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In the

Supreme Court of the United States

CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, et al.,

Respondents.

No. 71-32

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BOWIE K. KUHN, et al.,

Respondents.

Washington, D. C.,

Monday, March 20, 1972.

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ARTHUR J. GOLDBERG, ESQ., 1101 Seventeenth Street, N. W., WAshington, D. C. 20036; for the Petitioner.

PAUL A. PORTER, ESQ., Arnold & Porter, 1229 Nineteenth Street, N. W., Washington, D. C. 20036; for the Respondent Kuhn.

LOUIS L. HOYNES, JR., ESQ., Willkie Farr & Gallagher, 1 Chase Manhattan Plaza, New York, New York 10005; for other Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 71-32, Curtis C. Flood against Kuhn and others.

Mr. Goldberg.

ORAL ARGUMENT OF ARTHUR J. GOLDBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GOLDBERG: Mr. Chief Justice, and may it please the Court:

The issue in this case is the legality under Federal Antitrust and State statutory and common law of organized baseball's reserve system. To paraphrase Judge Waterman's opinion in the Court of Appeals, this is a scheme which binds every American professional baseball player to one team or its assignee for life, and which compels team owners to boycott the player property of another team owner and to boycott any fellow owner, and to boycott the player himself and blacklist him, who fails to abide by the agreement among the owners to eliminate competition in the recruitment and retention of personnel.

The reach of the reserve system extends beyond the Continental United States and even our new States, beyond the 24 major league clubs, which are defendants in this lawsuit, to 155 minor league clubs organized in 21 minor leagues, to the Mexican league, and even to Japan. An American player

boycotted by organized baseball today is boycotted by Japanese employers as well.

Perhaps it may be helpful to the Court if I, having stated the issue, now review a few of the pertinent facts.

On October 8, 1969, Curtis C. Flood, then a major professional ballplayer for the St. Louis Cardinals, was traded, his contract transferred and assigned to another national league baseball club, the Philadelphia Phillies, as part of a multi-player transaction between the two clubs.

As Judge Cooper found in the District Court, and I paraphrase him, at the time of the trade he was 32 years old, a veteran of 12 years' service with the Cardinals, co-captain of the team by election of his teammates, and acknowledged to be a player of exceptional and proven ability.

About that the record is very clear. In his active service with the St. Louis Cardinals, he batted around .300; won several Gold Gloves competition, which is the competition for excellent fielding; and was regarded to be a great asset for that team, as evidenced by the fact that he was being paid $90,000 a year.

Not a salary, as we know from reading the newspapers, that baseball owners throw away very lightly.

The circumstances surrounding his assignment, or, as Judge Waterman said in the Court of Appeals, to use baseball parlance, sale, are rather interesting as part of the background

of this litigation. Perhaps it explains why he chose to use the courts to vindicate his rights, although he had deep roots in St. Louis, Missouri, not only with the ball club, which he had served faithfully for 12 years, he was also an artist who had an artist's studio, he had two photographic studios there and franchises elsewhere; and he had many friends and family in St. Louis.

He was not consulted about the trade. Quite the contrary. He received a form notice and then a telephone call. The form notice was a very cryptic one. The record itself does not really display what it actually is. It's a printed form. And in that printed form there is a checkmark: Your contract is renewed; your contract "has been transferred"; you have been released from service.

Perhaps I might suggest to Your Honors, you might want to look at the exhibits rather than the cold record, to see how this form is filled out.

I should say in all fairness to my distinguished brothers on the opposite side, he also received a telephone call, after the transaction was completed; not before.

Presumably he had relinquished all of his rights to any consultation or disposition of his destiny when, at the age of 15, he signed a contract with the Cincinnati Reds without the assistance of an attorney, which was the practice in those days, and until very recently, until the 1970 contracts.

He signed his first professional baseball contract for an average salary of $4,000. He of course worked his way up the ladder, and when he was playing last he enjoyed this very generous salary.

The fact that he was an exceptional player, as Judge Cooper found in the District Court and Judge Waterman, speaking for the Court of Appeals, confirmed that finding, was illustrated by his batting average.

After he started to play full time in 1962 -- he had been there since 1958 -- with the St. Louis Cardinals, his batting averages were, in 1962, .296; 1963, .302; 1964, .311; 1965, .310; 1966, .267; 1967, .335; 1968, .301; 1969, .285.

I'm not a great mathematician, Mr. Chief Justice and Associate Justices, but this seems to me to be a batting average around .300.

He was also the winner of several Golden Gloves awards. These are awards given to players for"excellent in fielding."

He got this notice, this form notice, without advance consultation, and then he got the telephone call telling him he had to uproot himself, his family, his business connections, and move to Philadelphia.

On December 24, 1969, Mr. Flood wrote to the Commissioner of Baseball, Respondent Mr. Kuhn, Bowie Kuhn, the Commissioner of Baseball, asserting his right to negotiate with teams other than Philadelphia and stating -- and it's a rather

interesting exchange. This was his letter, in part, the relative part:

"Dear Mr. Kuhn: After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several states."

The Commissioner of Baseball, Mr. Kuhn, replied:

"Dear Curt:" -- this is faintly reminiscent to me of a unanimous decision of the Supreme Court which reversed the Hamilton case because a witness was addressed by her first name, while other witnesses were addressed by their last names. Putting that aside, the letter read:

Dear Curt: While we agreed with the contention that as a human being you are not a piece of property to be bought and sold, and this is fundamental to our society, we could not see its applicability to the situation on hand.

Faced with this sale, which he deemed to be an impairment of his legal rights, and a denial of his request that he be made a free agent, at liberty to seek employment with other teams, and without subjecting the new employer to boycott by the team owners, he had no recourse, in his opinion, other than to mount this lawsuit.

This lawsuit challenges the reserve system, which

permits this to be done.

Mr. Flood adhered to his refusal to play for Philadelphia during the 1970 season, so when Philadelphia sold its exclusive right to negotiate with Flood to the Washington Senators, after the 1970 season concluded, financial necessity compelled him to acquiesce.

So we have the reserve system, not unfamiliar to this Court, because this Court has passed upon it, I think wrongly, in two cases, and particularly Toolson.

I think a very accurate description of the reserve clause is contained both in the District Court opinion and in Judge Waterman's opinion for the majority of the Court of Appeals, for the whole Court of Appeals; Judge Moore filed a concurring opinion.

Judge Waterman, in the Court of Appeals, described the reserve system as a system, and I quote him, "which, pursuant to a nationwide agreement" -- and I shall say a word about that -- "clubs, baseball clubs, effectively restrict a baseball player, if he desires to play professional baseball at all, to contract negotiations with that club in organized baseball which first employs or 'reserves' him or with that club's assignee club, and any subsequent assignee clubs, to which in the parlance" -- and I'm quoting Judge Waterman -- "he has been 'sold' or 'traded'."

There is a more extensive treatment of how the reserve

system operates, citing the rules which govern, the baseball rules, in Judge Cooper's opinion in the District Court. And while I disagree with his conclusion, I do not disagree that Judge Cooper correctly describes how the reserve system operates.

Briefly, in addition to Judge Waterman's pungent and succinct description, it goes beyond that: No other club may bid for his services, once he signs. He is not permitted to approach any other club. That's called the no tampering rule.

A club which violates this rule is subject to boycott by the other clubs. In fact, any player that plays for another club which violates this rule is subject to discipline by the Commissioner of Baseball.

And it also extends beyond what Judge Waterman did not deal with, clubs, the major league clubs; it extends to the minor league clubs; it extends to the Mexican League; it extends even to Japan. This is uncontradicted in the record.

Now, Mr. Flood stayed out in 1970 and pursued this lawsuit, challenging the reserve system on several grounds.

First, that it violates the antitrust laws of the United States.

Secondly, that it violates the antitrust laws and common law of the several States.

And, third, that it violates the Thirteenth Amendment to the Constitution of the United States, prescribing that

indentured service, as well as slavery, should be not permitted.

Now, having stayed out in 1970, as I have said, he was confronted with 1971. At that time Philadelphia, the team that "owned" him -- again I quote, paraphrase Judge Waterman's opinion -- the team that "owns" him sold him to Washington.

He agreed to play for Washington. He was there for a few months, and we can all take judicial notice, I think, of what occurred, laymen, lawyers and I believe this Court. He tried. He had been laid off for a year.

After trying for a few months in spring training and in the actual season, he was benched; he could not easily regain his skills, which is not difficult to understand; and he left.

Now, the transfer to Philadelphia -- the transfer from Philadelphia to Washington was accompanied by stipulations between ourselves and opposing counsel that this would not prejudice this lawsuit. I'm well aware, however, that private people cannot stipulate a case for this Court, but the transfer did not moot this case.

In Radovich, the football case, this Court held that the success of a boycott did not moot a case.

And, furthermore, he had experienced damages in 1970, and he had suffered impairment of his career.

Now I turn to the reserve clause --

Q He indicated in his letter, I noticed in the record, in his letter in late 1969 to Mr. Kuhn, that Philadelphi

had offered him a contract. What were the terms of that contract?

MR. GOLDBERG: They offered him --

Q Not all the details, but just in terms of salary.

MR. GOLDBERG: They offered him an increase, to $100,000, with salary and other benefits. But that was not what he was contesting. He was contesting being removed without his consent and, as his letter states, he didn't want to be treated as chattel property.

Q Right.

MR. GOLDBERG: A question of principle.

Q I just wondered as to your --

MR. GOLDBERG: Yes.

Q -- what you're now telling us about the lack of mootness and about his damages in 1970.

MR. GOLDBERG: Yes.

Q I mean he was offered a hundred thousand dollars?

MR. GOLDBERG: Yes, he was offered that.

It is not, by the way, new, although I have seen articles about it which indicate that this high-paid ballplayer did things, you know, that "why did he do it when other ball-players" -- who, by the way, despite all the stories in the press in the five years previous, had only averaged a little over $8,000 a year. "Why this high-paid ballplayer did this?"

He did it, as he simply said, out of principle. He no longer wanted to be treated as chattel property. He made that decision on his own, and although he has been supported in this litigation by the Players Association, about which I shall later have reference, this was his decision. The record is very plain on that.

In fact he was told by the director, Mr. Miller, that he had a tough case. Neverthless, he felt in good conscience he had to pursue it.

Q As a practical matter, though, he had no real chance of remaining in St. Louis and negotiating another contract with the St. Louis club; he would have had to go to one of the other teams, even if it hadn't been for the reserve clause.

MR. GOLDBERG: That's right, Mr. Justice, provided this clause is legal. And I shall say it is not.

Q But even if it's not legal, if St. Louis is trading, regardless of the reserve clause, they're not going to negotiate another contract with him, though.

MR. GOLDBERG: He said that what he wanted was the opportunity, as a free agent, to negotiate his own deal; not to be traded, as this form that I have referenced, indicates, without his consent.

Now, the reserve clause has been in existence 100 years; long antedated any union that the ballplayers formed,

which I shall talk about in the labor exemption. With one important modification.

In 1965, the reserve system was extended for the first time to potential new players who had never signed an agreement with any team, and typically these are teenagers, just graduated from high school or who have dropped out of high school. This had never been done. In this category, not in the minor leagues, they until '65 enjoyed the privilege of negotiating their first contract. That no longer exists.

They have a semi-annual draft.

There is another factor which I shall advert to when I talk about the so-called labor exemption. Judge Cooper found that the baseball's reserve system is not presently collectively agreed to. The citation is in my brief. I shall not burden you with the citation.

Now, Flood decided to sue. He challenged, as I have said, on several grounds.

Q Mr. Goldberg, may I ask you: Suppose it had been collectively agreed to; would your position be any different?

MR. GOLDBERG: No. And I shall discuss that when I come to the labor exemption.

Q I hope you're going to get to that; you're talking rather --

MR. GOLDBERG: I will move fast.

[Laughter.]

Because of the shortness of time.

We have these three propositions. On the first, the antitrust laws, we are confronted obviously with two decisions of this Court: Federal Baseball, decided in 1922; and Toolson, decided in 1953.

Q And they would have to be overruled?

MR. GOLDBERG: They would have to be overruled. They should be overruled. They should be overruled for very good reasons.

They should be overruled because -- the first one, Federal Baseball was not, as Judge Friendly has said, "Justice Holmes' happiest hour". Indeed, --

Q But I take it, Mr. Goldberg, those both dealt with the issue of statutory construction?

MR. GOLDBERG: Yes. But even then it showed -- I doubt that Justice Holmes had ever seen a ballgame.

Q Of course, the Court doesn't readily overrule statutory construction cases.

MR. GOLDBERG: Yes. But it has, and quite recently, as I shall point out in a moment, in reading from an opinion written by Justice Stewart for a unanimous Court, in construing a statute.

That is the case that put aside the Collins vs. Hardeman?

The Federal Baseball in fact was abandoned by Justice Holmes the very next term, after he had written it.

And Toolson was a per curiam which merely said that, Well, we've done it, even though we think it's wrong, because interstate commerce has changed; we ought to leave it to Congress. And the Court was troubled at that time with whether or not prospective rulings could be met.

That problem of course has been settled by this Court even quite recently. And I shall mention that.

Now, I say to you very simply, I shall not belabor it, that Federal Baseball was wrong, the development of the law of what constitutes commerce has proceeded apace, and no one would doubt that baseball is engaged in interstate commerce.

This Court in Radovich, this Court in Shubert Theater, this Court in the boxing area have all characterized sports, if they're so called, as in interstate commerce. Baseball indeed is in interstate commerce in a very big way. It's a tremendous institution. It sends people all over the country and into Canada. It realizes enormous revenues from television.

I think I saw the other day that in the National contract television rights, they realized $41 million and then it's supplemented by local contracts.

Now, we have here a question of stare decisis.

Mr. Justice Stewart, when I mentioned that I thought

that this had been put to rest involving a statute --

Q Mr. Goldberg, just before you start on that, do you think that Federal Baseball and Toolson indicated that the baseball wasn't engaged in interstate commerce? Or is it that labor, labor isn't an article of commerce? Services isn't a matter, an article of commerce, as a matter of statutory construction and the intent of Congress?

But you just say that labor is an article of commerce?

MR. GOLDBERG: It depends on the way labor is treated. Labor should not be an article of commerce. (?) says it should not be a commodity.

Q Well, is Flood different?

MR. GOLDBERG: Yes.

Q Why?

MR. GOLDBERG: Because he's been treated as a commodity, as everybody is under the reserve rule. He's not treated as labor, as we traditionally understand labor people to be treated. Free American workers determine their own destiny.

Q Well, I gather Radovich settled that?

MR. GOLDBERG: Yes, it did. The same issue was raised in Radovich, and decided against the football owners which brought Radovich -- which were involved in the Radovich decision in this Court.

It was argued in Radovich, and I do not know what prompted this Court to take certiorari. I had not assumed that

the purpose of the grant, and this necessarily follows, if it is treated as a labor exemption, which I shall talk about, if it is decided that the labor exemption, so-called, applies, then it certainly applies to football. They have a union. It certainly applies to hockey.

And the consequences of a decision holding that the labor exemption applies to baseball necessarily means that it applies to all other sports, so-called sports.

By the way, it's very interesting, when you read this record, as I know you have or will, Bowie Kuhn, the Commissioner of Baseball, does not refer to it as a sport. He refers to it as entertainment.

If it's entertainment, it's governed by your decision in Shubert, which says that it's subject to antitrust regulations.

The decision, Justice Stewart, that I mentioned in the statutory construction, is your own, in Griffin vs. Breckenridge. Perhaps I should read only a few sentences.

Whether or not Collins vs. Hardemann, construes the Civil Rights Act, was correctly decided on its own fact is a question with which we need not here be concerned. But it is clear in light of the evolution of decisional law that has passed since the case was decided, that many of the constitutional problems perceived there simply do not exist.

Justice Holmes conceived there was a constitutional

problem.

Little reason remains therefore not to impart to the words of the statute their apparent meaning.

I move quickly to the next point. I think it ought to be overruled, it's an anomaly in the law; every commentator has said it's an anomaly in the law to adhere to Toolson and to Federal Baseball as improperly decided.

Now I move quickly to the next point. And that is State law.

Peculiarly enough, as Judge Waterman says, they were on the horns of a dilemma. If federal law did not apply because it was not interstate commerce, why should not State law apply? And Judge Waterman said, contrary to the District Court which was preempted, Judge Waterman said that it was -- it interferred with interstate commerce.

I take it this had no foundation whatsoever. The decisions of this Court are plenty and ample on the subject that State laws, which carry out the purposes of the great federal statute, the Sherman Act, which are not inconsistent ought to be applied.

And that is the law, Senator Sherman, the author of the Sherman Act, said that our law is designed to supplement not displace federal law. There is no preemption here, express or implied. There is no conflict, nor has any court found one. As Waterman says, there's a necessity for uniformity, but there

was no inquiry into the State statute to determine whether there was.

We have listed the State statutes and briefly summarized -- they are the same as the Sherman Act -- those States that have adopted it.

So the decision, for example, in the Continental Air Lines case covers that.

Finally --

Q Has this man left baseball?

MR. GOLDBERG: Pardon?

Q Has the petitioner left baseball?

MR. GOLDBERG: Yes, he left. He left now.

Q Is the case moot, therefore?

MR. GOLDBERG: No, it is not, because the '70 season is the season where he has a right to recover damages, because he returned later; and he also has a right to decide if he wants to go to the minor leagues or Japan, which are subject to the same rules.

I shall say one word, just take a few more minutes of my time, and cut it off for rebuttal.

MR. CHIEF JUSTICE BURGER: Your rebuttal time is used up.

MR. GOLDBERG: About -- yes. About the --

MR. CHIEF JUSTICE BURGER: Excuse me, your time is completely consumed; but we'll extend it three minutes, and

enlarge yours three minutes, Mr. Porter.

MR. GOLDBERG: There is nothing to the baseball argument that a new-found affection for the collective bargaining and the labor act; I share that affection. In fact, I shared it for many, many years.

Under the decisions of this Court, this is hard-core violation of the antitrust laws. This is a group boycott, and a blacklist. All owners under the rules are obligated not to deal with a player if he is on a reserve list. He is black-listed, not only here but in Mexico and in Japan. And this is the most obvious restraint of trade known to man.

I put a simple illustration: as Your Honors well know, I once represented the Steel Workers. Let me put a proposition: Suppose the Steel Workers Union -- it would never do this -- agreed with U. S. Steel that if a man signed up he had to work for U. S. Steel all his life, and if Bethlehem employed him, if he left and Bethlehem employed him, U. S. Steel would not supply parts for their fabricating, or steel for their fabricating operations. Is there any doubt in anybody's mind that that would be a per se violation? Not at all.

Finally, so there's nothing to this labor exemption, as the Court said recently, the Court said in Pennington, Justice White's opinion, you cannot just say conditions of employment and wages, you have to interpret the terms. This

purports to be a condition of employment; servitude is not a condition of employment nor is slavery.

Can you conceive any union being charged with a failure to bargain because of this? I cannot conceive of that.

Furthermore, this goes beyond the bargaining unit, the opinion, Justice Brennan, that you just wrote confirming Pennington. Because it covers the minor leagues, and it goes beyond that. So it gets out as a bargaining unit.

And for all of these reasons I would say that none of the arguments have any basis. Mr. Flood was the victim of a reserve clause which, in my view, violates all of the anti-trust statutes.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Porter.

ORAL ARGUMENT OF PAUL A. PORTER, ESQ.,

ON BEHALF OF RESPONDENT KUHN

MR. PORTER: Mr. Chief Justice, and may it please the Court:

I wish to take just about five minutes. I represent the respondent Bowie Kuhn, the Commissioner of Baseball, who was a defendant below in only Count One, and that was the antitrust count.

Mr. Hoynes then will discuss the issues of the case, including what we all agree is the central issue, namely, that this litigation involves basically a labor dispute.

Now, the Commissioner of Baseball serves for a term of seven years, with broad plenary powers both of administrative and quasi-judicial nature, to preside over the institution of professional baseball.

His principal and fundamental function is to maintain the integrity of the sport on the playing field and the public confidence in the honesty of the game.

He has the authority, under the rules of baseball, to take whatever action in his judgment is in the best interests of baseball. And he is required on frequent occasions to evaluate under that standard and weigh impartially the interests of players, the clubs, and the fans alike.

Now, baseball, as it's been recognized by this Court again and again, is a unique structure primarily bottomed on responsible self-government; the office of the Commissioner, as we all recognize, beginning with Judge Landis, was established to police the honesty of the sport; Since it has developed into an institutional apparatus, to reconcile many minor and major issues in the proper administration of the structure as a whole.

Q Well, Mr. Porter, does the structure of other sports differ today? Football, basketball, hockey?

MR. PORTER: Not perceptively, Mr. Justice Brennan. They have copied, including the reserve systems, essentially the same structure, the pattern as baseball.

Q And yet they come within the application of the antitrust laws?

MR. PORTER: Well, it has never been challenged except in Radovich. They have settled a number of cases, as Mr. Hoynes will develop. The Spencer Heywood case is a notable exemption. And they have been living on the brink, I think, had they recognized it --

Q Well, I mean, you're not making an argument for uniqueness of baseball with respect to its structure?

MR. PORTER: Oh, indeed, we are.

Q You are?

MR. PORTER: Indeed, we are. Yes, sir. And I could develop that, if time permitted, where we have spent 25 percent of our revenues for player development, major league revenues.

Now, the other sports have their farm systems, the college, and there are many other distinctions.

Now, the Commissioner, because of his neutral position, has no participation in the bargaining that is going on with respect to the reserve system. However, he testified in the District Court that this system was not a fossilized system engraved in tablet of stone, it was subject to changes and modifications, and, indeed, it has been changed and modified.

The Commissioner also gave important testimony on two particular areas that I would direct your attention to:

No. 1, that without some continuity of employment

between clubs and players, the relative equality of competition and the honesty of the sport would be seriously impaired. I would respectfully direct Your Honors' attention to the Commissioner's testimony, which is summarized in our Appendix.

Q But doesn't this go to whether it would be a violation of the antitrust laws rather than to coverage?

MR. PORTER: Well, I think, Mr. Justice White, that this is a labor dispute, and is a bargainable issue, as Judge Cooper found, and as I think the Second Circuit, as Judge Cooper said, that all evidence has not been fully exhausted in the bargaining process. And, indeed, as Mr. Hoynes will develop, this issue was on the bargaining table when Toolson -- when this litigation was brought by the players union.

Also I would direct your attention, finally, to the Commissioner's testimony, the exhibit that he sponsored, which is Exhibit A, found at page 407 of the Appendix.

Q But, Mr. Porter, you just said when this litigation was brought by the players union?

MR. PORTER: Oh, it was financed by the players union, indeed, that's conceded in this record.

One final point I would like to make, in spite of all the rhetoric --

Q Are you saying this is their lawsuit not Flood's?

MR. PORTER: Absolutely, yes, sir.

And in spite of all the rhetoric that we hear here about this being a per se violation, in the prior record below, with the exception of the petitioner, Mr. Flood, all the witnesses in support of Mr. Flood's case testified that some form of reserve system was essential.

I will halt there, I see my time is consumed, Mr. Chief Justice. Mr. Hoynes will continue.

MR. CHIEF JUSTICE BURGER: Mr. Hoynes.

ORAL ARGUMENT OF LOUIS L. HOYNES, JR., ESQ.,

ON BEHALF OF OTHER RESPONDENTS

MR. HOYNES: Mr. Chief Justice, and may it please the Court:

I am counsel for the National League, and I here represent the 24 major league clubs and the two major leagues.

The issues presented here are --

Q Is it your position that baseball is not commerce?

MR. HOYNES: No, it is not my position that baseball is not commerce, Your Honor. I think that has been well recognized, and, indeed, was recognized by the Toolson decision.

The issues here are much broader than Curt Flood's particular situation, which has been described by Mr. Justice Goldberg.

This is fundamentally, in our view, institutional litigation concerning the normal operation of baseball's basic, fundamental, and historic rules. And the real protagonists

here, as suggested by Mr. Justice Brennan's question a few moment ago, the real protagonists are the players union, the Major League Baseball Players Association, and the major league clubs, which I represent.

Q Does the record show us anything about the union?

MR. HOYNES: The record shows, in very great detail, Your Honor, as does the opinion of Judge Cooper, he devoted a good portion of his opinion to it,to tracing the effectiveness of bargaining, the effectiveness of the union.

Q Well, I mean the scope, its extent, numbers of players who are members.

MR. HOYNES: Yes, all the players in major league baseball, really, are members of the Players Association. The association has been recognized by the clubs as the formal collective bargaining agent for the players; and all of the terms and conditions of employment of a major league baseball player are in fact on the table on a more or less constant basis.

Q Have there been many NLRB proceedings involving the relationships between the clubs and this association?

MR. HOYNES: Well, there's been no dispute over the propriety of their representation. However, there have been a couple of unfair labor practice charges that have been brought, and processed by the NLRB, and the NLRB of course asserted jurisdiction, and that point is not debated by either side; it's

part of the workings of major league baseball as we know it today and have known it for some time.

Q Those proceedings you were referring to were the ones by the umpires?

MR. HOYNES: No, I was referring to proceedings involving the Major League Baseball Players Association itself.

Q The players themselves?

MR. HOYNES: Yes, Your Honor; some dispute at the beginning of this year on the question of the relationship between television revenues and bargaining on the pension plan. There was a dispute as to the extent to which we were required to disclose certain information. The NLRB involved itself in working that matter out. Complaint was issued, and so forth.

Q Would you be taking the same position if the plaintiff here were a minor league player?

MR. HAYNES: If the plaintiff were a minor league player? Your Honor, I would not be able to say to you that bargaining, directly representing the minor league players, was being carried on. But the Major League Baseball Players Association certainly has bargained with the interest of the minor league players in mind; indeed, many of the grievances that have been brought before our --

Q Yes, but the players aren't -- the minor league players, in terms, aren't settled by the bargaining between them?

MR. HOYNES: The bargaining with the minor league players directly?

Q Yes.

MR. HOYNES: No, there's no direct formal representation by the minor league players. It is -- that does not mean they are unrepresented, however. I suggest that their interests, as part of this entire structure, are --

Q So your position would not be the same if this were a minor league player?

MR. HOYNES: Well, my position would be the same, Your Honor. I simply would not be able to point to the direct one-to-one relationship between a formal bargaining representative and that particular player, as I can with Mr. Flood, who was clearly represented as a member of the organization.

But I would still argue, Your Honor, even if a minor league player were here.

Q Mr. Hoynes, how far does representation of Flood go? For example, did the owner consult with the Players Association about this?

MR. HOYNES: You mean as far as the assignment of Mr. Flood's contract?

Q Yes, sir.

MR. HOYNES: No, that contract assignment took place under the rules, which themselves were the subject of bargaining.

Q My question was: how much representation did

Flood get from this outfit?

MR. HOYNES: Well, no one in the --

Q As to this trade which is the basis of this suit. Now, what position did the union take on that?

Or do you call it a union?

MR. HOYNES: No, I call it a union, Your Honor.

Q Well, what position did the union take on this? Did they ever object?

MR. HOYNES: The union, after the transaction took place, conferred with Mr. Flood, as I understand it, and ultimately agreed with him to finance the cost of his litigation, and, as I was about to point out,it is quite transparent, I believe, from a reading of the record that the Players Association, the players union, has in fact controlled this litigation from beginning to end.

Q I understood that the union and management, what they were interested in is non-litigating; is that right?

MR. HOYNES: We certainly were interested in non-litigating, Your Honor. We believe that the --

Q Well, what negotiation was done between this union that protected Flood?

MR. HOYNES: Well, when the lawsuit began --

Q What, if anything, before the lawsuit?

MR. HOYNES: No representations by the union were made to us seeking --

Q Is that normal?

MR. HOYNES: -- seeking any --

Q Is that normal in union-management relationship?

MR. HOYNES: Your Honor, I believe it is during the pendency of a collective bargaining agreement. These rules were part of an arrangement, and bargaining was not to take place until the subsequent period. The transfer was entirely in accord with those arrangements.

Q So you're saying that a union, which says to management,"You can pick up a man and throw him out the door," without any recourse, that that's a union?

MR. HOYNES: Well, Your Honor, I don't believe the union has ever agreed to that, and I don't think that's what happened to Mr. Flood.

Q Well, did the union agree to the bargaining -- that paragraph which is under attack here? The reserve clause.

MR. HOYNES: The reserve system is not simply a paragraph, but a number of interrelated rules, all of which --

Q Agreed to by the union?

MR. HOYNES: I believe that's right, Your Honor.

Q That's hard to believe.

MR. HOYNES: Beg pardon -- with the management.

Q You mean that in the record it shows that?

MR. HOYNES: Well, Your Honor, there are the collective bargaining agreements in the record, and they are the

printed documents --

Q Well, is there anything that shows that the union, which you call a union --

MR. HOYNES: Yes.

Q -- agreed to these provisions?

MR. HOYNES: Your Honor, a collectively bargained agreement is an agreement signed, obviously, by the union and by management and all of the major league rules were encompassed by that agreement. I can't think of a plainer way to demonstrate that.

Q Well, what good is the union?

MR. HOYNES: Well, the union serves, Your Honor, as I think,having participated in the bargaining on management's side for the last several years, has made remarkable gains with respect to player-club relationships.

Q What has it done concerning individual players' relationships?

MR. HOYNES: Well, the union has bargained --

Q Wouldn't you say nothing?

MR. HOYNES: No, we're not saying nothing.

Q Wouldn't you say under the reserve clause there was no room for bargaining?

MR. HOYNES: No, I certainly would not say that. I would say that the reserve clause itself, the very core of the reserve clause is a subject, admitted by both sides, a mandatory

subject of bargaining and something about which bargaining was going on when interrupted by the pendency of the filing of this lawsuit.

And it is back to that forum, Your Honor, that we believe this matter should be remitted.

Q You mean back tothe union?

MR. HOYNES: Back to the collective bargaining table, Your Honor; yes.

Q Well, even though the union is not protecting the individual?

MR. HOYNES: Well, the union is protecting the individual, Your Honor. This union is very well --

Q How is the union protecting this individual, the named petitioner, Curtis C. Flood?

MR. HOYNES: Your Honor, the union bargains, obviously, for future benefits. And what's at stake here is the shape of baseball and its employee relations, really, for the future. Mr. Flood is, I think there's no question about that, he is retired from baseball now; he's through with baseball. He --

Q You couldn't call it voluntary, would you?

MR. HOYNES: Well, I would call it voluntary retirement at this point, Your Honor.

Q Oh, you would?

MR. HOYNES: He was playing for Washington, and felt that he no longer could play satisfactorily to his standards.

And he had other problems, as well, and left the country.

We were most eager to have him play during the pendency of this lawsuit. We told his counsel repeatedly that we would make no argument whatsoever that the case had been mooted, and that we wanted to see Curt Flood play and living his normal life, and the litigation could go forward.

They would not hear one word from us; that there was something inconsistent about him playing and litigating. We made no threats. It was suggested constantly that this be done.

And in 1971 Curt Flood decided he would return to baseball, and his play was of a caliber that -- he's a proud man; his play was of a caliber that was not satisfactory to him. He had other financial and business problems which caused him to leave both the Washington area and the United States. We regretted that very much. We would have been delighted to see Mr. Flood continue along in a prosperous career.

Q None of this came out.

MR. HOYNES: Beg pardon?

Q None of this is in the record?

MR. HOYNES: None of which is in the record, Your Honor.

Q His playing with Washington or any of his other business?

MR. HOYNES: Well, the record was closed before he began to play with Washington, Your Honor; yes. I think that

Justice Goldberg adverted to it, and I'm sure you can take notice of that fact.

As I mentioned before, it is our position that the players union is entirely in control of this litigation, and that it is concerned less with remedying any alleged wrong that may have been performed on Mr. Flood than it is trying to reorganize the employment relationships in professional baseball. In other words, the union is after larger game here.

Mr. Flood's testimony itself was isolated from the rest of the case presented on behalf of petitioner. He testified that he would like the entire system to be torn apart, and would like every ballplayer to be free to negotiate with any club of his choice. While all of the other witnesses that testified on behalf of the petitioner limited their testimony to certain modifications that they suggested in the reserve system, all assuming that some continuity of player control, some form of player reserve system, would in fact be necessary.

This testimony represented a repudiation, really, of Mr. Flood's position, and left him the forgotten man for the remainder of the case.

In fact, no evidence at all was offered on the damages which Mr. Flood's complaint indicated he had suffered to his outside business interests in St. Louis; not a shred of evidence was ever offered on that matter.

Thus the union, as I've said, was after larger game.

It intended to subvert the collective bargaining process in baseball, to obtain gains which it had not yet achieved at the bargaining table, outside of the bargaining table; and to unravel the very fabric of past collective bargaining, all of which was interwoven intimately with the reserve system.

In order to accomplish this purpose, the petitioner has attempted to persuade this Court to move radically in two new directions: first, to change the law abruptly and totally by overruling the narrow and well-confined precedents of long standing, which now indicate that baseball is not subject to the antitrust laws; and second, to declare illegal, per se illegal, I believe, according to their briefs, baseball's historic reserve system, as the trial court found, the corner-stone of the game.

And to act, in effect, as a compulsory arbitrator in an employee-employer dispute about the terms and conditions of employment in baseball, in fashioning a new system.

The trial was --

Q Mr. Hoynes, at this point would you comment as to why baseball moved to extend the -- why did it move into the draft system in 1965, to the new player?

MR. HOYNES: Your Honor, the adoption of the draft system is simply one more step in a number of steps that baseball has taken over a period of years to try to equalize competition on the playing field. Preceding the draft rule,

there were rules about bonuses, you may remember this. If a bonus of a certain size was awarded to a player, that player must serve immediately on a major league roster. All of these were efforts to prevent the clubs with the largest accumulations of wealth from being able to attract the most skillful young ball players.

And none of those systems seemed to --

Q The bonus system itself didn't come into effect until fairly recently, did it?

MR. HOYNES: Beg pardon?

Q When were the first bonuses paid?

MR. HOYNES: Well, I think the first bonuses probably of large amount were paid in the Fifties. Sometime before the rule of the '65 free agent draft.

I might note on the free agent draft subject, that all of the other sports have free agent drafts; in fact, in the other sports, the rights to negotiate with a player are perpetual. Once an amateur is drafted, he can negotiate only during his lifetime with the club that drafted him. In baseball, the negotiating rights are only of six months' duration. And if a player does not sign with the club that drafted him, he may be reselected, reselected by another club.

Q Mr. Hoynes, what are the principal differences between the standard National Football League contract and the type of contract which Mr. Flood had?

MR. HOYNES: Wall, Your Honor, there are a number of differences in the employment relationship between football and baseball, and a number of differences in the sport, the character of the sports themselves.

An obvious difference that receives much publicity is the option rule in professional football, a system by which a player can declare at the beginning of the season that he desires to move to another -- other pastures at the end of that season. He then plays an option -- they call it playing out the option.

At the end of that additional year, he is technically free to seek employment by another club. The rule has another provision that says that any other club that signs that player must compensate the club from which the player came, either in an amount measured by money,players, draft choices, what-have-you, satisfactory to that former club; or, if no agreement can be reached, that the Commissioner will establish compensation.

The Major League Baseball Players Association has denounced this arrangement as essentially a fraudulent one. In fact, there has been little or no mobility historically in football, and if one examines the collective bargaining process going on in football, one will see that the football players themselves denounce the arrangemet as being essentially a cosmetic one and not one that affords them any real freedom of choice in seeking their employment.

Other differences in the employment relationship in football and baseball are that in football the management may establish the rules of the game; in baseball our collective bargaining agreement expressly recognizes the duty of the major league clubs, before enacting any rule involving in any way player benefits or player rights, to negotiate that rule with the players.

Also in baseball there is a grievance procedure, which we've agreed to with the Players Association, one that's unparalleled by any other sport, which places all grievances about club and player matters, except those involving integrity which are reserved for the Commissioner, but the garden variety grievance goes before an arbitrator external to the game, a man, now, named Lewis Gill, former president of the American Academy of Arbitrators, jointly selected by the union and by the clubs. He's handled dozens of grievances in baseball, and makes final and unappealable decisions with respect to them.

And, finally, with respect to the differences in the character of the game, the games themselves, football, for example, and baseball; football is able to reach out and pluck from the college campuses players ready to play professional football, already nationally known and skilled.

Baseball has no such alternative. Baseball has an elaborate minor league system in which it develops its own players, and to which it devotes approximately 25 percent of

the major league gross revenue, something over a million dollars per year per club poured into the minor leagues to keep the flow of players, to keep this player development flow operating. There isn't any sport, any professional sport that has anything that even approximates that sort of an arrangement of those sort of expenses and difficulties of player development.

And for all of these reasons, we believe, and the Players Association recognizes in their bargaining with us, that the experience in other sports is, while not dissimilar from baseball, really, nevertheless, neither is it a good guide for the baseball world. There are important differences in the businesses, and we feel and, as I have said, the players union feels, too, that we must work out our own relationships in the light of the realities of the baseball business, not in the light of what some other sport may do, or some arid principles; but on the practical level at the bargaining table by the people who must live with the results of their labor with the players and the club owners.

Q Well, why are they paying for this lawsuit? I'm using your words, you said that.

MR. HOYNES: Sure, you're expressing a fact, Your Honor.

Q Well.

MR. HOYNES: Your Honor, bargaining had just begun in the core of the reserve system, and, like any labor union,

if they think they see an easy way to achieve a position of predominance, a better position, more cloud at the bargaining table, they seize the opportunity.

I think there's little doubt but what the owners' position here would be something of a shambles, if this Court were to rule that the reserve system is, per se, illegal.

As a matter of fact, I don't know how bargaining could proceed at all. I don't know what we would do at the bargaining table, because, presumably, not only the present system but every modification thereto, everything that we might work out in this area with the union would be forbidden by the antitrust laws. And even if only our present system, not speaking of other systems, were to be declared illegal, still there would be a third party at the bargaining table, and that would be the courts.

And the players union, I think, would be able to use that extremely effectively. We would be buying a new reserve system every time we bargained, and the option would be that we would be faced with more litigation, and not the certainty that, or probability, that the arrangements would be illegal without their acquiescence.

I think this kind of intrustion into the collective bargaining process is not something that the courts commonly do, on something that's quite inconsistent.

Q Is this the issue here, whether the reserve

clause violates the antitrust laws? I didn't know that. I thought the issue here was whether you were exempt.

MR. HOYNES: Well, Your Honor, I think the only factual issue presented here, obviously the broader issue is the Toolson exemption, which we believe reaches to the entire structure of the game, not only the reserve system. But Mr. Flood and the union here are complaining only about the reserve system, and it's very difficult to separate the two.

Q But the merits of the controversy were never reached, either in the District Court or the Court of Appeals?

MR. HOYNES: Well, the merits of the --

Q They declined, both courts delined to reach the merits because they held that organized baseball was not subject to either the federal or the State antitrust laws, and it's that issue that's now before this Court, is it not? And if we should decided that the Court of Appeals and the District Court were wrong in that view, then wouldn't the normal practice be for this Court to remand the case to the District Court for a trial of the case on the merits?

MR. HOYNES: I think it's quite right, Your Honor, but I think there are other levels of decision here, too. The labor matter that we're discussing, and I'm now arguing, was not --

Q Well, that just bolsters your argument, I gather --

MR. HOYNES: Yes.

Q -- that this is not a matter for the antitrust laws.

MR. HOYNES: That's right, Your Honor, it's a separate and distinct reason for reaching the same results.

Q Yes.

MR. HOYNES: I might also comment, as an aside, --

Q So you could lose the issue that is here on coverage, and still win on the reasonableness of the reserve system under the antitrust laws?

MR. HOYNES: Yes, I presume we could also lose the issue here on broad coverage and prevail on the issue that no suit can appropriately be brought by a member of the collective bargaining association, organization, in a matter which is essentially a matter for collective bargaining.

Q Do you think there's something unique in a union representing the great range of baseball players, all of them, being the collective bargaining agent for all of the players in a unit?

MR. HOYNES: No, Your Honor, I don't.

Q When you don't purport to reach the question of salary?

MR. HOYNES: No. The union has made express in its dealings with us that it does not wish to bargain except to set minimums and other parameters. It is suggested that we

would like to bargain, perhaps, not only about minumums of floor, but perhaps minimums that relate to the very seniority levels as well.

But it does not wish to intrude in the individual negotiations of a contract.

Q But that's what unions usually do.

MR. HOYNES: That's right, Your Honor, but the range of --

Q Then, why is it -- why doesn't it here?

MR. HOYNES: It certainly could, Your Honor, that would be a mandatory subject if the union were to raise, put that issue on the bargaining table. We would have no choice but to deal with it.

Q And the same with you, if you put it on the bargaining table?

MR. HOYNES: Yes, if we were to put it on the bargaining table as well.

I think both sides, to date, have felt that it was not in the interest of the individual players or of the process to --

Q That's just because the players are too different, one from another, for one union to represent them?

MR. HOYNES: I think that that is part of the answer, Your Honor; yes. I think that's part of the answer to a solution.

Q Well, what's the rest of the answer?

MR. HOYNES: Well, I think the rest of the answer is that not only are the players different, but their relationships with their clubs may be different as well.

Q Well, that's just saying the same thing.

MR. HOYNES: It's a feature of the same thing; an aspect of the same. There's a wide range, obviously, of talent, of desire, and it's felt that that's more appropriately realized in individual bargaining.

Q But while the union feels that if -- and you apparently; that you and the union really shouldn't set salaries, which is usually the subject of collective bargaining, you should be able to agree on a reserve system that applies the same to everybody?

MR. HOYNES: Well, Your Honor, --

Q Even though the players are different, one from another, and their relationships to the club were different?

MR. HOYNES: We don't think it would be practical to have a different reserve system reach individual players, such as you can differentiate salaries. That does not mean that a reserve system must necessarily monolithically apply to all players. There could be a small number of variations in the reserve system; again depending upon seniority or some other factor. Those kinds of suggestions have been made, and they certainly will continue to be on the table.

But an individual reserve system for each player, having that negotiated out separately is a little difficult to understand. I think that would not be workable.

That's not to say that individual players and clubs cannot negotiate such things as long-term contracts and so on, which go a long way toward modifiying the reserve system. That can be done and has been done.

And that any player is free to do with his club. There's certainly a precedent for that.

Your Honor, I'd like to briefly refer you to the Jewel Tea and Pennington decisions, which Mr. Justice Goldberg referred to. That's --

Q Just let's assume for the moment that both players and management, as they do, say, pay is out as a collective bargaining issue, that's going to be left to individual bargaining; and then the owners, among themselves, agree on a range, on some maximums: We will not pay anybody, no matter who it is, more than $100,000 a year.

MR. HOYNES: But we simply would not do that, Your Honor.

Q Let's just assume you did.

[Laughter.]

Let's assume you did. Because that's one of the suggested alternatives, of course, to a reserve system. There's going to have to be some maximums.

MR. HOYNES: Not one that we've suggested, Your Honor. That would be something that we would have to, I believe, say the maximum, like, say, the minimum is something that would have to be taken up with the Players Association and bargained. If the Association were to say, No, we don't care to bargain on that.

Q Well, I take it, then, you wouldn't do that because you think it would be improper?

MR. HOYNES: I think it would be improper, Your Honor, yes.

Q Not such as violating the antitrust laws?

MR. HOYNES: No, improper in terms --

[Laughter.]

Not at all, Your Honor, improper in terms of the labor laws.

Q All right. Let's pursue that. I just want to get your position clear.

If the owners agreed on a maximum of $100,000 a year, against the background where both labor and management have put it aside as a bargaining issue, that you say that would not violate the antitrust laws? Just a joint agreement among the owners as to what they would pay their players?

MR. HOYNES: Well, if this were put aside as a bargaining issue, you can't make something that's not a bargaining issue -- that is a bargaining issue not a bargaining

issue; but you can agree not to bargain about it.

Q All right. Let's assume -- put it the way you want to: you agreed not to bargain about it.

MR. HOYNES: We'd agreed not to bargain about it, and the union, thereby, would have acquiesced in our setting such maximums, then I believe we would be permitted to do so.

Q Only because of the labor exemption?

MR. HOYNES: Because of the labor exemption, because of the union acquiescence. But the union could challenge that, put it on the bargaining table at any time and dispute it.

Q Well, because of the labor exemption? Because of the basic exemption that baseball comes under the antitrust laws? Right?

MR. HOYNES: Of course, that goes without saying, Your Honor. That goes without saying.

I'd like to call the Court's attention, if I may, briefly, to a matter not mentioned in our brief, simply because it had not been published by that time, and that is the Yale Law Journal article by Professor Winter and Mr. Jacobs, entitled, Antitrust Principles in Collective Bargaining by Athletes, at 81 Yale Law Journal, No. 1. Which agrees completely, I believe, with the analysis which we have advanced in our brief. And suggests that the antitrust issues are perhaps even irrelevant here, that the labor policy and its supervening --

Q You're just suggesting that this judgment below

be upheld on that ground, that wasn't reached below?

MR. HOYNES: Your Honor, I'm suggesting that the judgment -- No. 1, that the judgment below be upheld on the grounds --

Q Yes.

MR. HOYNES: -- reached below; but, alternatively, that there is additional powerful, we think quite correct, grounds, which the bourts below felt it was not necessary to reach, to wit, labor policy, which offers an alternative reason for --

Q Do you think the record is adequate for that ground?

MR. HOYNES: Well, I think the record is --

Q And --

MR. HOYNES: -- quite adequate.

Q -- you would oppose a remand? Assume we disagreed with you on the exemption issue, the initial issue on which it was decided below, would you think it would be -- would you prefer that it would be remanded, the labor exemption issue, to be dealt with by the courts below first?

MR. HOYNES: Your Honor, I think it would not be inappropriate to remand that for such findings as you might feel would be appropriate and not inconsistent with your opinion. I do believe the record has been fully developed on that point, however.

I would mention only briefly that the role of Congress is one that I'm sure you are aware, and I will not labor the point; Congress has accepted the invitation this Court has repeatedly given, has examined the baseball system repeatedly; many bills have been introduced, many hearings held. The conclusions of those committee reports universally were to the effect that baseball's reserve system was something that was of the substance of the game and needed to be preserved.

Whenever Congress has acted, it has extended an anti-trust exemption. It has never, in any way, limited one in professional sports.

The matter is now under active consideration by Congress, which has flexible legislative power, it's not limited to apply in only the garden-variety antitrust laws; it can root out evils as it sees them with this flexible legislative power and deal with them quite precisely.

And if any regulatory policy, governmental regulatory policy of baseball should be adopted, then Congress, as this Court has repeatedly observed, is the proper body for adopting that.

I would like to mention, as well, the doctrine of stare decisis, this Court has said the last word on stare decisis in the Toolson and Radovich opinions. Again I need not repeat what this Court has said, except to note that the baseball community has continued to operate under those rules, grown and

invested more, and that those reliance interests, recognized in the Fifties, have multiplied, are of even greater weight now.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:12 o'clock, a.m., the case was submitted.]

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