FROM FLOOD TO FREE AGENCY: THE MESSERSMITH-MCNALLY ARBITRATION RECONSIDERED

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INTRODUCTION

On December 23, 1975, a three-member arbitration panel chaired, by neutral arbitrator Peter Seitz, ruled by a two-to-one vote that Los Angeles Dodgers pitcher Andy Messersmith and Baltimore Orioles pitcher Dave McNally were "free agents" who could negotiate with any major league club for their future services. That decision overturned professional baseball's "reserve system" that, in its various manifestations over the years since the origins of baseball as an organized sport in the late nineteenth century, had bound a player for the duration of his career to the first team that signed him to a contract.[1]

The outcome of the arbitration turned on the construction of paragraph 10(a) of the Uniform Player's Contract (Paragraph 10(a)). The provision, which was included in players' contracts since 1947, permitted a ball club to renew its existing executed contract with a player "for the period of one year on the same terms" in the event a player did not sign a new contract for the upcoming season by a specified deadline.[2] In initiating the arbitration, the Major League Baseball Players Association (MLBPA), on behalf of Messersmith and McNally, contended that having not signed new contracts for the 1975 season and instead having played out the "renewal" year, the pitchers were entitled to be adjudged "free agents" since the renewed contract was limited to "the period of one year."[3] The position of the ball clubs was that when Messersmith's and McNally's contracts were renewed prior to the 1975 season, the renewal "for the period of one year on the same terms" included renewal of the renewal right itself, thereby effectuating a continuing right to the player's services for future seasons.[4]

Arbitrator Seitz's award ruled in favor of the players and held that a renewal under Paragraph 10(a) effectuated only a one year

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[1] *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66. Lab. Arb. Rep. 101, 102, 118 (1975) (Seitz, Arb.) (debating whether the "free agency" grievance was arbitrable under the terms of the parties' collective bargaining agreement—as the arbitrator determined and the courts affirmed—was the subject of extensive discussion by the parties, the arbitration panel and the courts, but that issue is not addressed in this article which is instead concerned with certain aspects of the merits of the dispute).

[2] Nat'l League of Prof'l Baseball Clubs, Uniform Player's Contract, para. 10(a) (Mar. 3, 1969) [hereinafter Para. 10(a)] (on file with Catherwood Library Kheel Center); Flood v. Kuhn, 407 U.S. 258, 259 n.1 (1972).

[3] Para. 10(a), *supra* note 2; *Twelve Clubs*, 66 Lab. Arb. Rep. at 102.

[4] *Twelve Clubs*, 66 Lab. Arb. Rep. at 102.

renewal of a club's contract with a player, not a continuing one.[5] The business of baseball was suddenly "a whole different ball game" as MLBPA Executive Director Marvin Miller would triumphantly entitle his autobiography.[6] To baseball's long imperious owners, the emergence of the MLBPA culminating in that arbitral victory marked "the end of baseball as we knew it."[7]

There can be no question that the arbitration decision revolutionized the economics of baseball, transformed the balance of bargaining power between players and owners, and inaugurated an entirely new chapter in the business history of the sport. Seitz—who was immediately fired by the major league club owners from his position as the sport's impartial arbitrator[8]—would thereafter be dubbed the baseball players' "Abraham Lincoln."[9] Seitz himself recognized that his decision was a "leap[,] but" he later wrote "a justifiable one."[10] As he would write a few years later, "[i]n consequence[,] many baseball players, as free agents, obtained million dollar contracts."[11] Three

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[5] *Id.* at 114. Paragraph 10(a) of the Uniform Player's Contract executed by Messersmith and McNally for the 1974 season provided:

> If prior to the March 1 next succeeding said December 20 [when the ball club was required to tender a contract for the subsequent season to the player], the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player . . . to renew this contract for the period of one year on the same terms . . . .

Para. 10(a), *supra* note 2. *See infra* notes 50–51 (quoting Para. 10(a) in Grievance No. 75-27 and No. 75-28). That provision had been included in the Uniform Player's Contract beginning in 1947, with the only change to the above-quoted language being in the date for tender of the contract.

[6] MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION (2004).

[7] CHARLES P. KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960–81, at I (2002).

[8] Letter from John J. Gaherin to Peter Seitz (Dec. 23, 1975) (on file with Catherwood Library Kheel Center) (providing provisions of the collective bargaining agreement respecting arbitration of grievances, including: "At any time . . . either of the arbitrator's party may terminate the appointment of the impartial arbitrator by serving written notice." Upon issuance of the award in the Messersmith-McNally arbitration, the clubs' representative served Seitz with "notice . . . that you are terminated as impartial arbitrator effective upon receipt of this notice."); Murray Chass, *Baseball's Abraham Lincoln*, N.Y. TIMES, Sept. 25, 1979, at C13.

[9] Chass, *supra* note 8.

[10] Letter from Lee Lowenfish to Peter Seitz (May 9, 1980) (on file with Catherwood Library Kheel Center).

[11] Letter from Peter Seitz to Editor, The Atlantic (Jan. 29, 1981) (on file with Catherwood Library Kheel Center).

years earlier, the U.S. Supreme Court in *Flood v. Kuhn*[12] reaffirmed baseball's long-standing exemption from the anti-trust laws, thereby effectively foreclosing any further challenge to the reserve system in the courts.[13] Seitz's ruling constituted a stunning reversal of baseball player fortunes—perhaps, indeed, the greatest comeback in the history of the sport.

History, of course, is written by the winners and the fact that the decades long struggle for free agency waged in the courts, the halls of Congress, and ultimately in the hotel conference room in New York City where the Messersmith-McNally arbitration was held, is no exception to that rule. Marvin Miller was an unusually effective strategist and advocate as the executive director of the MLBPA from 1966 to 1982.[14] Both then, and during his retirement, he proved to be an engaging and persuasive source for journalists and historians so that much of the literature on the subject is written from his point of view, often without consideration of differing perspectives—for whatever reason. In summary, Miller's retrospective point of view was that the owners dug their own grave; that they had a weak case and "common sense dictated a negotiated settlement"; they had presented a "complicated case in an effort to confuse which might have worked with a less intelligent, less experienced arbitrator than Peter Seitz"; and the owners believed the courts would always do what the owners asked them to do so their counsel could not judge the case on its merit and that if Seitz agreed with the players, it would be an "unlawful" decision that the courts would overturn.[15] Miller simply "didn't see the basis for the lawsuit" challenging the Seitz decision and after the district court affirmed it, "the owners and their lawyers painted themselves into an even tighter corner" by appealing, "another useless stall tactic."[16] According to Miller, Kuhn's "inept performance as a thinker and as the owners' designated fall guy throughout that period was one lucky break for [me], for the players, and for all of baseball."[17]

But was the outcome of the arbitration in favor of Messersmith and McNally really as obvious and inevitable as Miller would

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[12] 407 U.S. 258 (1972).
[13] *Id.* at 285.
[14] MILLER, *supra* note 6, at 11, 30.
[15] *Id.* at 247, 249, 250.
[16] *Id.* at 254–55.
[17] *Id.* at 250.

have it? One can perhaps dismiss baseball Commissioner Bowie Kuhn's complaint that "no one had ever seriously imagined that the reserve system had a large, heretofore undiscovered ocean of free agency floating in its midst,"[18] as the special pleading of a sore loser. But Kuhn was correct when he wrote that "[t]he obstacles [to using the grievance procedure to claim free agency] were forbidding. Miller and the Players Association had always claimed that the reserve system was peonage that bound a player from first signing to the grave."[19] Nor is it so easy to brush aside the observation of Chief Judge Gibson of the Eighth Circuit Court of Appeals who, although concurring in the confirmation of the arbitration award in light of the deference owed by courts to arbitration, observed in a concurring opinion that "no player had slipped, or even intimated that he could slip, the bindings of the reserve system by merely playing out a one year option. The reserve system was devised over many years by club and league rules and sanctioned by the players' contract."[20]

The purpose of this article is twofold. First, to challenge the commonly held belief that credits Curt Flood with the "legal challenge that initiated . . . free agency and higher pay in [U.S.] baseball,"[21] and that "the path from Flood to [free agency is] clear."[22] The Flood case, it is said, "set the stage for the 1975 Messersmith-McNally arbitration and the advent of free agency"[23] so that Flood "helped usher in a new era that allowed the players to exercise greater control over their careers and to share in the owners' economic prosperity."[24] However, such claims overlook one problematic (from the players' point of view) connection between the two proceedings: the interpretation of Paragraph 10(a) that was asserted on behalf of Flood, with the legal and financial support of the MLBPA, was directly contrary to that on which the free agency claim of Messersmith and McNally was based—and upon which they prevailed. As a result, the Flood

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[18] BOWIE KUHN, HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER 159 (1987).

[19] *Id.* at 154.

[20] Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 633 (8th Cir. 1976) (Gibson, J., concurring).

[21] *Too Free an Agent*, FIN. TIMES (London), Apr. 10, 2011, at 18.

[22] Jules Tygiel, *Revisiting Curt Flood*, *in* JOY IN MUDVILLE: ESSAYS ON BASEBALL AND AMERICAN LIFE 176, 193 (John B. Wiseman ed., 2010).

[23] Nick Acocella, *Flood of Free Agency*, ESPN.COM, http://espn.go.com/classic/biography/s/flood_curt.html (last visited Nov. 3, 2011).

[24] BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 349 (2006).

case might have proved a decisive roadblock to free agency. Second to show that because the outcome of the arbitration was not a foregone conclusion (as Miller has claimed), given Flood's construction of that paragraph, unavoidable questions arise about the extent to which the arbitrator's decision may have resulted from considerations other than the contract interpretation issues that were the subject of the arbitration.

I. THE FLOOD CASE AND ITS AFTERMATH

In 1969, outfielder Curt Flood was traded by the St. Louis Cardinals to the Philadelphia Phillies.[25] Flood refused to report, consulted with Miller, and obtained the financial backing of the MLBPA for a lawsuit he filed against baseball Commissioner Bowie Kuhn and the clubs of Major League Baseball, in early 1970, attacking the reserve system, which granted the team—the Phillies—to which his contract had been assigned, the exclusive claim on his services as an illegal combination in restraint of trade under the antitrust laws.[26] As Miller described the effect of the system on a player in his testimony at the trial in the Flood case, once a player signs his initial contract with a ball club:

> [H]e becomes property, his contract can be assigned and reassigned, he can be optioned to play in other leagues with other teams, he can be sold, he can be traded. His alternatives . . . are down to one. He may accept what is done or he may find another way to make a [living].[27]

At issue in the case was the continuing validity of the anti-trust exemption for organized baseball that had been recognized by a 1922 decision of the U.S. Supreme Court, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,[28] in which the Court held that organized baseball was not engaged in interstate commerce and was thus not within the scope of the federal anti-trust laws.[29] Thirty years later, the Supreme Court revisited that issue in *Toolson v. New York Yankees, Inc.*,[30] and "affirmed [the judgments below dismissing the case] on the authority of *Federal Baseball Club of*

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[25] MILLER, *supra* note 6, at 171.

[26] Flood v. Kuhn, 407 U.S. 258, 265 (1972). *See* MILLER, *supra* note 6, at 171, 173, 187.

[27] Transcript of Record at 2, *Flood*, 407 U.S. 258 (No. 71-32).

[28] 259 U.S. 200 (1922).

[29] *Id.* at 209.

[30] 346 U.S. 356 (1953).

Baltimore . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[31]

When Flood filed his lawsuit, there were reasonable—perhaps even compelling—grounds for believing that the Court would reverse those prior rulings which had became glaringly anomalous in light of both the ever expanding interstate reach of the baseball business in the age of radio, television, and continental expansion as well as the Court's own decisions holding that other professional sports, including professional football and boxing, were within the scope the federal antitrust law.[32] After a lengthy trial in the U.S. District Court for the Southern District of New York, in which Flood was afforded a full opportunity to demonstrate that both the baseball business was engaged in interstate commerce and that the reserve system imposed collusive restraints on player employment and movement in violation of both federal and state antitrust law, the district court dismissed Flood's complaint under the authority of *Federal Baseball* and *Toolson*, and the Second Circuit Court of Appeals affirmed.[33] The Supreme Court then granted certiorari "in order to look once again at this troublesome and unusual situation"; although recognizing that "[P]rofessional baseball is a business and it is engaged in interstate commerce" and that "[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."[34] The Court held that:

> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.
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> Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by

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[31] *Id.* at 357.

[32] *See* Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957); United States v. Int'l Boxing Club of N.Y., 348 U.S. 236, 244–45 (1955).

[33] Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[34] *Flood*, 407 U.S. at 282.

the Congress and not by this Court.[35]

With the outcome of the *Flood* case, the decades long effort to challenge the reserve system in the courts as violating the antitrust laws effectively reached a dead end, and there was no reason to believe that Congress would bestir itself from decades of inactivity to legislate away baseball's "anomalous" antitrust exemption. Perhaps even more troubling from the point of view of the players was the unanimity of judicial opinion, extending even to the dissenters on the Supreme Court, as to the totality of the career long restraint imposed by the reserve system on players' ability to bargain freely for their services within the structure of organized baseball. As the district court in *Flood v. Kuhn* described it:

> The reserve system (also known as the "reserve clause") is the heart of plaintiff's complaint. No player seeking to play baseball professionally in this country can avoid its strictures since it applies to all clubs in both the major and minor leagues and thus all of organized baseball. The effect of this system is to restrict a player throughout his baseball life to negotiate with only one club at any one time; that club being either the one with which he begins his career or the club to which his contract is assigned.[36]

Dissenting from the Supreme Court majority in *Flood v. Kuhn*, Justice Marshall did not disagree with that description of the system at issue:

> To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner 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 from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.[37]

Faced by such an apparently ironclad system of restraint, and without effective recourse either to the courts or Congress, it appeared that the only possible means for players to challenge the reserve system in the aftermath of *Flood* lay through collective bargaining with the owners. Therefore, pursuing changes in the reserve system through the next round of

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[35] *Id.* at 283–84.

[36] Flood v. Kuhn, 309 F. Supp. 793, 796 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[37] *Flood*, 407 U.S. at 289 (Marshall, J., dissenting).

collective bargaining was on the meeting agenda of the MLBPA executive board itself.[38] An executive board meeting, convened in the immediate aftermath of the Supreme Court decision in the *Flood* case, was devoted to a review of the *Flood* ruling, but the board was at a loss as to how to respond to it other than to press for changes in the reserve system through negotiations with the club owners already set to begin in the fall and, especially in light of the suspicion that the owners would not negotiate in good faith, continue to "vigorously pursue solutions to our reserve system problems through Congressional legislation."[39]

However, progress was not made on either the collective bargaining or legal front. In a Brookings Institute symposium on *Government and the Sports Business*, published in 1974, James A. Scoville looked forward to the 1976 round of collective bargaining as the next stage in the players' efforts.[40] "Marvin Miller, the executive director of the [MLBPA]," Scoville wrote:

> [A] man with a lifetime of experience as a labor negotiator, is a tough and able union leader who is strongly committed to significantly weakening, if not eliminating, the reserve clause. Unless the owners depart from their historical reluctance to weaken the reservation system in any fashion, the 1976 negotiations are likely to be tumultuous, perhaps culminating in a strike or lockout of long duration. Unless the reserve system is dismantled by the courts, these negotiations will probably be the definitive test of whether player associations have the strength to force significant changes in the institutional structure of the sports labor market.[41]

The free agency issue would, however, not be resolved either by the courts or Congress, or by collective bargaining. Within three and a half years after the *Flood* decision, the players would execute an end run (to mix sports metaphors) around the Supreme Court's determined unwillingness to depart from precedent and Congress' continued failure to accept the Court's invitation to legislate. The decisive assault on the reserve clause would be launched not in a courtroom, legislative chamber, or negotiating session, but through an avenue of redress provided by

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[38] Minutes of Executive Board Meeting of the MLBPA (July 24, 1972), at 3, Exhibit 41, *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs, 66 Lab. Arb. Rep. 101 (1975) (Seitz, Arb.) (on file with Catherwood Library Kheel Center).

[39] Minutes of Executive Board Meeting of the MLBPA, *supra* note 38.

[40] James G. Scoville, *Labor Relations in Sports*, *in* GOVERNMENT AND THE SPORTS BUSINESS 185 (Roger G. Noll ed., 1974).

[41] *Id.* at 215.

the collective bargaining agreement that had been negotiated during the pendency of the *Flood* case with the club owners—the arbitration of disputes arising under that agreement before an impartial arbitrator.[42]

II. THE MESSERSMITH-MCNALLY ARBITRATION

"If someone had asked me what the reserve rule meant," at the time he was contacted about serving as the executive director of the MLBPA in December 1965, Marvin Miller wrote, "I would have replied 'It means that a player cannot choose to leave the club that first signs him.'"[43] However, "the first time I read [paragraph 10(a) of the Uniform Player's Contract]," Miller recalled:

> I did a double take. What I had been told—and what the *players believed*—was that once a player signed his first contract, he no longer had control over his career. But the plain words of this section of the contract, as I read it, gave a club a one-year option on a player's services after his contract expired. *Nothing more*. It provided that if a club and player did not agree on a new contract to replace the one that had terminated, the club could renew the old contract for *one additional year*.[44]

For Miller, that paragraph provided a base challenge to the reserve system that did not depend on overturning the sport's antitrust exemption, which the *Flood* case had affirmed.

The owners' agreement in 1970 to use impartial arbitration provided Miller and the players he represented with a forum to seek a ruling to that effect. Before the 1971 season started, Miller made his annual tour of baseball spring training camps and told the players that he believed that, "a player could become a free agent by playing for one year under a renewed contract."[45] All that was necessary to put Miller's theory to the test was for someone to do just that.

In 1974, pitcher Andy Messersmith signed a one-year contract

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[42] *See* Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 236 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976); MILLER, *supra* note 6, at 214–15; *New Pact Gives Baseball Players Big Gains*, L.A. TIMES, May 26, 1970, at D3 (explaining that arbitrations are determined by a panel of three arbitrators: one designated by the players, one designated by the owners, and one neutral that would cast the deciding vote).

[43] MILLER, *supra* note 6, at 41–42.

[44] *Id.* at 41.

[45] *Kan. City Royals*, 532 F.2d at 626.

with the Los Angeles Dodgers.[46] After winning 20 games, Messersmith and the team were unable to agree on terms for 1975, and the Dodgers renewed his contract for 1975, pursuant to paragraph 10(a) of his 1974 contract.[47] If Messersmith did not sign a new contract, he would be in position to initiate arbitration once the new season ended for a ruling that he was then a free agent, since the Dodgers were entitled—according to Miller's interpretation of the renewal right—to only a one-year extension of the contract of an unsigned player. As Messersmith and the Dodgers tried to negotiate new contract terms during the course of the season, Miller secured Montreal Expo pitcher Dave McNally, who was also playing without a signed contract before leaving baseball in June, for what he called "insurance" in the event the Dodger pitcher agreed to terms with his club, which would moot any potential grievance over the length of the renewal period.[48] As it turned out, Messersmith and the Dodgers did not agree on a new contract. On "October 7, 1975 the [MLBPA] filed a grievance on behalf of Messersmith alleging that":[49]

> On or about March 10, 1975, the Los Angeles Dodgers renewed the 1974 Uniform Player's Contract of John [Andy] Messersmith, pursuant to paragraph 10(a) thereof, for the period of one year.
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> Paragraph 10(a) of the Contract provides, in relevant part, as follows:
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> ". . . If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the player . . . to renew this contract for the period of one year on the same terms . . ." (Emphasis supplied).
>
> Mr. Messersmith performed for the Los Angeles Club in 1975 under the renewed contract . . . [and] completed the renewal year on September 28, 1975. As of September 29, 1975, the specified term of Mr. Messersmith's renewed Contract having expired, there was no longer any relation between the Los Angeles Club and the player, and Mr. Messersmith became free to negotiate with any of

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[46] MILLER, *supra* note 6, at 241; *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66 Lab. Arb. Rep. 101, 110 (1975) (Seitz, Arb.).

[47] MILLER, *supra* note 6, at 241.

[48] *Id.* at 243–44 (noting that "an inactive player [such as McNally,] was still owned for life by the last club he played for").

[49] *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (highlighting the key arguments made by both the Association and the leagues and clubs).

> the 24 clubs with regard to his services for 1976. However, the clubs, acting through their agents and representatives, have conspired to deny Mr. Messersmith that right, and have maintained the position that the Los Angeles Club is still exclusively entitled to his services.
>
> The clubs promptly should be ordered to treat Mr. Messersmith as a free agent, and should make Mr. Messersmith whole for any damages he may suffer due to the delay in doing so.[50]

On October 9, 1975, a substantively similar grievance was filed on behalf of McNally.[51] The hearing on the Messersmith-McNally grievances commenced in New York City on November 21, 1975, and continued on November 24 and December 1, 1975.[52] The three-member panel was chaired by Peter Seitz, a veteran labor arbitrator who had been appointed, by agreement of the players and the owners to a two-year term as chairman of the sport's arbitration panel in the fall of 1974.[53] The party representatives on the panel were Marvin Miller for the MLBPA and John J. Gaherin for the club owners.[54] As impartial arbitrator, Seitz would have the decisive vote.

The posture of the players in the arbitration was simple, straightforward, and relied squarely on the contention that paragraph 10(a) of the Player's Contract provided no more than a one year renewal right in accordance with Miller's interpretation of that provision. Richard Moss, MLBPA counsel framed the issue at the outset of the hearing that the case involved nothing more than a simple question of contract interpretation, "we believe your task will be an easy one . . . . This case involves one and only one thing, the interpretation of the phrase in paragraph 10A of the Uniform Player's Contract,"—whether a club could only renew a player's contract for one year, or whether it could continue to renew that contract in subsequent seasons.[55]

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[50] Greivance No. 75-27 at 1–2, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Tamiment Library and Robert F. Wagner Labor Archives).

[51] Grievance No. 75-28, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Tamiment Library and Robert F. Wagner Labor Archives).

[52] *See* Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 236 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

[53] Letter from Marvin J. Miller, Major League Baseball Players Ass'n, and John J. Gaherin, Player Relations Comm. Major Leagues of Prof'l Baseball Clubs, to Peter Seitz (Oct. 31, 1974) (on file with Catherwood Library Kheel Center). Previously, Seitz had served as an arbitrator in baseball player salary arbitration cases.

[54] *Id.*

[55] Transcript Arbitration Proceedings at 50–51, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 [hereinafter Arbitration Transcript] (on file with Catherwood Library

Moreover, the players contended that what was at stake in the proceeding was the preservation of an existing contractual right: "My point, Mr. Seitz, is that this is no big deal. Players have a right in their contracts, and it is a right in the nature of a safety valve, and, Mr. Seitz, we respectfully request that you not take that right away."[56]

III. PARAGRAPH 10(A) IN THE CURT FLOOD CASE

According to his own account, Miller was supremely confident about obtaining a favorable outcome in the arbitration and would ever after ridicule Bowie Kuhn's equally bold conviction that the owners would prevail.[57] Kuhn would, of course, prove to be woefully mistaken in his assessment of how the arbitration (and subsequent litigation) would be decided, but he *could*, unlike Miller, claim to have history on his side when it came to the construction of Paragraph 10(a). The prevailing interpretation of that provision was directly contrary to that adopted by Miller and asserted in the grievances filed on behalf of Messersmith and McNally.

There was, first of all, the understanding of that provision that had been expressed in the course of Congress' inquiries into the baseball business during the 1950s. During the hearings on "organized baseball" conducted by the Subcommittee on the Study of Monopoly Power of the Judiciary Committee of the House of Representatives in 1951, subcommittee Chairman Emanuel Celler observed that the reserve system provided ball clubs with successive renewal rights after each season "[s]o, in effect, it is self-perpetuating for an indefinite tenure."[58] The Subcommittee Report issued after the conclusion of the hearings had been unequivocal in its interpretation of Paragraph 10(a). "Since the club's right to renew the contract on the same terms is itself one

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Kheel Center). Transcript of proceedings in the arbitration and exhibits submitted by the parties were submitted to the court in the subsequent litigation filed by the major league clubs to set aside award. *Kan. City Royals*, 409 F. Supp. 233.

[56] Arbitration Transcript, *supra* note 55, at 140.

[57] *See* MILLER, *supra* note 6, at 249–50; *see also* Letter from Bowie K. Kuhn, Comm'r of Baseball, to Peter Seitz (Nov. 16, 1982) (on file with Catherwood Library Kheel Center) ("I felt the clubs' case was overwhelming as a matter of law, and indeed still do.").

[58] *Study of Monopoly Power: Hearing Before the Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary*, 82nd Cong. 730 (1951) (statement of Congressman Celler, Chairman of the Subcomm.).

of the terms of the contract, the renewal clause *obviously* gives the club a perpetual option on the player's services."[59] In a 1957 appearance before a House of Representatives committee that was again investigating baseball's anti-trust status, as well as that of other professional team sports, the assistant Attorney General in charge of the antitrust division of the U.S. Department of Justice similarly stated that "[t]he reserve clause is a clause in the contract between a club and a player which gives the club an exclusive, perpetual option on the player's services," citing the conclusion of the earlier report by the House of Representatives.[60]

More recently—and more relevantly—in the *Flood* case itself, the trial court had reached the same conclusion as to the perpetual effect of the renewal provision of Paragraph 10(a).[61] In considering, and denying, Flood's motion for a preliminary injunction, the district court found that "[t]he Uniform Player's Contract provides in part that if in the year of expiration of the contract a player and a club do not reach agreement on a new contract by a certain date, the club may unilaterally renew the existing contract" and that "[s]uch renewal contract would itself contain this renewal clause," the result being that "[t]he club with which a ballplayer initially signs thus has a right to his services for as long as it wishes to renew his contract, subject only to his right to retire from baseball."[62]

In its decision after trial, upholding the sport's exemption from the antitrust laws, the district court similarly concluded that:

> The renewal clause is contained in paragraph 10(a) of the Uniform Player Contract and provides that if in the year of expiration of the contract a player and club do not reach agreement on a new contract by a certain date "the Club shall have the right by written notice to the Player at [his] address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice . . . at a rate not less than 80% of the rate stipulated for the preceding year." Any contract so renewed would itself contain this renewal clause.[63]

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[59] H.R. REP. NO. 82-2002, at 113 (1952) (emphasis added).

[60] *Organized Professional Team Sports: Hearing on H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877, H.R. 8023, and H.R. 8124 Before the Antitrust Subcomm. on the H. Comm. on the Judiciary*, 85th Cong. 38 (1957) (citing H.R. REP. NO. 82-2002, at 113 n.66).

[61] Flood v. Kuhn, 309 F. Supp. 793, 796 (S.D.N.Y. 1970).

[62] *Id.*

[63] Flood v. Kuhn, 316 F. Supp. 271, 274 n.4 (S.D.N.Y. 1970), *aff'd*, 443 F.2d

It was not surprising that the court in the *Flood* case construed Paragraph 10(a) to give rise to a perpetual renewal option. For the truly adverse legacy of the *Flood* case to the chances for a favorable outcome for the Messersmith-McNally grievances, was that Curt Flood himself had relied on that construction of Paragraph 10(a) in prosecuting his case.

In his complaint, Flood had alleged that the Uniform Player's Contract, "which the professional ballplayer must sign with a club," provided:

> [T]hat the club has the "option" to renew the contract for an additional year after its termination. But each player is required to sign a new contract containing that option every year. If the player fails to sign a contract, the club may unilaterally renew the contract containing the "option clause," and so on, indefinitely. Thus, the so-called "option" is, in effect, a contract for perpetual service.[64]

In his motion for a preliminary injunction, Flood described Paragraph 10(a) as the "standard renewal provision" and contended that "since any [renewed] contract would itself contain the same provision for a renewal, the effect of signing a Uniform Contract is to subject the player to a state of perpetual bondage to the single club, as long as it wishes to renew his contract."[65] In his post-trial brief, Flood again stated that "any renewed contract will contain the same renewal provision, thereby permitting a further renewal, and so on, from year to year, throughout his baseball life."[66] Finally, in his brief to the U.S. Supreme Court, Flood yet again contended, "[s]ection 10(a) of the Contract provides that if a player does not sign with the club which had his last contract by March 1, the team owner may *unilaterally* renew his contract and cut his salary. . . . Each renewed contract

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264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[64] Complaint at 10, *Flood*, 316 F. Supp. 271 (No. 70 Civ. 202).

[65] Flood's Memorandum in Support of Motion for Preliminary Injunction, *Flood*, 316 F. Supp. 271 (No. 70 Civ. 202), Exhibit 34 at 456, *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66 Lab. Arb. Rep. 101 (1975) (Seitz, Arb.) (on file with Catherwood Library Kheel Center). In denying the preliminary injunction, the district court similarly construed the meaning of that paragraph, having noted that Flood had "agreed to be confined in this application for a preliminary injunction to the facts that are admitted on both sides and not in controversy." *Flood*, 309 F. Supp. at 795 n.3.

[66] Plaintiff's Post-Trial Brief, *Flood*, 316 F. Supp. 271 (No. 70 Civ. 202), Exhibit 39 at 473, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center).

contains the same renewal provision."[67]

Clearly, Flood—and the MLBPA—construed Paragraph 10(a) to mean that the renewal option provided for therein was perpetual, and not limited to one year. However, as it turned out, these submissions as to the meaning of Paragraph 10(a) did not persuade the arbitrator. To some extent, this can be attributed to the way the clubs presented their case. Committed to the view that the reserve system had a century long pedigree and was therefore so fundamental to the development of the baseball business that it should not be overturned, the clubs were naturally loath to put over great emphasis on a contract provision—that the renewal would be "on the same terms"—that dated only to 1947.[68] Accordingly the National League's counsel, Lou Hoynes, downplayed the significance of Paragraph 10(a), arguing "certainly the renewal provision in the Player[s'] Contract" is included in the reserve system, "but the backbone of baseball's reserve system, as it has existed, from the beginning or nearly the very beginning of baseball's organization, has been the provision agreed to by the Clubs that they will honor each other's reserve lists . . . ."[69] To ignore those rules, as he contended the players were doing, "is to describe the human skeleton omitting the backbone."[70] The "simple question" posed by the players is wholly inconsistent with the "substance of the reserve system as it has existed within organized baseball for decades and decades."[71] In fact, Hoynes contended, "this pattern of career-long control is not essentially dependent upon the renewal clause at all."[72]

Although the clubs did cite examples of the construction placed on Paragraph 10(a) by Flood and the MLBPA,[73] the clubs gave much more emphasis to the Major League Baseball Rules that contained interlocking provisions (independent of Paragraph

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[67] Brief for Petitioner at *8–9, *Flood*, 407 U.S. 258 (No. 71-32), 1971 WL 133753.

[68] *See* Memorandum on the History of Renewal Provisions in Player Contract Forms at 1, 6, Exhibit 16, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center).

[69] Arbitration Transcript, *supra* note 55, at 149.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 335.

[73] *See* Flood v. Kuhn, 316 F. Supp. 271, 275–76 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972); *see also* Transcript of Record, *supra* note 27, at 9 ("Each renewed contract contains the same renewal provision.").

10(a), the clubs contended) enforcing the long-standing restrictive effect of inter-club agreements not to compete for players on each other's "reserve lists."[74] The position of the players was "an

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[74] *Flood*, 407 U.S. at 259–61, 261 n.1 (discussing the baseball rules and how it supports the reserve system). The court noted:

> The reserve system . . . centers in the uniformity of player contracts; the confinement of the player to the club that 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 league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.
>
> B. Rule 9 of the Major League Rules provides in part:
>
> > (a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.
> >
> > . . . .
> >
> > After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club . . . .
>
> C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.
>
> D. The Uniform Player's Contract provides in part:
>
> > 4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.

attempt to rewrite history, to ignore a mountain of facts, in the course of which it meets itself coming through the door head-on" since it was inconsistent with the "rules in which the Association has knowingly acquiesced."[75]

In line with this litigation strategy, most of the clubs' evidence was designed to show that the reserve system was historically understood to preclude from players becoming free agents, and that the players and their representatives had acknowledged, even insisted that, the reserve system, as indeed Flood had argued to the Supreme Court, "binds every American professional baseball player to one team or its assignee, for life . . . ."[76]

> 5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. . . .
> 6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.
> 10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.
> (b) The Club's right to renew this contract, as provided in sub-paragraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof. *Id.*

[75] Arbitration Transcript, *supra* note 55, at 151, 154.

[76] Transcript of Record, *supra* note 27, at 4. The evidence offered by the clubs included: Arbitration Transcript, *supra* note 55, at 655; *Flood*, 316 F. Supp. 271; Memorandum from Marvin Miller to Members of MLBPA (July 14, 1969), Exhibit 28, *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66 Lab. Arb. Rep. 101 (1975) (Seitz, Arb.) (on file with Catherwood Library Kheel Center); Flood's Memorandum in Support of Motion for Preliminary Injunction, *supra* note 65, at 456 ("Since any renewal contract

Therefore, Hoynes argued, the Messersmith-McNally grievance "is an attempt to convert the career-long control represented by the reserve system taken as a whole to a one-year operation, and this position is totally inconsistent with the thrust of their antitrust and peonage claims and congressional submissions."[77] Miller, as the executive director of the MLBPA, Hoynes contended, "[had] continued to talk in every communication that we can find in terms of the perpetual nature of the reserve system, including the renewal option."[78] If the Association was correct, National League counsel Hoynes argued:

> Hundreds of thousands of dollars have been spent on all sides litigating this question and the Association really comes here today to tell us that all of the activity and all of that money and all of that fuss and bother, in my personal case sweat, blood and tears, was pointless because the reserve system was nothing more than a simple question of a contract provision which could easily be interpreted by any court or arbitrator—in fact, only appropriate interpreted—as a one-year renewal option, and that all the difficulties, all the threats of congressiona[l] action, all the questions about antitrust restraints, claims of peonage and involuntary servitude are all besides the point.
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> . . . .

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would itself contain the same provision for a renewal, the effect of signing a Uniform Contract is to subject the player to a state of perpetual bondage to the single club, as long as it wishes to renew his contract."); Plaintiff's Post-Trial Brief, *supra* note 66, at 473 ("Any renewal contract would contain the same renewal provision, thereby permitting a further renewal, and so on, from year to year, throughout his baseball life."); Brief for Petitioner at *8–9, *Flood*, 407 U.S. 258 (No. 71-32), Exhibit 40, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center); *The Antitrust Laws and Organized Professional Team Sports Including Consideration of the Proposed Merger of the American and National Basketball Associations: Hearing on H.R. 1206, H.R. 2305, H.R. 10185, and H.R. 11033 Before the H. Antitrust Subcomm. of the H. Comm. on the Judiciary*, 92nd Cong. 216 (1972) (statement of Marvin Miller), Exhibit 38, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center) ("After a player is drafted or [signed] to his first contract, he must agree to a set of regulations known as the Reserve Rules [and] thereby becomes the property of the employing club to which he is bound for life."); Interview by Gene Shallit with Marvin Miller (Feb. 15, 1973), Exhibit 47, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center) ("A ML player . . . is owned by the club which has his contract . . . we have been trying to do something about the really immoral, restrictive Reserve Rule System under which a player is property."); Interview by Bill Mazer, WNEW TV, with Marvin Miller (Dec. 24, 1972), Exhibit 46, *Twelve Clubs*, 66 Lab. Arb. Rep. 101 (on file with Catherwood Library Kheel Center).

[77] Arbitration Transcript, *supra* note 55, at 789.

[78] *Id.* at 831.

This position is unsupportable.[79]

However, this presentation by the clubs invited the response that such evidence should be discounted because it merely describes the reserve system as it had actually been operated by ownership—not as admissions as to the interpretation of Paragraph 10(a)—and that is just what the players argued. "[T]he one thing that all these statements . . . have in common is that they were all made in an entirely different context and were made pursuant to legitimate interests and goals of the speaker in that different context," Player Association counsel Richard Moss argued.[80] Counsel Moss placed particular emphasis on the argument that by construing Major League Rule 3(c)(1) to require that a player sign a contract for the current season, and not play under the renewal clause, the clubs previously prevented a player from testing the proper scope of the renewal provision.[81] Telling players they could not play unless they signed a new contract was an improper interpretation, Moss contended, because "if a player's contract is renewed, he is under contract, under a signed contract for that renewal year, so the application of the rule was entirely improper."[82] Moss argued that evidence of previous statements by players' representatives, including those in the *Flood* case, was irrelevant because prior to 1972, the clubs could effectuate renewal in perpetuity, "as a result of a combination of paragraph 10(a) . . . and [the] improper application of Major League Rule 3(c)(1)."[83]

The statements that the clubs were relying on amounted to nothing more than the recognition of the reality of ownership fiat, not an admission of its legitimacy. As Moss argued:

> [W]hat's wrong with Marvin Miller . . . saying at the various times that the club maintain perpetual renewal control over players in the context of trying to negotiate a solution to this problem . . . in view of the facts that perpetual renewal control was the owners' position, no determination of the meaning of paragraph 10-A had been made, and perpetual control was maintained by intimidating players under Major League Rule 3(c)(1).
>
> And what was wrong with Marvin Miller and with me as co-

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[79] *Id.* at 153–54. Flood's complaint included a fourth cause of action alleging that the reserve system constituted involuntary servitude barred by the Thirteenth Amendment. Complaint, *supra* note 64, at 15.

[80] Arbitration Transcript, *supra* note 55, at 735.

[81] *See id.* at 53 ("No player shall participate in any championship game until he has signed a Uniform Contract for service during the current season.").

[82] *Id.* at 54.

[83] *Id.* at 52.

> counsel, in the Flood case, trying to take advantage of the clubs' position in the context of saying to the court baseball's practices are stifling to free enterprise and competition and baseball's unique antitrust exemption should be removed, especially in view of the fact that perpetual renewal correctly was the owners' position, no determination of the meaning of paragraph 10-A had been made, and perpetual control was maintained by misapplying Major League Rule 3(c)(1).[84]

This rebuttal to the club's effort to rely on history proved persuasive to the arbitrator, who concluded:

> As sometimes happens in the affairs of men and nations, each of the parties, in this arbitration has reversed its position [regarding whether the Reserve System was subject to arbitration]. . . . Parties in court actions, not infrequently, assert positions inconsistent with what they would maintain in other fora and circumstances.
>
> . . . .
>
> What was said, by the Association in the Flood case [concerning the renewal provision in paragraph 10(a)], manifestly, was said for the purposes of the anti-trust litigation. Whether Section 10(a) of the Players Contract does or does not provide for perpetual renewal is to be decided, not by what the Association argued in some other context, but by the Arbitration Panel following its study of the record made in this case.[85]

The sweeping nature of Seitz's reasoning on this point is questionable. It was one thing to set aside any statements by player representatives that could be construed merely as acknowledgments that the reserve system, as administered by the owners, resulted in the club's exercising career-long control over the players it had under contract. It was quite another to disregard what the Association argued in some other context when those arguments—concerning the Association's and Flood's own understanding of the *meaning* of Paragraph 10(a), i.e., that it granted the clubs a perpetual renewal right—in an arbitral proceeding concerned precisely with determining what the parties understood that contract language to mean. Certainly, as the

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[84] *Id.* at 732–33.

[85] *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66 Lab. Arb. Rep. 101, 107 n.18 (1975) (Seitz, Arb.). During the hearing, Seitz perhaps tipped his hand that he would not regard the arguments made on behalf of Flood in the antitrust case to be probative of the contract interpretation issue in the arbitration by saying "[t]hat's the theory . . . which the Association was putting forward because it wanted to show the reserve clause as being an unreasonable restraint on trade." Arbitration Transcript, *supra* note 55, at 814.

clubs pointed out in the arbitration, Miller had never advanced the "theory" about the one year renewal on which the Messersmith-McNally grievance was founded to the court in the *Flood* antitrust case.[86]

Yet arbitrator Seitz decided not to hold the players to the construction of Paragraph 10(a) they relied upon in the *Flood* case and those statements would not determine the outcome of the arbitration.

IV. THE AWARD

Once the owners' appeal to prior interpretations of the meaning and scope of the "renewal right," including that advanced by the players, was set aside, Seitz proceeded to a *de novo* analysis of the meaning of Paragraph 10(a). The players had argued that:

> [W]e think it is clear that the phrase "The club shall have the right to renew this contract for the period of one year under the same terms" means precisely what it says. The club can renew the contract for the period of one year. If it meant that the club could renew it again and again in succeeding years, that could have been said.
>
> It is not a difficult concept for draftsmen to deal with. The phrase could have been to renew this contract in succeeding years, or for a period of one year and subsequently for additional periods of one year, or it could just have left out the words for a period of one year, but none of those alternatives appear in the Uniform Player's Contract.
>
> What the contract says is that the club can renew for one year, and we submit that is exactly what it means.[87]

Seitz agreed:

> There is nothing in Section 10(a) which, explicitly, expresses agreement that the Players Contract can be renewed for any period beyond the first renewal year. The point the leagues present must be based upon the implication or assumption, that if the renewed contract is "on the same terms" as the contract for the preceding year . . . the right to additional renewals must have been an integral part of the renewed contract. I find great difficulties, in so implying or assuming, in respect of a contract providing for the rendition of personal services in which one would expect a more explicit expression of intention.[88]

Seitz further relied on court rulings in cases involving

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[86] *See* Arbitration Transcript, *supra* note 55, at 789.
[87] *Id.* at 104–05.
[88] *Twelve Clubs*, 66 Lab. Arb. Rep. at 113.

professional basketball players in which:

> [I]n respect of the renewal clause in basketball which does not differ materially or significantly from Section 10(a) in the baseball Players Contract, the Courts construed the renewal clause as providing for an extension of the term of the contract only for the "renewal year" without any option to exercise additional and successive renewals.[89]

The arbitrator found that the owners' fallback position, that independent of Paragraph 10(a) the "no tampering" and "reserve list" provisions of the major league rules authorized each club to respect the reservation "rights" of other clubs, depended on the existence of a contractual relationship between team and player, a relationship which did not extended beyond the renewal year, and hence were of no greater force and effect.[90]

And so:

> The grievances of Messersmith and McNally are sustained. There is no contractual bond between these players and the Los Angeles and the Montreal clubs, respectively. Absent such a contract, their clubs had no right or power, under the Basic Agreement, the Uniform Player Contract or the Major League Rules to reserve their services for their exclusive use for any period beyond the "renewal year" in the contracts which these players had theretofore signed with their clubs.[91]

V. EXPLAINING THE AWARD

Responding to the decision, the owners not only immediately terminated Seitz, they moved unsuccessfully to set aside the award in the district court, a ruling which was then affirmed by the Seventh Circuit Court of Appeals.[92] That outcome was hardly surprising, given the deference extended to arbitration under the Steelworkers' Trilogy,[93] although one separately concurring member of the Court of Appeals panel, Chief Judge Gibson, did regard it as a "close case" and perhaps the award would have been overturned had a second judge shared similar concerns.[94]

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[89] *Id.* at 114.

[90] *Id.* at 114–17.

[91] *Id.* at 118.

[92] Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 267 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615, 624 (8th Cir. 1976).

[93] *Kan. City Royals*, 532 F.2d at 620 n.6.

[94] *Id.* at 632 (Gibson, C.J., concurring). The court said, "[T]he arbitration panel had jurisdiction to resolve the dispute, that its award drew its essence from the collective bargaining agreement . . . . We cannot say that those

Be that as it may, the award was affirmed and no matter how aggrieved the owners felt—and notwithstanding the quasi-guerilla war they conducted against it over the years, most notably through their collusive refusal to compete for free agents in the 1980s—free agency had come to baseball.[95]

That did not mean that the merits of the Seitz decision have escaped critical scrutiny, perhaps most notably from one of the most careful and accomplished students of the subject, Roger Abrams, former dean of the Northeastern University School of Law and author of *Legal Bases*.[96] Abrams's critique of the outcome of the Messersmith-McNally arbitration only gains additional weight from the fact that Abrams is a great admirer of Seitz as an arbitrator. In the course of an appreciation of Seitz as "a true arbitration 'superstar'" and a "role model" for later arbitrators, Abrams "argue[d] that [Seitz's] ultimate conclusion was in error" for having "ignored the recent bargaining history between the parties and the century-old narrative of the relationship between owners . . . and their players."[97] According to Abrams, the collective bargaining agreement in effect at the time of the grievance and arbitration provided that "[t]he owners agreed not to change the reserve system. That must mean that the reserve system as operated historically continued unchanged."[98]

In trying to understand what he regarded as an erroneous decision, Abrams suggested that:

> Obviously there must have been something else in the record that moved Arbitrator Seitz to his conclusion. He might have thought that the old reserve system was bad policy . . . . That could not have been why he acted, however. . . . Perhaps he appreciated that an award for management would have calcified the reserve

provisions are not susceptible of the construction given them by the panel." *Id.* at 617, 631.

[95] *See* Clifford Kachline, *Offensive Outburst, Record Attendance Highlight 1987*, *in* THE SPORTING NEWS OFFICIAL BASEBALL GUIDE 3, 15–16 (Dave Sloan ed., 1988). As total big league payrolls rose from $32 million in 1976 to $284 million a decade later, bidding on free agents coming on the market ceased after the 1985 season. *Id.* The players filed grievances and arbitration awards in 1987 and 1988 it was determined that the owners were guilty of collusion. Clifford Kachline, *Pitchers Reestablish Control in Historic 1988 Campaign*, *in* THE SPORTING NEWS OFFICIAL BASEBALL GUIDE 3, 18–20 (Dave Sloan ed., 1989).

[96] ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW (1998).

[97] Roger I. Abrams, *Liberation Arbitration: The Baseball Reserve Clause Case*, *in* ARBITRATION 2002; WORKPLACE ARBITRATION: A PROCESS IN EVOLUTION 192, 192–93, 198 (Charles J. Coleman ed., 2002).

[98] *Id.* at 203.

> system forever, but than an award for the union would lead to bargaining to fine tune any new reserve system.[99]

Abrams's intuition about any unexpressed reasoning behind Seitz's decision finds support in Seitz's correspondence files for the years after his decision. That correspondence does show that Seitz believed that the position baseball players found themselves in under the traditional operation of the reserve system was both incompatible with the nature of the employment relationship in contemporary society and that redress was unlikely through the collective bargaining process.[100]

In October 1978, Seitz wrote to the author of a [*Village*] *Voice* article, sent to him by Marvin Miller, who argued that the crumbling of reserve system paralleled the conversion of feudal society into capitalism and market economy, which Seitz noted, "I hadn't thought of," but added:

> However, if I recall my Opinion in Messersmith I did make some allusion to the movement, in modern times, from the status relationship to one of free contract—not only with regard to personal services but also, in respect of real property rights and duties. Thus, for example, I cited some cases in which the courts refused to assume that a lease of premises for a term, with an automatic renewal clause, may be renewed by the lessor at his option, beyond the period of the first renewal, absent plain and manifest evidence that it was the intention of the parties to do so. The thinking behind these cases, applied to baseball, meant to me that a player should have the freedom to commit himself to play for a contracting club, for any term of years he may desire or until he shuffles off this mortal coil (whichever [comes] first); but when he contracts for only one year, with a clause which enables the club at its option to hold him for another year (and another and yet another year) by tendering him a contract with the same clause, the parties have established what I choose to call a "status" which is incompatible with modern concepts of freedom to contract—especially for personal services.[101]

As to the prospects for effecting changes in the reserve system through collective bargaining, Seitz clearly became convinced that baseball management would not yield any round, no matter what the players proposed at the negotiating table. As Abrams noted, the evidence at the hearing showed that the negotiations

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[99] *Id.* at 203–04.

[100] *See infra* note 101.

[101] Letter from Peter Seitz to Milton Mankoff, Assoc. Dean, Queens College (Oct. 19, 1978) (on file with Tamiment Library and Robert F. Wagner Labor Archive) (commenting on Mankoff, "Baseball and the Rise of Capitalism").

had failed to effect any change in the reserve system (indeed, the clubs had offered substantial evidence in the arbitration designed to establish that the players' proposals for reforms had been rebuffed) including making provisions for a player to play out his option which was precisely what Messersmith and McNally were claiming as a matter of existing right in the arbitration.[102] However, that evidence may well have had the opposite of the intended effect on the arbitrator, who appears to have concluded from the evidence that management, was determined *not* to yield any ground at all with respect to what it believed to be its existing reserve system prerogatives. At the same time, it may have persuaded Seitz that the players, who was advancing numerous proposals for change, were being reasonable and open-minded, quite unlike the owners, and that a ruling in favor of Messersmith and McNally was necessary to open the door to negotiations that had been frustrated by the owners' refusal to bargain on the issue.[103]

A few years after the arbitration, Seitz took issue with an Associated Press story that quoted him as saying: "What I did was inevitable . . . . The owners were too stubborn and stupid. They were like the French barons in the thirteenth century. They accumulated [too] much power they wouldn't share it with anybody."[104] But although he disavowed calling the owners "stupid" (writing that he would never say that about a client), he

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[102] Abrams, *supra* note 97, at 202–03. *See* Memorandum from John J. Gaherin to All Major League Clubs (Feb. 11, 1970), Exhibit 33, *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs (*Twelve Clubs*), 66 Lab. Arb. Rep. 101 (1975) (Seitz, Arb.); Memorandum from Marvin J. Miller to All Major League Players (Dec. 26, 1969), Exhibit 32, *Twelve Clubs*, 66 Lab. Arb. Rep. 101; Memorandum from Marvin J. Miller to Player Representatives (Aug. 14, 1972), Exhibit 43, *Twelve Clubs*, 66 Lab. Arb. Rep. 101.

[103] Memorandum from Marvin J. Miller to All Major League Players, *supra* note 102. The copy in Seitz's file contains highlighting, presumably by Seitz, of the following statement contained in the attachment labeled "Discussions with the Owners' [R]epresentative Regarding the Reserve Rules . . . . The players and their Players Association never have proposed to abolish the reserve rules. Rather, we seek to make appropriate amendments which will enhance the players' position but which will not do harm to the game." *Id.*

[104] Will Grimsley, *Baseball Strike's Roots Go Back to Arbitrator Seitz*, L.A. TIMES, July 14, 1981, at D4; Letter from Peter Seitz to The Associated Press (July 20, 1981) (on file with Catherwood Library Kheel Center); Letter from D. Byron Yake, General Sports Editor, The Associated Press, to Peter Seitz (July 27, 1981) (on file with Catherwood Library Kheel Center); Letter from Peter Seitz to The Associated Press (July 29, 1981) (on file with Catherwood Library Kheel Center).

pointedly did not deny saying that they were "stupid."[105] John Mortimer's *Rumpole of the Bailey* was fond of responding to a colleague's caution that a trial strategy was a "two edged sword" by saying "most swords are,"[106] and that proved to be true with respect to this aspect of the club owners' argument.

That the evidence presented by the owners of the players' failure to effect change in the reserve system through collective bargaining did adversely affect the owners' case on the merits, it is confirmed by Seitz's later explanation of the role that arbitration came to play in the advent of baseball free agency. When queried by a television producer who was working on a documentary on the subject, Seitz responded, that although he would not discuss the merits of the decision or his reasoning:

> I perceive nothing wrong in my discussing arbitration as a dispute-resolving process, especially as it has been creatively used in [this] case. The Baseball Reserve System in [its] various . . . aspects and manifestations had been the subject of litigation by individual players for decades without resolving much. It has been the subject of investigation by Congressional committees. Then, after the establishment of the Players' Association and the difficulties experienced in bargaining on the matter, it became the subject of an anti-trust suit. That litigation avenue reached a dead end when the Supreme Court of the United States in the Flood Case decided that baseball was not a business subject to the anti-trust laws.
>
> But for the developments in collective bargaining and the proliferation of arbitration clauses in collective agreements, in the last four decades, the Supreme Court decision would have left the players with no other forum to which they might repair for relief. It was manifest that any effort to obtain . . . relief sought by them in union-management negotiations could only succeed, if at all, after a struggle that would wreak great damage to all concerned in the sport.
>
> The Players' Association then decided to play what, in the jargon of foreign affairs, may be called "the arbitration card." It was through this jointly agreed upon process that the stale-mate that existed for generations, was broken in the Messersmith-McNally Case.[107]

The most persuasive evidence that such considerations played a role in tipping the balance of a decision that could have gone

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[105] Letter from Peter Seitz to The Associated Press, *supra* note 104.

[106] 993 JOHN CLIFFORD MORTIMER, THE BEST OF RUMPOLE 53 (1993).

[107] Letter from Peter Seitz to Arthur L. Swerdloff, Vice President, SRS Productions, Inc. (Sept. 20, 1982) (on file with Tamiment Library and Robert F. Wagner Labor Archive).

the other way in favor of the players comes from Seitz's rather exasperated frustration with Bowie Kuhn's testimony at the arbitration. Kuhn appeared as a witness at the close of the owners' case to urge that the free agency issue be resolved by bargaining, not by arbitration, but this may well have proved fatal to the owners' case.[108] After listening to Kuhn, Seitz then pressed him as follows with patently unsatisfactory results:

> [Seitz:] . . . [D]o you have any advice for the panel as to what its procedure is to be? Shall we just go ahead as the contract requires us to, a resolution by decision, by award? Or is there some other procedure that perhaps would be more desirable in the interest of all?
>
> [Kuhn]: I think it is a very important question. I just wonder. It is one I, frankly, would like to reflect on before I would try to give you an answer.
>
> [Seitz]: Arbitration is a procedure, just as procedures of the courts. It is not perfect and it is desirable because it is better than anything else that seems to be available at the time. If anything else is available by way of procedure which is more desirable, if you reflect on it and if you have any ideas, I will be very glad to know what they are.
>
> [Kuhn]: I would be very happy to give them to you.
>
> [Seitz]: Call me collect.[109]

To say the least Seitz found Kuhn's response to be unhelpful, highlighted by the "call me collect" rejoinder. Seitz's dissatisfaction with Kuhn's testimony was underscored a few months later when he had occasion to comment on a Harvard Law School thesis examining arbitration in baseball. The only criticism of the thesis that he had, Seitz wrote the author:

> [I]s that you seem to indicate that the Leagues and the Players Association have engaged in more bargaining on the reserve system than the volume of testimony before me would confirm. Indeed, Bowie Kuhn, as a witness at the hearing, stated that the issue before the Arbitration Board was one that should not be decided in arbitration but by bargaining. When I agreed and asked him what procedures he would suggest, he had none to offer.[110]

A few years later, Seitz engaged in a revealing exchange of

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[108] Transcript of Record, *supra* note 27, at 268 (Kuhn had similarly testified at the trial of the Flood case that changes in the reserve system "should be made by clearly, in my opinion, bargaining between the players and the clubs").

[109] Arbitration Transcript, *supra* note 55, at 615–16.

[110] Letter from Peter Seitz to Ken Haas (June 7, 1976) (on file with Catherwood Library Kheel Center).

correspondence with Kuhn himself on the subject of Kuhn's testimony at the arbitration. Writing to Kuhn in early November 1982, just after the team owners had voted not to renew Kuhn's contract as commissioner, Seitz looked back on the Messersmith case ("by now, is as ancient history as the Carthaginian Wars") and reminded Kuhn that:

> At the hearing . . . you lectured me sternly and resonantly on the subject that arbitration was never intended to be and was the wrong way to resolve disputes concerning the Reserve System; and that such disputes should be settled by collective bargaining. I agreed with you and inquired whether you had any suggestions for me as to how to get the dispute from the arbitration table to the negotiating table (which the clubs you represented had already refused to do at my suggestion). You were unable to provide me with any guidance![111]

Kuhn quickly—and defensively—responded that, "you are quite right that I gave you no 'guidance.' I did not do so because I felt the clubs' case was overwhelming as a matter of law, and indeed still do."[112] To which Seitz replied:

> [W]hen, as a witness, you testified that the reserve system presented a problem for bargaining and not for arbitration, my heart, for a moment was uplifted. When I asked if you had some guidance for me as to how to achieve this and you said you had no advice, I returned to my slough of despond—and proceeded to do what my sense of duty instructed me to do.[113]

Seitz's frustration with the inability of baseball Commissioner Kuhn, an appointee of the owners with no input from the players, to propose any alternative process for resolving the free agency grievance could only have compounded the weight of the evidence establishing ownership's refusal to adopt any of the players' proposals to modify the reserve system. Add to that Seitz's dissatisfaction with baseball management's modus operandi, as revealed in earlier grievance arbitrations that he had heard, and the arbitrator could not have had any confidence that ownership would (had it prevailed in the arbitration) have been prepared to bargain meaningfully over revision of the reserve system. Although those awards did not manifest any predisposition to

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[111] Letter from Peter Seitz to Bowie Kuhn, Comm'r, Major Leagues of Baseball (Nov. 8, 1982) (on file with Catherwood Library Kheel Center).

[112] Letter from Bowie Kuhn, Comm'r, Major League Baseball, to Peter Seitz (Nov. 16, 1982) (on file with Catherwood Library Kheel Center).

[113] Letter from Peter Seitz to Bowie Kuhn, Comm'r, Major League Baseball (Nov. 23, 1982) (on file with Catherwood Library Kheel Center).

favor players over owners, Seitz did not mince words when it came to harsh assessments of management conduct (even in matters in which he found for the club):

> It is my own conclusion [he wrote in the course of rejecting a player's bid to terminate his contract on grounds of contract breach] that the failures, delinquencies and infractions which the record reveals . . . were, principally, the fault of the . . . Club. Its informal procedures, its unbusiness-like practices, its tardiness in response to the promptings of the Player Relations Committee . . . et cetera, resulted in a dispute which need not have occurred.[114]

And only the month before the hearing in the Messersmith-McNally arbitration, he pointedly questioned management's good faith in performing under the collective bargaining agreement with the players, although ruling in favor of the clubs:

> [T]he circumstances of this case impel me to make some additional observations which I deem imperative, [he wrote,] despite the fact that they do not constitute a part of my reasoning leading to the conclusions in the Award.
>
> . . . .
>
> The failure of the Clubs and the League to have communicated their actions promptly to the [Players] Association and the players may be ascribed to negligence and a lack of imagination or to design to disclose only those actions which, by a close and literal reading of the collective agreement they were under a legally enforceable duty to disclose or which, if there were a failure to disclose, they would be legally subjected to penalties or other detriments. In either case, what occurred is highly regrettable and deplorable. . . . [E]ach of the parties to the collective agreement owes to the other a candor and openness as to matters affecting that other party or of mutual concern which go beyond the technical requirements of their formal contract provisions. The parties in this relationship owe much more to each other than the degree of divulgence which the game of poker requires of players of that game.[115]

The insights into Seitz's thinking about the overall state of owner-player relations that these documents afford do suggest that the expressly stated reasoning for the decision in the Messersmith-McNally arbitration does not provide a complete

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[114] *In re* American and Nat'l Leagues of Prof'l Baseball Clubs and Major League Baseball, at 33 (1974) (Seitz, Arb.) (on file with Catherwood Library Kheel Center).

[115] *In re* American League of Prof'l Baseball Clubs and the Comm'r of Baseball, at 16–17 (1975) (Seitz, Arb.) (on file with Catherwood Library Kheel Center).

explanation for why Seitz decided the case as he did. This is not to contend that Seitz was wrong in his interpretation of Paragraph 10(a), but since a ruling in favor of the clubs could have justifiably been founded on the evidence presented at the hearing of the construction placed on Paragraph 10(a) *by the MLBPA* in the *Flood* case, it is to suggest that he may not have done so for reasons that were extraneous to the, "one and only one thing," to quote the players' counsel, "the interpretation of the phrase in paragraph 10(a) of the Uniform Player's Contract," tendered by the grievance at issue.[116] Seitz went out of his way in his decision to deny that he was playing the part of a "Philosopher-King intent upon imposing his own personal brand of industrial justice on the parties,"[117] but one may well conclude that he "doth protest too much."[118]

Indeed, there is, in fact, some very good authority to conclude that Seitz's truly game-changing ruling was not simply the arbitrator's interpretation of paragraph 10(a) of the Uniform Players Contract but was the product of the type of subjective and policy-oriented considerations that Seitz went out of his way to disavow. As one highly experienced and widely respected arbitrator once explained the decision-making process:

> [T]he ultimate decisions, inescapably, were affected by imponderables less objective and susceptible to measurement than statistics. Cardoza, Jerome Frank and Morris Raphael Cohen, among others, have written brilliantly on the role than subjective processes ("gut reactions") play in judicial decisions. Only the unsophisticated and naive entertain the view that quasi–judicial decision–makers such as arbitrators can decide wholly and exclusively on quantitative and objective phenomena. Practice in decision–making is not entirely consistent with theory. Every arbitrator should (and tries to) decide on the basis of the objective data in the record to the extent that such data furnish a sound guide to his decisions; but as arbitrators analyze their own performance, they come to realize that, frequently, there are considerations other than those susceptible of simple measurement that influence their conclusions.[119]

That was written in 1974, the year before the arbitration in the

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[116] Aribtration Transcript, *supra* note 55, at 51.

[117] *In re* The Twelve Clubs Comprising Nat'l League of Prof'l Baseball Clubs, 66 Lab. Arb. Rep. 101, 112 (1975) (Seitz, Arb.).

[118] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2.

[119] Peter Seitz, *Footnotes to Baseball Salary Arbitration*, 29 ARB. J. 98, 101 (1974).

Messersmith-McNally case, and it was written by Peter Seitz.