[1]Unless otherwise specified, all data on revenues and expenditures contained in this report and in the accompanying staff report are expressed in constant 1991 dollars, adjusted for changes in the consumer price index.

at the past rate is unlikely to continue and it appears unwise to assume future growth in local media revenues that is faster than the growth in gate receipts.

Costs

No projected slackening in revenue growth will affect the financial viability of baseball if the clubs cut expense growth, including player compensation, correspondingly. The clubs project that expenditures other than player salaries will grow more slowly, but that player salaries will grow more rapidly, than revenues. The players challenge the contention that salaries will grow if revenues do not. In projecting costs, the critical question is whether player compensation, which grew at an average real annual rate of 10 percent from 1985 through 1991, will continue rising even if growth of revenues slows or if revenues actually fall.[2] We deal with this important issue below.

Industry Operating Income

As the annexed staff report indicates, the baseball industry as a whole consistently produced net operating income before tax, averaging slightly more than 6 percent of revenue, from 1985 through 1991.

While acknowledging that other measures may be important, the Committee has chosen to focus primarily on net operating income before tax in its analysis of baseball financial performance. For one thing, this measure facilitates comparison among clubs that have quite different capital structures. Moreover, it focusses on the elemental relationship of any operating business -- whether operating revenues cover expenses. In reaching its conclusions, however, the Committee did, where appropriate, take into account other measures, especially return on investment (see Staff Analysis, Section II). However, our analysis of trends in operating revenues and costs encompasses the significant factors bearing on the financial outlook for the industry as a whole.

It should be emphasized that while standard accounting uses the terms profit and profitability, we refer to net operating income before taxes. We exclude interest expense and revenue, income tax liabilities and benefits, and the depreciation of the portion of the club purchase price attributable to intangible assets. Major league baseball as a whole or an individual club would have positive net operating income, under our definition, if its revenues from baseball operations exceeded the expenses of those operations, even though net operating income might not be enough to cover non-operating expenses, including, for example, interest on working capital or tangible assets, interest on the money borrowed to purchase the club, much less any repayment of loans or return on equity.

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[2]The players hold that the 10 percent growth rate is misleading for two reasons. First, they claim, salaries at the start of the period were depressed by the early stages of collusion. Second, some players negotiated multi-year contracts that shifted salary for 1990, when a work stoppage was considered possible, to later years, thus inflating salaries in the final year of the period.

The period since 1985 has been one of remarkable growth -- in attendance, in television revenues, and in other revenue sources. As the annexed staff report shows, industry operating income as of the end of the 1991 season, the last year for which final audited figures are available, averaged $3.5 million per club. But this income was concentrated in a minority of clubs. Complete data for 1992 will not be available before this Committee submits its report; but attendance fell slightly and player salaries rose significantly, suggesting that the net operating income line will be lower in 1992 than in 1991, which itself was well below earlier years.

The Committee is charged to consider not only the current economic condition of the industry but also its future course. The industry as a whole, by its own standards, enjoyed several years of healthy net operating income in the late 1980's; this does not necessarily mean that it will continue to do so. Whether most clubs most of the time can comfortably cover operating expenses, with some margin for necessary investments, is obviously economically important.

The clubs have presented "best" and "worst" case projections of revenues and costs through 1994.[1] Those projections indicate that the industry will suffer substantial losses in 1993 and 1994. The projected decline in operating income hinges on the assumption that player salaries will grow more rapidly than revenues, which in turn will be damped by a sharp drop in national television revenue. The clubs assume that player salaries will grow an average of 7 percent (best case from the standpoint of profitability) to 10 percent (worst case) in 1993 and 1994. Other costs are assumed to increase 3 to 6 percent, well below the assumed increase in revenues other than national television.

Recognizing that all forecasting is inherently unreliable, and that the history of baseball specifically is replete with predictions that have proven inaccurate, the information made available to this Committee drives it to several broad conclusions:

- The rapid rise in gross revenues which characterized the late eighties and early nineties is probably over for the time being. A major factor is the anticipated decline in revenues from national television broadcasting under contracts which expire in 1993.

- The critical variable on the cost side is player salaries, which have risen sharply throughout the eighties, and which - because they rose in 1991 and apparently in 1992 more rapidly than revenues - are the principal cost element which has eaten into the operating margins which baseball as a whole has enjoyed over the past 5-6 years.

Union representatives have suggested that, while they would not wish to endorse the owners' projections of lower revenue growth, they would expect aggregate salary costs to be responsive to aggregate revenue declines, just as they were to the rapid revenue increases of the past. If player costs do not respond to changes in revenue, then there will be a serious economic squeeze on baseball as a whole and a more imminent threat to the weaker clubs, raising doubts

[1]The Club projections are all in current dollars, *not* adjusted for inflation.

not simply about franchise value but about the continuity of established franchises and their ability to compete for players and eventually public support. Then the case for new mechanisms to provide for timely and orderly adjustment would, in the interests of owners and players alike, become more compelling.

Franchise Values

Despite the fall-off in operating income, the prices at which franchises have sold have remained high. During the past four years, seven clubs have been sold for prices (expressed in constant 1991 dollars) ranging from $80 million to $131 million. The average price has been $94 million. Investors in Tampa-St. Petersburg are reported to have offered approximately $110 million for the San Francisco team, but the owners disapproved the transfer of this franchise.

No recent upward or downward trend in franchise values is discernable. This is a matter of some controversy. The clubs hold that the sale of the Detroit Tigers in 1992 for a price below that of the expansion franchises is evidence of softness in asset values. The players assert that the willingness of San Francisco investors to offer $100 million for the San Francisco franchise contradicts this claim. Should the present pattern of franchise values hold in the future, there would appear to be little reason for apprehension about future economic pressure on baseball as a whole.

"Financially Troubled" Clubs

Whatever the economic condition of baseball as a whole, not all clubs fare equally well. Some franchises are highly successful financially; others are not. As we note in the following section, wide disparities in income have not at this point created troublesome differences in on-field performance. But some clubs are currently losing money, some have lost money persistently in recent years, and the next few years may aggravate the situation. The clubs claim that eleven teams are "financially troubled." The clubs and players dispute whether the number of teams that merit the designation of "financially troubled" is eleven or some smaller number. They also dispute exactly how much money has been lost. Whatever the merits in this dispute -- and we stipulate that at least some clubs have been unprofitable in the sense of a persistent inability to achieve revenues equal to operating costs -- any squeeze on industry profits would mean that clubs that have lost money in the past are at risk of losing more in the future.

The "bottom eight" group of clubs in the appended 8-10-8 report (See Attachment B) is in the main typical of clubs alleged by the owners to be "financially troubled," and it is such clubs which run the greatest risk of being adversely affected in the years ahead.

The staff report contains an analysis of financial performance and of the recent history of franchise values. It confirms that several clubs have lost money year after year based on the operating income measure the staff finds most defensible; we have noted elsewhere that it seems

likely that a number of these clubs will face an even more difficult period in the years immediately ahead.

Nevertheless, the Committee was told by the clubs that there is no evidence that current franchises will go out of existence. As noted, substantial prices continue to be paid, even for franchises considered troubled. The owners claim that the number of potential bidders for old or new franchises at established prices is diminishing. The recent sale of the Seattle club and the competition for the San Francisco franchise -- all involving clubs claimed to be troubled -- make it evident that, for whatever reason, baseball franchises are still considered valuable property. The committee has seen no evidence that baseball cannot support the prospective 28 franchises.

Whether the difficulties of the troubled clubs reach the point of undermining the stability and competitive positions of major league baseball, vis-a-vis other sports or the balance within baseball itself, turns in part on the relationship between player compensation and revenue, as we have discussed earlier, as well as on the revenue trend itself.

Revenue Sharing

Revenues of some clubs (mostly large market clubs) persistently exceed revenues of other clubs. Because these discrepancies could lead to competitive imbalance and do contribute to financial difficulties of small market clubs, this Committee was directed to consider the extent and nature of revenue sharing.

Major league baseball is a joint enterprise, a shared monopoly exempt from the antitrust laws by virtue of judicial decisions that Congress has not revoked. This exemption permits the clubs to establish a system of governance that regulates the number and location of franchises, which in turn influence the economic futures of particular clubs.

An important example of the way in which the economic impact of baseball's established regulatory and financial framework has evolved can be found in the rules and processes that govern how and to what extent various sources of revenue are allocated to individual clubs or the joint enterprise. In general, the arrangements assume that each club is entitled to the revenues generated by its local market. The rules adopted significantly affect the profitability or unprofitability of individual clubs. Specifically, revenues can be "shared" to reduce disparities among clubs or divided in ways that increase disparities or leave them unaffected.

A principal finding of this Committee is that the owners now face a set of conditions and economic prospects which requires a basic restructuring of the rules and processes that determine how and to what extent various sources of revenue are allocated to individual clubs or the joint enterprise.

Some current financial arrangements reduce and some increase revenue disparities. Disparity-reducing arrangements include those governing the distribution of revenues from national broadcasting (about $350 million in 1991) and licensing ($55 million in 1991). Together, these two

sources accounted for about 26 percent of revenues. Revenues from the Copyright Royalty Tribunal, the All-star game, and fees paid by superstations are also fully shared. A small portion of game receipts is shared with visiting teams.[4] In the American League a portion of local cable revenue sharing is also shared.[5]

In recent years, local broadcasting has generated a growing portion of the industry's revenue and the disparity in the revenues generated by individual clubs has skyrocketed. While the American League has recently increased the sharing of local cable (as opposed to over-the-air broadcast and radio) revenue, the general rule remains that each club is exclusively entitled to the local broadcasting revenue generated in its own market.

The rules that govern the distribution of revenues among the clubs need review. As far as the Committee can tell, revenue sharing arrangements have not been updated to reflect enormous recent changes in revenue sources. The fixed nominal payment to visiting clubs in the National League represents a steadily declining share of steadily rising ticket prices. Such practices may have made sense a century ago. They are now inadequate to bridge current disparities in revenue among the clubs. In short, baseball's revenue sharing rules produce a much different result in the early 1990's from that of a generation ago.

One aspect of current revenue allocation may actually widen financial disparities in the years immediately ahead. By far the most important component of revenue sharing in baseball today is the arrangement governing national broadcasting, which distributes revenue among the twenty-six major league clubs on an equal basis. The amount of that revenue has grown significantly over the past decade, and reached about $350 million in 1991. Should national broadcasting revenues decline, the cushioning effect of the existing revenue sharing arrangements will *actually be reduced* precisely when the financially weaker clubs may need it most. We have stated earlier that some clubs may face difficult circumstances, including operating deficits, in the immediate future. We believe that increased revenue sharing is warranted, and that under no circumstances should a possible decline in television revenues be permitted to reduce total revenue sharing.

While, as reported below, no overall problem of competitive balance in major league baseball has existed or exists now, the committee judges it important to make sure that financial imbalances do not create such a problem. In particular, the financially weakest clubs must not be led by low revenues to slash payrolls dramatically by selling off their star players in an effort to reduce costs and become profitable. Such practices would produce what is essentially minor league baseball in which some teams make no meaningful attempt to produce winning teams, would b.eak

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[4]Shared gate receipts equal 20 percent of revenue from ticket sales in the American League and $0.47 to $0.72 per attendee in the National League.

[5]The clubs also share certain expenses, including the costs of the Office of the Commissioner, the Player Relations Committee, centralized scouting, umpire development and contributions for player pensions. These shared expenses come to about 1.5 percent of average team operating expenses and do not vary significantly by team. By far the most important shared expense in recent years has been damage payments arising from collusion over player salaries.

faith with the public in the affected cities and harm baseball as a whole.[4] Increased revenue sharing, we believe, would reduce the likelihood of such unfortunate behavior.

Revenue sharing is an established feature of baseball's financial arrangements. It has played an important role in moderating financial disparities among the clubs over the past decade. The troubled financial times baseball may encounter in the immediate future make it more appropriate than ever before to fashion a mechanism that will support the financially weaker teams. A number of existing and potential revenue sources could be dedicated in whole or in part to an extended revenue sharing arrangement.

Whatever sources are selected, we recommend that the current level of twenty-five percent shared revenues should be considered as a floor, and that significant increments in this percentage should be achieved promptly.

The specifics of increased revenue sharing will be complicated to design and implement. The Committee does not believe its mandate requires it to make detailed recommendations on the structural and procedural modifications to the present rules in baseball that might be necessary. The clubs link revenue sharing to the establishment of limits on player salaries to a percentage of overall revenue. The players reject such limits, but claim a voice in the determination of revenue sharing arrangements. On this disagreement we take no position. We do note, however, that we see an important relationship between our recommendation for additional revenue sharing and our recommendation concerning salary arbitration, which is set forth in the next section.

Our analysis and the discussion between the players and owners persuade us that both parties, players as well as clubs, have an enormous interest in the additional financial stability that extended revenue sharing would bring to baseball. The fans and the communities served by major league baseball have an even larger stake.

Franchise Location

Franchise relocation is another possible but limited solution when a team finds itself in a market where sufficient revenues are difficult or impossible to generate. It is obviously not in the best interests of baseball as a whole if franchises are moved frequently. On the other hand no franchise in major league baseball has been moved for twenty years. The recent controversy surrounding the proposed move of the San Francisco Giants to Tampa-St. Petersburg is illustrative. Both the Oakland Athletics and the San Francisco Giants are on a list of clubs the owners designate as "financially troubled." The Giants' owner proposed to sell the team to a group of

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[4]There is some evidence that this occurred in the 1950's, after the Philadelphia Athletics franchise was sold to Kansas City, which became in the view of some a farm club for the New York Yankees. See Hank Greenberg, The Story Of My Life (1989), p. 215. Many believe that this was the strategy employed by the Houston club before its recent sale. It reduced its player salary cost, which had been about average in 1991, by almost fifty percent in 1992 at the same time that average salary for all clubs increased thirty percent. It was reported that this was the strategy proposed by the first, and unsuccessful, syndicate seeking to keep the San Francisco Giants in San Francisco.

investors found by an owners' committee to be financially responsible which would have relocated the team to St. Petersburg. Moving the Giants to Florida, it at least appears, would have strengthened both the Giants and Oakland (which would have remained as the sole team in the Bay area); it also seems likely that the move would have benefitted the players, who had no voice in the decision. On the other hand, there may well have been other factors which caused the clubs to reject the proposed move. We recognize baseball's legitimate interest in preserving the traditions of the game in a community that has supported a club for over thirty years.

The Committee heard no testimony on this issue and makes no judgment about the proposed sale and relocation of San Francisco to St. Petersburg. What the controversy does illustrate is that income disparities among the clubs, at least in part, result from and are perpetuated by the system of rules now in effect.

III. Implication for Methods of Setting Player Salaries

As we have indicated earlier, the future financial health of baseball as a whole depends on whether player salaries will adjust to any slowing of revenue growth. The players assert that just as salaries responded to the growth in revenues they will respond to decline or slowing in growth. The clubs contend that salaries will not respond because of long-term contracts that promise salaries based on more bullish revenue expectations and because arbitration tends to pass on to "poorer" clubs the salary costs paid by "richer" clubs.

The Committee is not persuaded that any relief is required from long-term contracts. A club may have erred in its own expectations as to revenues. A club may have deliberately engaged in deficit spending in order to increase its chance of succeeding on the field or because of pride, civic virtue or other considerations. We see no reason in such cases to suggest a change in the compensation system to account for past decisions voluntarily and deliberately entered into by the clubs.

Putting aside, therefore, the existence of long term contracts, the issue before the Committee is whether anything in the existing arrangement for determining player salaries will prevent salaries from responding to changes in revenues. History provides no clear guide, since baseball has not had to confront a situation of declining revenues since the present arrangement for determining salaries was put in place. As staff analysis shows, in the 1978-81 period when the reserve clause was breaking apart salaries as a share of revenues rose sharply, from 30 to 48 percent. Since then, including collusion payments, the share has remained close to 46 percent, though it did rise to nearly 51 percent in 1991. (See Staff Analysis, Figure 2.)

Players fall into three broad categories, based on seniority: players with fewer than three years of major league service;[7] players with six or more years of such service; and players falling between those two categories.

Players with Fewer than Three Years of Service. The bargaining agreement provides that clubs may pay players with fewer than three years of service any salary the team wishes, so long as the salary is a) at least $100,000 per year plus an adjustment for cost of living increases between 1991 and 1992; b) no more than 20 percent below the salary in the previous year; and c) no more than 30 percent below the salary two years past. If the player does not accept the team offer, he

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[7]We refer to "players with less than three years of major league service" for convenience. The dividing line is not precisely at three years. Under the 1990 agreement the salaries of a few of the most senior players in the up-to-three-years bracket are grouped with those who have completed three years. There were 17 such players in 1991. For convenience, however, the term "three years of service" will be used throughout as also including those players with fewer than three years of service who are thus treated.

It should also be clear that length of major league service is not calculated continuously from the date of a player's first major league service. A year of service is credited only for 172 days on a major league's active list, e.g., the 25 man roster during the season until September 1, the 40 man roster thereafter.

cannot play major league baseball. For a variety of reasons, clubs typically pay such players more than the required minimum. In 1991, 45 percent of all major league players were in this category. Their salaries, however, constituted slightly less than 9 percent of total salaries.

Compensation for such players, therefore, imposes little burden on the clubs. In any event, such salaries are under control of the clubs. If operating revenues decline, the clubs could reduce the salaries paid to these players, subject only to the minimum salary and the maximum reduction percentage (which is larger than even the most pessimistic forecast of decline in club revenues).

Players with Six or More Years of Service. At the other end of the spectrum, players who have completed six years of major league service and who are not playing under a multi-year contract extending beyond six years are eligible to become "free agents." Free agents may negotiate with any team and sign a contract of any mutually agreed duration for any mutually agreed compensation. In 1991, 30 percent of the players had six years or more of service. Their salaries, however, constituted almost 61 percent of the total salary bill.

These players include a large proportion of the prominent "franchise" players with a substantial public following, but only a small portion of these players is eligible to exercise free-agency rights in any given year. Some are playing under multi-year contracts signed before or after they became eligible to be free agents. After a player who ranks statistically among the top 50 percent in performance of all major league players at his position has exercised his right to free agency, he may not do so again for a period of five years. Clubs are obligated to pay free agent players only the salaries they voluntarily agree to as a result of negotiations with the player and/or his agent.

Unless it can be clearly demonstrated to be inimical to baseball as a whole we see no reason why outsiders should interfere with freely negotiated contracts between clubs and individual players. While the salaries of selected players are quite high, similar or higher salaries are paid in other sports and in the long run baseball needs to be attractive to talented young athletes.

In short, with respect to players with fewer than three years of service and those with six or more years of service, constituting 75 percent of the players and nearly 70 percent of the total salary bill, the clubs are paying salaries to which they have agreed. The arrangements set forth by the collective bargaining agreement in themselves create no structural impediment to salaries responding to changes in the revenue.

Players with Three To Six Years of Service. Players with at least three but fewer than six years of major league service are subject to the reserve system and are bound to the clubs that signed them, but are normally eligible for final offer salary arbitration, unless they have signed multi-year contracts. In 1991, 25 percent of major league players fell in this service category. They received slightly less than 31 percent of total player salaries.

The clubs argue that the "pernicious" system of final offer salary arbitration is the second of the two reasons for their prediction that player salaries will not be responsive to the projected decline in national television revenues. Under final offer arbitration, the player and the club to

which the player is reserved each present the arbitrator with a proposed salary for a one-year contract, together with arguments on why the proposed salary each party advocates is the more reasonable. Arbitrators must pick one proposed salary or the other. In making their decisions, arbitrators are barred from considering the financial condition of the club.

Probably the most important factor considered by the arbitrator is the salaries paid to "comparable" players, including free agents. Relevant free agent contracts include not only those signed in the current year, but all contracts still in effect that were signed in the previous years. The emphasis on "comparable salaries" was intended to and had the effect of eliminating geographic differentials in salaries. Length of service is also an important part of the salary arbitration criteria. This has resulted in arbitrators' decisions which show a pattern of average salaries, in the group of players eligible for arbitration, graduated by length of service with the higher salaries on average being paid to those players with longer major league service.

The Committee has heard three arguments on why arbitration produces undesirable effects. First, both the players and the clubs allege that arbitration systematically produces salaries different from those that would be generated by unfettered contracting between players and clubs.

Second, the clubs hold that arbitration reduces the effective control of the clubs over their payrolls. The lack of control arises, it is argued, because the clubs are forced either to release arbitration-eligible players as unrestricted free agents or to tender contracts to the players, which automatically precipitates arbitration under current rules if the player does not accept what the club has offered. Under final-offer arbitration, the arbitrator may choose the player's bid, which may considerably exceed what the club had been planning to spend. The statistical analysis conducted by staff on the lag between arbitration awards and free agency salaries was not considered conclusive enough by the Committee to provide much clarification on this point.

The players argue that arbitration does not deprive owners of effective control over their salary budgets because the club may refuse to tender a contract to a player and may enter the free-agent market to acquire a player who can provide comparable services. If the club tenders a contract, the players argue, it is because it thinks it can get "more player for the money" through arbitration than it can through the free agent market. Since no one denies that clubs can control what they spend in the free agent market, the players maintain that the clubs can do at least as well, on the average, under arbitration as they can under free agency.

The third argument against arbitration is that it deprives players who wish to play for a team other than their current one of the opportunity to act on that preference.

As a general matter, the Committee believes that in the absence of other compelling arguments restrictions on contracting between the parties should be minimized. The burden of proof is on those who would restrict the ability of individual players and owners to contract freely with each other. The Committee finds no such justification for arbitration as currently applied to

three-to-six year players. Accordingly, we recommend that the service level at which players become free agents be reduced from six to three years.[6]

The enlargement of the number of players entitled to free agency may have a number of side effects. One may be an increase in the number of long-term guaranteed contracts to ensure clubs that they will be able to keep promising players. Another may be an increase in the number of players moving from club to club. That, however, may or may not be balanced by a decrease in the number of trades of players in the three to six year category. It is impossible to predict with certainty the extent of such side effects. However, if the enlargement of free agency produces such significantly larger movement of players as to decrease fan loyalty to teams, it would be in the interest of the parties to negotiate subsequently some small deterrent to movement by players in the three to six year service group.

Taking all these considerations into account, the Committee recommends that the parties move to extend free agency to players in the three-to-six year category. We have not agreed to recommend any changes in the rules governing player compensation other than the reduction in the service requirement for free agency from six to three years.

[6]Arbitration, under the recommendation, would remain as an alternative to free agency when both the club and the player so agree under the existing contractual arrangement for players eligible for free agency.

IV. Competitive Balance

A reasonable degree of competitive balance is essential to the excitement of baseball. One of the great attractions of baseball is that on any given day any team may beat any other team. Tight pennant races, Cinderella teams, underdogs, and David-and-Goliath contests are all part of the lore and attraction of the national pastime, perhaps more so than in other sports. The practical question, therefore, is whether financial imbalances among teams have undermined competitive balance sufficiently to be "a problem."

Clubs situated in large communities usually have access to more local television revenues and game receipts than do clubs in small communities. Common sense suggests that clubs with larger revenues should be able to field stronger teams, on the average, than small market clubs can. This advantage should arise from the greater capacity of large-market clubs to support extensive farm systems to develop future players and to offer higher salaries to attract star players. Clubs that can remain financially viable only by keeping payrolls low might be expected to win relatively fewer games. Such a strategy might (or might not) keep these teams profitable, but it could destroy competitive balance.[9]

The Committee found no evidence that such a problem has existed in the past two decades.[10] The 1991 World Series involved two clubs that were last in their division's standings in 1990. Six of eleven teams alleged by the clubs to be in chronic financial difficulty (see section II above) finished in the top third of their respective division races in 1992; two won division titles. As the staff report shows, clubs in large markets enjoyed an advantage on the field of 2.5 games during the period from 1984 through 1990. Staff estimates indicate that a club in a market four times as large as that of another club would win from 2.5 to 5.2 more games than the smaller market team. (See Staff Analysis, Section III.) Staff analysis finds no evidence that competitive balance has decreased and some that it has increased since the advent of free agency.

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[9] Economic theory also suggests that large market teams should be stronger than small market teams. If transaction costs were small, it would be in the interest of both owners and players for players to be employed in baseball markets where they could contribute most to team revenues. If a player were in another market than the one where he could generate highest revenues, it would pay the team that owns his contract to negotiate a mutually advantageous sale with the team where the players addition to revenue was highest. The rules under which players are compensated would not affect this conclusion if transaction costs were small. In fact, transaction costs are significant. As the text indicates, the tendency indicated by economic theory is observed in practice. Economic theory does not, however, indicate *how large* the discrepancy in on-field performance will be.

[10] "Competitive balance" has no obvious simple definition. It could refer to the frequency with which teams win the World Series, the league championship, or their division; or it could refer to the frequency with which teams are "in the race" at some date in the season, which itself could be defined in various ways. Competitive balance could also refer to the difference in the average number of games won between first and last place teams or to the standard deviation in the number of wins. It could be based on a comparison of single-season records or on averages over several seasons. The number of possible definitions of competitive balance is infinite. The staff tried several definitions. None indicated a decrease in competitive balance and none indicated large imbalances.

From one standpoint, it is puzzling why the great differences in baseball market size--the largest market is effectively four times the size of the smallest--have *not* resulted in larger differences in won-lost records than those actually observed. Part of the answer to this puzzle seems to be that such factors as skill in player development, managerial ability, the equalizing effect of injuries, teamwork and synergy among the players, and just plain luck play a larger part in performance on the field than many suppose. Part may be that the greater revenue potential of the large-market teams is absorbed by (i.e. "capitalized into") higher purchase value so that a higher operating margin is needed to service debt or provide a return on equity. In any event, under the existing compensation arrangements, economic differences as represented by market size are weakly associated with differences in won-lost records. We have found no sign, moreover, that the association between economic differences and competitive imbalance has grown stronger over time.[11]

The data contained in the staff analysis do strongly suggest that there is a statistical association between payroll size and on-the-field performance. (See Staff Analysis, Figure 13.) They do not, however, establish which is the cause and which is the effect. It is arguable that there is a "winner's curse", i.e. that superior on-the-field performance capped by a league or world series championship causes payrolls to rise. The reverse may also be true, i.e. that payroll increases lead to superior on-the-field performance. The evidence before the Committee is too inconclusive to support a definitive judgment on this question. We do conclude that at least to this date there has been no problem of competitive balance.

We are *not* asserting that competition between the clubs is in perfect balance. Some teams have done poorly in recent years, including Cleveland, Seattle, and Houston, three of the eleven clubs alleged to be financially troubled. Whether these clubs will continue to perform poorly is not certain. As the result of its recent sale, ownership of the Seattle franchise moves to owners with larger financial resources; and Cleveland will have a new and more attractive stadium. As the experience of Baltimore dramatically illustrates, new and attractive stadiums can sharply increase fan interest and attendance, although in Baltimore's case the effect of the new stadium is difficult to disentangle from the team's greatly improved on-field performance.

The evidence we have found on the effect of market size on competitive balance suggests that increased revenue sharing would probably add slightly to competitive balance, but that the addition would be small in the context of a generally profitable industry. However, as indicated earlier, revenue sharing could help protect against cost pressure on weaker franchises if a serious cost-revenue squeeze were to develop for the industry generally.

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[11]The optimum degree of competitive balance is hard to define. Fans would probably be happiest if every club appeared to be a contender every year. Total baseball revenues would probably be maximized, however, if large market teams won a bit more often than small market teams do, but not by wide margins. Pennant races would continue to be exciting and the slight dominance of large teams would maximize the greater drawing power and television potential of the larger markets. The rather modest current advantage of large market teams seems to be roughly consistent with this economic ideal.

V. Other Issues

This section treats three other issues the Committee chose to address.

Related Party Transactions

Many teams are part of business groups that engage in activities other than baseball. These groupings may involve partnerships or corporations. The common element is that separate businesses, each of which is wholly or partly owned in common, sometimes engage in business transactions with one another. The prices paid by one such business to another may or may not be the same as would result if the businesses were independently owned. In such cases, the revenues, expenses, and profits of each entity may differ from those that would have been generated by arm's length transactions.

The players have long alleged that such transactions cause baseball profits to be systematically understated. The clubs acknowledge that some minor distortions may occur, but hold that they do not much color the overall picture of baseball's economic condition.

The Committee finds no evidence to suggest that local variations in media contracts, stadium arrangements and other related party transactions invalidate the general picture of club profitability that emerges from the combined operating statements furnished by the owners.

The staff analysis concludes that, with the exception of a handful of cases, the discrepancies reported are small, not suspect, or come down in the end to reasonable questions of judgment. And with one exception, where the club has not furnished enough data to allow a conclusive judgment, none of the cases concern financially troubled clubs.

The Committee concludes that the profits of a small number of teams, most of which are profitable, are somewhat understated because of related party transactions. The financial condition of some other teams may be affected to a relatively minor extent. In the aggregate, baseball is probably slightly more profitable than the statistics submitted to the Commissioner suggest. But this Committee does not think that its comments about the future or its recommendations would have been changed if teams transacted all business completely at arms length.

Player Compensation Based on Combined Revenues

During the bargaining leading up to the current labor-management agreement, the clubs advanced a proposal that would have established minimum and maximum gross salaries for each club based on a percentage of certain defined revenues for the clubs as a whole. Under this proposal the salaries of all players with fewer than six years of service would be determined by statistical measures of performance and would be paid from a common pool. The rules would have

provided numerous exceptions to the maximum, most notably an exclusion of salaries paid to players on any club's roster in the previous year. A broadly similar minimum-maximum rule, with the same exception, is in operation in professional basketball. The players did not accept this proposal and the clubs withdrew it.

The Committee does not express an opinion on any floor-ceiling proposal. It did identify various advantages and disadvantages to the idea. Some of the prominent ones are as follows:

Advantages:

- Allows clubs collectively and individually to negotiate their total labor costs within broad limits clearly related to revenue growth. Combined with revenue-sharing, contributes to stabilizing the weaker clubs.
- Gives both players and owners a common stake in the overall commercial success of baseball, since they would share explicitly in the same revenue stream.
- May increase management-labor harmony by focusing contract negotiations on exactly how much of the pie labor will get, and then fixing that for the duration of the contract.
- During a period of severe financial adjustment could be designed to protect players against rapidly falling salaries.

Disadvantages:

The Committee recommendations with respect to players with three to six years of service would in fact allow the clubs to negotiate all of their player costs clearly and specifically. Any minimum-maximum proposal would add nothing except to limit the ability of players to negotiate with individual clubs and to artificially restrict clubs from paying what they think players are worth. If, as basketball has found to be necessary, and as the clubs proposed in 1990, an exception to the maximum permits clubs to resign their own players without regard to the maximum, free agency would be essentially eliminated, since bidding clubs would be subject to the maximum while the players' current clubs would not. The result would be to reduce total player compensation and, as in basketball, might be to seriously affect competitive balance. If no such exception were made, clubs with payrolls now in excess of the maximum would be required to reduce the salaries of their present players and would be powerless to bid for any players at all.

If total player salaries are contractually tied to revenues, the players would insist on the right to have an equal voice in the negotiations and decisions which the clubs now make unilaterally that directly affect revenues, such as franchise sales and moves, new franchises, television and cable contracts, ticket prices, revenue sharing, etc. Finally, any direct tie to gross club revenues would require a relationship of trust in the accuracy of club statements as to revenues; it is clear that, at present, the union does not have the requisite level of trust.

Marketing and Promotion of Baseball

During the course of its work, members of the Committee frequently encountered observations on baseball from people knowledgeable about the marketing of professional sports. They have noted that effective and determined efforts by local clubs to boost attendance and promote their teams have produced marked results in recent years both at the gate and on the bottom line. At the same time, many expressed the view that baseball is marketed and promoted less well on a national level than are other major sports. In particular, observers in the world of sports and the media expressed the view that both basketball and football do a superior job at the national level of communicating the excitement and attraction of their sport to the public, and of finding ways to manage scheduling, competition and promotion of stars that build audiences and hence advertising revenue.

Although fan support of baseball is near all-time highs, the Committee judges that aggressive promotion of baseball can produce even better results. To realize this potential will involve looking at a wide range of matters, including how to make playoff and championship competition more attractive; exploring the possibility of more international baseball competition; additional ways to market local television rights; and possible restructuring of league structure and season length. These issues can be addressed only through disciplined and effective cooperation between players and clubs. Indeed, the very challenge of more effective national marketing for baseball underscores the need for a broad and durable partnership between players and owners. Marketing in baseball means marketing the players, particularly the stars; and the only way that can work is for players and owners to share a vital sense of their very real common interest and to develop a pattern of cooperation which allows them to build on that common interest.

Another opportunity is the management and marketing of television rights to cable distributors and other outlets for baseball programming other than national over-the-air broadcasters. Some of the clubs do a remarkably sophisticated job of selling local media rights to their games. But most TV markets now have 300-400 games per season available to the viewer; these games are available helter-skelter and often are not effectively promoted or scheduled so as to maximize audience and advertising potential. It is ironic that of the major sports, the only one with a judicially sanctioned anti-trust exemption is the one which makes available its entertainment product on the least controlled, least effectively marketed basis. The present price of most regular season games sold to local cable systems can range anywhere from $15,000 per game on the low end to $100,000 and higher per game on the upper end. Local TV may replace national broadcasting as the fastest growing source of revenue for baseball. While this revenue picture will certainly be affected by the general slowdown in TV revenue growth we have described elsewhere, baseball as a whole has a tremendous stake in maximizing the growth of local TV audience and revenue in the future. Many clubs presently do a professional job of selling and marketing their games on a local ADI[12] basis. But the increasing availability of multi-channel TV in markets all over the country, increasingly refined market segmentation programming strategies, and the profusion of other sports events available to distributors and local systems, are beginning to give

[12]ADI: Area of Dominant Influence, a television marketing term referring to the population of a geographic area in which a particular set of VHF stations are the principal ones received.

an enormous advantage to any sport or entertainment which does an aggressive, nationally coordinated job of packaging, scheduling, selling and promotion. The Committee feels this opportunity should be a major focus of baseball's efforts in the future.

The Committee makes no recommendation on how the players and clubs should organize to improve the marketing and promotion of baseball. We note simply that increases in overall baseball revenues create the potential for both parties to gain, and that "growing the overall pie" is a vital objective that the owners and players share in common. We think that cooperative efforts to increase revenues may be more important in the 1990's than they would have been in the 1980's.

Some parts of the game must and will forever remain the same. The bases will always be ninety feet apart, and there will always be three outs per half inning. But by examining imaginatively other aspects of the sport that do evolve over time in response to changing conditions, baseball may develop avenues of promotion which can rekindle public interest, attract new fans, and intensify the loyalty of existing ones.

Henry Aaron
David Feller
Peter Goldmark
Paul Volcker

Excerpt from Article XXIV
Collective Bargaining Agreement Between Parties
Establishing Economic Study Committee

A. Study Committee

A Study Committee shall be established no later than September 1, 1990, to study and report to the Commissioner and to the Parties to this Agreement on the overall economic condition of the industry, including a description of current or impending problems, if any; the cause of such problems; and possible solutions. The Committee shall be composed of six (6) individuals, four (4) of whom shall not be or have been an employee, member of, or consultant to, any club, the Player Relations Committee, the Association or Major League Baseball. The Chairman of the Player Relations Committee and the Executive Director of the Association, or their designees, shall serve as co-chairs of the Committee and shall each recommend two (2) additional members who shall be appointed by the Commissioner to serve on the Committee. The Committee shall consider the following issues as part of its study:

1. The relationship, if any, between club revenues and on-field competition;

2. The extent and nature of revenue sharing among the clubs;

3. The advantages (and/or disadvantages) of compensating players based on a percentage of combined industry revenues;

4. Past and future trends in national and local media markets;

5. The extent, nature, and value of club related party transactions;

6. Franchise values;

7. The number and location of geographical markets (including franchise relocation); and

8. Such other matters as the Committee (or either of the co-chairs thereof) deems appropriate.

Combined Summary of Operations and Other Financial Information

26 Major League Baseball Clubs
1991 Season

ERNST & YOUNG

26 Major League Baseball Clubs
1991 Season

Combined Summary of Operations and Other Financial Information

Contents

ERNST & YOUNG

277 Park Avenue
New York, New York 10172

Phone: 212 773 3000

Report of Independent Accountants

Major League Baseball Clubs

We have compiled the accompanying combined summary of operations (before income taxes) (the "Summary") of the twenty-six Major League Baseball Clubs (the "Clubs") and the Major Leagues Central Fund for the 1991 playing season. The Summary combines the revenues and expenses of each of the Clubs and the Major Leagues Central Fund for the respective fiscal year end which included the 1991 playing season. For presentation purposes, the Clubs have been grouped based on their respective contributions to income (loss) from baseball operations.

We audited the statements of revenues and expenses of six of the twenty-six Clubs and that of the Major Leagues Central Fund. Our audits were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. The statements of revenues and expenses of the twenty other Clubs together with the reports of other auditors thereon have been furnished to us through respective League Counsel. Each Club has also furnished to us, through the respective League Counsel, a completed questionnaire (the "Questionnaire") containing detailed financial information for the respective fiscal year end which included the 1991 playing season. The income (loss) before income taxes reported on these Questionnaires have been agreed by us to the respective Clubs' audited statements of revenues and expenses. These Questionnaires have been used to effect the above-mentioned compilation.

Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included with the Summary, they might influence the user's conclusions about the operations of the twenty-six Major League Baseball Clubs and the Major Leagues Central Fund for the 1991 playing season. Accordingly, the Summary is not designed for those who are not informed about such matters.

In our opinion, based on our audits, the reports of other auditors, and the reconciliation of the income (loss) before income taxes reported on the Questionnaires to the respective Clubs' audited statements of revenues and expenses referred to above, the Summary for the 1991 playing season has been properly compiled from the Questionnaires and the statement of revenues and expenses of the Major Leagues Central Fund.

The accompanying combined schedules of operating revenues, major league player costs, team operating expenses and major league player acquisition costs, scouting and player development expenses, stadium operations expenses, marketing, publicity and ticket operations expenses, general and administrative expenses, and amortization of franchise acquisition costs for the 1991 playing season have been compiled from the information included in the Questionnaires and the statement of revenues and expenses of the Major Leagues Central Fund. Such schedules are presented for purposes of additional analysis and are not a required part of the Summary. In our opinion, based on our audits, the reports of other auditors, and the reconciliation of the income (loss) before income taxes reported on the Questionnaires to the respective Clubs' audited statements of revenues and expenses referred to above, the combined schedules have been properly compiled from the Questionnaires and the statement of revenues and expenses of the Major Leagues Central Fund.

Ernst & Young

July 31, 1992

26 Major League Baseball Clubs
1991 Season
Combined Summary of Operations (Before Income Taxes)

(In Thousands)

	Schedule Reference	Top Eight	%	Middle Ten	%	Bottom Eight	%	Total	%
Operating revenues									
Regular season game receipts	I.A.	$ 199,546	34.43%	$ 182,787	33.08%	$ 140,688	34.71%	$ 523,021	34.02%
Spring training game receipts, net	I.B.	4,422	.77	4,401	.80	4,225	1.04	13,048	.85
National broadcasting	I.C.	107,997	18.63	134,997	24.43	107,997	26.65	350,991	22.83
Local television and radio	I.D.	125,610	21.67	109,614	19.84	72,203	17.81	307,427	20.00
In-park concessions, net	I.E.	58,970	10.17	42,349	7.67	29,653	7.32	130,972	8.52
Advertising and publications	I.F.	19,375	3.34	10,634	1.92	7,185	1.77	37,194	2.42
Parking, net	I.G.	6,458	1.11	5,370	.97	5,637	1.39	17,465	1.14
Stadium rent rentals	I.H.	8,821	1.52	6,522	1.18	3,264	.81	18,607	1.21
Copyright Royalty Tribunal	I.I.	4,099	.71	5,124	.93	4,099	1.01	13,322	.87
Amortization of amounts received in 1989 relating to network telecasting agreements	I.J.	2,846	.49	3,865	.70	3,086	.76	9,797	.64
League Championship Series and World Series	I.K.	2,835	.35	8,296	1.50	2,882	.71	13,213	.85
National licensing	I.L.	17,249	2.98	21,337	3.86	16,849	4.16	55,435	3.61
Other baseball-related revenues	I.M.	22,162	3.83	17,199	3.12	7,542	1.86	46,903	3.04
Total operating revenues		579,590	100.00%	552,495	100.00%	405,310	100.00%	1,537,395	100.00%
Operating expenses									
Major League player costs	II	222,261	47.22%	263,878	49.87%	242,402	55.26%	728,541	50.69%
Team operating expenses and major league player acquisition costs	III	34,586	7.35	44,567	8.42	37,386	8.52	116,539	8.10
Scouting and player development	IV	62,681	13.32	71,368	13.49	53,182	12.12	187,231	13.02
Stadium operations	V	62,026	13.18	45,079	8.52	33,791	7.70	140,896	9.80
Marketing, publicity and ticket operations	VI	18,367	3.90	27,531	5.20	19,998	4.47	65,496	4.55
General and administrative	VII	64,470	13.69	68,832	13.01	45,961	10.49	179,263	12.46
Office of the Commissioner		2,616	.56	3,271	.62	2,616	.60	8,503	.59
Player Relations Committee		1,510	.32	1,888	.36	1,510	.34	4,908	.34
Major League Scouting Bureau		1,016	.22	1,270	.24	1,016	.23	3,302	.23
Umpire Development Program		1,158	.24	1,447	.27	1,158	.27	3,763	.26
Total operating expenses		470,691	100.00%	529,131	100.00%	438,620	100.00%	1,438,442	100.00%
Income (loss) from baseball operations		108,899		23,364		(33,310)		98,953	
Other income (expense)									
Amortization of franchise acquisition costs	VIII	(24,091)		(16,504)		(22,461)		(63,056)	
Interest and investment income		22,113		5,724		5,385		33,222	
Interest expense		(26,647)		(11,792)		(13,572)		(52,011)	
Other		(5,172)		4,875		(984)		(1,281)	
Total other (expense)		(33,797)		(17,697)		(31,632)		(83,126)	
Income (loss) before income taxes and player grievance damages		75,102		5,667		(64,942)		15,827	
Player grievance damages		486		878		2,708		4,072	
Income (loss) before income taxes		$ 74,616		$ 4,789		$ (67,650)		$ 11,755	

26 Major League Baseball Clubs
1991 Season
Combined Operating Revenues
Schedule I

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
A. Regular Season Game Receipts				
Home game receipts—net:				
Total home game receipts	$ 218,792	$ 195,906	$ 143,309	$ 558,007
Less visiting club share	28,913	19,877	19,246	68,036
Less League share	5,645	5,266	3,911	14,822
Less admission/sales tax	8,951	10,980	3,950	23,881
Total home game receipts—net	175,283	159,783	116,202	451,268
Away game receipts	22,963	21,794	23,351	68,108
Unredeemed tickets, rain checks	1,300	1,210	1,135	3,645
Total Regular Season Game Receipts	199,546	182,787	140,688	523,021
B. Spring Training Game Receipts (net of rent and stadium operations expenses)	4,422	4,401	4,225	13,048
C. National Broadcasting				
Regular season	30,123	37,654	30,123	97,900
World series	45,981	57,476	45,981	149,438
League Championship Series	25,888	32,361	25,888	84,137
All-Star Game	5,200	6,500	5,200	16,900
Foreign rights	805	1,006	805	2,616
Total National Broadcasting	107,997	134,997	107,997	350,991
D. Local Television and Radio				
Television:				
Gross revenues	59,650	58,361	32,398	150,409
Less direct expenses	2	5,099	3,488	8,589
Television—net	59,648	53,262	28,910	141,820
Radio:				
Gross revenues	23,430	28,214	23,642	75,286
Less direct expenses	469	3,326	4,501	8,296
Local radio—net	22,961	24,888	19,141	66,990
Cable:				
Gross revenues (including advertising)	43,119	32,112	25,877	101,108
Less direct expenses, including local taxes	-	500	1,607	2,107
Less television scrambling	118	148	118	384
Local cable—net	43,001	31,464	24,152	98,617
Total Local Television and Radio	125,610	109,614	72,203	307,427

26 Major League Baseball Clubs
1991 Season
Combined Operating Revenues (continued)
Schedule I (continued)

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
E. In-Park Concessions, Net (including restaurant/stadium club revenues and novelties, but excluding sales of publications)	$ 58,970	$ 42,349	$ 29,653	$ 130,972
F. Advertising and Publications (including sales and cost of publications)				
Stadium signs and scoreboard, net of direct sales expenses (including commissions)	11,818	7,797	5,253	24,868
Scorecards—net of expenses	1,538	2,196	1,181	4,915
Yearbooks—net of expenses	830	137	139	1,106
Other—net of expenses	5,189	504	612	6,305
Total Advertising and Publications	19,375	10,634	7,185	37,194
G. Parking, Net	6,458	5,370	5,637	17,465
H. Stadium Suite Rentals				
Gross revenues (excluding ticket revenues)	13,093	7,350	3,680	24,123
Less direct expenses (including labor and supplies, but excluding depreciation)	4,272	828	416	5,516
Total Stadium Suite Rentals	8,821	6,522	3,264	18,607
I. Copyright Royalty Tribunal	4,099	5,124	4,099	13,322
J. Amortization of amounts received in 1989 relating to network telecasting agreements	2,846	3,865	3,086	9,797
K. League Championship Series and World Series				
Share of game receipts—net	2,013	8,837	3,111	13,961
Concessions—net	372	3,193	374	3,939
Other revenues	549	751	725	2,025
Less expenses	(899)	(4,485)	(1,328)	(6,712)
Total League Championship Series and World Series	2,035	8,296	2,882	13,213

26 Major League Baseball Clubs
1991 Season

Combined Operating Revenues (continued)

Schedule I (continued)

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
L. National licensing	$ 17,249	$ 21,337	$ 16,849	$ 55,435
M. Other Baseball-Related Revenues				
National marketing	1,582	2,429	2,404	6,415
Local marketing and licensing	1,659	6,632	289	8,580
All-Star Game receipts	621	777	621	2,019
Receipts from exhibition games	1,390	290	678	2,358
Other—net	16,910	7,071	3,550	27,531
Total Other Baseball-Related Revenues	22,162	17,199	7,542	46,903
Total Operating Revenues	$ 579,590	$ 552,495	$ 405,310	$1,537,395

26 Major League Baseball Clubs
1991 Season

Combined Major League Player Costs

Schedule II

(In Thousands)

	Top Eight	%	Middle Ten	%	Bottom Eight	%	Total	%
Current salary	$182,458	38.76%	$218,318	41.26%	$198,796	45.32%	$599,572	41.68%
Incentive bonuses earned	6,441	1.37	5,284	1.00	4,974	1.13	16,699	1.16
Deferred compensation earned	4,906	1.04	1,149	.22	7,210	1.64	13,265	.92
Pro-rated signing bonuses and renewal options	7,067	1.50	9,593	1.81	9,004	2.05	25,664	1.79
Interest on deferred compensation	2,372	.50	2,947	.56	2,141	.49	7,460	.52
Termination pay, including buyouts	2,094	.44	5,433	1.02	3,354	.77	10,881	.76
Players' benefit plan	16,923	3.61	21,154	4.00	16,923	3.86	55,000	3.82
Total Major League Player Costs	$222,261	47.22%	$263,878	49.87%	$242,402	55.26%	$728,541	50.65%

26 Major League Baseball Clubs
1991 Season

Combined Team Operating Expenses and Major League Player Acquisition Costs

Schedule III

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
Team Operating Expenses				
Salaries—manager, coaches and trainers	$ 7,493	$ 10,251	$ 6,771	$ 24,515
Spring training	3,835	7,346	4,511	15,692
Transportation and road trip expenses	7,172	7,881	7,098	22,151
Hotels and meals	3,196	4,524	3,745	11,465
Players moving allowances and expenses	218	404	263	885
Disability, life, accident and travel insurance	2,356	2,259	2,607	7,222
Workers' compensation insurance	4,815	6,012	7,015	17,842
Uniforms and playing equipment	354	455	225	1,034
Baseballs	749	821	666	2,236
Bats	352	446	311	1,109
Clubhouse expenses	849	1,169	890	2,908
Medical expenses	700	1,419	705	2,824
Other expenses	1,631	1,071	1,072	3,774
	33,720	44,058	35,879	113,657
Major League Player Acquisition Costs				
Amortization of cost of contracts purchased—active players	694	327	617	1,638
—players released or retired	9	214	1,646	1,869
(Gain) loss on sale of player contracts	163	(32)	(756)	(625)
	866	509	1,507	2,882
Total Team Operating Expenses and Major League Player Acquisition Costs	$ 34,586	$ 44,567	$ 37,386	$ 116,539

26 Major League Baseball Clubs
1991 Season

Combined Scouting and Player Development Expenses

Schedule IV

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
Scouting Expenses				
Salaries	$ 8,035	$ 11,261	$ 7,428	$ 26,724
Travel expenses	5,481	7,250	5,655	18,386
Other expenses	614	1,200	523	2,337
Total Scouting Expenses	14,130	19,711	13,606	47,447
Amateur Player Acquisition Costs				
Minor League signing bonuses and other player acquisition costs	9,937	10,036	5,577	25,550
Cost of released players	725	1,090	110	1,925
Sale of contracts—net (gain)	(500)	(575)	(146)	(1,221)
Other	105	301	292	698
Total Amateur Player Acquisition Costs	10,267	10,852	5,833	26,952
Player Development Expenses				
Salaries—front office (farm director, director of player development, assistances, etc.)	2,350	2,164	1,670	6,184
Salaries—managers, coaches, trainers and instructors	5,707	7,903	5,751	19,361
Class AAA Clubs	6,401	7,636	7,042	21,079
Class AA Clubs	2,996	3,244	3,326	9,566
Class A Clubs	5,900	6,806	5,543	18,249
Rookie Clubs	2,596	2,075	1,274	5,945
Spring training (March camps only)	3,336	3,565	2,826	9,727
Extended spring training (including June camps)	1,469	1,071	941	3,481
Instructional league	1,558	1,677	974	4,209
Latin American and other foreign	2,176	1,503	1,306	4,985
National Association, net	134	164	134	432
Other expenses	3,661	2,997	2,956	9,614
Total Player Development Expenses	38,284	40,805	33,743	112,832
Total Scouting and Player Development Expenses	$ 62,681	$ 71,368	$ 53,182	$ 187,231

26 Major League Baseball Clubs
1991 Season

Combined Stadium Operations Expenses

Schedule V

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
Salaries (or contracted cost) for day of game and season personnel	$ 19,321	$ 12,957	$ 13,880	$ 46,158
Salaries—year-round personnel	2,297	3,077	1,590	6,964
Signs and scoreboard operations, including salaries	2,087	957	2,228	5,272
Rent (including office/stadium rent, use taxes, Cable TV, super suites, etc.)	15,254	7,571	9,104	31,929
Depreciation of stadium (including super suites and scoreboard) and equipment	12,468	9,339	2,601	24,408
Real estate and property taxes	1,781	1,628	184	3,593
Utilities	3,978	3,812	1,946	9,736
Maintenance and repairs	2,211	3,516	1,190	6,917
Other expenses	2,629	2,222	1,068	5,919
Total Stadium Operations Expenses	$ 62,026	$ 45,079	$ 33,791	$ 140,896

26 Major League Baseball Clubs
1991 Season

Combined Marketing, Publicity and Ticket Operations Expenses

Schedule VI

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
Salaries, including bonuses and commissions:				
Marketing/promotions	$ 1,746	$ 3,693	$ 1,885	$ 7,324
Publicity/community relations	1,931	2,701	1,836	6,468
Sales office	1,683	2,480	1,930	6,093
Ticket office	4,263	4,632	4,247	13,142
Total Salaries	9,623	13,506	9,898	33,027
Game promotions—net (revenue) expense	(1,456)	342	(923)	(2,037)
Advertising	3,192	5,499	3,922	12,613
Club newsletter	33	574	28	635
Ticket printing and schedules	632	1,293	842	2,767
Agency and credit card commissions	1,367	1,233	929	3,529
Press room expenses (salaries and food supplies)	809	950	1,001	2,760
Other (including Media Guide)	3,988	3,910	3,722	11,620
All-Star Game expenses	179	224	179	582
	8,744	14,025	9,700	32,469
Total Marketing, Publicity and Ticket Operations Expenses	$ 18,367	$ 27,531	$ 19,598	$ 65,496

26 Major League Baseball Clubs
1991 Season

Combined General and Administrative Expenses

Schedule VII

(In Thousands)

	Top Eight	Middle Ten	Bottom Eight	Total
Salaries—baseball administration	$ 4,672	$ 5,692	$ 4,115	$ 14,479
Salaries—business administration	9,760	11,916	8,116	29,792
Payroll taxes	7,401	9,256	6,379	23,036
Travel and entertainment	4,113	8,018	3,512	15,643
Employee benefits:				
Group life, health and other	4,482	6,108	4,851	15,441
Retirement, profit sharing, 401(k) plans, etc.	3,454	4,866	3,245	11,565
Insurance:				
General liability—primary and excess	3,585	3,768	1,729	9,082
Other	2,389	911	295	3,595
Legal fees	4,045	3,488	1,883	9,416
Accounting fees	1,009	1,396	643	3,048
Other professional fees	4,289	2,525	3,029	9,843
Business taxes	978	855	941	2,774
Computer operations, including ticket office	1,270	1,107	396	2,773
Telephone	1,989	2,355	1,496	5,840
Postage	1,302	1,485	1,006	3,793
Stationery and supplies	1,434	1,149	920	3,503
Drug program	82	103	82	267
Charitable contributions	1,677	1,552	600	3,829
Other expenses	6,539	2,282	2,723	11,544
Total General and Administrative Expenses	$ 64,470	$ 68,832	$ 45,961	$ 179,263

MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

DONALD M. FEHR
EXECUTIVE DIRECTOR
GENERAL COUNSEL

2 February 1993

Hon. Howard M. Metzenbaum
c/o Chris Harvie
Subcommittee on Antitrust,
Monopolies and Business Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Re: Baseball's Antitrust Exemption

Dear Senator Metzenbaum:

In order to complete the record, I am enclosing a copy of the Baseball Economic Study Committee Report. I understand that you may have received parts of the report from representatives of the owners. In particular, I draw your attention to the Supplementary Statement of member Henry Aaron. In my view, Henry gave more serious consideration to the issues facing baseball than other members of the Committee.

Yours very truly,

Donald M. Fehr

DMF/mc

805 THIRD AVENUE, NEW YORK, NY 10022
TEL: (212) 826-0808 FAX: (212) 752-3649

Major League Baseball
Economic Study Committee

Staff Analysis

Edward M. Gramlich, Director
Fred O'R. Hayes
Charles C. Brown
Gary R. Solon
Stacy A. Miller

December 1992

The 1990-93 Basic Agreement between the American and National League Baseball Clubs and the Major League Baseball Players Association (MLBPA) established an Economic Study Committee (ESC). The ESC is to report on "the overall economic condition of the industry, including a description of current or impending problems, ... the cause of such problems, and possible solutions."

The ESC hired a staff to do the factual and statistical work necessary for this examination. This is the staff analysis. It focuses heavily on two questions the ESC felt to be of paramount importance -- the overall economic condition of baseball clubs, and the state of competitive balance between clubs with large and small revenue bases. Section I deals with the overall economic condition of the industry and impending problems. Section II looks for evidence of these problems on the financial side -- how profitable are baseball clubs, how much are clubs worth, how large are rates of return from owning clubs? Section III looks for evidence on the competitive side -- how competitive are the clubs on the field, how large are disparities in win-loss records, how great are the competitive advantages of clubs with greater revenue potentials? Since this is just an analytical report, it contains no recommendations of changes that might be made in the structure of major league baseball. Recommendations can be found in the report of the ESC itself.

I. The Overall Condition of Major League Baseball

To appraise the economic condition of major league baseball, we were able to examine confidential club data submitted to the Commissioner, covering the years 1978 to 1991. We converted all figures in this report to 1991 US dollars by deflating by the Consumer Price

Index. Since the data are confidential, we generally just give either club or group averages, not the data for particular clubs.

On the surface major league baseball looks reasonably healthy. As can be seen in Figure 1, overall real revenue for the 26 major league baseball clubs grew fairly slowly, at an annual average real growth rate of 3 percent, from 1978 to 1982 (the year following baseball's worst strike). Since that time revenues have increased sharply, at an annual average real growth rate of 10 percent from 1982 to 1991. Over this span major league baseball has more doubled its share of US real gross domestic product. Over the 1985-91 period, the focus of much of the ESC's report, the annual average real growth rate was 9 percent.

There has been much attention to the explosion in players' salaries. For most of this century these salaries were held down by the old reserve clause system, which bound players to clubs and did not let players sell their services on the free market. The reserve clause system began to break apart in the mid-1970s, and player salaries began a rapid ascent, at the annual average real growth rate of 12 percent a year from 1978 to 1991; 10 percent a year from 1985 to 1991.

But after an initial change, baseball revenues grew rapidly enough that even this rapid growth of players salaries did not absorb an unusually high fraction of revenues. Figure 2 shows player costs, including pension payments and collusion payments (to be explained later), as a share of club revenues. In the 1978-81 period, when the reserve clause system was breaking apart, this share rose sharply, from 30 percent to 48 percent. Since then, including the collusion payments, the share has remained pretty close to 46 percent, though it did rise to 51 percent in 1991.

The results for the overall operating income (to be defined below) of baseball clubs are shown in Figure 3. Average club operating income was low or negative up to 1985 but then began a rally through 1990, reaching a peak of $5 million per club. It dipped back to $3.5 million per club in 1991.

These numbers illustrate the high points. Each comes with a variety of qualifications and complications, to be discussed further below. And, even if these overall figures give the superficial appearance of health – revenues are rising rapidly, operating income used to be negative and is now positive – there could be potential trouble spots. Two of the main ones are:

- o The vast disparity in revenues between clubs.
- o The adjustment of the compensation system to slowdowns in revenue growth.

Revenue disparities

There is a widespread variation in the size of club markets, and in potential revenues. City population sizes vary from the two New York teams, splitting up a metropolitan population of 19 million, to Kansas City, Milwaukee, and Cincinnati, each with metropolitan populations of less than 2 million.

Similar population disparities exist in the other major professional sports – football, basketball, and hockey. But because of its more decentralized revenue sources, the revenue disparities are much greater in baseball. Average club revenue was $56 million in 1991, of which only $12 million came from a flat distribution from the major league central fund (MLCF). The balance, over three-fourths of total revenue, was raised by the clubs on their own, in markets as widely disparate in size as those cited above. This led to a great variation

in total revenues across clubs – from $96 million for the top revenue club to $39 million for the lowest revenue club. The lower number is less than the entire player payroll for some clubs.

Since clubs are bought and sold in free capital markets, franchise prices would be expected to capitalize these disparities. This means that clubs in large markets with high revenue potentials will tend to sell for more than clubs in small markets. It also means that star players will generally be worth more in large markets, where their contribution to winning games will produce more gate receipts and local television revenue. Would-be baseball owners then have a choice – they can buy large market clubs for a high price, knowing that if they do they will have the revenue potential to buy more star players and win more, or they can buy small market clubs without these advantages, but for a smaller price.

This description is more or less the way all free markets work in a capitalist system – whether for consumers or investors, one gets more if one pays more. But since baseball is not a pure business, these free market attributes can lead to difficulties. All clubs, from whatever size market, must bid for the same players and compete on the same playing fields. Large market clubs could bid player salaries to such a level that small market clubs could not afford to field competitive clubs and still remain profitable. If the small market clubs try to remain competitive, the impact of revenue disparities will be felt in the financial statements. If the small market clubs try to remain profitable, the impact of revenue disparities will be felt in win-loss records. For this reason, it is necessary to examine both financial records and on-field performance to see how serious these problems are.

Adjustment

The former reserve clause system has now been supplanted by a system with three categories for setting player salaries. In this system:

o Most players with fewer than three years of major league service must accept what the clubs offer them, provided that this offer exceeds the minimum salary of $100,000 per year. In 1991 45 percent of all major league players were in this category, but these players received only 9 percent of total compensation.

o Players with more than six years of major league service are eligible to become free agents and to sign contracts with any club for any agreed on duration. In 1991 30 percent of major league players had at least six years of major league service and these players received 61 percent of total compensation.

o Players in the middle with more than three but fewer than six years of major league service are subject to the reserve system and bound to the club that signed them, but are normally eligible for final offer salary arbitration, unless they have signed multi-year contracts. In 1991 25 percent of major league players were in this category, receiving 31 percent of total compensation.

Since the rules of collective bargaining create no impediment to clubs regarding player costs in the first two categories, those worried about the adjustment of costs to revenues focus on the third category -- arbitration. There is a possibility that if the growth of revenues is suddenly altered, say it slows dramatically, arbitration salaries will be set relative to free agent salaries negotiated when revenue prospects were more optimistic, will not adjust to revenues quickly, and will not be entirely under the control of baseball clubs. In this sense a sudden slowdown in revenue growth could at least temporarily worsen baseball club incomes.

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These seem to be the main potential problems with the structure of major league baseball. To see how serious they are we must look more carefully at the economic and competitive prospects for baseball clubs with different revenue bases, as well as at the adjustment mechanism.

II. Evidence of Financial Health – Operating Income, Franchise Values, and Rates of Return

We turn first to the financial side. How "profitable" are baseball clubs, both in general and for small market clubs in particular? Since it is difficult to define or appraise the general profitability of clubs, we look at things in three different ways – we examine the operating income of the clubs, we examine the franchise values of the clubs, and we combine these two pieces of information to compute realized real rates of return from owning baseball clubs.

Income statements

Since 1978 all clubs have submitted common audited financial forms on their baseball operations to the Commissioner. With the advice of Ernst and Young, these forms have become increasingly standardized over the years. We used these forms to compute a time series of the real operating income of each baseball club, on a common accrual basis over time and across clubs. The resultant data are probably more consistent and accurate than data for most other American industries.

There are seven accounting issues worth special mention:

o Interest receipts or expenditures. Normally when groups buy baseball clubs they incur varying amounts of debt. To the new owners, the interest on this debt looks like a fixed expense just like any other fixed expense. But to accountants, the interest is a function of the capital structure. What is paid out in interest by clubs with debt would appear as profits to clubs without debt. Hence unless interest payments and receipts are excluded, club expense statements simply are not comparable, given that different clubs purchased for different amounts at different times would have different interest expenses. We have thus followed accepted accounting practice by removing all interest payments and receipts from operating expenses and revenues (putting them "below the line," in accounting vernacular), and computing the net operating income of baseball clubs *as if* all clubs were financed entirely by equity (Sorter, *Journal of Accountancy*, 1986).

o Acquisition costs. Initial owner acquisition costs -- costs of the initial player roster, lease arrangements, the stadium, and "good will" -- are considered as capital transactions and also eliminated from expenses and revenues (put below the line). But when a tangible asset such as the stadium depreciates in the course of operating the club, this depreciation is considered a depreciable expense (above the line), even if the club does not actually pay out any cash. When the initial roster depreciates and the club is forced to acquire new players, these subsequent new player acquisition costs are also considered as expenses (above the line). But no further depreciation for initial rosters is allowed in our definition of operating income.

o MLCF. This is a shell entity that receives revenues from national and superstation television arrangements, licensing, and the All-Star game, and uses the revenue to finance the Commissioner's Office, centralized scouting and umpiring expenses, and payments to the player pension fund. The balance of the revenue is returned to the clubs, a flat amount per club. We treat this MLCF as a 27th club. When the total revenues of baseball are measured, we add the revenues of the 26 real clubs (net of the MLCF distribution) to the revenues of the

MLCF. When club averages are calculated, we compute this average across the 26 real clubs, including as revenues the amounts received by the clubs from the MLCF.

o Collusion payments. In the late 1960s the clubs were found to be guilty of collusive bidding for free agents. The clubs and players reached an out-of-court settlement that had the clubs pay $280 million to the MLBPA, which then redistributed the funds to individual players. We allocated the non-interest component of this amount, $242 million, to club salaries over the relevant years, 1986-92, using an annual distribution worked out by the MLBPA (as was seen earlier in Figure 2, this allocation roughly preserves the ratio of player costs to club revenues over the collusion period). For each year the adjustment to player salaries was a flat amount per club, regardless of how much the club may or may not have benefitted from collusion. While there seems to be no feasible alternative to this treatment, it should be noted that some clubs could have benefitted more from collusion than this flat addition to expenses, and had their operating income over this period artificially inflated, while other clubs could have benefitted less and had their operating income artificially depressed.

o Bonuses and deferred compensation. Very often baseball player or television contracts involve signing bonuses. Where we could identify these, we spread the bonuses according to the language of the contract or evenly across the years of the contract, to prevent otherwise erratic movements in revenues and expenses. Because the clubs themselves differ widely in how they treat these bonuses, it was not always possible to make these spreads.

On the other side, sometimes player contracts involve deferred compensation. Where possible, we put the appropriate present value amount into expenses in the year the deferred compensation liability was first incurred. Again, because of accounting procedure

variability, often it was not possible to do this and we simply had to use unadjusted club figures.

- Related party transactions (RPTs). RPTs are transactions between the club and a business in which the club or its owners have a financial interest, or which has a financial interest in the club. With one party either controlling or able to influence the other, or both parties controlled by a third party, the terms of an RPT may be slanted to favor one party at the expense of the other.

There are about fifty RPTs involving revenues or expenses in a typical year. We reviewed each of these RPTs and identified a small number that seemed clearly disadvantageous to the club over the 1988-91 period (more information is needed on another few RPTs). We have shown operating income figures without any adjustment for RPTs, but have also indicated how different treatment of these few RPTs could change our overall conclusions regarding operating income.

The RPTs are of several different kinds. Four clubs are units in consolidated enterprises that file consolidated tax returns covering both the club and the television station or beer company with which the club does business. The terms of transactions between units of these consolidated enterprises have no effect on either their tax liabilities or their operating income. While there is no tax motive for contrivance, nor is there an incentive to make sure all transactions are correctly priced. Two of the transactions we found disadvantageous to the clubs were between units of consolidated businesses.

When the club and the related party are both controlled by the same owners but not consolidated for tax purposes, the owners may sometimes be able to profit from manipulating transaction terms. We found two of the transactions in this category to be disadvantageous

to the club. Again, we indicated where alternative treatment would change our conclusions about overall club operating income.

There were a number of transactions where neither party had a controlling interest in the other. Here terms slanted to favor the related party would ordinarily be disadvantageous to club owners since they would incur all of the cost of the slanted terms but get only a small share of the benefits. We found no evidence that any RPTs of this kind were biased to favor the related party.

o Taxes. Since baseball clubs are in a so-called talent industry, their tax treatment is somewhat unusual. When a club is purchased, one of the "assets" involves the economic value of player contracts conferring rights to obtain player services at a below-free-market price. That value depreciates over time as player contracts expire or as players progress to free agency.

Like other talent enterprises, for tax purposes clubs are permitted straight line depreciation of intangibles such as the value of these initial player contracts. Then, when either the player or the club is sold, there is a recapture provision that assesses capital gains taxes on the difference between the sale price and the post-depreciation basis of the relevant contracts. Hence if a club has taken tax depreciation on player contracts and then sells these contracts at a higher price, it has to pay capital gains taxes on the difference. This general tax treatment is common to firms in talent industries and seems to confer no special tax advantages to baseball clubs, provided that the depreciable initial roster costs are set at reasonable values.

The key question then boils down to whether the limitation on depreciable roster costs is reasonable. That limit is 50 percent of the franchise value, with the average club now

claiming 43 percent (*Financial World*, 1992). While it is of course unclear how much a new clubowner is paying for what aspect of a club, the following crude calculation suggests that the limit may not be unreasonable.

We will see below that an average club now sells for $94 million. Applying the 43 percent ratio means that this average club would claim about $40 million as the present value of depreciable initial player roster costs. These costs are normally depreciated over a five-year period, reducing the typical club's taxable profits by $8 million per year. Is $8 million a good estimate of the true depreciation costs of the initial player contracts?

Probably not too bad. On the other side, several economists have tried to measure the value of existing player contracts to clubs by comparing market values and wages for players bound to the clubs, such as those in their first six years of major league service. Perhaps the best estimate from this literature is that individual clubs realize in benefits nearly $6 million per year from these contracts with their major league players. There are an average of 13 pre-arbitration players per club and these players are paid about $.3 million apiece less than their estimated market value; an average of 7 arbitration players per club and they are paid about $.2 million apiece less than their estimated market value (The market value estimates come from Zimbalist, *Baseball and Billions: The Economic Dilemmas of Our National Pastime*, Basic Books, 1992, pg. 92). There would be further value from contracts of minor league players owned by the club. The sum of all these contract rights could well be close to $8 million, though of course all estimates in this process are highly speculative. If this indirect test can be believed, there do not seem to be undue tax advantages to owning a baseball club. Whether there are or not, we have not adjusted our operating income figures for any tax advantages in the empirical examination below.

Operating income

Figure 3, described earlier, gives the real operating income of baseball clubs under these accounting conventions. The solid line representing the 26 club average was slightly positive up to 1979, negative from 1980 to 1984, and then positive again. The sharp drop in 1981 was due to the strike in that year.

But given the large disparities in potential revenue between the clubs, the most important indicator of the economic health of major league baseball may not be the overall average, but rather the operating income of clubs in small markets or otherwise difficult circumstances. One measure of these is given by the bottom line in the Figure, showing the income path for less profitable clubs. These less profitable clubs are defined statistically by a measure called the standard deviation, which has the property that a band from one standard deviation below the mean to one standard deviation above the mean includes about two-thirds of the clubs. Hence in the figure the area between the two dotted lines contains about 18 clubs, with an average of 4 clubs making operating income less than the lower band and an average of 4 clubs making operating income more than the upper band. By this statistical measure, several clubs – the 4 below the lower band and more just above it -- could have had negative operating income even when baseball as a whole had positive operating income.

The standard deviation is a statistical measure computed separately for each year, so it does not indicate *which* clubs had negative operating income. Nor does it say whether these negative income clubs are the same ones year after year. One can only determine the situation for particular clubs by examining their particular income statements.

Results of such an examination are summarized in Table 4, which categorizes the average annual real operating income of all 26 clubs either for the period when baseball as a whole

had positive operating income (1985-91) or for a longer period (1979-81). It is commonly felt that winning affects income, so we have also estimated the sensitivity of income to winning. For each period we regressed average club operating income on average winning percentage and measures of market size. The Table then uses the winning percentage coefficient to categorize hypothetical "adjusted" income *as if* each club had a .500 winning percentage over the relevant period. Since by this construction winning just shifts income from club to club, average operating income across all clubs is the same in both the "income" and "adjusted" columns.

In the recent positive income period 2 clubs lost fairly large amounts (more than $4 million per year) with or without the adjustment for wins. Then 8 clubs lost more modest amounts with no winning adjustment, 6 with a winning adjustment. By this standard between 8 and 10 clubs have had negative operating income in recent years. An adjustment for consolidated enterprise RPTs described above for one of these clubs might eliminate the negative operating income, leaving between 7 and 9 clubs with true negative operating income in the recent profitable period of baseball.

Over the longer period when baseball was first unprofitable and then became profitable, 3 clubs lost more than $4 million per year with no adjustment for winning, 2 with an adjustment. Then 7 clubs lost more moderate amounts with no adjustment, 8 with an adjustment. By this standard 10 clubs had negative operating income over the longer period which includes a spell when baseball as a whole was not profitable. Making the adjustment for consolidated enterprise RPTs in this case does not eliminate the negative operating income.

Hence our examination of the operating income of baseball clubs indicates that up to 10 clubs normally do not earn operating income. The number is cut slightly if we confine

attention to the recent seven-year period when baseball as a whole was profitable, it is sometimes cut by 1 if we make an adjustment for RPTs, and it can be changed slightly if we adjust for how much these clubs have won. But even with all adjustments there still seem to be about 7 clubs that do not earn operating income on average.

Asset values

A second way to look at the underlying profitability of baseball clubs is by their asset values, which should reflect the market valuation of clubs' future earning streams. We have these asset sale values from separate data also submitted by the clubs to the Commissioner, though these data are not confidential and particular club values can be presented.

Asset values for 7 clubs that were sold in the 1989-91 period, all in 1991 US dollars, are shown in Table 5. We only include the most recent Seattle sale, and we do not include the Texas sale (because a stadium was included) and the Kansas City transaction (which was not a true market sale). The average value for these 7 clubs is $94 million, implying a perhaps not unreasonable 4 percent real rate of return if the $4 million of average profits noted earlier were continued indefinitely. But the numbers in the Table do present some puzzles. Those clubs on the list that have on average had negative operating income have sold for just over $90 million, which seems a high price to pay for the privilege of losing money. And not much less than the sale price for those clubs on the list that have made money, which is just under $100 million.

It is puzzling that this variance in sale prices is so *small*, with so little premium paid for having positive operating income. Why will prospective owners pay $90 million to buy a club

that is likely to lose money on average, and only an extra $10 million for a club that is likely to make money on average?

There are several possible explanations:

o Measurement. Given the difficulties in measuring true baseball profits recounted earlier, one possible explanation for the discrepancy between income and asset values is that operating income is still not measured well, despite our best efforts. In this case one would place credence mainly in the asset values.

o Speculative bubbles. On the other side, economic history is full of examples of speculative bubbles, where asset values are bid much higher than the true worth of the property. Everything is fine until the market suddenly crashes. If it is true that asset values are being bid up by a speculative fever, one would place less credence in the asset values and more credence in the underlying operating income numbers.

o Civic altruism. Some of the sales of less profitble clubs could be influenced by civic pride -- that is, by the fact that local owners will bid what it takes to keep a club in the home city, even if these owners know they cannot earn positive operating income. In this case the asset value could reflect what a baseball club is worth in some other city, not in the present location. In this case, it is not even clear what question should be asked -- about the worth of the club in the present location, or the worth of the club in any imaginable location.

o The attractiveness of baseball. A related explanation is that potential owners simply want to own a baseball club -- because they are fans, because it helps their business, or for some other reason. This explanation does not fit the observed pattern of franchise values in all respects, because it implies high values for *all* franchises, not just those losing money. But it could still explain why baseball asset values in general give better reports of the financial health of baseball clubs than do the income statements of the clubs.

o Optimism. A final argument that does fit the facts well is that it takes a certain amount of optimism to operate a baseball club. Potential buyers of successful clubs will see full stadiums and/or winning records, realize they cannot do much better, and bid more or less a normal price for the earnings streams of successful clubs. On the other hand, potential buyers of clubs that are losing money will see empty stadiums and/or losing records, think they can do much better, and bid the price well beyond the level implied by the clubs' financial history.

Each of these hypotheses has different implications for the economic state of money-losing baseball clubs, and there are few enough sales that each hypothesis is virtually impossible to prove or disprove with actual data. This is one reason, possibly the main reason, why observers can look at the same facts and derive such different interpretations about the economic condition of major league baseball.

Rate of return

A third way to look at the profitability of baseball clubs involves the combination of disparate information from the income and asset value statements. One uses both the operating income figures and the asset figures to compute the internal rate of return from owning a baseball club. One views owners as buying a club at some date, earning or losing money over the holding period, and then selling a club at some later date. All dollar amounts are put in common terms, 1991 US dollars, and one then computes the internal rate of return that makes the present value of the entire transaction zero. One can then compare this internal rate of return with an internal rate of return calculated from bond or stock markets in the same way for the same time horizon to see which investment performed better. All rates of return in this calculation are pre-tax, which is acceptable if the tax

treatment is approximately the same. We argued earlier that there was not obviously more generous tax treatment of baseball clubs than for other types of investments.

The results of these calculations are given in Table 6. The ten clubs listed in the table have been bought and sold over the period for which we have the data necessary to compute internal rates of return. Four of these clubs showed losses in Table 4, six did not. Five were last sold after 1987, five were last sold before 1987. In all obvious ways, this seems a reasonable sample of clubs for computing internal rates of return.

The column listed "rate" shows our calculation of real internal rates of return. Income data were taken from the records described above, still with no adjustment for RPTs or taxes. The average annual pre-tax real rate of return from holding a club over the period was 5.6 percent, but the spread around this average was wide, with four clubs earning zero or negative returns, three clubs earning moderate returns, and three clubs earning very handsome returns. This wide variance in return is reflected in the standard deviation of 7.1 percent, which indicates that a random owner had a two-thirds chance of making an annual return between -1.5 percent and 12.7 percent.

These rate-of-return calculations permit a comparison of the returns from owning baseball clubs to the returns on other investments, most of which also did well in the 1980s. The column listed "bond" gives the annual pre-tax real rate of return on holding long term taxable government bonds (interest and capital gains) over the exact same holding period as for the baseball club. The asterisks show that 4 clubs outperformed the bond market, the other 6 clubs did not. The column listed "stock" gives the same annual pre-tax real rate of return information for randomly chosen common stocks (dividends and capital gains) over the exact same holding period as for the baseball club. The double asterisks show that 3 clubs outperformed the stock market, the other 7 did not.

These comparisons are for what are known as *ex post* returns over the exact holding period. An alternative way to display relative profitability is to assume that potential owners of baseball clubs knew the general expected real profitability of government bonds and stocks over the period when they bought their clubs. Under this assumption one would compare the return on baseball clubs to the long term average expected real return in the bond and stock market, given in the table as 4.1 percent per year for taxable government bonds and 8.2 percent per year for common stocks. By this standard, 5 clubs outperformed the bond market and 3 clubs outperformed the stock market.

Hence a few clubs seem to be doing very well, outperforming the stock market, and most not as well. For these calculations the time at which the club was bought and sold does matter, with those sold in the revenue surge of recent years earning somewhat higher real returns. The average operating income of the clubs also matters, with those earning more generally having higher rates of return.

Concerning overall profitability, is a real rate of return of 5.6 percent adequate compensation for owning a baseball club? One can argue the issue either way. Financial analysts might say that because of the greater risks in owning a baseball club, the real rate of return *should* be higher than for bonds, perhaps comparable to the real return on holding stocks. Sports fans might retort that since it is more fun or rewarding to own a baseball club than to clip coupons from randomly chosen bonds and stocks, the rate of return *need not* be very high. It is impossible to resolve this issue conclusively. The only factual statement that can be made is that the average real rate of return from owning baseball clubs has been moderate, with some chance of very large returns and some chance of negative or very low returns.

The future

The data examined so far, whether from income statements, asset values, or rates of return, are from the past decade, an era when baseball revenues were rising at a very rapid rate. An important question facing baseball is whether these past trends will continue, particularly if revenue growth slows. It is notoriously difficult to forecast anything about major league baseball, but it still makes sense to examine recent trends to see what can be found.

There are indications that revenue growth will slow. Although complete figures for 1992 are not yet available, game attendance did dip slightly. The CBS national television contract does not expire until the end of the 1993 season, but CBS is reporting large losses on its baseball contract. ESPN has already informed baseball that it is not exercising its option to extend its agreement past 1993. These contracts now provide about 23 percent of the revenue for the average club, and the likely drop in real revenue from the contracts could imply a decline in total club revenues, unless offset by rises in the real value of local television revenue (now also 20 percent of revenues for the average club).

The question is what happens then. If salary growth adjusts to revenue growth, operating income need not decline. But there are two reasons why salary growth may not adjust, one within the long run control of clubs and one at least partly not within the control of clubs. The factor that could in principle be controlled by the clubs is long term contracts for free agents. In the short run these long term contracts place a fixed liability on clubs, but over time the clubs can recontract and refuse to sign some of their low-value players. The factor partially outside the control of clubs is salary arbitration, and it has been suggested that

replacing arbitration with earlier free agency would insulate operating income from revenue fluctuations.

To determine how sensitively arbitration salaries follow free agent salaries, we have regressed these arbitration salaries on current and lagged free agent salaries over the 1983-91 period, the only span for which we have the requisite data. This is a very low power statistical test – using one period to measure the impact of the lag, there are only eight time series observations with real free agent salaries rising every year. We do not have any observations on the lag in periods when free agent salaries underwent sustained declines. Moreover, it is unclear exactly how to adjust for changes in the arbitration system (the system was changed to exclude two-year players in 1987, and again in 1991 to include a handful of two-year players), for new contracts, for deferred compensation, and for player contracts that moved money across years in anticipation of a possible work stoppage. But the results generally suggest that arbitration salaries respond to free agent salaries with very little lag – sometimes there is no lag at all, sometimes the lag is about a half-year. Our tentative conclusion is that eliminating arbitration, whatever its other virtues or costs, will not insulate operating income from revenue swings to a very great degree.

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Hence the various financial records give some hint of trouble for the first of the problems listed above. Revenue disparities among the clubs imply that some number of clubs do have trouble earning operating income -- we find that this number could be as high as 10. All the clubs that were sold in the 1989-92 period sold at good prices, but even then average internal rates of return were not exceptional, although some clubs were extremely good investments and some clubs were poor investments. As for sensitivity, there is no evidence that

alterations in the arbitration system will insulate operating income from declines in revenues to an important degree.

III. Evidence of Competitive Health: Wins and Losses on the Field

The other way problems with the structure of major league baseball can become evident involves on-field competitive performance. These competitive balance questions are much easier to deal with than the financial questions because win-loss records are public information, are not subject to the same ambiguities, and are available for a much longer period of time.

Competitive balance in general

For years the maintenance of competitive balance -- to prevent large market clubs from bidding talent away from small market clubs -- was the main justification given for the reserve clause. This justification was never convincing to academic economists studying baseball (Rottenberg, *Journal of Political Economy*, 1956). The economists' argument is that good players are worth more to large market clubs *whatever* the compensation system. If the compensation system is a reserve clause, large market clubs will pay more *to* small market clubs for star players. If the compensation system is free agency, large market clubs will pay more *than* small market clubs in bidding for star players. Either way the best talent will flow to the large market clubs, and either way the large market clubs should win more.

But these arguments involve theory. How has competitive balance fared in fact in this era when the compensation system was changing so rapidly? To answer this question, we

first looked at measures of tightness of pennant races. We focused on the 37 year period beginning in 1954 and ending in 1990. The AL began 1954 with its eight original clubs, added California and the club that is now Texas in 1961, added Kansas City and the club that is now Milwaukee in 1969, and added Seattle and Toronto in 1977. The NL began 1954 with its eight original clubs, added Houston and New York in 1962, and added Montreal and San Diego in 1969. We analyzed the leagues separately, breaking the 37 year period into 5 seven-year segments for each league. The segments are intended to be long enough to average out year-to-year variation in on-field performance, and are chosen so that expansion teams enter at the beginning of a seven-year segment. Hence the seven-year periods are 1954-60, 1961-67, 1969-75, 1977-83, and 1984-90 for the AL and the same except that the second segment is replaced by 1962-68 for the NL.

The results are shown in Table 7. One way to answer the question of how tight are pennant races is to compute the variation in performance of all clubs in all of the seven years, by league, again using standard deviations. To read the table, in the 1984-90 period in the NL, on average 8 of the 12 clubs had winning percentages between .435 and .565, 2 clubs (on average the last place club in each division) had winning percentages below .435 and 2 (on average the first place clubs) had winning percentages above .565. The middle columns translate these winning percentages into games won and lost – on average 8 NL clubs won between 70 and 92 games (in a 162 game season), 2 won less than 70 games, and 2 won more than 92 games.

The results of this test seem clear enough. As anticipated by the economic theorists, in neither league has there been a worsening of competitive balance since the start of free agency in about 1977. In the AL competitive balance has actually improved over time, with the lower tail teams winning an average of about 5 more games a year (from 66 to 71). It is well-known that this early disparity in the AL was in part a Yankee effect – the New York

Yankees won five pennants in these seven years – but it turns out that Chicago and Cleveland also did quite well through this whole period, and Baltimore, the team that is now Minnesota, and the team that is now Oakland did quite badly. This early period in the AL turns out to be the heyday of competitive *im*balance.

Apart from this period effect, competition stays imbalanced when the AL adds expansion teams, as it did in the next three seven-year segments. Finally, in the recent 1984-90 period competition is the most balanced – the Yankee effect has long since disappeared, as has the expansion effect.

It may be more meaningful to look at the NL, which did not have a Yankee effect in the 1954-60 period, and which added only two sets of expansion teams. Here there has been remarkably little change in competitive balance over the whole period, with the lower tail teams winning 69 games in the early period and 70 games in the recent period.

Another way to answer questions involving tightness of pennant races is just to see who won. By this measure there is a clear increase in competitive balance over time. In the AL 3 teams won pennants in the first seven-year period and 5 teams in the latest period. In the NL 4 teams won pennants in the first seven-year period and 6 in the latest seven-year period. In both leagues the excitement of World Series is now available to fans in more cities. Similarly, the table shows that there has been an upward drift in numbers of clubs winning division championships since the divisional championships began in 1969. And also in numbers of clubs within 10 games of the division winner at the close of the season, indicating that the excitement of pennant races is being spread around more widely.

These figures describe how competitive clubs are within a year. But it is also meaningful to focus on the performance of the clubs over a longer period, averaging out year-to-year

variation in their own performance. These measures of good and bad clubs are shown in Table 8, which presents the range statistics as if the clubs were engaged in one giant seven-year pennant race. Now in the recent NL period, 8 of the 12 clubs had seven-year average numbers of wins between 75 and 87 games, with the 2 worst teams over the seven-year span averaging less than 75 wins and the 2 best teams averaging more than 87 wins. Compared to Table 7, all of the ranges are compacted because year-to-year variation in club performance is averaged out.

But the range results can be interpreted roughly the same as before. In the AL competitive balance has improved slightly; in the NL there has been very little change. Nowadays in both leagues the lower tail clubs average about 75 wins per year over a seven-year period and the upper tail clubs average about 87 wins. Again we more or less confirm the economists' predictions that whatever free agency does to the clubs' income statements, it seems to have made remarkably little change in on-field performance. Indeed, for all the changes in professional baseball since 1954 -- in numbers of franchises, player compensation arrangements, the increased importance of shared national television revenues, the amateur player draft, and who knows what else -- the distribution of wins and losses has changed very little. The only thing that does seem to have changed is the number of clubs who are participating in pennant races and winning pennants and division championships in a seven-year period. By these measures, on-field competition has increased.

Market size

The next question involves the impact of market size. With either the reserve clause or the free agency compensation system, clubs in large markets are likely to win more than

clubs in small markets. But how much more? Is a large market worth a few or a lot of games in the win-loss column? Has this difference changed with free agency?

To answer this question, for each of the seven-year segments, now with both leagues pooled together to increase numbers of observations, we regressed clubs' seven-year win-loss percentage on metropolitan population from the Census, number of clubs in that area, and whether the club was a recent expansion club. The number-of-clubs variable permits us to determine empirically whether the New York, Los Angeles, Chicago, and San Francisco populations should be divided by two or some other number. There is no clear pattern, but we have used two for illustrative purposes below.

The results in Table 9 give the estimated impact on games won of a quadrupled market size from these regressions, holding constant other variables. As the accompanying scatter plot shows (Figure 10 for 1984-90), a number of the small market clubs (St. Louis, Montreal, San Diego, Minnesota, Pittsburgh, Seattle, Cleveland, Atlanta, and the San Francisco population divided by two clubs) have metropolitan populations between 2.5 and 3 million. If the population of these metropolitan areas were quadrupled, the clubs would have roughly the population of the two New York clubs (19 million divided by two), making each of these small market clubs into large market clubs.

Even though the large market clubs would be expected to win more than small market clubs, these population impacts seem reasonably small. In the 1954-60 period the large market clubs, particularly the Yankees and Dodgers, did very well, with the population quadrupling effectively amounting to an added 13.5 wins a year. We also tested the same model with games behind the first place team, arriving at almost identical results (games behind were reduced by 13.2). After 1960, market size effects become much more modest. In the first three pre-free-agency periods the quadrupling adds 3.2 wins; in the last two free

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agency periods the quadrupling adds 5.2 wins; in the most recent seven year period the quadrupling adds 2.5 wins.

How big a spread is 2.5 to 5.2 wins? The range can be shown in various lights. Over the recent seven year period Table 8 reported that the average distance from second to second-to-last place in a division has been 12 games. In this range 2.5 to 5.2 games has been worth about one place in the division standings. On the other hand, there has been a greater spread in the tails of the distribution -- the average distance between first and second place has been 6 games and the average distance from second-to-last to last place has been 8 games. In this range 2.5 to 5.2 games has been worth less than one place in the division standings -- 5.2 games would not have gotten a second place club into first place on average, nor would it have gotten a club out of last place. And the 2.5 to 5.2 game spread is for an enormous change in market size, taking a very small market club all the way to a club with a New York-sized market.

However large the spread, it should be remembered that changes in the method by which players are compensated is not likely to be causing the disparities. From a theoretical standpoint, the large market clubs would be expected to win more whether players are compensated under the reserve clause or free agency. Historically, the large market clubs did better in the old reserve clause system than under free agency. And in the National Basketball Association, where there has been a real attempt to protect the income of small market clubs through a salary cap, the large market clubs win championships far more regularly than they do in baseball.

On a technical level, one reason for the apparently small impact of market size on wins and losses could be the intrinsic difficulty of defining market size. We tried a number of alternative definitions -- looking at television's Area of Dominant Influence figures,

combining or splitting adjacent areas such as Baltimore and Washington, adjusting for clubs with large populations just outside the metropolitan areas or for clubs with more resources than the metropolitan population alone would predict. Indeed, one can make one's own adjustments by sliding clubs left or right the desired amounts in Figure 10. These types of adjustments never seem to change the basic story much.

Another possibility is that we should go behind the overall relationship between market size and on-field performance and look at the component relationships. A schematic diagram is given in Figure 11. Larger market size can lead simultaneously to larger player salaries (the top loop) and to larger player development expenditures (the bottom loop). These then could generate more wins. Since we need data on club player salaries and development expenditures to estimate such a model, we can only do the analysis for the last two periods, from 1977-90 (we extrapolated 1978 figures back one year to fill in 1977 values). There is also a new statistical uncertainty: to the effect that winning leads to higher salaries, the cause and effect relationship in the top loop is not entirely clear.

But even with these uncertainties, the results agree closely with those of the overall approach. In the overall approach a quadrupled market size raises the average club's winning percentage by .032 for the 1977-90 period, 5.2 games. In the disaggregated approach the quadrupling adds .029 (4.7 games), with the breakdown as shown. The relevant scatter plots are shown as Figures 12 and 13. Most of the impact, .025 (4 games), comes from the player salary loop, with only a slight amount from the player development loop. It might be felt that player development expenditures would work better if they were lagged, so that earlier years' development spending leads to current wins and losses. We tried this approach too, but lagged player development expenditures had no more explanatory power than did current player development expenditures. However the melon is sliced, one finds that the

quadrupling of city size adds 2.5 to 5.2 games to the win column, moving small market clubs up about one rung in the division standings, even less in the tails.

In non-quantitative terms there could be several reasons why we might not expect much relationship between market size and winning:

o Difficulties in defining market size. Some supposedly small market clubs have access to populated hinterland areas, lucrative television possibilities, or owners willing and able to spend to put competitive teams on the field. Some supposedly large market clubs may not have some of these advantages. For these purposes it is difficult to come up with precise measures of market size.

o Injuries and other random elements. Large market or rich clubs can buy players, but it is much harder to keep them healthy and to guarantee good performance. Today fans in every city can easily cite a list of highly-paid but less worthy free agents; in the old days these fans' parents were citing lists of expensive player trades and bonus babies that did not work out.

o Relative numbers of players and clubs. There may be more quality players at a position than the large market clubs can buy or want to pay to sit on the bench, with the consequence that even small market clubs will often have quality players at many positions.

o The price of winning. It has been argued that teams that win pennants find the price of winning is high -- that is, their successful players drive hard bargains the next year. To the degree that this is so, free agency has introduced an automatic mechanism to even out wins and losses across clubs.

o Conflicting goals. Just as better players have a higher value in large market areas, aging players with high media profiles who can fill seats do too. These expensive free agents may be worthwhile from a revenue standpoint to large market clubs, but not a winning and losing standpoint. If so, large market clubs will have higher payrolls, but not necessarily win that much more than small market clubs.

o Arbitration. Perhaps the ability to use less experienced and less expensive players through the arbitration system gives the small market clubs a strategy they can use to maintain their winning record. We tested for this effect by seeing if information on shares of arbitration players and free agents added explanatory power to the equations explaining wins and losses. These shares had essentially zero impact. If this is an alleged benefit of retaining the arbitration system, it seems to be of slight importance.

As a final matter, one still might wonder whether the differential winning advantage of large market clubs is growing over time. There is no evidence of such trends in the data analyzed, which go up to 1990. We do not include 1991 and 1992 in the formal data analysis, but by this time we do know who won in those years. In both 1991 and 1992 three of the four division-winning clubs – Atlanta, Pittsburgh, and Minnesota in 1991 and Atlanta, Pittsburgh, and Oakland in 1992 – were small market clubs. Even Toronto, the other winner in both years, has a population size slightly below average.

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The bottom line here is that, predictions to the contrary notwithstanding, competitive balance in major league baseball seems to have improved over time. The range between winning and losing clubs has declined over time in the AL, remained stable in the NL. In both league more teams have won pennants and divisions, and pennant races have involved more clubs.

Beyond that, there is no indication that the advantage to locating in a large market is terribly great *on-the-field*. However they manage to do it, small market clubs are hanging in there, winning 2.5 to 5.2 games less a year on average than the large market clubs. Possibly this margin is as small as it is because with fewer financial resources the small market clubs

just have to manage better to stay alive, possibly it is because with all the uncertainties of baseball, it is just very difficult to buy winning clubs. Whatever the case, on-field disparities due to market or resource size have been small ever since 1961, never smaller than in 1991-92, and smaller than in professional sports with less clubwide variance in their revenues.

Figure 1

Average Operating Revenue

Millions of 1991 Dollars

Figure 2

Player Costs as a Share of Industry Revenue

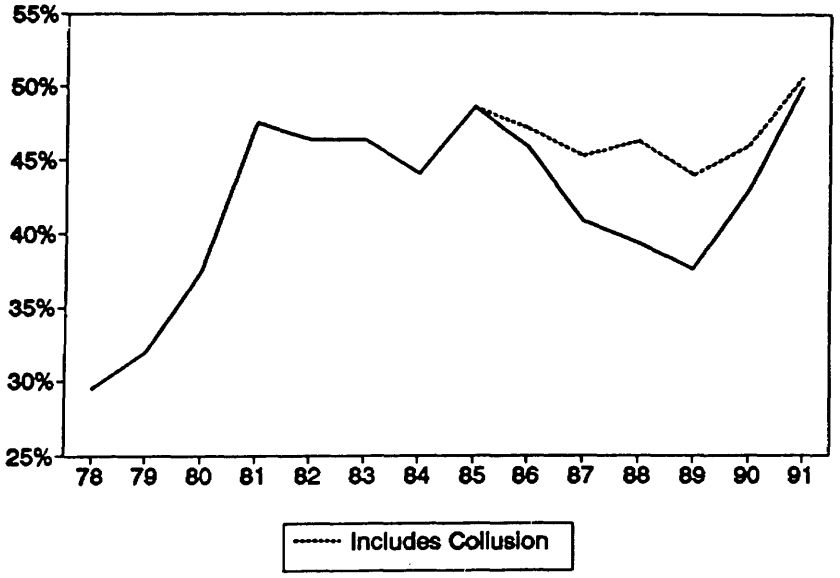


Figure 3

Average Income from Baseball Operations +/- One Standard Deviation

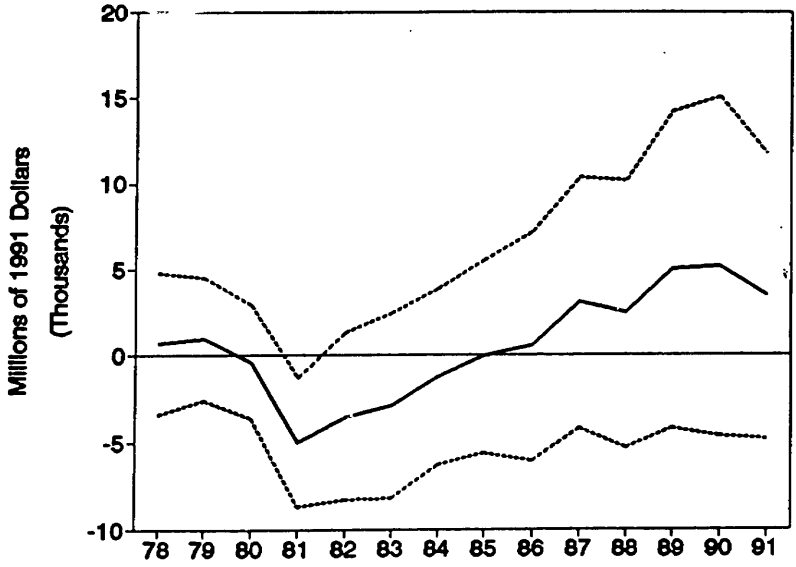


Table 4

Operating Income of Baseball Clubs

Number of clubs making operating income in the designated bracket

Bracket amounts in millions of 1991 US dollars per year

Adjusted and not adjusted for winning percentage

	1985-91		1977-91	
Bracket	Income	Adjusted*	Income	Adjusted*
Losses exceed $4 million	2	2	3	2
Losses less than $4 million	8	6	7	8
Income less than $4 million	6	9	10	10
Income from $4 to $8 million	5	4	5	5
Income exceeds $8 million	5	5	1	1
Average operating income ($ million)	2.7	2.7	0.9	0.9

*Assuming the club had a .500 winning percentage.

Table 5

Asset Values for Clubs Sold in 1989-92

Millions of 1991 US Dollars

Club	Sale date	Value
Detroit	1992	80
Montreal	1991	84
Baltimore	1989	84
San Diego	1990	85
Texas	1989	94
Seattle	1992	103
Toronto	1991	131
Average		94
Standard Deviation		17

Table 6

Internal Real Rates of Return

Percent

Club	Period	Rate	Bonds	Stocks
Cincinnati	1981-85	-3.7	15.2	14.6
Houston	1979-84	-2.5	3.0	7.4
Philadelphia	1981-87	-1.3	12.4	12.5
Cleveland	1977-86	0.1	4.0	8.8
San Diego*	1974-90	3.6	3.2	8.3
Detroit	1983-92	7.1	9.9	11.4
Seattle	1981-92	7.6	10.6	12.3
NY Mets**	1980-86	13.7	12.5	10.1
Baltimore**	1979-89	15.2	6.9	11.2
Toronto**	1976-91	15.8	3.5	7.6
Average		5.6		
Standard Deviation		7.1		
Long term average	1975-91		4.1	8.2

* Baseball club outperformed bonds but not stocks over the exact holding period.

** Baseball club outperformed bonds and stocks over the exact holding period.

Table 7

Measures of Tight Pennant Races

Range encompassing 2/3 of clubs, number of pennant and division winners, and number of clubs within 10 games of first place

By seven year period

American League

Period	LP	HP	LW	HW	PW	DW	TC
1954-60	.408	.592	66	96	3	-	-
1961-67*	.425	.575	69	93	4	-	-
1969-75*	.427	.573	69	93	3	5	5
1977-83*	.420	.580	68	94	4	7	7
1984-90	.438	.562	71	91	5	7	7

National League

Period	LP	HP	LW	HW	PW	DW	TC
1954-60	.428	.572	69	93	4	-	-
1962-68*	.419	.581	68	94	3	-	-
1969-75*	.428	.572	69	93	4	7	5
1977-83	.435	.565	70	92	4	8	7
1984-90	.435	.565	70	92	6	9	7

LP is the lower bound winning percentage.

HP is the higher bound winning percentage.

LW is the lower bound number of wins, 162 game basis.

HW is the higher bound number of wins, 162 game basis.

PW is number of pennant winners in the seven-year period.

DW is number of division winners in the seven-year period.

TC is the number of teams within 10 games of first place at the end of the season (the same for both leagues).

* Expansion clubs added.

Table 8

Winning and Losing Clubs

Range encompassing 2/3 of club seven-year winning percentage

American League

Period	LP	HP	LW	HW
1954-60	.423	.577	69	93
1961-67*	.443	.557	72	90
1969-75*	.446	.554	72	90
1977-83*	.441	.559	71	91
1984-90	.466	.534	75	87

National League

Period	LP	HP	LW	HW
1954-60	.451	.549	73	89
1962-68*	.433	.567	70	92
1969-75*	.443	.557	72	90
1977-83	.454	.546	74	88
1984-90	.461	.539	75	87

LP is the lower bound winning percentage.

HP is the higher bound winning percentage.

LW is the lower bound number of wins, 162 game basis.

HW is the higher bound number of wins, 162 game basis.

* Expansion clubs added.

Table 9

Effects of Quadrupled Market Size

Period	Win-Loss Pct.	Games Won	Games Back
1954-60	.083	13.5	-13.2
1961/2-67/68	.015	2.4	-2.8
1969-75	-.033	-5.3	3.0
1977-83	.048	7.8	-5.1
1984-90	.016	2.5	-0.9
First 3 Periods	.020	3.2	-3.9
Last 2 Periods	.032	5.2	-3.0

Figure 10
Average Win Percentage (84-90) VS. Average Market Size (84-90)

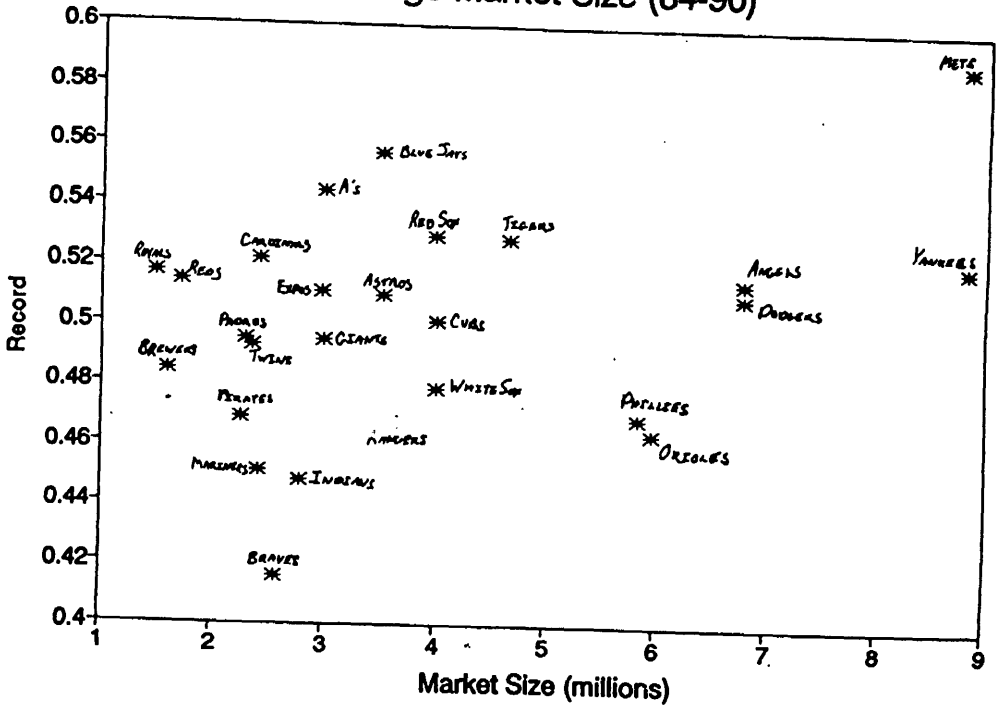


Figure 11

Causal Links Between Market Size and Win-Loss Record

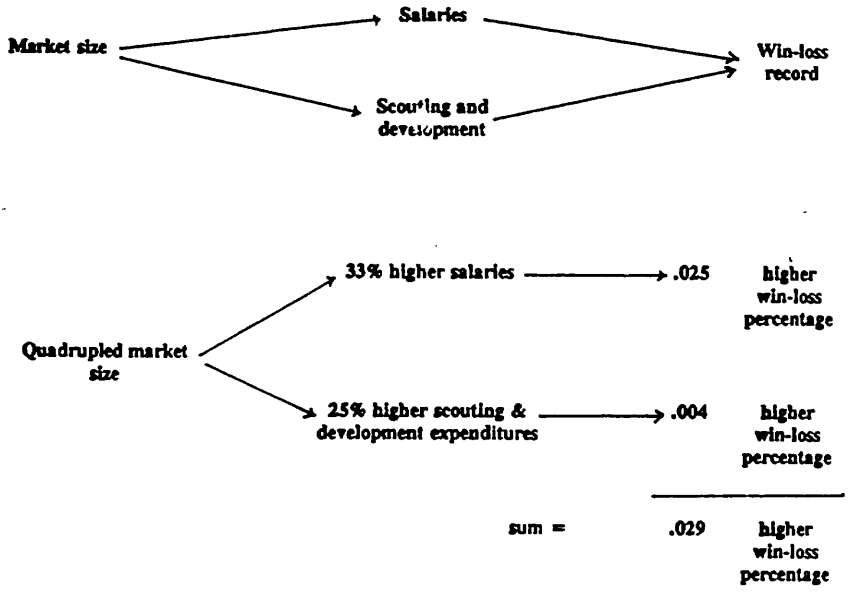


Figure 12
Average Player Salary (84-90) VS. Average Market Size (84-90)

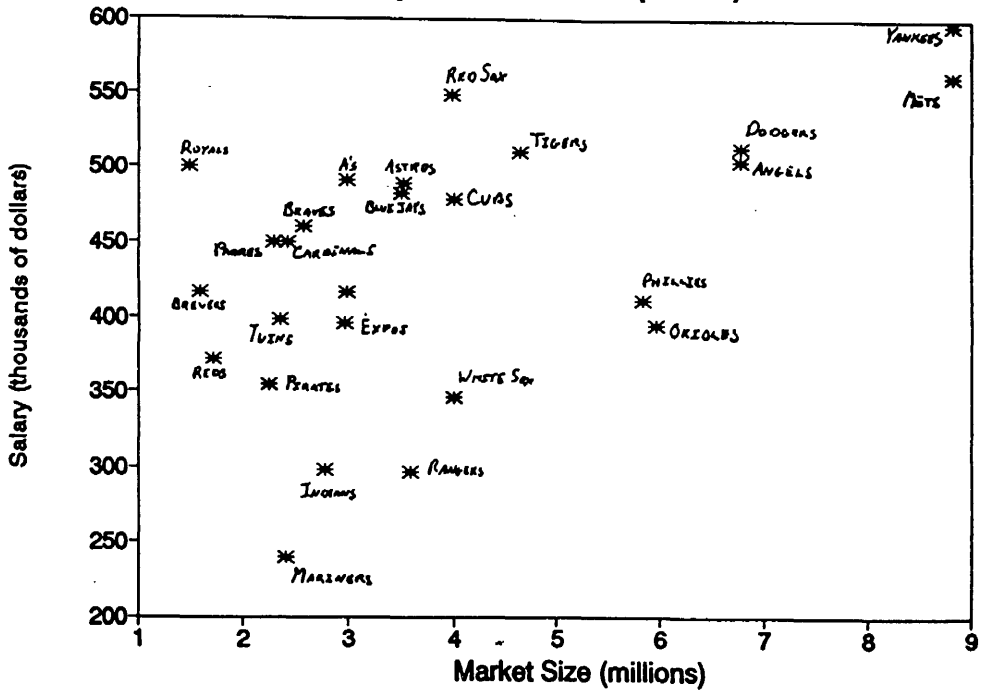
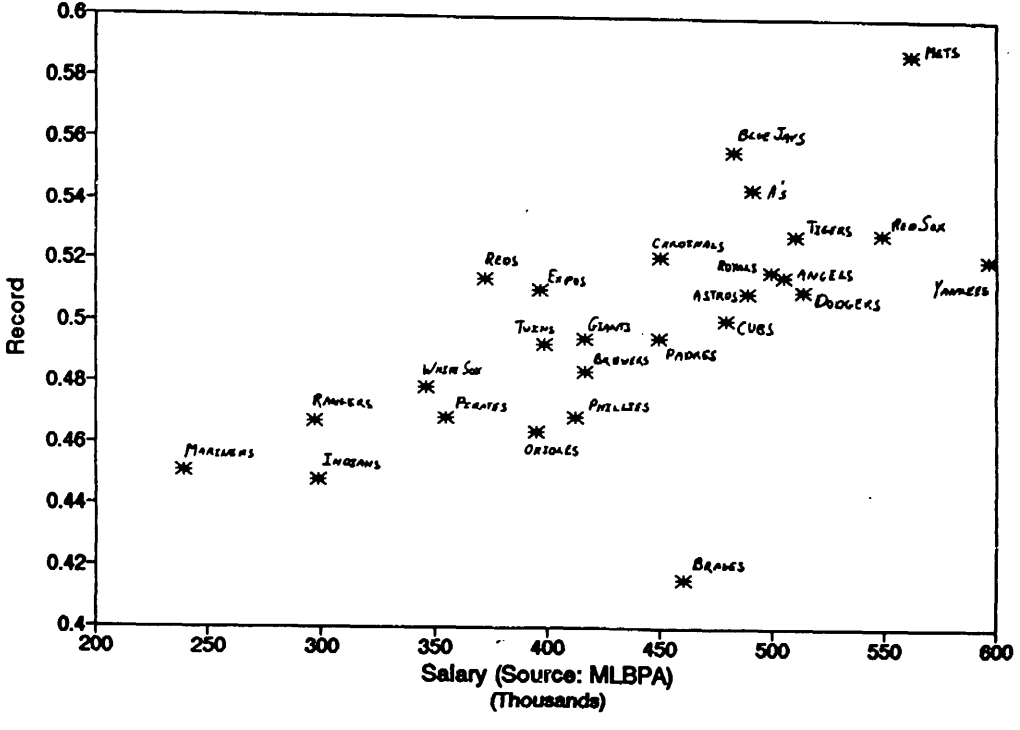


Figure 13
Average Win Percentage (84-90) VS. Average Player Salary (84-90)



THE BROOKINGS INSTITUTION

1775 MASSACHUSETTS AVENUE, N.W. WASHINGTON, D.C. 20036-2188
TELEPHONE: 202/797-6000 FAX: 202/797-6181

Economic Studies Program

3 December 1992

Mr. Donald Fehr, Executive Director
Major League Baseball Players' Association
805 Third Avenue
New York, New York 10022

Mr. Allan Selig, President
The Milwaukee Brewers Baseball Club
Milwaukee County Stadium
201 South 46th St.
Milwaukee, Wisconsin 53214

Dear Don and Bud:

Along with the other public members I have signed the majority report of the Baseball Study Committee. I did so because I concur in the major recommendations on free agency and revenue sharing and the major finding on competitive balance.

In contrast, I find the discussion of the economic condition of baseball to be garbled, inconsistent, and unbalanced. Accordingly, I have written this supplemental statement that should also be regarded as part of the output of the committee.

This supplemental statement should be regarded as part of the report of the Committee.

I have requested that wherever my name appears, on the transmittal letter covering the majority report or on the majority report itself, mention should be made that I am submitting a supplemental statement that should be regarded as part of the report. My understanding is that Peter sent out the report and covering letter before I transmitted this request to him. But I have asked that corrected pages be distributed; I presume that he will do so.

I also request that this supplemental report will be included as part of any distribution of the Committee's work to the various clubs, to the players' executive committee, or to others.

Sincerely yours,

Hank

Henry J. Aaron
Director

Supplementary Statement
Report of Baseball Study Committee

by
Henry J. Aaron
3 December 1992

Six labor negotiations between major league clubs and the players union have ended in three strikes and three lockouts. The relationship between players and clubs is best described as immature, a situation in which the two parties fail to take advantage of opportunities that could help both, but instead perpetuate distrust and rancor.

The Baseball Study Committee makes two major recommendations with which I concur. First, players should become eligible for free agency not after six years of service as under current rules, but after three years. Second, the proportion of baseball revenues distributed equally among the clubs should be increased. These are constructive recommendations, and I support them. The staff report also includes factual analysis clearly indicating that competitive balance in major league baseball good, that it is probably better than it has been in the past, and shows no signs of deteriorating.

Because I agree with these two central recommendations and the finding on competitiveness, I am signing the majority report. Nevertheless, I am impelled to submit this supplementary report because the majority report fails to clarify the nature of the disputes between players and owners and fails to explain the structure underlying this unfortunate relationship. This failure betrays the parties who appointed the committee, elected officials and the courts who may be called upon to settle disputes between the parties or change the special exemption of baseball from the anti-trust laws, and the

public who, as fans, are puzzled by the hostile and destructive relationship sullying a sport that brings pleasure, diversion, and surcease to millions. The report skirts central issues. In substitutes hortatory and saccharine rhetoric appropriate to childrens' novels or sentimental movies for clear analysis. And in an effort to fashion language . 'l members could accept, it becomes obscure and contradictory. Confusing what should have been the educational objectives of its report--which require clarity--with mediation and negotiation--which require compromise of conflicting interests, the majority blurs disagreements in the pursuit of consensus.[1]

Some Key Facts

The politics and economics of baseball are inextricably related. Baseball is a cartel managed by twenty eight clubs each of whose owners agreed when he or she purchased a franchise to abide by rules established by previous generations of owners. These rules govern league structure, the size of baseball markets, the distribution of revenues among the clubs, the scheduling of play, the management of the minor leagues, and many other matters. The Basic Agreement between the clubs and the players union governs labor relations, including the period during which players are under reserve and the tenure they must achieve to be eligible for arbitration and free agency.

The common perception among the public is that two major parties are involved in labor negotiations--players and owners. In a certain sense this view is obviously

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[1]These critical comments do not apply to the report of the staff, prepared under the direction of Edward M. Gramlich. This report is largely factual. It is careful in drawing inferences and highly informative.

correct. A deeper insight into the current situation emerges if one recognizes that for practical purposes, three parties are involved in negotiations--large-market clubs, small-market clubs, and the players. I shall return to this point presently.

Operating Income versus Asset Values

Unlike investors who primarily seek profits, baseball owners have twin objectives--profits and on-field success. They want both to make money and to win games. Furthermore, owning a baseball team brings a variety of noneconomic satisfactions. These dual objectives and diverse satisfactions mean that the economic health of baseball cannot be judged by the same standards--net operating revenues, ordinary accounting profits, or cash flow--that are applied, for example, to such activities as automobile dealerships, breweries, or ship lines, businesses that happen to be the former or current activities of owners of three baseball clubs.

Because owners are interested in winning games, they may rationally sacrifice net revenue for on-field success. They may spend more money on players, on scouting, or other outlays deemed likely to produce winners than is consistent with maximizing current net income. Because running baseball clubs is probably more fun for most people than selling cars, beer, or shipping services, owners may be prepared to sacrifice profits, or even pay for the pleasure by bearing losses.

To the extent that owners engage in such behavior, they rationally accept lower profits than they might earn in other businesses. In fact, it could be quite rational, although admittedly costly, for club owners out of a desire to win or in pursuit of the

pleasures of baseball to adopt policies that result in persistent losses. There is simply no way the Baseball Study Committee or anyone else can determine by looking at net income the weight that owners attach to making profits, fielding winning teams, or having fun.

This line of argument reveals that the lengthy passages in the majority report on revenues, costs, and net operating margins--interesting and informative as they may be--reveal precisely nothing about the economic health of baseball. To illustrate the point, owners of race horses are reported to lose money persistently; but this fact is not regarded as persuasive evidence that horse racing is in economic jeopardy. Race horse owners have fun and enjoy social cachet. They want to win, stand in the winners' circle, and collect occasional purses; and they are willing to pay for the pleasure. It is at least conceivable that owners of baseball clubs do the same thing. The way to tell is to look at franchise values. Are clubs valuable investments that club owners wish to retain or to acquire? To answer this question, one need only observe sales prices of franchises. The staff report makes clear that several clubs have sold in the past four years. The average price was $94 million. This group includes some clubs that have lost more than $1 million annually for several years running.

The staff report considers several possible explanations for why high and well-maintained asset values can coexist with persistent losses. It is conceivable, but hardly plausible, that baseball is riding on a speculative bubble. To accept this explanation, one would have to believe that high prices for baseball teams have persisted through a

protracted recession that seriously eroded the value of many other assets. Successive buyer-groups, all of whom can read the published warnings of current owners about the dire economic future of baseball, must be regarded as in the grip of something akin to the Dutch tulip bulb frenzy.[2] The assertion that each successive buyer of a baseball club is a "greater fool," oblivious to realities of the sport, requires that one believe hard-heads of investors, who understand enough to make millions in other businesses, turn mushy when buying a baseball team.[3] Again, such an explanation is conceivable, but hardly plausible.

The other explanations for high asset values in the face of indifferent operating income seem far more reasonable. Operating income or cash flow may in fact be greater than is apparent. Civic altruism may cause club owners to bear losses for the good of the communities in which they reside. And the sheer fun and community prestige from owning a baseball club may cause owners to accept returns that would be insufficient to induce them to hold more pedestrian investments.

In short, nothing whatsoever can be inferred about the economic health of baseball by looking at net operating income. Much can be inferred by examining the prices old investors demand when they sell franchises and that new investors are willing to pay when they buy franchises. The majority points out this fact. But it devotes six

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[2]During the tulip bulb frenzy, the prices of tulip bulbs soared to hundreds or thousands of dollars each. When the frenzy ended, prices collapsed.

[3]Since the Baseball Study Committee did not look into the representations made to potential buyers by former owners and other clubs, none of us is able to pass on the accuracy of information provided to potential investors.

times more space to a meandering examination of revenues, expenses, and operating income than it vouchsafes a brief examination of franchise values.

The majority asserts that positive operating income is essential over the long haul for the economic health of baseball. This assertion is economic nonsense, as demonstrated by the fact that teams sell for high and rising prices despite negative operating income. Owners who purchase clubs for high prices, field clubs that compete effectively, and sell clubs periodically for sizeable prices preside over an industry that evidences no economic illness. While club owners no doubt would prefer operating income to exceed operating expenses, in addition to enjoying the other benefits from owning a baseball club, positive net operating income is necessary for the economic health of the sport neither in the short nor in the long run. The majority report correctly observes that the only condition required for the long term health of baseball is that investors be prepared to own clubs and hire top-notch athletes, but it fails to recognize that this observation undermines its misplaced emphasis on net operating revenue.

The Three Parties to the Negotiation

Large market teams can pay free agents large salaries, pay salaries determined in arbitration and still have positive net operating income. They can do so because large-market teams on the average have larger revenues from attendance and vastly larger revenues from local television than do small market clubs. The arbitration system assures that small- and large-market teams must pay essentially the same salaries to

three-to-six year players.[4] To avoid excessive losses, small market teams can hold down salary costs by dipping sparingly into the free-agency market or by releasing arbitration-eligible players expected to win large salaries.

If picking talented players and assembling winning clubs were more of a science and less of an art than it is, these financial constraints might put small market clubs at a significant competitive disadvantage. As the staff report and the majority report make clear, this unfortunate circumstance has not occurred. No one is good enough at predicting which players will play well *next* year or what combination of players will jell into a winning team to permit those with deep pockets consistently to buy on-field success. Small market clubs have remained competitive. But, on the average they earn smaller operating income or incur losses, while large market clubs are disproportionately represented among those with positive net operating income.

While winning is important, it isn't everything (*pace* Vince Lombardi). The owners of small market clubs quite naturally would prefer positive operating income to operating losses. The ***political*** problem owners of small market clubs face is how to achieve this end. They have two major options.

First, they can petition large-market clubs to agree to arrangements under which a larger proportion of revenues is shared equally among the clubs or is distributed to offset revenue differentials. For example, local television could be distributed equally among the clubs, much as national television revenues currently are shared, or the small

[4]This group also includes the most senior 17 percent of players with more than two, but fewer than three, years of tenure.

share of gate receipts shared with visiting clubs could be increased. Either of these two measures would significantly reduce the current large imbalance in gross revenues among the clubs.

These solutions to revenue imbalances have a major shortcoming. Owners of large-market clubs prefer keeping revenue to giving it away; and owners of the small market clubs cannot force them to do so. If driven to extremes, the large-market clubs could probably leave the current leagues, reconstitute themselves as a separate league, and survive quite well. The small market clubs probably do not have this option. They therefore must try to persuade the large market clubs to make concessions on revenue sharing. The large market clubs are prepared to grant such concessions only if they receive something in return.[5]

The second way owners of small-market clubs can try to improve operating income is to join owners of large-market clubs in seeking concessions from the players. If total player salaries can be capped, the domain of competition among the clubs is changed and the chances of making profits is increased. If the cap is set below the level that would arise from free negotiation among clubs and players, small-market clubs may be able to make positive operating income. Note that smoothing out the ratio of salaries to revenues is also worth something to owners, as fluctuations can be troublesome. But

[5]It is important to note that even if revenues were completely shared so that revenues of every club were the same, there is no reason to suppose that any club would necessarily make positive operating income. Some or all owners might well decide that it was worth losing some money in the pursuit of winning. In this situation, baseball as a whole and each team might lose money each year, but each club could be a highly valuable asset coveted by investors.

the larger benefit to clubs comes from a salary cap that reduces the fraction of revenues paid out as salaries. If owners were to succeed in reducing the salary fraction, net operating revenues of all clubs, large and small, would be increased. Asset values would climb. The increase in asset values would approximate the capitalized value of the reduction in player salaries.

The effects on club values from a salary cap could be quite dramatic. Economists differ on the appropriate capitalization rate to use in value income streams. The correct choice depends on the certainty of the income stream. Purely for purposes of illustration, suppose that the correct capitalization rate is 10 percent and that a salary cap would reduce total player compensation by 15 percent. In 1991 player compensation was $670 million. Fifteen percent of $670 million is $100.5 million. Capitalized at 10 percent, this shift of income to owners would have increased aggregate team values by $1 billion, or approximately $38 million per club.

With such interests at stake, one can understand why the clubs find a salary cap so appealing. One can also understand why small-market clubs, whose owners understand that large-market clubs are not likely to agree to share a larger portion of revenues, would join forces with large market clubs to impose a salary cap. And one can understand the reasons why the players resist any salary cap that might appeal to the clubs.

Summary

The report of the majority, which I signed, makes two important recommendations--awarding free agency after three years of tenure rather than at six years and greatly increased revenue sharing among the clubs. It also reports one crucially important finding--that competitive balance in baseball is good and probably better than ever before.

Through roughly 9,000 words of text, however, the majority report leads readers up one blind alley and down another, suggesting that an industry whose companies are valued in the market at prices as high as, or higher than, ever before is on the brink of some vague sort of economic trouble.

The industry of baseball *is* in political chaos, bereft of any governing mechanism by which clubs can agree to share revenues among themselves in a fashion that will permit all clubs both to compete equally on the field and to have an equal chance to make positive operating revenues. No such concerns arise in most other industries, where increased market share goes to the strongest companies. In baseball, however, more "companies" in more cities make a stronger industry able to bring the pleasures of baseball to more fans. Thus, a governance structure of professional baseball clubs that is incapable of enforcing greater revenue sharing is *the* problem. Unless that problem is addressed and solved, labor management peace will never come to baseball.

Senator METZENBAUM. Thank you.

In order to see to it that no witness be precluded from an opportunity to appear, I am going to call to the witness table Mr. Zimbalist, who is the author of "Baseball and Billions," and also the Robert A. Woods professor of economics at Smith College; Gary Roberts, professor of law from Tulane Law School in New Orleans; Roger Noll, professor of economics at Stanford University; and also bring to the table at the same time the Honorable Frank Jordan, mayor of San Francisco; Rick Dodge, assistant city manager of St. Petersburg; Roric Harrison, former major and minor league player; and Gene Kimmelman, Consumer Federation of America.

Why don't you just please proceed, Mr. Zimbalist?

STATEMENTS OF A PANEL CONSISTING OF ANDREW ZIMBALIST, ROBERT A. WOODS PROFESSOR OF ECONOMICS, SMITH COLLEGE, NORTHAMPTON, MA; GARY R. ROBERTS, VICE DEAN AND PROFESSOR OF LAW, TULANE LAW SCHOOL, NEW ORLEANS, LA; ROGER G. NOLL, PROFESSOR OF ECONOMICS, STANFORD UNIVERSITY, STANFORD, CA; HON. FRANK M. JORDAN, MAYOR, CITY AND COUNTY OF SAN FRANCISCO, CA; RICHARD B. DODGE, ASSISTANT CITY MANAGER, ST. PETERSBURG, FL; RORIC HARRISON, FORMER MAJOR AND MINOR LEAGUE BASEBALL PLAYER, MISSION VIEJO, CA; AND GENE KIMMELMAN, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA, WASHINGTON, DC

STATEMENT OF ANDREW ZIMBALIST

Mr. ZIMBALIST. Thank you for inviting me to testify before your subcommittee today, and I hope that Senator Metzenbaum's efforts in conducting this hearing will not be in vain and that after scores of inquiries, Congress will be persuaded at last to take positive public policy action vis-a-vis the baseball industry.

The overriding economic characteristic of the industry is that there is an artificial scarcity of franchises which is underwritten in part by baseball's blanket exemption from the country's antitrust laws. This scarcity of franchises and protected monopoly status, in turn, can be held responsible for many of the industry's problems.

Over the years, baseball's owners have offered various rationales for the exemption. First, until 1976, the argued that the exemption was necessary to preserve the reserve clause in players' contracts. They said that without such a clause, competitive balance in the game would be undermined. Yet, the game has experienced unprecedented competitive balance since the introduction of free agency in 1977.

Second, the owners perennially have claimed that their industry is not profitable, that it is not a typical business, and hence they do not take advantage of their monopoly position. Without stockholders to whom they have to show profits and open their books, owners have several legal means to juggle their accounts and to hide the true return on their investments. I will be happy to elaborate on baseball's accounting trickery during discussion. For now, let me only cite the revealing case of the Cincinnati Reds.

We gained an unusually candid and detailed look at the Reds' books as a result, inter alia, of the litigation brought by Marge Schott's minority partners against her. Cincinnati is baseball's smallest media market, the 30th largest in the country. Despite this, the Reds have been a consistently very profitable franchise.

Between 1985 and 1992, the club averaged over $10 million a year in profits and were profitable every year. If owners did not receive a healthy economic return on their investment, including the consumption value of ownership, then the explosion of franchise values, more than tenfold since the late 1970's, would be impossible to understand.

What is true, however, about baseball's financial situation is that the industry is coming out of a 15-year boom period, during which revenue growth exceeded 14 percent per year. In all likelihood, if baseball does not move to an expanded playoff format, then beginning in 1994 baseball's national media contract will diminish by up to $3 million per team. The national media contract accounts for slightly under one-fourth of baseball's revenues, and this shortfall will be more than made up for by strong growth in licensing income and local revenue sources. The net effect, though, will be that the industry will experience low to moderate growth for the remainder of this decade.

Third, owners have claimed that baseball needs the exemption so that the commissioner can exercise the best interests of baseball clause. With the forced resignation of Fay Vincent and prospective restructuring of the office, however, this rationale, always dubious, is now clearly obsolete.

Fourth, the rationale heard from the owners more frequently over the past several months is that the exemption permits baseball to prevent franchise relocations. To the extent that baseball's relocation has thwarted some team movement in recent years, the purposes and processes underlying this outcome must be examined more closely. Is baseball ready to foreswear all future team movements, and hence render obsolete the practically ubiquitous practice of threatening cities with imminent departure in order to secure more favorable stadium deals?

To the extent that Congress is concerned with franchise movement and the blackmail of cities, there is a more direct and preferred remedy; namely, to give cities the right of first refusal to allow municipal ownership and to set a baseball expansion timetable.

Fifth, the owners have also claimed that the exemption prevents proliferation of frivolous litigation. This rationale would perhaps also serve to argue for granting the exemption to all U.S. industries. It is no longer clear, however, that the rationale applies to baseball. Baseball's longstanding protected and unregulated monopoly status has occasioned such arrogance, laxity, and arbitrariness that at least five lawsuits are presently pending, one for over $3 billion. The same uncompetitive and unregulated environment has engendered gross inefficiency and waste in the industry, which ultimately is paid for by the consumer.

What effect does the exemption have? Most importantly, the exemption allows for the preservation of baseball's amateur draft and minor league reserve system. These have constituted a formidable

barrier to entry, helping to thwart the emergence of the Continental League in 1960, as well as more recent efforts in 1987 and 1990. Baseball is the only major team sport since World War II which has not had a rival league and it has experienced slower expansion than football, basketball, or hockey. Thus, the exemption has reinforced the game's artificial scarcity.

Second, the exemption helps to preserve certain restrictive practices in broadcasting that are not protected by the 1961 Sports Broadcasting Act, which I trust Mr. Kimmelman will discuss.

Third, despite new provisions to forestall collusion in the 1990 basic agreement, the exemption takes the potential weapons of injunction and discovery out of the players' hands. Without these deterrents, players are less willing to consider doing away with salary arbitration, which is a major sticking point in the present discussions.

In sum, the exemption cannot be justified on efficiency grounds. If it could, lifting it would not matter because the owners would win in court. The exemption allows for an income redistribution in favor of the owners and against the consumers. It should be lifted, but by itself it is an incomplete remedy. In my view, it should be accompanied either by two pieces of legislation granting the cities the right of first refusal and an expansion timetable or by legislation breaking up baseball's four divisions into separate competing business entities.

Thank you.

[Mr. Zimbalist submitted the following material:]

68-153 O - 93 - 10

Baseball's Economics and the Antitrust Exemption

Testimony of

Andrew Zimbalist,

Robert A. Woods Professor of Economics,

Smith College, Northampton, Ma.

Before the Antitrust Subcommittee of the

Committee on the Judiciary

United States Senate

Oversight Hearings

December 10, 1992

Major League Baseball (MLB) is the only industry in the United States that has a blanket exemption from the country's anti-trust laws and is subject to no trade regulation. The exemption's origin lies in in the breakup of the Federal League (FL), which challenged MLB's monopoly during 1914-15. After two years of exploding player salaries, which resulted from competition for players between MLB and the FL, the leagues made peace. FL owners were either allowed to buy into MLB teams or they were paid off.

MLB's owners, however, treated the owners of the Baltimore Terrapins with scorn, offering them only $50,000 in settlement and saying they should be pleased with this paltry sum because, according to Charles Comiskey of the White Sox, Baltimore was not a major league city and, in fact, it was even a bad minor league city. Charles Ebbets of the Dodgers elaborated that the city had too large a population of colored people.

The Terrapins' owners, not surprisingly, sued MLB in 1916 claiming violation of antitrust laws. In April 1919 they won their suit before the Indiana Supreme Court for triple damages of $240,000. But MLB appealed and the decision was reversed in April 1921 before the Washington, D.C. Circuit Court of Appeals. The case was again appealed and came before the U.S. Supreme Court in May 1922. This court was headed by former President William Howard Taft, who also happened to be an erstwhile third baseman for Yale University and the first President to throw out a ball at opening day, and the court's decision was written by Oliver

Wendell Holmes, himself a former amateur baseball player.

The Supreme Court argued principally that baseball did not engage in interstate commerce and, hence, was not subject to the country's antitrust laws. A curious finding: did not the players cross state lines, were not the bats, balls and uniforms manufactured in different states, was not the first World Series broadcast over radio in 1921, using a relay between New York City and Newark, New Jersey? Even more curious, the decision was reaffirmed by the Supreme Court in 1953 and again in 1972. Congress from time to time has threatened to legislate away the exemption, but has never come close to acting.

So MLB is the only legally-sanctioned, self-regulating monopoly in the country. Decisions about how the game is played and how the business is conducted are made by the 28 groups of men and one woman who happened to be the fortunate owners of baseball's big league franchises. Prior to the forced resignation of Commissioner Fay Vincent in September 1992, the owners were subject to at least one constraint, however minimal. Now their decisions about the fate of our national pastime go completely unchecked.

Owners' Justification for the Exemption

Over the years, the owners of major league baseball's franchises have proferred three basic rationales for their exemption.

ONE. Without the exemption the reserve clause could be challenged and, without the reserve clause, baseball's competitive

balance would be undermined. This argument was put forward by virtually the entire baseball establishment and all the players testifying before Subcommittee on Monopoly Power of the House Judiciary Committee in 1951,[1] at a time when the Yankee dynasty was in full swing and the game had no competitive balance whatsoever.

What exactly is the threat of free agency that the baseball owners railed against, and now the football owners decry? It is nothing more than the right for players to receive competitive bids for their services, i.e., it is the same free labor market idea that functions in the rest of the U.S. economy.

The free labor market rights conferred by free agency, in fact, apply to only a small minority of professional ballplayers. The 3400 minor leaguers have no free agency rights. With few exceptions, minor leaguers are paid between $850 and $2000 a month for between 2.5 and 5.5 months per year. They have no job security and few benefits. One in ten minor leaguers makes it to the major leagues. Of those who make it, only one in eight stays for more than six years. And it is only those in this very select group of players with more than six years of experience in the major leagues who gain free agency rights.[2]

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1. Although Congress considered removing the exemption at the time of these hearings, it seems confusion over the status of the ruling in the Gardella case at the Second Circuit Court of Appeals was a major factor behind Congress' inaction in 1951. See, inter alia, Chapter One of my book Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime. New York: Basic Books, 1992.
2. To be sure, there are even restrictions on the free labor market rights of free agents. See Chapter 4 in Baseball and

When an owner signs a free agent, he or, in the case of Marge Schott, she is making a business decision. Nobody is pointing a gun at the owner's head, compelling them to sign and pay exhorbitant sums to individual free agents. A rational owner will estimate the expected value or additional revenue that the player will bring to the team and then offer the player any sum up to this amount. Since player performance is not perfectly predictable, sometimes the owner will overestimate and sometimes the owner will underestimate; over time player salaries under free agency should approach their value.[3] It makes no sense for the owners to sign a player for $6 million one day and the next day to call a press conference and announce that the team is losing money because player salaries are too high.

Those fans who express outrage at players' multi-million dollar salaries should ask themselves why baseball franchise owners should have different rules of the game than other U.S. businesses. They should also consider that if player salaries were somehow to be lowered that the money would be pocketed by the owners. They should further consider that multi-million dollar salaries are not so uncommon in the entertainment world. Bill

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Billions for more details on the operation of baseball's labor markets, including the functioning of salary arbitration primarily for players with between three and six years of major league experience.

3. There is a subsidiary issue here. Small city franchises that are only marginally profitable may find that they are caught on the short end of the bargain before the scales balance. Unpredictability and risk are more serious threats and deterrents to small city teams. This is another reason to increase revenue sharing among teams in MLB.

Cosby's annual income exceeds $100 million, Madonna's exceeds $60 million, Michael Jackson's exceeds $50 million and Prince's latest contract brings him $10 million per record ... and an entertainer's professional lifetime is generally significantly longer than a ballplayer's. Finally, they should consider the hundreds of corporate executives whose salary and stock options yield over $5 million annually. Perhaps there is something inequitable about the market-engendered salary structure in the United States and perhaps it would be desirable to reintroduce a truly progressiv income tax, but there is no persuasive rationale for singling out baseball's free agents for ridicule.

What about the traditional owner claim that free agency disrupts competitive balance, a claim that was repeated unsuccessfully in court this past summer with regard to football by the NFL owners. The basis for the claim is that rich clubs or big city clubs will be able to buy up disproportionately the best talent and dominate opponents on the field. If measured by the number of different teams winning their division, pennant or World Series, there has actually been more competitive balance in MLB than at any time since 1903. If other measures are used, such as the standard deviation or the spread in win percentages or excess tail frequencies the conclusion is similar. Further, big city teams have actually had a lower than average finish in the standings since 1977.

How can these unexpected results be explained? First, and

this is an explanation that was first suggested by University of Massachusetts professor Sy Rottenberg,[4] since it always has been possible to sell or trade players, the introduction of free agency did not initiate the movement of players from poor teams to rich teams, it only changed who captured the economic rent or extra value generated by the players. That is, prior to the advent of free agency, top players were sold or traded from poor to rich teams and the owners received payment for the player. With free agency, the top player may still move from a poor to a rich team but now the player receives the payment in the form of higher salary. Thus, free agency per se does not change the pattern of player movement across teams, it only changes the distribution of income between owners and players. If one adds to this insight, the fact that today teams losing free agents are compensated with amateur draft picks then it follows, other things being equal, that free agency would lead to a somewhat greater competitive balance.

The problem with this explanation is that it does not tell us why big city teams have not outperformed small city teams on average since 1977. For this we must turn to the second factor. Because of greater unpredictability in player performance, it is no longer possible to buy a winning team. Studies on the correlation of average team salaries and team win percentage revealed a positive and strong correlation prior to 1960 but no

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4. Simon Rottenberg, "The Baseball Players' Labor Market," Journal of Political Economy 64 (June 1956).

significant correlation over the last twenty years.[5]

Why has performance become more unpredictable? Some will say it has to do with increased pressure on the players from their high salaries and media attention. By this reasoning, some players are better equipped psychologically to cope with the pressure than others, but this ability is not always evident during the players' early years. I believe a stronger and more tractable phenomenon is at work and that is talent compression.

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5. Performance predictability becomes even more problematic as players enter the second half of their careers and are increasingly plagued by injury. Most free agents are in their late twenties or their thirties.

Table 1

Baseball Players and Population

Year	Major League Players	U.S. Population	Pop/Player
1890	480*	63 mn.	131,250:1
1903	320*	80 mn.	250,000:1
1990	650	250 mn.	385,000:1

* based on assumption of an average of 20 roster players per team.

In 1990, the population-to-player ratio was 54% higher than it was in 1903, the beginning of the modern era of professional baseball. That is, a smaller and smaller share of the population is playing professional baseball. Further, new groups have entered the game. Before 1947 no blacks played in the major leagues and there were few latins. Today these two groups comprise almost 35 percent of major league ballplayers. Moreover, the population is healthier, more physically-fit and better trained in baseball-specific skills through the expansion of youth league baseball. Because major league ballplayers are a smaller fraction of an increasingly prepared population, the difference between today's best, average and worst players is much smaller than it was twenty or forty years ago. Unlike track and field records which are based strictly on individual prowess and improve gradually over time, baseball performance statistics are the result of the balance of competing forces. Baseball's annual hitting and pitching records not only have not improved over time

but with one exception they have not even been approached in recent times. Moreover, the one exception dates back to 1961 and is tainted by an asterisk in the minds of most fans.[6] There is no more compelling evidence of talent compression than a review of batting and pitching records and their dates of accomplishment.[7]

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6. I refer here, of course, to Roger Maris' 61 home runs in 162 games, compared to Babe Ruth's 60 home runs in 154 games.
7. To be sure, the lively ball was not introduced until 1920 and this contributed to pitchers' low ERAs during the 1910s, but it also contributed to lower batting averages. Batting averages rose 13 points in 1920 and ERAs rose 0.39 points. Even adding 0.39 points to the ERAs listed in Table 2 would leave them considerably below the best performances in recent times. Eventually pitchers adjusted to the lively ball and both batting and slugging averages gave back some of the gained ground. Other rules' changes that have affected performance records since 1903 include: narrowing the strike zone in 1950, widening the strike zone in 1963, narrowing the strike zone and lowering the pitchers' mound in 1969 and the introduction of the designated hitter in the American League in 1973. Controlling for the different effects of these changes does not alter the argument regarding the impact of talent compression in the text.

Table 2

Performance Records

Category	Player	Year
Batting Avg.:		
.424	Rogers Hornsby	1924
.420	George Sisler	1922
.420	Ty Cobb	1911
RBIs:		
190	Hack Wilson	1930
184	Lou Gehrig	1931
183	Hank Greenberg	1937
Home Runs:		
61	Roger Maris	1961
60	Babe Ruth	1927
59	Babe Ruth	1921
58	Hank Greenberg	1938
58	Jimmie Foxx	1932
Doubles:		
67	Earl Webb	1931
64	George Burns	1926
64	Joe Medwick	1936
Runs:		
177	Babe Ruth	1921
167	Lou Gehrig	1936
163	Babe Ruth	1928
163	Lou Gehrig	1931
Earned Run Average:		
1.01	Dutch Leonard	1914
1.04	T.F. Brown	1906
1.09	Walter Johnson	1913

Similar to today's batters, the great batters of yesteryear faced many strong pitchers, but they also faced a steady diet of weak pitchers not enjoyed by today's players. Likewise, the great pitchers of yesteryear faced many strong batters but they also faced large numbers of weak batters. Because the inequality among the players was greater during baseball's earlier years, the strong players were better able to take advantage of their weaker opponents and set baseball's longstanding records. With rare exceptions, the only yearly record that is challenged consistently by today's players is stolen bases, and, interestingly, this activity has much more to do with individual prowess than it does an outcome of competing forces. In any event, it is this compression of baseball talent that today results in greater difficulty in selecting dominating players and leads to greater competitive balance among the teams. It is also clear evidence that talent is sufficient for a significant increase in the number of major league teams.

Other factors may have played a smaller role in the preservation of competitive balance since 1977 and warrant a brief mention: the introduction of the amateur draft in 1965; the relative equalization of team revenues with the more rapid growth of the national television revenues which are fully shared across the teams; poor management by big city owners, and neglect of their farm systems; possible perverse incentive effects of long-term contracts on older players; greater difficulty in keeping a winning team together; and, lastly, greater ease for bottom teams to improve quickly.

TWO. The owners of major league baseball franchises perenially have claimed that their industry is not profitable, that it is not a typical business. If the owners are not making a profit, after all, then how can it be argued that they are abusing the monopoly power conferred by the exemption?

To properly assess this claim, it is necessary to understand the structural circumstance of franchise ownership which assumes one of three legal forms: business partnership; subchapter S corporation or, in a few instances, a submerged division within a large corporation. In practice, what this means is that there are no stockholders for whom you have to show profits to convince that you are doing a good job or to please through increases in stock prices, and there are no stockholders to whom you have to open the books. This leaves baseball's owners free to cook their books practically at will and either to show greatly diminished profits or to show losses. Reality is different.

Consider the opportunities for accounting legerdemain. First, corporate tie-ins from cross ownership permit owners to easily transfer millions of dollars of profit from one business to another. The Tribune Company, for instance, owns both the Chicago Cubs and the superstation WGN which broadcasts Cubs and White Sox games. Chicago is the third largest media market in the country, and baseball broadcast rights to this city alone are worth in excess of $15 million a year. But as a superstation that reaches over 40 million homes nationally, WGN's contract with the Cubs is worth well over $25 million. Evidence from the late 1980s suggests that WGN was paying the Cubs around $7 million for

broadcast rights. These figures imply that the Tribune company chose to transfer roughly $20 million from its Cubs pocket to its WGN pocket.

Why would they do that? Baseball believes it derives public relations value from making franchises seem less profitable than they are or by making them appear to earn losses. The clubs then use this as ammunition in their negotiations with the Players' Association, with the cities and the minor leagues.

Seventeen of MLB's 28 teams have had cross-ownership ties with broadcasters since 1986 and have been able to utilize the same transfer pricing scheme as the Tribune Company. Corporate tie-ins also take other forms. Anheuser-Busch, for instance, owns the St. Louis Cardinals as well as Busch Stadium as two separate divisions. While the Cardinals pay a standard rent for the stadium, the ball team receives none of the parking, concessions or general stadium revenue which could amount to $10 to $15 million or more annually.

Anheuser-Busch also derives significant promotional value for its beer products from its ownership of the Cardinals and Busch Stadium. To be sure, promotional synergy between products of other businesses and baseball franchises benefits most owners.

(It may also be a matter of legislative concern that MLB's franchise owners use baseball's protected monopoly and subsidized status as a means to secure competitive advantage for their businesses in other industries. This occurs not only through transfer pricing schemes and promotional synergy, but also through easier access to loans (often using the franchise or some of its

contracts as collateral) and to politicians.)

Second, owners in a franchise partnership often make loans as individuals of tens of millions of dollars to the partnership to which they belong. This means that the partnership that owns the ball club may make interest payments of millions of dollars annually to one of the partners. In essence, the partner is choosing to receive his return on investment in the form of interest income instead of profit distribution. The end result is that the team's profits are artificially diminished.

Third, owners can pay themselves handsome salaries, even though they retain a full complement of front office personnel. We do not have details on the practices in MLB in this regard, but the NFL players' antitrust suit this past summer produced some fascinating revelations. NFL teams, like in baseball, are closely-held partnerships and subchapter S corporations. At least eleven NFL owners paid themselves over a million dollars salary in 1990, including the owner of the Buffalo Bills who paid himself $3.5 million and Norm Braman, who owns the Philadelphia Eagles and lives most of the year in France, paid himself the modest salary of $7.5 million. In other words, the Eagles might have had a $7 million profit turned into a $0.5 million loss from this sleight of hand. Although we do not have specific salary information for executives of baseball teams, we do know that some teams have front office expenses from $10 to $20 million above those of other teams.[8] Naturally, extensive ownership and front office

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8. More generally, as long as baseball's employees are paid above

perquisites can also hide profits.

Fourth, each of these three accounting practices is perfectly legitimate, but owners also can dishonestly manipulate or falsify their books by underreporting revenue or overstating costs. We caught an unusually candid glimpse of the books of the Cincinnati Reds as a result of the suit brought by Marge Schott's minority partners against her. Among other things, it was shown that Schott was giving her car companies free advertising in Reds' media outlets and double charging several major investment expenditures, such as their new $5 million electronic scoreboard and their artificial turf field.

Fifth, unlike other industries which cannot depreciate their employees, sports teams are allowed to depreciate their players. Player costs, of course, are also expensed. The general practice is for the owners to assign 50 percent of the team's purchase price to players and then depreciate this sum over five years. Thus, a team purchased for $100 million would claim depreciation of $10 million a year over five years, diminishing book profits by $10 million per year. Eventually, the depreciation is partially recaptured in higher capital gains taxes and the actual gain to ownership is equivalent to an interest free loan over the holding period.[9] The value of this tax shelter has fallen over time with

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their reservation wage (the best wage they could earn outside of baseball) then the industry's true monopoly profits will be hidden, even if no accounting gimmickry is employed.

9. The actual value of the loan would be the appropriate average rate of interest plus the average rate of inflation multiplied times the accumulated amount of depreciation summed over the ownership period (adjusted for the early years).

a lower proportion of the franchise purchase price assignable to players, decreasing tax rates and the diminishing spread between income and capital gains tax rates. Nonetheless, during the early years of ownership player depreciation privileges result in sharply lower book profits.

Lastly, it must be pointed out in response to the owners' cries of poverty that there is also an investment return in the consumption value of ownership. Most owners admit to great pleasure from the power and public exposure that team ownership confers. Even the most outlandish and irresponsible owners seem to become community icons. Certainly, the tens of thousands of baseball fanatics participating in rotisserie and other fantasy leagues will recognize this consumption value immediately.

If baseball teams were not yielding a positive economic return, it would defy all the laws of economics for franchise values to be over $100 million and to have risen so rapidly over the past two decades. Consider, for instance, the Seattle Mariners, one of baseball's weakest teams financially and on the field: the Mariners sold for $6.5 million in 1977, $13 million in 1981, $77 million in 1988, and $106 million in 1992. Six teams currently are appraised above $175 million.

Baseball's smallest media market is Cincinnati. We know from our privileged access to the Reds' books that the Reds have been eminently profitable, earning an average annual profit of $9.4

million during 1985-89, then $19 million in 1990 alone, $12 million in 1991, and around $5 million in 1992.

So, properly interpreted, virtually all MLB teams are profitable and to not be so seems to require a combination of a small city, poor team performance and wasteful management. Besides, who ever said capitalism guarantees profits?[10]

Two caveats are appropriate here. First, the protracted boom period since the mid-1970s of almost 15 percent annual revenue growth has come to an end. The national media contract, which had grown 16-fold between 1976 and 1990, will likely diminish between 10 and 20 percent beginning with the 1994 season, unless baseball moves to an expanded playoff format. But the national media contract with CBS and ESPN represents less than one-quarter of MLB's revenues and the shortfall here will be more than offset by growth in local television and radio contracts, licensing, luxury box, concessions and other income. Overall, we can expect slow revenue growth rates through the remainder of this decade. Mismanagement is a lot easier to conceal during periods of rapid revenue growth.

Second, there is a potential distribution problem. With the expected reduction in the national media contract which is shared equally among all teams and the consequent increased dependence on

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10. Further, if the owners truly feel that the finances of certain small city franchises are too fragile, they always have the option of increasing revenue sharing among the teams. Presently, approximately one-third of an average baseball team's revenue comes from shared sources; in the NFL this figure is over three-fourths. See discussion below in the text.

non-shared income sources, many small city franchises which are only marginally profitable and are more limited in their resources likely will experience greater financial pressure in the years ahead.

Herein lies a key dynamic behind baseball's economic instability. The big city owners (Steinbrenner, Reinsdorf, Tribune Co., O'Malley, Autry, Wilpon, Giles, et. al.) adamantly do not want to increase revenue sharing. Their strategy has been to say to the small city owners: "We know you don't want our charity; instead, what we'll do is help you make your operation more profitable." So, in lieu of more revenue sharing, they go after baseball's various constituencies. They go after the Players' Association and this is why there has been a work stoppage every time the collective bargaining agreement has come up since 1970, yielding the preposterous outcome that an industry with 15 percent yearly revenue growth, 20 percent yearly salary growth, average salaries over $1 million, no foreign competition and growing employment does not experience labor peace, and this is why we might have a lockout before the 1993 season begins. They go after the cities, which are confronted with threats of teams moving if they do not build new stadiums. They go after the minor leagues, which two years ago were forced to share more of their revenue with their parent franchises or to face extinction. And they go after the fans, who are faced each year with more expensive cable packages, tickets, concessions and parking costs. It should serve as a stern warning to baseball's barons, for instance, that the neighborhoods surrounding Baltimore's new stadium are 70

percent black but only 2 percent of attendees at Camden Yards in 1992 was African-American.

THREE. Various baseball team owners and commissioners have maintained that the sport's antitrust exemption was needed to allow the commissioner to exercise effectively the "best interests of baseball" clause. Without the exemption, the exercise of this power might abridge free commerce or property rights and be vulnerable to a successful challenge. In practice, the commissioner rarely invoked this power and did not serve as a sufficient check on the owners, who, after all, hire and fire the commissioner. Nevertheless, to the extent that this power ever had enduring significance, it has now been negated by the forced resignation of Fay Vincent and the owners' clear intention to restructure the office, further circumscribing the commissioner's independence. Plainly, this argument is now obsolete.

FOUR. A rationale heard from the owners more frequently over the past several months is that the exemption permits baseball to prevent franchise relocations. First, the premise of this claim is not fully correct. It is based on a facile interpretation of the Ninth Circuit Court of Appeals decision in the NFL Raiders' case. The decision did not say that any league rules restraining franchise movements were in violation of the antitrust laws, only that the NFL's rule 4.3 and its application in this case were in violation. One salient fact, for instance, was that if the Raiders' move to Los Angeles were restrained by the NFL it would have preserved the Rams' monopoly in the Los Angeles area, as defined by rule 4.1 to cover a radius of 75 miles.

Second, to the extent that MLB's exemption has thwarted some team movement in recent years, the purposes and processes underlying this outcome must be examined more closely. Is MLB ready to foreswear all future team movements and, hence, render obsolete the practically ubiquitous practice of threatening cities with imminent departure in order to secure more favorable stadium deals? To the extent that Congress is concerned with franchise movement there is a more direct and preferred remedy; namely, to give cities the right of first refusal and to allow municipal ownership (elaborated below).

FIVE. The owners have also claimed that the exemption prevents a proliferation of frivolous litigation. This rationale would perhaps also serve to argue for granting the exemption to all U.S. industries. It is no longer clear, however, that the rationale applies to baseball. MLB's longstanding protected and unregulated monopoly status has occasioned such ownership laxity and arbitrariness that at least five lawsuits are presently pending, one for over $3 billion.

Independent Perspectives on the Exemption

Outside the industry, views on the importance of baseball's antitrust exemption have varied widely. In their 1981 book Baseball Economics and Public Policy, economists Jesse Markham and Paul Teplitz argued that prior to the introduction of free agency there was cause to remove baseball's antitrust exemption but with free agency the exemption has little economic meaning. Their study was commissioned by MLB. Economist Gerry Scully resonates

that not only do the players have free agency now but they have a powerful union to protect their interests, so lifting antitrust exemption would accomplish little.[11]

On the other end of the spectrum is law professor Stephen Ross who could scarcely paint a rosier picture of the benefits from applying antitrust statutes to baseball. "Competing leagues would vie against each other for the right to play in public stadiums, driving rents up and tax subsidies down. Leagues would be more eager to add new expansion markets, lest those markets fall into the hands of a rival league. Because the competing leagues would bid on players, salaries would reflect more accurately the players' fair market value, and no one league would unduly restrict intraleague mobility of players. Teams thus could obtain more readily the right player for the right position. Leagues would hesitate to move prime games to cable for fear of losing their audience, as well as the loyalty of their fans, to a league whose games remained available on free television. The pressure of competition would force each league to maintain intelligent and efficient management."[12]

Reality lies somewhere in between these polar contentions that antitrust action would do away with all problems in MLB and that it would do nothing. Where does it lie? The first question to answer is what areas of MLB are still affected by its

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11. Scully, The Business of Major League Baseball. University of Chicago Press, 1989, pp. 192-193.
12. Ross, "Monopoly Sports Leagues," Minnesota Law Review 71, 3, 1989, p. 646.

exemption.

Impact of the Exemption

Consider the players. Damages in the recent collusion cases against the owners were settled at $280 million. If antitrust principles were applied to these cases, the Players' Association would have been entitled to triple damages or $840 million. Realizing this, the Players' Association added a clause to the 1990 Basic Agreement stating that in the future owners' collusion over free agent salaries will be subject to triple damages. The owners accepted the change, so the only remaining advantage seems to be indirect. If the exemption is lifted, the Players' Association will have recourse to injunctions and pre-trial discovery procedures. The implicit threat that either injunction or discovery rights might be invoked may further deter collusive behavior among the owners.

What about the players with less than six years experience who do not have free agency rights? Since the Players' Association operates essentially as a union shop, including all major league players, the collective bargaining agreement legally binds all major leaguers to its provisions. Players without free agency cannot bring an antitrust suit against MLB because of the non-statutory labor exemption that allows labor unions involved in bona fide, arms'-length bargaining to surrender possible protections under antitrust statutes. Removing the antitrust exemption, then, would have no direct effect on MLB's relation with the major league players.

Minor leaguers are in a different category. They do not belong to the Players' Association, nor any other union, and MLB restrains them from entertaining competitive bids for their labor services. This is restraint of trade and no labor exemption applies. Theoretically, a minor leaguer could sue MLB. Of course, such a suit would be time consuming and costly, and most minor leaguers have neither the money nor the interest to challenge their employers. Moreover, any lawyer would advise them that their chances in such a suit would be slim since the courts have repeatedly upheld MLB's exemption. Were the exemption lifted, this is an area that could well be affected.[13]

The existence of the reserve system in baseball's minor leagues is also a factor that makes it more difficult for competing leagues to establish themselves in baseball; in economists' jargon, the minor league reserve system is a barrier to entry. When the Continental League was forming in the late

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13. The absence of a blanket antitrust exemption in the NFL and the NBA has not mattered in this regard because they do not have professional minor leagues; colleges serve in this capacity. Interestingly, however, both the NFL and the NBA have been challenged in court on a related issue where MLB is also vulnerable -- the amateur draft. In all three sports, amateur players, either out of high school or college, are drafted by professional teams and prevented from seeking competitive bids for their services. The NBA and NFL have won their cases, basically on union shop grounds. That is, an amateur being signed in the basketball or football drafts is about to enter the "majors" and its players' union, so they are bound by the rules of the union's collective bargaining agreements. These rules accept the draft and, hence, by the labor exemption, the drafts are legal. Players drafted in baseball, however, are headed for the minor, not the major, leagues where there is no union. Thus, a challenge of baseball's June amateur draft would be quite compelling in the absence of baseball's exemption.

1950s, Branch Rickey appealed to MLB to allow the new league to draft and pay for players from its minors. MLB never responded to the request. The Continental League had the option of sueing MLB for exploitative adhesion, but here again MLB was protected by the antitrust exemption. Not anxious to test its exemption over this issue and to otherwise alienate scores of politicians, MLB compromised on an expansion program that incorporated some of the prospective team owners from the Continental League. Another effort to form a third league was close to fruition in 1987 when the stock market crashed in October, financially decimating some of the monied individuals involved in the effort. The effort was revived with some new investors in 1990; precisely one of the chief concerns was access to minor league talent. Without such access, the quality of play would be too low and the riskiness and expense of drafting players out of high school too great to make the new league viable. A third league in baseball does not have the option that the AFL or USFL had in football to offer sweeter deals to college players. Unlike in college football and basketball, the overwhelming majority of college players in baseball are not ready for major league competition.

The exemption, then, deters the formation of competitive leagues. This deterrence helps to explain the failure of rival major leagues to emerge in baseball since 1914-15 as well as the slower pace of expansion since the 1960s of MLB relative to the other professional team sport leagues. The NHL, NFL and NBA have all experienced rival leagues over the last thirty years and they have all expanded more rapidly than major league baseball.[14]

Among other things, a rival league would serve to pressure MLB to deal with its notoriously inefficient and wasteful management practices. It would also temper some of the troublesome arrogance that characterizes the baseball establishment.[15] In the end, management waste and abuse are paid for by the fans, the cities, the players, the umpires and many other employee groups.

Consider the media. Here antitrust has a straightforward role to play. MLB restrains trade when it imposes territorial restrictions on the broadcasting of its games. Although somewhat vitiated by compulsory license with the carriage of local Cubs, Braves, Yankee and Mets off-air games on superstations, baseball's territorial restrictions still apply to all local cable deals as well as to the broadcast deals of other teams. Thus, a Yankee fan living in Massachusetts cannot see the Yankees on cable (MSG) at any price because the Red Sox have been awarded exclusive rights to the area by MLB. The explosion in cable channel capacity from

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14. In 1967 there were ten teams in the NBA and six teams in the NHL; in 1991 there were twenty-seven and twenty-two teams respectively. That is, the NBA expanded by a factor of 2.7 and the NHL by 3.7 over the period, while MLB expanded from twenty to twenty-six teams, by a factor of 1.3. The NFL has also expanded more rapidly, but the existence of so many quasi-major football leagues (for example, the World League of American Football, the World Football League, the United States Football League, the Canadian Football League, and arena football) over the years makes a direct calculation more problematic. Of course, the precise rates of expansion will depend on the base year chosen.

15. See Chapter 2 in Baseball and Billions for a discussion of baseball ownership and management.

the advent of fiber optics and digital compression will soon make it technologically feasible as well as cost effective to offer fans throughout the country the choice of watching any major league game on any given day. As long as MLB awards teams exclusive territorial rights, however, this technological potential is thwarted.

Further complicating the implementation of unrestricted game viewing is MLB's system of revenue sharing. In particular, local broadcast revenues, with the exception of a small share of cable income, are retained by the team. Some teams earn over $40 million from their local media contracts while others earn under $10 million. To the extent that local rights lose exclusivity as viewership to local games becomes available nationally the pressure for additional revenue sharing among teams will mount. Baseball's big city franchises, then, are likely to resist the move toward a policy that would maximize consumer choice and welfare. If, however, in the spirit of political compromise with the small city teams, the big city owners surrender exclusivity to some share of local broadcasts, it is likely that MLB itself will centrally program and market on pay-per-view the menu of nationally available games. The existence of territorial rights and MLB's monopoly marketing of the pay-per-view games, in turn, will increase the purchase price for viewership and further limit the access of low and middle-income Americans to enjoying the national pastime.

The right to negotiate a network package for over-the-air broadcasting conferred by the 1961 SBA should be qualified to guarantee a certain level of fan access to free telecasting. The 175-game ESPN package strictly speaking is a violation of antitrust law since it is pay TV and not protected by the SBA. If MLB's blanket exemption were lifted, the ESPN package would be subject to challenge. In exchange for the right to make such a package deal, MLB might be required to lift its local blackout provisions on Tuesday, Thursday and Friday nights. By allowing ESPN games into certain local markets on these nights, this would raise somewhat the value of the ESPN package and lower somewhat the value of local contracts, but on balance the gross revenues should not be affected. It would simply redistribute revenues from local sources (only a small share of which is shared) to national sources (all of which is shared.)

In 1987 MLB's television committee recommended a rule that team owners not be allowed to own television stations. Over Commissioner Ueberoth's objections, the rule was accepted and has been honored only in the breach. Cross ownership ties now affect more than fifteen teams and in the one case the Tribune Company owns the Chicago Cubs, the superstation WGN that broadcasts the Cubs and the White Sox as well as local stations that will broadcast the games of five other major league teams in 1993. The Tribune Company, then, has enormous power within the baseball establishment and they are using it to promote their interests.

For instance, the immediate provocation for former Commissioner Vincent's ouster was his decision to realign the divisions in the National League so that they would correspond to their member teams' geographic locations. This would have promoted more local rivalries in the long run, reduced team travel expenditures and allowed the fans in Cincinnati and Atlanta to see more night games at normal hours. The Tribune Company disliked the move, however, because, given the divisional scheduling formula in the National League, it would have put a larger number of WGN's games on after prime time for most of the nation. Once again, the short-term profit interests of the most powerful owners conspired with baseball's exemption to limit fan access to the national pastime.

Consider the cities. MLB behaves like a standard monopoly in restricting supply (the number of teams) below the demand for teams from economically viable cities; that is, it creates an artificial scarcity.[16] There were, for instance, 18 ownership groups from around the country in 1990 who paid $100,000 simply to apply to be one of the National League's two expansion teams. This excess demand forces cities to compete with each other to

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16. Over the past year owners have been quick to point out that there were several franchises on the block that had not been sold. They claimed this was evidence of no excess demand. To this claim it must be pointed out that: (a) demand was artificially restricted by imposed conditions from MLB; (b) the asking price was unrealistic in some cases; and, most importantly, (c) other things equal investors always shy away from uncertainty and risk and MLB in 1992 was confronted by the prospects of labor unrest, legal turmoil, political backlash and a smaller national television contract. Despite this, the franchises in Houston, Detroit, San Francisco and Seattle all sold at around the $100 million mark.

attract new teams or retain existing ones. MLB can blackmail the cities into bankrolling new stadiums replete with luxury boxes, advertising-friendly electronic scoreboards, adjacent and abundant parking, and an extensive network of in-stadium restaurants and concessions outlets. All this can be worth tens of millions of dollars in additional annual revenue to a team and bring the city no more in rental payments. The cities are being mugged.

The standard ploy for a MLB franchise is to threaten to move the team. Such threats have consistently brought owners either more favorable rental contracts for their teams, as with the Minnesota Twins who have paid zero rent since 1989, or stadium retrofits such as the $105 million investment by New York City in adding luxury boxes, new scoreboards, concessions outlets, and parking to Yankee Stadium during 1974-75,[17] or entire new stadiums with a wide array of revenue-generating accoutrements, such as the new and beautiful Camden Yards ballpark in Baltimore which brought the Orioles' owner Eli Jacobs some $40 million in profits this past year.

If the affected city dares to demur and ask for a better deal, matters can get ugly very quickly. There were two notorious cases in 1992. The first was in Seattle where a local group trying to buy the team was told by the Commissioner that MLB had one rule that required local ownership and another rule that proscribed foreign ownership. Seattle's group included Nintendo

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17. New York City received zero rent from the Yankees in 1976.

of America, originally as a majority owner. Despite the facts that the Mariners' owner at the time lived in Indianapolis, that the previous owner lived in Los Angeles and that the CEO of Nintendo of America had lived in Seattle for fifteen years, raised his children there and would become the first Seattle Mariners' owner to possess a Washington state driver's license, the prospective Seattle group was told by the commissioner to expect a cold shoulder from MLB. This was the status quo until Speaker of the House, Representative Thomas Foley from the state of Washington, told MLB that if the Seattle group was turned down that it could expect to see legislation removing baseball's antitrust exemption in Congress within 24 hours. MLB relented and allowed Nintendo to hold 49 percent of the partnership's shares.

The second case was partially resolved last month and involved the San Francisco Giants. Back in 1958 when the plans for cold and windy Candlestick Park were being hatched, Mayor Christopher of San Francisco and his city council were either hoodwinked or paid off by Charles Harney, owner of the prospective stadium site on the bay and construction contractor. Giants' owner Horace Stoneham was guilty of benign neglect. There have been four referenda since 1987 to raise funds for a new stadium in the Bay Area and all four were voted down. Only Harold Stassen and Gus Hall have lost more elections. Of the four referenda defeats, however, only two were in San Francisco proper. The last one in the city was in November 1989, one month after the massive earthquake. The mayor, who had been actively supporting the new stadium, stopped campaigning for it and an ownership group from

Sacramento which controlled the NBA franchise there, hoping to lure the Giants 90 miles east, began a propaganda effort against the stadium on the grounds that a new stadium was needed but now was not the time to spend public funds on it while earthquake relief efforts were so crucial. This referendum lost by 50.5 percent to 49.5 percent, or by less than two thousand votes! The most recent vote in June 1992 in San Jose was in the context of a gargantuan fiscal crisis, and it is well to recall, as it was repeatedly recalled for the voters in San Jose, that Bob Lurie, the Giants' owner, inherited a multimillion real estate fortune from his father, that he bought the Giants in 1976 for $8 million and the sale price will be around $100 million. Besides, if a failed referendum was a sufficient condition to vindicate franchise relocation, then the Detroit Tigers also would be justifiable carpetbaggers because on May 17, 1992 a stadium initiative in Detroit failed decisively.

San Franciscans have been accused of being unworthy baseball fans. Many have pointed to the Giants' attendance which fell from 2.06 million in 1989, to 1.98 million in 1990 and to 1.74 million in 1991. Yet in 1991 the team record was 75 wins and 87 losses with a fourth place finish. It is possible to estimate econometrically what the Giants' attendance would have been had San Francisco fans behaved like average baseball fans. Controlling for city population and team win percentage, the expected attendance at Candlestick would have been only 1.69 million in 1991 or 50,000 below the actual.

In the meantime, the city of Tampa, Florida, the 13th largest

media market in the country, has been promised a major league team since 1984. In 1988 the city financed the construction of a $138 million domed-stadium, intended originally as the new home of the White Sox. Jerry Reinsdorf, owner of the White Sox, then used Tampa's beckoning dome to induce Chicago and Illinois to build his team a new Comiskey Park. When Bob Lurie signed a sale agreement with a Tampa group on August 6 of this year, the city began an additional $30 million investment to prepare the ballpark for major league play. Now the dome will remain empty and Tampa once again finds itself without a team. MLB will have several major litigations brought against it, the costs of which in large measure will ultimately be borne by the fans and will likely bring further instability to the game.

The obvious answer to MLB's ability to blackmail the cities and to extract annual subsidies totalling over $200 million from them is to rebalance the supply and demand equation through an expansion of franchises. There are enough economically-viable cities to support a gradual expansion to 40 teams by the year 2004. The Cincinnati Reds operate profitably in baseball's smallest media market, the 30th largest in the country. Without incorporating any smaller media markets, since four metropolitan areas have two teams each and two teams are in Canada, it would be possible for MLB to expand to 36 teams. Another six media markets were at least 86 percent the size of Cincinnati in 1990; at a market growth rate of 1.4 percent a year, by the year 2000 they would all be larger than Cincinnati was in 1990. Thus, there are more than enough economically viable cities to support such an

expansion.

Although the decision of the Ninth Circuit Court of Appeals in the NFL Raiders' case is often misinterpreted as discussed above, applying antitrust law has hardly been a godsend to the erstwhile NFL cities of Oakland, Baltimore and St. Louis. When Al Davis moved his Raiders to Los Angeles in 1982, the NFL was so embarassed by Davis' naked greed that it tried to stop him. Davis went to court and won on the grounds that the NFL was restraining trade and interfering with his property right.[18] Baltimore Colts' owner Robert Irsay, encouraged by the Davis precedent, packed up his bags in 1984 and was in Indianapolis in less time than it took Johnny Unitas to run out of the pocket. The NFL's St. Louis Cardinals followed suit in 1988 when they moved to Phoenix. The NFL was not willing to risk the expense and effort to challenge these moves even though there was no existing team in Indianapolis or Phoenix whose monopoly was being challenged.

The case can be made, then, that if baseball's exemption is lifted it should be accompanied by additional legislation.[19] One piece of legislation would give cities the right of first refusal. That is, before an owner was allowed to move a team or to sell it to owners in another city, the team should be offered for sale to

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18. Oakland was unsuccessful in the California courts when it tried to invoke eminent domain to prevent the Raiders' relocation.
19. It is also true that removing the exemption alone may provoke private antitrust suits yielding damages but no structural relief. For structural relief the antitrust division of Department of Justice or the Federal Trade Commission would have to get involved. The outcome in this case would be uncertain and the process would be expensive and drawn out.

its host city. The host city, in turn, could either buy it and operate it as a quasi-public company or it could arrange for a widely-dispersed ownership among its citizens -- as in Green Bay, Wisconsin with the football Packers. The fair market value could be set by an independent arbitration body.

Presently, MLB has a policy proscribing municipal ownership. Thus, when Joan Kroc attempted to give the Padres to the city of San Diego two years ago, the baseball establishment informed her that this was impossible. Publicly, the owners state that municipal ownership would be too cumbersome and inefficient. Many minor league franchises, however, are municipally-owned, management is separated from local politics and the teams are run efficiently. The real concern of baseball's barons is that public ownership means public actountability which, inter alia, may lead to open books. Open books means loss of control and that is where the real threat lies. Right of first refusal legislation would overturn MLB's prohibition on municipal ownership.

A second piece of legislation would set down an expansion timetable for baseball. Again, here I would argue for 40 teams by the year 2004. Congress may prefer a decision rule for expansion to a specific timetable; if so, an adjudicatory agency would have to interpret and oversee the implementation of the rule.

Another public policy option would be the creation of a federal sports commission. Such a commission, originally proposed in 1972 by Senator Marlow Cook, a Republican from Kentucky, would set guidelines for expansion in each league, control franchise movements, regulate the relationship between professional and

amateur sports and curb the reckless commercialization of organized sports. The checkered history of regulatory bodies in the United States and the primacy of special interests in Washington politics argue for great caution before pursuing public policy along these lines.[20] An oversight commission would have an advantage over a piecemeal legislative approach in being able to respond more flexibly, promptly and, possibly, more intelligently to new problems. It would, of course, be desirable to build in safeguards to minimize the opportunities for the industry to capture its regulators.[21] As perilous as this option may appear, the existing alternative may well be worse: that is, professional sports leagues run by self-interested owners unfettered by the forces of competition or regulation, and inter-collegiate athletics run by the NCAA, in turn, controlled by the non-academically-minded athletic directors from the big-time universities.

Each of the above public policy options entails some direct government interference in the industry. An alternative approach to undoing baseball's contrived scarcity of franchises would be

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20. One might also wonder whether the status quo wherein Congress periodically threatens to revoke the exemption if baseball does not behave in certain ways avoids the penetration of special interests. Besides, even without the threat of removing the exemption, there exists another threat -- the removal of the nonsensical right to depreciate players.

21. One such safeguard might be a requirement that no regulator could come from or go to a sports industry within a five-year period. Another might stipulate that the regulators be chosen from lists provided by particular constituencies, such as the United States Conference of Mayors, the Consumer Federation of America, sportswriters, players and the owners.

for Congress to legislate that the four divisions in MLB be broken into separate business entities.[22] The new leagues would be allowed to collaborate in setting common playing rules and arranging post-season contests, but their business dealings would be separate from each other. They would compete for fan loyalty, for television contracts, for worthy cities, and so on. Owning a team in more than one league and vertical interlocks would be prohibited.[23]

In 1947 former MLB Commissioner Happy Chandler broke baseball's longstanding tradition by decreeing that blacks be allowed into the game. Before leaving office in 1951, Chandler made a public statement with another democratic sentiment: "I always regarded baseball as our National Game that belongs to 150 million men, women and children, not to sixteen special people who happen to own big league teams." Our long-dormant public policy needs to be awakened if we are to rescue Commissioner Chandler's vision.

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22. A version of which was first suggested by Roger Noll in 1974; see his concluding chapter in Noll (ed.) Government and the Sports Business. Washington, D.C.: Brookings Institution, 1974.
23. Such a hands' off approach has a certain appeal but the move from contrived scarcity to contrived competition might also disfigure the national pastime beyond the tolerance level of the average fan. For instance, in addition to or instead of competing by offering lower ticket prices or cheaper broadcasting, the competition might take the form of greater commercialization or excessive experimentation with new rules to excite fan interest. Were true price competition also to break out, the threats of financial fragility and geographical instability of franchises may reappear. Under such conditions, the industry would still survive but are such outcomes the most desirable for the fans and the cities?

In April 1976 the U.S. House of Representatives passed a resolution establishing a Select Committee on Professional Sports (a.k.a., the Sisk Committee) to investigate the stability of the country's major sports industries. The Sisk Committee issued its report on January 3, 1977, concluding: "Based upon the information available to it, the Committee has concluded that **adequate justification does not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of an overall sports antitrust reform.**"[24] To accomplish such a reform, the Sisk Committee recommended the establishment of a successor committee to undertake a broad study and then propose a specific legislative course of action. The successor committee was never created.

No bill to lift baseball's exemption has ever made it out of committee in either the House or the Senate. Thus, Congress heretofore has shown itself to be content with baseball's legal monopoly. In other cases where the government has deemed it desirable to sanction a monopoly, such as with public utilities, the government has also sought to assure through regulatory controls that the monopoly did not abuse its privileges. Not so with baseball; it is a self-governing, unregulated monopoly.

There is no justification for treating the baseball industry differently from others in this regard. It is unaesthetic, unseemly, inefficient and unjust to perpetuate the historical

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24. Cited in Markham and Teplitz, p. 1.

mistake of baseball's exemption any longer. Congress cannot sensibly exercise its duties and represent the best interests of the U.S. electorate by periodically threatening to revoke the exemption. The anomoly should be ended forthwith and accompanying legislative protections should be enacted.

I did not vote for Ross Perot, but I found his rallying cry to the electorate most appealing: "Take back your government." I think it is also time to take back our national pastime.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Professor Andrew Zimbalist
Robert A. Woods Professor of Economics
School of Economics
Smith College
Northhampton, MA 01063

Dear Professor Zimbalist:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions no later than Monday, January 25, 1993:

Chairman Metzenbaum's questions:

1) Professor Zimbalist, in your testimony, you state that "Major League Baseball behaves like a standard monopoly in restricting supply [in order to] create an artificial scarcity." The owners dispute that characterization. The owners suggest that due to the economics of baseball and the limited supply of player talent, the game is simply not capable of supporting more than 28 teams at this time. What evidence do you have that baseball is deliberately maintaining an artificial scarcity of teams?

2) At the hearing, we heard from city officials from both San Francisco and Tampa Bay who testified about the dispute over the threatened relocation of the Giants. I believe the public is ill-served when teams threaten to move in order to gain concessions and subsidies from their hometowns. In your view, would elimination of the antitrust exemption promote or reduce stability with respect to the relocation of franchises?

3) In your book, Baseball and Billions, you state that Major League Baseball has refused to allow municipal ownership of teams. In which instances has baseball blocked cities from

owning teams? Also, isn't it the case that community ownership of teams has worked in the minor leagues and in the National Football League?

4) Professor Zimbalist, you have testified that a number of teams employ accounting gimmicks and transfer-pricing schemes with corporate affiliates that have the effect of understating team profits. What enables the owners to engage in these kinds of practices and what impact do they have on the fans and the public?

5) Professor Zimbalist, some observers have suggested that baseball in particular -- and professional sports in general -- are being priced out of the reach of poor people and working families. The costs of attending a game -- including ticket prices, and especially parking and concession costs -- are increasing steadily, and many fans need to subscribe to cable television in order to follow their teams on a regular basis. Has this problem become apparent to you in your research, and is there anything that we here in Congress can do about it?

Senator Thurmond's questions:

1) Please comment on what you consider the appropriate role of the Baseball Commissioner to be, especially in the context of an antitrust exemption?

2) Please address the legal argument, which Mr. Roberts and others propound, that a sports league should be viewed as one legal entity incapable of conspiring with itself under Section 1 of the Sherman Act.

3) Please state, as succinctly as possible, who will benefit from repeal of the antitrust exemption and how?

4) As I understand it, you believe that repealing the antitrust exemption is either not necessary and/or not sufficient to cure the structural problem inherent in the business of baseball. You propose additional action that would have to be undertaken either legislatively or in the form of regulation. At a time when de-regulation is thought to be the better approach for all but the most urgent problems, how do we justify federal government regulation of an entertainment industry such as baseball? Are we not better off repealing the antitrust exemption and leaving the outcome to market forces?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

Andrew Zimbalist's
Responses to Inquiries
pertaining to
Oversight Hearings
on
Major League Baseball's Antitrust Exemption
Antitrust Subcommittee
Committee on the Judiciary
U.S. Senate
10 December 1992

Chairman Metzenbaum's Questions

1. I might begin by noting theoretically that if, in the presence of their protected monopoly status, the owners did not contrive a franchise scarcity then they would not be behaving as efficient profit maximizers. There are many pieces of empirical evidence to support the contention of an artificial scarcity of baseball teams. First, when the National League conducted a bidding during 1990-91 for two expansion teams to enter the League in 1993 there were several dozen ownership groups interested in applying. After weeding out the less attractive applicants, the final list of applicants included 18 ownership groups from 10 different cities across the country. Each of these groups paid $100,000 just to apply and for the privilege of being considered by baseball's expansion committee.

Second, the smallest media market in Major League Baseball is Cincinnati. According to the Reds' own books, the franchise has been profitable every year at least since 1985, averaging almost $10 million a year in profits. Without incorporating any smaller media markets, since four metropolitan areas have two teams each and two teams are in Canada, it would be possible for MLB to expand to 36 teams. Another six media markets were at least 86 percent the size of Cincinnati in 1990; at a market growth rate of 1.4 percent a year, by the year 2000 they would all be larger than Cincinnati was in 1990. Thus, there are more than enough economically viable cities to support an expansion to 40 teams or more by the beginning of the next century.

Third, many argue that the effective constraint on expansion is not the economic viability of cities but the scarcity of playing talent. As I argue at length in my written testimony and in Baseball and Billions, there is no empirical basis for this contention. Indeed, there is every reason to believe that the absolute level of talent today in baseball is greater than ever before. Today there is a smaller share of an increasingly fit and trained population playing major league baseball and, in recent decades, there has been an influx of black and latins into the game. Furthermore, if more lucrative job opportunities opened up, it would induce more youth to attempt a professional baseball career. If anything, the problem is the reverse. There is an excess of top talent, leading to skills' compression and the failure for today's ballplayers to challenge longstanding individual season performance records.

Fourth, although we do not have access to complete details, I am confident from the information we do have that front office and executive salaries in baseball are considerably above

reservation levels (what these individuals would earn in their best alternative employment). This too constitutes a return to monopoly power.

Fifth, even using the owners' manicured figures, baseball has experienced a higher rate of return on sales in recent years than U.S. business on the whole. For instance, in 1990 baseball's return on sales was 10.6 percent, while the average in U.S. manufacturing was 6.3 percent.

In my view, the game would unquestionably benefit from expansion: more fans would get to see live professional baseball; more minor league ballplayers would have an opportunity to play major league ball; the blackmailing of cities would cease, or, at least, subside; and, historical performance records would come within closer reach of today's players. Other things being equal, franchise values and owners' profits would slip some, but this, after all, is the cost of breaking up any monopoly.

2. This is an excellent and complicated question, and goes straight to the heart of the public policy dilemma. First, let us assume that Congress lifts the antitrust exemption and does nothing else. Then the question becomes whether the new circumstance will bring about the formation of a competitive league or whether the greater potential threat of a competitive league will cause baseball to act preemptively and expand. To the extent that either of these outcomes comes to pass then the excess demand for franchises will be reduced as will baseball's ability to extort exploitative stadium contracts from cities. But before either of these outcomes materializes it is necessary that certain structural relief to baseball's organization be introduced; such as, the courts declaring that minor league contracts constitute exploitative adhesion and are violative of antitrust statutes. Successful civil litigation is likely to result only in damages and not structural relief; thus, it would be desirable in this instance to have the Justice Department bring its own suit but this is not something the Congress can legislate. In other words, if the exemption is lifted and Congress does nothing else it will result in substantial uncertainty regarding the continued monopolistic practices of baseball. In this case, it is possible, and I underscore the word "possible," that lifting the exemption would hurt cities' bargaining power vis a vis baseball franchises, as was the case with the NFL's Raiders and the city of Oakland. Here too the situation is ambiguous however, because the decision of the Ninth Circuit of Appeals referred clearly to the special circumstances of the NFL's attempted protection of the Los Angeles monopoly for the Rams and the NFL's rule 4.3.

Furthermore, only part of the problem is actual movement of franchises; the other part is the threat of movement and consequent extortion of giveaway stadium deals from the cities -- a dimarche recently employed by Bud Selig himself invoking the beckoning city of Phoenix. On the one hand, the owners extol the virtues of franchise stability and, on the other, they continue to exploit their unregulated control over the number and location of franchises to mug the cities. This arrogant behavior derives in significant measure from the decades of special treatment for their industry by the courts, with implicit Congressional assent.

Nevertheless, it is precisely the ambiguity of the precedent in the Raiders' case and the prospect of drawn-out and expensive legal battles that leads me to recommend Congress do more than simply lift the exemption. One option, involving only the laws of the free market, would be to legislate that baseball's four divisions be broken up into separate business entities. These entities could collaborate on setting playing rules and terms for interleague play as well as post-season competition, but they could not collaborate on signing television or radio contracts, basic agreements with the Players' Association or fixing territorial rights. This solution is straightforward and involves a minimum of government intervention. The only problem that it carries is the instability of markets. It is possible that weaker teams or leagues would be forced to move more frequently, to merge or to go out of business. The Darwinian laws of the marketplace may not be consistent with the desired cultural, geographic and financial stability of our national pastime.

Another option would be to lift the exemption and pass special legislation to restructure baseball's minor league contracts; in particular, freeing minor leaguers to sign contracts with other leagues, or applying a modified version of the 1960 Kefauver bill to limit the minor leagues' reserve system.

Yet another option would be to lift the exemption and legislate an expanison timetable for baseball and/or the right of first refusal for cities. The latter would give cities the right to purchase their team (either with municipal or dispersed citizen ownership) before it moved. In my view, a proper expansion timetable would provide for the creation of four new teams each in 1996, 2000 and 2004, bringing the total number of teams to 40. A still more interventionist approach would be along the lines of the legislation first proposed in 1972 by former Republican senator from Kentucky, Marlow Cook, envisioning the creation of a federal sports commission.

Although I favor lifting the exemption along with an expansion timetable and right of first refusal legislation, I view any of the other options (lifting the exemption by itself, lifting the exemption and breaking up the divisions, lifting the exemption and freeing the minor leaguers, lifting the exemption and creating a federal sports commission) as enhancing economic efficiency and consumer welfare and, hence, as more desirable than the status quo.

3. Yes, Major League Baseball has had a longstanding policy of proscribing municipal ownership of major league franchises. The details of individual cases are hard to come by, however, as this information along with most financial information about the teams is viewed as proprietary. This, of course, is the case despite the fact that the average major league team receives annual subsidies in excess of $10 million from its host city. One instance about which I have heard corroboration from a number of credible sources is the San Diego Padres. In this case, Joan Kroc inherited the club from her deceased husband, Ray Kroc, founder of MacDonalds, and did not have an interest in owning the franchise. In 1987, I believe, she attempted to give the team to the city of San Diego but was informed that this was not allowed. I have also heard from sources within the Pirates' organization that when the Pittsburgh Pirates were sold in 1985 for approximately $44

million to a local syndicate the city of Pittsburgh put down roughly $20 million of equity capital. Since the city was not allowed to own a part of the team, however, this money was considered a grant on behalf of keeping the team in Pittsburgh. A similar story is told about the 1990 sale of the Montreal Expos to a syndicate headed by Charles Brochu for around $86 million; apparently the city of Montreal and the province of Quebec together contributed some $29.4 million.

It is also true that various forms of municipal and local ownership schemes have been successful at all levels of minor league baseball and that the Green Bay Packers of the NFL have been owned in a dispersed form by members of that Wisconsin community since 1935. Publicly, the owners state that municipal ownership would be too cumbersome and inefficient. Many minor league franchises, however, are municipally-owned, management is separated from local politics and the teams are run efficiently. I discuss some of the successful experiences with community-owned minor league baseball teams in Baseball and Billions. The real concern of baseball's barons is that public ownership means public accountability which, inter alia, may lead to open books. Open books means loss of control and that is where the real threat lies.

4. Baseball franchises are closely-held companies. They are either partnerships, subchapter S corporations or submerged subdivisions within large corporations. In no case are there stockholders to whom the top executives and owners are accountable, either to open their books or to show profits in order to boost stock prices or benefit stock options. Their accounting legerdemain is often either in the owners' interest for reducing tax liabilities or in their perceived interest to show smaller profits. One aspect of showing smaller profits or book losses is to plead poverty to the Players' Association at collective bargaining time or to the cities when stadium construction or a new contract is being discussed. Another aspect has been to argue before the U.S. Congress and the courts that Major League Baseball does not take advantage of its protected monopoly status. I detail the mechanisms of creative accounting in my written testimony and provide further information in Baseball and Billions.

5. There is no question but that there is a trend for ticket, concessions and parking prices to rise. Average ticket prices today for a major league game are close to $10. For a family of four to attend a game, buy food and pay for parking, the tab can easily run from $60 to $100. It is also true that since baseball plays roughly ten times more games than football, twice as many games as basketball and is played in a much bigger arena than basketball, that baseball ticket prices are not as high as in other sports. There is also a process of cable-ization and tiering of baseball game broadcasts that is limiting viewing access to millions of Americans. Together these developments are making it increasingly difficult for low and middle income fans to consume major league baseball. Congress can do something about keeping the national pastime accessible to all income groups. One option would be to legislate price controls. I do not recommend this. The preferred option would be to take action to increase competition in professional baseball. Removing the antitrust exemption would be one step in the right direction; as indicated earlier, I recommend complementary steps as well.

Senator Thurmond's Questions

1. I would like to respectfully suggest that the long discussion with ex-Commissioner Vincent and with Bud Selig on the question of the Commissioner's role is irrelevant to the question of baseball's antitrust exemption. The proposition that the Commissioner can stand above the owners and safeguard the long-run interests of the game has always been dubious; with the dismissal of Mr. Vincent it has been made manifestly absurd. In the pre-August 1992 conception of the Commissioner's office, the Commissioner was always hired by and dismissable by the owners. In this structural circumstance, the Commissioner could take marginal decisions, especially on issues of the game's integrity such as the use of drugs, without worrying about the owners' reaction, but substantial decisions, especially those affecting the game's economics, could never be made in a manner to undermine the owners' interests. Commissioners Chandler and Vincent, and perhaps Commissioner Kuhn, learned this lesson. Commissioner Landis, heralded as a czar of baseball, in fact, was unable to make the only important economic change to the game he attempted, namely, the restructuring of the relationship between minor leaguers and the parent club.

If the CEOs of Ford, Chrysler and GM came before this subcommittee and proposed that they be allowed to merge, but in exchange, they offered to hire a commissioner to oversee their behavior, I assume they would be laughed out of the Hart Office Building. I suggest that structurally the situation in Major League Baseball is little different that this.

To make matters worse, the owners have been pretty clear that they do not want any further interference from future commissioners on economic matters. It seems the commissioner will be given relative independence on "integrity" issues but little, if any, real power pertaining to labor relations or the game's finances. Such an arrangement would have the advantage over the previous state of affairs only in reducing the dissimulation and hypocrisy of a guardian commissioner, hired and fired by the owners.

2. I am not a lawyer and fear I cannot do justice to the legal complexities of Mr. Roberts' argument. I can only say that I have a high regard for Mr. Roberts' intelligence and his experience in the sports' industries. I believe there are aspects of professional team sports that could lead one to infer their leagues are a single entity, but there are other aspects (e.g., the separate ownership and unequal profitability of the teams) which would lead to the opposite inference. As an economist and social scientist I believe that reality is more complex than the single entity argument allows.

3. As I suggested in my response to Senator Metzenbaum, I think that if Congress repeals baseball's exemption and does nothing else it is uncertain whether or when the industry will become more competitive. I suggested a number of complementary measures, not requiring a heavy-handed approach, that, if implemented, would undercut the industry's monopoly power and end up benefitting everyone but the twenty-eight owners. I would also like to suggest that removing baseball's exemption would benefit the Congress which would thereby

demonstrate to the American people that it is capable of standing up to entrenched interests and of passing legislation that promotes equal treatment under the law for all professional team sports' leagues and for all U.S. industries.

4. The real challenge, it seems to me, is to find the best public policy approach to preserve and strengthen our national pastime. It does not matter whether the baseball industry generates $2 billion in revenue or $50 billion.

Again, I want to emphasize that it is preferable for Congress to remove the exemption than for Congress to do nothing. But Congress can do still better and this is why I recommend additional action. There is both a free market and regulatory way to proceed, and, again, either is preferable to no action at all.

The free market course is to compel baseball to break its four divisions into four separate business entities. The actual legislation might stipulate that no league can expand to beyond eight or ten teams. These new leagues could cooperate only on matters pertaining to playing rules, scheduling and post-season play; they could not cooperate on media contracts, collective bargaining and setting territorial rights. As business competitors, each league would attempt to have a franchise in the most viable locations. It would not take long before a new team appeared in Washington, D.C., Tampa/St. Petersburg, and Phoenix, or a third team appeared in New York. Leagues would also presumably compete for fan interest and loyalty. This would provide a check on ticket and concessions prices and on the expansion of pay television. Competition would begin to provide answers to many of the abuses and problems that currently afflict the game.

While I would welcome such legislation by Congress, I feel there is still a more preferable option. The problem with the market solution is that it might be too destabilizing. Teams, cities and leagues could go under. Players could be left, at least temporarily, without a team. Litigations may abound, challenging rules and boundaries of the new situation. It is one thing to have instability in goods' producing industries. If private money builds a factory and the factory shuts down, this raises different public policy concerns than if a longstanding baseball team belongs to a league that goes under. A large share of the citizens in the city identify with the team and the city has likely invested millions of dollars to support the franchise. Do we want the normal rules of the marketplace to determine the evolution of the baseball industry, a major part of the country's cultural heritage?

Some may answer in the negative to this question and then conclude that Congress should do nothing. This would be a mistake. Removing the exemption would provide a modicum of competitive pressure on the baseball industry without entirely restructuring it. Furthermore, an orderly process of addressing baseball's abuses could be legislated directly and simply. Cities should be given the right to buy their ball team before it is sold and moved elsewhere, and baseball should be required to follow a timetable of periodic expansion. The implementing criteria for this legislation could be worked out easily enough. I would favor an expansion to 40 teams by the year 2004 and a franchise assessment board, involving representatives from the interested parties and the

American Arbitration Association or someone agreed to by the parties, to determine a fair market price for a franchise.

One might object that if the government were to do more than simply lift the exemption then it is meddling too deeply in the affairs of the private sector. As an economist, I do not instinctively favor government involvement in the economy and I am painfully aware of the pitfalls of regulation, but I do recognize there are areas involving externalities and public goods that the private sector cannot handle efficiently on its own. To ignore this reality, in my view, is to be blinded by libertarian ideology as well as to do a disservice to the electorate. Some parts of the economy need to be regulated. Rather than running away from this fact, it is time that government confront the difficulties of regulation forthrightly. I believe the measures I propose constitute benign, not heavy-handed, public oversight of the baseball industry and that they will work in the best, long-term interests of preserving and strengthening our national pastime. Given the status quo of a protected monopoly, with presumed oversight by an employee of the owners, there is a compelling case for a new public policy approach.

Senator METZENBAUM. Thank you very much, Mr. Zimbalist. Mr. Gary Roberts.

STATEMENT OF GARY R. ROBERTS

Mr. ROBERTS. Like everyone else, I will thank the subcommittee for giving me this opportunity. I must say these hearings are more fun to watch on C–SPAN when you can go to the refrigerator once in a while.

My written statement outlines in some detail my views on the impact of baseball's renowned antitrust exemption, or exclusion, as I prefer to call it, on the public interest. I will briefly summarize these views here in my oral remarks.

I believe, unlike everybody else, apparently, which is not unusual, that the exclusion is largely irrelevant to the public interest, and that if Congress is concerned, as it should be, about the monopoly market structures that characterize professional baseball, and indeed every major league sport, then it should deal with those specific issues rather than simply repeal this insignificant legal anomaly and then hope that the Federal courts will uncharacteristically use antitrust law to remedy meaningful problems.

There are arguably four areas in which the exclusion protects baseball from the threat of significant antitrust enforcement; one, rules affecting players; two, rules affecting broadcasting; three, rules affecting the number, location, and ownership of franchises; and, four, the complicated relationships between the major and minor leagues.

For reasons detailed in my written comments, it is only with respect to the fourth, the minor leagues, that I think we could expect significant changes in baseball's structure or behavior if the antitrust exclusion were repealed. In fact, without the exclusion, there would probably be a substantial restructuring of the minor league system as we know it in a very short period of time. In fact, I think a lot of communities with single-A ball clubs today would not have baseball teams in the future without that exclusion. But other than that, what changes would occur and whether they would be good or bad for the public interest, I think, is unpredictable.0

So while there is really no theoretical justification for baseball's anomalous antitrust exclusion, there is also no practical justification, in my mind, for wasting the time, energy, and political capital trying to abolish it. On the other hand, I do believe that there are many serious problems in baseball about which Congress and the public should be very concerned, virtually all of which relate to the fact that major league baseball, like each of the major professional sports leagues, is an inherently wholly integrated partnership that possesses monopoly power in most of the markets in which it operates.

This extraordinary market power allows baseball to act in two general ways which are common to monopolies that injure the public. First, monopoly power allows baseball executives often to act in foolish and inefficient ways without the fear of market retribution that would face businesses in competitive industries. And, second, monopoly power allows major league baseball to exercise that power in a variety of ways to maximize profits at the expense of

those over whom it holds the power, particularly fans, communities, and taxpayers.

But it must be emphasized that neither acting stupidly nor merely exercising monopoly power is illegal under the antitrust laws. Antitrust law condemns behavior which creates or entrenches excess market power. It was not designed and it has no rational doctrinal structure to control either stupidity or the exercise of monopoly power. Thus, abolishing the antitrust exclusion, in my judgment, would simply subject baseball to the same kind of haphazard, inconsistent, and doctrinally unjustified litigation that the other major sports have been subjected to, but which has not caused them to behave generally any more in the public interest than baseball does.

As I see it, the major problems in baseball today that should concern Congress and the public interest include grossly inadequate revenue sharing, a woeful shortage of franchises to meet reasonable demand, and the accelerating shift of baseball telecasts away from free TV to cable, and eventually to pay cable and then pay-per-view.

Rather than simply turn the Federal courts loose on baseball with an antitrust weapon not designed or well suited for dealing with these problems, I would suggest that Congress consider specific legislation that targets them and the market structure that creates and perpetuates them.

I would be happy to discuss with you at greater length today or in the future some of the alternatives that would bring about meaningful change for the betterment of the public and baseball, but given my time constraints here and the little yellow light up there, perhaps it is better now simply to answer questions you might have for me. But suffice it to say here that, in my mind, simply abolishing baseball's antitrust exclusion would be quite unlikely to benefit the public one iota, and in some ways might even injure it.

[Mr. Roberts submitted the following material:]

BEFORE THE ANTITRUST SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE

Statement of Gary R. Roberts, Vice Dean and Professor of Law, Tulane Law School, New Orleans, Louisiana

December 10, 1992

On the Scope and Implications of Baseball's Antitrust Exclusion

I want to thank the Subcommittee for inviting me to share my views on a subject of long-standing interest to me -- the extent to which baseball's structure and operations are affected by the Supreme Court's thrice stated view that the game of baseball is neither interstate nor commerce and thus not subject to federal antitrust law.[1]

I have been involved in litigating, teaching, speaking, and writing about sports antitrust issues for the better part of two decades. From 1976 through 1983 I worked at the Washington firm of Covington & Burling with, among others, now NFL Commissioner Paul Tagliabue. My primary client was the National Football League for whom I worked on several major antitrust cases; I also did some work for the National Hockey League and World Championship Tennis. In 1983 I joined the faculty of Tulane Law School where I have taught sports law, antitrust, and business enterprises for ten years. I have been the vice dean for the past three years. Since 1986 I have also been an officer and director of the Sports Lawyers Association, and the editor-in-chief of and regular writer for its bimonthly journal, *The Sports Lawyer*. I often speak at

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[1] *See* **Federal Baseball Club v. National League**, 259 U.S. 200 (1922); **Toolson v. New York Yankees**, 346 U.S. 356 (1953); and **Flood v. Kuhn**, 407 U.S. 258 (1972). While the latter two decisions involved suits challenging baseball's lifetime reserve system (i.e., restraints on the labor market for players), the former involved alleged blatant acts of monopolization by the sole remaining team in the defunct Federal League against the recently united National and American Leagues.

sports law conferences, have written seven major law review articles and two book chapters on sports antitrust matters, and along with Professor Paul Weiler of Harvard Law School I have just completed the manuscript for a 1,000 page sports law textbook and supplement which will be published this Spring by West Publishing Company. I also regularly work with and am cited by the print and broadcast media on sports legal issues and often author columns in publications like *The Sporting News* and *USA Today*. In short, sports law, particularly sports antitrust law, has been my career for over sixteen years.

The value of eliminating the baseball antitrust exemption (which is more appropriately called the "baseball antitrust exclusion") depends on how baseball would be affected and constrained if it did not exist. Ascertaining this requires an exploration of how antitrust law would likely be applied to baseball. My conclusion is that while it is in theory unjustified to treat baseball differently from other sports, and while there are certainly problems in baseball of concern to the public and Congress, abolishing the exclusion would be unlikely to further the public interest.

Although baseball is treated differently under antitrust law than the major leagues in football, basketball, and hockey, the conduct of those leagues is not discernibly more pro-public than that of Major League Baseball. Furthermore, the application of antitrust law to these other major sports leagues over the years by the federal courts has been inconsistent, often unjustifiable, and generally counterproductive. Subjecting baseball to the vagaries of this confusing enforcement process cannot predictably result in benefits to the public interest. Instead of focussing on this largely insignificant antitrust exclusion, Congress would

do better to focus on the real problems in baseball today and to adopt legislation specifically targeted against those problems.

I. The Scope and Effects of the Baseball Antitrust Exclusion

The *Federal Baseball* holding has not been extended to any other sport.[2] Still, all of the often cited examples of "bad" behavior by baseball owners which purportedly justifies abolishing the antitrust exclusion are more or less found in all of the major sports. There is no reason to assume that simply changing baseball's antitrust status will result in public benefits. For example, contrary to the assertion in the November 30 issue of *Business Week* (p.42), it is very doubtful that without the exclusion "it would be easier for baseball-hungry cities to lure a team" -- any more so than football-hungry cities can lure teams today.

The reason that the behavior of baseball owners is not noticeably different than that of owners in other sports, even though they enjoy the antitrust exclusion, is twofold: (1) the exclusion is not as far reaching as many believe, and even as to those matters it does cover the owners' fear of its abolition effectively deters them from engaging in the most egregious conduct, and (2) the haphazard enforcement of antitrust law against the other sports leagues results in very little if any meaningful benefit to the public. The fact is that all of the major leagues engage in conduct contrary to the public interest, not just baseball, but this conduct generally is a lawful exercise of monopoly power, not the unlawful acquisition or entrenchment of that power, and thus antitrust law is not

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[2] *See* United States v. International Boxing Club, 348 U.S. 236 (1955); Radovich v. National Football League, 352 U.S. 445 (1957); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971)(Douglas, J., reinstating lower court injunction).

an effective vehicle to deal with it. When league conduct does involve the acquisition or entrenchment of monopoly power, the courts have been largely ineffective in using antitrust law to combat it and to diminish market power. Accordingly, there is no significant predictable benefit to the public from applying antitrust law to sports leagues, and so whether baseball has its exclusion is unimportant. The problem is structural, and the best way to benefit the public is to strike legislatively at the heart of that structural problem, not randomly ask courts to review the normal profit-maximizing behavior of leagues under laws not designed to deal with that behavior.

A. The Exclusion Does Not Cause Blatant Anticompetitive Conduct By Major League Baseball

The lower courts have narrowed the scope of the exclusion by holding in several cases that contracts between baseball entities (teams, leagues, or players associations) and third parties, even those relating to marketing baseball entertainment, will not be protected in suits against either the third party or the baseball entity under Sherman Act section 1.[3] The Ninth Circuit has held, however, that if the third party is another baseball entity in the minor leagues, the exclusion will still apply.[4] This suggests that while the scope of the exclusion is not limitless, it would probably be interpreted by most lower courts to give baseball entities

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[3] See Fleer v. Topps Chewing Gum & Major League Baseball Players Ass'n, 658 F.2d 139 (3d Cir. 1981)(contract with memorabilia merchandiser); Henderson Broadcasting Corp. v. Houston Sports Ass'n (Houston Astros), 541 F. Supp. 263 (S.D. Tex. 1982)(contract with broadcaster); Twin City Sports Service, Inc. v. Charles O. Finley (Oakland Athletics), 365 F. Supp. 235 (N.D. Cal. 1972).

[4] Portland Baseball Club v. Kuhn, 491 F.2d 1101 (9th Cir. 1974).

great latitude in structuring professional baseball and producing baseball entertainment without fear of serious antitrust litigation.

1. Player Rules

One area in which baseball is most certainly protected is in rules restraining only the player-labor market. This was the market specifically involved in both the *Toolson* and *Flood* cases. Also, because these player rules involve an exercise of monopsony power raising very tricky conceptual antitrust questions, they are more difficult than usual to analyze under standard antitrust principles.[5] (In my view, the difficulty of applying antitrust doctrine to internally adopted sports league rules and policies, particularly player restraints, was a major factor influencing seven justices in *Flood* to reaffirm the anomalous exclusion.) But the impact of the exclusion in the player restraint context is virtually nonexistent today given the extraordinarily successful use of the protections and processes of federal labor law by the Major League Baseball Players Association (MLBPA) in collective bargaining. It is hard to imagine that players or consumers would be any better off today with respect to the labor market if the antitrust exclusion were abolished.[6]

2. Relationships With Minor Leagues

Another area in which courts would probably find baseball protected is in the complex relationships between the major and minor

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[5] *See, e.g.*, Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984)(indicating that a program to fix the maximum price patients would be charged for medical services presented less antitrust concern because it tended to lower, not raise, prices to consumers).

[6] It is ironic that player restraints have since 1975 been far more restrictive in the National Football League which does not enjoy antitrust protection and has repeatedly faced antitrust litigation over its rookie player draft and restrictions on veteran free agents. Indeed, the relative success of the players associations in baseball and football suggests that the availability of antitrust suits against the league actually distracts attention away from more effective labor law remedies.

leagues. It is not my purpose here to delve into the myriad rules and contracts that create the structure of the major league-minor league relationships, but it is important to note that the baseball exclusion plays its most significant role in allowing the major leagues to maintain these relationships without fear of serious antitrust challenge. Thus abolishing the antitrust exclusion might lead to radical changes in the structure and operation of the minor leagues and could potentially alter the structure and behavior of all professional baseball, albeit in unpredictable ways. If the baseball minor leagues as now constituted are good from a policy standpoint, this would be good reason to continue giving baseball the special antitrust protection not needed by the NFL and NBA who have the colleges for minor leagues.[7] If, however, one believes that the current system is undesirable, simply abolishing the baseball antitrust exclusion and leaving the matter to judicial enforcement would be unlikely to bring about desirable results. Specific legislation mandating the needed changes would be far preferable.

3. Radio and Television

A third area in which baseball is arguably, but not necessarily, protected is in the area of broadcasting -- television and radio restrictions on member clubs or league television contracts with pay channel .

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[7] I believe that the existence of the minor leagues, coupled with the tight control of their structure and operation by the major leagues, effectively precludes the emergence of any upstart major leagues to compete against Major League Baseball. Barriers to entry in sports with no minor leagues are enormous enough for newcomers like the American Football League in the 1960s, the World Football League and American Basketball Association in the 1970s, and the United States Football League in the 1980s, but the existence of the baseball minor leagues makes entry so much more difficult that potential newcomers are deterred from even trying. Still, even if the current structure of the minor leagues were significantly altered, it is uncertain whether new upstart major leagues would be attempted, whether such a league would be successful, or whether such a league would on balance be beneficial for fans or the general public interest.

networks. (League television contracts for "sponsored telecasting" in all four major sports are already exempt by the Sports Broadcasting Act of 1961.[8]) Currently, however, unlike the National Basketball Association, Major League Baseball imposes no significant quantitative restrictions on its member teams. It does prohibit individual teams from selling television rights for individual games to cable companies (but not to over-the-air broadcasters) outside of a designated home viewing area. However, whether this restriction actually prevents a team that otherwise would do so from having any games televised somewhere, whether someone would challenge the restriction, whether a court would find the rule to violate antitrust law, and whether lifting this restriction would in fact benefit the public interest are all highly questionable. Given the complexities of television technologies and the effects of various broadcasting schemes on public viewing, it is far from clear that subjecting this limited restriction on team cablecasts to antitrust review would result in a benefit to the public interest.

Major League Baseball does have a significant television contract with ESPN, which arguably is not exempt under the Sports Broadcasting Act. However, the evening games shown under this contract almost certainly would not otherwise appear on a major network and thus get far greater exposure on ESPN to the benefit of the public. Furthermore, because of the politically volatile nature of sports broadcasting generally, it is unlikely that baseball owners would try collectively (as opposed to individually) to restrict teams or utilize pay channels in any ways that would significantly diminish viewership, and if they did I am confident

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[8] 15 U.S.C. §§ 1291-94.

that Congress would be quick to react. Thus, the impact of the exclusion in the broadcasting area is largely theoretical.

A final point about broadcasting. It is not at all certain that the *Federal Baseball* exclusion would be held by the courts to cover restraints of trade on broadcasting. The exclusion has been held to cover the structure and production of the game, but it has never been extended to the marketing and sale of broadcasting rights through the obviously interstate commercial media of radio and television. If in fact someone wanted to challenge baseball's restriction on team cablecasts outside the home viewing area, there is a significant chance that the courts would hold that the antitrust exclusion did not apply. If so, abolishing the exclusion would accomplish nothing in this area, except perhaps to encourage potential plaintiffs (whether or not they had a valid case) to bring suit.

4. Franchising and League Structure

The fourth and last major area in which the exclusion probably protects baseball is in franchising decisions -- namely in deciding how many teams there will be, where those teams will be located, and who will own them. An example is the National League's recent decision to reject the purchase and relocation of the San Francisco Giants by a group in St. Petersburg, Florida. It this area, however, in which antitrust law most clearly does not properly apply; franchising decisions are an exercise of monopoly power, but they rarely if ever create or entrench market power.[9] Thus, it is within this sphere of decision-making that

[9] One exception to this would be if a league expands in reaction to an upstart league's efforts to put a franchise in an attractive unoccupied community. Such targeted expansion can disrupt the operations of the upstart league, prevent it from gaining a toehold in attractive communities, and possibly weaken its ability to

there is the greatest chance for courts to create much mischief to the detriment of the public by misusing antitrust law in unjustified and often highly political ways, as happened in the infamous *Oakland Raiders* case a decade ago in California.[10] It is the substantial potential for misuse of antitrust law in this type of case that causes me to oppose simply abolishing baseball's antitrust exclusion.

It should be noted that the greatest impact of the baseball antitrust exclusion flows from how it alters the risk assessment of baseball executives and thereby causes them to vary their conduct. Evidence suggests that major league owners generally believe that if they were to engage in blatantly anticompetitive or politically unpopular conduct, the courts and/or Congress would probably intervene and abolish the exclusion, even if antitrust law would not likely apply to that conduct. For example, I do not believe that the major league owners, if faced with a competing upstart league, would employ tactics like were used against the Federal League before the *Federal Baseball* case in 1922. Thus, the risk of losing the exclusion may deter improper conduct by baseball owners (with the possible exception of their relationships with the minor leagues) more than if the exclusion did not exist.

All of this is not to suggest that baseball does not benefit from the exclusion. By allowing major league owners to maintain control over the minor leagues and to make franchising decisions without the serious risk

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survive as a viable competitor. However, in the most blatant case of this happening -- the NFL's expansion into Dallas in 1960 and Minneapolis/St. Paul in 1961, simultaneously with the start up of the American Football League, antitrust law was unable effectively to deal with it. *See* **American Football League v. National Football League**, 323 F.2d 124 (4th Cir. 1963).

[10] *See* **Los Angeles Memorial Coliseum Comm'n v. National Football League (Raiders I)**, 726 F.2d 1381 (9th Cir.), cert. denied 469 U.S. 990 (1984); and **Raiders II**, 791 F.2d 1356 (9th Cir. 1986), cert. denied 484 U.S. 826 (1987).

of expensive and unpredictable litigation, the exclusion is a substantial benefit to the owners. But whether these owner benefits injure the public interest is questionable. One could make a case that the current minor league structure on balance benefits the public (although the opposite case can be made as well) and that subjecting baseball to the vagaries of often politically motivated and/or confused courts in franchising cases would cause more injury to the public interest than good. Thus, I believe the exclusion's impact on the public interest is not sufficiently clear to justify its abolition, at least not without specific guidance to the courts on how to apply antitrust law in specific cases.

B. Applying Antitrust Law To Professional Sports Leagues Does Not Predictably Benefit The Public Interest

The recent matter which has focussed so much attention on these these hearings was the National League's rejection of the sale and transfer of the San Francisco Giants to investors in St. Petersburg, Florida. But that this incident should be linked in so many minds to the subject of these hearings illustrates why simply abolishing the exclusion would not serve the public interest. Had baseball been subject to the same type of antitrust challenge in St. Petersburg that the NFL faced in the *Oakland Raiders* case, it almost certainly would have faced a prolonged and expensive legal battle in a politically biased forum that might have resulted in a distorted application of the law, the creation of bad precedent, and injury to the public interest. This was certainly the legacy of the *Oakland Raiders* case, whose legally unjustified result and unexplainable precedent ushered in the modern era of great uncertainty over the ability of leagues to control franchise relocations and thereby

triggered the now frequent use of relocation threats by owners to cause bidding wars between cities at the expense of taxpayers.

In the current Giants controversy, just as in the *Oakland Raiders* case, antitrust law could not sensibly be applied to cause a result more in the public interest than the decision of the league owners. In both cases, the league's decision to require a franchise to remain in its current home city led to charges that the decision was a section 1 "conspiracy . . . in restraint of trade" by the league owners. But no sensible antitrust principle can justify such a claim that would not equally apply to the inevitable lawsuit by interests in the other city if the league had voted the other way. Thus, in these cases a league (other than in baseball) is faced with a Catch-22 situation -- whether it approves or disapproves of the move, it will be sued in the disappointed city in an inevitably highly charged emotional and political environment.[11] This situation cannot predictably lead to results that generally benefit the public interest.

The fact is that there is no sensible set of principles under current antitrust doctrine to explain when or why a joint venture partnership like a sports league (even if it happens to have monopoly market power) might violate section 1 of the Sherman Act if it grants or rejects a proposal to expand its membership, to allow a change in ownership of a member franchise, or to allow the relocation of a member franchise's home games. Basic partnership/joint venture law makes every partner in a joint venture bound by the terms it agreed to in the founding

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[11] Of course, in some cases a league could do what the NFL did when the Philadelphia Eagles threatened a move to Phoenix in the mid-1980s -- that is, before it votes bring a declaratory judgment suit in the city it will support asking the "home town" judge to declare that it is not illegal for the league to require the team to play in that city. But this is simply allowing procedural posturing rather than a rule of law to bring about the appropriate outcome.

venture contract (the league constitution), and imposes a fiduciary duty on every partner not to compete against the venture or to seize any venture assets (including business opportunities) for its own unilateral benefit without the venture's approval. Thus, it is axiomatic that a lawful joint venture has the inherent right to determine how many partners it will have, who those partners will be, and where or how those partners will do business under the name and trademarks of the venture.[12] To suggest that it might violate anticonspiracy rules (that prohibit competitors from combining to create or entrench market power) for joint venture partners to exercise these inherent legal rights is without merit. Judicial rulings to the contrary, such as those in the *Oakland Raiders* case, simply achieve politically desired results at the expense of creating confusion and encouraging expensive groundless litigation in future cases, which then leads sports leagues to operate more out of an interest to avoid litigation than to do what is best to enhance the quantity and quality of its entertainment product.

It is precisely because I do not believe it to be in the public interest for sports leagues to be subject to misdirected, confusing, and politically motivated ad hoc regulation by federal courts that I have often argued that leagues should be treated as single firms incapable of internally

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[12] Of course, this would not be true if the venture were in fact a cartel -- a collection of inherent horizontal competitors whose coming together to form the organization is itself illegal. Such an organization is illegal in its inception, and one need not judge the legality of its subsequent behavior. *See* **United States v. Timken Roller Bearing Co.**, 341 U.S. 593 (1951). However, because the joining of sports teams in a league creates an entity to produce a valuable product that could not be produced by the teams separately, no one has ever seriously suggested that leagues are unlawful in their inception. Thus, they should be accorded the same lawful authority to structure and operate their joint venture business as that given to any partnership, except to the extent their decisions create or entrench monopoly market power. *See* **Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.**, 472 U.S. 284 (1985).

conspiring within the meaning of section 1 when the governing body of the venture's partners adopts rules or makes decisions relating solely to the structure and operation of the league itself.[13] Since abolishing the baseball antitrust exclusion would cause baseball's operating decisions to be subject to the same type of random, unpredictable quasi regulation by home town judges as the NFL faced in the *Oakland Raiders* case, I oppose that abolition.

II. The Real Problem

I do not argue that there is not a problem with the current market structure of baseball, or any major league sport. I only argue that the current manner in which antitrust law is applied to sports leagues is not the proper way to deal with that market problem. The real problem is that in many markets in which major sports leagues operate they have enormous market power. Coupled with the inherently highly decentralized structure of a sports league and the highly athletically competitive nature of the league's entertainment product, this has led many lower courts and legal observers to oppose granting "single entity" status to leagues.[14] "Better they be subject to arbitrary, ad hoc judicial

[13] To the extent such rules or decisions create or entrench excess market power, they could properly be challenged as acts of monopolization or attempts to monopolize by the league under section 2 of the Sherman Act.

[14] It should be noted, however, that several judges have supported finding leagues to be single entities for section 1 purposes, at least in the context of a specific case. *See* **North American Soccer League v. National Football League**, 505 F. Supp. 659 (S.D.N.Y. 1980)(trial court decision reversed on appeal at 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982)(Rehnquist, J., dissenting); **Raiders I**, 726 F.2d at 1401 (9th Cir. 1984)(Williams, J., dissenting); **San Francisco Seals v. National Hockey League**, 379 F. Supp. 966 (C.D. Cal. 1974). Furthermore, a recent Seventh Circuit opinion strongly hinted that it might have found the NBA to be a single entity had the league raised the issue. *See* **Chicago Professional Sports v. National Basketball Ass'n**, 961 F.2d 667 (7th Cir.), *cert. denied*, ___ S.Ct. ___ (1992).

regulation of their use of monopoly market power than no regulation at all" goes the argument. I don't agree with this argument's implicit view of the proper role of law, but regardless I believe that there are better ways to cure the evil of monopoly market power than subjecting leagues to the arbitrary, ad hoc use of anticonspiracy principles that cannot rationally be applied to the internal rules of an inherently totally integrated joint venture partnership.

What the courts largely have done to date is to use section 1 randomly and unpredictably to overturn league exercises of monopoly power, not more properly to use section 2 to attack behavior that actually causes or entrenches that market power.[15] Thus, rather than repeal baseball's antitrust immunity, I would urge Congress to explore legislation that would standardize and sensibly define the way antitrust law applies to all professional sports leagues, and that also then either regulates some of the operating decisions of leagues and/or forces upon them a market structure that greatly mitigates their excessive market power.

The source of the problem creating the current disappointment and anger in St. Petersburg is not that the National League owners "conspired" to leave a team in its current home city. Had the owners decided to let the Giants move there would have been just as much disappointment and anger in Northern California, the same calls for these hearings by California politicians, and the prospect for the same kind of politically biased section 1 antitrust litigation in San Francisco. The real problem is

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[15] The only case in which a court utilized section 2 to bring about meaningful reform in professional sports, through a preliminary injuction that led to a settlement, was **Philadelphia World Hockey Club v. Philadelphia Hockey Club**, 351 F. Supp. 462 (E.D. Pa. 1972)(holding that the NHL's lifetime reserve system would likely be found to allow the NHL to monopolize professional hockey and enjoining its use).

that there are not enough teams to satisfy the market demands of all the major metropolitan areas in the country that can reasonably support one. When there are two markets the size of the West San Francisco Bay and Tampa/St. Petersburg areas and only one available team, one community is going to be bitter and disappointed. The solution, however, is not to subject the league's decision as to which community gets that franchise to section 1 antitrust scrutiny by a judge and jury in the disappointed city -- i.e., to attack only the symptom of the underlying market power problem. The solution is to bring about the creation of enough franchises within a reasonable period of time to satisfy the reasonable demand for them -- i.e., to attack the source of the problem.

The shortage of franchises to meet reasonable demand reflects the monopoly power of existing major sports leagues over the nationwide market in which franchises in each sport are sold. If a league faced meaningful market competition, it could not afford to let attractive communities go without a team lest the competitor take and entrench itself in those communities first. Further, the unique ownership structure of a sports league compounds the problem of the league's monopoly market power.

If major league baseball were owned by a single person or group of stockholders, its total profitability would be enhanced by occupying every attractive territory in which no major league baseball team is currently operating. But because the peculiar ownership structure of a league requires that for every additional team there be an additional partner who will then share the league's total profits, it is not necessarily true that even a new profitable franchise would increase profits per partner. Thus, league owners rationally will not expand unless the profitability of

a new team would be great enough to justify an up-front franchise fee sufficient to compensate the existing franchise owners for a decline in their profits. But even in cases where such franchise fees could be charged and paid, major league owners will usually resist expansion because the fewer the number of franchises there are, the more each franchise is worth because of bidding wars between cities to attract or keep them. It is a classic example of how the market value (price) of something (a franchise) can be inflated to monopoly levels by artificially reducing its supply well below natural market demand.

Thus, under current market constructs, there will always be far fewer franchises in each professional sport than there are cities that could reasonably support one. How many fewer is a difficult question to resolve because the size a market must be to support a team in a league with a relatively unrestrained internal labor market (which over the long run forces every team to pay approximately the same player salaries in order to be athletically competitive) depends to a large extent on the degree to which the league is politically willing to share revenues. If every dollar of revenue in a league were shared equally by every team in the league, in theory every community in which a team would be profitable could reasonably support one and be athletically competitive. On the other hand, if no dollars are shared, only a few huge metropolitan areas could probably support viable competitive teams. In fact, given the very low amount of revenue sharing in major league baseball today, it may be that the market does not justify more than the current number of teams (if that many), although some of them are probably in the wrong cities.

In short, I see the major public policy problems in baseball today to be the woefully inadequate degree of revenue sharing and the far too few number of franchises, along with the accelerating shift of televised games off of widely-viewed free or cheap channels to more expensive pay cable or pay-per-view channels (which is another issue altogether[16]) -- all three of which conditions exist and will continue uncorrected because of the enormous market power that Major League Baseball enjoys in many of its operating markets. None of these problems, however, will be cured by simply abolishing the antitrust exclusion and subjecting baseball to the same kind of random antitrust enforcement to which the other major sports leagues have been exposed. They are the effects or symptoms of market power, not the causes of it which antitrust doctrines are designed to address.

Thus, if Congress is to solve or mitigate these "real" problems, it must attack the source. This could be done in one or some combination of three ways: (1) legislatively mandate a minimum level of revenue sharing (i.e., a maximum revenue disparity among clubs) for every major professional sports league, require expansion on a reasonable timetable to some set number of teams (probably around 36), and set a minimum percentage of televised games that must be on over-the-air and/or "basic package" cable channels; (2) create a regulatory body of some type empowered to correct structural market problems; or (3) require each major sports league to be split into two to four wholly independent leagues with equal market power and governed by wholly independent

[16] Because this shift is taking place at the individual club level, it poses even no arguable section 1 conspiracy issues. However, it is another classic exercise of monopoly power -- restricting output (the number of viewers) in order to charge much higher monopoly prices to the far fewer viewers willing to pay those prices.

governing boards, commissioners, etc. with no lawful right to cooperate in anything other than the staging of all-star, post-season championship, and possibly regular interleague games. The various pros and cons of each of these approaches are many and would need to be explored in detail before choosing the best one or combination of them.

Conclusion

The baseball antitrust exclusion is not a cause of any easily identifiable injury to the public, primarily because it is impossible to predict that the courts would apply antitrust law to baseball in a way that would enhance that public interest. Furthermore, the fear of losing the exclusion may effectively deter baseball owners from engaging in egregious conduct, some of which antitrust law might not affect even if it applied. The exclusion also has the benefit of protecting baseball from the expensive, behavior-distorting, and often counterproductive effects of being subjected to ad hoc, arbitrary judicial regulation under the guise of enforcing section 1 anticonspiracy principles ill suited for reviewing the internal decisions of an inherently integrated joint venture partnership.

I also believe that while treating baseball differently from the other major league sports is anomalous, there is very little political interest in changing the current exclusion. In the first place, because antitrust enforcement by the courts is so random and unpredictable, there are no easily identifiable benefits from abolishing the exclusion, and thus there will be little political support for doing so. Furthermore, any incident triggering immediate political passions against the exclusion, like the

current St. Petersburg-San Francisco dispute, will invariably create equally strong countervailing political interests. It would be legally and politically counterproductive to propose abolishing the exclusion in a context where the interests of some cities are pitted against the interests of other cities. The chances of passing some meaningful legislation will be much greater if the Subcommittee can propose something with more obvious benefits that might be able to muster a political consensus.

Thus, I recommend that Congress disregard the largely insignificant baseball antitrust exclusion and instead focus on the real problems affecting the public interest in professional baseball today, most specifically the lack of adequate revenue sharing, the fewer than justified number of franchises, and the shifting telecasting practices of the teams. The ultimate legislative ways of doing this are varied and need careful further study, but I am confident that focussing political attention in this fashion would have much greater long term benefits for fans and the public generally than wasting time and political capital on a futile effort to abolish the exclusion, an effort that even if it succeeded would create more legal confusion and chaos than predictable benefits.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Gary Roberts
Tulane Law School
6801 Freret Street
New Orleans, LA 70118-5698

Dear Mr. Roberts:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions posed by Senator Thurmond by no later than Monday, January 25, 1993:

1) Please comment on what you consider the appropriate role of the Baseball Commissioner to be, especially in the context of an antitrust exemption?

2) Please state, as succinctly as possible, who will benefit from repeal of the antitrust exemption and how?

3) As I understand it, you believe that repealing the antitrust exemption is either not necessary and/or not sufficient to cure the structural problems inherent in the business of baseball. You propose additional action that would have to be undertaken either legislatively or in the form of regulation. At a time when de-regulation is thought to be the better approach for all but the most urgent problems, how do we justify federal government regulation of an entertainment industry such as baseball? Are we not better off repealing the antitrust exemption and leaving the outcome to market forces?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

Tulane

Tulane Law School
Joseph Merrick Jones Hall
Tulane University
New Orleans, Louisiana 70118-5670
(504) 865-5933
FAX (504) 865-6748

Vice Dean

January 22, 1993

Sen. Howard M. Metzenbaum, Chair
Senate Antitrust Subcommittee
Hart Senate Office Bldg.
Washington, DC 20510-6275

Re: Hearings on Baseball Antitrust Exemption

Dear Senator Metzenbaum:

I received your letter of January 11 asking for responses to three specific questions posed by Senator Thurmond in connection with the hearings held last December 10 on baseball's antitrust exemption. This letter attempts to answer those questions.

Question 1: Please comment on what you consider the appropriate role of the Baseball Commissioner to be, especially in the context of an antitrust exemption.

The commissioner should not simply be a CEO for the owners, but rather should be empowered to act in the best interests of the game, which means taking into account and balancing the interests of owners, players, communities, and (most importantly) fans. It is, however, politically unrealistic to expect a commissioner elected only by owners to act contrary to the best interests of those owners. For this reason, I would support a rule, perhaps legislatively imposed, that requires the commissioner of any major sports league to be approved by the club owners, the players union, and a designated Senate committee, and that removal of a commissioner before the end of his/her stated term would also require the approval of at least two of these three groups. Only in this way would commissioners truly be politically positioned to govern the game instead of primarily to do the owners' bidding.

If the above suggestion were adopted, the authority of commissioners to act in the best interests of the game would be real, not illusory, and I would support extending the baseball antitrust exclusion to every professional sports league governed by such an independent commissioner. If there is not such an independent commissioner, my view is that the role of the commissioner is not linked to the existence of the baseball antitrust exclusion.

One could argue that since the antitrust exclusion is a benefit to baseball owners, its continuation should be made contingent on baseball's

creation of a strong commissioner. However, a commissioner that is hired and can be fired by the owners alone will be "strong" or independent in appearance only, not in fact. Thus, this would be a meaningless quid-pro-quo. I do not believe that how Congress decides to deal with the antitrust exclusion should be linked in any way to the role assigned by club owners to the commissioner, unless it somehow involves a commissioner whose appointment and removal involves the union and Congress as well as the owners.

Question 2: Who will benefit from repeal of the antitrust exemption and how?

There are only two groups who would be likely to benefit from repealing baseball's antitrust exclusion: (1) lawyers who would make lots of money litigating challenges to baseball practices, and (2) the baseball players association which could use the threat of antitrust litigation as a means to increase its collective bargaining leverage. More generally, anyone dealing with baseball could conceivably use the threat of antitrust litigation to enhance its bargaining position. Whether such a shift in relative bargaining power would be good or bad for the public interest would depend in each case on the specific context in which it occurred.

Otherwise, I do not know who will benefit from repealing the antitrist exclusion, and I do not believe anyone really knows no matter what they say. Because of the haphazard, often political, and usually assinine way in which the courts have applied antitrust law to this uniquely structured industry, we simply cannot predict how any challenges to various league practices would be resolved, let alone what practices would actually be challenged.

Question 3: At a time when de-regulation is thought to be the better approach for all but the most urgent problems, how do we justify federal government regulation of an entertainment industry such as baseball? Are we not better off repealing the antitrust exemption and leaving the outcome to market forces?

We are not better off repealing the exemption and leaving the outcome to market forces because the outcome will not be dictated by market forces! The outcome will be dictated by the way in which the federal courts choose to apply (or how the parties predict the courts will likely apply) the antitrust laws to a uniquely structured business that I believe is a natural monopoly. Historically, the courts have done a terrible job of applying antitrust to other professional sports leagues, and I see little reason to hope the performance will improve for baseball. Antitrust regulation of professional sports leagues will simply not predictably benefit the public interest.

As for the current political preference for de-regulation, I can only say that sometimes political fads go overboard. I agree that the market is generally a better long term regulator of an industry than government regulation, although there are often short-term frictional problems or

national security interests that an unregulated market simply cannot properly accomodate. However, in industries where market forces do not and will not result in competitive pricing and output decisions, especially natural monopoly industries like the major professional sports, regulation is appropriate. To the extent the current political wisdom is to oppose all but the most vital types of regulation, in my judgment it is wrong.

If Congress is interested in stopping the artificial restriction of professional sports franchises, forced monopoly subsidies by communities to sports teams, and monopoly pricing of sports contests, it will not do so by turning baseball over to the courts for haphazard antitrust enforcement. Other professional leagues are subject to the antitrust laws, and their track record on these consumer and public interest issues is no better than baseball's. What is needed to correct these practices that injure the public is to regulate them in some fashion. If that is politically unfashionable, so be it; but then Congress should quit complaining about the problems and simply accept them as the inevitable result of its refusal to regulate natural monopoly industries.

I hope this adequately responds to your inquiries. If you need any further information or input, please don't hesitate to contact me.

Respectfully,

Gary R. Roberts
Vice Dean & Professor

Senator METZENBAUM. Thank you very much.
Mr. Noll.

STATEMENT OF ROGER G. NOLL

Mr. NOLL. Thank you, Senator. The last time I appeared before this subcommittee was 20 years ago, a little over 20 years ago, when the issue was an antitrust exemption for professional basketball, and this committee, in its infinite wisdom, decided not to grant it. I hope it will be consistent this time.

I do not believe that the baseball antitrust exemption is valid, although I share some of Gary's concerns that it is not all that important. Let me say specifically how I think it is important. The single most important effect is what Don Fehr testified to before us; that is, if, in fact, the purpose behind the reopening of the collective bargaining agreement in baseball is, in fact, to impose unilaterally a more restrictive system in the player market after, say, a year's worth of negotiations that get nowhere, then the baseball players do not have available to them what the basketball players and the football players used in the last couple of years; namely, decertify as a union, become a professional association, and use antitrust to deal with the issue.

That is an important effect because, historically, strikes in professional sports have not worked. They do not work because the fact is the players have no reasonable alternatives and there is nothing available to them to cushion them from the enormous loss of income that derives from the strike. Unions in sports are congenitally weaker than unions in the rest of the economy, in part because of the diversity of interests among the players, but also in part because the players have very, very short time horizons. If you strike for a year, that means something like 25 percent of the players have just lost half their career. So strikes are not as effective a weapon in collective bargaining as they are in other industries.

I would like to devote the rest of my remarks to what I believe is an extraordinary myth that has been perpetuated since the appointment of Judge Landis as the commissioner of baseball 70 years ago, and that is that somehow a strong commissioner solves the public interest problems associated with professional sports.

The fact is you could easily separate out the commissioner's duties into, as Mr. Selig did, those having to do with the integrity of the game and those having to do with the business management of the game. There is no way on God's Earth that any court is ever going to find an antitrust violation to fine or suspend a player or an owner for gambling or for being involved in drug trafficking.

Indeed, in other sports with antitrust exposure, exactly these events have transpired in the past and nothing has come of it. There has not been antitrust litigation. The integrity-of-the-game issues have absolutely nothing to do with antitrust immunity.

The second part is the business affairs, and the fact remains if you have an antitrust exemption, it is because the Government has said it is OK to manage yourself as a cartel; it is OK to behave in a way that maximizes your leverage, whether it is over cities, whether it is over broadcast networks, whether it is over player unions, whether it is over fans. That is OK.

What the individual owners will see, then, is a necessity to have a commissioner to resolve the disputes among themselves that get in the way of collective profit maximization, and that is exactly what commissioners have done throughout the history of sport.

Now, Judge Landis, in fact, attempted a major reform of professional baseball that the owners did not think was in their business interest, and he was unable to carry it off; namely, the minor league system, which Gary says is the single most important part of the antitrust exemption—he tried to prevent the owners from establishing the current minor league rules. He said it was not in the interests of baseball to have the kind of monopolization of the minor league system that baseball currently enjoys. He tried to put an end to the farm system of minor leagues and the owners would not allow him to do it.

In other words, if a commissioner, even as strong a commissioner as Judge Landis, attempts to go against the collective profit-maximizing interests of a sport, the owners will simply not abide by it and there is no legal power or authority for a commissioner to prevent that, and that was the case of Judge Landis. They didn't have to fire him; they just ignored him.

Now, finally, as to what is the real public policy issue here, the real public policy issue is both San Francisco and St. Petersburg ought to have baseball teams, and so should a dozen other cities. Indeed, in addition to that, several of the larger cities should have two or three more. There is enough market demand out there to have on the order of 40 to 50 baseball teams. Why don't we have these teams? It is in my testimony, but Fay Vincent told you why and Bud Selig told you why, because the way to keep up those $100 to $200 million franchise values is, in fact, to play hardball with Mayor Jordan and hardball with St. Petersburg and hardball with players associations.

Thank you.

[Mr. Noll submitted the following material:]

Statement of Roger G. Noll
Before the
Subcommittee on Antitrust, Monopolies and Business Rights
Committee on the Judiciary
United States Senate

December 10, 1992

Once again, the baseball exemption -- the great anomaly of antitrust -- is before Congress. I thank the committee for inviting me to explain why I believe that the antitrust laws ought to apply to baseball, and ought to be vigorously enforced in all professional sports.

The message of my testimony is simply stated: all professional sports, including baseball, ought to be subject to the antitrust laws, but lifting the antitrust immunity from baseball is unlikely, by itself, to solve some of the problems that cause Congress regularly to investigate the sport.

In other professional team sports, the most significant effect of antitrust exposure has been on the rules that govern competition among teams for players. And in player relations, baseball has negotiated more liberal rules than exist in hockey or existed in football before the recent McNeil v. NFL litigation in Minneapolis. Practices regarding expansion, potential entry of new leagues, revenue sharing, team relocation, stadium arrangements, and broadcasting rights are not materially different among the sports. Thus, on the basis of the performance of other team sports under antitrust scrutiny, one can not make a case that, from the standpoint of consumers (sports fans), lifting the baseball antitrust exemption would, by itself, solve all of the anticompetitive problems of baseball. Nevertheless, I strongly urge Congress to eliminate the baseball exemption. To do so is a necessary, but not sufficient, action to ameliorate the monopolistic practices in the sport.

The initial rationale for the baseball exemption was probably not good law in 1921, when the Supreme Court ruled that the antitrust laws did not apply to baseball because baseball was not engaged in interstate commerce. Today there can be no doubt that this basis for the exemption is ludicrous. Baseball derives more than half of its revenue from various forms of broadcasting (radio and TV, local and national, off-air and cable), all of which are not only interstate in character but which are regulated by the federal government. Even the program acquisition process (including sports programming) for television networks is regulated by the Federal Communications Commission. Hence, it is ridiculous to contend that baseball is beyond the reach of federal legislation.

The primary defense of antitrust exemptions in sports is the claim that cooperation among owners benefits both players and sports fans. Examples of this argument are the following:

* Monopsonistic practices in the player market protect the balance of competition in a league, causing games to be more exciting, interest in (and, hence, revenue to) a sport to be greater, teams in smaller markets to have a chance of winning, and therefore both fans and players to be better off;
* Collective decisions about franchise locations enable owners as a group to prevent a single owner from greedily pursuing the highest possible price for a team, even if that means transferring the team from a city that supports it; and

* Cooperative decisions about the number of teams in a league prevent the number of teams from becoming so large that the talent pool is diluted, diminishing the quality of play, again risking competitive imbalance, and thereby reducing fan interest.

In addition, owners make two more arguments that pertain to their own financial welfare:

* Baseball is a precarious business financially, and any significant change in its institutional structure risks causing financial failure of some teams, especially in small cities; and
* Lifting the exemption would subject the sport to a flurry of litigation that would be both costly and wasteful.

None of these arguments is a valid defense for retaining the antitrust exemption. Although I question the validity of each of these claims, the most important reason that these arguments do not amount to a defense of the exemption is that they reflect a misconception of the true implication of antitrust liability.

The Nature of Antitrust Exposure

All of the important antitrust cases in professional sports during the past two decades have analyzed the practices of sports leagues according to the "Rule of Reason" test. That is, in order for a sports league to be found to have violated the antitrust statutes, plaintiffs have had to show that, first, the practices of the league had a significant anticompetitive effect, and second, that these practices did not have a reasonable business justification in that they did not produce an offsetting efficiency advantage. Antitrust harm (or damage) arises only if a practice leads to an anticompetitive effect that is more important than its beneficial effect. Consequently, all but the last of the reasons given for the antitrust exemption, if true, would constitute defenses against an antitrust complaint. Hence, they constitute reasons why baseball would not be found guilty of violating the antitrust laws, rather than reasons why it should be exempt.

The final reason -- the wasteful costs of defending against antitrust complaints -- has one element of truth: the litigation costs of baseball would be very likely to increase if its antitrust exemption were lifted and if it refused to change some of its business practices. But that is not because these cases would be frivolous. Indeed, federal courts have a great deal of experience in dealing with frivolous antitrust complaints. Some antitrust complaints in other industries have an invalid basis, usually of one of two forms. First, an antitrust issue is often raised inappropriately in a case that actually is about some other issue. Second, a disappointed owner of a failed business sometimes believes incorrectly that the failure is do to anticompetitive actions by competitors, and so files an invalid complaint. Courts have learned how to recognize most frivolous complaints, and readily dismiss them or grant summary judgement. Thus, the argument that baseball will suffer from frivolous complaints does an injustice to the judicial system, and constitutes no better a case for exempting baseball from antitrust than for repealing the antitrust statutes altogether.

The real reason baseball is likely to face increased litigation costs is that there is substance behind the complaints that would be filed against the sport, and that baseball is more likely to resist these complaints in court than to change its

practices to be in conformance with antitrust requirements. Baseball's business justifications for its anticompetitive practices have already been litigated with respect to other sports, and the courts have consistently held that these claims are invalid. Sports leagues have persistently failed to make a convincing case in court that their anticompetitive practices are necessary for the continued provision of high quality professional team sports. Baseball wants to avoid this litigation not because it would be frivolous and wasteful, but because it would be likely to lose.

The Business Justifications

When considering the business justifications for baseball's anticompetitive practices, two important aspects of the baseball business must be kept in mind. First, the sport is not in a precarious financial circumstance, and second, even if some significant number of teams were on the verge of economic inviability, their financial circumstances are determined by the revenue-sharing and team-location rules of the sport, not by the basic economic health of the industry.

To understand the economics of any professional sport, one simply has to compare the revenue stream with the underlying economic costs. In so doing, one should keep separate the earnings of the players and the other direct costs of operating a team: travel, baseball equipment, ticket sales, ballpark maintenance, etc. Owners, players, managers, and the principal front office personnel differ from secretaries, ticket takers, groundskeepers, and manufacturers of baseball equipment in one very important respect. The latter group earns wages and profits that are determined in a much broader market than just baseball, while the earnings of the former group depend completely on the financial status of the sport. Player salaries, manager salaries, and owner salaries and profits are determined solely by the willingness of fans to buy tickets, watch or listen to game broadcasts, and buy concession products. If baseball revenues go down, all of these groups will make less money. Thus, the financial viability of baseball is governed by the answer to the following question: Are baseball revenues, net of the direct cost of staging games, sufficient to keep players and managers in the sport with enough left over to cause business people to want to own a team?

The answer to this question is very obvious. If a baseball team takes in $50 million, and must spend $10 million for travel, stadium maintenance, equipment, ticket sellers, and even a minor league subsidy, that leaves $40 million to be divided among about 50 people (players, coaches, owners, executives). Obviously, this is more than enough to keep everyone in the business, and to make the sport financially viable. An average take of $800,000 each ought to be sufficient to maintain their attention.

By far the most important component of the costs in any team sport is the cost of players. But these costs are driven by revenues. In the 1985 negotiations with the baseball players union, the owners argued that their financial position was precarious on the basis of a projection of future costs and revenues. Their projection assumed that player costs would increase by fifteen percent per year, but that their revenues would grow by only eight percent annually. The problem with these projections was not just that they were wildly incorrect -- to the tune of several hundred million dollars. The key problem is that the projections reflected a fundamental misconception -- and one that still permeates the public discussion of the sports business. This misconception is that player costs are unrelated

to revenues -- that somehow a baseball superstar could still command a $5 million salary if revenues fell in half.

In reality, baseball salaries -- and player salaries in other sports and franchise values -- are driven by revenues. Owners pay players because players, in Bill Veeck's immortal phrase, "put fannies in the seats." More fannies (and more eyeballs glued to the television screen) translate to higher salaries. Baseball will not become financially unviable because of rising player salaries, for player salaries will simply adjust to whatever changes occur in the revenues of the sport. As all baseball players will readily admit, if a financial crisis hit baseball, and so all salary offers next year were ten percent less than last year, nearly all players would still be in the sport, and the game would go on as before. Indeed, this circumstance is almost precisely what happened in baseball in the mid-1980s when the owners engaged in salary collusion. Players were offered far less than one would have predicted, given the trends in revenues, yet the players continued to play. Then, when the owners lost the collusion case and a competitive market for veteran players was restored, salaries returned to their long-term trend. The importance of this episode is that it confirms a fundamental fact: by far the most important cost item to a baseball team is player salaries, and this is driven by revenues. Hence, unlike almost any other business, where salaries are driven by a much broader market, baseball's financial viability is remarkably secure. Its most import cost item simply adjusts to accommodate any change in revenues.

Although the entire sport is financially viable, all sports, including baseball, face the possibility that some teams may not be viable. In baseball, a persistently weak team does not do anywhere near as well financially as the average team. But two important facts must be kept in mind about this circumstance.

First, no teams are so weak financially that they cannot command a positive market price. That is, given the current financial performance of baseball, every single team could be sold today for at least $80 or $90 million, and perhaps more. Just ask the folks in St. Petersburg. Obviously, as long as investors are willing to spend such significant sums on weak teams in small cities, the sport is not on the verge of financial collapse.

Second, the relative financial strength of teams in a sport is determined by the sport's policies regarding revenue sharing. In football, for example, revenue is extensively shared. As a result, the differences in revenues between the most successful and least successful teams in football are far less than in baseball. Indeed, as was revealed in the McNeil case, so extensive is the revenue-sharing in football that the most profitable teams have mediocre playing records. The teams that are most successful on the playing field have average profit performance. By contrast, in baseball the most successful teams financially are usually the teams in the largest markets plus the small market teams that, in a given year, win a division championship.

Baseball and football are very similar in several respects. Teams in both sports are about the same size (the relevant comparison is the 40-person roster in baseball with the 57 or so players a football team can control, counting injured reserve and the development squad). Teams in both sports have, on average, about the same revenues. Moreover, in both sports more than half of the revenues come from various forms of broadcasting.

The most important difference between the sports is in how

the broadcasting revenues are shared. In football, the league has sold the TV rights to literally every regular-season game to a national network (including two cable networks, ESPN and TNT), even though most games are televised only locally in the territories of the two teams involved. These revenues are then shared equally. This policy guarantees that more than half the revenue in football is shared equally. In addition, gate receipts are shared, with 40 percent of the net receipts going to the visiting team. In baseball, gate receipts are divided less evenly (the visitors receive 20 percent in the American League and about 5 percent in the National League). And, local radio, television and cable revenues are not shared at all. As a result, a big-city team like the Yankees can receive ten times as much local broadcasting revenue as a small-market team. (Indeed, the Yankees local cable revenues are about the same as the total revenues of the weakest franchises.)

An important principle of antitrust is that in pursuing a reasonable business justification for an anticompetitive practice, businesses must adopt the least anticompetitive practice available to them for achieving their business objectives. Thus, if baseball does have, or were to develop, a problem with the viability of small-market teams, it could share revenue more equally. More revenue sharing is clearly less anticompetitive than, for example, restricting competition for players to reduce their pay, or bargaining as a league, rather than individual teams, for broadcasting rights. The fact that the owners refuse to adopt such a policy does not, therefore, justify a more anticompetitive practice.

A second cause of financial disparity among teams within baseball, as well as in other sports, is the monopoly enjoyed by teams in the large markets. If New York had a half-dozen baseball teams, the Yankees would be unlikely to command $40 million for their cable television rights. Indeed, because of the territorial rules of baseball, baseball teams located elsewhere are not permitted to sell cable rights in New York in competition with the Yankees. Thus, the Yankees, and other teams in the largest markets, have much greater revenue than teams in small markets because leagues have restricted competition in the large markets. Obviously, a procompetitive solution to the problem of revenue imbalance is to reduce the revenues of big city teams by letting more teams compete with them.

Franchise Locations

During the past fifteen years, much of the public attention to the business practices of professional sports has centered on the issue of the number and location of teams in the sport. The recent battle between San Francisco and St. Petersburg over the Giants is simply the most recent example; previous examples are the recurring battle between Oakland and Los Angeles over the Raiders, the movement of the Colts from Baltimore to Indianapolis, the relocation of the Cardinals in Phoenix from St. Louis, and the departure of the Washington Senators for Dallas-Ft. Worth.

Unfortunately, most of the debate about franchise movements -- and their relationship to antitrust -- has had a very narrow focus: the effect of a move on the community that a team abandons. The NFL, for example, has strongly advocated that it be given an antitrust exemption so that it could control the movements of teams more than is possible under the antitrust statutes. And, as a practical reality, the antitrust laws do prevent leagues from vetoing team relocations simply as a means of protecting exclusive territorial rights or otherwise serving the narrow business interests of other owners.

In this instance, the antitrust laws are being correctly interpreted by the courts, and the resulting policy outcome is the correct one. When a team moves from one city to another, the effect on sports fans is always no worse than a break-even affair. The fans in the new city gain and the fans in the old city lose. And, usually the former exceeds the latter, because teams typically draw better in their new home than in the old one, at least for a while.' Thus, there is nothing inherently wrong with team relocations, even though personally I will be very depressed if the Giants eventually leave for Florida.

The harm from relocation arises because the city that loses a team has no realistic expectation of getting a replacement. Washington, D.C., is one of the nation's largest metropolitan areas. It could easily support a baseball team. But the Senators have been gone for two decades, the owners have vetoed Washington as an expansion site (too much competition for Baltimore), and no other team seems likely to relocate, whether for lack of interest or lack of support among other owners. Likewise, the most salient fact about the battle over the Giants, and prior battles over other teams, is that both of the bidding cities are perfectly good, economically viable franchise locations. The policy problem raised by the fight over the Giants is not that St. Petersburg lost, but that anyone had to lose. Given the quality of the Giants in the past two years, either city should be roughly indifferent between the Giants and an expansion franchise. The harm made manifest in the battle is that baseball has not expanded to the extent justified by the market, forcing the loser in the battle for the Giants to be without a team.

Removing baseball's antitrust immunity would limit, but not remove, baseball's control over the number and location of franchises. In other sports, courts have applied the Rule of Reason to league decisions about franchise locations and ownership changes. Owners do have a legitimate business interest in assuring that owners are reputable and financially able to operate a team, and that a franchise location is economically viable. The courts have refused to block or to prohibit franchise relocations when league actions were not based on such interests.

Unfortunately, removal of the antitrust exemption in baseball is not likely, by itself, to solve the problem of scarcity in franchises. It is unlikely, for example, that removing the antitrust exemption will soon put teams in Washington and St. Petersburg. In other sports, susceptibility to antitrust has not forced more rapid expansion.

In all sports, expansion occurs only if it is in the financial interests of most of the existing teams to expand. For several reasons, teams are unwilling to expand a league until all viable franchise locations are occupied. Among the factors limiting expansion are:

* The Franchise Price Effect -- all teams benefit from a scarcity in franchises, because scarcity drives up the price at which either an existing team or an expansion franchise can be sold;
* The Home-Town Holdup Effect -- the presence of other unoccupied but viable franchise sites increases the bargaining power of existing teams in dealing with local governments to obtain stadium subsidies and state and local tax breaks;
* The Broadcast Revenue-Sharing Effect -- the addition of one more city to a league will have no significant effect on the amount of money that national

broadcasters will pay for rights to games, but it will create another mouth to feed through revenue sharing, thereby reducing the gross revenues of all existing teams; and

* The Local Competition Effect -- now that all sports are national in that all regions have teams, a new franchise is likely to have some effect on the local monopolies enjoyed by the others, either in ticket sales or local broadcasting (an effect that explains why leagues rarely expand into cities that already have a team).

Normally, under the present regime, the price of an expansion club has to be sufficient to compensate the existing owners for all of these effects, even though each one amounts to nothing more than the erosion of some of the monopoly profits of the existing teams. As long as a sport can control its membership by collaboration among the established teams, the league will not expand to the extent warranted by the market because it is not in the financial interest of existing owners to do so.

Antitrust has not proved to be an effective remedy to solving the problem of insufficient numbers of teams. Prospective owners and cities have been generally been unwilling to sue professional sports leagues to force expansion, for a variety of reasons. One factor is the historical unwillingness of the courts to provide structural relief in antitrust cases unless the federal government is the plaintiff. Thus, a city or a prospective owner may expect to win on liability, but win only damages (which are likely to be relatively small) and not a franchise. An illustrative example is the USFL antitrust case against the NFL, in which the NFL was found to have violated the antitrust laws in forcing the league out of business, but in which the USFL failed to win significant damages beyond its court costs and to obtain meaningful injunctive relief. Another instructive example is Hecht v. Pro Football, in which Mr. Hecht was victorious in his claim that the NFL had acted anticompetitively to prevent his AFL expansion team from locating in Washington, but which ended in a settlement giving the plaintiff only money -- no team, and no change in NFL practices.

Another reason that owners and cities are reluctant to use antitrust as a means to force expansion is that they fear retribution. Filing the suit is regarded as virtually guaranteeing that the city or owner will never have a team. And, among prospective owners, another inhibiting factor is that the prospective owner of an expansion franchise has mixed incentives. Whereas winning might bring a team, the owner must also consider that winning would reduce the value of teams in general, so that the victory could be Pyrrhic. A prospective owner prefers to gain membership to an exclusive club, not to one that, as a consequence of admitting the new owner, must also admit any other reasonably qualified applicant.

Thus, eliminating the baseball antitrust exemption leaves baseball positioned like the other sports with respect to its control of franchises. Whereas it will lose some control over the location of its existing members, history in other sports suggests that it will still not expand to the extent warranted by the economics of the sport.

Player Acquisition and Control

Elimination of the baseball antitrust exemption will provide some benefit to players, but the effect may not be dramatic. The benefit of antitrust exposure to players is that it gives them the option of reliance on antitrust, rather than collective

bargaining, to determine the rules within a sport governing the market for players. In other sports, leagues have lost several highly significant antitrust cases on the issue of player market restrictions. Hence, antitrust deserves important credit for introducing some competition into these markets. Nevertheless, baseball players have successfully used collective bargaining to negotiate agreements with baseball owners which give veteran players the right to become free agents, and give other players arbitration rights after three years. Although the situation in football is still very fluid, at the moment the baseball player markets is less restrictive than the 1992 systems in football and hockey, although on balance perhaps more restrictive than in basketball. (Basketball is difficult to compare with baseball because the former has a flexible but often binding cap on total salary payments by a team to all of its players, but allows the players to become free agents earlier in their careers.)

The elimination of the baseball antitrust exemption would clearly benefit the players in that it would virtually guarantee that the owners would never be able to reimpose a substantially more restrictive system than the status quo. The reason is that the introduction of free agency in 1976 has clearly had no damaging effect on the sport. The owners' claim that free agency would destroy competitive balance, lead to the creation of dynasties in the largest cities, and cause fans to lose interest has been solidly rejected by the subsequent facts. Baseball has never been more competitively balanced than during the free-agency era, when 23 of the 26 teams have won a division title. No team has managed to become dominant, and the teams that would appear to be best placed to dominate -- the Dodgers, Yankees and Cubs -- have had many poor years.

The importance of these facts is that they would prevent baseball from providing a reasonable business justification for a more stringent set of rules. Hence, should the owners unilaterally apply new rules when the current contract expires after the 1993 season, the baseball players would probably be able to block them by resort to antitrust -- if the exemption were lifted. Of course, the players might be able to win a substantially more liberal system than the status quo through antitrust litigation. If the owners believe this, they ought to be willing to negotiate a new arrangement with the players that is less restrictive than the current system. And even if the owners do not believe it, antitrust action might ensue, and their beliefs could be forced into modification.

The lesson from the history of antitrust applied to player markets is that the strength and wisdom of the players union is a far more important factor in determining player market rules than is antitrust exposure. Baseball has benefitted from a strong, intelligently-led union for 25 years, and through collective bargaining players have won a system that holds up well in comparison with the systems in the sports that have lost antitrust cases -- football and hockey -- and with basketball, where antitrust suits have been filed but settled before reaching conclusion.

One potentially important effect of the elimination of the antitrust exemption for baseball would be through minor league players. The contract that baseball requires minor league players to sign binds them exclusively to the existing institutional structure of baseball until they are released or, as major leaguers, qualify for free agency. This system is a barrier to entry of a competitive major league. The normal practice when a new league is formed in other sports is for the entrant to sign only a relatively few players who are employed in the established league. Most players in the new league will be

rookies or players who have previously been cut by the established league. In baseball, most players in both categories are tied up in the minor leagues. Very few players play in the major leagues during their first professional year, and most players who are removed from a major league playing roster are demoted to the minors, often to be recalled again and again.

If a competitive league entered and signed some major league veterans, all teams -- including the established teams -- would be required to promote some minor leaguers to fill out the roster, just as they do after an expansion. But the rules of baseball prohibit a new league from acquiring these players. Indeed, the last time an "outlaw" league tried to enter -- the Mexican League after World War II -- baseball banned for life any player who signed with the new league. Some legal scholars believe that the courts would not uphold such a Draconian policy today, but, if baseball again resorted to such a tactic, would overturn the antitrust exemption. Others, including baseball owners, disagree. The issue would be resolved with certainty if the exemption were removed. I believe that no court would rule that preventing a minor league player from joining a competitive major league was consistent with the antitrust statutes.

Whether minor leaguers and potential entrants would derive significant value from removing the antitrust exemption is uncertain. The last remotely successful entry of a new league was the World Hockey Association of more than twenty years ago. Between 1960 and 1970, the WHA, the American Football League, and the American Basketball Association all managed to enter and to survive long enough to force a merger with the established league. Since then, several new leagues have been attempted, a few have actually played, but none has succeeded. The history of the past twenty years is pretty convincing that the entry barriers in professional sports are high, even with antitrust exposure. Indeed, as the USFL case demonstrates, an entrant can even be forced out of business by anticompetitive practices that are found in violation of the antitrust statutes without the incumbent monopolist suffering any serious consequences beyond the legal costs.

An entrant in every sport faces a long list of serious problems. First, the existing leagues are very large and national in scope. To be attractive to broadcasters, and to convince fans that the newcomer is a serious major league, the entrant would have to be national in scope and large. Entering against 28-team leagues is much more difficult than entering against leagues with between nine and 16 teams. Second, a new league would have to enter in the biggest cities. In many cases, despite the outcome of Hecht, exclusive stadium leases stand in the way. In many cases, the established teams have contract provisions that give them the rights to concessions at all events in the stadium, not just their own games, so that a competitor would be in the peculiar position of letting the incumbent team earn the concession profits from its games. Moreover, the established leagues have the benefit of long-term, subsidized rental agreements for playing facilities that were signed under the duress of a monopolized industry. These subsidies would not go away for many years -- decades in some cases -- and so constitute a permanent, unfair competitive advantage of the incumbent, even if Hecht were enforced.

In the sports that are exposed to antitrust, these barriers, plus the unwillingness of the courts to take strong action to enforce antitrust in cases involving competitive leagues, have proved sufficient to keep entrants out. Thus, there is no reason for optimism that the removal of the antitrust exemption, by itself, would induce a real threat of a competitive league.

Nevertheless, the antitrust exemption should be removed simply because an issue such as this should not be prejudged. If a group of wealthy individuals and baseball-hungry cities want to try forming a new league, the legal barriers to doing so ought to be removed. There is no good reason for federal law to guarantee that a third major league will never be created. Moreover, entry is certainly more likely with the exemption removed. Hence, removing the exemption could make baseball more willing to expand as a preemptive move against entry, much as the first baseball expansion was a response to the threat posed by the formation of the Continental League.

Beyond Removing the Exemption

By itself, removal of baeball's antitrust exemption would be desirable. But an important implication from recent sports history is that this action does not go far enough. Congress needs to do more. The other sports have structural problems like baseball's, despite their susceptibility to antitrust. What is needed is some additional positive action that would eliminate the single most important structural problem in sports: lack of competition among teams and leagues for fans, as manifested most clearly by the gap between the number of teams and the number of viable franchise locations.

The structural problem of sports is unlikely to be solved without action by the federal government. Private antitrust litigation can provide financial relief for aggrieved parties and can force important accommodations from the leagues, but it is not likely to lead to the right structural outcome. The ideal industrial structure for a sport is to have multiple competing leagues, none of which honors or is bound by the business rules of the others. Each league would decide its own membership; however, its decisions on whether to expand and where to locate its teams would not be subject to the approval of others. This arrangement would dramatically alter the incentives governing expansion and team location decisions.

Imagine a world in which all four major league baseball divisions make independent decisions about where to locate a team. For starters, two would find themselves without a team in at least one of the three largest markets. These divisions would be disadvantaged in negotiating broadcasting contracts, and so would welcome the possibility to expand into them, or to relocate a weak team to a big city. Of course, none of the existing sites would actually be abandoned, for they all are viable -- someone will pay a high price to own a team even in small cities, as shown most recently by the sale of the Seattle Mariners. Hence, these cities, even if abandoned, would be immediate expansion targets by competing leagues seeking to collect the expansion fee. Then, three divisions would discover that they lacked a team in America's fastest growing market, Florida. St. Petersburg, with a ready-made stadium, would certainly be snapped up quickly. Indeed, from the experience of the most recent expansion, potential owners of expansion franchises have been identified in several major cities (including Washington). Can anyone imagine that the National League East would continue to protect the Baltimore Orioles if the American League East ceased to have a say about its expansion decisions?

Likewise, each league could develop its own player market rules, its own broadcasting arrangements, and its own revenue-sharing rules. None would have antitrust significance, because each league would provide a competitive alternative for a player, broadcaster, city stadium authority, or even owner who did not like one league's rules.

Sports as a whole would still have some legitimate need for a cooperative organization. The antitrust laws would not stand in the way of common playing rules, cooperation in scheduling (with an agreement about sharing the revenues from interleague games), a jointly-managed sport-wide championship playoff, and a common set of behavioral rules for participants in the sport. Pairs of leagues could also negotiate joint regular-season play and revenue sharing of interleague games. And each sport would need a central office -- a commissioner -- to oversee the legitimate collaborative activities. All of these arrangements have business justifications in that owners, players, fans, broadcasters and others involved in sports would all benefit from them. The antitrust laws do not stand in the way of such agreements.

If the ultimate objective is business competition but sporting cooperation within a sport, there are three paths to achieving it: regulation, litigation, and legislation. All three are better than the status quo; however, I do want to express a preference for a simple piece of legislation that not only removes the baseball antitrust exemption, but that states some simple ground rules for all professional team sports.

The regulation approach was last discussed in Congress in connection with various legislative proposals to deal with franchise relocations. In essence, it means setting up some broad guidelines governing the activities of sports leagues, and then asking a government agency -- perhaps a new one, perhaps one of the antitrust agencies -- to develop the details and enforce them. For example, Congress might state that all sports had to expand by a "reasonable number" of teams at a "reasonable rate," beginning with two shiny new baseball and football teams in, say, 1995. The vagueness in the law would derive from the difficulty of knowing exactly how far expansion should go: how many cities without a team could support one, how many teams could be added without seriously eroding the quality of play, and which cities ought to have multiple teams -- and how many? These are the kinds of questions that Congress must ask the bureaucracy to decide, for it has neither the time nor the resources to make these decisions itself, especially on a continuing basis.

The difficulty with this approach is that our system of government requires that regulatory agencies be quite inefficient. They face significant legal hurdles in imposing significant economic harm on anyone, and they are easy to hang up in long and costly legal battles. And the fight over which two cities deserve the next two baseball teams is going to be small potatoes compared with the battles in the past over which company deserved the next fighter contract or the next airline route. The political system does not seem to be a good candidate for picking which cities ought to have baseball teams.

The litigation strategy requires a federal antitrust attack against sports. Thus, in addition to the line removing the baseball exemption, Congress could, through legislation, the budget process, and oversight hearings, instruct the Federal Trade Commission and/or the Antitrust Division to investigate sports for the purpose of determining whether an antitrust action seeking structural relief was warranted. If so, the Congress could appropriate incremental funds necessary to carry out this litigation.

The problems with this approach are easy to identify. First, Congress cannot predetermine the outcome, nor can it even predetermine that federal antitrust action is warranted. In the end, the court will be the major player if this strategy is followed, making the outcome uncertain. Second, major antitrust

cases are very time consuming and expensive. For example, the investigation leading to the antitrust case against AT&T proceeded for seven years before the case was filed, and then for ten more years through litigation, settlement and implementation, all the while consuming scores of lawyers and not an insignificant number of economists.

The legislation strategy is to state with precision a few things that sports-wide associations (like Major League Baseball) are not permitted to do. After the sentence removing the antitrust exemption, the law would state that no league within a sport could at present account for more than a third of the existing teams, and that in the future mergers and switches of teams between leagues would be permitted only if they did not violate the concentration thresholds of the merger guidelines, with the unit of analysis for concentration calculations being a league. This would force baseball to break into three leagues -- or, more likely, the existing four divisions. The law would then prohibit:

* Collaboration between leagues in the sale of rights for broadcasting other than for interleague post-season championship playoffs, and in honoring exclusive territories in local broadcasting;
* Mutual recognition among leagues of restrictions on the competition for players, such as rookie drafts, waiver rules, minor league drafts and promotion rules, and restrictions on free agency after the expiration of a contract; and
* Agreements between leagues about franchise locations, expansion, procedures for stocking expansion teams, and compensation by one league for invasion of the franchise territory of another; and
* Exclusive agreements for sports facilities that go beyond securing the facility for the dates that are necessary for a team to complete a regular-season schedule and to secure options for playoffs.

Finally, the list would clearly state that it does not provide antitrust immunity for practices not listed. Instead, all other practices would be subject to antitrust scrutiny by the courts, including rules within leagues as well as between them. And the new act would repeal the Sports Broadcasting Act that gave leagues an antitrust exemption for negotiating national broadcast contracts, and the amendment to the 1967 tax bill that gave a partial antitrust exemption to the merger of the AFL and NFL insofar as the latter legislation went beyond the limits described above.

By taking such action, Congress would solve the structural problem within baseball and the other sports by making them structurally competitive. Congress would also achieve this result without costly litigation, without delay, and without creating new uncertainties about the future of sports. Fans will benefit from the ensuing competition by having more variety in sports broadcasting, by expansion into markets not now served, and by introducing the possibility of competition for fans in the larger cities. Players will benefit by the expansion in jobs and the creation of something more akin to a normal labor market in sports. Broadcasters will benefit from the availability of sports programming in a competitive environment in which a network need not buy rights to the entire industry to secure a national contract.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Professor Robert Noll
School of Economics
Stanford University
Stanford, CA 94305-6072

Dear Professor Noll:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions no later than Monday, January 25, 1993:

Chairman Metzenbaum's questions:

1) In their testimony before the Subcommittee, the baseball owners claimed that an antitrust exemption was necessary for them to prevent the relocation of baseball franchises. The owners even suggested that their good record of preventing such relocations, and thereby ensuring franchise stability, justified continuation of their antitrust exemption. How does Baseball's record on franchise stability compare with other sports leagues, and do the owners need an antitrust exemption in order to block or approve franchise relocations?

2) Do the baseball owners need an antitrust exemption in order to sanction owners, managers, players who violate a specific league rule or whose conduct is at odds with the best interests of baseball?

3) At the subcommittee's hearing, your colleague, Professor Roberts, stated that lifting the antitrust exemption would expose baseball to a flurry of antitrust litigation under the rule-of-reason test that would have unpredictable results. Is his concern justified based on the experience of the other sports that are subject to the antitrust laws?

4) How would lifting baseball's antitrust exemption benefit minor league players?

5) The owners have suggested that numerous teams are already losing money, that tv revenues will fall after next year, that costs are rising rapidly, and that there is a significant and potentially destabilizing disparity of income between large and small-market teams. If baseball is in such a dire economic situation, wouldn't that counsel against revoking their antitrust exemption?

6) In your testimony you suggested that it is in the owners' best financial interest to create an artificial scarcity of baseball franchises. You testified that there is enough demand for as many as 40 or 50 more teams. What evidence do you have that the owners have created an artificial scarcity of teams and what affect would such a scarcity have on cities and fans?

Senator Thurmond's questions:

1) Please comment on what you consider the appropriate role of the Baseball Commissioner to be, especially in the context if an antitrust exemption?

2) Please address the legal argument, which Mr. Roberts and others propound, that a sports league should be viewed as one legal entity incapable of conspiring with itself under Section 1 of the Sherman Act?

3) Please state, as succinctly as possible, who will benefit from repeal of the antitrust exemption and how?

4) As I understand it, you believe that repealing the antitrust exemption is either not necessary and/or not sufficient to cure the structural problems inherent in the business of baseball. You propose additional action that would have to be undertaken either legislatively or in the form of regulation. At a time when de-regulation is thought to be the better approach for all but the most urgent problems, how do we justify federal government regulation of an entertainment industry such as baseball? Are we not better off repealing the antitrust exemption and leaving the outcome to market forces?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

UNIVERSITY OF CALIFORNIA, SAN DIEGO UCSD

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DEPARTMENT OF POLITICAL SCIENCE, 0521
TELEPHONE (619) 534-3548
FAX (619) 534-7130

9500 GILMAN DRIVE
LA JOLLA, CALIFORNIA 92093-0521

January 25, 1993

Senator Howard M. Metzenbaum, Chairman
Subcommittee on Antitrust and Monopolies
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Metzenbaum:

I am responding to your letter of January 11 in which you asked me several questions about baseball's antitrust immunity and operating methods. I am herewith providing some brief answers. Unfortunately, because your letter did not reach me until January 20, I have been unable to take the time necessary to unearth any facts to buttress or illustrate my answers.

I will procede to answer both your and Senator Thurmond's questions as they were listed in your letter.

Senator Metzenbaum's Questions

1. An antitrust exemption is necessary for baseball to prevent some but not all movements of team franchises. Although I am not a lawyer, my understanding of the antitrust cases involving team movements is that a league can establish rules that create obstacles to team movements, as long as the reasons and effects are not antitcompetitive, and as long as the movement does not require approval by an unreasonably large majority of other owners. For example, the antitrust laws have been interpretted as saying that leagues may not stop a movement because one team wants to invade the territory of another for the purpose of competing with it. In short, a league can stop a move, or any change of ownership, if the league has a legitimate business reason for doing so. For example, if a city cannot support a team because it is too small, other owners, because of revenue sharing arrangements and the necessity for all teams in a league to be financially stable, can veto the move.

In practice, this issue is not very important, because few teams move in any sport, and in any case leagues usually do not attempt to prevent moves. The recent notoriety surrounding the sale of the San Francisco Giants notwithstanding, baseball has not attempted to stop very many franchise moves in its history. The current policy seems to be to try to find a local buyer who is willing to pay close to the same price as a bidder from another city, but to permit moves if this cannot be done -- unless the propsective owner wants to move a team into a city occupied by another major league team, in which case the move always will be stopped. Baseball did not attempt to stop the movements of the Washington Senators to Texas, the Seattle Pilots to Milwaukee, the Kansas City Athletics to Oakland, or the Los Angeles Angels to Anaheim. Indeed, in the past three decades, baseball has not stopped very many moves. Most likely, some team would now be in St. Petersburg had it not been for the baseball policy, and Denver might have succeeded in attracting the Oakland A's a

decade ago rather than wait for an expansion franchise in 1993. Whereas only baseball's executives know their roles in franchise moves, I do not know of any other times that baseball management has stopped a team from moving.

Despite the hand-wringing about franchise moves, the issue is not greatly significant. The vast majority of owners do not want to move their teams, and will not do so regardless of the antitrust status of baseball. And, when teams are offered for sale, in the vast majority of cases the old owner finds a buyer in the same city. The reason is that almost all existing franchise locations are financially more attractive than all but two or three cities that do not now have teams. Moreover, one of the attractive locations -- Washington, D.C. -- is probably out of bounds for either a team movement or an expansion franchise because the owners would allow the Baltimore Orioles to veto it. Thus, the frequency of franchise moves that might be stopped only because of the antitrust exemption is far too low to weigh heavily in an evaluation of the exemption.

Let me also briefly reiterate what I said in December, and have said in previous hearings on this topic. Franchise movements are not intrinsically bad. When they are blocked, the effect is to disappoint fans in a city without a team but with sufficient fan interest to be a viable franchise site. Team movements create a public issue solely because there are too few teams. If baseball had steadily expanded during the 1970s and 1980s in proportion to the growth of interest in the sport, cities like St. Petersburg would already have a team. Franchises move only if attractive markets have no team.

2. As in the previous question, baseball owners do not need an antitrust exemption to discipline owners, managers and players who violate the behavioral rules of the sport as long as there is a legitimate business interest in enforcing the rules. The NFL and the NBA have successfully banned, fined or suspended players, owners and managers for misconduct without any antitrust repercussions. Colleges and universities, which are subject to the antitrust laws, as demonstrated when they lost cases involving NCAA broadcasting rights and common scholarship practices for entering students, can legally discipline students for violating the NCAA's behavioral rules. Thus, baseball does not need antitrust immunity to impose penalties on numerous people in the sport over gambling, drugs, and other actions that harm baseball. Indeed, if these rules are the outcome of collective bargaining, they are immune from antitrust in any case. And, even with antitrust immunity, baseball sometimes loses these cases on other grounds unrelated to antitrust, as with the recent case involving Steve Howe. Basically, the only benefit to baseball from the antitrust exemption regarding discipline is that baseball can ban a player for life for playing with a competitive league -- as it did with the players who signed with the Mexican League in the late 1940s. This "disciplinary" action should not be permitted, but it has been because of the antitrust exemption.

3. Professor Roberts' view is partly correct in the following sense. If baseball does not change its most obviously anticompetitive practices, it will probably be sued. But, two points should be kept in mind. First, most sports antitrust suits are filed by players, and as long as baseball has a collective bargaining agreement, the major league players, at least, will not be able to sue. However, the minor league players may be able to sue, depending on whether courts rule that the labor exemption for collective bargaining extends to the rules pertaining to them. Such a ruling would be bad public policy; however, I do not know for sure whether it would be a bad

reading of the labor exemption. Second, the precedents in other sports are likely to carry over into baseball, so that baseball is unlikely to face a completely different set of antitrust constraints than the other sports. Baseball owners, by examining these precedents, can avoid most of the litigation by simply studying these cases and changing their practices accordingly. Thus, if baseball experiences a "flurry of antitrust litigation" it will be because they failed to learn from the experiences of other leagues.

4. If baseball did not have an antitrust exemption, several aspects of minor league operations would need to be seriously reexamined, and I believe that many would have to change. The National Agreement specifies the relationships among all professional baseball leagues, and much of it is probably not legal under the antitrust laws. The agreement covers not only the player market, but also relations among leagues and teams that amount to agreements not to compete. An example is the agreement about relations among leagues of the same classification, and about the arrangements when a team in a league with a higher classification moves into the territory of a team in a lower league.

Certainly the most important single issue would be the rookie draft, which serves to bring most players into the minor league system who have any serious chance of playing major league ball. Similarly, the minor league draft, whereby teams of higher classification draft players from teams of lower classification, would also be brought into question.

One can imagine three distinct paths for minor league baseball players, and I do not know which will emerge after the antitrust exemption is lifted. The first would be that the present system would be replaced by a system like the one that existed before the draft was instituted in 1964: competition among teams (including minor league teams as well as majors) for rookies. Most likely, teams would sign players to multiyear contracts, and then lower-classification teams would sell players with unexpired contracts to teams with higher classification. Unlike the old system, however, players with expired contracts would be free agents, just as are veteran major leaguers. The second possibility would be that minor league players would be unionized, and would sign an agreement that kept more or less the present system, in return for better terms of employment. The third possibility is that the major league players would expand their collective bargaining agreement to incorporate the minor leagues. If the major league players did not make minor league players full union members, a legal issue would arise whether the major league players could extend the labor exemption for antitrust to minor league arrangements. If they could not do so, perpetuation of the present minor league system would have to be accompanied by benefits for minor leaguers. Note that in all three cases, minor league players would be made better off, for they would either receive the benefits of competition or receive some additional compensation or security for agreeing to the present restrictions.

5. The financial conditions of baseball are not relavent to the question of whether it should have an antitrust exemption. For example, we should not tolerate price fixing among the nation's airlines because the recessaion has caused nearly all of them to lose money, and in the recent antitrust complaint against some prestigeous universities, the current financial crisis in higher education was not an issue in whether price-fixing in tuition is justified. If the nation's great universities can get along without an antitrust exemption during a period of financial retrenchment, so can major league baseball.

Several points should be kept in mind when discussing baseball's finances. First, the best indicator of the financial health of a business is how much it is worth. And the weakest baseball franchises are worth approximately $100 million -- ten times as much as they were worth twenty years ago, and three times as much as they were in the early 1980s. Second, baseball financial statements are not very meaningful indicators of the viability of the sport. There is no publicly determined standard for baseball accounting that corrects for numerous common practices that understate the profitability of teams. Examples are sales of local broadcast, concession and luxury box rights to corporate affiliates at prices less than the market value, and salaries of executive/owners that vastly exceed the payments to executives in other enterprises of the size and complexity of a sports franchise.

Moreover, many teams are hobbies of wealthy owners, and are purposely operated more extravagantly than a normal small business. I was once told by the late Phil Wrigley that every September he would inspect the books, estimate the likely profit of the Cubs, and then enter contracts for renovating Wrigley field or the Cubs' spring training facilities so that the team would show no profit. In poor years, he would simply not spend money on these items. As a result, the Cubs occaisionally showed losses, but never showed significant profits. I personally had great respect for Mr. Wrigley, partly because of his candor. But during his tenure as owner, the "precarious" financial position of the Cubs as "revealed" by the financial statements was obviously an illusion -- and equally obviously did not justify an antitrust exemption.

Quite possibly, baseball will not receive as large a national broadcasting contract next time around. But, so what? The decline of national rights is due in part to the fact that the national broadcasters are experiencing ever greater competition from local rights sold through superstations and regional cable networks. Local cable revenues are increasing rapidly, and on balance probably will more than offset the decline in national rights. And, even if it does not, the most important cost items to teams -- salaries to players, coaches and management -- are determined by revenues. They will simply decline (or, more likely, grow less rapidly) if revenues decline (or, more likely, grow less rapidly).

Finally, the disparity in team revenues and financial performance is due to baseball's failure to adopt more generous revenue sharing. Sports leagues do not need an antitrust exemption to share revenues, for revenue-sharing has no adverse effects on competition. Revenue sharing can make the rewards to good management more equal across different markets. Indeed, as was brought out in the recent antitrust case against the NFL, revenue sharing can be so extensive that it actually eliminates the financial incentive to field a winning team.

A core principal of antitrust is that if businesses want to engage in a cooperative practice that has a legitimate justification, they are required to adopt the least anticompetitive practice that can accomplish this objective. Baseball wants to keep its antitrust exemption because it wants to help the financial position of weak teams by harming players, broadcasters and fans through monopolistic practices. Of course, these practices actually help the strong teams more than they help the weak. Society does not need to subsidize the Yankees and the Dodgers in order to keep Milwaukee and Seattle financially viable. Instead, this objective can be accomplished -- if it is needed -- through revenue sharing.

6. In my testimony, I thought I said that baseball could expand to as many as 40 to 50 teams, not that it could add that many. The evidence that this is so has two main elements. The first is the expressed willingness of propsective owners to buy expansion franchises. When baseball announced its most recent expansion, groups in about a dozen cities expressed their willingess to pay the expansion fee to join the league. The price was $95 million, plus no share of national broadcast rights in the first year (1993). Even more propsective owners would have been found if either league had permitted expansion into a city that already has a team. The best indicator that baseball has many more viable franchise sites than teams is the expressed willingess of intelligent business executives to pay this much for a new team. The second piece of evidence arises from study of the factors that determine the revenues of a team, the most important of which is the population base of a metropolitan area for ticket sales and of a region for local broadcast sales. Many cities are comparable in size and other relevant characteristics to the smaller third of cities that currently have teams. Examples are Buffalo, Indianapolis, Memphis, New Orleans, Orlando, Phoenix, San Antonio, St. Petersburg/Tampa, and Washington, D.C. Conceivably, Charlotte, Portland, Salt Lake City and Vancouver, Canada, could also succeed even though these areas have a smaller population because of their large regional broadcasting markets. And, additional teams probably could succeed in some of the largest markets -- most clearly New York in the Jersey Meadowlands.

The important point about scarcity is that the price of a team reflects almost entirely its scarcity value. When a baseball franchise is sold, the buyer acquires almost no assets of value other than the right to join an exclusive club. The expansion teams, for example, had the right to "draft" players from established teams; however, they could as easily have populated their rosters through signing free agents and making use of the minor league system for a few years before entering the league, as they have in part. The latter would have been a little more expensive -- perhaps as much as an additional ten million dollars a year in salaries plus three million in minor league subsidies for a couple of years. But that still makes the franchise alone worth $70 million or more. This part of the franchise value is the capitalized value of the baseball monopoly to a member team.

Senator Thurmond's Questions

1. The appropriate role for the baseball commissioner is to be the final authority on the noneconomic aspects of the management of baseball. The commissioner should handle the enforcement of the behavioral rules of owners, players, managers and coaches, and the process of overseeing, developing and modifying the playing rules. Baseball refers to these duties as related to the "integrity of the game." These activities must be separated from the business activities of the sport in order to remove any possibility that these decisions would be tainted by economic considerations.

Specifically, I do not believe that the commissioner should be deeply involved in such business decisions as collective bargaining, negotiating broadcast contracts, undertaking expansion, or overseeing franchise relocation decisions. One reason is that the commissioner is appoiinted solely by the owners. Obviously, an independent commissioner will on occaision make decisions that a majority of owners oppose; however, a commissioner will always be selected to pursue the business interests of the owners. The disagreements that develop are likely to be about means and strategies, rather than ends.

The problem of the commissioner's biases and interests would not be solved by allowing players to have a say in the selection of the commissioner. Whereas this would allow baseball to have a genuinely neutral referee in collective bargaining disputes, it would not solve the problem of the unrepresentation of fans, cities, broadcasters and other affected business interests in baseball decision making. Owners and players share an interest in running baseball in a way that maximizes the wealth of the participants in the sport, even if this is at the expense of fans, local governments, and other industries.

All cartels suffer from the problem that some clever members occaisionally figure out ways effectively to defeat the cartel's rules against competition. I prefer a baseball structure in which the commissioner is not able to punish people in the industry who find ways to introduce more competition into baseball.

2. Professor Roberts' view about the "single entity" concept in sports needs to be broken into two parts. First, the league central office is most definitely a joint venture among the teams. In selling a league's national broadcasting rights and the league logos for promotional purposes, it does act as a single entity. Second, the individual teams need to cooperate (usually through league auspices) to settle on common playing rules, revenue-sharing agreements, a schedule, and a playoff system. In my view, the only practice in these two categories that is contrary to the public interest is the method of sharing national broadcasting rights. I believe that congress should appeal the Sports Broadcasting Act of 1961, which granted leagues an antitrust exemption for selling exclusive national television rights to their games.

Having identified some aspects of sports leagues that are truly joint activities among teams, I do not believe that it makes sense to think of all of the teams in a league as branches of a single business (like branche outlets of Macy's). The reason is that all of the legitimate collaborative functions can be undertaken without the need for eliminating competition in both the player market and the output markets. Indeed, the NCAA does this all the time. The college conferences in the NCAA are operated independently. They compete in selling broadcast rights (having lost an antitrust case on this issue), in selling tickets to games, and in arranging bowl games. Nearly all major metropolitan areas have several Division I basketball teams, and many have more than one Division I football team, all of whom compete. And several conferences and teams independently sell local, regional and national television rights. The NCAA, which is not exempt from antitrust, has no trouble surviving antitrust scrutiny when it disciplines players and coaches, when it establishes uniform playing rules, and when it arranges for national championships. Yet it does run into problems when it tries to adopt uniform business practices or otherwise to cartelize its members.

The important point is not whether professional leagues behave as if they were single entities, rather than competing businesses. Obviously, in many ways they do so behave. But some of these activities are perfectly legal and legitimate. Others exist purely because of antitrust exemptions, and are unnecessary. Still other business activities -- such as setting ticket prices, selling local broadcast rights, and negotiating employment arrangements for executives, coaches and free agent players -- are done completely independently. Even in baseball with its antitrust exemption, owners have created a structure in which many decisions by a team are made completely independently of the other teams -- and in competition with them. These facts

demonstrate to me that no league is a single entity, and that no league ought to be. I should add that no court has ever found otherwise in adjudicating antitrust disputes.

3. Repeal of the antitrust exemption will provide the following benefits:

A. Major league players need not fear that owners will fail to renegotiate a collective bargaining agreement, declare an impasse in bargaining, and reestablish the old "reserve clause" to eliminate veteran free agency and salary arbitration. Under the antitrust exemption, baseball players do not have the option that players in the other sports have used: use antitrust to prevent owners from unilaterally monopolizing the player market.

B. Minor league players will benefit in the ways described in answer to Senator Metzenbaum's Question #4. Specifically, they will be able to move to another minor league system if their advance to their parent major league club is blocked, and they will either have some freedom in their own player market or will be able to use the propsects for freedom to gain the strength necessary to form a union and bargain collectively.

C. Prospective competitors who might seek to form a new major league will benefit in that the barriers to entry will be lower. They will have access to minor league players to help populate new major league teams, and their players (including those who might jump from existing major league teams) will not risk a lifetime banishment from baseball for doing so. Note that 25 percent of the old USFL players played in the NFL the year after the USFL folded. These players did not risk a pro career by playing for a new league. But if a third major league were to form, the players who joined the new teams would risk such a ban if the league did not succeed.

D. Fans and cities would benefit to the extent that the repeal of the antitrust exemption did lower entry barriers for new leagues by enough to threaten the existing structure. Fans and cities might benefit from the entry of a new league, but this is not the most likely outcome. Instead, the source of the benefit most plausibly would be more rapid expansion of the existing leagues in order to keep new entrants out. In any case, more cities and more fans would have teams.

E. Broadcasters, advertisers and fans would benefit if the repeal of the antitrust exemption included repeal of the Sports Broadcasting Act. Professional sports on TV would come to look more like intercollegiate sports: more games being broadcast, with more opportunities for advertisers, especially small, local businesses, to buy advertising. As an illustration of the last point, Ira Horowitz concluded from a study of sports broadcasting that the most likely cause of the demise of smaller local and regional breweries was the rise of national sports broadcasting. Only very large national firms can derive full value from nationally broadcast events, and as a result, national sports advertising by a few large breweries drove the smaller firms out of business.

4. I do not believe that the best cure for the structural problems in sports is regulation in the sense of the creation of a government agency to monitor sports and to make rules regarding its business practices. Obviously, the nation has a deep problem with even the sports that do n t have an antitrust exemption. The scarcity of teams has made sports franchises exteremely valuable, and has given teams the power to extract hundreds of millions of dollars in subsidies from financially strapped local governments. Yet, unlike in other industries, these conditions

have not caused new businesses to enter major league sports. Through the structure of player reservation systems, stadium contracts, national broadcasting contracts, and, for baseball, minor league arrangements, competitive leagues have been forced out or kept out for more than twenty years.

I believe that the simple solution to this problem is divestiture within the existing sports. That is, force all of the existing major league sports to divide into no fewer than three independent leagues. These leagues could develop common playing rules, behavioral rules outside the economic realm (e.g., drugs, gambling, etc.), and championship playoffs. But they would not be permitted to honor each others' territorial rights, to adopt rules for acquiring players that limited interleague competition, or to collaborate in selling their broadcasting rights. This solution most assuredly does not require the establishment of a regulatory agency. It could be accomplished by the Department of Justice or the Federal Trade Commission through antitrust action, but to do so would probably require repeal of the existing exemptions: not only baseball's blanket exemption, but the Sports Broadcasting Act and the AFL-NFL Merger Amednment. It would also be greatly facilitated by a special appropriation for this purpose. Another approach would be to pass legislation removing the baseball exemption and specifying that no sports league having restrictions between teams regarding competition and a common expansion policy could constitute more than forty percent of the major league teams in a sport or eight teams, whichever is larger. This provision should be written to bar common business arrangements in a sport even as part of a collective bargaining agreement.

The effect of the divestiture approach would be to enable us to rely on market forces, rather than regulation, antitrust exemptions and strong commissioners, to serve the interests of fans. The most important single effect would be that leagues would begin to compete for franchise locations, and so would race to expand to any unoccupied attractive market. Hence, we would not need to worry about franchise relocations, for attractive alternative sites would be fewer, and attractive vacated sites would soon be reoccupied.

An interesting parallel can again be made to intercollegiate sports. Obviously, colleges do not relocate; however, leagues are constantly forming and reforming in order to make member teams more attractive to their fans. And, colleges frequently move from one classification to another, depending on their success. A wonderful example is the University of Nevada at Reno, which moved to Division IA in football in 1992 -- and managed to go to a bowl game during its first season. The reformations of league arrangements, the entry of new teams, and even the exit of unsuccessful ones, reflects the market at work. I would like to see the professionals, who do it for the money, subject to the same free market principles as the colleges, who, with few exceptions, are not so motivated.

Sincerely,

Roger G. Noll
Visiting Professor, UC San Diego
Morris M. Doyle Professor,
Stanford University

Senator METZENBAUM. Thank you very much, Mr. Noll.

Mayor Jordan, we are very happy to have you with us, sir, and I think pursuant to the instructions that I have received from Senator Feinstein, you will be able to get your plane out in adequate time. She gave me very strict instructions and I always do what she tells me to do.

STATEMENT OF MAYOR FRANK M. JORDAN

Mayor JORDAN. Thank you, Senator Metzenbaum. I appreciate the courtesy, and I also appreciate, as the mayor of San Francisco, this opportunity to address you and the Senate Judiciary Committee here today.

I did not travel to Washington, DC, as an attorney or as an antitrust expert or someone who is a professional knowing ins and outs of professional baseball, but I do sit before you today as the mayor of a major American city to describe to you what the people of San Francisco did to keep their baseball team.

There is no doubt in my mind that a major league baseball team is an important part of any city's identity. Fortunately, the current system of baseball's governance recognizes this fact and works to preserve baseball's relationship with our communities.

Just a few months ago, I recall arriving at city hall to discover that the owner of the San Francisco Giants baseball franchise had announced an agreement in principle to sell and relocate the Giants to St. Petersburg, FL. In fact, he said that he had a binding contract that already had been signed. It was a terrible day, obviously, for the people in San Francisco, and while the citizens in Tampa Bay at the same time were rejoicing at the prospect of luring the Giants away from my city, the residents of San Francisco were devastated by the news.

Thirty-four years earlier when the Giants came to San Francisco, I was a young San Francisco police officer. I remember the sense of excitement and joy that filled the streets of our city and the neighborhoods. It was a proud time. Even before the Giants arrived, San Francisco had always been a baseball town. We gave the Nation Joe DiMaggio and many other legendary ballplayers. In fact, some of my best childhood memories are of watching the San Francisco Seals at old Seals Stadium at 16th and Bryant.

But it wasn't until 1958 that the San Francisco Giants were obtained as a major league team for our city. In 1958, when the Giants arrived, jubilant fans crowded Market Street to welcome their new team and its stars, like Willie Mays, with a tickertape parade. People of all ages and backgrounds rejoiced together in the Giants' arrival. The children of San Francisco had new heroes and a new reason to be excited about their lives.

I remember just like it was yesterday Willie McCovey's perfect four-for-four day against Philadelphia's legendary Robin Roberts in his major league debut at old Seals Stadium. I remember when our city erupted with joy in September 1962 when the Giants won their first pennant for San Francisco.

Since 1958, almost 50 million people have watched the Giants play baseball in San Francisco. Millions more have followed games on television, radio, and the local newspapers. Every year, thousands of San Franciscans make their pilgrimage to Arizona for

spring training. The Giants have become a part of the city's culture that affects the daily lives of many of our residents.

On August 7 of this year, however, San Franciscans were forced to collectively consider the prospect of losing their baseball team and all that came with it. Although some local radio personalities repeatedly told their listeners that the Giants were gone, I and thousands of other people in my great city refused to give in.

Baseball is more than a game and baseball is more than just another business. Most baseball teams play in ball parks built with public support, and also with public financing. Teams are granted leases on favorable terms and they often have standard taxes waived. All of this is done in recognition of the importance of major league franchises and what they represent both on an emotional and economic level.

There is no doubt the Giants are a valuable asset to San Francisco. The Giants provide entertainment for people of all ages and all backgrounds. The Giants create economic opportunities for the city's residents and they produce economic benefits in tens of millions of dollars for the city and the surrounding area.

In the days following August 7, San Franciscans launched an all-out effort to save their team. Rallies were organized. Fans mailed hundreds of thousands of letters and postcards to former Commissioner Fay Vincent and to other owners. Local organizations formed to save the Giants received thousands of calls each day from fans eager to help in the effort to save our team. Businesses purchased additional season tickets and business leaders joined forces to put together an offer to buy the team so that it could continue to play in San Francisco.

Although we never saw a copy of the agreement to move the Giants to Florida, we knew that under major league rules the sale required the approval of the owners of both leagues. We also knew that major league baseball had traditionally taken a stance strongly discouraging franchise relocations. We knew that many of the Nation's mayors and elected officials supported the policy of franchise stability and have voiced their support before this and other congressional committees.

We knew that baseball had just successfully encouraged the city of Seattle to find local ownership in an effort to save the Mariners franchise. We knew that the cities of Montreal, Pittsburgh, San Diego, and others had successfully campaigned to save their teams in the past.

Senator METZENBAUM. Thank you very much, Mayor. The constraints of time are forcing me not to permit you to go on, but we will include the balance of your statement in the record.

Mayor JORDAN. Thank you very much, Senator.

[The prepared statement of Mayor Jordan follows:]

Remarks For Senate Judiciary Committee
Hearings on Major League Baseball's Antitrust Exemption

My name is Frank M. Jordan. I am the Mayor of the City and County of San Francisco. It is an honor to appear before you today.

I have not traveled to Washington as a lawyer or as an expert in antitrust law. I have not come here as an expert in baseball. I sit before you today as a mayor of a major American city to describe for you what the people of San Francisco did to keep their team. A major league baseball team is an important part of a City's identity. Fortunately, the current system of baseball governance recognizes this fact and works well to preserve baseball's relationship with our communities.

Just a few months ago, I arrived at work to discover that the owner of the San Francisco Giants baseball franchise had announced some sort of an agreement to sell and relocate the Giants to St. Petersburg, Florida. It was a terrible day for the people of San Francisco. While the citizens of the Tampa Bay Area were rejoicing in the prospect of luring the Giants away from San Francisco, the residents of San Francisco were devastated by the news.

Thirty-four years earlier, when the Giants came to San Francisco, I was a young San Francisco police officer. I remember the sense of excitement and joy that filled the streets and neighborhoods of the City. It was a proud time. San Francisco had long been a great baseball city — it gave the nation Joe DiMaggio and many other legendary ballplayers. But it did not have a major league team.

That all changed in 1958. Jubilant fans crowded Market Street to welcome their new team and its stars, like the young Willie Mays, with a ticker tape parade. The mood was reminiscent of the many celebrations held around the country to embrace the return of our young soldiers from World War II. People of all ages and backgrounds rejoiced together in the Giants' arrival. The children of the City had new heroes, a new reason to be excited about their lives.

Since 1958, almost 50 million people have watched the Giants play baseball in San Francisco. Millions more have followed games on television, radio and in the local newspapers. Every year, thousands of San Franciscans make their trip to Arizona for Spring Training. The Giants have become a part of the City's culture, and the daily lives of many of its residents.

On August 7th of this year, however, San Franciscans collectively considered the prospect of losing their baseball team and all that came with it. Although some local radio personalities repeatedly told their listeners that the Giants were gone, I and thousands of other people in my great City refused to believe them.

Baseball is more than a game and baseball is more than just another business. Baseball teams play in ballparks built with public support and financing. Teams are granted leases on favorable terms and they often have ordinary taxes waived. All this is done in recognition of the importance a major league franchise represents, both on emotional and economic terms. The Giants are a valuable asset to the City. The Giants provide entertainment for people of all ages and backgrounds. The Giants create economic opportunities for the City's residents and produce economic benefits in the tens of million of dollars for the City and its people.

In the days following August 7th, San Franciscans launched an effort to save their team. Rallies were organized. Fans mailed hundred of thousands of letters and postcards to former Baseball Commissioner Fay Vincent and to the other owners. Organizations formed to save the Giants received thousands of calls each day from fans eager to help in the effort. Businesses bought new season tickets and business leaders joined forces to put together an offer to buy the team so that it could continue to play in San Francisco.

Although we never saw a copy of the agreement to move the Giants to Florida, we knew that under Major League rules, the sale required the approval of the owners of both leagues. We knew that baseball had taken a stance strongly discouraging franchise relocations. We knew that many of the nation's mayors and elected officials supported the policy of franchise stability and have voiced their support before this and other congressional committees. We knew that baseball had just successfully encouraged Seattle to find local ownership in an effort to save the Mariners franchise. We knew that the cities of Montreal, Pittsburgh, San Diego and other cities had successfully campaigned to save their teams in the past. In fact, only ten teams have moved away from their home city since 1903, and none in the last twenty years.

In early September, I went to New York to meet with Bill White, the President of the National League. I told Mr. White that the City had a vital economic interest in the Giants franchise and had important contractual rights under the Stadium Lease. Without giving us any assurance of success, Mr. White told me that the League would consider a competing offer from San Francisco. Under the agreement to sell the Giants to Florida interests, the Giants owner allegedly promised to refuse to deal with all other who wanted to buy the team, even with those from San Francisco. Without the League's intervention, we would not have been permitted to submit a competing offer and the voices of Giants fans in San Francisco would not have been heard or considered.

I cannot begin to tell you the amount of time and work that my staff and other officials of our city government devoted to this effort. I can tell you, however, that it was and continues to be worth every minute. In entering the competition to save our own team, I vowed that we would fight hard, but we would fight fair. We never did anything to disparage the current Giants' ownership or those who were seeking to acquire our team.

As you know, on November 10, 1992, having in hand the offer from San Franciscans who stepped forward to save the team, the National League voted overwhelmingly to reject the proposed sale and transfer of the Giants to Florida. Baseball officials made clear that the reason for the decision was their policy of promoting stability of franchises. As I said publicly on that day, I was both gratified that our efforts had succeeded and sorry for the people of the Tampa Bay area.

The sad truth is that in any competition, there is only one winner. San Francisco was the winner in this instance, and I am certainly glad for that. But the key point is that this was a competition. In fact, it was Major League Baseball's policy of franchise stability that allowed a competition to occur. Had it not been for baseball's policy, and the requirement that new buyers' obtain the approval of Major League Baseball, San Francisco would never have had the opportunity to compete. The Giants might have left in the middle of the night, the way the professional football Colts left Baltimore for Indianapolis. Major League Baseball's policy of franchise stability prevented that from happening and gave San Francisco a chance to put together a strong offer and one of the strongest ownership teams in professional sports.

I believe that giving franchise cities this opportunity is good for baseball and good for the country. Obviously, it has also been good for the cities of San Francisco, Seattle, Chicago, Oakland, Minneapolis, Montreal, San Diego, Pittsburgh, Houston and many other cities that have found themselves in a position where an owner sought or threatened to relocate a baseball team.

Thankfully, baseball's current system of governance allowed the voices of the fans to be heard and gave our and many other communities an opportunity to gather the support and funds needed to save our teams. We are glad that in baseball, an owner cannot unilaterally decide to move a team away from its city and fans in the dark of the night. The current system gives our communities a fair opportunity to compete to keep our teams and as such, the current system is vital to preserving the stability of baseball as America's national pastime.

Thank You.

Senator METZENBAUM. Thank you very much.

Mr. Dodge, we are very happy to have you with us, sir. You are assistant city manager of the city of St. Petersburg.

STATEMENT OF RICHARD B. DODGE

Mr. DODGE. Mr. Chairman, members of the committee, it is good to be with you. My name is Rick Dodge. I am the assistant city manager of the city of St. Petersburg, FL. I am here today to represent the city and its taxpayers. I represent 4.6 million people of Tampa Bay. I represent 31,000 fans who reserved season tickets for baseball at St. Petersburg, FL, Suncoast Dome, and 60 corporations that have reserved stadium luxury suites. I also represent fair-minded individuals from cities throughout the United States that have been leveraged by major league baseball and have witnessed the unjust, unwise, and unfair business practices of those in charge of America's game.

The antitrust exemptions that we are discussing today have allowed major league baseball to artificially restrict the supply of baseball franchises, and thereby artificially increase their value. The unfortunate result of this practice is it positions one city against another, and regardless of the outcome both cities lose.

Baseball can thank St. Petersburg for new, generous stadium leases it signed in Oakland and the new publicly financed ball park in Chicago and the new ownership groups in Seattle and San Francisco. In most cases, taxpayers pick up the tab for the new stadiums, generous leases, and team subsidies. Fans pay a higher price at the gate and proceeds go to the pockets of baseball's elite group of owners.

Tampa Bay's recent efforts to purchase the San Francisco Giants best exemplifies the various methods baseball employs to skirt the law, operating accountable to no one with exemptions to the Sherman Antitrust Act.

On August 6, 1992, Bob Lurie signed a $115 million agreement in principle to sell the Giants to a Tampa Bay ownership group led by Vince Naimoli. This agreement, through further negotiations, evolved into a contract for sale, conditioned subject to the approval of major league baseball. Between the time the offer was submitted on August 6 and rejected by baseball on November 10, Tampa Bay fans watched in quiet desperation as officials in baseball conspired to thwart the team's move to Florida while it extracted financial gains from San Francisco.

Consider these points. Point: If Bob Lurie owned a troubled financial business in any other industry than baseball, he would have been free to sell his company to the highest bidder regardless of the bidder's intentions to relocate the company. Even though Tampa Bay's offer was $15 million higher than San Francisco's offer, and originally $20 million higher, 75 percent of the National League owners did not approve the sale. Such rules requiring approval of team location would be in violation of the Sherman Antitrust Act as an unreasonable restraint of trade, as ruled by the U.S. Court of Appeals for the Ninth Circuit during a similar dispute over the relocation of the Oakland Raiders football franchise. If football, basketball, and hockey teams operate successfully without the antitrust exemption, why should baseball be any different?

Point: Bob Lurie entered into an exclusive agreement to sell his team to the Tampa Bay ownership group, a stipulation which prohibited him from accepting or negotiating any other offers until baseball had voted on the sale. At the September baseball meetings, National League President Bill White made a statement that deserves repeating. He said, "Bob Lurie is a man of his word and he has given the St. Petersburg group his word he will not accept an offer. I will accept an offer. I will accept an offer from the people in San Francisco and the league will have to decide what they will do with that offer."

Not only do White's words constitute interference with Tampa Bay's exclusive offer, but his subsequent actions should provide enough evidence to this subcommittee that the administration of the industry of baseball is inappropriate with the antitrust exemptions. What Bill White was saying is Bob Lurie is a man of his word, but baseball is not so bound.

Point: In disallowing the sale to the Tampa Bay investors, baseball reiterated its longstanding policy against the relocation of franchises. Relocation is the longstanding policy of baseball. Since 1901, 12 franchises have relocated. Among those who benefited from such relocation, Peter O'Malley, who led the opposition against the Giants' move to Tampa Bay, owns a team that relocated from Brooklyn to Los Angeles in the late 1950's. Today, speaking before you, Acting Commissioner Bud Selig operates a franchise that moved from Seattle to Milwaukee in 1970.

Point: Baseball made this decision to protect the fans in San Francisco. This past season, San Francisco recorded the second lowest attendance in the league. The area's fans rejected four referendums during the past 10 years to build the Giants a suitable stadium. In an October survey of the San Francisco Examiner, only 50.7 percent of fans said they would be disappointed if the Giants moved to Florida. Most ironically, San Francisco fans are just 6 miles away from another major league baseball franchise in Oakland. If the fans were the primary interest of baseball, why wouldn't baseball reward Tampa Bay's 31,000 season ticketholders with a franchise?

Point: The fans are the bottom line that motivates baseball. In a letter sent to Florida Governor, Lawton Chiles, by Miami Marlins owner Wayne Huizenga on October 23, 1992, Huizenga expressed his concern over the Giants relocation to Florida, raising the issue of potentially lost future expansion fees. He asks, "To whom does that premium belong, major league baseball or Bob Lurie?" By prohibiting the relocation of the Giants to Tampa Bay, baseball owners have retained the opportunity to share a $100 million expansion fee at an undetermined future date. Were it not for the antitrust exemption, this might be construed by a court of law as stifling free and open commerce and demonstrating anticompetitive behavior.

Point: Major league baseball adopted rules in recent years requiring parties involved in sale and relocation to execute indemnity agreements whereby baseball officials are insulated from any liability or legal redress. Officials in both San Francisco and Tampa Bay signed such letters of indemnification, leaving baseball free to operate with impunity regardless of how improper its conduct may be. This policy, too, could be construed as an antitrust violation.

As I push through on this, I want to summarize by a couple of points. One, San Francisco and St. Petersburg have both lost in this transaction. San Francisco has retained its franchise, and that is important, but in the process they have given up $3 million in revenue for the operation of their stadium. It also must proceed with plans to build a new park to replace Candlestick if it hopes to retain the team in the future. Ironically, the ownership group that last week signed outfielder Barry Bonds to a 6-year, $43 million contract will ask taxpayers to bear the costs of a lengthy legal battle in court. St. Petersburg has also lost, and those economic factors are well shown in my written presentation.

I would like to take my last minute to sort of respond to something I heard earlier and, Senator Feinstein, it comes from your comments about trying to determine whether you were talking about a game, a business, or an athletic contest, and I think that is very important to this committee to understand the difference.

Baseball has three distinct faces. The first face is the sport, that dynamic and exciting athletic contest that takes place between the foul lines. It has rules that are precise, observable, and enforceable. The second face is the game, that mystical and romantic embodiment of our culture, our history, and our childhood richly described by the late Commissioner Bart Giamatti as the only game where one——

Senator METZENBAUM. Please wind up, Mr. Dodge.

Mr. DODGE. OK—starts from home and then returns there.

[The prepared statement of Mr. Dodge follows:]

TAMPA BAY AND ITS PURSUIT OF MAJOR LEAGUE BASEBALL

Testimony to be presented before the Committee on the Judiciary
Subcommittee on Antitrust, Monopolies and Business Rights
Richard B. Dodge, St. Petersburg Assistant City Manager
December 10, 1992

My name is Rick B. Dodge. I am the assistant city manager for the city of St. Petersburg, Florida. I represent the city and its taxpayers, which negotiated a 27-year lease to house the Giants in the city's Florida Suncoast Dome. I also represent 4.6 million people within a 2-hour drive of the dome, and the 31,000 fans who put down deposits to purchase season ticket reservations and the 60 corporations that reserved luxury suites. I represent the State of Florida which became an economic partner in this venture by committing $2 million a year for a thirty year period to aid the capital construction of the facility. And, finally, I represent fair-minded individuals from throughout the country who see the latest actions of Baseball as unjust, unwise and unfair for both the fans and for "America's Game," the sport of baseball. In my left hand is a baseball, symbolic and emblematic of the game. This baseball is now also ironically symbolic of Major League Baseball's latest effort to avoid ethical business practices by denial of Tampa Bay's recent relocation efforts. This baseball was signed on August 6, 1992 in the office of Bob Lurie, the owner of the Sar Francisco Giants. The signataries include Bob Lurie and his key executive staff; Vince Naimoli, the Managing General Partner of the Tampa Bay Investor Group; and a number of St. Petersburg City officials who attended the meeting. The baseball is a memento of a business agreement by the Tampa Bay Investor Group to purchase the Giants for $115 million. The signing of that agreement in principle, and the signing of this baseball, did not happen easily

or quickly. It capped off a 14-year effort by Pinellas County, the Pinellas Sports Authority and the City of St. Petersburg to bring baseball to the biggest market in the nation's fourth largest state.

In 1976, Bob Lurie purchased the Giants and was heralded as the savior of baseball for the San Francisco community. At that point in time, the ball club was in the process of being sold to an investor group from Toronto, Canada. Mr. Lurie led a civic effort to purchase the club with the intention of maintaining it in the Bay area. It is important to note that Mr. Lurie is a San Franciscan with deep roots in his community. His family included a former Mayor of San Francisco, his business holdings are in that city, and he is considered to be one of the first citizens of the area. During the next 18 years, Mr. Lurie did everything in his power and in his pocketbook to make the San Francisco Giants successful both athletically and financially. The athletic successes came with division championships and appearances in the World Series. But, the financial success was never present.

A major reason for the lack of financial success was a poor and inadequate baseball stadium affectionately known as The Stick, where cold, gale force winds produce fans wearing parkas in August and the highest revenue from hot coffee sales in the league. It is a ballpark so hated by players that it is referred to as "Devil's Island," and many players have stipulated in their contracts that they cannot be traded to San Francisco because of the quality of the playing conditions. If the players don't like the park, the fans like it even less. They showed their dislike through declining attendance. This year alone, the Giants have the second lowest attendance in the National League.

Bob Lurie, understanding that the future financial stability was tied to a modern baseball park with quality playing conditions and the normal compliment of revenue producing opportunities, attempted over a period of six years to construct a new ballpark. On four occasions, two in the City of San Francisco, one in Santa

Clara, and one in San Jose, the voters (more specifically the fans) of the Bay area denied approval of the construction of a new ballpark even though it was clear that failure to do so placed the franchise in jeopardy of moving. Only after the failure of the last referendum, only when Lurie was experiencing annual losses of between $5 to $10 million, only when all efforts had been exhausted to find any local ownership group that would pay him market value for his team, and only after being frustrated by a number of failed efforts to bring the community together in consensus did Bob Lurie gain permission from Fay Vincent to enter into explorations, discussions and ultimately a contract to sell and relocate the Giants.

When the last referendum failed on June 2, 1992, Bob Lurie wrote to San Francisco Mayor Frank Jordan on June 8 to advise him that he was considering relocating the team. On June 11, Commissioner Fay Vincent stated in New York that Mr. Lurie is free to pursue all the ranges of options available to that ball club.

With that public announcement, with no ownership group assembled or coming forward in San Francisco, and only after the assurances of Giants officials that they had the permission and authorization from the Commissioner of Baseball and the President of the National League, did representatives of Tampa Bay initiate discussions for the sale and relocation of the Giants. Those negotiations were finalized in an agreement in principle executed on August 6, 1992, the same day this baseball was signed by the principals. We then began a chronology of events that demonstrate how Major League Baseball's exemption from the anti-trust legislation permits them to twist and bend communities on both coasts of this country for purposes described as "the best interest" of the game.

The original timetable, suggested by Bob Lurie and to our knowledge with the approval of Major League Baseball, was for approval of the Tampa Bay Investor Group and the vote on relocation of the franchise occurring during the September 9 meeting of baseball in St. Louis. It soon became clear, however, that some

baseball officials would delay and filibuster the process to develop a bid from San Francisco. The first step in the approval process was for a group of owners, known as the Ownership Committee, to review the credentials and financial capacity of our proposed ownership group. Trying to obtain instructions from the Ownership Committee staff was extremely difficult. Continual changes, revamps of partnership agreements, all done at great time and great expense, were completed, and the Tampa Bay Investor Group was told finally that everything was in place and ready for approval. However, at the same time, some members of the Ownership Committee said publicly that they had not received all the information they needed to make a final recommendation. Finally, Vince Naimoli, the Managing General Partner of our ownership group, in frustration and anger, begged attorneys representing Major League Baseball to detail specifically what was required to permit the Ownership Committee to act. These delay tactics stalled the vote on the ownership group and on relocation at the September meetings of Major League Baseball.

But perhaps the biggest surprise during those September meetings was National League President Bill White's announcement of his intent. He indicated that Major League Baseball would accept a purchase offer from yet unnamed San Francisco investors. No timetable was set, and no requirements for a competitive bid were set. This was done despite an exclusive contractual requirement between the Tampa Bay Investor Group and Bob Lurie requiring he would neither accept nor negotiate other offers on his team until Major League Baseball had acted on the Tampa Bay offer. President White's words at that press conference deserve repeating: "Bob Lurie is a man of his word and he has given the St. Petersburg group his word that he will not accept an offer." White said, "I will accept an offer. I will accept an offer from the people in San Francisco and then the League will have to decide what they will do with that offer." That statement in itself should provide evidence enough to this subcommittee and to Congress that anti-

trust exemptions are inappropriate in terms of the administration of the industry of Baseball. What Bill White was saying is Bob Lurie is a man of his word, but Major League Baseball is not so bound. Bob Lurie is a man who honors contracts executed; Baseball may alter agreements as it sees fit. Bob Lurie is an ethical individual who has exhausted all opportunities in the San Francisco Bay area to solve his financial problems, but Major League Baseball as an industry has another agenda outside the normal practices and ethics of business transactions, and it may act in such a way because it considers itself not bound by any Antitrust laws.

After White's press conference, Major League Baseball did everything in its power to induce an offer in San Francisco, and, at the same time, stall action on the bona fide offer from Tampa Bay. The Mayor of San Francisco met with President Bill White; formal deadlines for receiving an offer were extended time and time again.

Finally, when a San Francisco Group was assembled, investors had serious concern that their submission of an offer would be ruled as tortiously interfering with the contractual relationship between Bob Lurie and the Tampa Bay investment group. Clearly, that was a valid concern and still is. As a result, the investors in San Francisco turned to their political leaders and said they were unwilling to submit an offer unless the City of San Francisco would indemnify them against lawsuits that may evolve from the Tampa Bay investors or the City of St. Petersburg. What choices did supervisors in the City of San Francisco have? Major League Baseball, through that investor group, had leveraged the City of San Francisco to take an unpopular, difficult and financially risky position. This indemnification was considered so onerous and dangerous that a coalition of San Francisco neighborhoods sued the Board of Supervisors in San Francisco Superior Court attempting to nullify the indemnification. And, an attorney in San Francisco wrote a guest column for the San Francisco Examiner on October 21, 1992. The attorney said, "Our mayor and supervisors have sold us

a bill of goods in promising to indemnify the local investors trying to veto the Florida sale. They are going to bankrupt San Francisco ....."

Furthermore, the investors in San Francisco said it was clear that this ball club could not be financially successful in Candlestick Park and, since there was no ability to construct a new facility, the city would need to eliminate all rent paid at Candlestick Park. The City of San Francisco had little choice but to approve the demands of the investor group. The Mayor agreed to relinquish all of the $3 million of revenue paid in forms of rent and expense reimbursements by the ball club to further induce the group from San Francisco to make an offer. This rent reduction requirement seems particularly questionable in light of the December 7 announcement that the Giants have signed outfielder Bobby Bonds to a six year $43 million dollar contract.

George Shinn, a Charlotte, North Carolina businessman and NBA owner, joined the group in a leadership position. Major League Baseball was then faced with the potentially embarrassing possibility of having to act on a local ownership group in San Francisco led by a businessman from Charlotte, North Carolina. No public objections were raised by Major League Baseball during Mr. Shinn's flirtation with leading the group, despite Baseball's longstanding tradition for local ownership. Suddenly at the last minute, George Shinn withdrew, indicating he and the other investors in San Francisco had fully analyzed the situation and concluded the team's records were "worse than we expected. We knew they'd be bad, but we didn't know they'd be disastrous." However, the very next day, October 12, Peter Magowan replaced George Shinn as the Managing General Partner and the group presented a $95 million offer to the National League. Why would Mr. Shinn withdraw and all jointly issue a statement that the business enterprise could not be financially successful, only to be followed the next day with the announcement from one of the primary investors in the Shinn group that he was proceeding to put an offer on the table?

Furthermore, after the $95 million offer was submitted, it was adjusted upward to $100 million. Also, the first offer that went to Major League Baseball included the new San Francisco ownership group retaining the Giant's $11 million share of the expansion fee. After concerns and complaints were brought to attention by the national media, the San Francisco Group altered its bid to permit Bob Lurie to retain the Giant's $11 million share of the expansion fee. These details demonstrate continual shaping of the bid offer by officials in Major League Baseball to move it toward a position that would be accepted.

During this entire process, National League President Bill White said he would not conduct an auction. In reality, however, that is specifically what he did. With one bona fide bid in hand for $115 million from the Tampa Bay Investor Group, Major League Baseball proceeded to leverage investors in the City of San Francisco to push their bid upward.

On October 17, Bill White and representatives of the Ownership Committee finally met in person with Vince Naimoli, Managing General Partner of the Tampa Bay Investor Group, and Jack Critchfield, a Tampa Bay civic leader. During that meeting, Jack Critchfield asked Bill White if he would give Tampa Bay its opportunity to increase its bid since he was accepting increases to and changes in the offer from San Francisco investors. Bill White and the members of the Ownership Committee reacted with shock and surprise, and said that no increases by the Tampa Bay Investor Group would be permitted, that the Tampa Bay offer was adequate and Baseball was not conducting an auction. Clearly, it was a reverse auction, and Major League Baseball's reluctance to accept any increase in offer from the Tampa Bay Investor Group underscores the strategy of closing the gap between the two bids, thus making the San Francisco bid appear more "competitive." Also, at that meeting, the rules for the percentage of equity investment were changed for the Tampa Bay Investor Group. Originally the Tampa Bay Investor Group was told it would be required to put up 60% equity

against 40% debt. At this meeting in Atlanta, it was then indicated that the Tampa Bay Investor Group would be required to put up 66% equity against 34% debt. Also, for the first time, the Tampa Bay Investor Group was told that limited investors of a million dollar size would not be acceptable. As a result of the Committee's new requirements, Vince Naimoli quickly replaced or increased the size of million-dollar investors, increased the amount of equity to the 66% level and also raised additional equity to remove Bob Lurie's participation.

On October 28, the San Francisco group increased its offer to $100 million. It is clear that the full content of the Tampa Bay offer was discussed with and profiled to the competitive group in San Francisco, and at the same time alteration and increases in the San Francisco offer were permitted while the Tampa Bay Investor Group was denied the opportunity to adjust its bid. On October 29, the Commissioner's office announced a special League meeting in Scottsdale, Arizona on November 10 and 11 to consider the Giants situation. At no time was there an indication that there would be a final decision at that meeting, only that considerations of the situation will be examined. No deadlines were set because Major League Baseball was concerned that they would not have a "competitive" counter offer to put on the table at the decision point.

During the week prior to the November 10 and 11 meetings in Scottsdale, Arizona, there were strong indications reported in the media that the San Francisco offer had numerous conditions that were not acceptable to Major League Baseball. During the weekend and up until the meetings commenced on November 10, new information and changes in conditions were permitted by Major League Baseball in the San Francisco offer. Bill Giles, the owner of the Philadelphia Phillies, depicts the rapid and last minute changes that were permitted by Major League Baseball in an article in the St. Petersburg Times on November 12: He said, "When I left for Santa Fe on Friday, I felt convinced it would end up in Tampa Bay, because the deal (the San Francisco investor offer) really wasn't

a deal. But when I got there, they changed it completely and took out all the loop holes and that's what made the difference." Finally, with all the maneuvering completed, the National League voted on November 10 to reject the proposal to sell and relocate the Giants to the Tampa Bay Investor Group.

In his remarks to the media announcing the vote of the National League, Bud Selig, Chairman of the Executive Council, summed up the decision. He said, "I think the National League was very sensitive today and pursued the same consistent policy both leagues have for a long time."

I would agree with Mr. Selig's remarks that Major League Baseball pursued consistent policy. That policy fails to comply with the spirit or substance of the Antitrust laws that every other sports league in the country must follow.

What are the results of this situation, Baseball having leveraged both the communities of San Francisco and Tampa Bay? Both cities have lost. The City of San Francisco has retained its franchise but it has given up all revenue for the operation of its stadium that comes from that baseball team. In times of tightening financial budgets in San Francisco, that loss of $3 million a year is significant. Furthermore, the City of San Francisco has been forced to indemnify the investors who have put forward a bid to purchase the Giants from Mr. Lurie. The City of San Francisco is now engaged in lawsuits with the Tampa Bay Investor Group and the City of St. Petersburg. These lawsuits will be costly to taxpayers in both cities and the potential exposure to the City of San Francisco could suffer could be in the billions of dollars.

The City of St. Petersburg has also lost. It has lost the opportunity to bring major league baseball to Tampa Bay. It has lost a minimum of 27 years of revenues to its stadium that team would provide. It has lost the economic impact that team would bring to the west coast of Florida. Furthermore, it has lost the opportunity to receive the $2 million per year State revenue that the State of Florida had committed for stadium capital improvements

had the team had been allowed to come to Tampa Bay. It has also now been leveraged into a position that, to protect its contractual rights, it has joined with Tampa Bay Investor Group to pursue remedies of tortious interference against the investors in the San Francisco group and also officials in San Francisco.

Major League Baseball would tell you that it has created stability by this process, and protected the longstanding tradition of not allowing the relocation of a franchise. Ironically, baseball's spokesperson and Chairman of the Executive Council, Milwaukee Brewers Owner Bud Selig, would not own the Milwaukee Brewers had the team not been permitted to move from Seattle in 1970. Similarly, the primary opponent to the Giants' move to Tampa Bay, Peter O'Malley has also benefitted from relocation. The Dodgers moved from Brooklyn to Los Angeles in the late 1950s. Baseball has not created stability, nor has it preserved a longstanding tradition. Baseball's longstanding tradition is relocation, and by using and playing one city against the other, they have created serious and unnecessary legal and financial problems in both areas.

If the motive of disallowing the relocation of the Giants to Tampa Bay was to protect the fans, it is important to examine the history of fan support in San Francisco. As stated earlier, the Giants' attendance was the second lowest in the league during the 1992 season, while nearly 31,000 Tampa Bay fans waited with season ticket reservations for baseball at the Florida Suncoast Dome. Fans had four opportunities to build the Giants a suitable home through failed referendum attempts. And, surveys conducted throughout the past months showed dwindling support for keeping the Giants in San Francisco despite the threat of a move. In an October survey of 610 San Francisco area taxpayers, only 50.7% responded that they would be disappointed if the Giants left for Florida, down from 64.3% in an identical pole conducted in April, 1992. Ultimately, if the fans were the primary interest, San Francisco fans would still be accessible to a major league

franchise in Oakland, just six miles away. Fans in Tampa Bay, however, are 250 miles from the nearest Major League franchise.

In a letter Miami Marlins Owner Wayne Huizenga sent to Florida Governor Lawton Chiles on October 23, 1992, it was not the issue of protecting the fans that stirred protest from baseball, but the issue of a future expansion fee. Huizenga asked, "To whom does this premium belong - Major League Baseball or Bob Lurie?." By prohibiting relocation of the Giants to Tampa Bay, baseball has retained a lucrative future expansion market and the $100 million fee that will be collected and shared by all baseball owners at a future date, yet undetermined.

The Sherman Antitrust Act is a key component of the free enterprise system and is a foundation of our country's economic structure. That legislation prohibits any contract, combination or conspiracy in restraint of trade or commerce and it punishes those who monopolize or combine or conspire with others to monopolize any part of such trade or commerce. If it were not for the blanket antitrust exemption enjoyed by Major League Baseball, Bob Lurie would have been free to maximize his profits by selling the Giants to the Tampa Bay Investor Group with the Giants then being relocated to St. Petersburg.

On the basis of the Antitrust exemption and the absence of any form of governmental regulation, Major League Baseball is free to operate in the clandestine, cloak and dagger fashion it does with secret meetings, hidden agendas and collusion among the owners and administrators of baseball, and with outsiders such as San Francisco politicians and investors.

If Bob Lurie had owned a financially troubled business in any industry other than baseball, he would have been free to sell his company to the highest bidder regardless of the bidders' intention to relocate the company. Or, Mr. Lurie would have been free to move the company to a location where it would have been profitable and have had a more positive economic impact while continuing to own the company.

However, the rules of baseball require that 75 percent of the National League owners and a majority of the American League owners had to approve the sale and relocation of the Giants, and even Mr. Lurie's vote was deemed invalid.

Such rules requiring approval of team location could be a violation of the Sherman Antitrust Act as an unreasonable restraint of trade. The United States Court of Appeal for the 9th Circuit so ruled in the case involving the relocation of the Oakland Raiders, since professional football does not possess an exemption from antitrust violations.

Bob Lurie agreed with the Tampa Bay Investor Group that its contract would be an exclusive one, and that Mr. Lurie would not negotiate for the sale of the Giants with any other party. Notwithstanding that fact and against Mr. Lurie's wishes, National League President Bill White negotiated with the San Francisco investors regarding the sale of the Giants; accepted a bid on a team he did not own; and worked with the San Francisco investors to revise the bid until it was in a form acceptable to Major League Baseball. Major League Baseball officials and individuals from San Francisco conspired and combined forces to frustrate what otherwise would have been a straight forward, fair market transaction and, in essence, compel Mr. Lurie to accept $15 million less for his team.

In the absence of the Antitrust Exemption, such conduct by Major League Baseball would be a violation of the Sherman Antitrust Act. Furthermore, there is legal authority for the proposition that if an exempt entity steps outside its sphere of exemption to conspire with a non-exempt entity, it loses its exemption. Therefore, it is possible that Major League Baseball in fact has violated the Antitrust Laws by conspiring with the San Francisco investors and politicians, notwithstanding the extent of the exemption from Antitrust.

In the letter mentioned earlier sent by Wayne Huizenga, the owner of the expansion Florida Marlins, to Florida Governor Lawton Chiles, Mr. Huizenga's rationale would seem to be that profits from

the sale of the Giants would go to Mr. Lurie while expansion fees are shared by all clubs. Major League Baseball's categorization of the Tampa Bay area as a territory for future expansion and its resulting disapproval of the relocation of the Giants to St. Petersburg has stifled free and open commerce; constitutes anti-competitive behavior, and, in the absence of the Antitrust Exemption, presumably would be a violation of the Sherman Antitrust Act.

In recent years, Major League Baseball has adopted a rule providing it will not consider any sale and relocation of a team unless the prospective purchasers execute indemnity agreements in favor of Major League Baseball, whereby Major League Baseball and its team owners and officials are insulated from any liabilities or legal redress in connection with their consideration of such relocation. In addition to the protection provided by the Antitrust Exemption, Major League Baseball coerces potential purchasers to provide contractual indemnity so that it can operate with impunity regardless of how arbitrary, inequitable or improper its conduct may be. This policy can have the effect of stifling a competitive market place by driving away prospective purchasers and to, a large extent, make the lords of baseball accountable to no one.

Mr. Chairman, the judicially created exemption of Major League Baseball from the Antitrust Laws is based upon what the lawyers tell me is legal fiction. The legal fiction is that organized baseball is not a business involved in interstate commerce. While no court has ever held that the baseball owners are exempt from antitrust liability for franchise relocation decisions, uncertainty about the scope of baseball's exemption from the Antitrust Law encourages the anti-competitive activity which has been so harmful to Tampa Bay and other cities.

In 1922 when Justice Holmes authored the much criticized opinion that gave baseball its Antitrust exemption, Major League Baseball may not have been much of a business. But, in 1992 it most assuredly is a very big business. As the book Baseball and

Billions points out, Major League Baseball is a billion and a half dollar annual industry. The revenues on its licensing of merchandise alone rack up $100 million annually.

It was because of the Antitrust exemption that Baseball is able to artificially restrict the supply of Major League Baseball franchises and thereby artificially drive up the price. This artificial restriction of supply has a number of results which are contrary to good public policy. First, the artificially inflated value of a franchise creates tremendous pressure upon competing communities to subsidize the teams through rent concessions and/or uneconomic leases. Second, the artificial restriction of supply allows and permits competing communities such as St. Petersburg to be used to leverage up the value of an existing franchise. Major League Baseball can threaten to allow an existing franchise to move solely in order to improve the bargaining position of the franchise holder. Finally, the lack of Antitrust oversight allows "America's Game" to conduct business in total secrecy, in a conspiratorial fashion and with disrespect for the public good.

Other United States sports leagues have operated successfully without the Antitrust exemptions, including football, basketball and hockey. Despite these successful models, the notion of an outright repeal of the Antitrust Exemption that has existed for 70 years may be perceived as too precipitous an action. At a minimum, we urge the Congress to provide legislative clarification of the extent of the current Antitrust Exemption and to state clearly that the Baseball Exemption has never extended to matters outside the reserve clause and other player relation issues.

Mr. Chairman, St. Petersburg and the Tampa Bay Investor Group have commenced a major legal challenge to seek redress for the wrongs perpetrated upon us. The Florida Attorney General, Bob Butterworth, has committed his Antitrust Division to assist us. We strongly believe that we will ultimately prevail, and achieve through the courts, redress for the conspiratorial activities of Major League Baseball, the San Francisco investors and others.

Unfortunately the continued existence of this historical anomaly of the exemption of Baseball from the Sherman Act, much criticized by legal scholars and economists, leaves the nation as a whole prey for future conspiratorial acts of the nature which I have described. The citizens of Florida urge you to adopt legislation repealing the baseball exemption or providing legislative clarification of the extent of the current exemption.

In regard to baseball, the sport and the country at a whole is at a crossroads. As Yogi Berra said so well, "When you come to a crossroads, take it."

Senator METZENBAUM. Thank you very much.

Our next witness is Roric Harrison, who is a former major and minor league player.

STATEMENT OF RORIC HARRISON

Mr. HARRISON. Good afternoon, Mr. Chairman and members of the committee.

Senator METZENBAUM. Do you want to bring the mike a little closer to you, please?

Mr. HARRISON. Good afternoon, Mr. Chairman and members of the committee. My name is Roric Harrison. I was born and raised in Los Angeles, CA, and I signed my first professional baseball contract in 1965. In 14 years as a pitcher, I was fortunate to have played with four major league teams for 4½ years—the Baltimore Orioles, Atlanta Braves, Cleveland Indians, and Minnesota Twins.

During my career, I watched a great many players who were unable to rise out of the minor leagues simply because the major league owners' monopoly acts as a smothering grip on minor league players. I wasn't a superstar, so I can say a few things on behalf of all the players who ride buses overnight from one small town to the next, making salaries that are laughable compared to the major league minimum—$109,000, I believe it is now.

I left professional baseball in 1978, but have not forgotten what it was like to climb up and stretch out in the overhead luggage rack of a bus, uncramping my legs to maybe get some sleep before pulling into a town just shy of daybreak.

During the same years that other men are developing career paths in business, a minor league baseball player has no right to interview with and move to a competing employer with a desirable position, a better salary, or a greater opportunity for advancement. When a minor league player finds himself bound to a big-league team with an overabundance of talent, he has nowhere to go. He can't move to a new team where he might have a better shot at making the majors. Instead, he is under the complete control of one employer for over 6 years, while sacrificing irreplaceable opportunities of youth.

Career opportunities are extremely limited on the major league level, and matching your potential peak performance years with available positions on a major league team can almost be impossible. Restricted movement in any business creates limited opportunities, but no business restricts opportunities and dreams like baseball.

For example, as a AAA-level minor league ball player in 1970, I played winter baseball in the Mexican Pacific Winter League during the off-season. American players often play in winter leagues in Latin America to improve their skills, and more importantly to generate an income. Baseball, you see, forces minor league players to forego outside career development. A minor league player isn't paid during the off-season. That means a player can't afford to go to school or work on an entry-level position with the potential of professional opportunities once he is washed up in baseball.

As I said before, minor league players are literally owned by baseball. Houston had acquired exclusive rights to me in 1965 and, in 1969, traded me to a team that became the Milwaukee Brewers.

They would own me, unless they traded my contract or released me, for the rest of my career. I was actually fortunate compared to today's players. The summer after I negotiated my player contract with Houston, new minor league players became subject to an exclusive draft. They are now notified by whatever team has drafted them that their only choice is to sign with that team or not play at all. If they wait until the following year's draft, they are faced with the same dilemma.

Anyway, I was enjoying tremendous success pitching in Mexico that winter when I was approached by officials from a Japanese team and asked if I would be interested in playing in Japan if they could get my contract. I knew that in those days the few players who were able to get out of their American contracts and go to Japan had signed multiyear contracts for sizable salaries.

The Japanese league told me that if they could buy my contract from Milwaukee, they could pay me what was equal to four times what I was earning with that club and give me a guaranteed 2-year contract with additional option years. They also offered to pay my housing expenses during the contract years and provide four trips to the United States each year. I told them if they could get my contract from Marvin Milkes, the Milwaukee general manager at the time, they would have a pitcher.

The Japanese gentleman later told me the Brewers turned down their offer of up to $200,000 plus, saying that they wouldn't sell me for any figure. So I was forced to remain with Milwaukee, and ironically a few weeks later when I began to negotiate for the upcoming year, all I heard from my GM was how bad I was and that it was impossible to give me a raise over the year before. A minor league player has no leverage and almost no negotiating power.

After spring training camp in 1971, to my great joy, I made the team and was in the Milwaukee bullpen opening day, but it was too good to be true. After the first game, I was traded to the Baltimore Orioles. That year, the Orioles were defending world champs. Their pitching staff was already the best in baseball, and it was back to the minor leagues for me. My other choice was to quit baseball.

There were other players on my AAA team who could have been playing for any other major league team, and therefore at least 12 players with big-league experience and successful records who were forced to stay in Rochester during the critical phase of their career did not have the opportunity to go and further their major league career. Because of a major league team that was loaded, they were forced to stay there.

I was almost unhittable in 1971, going 15 and 5 with five shutouts in 1 month, and winning the Pitcher of the Year Award for the AAA International League, but no callup from the Orioles. Other teams, managers, and players came to me and said that parent clubs were trying to trade for me, but the Orioles wouldn't trade. I was backup insurance in case someone got hurt. My dreams of being in the big leagues didn't matter at all.

It is fair to say that some players I knew went on to splendid big-league careers and 1 extra year in the minor leagues probably didn't mean that much to them. But, for me, that 1 extra year lost

from the big leagues meant a 25-percent reduction per year in my retirement pension, which wasn't that large in the first place.

What it meant to my career overall I will really never know, but if Houston, Milwaukee, Baltimore, and those teams I was traded to later had not had the special privilege of antitrust exemption, they could not have owned me for my entire baseball career and would not have been able to make my career choices for me. Today's drafted minor league players get locked up for as much as 6½ years, not much better than it was when I was playing.

I am sure the major league club owners would argue that restrictions on movement for minor league players are necessary. They say that they spend hundreds of thousands of dollars developing each minor league player who makes it to the big leagues, so the owners need to make sure that their investment is protected from other owners who might otherwise raid the stable.

I believe it is possible to give the minor league players freedom and still preserve the minor league system, but with license to act as a monopoly, the major league owners have no incentive to find alternatives. For example, they could use the entire minor league system as a combined player development pool, dipping in and acquiring someone from any team for a needed position based on ability, performance, and merit. That way, each owner wouldn't be limited to the best available player within their own system and a minor league player wouldn't be a captive of his own organization.

The minor league teams are already supported almost entirely by major league teams. This system would simply allow a player blocked from the big leagues by a talent-rich team to go to another big-league team and realize his life's ambition. A minor league player out of college, if he goes to college, and most don't, is 22 years old and obligated to that team that drafted him until he is 28 years old or older before he gains the right to move to another team of his own. Talent should flow where it is needed and players who have the ability shouldn't be trapped in a dead-end organization for the better part of their younger years. They deserve the opportunity to move to a team that needs them.

Players aren't the only victims of the restrictions imposed on the minor leagues by the major league club owners. Towns and cities that boast minor league teams are subject to the impact of business decisions that they have no part in making. When a minor league team is forced to change its affiliation with a major league team, the whole operation can be uprooted and moved to a different city, leaving the first community with an empty stadium and disappointed fans. Over the years, I have watched Charleston, WV, Louisville, KY, Evansville, IN, Winnipeg, AB, and many other communities lose hometown teams, and I imagine the losses to merchants and families were tremendous.

The fair play and team spirit that baseball teaches school kids on playgrounds and Little League fields all over America shouldn't have to be left on the field for those who grow and become professionals. When management has the advantage of being an unrestricted cartel for the 3,200—and I know Mr. Selig says 4,300—professional players who are on minor league teams today and the hope-filled kids who will be drafted next summer, baseball is no longer a fair contest.

I consider it a privilege and an honor to have played in the minor leagues, and I loved it. I hoped to be speaking here today on behalf of those minor league ballplayers because there is no one speaking on their behalf. Mr. Fehr represents the major league players. There is no one speaking for minor league players, and I feel that it is my part to say something on behalf of them because no one else is.

Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Harrison, for very, very moving testimony on a matter that is—each time I read about it or hear about it or talk about it, I am more and more shocked, and I don't see how major league baseball can look their families in the face and look the fans in the face and live with themselves. I think the situation that prevails with respect to minor league baseball players is an absolute abomination, and if for no other reason, unless there is some action in connection with it, I pledge I will lead the fight to repeal the antitrust laws. I am not sure that that is the only answer, but maybe we need a law that deals with this whole question of indentured service in baseball and maybe we ought to do something on that subject alone regardless of what we do about the antitrust laws.

Senator SPECTER. I would like to associate myself with the chairman's remarks about the poor treatment of the minor league players.

Senator METZENBAUM. Thank you.

Mr. HARRISON. Thank you very much.

[Mr. Harrison submitted the following material:]

STATEMENT BY

RORIC HARRISON

FORMER MAJOR AND MINOR LEAGUE PLAYER

BEFORE THE

SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

DECEMBER 10, 1992

Good Morning Mr. Chairman & Members of the Committee.

My name is Roric Harrison, I was born and raised in Los Angeles, California, and signed my first professional baseball contract for the 1965 season. In 14 years as a pitcher, I was fortunate to have played four and one half years in the Major Leagues with Baltimore, Atlanta, Cleveland and Minnesota. During my career, I watched a great many players who were unable to rise out of the minor leagues simply because the major league owners' monopoly acts as a smothering grip on the minor league player.

I wasn't a super star, so I can say a few things on behalf of all the players who ride buses overnight from one small town to the next, making salaries that are laughable compared to the Major League minimum. I left professional baseball in 1978, but have not forgotten what it was like to climb up and stretch out in the overhead luggage rack of a bus to uncramp my legs and maybe get some sleep before pulling into town just shy of day break.

I loved my years in minor league ball and am happy to have had the experience, but I believe there must be a way for players to have a shot at the big leagues without sacrificing irreplaceable opportunities of youth.

During the same years that other young men are developing career paths in business, the minor league baseball player has no right to interview with, and move to, a competing employer with a desirable position, a better salary, or a greater opportunity for

advancement. When a minor league player finds himself bound to a big league team with an over-abundance of talent, he has nowhere to go. He can't move to a new team where he might have a better shot at making the majors. Instead, he is under the complete control of one employer for over six years.

Career opportunities are extremely limited on the major league level and matching your potential peak performance years with available positions on a major league team can be almost impossible. Restricted movement in any business creates limited opportunities -- but no business restricts opportunities and dreams like baseball.

For example, as a AAA level minor league ballplayer in 1970, I played winter baseball in the Mexican Pacific Winter League during the off season. American players often play in the Latin American winter leagues to "improve their skills" and, more importantly, to generate an income. Baseball, you see, forces minor league players to forgo outside career development. A minor league player isn't paid during the off-season, which lasts through the 4 1/2 months of winter. That means a player can't afford to go to school or work an entry level position with the potential of preparing him for professional opportunities once he is washed-up in baseball. He has to find a way to get compensated playing baseball 12 months a year.

As I said before, minor league players are literally owned by Baseball. Houston had acquired exclusive rights to me in 1965 and, in 1969, traded me to the team that became the Milwaukee Brewers. They would own me, unless they traded my contract or released me, for the rest of my career. I was actually fortunate compared to today's player. The summer after I negotiated my player's contract with Houston, new minor league players became subject to an exclusive draft. They are now notified by whichever team has drafted them. Their only choice is to sign with that team or not play. If they wait until the following year's draft they face the same dilemma.

Anyway, I was enjoying tremendous success pitching in Mexico when I was approached by officials for a Japanese team and asked if I would be interested in playing in Japan if they could get my contract. I knew that, in those days, the few players who where able to get out of their American contracts and go to Japan had signed multi-year contracts for sizeable salaries. The Japanese league told me that if they could buy my contract from Milwaukee, they could pay me four times what I was earning with my club and give me a guaranteed two year contract with additional option years. They also offered to pay my housing expenses during the contract years and provide four round trips per year back to the U.S.. I told them if they could get my contract from Marvin Milkes, Milwaukee GM, they'd have a pitcher.

The Japanese gentlemen later told me the Brewers turned down their $200,000+ offer, saying that they wouldn't sell me for any figure. So, I was forced to remain with Milwaukee. Ironically, a few weeks later I began negotiating for the upcoming year and all I heard from my GM was how bad I was and that it was impossible to give me a raise over the previous year. A minor league player has no leverage and almost no negotiating power.

After spring training camp in 1971, to my great joy, I made the team and was in the Milwaukee bullpen opening day. But it was too good to be true, after the first game I was traded to the Baltimore Orioles. That year, the Orioles were defending World Champs. Their pitching staff was already the best in baseball. It was back to the minor leagues for me. My other choice was to quit baseball.

There were other players on my AAA team who could have been playing for another major league team, but because of a loaded championship team in Baltimore --At least 12 players with big league experience and successful records were forced to stay in Rochester during the critical phase of their career. Not to mention a lost year on the major league pension program.

I was almost unhittable in 1971, going 15-5 with five

shutouts in one month, and winning the Pitcher of the Year award for AAA International League. But, no call up came from the Orioles. Other team's managers and players came to me and said their parent clubs were trying to trade for me, but the Orioles wouldn't trade. I was back up insurance in case someone got hurt -- my dream of being in the big leagues didn't matter to them.

It's fair to say that some players I knew went on to splendid, big league careers, and one extra year in the minors probably doesn't seem like much to them now. But, for me, that one extra year lost from the big leagues meant a 25% reduction per year in my retirement pension, which wasn't large to start. What it meant to my career overall, I'll never really know.

But if Houston, Milwaukee and Baltimore and those teams I was traded to later had not had the special privilege of the antitrust exemption they could not have "owned" me for my ENTIRE baseball career and would not have been able to make my career choices for me. Today's drafted minor league players get locked up for as much 6 1/2 years--not much better than in my day.

I'm sure the major league club owners would argue that the restrictions on movement for minor league players are necessary. They say that they spend hundreds of thousands of dollars developing each minor league player who makes it to the big leagues. So, the owners need to make sure their investment is protected from other owners who might otherwise raid the stable.

I believe it is possible to give the minor league players freedom and still preserve the farm system. But, with a license to act as a monopoly, the major league owners have no incentive to find alternatives. For example, they could use the entire minor league system as a combined player development pool, dipping in and acquiring someone from any team for a needed position based on ability, performance and merit. That way each owner wouldn't be limited to the best available player within his team's minor league system, and a minor league player wouldn't be a captive of his organization.

The minor league teams are already supported almost entirely

by the major league teams. This system would simply allow a player blocked from the big leagues by a talent rich team to go to another big league team and realize his life's ambition.

A minor league player out of college -- if he goes to college, most don't -- is 22 years old and obligated to the team that drafts him until he is 28 years old, or older, before he gains the right to move to another team on his own. Talent should flow where it is needed, and players who have the ability shouldn't be trapped in a dead end organization for the better part of their younger years. They deserve the opportunity to move to teams that need them while they have prime performance years available.

Players aren't the only victims of the restrictions imposed on the minor leagues by the major league club owners. Towns and cities that boast minor league teams are subject to the impact of business decisions they have no part in making. When a minor league team is forced to change its affiliation with a major league team the whole operation can be uprooted and moved to a different city leaving the first community with an empty stadium and disappointed fans. Over the years I've watched Charleston, West Virginia; Louisville, Kentucky; Evansville, Indiana; Winnipeg, Alberta; and many other communities lose home town teams that way. I imagine the loss to merchants and families economically or emotionally committed to those teams has serious repercussions for years.

Fair play and team spirit that baseball teaches school kids on playgrounds and little league fields all over America shouldn't have to be left on the field for those who grow up to play professionally. When management has the advantage of being an unrestricted cartel, for the 3200 professional players who are on minor league teams today--and the hope-filled kids who will be drafted next summer, baseball is no longer a fair contest. I consider it a privilege and honor to have played minor and major league baseball, I hope by speaking here today I will have given something back to the kids who make the game possible.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 12, 1993

Roric Harrison
27271 Las Ramblas
Mission Viejo, CA 92691

Dear Mr. Harrison:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions posed by Senator Thurmond by no later than Monday, January 25, 1993:

1) Has there been any change in the rules governing minor league players since you participated in the sport?

2) Would you address whether there has been any attempt to unionize the minor league players in the same way as the major league players, and if not, why not?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

February 8, 1993

Senator Howard M. Metzenbaum
Chairman, Subcommittee On Antitrust,
Monopolies and Business Rights
Room 308 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum:

Thank you for inviting me to testify at the hearing on baseball's antitrust immunity. The experience of participating in the hearings was a privilege I will never forget.

In response to the questions posed by Senator Thurmond, I am submitting the following statement:

Question 1: No changes that I am aware of since the 1976 change which gave the club the right to reserve a minor league player for six additional contracts after his original agreement, or seven years.

Question 2: There have been various incipient tries to organize minor league players but without success. The prohibitive costs associated with such attempts have rendered future efforts unlikely.

If I can be of help in any way, please don't hesitate to let me know.

Again, thank you for allowing me to play a small part in your subcommittee's important review of baseball's business practices.

Sincerely yours,

Roric Harrison

RH:ct

Senator METZENBAUM. I think it is appropriate that this hearing having to do with the owners and having to do with Mr. Vincent's role and the role of others getting teams, not getting teams—that it is appropriate that the last witness at this hearing is somebody speaking for the consumers of America, a very able spokesperson, in fact, one we have heard from many times previously, Gene Kimmelman of the Consumer Federation of America. We are delighted to have you with us.

STATEMENT OF GENE KIMMELMAN

Mr. KIMMELMAN. Thank you, Mr. Chairman. I think the one thing I can say for sure for all consumers in America is they wish that even for just one inning they were unhittable as a pitcher, not a whole season.

It is an honor to be here, Mr. Chairman, Senator Feinstein, Senator Specter, Senator Mack, on behalf of the Consumer Federation. We certainly will support your efforts to eliminate baseball's antitrust exemption and subject major league baseball to the same procompetition rules that other businesses must live with.

I would like to take a slightly different tack at this point. You have heard many of the reasons for eliminating the antitrust exemption already today, and I certainly would say from a fan's point of view, the notion of having more teams, having expansion, whether it be in Florida or elsewhere, is a very welcome thought. But in the interim, until that happens, there is a sort of minor consolation prize for the public, and that is the opportunity to watch baseball games on television, and I want to address a concern we have with trends that we believe are related to baseball's antitrust immunity. And when I speak of the antitrust immunity, it is not just the common law immunity, but what we think may be an overbroad reading of the 1961 Sports Broadcasting Act by the leagues.

We think the antitrust exemption hurts sports fans who want to watch games on TV. By using territorial restrictions, traditional horizontal restraints, we think baseball is trying to maximize its revenues by limiting output, limiting televised games to raise prices, prices that ultimately are paid by the public.

Some ominous trends, Mr. Chairman, we think, are developing. Let me give you a few examples in television contracts. Everyone remembers the old, traditional Saturday afternoon game of the week, the only opportunity to watch national televised baseball. It used to be on over 30 Saturdays; now, 16. In many communities where people cannot afford cable television—and even with our new regulated rates, it certainly is more expensive than free over-the-air television—the opportunity to watch national games and to watch the national pastime is severely restricted.

In the last few years, the New York Yankees have shifted a large portion of their games from free over-the-air television to pay cable, again raising prices for the many New York Yankees fans who used to watch games for free over the air.

A contract between major league baseball and ESPN involves an absolute prohibition anywhere in the country for watching over-the-air baseball games Wednesday night, and in some instances Sunday evenings—no over-the-air games because of this cable contract. You can get a lot of games on cable if you are willing to pay,

but the free games that were once available these evenings are no longer available to the American people. We see a trend of more and more pay-per-view packages, pay options, more and more money consumers have to shell out to watch the national pastime.

Unfortunately, we think this trend is likely to continue, ironically, at a time when there are greater viewing options for the public and more competition coming to the market for multichannel video distribution. We have a growth of cable options. We have new satellite distribution systems coming to market, we have wireless cable, more and more games, and yet the leagues are trying to cut back on these games, starting with the superstations.

Major league baseball has testified before another subcommittee of this committee that it would like to eliminate the cable compulsory license. This would be an effort, we believe, to wipe out superstation telecasts. The Braves, the Cubs, the White Sox, and the Mets carried now nationwide on cable systems would no longer be available unless agreements could be worked out to pay major league baseball more, and former Commissioner Vincent indicated there was not a strong interest in having this broad national distribution of games.

Now, the greatest fear we have from a consumer perspective is that just as we are about to get more distributional competition, competition to cable, we could see exclusive contracts for one distribution medium, possibly cable only, signed by major league baseball, which would lock up the distribution of games to one way of reaching the fans, cable television. This could be the death knell to these technologies, these new potential competitors to cable, and again could lead to dramatic price increases for consumers.

Now, without antitrust immunity, with free-market pressures, we think fans would benefit, first, by having increased options for free over-the-air television of major league baseball, and there would be increased pressure on cable and its new competitors to offer new, attractive packages at attractive prices for consumers. We could virtually have baseball on demand in this country, and if that sounds too much like pie-in-the-sky, I want to remind you of what the situation is with radio.

As a kid growing up in Cincinnati, OH, finding out that my family was going to move to Tennessee, my heart was broken. I was a Reds fan; I couldn't give up the Cincinnati Reds. Lo and behold, we have in this country clear-signal channels, and I found that I could listen to WCKY and WLW and pick up the Reds games in Tennessee. Then I also found I could pick up WCAU and listen to the Phillies, and KDKA, the Pirates. I could listen to the Mets, I could listen to the White Sox, I could listen to Yankees games.

Clear-station radio in this country, for free, has offered consumers something that is just wonderful, not just for a little kid like me at that time. Why can't we do that on television? There is no technical reason we can't do that, but we are fearful that territorial restrictions that major league baseball enters into to limit broadcasts and to limit the potential for new technologies will wipe out that potential option and new competitive options for consumers.

We urge you, Mr. Chairman, to eliminate this barrier to greater fan access to more games and television competition for attractively packaged and priced games, just as has been the case for college

sports telecasts when the NCAA was subjected to antitrust and just as other businesses in our economy have learned to live with and prosper under. Our Nation's procompetition laws are good enough for everyone else. Mr. Chairman, we believe they should be good enough for major league baseball.

Thank you.

[Mr. Kimmelman submitted the following material:]

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Consumer Federation of America

TESTIMONY OF

GENE KIMMELMAN, LEGISLATIVE DIRECTOR

CONSUMER FEDERATION OF AMERICA

on

BASEBALL'S EXEMPTION FROM THE ANTITRUST LAWS

before the

SENATE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES

AND BUSINESS RIGHTS

December 10, 1992

1424 16th Street, N.W., Suite 604 • Washington, D.C. 20036 • (202) 387-6121

INTRODUCTION

The Consumer Federation of America (CFA) believes that sports fans and the general public are increasingly harmed by professional sports league activities that are not subject to our nation's pro-competition, antitrust laws. To promote maximum sports viewing options at the lowest price and to infuse competitive market pressures in the structure of Major League Baseball, CFA urges Congress to eliminate Major League Baseball's antitrust immunity[1] and to ensure that the Sports Broadcasting Act's antitrust exception is limited to national off-air broadcasting contracts.[2]

Hidden behind our national pastime's positive cultural image is a pattern of questionable business practices, peculiar (and possibly extortionist) expansion and franchise transfer decisions, volatile labor relations and anti-consumer television contracts that are shielded from antitrust scrutiny. While CFA believes sports fans and society at large would be better served if all these activities were subject to the pro-competition rules that govern our economy, we wish to focus our attention in this testimony on the importance of antitrust to dangerous trends in professional sports video contracts.

In the increasingly competitive multichannel video marketplace that is likely to develop under the 1992 Cable Act,[3] consumers' sports viewing options should expand significantly and

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1 See Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

2 15 U.S.C. § 1291.

3 Public Law 102-385, 106 Stat. 1460 (Oct. 5, 1992).

cable prices should fall to competitive market levels.[4] New direct broadcast satellite and wireless competitors to cable could offer consumers imaginative new options and packages for sports programming otherwise available on broadcast channels, superstations (i.e. WTBS, WGN, WWOR), cable channels or new sports networks. Competitive forces should drive down prices and increasingly respond to niche market demand (e.g., offer native New Yorkers who retire to Florida a greater opportunity to watch the Yankees or Mets). With new technologies offering consumers dramatically larger channel capacity in an increasingly competitive video marketplace, it is conceivable that sports fans could watch virtually any game they desire for free (i.e., over-the-air) or at a reasonable price.

I. The Antitrust Loophole: Horizontal Restraints that Result in Fewer Games on TV at Higher Prices.

These potential consumer benefits may be impossible to achieve, however, as a result of Major League Baseball's federal antitrust exemption. Without public scrunity of horizontal agreements that limit output in order to maximize revenue, it is no wonder that baseball has established a set of rules restricting the sale of television rights to particular territories. By dividing markets among its teams, the League ensures that teams cannot enter each other's territories to compete on the basis of price (e.g., free-TV v. cable, basic cable v. pay-channels), quantity of games available, or quality of viewing options. This results in an opportunity and incentive for the League to maximize television profits by reducing viewing options or by making them more expensive for baseball fans.

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4 Numerous economists claim cable's basic rates are inflated 20-30 percent above competitive market prices. See Thompson v. Higgins, "FCC Faces Thorny Questions About Rate Re-regulation," Multichannel News, Nov. 23, 1992 at 50.

Recent trends in professional sports television contracts, shielded with antitrust immunity, threaten to deny consumers the full fruits of video competition. Major League Baseball has more than cut in half the number of games available for national over-the-air viewing on its traditional Saturday afternoon "game of the week."[5] The New York Yankees have shifted a substantial amount of local television coverage from free over-the-air channels to an expensive cable network.[6] Consumers may no longer watch free over-the-air baseball games on Wednesday or, in some instances, Sunday evenings because the League gave ESPN exclusive television rights during these time slots, to maximize cable revenue.[7] Also, more and more professional sports teams are promoting pay-per-view television packages.[8]

Despite significant technological advances that should dramatically expand sports viewing options, Major League Baseball has acted like a classic monopolist attempting to limit output and raise prices. By dividing the country into exclusive "home television territories"[9] the League ensures that clubs can shift television rights from over-the-air stations to cable networks without fear that a local broadcaster would compete by importing another team's games. Similarly, the League can use its territorial restrictions to prevent local broadcasters from substituting new national telecasts on the Saturday afternoons when fans can no longer view a "game of the week" telecast.

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5 See Smith, "Fight Baseball's TV Fadeout," New York Times, Oct. 1, 1989.

6 See Mc Manus, "The Perie of Pinstripes", Sports Inc., Feb. 20, 1989 at 42.

7 See Statement of Fay Vincent before the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights, Nov. 14, 1989 at 5-6.

8 See Brown, "Slow Bat Sure, Local Sports Trying PPV," Broadcasting, June 8, 1992 at 21.

9 See Memorandum to Broadcasting Directors from David Alworth, Major League Baseball, April 29, 1992.

These territorial restrictions allow major league teams to maximize television revenue by maintaining a monopoly on local baseball viewing options. Through limitations on television distribution rights (i.e., output), the League provides fewer viewing options than fans desire, which results in above-market prices for televising/viewing rights.

This anti-consumer behavior is most obvious in Major League Baseball's political efforts to undermine superstation distribution of the Atlanta Braves, Chicago Cubs, Chicago White Sox, and New York Mets.[10] By eliminating cable operators' automatic right to retransmit local broadcast stations (i.e., the cable compulsory license), the League hopes to prevent WTBS, WGN and WWOR from distributing locally televised baseball games to cable systems and viewers throughout the country. By limiting superstation telecasts, the League could bring in more money from cable's "regional sports" channels and pay-per-view. Of course this means fewer games at a higher price for baseball fans.[11]

The public dangers associated with Baseball's efforts to limit television distribution will grow substantially as competitors to cable television enter the video market. If the League continues to use exclusive television contracts to maximize revenue, it could sell exclusive rights to one video distribution medium -- like cable TV -- and thereby prevent wireless cable or direct broadcast satellite systems from obtaining the type of sports programming that would make these distribution systems competitive with cable. Not only would these exclusive arrangements leave fans without competitive

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10 See Statement of Commissioner Fay Vincent before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, April 29, 1992.

11 See Statement of Gene Kimmelman before the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks, April 29, 1992.

options for sports viewing, they could stymie the development of multichannel video competition in general.

II. Benefits of Eliminating Antitrust Immunity.

These anti-consumer trends may be averted without harming Baseball by eliminating the League's antitrust immunity. No other professional sports league -- the NBA, NFL, or NHL -- has had any difficulty maintaining important league functions under full antitrust liability. Contrary to Major League Baseball's claims, necessary measures to protect weak franchises, promote fair distribution of quality athletes or share revenue in an equitable fashion do not require antitrust immunity. As a matter of fact, insulation from competitive forces may be one of the fundamental causes for public disenchantment with Baseball's management. If the NBA, NFL and NHL can manage and prosper within the confines of our nation's pro-competition laws, so should baseball.

This principal applies equally for professional sports television contracts. Full application of the antitrust laws to National Collegiate Athlete Association (NCAA) contracts for televising college sporting events has led to a dramatic expansion in sports viewing options for the American people. In determining that an NCAA restriction on college football telecasts violates the antitrust laws, the Court demonstrated how a "rule of reason" analysis of professional sports television contracts would protect appropriate league functions while promoting greater consumer welfare:

> What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad or rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed,

all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product" athletes must not be paid, must be required to attend classes, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also those available to athletes -- and hence can be viewed as pro-competitive.

* * *

Despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry.

* * *

Because it restrains price and output, the NCAA's television plan has a significant potential for anti-competitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights. Moreover, the court found that by fixing price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market. And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.

The anti-competitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). (Footnotes omitted)."

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12 NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, at 101-107 (1984).

A more recent application of this legal standard to the National Basketball Association's (NBA) television contracts illustrates the value of antitrust to sports fans. A federal district court judge found that the NBA's effort to reduce the number of superstation telecasts of pro-basketball games from 25 to 20 per season was an unreasonable restraint of trade. The court's detailed antitrust analysis points out the danger consumers face when professional sports leagues attempt to reduce telecasts available to competing media outlets:

> The 5-game reduction damages competition in several areas. It constrains competition between the teams and the league, by ousting teams from a portion of the national television market and allocating that portion to the league. It reduces competition between basketball on superstations and basketball on the networks, to the extent that they compete for viewers, and by the same token, also reduces competition between superstations and the networks for advertisers.
>
> Further, by placing an artificial limit on the number of games in the market, the reduction makes supply less responsive to demand. Limiting the teams to 20 games keeps the teams from judging for themselves how many superstation games the market might bear -- and there clearly is demand as evidenced both by the audiences, outside Chicago and Atlanta, for superstation games and the interest among advertisers in buying time during those games. The number of games on television is less responsive to the preferences of broadcasters, advertisers and fans than it would be in a freer market.
>
> The 5-game reduction also keeps viewers from deciding whether the games they want to watch will be on a superstation or on the networks. It "curtail(s) output and blunt(s) the ability of (the teams) to respond to consumer preference." NCAA, 468 U.S. at 120. It preempts market mechanisms by deciding for viewers, broadcasters and advertisers that they do not need games that they are currently demanding and, in doing so, "impairs the ability of the market to advance social welfare by ensuring the provision of desired goods." FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) ("Indiana Dentists").[13]

While it is unlikely that the public or professional sports leagues would suffer any ill consequences from application of "rule of reason" antitrust analysis to television contracts, it may be appropriate for Congress to maintain the limited antitrust

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13 Chicago Professional Sports Limited Partnership and WGN v. NBA, 754 F. Supp. 1336 (N.D. Ill. 1991).

immunity for contracts involving national over-the-air football, baseball, basketball or hockey telecasts. So long as this narrow exemption contained in the Sports Broadcasting Act's antitrust exemption, which enabled the NFL to sell a package of games to one network so that all road games would be televised in a team's home area -- is not interpreted to apply to pay or cable contracts, the consumer benefits of subjecting Major League Baseball to our antitrust laws would be preserved.[14]

CONCLUSION

Unless Congress eliminates Major League Baseball's exemption from federal antitrust laws, consumers are unlikely to reap the full benefits of new multichannel video technologies and viewing options. Behind the shield of antiturst immunity, Baseball is increasingly relying on horizontal, territory-restricting agreements to control output, reduce free over-the-air telecasts, and promote cable or pay-er-view television options that result in higher prices for sports fans and advertisers. However, if baseball is required to abide by our nation's pro-competition laws, consumers are likely to receive greater viewing choices at lower prices.

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14 This interpretation of the Sports Broadcasting Act is consistent with the Act's legislative history. See Ross, "An Antitrust Analysis of Sports League Contracts with Cable Networks," Emory Law Journal, Vol. 39, No. 2, Spring 1990.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 11, 1993

Gene Kimmelman
Consumer Federation of America
1424 16th Street, N.W.
Suite 604
Washington, D.C. 20036

Dear Mr. Kimmelman:

Thank you for testifying at the December 10, 1992 Subcommittee on Antitrust, Monopolies and Business Rights hearing on Baseball's antitrust immunity. Your views on this issue are greatly appreciated and very helpful.

Unfortunately, due to the time constraints on the day of the hearing, there are a few questions that were not answered. Please respond, in writing, to the following questions no later than Monday, January 25, 1993:

Chairman Metzenbaum's questions:

1. How does Baseball's antitrust exemption facilitate the movement of games from free TV to cable?

2. Can you give us some examples of how Baseball's territorial restrictions hurt fans? Would fans be better off if these restrictions were subject to antitrust review?

3. You have testified that Congress should eliminate the blanket antitrust immunity granted to Baseball by the Supreme Court in 1922. Do you also believe that Congress should repeal or amend the 1961 Sports Broadcasting Act?

4. You have suggested that the insulation of Baseball's TV deals from antitrust scrutiny also could hinder development of competition in the cable TV business. How would that happen?

Senator Thurmond's question:

1) Do you propose that we repeal the Sports Broadcasting Act of 1961, or is your concern only with cable?

I look forward to working with you in the future as the Subcommittee continues its work in this area.

Again, thank you for your contribution.

Very sincerely yours,

Howard M. Metzenbaum
Chairman,
Subcommittee on Antitrust,
Monopolies and Business Rights

HMM/eao

Consumer Federation of America

January 28, 1993

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies
and Business Rights
United States Senate
Russell Building, Room 140
Washington, D.C. 20510

Dear Chairman Metzenbaum:

Please find enclosed our response to your questions and Senator Thurmond's questions concerning major league baseball's antitrust immunity.

I look forward to working with you in the future on this issue.

Sincerely,

Gene Kimmelman
Legislative Director
Consumer Federation of
America

1424 16th Street, N.W., Suite 604 • Washington, D.C. 20036 • (202) 387-6121

CFA'S ANSWERS TO CHAIRMAN METZENBAUM'S QUESTIONS

1. Without antitrust scrutiny, Major League Baseball is able to negotiate television contracts with cable networks that pay a premium for exclusive distribution rights to narrow segments of the TV-viewing public. Under traditional antitrust analysis, such restrictions on output and efforts to raise price would be suspect. However, Baseball's antitrust exemption increasingly enables cable networks that can pay a premium, and pass along the cost to subscribers, to outbid the free over-the-air networks for television rights to baseball games.

2. Territorial restrictions that are insulated from antitrust principles allow baseball teams to prevent sports fans from watching which ever teams or games they prefer to see on television. For example, after the Yankees moved many of their games from free-TV to cable, New York's broadcast stations could not replace these Yankees games with Red Sox or other popular teams' games because of territorial restrictions. If the antitrust laws applied, the Yankees could not have blocked this competition, and therefore would most likely have kept all their games on free-TV. New Yorkers would either be able to watch all Yankees games, or other popular games, for free.

3. To the extent the Sports Broadcasting Act is applied only as Congress intended -- to cover free over-the-air national "telecasts" of professional sporting events, it does not harm consumers. However, if the professional sports leagues succeed in convincing the courts to apply the Act to local television contracts, cablecasts or

other technologies, consumers would be harmed by the types of anti-competitive exclusive television distribution arrangements available to Baseball, as described in response to Questions 1, 2, and 4. At the appropriate time, we urge that the Congress reiterate its original narrow intent in passing the Sports Broadcasting Act.

4. Under the 1992 Cable Act, Congress sought to promote competition to the cable industry by ensuring that cable's potential competitors could purchase cable-owned programming at market prices. In an effort to thwart this competition, cable companies could purchase exclusive rights to televise the most important games of the most popular baseball teams. Shielded from antitrust liability, Baseball might accept a premium price offer from cable for exclusive television rights that prevents satellite or other competitors from offering consumers programming that is comparable to cable service. This would impede the development of multichannel video competition, contrary to Congress' stated goals in the 1992 Cable Act.

ANSWER TO SENATOR THURMOND'S QUESTION

1. As described above in response to Chairman Metzenbaum's third question, CFA believes it is important for Congress to clarify that it did not intend for the Sports Broadcasting Act's antitrust immunity to extend beyond national over-the-air broadcasts of professional sporting events. At this time, we do not believe it is essential to repeal the Act.

Senator METZENBAUM. Thank you very much, Mr. Kimmelman. We will have 5-minute rounds for those of us who are still here and then conclude this hearing.

I want to say a prefatory statement to you, Mr. Harrison, that I don't know how much impact your testimony is going to have with reference to the repealing of the antitrust exemption, but I can tell you that it has had sufficient impact that I am determined that I will put in a piece of legislation to deal with the question of what I consider to be involuntary service because I don't think that is the right way to treat people, whether it is in baseball or at General Motors or at General Dynamics, or wherever. I just don't think that that is the way this country has operated. I am hopeful my colleague from Pennsylvania and perhaps my colleague from California and others will join me. I think we can move it.

Having said that, let me start by asking Professors Roberts, Noll, and Zimbalist, and perhaps Mr. Kimmelman as well, to focus sharply on probably what is the most important question before us. How does the antitrust exemption affect the fans? In what ways, if any, does the antitrust exemption cost fans money or result in fans losing benefits or opportunities which they might otherwise have if major league baseball was not exempt from the antitrust laws? Mr. Zimbalist.

Mr. ZIMBALIST. Well, I think, as I tried to indicate in my oral testimony, that the exemption makes it impossible for rival leagues to go to the minor leagues. To have access to that group of players would be the natural alternative to form a rival league. Because of the reserve system in the minor leagues and because of the exemption and because of the unlikelihood of being able to successfully sue on the grounds of exploitative adhesion because of the exemption, it is not possible to get a rival league using AA and AAA minor leaguers. This, it seems to me, has forestalled the creation of rival leagues.

Baseball is the only sport that has not had a rival league since World War II. It has had slower expansion. So I think this is a very, very important factor. Lifting the exemption by itself would not guarantee that we have a rival league. It would increase the chances that we have it, and if you had rival leagues and you had competition, then all sorts of very salutary things would follow from the consumer point of view.

Senator METZENBAUM. Mr. Roberts.

Mr. ROBERTS. Well, I guess my whole point is that I don't know the answer to the question because repealing the exemption assumes you know what the Federal courts are going to do with the antitrust laws in baseball when you get done repealing it, and I have had enough experience with the Federal courts to know that what these guys are going to do with it—you can take Judges Easterbrook and Posner on one side and Abner Mikva and a few others on the other side, and you try and tell me who is going to get these cases and what they are going to do with them. I just don't know, and that is the problem. If we have got problems in baseball, and we have got them, let us deal with the problems instead of repealing an exemption and Lord knows what is going to happen.

Senator METZENBAUM. Professor Noll.

Mr. NOLL. I think specifically, beyond repealing the exemption, you ought to repeal the Sports Broadcasting Act because that, in fact, creates part of the problem about expansion franchises. The reason the leagues won't expand is because they don't want one more mouth to feed in the fixed broadcasting contracts, and that is just pure protection of monopoly profit. There is absolutely no economic or social justification for protecting monopoly profit, and that is why they don't expand.

What your legislation ought to do besides repealing those two exemptions is prohibit collaboration between leagues in the sale of rights for broadcasting—Gene Kimmelman's point about local territorial rights—prohibit mutual recognition among leagues of restrictions on the competition for players, prohibit agreements between leagues about franchise locations, and prohibit exclusive agreements for sports facilities; that is to say, have legislative teeth behind one of the antitrust cases that was lost, which is the *Hecht* case, which says that these exclusive leases are illegal, but, in fact, they still exist.

I think that you do need proactive action beyond simply repeal because Mr. Selig is right. The situation isn't all that much better in football and basketball than it is in baseball, and they have antitrust exposure.

Senator METZENBAUM. Mr. Kimmelman, do you care to comment?

Mr. KIMMELMAN. I think you should eliminate the exemption. I think you can't really predict what the free market will bring. We do have some experience with the other professional leagues that should dampen expectations, but one concrete example: The Chicago Bulls tried to protect the number of games they were showing on their super station. The NBA didn't like it. They wanted to reduce superstation games from 25 to 20. The courts found that was a violation of the antitrust laws. I mean, it is those kinds of concrete things that we know of today, efforts to reduce fan access to sports on television, that are of concern. Elimination of antitrust immunity protects the fans that way, and an increasingly competitive environment for television rights, we think the benefits could be much larger than that.

Senator METZENBAUM. Mr. Harrison, as I see it, the way baseball treats its minor league players is really an abuse of monopoly power. Most of these kids are typically out of school; most of them are not even college graduates. I think they are high school players. They sign with a team and once they sign, the team owns them for 6½ years. They can't go to any other team, no matter how well they are playing. If the team doesn't need them or they are not playing well enough, whatever the case may be, they are locked in. The team isn't under any obligation to release them regardless of whether their major league affiliate ever uses their talents.

Can you give me any good reason why owners should be allowed to treat minor league players as indentured servants, or was any ever given to you when you were in that category?

Mr. HARRISON. Well, I was not in that information loop with my owner, but I can——

Senator METZENBAUM. What was that?

Mr. HARRISON. I say I was not in that information loop with the owner of my team when I signed. I mean, he did not give me that

information of why he thought it should stay that way, and I certainly see no reason why it should stay that way. Mr. Selig, in representing the owners, talked about the moral obligation he has to the general public, but where is the moral obligation he has to his own employees, mid-level and low-level, which are the minor leagues, if you want to bring in the business aspect of it, as he does? He shows no moral obligation there, let alone the good labor practices that all other businesses must live with in business.

Senator METZENBAUM. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I think today's hearings have been very informative, and I thank all of you gentlemen for coming. With seven witnesses, it is a little hard to do too much on questions in 5 minutes. I would like to make an observation or two and perhaps ask a question.

One of the very revealing statements, to me, was the one about not being romantic about the history of baseball which Mr. Vincent commented about and which I discussed with him, as contrasted with your testimony, Mayor Jordan, or your testimony, Mr. Harrison, that the essence of baseball is the romanticism. I think part of what we need to do on a joint effort is to bring back the field of dreams. It can't be perfect, but baseball has to be more than simply a money machine.

When Tampa Bay and St. Petersburg were referred to as a baseball asset, I know how that made you feel, Mr. Dodge. By those standards, there are many other baseball assets around the country today which are really not baseball assets at all. Baseball is an American asset and it is being run conversely, that is not being run right.

We talk about some of the statutory changes which are proposed—and I went to your statement, Mr. Roberts, to see what your ideas were because you couldn't get to them in your testimony; changes such as legislating a mandate on a minimum level of revenue sharing—if you want to ask Congress to do that, you are in deep water—requiring us to determine an expansion on a reasonable timetable, or setting a minimum percentage of televised games.

I think what we are going to be faced with, really, is either taking away the antitrust exemption and letting the market work or not taking it away. You suggest splitting the sports leagues into two or four independent leagues, and while that may be a good idea, it will really have to be done, I think, by the courts in applying the antitrust laws if the exemption is removed.

But I do think these hearings are very important to put sports, and not just baseball, but football, hockey, and basketball, on notice that there are some really important problems out there on the expansion to more cities. They just have to do that, and beyond St. Petersburg and Tampa.

In discussing the business of pay television, one thing was significant today. To get a commitment from Mr. Selig that they won't go to pay TV on postseason games, League Championship or World Series is significant. To the extent that such a statement has any binding effect, I don't know, but it has some moral effect since he is a spokesman for major league baseball. I think that is significant

and I think that is something that those of us in the Congress can hold them to, but they are creeping around the edges. Mr. Kimmelman outlines it eloquently. It happens all over that they are moving to pay TV by increments.

In addition they have to find a way to deal with teams like the Pittsburgh Pirates, part of the major leagues, and not to take the franchise away bit by bit—Bonilla, Bonds, et cetera.

Your testimony was very powerful, Mr. Harrison, as Senator Metzenbaum said, and I join him. These are problems which we all hope the leagues will address. This is a clarion bugle call putting them on notice because if they don't, we will, and that is a bad alternative.

Thank you.

Mr. ROBERTS. Senator, can I just say one thing in response?

Senator SPECTER. I should have allowed you some time, and this generous clock has anyway because I did comment about your testimony.

Mr. ROBERTS. I share your romantic view of baseball, but the problem is, in the real world, it just ain't so. Asking people to spend $100 million to buy a franchise and then run it in the public interest is like asking a Senator not to worry about reelection. The real world is out there and these are people who are in business to make money.

If it is a national asset instead of a private asset, then the Government ought to buy it or regulate it, and expecting these people—and they are not bad people; they are just businessmen who have a lot of market power and they are going to use it, and that is what they do.

Senator SPECTER. I think what you say has a lot of merit, and there has to be a balance. Right now there is an imbalance and I think, in large measure, by this antitrust exemption which we are——

Mr. ROBERTS. That is where I disagree. I don't think the exemption gives them power at all.

Senator METZENBAUM. There is a big difference between asking Congress to regulate it, which nobody is suggesting, and questioning whether or not any particular business is entitled to an exemption from the laws that are applicable to everybody else. I think you have turned it right up on its head. I don't think anybody is suggesting that we are going to regulate baseball.

Mr. ROBERTS. Well, I am.

Senator METZENBAUM. Pardon?

Mr. ROBERTS. I am.

Mr. NOLL. He hasn't learned his lesson.

Senator METZENBAUM. Well, you liberal fellows—I wouldn't know about that. [Laughter.]

Senator Feinstein.

Senator FEINSTEIN. I think Mr. Mack is next.

Senator METZENBAUM. Oh, I am sorry—no; we go back and forth.

Senator FEINSTEIN. Oh, you go back and forth, all right. Well, this is my first hearing as a U.S. Senator and I must say, Mr. Chairman and Senator Mack, it has been a very interesting one.

The more I think about it, it seems to me that the question of the exemption comes down to whether you have got a team or you

don't have a team. If you have got a team, you want to protect that team. You want to see that it remains, and if the exemption is removed there is the opportunity for the marketplace to move just based on the owner's wishes alone without considering the civic fabric, the amount invested, the fan stability, franchise stability, all of those things. If you don't have a team, then you want to see the exemption go because then you want those things.

Somehow, it seems to me that the exemption—I would almost tend to agree with Mr. Roberts—isn't really what is going to solve the problem of baseball. I don't know. If I were a baseball owner—and I don't know how many of them are left here—I would really be listening very carefully to what was said today because I do think, in this day and age, there are some things that are very compelling, and that is that you can't have your cake and eat it, too.

Mr. Harrison's biographical remarks on his career are probably not the kind of thing that most American people would say is right. They would want a change. They would say, well, why couldn't he exercise his talent? If you have a chance, go for it. I mean, that is as American as the American pastime.

I am very deeply disturbed should the commissioner of baseball become a CEO for owners because that, to me, would say baseball is then a box of Tide on a supermarket shelf, and that all of the things that we in cities go through to get a team, to keep a team, and to support a team are really irrelevant.

So I really think right now, Mr. Chairman, because I think you have made some very forceful remarks—you are known to have a very forceful position—that the ball is in baseball's court, to use a bad pun, and it is going to be very interesting for me to watch and see what comes out of this reorganization meeting. I just hope that the owners and the representatives that are here today take as seriously as I did what I heard, and I thank you for the opportunity.

Senator METZENBAUM. Thank you very much, and following your line of reasoning, I hope the baseball owners don't think that they can just volley the ball back and forth across the court, or else they may wind up being in the courts.

Senator Mack.

Senator MACK. Mr. Chairman, thank you, and let me——

Senator METZENBAUM. It took me this many hours to get to be cute.

Senator MACK. Mr. Chairman, let me say again how much I appreciate your holding this hearing today. I do think it was timely. I think it was, in fact, very valuable, and I want to express again to you and to the staff that put together the witnesses today, it is an excellent group of people and I wish that, in a sense, we had more time. As Senator Specter indicated, it is difficult to come up with a series of questions for seven people.

Through my mind went the thought as I saw Rick Dodge and Mayor Jordan sitting side by side, and then listening to Mr. Harrison express so eloquently the problems and concerns of minor league baseball and the players, that there are always—in almost any process, there are winners and losers and we are moved by those who come up at the short end. The question we have to ask ourselves is what is the most significant or what is the most effec-

tive, what is the most compassionate way to come up with making those decisions about how you allocate resources, where teams go, how consumers will have an access to watch this sport that we all love. My conclusion really is that, in fact, it is through more reliance on the free market.

As I listened to the discussion today—again, I came in here with a preconceived idea, I must admit that, that it is time that the exemption be lifted, but I was also somewhat affected by Mr. Zimbalist's comments with maybe moving toward the splitting of the teams into three or four leagues to really establish some competition. The idea of giving minor league baseball players a greater opportunity to participate in the sport is one that is really exciting to me, and so I hope that we will be able to find some ways to be helpful in that particular area.

I am convinced now more than I was when this hearing started that if we will find a way for the free market to have a greater impact on the decisions that major league baseball makes, there will be more teams playing in more cities with more people playing in the game and more fans having the opportunity to watch.

Since I do have just a bit more time, I just want to give Rick Dodge the opportunity to just expand a little bit on whether you think that you were used. I could probably come up with a more eloquent way to say that, but what is the feeling of what happened to you for the sixth or seventh time now through the process of trying to get major league baseball?

Mr. DODGE. The area certainly feels it has been used. The fans feel they have been used. The city and county governments feel they have been used. The point I was making earlier which is very important is our quibble was never with the city of San Francisco. They have also been used in this process, and for anyone to say what baseball—look at the wreckage that now exists. The city of San Francisco, not by its choice, and the city of St. Petersburg, not by its choice, are in major litigation. Baseball is not part of that process, but they, through their forced indemnification by the investor groups on both sides, have created the cities battling among themselves.

There is loss of revenue to that stadium in San Francisco of about $3 million a year. If you look at the trend of leases from the 1980's forward, they are no longer making leases that pay the debt service to stadiums or their operating deficits. They are now subsidizing those franchises. Players' revenues and salaries going up, revenues in the game going up, revenues coming to stadiums and communities going down to a subsidized position—yes, we feel we were used.

Senator MACK. Did you get any assurances from any team owners or the commissioner's office about the criteria that were established? Again, I made the point that you guys have played by the rules that have been told to you, and it seems each time you do that—who is it in the cartoon? Is it Lucy that holds the football and says, I am going to hold it this time?

Mr. DODGE. This time, I am going to hold it.

Senator MACK. Yes, right.

Mr. DODGE. To be specific to that, when we were contacted by the executives of the Giants, we asked, one, specifically, do you

have permission to discuss the relocation and sale of this franchise? We repeated that question three times both to the owner in San Francisco and also to the commissioner, and each time received, yes, you can proceed to negotiate a contract for sale, even to the point that the announcement of that contract was approved by the commissioner's office.

Senator MACK. You are saying that the commissioner's office specifically gave you permission to engage in an offer and acceptance of a contract?

Mr. DODGE. Absolutely.

Senator MACK. Well, I think that is contrary to what we heard earlier this morning.

Senator FEINSTEIN. Mr. Chairman, I think that is correct. I think what Mr. Vincent said this morning, and we can check the record, is that he said to the team, you now have the opportunity to exercise your options, but he specifically said that did not mean we could approve a contract.

Senator MACK. Let me get Rick Dodge again to give——

Mr. DODGE. That is right. He did announce that, but before we went and met with the Giants in San Francisco, we specifically asked for that to be reinforced specifically if we could enter into a contract and whether he supported the relocation of that franchise to Florida. We would have not proceeded to enter into that contract without that permission and without that guarantee being offered by the Giants.

Senator MACK. Mayor Jordan, I think you wanted to respond.

Mayor JORDAN. Thank you very much, Senator Mack. The issue as I saw it from my point of view was that Baseball Commissioner Fay Vincent did give Bob Lurie, the owner of the Giants, an opportunity to shop the team around the country, but at the same time he also expected to have the offer brought to baseball before it was signed, sealed, and delivered in principle.

The part that is confusing and frustrating to me is that I talked to Bob Lurie; he told me he had signed the contract in principle. At the same time, I already had organized a very prominent investor group in San Francisco who were out trying to put a package together. In fact, one of the principal investors had already had in his hands the financial records of the Giants, so that doesn't show me an opportunity to keep the franchise in San Francisco. It seemed that both of those offers could have been brought to the baseball world, as Commissioner Fay Vincent mentioned this morning, so that a decision could be made as to which one is the best offer, but also giving the San Francisco base an opportunity to present their offer as well and not just shut them out, stating it is tampering if you even bring across an offer yourself.

Senator METZENBAUM. Thank you very much. I want to thank each of the witnesses. Thank you, Senator Mack and Senator Feinstein, for being with us the entire day.

That concludes the hearing.

[Whereupon, at 2:47 p.m., the subcommittee adjourned.]

[The following was subsequently submitted for the record:]

Burson-Marsteller

1850 M Street, N.W.
Suite 900
Washington, D.C. 20036 5890
202.833.8550

J. Gordon Stephens, Jr., Esq.
Senior Vice President and Senior Counsel
Government Relations

December 9, 1992

Mr. Bill Corr
Chief Counsel
Subcommittee on Antitrust, Monopolies
and Business Rights
Senate Judiciary Committee
308 Senate Hart Office Building
Washington, DC 20510

Dear Mr. ~~Corr~~ Bill:

Per a conversation I had earlier today with your office, I am enclosing a December 9, 1992 press statement from the Cincinnati Reds' President and Chief Executive Officer Marge Schott. We are requesting this statement be made a part of the record of tomorrow's hearing on the anti-trust exemption for professional baseball.

We appreciate your consideration of this request. If you have any questions, please do not hesitate to contact me at (202) 833-4202. Thank you for your assistance.

Sincerely,

Skip Stephens

J. Gordon Stephens, Jr.
Senior Vice President
and Senior Legal Counsel

Enclosure

THE CINCINNATI REDS
for further information, please contact
100 riverfront stadium
cincinnati, ohio 45202 phone (513) 421-4510

NEWS RELEASE

FOR IMMEDIATE RELEASE -- DECEMBER 9, 1992

STATEMENT FROM REDS' PRESIDENT & CHIEF EXECUTIVE OFFICER MARGE SCHOTT

GOOD MORNING LADIES AND GENTLEMEN. I APPRECIATE YOUR COMING TODAY TO HEAR MY REMARKS. THE PAST FEW WEEKS HAVE BEEN VERY DIFFICULT FOR ME AND HAVE CAUSED ME A GREAT DEAL OF SORROW. I HAVE READ MANY THINGS ABOUT MYSELF WHICH I AND OTHERS KNOW ARE NOT TRUE. I THEREFORE WELCOME THIS OPPORTUNITY TO REFUTE THE FALSEHOODS BEING STATED ABOUT ME BY CERTAIN PEOPLE WITH THEIR OWN AGENDAS AND PRIVATE INTERESTS.

I KNOW IN MY HEART THAT I AM NOT A RACIST OR BIGOT. I HAVE ALWAYS BELIEVED IN EQUAL OPPORTUNITY FOR EVERYONE AND THAT INDIVIDUALS SHOULD BE JUDGED BY THEIR MERIT, NOT BY THEIR SKIN COLOR, RELIGION OR GENDER. MY RECORD WITH THOUSANDS OF EMPLOYEES, FOR OVER 24 YEARS SINCE MY HUSBAND CHARLES DIED, SPEAKS FOR ITSELF. I HAVE ALWAYS THOUGHT OF MY EMPLOYEES AS MY FAMILY.

AS A MINORITY PERSON MYSELF -- A WOMAN OWNER IN THE MALE BASEBALL WORLD -- I HAVE BEEN ON THE RECEIVING END OF SUBTLE AND NOT SO SUBTLE DISCRIMINATION. THEREFORE, I AM SENSITIVE ABOUT COMMENTS WHICH CAN HURT OTHERS. I ACKNOWLEDGE THAT IN THE PAST I HAVE, ON OCCASION, MADE INSENSITIVE REMARKS WHICH I NOW REALIZE HURT OTHERS. ON THOSE FEW OCCASIONS, IT WAS MY MOUTH BUT NOT MY HEART SPEAKING.

FOR ANY SUCH REMARKS WHICH WERE INSENSITIVE, I AM PROFOUNDLY SORRY AND I APOLOGIZE TO ANYONE I HURT. I CAN ONLY SAY THAT I DID NOT MEAN THEM. I LOVE BASEBALL AND IF ANYTHING I HAVE SAID CAUSED EMBARRASSMENT TO THE GAME, THE REDS, THE WONDERFUL FANS AND CITY OF CINCINNATI, I AM SORRY.

SINCE THIS MATTER HAS TAKEN ON A DEGREE OF FORMALITY, I HAVE RETAINED ATTORNEY BOB BENNETT AND HIS FIRM TO REPRESENT MY INTERESTS IN THIS MATTER. I HAVE ASKED MR. BENNETT TO FULLY COOPERATE WITH BASEBALL'S INQUIRY AND MAKE EVERY EFFORT TO HELP RESOLVE THIS MATTER AS FAIRLY AND AS QUICKLY AS POSSIBLE.

IN FAIRNESS TO ME, I WISH TO ADD THAT WHILE I AM NOT WITHOUT BLAME IN THIS MATTER, I AM ALSO NOT THE CAUSE OF THE PROBLEM. MINORITY ISSUES HAVE BEEN PRESENT IN BASEBALL LONG BEFORE I CAME TO THE GAME. THEY MUST BE RESOLVED. IN THIS REGARD, I WANT TO ASSURE EVERYONE THAT I WILL WORK DILIGENTLY AS AN OWNER TO ADDRESS THESE IMPORTANT AND LEGITIMATE CONCERNS OF MINORITIES. WHILE I AM ONLY ONE OWNER, I PLEDGE TO YOU THAT I WILL WORK WITH OTHERS TO ACCOMPLISH MEANINGFUL REFORM. SINCE I CAME TO BASEBALL, I HAVE INITIATED MANY PROGRAMS THAT BENEFIT CHILDREN OF ALL RACES AND CREEDS AND I WILL CONTINUE TO DO SO.

ON THE ADVICE OF MY LEGAL COUNSEL AND IN THE BEST INTERESTS OF BASEBALL, IT WOULD NOT BE APPROPRIATE FOR ME TO MAKE ANY FURTHER COMMENTS AT THIS TIME.

THANK YOU VERY MUCH FOR COMING TODAY.