DEPARTMENT OF JUSTICE

Onward to Victory[1]: Competition Policy in Collegiate and Professional Sports

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I. Introduction

Good afternoon. Thank you to Dean Newton for inviting me to be with you today and discuss the intersection of organized sports and antitrust law. I first knew Dean Newton as my constitutional law professor in 1992. I arrived with a science background and relatively little sense of what to expect in a law school classroom. But I was instantly hooked by Dean Newton's class. She is a wonderful scholar and academic, and a testament to the power of excellent teaching and administration. I am grateful to her for furthering my love of the Constitution and I'm honored to be here today.

Notre Dame is an ideal setting to talk about competition policy in collegiate and professional sports—and not just because we find ourselves on the eve of the storied Notre Dame-Michigan football game. As a highly respected academic institution, known for its success both on and off the field, Notre Dame has cultivated an enviable place in our national sports consciousness. The Fighting Irish played their inaugural football game in 1887.[1] Since then, Notre Dame's sports prowess has cemented its place in athletic history. Many people may not be aware, however, that for the past eleven years, Notre Dame has ranked first in the nation for its 98 percent student-athlete graduation rate, the highest for all universities with football programs, and I commend you for that.[2]

I also would be remiss not to add that Notre Dame features prominently in my Front Office. My old friend and colleague, Roger Alford, is on leave from the law school faculty to serve as my deputy for international affairs. He is doing some groundbreaking work and I am grateful he agreed to serve. I am also grateful to Notre Dame for allowing him to do it. Also, my counsel, Bill Rinner, is a proud Notre Dame alumnus and an incredible legal mind, who just this week became a father to another potential Fighting Irish. Our International Section Chief, Lynda Marshall, and one of our top litigators, Julie Elmer, are also alums.

Today, I wish to share some lessons and observations about antitrust policy in collegiate and professional sports. The sports industry is fascinating for competition lawyers because it reflects a hydraulic tension between competition and necessary cooperation.

That is leagues, teams, and governing bodies require collaboration so that on-the-field competition can take place – but anything less than intense competition makes sports less attractive to players and fans alike. It's not surprising then that U.S. courts are often tasked with distinguishing between necessary collaboration and anticompetitive conduct in an industry whose very essence is competition.

The realities of organized sports make the application of the antitrust laws to sports unique. Just as in music and other entertainment industries, however, the considerable evolution

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[1] NOTRE DAME, FIRST GAME IN NOTRE DAME FOOTBALL HISTORY, http://125 nd.edu/moments/first-game-in-notre-dame-football-history/.

[2] *See* UNIVERSITY OF NOTRE DAME, Notre Dame Wins 11th Straight National Title in Graduation Based on 2017 NCAA Graduation Success Rate Numbers (Nov. 8, 2017), https://und.com/news/2017/11/8/Notre_Dame_Wins_11th_Straight_National_Title_in_Graduation_Based_on_2017_NCAA_Graduation_Success_Rate_Numbers.aspx.

of the business of sports over the last century prompts us to take a fresh look at competition policy in an industry that's as much a part of our national economy today as it is part of our culture.

II. Sports in America

Like so many of you, I have a deep love and admiration for sports. As a kid from Los Angeles and a devoted UCLA alumnus, I am proud of the fact that UCLA has the most team sport national championships of any college in the nation. Growing up, I cheered for only two college football teams: the Bruins and any team playing the Trojans. I know that we, in this room, share that last point in common.

Whether it's Notre Dame versus Michigan, UCLA versus USC, or Duke basketball versus North Carolina, rivalries tell us something about why Americans love sports: for both athletes and sports fans, raw competition and love of the game offer lessons in perseverance, triumph, and teamwork.

To quote the late Byron White, the greatest athlete to serve on the Supreme Court, "[s]ports constantly make demands on the participant for top performance, and they develop integrity, self-reliance and initiative. They teach you a lot about working in groups, without being unduly submerged in the group."[3] Of course, the late Justice knew something about top performance. A talented football, basketball, and baseball player at the University of Colorado, Justice White was a runner up for the Heisman Trophy in 1937, a Rhodes Scholar, and a first round NFL draft pick.

Sports are an integral part of American culture and identity.[4] Football is as much a staple of Thanksgiving in many households as are turkey and stuffing. Sports metaphors have even invaded our language. If you've ever used "ballpark" to mean a broad range within which a comparison is possible, "end around" to describe an evasive tactic, or "taking off the gloves" to mean attacking without mercy, know that you have used an idiomatic expression derived from baseball, football, and boxing, respectively.

The history of sports in America also reaffirms the idea that we are a nation of innovators. The country that invented some of the most successful and pioneering companies in the world also invented modern baseball, basketball, American football, and, of course, the newest sports phenomena, mixed martial arts, as made popular around the world by the Ultimate Fighting Championship.

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[3] Alfred Wright, *A Modest All-America Who Sits on the Highest Bench*, SPORTS ILLUSTRATED (Dec. 10, 1962), *available at* https://www.si.com/vault/1962/12/10/666806/a-modest-allamerica-who-sits-on-the-highest-bench.

[4] The love of sport is not unique to any time or place. Greek philosophers waxed poetically about the deeper meaning of sports. *See* GEORGE F. WILL, MEN AT WORK: THE CRAFT OF BASEBALL 2 (1991) ("Sport, they said, is morally serious because mankind's noblest aim is the loving contemplation of worthy things, such as beauty and courage. By witnessing physical grace, the soul comes to understand and love beauty. Seeing people compete courageously and fairly helps emancipate the individual by educating his passions.").

Like antitrust policy, competition is the lifeblood of sports. In sports, as in antitrust policy, we don't pick winners and losers, but provide rules designed to promote the competitive process and let competition determine the winner.

III. The Antitrust Laws

Let me speak now about the antitrust laws.

The Sherman Act has been a favorite vehicle for challenging conduct in sports. Enacted in 1890, Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade or commerce.[5] These prohibitions can be enforced by either the government or private litigants. U.S. courts are routinely asked to address antitrust challenges in sports precisely because organized sports require agreement to assure fair play, consistency, and organization.

Although antitrust can seem like an esoteric discipline, sports fans should care about antitrust and antitrust lawyers should care about sports for at least three reasons. First, sports teach us important lessons about the structure of our government. Second, antitrust challenges in sports reaffirm the flexible and resilient nature of antitrust law itself. And third, competition and its enforcement has helped sports improve and become a more enjoyable experience for the American consumer, fans like you and me, and for the athlete that makes it all happen.

IV. Lesson No. 1: The Structure of Government

Let me start with a lesson from antitrust and baseball. As many of you may know, baseball enjoys legal immunity from the antitrust laws. This was not granted to them by Congress but, in 1922, the Supreme Court famously decided in *Federal Baseball Club v. National League of Professional Base Ball Clubs* that the Sherman Act does not apply to the conduct of a professional baseball league because the business of baseball is not in interstate commerce.[6] Writing for a unanimous Supreme Court, Justice Oliver Wendell Holmes opined that the business of baseball is not commerce but "giving exhibitions of baseball, which are purely state affairs."[7]

Although the late Justice had a narrow view of commerce, he astutely noted that "[t]he life of the law has not been logic; it has been experience."[8] That, of course, begs the question: what does contemporary experience teach about the business of baseball today? More specifically, what does the experience of generating $10 billion in annual revenue suggest about whether the business of exhibiting baseball is commerce?

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[5] *See* Sherman Act, 15 U.S.C. § 1.
[6] Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922).
[7] *Id.* at 208.
[8] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

Since the *Federal Baseball Club* decision 96 years ago, the Supreme Court heard at least two challenges to baseball's exemption, the last one 45 years ago, and has declined to overturn it in both cases.[9]

One of those challenges was brought by Curt Flood, a centerfielder who was traded from the Cardinals to the Phillies in 1969. Under baseball's reserve system, the Cardinals retained the right to Flood's services even when his contract expired. As a practical matter, the reserve clause prevented Flood from entering into a contract with another team, and allowed the Cardinals to reassign, trade, sell, or release him. Flood refused to report to the Phillies. On Christmas Eve 1969, Flood wrote a letter to Baseball Commissioner Bowie Kuhn:

> After twelve years in the major leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States.
>
> It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decision. I, therefore, request that you make known to all Major League clubs my feelings in this matter, and advise them of my availability for the 1970 season.[10]

Kuhn denied the request, citing the reserve clause in Flood's contract.

Flood then sued both the Commissioner and Major League Baseball for violations of the antitrust laws, specifically Section 1 of the Sherman Act. His lawyer, former Supreme Court Justice Arthur Goldberg, argued that baseball's reserve clause depressed wages and limited players to one team for life. Despite Flood's high salary for the time, he likened the reserve clause to slavery.

By 1972, *Flood v. Kuhn* was heard by the Supreme Court. Justice Blackmun, writing for the majority, described the antitrust exemption for professional baseball as an "exception and an anomaly" but one entitled to *stare decisis*.[11] Despite its concerns about the baseball exemption, the Court's majority opined that any inconsistency or illogic surrounding the baseball exemption is to be remedied by Congress and not by the Supreme Court.[12]

In a blistering dissent, Justice Douglas described the baseball exemption as "a derelict in the stream of the law that [the Supreme Court], its creator should remove."[13] Of course, Justice Douglas also had some unusual legal views like giving trees standing to sue for their own

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[9] Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 282 (1972).
[10] DEAN A. SULLIVAN, LATE INNINGS: A DOCUMENTARY HISTORY OF BASEBALL 254 (2000).
[11] Flood v. Kuhn, 407 U.S. 258, 282 (1972).
[12] *Id.* at 284.
[13] *Id.* at 267 (Douglas, J., dissenting).

protection,[14] but in his *Flood* dissent, he was on to something. Justice Marshall, who also dissented, wrote:

> The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. […]
>
> Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports.[15]

Twenty-six years later, Congress passed the Curt Flood Act of 1998, whose purpose, as Congress stated it, is "to state that the major league baseball players are covered under the antitrust laws" and grant them the same antitrust rights as basketball and football players.[16] The act repealed baseball's antitrust exemption for issues directly relating to the terms and conditions of player employment. It does not, however, apply to minor leagues and minor league reserve clauses and several franchise ownership issues.[17]

There is one additional lesson we can draw from the baseball exemption story: markets operate best when unencumbered by anticompetitive restraints. Five years after Curt Flood lost his case before the Supreme Court, arbitrator Peter Seitz awarded free agency status to two Major League Baseball pitchers.[18] Eventually, baseball's reserve system was abolished in favor of a negotiated free agency. In addition to ensuring player mobility, free agency allowed players to bargain for better wages and conditions of employment. According to retired professor Ed Edmonds, Notre Dame's resident sports law expert, it also resulted in decades of phenomenal salary growth and an expansion of the Major League Baseball Players Association as a formidable force in bargaining with team owners.[19]

Such is the power of the free market when unreasonable restraints give way to competition.

V. Lesson No. 2: Antitrust is Flexible

Now, lesson two.

Controversies surrounding the rules of the National Collegiate Athletic Association ("NCAA") and its affiliates have been a hotbed of private antitrust litigation. For over a century, the NCAA has set rules governing the eligibility of athletes at more than 1,000 member colleges

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[14] *See* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting).

[15] *Flood*, 407 U.S. at 292 (Marshall, J., dissenting).

[16] Curt Flood Act of 1998, Pub. L. No. 105-297, § 2, 112 Stat. 2824.

[17] *See* 15 U.S.C. § 26b.

[18] Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years*, 9 MARQ. SPORTS L. J. 315 (1999).

[19] *Id.* at 316.

and universities.[20] While it has an important role in maintaining academic standards and codes of conduct for student-athletes, it is unquestionably a substantial commercial enterprise that generates over $1 billion annually.[21] This duality is often at the heart of antitrust challenges against the NCAA.

The NCAA is well known for its embrace of amateurism. It has implemented and defended limits on student-athlete compensation and interactions with professional sports leagues to try to promote and protect that amateurism. Athletes can lose amateur status by, among other things, signing a contract with a professional team or entering the draft of a professional league. They also cannot receive pay based on their athletic ability. That means that student-athletes cannot be paid from endorsements or boosters, or share in the revenue that they help generate for the NCAA and its affiliates each year. As one appellate court recently put it, these rules can "promote amateurism," which may, in turn, help "increas[e] consumer demand for college sports."[22]

The tension between eligibility rules that promote amateurism and what some have challenged as an anticompetitive agreement to fix at zero a student-athlete's compensation was central to the landmark *O'Bannon v. NCAA* case. In that case, former all-American UCLA basketball player Ed O'Bannon had learned that he was depicted in a college basketball video game without his consent or compensation, and he filed a class action lawsuit on behalf of himself and similarly situated college football and basketball players. The lawsuit alleged, among other things, that the NCAA's rules preventing student-athletes from being compensated for the use of their name, image, and likeness violate Section 1 of the Sherman Act.[23]

The district court held that the NCAA's total ban on compensation for student-athletes is anticompetitive and found that a less restrictive alternative would be to allow member schools to grant scholarships up to the full cost of attendance and to hold up to $5,000 of their licensing revenues in trust for the student-athlete after college.[24]

On appeal, the Ninth Circuit affirmed that NCAA regulations are subject to antitrust scrutiny, but struck down the deferred compensation trust framework. The Court of Appeals noted that the NCAA's total ban on compensation was "more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market."[25] In accordance with these principles, the Court held that the Sherman Act requires the NCAA to "permit its schools to provide up to the cost of attendance to their student athletes."[26]

Our antitrust laws promote vigorous competition and are flexible enough to take into account amateurism as one of many market characteristics that may drive demand for college

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[20] O'Bannon v. NCAA, 802 F.3d 1049, 1049 (2015).

[21] Steve Berkowitz, *NCAA reports revenues of more than $1 billion in 2017*, USA TODAY (March 7, 2018), https://www.usatoday.com/story/sports/college/2018/03/07/ncaa-reports-revenues-more-than-1-billion-2017/402486002/.

[22] *O'Bannon*, 802 F.3d at 1072 (internal citations and punctuation omitted).

[23] *Id.* at 1055.

[24] *Id.* at 1066, 1072.

[25] *Id.* at 1078-79.

[26] *Id.* at 1079.

sports. As the Supreme Court has observed, in some instances, college sports require some restraints on competition if the product is to be available at all.[27] Such restraints, however, require a careful balancing of the proffered justification of the restraint against harm to competition. In other words, amateurism, although a laudable goal, in itself does not grant antitrust immunity, and rules designed to promote amateurism need to be carefully tailored so they don't unreasonably limit competition.

I am encouraged that reinvigorated public debate and an evolving understanding of the college sports market have spurred positive changes at NCAA schools. For example, the NCAA's transfer rules have been modified to give players more flexibility. Also, the NCAA recently announced reforms that will allow certain college basketball players to speak to agents and more actively consider the National Basketball Association draft without forfeiting their eligibility. In addition, the NCAA now permits scholarships up to the full cost of attendance, which can be awarded for a multi-year period covering the student's full period of eligibility.

I applaud these procompetitive changes and am proud of the role the Antitrust Division has played in advocating for increased competition. I hope the NCAA will go further, as needed, to implement new rules or modify existing ones to promote increased competition for student-athletes. In the future, for example, I hope to see schools consider competing fully to fund student-athletes' educational expenses, for example, by offering graduate education tuition incentives and job training as they compete for top student-athletes.

VI. Lesson No. 3: Free Market Competition Improves On-The-Field Competition

The last major lesson I wish to discuss is that competitive markets improve on-the-field competition and the consumer experience. In the late 1990s, some may recall that NBC was shut out of the opportunity to broadcast National Football League ("NFL") games.[28] In 2000, NBC announced the formation of the XFL, a joint venture with the World Wrestling Federation. The XFL's opening game took place in February 2001, less than one week after the NFL Super Bowl. Although it only lasted one season, the XFL competed, to some degree, with the NFL by promoting entertainment value and individualism as a brand. The story behind the creation of the XFL is well documented in an ESPN 30 for 30 episode, "This Was the XFL," directed, of course, by Notre Dame alumnus, Charlie Ebersol.

Nearly two decades later, the XFL announced it will be revived in 2020. As competition would have it, shortly thereafter, the Alliance of American Football ("AAF") was announced as another upstart competitor to the XFL.[29] Notably, the AAF is slated to beat the revamped XFL to market by a full year and already has a television distribution deal with a major network. That network has also agreed to sixty percent fewer commercial breaks and no television timeouts. While the ultimate success of the XFL and the AAF remains to be seen, the race to market and

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[27] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 101-02 (1984).

[28] Leonard Shapiro, *NBC Gets in on WWF Football*, WASH. POST (March 30, 2000), https://www.washingtonpost.com/archive/sports/2000/03/30/nbc-gets-in-on-wwf-football/9308639f-aa5d-4b10-8742-2ca86abe4f85/?utm_term=.1e7210d70c90.

[29] Anthony Crupi, *In a Shot Across the Bow at the XFL, an Ebersol Cooks Up a Rival Football League*, ADAGE (March 20, 2018), http://adage.com/article/media/upstart-alliance-american-football-aaf-rival-xfl-nfl/312818/.

improved viewer experience reflect the hallmarks of competition that effective antitrust policy promotes to the benefit, ultimately, of the consumer.

Newcomers like the XFL may be unlikely to threaten the NFL's position as the dominant professional football league in the United States. Nonetheless, some of the XFL's production and broadcast innovations – like widespread use of Skycam and on-field microphones– are now used more regularly by the NFL, a demonstrated consumer benefit of competition.[30]

And, of course, many may recall the United States Football League ("USFL"), which was created to compete with the NFL and lasted three seasons in the 1980s. When it tried to compete head on, they filed an antitrust lawsuit against the NFL.[31] The USFL won part of the legal case, but was only awarded damages of one dollar. Four days later, the USFL owners voted to suspend operations. But the NFL ultimately had to pay $5.5 million in attorneys' fees. The competitive impact of the USFL, nevertheless, is undisputed. From on-field innovations – two-point conversions, the instant replay, and expansion teams – to a multitude of greater players, the NFL product became better.

These examples demonstrate that antitrust is a forward-looking exercise that ultimately improves choice and quality for sports fans.

VII. Looking Ahead

Today, organized sports are more than leisurely pastimes. The sports industry is a profitable one whose goals and unique attributes are complemented by sound antitrust policy. With limited exception, leagues, governing bodies, or teams can and should have their conduct tested against the crucible of the antitrust laws. That is why the Antitrust Division remains an active observer that is ready to investigate and enforce the antitrust laws where the evidence suggests that conduct or a transaction has resulted in, or is likely to result in, harm to competition.

Indeed, several recent enforcement actions have touched on competition in the sports industry. In June 2018, the Antitrust Division announced that it would require the Walt Disney Company to divest 22 Regional Sports Networks ("RSNs") as a condition of its $71.3 billion acquisition of certain assets from Twenty-First Century Fox, Inc. Without the required divestitures, the transaction would likely result in higher prices for cable sports programming. Disney agreed to divest the 22 RSNs.

The Antitrust Division has also enforced the antitrust laws in conduct matters touching professional sports. In November 2016, the Antitrust Division filed a complaint to stop

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[30] *See* Don Kaplan, *NFL Urged to Launch XFL 'Skycam'*, N.Y. POST (Aug. 27, 2001), https://nypost.com/2001/08/27/nfl-urged-to-launch-xfl-skycam/; Terry Lofton, *Bubba Cam put Cameraman into the Game*, STREET & SMITH'S SPORTS BUSINESS (May 16, 2011), https://www.sportsbusinessdaily.com/Journal/Issues/2011/05/16/Leagues-and-Governing-Bodies/XFL-Bubba-Cam.aspx; Adam Silverstein, *This is the XFL, again: Controversial Football League set to return in 2020*, CBS SPORTS (Jan. 25, 2018), https://www.cbssports.com/wwe/news/this-is-the-xfl-again-controversial-football-league-set-to-return-in-2020/.

[31] President Trump was a USFL team owner and a plaintiff in that lawsuit.

DIRECTV and its parent, AT&T, from orchestrating a series of unlawful information exchanges between DIRECTV and three of its pay television competitors during the companies' negotiations to carry the Dodgers pay television channel. The companies settled that case with the Division in March 2017. The settlement enjoined the companies from sharing competitively-sensitive information with their rivals and required corporate monitoring, antitrust training, and corporate compliance programs.

As for my hopes regarding the sports antitrust litigation currently pending in federal courts across the country, I recognize that, in the words of Chief Justice John Roberts, the role of the courts is to call balls and strikes. But in so doing, they should, in Justice White's parting words upon retirement, make those calls in a manner that is "clear, crisp, and leave[s] … as little room as possible for disagreement about their meaning."

Thank you.