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*CONDUCT DETRIMENTAL: EXAMINING THE NFL'S COLLECTIVE  
BARGAINING AGREEMENT AND THE COMMISSIONER'S ROLE THROUGH  
A CASE STUDY OF DEFLATEGATE*

David Shyu

*INTRODUCTION*

As the most popular sport in the United States, American football and the National Football League ("NFL") commands not only the market share, but also an entire day of the week. Its undeniable success has been both a blessing and a curse. While revenues continue to surge year after year, so too has the scrutiny behind each and every action the NFL takes, particularly that of its commissioner, Roger Goodell.

Appointed on August 8, 2006, Goodell has more or less ruled his league with a steadfast zeal unlike any of his predecessors.<sup>1</sup> Adopting a no-nonsense approach to managing both on-field and off-field issues, he has assumed a position as one of the most powerful men in sports.<sup>2</sup> His emphasis on protecting the integrity of the league and its players, however, have been met with criticism.<sup>3</sup>

This Note will closely examine whether the NFL, specifically its Commissioner, has exceeded its authority in its handling of the recent incident involving allegations of the New England Patriots and quarterback Tom Brady's role in deflating footballs during a crucial playoff game. The Note will look at the existing the NFL current Collective Bargaining Agreement, and trace the source of the Commissioner's power. Then it will delve into the details of the case—including the Wells Report and investigation, the arbitration process, and the District Court opinion. The Note will analyze the District Court's opinion in anticipation of the Second Circuit's appellate review. Finally, it will conclude by examining the history

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<sup>1</sup> Mark Maske, *Owners Pick Goodell as NFL Commissioner*, WASHINGTON POST (Aug. 9, 2016), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801043.html>.

<sup>2</sup> Maske, *supra* note 1.

<sup>3</sup> Dan Le Batard, *Roger Goodell, NFL Have Credibility, Integrity Issues*, ESPN (May 17, 2015), [http://www.espn.com/nfl/story/\\_/id/12900850/roger-goodell-nfl-credibility-integrity-issues-wake-deflategate](http://www.espn.com/nfl/story/_/id/12900850/roger-goodell-nfl-credibility-integrity-issues-wake-deflategate).

of the NFL's Collective Bargaining Agreements and suggesting a possible solution to ensure a system of checks and balances among the players of the collective bargaining process.

*NFL COLLECTIVE BARGAINING AGREEMENT FRAMEWORK*

The NFL is governed by the National Labor Relations Act ("NLRA"), which mandates the duty to bargain collectively.<sup>4</sup> Section 158(d) of the NLRA provides: "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and *other terms and conditions of employment . . .*"<sup>5</sup> "[N]o party to such contract shall terminate or modify such contract" unless certain conditions collective bargaining procedures are followed.<sup>6</sup>

As to the duty to collectively bargain for other terms and conditions of employment, the Supreme Court held in *NLRB v. Wooster Division of Borg-Warner Corp.* ("Borg-Warner")<sup>7</sup> that a party is only bound to bargain in good faith over mandatory subjects of collective bargaining.<sup>8</sup> The Court explained that parties may freely propose and bargain over permissive subjective collective bargaining, but that neither party must insist on the resolution of the permissive subject over fears that such bargaining would be done in bad faith.<sup>9</sup>

The Court furthered this holding in *NLRB v. Katz*<sup>10</sup>, where it decided that an employer cannot unilaterally modify a mandatory subject to an agreement that was collectively bargained.<sup>11</sup> The Court determined in *First National Maintenance Corp. v. NLRB*<sup>12</sup> that management decisions fall within three distinct categories: (1) those that have an indirect and attenuated impact on the employer-employee relationship, (2) those that deal with an

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<sup>4</sup> 29 U.S.C. § 158(d) (2013).

<sup>5</sup> *Id.*

<sup>6</sup> *See id.* (establishing that collectively bargained agreements are equivalent to contracts entered into by the parties).

<sup>7</sup> *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 349 (1958) (hereinafter *Borg-Warner*).

<sup>8</sup> *Id.* at 349.

<sup>9</sup> *Id.*

<sup>10</sup> 369 U.S. 736 (1962).

<sup>11</sup> *Id.* at 747.

<sup>12</sup> 452 U.S. 666 (1981).

exclusive aspect of the relationship between employers and employees and (3) those that have a direct impact on the employer-employee relationship.<sup>13</sup> The first and second categories deal with permissive and mandatory decisions, respectively. The third category, however, is determined by a balancing test, which states that a decision becomes mandatory “only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”<sup>14</sup>

*THE COMMISSIONER'S AUTHORITY*

On July 25, 2011, the NFL and the National Football League Players Association (“NFLPA”) reached an agreement and signed a new 10-year collective bargaining agreement (“CBA”).<sup>15</sup> This CBA covered, among other things, the broad disciplinary powers of the commissioner and the procedures to enforce disciplinary action.<sup>16</sup> And because the NFL and the NFLPA negotiated the newest CBA in good faith, the parties solidified the CBA as a binding contract, and is unlikely to be terminated. Based on this CBA, Commissioner Goodell enjoys a expansive range of his disciplinary powers, and, short of any major upheavals, stands unchallenged as he solidifies his power.

The CBA draws its essence for the Commissioner's authority from two sources: the NFL Constitution and Bylaws and the NFL Player Contract. Article VIII of the NFL Constitution and Bylaws regulates the role of the Commissioner. In particular, Section 8.3 states:

[T]he Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate: . . . [a]ny dispute between a player and any official of the League; [a]ny dispute involving a member or members in the League or any players or employees of the members of the League or any combination thereof that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football.<sup>17</sup>

<sup>13</sup> *Id.* at 677 (quoting *Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 178 (1971)).

<sup>14</sup> *Id.* at 677-78.

<sup>15</sup> Nate Davis, *NFL, Players Announce New 10-Year Labor Agreement*, USA TODAY (July 25, 2011, 8:03 PM), <http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.Vryf0F43k2I>

<sup>16</sup> NFL COLLECTIVE BARGAINING AGREEMENT art. 46 (2011).

<sup>17</sup> CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE Article VIII (effective February 1, 1970) (revised 2006).

Section 8.6 furthers this authority:

The Commissioner is authorized . . . to hire legal counsel and take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the League or professional football, whenever any party . . . employed by, or connected with the League or any member thereof is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football.<sup>18</sup>

Moreover, Section 8.13(A) enumerates the Commissioner's disciplinary powers:

Whenever the Commissioner, after notice and hearing, decides that . . . any player . . . or employee thereof . . . has been or is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to: (1) Suspend and/or fine such person in an amount not in excess of five hundred thousand dollars (\$500,000) . . . and (2) Cancel any contract or agreement of such person with the League or with any member thereof, among others.<sup>19</sup>

The NFL Constitution and Bylaws grant the Commissioner a highly discretionary and grossly encompassing authority to exercise his or her power without much supervision.

The NFL Player Contract provides similar language and serves as a vehicle for the Commissioner to convey his authority to players. Paragraph 15 of the NFL Player Contract states:

The “[p]layer recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players . . . or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving [the] Player the opportunity for a hearing at which he may

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

be represented by counsel of his choice, to fine [the] Player in a reasonable amount; to suspend Player for a period certain or indefinitely<sup>20</sup>

Players are thus bound by their individual contracts as well as the CBA.

#### EXPANSION OF POWER

In December of 2014, the NFL released a revised Personal Conduct Policy that included several new measures worth noting.<sup>21</sup> For instance, one provision stated that “*everyone* who is part of the league must refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL.”<sup>22</sup> Following that, the new measures include, among others, (1) independent investigative procedures; (2) an expert group of outside advisors to review and evaluate potential violations and consult on other elements of the policy; (3) violations of the Personal Conduct Policy regarding assault, battery, domestic violence or sexual assault that involve physical force will ‘result in a six-game suspension without pay for a first offense’; and (4) an appeals process pursuant to Article 46 (Commissioner Discipline) of the Collective Bargaining Agreement where the commissioner may name a panel that consists of independent experts to participate in deciding an appeal.<sup>23</sup> The NFL uses this policy to handle offenses specifically related to domestic violence, child abuse, and drug/substance abuse.<sup>24</sup>

On February 15, 2014, then-Baltimore Ravens player Ray Rice was arrested on assault charges against his then-fiancée, Janay Palmer, in an Atlantic City casino.<sup>25</sup> After a disciplinary hearing, the NFL handed Rice a written notice, explaining that the NFL had suspended him for two games in

<sup>20</sup> NFL PLAYER CONTRACT APPENDIX A ¶ 15, available at [http://ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/APPENDIX\\_A\\_player\\_contract\\_.pdf](http://ipmall.info/hosted_resources/SportsEntLaw_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/APPENDIX_A_player_contract_.pdf).

<sup>21</sup> *NFL Owners Endorse New Personal Conduct Policy*, NFL.COM (Dec. 10, 2014, 01:40 PM), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>

<sup>22</sup> See NATIONAL FOOTBALL LEAGUE PERSONAL CONDUCT POLICY (Dec. 2014), available at <https://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> See *NFL Owners Endorse New Personal Conduct Policy*, *supra* note 18.

<sup>25</sup> See Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBINATION (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens#>.

the upcoming season.<sup>26</sup> Shortly after announcing the suspension, Goodell was criticized for being too lenient. In response, he admitted he “didn’t get right”.<sup>27</sup> Goodell then sent a memo to all NFL personnel, informing them that he would introduce a new Domestic Violence Policy which would be effective immediately.<sup>28</sup> On September 8, 2014, a video surfaced, which showed Ray Rice actually striking his then-fiancée.<sup>29</sup> The NFL banned Mr. Rice indefinitely, claiming that the NFL changed its suspension because it had acquired new evidence.<sup>30</sup> Mr. Rice appealed this new suspension and requested that Commissioner Goodell not preside over the hearing because of his involvement in the investigation.<sup>31</sup> Crucially though, Commissioner Goodell testified at Mr. Rice’s appeal in November anyways.<sup>32</sup>

This is not the first time Commissioner Goodell exceed the scope of his authority on disciplinary matters. In 2012, the Commissioner aggressively pursued the New Orleans Saints over allegations that players were offered monetary awards for intentionally injuring other players—in a scandal known as “Bounty-Gate”.<sup>33</sup> He fined the Saints \$500,000 and two second-round draft picks.<sup>34</sup> He suspended Head coach Sean Payton was suspended for an entire season, an unprecedented suspension in league history; General Manager Mickey Loomis was suspended for eight games; Assistant Coach Joe Vitt, for six-games; Defensive Coordinator Gregg Williams, indefinitely; Linebacker Jonathan Vilma, an entire season; Linebacker Anthony Hargrove, eight games; Linebacker Will Smith, four games; and Linebacker Scott Fujita, three games.<sup>35</sup> Shortly after the Commissioner handed down the suspensions and fines, there were

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Tom Pelissero & Gary Milhoses, *Ray Rice Cut by Ravens, Suspended by NFL Indefinitely*, USA TODAY (Sept. 8, 2014), <http://www.usatoday.com/story/sports/nfl/ravens/2014/09/08/baltimore-ravens-cut-ray-rice/15291729/>.

<sup>30</sup> See Bien, *supra* note 22.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Damien Cox, *NFL Commissioner Roger Goodell Won’t Say Sorry Over Bounty-Gate*, TheStar (Dec. 14, 2012), [http://www.thestar.com/sports/football/2012/12/14/nfl\\_commissioner\\_roger\\_goodell\\_wont\\_sorry\\_over\\_bountygate\\_cox.html](http://www.thestar.com/sports/football/2012/12/14/nfl_commissioner_roger_goodell_wont_sorry_over_bountygate_cox.html).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

immediate calls for Commissioner Goodell to be recused from handling the appeal because he, as part of the investigation, had prejudged the case.<sup>36</sup> Amid the controversy, Commissioner Goodell handed the appeal process over to former NFL Commissioner, Paul Taglibue, who in a 22-page denounced Goodell's mishandling of the entire case.<sup>37</sup> Former-Commissioner Taglibue overturned several of the suspensions, highlighting that there had not been any proof that the Saints engaged in any illegal activities: "If the League wishes to suspend a player for pre-game talk including 'offers' to incentivize misconduct, it must start by imposing enhanced discipline for illegal hits that involve that kind of player misconduct that it desires to interdict."<sup>38</sup>

Further, in March of 2015, District Court Judge David Doty overturned the NFL arbitrator's denial of Minnesota Vikings player Adrian Peterson's appeal.<sup>39</sup> The court expressed, in a 16-page ruling, that the arbitrator (who Commissioner Goodell hand-picked) "simply disregarded the law of the shop and in doing so failed to meet his duty" under the CBA.<sup>40</sup> The order noted that Henderson exceeded his authority as arbitrator when he retroactively applied the new, harsher Personal Conduct Policy: "[n]othing in the record supports a finding that the NFLPA asked Henderson to determine whether the discipline imposed was consistent with the previous Policy. Moreover, Henderson's conclusion that the New Policy is consistent with the previous Policy is contradicted by the Commissioner's own statements in which he acknowledged that the New Policy included 'changes' to the policy."<sup>41</sup> The court granted the petition to vacate the arbitration award and remanded the case for further proceeding consistent with the order and the CBA.<sup>42</sup>

With such an exhaustive list of incidents where Goodell asserts his ever-expansive authority, it is not surprising that the most recent scandal, known commonly as "Deflategate", calls into question of whether the Commissioner has gone too far. Deflategate elevates the Commissioner's power to an unprecedented level.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *National Football League Players Ass'n v. National Football League*, 88 F.Supp.3d 1084, 1086, 202 L.R.R.M. (BNA) 3450 (D. Minn. 2015).

<sup>40</sup> *Id.* at 1091.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1092.



*BACKGROUND OF THE CASE*

After the American Football Conference (“AFC”) Championship Game on January 18, 2015, the NFL launched its investigation into the alleged deflated game balls used during the first half of the game.<sup>43</sup> The NFL announced on January 23, 2015 that it would retain Theodore Wells as lead investigator.<sup>44</sup> On May 6, 2015, the NFL published the report (“Wells Report”), which made the following findings. First, it found the New England Patriots personnel to have “participated in violation of the Playing Rules and were involved in a deliberate effort to circumvent the rules.”<sup>45</sup> Specifically, Patriots Officials Locker Room Attendant, Jim McNally, and Patriots Equipment Assistant John Jastremski were both found to have participated in a deliberate effort to release air from the footballs after the footballs were examined by the referees prior to the start of the game.<sup>46</sup>

Second, the investigation found that Tom Brady, quarterback of the Patriots, was “more probable than not” and “at least be generally aware” of Mr. McNally and Mr. Jastremski’s actions.<sup>47</sup> Although the Wells Report noted the lack of tangible evidence linking Brady to the deflation, it nevertheless concluded that Brady must have been involved because “it is unlikely” that the equipment assistant and locker room attendant would deflate footballs “without Brady’s knowledge or approval.”<sup>48</sup>

Third, the Wells Report exonerated the Patriots ownership, head coach Bill Belichick, other Patriots coaches, head equipment manager, and all other Patriots players and employees were exonerated.<sup>49</sup>

Fourth, scientific consultants determined that the decrease in air pressure was likely not a result of basic scientific principles, including

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<sup>43</sup> Elliott McLaughlin, *What the Heck is Deflategate Anyway?*, CNN (Jan. 23, 2015), <http://www.cnn.com/2015/01/22/us/nfl-patriots-deflategate-rules/>

<sup>44</sup> Susana Kim & Aaron Katersky, *Deflategate: NFL Probing Whether New England Patriots Used Deflated Balls*, ABC News (Apr. 12, 2015), <http://abcnews.go.com/Sports/deflategate-nfl-investigating-england-patriots-deflated-balls/story?id=28322679>

<sup>45</sup> Report from Theodore V. Wells Jr., *Investigative Report Concerning Footballs Used During The AFC Championship Game on January 18, 2015*, 2, available at <https://nflabor.files.wordpress.com/2015/05/investigative-and-expert-reports-re-footballs-used-during-afc-championsh.pdf> (May 6, 2015).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 17-19.

<sup>48</sup> *Id.* at 16-17.

<sup>49</sup> *Id.* at 122.

primary gas laws. The consults concluded that the data “alone did not provide a basis for them to determine with absolute certainty whether or not there was or was not tampering.”<sup>50</sup>

Shortly after the Wells Report was published, Executive Vice President of the NFL, Troy Vincent, wrote two letters, one to Patriots owner, Robert Kraft, and the other to Brady.<sup>51</sup> The letter to Mr. Kraft first explained that the NFL has determined that employees of the Patriots organization violated the NFL's official playing rules in a deliberate effort to deflate footballs.<sup>52</sup> The letter then sanctioned the Patriots with two punishments. First, a fine of \$1,000,000, along with a loss of a first round draft pick in 2016 and a fourth round draft pick in 2017.<sup>53</sup> Second, employees McNally and Jastremski were both barred from any participation in preparation of football games. The employees may be reinstated, but only with Mr. Vincent's approval.<sup>54</sup>

The letter to Brady entailed a similar explanation. The NFL had determined that Brady would be disciplined for his role in the deflated football game.<sup>55</sup> Brady would be suspended for four games for his general awareness of the incident and for his failure to cooperate fully and candidly.<sup>56</sup> Accordingly, the letter noted that the disciplinary actions were handed down by the Commissioner pursuant to Article 46 of the Collective Bargaining Agreement and the NFL player contract.<sup>57</sup>

#### *THE ARBITRAL PROCESS*

On May 14, 2015, Brady, through the National Football League Players Association (“NFLPA”), declared he would appeal his four-game suspension.<sup>58</sup> Four days later, Patriots owner Kraft announced that the Patriots would reluctantly accept the sanctions.<sup>59</sup> Upon receiving Brady's appeal, Commissioner Goodell quickly designated himself as the arbitrator

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<sup>50</sup> *Id.* at 9-12, 131.

<sup>51</sup> National Football League Mgmt. Counsel v. National Football League Players Assoc., \_\_\_ F.Supp.3d \_\_\_, 7, 2015 WL 5148739 (S.D.N.Y. 2015) (hereinafter NFL).

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

to handle the appeal, pursuant to CBA Article 46, Section 2(a), which provided that “the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.”<sup>60</sup> Brady immediately filed a motion for recusal, arguing: (1) Commissioner Goodell cannot lawfully arbitrate in a CBA violation matter by delegating disciplinary powers to Vice President Vincent; (2) Goodell cannot lawfully arbitrate in a matter where he was a central witness; (3) Goodell cannot lawfully arbitrate in a matter in which he had publicly prejudged; and (4) Goodell cannot lawfully arbitrate in a matter in which he could implicate the competence and credibility of the NFL staff.<sup>61</sup> On June 2, 2015, Commissioner Goodell issued his decision on the motion to recuse and denied the motion to recuse on the grounds that the CBA granted him the discretion to serve as the hearing officer in any appeal that involved conduct detrimental to the integrity of the game.<sup>62</sup>

Furthermore, Brady and the NFLPA filed several motions for discovery, first requesting “all documents created, obtained, or reviewed by NFL investigators (including by Mr. Wells and his investigative team at the Paul, Weiss firm and NFL security personnel) in connection with the Patriots investigation (including all notes, summaries, or memoranda describing or memorializing any witness interviews).”<sup>63</sup> Brady also filed a motion to compel the testimonies of NFL Executive Vice President and General Counsel, Jeff Pash, and Ted Wells regarding the NFL’s involvement in the Paul, Weiss firm’s work in connection with the investigation and the League’s prior punishment or lack of punishment of alleged or actual violations of the NFL playing rules and incidents involving an alleged failure to cooperate.<sup>64</sup>

Interestingly, Commissioner Goodell denied the requests for discovery but granted, in part, the motion to compel the testimonies. As to the denial for discovery, Goodell based his decision on two arguments. First, he cited to Article 46 of the CBA, which provides that “in appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing.”<sup>65</sup> Second, Goodell stated that he did not review any of the interview notes or

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 6.

<sup>62</sup> *Id.* at 6-7.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 7-8.

any documents produced by the Paul, Weiss firm, nor did the interview notes and documents play any role in his disciplinary decisions.<sup>66</sup> Goodell firmly stated that his decisions were solely guided by the Wells Report.<sup>67</sup> Based on these arguments and his own interpretation of the language and meaning of the CBA, Goodell denied the motion for discovery.<sup>68</sup> Goodell also denied the motion to compel Pash's testimony, arguing that the CBA grants him discretion to determine whether a witness' is necessary for a hearing to be fair, based on the scope of the witness presentation.<sup>69</sup>

But, even though Goodell denied both the request for documents and testimony of Pash, he granted the Wells testimony. Goodell explained this decision in a confusing and contradictory manner, stating that although Pash was the NFL's general counsel, Pash did not have any first-hand knowledge of the Patriots investigation that led to Brady's discipline.<sup>70</sup> Instead, Pash's role was merely limited to facilitating access by Mr. Wells to witnesses and documents.<sup>71</sup> Wells, on the other hand, had been directly involved with the investigation, and under Goodell's determination, his testimony was thus relevant and necessary.<sup>72</sup>

On July 28, 2015, Commissioner Goodell released a 20-page final decision award ("Final Award") upholding Brady's four-game suspension.<sup>73</sup> The Final Award declared that in any appeal concerning the Commissioner's disciplinary action, the hearing officer must give deference to the findings of the disciplinary decision under review, even if the hearing officer happens to be the Commissioner.<sup>74</sup> It noted that the Commissioner was compelled by standards of fairness and consistent treatment of players in similar situations.<sup>75</sup> It explained that the Commissioner considered the scientific testimonies, along with all the evidence in the record from both the Wells Report and the arbitral during the decision-making process.<sup>76</sup> It determined

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 8-9.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

that it was unlikely Mr. McNally and Mr. Jastremski, as the assistant equipment manager and locker room attendant, respectively, would have personally and unilaterally engaged in tampering with the game footballs without Brady's knowledge and approval.<sup>77</sup> The Final Award emphasized that Brady's instruction to his assistant to destroy his cell phone that he had been using since early November 2014 played a significant role.<sup>78</sup> And finally, it concluded that the critical conduct was Brady's willful destruction of potential relevant evidence, and that such conduct goes well beyond Brady's failure to respond or fully cooperate with the investigation.<sup>79</sup>

Relying on the Final Award findings, the Commissioner made conclusions that sharply differed than what was first explained to Brady. In contrast to the letter written to Brady earlier, which stated that Brady had a general awareness, the final decision concludes that Brady "knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr. Jastremski's support, Mr. McNally tampered with game balls."<sup>80</sup> The Commissioner argued that because neither the NFL nor the NFL club members had authority to compel production of specific and relevant materials to the investigation, Brady's willful destruction of potentially relevant evidence was detrimental conduct, subject to discipline such as a reasonable fine, suspension for a period of certain or indefinite time, or termination of the his contract.<sup>81</sup> The Commissioner determined that all the evidence pointed to conduct detrimental to the integrity and public confidence in the game of professional football without further explanations.<sup>82</sup>

#### *STANDARD OF REVIEW FOR AWARDS OF FINAL DECISIONS IN ARBITRATION*

To determine whether a court may make an arbitration award, one must first examine the plain statutory language of the Federal Arbitration Act ("FAA"). Enacted in February 12, 1925 and codified at 9 U.S.C. Section 10, the statute explicitly provides four scenarios where an award may be vacated: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 9.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>83</sup> Unless a court found evidence of any of the four circumstances, great deference is given to an arbitration decision under CBAs in professional sports.<sup>84</sup>

The Supreme Court, in the Steelworks trilogy of the 1960's, established the current deferential standard of review for arbitration awards.<sup>85</sup> In the latest case of the trio, *United Steelworkers of America v. Enter. Wheel and Car Corp.*, the Court reversed the circuit court's decision to review an award of final decision.<sup>86</sup> The Court held that the proper approach for courts was to deny review of an arbitration award unless the arbitrator's decision did not manifest the essence of the CBA by means of the arbitrator dispensing his own brand of industrial justice.<sup>87</sup> In essence, the Court carved out the lone exception to an otherwise deferential standard of review regarding arbitration awards made under a CBA.

#### DISTRICT COURT OPINION

In a 40-page opinion, Judge Berman vacated Commissioner Goodell's award of final decision, holding that: (1) Brady was not given adequate notice to his potential discipline (four-game suspension) and his alleged misconduct; (2) Brady was denied the opportunity to examine of the lead investigators, Jeff Pash; and (3) Brady was denied equal access to the investigative files, including witness interview notes.<sup>88</sup> The Court found that the award failed to draw its essence from the collective bargaining

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<sup>83</sup> 9 U.S.C. §§ 10(a)(1)-(4) (2002).

<sup>84</sup> See Hannah Gordon, *In the Replay Booth: Looking at Appeals of Arbitration Decisions in Sports Through Miami Dolphins v. Williams*, 12 HARV. NEGOT. L. REV. 503, 507 (2007).

<sup>85</sup> See *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960).

<sup>86</sup> 363 U.S. at 594.

<sup>87</sup> *Id.*

<sup>88</sup> NFL *supra* note 9, at 11.

[Vol. 17: 181, 2017]

*Conduct Detrimental*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

agreement and that the Commissioner's denial of relevant documents was fundamentally unfair and in violation of the FAA.<sup>89</sup>

*INADEQUATE NOTICE OF DISCIPLINE AND MISCONDUCT*

The court found that the NFL did not give Brady any notice that his alleged participation in the deflated footballs would warrant a four-game suspension.<sup>90</sup> In Vincent's letter to Brady, there was no specific determination of what Brady's discipline was to both his alleged refusal to fully cooperate and his alleged participation in the deflation.<sup>91</sup> But, Commissioner Goodell cited to the Steroid Use Policy as his reasoning for establishing Brady's four-game suspension.<sup>92</sup> The court rejected Goodell's reliance on the collectively bargained steroid policy as the applicable standard in the case because the policy was *sui generis* and not reasonably comparable to the alleged ball deflation and non-cooperation.<sup>93</sup> The court went on to explain that the steroid policy was a completely separate entity that was designed to protect player's health.<sup>94</sup> The steroid policy had nothing to do with alleged misconduct of game equipment, nor did it have anything to do with non-cooperation.<sup>95</sup>

As to Brady's alleged failure to cooperate and alleged obstruction to the investigation, the court again found no notice. Furthermore, the court determined that, based on the available evidence, there had never been any suspension levied onto a player for failing to cooperate or obstructing the investigation.<sup>96</sup> The court then analyzed whether there had been any discernible infraction on the part of Brady and found that no player had ever been suspended based on an alleged general awareness to a violation of the playing rules.<sup>97</sup> The court relies primarily on the findings in the Wells Report and the initial letter sent to Brady, but does not mention the findings and conclusions of Commissioner Goodell's final arbitration award.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 11-12.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 12.

<sup>96</sup> *Id.* at 13.

<sup>97</sup> *Id.* at 13-14.

The court also found that Commissioner Goodell's reliance on the NFL's "conduct detrimental policy" misplaced. The Commissioner argued in the Final Award that he provided Brady adequate notice because Brady was aware of what constituted conduct detrimental to the league.<sup>98</sup> The court disagreed, holding that Brady should have been given notice of his potential discipline based on the Player Policy regarding equipment violation, and not based on the Competitive Integrity Policy.<sup>99</sup> According to the Players Association, the Wells investigation was undertaken pursuant to the Section A2 of the Game Operations Manual found in the Policy on Integrity of the Game & Enforcement of Competitive Rules, which is only provided to the chief executives, club presidents, general managers, and head coaches.<sup>100</sup> The court held that not only was Brady not served a notice of the manual and its guidelines for disciplinary actions, but also distinguished Brady's alleged detrimental conduct from that of the Ray Rice and Adrian Peterson cases.<sup>101</sup> In those cases, the respective courts found that the players "could, perhaps, be said to appreciate that acts of domestic violence might be deemed 'conduct detrimental'" because the Player Policies provided specific provisions on what constitutes detrimental conduct and procedures on giving notice.<sup>102</sup>

In essence, the court found that although the NFL gave Brady notice, the notice was inadequate. The court concluded that the four-game ban based on the steroid policy was not applicable to footballs deflated during a game, despite the Commissioner's testimony that the most reasonable interpretation of the CBA was to apply the closest personnel disciplinary standard that was available.<sup>103</sup> Instead, the court found no discernible infraction of Brady's alleged non-cooperation to the investigation; however, the court did not rely on Commissioner Goodell's final award.<sup>104</sup> Rather, the court supported its finding based on its interpretation of the Wells Report and other documents prior to the final award.<sup>105</sup>

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<sup>98</sup> *Id.* at 15-16.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* See National Football League Players Assoc. v. National Football League, 88 F.Supp.3d 1084, 1086, 1088 (D. Minn. 2015).

<sup>102</sup> NFL *supra* note 9, at 16.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*



*BRADY DENIED OPPORTUNITY TO EXAMINE LEAD INVESTIGATOR JEFF PASH AND PERTINENT DOCUMENTS*

In addition to the inadequate notice provided to Brady, the court also found Commission Goodell's arbitral decision to be fundamentally unfair and in violation of the FAA.<sup>106</sup> The court noted that while arbitrators "need not follow all the niceties observed by the federal courts" when determining what evidence to hear and are not required to hear all the evidenced proffered by a party, they must give each of the parties an adequate opportunity to present its evidence and argument.<sup>107</sup> In the NFL arbitration context, the court noted that recent NFL precedent established that a fundamentally fair hearing provided the players an opportunity to confront their investigators.<sup>108</sup> Citing the Ray Rice case, the court agreed with the holding that "to limit the available witnesses knowledgeable about the content of that meeting to the individuals the NFL is willing to produce would prevent Mr. Rice from presenting his case and runs the risk of providing an incomplete picture of the content of a meeting that both parties have identified as critical."<sup>109</sup> Significantly, the court found that Mr. Pash, for his roles as executive vice president and general counsel, as well as the co-lead investigator, would logically have valuable insight into the drafting and production of the Wells Report.<sup>110</sup> The court determined that Brady was prejudiced by the lack of access into what could be reasonably inferred as a crucial witness and held that the issues known to Pash constituted evidence plainly pertinent and material to the controversy.<sup>111</sup> The court was troubled by the inability of Brady to challenge the "independent" nature of the investigation.<sup>112</sup>

As to denying access to the investigative files, the court held on similar grounds that such a denial was so fundamentally unfair that it prejudiced Brady and violated the FAA.<sup>113</sup> The court argued that the interview notes formed the basis for the Wells Report and may have

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<sup>106</sup> *Id.* at 17.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 18.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 19.

contained material that facilitated his cross-examination by the Paul, Weiss attorneys.<sup>114</sup> The fact that Brady was unable to challenge his suspension due to a lack of access to relevant files also raised concerns about whether the investigation was independently done.<sup>115</sup> The NFLPA argued a conflict of interest in that Paul, Weiss had been the NFL's retained counsel for some time, and was assigned to spearhead the Deflategate investigation.<sup>116</sup> The court ultimately found for Brady, applying established precedent as well as principles of fairness.

*ISSUES THE COURT DID NOT ADDRESS*

Because the court reached its holding based on interpretation on the well-established standard of review for final arbitration awards, it did not address the following issues: (1) whether Commissioner Goodell was "evidently partial" within the meaning of 9 U.S.C. Section 10(a)(2); (2) whether Goodell based his factual conclusion on the evidence from the Wells Report or his own interpretation of the controversy; and (3) whether Goodell's public statement lauding the reliability of the Wells Report rendered him incapable of reaching a contrary conclusion in Brady's appeal and undermined his competency as commissioner.<sup>117</sup>

All of the issues the District Court dismissed fell squarely within the Supreme Court's precedent and well-established statutory interpretations for review of arbitral decisions under CBAs. Had the court addressed the evidently partial issue, the court would have had a clear and proper ground for vacating the award because evidently partiality is one of the narrow exceptions explicitly provided in 9 U.S.C. Section 10(a)(2). In this case, Brady filed a motion to recuse Commissioner Goodell because of the Commissioner's active role in the investigation. Further, Brady pointed out that the Commissioner had publicly prejudged his attitude to the incident. These two facts alone should have prompted the court to find that the Commissioner abused his power.

Similarly, the court would have had a stronger analysis by deciding whether the Commissioner distributed his own industrial brand of justice, rather than finding on the grounds of inadequate notice. The holding that the

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 20.

NFL failed to provide Brady with a sufficient notice may be, at best, be inferred to address whether Goodell had failed to draw from the essence of the collective bargaining agreement. But, given the amorphous nature of the facts, a higher court of review could reject the holding for lack of solid judicial foundation. For example, the record nevertheless showed that Goodell provided Brady notice, however inadequate it may have been. Instead, the court could have used the Ray Rice, Adrian Peterson, and the New Orleans Saints cases in support of finding the Commissioner's inclinations to dispense his own brand of justice. These cases are compelling evidence that the Commissioner has a history of reaching beyond his mandated authority in order to carry out his disciplinarian role.

This, along with the court's analysis over the fundamental unfairness argument regarding Brady's inability to access investigative documents and Pash's testimony do not necessarily fall within the established standard of review. More likely, the holding suggests that the court is moving away from the deferential standard and towards a standard where the court may intervene if there is evidence of fundamental unfairness. But, if the court was able to expand its involvement in vacating final arbitration awards, how much expansion would be appropriate? If the standard is adjusted to accommodate the standard established in this holding, courts would be able to interject an unfavorable final arbitration award based on notions of equity and notions of fairness. Regardless of what the trend will be in the future, this case presented a unique situation where the court based its findings primarily on legal and procedural grounds but opened a potential area for reform, all based on the actions of one man.

#### *DISCUSSION*

To understand the gravity of how egregious the Commissioner's conduct was, it is helpful to look at the evolution of the NFL's CBA. From 1956, when the NFLPA was formed, until the early 1970's, the NFL only faced minor issues such as pension contributions, post-season compensation, and grievance procedures.<sup>118</sup> Then in 1974, the NFL experienced its first significant strike, which lasted forty-four days and left the NFLPA split and underfunded.<sup>119</sup> At issue in this strike was whether the Rozelle Rule, which

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<sup>118</sup> C. Peter Goplerud III, *Collective Bargaining In the National Football League: A Historical and Comparative Analysis*, 4 Vill. Sports & Ent. L.J. 13, 16.

<sup>119</sup> *Id.* at 17.

governed player free agency, violated antitrust laws.<sup>120</sup> At the time, players were allowed to negotiate with other teams when their contracts had expired.<sup>121</sup> But, the new team had to compensate the old team for the loss of the player, and if the teams could not reach an agreement over the cash or players used as compensation, then-Commissioner Pete Rozelle, would determine the compensation.<sup>122</sup> Commissioner Rozelle, for the most part, denied player movement because he was concerned that few rich teams would dominate the league and create a loss of fans and revenue.<sup>123</sup> The Eighth Circuit in *Mackey v. NFL*<sup>124</sup> held that free agency pertained to a mandatory subject of collective bargaining, and to deny proper negotiations was a restraint of trade in violation of the Sherman Antitrust Act.<sup>125</sup> Specifically, the court made the inquiry of “whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.”<sup>126</sup> The court rejected the NFL’s contention that that players would “flock to cities having natural advantages such as ‘large economic bases, winning teams, warmer climates and greater media opportunities.’”<sup>127</sup> Instead, the court found that the Rozelle Rule was “significantly more restrictive than necessary to serve any legitimate purposes.”<sup>128</sup>

The same case could be made for Goodell’s contention that what the Patriots and Brady did were in violation of the language of the Personal Conduct Policy, the Player Contract, and CBA—that the deflating of footballs was “conduct detrimental” to the interests and integrity of the NFL. This line of reasoning can even be argued to serve a legitimate business purpose—fair games with no unfair advantages to either team would solidify the public’s perception that the NFL is about integrity and honest play. But, if an appellate court followed the *Mackey* decision and took notice of Goodell’s history in handling disciplinary cases, it would be hard to imagine a decision favorable to the NFL. The single comparison that can be drawn between the Rozelle Rule and Goodell’s disciplinary actions is that both

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 18.

<sup>123</sup> *Id.*

<sup>124</sup> 543 F.2d 606 (8th Cir. 1976).

<sup>125</sup> *Id.* at 609.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 618.

<sup>128</sup> *Id.* at 621.

showcased the consequence of granting the commissioner almost absolute discretion over the management of the NFL.

During the 1980's, the NFLPA and NFL clashed once again,<sup>129</sup> this time, over the percentage of the revenue that should be set aside for the players and free agency once again. After a fifty-seven day strike that began September 21, 1982, the two parties finally signed a new CBA.<sup>130</sup> In which the team owners and the NFL continued to refuse the concept of the free agency.<sup>131</sup> Rather, they adopted a right of first refusal system, which along with established minimum salaries escalating with seniority, and a guarantee of right for players to use agents.<sup>132</sup> Overall, this was considered a failure by the NFLPA and a win by the owners and the NFL.<sup>133</sup>

Fast forward to the current CBA structure and the protruding issue is clearly over the Commissioner's power. The language of the CBA that governs the Commissioner's role as a disciplinary is far too broad and subjective. From an organizational standpoint, it makes sense to have an authoritative figure who can regulate without too much red tape. However, there needs to be a check and balance system in place to prevent abuses of power. Much like our federal system, there should be a legislative board that enacts all the rules and regulations of the NFL. The board would be composed of two bodies so the players, team owners, and the NFL are equally represented. Critically, there also needs to be an independent oversight committee that can interpret rules, regulations, and decisions of the two other branches, much like the Supreme Court.

In order to implement this system, though, team owners must play a bigger role. During the CBA negotiations, team owners and the NFL executives work closely with representatives from the NFLPA. As such, they are generally aware of the terms in the CBA. Given that presumption, the NFLPA and owners should form a regulatory body that provides oversight for the NFL. It is illogical to have the NFL govern itself, especially when the Commissioner has shown instances of abuse of power. While the argument could be made that the team owners wanted the Commissioner to have expansive authority to run the league, it is clear from the aftermath of Deflategate that even team owners could be implicated. Team owners should seriously consider the sanctions and public image

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<sup>129</sup> Goplerud III, *supra* note 114, at 24.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; see also Robert C. Berry et. al., Labor Relations in Professional Sports 92-96 (1986).

injuries levied on the Patriots and the Saints as a fair warning to how far the Commissioner will go to enforce his discipline.

*SECOND CIRCUIT OPINION*

On April 26, 2016, the Second Circuit reversed the District Court's opinion and remanded the case with instructions to confirm the arbitration award, reinstating Brady's suspension. The appellate court took a narrow approach to overturn the decision. It held that "the basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law. Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been three games or five games at all."<sup>134</sup>

Though the District Court decision was overturned, it does not change the overall question of this Note: whether or not Commissioner Goodell exceeded the scope of his authority. In fact, the Second Circuit implicitly acknowledged that the Commissioner cannot be challenged given the amount of deference given to the arbitral process. Perhaps we must also reexamine whether our judicial system is capable of reviewing labor cases where this is a blatant abuse of power.

*CONCLUSION*

Although the current CBA was signed only a few years ago, there is already an emergence of issues that must be addressed in the next round of negotiations. The Commissioner role must be reexamined and restructured so that incidents like Deflategate do not cripple the growth of the NFL. The NFLPA, team owners, and executives of the NFL must explore and integrate a type of check and balance system to ensure no one party may freely exercise his or her authority without hindrance. As it stands right now, the current CBA is subject to abuse of discretionary power from the Commissioner. The history of CBA in the NFL has shown that players are not afraid to strike, and given the profitability of the NFL enterprise, it would be conduct detrimental to the league if reform is not in place.

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<sup>134</sup> National Football League Mgmt. Council v. National Football League Player's Assn', Nos. 15-5916, slip op. at 33 (2d Cir. 2016).

[Vol. 17: 181, 2017]

*Conduct Detrimental*

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL