# PROFESSIONAL SPORTS FRANCHISE RELOCATION: INTRODUCTORY VIEWS FROM THE HILL

*By Senator Slade Gorton**

Recent calls for expansion from cities abandoned by professional sports teams, concerned fans in cities threatened with similar losses, and pleas from professional sports leagues for relief from adverse federal court decisions all have caught the ear of many in Congress. So far, however, these conflicting voices have not elicited the kind of thoughtful review of the history of congressional intervention in professional sports issues necessary to generate a successful resolution to the problem.

The most recent congressional debate has arisen because of the increased frequency of bidding contests among cities for existing professional sports teams. The drama inherent in Mayflower vans moving the Colts out of Baltimore as the city slept drew the attention of legislators eager to avoid similar losses on the part of their constituents. Although some commentators tend to trivialize the issue of sports team relocations on the grounds that they involve mere games, legislators are willing to respond to constituent concern about sports teams because they realize that professional sports teams are important community assets, economically and psychologically.

Cities with professional sports teams are considered "major league," not an unimportant characterization in attracting business and trade. Teams generate significant revenues and jobs and are a focal point in the development of a sense of civic pride.[1] For these reasons communities have long been willing to make

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[1] *See, e.g.*, Report of Seattle Major League Baseball Commission (Aug. 9, 1985) (available through the Office of the Governor of the State of Washington; Olympia, Washington). (The Report found that the Seattle Mariners generated $52.7 million in economic activity in the State of Washington in 1984).

substantial investments of public funds to attract teams and to construct and maintain suitable playing facilities. In the past 20 years, state and local governments have spent over $6 billion building or renovating stadiums.[2] Moreover, many communities have committed substantial sums to construct facilities in the absence of any commitment by a league for a franchise. For example, Buffalo, New York, is beginning construction of a $90 million stadium suitable for baseball, and St. Petersburg, Florida, is rumored to be planning a domed stadium even without any pledge of a Major League Baseball team. These cities may be following the successful example of Indianapolis, Indiana, which spent $80 million to construct the Hoosier Dome before luring the Colts from Baltimore, or they could be simply building very expensive white elephants.

Why should Congress intervene to help state and local officials who evidently will not help themselves by negotiating secure leases or delaying the expenditure of public funds until a team is committed to locate in the community? There are two answers to that question.

First, due to the enormous discrepancy between the demand for professional sports teams and the supply, particularly in football and baseball, it is extremely difficult for any local officials to make meaningful demands on a team in negotiating a lease. For every city cautious enough to require a pledge of security, there is another city willing to forego that security to win a franchise. In short, in a seller's market, buyers make few demands.

Second, the fact that the market is so heavily tilted in favor of team owners is in large measure attributable to a series of congressional manipulations of the free market, or in the case of baseball, a failure by Congress to strip baseball of its unique status in the world of business granted to it by the Supreme Court in 1922.[3] These actions and this omission have permitted the leagues to control the supply of the product in the marketplace virtually free from any competitive pressure to respond to market demand.

For instance, in 1961, and again in 1966, Congress gave pro-

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[2] *Sports Stadiums: Is the U.S. Overdoing It?*, U.S. NEWS AND WORLD REPORT, May 21, 1984, at 51-52.

[3] Federal Baseball Club v. National League, 259 U.S. 200 (1922).

fessional football a limited exemption from the application of the federal antitrust laws. First, the National Football League (NFL) and the American Football League (AFL) were each permitted to bargain collectively for the sponsored telecasting of their games.[4] In 1966, Congress permitted the merger of the two leagues into what is today known as the NFL.[5] It is unclear whether either of these actions by Congress alone would have been sufficient to create the kind of market power which the NFL now wields, but together these actions have effectively eliminated those market forces which would have generated the addition of new franchises into the league.

As a result, there has been no expansion by the NFL since that merger beyond the four additional teams contemplated in the merger agreement itself.[6] Yet cities such as Phoenix, Arizona and Birmingham, Alabama, which can clearly support an NFL franchise, are denied one. They are instead forced to try to lure teams away from cities which already have them. The bait, of course, is more subsidies and more guarantees, all to the benefit of owners at the expense of the public purse. Any chance for a new league, such as the United States Football League (USFL), to thrive and meet this new demand is thwarted by the preemptive position of the NFL in the televising of professional football on network television, a position only possible with the aid of Congress.

It is hardly sound or balanced public policy to manipulate the free market for the benefit of the league and owners and then to turn our backs on the cities which become the victims of that manipulation. In my view, there is considerable support for the enactment of legislation to provide controls over franchise relocation. The difficulty in passing such legislation, however, arises over what approach such legislation ought to take.

Some members of Congress believe that traditional antitrust

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4 Professional Football, ETC., Leagues—Television Contracts Act of 1961, Pub. L. 87-331, 75 STAT. 732 (1961) (codified as amended at 15 U.S.C. §§ 1291-1295 (1984)).

5 Act of Nov. 8, 1966, Pub. L. 89-801, 80 STAT. 1516 (1966) (amending 15 U.S.C. §§ 1291-1295 (1982)).

6 Paragraph (3)(d) of the merger agreement called for "[s]tudies of the feasibility of adding at an early date two additional franchises (in addition to the two franchises referred to in Paragraph (4)(m) to be added in 1967-68) for a combined league total of 28 franchises in 27 cities."

analysis simply does not work in the case of professional sports leagues. These legislators argue that all that need be done is to exempt the leagues from the antitrust laws so that they will be free to regulate themselves. They are convinced that given the proper latitude to act, free from the threat of litigation, the leagues will proceed in the best interests of all concerned. As one who, while the Attorney General of the State of Washington, brought suit against the American League for the arbitrary removal of the Seattle Pilots, I can state without hesitation that an exemption for the leagues from the antitrust laws will do little for the cities either in protecting them from actual relocations or, as is more often the case, in protecting them from relocations threatened as a ploy to induce lease concessions. If an antitrust exemption were the cure-all, no city need ever fear the move of a baseball team.[7]

A second group of legislators, in which I am included, believes that for cities the most important competition takes place off the field. Thus, if the antitrust laws were fully applicable to the leagues and the leagues were forced to operate in a truly free market, legislation would be unnecessary. With competition allowed to flourish, the supply of teams would more likely keep pace with the demand for teams and the disparate bargaining power between teams and cities would tend to equalize. Alternatively, absent a strict application of the antitrust laws, as would normally be the case, regulation should be imposed to assure the achievement of those societal goals competition would have served, in this case, team availability and stability.

Although I would not deny the leagues the first opportunity to act in the public interest with respect to decisions regarding the location of teams and expansion, I find no basis to believe that the leagues will place the cities' interests on the same level of priority as their own business interests. For that reason, the Professional Sports Team Community Protection Act[8] places particular emphasis on the interests of the city, both those cities which

[7] The fact that Major League Baseball is totally immune from the application of the federal antitrust laws was not terribly comforting to the citizens of Minneapolis when faced with the possible relocation of the Minnesota Twins in 1984, nor is it likely to encourage the citizens of Pittsburgh in their effort to keep the Pirates.

[8] S.2505, 98th Cong., 2d Sess., CONG. REC. S.3458-3459 (March 29, 1984) (reintroduced as S.287, 99th Cong., 1st Sess., CONG. REC. S.633 (Jan. 4, 1985)).

now have teams and are threatened with their loss, and those cities which have no teams but are seeking to obtain them.

It is the plight of the "have-not" cities which is hardest for Congress to address directly. The Professional Sports Team Community Protection Act attempts to do that by mandating expansion in the NFL and in Major League Baseball. Although much criticism has been leveled against these provisions, there is nothing inconsistent between these requirements and Congress' more traditional prohibition of certain activities by monopolies. Section 2 of the Sherman Act requires that monopolies not misuse their market power.[9] Surely, it is within Congress' authority to find that the prolonged refusal of certain leagues to expand the availability of their product when there are cities which can support a team, is a misuse of monopoly power.[10] Moreover, from a more pragmatic view, without the prospect of additional teams becoming available in the relatively near future, it is unlikely that Congress can enact legislation to protect the cities which now have teams. For the "have-nots", the status quo, which gives cities without teams at least the chance to entice a team away from another city, is preferable to a regulatory scheme designed solely to encourage stability. Thus, even though such cities may ultimately become victims of franchise relocations themselves, that prospect is considerably more remote than the chance to win a team simply by sweetening the pot.

If Congress is to deal with the current "crisis" in sports franchise relocation, the real challenge, and my first concern, is that we not make matters worse. In our previous forays into the law of sports, we have legislated in a piecemeal fashion, dealing with issues as the leagues brought them to our attention. Rarely have we considered the cumulative effect of our actions, nor have we revisited issues in light of the significant changes in the world of sports and most notably in the world of broadcasting in the last 25 years.[11]

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9 Sherman Act § 2, ch. 647, 26 STAT. 209, 209 (1890) (codified as amended at 15 U.S.C. § 2 (1982)).

10 Some commentators have suggested that a section 2 analysis of NFL actions might well be appropriate. *See, e.g.*, Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROBS., Winter-Spring 1973; Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013.

11 It has been argued that the drafters of 15 U.S.C. 1291 could not have fore-

Because the marketplace, as skewed by Congress, is unwilling to provide the appropriate number of franchises, we in Congress have two responsible alternatives. We can return to a truly free market, repealing our previous grants of antitrust immunity, or we can regulate to correct the market imperfections we have created. If we take the latter course, we must acknowledge that the consequences of these market imperfections include both franchise instability and an unreasonably restrained supply of teams. Both these problems must be addressed simultaneously. Otherwise, we will merely have passed on to a future congress a problem we should have solved in the 99th Congress. If that is our choice, both our cities and professional sports will lose.

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seen the potential and rapid growth of alternative broadcasting systems such as pay and cable television. Moreover, at the time of the passage of that Act, there were two substantially smaller professional football leagues competing for network contracts. The fact that all competition would be eliminated by the merger of those leagues and that the result would be a multi-year contract for the NFL of approximately $2.1 billion was probably not foreseen by the drafters of the 1961 Act nor is there evidence that such a possibility was specifically addressed in the context of congressional approval of the merger.