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104TH CONGRESS, 2d Session | SENATE | REPORT 104–231

MAJOR LEAGUE BASEBALL REFORM ACT OF 1995

FEBRUARY 6, 1996.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 627]

The Committee on the Judiciary, to which was referred the bill (S. 627) to apply the antitrust laws of the United States to major league baseball, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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29–010

I. TEXT OF S. 627, AS REPORTED

[104th Cong., 1st sess.]

A BILL To require the general application of the antitrust laws to major league baseball, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Major League Baseball Antitrust Reform Act of 1995."

SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section:

"Sec. 27 (a) Subject to subsection (b), the antitrust laws shall apply to the business of professional major league baseball.

"(b) Nothing in this section shall be construed to affect—

"(1) the applicability or nonapplicability of the antitrust laws to professional baseball's amateur draft, the minor league reserve clause, the Professional Baseball Agreement, or any other matter relating to the minor leagues;

"(2) the applicability or nonapplicability of the antitrust laws to any restraint by professional baseball on franchise relocation; or

"(3) the application of Public Law 87–331 (15 U.S.C. 1291 et seq.) (commonly known as the Sports Broadcasting Act of 1961)."

II. PURPOSE

This Committee has long held the view that free market competition, protected by the antitrust laws, is the foundation of our economic system. Immunity from the antitrust laws is appropriate only in very limited circumstances, and only if certain precautions are taken. Immunity should be granted and maintained only where it is clear that competition will not work in a particular industry or market. Moreover, any industry that is granted immunity is well advised to adopt the least anticompetitive practices possible, in order to preserve the fairness of the economic system and maintain its exemption. With these principles in mind, the Committee has reviewed S. 627, the "Major League Baseball Antitrust Reform Act of 1995."

The purpose of S. 627 is to affirm that major league baseball's owners and players are subject to the Nation's antitrust laws. Professional baseball is the only industry in the United States that claims an exemption from the antitrust laws without being subject to alternative regulatory supervision. Yet Congress has never declared professional baseball to be exempt from the antitrust laws. Instead, the U.S. Supreme Court shielded the owners of major league baseball from the antitrust laws through its judicial decisions, beginning in 1922. While subsequently finding the exemption to be an "anomaly," the Court expressly left it to Congress to modify the exemption.

This legislation, S. 627, will end the anomalous antitrust loophole enjoyed by the owners of major league baseball, by clarifying that the antitrust laws do apply to major league baseball with certain exceptions. Under S. 627, the antitrust laws will apply expressly to areas of immediate concern such as player relations, competition from new leagues, and telecommunications activities that are not within the scope of the Sports Broadcasting Act of 1961. However, S. 627 will not affect existing law with respect to professional baseball's ability to restrain franchise relocation, matters relating to the minor leagues, or the statutory provisions of the Sports Broadcasting Act.

The baseball strike of 1994–95—which tarnished the national pastime by curtailing the 1994 season and shortening the 1995 season—has reemphasized the need to express Congress, intent to apply to professional baseball the rules of fair and open competition that are followed by all other unregulated business enterprises in this country, including all other sports leagues. The strike, which started in August 1994 and did not end until April 1995, was not prompted by the players' demand for more money, but by their lack of any alternative when faced with the owners' threats to impose unilaterally terms and conditions of employment that could violate the antitrust laws. Other professional athletes and similarly situated employees have alternatives to striking specifically because of these laws. Unfortunately, negotiations were unproductive and, to the fans great dismay, the 1994 World Series was never played. These failed negotiations achieved what the Great Depression, world wars, and scandal could not—the cancellation of the World Series. The strike continued into the 1995 season, which began only after a Federal injunction restored the terms of the old agreement. Remarkably, the owners and players have yet to reach a new labor agreement. It is clearly time to end baseball's antitrust exemption.

III. Legislative History

Many bills have been introduced over the decades in response to the Supreme Court's 1922 decision establishing baseball's antitrust exemption. During the previous Congress, this Committee voted on June 23, 1994, and narrowly failed to pass S. 500, which as amended, would have eliminated the antitrust exemption for major league baseball as it related to labor issues.

In the 104th Congress, Senators Hatch, Moynihan, Graham, and Bingaman introduced S. 415, the Professional Baseball Antitrust Reform Act of 1995, on February 14, 1995. On that same day, Senators Thurmond and Leahy introduced S. 416, the Major League Baseball Antitrust Reform Act of 1995. While the two bills had similar goals, the primary difference was that S. 415 would have overridden the "nonstatutory labor exemption" in certain circumstances. The Subcommittee on Antitrust, Business Rights, and Competition promptly held a hearing on the bills.

Senator Thurmond chaired the Antitrust Subcommittee hearing on February 15, 1995, at which both S. 415 and S. 416 were analyzed. Witnesses included: Senators Hatch, Moynihan, Kassebaum, and Graham; Mr. Selig, chairman of the Major League Baseball Executive Council; Mr. O'Connor of Morgan, Lewis & Bockius; Mr.

Rill of Collier, Shannon, Rill & Scott; Mr. Fehr, executive director of the Major League Baseball Players Association; Mr. Cone and Mr. Murray, both baseball players and members of the Major League Baseball Players Association; and Mr. Arquit of Rogers & Wells.

Following the hearing, on March 27, 1995 Senators Hatch, Thurmond, and Leahy introduced a compromise bill, S. 627, the Major League Baseball Antitrust Reform Act of 1995, which was cosponsored by Senators Moynihan and Graham. The legislation was referred to this Committee and the Antitrust Subcommittee. On April 5, 1995, with a quorum present, the Antitrust, Business Rights, and Competition Subcommittee approved S. 627 by voice vote for full Committee consideration.

IV. Vote of the Committee

On August 3, 1995, with a quorum present, the Committee on the Judiciary ordered S. 627 favorably reported by a vote of 9 to 8, with one member abstaining. In compliance with paragraph 7 of Rule XXVI of the Standing Rules of the Senate, the members of the Committee voted as follows on S. 627:

YEAS	NAYS
Hatch	Grassley
Thurmond	Specter
Simpson	Brown
Thompson	Kyl
DeWine	Biden
Abraham	Heflin
Kennedy	Simon
Leahy	Feinstein
Feingold	

ABSTENTION

Kohl

Senator Simpson offered an amendment that would have maintained the existing antitrust exemption if an independent baseball commissioner was appointed in accordance with specific procedures. The amendment was not adopted by a vote of 6 to 11, with one abstention, as follows:

YEAS	NAYS
Hatch	Thurmond
Simpson	Specter
Grassley	Thompson
Brown	Kyl
Kennedy	DeWine
Leahy	Abraham
	Biden
	Heflin
	Simon
	Feinstein
	Feingold

V. DISCUSSION

Major league baseball has enjoyed an esteemed position in this Nation over the last century. Often referred to as America's national pastime, the game has been a bond linking generations and evokes special memories of family and childhood for many.

Unfortunately, the realities of baseball do not always match this perception. The game is, in fact, a lucrative business—when not sidelined by labor problems—generating billions of dollars in revenues and related income each year. With their current antitrust status, the owners may conspire and collude without restraint, and they have repeatedly taken unfair advantage of their unique legal position. The antitrust laws were designed to prohibit the very kind of economic practices that exist in major league baseball today.

The list of those harmed by baseball's antitrust exemption is long. Municipalities, minor league owners, prospective investors, players, and fans have all been victims of professional baseball's anticompetitive practices. It is no surprise that the owners' relationship with the players has been so contentious; in fact, baseball has been plagued with more work stoppages than all other professional sports combined. Nor is it surprising that record numbers of fans decided to demonstrate their frustration in 1995 by staying away from ballparks across the country—overall, the decline in attendance is estimated at more than 20 percent.

As the Committee began its consideration of S. 627, Chairman Hatch summarized the need for legislation to resolve these problems by stating:

> This bill will bring about sound reforms that ensure that baseball is treated fairly and properly under the antitrust laws. In the long run, our bill will contribute to constructive labor relations between the players and owners, and will subject Major League Baseball to the same treatment under the nation's laws that the other professional sports experience.

Among groups which have analyzed and support this legislation, two are particularly noteworthy. By letter of August 3, 1995, the Department of Justice—which has enforcement responsibilities over our Nation's antitrust laws—responded to Senator Leahy, the ranking member of the Antitrust Subcommittee, stating that the "Department supports legislation that would narrow baseball's special antitrust exemption by applying the antitrust laws to Major League Baseball with certain exceptions." Likewise, the Section of Antitrust Law of the American Bar Association supports S. 627 because it "reverses baseball's anomalous antitrust exemption and places professional baseball on the same footing as other professional sports."

At the Committee's markup, Senator Leahy observed: "Congress may not be able to solve every problem or heal baseball's self-inflicted wounds, but we can do this: We can pass legislation that will declare that professional baseball can no longer operate above

the law that governs all other professional sports and commercial activity."

A. BACKGROUND OF BASEBALL'S EXEMPTION

Major league baseball's unusual antitrust status began with the U.S. Supreme Court's decision in *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). Explaining why the antitrust laws should not apply, the Court held that exhibitions of baseball did not satisfy the interstate commerce jurisdictional requirement because they were "purely state affairs" and not "trade or commerce in the commonly accepted use of those words." In 1922, the Supreme Court could not have envisioned the 1993 World Series, where Canada's Toronto Blue Jays defeated the Philadelphia Phillies in a game televised around the world. The game the Court sought to protect bears little resemblance to the billion dollar industry operating today.

A series of cases followed the 1922 decision of *Federal Baseball*, in which the Federal courts refused to extend an antitrust exemption to any other sport,[1] and held that other sports were subject to the antitrust laws.[2] These decisions acknowledged the erroneous nature of *Federal Baseball*, but refused to abandon the precedent as it applied to baseball.

The decision of the Supreme Court in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), repudiated the legal basis of the *Federal Baseball* case and its progeny. The Court correctly acknowledged in *Flood* that its prior decisions which created the exemption were now outdated and incorrect. Specifically, the Court found that "[p]rofessional baseball is a business and it is engaged in interstate commerce." 407 U.S. at 282. Rather than modify the exemption it had created, however, the Court avoided the issue by holding that "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court." *Id.*[3] Without the Supreme Court decisions in *Federal Baseball* and *Flood*, major league baseball would have no arguable claim to antitrust immunity.[4]

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[1] Radovich v. *National Football League*, 352 U.S. 445 (1957) (professional football); *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) (professional basketball); *Nassau Sports* v. *Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972) (professional hockey).

[2] *See, e.g., Dessen* v. *Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (professional golf); *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (professional bowling); *Amateur Softball Ass'n* v. *United States*, 467 F. 2d 312 (10th Cir. 1972) (amateur softball).

[3] The Court in *Flood* also held that state antitrust enforcement is pre-empted, affirming the appellate court's ironic conclusion that the "burden on interstate commerce outweighs the states' interests" in enforcing their own antitrust laws against baseball. 407 U.S. 284. To the extent that the Federal exemption was due to baseball *not* being in interstate commerce and a "purely state affair," however, State antitrust laws are the only ones that would apply to baseball.

[4] A federal court recently grappled with the Supreme Court's *Flood* decision in *Piazza* v. *Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993). The underlying facts in *Piazza* concerned the efforts of investors to purchase the San Francisco Giants and move the team to St. Petersburg, FL. The league thwarted the move, and the investors sued. Noting that the Supreme Court in *Flood* had repudiated the legal basis for the decision in *Federal Baseball*, the district court limited the case to its facts and denied the league's motion for summary judgment. Specifically, the court found that the reserve clause at issue in *Federal Baseball* and *Flood* remained exempt from the antitrust laws, but that in all other respects baseball was a business in interstate commerce and was therefore subject to the antitrust laws. The league reportedly settled the suit before trial for $6 million. In a related case, the Supreme Court of Florida found the *Piazza* rationale persuasive and adopted it in *Butterworth* v. *National League of Professional Baseball Clubs*, 644 So.2d 1021 (Fla. 1994). *See also Morsani* v. *Major League Baseball*, 1995 Fla. App. Lexis 10391 (Fla. 2d DCA 1995) (following rationale of *Butterworth* to reinstate state antitrust claims). *But see New Orleans Pelicans Baseball, Inc.* v. *National Ass'n of Professional*

B. GENERAL APPLICABILITY OF THE ANTITRUST LAWS

Courts have repeatedly held that the antitrust laws do apply to other professional sports, including professional football, basketball, and hockey, as discussed above, as well as all other unregulated businesses. However, the courts also have long recognized that a professional sports league is a joint venture whose product—a series of contests leading to a championship—could not be obtained if the individual franchises or teams were not permitted a high degree of cooperation and business coordination beyond that required in most other industries.[5]

Courts generally review the conduct of a *bona fide* joint venture under the so-called "rule of reason" analysis, discussed next, which balances benefits against any harm to competition, rather than holding the conduct *per se* illegal without analyzing any defense or justification. A second important doctrine explained below is the nonstatutory labor exemption from the antitrust laws, which applies generally to all sports and industries.

1. The rule of reason

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies that unreasonably restrain trade. 15 U.S.C. 1. Legality under the antitrust laws generally depends on whether the conduct in question is considered "procompetitive" or "anticompetitive." Actions and conduct by joint ventures often have both procompetitive and anticompetitive aspects, so legality is determined by balancing the beneficial effects on competition against the restraints the conduct imposes on competition. This balancing involves analyzing the facts peculiar to the business, the history of the restraint, and the reasons why the restraint was imposed.[6] This balancing analysis is known as the "rule of reason," and is routinely used by courts in deciding antitrust cases involving professional sports.[7]

Baseball Leagues, Inc., No. 93–253, 1994 WL 631144 (U.S.D.C., E.D. La. Mar. 1, 1994) (rejecting *Piazza* as an "impressive dissent from precedent" and granting summary judgment based on existence of antitrust exemption).

[5] *See, e.g., Mackey* v. *National Football League,* 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *National Collegiate Athletic Ass'n* v. *Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, 86 (1984).

[6] *See, e.g., Chicago Bd. of Trade* v. *United States,* 246 U.S. 231, 238 (1918); *National Soc'y of Professional Eng'rs* v. *United States,* 435 U.S. 679, 691 (1978).

[7] *See, e.g., National Collegiate Athletic Ass'n,* 468 U.S. at 86; *Los Angeles Memorial Coliseum Comm'n* v. *National Football League,* 726 F.2d 1381, 1386 (9th Cir.), *cert. denied,* 469 U.S. 990 (1984).

Some professional sports leagues have argued for treatment as a "single entity" for purposes of antitrust analysis, rather than individual teams. *See, e.g., Los Angeles Memorial Coliseum Comm'n,* 726 F.2d at 1387; San Francisco Seals, Ltd. v. *National Hockey League,* 379 F. Supp. 966 (C.D. Cal. 1974). *See also* Gary Roberts, *The Single Entity Status of Professional Sports Leagues under Section 1 of the Sherman Act: An Alternative View,* 60 Tul. L. Rev. 562 (1986); Myron C. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model,* 82 Mich. L. Rev. 1 (1983). Because there can be no "contract, combination, or conspiracy in restraint of trade" unless the conduct involves two or more separate entities, such treatment would immunize sports leagues against most antitrust liability. *See Copperweld Corp.* v. *Independence Tube Corp.,* 467 U.S. 752 (1984). Courts have rejected the argument that sports leagues constitute a single entity. *See, e.g., Los Angeles Memorial Coliseum Comm'n,* 726 F.2d 1381; *North Am. Soccer League* v. *National Football League,* 670 F.2d 1249, 1257–1259 (2d Cir.), cert. denied, 459 U.S. 1074 (1982); *cf. Chicago Professional Sports & WGN* v. *National Basketball Ass'n,* 961 F.2d 667 (7th Cir.), *cert. denied,* 113 S. Ct. 409 (1992) (Judge Easterbrook remanded case and encouraged league to raise single entity theory before district court).

While most restraints of trade are analyzed in terms of their reasonableness based on their nature, purpose, and effect, practices such as price fixing have such a pernicious effect that they are presumed conclusively to be unreasonable. Under the *per se* rule, these "naked restraints" on competition are deemed to be automatic antitrust violations without inquiry into their specific harm or business justifications.

In sports cases, as noted, the courts typically rely on the rule of reason to look at the purpose of any restriction and whether it reasonably relates to legitimate objectives or whether it is motivated by an anticompetitive intent, such as eliminating a competitor from the marketplace. The legality of a practice under the rule of reason can only be determined by its effect on competition in a relevant market. That is, to constitute an antitrust violation, the restriction must result in the substantial foreclosure of competition of a particular product in a particular geographic area.

2. Nonstatutory labor exemption

Understanding the broad outlines of the "nonstatutory labor exemption" is necessary to determine the practical impact and effect of S. 627. The nonstatutory labor exemption from the antitrust laws applies to all sports and industries, regardless of the existence of other antitrust exemptions.

In an effort to harmonize the nation's antitrust and labor laws, Congress has since 1914 protected from antitrust challenge the formation of labor unions and their collective activities as authorized under the labor laws.[8] While the statutory exemption is limited to unilateral activities of labor unions and employees, the courts have developed a limited "nonstatutory" labor exemption from the antitrust laws that applies to concerted activities and agreements between labor and nonlabor parties, such as between a union and employers in a collective bargaining setting.

The nonstatutory labor exemption is limited, both because the exemption lasts only as long as there is a collective bargaining relationship and because all implied exemptions to the antitrust laws are strongly disfavored and to be construed as being no broader than clearly necessary. *See, e.g., California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105–106 (1980).

That being said, there are conflicts and disagreements among courts and academics over the extent and scope of the nonstatutory labor exemption and, in particular, whether a union must decertify in order for individual employees to be protected by the antitrust laws.[9] It is clear, however, that at some point the nonstatutory labor exemption ends and employees have a right to invoke the antitrust laws. Thus, any assertion that the antitrust laws have nothing to do with labor relations is incorrect.

The recent bargaining between the National Basketball Association and the NBA Players Association provides an instructive ex-

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[8] Clayton Act § 6, 15 U.S.C. 17 (exempts operation of labor organizations from the antitrust laws by stating that labor is not an article of commerce); Clayton Act § 20, 29 U.S.C. 52; and Norris-LaGuardia Act, 29 U.S.C. 101–110, 113–115.

[9] The Supreme Court has granted certiorari in order to review *Brown v. Pro Football,* 50 F.3d 1041, 1053–54 (D.C. Cir. 1995), which adopted a broad view of the nonstatutory labor exemption as protecting the entire collective bargaining process, and rejected the players' argument that the exemption expires with the formal collective bargaining agreement.

ample of the importance of the possibility of invoking the antitrust laws in the context of labor relations. The threat of union decertification led the parties to return to the bargaining table and ultimately to a new contract. The National Football League has also experienced successful application of the antitrust laws to the relationship between labor and management in the multiemployer context.

The Committee need not address or resolve the debate over the scope of the nonstatutory labor exemption and whether decertification is a necessary prerequisite before players invoke the antitrust laws. It is sufficient to recognize that the antitrust laws play a role in the labor-management context, and S. 627 will ensure that the same rules apply to baseball as to all other sports and industries.

C. IMPACT OF EXEMPTION ON BASEBALL'S LABOR RELATIONS

On August 12, 1994, major league baseball experienced its eighth baseball work stoppage since 1972—more stoppages than in professional basketball, football, and hockey, combined. The strike undeniably has had an impact on this legislation. For many supporters of this legislation, the strike provided the motivation to seek modification of baseball's anomalous antitrust exemption. On the other hand, among those who defend the current exemption, the strike provided a reason to take no action. Senator Thurmond discussed the effect of the strike during his subcommittee's hearing on February 15, 1995:

> Some Members of Congress believe that we should not get involved during the current strike, while other Members have asserted that in the absence of a strike there is no need for the Congress to take action on this issue. Whether there is a strike or not, it is my belief that it is proper for the Congress to consider this antitrust issue as a matter of public policy. The Congress has considered baseball's antitrust exemption in the past, including serious attention by the Senate Judiciary Committee last year, prior to the current strike. I intend to continue working on this issue, even if the strike were to end today.

This most recent strike ultimately led to the cancellation of the remainder of the 1994 regular season and the World Series. The 1994–95 strike was the longest in professional sports history, and the only sports work stoppage to result not only in the complete loss of postseason play, but to carry over into the next season. The strike caused immeasurable emotional and financial damage to professional baseball and the country, as has been noted by the media and fans. This course of events has crystallized for the public the peculiar tendency of professional baseball to resort to strikes and lockouts as a means of resolving labor disagreements—a result, in large measure, of its judicially granted antitrust exemption. In testimony before the Antitrust Subcommittee, Mr. Arquit explained the impact of baseball's special antitrust status on labor relations as follows:

> At present, because of the baseball exemption, owners can act in concert to impose conditions on players, even in the absence of the nonstatutory labor exemption. Knowing

> that they have the legal freedom ultimately to play this trump card, the owners have less incentive to negotiate seriously at the early stages of the process. In contrast to the Congressional policy favoring collective bargaining, as embodied by the National Labor Relations Act, the baseball antitrust exemption encourages exactly the opposite conduct by owners: protracted collective bargaining, leading precisely to impasse. Given the jagged interface between antitrust and labor relations created by the exemption, the acrimonious history of collective bargaining in the context of Major League Baseball comes as no surprise.

The facts leading up to the strike demonstrate its connection to baseball's antitrust exemption, for baseball players faced a choice that would never be faced by any other professional athlete or similarly situated employee. In 1993, even though the collective bargaining agreement in major league baseball had expired, the owners promised the players that they would not unilaterally implement new terms of employment in the off-season. Consequently, there was no work stoppage. In 1994, however, the owners would not make the same promise. If no agreement was reached between the owners and players before the 1994–95 off-season, then the owners could unilaterally attempt to change the terms of employment before the period for signing contracts for the 1995 season.[10]

The difference between baseball and other sports is that other athletes have the option of challenging new terms of employment under the antitrust laws.[11] Baseball players, having no such option, are forced to either accept the new conditions or strike. Mr. Fehr discussed this dynamic at the February 1995 hearing:

> When parties sit down at the negotiating table they do so fully knowledgeable of the rights and obligations of the other side. In the case of baseball, when the owners sit down at the table they look across the table at athletes who they believe, if negotiations break down, have two and only two options—accept their offer or strike. In any other sport, when the owners sit down at the bargaining table they look across the table at athletes who they know, if negotiations break down, have three options—accept their offer, strike, or exercise their rights under the antitrust laws.

As a result, the players chose to strike in August 1994 in an attempt to force negotiation of a new collective-bargaining agreement during the season. Unfortunately, negotiations were unproductive and on December 22, 1994, the owners implemented new terms of employment. The strike continued, as players refused to sign contracts under new terms that were less favorable to the players than those in the expired collective-bargaining agreement. The remainder of the 1994 season was lost, including the first cancellation of the World Series. The 1995 season began only after a Federal judge

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[10] Labor law permits the major league baseball owners, as it does other employers and owners in other sports, to change the terms of employment at an impasse in the negotiations.

[11] As discussed above, players in other sports might have to decertify their union to be able to bring an action in court, but the option remains nonetheless.

issued an injunction restoring the terms of the old agreement.[12] While the strike has ended, the dispute continues, as no labor agreement has been reached. This legislation would help resolve baseball's labor problems. As Chairman Hatch emphasized at the Committee's markup, S. 627 "does not impose a big-government solution to baseball's problems. On the contrary, it would get government out of the way by eliminating a serious government-made obstacle to resolution of the labor difficulties in baseball."

Arguments that Congress should not interfere in ongoing labor negotiations are unconvincing when there are no significant negotiations in progress. As Chairman Hatch said during the Committee markup: "There are no meaningful negotiations underway. The players made their last proposal on March 30, 1995, and the owners have not made a counterproposal. Indeed, the owners suspended negotiations for 14 weeks after the March 30 proposal." In light of this record, the Committee believes that S. 627 could provide the incentive to bring both parties back to the negotiating table to resolve a labor dispute that threatens the very future of the game.

D. OWNERS' ARGUMENTS FOR SPECIAL TREATMENT UNDER THE ANTITRUST LAWS

The Committee views antitrust exemptions with skepticism, because free market competition, protected by our antitrust laws, forms the foundation of our economic system. As with any other group advocating an antitrust exemption, the burden of persuasion lies with the owners, for an exemption should be maintained only so long as it serves the public interest. In reviewing the owners' arguments, it is important to note that a number of the potential concerns raised by the owners are not implicated by S. 627, for the legislation does not affect the application of the antitrust laws to franchise relocation decisions or the relationship of the major leagues to the minor leagues.

1. Baseball is not a business

The rationale for professional baseball's judicially created exemption from the antitrust laws in the *Federal Baseball* case was that professional baseball was not a business in interstate commerce. 259 U.S. at 208. It has long been recognized by the Court, however, that such a proposition is no longer true. *Flood*, 407 U.S. at 282. It is now indisputable that major league baseball not only involves interstate commerce, but constitutes a significant interstate financial enterprise, generating revenues and related economic activity—when not on strike—of billions of dollars a year.

Despite the size and financial impact of professional baseball, its owners have long asserted that their industry is notable for its lack of profitability. Prior to the recent strike, for example, owners had predicted industrywide losses of some $100 million for the 1994 season. It is impossible to verify assertions of economic losses due to the lack of financial disclosure by the owners, as well as the multiplicity of revenue sources which may benefit owners apart

[12] *Silverman* v. *Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y.) (National Labor Relations Board had reasonable cause to believe that the owners' unilateral actions constituted an unfair labor practice), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

from the team itself. Of course, profitability is not a factor in determining whether a particular enterprise is engaged in interstate commerce or should be subject to the antitrust laws.

2. Effect on the minor leagues

Owners argue for continuation of professional baseball's antitrust exemption on the basis that it is necessary to preserve the minor league system. At the Antitrust Subcommittee hearing, Mr. Selig asserted that:

> * * * the exemption preserves and enhances our Minor League system throughout the United States, allowing millions of fans the opportunity to watch professional baseball who would otherwise be deprived of that privilege.

Currently, most of the various minor league teams are bound to major league affiliates. This relationship is governed by the Professional Baseball Agreement, under which the major league teams substantially contribute to the payment of minor league player costs. The owners of the major league and minor league baseball clubs assert that if the antitrust laws applied to baseball, the major leagues would reduce or eliminate this "subsidy" payment. The owners further argue that certain aspects of the operation of minor league baseball, such as its reserve clause (by which players are bound to teams for up to 6½ years), would be susceptible to legal attack under the antitrust laws. Mr. Rill stated at the Antitrust Subcommittee hearing that:

> If the antitrust exemption is repealed, the continued use of the minor league contract would very likely result in challenges similar to those that wheeled around the majors' reserve clause. * * * Without the protection of the minor league contract, [major league] clubs would not invest the hundreds of millions of dollars necessary to operate the minor league system.

In addition to the usual skepticism with which claims for antitrust protections are greeted, many commentators and Members of Congress have questioned the owners' sincerity in asserting a need for special treatment to protect the minor leagues, in light of the owners' own threats to the minor leagues. For example, in the midst of contract negotiations in 1990, the owners threatened to do away with the minors altogether.[13] As the current agreement with the minor leagues comes up for renegotiation, there is no certainty that the relationship will continue as it has in the past regardless of what happens to baseball's antitrust exemption.

More importantly, the Committee has elected to leave the law as it currently exists with regard to the minor leagues. The legislation expressly states in section 2 that it shall not be construed to affect "the applicability or nonapplicability of the antitrust laws to professional baseball's amateur draft, the minor league reserve clause,

[13] The Associated Press reported that the "chief negotiator for the major leagues said the commissioner's office would begin discussions to start new minor leagues and clubs outside the * * * current minor league governing body." Ronald Blum, AP Sports News, Lexis, AP File (Nov. 18, 1990); "Majors, Minors Can't Agree," Sporting News, Nov. 26, 1990, at 37 (major league baseball sending out new franchise applications and would abandon attempts to reach agreement with minor leagues).

the Professional Baseball Agreement, or any other matter relating to the minor leagues." At the Antitrust Subcommittee hearing, Senator Thurmond explained the importance of maintaining the status quo for the minor leagues:

> Protecting the current relations with the minor leagues is important to avoid disruption of the more than 170 minor league teams which are thriving throughout our Nation. This is a priority which other Members and I have clearly expressed.

Despite the unambiguous language of the bill, opponents of the legislation have continued to maintain that it might harm the minor leagues. The Committee has asked repeatedly for the input of the minor leagues, to determine if the proposed statutory language is insufficient to preserve current law. However, the minor league owners have proposed no changes to the language of the bill.

3. Effect on franchise relocations

Those defending the antitrust exemption also contend that it enables professional baseball to protect local communities and fans against abandonment by teams seeking more lucrative venues. Major league baseball does enjoy a good record of franchise stability, as least compared to other leagues. The bill expressly provides that it shall not affect "the applicability or nonapplicability of the antitrust laws to any restraint by professional baseball on franchise relocation." It is the Committee's intent that the status quo of the law concerning franchise relocation remain in place. Thus, S. 627 would have no impact on baseball's current ability to prevent franchise relocation.

4. Effect on broadcast relationships

Another concern voiced with respect to application of the antitrust laws to professional baseball is that the laws might unreasonably intrude upon the owners' ability to negotiate jointly national broadcast contracts. The Sports Broadcasting Act of 1961 addresses that concern, and applies to professional baseball. 15 U.S.C. 1291 *et seq.* The Sports Broadcasting Act provides a limited antitrust exemption to enable the member clubs of professional sports leagues to jointly pool their separate rights in sponsored telecasting of their games to sell to a purchaser.

To further ensure that baseball comes within the Sports Broadcasting Act, S. 627 provides that the legislation shall not be construed to affect "the application" of the Sports Broadcasting Act. Thus, any congressional repeal of baseball's judicially created antitrust exemption would not prejudice professional baseball's ability to negotiate jointly such agreements with the networks. Major league baseball would be in the exact same position as the other major professional sports.[14]

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[14] With respect to local broadcast rights, application of the antitrust laws to major league baseball would prevent unreasonable restraints of trade from being imposed by the league on individual teams. Well-established precedent limits a sports league's latitude in abusing its local broadcast market. *See Chicago Professional Sports Ltd. Partnership* v. *National Basketball Ass'n,* 961 F.2d 667 (7th Cir.), *cert. denied,* 113 S. Ct. 409 (1992) (the Chicago Bulls—owned

Continued

5. Role of the baseball commissioner

Some have argued that professional baseball need not be subject to the antitrust laws, because of the existence of a strong and independent commissioner. Even if the Committee accepted the unique argument that private regulation could suffice to justify an antitrust exemption, examination of the facts clearly reveals that baseball's commissioner has not been characterized by "strength" and "independence." Major league baseball has been operating without an even nominally independent commissioner since Fay Vincent's departure in 1992.

The owners recently weakened the powers of the vacant commissioner's office through the actions of a Restructuring Committee. Previously, the commissioner had authority to take any and all actions deemed to be in the "best interests" of the game. The recommendations recently adopted by the Restructuring Committee, however, will prevent future commissioners from using the "best interests" powers with respect to a list of issues, including: the expansion, sale, and relocation of teams; scheduling; interleague play; divisional alignment; and revenue sharing among owners. The commissioner is also explicitly prohibited from using the "best interests" powers with regard to collective bargaining matters. After reviewing the changes the owners made to the commissioner's office, former commissioner Peter Ueberroth commented:

> Basically, the commissioner seems to have no portfolio, power or job. * * * I think the changes dramatically change the position. There will be the appearance of more responsibility, but substantially less authority. That's the recipe for a non job.

The commissioner would have no power, for example, to prevent or end a play-stopping decision by the owners to stage a lockout of players over collective bargaining issues.

VI. Section-by-Section Analysis

Section 1 states the bill's short title, the "Major League Baseball Antitrust Reform Act of 1995."

Section 2 of the bill amends the Clayton Act to add a new section 27. Section 27(a) removes the judicially created antitrust exemption for professional baseball and provides that the antitrust laws shall apply to the business of professional baseball as they apply to all other professional sports. The phrase "the antitrust laws shall apply" is intended to incorporate the entire jurisprudence of the antitrust laws, as it now exists and as it may develop. In so applying the antitrust laws, the various judicial doctrines which have developed over the years and now apply to other professional sports leagues would, depending on the applicable facts, apply to professional baseball.

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by Jerry Reinsdorf, coowner of the Chicago White Sox—successfully challenged an NBA rule limiting the number of games "superstation" WGN could carry). *See also National Collegiate Athletic Ass'n*, 468 U.S. 85 (NCAA rule restraining member schools in the number of games they could contract to broadcast held unlawful). There is no reason to conclude that baseball cannot live with the same rules that govern the other professional sports leagues. Indeed, one Federal court has held that baseball's exemption is inapplicable to local broadcasting. *Henderson Broadcasting Corp.* v. *Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982).

S. 627 clarifies that major league baseball's owners and players are subject to the Nation's antitrust laws. The legislation was specifically drafted so that it would not implicate issues relating to other activities, such as franchise relocation or the operation of the minor leagues. The bill clarifies the law at the major league level. While it is far from clear as a public policy matter that clarification of the antitrust laws as they apply to the minor leagues should be omitted from this legislation, S. 627 is nonetheless specifically limited to the major leagues.

New section 27(b)(1) of the Clayton Act states that subsection (a) does not affect the applicability or nonapplicability of the antitrust laws to professional baseball's amateur draft, the minor league reserve clause, the Professional Baseball Agreement, or any other matter relating to the minor leagues.

New section 27(b)(2) of the Clayton Act likewise states that subsection (a) does not affect the applicability or nonapplicability of the antitrust laws to any restraint on franchise relocation by professional baseball. Thus, both subsections (b)(1) and (b)(2) leave the law as it is, and as the courts may interpret it in future cases.

New section 27(b)(3) of the Clayton Act provides that the legislation will not affect the application to professional baseball of the Sports Broadcasting Act, 15 U.S.C. 1291 *et seq.*, which explicitly permits the owners in sports leagues to pool their separate rights in sponsored telecasting of their games.

There is no language in the Committee-approved S. 627 that would grant baseball players any rights not enjoyed by athletes in other professional sports. The availability of antitrust remedies as a last resort has made a positive contribution to resolving several labor disputes experienced in other professional sports, and there is no reason why baseball players and fans should not benefit from these alternatives as well.

The Committee wishes to make clear that by supporting these particular modifications of baseball's judicially created antitrust exemption in S. 627, it does not intend to imply that more comprehensive change is not also justified—or to imply that the courts should not act decisively themselves to limit further baseball's exemption in appropriate cases. Indeed, a Federal court and the highest court of a State have already taken such action. *Piazza*, 831 F. Supp. 420; *Butterworth*, 644 So. 2d 1021.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 8, 1995.

Hon. Orrin G. Hatch,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 627, the Major League Baseball Antitrust Reform Act of 1995, as ordered reported by the Senate Committee on the Judiciary on August 3, 1995. CBO estimates that enacting S. 627 would result in no significant costs to the federal government or to state or local governments. Also, enacting this bill would not affect direct

spending or receipts. Therefore, pay-as-you-go procedures would not apply.

S. 627 would remove major league baseball's current exemption from antitrust laws, except that it would retain the antitrust exemption for minor league baseball and for decisions regarding the relocation of major league franchises. By removing the antitrust exemption under these circumstances, this bill would allow the players under certain circumstances to challenge in federal court certain decisions by the owners. Enacting S. 627 would impose additional costs on the U.S. court system to the extent that additional antitrust cases are filed. However, CBO does not expect any resulting increase in caseload or court costs to be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL,
Director.

VIII. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee concluded that no significant additional regulatory impact or impact on personal privacy would be incurred in carrying out the provisions of this legislation. After due consideration, the Committee concluded that enactment of the Act would not create any significant additional paperwork.

IX. ADDITIONAL VIEWS OF SENATOR THURMOND

It has been a pleasure to work with Chairman Hatch on S. 627, the Major League Baseball Antitrust Reform Act of 1995, during this Congress. I join in the majority report, and wish to emphasize a few key points on this important issue.

First, the Antitrust, Business Rights, and Competition Subcommittee s hearing on "The Court Imposed Major League Baseball Antitrust Exemption," which I chaired in February 1995, was vital to provide the foundation for this legislation. While those who oppose the bill assert that additional analysis is needed, I believe we achieved the goal of providing a balanced and fair hearing to both those who favor baseball's antitrust exemption and those who oppose it. Moreover, both the Senate and the House of Representatives have previously held numerous hearings on this issue. Although the antitrust aspects of baseball's special exemption are complex, the issue does not suffer from lack of public hearings.

Second, opponents of this legislation continue to dwell on whether the Congress should get "involved" in baseball's antitrust exemption, given that a new labor agreement has not been reached despite the end of the strike. However, the Congress has played an important role in baseball's antitrust exemption simply by its inaction. The Supreme Court has long viewed as outdated the reasoning underlying its decision creating baseball's exemption in *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs,* 259 U.S. 200 (1922), yet has steadfastly maintained that the solution should come from Congress. *Flood* v. *Kuhn*, 407 U.S. 258 (1972). Thus, the Congress is involved even if it fails to act, as I stated at the Antitrust Subcommittee markup of S. 627 on April 5, 1995:

> As long as the special antitrust exemption remains in place for baseball, the Congress is involved in the sport in a way that it should not be. The Congress has an ongoing impact on the sport simply by permitting the special exemption to remain long after the factual basis for it has disappeared.

This bill is not a matter of choosing between owners and players—for both groups are responsible for baseball's labor problems—but exercising the responsibility of the Congress to legislate an end to the judicially created exemption which the Court itself has long held to be an anomaly.

Finally, opponents assert that S. 627 would be harmful to baseball's ability to control franchise relocation, despite language in the bill expressly providing that it shall not affect "the applicability or nonapplicability of the antitrust laws to any restraint by professional baseball on franchise relocation". In introducing S. 627, I stated in the clearest possible terms that the legislation maintains

the status quo for franchise relocation, although I noted "that it may be worthwhile reviewing the franchise relocation issue as it relates to all professional sports." Relocation is a significant issue to all professional sports, as illustrated by the events of the last year in the National Football League. As I indicated at my subcommittee's February hearing, legislation may be desirable to protect objective franchise relocation rules in professional sports. Nonetheless, S. 627 would have no impact on baseball's current ability to control franchise movement.

STROM THURMOND.

X. MINORITY VIEWS OF SENATOR SPECTER

I have been involved in sports antitrust issues since coming to the Senate. Franchise relocation, protection for smaller market teams, revenue sharing have all been issues of concern to me, and all implicate the antitrust laws. Like many Americans, I have been a sports fan since I was a child. I was especially a baseball fan. My current perspective, however, is not just a fan's. As a legislator, I must look at the numerous issues affecting sports and public policy, from intangible ones that interest fans to the very tangible economic issues that drive professional sports today. After carefully weighing all the relevant issues, I must oppose S. 627 at this time.

Despite the successful completion of the 1995 baseball season, there is still no agreement between the players' union and the major league owners. The underlying issues, which have caused several strikes and lockouts over the past several years, most notoriously the strike that began during the 1994 season, causing the cancellation of the World Series, have not been resolved. The players are free to strike again, and the owners retain the option of locking the players out. Even as free agents are signed and the "hot stove" league is in full swing, the 1996 season is threatened by this failure of the parties to reach a collective-bargaining agreement.

Whatever the merits of eliminating major league baseball's broad, judicially created exemption from the antitrust laws, Congress should not act while the labor situation remains uncertain. Any action we take is certain to be viewed as favoring one side to the dispute or the other. In such instances, Congress acts best when it does not act at all. The complex labor problems that have characterized baseball for the past years ought to be resolved by the parties without congressional interference.

I am particularly concerned with this legislation because it will not achieve one of its primary purposes, that of resolving baseball's labor strife. This is a complex time for labor relations in professional sports. The professional football players' union was decertified in 1989. In the spring of 1995, the professional basketball players' union faced a serious internal struggle over whether to be decertified, and the National Basketball Association locked out the players. These matters were finally resolved with the adoption of a new collective-bargaining agreement. Even after the agreement was struck, however, some union members took the union to court. In hockey, last season began with a players' strike against the National Hockey League.

Football, basketball, and hockey do not enjoy an exemption from the antitrust laws. Given the labor relations records of these other professional sports, there is no reason to believe that the existence of major league baseball's antitrust exemption is the reason for baseball's labor relations problems. Thus, Congress should not in-

tervene to no purpose while there is no contract between the players' union and the owners.

The problems faced by baseball and these other sports reflect a variety of factors. Experts cannot agree on solutions to the problems that confront sports. Some argue that baseball's problems are especially acute because of the exemption from the antitrust laws, which makes baseball less susceptible to market forces. Others argue that the antitrust exemption is irrelevant to baseball's problems. I am not able to say which side has the better of the argument, but the labor problems encountered by other professional sports leagues makes me skeptical that eliminating baseball's antitrust exemption would have a salutary effect on its labor relations.

I do generally agree with the supporters of this bill that exemptions from the antitrust laws are bad public policy. Baseball, however, has such an exemption. Expectations and reliance interests are based on that exemption. Whether or not that exemption ought to be retained, I believe strongly that given the current state of play, it would be a mistake for Congress to enact this bill. This bill would only upset the current situation, making it less likely that the parties to baseball's labor strife will be able to resolve their dispute between themselves. We should not lose sight of the fact that voluntary collective bargaining is the basis of labor relations in this country. The parties should be left to settle their current impasse themselves without interference from Congress.

I must also raise a parochial reason for opposing the bill: the future of the Pittsburgh Pirates. While the bill purports to preserve the antitrust exemption that allows major league baseball to block franchise relocations, the uncertainty that the bill would engender is likely to result in severe dislocations to the sport. In such an atmosphere, it is impossible to be certain that the Pirates would be retained in Pittsburgh.

S. 627 does nothing to solve the roiling labor issues in baseball. It will only serve to upset the current situation even further and can only make a labor agreement less likely, as all sides learn to deal with a new set of rules. Whatever the possible merits of this bill as antitrust policy, this is the wrong time for the Senate to adopt this bill.

ARLEN SPECTER.

XI. MINORITY VIEWS OF SENATOR SIMON

In approving a repeal of major league baseball's longstanding antitrust exemption, this Committee has decided to alter the balance of power in an ongoing labor dispute between millionaires while the truly pressing problems facing our Nation remain unresolved. Congress should be devoting its time and resources to other matters rather than inserting itself into a controversy for which both sides deserve blame. Indeed, of the many labor disputes ongoing in America today, I can think of few, if any, that are less deserving of our attention than this one. The American people, who have consistently opposed government's interference in this area, agree.

Not only does S. 627 reflect Congress' misplaced priorities, it is also unlikely to solve the problem it purports to address. Under two recent Federal appellate decisions interpreting the antitrust laws' so-called "non-statutory labor exception,"[1] it appears that the antitrust laws are not applicable to the dispute between the players and the owners. Given that the baseball strike of 1994–95 ended not because of any expected change in major league baseball's status under the antitrust laws, but because of the courts' application of our *labor laws*, S. 627 also appears unnecessary. In short, it is doubtful that S. 627 will do anything other than give the players an additional weapon in their broader, ongoing conflict with the owners.

Finally, while I agree that baseball's antitrust exemption raises certain questions, we should also remember that in some ways, Congress may have more to learn from professional baseball than professional baseball has to learn from Congress. Of the four major professional sports in America, baseball has enjoyed by far the most franchise stability. While NFL fans from Cleveland and Houston—and perhaps other cities—are faced with the prospect of losing their beloved teams to other communities, and while this very Committee is studying antitrust legislation to prevent these moves, no baseball franchise has changed cities in over a quarter-century. Even assuming that baseball's work stoppages are a direct result of baseball's antitrust exemption—and we should remember that those major sports which do not enjoy an antitrust exemption have also experienced often-extended work stoppages in their own right—the problems created by the application of the antitrust laws to franchise relocation may be, in the minds of many loyal fans, even greater.

S. 627 seeks to address this prospect by excepting franchise relocation issues from its coverage. Similarly, it attempts to deal with concerns about the effect of the bill on the minor leagues by except-

[1] *Brown* v. *National Football League, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995); *National Basketball Association* v. *Williams*, 45 F.3d 84 (2d Cir. 1995).

ing the minor leagues from its scope. Disputes regarding the scope and nature of these exceptions, however, will undoubtedly result in additional litigation—the outcome of which simply cannot be predicted. Indeed, the minor leagues oppose S. 627 despite the minor-league exception, and it can safely be said that this legislation, at the very least, should make those concerned about sports franchise relocation very uncomfortable.

The variety of problems facing our professional sports leagues demonstrates that even if professional baseball is a deserving subject of Congress's attention, such consideration should not take place on an *ad hoc* basis, in response to one "crisis" or another, but should be part of an overall and careful reexamination of professional sports under the law. Only by studying the issue raised by S. 627 in this broader context can Congress avoid the justifiable criticism that it is simply playing favorites in a rancorous dispute that, but for the parties' stubbornness and lack of reason, should have been resolved long ago.

PAUL SIMON.

XII. MINORITY VIEWS OF SENATORS BROWN AND FEINSTEIN

In 1922, Justice Oliver Wendell Holmes determined that the game of baseball is not commerce to be regulated by the antitrust laws. Since that time, Congress and the courts have had ample opportunity, during good times and bad, to revoke that antitrust exemption. Proponents of this legislation argue that the baseball antitrust exemption, which has remained in place for 75 years, to the benefit of franchise stability and minor league support, despite repeated judicial and congressional inquiries, should now be lifted in the middle of an ongoing labor dispute.

That argument is unconvincing for a couple of reasons. First, we need to acknowledge, just as the National Football League (NFL) has after suffering through a stunning number of franchise relocations, that there are times when, in the interest of the fans, professional sports teams must act as business partners instead of business competitors. For example, the Colorado Rockies and the San Francisco Giants need to agree on the size of the field and the rules of the game before they can successfully compete. Second, and more importantly, Congress should not, as a matter of principle, intervene in an ongoing labor dispute.

BASEBALL AND THE INTERESTS OF THE FANS

Before we jump to any conclusions about whether Baseball has abused its exemption from application of the antitrust laws, we should consider some of the facts:

> Baseball has a history of franchise stability that must be the envy of the other major sports. In the past year, the NFL had two franchises abandon the second largest market in the United States: the successful Los Angeles Raider franchise relocated from Los Angeles to Oakland, and the Los Angeles Rams jumped to St. Louis. The NFL also will apparently now lose the historic Cleveland Browns franchise to Baltimore and the Houston Oilers to Memphis. The Chicago Bears are threatening to move to Gary, IN, while the Phoenix team (itself a recent transplant from St. Louis) has talked of moving again. In hockey, franchises continue to move regularly. Even the NBA, which has gone through the most popular era in its history after a decade of problems, had the San Diego Clippers relocate to Los Angeles. Baseball has not had a single relocation in the past 25 years. On the contrary, the recent effort of the San Francisco Giants to move was rejected by Baseball and the Giants remained in San Francisco. Contrary to the Oilers, at the urging of Baseball, the Houston Astros decided not to pursue relocation but instead redoubled their effects to be successful in Houston. All of that was made possible by the exemption, without which Baseball would be in the same vulnerable posi-

tion as the other sports. Given that Baseball, more than any other sport, is steeped in tradition and stability, unchecked franchise relocation would be disastrous to the national pastime.

Regarding the number of franchises, Baseball has kept pace with the other major sports. In addition, Baseball has already announced the addition of its 29th and 30th franchises to begin play in Tampa Bay and Phoenix in 1998 and has under consideration the possibility of adding two additional franchises before the year 2000.

Despite the exemption, Baseball supports the minor league system at a level of over $200 million per year. Minor league baseball benefits hundreds of communities, large and small, across the country. Relations between the major and minor leagues are at an all time high. The relationship is so inextricably intertwined that any attempt to eliminate the exemption, upon which 75 years of cooperative dealings have been based, even with an attempted carve out, will no doubt create numerous points of contention. For instance, the majority is clear that it is eliminating the exemption with regard to labor relations. But more than 37 percent of the players on each team's major league roster are actually playing in the minor leagues. Despite this bill's attempt to except the minor leagues, the potential for conflict is inherent and obvious.

CIVIC INVOLVEMENT WITH HOME TEAMS

Professional baseball and football are not like other businesses. They are not commodities like *Coca-Cola* or *Post Toasties*. Around baseball teams and football teams, perhaps more than anything else, there is a civic spirit and a civic commitment. Communities show this spirit in building stadiums and fixing up stadiums, which are very costly; in chamber of commerce support; civic lunches and receptions; and parades and other community celebrations.

There is no business that has the kind of civic dimension that professional baseball and football have. The players are role models for children, spending time at recreation centers and schools, helping underprivileged youngsters. Employees of other companies do not do this to the same extent. Indeed, most teams have foundations which perform charitable and community activities, such as engaging in canned food drives, toys for tots campaigns, and raising money for causes such as children's hospitals, Special Olympics, and the March of Dimes. There are no companies which are so involved in the civic dimension of the community.

INTERVENING IN AN ONGOING LABOR DISPUTE

The current bill intervenes in a continuing labor dispute. The majority report justifies this legislation on the basis that it "would help resolve baseball's labor problems." This conclusion is dubious at best.

The middle of an ongoing labor dispute is not the right time to change the rules of the game. Both President Clinton and his chosen mediator, William Usery, repeatedly stated that the problems

of baseball should be decided at the negotiating table. But, every time this issue comes before Congress, the parties drop what they are doing, leave the negotiating table, and focus their efforts on legislation.

Despite baseball's antitrust exemption, the Major League Baseball Players Association has been among the most successful unions in any industry in the history of this country. The average player's salary has grown to over $1 million per year, despite several teams have severe financial problems, according to Major League Baseball. Through negotiations, the Players Association has also gained from the owners, in addition to the exorbitant salaries, the elimination of the reserve system, and treble damages for any collusion among owners regarding free agents.

Contrary to the proponents' suggestions, the courts are not always hostile to the baseball exemption. The two Federal courts which have addressed the exemption since the *Piazza* opinion cited by the majority expressly rejected *Piazza* and held that the exemption was both valid and expansive. *New Orleans Pelicans Baseball, Inc.* v. *National Ass'n of Professional Baseball Leagues, Inc.*, No. 93–0253, 1994 U.S. Dist. WL 631144 (E.D. La. Mar. 1, 1994); *McCoy* v. *Major League Baseball*, No. C95–383D, 1995 U.S. Dist. Lexis 19858 (W.D. Wash. Nov. 2, 1995). The *Butterworth* case cited by the majority is a State court decision which contained no independent analysis and relied entirely on the reasoning of *Piazza*.

Baseball is not the only enterprise with this regulatory status. Other industries have operated under regulatory schemes independent of the antitrust laws. Many will disagree with the suggestion by the majority that baseball is the only industry to claim an exemption without being subject to alternative regulatory supervision. Here are some illustrations:

> Fewer than 3 years ago, in the National Cooperative Production Amendments Act of 1993, Congress conferred broad protection from antitrust treble damages liability on production joint ventures in *any* industry, so long as they file notification with the Justice Department. This legislation extended to production joint ventures the same longstanding antitrust protection previously accorded to research joint ventures by the National Cooperative Research Act of 1984.
>
> The Soft Drink Interbrand Competition Act of 1980 confers broad antitrust protection on the distribution systems of soft drink producers, with no regulatory supervision, so long as soft drinks face "substantial and effective competition." That act has been invoked repeatedly and successfully to forestall antitrust liability.
>
> The Health Care Quality Improvement Act of 1986 protects doctors and other health care providers from all damages liability under the antitrust laws for peer review activities so long as those activities offer a minimum of procedural due process.

It is obvious that Baseball, like these other businesses, will not come crashing down if antitrust laws do not apply in the near future. Whereas, if we were to act now, it would be to take a position in an ongoing dispute. That should not be the role of Congress. Elimination of the antitrust exemption would not ensure labor

peace—to the contrary, it would guarantee protracted, uncertain, and expensive litigation and would complicate matters further.

THE EXEMPTION IS UNRELATED TO THE 1994–95 BASEBALL STRIKE

Proponents of the legislation suggest that all of the labor discord in Baseball can somehow be attributed to the existence of the exemption and that its elimination would be a labor panacea. Nothing could be further from the truth. In fact, all that its elimination would cause is unbridled litigation. In addition, the nonstatutory labor exemption would preclude an antitrust suit absent decertification in any event, so eliminating the exemption in the fashion contemplated would merely shift the fight from the current judicial exemption to the nonstatutory labor exemption.

Despite the applicability of the antitrust laws to the other major sports, they too have had their own significant labor problems. The NFL went through 5 years of litigation and even played a portion of one season with replacement players. The National Hockey League (NHL) lost a significant part of last season and almost lost the entire season while the owners engaged in a lockout of the players. Although the National Basketball Association (NBA) has not lost any portion of a season as a result of a work stoppage, it did play the first 55 days of this season with replacement referees.

Following the proponents' logic that the antitrust exemption somehow created the labor controversy, we would have to assume there are other examples, aside from the strike, of labor disadvantage. Take a look at salaries: the NBA, the NFL and the NHL, which do not have an exemption, do have a form of salary restraint. Baseball, which has the exemption, does not have a salary restraint.

By suggesting that the 1994 strike could have been averted if only the union had the ability to file an antitrust suit against the owners, supporters of the proposed legislation greatly overstate both the speed and effectiveness of antitrust legislation. Whatever else they may be, antitrust cases are uncertain, expensive, and above all, very time-consuming.

As the majority concedes, before an antitrust suit could be filed, the union will still confront—as do the players in every other professional sport—the nonstatutory labor exemption from the antitrust laws, which derives from several Supreme Court decisions, most notably *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In order to bring an antitrust action against the owners, the players would first have to decertify their union to sever the collective bargaining relationship with the club owners. The players could then have to file suit and proceed through the typical morass that comprises current antitrust litigation. Only the NFL has proceeded down such a path, and that litigation took in excess of 5 years to resolve, with the final resolution not determinative.

Although the majority report only discusses the repeal of baseball's antitrust exemption as affecting labor issues, it likely will have ramifications in other areas as well.

DISCIPLINARY ACTION

Dating all the way back to the Black Sox scandal of 1919, baseball has been able to effectively discipline its own personnel. However, the exercise of this power has been challenged on antitrust grounds. For example:

> When the Executive Council of Major League Baseball suspended Cincinnati Reds owner Marge Schott for racially and ethnically insensitive remarks, Ms. Schott argued that without the antitrust exemption her suspension would be considered an illegal group boycott violative of antitrust laws. Schott made it clear that without an antitrust exemption, every league suspension could be challenged in court.
>
> When baseball Commissioner Bowie Kuhn disapproved the assignments of three player contracts after their sale by Oakland Athletics owner Charles Finley, the Athletics commenced an action in federal court claiming violations of antitrust laws.

Other sports have also been subjected to antitrust challenges for protecting the integrity of their games:

> When professional golfer Jane Blalock was suspended by the Ladies Professional Golf Association for allegedly cheating, she retaliated against the league by commencing an antitrust challenge.
>
> When professional bowler Ralph Manok was suspended for cheating by his bowling association, he too responded by instituting antitrust litigation.
>
> When NBA star Jack Molinas was indefinitely suspended for gambling, he sued the league on antitrust grounds.

Removing baseball's exemption could well open the floodgates to further challenges to Baseball's important ability to protect the integrity of the game.

EQUIPMENT DEALS

Eliminating the antitrust exemption could also subject Major League Baseball to challenges of exclusive contracts that it has established with equipment manufacturers. Although the exclusive equipment deals help to maintain the uniformity of the game, every new contract would carry the risk of an antitrust challenge. Antitrust challenges against other sports leagues illustrate just some of the types of costly and counterproductive court battles baseball could face if the exemption is lifted:

> When the PGA banned the use of golf clubs with certain U-shaped grooves on the professional tour, a golf club manufacturer sued, alleging that the ban was an unlawful boycott and restraint on competition in violation of antitrust laws.
>
> The United States Tennis Association, which banned double-strung racquets from the professional tour, was subjected to a lengthy antitrust challenge by a tennis racquet manufacturer before the court ruled in the USTA's favor.
>
> In another golf case, a golf shoe manufacturer sued the USGA on antitrust grounds, alleging that a USGA determination that a certain golf shoe did not conform to a USGA rule violated antitrust laws.

It is clear from past examples of lawsuits—both within and outside of Major League Baseball—that Major League Clubs could face a storm of new antitrust challenges if the exemption is lifted. While it is impossible to say for certain whether any or all of these challenges would succeed, it is important not to underestimate the chilling effect of potentially costly and time-consuming antitrust litigation, which will only be encouraged by this legislation.

CONCLUSION

The important consideration here is the fans. Our first priority ought to be to protect them. Ending a baseball season is unacceptable; so too is franchise relocation; so too is terminating support of the minor leagues. To accommodate these interests, our sports teams are going to have to act as business partners at times. As even the proponents concede, the exemption serves a useful function in some areas: franchise stability, the relationship with the minor leagues, certain broadcast matters. To act now in the middle of an ongoing labor dispute would be counterproductive. As a matter of principle, Congress ought to stay out of this continuing labor dispute.

HANK BROWN.
DIANNE FEINSTEIN.

XIII. MINORITY VIEWS OF SENATOR FEINSTEIN

In addition to the joint views I have filed with Senators Brown and Heflin, I write separately to add some personal views. As the former mayor of a city with two professional sports franchises, baseball's Giants and football's 49ers, I had to fight to keep baseball in San Francisco, and I know firsthand that the only reason the Giants didn't leave San Francisco was baseball's antitrust exemption. The need to maintain franchise stability, which baseball's antitrust exemption clearly does—no Major League Baseball team has abandoned its city for another since the Washington Senators left the Nation's Capital for Texas almost 25 years ago—is the overriding reason that I have consistently opposed repeal of the exemption, and will do everything in my power to see that this bill does not pass.

Moreover, I believe that baseball's antitrust exemption, far from being repealed, should be extended to other major professional sports. As we state in the joint views, these teams, too, are integral parts of their communities, and their fans and hometowns deserve the same protections which baseball fans enjoy. Thus, I intend to introduce legislation which will extend the exemption to other sports.

DIANNE FEINSTEIN.

XIV. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 627, as reported, are shown as follows (existing law which would be omitted is enclosed in bold brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman type):

UNITED STATES CODE

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TITLE 15—COMMERCE AND TRADE

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CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 12. Words defined; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

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SEC. 27. (a) Subject to subsection (b), the antitrust laws shall apply to the business of professional major league baseball.

(b) Nothing in this section shall be construed to affect—

(1) the applicability or nonapplicability of the antitrust laws to professional baseball's amateur draft, the minor league reserve clause, the Professional Baseball Agreement, or any other matter relating to the minor leagues;

(2) the applicability or nonapplicability of the antitrust laws to any restraint by professional baseball on franchise relocation; or

(3) the application of Public Law 87–331 (15 U.S.C. 1291 et seq.) (commonly known as the Sports Broadcasting Act of 1961).

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