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National Football League Management Council v. National Football League Players Association: Deflategate Reviewed

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NATIONAL FOOTBALL
LEAGUE MANAGEMENT COUNCIL V.
NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION:
DEFLATEGATE REVIEWED

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INTRODUCTION

In *National Football League Management Council v. National Football League Players Association (Deflategate)*,¹ presiding Judge Richard Berman issued a strong rebuke of NFL commissioner Roger Goodell’s decision to uphold a four-game ban of New England Patriots quarterback Tom Brady for his alleged involvement in a ball deflation scheme.² Using an assembly of past NFL arbitration appeals decisions, Judge Berman ruled that Goodell’s suspension of Brady for four games violated the principles of fairness that underlie the Federal Arbitration Act and vacated the discipline imposed on Brady.³ Judge Berman stated that Goodell’s decision was “premised upon several significant legal

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1. Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n (*Deflategate*), Nos. 15 Civ. 5916 (RMB)(JCF), 15 Civ. 5982 (RMB) (JCF), 2015 WL 5148739 (S.D.N.Y. Sept. 3, 2015).
 2. *Id.* at *1.
 3. *Id.* at *11 (“The Court is fully aware of the deference afforded to arbitral decisions, but, nevertheless, concludes that the Award should be vacated.”).

deficiencies,” and, even with the deference afforded to arbitrators, Berman ruled Goodell’s arbitration decision fundamentally unfair.⁴ The arbitration and subsequent vacation of the decision appears to be the catalyst for a discussion that has been in the making since 2011,⁵ when the NFL Collective Bargaining Agreement (CBA) granted more power to the NFL commissioner than ever before.⁶

It is easy to dismiss the decision as the conclusion of an over-reported story that relates to an over-reported league, but *Deflategate* and the facts surrounding the case provide unique insight into the tensions that exist between the NFL’s commissioner, owners, the players’ union, players, and fans. Most notable about Judge Berman’s opinion is its evisceration of Goodell’s behavior as arbitrator,⁷ a power that the most recent CBA expanded in 2011.⁸ Goodell’s authority does not only reach household name players. He has the authority to punish and deprive the due process rights of all NFL players,⁹ many of them making little more than the minimum salary¹⁰ in a league with a very short career span.¹¹ The general application of Judge Berman’s opinion may be important in future NFL cases. Additionally, decisions that reduce the power of the NFL commissioner or narrow the scope of the CBA promote discussions between league officials and union officials, which helps to provide notice to players and promotes positive player activity outside of the sport. Finally, creating the opportunity for discussion

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4. *Id.*
 5. *NFL Clubs Approve Comprehensive Agreement*, NFL (July 26, 2012, 8:43 PM), <http://www.nfl.com/news/story/09000d5d820e6311/printable/nfl-clubs-approve-comprehensive-agreement> [<http://perma.cc/HYZ5-EYGK>].
 6. See generally Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 93–99 (2014) (arguing that, over time, the major sports leagues’ commissioners’ power to sanction players has expanded immensely).
 7. *Deflategate*, 2015 WL 5148739, at *20.
 8. Pacifici, *supra* note 6, at 97.
 9. NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT, 204–07 (2011).
 10. Anthony Riccobono, *NFL Salaries: After NFL Draft, Rookies Get Rich, Try Not to go Broke*, INT’L BUS. TIMES (May 22, 2015, 5:32 PM), <http://www.ibtimes.com/nfl-salaries-after-nfl-draft-rookies-get-rich-try-not-go-broke-1935346> [<http://perma.cc/4QKX-S9PN>] (noting that the minimum pay for rookie players in 2015 was \$435,000 and that “[o]nly 20 players on the Super Bowl-winning New England Patriots made at least \$1 million last season”).
 11. See *Average Playing Career Length in the National Football League (in Years)*, STATISTA, <http://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> [<http://perma.cc/49NS-E82T>] (last visited Jan. 17, 2016) (noting that the average career of an NFL player is about three years).

between the players union and NFL management allows the public to become engaged and provide input that may affect the historically secretive league in positive ways.

I. DEFLATEGATE DECISION

A. Wells Investigation and Disciplinary Letter

The New England Patriots, a perennial NFL powerhouse since 2001, played the Indianapolis Colts in the AFC Championship Game on January 18, 2015.¹² During the game, the Colts requested that NFL officials inspect the footballs used by the Patriots because a Colts player and Colts staff member reported that an intercepted ball appeared to be under-inflated.¹³ As a result, at halftime, members of the officiating crew tested the air pressure of eleven of the Patriots' game balls and found that all of them were underinflated, in violation of NFL rules.¹⁴ Five days later, the NFL announced that Theodore Wells and his law firm would lead an investigation with the involvement and cooperation of NFL General Counsel, Jeff Pash.¹⁵

The product of the investigation was a 139-page document, most often referred to as the "Wells Report," with an additional one hundred pages of scientific evidence designed to disprove the claim that the ball deflation was natural.¹⁶ The Wells Report was released to the public on May 6, 2015.¹⁷ The Wells Report concluded that: 1) Jim McNally and John Jastremski, both Patriots equipment staff members, deliberately released air from footballs, after the NFL official approved the inflation

12. *Tom Brady Carries Pats to Rout of Colts, Claims Sixth Super Bowl Trip*, ESPN (Jan. 19, 2015), <http://espn.go.com/nfl/recap?gameId=400749520> [<http://perma.cc/LEE5-QKWY>].

13. THEODORE V. WELLS, JR. ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 1, 7 (2015) [hereinafter THE WELLS REPORT].

14. *Id.* at 1, 7–8.

15. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n (*Deflategate*), Nos. 15 Civ. 5916 (RMB)(JCF), 15 Civ. 5982 (RMB)(JCF), 2015 WL 5148739, at *2 (S.D.N.Y. Sept. 3, 2015) (quoting THEODORE V. WELLS, JR. ET AL., INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 1) ("On January 23, 2015, the NFL publicly announced that it had retained Theodore V. Wells, Jr. and his law firm to conduct an 'independent' investigation, together with NFL Executive Vice President and General Counsel Jeff Pash.").

16. THE WELLS REPORT, *supra* note 13.

17. *Id.*

levels; and 2) Brady, “more probabl[y] than not . . . was at least generally aware of the inappropriate activities.”¹⁸

On May 11, 2015, NFL Executive Vice President Troy Vincent mailed a disciplinary letter to the New England Patriots organization.¹⁹ In the letter, Vincent accepted the findings of the Wells Report and punished the team for a violation of the NFL’s Policy on Integrity of the Game and Enforcement of Competitive Rules (“Competitive Integrity Policy”).²⁰ Vincent fined the club \$1 million, stripped the team of two future draft picks, and suspended Jastremski and McNally from equipment supervision.²¹

On the same day, Vincent mailed a similar disciplinary letter to Brady.²² Vincent suspended Brady for four games, citing the Wells Report’s finding of the quarterback’s general awareness, in addition to Brady’s “failure to cooperate fully and candidly with the investigation,” and Brady’s inconsistent testimony.²³ Vincent noted that Goodell authorized him to inform Brady of the discipline, and Goodell’s authority was exercised under Article 46 of the CBA.²⁴

B. Arbitration

Brady submitted an Article 46 arbitration appeal of the NFL’s disciplinary decision through the National Football League Players Association (NFLPA).²⁵ Robert Kraft, who owns the Patriots, did not appeal.²⁶ Goodell appointed himself arbitrator of the hearing, as permitted by Article 46 of the CBA.²⁷ Brady and the NFLPA sought recusal of Goodell, arguing that he could not fairly arbitrate a matter related

18. *Id.* at 2.

19. *Deflategate*, 2015 WL 5148739, at *4.

20. *Id.*

21. *Id.*

22. *Id.* at *5.

23. *NFL Releases Statement on Patriots’ Violations*, NFL (May 11, 2015, 8:48 PM), <http://www.nfl.com/news/story/0ap3000000492190/article/nfl-releases-statement-on-patriots-violations> [<http://perma.cc/W5SL-3QRQ>].

24. *Deflategate*, 2015 WL 5148739, at *5.

25. *Id.*

26. *Id.* (“On May 19, 2015, Patriots owner Robert Kraft is reported to have stated that ‘I don’t want to continue the rhetoric that’s gone on for the last four months. I’m going to accept, reluctantly, what he [Commissioner Goodell] has given to us [the Patriots’ organization], and not continue this dialogue and rhetoric, and we won’t appeal.’”).

27. Complaint for Petitioner, Ex. B, at 5, *Deflategate*, 2015 WL 5148739, ECF No. 4–2.

so intimately to him.²⁸ Goodell denied the request.²⁹ Additionally, Brady requested production of all documents used to draft the Wells Report and Pash's testimony regarding his involvement in the creation of the Wells Report.³⁰ Goodell denied both requests, deeming them cumulative.³¹ He explained that only the Wells Report was used to make the disciplinary decision and that the NFL presented all the documents used to make conclusions in the Wells Report, making any further evidence unnecessary.³² The NFL also claimed that Pash was not important enough to the investigation to warrant compelling his testimony.³³

On June 23, 2015, the arbitration hearing was held.³⁴ The same law firm that drafted the Wells Report represented the NFL at the hearing.³⁵ Goodell issued the final decision on July 28, 2015.³⁶

The fourth section of Goodell's decision addressed Brady's awareness of tampering with footballs.³⁷ Goodell observed that Brady spent a significant amount of time on the phone with Jastremski in the days following the AFC Championship Game, which was uncharacteristic of Brady and Jastremski's relationship before that point.³⁸ Goodell threw all of Brady's justifications for the phone conversations out stating, "The sharp contrast between the almost complete absence of communications through the AFC Championship Game and the extraordinary volume of communications during the three days following the AFC Championship Game undermines any suggestion that the communications addressed only preparation of footballs for the Superbowl."³⁹ Further, Goodell rejected McNally's arguments related to texts recovered by the Wells Report investigators, including arguments that a text discussion between Jastremski and McNally about "stress" actually referred to selling Patriots merchandise and texts between Jastremski and McNally about Brady's passer rating being deflated were taken out

28. *Deflategate*, 2015 WL 5148739, at *5.

29. *Id.* at *6.

30. *Id.*

31. *Id.* at *6–7.

32. *Id.* at *7.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at *8.

37. ROGER GOODELL, FINAL DECISION ON ARTICLE 46 APPEAL OF TOM BRADY 7–11 (2015) [hereinafter *Arbitration Decision*].

38. *Id.* at 8–9.

39. *Id.* at 9.

of context.⁴⁰ In rejecting all the arguments, Goodell stated, “[T]he available electronic evidence, coupled with information compiled in the investigators’ interviews, leads me to conclude that Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme . . . [of tampering with] game balls.”⁴¹

Goodell then addressed Brady’s cooperation with the investigation.⁴² Brady failed to turn over the cellphone he used during the time the deflation activities allegedly occurred because he destroyed the cellphone before investigators spoke with him.⁴³ Brady argued that he always destroyed former cellphones.⁴⁴ Goodell rejected this argument because Brady had produced cell phones for his personal investigation that he had owned prior to the cellphone that he had destroyed.⁴⁵ Additionally, Goodell noted that the date of destruction, which appeared to be the same day Brady spoke with Wells Report investigators, was troublesome.⁴⁶ Goodell ruled that Brady failed to cooperate with the NFL and the appointed investigators, then explained, “[T]he NFL is entitled to expect and insist upon the cooperation of owners . . . and players in a workplace investigation and to impose sanctions when such cooperation is not forthcoming, when evidence is hidden, fabricated, or destroyed, . . . or when individuals do not provide truthful information.”⁴⁷ In sum, Goodell stated:

The evidence fully supports my findings 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.⁴⁸

40. *Id.*

41. *Id.* at 10.

42. *Id.* at 11.

43. *Id.* at 12–13.

44. *Id.* at 12.

45. *Id.*

46. *Id.* at 13.

47. *Id.*

48. *Id.*

Goodell then argued that no prior NFL “conduct detrimental” proceeding paralleled the Brady issue due to Brady’s unique failure to cooperate with the investigation and his outright destruction of evidence relevant to the league investigation.⁴⁹ Goodell cited to the non-cooperation of players in the *Bountygate* case⁵⁰ and explained that those players’ behavior could not be used as precedent because Brady’s actions were not coerced by any of the Patriots’ management or coaching staff.⁵¹ Goodell argued that other players’ failure to be “fully candid” with the NFL, while wrong, was never as serious as Brady’s noncooperation and destruction of evidence.⁵² After dismissing all other previous cases, Goodell concluded that the most appropriate level of discipline to impose on Brady was “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.”⁵³

Goodell closed the arbitration decision by addressing other legal issues advanced by Brady and the NFLPA. Brady argued that he had no notice of the NFL’s power to suspend him for “conduct detrimental” to the game because it was not included in the “Player Policies” document distributed to NFL players every year.⁵⁴ Goodell ruled the argument invalid, explaining that tampering with game balls was unquestionably “conduct detrimental” and Brady should have known that it would injure the public’s confidence in the integrity of football.⁵⁵

Brady also argued that he was not on notice that the NFL could discipline him for failure to cooperate with the NFL’s investigation, and, further, the examples of “conduct detrimental” to the integrity of the game provided in the standard player’s contract failed to put him on notice.⁵⁶ Goodell threw the arguments out, explaining that

49. *Id.* at 14.

50. *Id.* In the *Bountygate* case, several coaches and players of the New Orleans Saints were found to have engaged in a scheme to pay players for causing injuries to other players. See *Paul Tagliabue Vacates Penalties*, ESPN (Dec. 12, 2012), http://espn.go.com/nfl/story/_/id/8736662/paul-tagliabue-vacates-new-orleans-players-bounty-penalties [<http://perma.cc/XAW9-JTQS>] (discussing the results of the players’ appeal, where, although the arbitrator affirmed the factual findings that the players engaged in the “cash-for-hits program,” the suspensions were dismissed).

51. Arbitration Decision, *supra* note 37, at 14.

52. *Id.* at 15.

53. *Id.* at 16.

54. *Id.* at 16–17.

55. *Id.* at 17.

56. *Id.*

the NFL player contract clearly establishes that players may not undermine the integrity or perceived good character of players, including “any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.” Goodell concluded that it is only reasonable to assume that a player with an NFL tenure like Brady’s should be put on notice of what is “conduct detrimental” to the league.⁵⁷

Finally, Goodell determined that he did not improperly delegate his authority as Commissioner to determine conduct detrimental as Brady had argued during the arbitration. Goodell explained, “I was directly involved in the assessment of Mr. Brady’s conduct that led to his suspension and in determination of the suspension itself; I concurred in Troy Vincent’s recommendation and authorized him to communicate to the club and to Mr. Brady the discipline imposed under my authority as Commissioner.”⁵⁸

After Goodell entered his arbitration decision, Brady appealed, seeking vacation of Goodell’s suspension.⁵⁹ The NFL and Goodell also appealed, seeking confirmation and enforcement of the arbitration award.⁶⁰

II. VACATION OF *DEFLATEGATE* DECISION

On September 3, 2015, Judge Berman vacated the suspension levied against Brady, which lifted the four-game ban before the start of the 2015–2016 NFL season.⁶¹ Berman lambasted Goodell in his opinion, noting Goodell’s distinct lack of fairness and neutrality, qualities all arbitrators are expected to exhibit.⁶² Berman first provided the legal standard established for reviewing arbitrator decisions.⁶³ Berman then explained that the CBA failed to provide adequate notice to Brady of the discipline that he could face for equipment violations,⁶⁴ Goodell’s denial of Brady’s request to have Pash testify was wrongful, and denial

57. *Id.* at 17–18.

58. *Id.* at 18.

59. Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n (*Deflategate*), Nos. 15 Civ. 5916 (RMB)(JCF), 15 Civ. 5982 (RMB)(JCF), 2015 WL 5148739, at *1 (S.D.N.Y. Sept. 3, 2015).

60. *Id.*

61. *Id.*

62. *Id.* at *9–20.

63. *Id.* at *9–10.

64. *Id.* at *11 (“The Award is premised upon several significant legal deficiencies, including (A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct.”).

of equal access to the investigative files was also improper.⁶⁵ Berman minced no words in criticizing Goodell's brazen disregard for appearing (much less being) neutral while arbitrating the Brady appeal.

A. Legal Standard

The court explained that arbitration awards are not reviewed with the scrutiny normally afforded to judicial hearings, and arbitrators are limited by the requisites of "fairness" and "due process."⁶⁶ The court may only overturn an arbitrator's decision to the extent that the arbitrator violates the Federal Arbitration Act⁶⁷ which states:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁶⁸

Finally, the court explained that an arbitrator may only make decisions in accordance with the applicable bargaining agreement, and the arbitrator "must interpret and apply that agreement in accordance with

65. *Id.* ("(B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness interview notes.").

66. *Id.* at *9 (quoting *Kaplan v. Alfred Dunhill of London, Inc.*, No. 96 Civ. 0258 (JFK), 1996 WL 640901, at *7 (S.D.N.Y. Nov. 4, 1996)) ("The deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requisites of fairness or due process.").

67. 9 U.S.C. § 10 (2012).

68. 9 U.S.C. § 10(a).

the ‘industrial common law of the shop.’”⁶⁹ The “law of the shop” is an application of the industry’s common law, or, in other words, the “past practices of the industry and the shop,” like prior NFL arbitration awards.⁷⁰

B. Legal Analysis

The court found that the “law of the shop” in the NFL is “to provide professional football players with advance notice of prohibited conduct and potential discipline.”⁷¹ Arbitrators in other NFL appeals ruled that the only way to fairly discipline players is to make clear what the consequences of the players’ actions are.⁷² Additionally, the court found prior NFL arbitration decisions that suggested that obstruction of a league investigation does not warrant suspension of a player.⁷³

Considering the law of the NFL’s shop, the court vacated the arbitration award entered against Brady.⁷⁴ It found that the CBA provided no notice of Brady’s alleged “misconduct” to the player, and, by extension, the CBA failed to provide notice of the severity of punishment that Brady could face as a result of his violation.⁷⁵ Further, the court concluded that denying Brady’s request to interview Pash, one of the lead investigators and editors of the Wells Report, was a denial of evidence that was “plainly pertinent and material to the controversy,” in violation of the Federal Arbitration Act.⁷⁶ Similarly, denial of access to the investigative files was a denial of information that violated Brady’s rights.⁷⁷

69. *Deflategate*, 2015 WL 5148739, at *10 (quoting *United States v. Int’l Bhd. of Teamsters*, 954 F.2d 801, 809 (2d Cir. 1992)).

70. *Bureau of Engraving, Inc. v. Graphic Commc’ns Int’l Union, Local 1B*, 164 F.3d 427, 429 (8th Cir. 1999).

71. *Deflategate*, 2015 WL 5148739, at *10.

72. *Id.*

73. *Id.* Notably, the court did not declare this rule to be “the law of the shop,” explaining, “[i]n the *Bounty–Gate* case . . . Tagliabue stated: ‘There is no evidence of a record of past suspensions based purely on obstructing a League investigation. In my forty years of association with the NFL, I am aware of many instances of denials in disciplinary proceedings that proved to be false, but I cannot recall any suspension for such fabrication. There is no evidence of a record of past suspensions based purely on obstructing a League investigation.’” *Id.*

74. *Id.* at *1.

75. *Id.* at *11.

76. *Id.* at *18 (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997)).

77. *Id.* at *19 (“The Court finds that Commissioner Goodell’s denial of the Players Association’s motion to produce the Paul, Weiss investigative

1. Failure to Provide Notice

In overturning the Goodell ruling, the court emphasized the CBA's failure to put Brady on notice of the fact that the steroid policy would be the scheme under which he was punished for "general awareness" of ball deflation.⁷⁸ Goodell stated that Brady's suspension for "general awareness" of the deflation of footballs was based on the CBA policy related to steroids.⁷⁹ The court took issue with Goodell's use of the policy and argued that the steroid policy is meant to only address players' steroid use.⁸⁰ The court explained there was no clear "scientific, empirical, or historical evidence of any comparability between Brady's alleged offense and steroid use."⁸¹ The court also noted that Brady was only "generally aware" of the deflation activities, and the steroid policy failed to put Brady on alert of potential punishment for such a "general awareness."⁸² The court explained, "no NFL policy or precedent notifies players that they may be disciplined (much less suspended) for general awareness of misconduct by others."⁸³ In sum, the court found that "no player alleged . . . to have had a general awareness of the inappropriate ball deflation activities of others or who allegedly schemed with others to let air out of footballs in a championship game and also had not cooperated in an ensuing investigation, reasonably could be put on notice."⁸⁴

The court also ruled in favor of Brady's argument that the football player was never put on notice of discipline for his failure to cooperate

files, including notes of witness interviews, for Brady's use at the arbitral hearing was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3) and that Brady was prejudiced as a result.").

78. *Id.* at *12 ("The Court finds that no player alleged or found to have had a general awareness of the inappropriate ball deflation activities of others or who allegedly schemed with others to let air out of footballs in a championship game and also had not cooperated in an ensuing investigation, reasonably could be on notice that their discipline would (or should) be the same as applied to a player who violated the NFL Policy on Anabolic Steroids and Related Substances.") (emphasis omitted).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at *12, *14. ("The Court is unable to perceive 'notice' of discipline, or any comparability between a violation of the Steroid Policy and a 'general awareness' of the inappropriate activities of others, or even involvement in a scheme by others to deflate game balls on January 18, 2015, and non-cooperation in a football deflation investigation.").

83. *Id.* at *14.

84. *Id.* at *12 (emphasis omitted).

with investigators.⁸⁵ The court provided Wells’s arbitration testimony, where he stated, “I did not tell Mr. Brady at any time that he would be subject . . . for . . . not turning over the documents.”⁸⁶ Brady appealed to the *Bountygate* decision, in which former NFL Commissioner Paul Tagliabue stated, “There is no evidence of a record of past suspensions based purely on obstructing a League investigation.”⁸⁷ The court agreed, and stated, “Because there was no notice of a four-game suspension in the circumstances presented here, Commissioner Goodell may be said to have ‘dispense[d] his own brand of industrial justice.’”⁸⁸

The court also drew an important distinction between the Competitive Integrity Policy, which is administered only to team owners and management, and the Player Policies, which is given to players.⁸⁹ Vincent’s letter to Brady stated that Brady was punished under the terms of the Competitive Integrity Policy, but Brady had never seen the policy and, therefore, never had notice of the possible infraction.⁹⁰ Instead, Brady argued that the only notice he received was found in the Player’s Policy, which permits the NFL to fine—not suspend—players for an equipment violation.⁹¹ The court ruled that “Brady was on notice that equipment violations under the Player Policies could result in fines,” and that “[h]e had no legal notice of discipline under the Competitive Integrity Policy.”⁹² The court cited other NFL “law of

85. *Id.* at *13 (stating “[i]n further support of his claim that there was no notice of his discipline, Brady points to the testimony of Mr. Wells, who acknowledged the following at the arbitration hearing: ‘I want to be clear—I did not tell Mr. Brady at any time that he would be subject to punishment for not giving—not turning over the documents [emails and texts]. I did not say anything like that,’ before affirming Brady’s argument”).

86. *Id.*

87. *Id.*

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

89. *Id.* at *14–15 (“Brady was on notice that equipment violations under the Player Policies could result in fines. He had no legal notice of discipline under the Competitive Integrity Policy, which is incorporated into the Game Operations Manual and distributed solely to—and, therefore, provides notice to—‘Chief Executives, Club Presidents, General Managers, and Head Coaches,’ and not to players.”).

90. *Id.* at *15.

91. *Id.*

92. *Id.*

the shop” precedent explaining that the Competitive Integrity Policy “could not serve as the basis for disciplinary action against [players].”⁹³

Finally, the court rejected Goodell’s argument that Brady’s activity was punishable under the CBA’s policy that restricts players from engaging in activity that is detrimental to the integrity of the NFL.⁹⁴ The court found that Goodell was legally expected to rely on the more specific Player Policies instead of the more general CBA policy.⁹⁵ Additionally, the court pointed to common law and stated, “an applicable specific provision within the Player Policies is better calculated to provide notice to a player than a general concept such as ‘conduct detrimental.’”⁹⁶

2. Improper Denial of Opportunity to Examine Pash

Brady argued that Goodell’s denial of Brady’s request to examine Pash was improper and unfair, and the court agreed.⁹⁷ The NFL’s general counsel, Pash, co-led the investigation into the deflated footballs.⁹⁸ As co-lead investigator, Pash was permitted to review the Wells Report before it was made public.⁹⁹

The court noted that an arbitrator is not bound by the standard rules of discovery and need not listen to every piece of evidence that is offered by parties but also noted that “[a] fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses.”¹⁰⁰ The court also pointed to additional NFL

93. *Id.* at *14–15 (“NFL arbitral precedent confirms that because Brady did not have notice of the Competitive Integrity Policy, that Policy could not serve as the basis for disciplinary action against him.”).

94. *Id.* at *16 (“Goodell’s reliance on notice of broad CBA ‘conduct detrimental’ policy—as opposed to specific Player Policies regarding equipment violations—to impose discipline upon Brady is legally misplaced.”).

95. *Id.*

96. *Id.*

97. *Id.* at *17–18 (“The Court finds that Commissioner Goodell’s denial of Brady’s motion to compel the testimony of Mr. Pash was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3).”).

98. *Id.* at *1.

99. *Id.* at *17–18 (“[Brady] was foreclosed from exploring, among other things, whether the Pash/Wells Investigation was truly ‘independent,’ and how and why the NFL’s General Counsel came to edit a supposedly independent investigation report.”).

100. *Id.* at *17 (quoting *Kaplan v. Alfred Dunhill of London, Inc.*, No. 96 CIV. 0258 (JFK), 1996 WL 640901, at *5 (S.D.N.Y. Nov. 4, 1996)).

arbitration rulings, where arbitrators ruled that “players must be afforded the opportunity to confront their investigators.”¹⁰¹

Considering both the common law and the NFL’s “law of the shop,” the court found that Goodell had acted unfairly toward Brady.¹⁰² The court found that Pash’s testimony may have been material and that Brady was prejudiced because he was “[d]enied the opportunity to examine Pash at the arbitral hearing.”¹⁰³ The denial of Pash’s testimony prevented Brady from asking Pash about the execution of the investigation and denied Brady the chance to investigate the edits Pash made to the Wells Report.¹⁰⁴ Finally, the court explained “[a]s co-lead investigator . . . Pash was in the best position to testify about the NFL’s degree of involvement in, and potential shaping of, a heralded ‘independent’ Investigation. The issues known to Pash constituted ‘evidence plainly pertinent and material to the controversy.’”¹⁰⁵

3. Improper Denial of Access to Investigative Files

Lastly, the court ruled that Goodell’s denial of Brady’s request for documents, memoranda, and other investigation materials used in the drafting of the Wells Report was improper because it was fundamentally unfair and in violation of the Federal Arbitration Act.¹⁰⁶ The court denied Goodell’s argument that the interview notes were not pertinent to Brady’s punishment, and accepted Brady’s argument that the denial was especially unfair due to the NFL counsel’s unique access to the files.¹⁰⁷

The court explained that the deference afforded to arbitrators “does not negate the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party.”¹⁰⁸ Here, the NFL’s counsel was the

101. *Id.*

102. *Id.* at *18 (“The Court finds that Commissioner Goodell’s denial of Brady’s motion to compel the testimony of Mr. Pash was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3).”).

103. *Id.*

104. *Id.*

105. *Id.* (citing *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997)).

106. *Id.* at *19 (“The Court finds that Commissioner Goodell’s denial of the Players Association’s motion to produce the Paul, Weiss investigative files, including notes of witness interviews, for Brady’s use at the arbitral hearing was fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3) and that Brady was prejudiced as a result.”).

107. *Id.*

108. *Id.* (quoting *Home Indem. Co. v. Affiliated Food Distribs., Inc.*, No. 96 Civ. 9707(RO), 1997 WL 773712, at *4 (S.D.N.Y. Dec. 12, 1997)).

same law firm that drafted the Wells Report.¹⁰⁹ The NFL's attorneys had all the evidence that Brady requested and they were able to use the documents to develop the NFL's case at the arbitration hearing, while Brady's attorneys were forced to develop a narrative on their own. The court ruled that Goodell's denial was an outright violation of the Federal Arbitration Act.¹¹⁰

CONCLUSION

Goodell stepped over the line multiple times while acting as arbitrator in the Brady appeal. However, Goodell's actions as arbitrator were not uncharacteristic of the NFL commissioner, and many would argue Goodell only acted as the owners expect him to act. Goodell's authority is dangerous to the league and its players. While Brady will never have to worry about his financial position, Goodell's authority and the potential abuses that come with it could jeopardize the "everyday" players working to make a living in the NFL. Taking power away from Goodell promotes more collaborative resolutions, and kicking Goodell's decision out now allows the NFL to address this issue in the open, much like the Ray Rice and Adrian Peterson cases forced the NFL to adopt a new domestic violence policy.¹¹¹

Judge Berman's decision cut Goodell's arbitration ruling off at the knees. Notably, Berman did not spend a single word addressing Brady's culpability, presumably because he found Goodell's blatant abuses of authority to be so egregious. As an outsider, it is easy to mock Goodell's flagrant missteps, but it appears Goodell's decision was an effort to appease the owners who voted him into his position and who he represents. In 2011, the NFL adopted a new CBA that granted Goodell unparalleled authority and that made him the most powerful commissioner in professional sports.¹¹² That power exists for a reason. Goodell works for the owners and has performed wonderfully in his role as their

109. *Id.* at *20.

110. *Id.* at *19 ("The interview notes were, at the very least, the basis for the Wells Report, and Brady was prejudiced by his lack of access to them. 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. Because the investigative files included the unedited accounts of the witness interviews, the Wells testimony at the arbitral hearing failed to put Brady 'in the same position as the document[s] would [have].'" (quoting *Postlewaite v. McGraw-Hill, Inc.*, No. 98 CIV. 0611(LLS), 1998 WL 751687, at *4 (S.D.N.Y. Oct. 28, 1998))).

111. *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 19, 2014, 10:35 AM), <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy> [<http://perma.cc/VE5B-UQTG>].

112. *Pacifici*, *supra* note 6, at 96-97, 104-05.

representative. Goodell works to make the league as valuable and profitable as possible, and, working with the owners, he has succeeded in doing so.¹¹³ Goodell represents the owners in the court of public opinion, and he has unfailingly served that task.¹¹⁴ Goodell is asked to serve as the whipping boy of the NFL. When players make missteps in their personal lives, he is expected to both punish the player while assuring the public the NFL is a family-oriented organization. Fundamental to walking the line between the league's disciplinary force and the league's representative is Goodell's ability to unilaterally administer "justice" to players who violate the league's strict code. So far, Goodell has been able to act without dissent from owners, but given additional issues like the league's handling of concussions and off-the-field player issues, many have begun to question whether Goodell and the owners will be able to maintain the status quo under such significant public pressure.¹¹⁵

Limitation of Goodell's authority is positive and helps the league as a whole. Goodell's authority applies to every player in the league, from undrafted free agents fresh out of college to future hall of famers. Limitation of Goodell's authority is especially important to those players whose names only the most diehard of fans will know. NFL career spans are incredibly short for the majority of players, and the physical toll the sport takes on players limits their career options after football.¹¹⁶ A practice squad or lesser-known backup player who is punished by the NFL does not have the resources or public presence to bring a powerful suit against the NFL. Limiting Goodell's power will make the NFL arbitration appeals process fairer and more predictable and will help limit the need for lesser-known players to take cases to the legal system for a more fair hearing.

Judge Berman's decision may promote more discussion between the NFL and the NFLPA. When Goodell's authority is limited, issues may be settled with discussions between the NFL and its union, instead of with disciplinary letters and arbitration appeals hearings. As a result of

113. Mike Ozanian, *The Most Valuable Teams in the NFL*, FORBES (Sept. 14, 2015, 9:51 AM), <http://www.forbes.com/sites/mikeozanian/2015/09/14/the-most-valuable-teams-in-the-nfl/> [<http://perma.cc/A92W-UKNF>].

114. Kevin Clark, *Why NFL Commissioner Roger Goodell has Survived*, WALL ST. J. (Oct. 7, 2014, 2:44 PM), <http://www.wsj.com/articles/why-nfl-commissioner-roger-goodell-has-survived-1412636655> [<http://perma.cc/CCF8-YBP5>].

115. Jack Hamilton, *Goodell's Long Fall: Why the NFL Commissioner's Latest Disaster Might Actually be His Undoing*, SLATE (Sept. 3, 2015, 7:42 PM), http://www.slate.com/articles/sports/sports_nut/2015/09/roger_goodell_deflategate_ruling_why_the_nfl_commissioner_s_tom_bradys_ruling.html [<http://perma.cc/FX7E-PJEZ>].

116. *Average Career Playing Length*, *supra* note 11.

discussions, the NFL and the NFLPA may be more able to make headway on talks about other important issues facing the league, such as how to better handle player health following player retirement and what policies may need to be adopted to better handle off-the-field player concerns.

The *Deflategate* decision is still new, and the NFL has already filed an appeal, so the effect of the case on the league and on Goodell's authority as commissioner will not be observed for a long time.¹¹⁷ What is clear is that the effects will be felt by many people in the years to come.

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117. Lorenzo Reyes & Rachel Axon, *NFL Files an Appeal of Deflategate Decision that Erased Tom Brady Suspension*, USA TODAY (Sept. 3, 2015, 4:03 PM), <http://www.usatoday.com/story/sports/nfl/patriots/2015/09/03/deflategate-tom-brady-roger-goodell-judge-richard-overtured-berman-new-england/71504142/> [<http://perma.cc/4WPA-ZFYK>].

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