The Burger Court Opinion Writing Database

Flood v. Kuhn

407 U.S. 258 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

B0

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 13, 1972

Re: No. 71-32 - Flood v. Kuhn

Dear Harry:

After much travail I come out on this case as a "reluctant affirm".

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

Circulated: JUN 12 1972

Recirculated: _____

No. 71-32 -- Curtis C. Flood v. Bowie K. Kuhn et al.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in the result because, like Mr. Justice Douglas, I have grave reservations as to the correctness of Toolson v. N.Y., supra; as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with Mr. Justice Douglas that Congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____

Recirculated: JUN 16 1972

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner,
v.
Bowie K. Kuhn et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 19, 1972]

MR. CHIEF JUSTICE BURGER, concurring.

I concur in Parts II, III, and IV of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations as to the correctness of *Toolson* v. *New York, supra;* as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

To: The Chief Justice
~~Mr. Justice Black~~
~~Mr. Justice Harlan~~
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Circulated: 10-8

Recirculated: _____

Curtis C. Flood, Petitioner,
v.
Bowie K. Kuhn et al.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

Today, the Court denies certiorari to a man who wanted simply to work for the employer of his choice but who was prevented from doing so by a concerted refusal to deal among his prospective employers. This anomaly in our antitrust laws occurs solely because Curtis C. Flood sought to earn his livelihood as a baseball player. Had this same group boycott occurred in another industry, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207; *United States* v. *Shubert*, 348 U. S. 223; or even in another sport, *Haywood* v. *National Basketball Association*, 401 U. S. 1204; *Radovich* v. *National Football League*, 352 U. S. 445; *United States* v. *International Boxing Club*, 348 U. S. 236; we would have no difficulty in sustaining his claim. The result obtains, however, because of professional baseball's exemption from the antitrust laws—an exemption predicated upon an overly narrow interpretation of Congress' power under the Commerce Clause, *Federal Baseball Club* v. *National League*, 259 U. S. 200; which retains its force solely because of judicial paralysis. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356. Somewhat ironically, this antiquated interpretation of the Commerce Clause is now used not only to deny a claim under the federal antitrust laws but also as evidence of a congressional intent to pre-empt the regulation of baseball

To: The Chief Just
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Douglas, J.

Circulated:

Dated: 10/13/71

SUPREME COURT OF THE UNITED STATES

No. 71-32

Curtis C. Flood, Petitioner, *v.* Bowie K. Kuhn et al. } On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October 18, 1971]

The petition for a writ of certiorari is denied.

MR. JUSTICE DOUGLAS, dissenting.

Today, the Court denies certiorari to a man who wanted simply to work for the employer of his choice but who was prevented from doing so by a concerted refusal to deal among his prospective employers. This anomaly in our antitrust laws occurs solely because Curtis C. Flood sought to earn his livelihood as a baseball player. Had this same group boycott occurred in another industry, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207; *United States* v. *Shubert*, 348 U. S. 223; or even in another sport, *Haywood* v. *National Basketball Association*, 401 U. S. 1204; *Radovich* v. *National Football League*, 352 U. S. 445; *United States* v. *International Boxing Club*, 348 U. S. 236; we would have no difficulty in sustaining his claim. The result obtains, however, because of professional baseball's exemption from the antitrust laws—an exemption predicated upon an overly narrow interpretation of Congress' power under the Commerce Clause, *Federal Baseball Club* v. *National League*, 259 U. S. 200; which retains its force solely because of judicial paralysis. *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356. Somewhat ironically, this antiquated interpretation of the Commerce Clause is now used not only to deny a claim under the federal antitrust laws but also as evidence of a congressional intent to pre-empt the regulation of baseball

356

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 71-32

Circulated: 10/14/71

Curtis C. Flood, Petitioner, v. Bowie K. Kuhn et al. | On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[October 18, 1971]

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner, *v.* Bowie K. Kuhn et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

This Court's decision in the *Federal Baseball Club* v. *National League,* 259 U. S. 200, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view[1] of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, particularly *United States* v. *Knight,* 156 U. S. 1, *Hammer* v. *Dagenhart,* 247 U. S. 251, and *Paul* v. *Virginia,* 8 Wall. 168, the whole concept of commerce has changed.

Under the modern decisions such as *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219; *United States* v. *Darby,* 312 U. S. 100; *Wickard* v. *Filburn,* 317 U. S. 111; *United States* v. *South Eastern Underwriters Assn.,* 322 U. S. 533, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system. An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H. R. Rep. No. 2002, 82d Cong., 2d Sess., 4, 5) would be hard

[1] While I joined the Court's opinion in *Toolson* v. *New York Yankees Inc.,* 346 U. S. 356, I have lived to regret it; and I would now correct what I believe to be its fundamental error.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: D...

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-32

Recirculated: 5-17

Curtis C. Flood, Petitioner, v. Bowie K. Kuhn et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

This Court's decision in the *Federal Baseball Club* v. *National League,* 259 U. S. 200, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view[1] of a rather dismal business account over the last 50 years would keep that derelict in midstream.

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner, v. Bowie K. Kuhn et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

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[1] While I joined the Court's opinion in *Toolson* v. *New York Yankees Inc.,* 346 U. S. 356, I have lived to regret it; and I would now correct what I believe to be its fundamental error.

June 15, 1972

Dear Chief:

Would you please announce that I am dissenting in No. 71-32 - Flood v. Kuhn?

W. O. D.

The Chief Justice

71-32

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 12, 1972

RE: No. 71-32 - Flood v. Kuhn, et al.

Dear Bill:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

BM

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 20, 1972

No. 71-32 - Flood v. Kuhn

Dear Chief,

I have asked Harry Blackmun to undertake the writing of the opinion for the Court in this case, which, hopefully, can be a rather brief per curiam.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 9, 1972

71-32 --- Flood v. Kuhn

Dear Harry,

I agree with your memorandum in this case and hope it will become a signed opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 26, 1972

Re: No. 71-32 - Flood v. Kuhn

Dear Harry:

Agreeing with the result you reach and preferring the long form to a short per curiam, I join your memorandum in this case but with the gentle suggestion that you omit Part I.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner, *v.* Bowie K. Kuhn et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

Memorandum of MR. JUSTICE MARSHALL.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, who had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not "a piece of property to be bought and sold irrespective of my wishes," [1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved to the owners of major league base-

[1] Letter from Curt Flood to Bowie K. Kuhn, December 24, 1969, App., p. 37.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner,
v.
Bowie K. Kuhn et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

Memorandum of MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, who had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not "a piece of property to be bought and sold irrespective of my wishes,"[1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved to the owners of major league base-

[1] Letter from Curt Flood to Bowie K. Kuhn, December 24, 1969, App., p. 37.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner, *v.* Bowie K. Kuhn et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, who had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not "a piece of property to be bought and sold irrespective of my wishes,"[1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved to the owners of major league base-

[1] Letter from Curt Flood to Bowie K. Kuhn, December 24, 1969, App., p. 37.

O.K. SAS 6/7/73

Printer - 2 small changes - Pages - 5 & 8. No proof needed.

~~3rd DRAFT~~

SUPREME COURT OF THE UNITED STATES

No. 71–32

Curtis C. Flood, Petitioner, v. Bowie K. Kuhn et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 19, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, who had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not "a piece of property to be bought and sold irrespective of my wishes," [1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved to the owners of major league base-

[1] Letter from Curt Flood to Bowie K. Kuhn, December 24, 1969, App., p. 37.

May 4, 1972

Re: No. 71-32 - Flood v. Kuhn

Dear Potter:

I have a proposed Per Curiam for this case at the Printer. I must confess to you that I have done more than merely follow Toolson with a bare peremptory paragraph. The case, for me, proved to be an interesting one, and I have indulged myself by outlining the background somewhat extensively. As a matter of fact, this has prompted me to conclude that Federal Baseball and Toolson have a lot to be said for them. When I finally get to the heart of the matter, however, I give it rather summary treatment. The briefs on both sides are good and I rationalize by saying that they deserve at least this much.

Please give the opinion a reading and let me have your general reactions. The case, supposedly, is critical for the baseball world. I am not so sure about that, for I think that however it is decided, the sport will adjust and continue.

Sincerely,

HAB

Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

1st DRAFT

Circulated: 5/5/72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71-32

Curtis C. Flood, Petitioner, *v.* Bowie K. Kuhn et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1]

[1] The reserve system, publicly introduced into baseball contracts in 1887, see *Metropolitan Exhibition Co.* v. *Ewing*, 42 F. 198, 202–204 (C. Ct. SDNY 1890), centers in the uniformity of player contracts; the confinement of the player to the club which has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. Thus

A. Rule 3 of the Major League Rules provides in part:

"(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner.

. . . . .

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any

B
1st —

p. 5

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-32

Recirculated: 5/25/72

Curtis C. Flood, Petitioner,
v.
Bowie K. Kuhn et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1972]

Memorandum of MR. JUSTICE BLACKMUN.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1]

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. . . . . .

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1972

MEMORANDUM TO THE CONFERENCE:

Re: No. 71-32 Flood v. Kuhn

I have now verified the fact that the St. Louis Cardinals are owned by a subsidiary of Anheuser Busch.

Accordingly, and regretfully, I am out of the case. Fortunately, this will not affect the result.

L. F. P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 15, 1972

Re: 71-32 - Flood v. Kuhn

Dear Harry:

Please join me in your opinion in this case.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference