Deflategate Revisited: Over-Inflated Commissioner Authority Undermines the NFL's Disciplinary Process

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I. INTRODUCTION

Arbitration provides labor unions and employers several benefits. It offers an expedient, less expensive, and private method for settling internal disputes between a labor union and business.[1] Crucially, it delivers finality for the parties.[2] Arbitration proceedings also aid in ensuring that courts, which lack subject matter expertise, do not intervene.[3] The "Deflategate" debacle—which is still receiving media attention[4]—provides an excellent avenue to examine the importance of collective bargaining in professional athletics. More specifically, the need to bargain for a fair disciplinary process for athletes accused of wrongdoing. Such a simple allegation—the under-inflation of footballs—led to a public legal battle that cost the National Football League (NFL), NFL Players Association (NFLPA), and New England Patriots an estimated $22.5 million collectively.[5]

Quarterback Tom Brady's (Brady) case served as an illuminating spotlight on the deficiencies of the NFL's disciplinary process, a process which the NFLPA quite literally bargained for. It could have led to meaningful change, but it did not. More broadly, the entire Deflategate debacle is informative for all unions engaged in collective bargaining. Despite its team of lawyers, the NFLPA chose not to focus on the disciplinary procedures, helping to create an unfair process. As a result, the

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[1] Steve J. Ahn, *The "Industrial Law of the (NFL) Shop": How Arbitration Advantages Played Out in the "Deflategate" Controversy*, 71 DISP. RESOL. J. 147, 148 (2016).

[2] *Id.*

[3] *Id.*

[4] *See* Tyler Sullivan, *New Deflategate revelations paint the NFL in a bad light during infamous saga with Tom Brady and Patriots*, CBS SPORTS (Feb. 7, 2022, 11:40 AM), https://www.cbssports.com/nfl/news/new-deflategate-revelations-paint-the-nfl-in-a-bad-light-during-infamous-saga-with-tom-brady-and-patriots/; Kevin Seifert, *What really happened during Deflategate? Five Years Later, the NFL's 'Scandal' Aged Poorly*, ESPN (Jan. 18, 2020), https://www.espn.com/nfl/story/_/id/28502507/what-really-happened-deflategate-five-years-later-nfl-scandal-aged-poorly; Darren Hartwell, *Report: NFL Covered Up Key Deflategate Evidence that Favored Pats*, NBCSPORTS.COM (Feb. 7, 2022), https://www.nbcsports.com/boston/patriots/report-nfl-covered-key-deflategate-evidence-favored-patriots.

[5] Darren Rovell, *Estimated Deflategate Cost: $22.5 Million*, ESPN (June 1, 2016), https://www.espn.com/nfl/story/_/id/15873396/nfl-estimated-deflategate-cost-22-million-tom-brady-new-england-patriots-roger-goodell.

Commissioner can dictate what punishment will be ordered and preside over any appeals of his decision. Further he has the authority, *inter alia*, to determine what evidence may be brought and the scope of discovery. Meanwhile, any appeals to the court system inevitably result in affirmation of the Commissioner's decision because of the judicial deference to arbitration agreements as bargained for by the parties. If an unfair disciplinary process can be accepted by the parties in the NFL, it can happen in collective bargaining agreements for any labor organization.

This note aims to examine the role of arbitration in the NFL's disciplinary process. Specifically, how the NFL Collective Bargaining Agreement (CBA) grants the Commissioner (Goodell) broad authority to determine punishment and hear any appeals concerning that punishment. Deflategate should have served as a lesson to the NFLPA that the disciplinary process it agreed to was fundamentally flawed in that it granted the Commissioner broad power to discipline players as he saw fit, with little to no review of his decisions. Yet, the organization still failed to advocate for improvements to that process in the recently approved CBA that took effect at the start of the 2022 season. This note will examine the controlling law around arbitration of disputes under CBAs, the NFL's process under the old CBA (which was in force from 2011-2021), the facts of Brady's case, the reasoning of the Court of Appeals for the Second Circuit for refusing to vacate Brady's suspension, the disciplinary process for other professional sports leagues, and the process under the new NFL CBA. With this foundation, the note will provide critical recommendations that the NFLPA can bargain for in the next iteration of the NFL CBA that will enhance fairness and minimize negative public perception that damages the players and the league.

II. LEGAL BACKGROUND

A. Labor Management Relations Act

In 1947, the Labor Management Relations Act[6] (LMRA, also known as the Taft-Hartley Act) amended the National Labor Relations Act[7] (NLRA).[8] The LMRA governs disputes involving the assertion of rights under a collective bargaining agreement.[9] It promotes "industrial stabilization through the collective bargaining agreement," and emphasizes the private arbitration of grievances.[10] Further, it seeks to avoid government

[6] Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–44, 167, 171–75, 175a, 176–83, 185–87.

[7] National Labor Relations Act, 29 U.S.C. §§ 151–69.

[8] *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited May 12, 2022).

[9] Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

[10] United Steelworkers Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

intervention in labor disputes, instead preferring private resolution by the parties.[11]

Arbitration agreements are the result of negotiations between parties, and therefore reflect their "priorities, expectations, and experience."[12] Arbitrators are selected by the parties because of their expertise and ability to "interpret and apply [the] agreement in accordance with the 'industrial common law of the shop.'"[13] The careful bargaining of the parties to draft a CBA and select an arbitrator results in courts reviewing arbitration awards in a very limited manner.[14] Further, courts are not permitted to review arbitrator decisions on the merits, even if there are allegations that the decision is based on factual errors or misinterpretations of a party's arguments. Instead, courts only look to see if the arbitrator acted within the scope—as defined in the CBA—of his authority. So long as the award "'draws its essence from the collective bargaining agreement' and is not merely the arbitrator's 'own brand of industrial justice,'" the courts must affirm it.[15] When the arbitrator acts within the scope of his authority, and one of the parties is unsatisfied with his decision, the solution is not judicial intervention. Instead, the parties need to draft their agreement to reflect the scope of power they wish the arbitrator to have.[16]

This standard for judicial review of arbitration awards—whether the arbitrator acted within the scope of his authority, and whether the award draws its essence from the CBA and is not the arbitrator's own brand of industrial justice—is an appropriate standard for determining if vacatur is awarded. Labor arbitration is a substitute for industrial strife, and finality is crucial in fostering peaceful settlements of disputes between union leaders (NFLPA) and management leaders (NFL) who are locked into a contractual relationship that cannot end because neither side can function without the other.[17] If unions or companies could seek judicial review of arbitration awards more easily, the incentive to resolve disputes quickly and privately would be lost, which would increase the risk of labor strife and disrupt commerce (e.g., the NFL Lockout of 2011).[18] Therefore, courts should be deferential, and vacate awards on a limited basis.

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[11] 29 U.S.C. § 171. *See also* Int'l Brotherhood Elec. Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 714 (2d Cir. 1998).

[12] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 536 (2d Cir. 2016).

[13] Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

[14] *Major League Baseball Players Ass'n*, 532 U.S. at 1728.

[15] *Int'l Brotherhood Elec. Workers*, 143 F.3d at 714 (quoting United Steelworkers Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[16] United Bhd. Carpenters & Joiners Am. V. Tappan Zee Constructors, LLC, 804 F.3d 270, 275 (2d Cir. 2015).

[17] Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 256 (2018).

[18] *Id.*

B. Federal Arbitration Act

Questions that come up during arbitration that are procedural in nature (what evidence to include or exclude, which witnesses to hear) are left to the discretion of the arbitrator and are not ordinarily scrutinized by courts.[19] However, under the Federal Arbitration Act (FAA), there is an exception that grants courts the authority to vacate an arbitration award. Under § 10 of the FAA, the court can vacate an award where:

> (1) the award was procured by corruption, fraud, or undue means; (2) . . . there was evident partiality or corruption in the arbitrators, or either of them; **(**3) . . . 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; or (4) . . . 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.[20]

While this limitation does exist, the FAA does not apply to arbitrations conducted pursuant to the LMRA, but federal courts have looked to the FAA for guidance.[21] Further, the circuit courts have been divided on whether the requirement of "fundamental fairness" applies to arbitration awards under the LMRA.[22] The Second Circuit (which had jurisdiction in Brady's case) previously held that an arbitration determination will be subject to evidentiary review only if "fundamental fairness is violated."[23] The court did not decide whether the "free-floating procedural fairness standard" of the FAA needed to be imported into its review of arbitration awards conducted pursuant to the LMRA.[24] Instead, the court determined that the Commissioner's procedural decisions did not violate the CBA, which made the fundamental fairness question a moot point that they did not need to address.[25]

C. NFL CBA (2011–21)

The older version of the CBA, which governed the disciplinary process during Deflategate, was entered into by the NFLPA and the NFL on August

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[19] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 (1987).

[20] 9 U.S.C. § 10.

[21] *United Paperworkers Int'l Union*, 484 U.S. at 40 n.9.

[22] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 545 n.13 (2d Cir. 2016).

[23] Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

[24] *Nat'l Football League Mgmt. Council*, 820 F.3d at 545 n.13.

[25] *Id.* at 532.

4, 2011.[26] After a contentious and drawn-out bargaining process, which lasted from 2008 to 2011, the two sides agreed to a deal. The major area of contention was how revenue would be shared, and although the players received the share they desired, one of the concessions they made was for broad power over player discipline to remain with the Commissioner.[27]

The relevant portions of the CBA that were at the center of the Deflategate saga are contained in Article 46, titled "Commissioner Discipline," which consists of two pages.[28] The Commissioner has the ability to fine or suspend a player (discipline) for conduct on the field, and for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[29] The Commissioner will send written notice of the discipline to the player and the NFLPA.[30] The player, or the NFLPA with the player's approval, may appeal the decision within three days of the written notification.[31]

When an appeal arises, the Commissioner must consult with the Executive Director of the NFLPA and may appoint one or more individuals to serve as the hearing officer.[32] However, the Commissioner may, at his discretion, serve as the hearing officer of any appeal.[33] In essence, this caveat not only grants the Commissioner the power to hand out the initial punishment, but also gives him the power to uphold that punishment on appeal. Further, this appeal process governs punishments that are issued pursuant to the CBA and the Personal Conduct Policy,[34] which only bolsters the Commissioner's disciplinary strength.

The CBA also provides a limited explanation of how the discovery process will work. In an appeal, the parties are required to "exchange copies of any exhibits upon which they intend to rely," at least three days before the hearing.[35] Any exhibits that are not produced to the other side before

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[26] NFL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, Preamble (2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf [hereinafter 2011 NFL CBA].

[27] *See* Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 14–27 (2012).

[28] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.

[29] *Id.* at Art. 46 § 1(a).

[30] *Id.*

[31] *Id.*

[32] *Id.* at Art. 46 § 2(a).

[33] *Id.*

[34] 2011 NFL CBA, *supra* note 26, at Art. 46 § 2(a); *see also* NFL, PERSONAL CONDUCT POLICY 7 (2015), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/PersonalConductPolicy2015.pdf [hereinafter 2015 PCP] (stating that "[a]ppeals of any disciplinary decision will be processed pursuant to Article 46 of the Collective Bargaining Agreement . . ."). The Personal Conduct Policy, which was unilaterally imposed by Goodell and the NFL, acts as a supplement to the CBA. It elaborates on what players can be punished for.

[35] 2011 NFL CBA, *supra* note 26, at Art. 46, § 2(g)(i).

those three days will not be allowed to be introduced at the hearing.[36] The players are given a significantly greater right of discovery in other proceedings under the CBA, specifically in Article 15 and Article 16. Those both allow "reasonable and expedited discovery."[37]

The limited nature of discovery under the CBA makes it even harder to challenge an arbitral award involving conduct detrimental because, as stated above, the courts treat CBAs deferentially, and the fact that the discovery provision in Article 46 is limited is unlikely to be enough for vacatur because the parties bargained for its limited scope. Thus, in situations such as Brady's, where he sought vacatur because of the Commissioner's refusal to permit discovery of internal notes from the investigation following Deflategate, courts are unlikely to rule that the arbitration award violated "fundamental fairness."

III. DEFLATEGATE

A. Facts of Deflategate

At the end of the 2014–15 regular season, the New England Patriots, led by Tom Brady, entered the playoffs with the number one overall seed in the AFC (American Football Conference) after completing their season with twelve wins and four losses.[38] In the divisional round of the playoffs, the Patriots defeated the Baltimore Ravens in a close game (thirty-five to thirty-one).[39] Their next opponent was the Indianapolis Colts in the AFC Championship Game. The teams met at Gillete Stadium—New England's home-field in Foxborough, Massachusetts—on January 18, 2015.[40] The temperature during the game hovered around forty-eight degrees.[41]

The game was close in the first half, but New England was up by ten points going into halftime (seventeen to seven).[42] However, prior to half-time, Colts' linebacker D'Qwell Jackson intercepted a Tom Brady pass.

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[36] *Id.*

[37] *See id.* at Arts. 15, 16. Article 15, titled "System Arbitrator" outlines the jurisdiction of the System Arbitrator, who has authority to enforce articles 1, 4, 6–19, 26–28, 31, and 65–67, none of which specifically cover player discipline. *Id.* at Art. 15, §1. Article 16, titled "Impartial Arbitrator" expresses that the impartial arbitrator has the exclusive jurisdiction to "determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the express terms of this Agreement." *Id.* at Art. 16, §1. None of those disputes that expressly referred to the impartial arbitrator deal with player discipline or, most notably, commissioner discipline as discussed in this note. *See id.* at § 2.

[38] *2014 NFL Standings & Team Stats*, PRO FOOTBALL REFERENCE, https://www.pro-football-reference.com/years/2014/#all_AFC (last visited Apr. 11, 2022).

[39] *Pats erase two 14-point deficits vs. Ravens, into AFC title game again*, ESPN (Jan. 11, 2015), https://www.espn.com/nfl/recap/_/gameId/400749515.

[40] *Colts vs. Patriots – Game Summary*, ESPN, https://www.espn.com/nfl/game/_/gameId/400749520 (last visited Apr. 2, 2022).

[41] *Past Weather in Foxborough, Massachusetts, USA – January 2015*, TIME&DATE, https://www.timeanddate.com/weather/@4937222/historic?month=1&year=2015 (last visited Mar. 31, 2022).

[42] *Colts vs. Patriots*, *supra* note 40.

After the play, he believed that the football felt under-inflated (below the minimum pressure of 12.5 pounds per square inch), and he reported this to Colts' personnel on the sideline.[43] The Colts' personnel informed NFL officials, who tested all Patriots and Colts footballs at halftime with two air gauges.[44] The court stated that all of the Patriots' balls tested were found to be below 12.5 pounds per square inch on both gauges.[45] After their slow start in the first half, the Patriots played their best in the second half, scoring twenty-eight points en route to a forty-five to seven victory.[46] They would later play the Seattle Seahawks in Superbowl XLIX, winning twenty-eight to twenty-four.[47]

During the initial stages of Deflategate, it was reported by Chris Mortenson that eleven of the twelve Patriots' game balls were underinflated, but this report later turned out to be incorrect.[48] It was also reported that Mortenson got this information from NFL Executive Vice President of Football Operations Troy Vincent.[49] Additionally, the NFL, on direct orders from NFL general counsel Jeff Pash, "expunged" records of PSI (pounds per square inch) numbers taken during the 2015 season to determine the impact of weather on pressure in footballs.[50] Under the Ideal Gas Law, air pressure in balls can rise during warm days, and drop during cold days.[51] The measurements taken during the 2015 season produced numbers that were outside of the range allowed by the NFL (12.5–13.5 PSI),[52] meaning that footballs used by the Patriots were consistent with the Ideal Gas Law, and the loss of air pressure could have been due to the cold temperature.

On January 23, 2015, the NFL announced that it had retained Ted Wells, and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") to conduct an independent investigation into whether the balls had been tampered with before or during the game.[53] The ensuing 139-page report (referred to as the "Wells Report") was released on May 6, and concluded that it was "more probable than not" that two Patriots' equipment officials (Jim McNally and John Jastremski) had "participated in a deliberate

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[43] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016).

[44] *Id.* at 532–33.

[45] *Id.* at 533.

[46] *See Patriots Take AFC Championship over Colts 45-7*, CBS NEWS (Jan. 18, 2015, 10:07 PM), https://www.cbsnews.com/news/patriots-take-afc-championship-over-colts-45-7/.

[47] *Patriots vs. Seahawks – Game Summary*, ESPN, https://www.espn.com/nfl/game/_/gameId/400749027 (last visited Apr. 3, 2022).

[48] Hartwell, *supra* note 4.

[49] Sullivan, *supra* note 4.

[50] Hartwell, *supra* note 4. These psi measurements, which were taken during halftime of 2015 regular season games "generated numbers beyond the permitted range of 12.5 to 13.5 psi, with the reading showing a direct correlation between temperature and air pressure." *Id.*

[51] Sullivan, *supra* note 4.

[52] *Id.*

[53] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533 (2d Cir. 2016).

effort to release air from Patriot[s'] game balls after the balls were examined by the referee."[54] The report specifically found that McNally had obtained the game balls from the Officials Locker Room before the game, and had taken them to a single-toilet bathroom where he used a needle to deflate the footballs before bringing them to the field.[55]

The investigation team examined videotape evidence, witness interviews, and text messages between McNally and Jastremski months before the AFC Championship game.[56] The two discussed Brady's preference for less-inflated footballs.[57] McNally also referred to himself as the "deflator," and Jastremski agreed to provide McNally with a "needle" in exchange for "cash," "newkicks," and autographed Brady memorabilia.[58] The report also relied on Exponent, an "engineering and scientific consulting firm," which found that the under-inflated footballs could not "be explained completely by basic scientific principles, such as the Ideal Gas Law."[59] In a footnote in the Second Circuit's opinion, Judge Barrington stated that the Wells Report "concluded that the evidence did not establish that any other Patriots' personnel participated in or had knowledge of these actions," when referring to the actual deflation of footballs in the bathroom.[60]

The investigation also examined Brady's role.[61] The Report concluded that it was "more probable than not" that Brady had been "at least generally aware" of McNally and Jastremski's actions, and it was "unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's," "knowledge," "approval," "awareness," and "consent."[62] The report also cited to a text message conversation between McNally and Jastremski, in which McNally complained about Brady and threatened to overinflate the game balls.[63] Jastremski explained that he had spoken to Brady the night before and "[Tom] actually brought you up and said you must have a lot of stress trying to get them done."[64] The investigation also pointed out that Brady had publicly stated he preferred less-inflated footballs in the past, been personally involved in a rule change in 2006 that permitted visiting teams to prepare game balls in accordance with the preferences of

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533 (2d Cir. 2016).
[60] *Id.* at 552 n.3.
[61] *Id.* at 533.
[62] *Id.*
[63] *Id.*
[64] *Id.*

their quarterbacks, and had been a "constant reference point" in McNally and Jastremski's discussions.[65]

The report also found that Brady and Jastremski spoke on the phone for approximately twenty-five minutes on January 19 after more than six months of not communicating by phone or message.[66] Brady had also invited Jastremski to the quarterback room and had sent him several text messages that were designed to "calm him."[67] Brady also refused to make available "any documents or electronic information (including text messages and emails)."[68]

On May 11, 2015, NFL Executive Vice President Troy Vincent, Sr., sent Brady a letter notifying him that Goodell had authorized a four-game suspension.[69] Pursuant to Article 46 of the Collective Bargaining Agreement between the NFL and the NFL Players Association (NFLPA), Goodell suspended Brady for engaging in "conduct detrimental to the integrity of and public confidence in the game of professional football."[70] The letter cited to the Wells Report's conclusions regarding Brady's awareness and knowledge of the scheme, and his "failure to cooperate fully and candidly with the investigation," (e.g., refusing to produce electronic evidence such as emails and texts).[71]

Through the NFLPA, Brady filed an appeal of the suspension.[72] The Commissioner used the discretion granted to him by the CBA to serve as the hearing officer. The NFLPA wanted to challenge the conclusions of the Wells report and argued that Goodell had improperly delegated his authority to discipline players under the CBA.[73] The NFLPA also filed motions prior to the hearing seeking to recuse the Commissioner, compel NFL General Counsel Jeff Pash to testify about his role in the preparation of the Wells report, and to compel the production of Paul, Weiss's internal investigation notes.[74]

Goodell denied these motions on June 2, and June 22, 2015.[75] He determined that he should not recuse himself because he did not "delegate [his] disciplinary authority to Mr. Vincent" and did "not have any first-hand knowledge of any of the events at issue."[76] Goodell also refused to compel

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[65] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 533–34 (2d Cir. 2016).

[66] *Id.* at 534.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 534 (2d Cir. 2016).

[72] *Id.*

[73] *Id.* at 534.

[74] *Id.*

[75] *Id.* at 534–35.

[76] *Id.* at 535.

Pash's testimony because he did not "play a substantive role in the investigation," and the Wells report made it clear that it was prepared by the Paul, Weiss investigative team, and no one else.[77] The Commissioner also ruled that the CBA did not require the production of the Paul, Weiss investigation notes, and stated the notes did not play a role in the disciplinary decision.[78]

The Commissioner held a hearing on June 23, involving approximately ten hours of testimony and argument.[79] Before the hearing, it was revealed that Brady had—on March 6—instructed his assistant to destroy the cellphone that he had been using since November 2014.[80] Brady testified that he was disposing of the phone as he normally would, in order to protect his privacy.[81]

Goodell affirmed the four-game suspension in his final decision on July 28.[82] The Commissioner relied on the new evidence concerning the destroyed cell phone, finding that Brady had failed to cooperate with the investigation, but also "made a deliberate effort to ensure that investigators would never have access to information that he had been asked to produce."[83] The Commissioner used this phone incident to draw an inference that the cell phone would have contained inculpatory evidence.[84] The Commissioner stated:

> (1) Mr. Brady participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game and (2) Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators.[85]

Goodell also compared Brady's conduct to that of a steroid user.[86] He argued steroid users seek to gain a similar systematic competitive advantage.[87] Thus, he affirmed the four-game suspension as appropriate here because it was similar to the suspension imposed on first time steroid users in the NFL.[88]

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[77] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

B. The Second Circuit's Decision

On the same day that Goodell affirmed Brady's suspension, the NFL sought confirmation of the award under the LMRA.[89] The NFLPA sought to vacate the suspension.[90] The District Court for the Southern District of New York vacated the award, holding that Brady lacked notice that he could be suspended for four games because the provisions that were relevant to his conduct only stated that fines could be imposed.[91] The district court also held that Brady was deprived of fundamental fairness by the Commissioner when he denied the NFLPA's motion to compel the production of the internal notes of Paul, Weiss, and excluded Pash's testimony about his role with the Well's report.[92] The Second Circuit then reversed the district court's holding and remanded it for affirmation of the arbitration award.[93]

The court noted that the "law of the shop" requires that the NFL provide players with notice of "prohibited conduct and potential discipline."[94] The main argument that the NFLPA and Brady made was that the suspension was improper because Brady was only on notice that his alleged conduct could lead to a fine.[95] The court concluded that the Commissioner's decision was "'plausibly grounded in the parties' agreement,' which is all the law requires."[96] The court reasoned that the reference to steroids was perfectly fine because the arbitrator is "entitled to generous latitude in phrasing conclusions," and that Brady was not deprived of notice.[97] The Commissioner was also, according to the court, within his discretion when he concluded that Brady had participated in the scheme to deflate footballs, rather than just being generally aware.[98] This shift, according to the court, was a reasonable assessment of the facts along with new information presented at the hearing.[99] The court also held that Brady did not lack notice that the NFL could discipline him for non-cooperation (destruction of his cell-phone) because the initial letter sent to Brady indicated that he was being punished for failing to cooperate (not providing electronic data).[100]

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[89] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[90] *Id.* Though the NFLPA filed in Minnesota and the NFL filed in New York, the cases were consolidated and heard in New York. *Id.*

[91] *Id.* at 536.

[92] *Id.*

[93] *Id.* at 532.

[94] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 538 (2d Cir. 2016).

[95] *Id.*

[96] *Id.* at 539.

[97] *Id.* at 540.

[98] *Id.* at 542.

[99] *Id.*

[100] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 542–44 (2d Cir. 2016).

Further, the court emphasized that Article 46 does not limit the Commissioner's ability to reexamine the basis for a suspension.[101]

The court reiterated that procedural questions, like that of the exclusion of Jeff Pash's testimony, are left to the arbitrator to decide and was not "fundamentally unfair."[102] It noted that the League and NFLPA agreed to the CBA structure that granted responsibility for the "investigation and adjudication" to the Commissioner.[103]

In terms of the discovery argument, the Second Circuit reiterated that if the parties "wished to allow for more expansive discovery, they could have bargained for [it]."[104] The League argued that because the CBA did not require the exchange of investigatory notes, the exclusion of those notes should not permit vacatur of the award.[105] Further, the Commissioner determined that Brady was not deprived of fundamental fairness because the Commissioner did not review any of the notes or documents that were made by Paul, Weiss (except for the final report).[106]

Thus, the court (the majority) in Brady's case largely chose to defer to the Commissioner's authority under the CBA to interpret Article 46. The court held that any displeasure with the outcome of the Commissioner's disciplinary process must be resolved by the NFL and NFLPA; the court would not intervene.

The dissent in Brady's case appears more compelling for a number of reasons, and ultimately the Second Circuit was incorrect in its decision to reverse the district court. To begin, judicial review of an arbitration award consists of a two-step process: (1) whether the arbitrator acted within the scope of his authority under the CBA; and (2) whether the arbitral award "draws its essence from the agreement" and does not reflect an example of the arbitrator's own brand of justice.[107] The dissent pointed out that in deciding an appeal for conduct detrimental, the arbitrator can decide whether the misconduct *charged* actually occurred, the conduct was actually detrimental to the league, and if the penalty is permissible under the CBA.[108] The crucial point is that the arbitrator cannot base a decision on misconduct that is different from what was originally charged.

The Commissioner did exactly that in Brady's case. There are differences between what was found in the Wells report and the findings of the Commissioner in his final written decision. The Wells report, as noted

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[101] *Id.* at 544.
[102] *Id.* at 545.
[103] *Id.* at 546.
[104] *Id.* at 547.
[105] *Id.* at 546.
[106] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 546–47 (2d Cir. 2016).
[107] *See* Local 1199, Drug, Hosp. & Health Care Emp. Union v. Brooks Drug Co., 956 F.2d 22, 25 (2d Cir. 1992).
[108] Nat'l Football League Mgmt. Council, 820 F.3d at 549–50 (Katzmann, C.J., dissenting).

above, concluded that it was "more probable than not" that Tom Brady was "at least generally aware" of the Patriots' assistants release of air from the game balls, and that it was "unlikely" that they deflated the balls without Brady's "knowledge," "approval," "awareness," and "consent."[109] The Commissioner's final decision went further.[110] The decision found that Brady "knew about, approved of, consented to, and provided inducements and rewards in support of a scheme" that tampered with game balls.[111] While the Wells Report provided evidence that Brady provided the assistants (Jastremski and McNally) with memorabilia, there was never a conclusion that it was "more probable than not" that the gifts given by Brady to them were intended as a reward or payment specifically for deflating the footballs.[112] Thus, the Commissioner exceeded his authority under the CBA by basing his disciplinary decision on findings not made in the Wells report, and by not giving Brady adequate notice that this gift-giving would play a major role in the Commissioner's discipline.

The Commissioner's decision—to suspend Brady without pay for four games—also fails the second step of the analysis because it does not "draw its essence" from the CBA. This punishment was unprecedented and ignored a similar penalty. The NFL prohibits the use of "stickum,"[113] a violation of which results in a $8,268 fine.[114] The use of stickum and the deflation of footballs both encompass attempts to improve a player's grip and would seemingly make the prohibition of stickum as a good starting point for the Commissioner to determine appropriate discipline. Further, the NFL's justification for outlawing stickum—that it negatively impacts the integrity of the game and can provide an unfair advantage—is almost identical to what the Commissioner indicated about deflation of game balls—that they are an improper effort to gain a competitive advantage and threatens the integrity of the game.[115] The Commissioner ignored the stickum penalty (and all of its similarities), and relied on the penalty for violations of the NFL's steroid policy (discussed above). His fluctuating reasoning for Brady's discipline indicate that Commissioner Goodell did not base the discipline imposed on his interpretation of the CBA but was instead his own brand of "industrial justice."

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[109] *Id.* at 550.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Stickum is a "thick, dark yellow, glue-like material" that players would apply to their hands and arms which helped them grip and catch footballs. It was banned by the NFL in 1981. *Equipment Innovation: Sticky Gloves/Stickum*, NFL, https://www.nfl.com/100/originals/100-greatest/game-changers-77#:~:text=In%20the%201970s%20and%20early,their%20hands%2C%20like%20a%20magnet (last visited May 12, 2022).

[114] Nat'l Football League Mgmt. Council, 820 F.3d at 552 (Katzmann, C.J., dissenting).

[115] *Id.*

Regardless of the outcome in Brady's case, and his overall guilt, the only way to ensure that the process is fair requires the NFLPA to bargain for a more robust disciplinary process that proscribes what the Commissioner's authority is in disciplinary appeals that result in arbitration. To understand further how the NFLPA and NFL can improve their process, a review of how other professional sports league CBAs have limited Commissioner power and improved fairness is crucial.

IV. DISCIPLINARY PROCESSES IN OTHER CBAS

While the CBAs of the other major sports leagues give their respective commissioners broad disciplinary authority, they have more procedures built in that help to ensure that the disciplinary process is not dictated entirely by their commissioners. In the organized industrial-labor setting (e.g., motor vehicle manufacturing), there are procedures in place that also ensure appeals are not heard by the individual who initially imposed discipline.

A. Major League Baseball

The heart of the Major League Baseball ("MLB") Commissioner's power to discipline players is found in its CBA (referred to as the "Basic Agreement" by MLB), and its Constitution and Bylaws.[116] The Commissioner's power is laid out in Article XII, and is similar to the wording in the NFL CBA.[117] Article XII states, "a Player may be subjected to disciplinary action for just cause by his Club, the Chief Baseball Officer or the Commissioner. Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed."[118] Further, it also establishes that, "[p]layers may be disciplined for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball including, but not limited to, engaging in conduct in violation of federal, state or local law."[119] MLB is also required to give written notice to the player and the MLBPA when discipline is being imposed.[120]

Upon learning that the Commissioner is investigating the player, the player and MLBPA are required to provide "reasonable cooperation" with

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[116] *See* MAJOR LEAGUE BASEBALL CLUBS & MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2017–21 BASIC AGREEMENT Art. XII (2016), https://www.mlbplayers.com/_files/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [hereinafter MLB CBA]. At the time of authoring this note, the MLB recently agreed to a new CBA, it has not yet been made public by the MLB or the MLBPA. Thus, the information contained herein involves the CBA that was in effect from 2017–21. Nevertheless, it still provides an excellent comparison to the NFL CBA.

[117] *Id.*

[118] *Id.* at Art. XII § A.

[119] *Id.* at Art. XII § B.

[120] *Id.* at Art. XII § C.

the investigation.[121] However, the player still retains the right to assert that he need not comply with the investigatory request because it is "unreasonable, irrelevant, overbroad, or ambiguous, or the requested information is covered by a recognized privilege."[122] Disputes of this nature are resolved by the Arbitration Panel (discussed further below), as expeditiously as possible.[123] In comparison, the 2011 NFL CBA did not require any sort of investigation by the NFL prior to imposing punishment.[124]

The MLB Commissioner can also conduct interviews of players in order to investigate, and the player and MLBPA are due "reasonable advance notice" of any interview.[125] Once the Commissioner's investigation is complete, and before any discipline is imposed, the parties conduct a "pre-discipline conference."[126] Any conversations at this conference are considered confidential and inadmissible in any grievance that challenges any discipline that is imposed on the player.[127] Before, or during this conference, the Commissioner is required to "describe the results of the investigation and the evidence supporting discipline."[128]

If the player is disciplined, he has the right to discover all documents and evidence "adduced during any investigation of the charges involved, including but not limited to [any] . . . that tend to negate a Player's guilt, . . . mitigate punishment, or . . . impeach any witness who will appear at any hearing challenging discipline."[129] These discovery procedures give baseball players an advantage as compared to their NFL counterparts. As explained above, Goodell retains the ability to decide what documents are discoverable for the disciplined player and NFLPA.

The actual procedures for grievance disputes in MLB are unique to each source of punishment. Players can challenge punishment that results from on-field conduct, or off-field conduct.[130] For on-field conduct (such as a fight), the grievance would be heard in front of the Special Assistant to the Commissioner, Chief Baseball Officer, or the Commissioner himself.[131]

The grievance procedure for off-field conduct discipline is different from discipline resulting from on-field conduct. The grievance has to first be brought up to the player's club, next to the League's Labor Relations Department, and then finally it is heard in front of the Arbitration Panel.[132]

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[121] *Id.* at Art. XII § D.
[122] MLB CBA, *supra* note 116, at Art. XII § D.
[123] *Id.*
[124] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.
[125] MLB CBA, *supra* note 116, at Art. XII § D.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at Art. XI §§ B–C.
[131] *See* MLB CBA, *supra* note 116, at Art. XI § C (1)–(4).
[132] *See id.* at Art. XI § B.

The Arbitration Panel is a three-person panel, formed by each party selecting one arbitrator, and then agreeing on an impartial third arbitrator.[133] Most notably, as compared to the NFL[134], the MLB CBA does not give the Commissioner authority to appoint himself as the arbitrator to hear, and decide the appeal.[135]

The MLB procedures do not allow for the Commissioner to hear appeals for off-field discipline, instead requiring a three-person arbitration panel where the players have a say in who sits on the panel. As stated above, the NFL Commissioner in comparison can hear the appeals himself. Further, even when he does appoint a hearing officer, he only needs to "consult" with the NFLPA Executive Director before appointing a hearing officer. The NFL Commissioner has the sole ability to determine who will hear the case, whereas the MLB gives more control to the players regarding the appeal process by allowing them a say in the arbitration panel. The MLB also outlines the discovery procedures, whereas the NFL remains silent, leaving those decisions to the Commissioner.

B. National Basketball Association

The NBA Commissioner's authority to impose discipline on players is found in the NBA's Constitution and Bylaws, and that power is limited by the League's CBA.[136] The NBA's current CBA was ratified by the National Basketball Players Association ("NBPA") in December of 2016, went into effect on July 1, 2017, and will run through the 2023–24 NBA season.[137] In contrast, the most recent iteration of the NBA Constitution and Bylaws was agreed on in 2019.[138]

The Commissioner is empowered to discipline a player who, in the Commissioner's opinion, made a statement that has "an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member," or if the player is, "guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association."[139] This language is similar to that of the NFL and MLB, in that it gives the Commissioner broad discretionary power in issuing punishment.

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[133] *See id.* at Art. XI § A (9). If the MLBPA and MLB cannot agree on the third arbitrator, a list from the American Arbitration Association is provided, and the parties then narrow that list down to one. *Id*. In proceedings that go before an arbitrator and not the three-person panel, the Impartial Arbitrator presides. *Id.*

[134] *See supra* notes 32–33; *see infra* note 214.

[135] *See id.* at Art. XI.

[136] *See* NAT'L BASKETBALL ASS'N, CONSTITUTION AND BYLAWS Art. 35 §§ (b)–(f) (2019), https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2019/09/NBA-Constitution-By-Laws-September-2019-1.pdf [hereinafter NBA CONSTITUTION].

[137] *Collective Bargaining Agreement*, NAT'L BASKETBALL PLAYERS ASS'N, https://nbpa.com/cba (last visited March 29, 2022).

[138] *See* NBA CONSTITUTION, *supra* note 136.

[139] *Id.* at Art. 35 § (d).

This "best interests" clause is much the same as the NFL's "conduct detrimental" clause.

The grievance procedure under the NBA CBA is markedly different from the NFL's. The NBA uses a Grievance Arbitrator and a Player Discipline Arbitrator.[140] The Grievance Arbitrator is responsible for resolving disputes "involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including any dispute concerning the validity of a Player Contract or any dispute arising under the Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse."[141] The CBA also explains that any dispute that falls under the jurisdiction of the Grievance Arbitrator is referred to as a "Grievance."[142] However, whether a player's appeal of discipline goes to the Grievance Arbitrator, or the Player Discipline Arbitrator, is based on the severity of the punishment.[143] There is no distinct arbitrator for disputes involving actions taken by the Commissioner concerning the integrity of the game.

If the discipline imposed is a fine that is less than $50,000, a suspension that is less than twelve games, or a combination of both, then the player must first appeal to the Commissioner.[144] After the Commissioner reviews the appeal and makes a decision, the player can then file another appeal to the Player Discipline Arbitrator.[145] Once the Player Discipline Arbitrator makes a determination, the decision is final and binding.[146] This Arbitrator is a single person, who is agreed on by the NBA and the NBPA, and who has experience in professional basketball or is an attorney with experience as an arbitrator or mediator.[147] The CBA also outlines when and why the Player Discipline Arbitrator can be dismissed from his role.[148]

If the suspension is longer than twelve games, the fine exceeds $50,000, or both, then the Grievance Arbitrator handles the appeal.[149] The arbitrator is mutually agreed on by both parties at the beginning of the CBA and remains the arbitrator for the entirety of the CBA.[150]

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[140] NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT Art. XXXI §§ 1(a)(i), 9(a) (2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA].

[141] *Id.* at Art. XXXI § 1 (a)(i).

[142] *Id.*

[143] *See id.* at Art. XXXI § 9.

[144] *Id.* at Art. XXXI § 9(a)(1).

[145] *Id.* at Art. XXXI § 9(a)(5).

[146] NBA CBA, *supra* note 140, at Art. XXXI § 9(a)(5)(c).

[147] *Id.* at Art. XXXI § 9(a)(5)(d). Further, the CBA gives some examples of a "person with experience in professional basketball (such as a former NBA coach, general manager, or player)." *Id.*

[148] *Id.* at Art. XXXI § 9(a)(5)(e).

[149] *Id.* at Art. XXXI § 9(b).

[150] *Id.* at Art. XXXI § 7(a). The NBA CBA also provides that the Grievance Arbitrator may be removed by either party during a six-day window (July 27 until August 1) of each year. NBA CBA, *supra* note 140, at Art. XXXI § 7(a).

While the NBA Commissioner can hear an appeal of his disciplinary decision, it is only for smaller punishments. Even when the Commissioner can hear the appeal to his decision, the player has another avenue—an appeal to the Player Discipline Arbitrator—which is not possible in the NFL. Rather than positioning the ultimate authority in the Commissioner, the NBA places considerable control in the hands of neutral arbitrators selected by both sides.

C. National Hockey League

The National Hockey League ("NHL") CBA, which is between the National Hockey League Players Association ("NHLPA") and the NHL, was ratified by the NHLPA on January 12, 2013,[151] and would have ended on September 15, 2022.[152] Most recently, the NHL and NHLPA ratified a four-year extension to the CBA on July 10, 2020, with the deal running through the 2025–26 season.[153] The NHL's discipline process is laid out in Articles 17, 18, and 18-A of its CBA.[154] Like the CBAs of the NFL, MLB, and NBA, the NHL CBA provides for discipline of players for their on-ice conduct[155] as well as conduct that occurs off-ice.[156] The NHL also lays out its procedure in a clear manner, and requires that the NHL and NHLPA distribute a copy of Article 18 (or a summary, agreed upon by the parties) to the players, coaches, and general managers when the regular season begins.[157] Each team is required to confirm—in writing—that it received Article 18, distributed it to all of its players, and each player provide a written acknowledgment that they received it.[158]

1. On-Ice Conduct

As its name suggests, "supplementary discipline for on-ice conduct" means any supplementary discipline imposed by the Commissioner (or his designee) for conduct of a player towards another player, coach, or on-ice official that occurred either on the ice or in the player bench or penalty bench area.[159] After an incident occurs, the NHL conducts a preliminary review of

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[151] *Collective Bargaining Agreement*, NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, https://www.nhlpa.com/the-pa/cba (last visited Apr. 8, 2022).

[152] *See* NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT (2012), https://www.nhlpa.com/the-pa/cba [hereinafter NHL CBA].

[153] NAT'L HOCKEY LEAGUE PLAYERS' ASS'N, *supra* note 151.

[154] *See* NHL CBA, *supra* note 152, at Arts. 17, 18, 18-A.

[155] *Id.* at Art. 18.

[156] *Id.* at Art. 18-A.

[157] *Id.* at Art. 18 § 18.21. While this "explanatory notice" given to the players includes all of the information contained in Article 18 (which covers discipline for on-ice conduct) there is no requirement that Article 18-A, or a summary of 18-A, be provided to the players. *See id.* at Art. 18-A. Article 18-A outlines the process for player discipline involving off-ice conduct that the league seeks to punish. *Id.*

[158] NHL CBA, *supra* note 152, at Art. 18 § 18.21.

[159] *Id.* at Art. §18.1.

video footage, reports of on-ice officials, Officiating Managers, and written medical information from the teams (e.g., if two or more players were involved in a fight.)[160]

If the preliminary review indicates that a suspension between zero and five games might be appropriate, the League can continue with Supplementary Discipline via a telephonic hearing.[161] If a suspension of six games or more is warranted, then an in-person hearing must occur.[162] Before any hearing, the League is required to provide the NHLPA with the evidence outlined above.[163] Once the League makes its determination it must inform the player, team, and NHLPA before the league announces the decision to the media.[164]

The NHL may then file an appeal on the player's behalf directly to the Commissioner.[165] He must determine whether the initial decision was supported by "clear and convincing evidence."[166] The Commissioner has the authority to consider any and all evidence relating to the incident, even if that evidence was not available at the time of the initial discipline. If the decision appealed is a suspension for five games or fewer, the Commissioner has sole discretion to decide whether a hearing is required, and any decision he makes regarding the appeal is final and not subject to further review.[167] If the player discipline was for a suspension of six games or more, the Commissioner must conduct a hearing before rendering a decision.[168]
If the Commissioner affirms the six games or more suspension, the NHLPA can file an appeal of the Commissioner's determination to the "Neutral Discipline Arbitrator ("NDA")."[169] The NDA considers any evidence relating to the on-ice incident, and then determines whether the Commissioner's decision was supported by "substantial evidence."[170] Any decision by the NDA (whether affirming the suspension or vacating) is final and not subject to further review.[171] Notably, the NDA is jointly appointed by the NHL and NHLPA (and must have "substantial experience as an arbitrator or judge"[172]), and serves for the duration of the CBA.[173]

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[160] *Id.* at Art. 18 § 18.3(a). After the preliminary review, the League can choose to impose: no discipline, a fine, a suspension of five games or fewer, or a suspension of six games or more. *Id.* at Art. 18 § 18.5.

[161] *Id.* at Art. 18 § 18.8.

[162] *Id.* at Art. 18 § 18.9.

[163] NHL CBA, *supra* note 152, at Art. 18 § 18.8(c).

[164] *Id.* at Art. 18 § 18.11.

[165] *Id.* at Art. 18 § 18.12.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] NHL CBA, *supra* note 152, at Art. 18 § 18.13(a).

[170] *Id.* at Art. 18 § 18.13(c). The NDA also can consider additional evidence that was not available at the time of the initial hearing, or at the Commissioner's hearing. *Id.*

[171] NHL CBA, *supra* note 152, at Art. 18 § 18.13(c).

[172] *Id.* at Art. 18 §§ 18.14(a), (c).

[173] *Id.* at Art. 18 § 18.14(a).

2. Off-Ice Conduct

The Commissioner's authority for disciplining players for off-ice conduct is housed in Article 18-A of the CBA.[174] Similar to the NFL's "conduct detrimental" provision, the NHL Commissioner may impose discipline[175] for "conduct . . . that is detrimental to or against the welfare of the League or the game of hockey."[176] Once the League decides to begin an investigation, it must immediately notify the NHLPA.[177] Further, no interviews of players (whether they are subject to discipline, or not) may be conducted without notice to the NHLPA that gives reasonable time for it to participate.[178] The CBA further stipulates that the NHL will provide advance notice for interviews of non-players, and if the NHLPA cannot participate, the NHL must provide its notes and "other recording[s]" that relate to the interview.[179]

Before the hearing, the NHL is required to provide the player with the specifics of the allegations against the player, and why the league believes the player's actions rise to the level of requiring discipline.[180] Both parties are also required to disclose all evidence and witnesses that will be presented at the hearing.[181] The CBA also notably prohibits any discussion of the case between those involved with the "prosecution" and those who are involved in deciding the case (league officials, such as the Commissioner).[182] The Commissioner cannot impose discipline against a player without holding a hearing except in situations where the player's off-ice conduct may be the subject of criminal investigation.[183] In those situations, the league can suspend the player, without conducting any formal review as outlined above, if not suspending the player would "create a substantial risk of material harm to the legitimate interests and/or reputation of the League."[184] Thus, if a player is charged with a crime, and the League does nothing, it may negatively impact public perception of the NHL. Rather than suffering negative perception, the league may suspend the player without following the usual process.

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[174] *See id.* at Art. 18-A.

[175] Discipline can be either expulsion from the league or suspension, cancelling the players contract, or imposition of a fine. *Id.* at Art. 18-A §§ 18-A.2(a)–(c).

[176] *Id.* at Art. 18-A § 18-A.2.

[177] NHL CBA, *supra* note 152, at Art. 18-A § 18-A.3(a)(i).

[178] *Id.* at Art. 18-A §§ 18-A.3(a)(ii)–(iii).

[179] *Id.* at Art. 18-A § 18-A.3(a)(v).

[180] *Id.* at Art. 18-A § 18-A.3(b).

[181] *Id.*

[182] *Id.* at Art. 18-A § 18-A.3(f).

[183] NHL CBA, *supra* note 152, at Art. 18-A §§ 18-A.3(d), 18-A.5.

[184] *Id.* at Art. 18-A § 18-A.5.

After the Commissioner determines whether to impose discipline, the player may file an appeal to the Impartial Arbitrator[185] ("IA"), which then requires the proceeding be governed by the Grievance process found in Article 17 of the CBA.[186] Unlike in the NFL—which does not even have a requirement for an impartial arbitrator—the IA is agreed upon by both parties.[187] The IA then considers whether the Commissioner's determination was supported by "substantial evidence" and was not unreasonable based on: "(i) the facts and circumstances surrounding the conduct at issue; (ii) whether the penalty was proportionate to the gravity of the offense; and (iii) the legitimate interests of both the Player and the League."[188]

Prior to the hearing in front of the IA, the parties must exchange disclosure statements that contain the relevant documents that will be presented as evidence, and what they are being used to establish.[189] The NHL CBA also requires that both parties use their best efforts to ensure that witnesses are present at the arbitration hearing in order to testify.[190] After the hearing, the IA will then issue a written decision that is final and binding on the player, NHL, and NHLPA.[191]

The disciplinary process as outlined in the NHL CBA is more thorough than the NFL CBA. It has robust evidentiary procedures that require both sides to share information and ensures that appeals are heard by neutral parties. While the NHL CBA still rests great power in the Commissioner to discipline players, any appeal of the Commissioner's decision goes to another individual who is not subject to the control of the owners and is also experienced in arbitration.

D. CBA Between United Auto Workers Union & Ford Motor Company

Comparing the NFL's disciplinary process to how the auto industry disciplines its employees also provides a non-sports example that the NFL could look to for guidance. To do so, the agreement between the Ford Motor Company ("Ford") and the United Auto Workers Union ("UAW") will be examined. Ford needs no introduction; the automobile manufacturer has been churning out vehicles since 1903.[192] The UAW, on the other hand, is

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[185] Once the appeal is filed, Article 17 of the CBA kicks in, requiring that the NHL and NHLPA discuss potential resolutions or settlement of the grievance. *Id.* at Art. 17 § 17.4(a). If the parties cannot resolve the issue, the player who sought the appeal can then choose to arbitrate before the Impartial Arbitrator. *Id.* at Art. 17 § 17.5. However, the need for expediency can be enough to circumvent the grievance committee procedure just outlined. *Id.* at Art. 17 § 17.17.

[186] *Id.* at Art. 18-A § 18-A.4.

[187] NHL CBA, *supra* note 152, at Art. 17 § 17.6.

[188] *Id.* at Art. 18-A § 18-A.4.

[189] *Id.* at Art. 17 § 17.8.

[190] *Id.* at Art. 17, § 17.9(a).

[191] *Id.* at Art. 17, § 17.13.

[192] *Our History*, FORD, https://corporate.ford.com/about/history.html (last visited Oct. 20, 2022).

one of the primary labor organizations representing employees of the automotive industry.[193]

In the CBA (UAW CBA) between Ford and UAW the power to discipline employees can be found in the "Discipline and Discharge" section under "Company Responsibility."[194] It explains that Ford has the right to discipline and discharge employees "for cause, provided that in the exercise of this right it will not act wrongfully or unjustly or in violation of the terms of this Agreement."[195] When imposing discipline, any prior infractions that occurred more than eighteen months previously will not be taken into account.[196] Importantly, the UAW CBA never offers a more concrete definition of what exactly constitutes "cause."

Once an employee is disciplined—either by a discharge, layoff, reprimand, or warning—the employee's District Committeeperson is notified in writing.[197] The District Committeeperson represents employees at disciplinary hearings and during the grievance process.[198] The disciplinary action is final unless the Committeeperson—on the employee's behalf—files a written grievance within three days of the written disciplinary notice explained above.[199]

The Grievance Procedure has four stages. The first stage grievance hearing is basically an informal meeting between the employee and the employer to settle the issue, if possible.[200] If it cannot be settled orally and informally, the grievance can move to the second stage by referring the grievance to the Unit Committee.[201] At the second stage, a formal written account of the action is presented to the company's representative prior to a weekly held grievance meeting.[202] Members of the unit committee (representing the union) and representatives of Ford meet to consider the grievance.[203] The representative(s) of the company have the authority to adjust the discipline, and must give its decision in writing to the Union representative within one week of the last meeting.[204] At the third stage, the Unit Committee Chairperson writes a formal and complete account and appeal to the Plant Review Board.[205] The Plant Review Board then renders

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[193] *See* Joel Cutcher-Gershenfeld et al., *The Decline and Resurgence of the U.S. Auto Industry*, ECON. POL'Y INST. (May 6, 2015), https://www.epi.org/publication/the-decline-and-resurgence-of-the-u-s-auto-industry/.

[194] AGREEMENTS BETWEEN UAW AND THE FORD MOTOR COMPANY VOLUME I (2019), at Art. IV, § 3, https://uaw.org/uaw-auto-bargaining/fordcontract/ [hereinafter UAW-Ford CBA].

[195] *Id.*

[196] *Id.*

[197] *Id.* at Art. VII § 5(a).

[198] *Id.* at Art. VI § 11(a).

[199] *Id.* at Art. VII § 5(c).

[200] UAW-Ford CBA *supra* note 194, at Art. VII § 2.

[201] *Id.* at Art, VII § 2(d).

[202] *Id.* at Art. VII § 3(a), (c).

[203] *Id.* at Art. VII § 3(c).

[204] *Id.* at Art. VII §§ 3(e)–(f).

[205] *Id.* at Art. VII § 4(a).

a decision on behalf of Ford. The Review Board is composed of three people representing the UAW and three people representing Ford.[206]

In the fourth stage, which is the last, the appeal is to an impartial "Umpire" who is selected by both sides.[207] To get to that point, the National Ford Department of the International Union must appeal the decision that was made at the third stage. The Umpire can conduct investigations he or she deems proper, hold hearings open to the parties, and examine the witnesses of each party.[208] Further, each party can cross-examine all witnesses.[209] The Umpire's decision, after hearing and ruling on the grievance, is final and binding.[210] Further, the union is required to not encourage or accompany the employee in pursuing the appeal of the Umpire's decision in court.[211]

While appeals under the NFL's CBA are heard either by officers selected by the Commissioner or himself, the UAW-Ford CBA does not even allow for the possibility of the initial disciplinarian also presiding over the appeal. Moreover, there are more steps for an employee to go through that involve different individuals to hear the appeal. Lastly, it ends with an impartial arbitrator, which the NFL does not provide at the highest level of disciplinary review. The UAW-Ford CBA is far from perfect. Its largest flaw is the lack of a clear definition of what constitutes discipline for "cause."

V. PROCESS UNDER THE NEW NFL CBA

A. More of the Same

The NFL's current CBA was entered into by the NFL and NFLPA on March 15, 2020.[212] Similar to the 2011 version, the 2020 CBA grants power to the Commissioner to fine or suspend a player for his actions on the field or for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[213] If Brady's suspension for Deflategate were to happen today, it would proceed in the exact same manner that it did back in 2015. The process for appealing the Commissioner's discipline remains the same for offenses that are punished for being "conduct detrimental" to the League. The Commissioner has the authority to personally select the hearing officer, or, at his discretion, he can serve as the

[206] UAW-Ford CBA, *supra* note 194, at Art. VII § 4(d).
[207] *Id.* at Art. VII § 21.
[208] *Id.* at Art. VII § 13(b).
[209] *Id.*
[210] *Id.* at Art. VII § 19.
[211] *Id.*
[212] NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT, Preamble (2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [hereinafter 2020 NFL CBA].
[213] *Id.* at Art. 46 § 1(a).

hearing officer himself.[214] The discovery process remains the same as well, requiring only that the parties exchange copies of "exhibits upon which they intend to rely."[215] These discovery restrictions ensured that Brady's requests for internal investigative notes related to the subsequent independent investigation would not be disclosed. Thus, the League can continue to rely on evidence it wants to use for the hearing, which would presumably help the League's case, and deprive the player of potential exculpatory evidence. As in the Brady case, the player will not be able to argue that the denial of evidence deprives him of a fair arbitration because the players agreed to these discovery rules. The new CBA also remains silent on requests for witness testimony[216] (e.g., Goodell's refusal to compel Jeff Pash's testimony per Brady's request[217]).

B. What Has Changed?

The most notable changes to the CBA involve the disciplinary process for violations of the League's Personal Conduct Policy ("PCP"), which the 2011 iteration of the CBA was completely silent on.[218] Now, violations of the PCP—as well as disputes over whether a PCP violation was proven by the NFL—will be initially determined by a Disciplinary Officer[219] ("DO") that is jointly selected by the parties.[220] The DO is responsible for conducting evidentiary hearings, issuing binding findings of fact, and determining what, if any, discipline should be imposed.[221] The CBA also now explicitly states that the NFL has the "burden of establishing that the player violated the [PCP]."[222] Noticeably absent is what that burden of proof is. Is it "beyond a reasonable doubt," "preponderance of the evidence," "clear and convincing evidence," or another standard?

While the Disciplinary Officer's decision is subject to appeal by either party to the Commissioner, it is limited to "why, based on the evidentiary record below, the amount of discipline, if any, should be modified."[223] Before, the player could challenge the decision on the merits. However, that

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[214] *Id.* at Art. 46 § 2(a).

[215] *Id.* at Art. 46 § 2(f)(ii)(A).

[216] *See id.* at Art. 46.

[217] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 535 (2d Cir. 2016).

[218] *See* 2011 NFL CBA, *supra* note 26, at Art. 46.

[219] The Disciplinary Officer serves a minimum two-year term (unless the NFLPA and NFL decide otherwise), after which either party may discharge the Disciplinary Officer with 120 days written notice. 2020 NFL CBA, *supra* note 212, at Art. 46 § 1(e)(i). If the officer is dismissed, the parties will each then identify two successor candidates at minimum. *Id.* Then, "[a]ll timely candidates will . . . be promptly ranked by the parties. Within sixty days, the top two candidates will be interviewed by the parties. Absent agreement on a successor, the parties will alternately strike names from said list, with the party striking first to be determined by the flip of a coin." *Id.*

[220] *Id.*

[221] *Id.* at Art. 46 § 1(e)(ii).

[222] *Id.* at Art. 46 § 1(e)(iv).

[223] 2020 NFL CBA, *supra* note 212, at Art. 46 § 1(e)(v).

right no longer exists. The Commissioner (or his designee) then issues a written decision that is final and binding.[224] If a player seeks to reduce the suspension, he would only be able to rely on the evidence that was already put in front of the Disciplinary Officer. Thus, he cannot advance arguments concerning the fairness of the hearing, the exclusion of evidence, or the existence of arbitrator bias.

The new CBA also outlines that the NFL, in hearings conducted for PCP violations, must produce any "transcripts or audio recordings of witness interviews, any expert reports and court documents obtained or prepared by the NFL as part of its investigation, and any evidentiary material referenced in the investigative report that was not included as an exhibit."[225] These discovery requirements for PCP violations are stark in comparison to discovery requirements for cases based on conduct detrimental to the league, where there is no mention of what the NFL is required to turn over other than "exhibits" on which the NFL "intend[s] to rely."[226]

VI. CRITICAL RECOMMENDATIONS TO IMPROVE THE NFL'S DISCIPLINARY PROCESS

Despite the NFLPA and the players indicating that player discipline was a crucial issue ahead of talks between the two prior to agreeing to the current CBA,[227] it remains largely the same as it was when Deflategate was decided. It appears that the NFLPA made the decision that there were more important issues than player discipline because only a handful of players have found themselves in the appeals process.[228] While it may be true that not many players find themselves entangled in the appeals process for player discipline, Brady's case conveys that the federal courts will not intervene in the NFL's arbitration process. Any shortcomings are the result of the NFLPA bargaining for them and agreeing to them. Thus, it is crucial for the NFLPA to bargain for changes to Article 46 to ensure that the disciplinary process is fair to players.

The number one priority for the NFLPA should be to limit the Commissioner's power to preside over appeals to his initial suspensions and fines. The recent change that enables a DO to be the first person to hear the appeal for discipline imposed for conduct violative of the PCP is a step in the right direction, but it is not enough. A disciplinary system similar to the

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[224] *Id.*

[225] *Id.* at Art. 46 § 2(f)(ii)(B).

[226] *See id.* at Art. 46 § 2(f)(ii)(A).

[227] Kevin Seifert, *DeMaurice Smith: NFLPA Will Approach 2021 Talks Like 'War'*, ESPN (Feb. 2, 2018, 9:57 AM), https://www.espn.com.sg/nfl/story/_/id/22291292/demaurice-smith-nflpa-approach-2021-cba-talks-war.

[228] *See* Daniel Kaplan, *Ten Important Changes in the New NFL CBA*, THE ATHLETIC (Mar. 15, 2020), https://theathletic.com/1676849/2020/03/15/ten-important-changes-in-the-new-nfl-cba/.

NHL,[229] NBA,[230] and MLB,[231] which allows an impartial arbitrator to hear the final appeal, would ensure that even the perception of partiality could be avoided. The NFL should also include a provision that prohibits communication about a case between those who are "prosecuting" the player and those who ultimately decide, similar to the NHL.[232] Proscribing communication between investigators and arbitrators (the Commissioner, or others) would limit the Commissioner's involvement with any investigations and ensure his impartiality. The court in Brady's case determined that whether or not the Commissioner was partial was not really a concern because arbitration is a creature of contract, and the parties to an arbitration cannot ask for more impartiality than "inheres in the method they have chosen."[233] The NFLPA and NFL specifically contracted to allow the Commissioner to preside as arbitrator over appeals, and knew he would have a stake in the underlying discipline and in every arbitration brought.[234] Thus, the court determined that even if the arbitrator is partial to one side, or has an interest, that partiality will not be enough to vacate an award under the "evident partiality" prong under the FAA if the parties bargained for it. The only way to avoid having a partial Commissioner as arbitrator, is to remove him from the appeals process as a whole.

The NFL and NFLPA should seek to clarify what the standard of proof is for disciplinary proceedings. This was not directly addressed by the court in Brady's case, but it remains an unanswered question. The NHL has a "clear and convincing evidence standard" for the Commissioner when considering appeals for on-ice conduct discipline, and a "substantial evidence" standard for the Impartial Arbitrator in reviewing the Commissioner's imposed discipline for off-ice conduct. The NFLPA should begin by advocating for a standard in the first place. Currently, there is nothing in the NFL CBA that indicates the standard of proof. Courts, as outlined above, are highly deferential to CBAs and thus will not vacate an award on evidentiary grounds simply because a standard has not been bargained for. Rather, courts will defer to the Commissioner's interpretation of the CBA. The NFLPA should advocate for a similar standard to that of the NHL.

Directly at issue in Brady's case was limited discovery. The MLB provides that a disciplined player has the right to discover all documents related to the investigation, including those that are exculpatory.[235] The NFLPA and NFL should implement a similar provision because, as noted

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[229] *See* NHL CBA, *supra* note 152, at Art. 18 § 18.13(a).
[230] *See* NBA CBA, *supra* note 140.
[231] *See* MLB CBA, *supra* note 116, at Art. XI.
[232] NHL CBA, supra note 152, at Art 18-A § 18-A.3(f).
[233] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 548 (2d Cir. 2016).
[234] *Id.*
[235] MLB CBA, *supra* note 116, at Art XII § D.

above, the courts will not vacate an award for fairness concerns simply because the NFLPA agreed to a truncated discovery provision. The 2020 CBA remains silent on the players right to cross-examine accusing witnesses and those involved in any investigation. Even if a firm requirement compelling witnesses to testify is not possible, a provision that requires the league to try its best to get voluntary participation in an arbitration hearing would ensure that the Commissioner does not exercise his authority to waive off requests to cross-examine witnesses. Commissioner Goodell refused such a request in Brady's case. The NHL's process is an excellent example of how this could be done. There, the CBA requires that the NHL and NHLPA use their best efforts to ensure that witnesses are present at the arbitration hearing, so they are able to testify.[236] MLB also provides that the player has a right to evidence that may impeach any witnesses that appear at hearings.[237]

These recommendations will not only aid the NFL in conducting a fair arbitration process, but they will also help to ensure that disputes do not bubble over into drawn out and expensive battles in federal courts.

VII. CONCLUSION

Without significant changes to the CBA, the players will remain subject to the Commissioner's discipline with very little in terms of recourse. The Commissioner continues to wield immense control over the investigatory process—who is disciplined and why; the appeal procedures; what evidence is discoverable; and whether a punishment is affirmed. The control of the Commissioner can lead to punishments that have the appearance of being unfair from the start, leading to dissatisfaction and mistrust from the players and fans. Further, federal courts are unlikely to vacate any discipline that the Commissioner imposes—see Brady, Adrian Peterson, and Ezekiel Elliott's respective cases.[238] The Deflategate saga is not just impactful in the realm of professional sports, it is also informative for unionized labor as a whole. If an individual is not an athlete who has already made millions of dollars, the impact of being dismissed from a job is much more severe. Inattention to detail when crafting and negotiating a labor agreement is detrimental to all, not just high-profile athletes. As demonstrated in the section above regarding the CBA between Ford and the UAW, unartful drafting of CBAs can leave employees with uncertainties about what they can be disciplined for.

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[236] NHL CBA, *supra* note 152, at Art. 17 § 17.9.

[237] MLB CBA, *supra* note 116, at Art XII § D.

[238] *See* Nat'l Football League Players Ass'n on behalf Peterson v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016); Nat'l Football League Players Ass'n v. Nat'l Football League, 874 F.3d 222 (5th Cir. 2017).

Tom Brady's actual guilt or innocence, while important, is not the focus or issue. Rather, the issue is the system that was used to punish him. Instead of fostering a system that resolves disputes quickly via arbitration, the NFL's CBA fails to ensure that players receive a fair disciplinary process. While the current rendition of the NFL CBA runs through the 2030 season—that might be just enough time for the NFLPA to determine what its priorities are, and to advocate for them. The disciplinary process under the CBA should be at the top.