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Ali to Flood to Marshall: The Most Triumphant of Words

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ALI TO FLOOD TO MARSHALL: THE MOST TRIUMPHANT OF WORDS

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I am honored to participate in this commentary on the Curt Flood Act of 1998.[1] I shall not, however, provide a detailed analysis of its provisions. Instead I will reflect upon my reactions to the Act. To be honest, I am disappointed. Negotiated by the Major League owners and the Major League Baseball Players Association through collective bargaining and modified by Congress, the Act is certain to become a staple of legislative drafting courses for decades. As others in this commentary may have stated, it is as notable for what it purports to do as for what Congress purports it does not do. The Act confers standing on major league baseball players to sue under the antitrust laws, does not otherwise change the extent to which the business of baseball is exempt from the antitrust laws, whatever it or its source may be, and declines to confer such standing on minor league baseball players even though they may have this 'standing' anyway.

While others may celebrate its passage as long overdue and Congressmen and Senators whom I respect and admire worked hard to pass it, I find the Act only a symbolic tribute to the revolutionary but not to his revolution. It took twenty-seven years for Congress to overrule the result in *Flood v. Kuhn*,[2] and then only after Curt Flood's death, only after the principle of free agency for which he fought had become the status quo and from which the players of today benefit. I am disappointed because I was inspired by Curt Flood. He stood for something, a principle hidden in the glare of the shiny walls of a marvelous new monument.

I do not remember paying much attention as a kid to Curt Flood's refusal to be traded to Philadelphia. I was in high school at the time. The legislative history is replete with details of the story, details of which, as I say, I was unaware. I do know that Flood's valiant stand followed school desegregation, the escalation of the Vietnam War, and Martin Luther King Jr.'s assassination. In my neighborhood, his historic stand followed and was overshadowed by Muhammad Ali's refusal to

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1. P.L. 105-297 codified at 15 U.S.C. § 27a (1998).
2. 407 U.S. 258 (1972).

step forward to be drafted into the United States Army and by the defiant Black Power salutes of John Carlos and Tommy Smith at the 1968 Olympics. In fact, I probably did hear of it when it occurred but my earliest conscious recollection of the Curt Flood litigation was in Ralph Winter's[3] Labor Law class at Yale, where he regaled the class with insights from his clerkship with Justice Marshall.

Although the courageous stands on principle of Flood and Ali are quite similar and gave rise to decisions by the United States Supreme Court, their actions and cases are seldom discussed together. *Flood v. Kuhn* is a baseball case and *Clay v. United States*[4] is a military draft case. In both cases, African-Americans, influenced by the Civil Rights Movement, asserted their freedom. Ali relinquished his crown as Heavyweight Champion of the World and millions of dollars; Flood walked away from $100,000.00 per year and his career in baseball.

It so happens that the Civil Rights Movement had produced an African-American on the Supreme Court at the time both cases were heard. Since Justice Marshall recused himself in Ali's case,[5] I can only speculate that he would have voted with the rest of the Court. Likewise, his dissent in *Flood v. Kuhn* certainly came as no surprise,[6] but it receives the same scant attention in discussions of the case as Flood's 13th Amendment claim received in the courts.

Where Justice Blackmun's majority opinion merely recounted Flood's allegation that the reserve system was "a form of peonage and involuntary servitude" and the trial court's disposition of the claim, Justice Marshall devoted significant attention to the claim in his dissent. He explained the claim. "After receiving formal notification of the trade, [Flood] wrote to the Commissioner of Baseball protesting that he was not a piece of property to be bought and sold irrespective of his wishes . . . To nonathletes it might appear the petitioner was virtually enslaved by the owners of major league baseball clubs."[7] Then he explained why the claim failed.

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3. Judge Ralph Winter of the Second Circuit Court of Appeals, then a professor at Yale Law School and co-author of a law review article cited by Justice Marshall in his dissent, Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

4. 403 U.S. 698 (1971).

5. *Id.*; *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979).

6. Reportedly, Justice Marshall initially voted against Flood. *See* WOODWARD & ARMSTRONG, *supra* note 5, at 223-26.

7. *Flood*, 407 U.S. at 288-89.

> But athletes know that it was not servitude that bound [Flood] to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days. He cannot escape except by retiring, and he cannot prevent the club from assigning his contract to any other club."[8]

Justice Marshall's dissent is not referred to in the legislative history, perhaps, because it is better known for his raising of the potential application to the case of another exemption from the antitrust laws: the labor law exemption. That is unfortunate because his antitrust analysis rests upon the great moral principle for which Flood fought. He quotes selectively from *United States v. Topco*.[9] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . ."[10]

As Justice Marshall's analysis makes clear, the heart of Flood's claim was not so much about money as it was about the freedom to choose one's employer, perhaps the freedom to choose the employer willing to pay the highest salary, but nevertheless the freedom to choose. When Congress prescribed a cause of action for major league baseball players under the antitrust laws to the same extent as professional basketball and football players, it only reversed the narrow legal principle that major league baseball players may not sue under the antitrust laws.

More importantly, the Act leaves in place a legal regime under which owners may lawfully re-implement the restrictions on individual freedom of the sort challenged by Flood. At the time of the Act's passage, Congress was well aware that the Court recently had answered Justice Marshall's questions about the applicability of the labor law exemption in *Brown v. Pro Football, Inc.*[11] As many readers may know, the Court extended the scope of the labor exemption well beyond that which Justice Marshall had envisioned. The Court held that professional football players may not bring an action under the antitrust laws to challenge actions collectively taken by owners in the course of the collective bar-

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8. *Id.* at 289. The reference to escape by retirement may have been a reference to Jackie Robinson who had retired rather than accept a trade to the New York Giants made by the Dodgers without consulting him. *See* ARNOLD RAMPERSAD, JACKIE ROBINSON: A BIOGRAPHY 304-309 (1997).

9. 405 U.S. 596 (1972).

10. *Flood*, 407 U.S. at 291.

11. 518 U.S. 231 (1996).

gaining process that would otherwise violate the antitrust laws. A reading of the legislative history indicates that Congress intended to leave *Brown* intact.[12] It is clear that in the aftermath of *Brown*, the very reserve system Curt Flood fought could be imposed unilaterally by owners and still be exempt from antitrust scrutiny if they imposed it after having demanded it in negotiations and having bargained to an impasse.

The minority members of the Senate Judiciary Committee opposed the legislation in part because they viewed Brown as obviating the right to sue granted by the Act unless the players decertified their union.[13] This flaw and others in the Act are there because politically it could have been passed without them. The failure to modify Brown is a defect too large to ignore. When Congress takes up the matter again, it might begin by looking back to Justice Stevens' dissent in Brown. He argued that the exemption should not cover agreements or actions initiated by employers in the collective bargaining process that "depress wages below the level that would be produced in a free market."[14] Only agreements that were in a union's self interest, namely those that increase the level of wages for its members, would be shielded.[15] Justice Marshall expresses similar sentiments in his dissent in *Flood v. Kuhn*.[16]

I am also disappointed because of the politically necessary compromise to exclude minor league players from the Act. I do not believe that Curt Flood argued that only major league players were entitled to economic freedom. His 13th Amendment articulation surely could not have been so limited. Indeed, only political reasons can be expressed to explain why major league players, who have the power of their mighty Major League Baseball Players Association to fend for them should they be given a cause of action to fight for this basic freedom under the antitrust laws, while minor league players are left to find an action on their own if they can.[17]

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12. CONG. REC. § 9494-9498 (July 30, 1998) (statement of Sen. Hatch).

13. *See* S. Rep. No 105-118 (1998).

14. *Brown*, 518 U.S. at 255.

15. *See id.* at 252-58.

16. "Petitioner suggests that the reserve system was thrust upon the players by the owners and that the recently formed players' union had not had time to modify or eradicate it." *Flood*, 407 U.S. at 295.

17. Congress apparently left in place the existing controversy over the extent of baseball's exemption from the antitrust laws. In *Piazza*, the court applying principles of *stare decisis*, held that the exemption was limited to the reserve system and did not apply to any other aspect of the business of baseball. The Major League Baseball Players Association agrees with that result and argues that the exemption no longer exists except otherwise provided by law, i.e. Sports Broadcasting Act of 1961. That analysis arguably could be used by a minor league player who would not face the labor law exemption because they do not have a union.

There is reason to hope that the tribute becomes a more fitting one. First, the Act came about because the Major League Baseball Players Association obtained an agreement in the collective bargaining agreement to negotiate and work for an exemption.[18] The Act, with some modifications, reflects what they agreed upon. The Association was as aware of *Brown* when it negotiated the language as Congress and the owners were. Surely it did not use the collective bargaining process to obtain a bargaining tool without some strategy as to how it would use the Act in the future. The Association supported Flood in his litigation; it now carries the torch of keeping his principle alive.

Second, *Brown* was not the only existing law that Congress did not intend the Act to affect. It was aware of *Butterworth v. National League*[19] and *Piazza v. Major League Baseball*,[20] cases which held that the federal baseball exemption was limited by the principle of stare decisis to the reserve system and not to the entire business of baseball. Accordingly, minor league baseball players may have a cause of action under the antitrust laws without regard to the Act. More importantly, those cases involve antitrust challenges which arose out of unsuccessful attempts to purchase major league baseball teams. A future Supreme Court could follow the logic it did in *Flood v. Kuhn* and hold that since Congress was aware of those decisions and apparently explicitly let them stand, they are good law. It would be more than ironic if the baseball exemption was judicially determined not to apply beyond the reserve system and major league baseball players were the only participants in the business of baseball who were prevented from using the antitrust laws because of the labor law exemption. Could Congress really have contemplated that result?

Finally, if the Supreme Court were to so hold, there is another area not pertaining to players and probably not even considered by Flood that could make the Act a fitting tribute to his revolution. Discrimination necessarily involves refusals to associate on the basis of race. In antitrust parlance, a refusal to associate for whatever reason is a refusal to deal, a *per se* violation. The exemption granted by the Court in *Federal Baseball* permitted Major League Baseball to use its monopoly power not only to segregate the player market by race, but the ownership market as well. Had the Negro Leagues joined in *Toolson v. New*

18. *See* S. Rep. No. 105-18, October 29, 1997 (1997).
19. 644 So.2d 1021 (Fla. 1994).
20. 831 F. Supp. 420 (E.D. Pa. 1993).

York Yankees,[21] the Court might have been presented with that issue at the same time it decided *Brown v. Board of Education*.[22] It is too late for the Negro League owners to use the antitrust laws but such laws may help bring about the return of African-Americans to the ownership of professional sports teams.

I am glad that Congress passed a law to honor Curt Flood. It is more appropriate than a street, a public building or a statue. Those constructs would remind us only of the man; but a law has the potential for more. It can implement the ideals of its namesake. Curt Flood stood for a principle, the economic freedom of individuals to compete in the marketplace of professional athletics. A *statute* that bears his name ought to stand for the same principle.

21. 346 U.S. 356 (1953).

22. 347 U.S. 483 (1954); *See also* Alfred Dennis Mathewson, *Major League Baseball's Monopoly and the Negro Leagues*, 35 AMER. BUS. L.J. 291 (1998).