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My friend Clarence Thomas is one of the few good lawyers that I know who believes that the Supreme Court's narrow construction of the Commerce Clause in 1895, in *United States v. E. C. Knight Co.*, 156 U. S. 1, was correct. He might also agree with the 1922 opinion of Justice Oliver Wendell Holmes holding that games of professional baseball are purely local affairs. In my judgment, however, the Court's more recent interpretations of the Constitution have removed the predicate for Justice Holmes' opinion from the law. Anomalously, however, more recent cases have also treated his opinion as though it announced a general exemption from the Sherman Act for organized baseball. Today I plan to comment on two events in my pre-judicial career in which baseball's so-called judicial

exemption from the Sherman Act played a significant role. The first was my service as Associate Counsel to the House Subcommittee on Monopoly Power in 1951 when it conducted its investigation of Organized Baseball, and the second was my representation of Charles O. Finley when he moved the Kansas City Athletics to Oakland, California, in 1967.

I

In 1951 I was an associate at the firm now known as Jenner & Block, working for the firm's most outstanding lawyer, Edward R. Johnston. In that year the American Bar Association formed its section on Antitrust Law and Mr. Johnston accepted the Association's invitation to become the first Chairman of the new Section. Not long thereafter he was asked by Chauncey Reed, the Republican Congressman from West Chicago, Illinois, to suggest the name of a lawyer to serve as Associate Counsel to the Subcommittee on the Study of Monopoly

Power of the House Judiciary Committee. Apparently some members of the antitrust bar were concerned that the subcommittee might propose legislation that would limit the size of prosperous business entities. They lacked confidence in the judgment of Brooklyn's Congressman, Emmanuel Celler, who was the Democratic chairman of both the Judiciary Committee and the subcommittee that was popularly known as "the Celler Committee." In essence, the new associate counsel was expected to represent the minority in an anticipated adversarial setting. In prior months the general counsel for the subcommittee had been Edward Levi, a former lawyer in the antitrust section of the Department of Justice, who was also then viewed by some as a potential threat to the status quo. Based on Mr. Johnston's recommendation, Chauncey Reed offered the job to me. I accepted, we became good friends, and in 1952 when the Republicans took control of Congress, he invited me to serve as chief counsel of the Committee

on the Judiciary. Having just begun my practice in a new three-person law firm, I did not accept that offer.

The most publicized work of the subcommittee was its investigation of organized baseball. That investigation gave me the opportunity to interview and examine in public hearings a number of well-known sports figures such as Ty Cobb, "PeeWee" Reese, "Happy" Chandler, the former Commissioner of Baseball, and George Trautman, the executive in charge of the minor leagues. When I interviewed Branch Rickey, instead of learning details about his hiring of Jackie Robinson, I was surprised to learn that he thought the most effective way to develop a winning team was, as he put it, "to keep 'em hungry" - don't overpay your players.

The hearings went on for several months and produced a truly massive record. Most of the evidence focused on the impact of the rules relating to the enforcement of the so-called reserve clause on the players - rules that would probably have violated the Sherman Act's prohibition of industry wide boycotts if

the statute applied - but the evidence covered other aspects of the game as well. In his testimony Trautman made a persuasive case for preserving the reserve clause because he believed it necessary to protect baseball clubs' farm systems - thus, he argued that it served a valid purpose in organized baseball that was not required in other professional sports. Apart from that argument, I recall nothing in the record supporting a claim that baseball should be treated differently from any other sport.

The five conclusions that the subcommittee reached in its 232 page report may interest you. They highlight the difference between a narrow exemption for the reserve clause and a broader exemption for some or all other aspects of the sport.

First, the subcommittee concluded that the evidence would not justify legislation flatly condemning the reserve clause. It recognized that the "unenviable status of the minor league player, the ossification of the major league territorial map, and the tendency of

the farm systems to enable the richest clubs to engross the player market, are all at least in part the result of the reserve clause." Nevertheless, the evidence did not identify any "feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle."

Second, the subcommittee concluded that organized baseball should not be granted a complete immunity from the antitrust laws. It noted that four bills had been introduced in Congress, three in the House and one in the Senate, that would "give baseball and all other professional sports a complete and unlimited immunity from the antitrust laws. The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. . . Thus the sale of radio and television rights, the management of stadi[ums], the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on

the playing field, would be immune and untouchable."

Confining its attention to baseball, the subcommittee could not place its stamp of approval on every aspect of the game as then conducted. The Report noted: "The restrictions on transfer of baseball franchises, together with the enforcement of those restrictions, have prevented the composition of the major leagues from reflecting tremendous population shifts which have occurred in the United States since 1903."

Third, the subcommittee thought it would be extremely unwise to create a new federal agency to regulate organized baseball, and fourth it opposed the enactment of a limited exemption for the reserve clause. It reasoned that there is no need to enact a special rule of reason for baseball if such a rule already applied to baseball, and noted that the Department of Justice had "not disputed baseball's position that the reserve clause is legal under the rule of reason." It therefore adopted the fifth

proposed conclusion, "namely, to recommend no legislative action at this time."

Those conclusions - like the voluminous record compiled during the hearings - highlight the importance of recognizing a distinction between a limited exemption for the reserve clause and a broader exemption that would apply to other aspects of the baseball business. No evidence whatsoever - zero - identified any need for a broader exemption. To some extent the development of the farm system in baseball was both unique to baseball and the product of the reserve clause. Moreover, arguably an exemption was needed to protect the farm system. Reliance interests therefore provided a rational basis for the *stare decisis* justification in the *Toolson* and *Flood* cases, both of which dealt only with the reserve clause. On the other hand, the rule of reason would adequately protect rules regulating the number and location of major league teams. There are no reliance interests that would justify treating baseball's geographic

decisions differently from other sports or exempting any other aspects of the baseball business from the antitrust laws.

II

In 1967, Charlie Finley was in the process of moving the Kansas City Athletics to another City. He hired me with the objective of getting out of a City where he had become unpopular and arriving elsewhere without being sued by Kansas City, as the Braves had been sued by Milwaukee when they moved to Atlanta. He was considering Dallas, Seattle, and Oakland as potential new homes for his team. I helped him negotiate his long term contract with the Oakland-Alameda Coliseum and, more importantly, obtain the approval of the relocation of the Team from the owners of American League clubs. I particularly remember making the equivalent of a closing argument at a meeting of those owners in a Chicago hotel. One of the

points that I made in that argument was that the interest in protecting the San Francisco Giants' monopoly position in the Bay Area market from competition from an American League team in Oakland - whose home games could be scheduled when the Giants were not playing at home - would not justify a negative vote either as a matter of business judgment or as a matter of law. Indeed, based on my work on the Celler Committee, I thought it clear that a decision motivated by an interest in protecting the Giants from competition in Oakland would clearly violate the antitrust laws. Charley was nice enough to credit my argument as having played an important role in our obtaining enough votes to authorize the move.

We were successful in making the move without precipitating a suit by Kansas City, but as soon as we arrived in Oakland we were confronted with litigation brought by another plaintiff, Twin City Sportservice, the concession company that had performed services for the Athletics in both Kansas City and Philadelphia.

The Oakland Coliseum had a concession contract with a local company covering all events in the stadium, and Sports Service had a long-term contract that Connie Mack had signed many years ago when the team was in Philadelphia and in financial difficulty. In exchange for a large loan, the A's had agreed that Sportservice would have the right to continue to act as the A's concessionaire, not only if the team moved elsewhere but also for all events held in the stadium to which the team moved. We challenged the enforceability of that contract as a matter of common law, and also filed a counterclaim alleging that Sportservice was violating the antitrust laws. The case was tried before Retired Justice Tom Clark, who ruled against us on the common law issues but in our favor on the antitrust counterclaim.

When I went on the bench in 1970, the case was still being litigated. Indeed, my former partner Bill Myers continued handling the case for several years - including two appeals to the 9th Circuit - and

eventually in 1982 the Court of Appeals ruled in our favor and approved an award of treble damages of \$846,504. If nothing else, the case demonstrates that one important aspect of the baseball business - ballpark concessions - is not exempt from the antitrust laws.

My study of the issue when I was representing Charley firmly convinced me that there was no valid reason for giving the leagues any exemption, not only for concessions or television arrangements, but even for their exercise of control over the location of their teams. It is reasonable - and therefore perfectly legal - for a league to exercise control over the places where its teams play, provided only that their decisions reflect reasonable attempts to protect the best interests of the game. There is a world of difference between reasonable decisions of that kind, and decisions motivated entirely by the interest in protecting one owner from competition. When the American League approved the Athletics' move to

Oakland, they protected the Kansas City fans by also allowing a new Kansas City team to join the League. While allowing Oakland to have a team across the bay from San Francisco was not welcomed by the Giants, the rules did not allow that one club's self-interest to block the move.

III

I shall close with a brief comment on the Curt Flood Act enacted by Congress in 1998. As the title of the Act suggests, it overrules the Supreme Court decision in *Flood v. Kuhn*, 407 U. S. 258 (1972), as well as the earlier decision in *Toolson v. New York Yankees, Inc.*, 346 U. S. 356 (1953) (*per curiam*). Thus, by enacting the Curt Flood Act, Congress rejected the *stare decisis* rationale in those two cases, and agreed with the views endorsed by Justices Burton and Reed in the earlier case and by Justices Douglas, Brennan, and Marshall in the later case.

Congress carefully added a good deal of language expressing the simple point that the statute does not change any other aspect of the antitrust laws' application to baseball or to any other sport. The provisions of the law relating to the location of franchises, and to concession sales at baseball games, remain the same as they were when I worked with the Celler Committee in 1951 and when I helped Charley move to Oakland in 1967. In the former capacity, I had an open mind about the non-reserve clause issues, but in the latter my position might have been influenced by the interests of my client. Nevertheless, discounting my historic bias, it now seems abundantly clear to me - as it did to Justice Douglas when he acknowledged in his dissent in *Flood* that his vote in *Toolson* had been wrong - that it simply makes no sense to treat organized baseball differently from other professional sports under the antitrust laws. Nor would it be reasonable to conclude that the San Francisco Giants could not prevent the A's from moving their ball club

to Oakland in 1967 but can now prevent them from moving from Oakland to San Jose.

In his lecture on the Path of the Law printed in the Harvard Law Review in 1897, Oliver Wendell Holmes made this oft-quoted observation: "It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."¹ I think Justice Holmes would agree that his observation is equally applicable to a statement of law - even in one of his own opinions - "if the grounds upon it was laid down have vanished and the rule simply exists from blind imitation of the past."

Thank you for your attention.

¹ Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).