

Seton Hall University

eRepository @ Seton Hall

Student Works

Seton Hall Law

2022

Service Time Manipulation and the Curt Flood Act

Daniel MacLane

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the Law Commons

Major League Baseball's ("MLB") collective bargaining agreement ("CBA") is set to expire when the 2021 baseball season concludes.¹ The expiration of the CBA has the potential to coincide with a bitter showdown between the players association and ownership regarding critical issues within the CBA.² Service time manipulation will be an issue discussed during these negotiations. Service time manipulation is a loophole in the MLB CBA that allows for MLB franchise owners to maintain "control" over a player for an extra year by delaying adding a player to the major league roster with the intent of gaining the additional year of control.³ This is a practice which has no comparable mechanism in the National Football League ("NFL") or the National Basketball Association ("NBA").

In 1969, Curt Flood, a gold-glove recipient and three-time All-Star centerfielder for the St. Louis Cardinals, was traded to the Philadelphia Phillies.⁴ Flood refused to go to Philadelphia and instead planned to sue the MLB.⁵ At the time, MLB players' contracts contained what is known as reserve clauses.⁶ These clauses bound players to their team for life; players could only be removed from a team's roster through trade, release, or retirement.⁷ Flood ultimately lost this suit because Supreme Court precedent granted the MLB an antitrust exemption.⁸ But, born from this suit was free agency and more player rights in baseball.⁹ The lawsuit placed pressure on the MLB franchise owners and the Major League Baseball Players' Association ("MLBPA")

¹ Dayn Perry, *Why the current MLB, MLBPA negotiations could be a prelude to labor strife when the CBA expires in 2021*, CBS SPORTS (May 28, 2020, 9:53 AM), <https://www.cbssports.com/mlb/news/why-the-current-mlb-mlbpa-negotiations-could-be-a-prelude-to-labor-strife-when-the-cba-expires-in-2021/>.

² See Perry, *supra* note 1.

³ Michael Baumann, *MLB Service-Time Manipulation Farce Has Reached Unprecedented Proportions*, The Ringer (Mar. 7, 2019, 9:11 am), <https://www.theringer.com/mlb/2019/3/7/18254501/service-time-manipulation-vladimir-guerrero-jr-fernando-tatis-jr-peter-alonso>.

⁴ Allen Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process*, THE ATLANTIC (July 12, 2011), <https://www.theatlantic.com/entertainment/archive/2011/07/how-curt-flood-changed-baseball-and-killed-his-career-in-the-process/241783/>.

⁵ Barra, *supra* note 4.

⁶ Barra, *supra* note 4.

⁷ Barra, *supra* note 4.

⁸ *Flood v. Kuhn*, 92 S.Ct. 2099, 99 (1972).

⁹ Barra, *supra* note 4.

successfully bargained for binding arbitration.¹⁰ In 1975, an arbiter ruled pitchers Dave McNally and Andy Messersmith to be free agents and the reserve system was unofficially no more.¹¹

In 1976 MLB CBA officially ended the reserve system creating modern free agency.¹² Congress in 1998 passed the Curt Flood Act repealing the MLB antitrust exemption insofar as it relates to the players and labor disputes.¹³ Despite this progress, the MLB CBA still has provisions that work against the players and allows teams more control over their respective players than the players' counterparts in other professional sports leagues. Players need to accumulate six years of major league service to become eligible for free agency.¹⁴ This six year requirement is in addition to the time a player spends in the minor leagues.¹⁵ Service time manipulation is a practice that allows MLB franchises to add an additional year to the player's rookie contract.¹⁶ Service time manipulation occurs by keeping a player ready to play in the major leagues off the major league roster with the intent to prevent that player from accumulating service time.¹⁷ After at least 16 days have passed, the player can no longer accumulate a year of service and the team can then add the player to the major league roster while gaining what is functionally a seventh year of control over the player.¹⁸ In this comment, I will argue that the Curt Flood Act should be amended to create a cause of action for players to bring suit in the event that a team is manipulating the player's service time.

¹⁰ Barra, *supra* note 4.

¹¹ David Berri, *Throwback Thursday: The End of the Reserve Clause*, VICE (Dec. 24, 2015, 11:26 AM), <https://www.vice.com/en/article/qkydzb/throwback-thursday-the-end-of-the-reserve-clause>.

¹² Barra, *supra* note 4.

¹³ See Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

¹⁴ MAJOR LEAGUE BASEBALL, 2017-2021 BASIC AGREEMENT, at 92 (2017) [hereinafter AGREEMENT].

¹⁵ Cook Gaines, *Most Baseball Draft Picks Will Still Be In The Minors Four Years From Now*, BUSINESS INSIDER (June 7, 2013).

¹⁶ Dan McLaughlin, *Baseball Can and Should End Service-Time Manipulation*, NATIONAL REVIEW (Apr. 15, 2019), <https://www.nationalreview.com/2019/04/baseball-can-and-should-end-service-time-manipulation/>.

¹⁷ Dayn Perry, *MLB service-time manipulation: Why longstanding baseball practice is a major issue in 2021*, CBS Sports (Mar. 2, 2021, 12:02 PM), <https://www.cbssports.com/mlb/news/mlb-service-time-manipulation-why-longstanding-baseball-practice-is-a-major-issue-in-2021/#:~:text=And%20what%20is%20service%2Dtime,time%20during%20his%20rookie%20season.>

¹⁸ Perry, *supra* note 17.

The first section of this comment will focus on the history of the MLB's antitrust exception, antitrust law generally, the background of the MLB's current free agency system, and details about service time manipulation. The Curt Flood Act repealed the antitrust exemption and provides players with the protections of the Sherman Antitrust Act.¹⁹ The current MLB free agency system and the MLB franchises' wide latitude in roster control have allowed for the practice of service time manipulation.

The second part of this comment will analyze why collective bargaining as well as other solutions are inadequate. It will also argue for amending the Curt Flood Act to provide standing for minor league players and to create a cause of action to end service time manipulation. The protections provided by the Curt Flood Act are inadequate to prevent service time manipulation and collective bargaining will likely not end the practice. Service time manipulation is not the result of a conspiracy between the MLB franchises and therefore the protections of the Curt Flood Act and Sherman Antitrust Act are not adequate. Even if the protections were adequate, players that are having their service time manipulated lack standing under the Curt Flood Act. Collective bargaining will also likely not solve the issue because service time manipulation is not a codified provision within the MLB's CBA and it will be difficult to end service time manipulation while allowing teams to maintain wide latitude over their rosters. If the MLB and MLBPA cannot come to an agreement, a possible lockout would have widespread economic impact which incentivizes Congress to amend the Curt Flood Act. A simple resolution would be to amend the Curt Flood Act to create a cause of action for players to bring suit if an MLB franchise manipulates their service time.

Creating a cause of action also allows the MLB and MLBPA to negotiate their own solution, prevents the government from being overly involved with the upcoming negotiations,

¹⁹ See 112 Stat. 2824.

and comes at a minimal cost to taxpayers. Players having their service time manipulated can bring suit in federal district court and can receive both back pay for lost income from the missed years of increased salary and can have their team control reduced by a year.

There will be challenges to analyzing this situation. It may be difficult to sympathize with MLB players who are making significantly more than the average person.²⁰ Also, congressional involvement in this area would seem to be misfocused energy considering the economic and health crisis currently facing the United States. These two issues will be addressed and kept in mind during the analysis contained within this comment.

Part II

A. History of the MLB Antitrust Exemption

In 1922, the Supreme Court in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs* established the MLB's antitrust exemption.²¹ The plaintiff, an incorporated baseball club, brought suit against other baseball clubs and baseball officials alleging that there was an attempt to monopolize baseball.²² The Court ruled against the plaintiff stating that, despite there being an attempt to monopolize and constrain trade, "[o]rganized [b]aseball is not interstate commerce and does not constitute an attempt to monopolize within the Sherman Act."²³ This case established the MLB's antitrust exemption. Most other sports leagues do not enjoy this same exemption. For example, basketball, golf, hockey, boxing and football do not enjoy antitrust law exemptions.²⁴

²⁰ The median household income in the United States as of 2014 was \$56,516 whereas the average MLB player made over \$4 million as of 2019. Compare Emmie Martin, *Here's how much the average American earns at every age*, CNBC (Aug. 24, 2017), <https://www.cnbc.com/2017/08/24/how-much-americans-earn-at-every-age.html>, with *Average MLB salary drops for second straight year*, ESPN (Dec. 20, 2019), https://www.espn.com/mlb/story/_/id/28341983/average-mlb-salary-drops-second-straight-year.

²¹ *Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

²² *Id.* at 207.

²³ *Id.* at 206.

²⁴ *Haywood v. National Basketball Assn.*, 401 U.S. 1204, 05 (1971); *Flood*, 92 U.S. at 262.

Toolson v. New York Yankees reaffirmed the MLB's antitrust exemption.²⁵ Here, in less than one page, the majority affirmed *Federal Baseball Club's* holding noting that the proper remedy to apply antitrust laws to the MLB would be legislative rather than judicial.²⁶ The dissent in *Toolson* advocated for the removal of the antitrust exception while noting that it was clear the MLB was engaged in interstate trade/commerce.²⁷ This case was decided in 1953 when the MLB had a much smaller economic impact on the economy, but Justice Burton's dissent is certainly reflective of the modern MLB's economic impact.

As referenced above, *Flood v. Kuhn* set the stage for changing the landscape of MLB free agency. Curt Flood, a professional baseball player, was traded in 1969.²⁸ However, Flood was not consulted about the trade and refused to be traded.²⁹ He formally complained to the commissioner and requested that he be granted free agency as opposed to being traded, but this request was denied.³⁰ Flood then decided to forgo a \$100,000 salary (worth over \$670,000 today³¹) and filed an antitrust action against the MLB in the Southern District of New York.³² The case was eventually appealed to the Supreme Court. The Supreme Court was hostile towards the exemption, specifically referencing that some might regard this antitrust exemption as "unrealistic, inconsistent, or illogical."³³ The Court also noted that professional baseball was participating in interstate commerce.³⁴ The Court stated that this exemption was an aberration in the sense that other professional sports such as golf, hockey, basketball, boxing and football do not have the same exemptions.³⁵ Despite this hostility, the Court ruled against Flood and upheld

²⁵ *Toolson v. New York Yankees*, 346 U.S. 356, 57 (1953).

²⁶ *Id.*

²⁷ *Id.* 357 (J. Burton dissenting.)

²⁸ *Flood v. Kuhn*, 92 U.S. 258, 65 (1972).

²⁹ *Id.* at 265.

³⁰ *Id.*

³¹ US Inflation Calculator, <https://www.usinflationcalculator.com/> (last visited Apr. 3, 2021).

³² *Flood v. Kuhn*, 92 U.S. at 265-66 (1972).

³³ *Id.* at 282, (quoting *Radovich v. NFL*, 352 U.S. 445, 52 (1957)).

³⁴ *Id.*

³⁵ *Id.*

the antitrust exemption on stare decisis grounds.³⁶ However, the Court did note that Congressional action could rectify any “inconsistency or illogic” in having a common law antitrust exemption.³⁷ It is also interesting to note that the Court expressly repudiated the notion that the MLB was not engaged in interstate commerce, yet upheld the holdings of *Toolson* and *Federal Baseball*.³⁸ This position seems contradictory since the basis for the holding in *Federal Baseball* is that the MLB by nature is not engaged in interstate commerce.³⁹

B. The Curt Flood Act

Congress passed the Curt Flood Act in 1998.⁴⁰ The Curt Flood Act amended the Clayton Act to provide antitrust protections to MLB players, but does not itself create any new causes of action.⁴¹ Causes of action under the Curt Flood Act are limited to actions under existing antitrust law.⁴² This law, however, does not apply to minor league players by way of negative inference.⁴³ Minor league players constitute the vast majority of professional baseball players.⁴⁴

The stated purpose of the Curt Flood Act is to provide the same antitrust protections to MLB players as is provided to their counterparts in other professional sports.⁴⁵ There are, however, exceptions contained in Section 3 of the act.⁴⁶ Subsection 3(b) states that new causes of action are not explicitly or implicitly created by the act.⁴⁷ Subsection 3(c) codifies standing

³⁶ *Id.* at 284.

³⁷ *Id.*

³⁸ *Id.* at 282.

³⁹ *Federal Baseball Club, Inc.*, 259 U.S. 200, 207.

⁴⁰ 112 Stat. 2824.

⁴¹ *Id.* Language excludes minor league baseball players and speaks strictly to major league baseball players.

⁴² *Id.*

⁴³ *Id.* Minor league players are not mentioned and the act explicitly states that it applies to major league players.

⁴⁴ There are approximately 275-280 under contract per each MLB team. The MLB roster can only hold at most 40 at a time so there are at least 200 minor leaguers employed at a time. However, due to the recent cut in teams, this number is likely to decrease. But it will likely only drop by around 70 so MLB players will still outnumber MiLB by a considerable number. J.J. Cooper, *Ask BA: How Many Players Are In Each Organization?*, BASEBALL AMERICA (Aug. 21, 2018), <https://www.baseballamerica.com/stories/ask-ba-how-many-players-are-in-each-organization/>.

⁴⁵ Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

⁴⁶ *Id.*

⁴⁷ *Id.*

limitations and generally limits standing to major league players.⁴⁸ The Act defines a major league baseball player in four different ways:

(1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or (2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or (3) a person who has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: Provided however, That for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or (4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.⁴⁹

Subsection 3(d) states five other limitations including providing the definition of “person” under the action and solidifies that this is limited to actions related to major league baseball.⁵⁰ Overall, the act extends antitrust protections of The Sherman Antitrust Act to MLB players. These protections, however, as presented below, will not protect MLB players from having their service time manipulated.

C. The Sherman Antitrust Act

The Curt Flood Act allows MLB players to bring suit under The Sherman Antitrust Act for conspiracy to restrain trade or monopolization of industry.⁵¹ The Sherman Antitrust Act

⁴⁸ *Id.*

⁴⁹ 112 Stat. 2825(c)(1)-(4).

⁵⁰ 112 Stat. 2825.

⁵¹ 112 Stat. 2824.

outlaws the monopolization of industries.⁵² The goal of the Sherman Antitrust Act is to foster competition by preventing the creation of monopolies and the cartelization of business.⁵³

When evaluating whether certain actions violate the Sherman Antitrust Act, courts generally apply one of two tests.⁵⁴ The first test is the *Per Se* Test.⁵⁵ A practice that violates the Per Se Test is per se invalid. This test, however, is not applied against sports leagues since cooperation is needed to effectively run the league.⁵⁶

The Second Test is the Rule of Reason Test.⁵⁷ The Rule of Reason Test is a conjunctive rule that requires establishing three elements; “(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition.”⁵⁸ A claim under the Sherman Antitrust Act can be sustained if these elements are established.⁵⁹ The Rule of Reason test has been applied in the context of sports before. In fact, it was recently applied against the NCAA for NCAA rules restricting the education-related benefits that colleges offer to their athletes.⁶⁰

D. Free Agency Explained

“A free agent is eligible to sign with any club for any terms to which the two parties can agree.”⁶¹ To reach free agency under the current CBA, a player must accumulate six years of major league service.⁶² Specifically, a player must be on a major league roster for a total of six years, as defined by the CBA.⁶³ To accumulate a year of service, the player must be on the 26-

⁵² 15 U.S.C.A. § 1 (2004).

⁵³ John W. Polonis, *Comment: Stealing Home in Hollywood: Why the Takeover of the Los Angeles Dodgers Illustrates the Unjust Nature of Major League Baseball's Antitrust Exemption*, 19 VILL. SPORTS & ENT. L.J. 785, 800 (2012).

⁵⁴ Polonis, *supra* note 53, at 801-02.

⁵⁵ Polonis, *supra* note 53, at 801-02.

⁵⁶ *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984).

⁵⁷ Polonis, *supra* note 53, at 801-02.

⁵⁸ *Oltz v. Saint Peter's Cmty. Hosp.*, 861 F.2d 1440, 46 (9th Cir. 1988).

⁵⁹ *Id.*

⁶⁰ *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020).

⁶¹ FREE AGENCY, <http://m.mlb.com/glossary/transactions/free-agency>, (last visited Mar. 2, 2021).

⁶² AGREEMENT, *supra* note 14, at 92.

⁶³ AGREEMENT, *supra* note 14, at 92.

man major league roster for at least 172 of the 187 days in the MLB season.⁶⁴ A player in the minor leagues on the 40-man roster can accumulate service time while in the minor leagues so long as they spend less than 20 days on the minor league roster.⁶⁵ Major league teams have both 26 man rosters and 40 man rosters.⁶⁶ During the time prior to free agency, a player remains under team control wherein a team is free to waive, trade or demote the player to the minor leagues (under limited circumstances).

Players are subject to salaries very friendly to their respective franchises during their first three seasons.⁶⁷ After this three year period, a player is then eligible for salary arbitration which allows them to receive pay raises.⁶⁸ There are exceptions for players who meet the Super Two requirements.⁶⁹ Players who are in the top 22% of service time and who have between two to three years of MLB service time potentially qualify for salary arbitration.⁷⁰ To qualify for the Super Two exception, the player must have at least two years and 86 days of service time from the prior few seasons.⁷¹ These pay raises themselves have been the subject of some controversy with potential owner collusion to keep them as low as possible.⁷² In 2019, there was a report that

⁶⁴ Beginning in 2018, the MLB season was expanded to 187 days. AGREEMENT, *supra* note 14, at 4, 104.

⁶⁵ This slightly different rule with a player on the 40-man roster regards the length of the player's optional assignment. AGREEMENT, *supra* note 14, at 105..

⁶⁶ The 26-man roster is the major league team being fielded on a given day. The 40-man roster includes 14 additional players who are in the minor leagues, but those 14 players are signed to a major league contract. Those additional 14 players could be called up to the major leagues at any time such as in the event of an injury to a player on the major league roster. 40-MAN ROSTER, <http://m.mlb.com/glossary/transactions/40-man-roster> (last visited Feb. 27, 2021).

⁶⁷ FREE AGENCY, <http://m.mlb.com/glossary/transactions/free-agency>, (last visited Dec. 19, 2020).

⁶⁸ AGREEMENT, *supra* note 14, at 18.

⁶⁹ AGREEMENT, *supra* note 14, at 19.

⁷⁰ AGREEMENT, *supra* note 14, at 19.

⁷¹ AGREEMENT, *supra* note 14, at 19.

⁷² See Chris Cwik, *MLB hands out championship belt to team that pays out lowest total in arbitration*, YAHOO SPORTS (Mar. 29, 2019) https://www.yahoo.com/entertainment/report-mlb-hands-out-championship-belt-to-team-that-hands-out-lowest-total-in-arbitration-143638570.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAJfIAL-DyIe7LIlfemqrJ_k6xm810MkGoAPpiM0oJ9B6xd5bFE21CpcSx2zwZ_eemsK7hi3zm20ahJOEOA3KVfSL7hoWPwWc4dgr34coTnHOs25ZQZNJLeZdNK5EA-9xa2EbToCiArIRutwYI_65sBkLtbHnzulK6vV1JDOJxpHAA.

the MLB was giving out a championship belt to the owner who kept their arbitration pays raises to the least amount.⁷³

Qualifying for arbitration or free agency is not as simple as accumulating service time either. Players must first work their way up the minor leagues.⁷⁴ Professional baseball players will often spend four to five years in the minor leagues before finally making the MLB roster.⁷⁵ So players might have to wait upwards of 10-11 years before reaching free agency unlike their counterparts in the NFL and NBA who only have to wait four to five years after being drafted.⁷⁶

The average age of an MLB free agent in 2018-2019 was 32.2 years old, partially as a result of the six year service requirement.⁷⁷ Teams are generally more hesitant to sign older players as reflected by the decrease in average value per season of contracts.⁷⁸ Generally, players reach their prime between the ages of 26-28, but are often under team control during this period.⁷⁹ There are exceptions such as Bryce Harper and Juan Soto who quickly moved up the minor leagues and have reached or will reach free agency during their prime.⁸⁰ However, other players such as Jeff McNeil and Jacob deGrom, who were called up later than most players, never have the chance to reach free agency during their prime and this impacts their compensation.⁸¹ For example, Gerrit Cole received almost \$200 million more than Jacob

⁷³ *Id.*

⁷⁴ The Minor League Baseball League (“MiLB”) is divided into different levels based upon skill. The MiLB top level is triple A, followed by double A, then single A and then rookie ball. Single A often has high A and low A teams. Rookie ball also typically features multiple teams. *See* Gaines, *supra* note 12; Andrew Simon, *Explaining the MLB farm system*, MLB.com (May 13, 2019), <https://www.mlb.com/news/the-mlb-farm-system-explained>.

⁷⁵ Gaines, *supra* note 15.

⁷⁶ Adding the 6 year service time requirement with the four to five average span in the minor leagues comes out to a ten to eleven year period in which it takes a player drafted to become a free agent. AGREEMENT, *supra* note 14, at 92; Gaines, *supra* note 15.

⁷⁷ Travis Sawchik, *How To Save MLB Free Agency*, FIVETHIRTYEIGHT (Feb. 7, 2019), <https://fivethirtyeight.com/features/how-to-save-mlb-free-agency/>.

⁷⁸ *See Id.*

⁷⁹ Mitchel Lichtman, *How do baseball players age? (Part I)*, THE HARDBALL TIMES (Dec. 21, 2009).

⁸⁰ *Harper supra* note 75.

⁸¹ Mark Herrmann, *Jeff McNeil called up by Mets*, NEWSDAY (Jul. 24, 2018, 10:53 PM), <https://www.newsday.com/sports/baseball/mets/jeff-mcneil-mets-1.20079641>; Brendan Prunty, *Mets call up pitchers Rafael Montero, Jacob deGrom as team hopes to build on young arms*, NJ.com (May 13, 2014), https://www.nj.com/mets/2014/05/mets_call_up_pitchers_rafael_montero_jacob_degrom_as_team_hopes_to_build_

DeGrom for their first post-rookie contracts.⁸² This is despite Cole having a lower career earned run average.⁸³ Obviously compensation is not only tied to age as production, expected performance, and analytics also play a predominant role in how much a player is paid. However, as stated above, entering free agency in a player's prime has a critical impact on how much a player is compensated.⁸⁴

E. Service Time Manipulation

Service time manipulation is a practice in which MLB franchises do not add a minor league player, who is ready to play in the major leagues, to the major league roster for the first few weeks of the season.⁸⁵ After 16 days pass and the player can only accumulate 171 days of service rather than the 172 days required to accumulate a full year, the franchise will add the player to the major league roster.⁸⁶ Franchises do this to gain an extra year of control over a player prior to the player reaching free agency.⁸⁷ This seemingly happened in 2019 with the Toronto Blue Jays and Vladimir Guerrero Jr. The Blue Jays waited several weeks in the beginning of the season to call up the top prospect, likely to gain an extra year of control over him.⁸⁸ Teams will sacrifice putting their most competitive team on the field to gain an extra year of control. This is a prudent practice for the MLB franchises since waiting two weeks is a small

on_young_arms.html. McNeil was called up at the age of 26 starting his service time clock much later than most. Jacob deGrom was called up at the age of 24.

⁸² Jabari Young, *Gerrit Cole agrees to historic \$324 million deal with Yankees, reports say*, CNBC, (Dec. 11, 2019, 5:46 PM), <https://www.cnbc.com/2019/12/11/gerrit-cole-agrees-to-historic-324-million-deal-with-yankees-reports.html>; Ronald Blum, *Mets, deGrom agree to \$137.5 million, 5-year deal*, Associated Press (Mar. 27, 2019) [https://apnews.com/article/32593f73b98140a8a261e8cc126035eb#:~:text=NEW%20YORK%20\(AP\)%20%E2%80%94%20NL,million%20deferred%20into%20the%202030s](https://apnews.com/article/32593f73b98140a8a261e8cc126035eb#:~:text=NEW%20YORK%20(AP)%20%E2%80%94%20NL,million%20deferred%20into%20the%202030s).

⁸³ Earned run average means the average number of runs a pitcher will allow per nine innings. Jacob DeGrom has a career 2.61 earned run average. Gerrit Cole has a career 3.19 earned run average. Player Pitching Comparison Finder, https://stathead.com/baseball/player-comparison.cgi?request=1&sum=1&type=p&player_id_1_hint=Jacob+deGrom&player_id_1_select=Jacob+deGrom&player_id_1=degroja01&fromyear_1=2014&toyear_1=2020&player_id_2_hint=Gerrit+Cole&player_id_2_select=Gerrit+Cole&player_id_2=colege01&fromyear_2=2013&toyear_2=2020 (last visited Oct. 25, 2020).

⁸⁴ See Sawchik *supra* note 77.

⁸⁵ Adam Garland, *Service Time and What it Means for Top Prospects*, PITCHER LIST (Aug. 28, 2018).

⁸⁶ Garland, *supra* note 85.

⁸⁷ Garland, *supra* note 85.

⁸⁸ See Steve Gardner, *Blue Jays calling up phenom Vladimir Guerrero Jr.; he'll make his MLB debut on Friday*, USA TODAY (Apr. 24, 2019).

price to pay to delay arbitration salary raises and to delay a player's free agency by an additional year. It is especially helpful for teams, such as the 2019 Blue Jays, that are not close to competing for a playoff spot.⁸⁹ However, this practice limits a player's ability to receive proper compensation.

In fact, in February 2021, the former President of the Seattle Mariners, Kevin Mather implicitly admitted to the practice of service time manipulation.⁹⁰ In reference to the Mariners top prospects, Mather stated that "there was no chance you were going to see these young players at T-Mobile Park."⁹¹ He then went on to say that the Mariners "weren't going to start the service time clock."⁹²

The MLBPA released a statement in response stating that these comments were "a highly disturbing yet critically important window into how Players are genuinely viewed by management."⁹³ These statements have had the unsurprising effect of alienating Mariners top prospect Jarred Kelenic.⁹⁴ As of the start of the 2021 season, Kelenic is the number four ranked prospect in baseball and has voiced his frustration with the Mariners.⁹⁵ Kelenic's agent claims that if Kelenic signed the contract that was offered to him, then he would have made his debut in the 2020 season.⁹⁶ The contract that was offered to Kelenic would have kept him on the Mariners

⁸⁹ The Blue Jays in 2019 finished a whopping 29 games out of first place in their division. STANDINGS, <https://www.mlb.com/standings/2019> (last visited Apr. 3, 2021).

⁹⁰ Ken Davidoff, *Kevin Mather spilled the beans on worst kept secret in baseball*, New York Post (Feb. 22, 2021 9:36 PM), <https://nypost.com/2021/02/22/kevin-mathers-rant-exposed-mlbs-service-time-manipulation-issue/>.

⁹¹ By not seeing them at T-Mobile Park, he means that they will not be on the major league roster. T-Mobile Park is the home stadium of the Seattle Mariners. Davidoff, *supra* note 90; T-MOBILE PARK, <https://www.mlb.com/mariners/ballpark> (last visited Feb. 26, 2021).

⁹² This statement hints at the practice of service time manipulation because service time manipulation is contingent upon not starting the service time clock. Davidoff, *supra* note 90.

⁹³ Davidoff, *supra* note 90.

⁹⁴ Michael Shapiro, *Prospect Jarred Kelenic Says the Mariners Are Manipulating His Service Time*, Sports Illustrated (Feb. 21, 2021), <https://www.si.com/mlb/2021/02/24/jarred-kelenic-mariners-prospect-service-time-manipulation>.

⁹⁵ Shapiro *supra* note 94.

⁹⁶ Shapiro *supra* note 94.

through 2029.⁹⁷ This would be drastically longer than the six years of control that a team would have over a player making the major league roster.

In response to Mather's comment, other players in addition to Kelenic have now voiced their concerns.⁹⁸ In particular, former AL MVP Josh Donaldson and superstar pitcher Gerrit Cole have both voiced their concerns regarding service time manipulation.⁹⁹

Part III

A. CBA Negotiations will not be Enough to Solve Service Time Manipulation

The fundamentals surrounding the upcoming negotiations will make it difficult for the MLB and MLBPA to resolve the issue of service time manipulation for a few reasons. First, service time manipulation is a practice that comes primarily from the wide latitude that MLB has over controlling their rosters.¹⁰⁰ Service time manipulation is not a codified provision within the CBA.¹⁰¹ Negotiating this practice away will not be easy because the franchises still needs wide latitude in making roster decisions. Any collective bargaining solution would not be likely to reduce the MLB franchise's roster management power because MLB franchises manage their rosters while the players play the game. Traditionally, the only role players have had in roster management is agreeing to contracts to play for a specific team and that is it.

A collective bargaining solution would more likely be raising minimum salaries, reducing the time requirement to accumulate a year of service time, reducing the time period to reach free agency from six years to five years, or granting arbitration after two years instead of three years.¹⁰² While these solutions would increase the cost/decrease the benefit of manipulating a

⁹⁷ Davidoff, *supra* note 94.

⁹⁸ Matt Snyder, *MLB players respond to Kevin Mather's service-time comments and preview upcoming CBA fight*, CBS Sports (Feb. 24, 2021, 2:13 PM).

⁹⁹ *Id.*

¹⁰⁰ Teams manage their team around the service time requirements. See AGREEMENT, *supra* note 14, at 84, 92, 104.

¹⁰¹ See generally AGREEMENT, *supra* note 14.

¹⁰² See Gabe Lacques, *MLB players are ready to 'burn the whole system down.'* *Here's what they want to avoid a strike.*, USA TODAY (Feb. 22, 2019, 2:24 PM), <https://www.usatoday.com/story/sports/mlb/columnist/gabe-lacques/2019/02/22/mlb-collective-bargaining-agreement-strike/2948101002/>.

player's service time, they would not eliminate the practice altogether. The only way to address the root cause is to provide players with roster management power and no solution will provide players with this power because it would contravene the role the MLB franchise is supposed to play.

One could argue that a collectively bargained grievance system could be adequate and serve in the place of the cause of action being proposed in this comment. The issue with this solution is that the MLB already has a grievance system in place which has been ineffective in addressing service time manipulation.¹⁰³ Kris Bryant, whose service time was manipulated in 2015, filed a grievance that was not addressed for four years and, when it was finally addressed, Bryant lost the grievance.¹⁰⁴ Despite failing to make the Cubs' major league roster after an excellent spring training and then being promoted to the major league roster on the exact date when the Cubs could obtain an extra year of club control, Bryant still lost this grievance.¹⁰⁵ Even if they improve upon this system, federal magistrates and justices would be more neutral observers than MLB approved arbiters.

Unless collective bargaining somehow is successful in shifting some roster management power to the players, then collective bargaining will not address the root cause of service time manipulation. Solutions such as reducing total time to accumulate a year of service time and reducing the time period of control will just increase the cost to the team or reduce the benefit, but will not end the practice of service time manipulation.

Second, the MLBPA only represents players on the 40-man roster of the major league teams during their CBA negotiations with the MLB.¹⁰⁶ The MLBPA is a very successful union

¹⁰³ Anthony Franco, *Kris Bryant Grievance To Be Heard This Week*, MLB Trade Rumors (Oct. 23, 2019, 1:11 PM), <https://www.mlptraderumors.com/2019/10/kris-bryant-grievance-to-be-heard-this-week.html>.

¹⁰⁴ Franco, *supra* note 103; James Neveau, *Kris Bryant Reportedly Loses Service Time Grievance Against Cubs*, NBC Chicago (Jan. 29, 2020, 9:33 AM), <https://www.nbcchicago.com/news/sports/chicago-baseball/kris-bryant-reportedly-loses-service-time-grievance-against-cubs/2209462/>.

¹⁰⁵ Baumann, *supra* note 3.

¹⁰⁶ ABOUT US, <https://www.mlbplayers.com/> (last visited Apr. 4, 2021).

that has been beneficial for the players. Marvin Miller has been a critical behind the scenes figure in MLB history.¹⁰⁷ Miller helped end the reserve clause system and negotiated the first CBA in MLB history.¹⁰⁸ During Miller's sixteen years as MLBPA's executive director, the average MLB salary increased by 1,189%.¹⁰⁹ Miller and the MLBPA have played a critical role in transforming MLB player rights.¹¹⁰

However, the MLBPA does not represent the interests of the players not on the 40-man roster. For example, in recent MLB, MLBPA negotiations regarding the shortened COVID-19 season, the MLBPA agreed to reduce the MLB draft from over sixty rounds to only five rounds.¹¹¹ This draft reduction was done by the MLB in an effort to reduce the minor league system size and reduce the MLB owners' expenditure.¹¹² This is evidenced by the fact that the MLB has recently drastically reduced the number of minor league teams resulting in the release of hundreds of minor league players.¹¹³ The New York Mets, for example, lost their long time single A affiliate, the Columbia Fireflies.¹¹⁴

Minor league players are the players having their service time manipulated since they are typically not on the 40-man roster when their service time is being manipulated. Therefore, the MLBPA does not necessarily represent this interest. A counterpoint is that the MLBPA negotiates service time. Also, service time manipulation implicitly affects major league players. But a non-40-man roster player who is having his service time manipulated is not represented by

¹⁰⁷ See Marvin Miller, <https://www.mlbplayers.com/history> (last visited Feb. 27, 2021).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ If not for Miller and the MLBPA making the progress that they have, the modern game would not exist as we know it.

¹¹¹ Craig Calcaterra, *2020 MLB Draft will only be five rounds*, NBC SPORTS (May 8, 2020), <https://mlb.nbcsports.com/2020/05/08/2020-mlb-draft-will-only-be-five-rounds/>.

¹¹² *Id.*

¹¹³ ESPN Staff, *Why MLB's minor leagues as you know them will end Sept. 30*, ESPN (Sep. 3, 2020), https://www.espn.com/mlb/story/_/id/29795127/why-mlb-minor-leagues-know-end-sept-30.

¹¹⁴ J.J. Cooper, *Binghamton, Brooklyn Survive as Mets Announce Affiliates*, BASEBALL AMERICA (Nov. 10, 2020), <https://www.baseballamerica.com/stories/binghamton-brooklyn-survive-as-mets-announce-2021-minor-league-affiliates/>.

the MLBPA so this interest of preventing service time manipulation is not necessarily represented by the MLBPA during negotiations.

Third, service time manipulation has not been addressed in previous CBAs and has been a problem since at least 1994.¹¹⁵ Since 1994, there have been five new CBAs and yet this practice remains in place.¹¹⁶ Although service time manipulation should be a topic of discussion at the upcoming negotiations, it seems unlikely that it will be resolved since previous negotiations have been unsuccessful.¹¹⁷

B. Other Solutions That Are Similarly Inadequate

Creating a competing professional baseball league is an infeasible solution to service time manipulation. One could argue that European soccer clubs compete against one another effectively, but, even if this argument holds merit, they are not within the same country.¹¹⁸ Individual laws in their respective countries apply.¹¹⁹ There is also a single international soccer league managing the interaction between these leagues in UEFA so there is some level of cooperation among the leagues.¹²⁰ There are also hierarchies within the domestic soccer leagues themselves which is similar to the major and minor league system employed by Major League Baseball.¹²¹

¹¹⁵ See Christina Kahrl, *What you need to know about service-time practices in MLB*, ESPN (Apr. 16, 2019), https://www.espn.com/mlb/story/_/id/26514863/what-need-know-service-practices-mlb. Article references that the Seattle Mariners considered manipulating Alex Rodriguez's service time.

¹¹⁶ Mark Armour & Dan Levitt, *A History of the MLBPA's Collective Bargaining Agreement: Part 3*, The Hardball Times (Nov. 9, 2016); *Agreement*, *supra* note 14.

¹¹⁷ Players have some expected proposals, but expect vigorous opposition from owners. See Lacques, *supra* note 102.

¹¹⁸ HOW IS EUROPEAN SOCCER STRUCTURED WITH LEAGUES AND CUP COMPETITIONS?, https://www.bundesliga.com/en/faq/what-are-the-rules-and-regulations-of-soccer/___trashed-10568 (last visited Jan. 5, 2021).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

Competing major sports leagues almost always fail within the United States. The best-case scenario for these leagues is that they last for a couple of years before going bankrupt or merging with the predominant sports league. For example, the United States Football League failed and the American Basketball Association eventually merged with the NBA.¹²² Although, in essence, it was more the NBA absorbing the ABA considering only four ABA teams merged into the NBA.¹²³ The most recent example of an attempted competing sports league was the XFL, which failed almost immediately.¹²⁴ A competing sports league is not a good solution to ending service time manipulation.

There is also the potential solution that a contract claim by the players could be brought. Service time manipulation is potentially a violation of the CBA as it stands.¹²⁵ This comment does not explore this potential solution but it is explored in the cited article.

C. Congressional Incentive to Act on Service Time Manipulation

Congress could play a role in helping the MLBPA in its upcoming negotiations and expedite the negotiation process. Considering that there is a global pandemic happening at the time of these negotiations with many Americans suffering physically, mentally and economically, getting involved in these negotiations does not seem like a top congressional priority. I would argue, however, that it is still a priority. On the surface, many people envision professional athletes as millionaires which would help foster the perception that Congress is involving itself in negotiations between billionaire owners and millionaire players while the

¹²² Joshua Lobdell, *The History of the USFL*, BLEACHER REPORT (Jul. 16, 2000), <https://bleacherreport.com/articles/218727-the-history-of-the-usfl>; NBA MERGES WITH ABA, <https://www.history.com/this-day-in-history/nba-merges-with-aba#:~:text=On%20August%205%2C%201976%2C%20the,and%20the%20San%20Antonio%20Spurs>. (last visited Jan. 2, 2021).

¹²³ *Id.*

¹²⁴ Kevin Seifert, *XFL File for Chapter 11 bankruptcy after suspending operations*, ESPN (Apr. 13, 2020), https://www.espn.com/xfl/story/_/id/29030763/xfl-files-chapter-11-bankruptcy-suspending-operations.

¹²⁵ For a more detailed discussion of this, see Patrick Kessock, *Article: Out of Service: Does Service Time Manipulation Violate Baseball's Collective Bargaining Agreement?*, 57 B.C. L. REV. 1367 (1998).

American people continue to suffer. However, this perception is only a small part of the entire picture.¹²⁶

Players and owners are not the only beneficiaries from completing these negotiations. The negotiations regarding the next CBA are expected to be contentious with the potential to end in a lockout.¹²⁷ A lockout can have negative consequences for MLB revenues¹²⁸ but also could have a broader economic impact. MLB franchises lease and own stadiums that hire people from surrounding areas who are economically dependent upon these jobs.¹²⁹ Congress could potentially be helping stimulate these local economies by ensuring that these negotiations go smoothly.¹³⁰

Baseball has a substantial impact on the economy and Congress is incentivized to prevent any widespread economic impact of a lockout. The MLB's revenues hit a record high of \$10.7 billion in 2019.¹³¹ This record was in large part due to media rights contracts the MLB has with broadcasting companies such as Turner Sports, Fox, and ESPN.¹³² The value of the individual franchises is further evidence of the economic impact of the MLB.¹³³ In fact, the New York Mets

¹²⁶ Only 4.1% of professional baseball players are millionaires. Daniel R. Epstein, *We should stop calling players "millionaires,"* SB NATION (Jul. 23, 2019, 3:00 PM), <https://www.beyondtheboxscore.com/2019/7/23/20703711/stop-calling-players-millionaires-mlbpa-mlb-owners-players-strasburg-harper-machado-minor-league-pay>.

¹²⁷ See Perry, *supra* note 1; see also Ronald Blum, *Playing for free, salary drop, 2022 lockout possible for MLB*, THE DENVER POST, (June 14, 2020, 5:49 PM), <https://www.denverpost.com/2020/06/14/mlb-lockout-possible-2022/>.

¹²⁸ Previous lockouts have also been very costly for both the MLB owners and its players. The most notorious lockout, but not the only lockout, in MLB history came in 1994-1995. This lockout resulted in the cancellation of the 1994 MLB season and cost players and management about \$1 billion, while dropping operating revenue by over \$600 million from the previous season. *1994 strike was a low point for baseball*, ESPN, <https://www.espn.com/mlb/news/story?id=1856626> (last visited Apr. 14, 2021).

¹²⁹ It is listed that 1,200 game day employees work for the team. JOIN OUR TEAM, <https://www.mlb.com/mets/team/jobs>, (last visited Apr. 14, 2021).

¹³⁰ See Nancy Armour, Rachel Axon, Steve Berkowitz, and Tom Schad, *Owners pledged to pay workers when sports shut down, but many are being overlooked*, USA TODAY (Apr. 26, 2020 11:35 AM), <https://www.usatoday.com/story/sports/2020/04/26/coronavirus-owners-pledged-pay-workers-but-many-being-overlooked/3012573001/>.

¹³¹ Jabari Young, *Major League Baseball revenue for 2019 season hits a record \$10.7 billion*, CNBC (Dec. 22, 2019, 11:46 AM), <https://www.cnbc.com/2019/12/22/report-mlb-revenue-for-2019-season-a-record-10point7-billion.html>.

¹³² *Id.*

¹³³ *The Business Of Baseball*, Forbes, <https://www.forbes.com/mlb-valuations/list/#tab:overall>, (last visited Oct. 25, 2020).

were recently purchased for a sum of \$2.475 billion.¹³⁴ So the MLB not only has an impact on a micro scale, but also has a large economic impact on the macro level.

Service time manipulation is not the only issue that will be addressed at the upcoming CBA negotiations, evidenced by the length of the 2017 CBA, but it is an important issue.¹³⁵ Considering the low likelihood that an adequate solution for service time manipulation will come from collective bargaining, Congress helping resolve this major issue will expedite negotiations avoiding the rippling economic consequences of a lockout. Therefore, Congress is incentivized to amend the Curt Flood Act.

D. Inadequacies of the Current Curt Flood Act protections

Congress should move to amend the Curt Flood Act to create a cause of action for players to bring suit if their service time is being manipulated because the current protections provided by the Curt Flood Act are inadequate since an antitrust suit regarding service time manipulation would fail. Applying the Rule of Reason, service time manipulation is likely NOT a Sherman Antitrust Act violation. Under the current Curt Flood Act, major league players receive the protections of antitrust law.¹³⁶

As stated above, the Per Se Test regarding antitrust violations is not applicable in the context of professional sports.¹³⁷ However, the Rule of Reason test can be applied.¹³⁸

The first element of the Rule of Reason test is proving “an agreement or conspiracy among two or more persons or distinct business entities.”¹³⁹ Any antitrust claim would fail here because there is no agreement or conspiracy. Rather, service time manipulation is the result of

¹³⁴ Bob Nightengale, *Steve Cohen’s \$2.475 billion purchase of Mets is latest bellwether in sale of sports franchises*, USA TODAY (Sep. 15, 2020, 5:42 PM), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/09/15/new-york-mets-sale-steve-cohen-wilpon/5806326002/>.

¹³⁵ See generally AGREEMENT, *supra* note 14.

¹³⁶ 112 Stat. 2824 (1998).

¹³⁷ See 468 U.S. 85, 100-01 (1984).

¹³⁸ *Id.*; See also *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020).

¹³⁹ *Oltz v. Saint Peter’s Cmty. Hosp.*, 861 F.2d 1440, 46 (9th Circuit 1988).

MLB franchises individually using their roster management power. So since there is no conspiracy, players cannot bring an antitrust claim under the Sherman Antitrust Act. Therefore, the current Curt Flood Act protections are inadequate.

Even assuming that an antitrust suit would succeed, standing under the Curt Flood Act would be an issue for players bringing suit. Under the Curt Flood Act, standing to sue under the act is limited to major league players.¹⁴⁰ Sections 3(c)(1) and (2) are clearly inapplicable because when the manipulation is occurring, the player is a minor league player and not a major league player.¹⁴¹ Section 3(c)(3) overtly states that injuries sustained from conduct occurring in the minor leagues does not justify standing.¹⁴² There could be an argument that suit could be brought under section 3(c)(4) after the player's call up to the major leagues, but then the issue once again comes in that the injury being disputed occurred while the player was a minor leaguer.¹⁴³ However, a potential counterargument is that the injury is a prolonged one that occurs during a player's major league tenure since the added years of control are during the player's tenure on the major league roster. So there is the possibility that these players have standing under the Curt Flood Act under section 3(c)(4). However, even if you can justify standing under section 3(c)(4), the antitrust claim would fail at the first step of the rule of reason inquiry. Therefore, the current protections under the Curt Flood Act are inadequate because there is no conspiracy so no antitrust suit can be brought and, even assuming that a claim can be brought, there likely is no standing under the Curt Flood Act.

E. Congress should amend the Curt Flood Act to create a cause of action

¹⁴⁰ 112 Stat. 2825(c) (1998).

¹⁴¹ 112 Stat. 2825(c)(1)-(2) (1998).

¹⁴² 112 Stat. 2825(c)(3) (1998).

¹⁴³ 112 Stat. 2825(c)(4) (1998).

Congress should move to amend the Curt Flood Act because collective bargaining will be inadequate to address service time manipulation, Congress is incentivized to expedite MLB CBA negotiations, service time manipulation is not an antitrust violation, and there is likely no standing for players to bring action under the Curt Flood Act. Amending the Curt Flood Act should be done cautiously since a complete overhaul is not necessary. A complete repeal of the antitrust exemption is not necessary and would likely have negative consequences. Baseball, and professional sports generally, by its nature require some level of cooperation to operate.¹⁴⁴ A single entity is needed to schedule games between teams, establish divisions, set certain protocols, etc.¹⁴⁵

Congress should amend the language of the Curt Flood Act to create a cause of action allowing players to seek equitable and monetary relief if their service time is being manipulated. Congress should start by repealing the language in section 3(b) of the Curt Flood Act which states that the law does not create any new causes of action.¹⁴⁶

Congress should then create a cause of action allowing a player to bring suit in federal district court should a team manipulate his service time. The MLB franchise, under the cause of action, would have a duty to the player in deciding whether to add the player to the major league roster to be making that decision in the interest of making the team as competitive as possible. To show a breach of this duty, the player should have to prove intent on the part of the team to keep the player in the minor leagues in order to manipulate the player's service time. The burden should be on the player to show by a preponderance of the evidence that he was kept in the minor leagues with the intent to gain an extra year of control over the player as opposed to the

¹⁴⁴ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984).

¹⁴⁵ See *Id.*

¹⁴⁶ 112 Stat. 2824.

team keeping him in the minor leagues for the purpose of making the team as competitive as possible.

The statutory remedy for a rookie or second year player should be that the additional year of control obtained by the team is waived. There would also need to be a statutory remedy for Super Two eligible third year players, and fourth year and beyond players who would have been arbitration eligible one year earlier if not for their service time being manipulated. The remedy would have to be damages in the amount of what they would have made had their service time not been manipulated. For Ex Post Facto concerns discussed below, there should not be any punitive damage awards granted by this statute.

This amendment would provide the players with a remedy for having their service time manipulated while avoiding too much government involvement which will help keep the costs to taxpayers down. The government should be as minimally involved for both public image purposes and to still allow for wide latitude between the MLB and MLBPA to negotiate privately. The government should not be using a substantial amount of taxpayer dollars to address service time manipulation. To solidify keeping the cost to the government down, a provision applying court costs to the losing party should be added as well.

The government also is not forcing the MLB and MLBPA to adopt any additional provisions either. Under this proposal, the MLB and MLBPA are not required to adopt any specific provisions about service time manipulation and are still free to address it within their own collective bargaining negotiations. Although they would be negotiating with the backdrop of this cause of action, they can still agree to address service time manipulation as they see fit. So, this cause of action both allows the government to be minimally involved at minimal cost to the taxpayer while not imposing any mandates upon the negotiating parties.

Current MLB players who had their service time manipulated can likely bring suit despite the Ex Post Facto Clause in the Constitution.¹⁴⁷ Supreme Court precedent has limited the Ex Post Facto Clause to the criminal context.¹⁴⁸ In fact, the Supreme Court has held that a Kansas law requiring people that have a propensity for sexual violence to be civilly committed was not violative of the Ex Post Facto Clause insofar as it applied to people convicted of those offenses prior to the law’s enactment.¹⁴⁹ The Supreme Court will evaluate whether a law is meant to be criminal or civil in nature when determining if the Ex Post Facto clause of the Constitution applies. In *Kan. v. Hendricks*, the Court posed the inquiry as first determining whether the law is meant to establish civil proceedings.¹⁵⁰ Next, the Court stated that it “will reject the legislature’s manifest intent only where ... ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”¹⁵¹ When analyzing this, the Court determined whether or not the law served “either of the two primary objectives of criminal punishment: retribution or deterrence.”¹⁵²

Applying this analysis to the proposed Curt Flood Act amendment, this amendment would not serve either objective of criminal punishment. It is not retributive because it does not create culpability on the part of the franchises. Considering the remedy is only reducing player control, the franchises would not be punished for manipulating service time. Rather, the status quo would be restored. It also does not serve as a deterrent because it does not involve government action. The government’s involvement would be the courts hearing the cases rather than, for example, a regulatory agency attempting to prevent the practice. Therefore, this cause

¹⁴⁷ U.S. Const. art. 1, § 9, cl. 3.

¹⁴⁸ The Supreme Court in *Calder* defines four instances in which the ex post facto clause applies. All four instances relate to the criminal context. The Supreme Court also goes on to explicitly state that the “prohibition extends to criminal, not to civil, case.” *See Calder v. Bull*, 3 U.S. 386 (1798).

¹⁴⁹ *Kan. v. Hendricks*, 521 U.S. 346, 369 (2003).

¹⁵⁰ *Id.* at 361.

¹⁵¹ *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

¹⁵² *Id.* at 361-62.

of action would not serve the purpose of being a deterrent. Rather, the looming threat of a player suit would serve as the deterrent. Overall, creating a cause of action with no punitive consequences is a civil proceeding.

Since creating this cause of action would likely not violate the Ex Post Facto Clause, then the clause should help remedy service time manipulated by some current players. In the interest of fairness, there should be a retroactive limitation of five years. This would allow players still on their rookie contracts to bring suit while preventing a litany of litigation for all players affected at some point by service time manipulation.

Conclusion

Congress should amend the Curt Flood Act to create a cause of action for players to bring suit if a team is manipulating their service. Such action would prevent an unfair practice utilized by billion-dollar MLB franchises. Typically, this would seem like a contractual issue that should be discussed during CBA negotiations. The MLB and MLBPA, however, have been unable to resolve this issue in the past.

While it might seem like Congress should not be intervening in the negotiations of the MLB while Americans are suffering from a pandemic, many states have begun to open and more states will follow soon resulting in an economic recovery. With this economic recovery will come the reopening of baseball stadiums and the creation of jobs for the surrounding neighborhoods. Amending a not very well-known law that could end up expediting CBA negotiations that would have a wide impact on the American economy should be easy and uncontroversial.

Presumably, these greater protections will help facilitate the negotiations between the MLB and MLBPA and prevent a long-term lockout. Preventing a long-term lockout will help

stimulate the economy for a minimal cost which is a goal Congress should have in mind for the upcoming year.

It would also be difficult for the MLBPA to hold out for too long as well in the event of a lockout. Players like Bryce Harper with over \$300 million contracts would be able to withstand an extended lockout.¹⁵³ However, minor league players make significantly less and their salaries hover around the poverty line.¹⁵⁴ Many of these players are already struggling enough from the work stoppage related to the coronavirus.¹⁵⁵ This would just further the bargaining position of owners and require Congress to step in to end the practice of service time manipulation.

The likelihood of Congress amending an over twenty-year-old statute seems unlikely. Rather, in all likelihood, it seems that the MLB and MLBPA will be in a standoff come the expiration of the current CBA. This is a precarious situation which could drag on for months. Congress should step in and assure that the players playing America's pastime are protected and these discussions are expedited to avoid the economic impact of an extended negotiation.

¹⁵³ Abigail Hess, *Bryce Harper has signed a record-breaking \$330 million 13-year contract with the Philadelphia Phillies*, CNBC (Feb. 28, 2019), <https://www.cnbc.com/2019/02/28/bryce-harper-signs-a-record-breaking-330-million-deal-with-the-phillies.html>.

¹⁵⁴ Daniel Gallen, *Minor league baseball salaries hover at poverty level while major league teams earn big profits*, Penn Live (July 8, 2019), <https://www.pennlive.com/sports/2019/07/minor-league-baseball-salaries-hover-around-poverty-line-some-are-pushing-for-change.html#:~:text=The%20average%20salary%20for%20a,months%20of%20the%20regular%20season..>

¹⁵⁵ See Tom Huddleston Jr., *Minor league baseball player: I was already struggling to make ends meet – then coronavirus hit*, CNBC (July 14, 2020, 11:21 AM), <https://www.cnbc.com/2020/07/14/how-baseballs-coronavirus-shutdown-affected-a-minor-leaguer.html>.