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“To Authorize the Merger of Two or More Professional Basketball Leagues:” Professional Basketball’s 1971-72 Congressional Hearings and the Fight for Player Freedoms

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**“To Authorize the Merger of Two or More Professional Basketball Leagues:” Professional
Basketball’s 1971-72 Congressional Hearings and the Fight for Player Freedoms**

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A thesis submitted in partial fulfillment of the requirement for the degree of

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Abstract

This thesis examines the congressional hearings in 1971 and 1972 regarding American professional basketball's request for an exemption from antitrust law. Starting in 1970, the players of the National Basketball Association fought in court and Congress to change the league's business practices, in particular the reserve system. This labor contract structure involved a series of rules and restrictions that kept the players bound to a team without recourse to negotiations in a free market. The American Basketball Association, created in 1967, offered an alternative by forcing teams from the two leagues to bid against each other for players. When the leagues agreed in principle to merge into a single entity in 1970, NBA players sued them on the grounds that a merger would eliminate competition, maintain the reserve system, and, thus, violate antitrust laws. The lawsuit, *Robertson v. National Basketball Association*, by restricting the two leagues from merging, compelled the leagues to petition for a congressional exemption. Hearings before Congress took place between September 1971 and September 1972. The hearings became a referendum on league practices and the rights of professional athletes, and, this thesis argues, the catalyst to changing the reserve provisions to a free-market system.

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Contents

Introduction.....	1
Historiography.....	3
I. A New Kind of Court.....	6
Preventing a merger.....	7
Advancing the cause of the NBPA.....	13
Challenging league practices under antitrust law.....	19
II. Hearings Before Subcommittee No. 5.....	25
September 21, 1971.....	30
September 22, 1971.....	36
September 23, 1971.....	41
November 15, 1971.....	43
January 25, 1972.....	46
May 3 and 9, 1972.....	51
July-September, 1972: HR 10185.....	55
September 18, 1972: “To Authorize the Merger of Two or More Professional Basketball Leagues, and for Other Purposes”.....	57
Conclusion.....	61
Bibliography.....	64

Introduction

Before the legal battles, congressional hearings, bargaining agreements, franchise failures, and out-of-court settlements; there was Willis Reed. One of the National Basketball Association's cherished playoff moments came on May 8, 1970, when this New York Knicks star center overcame a hobbling leg injury he had sustained four days earlier to play in the deciding seventh game of the NBA Finals. Although Reed scored only two baskets in the contest, a 113-99 win over the Los Angeles Lakers, his teammates would comment after the game and in the years since that it was his determination to play through the pain that emotionally led the team to victory.

Reed's heroics that night became the signature moment for a New York Knicks club that had secured an NBA championship for the first time ever. Even though his teammate Walt Frazier was clearly the deciding factor statistically in the series' final game-his 36 points and 19 assists led the Knicks in both categories that evening-today the game is remembered as the "Willis Reed Game," one example of how, in sports, the narrative often becomes more important than the facts.¹

Just one month before the game, the players of the NBA tried to change the narrative of league history in a different court, starting a revolution of labor relations in professional sports when they united in a lawsuit against the league. This suit, *Robertson v. National Basketball Association*, ultimately enjoined the NBA from merging with its rival league, the American

¹ "Gutsy Reed Rallies Knicks in Game 7," *NBA Encyclopedia: Playoff Edition*.

Basketball Association, based on the allegations that certain league practices such as the college draft and structure of player contracts were violations of United States antitrust law. With the competition between the two leagues driving player salaries to record amounts, the owners of teams in both leagues petitioned Congress for an exemption from antitrust law in order to merge the two leagues and preserve the financial status quo, thereby preventing what they claimed would be ruinous financial consequences.²

The congressional hearings for this proposed legislative exemption lasted eleven days over one calendar year, and became the first public battleground for team owners and players to lay out their arguments for or against the creation of a single professional basketball league. While it was ultimately the settlement of the Robertson case in 1976 that established that basketball players were free to sell their services on a free market, the hearings that began a half decade earlier, before Subcommittee No. 5 of the Committee of the Judiciary, were the true turning point for the players that led to them later securing their freedom. Few mentions of the hearings exist in the literature, and no analyst has made the case that Congress, rather than the courts, was the catalyst to the monumental transformation of the reserve system in professional basketball.

² *Robertson v. National Basketball Association* 389 F. Supp. 867 (1975).

Historiography

Until the 1970s, labor relations in United States professional sports was not a significant area of study, largely because until the 1960s the balance of power lay almost exclusively with owners of professional sport teams. The 1970s were a decade long battleground for professional athletes in basketball, baseball, and football to establish positions of strength in collective bargaining relationships with team owners. This process involved lawsuits and interventions from Congress in all three sports, along with threats of strike, before the establishment of collective bargaining relationships between team owners and player unions by the decade's close. As the study of professional sports labor relations progresses, it has come to involve disciplines such as economics, labor law, history, media studies, and race relations.

Key contributors in the study of sports labor relations include Paul D. Staudohar and Roger G. Noll, both as authors and editors. Staudohar's book *Playing For Dollars* is an overview of professional sport labor relations history in the United States throughout the twentieth century. Along with James G. Mangan, Staudohar edited *The Business of Professional Sports*, a 1991 collection of articles on sports business practices as they pertain to labor law, media, race, and economics. Noll, who will be mentioned frequently in a later section of this work as a witness in the aforementioned congressional hearings, is an economist who edited the 1974 collection *Government and the Sports Business*, which takes a similar scope to Mangan and Staudohar's later collection. Also of particular import to the history of labor relations in basketball is Noll's article "Professional Basketball: Economic and Business Perspectives," which appears in

Staudohar and Mangan's collection. Finally, a number of labor law scholars have contributed their interpretations of labor practices in professional sports. Michael S. Jacobs and Ralph K. Winter Jr. published the article "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," in the *Yale Law Journal* in 1971. This article is widely cited by the authors who would follow in subsequent legal overviews of labor relations in professional sports, many of which are cited within.

The history of Congress' relationship with professional sports has been documented in two separate accounts, Stephen Lowe's *The Kid on the Sandlot: Congress and Professional Sports 1910-1992*, and David G. Surdam's *The Big Leagues Go to Washington*. Both authors provide analysis of professional sports' dealings with Congress in the twentieth century, with particular emphasis on baseball. Lowe and Surdam both wrote on Subcommittee No. 5's hearings and proposed legislation for the merger of the ABA and NBA, particularly with regard to the failure of professional basketball compared to the success of professional football in securing an antitrust exemption for a merger of its rival leagues, the National Football League and the American Football League, in 1966. But neither Lowe nor Surdam draw a direct connection from the content of the basketball hearings and Congress' failure to pass legislation granting a merger of the two basketball leagues to the settlement of the Robertson suit, and the establishment of free agency in professional basketball, in 1976.

No source has explored the 1971-72 congressional hearings for the merger of the ABA and NBA as a primary topic, nor have the hearings been directly related to the *Robertson* lawsuit and its eventual settlement. Thus, this thesis is the first to argue that while the *Robertson* lawsuit forced the professional basketball leagues to seek congressional exemption, the hearings and decision of Congress in connection to the proposed legislation directly influenced the settlement

of the *Robertson* lawsuit, which established the first complete free agency system in the history of American professional sports.

I. A New Kind of Court

The lawsuit filed by all National Basketball Association players against their league, and the subsequent proposed legislation for which Subcommittee No. 5 would hold hearings, came about as a culmination of the league's history, and that of labor relations and antitrust violations in professional sports. The *Robertson* lawsuit did not pit one man against the NBA, but rather every player past, present, and future against the commanding authority of the Association. The lawsuit took its name, *Robertson v. National Basketball Association*, because the president of the players' union, the National Basketball Players Association, and the lead plaintiff in the suit, was Oscar Robertson, a star guard for the Cincinnati Royals. Robertson was joined by thirteen other union representatives on each of the NBA's fourteen franchises, and together the fourteen players represented the interests of all NBA players.

The union, led by Robertson as well as by the NBPA's general legal counsel, Larry Fleisher, decided to sue the league over alleged violations of antitrust law involving the structure of player contracts and the method the league used to disperse college players to NBA teams, known as the common draft. The suit also claimed it would be a violation of antitrust law if the merger between the NBA and the American Basketball Association, which was rumored to be nearing completion, were in fact to take place. The ABA was a competing league that had sprung up in 1967 and promptly begun luring top college players and some NBA players with hefty salaries that dwarfed those found in the NBA. The developments that led to the filing of the *Robertson* suit in 1970 also became the backdrop to the congressional hearings which would

begin the following year. Although the lawsuit and the hearings would occupy separate branches of government, both became battlegrounds for the players and owners of professional basketball. The decision of the players to fight for their freedoms through legal processes satisfied three separate purposes: preventing a merger, advancing the cause of the union, and fighting league practices that appeared to be illegal under antitrust law.³

Preventing a merger

When the *Robertson* case began, the NBA was just entering its third decade of existence. It had become a stable and profitable enterprise by 1970, after a slow but steady rise in popularity through the years. Ironically, the league was born out of the very thing the players now sought to prevent, a merger, when the Basketball Association of America and the National Basketball League united to create the NBA in 1949. But that merger had been one of economic necessity in an era where professional basketball featured sparingly attended contests and teams were based in sparsely populated places like Sheboygan, Wisconsin and Waterloo, Iowa along with metropolitan hubs such as New York and Boston. By the time the ABA came around, professional basketball was popular in America, although the restrictions imposed on player abilities to negotiate contracts made it difficult for them to benefit from the league's rise in profitability. NBA players sought to prevent the merger to preserve the newfound freedom and bargaining power they acquired with two leagues to offer their services to. After decades of the NBA maintaining a dominant economic position, the players now had a chance to chip away at that power and reap the profit that had become a consistent aspect of professional basketball.⁴

³ Oscar Robertson, *The Big O: My Life, My Times, My Game* (United States: Rodale, 2003), 249; David Halberstam, *The Breaks of the Game* (New York: Alfred A. Knopf, 1981), 194.

⁴ Connie Kirchberg, *Hoop Lore: A History of the National Basketball Association* (Jefferson, NC: McFarland, 2007) 46, 52, 54-55, 60-61.

The early years of the NBA were crucial for the league to establish staying power as the premier professional basketball league. Since the game's invention in 1891, no professional league of the NBA's size and scope had existed for more than a few years before it came along. College basketball, a fan favorite with its consistently good play, was a major reason for this lack of consistent professional basketball in the twentieth century, as it competed for audiences with professional basketball. A pivotal moment for the NBA came in 1951, when the college game was struck a blow in the form of a gambling scandal that included allegations of point shaving against dozens of college players. Amid this moral and legal crisis, the NBA was able to avoid any gambling allegations within its ranks and install a policy to prohibit players associated in any way with gambling to play in the NBA. As a result, the league emerged as an eager party to occupy the vacancies in arenas that came about through the cancellation of college games.⁵

With a solidified roster of arenas and teams, the NBA was well on its way to success in the world of American professional sports. The number of teams in the league reached eight in 1955 after a rapid reduction from the seventeen teams of the NBA's initial 1949-50 season. Over the next decade the league carefully began to expand, hitting the ten-team mark in 1966. Many teams relocated from smaller towns to cities, as places like Rochester, New York and Fort Wayne, Michigan (and the aforementioned Sheboygan) lost viability in sustaining a professional sports team. Furthermore, some teams chose to relocate to rapidly growing western markets, namely the Lakers from Minneapolis to Los Angeles and the Warriors from Philadelphia to San Francisco/Oakland. Also the institution of the 24-second shot clock in 1954-55, an idea of

⁵ Leonard Koppett, "The NBA: 1946: A New League," in *The Official NBA Encyclopedia* ed. Jan Hubbard (New York: Doubleday, 2000) 41; Kirchberg, *Hoop Lore*, 68. This policy had some unfortunate resonance with players such as Connie Hawkins, who was banned from the NBA for much of his career despite allegations that were later revealed to have come out of "unsubstantiated newspaper reports" and resulted in the NBA paying out more than one million dollars in a 1969 settlement with Hawkins; Brian E. Lee, "A Survey of Professional Team Sport Player-Control Mechanics under Antitrust and Labor Law Principles: Peace at Last," *Valparaiso University Law Review* 11 no. 3 (1977): 410-11.

Syracuse Nationals owner Danny Biasone, pushed the game into a new era of fast paced high scoring games. The new rule established a timer on how long a team could establish possession of the basketball before attempting a shot. This rule made impossible the frequently employed strategy of teams taking a lead then attempting to keep possession for the entirety of the fourth quarter, as in the college game's second half, and turned the fourth quarter from an often boring and predictable affair into an exciting and uncertain one.⁶

By the mid-1960s, the NBA was firmly established as a professional sports league in America, although it still lagged in popularity behind the juggernauts of Major League Baseball and the National Football League. Alongside the revenues from tickets sold for games, the NBA also garnered broadcast revenue via contracts with NBC, and later ABC and CBS, to televise games nationally.⁷ NBC had controlled the rights to broadcast the NBA from 1953 through 1962, when the network chose to reduce coverage of the NBA and only broadcast playoff games after years of marginal revenues that paled in comparison to other sports. The NFL had by that time negotiated a lucrative broadcast contract, with a groundbreaking \$9.3 million contract with CBS for the rights to broadcast professional football for two years starting in 1961. Although ABC stepped in to broadcast NBA regular season and postseason contests in 1964, the network paid a mere \$650,000 for the privilege. It was not until the mid-1970s that the NBA began to draw the lucrative revenues that the NFL had already been receiving for over a decade. But despite the inability of the NBA to capitalize on the profitability of broadcast rights like the NFL, the business of professional basketball had become a lucrative enterprise by 1960. This fact was not

⁶ Roger Noll, "Professional Basketball: Economic and Business Perspectives" in *The Business of Professional Sports* ed. James A. Mangan and Paul D. Staudohar (Chicago: University of Illinois Press, 1991) 21-22; Charles Paikert, "When Biasone took 24 seconds to save the NBA," *New York Times* October 28, 1984.

⁷ A third source of revenue, merchandise and souvenirs (i.e. jerseys and other clothing, posters, books, home videos) was an aspect that would not be fully tapped into for another twenty years; Roger Noll, "The U.S. Team Sports Industry: An Introduction," in *Government and the Sports Business*, ed. Roger Noll (Washington D.C.: The Brookings Institute, 1974), 7.

lost on Abe Saperstein, owner of the touring Harlem Globetrotter professional basketball team, when he began the American Basketball League in 1961.⁸

The ABL was a notable first challenger to the NBA's power and supremacy in the 1960s, but was not nearly as successful as the ABA would be six years later. Saperstein's league occupied some cities that the NBA had yet to expand to, such as Chicago, Pittsburgh and Cleveland. But what Saperstein had gained in establishing professional basketball in untapped metropolitan areas was negated by a lack of professional-level talent, as the ABL could not lure players from the NBA in its brief existence, and was forced to fill its teams almost entirely with players from minor leagues and NBA burnouts. The ABL hung on for only one season before disbanding in December 1962, midway through its regular season, temporarily ending a threat to the NBA that had barely provoked action from the league.⁹

While the ABL did not succeed, it did reveal that there were a number of metropolitan areas that the NBA had not reached which could prove lucrative for professional basketball. The league expanded to Chicago for the 1966-67 season, bringing the total number of teams to ten, but had yet to establish outposts anywhere in the American west aside from the Lakers and Warriors in California. Cities like Dallas, Houston, Miami, New Orleans, and Minneapolis (which had not received a replacement franchise after the departure of the Lakers) seemed logical choices for the NBA to expand to next, but the league was in no rush to do so. That changed quickly with the advent of the American Basketball Association.

⁸ Kirchberg, *Hoop Lore*, 99-101; David George Surdam, *The Big Leagues Go to Washington* (Chicago: University of Illinois Press, 2015), 178-81; Benjamin G. Rader, *In Its Own Image: How Television Has Transformed Sports* (New York: The Free Press, 1984), 146-47.

⁹ The NBA in fact offered for the Cleveland Pipers (owned by George Steinbrenner, whose claim in professional sports was as the owner of the New York Yankees of Major League Baseball) to join the league, an offer which was accepted but eventually failed due to a lawsuit filed by Saperstein that prevented the move; Kirchberg, *Hoop Lore*, 99-101; Noll, "Professional Basketball: Economic and Business Perspectives," 22.

From its earliest days, the ABA focused almost exclusively on merging with the NBA. The ABA's origin lay with Dennis Murphy, who was the mayor of Buena Park, California in 1966. He had hoped to begin an expansion American Football League team in Anaheim but was foiled when the AFL and NFL merged. Murphy instead saw opportunity for expansion in professional basketball, and got together a group of investors who had interest in capitalizing on the NBA's untapped markets. He drummed up interest with the allure of an entrance fee of only \$5,000 (a down payment on the eventual \$50,000) per team, a fraction of what the Chicago ownership had paid to expand into the NBA the previous year, \$1.5 million. As Murphy saw it, the ABA could merge with the NBA within three years, and he sold many of the ABA owners on the idea that their membership in the ABA would soon be parlayed into a spot in the NBA at a steep discount. Murphy also enlisted George Mikan, professional basketball's first great star from the years before and directly following the NBA's creation in 1949, as the ABA's first commissioner; he brought a sense of legitimacy to the league as a part of professional basketball lore. Mikan is also credited with the idea of dyeing the ABA's basketballs red, white, and blue, an early example of the ABA's prowess in marketing.¹⁰

In more ways than one, the ABA brought legitimate competition to the NBA for the first time in nearly twenty years. The same season the ABA first began play, 1967-68, for instance, coincided with the first year the NBA consisted of 12 teams, as the league added franchises in Seattle and San Diego in a thinly veiled defensive maneuver to occupy cities that would be clear targets for ABA expansion or relocation. The following year the new western teams were joined by Phoenix and Milwaukee, and 1970 saw three more teams join the NBA in Buffalo, Cleveland, and Portland. But the competition among leagues took place on a smaller scale as well, as the

¹⁰ Kirchberg, *Hoop Lore*, 110; Terry Pluto, *Loose Balls* (New York: Simon and Schuster, 1990), 33, 39-40, 43-45.

ABA offered established NBA stars like Rick Barry¹¹ and college standouts like Mel Daniels substantial pay raises to bring their talents to the ABA. With the rival league suddenly appearing legitimate, NBA teams responded with a salary spike of their own which brought the league player compensation average up from \$13,000 to \$20,000 between 1966 and 1967.¹²

Basketball players certainly were not going to refuse a pay increase, and with the ABA aggressively campaigning for NBA players to switch sides, for the first time in their careers there was a competitive market for their talents. Almost all NBA players had never had a choice of what team they would play for throughout their careers due to a series of restrictive rules within the league. Players entered the league via a dispersal draft in which teams picked in reverse order of the previous season's standings, a system that fostered competitive balance. Players were left with no choice but to play for the team that drafted them, or not play at all, as teams held the rights of a player they drafted in perpetuity. Furthermore, the contracts that the players signed had an option clause, which provided that after the regular term of the contract expired the team had the option to unilaterally re-sign the player for another year, often at a reduction of salary, before the player could sign with another team. Worse, even when players did play out their option year and sign with another team, that team was forced to compensate the player's old team with draft picks, players, or money in exchange for the player changing teams. This compensation rule proved to be a strong deterrent to teams who considered signing free agents.¹³

¹¹ Barry was offered a pay raise as well as 15% share in the ABA team he played for, the Oakland Oaks, which had swayed him in part by hiring his father-in-law as a coach; Pluto, *Loose Balls*, 50.

¹² John Hareas, "Coast to Coast: The NBA Expands," in *The Official NBA Encyclopedia* ed. Jan Hubbard (New York: Doubleday, 2000), 73; Kirchberg, *Hoop Lore*, 121; Pluto, *Loose Balls*, 50, 63.

¹³ This rule is generally known as the "Rozelle Rule," named for the NFL commissioner whose league operated under a similar rule. Rozelle's harsh compensation decisions were an effective deterrent of players being able to switch teams; Lee, "A Survey of Professional Team Sport Player-Control Mechanics..." 392; Noll, "Professional Basketball: Economic and Business Perspectives," 36.

When the ABA and NBA began merger talks in 1969, the players were not about to give up the new ability to offer their services on a somewhat free market. Thus, the *Robertson* suit was filed in an attempt to restrict the two leagues from merging, preserving the competitive balance which led to a newfound economic freedom for players. As Oscar Robertson noted in his memoir, “In what became forever known as the Oscar Robertson suit, we claimed that any proposed merger between the National and American Basketball Associations would restrict player mobility and make pro basketball a monopoly. Our suit therefore claimed that any proposed merger constituted a violation of the Sherman Antitrust Act.”¹⁴

Advancing the cause of the NBPA

The decision to sue the league proved to be a turning point for the National Basketball Players Association, the players union which formed more than 15 years prior but had inconsistent success in negotiating with the NBA. When Boston Celtics guard, and perennial All-Star, Bob Cousy first formed the NBPA in 1954, he sought to improve the conditions under which NBA players worked and institute a pension program to benefit retired professional basketball players. Some of the changes Cousy hoped for included a limit on the number of exhibition games teams played (many of which players were not compensated for), and a trainer to travel with the team and tend to injuries. But it was not until 1957 that the NBA even acknowledged that the players had unionized, a step that was not achieved until after Cousy met with AFL-CIO representatives and threatened to affiliate with the massive labor group. Recognition did not lead to much progress, and the commissioner of the NBA, Maurice Podoloff, did not seriously consider the requests the players brought to the league offices. When

¹⁴ Robertson, *The Big O*, 249.

Cousy passed the mantle of NBPA president to his teammate, Tom Heinsohn, in 1962, the position still seemed a largely symbolic one. But Heinsohn made a decision that forever changed NBA history when he was introduced to Larry Fleisher, a graduate of Harvard Law School, and offered Fleisher the role of the NBPA's general counsel.¹⁵

The addition of Fleisher brought the union a newfound legitimacy with the Ivy League-educated lawyer who had graduated from Harvard in 1953 and practiced law while also working in accounting in the decade before his association with the NBPA began in 1962. Fleisher brought new tactics for the players to use when dealing with ownership, as he recognized that the strategies of the loosely organized union had produced few results in its first ten years. He also helped the players negotiate on an individual level, as he became a player agent as well as the NBPA's general counsel. Heinsohn had been able to negotiate a pension plan for retired NBA players in his first year as union president, but beyond a handshake agreement with league ownership, no progress ensued toward establishing the agreed-upon pensions. With little to show for their efforts after a decade, Fleisher, Heinsohn and many of the league's top players formulated a surprise for the owners at the 1964 All-Star game in Boston.¹⁶

Amid a raging blizzard that forced some All-Stars to cancel flights and travel by train, players arrived in Boston to the news that Heinsohn and Fleisher had been denied a meeting to discuss the implementation of the pension plan by the NBA team owners and their new commissioner, J. Walter Kennedy. Although Heinsohn and three player representatives had once again been told by league representatives the previous week that a pension plan was on the way,

¹⁵ Bill Reynolds, *Cousy: His Life, Career, and the Birth of Big-Time Basketball* (New York: Pocket Star Books, 2006) 149-152; Paul D. Staudohar, *Playing for Dollars* (Ithaca: Cornell University Press, 1996), 105. Alexander Wolff, "NBA Players Counsel Larry Fleisher Wears a Second Hat as an Agent" *Sports Illustrated*, February 11, 1985.

¹⁶ "History," *NBPA.com*, Wolff, "NBA Players Counsel Larry Fleisher Wears a Second Hat as an Agent."

the lack of progress after similar statements in years past led the players to conclude that it was time for more severe action. As players continued to stream into the hotel lobby the day of the All-Star game, Heinsohn was waiting for them with a petition to boycott that evening's game. The players informed Kennedy hours before the game was set to begin that unless their demands regarding the pension program and other changes to working conditions were met, the All-Star game would not be played.¹⁷

The timing of the boycott was not accidental, and had in fact been discussed months ahead of time, as this was the first All-Star game the NBA had ever broadcast on television. Thus, the players had a unique leverage in refusing to play because it would not only disappoint the fans in attendance, but it would be a no-show for fans tuning in across the country to see an All-Star game for the first time. More significantly for the NBA, it would be a severe hindrance to the league's future efforts to maintain a contract to broadcast games nationally, because although the league had a contract to broadcast with ABC, the network had not shown significant interest in promoting its basketball coverage since agreeing to broadcast the league earlier that year. If the game had been cancelled, league representatives feared that ABC would choose to no longer broadcast professional basketball, as NBC had done two years previous. The decision of the players to boycott this game therefore threatened irreparable damage to the league's relationship with ABC or any other prospective broadcast partners.¹⁸

The players' boycott gambit was met with fury from the team owners. Specifically, Robert Short, owner of the Lakers, threatened to end the careers of his team's two All-Stars,

¹⁷ Robertson, *The Big O*, 181; Mike Bresnahan, "NBA All-Star ultimatum paid off for players," *LA Times* February 16, 2011; Steve Aschburner, "The All-Star Game That Nearly Wasn't," *NBA.com* February 13, 2014.

¹⁸ Bresnahan, "NBA All-Star Ultimatum paid off for players."

Jerry West and Elgin Baylor, if they did not play in the game.¹⁹ West would later note that he and the other All-Stars ““felt like we were slaves in the sense we had no rights,”” and referred to it as ““the stone ages of basketball.””²⁰ Although it is impossible to say whether the players really would have gone through with not playing the game considering the ramifications, West, Baylor, Heinsohn, and the rest of the players in the locker room were not fazed by threats from management. Ultimately, Kennedy relented on behalf of the owners, and the 1964 All-Star Game was played. The MVP of that game, Oscar Robertson, was only just beginning his foray into the history books as a participant in the NBA’s labor relations.²¹

The next step for Robertson was to assume the mantle of union president, bestowed upon him when Heinsohn stepped down in 1965. The decision as to who should succeed Heinsohn ultimately rested on two criteria: the next union president should be a premier player, as he had a significantly better bargaining position than an average one, and he should be African American, as the majority of the league by that time was black. Robertson fit the bill in both regards, as he was not only one of the best players of that era but was widely considered as one of the best players of all time (and perhaps “the most complete player the NBA has ever seen”).²² Robertson was African American as well, and far from immune to the prejudices that black professional athletes experienced in an era that was less than a generation removed from the first athletes to break the color barrier in professional sports.²³

¹⁹ Baylor’s response to Short is remembered varyingly as “Sorry Bob,” and “Tell Bob Short to go [expletive] himself,” depending on the source; Ibid., Aschburner, “The All-Star Game That Nearly Wasn’t.”

²⁰ Bresnahan, “NBA All-Star Ultimatum paid off for players.”

²¹ Ibid.; “1964 All-Star Game Recap,” *NBA.com*, February 27, 2013.

²² Kirchberg, *Hoop Lore*, 94.

²³ Robertson, *The Big O*, 213; Halberstam, *The Breaks of the Game*. 268. In the NBA, the first players to break the color barrier were Chuck Cooper of the Boston Celtics, Earl Lloyd of the Washington Capitals, and Nat “Sweetwater” Clifton of the New York Knicks in 1950. Cooper was the first African American to be drafted, while Lloyd, who was selected later in the same draft, was the first to play in a game on October 31, 1950; John Smallwood, “NBA Pioneers: The African-American Influence” in *Official NBA Encyclopedia* ed. Jan Hubbard (New York: Doubleday, 2000), 58-59.

The beginning of Robertson's tenure involved limited improvement in relations between the NBPA and NBA, even as Fleisher's influence continued to change the shape of the union. In 1967, the players again threatened a strike, this time before the playoffs, to get the team owners to the bargaining table. The agreement reached that year, which was the first collective bargaining agreement in the history of American professional sports, led to improved medical and pension benefits, a limit on 82 regular season games (the number that remains to this day), and perhaps most significant, the official recognition of Fleisher by the league as the NBPA's general counsel. It was most likely not a coincidence that the league had agreed to improve players rights the same year that the ABA had begun cherry-picking NBA players.²⁴

For Robertson, Fleisher, and the entire union, the impending merger of the ABA and NBA in 1970 would have little benefit for the players if consummated. As separate entities, the competition between the ABA and NBA had driven up salaries and given players a limited market to choose where they might ply their trade. But united as one entity, the team owners could eliminate the market for talent, continue to pay players what they pleased, and restrict them from changing from one team to another. It was clear to the NBPA that it was in the players' best interest to stop a merger. Thus, the *Robertson* suit was filed not only to challenge the restrictive option clause and player draft (the former having been an elimination target of Fleisher's as a part of his legacy in professional basketball), but to set in motion the process that led to a court ordered injunction on the merger between the ABA and NBA.²⁵

A victory in court could keep the two leagues separate, strike down as illegal the restrictions of the reserve system in basketball, and give the players the leverage they needed to bargain collectively more effectively with the team owners. Collective bargaining is a process

²⁴ Halberstam, *The Breaks of the Game*, 270; "History," *NBPA.com*.

²⁵ *Ibid.*, 273.

undertaken between representatives of employers and employees to determine the rights of workers and terms of employment. For the NBA, collective bargaining would consist of a representative for the owners (often the commissioner of the league) and the NBPA's general counsel (Fleisher) bargaining over issues like player compensation, conditions of work and travel for players, and insurance and pensions. Collective bargaining was an accepted forum for labor unions and management to resolve issues of working conditions, protected by the National Labor Relations Board of the federal government. Within a year of the *Robertson* suit's filing another major challenge to the reserve system in professional sports came about in baseball player Curt Flood's *Flood v. Kuhn* lawsuit brought against major league baseball.

The Major League Baseball Players' Association had also formed in the 1950s, and followed a similar path to success as that of the NBPA. The MLBPA appointed Marvin Miller in 1966 to be its executive director. Like Fleisher had done with the NBPA, Miller organized the group under the goal of changing the imbalance of power which gave baseball team owners complete control. Baseball had a unique history with regard to antitrust law that allowed for the sport to be granted an antitrust exemption in the 1920s, decades before the NBA formed. The unique relationship of baseball and antitrust law, as well as the decades of history and popularity that baseball owners used to curry favor with the public interest against altering the operation of the league, made Miller and the MLBPA's fight with Major League Baseball unique to that of the NBPA. But the tactics of the baseball union, such as threats of strike, and the *Flood* lawsuit (which was supported by the MLBPA but was filed by Flood alone, unlike the *Robertson* suit which was filed on behalf of all NBA players) pitted the baseball union against its league in a similar way to that of the NBPA.²⁶

²⁶ Charles P. Korr, *The End of Baseball As We Knew It: The Players Union 1960-81* (Chicago: University of Illinois Press, 2005), 17,45,64,69.

But while labor relations in baseball largely revolved around the sport's antitrust exemption, in basketball there floated some notions that these were not antitrust issues. Legal experts such as Michael Jacobs and Ralph Winter wrote in *The Yale Law Review* that the recognition of players unions meant issues of compensation and player restriction were subject to collective bargaining, "a change in legal status which [had] only been dimly received." As labor relations developed, the rationale behind business practices of professional sports leagues, including the NBA, came into question under United States law.²⁷

Challenging league practices under antitrust law

Regulating the business of sports under antitrust law was complicated; in the words of Steven R. Rivkin, "like any attempt to push a square peg through a round hole, is bound to be troublesome."²⁸ Antitrust law in the United States has its foundations in the Sherman Antitrust Act of 1890, and primarily the legislation's first two sections. Section 1 declares illegal any interstate restraint of trade, while Section 2 declares monopolization or knowing attempts to do so to be illegal as well. Also of consequence is the Clayton Act of 1914, which amended the Sherman Act and "exempts labor organizations from antitrust liability" as an encouragement of employers and employees to collectively bargain.²⁹

The first antitrust case of note in American professional sports was *Federal Baseball Club v. National League of Professional Baseball Clubs*. The owner of the Baltimore Terrapins

²⁷ Michael S. Jacobs and Ralph K. Winter Jr., "Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage," *The Yale Law Journal* 81 no.1 (1971), 1-2.

²⁸ Steven R. Rivkin, "Sports Leagues and the Federal Antitrust Law" in *Government and the Sports Business*, ed. Roger Noll (Washington: Brookings Institute, 1974), 387.

²⁹ 15 U.S.C. Sections 1-2; Phillip J. Closius, "Professional Sports and Antitrust Laws: The Ground Rules of Immunity, Exemption, and Liability," in *Government and Sport: The Public Policy Issues* ed. Arthur T. Johnson and James H. Frey (Ann Arbor: Rowman & Allanhead, 1985) 156; James G. Scoville, "Labor Relations in Sports" in *Government and the Sports Business*, ed. Roger Noll (Washington: Brookings Institute, 1974), 213.

baseball club filed this 1922 lawsuit because his team was the only one left in the Federal League, a rival professional baseball league to Major League Baseball, which the National League (a division of the MLB) did not purchase after the Federal League folded. The resulting decision by the Supreme Court determined that professional baseball should have an exemption from antitrust regulation because it did not constitute interstate commerce. This exemption from antitrust regulation may have seemed inconsequential to the Supreme Court at the time, but the result of *Federal Baseball* is considered to have “led to the involuntary servitude of professional ballplayers for over fifty years,” because of the ability it gave baseball teams to exploit players with restrictive contracts through the antitrust exemption.³⁰

In the 1950s, a number of players suing their teams over the terms of their contracts lost their cases because of the *Federal Baseball* exemption and its usefulness in the league’s defense of anti-competitive practices. It would not be long before commentators acknowledged that the ruling in *Federal Baseball*, and the antitrust exemption professional baseball acquired, was a mistaken judgment by the Supreme Court.³¹ The unique nature of professional sports meant that this case was not the last time a court would have difficulty determining the proper course of action in a sports league’s antitrust liability. The reasons are complex, but at least in the early years “the legal system regarded professional sports as games or amusements rather than business,” not realizing that the industry would reach enormous heights of profit, economic power, and visibility as an institution of American culture.³²

³⁰ *Federal Baseball Club v. National League* 259 U.S. 200 (1922); Lee, “A Survey of Professional Team Sport Player-Control Mechanics...” 375-376.

³¹ The statement, made as a part of the decision in *Radovich v. National Football League* 352 U.S. 445 (1957), included the Supreme Court stating: “were we considering the question of baseball for the first time upon a clean slate we would have no doubts” regarding baseball as interstate commerce and applicable to the antitrust laws. In Lee, “A Survey of Professional Team Sport Player-Control Mechanics...” 378.

³² Closius, “Professional Sports and Antitrust Laws: The Ground Rules...” 140.

Professional sports leagues presented a conundrum of legality because it was necessary for leagues to operate as a kind of cartel under which all teams belong. All teams in a professional sports league were independent businesses, but the competition between teams had to be curbed by the acknowledgement that the teams must cooperate to varying degrees to make the league work. For example, teams obviously needed to cooperate to follow the rules of play. But this cooperation extended to matters of competitive import as well, because if one team performed too well or too poorly, they would disrupt the competitive balance of the league, thereby placing the entire league's health in jeopardy because fewer fans would attend a game where the result was more or less predetermined. One example was the Cleveland Browns football team of the All-American Football Conference in the 1940s, a consistently dominant team that ultimately was considered responsible for the league's failure because of its predictable success. Teams also relied on leagues for the context of games; each match between two league teams was worthwhile because of its importance in the standings, the lead up to playoffs, and the eventual crowning of a league champion. In order to keep fans interested, leagues enacted policies to promote parity among teams, or at least to provide the appearance of competitive balance among teams in a league. These policies which, while on the surface appeared to benefit the health of the league, did so in large part by restricting the freedoms of players.³³

One major practice at issue in the *Robertson* case was the reserve clause. The reserve clause, or reserve system, was a series of varying regulations in professional sports that limit the freedom of players to negotiate with any team except the one that controls their rights. It had

³³ Scoville, "Labor Relations in Sports," 203; Rivkin, "Sports Leagues and the Federal Antitrust Laws," 388; Jacobs and Winter, "Antitrust Principles and Collective Bargaining" 5; Seth Goldstein, "Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports" in *Pepperdine Law Review* 4 no.285 (1977) 286 n.6; Gary R. Roberts, "Professional Sports and the Antitrust Laws" in *The Business of Professional Sports* ed. James A. Mangan and Paul D. Staudohar (Chicago: University of Illinois Press, 1991), 143-44; Scott J. Foraker, "The National Basketball Association Salary Cap: An Antitrust Violation?" in *Southern California Law Review* 59 no. 157 (1986), 159.

existed since baseball's National League instituted the first form of it in the 1870s. Reserve systems in all sports had varying specific definitions, but they can be defined as an agreement among all teams in a league not to compete for players, and thus keep teams from buying up the best talent or drawing players to franchises in certain attractive locations like New York or Los Angeles. As these systems predated the existence of players unions and collective bargaining between leagues and players, they were instituted without input of players in any league. Were it not for baseball's antitrust exemption, the fact that they were instituted without the consent of players, coupled with the clear restriction of competition, would make reserve systems in baseball a clear violation of antitrust law and an easy target to strike down in court. But the antitrust exemption in baseball, upheld by the Supreme Court in the 1953 lawsuit *Toolson v. New York Yankees*, and later *Flood v. Kuhn* in 1972, meant that the reserve system in baseball would not be outlawed in a lawsuit.³⁴

Basketball's history of legal battles leading up to the *Robertson* suit contains some important decisions relating to the operation of the NBA. In 1961, the Syracuse Nationals sued player Dick Barnett for his attempts to leave the NBA and play in the ABL when his contract with Syracuse expired. Syracuse ultimately won the suit and restricted Barnett from joining the ABL (which folded within months of the decision anyway), but the most important aspect of the suit to the future of the NBA was that the proceedings established that the reserve contract system in basketball was really an option clause, which only kept players bound to a team for the an additional year following the terms of their contract, unlike baseball's reserve system which kept players bound for life.³⁵

³⁴ Jacobs and Winter, "Antitrust Principles and Collective Bargaining..." 7; Lee, "A Survey of Professional Team Sport Player-Control Mechanisms..." 393.

³⁵ Goldstein, "Out of Bounds Under the Sherman Act?" 290.

Another significant case was that of Spencer Haywood, which played out in the court of law in *Haywood v. National Basketball Association*, and *Denver Rockets v. All-Pro Management Inc.*, and overlapped with the first year of the *Robertson* case as it concluded in 1971. Haywood jumped to the ABA from the University of Detroit before completing his degree or waiting four years after his high school class had graduated, which had been stipulated in NBA rules as the rules a player had to satisfy to play professionally.³⁶ He chose to jump from the ABA to the NBA after only a year due to a dispute over the terms of his contract with the Denver Rockets of the ABA. Under the NBA's rules, Haywood was still not supposed to play in the league since it had not been four years since his high school class graduated, but the court ruled that since Haywood's unique skills could only be applied in a way to support himself and his family in professional basketball, the NBA would have to allow him to play and create an exception for players to leave college before their graduation date. The NBA obliged by creating a "hardship rule" that would allow players to apply for early entry into the draft if they could prove hardship in their life requiring them to begin making a living before graduating college.³⁷ The case's significance is twofold, because along with the creation of the hardship rule, the Haywood case set the precedent "that professional sport league provisions would henceforth be held accountable under the anti-trust laws."³⁸

With the *Robertson* suit, the NBPA, as represented by the player representatives of each team, attempted to alter the course of history for both professional basketball, and labor relations in professional sports. As the suit developed over the years, it became clear that the issue might

³⁶ One reason the NBA protected the college leagues was that college basketball served as a minor league for the NBA in lieu of an actual system like baseball or hockey had, and also provided early exposure of players to fans of the game before they jumped to the professional ranks. Lee, "A Survey of Player-Control Mechanisms..." 382-86.

³⁷ Hardship is easy to prove, a hardship case has never been denied in the NBA.

³⁸ *Haywood v. National Basketball Association* 401 U.S. 1204 (1971); *Denver Rockets v. All-Pro Management* 325 F. Supp. 1049 (C.D. Cal. 1971); Lee, "A Survey of Player-Control Mechanisms..." 382-86.

change the structure and business of professional basketball as it had been known for the previous quarter of a century. Although the players had taken the first step toward these fundamental changes, obstacles would arise to show that taking the league to court was only the first step in securing the freedoms that these players felt should be lawfully theirs.

II. Hearings Before Subcommittee No. 5

Robertson v. National Basketball Association hinged on prohibiting the NBA and ABA from merging into one league. Only after that first step would the players be able to state their case as to the antitrust violations committed by the NBA in the form of option clauses, compensation for free agent signings, and the college draft, and eliminate these violations forever in professional basketball. Thus, when Judge Charles Tenney of the U.S. District Court of the State of New York ordered a temporary (and later preliminary) injunction on the merger between the NBA and ABA on May 4, 1970, the players succeeded in stopping what had appeared to be an imminent merger. The injunction forced the two leagues down a significantly more difficult path to merging: congressional exemption. The next fight for the freedoms of professional basketball players would be decided by Congress and the Subcommittee on Antitrust and Monopoly.³⁹

The Subcommittee on Antitrust and Monopoly, which was a part of the Committee on the Judiciary and was also known as Subcommittee No. 5, had compiled an extensive history of hearings related to professional sports over the previous three decades. Since its inception in the summer of 1949, the subcommittee had frequently held hearings relating to questions of regulating professional sports and the industry's relationship with antitrust law. Of particular interest to the subcommittee had been baseball, to the point that by 1965, Major League Baseball Commissioner Ford Frick had already made 14 appearances in various hearings for the

³⁹ 389 F. Supp. 867, 873 (S.D.N.Y. 1975); congressional exemption consists of a law passed by the government allowing an otherwise illegal action to be exempt from law.

subcommittee. Although the subcommittee's hearings through the 1950s had produced no significant legislation regarding antitrust regulation in professional sport, the House of Representatives and Senate had independently voted through bills that were the result of subcommittee hearings in the decade. The following decade, Congress did succeed in the passage of two bills that originated with the subcommittee: the Sports Broadcasting Act of 1961, which allowed sports leagues an antitrust exemption to pool their broadcasting rights when selling them to networks, and later a bill to allow an antitrust exemption for professional football so that the NFL and AFL could merge in 1966.

The major precedent for the merger between the NBA and ABA in Congress was the 1966 merger of the NFL and AFL, as the basketball leagues sought an essentially identical antitrust exemption. The chairman for Subcommittee No. 5 in the House of Representatives, Democrat Emanuel Celler of New York, had hoped to hold hearings pertaining to the professional football merger and its effects. But the bill's sponsors avoided what could have been a major hindrance to the football merger's success by attaching it as a rider to the "Investment Tax Credit Bill," an anti-inflationary tax measure that was created at the behest of President Lyndon B. Johnson. Despite the consternation of Celler and others that a thorough investigation of professional football prior to granting the exemption should take place, professional football's "end run" as a rider to the tax bill succeeded, as it was voted through Congress by a wide margin with only minimal hearings in Subcommittee No. 5. Within a year of announcing their intent to merge, the NFL and AFL were granted the legal means to do so.⁴⁰ Among many differences between the football merger bill and that of the professional basketball leagues was the fact that

⁴⁰ The AFL-NFL merger was announced on June 8, 1966, and President Lyndon B. Johnson signed into law the bill featuring the congressional exemption on November 8, 1966; Stephen Lowe, *The Kid on the Sandlot*, (Bowling Green, OH: Bowling Green Popular Press, 1995), 113-16.

professional basketball had to wait more than a year from the date of Judge Tenney's injunction until the hearings for their proposed bill, S.2373 in the Senate and HR 10185 in the House of Representatives, began. While the football leagues had managed to evade any serious intrusions on the part of Subcommittee No. 5, the basketball leagues found themselves subject to months of hearings that would last a full calendar year, and did not produce a decision from Congress until September 1972, more than two years after the initial injunction in the *Robertson* lawsuit.⁴¹

While at the outset the tactics of the AFL and NFL clearly influenced those of the NBA and ABA in 1971, the attitudes of Congress and the public toward the football merger in 1966 had favored the legislation from step one. A major reason for the success of the football merger was the sport's popularity, which was evident from its sizeable television contract and outweighed that of basketball. This popularity led the progress of the football merger bill to be a matter of public interest to a far greater degree than the basketball merger years later. Also significant was the influence of Senators Hale Boggs and Russell Long, both Democrats from Louisiana, who oversaw the antitrust exemption's addition to the Investment Tax Credit Bill, and saw to it that the exemption survived as a part of the bill through both houses of Congress. Boggs and Long's reasons for doing so became clear when New Orleans became the recipient of an NFL expansion team following the passage of the Investment Tax Credit Bill in November 1966, the result of an unofficial agreement between the NFL and the Louisianans. What little resistance the football leagues did receive regarding the reasons they sought to merge was explained away with an argument that franchises were struggling financially due to the rising price of rookie contracts, and an assurance by team owners that the merger of the two leagues would benefit all players because the teams would reallocate the money they had been spending on rookies to

⁴¹ Basketball's hearings in the House of Representatives were regarding mainly HR 10185, but also a number of other related that had been proposed regarding the ABA-NBA merger.

veteran players' contracts. A similar line of reasoning would be central to the argument of the basketball merger hearings as well. A popular aspect of the proposed merger of the AFL and NFL was the plan to create a playoff game to be played annually between the best teams in each league to declare an undisputed champion. The creation of this game, known today as the Super Bowl, generated significant public interest and support regarding the merger of the football leagues.⁴²

By 1971, it was clear that what appeared to be a universally beneficial merger of the two professional football leagues had in fact been a money saving measure for team owners, to the detriment of all professional football players. Testimony from two leaders of the NFL Players Association in the hearings regarding the basketball merger bill clarified the fallout from the 1966 antitrust exemption given to professional football. The Executive Director of the NFLPA, Edward Garvey, remarked that the NFL's merger created "monopoly rights in perpetuity" bestowed upon the league by Congress, "without establishing safeguards for the employees or the public."⁴³ John Mackey, a tight end for the Baltimore Colts and the President of the NFLPA, spoke in equally strong terms. Mackey remarked that the professional basketball legislation in question "is possibly the most important matter to come before the Congress of the United States in this session because it asks that you grant to 28 men the right to deny freedom to citizens of this country," reflecting his opinion that Congress had denied freedom to the professional football players five years previous.⁴⁴ The basketball leagues approached their request for an antitrust exemption to merge with the assumption that the NFL's precedent would be a

⁴² David George Surdam, *The Big Leagues go to Washington*, (Chicago: University of Illinois Press, 2015), 217-224; Lowe, *The Kid on the Sandlot*, 116.

⁴³ *Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, S.2373, 92nd Cong., 2d sess., January 25, 1972; 833.

⁴⁴ *Ibid.*, 844. The number 28 corresponds to the number of professional basketball teams in total between the ABA and NBA in 1972.

successful guide. What they instead discovered was that associating with the football leagues would only draw negative assumptions and comparisons.

Further damaging congressional sentiment toward professional sports as the basketball hearings got underway was the decision of Robert Short, the owner of the Washington (D.C.) Senators of Major League Baseball, to move the team to Texas. After months of media speculation this decision was reached on Tuesday September 22, 1971, the first day of the Senate's hearings on the proposed basketball merger bill. The loss of the baseball Senators was met with much disdain by actual Senators, who were also aware that the previous year the ABA's Washington Capitals team had been moved to Virginia. The demise of Washington professional sports franchises was not going to win any sympathy for professional basketball. David Surdam notes that congressional sentiment was further damaged with the high profile lawsuits regarding the freedoms of professional athletes that were currently active in courts: *Robertson v. National Basketball Association*, *Flood v. Kuhn*, and the aforementioned lawsuits regarding Spencer Haywood's eligibility. The fact that athletes were fighting reserve systems in multiple lawsuits and across sports was well known, and influenced the subcommittee to use these hearings as a forum to consider the practices of professional basketball beyond the mere request of a merger of the two leagues.⁴⁵

The NBA and ABA were not only fighting an uphill battle, but the leagues were the victims of bad luck as well. The chairman of the Senate Subcommittee No. 5 who had overseen the quick exemption for the football leagues, Democratic Senator Phil Hart of Michigan, chose to step down from chairing the hearings because he was related to the owner of the Detroit Tigers of Major League Baseball and considered his involvement a conflict of interest. The loss of Hart

⁴⁵ Surdam, *The Big Leagues Go to Washington*, 225.

was significant, because along with the Louisianans he had been among the Congressmen eager to see the football merger bill succeed. His replacement, another Democratic senator from North Carolina by the name of Sam Ervin Jr. (who would soon become famous for his questioning in the Watergate scandal), established from his opening statement on the first day of the hearings that he was strongly opposed to granting professional basketball an antitrust exemption. While the leagues sought to depict their situation as one of businesses in financial trouble seeking the aid of Congress for the benefit of the public interest in basketball, Ervin instead framed the bill as one which “proposes to rob every man in America who possesses skill in basketball of the right to sell his skill to the highest bidder on a free market and negotiate a contract with anybody who desires to purchase his athletic skill.”⁴⁶ Those representing the leagues and the players respectively over the next calendar year would focus their efforts on influencing Ervin and his fellow congressmen’s perception of the true reasons for the bill, which in its initial form was simply stated “to authorize the merger of two or more professional basketball leagues.”⁴⁷

September 21, 1971

The hearings before Ervin and the Senate Subcommittee No. 5 took place over seven days between September 1971 and May 1972, while the House of Representatives followed with its own hearings across four days from July to September 1972. The hearings in Senate encompassed virtually all of the meaningful testimony and developments that would influence Congress’ eventual decision regarding the fate of the merger. Along with Ervin, the bill’s main sponsors in the Senate—Roman Hruska of Nebraska, a conservative Republican, and John Tunney

⁴⁶ *Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, S.2373, 92nd Cong., 2d sess., September 21-23, 1971. 14-15.

⁴⁷ S.2373, *Hearings*, 11.

of California, a Democrat—were present for nearly all of the hearings, and other members of Subcommittee No. 5 appeared infrequently throughout. As the hearings progressed, Ervin and Hruska established their clear biases toward the players and owners respectively in their questioning or comments pertaining to testimony. Whereas Ervin was against the legislation and a champion of player’s rights, Hruska made it known that he was a proponent of the bill and its merits in satisfying the public interest. Although Tunney too was a sponsor and proponent of the legislation, his comments generally did not express a clear bias toward the players or owners.

Although the bill’s purpose was only to allow an antitrust exemption to allow the NBA and ABA to merge, the hearings became an extensive look into the state of professional basketball, and focused on the economics of professional basketball and the issue of player rights that were the basis of the *Robertson* case. Ervin’s opening statement was as much about the evils of the reserve system in professional sports as it was about the simple act of merger that the two leagues requested. He claimed the leagues treated players as “chattel,” and said that he believed the hearings were really about “modern peonage and the giant sports trusts.”⁴⁸ He compared the system of drafting players to telling a college graduate with a journalism degree that he “could either work for the newspaper in Anchorage, Alaska, at the salary offered or not work at all,” a comparison he would revisit frequently in the hearings.⁴⁹ By the time the first witness delivered his testimony, it was clear that under Ervin’s guidance these hearings would be in large part a referendum on the business practices of professional basketball, the industry’s treatment of its employees, and how these practices were perceived by the U.S. Government.

Those testifying for the NBA and ABA relied on an argument that franchises in both leagues, but particularly in the ABA, were in financial trouble and would fold without an

⁴⁸ Ibid., 12.

⁴⁹ Ibid., 15.

imminent merger. Thomas Kuchel, a former senator from California and the legal counsel for the two leagues, established this angle when he declared that “Congress will decide whether professional basketball as we know it today will flourish or fail.”⁵⁰ Kuchel was known as a moderate Republican during his term, which lasted from 1953 through 1969. He also noted that what the leagues sought was the simple act of a merger, and that the antitrust exemption would cover that act alone. Kuchel presented the leagues as willing to negotiate with the NBPA, highlighting this by pointing out that both leagues had agreed to no longer reduce the amount teams would pay players in their option years (formerly teams could cut this amount by up to twenty-five percent), and also explaining that earlier in the month the leagues had offered the players in bargaining a five-point offer which eliminated the mandatory option clause. Finally, he pointed out that “rather than run the risk of merging in the absence of legislative approval or taking the time to litigate the matter, both professional leagues have come to the Congress,” framing the situation as one that the basketball leagues held control in, despite the fact that the leagues had only sought the aid of Congress after the setback of the *Robertson* injunction.⁵¹

The league’s five-point offer would not be further discussed in the hearings until those opposing the legislation testified, but nonetheless deserves definition. The five points of the offer were as follows: all first-year players would sign contracts that lasted a single year with an additional option year, veteran players would no longer be required to sign contracts with option clauses, option clauses would remain in the contracts they currently exist in, and two new ways a player could switch teams would be introduced. The first, the right of first refusal, dictated that a team would have the right to sign its own free agent for whatever amount another team has offered him before he is free to sign with that other team. The second way outlined a system of

⁵⁰ Ibid., 91.

⁵¹ Ibid., 112.

compensation where an independent arbitrator will determine a compensation that a player's new team must reward his old team, with the added stipulation that "arbitrators shall not award compensation so substantial as materially to discourage the movement of players from one club to another."⁵² The final two points would become a topic of debate as the hearings progressed, as those representing the players' interests, along with Ervin, would assert that the right of first refusal and compensation were effectively a new form of the reserve system.

Bolstering the case of the leagues were the testimonies of two players, Larry Jones of the ABA's Floridians, and Rick Barry of the ABA's New York Nets. Jones claimed to be a representative, former president, and founding member of the ABA Player's Association, and declared that ABA players were in favor of the legislation and the merger. In recounting his career, Jones noted that he was only able to revive his playing career in the ABA after he was cut from the Philadelphia 76ers one year into his NBA career. Barry, who was the first NBA player to join the ABA, also provided support for the legislation. In a curious turn of phrase, Barry stated that if basketball players were indeed the indentured servants of the team owners as Ervin suggested in his opening statement, then Barry was "a happy slave."⁵³

The influence of these two players would wane as the hearings progressed. In Jones' case, Zelmo Beaty, the current president of the ABAPA, testified the following day that the ABA players were in fact against the legislation in its current form. A telegram from Beaty was later included in the text of the hearings remarking that Jones' testimony was not approved by the executive board of the ABAPA. As for Barry, he would later modify his stance in a telegram sent in May 1972 and included in the text of the hearings, claiming that while he remained a

⁵² Ibid., 95-96.

⁵³ Ibid., 153.

proponent of the merger, he only supported it if the leagues also make changes to the reserve system.⁵⁴

The final proponent of the merger to testify on the first day of hearings was economist Robert Nathan, who sought to prove that the NBA and ABA were financially troubled. Nathan had been exclusively furnished with the finances of teams in both leagues, although he admitted the data was incomplete and was missing some information on teams' profits and expenses in certain seasons. He surveyed the financial outcome of every team's individual season that he had data for, which he called team years, since the ABA's first season (for example, one team year would be the 1968 Boston Celtics, which is separate from the 1969 and 1970 Boston Celtics team years). He found that no team in the ABA had made a profit in a team year to date, while only 25 of the 67 NBA team seasons he had data for since 1966 were profitable. Nathan acknowledged that merely lacking profit was not a death knell for the owners of professional basketball teams, who were all businessmen with other profitable interests. But if this lack of profit continued, he argued that the industry would cease to attract new owners.⁵⁵

Nathan related the financial shortcomings of professional basketball teams to what he called "instability of professional basketball teams," which he defined as the rapid rise in player salaries in the past five years, particularly those of first year players. He claimed the average salary for a rookie in the NBA had grown from \$12,500 in 1966 to \$46,000, while the highest paid rookies on each team made an average of \$114,000. Further proving that leagues' financial problems were connected directly to player salaries, Nathan noted that teams were unable to make money even though both leagues had an increase in the number of spectators attending their games, with the ABA in fact showing a more rapid rise in attendance than the NBA despite

⁵⁴ Ibid., 154.

⁵⁵ Ibid., 157-59, 197-99.

being the younger and less economically viable league. Nathan concluded his statement by likening the current state of professional basketball to that of the late 1940s, when the BAA and NBL competed before merging into the NBA. He pointed out that when those two leagues competed there was mass instability and a constant flux of teams forming and disbanding. Nathan claimed that if history was any guide, the presence of two basketball leagues was a trend that could not last for a long period of time without negative repercussions.⁵⁶

Nathan's interactions with the subcommittee following his presentation established some topics of interest that would become increasingly important as the hearings progressed. Senator Hruska asked for Nathan's view on the state of professional football since the merger of the two leagues, to which Nathan responded that league was "much more stable" than professional basketball.⁵⁷ The issue of who benefitted from professional football's merger, and who did not, would be addressed further as the hearings continued. Senator Ervin also brought up that Nathan had not received a complete record of the finances of teams in either league, claiming "we are not allowed to see what both the right hand and the left hand doeth," which mattered since there was a strong possibility that the owners of teams that did not make a profit filed their losses against profits in other business ventures on their tax returns.⁵⁸ The comparison of the football and basketball mergers, as well as the issue of the owners' tax records, would continue to hold significance for Subcommittee No. 5.

⁵⁶ Ibid., 173-74, 195-96.

⁵⁷ Ibid., 174.

⁵⁸ Ibid., 176.

September 22, 1971

As the hearings moved to their second day, opponents of the legislation built their case by reminding the subcommittee that this matter had reached Congress because of the *Robertson* lawsuit and the player's initial success in suing the league on antitrust grounds. Larry Fleisher, the NBPA's general counsel, began the testimony of the opposition with a statement that "the legislation as introduced does not solve any of the true inequities of professional basketball," remarking that the players had already set in motion the *Robertson* suit which could solve those problems.⁵⁹ He introduced the ideas that those testifying after him would provide evidence for, including "the one-sided nature of the employer-employee relationship in professional basketball," and the existence of ways that team owners can profit from the losses of their teams "by nature of their enormous personal wealth."⁶⁰ He pointed out that sixty-five percent of NBA players were African American, and asserted that "how Congress treats the economic rights of black basketball players who have escaped the ghetto by hard work will be noted by all black Americans."⁶¹ Although the stance of African Americans did not become a topic of frequent discussion in the hearings, the bill's opposition did secure the support of the Congressional Black Caucus and the NAACP, with both groups sending representatives to appear in the hearings. Clarence Mitchell, the Director of the NAACP's Washington Bureau, echoed Fleisher's point that a majority of professional basketball players were African American, and spoke about how that opportunity had created role models for African Americans in the United States. Congressman Louis Stokes, a Democrat from Ohio and a leader of the Black Caucus, did not

⁵⁹ Ibid., 229.

⁶⁰ Ibid., 227-28.

⁶¹ Ibid., 229.

testify formally but appeared at the hearings to declare the Caucus' support for opponents of the bill.

Fleisher set about depicting the owners of professional basketball teams as businessmen in search of profitability, juxtaposing them with the players who were in the midst of fighting for their freedoms. He claimed the ABA's purpose from its start was to create a league that could eventually join the NBA and reap the associated profits. Furthermore, he said the owners' purpose in both leagues for merging was to increase their profits by minimizing player salaries, something that "the courts have prohibited them from doing" in the *Robertson* case.⁶² Fleisher pointed out that fifty percent of professional basketball team owners had owned their teams for less than two years, stating that "what we now see here is a totally new business in which the entrepreneurs have immediately come to Congress to ask for special privileges, for guarantees against failure due to their own weaknesses, to poor management, to lack of planning and to greed."⁶³ Meanwhile, Fleisher asserted that the players, by comparison, had not sought out a solution by Congress, and were "asking now for nothing more than to have the right to bargain fairly and to have the owners compete lawfully."⁶⁴ In his written statement, Fleisher remarked that while the team owners claimed to be losing money, they indirectly received profits through tax benefits and fees paid by expansion teams which were distributed equally to all existing teams in the leagues.⁶⁵

Following Fleisher was Ira Millstein, the NBPA's legal counsel in the *Robertson* case, who echoed much of Fleisher's sentiment. Millstein noted that the NBPA was active not only in the *Robertson* litigation, but also in collective bargaining negotiations with the league, and

⁶² *Ibid.*, 233.

⁶³ *Ibid.*, 234.

⁶⁴ *Ibid.*, 232.

⁶⁵ *Ibid.*, 294-95.

expressed concern that congressional action with regard to the merger would interfere with those negotiations. He claimed that the legislation in question was not a request for a merger, but “an elimination of competition bill,” and pointed out that the *Robertson* case existed for the express purpose of stopping an elimination of competition and other violations of antitrust law.

Millstein put forth the idea that despite what the owners claimed, there was little chance that they would bargain in good faith should the merger take place. He highlighted this concern by relating to the subcommittee that the owners had already acted in bad faith twice in the *Robertson* case. First, Millstein pointed out that no players had switched leagues since the leagues came to a preliminary merger agreement the previous May. This was abnormal compared to the previous four years, and went against the injunction filed in April that stated the leagues were forbidden to merge and must continue to compete as separate businesses. Furthermore, Millstein noted that only a week before the hearings began, the players’ legal counsel informed the league that they would be applying for an injunction to limit the owners from discussing the lawsuit with players. Before the injunction could be filed, but with the knowledge that it was forthcoming, the owners attempted to schedule a private discussion of the lawsuit and upcoming hearings directly with the players in one of the teams’ locker rooms. With this evidence, Millstein concluded that “the owners cannot be expected to rectify these anticompetitive abuses which I have described today under their own volition.”⁶⁶

Fleisher and Millstein’s testimonies sparked an exchange between both of them, as well as Ervin and Hruska, which highlighted the stances the two senators held at this point. Ervin again compared the plight of the players to a hypothetical situation in another industry, asking Millstein if he would resist a situation where Congress restricted which clients a lawyer could

⁶⁶ Ibid., 262.

work for and how much they would charge for their services. He argued that “this is in essence what they are asking for in respect to athletes in basketball,” with the proposed legislation.⁶⁷ Ervin criticized Nathan’s testimony the previous day by noting that he had not factored in the profit that all teams gained through the fee paid by expansion teams that Fleisher had made note of, an omission that Ervin compared to putting on the play Hamlet without its titular character. Hruska, meanwhile, claimed that the right of free agency that basketball players asked for was not consistent with the freedoms of labor unions in America, where there was no free agency system. He also informed Millstein that, in his view, this was not a bill to eliminate competition, and that was only Millstein’s opinion of the proceedings. Hruska also responded to Ervin’s claim that Congress should fight for the players who do not wield the power of the owners, by claiming that the fans also do not hold power in this situation and should be accounted for. Hruska bolstered this claim by submitting a list of the merger’s benefits to the fans to the record, which included more evenly balanced teams, opportunities for fans to see stars in both of the leagues, and the creation of a championship game which would produce an undisputed champion of professional basketball.⁶⁸

Echoing Millstein’s sentiment that the antitrust battle should be left to the courts was the Dean of Columbia Law School, Michael Sovern. Sovern claimed that “the major purpose of the merger is obviously and explicitly to control the labor market in basketball players,” therefore it was an issue of labor relations and not of economic liability.⁶⁹ He established that not only was there a burden of proof on the owners to show that they were in need of Congress’ aid, but there was a burden as well on Congress to ensure that any legislation they enact protect the players in

⁶⁷ Ibid., 245.

⁶⁸ Ibid., 243, 250-53, 263.

⁶⁹ Ibid., 322.

labor relations with the merged entity. Speaking from his position of specialty within the area of labor relations, Sovern made clear that “absent the direst kinds of national emergency, the Congress does not come to the bargaining table in labor-management affairs,” implying that this legislation was exactly that kind of interference but hardly an emergency of national proportions.⁷⁰

Representing the views of professional basketball players who opposed the legislation were Oscar Robertson, who remained president of the NBPA, Zelmo Beaty, the president of the ABAPA, and Dave Debusschere, a veteran forward for the New York Knicks. Robertson established that among NBA players “opposition to the proposed merger is total,” claiming all but one unnamed NBA player who was restricted from taking a position due to pending litigation were opposed.⁷¹ Robertson also pointed out that as an established star in the league he did not “stand to benefit financially” by keeping the leagues apart, a fact also true for high-profile veterans like Beaty and Debusschere.⁷² Beaty established the position of the ABAPA, which opposed the legislation as written but would support a merger that gave players “the opportunity to freely negotiate for their services.”⁷³ Beaty not only represented the ABA, but also exemplified one way basketball players benefitted from the two leagues, as he had been a middling player for the Atlanta Hawks of the NBA before switching leagues and becoming a top player for the Utah Stars, who had won the ABA championship in 1971. Debusschere, who had served as player-coach of the Detroit Pistons before joining the Knicks, described how he had seen the labor negotiations from the perspective of both a player and as management. He remarked that players used to have “a natural reticence in dealing with management and accepted

⁷⁰ Ibid., 322-23.

⁷¹ Ibid., 303-304.

⁷² Ibid.

⁷³ Ibid., 313.

that they knew best,” while the NBPA had more recently established a unity that built up to all NBA players taking a firm stance against the merger.⁷⁴

September 23, 1971

The hearings’ third day was devoted exclusively to the testimony of Dr. Roger Noll and Dr. Benjamin Okner, both of whom were economists from the Brookings Institution. Noll, as mentioned above, would later become an influential voice in the history of labor history through his work with the Brookings Institute and later at Stanford University. Okner specialized in taxation and had previously worked within the U.S. Government. Noll and Okner were the first witnesses to testify independent of the owners or players, and Noll claimed that their only loyalties relating to the merger, supposedly, were as fans and for fans of professional basketball. Their extensive findings, as well as Okner’s explanation of the tax benefits afforded to the owners of professional sports teams, became the most influential testimony the subcommittee would hear.

Noll and Okner noted that a merger would be beneficial for fans who wanted teams to play interleague games and for a single championship, but argued that the reason the leagues sought a merger was so that teams could pay players less. Their findings showed that a merger in its present state was not the most efficient way for teams to balance profits throughout the leagues. Noll first presented their findings on how professional basketball teams made money, noting the importance of a team’s attendance as a factor to its profitability, and concluded that teams with fewer wins drew smaller crowds. This contributed to their view of the merger between the two leagues, because if the younger ABA was a lesser league as its finances and

⁷⁴ Ibid.,315-16.

lack of prestige dictated, there was a strong possibility that ABA teams would draw even fewer fans post-merger.⁷⁵

Because attendance, and the associated revenues from tickets, was such a significant factor in team's revenue, Noll proposed that Congress include in its legislation a revenue-sharing system. The system consisted of the home team sharing forty percent of its ticket revenue for each game with the away team. This split, Noll argued, was more significant than a merger or the reserve system in creating competitive balance, because it would make the profit benefits of teams in high population areas like New York and Los Angeles less significant. Finally, Noll acknowledged that the rise in player salaries had the appearance of a "predatory price cut" in reverse as enacted by the NBA, wherein the league raised salaries in an attempt to make costs too expensive for the ABA and drive the new league to financial ruin.⁷⁶

Okner's testimony regarding the tax benefits of professional sports further indicated that the financial situation of professional basketball was not as bleak as what the proponents of the merger had depicted two days prior. He verified a theory Ervin had proposed during Nathan's testimony, that teams were able to depreciate the cost of player contracts as tax write offs, so that over the length of a player's contract team owners got tax breaks equal to the amount of salary they had paid the player. Owners were further able to use the margin of loss a team had accumulated as a tax write off against whatever profits they turned in other businesses they owned. This revelation, that many team owners were losing money in theory but not in practice due to the application of these losses against taxed profits in other industries, led Ervin to determine it would be necessary for all professional basketball team owners to provide the subcommittee with their complete personal tax returns. Noll and Okner concluded their

⁷⁵ Ibid., 45.

⁷⁶ Ibid., 368.

statement with the recommendation that the leagues be allowed to merge temporarily for three years with a system of gate sharing and less restrictive option clauses for players implemented.⁷⁷

November 15, 1971

The reconvening of Subcommittee No. 5 two months following the first round of hearings firmly established that any hope professional basketball team owners had of an easy path to congressional exemption was gone. Ervin opened the hearings on November 15 by noting that he had been unable to acquire the complete personal tax returns of the owners. He further said that he was not surprised his attempt to learn more about their unique tax situation was treated “as if I had laid hands on the arc of the covenant,” and remarked the owners “do not think the U.S. Senate has any right to their financial information even though they are trying to get the right to place in bondage through option clauses and the common draft every athlete that plays for their teams.”⁷⁸ When confronted with an argument from Kuchel that it was unusual and unnecessary for a congressional committee to request individual tax records, Ervin asserted that the IRS had subpoenaed 1,235 individual tax records for congressional committees since 1961, including 107 for the Subcommittee’s hearings regarding fixing on professional boxing that year. It was becoming evident that the proof that Ervin required of the leagues’ financial hardship was higher than that the proponents of the merger had expected.⁷⁹

The remainder of the November 15 hearings was comprised of testimonies from proponents of the bill, primarily owners of teams in both leagues. Wendell Cherry, part owner of the Kentucky Colonels of the ABA, claimed that although his team was among the most

⁷⁷ *Ibid.*, 392-93.

⁷⁸ S.2373, *Hearings*, Part 2, 525-26.

⁷⁹ *Ibid.*, 526-28.

successful on the court, they had yet to turn a profit. He attributed this to the cost of players and other personnel, which made up virtually all of the team's revenue in 1970. Curiously, Cherry also claimed that contrary to previous testimony, there was not a free market in professional basketball. Because each professional basketball player was selling his services among two buyers, the ABA and NBA, Cherry considered that not to be a free market, and argued this meant merging the two leagues did not violate antitrust law if there was no free market to eliminate. This argument went against the idea of professional basketball's free market that existed because of the two leagues, and Cherry's logic behind his version of a free market has been viewed as "dubious."⁸⁰ He concluded that Congress denying a merger would be "a death warrant to the ABA," and stated he believed it was in the public interest to grant the leagues the antitrust exemption.⁸¹

Four other owners or former owners testified or submitted statements to the subcommittee, all of whom stood by the position that the merger was a financial necessity for the professional basketball leagues. Abe Pollin, owner of the NBA's Baltimore Bullets, claimed he had faith in the ability of the league to negotiate effectively and fairly with the NBPA. Herman Sarkowsky, owner of the NBA's Portland Trail Blazers, stated that the merger bill was "basketball's last hope" to continue its existence as an important part of the American scene, and claimed that the rising salaries of professional basketball players would be "instrumental in the destruction of professional basketball."⁸² James Kirst, the former owner of the Utah Stars, claimed that in the three seasons he owned the team he suffered close to \$2 million in losses relating to team expenses. The final testimony of an owner, that of Earl Foreman of the Virginia

⁸⁰ Surdam, *The Big Leagues Go to Washington*, 234.

⁸¹ S.2373, *Hearings*, Part 2, 544, 562.

⁸² *Ibid.*, 661-62.

Squires, amounted mostly to an explanation of why he moved the Washington Capitals, which he explained was entirely because of inadequate playing facilities.⁸³

Robert Nathan also returned to testify, clearly with the goal of discrediting the testimonies of Noll and Okner. He claimed their observations regarding the special tax depreciations of professional sports teams were “about as remote from reality and sound economic principles as I have encountered in a long period of time.”⁸⁴ He backed up that statement by saying that they did not have the data to justify their claims, as opposed to the claims made in his testimony, which were based on the more thorough financial information the leagues had provided him. Nathan reiterated that his findings showed that the ABA and NBA were suffering from extensive loss of revenue, claiming that in aggregate the NBA teams had lost \$8.6 million over the past four seasons. While Nathan went to great lengths to undermine the testimony of Noll and Okner, as well as to claim that the tax bracket most professional basketball owners were in supported the idea that they lost money regardless of write-offs, Ervin was not swayed. He remained steadfast that it would be impossible for the subcommittee to get a complete understanding of the economics of professional basketball without the tax returns of the owners.⁸⁵

Although after November 15 the subcommittee again broke until the following January, Nathan’s testimony generated a response by letter from Noll and Okner. In it, they asserted that Nathan’s refutation of their testimony was in fact a misunderstanding on the part of Nathan in interpreting their findings. They provided a criticism of their own based on Nathan’s determination that all ABA teams are sold because they are losing money, pointing out that a

⁸³ Ibid., 593, 663-64.

⁸⁴ Ibid., 608.

⁸⁵ Ibid., 613-14.

sale is also a purchase, and new owners could benefit from the tax depreciation laws and understood this as a benefit of owning a franchise. Noll and Okner reiterated that overall their findings were not meant to support or oppose a merger, but to suggest that revenue sharing would benefit financial equality in the leagues.⁸⁶

January 25, 1972

The fifth day of hearings before Subcommittee No. 5 yielded a new element to the proceedings: criminal allegations. Representative Sam Steiger of Arizona came before the subcommittee to begin the hearings, and revealed that the Jacobs family, owners of the Cincinnati Royals, had a “history replete with reports of business associations with underworld and organized crime figures.”⁸⁷ Steiger informed the subcommittee that Emprise Corporation, which was owned and operated by the Jacobs family, had come under investigation for extensive dealings with organized crime in parts of the corporation’s more than four hundred subsidiary companies that were throughout the country. He further claimed that Emprise had been ordered to divest of their holdings in a dog racing track in New Mexico due to the corporation’s operating practices, which had developed a bad reputation, among other allegations and charges against the corporation.

Steiger noted the Jacobs’ were involved in other professional sports along with their ownership of the NBA. He claimed Emprise had loaned two baseball teams, the Montreal Expos and the Milwaukee Brewers, \$2 million and \$4 million respectively, at uncommonly low interest rates. Emprise also had extensive dealings with professional baseball and football as a concessionaire, providing food and beverage at sporting events, through one of the corporation’s

⁸⁶ Ibid., 675-677.

⁸⁷ Ibid., 678.

subsidiaries. He also drew another connection to the NBA when he produced a letter written by NBA Commissioner J. Walter Kennedy to a legal counsel of the Jacobs', which defended the good character of Max Jacobs, vice president of Emprise and the Cincinnati Royals' chairman of the board. Steiger did not provide an opinion on the basketball merger, but requested that a deterrent to those involved in organized crime be included should the subcommittee draft legislation for the merger. Although the dealings of the Jacobs' and Emprise would become a topic of interest for the remainder of the hearings, ultimately the charges (and eventual indictment) against the Jacobs' had little relevance to the hearings beyond the negative connotation the situation provided the NBA.⁸⁸

Directly following Steiger's testimony came that of Kennedy. He spoke primarily about the idea of gate sharing that had been the recommendation of Noll and Okner, along with the league's five point offer to the NBPA which had been discussed by Kuchel on the first day of hearings. Kennedy defended the league's current methods of gate sharing, which he explained was a 94:6 split where the six percent went to the league offices for operating expenses. He claimed that if gate revenue were shared between home and away teams, there would be less of an incentive for the home teams to promote their games, arguing that "the best show in the world will play to empty seats if it is not promoted."⁸⁹ Kennedy also defended the final point in the league's bargaining offer to the NBPA, compensation for free agents as determined by an independent third party, as instrumental in the league's goal to "maintain equality of competition on the playing field."⁹⁰ Kennedy acknowledged that the league's proposal restricted the freedoms of the players in their ability to offer their services on a free market, but defended the restriction

⁸⁸ Ibid., 679-691.

⁸⁹ Ibid., 726.

⁹⁰ Ibid., 727.

as “entirely reasonable and not excessive in the light of the peculiar problems that are faced by professional sports and by basketball.”⁹¹

Senators Ervin and Hruska utilized the opportunity to question Kennedy again to put forth their respective opinions on the state of professional basketball and its proposed antitrust exemption. Ervin referred to compensation as “a Damocles sword...that hangs over all of the clubs in the league to keep them from raiding the players of other clubs.”⁹² Ervin also accused Kennedy of ignoring the Jacobs’ relationship with organized crime, to which Kennedy responded that the league had reached out to the *St. Louis Dispatch*, which had been investigating the Jacobs case, for accurate facts pertaining to the situation. Furthermore, Kennedy claimed his letter was not meant to be a recommendation for or against Jacobs, but merely an acknowledgement that all of Jacobs’ dealings with the NBA had been fair. Hruska referred to Kennedy’s submitted statement, wherein Kennedy related the story of professional basketball in the 1940s that Nathan had similarly discussed in his first testimony. Kennedy, like Nathan, put forth that professional basketball was not meant to have two separate leagues, and that the last time it happened the result was a number of teams going out of business, which was accompanied by a number of unemployed professional basketball players. Hruska closed Kennedy’s testimony by remarking that these hearings were about proving that this situation, the unemployment of many professional basketball players due to the financial failure of franchises, could happen again. He demonstrated his continued support of the bill when he said that while they would have to do it “the hard way,” he believed it should not be so hard to prove.⁹³

⁹¹ Ibid., 728.

⁹² Ibid., 733.

⁹³ Ibid., 745.

More brief was the testimony of ABA Commissioner Jack Dolph, who went before the subcommittee to argue for the merit of the merger for all involved. Dolph reiterated that every ABA team to date had consistently lost money, with the “biggest single factor” being the competition between the two leagues to sign unproven college players to large contracts.⁹⁴ Dolph noted that the subcommittee had lost sight of the leagues’ financial plight in their extensive hearings, and warned that doing so “can sound the death knell of professional league basketball as we know it today.”⁹⁵ Dolph faced questioning from Ervin regarding the decision to move the Washington Capitals team to Virginia, which he remarked was “helpful to our merger cause” and “a business decision” that was necessary due to the lack of a proper playing facility for the Washington team.⁹⁶ Overall, Dolph’s statement argued that the merger of the two league would be beneficial to owners, players, and fans, who wanted their teams to have a fair chance at winning a unified national championship.

Aforementioned testimonies from NFLPA President John Mackey and Executive Director Ed Garvey followed. While it has already been noted that the two testified against the effects of the NFL merger, both also spoke of their opposition to the basketball merger. Garvey noted that the proposed legislation was a request for monopolization by the team owners, and argued that it robbed players of their “individual rights to negotiate” because monopolization is done for the benefit of the owners, not “for the benefit of the public or the employee.”⁹⁷ Mackey’s testimony focused on the restrictions of player rights that the NFL bill had brought and the NBA bill would also bring about. Stephen Lowe calls Mackey’s testimony “the most damaging testimony against the bill,” because Mackey managed to take what the owners thought

⁹⁴ Ibid., 747.

⁹⁵ Ibid.

⁹⁶ Ibid., 750.

⁹⁷ Ibid., 839.

was a strength, comparing their bill to that of football, and make it a weakness by showing the negatives for players that had come from the merger. Ervin responded strongly to Mackey's statements, likening the football merger to a Garden of Eden which Congress had passed without realizing it was "full of serpents," in regard to the player rights.⁹⁸

The final professional basketball player to testify before the Senate's subcommittee, Bill Bradley of the New York Knicks, appeared later in the day. Bradley, who was a Rhodes Scholar and graduate of Princeton, would become known after his basketball career as a senator from New Jersey and presidential candidate in the 2000 elections. He appeared in opposition to the legislation as a Vice President of the NBPA. He rebuffed the repeated claims of the bill's proponents that the livelihood of basketball was at stake, calling these statements "specious" and further asserting that "the market for the best basketball in the world will not disappear," whether the NBA and ABA merged or remain separate.⁹⁹ Bradley also said that the supposed fear of players constantly changing teams had already been realized in the NBA, where 68 percent of players in the league had switched teams in the past two years, without serious repercussion. Bradley referred to this current condition within the league as a "chaos," claiming that it would only be perceived as such by the media and public if the players were "determining their own futures like any other American citizen." Bradley further defended the idea of player freedoms by discussing the nature of basketball as a sport where many players have similar skills or characteristics (for example some players shoot well but dribble poorly, or are very tall but slow runners) that would not produce success if they played on the same team. He said the competitive nature of professional athletes deters the best players from joining the same team, because they would rather compete against one another.

⁹⁸ Ibid., 845; Lowe, *The Kid on the Sandlot*, 118.

⁹⁹ S. 2373, *Hearings*, Part 2, 868-69.

Appearing after Bradley was Paul Warnke, an attorney for the NBPA, whose expressed purpose was to summarize the testimony the subcommittee had heard to date. He noted that those appearing on the behalf of the players argued a merger would eliminate player's bargaining power that had been achieved with the presence of two leagues. Warnke said he believed there had "been considerable misunderstanding" on the terms of the merger, which did not include any protections for players rights.¹⁰⁰ Of the owners, Warnke remarked that their arguments for financial plight had amounted to "exaggerated, even distorted, pictures of the economic difficulties with which they are confronted," and said that the team owners' inability to maintain profitable businesses had led them to "ask for a Congressional medal for irresponsibility" with this legislation.¹⁰¹ Warnke concluded that if there were problems in professional basketball that necessitated changing, they should be made by the leagues and not by the government with a "Congressional imposed subsidy that comes out of the hide of the players."¹⁰² Although the testimony of Warnke represented the culmination of the representation of the owners and players at the hearings, it was necessary for the subcommittee to reconvene twice more before the hearings in the Senate would conclude. Subcommittee No. 5 originally planned to reconvene the day following its January hearings, before scheduling conflicts forced a lengthy break until May.

May 3 and 9, 1972

The further delay of the hearings' conclusion allowed for two major developments that pertained to professional basketball. The ABA had elected to resume an antitrust lawsuit it had filed against the NBA before their merger agreement; the lawsuit was for \$300 million and

¹⁰⁰ Ibid., 872.

¹⁰¹ Ibid., 878-79.

¹⁰² Ibid., 883.

accused the NBA of monopolization and violations of the Sherman Act. Ervin remarked that this lawsuit was the ABA claiming “that they want to stick their fingers in the monopoly pie,” and he said it “illustrates better than anything else the dangers and inequities of allowing any one group to monopolize a business.”¹⁰³ The second development relating to the hearings was that Emprise Corporation was found guilty in Federal court of a felony offense for hiding an ownership stake in a Las Vegas casino. Together, these two developments further hindered professional basketball’s ability to claim it sought the simple act of merger merely to avoid financial ruin, as these behaviors depicted the sport of professional basketball as a business containing greed and corruption.¹⁰⁴

The testimony that took up the majority of the hearings’ final two days came from Noll and Okner, who appeared now as employees of the Senate. Although Ervin’s insistence on receiving team owners’ tax returns never came to fruition, the leagues did succumb to Congress by providing the available economic data of each team in both leagues since the ABA’s inception. The subcommittee had called upon Noll and Okner to analyze the data, which they determined was for the most part the same data Nathan had used to make his own observations on the financial state of professional basketball. That Subcommittee No. 5 was willing to not only bring Noll and Okner back to testify again but hire them as employees of the Senate, was a strong vote of confidence by the subcommittee for the economists. It also served as an indirect statement that Nathan’s attempts to refute Noll and Okner’s initial testimonies had little effect on the opinions of the senators.

Although Noll and Okner prefaced their presentation with a remark that their observations were “extremely tentative” based on the data they had, they also made clear to the

¹⁰³ Ibid., 971.

¹⁰⁴ Ibid., 972-73.

subcommittee that the data they were working with was more or less the same data that Nathan had made his statements with.¹⁰⁵ Their comment regarding the tentativeness of their findings also meant that any findings Nathan had made should be considered with the same hesitancy, a notion that Nathan had not put forth in either of his testimonies. Okner commented that if there were differences between their findings and those of Nathan, it was due to their work being done with what they believed to be “more complete data” than that which Nathan had been provided with a year earlier.¹⁰⁶

Even with the acknowledgement that their observations could not be made in specific terms but as generalizations, the economists nonetheless had concluded that the financial condition of professional basketball was “more robust than we had earlier conjectured” in their first testimony.¹⁰⁷ The economists further noted that this was the case even though in every possible instance they had chosen to assume the least amount of profit had been made by a team wherever there was not exact data. This meant that there was a likelihood of more financial stability and viability than their findings already suggested. Noll said “the results do not reveal a financial disaster in pro basketball,” claiming that the financial struggles of some teams were the result of “a few very bad years,” which nonetheless left the economists with the view that “most teams in most years have performed well enough to be viable long-term enterprises, even in the ABA.”¹⁰⁸

The issues that left many teams at a loss for profit, specifically some ABA teams, were accounted for by Noll and Okner as a lack of revenue, and independent of salary. They in fact found that seven professional basketball teams (data was provided anonymously without team

¹⁰⁵ Ibid., 980.

¹⁰⁶ Ibid., 1005.

¹⁰⁷ Ibid., 987.

¹⁰⁸ Ibid., 987.

names) could have paid no salary to their players and still lost a combined \$2 million the previous season. This striking statistic, that teams who claimed they were losing money because of player salaries would still lose money with those salaries completely out of the equation, proved that the problem for a number of teams was an inability to generate sufficient revenue. They found that the ABA teams that fared worse economically “charge lower prices and draw fewer fans than some minor league baseball teams,” leading Noll and Okner to conclude that the reason some of these teams may be on the verge of collapse was because “they are playing in cities in which there is just very little demand for professional basketball games.” David Surdam observes that the lack of profitability for ABA teams noted by Noll and Okner influenced the opinions of Hruska and Tunney, who had sponsored the bill in hopes of no professional basketball teams folding but were becoming hesitant to protect teams that barely drew crowds on par with minor league organizations.¹⁰⁹

Noll and Okner’s conclusions, which Noll reiterated in the only testimony of the hearings’ final session on May 9, 1972, supported legislation for the two leagues to merge only with a number of conditions. As had been their view from their initial testimony the previous September, the economists concluded that the most important change professional basketball could make to even out financial discrepancies between teams would be a system of gate sharing where home teams split the revenue for each game with the visiting team. The economists also recommended a lengthy list of changes to both league operations and the protection of player rights, including the elimination of the college draft, the abandoning of territorial rights which restricted teams from operating within the same general area as another team, the sharing of both gate receipts and broadcast rights of all teams, the elimination of relationships where team

¹⁰⁹ Ibid., 1021; Surdam, *The Big Leagues Go to Washington*, 232.

owners also owned the stadium their team played in (or instead the institution of a system where the team paid a rent to the stadium consistent with that of other teams), and the establishment of a completely free market for players absent of compensation or the right of first refusal.¹¹⁰

July-September 1972: HR 10185

Upon the completion of the Senate's hearings for S.2373, the congressmen who made up the House of Representatives' branch of Subcommittee No. 5 began their hearings. Taking place over four days between July and September of 1972, the hearings were little more than a reiteration by proponents and opponents of points and arguments that had been established in the Senate's hearings. House chairman Emanuel Celler proved as unsympathetic to the plight of the team owners as Ervin had been, referring to their actions to date as "the callous abuse of unwarranted privilege" which "steadily victimized the legitimate interests of fans and severely restricted legal rights of players." David Surdam notes that despite the repeated claims of team owners that they were losing money, Celler and Irvin both "remained skeptical about the owners' claims of losses" throughout the hearings in the House and Senate.¹¹¹

Familiar faces both favoring and opposing the legislation appeared before this branch of the subcommittee. Kuchel, the league's legal representation, again inferred that "Congress will decide the fate of professional basketball," whereas NBPA representative Fleisher later countered that "it is an insult to the game to say it-basketball, will disappear if a merger isn't approved."¹¹² Fleisher further echoed an argument of the bill's opponents that the leagues could not be expected to bargain in good faith "where the employer has total control over the players'

¹¹⁰ S.2373, *Hearings*, Part 2, 1022-23.

¹¹¹ *Hearings before Antitrust Subcommittee No. 5 of the Committee on the Judiciary*, HR 10185, 92nd Congress, 2d sess., July 27-Sep. 7, 1972. 1; Surdam, *The Big Leagues Go to Washington*, 229.

¹¹² HR 10185, *Hearings*, 117, 150.

movements,” informing the subcommittee that “for 11 years I attempted to bargain and collectively negotiate on that point. I was refused the opportunity to bargain and negotiate on it.”¹¹³ One development that took place in the House hearings was the questioning of NBA Commissioner Kennedy regarding the Emprise Corporation’s indictment in Federal court. Kennedy noted that Max Jacobs, who had been the Chairman of the Cincinnati Royals, had since retired from the position. Since Jacobs and the Emprise Corporation were no longer directly affiliated with the NBA, Kennedy believed the “case is closed” regarding any action on the part of the NBA.¹¹⁴ Others testifying a second time included Wendell Cherry, Paul Warnke and Oscar Robertson, all of whom remained consistent with their initial testimonies.

Another individual returning to Subcommittee No. 5 did so from a different side of the hearings, as Senator Ervin testified on the House hearings’ third day to summarize his view of the legislation and the findings of the Senate subcommittee. Ervin focused on the lack of rights possessed by players in basketball, baseball, and football, noting that he believed “it is atrocious that this servitude is going on in twentieth century America and any sports legislation that passes Congress should abolish it.”¹¹⁵ Ervin further acknowledged that despite the arguments of team owners that their league was in financial crisis, the final analysis of Noll and Okner had in fact shown that the majority of teams in the ABA and NBA were not in imminent financial danger. Ervin continued his testimony by declaring his intent to submit a bill to the Senate that would “protect the constitutional rights of professional athletes,” with a later statement that “any sport

¹¹³ Ibid., 149.

¹¹⁴ Ibid., 34.

¹¹⁵ Ibid., 224.

that cannot make a financial success without enslaving other Americans in what is supposed to be a free society, do not need to exist.”¹¹⁶

September 18, 1972: “Authorizing the Merger of Two or More Professional Basketball Leagues, and For Other Purposes”

Upon completion of Subcommittee No. 5’s hearings in both houses, a bill was drafted which approved an antitrust exemption for the ABA and NBA to merge into a single league, with amendments attached that called for significant changes to the operation of professional basketball. This amended bill was presented and voted on in both the Senate and House of Representatives, but did not receive the support of the professional basketball leagues or players and was not voted through either house. Despite the bill’s failure, the conditions that Subcommittee No. 5 determined were acceptable for the leagues to merge under reflected the effectiveness of some arguments that were presented over the previous year of hearings.

In approving the exemption, the text of the proposed bill noted that the original reason the leagues sought to merge “was to grant financial assistance to the weaker teams, generally in the American Basketball Association, to prevent the teams from failing financially.”¹¹⁷ Keeping in line with this reasoning, the bill proposed that ticket revenues from all games would now be split between the home and away teams by at least a 70:30 margin. This amendment reflected the influence of Noll and Okner, who noted repeatedly that they believed gate sharing was crucial in establishing a financial balance in the league, albeit at a more severe 60:40 split. The introduction of gate sharing was justified as an action “not just to prevent team failures but,

¹¹⁶ Ibid., 226, 248. There is no evidence to suggest the bill Ervin spoke of ever made it to any significant phase of voting or support in either house of Congress.

¹¹⁷ Select Committee on the Judiciary, *Authorizing the Merger of Two or More Professional Basketball Leagues, and for Other Purposes*, 92nd Cong., 2nd sess., 1972, S.Rept.92-1151, 4.

equally as important, to allow all the teams to compete on a relatively equal financial footing in their bidding for player services.”¹¹⁸ The bill also amended the terms of the merger so that the league entrance fee charged to ABA teams, \$1.25 million, would now come exclusively out of the teams’ television broadcasting revenues, which were still insignificant when compared to those of football and baseball but had been noted in testimony by league representatives as both a projected lucrative area of revenue in the near future and a justification of the entrance fee charged to the ABA as an opportunity for future profit. The bill noted that the decision to charge these supposedly financially troubled franchises a seven figure fee for the privilege of merging was “inconsistent with the rationale advanced for the merger.”¹¹⁹ This amended entrance fee, which had been discussed and criticized in the hearings, was not a ground-shattering change to the terms under which the teams could merge. Nonetheless, it was a change made by the subcommittee to maintain that the merger take place under terms that were conducive to financial success for all teams.¹²⁰

The amended bill also called for substantive changes to the structure of player contracts and the labor market that currently existed in professional basketball. The bill explained that the subcommittee believed “the present use of option clauses, reserve clauses, and other devices designated to tie a player to a team deny him fundamental rights and constitute a violation of the antitrust laws.”¹²¹ This justified the amendments in the bill which follow: all first year players sign one year contracts with a single option year, all option clauses would be limited to a single year, teams would not control a player’s rights after the expiration of his contract, compensation would no longer be award for free agents who switched teams, and any person found to violate

¹¹⁸ Ibid.

¹¹⁹ Ibid., 6.

¹²⁰ Rader, *In Its Own Image*, 147.

¹²¹ “Authorizing the Merger...,” 8.

these terms would be subject to a fine up to \$50,000. As the text of the proposed bill explained, “the Committee has decided that every player should have the right to sell his skills to the highest bidder for the highest price obtainable.”¹²²

Such substantial changes to the operation of the league and the nature of labor in professional basketball demonstrated a sincere concern of Subcommittee No. 5 to incur positive change to professional basketball. But in the words of NBA Commissioner J. Walter Kennedy, “They put things into the merger that I don’t think owners in either league can live with.”¹²³ The failure of the ABA and NBA to persuade Congress to allow a simple antitrust exemption like that of professional football in 1966 demonstrated the effectiveness in the argument that the players deserved a free market, presented by a united front of the players and the NBPA. Although the subcommittee had taken great issue with the reality that this exemption was a group of millionaires asking for financial assistance, situations like this one had already proved effective in professional sports five years earlier, and remain effective in the financial sector forty years later in cases like the Emergency Economic Stabilization Act of 2008.

The effectiveness shown by professional basketball players and their representatives in arguing for the illegality of team business practices had now succeeded in gaining the protection of the court with a preliminary injunction, and that of Congress in the amended bill’s protections for players’ freedoms on an open market. Congressional exemption had appeared to be the ace in the hole for the professional basketball administration, which was working with fifty years of history that dictated that the United States did not wish to interfere with the affairs of professional sports. But “their football peers had poisoned the legislative well of goodwill,” and

¹²² Ibid., 4-6.

¹²³ Pluto, *Loose Balls*, 424.

with the resounding failure of the pursuit of an antitrust exemption, the only remaining path to a legal merger of the leagues was the conclusion of the *Robertson* suit.¹²⁴

¹²⁴ Surdam, *The Big Leagues Go to Washington*, 238.

Conclusion

While professional basketball players secured their freedoms with the settlement of the *Robertson* lawsuit in 1976, that victory was only possible because of the hearings before Subcommittee No. 5 in 1971 and 1972. If team owners had successfully convinced Congress that professional basketball required an antitrust exemption to merge the two leagues, the lawsuit of the players would have been redundant in its charges that the leagues were violating antitrust law by merging. But the amended bill that was the result of the hearings allowed the players to continue their battle for freedom in the courts. Collective bargaining forced the owners either to continue operating as separate leagues or to allow the creation of the “Oscar Robertson Rule” through the lawsuit’s settlement, which established a free market for players to sign contracts with any interested team.

The triumph convincing Congress to allow a merger only if a free market were established (among other changes to league practices) was a more difficult obstacle to a free market for players than the battle fought in the *Robertson* lawsuit. In court, the charges against the league of multiple violations of antitrust law had clear evidence to support the claims of the players. From the lawsuit’s initial steps the court had been on the side of the players. Judges allowed the injunction that kept the teams from merging and later struck down a series of requests by the leagues to throw away the lawsuit because of fine print details, such as the claim that the lawsuit should be filed by the NBPA and not the players. Congress, meanwhile, could have been swayed by the owner’s supposed financial plight, and choose to ignore the antitrust

violations the players were pointing out in the *Robertson* lawsuit. Ultimately, the court only considered the legality of the league's actions, while Subcommittee No. 5 had to consider the public interest among other issues beyond whether professional basketball leagues operated entirely within the scope of antitrust law.

It was only after the conclusion of these hearings, and the reality that any bill drafted by Subcommittee No. 5 regarding a professional basketball merger would not be supported by the leagues, that the players' lawsuit could turn fully to the allegations of antitrust violations in league practices. Jim Quinn, a partner at Weil, Gotshal and Manges law firm in New York, was a part of the NBPA's legal counsel in the *Robertson* case from 1973 through its conclusion in 1976. In an interview, he explained that originally, the *Robertson* lawsuit was filed with a primary focus of stopping the merger, and the NBPA "threw in" the claims against restrictions on player rights because it calculated that the claims would succeed in court.¹²⁵ But what began as secondary claims moved to the forefront of the suit, following the failure of the leagues to secure an antitrust exemption to merge.

The terms of the Robertson Settlement Agreement, which was approved by the court in August 1976, reflect much of what Subcommittee No. 5 had proposed in its failed revised merger bill. Option clauses were no longer mandatory on veteran contracts, first year players had to sign contracts for one year with an additional option year, and compensation would only exist until the conclusion of the 1980-81 season. The settlement further awarded all NBA players who were active between 1966 and 1976 a share of a \$4.3 million fund paid for by the NBA, which also paid for all attorney fees incurred by the players. With this decision, professional basketball became the first professional sport to have a system of free agency for players, a development

¹²⁵ James Quinn, telephone interview with author, January 7, 2016.

that would follow in baseball within months of the *Robertson* settlement, and before long in football as well.¹²⁶

The New York Knicks won the NBA Finals again in 1973, when they defeated the Los Angeles Lakers with greater ease than the 1970 series between the two teams. Once again Willis Reed was voted Most Valuable Player of the series, although this time without an injured leg the star center was able to dominate to a larger degree than his hallowed appearance in 1970. Along with Reed, the Knicks featured Bill Bradley and Dave DeBusschere, both of whom had testified in the hearings over the previous two years and averaged more points and rebounds respectively than Reed over the course of the series with the Lakers. The Knicks may have needed Reed to win the NBA finals, but they would not have won without players like Bradley and DeBusschere playing their part. In a similar fashion, the *Robertson* settlement is remembered for the creation of a free market for professional basketball players, but was only made possible by the victory of the players in the outcome of the hearings before Subcommittee No. 5.

¹²⁶ *Robertson v. National Basketball Association Settlement Agreement*, August 2, 1976.

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