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THE APPLICATION OF FEDERAL ANTITRUST LAWS TO MAJOR LEAGUE BASEBALL

HEARING

BEFORE THE

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WEDNESDAY, FEBRUARY 13, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:12 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Hatch, Specter, DeWine, Sessions, and Brownback.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. The Judiciary Committee is starting a little late, and I do not know if they have explained why all the lights are going on. There is a series of roll call votes, and it is going to require a rotating panel up here, but we will try to do it in a way that accommodates the witnesses as well as possible.

I see Mrs. Kaludi in the audience, and she is more aware of how these lights work than anybody else here and can explain it to anybody who needs an explanation.

Senator Hatch is on his way, and he suggested that we begin, so I will.

This week, spring training begins for the major league baseball teams. This winter, besides the usual discussion about players' trades and signings and team prospects for the coming season, baseball fans in Minnesota, Florida, Montreal, and many other communities have been on a rollercoaster ride that began with the baseball commissioner's November 6 announcement that two unnamed teams would not be playing this year.

In 1998, Congress culminated decades of hearing on labor strife and other problems in major league baseball when we enacted the Curt Flood Act. Senator Hatch was the lead sponsor of that measure, and I was the principal cosponsor. It was a bipartisan effort to clarify the law. The principal purpose of the law was to make sure that Federal antitrust laws apply to the relationships between major league baseball owners, teams, and players.

Clarifying the law was intended to contribute to an atmosphere in which team owners and players would resolve their differences through collective bargaining. Whether the parties are successful in reaching a negotiated agreement remains an open question as we meet today.

In 1997 and 1998, I observed that the stops and starts of the legislative journey toward passage of the Curt Flood Act would have tried the patience of Job, and I complimented the then Chairman for staying the course and getting the job done.

The statute, the Curt Flood Act, uses language suggested, as I recall, by the major league team owners to make clear that the Act did not "change the application of the antitrust laws" to any other aspect of major league baseball. I thought then and I think now that it was appropriate to adopt that provision and begin with the assumption that no industry, no company, and no person is above the law.

The Curt Flood Act did not create or confirm any Federal antitrust immunity but was written in terms of Federal antitrust laws in fact applying to major league baseball.

Major league baseball's claim to a unique antitrust exemption arose not from an act of Congress but from a decision by the United States Supreme Court 80 years ago that has since been discredited. In the subsequent case of Flood versus Kuhn, the Supreme Court explicitly limited its holding to the reserve system and reserved an antitrust law exemption for that reserve system relying as justification on the judicial doctrine of stare decisis, the principle that judicial decisions once made should be respected and upheld.

Justice Blackmun noted that the Supreme Court had invited Congress to pass a statute to change the law if it chose, that Congress had not acted and that Congress had, by its "positive inaction," acquiesced in what he described as a legal anomaly and aberration.

It was against this judicial backdrop that in 1998 Congress finally did act and eliminated the judicially created exception preserved in limited form by Justice Blackmun in the Flood case. It was appropriate that we did it in a law named for the player who sacrificed his career to raise the issue.

Our bill did not question that the antitrust laws apply to major league baseball just as they apply to professional football, basketball, ice hockey, soccer, and all professional sports. Professional sports are a business, and the laws that apply to other businesses apply to them. There is no longer any basis in the law for some general, free-floating baseball antitrust exemption, nor has such a special antitrust exemption been justified.

When the Committee was engaged in hearings in 1995 that led to passage of the Curt Flood Act, after the work stoppage in 1994 and the lamentable and historic cancellation of the World Series, David Cone, an outstanding major league pitcher, testified and asked this question: If baseball were coming to Congress today to ask us to provide a statutory antitrust exemption, would we?

That is the question I repeat today. Does anybody anywhere in this country think that if baseball was coming in and raising for the first time an antitrust exemption that this Congress or any Congress would grant it for them? Of course not.

What about major league baseball, as distinct from other professional sports and businesses, entitles it to special rules of law? I cannot think of it.

In my view, the heavy burden of justifying any exception from the rule of law is and should be squarely on the proponents of any antitrust exemption. I will ask the representative of major league baseball who are with us today, their general counsel, to explain precisely what such an exemption would permit and precisely why it is necessary.

There has been a fair amount of public outcry over the actions of the owners in unilaterally announcing the end of baseball in at least two cities within 2 days of the end of the World Series, and less than 2 months after the tragic attacks of September 11. More recently, they have suggested four teams, not just two, need to be eliminated.

In the meantime, we have seen owners approve a merry-go-round of ownership swaps, with the owner of the Montreal Expos being approved to buy the Florida Marlins, while the owner of the Marlins and a former owner of the Padres were approved to buy the Boston Red Sox, and the other owners joining together to buy and operate the Expos and prepared to pay the owner of the Minnesota Twins a hefty fee to kill that team's existence. To an outsider, it seems that the major league baseball team owners take care of each other pretty well.

We will hear today how major league baseball owners continue to ask courts to create special legal exceptions and immunities for them and how they hold themselves above not only Federal antitrust law, but also the power of State law enforcement officers. Once having been a State law enforcement officer, I always worry when some suggest that there are areas where the Federal law supersedes, and we will talk about that.

We will also hear some discussion of pending legislative proposals by Senator Wellstone and Representative Conyers, which would codify the ruling in some decisions by expressly providing in law that the Federal antitrust laws apply to major league baseball franchise relocation.

So I think this hearing will give us the opportunity to explore these issues of law and the State of the law as they apply to major league baseball.

I thank each of our witnesses for being with us today.

Another vote has begun, and I am going to go to this vote and come back, and we will start with the first witness.

[Recess.]

Senator FEINSTEIN. [Presiding.] The Chairman will be returning to the Committee forthwith. As he may well have said, we have a number of votes, and he has asked me to begin this hearing, so we will begin with the public witnesses. And as they are taking their seats, I will begin the introductions.

First is the honorable Bob Butterworth, Attorney General of Florida. Mr. Butterworth has served as Attorney General of Florida since 1986. He has previously held positions within the Broward County judicial system and served as Broward County sheriff.

We will begin our testimony with you, General Butterworth. Welcome and thank you for being here. Sorry for the delay.

STATEMENT OF HON. ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, TALLAHASSEE, FLORIDA

Mr. BUTTERWORTH. Senator, thank you so very much for this opportunity.

Baseball began as a simple game played by amateurs in pastures of rural America. Today it is a major commercial enterprise conducted in big city board rooms and multi-million-dollar stadiums. I believe the time has come to treat baseball as the very big business it has evolved into.

The time may have also come to recognize a sad irony, namely, that while baseball remains America's pastime, its big league version is acting in a very un-American manner.

In the 1990's, my State became the home of two major league teams. Today, less than a decade since the first team arrived, there is a strong possibility that Florida could lose one or both of our teams. Obviously, such a move would mean the loss of millions of dollars for communities where those teams are located.

But beyond dollars, there is the emotional impact. Countless fans have welcomed these teams into their hearts. Fan loyalty is not as easily quantified as team profit but it every bit as worthy of consideration.

If Florida loses one or both of its teams, it will not be because of the fans. It will be because the powers that be, the major league team owners and their commissioner, have deemed it the financially prudent move to make in order to increase their profits. And when they make that decision, it will be made behind closed doors. That was made clear last November 6, when major league owners met behind closed doors and voted to reduce the number of teams by two.

We are led to believe that the two teams on the chopping block are the Twins and the Expos, but Commissioner Bud Selig has done everything humanly possible to dodge questions about the future of specific teams.

He was not so reluctant, though, to talk last year, when he entered the fray over a proposal before the Florida legislature to authorize funding for a new stadium in downtown Miami. In a letter to a State Senator which is being put up on the board, Commissioner Selig said that unless funding was secured, the Marlins would be a prime candidate for contraction or relocation. The letter goes further. This statement could be viewed in only one way—that is, as a threat. And rest assured, that threat was still in our minds when the owners voted to contract on November 6.

It was within this atmosphere that I moved to protect the interests of the people of the State of Florida. I issued investigatory subpoenas. I did so under the authority of Florida's antitrust law, bolstered by a Florida Supreme Court decision. That ruling made it clear that the baseball exemption applies only to the reserve system and does not extend to team relocation matters.

Major league baseball successfully, unfortunately, urged a Federal district judge to block my investigation, rejecting the Florida Supreme Court ruling. The Federal judge said the exemption applied to all—all—all aspects of business of baseball.

The bottom line of that ruling was to prevent me as attorney general from carrying out my Constitutional responsibilities.

Whatever Florida antitrust law was actually violated during that meeting, I have no idea. That remains totally, totally unknown. As State Attorney General, however, I must have the authority to find out. Toward that end, we of course have appealed.

There is, of course, another forum in which this matter can be resolved—namely, right here in the U.S. Congress. You have it within your power to clearly delineate those areas in which major league baseball is exempt from antitrust law and those in which it is not. And certainly one area in which it should not be exempt is in how it determines the fate of team franchises and the communities that support them.

I for one believe that it is time for the big leagues to play by the same rules as other multi-billion-dollar industries and other professional sports, and it just may be that the only way it will happen is through firm and decisive action on your part.

Thank you very much, Madam Chair.

Senator FEINSTEIN. Thanks very much, General Butterworth.

[The prepared statement of Mr. Butterworth follows:]

STATEMENT OF HON. ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, TALLAHASSEE, FLORIDA

Chairman Leahy and Senators, thank you for this opportunity.

I am here today at your invitation and because of a federal district court's interpretation of baseball's antitrust exemption which prevents me from carrying out my responsibilities to the people of Florida as their Attorney General.

Specifically, the district court has barred the State of Florida from conducting an antitrust investigation into Major League Baseball's handling of matters that could severely impact Florida's status in the major leagues and cause untold economic harm.

I believe it is incumbent upon this Congress to exercise its authority and make it clear that Major League Baseball must abide by the same rules of fair play as any other multi-billion dollar industry operating in America.

Were he alive today, Abner Doubleday would likely be astonished at how drastically the sport he is largely credited with inventing has been transformed.

What began as a simple game played in the pastures of rural America has become a major commercial enterprise conducted in big city boardrooms and multi-million dollar stadiums.

As much as we would like to cling to an idealized, "Field of Dreams" vision of baseball, it is time to face facts.

Baseball, at least as it pertains to the major leagues, is more than just a game...

...it is a very, very big business.

The time has come to treat it as such.

The time also may have come to recognize a sad irony about the nature of the game. a

Namely, that while baseball remains America's pastime, its big league version is acting in a very un-American manner.

In the 1990s, my state became the proud home of two major league baseball teams, the Florida Marlins and the Tampa Bay Devil Rays.

Today, less than a decade since the first team arrived, there is the possibility that Florida could lose one or both of those teams in the not-too-distant future.

Such a move would of course have a significant, negative impact on the economies of the communities those teams represent and Florida as a whole.

For instance, our own internal estimates based upon publicly available information show that the annual economic impact of the Florida Marlins on the South Florida economy is approximately $193 million.

For Tampa Bay/St. Petersburg, which also has a 27-year lease arrangement with the Devil Rays, the estimated annual economic impact of the club is approximately $178 million.

As the nation's premier spring training site, our state could also suffer from the elimination of non-Florida teams that train here and generate millions of dollars in revenues.

Not to mention the financial harm that could come from the elimination of minor league squads in Florida.

If we do lose such valuable assets, it will not be because the people have decided they no longer want major league baseball in their state.

It will be because the powers that be—the major league team owners and their commissioner—have deemed it the financially prudent move to make.

And when and if they make that decision, it will almost certainly be made behind closed doors.

While the game of major league baseball is a spectator sport, the business of major league baseball is anything but.

Recent meetings of major league owners made that fact abundantly clear.

Last November 6th, a closed-door meeting resulted in a vote to reduce the number of major league teams from 30 to 28.

We are led to believe the two teams on the chopping block are the Minnesota Twins and the Montreal Expos, but Major League Baseball continues to hold its cards close to the vest.

Commissioner Bud Selig in particular has done everything humanly possible to dodge questions about the future of specific teams.

He was not so reluctant to talk last year, however, when he entered the fray over a proposal before the Florida Legislature to authorize funding for a new stadium in downtown Miami.

In a letter to Senator J. Alex Villalobos dated April 25, 2001, Commissioner Selig said that unless funding was secured, the Marlins would be a prime candidate for contraction or relocation.

That letter said in part: "Relocation of Clubs and contraction of the number of Clubs in Major League Baseball are two options that are in fact being actively reviewed as part of a global plan of economic reorganization.

In the event the Marlins and the local community do not succeed in securing the necessary funding sources the Marlins will be a very likely candidate for each of those options.

We recognize that relocation and contraction are very significant actions.

Should the Marlins fail to secure legislation necessary to implement its funding plan, however, we believe such steps will be warranted.

Bluntly, the Marlins cannot and will not survive in South Florida without a new stadium."

This statement could only be viewed as a threat.

And rest assured, that threat was still in our minds when the owners voted on November 6th to contract.

It was within this atmosphere that I asserted my powers as Florida's attorney general.

About a week after the November 6th meeting, my office issued investigative subpoenas to the league, Commissioner Selig and Florida's two teams.

We did so armed with a Florida Supreme Court decision giving us clear authority to investigative potential antitrust violations by baseball under state antitrust law, *Butterworth* vs. *National League of Professional Baseball Clubs*.

In its ruling, the court made it clear that Major League Baseball's exemption is limited to the reserve system and does not extend to team relocation matters.

The goal of our proposed investigation was to obtain the answers to some fairly simple questions.

They included whether the Marlins or Devil Rays were to be eliminated and what the financial condition of each team actually was.

Three days before their response was due, the league filed an action in Tallahassee federal district court to block our investigation.

The judge granted the league's request to quash our antitrust subpoenas.

In his ruling, he cited the baseball antitrust exemption, a judicial anomaly created in 1922 by the U.S. Supreme Court.

Rejecting the Florida Supreme Court decision, the district court judge said that exemption applied to all aspects of the business of baseball, including team location.

That view, however, is not universally held within the federal judiciary.

Most notably, a Pennsylvania federal court in *Piazza* vs. *Major League Baseball* ruled that the application of the baseball exemption is more narrowly limited to the league's player reserve system.

In other words, it exempts the league from antitrust law in its dealings with team members, but not in its dealings with the communities where those team members play.

We believe that well-reasoned decision is correct, and it is our hope that the U.S. Supreme Court will settle this matter once and for all by confirming it.

Toward that end, we have appealed the Florida federal district court ruling to the circuit court in Atlanta.

There is, of course, another forum in which this matter can be resolved.

Namely, right here in the United State Congress.

You have it within your power to clearly delineate those areas in which Major League Baseball is exempt from antitrust law and those in which it is not.

And certainly, one area in which it should not be exempt is in how it determines the fate of team franchises and the communities that support them.

Congress took a step in the right direction with the Curt Flood Act of 1998 with members of this committee even confirming that the passage of the act had no effect on the authority of state attorneys general to investigate baseball under state antitrust laws.

That point was made clear in the following exchange between Senators Wellstone, Hatch and Leahy:

Mr. Wellstone. Mr. President, late last night (July 30, 1998), the Senate passed by unanimous consent S. 53. I have been contacted by the Attorney General of my State, Hubert H. Humphrey III, and asked to try to clarify a technical legal point about the effect of this legislation.

The State of Minnesota, through the office of Attorney General, and the Minnesota Twins are currently involved in an antitrust related investigation. It is my understanding that S. 53 will have no impact on this investigation or any litigation arising out of the investigation.

Mr. Hatch. That is correct. The bill simply makes it clear that major league baseball players have the same rights under the antitrust laws as do other professional athletes. The bill does not change current law in any other context or with respect to any other person or entity.

Mr. Wellstone. Thank you for that clarification. I also note that several lower courts have recently found that baseball currently enjoys only a narrow exemption from antitrust laws and that this exemption applies only to the reserve system.

For example, the Florida Supreme Court in *Butterworth* v. *National League*, 644 So.2d 1021 (Fla. 1994), the U.S. District Court in Pennsylvania in *Piazza* v. *Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) and a Minnesota State court in a case involving the Twins have all held the baseball exemption from antitrust laws is now limited only to the reserve system.

It is my understanding that S. 53 will have no effect on the courts' ultimate resolution of the scope of the antitrust exemption on matters beyond those related to owner-player relations at the major league level.

Mr. Hatch. That is correct. S. 53 is intended to have no effect other than to clarify the status of major league players under the antitrust laws.

With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.

Mr. Leahy. I concur with the satement [sic] of the Chairman of the Committee.

The bill affects no pending or decided cases except to the extent that courts have exempted major league baseball clubs from the antitrust laws in their dealings with major league players.

In fact, Section 3 of the legislation makes clear that the law is unchanged with regard to issues such as relocation.

The bill has no impact on the recent decisions in federal andstate courts in Florida, Pennsylvania and Minnesota concerningbaseball's status under the antitrust laws.

Mr. Wellstone. I thank the Senator. I call to my colleagues attention the decision in *Minnesota Twins* v. *State by Humphrey*, No. 62–CX–98–568 (Minn. dist. Court, 2d Judicial dist., Ramsey County April 20, 1998) reprinted in 1998–1 Trade Cases (CCH) 72,136.

Cong. Rec. H9945 (daily ed. Oct. 7, 1998) (statement of Senators Hatch, Leahy, and Wellstone).

The consequences of decisions to contract the major leagues or relocate teams are too important to the people of Florida for them to be made without proper checks that protect their interests.

The same can be said in relation to the people of any state where Major League Baseball is a vital part of the local economy.

For example, such has already been the case in Massachusetts, where the state attorney general was forced to intervene in the sale of the Boston Red Sox.

In that case, Major League Baseball was poised to accept a lower offer of $700 million for the purchase of the team despite two other higher bids.

The impact of that action would have been the deprivation of tens of millions of dollars for charities which would have benefitted from the trust that holds a majority share of the team.

Fortunately, the Massachusetts attorney general's action resulted in $30 million more for the charities.

In Florida, Major League Baseball came to us full of promises, including to directly or indirectly infuse millions of dollars into the surrounding economies.

In the process, it took advantage of remarkable tax benefits and local financial support from the host cities.

That same pattern has been followed throughout the country.

It is nothing less than a betrayal of the public trust to now conspire behind closed doors about the future of baseball in those communities that welcomed the major leagues.

The November 6 vote was akin to General Motors, Ford and every other car maker in America meeting to vote to shut down all Daimler-Chrysler factories so that they could sell more cars and make more profit.

This typically would be characterized as a concerted agreement to restrict output, which would be illegal in just about any other circumstance but baseball.

I for one believe it is time for the big leagues to play by the same rules as other multi-billion dollar industries.

And it just may be that the only way that will happen is through firm and decisive action on your part.

Unfortunately, the only game the major leagues seem to understand is hardball.

Finally, it bears repeating that every other professional sport in this country has done quite well without an antitrust exemption and on revenues that are far less than that of Major League Baseball.

Indeed, none of these sports suffer from Baseball's woes.

While the antitrust laws apply to these sports, the reality is that established antitrust analysis will require a balancing test of the pro-competitive versus anti-competitive effects of the conduct before it can be determined if that conduct violates the antitrust laws.

This analysis is known as the "rule of reason" analysis.

Even the Reagan Administration, which was not known for its antitrust activism, concluded that the "rule of reason" analysis required in most cases to determine whether the antitrust laws have been violated was sufficient protection for Major League Baseball to justify doing away with the exemption.

In a 1982 Congressional hearing, Deputy Assistant Attorney General Abbott B. Lipsky, Jr. of the Reagan Justice Department testified:

"It has been the position of the Antitrust Division for some time that baseball's exemption is an anachronism and should be eliminated.

I know of no economic data or other persuasive justification for continuing to treat baseball differently from the other professional team sports, all of which are now clearly subject to the antitrust laws.

As I stated earlier, antitrust courts have sufficient flexibility in the rule of reason analysis to take into account any special considerations that may be found to exist in baseball."

H.R. Rep. No. 103–871 (1994).

President Reagan's Justice Department was right.

Today, Congress has the opportunity to affirm that position and undo the travesty that is the baseball antitrust exemption.

Once again, I want to express my appreciation for allowing me to speak with you today.

I hope my comments have been helpful.

I also hope you will call on me or my staff for any further information you may need.

We stand ready to assist, and look forward to working with you any way we can to protect the people's interests.

Thank you.

Senator FEINSTEIN. The next witness is Lori Swanson. She is Deputy Attorney General in the office of Minnesota Attorney General Mike Hatch and has been there since January 1999. She oversees the civil enforcement work of Minnesota's Attorney General's office and has handled antitrust, consumer, commerce, and charities matters.

Welcome, Ms. Swanson.

STATEMENT OF LORI R. SWANSON, DEPUTY ATTORNEY GENERAL OF MINNESOTA, ST. PAUL, MINNESOTA

Ms. SWANSON. Madam Chair, thank you for the introduction.

I have been asked by Attorney General Mike Hatch of our State of Minnesota to come before the Committee today and represent the views of the Minnesota Attorney General's office and represent the people of Minnesota as it relates to these issues of baseball and antitrust. It is a privilege to appear before you today to talk about these issues.

As we have heard, the Minnesota Twins have been the focus of a lot of attention this off-season. Last November multi-millionaire owners of 30 independent businesses brazenly and openly got together in Chicago and voted to, through concerted action, eliminate two of their own in order to benefit the remaining teams.

It is hard to imagine, frankly, any other industry in America where all of the competitors could get together behind closed doors, away from public view, away from public scrutiny, and collectively decide that two of them should go out of business, reducing supply, so that the others could make more money and remain more profitable.

This is not the first time this issue of contraction of teams has been an issue before the people of Minnesota or that the people of Minnesota have been threatened on these issues, or frankly, people around other parts of the country as well.

In 1997, the Minnesota Twins signed a letter of intent to sell their team to investors in North Carolina if the Minnesota legislature did not publicly finance a new stadium, and major league baseball, similar to Florida's instance, indicated that they would approve that sale if the Minnesota legislature did not publicly finance the stadium. They also said that if the Minnesota legislature did not do so, no other team would be allowed to play in the Metrodome stadium, which is our local baseball stadium in Minnesota. Again, this was concerted activity, a boycott situation that frankly would be hard to imagine any other industry doing.

And the transaction made no economic sense. At the time, the Minnesota media market was the 14th largest in the country, and North Carolina was 47th, and North Carolina had no stadium, either. So it did not seem to make a lot of economic sense.

Our office served the request for information on baseball, attempting to investigate whether this could be a concerted illegal boycott and, frankly, a pretext to hold the people of Minnesota hostage, and we ran smack dab into the so-called antitrust exemption.

The others of major league baseball believe that unlike these other businesses, including other professional sports leagues, they are not subject to the antitrust laws. We disagree with major league baseball. We think that some of those cases took place in an era where both baseball and antitrust were different, and in fact, the exemption has been narrowed by the Court so that this type of contraction would not necessarily be immune to challenge.

However, there is obviously disagreement among the courts, and we think it is appropriate—the Attorney General's office in Minnesota—that these issues be clarified by Congress.

It is interesting—the league contends that contraction is necessary because certain so-called small market teams like the Twins

do not generate enough revenue to satisfy the league, even though public reports show that the Twins in fact made a profit last year when other teams did not.

What is very interesting is that looking at baseball's rationale over the last 15 years for keeping the exemption, it seems to be in extreme contrast with their public statements today.

In the past, Commissioner Selig of major league baseball has made certain representations to Congress about what major league baseball would do if the so-called exemption were allowed to remain in place. For instance, in 1993, Commissioner Selig testified before Congress that "Congress has often looked at baseball's position with respect to the antitrust laws, and it has always reaffirmed baseball's antitrust status, because baseball's conduct has always been consistent with the public interest." He said it has always been consistent with the public interest.

He went on to say that "Baseball has continued to uphold its unique covenant with its fans and it deserves to retain its current status under the antitrust laws." Why? Because he said baseball has upheld its unique status and has kept its commitment to the public.

Similarly in a 1993 appearance before a Subcommittee of the House Judiciary Committee, Commissioner Selig asserted that: "The most immediate consequence of the elimination of baseball's antitrust exemption would be that a number of teams in small markets would attempt to abandon some of baseball's existing cities for what they think are better economic conditions elsewhere."

Again in 1993, when Commissioner Selig invoked baseball's antitrust exemption to prevent the San Francisco Giants from moving to Florida, he testified that: "The national league's decision to keep the Giants in San Francisco where they have successfully operated with loyal support from millions of fans for the past 35 years was simply a reaffirmation of baseball's longstanding policy against the relocation of franchises that have not been abandoned by their local communities."

Now, though, the league seems to be doing something different. The league would use its supposed exemption to eliminate a franchise, the Minnesota Twins, that has enjoyed support from the people of Minnesota for over 40 years. The Twins were the first American League team to draw more than 3 million fans in a single season. To say that the community, the people of Minnesota, have abandoned the Twins ignores the fact that the team drew over 1.75 million fans last season.

Commissioner Selig himself recognizes the trauma that can be caused communities when teams are relocated in this way. He talks about how he was "personally heartbroken" when the Graves left Milwaukee after the 1965 season. He said: "The city of Milwaukee and the State of Wisconsin were traumatized by the loss of that franchise. The people in my home State felt hostility, bitterness, and a deep sense of betrayal toward major league baseball for allowing the Braves to abandon us."

I am running out of time, but we would support any efforts. We think that the claims in the past on the antitrust exemption have not been followed.

[The prepared statement of Ms. Swanson follows:]

STATEMENT OF LORI R. SWANSON, DEPUTY ATTORNEY GENERAL OF THE STATE OF MINNESOTA

I. INTRODUCTION

Mr. Chairman, members of the committee, it is a privilege to be asked to appear before you to discuss baseball and antitrust. As you know, the Minnesota Twins have been the focus of a lot of attention this offseason, and it has not been because of the team's young talent that some predict could win the American League Central Division this year. Rather, ever since Major League Baseball's owners gathered together in Chicago last November and decided to eliminate two of their own, the future existence of this team—along with that of the Montreal Expos—has been in doubt. While the League says in public that it has not settled on which teams would be targeted for contraction under its plan, recent media stories indicate that in fact consideration has not been given to contracting any team other than the Twins or Expos. And from day one, the Twins and Major League Baseball have been fighting tooth and nail to get out of the team's lease in the Metrodome for the 2002 season. That is not the conduct one would expect from a team planning on being around much longer.

After a series of battles in the Minnesota state courts, the Twins will continue to play through the 2002 season. But after that, the team's continued existence remains up in the air.

How is it that multi-millionaire owners of thirty independent businesses—and mind you, these are big businesses—could so brazenly and openly get together and eliminate two of their own in order to benefit the remaining teams? How can they threaten the existence of a franchise that has a forty-plus year history in Minnesota (and a one-hundred year history overall) and deprive millions of fans in Minnesota of their toeam, just for their own profit? The answer is that the owners believe that unlike other businesses—including all of the other professional sports leagues—they are not subject to the antitrust laws.

We disagree with Major League Baseball and believe that the baseball antitrust exemption, created by the U.S. Supreme Court back in a different era—both of baseball and of antitrust law—has since been narrowed by the courts so that the owners' contraction ploy is not immune from challenge under the antitrust laws. That said, there is some disagreement among courts as to whether that is in fact the case. Just recently, for example, a federal court in Florida agreed with the League that contraction fell within the scope of the antitrust exemption. But Major League Baseball's recent contraction plans demonstrate that, if the League does in fact have an exemption, it no longer can be entrusted with that privilege. If Major League Baseball wants to conduct itself as just another for-profit business, in total disregard for the game and its fans, then it should not be treated differently under the antitrust laws than any other private business. Therefore, I would support legislation clarifying that issues such as franchise contraction are subject to scrutiny under the Sherman Act.

II. MAJOR LEAGUE BASEBALL'S NARROW ANTITRUST EXEMPTION POST-*Flood* v. *Kuhn*.

Major League Baseball's antitrust exemption originates in the so-called "baseball trilogy," three U.S. Supreme Court decisions dating back to 1922. In Federal Baseball,[1] the first of these cases, the Supreme Court decided that the business of giving exhibitions of baseball did not amount to interstate commerce. Rather, the Court said, baseball was a purely state affair, notwithstanding the fact that in order to put on these exhibitions teams regularly crossed states lines. Because baseball was not interstate commerce, the Sherman Act did not apply to the sport.

By the time the Supreme Court last considered Major League Baseball's antitrust exemption, in the 1972 *Flood* v. *Kuhn*[2] case, the Court's take on interstate commerce had changed significantly, expanding to encompass a much broader range of economic activities. Furthermore, the game of baseball itself had changed, becoming less a pastime and more a business. The Supreme Court at last recognized the obvious in Flood—that baseball by the early 1970's was engaged in interstate commerce.

What was left of Major League Baseball's antitrust exemption after *Flood* v. *Kuhn*? Not much, we believe. And at least one federal district court agrees with this position. In a case known as *Piazza* v. *Major League Baseball* League Baseball,[3] an investment group challenged Major League Baseball's refusal to allow it to buy the

[1] *Federal Baseball Club of Baltimore* v. *National League*, 259 U.S. 200 (1922).
[2] *Flood* v. *Kuhn*, 407 U.S. 258 (1972).
[3] *Piazza* v. *Major League Baseball* League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993).

San Francisco Giants and move the team to Florida. The League argued that decisions concerning franchise relocations were exempt from the antitrust laws. The district court conducted an extremely thorough analysis of the origins and evolution of the antitrust exemption and concluded that the Supreme Court's decision in *Flood* effectively limited the exemption to the so-called reserve clause. The district court reasoned—correctly we believe—that because *Flood* rejected *Federal Baseball's* rationale that Major League Baseball was not engaged in interstate commerce, the proper application of *stare decisis* meant that the only aspect of *Federal Baseball* that remained to be followed was its result, which was the exemption of the reserve system from the antitrust laws.

Obviously, Major League Baseball disagrees with us as to the scope of the antitrust exemption. If the League didn't, I doubt the owners would be engaging in coordinated conduct that, in almost any other industry, would at least raise some eyebrows. And unfortunately, a federal judge in Florida recently agreed with Major League Baseball that contraction falls within the scope of their antitrust exemption. Given these different interpretations about the scope of the exemption, particularly concerning contraction, clarification by Congress is in order.

III. Major League Baseball does not Deserve any Exemption from the Antitrust Laws

Whatever the present scope of the exemption, Major League Baseball has proven that it is undeserving of any privileged status under the antitrust laws. If the League wants to conduct itself simply as a for-profit business in disregard for the game and its fans, then it should not be treated any differently under the antitrust laws than any other private enterprise.

The League isn't shy about acknowledging the reasons motivating its push for contraction. It openly contends that contraction is necessary because certain "small market" teams like the Twins do not generate enough revenue to satisfy the League. And Major League Baseball is now using its antitrust exemption as a shield to accomplish the elimination of franchises with impunity. This is quite a turnaround from the past, when Major League Baseball has come before Congress to state its case for retaining whatever exemption it might have from the antitrust laws and argued that the exemption allows the League to protect small market franchises.

In a 1993 appearance before a subcommittee of the House Judiciary Committee, Commissioner Selig asserted that "the most immediate consequence of the elimination of Baseball's antitrust exemption would be that a number of teams in small markets would attempt to abandon some of Baseball's existing cities for what they think are better economic conditions elsewhere."[4] But now Major League Baseball would use it supposed antitrust exemption (as the League would have it) to abandon at least two cities. Commissioner Selig, in announcing the postponement of contraction until the 2003 season, reiterated that as many as four cities might be abandoned as a result of the League's contraction plans.

When Commissioner Selig invoked Baseball's antitrust exemption to prevent the San Francisco Giants from moving to Florida, he testified that "the National League's decision to keep the Giants in San Francisco, where they have successfully operated with loyal support from millions of fans for the past 35 years, was simply a reaffirmation of Baseball's longstanding policy against the relocation of franschises that have not been abandoned by their local communities.[5] Now, though, the the League would use its supposed exemption to teliminate a franchise that has enjoyed loyal support from the people of Minnesota for over forty years. In fact, the Twins were the first American League team to drawmore than 3 millions fans in a single season. And to say that the community has abandoned the team ignores the fact that the team drew over 1.7 million fans last season. And to say that the community has abandoned the team ignores the fact that the team drew over 1.7 million fans last season, more than attended home games for five other teams.

During the 2001 World Series, Commissioner Selig declared in a message to fans: "[B]aseball is an important social institution and a part of our national fabric. Baseball has a responsibility to those who look to the game not only for fun and entertainment, but also for a responsibility to those who look to the game not only for fun and entertainment, but also for a sense of stability and unification."[6] Major League Baseball has used this imagery to justify whatever antitrust execption it

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[4] Hearing Before the Subcommittee on Economic and Commercial law of the House Comm. on the Judiciary, 103rd Cong. 57–58 (1993) (statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club).

[5] *Id.* at.51.

[6] "From the Commissioner," World Series 2001 Program, p.8 (Exhibit A).

might have. The Commissioner, for example, has testified: "Congress has often looked at Basall's position with respect to the antitrust laws and it has always reaffirmed Baseball's antitrust status because Baseball's conduct has always been consistent with the public interest." [7] He went on to say: "Baseball has continued to uphold its unique covenant with its fans and it deserves to retain its current status under the antitrust laws.[8] Contraction, however, has nothing to do with the public interest; rather, it has only to do with the owners' bottom lines.

I cannot conceive of any greater breach of Baseball's "unique covenant with its fans," as the Commissioner put it, than to forsake the people of Minnesota, who have supported their team for so long. Commissioner Selig himself has eloquently described the blow a community feels when it is abandoned and how he was "personally heartbroken" when the Braves left Milwaukee after the 1965 season. As the Commissioner recalls: "The city of Milwaukee and the state of Wisconsin were traumatized by the loss of that franchise. The people in my home town felt hostility, bitterness and a deep sense of betrayal towards Major League Baseball for allowing the Braves to abandon us. The years of drawing more than 2 million fans per season were forgotten." [9] Commissioner Selig referred to there being a "void" in the community after the Braves' departure. And I am certain that the same void and sense of betrayal would be felt in Minnesota and any other community Major League Baseball targets for contraction. If Major League Baseball can so callously abandon communities in the name of profits—and do so just days after piously proclaiming Baseball's role "in the recovery of our nation" [10]—then there is no longer any "unique covenant" to justify a privileged status under the antitrust laws.

According Major League Baseball favored treatment under the antitrust laws also means entrusting the League with a weighty responsibility to make certain that its privileged status is not abused. Revelations that have occurred since contraction was announced last November, though, raise serious doubts as to whether Major League Baseball is deserving of that trust. As many of you are probably aware, it came to light recently that Commissioner Selig had arranged a $3 million loan for the Milwaukee Brewers from a financial institution controlled by Carl Pohlad, the owner of the Minnesota Twins. In addition to the Brewers loan, there have been reports of a Pohlad loan to Colorado Rockies owner Jerry McMorris. Major League Rule 20 (c) prohibits loans made directly or indirectly between owners without the approval of other owners, and according to press reports neither loan was approved by the other owners. Mr. Selig's reported response to a question as to why the possible violation of League rules was not discussed at a recent owners' meeting: "We decided it was an antiquated rule." Well, the baseball antitrust exemption is also an "antiquated rule" from a time when Major League Baseball was more a pastime, not just a business. If the owners are willing to ignore their own internal governance structure when an "antiquated" rule gets in the way of doing business, that certainly calls into question whether Major League Baseball can be trusted to conduct itself in a responsible manner with an antiquated antitrust exemption (if such an exemption exists).

IV. Conclusion

The baseball antitrust exemption has been described as "a derelict in the stream of the law." [11] The Supreme Court itself has acknowledged that the exemption is "unrealistic, inconsistent and illogical." [12] It is, to borrow Commissioner Selig's words, antiquated. Modern antitrust doctrine can deal with issues like contraction without throwing professional sports leagues into chaos, contrary to what Major League Baseball suggests would happen if it lost whatever antitrust exemption it might currently have. And given that the League, through its contraction scheme, has broken whatever "covenant" it may have had with its fans, there is certainly no basis to allow it to enjoy a privileged status under the antitrust laws. The notion that the Major League Baseball is deserving of any exemption is far more antiquated than any of the League's own rules that the owners refuse to follow.

I thank you for the opportunity to appear before you today.

Senator Feinstein. Very good. Thanks very much, Ms. Swanson.

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[7] Statement of Allan H. Selig, supra note 4, at 58.
[8] Id. at 59.
[9] Id. at 53.
[10] "From the Commissioner," supra note 6.
[11] Flood, 407 U.S. at 286 (Douglas, J., dissenting).
[12] *Radovich* v. *National Football League*, 352 U.S. 445, 452 (1957).

We were going to spell each other, and I know that Senator Leahy was on his way back, but I am going to have to recess now, because we are down to about 1 minute, so I am going to race to do the vote and then come right back.

Thank you.

[Recess.]

Senator FEINSTEIN. I am going to call the hearing to order and ask the panel of witnesses to please take their seats.

Because we have two colleagues that I know of who have come back and forth from votes now three times, I am going to ask the witnesses' patience and allow the Senators to make their statements at this time.

So we will begin with Senator Wellstone and go right down the line.

Senator?

STATEMENT OF HON. PAUL D. WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator WELLSTONE. Thank you, Madam Chair, and let me apologize to the panelists. This is an unusual situation where we have the votes scheduled at the same time.

I would like to thank all of you for being here, and I want to thank Lori Swanson for her superb testimony. I am sorry that I was not here to hear you directly, Lori, but thank you for representing Minnesota so well.

I am honored to be here with my colleagues, Senator Dayton from Minnesota and Senator Nelson.

Madam Chair, I want to thank you and Senator Leahy and the Committee for holding these hearings on S. 1704, which is the Fairness in Antitrust in National Sports (FANS) Act of 2001, which I introduced at the end of last session with Senators Dayton and Harkin.

The goal of the legislation is to limit major league baseball's antitrust exemption as it relates to decisions to eliminate or relocate a major league baseball team. This is an important bill, made necessary by major league baseball owners' unfortunate decision last fall to eliminate two teams.

As you know, the Minnesota Twins were prominently mentioned as one of the two teams, along with the Montreal Expos, to be eliminated.

Thankfully, team elimination will not happen this season. Frankly, I think the major league baseball owners did not anticipate the hailstorm of criticism they received for the so-called "contraction" decision. The owners failed to perceive the public sense of betrayal at the hands of owners willing to put their own profits before loyalty to fans and their communities. The decision to abandon contraction at least for now was good news for the Minnesota Twins fans and anyone who believes in this great American pastime.

But unfortunately, the battle is not over. The owners have made it eminently clear that they intend to pursue team elimination and/or relocation next year. So Mr. Chairman, while we may have stepped back from the brink, it is only temporary. We must remain vigilant, and we need the full protection of the antitrust laws in doing so.

Mr. Chairman and Senator Feinstein—I will abbreviate this—let me just tell you a little bit, although I could tell you a lot, about the Minnesota Twins team and the community that has been threatened by the owners' apparent desire to eliminate some of their competitors.

The Minnesota Twins are a vibrant, vital team, a team that strikes incredible loyalty in the hearts of Minnesota fans—indeed, of fans all over the Upper Midwest.

To be sure, Minnesota is a so-called "smart market" team, but nonetheless it is a team that has thrived and is thriving now. Since 1961, they have played in three World Series and won two. Three Minnesota players have been inducted into the Hall of Fame—Harmon Killebrew, Rod Carew, and Kirby Puckett. Minnesota was the first American League team to draw 3 million in attendance over a season; that happened in 1988. Last season, we fielded a team that finished second in their division and drew 1.8 million fans.

The 2001 season that just ended was a phenomenal one for the Minnesota Twins. And the list goes on and on, but just quickly, they had 46 crowds of 20,000-plus in 2001; they had 15 crowds of 30,000-plus in 2001; they had increased attendance of 723,211, which ranked first in the American League and second only to the Milwaukee Brewers in major league baseball; they finished the season with an average attendance of 22,287, the team's highest average attendance figure since 1994. The list goes on.

This is a team that the owners want to eliminate? I think not.

Mr. Chairman and members of the committee, our country has a lot of urgent priorities, and you have a lot of urgent priorities—the war against terrorism, economic security in our own country—there are many pressing priorities. We should not in the midst of these urgent priorities have to be concerned about protecting our fans and communities from unilateral, self-serving decisions by major league baseball owners.

Unfortunately, however, in light of the owners' announced intentions to pursue team elimination next season, we have no choice but to urge quick consideration of this legislation. We must act as soon as possible to hold major league baseball owners accountable for their decisions.

Last fall, Senator Dayton and I wrote to the President, asking for his help. I think it is terribly important that he weigh in, and we certainly will need his support.

There are two specific issues that I want to conclude with in respect to S. 1704, since I have authored this bill, that I would like to discuss.

First, we have heard concerns that despite clear language to the contrary, the bill would be interpreted as applying to minor league baseball teams. That was not our intent in drafting S. 1704, and I would be more than happy to work with the minor league baseball owners on specific language to clarify this point and would urge members of the Committee to join me in this effort as well.

Second, major league owners and their economists will tell you that lifting major league baseball owners' antitrust exemption will promote league instability by fostering team relocation. I challenge such a conclusion. The National Football League—fully subject to the antitrust laws—was able to negotiate guidelines with the Con-

ference of Mayors providing for community input on relocation decisions. I think this is the operative language of the final point I want to make, Mr. Chairman and members of the committee.

The application of the antitrust laws does not prevent a league from working to keep a team in a city, but insulating that league from the antitrust laws absolutely prevents cities, fans, and other interested parties from challenging a league decision to move a team. I think that is really the crucial point.

Again, Mr. Chairman, I want to emphasize to you that I think relying on the "good will" of major league baseball to protect Minnesota's interests with respect to relocation would be foolhardy. I think that our State, our communities, fans across the country need to have the right to challenge these decisions. They ought to be able to challenge anticompetitive practices when it looks like it is just a cartel that has gotten together.

Mr. Chairman, members of the committee, I want to thank you for holding these hearings so promptly. I look forward to working with you and the Committee on this important legislation. Initially, when I introduced this legislation, I thought it was a shot across the bow, but I actually believe there is growing disillusionment with the owners and the high-handedness and the way in which they have approached these decisions, and I think there is more support than there has been before for ending this antitrust exemption, and I am committed to this fight.

Thank you, Mr. Chairman.

[The prepared statement of Senator Wellstone follows:]

STATEMENT OF HON. PAUL D. WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

"FAIRNESS IN ANTITRUST IN NATIONAL SPORTS (FANS) ACT OF 2001"

Mr. Chairman and Members of the Committee, I want to thank you for so promptly holding hearings on S. 1704, the "Fairness in Antitrust in National Sports (FANS) Act of 2001, " which I introduced at the end of last session along with Senators Dayton and Harkin.

The goal of this legislation is to limit major league baseball's antitrust exemption as it relates to decisions to eliminate or relocate a major league baseball team. This is an important bill, made necessary by major league baseball owners' unfortunate decision last fall to eliminate two teams. As you know, the Minnesota Twins were prominently mentioned as one of the two teams, along with the Montreal Expos, to be eliminated.

Thankfully, team elimination will not happen this season. Frankly, I think major league baseball did not anticipate the hailstorm of criticism it received for its so-called "contraction" decision. The owners failed to perceive the public sense of betrayal at the hands of owners willing to put their own profits before loyalty to fans and their communities. The decision to abandon contraction at least for now was good news for the Minnesota Twins' fans and anyone who believes in the great American pastime.

But unfortunately the battle is not over. The owners have made eminently clear that they intend to pursue team elimination and/or relocation next year. So, Mr. Chairman, while we may have stepped back from the brink, it is only temporary. We must remain vigilant. And we need the full protection of the antitrust laws in doing so.

Mr. Chairman, let me tell you a little about the team and the community that had been threatened by the owners' apparent desire to eliminate some of their competitors. The Minnesota Twins are a vibrant, vital team a team that strikes incredible loyalty in the hearts of Minnesota fans—indeed of fans all over the Upper Midwest.

To be sure, Minnesota is a so-called "small market" team. But nonetheless it is a team that has thrived and is thriving now:

Since 1961, the Minnesota Twins have played in 3 world series and won two

Three Minnesota players have been inducted into the Hall of Fame: Harmon Killebrew, Rod Carew, and Kirby Puckett

Minnesota was the first American League team to draw 3 million in attendance over a season that happened in 1988

Last season we fielded a team that finished second in their division and drew 1.8 million fans

The 2001 season that just ended was a phenomenal one for the Twins. This past year we:

• Won 85 games, holding or sharing a portion of first place in the American League Central division from opening day until mid-August. Indeed, this upstart team could not be beat right up to the All Star Game.

• Finished in the top seven in the American League in all major team statistical categories [batting (4th), pitching (7th), and fielding (5th)]

• Showed the fifth largest increase in Major League Baseball in victories (69 in 2000 to 85 in 2001) while maintaining the league's lowest payroll and Major League Baseball's lowest average ticket price heading into the 2002 season

• Had 46 crowds of 20,000-plus in 2001 compared with 10 in 2000

• Had 15 crowds of 30,000-plus in 2001 compared with 5 in 2000

• Had increased attendance of 723,211 which ranked first in the American League and second only to the Milwaukee Brewers in Major League Baseball

• Finished the season with an average attendance of 22,287, the team's highest average attendance figure since 1994

• Increased cable television ratings by 161%, the largest yearly gain of any major league baseball team the highest in team history on its licensed regional sports network carrier

• Increased over-the-air television ratings by 105%—our highest over-the-air ratings since 1996

This is a team the owners want to eliminate? I think not.

Mr. Chairman and Members of the Committee, our country has tremendously urgent priorities. We have the war against terrorism, our struggle to help working families in the midst of a severe economic down turn, and other pressing domestic priorities providing adequate resources to educate our children, adequate health care for working families, prescription drug benefits, particularly for the elderly. We should not in the midst of these urgent priorities have to be concerned about protecting our fans and communities from unilateral, self-serving decisions by major league baseball owners.

Unfortunately, however, in light of the owners' announced intentions to pursue team elimination next season, we have no choice but to urge quick consideration of this legislation. We must act as soon as possible to hold major league baseball owners accountable for their decisions.

Last fall Senator Dayton and I wrote to the President asking for his help. We noted that achieving Congressional action on this legislation will be exceedingly difficult in view of other urgent legislative issues facing Congress and the Administration. We urged him, therefore, to weigh in on this. With the help of the Administration, I trust we can push this measure forward and give the owners some pause about what they are doing.

Mr. Chairman there are two specific issues with respect to S. 1704 that I would like to address. First, we have heard concerns that, despite clear language to the contrary, the bill could be interpreted as applying to minor league baseball teams. That was not our intent in drafting S. 1704. I would me more than happy to work with the minor league baseball owners on specific language to clarify this point and would urge members of the Committee to join us in that effort as well.

Second, major league owners and their economists will tell you that lifting major league baseball owners' antitrust exemption will promote league instability by fostering team relocation. I challenge such a conclusion. The National Football League fully subject to the antitrust laws was able to negotiate guidelines with the Conference of Mayors providing for community input on relocation decisions. The application of the antitrust laws does not prevent a league from working to keep a team in a city. But insulating that league from the antitrust laws absolutely prevents cities, fans, and other interested parties from challenging a league decision to move a team. And Mr. Chairman, when it comes to the interests of Minnesota fans there's not a whole lot of difference between contraction and relocation. The team would still be gone—and the fans and communities of our state would still be harmed. Frankly, relying on the "good will" of Major League Baseball to protect Minnesota's interests with respect to relocation would be foolhardy.

Again, Mr. Chairman. I want to thank you again for holding these hearings so promptly. I look forward to working with you and the Committee on this important legislation.

Chairman LEAHY. Thank you.

I want to thank Senator Feinstein for coming over and filling in. As I mentioned earlier to the panel, we did not anticipate a whole series of fairly close roll call votes, which held up a number of us, and I apologize for that. It is one of the reasons why we are running so far behind.

I see Senator Dayton and Senator Nelson here, who also wish to make statements.

Senator Dayton?

STATEMENT OF HON. MARK DAYTON, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DAYTON. Thank you, Mr. Chairman, and thank you very much, Mr. Chairman, for arranging this hearing to swiftly in the midst of all the other demands on this committee. And I want to thank Senator Feinstein for accommodating our insertion into the middle of the first panel, and I want to apologize to the panel for the interruption. Thank you very much for your forbearance.

Mr. Chairman and members, it is no coincidence that both of Minnesota's Senators are testifying on behalf of this legislation today, Senator Wellstone as its author and I as an original cosponsor.

Like thousands of Minnesota Twins fans throughout not only Minnesota but the entire Upper Midwest region, we were stunned last November when major league baseball suddenly announced plans to "contract," that is, to eliminate two teams before the start of the 2002 season. One of those teams was widely rumored to be our Minnesota Twins.

Fortunately for us, a Minnesota judge ruled that the Twins are contractually obligated by a 1-year least that the team signed only last October to play this season in Minnesota, and the Minnesota Court of Appeals has upheld that decision. Commissioner Selig has now announced that major league baseball will not eliminate any teams for this 2002 season, so Minnesota Twins fans and their elected leaders have a brief reprieve.

I am cosponsor this legislation because it would importantly clarify that major league baseball does not enjoy a status different from any other sports league relating to the elimination or relocation of a team franchise.

Nevertheless, as Senator Wellstone pointed out, in past year, numerous teams in the NFL, NBA and NHL have been moved by their owners to different cities. Federal courts have upheld owners' rights to do so, and they have rejected league attempts to prevent these moves as violations of the Sherman Antitrust Act—for example, Los Angeles Memorial Coliseum Commission versus the National Football League in 1984.

So even if this legislation is passed by Congress and then signed into law by a former baseball team owner, or even if it were law today, it would not—it could not—prevent a Minnesota Twins owner from moving that team out of our State.

What the Wellstone bill would do, however, is to prevent a scheme such as major league baseball recently concocted for its so-called "contraction." Without claiming an antitrust exemption, major league baseball could not have planned and then proclaimed that two teams would be eliminated by the league and taken away from their cities and their fans. Without such an exemption, the owners of 28 baseball businesses could not act in concert to buy out the owners of the other two franchises for their expected future financial gains.

The league-coordinated "contraction" is very different from an individual owner's decision to sell or move a single franchise. In that situation, while one city and its citizens lose their team—and I deplore when those occasions occur—at least another city and its citizens gain it. With contraction, only the owners gain. Fifty players lose jobs, and their association loses financial leverage. Two cities lose their teams; two other cities lose their chances to gain teams.

Baseball's claimed antitrust exemption also allows the owner of an existing team to prevent another team from being moved to a nearby city where it might "compete in its market." One owner wins while depriving, for example, thousands of fans in a city like Washington who want a team and have a willing buyer.

This restraint of competition is precisely the abuse which antitrust legislation is meant to stop. Major league baseball's "contraction" demonstrates clearly the tight control which the league exercises over the actions of the businesses which comprise it.

Please remember that in its landmark decision, Curt Flood versus Kuhn, in 1972, the U.S. Supreme Court stated unequivocally that "professional baseball is a business engaged in interstate commerce." Senator Wellstone's bill applies to those businesses the same rules which apply to other pro sports businesses.

Let me conclude by saying again to my constituents in Minnesota: Congress cannot save the Twins for Minnesota. Only Minnesota can save the Twins for Minnesota. As much as I detest the financial excesses in pro sports today, I believe that the Twins need revenues from a new baseball stadium to be viable financially. More importantly for Twins fans, they need those new stadium revenues to field winning teams, with marquee players who can win league pennants and World Series. In both 1987 and 1991, we in Minnesota found out how exciting and fun that can be.

Like the Metrodome, this new stadium can be built without costing a single taxpayer dollar. However, if the Minnesota legislature fails to approve the project this year, they may not get another chance.

So I urge the Committee to move forward the Wellstone legislation which is important to the Nation, and I urge the Minnesota legislature to act in ways that are so important to Minnesota.

Thank you, Mr. Chairman.

[The prepared statement of Senator Dayton follows:]

STATEMENT OF HON. MARK DAYTON, A U.S. SENATOR FROM THE STATE OF MINNESOTA

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Baseball suddenly announced plans to "contract": to eliminate two teams before the start of the 2002 season. One of those teams was widely rumored to be our Minnesota Twins.

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Nevertheless, in past years, numerous teams in the NFL, NBA, and NHL have been moved by their owners to different cities. Federal courts have upheld owners' rights to do so, and they have rejected league attempts to prevent these moves as violations of the Sherman Anti- Trust Act (eq. Los Angeles Memorial Coliseum Commission vs. the National Football League in 1984).

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This league-coordinated "contraction" is very different from an individual owner's decision to sell or move a single franchise. In that situation, while one city and its citizens lose their team, another city and its citizens gain it. With contraction, only the owners gain. Fifty players lose jobs, and their Association loses financial leverage. Two cities lose their teams; two other cities lose their chances to gain teams.

Baseball's claimed antitrust exemption also allows the owner of an existing team to prevent another team from being moved to a nearby city, where it might "compete in its market." One owner wins while depriving thousands of fans in a city like Washington, who want a team and have a willing buyer. This restraint of competition is precisely the abuse which antitrust legislation is meant to stop. Major League Baseball's "contraction" demonstrates clearly the tight control which the League exercises over the actions of the 30 businesses which comprise it. Please remember that in its landmark decision, Curt Flood vs. Kuhn, 1972, the U.S. Supreme Court stated unequivocally that "professional baseball is a business engaged in interstate commerce." Senator Wellstone's bill applies to those businesses the same rules which apply to other pro sports businesses.

Let me conclude by saying again, to my constituents: Congress cannot save the Twins for Minnesota. Only Minnesota can save the Twins for Minnesota. Much as I detest the financial excesses in pro sports today, I believe that the Twins need revenues from a new baseball stadium to be viable financially. More importantly for Twins fans, they need those new stadium revenues to field winning teams, with marquee players, who can win league pennants and World Series. In both 1987 and 1991, we found out how exciting and fun that can be.

Like the Metrodome, this new stadium can be built without costing a single taxpayer dollar. However, if the Minnesota Legislature fails to approve the project this year, they may not get another chance.

Chairman LEAHY. Thank you.

Normally, we go to the ranking member, but he has asked me to recognize Senator Nelson next, so I will call on Senator Nelson, and then we will go to the ranking member.

STATEMENT OF HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. Thank you, Mr. Chairman.

Mr. Chairman, I am here to shake things up. I am joining with my attorney general from Florida because we see eye-to-eye on this

situation. He of course has one of the greatest reputations and is one of the longest-standing attorneys general in the country.

But I want to approach this from a different perspective. I want to give you two examples of why the issue before us is very important to us in Florida.

I believe that Commissioner Selig tried to do the right thing in recognizing that a number of the old Negro League players had not been properly treated or adequately compensated. So a few years ago, an effort was made to give some compensation in the form of a pension to some of the Negro League players, and it was a good step in the right direction, but it stopped way short of the fair compensation that those Negro League players should have had.

The criterion that was used by major league baseball said in essence that the major leagues were integrated in 1947 when the color barrier was broken. The color barrier was broken in 1947, but they were not integrated until late in the decade of the 1950's. As a matter of fact, I think the last team was in about 1959, and it was the Boston Red Sox before they were integrated.

So there was a fiction that major league baseball was integrated, and on the basis of that fiction, players who remained in the Negro Leagues were not eligible, then, for the pension that had been set down.

That is wrong, and I think that that should be corrected, and I want to commend Commissioner Selig for his first step. I have been trying to have a meeting with him since early December, when I met with a number of these Negro League players in Florida who are now retired, and I am still waiting to have my meeting, so when this hearing came up, I chose to go ahead and make this a public statement and would urge upon the commissioner to please follow through. I think he is stepping in the right direction.

But when you look back, baseball used its antitrust exemption to unfairly compete against the Negro Leagues and then systematically discriminated against most of those Negro League players for many years after 1947. That is one thing I wanted to get across.

The second concern that I have about the antitrust exemption is based on the owners' decisions that they are going to contract the league, constrict, lower. And of the four teams that they are looking at, two of them are in Florida. Well, of course, that would be devastating to us. We have a whole infrastructure in Florida—in Miami, the Florida Marlins; in Tampa Bay, the Devil Rays.

But even if it were Minnesota and Montreal, that has an effect upon us, because we have something known as minor leagues in the State of Florida and also the wonderful renewal of the year each year with spring training, which is just about to occur. And both of those teams, Montreal and Minnesota, have spring training facilities, and all the host of economic activities that accrue therefrom would be severely affected.

So Mr. Chairman, I wanted to add my two bits, and I will continue to speak out both publicly and privately on behalf of these old Negro Leaguers—and by the way, in meeting with a number of them, now in their eighties, I said, "Now, tell me what it was really like—what was your talent back in those days?"

And they said, "We could pitch and win games, and we would pitch all nine innings."

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I would love to hear some of those stories, and I appreciate what you said about Attorney General Butterworth. I think we are very fortunate to have both attorneys general here, both Attorney General Butterworth and Deputy Attorney General Swanson. I am sure members of this Committee are well aware of their accomplishments and activities.

Thank you.

Senator Hatch, who, as I said in my earlier statement, was the chief sponsor of the Curt Flood Act, has joined us, and I will now yield to Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I will not take too long, but for quite some time now, I have been concerned about the health of baseball, both in its role as our National pastime with millions of fans and as a multi-billion-dollar industry that in one way or anther affects financially hundreds of thousands, if not millions, of Americans.

I am pleased that the Committee has decided to continue to examine whether and how the Federal antitrust laws may be contributing to baseball's problems, as well as how the antitrust laws might be used to fix some of these problems. Having sponsored and cosponsored, as the distinguished Chairman has said, legislation to limit baseball's antitrust exemption, I have a particular interest in today's hearing and welcome the testimony and opinions that will be offered by our distinguished witnesses.

As many of those participating today may recall, I sponsored legislation in the 103d Congress that would have made clear that antitrust laws apply to major league baseball with regard to labor relations.

I the 105th Congress, I again along with several others, including Senators Leahy and Thurmond, introduced legislation to clarify how and to what extent the Federal antitrust laws apply to baseball. This legislation, enacted as the Curt Flood Act of 1998, made clear that major league baseball, like all other professional sports, is subject to our Nation's antitrust laws except with regard to a few areas such as team relocation, the minor leagues, and sports broadcasting.

Major league baseball continues to face serious and controversial problems and issues, including the alleged need for contraction, the potential relocations advocated by some, substantial increases in player salaries coupled with reported operating losses, and finally, the systemic competitive imbalance that practically ensures that only the teams which can affords to spend significantly more on payrolls than their competitors have any realistic chance of reaching, let alone winning, the World Series.

As demonstrated by my past support for narrowing the exemption, I am not opposed to redefining or even repealing baseball's exemption if the arguments and evidence presented indicate the need for such action. At this time, however, I personally am not convinced that the limited antitrust exemption is, as some claim, the

root cause of the problems identified by opponents of the exemption. In this vein, I think it is advisable for this Committee to work to compile a factual record sufficient to support a reasoned and fully supported decision on what, if anything, to do with the antitrust exemption.

In the hopes of encouraging the kind of testimony and debate that I believe will be most valuable for the compilation of such a record, I suggest that two basic questions need to be addressed at this hearing, and I would ask each of today's witnesses to comment on them with as much specificity as possible.

First, in what specific ways do the antitrust laws and baseball's limited exemption from these laws actually affect or contribute to the problems that have been repeatedly identified by industry participants and commentators?

Second, how would legislative action modifying or clarifying baseball's exemption ameliorate or even eliminate some of these problems?

In conclusion, I want to restate that I come to this hearing with an open mind. I look forward to the testimony that will be offered here today, and I sincerely hope that this hearing will hope to elucidate with some specificity how the current application of the antitrust laws affects baseball, both as a sport and as an industry, and what further action, if any, is warranted with respect to major league baseball's antitrust exemption.

So I look forward to the hearing. I can only be here for part of the time, but I appreciate your holding it, Mr. Chairman, and thank you for allowing me to say these few words.

Chairman LEAHY. Thank you very much, Senator Hatch.

Mr. DuPuy has been Executive Vice President and Chief Legal Officer of the Major League Baseball Players Association since 1998. He also serves as Chairman of the board of Central Baseball, which oversees all of major league baseball's interactive media and internet rights.

Mr. DuPuy, you have been very patient, and we are pleased that you could be here with us.

Please go ahead.

Senator WELLSTONE. Mr. Chairman, can I thank you again, and I thank the panelists for your forbearance. I appreciate it.

STATEMENT OF ROBERT A. DUPUY, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, OFFICE OF THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, NEW YORK, NEW YORK

Mr. DUPUY. Mr. Chairman and members of the committee, thank you.

I appreciate the opportunity to testify before the Committee today on the bill introduced by Senator Wellstone. Baseball's exemption has been of great importance to the growth and stability of all of professional baseball for 80 years. It has not created problems; it has helped to solve them.

Major league baseball has not abused its exemption but instead has used it to benefit the sport and its fans. One of the most important of those benefits is the ability to promote franchise stability.

The last time a major league franchise relocated was prior to the 1972 season. That record over the last 30 years most certainly would not have been possible without the antitrust exemption. Indeed, during that same period of time, the other three major sports have had a total of 22 relocations. Again, baseball has had zero, and it is not a coincidence that baseball is the only sport with an exemption.

With due respect to the testimony of Senator Wellstone, Minnesota has a baseball team today because of the antitrust exemption. Minnesota, a hockey hotbed, lots its hockey team to a Southern city because the NHL did not have an exemption and stands at risk of losing its football team because the NFL does not have an exemption.

Baseball has used the exemption to promote franchise stability and to keep the Twins in Minnesota to date.

The exemption also protects and supports baseball's extensive minor league system, which provides professional baseball to 160 small and medium-sized communities throughout the country. Major league baseball invests $150 million per year in the minor leagues.

Without the protections afforded us by the exemption, a less costly yet certainly less accessible system would no doubt be developed.

We understand that the current bill was introduced by Senator Wellstone in response to baseball's vote to reduce the number of major league teams by two. Let me be clear. No one desires contraction. No one wants to deprive even a single fan of major league baseball. Commissioner Selig was one of the last to be convinced of contraction's necessity.

But given the current economic structure of baseball, there are markets which have demonstrated over time that they cannot support a major league baseball team, let along a competitive major league team.

Contraction is an attempt to face up to the economic realities of the industry so as to deliver a competitively balanced product at the highest level to as many fans as possible.

Commissioner Selig and the owners are compelled to confront the current imbalance in the game. Without a competitive product on the field, interest in the game will erode. With more and more entertainment options available, fans will turn to other more competitive sports. It is far preferable that baseball attempt to solve its problems in a coordinated, limited, and carefully managed process than to have a number of teams file bankruptcy, perhaps even in the middle of the season, with the resultant chaos that would inevitably ensue.

Contraction is not intended to be punitive. It is clearly heartrending for those fans and club employees who might lose their team, but it is intended to advance consumer welfare in the end, to protect competition, not competitors, and to allow 28 teams to improve their competitive posture and economic stability and allow major league baseball to be affordable to the fans—all objectives consistent with the tenets of the antitrust laws.

For example, in one instance, a contraction candidate receives 80 percent of its revenues from Central Baseball; another receives more than 55 percent. That almost $100 million a year subsidy

borne by the other 28 clubs at some point must inevitably lead to higher ticket prices across the entire industry.

The industry's financial results that led the clubs to the decision to contract have been widely reported. The blue ribbon panel consisting of Paul Volcker, George Mitchell, Richard Levin, and George Will issued their report in July of 2000 and made several recommendations for dealing with the issue of competitive imbalance. The 2001 update to that report clearly demonstrates that since the first report, both the economics of the game and the competitive balance of the game have further deteriorated. Additionally, not a single recommendation of the panel has been achieved at the bargaining table.

The competitive imbalance problem is apparent even to the most casual fan who watches only the playoffs and sees the same teams win year in and year out. Since 1995, no World Series game has been won by a team outside the top quartile of teams, and only 5 of 224 playoff games have been won by teams from the bottom half—a mere 2 percent.

Returning to the current bill, in 1997 and 1998, the commissioner's office and the players worked very closely with this Committee to craft a carefully worded change to our exemption. That legislation, the Curt Flood Act, provides major league players with the same rights under the antitrust laws in the area of labor relations as all professional athletes have. We continue to stand by that agreement and believe that no further changes are necessary or appropriate.

S. 1704 would open baseball to attack in areas in which baseball has worked hardest and achieved the most for the benefit of fans at all levels. For that reason, we oppose the passage of S. 1704.

Thank you, Mr. Chairman, for the opportunity to testify, and I ask that my full remarks be made a part of the record of this committee.

[The prepared statement of Mr. DuPuy follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF ROBERT A. DUPUY, EXECUTIVE VICE PRESIDENT AND CHIEF LEGAL OFFICER, OFFICE OF THE COMMISSIONER OF MAJOR LEAGUE BASEBALL, NEW YORK, NEW YORK

Mr. Chairman, my name is Robert A. DuPuy. I serve as Executive Vice President, Administration, and Chief Legal Officer for Major League Baseball. I have held this position since 1998, and prior to that served as outside counsel to the Commissioner and the Major League Executive Council. I appreciate the opportunity to testify before the Committee today on S.1704, introduced by Senator Wellstone, and more generally about baseball's antitrust exemption.

Let me first address baseball's exemption. That exemption has been of great importance to all of professional baseball for 80 years. As the Committee knows, the United States Supreme Court found the business of baseball to be exempt from the antitrust laws in 1922. That finding was reaffirmed in 1953 and then again in 1972, and over the years it has been applied by numerous federal district courts and circuit courts, including only a few weeks ago by the federal district court in Tallahassee, Florida.

Major League Baseball has not abused its exemption, but instead has used it to benefit the sport and its fans. One of the most important of those benefits is the ability to control franchise movement. Baseball has long had a policy of franchise stability, and we have made great efforts over the last several decades to prevent teams from abandoning their communities. Those efforts have been an unqualified success. The last time a franchise relocated was prior to the 1972 season. That record over the last 30 years most certainly would not have been possible without our antitrust exemption. Indeed, during that same period of time the National Foot-

ball League has had seven franchise relocations, the National Basketball Association eleven and the National Hockey League eight, a total of 26 in the other major sports. Again, baseball has had zero, and it is not a coincidence that baseball is the only sport with an exemption.

The exemption also protects and supports baseball's extensive minor league system, which provides for the training and development of future major league players and also provides professional baseball to 160 small and medium-size communities throughout the country. A number of aspects of that extensive system would be exposed to attack under the antitrust laws without the exemption, thereby greatly increasing the likelihood of a different type of player development system with fewer players, fewer teams and fewer locations for fans to watch professional baseball. Major League Baseball invests $150 million per year in the minor leagues. Without the protections afforded us by the exemption, a less costly yet less accessible system would no doubt be developed and perhaps millions of the 35 million fans who attended games this past year could lose the opportunity.

Many other matters in baseball would be subject to challenge without the exemption, such as regulation of certain ownership requirements, the Commissioner's disciplinary authority over clubs, equipment standards and others. If the exemption were removed, based on the experiences of other sports, baseball would almost certainly have to defend a large number of antitrust lawsuits. But unlike the experiences of other sports, we would have to defend these suits after being allowed for 80 years to develop with our exemption in place. With the possibility of treble damages in every case, no one could predict with any degree of certainty what baseball would be like after that onslaught of litigation.

We understand that S. 1704 was introduced by Senator Wellstone in response to baseball's vote to reduce the number of major league teams by two for the 2002 season. Let me be clear: no one desires contraction, no one wants to deprive even a single fan of Major League Baseball. Commissioner Selig was one of the last to be convinced of contraction's necessity. But the unassailable truth is that given the current economic structure of baseball, there are markets which have demonstrated over time that they cannot support a major league team, let alone a competitive major league team. Contraction is an attempt to face up to the economic realities facing the industry, so as to deliver a competitive product at the highest level to as many fans as possible.

Contraction is not intended to be punitive. It is clearly heartrending for those fans and clubemployees who might lose their teams. But it is intended to advance consumer welfare in the end, to protect competition (not competitors) and to allow twenty-eight teams to improve their competitive posture and economic stability and to allow Major League Baseball to be affordable to the fans, all objectives consistent with the tenets of antitrust law. For example, in one instance, a contraction candidate receives 80% of its total revenues from central baseball, while another receives in excess of 50%. That $100 million a year subsidy borne by the other twenty-eight clubs at some point must inevitably lead to higher ticket prices across the entire industry, while the communities at issue continue not to support their teams.

No legitimate public policy is served by legislation that would force baseball to constantly defend before antitrust juries the reasonableness of its efforts to promote franchise stability and competitive balance.

I understand that the Committee has requested testimony on the role that baseball's antitrust exemption has played in the recent litigation in Minnesota and Florida. The exemption played no role in the Minnesota litigation. That case concerned only the Minnesota Twins' Metrodome lease for the 2002 season. In Florida, Attorney General Butterworth issued civil investigative demands against baseball, seeking to investigate possible antitrust violations in the state of Florida. Judge Robert Hinkle of the United States District Court for the Northern District of Florida, Tallahassee Division, applied baseball's exemption to prohibit that investigation. The case is on appeal to the Eleventh Circuit Court of Appeals, which has had occasion to uphold baseball's exemption in the past. Although we expect the preliminary injunction to be affirmed and made permanent, the case provides a vivid example of an attempt by a local official to use the antitrust laws to advance local interests in a way that might be in direct conflict with the interests of fans in one or more other states.

Ironically, the presence of Attorney General Butterworth from Florida underscores this very issue. In 1992, the Florida Attorney General sued baseball to try to force the relocation of the San Francisco Giants to Tampa. Baseball resisted moving the Giants and then Chairman of the Executive Council Selig came before Congress for three hearings, including one in St. Petersburg, Florida before a very hostile gallery. Baseball stayed in San Francisco, although the owner was forced to take $15 million less than Tampa was prepared to pay for the franchise, because now-Commissioner

Selig and members of the Executive Council believed San Francisco deserved to keep its team. Today the Giants play before sellouts in one of baseball's premiere facilities and the fans of San Francisco had the thrill of watching Barry Bonds set the home run record this past season.

Since then, Florida has gotten two teams, and Attorney General Butterworth is attempting to invoke the same principles he used to try to force the Giants to Tampa to prevent the Marlins or Devil Rays from relocating or being contracted. Imagine if the Twins had in fact pursued relocation to Orlando as was discussed at one point. The Florida Attorney General and the Minnesota Attorney General would be here on opposite sides of the same issue.

Federal Judge Hinkle recently wrote "It is difficult to conceive of a decision more integral to the business of Major League Baseball than the number of clubs that will be allowed to compete."[1] Baseball has not abused its exemption, it has acted in the fans' best interests, it deserves to retain the exemption. In some respects, contraction is less subject to review than relocation. Relocation often involves an owner choosing to leave one market for perceived greener pastures. Baseball has not allowed that in more than thirty years. Contraction is a decision that one or more markets cannot be viable. While the impact on the fans in thatlocation is the same, the element of economic instability on the part of the club is even more compelling.

The industry's financial results that led the clubs to the decision to contract have been widely reported. The independent Blue Ribbon Panel, consisting of former Federal Reserve Chairman Paul Volcker, former Senate Majority Leader George Mitchell, Yale President Richard Levin and noted commentator George Will, issued their report in July 2000, and made several recommendations for dealing with the issue of competitive imbalance. The report and an update to that report have been provided to the Committee and will be available again at the time of the hearing. The update clearly demonstrates that since the first report was issued, both the economics of the game and the competitive balance of the game have further deteriorated. None of the recommendations of the Panel has been achieved at the bargaining table. Instead the union has, as it did in 1996 with highly-respected mediator Bill Usery, chosen instead to attack the credibility of the report and the members of the Panel.

The losses of the industry are real; the competitive imbalance problem is apparent even to the most casual fan who watches only the playoffs and sees the same teams win year in and year out. Those who would put up obstacles to the legitimate attempts to deal with baseball's core economic issues, whether by legislation, litigation or grievance, are only forestalling and perhaps exacerbating the inevitable correction which will have to occur if fans are to have faith and hope that their teams can compete. The status quo is not working and is not acceptable.

In 1997–98, the Commissioner's Office and the union worked closely with this Committee to craft a carefully worded change to our exemption. After much discussion, all parties agreed to the wording of legislation that was signed into law by the President in October 1998. That legislation, the Curt Flood Act, provides Major League players the same rights under the antitrust laws in the area of labor relations as other professional athletes have. All parties at the time believed the change created the right balance for the exemption. We continue to stand by the agreement and believe that no further changes are necessary or appropriate.

S.1704, introduced by Senator Wellstone, would open baseball to attack in areas in which baseball has worked hardest and achieved the most for the benefit of fans at all levels. In particular, baseball's admirable record of franchise stability would be threatened, creating the distinct possibility of teams moving, uncontrolled, from city to city. Our extensive minor league system would be in jeopardy, and any player development system taking its place would undoubtedly be consolidated and involve fewer communities. The legislation would spawn many lawsuits in local courts with conflicting objectives and inconsistent rulings, all of which would change the face of baseball unpredictably and damage the sport irreparably. Such results cannot be in the best interests of baseball or its millions of fans.

For all of the above reasons, we urge in the strongest terms that S.1704 not be enacted.

Thank you, again, Mr. Chairman, for the opportunity to testify before you today, and I ask that my full statement be made part of the record of this proceeding.

Chairman LEAHY. Thank you very much.

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[1] *Major League Baseball* v. *Butterworth*, No. 4:Olcv-RH, 2001,—F.Supp—, 2001 WL 1690202 at *13 (N.D. Fla. Dec 27, 2001)

I have a statement by the Senator from Wisconsin, Senator Feingold, and that will be placed in the record at the appropriate place.

[The statement of Senator Feingold follows:]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Mr. Chairman, I want to thank you for scheduling this hearing. Everyone in this room is concerned about the operation of baseball and how best to maintain its existence through changing financial and organizational circumstances. Thank you to the witnesses for appearing today.

Baseball has provided us with decades of entertainment, diversion, and history. As Americans struggled with the concept of integrating schools and communities, Jackie Robinson in 1947 broke color barriers by becoming the first African American to play major league baseball in the 20th century. We've watched unbreakable records break, and teams go from worst to first. We've seen perfect games and no-hitters, 23-inning marathons, and, most recently, a thrilling 7-game World Series.

I recognize that baseball, like all long-running businesses, must evolve as circumstances dictate. I also acknowledge the argument that the antitrust exemption has helped maintain the unique nature of minor league baseball. There are many towns and communities across the country that benefit economically and otherwise through the existence of minor league franchises. I am certainly a supporter of these clubs, and I know that Wisconsinites have long enjoyed watching the Wisconsin Timber Rattlers and the Beloit Snappers.

I have some concerns, however, about Major League Baseball's recent proposal to contract two teams as a right of baseball's long-enjoyed antitrust exemption. I wonder, as I'm sure many of us have, if contraction is the best solution to baseball's financial problems. I don't necessarily think that a franchise's inability to generate local revenue for a stadium should justify folding a team, nor do I think such a momentus decision should be undertaken by team owners alone.

Baseball's antitrust exemption is a privilege unknown to all other American businesses. The exemption allows team owners to make decisions collectively regarding the sport's economic operation without the input of the players or other interested parties. The original purposes of the antitrust laws are sound and have proven to be good for the economy of this nation over a very long period of time. I hesitate to extend unrestricted power to any business or industry through an exemption to these laws.

I am not wholly convinced that team contraction falls within the range of the baseball's antitrust exemption. I am eager to hear the testimony of today's witnesses as to the legality of contraction in light of the narrowing of the antitrust immunity caused by past legislation such as the Curt Flood Act of 1998. It is, of course, of concern when the owners of several independent businesses collectively elect to eliminate two of their own for the betterment of the remaining businesses. If the antitrust immunity allows this action as an industry practice, it should be closely reexamined.

Furthermore, while as I said before, there is a plausible argument that minor league baseball has flourished as a result of the exemption, I am concerned about the minor league affiliates of the Montreal Expos and the Minnesota Twins, should these teams be contracted. Several minor league teams in Connecticut, Florida, Iowa, Tennessee, Pennsylvania and Vermont face an uncertain future as a result of contraction. I look forward to hearing from today's witnesses what plan, if any, Major League Baseball and Minor League Baseball have in place for these teams and their communities.

Abuse of baseball's antitrust immunity is what puts its maintenance in the most danger. Contraction must not simply be a quick fix to a complex problem, and then justified by an eighty year old antitrust exemption granted in a Supreme Court decision that most scholars believe was wrong.

Finally, I want to recognize the strong feelings of baseball fans, who loyally follow their teams through good times and bad. No discussion of baseball would be complete without acknowledging their important role.

Again, I thank the Chairman for scheduling today's hearing, and thank you to the witnesses for appearing today before the Committee to help shed some light on this important issue.

Chairman LEAHY. Donald Fehr is Executive Director and General Counsel for the Major League Baseball Players Association. He joined the Major League Baseball Players Association as General

Counsel in 1977, if I am correct, and was named Executive Director in 1985.

Mr. Fehr, we are glad to have you. You are no stranger to this Committee room. Please go ahead.

STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NEW YORK, NEW YORK

Mr. FEHR. Thank you, Mr. Chairman.

I appreciate the committee's invitation to appear here today and was happy to respond to it. I am glad to convey my views on the status of the law in the industry as relevant to the pending situation.

Before beginning, I also want to thank the other Senators who are here and have been here and will be coming in and out for their courtesy, and most specifically Senator Hatch, for the work that he put in along with the Chairman in connection with the Curt Flood Act 4 years ago.

First of all, Mr. Chairman, my views on the baseball antitrust exemption as it relates to matters concerning the number and location of franchises are well-known. I have testified before this Committee any number of times going back, I believe, over a period of 20 years, and I do not want to repeat that now.

I will simply make the point that where you have a circumstance in which you have cities competing for teams rather than two or more entities of teams competing for cities, you have stress, and the power is with those who control access to the teams; it is not with the cities. And that is a difficult issue. It is not the kind of issue which is foreign to garden-variety antitrust considerations. Those kinds of market power and control issues are the reasons why we have the antitrust laws.

Secondly, there is no doubt why we are here today. We are not here because the Players Association stirred up the pot; we are not here because the Committee felt on its own that the Curt Flood Act was a needed revision. We are here because a contraction announcement was made. We are here because an announcement was made to reduce the number of teams—something which before the last 12 months would not have even been conceived of, much less taken seriously.

In that regard, what we had, of course, was a decision which was made by the 30 owners acting together, privately, without input from the outside, without standards imposed by law or, so far as I know, imposed by their own internal rules, with no possibility if the exemption exists—there is some question about that—but no possibility of even having the matter investigated to find out what the motives were, how the decisions were made and all the rest of it, and with no forum under which that decision can be reviewed for compliance with any set of standards.

I think that if you gauge the reaction of major league baseball to the various matters which have been initiated, one of the things which strikes me is that they seem to be offended that questions are asked or the suggestion that there be some standard that their conduct can be reviewed against, even though the antitrust stand-

ard, of course, is the basic standard against which concerted activity by all businesses is reviewed in the United States.

In connection with the number and location of franchises, it is certainly accurate that no team has been relocated since 1972. That was not the case previously, as people know, beginning with the fabled move of the Dodgers and the Giants to the West Coast.

But I suggest that that is not really the issue. The issue is a more fundamental one, and that is, is there an exemption, what is the basis for it, and what does it mean. And I want to further suggest that this is a matter of significantly broader public interest than as relates to players. Players believe that the subject of contraction is a mandatory subject of bargaining; the clubs do not. If there is going to be contraction pursued, that issue will b resolved in one fashion or another. But the point I want to make is that if the clubs are right, then antitrust issues to the side, whether there will be contraction is not an issue of bargaining, only the effect.

If the players are right, then it would be a matter of collective bargaining, but we would be compelled and would bargain in good faith about that issue.

We do not, however, represent the broader community interest. The Players Association of course represents and is authorized to represent only its own membership.

The practical effect of having no standards is what I would ask the members of the Committee to focus on. It means that the question of whether the major league owners are acting in what would otherwise be considered an unreasonably anticompetitive manner may not even be asked. The inquiry cannot be made. There is no standard against which the conduct is weighed, no forum in which the facts can be ascertained, no judge or jury before whom a complaint can be heard.

Moreover, if there is an exemption, and if it is undefined or blanket—except in the area with respect to players or as governed by the Sports Broadcasting Act—what that means is that any conduct is exempt from the antitrust laws, regardless of its effect, regardless of its purpose, regardless of its motive.

We do not know what the scope of the exemption is, and that, I suggest, is an odd basis upon which public policy ought to be formulated. If there is going to be an exemption, we ought to know what it is.

I will make just one other comment—I know my time is running out—and would then be pleased to respond to questions when the opportunity presents itself.

Mr. DuPuy makes a compelling case—although without examination of it—that baseball needs to do what it is doing. With all due respect, that is exactly what everyone about whose conduct questions are raised under the antitrust laws does. It says "My conduct is reasonable. It is not unreasonably anticompetitive." That is not a reason not to have the antitrust laws. That is a defense.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fehr follows:]

STATEMENT OF DONALD M. FEHR, EXECUTIVE DIRECTOR, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, NEW YORK, NEW YORK

Mr. Chairman, Senator Hatch and Members of the Committee:

My name is Donald Fehr, and I serve as the Executive Director of the Major League Baseball Players Association (MLBPA), a position I have been privileged to hold for more than a decade and a half. Quite frankly, given the passage of the Curt Flood Act of 1 998—for which I again thank the Committee for its considerable time and effort—I did not expect to be invited again to testify on the subject of the antitrust exemption allegedly enjoyed by Major League Baseball (MLB) this soon, if at all. Nevertheless, since the Committee is once more hearing testimony on this issue, I thank you for permitting me to express the views of the MLBPA. I appreciate the opportunity to be here.

As I understand it, the question under consideration is whether, as a matter of sound public policy, it is appropriate for Major League Baseball to enjoy an exemption from the antitrust laws for any purposes other than those served by the Sports Broadcasting Act, 15 U.S.C. Sec 1291. My views on the appropriateness of any antitrust exemption for Major League Baseball have been set forth many times in prior testimony before this and other Committees, and need no extensive review here. Accordingly, I will make only a few brief comments, respond to any questions put by members of the Committee at the hearing, and then supplement the record following the hearing to the extent appropriate and desired by members of the Committee.

As set forth in my written testimony to the House Judiciary Committee on 6 December 2001 (copy attached), in 1979 the National Commission for the Review of Antitrust Laws and Procedures made the following recommendations with respect to antitrust immunities:

1. Free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy.
2. Exceptions from this general principle should only be made when there is compelling evidence of the unworkability of competition or a clearly paramount social purpose.
3. Where such an exception is required, the least anticompetitive method of achieving the regulatory objective should be employed.
4. Existing antitrust immunities should be reexamined.

Moreover, the Commission went on to make clear that those seeking to create or maintain an antitrust exemption have the burden of proof "to show a convincing public interest rationale" for the exemption, and that "[T]he defects in the marketplace necessary to justify an antitrust exemption must be substantial and clear". (Emphasis supplied.)

Simply put, I know of no compelling evidence which demonstrates the unworkability of competition in MLB, much less a clearly paramount social purpose to be served by an antitrust exemption; nor am I aware that any defects in the marketplace sufficient to warrant an exemption have been demonstrated by substantial and clear evidence. Absent such evidence and such a demonstration, it is difficult to see how granting an exemption in favor of baseball's owners—for that is whom the exemption runs to—represents sound public policy. This conclusion is buttressed by the experience of the other professional team sports, most notably the National Football League (NFL) and the National Basketball Association (NBA), both of which operate successfully, but operate subject to the antitrust laws.

The so-called baseball exemption did not come about because the Congress concluded that an exemption should be granted. Rather, the exemption came about because the Supreme Court in Federal Baseball, in 1922, found the exhibitions of baseball games to be "purely state affairs". Had the case been heard a few years later, that same finding would clearly have been inconsistent with the emerging concept of interstate commerce, and we would likely not be here today. This is not a case in which a public policy rationale for an antitrust exemption has been articulated.

Obviously, there is no remaining question about professional baseball's status with respect to interstate commerce. The fact that it is in interstate commerce is undeniable; the Supreme Court in Flood so held, and the industry itself admits it. MLB has gone so far as to invoke the Constitution's Commerce Clause for protection against state enforcement actions! [1]

So what precisely is it about the organization or operation of Major League Baseball that justifies its belief that its conduct, even if conceded to be unreasonably

[1] As indicated in papers filed by appellants in the recent Minnesota Sports Facilities case.

anticompetitive, should nonetheless be shielded from judicial review under the antitrust laws? Surely, if MLB is to enjoy special status under the antitrust laws, its current owners, which include some of the largest and most successful corporations in the world, should be able to specifically articulate those practices in which they engage or may wish to engage which would otherwise violate the antitrust laws. But it is not enough to simply articulate what practices would constitute an antitrust violation in order to make the case for an exemption; more is required. It is up to MLB to demonstrate in a compelling way why it is in the public interest for the practices it feels would be unreasonably anticompetitive to nevertheless be permitted. Remember that a showing that certain conduct is, in fact, reasonable (e.g., that "contraction" under the current facts is not unreasonably anticompetitive) does not justify an exemption from the antitrust laws; rather, such a showing would demonstrate that the conduct was not violative of the antitrust laws in the first place, and would therefore not support the case for damages.

This goes to the very heart of the matter. In practical effect, an exemption means that the question of whether MLB is acting in an unreasonably anticompetitive manner may not be asked; the inquiry may not be made. There is no standard against which the conduct may be weighed; there is no forum in which the facts can be ascertained; there is no judge or jury before whom a complaint may be heard. Moreover, if there is to be an exemption, an undefined or blanket exemption means that any conduct not specifically covered by the antitrust laws, whether or not foreseeable, may be claimed to be exempt; one does not know what the extent of the exemption is or might be. The question which then arises is whether this is a sound basis upon which to formulate public policy.

What, then, should our public policy be? Should baseball be treated differently than other businesses, than other sports? For what purposes? To what extent? It is apparently the position of baseball's owners that, with the exception of the Curt Flood Act, the holding in Federal Baseball means that any and all of its other actions are immune from antitrust scrutiny. Thus, in their view, no one in Minnesota may even ask if the actions or motives of the decision to contract the Twins were in furtherance of an objective forbidden by the antitrust laws, nor may the Attorney General of Florida even investigate the facts with respect to the Florida teams. What public policy underlies this result? Is the doctrine of stare decisis being served at the expense of sound policy and equal justice?

In my view, the reading of the cases that makes the most sense in the context of public policy is the opinion of Judge Padova in Piazza (a copy of which is attached), which was endorsed by the Florida Supreme Court. When the "Curt Flood Act of 1998" (CFA) was enacted, it was my view that the combination of Piazza and the CFA would virtually eliminate any special immunity for MLB, leaving it with only those statutory immunities Congress has or will deem appropriate for major league sports, such as the non-statutory exemption provided by labor law. (See the "Sports Broadcasting Act of 1961"[2], which expressly grants immunity to Baseball and the other professional team sports for its collective actions in selling national broadcasting rights.) However, subsequently, the Minnesota Supreme Court, and, recently, a federal district court in Florida have gone the other way. Thus, it is unclear what the status of the law is. I expect that uncertainty to remain until the Supreme Court again considers the question for the first time in a case not about the reserve system—or until the Congress clarifies the law.

Everyone understands that this Committee is holding this hearing, as the House Judiciary Committee did two months ago, because of the decision by MLB's owners to eliminate, or "contract" two franchises, rather than attempt to sell or relocate them. The question then becomes whether the Congress should consider legislation to clarify the law, so as to make it clear that such decisions either must comply with the antitrust laws, or that the owners have an exemption in this respect. While there is no doubt of my position, given my testimony in hearings before this Committee and others over nearly two decades, I believe that it is in the public interest to clarify the law, even if that clarification is that there is, in fact, a compelling public policy interest such that baseball's owners should enjoy an exemption from the antitrust laws. And the case is there to be argued. On the one hand, MLB can be asked to demonstrate why it is in the public interest for an exemption to be had; alternatively, the people of Minnesota and elsewhere should have the opportunity to demonstrate why it is in the public interest for unreasonably anticompetitive actions with respect to the number and location of franchises to be subject to appropriate sanction (and at the very least, investigation) under the antitrust laws.

In a very real sense, the entire debate about the number and location of franchises simply comes down to whether such decisions should be made by owners free

[2] 15 U.S.C. 1291, et seq.

from the public policy standard established by the antitrust laws or some other standard established by the Congress, or whether the owners of major league teams should be required to conform their actions to conduct not unreasonably anti-competitive. Should the public policy of the United States be that that the owners have unlimited discretion—regardless of the action taken or the motive behind it—or should such decisions be made against the backdrop of the antitrust laws, with the courts able to ascertain the facts and determine whether the conduct passes muster?

I thank the Committee for the opportunity to submit my views, and I will be happy to answer any questions.

Chairman LEAHY. Thank you.

Senator DeWine is a former Chairman and currently the ranking Republican on the Antitrust Subcommittee, so I am going to go somewhat out of our procedure now that he is here and recognize him, and then we will go next to Mr. Brand.

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. I thank the Chairman for your courtesy.

Let me thank you, Mr. Chairman, for holding this timely hearing on the application of our Federal antitrust laws to major league baseball. The Judiciary Committee has maintained historically a longstanding interest in this area, so this is one in a long line of hearings on this particular issue.

Now is a critical time for major league baseball. There is no long-term labor agreement. Controversy is raging about potential contraction. And baseball today, quite simply, is a sport of haves and have-nots, a game where the teams with the biggest bucks can buy the best players.

The simple fact is this. There is a direct relationship between the levels of revenue that teams bring in and their ability to compete on the field. If you want to win consistently, you have to spend a lot of money, year after year after year. Most teams simply cannot afford to do that, and therefore, most teams simply cannot in reality compete.

This is an issue that I raised well over a year ago when I chaired an Antitrust Subcommittee hearing to examine and highlight revenue imbalance. Since that hearing, have things improved? The answer we all know: Not at all. In fact, things just keep getting worse.

The revenue gap between the richest and the poorest clubs has expanded from $130 million in 1999 to $152 million in 2001—and heaven knows what it will be in 2002. As a direct result, the payroll gap is of course exploding. Every year, the top few teams spend more and more money on premium players, and every year it becomes harder and harder for other franchises to compete. Last year, the Yankee payroll was $121 million; this year, it is estimated that it will be $130 million, maybe even higher than that.

In contrast to the Yankees' $130 million, last year, the Cincinnati Reds spend about $42.5 million on players, and the Pittsburgh Pirates spent about $41.5 million on players. And we do not expect that either one will go up very much this year.

These are two great, traditional baseball franchises with long histories and a very solid fan base. Pittsburgh has a beautiful, brand new ballpark to generate extra revenue, and the Reds will have a new ballpark in the year 2003. But even when you combine

these two teams' payrolls, they are not even close to the Yankees'. That is why it is crucial that we examine once again how baseball is managing itself and whether it is time for baseball to operate under the same laws currently applied to other sports leagues.

Accordingly, we must focus on whether the antitrust exemption helps or hurts baseball—not whether the exemption helps the players, and not whether it helps the owners, but whether it helps the sport itself, and ultimately, therefore, the fans.

Realistically, how can teams compete year after year when they cannot afford to pay for the best players? The answer is simple: They cannot. Everybody understands it. Everybody gets it. The fans get it. They complain to me whenever I am back in Ohio and we talk about baseball.

The owners get it. In 2000, the Commissioner's Blue Ribbon Panel report called for measures to solve baseball's revenue disparity problems.

And the players get it. Baseball Weekly published a survey of major league baseball players in May 2000. In response to questions about the biggest problem facing the game of baseball, the players—the players—said it was competitive balance.

So everyone agrees. But here is what bothers me. If everyone understands that there is a significant revenue imbalance, why can't the players and the owners just sit down and fix it? As I said already, I chaired a hearing specifically on this subject a year ago. We discussed a lot; a lot of important issues were raised. But the problem is still not fixed, and quite candidly, I do not see any indication that anyone is serious about getting it fixed. It is getting worse.

The way I see it, today we have another opportunity to look at this problem in the context today of the antitrust exemption.

The blue ribbon panel suggested a number of measures including enhanced revenue-sharing, enhanced competitive balance taxes, minimum payrolls, and many others, up to and including contraction and franchise relocation. There has been a great deal of dispute about a number of these recommendations, so today, I think we need to examine the impact of these possible actions and whether the antitrust exemption affects the ability of the league to implement these measures.

And I would like to find out specifically from our witnesses on the panel today what impact baseball's antitrust exemption is having on efforts to decrease the revenue disparity. In other words, to put it bluntly, does having the antitrust exemption help or hurt? To me, the biggest question that is facing major league baseball and the thing that I think fans are the most concerned about is the terrible disparity in income.

As a Senator, a member of the Judiciary Committee, and the Ranking Member of the Antitrust Subcommittee, I want to know what the owners and the players are doing to fix this problem. As a fan, I want a solution to this problem so that every year, I can look forward to spring training with a realistic hope that the Indians and the Reds both have a shot at winning the pennant.

Senator FEINSTEIN. I would like to recognize Mr. Brand. Mr. Brand is the Vice President of Minor League Baseball. We want to welcome you here. Please proceed.

STATEMENT OF STANLEY M. BRAND, VICE PRESIDENT, MINOR LEAGUE BASEBALL, WASHINGTON, D.C.

Mr. BRAND. Madam Chair, Senator Hatch, members of the committee, thank you. I appreciate the invitation to be here today.

Minor league baseball is comprised of is comprised of 206 teams and 18 leagues playing professional baseball in the United States, Canada, and Mexico at the AAA, AA, A, and rookie levels. Last year, minor league baseball drew almost 39 million fans.

Repeal or alteration of the exemption is a serious threat to the survival of minor league baseball, particularly at the A and rookie levels. Last year, MLB spent over $130 million on direct player development costs, including minor league salaries, and another $90 million on signing bonuses and scouting.

This subsidy underwrites the presence of minor league baseball in over 100 small markets. Repeal or alteration of the exemption would inevitably affect the incentive that MLB has to continue its investment in minor league player development.

At the core of the incentive is the minor league player draft and reserve clause which permits MLB to retain the services of minor league players long enough to bring them to the major leagues. If MLB determines that the antitrust laws make it too risky to draft and then reserve players for 6 years, they can expect to spend money on many fewer players. Subjecting the minor league draft and reserve class to challenge as illegal restraints of trade under the antitrust law not only affects the major league's incentive to invest, but the cost of facing these challenges could overwhelm us in the minor leagues.

We do not have any TV revenue, and ticket sales and fence sign advertising would not allow us to mount a successful defense to these suits.

That is why we and the Members of Congress representing the communities that we play in fought hard to include a clear and comprehensive carve-out for the minors during enactment of the Curt Flood Act.

When we examined S. 1704, the bill introduced by Senator Wellstone, and its companion in the House, we were alarmed to find that it deleted key provisions of the Curt Flood Act, including the section protecting the core incentive for major league baseball organizations to pay for minor league players, the minor league player draft and reserve clause.

This was particularly puzzling since the only stated purpose of the bill was to remove the antitrust protection for decisions to eliminate or relocate major league clubs.

The potential for using the absence of all the language contained in the Curt Flood Act to imply that the antitrust immunity no longer applies to minor league player/umpire/franchise issues is not insubstantial, and it would certainly encourage potential plaintiffs to file lawsuits that might raise this question, cause us crippling expense, and possibly produce holdings that would be very damaging to our long-term interests.

It is particularly troubling that this language is omitted given the long and arduous efforts we made to have it included in the final version of the Curt Flood Act—language, I would add, that was facilitated by the efforts of then Chairman Hatch and Ranking

Member Leahy to obtain agreement among the parties on this issue.

Why the bill so glaringly omits the agreed-upon Curt Flood language is a mystery to us. I can tell you this. On April 10, 1994, Mr. Fehr was quoted in The Los Angeles Times as stating: "Too much money is being wasted in the minor leagues."

Since that time, the Players Association has been the principal proponent of total and outright repeal of the antitrust exemption. During consideration of the Curt Flood Act, the players' representatives resisted adding language to this legislation, making clear to the protection to the minor leagues. I can only conclude that the Players Association seeks repeal in order to diminish minor league baseball so that they can lay claim to the money they say is wasted on the minors and divert it to major league players.

Beyond the deletion of specific protections for the Minor Leagues in the Curt Flood Act—and I appreciate Senator Wellstone's comments about not intending to harm the minor leagues—the erosion of the immunity for yet another aspect of the business of baseball represents a troubling precedent. It accelerates what we believe is an unjustified momentum begun with the Curt Flood Act, of piecemeal repeals of aspects of the immunity whenever MLB makes a difficult or unpopular business decision.

Finally, I have been asked to address the impact of contraction at the major league level upon minor league baseball. As I look up on the dais I see minor league baseball represented in each and every one of your States, in some places more than one place.

As the president of minor league baseball, Mike Moore, stated on November 6 last year: "We plan on baseball being played by all of our franchises next season. Commissioner Selig has indicated to me that following any definitive decisions on contraction, we will work closely on formulating solutions pertaining to the minor leagues. The commissioner has been a strong supporter and ally of minor league baseball, and we will continue to work together toward our common goals."

Indeed, Commissioner Selig, testifying last December before the House Judiciary Committee, stated that it was not necessarily the case that the minor league clubs would be contracted even if their affiliated major league clubs cease to exist.

There are a number of ways that this can be addressed, including pooled arrangements under so-called cooperatively run minor leagues, or assumption by major league affiliates of additional minor league clubs.

Suffice it to say we will be working very diligently to preserve viable minor league clubs in the event of major league contractions.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Brand follows:]

STATEMENT OF STANLEY M. BRAND, VICE PRESIDENT, MINOR LEAGUE BASEBALL

Mr. Chairman and Members of the Judiciary Committee, I appreciate the invitation you have extended to me as Vice President of Minor League Baseball ™ to participate in the hearing today on the application of federal antitrust laws to baseball. In the almost 10 years that I have served as Vice-President of Minor League Baseball ™, this is the first opportunity I have had to directly address this Committee on this important subject even though the issue of baseball's antitrust exemption has been actively debated in and acted upon by Congress during that time period.

The recent interest in Congress in baseball's antitrust exemption was generated by the decision by Major League Baseball ("MLB") announced by Commissioner Selig on November 6, 2001 to eliminate two major league clubs for the 2002 season. Discussions to shrink baseball at the Major League level had been previously reported, but the official announcement predictably triggered a host of congressional reactions, including introduction of a bill by Senator Wellstone, (D–MN), the purpose of which was stated to be repeal of baseball's immunity with respect to the elimination or relocation of Major League teams.

This bill produced considerable, and in our view, justifiable alarm throughout Minor League Baseball™ which had worked diligently in 1998 to insure that the Curt Flood Act of 1998 included protection for the minor leagues. We believed then, and we still believe today, that further attempts to limit or change baseball's antitrust immunity represents a threat to Minor League Baseball™, is not justified by any compelling public policy and will not achieve the goals for which it is proffered.

Minor League Baseball™ is comprised of 206 teams in 18 leagues playing professional baseball in the United States, Canada and Mexico at the AAA, AA, A and rookie levels and consists of approximately 5548 active players. Last year, Minor League Baseba™ drew almost 39 million fans during the championship season. Repeal of baseball's antitrust exemption would inevitably affect one important incentive that MLB has to continue its investment in minor league player development, which in turn could result in the elimination of many minor league teams, particularly at the Rookie and A levels.

Last year, MLB spent over $130 million on direct minor league development costs (including minor league player salaries) and another $90 million on player bonuses and scouting as a means of developing talent for the Major Leagues. It is this subsidy that assists in underwriting the presence of Minor League Baseball™ in small towns and rural America.

In the event of repeal, the minor league player draft and reserve clause might be challenged as illegal restraints of trade under § 1 of the Sherman Act. *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976); *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1977). In addition, the Professional Baseball Agreement between the Majors and Minors, which ensures competitive balance among MLB teams in player acquisition and retention, also might be challenged as illegal under §§ 1 or 2 of the Sherman Act. *Philadelphia World Hockey Club* v. *Philadelphia Hockey Club*, 351 F.Supp. 462 (E.D. Pa. 1972). NAPBL leagues banding together to affiliate with MLB on uniform terms in the absence of the PBA may likewise be challenged under § 1 of the Sherman Act. *FTC* v. *Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). Although we are hopeful that Minor League baseball would prevail against such challenges, the cost of facing them would be enormous and would itself threaten our survival. The upshot is that minor league player development will be stripped of the stability created by the player draft, reserve clause and the PBA. The Minors have virtually no TV revenue, and their ticket sales and fence sign advertising does not generate the kind of cash flow that can support a legion of lawyers.

If MLB determines that the antitrust laws make it too risky to draft and then reserve players for six years, the nature of MLB's investment in minor league players could change dramatically. Without the reserve clause, MLB can be expected to spend money on many fewer minor league players. MLB will not spend money signing prospects in the hope that they develop only to have them subject to being acquired by other teams due to their short-term contracts. With the signing of few minor league players overall, there will naturally be fewer minor league teams. This loss of teams would adversely affect numerous player development investments in facilities. The loss to consumers of affordable, intimate and wholesome entertainment provided by minor league clubs could be extensive, particularly in smaller communities and markets.

Such reduced output is of course antithetical to the policy underlying the antitrust laws to increase—rather than decrease—product. One can speculate that even in the absence of an agreement to sign players to uniform contracts with renewal options, major league organizations individually have superior bargaining power that will permit them to sign hundreds of lower level players to the same kind of one-year agreements with successive yearly options that are now required. If the antitrust laws are applicable, how will MLB clubs assess the risk that such a pattern will be challenged as being illegally collusive? Isn't it likely they will attempt to avoid that risk (and reduce their expenses) by trying to shift the risk and burden of employing the players to the minor league teams (which the minor leagues can ill afford)?

A number of academics have suggested that the first year player draft could be upheld under a "rule of reason" analysis. *NCAA* v. *Bd.* of Regents of the University

of Oklahoma, 468 U.S. 85 (1984). However, the minor league draft certainly will be subject to challenge since minor league players, unlike players in the NBA and NFL, are not part of any collective bargaining unit and therefore the minor league player draft is not covered by the labor antitrust exemption. This is an important difference from other professional sports; unlike the NBA and NFL, baseball's draft extends to players who will never be part of the "major league" team and the bargaining agent that represents them.

For all of the foregoing reasons, we, and the Members of Congress representing our clubs and their communities, fought hard to include a clear and comprehensive "carve out" for the minor leagues during enactment of the Curt Flood Act of 1998. The "carve out" was hammered out among representatives of Major League Baseball, the Players Association and Minor League Baseball™ and incorporated as agreed to by these entities into the final legislation. When we examined closely the provisions of S. 1704, the bill introduced by Senator Wellstone, we were surprised to find that while the bill was purportedly drafted to parallel the language contained in the Curt Flood Act of 1998, with only language changes to reflect that this bill would lift baseball's antitrust immunity with respect to contraction and franchise relocation rather than major league player matters (the subject of the 1998 Act), the actual language of the current bill has deleted some language from the Curt Flood Act that is unrelated to contraction and franchise relocation. This puzzling deletion of language from the Curt Flood Act has the potential to be argued to a court as having some substantive significance, despite the limited stated purpose of the bill, and thus might lead to unintended consequences damaging to baseball and particularly Minor League Baseball.

The most glaring example of this failure to track the language in the Curt Flood Act is in the express list of matters not affected by the bill in subsection 3(b). The Curt Flood Act had six items in its list of unaffected matters. To accomplish the lifting of the antitrust immunity only for Major League franchise contraction and relocation, the only change in wording in this list should be the removal from item #3 of the words "franchise . . . relocation." However, S. 1704 omits far more language than just these two words.

First, the bill omits entirely all of what were items #1 and #5 in subsection 3(b) of the Curt Flood Act. Those two items stated:

> (1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;
> (5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons;

In addition, the Curt Flood Act's item #3 in the list of unaffected matters (which in the proposed bill is now item #2) has been edited in the proposed bill by deleting the words "franchise expansion, location, and relocation," even though the stated purpose of the bill is to lift the immunity only as to contraction and relocation and only with respect to maior league franchises. If the bill's stated purpose is accurate, issues of major league expansion or location that do not involve relocation, and all franchise issues at the minor league level, should still be covered by the immunity and thus specifically referred to in item #3 (now #2).

These deletions in the proposed bill are very troubling and hold enormous potential mischief for Minor League Baseball. This is particularly so for the deletion of item #1 specifically identifying employment matters at the minor league level, the amateur or first-year player draft, or any reserve clause as applied to minor league players. As stated earlier, together the first year player draft and minor league reserve clause constitute the core incentive for Major League organizations to pay for the development of these players and any change in its foundation could wreak havoc on minor league economic stability. Also, taking out the item referring to umpires has potential implications for the minor leagues. And perhaps most troubling, the deletion in item #3 (#2 in the proposed bill) of the reference to all franchise expansion, location, or relocation matters removes from the bill the express protection for the minor leagues with respect to these types of franchising issues, putting at potential risk all of the minor league rules dealing with territories and territorial rights that protect the viability of all minor league teams, particularly at the lower classification levels in many smaller and rural markets across the country.

Furthermore, in subsection d(1) of the Curt Flood Act, it states in the second sentence: "As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not 'in the business

of organized professional major league baseball'." This language has been deleted from the proposed bill. Again, the reason for the deletion is not at all clear, but its absence when compared with the Curt Flood Act—is striking and might well be misinterpreted by a court some day as a deliberate statement of congressional purpose that could subject the minor leagues to significant antitrust risk.

The potential for using the absence of all of the language contained in the Curt Flood Act to imply that the antitrust immunity no longer applies to minor league player, umpire, or franchise issues is not insubstantial, and it would certainly encourage potential plaintiffs to file lawsuits that might test this question, cause the minor leagues crippling expense, and possibly produce holdings that would be very damaging to Minor League Baseball. It is particularly troubling that this language was omitted given the long and arduous efforts we made to have it included in the final version of the Curt Flood Act.

Beyond the impact of deleting these paragraphs from the Curt Flood Act, there are two more indirect ways in which it might have serious long term detrimental effects, especially to the extent the bill lifts the immunity for major league franchise relocation instead of just contraction.

First, the bill apparently would subject Major League Baseball to potential treble damage antitrust liability for any action relating to franchise relocation. As we have seen in other sports, particularly football, this has caused such an in terrorem effect on leagues that individual franchises are now essentially free to relocate without any league oversight. In other sports, this has created the phenomenon of teams essentially putting themselves up for auction to the highest bidding community and forcing taxpayers in many communities to provide hundreds of millions of dollars in direct and indirect subsidies to teams in order to attract or avoid losing a team. It is puzzling why, in response to Major League Baseball's announced efforts to contract by two teams, Congress would want to pass legislation lifting the antitrust immunity for both contraction and relocation. The historic baseball antitrust immunity has had an obvious restraining effect on relocations at the major league level and has served the public interest well by reducing the ability of teams to force huge public subsidies out of local communities. Denying immunity for relocation decisions could also create disruption in certain AAA minor league markets as well by subjecting those cities to uncertainties for the future of their AAA clubs, and bidding wars to attract major league clubs. Lifting the immunity with respect to contraction is one thing; lifting it with respect to relocation is entirely another that is not at all justified or even suggested by the current efforts of Major League Baseball to eliminate two teams.

How did we get from the carefully crafted and agreed upon provisions of the Curt Flood Act to the reduced and inadequate minor league protections of S. 1704. Sponsors of this legislation—and the Major League Players Association—have cavalierly and falsely asserted that the minor league exemption on "carve out" remains intact. I cannot explain why S. 1704 is drafted in this manner but I can tell you this: On April 10, 1994, Don Fehr stated in the L.A. Times that "[t]oo much money is being wasted in the minor leagues." Since that time, the MLBPA has been the principal and relentless proponent of total and outright repeal of the antitrust exemption. During consideration of the Curt Flood Act, the union steadfastly resisted adding language to the legislation making clear the protection of the minor leagues, and only relented under pressure from its own congressional allies when it became apparent no legislation could be passed without such language and the support of the minor leagues.

I can only conclude that the Players Association seeks total repeal in order to destroy minor league baseball so that Mr. Fehr can lay claim to the money "wasted" on the minors and divert it to his players.

Beyond the deletion of key protections for the minor leagues, the legislation would erode baseball's immunity for another aspect of its business without any demonstration that it will solve the problems for which it is advanced. It accelerates the unjustified momentum begun with the Curt Flood Act of lifting aspects of the antitrust immunity on a piecemeal basis whenever baseball makes a difficult or unpopular decision. Rather than deal directly with the event that generated concern (planned contraction), the bill, like the Curt Flood Act, erodes a long-standing legal principle that has served the public well. This in turn makes it politically easier to lift the immunity even further when the next problem arises, a trend that will undoubtedly have adverse affects on Minor League baseball. It's bad public policy and could hasten the demise of grassroots baseball with no assurance that it will achieve its desired result.

There has been much discussion concerning the lack of competitive balance at the Major League level and the economic remedies available to restore healthy on-field competition to baseball. What is seldom discussed is the role of the exemption in

buttressing competition at the Major League level through minor league player development. In the event of repeal, major and minor league teams will presumably be free to compete openly for the signing of baseball player prospects. Players signed by major league teams could presumably be placed either on the major league roster (currently 40 players) or assigned to minor league teams for further development. Free of standardized player contracts with fixed salaries and reserve periods, major league teams would compete for the top prospects. Minor League Baseball™ believes this competition will upset the competitive balance that is essential for Baseball's viability. The wealthier teams would be in a position to outbid smaller market teams for available first year draft talent. This can only exacerbate the competitive problems detailed in the Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics (July, 2000).

If repeal triggers unbridled competition in the payment of salaries for minor league players, Minor League Baseball™ believes the rich will simply get richer at the expense of less prosperous clubs. This scenario is identical to that of the 1940's-50's when Branch Rickey of the St. Louis Cardinals purchased a large number of minor league teams from which he could stock the major league Cardinals. It was this very practice, which led to the player draft, which was designed to ensure balance in the hiring of players.

While professional football and basketball look to college for developing professional players, there exists grave doubt that colleges could—or should—fill the void likely to be created by the reduction in minor league clubs that will result from repeal of the baseball antitrust exemption.

As colleges currently organize their baseball programs, there is little prospect colleges could train baseball players as effectively as do the minor leagues. Baseball is played primarily during the summer when colleges are closed. The NCAA will not permit students to play in the minor leagues without forfeiting their college baseball eligibility. Some have argued that the "summer leagues," such as the Alaskan and the Cape Code leagues, may fill the gap during the summer months when colleges are closed. However, in the view of baseball experts, such leagues are simply not competitive enough and their seasons not long enough to develop the talent as well as traditional minor leagues. It's problematic too whether even their existing caliber of play could be preserved if summer leagues were expanded as needed if minor league teams fail.

In addition, as a general rule, minor league teams have better coaches, facilities and competition than is found in college ranks. Colleges are still not likely to develop players as effectively as do the minor leagues. In college, students may play baseball at most 3 to 4 times per week for three months. And yet, baseball is an extremely difficult sport requiring considerable skill and finesse. These skills can best be developed only in the minor leagues where players play every day, 6 to 7 months of the year. Only then can prospects advance to the major leagues in, on average, 3 to 4 years' time. As it is, college baseball players usually require 2 to 3 years' additional development before they are prepared to play in the major leagues. College AllAmericans frequently languish in Rookie League baseball before quitting the game altogether.

We have serious doubts that the NCAA would permit MLB to invest in college baseball programs on terms that are acceptable to MLB. Surely the NCAA would require that all of the hundreds of NCAA baseball programs be treated alike, all receiving the same level of financial support from MLB teams. The logistics of financing such a system would in our view be insurmountable, not to mention the chaos likely to be created by mixing professional and amateur sports programs and their respective purposes and goals.

Minor League Baseball™ believes it is inadvisable to create an alternative player development system that merges, or at least commingles, professionalism and education. We believe that our colleges ought to concentrate on developing major league doctors, scientists and educators, not major league ballplayers. We cannot foresee how creating greater reliance on college baseball, as a player development system will do anything but expose baseball to the scandals that have blemished other college athletics.

Finally, I have been asked to address the impact of contraction at the Major League level upon Minor League Baseball™ As the President of Minor League Baseball™, Mike Moore, stated on November 6, 2001:

> We plan on baseball being played by all of our franchises next season. Commissioner Selig has indicated to me that following any definitive decisions on contraction, we will work closely in formulating solutions pertaining to the Minor Leagues. The Commissioner has been a strong supporter and ally of Minor League Baseball™ and we will continue to work together toward our common goals.

Indeed, Commissioner Selig in testifying last December before the House Judiciary Committee stated that it was not necessarily the case that minor league clubs would be contracted if their affiliated Major League club ceased to exist. There are a number of ways in which this issue can be addressed, including: 1) assumption by other Major League clubs of the contracted clubs minor league professional development agreements; or 2) maintenance of the contracted minor league clubs player development contract on a "cooperative" or shared basis among several Major League clubs. Suffice it to say that we will be working cooperatively to preserve our viable minor league clubs in the event of Major League contraction.

Chairman LEAHY. Thank you very much.

Mr. DuPuy, there was a report in The Washington Post by Mark Asher which I am sure you have seen that says that major league baseball wanted to keep its plans for contraction a secret until after the World Series. And you are quoted as explaining that major league baseball owners initially decided not to identify the teams targeted for elimination because it was a fluid situation—nobody wanted to jump the gun and cause any more grief and heartbreak than was necessary.

In what way was the situation so fluid that baseball decided to keep fans of more than two teams at risk and guessing?

Mr. DUPUY. Senator, as the commissioner has repeatedly stated, no final vote has been taken on the identification of the two teams. Contraction was a process that was discussed over the course of some—

Chairman LEAHY. It was not a question of the vote. You were quoted as saying that they decided not to identify the teams because it was a fluid situation.

Mr. DUPUY. Well, Senator, given what was going on with regard to the season, with regard to the World Series, and in the aftermath of September 11, the commissioner and the owners decided that they did not want to disrupt the season, they did not want to disrupt the post-season. The commissioner indicated that he would turn his attention to the economic ills of baseball as soon as the season was over. The season ended on November 4, and on November 6, he announced that the clubs had voted to contract. It was an effort to protect the season, Senator.

Chairman LEAHY. At that time, was there any discussion—are you aware, directly or indirectly, of any discussion among the owners of trying to leverage the threat of contraction into more public financing of stadium facilities?

Mr. DUPUY. Absolutely not. In fact, quite the opposite—contraction is an acknowledgement that the owners have been unable to succeed in those locations in getting venues necessary to support the game in the current economic environment. It is just quite the opposite.

Chairman LEAHY. I am not sure that that is necessarily so. Sometimes the threat of it might raise the possibility of more public financing. But it is your testimony here before the Senate that at no time whatsoever to your knowledge was there any discussion among the owners that the threat of contraction could possibly lever into financing more public facilities?

Mr. DUPUY. That is most certainly my testimony.

Chairman LEAHY. Thank you.

Mr. DUPUY. Contraction was a decision made based on the economics of the game. It was not a threat, it was a decision.

Chairman LEAHY. If Governor Ventura and the people of Minnesota had given in to the demands for a publicly financed facility, was major league baseball set to make one of the Florida teams a contraction candidate, as you refer to teams slated for elimination?

Mr. DUPUY. Senator, we have a number of teams that are in trouble. In Minnesota, there have been something like 40 different stadium initiatives. The last one, the owner agreed to pay 83 percent of the cost of the stadium himself. So I cannot speculate as to what might have happened, but—

Chairman LEAHY. That was not precisely my question. Had he gone along with the publicly financed facility—and there had to be alternatives being discussed by you and the owners as you went along—was a Florida team a contraction candidate at that point?

Mr. DUPUY. There were a number of teams that were contraction candidates, including teams from the State of Florida, yes, sir.

Chairman LEAHY. Thank you.

Mr. Brand, your testimony ends with a matter of great interest to me—whether minor league clubs would be contracted if their affiliated major league teams cease to exist. There would never be the possibility of any parochialism to come out of Members of the Senate—

Mr. BRAND. We are in favor of parochialism, Senator.

Chairman LEAHY. But we do have the Vermont Expos, a great team. Do you consider the Vermont Expos "a viable minor league club," to use the words in your testimony? Is there any assurance that the Vermont Expos will continue to exist within the baseball minor leagues beyond 2 years?

Mr. BRAND. Absolutely we consider it viable. That is why that team was moved there several years ago.

From every perspective we have, that would be one of the several locations that we would want to fight to preserve. In fact, I cannot imagine—while I cannot speak for major league baseball—I cannot imagine that that would be a market that they would want to see dissolved. And as I said, there are a number of ways to keep that club alive, including cooperative arrangements or, again, additional clubs for other major league affiliates. But certainly that would be our intention.

Chairman LEAHY. I have other questions, but I have gone 8 seconds over, and I will stop at this point—and of course, would greatly encourage everybody else to do the same.

Senator Hatch.

Senator HATCH. Let me just ask one question, and I will submit other questions in writing. As you know, these are areas that really do concern me, and I see answers on both sides, and I just want to do what is right.

Mr. DuPuy, according to financial industry estimates, the value of all baseball franchises increased from $3.1 billion in 1996 to over $7.9 billion, almost $8 billion, in 2001, or about 18 percent each year. According to these same estimates, each of baseball's 28 franchises that existed in 1996 is worth more today than in 1996—and that is good. But moreover, each of the three franchises sold in recent weeks, Boston, Florida, and Montreal, sold for at least 30 percent more than those financial industry estimates as I understand it.

If baseball is losing as much money as you say, why do its assets continue to appreciate so rapidly?

Mr. DUPUY. Senator, the numbers that you accurately state were estimates. In fact, the Blue Ribbon Panel report which has been provided to the Committee at Table 15 showed the rate of return on the last 13 clubs that were sold, and in five instances, those clubs had a negative rate of return based on their operating losses. In four instances, they essentially broke even, and in four instances, they did have a good rate of return, but three of those four had new stadiums.

With respect to the clubs you just mentioned, there was one buyer for Florida. Florida sold for exactly the same amount that Mr. Henry purchased Florida for 3 years ago, and Mr. Henry incurred approximately $40 million in losses over the 3 years, so he had a negative rate of return.

The Boston Red Sox is one of our flagship franchises, but as you also know, the sale of the Red Sox included 80 percent of the New England Sports Network, which is an extraordinarily valuable property; it included Fenway Park, which is an extraordinarily valuable property; and it included adjacent real estate. So that number, given that the franchise had been held for so long by the Yockey Foundation is very hard to estimate in terms of the rate of return there.

With regard to Montreal, Senator, we have no buyer. We had no buyer, and we have no buyers. There was no one interested in operating Montreal, there was no one interested in buying Montreal, and we ended up having to buy the franchise.

Senator HATCH. Attorney General Butterworth, in your testimony, you state that in the process of enacting the Curt Flood Act, members of this Committee "confirmed that the passage of the Act had no effect on the authority of State attorneys general to investigate baseball under State antitrust laws." In fact, you quote a statement that I made in response to the question from Senator Wellstone regarding whether the Act would overturn the Piazza and Butterworth cases. I replied that the Act would "simply make clear that major league baseball players have the same rights under the antitrust laws as do other professional athletes" and that the Act "does not change current law in any other context."

Would you explain in detail if you would what relevance, if any, you believe the Curt Flood Act and the statements you quote have regarding the validity of the holdings of both Piazza and the Butterworth decisions?

Mr. BUTTERWORTH. Yes, Senator. Thank you very much, and thank you very much for sponsoring the Curt Flood Act with Chairman Leahy.

Senator Wellstone put those comments into the record because of the request of his attorney general, Skip Humphrey, from the standpoint of not changing whatever the law was on antitrust. It was our position that the Piazza case was correct and that Butterworth versus National League was correct. And in fact, in the chairman's initial comments that he made, his comments were such that he believed that the only antitrust exemption that was there with Supreme Court cases was with the reserve clause. That was it, period.

And the Florida Supreme Court, when I filed antitrust subpoenas against the National League for not allowing them to come into Tampa, the Florida Supreme Court ruled that the antitrust exemption only applies to the reserve clause. So the particular comments that we have, we just wanted to make sure that there was no change in the law pursuant to the Curt Flood Act as it pertains to the Butterworth case or the Piazza case.

Senator HATCH. Mr. Brand, let me ask you a question. As I understand it, the current contract between major league baseball and minor league baseball will expire at the end of 2003, that season.

Mr. BRAND. Yes, sir.

Senator HATCH. So far, as I understand it, Commissioner Selig has refused to provide any guarantees of the current number of minor league clubs after that time. So isn't it possible that if a contraction at the major league level is carried out, that at that time there will be a corresponding contraction in the minor league world as well?

Mr. BRAND. It is theoretically possible, but as I said, he did state in the House Judiciary Committee that it was not necessarily the case that that would be so.

The nature of our negotiations over the PBA over the last 9 years has been excellent, and we have been able to cooperate on a number of issues and work them out, and I cannot imagine that there would be an interest on the other side in doing anything but maintaining through some mechanism the very few but viable minor league clubs that would be affected by major league contractions.

Senator HATCH. May I, Madam Chairwoman, just ask Mr. Fehr one question?

Senator FEINSTEIN. [Presiding.] Yes. Please go ahead.

Senator HATCH. Mr. Fehr, do you have any comment—I have more questions, but I will have to submit them in writing—do you have any comments you would care to make?

Mr. FEHR. Just a couple of brief comments. First of all, at the time the Curt Flood Act was passed, the most recent decision of law was in fact the Piazza case and the Butterworth case. My recollection of the discussions to which Mr. Brand referred was that the Committee wanted to make certain that the Curt Flood Act was not deemed to change the law other than in the areas in which it specifically addressed it, without commenting on what that law was. But those were the last two decisions.

There has subsequently been a decision of the Minnesota Supreme Court and then, recently, of a Federal district court in Florida, which have not adopted the rationale of those cases, so there is uncertainty, and that may be part of the desire to clarify the situation.

Secondly, with respect to the number of minor league teams, I have not looked at the documents specifically, but I believe that the guarantee of the number of minor league teams contained in the professional baseball agreement is in fact less than the number of minor league teams currently playing. And while it is certainly conceivable, as Mr. Brand says, that we could have a situation in which we have more AAA teams and more AA teams than we have

major league teams, that has never happened before. They have always been the same.

Senator HATCH. Yes, I understand that.

Mr. FEHR. So I would expect that that would be an unlikely result. For purposes of the legislation, however, for purposes of public policy, the question would be not would it end up that way, but perhaps however it ends up, can there be a judgment made as to whether that was the result of unreasonably anticompetitive activity. That seems to me to be the issue. We cannot resolve that here; that takes a full investigation and a proceeding.

Senator HATCH. Thank you.

My time is up. I appreciate all the testimony.

Senator FEINSTEIN. Thanks very much, Senator Hatch.

Mr. DuPuy, I have always been a staunch supporter of the antitrust exemption, and it really goes back to my days as mayor, negotiating with Mr. Lurey and the Giants, and trying to do a new stadium when the Giants were in play. It was really the antitrust exemption that saved the Giants for San Francisco, and I am acutely aware of that.

So I watched with some interest when Peter McGowan came along and, instead of requesting public money, built a stadium on his own. And I happen to think that that is the way to go with respect to professional sports, that these are private franchises, and why should the people pay.

I am really concerned about this one, because I think that if you eliminate the smaller markets from having baseball teams, you essentially end up destroying baseball as we know it today as the national pastime. That is what I think this is doing.

I think there is a very interesting paragraph on page 16 of the report that goes on to say that eventually what we are going to have is the larger markets prevailing because of all the advantages of naming and all the accessories that come along with a larger market as opposed to a smaller market. If that happens, it will be tragic.

So as I see it, your league is in a pickle because you are going to have to make some substantial changes. Revenues are not declining, they are increasing. Yet we have these exorbitant salaries to pay.

So if I am going to continue to support an antitrust exemption, it cannot be at the risk of losing all smaller market teams, which is the way I see this thing going.

Could you respond to that, please?

Mr. DUPUY. I would like to respond to that, Senator, and I appreciate your comments about the efforts that we made to protect the San Francisco Giants, who now play in one of our premier facilities, and the fans of San Francisco had the thrill of watching Barry Bond set the home run record this year.

The irony of the panel today is that as you know, Attorney General Butterworth in fact sued under the antitrust laws to try to force the Giants to move to Tampa, and now he is here today indicating that he wants to sue to prevent the teams from moving out of Florida. And that in fact is one of the purposes of—

Senator FEINSTEIN. He has had a conversion.

Mr. DUPUY. He has had a conversion.

Mr. BUTTERWORTH. We will trade the Marlins for the San Francisco Giants.

Mr. DUPUY. But Senator, you underscore something that is very accurate. In certain indices, baseball actually is doing well. As the Blue Ribbon Panel report indicates, revenues have grown from $1.3 billion to $3.5 billion. We have 18 new or under construction stadiums in which teams play that have become destination points, as PACBEL has become. WE have 35 million fans attending minor league games. We had 70 million fans in each of the last 3 years attending major league games.

The exemption in fact has served all of those purposes very well. It has promoted franchise stability, and it has promoted the minor leagues. But I would submit that the reason we are here does not have to do with the exemption, and the reason why we are not thriving economically like the other leagues has nothing to do with the exemption, because in the areas covered by the exemption we do do better than the other leagues. We have not had relocations, where the other leagues have had 22 relocations.

Why we are here is an inability to get a labor deal that works. The NFL has a salary cap. It works. The NBA has some form of salary cap. It works. We have been unable to achieve a labor deal, and that has nothing to do with the exemption, because we repealed the labor protections in the exemption.

Senator FEINSTEIN. That is correct.

Mr. DUPUY. So what it has to do with is an inability to achieve a labor deal that has an appropriate blend of revenue sharing and some form of salary restraint. And the commissioner and the owners have indicated that they are ready to do substantially more revenue sharing. The Players Association has balked to that, in response to Senator DeWine's comments. The owners are serious about doing revenue sharing. The owners are serious about the recommendations made by some of the most distinguished people in America, and we have been unable to achieve that.

But I do not think that ties to the exemption. I agree—we would like to have major league baseball in as many communities as possible.

Senator FEINSTEIN. Well, I have to agree with you.

Let me just take on Mr. Fehr for a moment on this subject. Mr. Fehr, I remember Willie Mays in San Francisco. He lived in the city, he put his divot back, he helped young people. It was wonderful. Now there is talk of putting his memorabilia in a museum in San Francisco.

But baseball has changed now. Most players do not live in their communities; they do not do what they used to do. And their salaries are exorbitant, particularly the big stars. I adore Barry Bond because he hits a home run over into the water in San Francisco Bay, and it is great. On the other hand, these salaries are astronomical, and they are changing the nature of baseball.

What do you have to say about that?

Mr. FEHR. Let me respond to both the question you asked me and the question you asked Mr. DuPuy, and let me begin by suggesting that one of the dangers that you get into in a discussion is oversimplifying.

Let me begin with the question of the San Francisco Giants. We were faced in bargaining in 1990 with the suggestion that something had to be done because under no conditions could we maintain two teams in the Bay area. At the same time, the State of Florida was told, as it had been told for all of the last century until 1993, that under no conditions could it have a major league baseball team. It is sort of a class case of a vacant market. And I understand that as Mayor of San Francisco, dealing there, you do not want the team to leave. Certainly you understand that someone in Florida would ask why is it that we are faced with a monopoly that says no team may play here. You cannot startup a business. The barriers to entry in major league baseball are not high—they are absolute. You must be voted in. So you have competing considerations which need to be weighed.

Secondly, there is the suggestion that the number of teams that have difficulties is static. In fact, if we had been discussing contraction in 1990 or in 1989, what teams would have been at the top of the list? Atlanta, Cleveland, Seattle, and certainly San Francisco. Those teams are now regularly four of the top six or seven revenue producers in America. Seattle and San Francisco grossed, I believe, in local revenues the second and third highest of anyone. Now, what does that suggest?

Senator FEINSTEIN. But they are not making money. Only three teams, if I understand this report correctly, have made money.

Mr. FEHR. Let me come to that, Senator. As I indicated, this unfortunately takes a little explanation, so I hope you will bear with me, and I will be glad to submit further answers or to speak with you separate about that.

The point is how did that turn—what happened? Well, the management of those clubs began doing things differently than they had before.

Now, when we come to salary issues and whether salaries are exorbitant, one of the things which perplexes me is that most people would think the major league baseball players are management's dream union. Why is that? We say that we do not want to negotiate salaries. All we ask is that you do not conspire about setting them. We want people to have reasonable opportunities to seek work with other employers just like everyone else does. It is a right that everyone else takes for granted. And even with the free agency that we have, major league baseball players still cannot pick up and move; they are limited in matters that we have agreed to—and I do not suspect they will be substantially different in the next agreement—to wait until 6 years in the major leagues before they can become a free agent, which is usually 10 or 12 years, that is to say, the overwhelming majority of their career.

Why do players not live in their communities as much as they used to? There is a very simple reason—because they now work out year-around, and therefore they need to live in warm weather climates. That is why fewer of them do.

In terms of salaries, we have been able now to track aggregate salary levels as a percentage of revenues going back over 20 years—

Senator FEINSTEIN. Excuse me. Are you saying they do not live there because of climate?

Mr. FEHR. What I am saying is that players tend more often to want to work out in the winter time, and as a result of that, they tend to want to live in more warm weather climates.

Senator FEINSTEIN. I thought Florida had a pretty good warm weather climate.

Mr. FEHR. I am not familiar with what the weather situation is in San Francisco specifically. But the majority of players in the off season live in California, Arizona, and Florida.

On salaries—and then I will conclude; I know time is restricted here, and this will take substantially more discussion—we have been able to track salaries. Aggregate salary levels are more or less the same percentage of revenues now that they were in 1980 or 1985 or 1990 or 1994. Salaries increase because revenues have increased. As Mr. DuPuy quite correctly indicated, baseball's revenues went from approximately $1.3 billion in 1990 to approximately $3.5 billion or slightly more than that, as constantly reported in 2001.

You would expect, then, that salaries in terms of rate of growth would more or less reflect the rate of revenue growth in a free market, because the players' contribution to the product, you would expect in economic terms to be more or less the same. That has in fact happened. Players' salaries are a product of the revenue they produce, just like a worker's contribution is most places that that takes place.

I would be glad to have further discussions with you about this or to respond in another forum. I know that time is limited today, and I suspect there may be more questions.

Thank you.

Senator FEINSTEIN. Thanks, Mr. Fehr.

I know that Senator DeWine has more questions, but I would like to ask Mr. DuPuy if I may to respond to that, because this is sort of the heart of the argument between the league and the players.

How do you respond to that? It has been going on for years now. How are you going to break through it? I do not want to see these communities lose their teams.

Mr. DUPUY. Let me respond with the easiest example given the time constraints. First of all, salaries grew from 50 percent of revenue to 60 percent of revenue since 1980, so there has been a substantially larger portion of revenues devoted to salaries. But I did not hear Mr. Fehr respond, in response to your question, to the inquiry with regard to revenue sharing—why the Players Association will not allow the clubs to share more revenues so that the small markets can compete, so that some small markets can get into the playoffs, so that some small markets can occasionally get into the World Series.

Senator FEINSTEIN. Let us get an answer to that.

Mr. Fehr?

Mr. FEHR. Thank you.

In 1994, the proposal that produced the strike was evaluated by the Congressional Research Service—I believe that is the right name; it is the arm of the Library of Commerce. They wrote a report on it, and they said that the revenue sharing proposal there which was combined with a salary cap was designed to benefit

principally the largest-income clubs. It had been effects on players, too, and we opposed it.

Coming out of that labor dispute, we ended up with an agreement which provided for revenue sharing by agreement. Although there was a lot of work done on it, it was done pursuant to a conceptual framework that I think we had put forward initially. And vastly more revenue is shared now than was shared back in 1994 and certainly previous to that.

In these negotiations, we understand and expect that revenue sharing—

Senator FEINSTEIN. "These" being which?

Mr. FEHR. Current negotiations. I am sorry. I apologize. We would expect that revenue sharing would be the single largest issue that is on the table, and certainly the clubs have put it on the table.

We had discussions that took place over a period of about 10 weeks in April, May, and June. Those discussions were interrupted by the decision of the commissioner to do so, in retrospect, it appears clear, because contraction was out there. And one of the things that makes it difficult to discuss revenue sharing is if you do not know how many teams you have and who they are, it is pretty difficult to try to come to concrete circumstances.

Senator FEINSTEIN. Let me ask Mr. DuPuy this question, then. In exchange for revenue sharing, would you forget contraction?

Mr. DUPUY. Senator, I do not have a vote. The clubs vote on contraction based on the recommendation of the commissioner and his staff. But I will tell you—and you still did not hear an answer—the commissioner recommended 50 percent local revenue sharing. The players made a proposal in the summer that had $20 or $30 million more being shared. That is not nearly enough.

The problems are so pervasive that under this structure, there are markets that cannot support major league teams. I wish that were not the case. I wish I could tell you we could have 50 teams. But we cannot have 50 teams. We cannot support 30. There is no magic to 30. Major league baseball expanded from 16 to 30 over 35 years and now wants to contract back to 28—but it wants to do so in a viable, stable economic environment where teams can compete.

In certain circumstances, could we avoid contraction? Perhaps. But our 30 years of bargaining history suggest that we are not going to get a salary cap. We are not going to get 50 percent revenue sharing. We are not going to get anywhere close to that. And without that, it is impossible for me to sit here and by Pollyannaish about the prospects of avoiding contraction.

Mr. FEHR. Senator, if I could just fill in a gap, the assumption I made—

Senator FEINSTEIN. I think we have the nucleus of a solution right here.

Mr. FEHR. The assumption that I made, Senator, given the events, was that the clubs made a deliberate decision not to have contraction be an issue that would be part of an overall agreement, and it would be a matter that would be accomplished, and we would bargain later. That is a matter of choice that they engaged in.

I do not, however, want to leave the Committee with the impression that I or Bob or I suspect any of us involved in the process can be prepared to predict the results of bargaining. We are just getting back to it. We all know there is going to be more revenue sharing. We have some differences as to how and when to do it and what the appropriate way is.

The only way we are going to solve that problem is to get back and bargain it out. The season is going to start on time. I assume we will be having meetings heating up on a much more regular basis in the near future. But that is where the issue is going to have to be resolved.

Senator FEINSTEIN. Thank you both.

Senator DeWine?

Senator DEWINE. Madam Chair, thank you very much.

Mr. DuPuy, you testified that there were no bids for the Expos, but weren't there bids received from people who wanted to move the Expos?

Mr. DUPUY. There have been inquiries received from individuals or groups who are interested in buying and relocating the Expos, yes, sir.

Senator DEWINE. I have been told—and this may not be right—that both the Virginia and D.C. organizations that want to bring a ball club to this part of the country, the Nation's Capital area, submitted bids of $160 million for the Expos; I am also told that that was more than major league baseball paid for the club.

Mr. DUPUY. The latter point, I concede. I am not sure what the details were of the offer, so I cannot comment on that. But there were letter inquiries about acquiring the Expos and moving them, yes, sir.

Senator DEWINE. Certainly, you would think that that would raise possible antitrust concerns if major league baseball is stifling competitive bids to preserve these clubs. If you could bring a club to a viable market and keep going, it seems to me that that is a concern. That is a public policy issue. That is what we get down to here. Some people may ask why is Congress having these hearings, why is Congress talking about these issues. But it is the exemption that enables you to make what many would consider to be an arbitrary decision when you have a bidder out there who has money, who can bid, who can bring a team to a viable market—at least, what most people think is a viable market—and you stifle that and say, no, we are not going to do that; instead, we are going to basically est out on a path to contract this club.

You understand why there is a concern, a public policy concern, that goes beyond the issue that I raised in my opening statement when I was talking about what I see as a fan and the competitive problems of baseball.

Mr. DUPUY. And again, Senator, the purpose of the contraction decision was to improve the competitive product. If the product that baseball produces is a competitive baseball game, the contraction decision was an attempt to do that.

The commissioner has indicated more receptivity to relocation than at any time in the past 30 years. He has also made public comments about Washington and Northern Virginia being probably the most likely or the most prominent relocation candidates. But

he has also said that until we fix the economic system, merely moving a team from one location to another, all that does is ensure the failure of the new market. He has indicated that relocation is on baseball's horizon, done in a carefully managed way, but only after the economic system is fixed. The system right now cannot support—

Senator DEWINE. As you have heard and as you know, Mr. DuPuy, there is no stronger advocate for revenue sharing and for fixing the current system than Mike DeWine.

Mr. DUPUY. I appreciate that, Senator.

Senator DEWINE. But I do not know too many people who think that a moved Expos team in the Washington, D.C. area could not survive. I just do not know too many people who can look you in the eye and tell you they could not survive in this place, and that people who have put together some viable options and put the money together could not move the Montreal Expos to the Washington, D.C. area and do just fine and compete just real well.

Mr. DUPUY. Senator, there are other markets, other cities the size of Washington, D.C., that are not thriving in the current system.

Senator DEWINE. Well, it seems to me, with all due respect, that that is a separate issue, which I agree with you on. I am not sure that your point—or, that one point makes the other.

Let me ask a question to Mr. Brand. I want to talk about the whole question of whether or not the minor leagues as we know them depend on the antitrust exemption. And maybe a better question is if you remove the antitrust exemption, what would we end up with as far as the minor leagues.

I understand that the National Hockey League does have a minor league system in place, and they do not have the minor league exemption, do they?

Mr. BRAND. No, they do not.

Senator DEWINE. What is the difference?

Mr. BRAND. Well, one difference is that if you look at the stability of minor league hockey franchises over the last 10 years, you will find great instability. Those leagues shrink, they contract; they do not exist in places the way Indianapolis has existed in Indianapolis for 100 years. They do not exist in the breadth and reach that the current minor league system does.

So I do not think that hockey is an appropriate analogue, because as I say, the franchise stability is nowhere near what it has been in baseball.

Senator DEWINE. Mr. Chairman, my time is up. I think we have a vote. I have a number of questions that I would like to ask, and I would be more than happy to go and vote and come back.

Chairman LEAHY. I understand. Let me do this, and it is a little bit unusual, but the Senator from Ohio is extremely knowledgeable in this subject. I would not mind recessing and then having the Senator from Ohio reconvene the hearing. I will not be able to come back, but I do not want to cutoff any Senator, and the Senator from Alabama has not asked questions yet; is that correct?

Senator SESSIONS. Yes. If possible, I would like a few minutes before we recess.

Chairman LEAHY. Why don't we do this, if this will work for both of you. I will put my questions in the record. Because of the votes, we have delayed this panel a great deal, and I do have a number of questions, especially to the two attorneys general, because I am very, very concerned about Federal action that cuts out the rights of our States. As a former State attorney, I feel that way, and I know that our attorney general would feel that way. So I am going to put those questions in the record.

Senator Sessions, why don't you begin your questioning now, and Senator DeWine, when you come back, I will leave it in your capable hands, and when you have finished, if you would then recess the hearing.

Senator DEWINE. Thank you, Mr. Chairman.

Senator SESSIONS. Thank you, Mr. Chairman, and I thank Senator DeWine; he is certainly a thoughtful and wise person when it comes to these issues.

General Butterworth, it is good to see you. We are glad to have you back in Washington. I enjoyed serving with you as attorney general.

It is troubling to me that we have not had a ball team here in Washington for over 30 years. We are first in war and first in peace, and no place in the American or National Leagues is a source of pain in light of the fact that we have football and basketball teams.

And you know, antitrust exemptions are just problems for us. I have a little twisted slogan that I made up: Oh, what a tangled web we create when we first start to regulate.

When you get an exemption, you have gotten a privilege, so we have to look at that thing and ask if it is being executed and carried out in a way that is healthy and positive for the public, or is it not.

I thought over the years, not having been a member of this committee, that from the fan point of view—and I am a long-time baseball fan—the goal was to keep ball players a little longer on the same team so they do not get sent everywhere, and that we could somehow maintain more stability there. But it looks like there are a lot of other forces at work, as I guess I should not be surprised.

So in recent weeks, I had the opportunity to talk to a law school classmate of mine, Mr. Don Watkins, who is an African-American who has done exceedingly well in business and is interested in buying a baseball team. And basically, he tells me that he has been treated courteously by the league officials and feels that they have made some good progress. But if you look at the newspapers about moving or buying a franchise, you know it is a long and difficult process.

So I would think that major league baseball would be interested in having an African-American owner; he would be the first one. But really, I am told that since he first applied to buy the Tampa Bay Devil Rays, he has heard nothing from the league in nearly a year. His most recent expression of interest in the Minnesota Twins was ignored until last December when, at a House Judiciary Committee hearing, a Congressman from Alabama asked the Twins' president in front of the commissioner why nobody had spo-

ken to Donald Watkins, and only then did he receive a call about it.

I also understand that Donald's efforts to inquire into the possibility of purchasing the Montreal Expos and moving them to Washington was summarily foreclosed as not on the table by league officials.

So to me it is odd, Mr. DuPuy, when you say, as I believe you said a little earlier, that there is no interested buyer for the Montreal Expos. I am encouraged that he has been permitted by the league officials to talk to the Twins and the Devil Rays, and I am also encouraged by the recent comments from Commissioner Selig after the owners' meeting that Washington was the most likely relocation city. These comments were understandably confusing to Donald Watkins, who had been told by league officials only a week earlier that it would be a waste of time to discuss relocation of a team to Washington, D.C.

Mr. Watkins' plan would be to build a privately financed stadium with a destination-class museum and hall of fame for African-American athletes that would clearly make a major contribution to our Capital's large minority population and tourist flow. It would seem to make more economic sense to locate it here than in Minnesota or Tampa Bay.

So I think his request to discuss this possibility ought to be honored. Would you agree, Mr. DuPuy?

Mr. DUPUY. I would certainly agree with the latter statement, Senator, yes. I have to admit to a little bit of confusion in that my understanding from your earlier comments was that Mr. Watkins was interested in acquiring the Minnesota Twins. He in fact met with the owner of the Minnesota Twins, and he met with the president of the Minnesota Twins. He had a meeting with Tom Ostertag, our general counsel, and Bill Bartholemy, the Chairman of our ownership committee, which is not usually done that early in the process, and my understanding is that he submitted at least a preliminary offer to acquire the Minnesota Twins, and I am now a little surprised to hear that he would like to have a team in Washington, D.C. I am not sure that that solves the Minnesota attorney general's issues.

But we would be delighted—to go back to your very first statement—we would be honored and delighted to have an African-American owner of a major league baseball team, and I hope it happens sooner rather than later.

Senator SESSIONS. Well, why shouldn't he be able to shop around? If Montreal is going to be on the market, why shouldn't he be able to ask about that one, the Devil Rays, or Minnesota, talk to the various owners and make the best deal?

Mr. DUPUY. He certainly has the right to shop around. We have not denied him permission to talk to any team, Senator.

Chairman LEAHY. Well, if I could, Senator Sessions, just ask this question—are there any minor league baseball teams—minor league teams—that have owners from racial minorities?

Mr. BRAND. Yes.

Chairman LEAHY. How many?

Mr. BRAND. There are several and I would have to submit that for the record, which I would be happy to do.

Chairman LEAHY. OK. Please do.

Well, then, Mr. DuPuy, are there any major league baseball teams that have owners from racial minorities?

Mr. DUPUY. I do not know all the members of some of the ownership groups. There are a number of teams that are owned by very broad ownership groups. But in terms of the principal owners, the answer would be no.

Chairman LEAHY. Thank you.

And Mr. Brand, you understand that I am referring to principal owners—

Mr. BRAND. Majority owners. I am not aware of any majority owners. There are minority owners representing minorities.

Chairman LEAHY. I just wanted to make sure everybody understands, because I think the question raised by the Senator from Alabama is a very good one. I just wanted to make sure we had that for the record.

Thank you.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. DuPuy, my question is this. Has there been an approval of Mr. Watkins as a possible owner of a major league baseball team, and has he been apprised of all ownership opportunities that might exist, and would you apprise him of any ownership opportunities that might exist?

Mr. DUPUY. Answering your third question first, absolutely. Answering your second question, I believe he is aware of all of them. Answering your first question, he was authorized to begin discussions. We do not sell major league teams. The owners sell those teams. So he has been authorized to talk to the Tampa Bay Devil Rays and authorized to talk to the Minnesota Twins.

Senator SESSIONS. But do you have the authority to approve him as an owner or not, and do you assert the authority to control the ability to talk to a major league team or not?

Mr. DUPUY. We have very detailed written ownership guidelines that I would be happy to discuss with you. The first process is that a club indicates to us the desire to sell, and we then preliminarily approve anyone who is going to talk to those people to avoid early problems. Then, eventually, the clubs as a group must approve any transfer of ownership. That is a shorthand version of a very detailed process.

Senator SESSIONS. So if Mr. Selig has said that it is a possibility that you could move the Montreal Expos to Washington, D.C., you are telling me that Mr. Watkins would be able to be approved for discussions with regard to possibly buying that team and moving it here?

Mr. DUPUY. I was not aware that the commissioner had indicated any intent or desire to move the Expos to Washington.

Senator SESSIONS. Well, he said it would be the next location.

Mr. DUPUY. Yes, sir.

Senator SESSIONS. I guess that is a distinction.

Mr. DUPUY. Yes, sir.

Senator SESSIONS. But still, what we are asking is if you have a good location, and you have a buyer who is willing to put in a lot of money to buy a stadium and build a center to go along with it, they ought to be given a chance to do that, it seems to me.

Mr. DUPUY. Those facts, that hypothetical, absolutely, under every circumstance. That is what we want—good locations, with good stadiums and competitive teams.

Chairman LEAHY. Senator Sessions, we are going to have to recess because we only have about 3 minutes left in the vote.

We will recess, and Senator DeWine will resume the hearing, and of course, you are welcome to come back and ask further questions.

I thank all of you very, very much for being here. We will recess for about 10 minutes. It might seem like it has been kind of a chopped-up session, but trust me, this hearing has been on the internal monitors, and from the emails I have been getting since I have been up here, a lot of people in the Senate have been watching. So it is a matter of some concern here, and it certainly is a matter of great concern to Senator Hatch and myself.

I worry very much that a perceived antitrust exemption—perceived antitrust exemption—actually ends up hurting baseball more than helping it, but we will continue that debate as we go on.

Thank you.

[Recess.]

Senator DEWINE. [Presiding.] The Committee will reconvene.

Let me thank the panelists for your patience in putting up with the crazy Senate schedule. You have endured this morning, now by afternoon, six different roll call votes which have disrupted the hearing, so I appreciate your patience.

Let me start with Mr. Fehr and Mr. DuPuy, a question about the status of negotiations. The World Series ended this year unusually, in very, very early November, on a very high note, a great World Series. I think some of us who follow this closely expected that we might see some beginnings of negotiations. I take it, though, from comments that both of you have made that, really, there has not been much negotiation going on. Is that correct?

Mr. FEHR. Senator, let me respond briefly to that in a couple of ways. First, we have made an effort this time on both sides not to accompany every negotiating session with a press conference, and that may account for some of the feelings that people have.

We did have a sustained interruption in the negotiations, and over the last several months on both sides, we have been working through the contraction issue. There have been a number of meetings, and as a matter of fact, probably the most important meeting I will have in the next 2 days is a scheduling meeting to tie down a number of dates. I expect that we will be back at it with frequency fairly quickly.

Mr. DUPUY. I would agree with that, Senator. I think the absence of agreement does not suggest that the parties are not bargaining. We have fundamental serious differences, but we are bargaining.

Senator DEWINE. All right. That is good news, so you are assuring baseball fans that some negotiations are going on, or at least some discussions are going on; is that correct?

Mr. DUPUY. That is correct.

Senator DEWINE. Is that correct?

Mr. FEHR. Sure it is.

Senator DEWINE. All right. Let me ask a question for all the members of the panel, but maybe I will start with Mr. Brand.

Imagine a world where there is no antitrust exemption for baseball, specifically in regard to the minor leagues. Where are the teams going to get the players, and what would happen? If wiped away tomorrow, the 6-year reserve clause is gone, they have to get the players somewhere. What is going to happen? Are you telling me that we would see no minor league teams, that we would see some minor league teams, that there would be different minor league teams?

Mr. BRAND. I think we would see some minor league teams. That would depend on the level of economic incentives that the major leagues would have to invest as they do now. I do not think they would have anything close to that.

They would be in effect under the same system that they are under now at the major league level, which I think would significantly reduce the number of minor league players that they would be able to sign. I think that would impact most critically the smaller markets—Kinston, North Carolina, towns and cities that are smaller than 100,000, of which we have many, many, many clubs. I am sure they would continue to use colleges as some aspect of it and complex baseball centered around the spring training sites—but it would look nothing like the system that we have now. And I think that in many, many, many smaller and rural markets in America—like Oneonta, New York, like Kannapolis, North Carolina, like Kane County, Illinois—there may not be minor league baseball as we know it. It would be some system—I think it would be a lot smaller and a lot less diverse geographically.

Senator DEWINE. There are two ways of looking at this. One is from the point of view of the public. In Ohio, we have a number of minor league baseball teams, as you know, and a number of new stadiums, new ball parks, which we are delighted to see and are a great asset to our State and to the economic development of the downtowns of a number of cities.

The other way of looking at it, of course, is from the point of view of an 18-year-old, a 19-year-old, a 20-year-old, or whatever age you want to put on that minor league player.

So Mr. Brand, from the point of view of that young man, would he be better off with the antitrust exemption around or not?

Mr. BRAND. Well, from my perspective, I think you are better off with it if the idea is that you can sign more players and roster them to more places around the country, giving you a chance to matriculate to the next level of baseball and ultimately around to a 40-man roster. I think that would give you more opportunities rather than less.

Senator DEWINE. Understanding that only a small percentage make it. That is just the reality, that is life.

Mr. BRAND. Yes. But I think that will be true under any system, that a smaller percentage of prospects will make it onto a 40-man roster than are drafted.

Senator DEWINE. Mr. Fehr—the same two questions.

Mr. FEHR. I have a number of responses. First, if you will permit me just to say that Mr. Brand referred to a quote attributed to me

in a Los Angeles paper some 8 years ago about wasting money on the minor leagues.

Senator DEWINE. You are kind of slow to respond to that. You are usually a little quicker than that.

Mr. FEHR. Well, there were other questions. But I have no memory of that and do not know what it referred to. I want to assure everyone that the Players Association has never made proposals except in the context of some current issues relating to the draft, which I will come to in a second, which would say you should dispense with a number of minor league teams, or we want you to change funding, or anything like that. We do not represent those players.

There was an issue that troubles us philosophically, and that is when we draft vastly more players than we will ever have by an order of 9–1/2-to-one, a chance for a substantial major league career—

Senator DEWINE. That is what the figures are on the draft?

Mr. FEHR. Yes. And effectively, what we tell the high school players is: "Do not go to college, play minor league baseball," knowing that most of them will never make it and then will be out of baseball sometime in their mid-twenties without a college degree, without any job skills, and without any training. That is troubling.

We have had points made by major league baseball to us in prior negotiations that football and basketball have it easier, because the colleges do it for them. But we are not out to affect the operation of minor league baseball. I do not know why the bill on the House side was drafted the way it was, and I think Senator Wellstone's comments for the purposes of his bill ought to resolve that issue.

With respect to your specific question, if the antitrust exemption was suddenly agreed by everyone to have disappeared, what would happen is that a new system would have to be developed. I do not think anyone can predict what it would be, but the notion that there would be no player restraints and no rosters and no set of procedures which would be deemed reasonable under the antitrust laws strikes me as a very unlikely prospect. I do not think we can predict what it would be. Major league baseball still needs to train the players. They believe you have to train vastly more than make it in order to have the quality to get you to the major leagues, and although many more players come out of college than used to, you still have large numbers that do not go.

Senator DEWINE. Excuse me. What percentage come out of college that make it in the major leagues?

Mr. FEHR. I do not know that now, but we can certainly provide that to you probably by some time next week.

Senator DEWINE. Do you have a guess—just a guess.

Mr. FEHR. I do not offhand, but my guess is that the number of players in the major leagues that have at least some college at this point is probably less than 50 percent, but is growing, and it is a higher percentage among players who grow up in North America as opposed to Latin America.

We can certainly provide that. That is easily ascertainable.

Senator DEWINE. OK. Go ahead. I interrupted you. I am sorry.

Mr. FEHR. The last comment—with respect to the point of view of the 18-year-old, it has this principal effect. If a player is drafted,

he is stuck with the organization that he goes into, and if he happens to be a first baseman, and that organization is loaded with first basemen, his opportunity to advance is going to be retarded as compared to an organization that is not.

From his standpoint, having some choice about where he plays would obviously be better.

Senator DEWINE. I am not sure I understand your answer about the big picture. I understand your answer, Mr. Fehr, about the player, and I appreciate that.

Can you guess what kind of a world you think we would see? Take off your hat as a representative of the players—I mean, you have a great deal of experience in baseball—what kind of world do you think would evolve?

Mr. FEHR. You have to remember that the players that are contracted now are in most instances not signed by the minor league clubs—they are signed by the major league clubs—and I think they would have to consider whether or not the current system is reasonable or whether it is not—reasonable in an antitrust sense—or whether it is not, and if so, they would have to make some modifications.

I find it difficult to believe that major league baseball would still not want to operate a very substantial minor league system. I think it is probably likely if that happens that there would be a renewed interest in exploring whether or not the current rules under which the major colleagues play by could in some fashion be amended so that you could have more college baseball than there now is, even during the summer when the colleges are not in session.

But if you really want me to speculate about that, I would prefer to think about it a little more before I respond. It is not a subject that I have thought about precisely before.

Senator DEWINE. OK.

Mr. DuPuy?

Mr. DUPUY. Senator, I think it is clear that the major league would not run the risk of making a decision on whether something is reasonable or not and then be subjected to 9–1/2-to-one times in terms of the number of players seeking treble damages under the antitrust laws. While I cannot speculate as to what would happen, I agree with Mr. Brand that the likelihood is that places like Columbus and Toledo would probably survive and have teams either because there would need to be places for the highly developed athletes just before they reached the major leagues, or because some competitor would spring up. But I think the much more likely result in terms of the Mahoning Valleys of the world is that we would have development camps in the Florida and Arizona areas, in the spring training sites; we would run people through development camps, and eventually, they might be signed to professional contracts rather than run the risk.

So I think there is a very likely chance that it would have a significant negative impact on the number of communities that have minor league ball.

Senator DEWINE. Do you want to take on the question of the 18-year-old? Is it in my interest to have the antitrust exemption?

Mr. DUPUY. I think it is in your interest to be found in a development system that operates and treats everyone equally and gives them equal opportunity. I think there is more opportunity in that system.

If we go to the few "haves"—it would be the same as the major league clubs who can now afford to sign foreign players. There are only a few. And now you have the opportunity where you can end up playing for any of 30. Under that system, certain clubs can only sign so many young kids, and I think some of the other kids would fall by the wayside.

Senator DEWINE. General Swanson or General Butterworth, do either of you want to respond?

Mr. BUTTERWORTH. Senator, I am not sure what effect it would have. I would assume, since baseball is in the business of baseball, and they have to train their players, they are going to train their players, whether it be through the minor league program which is working right now, or what I like is the idea of what I am hearing today, that is, that if in fact we have young athletes in this country who are being told do not go to college, and your chances are 2 percent in order to make it in the major leagues, and you end up staying there 5 years, you get married, have a couple kids, and then you are out there with nothing—to me, that is something that we should not be allowing to happen.

On the 18-year-old, I am sure that anyone who believes that he has a talent, and a team is interested in him, the team will be able to sign him, if they still can, for a term of years anyway. So I do not think it would have that much of an effect.

But what I am hearing here today really discourages me, Senator, with all due respect. If these leagues are telling our talented youngsters that "You are going to be a star," when only one or 2 percent of them might even make it, in essence, ruining their lives and their chance for an education, I think that is flat out wrong. We should be encouraging those young athletes, if they are eligible, to go into colleges. Florid has a lot of good colleges. They have a lot of good baseball teams. We have seven college teams right now that could probably beat one of our Florida pro teams.

Mr. DUPUY. Senator, could I respond just on the last point?

Senator DEWINE. Certainly.

Mr. DUPUY. We do have a college scholarship program for minor leaguers to the tune of about $10 million a year. I do not want the attorney general to leave here believing that we are not trying to see these kids finish school. We do fund a college scholarship program.

Mr. BUTTERWORTH. This is the first time I have heard this, Senator.

Senator DEWINE. Mr. Brand?

Mr. BRAND. If I might, these people are not conscripted; they are paid, and they are also paid $90 million a year in signing bonuses. We do not tell them not to go to college.

Senator DEWINE. Now, Mr. Brand, the average player for—pick a team—and I am not here in any way to criticize the minor league system, and I have not taken a position on whether we should do away with the antitrust exemption or not, and we are asking questions about what impact it would have on minor league baseball,

and I think I have already said that minor league baseball is very important to Ohio—but I find your statement a little misleading. There are a number of players who do not make very much money who play in minor league baseball, and we know statistically that the majority of them will not make it to the major leagues. Are those two statements I just made not true?

Mr. BRAND. They are paid at a level based on classification, and they are paid signing bonuses, some of which total up to several million dollars.

Senator DEWINE. But the average player does not get a signing bonus of several million dollars.

Mr. BRAND. I do not know what the average signing bonus is. I know that down into the draft, that can be into the several hundreds of thousands of dollars, down into several rounds of the draft.

My point is—

Senator DEWINE. Would you supply us with that information?

Mr. BRAND. Absolutely.

Senator DEWINE. Again, our job here is not to make this decision on that basis, but I think that your implication that every kid who is playing in the minor leagues is doing very well, I do not think is true. Now, if I am wrong on the statistics, you let me know.

Mr. BRAND. No. My point was simply that they do that under their free will for a chance—

Senator DEWINE. Oh, absolutely.

Mr. BRAND. For a chance to make it into the major leagues, and sometimes with the addition of a substantial signing bonus. That is my point, and I have submitted for the record the reason why, for a lot of practical reasons, I do not think the college system presents an alternative player development system.

Senator DEWINE. Why don't you elaborate on that for a moment, since that has been raised as an issue?

Mr. BRAND. First, the college schedule is significantly reduced. The NCAA has rules about how much can be spent on baseball. There are any number of reasons why I do not think that system could take the place of the current minor league system.

I think the fact that in most minor league classifications, you are playing a 70- to 144-game schedule, a professional player is playing baseball and not going to college, a college student is studying to be a professional of a different sort. So I do not see that as an alternative. I certainly recognizer the responsibility that baseball has to remunerate its players, and I will supply those for the committee.

Senator DEWINE. Thank you very much.

Mr. Fehr and Mr. DuPuy, as I noted in my opening comments, I believe that baseball's biggest problem is the ever increasing level of revenue disparity. The Blue Ribbon Panel recommendations, which I have here and which you have both obviously spent a lot of time looking at, makes a number of recommendations about how to address this problem.

I would like to ask both of you to tell us first what is the status of these proposals—and you got into that a little bit a moment ago—do you think these proposals will help address revenue disparity?

Does the antitrust exemption or the possible repeal of it impact on the ability of baseball to implement these proposals?

Specifically, I would like to hear your comments on the impact of the antitrust exemption on baseball's ability to implement greater revenue sharing and more extensive competitive balance tax, minimum club payroll, draft reform, unequal distribution of central fund revenues.

I would also like to ask the panel to comment on the impact of the antitrust exemption with regard to franchise relocation and contraction.

Let me go through these one by one, and I know I was going fast, and I did not expect you all to take notes, but let me go through these, Mr. Fehr and Mr. DuPuy, one by one, just a summary of the recommendations, and give us some indication—two questions—does antitrust impact the ability to achieve this, and second, what is your opinion about this—and I assume, Mr. DuPuy, you like it because it is part of the recommendation. I do not know that, but you can tell us if you do not like it. And Mr. Fehr, tell us whether this is something that is viable.

I understand, Mr. Fehr, that this is something that is subject to negotiation, and I also understand that your position on one issue may affect your position on another, and I understand how bargaining goes. But give us some indication of whether any of these are totally out of the ball park or whether they can at least be discussed and what your opinion is of them.

Let me start with the first recommendation, that major league baseball should share at least 40 percent and perhaps as much as 50 percent of all local revenues after local ball park expenses are deducted under a straight pool plan.

Why don't we start with you, Mr. Fehr?

Mr. FEHR. Let me make a couple of preliminary comments, Senator. The Blue Ribbon report is an interesting document; I want the record to be sure to reflect the following, however. Its members were selected by the major league owners. All of them had prior or existing relationships with the major league owners. The deliberations of the Blue Ribbon Panel to the extent they were conducted with anyone were not conducted with representatives of the players, with the exception of one proceeding which took less than an hour, most of which was taken up in pleasantries.

We tended to look at that when it came out, I suspect, much as you might if your Democratic colleagues on an issue selected a blue ribbon panel of people they were familiar with and came out with conclusions and said, "Let us go with it."

Second, hopefully, we will not be engaged in bargaining by public relations, but one can argue that the release of the report and so on was designed principally to affect bargaining, because the recommendations that you referred to, which are the core of the report, constitute in the main bargainable issues.

With that said, when you look at how these matters should be addressed in bargaining, in the discharge of my responsibilities, we do two things. We do look at the issues separately, but what we attempt to look at is the combined effect of whatever series of procedures you have in place on two things—the entrepreneurial activity of the clubs, how does it affect what they do with players and

otherwise. We all know that things like tax rates affect behavior; that is why you have so many debates about that kind of thing in this body.

Secondly, we try to ask what do we think is the likely effect on players; and then, third, we say that regardless of how we view these things in the abstract, we understand that we have an obligation to bargain in good faith about them. The club puts it on the table, as they do with proposals we make, and we would.

On the 40 percent or perhaps 50 percent revenue sharing, in our view, there are two issues there outside of what additional revenue sharing or similar-type measures might compound the difficulty of understanding what the effects would be.

The first one is we believe there ought to be additional revenue sharing. We made a proposal in that regard. It was—and I do not think I will compromise the bargaining process by suggesting it was an initial proposal. We hoped to get a response back which moved in our direction; it has not happened yet.

But there is no doubt in my mind there will be significant additional revenue sharing of one type or another.

There is a phrase in there, though, called "straight pool" which I also want to comment on. We have in the current agreement what is known as a "split pool," and in oversimplified shorthand, what that means is that we have a revenue sharing pool put together—and obviously, the clubs with higher revenues contribute vastly more than the clubs with less revenue—and then, what we do is we split a part of that out which goes exclusively to the recipient clubs and most of it to the clubs at the bottom, and then we divide the rest of it equally. That is why it is called a "split pool."

When you go to a "straight pool," that changes. What happens is instead of splitting a part out for the clubs that are the recipient clubs and the ones that need it the most at the bottom, you divide it all equally without splitting that out and then divide the rest of it equally. That has the effect, at whatever amount of revenue sharing you have, of diverting money from the clubs at the bottom and giving it to the clubs in the middle.

So the question we have asked about that is why do you want to divert money from the clubs at the bottom and give it to the clubs that have higher incomes in the middle—at whatever level of revenue sharing, that is the effect.

The only answer I can come to is that there are more votes in the middle of clubs. That is a problem we have because when you come to issues like contraction and the issues we have to bargain with, anything which operates in that way as compared to a split pool makes the pressures on the clubs that have less income more rather than less severe.

Senator DEWINE. Mr. DuPuy?

Mr. DUPUY. I did not really hear an answer whether Mr. Fehr liked it or did not like it, but if that is your question, we do like it. And the comments about the Blue Ribbon Panel report—

Senator DEWINE. Excuse me.

Mr. Fehr, did you say you liked it or did not like it?

Mr. FEHR. I said that there would have to be additional revenue sharing, and it has to be negotiated.

Senator DEWINE. So you are for the concept of additional revenues.

Mr. FEHR. Additional revenues—yes.

Senator DEWINE. OK.

Mr. DUPUY. In terms of the effect of the antitrust laws, in terms of across the table, Senator, I think the antitrust laws have no place. In terms of the collective bargaining agreement, we have a different statutory framework, the National Labor Relations Act. But in terms of the ability to—

Senator DEWINE. It has no impact, you say?

Mr. DUPUY. In terms of the negotiations between the players and the club.

Senator DEWINE. Right—a labor issue, right?

Mr. DUPUY. Right. But in terms of the ability to implement that within the club network, it has a most certain impact.

Senator DEWINE. What does that mean?

Mr. DUPUY. Because theoretically -let us take a team, the Biloxi Senators, who happen to be the major revenue producer in major league baseball—and the clubs would vote to have 50 percent straight pool revenue sharing, let us say. But the Biloxi Senators might be unhappy about that. They might in turn file an antitrust suit against the other owners in baseball. In that respect, in my view, the antitrust exemption is very useful in terms of operating as we believe we should be treated, as a single business.

Professional sports leagues, as you know, are a unique blend of cooperation and competition. You cannot have a league with one team—it is like one hand clapping. And you cannot have a team without a league; otherwise, you have the Harlem Globetrotters barnstorming. We need a league. We need a league of competitive teams, and the antitrust exemption helps within that framework, but not in terms of the bargaining process, I concede. The bargaining process is covered by the National Labor Relations Act.

Senator DEWINE. Do you want to comment on the issue of going to a "straight pool"? You heard Mr. Fehr's comment, and I want to know if you want to comment on that.

Mr. DUPUY. The club votes are the commissioner's business, frankly, and not Mr. Fehr's. The commissioner has indicated that he has the votes for the Blue Ribbon Panel report; he recommended the Blue Ribbon Panel report, and we are prepared to negotiate the Blue Ribbon Panel report. We have attempted to negotiate the Blue Ribbon Panel report, and the preference is for the "straight pool" plan, which the commissioner and the clubs believe is a fairer method of allocating.

Senator DEWINE. Would you like to respond to that at all, Mr. Fehr?

Mr. FEHR. I guess just a couple of things. The club's bargaining position certainly has been as Mr. DuPuy has just suggested. But when we look at this, again, we look at two things. We have an obligation to the membership to try to ascertain how clubs will behave differently and what the effect on players will be, and without getting into the issue of individual club votes, although there are some very interesting and fascinating issues there, we think that the "split pool" on balance is a better approach because of the factors that I described before.

The only other comment I would make is to harken back to the first testimony I ever gave before this committee. Clubs and leagues want to describe themselves as single businesses, single entities. There is a lot of debate about whether they are or are not. But the central premise of the antitrust laws is that if you have a single entity in a market, and it is the only entity, you have a problem.

Senator DEWINE. Mr. DuPuy, on the issue of the Biloxi Senators, just to clarify, isn't it true that even if you did not have the antitrust exemption, you would be under basically a rule of reason—if it is a reasonable effort to share revenue, it is OK. In the NFL, the NBA, that is how they have to operate; true?

Mr. DUPUY. Absolutely.

Senator DEWINE. They do it.

Mr. DUPUY. Absolutely.

Senator DEWINE. Let me ask if anybody else on the panel wants to comment on anything that has been said about this proposal before I move to the next proposal. Does anybody want to jump in?

[No response.]

Senator DEWINE. OK, good. The second proposal is that major league baseball should levy a 50 percent competitive balance tax on club payrolls that are above $84 million.

Mr. Fehr?

Mr. FEHR. There are two things about that. First of all, the proposal we got from the clubs, in fairness, was not at $84 million; it was at $98 million, the difference essentially reflecting the increase in league revenues from the time the blue ribbon report was written until the time of bargaining.

Secondly, as we approach this, we look at it in two ways—what is the combined effect of what they call a "competitive balance tax"—I think they have a good PR person to call it that; it used to be called a "luxury tax"—but what it is in effect is a procedure which says that we will penalize someone financially for hiring an employee. That, you will understand and I think everyone will appreciate, is a difficult problem for people who represent employees. We do not think players are luxuries, et cetera.

We had a luxury tax in the early years of the agreement which just expired. It went away as the level of revenue sharing increased. Our position has been as follows and remains that we do not like luxury taxes, we do not think they are necessary. If you are going to have one, this particular vehicle does not strike us as an appropriate way to go, and we think that these matters can be resolved with revenue sharing.

In any event, it looks like revenue sharing and that discussion ought to follow the revenue sharing discussion.

Senator DEWINE. Mr. DuPuy?

Mr. DUPUY. Senator, the teams like the luxury tax—frankly, the teams would prefer a salary tax like the NFL has, like the NBA has. They recognize, based on the history of negotiation, that they could not achieve a salary cap in baseball without a devastating and perhaps lengthy work stoppage. No one wants a work stoppage. So the clubs proposed something that the players lived with under the earlier agreement, lived with under the last agreement, without apparently any appreciable impact on the rising salaries.

This is an attempt to bring payrolls back together, to make payrolls closer and therefore give more money to distribute to the other clubs, to the Cincinnatis of the world, so as to allow them to sign players.

The idea that this will act as a restraint on the Biloxi Senators—if the Biloxi Senators are in a pennant race, and they want to acquire a player in September to help them over the hump, they will do so whether they have to pay a $2 million luxury tax or a $1 million luxury tax, or competitive balance tax, or a $500,000 competitive balance tax. It is the same principle that allows people to buy homes. If you ever look at what you pay in total in terms of the interest you pay on your house when you acquire your house, you would never buy a house. But the teams will continue to acquire players to win pennants.

Senator DEWINE. Let me move to the third proposal—and again, any of the panel members can jump in if you have a comment about any of this, but we need to keep moving. The third proposal is that major league baseball should use unequal distribution of new central fund revenue to improve competitive balance, creating a commissioner's pool that is allocated to assist low-revenue clubs in meeting a minimum club payroll of $40 million.

Mr. Fehr?

Mr. FEHR. With respect to that, I think the initial proposal for uneven distribution of central fund revenue was probably ours about 10 years ago, or maybe a little less long ago than that.

It is an issue that is open for discussion. We have made proposals on it, and they have made some. I would expect it to be discussed. I cannot tell you whether it will be part of the eventual agreement, but it is a subject which has been discussed.

Obviously, you get into the magnitude of it, the circumstances under which it is distributed, what does it mean when you say "unequal distribution" and all the rest.

Senator DEWINE. Mr. DuPuy?

Mr. DUPUY. We are for it.

Senator DEWINE. The next proposal is that major league baseball should conduct an annual competitive balance draft of players.

Mr. FEHR. In that case, that was not part of the initial suggestions made by the clubs to us. We recently asked them about that, and they indicated to us that that was something that they would be willing to consider. I expect we will have further discussions about it.

In that regard, I should point out that we view things like moving draft choices around, moving players around on rosters, as an item which could be in many respects a significant aid to clubs that need it, not as an add-on to everything else, but perhaps in substitution for part of the other things. I expect that we will continue discussing that.

Senator DEWINE. Mr. DuPuy?

Mr. DUPUY. We did not include it in our original proposal because we thought it was objectionable to the players. Given their more recent statement of receptivity, we are revisiting that issue.

Senator DEWINE. The next proposal is that major league baseball should reform the Rule 4 draft process.

Mr. Fehr?

Mr. FEHR. The Rule 4 draft is the so-called amateur draft. That is an issue about which the parties have had very substantial discussions, and I would expect those to be ongoing.

It is one which is a little bit of a tricky bag, however, and I want to just indicate one reason why. In baseball, we sometimes talk about things that are a little bit peculiar from the outside, but in this set of circumstances, we would be talking about reforming an amateur draft which would affect principally individuals who will never become members of our bargaining unit. That makes the process a little difficult. But I do expect those discussions to continue.

Senator DEWINE. Mr. DuPuy?

Mr. DUPUY. The purpose is to get all eligible players available to all teams so as, again, to help the competitive imbalance problem. So we are for it.

Senator DEWINE. The next item is that major league baseball should utilize strategic franchise relocations when necessary to address the competitive issues facing the game.

I think we have probably exhausted that issue by now, unless someone wants to add anything more to that.

[No response.]

Senator DEWINE. Finally, major league baseball should expand its initiatives to develop and promote the game domestically and internationally, and I assume everybody is for that.

Mr. FEHR. Yes.

Mr. DUPUY. Yes.

Senator DEWINE. Let me ask the members of the panel if anyone has any additional closing comments that they want to make—I am sure you are all ready to go and have lunch.

Mr. BUTTERWORTH. If I could make one quick comment, Senator.

Senator DEWINE. Yes, General Butterworth.

Mr. BUTTERWORTH. What happened here started in 1922 when one branch of Government decided they wanted to legislate. Our Founding Fathers probably would never have allowed the United States Supreme Court to do what they did, but I think the U.S. Supreme Court did what they thought was right under the circumstances of baseball at that particular point in time in order to put some integrity into the sport. Then, when Congress looks at it later and says, well, it is so obvious that they messed up, we are not going to take any action—in fact, when you look at it, if in fact they do have an exemption, professional baseball is the only industry in the United States that is exempt from the antitrust laws without being subject to alternative regulatory supervision. Congress decided that, "This is such a slam-dunk, we are going to let the United States Supreme Court decide it again," and the United States Supreme Court decided it again. They said, "Congress, you really should decide this."

Those of us like Lori and myself who are in the trenches in Minnesota and in Florida—I have a Florida Supreme Court that says the antitrust exemption is only a reserve clause. Lori's Supreme Court says no—it is everything. I have a Federal court judge who says no—now it is everything. Lori has a district court judge that is going with her.

So, please, we need help.

Senator DEWINE. Anyone else?

Mr. Fehr?

Mr. FEHR. Only, Mr. Chairman, that it does seem to me that to the extent there are public/private policy issues sufficient to attract the attention of the Congress, if there is to be an exemption, someone ought to articulate what it is, be satisfied that the appropriate demonstration of need has been made, so that we do not have these kinds of uncertainties.

Senator DEWINE. I think the testimony has been very helpful, and I thank you all very much.

Let me just make one final comment. I believe that all the problems that we have discussed today—and we have discussed many problems—that the bulk of the problems of organized baseball will in fact be solved if you solve the disparity in income problem.

I believe that baseball will never be truly healthy, will never be truly competitive, will never truly be the sport that we all love so much and that we know it can be again, unless we solve this competitive problem.

So, Mr. DuPuy and Mr. Fehr, I think you have a big responsibility, and it is a responsibility, quite candidly, that goes beyond your responsibility to your respective parties, beyond your responsibility to the owners, beyond your responsibility to the players. I think that is the great tradition of baseball and the history of baseball, and I believe some obligation—a compelling obligation—to the fans.

So we wish you well. Thank you.

Mr. FEHR. Thank you, Senator.

Mr. DUPUY. Thank you.

Senator DEWINE. The hearing is adjourned.

[Whereupon, at 1:40 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Stanley M. Brand to questions submitted by Senator Leahy

Question 1. In your testimony you contend that professional baseball continues to enjoy antitrust immunity and that minor league baseball is likewise immune from federal antitrust law. On what do you base your contention that minor league baseball is immune from federal antitrust laws? In your view, when did minor league baseball first gain immunity from federal antitrust laws?

Answer. Minor League Baseball is exempt from the antitrust laws based on the rationale of the Supreme Court's various decisions on the subject, the decisions of lower federal courts, and Congressional action. This "immunity" or "exemption" dates back to the Supreme Court's 1922 decision in Federal Baseball Club of Baltimore, Inc. v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). The rationale for the decision of the Supreme Court in Federal Baseball was not limited to the Major Leagues but applied generally to the "business of baseball." *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). In 1946, a federal district court in the state of Washington observed in dicta in a case involving claims against a minor league baseball club that "professional baseball did not constitute commerce in the commonly-accepted use of those words," relying on the Supreme Court's 1922 decision. *Niemiec* v. *Seattle Rainier Baseball Clubs*, Inc., 67 F. Supp. 705, 712 (W.D. Wash. 1946). Since that time other federal courts have specifically held that the baseball antitrust exemption applies to minor league baseball. See, e.g., *Portland Baseball Club, Inc.* v. *Kuhn*, 368 F. Supp. 1004 (D.Or. 1971), affd, 491 F.2d 1101 (9th Cir. 1974) (per curiam); *Moore* v. *National Association of Professional Baseball Clubs*, No. C78–351 (N.D. Ohio 1976); *New Orleans Pelicans Baseball, Inc.* v. *National Association of Professional Baseball Leagues, Inc.*, No. 93–253 (E.D. La. March 1, 1994). When

Congress has in the past taken up the subject of the baseball antitrust exemption, it specifically examined "Organized Baseball," referring to the combination of the two major leagues (the National and American) and the 17 minor leagues represented by the National Association of Professional Baseball Leagues that have, for over 90 years, contracted with one another to abide by certain rules and regulations. See Organized Baseball: H.R. Rep. No. 2002, 82 Cong., 1st Sess. 12–43 (1952).

This record of judicial and legislative recognition of the antitrust immunity afforded minor league baseball creates a strong reliance interest recognized by the Supreme Court in its 1957 decision in *Radovich* v. *National Football League*, 352 U.S. 445, 450–451, reh'g denied, 353 U.S. 931:

> ". . .vast efforts had gone into the development and organization of baseball since that [Federal Baseball] decision and enormous capital had been invested in reliance on its permanence.

Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." 352 U.S. at 450–451.

Question 2. You testified that you consider the Vermont Expos a "viable minor league club," and that you believed it was only "theoretically" possible that the club would be eliminated after the expiration of the current contract in 2003. What concrete assurances can you provide that the Vermont Expos will continue to exist within the baseball minor leagues beyond two years? Do the minor leagues have to gain the approval of the major league owners to continue a minor league team in existence?

Answer. It is only "theoretically possible" that a minor league club such as the Vermont Expos would be eliminated as no longer viable after the Professional Baseball Agreement expires in the sense that the major leagues might try to reduce their support for the minor leagues, especially if the antitrust laws are changed. I consider that to be "theoretical" or speculative because the parties have, especially in recent years, worked well together to assure that Minor League Baseball receives the necessary support to continue in viable markets. The minor leagues do not have to gain approval of major league owners to continue a minor league team in existence.

Question 3. In 1997 we heard testimony from a former minor league player who played with affiliated minor league teams and with the St. Paul Saints of the independent Northern League. He indicated that under the standard minor league player contract, a player was required to waive all rights to appeal any action by the team in State or federal court and that the only avenue of appeal is to the Commissioner of baseball. Is that accurate? What does the player contract for minor league players provide with respect to player's rights, the reserve clause and compensation? That player questioned why Congress would want to "create a new federal law exempting the owners' actions in the minors from the antitrust laws." He asked:

"What are the laws [owners] must be able to break in order to run minor league teams? How much more power do they need when bargaining with an 18-year old kid whom they own for 7 years, and what minor league player is going to jeopardize his career by challenging the system?" Since no minor league player testified this year, I ask them of you on their behalf.

Answer. A copy of the current uniform Minor League player contract is attached. As with a growing number of employment agreements in many industries, it contains alternative dispute resolution ("ADR ") language. The Supreme Court has endorsed ADR, even to resolve statutory discrimination claims, most recently in *Circuit City Stores, Inc.* v. *Adams*,— U.S.——, 149 L. Ed. 2d 234, 121 S. Ct. 1302 (2001).

In answer to the former minor league player's questions, Minor League Baseball is not requesting a change in the law but a continuation of baseball's status as excluded from the antitrust laws. Actually, minor league prospects have a good deal of leverage in bargaining with Major League teams, as indicated by the burgeoning signing bonuses paid to drafted players and their ability to decline to sign with the club that drafts them and re-entering the draft pool. Recent examples abound of players declining to sign and playing clubs off one another to bid up signing bonuses. The magnitude of the signing bonuses and the number of players who receive significant bonuses indicate bargaining power that players entering baseball have acquired.

Several players or their agents have used these strategies to significantly increase their economic well-being and the reality of the power of players is no longer as por-

trayed by the minor league player referred to in your question, if that was ever the case.

Question 4. If you were to suggest language for a statutory federal antitrust exemption for minor league baseball, what would it say?

Answer. Minor League Baseball believes that the Supreme Court decisions creating the baseball exemption are clear and that statutory language is therefore not necessary. If this were to be confirmed by Congress, we suggest that appropriate language would make it clear that federal and state antitrust laws do not apply to the business of major league and minor league baseball, including but not limited to all of the areas listed in subsection (b) of the Curt Flood Act.

Question 5. I am uncertain from your testimony whether you believe that the minor league draft for players, the minor league reserve clause, and the Professional Baseball Agreement between major league teams and the National Association of Professional Baseball Leagues would withstand federal antitrust scrutiny if challenged. For each of these aspects of the minor leagues about which you testified, do you believe that would be upheld as reasonable if challenged as contrary to federal antitrust law?

Answer. I believe each of the aspects of baseball's operations is reasonable given the unique nature of sports leagues which require cooperation to produce on-field competition. But after having been permitted and encouraged to develop for 80 years without the risk and expense associated with such challenge, Minor League Baseball's future should not now be gambled in countless courtrooms.

Question 6. You note that because minor league players are not part of any collective bargaining unit and that the minor league player draft is not protected by the labor antitrust exemption as the result of collective bargaining with a labor union. Is one solution to that problem collective bargaining with minor league players?

Answer. Minor League Baseball does not believe that collective bargaining at the minor league level is appropriate, or that collective bargaining would benefit players, fans or teams.

Question 7. In 1922, the Supreme Court held that professional baseball was personal effort and not a subject of "commerce" and that, therefore, the actions of the National League, American League and individuals in allegedly conspiring to monopolize the business of baseball by destroying the Federal League were not to be subject to scrutiny under the Sherman Anti-Trust Act. Do you contend that minor league baseball is immune from federal antitrust laws on that basis? Do you contend that minor league baseball is exempt from federal antitrust laws? If so, what is your basis for that contention?

Answer. Yes, see my answer to question no. 1, above.

Question 8. Please help us understand the history of the minor leagues. (A) Is it true that from 1914 and continuing for 25 years, Judge Kennesaw Mountain Landis, while serving as commissioner of baseball, on a number of occasions acted to oppose secret agreements and handshake deals between major league interests and minor league baseball teams and had occasion to declare a number of minor league players free agents? Please provide a description of the actions taken and basis therefore. (B) Am I correct that in 1914, the National Commission that governed the National League and American League had prohibited major league teams from owning minor league teams or developing a farm system and that minor leagues also acted to prohibit major league owners from also owning minor league teams? (C) Is it accurate that in 1921, the National Agreement among major league owners allowed major league teams to own minor league teams? (D) Is it true that in the Cedar Rapids case in 1938, Commissioner Landis made a ruling that resulted in as many as 90 minor league players becoming free agents? (E) Is it true that in 1939, "major league baseball owners sought legislation to codify relations between big league teams and minor league teams," as Peter Golenbock writes in *The Spirit of St. Louis*? What was that legislation and what happened to it?

Answer. I have not been able to confirm the actions of the Baseball Commissioner and National Commission between 1914 and 1939 about which your question asks.

Question 10. 1 believe that at least one of the bidders for the Boston Red Sox was Miles Prentice, a minor league owner. From his experience in connection with the minor leagues, do you have any reason to doubt that Mr. Prentice would make an outstanding baseball team owner? What is your understanding why Mr. Prentice's bid and the other higher bids for the Boston Red Sox were rejected and Mr. Henry's bid was preferred by the other major league baseball owners?

Answer. Based on his minor league experience, I have no reason to doubt that Miles Prentice would make an outstanding Major League owner. I have no knowl-

edge of the reason why the Major Leagues made their decisions concerning the sale of the Boston Red Sox.

Question 11. Which minor league baseball teams include owners from racial minorities, and what percentage of those teams is owned by members of a minority group?

Answer. Minor League Baseball does not ask prospective owners about their race or ethnicity and does not keep records of such characteristics.

Question 12. Please provide the Committee with a current copy of the Professional Baseball Agreement governing the relationship between the major and minor leagues.

Answer. A copy is attached.

Question 13. Is it your understanding that the provisions of the Curt Flood Act apply to independent 5 minor league teams? Do those teams enjoy the exemption from the antitrust laws that you claim for the affiliated minor leagues?

Answer. It is not my understanding that the Curt Flood Act applies to so-called independent minor league teams, which are not part of the professional baseball system of major league and affiliated minor league teams that evolved in reliance on the Supreme Court's 1922 decision.

Question 15. We have heard concerns that the major league interests and their affiliated minor league have been attempting to prevent or discourage the development or expansion of the independent minor leagues. Is this true? Are there any restrictions in major or affiliated minor league policies, formal or informal, on ownership or other types of participation in both affiliated and independent minor league teams? Have the geographical divisions of territory of the major and affiliated minor leagues been used to discourage the development or expansion of independent minor league play? Even if your answer is "no," please explain those geographical allocations of territory, and how they affect the locales in which the independent teams may operate.

Answer. Minor League Baseball supports the growth of professional baseball where it can be viable and not threaten public investments in existing facilities. Minor League Baseball restricts members of its teams' ownership groups from direct and indirect violations of their mutual agreements. Those agreements include provisions that provide reasonable recognition to territorial exclusivity. Those provisions are included in the National Association Agreement, a copy of which is attached.

Question 16. I understand that time at the hearing was limited, so if you would like to expand on any of your own responses, or respond to any comments made by other members of the panel, please do so.

Answer. During the testimony by the panel on February 13, 2002 a question was raised about the source of a quote attributed to Mr. Fehr. I later corresponded with Mr. Fehr, and a copy of my letter and the newspaper article in which he was quoted is attached. I ask that they be made a part of the record.

Responses of Mr. Brand to questions submitted by Senator Hatch

Question 1. Mr. Brand, as was discussed during the hearing, the current contract between Major League Baseball and Minor League Baseball will expire at the end of 2003 season. What are the legal obligations on Major League Baseball, if any, to support the same number of minor league teams in the 2004 season as are playing today? Could you please explain the obligation of Major League Baseball to support any minor league clubs in 2008. 2012, or 2016?

Answer. The PBA will not necessarily terminate with the end of the 2003 season, but is only subject to termination in the event certain conditions occur as specified in the PBA. A copy of the PBA is attached. Minor League Baseball hopes and expects to renew the PBA whenever it expires, and that it will include the same level of support for the minor leagues (in large part because MLB's continued support of the minor leagues helps to justify the exemption baseball enjoys from the antitrust laws).

Question 2. What is the process by which a minor league team becomes a member of one of the leagues of the National Association of Professional Baseball Leagues? How does such a team become affiliated with a major league club and how is the level of play determined? Once a club is affiliated at a certain level, such as at AAA, can it be switched to a different league? Have there ever been more AAA teams or AA teams than there are major league clubs?

Answer. The process by which leagues can apply for membership in the National Association of Professional Baseball Leagues is spelled out in the NAA, a copy of which is attached. Expansion of affiliated leagues is governed by the NAA and portions of the Major League Rules that are a part of the PBA, a copy of which also is attached. The affiliation process and level ("classification ") of play also are governed by these same agreements and rules. A club at a classification is not switched to a different league, but occasionally clubs may relocate to other home cities, either because that city is vacant or through a draft of a territory by a league of higher classification. Again, the process for such is spelled out in the attached agreements and rules.

Question 3. Has there ever been any communications or direction from Major League Baseball to its clubs to ensure that all affiliations between major league teams and minor league teams expire at the same time or prior to a new round of negotiations between Major League Baseball and National Association of Professional Baseball Leagues?

Answer. Not to my knowledge, except as pursuant to the terms of the PBA.

Question 5. Mr. Brand, has there been any discussion among the members of your organization concerning the possibility of contraction of minor league clubs and the consequences for current owners?

Answer. Yes, because of the publicity and attendant speculation.

Question 6. If Major League Baseball does proceed with its stated plans to contract the number of major league clubs, which has ranged from two to six according to various news reports, and as a result, the number of minor league clubs is reduced after the end of the 2003 season, what legal alternatives are available to local jurisdictions that either lose a team or see their current team replaced with a club playing at a lower level, such as AAA team being replaced with a AA or A team?

Answer. See answer to question no. 1 above.

Question 7. As you indicated during the hearing, the Committee does lack some basic information about the status and operation of the minor leagues. Consequently, please provide the following information about the 206 clubs which belong to your organization:

A. The number of clubs which play in facilities which were built either in total or in part with taxpayer funding;

Answer. In the United States, the National Association of Professional Baseball League clubs in Lexington, Kentucky, Memphis, Tennessee and Chattanooga, Tennessee currently play in facilities built without taxpayer funding.

B. The number of minor league clubs with either lease agreements or other contractual arrangements with local jurisdictions for terms that extend beyond the 2003 season;

Answer. 97

C. The number of clubs that, last season, played in a facility that was built or remodeled after 1995; and

Answer. Every National Association of Professional Baseball League facility has been remodeled or constructed after 1995.

D. The number of minor league facilities that were remodeled or constructed to comply with the requirements of the current Professional Baseball Agreement.

Answer. All.

Question 8. Please provide an explanation of the legal alternatives open to a local jurisdiction in instances where a major league club terminates a minor league club's affiliation and there are still outstanding legal agreements with either a governmental entity or private companies. Are there any damages that may be recoverable for the cost of upgrades, renovations, or new construction of stadia in order to comply with the requirements of the Professional Baseball Agreement?

Answer. See answer to question no. 1 above.

Question 9. Mr. Brand, in your written statement, you indicated that one of the benefits of baseball's antitrust exemption is the stability that it can bring to both major league and minor league franchises. This Committee has received testimony in the past that between 1987 and 1993, there were 49 minor league franchise relocations. Would you please provide a list of the franchise relocations or changes in affiliations that have occurred between 1994 and 2001?

Answer. The Minor League Baseball teams that have relocated during the six years between 1994 and 2001 are as follows:

Relocated to	Relocated From
Akron, OH	Canton, OH
Lowell, MA	Elmira, NY
Salisbury, MD	Albany, GA
Lancaster, CA	Riverside, CA
Mobile, AL	Wilmington, NC
Jackson, TN	Memphis, TN
Salem-Keizer, OR	Bellingham, WA
Pulaski, VA	Huntington, WV
Myrtle Beach, SC	Durham, NC
Tucson, AZ	Phoenix, AZ
Fresno, CA	Tucson, AZ
Dayton, OH	Rockford, IL
Niles, OH	Erie, PA
Missoula, MT	Lethbridge, Alberta
Round Rock, TX	Jackson, MS
Lakewood, NJ	Fayetteville, NC
Staten Island, NY	Watertown, NY
Sacramento, CA	Vancouver, BC
Orange County, FL	Orlando, FL
Brooklyn, NY	St. Catharines, Ontario
Sevierville, TN	Knoxville, TN
Vancouver, BC	Medford, OR
Troy, NY	Pittsfield, MA
Portland, OR	Albuquerque, NM
Pasco, WA	Portland, OR
Casper, WY	Butte, MT
Provo, UT	Helena, MT

Some of the relocations listed above occurred because of expansion, and resulted in Minor League Baseball being played in an additional market. For example, the Durham Single A club relocated to Myrtle Beach to permit an expansion AAA club to locate in Durham. Others were relocations within the same market (e.g. Knoxville to Sevierville, Tennessee).

Question 10. Would you please describe the average and median salaries of players at the AAA level, the AA level, the A level, and the rookie level?

Answer. Major League clubs pay the salaries of these players, who are under contract to those clubs, and Minor League Baseball therefore does not have the information on player salaries, bonuses, etc. necessary to answer this question.

Question 11. Mr. Brand, in the early 1990s, the President of the National Association of Professional Baseball Leagues asked Congress to repeal baseball's antitrust exemption. You now assert that the minor league clubs are the primary beneficiaries of that exemption. Please explain the change in position.

Answer. To the best of my knowledge and information, no President of the National Association of Professional Baseball Leagues has taken the position that Congress should repeal baseball's antitrust exemption. There has been no change in the organization's position.

Question 12. Mr. Brand, I have read the standard contract that every minor league player is required to sign to play professional baseball. Would you please explain the origins or reasons why a player is bound to a major league organization in the standard minor league contract for a period of seven seasons? Would you also explain why it is necessary, in the Minor League Uniform Player Contract, for a player to assign to the club all rights involving his likeness for a term that exceeds the contractual relationship? I should note that the description of the photographs or motion pictures does not appear to be limited to those involving baseball.

Answer. The term of a minor league baseball player's contract (up to a maximum of seven seasons) strikes a reasonable balance between the player's interest in free agency and a major league club's interest in realizing a potential return on its investment in developing a player. If the major league clubs paid a player in his early minor league years, developed a prospective star, and then had no assurance he would be available to play for the major league club for any length of time, there would be significantly reduced incentive to provide players for the rosters of the many clubs that comprise Minor League Baseball.

The Minor League Uniform Player's contract specifies that use of a player's likeness continues after the contract ends so as to prevent disputes about whether the

minor league club is liable if it, for example, offers as a promotional item in a subsequent season the image of a player made while that player was in the minor league club's uniform the previous season. Minor league clubs have been subject to litigation over precisely that issue, questions about which would generate additional litigation and diminish the value of the clubs' marks (e.g. logos and designs) which identify players with the club in particular and Minor League Baseball in general, identification which adds value to a player likeness.

Question 1. In what specific ways do the antitrust laws—and baseball's limited exemption from these laws—actually affect or contribute to the problems that have been repeatedly identified by industry participants and commentators?

Answer. We believe that this question is directed to problems at the major league level. Minor League Baseball believes that Major League Baseball's problems are almost entirely in the areas of competitive balance and poor financial performance, and neither the antitrust laws nor baseball's exemption contributes to these problems. These problems mainly relate to issues that must be bargained collectively, and collective bargaining is covered by the labor laws and the non-statutory labor exemption. Repeated citations to baseball's antitrust exemption as a cause of baseball's problems, particularly after the passage of the Curt Flood Act, are simply misplaced.

Question 2. How, specifically, would legislative action modifying or clarifying baseball's exemption ameliorate or eliminate the relevant problems?

Answer. For the reasons given in the answer to question 1, it would not. Moreover, changes to baseball's status under the antitrust laws would cause significant and unjustifiable harm to Minor League Baseball, for the reasons explained in my testimony.

Responses of Robert A. Butterworth to questions submitted by Senator Leahy

Question 1. Team relocations can raise real concerns in any sport, and the United States Conference of Mayors and the National Football League crafted a policy several years ago to address those concerns. As I understand it, this jointly-developed set of principles governs the future relocation of any professional football team, and includes a variety of community-sensitive processes and substantive requirements: There are public hearings, conversations with local governments and stake holders, and a league mandate that the fans be well-served. The cooperative effort of the mayors and the league seems well-designed to bring some balance to this potentially contentious issue, and the procedures they have developed shed real light for the affected public on what is actually happening. Do you think that such a mechanism could work effectively for baseball as well?

Answer. Any process governing the relocation of professional sports teams that involves the community can be seen as a positive step. Oftentimes local community and government interests have little, if any, input regarding the relocation of teams that they have come to support and subsidize. Procedural safeguards that allow for public comment also take into account the issue of "fairness" that is not currently part of the relocation process. Furthermore, individual clubs should take into account, and justify, whether relocation will really solve their current problems, assuming their problems do indeed exist. Unfortunately, fan loyalty is often unrepresented at the table of discussion surrounding relocations of professional sports teams.

However, it should be stressed that absent a clarification by Congress as to the scope of the antitrust exemption, if such an exemption exists, any such. procedural or substantive measure would largely be meaningless. Major League Baseball operates in the dark, as we have seen by its recent contraction proposal. It has no interest in being forthcoming with its financial data, or in giving straight answers to the public. Therefore, since MLB operates above the law, there is no guarantee that it will provide honest public hearings, or issue written fact findings that are based on subjective criteria, such as fan loyalty. Furthermore, since the owners act in concert with each other to the detriment of communities, any individual club's written notice of a proposed transfer (as required by the NFL's Policy and Procedures for Proposed Franchise Relocations) is largely illusory and perfunctory.

Question 2. The Conference of Mayors and the NFL have also developed a stadium financing program, which allows owners to borrow money from the league to build new stadia. It thus seems much less likely to result in communities being

forced to pay the full cost of new facilities in order to keep their teams—a situation that many have charged prevails in baseball today. Do you think that such an approach would foster better community relations with major league baseball, were it adopted?

Answer. The NFL's stadium financing program is a positive step in that it recognizes that the league may provide additional funds to assist in the financing of stadia. It also implicitly recognizes that private parties need to commit funds, instead of relying on public entities to fund new stadia with government subsidies that could be better spent elsewhere on necessities such as education and hospitals.

However, by simply describing the stadium financing venture as a "public-private partnership," it does not expound upon the level of commitment that should be expected from private entities. Therefore, under MLB's current scheme, a league subsidy agreement would only be effective to the extent that individual clubs were committed to funding new stadia. Without such a commitment from the individual club, public entities will continue to be threatened with contraction or relocation. Also, the cartel-like behavior of MLB, including the recently reported loan from an owner to the Commissioner, suggests that owners do not exercise their independent business judgment in dealing with matters of financing new stadia. In at least one instance, Florida has been threatened by the Commissioner that "the Marlins cannot and will not survive in South Florida without a new stadium." In the current climate of extortion, it is unlikely that more involvement from the league will be beneficial.

Question 3. I understand that time at the hearing was limited, so if you would like to expand on any of your own responses, or respond to any comments made by other members of the panel, please do so.

Answer. The other points I'd like to make are part of our answers to the questions posed by Senator Hatch.

Responses of Robert A. Butterworth to questions submitted by Senator Hatch

Question 1. In what specific ways do the antitrust laws—and baseball's limited exemption from these laws—actually affect or contribute to the problems that been repeatedly identified by industry participants and commentators?

Answer. The short answer is that the antitrust laws do not affect or contribute to the problems that baseball has experienced but the exemption has. Part of the problem is identified by the language of your own question. Is the baseball antitrust exemption "limited?" No one seems to know the scope of the . exemption. A very careful reading of the briefs and opinions as well as the Congressional Record suggests that the baseball antitrust exemption has always been limited to at most the reserve system, but no one seems to know for sure, so, in the meantime, baseball acts with impunity.

This uncertainty as to the scope of the baseball antitrust exemption has allowed MLB to claim immunity when its members collude to determine what is in their pecuniary interest and the interest of the industry as a whole, which means that fans and the communities that support MLB are not a top priority. The baseball antitrust exemption allows the various owners of MLB clubs to get together, unlike any other sport, and vote to do away with two or more of their own members so that each remaining member can benefit fmancially from the unlucky teams' demise. No other sport can vote to restrict its overall output. Indeed, most encourage development of teams and expansion efforts.

The antitrust laws, if they were allowed to be applied, would level the playing field by making MLB more accountable to local communities and to fans. With the exemption lifted, the focus would shift from the owner's "what's in it for me" attitude, which ultimately will be the death of baseball, if not checked, to "how do I compete with the other teams or on behalf of my community to make not only a profit but to provide real entertainment arid competitive value for the fans in my community."

At the core of this issue are fundamental notions of fairness and equality under the law.

Exemption from the law promotes lawlessness. The relationship between the clubs and its communities is an interdependent partnership, where both sides have something to offer the other. When the clubs act in concert, the independent judgment of the individual club is gone, and all pro-competitive incentives to compete for a city's resources are eliminated. The result is an "all-or-nothing" approach, where the

clubs band together and impose demands as a collective, leaving the cities powerless. Deals that include terms more favorable to cities are certainly frowned upon and discouraged, since another club in a different market might have to accept similar terms. The arrogance of MLB on this point should not be understated. A Florida state senator's receipt of threats from the Commissioner of MLB that "the Marlins cannot and will not survive in South Florida without a new stadium," suggests that Miami-Dade County is somehow unworthy of a MLB club unless it builds a new stadium at the taxpayers' expense. It is our belief that in a truly free, competitive market, clubs should be competing for some of our great cities, and not the other way around. I will also let the greatness of Miami speak for itself as a community that is fully capable of supporting a MLB club.

Another result of MLB's cartel behavior apparently condoned by the existence of an antitrust exemption is its dealings with cities without clubs. Existing clubs that are not financially sound are prevented froze relocating to other locations that could support a club (such as the Washington, D.C. area), so that MLB can retain the city as a threat against other communities who are reluctant to divert crucial funds for local government to the construction of shiny new stadia.

No other industry is so enigmatically and inextricably exempt from the nation's laws against anticompetitive behavior.

Question 2. How, specifically, would legislative action modifying or clarifying baseball's exemption ameliorate or eliminate the relevant problems?

Answer. It is naive to think that bringing MLB under the full realm of antitrust law will solve MLB's current woes. There appears to be many fundamental management problems, especially since MLB claims that only five teams were profitable in 2001, despite the fact that baseball had record-breaking revenues. Nonetheless, we in Florida feel strongly that many relevant issues could be resolved by clarifying baseball's antitrust exemption.

Clarifying the exemption would create better law. The trilogy of Supreme Court decisions (Federal Baseball, Toolson, and Flood) does not provide any clear guidance and the current state of the law has created a vacuum of enforcement where neither state nor federal authorities can apparently investigate MLB's anticompetitive conduct. This result has confounded judges on the state and federal levels as to the scope and meaning of such an anomalous exemption from the law. This anomaly, which was created by the Supreme Court, was left for Congress to resolve. Therefore, Congress is apparently tasked with responsibilities of interpretation and clarification of the law, which are tasks normally reserved for our nation's judiciary. Indeed, Congress has laudably taken on this arduous task through numerous hearings. This confusion of constitutional roles has allowed MLB to argue conflicting positions in different forums, as Flood noted in his 1971 brief before the Supreme Court:

For half a century! Organized Baseball has succeeded in persuading one forum after another that 'some other forum' is the appropriate one to deal with the abuses of the reserve clause. In its brief to this Court in 1922, Organized Baseball argued that ' baseball should be exempted from federal antitrust regulation because 'a state is entirely competent to reach and deal with any evil in this field of sport requiring legislative remedy.' (Citation omitted) It then told Congress that the federal courts were available. In the words of the Cellar Subcommittee's 1952 Report, Baseball 'represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested [in the courts] by the [Sherman Act's] rule of reason.' (Citation omitted) Then, in 1953, Baseball successfully- if opportunistically—argued to this Court in TooLron that it ought not subject the reserve system to the Sherman Act's 'rule of reason' because Baseball was sufficiently regulated by state law .... But in 1966, Baseball argued to the Wisconsin state court that only federal law could regulate baseball adequately.

Brief for Petitioner at 19–20, *Flood* v. *Kuhn*, 407 U.S. 258 (1972) (No.71–32) (emphasis original). As Congress is awarc, the Suprcmc Court in Flood determined that baseball's reserve system was exempt from the federal antitrust laws, and state antitrust regulation would conflict with federal policy, and the burden on interstate commerce was outweighed by the state's interests in regulating baseball's reserve system. *Flood* v. *Kuhn*, 407 U.S. 258, 284 (1972). Eliminating the exemption or at least clarifying its scope would allow under the appropriate circumstances for an enforcement mechanism which would discourage MLB's anticompetitive conduct.

Currently, communities negatively impacted by MLB's collusive conduct have limited legal recourse. Communities can, and have, spent millions on stadiums to keep teams from relocating only to learn a few short years later that the team may still be relocated for greener financial pastures and an even better facility. Threats like these are used to extract even more concessions from communities desperate to keep their teams from leaving.

Antitrust laws should therefore be available to these communities so that they may have some recourse to take to protect their vast investments in attracting and maintaining the team. The existence of the antitrust laws as. a potential avenue of relief would hopefully give MLB pause when considering business decisions that may benefit the industry as a whole but destroy the communities who trusted MLB's representations regarding the teams' commitment.

In this vein, it is important to understand that applying the antitrust laws to baseball will not automatically give rise to antitrust violations every time MLB acts. More often than not, the rule of reason test, will most likely apply to baseball's conduct. That test, which requires a balancing of potential procompetitive effects against anticompetitive ones would have to be considered before a violation of the antitrust laws could be detennined. Consequently, lifting the exemption will merely level the playing field; it will not bring the rain of litigation the proponents of the exemption fear. Rather, the lifting of the exemption should create just enough deterrence to ensure that MLB takes into account competitive effects before acting in concert, just as the NFL, NHL, and soccer leagues have done for years, with minimal litigation resulting.

Communities win when businesses play fair. Eliminating the exemption would create an open and honest dialogue, which is absent when owners act in concert. Despite the obviousness of this statement, MLB defends its exemption on the ground that it promotes stability. MLB has a short memory. One newspaper reporter, commenting on the trial in Washington state regarding the 1970 move of the Seattle Pilots to Milwaukee, reflected on Seattle's woes:

It all began, of course, when the American League took the Seattle Pilots out of here and shipped them to Milwaukee. Actually, it began before that. It began in the late '50s anal through much of the '60s, when baseball franchises were moved, from city to city, like so many touring road companies. No matter 'public confidence,' or any other quality, such as fan loyalty, civic pride, or whatever; the national game became a financial roadshow. Teams went to better 'markets,' to communities which 'qualified' by offering favorablc rcnts, subsidizcd playing sitcs (up to 'major lcaguc standards') and 'good' concession deals.

Emmett Watson, Baseball on Trial, Seattle Post-Intelligencer, Jan. 25, 1976.

It is worthy to mention that the following year after the Pilots moved to Milwaukee, the Washington Senators relocated to become the Texas Rangers.

Currently, representatives from the communities of Minnesota and Montreal, as well from other communities from teams that are candidates for contraction, certainly do not feel that the exemption has created any semblance of stability. Rather, it is an illusory game that MLB uses to justify its lawlessness. If owners do not decide collectively to relocate a club, then communities will still have to fear the league's elimination of the team by contraction.

Elimination of the exemption is good policy. No one should be above the law. Congress should strive to discourage cartel-like behavior, and force MLB owners to deal directly and honestly with communities. Furthermore, MLB has not earned any type of special treatment. If there is any question as to whether it has, we would invite Congress to convene special hearings with representatives from communities that have lost baseball clubs, or are currently being threatened with the loss of the club, and ask them if they feel MLB has treated them fairly.

Whatever course Congress decides to take, it must be resolute. MLB has a history of settling its disputes in order to maintain its claim to special status under the antitrust laws. However, Congress can expect these issues to re-surface until this matter is resolved until it takes action, or the Supreme Court agrees to revisit this issue.

Responses of Robert A. DuPuy to questions submitted by Senator Leahy

Question 1. I asked Mr. Brand during the hearing what assurances he could give me concerning the fate of the Vermont Expos after expiration of the current contract in 2003. After the hearing, I received your letter dated February 14 in which you say we do share the desire to see minor league baseball thrive in the state of Vermont. I thank you for your letter. In precise terms, what the owners' commitment to minor league baseball in Vermont after expiration of the current contract? What you intend to do about the minor league teams associated with any major league teams that are subject to contraction?

Answer. Baseball is committed to preserving and supporting the Vermont Expos and all affiliated minor league clubs while the current Professional Baseball Agree-

ment is in place. After that agreement terminates, that issue and many other interrelated matters are subject to bilateral negotiations with the minor leagues. We remain committed to working with the minor leagues to deliver professional baseball to as many communities as possible.

Question 2. I noted in my opening statement that I will ask you to submit language that you and Mr. Selig would support Congress enacting in order to provide a statutory antitrust exemption for major league baseball. I ask that you do so in writing.

Answer. Baseball believes that the Supreme Court decisions creating the baseball exemption are clear and that statutory language is therefore not necessary. For purposes of responding to the question, however, we would suggest that any statutory language make clear that federal and state antitrust laws do not apply to the business of baseball, including but not limited to all of the substantive areas listed in subsection (b) of the Curt Flood Act other than Major League Baseball player employment matters as described in subsection (a) of that act.

Question 3. You say in your testimony that major league baseball's contention that it continues to enjoy an antitrust exemption "played no role in the Minnesota litigation."

(A) Did major league baseball or the Twins make arguments to the Minnesota state courts based on a theory that issuance of the injunction to require the Twins to play this coming season in Minnesota would violate the Commerce Clause in the United States Constitution?

Answer. Yes.

(B) How is such an argument consistent with major league baseball continuing to assert that the justification for it to enjoy exemption from federal antitrust laws is the premise that baseball is not commerce?

Answer. Major League Baseball does not assert that justification.

Question 4. In a recent article by Mark Asher in the Washington Post, Mr. DuPuy, you are quoted as saying: "No one expected the level of opposition we received," to your plan for contraction. Mr. Selig lived through the loss of the Milwaukee Braves to Atlanta after 1965. He saw what happened when the Seattle Pilots became his Brewers. And, of course, he recalls the landmark relocations of the modern sports era, when the Dodgers and the Giants abandoned New York for the west coast. Did you proceed down this path without expecting the public and public officials to react in opposition to these plans?

Answer. My statement was not meant to imply that we did not expect opposition from all the sources that have generated opposition. What we did not expect was the decision in regard to the Metrodome lease by the Minnesota courts, which we believe is contrary to Minnesota law.

Question 5. Since our last hearings, major league baseball has modified a number of agreements. Please provide the Committee with copies of major league baseball's current governing documents, including but not limited to its new Constitution, any bi-laws, guidelines, the Professional Baseball Agreement with the minor leagues, the rules that govern changes in ownership, the existence and location of teams and territorial agreements. We are not asking for the rules that govern the playing of the game of baseball but the rules and protocols governing the business of baseball.

Answer. Such documents are attached hereto.

Question 6. Would you provide copies of the papers filed before Judge Hinkle in the recent case and the briefs on behalf of major league baseball teams to both the District Court and 11‴ Circuit? It appears from Judge Hinkle's footnote 16 that you argued that passage of the Curt Flood Act constituted "an endorsement by Congress of the exemption of the business of baseball" from all antitrust laws.

Answer. Copies of such papers are attached hereto or will be sent when they are completed.

Question 7. 1 have read recent reports that Paul Beeston, who is described by Murray Chase in the New York Times as baseball's chief operating officer and the clubs' primary negotiator with the players' union is stepping down. Who will be replacing Mr. Beeston as baseball's eighth lead labor negotiator in the last three decades of labor negotiations?

Answer. Baseball's negotiating team currently consists of Bob DuPuy, Rob Manfred, Howard Ganz, Andy MacPhail and Peter Angelos. None of those representatives has been designated as lead negotiator.

Question 8. 1 believe that at least one of the bidders for the Boston Red Sox was Miles Prentice, a minor league owner. From his experience in connection with the minor leagues do you have any reason to doubt that Mr. Prentice would make an outstanding major league baseball team owner? Why was Mr. Prentice's bid for the

Boston Red Sox rejected and Mr. Henry's bid preferred by the other major league baseball owners?

Answer. No.

Mr. Henry's bid was the only bid presented by the Boston Red Sox to the other Major League Baseball owners for approval.

Question 9. Which, if any, major league baseball teams include owners from racial minorities, and what percentage of ownership of each of those teams to minority members hold?

Answer. Due to a variety of factors which include the complexity of club organizational structures, the frequency of ownership transfers and ownership confidentiality concerns, the Commissioner's Office does not compile information regarding the races of equity investors of the major league clubs. However, examples of club owners from racial minority groups include Hiroshi Yamauchi (Seattle Mariners), Linda and Robert Alvarado (Colorado Rockers) and Daniel Manning (Arizona Diamondbacks). We believe there are others.

Question 10. Is it your understanding that the provisions of the Curt Flood Act apply to independent minor league teams? Do those teams enjoy the exemption from the antitrust laws that you claim for the major and affiliated minor leagues?

Answer. Because of the wording of the Curt Flood Act and that of the Supreme Court opinions establishing Baseball's antitrust exemption, together with the reliance arguments in the Toolson and Flood opinions, we do not believe that the independent minor leagues enjoy the same benefits under Baseball's antitrust exemption.

Question 11. We have heard concerns that the major league interests and their affiliated minor league have been attempting to prevent or discourage the development or expansion of the independent minor leagues. Is this true? Are there any restrictions in major or affiliated minor league policies, formal or informal, on ownership or other types of participation in both affiliated and independent minor league teams? Have the geographical divisions of territory of the major and affiliated minor leagues been used to discourage the development or expansion of independent minor league play? Even if your answer is "no," please explain those geographical allocations of territory, and how they affect the locales in which the independent teams may operate.

Answer. At the major league level, there have been no such efforts or restrictions and we are not aware of any such effects.

Question 12. Following up on Senator Nelson's comments at the hearing, please explain the major league owners' position on pensions due to players in the Negro Baseball League who played in that league between 1947 and 1960

Answer. In 1994, the owners voluntarily and retroactively created a pension program for Negro League Players who played prior to the integration of Major League Baseball in 1947. The owners had no legal obligation to create such a benefit and, in fact, the beneficiaries of the program, in many cases, were never employed by a Major League Baseball club. Benefits were not made available to Negro League Players based on service between 1947 and 1960 because players of all races had an opportunity to play in Major League Baseball during that period. Although the integration of Baseball was admittedly not complete by 1947, that year seemed to be an appropriate point of demarcation for this voluntary program.

Question 13. I understand that time at the hearing was limited, so if you would like to expand on any of your own responses, or respond to any comments made by other members of the panel, please do so.

Answer. See answer to question 8 from Senator Hatch.

Responses of Robert A. DuPuy to questions submitted by Senator Hatch

Question 1. Mr. DuPuy, does Major League Baseball believe that its actions with regard to its umpires are not subject to the antitrust laws, or does it consider itself bound by the court's decision in *Postema* v. *National League of Professional Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992)?

Answer. Major League Baseball's umpires are members of a collective bargaining unit and their relationship with Major League Baseball is currently governed by a collective bargaining agreement. Therefore, the non-statutory labor antitrust exemption covers that relationship, as set out by the United States Supreme Court in the 1996 *Brown* v. *National Football League case*. Baseball believes the Postema case was wrongly decided. The United States Court of Appeals for the Second Circuit

reached the conclusion, contrary to the one in Postema, that baseball's relationship with its umpires was not subject to the antitrust laws. *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970). See also *Moore* v. *National Association of Professional Baseball Leagues*, C78-351 (N.D. Ohio, filed July 7, 1976), which found baseball's exemption applicable to former umpires' claims of antitrust violations following umpires' discharge ("It cannot be disputed that professional baseball umpires perform an integral function in 'the business of baseball'")

Question 2. Mr. DuPuy, does Major League Baseball believe that issues involving local radio broadcasts are not subject to the antitrust laws, or does it consider itself to be bound by the court's decision in *Henderson Broadcasting Com.* v. *Houston Sports Ass'n*, 541 F. Supp. 263 (S.D. Texas 1982)?

Answer. Major League Baseball respectfully disagrees with the opinion in the Henderson case. In fact, there is contrary authority even in Texas. In *Hale* v. *Brooklyn Baseball Club, Inc.*, Civil Action No. 1294 (N.D. Tex. 1958), the court held that the television broadcasting of baseball games was covered by the exemption. The court stated:

> The telecasting simply lifts the horizon, so to speak, and brings in another set of viewers of the same identical game that those present in the grandstand are seeing at the same time, ordinarily, and I believe it's straining realities to suggest that this television business has become a new facet of activity that you can look at apart from the ordinary business of baseball; and I can't follow that because there couldn't be such broadcasting except for the old-fashioned baseball game being played somewhere—the very gist and essence of the baseball business.

Question 3. During your testimony to the Committee, you indicated that baseball's exemption from the antitrust laws has ensured that there has been no team relocation in almost three decades. On the other hand, there have been approximately twelve separate instances where a major league club has indicated that it would have to move unless local communities provided some form of public subsidy. Please provide an explanation of what steps the Commissioner took, if any, in each of these instances to assure the local jurisdictions involved that moving a team was not a real option available to the club. If the stadiums or the improvements had not been approved, would the teams have been permitted to relocate?

Answer. It cannot be disputed that baseball's antitrust exemption has contributed greatly to our franchise stability for the last 30 years. Baseball's franchise stability policy has never, however, completely closed the door to a franchise relocation; we have stated publicly on many occasions that major league clubs will not be consigned to economic failure due to the absence of public and fan support. The question posed is very general and therefore difficult to address, but clubs seeking new ballparks have usually urged a joint public/private partnership and a degree of local support commensurate with the local benefit being created. Commissioners have encouraged such progress while hoping also to maintain baseball's franchise stability policy. As proud as baseball is of its record of no teams relocating over the last thirty years, it is equally proud of its many magnificent new ballparks, which the public has, without exception, embraced upon their completion.

Question 4. Mr. DuPuy, as I understand, when every minor league player signs with a major league club, he is required to sign the Minor League Uniform Player Contract. In that contract, there is a provision that requires that any dispute between the club and the player may be appealed only to the Commissioner of Baseball and may not be reviewed in federal or state court. Would you please explain the extent of this legal waiver? Would it, for example, apply to disputes involving rights afforded employees under the Fair Labor Standards Act, federal civil rights laws, the Americans with Disabilities Act, or federal labor laws? Would, for example, disputes involving a player's allegation of employment discrimination based upon race be appealed only to the Commissioner or could a suit be brought in federal or state court?

Answer. To perform services for a minor league club affiliated with a major league club, a player must sign a Minor League Uniform Player Contract. That contract contains a broad dispute resolution procedure that requires any "dispute or claim between [a] player and [a] club arising under any of the provisions of [the] Major League Uniform Player Contract" to be resolved in an arbitration proceeding before the Commissioner. The argument that claims under certain federal statutes would not be covered by this provision has never been raised.

Question 5. How many disputes involving minor league players have been appealed to the Commissioner over the last five years under the procedures set forth in the Minor League Uniform Player Contract? In addition, would you explain the procedures that are established to handle player disputes that are brought to the

Commissioner under the terms of the contract, including those instances where the commissioner would have to recuse himself? Is a player permitted, for example, to be represented by counsel during such appeals? On questions of legal interpretation, to whom does the Commissioner turn for assistance?

Answer: There have been approximately nine such appeals. The procedure resembles that of an appellate court, and it is a procedure that Baseball takes very seriously. The appellant submits in writing anything he chooses—a letter, a lengthy brief with enclosures, or anything in between. The respondent responds similarly. The appellant then has the opportunity to submit a reply brief or other materials. A briefing schedule for the submissions is generally set, though extensions of time have been liberally granted to accommodate the needs of any party. Oral argument is rarely, if ever, requested. There is no specific procedure covering recusal, but the Commissioner could recuse himself when appropriate. A player is, of course, permitted to be represented by counsel during such appeals, and the Commissioner turns to one or more lawyers in the Commissioner's Office for assistance on questions of legal interpretation.

Question 6. Mr. DuPuy, during your testimony and the testimony of Mr. Selig in the House, you both repeatedly stressed the important role that the antitrust exemption played in guaranteeing baseball's stability. On the other hand, your representatives indicated to staff that contraction was a certainty and, according to press reports following the hearing, as many as eighteen teams were considered as possible candidates for contraction. How was each team notified that it was under consideration for contraction? In addition, please explain how contraction is different than relocation to the fans and cities that end up losing a team?

Answer. Within the past twelve to eighteen months, each of the thirty teams engaged in a comprehensive review of its financial situation and overall status with the Commissioner or his representatives and financial experts. When individual Clubs were considered as contraction candidates, I and other representatives of the Commissioner's Office met specifically with those teams.

We do not believe that most fans would see any difference between losing a team through relocation or contraction.

Question 7. Mr. DuPuy, since roughly 1985, the Arizona Diamondbacks, the Baltimore Orioles, the Chicago White Sox, the Cincinnati Reds, the Cleveland Indians, the Colorado Rockies, the Detroit Tigers, the Houston Astros, the Milwaukee Brewers, the Seattle Mariners, the Texas Rangers, and the Toronto Blue Jays have received an estimated $2.5 billion in public subsidies. Would you please explain which of these clubs, if any, was considered as a possible candidate for contraction and, if so, why?

Answer. See answer to question 6, above.

Question 8. Mr. DuPuy, during the hearing, you indicated that no one was interested in purchasing the Montreal Expos. Obviously, your assessment seems to contradict a variety of reports from individuals in Washington, D.C-, who have repeatedly expressed their interest in purchasing the Expos and moving them to the Nation's Capital. Would you please explain the steps taken by Major League Baseball to determine whether there were any potential buyers of the Expos and why the two organizations in the Washington, D.C. area did not qualify? Did Major League Baseball receive any notification that an offer from Washington, D.C. was being made to the Expos, as reported in the media?

Answer. Baseball did not consider any suggestions that the Montreal Expos be sold and relocated, for the reasons given in the answer to question 7 from Senator Sessions. I would like to clarify, however, that Baseball did receive one or two communications (not offers) in regard to a potential purchase of the Expos, purportedly with the objective of keeping the Expos in Montreal. Baseball did not pursue such possibilities because it was already involved in the complex transactions recently completed regarding the Expos, Marlins and Red Sox.

Question 9. Mr. DuPuy, during your testimony, you made several references to the considerable losses major league clubs are suffering. To better understand the nature of these losses, would you please provide the following:

a) The amount deducted from net income by the major league clubs in 2001 for franchise amortization?

Answer. $170.7 million.

b) The amount of the loss in 2001 that is attributable to teams that are owned by individual or limited partnerships?

Answer. The industry does not accumulate financial data by ownership structure.

c) The amount of the loss in 2001 that is attributable to teams that are owned by entities, which also own cable or broadcast companies or other businesses that broadcast or carry, televised baseball games?

Answer. Franchises owned by media corporations and their 2001 losses from baseball operations are as follows (in millions):

Anaheim/Walt Disney Company	($ 9.6) .
Atlanta/AOL/Time Warner	($14.4) .
Chicago (NL)/Tribune Company	None .
Los Angeles/Fox	($45.3) .
Toronto Blue Jays/Rogers Communications	($52.9) .

d) The amount of the loss in 2001 that is attributable to interest?

Answer: $112.5 million, net.

e) The amount in 2001 of salaries, bonuses, or other management related payments, including loans, which the owners paid to themselves?

Answer. This information has not been accumulated.

f) The amount in 2001 paid out to players in compensation that was treated as loss in prior years but deferred?

Answer. This information is not available.

g) The amount of player compensation that was treated as loss in 2001 but not paid in cash?

Answer. This information is not available.

h) The amount in 2001 paid out in cash for signing bonuses to amateur and professional players, as compared to the amount actually incurred as costs on operating systems?

Answer. This information is not available.

i) The amount of the loss in 2001 that reflects the non-cash cost incurred for the depreciation of stadia and stadium improvements?

Answer. This information is not currently available. In 2000, the amount was $67.5 million.

Question 10. In your response to my question about the 18 percent annual increase in baseball franchise values, you noted that the Blue Ribbon report states that the sale of some clubs does not make enough to cover operating losses and still earn a significant return. Doesn't your response really underscore the fact that in some instances, operating losses, when using normal accounting methods, may not accurately reflect the value of an asset like a club?

Answer. I do not believe that the response referred to in your question suggests that "operating losses, when using normal accounting methods, may not accurately reflect the value of an asset like a club." My comments before the Committee were intended to make the point that, even taking into account asset appreciation realized at the time of sale, many franchises do not generate market investment returns (or in some cases any return) for owners. There can be no debate that the "value" of a club asset is the price that the asset commands in the market. Our analysis indicates that for many clubs, the asset appreciation is simply not great enough to offset operating losses incurred during the period of ownership.

Question 11. Would you please explain in further detail why, given the significant losses reportedly suffered by almost every single club in baseball the value of baseball franchises is still increasing at a rate of 18 percent a year?

Answer. The estimate that franchise values have increased at a rate of 18% per year is simply not accurate. In fact, lower revenue franchises that continue to suffer significant operating losses or a lack of competitiveness on the field have seen little or no asset appreciation in recent years.

Question 12. In your response to my question, you referred to the Boston Red Sox as one of the flagship franchises in baseball. In his testimony before the House, Mr. Selig referred to the Red Sox as one of the "five" franchises worth owning. Would you please identify the other four?

Answer: Any answer would include a degree of subjectivity and could change over time. Therefore, there is no definitive list of such franchises.

Question 13. In your response to my question, you noted that Mr. Henry sold the Marlins for what he paid Mr. Huizenga for them. According to published reports, Mr. Henry allowed Mr. Huizenga to receive all luxury suite income generated by the Marlins as well as other income generated by the Marlins, as well as other income streams such as rental payments. What is the role of Major League Baseball in reviewing a sale of a team, as in the case of Mr. Henry? If Major League Baseball believes that the sale is structured in such a way that it will put a new owner in a situation where he or she cannot succeed, will the sale be blocked? If so, in the

case of Mr. Henry, did Major League Baseball believe Mr. Henry would be able to succeed in Florida?

Answer. Major League Baseball reviews potential sales of teams carefully to make judgments about the financial wherewithal of new ownership groups, among other reasons, and then to make recommendations to the clubs. It is highly unlikely that Major League Baseball would recommend club approval in any situation in which we believed that a new owner could not succeed. Major League Baseball did believe that Mr. Henry would be able to succeed in south Florida and did not anticipate the extent of the decrease in fan support together with the ongoing lack of support for a new ballpark.

Question 14. Has Major League Baseball had any discussions with club owners other than those of the Twins and Expos regarding the prospect of contracting their clubs? Specifically, have their been any discussions or contacts concerning contraction between Major League Baseball and the current or prospective owners of the Florida Marlins, the Tampa Bay Devil Rays, the Kansas City Royals, the Oakland Athletics, the Philadelphia Phillies, the Toronto Blue Jays, or the San Diego Padres?

Answer. See answer to question 6, above.

Question 15. Mr. DuPuy, is it the position of Major League Baseball that the operating losses attributed to the Los Angeles Dodgers, the Texas Rangers, the Atlanta Braves, and the Toronto Blue Jays have nothing to do with the business plans or objectives of the media companies which own these clubs? What is Major League Baseball's explanation for the unequal concentration of losses among these four clubs when compared to the other twenty-six franchises in baseball?

Answer. Major League Baseball's position is that the operating losses of the Los Angeles Dodgers, Texas Rangers, Atlanta Braves and Toronto Blue Jays are caused, in large part, by the fundamentally flawed economic system that exists in Baseball. In addition, local market factors—like the exchange rate that burdens Toronto—play a role. It is also important to note that clubs such as the Los Angeles Dodgers and the Toronto Blue Jays suffered from a lack of profitability even before the acquisition of those clubs by media companies. Since the media companies acquired clubs such as the Dodgers and Blue Jays, the books of those clubs have been subjected to intense scrutiny to insure that all related party transactions yield "market" revenues for the clubs and that reported losses are not overstated.

Question 16. In your testimony, you endorsed a proposal to tax all franchises at a 50 percent rate on any new incomes they may earn in a given season. As I understand, if this proposal is implemented, if the income of a struggling franchise increases by one dollar, its share of revenue sharing is reduced by 50 cents. This kind of an arrangement would appear to create a disincentive for small clubs to take major risks to generate new income, the very same kind of growth impediment we have seen with high income tax rates. Would you please explain how such an arrangement will benefit small franchises?

Answer. The 50% straight pool plan benefits low revenue clubs by significantly reducing revenue disparity. The revenue of high revenue clubs is reduced and the revenue of low revenue clubs is augmented. This reduction in disparity gives lower revenue clubs a greater opportunity to be competitive on the field, which is the key to revenue growth in Baseball.

The alleged disincentive for revenue growth is largely a theoretical issue. Most important, with the exception of revenue increases associated with new stadium construction, most revenue growth in Baseball requires little capital investment. As a result, clubs have every incentive to earn more revenue whether they keep 50 cents or 75 cents of each incremental dollar. Currently, some low revenue clubs face a 39% marginal tax rate (as compared to 19% for top revenue clubs.) Despite this fact, low revenue clubs have significantly increased their revenue in recent years and there is no evidence of any disincentive effect. Baseball's current proposal also includes the discretionary reallocation of central fund revenues. It is contemplated that these reallocations would be used to reward, or to create incentives for, revenue growth.

Finally, the move to the straight pool plan eliminates a substantial inequity. As noted above, under the current plan, the highest revenue clubs face a marginal tax rate of only 19% compared to 39% for some lower revenue clubs. The straight pool plan would correct this inequity and make all clubs subject to exactly the same growth incentives.

Question 17. One of the proposals made by the Blue Ribbon panel was for payroll floors. Given the specificity of some of the recommendations, would you please explain what Major League Baseball believes would be an appropriate floor for each club? Would there be penalties for the clubs that do meet such floors?

Answer. Baseball's current proposal to the Players Association is that a $45 million payroll minimum should be applicable to all clubs. The minimum would be enforced by disqualifying a club that fails to meet the minimum payroll from any discretionary reallocation of central revenues such as those described in the answer to question 16, above.

Question 18. I was surprised to hear your assertion that both of the teams in Florida were under consideration for contraction. As I understand, Tampa Bay was required to pay an entry fee in 1998 of $150 million. What impact do you believe this entry fee has had on Tampa Bay's ability to become competitive and, if it is contracted, will some portion of the fee be returned?

Answer. We do not believe that Tampa Bay's performance on the field is the result of the expansion fee paid between 1995 and 1997. No decisions have been made regarding teams to be contracted or the terms of contraction

Question 19. The prospective move of the Oakland Athletics to Santa Clara calls into question whether that township is part of the San Francisco Giants franchise rights area. In what year did Santa Clara become part of the Giant's franchise area? Why was it made at that time and what were the factors considered or the assumptions made that led to that determination?

Answer. 1990.

The Giants requested the additional territory as part of their effort at the time to obtain a new ballpark in Santa Clara.

Question 20. In your written statement, you indicated that one of the benefits of the antitrust exemption is that it permits the league to impose uniform equipment rules and requirements. Other major league sports are able to institute rules governing uniforms and equipment, however, even though they are subject to the antitrust laws. Would you please explain why baseball is different and why, unlike the NBA, the PGA, or the NFL, Major League Baseball would be unable to ensure equipment uniformity without an exemption from the antitrust laws?

Answer. One must assume that without an antitrust exemption baseball would be suddenly subject to litigation relating to the various aspects of its business that have been allowed to develop for eighty years under the exemption. Among the potential plaintiffs could be equipment manufacturers who might attempt to force upon baseball, for instance, aluminum bats, claiming that they are used successfully in college baseball and almost all other baseball leagues. The PGA has, in fact, lost an antitrust lawsuit involving equipment standards and had a standard relating to golf clubs forced upon it.

Question 1. In what specific ways do the antitrust laws—and baseball's limited exemption from these laws—actually affect or contribute to the problems that have been repeatedly identified by industry participants and commentators?

Answer.

Baseball's problems are almost entirely in the areas of competitive balance and poor financial performance, and neither the antitrust laws nor baseball's exemption contributes to these problems. These problems mainly relate to issues that must be bargained collectively, and collective bargaining is covered by the labor laws and the non-statutory labor exemption. Constant citations to baseball's antitrust exemption as a cause of baseball's problems, particularly after the passage of the Curt Flood Act, are simply misplaced.

Question 2. How, specifically, would legislative action modifying or clarifying baseball's exemption ameliorate or eliminate the relevant problems?

Answer.

For the reasons given in the answer to question 1, it would not.

Responses of Robert A. DuPuy to questions submitted by Senator Sessions

Question 1. Please explain the process by which Major League Baseball reviews and approves candidates to purchase ownership interest in Major League Baseball franchises.

Answer.

Baseball's ownership guidelines and procedures, which explain the process in detail, are enclosed herewith.

Question 2. Does Major League Baseball intend to eliminate teams before the 2003 season? If so, how will these teams be chosen?

Answer.

Yes As we have previously stated, the teams will be chosen based on the absence of local support and the inability to generate local revenues sufficient to produce competitiveness on the field and financial stability off the field.

Question 3. What would happen to the minor league affiliates of any teams that are eliminated?

Answer. Baseball is committed to preserving and supporting affiliated minor league clubs while the current Professional Baseball Agreement is in place. After that agreement terminates, the issue of minor league affiliates and many other interrelated matters are subject to bilateral negotiations with the minor leagues. We remain committed to working with the minor leagues to deliver professional baseball to as many communities as possible.

Question 4. Does Major League Baseball formally or informally recognize areas of exclusivity which prevents relocation of competing franchises?

Answer.

Although major league clubs do have territories, any major league club may relocate anywhere with the vote of three-fourths of all major league clubs.

Question 5. Are Clubs allowed to vote against expansion to prevent competition?

Answer. Expansion also requires a three-fourths vote, and clubs are of course allowed to vote for or against expansion.

Question 6. Has the Baltimore Oriole organization objected to the location of a franchise in the Washington, D.C. area?

Answer.

The Baltimore Orioles have not made any such formal objection. The Orioles have, however, publicly and privately stated the belief that the placement of a major league club in Washington, D.C. would have a significant negative financial impact on the Orioles.

Question 7. If the Baltimore Oriole organization did not object, would Major League Baseball permit a relocated or new franchise in the Washington, D.C. area?

Answer. Baseball has looked generally at the possibility of relocation and has not ruled it out with regard to any city in the near future. It is not, however, an immediate answer to the problems we are trying to solve. In researching and studying various relocation possibilities, it became clear to us that moving a club during this past offseason, given our current industry economic environment, would merely be substituting one problem for another problem. Although we are very proud that no clubs have moved for thirty years, we may well find that relocation can become one part of our overall solution in the near future. But it is not the answer to any problems we are facing at this time.

Question 8. If a prospective buyer can demonstrate satisfactorily their ability to build a privately-financed stadium, would they be permitted to purchase the Montreal Expos for relocation to Washington, D.C.? If not, why?

Answer.

See answer to question 7, above.

Responses of Lori R. Swanson to questions submitted by Senator Hatch

Question 1. In what specific ways do the antitrust laws—and baseball's limited exemption from these laws—actually affect or contribute to the problems that have been repeatedly identified by industry participants and commentators?

Answer. The State of Minnesota, as Senator Hatch's question implies, believes that Major League Baseball has a limited antitrust exemption, more specifically an exemption limited to Baseball's reserve clause. A federal court, the Florida Supreme Court and a lower court in Minnesota agreed. The problem is that other courts take a different view and have determined that Baseball enjoys a broad exemption. That is why Congress should clarify that any exemption does not apply to franchise relocation or contraction. Although it is difficult to predict with certainty how Major League Baseball would be different if there were a clear pronouncement that franchise relocation and contraction are—as they are in any other sports league—subject to the antitrust laws, it is difficult to see how a truly competitive environment could harm the League or local communities. Indeed, state and federal governments should be able to investigate abusive, anticompetitive practices and get behind Baseball's wall of secrecy. As long as some courts construe the exemption broadly, however, such investigations are severely constrained.

As you are aware, the hallmark of an antitrust violation is an agreement that has the effect of raising prices, lowering output, or rendering output unresponsive to consumer demand. *NCAA* v. *Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984). The decision by twenty-eight team owners to buy out two other owners and put their teams out of business appears, for example, to be such an effort to restrict supply. As a consequence, there will be fewer teams available to buyers in the market for Major League Baseball franchises, thereby driving up the value of the remaining franchises. Furthermore, the cost of obtaining a franchise is increased by making certain that there are always fewer teams in the League than viable markets that could support franchises. By maintaining an artificial scarcity of franchises, cities with teams are pit against cities without teams in bidding wars to maintain or attract the franchises through public subsidies for stadia and other amenities. The exemption—or more accurately, the exemption as interpreted in an expansive manner by certain lower courts precludes any evaluation of the owners' conduct to inquire whether contraction would benefit fans, as consumers of the game, or simply line the owners' pockets.

Question 2. How, specifically, would legislative action modifying or clarifying baseball's exemption ameliorate or eliminate the relevant problems?

Answer. As I noted during my testimony, the Minnesota Attorney General's Office believes that Major League Baseball's antitrust exemption has already been limited *post-Flood* v. *Kuhn* so that contraction does not fall within the scope of any remaining exemption. Nevertheless, lower courts are divided on the issue, and a federal district court in the Northern District of Florida has gone so far as to find that contraction falls within the antitrust exemption. Legislative action clarifying Major League Baseball's antitrust exemption would resolve the matter once and for all with respect to contraction and franchise relocation, and would ensure that any actions by the League in regard to these matters would be subject to the same scrutiny they would be in the context of other sports leagues.

Responses of Lori R. Swanson to questions submitted by Senator Leahy

Question 1. Team relocations can raise real concerns in any sport, and the United States Conference of Mayors and the National Football League crafted a policy several years ago to address those concerns. As I understand it, the jointly-developed set of principles governs the future relocation of any professional football team, and includes a variety of community-sensitive processes and substantive requirements: There are public hearings, conversations with local governments and stake holders, and a league mandate that fans be well-served. The co-operative effort of the mayors and the league seems well-designed to bring some balance to this potentially contentious issue, and the procedures they have developed shed real light for the affected public on what is actually happening. Do you think that such a mechanism could work effectively for baseball as well?

Answer. The fact that a mechanism to address relocation issues was worked out by the National Football League and the Conference of Mayors suggests that Major League Baseball's warnings of dire consequences for franchise stability should Congress approve the FANS Act are overblown.

Commissioner Selig has not been shy in earlier testimony about asserting that revocation of Major League Baseball's antitrust exemption would prevent the League from keeping franchises in smaller markets. The Commissioner, in previous testimony before Congress, has pointed to the Raiders' example from the NFL in the early 1980's (*Los Angeles Memorial Coliseum Comm'n* v. *NFL*, 726 F.2d 1381 (9th Cir. 1984)) and warned that Baseball would be powerless to prevent similar situations from happening.

While no Major League Baseball franchises have relocated since 1972, Baseball's position is ironic since the League has used the threat of relocation in a number of instances over the years in order to extract financial concessions from state and local governments. In 1997, for instance, the Minnesota Twins threatened to move from the Twin Cities to a smaller market in Charlotte, North Carolina in order to pressure the Minnesota legislature into funding a new stadium. Commissioner Selig's own franchise, the Milwaukee Brewers, also threatened to move to Charlotte before the State of Wisconsin provided public-funding for a new stadium. According to Professor Stephen Ross of the University of Illinois School of Law, seven teams including the Twins—had threatened to move to Florida's Tampa-St. Petersburg area during a ten year period before an expansion franchise was located there. Minneapolis Star Tribune, May 12, 1997.

Furthermore, the League's dire warnings of franchise instability do not account for the fact that modern federal antitrust doctrine allows a certain degree of cooperation among sports competitors when that cooperation fosters pro-competitive outcomes. Federal courts have held that some degree of cooperation among competing teams is essential for the existence and functioning of sports leagues. Without commenting on the extent of cooperation that might be allowed under the antitrust laws, the mechanism implemented by the NFL and the Conference of Mayors suggests that Major League Baseball could preserve its stated goal of franchise stability while operating within the confines of the Sherman Act.

Question 2. The Conference of Mayors and the NFL have also developed a stadium financing program, which allows owners to borrow money from the league to build new stadia. It thus seems much less likely to result in communities being forced to pay the full cost of new facilities in order to keep their teams—a situation that many have charged prevails in baseball today. Do you think that such an approach would foster better community relations with Major League Baseball, were it adopted?

Answer. The existence of a program crafted by the NFL and the Conference of Mayors to deal with stadium funding issues suggests that less drastic alternatives than contraction might be available to the League to deal with any economic issues it might have. And it stands to reason that if the League adopts some sort of creative approach for funding of new stadia that does not involve the threat of contraction or relocation unless the public funds the facility, relations between the League and its host communities might improve.

Over the past several years—and continuing to the present—teams essentially have held cities hostage by threatening to relocate unless public funding is provided for new facilities. The Twins' threatened move to North Carolina in 1997, for example, is a graphic illustration of a decision that did not appear to be in the team's or Major League Baseball's best interests (since the team was threatening to move to a smaller market) unless the goal was to obtain public money for a new stadium for the team—and to serve as an example to other communities that they had better fall in line or risk losing their franchises. And because of the expansive construction of the Baseball antitrust exemption given by a number of courts, the League is able to conduct itself in a cartel-like manner out of the reach of law enforcement investigations. Baseball should be subject to the same antitrust scrutiny as other sports leagues.

Perhaps if Congress made clear that Baseball is in fact subject to the antitrust laws in the context of franchise relocation and contraction, the League would be less inclined to engage in boycott-like behavior to pressure cities to provide public funding for new facilities, which in turn might also foster better community relations.

Question 3. I understand that time at the hearing was limited, so if you would like to expand on any of your own responses, or respond to any comments made by other members of the panel, please do so.

Answer. The only additional comment I would like to make for the record is to again reiterate our belief that, *post-Flood* v, *Kuhn*, Major League Baseball's antitrust exemption has been limited to the so-called reserve clause. We believe that Major League Baseball's contraction plans do not fall within the scope of the exemption as it presently exists. Nevertheless, given the split among lower courts concerning the extent of the exemption *post-Flood* v, *Kuhn*, we would support legislation clarifying that the contraction of franchises is subject to scrutiny under the antitrust laws.

SUBMISSIONS FOR THE RECORD

Statement of Hon. Jeff Sessions, a U.S. Senator from the State of Alabama

The topic of today's hearing is of great interest to many Americans. After all baseball is the all-American sport. In the past few months I have learned that Major League Baseball's owners have decided to contract by two or more teams. This decision is somewhat troubling to me. Indeed, the loss of the Minnesota Twins—as the media has reported—would be felt not only in Minnesota but in other smaller communities throughout the country—in Connecticut, Iowa, Tennessee, and Florida—which are home to the Twins' farm teams.

Though we have no Major League Baseball team in Alabama, we do have several minor league teams that are indirectly threatened by agreements to contract the operations of Major League Baseball. If there are fewer major league clubs because

of contraction, it is logical to assume that some of the minor league teams they support will be eliminated too. This is of great concern for me and the people of Alabama.

The topic of today's hearing, the application of the antitrust law to Major League Baseball, would not require Baseball to maintain franchises that are not economically viable. It would, however, apply a rule of reason analysis to assure that economic viability is determined by market forces, rather than by the internal politics and the self-interest of a small group of owners. Whether this so-called antitrust exemption should continue is a topic that must be studied fully and carefully before we draw any conclusions.

It is troubling to me that Major League Baseball has deprived our Nation's Capitol of a franchise for the past 30 years. Especially, since every other major league sport is represented in this City. For over the past three decades it could be said of Washington, First in war, first in peace and nowhere to be found in the American or National leagues. It seems to me that it makes good sense for Major League Baseball to relocate a struggling team to Washington. One obvious example is the Montreal Expos, who for some time have been a huge money-losing operation for the league. In an environment governed by the antitrust laws either the current owner or a new owner could move that team to a more profitable location—most likely Washington. It makes no economic sense for the League to buy the Expos as it has decided to do and continue to operate it with massive losses in Montreal, unless the League's ultimate goal is to eliminate this team. What is preventing this team from being relocated to Washington?

Major League Baseball has chosen to establish a complicated set of procedures where the League will control any transaction to purchase or sell a franchise. I have learned much about the League's mysterious processes from watching and talking to my friend and law school classmate Donald Watkins who is attempting to purchase a Major League franchise. Though Donald tells me that he has been treated very courteously by League officials and feels he is now making good progress, you only have to read the newspapers to see that it has been a long road.

For its own good, if for no other reason, I would have thought that Major League Baseball long ago would have aggressively recruited an individual with the potential to become the first African-American owner of a Major League Baseball team. Instead, when Donald first applied to buy the Tampa Bay Devil Rays he heard nothing from the league for nearly a year. His more recent expression of interest in the Minnesota Twins was ignored until last December, when at a House Judiciary Committee Hearing a Congressman from Alabama asked the Twins President in front of the Commissioner why the team had never spoken to Donald. Only then did Donald receive a call. I also understand that Donald's effort to inquire into the possibility of purchasing the Montreal Expos to move them to Washington was summarily foreclosed as "not on the table" by League officials.

I am encouraged that Donald has finally been permitted by the League to talk with both the Twins and the Devil Rays. I am also encouraged by recent comments from Commissioner Selig after the owners' meeting that Washington was the most likely relocation city. These comments were, understandably, quite confusing to Mr. Watkins, who had been told by league officials only a week earlier that it would be a waste of time to discuss relocation of a team to Washington, D.C. However, Mr. Selig, as numerous columnists have pointed out, has said positive things about Washington before and nothing ever seems to happen.

Donald's plan to build a privately-financed stadium with a destination class museum and Hall of Fame for African-American athletes would clearly make a major contribution to the nation's capital with its large minority population and tourist flow from all across the country. It also would seem to make more economic sense to locate it here than in either Minnesota or Tampa Bay. I would urge Baseball to discuss this possibility with him as he has requested.

Normally, if someone like Mr. Watkins wanted to buy a team in any other professional sport, he would be free to call on current owners and, subject to financial and fitness qualifications, be allowed to buy a team. He would also have some flexibility to move the team under appropriate circumstances. Major League Baseball apparently does not operate in this way, but instead sees itself as something of an exclusive "private club." The unfortunate result could be to deprive it of a minority owner who could bring much needed energy, creativity and spirit to the sport. This would be a disservice to the fans, the sport and the country, and I hope it does not happen.

Statement of Hon. Strom Thurmond, a U.S. Senator from the State of South Carolina

Mr. Chairman:

Thank you for holding this important hearing on the applicability of antitrust laws to Major League Baseball. We have worked together in the past on this issue, and I appreciate your commitment to establishing a sound public policy that will enable America's pastime to flourish.

We are here today because of the latest development in the continuing saga of baseball and its unique treatment under the antitrust laws. The Commissioner of Major League Baseball has announced that two baseball teams will be eliminated, or contracted, after the upcoming baseball season. The Commissioner asserts that contraction is a necessity due to the economic conditions facing baseball today. It is widely expected that the Minnesota Twins and the Montreal Expos will be the teams that are eliminated. In response to the expected dissolution of these teams, Senators Wellstone and Dayton have introduced a bill that would further reduce the remaining vestiges of baseball's antitrust exemption. S.1704, the Fairness in Antitrust in National Sports Act of 2001, would make the antitrust laws applicable to the elimination or relocation of major league baseball teams. In layman's terms, Major League Baseball would no longer be able to shut down an existing team or prevent a team from relocating to another city. If this bill were to gather significant support, Major League Baseball would probably not pursue contraction because the antitrust exemption is important to the owners of major league teams.

Major League Baseball's antitrust exemption was established by the case of *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). In this case, the Supreme Court held that antitrust laws did not apply to "exhibitions of baseball" because the games did not implicate interstate commerce. The Supreme Court eventually rejected the legal basis of the exemption in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), noting that professional baseball was indeed a business that involved interstate commerce. The Court, however, refused to overturn the longstanding precedent of *Federal Baseball Club*, stating that it was up to Congress to do away with the antitrust exemption.

In 1998, I worked with the distinguished Chairman and Ranking Member to pass the Curt Flood Act, which ensured that antitrust laws applied to Major League Baseball. The Act provided antitrust protections to major league baseball players and applied only to issues of employment between major league owners and players. The Act left untouched the state of the law in all other areas where the antitrust exemption was applicable, such as matters relating to minor leagues and the relocation of baseball franchises.

Although some courts have also narrowed the antitrust exemption in recent years, many experts believe that the exemption has continued viability in several areas. Senator Wellstone's bill seeks to chip away at one area of exemption, the movement of franchises, presumably in hopes of persuading Major League Baseball to retreat from its contraction plans.

As I see it, the Players Association and Major League Baseball are playing elaborate games designed to force each other to the bargaining table. The real issue is one of economic stability for the game of baseball, and the government should intervene once again only if there is a compelling need.

Major League Baseball can help cure its economic ills by increased revenue sharing and by the use of salary restraints. Other professional sports are thriving today as a result of implementing these measures. Revenue sharing and salary restraints enable small-market teams to compete with teams from larger cities, thereby encouraging a competitive sporting environment. The inability of the Major League Baseball Players Association and the owners of major league teams to agree on reasonable competitionenhancing measures is ruining the game of baseball. I hope that sensible people with the courage to work toward a compromise will put an end to the labor unrest that has plagued Major League Baseball for years.

In July of 2000, a Blue Ribbon Panel on Baseball Economics issued a report that found revenue disparities were causing a "chronic competitive imbalance." As one example of this serious imbalance, one club had a payroll equal to the sum of the five lowest payroll clubs in 1999. In 2000, Minnesota, Florida, and Kansas City had Opening Day player payrolls that were less than the combined salaries of two players of one club. The panel also found that there was "a strong correlation between high payrolls and success on the field." For a five-year period between 1995 and 1999, no team in the bottom half of payrolls in Major League Baseball won a single postseason game. I believe that the panel's findings demonstrate that baseball must

find a way to make its smaller-market teams competitive. If baseball does not reform itself, the public will lose interest in a predictable and uncompetitive sport.

The Blue Ribbon Panel also made recommendations that should be given considerable thought. The panel found that Major League Baseball should share at least 40 percent of all members clubs' local revenue. Although there is limited revenue sharing that takes place currently, it may not be enough to overcome the serious disparities that exist. The panel also found that a competitive balance tax should be applied to club payrolls that are above a fixed amount and encourage all clubs to have a minimum payroll amount. A competitive balance tax would function much like a salary cap utilized by other professional sports. I hope that the owners and the players will seriously consider these recommendations for the sake of the survival of baseball.

I am pleased that we are bringing together representatives of baseball and the union today. I will gladly listen to reasonable proposals to change current law. However, we have greatly limited the antitrust exemption in the past and have provided protections to major league baseball players. Before we enter the fray, I want to ensure that both management and the players have negotiated in good faith. The current trouble with baseball has very little to do with the antitrust laws. This is an ancillary issue. Baseball's current troubles are economic and should be addressed by the players and the owners through constructive negotiations over revenue sharing and salary restraints.

Statement of Miles Wolff, Commissioner, Northern League Baseball

In 1993 I founded and assumed the role of Commissioner of the Northern League Baseball, the first of the modern independent leagues, which presently comprising eighteen teams in twelve states and two Canadian provinces. In 2001, I became Commissioner of the Central Baseball League, another independent league, comprising eight teams in four states. In addition, I own the Quebec Capitales of the Northern League, and am the owner of the Burlington Indians of the Appalachian League. I was President and publisher of Baseball America, the trade publication of professional baseball, for nineteen years and am coeditor of the Encyclopedia of Minor League Baseball, most recent edition 1996. Over the past twenty years, I have owned six National Association teams, including the Durham Bulls during the time the movie Bull Durham was filmed.

The business of professional baseball in the United States is comprised of three ownership components Major League Baseball ("MLB"), the National Association of Professional Baseball Leagues ("NAPBL"), consisting of those minor leagues which are affiliated with and subsidized by MLB, and five independent minor leagues which are not affiliated with or subsidized by MLB or the NAPBL. There currently are more than 50 independent minor league teams in 21 states across the country, in addition to two teams which play in Canadian cities (Winnipeg and Quebec City). MLB and the NAPBL refer to themselves as "organized baseball" in that they operate under an umbrella agreement called the Professional Baseball Agreement (aPBA") which provides, among other things, for the division among themselves of exclusive geographic territories. The scope of these territories are extensive and, in many cases, go well beyond the limits of relevant market considerations and have had the effect of precluding the ability of many American communities to attract professional baseball. It is the scope of these exclusive territories which to a significant extent resulted in the creation, nearly 1 D years ago, of the independent minor leagues.[1]

The number of NAPBL teams in the United States effectively is "capped" by the PBA, which limits the obligation of MLB to subsidize only a specified number of organized baseball affiliates. Thus, as a practical matter, the expansion of minor league baseball to additional American communities is dependent almost entirely on development of the independent minor leagues. As an example, were it not for the independent leagues, there would be no professional baseball at this time in states such as South Dakota (Sioux Falls) and North Dakota (Fargo-Moorhead). In addition, except for the Major League Minnesota Twins, the only professional baseball available in the State of Minnesota is through the independent minor leagues.

[1] It should be noted that MLB and the NAPBL have a significant statutory advantage over the independent minor leagues since the latter apparently do not enjoy the antitrust exemptions provided MLB and the NAPBL under the federal Curt Flood Act of 1998.

The calibre of play in the independent leagues generally is strong and is represented principally by talented younger players who either have been overlooked by the Major League draft system or were signed and later released by Major League organizations. Most players view the leagues as a "second chance' opportunity to demonstrate their professional talent and, ultimately, have their contracts acquired by Major League teams- Many have been able to achieve that goal and a number currently are playing in the Major Leagues.

Although it does not appear that any of the independent teams have positioned themselves in a manner that adversely affects the market condition of any MLB or NAPBL team, many of them do conduct play within the boundaries of the exclusive territories allocated by MLB and the NAPBL between themselves. Subsequent to enactment of the Curt Flood Act in 1998, which extended statutory privileges of antitrust exemption to the NAPBL, that organization actively began exploring means by which it could prevent independent teams from entering these exclusive territories. One of the tactics utilized by the NAPBL was to implement policies designed to punish any individual over whom the NAPBL might have jurisdiction or control if they were to "cooperate" in any way with any other professional league whose "existence" conflicted in any way with the NA or any of its teams, or which included a team that played within any of the territories claimed by the NAPBL or MLB.

In view of the scope of the exclusive territories allocated by MLB and the NAPBL, it is virtually impossible for any independent professional baseball league to operate without "intruding" on these territories. Accordingly, the position of the NAPBL effectively prohibits any relationship with any independent professional team. The concept of "cooperation" has been broadly defined by the NAPBL to include not only ownership interests, but virtually any form of business or professional service relationship.

Since the NAPBL for 100 years has effectively controlled the industry of minor league baseball in the United States, arid has developed extensive resources, vendor and other industry-relevant relationships over that period of time, the effect of its blackball of persons having relationships with independent professional teams has been substantially to limit the business opportunities and investor resources available to independent professional baseball, and to preclude independent teams from playing in many communities which are desirous of attracting professional baseball.

An example of the influence wielded by the NAPBL involves the nation's capital. The exclusive "organized baseball" territory which includes Washington, D.C. is actually owned at this time by the NAPBL (not MLB) for the benefit of one of its teams based in Woodbridge, Virginia.[2] Several years ago, an effort was made by an independent professional league to establish a team in Washington. The NAPBL promptly responded with threats of punitive action that forced the independent team to back away. Similar experiences have been encountered in other communities in different parts of the country. Given the enormous industry power of the NAPBL, which includes political lobbying clout funded by the NAPBL as well as MLB, the NAPBL has been a major deterrent factor in the efforts of many American communities to attract professional baseball, except to the extent so desired by the NAPBL or MLB.

In some instances, these efforts have been undertaken by the NAPBL as agent for MLB- evidenced in an August 1999 resolution adopted by the NAPBL Board of Trustees—while, in others, the NAPBL has pursued its own territorial interests. In either case, the power and influence of the "organized baseball" establishment—which represents the only components of professional baseball entitled to the exemptions provided under the Curt Flood Act—are such that growth of the independent minor leagues has been restricted,

Although these issues may not be directly germane to the pending debate regarding MLB contraction (which ultimately would have the effect of reducing the number of NAPBL teams) or relocation, they do represent clear examples of the abusive manner in which the "organized baseball" system, including the NAPBL, has claimed the right to decide which communities are entitled to professional baseball and which are not, without regard to the wishes of local communities or even, in many cases, valid market considerations.

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[2] MLB would be entitled under the PBA to acquire the territory but would be required to compensate the NAPBL team and league which presently has territorial control over the District.