

The Reenactment of *Flood v. Kuhn*

On May 22, 2013, Justice Sonia Sotomayor presided over a reenactment of the landmark Supreme Court case *Flood v. Kuhn*, a suit brought by Curt Flood of the St. Louis Cardinals, in hopes of overturning baseball's antitrust exemption. In the words of reporter Nina Totenberg, "Supreme Court Justice Sonia Sotomayor's wicked, waggish sense of humor—and knowledge of baseball—were on full display . . . when she presided over the re-enactment. . . ."

Flood brought a suit to protest his treatment by the baseball team owners. He challenged the existing policy that allowed teams not only to set the salaries without consultation with the players, but also allowed them to conduct trades of players without their input or permission. Flood challenged this policy in a letter written to the Commissioner of Baseball, Bowie Kuhn. In it, he demanded the right to negotiate on his own behalf. Kuhn denied the request laying the ground for what became a landmark case.

The reenactment was part of the Frank C. Jones Reenactment Series, named for the late President of the Society under whose leadership these programs became a regular activity of the Society. The principal "players" in the 2013 reenactment are all avid baseball fans, starting with the Justice herself and including the two extremely capable advocates, Pamela S. Karlan and Roy Englert who argued the case. Professor Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford. She is also the co-director of the school's Supreme Court Litigation Clinic. The clinic trains students to litigate live cases before the Court. In addition to her impressive academic and professional credentials, Ms. Karlan has another association with the case, because she had clerked for Justice Harry A. Blackmun, the author of the majority opinion for the Court in 1972. The other counsel, Roy Englert, is an appellate litigator and antitrust lawyer at Robbins Russell in Washington D.C. of which he is a co-founder. This year he argued before the Supreme Court in his twenty-first appearance. He has briefed many other cases in the Court, in addition to his extensive litigation in lower courts.

Ms. Totenberg's report outlined the basic facts of the case: ". . . [T]he case was brought by St. Louis Cardinals great Curt Flood, who challenged baseball's reserve clause—the provision that allowed teams to virtually own players, set salaries and conduct trades, with the players for all practical purposes never able to negotiate freely with other teams. That meant that at the time Flood brought his challenge in 1970, he was earning what was then considered a top salary of \$90,000. This, for a player who had signed with the Cards at age 18 with no agent or lawyer, and who in six of the next 12 seasons batted .300 and won seven Golden Glove awards. So, when he was traded to the Philadelphia Phillies, a definitely lesser team at the time, he refused to go, and

could not play for any[other] team."

At this point, Flood wrote his letter to the Baseball Commissioner stating that he was "not a piece of property to be bought and sold." Kuhn's refusal of Flood's demand was ultimately appealed to the Supreme Court.

The decision was handed down in 1972. The Court ruled against Flood by a vote of 5 to 3. Justice Harry Blackmun wrote the decision. Although the Court found against Flood, Blackmun's opinion acknowledged that the Court's previous rulings upholding baseball's antitrust exemption were too sweeping. He thus provided an opening for future challenge and change, which would lead to the eventual creation of the free agency system which baseball now has.

On the day of the reenactment, Professor Brad Snyder, an Assistant Professor of Law at the University of Wisconsin School of Law, provided a more detailed overview of the circumstances surrounding the case. Snyder is the author of a number of law review articles and other similar academic publications, and two critically acclaimed books about baseball including one about this specific case: **A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports**. The text of his remarks follows this article and starts



The two oral advocates, for the reenactment, Pamela Karlan and Roy Englert, presented stimulating and sometimes entertaining arguments in the case.

on page 8 of this magazine.

With that background, the stage was set for the oral argument with Professor Karlan and Mr. Englert as advocates, and Justice Sotomayor acting as "the Court." In an interesting historical coincidence, the reenactment was not the first time that Justice Sotomayor "considered" a lawsuit concerning professional baseball. Indeed, her previous participation earned Justice Sotomayor the nickname "the judge who saved baseball" in 1994. At the time, Sotomayor was serving on the United States District Court of the Southern District of New York. A controversy

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At the conclusion of the “oral argument”, Justice Sotomayor applauded the two advocates for their presentations.

came before her in which team owners were accused of colluding illegally to fix the salaries of baseball players. The dispute threatened to delay the opening of the season that year. In her decision on the case, then-judge Sotomayor agreed that the team owners were colluding, and she granted a temporary injunction that barred them from the practice, opening the way for the season to begin on schedule. Her timely action not only earned her the nickname, but also the good will of millions of baseball fans.

The audience enjoyed a wonderful performance from all three of the principals on May 22. Oral arguments were interspersed with references to great baseball players, the recital of statistics, and baseball terminology. The attorneys and the Justice all engaged in some light-hearted banter and good-natured jokes. Professor Karlan represented Flood that evening. Roy Englert represented Major League Baseball and Bowie Kuhn.

Karlan opened her argument asserting that the 1922 and 1953 decisions by the Supreme Court that upheld baseball’s antitrust exemption were outliers and that no other professional sport enjoyed such protection. Sotomayor inquired why the Court should consider breaking with its past traditions at this time, thus depriving the owners of their “reliance” on previous decisions. Karlan said that if the Court ruled in favor of the owners for a third time, “it would amount to something done in baseball only once before—three errors on a single play.” Sotomayor countered by saying that the Court could apply another baseball rule: “three strikes and you’re out.” Karlan’s reply was, “I’m swinging for the fences here, your honor.”

Sotomayor suggested that if players became empowered to act as free agents, that they would move about freely seeking better terms, displaying little loyalty to a team. She suggested that such an inconsistency might inhibit fans from developing strong loyalty to the teams and would jeopardize revenue to the team owners. Karlan said that if the exemption was repealed that team owners would have to pay the players what they were worth to keep them, rather than relying on the unfair advantages team owners had under the existing system. Feigning horror and surprise, Sotomayor said that if

that policy was implemented, that the Yankees “might have to pay Reggie Jackson \$1 million a year!” Karlan countered that it could be even worse, the Yankees might have to pay “Alex Rodriguez a quarter of a billion dollars not to play!” Sotomayor responded saying, “I can’t imagine such a thing.”

After this exchange, Karlan addressed the underlying legal questions to conclude her presentation. She observed that during the late 1800s and early 1900s baseball had operated on a competitive basis, including independent leagues. This all changed when the Court ruled in 1922 that baseball was exempt from antitrust law. She characterized that ruling as ridiculous. She said the Court’s assertion in that same ruling that the sport did not involve interstate commerce, was also ridiculous.

Speaking for Major League Baseball, Roy Englert observed that some 50 bills had been introduced in Congress over the ensuing years seeking to eliminate the antitrust exemption for baseball. But none had passed. He suggested that given that history, the Court should leave the regulation of the sport to Congress to determine.

Sotomayor inquired of Englert, “Where are the rights of the players?” Quoting Flood himself, she said that the current system of baseball was a form of “involuntary servitude” which did not exist in any other industry.

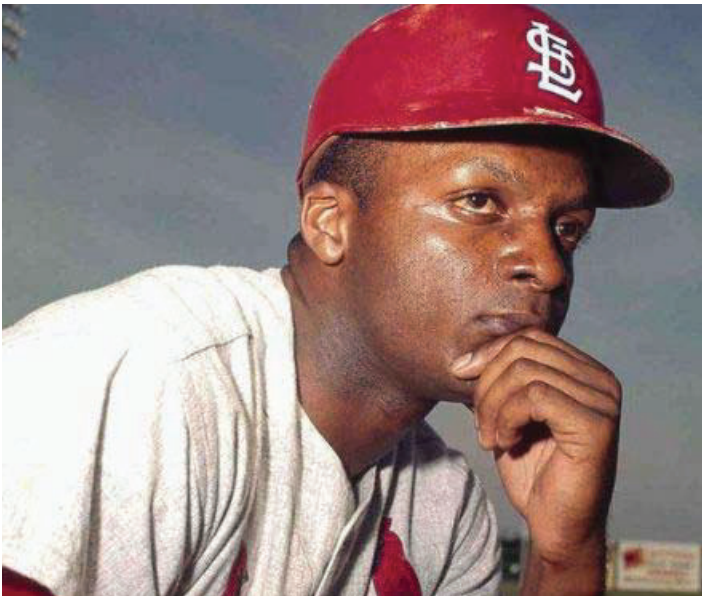
Englert countered by informing the Justice that “these young men are making on average \$28,000 [a year] . . . as much as Supreme Court Justices.” (These figures are of course for 1974.) Moreover, unlike other sports, baseball involved an enormous investment in training players in the minor leagues, thereby increasing significantly the costs to the owners.

The Justice inquired how the integrity of the Court is affected when it lets “clearly erroneous decision[s] stand?” A further question, is how long should the Court let erroneous decisions stand before seeking to correct the problems.

At the conclusion of argument, the Justice summarized the opinion written by Justice Blackmun saying that it was “notorious” for the “seven-page sentimental opening.” This



Annie Jones Blattner, daughter of the late Frank C. Jones for whom the series is named, is shown with Justice Sotomayor during the reception following the reenactment.



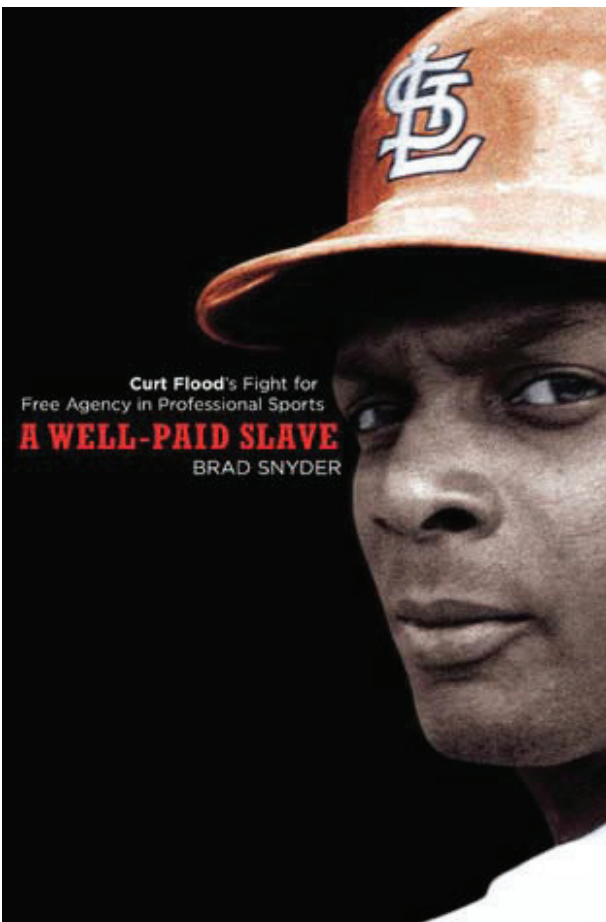
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sections in which the antitrust exemption and the reserve clause were upheld. The judgment was based entirely on the doctrine of *stare decisis*, respect for precedent. Blackmun acknowledged in the opinion that the Court had been wrong when it determined baseball did not involve interstate commerce. In spite of that, he concluded that the exemption should continue because the Court had previously upheld the principle, and because Congress had not acted to overrule the Court.

When commenting what she would have done, the Justice responded that “first of all, she would have insisted that Joe DiMaggio be added to the list of baseball greats,” and on that condition she would have joined the opening section of the opinion. But she continued, “[t]here are Supreme Court decisions that are wrong.” The Court’s 1896 decision upholding segregation was wrong, and the Supreme Court was right to reverse it in 1954. But sometimes, the question is not whether the decision was wrong, but whether this was the right time to overrule it.” In conclusion, she said that from today’s perspective we view the reserve clause that deprived players of any real negotiating power as a horrible thing. But putting it into historical perspective, at the time the case was argued, both sides saw themselves as “fighting for the very survival of baseball.”

After an outstanding career with the St. Louis Cardinals, Curt Flood protested against being traded against his will to the Philadelphia Phillies. His protest was the genesis of the case *Flood v. Kuhn*.

preamble included a recitation of the history of the game, and listed some 88 best players of all time. She commented that it “was so un-judgelike” and observed that Chief Justice Burger and Justice Byron White had refused to sign onto that section of the opinion. However, they did join the



Copies autographed by the author of *A Well-Paid Slave: Curt Flood’s Fight for Free Agency in Professional Sports* are available in limited quantities in our Giftshop at the Supreme Court or available online at www.supremecourtgifts.org

A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports
Price: \$16.00

After the 1969 season, the St. Louis Cardinals traded their star centerfielder, Curt Flood, to the Philadelphia Phillies, setting off a chain of events that would change professional sports forever. At the time there were no free agents, no no-trade clauses. When a player was traded, he had to report to his new team or retire. Unwilling to leave St. Louis and influenced by the civil rights movement, Flood chose to sue Major League Baseball for his freedom. His case reached the Supreme Court, where Flood ultimately lost. But by challenging the system, he created an atmosphere in which, just three years later, free agency became a reality. Flood's decision cost him his career, but as this dramatic chronicle makes clear, his influence on sports history puts him in a league with Jackie Robinson and Muhammad Ali.

Flood v. Kuhn: An Historical Overview

By: Brad Snyder*

On October 7, 1969, St. Louis Cardinals center fielder Curt Flood received an early morning phone call that he had been traded to the Philadelphia Phillies.

Flood's contract contained a provision known as the reserve clause. The reserve clause says that we own you for this year and next year, too. And next year, you can only resign with us – unless we trade you, then your new team owns you for this year and next year, too. In short, the reserve clause is a perpetual option that results in lifetime ownership.

Curt refused to go to Philadelphia. Instead, he met with Marvin Miller, the head of the MLB players association, about challenging the legality of the reserve clause.

"It's a million-to-one shot," Miller said, "and even if that million-to-one shot comes home, you'll never see a dime."



Professor Brad Snyder presented the background of the case *Flood v. Kuhn* on the evening of the reenactment. He is the author of a book based on the case, *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports*.

The reason why Miller said it was a million-to-one shot is that the U.S. Supreme Court had twice ruled that the Sherman Anti-Trust Act did not apply to MLB.

In a 1922 case known as *Federal Baseball*, Justice Oliver Wendell Holmes ruled in a unanimous opinion that professional baseball was not interstate commerce for the purposes for the Sherman Act. He analogized the case to the Chautauqua lecture circuit, a series of exhibitions in which the travel was incidental to the commercial activity itself.

Judge Henry Friendly later wrote that *Federal Baseball* was "not one of Mr. Justice Holmes's happiest days." But as Kevin McDonald has pointed out in the *Journal of Supreme Court History*, *Federal Baseball* was consistent with the Court's antitrust jurisprudence at the time.

Since writing my book, *A Well-Paid Slave*, I've learned two interesting facts about Holmes & *Federal Baseball*:

1) Holmes knew nothing about baseball. He once tried to borrow one of Justice Day's baseball analogies and wrote a female friend: "I sneaked a base."

2) *Federal Baseball* was probably one of five opinions that Holmes wrote during a six-day period.

In 1953, the Supreme Court reaffirmed baseball's "antitrust exemption" in a case brought by New York Yankees minor league pitcher George Toolson. *Toolson* was not one of the Supreme Court's happiest days. The Court was in transition. Chief Justice Earl Warren was a recess appointment to the Court. Justice Black was acting as Chief Justice and running the Conference.

In *Toolson*, the Court refused to reconsider *Federal Baseball's* reasoning yet completely changed its meaning. At the end of the one-paragraph per curiam opinion written by Justice Black, Chief Justice Warren added a sentence claiming that in 1890 Congress had intended to exempt professional baseball from the Sherman Act. This sentence attempted to spur congressional action, yet completely misconstrued the Court's antitrust jurisprudence as well as *Federal Baseball*.

There was some hope after *Toolson*. Between 1953 and 1970, the Supreme Court refused to exempt professional football, boxing, or basketball from the antitrust laws because these other sports were engaged in interstate commerce. Baseball was the outlier.

Nonetheless, Marvin Miller still saw the case as a million-to-one shot and one that would ruin Curt Flood's playing career and any possible future coaching or management career in the game.

Flood asked Miller if the lawsuit would benefit future players.

Miller said it would.

Flood said that was good enough for him.

Why did Curt Flood litigate a case in which he would sacrifice everything for the benefit of others? Well, you'll have to read my book for the complete answer.

But, for anyone who knew his personal story of protesting Jim Crow segregation alongside Jackie Robinson and Medgar Evers among others, it was no surprise that Curt Flood was willing to stand up to MLB.

On December 24, 1969, Curt wrote a letter to baseball commissioner Bowie Kuhn. "After 12 years in the major leagues," Flood wrote, "I do not feel that I am a piece of property to be bought and sold irrespective of my wishes" and asked to be declared a free agent so that he could negotiate with the team of his choice. Kuhn, not surprisingly, denied Flood's request.

A week or so later, Flood went on ABC Sports where Howard Cosell asked him what's wrong with a baseball player making \$90,000 a year (superstars made \$100,000 in those days) being traded from one team to another. Flood replied: "A well-paid slave is nonetheless a slave."

Curt sat out the entire 1970 season while his case went to trial in the Southern District of New York. At his trial, former

owner Bill Veeck and former players Jackie Robinson, Hank Greenberg, and Jim Brosnan testified for Flood.

Flood's legal team brought federal antitrust claims, state antitrust claims, as well as a 13th Amendment claim. Flood's legal team argued that if baseball was not interstate commerce, then it was intrastate commerce subject to state antitrust law.

The owners argued that the federal trial court lacked jurisdiction because of *Toolson's* antitrust exemption as well as a second exemption. Unions, based on a divided opinion in the *Jewel Tea* case, should not be able to create monopolistic entities and then turn around and sue for monopoly. A concurring opinion by Arthur Goldberg, now Flood's counsel, advocated an exception for collective bargaining. Flood's lawsuit, the owners argued, should be decided at the negotiating table through collective bargaining.

By the time the trial court dismissed the case and it was appealed to the Second Circuit, Flood was living in exile in Denmark.

Before the 1971 season, the Phillies sold Curt's rights to the Washington Senators. Both parties to the litigation agreed that signing with the Senators would not moot Curt's case. Curt tried to make a comeback with the Senators in 1971, but the season off had sapped him of his skills, and financial problems and alcoholism drove him to distraction. He played in only 13 games before exiling himself to Mallorca, Spain.

Flood was in Spain on March 20, 1972, when the Supreme Court heard his case.

A young Willkie Farr partner, 36-year-old Louis Hoynes, represented the owners, and the legendary Washington attorney Paul Porter represented Commissioner Kuhn.

Before the argument, Hoynes and Porter were mooted at Porter's firm, Arnold & Porter, where former Justice Abe Fortas made a rare appearance at his old law firm to serve as a mock chief justice. Fortas also wrote a memo handicapping the case.

As he did at trial and on appeal, former Justice Arthur Goldberg represented Flood. Goldberg denied the offers of several former clerks to moot the case. The argument was not one of Justice Goldberg's happiest days.

I can't wait to hear the do-over.

Professor Snyders' Comments after the Re-enactment

Curt Flood was not baseball's first free agent.

On June 20, 1972, he lost his case 5-3. The Conference vote was initially 5-4 in MLB's favor. Then Justice Powell, a vote for Flood, recused himself because he owned Anheuser Busch stock and the beer company owned the Cardinals. Then Justice Thurgood Marshall switched his vote from MLB to Flood creating a 4-4 tie. At the 11th hour, Chief

Justice Warren Burger switched his vote from Flood to MLB. Justice Harry Blackmun's opinion became the opinion of the Court. Part I of Blackmun's opinion included an ode to baseball and a list of 88 baseball greats. Both Chief Justice Burger and Justice Byron White refused to join Part I. The rest of Blackmun's opinion conceded that baseball was interstate commerce, yet allowed the trial court's decision to stand based on *Federal Baseball* as well as congressional inaction in response to *Toolson*.

Flood's defeat, however, led to victory. By consistently arguing that these issues should be resolved at the negotiating table, the owners were forced to make concessions – including independent grievance arbitration as part of the 1970 collective bargaining agreement negotiated on the eve of Curt's trial.

Using the new grievance procedure, Catfish Hunter became baseball's first free agent after the 1974 season when an arbitrator ruled that Oakland A's owner Charley Finley had breached Hunter's contract by refusing to set up a lifetime annuity. Hunter signed with the Yankees for \$3.75 million. The following year, Andy Messersmith and Dave McNally played an entire season without new contracts (in an attempt to "play out" their options), and arbitrator Peter Seitz declared them free agents. Messersmith and McNally opened the floodgates.

At the dawning of free agency, Flood remained in Spain in the throes of alcoholism and poverty. He returned to Oakland in 1975, sobered up after a decade, and married the love of his life, actress Judy Pace. During the 1994 baseball strike, Flood spoke to a gathering of striking players in Atlanta and was given a standing ovation. Thankfully, then-Judge Sonia Sotomayor saved baseball fans everywhere by issuing a temporary injunction for the players and ending the strike.

In 1996, Flood starred in Ken Burns's *Baseball* documentary and met then-President and Mrs. Clinton during a media reception at the White House. Flood died of throat cancer in January 1997.

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