NOTES & COMMENTS

Deflategate Pumped Up: Analyzing the Second Circuit's Decision and the NFL Commissioner's Authority

JOSH MANDEL*

Deflategate was one of the most controversial scandals in NFL history, and while many became fascinated due to their love of football, Deflategate was ultimately rooted in law. NFL Commissioner Roger Goodell suspended Tom Brady, the legendary quarterback for the New England Patriots, for four games for engaging in "conduct detrimental to the integrity of and public confidence in the game of professional football." More specifically, Goodell suspended Brady because he was generally aware of Patriots staff deflating footballs prior to the 2015 AFC Championship game, and because he failed to cooperate with the investigation into the deflated footballs.

Commissioner Goodell controversially elected to act as the arbitrator in Brady's challenge to the four-game suspension, which Goodell affirmed in his arbitration award. Thereafter, Brady successfully petitioned the United States District Court for the Southern District of New York to vacate Goodell's arbitration award. Nonetheless, the 544-day

* Editor-in-Chief, University of Miami Law Review; J.D. Candidate 2018, University of Miami School of Law; B.A. 2012, Oberlin College. I would like to thank my family and friends, AEL, the HOPE Public Interest Office, and the University of Miami School of Law. A special thank you to Professor Peter Carfagna for his support and direction, and the University of Miami Law Review for selecting this Note for publication. This Note received the inaugural University of Miami School of Law Dean's Writing Prize Award in Entertainment, Arts & Sports Law.

Deflategate saga ended after the Second Circuit reinstated Goodell's award in a 2–1 decision and denied Brady's subsequent request for en banc review. Because two federal judges ruled in favor of Brady, while two others ruled in favor of Goodell and the NFL, this Note acts as the tiebreaker, wherein each issue on appeal is reevaluated and discussed under controlling arbitration and labor law.

Upon closer examination, Deflategate presents a number of important questions about the scope and fairness of the NFL Commissioner's authority. Should the NFL Commissioner have the authority to elect himself as the arbitrator in a challenge to his prior disciplinary decision? Should the NFL Commissioner have the authority to suspend, or terminate the contract of, any player who engages in "conduct detrimental" to the NFL, despite the "conduct detrimental" standard holding no concrete definition and being subject to the unilateral interpretation of the NFL Commissioner? How far can and should such a standard be stretched? Is such a standard inherently fair simply because a court deems it so?

While this Note begins with the discussion outlined above—acting as the tiebreaker in the 2–2 split among federal judges—this Note then focuses more broadly on the contractual rights afforded to and enjoyed by the NFL Commissioner. In doing so, this Note explores the provisions in the 2011 NFL Collective Bargaining Agreement that many believe grants the NFL Commissioner too much authority, and discusses ways in which the NFL Players Association and the NFL can come to an agreement in limiting such authority as the negotiations for the 2021 Collective Bargaining Agreement soon approaches.

INTRODUCTION 830
I. WHAT IS DEFLATEGATE? 832
A. *The AFC Championship Game* 832
B. *The Wells Report and the Suspension* 833
C. *Brady's Appeal* 835
D. *The Arbitration* 837

1. FACTUAL ISSUES 837
2. PROCEDURAL ISSUES 838
II. UNITED STATES DISTRICT COURT JUDGE RICHARD BERMAN'S DECISION 839
A. *Notice* 840
B. *Examining Jeff Pash* 842
C. *The Wells Report Investigative Notes* 843
III. THE SECOND CIRCUIT'S DECISION 844
A. *Majority* 844
1. NOTICE 845
2. EXAMINING JEFF PASH 849
3. THE WELLS REPORT INVESTIGATIVE NOTES 850
B. *Dissent* 850
IV. BREAKING THE 2–2 TIE 851
A. *Governing Labor and Arbitration Law* 852
B. *Article 46's Provisions* 853
C. *The Standard NFL Player Contract* 854
D. *Notice* 854
1. SUSPENSION OR FINE 854
2. ANALOGIZING DEFLATING FOOTBALLS TO STEROID USE 855
3. PUNISHMENT FOR SPECIFIC CONDUCT 857
4. DISCIPLINE FOR PROVIDING INDUCEMENTS AND REWARDS 859
E. *Examining Jeff Pash* 861
F. *The Wells Report Investigative Notes* 863
G. *Brady's Request for En Banc Review* 864
H. *Commentary to the Second Circuit's Majority Opinion* 865
V. A CLOSER LOOK AT THE NFL COMMISSIONER'S AUTHORITY 866
A. *The Power of Article 46* 866
B. *Looking to the 2021 CBA* 871
CONCLUSION 879

INTRODUCTION

New England Patriots ("Patriots") quarterback Tom Brady is a living football legend, considered by many to be the greatest quarterback of all time. His achievements on the gridiron are endless: at the close of the 2017 National Football League ("NFL") regular season, Brady had thrown for 66,159 yards, 488 touchdowns, and just 160 career interceptions.[1] Yet, despite his unquestioned greatness, one interception would forever associate Brady with the most controversial NFL scandal to date.

The interception in question occurred on January 18, 2015, when the Patriots defeated the Indianapolis Colts ("Colts") in the American Football Conference ("AFC") Championship game.[2] During the second quarter, Colts linebacker D'Qwell Jackson intercepted Brady's pass.[3] During halftime, the game referees tested the air pressure on twelve of the Patriots' footballs after becoming aware that the footballs might have been underinflated.[4] The referees found that eleven of the twelve balls were, in fact, underinflated,[5] prompting the 544-day scandal known as "Deflategate."[6]

A subsequent investigative report ("the Wells Report") into the deflated footballs was published.[7] The Wells Report concluded that

---

[1] *New England Patriots*, NAT'L FOOTBALL LEAGUE, http://www.nfl.com/player/tombrady/2504211/careerstats (last visited Feb. 25, 2018).

[2] ASSOCIATED PRESS, *Tom Brady Carries Pats to Rout of Colts, Claims Sixth Super Bowl Trip*, ESPN (Jan. 19, 2015), http://www.espn.com/nfl/game?gameId=400749520.

[3] John Breech, *Colts LB D'Qwell Jackson Basically Started Deflategate on Accident*, CBS SPORTS (Jan. 22, 2015), http://www.cbssports.com/nfl/eye-on-football/24984712/did-colts-lb-dqwell-jackson-start-deflategate-on-accident.

[4] Mark Sandritter, *NFL Determines Patriots Used Deflated Footballs During AFC Championship, Per Report*, SBNATION (Jan. 20, 2015, 11:09 PM), http://www.sbnation.com/nfl/2015/1/20/7864117/patriots-deflated-footballs-nfl-new-england-bill-belichick.

[5] *Id.*

[6] Alex Reimer, *Deflategate Officially Ended 544 Days After It Started, but We Can't Stop Talking About it*, SBNATION, http://www.sbnation.com/nfl/2015/8/31/9213261/deflategate-timeline-tom-brady-roger-gooddell-patriots/in/7622154 (last updated Feb. 5, 2017, 12:45 PM) [hereinafter *Deflategate Officially Ended*].

[7] *See generally* THEODORE V. WELLS, JR. ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS

it was "more probable than not" that Brady was "generally aware" of misconduct committed by Patriots employees in relation to the deflation of the footballs.[8] As a result, NFL Commissioner Roger Goodell suspended Brady for the first four games of the following 2015–2016 NFL regular season because Brady had engaged in "conduct detrimental to the integrity of and public confidence in" the NFL.[9] Goodell later announced that he would elect to serve as the arbitrator in Brady's appeal.[10]

Goodell upheld the suspension in his arbitration award.[11] Thereafter, Brady petitioned the United States District Court for the Southern District of New York to vacate Goodell's arbitration award, which was ultimately granted by Judge Richard Berman.[12] The NFL appealed Judge Berman's decision to the Second Circuit, where Goodell's arbitration award was reinstated.[13] On July 13, 2016, Brady's petition for a Second Circuit en banc rehearing was denied.[14]

Because two federal judges ruled in favor of Brady and two others ruled in favor of the NFL, this Note analyzes the conflicting views between the courts, and discusses which views were more in line with legal standards and case law. In other words, this Note analyzes, and thus predicts, which way the Second Circuit en banc

---

USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (2015), http://online.wsj.com/public/resources/documents/Deflategate.pdf.

[8] *Id.* at 2.

[9] *NFL releases statement on Patriots' violations*, NAT'L FOOTBALL LEAGUE: NEWS, http://www.nfl.com/news/story/0ap3000000492190/article/nfl-releases-statement-on-patriots-violations (updated May 11, 2015, 8:48 PM).

[10] Jonathan Clegg, *Goodell Appoints Himself Arbitrator of Brady Appeal*, WALL STREET JOURNAL (May 15, 2015, 11:23 AM), http://www.wsj.com/articles/goodell-appoints-himself-arbitrator-of-brady-appeal-1431703420.

[11] Roger Goodell, National Football League, Final Decision on Article 46 Appeal of Tom Brady 20 (July 28, 2015), https://nfllabor.files.wordpress.com/2015/07/07282015-final-decision-tom-brady-appeal.pdf.

[12] Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n (*NFL Mgmt. Council I*), 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015).

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

[14] Alex Reimer, *Tom Brady's DeflateGate Appeal is Rejected, Suspension Stands*, SBNATION (July 13, 2016, 9:45 AM), http://www.sbnation.com/nfl/2016/7/13/11779840/tom-brady-deflategate-appeal-rejected.

panel would have decided if it had granted Brady's request for a rehearing.

Deflategate was just one example of the NFL Commissioner's broad disciplinary and governing authority. Following the detailed discussion of Deflategate, this Note addresses the provisions of the NFL and NFLPA Collective Bargaining Agreement ("CBA") that grant the NFL Commissioner authority, which many consider far too broad and unfair to players. This Note offers an eye-opening example, wherein the NFL Commissioner, under the relevant authority in the CBA, could suspend, or terminate the contract of, a player for engaging in constitutionally-protected behavior. Finally, in an attempt to limit the Commissioner's authority, this Note offers suggestions and recommendations to the NFLPA and NFL (including Roger Goodell himself) in advance of the inevitable collective bargaining to follow the expiration of the current CBA in 2021.

This Note begins in Part I with a detailed background of the facts in Deflategate. Part II explains Judge Berman's reasons for vacating Goodell's arbitration award. Part III explains the reasoning of the Second Circuit majority and dissenting opinions. Part IV analyzes all three judicial opinions under controlling legal principles, thereby predicting what the Second Circuit en banc panel, if it had granted rehearing, would have considered and held. Finally, Part V examines the NFL and NFLPA CBA and addresses relevant concerns about the NFL Commissioner's power.

I. WHAT IS DEFLATEGATE?

A. *The AFC Championship Game*

On January 18, 2015, the Patriots played against the Colts in the AFC Championship game.[15] During the second quarter of the game, Patriots quarterback Tom Brady threw a pass that was intercepted by Colts linebacker D'Qwell Jackson.[16] Jackson returned to the Colts sideline with the ball in hand and ultimately an equipment staff member informed Colts head coach Chuck Pagano that the ball felt underinflated.[17] After Coach Pagano notified the appropriate NFL personnel, the game referees tested the pounds per square inch

---

[15] ASSOCIATED PRESS, *supra* note 2.

[16] Breech, *supra* note 3.

[17] *Id.*

("psi") levels of the Patriots' and Colts' footballs.[18] The referees found that all four of the Colts' footballs were within the NFL's permissible psi range of 12.5 to 13.5,[19] while eleven out of twelve of the Patriots' footballs were deflated to a psi below 12.5.[20] The Patriots won the game handily, with a score of 45–7,[21] and eventually went on to win the Super Bowl by beating the Seattle Seahawks in historic fashion.[22]

On January 23, 2015, Goodell released the NFL's first statement concerning what quickly became dubbed "Deflategate" by sports media.[23] In the statement, Goodell notified the public that the NFL was "conducting an investigation as to whether the footballs used in . . . [the] AFC Championship Game complied with the specifications that are set forth in . . . Playing Rule 2, Section 1, which requires that the ball be inflated to between 12.5 and 13.5 [psi]."[24] Goodell then explained that NFL Executive Vice President Jeff Pash and Ted Wells of the law firm Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") would lead the investigation.[25]

B. *The Wells Report and the Suspension*

The 243-page Wells Report was published on May 6, 2015.[26] In the report, Ted Wells found that it was more probable than not that Patriots equipment assistant John Jastremski and Patriots locker room attendant Jim McNally deliberately deflated footballs, and that

---

[18] *See* Sandritter, *supra* note 4. Interestingly, NFL policy allows for each team to provide their own footballs for a game—and Tom Brady led the charge to implement this policy. *See* Dana Hunsinger Benbow, *How Tom Brady Helped Change Rule for Pre-Game Care of Footballs*, USA TODAY SPORTS (Jan. 26, 2015, 6:20 PM), https://www.usatoday.com/story/sports/nfl/2015/01/26/tom-brady-deflategate-peyton-manning-rule-change-nfl/22372835/.

[19] WELLS, JR. ET AL., *supra* note 7, at 1. *See generally Rulebook: Rule 2: The Ball*, NAT'L FOOTBALL LEAGUE, http://static.nfl.com/static/content/public/image/rulebook/pdfs/5_2013_Ball.pdf (last visited Feb. 25, 2018).

[20] Sandritter, *supra* note 4.

[21] ASSOCIATED PRESS, *supra* note 2.

[22] *See Deflategate Officially Ended*, *supra* note 6.

[23] NAT'L FOOTBALL LEAGUE: COMMUNICATIONS, NFL STATEMENT (2015), https://nfllabor.files.wordpress.com/2015/01/1-23-15-nfl-statement-2.pdf.

[24] *Id.*

[25] *Id.*

[26] *See generally* WELLS, JR. ET AL., *supra* note 7.

"it [was] more probable than not that [Brady] was at least generally aware of the inappropriate activities of McNally and Jastremski."[27]

The investigative team relied on the following in reaching its conclusion: (1) text messages between McNally and Jastremski;[28] (2) the unusual relationship between Brady and Jastremski following the AFC Championship Game;[29] (3) the low likelihood that an equipment assistant and a locker room attendant would deflate footballs without the star quarterback's approval;[30] and (4) Brady's public acknowledgement that he prefers game balls at a lower psi level, as well as his involvement in the 2006 rule change regarding how teams prepare footballs during road games.[31] It was also noted in the Wells Report that, upon request, Brady declined to provide texts, emails, or any documents and electronic information relevant to the investigation.[32]

On May 11, 2015, the NFL punished Brady for his role in Deflategate.[33] NFL Executive President Troy Vincent wrote a letter to Brady, stating that "pursuant to the authority of the Commissioner under Article 46 of the Collective Bargaining Agreement and [Brady's] NFL Player Contract," Brady was to be suspended without pay for the first four games of the 2015–2016 regular season.[34] In his letter to Brady, Vincent explained that

> the [Wells] report established that there is substantial and credible evidence to conclude you were at least *generally aware* of the actions of the Patriots' employees involved in the deflation of the footballs and that it was *unlikely* that their actions were done *without your knowledge*. Moreover, the report documents your f*ailure to cooperate fully and candidly* with the

---

[27] *Id.* at 2.

[28] *See id.* at 4–7.

[29] *See id.* at 18.

[30] *See id.* at 19.

[31] *See id.*

[32] It is important to note that Brady's refusal to provide the requested information was not material to the conclusions made in the Wells Report. *See id.* at 21.

[33] *Deflategate Officially Ended*, *supra* note 6.

[34] *Troy Vincent's Letter to Tom Brady*, ESPN (May 12, 2015), http://www.espn.com/nfl/story/_/id/12873455/troy-vincent-letter-tom-brady.

> investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) . . . . Your actions . . . clearly constitute conduct detrimental to the integrity of and public confidence in the game of professional football.[35]

C. *Brady's Appeal*

Brady formally appealed his suspension on May 14, 2015.[36] Later that day, Goodell announced that he would serve as the arbitrator in Brady's appeal.[37] Such a decision was unexpected given Goodell's usual practice of appointing independent arbitrators for high-profile appeals,[38] and the fact that Goodell decided to hold an independent investigation (i.e., the Wells Report).

Brady, represented by the NFL Players Association ("NFLPA") and New York attorney Jeffrey Kessler,[39] filed a number of motions requesting that (1) Goodell recuse himself as arbitrator, (2) the NFL produce Commissioner Goodell, NFL Executive Vice President Troy Vincent, NFL Executive Vice President Jeff Pash, and Ted Wells as witnesses at Brady's arbitration, and (3) the NFL produce "[a]ll documents created, obtained, or reviewed by NFL investigators (including 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)."[40]

Goodell released a letter to the public on June 2, 2015, where he explained his reasons for denying Brady's request for Goodell's recusal as arbitrator.[41] In short, the letter explained that the CBA

---

[35] *Id.* (emphasis added).

[36] *Deflategate Officially Ended*, *supra* note 6.

[37] Clegg, *supra* note 10.

[38] *See id.*

[39] *See Jeffrey L. Kessler*, WINSTON & STRAWN LLP, http://www.winston.com/en/who-we-are/attorneys/kessler-jeffrey-l.html (last visited Feb 25, 2018).

[40] Motions for Tom Brady at 2, Re: Tom Brady Article 46 Appeal, http://thesportsesquires.com/wp-content/uploads/2015/05/NFLPA-Brady-Motion-to-Compel-Witnesses-and-Discovery.pdf.

[41] *Letter from Roger Goodell to NFLPA Regarding Brady Appeal*, NAT'L FOOTBALL LEAGUE: NEWS, http://www.nfl.com/news/story/0ap3000000495253/

"provides that 'at his discretion,' the Commissioner may serve as hearing officer in 'any appeal' involving conduct detrimental to the integrity of, or public confidence in, the game of professional football."[42]

In this letter, Goodell responded to three arguments Brady made for Goodell's recusal. First, in response to Brady's argument that Goodell should recuse himself because of NFL Executive Vice President Troy Vincent's role in deciding Brady's discipline (i.e., that Vincent, rather than Goodell, disciplined Brady), Goodell stated that he never ordered Vincent to discipline Brady.[43] Instead, Goodell explained that Vincent was authorized to inform Brady of the suspension and the reasons supporting the discipline in a written letter.[44] Second, in response to Brady's argument that Goodell should recuse himself because he was a "necessary" or "central" witness in the appeal proceeding, Goodell simply denied this allegation.[45] Third, in response to Brady's argument that Goodell should recuse himself because he had prejudged the matter, Goodell stated that, despite his public appreciation for the work done by Ted Wells and the Paul, Weiss firm, he was not "wedded to their conclusion or to their assessment of the facts."[46] Goodell then expressed that he had an open mind going into the arbitration.[47]

Almost three weeks later, on June 22, 2015, Goodell denied Brady's additional requests: that NFL Executive Vice President Jeff Pash testify, and that the investigative notes used in drafting the Wells Report be provided to Brady.[48] In support of his denials, Goodell explained that Pash did not play a substantial role in the investigation, and that the investigative notes played no role in Goodell's decision to suspend Brady.[49]

---

article/letter-from-roger-goodell-to-nflpa-regarding-brady-appeal (updated June 2, 2015, 3:04 PM).

42 *Id.*

43 *Id.*

44 *See id.*

45 *See id.*

46 *Id.*

47 *Id.*

48 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 459 (S.D.N.Y. 2015).

49 *Id.*

D. *The Arbitration*

The arbitration appeal hearing was held on June 23, 2015.[50] Five days later, Goodell published his arbitration award confirming Brady's suspension.[51] The award addressed a number of issues, but only the following four are relevant for this Note. The first two issues are factual, while the second two are procedural.

1. FACTUAL ISSUES

Goodell first addressed Brady's role in the deflation of the footballs.[52] Goodell's ultimate conclusion was 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 the game balls."[53] Goodell relied on the following: (1) Brady's relationship with Jastremski and McNally; (2) the frequency, duration, and location of Brady's conversations with Jastremski and McNally; (3) the Wells Report investigators' interviews; (4) and text messages between Jastremski and McNally in reference to Brady and footballs.[54]

Next, Goodell looked to Brady's level of cooperation with the Wells Report investigation, initially noting that

> [t]he most significant new information that emerged in connection with the appeal was evidence that on or about March 6, 2015—the very day he was interviewed by Mr. Wells and his investigative team—Mr. Brady instructed his assistant to destroy the cellphone that he had been using since early November 2014, a period that included the AFC Championship Game and the initial weeks of the subsequent investigation . . . At the time that he arranged for its destruction, Mr. Brady knew that Mr. Wells and his

---

50 Goodell, *supra* note 11, at 1.

51 *Id.*

52 *See id.* at 7–11.

53 *Id.* at 10 (emphasis added).

54 *Id.* at 7–11.

> team had requested information from that cellphone in connection with their investigation.[55]

As to these factual issues, Goodell ultimately found that

> (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. All of this indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football.[56]

2. PROCEDURAL ISSUES

Goodell then moved on to two procedural issues. First, Goodell addressed his decision to suspend Brady for four games, rather than to fine him.[57] Goodell pointed out that "[n]o prior conduct detrimental proceeding is directly comparable to this one."[58] As a result, Goodell stated the following:

> In terms of the appropriate level of discipline, the closest parallel of which I am aware is the collectively bargained discipline imposed for a first violation of the policy governing performance enhancing drugs; steroid use reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game. . . . [T]he first positive test for the use of [PEDs] has resulted in a four-game suspension without the need for any finding of actual competitive effect.[59]

---

55 *Id.* at 1–2.
56 *Id.* at 13 (emphasis added).
57 *See id.* at 14.
58 *Id.*
59 *Id.* at 16.

Next, in response to Brady's argument that he was not given notice of possible discipline for his actions, Goodell noted that Brady was aware of or had notice with respect to the following: (1) that the authorized psi range for game balls was between 12.5 and 13.5; (2) that it is reasonable to believe that tampering with game balls could affect the integrity of, and public confidence in, the game of professional football; and (3) that destroying cell phones, which were essential to investigators, would itself be deemed conduct detrimental.[60] Goodell also pointed out that "the CBA-mandated standard NFL Player Contract, which Mr. Brady signed, makes clear and provides notice that, in the event of a finding of conduct detrimental, [Goodell] may 'suspend Player for a period certain or indefinitely.'"[61]

II. UNITED STATES DISTRICT COURT JUDGE RICHARD BERMAN'S DECISION

Brady filed a petition to vacate Goodell's arbitration award in the United States District Court for the Southern District of New York.[62] On September 3, 2015, presiding Judge Richard Berman ruled in favor of Brady, thereby vacating the four-game suspension.[63] Judge Berman outlined the issues presented:

> (A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President . . . Jeff Pash; and (C) denial of equal access to investigative files, including witness interview notes.[64]

---

60 *See id.* at 18.

61 *Id.* For a detailed discussion about this relevant provision of the CBA-mandated standard NFL Player Contract, see *infra* Part V.

62 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015).

63 *Id.* at 449, 453.

64 *Id.* at 463.

A. *Notice*

In response to Brady's allegation of improper notice,[65] Judge Berman analyzed four questions presented: (1) whether Brady was on notice that he could be suspended based on a comparison between deflating footballs and steroid use; (2) whether Brady was on notice he could be suspended for being generally aware of others' misconduct; (3) whether Brady was on notice his specific conduct could lead to a suspension; and (4) whether the CBA's Article 46 conduct detrimental standard provided sufficient notice.[66]

As to the first question presented,[67] Judge Berman found that no NFL player who "had a general awareness of the inappropriate ball deflation activities of others or who schemed with others to let air out of footballs . . . and also had not cooperated in an ensuing investigation, reasonably could be on notice that their discipline would" be equal to that of a steroid user.[68] In support of this finding, Judge Berman relied on oral arguments,[69] the bargained-for Steroid Policy in the CBA,[70] Ted Wells' testimony,[71] and former NFL Commissioner Paul Tagliabue's observation in the Bountygate[72] matter.[73] Judge Berman then argued that Goodell violated the law of the shop[74] because Goodell did not draw his award from the CBA, and instead "'must have based his award on some body of thought, or feeling, or policy, or law that is outside [of the CBA].'"[75]

---

65 *See id.* at 463–70.

66 *See id.*

67 *See id.* at 465.

68 *Id.*

69 *Id.* at 463.

70 *Id.* at 464.

71 *Id.* at 464–65.

72 *See generally* Katherine Terrell, *New Orleans Saints Bounty Scandal Timeline*, NOLA, http://www.nola.com/saints/index.ssf/2012/12/bounty_scandal_timeline.html (updated Dec. 12, 2012, 9:11 AM).

73 *NFL Mgmt. Council I*, 125 F. Supp. 3d at 463, 465–66.

74 For more information on the arbitration principle of the "law of the shop," see Jerome S. Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQUETTE L. REV. 695, 698 (1966) (explaining that "[w]hen an arbitrator enforces a past practice [prevalent in the industry,] he is merely declaring the industrial 'common law of the shop.'"). *See also infra* notes 165–169 and accompanying text.

75 *NFL Mgmt. Council I*, 125 F. Supp. 3d at 465.

As to the second question presented,[76] Judge Berman emphasized that the "principal finding" in the Wells Report and Troy Vincent's suspension letter to Brady was that Brady was generally aware of others' misconduct.[77] Judge Berman then explained that "no NFL policy or precedent notifies players that they may be disciplined (much less suspended) for general awareness of misconduct by others."[78] Further, Judge Berman found that the NFL has never punished players before for Brady's specific conduct.[79] As a result, Judge Berman concluded that Goodell's arbitration award violated the law of the shop because "Brady had no notice that such conduct was prohibited, or any reasonable certainty of potential discipline stemming from such conduct."[80]

As to the third question presented,[81] Judge Berman found that Brady was not on notice that his conduct could lead to a suspension under the Competitive Integrity Policy.[82] Judge Berman reasoned that Brady "had no legal notice of discipline under the Competitive Integrity Policy, which is . . . distributed solely to—and, therefore, provides notice to—'Chief Executives, Club Presidents, General Managers, and Head Coaches,' and not to players."[83]

As to the fourth and final question presented,[84] Judge Berman concluded that Goodell's use of the conduct detrimental standard in Article 46, rather than specific Player Policies, was "legally misplaced" as a basis for deciding Brady's discipline.[85] Further, he

---

76 *Id.* at 467.
77 *Id.*
78 *Id.*
79 *See id.*
80 *Id.*; *see id.* at 467 n.18.
81 *Id.* at 467–68.
82 *NFL Mgmt. Council I*, 125 F. Supp. 3d at 469.
83 *Id.* at 468–69.
84 *Id.* at 468–70.
85 *Id.* at 470.

pointed out an inconsistency, in that the past conduct of Adrian Peterson[86] and of Ray Rice[87] could have been considered conduct detrimental, where in fact "[they] were disciplined . . . under the specific domestic violence policy . . . because an applicable specific provision within the Player Policies is better calculated to provide notice to a player than [the] general . . . 'conduct detrimental.'"[88]

B. *Examining Jeff Pash*

Judge Berman found that the arbitration was fundamentally unfair because of Goodell's decision to not require testimony from Jeff Pash, the NFL Executive Vice President who acted as the co-lead Wells Report investigator.[89] Judge Berman acknowledged the broad discretion that arbitrators have with respect to admitting evidence into the arbitration.[90] Nonetheless, Judge Berman held that Brady was "foreclosed from exploring . . . whether the . . . Investigation was truly 'independent,' and how and why [Pash] came to edit a supposedly independent investigation report."[91]

Judge Berman then looked generally to NFL arbitration precedent, finding that "in Article 46 arbitration appeals, players must be afforded the opportunity to confront their investigators."[92] After comparing this matter to the Bountygate[93] and Ray Rice[94] matters (i.e., where all individuals associated with the investigation were compelled to testify), Judge Berman stated: "[g]iven Mr. Pash's

---

[86] *See generally* Conor Orr, *Adrian Peterson Suspended Without Pay*, NAT'L FOOTBALL LEAGUE, http://www.nfl.com/news/story/0ap3000000430302/article/adrian-peterson-suspended-without-pay-for-rest-of-14 (updated Nov. 18, 2014, 5:38 PM).

[87] *See generally* Ryan Wilson, *Ray Rice Cut by Ravens, Indefinitely Banned by NFL Amid Video Fallout*, CBS SPORTS (Sept. 8, 2014), http://www.cbssports.com/nfl/news/ray-rice-cut-by-ravens-indefinitely-banned-by-nfl-amid-video-fallout/.

[88] *NFL Mgmt. Council I*, 125 F. Supp. 3d at 470.

[89] *Id.* at 472.

[90] *Id.* at 471 (citing Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283(GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4, 2013)).

[91] *Id*. at 472. Interestingly, in his opinion, Judge Berman questioned the independence of the Wells Report investigation by bolding or quoting the word "independent" seven times. *See generally id.*

[92] *Id.* at 471.

[93] *See generally* Terrell, *supra* note 72.

[94] *See generally* Wilson, *supra* note 87.

very senior position in the NFL . . . and his designation as co-lead investigator with Ted Wells, it is logical that he would have valuable insight into the course and outcome of the Investigation and into the drafting and content of the Wells Report."[95] Accordingly, Judge Berman held that "[t]he issues known to Pash constituted 'evidence plainly pertinent and material to the controversy,' and [Goodell's] refusal to hear such evidence warrants vacatur."[96]

C. *The Wells Report Investigative Notes*

Judge Berman found prejudice against Brady when Goodell denied him access to the Wells Report investigative notes.[97] Judge Berman stated that "Brady was denied the opportunity to examine and challenge materials that may have led to his suspension and which likely facilitated Paul, Weiss attorneys' cross-examination of him."[98]

Judge Berman focused primarily on one troubling fact: "Paul, Weiss acted as both alleged 'independent' counsel during the Investigation and also (perhaps inconsistently) as retained counsel to the NFL during the arbitration."[99] On this issue, Judge Berman further stated that

> Paul, Weiss uniquely *was able* to retain access to investigative files and interview notes which it had developed; *was able* to use them in direct and cross-examination of Brady and other arbitration witnesses; share them with NFL officials during the arbitral proceedings; and, at the same time, withhold them from Brady.[100]

This duality of roles led Judge Berman to believe that Goodell and Pash may have had "greater access to valuable impressions, insights, and other investigative information which was not available

---

95 *NFL Mgmt. Council I*, 125 F. Supp. 3d at 471.
96 *Id.* at 472.
97 *Id.* at 473.
98 *Id.*
99 *Id.*
100 *Id.* (emphasis added).

to Brady."[101] As a result, Judge Berman concluded that Goodell's decision was fundamentally unfair.[102]

Judge Berman closed his opinion by vacating Goodell's award, thereby overturning Brady's four-game suspension.[103] And, of course, one week after Judge Berman's opinion was published, Brady threw four touchdowns in a 28–21 win over the Pittsburgh Steelers.[104]

III. THE SECOND CIRCUIT'S DECISION

The NFL appealed Judge Berman's vacatur to the Second Circuit.[105] In a controversial 2-1 decision published on April 25, 2016, the Second Circuit ruled in favor of the NFL, thereby reinstating Goodell's arbitration award.[106]

A. *Majority*

Judge Barrington Parker, joined by Judge Denny Chin, opened his majority opinion by explaining the general principle driving his findings:

> [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 the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act ("LMRA") [to] ensure that the arbitrator was "even arguably

---

101 *Id.* at 472.

102 *Id.*

103 *Id.* at 474.

104 ASSOCIATED PRESS, *Tom Brady's 4 Passing TDs, 3 to Rob Gronkowski, Highlight Pats' Opening Win*, ESPN (Sept. 11, 2015), http://www.espn.com/nfl/recap?gameId=400791485.

105 *NFL Mgmt. Council II*, 820 F.3d 527, 532 (2d Cir. 2016).

106 *Id.* at 527, 532.

> construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.[107]

Under this principle, Judge Parker responded to the district court's "three bases for overturning Brady's suspension: (1) lack of adequate notice that deflation of footballs could lead to a four-game suspension, (2) the exclusion of testimony from Pash," and (3) the refusal to provide Brady access to the Paul, Weiss investigative notes.[108]

1. NOTICE

With respect to notice, Judge Parker addressed five issues. Regarding the first of the five issues, Judge Berman found that Brady was only provided notice that his specific conduct could be disciplined under the Player Policies, "which are collected in a handbook distributed to all NFL players at the beginning of each season, [and] include a section entitled 'Other Uniform/Equipment Violations.'"[109] Further, Judge Berman reasoned that the Player Policies only provided that under the section entitled Other Uniform/Equipment Violations, "[f]irst offenses will result in fines."[110]

Judge Parker found two flaws inherent in Judge Berman's findings. The initial flaw was pointed out during arbitration, where the NFLPA, on behalf of Brady, discredited its own argument by stating "we don't believe [the Player Policy] applie[d] either, because there is nothing [in the Player Policy] about the balls."[111] Judge Parker agreed, finding that the Player Policies, and more specifically, the section entitled Other Uniform/Equipment Violations, "says nothing about tampering with, or the preparation of, footballs, and, indeed,

---

107 *Id.* at 532.
108 *Id.* at 537–38.
109 *Id.* at 538.
110 *Id.* at 539.
111 *Id.* at 538.

does not mention the words 'tampering,' 'ball,' or 'deflation' at all."[112] Conversely, Judge Parker noted that Article 46 authorized Goodell to discipline players for conduct believed to threaten the integrity of the game, and as such, there was "little difficulty in concluding that the Commissioner's decision to discipline Brady pursuant to Article 46 was 'plausibly grounded in the parties' agreement,' which is all the law requires."[113]

The next flaw Judge Parker noted within the first of five issues was that the 2014 Schedule of Fines makes clear that the fines referred to and relied upon by Judge Berman are only minimums.[114] The 2014 Schedule of Fines states that "other forms of discipline, including higher fines and suspension may also be imposed, based on the circumstances of the particular violation."[115] Judge Parker concluded that Goodell's interpretation of the Player Policies and 2014 Schedule of Fines was "at least 'barely colorable,' which, again, is all that the law requires."[116]

The second of the five notice issues that Judge Parker addressed was in relation to Goodell's steroid comparison.[117] Judge Parker stated that Goodell "was within his discretion in drawing a helpful, if somewhat imperfect, comparison" between deflating footballs and steroid use when considering the discipline imposed on Brady.[118] Judge Parker further explained:

> [i]f deference means anything, it means that the arbitrator is entitled to generous latitude in phrasing his conclusions. . . . While [Brady] may have been entitled to notice of his range of punishment, it does not follow that he was entitled to advance notice of the analogies the arbitrator might find persuasive in selecting a punishment within that range.[119]

---

112 *Id.* at 539.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at 539–40.
118 *Id.* at 540–41.
119 *Id.* at 540.

In response to the dissent's claim[120] that vacatur is warranted because Goodell "failed to [analogize] a policy regarding stickum,"[121] Judge Parker stated that "even if the fine for stickum is the most appropriate analogy to Brady's conduct, nothing in the CBA or our case law demands that the arbitrator discuss comparable conduct merely because we find that analogy more persuasive than others."[122] Judge Parker insisted that although "the penalty meted out to Brady [may be] harsh," vacatur was not warranted.[123] As an important aside, Judge Parker noted that the CBA did not even require Goodell to provide an explanation for his discipline; rather, Goodell was free to suspend Brady without any analogy at all.[124]

The third of the five notice issues that Judge Parker addressed was whether Brady was on notice that he could be suspended for being "generally aware" of others' misconduct.[125] Judge Parker split this issue twofold.[126] First, in response to Judge Berman's finding that there is no disciplinary precedent comparable to Brady's (i.e., discipline for the conduct of deflating footballs), Judge Parker alleged that Judge Berman "misapprehend[ed] the record"—Goodell's award clearly stated that Brady's discipline was confirmed because he "'participated in a scheme to tamper with game balls' **and** 'willfully obstructed the investigation by . . . arranging for destruction of his cellphone.'"[127] In other words, Brady was disciplined for reasons that Judge Berman omitted.

Second, in response to Brady's argument that Goodell was bound to the conclusions in the Wells Report, Judge Parker pointed to Article 46, which notably does not limit an arbitrator from reassessing the factual basis for the discipline at issue.[128] Judge Parker

---

120 *See infra* Section III.B.

121 For more information on what stickum is, see John Gennaro, *San Diego Chargers: What Is "Stickum", Anyway?*, SBNATION (Oct. 22, 2012, 1:12 PM), https://www.boltsfromtheblue.com/2012/10/22/3539890/what-is-stickum-san-diego-chargers (stickum is "a powder, paste, or aerosol spray" applied to players' hands or gloves to improve their grip when catching or handling a football).

122 *NFL Mgmt. Council II*, 820 F.3d at 540, 552.

123 *Id.*

124 *See id.* at 540–41.

125 *See id.* at 541–42.

126 *See id.*

127 *Id.* at 541 (quoting Goodell, *supra* note 11) (emphasis added).

128 *See id.*

made his point by noting that "[b]ecause the point of a hearing in any proceeding is to establish a complete factual record, it would be incoherent to both authorize a hearing and at the same time insist that no new findings or conclusions could be [made]."[129] And, to Brady's argument that the language used in Goodell's award improperly implied his conduct was more severe than the findings in the Wells Report, Judge Parker found that "nothing in the CBA suggests that [Goodell] was barred from concluding, based on new information generated during the hearing, that Brady's conduct was more serious than was initially believed."[130]

The fourth of the five notice issues that Judge Parker addressed was whether Brady was on notice that he could be disciplined for non-cooperation in the Wells Report investigation.[131] Judge Berman found that Goodell's award could not be upheld because no player in NFL history had ever been disciplined for "alleged failure to cooperate with—or even allegedly obstructing—an NFL investigation."[132] Brady also argued that he "had no notice that the destruction of the cell phone would even be at issue in the arbitration proceeding."[133] In response to both Brady and Judge Berman, Judge Parker explained that the NFL's letter to Brady, which stated that he was suspended for reasons such as "failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.)," gave "clear notice [to Brady] that his cooperation with the investigation was a subject of significant interest."[134] Further, Judge Parker pointed out that the testimony of one of Brady's expert witnesses regarding why Brady destroyed his cellphone suggested that Brady "had at least enough notice of the potential consequences of the cell phone destruction to retain an expert in advance of the arbitration."[135] Judge Parker also articulated that "any reasonable litigant would understand that the destruction of evidence, revealed just days before the

---

129 *Id.*
130 *Id.*
131 *See id.* at 542–44.
132 *Id.* at 542.
133 *Id.* at 543.
134 *Id.*
135 *Id.*

start of arbitration proceedings, would be an important issue," and concluded that there was no fundamental unfairness as a result.[136]

The last of the five notice issues that Judge Parker addressed was whether Brady was on notice that he could be suspended, rather than fined.[137] In response to Judge Berman's position that the Player Policies only provided Brady with notice that he could be fined and not suspended, Judge Parker found that Brady's suspension was based on Article 46's conduct detrimental standard, not the Player Policies.[138] In other words, "Article 46 put [Brady] on notice prior to the AFC Championship Game that any action deemed by [Goodell] to be 'conduct detrimental' could lead to suspension."[139]

2. EXAMINING JEFF PASH

Regarding Goodell's denial to compel Jeff Pash's testimony, Judge Parker concluded that Goodell's decision fit "comfortably within [Goodell's] broad discretion to admit or exclude evidence and raises no questions of fundamental fairness."[140] After acknowledging the vast deference that arbitrators are afforded, Judge Parker pointed out that Pash's testimony would cover whether the Wells Report investigation was truly "independent," which was separate from the main issue: whether Brady engaged in conduct detrimental to the NFL.[141] Judge Parker found that "[t]he CBA does not require an independent investigation, and nothing would have prohibited [Goodell] from using an in-house team to conduct the investigation. The [NFLPA] and [NFL] bargained for and agreed in the CBA on a structure that" made the NFL and Goodell responsible for both investigation and adjudication.[142]

---

136 *Id.* at 544.

137 *Id.* at 544–45.

138 *See id.* at 544.

139 *Id.* at 544–45. As explained *infra* in Section V.A., the Standard NFL Player Contract, which every player (including Brady) signs, also provides notice to players that the Commissioner is permitted to fine, suspend, and even terminate the contract of a player should the Commissioner reasonably judge that the player's conduct was detrimental to the League. *See infra* Section V.A.

140 *NFL Mgmt. Council II*, 820 F.3d at 546.

141 *See id.* at 545–46.

142 *Id.* at 546.

3. THE WELLS REPORT INVESTIGATIVE NOTES

Judge Parker decided that Goodell's refusal to allow Brady access to the Wells Report investigative notes was fundamentally fair.[143] Judge Parker clarified that Article 46 only required sharing of exhibits that the adverse parties *intend* to rely on.[144] Given Goodell's claim that he never used the investigative notes to determine Brady's discipline, Judge Parker concluded that "[Goodell] was, at the very least, 'arguably construing or applying the [CBA].'"[145]

B. *Dissent*

Second Circuit Chief Judge Robert Katzmann was the lone dissenter.[146] Judge Katzmann only addressed two points: (1) that Goodell based his final decision on misconduct different from that originally charged; and (2) that Goodell instituted his own brand of industrial justice because of the failure to use stickum as the proper analogy for punishment.[147]

With respect to his first point, Judge Katzmann stated that Goodell improperly based his arbitration award on misconduct that was different from the misconduct that influenced the initial four-game suspension.[148] Judge Katzmann focused on one of the reasons Goodell provided in his arbitration award—that "[Brady] provided inducements and rewards [to John Jastremski and Jim McNally for their efforts in deflating footballs]."[149] But, Judge Katzmann noted that nowhere in the Wells Report was there a finding that "it was 'more probable than not' that the gifts Brady provided [to Jastremski and McNally] were intended as rewards or advance payment for deflating footballs in violation of [NFL] rules."[150] In other words, Judge Katzmann alleged that the Wells Report failed to put Brady on notice "that he was found to have engaged in a *quid pro quo*";

---

143 *See id.* at 546–57.
144 *See id.* at 546.
145 *Id.* at 547.
146 *See id.* at 549.
147 *See id.* at 549–554 (Katzmann, J., dissenting).
148 *Id.* at 550.
149 *Id.*
150 *Id.*

yet *quid pro quo* was one reason Goodell confirmed his initial discipline.[151]

Judge Katzmann interestingly noted that Brady's brief was quiet on this issue—this silence, according to Judge Katzmann, reflected the lack of notice.[152] Judge Katzmann reasoned that if Brady had been aware that Goodell was going to focus on this alleged *quid pro quo*, then Brady may have been able to persuade Goodell to reverse his initial discipline.[153]

Regarding his second point, Judge Katzmann reasoned that Goodell's analogy comparing deflating footballs to using steroids, rather than to using stickum,[154] reflected that the arbitration award was not based on Goodell's interpretation of the CBA.[155] A fine for using stickum would amount to $8,268—an amount much less than Brady's loss of compensation for the four games he was suspended for.[156] Judge Katzmann concluded that, with respect to Goodell's analogy to steroid use, "[t]he lack of any meaningful explanation in [his] final written decision convinces me that [he] was doling out his own brand of industrial justice."[157]

IV. BREAKING THE 2–2 TIE

In response to the Second Circuit's 2–1 reversal of the district court's ruling, University of New Hampshire Law Professor Michael McCann stated "you might say there were [four] federal judges that studied this case and [two] of them ruled for Brady, [two] of them ruled for the NFL."[158] Given such conflict, this Part describes controlling principles, and then applies them to the facts and

---

151 *Id.*

152 *Id.* at 551.

153 *Id.*

154 For more information on stickum, see John Gennaro, *supra* note 121. Judge Katzmann reasoned that stickum, "a substance that enhances a player's grip," was more similar to deflating footballs than using steroids because using stickum and deflating footballs both improve grip and are used without the permission of the referee. *See NFL Mgmt. Council II*, 820 F.3d at 552 (Katzman, J., dissenting).

155 *Id.* at 553–54.

156 *Id.* at 553.

157 *Id.* at 553.

158 *Tom Brady Must Serve 'Deflategate' Penalty*, WCVB, http://www.wcvb.com/article/tom-brady-must-serve-deflategate-penalty/8234240 (last updated Apr. 26, 2016, 5:18 AM).

issues in Deflategate to determine which of the conflicting views likely would have prevailed were an en banc rehearing granted.

A. *Governing Labor and Arbitration Law*

Because the issues in Deflategate involve rights under the NFL's and NFLPA's Collective Bargaining Agreement ("CBA"), § 301 of the Labor Management Relations Act ("LMRA") governs.[159] Judicial review of an arbitration award under LMRA § 301 is "very limited."[160] A court is precluded "from resolving merits of parties' labor disputes on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."[161] The construction of the CBA and determination of any facts at issue, "however good, bad, or ugly," are for the arbitrator—and only the arbitrator—to decide.[162]

Rather than interpreting the CBA or assessing the facts, the purpose of judicial review of labor disputes is instead to determine if the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority."[163] So long as the arbitrator's decision draws "its essence from the [CBA]" and is not merely the arbitrator's "own brand of industrial justice," then the decision must be confirmed.[164]

Although an arbitral decision must be drawn from the CBA, the arbitrator is also bound by what is referred to as the "common law of the shop": "The labor arbitrator's source of law is not confined to the express provisions of the [CBA], as the industrial common law—the practices of the industry and the shop—is equally a part of the [CBA] although not expressed in it."[165] It is accepted that the common law of the shop of professional football requires that players be provided "advance notice of prohibited conduct and potential

---

159 29 U.S.C. § 185 (2012); *see* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

160 *Garvey*, 532 U.S. at 509.

161 *Id.* at 511.

162 Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 573 (2013).

163 United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

164 United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

165 United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960).

discipline."[166] As stated by former neutral NFL arbitrators, "adequate notice is the fundamental concept in discipline cases,"[167] and disciplinary programs "require[] that individuals subject to that program understand, with reasonable certainty, what results will occur if they breach established rules."[168]

While judicial review of an arbitration award is limited, so is the deference afforded to it.[169] The Federal Arbitration Act provides that a court may vacate an arbitration award "where the arbitrators . . . refus[ed] to hear evidence pertinent and material to the controversy,"[170] or "where there was evident partiality."[171]

B. *Article 46's Provisions*

Article 46, Section 1(a) of the CBA states that the Commissioner may fine or suspend a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."[172] Article 46, Section 2(a) states that "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."[173] Article 46, Section 2(b) states that "[t]he NFLPA and NFL have the right to attend all hearings provided for in this Article and to present, by testimony or otherwise, any evidence relevant to the hearing."[174] Article 46, Section 2(f)(ii) states that "[i]n appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely on no later than three (3) calendar days prior to the hearing."[175]

---

166 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 462 (S.D.N.Y. 2015).

167 *Id.*

168 *Id.*

169 *See* United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 32 (1987).

170 9 U.S.C. §10(a)(3) (2012).

171 9 U.S.C. §10(a)(2) (2012).

172 NFL PLAYERS ASS'N, NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 204 (2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter NFL CBA].

173 *Id.* at 205.

174 *Id.*

175 *Id.*

C. *The Standard NFL Player Contract*

In the Standard NFL Player Contract, which can be found in Appendix A of the CBA,[176] players are provided notice of the following:

> Player 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. Player therefore acknowledges his awareness that if he . . . is guilty of any . . . 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 Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.[177]

D. *Notice*

Similar to the three judicial opinions discussed above,[178] the below analysis related to notice will be structured as follows: (1) whether Brady had notice he could be suspended, rather than fined; (2) whether Brady had notice he could be suspended for four games under a comparison between deflating footballs and steroid use; (3) whether Brady was on notice he could be punished for the specific type of conduct he engaged in; and (4) whether Brady was on notice he could be disciplined for providing inducements and rewards.

1. SUSPENSION OR FINE

Both Brady and Judge Berman argued that the only notice provided to Brady was that he could be fined under the Player Policies in the amount of $5,512 "for player equipment violations designed

---

176 *See generally id.* app. at 256–64.
177 *Id.* app. at 261–62.
178 *See supra* Parts II and III.

to gain a competitive advantage."[179] But this argument fails for the reasons presented by Judge Parker, among others.

Judge Parker noted that the 2014 Schedule of Fines (incorporated into the Player Policies) provides that "other forms of discipline, including higher fines and suspension may also be imposed, based on the circumstances of the particular violation."[180] Thus, even if it were true that Goodell based Brady's discipline on the Player Policies and the 2014 Schedule of Fines, Judge Parker was correct in finding that Goodell arguably construed the terms above, as a suspension is permissible under the 2014 Schedule of Fines. Thus, Brady was on notice that his actions could result in suspension.[181]

However, that method of reasoning is unnecessary. Pursuant to Article 46 of the CBA, Goodell is granted the authority to suspend any player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."[182] Further, pursuant to the Standard NFL Player Contract, which Brady signed, the Commissioner is permitted to suspend a player if the Commissioner "reasonably judge[s]" that the player's conduct was "detrimental to the League or professional football."[183] Because Brady signed the Standard NFL Player Contract, he was provided with notice of the language within it. In other words, here, Brady was provided with clear notice of the possibility of being suspended for conduct detrimental to the League when he signed his NFL Player Contract.

2. ANALOGIZING DEFLATING FOOTBALLS TO STEROID USE

Judge Berman found that Brady had no notice that his suspension would be based on a comparison between deflating footballs and steroid use.[184] Judge Berman reasoned that "as a matter of law, [the NFL's Steroid Policy cannot] serve as adequate notice of discipline to Brady,"[185] and, as a result, "Goodell may be said to have

---

179 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 467 (S.D.N.Y. 2015).

180 *NFL Mgmt. Council II*, 820 F.3d 527, 539 (2d Cir. 2016).

181 *See id.* at 538–39.

182 NFL CBA, *supra* note 172, at 204.

183 *Id.* app. at 261. For further discussion on the possible alarming effects of this Standard NFL Player Contract provision, see *infra* Part V.

184 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 463–66 (S.D.N.Y. 2015).

185 *Id.* at 464.

'dispensed his own brand of industrial justice.'"[186] In contrast, Judge Parker found that "[w]hile [Brady] may have been entitled to notice of his range of punishment, it does not follow that he was entitled to advance notice of the analogies the arbitrator might find persuasive in selecting a punishment within that range."[187] While both arguments have merit, based on controlling principles of arbitration and labor law, Judge Parker's position prevails.

Article 46, which grants Goodell the authority to discipline players[188] and provides the procedural details for disciplinary proceedings,[189] provides in relevant part that "[a]s soon as practicable following the conclusion of the hearing, the hearing officer will render a written decision which will constitute full, final and complete disposition of the dispute and will be binding upon the player(s), Club(s) and the parties to this Agreement with respect to that dispute."[190] Nothing in the CBA, and more specifically, nothing in Article 46 or the Standard NFL Player Contract that Brady signed, mandates that Goodell explain his reasoning, or provide any analogy used, in determining the discipline imposed.[191] Although comparing deflating footballs to using steroids may be a stretch of an analogy, Goodell arguably construed the CBA provision above.

Dissenting Chief Judge Katzmann's position was that the more appropriate comparison would have been between deflating footballs and using stickum, given that use of stickum and deflation of footballs both "involve attempts at improving one's grip and evading the referees' enforcement of the rules."[192] However, courts are precluded "from resolving merits of parties' labor disputes on basis of its own factual determinations, no matter how erroneous the arbitrator's decision"[193]—and this is precisely what Judge Katzmann was attempting to do. In other words, Judge Katzmann argued Goodell's analogy to steroid use was erroneous, and instead, Goodell should have compared deflating footballs to using stickum.

---

186 *Id.* at 466 (quoting 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 527 (2d Cir. 2005)).

187 *NFL Mgmt. Council II*, 820 F.3d 527, 540 (2d Cir. 2016).

188 *See* NFL CBA, *supra* note 172, at 204–05.

189 *See id.* at 205.

190 *Id.*

191 *See generally id.*

192 *NFL Mgmt. Council II*, 820 F.3d at 552 (Katzman, J., dissenting).

193 Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 511 (2001).

But, as the above principle mandates, Judge Katzmann is forbidden from resolving this dispute on his own factual determination, regardless of how erroneous he believed Goodell's analogy was.

Further, as Judge Parker stated, "[i]f deference means anything, it means that the arbitrator is entitled to generous latitude in phrasing his conclusions."[194] The larger issue under analysis was whether Goodell "arguably construe[ed]"[195] the authority granted to him under Article 46 of the CBA. Given that Article 46 does not require Goodell to explain the reasoning used to determine the award, Goodell was free to suspend Brady for four games, whether based on an analogy to steroid use, stickum, gambling, or otherwise, so long as Brady was on notice that he could be punished for his conduct. Thus, Goodell arguably construed the CBA, even though the analogy he applied may have been irrational.

3. PUNISHMENT FOR SPECIFIC CONDUCT

Judge Berman stated that "[n]o NFL policy or precedent provided notice that a player could be subject to discipline for general awareness of another person's alleged misconduct."[196] Further, Judge Berman echoed Brady's contention that "no player suspension in NFL history has been sustained for an alleged failure to cooperate with—or even allegedly obstructing—an NFL investigation."[197] In other words, because no NFL player had ever been disciplined for being generally aware of others' misconduct, and/or failing to cooperate with an investigation, Judge Berman found that Goodell violated the common law of the shop, and thus dispensed his own brand of industrial justice.[198] Judge Parker, on the other hand, found that Brady was not suspended solely for being generally aware of others' misconduct, or solely for non-cooperation with the Wells investigation, but rather, for being generally aware of others' misconduct **and** for non-cooperation.[199]

---

194 *NFL Mgmt. Council II*, 820 F.3d at 540.

195 *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 30 (1987).

196 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 466 (S.D.N.Y. 2015).

197 *Id.* at 465.

198 *See id.* at 466.

199 *See NFL Mgmt. Council II*, 820 F.3d at 541 (emphasis added).

While Judge Parker was correct that Goodell disciplined Brady for both of these findings together, rather than separately, it is also true that there is no NFL precedent providing notice to players that they can be disciplined for general awareness of others' misconduct, non-cooperation with an investigation, or both the former and the latter. The counterview is that there is, in fact, NFL precedent that provides notice to players that they can be disciplined for the (very broadly defined) conduct detrimental standard found in Article 46 and/or the Standard NFL Player Contract.[200]

These conflicting views on disciplinary precedent beg the question: under the counterview above—that is, that there is precedent that players have been disciplined for "conduct detrimental"—how broadly is this conduct detrimental standard to be defined? Could Goodell suspend a player for four games for partying the night before a big game, arguing that it qualifies as conduct detrimental to the public confidence in the game of professional football? The answer to such a question is likely a resounding yes, yet critics and fans may argue that such discipline seems too strict.[201] Further, following Judge Berman's position detailed above, it could be argued that there is a lack of notice to the player that his conduct could fall under the all-encompassing conduct detrimental standard, which, as can be seen, may be applied so broadly as to inculpate any player for previously undisciplined actions.

This analysis is based on two conflicting views of a complicated legal standard: the law of the shop and its definition and application. On the one hand, Judge Parker argues broadly that disciplining a player for engaging in conduct detrimental does not violate the law of the shop because players have been disciplined under this authority in the past. On the other hand, Judge Berman argues that punishing a player for engaging in conduct detrimental violates the law of the shop if the specific conduct for which the player is being disciplined (e.g., deflating footballs) has never been the subject of discipline. Applying controlling arbitration principles, it logically follows that Goodell arguably construed the CBA, and thus complied with the law of the shop, in that a player, like Brady, is provided

---

200 *See* NFL CBA, *supra* note 172, at 204–05.

201 This question is discussed at length *infra* in Part V.

notice of possible suspension under the conduct detrimental standard in Article 46 and/or the Standard NFL Player Contract. But, at the same time, such a broad standard creates a slippery slope for members of a union, or for those subject to a CBA, whereby the disciplinarian, like Goodell, can justify his or her discipline simply by reliance on an undefined standard, like conduct detrimental, which provides limited precedent to players for specific conduct they can and cannot engage in.

While both Judge Berman's and Judge Parker's views hold merit, the issue of the undefined and arbitrary conduct detrimental standard seems difficult to resolve. Although Brady conceded that his conduct did, in fact, qualify as conduct detrimental, and confined his arguments to specific notice and procedural issues (essentially rendering this question discussed above untouched and without analysis), Judge Berman and the Second Circuit could have, and possibly should have, addressed the fairness of the conduct detrimental standard *sua sponte*, notwithstanding the fact that such a standard was collectively bargained. As it currently stands, the meaning of "conduct detrimental" is essentially left open to (only Roger Goodell's) interpretation—this uncertainty warranted en banc review.

4. DISCIPLINE FOR PROVIDING INDUCEMENTS AND REWARDS

Dissenting Chief Judge Katzmann found that Brady was not on notice that he could be disciplined for providing "inducements and rewards in support of the scheme."[202] Further, Judge Katzmann stated that the Wells Report did not amount to a preponderance of the evidence[203] that Brady's gifts were "intended as rewards or advance payment for deflating footballs in violation of [NFL] rules."[204]

---

[202] *NFL Mgmt. Council II*, 820 F.3d 527, 550 (2d Cir. 2016) (Katzman, J., dissenting).

[203] *See* 1 NAT'L FOOTBALL LEAGUE, *Policy on Integrity of the Game & Enforcement of Competitive Rules*, *in* ADMINISTRATIVE/BUSINESS OPERATIONS – LEAGUE RULES & POLICIES, https://www.espn.com/pdf/2015/0902/espn_otl_nflintegritypolicy.pdf C7, C8 (providing that the "standard of proof required to find that a violation of the competitive rules has occurred shall be a Preponderance of the Evidence. . . . It means that, as a whole, the fact sought to be proved is more probable than not.").

[204] *NFL Mgmt. Council II*, 820 F.3d at 550 (Katzman, J., dissenting).

In response, Judge Parker stated that the Wells Report made clear that its conclusion was "significantly influenced by the substantial number of communications and events consistent with its findings, including that McNally . . . received valuable items autographed by Tom Brady."[205] Further, Judge Parker explained that it was noted in the Wells Report that "Brady [was] a constant reference point in the discussions between McNally and Jastremski about . . . items to be received by McNally."[206] Judge Parker thereby found that Brady was provided notice that these gifts were at issue once the Wells Report was published.[207]

The issue restated is whether Brady was on notice that his relationship and communications with McNally and Jastremski would be at issue in the arbitration, even though the Wells Report never conclusively found that the three participated in a *quid pro quo* for deflating footballs. The Wells Report only stated that Brady's relationship and communications with Jastremski and McNally "significantly influenced" the conclusions.[208] Judge Parker holds to the belief that knowledge of this significant influence was enough to put Brady on notice that his relationship and communications with Jastremski and McNally would be at issue.[209] Yet, Judge Katzmann would require a finding consistent with the requisite standard of proof that Brady "more probabl[y] than not" participated in a *quid pro quo* with Jastremski and McNally for their efforts in deflating footballs.[210]

In an attempt to determine which view prevails, an analogy—for lack of a less ironic method of reasoning[211]—may offer insight. If the law of the shop provides that a player is on notice that his conduct may lead to discipline because **he was aware** that there had been discipline for similar conduct **in the past**,[212] then it similarly

---

205 *Id.* at 542 (majority opinion).

206 *Id.*

207 *See id.*

208 WELLS, JR. ET AL., *supra* note 7, at 13.

209 *See NFL Mgmt. Council II*, 820 F.3d at 542.

210 *See id.* at 550 (Katzman, J., dissenting).

211 *See supra* Section IV.D.2. (addressing Commissioner Goodell's analogy between steroid use and deflating footballs).

212 *See NFL Mgmt. Council II*, 820 F.3d at 541 (Judge Parker offering his view and applying of the law of the shop).

follows that a player is on notice that a factor may influence the arbitrator's decision because **he was aware** that it was an influential factor **in the past**. In other words, because Brady was aware of the "significant influence" that his relationship and communications with Jastremski and McNally played in the Wells Report conclusion,[213] he was therefore on notice that his relationship and communications with Jastremski and McNally could play a role in Goodell's final decision.

E. *Examining Jeff Pash*

Goodell denied Brady's motion to compel NFL Executive Vice President Jeff Pash's testimony at the arbitration hearing on the grounds that Pash did not "play a substantive role in the investigation," and that the Wells Report was "prepared entirely by the Paul Weiss investigative team."[214] Given Mr. Wells' testimony at the arbitration that Pash assisted in the editing process of the Wells Report,[215] Judge Berman concluded that Pash's testimony was, in fact, necessary because Pash would have had "valuable insight into the course and outcome of the investigation and into the drafting and content of the Wells Report," and could testify as to whether the investigation was independent.[216] In other words, Judge Berman argued that "Pash was in the best position to testify about the NFL's degree of involvement in, and potential shaping of, a heralded 'independent' [i]nvestigation."[217]

Judge Parker took the position that Pash's testimony about the independence of the investigation and subsequent Wells Report would have been separate from the main issue, which was whether Brady had engaged in conduct detrimental to the NFL.[218] Judge Parker found that "[t]he CBA does not require an independent investigation, and nothing would have prohibited [Goodell] from using an

---

213 WELLS, JR. ET AL., *supra* note 7, at 13.

214 Article 46 Appeal of Tom Brady, Decision on Hearing Witnesses and Discovery at SPA63, http://online.wsj.com/public/resources/documents/nfl_brief_deflategate.pdf [hereinafter Decision on Hearing Witnesses].

215 *See NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 471 (S.D.N.Y. 2015).

216 *See id.* at 471–72.

217 *Id.* at 472.

218 *NFL Mgmt. Council II*, 820 F.3d 527, 546 (2d Cir. 2016).

in-house team to conduct the investigation."[219] Judge Parker also added that Goodell "made clear that the independence of the Wells Report" was immaterial to the discipline.[220]

Judge Parker's position prevails under controlling arbitration principles and CBA provisions. The Federal Arbitration Act requires that when "arbitrators [are] guilty of . . . refusing to hear evidence pertinent and material to the controversy," then vacatur may be necessary.[221] In addition, vacatur is warranted only when fundamental fairness is violated.[222] Generally, arbitrators "are endowed with 'discretion to admit or reject evidence and determine what materials may be cumulative or irrelevant.'"[223]

Article 46, Section 2(b) provides that "[t]he NFLPA and NFL have the right to attend all hearings provided for in this Article and to present, by testimony or otherwise, any evidence *relevant* to the hearing."[224] Article 46, Section 2(f)(ii) provides that "[i]n 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."[225]

The text of Article 46 is straightforward—the CBA does not require that all evidence must be admitted; the CBA simply requires that the *relevant* admitted evidence be exchanged no later than three days before the hearing.[226] Applied to the arbitration, Goodell's judgment that Pash did not play a substantive role in the investigation is in accordance with these CBA provisions. Goodell was within his authorized discretion as arbitrator "to admit or reject evidence and determine what materials may be cumulative or irrelevant"[227] when he decided that Pash's testimony about the independence of the investigation (which Judge Parker accurately painted as outside the main issue) was unnecessary. Although Judge Berman and Brady may have believed that denying Pash's testimony was

---

219 *Id.*

220 *Id.*

221 9 U.S.C. §10(a)(3) (2012).

222 *See* 9 U.S.C. §10(a)(2) (2012).

223 Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283(GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4, 2013).

224 NFL CBA, *supra* note 172, at 205.

225 *Id.*

226 *Id.* (emphasis added).

227 *Abu Dhabi Inv. Auth*., 2013 WL 789642, at *8.

generally unfair, the CBA, which was negotiated and collectively bargained, did not require Goodell to compel Pash's testimony, so long as Goodell believed—as he did—such testimony was not material or pertinent to the controversy. For these reasons, Judge Parker's argument prevails on this issue.

F. *The Wells Report Investigative Notes*

Goodell denied Brady's motion requesting access to the Wells Report investigative notes, claiming they "played no role in the disciplinary decisions; the Wells Report was the basis for those decisions."[228] Judge Berman, focusing on Paul, Weiss's role as both NFL investigators and NFL counsel, stated that "this change in roles *may have* afforded Goodell (and Pash) greater access to valuable impressions, insights, and other investigation information which was not available to Brady."[229] Judge Parker found that Goodell reasonably interpreted the CBA to not require such expansive discovery.[230] Judge Parker also noted that Goodell "did not review any of Paul, Weiss' internal interview notes or any other documents generated by Paul, Weiss other than the final report."[231]

Goodell was within his authorized discretion as arbitrator to "admit or reject evidence" that he may consider irrelevant to the issue presented.[232] Article 46 of the CBA provides in relevant part that "[i]n appeals under Section 1(a), the parties *shall* exchange copies of any exhibits upon *which they intend to rely*."[233] It should be noted that Judge Berman stated that the change in roles of the Paul, Weiss team "may have" afforded Goodell and Pash more access to these investigative notes, and that Brady was restricted from materials that "may have" led to his suspension.[234] But "may have" does not equate to "which they intend to rely," which would trigger an exchange of exhibits. With these considerations in mind, Goodell con-

---

228 Decision on Hearing Witnesses, *supra* note 214, at SPA65.
229 *NFL Mgmt. Council I*, 125 F. Supp. 3d 449, 472 (S.D.N.Y. 2015).
230 *NFL Mgmt. Council II*, 820 F.3d 527, 547 (2d Cir. 2016).
231 *Id.* at 546–47.
232 *Abu Dhabi Inv. Auth.*, 2013 WL 789642, at *8.
233 NFL CBA, *supra* note 172, at 205 (emphasis added).
234 *See NFL Mgmt. Council I*, 125 F. Supp. 3d at 472–73.

strued Article 46 to mean that Brady's possession of the Wells Report investigative notes was unnecessary because Paul, Weiss—acting as counsel to the NFL—did not intend to rely on them.

Further, the issue presented in the arbitration hearing was whether Goodell's initial discipline was justified. Goodell emphasized the fact that he never considered the investigative notes when determining whether, and for how long, he would discipline Brady—rather, he stated that he focused solely on the Wells Report. Although Judge Berman expressed concern with the seemingly conflicting roles played by Paul, Weiss (i.e., both as investigator for and counsel to the NFL), nothing in the CBA mandates that the investigation be conducted by an independent team, or a team independent to those representing an adverse party. Judge Parker correctly concluded that Goodell was, at the very least, arguably construing the CBA, and thus, did not violate the necessity of fundamental fairness.

Though the CBA does not forbid an investigative party subsequently acting as counsel, the apparent conflict raises questions. The CBA offers no means for someone like Brady who is attempting to gain access to evidence that only the disciplinarian had access to. Should Brady have trusted that Goodell was honest in his assertion that the discipline was based solely on the Wells Report? Imagine if the roles were reversed, and Brady had hired Paul, Weiss to represent him during the arbitration. It is "more probable than not" that Goodell would feel discomfort knowing that Brady hired the team who conducted the investigation to represent him. There is an element of unfairness in this dynamic, though not necessarily under controlling legal principles.

G. *Brady's Request for En Banc Review*

Based on the above discussion, there is a colorable argument that the Second Circuit should have granted en banc review. Brady and Judge Berman focused primarily on issues related to notice, fairness, and the law of the shop,[235] while Judge Parker focused primarily on whether Goodell acted within his broad authority as arbitrator and under the CBA.[236] While it is argued above that the majority of

---

235 *See generally id.*

236 *See generally NFL Mgmt. Council II*, 820 F.3d 527 (2d Cir. 2016).

Judge Parker's arguments would have prevailed should en banc review have been granted, it is unclear whether Brady was on notice that his specific conduct could have led to a four-game suspension.[237] Further, none of the three writing judges discussed the vagueness and arbitrary application of the CBA's conduct detrimental standard found in Article 46 and the Standard NFL Player Contract.

H. *Commentary to the Second Circuit's Majority Opinion*

Former Solicitor General, Ted Olson, who joined Brady's legal team just prior to Brady's request for en banc review, emphasized the impact of the Second Circuit's decision, writing that this matter "raises significant labor law issues that could have far-reaching consequences for *all* employees subject to [CBAs]."[238] Olson pointed out that the legal issues in "the [Second Circuit's] opinion are of great importance not only to NFL players, but to all unionized employees."[239]

Olson is correct—all unionized employees and employees subject to CBAs could be affected by the Second Circuit's holding. In fact, the following outlined scenario provides an example of how broadly and unfairly the Second Circuit's holding could be applied: (1) an employee can be investigated by his or her boss for engaging in conduct never before disciplined; (2) the employee can be disciplined by that boss, despite this type of conduct never being the subject of discipline before; (3) given no previous similar discipline, the boss can assign whatever discipline he or she wishes; (4) the severity of discipline can be based on a ludicrous comparison to an irrelevant disciplinary policy; (5) the employee's appeal will be heard by none other than the same boss who initially disciplined the employee; (6) the boss can make a final decision confirming the initial discipline based on new facts revealed only at the appeal; (7) the employee can elect to appeal to a federal district court, but face the burden of the

---

237 *See supra* Section IV.D.3.

238 Michael Hurley, *Hurley: How Tom Brady Can Appeal to Second Circuit for Rehearing En Banc*, CBS BOSTON (May 5, 2016, 1:14 PM), http://boston.cbslocal.com/2016/05/05/tom-brady-appeal-second-circuit-en-banc-rehearing-en-banc/; *see Theodore B. Olson: Biography*, GIBSON DUNN, https://www.gibsondunn.com/lawyer/olson-theodore-b/ (last visited Feb. 26, 2018).

239 Hurley, *supra* note 238.

extraordinary cost of litigation; and (8) the reviewing court(s) can confirm the boss' discipline and arbitration award, pointing to the deference afforded to arbitration awards and to the CBA to which the employee had no individual input.

Put another way: We were all in grade school once. Imagine your teacher sends you to detention. Now, imagine that you have the right to challenge that discipline. Unfortunately for you, your challenge must be made to that same teacher. Good luck.

V. A CLOSER LOOK AT THE NFL COMMISSIONER'S AUTHORITY

Deflategate is just one of many similar scandals in which Goodell's broad authority was at issue or applied.[240] But does the NFL Commissioner have too much authority? This Part will offer insight into the extent of the NFL Commissioner's authority. Thereafter, this Part will offer points for consideration for the negotiations and collective bargaining that will occur following the current CBA's expiration after the 2020–2021 NFL season.

A. *The Power of Article 46*

Article 46, Section 1(a) of the CBA states that the Commissioner may fine or suspend a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."[241] Article 46, Section 2(a) states that "the Commissioner may

---

[240] The NFL has faced many scandals over the years. However, the scandals most relevant and similar to Deflategate are the Ray Rice, Adrian Peterson, and Ezekiel Elliott scandals. For more information on the Ray Rice scandal, see Don Van Natta Jr. & Kevin Van Valkenburg, *Rice Case: Purposeful Misdirection by Team, Scant Investigation by NFL*, ESPN (Sept. 19, 2014), http://www.espn.com/espn/otl/story/_/id/11551518/how-ray-rice-scandal-unfolded-baltimore-ravens-roger-goodell-nfl. For more information on the Adrian Peterson scandal, see Michael McCann, *Roger Goodell's Power to Discipline Stronger than Ever After Win v. Adrian Peterson*, SPORTS ILLUSTRATED (Aug. 4, 2016), https://www.si.com/nfl/2016/08/04/adrian-peterson-appeals-court-suspension-roger-goodell-wins. For more information on the Ezekiel Elliott scandal, see Jeanna Thomas, *The Ezekiel Elliott Suspension Explained in a 2-Minute Read*, SBNATION, https://www.sbnation.com/2017/11/19/16666714/ezekiel-elliott-nfl-suspension-cowboys-ex (last updated Dec. 24, 2017, 4:37 PM).

[241] NFL CBA *supra* note 172, at 204.

serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."[242]

Pursuant to the Standard NFL Player Contract, which can be found in Appendix A of the CBA,[243] the Commissioner holds the following authority:

> Player therefore acknowledges his awareness that if he . . . is guilty of any . . . form of conduct **reasonably judged** by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right . . . to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.[244]

These provisions prompt questions and concerns. First, under Article 46, Section 1(a), how broadly is "conduct detrimental" to be stretched? Looking to Deflategate, it was stretched almost to the point of snapping—the insignificant finding that Brady was "at least generally aware" of others' misconduct constituted (notably, for the first time in NFL history) sufficient detrimental conduct worthy of a four-game suspension. But under what analytical test is such detrimental conduct to be judged? Is it fair that only one person—the Commissioner—determines the ultimate discipline? Is conduct detrimental as a disciplinary standard inherently fair because a deferential court suggests it is,[245] or because other major league sports organizations have similar standards and provisions in their respective collective bargaining agreements?[246] As mentioned above, un-

---

242 *Id.* at 205.

243 *See id.* app. at 256–64.

244 *Id.* app. at 261–62 (emphasis added).

245 *See generally NFL Mgmt. Council II*, 820 F.3d 527 (2d Cir. 2016).

246 *See generally* MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT 2017–2021 (2017), http://www.mlbplayers.com/pdf9/5450407.pdf [hereinafter MLB CBA]; NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT (2017), http://3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA]; COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION SEPTEMBER 16, 2012 – SEPTEMBER 15, 2022

fortunately, neither the district court nor the Second Circuit in Deflategate discussed these concerns about the conduct detrimental standard.[247]

Second, and most troubling, is the inconsistent and unreasonably broad authority that is granted to the NFL Commissioner in the Standard NFL Player Contract. According to its text, if the Commissioner were to "reasonably judge[]" that a player has engaged in conduct detrimental to the NFL, then the Commissioner has the contractual right to suspend the player indefinitely or terminate his contract.[248] It is important to note the differences between the language in Article 46, Section 1(a), and the language in the Standard NFL Player Contract. In the former, the Commissioner is permitted to discipline a player "for conduct detrimental *to the integrity of, or public confidence in, the game of professional football*."[249] Whereas in the latter, the Commissioner is permitted to discipline a player (e.g., he can terminate his contract, which is not permitted in Article 46, Section 1(a)) for conduct that he or she **reasonably judges** to be detrimental *to the League*.[250] In the former, "reasonably judges," which is a low threshold and an entirely discretionary standard, is absent. In the latter, "to the League" is much broader, allowing for more flexibility in application when compared to the former's "to the integrity of, or public confidence in, the game of professional football." These differences beg the question: what conduct could be reasonably judged as detrimental to the NFL? Could Roger Goodell terminate the contract of a player invoking his First Amendment right?

Throughout the 2016–2017 NFL season, former San Francisco 49ers quarterback Colin Kaepernick knelt during the national anthem in protest against police brutality of minorities.[251] Many fellow

---

(2012), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf [hereinafter NHL CBA].

247 *See infra* Parts II & III.

248 *See* NFL CBA, *supra* note 172, app. at 261–62.

249 *Id.* at 204 (emphasis added).

250 *See id.* app. at 261–62.

251 *See* Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NAT'L FOOTBALL LEAGUE, http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-protest-of-national-anthem (last updated Aug. 28, 2016, 4:33 PM). In an interview with NFL Media Reporter Steve Wyche, Kaepernick stated, "I'm not going to stand up to show pride in a flag for

NFL players followed Kaepernick and began kneeling in protest, as well.[252] In his usual controversial fashion, on September 22, 2017, during a rally for Alabama Senate Republican candidate Luther Strange, then-presidential candidate Donald Trump stated the following in response to the NFL player protests:

> Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say "Get that son of a b[****] off the field right now. Out! He's fired. He's fired!" . . . [Y]ou know what's hurting the game . . . ? When people like yourselves turn on television and you see those people taking the knee when they're playing our great national anthem. The only thing you could do better is if you see it, even if it's one player, leave the stadium. I guarantee things will stop.[253]

Two days later, on September 24, 2017, in a display of solidarity following Trump's controversial comments, dozens of NFL players, along with some team owners, knelt in protest.[254] Several players who did not kneel, instead stood and locked arms with teammates in solidarity.[255] And, every player from the Seattle Seahawks and Tennessee Titans remained in their locker rooms during the national anthem.[256]

---

a country that oppresses black people and people of color . . . There are bodies in the street and people getting paid leave and getting away with murder." *Id.*

[252] For a list of NFL players who have knelt in solidarity with Colin Kaepernick, see *Arian Foster, Marcus Peters Among NFL Players Protesting During National Anthem*, SPORTS ILLUSTRATED (Sept. 11, 2016), https://www.si.com/nfl/2016/09/11/national-anthem-protest-kneel-sit-players-list.

[253] Sophie Tatum, *Trump: NFL Owners Should Fire Players Who Protest the National Anthem*, CNN: POLITICS, http://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/index.html (last updated Sept. 23, 2017, 4:05 PM); *accord* Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protestors: 'Get that Son of a B[****] Off the Field'*, GUARDIAN (Sept. 23, 2017, 6:43 PM), https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests.

[254] Benjamin Hoffman et al., *After Trump Blasts N.F.L., Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html.

[255] *Id.*

[256] *Id.*

Are President Trump's comments without merit? Could a player actually be fired for kneeling in protest? Pursuant to the language of the Standard NFL Player Contract discussed above, it is reasonable to conclude that the Commissioner would indeed be permitted to terminate the contract of any player kneeling in protest, so long as the Commissioner could "reasonably judge[ ]" that such protest is detrimental to the NFL.[257] But what conduct could be detrimental? The NFL is a business dependent upon public image. Thus, any conduct that could compromise the NFL's public image could be reasonably judged as detrimental to the NFL. Recent television ratings reports show that NFL ratings are in decline, in part due to these player protests.[258] Even more, in response to the player protests, many fans have boycotted the NFL—either because they are offended by the protests,[259] or because they dislike that Kaepernick

---

[257] *See* NFL CBA, *supra* note 172, app. at 261–62. It is important to note that President Trump's comments were in the context of NFL team owners—not the NFL Commissioner—firing protesting players. This distinction is rather important, given the different authority that team owners and the Commissioner possess under the CBA. *See generally id.* This Note is focused solely on the Commissioner's authority. However, for an in-depth discussion on the legality of an NFL team owner firing a protesting player, see Michael McCann, *Can an NFL Owner Legally 'Fire' a Player for Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017), https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest; *see also* Tatiana Waserstein, *O Say Can You . . . Kneel? The Legality Behind Firing NFL Players for Taking a Knee During the National Anthem*, U. MIAMI L. REV.: INSIGHTS (Oct. 12, 2017), https://lawreview.law.miami.edu/kneel-legality-firing-nfl-players-knee-national-anthem/.

[258] *See* Albert Breer, *Declining NFL Television Ratings Presented at Meeting Grabbed Attention of Owners*, SPORTS ILLUSTRATED (Oct. 19, 2017), https://www.si.com/nfl/2017/10/19/nfl-ratings-decline-owners-players-meeting-mmqb ("[N]o one is claiming that . . . players kneeling during the anthem [is] even close to the only reason[ ] for the professional football model being shaken up a bit. But the fact is, the model *has* been shaken up a bit.").

[259] *See* Matthew VanTryon, *Here's Why More than 20,000 Say They Will Boycott NFL Games for Veterans Day*, INDYSTAR, https://www.indystar.com/story/sports/nfl/2017/11/10/heres-why-more-than-20-000-boycott-nfl-games-veterans-da/849326001/ (last updated Nov. 10, 2017, 1:27 PM); Gary Nelson, *Off-Duty Officers Taking Stand Against Kneeling NFL Players*, CBS MIAMI (Oct. 20, 2017, 6:51 PM), http://miami.cbslocal.com/2017/10/20/miami-dade-police-protest-national-anthem-kneeling/ (explaining that Miami-Dade police "officers are refusing to volunteer to work Hard Rock Stadium Sunday when the [Miami Dolphins] host the [New York] Jets.").

has been "blackballed" by the NFL.[260] Notably, on October 8, 2017, during a game between the Indianapolis Colts and the San Francisco 49ers, Vice President Mike Pence controversially left the game in response to a number of players kneeling during the national anthem.[261]

In other words, President Trump's statements, Vice President Pence's reactionary protest, boycotts, and declining television ratings would not have occurred but for the players kneeling in protest during the national anthem. And, the player protests, no matter how constitutional, peaceful, and well-intentioned as they may be, could be reasonably judged as detrimental to the NFL, giving the Commissioner grounds for terminating their contracts pursuant to the Standard NFL Player Contract. But, although permissible, would such a termination be right? Should Goodell be given such broad disciplinary authority?

B. *Looking to the 2021 CBA*

As highlighted above, the NFL Commissioner's authority is far too broad in three ways. First, the Commissioner is permitted to discipline a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football," which is an undefined and arbitrary standard, subject only to the Commissioner's interpretation.[262] Second, the Commissioner is permitted to elect him

---

[260] Kevin B. Blackistone, *The NFL Has Effectively Blackballed Colin Kaepernick*, WASH. POST (Mar. 23, 2017), https://www.washingtonpost.com/sports/redskins/the-nfl-has-effectively-blackballed-colin-kaepernick/2017/03/23/d0b754d6-0fd1-11e7-ab07-07d9f521f6b5_story.html?utm_term=.bd5048f197aa; Scott Gleeson, *Steve Kerr: 'No-brainer' that Colin Kaepernick is Being 'blackballed' in NFL*, USA TODAY: SPORTS (Oct. 31, 2017, 10:20 AM), https://www.usatoday.com/story/sports/nba/warriors/2017/10/31/steve-kerr-colin-kaepernick-white-house-nfl-nba/816441001/. In response to being blackballed by the NFL, Colin Kaepernick has filed a grievance against the NFL for collusion. For more information and an in-depth analysis on Kaepernick's grievance against the NFL, see Michael McCann, *Kaepernick Collusion Case: What Does It Mean that Jones, Kraft, Other Owners Will Be Deposed?*, SPORTS ILLUSTRATED (Nov. 3, 2017), https://www.si.com/nfl/2017/11/03/colin-kaepernick-collusion-jerry-jones-bob-mcnair-robert-kraft-owners-be-deposed.

[261] Eli Watkins, *Pence Leaves Colts Game After Protest During Anthem*, CNN: POLITICS (Oct. 9, 2017, 11:28 AM), http://www.cnn.com/2017/10/08/politics/vice-president-mike-pence-nfl-protest/index.html.

[262] *See* NFL CBA, *supra* note 172, at 204.

or herself as the arbitrator in any challenge of an initial discipline.[263] Third, the Commissioner is permitted to discipline any player for conduct that the Commissioner reasonably judges as detrimental to the NFL.[264] There is no question that the NFLPA collectively bargained poorly with respect to Commissioner authority in the 2011 CBA.[265] However, the current CBA expires following the 2020–2021 NFL season,[266] lending the NFLPA an opportunity to remedy its prior efforts. And the NFLPA has already expressed its commitment to revise the structures and provisions present in the 2011 CBA.[267]

It is important to first note the relevant similarities and differences between the NFL's CBA and the CBAs of Major League Baseball ("MLB") and the National Basketball Association ("NBA"). The MLB CBA provides that the MLB Commissioner is permitted to discipline players for conduct that questions "the integrity of, or the maintenance of public confidence in, the game of baseball."[268] Further, pursuant to Article XI(A)(1)(b) of the MLB CBA, Commissioner disciplinary action can only be appealed directly to the Commissioner.[269] As for the NBA CBA, the NBA Commis-

---

263 *See id.* at 205.

264 *See id.* app. at 261–62.

265 *See* Ben Volin, *Now More than Ever, We Realize NFL Owners Won*, BOSTON GLOBE (July 21, 2013), https://www.bostonglobe.com/sports/2013/07/20/nfl-owners-destroyed-players-cba-negotiations/ia3c1ydpS16H5FhFEiviHP/story.html.

266 *See* Chris Chavez, *NFL Players Union President Eric Winston: NFL Lockout 'Inevitable' for 2021*, SPORTS ILLUSTRATED (Aug. 22, 2017), https://www.si.com/nfl/2017/08/22/nfl-lockout-inevitable-eric-winston-players-union (noting the likelihood that a lockout will occur "when the 10-year collective bargaining agreement expires in 2021.").

267 *See* Mark Maske, *NFLPA: 'There's Not Gonna Be an Extension of the CBA' Without Changes*, WASH. POST: SPORTS (Jan. 25, 2017), https://www.washingtonpost.com/news/sports/wp/2017/01/25/nflpa-theres-not-gonna-be-an-extension-of-the-cba-without-changes/?utm_term=.6b5af2dd1739 (noting that a CBA extension is unlikely to happen without significant changes related, in part, to the arbitration and Commissioner authority provisions).

268 MLB CBA, *supra* note 246, at 42; *accord* PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES" 5 (3d ed. 2017).

269 MLB CBA, *supra* note 246, at 42.

sioner may discipline players for conduct that questions "the integrity of, or the public confidence in, the game of basketball."[270] However, the NBA CBA differs from the NBA and NFL CBAs regarding Commissioner authority with respect to who may act as the hearing officer of an appeal:

> If a player's punishment for off-court conduct results in a financial impact of $50,000 or less, Commissioner discipline is only reviewable by the Commissioner. If, however, punishment results in financial impact of more than $50,000, a player may file a grievance and have it heard by an impartial arbitrator.[271]

Therefore, the NFL, MLB, and NBA CBAs are all similar in terms of Commissioner's authority regarding player conduct and appeal procedures, notwithstanding the NBA's $50,000 threshold for impartial arbitrator or Commissioner review.

But are there more reasonable alternatives to these provisions? With respect to disciplinary appeals, as governed by Article 46, Section 2(a) of the NFL CBA,[272] attorney Adriano Pacifici recommended a reasonable alternative that may provide more fairness to players.[273] His recommendation was simple—the NFL should "adopt a hybrid system of commissioner disciplinary review," limiting the Commissioner's authority solely to determining initial discipline.[274] Under Mr. Pacifici's hybrid system, rather than the Commissioner having the contractual discretion to elect him or herself as the arbitrator for an appeal to his or her discipline, three neutral and independent arbitrators would hear and decide all appeals.[275] The three arbitrators would be selected from a list of nine potential arbitrators from the American Arbitration Association, wherein the

---

[270] NBA CBA, *supra* note 246, at 401, 404–05; *accord* CARFAGNA, *supra* note 268, at 8.

[271] CARFAGNA, *supra* note 268, at 8; *accord* NBA CBA, *supra* note 246, at 404–05.

[272] NFL CBA, *supra* note 172, at 204–05.

[273] *See* Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 112–15 (2014).

[274] *Id.* at 112.

[275] *Id.* at 113–15.

NFLPA and the NFL would each "have the ability to eliminate three potential arbitrators, leaving them with a three-person panel."[276] Mr. Pacifici's hybrid system is consistent with the current system mandated by the National Hockey League ("NHL") CBA, which provides for impartial and independent arbitrators to review the NHL Commissioner's disciplinary decisions.[277] Should the NFL commit to such a hybrid system, the NBA and MLB may follow suit, thereby providing for fairness to all major league sports players and, ideally, consistency across professional sports.

As for Article 46, Section 1(a), which states that the Commissioner may fine or suspend a player "for conduct detrimental to the integrity of, or public confidence in, the game of professional football,"[278] a reasonable alternative may not be so obvious. After all, each of the other three major sports leagues—the NBA, MLB, and NHL—have similar provisions granting the Commissioner broad authority to discipline conduct that undermines the integrity of or public confidence in the respective sport and league. That being said, the Commissioner authority found in the Standard NFL Player Contract is too broad and needs revision—otherwise, as established above, the Commissioner could discipline, and even terminate the contract of, any player who engages in constitutionally-protected behavior, such as kneeling in protest in accordance with the First Amendment of the United States Constitution.

During the collective bargaining and negotiation stages for the new CBA, the NFLPA should focus its efforts on revising Article 46, Section 2(a) to accord with Mr. Pacifici's hybrid system, and striking the provision in the Standard NFL Player Contract that grants the Commissioner authority to discipline—and even fire—a player for conduct reasonably judged by the Commissioner as detrimental to the NFL. Though, why would the NFL agree to any contractual revisions in this respect? What leverage does, or could, the NFLPA have in bargaining for these contractual revisions?

---

276 *Id.* at 114–15.

277 *See generally* NHL CBA, *supra* note 246.

278 NFL CBA, *supra* note 172, at 204.

First, as was recently argued by the former NFLPA President, Domonique Foxworth, the NFLPA can decertify as a union and, instead, operate as a trade association.[279] According to Foxworth, "[t]he existence of unions allows leagues to operate under rules that are in violation of federal antitrust law, which is why decertifying has been the most impactful threat to leagues."[280] Under an association, the players

> would be working under rules imposed by the leagues, not agreed upon with the players—rules that are clear violations of federal antitrust law: franchise tag, salary caps and luxury tax, minimum salary limits . . . drafts and age restrictions, the NFL's infamous commissioner power in Article 46, etc. It would force the [NFL] back into a world they fear, a world where they have to follow the same laws as other businesses or be exposed to the risk of treble damages.[281]

In other words, decertifying could grant the NFLPA leverage in advance of the upcoming collective bargaining.

But decertifying presents a host of legal and practical difficulties. Decertifying worked against the NFLPA during the 2011 NFL CBA negotiations.[282] The NFL called the NFLPA's move to decertify a sham.[283] And, in *Brady v. Nat'l Football League*, the Eighth Circuit agreed, finding that the NFLPA had decertified when negotiations were at an impasse, and thus, the NFL was still entitled to operate under already existing antitrust exemptions.[284] According to Foxworth, "decertifying now, well in advance of any negotiations, is a more than sufficient 'distance in time' to avoid" an accusation

---

[279] Domonique Foxworth, *All 22: Why Decertification of the NFLPA and Other Unions Could Pay Off Big*, UNDEFEATED (July 25, 2017), https://theundefeated.com/features/all-22-why-decertification-of-the-nflpa-and-other-unions-could-pay-off-big/.

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *See id. See generally* Brady v. Nat'l Football League, 644 F.3d 661 (8th Cir. 2011).

from the NFL that decertifying is a sham to create leverage for CBA negotiations.[285]

Decertifying could pay off dividends (assuming it is done genuinely and not as a sham). But given the obvious risks in such a move,[286] an alternative means to limiting the Commissioner's authority is a renegotiation of total NFL revenue sharing. Under the 2011 CBA, the NFLPA is entitled to 47% of all revenue from 2011 through 2021.[287] Should the scenario arise during upcoming negotiations, the NFL should agree to additional player protections incorporated into the CBA—including a limitation of Commissioner authority as outlined above—in exchange for the NFLPA's reduced share of NFL revenue from 47% to 46% from 2021 to 2031. Neither the NFL nor the NFLPA have much to lose in such an agreement. Looking to the NFL's total revenue for 2016, which was roughly $14 billion,[288] the players' 47% share under the 2011 CBA equated to roughly $6.58 billion. However, should the players only take 46% of the $14 billion revenue figure, the share equates to roughly $6.44 billion, which is still quite a lot of money. From the NFL's perspective, using the $14 billion revenue figure as a baseline, an additional annual 1% share of revenue from 2021 through 2031 would amount to $1.4 billion. But even this $1.4 billion figure may be significantly understated, given that Goodell has expressed that he wants total NFL annual revenues to reach $25 billion by 2027.[289] From the NFLPA's perspective, losing $140 million annually seems too costly at first. But, as noted above, 46% of the 2016 NFL total revenue still equated to a substantial amount of money. And, again, with each year that the NFL continues to see an increase in its total revenue, the NFLPA's financial losses will quickly be mitigated.

---

285 Foxworth, *supra* note 279.

286 For more information on further risks that come with decertifying, see *id.*

287 *NFL Clubs Approve Comprehensive Agreement*, NAT'L FOOTBALL LEAGUE (July 21, 2011), https://nfllabor.wordpress.com/2011/07/21/nfl-clubs-approve-comprehensive-agreement/.

288 Daniel Kaplan, *NFL Revenue Reaches $14B, Fueled by Media*, SPORTSBUSINESS J. (Mar. 6, 2017), http://www.sportsbusinessdaily.com/Journal/Issues/2017/03/06/Leagues-and-Governing-Bodies/NFL-revenue.aspx.

289 Mike Florio, *Goodell Wants NFL to Be Earning $25 billion per Year by 2027*, NBC SPORTS (April 5, 2010, 1:05 PM), http://profootballtalk.nbcsports.com/2010/04/05/goodell-wants-nfl-to-be-earning-25-billion-per-year-by-2027/.

Nonetheless, despite the obvious benefit to both parties—i.e., the NFLPA contractually protects its players and the NFL makes more money—the necessary question in determining whether such an agreement could materialize is whether the NFL and NFLPA believe a difference in revenue sharing is worth the additional protections to the players.

Should decertifying and revising NFL revenue sharing prove to be unsuccessful strategies, it is recommended here that the NFL, and more specifically, Commissioner Goodell, should remain flexible during collective bargaining in an attempt to repair the NFL's public image. It goes without saying that Roger Goodell (and thus, the NFL), has a public perception problem—"[he] has a 28 percent job approval rating, with 42 percent disapproving and 30 percent unsure. It's even worse when respondents were asked if they have a favorable or unfavorable opinion of [Goodell]—19 percent thumbs-up, 40 percent thumbs-down, 40 percent not sure."[290] This level of disapproval may be because of the way Goodell has been perceived during and after his handling of NFL scandals, including the Bountygate,[291] Ray Rice,[292] Adrian Peterson,[293] Deflategate, and Ezekiel Elliott[294] matters.

Fans love the NFL and buy its products because of their admiration for the players. But many players have grown to strongly dislike Goodell and have expressed such sentiments publicly.[295] Players' distaste for Goodell could be imputed to fans—and if fans dislike Goodell, then it naturally follows that the NFL's abysmal approval rating[296] may be in part due to the conflict between the players and Goodell.

---

290 *Roger Goodell's Approval Rating Is Lower than President Obama's*, FOX SPORTS (Feb. 10, 2016, 5:13 PM), http://www.foxsports.com/nfl/story/roger-goodell-s-approval-rating-is-lower-than-president-obama-s-021016.

291 *See generally* Terrell, *supra* note 72.

292 *See generally* Wilson, *supra* note 87.

293 *See generally* Orr, *supra* note 86.

294 *See generally* Thomas, *supra* 240.

295 *E.g.*, Steven Ruiz, *Roger Goodell Tells Booing NFL Draft Crowd to 'Bring It On,'* USA TODAY: SPORTS: FOR THE WIN (Apr. 30, 2016, 1:00 PM), http://ftw.usatoday.com/2016/04/2016-nfl-draft-commisioner-roger-goodell-boos-bring-it-on.

296 *See* Breer, *supra* note 258.

Examples of players' disdain for Goodell are endless. In a 2010 interview with NFL Network, former Chicago Bears linebacker Brian Urlacher stated the following about Goodell: "It's a dictatorship. . . . If [Roger] Goodell wants to fine you he's going to fine you, that's the way it goes and that's just the way it is."[297] Former Pittsburgh Steelers linebacker James Harrison has said that he "hate[s] [Goodell] and will never respect him."[298] Former Pittsburgh Steelers free safety Ryan Clark, once an NFLPA representative and now an ESPN NFL analyst,[299] stated the following in an ESPN interview:

> When you've been in those meetings and you've been through labor negotiations, and you see how Roger Goodell and the owners feel about the players, the things that were said to the players during this time, you develop a hate—you really do, . . . [a]nd sometimes you can't see through that hate. Sometimes it factors into all of your thoughts about the NFL, about the owners, about Roger Goodell.[300]

Former New Orleans Saints linebacker Jonathan Vilma co-owns a restaurant in Miami that has a picture of Goodell with the caption "DO NOT SERVE THIS MAN."[301] In an interview with Sports Il-

---

[297] *Bears LB Urlacher Upset About Crackdown on Illegal Hits*, NAT'L FOOTBALL LEAGUE, http://www.nfl.com/news/story/09000d5d81c3b979/article/bears-lb-urlacher-upset-about-crackdown-on-illegal-hits (last updated July 26, 2012, 8:29 PM).

[298] Cindy Boren, *James Harrison May Not Like Roger Goodell, but He Thinks He'll Beat Tom Brady in Court*, WASH. POST (Sept. 1, 2015), https://www.washingtonpost.com/news/early-lead/wp/2015/09/01/james-harrison-may-not-like-roger-goodell-but-he-thinks-hell-beat-tom-brady-in-court/?utm_term=.a772a041c672.

[299] *See* Mike Florio, *Ryan Clark Joins NFLPA Executive Committee*, NBC SPORTS (Mar. 19, 2014, 2:55 PM), http://profootballtalk.nbcsports.com/2014/03/19/ryan-clark-joins-nflpa-executive-commitee/; *Ryan Clark*, ESPN MEDIAZONE, https://espnmediazone.com/us/bios/ryan-clark/ (last visited Feb. 26, 2018).

[300] Sean Wagner-McGough, *Ryan Clark: Players 'Develop a Hate' for Roger Goodell, NFL Execs*, CBS SPORTS (Mar. 21, 2016), https://www.cbssports.com/nfl/news/ryan-clark-players-develop-a-hate-for-roger-goodell-nfl-execs/.

[301] Chris William, *Top 20 NFL Players Who Absolutely HATE Roger Goodell*, SPORTSTER (June 27, 2016), https://www.thesportster.com/football/top-20-nfl-players-who-absolutely-hate-roger-goodell/.

lustrated, New Orleans Saints quarterback Drew Bress said the following about Goodell and his Article 46 powers: "[H]e definitely has too much power. . . . He is **judge, jury and executioner** when it comes to all the discipline. I'm not going to trust any league-led investigation, when it comes to anything."[302]

Goodell's conduct single-handedly affects the NFL's success—and thus far, his conduct, as the above demonstrates, seems more detrimental than beneficial. If Goodell wants to repair the NFL's public image, he and the NFL Management Council should be open to limiting the power he has as "judge, jury, and executioner."[303]

CONCLUSION

Although the public's interest in Deflategate was largely based in its love of football, Deflategate was a scandal rooted in law. This Note analyzed the district court and Second Circuit decisions in an attempt to act as the tiebreaker between two federal judges (Judges Berman and Katzmann) finding in favor of Brady and two federal judges (Judges Parker and Chin) finding in favor of Roger Goodell and the NFL.

But from Deflategate, and the other relevant NFL scandals, a question must be raised: is the NFL Commissioner's authority under the 2011 NFL Collective Bargaining Agreement too broad? The NFLPA certainly, and rightfully, believes so, and is expected to push for a revision to limit the Commissioner's authority as the bargaining stage for the 2021 CBA approaches. This Note highlighted the relevant provisions of the 2011 CBA that will likely be at issue during future negotiations and collective bargaining. This Note also recommended ways in which the NFLPA could create leverage in advance of these negotiations, and explained how the public image dilemma that the NFL and Roger Goodell face could and should influence their approach during negotiations.

---

302 *Drew Brees: I Won't Trust Any Investigation Led by Roger Goodell*, SPORTS ILLUSTRATED (Apr. 26, 2016), https://www.si.com/nfl/2016/04/26/drew-brees-roger-goodell-tom-brady-deflategate-investigation (emphasis added) [hereinafter Drew Brees].

303 *See id.*