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NOTE

THE NFL COMMISSIONER AS JUDGE, JURY, & EXECUTIONER: DISCRETION DETRIMENTAL TO THE INTEGRITY OF ARBITRATION

S. Tyler Owens[†]

ABSTRACT

The National Football League's (NFL) disciplinary policy has attracted the national spotlight in recent years as punitive matters such as players' off-the-field misconduct, instances of domestic violence, and team cheating scandals continually inundate ESPN headlines and national news sources alike. This Note addresses the increasingly complex issues within the NFL's alternative dispute resolution procedure regarding disciplinary action. The crux of the issue lies within the current Collective Bargaining Agreement (CBA) between the NFL Management Council and the NFL Players Association, which outlines the plenary power granted to the NFL Commissioner to essentially serve as detective, judge, jury, and executioner over its arbitration proceedings.

The disputes between the NFL Management Council and the NFL Players Association are typically resolved through extrajudicial proceedings, such as arbitration. Lately, however, these quarrels have resulted in court proceedings, as appeals from NFL disciplinary decisions continue to arise. Courts generally defer to arbitration decisions handed down by the League. However, recent disagreements over the Commissioner's arbitrary means of administering player punishment and the Commissioner electing to act as the sole arbitrator over disciplinary matters have led to more appeals and warrant a deeper investigation into these concerns. Without a consistent, uniform measure for handling these disciplinary disputes, the NFL will continue to face the threat of ongoing litigation in the form of a growing number of cases between the NFL Management Council and the NFL Players Association.

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This Note addresses the issue of the NFL Commissioner's discretionary authority over determining guilt for "conduct detrimental to the integrity of, or public confidence in, the game of professional football," and it questions the grant of his seemingly dictatorial power through means of what some have identified as unconscionable contract terms. This Note seeks to resolve this issue within the CBA by proposing a selection of viable alternative amendments to the existing alternative dispute resolution process. By simply eliminating the language, which grants the NFL Commissioner the unconditional authority to appoint himself to oversee appeals, the issue within the CBA would be resolved. The current CBA provides for appointing a neutral arbitrator or assembling an arbitration panel to resolve disputes between the NFL Management Council and the NFL Players Association. Effectively, this proposed solution would instill a mode of fairness in the disciplinary process yet still respect the Commissioner's role as Chief Executive of the League.

I. INTRODUCTION

On a cold, rainy January evening at Gillette Stadium in Foxborough, Massachusetts, Tom Brady and the New England Patriots prepared to battle the Indianapolis Colts for the 2015 American Football Conference (AFC) Championship title.¹ After a sixteen-game regular season journey and single-game elimination postseason gauntlet, this game was the final challenge standing between these two teams and securing a Super Bowl berth. All eyes were on Tom Brady as he threw for three touchdowns and more than 200 yards,² but a critical mistake, an interception thrown into the hands of Indianapolis Colts' linebacker D'Qwell Jackson,³ spawned an investigation that became the catalyst for the biggest National Football League (NFL) scandal since the New Orleans Saints "BountyGate" debacle in 2011.⁴ Tom Brady went on to lead the Patriots to a 45-7 blowout victory⁵

1. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 452 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

2. AFC CHAMPIONSHIP, ESPN, <http://espn.go.com/nfl/boxscore?gameId=400749520> (last visited Feb. 12, 2016).

3. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 454.

4. Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 95 (2014).

5. AFC Championship, ESPN, <http://espn.go.com/nfl/boxscore?gameId=400749520> (last visited Feb. 12, 2016).

and an eventual Super Bowl title.⁶ The NFL led an investigation into a scandal⁷ regarding Brady and the Patriots that would soon be infamously dubbed “DeflateGate.”⁸

Shortly after D’Qwell Jackson’s interception, “[t]he intercepted ball was apparently handed to the Colts equipment staff, who used a pressure gauge and determined that the football was inflated to approximately 11 [pounds per square inch (psi)],⁹ i.e., below the range of 12.5 to 13.5 psi specified in Rule 2, Section 1 of the 2014 NFL Official Playing Rules”¹⁰ This prompted NFL officials to collect and test the remaining Patriots’ game balls at halftime, all of which were concluded to have a psi below the regulation range of 12.5 to 13.5 psi.¹¹ Following the Patriots’ AFC Championship

6. *Super Bowl XLIX*, NFL, <http://www.nfl.com/superbowl/49> (last visited Oct. 12, 2015).

7. This is not the first scandal to mar the dynasty of the Patriots’ Brady-Belichick era. See, e.g., Don Van Natta, Jr., & Seth Wickersham, *Spygate to Deflategate: Inside What Split the NFL and Patriots Apart*, ESPN (Sept. 8, 2015), http://espn.go.com/espn/otl/story/_/id/13533995/split-nfl-new-england-patriots-apart.

8. Robert Blecker, *DeflateGate: The Smoking Gun*, ROBERT BLECKER (Aug. 19, 2015) <http://www.robertblecker.com/deflategate-the-smoking-gun/>.

9. Notably, scientists and engineers alike concluded that the atmospheric conditions on the day of the AFC Championship explain the deflation of the footballs. Rachel Ehrenberg, *Deflategate Favored Foul Play Over Science*, SCIENCE NEWS (June 18, 2015, 9:00 AM), <https://www.sciencenews.org/blog/culture-beaker/deflategate-favored-foul-play-over-science>. In an attempt to recreate the conditions of that cold, rainy January evening, scientist Michael Naughton experimented by “inflat[ing] a football to 13.5 psi at 72° F,” which accounts for the conditions of the locker room during pre-game, and then “stuck it in a fridge and measured the pressure at 42° F,” which is slightly cooler than the temperature on game night of 47.7° F. *Id.* “The pressure dropped to 10.5 psi.” *Id.* Likewise, CEO of HeadSmart Labs, Tom Healy, conducted a similar experiment “by placing 12 balls inflated to 12.5 psi in a cold room for 2.5 hours.” *Id.* The average decrease in pressure was 1.07 psi. *Id.* Additionally, “saturating the balls with water to mimic field conditions bumped the measurements down another 0.75 psi.” *Id.* Even ESPN’s John Brenkus, host of Sport Science, determined, “based on our analysis, under-inflated balls had miniscule effect on any given play.” Dan Quin, *Deflategate Gets Sport Science Treatment*, ESPNFRONTROW.COM (Jan. 22, 2015), <http://www.espnfrontrow.com/2015/01/deflategate-gets-sport-science-treatment/>.

10. *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 125 F. Supp. 3d 449, 454 (S.D.N.Y. 2015), *rev’d*, 820 F.3d 527 (2d Cir. 2016).

11. *Id.* Interestingly, this is not the first time the NFL has been made aware of football tampering. “In 2009, the NFL suspended a member of the Jets’ equipment for attempting ‘to use unapproved equipment to prep the K[icking] Balls’ before a game against the Patriots.” Mike Florio, *2009 Jets-Patriots Incident Becomes Issue in Brady Case*, PRO FOOTBALL TALK (Jul. 30, 2015, 9:30 AM), <http://profootballtalk.nbcsports.com/2015/07/30/2009-jets-patriotsincident-becomes-issue-in-brady-case/>. The NFLPA highlighted the inconsistency between the Jets-Patriots incident and the NFL’s handling of DeflateGate by noting in its complaint, “the NFL did not investigate or discipline the Jets

victory, the NFL “retained Theodore V. Wells, Jr. and his law firm to conduct an ‘independent’ investigation”¹² Upon the conclusion of the more than \$3 million investigation,¹³ which rendered the 243-page “Wells Report,”¹⁴ it was determined that “it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules.”¹⁵

Following the findings in the Wells Report, the NFL hammered the Patriots Club with a \$1 million fine and forced them to forfeit valuable draft picks¹⁶ in

kicker for ‘general awareness’ or specific involvement, even though the Jets kicker (like Brady in this case) was the player most likely to benefit from the behavior and, in turn, the player most likely to be aware of the conduct.” *Id.* In another instance, during a gelid week thirteen matchup of the 2014 season in twelve-degree weather between the Carolina Panthers and the Minnesota Vikings, “Fox cameras showed sideline attendants using heaters to warm up game balls, which is against league rules.” Ben Goessling, *NFL Aware of Game Ball Incident During Panthers-Vikings*, ESPN (Dec. 1, 2014), http://www.espn.com/blog/minnesota-vikings/post/_id/11218/nfl-aware-of-game-ball-incident-during-panthers-vikings. In response to the incident, President of NFL Officiating, Dean Blandino, stated, “You can’t do anything with the footballs in terms of any [sic] artificial, whether you’re heating them up, whether it’s a regular game ball or kicking ball, you can’t do anything to the football.” *Id.* However, aside from issuing a mere warning to each team, the NFL took no further action regarding the proclaimed violation. *Id.* Lastly, and perhaps most surprisingly, Green Bay Packers quarterback, Aaron Rodgers, admitted during a pregame interview in November 2014 to habitually over-inflating footballs, even going so far as to say, “I like to push the limit to how much air we can put in the football, even go over what they allow you to do and see if the officials take air out of it.” Mike Florio, *Aaron Rodgers Likes His Footballs Overinflated*, PRO FOOTBALL TALK (Jan. 20, 2015, 5:47 PM), <http://profootballtalk.nbcsports.com/2015/01/20/aaron-rodgers-likes-his-footballs-overinflated/>. In accordance with the NFL’s prior methodology in handling these matters, the patent evidence of football tampering by Rodgers yielded no investigation into a potential violation, let alone any suspension or fine. *Id.* However, Brady’s alleged involvement in DeflateGate launched a comprehensive investigation that culminated in his suspension, which the NFLPA claimed was pursuant to “quench[ing] other NFL owners’ thirst for a more draconian penalty,” as opposed to Brady merely receiving a fine. Mike Florio, *2009 Jets-Patriots Incident Becomes Issue in Brady Case*, PRO FOOTBALL TALK (Jul. 30, 2015, 9:30 AM), <http://profootballtalk.nbcsports.com/2015/07/30/2009-jets-patriotsincident-becomes-issue-in-brady-case/>.

12. *Id.* at 453.

13. *Id.*

14. THEODORE V. WELLS, JR., ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (WELLS REPORT) (2015).

15. *Nat’l Football League Mgmt. Council*, 125 F. Supp. 3d at 454 (internal quotations omitted).

16. “A group of New England Patriots fans asked a Massachusetts federal court on [4 April 2016] to issue a temporary restraining order that would save a first-round draft pick revoked by the NFL in connection to the Deflategate scandal, saying the punishment is unfair and discriminates against Pats fans.” U.S. District Judge F. Dennis Saylor eventually dismissed the suit on the ground of futility. *New England Patriots Fans v. Nat’l Football League*, No. CV 16-10659-FDS, 2016 WL 3248207 (D. Mass. June 10, 2016). *See New*

the upcoming seasons.¹⁷ Additionally, two members of the Patriots equipment staff were suspended indefinitely without pay for their involvement in the deflation activity.¹⁸ As for Tom Brady, he denied any wrongdoing in the matter but was nonetheless subject to a four-game suspension,¹⁹ which he promptly appealed to the NFL.²⁰ Pursuant to the NFL's Collective Bargaining Agreement (CBA),²¹ NFL Commissioner Roger Goodell designated himself as the sole arbitrator over Brady's appeal.²²

Brady's counsel submitted a motion to recuse Goodell as the arbitrator of the appeal on the basis of prior arbitrations in which Goodell recused himself and appointed independent arbitrators.²³ However, none other than the Commissioner himself denied this motion for recusal, and the arbitration proceeded.²⁴ Goodell found that Brady's involvement in the deflation of the footballs in the AFC Championship game was dispositive of "conduct detrimental to the integrity of, and public confidence in, the game of professional football."²⁵ Specifically, Goodell determined that Brady violated what is known as the "Competitive Integrity Policy" of the NFL

England Patriots Fans v. Nat'l Football League, No. CV 16-10659-FDS, 2016 WL 3248207 (D. Mass. June 10, 2016); Matthew Perlman, *Patriots Fans Sue Over Draft Pick Lost in "Deflategate"*, LAW 360 (Apr. 5, 2016), <https://www.law360.com/articles/780495>.

17. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 452.

18. *Id.* at 455.

19. For perspective on the magnitude of this kind of punishment, a four-game suspension for Tom Brady would "mean[] a loss of \$2,117,647.06 . . ." Barry Petchesky, *Tom Brady's New Contract Will Save Him Almost \$2 Million on His Suspension*, DEADSPIN (Apr. 25, 2016), <http://deadspin.com/tom-bradys-new-contract-will-save-him-almost-2-million-1772894235>. However, due to "a biennial NFL tradition," Tom Brady and the Patriots restructured his contract by frontloading \$28 million as a signing bonus, which brought his annual salary for the 2016 and 2017 seasons down to just \$1 million. Barry Petchesky, *Tom Brady's New Contract Is Great for Everyone*, DEADSPIN (Mar. 10, 2016), <http://deadspin.com/tom-bradys-new-contract-is-great-for-everyone-1764008215>. This creates salary cap room, which is great for the Patriots, and it guarantees \$28 million of Brady's salary while simultaneously diminishing the financial impact of his four-game suspension, which is exceptional for Brady. *Id.* As a result of the timely restructuring, Brady's "suspension will now cost him only \$235,294.12," the outcome of which is a savings of \$1,882,352.94. *Id.*

20. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 457.

21. "[T]he Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion." Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2011-2020, art. XLVI, § 2(a) (2011), <https://perma.cc/S9RU-R886> [hereinafter NFL CBA].

22. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 457.

23. *Id.* at n.11.

24. *Id.* at 458.

25. *Id.* at 462 (internal citations omitted).

Game Operations Policy Manual²⁶ for his failure to cooperate in the investigation by instructing his assistant to destroy evidence located on his cellphone.²⁷ Brady's failure to cooperate created an additional layer of contention regarding the issue of improper notice alleged by Brady, because this policy was distributed to team owners, presidents, and general managers, but never to players.²⁸ Ultimately, Roger Goodell, in his authority as sole arbitrator of Brady's appeal, affirmed his own decision to punish Brady and enforced the four-game suspension.²⁹

Brady appealed the ruling, and the United States District Court for the Southern District of New York reversed the NFL's decision, thus vacating the arbitration award by Commissioner Goodell.³⁰ In his opinion, Judge Berman addressed Brady's notice claims,³¹ his denied opportunity to examine investigator Jeff Pash,³² and his right to access the investigative files.³³ Judge Berman ultimately found that the Commissioner's award "failed to draw the award from the essence of the collective bargaining agreement" and was "fundamentally unfair."³⁴ The NFL Management Council appealed the case to the United States Court of Appeals for the Second Circuit for further review of these issues.³⁵ However, nowhere in Judge Berman's analysis was there any discussion of Goodell's authority not only to interpret the NFL's disciplinary policy on player conduct deemed detrimental to the League and impose punishment as a result of that interpretation, but also to oversee the appeal in the arbitration of his own

26. The operative language from the policy in § A2:

Actual or suspected violations will be thoroughly and promptly investigated. Any club identifying a violation is required promptly to report the violation, and give its full support and cooperation in any investigation. Failure to cooperate in an investigation shall be considered conduct detrimental to the League and will subject the offending club and responsible individual(s) to appropriate discipline.

Id. at 453.

27. *Id.* at 462, 464.

28. Mike Florio, *Vincent Admits Brady Was Disciplined Under Policy Not Given to Players*, NBC SPORTS (Aug. 4, 2015), <http://profootballtalk.nbcsports.com/2015/08/04/vincent-admits-brady-was-disciplined-under-policy-not-given-to-players/>.

29. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 463.

30. *Id.* at 466.

31. *Id.* at 466-74.

32. *Id.* at 471.

33. *Id.* at n.20.

34. *Id.* at 465, 471.

35. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 549 (2d Cir. 2016) (remanded with instructions to confirm the arbitration award).

decision.³⁶ This raises a multitude of questions as to the validity and enforceability of such expansive power, but the court did not address these issues.

On April 25, 2016, the Second Circuit reversed Judge Berman's decision and reinstated the four-game suspension.³⁷ The three-judge panel affirmed the Commissioner's authority to impose the arbitration award pursuant to the terms in the CBA.³⁸ However, it is critical to distinguish that although the Second Circuit affirmed the NFL's right to impose the four-game suspension, it did not affirm the propriety of the suspension itself.³⁹

Chief Judge Katzmann wholly disagreed with the majority's reinstatement of the arbitration award. Katzmann determined that Commissioner Goodell's decision exceeded his authority because it did not draw its essence from the CBA, and that the Commissioner instituted his "own brand of industrial justice."⁴⁰ Brady and the NFL Players Association requested an *en banc* appeal before the Second Circuit but were promptly denied.⁴¹ Consequently, Brady's final recourse would be to appeal to the Supreme Court of the United States. However, in a Facebook post dated July

36. *See id.*

37. *See id.*

38. The court specifically held,

[t]he parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes "conduct detrimental," and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement.

Id. at 548.

39. *See Nat'l Football League Mgmt. Council*, 820 F.3d at 527.

40. *Nat'l Football League Mgmt. Council*, 820 F.3d at 549 (Katzmann, J., dissenting). Chief Judge Katzmann concluded his dissent by stating:

I end where I began. The Article 46 appeals process is designed to provide a check against the Commissioner's otherwise unfettered authority to impose discipline for "conduct detrimental." But the Commissioner's murky explanation of Brady's discipline undercuts the protections for which the NFLPA bargained on Brady's, and others', behalf. It is ironic that a process designed to ensure fairness to all players has been used unfairly against one player.

Id. at 554.

41. Zachary Zaggar, et al., *Tom Brady Says He Is Dropping Deflategate Legal Fight*, LAW 360 (July 15, 2016), <http://www.law360.com/articles/818081/tom-brady-says-he-is-dropping-deflategate-legal-fight>.

15, 2016, Brady announced his decision not to pursue an appeal to the Supreme Court.⁴² This may have officially ended the DeflateGate debacle, but similar incidents with comparable denigrating effects to the NFL and players will continue to transpire until adjustments are made to the League's disciplinary and arbitration policies.

The result of the DeflateGate arbitration is a prime example of the dictatorial power granted to the NFL Commissioner in the CBA. Essentially, Goodell is "empowered to serve as *detective, judge, jury, and executioner* in matters impacting the integrity of the game."⁴³ Simply stated, "if a player engages in 'conduct detrimental' to the [NFL], the commissioner has the power to investigate the wrongdoing, discipline the player, and then hear the player's appeal."⁴⁴ Is this truly the kind of broad, overarching power the NFL Players Association (NFLPA) intended to yield to the Commissioner in the recently negotiated CBA with the NFL Management Council? Based upon its unambiguous language, it would seem so.⁴⁵ But is this grant of practically unlimited discretionary authority legally enforceable? That is one of the questions this Note addresses.

This Note will first provide a background explanation of the NFL's CBA, its Constitution and Bylaws, and the newly adopted Personal Conduct Policy, all of which aid in governing the issues that inevitably arise between the NFL Management Council and the NFLPA. Furthermore, it will discuss why the judiciary traditionally grants substantial deference to an arbitrator's

42. The full post reads:

I'm very grateful for the overwhelming support I've received from Mr. Kraft, the Kraft family, coach Belichick, my coaches and teammates, the NFLPA, my agents, my loving family and most of all, our fans. It has been a challenging 18 months and I have made the difficult decision to no longer proceed with the legal process. I'm going to work hard to be the best player I can be for the New England Patriots and I look forward to having the opportunity to return to the field this fall.

Tom Brady, FACEBOOK (July 15, 2016, 9:50 AM), <https://www.facebook.com/TomBrady/posts/1188349551206193>.

43. Gabe Feldman, *New Orleans Saints Bounty Litigation: Explained!*, GRANTLAND (July 9, 2012), <http://grantland.com/the-triangle/new-orleans-saints-bounty-litigation-explained/> (emphasis added). This sentiment is shared among NFL players as well. See also Josh Alper, *Ryan Clark Toning Down His Comments Toward the League*, CBS SPORTS (Aug. 21, 2012), <http://profootballtalk.nbcsports.com/2012/08/21/ryan-clark-toning-down-his-comments-toward-the-league/>; Ian McCue, *Bills' Richie Incognito Calls NFL Disciplinary System 'Bogus'*, 247 SPORTS (Aug. 9, 2015), <http://buf.247sports.com/Bolt/Bills-Richie-Incognito-calls-NFL-disciplinary-system-bogus-38642282>.

44. Feldman, *supra* note 43.

45. See NFL CBA, *supra* note 21, art. XLVI, §§ 1-2.

decision. After summarizing the standard of review for arbitration decisions, this Note will present the framework used by courts when examining the unconscionability of contractual agreements. This Note will then present the various bases upon which a court will insert its own judgment in order to cure substantive or procedural injustices of arbitration decisions. Then it will provide a backdrop for how to interpret what constitutes the nebulous conduct detrimental clause of the CBA. Finally, it will assess the current, precarious situation faced by the NFL in the wake of its ongoing litigation with the NFLPA, and it will seek to resolve the issues within the CBA by proposing various viable, alternative amendments to the existing alternative dispute resolution process.

II. BACKGROUND

The NFL's disciplinary policy has drawn the attention of the national spotlight in recent years as players' off-the-field conduct, team cheating scandals, and other punitive matters flood ESPN headlines and national news sources alike. These issues within the NFL have increasingly given rise to alternative dispute resolution and even court proceedings as appeals from League disciplinary decisions continue to ensue.⁴⁶ As a result, the federal court system and independent arbitrators are playing a major role in professional athlete employee disputes, such as the recent cases involving Tom Brady,⁴⁷ Ray Rice,⁴⁸ Adrian Peterson,⁴⁹ Greg Hardy,⁵⁰ and the previously mentioned New Orleans Saints BountyGate scandal.⁵¹ Without a consistent, uniform measure for handling these disciplinary disputes, the

46. See *infra* notes 47-51.

47. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015), rev'd, 820 F.3d 527 (2d Cir. 2016).

48. Nat'l Football League Mgmt. Council, 125 F. Supp. 3d at 458 n.11; In the Matter of Ray Rice (2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

49. Roger Goodell indefinitely suspended Adrian Peterson after he pled no contest to child abuse charges in 2014. The district court vacated the suspension. See Nat'l Football League Players Ass'n v. Nat'l Football League, 88 F. Supp. 3d 1084 (D. Minn. 2015). However, the NFL appealed to the Eighth Circuit, and a three-judge panel reversed the lower court's decision concluding that "the parties bargained to be bound by the decision of the arbitrator, and the arbitrator acted within his authority." See Nat'l Football League Players Ass'n v. Nat'l Football League, 831 F.3d 985 (8th Cir. 2016).

50. Mark Maske, *What Does the Reduction of Greg Hardy's Suspension Mean for Future NFL Disciplinary Cases?*, WASH. POST (Sept. 13, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/07/13/what-does-the-reduction-of-greg-hardys-suspension-mean-for-future-nfl-disciplinary-cases/>.

51. Paul Tagliabue, *Paul Tagliabue's Full Decision on Saints Bounty Appeal*, NFL (Dec. 11, 2012), <http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal>.

NFL will continue to face the looming threat of ongoing litigation in the form of a growing number of cases between the NFL Management Council and the NFLPA.

As cited above, the newest string of cases followed a recently settled collective bargaining agreement in the NFL, which is set to remain in effect through the end of the 2020 League Year.⁵² Courts will generally defer to arbitration decisions handed down by the League, which is the standard procedure in any appeal from an arbitration award.⁵³ However, disagreements over the Commissioner's arbitrary means of administering player punishment for disciplinary matters have led to the grant of more appeals and warrant a deeper investigation into these issues.⁵⁴ At least one court characterized the unreasonableness of Goodell's discretionary authority as "unconscionable" in the context of the arbitration clause contained within the new CBA.⁵⁵ This Note addresses the issue of the NFL Commissioner's discretionary authority over determining guilt for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."⁵⁶ Pursuant to the 2011-2020 NFL CBA:

[When a player] is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving 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.⁵⁷

Furthermore, the CBA provides that at the League Commissioner's discretion the Commissioner may serve as the hearing officer in any appeal involving conduct detrimental to the integrity of, or public confidence in,

52. "Final League Year" means the League Year which is scheduled prior to its commencement to be the final League Year of this Agreement. As of the date hereof, the Final League Year is the 2020 League Year." NFL CBA, *supra* note 21, art. I.

53. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

54. In the Matter of Ray Rice (2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf; NFL CBA, *supra* note 21, art. I; Maske, *supra* note 50.

55. The Missouri Supreme Court found that "the terms in the contract designating the commissioner, an employee of the team owners, as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813 (Mo. 2015).

56. NFL CBA, *supra* note 21, art. XLVI, § 1.

57. *Id.* at app. A, Standard NFL Player Contract, ¶ 15.

the game of professional football.⁵⁸ This amount of sweeping discretionary power would seem to fall under the characterization of an unconscionable, and therefore unenforceable, arbitration agreement within the context of an employment contract, which is exactly what the Supreme Court of Missouri recognized in its decision.⁵⁹ If that is the case, why has the NFLPA avoided raising this issue in recent court proceedings? The answer to this question and more will follow after a proper foundation of the issues is made clear.

III. FRAMING THE ISSUE

This section will aid in framing the issue at hand by laying a foundation of the makeup of the current agreement between the NFL Management Council and the NFLPA, including the numerous moving pieces that influence, empower, and limit the decisions made by the Commissioner in regard to disciplinary actions on the basis of conduct detrimental.

A. *An Understanding of the Contract and the Parties*

1. The Controlling Agreements

The NFL CBA serves as the signifying document of the negotiated terms, agreed upon at “arm’s length,”⁶⁰ between the NFL Management Council, which encompasses the member clubs, their owners, and the management of the NFL, and the NFLPA, which is the Union that represents all NFL players.⁶¹

Additionally, this agreement is subject to the provisions of the National Labor Relations Act⁶² (NLRA).⁶³ The NLRA is the act that “provides for the

58. *Id.* at art. XLVI, § 2.

59. *Id.* at art. XLVI, § 1. *See also* State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798 (Mo. 2015).

60. An “arm’s length” agreement denotes the legal principle that the two contracting parties made the agreement freely and independently of each other. This is legally significant in terms of contract law, because evidence of an equitable agreement in which the parties freely entered into will withstand legal scrutiny, even where the parties share common interests, such as an employer-employee relationship. *See* “Arm’s Length,” THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/arm's+length>.

61. NFL CBA, *supra* note 21, at xiv.

62. *Id.*

63. Pursuant to 29 U.S.C. § 141, the purpose of the NLRA is to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees

collective bargaining process that allows the respective leagues owners and players unions to negotiate the rules and regulations of the relationship between the two sides.⁶⁴ In fact, this submission to the National Labor Relations Board (NLRB) came by way of the seminal case *American League of Professional Baseball Clubs v. Association of National Baseball League Umpires*.⁶⁵ The court established that the NLRB was entitled to jurisdiction over Major League Baseball and professional sports in general.⁶⁶ Congress amended the NLRA in 1947, establishing the Labor Management Relations Act (LMRA), better known as the Taft-Hartley Act.⁶⁷ Section 301 of the LMRA grants federal district courts the jurisdictional authority to hear cases involving the violation of labor contracts such as the CBA.⁶⁸ The Supreme Court found that the Taft-Hartley Act grants standing to individual employees to bring their suits before such tribunals for a breach of the collective bargaining agreement between his employer and his union.⁶⁹

The NFL CBA comprises the various provisions regarding player salaries, retirement benefits, health coverage, limitations on practicing, guidelines on player discipline and grievances, and several other protections and restrictions.⁷⁰ Additionally, within the appendices of the CBA is the standard NFL Player Contract, which also aids in governing the power between players and management.⁷¹ It is important to note that the provisions of the CBA “supersede any conflicting provisions in . . . the NFL Constitution and Bylaws . . . or any other document affecting the terms and conditions of employment”⁷² These accompanying documents include the NFL Constitution and Bylaws and the NFL Personal Conduct Policy.

in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C § 141 (1947).

64. Matthew J. Parlow, *Professional Sports League Commissioners’ Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 197 (2010).

65. *Id.*

66. *Id.*

67. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 185(a) (1947).

68. *Id.* § 301(a).

69. *Smith v. Evening News Ass’n*, 371 U.S. 195, 200 (1962).

70. *See generally* NFL CBA, *supra* note 21.

71. *Id.* at app. A.

72. *Id.* at art. II, § 1.

The Constitution and Bylaws of the NFL enumerates the requirements for membership, it outlines the territorial rights of member clubs, and it sets the guidelines for the fundamental aspects of the functions of the NFL such as League meetings, officers, television agreements, player eligibility, and the details of regular and postseason game play.⁷³ Lastly, the NFL Personal Conduct Policy is another supplemental agreement between the parties, which is specifically tailored to establish the standards of behavior for all personnel of the NFL.⁷⁴ It functions as a step-by-step framework, outlining exactly how conduct violations are to be handled from the initial awareness of a possible violation all the way to the final decision on the matter.⁷⁵

2. The Granted Powers

With a basic understanding of the relevant governing agreements in mind, it is now appropriate to examine exactly what power these documents impart to the Commissioner as it relates to his authority in player discipline. First, it is important to distinguish the variation in procedure between injury grievances, non-injury grievances, and matters of discipline by member clubs, otherwise known as “club discipline,” as opposed to matters resulting in discipline by the Commissioner.

For both injury and non-injury grievances, the grievances are heard by third-party, independent arbitrators “whose appointment must be accepted in writing by the NFLPA and the Management Council.”⁷⁶ Likewise, in instances of club discipline, disputes must be processed in accordance with the procedure in Article 43 of the CBA.⁷⁷ In stark contrast, instances involving discipline administered under the exclusive authority of the Commissioner are not afforded the same procedural right to an independent arbitrator. Instead, those matters characterized under the classification of “conduct detrimental” are subject to both the Commissioner’s authority to impose discipline and then to personally adjudicate any appeals that flow from his decisions.⁷⁸ The reasons for this seemingly unjust disparity in procedural rights will be explained *infra* in Section E, *Defining Detrimental Conduct*.

73. See generally NFL, CONSTITUTION AND BYLAWS OF THE NFL (2006), http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

74. See generally NFL Personal Conduct Policy, NFL (2013), <https://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf>.

75. *Id.*

76. NFL CBA, *supra* note 21, art. XLIII, §§ 6-7.

77. *Id.* at art. XLII § 4.

78. *Infra* notes 81-83.

As previously mentioned, the Commissioner is vested with the power to essentially act as detective, judge, jury, and executioner in matters regarding conduct detrimental to the integrity of the League. Where exactly do these powers come from, and how are these powers implemented in situations such as the DeflateGate scandal involving Tom Brady?

a. Investigative Power—Detective

The Commissioner's investigative power is derived from Article VIII of the NFL Constitution and Bylaws. This section summarizes the numerous powers of the League Commissioner. In particular, section 8.6, "Detrimental Conduct," provides:

The Commissioner is authorized, at the expense of the League, to hire legal counsel and take or adopt appropriate legal action or such other steps or procedures as he deems necessary and proper in the best interests of either the League or professional football, whenever any party or organization not a member of, employed by, or connected with the League or any member thereof is guilty of any conduct detrimental either to the League, its member clubs or employees, or to professional football.⁷⁹

This explicit grant of power is precisely the kind exercised by Goodell in employing Theodore V. Wells, Jr., in the investigation of the DeflateGate scandal. This is not the first time that the NFL has retained Wells to conduct an investigation. The same investigative power was used in the "BullyGate" scandal in which the Wells Report helped support the findings that former Dolphins offensive lineman, Richie Incognito, committed "conduct detrimental" for bullying former teammate and fellow lineman, Jonathan Martin.⁸⁰

b. Judicial Power—Judge & Jury

The Commissioner's judicial power stems from both the CBA and the Constitution and Bylaws of the NFL. Returning to section 46 of the CBA, the League Commissioner is granted the power to,

after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. For appeals under Section 1(b) above, the parties shall, on an annual basis, jointly select two (2) or more designees to serve as hearing

79. NFL, CONSTITUTION AND BYLAWS OF THE NFL, art. VIII, § 8.6 (2006), http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

80. McCue, *supra* note 43.

officers Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.⁸¹

Again, the far-reaching powers of the Commissioner are highlighted by his ability to declare himself as the final authority on the matters of any appeal. The NFL Constitution and Bylaws explicitly state, “[t]he Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate . . . [a]ny dispute . . . that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of League or professional football.”⁸² These two clauses make it exceedingly clear that the Commissioner has the ultimate discretion over player misconduct that is deemed detrimental to the integrity of the League, and the only option for review granted to the players is to appeal the Commissioner’s decision directly back to the Commissioner himself.

c. Executive Power—Executioner

The Commissioner’s executive power is found primarily in the Constitution and Bylaws of the NFL. Under the section titled “Disciplinary Powers of Commissioner” it is detailed:

Whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League . . . is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to: [s]uspend and/or fine such person . . . and/or [c]ancel any contract or agreement of such person with the League⁸³

The plenary authority of the Commissioner is pervasive throughout the entire judicial process, even up to the point of actually implementing the consequences judged appropriate. The principle of checks and balances held so dear and defended so vigorously in the American court system is almost entirely absent in this system of arbitrary justice. Without any safeguards in place, the Commissioner has the absolute say on every aspect

81. NFL CBA, *supra* note 21, art. XLVI, § 2.

82. NFL, CONSTITUTION AND BYLAWS OF THE NFL, art. VIII, § 8.3 (2006), http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

83. NFL, CONSTITUTION AND BYLAWS OF THE NFL, art. VIII at § 8.13 (2006), http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf.

of discipline, which leaves those subjected to this oppressive authority without any recourse except to appeal to the federal court system. However, according to the CBA, this is exactly what the parties bargained for in their most recent contract negotiations. Should the Commissioner's decision be appealed to a federal court, the claimant is almost exclusively at the mercy of the prior arbitrator because of the vast deference the court system grants to arbitration decisions.

B. *The Deferential Standard*

The scope of review for an appeal of an arbitration decision is construed extremely narrowly.⁸⁴ Courts generally uphold such decisions regardless of whether the court agrees with the decision, unless the arbitrator exercises authority that conflicts with the limitations set out in the written agreement concerning arbitration. The significant language supporting this principle of deference comes from the seminal case *United Paperworkers International Union v. Misco Inc.* in which the Supreme Court held that the judiciary is required to uphold an arbitrator's award if it "draws its essence from the collective bargaining agreement" and is not "merely his own brand of industrial justice."⁸⁵ Therefore, so long as the arbitrator reasonably interpreted and applied the contract, his decision will be held legitimate and enforceable. In fact, the Court goes so far as to say "[t]he contractual theory of arbitration . . . requires a reviewing court to affirm an award it views as incorrect—even very incorrect—so long as the decision is plausibly grounded in the parties' agreement."⁸⁶ The United States Court of Appeals for the Second Circuit implemented this same standard in its decision to affirm the Commissioner's arbitration award and reverse Judge Berman's judgment vacating the four-game suspension.⁸⁷

84. See *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978) (stating that the scope of judicial review of a labor board's arbitral decision is "among the narrowest known to the law"); see also *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 507 (2001) (holding that "judicial review of an arbitrator's decision in a labor dispute is extremely limited").

85. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

86. *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 32 (2d Cir. 1997).

87. In reviewing an arbitration award under LMRA, the task of the court is simply to ensure that the arbitrator was even arguably construing or applying contract and acting within scope of his authority. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 537 (2d Cir. 2016) (quoting *Misco, Inc.*, 484 U.S. at 38). Furthermore, as long as the arbitration award "draws its essence from the collective bargaining agreement" and is not merely the Commissioner's "own brand of industrial

The purpose behind this deferential acquiescence is to promote the self-governing dispute resolution system, which is contractually agreed upon by the parties. Accordingly, in *Misco*, the Court emphasized:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.⁸⁸

“Alternative dispute resolution of this kind fulfills the intent of the LMRA, which established ‘a clear preference for the private resolution of labor disputes without government intervention.’”⁸⁹ Furthermore, the “federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.”⁹⁰

A synthesized summary of conclusions that can be drawn from these principles is succinctly stated in the NFL's brief before the United States Court of Appeals for the Second Circuit: “Substantive decisions need only be grounded in the CBA; procedural decisions need only avoid caprice; and remedial discretion need only avoid contradicting the terms of the CBA.”⁹¹ Despite this clear and established level of respect for prior rulings in arbitration decisions, the court in the Brady case ruled to overturn Goodell and the NFL in their suspension of Brady in the DeflateGate scandal.⁹² And the court did so without even basing its reversal upon any reference to the most blatant and inflammatory issue underpinning the entire dispute: the arguable unconscionability of the Commissioner's extensive arbitrary power.

justice,” it must be affirmed. *Id.* (quoting *Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 714 (2d Cir. 1998) (internal quotations omitted)).

88. *Misco, Inc.*, 484 U.S. at 37-38.

89. *Local 97 v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 124 (2d Cir. 1999) (quoting *Int'l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 714 (2d Cir. 1998)).

90. *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

91. Brief of Petitioner-Appellants at 1-2, *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2015) (No. 15-3228).

92. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 474.

C. *What is Unconscionable?*

Before exploring the reasons why the issue of unconscionability has not been brought to light before the courts in the recent litigation between the NFLPA and the NFL Management Council, it is essential to define what exactly is an unconscionable agreement. The basic principles of the unconscionability doctrine require that there be a showing of both procedural and substantive unconscionability for a court to render an agreement unenforceable on such grounds.⁹³ The court may also apply a sliding scale method of examining unconscionability.⁹⁴

1. Procedural Unconscionability

The courts have defined procedural unconscionability as the manner in which the contract was negotiated and the circumstances of the parties.⁹⁵ Indicia of procedural unconscionability can include “oppression, arising from inequality of bargaining power and absence of real negotiation or meaningful choice, and surprise, resulting from hiding disputed term in prolix document.”⁹⁶ The focus here is primarily on how the contract came into being, i.e., its formation.

2. Substantive Unconscionability

Courts have determined substantive unconscionability to be the actual terms of the agreement.⁹⁷ Substantive unconscionability is indicated by “contract terms so one-sided as to shock the conscience; in determining whether contract is unconscionable courts should not be thrust in paternalistic role of intervening to change contractual terms that parties have agreed to merely because court believes terms are unreasonable.”⁹⁸

D. *Limitations on Arbitrators’ Discretionary Authority*

With an understanding of the applicable standard of review and of the legal doctrine of unconscionability set in place, it is appropriate to explore the boundaries of arbitrators’ discretionary authority in making their

93. *American Software, Inc. v. Ali* is one of the seminal cases for characterizing the kind of procedural and substantive indicia required to prove the contractual defense of unconscionability. *American Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 479 (Cal. Ct. App. 1996).

94. *Id.* at 480.

95. *Id.* at 479.

96. *Id.* at 480.

97. *Id.* at 479.

98. *Id.* at 480.

arbitration decisions. As previously mentioned, arbitration decisions may be overturned where a court determines that the arbitrator has exceeded the scope of his authority.⁹⁹ In these instances, the court disregards the general principle of deference granted to the Commissioner and instead overrules their decision by virtue of the usurpation of the limitations in the agreement. However, ascertaining the bounds of the Commissioner's authority is no easy task, especially given that the NFL CBA provides the Commissioner with such broad, inestimable power regarding "conduct detrimental." But exceeding the scope of authority is not the only basis that will trigger a justiciable appeal from an arbitrator's decision. There are other grounds for overturning an arbitration decision in which a court will intervene to rectify an inequitable result.

1. Other Avenues for Judicial Intervention

There are two formative cases that lay the foundation for if and when a court may intervene to overturn an arbitration decision between contracting parties. The first, *United Paperworkers International Union v. Misco, Inc.*, has already been mentioned for its influence on providing the standard of judicial deference when reviewing arbitration decisions, but it also provided two indicia where, if found, a court may exercise its discretion to vacate an arbitrator's decision. These indicia include an error by the arbitrator that is in "bad faith," or is "so gross [that it] amounts to affirmative misconduct."¹⁰⁰ Additionally, the Supreme Court noted that it may also "refus[e] to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy."¹⁰¹

The second case, *Local 97 v. Niagara Mohawk Power Corp.*, offered two additional criteria for when, if violated, courts may interfere with an arbitrator's decision. In short, the court provided that "[g]enerally speaking, unless the award is procured through fraud or dishonesty, the decision should not be disturbed."¹⁰² Therefore, five possible criteria exist—bad faith, affirmative misconduct, public policy, fraud, and dishonesty—that, if violated, will trigger the court's ability to interfere with an arbitrator's decision.

99. "It seems that the only instances in which a court will not merely grant deference to the Commissioner is where it is determined that his actions exceed the scope of his authority." Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the Nat'l Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008).

100. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987).

101. *Id.* at 42.

102. *Local 97 v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 124 (2d Cir. 1999).

2. Possible Unconscionability Exception

a. *State ex rel. Hewitt v. Kerr*

So, what about unconscionability? Case law has provided a remedy to contract agreements that amount to unconscionability.¹⁰³ Accordingly, as explained above, courts will declare unenforceable an agreement that they determine unconscionable on substantive and procedural grounds, or under some alternative sliding scale method considering the magnitude of either substantive or procedural unconscionability.¹⁰⁴ In fact, the Supreme Court of Missouri made such a finding in its decision in *State ex rel. Hewitt v. Kerr*.¹⁰⁵

After a decision compelling arbitration from the Missouri Court of Appeals, a former employee of the St. Louis Rams Partnership, Todd Hewitt, appealed on the basis of unconscionable contract terms.¹⁰⁶ The court was reluctant to find procedural unconscionability,¹⁰⁷ but it did determine that “the terms in the contract designating the commissioner, an employee of the team owners, as the sole arbitrator with unfettered discretion to establish the rules for arbitration are [substantively] unconscionable and, therefore, unenforceable.”¹⁰⁸

Under the NFL CBA, which governed the terms of Hewitt’s contract, the court gathered that “the ‘League’ consists of the team owners” and, furthermore, that “the league ‘shall select and employ’ the commissioner and set his or her term of employment and compensation.”¹⁰⁹ Therefore, the court reasoned that in disputes concerning the League team owners, “the commissioner is required to arbitrate claims against his employers.”¹¹⁰ This presents a prime example of a conflict of interest, especially given that not

103. According to the Supreme Court,

The final phrase of § 2 . . . permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as . . . *unconscionability* . . .”

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting 9 U.S.C.S. § 2) (emphasis added).

104. *American Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 479-80 (Cal. Ct. App. 1996).

105. *See State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015) (en banc).

106. *Id.* at 803.

107. *Id.* at 809-10.

108. *Id.* at 813.

109. *Id.*

110. *Id.*

only is the Commissioner the arbitrator, but he also “controls virtually every aspect of the arbitration from establishing the rules and procedures to making the final decision.”¹¹¹

However, regardless of the finding of unconscionability, the court upheld the lower court’s decision compelling arbitration.¹¹² But it did so with a substantial remediating modification. Arbitration was necessary, because Hewitt agreed to arbitrate his disputes under the terms of the contract.¹¹³ Mr. Hewitt was not bound, however, to submit to an arbitration governed by an inherently biased arbitrator, NFL Commissioner Roger Goodell.¹¹⁴ Consequently, the court ordered the trial court to “issue an order to compel arbitration whereby the trial court appoints a neutral arbitrator.”¹¹⁵

b. Commissioner Recusal

Roger Goodell elected to punt on two prior opportunities to sit as the hearing officer in an arbitration between a decision made by the NFL and an individual player.¹¹⁶ Rather than exercising his authority to oversee the arbitration himself, an independent arbitrator was appointed.¹¹⁷ Admittedly, these disciplinary actions were in response to off-the-field domestic violence occurrences,¹¹⁸ which are distinctly different from the on-the-field cheating scandal before the Second Circuit regarding Tom Brady. But why the difference in procedure? Why not always resort to using a neutral arbitrator? The issue is determining what constitutes “conduct detrimental to the integrity of, or public confidence in, the game of professional football.”¹¹⁹ Credibly, no individual stands in a better or more reliable position to make that determination than the Commissioner of the NFL. It is the Commissioner who has a direct and dependent stake in

111. *Kerr*, 461 S.W.3d at 813.

112. *Id.* at 815.

113. *Id.*

114. *Id.*

115. *Id.*

116. See *Nat’l Football League Players Ass’n v. Nat’l Football League*, 88 F. Supp. 3d 1084, 1088 (D. Minn. 2015); *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015); *In the Matter of Ray Rice* (2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

117. *Nat’l Football League Players Ass’n*, 88 F. Supp. 3d at 1088.

118. Adrian Peterson was indicted by a Texas Court “on a charge of felony reckless or negligent injury of a child, as a result of the May 2014 incident involving his son.” *Id.* at 1087. A “New Jersey state grand jury indicted Rice on one count of aggravated assault for striking his “then-fiancé . . . in the elevator of an Atlantic City hotel and casino.” *In the Matter of Ray Rice*, 1-2 (2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

119. See generally NFL CBA, *supra* note 21.

protecting the *integrity* of the game, and it makes absolute sense that the Commissioner should be the one to have the final say.

E. *Defining Conduct Detrimental*

In order to analyze the Commissioner's discretion in the DeflateGate case and the subsequent appeal that overturned Goodell's decision, there is one final consideration that must be taken into account: What exactly is "conduct detrimental"?

The NFL CBA fails to provide a precise definition for "conduct detrimental."¹²⁰ And although the NFL Player Contract offers a handful of examples,¹²¹ it is by no means comprehensive. Navigating what exactly constitutes conduct detrimental is no simple task given the indistinct language surrounding the phrase in the new CBA.¹²² At minimum, what can be deciphered amidst the ambiguity is that the CBA distinguishes between "two types of detrimental conduct: (1) conduct that is detrimental to the [club]; and (2) conduct detrimental to the [L]eague."¹²³

Conduct detrimental to the club may be individually defined by each member team. However, the CBA does provide guidelines for what is not conduct detrimental to the club by specifically enumerating certain violations separate from the conduct detrimental clause in Article 42 such as: being overweight, being absent or tardy for meetings and practices, damaging or losing equipment, and throwing the football into the stands.¹²⁴ In fact, the only indication of what may be included within the scope of conduct detrimental is "[a]ny material curfew violation the night prior to the Club's game."¹²⁵

120. See generally NFL CBA, *supra* note 21; McCue, *supra* note 43.

121. Particular examples of "conduct detrimental" from the Standard NFL Player Contract include:

[I]f [a player] accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance

NFL CBA, *supra* note 21, at app. A, Standard NFL Player Contract, ¶ 15.

122. NFL CBA, *supra* note 21, art. XLVI, §§ 1-2, app. A, Standard NFL Player Contract, ¶ 15.

123. Darren A. Heitner & Richard Bogart, *Personal Foul: Conduct Detrimental to the Team Penalty Declined?*, 5 HARV. J. SPORTS & ENT. L. 215, 222 (2014).

124. NFL CBA, *supra* note 21, art. XLVI, § 1.

125. *Id.*

Conduct detrimental to the League is even more elusive. DeflateGate shed light on several specific examples revealed in the Competitive Integrity Policy,¹²⁶ but the policy hardly serves as an exhaustive list of all of the potential matters encompassed within the term conduct detrimental. Determining what kind of standard of conduct is in the best interest of the League can be incredibly over-inclusive, and, without any bounds on this broad inclusion, even the most remote acts by players on or off of the field may fall within the jurisdiction of the Commissioner's discretion.

It is well regarded that "rules promoting lawful, ethical, and responsible conduct serves the interests of the League, its players, and fans."¹²⁷ For example, it is easy to see how unethical behavior, i.e., cheating, can operate as a catalyst for the loss of public confidence in the integrity of the game. Major League Baseball serves as a reminder of how rampant steroid use cost a number of would be hall of famers the opportunity to have their names enshrined in Cooperstown with the greatest to ever play the game.¹²⁸ But a more concrete application of the term "conduct detrimental" is imperative when wading through the consistent and complicated waves of issues that require the League Commissioner's judgment. Finally, however, a succinct and complete *attempt* at a definition for such conduct can be deduced by looking outside the text of the CBA to the newly drafted NFL Personal Conduct Policy.

1. The Personal Conduct Policy

The scope of the Personal Conduct Policy applies to "*everyone* who is part of the League . . . includ[ing] owners, coaches, players, other team employees, game officials, and employees of the league office, NFL Films,

126. In particular, the policy provides that "failure to cooperate in an investigation" and failure to report an actual or suspected violation is conduct detrimental to the League. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015).

127. Casinova O. Henderson, *How Much Discretion Is Too Much for the NFL Commissioner To Have Over the Players' Off-the-Field-Conduct?*, 17 SPORTS LAW. J. 167, 170 (2010).

128. Sportswriters across the country have determined that some of the best baseball players in recent history should "not be honored for their feats on the diamond because of their ties to performance-enhancing drugs It skipped over stars such as Roger Clemens, Barry Bonds and Mark McGwire, all of whom have been scrutinized for steroids use." Dennis Lynch, *Baseball Hall of Fame 2015 Voting Results: 'Steroid Era' Players Miss Out, Tide Could Turn with Time*, INT'L BUSINESS TIMES (Jan. 6, 2015), <http://www.ibtimes.com/baseball-hall-fame-2015-voting-results-steroid-era-players-miss-out-tide-could-turn-1774918>.

NFL Network, or any other NFL business.”¹²⁹ Additionally, the type of conduct governed by the Personal Conduct Policy encompasses incidents both on the field and off the field.¹³⁰ Conduct detrimental, according to the Personal Conduct Policy, is “[c]onduct by anyone in the league that is illegal, violent, dangerous, or irresponsible puts innocent victims at risk, damages the reputation of others in the game, and undercuts public respect and support for the NFL.”¹³¹

Under the revised Personal Conduct Policy, a player or other League employee will be held responsible for engaging in conduct detrimental to the League whether or not he is convicted of a charged crime.¹³² The determination of whether the individual engaged in conduct detrimental is, of course, left up to the discretion of the Commissioner. Prior to the implementation of the new Personal Conduct Policy, it is not surprising that “many off-the-field criminal acts such as *domestic violence* have largely been ignored by the NFL and are rarely considered detrimental conduct.”¹³³ Yet, in the wake of the recent domestic violence incidents surrounding the NFL,¹³⁴ the public is crying out for justice in response to the repeated mishandling of these issues by the NFL and, namely, Commissioner Roger Goodell.¹³⁵ Some critics, even a U.S. Senator, have called for Goodell’s resignation.¹³⁶

The new Personal Conduct Policy is Goodell’s response to his critics, but he will likely remain under pressure until the public witnesses swift and proper handling of similar issues in the future. Unfortunately, the Policy is merely a feeble attempt to slap a band-aid on an already gushing wound. Nevertheless, NFL owners swiftly and unanimously adopted it at a League

129. NFL Personal Conduct Policy, NFL (2013), <https://nflabor.files.wordpress.com/2013/06/personal-conduct-policy.pdf>.

130. *Id.*

131. A non-exhaustive list of examples of such prohibited conduct is provided in the Policy. *Id.*

132. “It is not enough simply to avoid being found guilty of a crime . . . [E]ven where the conduct itself does not result in conviction of a crime[,]” if the league finds that you have engaged in any of the following conduct, you will be subject to discipline. *Id.*

133. Heitner & Bogart, *supra* note 123, at 227 (emphasis added).

134. NFL CBA, *supra* note 21, art. XLVI, §§ 1-2, app. A, Standard NFL Player Contract, ¶ 15.

135. Jenni Wood, *The National Football League Drops the Ball*, INFOPLEASE (2014), <http://www.infoplease.com/news/2014/nfl.html>.

136. *Id.*

meeting in December 2014.¹³⁷ Unsatisfied, the NFLPA promptly filed a non-injury grievance in response to the new Policy citing numerous inconsistencies with the current CBA.¹³⁸ The NFLPA has recently submitted a proposed alternative to the Policy that it hopes will resolve the issues between the NFLPA and NFL on the matter.¹³⁹

Despite the much needed reinforcement of the NFL's disciplinary procedures and supplemental clarification of what constitutes conduct detrimental to the League, there are still questions surrounding this issue that remain unanswered. Specifically, an explanation is necessary to delineate the breadth of the last clause of the conduct detrimental definition provided in the Policy: “[c]onduct that . . . undercuts public respect and support for the NFL.”¹⁴⁰ This language is just as amorphous as the language in Article 46 of the CBA.¹⁴¹ The conclusion remains. There is no concise, tangible definition of conduct detrimental. It means whatever the Commissioner determines it means. But that is precisely the discretionary power that the CBA vests in him as Chief Executive of the NFL.

2. The Commissioner's Discretion Regarding “Conduct Detrimental”

Distinguishing criminal and other illegal conduct from non-criminal and lawful conduct that may be deemed detrimental to the League is a relatively simple task. However, distinguishing between what kind of non-criminal and lawful conduct is or is not detrimental to the League is an entirely different issue. The NFL, as acknowledged within the language of the CBA, has left this task to the Commissioner. Deciding when on-the-field conduct, such as deflating game balls, is conduct detrimental appears to be the area where the Commissioner has the greatest amount of discretion. Admittedly, it seems inherently prudent that the individual whose job it is to promote and protect the integrity of the League, and who has the greatest stake in the

137. *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 19, 2014), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

138. Albert Breer, *NFLPA Filed Grievance over Personal Conduct Policy*, NFL (Jan. 24, 2015), <http://www.nfl.com/news/story/0ap3000000462407/article/nflpa-filed-grievance-over-personal-conduct-policy>.

139. Tom Pelissero, *NFLPA Outlines Proposal for Neutral Arbitration in Personal Conduct Policy*, USA TODAY: SPORTS (Dec. 17, 2015), <http://www.usatoday.com/story/sports/nfl/2015/12/17/nflpa-personal-conduct-policy-proposal/77504646/>.

140. *NFL Personal Conduct Policy*, NFL (2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

141. NFL CBA, *supra* note 21, art. XLVI, § 2.

League's success, should be the one to bear the responsibility of determining what exactly is conduct detrimental to the League.

The NFL's appellate brief submitted to the Second Circuit provides a strong argument for the delegation of this duty to the Commissioner:

[It is no] surprise that [the NFL Management Council and the NFLPA] would entrust that responsibility to the individual whose job it is to manage the League. The Commissioner has no incentive to favor one team over another; he has no incentive to favor one player over another. His primary responsibility is to protect the game of professional football. And as the person chiefly responsible for the League's well-being, the Commissioner is in the best position to assess whether and to what extent specific conduct threatens the League's integrity and the public's confidence in the sport, to provide reasonable and fair process, and to ensure appropriate levels of discipline.¹⁴²

Therefore, it seems patently obvious and appropriate that the Commissioner ought to have the power to decide what kind of conduct is detrimental to the League and what conduct is not. But should it also be his exclusive job to then determine what the punishment should be for conduct that is detrimental to the League's integrity? And should it then be his sole responsibility to oversee the appeal of his own decision when arbitration arises? As the age-old adage goes, "Power tends to corrupt and absolute power corrupts absolutely."¹⁴³

IV. VIABLE SOLUTIONS

There are a plethora of alternatives and alterations that could be adopted to ensure a more just and impartial approach to the handling of disciplinary issues within the NFL, and this Note presents a few of those options in order to achieve that goal. The arbitration process in place within the CBA has proven to be inadequate in the face of CBA's unconscionable terms¹⁴⁴ and mounting criticisms of Commissioner Goodell.¹⁴⁵ This arbitrary means of settling disputes between the NFL Management Council and the NFLPA masquerades under the guise of a fair and reasonable arbitration clause. It is

142. Brief of Petitioner-Appellants at 7, *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2015) (No. 15-3228).

143. Letter from John Emerich Edward Dalberg Acton to Bishop Mandell Creighton (Apr. 5, 1887), <http://history.hanover.edu/courses/excerpts/165acton.html>.

144. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813 (Mo. 2015).

145. Wood, *supra* note 135.

time for the NFL to take proactive measures and make some long overdue changes before more cases, such as the now notorious DeflateGate scandal, begin to wreak havoc on the NFL's already controversial authority.

A. Amend the CBA

The current CBA is set to expire in 2020, but there is nothing preventing the NFL and the NFLPA from implementing a viable alternative to the current arbitration process. According to the provisions of the CBA, all that is required to modify the agreement is written mutual consent by authorized representatives of the contracting parties.¹⁴⁶ Therefore, to cease the harangue of Commissioner Goodell and prevent future abuse of his power, the language granting the Commissioner the unrestricted authority to appoint himself as the sole hearing officer to any appeal should be eliminated.¹⁴⁷

The solution is simple but not easy. Unfortunately, reaching a decision to reign in the power of the Commissioner that both parties can agree upon is not likely. This is because “the commissioner’s broad powers have been unchanged since 1968 under Pete Rozelle.”¹⁴⁸ Granted, prior commissioners simply “adhered to the rules” and refrained from getting caught up in the precarious position in which current Commissioner Goodell has found himself due to his sloppy mishandling of recent player disciplinary issues.¹⁴⁹ Perhaps the pressing weight of ongoing litigation and the watchful eye of scrutinizing media coverage is enough to convince the two parties to come to an agreement. Additionally, if the NFL is even amenable to negotiating the terms of the CBA, limiting the Commissioner’s power will most assuredly come at a significant cost to the NFLPA. Nevertheless, the right amendment to the CBA’s arbitration process will prove beneficial for both the players and the League management by providing a consistent and reliable method for handling disciplinary conduct deemed detrimental by the Commissioner.

146. NFL CBA, *supra* note 21, art. II, § 4; NFL CBA, *supra* note 21, art. LXX, § 9.

147. NFL, CONSTITUTION AND BYLAWS OF THE NFL, art. VIII, § 8.3 (2006), http://static.nfl.com/static/content/public/static/html/care_ers/pdf/co_.pdf.

148. Adam Kilgore, *Did Players Hand Roger Goodell Too Much Authority? Answer Isn't Simple*, WASH. POST (May 29, 2015), https://www.washingtonpost.com/sports/redskins/did-players-hand-roger-goodell-too-much-authority-answer-isnt-simple/2015/05/29/44fe7648-0648-11e5-a428-c984eb077d4e_story.html.

149. *Id.*

1. An Appropriate Approach to Disciplinary Action

Beginning with the premise that the Commissioner is in the best position, and arguably the only position, to demarcate what constitutes conduct detrimental, disciplinary matters falling under the category of conduct detrimental should continue to be handled in a similar manner as any other conduct violation. NFL staff, an independent party, or a combination of both, is tasked with examining and investigating any potential violation.¹⁵⁰ Once an on-the-field violation of conduct detrimental to the NFL has been established, it then becomes the duty of “Executive Vice President of Football Operations, Troy Vincent, and the Vice President of Football Operations, Merton Hanks, [to] decide what discipline—if any—is warranted.”¹⁵¹ Violations of the Personal Conduct Policy that are predominantly off-the-field issues result in a decision by a disciplinary officer¹⁵² to determine what discipline—if any—is warranted.¹⁵³ In regard to conduct detrimental, which can include both on-the-field and off-the-field conduct violations, it would depend on the nature and severity of the violation to determine to which NFL official the Commissioner should delegate the task of making the disciplinary decision.

The NFL utilizes a “fine schedule,” which outlines the applicable fine to be imposed for a variety of corresponding offenses.¹⁵⁴ Additionally, the Personal Conduct Policy outlines a minimum floor of suspension durations for violations under its authority.¹⁵⁵ These two procedural guidelines, in conjunction with prior disciplinary decisions, combine to form what is known as the “law of the shop.”¹⁵⁶ This principle essentially refers to “the

150. NFL Personal Conduct Policy, NFL, at 3 (2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

151. *Fines & Appeals*, NFL, <http://operations.nfl.com/football-ops/fines-appeals/> (last visited Nov. 8, 2016).

152. As of April 2016, the NFL Disciplinary Officer is B. Todd Jones, who previously completed his service as Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives. Ken Belson, *N.F.L. to Hire B. Todd Jones, A.T.F. Director, as Disciplinary Officer*, N.Y. TIMES (Mar. 23, 2015), <http://www.nytimes.com/2015/03/24/sports/football/nfl-to-hire-b-todd-jones-atf-director-as-disciplinary-officer.html>.

153. NFL Personal Conduct Policy, NFL, at 3 (2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

154. *Fines & Appeals*, NFL, <http://operations.nfl.com/football-ops/fines-appeals/> (last visited Nov. 8, 2016).

155. See generally NFL Personal Conduct Policy, NFL, at 6 (2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>.

156. See *United Steelworks of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

practices of the industry and the shop.”¹⁵⁷ The law of the shop as it pertains to the NFL in the context of discipline refers to how the NFL has carried out and handed down disciplinary actions in the past. The application of discipline is precisely the area where Commissioner Goodell has gone awry.¹⁵⁸ Maintaining the status quo in how the NFL handles discipline provides assurance to its members that decisions to punish will not be made arbitrarily, but instead will conform to tradition and common practices. This creates trust between management and employees by ensuring what procedures will be followed and what results can be expected for various instances of misconduct.

Contrarily, the Commissioner’s decision to enforce a four-game suspension is “unprecedented punishment,” according to Chief Judge Katzmann.¹⁵⁹ The Commissioner relied upon guidance from violations of the NFL’s steroid policy in this instance, as opposed to utilizing a more reasonably analogous penalty policy, such as the violation of the prohibition of “stickum”¹⁶⁰ found in the NFL’s fines schedule.¹⁶¹ In Chief Judge Katzmann’s dissent, he outlined the parallels between the prohibited use of stickum and tampering with footballs. He argued that both the use of stickum and the deflation of footballs “involve attempts at improving one’s grip and evading the referees’ enforcement of the rules”¹⁶² Judge Katzmann continued by citing the League’s justification¹⁶³ for the ban on stickum, which is nearly identical to the Commissioner’s explanation¹⁶⁴ for punishing Brady for his involvement in DeflateGate. Furthermore, the Chief Judge highlighted the widely contrasted distinction between the

157. *Id.*

158. Wood, *supra* note 135.

159. Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527, 552 (2d Cir. 2016) (Katzmann, R., dissenting).

160. Stickum “is a glue-like substance [NFL] players applied liberally to their hands” to improve their grip on the football. Adam Rank, *These Players Inspired Their Own Rules Changes*, NFL (Sept. 7, 2016), <http://www.nfl.com/news/story/09000d5d827ee120/printable/these-players-inspired-their-own-rules-changes>. The NFL banned this adhesive in 1981, and its prohibition was infamously coined the “Lester Hays Rule.” *Id.*

161. *Nat’l Football League Mgmt. Council*, 820 F.3d at 553-54 (Katzmann, R., dissenting).

162. *Id.* at 552.

163. Stickum “affects the integrity of the competition and can give a team an unfair advantage” *Id.*

164. The deflation of footballs “reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game” *Id.*

penalty for using stickum and Brady's four-game suspension.¹⁶⁵ The Commissioner's decision, Chief Judge Katzmann contended, amounts to a drastic deviation from the CBA, which he characterized as "[Goodell's] own brand of industrial justice."¹⁶⁶

After a decision has been made to punish a player or other member of the League, that individual is guaranteed the opportunity to appeal any penalty (i.e., fine, suspension, or otherwise) that is imposed.¹⁶⁷ This is where the procedure for violations constituting conduct detrimental begins to deviate. Instead of having the opportunity to appeal to one of the appointed Appeals Officers,¹⁶⁸ an independent arbitrator,¹⁶⁹ or being heard by an Appeals Panel,¹⁷⁰ the Commissioner can appoint himself to oversee the appeal.¹⁷¹ At this point, the Commissioner's authority stretches too far. This Note proposes the following options as viable solutions to this problem.

a. Appoint a Neutral Arbitrator

Appointing an independent arbitrator is a process that is already built into the current CBA disciplinary system. Each year the NFL and NFLPA jointly select two Appeals Officers,¹⁷² also referred to as "Hearing Officers," that are equally paid by both parties.¹⁷³ These Appeals Officers function as neutral parties in reviewing the appeal of disciplinary decisions. They are typically individuals who have experience in the League as either players,

165. "Under a collectively bargained-for Schedule of Fines, a violation of this prohibition warrants an \$8,268 fine in the absence of aggravating circumstances. . . . [A] player caught violating the prohibition on stickum a second time is to be fined \$16,537. Thus, even where aggravating circumstances exist, the [fines schedule] does not provide for the extreme increase in penalty that the Commissioner found appropriate here." *Id.* at 552-53.

166. *Id.* at 554.

167. *Fines & Appeals*, NFL, <http://operations.nfl.com/football-ops/fines-appeals/> (last visited Nov. 8, 2016).

168. *Id.*

169. See *Nat'l Football League Players Ass'n v. Nat'l Football League*, 88 F. Supp. 3d 1084, 1088 (D. Minn. 2015); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 453 (S.D.N.Y. 2015); *In the Matter of Ray Rice* (2014), http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf.

170. NFL CBA, *supra* note 21, art. XV, § 7 (2011).

171. *Id.* § 2.

172. The Appeals Officers for the current term are Derrick Brooks and James Thrash, both long-term veterans of the League. *Fines & Appeals*, NFL, <http://operations.nfl.com/football-ops/fines-appeals/> (last visited Nov. 8, 2016).

173. NFL CBA, *supra* note 21, art. XLVI, § 2.

coaches, or both,¹⁷⁴ which brings an added benefit of perspective and expertise in weighing the various factors at play in a disciplinary appeal. Additionally, the League has also appointed and utilized past and present League executives to hear the appeals of disciplinary decisions.¹⁷⁵ While these systems are not perfect, they at least provide an added level of neutrality to the appeals process, which has been rife with controversy as of late.

b. Implement an Arbitration Panel

The most desired option by the NFLPA for overseeing disciplinary appeals is to implement a panel of arbitrators with “special expertise in the business of football [and] active members in good standing of a state bar, preferable with some judicial experience.”¹⁷⁶ This language comes directly from a memorandum by the Union Executive, DeMaurice Smith, proposing a revision to the Player Conduct Policy.¹⁷⁷ The panel would be composed of three members to be randomly selected by the NFL and NFLPA.¹⁷⁸ The proposal places the burden of proof upon the NFL Management Council, calls for a “just cause” standard of review, requires the panel to follow legal precedent and the law of the shop, and considers all decisions by the panel binding and final.¹⁷⁹

174. Former appeals officers include Matt Birk, Ted Cottrell, and Art Shell. Darin Gantt, *Matt Birk Replaces Art Shell as Appeals Officer*, NBC SPORTS (Aug. 2, 2013), <http://profootballtalk.nbcsports.com/2013/08/02/matt-birk-replaces-art-shell-as-appeals-officer/>); *Hall of Famer Derrick Brooks Hired as NFL Appeals Officer*, FOX SPORTS (July 25, 2014), <http://www.foxsports.com/nfl/story/derrick-brooks-hired-appeals-officer-discipline-hall-of-fame-tampa-bay-buccaneers-072514>; *League Thinks Job Appeals to Shell*, PHILLY.COM (July 25, 2014), http://articles.philly.com/2002-10-25/sports/25350953_1_injury-report-job-appeals-famer-art-shell.

175. NFL Executive Vice President of Labor Relations, Harold Henderson, oversaw the appeals of both Adrian Peterson and Greg Hardy. Maske, *supra* note 50; Eben Novy-Williams, *Peterson Appeal Dec. 2 to Be Heard by Harold Henderson*, BLOOMBERG (Nov. 22, 2014), <http://www.bloomberg.com/news/articles/2014-11-21/peterson-appeal-dec-2-to-be-heard-by-harold-henderson>. Former NFL Commissioner, Paul Tagliabue, oversaw the appeal of the BountyGate scandal. Tagliabue, *supra* note 51.

176. Tom Pelissero, *NFLPA Outlines Proposal for Neutral Arbitration in Personal Conduct Policy*, USA TODAY: SPORTS (Dec. 17, 2015), <http://www.usatoday.com/story/sports/nfl/2015/12/17/nflpa-personal-conduct-policy-proposal/77504646/>.

177. *Id.*

178. *Id.*

179. *Id.*

This proposal resembles how the current Appeals Panel is selected and operated in the CBA.¹⁸⁰ However, the Appeals Panel under the CBA does not have jurisdiction over appeals deriving from the Commissioner's authority in declaring conduct detrimental.¹⁸¹ Adopting the utilization of an appeals panel as proposed by the NFLPA, which still comports with the nature of its function under the current language of the CBA, could provide an optimal solution for administering discipline for *conduct detrimental*.

2. The Pros and Cons

Each proposed solution has its pros and cons, but this would be true of any proposed method. For instance, it is nearly impossible to eliminate every vestige of partiality in appointing an arbitrator to hear an appeal. The arbitrator must exhibit a specialized proficiency in his knowledge of the NFL to rule effectively over League disciplinary matters. This informed understanding is attained by way of experience either on the field as a player or coach or in the office as a League executive. Therefore, it is not difficult to imagine that a former player may empathize with a player's perspective, whereas a League executive may be more critical. However, to sacrifice this expertise in exchange for an outside party with far less knowledge of the issues is simply irresponsible and ineffective. It is logical that an arbitrator ruling on matters that affect *the integrity of the game of professional football* must have some stake in the outcome. Otherwise, it is merely a third party ruling as he sees fit, and there is no assurance that he has any vested interest in how his decision will protect and promote the image of the NFL.

Thus, an arbitration panel presents the greatest opportunity for fairness by offering a group of preferred arbitrators, which is selected at random from a pool of experts preapproved by the NFL and NFLPA. Yet again, the element of random chance of who will arbitrate on the panel invites criticism of the process, because the NFL or NFLPA might argue that their odds at winning an appeal would have been more likely had the outcome of the panel drawing fell in their favor.

The system will never be perfect, and one can always count on human error to pervert justice. However, that is no excuse for complacency or indifference when it comes to the procedure of dealing with disciplinary issues. It should be refined and retuned as the League continues to work toward serving its players, members, and even fans by upholding high standards of conduct and providing just consequences for violations.

180. NFL CBA, *supra* note 21, art. XV, § 7 (2011).

181. *Id.* § 1.

Seeking a reliable and trusted system of justice is the only way to instill faith in the position of the Commissioner and strengthen the relationship between the parties.

V. CONCLUSION

This Note calls for the NFL to take a page from its own book by applying one of its already well-functioning appeals processes to the procedure for handling conduct detrimental. The current CBA provides for the implementation of appointing a neutral arbitrator or assembling an arbitration panel to resolve disputes between the NFL Management Council and the NFL Players Association. The swift elimination of the Commissioner's unconditional authority to self-appoint and the utilization of an alternative method of arbitration would solve the crisis of the CBA's current terms.

For the last fifty years, the Commissioner's authority in his capacity to exercise his discretion over conduct detrimental has remained virtually untouched. Perhaps that is because no Commissioner during the past five decades has experienced as much backlash and media shaming for his controversial decisions as Roger Goodell. His poor exercise of discretion and failure to adhere to the law of the shop has created a firestorm of criticism from players and the public alike. The abuse of such supreme power in the hands of the current Commissioner has exposed an area of great weakness in the CBA. Absent Goodell's tactless indiscretion in recent events, there may be no need to make any alterations to the CBA. But employing proactive measures now to prevent the misuse of power in the future will ultimately serve to protect *the integrity of*, and ensure *public confidence in*, the game of professional football.

