MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION*

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I. INTRODUCTION

Although I am confident that the Antitrust Subcommittee requested that I appear because of my interim position as the Chairman of the Executive Council of Major League Baseball, I must candidly tell you that I necessarily bring with me all that I have learned and experienced during my twenty-three 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 Major League Baseball (MLB) has with the millions of Americans who support our great game are all shaped by my personal experiences in MLB. I was deeply and personally affected by what I consider to be a flagrant breach of that special covenant that MLB has with its fans when the sport allowed the Milwaukee Braves to move from Milwaukee to Atlanta in 1966. This is the type of breach of the public trust that MLB might not be able to prevent if those upset with the decision to save MLB in San Francisco succeeded in stripping MLB of its seventy year antitrust exemption. My personal experiences in the sport leave no doubt in my mind that MLB did serve the public interest in San

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* This text is an edited transcript of testimony given by Mr. Selig on Dec. 10, 1992, before the Antitrust Subcommittee of the Senate Judiciary Committee.

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Francisco by preferring to keep franchises staying where they are. No legitimate public policy would be served by legislation that would force MLB to defend constantly the reasonableness of its efforts to promote franchise stability.

This hearing was called for two reasons. The first is the concern of the National League's decision not to approve the relocation of the San Francisco Giants to Tampa Bay. The second is the circumstances surrounding the September 1992 resignation of Commissioner Francis "Fay" Vincent and the future of MLB's governing structure in the future. I will address both issues, and I am confident that you will conclude that in neither area did MLB violate the antitrust laws or the special trust that exists between the game and the American people.

II. MAJOR LEAGUE BASEBALL'S STRONG PREFERENCE FOR FRANCHISE STABILITY

To the many loyal baseball fans in the Tampa Bay area, 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. 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 thirty-five years, was simply a reaffirmation of the MLB's long established policy against the relocation of franchises that have not been abandoned by their local communities. Although I understand the disappointment of the people of Tampa Bay, my vivid memory of the devastation caused in Milwaukee when the Braves went to Atlanta leaves me firmly convinced that MLB'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 MLB since the 1903 Agreement between the American League and the National League. The Braves' stay in Milwaukee was, until their abrupt departure twelve years later, one of the great success stories in MLB. While Milwaukee was a small town compared to most other MLB cities at the time, the Milwaukee community immediately embraced the Braves and supported them spectacularly. The Braves became a part of the basic fabric of the Milwaukee community. The team drew 1.83 million fans in their inaugural season

in Milwaukee, a National League record at the time. With increased seating the following year, the Braves became the first National League club to attract more than two million fans, a feat which the team duplicated 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 1950s, when the teams played fewer home games and Milwaukee's County Stadium had a smaller capacity than it has today. In fact, the Braves led the National League in attendance in six of their twelve years in Milwaukee, and only the Brooklyn/Los Angeles Dodgers drew more fans over the same twelve year period. As a result of this tremendous support, the Braves were also profitable in Milwaukee.

As a young man living in Milwaukee, I was one of the many ardent fans of the Braves. When the Braves placed shares of the club on the public market, I bought two thousand shares and was the largest public shareholder of the club even although I owned only a very small percentage of the team. In 1963, we started to hear rumors that, despite the success of the franchise in Milwaukee, the Braves would be moving to Atlanta. The people of Milwaukee were outraged and they aimed 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 team after the 1964 season, but the stadium lease forced the owners to stay for one more season. While the team played in Milwaukee during the 1965 season, the club's management abandoned them. As a result, I became Vice President of a Milwaukee civic group that ran the Braves during that season.

Despite our efforts, the Braves did move to Atlanta at the end of the 1965 season. I was personally heartbroken and 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 toward MLB for allowing the Braves to abandon us. MLB awarded our loyal financial and emotional support of the team with a slap in the face. MLB forgot the years of drawing more than two million fans per season. The club simply moved to potentially greener pastures and no one from MLB stopped them.

The void left in the community by the Braves' departure drove me to devote the next seven years of my life to trying to bring MLB back to Milwaukee. I understand the disappointment and frustra-

tion felt by the people of Tampa Bay because, on several occasions during those seven years, I was certain that I had reached an agreement to purchase an existing franchise. Each time a deal could not be reached. We also lost when MLB awarded four expansion franchises to begin play in 1969.[1]

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 they were looking to sell the team. I led a group that signed a contract to buy the Pilots in October 1969. For the next six months, MLB responsibly and properly did everything it could to keep the Pilots in Seattle. It was not until the owners of the Pilots declared bankruptcy and the court ordered the sale of the club to my group that MLB reluctantly allowed the club to move to Milwaukee.[2] After seven years of heartache, the people of Milwaukee finally received something that should never have been taken from them in the first place.

The moral of my experience in Milwaukee is that the professional sport leagues in general and MLB, 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 sport 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 is precisely the policy of MLB. It is also the reason why the loyal supporters of the Giants will continue to enjoy the performances of Matt Williams and his teammates next year and for many years after that.

If MLB were not exempt from the Sherman Antitrust Act,[3] a

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1. The four expansion franchises were the Kansas City Royals, Montreal Expos, San Diego Padres, and Seattle Pilots.

2. We actually purchased the club on March 31, 1970, just days before the opening of the 1970 season.

3. 15 U.S.C. § 1-7 (1982). Section 1 of the Sherman Act provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy on the restraint of trade of commerce among the several states . . . is declared to be illegal. Every person who shall make any contract to engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished.

15 U.S.C. § 1 (1982).

decision protecting franchise stability such as the one made in San Francisco would have certainly subjected MLB to a costly and unpredictable lawsuit. Without its exemption, MLB might not have attempted to save the Giants for the people of San Francisco. Ever since the United States Court of Appeals for the Ninth Circuit concluded in *Los Angeles Memorial Coliseum Comm'n v. National Football League*[4] that the antitrust laws left the National Football League (NFL) powerless to stop Raider owner Al Davis from abandoning the remarkably supportive and profitable Oakland market for greener pastures in Los Angeles, no professional sports league, other than MLB, has been able to stop a franchise from abandoning its local community.[5]

Professor Gary Roberts explained that the rash of NFL franchise moves following the *Los Angeles Memorial Coliseum Comm'n* 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 sport league's governance decisions under the antitrust laws.[6]

Those who suggest that MLB's problems would be solved by subjecting its decision making 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

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Section 2 of the Sherman Act provides, in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished.

15 U.S.C. § 2 (1982).

4. 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). This misguided application of the antitrust rules is why Oakland is without its famed Raiders, although the city does still have the publicly financed stadium which it built for the team with its annual debt service of $1.5 million through the year 2006.

5. It is also why Baltimore no longer has its beloved NFL Colts, and why the NFL's Cardinals now play in Phoenix rather than St. Louis. In the National Basketball Association, the Clippers are in Los Angeles rather than San Diego, and the Kings play in Sacramento rather than Kansas City. In the National Hockey League (NHL), the Flames play in Calgary as opposed to Atlanta, the Devils play in New Jersey as opposed to Colorado, and the Stars play in Dallas as opposed to Minnesota.

6. THE BUSINESS OF PROFESSIONAL SPORTS 146 (Paul Staudohar & J. Mangan eds. 1992). This author agrees 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 different philosophies and interests. In the long run nobody gains from such an unpredictable and irrational system." *Id.* at 148.

other professional sports today.[7]

In fact, Congress was appalled by the Raider abandonment of Oakland and the NFL's Baltimore Colts' subsequent midnight exodus out of Baltimore that several members of Congress introduced a number of bills in 1984 and 1985 designed to promote franchise stability.[8] These bills would have given the professional sports leagues the authority that only MLB has to stop franchises from leaving communities that have supported them. Although differences as to the 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 reported out of Committee was the Professional Sports Community Protection Act of 1985.[9]

It is this same public interest that MLB took into account when it kept the Giants in San Francisco and it is this same public interest that MLB has successfully preserved for the last twenty years. I am extremely proud of MLB's record on franchise stability. Because MLB's internal governance decisions have not been subjected to the antitrust laws, MLB has the best record of the professional sports in the area of franchise stability. Not one baseball franchise has relocated between 1903 and 1952. While several franchises moved between 1953 and 1972,[10] no club has been permitted to relocate since the Washington Senators' moved in 1972. The recent attempted relocations of the Seattle Mariners and the Giants are just the latest of a long list of potential relocations over the last twenty years that MLB's strong policy in favor of stability and against

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7. Even Professor Andrew Zimbalist, an ardent supporter of the elimination of MLB's antitrust exemption, has recognized that "[a]plying 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." ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 166 (1992).

8. One of the more prominent bills was the Sports Community Protection and Stability Act of 1985, S. 298, 99th Cong., 1st Sess. (1985).

9. The preamble to the Professional Sports Community Protection Act 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." S. 259, 99th Cong., 1st Sess. (1985). While this bill was not voted by the full Senate, a vast majority of the legislators agreed with the bill's finding that "it is in the public interest (1) to preserve stability in the relationship between professional sports teams and the communities in which such teams may successfully operate ..." *Id.* at § 1.

10. The Braves moved to Atlanta from Milwaukee in 1966 and the Senators moved to Minnesota from Washington in 1961 and then to Texas in 1972.

abandonment prevented. In contrast to MLB's unblemished record over the last twenty years, the NFL and the National Hockey League (NHL) have had three franchise relocations since 1979.[11] As MLB's franchise relocation record amply demonstrates, MLB has not abused its antitrust exemption. While MLB does not prohibit all franchise relocations, MLB does not allow a franchise to relocate simply so that the owner can earn greater profits. The fact that the National League rejected the Giants relocation to Tampa Bay despite the fact that the move would have netted Giant owner Bob Laurie a reported fifteen million dollars more than he was able to get in San Francisco shows that profit has not been the driving force in MLB's decisions.

The San Francisco decision certainly cannot be said to be evidence that MLB has abused its antitrust exemption. MLB's most recent decision in favor of franchise stability in San Francisco proves that no legitimate basis exists for altering MLB's antitrust status. Although the effects of eliminating MLB's exemption cannot be thoroughly anticipated by anyone, it seems inevitable that the most immediate consequence would be that a number of teams in small markets would attempt to abandon some of MLB's existing cities for what they perceive as better economic conditions elsewhere. This is particularly likely today because MLB has moved into an extremely difficult economic time. As more and more small market franchises 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, MLB could be faced with franchises 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 MLB impotent to stop such conduct.

III. The Resignation of Commissioner Francis Vincent and the Future Governance of Major League Baseball

As for the issue of former Commissioner Vincent's resignation, the owners did not summarily dismiss Commissioner Vincent for protecting the "best interests" of the game and the public. When Commissioner Vincent took office, he acknowledged that if he ever lost the confidence of a majority of the owners, he would resign.

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11. *See supra* note 5 and accompanying text.

While Commissioner Vincent had the full support of the owners when he took office under very difficult circumstances after the death of former Commissioner A. Bartlett Giamatti, he gradually lost that support. By September 1992, eighteen teams requested his resignation. Since he needed a majority of the clubs to be re-elected to a second term, Commissioner 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 Commissioner Vincent. Perhaps the most commonly articulated concern was his inability to develop a consensus among the owners on the vital issues that face MLB today. Rather than pulling together under his leadership, the teams were becoming further and further apart and were advancing their parochial interests. In the opinion of an overwhelming majority of the clubs, Commissioner Vincent was simply not the person to lead MLB during a very difficult and challenging period. Since his departure, the owners have appointed a restructuring committee which has attempted to confront the difficult issues facing MLB and unify the owners. It does not help MLB to have numerous teams for sale and to have teams on the verge of bankruptcy. It also will not be beneficial if only a few teams can afford the top players because fans will lose interest.

The Executive Council of MLB[12] is currently exercising the powers of the Commissioner, including its "best interests" powers. 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 sport.

IV. CONCLUSION

In the meantime, MLB's responses to the two most recent relocation attempts demonstrate that MLB remains committed to upholding the public's trust in the sport. As the Subcommittee is aware, the Mariners attempted to move to Tampa Bay prior to

12. The Executive Council of Major League Baseball consists of American League President Dr. Bobby Brown, National League President William White, Jackie Autry of the California Angels, Bill Bartholomay of the Atlanta Braves, Stan Cook of the Chicago Cubs, Bud Kuhlmann of the St. Louis Cardinals, Carl Pohlad of the Minnesota Twins, Tom Werner of the San Diego Padres, and this author. Ex Officio members include Doug Danforth of the Pittsburgh Pirates and Haywood Sullivan of the Boston Red Sox.

Commissioner Vincent's resignation. MLB stopped that effort and found a new owner who made a commitment to keep the Mariners in Seattle. While the proposed move by the Giants occurred after Commissioner Vincent's resignation, MLB also stopped that move and found a new ownership group that made a commitment to keep the Giants in San Francisco. This consistent policy of favoring stability over abandonment will continue.

When the United States Supreme Court reaffirmed MLB's antitrust exemption in *Flood v. Kuhn*,[13] the Court noted that over fifty bills had been introduced with respect to MLB over the previous twenty years.[14] The Court found it significant that the only bills that passed either the House of Representatives or the Senate would have acted to expand the antitrust exemption to the other professional league sports.[15] The bills which would have stripped MLB of its antitrust exemption never made it out of Committee.[16] Since 1972, Congress has considered scores of additional bills regarding MLB 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.[17] In short, Congress has often looked at MLB's position with respect to the antitrust laws and it has reaffirmed MLB's status because MLB's conduct has been consistent with the public interest.

Club owners, governments, and the communities in which MLB currently operates have relied on MLB's antitrust immunity which has existed for over seventy years. Nothing has happened recently to suggest that MLB has abused its exemption so that Congress should reverse its long-held position on this issue. Recent events such as MLB's decision to preserve the game in Seattle and San Francisco make it more clear that MLB's status should remain as it has for the last seventy years. MLB's critics who have advocated for the removal of the antitrust exemption have consistently failed to describe the ways in which the performance of MLB would better serve the public interest if it operated under the antitrust laws which the courts have unfortunately applied to the other professional sports leagues.[18] The same is true today. The fact of the matter

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13. 407 U.S. 258 (1972).
14. *Id.* at 281.
15. *Id.*
16. *Id.*
17. *Id.*
18. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dis-*

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. MLB has continued to uphold its unique covenant with its fans and it deserves to retain its current status under the antitrust laws.

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missed, National Football League v. Mackey, 434 U.S. 801 (1977) (affirming that player restraints under the Rozelle Rule violated the Sherman Act); Robertson v. National Basketball Assoc., 389 F. Supp. 867 (S.D.N.Y. 1975) (holding that restraints on players are illegal under the Sherman Antitrust Act); and Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (holding that the NHL was prohibited from using the reserve clause in player's contract to the detriment of a rival league).