The Commish v. The Quarterback: Setting the Stage for the Next Labor Dispute in the NFL

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On July 15, 2016, the Second Circuit Court of Appeals ended a fourteen-month fight between the Commissioner of the National Football League and one of the League’s biggest and most feted stars.³ The court declined to rehear the appeal of a decision over the punishment meted out to New England Patriots Quarterback Tom Brady for participation in a scheme to tamper with equipment in a league championship game.⁴ By doing so, the court left in place a split decision that overturned a district court finding of arbitral unfairness. The Second Circuit Court of Appeals effectively reinstated a four-game suspension for cheating – or at least awareness that others had cheated – by under-inflating footballs used in the AFC Championship game between the New England Patriots and Indianapolis Colts on January 18, 2015.⁵

Brady served his four-game suspension in the first part of the 2016-17 NFL season; the Patriots went on to win their division and ultimately the 2016 NFL Championship Lombardi Trophy with Brady named the Super Bowl LI Most Valuable Player.⁶ In the end, the punishment made no difference to the outcome of the season – just as the under-inflated footballs made no difference to the outcome of the 2015 AFC Championship game.⁷ But the episode, the expensive investigation, the extended legal battle, and the Second Circuit’s decision to provide Commissioner Goodell wide latitude and broad discretion

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⁵ Id.
⁷ The referees tested the game balls at halftime and, after determining that they were below the league prescribed pressure levels, re-inflated the footballs. As both courts noted, Brady’s performance with properly inflated footballs in the second half of the game improved over his first half performance. Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 125 F. Supp. 3d 449, 454 n.3 (S.D.N.Y. 2015), rev’d, 820 F.3d 527 (2d Cir. 2016) (citing Wells Report, at 122 n.73). The Patriots defeated the Indianapolis Colts by a score of 45 to 7, a margin of 38 points, with four of New England’s touchdowns scored in the second half. AFC Championship—Indianapolis Colts at New England Patriots—January 18th, 2015, Pro Football Reference, http://www.pro-football-reference.com/boxscores/201501180nwe.htm (last visited Apr. 9, 2017).
when sitting as an arbitrator of player misconduct disputes sets the stage for the next battle between the League and its players. The battle now will likely move away from the courts – and back to the negotiating table as the players assess the meaning and impact of the broad powers bestowed on the Commissioner by the collective bargaining agreement.

Part I examines the facts of the so-called “Deflategate Scandal” as described in the League investigative report (“Wells Report”) and as characterized in the parties’ court filings. It also parses the disciplinary ruling and Goodell’s arbitration decision on appeal of the initial suspension order. Part II explores the historical background of a commissioner’s power to discipline, and the legal constructs, drawn from traditional labor law principles, that govern the arbitration of unionized player grievance disputes. Part III examines the language of the NFL’s collective bargaining agreement dealing with player misconduct impacting the integrity of and public confidence in the game of football. It traces the history of player misconduct cases leading up to the Brady dispute. Part IV examines the two approaches taken by the courts in dealing with Commissioner Goodell’s arbitration decision – one which would vacate the decision on the basis of inherent unfairness and failure to provide procedural due process; the other which viewed the Commissioner’s actions through a narrow lens by which the courts customarily view labor arbitration decisions. Part IV also identifies the legal principles established by the Second Circuit decision. Part V explores the aftermath of Brady and predicts a course of events leading to the next labor negotiations.

PART I: THE DELFLATEGATE SCANDAL AND COMMISSIONER GOODELL’S DECISIONS TO SUSPEND BRADY

Much has been written in the sports press about Deflategate and the facts uncovered by the NFL in its investigation. This section will briefly explore the basic chronology and allegations of misconduct, set forth the pertinent NFL rules and describe the initial disciplinary decision and Commissioner Goodell’s arbitration decision that formed the basis for the legal challenges brought by the NFL players association and Brady.

A. Just the Facts, Ma’am” – The Wells Report Concluded After a Four-Month Investigation That It Is “More Probable Than Not” That Two Patriots Employees Were Involved in a Deliberate Effort to Deflate Footballs in Violation of the NFL Rules and That Tom Brady Was “At Least Generally Aware” of the Inappropriate Activities

On January 18, 2015, the National Football League held its American Football Conference championship game at Gillette Stadium in Foxborough,
Massachusetts, pitting the Indianapolis Colts against the New England Patriots to determine which team would advance to Super Bowl XLIX. During the game’s first half, the Colts questioned the inflation level of certain footballs used by the Patriots. At halftime, League officials tested the air pressure of the footballs being used by each team, and determined that eleven footballs used by the Patriots were under the League-prescribed minimum of 12.5 pounds per square inch (“PSI”). The officials re-inflated the balls to the proper pressure, and continued the game. On January 23, 2015, the NFL announced that it was conducting an investigation into the footballs used by the Patriots during the AFC Championship Game. The investigation focused on the circumstances surrounding the use of under-inflated footballs, “including whether Patriots personnel were involved in deliberate efforts to circumvent the [NFL] Playing Rules.”

The investigation was conducted by attorney Theodore Wells and the law firm of Paul, Weiss, Rifkind, Wharton & Harrison, together with NFL Executive President Jeff Pash. On May 6, 2015, the NFL released its so-called “Wells Report” – 139 pages in length plus an accompanying 82-page expert report. The Report cost the League more than $2.5 million. The Wells Report concluded that “it is more probable than not that New England Patriots personnel participated in violations of the Playing Rules and were involved in a deliberate effort to circumvent the rules. In particular . . . that Jim McNally (the Officials Locker Room attendant for the Patriots) and John Jastremski (equipment assistant for the Patriots) participated in a deliberate effort to release air from Patriots game balls after the balls were examined by a referee.” The Report

11 Reportedly, the Colts had warned officials in advance of the game of rumors that the Patriots’ quarterback, Tom Brady, preferred using game balls that were under the PSI ratings allowed by Rule 2.1. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Theodore Wells, Jr., Brad Karp, and Lorin Reisner, Investigative Report Concerning Footballs Used During the AFC Championship Game on January 18, 2015 (May 6, 2015) at 46 available at https://nflabor.files.wordpress.com/2015/05/investigative-and-expert-reports-re-footballss-used-during-afc-championship.pdf [hereinafter “Wells Report”]. During the game’s first half, Colts linebacker D’Qwell Jackson intercepted a Brady pass and the equipment staff noted that the Patriots-supplied ball seemed underinflated. Bob Glauber, NFL investigating Patriots for possible deflation of footballs, Newsday (Jan. 20, 2015), http://www.newsday.com/sports/football/nfl-opens-patriots-deflated-football-probe-after-afc-championship-win-1.9821346. The Colts raised their concern with NFL officials. Id.

12 Wells Report, supra note 11, at 1, 8, 68–70, 113–115. The balls supplied by the Colts had lost some air pressure but were within the league equipment requirements on at least one of the two gauges used to test the sets of balls. Id. at 8. The scientific analysis of the half-time air pressure data concluded that the average drop in air pressure of the Patriots’ balls exceeded that of the Colts by .45 to 1.02 psi, which was considered statistically significant and unlikely to have occurred by chance (0.4% likelihood). Id. at 114. Absent another factor, this supported the conclusion that the balls did not begin the game at the same pressure. Id. at 115.

13 The Report notes that Brady’s performance actually improved in the second half when the balls were properly inflated. Id. at 122 n.73.

14 Id. at 2.

15 Will Brinson, Ted Wells’ firm billing NFL more than $2.5 million for Wells Report, CBS Sports (Aug. 5, 2015), http://www.cbssports.com/nfl/news/ted-wells-firm-billing-nfl-more-than-25-million-for-wells-report/.” “The NFL did not impose any constraints on the investigation” that was conducted by a team of seven attorneys including Wells. Wells Report, supra note 11, at 23, 24 n.2. The investigation covered a rather wide scope interviewing at least sixty-six individuals including League and individual team personnel, on-field referees, and stadium security (with some individuals interviewed more than once). Id. at 24–27. The Wells team also reviewed a significant volume of related materials including video, emails, text messages, football equipment, weather data and public statements. Id. at 29–30. To synthesize the scientific aspects of the case, the team hired Exponent, a consulting firm and Princeton Professor, Dr. Daniel R. Marlw. Id. at 22, 31–32.

16 Wells Report, supra note 11, at 2, 80–83.
also concluded that "it is more probable than not that Tom Brady (the quarterback for the Patriots) was at least generally aware of the inappropriate activities of [the Patriots employees] involving the release of air from Patriots game balls."\(^{17}\) The Report concluded that no other Patriots personnel participated in or had knowledge of the rules violations.\(^{18}\)

Among the evidence relied on were a videotape and witness interviews establishing that, after the officials inspected the game balls, McNally, the locker room attendant, removed the Patriots footballs from the Officials Locker Room, took them to a locked bathroom, and one minute and forty seconds later emerged with the footballs, which he took to the field.\(^{19}\) This conduct violated NFL protocol — and, to the knowledge of officials involved — had never occurred before.\(^{20}\) The Report also relied on numerous text messages between McNally (who referred to himself in one text message as "the deflator") and Jastremski, the equipment assistant, discussing the air pressure of the Patriots footballs, Brady’s unhappiness with the inflation level of the Patriots footballs, and a plan for Jastremski to provide a "needle" to McNally, together with McNally’s requests that cash and sneakers be provided with the needle.\(^{21}\)

The investigators noted that Brady had an expressed preference for "softer" footballs; and that, from time to time, he had made known his unhappiness with the pressure of game balls.\(^{22}\) Text messages between the two Patriots employees discussed Brady’s complaints on numerous occasions.\(^{23}\) The investigators also discovered that Tom Brady had presented both Patriots employees with autographed memorabilia in the days leading up to the AFC Championship Game.\(^{24}\) Moreover, immediately after suspicions of ball tampering were raised by the NFL and the media, Brady and Jastremski spoke by telephone on a number of occasions and exchanged several text messages — although they had not done so at any time during the six months preceding the AFC Championship Game.\(^{25}\) The investigators did not have access to Brady’s

\(^{17}\) Wells Report, supra note 11, at 2, 122, 126–129.
\(^{18}\) Id. at 3, 122. The Report specifically stated that no evidence supported any involvement by Patriots ownership, Coach Bill Belichick and his staff, and Patriots Head Equipment Manager Dave Schoenfeld. Id. at 122.
\(^{19}\) Wells Report, supra note 11, at 57–58. When questioned, McNally gave an inaccurate description of the hallway bathroom and inconsistent reasons for his choice to take the balls without permission and stop at the bathroom. Id. at 58–60.
\(^{20}\) Id. at 61–62.
\(^{21}\) Id. at 122–24.
\(^{22}\) Jastremski prepared over the course of a week twenty to thirty-five game balls (each estimated to take an hour), conditioning them with water, leather conditioner, and dirt. Id. at 38–39. Throughout the course of the 2014–15 season, Jastremski and Brady had many conversations regarding the inflation of the balls with Brady instructing Jastremski to target the lower level (12.5 psi) with Brady stating that he did "not ever want to get near the upper range again." Id. at 39–40.
\(^{23}\) Id. at 75–83.
\(^{24}\) Id. at 87–88, 89–94. McNally on numerous occasion requested apparel, memorabilia, and expensive sports tickets in return for his "needle" services. Id. at 75 (In two separate text messages, McNally wrote, "... jimmy needs some kicks ... let’s make a deal ... come on help the deflator" and "... I’m not going to ESPN ... yet"). In January 2015, Jastremski fulfilled McNally’s requests and provided sneakers and certain items of apparel. Id. at 87. On January 10, 2015 before the AFC Division Game against the Ravens and about one week before the AFC Championship game against the Colts, McNally received two signed practice balls from Brady after discussions about the items with Jastremski. Id. at 88–89. Likewise, Jastremski also received valuable items from Brady including a signed ball that allegedly was used when Brady exceeded 50,000 passing yards for his career. Id. at 90–94.
\(^{25}\) Id. at 101–03.
phone records, text messages, or emails. Brady declined to provide them, although he did agree to be interviewed by the investigators. Finally, while Brady denied any involvement or knowledge of the scheme to deflate game balls and denied knowing even the name of the locker room attendant or his job, the Report "found these claims not plausible and contradicted by other evidence." As part of the investigation, scientific consultants conducted tests and analyses of footballs under various conditions. The experts concluded that, while some drop in pressure could be expected when footballs are moved from a warm environment to the cold conditions on a playing field, the reduction in pressures "cannot be explained completely by basic scientific principles, such as the Ideal Gas Law, based on the circumstances and conditions likely to have been present on the day of the AFC Championship Game." Further stating that "[t]his absence of a credible scientific explanation for the Patriots halftime measurements tends to support a finding that human intervention may account for the additional loss of pressure exhibited by the Patriots balls." Following the issuance of the Wells Report, both Patriots employees were indefinitely suspended without pay. As described below, the NFL took disciplinary action against both the Patriots and Brady.

B. The NFL Rules and Player Policies Regarding Footballs and Equipment

The NFL Playing Rules – at Rule 2, Section 1 – set the specifications for balls used in an official NFL game. Under the rules, game balls must be inflated to between 12.5 and 13.5 psi. NFL game officials – referees – are the sole judges of whether the balls offered for play comply with the specifications. The NFL Rules allow each team (home and away) to provide the game balls used by that team while on offense to accommodate the preferences of their individual quarterbacks. To ensure the game balls comport with specifications,
Each team must present twelve primary balls – and twelve back-up balls – for testing by the referees. Two hours before game time, referees examine each ball, including by testing with an air pressure gauge to ensure each ball is inflated within the permissible range.32

The Games Operations Manual governs the treatment of game balls. It provides that

[...] Once the balls have left the locker room, no one, including players, equipment managers, ball boys and coaches, is allowed to alter the footballs in any way. If any individual alters the footballs, or if a non-approved ball is used in the game, the person responsible and, if appropriate, the head coach or other club personnel will be subject to discipline including but not limited to a fine of $25,000.33

The NFL has a general policy covering enforcement of game rules. The NFL Policy on Integrity of the Game & Enforcement of Competitive Rules provides that

... actual or suspected violations will be thoroughly and promptly investigated. Any club identifying a violation is required promptly to report the violation, and give its full support and cooperation in any investigation. Failure to cooperate in an investigation shall be considered conduct detrimental to the League and will subject the offending club and responsible individuals to appropriate discipline.34

The NFL policies also address use of non-conforming equipment by a player, although not specifically with respect to game balls. Before each season, the NFL distributes “Policies for Players”, which include the policies concerning equipment violations by players. The Game Related Player Conduct Rules describe in detail permitted and non-permitted uniforms and player apparel (such as gloves and kicking shoes). They also address the use of “unauthorized foreign substances”, such as stickum or slippery compounds.35 The 2014 version of the Player Policies addressed the penalties that could be assessed for such uniform and equipment violations:

If it is determined that a player has engaged in one or more of the offenses listed below, he is subject to a fine and/or other

34 Id.
League discipline may also be imposed on players whose equipment, uniform, or On Field violations are detected during postgame review of video, who repeat violations on the same game day after having been corrected earlier, or who participate in the game despite not having corrected a violation when instructed to do so. First offenses will result in fines.36

The player policies distributed by the NFL in 2014 also addressed League discipline:

The Commissioner may impose fines and other appropriate discipline, up to and including suspension or banishment from the League, for certain misconduct on the playing field, as well as for conduct detrimental to the integrity of or public confidence in the NFL or the game of professional football.37

The policies described those offenses to be dealt with solely by the Commissioner: “Some of the types of offenses which fall under the sole disciplinary authority of the Commissioner or, where appropriate, his designee are: . . . commission of flagrant fouls, fighting, or unnecessarily entering the area of a fight; or other game-related misconduct.”38

Finally, the player policies included a catch-all provision: “[T]he League also prohibits NFL players from engaging in on-field actions that it deems unbecoming a professional football player, unsportsmanlike, or that interfere with the orderly conduct of an NFL game.”39

C. The Vincent Disciplinary Determination

On May 11, 2015, Troy Vincent, NFL Executive Vice President of Football Operations, notified both the Patriots and Brady of discipline imposed for violations of the NFL Policy on Integrity of the Game and Enforcement of Competitive Rules relating to the use of under-inflated footballs in the AFC Championship Game. The Patriots were fined $1 million and forfeited the club’s first-round selection in the 2016 NFL Draft and the club’s fourth-round selection in the 2017 NFL Draft. Quarterback Tom Brady was suspended without pay for the first four games of the 2015 regular season for conduct detrimental to the integrity of the NFL.40

The letter to Brady described Brady’s role in the use of under-inflated footballs as “a violation of longstanding playing rules developed to promote fairness in the game.”41 The letter relied on the Wells Report findings that

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37 Id. at 1.
38 Id. (emphasis added).
39 Id. at 12.
there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots’ employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge. Moreover, the report documents your failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information, and by providing testimony that the report concludes was not plausible and contradicted by other evidence.42

Brady’s actions, according to the letter from Vincent, “clearly constitute conduct detrimental to the integrity of and public confidence in the game of professional football.”43

D. The Arbitration and Commissioner Goodell’s Ruling

Brady appealed the suspension. Commissioner Goodell presided over a ten-hour hearing, involving live testimony, argument of counsel and more than 300 exhibits.44 Most of the factual evidence had been unearthed by (and published in) the Wells Report. According to the decision, “[t]he most significant new information that emerged in connection with the appeal was evidence that on or about March 6, 2015 – the very day that he was interviewed by Mr. Wells and his investigative team – Mr. Brady instructed his assistant to destroy the cellphone that he had been using since early November 2014, a period that included the AFC Championship Game and the initial weeks of the subsequent investigation.”45 Despite repeated requests by the NFL for the cellphone and its 10,000 stored text messages, Brady did not disclose that he had ordered his phone destroyed until a week before the hearing.46 Goodell presided over the appeal pursuant to Article 46 of the CBA – which empowers the NFL Commissioner to act as arbitrator over issues involving integrity of the game. The 20-page written arbitration award makes clear that Goodell provided deference to both the disciplinary decision on appeal and the Wells Report on which it relied.47 However, Commissioner Goodell noted that prior to the hearing he was “eager to hear any new information, including testimony from Mr. Brady, that might cause me to reconsider the discipline initially imposed.”48

43 Id.
46 Id. at 2.
47 Id. at 5.
48 Id.
The standard of proof applied was the “preponderance of evidence” and, according to Goodell, he was bound by standards of fairness and consistency of treatment of similarly situated players.\(^\text{49}\)

The arbitration award made the following factual findings: (1) the lowered pressure in the Patriots footballs resulted from tampering by two Patriots employees — “at least in substantial part”\(^\text{50}\); (2) Brady actively participated in the equipment tampering scheme — through knowledge, consent and providing inducements to the employees who tampered with the game balls, with the effect of vitiating steps taken by game officials to ensure the equipment was in compliance with League rules;\(^\text{51}\); (3) Brady gave the cellphone — that he had used since before the 2014 AFC Championship Game — to his assistant for destruction immediately before the investigators’ interview and knowing that the NFL investigators had requested the information stored on his cellphone;\(^\text{52}\) (4) Brady took steps to make sure that NFL investigators would never have access to information that he had been asked to produce:

Put differently, there was an affirmative effort by Mr. Brady to conceal potentially relevant evidence and to undermine the investigation.\(^\text{53}\) Mr. Brady’s conduct gives rise to an inference that information from his cellphone, if it were available, would further demonstrate his direct knowledge of and involvement with the scheme to tamper with the game balls prior to the AFC Championship Game.\(^\text{54}\)

All of this, Goodell concluded, “indisputably constitutes conduct detrimental to the integrity of, and public confidence in, the game of professional football.”\(^\text{55}\)

Notably, Goodell’s factual findings went farther than either the Wells Report or the disciplinary determination. Like both of those determinations,\(^\text{56}\) Goodell concluded that two Patriots employees were involved in a deliberate effort to tamper with equipment by releasing air from footballs after the ball had

\(^{50}\) Id. at 7.
\(^{51}\) Id. at 10.
\(^{52}\) Id. at 12–13.
\(^{53}\) The Goodell decision discussed the importance of cooperation in an investigation: “Mr. Brady’s failure to cooperate and his destruction of potentially relevant evidence are significant because the ability to conduct an investigation — whether by NFL staff or by independent parties retained by the NFL — ultimately depends on cooperation. Neither the NFL nor any NFL member club has subpoena power or other means to compel production of relevant materials or testimony. Nonetheless, the NFL is entitled to expect and insist upon the cooperation of owners, League employees, club employees and players in a workplace investigation and to impose sanctions when such cooperation is not forthcoming, when evidence is hidden, fabricated, or destroyed, when witnesses are intimidated or not produced upon reasonable request, or when individuals do not provide truthful information.” Id. at 13.
\(^{54}\) Id.
\(^{55}\) Id.
\(^{56}\) Both the Wells Report and Vincent’s Disciplinary letter couched their findings as “more probable than not.” Because Goodell applied the preponderance of evidence burden of proof, which he described as “more probable than not,” his conclusions amounted to the same determination. Final Decision on Art. 46 Appeal of Tom Brady (July 28, 2015) at 5 available at https://nfllabor.files.wordpress.com/2015/07/07282015-final-decision-tom-brady-appeal.pdf. And because neither McNally nor Jastremski testified at the hearing, and were not proffered as witnesses by Brady or the Players Association, Goodell did not have the opportunity to separately assess their credibility but instead weighed their previous statements (which he found to be “not credible”) against the entire record. Id.
been examined and approved for play by game officials. But Goodell went farther with respect to Brady. As opposed to a finding of mere general awareness of the employees’ activities, the Commissioner found that the quarterback “knew about, approved of, consented to, and provided inducements and rewards in support of” the employees’ scheme to deflate footballs, with the result that the game balls did not comply with League requirements. Goodell also went farther than either the investigators or the Vincent letter with respect to Brady’s conduct during the investigation. Holding that the League was entitled to cooperation from its players, Goodell found that by ordering the destruction of his cellphone, Brady had made “deliberate effort[s]” to “conceal potentially relevant evidence and to undermine the investigation.” This not only led to an inference that the cellphone contained damaging and incriminating information; it became a separate basis for the detrimental conduct finding.

The arbitration award upheld the discipline and provided an in-depth discussion of why a four-game suspension was appropriate. First, Goodell found that no prior detrimental conduct proceeding was directly comparable because the Brady appeal involved (1) a player’s uncoerced participation in a scheme to violate a competitive rule and (2) undermine efforts by game officials to ensure compliance with League rules, coupled with (4) a failure to cooperate with the League’s investigation and (5) destruction of potentially relevant evidence with knowledge that the evidence had been sought in the investigation. Indeed, Goodell went to great efforts to distinguish prior detrimental conduct decisions. In this instance, Goodell found the “closest parallel” in a first violation of the League’s policy against performance enhancing substances. In both situations, according to Goodell, the conduct involves an effort to secure a competitive advantage and threatens integrity of the game. And, in each circumstance, a four-game suspension is warranted—without the finding of actual competitive effect.

Goodell dealt with a number of objections raised by the NFLPA, too. The first was whether Brady had notice that his conduct could subject him to suspension from play. Goodell initially addressed whether Brady was on notice that active participation in an equipment-tampering scheme could result in a suspension. In so doing, he noted Brady’s full awareness of the NFL rule

58 Id. at 10.
59 Id. at 13.
60 Goodell distinguished the Deflategate proceeding from that of “Bountygate” because, unlike the Saints players who were pressured by team personnel to target players, Brady was under no pressure from Patriots’ officials to alter the game balls or obstruct the investigation of the underinflated balls. Id. at 14.
61 According to Goodell, this was unlike the instance involving a Carolina Panthers ball attendant who warmed a football on the sidelines (because in that incident there was no intentional attempt to violate rules, no player involvement, and no effort to conceal the conduct); or the incident involving a Jets employee who “attempted to use” unapproved equipment (kicking balls) (because in that incident that actions were in plain view and no player was involved); or Aaron Rodgers’ comments that he “liked to push the limit in terms of inflating balls to see if the officials took air out of the balls prior to game time (here, balls were tampered with after the officials approved them for use). Id. at 15, 15 n.5.
62 This appeal, according to Goodell, was unlike the Brett Favre investigation into workplace rules violations by “sexting” a team employee (which did not involve integrity on the field), where “being less than fully candid” with investigators merely resulted in a lengthier investigation and thus merited a fine. Id. at 15.
63 Id. at 16.
regarding inflation of game balls and Brady’s knowledge that players are subject to suspension for violating the playing rules. Tampering with equipment after it had been approved for play by game officials – and deliberately undermining game officials’ responsibility to ensure game balls are in compliance with League rules – he held, are “plainly within the scope of matters” that affect the integrity of, and public confidence in the game. In other words, Goodell found players should not be surprised to be suspended if they cheat by tampering with equipment.

Goodell also addressed whether Brady had notice that his conduct during the investigation could amount to “conduct detrimental” sufficient to warrant a suspension. Finding no disagreement among the parties that players are obligated to comply with a League investigation, Goodell found that willful destruction of potentially relevant evidence goes beyond mere failure to respond or failure to cooperate. Goodell noted that, in his NFL Player Contract, Brady (like all NFL players) recognized “the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players.” And, Goodell found, Brady also contractually agreed that such conduct includes “any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or to professional football.” Accordingly, Goodell found “there should be no question in anyone’s mind” that obstructing an investigation by destroying evidence will be deemed conduct detrimental to the League and professional football.

The NFLPA also objected to the conduct of the proceedings leading up to the arbitration — and insisted that Goodell recuse himself from serving as arbitrator. The union argued that Commissioner Goodell had improperly delegated his authority to determine conduct detrimental and impose discipline because Troy Vincent, not the Commissioner, had sent the disciplinary letter to Brady and the Wells Report investigators, not Goodell, had concluded that Brady’s actions constituted detrimental conduct. The Commissioner rejected these arguments out of hand — stating that he had concurred in Vincent’s recommendation and authorized Vincent to communicate the discipline. Further, the Commissioner ruled that he had made his own independent

66 Id. at 17.
67 Id. at 17–18.
68 Id.
69 Id.
70 Id.
71 Id. at 17. “Indeed, a player of Mr. Brady’s tenure in the league and sophistication, and who was represented by highly experienced counsel (both personal and NFLPA-engaged), cannot credibly contend that he believed that he could, without consequences, destroy his cellphone on or about the day of his interview with the investigators when he knew in advance of the interview that the investigators were seeking the cellphone for the evidence that it contained.” Id. at 18.
72 Id. at 18.
73 Id. at 18–19.
74 This issue was also the subject of earlier rulings, dated June 2, and June 22, 2015. Letter from Roger Goodell, Commissioner, NFL to NFL Players Ass’n (June 2, 2015) available at http://www.nfl.com/news/story/0ap3000000495253/printable. See also Letter from Roger Goodell, Commissioner, NFL to NFL Players Ass’n (June 22, 2015) (on file with author).
judgment as to whether Brady’s conduct amounted to conduct detrimental warranting a four-game suspension. Goodell also rejected the NFLPA’s arguments that Brady was denied a fundamentally fair hearing because the union was not allowed access to internal records of the Paul, Weiss law firm or to question NFL General Counsel Jeff Pash — one of the authors of the Wells Report — at the hearing.75

Thus, under Article 46 of the collective bargaining agreement, the Commissioner’s Arbitration Award became the “full, final and complete disposition of the dispute ... binding upon the player.”76 That is, until challenged in court by the NFL Players Association and Brady, as discussed in Part IV below.

PART II: THE LEGAL BACK-DROP

A. The Law Governing Sports Leagues in the United States Gives Broad Powers to the League Commissioner to Investigate and Resolve Controversies Not in the Best Interests of the Sport

To understand the issues in dispute in the Brady case, one should start with an examination of the role of the commissioner in U.S. professional sports and the deference generally afforded by courts to internal decisions of sports leagues.

The law treats sports leagues in the United States much like social clubs. The National Football League is a “private association” — a group of individual members who associate voluntarily for their own purposes.77 In the case of the NFL, that purpose is to “promote and foster the primary business of League members” — to organize American football competitions.78 Unless the League’s members are engaged in an illegal activity or the League’s actions are

75 "The NFLPA’s premise — that Mr. Pash played a significant role in the investigation — is simply incorrect, as Mr. Wells confirmed at the hearing. He testified that ‘Jeff Pash did not attend any witness interviews. I did not ... involve him [in] my deliberations with respect to my assessment of those interviews. Mr. Pash played no substantive role in the investigation ... and [any comments that he may have provided on a draft of the report] did not impact in any substantive fashion the conclusions with respect to my findings with respect to Mr. Brady.’” Final Decision on Art. 46 Appeal of Tom Brady (July 28, 2015) at 19 n.21 available at https://nfllabor.files.wordpress.com/2015/07/07282015-final-decision-tom-brady-appeal.pdf.

76 Nat’l Football League Const. art. 46.2 (d) (revised 2006).

77 While they can be regulated through statute, private associations find foundation in federal and in many instances state constitutional rights to associate. Federal courts have developed criteria to decide if certain associations are private or state actors open to regulation from public accommodation statutes. Steven M. Colloton, Freedom of Association: The Attack on Single-Sex College Social Organizations, 4:2 Yale L. & Policy Rev. 426, 429 (1985). Generally, “[o]rganizations that have procedures for choosing selective memberships, fund their activities from private sources, restrict the use of their facilities to members and bona fide guests, govern themselves according to membership preferences, and can demonstrate that they were not founded with the purpose of circumventing civil rights laws have been declared private under both federal and state law.” Id. at 429–30 (internal citations omitted). The NFL League Office in April 2015 relinquished a tax exemption under 501(c)(6) of the Federal Tax Code. The section provides exempt statute to “business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues.” The “Professional football leagues” language was added in 1966, although the NFL has been considered exempt since 1942. See I.R.C. §§501(c)(6) (2015); Liam O’Gorman-Hoyt, 501(c)(6) Tax Exemptions: Closing the Loophole the NFL Just Exposed, Front Office Sports (June 1, 2016), http://www.frontofficesports.org/interviews/501c6-tax-exemptions-closing-the-loophole-the-nfl-just-exposed.

78 Nat’l Football League Const. art. 2.1(A) (revised 2006).
regulated by some specific statute (such as antitrust or labor laws); private associations are governed by agreements or contracts among their members and are given considerable latitude in rule making and enforcement in order to accomplish their legitimate objectives. In U.S. professional sports parlance, this contract is most-often the league constitution and by-laws.

League constitutions for the major U.S. sports – football, baseball, basketball and hockey, give considerable power over the business of the league to the chief executive officer, the commissioner. In particular, these agreements give the commissioner the authority to decide what activities, transactions and acts taken by people associated with the sport – owners, team or league employees, players, officials – negatively impact the integrity and public perception of the sport and what remedial actions should be taken to protect the sport from the detrimental impact of such activities. The current structure of most league constitutions dates back to the appointment of Judge Kenesaw Mountain Landis as Baseball Commissioner following the "Black Sox" cheating scandal in 1919. Commissioner Landis took the job at a time when baseball was reeling from allegations that the sport’s best players had intentionally lost championship games; he was charged with restoring baseball’s tarnished image. Landis insisted that he be given very broad powers to investigate and discipline any past and future activities that – in his opinion – were “not in the best interests of baseball”. And he insisted that his decisions on such matters be the last word – requiring the Major League Baseball owners to waive all recourse to


80 In the late 1910s, gambling on baseball became more prevalent with the decrease in control of professional baseball’s governing body, the National Commission (consisting of the American and National League Presidents and a chairperson) and the reserve clause’s restraint on salaries. Andrew Zimbalist, In the Best Interests of Baseball? Governing the National Pastime 32 (2006). The most infamous scandal involved the Chicago White Sox (“Black Sox Scandal”) where eight players were accused of receiving money to “throw” the 1919 World Series against the Cincinnati Reds. Fred Mitchell, Flashback: Story of 1919 Black Sox scandal still resonates, Chi. Trib. (Jul. 5, 2015), http://www.chicagotribune.com/sports/baseball/whitesox/ct-flashback-buck-weaver-black-sox-spt-0705-20150703-story.html. The men were acquitted of conspiracy charges, but did not elude the jurisdiction of newly minted Commissioner Landis who permanently banned all eight men from professional competition. The ban remains in effect today. Letter from Robert Manfred, Commissioner, Major League Baseball, to Arlene Marcley, President, Shoeless Joe Jackson Museum (July 20, 2015) (on file with the author) (MLB Commissioner’s Office found it inappropriate to assess Joe Jackson’s removal from the ineligible list almost one century after the original determination given the lack of ability to reassess all factors and evidence present at the time). The commissioners preceding Commissioner Manfred all declined on similar grounds.

81 Landis, a judge for the U.S. District Court for the North District of Illinois, expressed “gratitude” for the commissionership offer, but did not want to leave his federal post. Andrew Zimbalist, In the Best Interests of Baseball? Governing the National Pastime 27, 34 (2006). The owners quickly agreed to allow Landis to continue his work as a judge as federal courts were closed from June to September (most of the baseball season). Id. at 34. Landis again declined the offer to serve as League Commissioner when the National Commission (consisting of the American and National League Presidents and a chairperson) limited the Commissioner’s disciplinary powers to only to clear “offenders” in baseball. Id. at 36. Rather, Landis stated there was “not enough money in America” to persuade him to remain Commissioner without “power to deal with evil wherever [The Commissioner] found evil.” Id. See also Colin J. Daniels & Aaron Brooks, From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority, 10 Tex. Rev. Ent. & Sports L. 23 (2008); Adriano Pacifici, The Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty & Beyond, 3 Berkeley J. Ent. & Sports L. (2014); see also Finley v. Kuhn, 569 F.2d 527, 532–33 (7th Cir.).
the courts.\textsuperscript{82} That broad power has been recognized and upheld by the courts almost since its inception. The U.S. District Court for the Northern District of Illinois (a court where Landis sat as a federal judge) remarked in an early case challenging the Baseball Commissioner’s authority, “[a]s we have seen, the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.”\textsuperscript{83}

The “best interest powers” convey a broad swath of power to a league’s commissioner to act as “judge, jury & executioner.” Typically, the constitutions give the commissioner the power to investigate, to prosecute and to decide penalties. The best interest powers are broadly defined to touch on all matters involving integrity and public confidence in the game.\textsuperscript{84}

Consistent with the law of private associations, the conveyance of this power is a matter of contract among the members of the league. When courts are confronted with the question of whether a league commissioner has appropriately meted out discipline or taken remedial action in the “best interests” of a sport, they turn almost exclusively to the language of the league constitution.

One of the best examples involves court review of a baseball commissioner decision to disallow a players-for-cash trade, even though similar trades had been allowed in the past, and were generally permitted under the Major League Rules. In 1978, Baseball Commissioner Bowie Kuhn disapproved the players-for-cash trade of Joe Rudi, Rollie Fingers, and Vida Blue from the Oakland Athletics to the Boston Red Sox and New York Yankees “as inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it.”\textsuperscript{85} Charles Finley, owner of the A’s, challenged Kuhn’s action in federal court, arguing that in disapproving the trades the Commissioner had exceeded his authority, and acted arbitrarily and unreasonably and in violation of the U.S. antitrust laws and Finley’s rights under the U.S. Constitution.\textsuperscript{86} Rather than analyze the merits of Kuhn’s decision, that is whether Kuhn had correctly judged the situation and whether disapproving the trades was the appropriate remedy under the circumstances, the Finley court examined whether the baseball clubs had given the Commissioner the authority to take such an action:

The two important questions raised by this appeal are whether the Commissioner of Baseball is \textit{contractually authorized} to disapprove player assignments which he finds to be ‘not in the best interests of baseball’ where neither moral turpitude nor a violation of a Major League Rule is involved, and whether the

\textsuperscript{82} The owners essentially waived their rights to litigate or appeal Landis’ decisions through a “loyalty oath” that stipulated that they would not publicly criticize Landis and “acquiesce in his decisions”. Zimbalist, supra note 80, at 37. The acceptance of the Commissioner as final arbiter of disputes and the waiver of recourse to the courts is now expressly incorporated in the Major League Constitution. MLC, Art. VI, Sec. 1 and 2 (adopted Jan. 1921).

\textsuperscript{83} Milwaukee Am. Ass’n v. Landis, 49 F.2d 298 (N.D. Ill. 1931) (upholding a challenge to a commissioner decision to declare a player a free agent because the owner secretly controlled the major league club and minor league clubs between which he was transferred in order to keep the player out of the hands of other clubs).

\textsuperscript{84} See also Chi. Nat’l League Ball Club v. Vincent, 1992 U.S. Dist. LEXIS 14948 (N.D. Ill. 1992) (finding the Commissioner’s “best interest” authority defined through Constitution and By-laws, which did not include the ability to unilaterally overrule a vote by National League owners).

\textsuperscript{85} Finley v. Kuhn, 569 F.2d 527, 531 (7th Cir. 1978) cert. denied, 439 U.S. 876 (1978).

\textsuperscript{86} See id.
provision in the Major League Agreement whereby the parties agree to waive recourse to the courts is valid and enforceable.  

The Finley Court found that the owners had agreed among themselves to empower the commissioner to make such decisions—and to make those decisions immune from challenge. Because the owners had contractually delegated such authority, the Finley Court concluded that "the Commissioner has the authority to determine whether any act, transaction, or practice is 'not in the best interests of baseball' and to take whatever preventive or remedial action he deems appropriate." The Commissioner's authority was not limited to issues involving compliance with Major League Rules or moral turpitude. Having concluded that Kuhn was authorized to act, it left to the Commissioner the task of interpreting and applying baseball's rules—finding no room for the courts in such a dispute. The Court found "[a]ny other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also . . . the 'intent of the (baseball) code,' an even more complex and subjective task."  

While the analysis could have stopped there, the Finley Court also considered whether the Oakland A's owner had waived his recourse to the courts to challenge the Commissioner's decision by signing the Major League Agreement. In analyzing the waiver's effectiveness, the Finley Court looked to three sources. First, the agreement itself expressly provided such a waiver. In Article VII, Section 2 of the Major League Agreement, the baseball clubs voluntarily agreed to be bound by the Commissioner's decisions and to waive recourse to the courts. Second, the court looked to state law governing private associations, finding that courts generally "will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations." Finally, the Finley Court referenced the arbitration clause in the agreement and federal and state court decisions enforcing agreements to arbitrate. The court found it significant that the baseball clubs agreed "to place the Commissioner in the role of binding arbitrator between disputing parties." Viewing the waiver of recourse clause in this light, the Finley Court found it consistent with state and federal decisions upholding agreements to arbitrate disputes and waive review of an arbitrator's decision.  

To the extent a league commissioner's powers are circumscribed, it is through general notions that parties may not, through their league agreements,

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87 Finley, 569 F.2d at 530 (emphasis added).
88 Id. at 539.
89 Id. See Oakland Raiders v. Nat'l Football League, 131 Cal. App. 4th 621, 645-46 (2005) ("Given the unique and specialized nature of this association's business—the operation of a professional football league—there is significant danger that judicial intervention in such disputes will have the undesired and unintended effect of interfering with the League's autonomy in matters where the NFL and its commissioner have much greater competence and understanding than the courts."). See also Crouch v. Nat'l Ass'n For Stock Car Auto Racing, Inc., 845 F.2d 397, 403 (2d Cir. 1988) (referencing the 7th Circuit's ruling in Finley "We believe that federal courts are equally unfamiliar with standards such as 'race procedure decision' and 'lap and time penalty,' and thus should decline the plaintiffs' invitation to become the 'super-scorer' for stock car racing disputes.").
90 Finley, 569 F.2d at 541-42.
91 Id. at 542 (quoting Am. Fed'n of Tech. Eng'rs v. La Jeunesse, 63 Ill.2d 263, 347 N.E.2d 712, 715 (1976)).
92 Id. at 543.
93 Id. at 544.
contravene other laws, nor may the commissioner in exercising his “best interests” powers disregard the association’s own bylaws, or take actions that are procedurally unfair.

Although the waiver of recourse clause is generally valid . . . we do not believe that it forecloses access to the courts under all circumstances. Thus, the general rule of nonreviewability which governs the actions of private associations is subject to exceptions 1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association and 2) where the association has failed to follow the basic rudiments of due process of law.94

If the procedural basics are met, the courts will not visit the question of whether the decision is right or wrong.

Other cases have followed the reasoning of Finley. When it comes to acts taken pursuant to best interest powers, league commissioners have broad powers under the league constitutions and bylaws to investigate, prosecute and take remedial or disciplinary action. As long as the league agreements do not violate other laws, and the actions do not contravene the league’s own agreements and are consistent with the basic rudiments of due process, the commissioner’s decisions are not subject to challenge in the courts.95

B. Labor Law Provides Broad Discretion to Arbitrators to Decide Grievance Disputes Brought Under the Terms of Collective Bargaining Agreements and Courts Give Deferential Treatment to Labor Arbitration Decisions

The “best interests” cases, discussed above, deal primarily with decisions made by league commissioners adverse to teams or their owners – that is, parties to the league constitutions and bylaws.96 A different set of agreements is in play in disciplinary actions involving players. The specifics of those agreements are discussed in PART III, below. For the present discussion, it is sufficient to know that both the collective bargaining agreement – and the

94 Finley, 569 F.2d at 544. See id. at 544 n.65 (quoting Van Dael v. Vinci, 51 Ill.2d 389, 282 N.E.2d 728, 732 (1972) “[T]he procedure must not be a sham designed merely to give colorable propriety to an inadequate process.”); See also Rose v. Giamatti, 721 F.Supp. 906, 916 (S.D. Ohio 1989) (observing that under the Major League Agreement, “Commissioner is given virtually unlimited authority to formulate his own rules of procedure for conducting investigations, the only limitation being that whatever rules he adopts must recognize the right of any party in interest to appear before him and be heard.”); Am. League Baseball Club of N.Y. v. Johnson, 179 N.Y. Supp. 498, 506 (N.Y. Sup. Ct. 1919), aff’d, 179 N.Y.S. 898 (1920) (a party is entitled to notice of the alleged misconduct and a fair opportunity to be heard).

95 See, e.g., Spirit Lake Tribe of Indians ex rel. Comm. of Understanding & Respect v. Nat’l Collegiate Athletic Ass’n, 715 F.3d 1089, 1094 (8th Cir. 2013) (holding that the plaintiff, a Native American Tribe, did not meet the exceptions to the principle of judicial noninterference when it sought to enjoin the NCAA from retiring the University of North Dakota’s “Fighting Sioux” mascot); Crouch v. Nat’l Ass’n For Stock Car Auto Racing, Inc., 845 F.2d 397, 403 (2d Cir. 1988) (concluding “... the district court should have deferred to NASCAR’s interpretation of its own rules in the absence of an allegation that NASCAR acted in bad faith or in violation of any local, state or federal laws.”).

96 In the Deflategate scandal, as discussed in Part I, Commissioner Goodell did discipline the Patriots for the role of Patriots’ personnel in tampering with the game balls, but that decision was not challenged in the courts.
individual player contracts—typically empower league commissioners to arbitrate disputes involving player discipline taken pursuant to “best interests” powers.\textsuperscript{97} The Brady case involved a challenge by the players’ union and Tom Brady personally to Goodell’s role as an arbitrator in the grievance arbitration challenging the League’s initial determination to suspend Brady for four games and the decision made by Commissioner Goodell as arbitrator of that dispute. Thus, to appreciate the context of the Brady litigation, one must also understand the law regarding challenges to labor arbitrations.

Arbitration is the primary method used by public and private employers and unions to resolve workplace disputes.\textsuperscript{98} This so-called “dispute arbitration” mechanism is a standard provision in labor agreements and is often the final step in a grievance process. The collective bargaining agreement usually spells out the procedure leading up to an arbitration, the process and timing for initiating an arbitration, the selection and appointment of an arbitrator and the consequences of the decision. Over the years, the typical arbitration provision has evolved to include a definition of what “claim” can be arbitrated (typically, the claim must allege that the contract has not interpreted, applied, or enforced in a manner contemplated by the agreement).\textsuperscript{99} Likewise, an arbitrator’s authority is generally limited to interpretation, application, and enforcement of the labor agreement; the authority specifically does not extend beyond the four corners of the agreement.\textsuperscript{100} Many contracts provide that the arbitrator has no power to add to, subtract from, modify, or delete any provision of the labor agreement.\textsuperscript{101}

Arbitration involves a hearing in which each side is afforded an opportunity to make arguments and present evidence. Labor agreements typically require a written and reasoned award and opinion. While no form is prescribed, a typical award sets forth the facts, a summary of the parties’ contentions, the arbitrator’s analysis, and concludes with an award, including a statement of affirmative relief.\textsuperscript{102}

Most labor agreements provide that an arbitrator’s decision is final and binding. Even without specific language, it is generally understood that arbitration is the final step of a grievance process and that the parties have agreed

\textsuperscript{97} Major League Baseball Collective Bargaining Agreement (2012-16) Art. XII § B (“Players may be disciplined for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball...”); National Basketball Ass’n Constitution and Bylaws (May 2012) Art. 35 § C (The NBA Bylaws require teams to incorporate Article 35 into the Uniform Player Contract, it provides that the Commissioner can impose a fine or suspension “[i]f in the opinion of the Commissioner any act or conduct of a Player at or during an Exhibition, Regular Season, or Playoff Game has been prejudicial to or against the best interests of the Association or the game of basketball.”); National Football League Collective Bargaining Agreement (2011-20) Art. 46 §A (“... action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football...”); National Hockey League Collective Bargaining Agreement (2012-22) Art. 18-A §2 (“Whenever the Commissioner determines that a Player has violated a League Rule applicable to Players (other than Playing Rules subjecting the Player to potential Supplementary Discipline for On-ice Conduct) or has been or is guilty of conduct (whether during or outside the playing season) that is detrimental to or against the welfare of the League or the game of hockey...”).


\textsuperscript{99} Id.

\textsuperscript{100} Id. at 15.

\textsuperscript{101} Id. at 2.

\textsuperscript{102} Id. at 2.
to the arbitration process to avoid the time and expense of litigation. Nonetheless, parties can bring lawsuits in federal court to either set aside ("vacate") or to enforce ("confirm") an arbitration award under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.

In 1960, the United States Supreme Court decided three cases (the "Steelworkers Trilogy"), which established the guiding principles for courts to follow when deciding challenges to arbitrations under Section 301 of the LMRA. First, the Supreme Court made clear that courts should refrain from reviewing the merits of an arbitration award.

The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. The arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level - disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements. (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. at 574) [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

The grounds recognized by the courts for vacating an arbitration award are quite limited. The courts will not re-litigate or second-guess the merits of an award. Errors of fact or even of law are generally not sufficient to overrun an arbitrator's decision. But an arbitration award is subject to attack and vacation if the arbitrator exceeds his authority by going beyond the issue submitted by the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

103 The U.S. Supreme Court stated the primary rationale for section 301 of the Labor Management Relations Act was to ensure labor peace. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1959) ("...the agreement to arbitrate grievances is the quid pro quo for an agreement not to strike.").

104 29 U.S.C. §185 (a) (1947) ("Suits for violation of contracts between an employer and a labor organization ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.").


106 "In a suit under 301 (a) of the Labor Management Relations Act, 1947, to compel arbitration of a dispute pursuant to a collective bargaining agreement providing for arbitration of all disputes between the parties 'as to the meaning, interpretation and application of the provisions of this agreement,' the function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract, and the court has no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 568 (1960).
parties\textsuperscript{107} or where there are due process concerns, such as whether the arbitrator failed to follow proscribed procedures\textsuperscript{108} or failed to allow a party the opportunity to present evidence.\textsuperscript{109} The oft-cited standard is traced to United States Supreme Court decisions that an award should be enforced so long as it “draws its essence” from the collective bargaining agreement. As the Supreme Court stated in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960):

\begin{quote}
[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
\end{quote}

Parties frequently focus their challenges on whether the arbitration award “draws its essence” from the collective bargaining agreement.\textsuperscript{110} Indeed, the essence of the CBA is not just the express terms of the agreement but also prior arbitral decisions and extrinsic evidence of custom and practice of the parties, i.e., the “law of the shop”.\textsuperscript{111} The Supreme Court further explained the

\textsuperscript{107} Courts have generally interpreted the issue submission standard broadly stating that an arbitrator does not exceed the issue’s scope if he or she “[s]tays within the areas marked out for his consideration.” Lackawanna Leather Co. v. United Food & Commercial Workers Int’l Union, AFL-CIO & CLC, 706 F.2d 228, 231 (8th Cir. 1983), opinion corrected sub nom. Lackawanna Leather Co. v. United Food & Commercial Workers Int’l Union, AFL-CIO & CLC, Dist. Union No. 271, No. 81-2434, 1983 WL 821240 (8th Cir. June 28, 1983) (citing Enter. Wheel & Car Corp., 363 U.S. at 598).

\textsuperscript{108} See, e.g., Centralab, Inc., Fort Dodge, Iowa v. Local No. 816, Int’l Union of Elec., Radio & Mach. Workers of Am., 827 F.2d 1210 (8th Cir. 1987) (vacating an arbitrator’s award that related to setting new rates because the arbitration provisions did not give the authority to do so); Kan. City Luggage & Novelty Workers Union, Local No. 66, AFL-CIO v. Neveel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964) (holding an arbitration award unenforceable regarding the back pay because the issue was not submitted to arbitration by the parties).


\textsuperscript{110} In the sports context, this has manifested itself in discussion of the appropriate interpretations of the Collective Bargaining Agreement’s standard of review. Courts have generally upheld arbitrator decisions as long as the decision is “at least ‘barely colorable.” Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527, 539 (2d Cir. 2016) (citing In re Andros Compania Maritima, S.A., 579 F.2d 691, 704 (2d Cir. 1978). For example, the U.S. District Court for the Southern District of New York upheld a National Hockey League neutral arbitrator’s decision to overturn the Commissioner’s discipline ruling given the arbitrator’s interpretation that the deferential standard of review of “substantial supporting evidence” conflicted with the CBA’s grant that the neutral arbitrator could hear new evidence not offered at the original hearing. Nat’l Hockey League v. Nat’l Hockey League Players Ass’n, No. 16 Civ. 4287 (AJN), 2017 WL 1030718 (S.D.N.Y. Mar. 15, 2017).

\textsuperscript{111} This language is taken from the NFLPA’s brief in the district court and is supported by the following legal citations: (“[T]he industrial common law—the practices of the industry and the shop—is equally a part of the [CBA] although not expressed in it.”), United Steelworkers v. Warrior & Gulf
arbitrator’s task in *Alexander v. Gardner-Denver*, 415 U.S. 36, 53 (1974): “[a]s the proctor of the bargain, the arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties.”

Courts expressly follow these principles when ruling on challenges to arbitration awards in the sports context. For example, in *Major League Baseball Players Association v. Garvey*, the courts considered challenges by Steve Garvey, a Major League Baseball player, to arbitrator findings in a dispute between Garvey and the players’ union over whether he was entitled to compensation from a damages fund established through settlement of collusion claims against the Major League Clubs. An arbitrator denied Garvey an award from the collusion settlement fund, finding that the reason he was not offered a contract extension by his team was Garvey’s age and injury history, not collusion among the Clubs. Garvey moved to vacate the arbitration decision. The district court denied the motion but the court of appeals ruled that an award in the player’s favor was required. Reviewing the award in detail, the court of appeals labeled the arbitrator’s findings “inexplicable” and “border[ing] on the ‘irrational’ and found the record provided “strong support” for factual findings in favor of the player. The Supreme Court reversed, relying on traditional principles that provide deference to an arbitrator’s award:

Judicial review of a labor-arbitration decision . . . is very limited. Courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties’ agreement. We recently reiterated that if an “arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,” the fact that ‘a court is convinced he committed serious error does not suffice to overturn his decision.”

The Supreme Court found the lower appellate court opinion “baffling”: “it overturned the arbitrator’s decision because it disagreed with the arbitrator’s factual findings, particularly with respect to credibility. . . Even ‘serious error’ on the arbitrator’s part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority.”

PART III: PLAYER MISCONDUCT IN THE NFL – THE AGREEMENTS AND THE CASES LEADING UP TO BRADY

In many ways, the fact that the Brady challenge was in the courts at all is quite surprising. After all, the dispute involved an area traditionally within league authority (cheating on the field by tampering with or using illegal equipment). Questions of whether a player should be disciplined for breaking the rules in a game (cheating, fighting, abusing officials, rules infractions) have been well within the confines of a league commissioner’s powers for many years. But all of the parties treated Deflategate as much more than the straightforward application of a league rule. The NFL spent $2.5 million investigating the incident and a player was suspended for a quarter of a season—not merely fined or removed from a game. Indeed, the matter quickly escalated into a battle over the NFL Commissioner’s power. An examination of the legal precedent regarding such power is also necessary to understand the court rulings that followed.

A. Under the Collective Bargaining Agreements and Uniform Player Contracts, the Commissioner Has the Power to Investigate and Discipline Player Misconduct That Is Detrimental to the Sport

Given the tradition of bestowing a single powerful commissioner with the responsibility and authority to protect the integrity of the sport, it is not surprising that owners of professional sports teams insisted that this same broad power over “best interests” issues also apply to the athletes playing the game. In labor agreements between the league and players—and between owners and players—league commissioners have consistently had the power to deal with player misconduct that impacts the integrity of the game. Thus, both the collectively bargained agreements and the player contracts recognize the power of the league commissioner to investigate and discipline conduct that is “not in the best interests of” or “detrimental to the integrity and public confidence in” the sport.

This broad “best interests” power—to discipline players and to be the final judge of any disputes—is given to the NFL Commissioner in Article 46 of the NFL’s Collective Bargaining Agreement. Section 1(a) provides, in pertinent part:

All disputes . . . involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or

Steelworkers v. Enten. Wheel & Car Corp., 363 U.S. 593, 597 (1960) that “the award must be sustained so long as it ‘draws its essence from the collective bargaining agreement’

An apropos example is gambling in Major League Baseball. Gambling became prevalent in baseball (and among even players) in the early 20th century, with the 1919 Black Sox Scandal serving as the most infamous case that spurred the election of Commissioner Landis to police the baseball. See supra note 80. Two reminders of this time remain in Major League Baseball today, the “best interest” power held by the Commissioner and Rule 21(d), the gambling section under the Official Professional Baseball Rules. A more contemporary example of the interaction of the Commissioner’s authority and Rule 21 involved former player-manager, Pete Rose who was placed on the permanently ineligible list after evidence arose he bet on games he was directly involved with. The Pete Rose Case; The 2 Rules in the Rose Case, N.Y. Times (Aug. 25, 1989), http://www.nytimes.com/1989/08/25/sports/the-pete-rose-case-the-2-rules-in-the-rose-case.html.
public confidence in, the game of professional football, will 
be processed exclusively as follows: the Commissioner will 
promptly send written notice of his action to the player, with a 
copy to the NFLPA. Within three (3) business days following 
such written notification, the player affected thereby, or the 
NFLPA with the player's approval, may appeal in writing to 
the Commissioner.

The CBA thus provides that it is the Commissioner who is empowered 
to take action against a player for "conduct detrimental" and, if the player 
disagrees, he may appeal to the Commissioner. For appeals under Section 1 (a), 
"the Commissioner may serve as hearing officer in any appeal . . . at his 
discretion."\(^\text{119}\) Decisions of the Commissioner are the final word and bind all 
parties:

As soon as practicable following the conclusion of the 
hearing, the [Commissioner serving as hearing officer] will 
render a written decision which will constitute full, final and 
complete disposition of the dispute and will be binding upon 
the player(s), Club(s) and the parties to this Agreement with 
respect to that dispute.\(^\text{120}\)

Likewise, the NFL standard player contract recognizes this power at paragraph 15:

INTEGRITY OF GAME. Player recognizes the detriment to 
the League and professional football that would result from 
impairment of public confidence in the honest and orderly 
conduct of NFL games or the integrity and good character of 
NFL players. Player therefore acknowledges his awareness 
that if he . . . is guilty of any other form of conduct reasonably 
judged by the League Commissioner to be detrimental to the 
League or professional football, the Commissioner will have 
the right, but only after giving Player the opportunity for a 
hearing at which he may be represented by counsel of his 
choice, to fine Player in a reasonable amount; to suspend 
Player for a period certain or indefinitely; and/or to terminate 
this contract.\(^\text{121}\)

This power under Article 46 has been present since the first 
CBA through the explicit incorporation of the NFL Constitution and 
Bylaws and the Standard Player Contract.\(^\text{122}\)

\(^{119}\) National Football League Collective Bargaining Agreement (2011-20), at Article 46, Section 2(a) 
(emphasis added).

\(^{120}\) Id. at Art. 49, Sec. 2(d) (emphasis added).

\(^{121}\) National Football League Uniform Player Contract, Appendix A ¶15.

\(^{122}\) On January 22, 1971, the NLRB certified the NFLPA as the exclusive bargaining unit of NFL 
players. Nat'l Football League Players Ass'n v. N.L.R.B., 503 F.2d 12, 13 (8th Cir. 1974). The 
creation of a collective bargaining agreement incorporated the NFL Constitution and Bylaws that 
grants the Commissioner under Art. VII §3 (E) "full, complete, and final jurisdiction and authority to 
arbitrate...any dispute involving a member or members in the League or any players or employees of
B. The Labor Agreements Also Give the NFL Commissioner the Discretion to Define What Conduct Is “Detrimental to” or “Not In the Best Interests of” the Sport

Part and parcel of the disciplinary power is the ability of the Commissioner to define what type of player conduct is “detrimental to the integrity of” or “not in the best interests of” the game. For example, since the first labor agreement, the NFL’s CBA has always had a provision authorizing the Commissioner to define conduct detrimental to the integrity of the game of professional football. In the Matter of Ray Rice Decision, (Nov. 28, 2014), at 15 available at https://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf (“Commissioner has always had sole discretion to determine what constitutes conduct detrimental”) (quoting Bountygate, Decision on Recusal at 1-3 (Nov. 5, 2012)). 124

In addition, both the CBA and the standard player’s contract give the Commissioner the power to discipline players for conduct detrimental to the league and to hear appeals of such disciplinary decisions. 125 This selection of arbitrator is different than arbitrator selection in other issues involving player discipline. There, the CBA conveys powers to hear disciplinary appeals to a third-party arbitrator. But where integrity of the sport is involved, the CBA on its face gives the Commissioner the ability to hear appeals in detrimental conduct cases.

This last issue, whether a league commissioner can or must decide issues of discipline involving integrity or best interests, has been hotly contested by the NFLPA and other players’ unions – long before the Deflategate scandal. For example, there are several past instances in which the union, players, or other parties have attacked a decision by a sports commissioner on the ground
that he was biased or that his role as investigator and disciplinarian rendered him unfit to be an arbitrator.

If history is any lesson, there is good reason that players' unions argue for the appointment of a different arbitrator to hear appeals of disciplinary decisions. Over the years, both with respect to on-field and off-field conduct, third-party arbitrators have readily revisited decisions concerning the appropriateness and severity of discipline imposed by a league commissioner's office. These victories provided the legal the impetus for challenging Goodell's heavy-handed treatment of Brady and the discipline he imposed.

PART IV: THE COURTS TAKE TWO DIVERGENT APPROACHES TO GOODELL'S ARBITRATION RULING

A. The District Court Reinstates Brady Finding That Brady Lacked Notice That a Player Could be Disciplined for General Awareness of a Scheme to Deflate Footballs and That a Player Could Be Suspended for Four Games for Participating in a Scheme to Deflate Footballs or Obstructing a League Investigation

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128 See, e.g., Nat'1 Football League Players Ass'n on behalf of Peterson v. Nat'1 Football League, 2015 WL 672168 (D. Minn.) ("Commissioner Goodell, tired of being reversed for imposing inconsistent player discipline—first by Commissioner Tagliabue serving as arbitrator in Bounty, then by Judge Jones in Rice—appointed Mr. Henderson to arbitrate Mr. Peterson's appeal. Arbitrator Henderson served sixteen years as NFL Executive Vice President for Labor Relations and Chairman of the Management Council Executive Committee and has significant professional and financial ties to the League.") (internal citations omitted); See also Nat'1 Basketball Ass'n v. Nat'1 Basketball Players Ass'n, No. 04 Civ. 9528 (GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).

129 See, e.g., State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. 2015) (designation of the NFL Commissioner in a contract dispute between an NFL Club (one of his "employers") and an employee was unconscionable, but did not invalidate the entire arbitration agreement); Nat'1 Football League Players Ass'n on behalf of Peterson v. Nat'1 Football League, 2015 WL 672168 (D. Minn.); Jonathan Vilma, v. Nat'1 Football League, 2012 WL 3776747 (E.D. La.), at T 179-88 (arguing that Goodell was not a neutral arbitrator given his role as "investigator, prosecutor, judge, jury, appellate court, and ultimate decision-maker in this process."). In the Ray Rice Discipline case, Commissioner Goodell appointed a neutral arbitrator under Art. 46 because he was required to testify to what he knew at the time he imposed the first and second Rice suspensions. Rice wins appeal eligible to sign, ESPN.com (Dec. 1, 2014), http://www.espn.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement.

130 Larry Eldridge, Ferguson Jenkins drug charge: why arbitrator upset suspension, Christian Sci. Monitor (Oct. 1, 1980), http://www.csmonitor.com/1980/1001/100131.html (Commissioner Kuhn's suspension overturned after it was revealed that Kuhn was not fully briefed on the case, Jenkins' Canadian drug charge case was still pending, and Jenkins' refusal to cooperate with MLB officials did not support a suspension); Major League Baseball Players Association and the Commissioner of Major League Baseball (Howe) (Nicolau, Arbitrator 1992), Panel Decision No. 94 at 49-50 ("With [best interests power] comes a heavy responsibility, especially when that power is exercised unilaterally and not as the result of a collectively bargained agreement as to the level of sanctions to be imposed for particular actions.") (emphasis added); In the Matter of the New Orleans Saints "Bountygate" (Dec. 2012) (Former Commissioner Tagliabue acted as arbitrator of the coaches and players involved in "Bountygate." Tagliabue affirmed Goodell's factual findings, but after importing the "rules of the shop" vacated the suspensions because these actions were not disciplined in the past); In the Matter of Ray Rice, supra note 123 (Arbitrator found an implied "just cause provision" and found the second discipline of Rice extending his suspension was arbitrary since the NFL did not carry the burden that new, pertinent information was discovered between the two suspensions); Alex Rodriguez, Biogenesis (2013-14) (Arbitrator reduced Rodriguez's suspension to one season (162 games) from 211 games finding that a positive drug test is not required to discipline under the Joint Drug Agreement (termed "non-analytical positive").
The NFL moved quickly to confirm the arbitration award, so that Brady could serve his four-game suspension at the start of the 2015 season. Brady and the NFL Players Association countered by moving to vacate Goodell’s arbitration decision. The case was heard by District Judge Richard Berman in the Southern District of New York. After submission of hundreds of pages of briefing and exhibits, the court heard two days of oral argument in August 2015. Judge Berman issued his decision on September 3, 2015, just in time to allow Brady to play in the Patriot’s opening game against the Pittsburgh Steelers.

The district court overturned the arbitration award in a 40-page opinion that was “premised upon several significant legal deficiencies.” First, the district court held that Brady did not have adequate notice that he was subject to discipline under the NFL’s Competitive Integrity Policy or that he would be subject to a four-game suspension for the alleged misconduct. Finding that “[a] player’s right to notice is at the heart of the CBA, and, for that matter, our criminal and civil justice systems,” and that “[i]t is the ‘law of the shop’ to provide professional football players with advance notice of prohibited conduct and potential discipline,” the district court held that Brady had “no notice that he would receive a four-game suspension for general awareness of football deflation by others or participation in any scheme to deflate footballs, and non-cooperation with the ensuing investigation.” Rather, Brady was on notice only that equipment violations under the Players Policies could result in fines—not that, as a player, he was subject to discipline under the Competitive Integrity Policy which was not distributed to players, but instead to Chief Executives, Club Presidents, General Managers and Head Coaches. Further, the court found that Brady had no notice that discipline for tampering with game equipment would be the equivalent of a player who had violated the League’s steroid policy.

Judge Berman also disagreed with the Commissioner’s arbitration award at several key points. He rejected Goodell’s comparison of ball tampering to the use of steroids, describing the much-negotiated steroids policy as “sui generis”—that is, in a class of its own. “[The League’s steroids policy] cannot, as a matter of law, serve as adequate notice of discipline to Brady” because, “among other things, it cannot reasonably be used as a comparator for . . . ball deflation by others . . . and for non-cooperation in the ensuing investigation.” Disagreeing with Goodell’s reasoning that the steroids policy is like a policy against tampering with game equipment and destroying potentially relevant evidence because both “go to the integrity of the game,” the district court found that none of the critical issues of health, injury, addiction and peer pressure (that were central to the steroids policy) were present in the Brady

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132 This is the policy that states that failure to cooperate in an investigation is considered conduct detrimental to the League and will subject offending individuals to discipline. Supra note 37.
134 Id. at 462.
135 Id. at 463.
136 Id. at 467–69. In doing so, the district court dismissed the arguments that Brady was disciplined for “conduct detrimental” to football, finding that Goodell’s reliance on the policy was “legally misplaced” and that a specific policy took precedence over a general policy. Id. at 470.
137 Id. at 463.
138 Id. at 466.
139 Id. at 465.
Further, the court read the record differently on whether Brady had notice that destruction of his cellphone and non-cooperation during the investigation would result in discipline. Judge Berman pointed to testimony from Ted Wells, the League’s outside investigator, that he “did not tell Mr. Brady at any time that he would be subject to punishment for not giving – not turning over the documents [emails and texts].” He also pointed to the arbitration opinion from Bountygate case, in which former Commissioner Tagliabue overturned player suspensions based, in part, on obstructing an investigation: “I cannot recall any suspension for ... fabrication [of false testimony]. There is no evidence in the record of past suspensions based purely on obstructing a League investigation.” While Judge Berman recognized that “[a]n arbitrator’s factual findings are generally not open to judicial challenge, and we accept the facts as the arbitrator found them” the district court departed on several occasions from Goodell’s factual findings. Perhaps most significantly, the court rejected Goodell’s explicit findings that Brady did have notice that: (1) he should not tamper with game equipment by deflating footballs; (2) he could be suspended for conduct detrimental to the game of football; and (3) he could be suspended for obstructing a League investigation by destroying potentially relevant evidence.

The district court found the deficiencies in the arbitration award amounted to Goodell “dispens[ing] own brand of industrial justice.” The district court held it had “no choice but to refuse enforcement of the award.”

B. The District Court Also Found the Arbitration Was Fundamentally Unfair

The district court also considered Brady’s argument that he should have been allowed to examine Jeff Pash, the NFL’s General Counsel and designated co-lead investigator. Recognizing that an arbitrator has discretion to admit or reject evidence, Judge Berman nonetheless found that Brady was prejudiced because he was foreclosed from exploring whether the Wells investigation was truly “independent” and how and why Pash edited the “supposedly independent

141 Id. at 465 (quoting from June 23, 2015 Hr’g Tr. 336:19-23).
142 Id. at 465–66 (quoting Bountygate, Slip Op., at 13).
143 Id. at 463 (citing Westerbeke Corp. v. Daihatsu Motor Co., Ltd, 304 F.3d 200, 213 (2d Cir. 2002) and Int’l Bhd. of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 726 (2d Cir. 1998)).
144 For example, the district court focused on the language from the Wells Report and Vincent Letter that Brady was “generally aware” of the activities of McNally and Jastremski – and noted that the language differed from that in the arbitration opinion. Id. at 467 n.17. Yet, the court focused its analysis on whether a player had notice that he could be disciplined for general awareness that others had tampered with equipment. Id. at 467–68.
146 Id. at 16–17.
147 Id. at 17–18.
149 Id. at 466. (quoting from United Steelworkers of Am. v. Enter. Wheel & Car Corp., 80 S. Ct. 1358, 1361 (1960)).
investigative report." No other witness, the court held, was in the position to offer this testimony, which was "evidence plainly pertinent and material to the controversy." The "refusal to hear such evidence warrants vacatur of the award."

The district court also considered the argument that the arbitration hearing was unfair, because the Players' Association and Brady were denied access to the Paul, Weiss interview notes. Judge Berman found that Brady was prejudiced by his lack of access to the interview notes, because Brady was denied the opportunity to examine and challenge the Report through the contents of the unedited notes. Prejudice was compounded by the fact that the same law firm who had conducted the independent investigation also represented the NFL during the arbitration, enabling it to share and use the investigation notes with NFL officials during the arbitral proceedings, while at the same time withholding them from Brady. Thus, Goodell violated his "affirmative duty... to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other party." Thus, the district court held that these procedural deficiencies provided a separate basis for overturning the arbitration award.

C. The Second Circuit Soundly Rejected the District Court's Rulings and Instead Grounded Its Decision on Traditional Labor Law Principles

Suffice it to say that the Second Circuit squarely rejected each of the findings of the district court, reversed the judgment and reinstated the four-game suspension called for in Goodell's arbitration award. At every turn, the principle that "a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential" served as the guidepost for the court of appeals. The Second Circuit panel defined its role and scope of review at the outset:

Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act, 29 U.S.C. § 141 et seq. (the "LMRA"). We must simply ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." United

151 Id.
152 Id.
153 Id. at 473.
155 Id. at 474.
Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.157

The Second Circuit then systematically reversed each of the grounds on which the district court vacated Goodell’s arbitration award. First, the panel rejected the position that the Commissioner was not permitted to impose a four-game suspension because the Player Policies mandated only a fine for equipment infractions. It determined, as did the Commissioner, that the Player Policies did not address the issue of equipment tampering, but that Article 46 – the “detrimental conduct” provision of the CBA – “gives the Commissioner broad authority to deal with conduct he believes might undermine integrity of the game.”58 The court thus concluded that the Commissioner’s decision to discipline Brady under Article 46 was “plausibly grounded in the parties’ agreement”, which is all the law requires.”159 Next, the Second Circuit examined the comparison drawn by the Commissioner between Brady’s conduct and steroid users, finding that deference to an arbitrator allows “generous latitude [to an arbitrator] in phrasing his conclusions.”160 The court held that the Commissioner was within his discretion in drawing the “helpful, if somewhat imperfect, comparison to steroids, in part because the Commissioner could have imposed the same suspension without reference to the League’s steroids policy.”161 The CBA does not require the arbitrator to “fully explain his reasoning”; “it merely mandates that the hearing officer render a ‘written decision’.”162 Likewise, the Brady Court rejected the district court’s conclusion that the award was invalid because there was no basis for disciplining a player for general awareness of another’s misconduct, the premise for the original disciplinary decision as set forth in the Vincent letter. “This conclusion misapprehends the record. The award is clear [that Brady was disciplined] … because Brady both ‘participated in a scheme to tamper with game balls’ and ‘willfully obstructed the investigation’.”164 It was within the Commissioner’s discretion to conclude, after a full hearing, that Brady’s conduct was more serious than initially believed. Further, the parties all agreed the tampering with game equipment and destroying pertinent evidence in an investigation amount to

158 The provision says nothing about tampering with, or the preparation of, footballs and, indeed, does not mention the words ‘tampering,’ ‘ball,’ or ‘deflation’ at all. Moreover, there is no other provision of the Player Policies that refers to ball or equipment tampering, despite an extensive list of uniform and equipment violations ranging from the length of a player’s stockings to the color of his wristbands.”
159 Id.
160 Id. (quoting Wackenhut Corp. v. Amalgamated Local 515, 126 F.3d 29, 32 (2d Cir. 1997)). The Second Circuit likewise rejected the argument that the only available punishment was a fine as published in a schedule in the Player Policies. Id.
161 Id. at 540.
162 Id. at 540–41.
163 Id. at 540.
164 Id. at 541.
"conduct detrimental,“ the district court erred in vacating the award which found as a matter of fact that Brady had engaged in such conduct.

Finally, the court of appeals overruled the holding that Brady could not be disciplined for obstructing the investigation, including the deliberate destruction of his cell phone. Avoiding the issue of whether a player was on notice that such behavior could result in a suspension, the court found it "well established" that the law permits a trier of fact to draw an adverse inference when a party deliberately destroys evidence. These principles are sufficiently settled that there is no need for any specific mention of them in a collective agreement, and we are confident that their application came as no surprise to Brady or the Association." Agreeing with Goodell, the Second Circuit found that "Article 46 put [Brady] on notice prior to the AFC Championship Game that any action deemed by the Commissioner to be ‘conduct detrimental’ could lead to his suspension."

The Second Circuit similarly rejected the conclusions that the arbitration was "unfair." Recognizing that "[a]rbitrators do not 'need to comply with strict evidentiary rules,' and they possess ‘substantial discretion to admit or exclude evidence,'" it upheld Goodell’s rulings refusing to compel the testimony of NFL General Counsel Jeff Pash. Pash’s testimony was collateral to the issues in the arbitration and was of limited probative value given that the Commissioner made clear that the “independence” of the investigation was not material to his decision. As to the finding that Brady was entitled to the interview notes generated by the law firm’s investigative team, the court looked to the language of the CBA. Because Article 46 merely requires the parties to exchange exhibits in advance of a hearing, “[t]he Commissioner reasonably interpreted this provision to not require more extensive discovery.” At the very least, the Commissioner was arguably construing or applying the contract. And “had the parties wished to allow for more expansive discovery, they could have bargained for that right. They did not, and there is simply no fundamental unfairness in affording the parties precisely what they agreed on."

D. The Second Circuit Opinion Provides a Number of Lessons

The Second Circuit opinion in *Brady* teaches a number of lessons beyond merely upholding the four-game suspension.

*First,* the *Brady* Court reaffirmed the application of traditional deference shown to arbitrators in the labor context: “[e]ven if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority ... In short, it is not our task to decide how we would have conducted the arbitration proceedings, or how we would

166 Id. at 544.
167 Id.
168 Id. at 544-45.
169 Id. at 545 (citing LJL 33rd St. Assoc., LLC v. Pitcairn Props. Inc., 725 F.3d 184, 194–95 (2d Cir. 2013); see also Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).
171 Id. at 547. The court of appeals addressed other arguments attacking the arbitration procedure, finding these likewise did not merit vacating the award.

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have resolved the dispute."  

This deferential standard is no less applicable where the parties are sports leagues or professional players. The court stated "[w]e do not sit as referees of football any more than we sit as the 'umpires' of baseball or the 'super-scorer' for stock car racing. Otherwise, we would become mired down in the areas of a group's activity concerning which only the group can speak competently."

**Second**, the court made clear that questions concerning whether conduct is "detrimental to the game" and the appropriateness of discipline are matters to be left to the arbitrator – in this instance the Commissioner. This is the bargained-for regime:

In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory.

**Third**, in his award, an arbitrator can go beyond the stated rationale for the action which is being challenged – at least as long as he does not develop an entirely new reason for the discipline. Further, by introducing exculpatory evidence, a party opens the door to additional inculpatory evidence. The Second Circuit did not go as far as saying that the arbitrator hears the case *de novo*, but at least evidence offered at the hearing can further inform the arbitrator and allow him to buttress the challenged determination. Demonstrating this point, the Second Circuit found that

[i]n light of Brady's effort to challenge the factual conclusions of the Wells Report by presenting exculpatory evidence, it would make little sense to accept the Association’s contention that the introduction and consideration of inculpatory evidence violates the Commissioner’s broad authority to manage the hearing. . . The Commissioner did not develop a new basis for the suspension, nor did he deprive Brady of an opportunity to confront the case against him. We see nothing in the CBA that suggests that the Commissioner was barred from concluding, based on information generated during the

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173 Id. at 537 n.5 (quoting Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 845 F.2d 397, 403 (2d Cir. 1988). See also Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 536-38 (7th Cir. 1978)).
174 Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016). See also Id. at 545 n.12 (“But determining the severity of a penalty is an archetypal example of a judgment committed to an arbitrator’s discretion. The severity of a penalty will depend on any number of considerations, including the culpability of the individual, the circumstances of the misconduct, and the balancing of interests inherently unique in every work environment. Weighing and applying these factors is left not to the courts, but to the sound discretion of the arbitrator.”).
hearing, that Brady’s conduct was more serious than was initially believed.175

Fourth, independence is not required of an investigation or an arbitration under the NFL’s collective bargaining agreement. While the parties spent much time addressing whether the investigation was independent and whether testimony on this point should have been compelled, the Second Circuit determined that such evidence is immaterial. “The CBA does not require an independent investigation, and nothing would have prohibited the Commissioner from using an in-house team to conduct the investigation. The Association and the League bargained for and agreed in the CBA on a structure that lodged responsibility for both investigation and adjudication with the League and the Commissioner.” 176

At the least in the context where the CBA permits the Commissioner to serve the tri-partite functions of investigator, disciplinarian and ultimate arbitrator, evident partiality does not require recusal of the Commissioner from serving the role of arbitrator.

We may vacate an arbitration award “where there was evident partiality . . . in the arbitrator [].”177 9 U.S.C. § 10(a)(2)16 . . . However, arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen178 . . . Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes ‘conduct detrimental,’” and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner’s authority, they could have fashioned a different agreement.179

But the Brady Court left open for another day, two important questions: whether non-cooperation with an investigation alone could result in a suspension, and whether a “free-floating procedural fairness standard” of the FAA ought to be imported to review of arbitrations conducted pursuant to the LMRA.180

176 Id. at 548.
177 According to the Brady Court, “[e]vident partiality may be found only ‘where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.’” Id. at 548 (citing Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012) (quoting Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007))).
178 Id. (citing Williams v. Nat’l Football League, 582 F.3d 863, 885 (8th Cir. 2009); Winfrey v. Simmons Food, Inc., 495 F.3d 549, 551 (8th Cir. 2007)).
179 Id.
180 Id. at 545 n.13.
Part V: WHAT NEXT?

A. Impact of Brady on Subsequent Sports Cases

While the Second Circuit’s Brady Opinion clearly reestablished the Commissioner’s role as ultimate arbitrator of best interest issues, there remains an open question whether the ruling will be followed in other jurisdictions. Two recent sports cases challenging arbitration awards in other circuits suggest a possible split – and perhaps open the possibility of forum shopping by losing parties in future cases.

1. The Eighth Circuit Reaffirms the Role of the Arbitrator in Another NFL Conduct Detrimental Case.

The NFL won another arbitration victory in the Eighth Circuit, a court generally viewed as unfavorable for the NFL, when the appeals court upheld the suspension of Minnesota Vikings running back, Adrian Peterson, in August 2016.181 Like Brady, the Peterson case involved an arbitration dealing with player misconduct. During the 2014 football season, Commissioner Goodell suspended Minnesota Vikings running back Adrian Peterson indefinitely for “conduct detrimental to . . . the game of professional football,” and fined Peterson a sum equivalent to six games’ pay.182 Peterson was suspended under Article 46 of the CBA for hitting his four-year-old son with a tree branch as a form of corporal punishment.183 The NFLPA appealed.184 The Players Association’s primary argument in the arbitration was that custom and practice under the Personal Conduct Policy in effect at the time of Peterson’s misconduct limited the Commissioner’s disciplinary authority to a maximum two-game suspension for a first-time domestic violence offense. The arbitrator affirmed the suspension and fine, concluding that the discipline was “fair and consistent” with prior disciplinary actions and that communications by Goodell in August 2014 concerning treatment of domestic violence incidents did not constitute a change of the Personal Conduct Policy, but rather “reinforce[d] that policy with initiatives to explain and enhance it.”185

181 Nat’l Football League Players Ass’n on behalf of Peterson v. Nat’l Football League, 831 F.3d 985 (8th Cir. 2016) [hereinafter “Peterson”].
182 Id.
183 The indictment alleged that Peterson hit his four-year-old son with a tree branch as a form of corporal punishment. Id. The punishment reportedly inflicted “cuts and bruises to the child’s back, buttocks, ankles, legs, and scrotum, along with defensive wounds to the child’s hands.” Id. Peterson was quoted as telling investigators that he would “never eliminate whooping my kids . . . because I know how being spanked has helped me in my life.” Id. Peterson entered a nolo contendere plea to the charges. Id.
184 Goodell designated Harold Henderson to hear Peterson’s appeal. Id. Henderson was the president of a League-affiliated charity, the Player Care Foundation. Id. He previously served for sixteen years as the NFL’s vice president for labor relations and chairman of the NFL Management Council Executive Committee. Id. The NFLPA, who prosecuted the appeal on Peterson’s behalf, requested Henderson to recuse himself due to his close ties to NFL officials and his role in shaping the League’s disciplinary policies. Id. at 990–91. Henderson denied the request, noting that the Association had not objected to his designation as arbitrator in dozens of past disciplinary appeals. Id. at 991.
185 Id. at 991.
The Players Association petitioned the United States District Court in Minnesota to vacate the arbitration award. The NFLPA argued that the case involved "the rare Arbitration Award that must be set aside" and sought to vacate the award on four grounds: (1) the Commissioner retroactively punished Peterson, in violation of the Collective Bargaining Agreement, by applying an allegedly new domestic violence policy announced in August 2014; (2) the arbitrator exceeded his authority by hypothesizing whether Goodell could have disciplined Peterson in the same manner prior to the August 2014 memorandum; (3) the arbitrator was evidently partial; and (4) the award violated the principle of fundamental fairness.

The district court granted the petition and vacated the award. First, the district court accepted the union's argument that Goodell retroactively applied a new disciplinary standard to Peterson, in violation of the CBA as interpreted by past arbitration awards. The district court concluded that the August 2014 communications effected a "New Policy" that "cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in meting out punishment under the CBA." The district court found "no valid basis" for distinguishing the disciplinary actions against another NFL player, Ray Rice and faulted the arbitrator for failing to "explain why the well-recognized bar against retroactivity did not apply to Peterson." The district court also ruled that the arbitrator "exceeded his authority by adjudicating the hypothetical question of whether Peterson's discipline could be sustained under the previous Policy."

The NFL appealed, arguing that the deference traditionally accorded arbitration opinions should apply in Peterson as well. The Eighth Circuit agreed. As was the case in the Second Circuit opinion in Brady, the Eighth Circuit took every opportunity to apply a deferential standard and chastised the district court for overstepping its bounds:

In an arbitration case like this one, the role of the courts is very limited. We thus do not apply our own view of what would be appropriate player discipline, and we do not review whether the arbitrator "correctly" construed the Collective Bargaining Agreement when he reviewed the Commissioner's decision.

... as long as the arbitrator is arguably construing or applying arbitral precedents, a court's disagreement with the arbitrator's application of precedent is not sufficient grounds to vacate an arbitration decision.

... In resolving a motion to vacate an arbitration award, however, the question for the courts is not whether the arbitrator's

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186 Peterson, 831 F.3d at 992.
187 Id.
188 Id. As referenced above, supra note 123, Rice was suspended for two games on July 23, 2014 for striking his wife in a hotel elevator and knocking her unconscious. Supra note 123, at 5. On September, 8, 2014, after a video of the incident was released publicly, the NFL suspended Rice indefinitely. Supra note 123, at 7. The first disciplinary ruling was based on the Leagues "law of the shop" and the second was premised upon Rice's alleged inconsistent description of the event during the pre-discipline hearing in June 2014. Supra note 123, at 5, 7.
189 Peterson, 831 F.3d at 992.
190 Id.
191 Id. at 994 (citing Am. Nat'l Can, 120 F.3d at 892-93).
distinction is persuasive enough to withstand ordinary judicial review. An erroneous interpretation of a contract, including the law of the shop, is not a sufficient basis for disregarding the conclusion of the decision maker chosen by the parties. The dispositive question is whether the arbitrator was at least arguably construing or applying the contract, including the law of the shop.\footnote{192}

... As applied to Peterson's case, therefore, the arbitrator thought the terms of the Agreement, the law of the shop, and the Personal Conduct Policy gave the Commissioner discretion to impose a six-game suspension and fine if he concluded that shorter suspensions in prior cases had been inadequate. The arbitrator’s decision on this point was grounded in a construction and application of the terms of the Agreement and a specific arbitral precedent. It is therefore not subject to second-guessing by the courts. In any event, the question for a reviewing court is not whether the arbitrator’s distinctions were correct, but whether the arbitrator was arguably construing and applying the contract and the law of the shop. We see no basis for setting aside the decision under a federal court’s limited scope of review.\footnote{193}

... In any case, a federal court may not set aside an arbitrator’s decision based on “improvident, even silly, fact-finding,” so the Association’s reliance on Goodell’s testimony does not carry the day.\footnote{194}

Likewise, the appeals court soundly rejected the argument that the arbitration award should be set aside because the Commissioner-appointed arbitrator was “evidently partial.”\footnote{195} Like the Brady Court, the Eighth Circuit looked to the scheme chosen by the parties in their collective bargaining agreement, observing that the parties had bargained for the procedure and holding that it was foreseeable that arbitrations would sometimes involve credibility of the Commissioner or League employees. The court stated “[w]hen parties to a contract elect to resolve disputes through arbitration, a grievant ‘can ask no more impartiality than inheres in the method they have chosen.’”\footnote{196}

And the Eighth Circuit dealt a blow to the union’s argument that the result was “fundamentally unfair.” First, it held that fundamental fairness is a not a basis for vacatur under the Labor Management Relations Act, and that the Federal Arbitration Act merely “informs our analysis in labor arbitration cases”.\footnote{197} There was no identified structural unfairness in the Article 46 arbitration process, thus “the Association’s fundamental fairness argument is little more than a recapitulation of its retroactivity argument against the merits of

\footnote{192} Peterson, 831 F.3d at 994 (citing United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); Alcan Packaging v. Graphic Comm., 729 F.3d 839, 843 (8th Cir. 2013)).
\footnote{193} Id. at 994–95.
\footnote{194} Id. at 995 (citing Major League Baseball Ass’n v. Garvey, 532 U.S. 504, 509 (quoting Misco, 484 U.S. at 39)).
\footnote{195} Id. at 998.
\footnote{196} Id. (citing Winfrey v. Simmons Food, Inc., 495 F.3d 549, 551 (8th Cir. 2007) (quotation omitted)).
\footnote{197} Id. at 998 (citing Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 298 n.6 (2010); Am. Postal Workers Union v. U.S. Postal Serv., 754 F.3d 109, 112 n.4 (2d Cir. 2014)).
the arbitrator’s decision.”198 When an award draws its essence from the collective bargaining agreement, a dissatisfied party may not avoid the result by showing that the result is “fundamentally unfair.”199

Thus, like the Second Circuit’s opinion in Brady, the Eighth Circuit pronounced that the procedure bargained for by the parties would be followed, and no award would be upset if it drew its essence from the CBA, even if the arbitrator was biased, had incorrectly applied past precedents, engaged in improvident fact-finding, or was, in a court’s mind, simply wrong. The role of the courts was strictly limited to determining whether the arbitrator was arguably construing and applying the contract and the law of the shop and adhering to the procedure set forth in the parties’ collective bargaining agreement.

2. The Seventh Circuit Suggests A Possible Route For Setting Aside Arbitral Awards in Sports Cases.

Despite the Second and Eighth Circuits’ clear pronouncements, not all courts are as willing to follow an arbitrator’s award in sports matters—particularly when the courts view that the arbitrator got it wrong. On September 22, 2016, the Seventh Circuit Court of Appeals decided that an arbitrator exceeded his authority by looking to the parties’ past dealings to resolve an ambiguity created by the silence in their agreement.200 The Seventh Circuit strayed from long-standing principles giving arbitrators broad deference when interpreting agreements, and instead parsed the language of the collective bargaining agreement and, in effect, overruled the arbitrator’s interpretation of contract language and law of the shop.

The case involved a dispute between the US Soccer Federation and the soccer players’ union over the right to use player images in advertising. After a detailed review of the terms of the collective bargaining agreement, and tracing the parties’ past course of dealing, the arbitrator ruled in the players’ favor. The arbitrator found that the portion of the collective bargaining agreement concerning sponsor use of the likenesses of six or more players in ads was ambiguous and, applying the past course of dealing, interpreted the contract to require union approval for such print ads.201

The Federation challenged the award in federal court. Predictably, the district court upheld the arbitrator’s award and “emphasiz[ed] its extremely limited authority to review the decisions of arbitrators,” relying on a long line of United States Supreme Court and Seventh Circuit precedent holding that arbitration decisions should not be disturbed.202 The district court found that the arbitrator “considered” and “interpreted” the parties’ written agreements, and “reached a conclusion.”203 He did exactly what the parties bargained for under the CBA/Uniform Players Agreement.204

On appeal, the Seventh Circuit rejected the arbitrator’s reading of the contract as “unreasonable,” imposing its own construction of the contract

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198 Peterson, 831 F.3d at 999.
199 Id.
200 United States Soccer Fed’n, Inc. v. United States Nat’l Soccer Team Players Ass’n, 838 F.3d 826, 829 (7th Cir. 2016).
201 Id. at 828.
203 Id. at 748.
204 Id. at 747–48.
Parsing the contract language, the appeals panel read the contract language differently than the arbitrator. Where the arbitrator found the agreement was ambiguous as to the need for player approval, the Seventh Circuit deemed it to be explicit in requiring none.205

What is significant about the U.S. Soccer Federation decision was the appellate court’s willingness to supplant the arbitrator’s reading of the contract language for its own. In so doing, the panel concluded both that the arbitrator was wrong and that language “can reasonably be construed only in one way.”206 This approach is a departure from prior Seventh Circuit precedent, which permitted a court to set aside an award only if “there is no possible interpretive route to the award.”207 And it is significant, because under such circumstances, the district court erred in deferring to the arbitrator’s discretion. The difference between “no possible interpretative route” and “only reasonable construction” is more than mere semantics. The standard adopted in U.S. Soccer Federation invites a court to adopt the better argument – usurping what traditionally is viewed as the role of the arbitrator. And it instructs a reviewing court that it need not defer to an arbitrator in doing so.

Given the suggestion that a court can – and should – vacate an arbitrator’s decision when the arbitrator employs an unreasonable contract interpretation, a party unhappy with a sports commissioner decision in a “best interests” case may have the ability to overturn a player discipline. At least in the Seventh Circuit, the union and player would argue that the Commissioner’s contract interpretation was unreasonable and that the CBA and law of the shop “can reasonably be construed only in one way.”208

3. The Latest NFLPA-NFL Face-off in Federal Courts over Player Discipline Resurrects Similar Arguments and Outcomes from the Brady case.

Notwithstanding the Second and Eighth Circuits’ clear deference to the League’s collectively bargained discipline procedures, the NFLPA once again brought suit against the NFL in federal court to prevent enforcement of a six-game suspension against Dallas Cowboys running back, Ezekiel Elliott. This time, the NFLPA did not wait for the completion of the appeals process before filing suit in the United States District Court for the Eastern District of Texas, asking the court to vacate an arbitral award (that had yet to be entered) and also moving for a preliminary injunction to stop enforcement of the potential award.210

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205 United States Soccer Fed’n, Inc. v. United States Nat’l Soccer Team Players Ass’n, 838 F.3d 826, 832 (7th Cir. 2016)
206 Id. at 832–33.
207 Id. at 833.
208 Id. at 832 (quoting Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc., 935 F.2d 1501, 1505–06 (7th Cir. 1991)).
209 Id. at 833.
Elliott was disciplined under the NFL’s Personal Conduct Policy, for allegedly engaging in multiple incidents of physical violence against Tiffany Thompson, his girlfriend.\textsuperscript{211} Local law enforcement refused to criminally charge Elliott, citing conflicting accounts and lack of evidence. But the NFL launched its own extensive five-month investigation.\textsuperscript{212} On August 11, 2017, Goodell imposed a six-game suspension based upon three specific domestic violence incidents in July 2016 that the League’s investigators substantiated.\textsuperscript{213} As in Peterson, the NFLPA appealed the discipline decision and Goodell appointed Harold Henderson to hear the appeal. Similar to Brady, the arbitrator denied the NFLPA’s request to present certain information at the hearing. Henderson refused the union’s motion to compel the testimony of the alleged victim, production of the investigator’s notes, and adverse examination of Goodell and one of the league investigators, Kia Roberts.\textsuperscript{214}

The NFLPA filed suit challenging the arbitrator’s evidentiary rulings, and resurrected a common argument from the Brady and Peterson cases. The union contended that the discipline process was “fundamentally unfair.” The union focused on the fact that Kia Roberts, the only person to directly interview the victim, had not met directly with Goodell and that her recommendation against discipline was not included in the final report given to Goodell.\textsuperscript{215}

Five days after the NFLPA filed suit in the Eastern District of Texas, Henderson affirmed Goodell’s decision on September 5, 2017.\textsuperscript{216} But on the same day the arbitration decision was rendered, the Eastern District of Texas enjoined Elliott’s suspension, ruling that the arbitration was procedurally flawed and unfair.\textsuperscript{217} The NFL then immediately sought an emergency stay of injunction from the Fifth Circuit.\textsuperscript{218} On October 12, the Fifth Circuit vacated the injunction and remanded the case for dismissal, ruling that the district court lacked jurisdiction because the NFLPA had initiated suit before the arbitrator had rendered his decision.\textsuperscript{219}

While the Texas proceeding was winding its way through the courts, the NFL filed its own suit in the Southern District of New York to confirm Henderson’s award.\textsuperscript{220} The Southern District of New York rejected the NFLPA’s challenge to the arbitration decision.\textsuperscript{221} Subsequently, the Second Circuit denied the NFLPA’s bid to continue with the injunction pending the

\begin{itemize}
  \item \textsuperscript{211} Re: Ezekiel Elliott Appeal – Player Conduct Policy (Sept. 5, 2017), at 1 (Henderson, Arb.).
  \item \textsuperscript{212} Id. at 1.
  \item \textsuperscript{213} Id. at 2. As permitted by the collective bargaining agreement, see In the Matter between NFLPA and NFL. (Apr. 11, 2011), at 34–35, 38–40, Goodell relied upon information gathered by League personnel support his decision. Id. 2–3.
  \item \textsuperscript{214} Nat’l Football League Players Ass’n (Ezekiel Elliott) v. Nat’l Football League, No. 4:17-CV-00615, at 18 (E.D. Tex. Sept. 8, 2017).
  \item \textsuperscript{215} Id. at 16.
  \item \textsuperscript{216} Re: Ezekiel Elliott Appeal – Player Conduct Policy (Sept. 5, 2017), at 8 (Henderson, Arb.).
  \item \textsuperscript{217} Nat’l Football League Players Ass’n (Ezekiel Elliott) v. Nat’l Football League, No. 4:17-CV-00615, at 22 (E.D. Tex. Sept. 8, 2017).
  \item \textsuperscript{218} Appellant (Nat’l Football League) Emergency Motion for Stay Pending Appeal, Sept. 15, 2017, No. 17-40936.
\end{itemize}
union's appeal of the lower court's ruling.\textsuperscript{222} As a result, the Second and Fifth Circuits ensured that Elliott would serve the league-imposed suspension during the 2017 regular season.

The Fifth Circuit left open an issue that proved determinative in both Brady and Peterson: whether the Labor Management Relations Act (LMRA) provides for the vacatur of an arbitral award in the event of "fundamental unfairness." This interpretation derives from the FAA, which allows for vacatur if an arbitral proceeding is fundamentally unfair.\textsuperscript{223} Unlike its counterpart in the Southern District of New York,\textsuperscript{224} the Eastern District of Texas merited this argument, leading to its initially favorable ruling on the NFLPA's motion for a preliminary injunction.\textsuperscript{225}

In determining whether Elliott would succeed on the merits, the Eastern District of Texas did not extensively review or cite Henderson's arbitration decision.\textsuperscript{226} It also neglected to assess if Henderson acted "within the bounds of his bargained-for authority," which both the Second and Eighth Circuits recognized as the appropriate review of an arbitral decision under the LMRA.\textsuperscript{227} Rather, the district court focused on whether the evidentiary rulings had tainted the proceeding and prevented the NFLPA from presenting evidence.\textsuperscript{228}


\textsuperscript{224} Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass’n (Ezekiel Elliott), No. 17-6761, at 13–15 (S.D.N.Y. Oct. 30, 2017). The Southern District of New York’s ruling aligned with the Second and Eighth Circuit decisions in Brady and Peterson. Accord Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass’n, 820 F.3d 527, 545 n.13 (2d Cir. 2016) and Peterson, 831 F.3d at 989. Judge Katherine Polk Failla emphatically rejected the NFLPA’s argument that Henderson’s evidentiary ruling resulted in an unfair outcome and held that the FAA does not apply to cases involving the LMRA—at least to the extent that collectively bargained procedures are followed. See Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n (Ezekiel Elliott), No. 17-6761, at 13–14 (S.D.N.Y. Oct. 30, 2017). The court also posited that even if the "fundamental unfairness" argument were permitted, the NFLPA failed to adequately support this allegation. Id. at 20–23.

\textsuperscript{225} Nat'l Football League Players Ass'n (Ezekiel Elliott) v. Nat'l Football League, No. 4:17-CV-00615, at 5–6, 13–15 (E.D. Tex. Sept. 8, 2017). The Eastern District of Texas acknowledged that the LMRA — not the FAA — conferred jurisdiction on the court, but nonetheless proceeded to cite only FAA cases to support its “fundamental unfairness" holding. Id.

\textsuperscript{226} This was likely because the case was filed before the arbitration decision was handed down. See supra note 210.

\textsuperscript{227} See also Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 536 (2d Cir. 2016). Henderson’s opinion went to great lengths to determine that the process followed by Goodell and the investigators was true to the CBA. While acknowledging that the investigators “expressed surprise” when not solicited for their recommendations, Henderson stated that the CBA only called for these recommendations "if desired" by the Commissioner. Re: Ezekiel Elliott Appeal — Player Conduct Policy (Sept. 5, 2017), at 5 (Henderson, Arb.). Furthermore, Henderson pointed out that the practice followed by the NFL in the Elliott proceedings insulated the investigative team from the ultimate decision-maker. Id. The NFLPA commonly advocates for this separation, but in Elliott it argued that the exclusion of Roberts’ opinion that the domestic assault allegations were unsubstantiated should have been considered by Goodell. At least facially, Henderson’s interpretation of the CBA appeared to be no different from that of the arbitral appeals in Brady and Peterson that were eventually upheld.

The Fifth Circuit did not reach the fundamental fairness issue or determine whether Henderson had the authority to exclude evidence in the arbitration. The Fifth Circuit dealt only with the threshold issue of jurisdiction, finding that Elliott and the NFLPA did not exhaust all remedies because they filed their challenge before arbitrator Harold Henderson had ruled. Therefore, the court could not extend jurisdiction under the LMRA.

The Elliott case represents the constant tug-o-war between traditional courts and the collective bargaining process in professional sports. Moreover, this case demonstrates that the NFLPA has not shied away from targeting the Commissioner’s power through litigation despite the unfavorable rulings in Brady and Peterson and now Elliott. It leaves open for further argument whether the collectively bargained arbitration procedures nonetheless are so one-sided that they render any arbitral decision against a player “fundamentally unfair.”

B. Collective Bargaining, and Not the Courts, Will Be the Most Effective Way to Curb the Commissioner’s Power to Discipline Players

While the Second Circuit ensured that Deflategate did not disrupt settled arbitration law principles, it has created yet another issue for the collective bargaining discussions for the next NFL-NFLPA Basic Agreement. At the end of the Deflategate appeal, the League and Goodell appeared to be the “winners.” Yet, in the context of the much larger battles the League faces with its public image, Club-player relations, and integrity, the “jury” is still out. In Deflategate, the press portrayed Goodell as a tyrannical figure who embodied how the League was out of touch with more pressing issues on and off the field, such as a player safety, disturbing effects of “locker room culture,” and ongoing player contacts with the criminal justice system. Throughout the 2016 season, Goodell has attempted to rehabilitate this image – even recently revising the rule against excessive touchdown celebrations at the bequest of the players. While a nice gesture, this goodwill will not likely avoid contentious collective bargaining negotiations.

NFLPA executive, George Atallah admits that at this point, the major issues at the center of the 2021 collective bargaining discussion with the NFL are yet to be determined. However, one thing is clear: the players are preparing for another lawsuit.
for a fight. The 2011 NFL lockout lasted 132 days (roughly four months) with no missed regular season games. 234 Considering other profession sports league work stoppages, this lockout was relatively short. The reason is, at least in part, that the NFL players on the whole were not prepared to endure the financial difficulties of a season-interrupting work stoppage. Prior to 2011, the NFLPA secured a $44 million insurance policy that would have paid each player approximately $200,000 if the lockout endured. 235 But, some players, notably Vince Young and Bryant McKinnie, received “lockout loans” with interest rates above 20 percent even though they were reportedly receiving high annual salaries. 236 Considering the average NFL salary was $2 million between 2009 and 2010 with the League minimum at $310,000 and $325,000, respectively, a $200,000 insurance payout would not be sufficient for players counting on much bigger yearly payouts. 237 With the benefit of more time to plan, future collective bargaining negotiations may be different. NFLPA executives have already requested that their constituents to save money in order to provide a financial cushion and, thus, leverage to future bargaining. 238 This individual preparedness is in addition to the collective fund that the NFLPA enjoys from NFL Players, Inc., its “business arm” that handles player licensing and marketing. 239 In the last six years, NFL Players’ Inc. revenues have grown 52 percent and now total $160 million with about 30 percent used to fund NFLPA programs. 240 The NFLPA can vote to divert the approximately 70 percent remaining of NFL Players, Inc. revenue to a “war chest” in case of a labor dispute. 241 While this vote can occur at any time, 2018 or 2019 are the predicted seasons.

Labor negotiation issues are always varied, creating a complicated web as to what each side is willing to concede to achieve its bargaining objectives. Historically, the issues at the center of professional sports lockouts and strikes have dealt primarily with compensation, in the form of free agency (when the player would be eligible for market determined wages) and salary caps (how much a team is able to spend in total on player services). With concussions on the rise and recent claims by the NFL players and union that the League and its clubs recklessly treated players with opioids and other painkillers, questions of player safety, insurance and retirement benefits loom large. Less clear is whether the players would be prepared to wage a labor battle over the


234 Marvez, supra note 233.
235 Id.
236 Id.
237 Id.
238 Id.

240 Id.
241 Id.
242 Id.

Commissioner’s authority to investigate and discipline player misconduct. The Second Circuit opinion in Deflategate provided a decisive blow to potential litigation strategy to alter the League’s discipline structure, making clear that the current regime is virtually unavailable through the Courts.244 Labor negotiation may be the only remaining weapon.

To this point, the NFLPA has used a mixed strategy of labor negotiation and litigation in its attempts to alter disciplinary policy. In 2014, NFLPA filed a grievance against a newly ratified NFL Personal Conduct Policy (“Conduct Policy”) that sought to address many of the issues discovered in the discipline of Ray Rice, contending it should have been collectively bargained.245 After more than a year, a neutral arbitrator largely found that the Conduct Policy did not conflict with CBA.246 On the whole, this decision affirms that at least for the time being a neutral third-party appeal process will not be mandated through the grievance procedure.247 According to Jeffrey Pash in a letter accompanying the arbitration decision’s release, the NFLPA terminated discussions over the Conduct Policy when the NFL would not limit the Commissioner’s authority through a third-party appeal process in all disciplinary matters.248 As a result of this hardline, the NFLPA turned down NFL proposals that would have loosened the restrictions on the Commissioner’s “Exempt List” (used for players awaiting disciplinary decisions) that was later upheld in its more stringent form by the arbitrator.249 The NFLPA may have lost that individual battle, but it is undoubtedly gearing up for the next one. In recent years, the union has separated itself from its counterparts in other leagues for its willingness to try untested legal strategies to oppose the League.250

The NFLPA’s legal strategies, though arguably creative, at times can undercut its position in a subsequent legal battle. Specifically in the grievance concerning the new Conduct Policy, the NFLPA argued that Commissioner Goodell should have exclusive authority to discipline under Article 46 and cannot delegate this responsibility to other League officers.251 The arbitrator agreed with the NFLPA, but stated that Goodell does have authority to discipline under Article 46 and cannot delegate this responsibility to other League officers.252 The arbitrator agreed with the NFLPA, but stated that Goodell does have authority to receive assistance and counsel in an investigation even though the power to discipline

244 See supra Part IV, §§C-D.
247 Id.
248 Id.
249 Id.
250 For example, on the day of the CBA expiration in 2011, players terminated the union as their collective bargaining agent and filed an action in a federal district court alleging that the NFL Management Council’s planned lockout constituted a group boycott and price-fixing agreement that would violate the Sherman Antitrust Act. Brady v. Nat’l Football League, 779 F. Supp. 2d 992 (D. Minn. 2011), vacated, 644 F.3d 661 (8th Cir. 2011). While the NFLPA was successful on the district court level, on appeal, the Eighth Circuit rejected the players’ ability to complete a legal “end-run” around settled labor law to use a more agreeable antitrust theory enjoining Club owners from locking out players. Id. at 673 (“Whatever the effect of the union’s disclaimer on the League’s immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.”).
251 In the Matter between NFLPA and NFL et al. (Apr. 11, 2011), at 34–35.

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rests solely with Commissioner. The result when coupled with the Second Circuit's Deflategate decision may be the worst of both worlds for the NFLPA. Any investigation into player misconduct can be conducted by the Commissioner with the assistance of other League personnel and third parties. Any discipline must be imposed by the Commissioner, or at his direction, and any arbitration over that discipline can be heard by the Commissioner. Neither the investigation nor the arbitration must be independent or free of bias. The Commissioner indeed can serve as judge, jury, and executioner in disciplinary proceedings involving conduct detrimental to the League.

Looking to 2021, the NFLPA leadership has stated that discipline will undoubtedly be on the table. But, no one should expect a quick compromise. NFLPA Executive Director DeMaurice Smith has stated that in the past the sides have been close to developing a stand-alone agreement on neutral arbitration in the drug policy context, but the agreement fell apart when the League wanted to include it as part of a larger agreement. Since late 2016, both sides have expressed interest in beginning discussions for the new CBA. However, Smith made clear that the NFLPA is not open to an extension, but rather an ongoing conversation about the future of the sports' economic conditions.

In the recent Ezekiel Elliot case, discussed above, the NFLPA clearly showed its position on the current status of the discipline process stating in a press release:

Commissioner discipline will continue to be a distraction from our game for one reason: because NFL owners have refused to collectively bargain a fair and transparent process that exists in other sports. This "imposed" system remains problematic for players and the game, but as the honest and honorable testimony of a few NFL employees recently revealed, it also demonstrates the continued lack of integrity within their own League office.

All negotiations will be driven in some respect by purely economic factors. If 2011 is any indicator, the NFLPA will be more likely to bargain based on player-centric principles. Although the union had less leverage in 2011, it earned some victories in player safety (reduced offseason, contact, and improved training room medical care) and establishment of benefits for current and former players.

252 In the Matter between NFLPA and NFL et al. (Apr. 11, 2011), at 38-40.
255 Id.
Given the NFLPA’s focus on discipline as evidenced by its support of Rice, Peterson, and Brady, it would be fair to assume that harnessing the Commissioner’s power to discipline may be a priority. Yet, the union may need to be open to slowly instituting changes instead of a sweeping institution of a third-party appeal process that it sought in its grievance. As demonstrated, the League stands on sound legal arguments to retain the Commissioner’s authority and absent significant NFLPA leverage may not be persuaded to limit this power.

257 Andrew Brandt, The CBA at Halfway, Monday Morning Quarterback (Sept. 22, 2016), http://mmqb.si.com/mmqb/2016/09/22/cba-halfway-point-part-one. The benefits, overshadowed by discussions surrounding the salary cap and contract, were significant funding player pensions, medical costs, tuition assistance, insurance, neurocognitive disability benefits and providing $1 billion to NFL retirees throughout the course of the agreement. Id.