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Between the Hash Marks

THE ABSOLUTE POWER THE NFL'S COLLECTIVE BARGAINING AGREEMENT GRANTS ITS COMMISSIONER

INTRODUCTION

For many Americans, Sundays revolve around one thing—the National Football League (the NFL or the League). Fans come from all over to watch their favorite teams compete and partake in a sport that has become more than just a game. Sunday worries for NFL fans consist of painting their faces, tailgating, and setting their fantasy lineups.¹ For professional football players, football is a way to earn a living; touchdowns, yards, and big hits highlight ESPN's top plays,² generating a multibillion-dollar industry.³ Like the other three major sports leagues,⁴ the NFL is governed by a multitude of intricate rules, regulations, and agreements that dictate the employment and

¹ Fantasy sports involve fans signing up for a league and creating a virtual team. To create a team, fans conduct a draft, online or offline, where they select players from a professional sports league, thus creating their own ideal or “fantasy” team. Fans then compete against each other in their league, and their success is determined based on their players’ “real-game” statistics. Chris Isidore, *Fantasy Sports: What Is It, Anyway?*, CNN MONEY (Oct. 6, 2015), <http://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/> [<https://perma.cc/UM2Z-JAG2>].

² “ESPN” is an acronym that used to stand for Entertainment and Sports Programming Network. *Frequently Asked Questions*, ESPN (Jan. 14, 2014), <http://m.espn.go.com/general/story?storyId=1457975&src=desktop&wjb> [<https://perma.cc/2CLN-4AQT>].

³ Monte Burke, *How the National Football League Can Reach \$25 Billion in Annual Revenues*, FORBES (Aug. 17, 2013), <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/#411b7d873ad0> [<https://perma.cc/66W5-KEB3>].

⁴ See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association arts. 17–18-A (Feb. 15, 2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf [<https://perma.cc/Q5XS-CV3Z>] [hereinafter NHL Collective Bargaining Agreement]; Major League Baseball Collective Bargaining Agreement: 2012–2016 Basic Agreement art. XI (2012), http://mlb.mlb.com/pa/pdf/cba_english.pdf [<https://perma.cc/UY3D-EYLS>] [hereinafter MLB Basic Agreement]; NBA Collective Bargaining Agreement, Nat’l Basketball Ass’n art. XXXI (Dec. 8, 2011), [https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2011NBA_NBPA_CBA\(final%20version\).pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2011NBA_NBPA_CBA(final%20version).pdf) [<https://perma.cc/QP7Y-A3X2>] [hereinafter NBA Collective Bargaining Agreement].

conduct of football players.⁵ In order for fans to watch their favorite players make one-handed catches, hit homeruns, or fly through the air and dunk a basketball, team owners and unions representing players have come to agreements that allow their employer-employee relationship to function properly. These relationships are covered by Collective Bargaining Agreements (CBAs) which provide players and team owners with rules and regulations governing many facets of their relationship such as employment conditions, eligibility, grievances, and base salaries.⁶ In addition to these areas, each of the four⁷ major leagues' CBAs has extensive sections outlining disciplinary action that may be enforced if necessary.⁸

Over the last few years, the NFL has received much criticism from the public, NFL officials, and the legal community over how its disciplinary process has been handled. Domestic abuse,⁹ the illegal deflation of game-used footballs,¹⁰ and a program undertaken by the New Orleans Saints to injure fellow athletes for money¹¹ are some of the heinous actions players have taken part in or have been accused of committing that have negatively impacted the public's perception of the NFL. These incidents have called into question the ability of the NFL Commissioner, Roger Goodell, to properly handle such disciplinary matters for player conduct that he has considered "detrimental to the integrity of . . . the game of professional football."¹² Goodell not only has the power to discipline players for such conduct, but also the power to review player appeals for punishments he imposed by electing himself arbitrator over

⁵ See generally Collective Bargaining Agreement between National Football League and National Football League Players Association (2011), <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/6A6J-QY34>] [hereinafter NFL Collective Bargaining Agreement].

⁶ *What Are Collective Bargaining Agreements and How Are They Used in Sport?*, IN BRIEF (Nov. 9, 2016), <http://www.inbrief.co.uk/sports-law/collective-bargaining-agreements-in-sport/> [<https://perma.cc/36QK-MWHU>].

⁷ The four major sports leagues discussed in this note include the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL).

⁸ See NFL Collective Bargaining Agreement, *supra* note 5; MLB Basic Agreement, *supra* note 4, at art. XII; NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI; NHL Collective Bargaining Agreement, *supra* note 4, at arts. 18, 18-A.

⁹ *Key Events in the Ray Rice Story*, CNN (Sept. 16, 2014), <http://www.cnn.com/2014/09/09/us/ray-rice-timeline/> [<https://perma.cc/KHJ2-BM99>].

¹⁰ Chris Mortensen, *11 of 12 Pats Footballs Underinflated*, ESPN (Jan. 21, 2015), http://www.espn.com/boston/nfl/story/_/id/12202450/nfl-says-new-england-patriots-had-inflated-football-afc-championship-game [<https://perma.cc/6Q7U-MVJE>].

¹¹ *Saints Bounty Scandal*, ESPN (Feb. 26, 2013), http://www.espn.com/nfl/topics/_page/new-orleans-saints-bounty-scandal [<https://perma.cc/Z24W-P9PZ>].

¹² See NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 1(a).

such grievances under Article 46 of the NFL CBA.¹³ While many may blame Goodell for the turmoil the League has recently experienced and claim that he has abused his power as the NFL's disciplinarian, this note will show that it is the overly broad language of the CBA that grants Goodell vast amounts of discretion to act as the judge, jury, and executioner of the League's disciplinary matters when dealing with on-field player conduct or conduct deemed "detrimental to the integrity of . . . the game of professional football."¹⁴ A revision of Article 46 of the NFL CBA would help lessen the overarching power of Goodell, and ensure that players are receiving fair appeals reviewed by impartial arbitrators.

In order to further demonstrate that the language of the CBA is the source of the NFL's flawed disciplinary process, Part I of this note provides a brief history of the development of the NFL, MLB, NBA, and NHL's CBAs, respectively, while demonstrating the importance of arbitral hearings within sports. Part II discusses the NFL CBA specifically, and the particular provisions that have caused issues in recent years. Part III provides a comparative analysis by examining how the NBA, MLB, and NHL have deployed their CBAs in comparison to that of the NFL. Part IV proposes a change to the disciplinary process that limits the Commissioner's power as the League's sole disciplinarian when dealing with on-field player conduct or conduct deemed detrimental to the game of football.

I. COIN TOSS: THE DEVELOPMENT OF THE COLLECTIVE BARGAINING AGREEMENT ACROSS THE LEAGUES

Before CBAs, players in professional leagues were at the mercy of contracts dictated by team owners.¹⁵ Owners would often "collude" over a variety of matters such as player salaries.¹⁶ Disputes between league owners and athletes quickly required the existence of collective bargaining agreements to prevent the occurrence of lockouts.¹⁷ Negotiated and agreed upon

¹³ See *id.* at § 2(a).

¹⁴ *Id.* at § 1(a).

¹⁵ PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXTS, CASES AND PROBLEMS* 155 (West Publishing Co., 5th ed. 2015).

¹⁶ *Id.*

¹⁷ Lockouts are when owners or management decides to prohibit their employees from attending work over a disagreement between the two sides. Lockouts often involve the hiring of replacement workers to maintain the company's business while the original workers are being kept from their jobs. John W. Schoen, *Strike or Lockout: What's the Difference?*, CNBC (Feb. 20, 2015), <http://www.cnbc.com/2015/02/20/strike-or-lockout-whats-the-difference.html> [<https://perma.cc/H3YC-J7PQ>] (referring to lockouts generally rather than specifically).

by players' unions and team owners, the CBA is meant to create a principal, binding authority for players and team owners that "establishes specific elements of how the league will operate, such as: division of league revenues, team salary caps, free agency requirements, restrictions on player mobility, provisions regarding the drafting of players, disciplinary rules, and other general regulations of the league."¹⁸ While CBAs govern nearly all interaction between players, owners, and league officials, the National Labor Relations Board has the authority to claim jurisdiction over certain claims if they greatly affect commerce.¹⁹

The National Labor Relations Act of 1935 (NLRA),²⁰ enforced by an independent federal agency called the National Labor Relations Board (NLRB or the Board),²¹ is tasked with governing "the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining."²² Although the Board decides when it has jurisdiction over a labor dispute, it can decline such jurisdiction if the dispute has a minimal effect on commerce.²³ After the NLRB claimed jurisdiction over the MLB in a 1969 adjudication,²⁴ the Supreme Court enforced its jurisdiction over the MLB in *Flood v. Kuhn* by explicitly stating that the MLB engaged in interstate commerce.²⁵ The NLRB's

¹⁸ Brittany L. Forgues, *Collective Bargaining Agreements and What Has Changed in the NBA and NFL*, MSLAW BLOG (Sept. 2012), <http://www.mslaw.edu/verdict-3/> [https://perma.cc/MC52-7E3B].

¹⁹ See *infra* notes 20–23 and accompanying text.

²⁰ The NLRA was created by Congress in 1935 to "protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy." *National Labor Relations Act*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/resources/national-labor-relations-act> [https://perma.cc/HA3P-JAJP] (last visited Nov. 23, 2016); see *National Labor Relations Act*, 29 U.S.C. §§ 151–169 (2012).

²¹ Jason La Canfora, *NFL Says Players' Union is 'Surface Bargaining' So It Can File Suit*, NFL (Aug. 3, 2012), <http://www.nfl.com/news/story/09000d5d81e4de6d/printable/nfl-says-players-union-is-surface-bargaining-so-it-can-file-suit> [https://perma.cc/K7F8-WZDG].

²² *National Labor Relations Act*, *supra* note 20.

²³ The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

29 U.S.C. § 164(14)(c)(1).

²⁴ Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969). The Board found that the MLB largely affected interstate commerce in many ways, and despite having an internal self-regulation system in place, its inadequacy to regulate the owner-player relationship in the MLB granted the Board jurisdiction over the MLB. *Id.* at 193–94.

²⁵ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

work in the MLB and NFL following the 1987 NFL strike²⁶ established that the NLRA can and continues to be applied to the four major sports leagues in the United States.²⁷ After the NFL and its players' union, the National Football League Players Association (NFLPA), adopted the 1993 NFL CBA, the NFLPA became a certified union under the NLRB.²⁸ Each league's CBA includes arbitration procedures that allow players and league management to resolve disputes within the league itself and prevent the need to go to court. However, these procedures and the arbitral awards they produce are often the source of litigation themselves.

A. *Reasons for CBAs' Arbitration Policies Before Federal Court Intervention*

Each of the leagues' CBAs contains arbitration procedures that allow athletes to file grievances against league punishments they feel are undeserved or excessive.²⁹ Such procedures entitle athletes to arbitration hearings, with parties dictated by the leagues' CBAs, where they can challenge the legitimacy of the punishment they received under the CBA.³⁰ Arbitration is meant to resolve a dispute in the most efficient way without interference by the courts.³¹ When dealing with an employer-employee agreement, which exists between professional athletes and team owners, an arbitrator's duty is to review whether the punishment imposed adheres to principles of due process and fairness under the NLRA and applicable CBA.³² Any type of arbitral decision that is not in accordance with federal law or the league's CBA creates the risk of violating players' due process rights.

²⁶ See *NFL Players Share in Record Settlement: Labor Relations: \$30-Million Judgment Arising from 1987 Strike Will be Divided Among About 1,300.*, L.A. TIMES (Sept. 13, 1994), http://articles.latimes.com/1994-09-13/sports/sp-37895_1_labor-relations [<https://perma.cc/7QMR-36N5>].

²⁷ See *Impact of the NLRB on Professional Sports*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/our-history/impact-nlr-professional-sports> [<https://perma.cc/AC3J-ZMTJ>].

²⁸ *History: The 1990's—Growth of the Union*, NFL PLAYERS ASS'N, <https://www.nflpa.com/about/history> [<https://perma.cc/B5Y8-W4G9>].

²⁹ The leagues differ on which parties can serve as arbitrators once players appeal or start the grievance procedure. See discussion *infra* Sections I.B–E.

³⁰ See discussion *infra* Sections I.B–E.

³¹ *What Is Arbitration?* MEDIATE.COM, <http://www.mediate.com/articles/grant.cfm> [<https://perma.cc/JUH8-HZJ5>].

³² *NFL Mgmt. Council v. NFL Players Ass'n*, 125 F. Supp. 3d 449, 462 (S.D.N.Y. 2015) (citing *United States v. Int'l Bhd. of Teamsters*, 954 F.2d 801, 809 (2d Cir. 1992)) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

While the NFL CBA gives the Commissioner the ability to review disciplinary actions he or she has imposed on athletes³³ for on-field player conduct or conduct that is detrimental to the game of football (“detrimental conduct”),³⁴ this power may potentially violate players’ federal due process rights. The purpose of these grievance arbitrations is for players to receive a fair, unbiased review of whether the punishment was justified under the provisions of the CBA. The potential for players’ due process rights to be violated when Goodell reviews appeals of his *own* disciplinary decisions, however, requires Federal Court intervention in arbitral awards to ensure adequate due process. Because the NFL CBA’s arbitral process has failed to prevent the need for court intervention evidenced by recent litigation, provisions of the CBA need to be rewritten to better protect players’ due process rights.

While federal courts can review arbitral decisions, decisions made by arbitrators are typically given great deference.³⁵ Courts generally do not review the fact-findings of arbitrators, but courts do, however, review decisions for fairness and due process concerns.³⁶ Section 10 of the Federal Arbitration Act requires that arbitral awards be fair and provide due process in order to be upheld.³⁷ Under this statute, a reviewing court needs to determine “whether the arbitrator’s award draws its essence from the collective bargaining agreement, since the arbitrator is not free to merely dispense his own brand of industrial justice.”³⁸ As in the cases of Tom Brady³⁹ and Adrian Peterson,⁴⁰ both athletes challenged their arbitral decisions for numerous reasons—including the absence of impartiality of the arbitrator during their inter-NFL appeal.⁴¹ Fairness in arbitral

³³ NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 2(a) (showing why such disciplinary authority is given to the Commissioner).

³⁴ *Id.* at art. 46, § (1)(a).

³⁵ *NFL Mgmt. Council*, 125 F. Supp. 3d at 463 (citing *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 213–14 (2d Cir. 2002)). “An arbitrator’s factual findings are generally not open to judicial challenge, and we accept the facts as the arbitrator found them.” *Id.*

³⁶ *Id.* at 462.

³⁷ Federal Arbitration Act, 9 U.S.C. § 10(a) (2012). Under section 10 of the Federal Arbitration Act, a United States court can vacate an award when found on fraudulent premises or corruption, when arbitrators were not impartial, where arbitrators prejudice one of the parties by refusing to hear material evidence or postponing, or when arbitrators exceed the power ordained to them. *Id.*

³⁸ *NFL Mgmt. Council*, 125 F. Supp. 3d at 462 (quoting *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005)).

³⁹ See *infra* Section II.A for a discussion on Tom Brady’s suspension after being accused of deflating footballs during an NFL game.

⁴⁰ See *infra* Section II.B for a discussion on Adrian Peterson’s suspension after being accused of taking part in off-field conduct detrimental to the game of football.

⁴¹ See *infra* Section II.C.

decisions is of the utmost importance. Although these decisions are not reviewed often, they are given a high level of deference when courts are asked to intervene. Because arbitral decisions are given substantial weight, it is crucial to ensure impartial decisions and limit the League Commissioner from arbitrating his own disciplinary decisions by changing the language of the CBA that grants Goodell such authority.⁴² The next section of this note will outline the history of the use of the NFL's CBA and take a look at how the current CBA is problematic in regard to Goodell's arbitration power. Then, a comparative analysis of the NFL's CBA and other leagues' CBAs will be done to find a better way of designing the disciplinary process for the NFL that encourages due process.

B. *National Football League: Road to Today's CBA*

NFL players first attempted to unionize as a players' association behind Creighton Miller in 1956.⁴³ After drafting a proposal of player demands⁴⁴ and submitting it to League Commissioner Bert Bell, the young player association never received a response from Bell.⁴⁵ In 1968, the NFL and NFLPA agreed on a deal, marking the NFL owners' acknowledgment of the NFLPA as the players' means of representation.⁴⁶ The headlining provisions of the 1968 Agreement included a minimum wage for players, an insurance plan, an improved pension plan, and the "Rozelle Rule."⁴⁷ Players quickly took issue with the 1968 CBA, especially the Rozelle Rule that essentially prohibited all player movement or free agency.⁴⁸ John Mackey, the NFLPA's president, argued that the rule violated Section 1 of the Sherman Act.⁴⁹ The court in *Mackey v. National Football League* found that the restraints put on teams when signing free agents did not serve any legitimate business purpose—making it overly

⁴² NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, §§ 1(a), 2(a).

⁴³ *History: The Beginning—1956*, NFL PLAYERS ASS'N, <https://www.nflpa.com/about/history> [<https://perma.cc/AP3S-8334>] (originating out of the players' demand for a minimum \$5,000 yearly salary and a continued salary for injured players).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *NFL Labor History Since 1968*, ESPN, http://www.espn.com/nfl/news/story?page=nfl_labor_history [<https://perma.cc/GR67-VMQ9>] (last visited Nov. 23, 2016). While this marked the NFL's recognition of the NFLPA, the NLRB did not recognize the NFLPA as the player's union until 1993. *History: The 1990's—Growth of the Union*, *supra* note 28.

⁴⁷ Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 281 (2008). Litigation ensued over the Rozelle Rule, which called for teams to send draft picks or players to a free agent's former team upon signing the player. *Id.*

⁴⁸ *Id.*

⁴⁹ *Mackey v. NFL*, 407 F. Supp. 1000, 1002 (D. Minn. 1975).

restrictive,⁵⁰ forcing the NFL and NFLPA to renegotiate a new CBA.⁵¹ The newly formed 1977 CBA included limited free agency with compensation, increased benefits, an option clause, and grievance procedures for athletes to dispute treatment they deemed unfair.⁵²

Following the 1977 CBA, the League faced two player strikes within the next ten years that were focused primarily around the issues of revenue sharing and free agency.⁵³ Following the strikes, the players won two landmark victories in court that had monumental effects on future NFL CBAs.⁵⁴ In *McNeil v. National Football League*, a jury struck down the owners “Plan B” system⁵⁵ finding that it violated antitrust law by adding unnecessary restrictions under the NLRB.⁵⁶ The NFLPA then filed a second suit on behalf of former Philadelphia Eagle Keith Jackson, who was an unsigned player under Plan B when the court announced its *McNeil* verdict.⁵⁷ In 1992, Judge Doty granted the NFLPA’s injunction against Plan B, which allowed Jackson and other players to become unrestricted free agents for five days where they were able to sign with any team they wanted.⁵⁸ These two cases led to discussions between the NFLPA’s former executive director, Gene Upshaw, and Commissioner Tagliabue,⁵⁹

⁵⁰ *Id.* at 1007.

⁵¹ *See id.* at 1007–08; *see also History: The 1970’s—AFL and NFL Players Associations Merge*, NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, <https://www.nflpa.com/about/history> [<https://perma.cc/G73S-F4PS>] (Players’ hatred of the Rozelle Rule and yearning for a new CBA came from the Rule’s practical prevention of free agency.).

⁵² *See* Dryer, *supra* note 47, at 282.

⁵³ In 1982, a two-month strike occurred due to the players’ “percentage-of-gross proposal” whereby players argued that 55% of the clubs’ league-revenue should be dispersed amongst them based on years of service, playtime, and performance. *History: The 1980’s—Era of Change*, NFL PLAYERS ASS’N, <https://www.nflpa.com/about/history> [<https://perma.cc/G73S-F4PS>]. The second strike came in 1987 when the owners rejected the players’ free agency demands they desired in the new CBA. *Id.* The players quickly ended the strike, and instead filed unfair labor practice charges with the NLRB, and an antitrust lawsuit against the NFL for imposing anti-competitive player restraints on the Right of First Refusal and the compensation system. *Id.*

⁵⁴ *History: The 1990’s—Growth of the Union*, *supra* note 28.

⁵⁵ Plan B “allows each team to retain limited rights to 37 players each season. A protected player is unable to s [sic] sign with other teams without giving his old team the first chance to sign him or forcing his new club to compensate his old club if he goes elsewhere.” Mike Freeman, *NFL Is in Violation of Antitrust Laws, Jury Decides*, THE TECH (Cambridge, Mass.), Sept. 11, 1992, at 3.

⁵⁶ *History: The 1990’s—Growth of the Union*, *supra* note 28.

⁵⁷ *Id.*

⁵⁸ *NFL Labor History Since 1968*, *supra* note 46.

⁵⁹ Tagliabue served as NFL commissioner from 1989–2006 and was brought in by Goodell to conduct an independent appeals hearing following the “Bountygate” scandal, when Goodell levied harsh penalties on New Orleans Saints player and personnel for their involvement in an alleged bounty program that rewarded players for big hits and injuries to other players. James Montgomery, *Roger Goodell Ripped by Former NFL Commissioner Paul Tagliabue*, ROLLING STONE (Jan. 26, 2015), <http://www>.

which resulted in a new CBA in 1993 that allowed for both free agency and a salary cap.⁶⁰ Following the 1993 CBA, the NFLPA became a certified union under the NLRB.⁶¹

The 1993 CBA remained in effect for the next eighteen years, during which it was extended five times until its expiration in 2011.⁶² Before the 2011 season, League owners locked out the players since they were unable to agree on a new CBA.⁶³ The lockout started following the owners' decision to opt out of the 2006 CBA in 2008, which left the NFL without a salary cap for the next two years.⁶⁴ In the process of eventually ending the lockout and signing a new CBA in 2011,⁶⁵ the players made great strides in expanding their rights under the current CBA for better grievance procedures and health and safety conditions.⁶⁶ The league agreed to longer rest periods between practices and to set-up trust funds for former players experiencing both physical and emotional pain.⁶⁷ This current CBA may address many of the League's earlier problems—from the "Rozelle Rule" to the "Plan B" system—but it also includes language granting Commissioner Goodell too much power over the disciplinary process.

Under the current NFL CBA, player appeals are divided into disputes that fall under "Grievances" and those that fall under "Commissioner Discipline."⁶⁸ A grievance is defined as "[a]ny dispute . . . arising after the execution of this Agreement and involving the interpretation of . . . any provision of this

rollingstone.com/culture/news/roger-goodell-ripped-by-former-nfl-commissioner-paul-tagliabue-20150126 [https://perma.cc/GXT9-57DC].

⁶⁰ *History: The 1990's—Growth of the Union*, *supra* note 28.

⁶¹ *Id.*

⁶² *History: The 2000s*, NFL PLAYERS ASS'N, <https://www.nflpa.com/about/history> [https://perma.cc/F8TG-ZHTY].

⁶³ *NFL Lockout*, ESPN (Dec. 5, 2012) http://espn.go.com/nfl/topics/_/page/nfl-labor-negotiations [https://perma.cc/VH2Q-Q67V].

⁶⁴ Though the 2006 CBA had an extension clause in it, both parties could opt out of the extension and thus the whole CBA.

NFL owners vote[d] 32–0 to opt out of the CBA following the 2010 season, 2 years before the extension was originally set to expire. The 2006 CBA extension allowed either the NFL or NFLPA to [opt] out of the deal following the 2010 season by November 8, 2008. At the time, the NFL released a statement reading in part: "The current labor agreement does not adequately recognize the cost of generating the revenues of which the players receive the largest shares; nor does the agreement recognize that those costs have increased substantially—and at an ever increasing rate—in recent years during a difficult economic climate in our country."

Id.

⁶⁵ *Id.*

⁶⁶ *History: The 2000s*, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ NFL Collective Bargaining Agreement, *supra* note 5, at arts. 43, 44, 46.

Agreement.”⁶⁹ Grievances are to be decided by a panel of four arbitrators mutually agreed upon by both the NFLPA and NFL.⁷⁰ The arbitrators’ decision after hearing from representatives of the grievant and the NFL serves as the final say on the grievance.⁷¹

While grievances are to be decided by arbitrators, there is another type of Commissioner Discipline appeal that is to be heard by the Commissioner, or his designee, rather than a mutually agreed upon panel of arbitrators. Article 46 allows the Commissioner to hear appeals of fines or suspensions he imposed “for conduct on the playing field . . . [excluding unnecessary roughness and unsportsmanlike conduct] . . . or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”⁷² In addition, Section 2(a) of Article 46 empowers Goodell to serve as the arbitrator over his own decisions or pick any representative after speaking with the NFLPA Executive Director (even in the absence of reaching an agreement).⁷³

While many criticize Goodell for abusing his power as Commissioner,⁷⁴ it is the language of the CBA that grants Goodell the authority to arbitrate appeals of his own disciplinary decisions for detrimental player conduct.⁷⁵ Rewriting parts of Article 46 of the NFL CBA is imperative to prevent partiality and bias by Goodell and to ensure athletes’ due process rights are enforced under Section 10 of the Federal Arbitration Act.

C. *Major League Baseball: Road to Today’s CBA*

Following baseball’s inception on a professional level in 1868, players frequently switched teams after their one-year

⁶⁹ *Id.* at art. 43, § 1.

⁷⁰ *Id.* at art. 43, § 6. Of the four arbitrators, one will be appointed Notice Arbitrator. *Id.* If one of the four arbitrators is dismissed, the parties must agree on a new arbitrator within thirty days before the Notice Arbitrator submits a list of ten experienced arbitrators for the NFLPA and NFL to select a new arbitrator. *Id.*

⁷¹ *Id.* at art. 43, § 8.

⁷² *Id.* at art. 46, § 1(a). If Goodell chooses not to serve as the arbitrator, he can select others to serve as hearing officers. *Id.* Section 2(a) of Article 46 states: “[T]he Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers.” *Id.* at art. 46, § 2(a). This section also states: “[T]he Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.” *Id.*

⁷³ *Id.* at art. 46, § 2(a).

⁷⁴ Will Graves, *NFL Players Say Goodell Abuses His Power*, PORTLAND PRESS HERALD (Sept. 5, 2015), <http://www.pressherald.com/2015/09/05/nfl-players-say-goodell-abuses-his-power/> [<https://perma.cc/V3R5-WSAY>].

⁷⁵ NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, §§ 1(a), 2(a).

contracts expired.⁷⁶ This led to baseball's earliest labor dispute in 1879, as owners wanted to control player contracts and salaries after their contracts expired so they could retain their best players during free agency.⁷⁷ Team owners secretly conspired to create the reserve clause,⁷⁸ which essentially gave owners total, indefinite control over a player's choice to play for another team.⁷⁹ In reaction to the reserve clause, the Chicago White Stockings's President, John Montgomery Ward, led a band of current baseball players to form the Brotherhood of Professional Baseball Players in 1885—the first ever players' union in baseball.⁸⁰ While the formation of MLB's first union was a major step empowering players in their employer-employee relationship with the owners, the Brotherhood only lasted one season as numerous attempts to unionize over the next eighty years failed because the owners' promises of consistent pay and work proved more attractive than union membership.⁸¹

In 1965, the players reached out to Marvin Miller, a United Steelworkers of America economist, who helped them become more organized and educated as a union.⁸² Miller's efforts led to two great achievements for athletes across the four major sports. In 1966, Miller led the players in forming the Major League Baseball Players Association (MLBPA).⁸³ Two years later, Miller helped the players "negotiate the first-ever collective bargaining agreement (CBA) in professional sports."⁸⁴ The MLB's First (1968) and Second (1970) Basic Agreements focused on two key issues: a minimum salary and a grievance procedure. The First Agreement allowed an owner-chosen Commissioner to serve as the arbitrator over grievances brought by players (similar to the NFL's current CBA), but the MLB's Second Basic Agreement "changed the grievance procedure to one where

⁷⁶ See Dryer, *supra* note 47, at 268.

⁷⁷ Thomas J. Hopkins, Perspectives, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 303–04 (1992).

⁷⁸ The reserve clause in a player's contract bound the player to the original team he signed with, even if that original contract only covered his first season, for a long period of time. *Reserve Clause*, BASEBALL REFERENCE, http://www.baseballreference.com/bullpen/Reserve_clause [<https://perma.cc/PE9T-HNRX>]. "For most of baseball history, the term of reserve was held to be essentially perpetual, so that a player had no freedom to change teams unless he was given his unconditional release." *Id.*

⁷⁹ The reserve clause allowed owners to submit a list of up to five players the owners wanted to keep on their teams, so other owners could not sign them and receive the same treatment to retain their own players. Dryer, *supra* note 47, at 268.

⁸⁰ *History*, MLB PLAYERS (June 29, 2016), http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000 [<https://perma.cc/M7SY-BMS2>].

⁸¹ See Dryer, *supra* note 47, at 269.

⁸² *History*, *supra* note 80.

⁸³ See Dryer, *supra* note 47, at 269.

⁸⁴ *History*, *supra* note 80.

a panel of arbitrators outside the Commissioner's office could be chosen to handle disputes."⁸⁵ Rather than give the Commissioner the sole authority to serve as the ultimate arbitrator over a dispute, grievance procedures could be arbitrated by this panel.⁸⁶ This provision signified the first time in MLB history that owners (who theoretically controlled the Commissioner) were not in "total control over player disputes."⁸⁷

While the MLBPA continued to make great strides for the players during the 1970s and 1980s, they still refused to sign the owners' CBA proposal in 1994 because they disapproved of the league's revenue sharing⁸⁸ and salary cap.⁸⁹ This led to a players' strike in 1994 and the cancellation of the World Series after the MLBPA refused to sign the proposed CBA that would have cut players' salaries and benefits.⁹⁰ The strike ended right before the 1995–96 season after the NLRB sought an injunction against the owners, allowing the teams to compete under the 1970 CBA for the next one and a half seasons.⁹¹ A new CBA was reached between the owners and players in 1997, and many of its provisions are still intact in MLB's current CBA.⁹² Such provisions include a uniform player's contract, salary arbitration, a revenue sharing plan between teams, free agency procedures, and an extremely detailed grievance procedure.⁹³ The remainder of this section will explain the MLB's current arbitration procedure in depth.

Article XI of the current MLB CBA governs the players' rights to arbitration hearings for grievances and complaints.⁹⁴ Whereas NFL players face discipline solely from the Commissioner of the league for detrimental conduct,⁹⁵ MLB players may potentially face disciplinary actions from the Commissioner, Senior Vice President of Standards and On-Field

⁸⁵ See Dryer, *supra* note 47, at 269.

⁸⁶ *Id.*

⁸⁷ *Id.* at 269–70; Hopkins, *supra* note 77, at 307.

⁸⁸ Revenue sharing commonly refers to "sharing operating profits or losses among associated financial actors." Sean Ross, *How Does Revenue Sharing Work in Practice?*, INVESTOPEDIA (Jan. 9, 2015), <http://www.investopedia.com/ask/answers/010915/how-does-revenue-sharing-work-practice.asp> [<https://perma.cc/W5GZ-AR9R>].

⁸⁹ See Dryer, *supra* note 47, at 270–71. Salary caps in professional sports are a limit on the amount of money a team can spend on players. The amount of money is often determined by league revenue from the previous year, television contracts, and profits aggregated from ticket and merchandise sales. See Chris Neiger, *How Salary Cap Changed Sports*, INVESTOPEDIA (Sept. 28, 2010), <http://www.investopedia.com/financial-edge/0910/how-salary-caps-changed-sports.aspx> [<https://perma.cc/BH6V-R5AF>].

⁹⁰ Dryer, *supra* note 47, at 271.

⁹¹ *Id.*

⁹² *Id.*

⁹³ MLB Basic Agreement, *supra* note 4, at art. XI.

⁹⁴ *Id.*

⁹⁵ NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 1.

Operations, or the players' respective clubs for "just cause."⁹⁶ The Commissioner is extended further authority to punish a player for detrimental conduct, but he can defer this power to the player's club.⁹⁷ In comparison to the NFL, the distinction between "just cause" and "detrimental conduct" is important because a player is entitled to have his grievance heard by an impartial arbitration panel only for punishment under the "just cause" authority.⁹⁸ This is an important distinction because both types of conduct are not entitled to the same grievance procedure outlined in Article XI.⁹⁹ Within Article XI, an impartial arbitration panel hears players' grievances,¹⁰⁰ but the CBA narrowly defines the term "grievance."¹⁰¹ A grievance is defined as "a complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the Association and the Clubs . . . or between a Player and a Club," but disciplinary action taken by the Commissioner "involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball" is not considered a grievance.¹⁰² By removing "detrimental conduct" from the definition of "grievance," the language of the CBA prevents players from submitting such complaints to an impartial third party.¹⁰³ When such action is taken by the Commissioner, he or she can review any appeals of his own disciplinary decisions—similar to Article 46 of the NFL—and his decision is deemed the "full, final and complete disposition of such complaint."¹⁰⁴ The Commissioner is not to blame for exercising such power following a player appeal, but rather, it is the language of Article XI of the MLB CBA that deprives players of due process.

The CBA's definition of "grievance" also excludes player conduct on the field or within the ballpark.¹⁰⁵ If such conduct takes place on the field or within the ballpark, players can receive fines or suspensions imposed on them by the Commissioner or Senior Vice President of Standards and On-Field Operations, which will not be heard by a neutral arbitration panel either.¹⁰⁶

⁹⁶ MLB Basic Agreement, *supra* note 4, at art. XII.

⁹⁷ *Id.* at art. XII(B).

⁹⁸ *Id.* at art. XII(A).

⁹⁹ *Id.* at art. XI.

¹⁰⁰ *Id.* at art. XI(B).

¹⁰¹ *See id.* at art. XI(A)(1)(a).

¹⁰² *Id.* at art. XI(A)(1)(a), (b).

¹⁰³ *See id.* at art. XI(A)(1)(a).

¹⁰⁴ *Id.* at art. XI(A)(1)(b); *see also* NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 2(d).

¹⁰⁵ MLB Basic Agreement, *supra* note 4, at art. XI, § (C)(1)(a).

¹⁰⁶ *Id.* at art. XI, § (C)(1)(c).

Instead, appeals of these fines or suspensions can only be heard by the Commissioner where his decision is the final say on the complaint and has “the same effect as a Grievance decision of the Arbitration Panel.”¹⁰⁷

When a player’s complaint is considered a grievance under the MLB CBA’s limited definition,¹⁰⁸ the Labor Relations Department (LRD) and MLBPA are first given a chance to reach an agreement to settle the dispute.¹⁰⁹ If unable to reach an agreement, the MLBPA must inform the LRD of its decision to proceed with the grievance in writing, which leads the MLBPA or player to appeal in writing “to the Panel Chair for impartial arbitration.”¹¹⁰ The arbitration panel’s decision will either “affirm, modify or reverse the decision,” and serve as the final hearing for the grievance.¹¹¹

The arbitration panel used in these types of appeals consists of either an impartial arbitrator or tripartite panel.¹¹² Tripartite panels are made up of the “impartial arbitrator and two party arbitrators,” one of which is appointed by the MLBPA and the other appointed by the Commissioner’s office.¹¹³ The panel’s award will be decided by the impartial arbitrator when acting alone or by a majority vote when the panel is tripartite.¹¹⁴ Regardless of the type of panel formed, the impartial arbitrator always serves as the Panel Chair who is appointed by the MLBPA and LRD as a representative of the league.¹¹⁵ While the Commissioner’s power to review his own disciplinary decisions for detrimental conduct or player conduct that takes place on the field is similar to the problems inherent in the NFL CBA, the arbitration panel used during MLB grievance procedures mitigates some of this absolute power. The NFL may be able to use a similar grievance procedure to help lessen Goodell’s authority, or perhaps propose such a system as a compromise under a new CBA.

¹⁰⁷ *Id.* at art. XI, § (C)(1)(a).

¹⁰⁸ *See id.* at art. XI, § (A)(1)(a).

¹⁰⁹ *Id.* at art. XI, § (B).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at art. XI, § (A)(9).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* If the two sides cannot agree on a candidate to serve as the impartial arbitrator, they have the option to choose from a list of professional arbitrators supplied to them by the American Arbitration Association. *Id.*

D. National Basketball Association: Road to Today's CBA

Bob Cousy, former Boston Celtic,¹¹⁶ helped organize the first union of NBA players in 1954.¹¹⁷ Because the NBA failed to take the National Basketball Players Association (NBPA) seriously as an adequate representative of the NBA players, the players threatened to strike before the 1964 All-Star game.¹¹⁸ The threatened strike resulted in the first NBA CBA in 1970, which led to a pension plan and a small per diem.¹¹⁹ Even with the new CBA, the absence of health benefits and a minimum wage generated the need for further discussions between players and the NBA. The first settlement agreement between owners and players, the Robertson Settlement Agreement (RSA), took place in 1976.¹²⁰ Between the RSA and the other collective bargaining agreements that followed in 1980 and 1983, the league saw many changes develop in the NBA-NBPA dynamic that still exist today, including the removal of a reserve system (similar to the one used by the MLB), creation of a salary cap for the league's financial stability, and the "Larry Bird Exception."¹²¹

The settlements, agreements, and strikes that occurred between 1988 and 2005 proved to be crucial to the development and formation of today's CBA. After the 1983 CBA expired, the players sued the owners in 1987 and again in 1994 in two antitrust lawsuits over the college player draft and salary cap.¹²² The issues in these lawsuits—combined with disagreement over revenue sharing and the salary cap—led the NBA to four lockouts during the 1995, 1996, 1998, and 2011 seasons, respectively.¹²³ The 2005-2011 and 2011-2021 CBAs added maximum salaries, a mid-level exception, escrow and luxury tax, reductions in

¹¹⁶ *Bob Cousy Facts*, YOUR DICTIONARY, <http://biography.yourdictionary.com/bob-cousy> [https://perma.cc/6N5L-H6HJ].

¹¹⁷ See Larry Coon, *Table of Contents: What's the History of the CBA?*, CBA FAQ, <http://www.cbafaq.com/salarycap.htm#Q6> [https://perma.cc/5WGZ-R3M9].

¹¹⁸ See Dryer, *supra* note 47, at 274–75.

¹¹⁹ See *id.*

¹²⁰ *Oscar Robertson*, NBA LEGENDS, http://www.nba.com/history/robertson_bio.html [https://perma.cc/6NEK-YW7C].

¹²¹ Dryer, *supra* note 47, at 275. Under this exception, teams could offer veteran free agents up to 12.5% more of the player's previous salary from the year before. *Id.* at 275–76. The Bird rights serve as an exception, although limited by the idea of a luxury tax, to the salary cap and allow teams to go above the cap when such circumstances like the Bird rights exist. *Id.* at 276.

¹²² See *Bridgeman v. NBA*, 675 F. Supp. 960 (D.N.J. 1987); see also *NBA v. Williams*, 857 F. Supp. 1069 (S.D.N.Y. 1994).

¹²³ *Pro Sports Lockouts and Strikes Fast Facts*, CNN LIBRARY (May 30, 2016), <http://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts> [https://perma.cc/9VHT-BDNE]; Jeff Zillgitt, *Timeline to the 1998–99 NBA Lockout*, USA TODAY, <http://usatoday30.usatoday.com/sports/basketball/nba/story/2011-10-12/Timeline-to-the-1998-99-NBA-lockout/50747980/1> [https://perma.cc/ZUN9-RC43].

contract lengths and raises, and greater penalties for taxpaying teams.¹²⁴ In line with these controversial provisions is the Commissioner's power to arbitrate player appeals.

Under its current CBA, the NBA Commissioner has the power to discipline players for on-court conduct and conduct damaging the "preservation of the integrity of, or maintenance of public confidence in, the game of basketball."¹²⁵ Similar to the MLB CBA,¹²⁶ player complaints are heard by a mutually agreed upon grievance arbitrator at all times, except when the complaint involves Commissioner action taken to preserve the integrity of the game of basketball or for player conduct that occurs on-court.¹²⁷ The Commissioner may arbitrate over player actions that fall under these two "special procedures with respect to player discipline,"¹²⁸ but in a more limited fashion than in the NFL and MLB.¹²⁹

Fines under \$50,000 and suspensions of twelve games or fewer imposed on players by the Commissioner, or his designee, for on-court conduct or action detrimental to the NBA are considered lesser punishments.¹³⁰ An appeal of such a fine or suspension will not be heard by a grievance arbitrator, but instead, will be heard directly by the Commissioner if he so chooses.¹³¹ A player can file a grievance to a neutral Grievance Arbitrator, but if the punishment imposed threatens the integrity of the game of basketball and is \$50,000 or less—or is a suspension of twelve games or fewer—the Commissioner has the authority to turn the grievance into an appeal for his review.¹³² If the Commissioner's designee imposes a punishment, the Commissioner can only "affirm or reduce such fine and/or suspension, and shall not have authority to increase such fine and/or suspension."¹³³ The Commissioner's decision serves as the "full, final and complete disposition of the dispute."¹³⁴

For harsher punishments where the Commissioner, or his designee, hands out punishments exceeding \$50,000 and/or suspensions that surpass twelve games, the players can file their grievances with a mutually agreed upon Grievance

¹²⁴ See Dryer, *supra* note 47, at 274–75.

¹²⁵ NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI, § 1(b)(ii).

¹²⁶ MLB Basic Agreement, *supra* note 4, at art. XII(A), (B).

¹²⁷ NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI, § 1.

¹²⁸ *Id.* at art. XXXI, § 9.

¹²⁹ See generally *id.*

¹³⁰ *Id.* at art. XXXI, § 9(a).

¹³¹ *Id.*

¹³² *Id.* at art. XXXI, § 9(d).

¹³³ *Id.* at art. XXXI, § 9(a)(4).

¹³⁴ *Id.*

Arbitrator.¹³⁵ When a Grievance Arbitrator presides over a Commissioner's disciplinary action, he or she must apply an "arbitrary and capricious' standard of review."¹³⁶ If the NBPA and league cannot settle the dispute, a Grievance Arbitrator will deliver a written decision that serves as the "full, final and complete disposition of the Grievance."¹³⁷

While the NBA grievance procedure seems to be a lot more developed than that of the NFL, the major difference is the use of a neutral arbitrator to hear appeals of harsher punishments for conduct detrimental to the game of basketball—a procedure that is nonexistent in the NFL. For less severe punishments, the NBA Commissioner holds the same power as Goodell to review appeals of his own decisions, but Article XXXI of the NBA CBA curtails the Commissioner's power by removing the ability to review his or her own decisions over harsher punishments and instead allows them to be decided by a mutually agreed upon arbitrator.¹³⁸ Adding this language to Article 46 of the NFL CBA would help curb Goodell's power over reviewing his own decisions and ensure NFL players' due process rights are not violated. Taking into account the severity of the punishment in order to determine the party responsible for arbitrating a player's appeal can achieve two purposes. First, it will greatly reduce the Commissioner's power and, secondly, contribute to forming a solution to eradicate the overly broad language of NFL CBA Article 46. Using similar language from the NHL CBA below will also help limit the Commissioner's power under Article 46.

E. National Hockey League: Road to Today's CBA

Established in 1967, the National Hockey League Player's Association (NHLPA) was designed to "represent the players of the National Hockey League and to guarantee that their rights as players [were] upheld under the terms of the Collective Bargaining Agreement."¹³⁹ Player and owner relations started unraveling in the early 1990s when the NHLPA initiated the first general strike against the NHL owners on April 1, 1992,

¹³⁵ *Id.* at art. XXXI, § 9(b). If the parties cannot agree, they request and receive a list of eleven attorneys from the International Institute for Conflict Prevention and Resolution (CPR) who have had no involvement in professional sports in the last five years. *Id.* at art. XXXII, § 6(a). If the two parties cannot agree on an arbitrator in seven days, they can return the list and delete five names. *Id.* The CPR Institute then chooses an arbitrator from the remaining names on the list. *Id.*

¹³⁶ *Id.* at art. XXXI, § 9(b).

¹³⁷ *Id.* at art. XXXI, § 6.

¹³⁸ *Id.* at art. XXXI, § 9(b).

¹³⁹ *About the NHLPA*, NHL ALUMNI, <http://nhlalumni.org/national-hockey-league-players-association/> [<https://perma.cc/92MZ-NR5R>].

over the terms of the CBA.¹⁴⁰ The strike, the NHLPA's first action since its inception,¹⁴¹ was an effective tool to force the NHL owners to negotiate. After the two sides reached a settlement that called for a two-year deal, the owners and players agreed upon several topics including free agency, arbitration, number of regular season games, and teams' ability to play two games in neutral sites per season.¹⁴² The next season, the owners replaced John Ziegler with Gil Stein as NHL President, and eventually, Gary Bettman.¹⁴³

Under Bettman's tenure as Commissioner thus far, the league has experienced three lockouts in the 1994, 2004, and 2012 seasons, all of which have helped shape the current CBA. The main issues debated during these lockouts included a luxury tax, playoff revenue sharing, free agency, a salary cap, and a new grievance procedure.¹⁴⁴ The grievance procedure discussed below serves as a great resource for the NFL after which to model Article 46.

Under the NHL's current CBA, player appeals fall under "Grievances," "Supplementary Discipline for On-Ice Conduct," or "Commissioner Discipline for Off-Ice Conduct."¹⁴⁵ A grievance is defined as "any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement."¹⁴⁶ Grievances, unlike the other two categories of appeals, are to be decided by an impartial arbitrator.¹⁴⁷ If a grievance is filed within sixty days of the occurrence of the event from which it stems, and the NHLPA and NHL cannot amicably reach a solution to the player's appeal on their own, they can jointly select a member of the National Academy of Arbitrators to arbitrate the appeal.¹⁴⁸ After a hearing takes place, the impartial arbitrator will render a final decision on the grievance.¹⁴⁹

If the player's conduct falls under "Supplementary Discipline for On-Ice Conduct," or "Commissioner Discipline for

¹⁴⁰ Joe LaPointe, *Hockey; Puck Stops Everywhere as Players Go on Strike*, N.Y. TIMES (Apr. 2, 1992), <http://www.nytimes.com/1992/04/02/sports/hockey-puck-stops-everywhere-as-players-go-on-strike.html> [https://perma.cc/ZJZ2-3CK2].

¹⁴¹ Jamie Fitzpatrick, *NHL Lockouts and Strikes: A History*, ABOUT SPORTS, <http://procehockey.about.com/od/history/a/Nhl-Lockouts-And-Strikes-A-History.htm> [https://perma.cc/2YB4-VN99].

¹⁴² *Today in NHL History—1992 NHLPA Strike Begins*, THE PUCK REPORT (Apr. 1, 2016), <http://www.puckreport.com/2010/04/today-in-nhl-history-1992-nhlpa-strike.html> [https://perma.cc/VVN5-AKF7].

¹⁴³ *Id.*

¹⁴⁴ Fitzpatrick, *supra* note 141.

¹⁴⁵ NHL Collective Bargaining Agreement, *supra* note 4, at arts. 17, 18, 18-A.

¹⁴⁶ *Id.* at art. 17.1.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at art. 17.6.

¹⁴⁹ *Id.* at art. 17.13.

Off-Ice Conduct,” then the NHL Commissioner has the power to impose punishments on players.¹⁵⁰ Under Article 18.1 of the CBA, the Commissioner (or his designee) can impose a fine or suspension under his “Supplementary Discipline for On-Ice Conduct” on a player for “[p]layer conduct either on the ice or in the [p]layer or penalty bench areas vis-à-vis other participants in the game . . . in violation of the League Playing Rules.”¹⁵¹ If a player wants to appeal the Commissioner’s punishment, he or she must first appeal directly to the Commissioner.¹⁵² Similar to the NBA, the NHL breaks up the penalties within this category based on the severity of the punishment.¹⁵³ A suspension of fewer than six games allows the Commissioner to use discretion to decide whether a hearing is even required.¹⁵⁴ If the suspension is six games or more, the Commissioner is to hold a hearing where he may consider all relevant evidence available, and make a decision on whether to affirm, deny, or modify the appeal.¹⁵⁵ The weight the Commissioner’s decision has is based on the severity of the punishment. For suspensions of fewer than six games, the Commissioner’s decision on appeal “shall be final and binding in all respects and not subject to review.”¹⁵⁶ When appeals of suspensions for six games or more are upheld by the Commissioner, the NHLPA can “file an appeal of the Commissioner’s determination to the Neutral Discipline Arbitrator (“NDA”). . . . within seven (7) days from the issuance of the Commissioner’s determination” if the player so chooses.¹⁵⁷ Once an NDA is selected, he or she decides whether the Commissioner’s suspension or fine of the player was appropriate in light of the player’s conduct and “whether the length of the suspension imposed [was] supported by substantial evidence.”¹⁵⁸ The NDA’s decision on appeals of suspensions for six games or more has the same finality as the Commissioner’s decision on appeals of suspensions of fewer than six games.¹⁵⁹

¹⁵⁰ *Id.* at arts. 18, 18-A.

¹⁵¹ *Id.* at art. 18.1.

¹⁵² *Id.* at art. 18.12.

¹⁵³ *Id.* at arts. 18.12, 18.13.

¹⁵⁴ NHL Collective Bargaining Agreement, *supra* note 4, at art. 18.12.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at art. 18.13(a). Both parties to the dispute have thirty days to mutually agree upon an NDA to reside over the grievance. *Id.* In the event that the two sides cannot agree on an arbitrator or the arbitrator is unable to reside over the case, the parties can appoint a replacement NDA from the Labor Arbitration Rules of the American Arbitration Association. *Id.*

¹⁵⁸ *Id.* at art. 18.13(a).

¹⁵⁹ *Id.*

Article 18-A of the NHL CBA gives the Commissioner authority to punish players for “Off-Ice Conduct” when one of two player actions occurs: a player’s actions violate a league rule or the player “is guilty of conduct . . . that is detrimental to or against the welfare of the League or the game of hockey.”¹⁶⁰ This type of language seems to be a common theme as it gives the Commissioner authority to handle player conduct for which there is no precedent. The Commissioner’s finding of such violation or conduct can lead to expulsion from the league, imposition of fines and suspensions, or possible cancellation of player contracts with their respective teams.¹⁶¹ Following a Commissioner’s decision to impose punishment on a player, a player can authorize the NHLPA to appeal to an impartial arbitrator jointly selected by the NHLPA and NHL from the National Academy of Arbitrators.¹⁶² The standard of review used by the Arbitrator when examining the Commissioner’s decision to impose such punishment is “whether the Commissioner’s determination was supported by substantial evidence and was not unreasonable.”¹⁶³ When looking at the evidence, the arbitrator is to consider the facts relevant to the issue at hand, the appropriateness of the punishment based on the severity of the harm, and what is best for both the player and league in reaching a decision.¹⁶⁴ The decision of the Impartial Arbitrator is final and binding.¹⁶⁵

The NHL CBA is better able to curb the Commissioner’s authority to preside over appeals of his own disciplinary decisions in comparison to the NFL CBA. The NHL Commissioner is able to arbitrate appeals concerning less severe punishments for actions that happen on-ice, but only impartial arbitrators can arbitrate the Commissioner’s disciplinary conduct for detrimental player conduct.¹⁶⁶ This note’s solution will use and expand upon the NHL CBA’s complete removal of its Commissioner’s power to arbitrate his own decisions for players’ detrimental conduct. Removal of such power from the NFL’s CBA will help diminish the existence of any partiality during a player appeal and correct the flawed language that currently grants Goodell too much power over the NFL’s disciplinary process.

¹⁶⁰ *Id.* at art. 18-A.2.

¹⁶¹ *Id.*

¹⁶² *Id.* at arts. 17.5, 18-A.4.

¹⁶³ *Id.* at art. 18-A.2.

¹⁶⁴ *Id.* at art. 18-A.4.

¹⁶⁵ *Id.* at art. 17.13.

¹⁶⁶ *Id.* at arts. 18.12, 18-A.4.

II. FLAG ON THE FIELD: ISSUES WITH THE NFL CBA

This part will demonstrate that the source of the NFL's flawed disciplinary process is the language in Article 46 of the NFL CBA. The cases of Tom Brady and Adrian Peterson will show how the deployment of Article 46 allows Goodell to legally arbitrate over certain appeals under the CBA while simultaneously violating NFL players' due process rights under federal law.

Article 46 explicitly grants Goodell the authority to hear appeals arising from punishments he imposed when player conduct took place on-field or was deemed detrimental conduct.¹⁶⁷ This control over the NFL's disciplinary process is a major reason why players argue that their appeals have fallen victim to evident partiality on the part of the arbitrator.¹⁶⁸ Such partiality arguments, seen in both Tom Brady's¹⁶⁹ and Adrian Peterson's cases,¹⁷⁰ factored into challenges brought against Goodell's recent decisions—decisions that have ultimately been subject to appeal in federal court.¹⁷¹ The CBAs of the NBA and NHL curb their Commissioners' power by allowing them to only arbitrate a disciplinary conduct of a certain severity,¹⁷² but Article 46's grant of power to Goodell allows him to “serve as hearing officer in *any* appeal under Section 1(a),” including detrimental conduct or conduct which takes place on the playing field.¹⁷³ Such language grants Goodell the sole authority to punish a player for any punishment he handed out for detrimental conduct, regardless of the severity of the punishment or opinions of others.

Goodell's option to serve as arbitrator or delegate this responsibility to an associate of his choosing without restriction, creates a very real chance of partiality.¹⁷⁴ His ability to review an arbitration of his own disciplinary decision puts him between the proverbial rock and a hard place, and essentially makes a mockery of the NFL arbitration process as a whole. Commissioners are hired to work for team owners, so expecting a Commissioner to arbitrate fairly over an appeal runs contrary

¹⁶⁷ NFL Collective Bargaining Agreement, *supra* note 5, at art. 46 § 1(a), 2(a).

¹⁶⁸ *See infra* Sections II.A–C.

¹⁶⁹ *See infra* Section II.A.

¹⁷⁰ *See infra* Section II.B.

¹⁷¹ *See infra* Section II.C.

¹⁷² *See* NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI, § 9; *see also* NHL Collective Bargaining Agreement, *supra* note 4, at arts. 18, 18-A.

¹⁷³ NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 2(a) (emphasis added).

¹⁷⁴ *See id.*

to his responsibilities as the League's Commissioner.¹⁷⁵ If Goodell upholds his own disciplinary decision, the NFLPA will challenge his impartiality since he works for the owners, but if he strikes down or lowers his previously imposed punishment, he "would undermine his own competency as Commissioner,"¹⁷⁶ and would run the risk of being fired by the owners.¹⁷⁷ Whenever Goodell elects himself arbitrator, like in Brady's case,¹⁷⁸ or selects an associate he is known to have close ties with, like Harold Henderson in Adrian Peterson's case,¹⁷⁹ the players can always bring a strong argument that the arbitral award should be set aside due to obvious partiality under Section 10 of the Federal Arbitration Act.

A. *Deflategate*

New England Quarterback Tom Brady recently appealed a four-game suspension imposed by Commissioner Goodell in the United States District Court, Southern District of New York.¹⁸⁰ In the American Football Conference Championship game on January 18, 2015, a Colts linebacker intercepted a pass thrown by Tom Brady.¹⁸¹ The Colts's training staff tested the ball and found that its inflation levels, along with ten other Patriot footballs used that game, were below the levels required in the Official Playing Rules of the NFL.¹⁸² The media colloquially termed this scandal

¹⁷⁵ Robert E. Wallace Jr., *Neutral Arbitrators in Sports: What Makes It Fair?*, LAW360 (July 23, 2015), <http://www.law360.com/articles/680682/neutral-arbitrators-in-sports-what-makes-it-fair> [<https://perma.cc/G2N6-ZJ4D>].

¹⁷⁶ NFL Mgmt. Council v. NFL Players Ass'n, 125 F. Supp. 3d 449, 474 (S.D.N.Y. 2015).

¹⁷⁷ As NFL Commissioner, Goodell is subject to termination under language within the NFL's constitution.

In the event that the Commissioner or any other officer of the League shall be convicted of a crime involving moral turpitude or be physically or mentally incapacitated to perform his duties or shall fail or refuse to abide by the Constitution and Bylaws of the League, and the Executive Committee finds that such action by such officer is detrimental to the best interests of the League, or in the event the Commissioner or any other officer of the League fails or is unwilling to perform his duties, then such Committee shall have the power after notice and hearing to suspend or remove said officer and to terminate any contract between such Commissioner or officer and the League.

Constitution and Bylaws of the National Football League art. VI, § 6.5(G) (2006), http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf [<https://perma.cc/CKB7-86TM>].

¹⁷⁸ See *infra* Section II.A.

¹⁷⁹ See *infra* Section II.B.

¹⁸⁰ NFL Mgmt. Council, 125 F. Supp. 3d at 452.

¹⁸¹ *Id.* at 454.

¹⁸² *Id.*

“Deflategate,”¹⁸³ since the Patriots were allegedly using deflated footballs. Despite Brady denying any knowledge of the deflation of game-used footballs, an investigation led by Ted Wells¹⁸⁴ and NFL Executive Vice President and General Counsel Jeff Pash found that “it is more probable than not that Brady was at least generally aware of the inappropriate activities of McNally and Jastremski [New England personnel] involving the release of air from Patriots game balls.”¹⁸⁵ Because Brady’s actions were deemed “conduct detrimental to the integrity of and public confidence in the game of professional football,”¹⁸⁶ Goodell was able to select an arbitrator under his Article 46 authority. Troy Vincent,¹⁸⁷ acting under orders from Goodell, imposed a four-game suspension allowed by Goodell’s Article 46 authority.¹⁸⁸

After the NFLPA appealed Brady’s suspension, Goodell elected himself arbitrator of Brady’s appeal by exercising his Article 46 Section 2(a) authority.¹⁸⁹ Following Goodell’s decision to hear Brady’s appeal, the NFLPA filed a motion *to Goodell* asking for Goodell to recuse himself from serving as the arbitrator.¹⁹⁰ The NFLPA argued that if Goodell chose to arbitrate Brady’s appeal, he would have a clear conflict of interest in reviewing his own decision since he would be (1) deciding the fairness of a suspension that he imposed, and (2) arbitrating a decision that could potentially question the credibility of the NFL staff who worked for him.¹⁹¹ Goodell denied the NFLPA’s motion to recuse himself and affirmed his own decision to suspend Brady based on Brady’s alleged obstruction of the NFL investigation (by having his cell phone destroyed) and for his role in the Deflategate scheme.¹⁹²

The NFLPA appealed in federal court to have the award vacated while the NFL simultaneously asked the court to have

¹⁸³ Jacob Gershman, *NFL Taps Attorney Ted Wells to Lead ‘Deflategate’ Probe*, WALL ST. J. (Jan. 23, 2015), <http://blogs.wsj.com/law/2015/01/23/nfl-taps-attorney-ted-wells-to-lead-deflategate-probe/> [<https://perma.cc/MYX8-GMPX>].

¹⁸⁴ Ted Wells is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and has worked on many NFL-related matters. *Id.*

¹⁸⁵ *NFL Mgmt. Council*, 125 F. Supp. 3d at 454.

¹⁸⁶ *Id.* at 457.

¹⁸⁷ Troy Vincent occupies the position of NFL executive V.P. of football operations. Mike Florio, *Transcript Proves NFL Didn’t Know Air Pressure Could Drop Naturally*, NBC SPORTS (Aug. 5, 2015), <http://profootballtalk.nbcsports.com/2015/08/05/transcript-proves-nfl-didnt-know-air-pressure-could-drop-naturally/> [<https://perma.cc/H866-T88Y>].

¹⁸⁸ *NFL Mgmt. Council*, 125 F. Supp. 3d at 456–57.

¹⁸⁹ *Id.* at 457.

¹⁹⁰ *Id.* at 458.

¹⁹¹ *Id.*

¹⁹² *Id.* at 458, 463, 466.

the award approved.¹⁹³ Judge Richard M. Berman presided over the NFLPA's appeal and reached a decision without even addressing some of Brady's claims.¹⁹⁴ In light of Section 10 of the Federal Arbitration Act (FAA),¹⁹⁵ the court recognized its ability to vacate Goodell's award if any parts of Section 10 were "affirmatively shown to exist."¹⁹⁶ While a court reviewing an arbitrator's decision is supposed to show great deference, enforce limits on judicial scrutiny, and ensure fairness—due process is still required.¹⁹⁷ The district court focused on whether Goodell's authority to affirm Brady's punishment came from the CBA, a neutral, legally binding source agreed upon by the NFL and NFLPA, rather than Goodell's individual reasoning.¹⁹⁸ Judge Berman vacated Goodell's decision, finding that Goodell's denying Brady's legal team "equal access to investigative files, including witness interview notes" and the chance to examine Jeff Pash was "fundamentally unfair and in violation of 9 U.S.C. § 10(a)(3)" and that Brady was prejudiced as a result.¹⁹⁹ The court also found "legal deficiencies" in Goodell's award that lacked proper notice of the potential discipline Brady could receive in deflating footballs if found to have actually participated in the ball-tampering scheme.²⁰⁰

Tom Brady's four-game suspension was later reinstated by the U.S. Court of Appeals following the NFL's appeal.²⁰¹ The court reversed the lower court's judgment finding that Brady was not denied fundamental fairness since the commissioner correctly utilized and applied his broad discretion allocated by Article 46 of the NFL CBA.²⁰² Rather than decide if Brady contributed to the deflation of game-used footballs, or if Goodell serving as arbitrator over his disciplinary decision demonstrates facial partiality, the court stated that its sole responsibility was to determine whether Goodell—acting as arbitrator—acted within the scope of the NFL CBA.²⁰³ The court did, however, explicitly state that the bargained-for "authority was especially

¹⁹³ *Id.* at 452.

¹⁹⁴ *Id.* at 473.

¹⁹⁵ Federal Arbitration Act, 9 U.S.C. § 10 (2012).

¹⁹⁶ *NFL Mgmt. Council*, 125 F. Supp. 3d at 462.

¹⁹⁷ *Id.* at 462.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 463, 473.

²⁰⁰ *Id.* at 463.

²⁰¹ Conor Orr, *Tom Brady's Four-Game Suspension Reinstated by Court*, NFL (Apr. 25, 2016), <http://www.nfl.com/news/story/0ap3000000655649/article/tom-bradys-fourgame-suspension-reinstated-by-court> [<https://perma.cc/3DVM-KRRB>].

²⁰² *Id.*; see *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016).

²⁰³ *NFL Mgmt. Council*, 820 F.3d at 532.

broad.”²⁰⁴ In ruling for the NFL, the court found that even though the NFL CBA by saying the “tripartite” of allowing the Commissioner to investigate player violations, impose punishment, and arbitrate his own discipline is “unorthodox,” both parties to the CBA agreed to it.²⁰⁵ The court’s reinstatement of Brady’s suspension, despite its recognition of Article 46’s breadth, shows that Goodell did not do anything wrong, but acted under his authority given to him by the mutually agreed upon NFL CBA.²⁰⁶ The court’s decision in the “Deflategate” scandal clearly demonstrates that Goodell’s decision-making is not the problem, but rather it is the mutually agreed upon language of Article 46 that is the issue.

B. *Adrian Peterson*

Adrian Peterson, a running back for the Minnesota Vikings, was charged and indicted by a Texas grand jury for “felony reckless or negligent injury of a child” after a dispute arose involving Peterson’s son.²⁰⁷ While Peterson’s charges were pending, the NFL and NFLPA agreed that Peterson would be placed on the Commissioner’s Exempt List,²⁰⁸ where he remained following his plea agreement that reduced the charges down to a misdemeanor for reckless assault.²⁰⁹

The NFL granted Peterson a hearing to decide if it would impose discipline for violating the League’s Personal Conduct Policy in addition to any punishment Peterson received under state criminal law.²¹⁰ Goodell imposed punishment on Peterson after finding that Peterson’s conduct “was detrimental to the league” and that he “appeared inclined to repeat the behavior in the future.”²¹¹ Just prior to Peterson’s League hearing, but after his criminal allegations, Goodell instituted a “New Policy” of discipline intended to deal with domestic violence issues following an incident involving NFL player Ray Rice.²¹² This policy led to

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *NFL Players Ass’n v. NFL*, 88 F. Supp. 3d 1084, 1087 (D. Minn. 2015).

²⁰⁸ Kevin Patra, *What Is the Reserve/Commissioner Exempt List?*, NFL (Sept. 17, 2014), <http://www.nfl.com/news/story/0ap3000000396169/article/what-is-the-exempt-list> [<https://perma.cc/ZX2P-NJXX>] (“The Exempt List is a special player status available to clubs only in unusual circumstances. The List includes those players who have been declared by the Commissioner to be temporarily exempt from counting within the Active List limit. Only the Commissioner has the authority to place a player on the Exempt List.”).

²⁰⁹ *NFL Players Ass’n*, 88 F. Supp. 3d at 1087.

²¹⁰ *Id.*

²¹¹ *Id.* at 1088.

²¹² *See id.* In the case of Ray Rice, he was initially suspended for two games by Goodell after meeting with the Commissioner to discuss Rice’s assault of his fiancée in

Peterson receiving an unpaid suspension for “at least the remainder of the 2014 season,” a fine, and Commissioner-ordered counseling with an NFL designated therapist.²¹³

The NFLPA appealed Goodell’s disciplinary decision, which triggered the disciplinary process under Article 46, alleging multiple issues with Peterson’s punishment.²¹⁴ It argued that the Commissioner’s application of the New Policy was impermissible; the implementation of the New Policy deprived Peterson of a fair disciplinary process thereby preventing him from taking part in pre-disciplinary discussions; and Goodell’s order of mandated psychiatric treatment was not a punishment available under the CBA.²¹⁵ Similar to Brady’s case, the NFLPA asked that Goodell recuse himself and have the appeal be heard by a neutral arbitrator.²¹⁶ Goodell granted the NFLPA’s request to recuse himself and designated Harold Henderson²¹⁷ to serve as the hearing officer over Peterson’s arbitration.²¹⁸ Fearing that Henderson’s close ties to Goodell would cause “evident partiality,” the NFLPA requested that Henderson also recuse himself from hearing the appeal.²¹⁹ Not only did Henderson decline to recuse himself, but he also completely ignored the NFLPA’s argument against Goodell’s retroactive use of the New Policy on Peterson.²²⁰ Henderson instead found that the New Policy “was entirely ‘fair and consistent’” and well within the “broad discretion” that Goodell had under the New Policy.²²¹ The NFLPA also argued that Goodell’s refusal to grant Peterson a hearing before imposing discipline violated Peterson’s rights. Henderson rejected this argument, yet, provided very little reasoning to support his decision.²²² Henderson also side-stepped the issue of league-

an elevator. Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SB NATION (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens> [<https://perma.cc/SU8B-CLQ9>]. After a video was released that explicitly showed what happened in the elevator, Goodell suspended Rice indefinitely and created a new domestic violence policy to be applied prospectively. *Id.*

²¹³ *NFL Players Ass’n*, 88 F. Supp. 3d at 1088.

²¹⁴ *Id.* at 1088.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Harold Henderson “served as the NFL[s] Executive Vice President for Labor Relations and Chairman of the NFL Management Council Executive Committee for 16 years” from 1991 to 2007. Laura Amato, *Harold Henderson: 5 Fast Facts You Need to Know*, HEAVY (July 10, 2015), <http://heavy.com/sports/2015/07/harold-henderson-greg-hardy-suspension-appeal-reduced-suspension-nfl-roger-goodell/> [<https://perma.cc/5T6C-ZYHH>].

²¹⁸ *NFL Players Ass’n*, 88 F. Supp. 3d at 1088.

²¹⁹ *Id.*

²²⁰ *Id.* at 1088–89.

²²¹ *Id.* at 1089.

²²² *See id.*

ordered counseling by claiming that the Commissioner had the right to order such counseling.²²³

Like in the Brady case, the NFLPA sought to have Henderson's arbitral award vacated by appealing to federal court under violations of Section 301 of the Labor Management Relations Act and Section 10 of the Federal Arbitration Act.²²⁴ In reviewing Peterson's appeal, the court noted that while labor arbitrators are given substantial deference, courts must vacate arbitral awards if the arbitrator is enforcing his own sense of justice outside of the bounds of the established CBA.²²⁵ Among the NFLPA's arguments, the court only reached two of its four claims because District Court Judge David S. Doty found that enough evidence existed to vacate the arbitral award based on the first two claims.²²⁶ Judge Doty held that Henderson's award failed to "draw its essence from the CBA," meaning that Henderson upheld Goodell's punishment even though it was well-established that the New Policy was to be applied prospectively rather than retroactively.²²⁷ Because Goodell's New Policy was to be applied prospectively,²²⁸ rather than retrospectively, Henderson should have overturned Goodell's punishment since it did not draw its essence from the CBA. Doty's decision to vacate the arbitral award also focused on Henderson exceeding his authority as arbitrator.²²⁹ Rather than answer the question of whether the League's New Policy could be applied retroactively, Henderson answered whether the punishment Peterson received was consistent with the League's older disciplinary policy.²³⁰ Henderson's decision to answer the wrong question—conscious or not—in combination with his arbitral award not coming from the binds of the CBA, convinced Judge Doty to vacate the award.

C. *Existence of Evident Partiality*

Judge Berman and Judge Doty both found for Brady and Peterson in the District Court, respectively, before reaching either of their evident partiality arguments on the part of Goodell (Brady's case) and his designee, Harold Henderson

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* (citing *Associated Elec. Coop., Inc. v. Int'l Bhd. of Elec. Workers, Local No. 53*, 751 F.3d 898, 901 (8th Cir. 2014)).

²²⁶ *Id.* at 1092.

²²⁷ *Id.* at 1091.

²²⁸ *Id.* at 1090.

²²⁹ *Id.* at 1092.

²³⁰ *Id.*

(Peterson's case).²³¹ Cases which were completely different— as Brady's case focused on on-field conduct while Peterson's case concerned off-field conduct—both demonstrated the courts' reluctance to weigh in on "Goodell's dual role as commissioner and arbitrator,"²³² which is the crux of the NFL's flawed disciplinary process. Goodell is allowed to arbitrate his own disciplinary decisions while also expected to remain impartial despite his employment being determined by the owners.²³³ In Brady's case, the NFLPA called Goodell "hopelessly biased" and an evidently prejudiced arbitrator²³⁴ since his "competency as Commissioner" was jeopardized.²³⁵ The NFLPA alluded to three key points while arguing that Goodell could not be unbiased as an arbitrator: (1) improper delegation of power to Troy Vincent to impose punishment on Brady, (2) faulty justification of his decision based on evidence not used when the initial punishment was imposed, and (3) public praise of the Wells Report before naming himself arbitrator.²³⁶ While the first two factors could be argued either way, Goodell's public praise of the Wells Report²³⁷ clearly showed he could not be impartial. In response to the NFLPA, the NFL argued, and the Second Circuit agreed,²³⁸ that "the CBA specifically grants the Commissioner the power he exercised over Brady's case. Nothing in the CBA stops the commissioner from serving as an arbitrator when his own conduct is being challenged."²³⁹

²³¹ See *NFL Mgmt. Council v. NFL Players Ass'n*, 125 F. Supp. 3d 449, 473 (S.D.N.Y. 2015); see also *NFL Players Ass'n*, 88 F. Supp. 3d at 1092.

²³² Julia R. Perdue, *Deflategate: The Elephant in the Courtroom*, BLOOMBERG BNA (Sept. 18, 2015), <http://www.bna.com/deflategate-elephant-courtroom-b17179936275/> [https://perma.cc/L2B6-WHVVH].

²³³ See Howard Bryant, *Roger Goodell's Bosses*, ESPN (Jan. 8, 2013), http://espn.go.com/nfl/story/_/id/8822087/roger-goodell-works-owners-not-game [https://perma.cc/A5E S-NW8R].

²³⁴ Jeff Zalesin, *NFL Union Says Brady's Deflategate Arbitration Wasn't Fair*, LAW360 (Aug. 10, 2015), http://www.law360.com/articles/689157/nfl-union-says-brady-s-deflategate-arbitration-wasn-tfair?article_related_content=1 [https://perma.cc/TM6T-R3YU].

²³⁵ *Id.*

²³⁶ Mike Garafolo, *Brady Decision Was a Blow for NFL, Commissioner, but It Did the League One Favor*, FOX SPORTS (Sept. 3, 2015), <http://www.foxsports.com/nfl/story/tom-brady-deflategate-new-england-patriots-ruling-stopped-short-of-setting-precedent-090315> [https://perma.cc/XV9G-34MT].

²³⁷ The Wells report was a report that covered the Patriots involvement in "Deflategate." Of the 243 reports, the main takeaways were that "It is more probable than not that New England Patriots personnel participated in violations of the Playing Rules" and "Tom Brady (the quarterback for the Patriots) was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls." *Key Takeaways from Ted Wells Report*, AROUND THE NFL (May 6, 2015), <http://www.nfl.com/news/story/0ap3000000491524/article/key-takeaways-from-ted-wells-report> [https://perma.cc/439B-2G64].

²³⁸ *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016).

²³⁹ Zalesin, *supra* note 234.

In Peterson's case, the NFLPA said that "[a] long-time NFL Executive and current legal consultant cannot, by definition, be a neutral arbitrator."²⁴⁰ These arguments in court pertaining to evident partiality, although unanswered, show how the decisions of Goodell and Henderson to not recuse themselves and to arbitrate the appeals were simultaneously legal under the NFL CBA, and most likely illegal under section 10 of the FAA due to inescapable partiality. This demonstrates that it is the language of Article 46, rather than Goodell's actions that creates violations of federal law.

If either Judge Berman or Judge Doty in the District Court, or Chief Justice Katzmann in the Second Circuit, had ruled on the evident partiality claim, he would have been likely to find that neither Goodell nor Henderson was impartial under *Morris v. N.Y. Football Giants*.²⁴¹ The *Morris* court concluded that Commissioner Tagliabue, Goodell's predecessor as Commissioner, could not be neutral when serving as arbitrator based on his role as Commissioner and prior history of advocating for the owners.²⁴² Based on Goodell's role as Commissioner (where he is an "employee of the owners")²⁴³ and Henderson's previous experience as a "NFL Executive and current league consultant,"²⁴⁴ Judge Berman and Judge Doty would have found that neither Goodell nor Henderson were impartial arbitrators, leading to both arbitral awards being thrown out. It is arguable whether Goodell's punishments are within bounds of the CBA regardless of Brady's case being overturned, but it is undisputed that the process illustrated in Article 46 of the NFL CBA legally put Goodell in a position to unilaterally decide a player's suspension.

III. THE PREVIOUS PLAY IS UNDER REVIEW: DEPLOYMENT OF THE OTHER LEAGUES' CBAS

This part provides an analysis of how the MLB, NBA, and NHL handle their players' appeals for detrimental conduct or conduct that takes place on the field, court, or rink in comparison to the NFL. Comparing the CBAs of all four leagues will demonstrate the lack of due process created by the language of Article 46 of the NFL CBA.

²⁴⁰ Mike Florio, *Union Questions Harold Henderson's Neutrality*, NBC SPORTS (Nov. 21, 2014), <http://profootballtalk.nbcsports.com/2014/11/21/union-questions-harold-hendersons-neutrality/> [<https://perma.cc/RJD7-8JMJ>].

²⁴¹ *Morris v. N.Y. Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1016–17 (N.Y. Sup. Ct. 1991).

²⁴² *Id.*

²⁴³ Bryant, *supra* note 233.

²⁴⁴ See Florio, *supra* note 240.

A. *Major League Baseball's CBA in Action*

While the MLB has yet to encounter a situation where a Commissioner imposed a punishment on a player and then arbitrates his or her own decision, former Commissioner Bud Selig's suspension of Alex Rodriguez in 2013 almost led to such a situation. The MLB initially banned Rodriguez for 211 games after finding "overwhelming evidence" that he "not only obtained illegal performance-enhancing substances from the now-shuttered Biogenesis anti-aging clinic in South Florida, but also sought to hinder their investigation into those allegations."²⁴⁵ Despite the league having an arbitration process in place pertaining to steroids and performance-enhancing drugs agreed upon in the Joint Drug Agreement,²⁴⁶ former Commissioner Bud Selig could have asserted his "conduct detrimental to the game" authority.²⁴⁷ If Selig asserted his detrimental conduct authority, he could have arbitrated Rodriguez's appeal rather than have it heard by an independent arbitrator.²⁴⁸

Although Selig chose not to discipline Rodriguez for detrimental conduct,²⁴⁹ the MLB's Commissioner's authority under Article XI section A(1)(b) would have allowed Selig to unilaterally punish Rodriguez and arbitrate an appeal over his own disciplinary decision. Even though suspensions can be determined by other MLB executives,²⁵⁰ which may reduce the chance of partiality, the Commissioner still has the same ability as the NFL Commissioner to arbitrate his own disciplinary decisions. In rewriting the language of Article 46 of the NFL CBA, drafters should use language from the CBAs of the NBA and NHL, which reduce the Commissioner's disciplinary authority, rather than that of the MLB CBA, which grants the Commissioner too much power.

²⁴⁵ Paul Hagen, *Arbitrator: A-Rod Suspended for 2014 Season*, MLB (Jan. 11, 2014), <http://m.mlb.com/news/article/66433260/arbitrator-rules-alex-rodriguez-to-be-suspended-for-2014-season/> [https://perma.cc/8V77-BX8B].

²⁴⁶ See Major League Baseball Joint Drug Prevention and Treatment Program § 8 (2006), <http://mlb.mlb.com/pa/pdf/jda.pdf> [https://perma.cc/CP35-SMR4].

²⁴⁷ See MLB Basic Agreement, *supra* note 4, at arts. XI(A)(1)(b), XII(A).

²⁴⁸ *Id.* at arts. XI(A)(1)(b), XII(A).

²⁴⁹ Erica Zonder, *Judge, Jury, and Executioner: The Commissioner and the "Integrity of the Game,"* SPORT IN AM. HISTORY (Sept. 14, 2015), <http://ussporthistory.com/2015/09/14/judge-jury-and-executioner-the-commissioner-and-the-integrity-of-the-game/> [https://perma.cc/ED85-CQK9].

²⁵⁰ MLB Basic Agreement, *supra* note 4, at art. XII(A).

B. *National Basketball Association's CBA in Action*

Like the MLB, the NBA has yet to encounter a situation where the Commissioner has arbitrated his or her own disciplinary decision. Looking at an in-game brawl between the Indiana Pacers and Detroit Pistons demonstrates how independent arbitrators are crucial to due process in the event the Commissioner excessively punishes a player. While the Commissioner did not arbitrate any of his own suspensions, disciplinary conduct imposed on players involved in this incident, which became known as “Malice at the Palace,” shows why independent arbitrators are needed. The “Malice at the Palace” was the media’s name for the brawl that ensued between multiple players and fans in the closing minutes of a Detroit Pistons and Indiana Pacers game at the Palace of Auburn Hills.²⁵¹ Following the fight, Pacers player Jermaine O’Neal received a suspension of twenty-five games.²⁵² Despite former Commissioner Stern’s authority to unilaterally impose suspensions for on-court conduct according to the NBA CBA,²⁵³ the union appealed the Commissioner’s decision to arbitrator Roger Kaplan. As union director Billy Hunter said, “The action taken by the commissioner sets a new high-water mark in terms of the kind of discipline he feels he can impose, I think he has exceeded his authority and should be subject to review and challenge.”²⁵⁴ Both arbitrator Roger Kaplan and U.S. District Judge George B. Daniels, in an appeal by the NBA, found that former Commissioner Stern’s suspension was excessive and reduced it to fifteen games.²⁵⁵

O’Neal’s suspension did not necessarily question the ability of the NBA Commissioner to arbitrate his own disciplinary actions, but instead, showed why the Commissioner should not have absolute discretion over player discipline. Neutral arbitrators are needed because Commissioners may make mistakes when punishing players, and allowing a Commissioner to have the ability to arbitrate his own decisions is

²⁵¹ Satchel Price, *How ‘Malice at the Palace’ Changed the Careers of Six Key Pacers*, SBINATION (Nov. 19, 2014), <http://www.sbnation.com/2014/11/19/7246943/malice-at-the-palace-anniversary-pacers-pistons-ron-artest> [<https://perma.cc/W4R9-YKE3>].

²⁵² *Suspensions Without Pay, Won’t Be Staggered*, ESPN (Nov. 22, 2004), <http://www.espn.com/nba/news/story?id=1928540> [<https://perma.cc/73BD-NU5E>].

²⁵³ See NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI, § 9.

²⁵⁴ Chris Sheridan, *Union Appeals Suspensions for Artest, O’Neal, Jackson*, THE ST. AUGUSTINE RECORD (Nov. 24, 2004), http://staugustine.com/stories/112404/spo_2724749.shtml#.WCvIIRIrKt8 [<https://perma.cc/2EEW-4SGB>].

²⁵⁵ Larry Neumeister, *O’Neal Doesn’t Have to Finish Brawl Suspension*, USA TODAY (Dec. 31, 2004), http://usatoday30.usatoday.com/sports/basketball/nba/pacers/2004-12-30-oneal-judge-suspension_x.htm [<https://perma.cc/Q43N-NWXY>].

bound to lead to partiality. While players are protected from potential Commissioner partiality for harsher punishments by having their appeals sent to neutral arbitrators, players are not awarded the same protection for appeals of lesser punishments because the Commissioner retains his authority to serve as arbitrator.²⁵⁶ While the NFL should utilize a similar system when rewriting Article 46, where the use of an arbitrator is based on the severity of the punishment, it should go one step further and completely remove the Commissioner from being able to review appeals of his own decisions. Because complete removal of the Commissioner from the appeals process is easier said than done, removing his arbitral power over harsher punishments could serve as a good middle ground for the next NFL CBA. This will help ensure the protection of players' due process rights and the impartiality of the arbitrator in situations where the players' due process rights are most likely to be jeopardized.

C. *National Hockey League's CBA in Action*

The recent suspension of Dennis Wideman, a defenseman for the Calgary Flames, demonstrates how the NHL appeals process operates under its most recent CBA. While playing the Nashville Predators, another player checked Wideman into the boards, causing him to hit his head.²⁵⁷ While slowly making his way to the bench, Wideman cross-checked in-game NHL referee, Don Henderson, with his stick.²⁵⁸ After the game, both Wideman and Henderson were both diagnosed with concussions.²⁵⁹ Despite the concussion, the NHL stated that "Wideman maintained continued awareness of his circumstances, refused medical attention and played the remainder of the game, thereby showing no signs that he was disoriented to the extent required to not be responsible for his on-ice conduct."²⁶⁰ The NHL suspended Wideman for twenty games²⁶¹ for his on-ice conduct, conduct that enables the Commissioner (or his designee) to issue

²⁵⁶ *See id.*

²⁵⁷ Matthew Heimlich, *In Brief: The Dennis Wideman Suspension and Subsequent Legal Debacle*, WHITE BRONCO (Aug. 11, 2016), <http://thewhitebronco.com/2016/08/in-brief-the-dennis-wideman-suspension-and-subsequent-legal-debacle/> [https://perma.cc/H5HG-SDW9].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

a fine or suspension under his “Supplementary Discipline for On-Ice Conduct” authority.²⁶²

Wideman appealed his suspension to Neutral Discipline Arbitrator (NDA) James Oldham, after Commissioner Bettman issued a ruling upholding Wideman’s twenty-game suspension.²⁶³ Oldham reduced Wideman’s suspension to ten games, as he claimed to take Wideman’s “concussed state” into account, believing he did not mean to injure Henderson.²⁶⁴ The NHL quickly filed a complaint in the United States District Court²⁶⁵ claiming that “Oldham ‘exceeded his authority under the CBA’ by substituting his own judgment for that of the Commissioner.”²⁶⁶ The NHL not only sought to have Oldham’s ruling vacated, arguing that he acted outside the scope of the CBA, but also fired Oldham as a NDA.²⁶⁷ The court has yet to rule on the NHL’s motion for summary judgment and NHLPA’s counter motion to dismiss the NHL’s suit to vacate Oldham’s decision.²⁶⁸

In comparing the CBAs of the four leagues, Wideman’s case shows that the NHL CBA does the best job of restraining Commissioner Bettman’s power to arbitrate his own disciplinary decisions. Bettman is allowed to hear appeals of his own punishments for on-ice conduct, but his ruling is not final.²⁶⁹ As illustrated in Wideman’s case, the player was able to appeal the Commissioner’s decision to an NDA.²⁷⁰ The NHL CBA provides the best guidance for rewriting Article 46 of the NFL CBA because it goes one step further than the NBA CBA and removes its Commissioner from arbitrating player appeals for detrimental conduct.²⁷¹ Part IV of this note will utilize various parts of the other leagues’ CBAs in an effort to reconstruct Article 46 to ensure arbitrator impartiality and protection of players’ due process rights guaranteed by section 10 of the FAA.

²⁶² See NHL Collective Bargaining Agreement, *supra* note 4, at art. 18.

²⁶³ Heimlich, *supra* note 257.

²⁶⁴ *Id.*

²⁶⁵ *Id.*; *NHL Appeals to U.S. District Court in Dennis Wideman Case*, ESPN (June 8, 2016), http://www.espn.com/nhl/story/_id/16055948/nhl-seeks-vacate-decision-dennis-wideman-calgary-flames [<https://perma.cc/UE3X-YUYN>].

²⁶⁶ Heimlich, *supra* note 257.

²⁶⁷ *Id.* It is interesting to note that the NHL terminated Oldham after siding against the NHL—a fate that Goodell could potentially face since he is also at the will of the NFL.

²⁶⁸ *Id.*

²⁶⁹ See NHL Collective Bargaining Agreement, *supra* note 4, at arts. 18.12, 18.13.

²⁷⁰ See Heimlich, *supra* note 257.

²⁷¹ See NHL Collective Bargaining Agreement, *supra* note 4, at art. 18.13.

IV. AFTER REVIEW, THE RULING ON THE FIELD IS OVERTURNED: REWRITING ARTICLE 46 OF THE NFL CBA

An influx of recent litigation combined with an in-depth analysis of the other leagues' CBAs shows that Commissioner Goodell has too much power to review appeals of his own decisions after he imposes punishment on a player for on-field conduct or detrimental conduct. The methods the NBA and NHL use to curb their commissioners' power mentioned above, demonstrate possible ways for the NFL to remove some of Goodell's disciplinary authority. The NFLPA should renegotiate the terms of Article 46 with the owners and revise Section 2(a) to not only prevent Goodell, or his designee, from arbitrating his own disciplinary decisions, but to have the Commissioner completely removed from the appeals process entirely. By rewriting this provision, the NFL can implement a two-tier appeals system that mirrors parts of the NBA's and NHL's CBAs in one step, and establishes a five-person committee to review harsher punishments in another step.

Although the courts did not reach the question of the arbitrator's partiality in the Brady or Peterson cases, any player appeal that has Goodell or his designee as the arbitrator is going to face a strong claim of "evident partiality" under section 10 of the FAA. To combat this problem, and remove ultimate power from Goodell (or his designee), the first step would be to remove the language of Article 46 that says, "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article."²⁷² The second step would be to determine who can arbitrate player appeals for disciplinary action by Goodell based on the severity of the punishment, similar to the CBAs of the NBA and NHL. Taking into account the length of the NFL season²⁷³ compared to those of the NBA and NHL,²⁷⁴ suspensions of four games or fewer and fines of less than \$25,000 should be sent to a neutral arbitrator who is far removed from the initial disciplinary action and not hand-picked by Goodell. Rather than merely require the Commissioner to *consult* with the NFLPA over designating an arbitrator,²⁷⁵ Section 2(a) of Article 46 should be rewritten to read: "For appeals under Section 1(a) above, the Commissioner is required to consult with the Executive Director of the NFLPA to appoint one or more designees to serve as

²⁷² NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 2(a).

²⁷³ See NFL Collective Bargaining Agreement, *supra* note 5, at art. 31.

²⁷⁴ See NBA Collective Bargaining Agreement, *supra* note 4, at art. XXXI, § 9; *see also* NHL Collective Bargaining Agreement, *supra* note 5, at art. XVIII, §§ 9–12.

²⁷⁵ See NFL Collective Bargaining Agreement, *supra* note 5, at art. 46, § 2(a).

hearing officers. *The Commissioner cannot appoint a designee unless he or she is agreed upon by the NFLPA.*” The NFL CBA can then mirror the language of the NBA or NHL CBAs and condition that if the Commissioner and NFLPA fail to agree on a neutral arbitrator, the CPR Institute Labor Arbitration Association will supply a list of arbitrators with a specific background in sports law.²⁷⁶ The first tier of this proposed solution removes Goodell’s authority to arbitrate his own disciplinary decisions, and helps prevent evident partiality by allowing lesser punishments to be reviewed by neutral arbitrators rather than by the Commissioner.

While the first tier of this solution will limit the Commissioner’s ability to arbitrate his or her own decisions, the second tier will set up a five-person committee to handle all disciplinary conduct imposed by the NFL Commissioner for harsher punishments that involve player action that takes place on-field or is deemed detrimental conduct. Both the NFLPA and team owners will be able to vote on the five members elected to the Committee who will each serve a four-year term before being eligible for reelection. Adding this provision ensures that no member will be unilaterally employed by either the owners or the players, so he or she can remain impartial. In order to serve on this committee, special requirements must be met in order to ensure fair procedures for both athletes and the Leagues. Committee members cannot have worked for either the Players’ Associations or Leagues alone, respectively, to serve on this committee, but may if he or she spent time working on “both sides of the ball.” Ideally, a five-person committee would be made up of one NFLPA representative, one NFL representative, and three neutral committee members who meet these special requirements. By establishing a Committee with clear cut rules regarding who can serve and under what circumstances the Committee will hear such grievances, players will be more likely to receive fair appeals that ensure due process rights, transparency will be encouraged, and arbitrators will be immune to evident partiality and likely to gain expertise over these types of matters. The decision of this Committee will be the final say on each grievance.

²⁷⁶ See NBA Collective Bargaining Agreement, *supra* note 5, at art. XXXI, § 7(b); NHL Collective Bargaining Agreement, *supra* note 4, at art. XVIII, § 14.

CONCLUSION

As illustrated by the cases of Tom Brady and Adrian Peterson, the NFL will continue to be at risk of an impending lawsuit anytime Commissioner Goodell exercises his ability to arbitrate player appeals of his own disciplinary decisions. While Goodell is acting within the bounds of the CBA, it is evident that Article 46's grant of power to the Commissioner is flawed, as it calls on the Commissioner to be impartial while still working for the owners. Furthermore, even though neither Judge Berman nor Judge Doty reached the evident partiality claim in the cases of Brady or Peterson, that claim under section 10(2) of the FAA will always present an extremely difficult hurdle for the federal court to overcome when Goodell has to prove he was not biased in upholding his own decision. In order for the NFL to fix its disciplinary process and prevent players from appealing to federal court on evident partiality grounds, Article 46 must be rewritten to reflect and run parallel with federal law. When the NFLPA and team owners negotiate the next CBA, they will have the advantage of looking at the CBAs of the MLB, NBA, and NHL to see what has and has not worked for the other leagues. Looking at different aspects of each CBA and learning from the cases of Brady and Peterson should show that claims of partiality and failure to adhere to players' due process rights can easily be diminished by removing Goodell's authority to arbitrate the appeals of his own disciplinary decisions. Removing Goodell from the arbitration process, and replacing him with an impartial arbitrator for lesser punishments and a special committee for harsher punishments, will enhance players' due process rights under federal law and prevent player grievances from requiring further litigation in federal court.

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