

Chapter 1

THE MORAL INTEGRITY OF THE SPORT: THE ROLE OF THE COMMISSIONER AND THE LAW

Introduction

Though the building blocks of professional sports are the athletic skills of the players, the mortar holding these blocks together is a nexus of contracts between the players, clubs, and league. In each of the three “major leagues,” the constitution and collective bargaining agreement provide foundational support for the structure and governance of the league. These foundational documents state the scope of and the limitations on the authority of the Commissioner, who is entrusted with overseeing the league. Today, Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA) each have a Commissioner entrusted with protecting the “best interests” of the game, though the contours of the position vary by league.

Chapter 1 begins with an overview of the Commissioner’s powers in each league, and then examines the exercise of Commissioner’s powers at various points during league history (Section I), as applied to gambling (Section II), misconduct on the field (Section III), drug use (Section IV), diversity in sports (Section V), and recent punishments handed down through Commissioner’s Authority (Section VI)—including an in-depth look at DeflateGate. As you read the cases below, consider whether or not in a particular situation the case was resolved within the league’s internal procedures or in a court of law. When do you think that internal resolution, under the auspices of the Commissioner, is best? What issues ought to be reserved for a court of law? When answering these questions, does it make a difference to you if the Commissioner’s decision affects a player or a third party? Ask whether the issue centers around a contractual or a constitutional right? Chapter 1 should be read in conjunction with the CBA Cheat Sheet in Appendix A, Tab 3, as it explores the topics most relevant to the CBAs in more detail.

I. THE COMMISSIONER'S POWERS

The oldest of the leagues, MLB, was the first to create a Commissioner. The position was created in response to the “Black Sox Scandal” of 1919.¹ Federal Judge Kennesaw Mountain Landis was appointed to oversee the league as Commissioner. While Commissioner Landis may have had the powers of a “benevolent but absolute despot [with] all the disciplinary powers of a proverbial *pater familias*,”² subsequent MLB Commissioners have seen the office’s authority erode as the Major League Baseball Players Association (MLBPA) emerged and gained strength. The current MLB Collective Bargaining Agreement (MLB CBA), which runs from 2017 until 2021,³ provides the most important limitations on the Commissioner’s once plenary powers. Once the Commissioner actually assesses a disciplinary penalty, the standard of review for punishment imposed upon a player for misconduct is “just cause.” Players who are disciplined may appeal to an impartial arbitrator or a three-arbitrator panel chaired by an impartial arbitrator. Discipline for on-field conduct may only be appealed if it results in a fine greater than \$10,000 or a suspension of more than ten games, which leads to many suspensions falling short of the ten-game mark. Commissioner actions “involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball” are exempt from the ordinary grievance procedure, if the Commissioner so desires. Furthermore, the “best interests” power includes not only financial but also moral issues. However, if the Commissioner invokes his “best interests” power, the MLBPA can reopen the CBA if it finds his decision “unsatisfactory.” In April 2011, former MLB Commissioner Bud Selig took an unprecedented step and invoked his “best interests” power to take over control of the L.A. Dodgers, citing substantial debt and the owner’s messy divorce, among other things, as the main reasons.⁴

By contrast, in the NFL, the Commissioner maintains nearly complete control over the area of player discipline, which was on full display during the “Deflategate” Scandal.⁵ Under the NFL CBA,

¹ For more information on the Black Sox Scandal, you may want to read Eliot Asinof, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (2000).

² *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

³ Maury Brown, *Breaking Down MLB’s New 2017-21 Collective Bargaining Agreement*, *FORBES*, Nov. 30, 2016, available at: <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#622e8d9d11b9>.

⁴ For more information on the sale of the Dodgers and *McCourt v. MLB*, see the Frank McCourt Study Guide in Appendix A, Tab 9. Another recent example of Commissioner’s Authority in the context of a team owner is explored in the Donald Sterling Study Guide in Appendix A, Tab 8.

⁵ This is more thoroughly explored in Section VI of this Chapter.

if the Commissioner decides to punish a player with a fine, suspension, or both, for “conduct on the playing field” or “conduct detrimental to the integrity of, or public confidence in, the game of professional football,” the player’s only recourse is an appeal to the Commissioner himself.⁶ Additionally, the NFL Commissioner has been allowed to implement and oversee a league-wide Personal Conduct Policy (PCP).⁷ The NFL PCP allows for a player to be disciplined if he engages in conduct detrimental to the NFL. This has led to the high profile suspensions of Michael Vick (dogfighting conviction), Ben Roethlisberger (off-field repeated accusations of misconduct, though no charges were filed), Ray Rice (domestic violence),⁸ Adrian Peterson (child abuse),⁹ and Tom Brady (involvement with deflating footballs scandal).¹⁰ Each suspension was handed out by NFL Commissioner Roger Goodell and appealed by the player to Goodell. Disputes pertaining to terms and conditions of player employment involving the interpretation of the NFL CBA, the NFL Player Contract, or the NFL Constitution and Bylaws are resolved under a different procedure before neutral arbitrators.¹¹

Finally, in the NBA, the two most significant contractual provisions governing the Commissioner’s authority are Article 35 of the NBA Constitution and Article XXXI of the NBA CBA. Article 35, which lists various offenses and their maximum penalties, is the starting point for the Commissioner’s power to address misconduct. Article 35 requires that each team include a clause in its player contracts binding the players to this provision. In general, Article 35’s clauses enable the Commissioner to fine a violator up to a maximum of \$50,000 and possibly issue a suspension, depending on the infraction. For example, Article 35(d) broadly enables the

⁶ NFL Collective Bargaining Agreement Art. XI, § 1(a) (2011). The “conduct on the playing field” clause contains an exception for penalties “imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players [which] shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within ten (10) days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner.” *Id.* at Art. XI, § 1(b).

⁷ For more information on the PCP and subsequent arbitrations, see the NFL’s Personal Conduct Policy and Arbitration discussion *infra*.

⁸ For more information, see the 2014 NFL Domestic Violence Suspensions Study Guide re: Ray Rice in Appendix A, Tab 10.

⁹ For more information, see the Adrian Peterson Study Guide in Appendix A, Tab 11.

¹⁰ For more information, see Section VI of this Chapter.

¹¹ For more information, see the CBA Cheat Sheet Study Guide in Appendix A, Tab 3.

Commissioner to fine a player up to \$50,000 and/or suspend the player if the Commissioner finds in his opinion that the player's conduct during a game is "against the best interests" of the sport. Conduct that does not conform with "standards of morality or fair play . . . or that is prejudicial or detrimental to the Association" is punishable by a fine not exceeding \$50,000, a definite or indefinite suspension, or both. For a player wagering on the outcome of a game, the "decision of the Commissioner shall be final, binding and conclusive and unappealable." With the exception of this gambling clause, Article 35(h) holds that all other Commissioner actions taken pursuant to Article 35 are appealable. Teams will appeal to the Board of Governors, while players are directed to follow the grievance procedures under the NBA CBA.

Article XXXI of the NBA CBA sets out rules governing grievance procedures, as well as the standard of review for the arbitrator to employ. In general, a Grievance Arbitrator reviewing a disciplinary action must resolve "whether there has been just cause for the penalty imposed." If the Commissioner acts concerning "the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball," then the Grievance Arbitrator is directed to apply an "arbitrary and capricious" standard of review to the appeal of a fine and/or suspension having a financial impact greater than \$50,000 on a player. Commissioner decisions involving "the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball" resulting in a financial impact of less than \$50,000 on a player are similarly only appealable to the Commissioner. Furthermore, a fine or suspension imposed on a player for "conduct on the playing court (regardless of its financial impact on the player)" can only be appealed to the Commissioner.

When evaluating the "Commissioner's authority" decisions below, consider the breadth of the Commissioner's power relative to the degree to which the player's alleged offense threatens "public confidence" in the sport. On the other hand, consider the extent to which arbitral scrutiny of a Commissioner's decision under the Collective Bargaining Agreement tends to increase according to the severity of the punishment imposed.

Major League Baseball¹²

Brief Summary

The MLB Commissioner may punish players for off-field conduct if such conduct challenges the integrity of, or the maintenance of public confidence in, baseball. Similarly, individual teams may punish players for off-field conduct that does not conform to high standards of personal conduct and may terminate a player's contract if the player fails, refuses, or neglects to conform his personal conduct to the standards of good citizenship. Team disciplinary action is subject to review by an impartial arbitration panel under a just cause standard of review; Commissioner disciplinary action is only reviewable by the Commissioner himself.

Commissioner Authority

Per the MLB Constitution, the Commissioner may take disciplinary action involving "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball."

As set forth in the 2017–2021 Basic Agreement, such action is not subject to the ordinary grievance procedure. Article XI(A)(1)(b) states:

"Grievance" shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball. Within 30 days of the date of the action taken, such complaint shall be presented to the Commissioner who promptly shall conduct a hearing in accordance with the Rules of Procedure. . . The Commissioner shall render a written decision as soon as practicable following the conclusion of such hearing. The Commissioner's decision shall constitute full, final and complete disposition of such complaint, and shall have the same effect as a Grievance decision of the Arbitration Panel. In the event a matter filed as a Grievance in accordance with the procedure hereinafter provided in Section B gives rise to issues involving the integrity of, or public confidence in, the game of baseball, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such

¹² The MLB Constitution, the Basic Agreement, and the Uniform Player Contract are available at: <http://mlb.mlb.com/home>. At the time of this writing, the MLB CBA was recently renegotiated. For the most up-to-date information, follow Michael McCann's articles at SI.com and the Sports Law Blog, visit www.MLB.com, and visit www.mlbpa.com.

procedure and thereafter be processed in accordance with the procedure provided above in this subparagraph (b).

The Association may reopen this Agreement, with reference solely to Section A(1)(b) and Section C of this Article, upon the giving of 10 days' written notice at any time, based upon experience under the aforesaid Sections which, in its opinion, is unsatisfactory.¹³

Team Authority

Per § 3(a) of the Major League Uniform Player's Contract ("UPC") (appended to the Basic Agreement as Schedule A),

The Player agrees to perform his services hereunder diligently and faithfully, to keep himself in first-class physical condition and to obey the Club's training rules, and pledges himself to the American public and to the Club to conform to high standards of personal conduct, fair play and good sportsmanship.

Further, per § 7(b):

The Club may terminate this contract upon written notice to the Player. . . if the Player shall at any time: (1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules; or (2) fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team; or (3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract.

While Commissioner discipline is not subject to the grievance procedure outlined in Article XI of the Basic Agreement, team discipline is subject to this procedure. If a player chooses to appeal team discipline, his appeal will be heard by an arbitration panel. Per Article XI(A)(9), an arbitration panel "shall mean the impartial arbitrator or, where either Party elects in advance of the opening of the hearing in a matter, a tripartite panel so empowered and composed of the impartial arbitrator and two party arbitrators, one appointed by the Association, the other appointed by the LRD." Per Article XII, the arbitration panel will review disciplinary action using a just cause standard of review.

¹³ For a specific example, see Chapter 6, Section I re: Biogenesis Scandal.

Personal Conduct Policy

On August 21, 2015, Major League Baseball announced its own personal conduct policy for disciplining players for domestic violence, sexual assault, and child abuse.¹⁴ Unlike the NFL's most recent policy, MLB's policy was collectively bargained for between the League and the Union.¹⁵ The Policy gives the MLB Commissioner the authority to punish players, with "no maximum, no minimum" punishments, regardless of whether the player is found guilty or enters a guilty plea.¹⁶ Appeals may be heard by an independent arbitrator through the MLB's regular appeals process.¹⁷

A player accused of domestic violence, sexual assault, or child abuse can be placed on "administrative leave" for up to seven days while a decision is made. Like in the NFL, a suspension is not dependent on a criminal conviction, and a decision can be postponed until a criminal case has been resolved. If a player is suspended, they will not receive service time, potentially impacting free agency and salary arbitration, which is discussed in Chapters 2 and 3. If the Commissioner determines that allowing a player currently under criminal investigation would substantially or irreparably harm the league or team, then a player can be suspended with pay while the charges are pending.

The so-called "A-Rod provision" states that the player and union can *only* be represented by in-house counsel of the MLBPA or outside counsel appointed by the association—this is a result of Rodriguez hiring outside counsel following the Biogenesis Scandal, which is fully explored in Chapter 6. Finally, a joint policy board consisting of three experts is charged with developing a treatment plan for the players—refusal to enter the treatment potentially subjects a player to further discipline.

Since the implementation of this policy, several high-profile players have been disciplined by Commissioner Manfred: Jose Reyes,¹⁸ Aroldis Chapman,¹⁹ Hector Olivera,²⁰ and Jeurys Familia²¹

¹⁴ MLB, MLBPA Announce Joint Policy Regarding Domestic Violence, Sexual Assault and Child Abuse, August 21, 2015, MLB.COM, available at: <http://m.mlb.com/news/article/144506188/mlbmlbpa-announce-policy-for-domestic-violence-sexual-assault-child-abuse/>.

¹⁵ *Id.*

¹⁶ Dave Brown, MLB Enacts Domestic Violence, Sexual Assault and Child Abuse Policy, CBSSPORTS.COM, August 21, 2015, available at: <http://www.cbssports.com/mlb/news/mlb-enacts-domestic-violence-sexual-assault-and-child-abuse-policy/>.

¹⁷ *Id.*

¹⁸ Jeff Todd, Jose Reyes Suspended Through May 31 Under Domestic Violence Policy, MLB Trade Rumors, May 13, 2016, available at: <http://www.mlptraderumors.com/2016/05/jose-reyes-suspended-through-may-31.html>.

National Basketball Association²²

Brief Summary

The NBA Commissioner has the power to punish players for off-court conduct in order to preserve the integrity of, or maintain public confidence in, the game. When convicted of a violent felony, any player shall be suspended for a minimum of ten games. If there is reasonable cause to believe that a player has engaged in off-court violent conduct, including domestic violence, a clinical evaluation is required. If a player's punishment for off-court conduct results in a financial impact of \$50,000 or less, Commissioner discipline is only reviewable by the Commissioner. If, however, punishment results in financial impact of more than \$50,000, a player may file a grievance and have it heard by an impartial arbitrator. While the collective bargaining agreement states that grievances involving the preservation of the integrity of the game should be reviewed using an arbitrary and capricious standard of review, it confusingly also states, in another provision, that grievances regarding discipline shall be reviewed under a just cause standard. This has caused much debate and conflicting arbitral results.

Teams may also punish players for off-court conduct; however, NBA action supersedes team action when both attempt to discipline a player for the same off-court conduct. Under the UPC, teams may fine or suspend players for conduct not in accordance with the highest standards of honesty, citizenship, and sportsmanship, and teams may terminate a player's contract if he fails, refuses, or neglects to conform his personal conduct to standards of good citizenship, good moral character, and good sportsmanship.

Commissioner Authority

Per Article 35 of the NBA Constitution:

The Commissioner shall have the power to suspend for a definite or indefinite period, or to impose a fine not exceeding \$50,000, or inflict both such suspension and fine upon any Player who, in his opinion, (i) shall have made or

¹⁹ Paul Hagen and Bryan Hoch, Chapman gets 30-game suspension from MLB, MLB.com, March 1, 2016, available at: <http://m.mlb.com/news/article/165860226/yankees-aroldis-chapman-suspended-30-games/>.

²⁰ Mike Axisa, Hector Olivera suspended 82 games for domestic violence incident, CBS Sports, May 26, 2016, available at: <http://www.cbssports.com/mlb/news/hector-olivera-suspended-82-games-for-domestic-violence-incident/>.

²¹ MLB suspends Mets closer Jeurys Familia for violating domestic violence policy, ESPN.com, March 30, 2017, available at: http://www.espn.com/mlb/story/_id/19030998/new-york-mets-closer-jeurys-familia-gets-15-game-suspension.

²² The NBA CBA, Constitution and Bylaws, and UPC are available at: <http://nbpa.com/cba/>.

caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member, or (ii) shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association.

There are specific provisions in the collective bargaining agreement providing guidelines for punishment of conduct involving unlawful violence and violent misconduct. Article VI (Player Conduct) § 7 states, "When a player is convicted of (including a plea of guilty, no contest, or nolo contendere to) a violent felony, he shall immediately be suspended by the NBA for a minimum of ten (10) games." Further, in § 8:

[W]hen the NBA and the Players Association agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent conduct, the player will . . . be required to undergo a clinical evaluation. . . and, if deemed necessary by such expert, appropriate counseling, with such evaluation and counseling program to be developed and supervised by the NBA and the Players Association. For purposes of this paragraph, "violent conduct" shall include, but not be limited to, sexual assault and acts of domestic violence.

There are specific directions with regard to the grievance procedures for player discipline. In Article XXXI, § (9), the collective bargaining agreement explains:

(a) A dispute involving (i) a fine of \$50,000 or less or a suspension of twelve (12) games or less (or both such fine and suspension) imposed upon a player by the Commissioner (or his designee) for (x) conduct on the playing court (as defined in Section 9(c)(i) below), or (y) for in-game conduct involving another player (as defined in Section 9(c)(ii) below), or (ii) action taken by the Commissioner (or his designee) (A) concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) resulting in a financial impact on the player of \$50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration; but instead shall be processed exclusively. . .

(b) A dispute involving (i) a fine of more than \$50,000 and/or a suspension of more than twelve (12) games that is imposed upon a player by the Commissioner (or his designee) for conduct on the playing court, or (ii) an action taken by the Commissioner (or his designee) that (A) concerns the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and (B) results in a financial impact on the player of more than \$50,000, shall be processed and determined in the same manner as a Grievance under Sections 2–7 above; provided, however, that the Grievance Arbitrator shall apply an “arbitrary and capricious” standard of review.

Despite this seemingly clear language, outlining the use of an arbitrary and capricious standard of review for all grievances involving discipline that has resulted in a fine of more than \$50,000 or a suspension of more than twelve games, Article XXXI, § (15)(c) confusingly states:

The parties recognize that a player may be subjected to disciplinary action for just cause by his Team or by the Commissioner (or his designee). Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed. Notwithstanding the foregoing, in all proceedings pursuant to Section 9(b) above, the Grievance Arbitrator shall apply an “arbitrary and capricious” standard of review as set forth in that Section.

Team Authority

Under the collective bargaining agreement, a team may also punish players for instances of off-field misconduct; however, “The NBA and A Team shall not discipline a player for the same act or conduct. The NBA’s disciplinary action will preclude or supersede disciplinary action by any Team for the same act or conduct.”

Per § 5 of the Uniform Player Contract (appended to the collective bargaining agreement as Exhibit A),

(b) The Player agrees: (i) to give his best services, as well as his loyalty, to the Team, and to play basketball only for the Team and its assignees; (ii) to be neatly and fully attired in public; (iii) to conduct himself on and off the court according to the highest standards of honesty, citizenship, and sportsmanship; and (iv) not to do anything that is materially detrimental or materially prejudicial to the best interests of the Team or the League.

(c) For any violation of Team rules, any breach of any provision of this Contract, or for any conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player, the Team may reasonably impose fines and/or suspensions on the Player in accordance with the terms of the CBA.

(d) The Player agrees to be bound by Article 35 of the NBA Constitution, a copy of which, as in effect on the date of this Contract, is attached hereto. The Player acknowledges that the Commissioner is empowered to impose fines upon and/or suspend the Player for causes and in the manner provided in such Article, provided that such fines and/or suspensions are consistent with the terms of the CBA.

§ 16 (Termination) outlines the reasons a Team may terminate the Contract.

National Football League²³

Brief Summary

The Commissioner has the authority to impose punishment for off-field conduct detrimental to the integrity of, or public confidence in, the game of football. The Commissioner's discipline is subject only to his review upon player appeal. Teams may similarly punish players for off-field conduct (provided the league has not already handed down discipline for the same conduct); however, team discipline is subject to review by an impartial arbitrator. The Personal Conduct Policy provides guidelines for player discipline involving off-field conduct. This Policy makes clear that the Commissioner may punish players for irresponsible off-field conduct, even if it does not result in a criminal conviction. While the suspension length for certain kinds of conduct are still subjective and based on the Commissioner's discretion, the NFL owners did adopt changes in 2014 that provided more predictability and structure for suspensions related to domestic violence, child abuse, and other crimes of violence.²⁴

Commissioner Authority

Per Article XI of the 2011–2020 NFL collective bargaining agreement, the Commissioner may impose fines or suspensions for

²³ The NFL CBA, Bylaws, and Uniform Player Contract are available at: <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

²⁴ NFL Owners Endorse New Personal Conduct Policy, NFL.com, December 10, 2014, available at: <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy>.

off-field conduct “detrimental to the integrity of, or public confidence in, the game of professional football.” Under such circumstances, “[T]he Commissioner will promptly send written notice of his action to the player with a copy to the NFLPA. Within twenty days following such written notification, the player affected thereby, or the NFLPA with the player’s approval, may appeal in writing to the Commissioner.”

Under the same Article regarding Commissioner Discipline, “The Commissioner and a Club will not discipline a player for the same act or conduct. The Commissioner’s disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.”

Team Authority

While Commissioner discipline for off-field conduct is only reviewable by the Commissioner himself, “Any dispute involved in Club discipline may be made the subject of a non-injury grievance under Article IX” (per CBA Article VIII, § 4). Under Article IX, a player may have team discipline reviewed by an impartial arbitrator whose decision “will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement.”

Per § 11 of the NFL Player Contract (appended to the NFL CBA as Appendix C):

Player understands that he is competing with other players for a position on Club’s roster within the applicable player limits. If at any time, in the sole judgment of Club, Player’s skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club’s roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.

Under § 15²⁵:

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 accepts a bribe or agrees to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with

²⁵ § 15 is a focal point of the Deflategate Scandal, see Chapter 1, Section VI.

stimulants or other drugs for the purpose of attempting to enhance on-field performance; or 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.

Personal Conduct Policy

Background

Commissioner Goodell instituted a Personal Conduct Policy in 1997, enhanced the Policy in 2007, and updated it again in August 2014 following Ray Rice's domestic violence incident.²⁶ The revised policy was accepted with a unanimous vote of the thirty two NFL club owners in December of 2014. According to an NFL press release, the policy was drafted "after an extensive series of meetings and discussions [with] experts and others inside and outside the NFL, including current and former players, the NFL Players Association, domestic violence/sexual assault experts and advocates, law enforcement officials, academic experts, and business leaders" which lasted over four months.²⁷ The new Policy includes "additional NFL-funded counseling and services for victims, families, and violators," a larger list of prohibited conduct, criteria for paid leave for individuals charged with committing a violent crime, a committee to review and update the policy, and a new procedure for issuing discipline for violations of the policy.²⁸ It was issued under the Commissioner's authority under the CBA to protect the NFL from "conduct detrimental" to the League.

Discipline Under the Policy

The updated Policy establishes a new procedure for disciplining players and others who are "part of league."²⁹ The policy is as follows:³⁰

²⁶ Jane McManus, Severe Penalties for Domestic Violence, August 29, 2014, ESPNW, available at: <http://www.espn.com/espnw/news-commentary/article/11425377/nfl-implements-domestic-violence-penalties>.

²⁷ See NFL Owners Endorse New Personal Conduct Policy, *supra*.

²⁸ *Id.*

²⁹ *Id.*

³⁰ The Personal Conduct Policy is available at: <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf>. The information that follows is from this page unless stated otherwise.

1. *NFL Investigation.* Teams are required to report any potential violations of the policy to the NFL. Once the NFL learns of a possible violation of the policy, it will begin an investigation. If there is a police investigation, the NFL may wait to investigate until the completion of the law enforcement proceedings.
2. *Exempt List.* When a player is formally charged or the NFL determines that there is evidence that a violation has occurred, the commissioner may put a player on the exempt list. The policy does not specify the amount of evidence that is required to put a player on the exempt list, stating only that the decision “will not be guided by the same legal standards and considerations that would apply in a criminal trial.” If put on the list, the player will be paid their salary but will not be eligible to participate in practices or games and will not count towards one of the team’s roster spots. The commissioner may place a player on the list for a set period of time or indefinitely to be removed at the commissioner’s discretion.³¹
3. *Determining Whether There Is a Violation.* An individual is found to have violated the policy upon the “disposition of a criminal proceeding. . . or if the evidence. . . demonstrates that [the individual] engaged in conduct prohibited by the Personal Conduct Policy.”
4. *Discipline.* An initial decision is “made or recommended” by a “disciplinary officer.” A disciplinary officer is a member of the league office who is a “highly-qualified individual with a criminal justice background.” The disciplinary officer acts on a delegation of authority from the commissioner and may consult independent advisors. The player or other League employee is to be presented with the evidence against him and have an opportunity to meet with the disciplinary officer prior to the imposition of the disciplinary measures. The disciplinary officer must provide a written order explaining the findings of a violation and any the rationale behind the discipline imposed. The

³¹ Kevin Patra, What is the Exempt List?, NFL.com, September 17, 2014, available at: <http://www.nfl.com/news/story/0ap3000000396169/article/what-is-the-exempt-list>.

discipline may be a fine, suspension of any length, community service, and/or a requirement to seek counseling, or league banishment. The officer will consider mitigating and aggravating factors. Repeat offenders, owners, and league officials are subject to greater discipline. There is a baseline suspension of six games for first time offenders in cases of sexual assault or domestic abuse.

5. *Appeals.* Players may appeal under Article 46 of the CBA. The commissioner may name a panel to recommend a decision on appeal, but the commissioner makes the final decision on appeal.

NFLPA's Challenge

NFLPA's Prior Proposal

Prior to the release of the NFL's policy, the NFLPA sent the NFL a proposed revision to Personal Conduct Policy. Under the Union's proposal, the commissioner or a designee would issue a disciplinary decision, but appeals would be heard by a neutral panel of arbiters.³²

NFLPA's Grievance

In January 2015, the month following the NFL's rollout of the new policy, the NFLPA filed a grievance against the NFL and the Clubs under Article 43 of the CBA.³³ The grievance sought a declaration that provision in the Policy that are inconsistent with the CBA, custom, and the "law of the shop" and an order preventing their implementation.³⁴ Specifically, the NFLPA challenged the use of the Exempt List, the delegation of authority to make initial rulings regarding discipline to the disciplinary officer, the option of mandatory counseling as discipline, and the use of third party advisors on appeal.³⁵

NFLPA's Arguments, Generally

The NFLPA asserted that the new Personal Conduct Policy was neither in accordance with the CBA nor collectively bargained, and it is therefore unenforceable.³⁶ The NFLPA did not challenge the

³² Tom Pelissero, NFLPA Outlines Proposal for Neutral Arbitration in Personal Conduct Policy, December 17, 2015, USA TODAY, available at: <http://www.usatoday.com/story/sports/nfl/2015/12/17/nflpa-personal-conduct-policy-proposal/77504646/>.

³³ *In the Matter of the Arbitration Between NFLPA v. NFL and 32 Club Members*, Jonathan B. Marks, Arbitrator, 2, April 11, 2016.

³⁴ *Id.* at 3.

³⁵ *Id.* at 4.

³⁶ *Id.* at 5.

authority of the NFL to unilaterally create a new policy, but opposed the aspects of the policy which conflict with the CBA.³⁷ According to the NFLPA, Article 46 of the CBA limits the commissioner's authority to discipline "conduct detrimental," and the new Personal Conduct Policy oversteps the limits on the commissioner's authority.³⁸

NFL's Arguments, Generally

The NFL rebutted that the commissioner has historically had "complete authority" to discipline players and that the NFLPA has never challenged prior conduct policies.³⁹ Further, the NFL argued the NFLPA failed to meet its burden of showing the Personal Conduct Policy, "on its face," conflicted with the CBA which does not limit scope of discipline of process by which it is issued.⁴⁰ Finally, the NFL argued the grievance was premature because it did not yet violate the CBA as applied to any players.⁴¹

Arbitration Decision

As a threshold matter, Arbitrator Jonathan Marks concluded that this grievance was also ripe for arbitration.⁴² Marks then addressed the NFLPA's main contentions regarding the policy in turn.

Exempt List

The NFLPA argued the CBA allows the commissioner to utilize a set menu of punishments—fine, suspension, or termination of contract—and only after a player is found to have engaged in conduct detrimental. According to the NFLPA, the exempt list is a punitive measure employed before a hearing or determination of culpability, and any changes to its use should be collectively bargained for.⁴³ The NFL countered that pay without leave is not disciplinary, but a routine practice when an investigation is pending, and thus a hearing is not required and it is not a punishment outside the scope of the CBA.⁴⁴

Marks addressed these points in turn and reached the following conclusions. First, he concluded that the CBA addressed discipline after a hearing, such that the commissioner may unilaterally create procedures related to paid leave which would impact players prior

³⁷ *Id.* at 5.

³⁸ *Id.* at 5–6.

³⁹ *Id.* at 6 (quoting the NFL's brief).

⁴⁰ *Id.* at 6 (quoting the NFL's brief).

⁴¹ *Id.* at 6 (quoting the NFL's brief).

⁴² *Id.* at 8 (citing *Rozelle Augmented Drug Policy Matter (Augmented Drug)*).

⁴³ *Id.* at 10–11.

⁴⁴ *Id.* at 11.

to a final decision.⁴⁵ Moreover, he concluded that pay without leave is not a suspension as contemplated by the CBA because the player received compensation and can be involved in team activities outside of practice and games. He drew a comparison to Arbitrator Kasher's decision in *Scott v. Dallas Cowboys* which found that being placed on Non-Football Injury list, which bars a player from football activity for thirty days without pay but allows him to communicate with the team, is not a suspension, and found that being put on the exempt list is less severe and so is also not a suspension.⁴⁶ Accordingly, the CBA's provisions regarding suspension does not bar the use of the exempt list. Finally, the arbitrator cited the commissioner's "broad, far-reaching, and plenary" authority under the CBA to establish policies and procedures to protect the integrity of the game as grounds for establishing pay without leave procedures which do not facially conflict with the CBA.⁴⁷ Therefore, the Personal Conduct Policy's use of unpaid leave is permissible under the CBA. The analysis continued, however, that because unpaid leave is an "action" "against" a player "for" conduct detrimental, it falls under Article 46 and so its use is subject to the notice, appeal, and hearing provisions of that Article.⁴⁸ The use of the Exempt List to achieve that end is not materially different from the Exempt List under the CBA and so is a permissible method of issuing unpaid leave.⁴⁹

Disciplinary Officer

The NFLPA contended the commissioner cannot delegate his disciplinary authority to a disciplinary officer. The Union argued that because the CBA outlines the "exclusive" procedures for disciplining detrimental conduct, and this procedure does not include the power to delegate authority over initial disciplinary actions. Moreover, the CBA gives the commissioner the power to delegate authority on appeal, so it cannot be said that the commissioner has the authority to delegate initial discipline. The NFL, in response, claimed that the commissioner had and exercised the power to delegate authority without objection, the CBA does not bar delegation, and that it would be impracticable for the commissioner to rule in every conduct detrimental case.

Arbitrator Marks began his analysis with the language of the CBA. He observed that Article 46 requires in the "*exclusive process*" that the commissioner give notice of "*his action*" and concluded that the

⁴⁵ *Id.* at 11–12.

⁴⁶ *Id.* at 15–18.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 29.

⁴⁹ *Id.* at 33.

commissioner must therefore take the action of issuing discipline in the first instance.⁵⁰ He also accepted the NFLPA's *inclusio unius est exclusio alterius* argument and found the argument that permitting designation would upend Article 46 precedent.⁵¹ Accordingly, Marks found that the commissioner may not delegate the authority to issue initial disciplinary orders. He then suggested, without deciding, that staff members may be help compile a record and write a recommendation, but emphasized that the commissioner must issue or sign off on the final decision.⁵² Marks retained jurisdiction to assess future policies if the parties cannot agree on revised procedures.⁵³

Involvement of Other Advisors

The NFLPA contested the Policy's allowance of outside advisors in both the initial conduct detrimental decision and the appeal. The Union argued the process is a collectively bargained for and confidential process and the use of advisors is outside the CBA and the custom and practice of disciplinary actions.⁵⁴ It again pointed to the word "exclusive" in the Article 46 process and argued that because the CBA does not sanction advisors, they cannot be utilized. The NFL responded that former versions of the policy allowed for medical, law enforcement, or other relevant professionals to advise the NFL in issuing discipline, and that their lack-of mention in the CBA does not mean advisors are prohibited. The arbitrator pointed to the prior arbitration in *Rozelle Augmented Drug Policy Matter (Augmented Drug)* where Arbitrator Kasher found advisors were permissible because they are not prohibited by the CBA and the NFLPA knew and encouraged the use of advisors.⁵⁵ By analogy, he found the Policy's permitting advisors in disciplining players does not violate the players' rights under the CBA and advisors are therefore permissible. He suggested the role of advisors in the appellate process can and should be clarified in a future rendition of the policy.⁵⁶

Counseling, Treatment, and Therapy

The NFLPA contested the use of counseling as a possible disciplinary measure under the policy because it is outside the scope of possible measures under Article 46 of the CBA, namely fines, suspension, and termination, and sought a policy where counseling

⁵⁰ *Id.* at 37 (emphasis in original).

⁵¹ *Id.* at 38.

⁵² *Id.* at 40.

⁵³ *Id.* at 40.

⁵⁴ *Id.* at 41.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* at 46.

and therapy was used as a means to help players rather than discipline them.⁵⁷ The NFL contests that the language of Article 46 does not intend to exhaust all possible methods of discipline, Rule 8.6 of the Constitution and Bylaws gives the Commissioner authority to take actions he deems “necessary and proper” in relation to conduct detrimental, and that the NFLPA waived its objection by not grieving when faced with this form of discipline in earlier instances.⁵⁸ The arbitrator found that the NFLPA was concerned with the characterization of counseling as discipline, and the NFL acknowledged it believed the difference between labeling counseling as help or discipline was immaterial. Therefore, he directed the parties to meet and confer to adopt mutually agreeable language.

Summary of Findings

- “This grievance is properly before me for decision.
- The New Policy’s provisions relating to Leave with Pay and the Exempt List are, on their face, valid exercises of the Commissioner’s authority.
- When the Commissioner decides to place a player on paid administrative leave or the Exempt List pursuant to the Leave with Pay provisions of the New Policy, he must comply with the procedural requirements of Article 46.
- As now written, the provisions of the New Policy relating to the disciplinary officer violate the CBA. I retain jurisdiction in the event the Parties are unsuccessful in agreeing to the terms of a revised policy.
- The New Policy’s provisions relating to expert and independent advisors and the panel of independent experts are, on their face, valid exercises of the Commissioner’s authority, although further issues may arise depending on how these provisions are implemented in practice.
- The Parties’ dispute over the counseling, treatment, therapy and enhanced supervision elements of the New Policy can and should be resolved by language changes to the New Policy. I retain jurisdiction in the

⁵⁷ *Id.* at 49–50.

⁵⁸ *Id.* at 51.

event the Parties are unsuccessful in agreeing to the terms of a revised policy.”⁵⁹

II. GAMBLING

Allegations that players, coaches, referees, and other professional sports personnel are betting on games raise the specter that games are decided not by the players’ skills, but rather by the money at stake. *Rose v. Giamatti* and *Molinas v. National Basketball Association* involved circumstances in which the Commissioner of the MLB and NBA, respectively, issued a lifetime ban for gambling.

Though the narrow legal issue in *Rose v. Giamatti* was whether the Cincinnati Reds were a necessary party to the lawsuit, thereby destroying federal jurisdiction based on diversity, the issue of paramount importance was what penalty all-time hits leader Pete Rose would face from Commissioner Bart Giamatti as a result of his betting—while employed as Reds manager—on his team to win. Rose’s gambling violated MLB’s anti-gambling policy, posted prominently in each MLB locker room.⁶⁰

Commissioner Giamatti hired a lawyer to investigate rumors of Rose’s betting. The Commissioner argued that he was empowered to do so under Article I of the Major League Agreement (MLA), which gives the Commissioner the power to investigate and take action against an act that is not in the best interests of the game. Rose argued that as a result of this investigation, the Commissioner could not give Rose a fair hearing because the Commissioner had already prejudged the facts. Though Rose won a 10-day restraining order in state court,⁶¹ he could not prevent Commissioner Giamatti from removing the case to federal court. Pete Rose was a domiciliary of Ohio. To keep the case out of federal court, Rose sued Commissioner Giamatti (domiciliary of New York) and the Cincinnati Reds (Ohio). The Reds were not a necessary party to the suit, and therefore, the requisite diversity for federal jurisdiction existed. More importantly, the Ohio court reasoned that the contract between Rose and the Reds incorporated the MLA, and the Agreement states that Rose is subject to the discipline of the Commissioner, not the Reds.

Ultimately, Rose and Commissioner Giamatti reached a litigation-ending settlement that stipulated (1) Rose was permanently banned from any employment or association with

⁵⁹ *Id.* at 53–54.

⁶⁰ Major League Rules, Rule 21(d).

⁶¹ *Rose v. Giamatti*, 721 F.Supp. 906 (S.D. Ohio 1989).

MLB, (2) there would be no hearing into Rose's alleged gambling activity, and (3) Rose's acknowledgment that the Commissioner has the authority to investigate and act in reaction to any matter the Commissioner believes is contrary to the best interests of baseball.⁶²

In *Molinas v. National Basketball Association*,⁶³ Commissioner Maurice Podoloff indefinitely suspended Jack Molinas, a player for the Fort Wayne Pistons, for betting 10 times on the Pistons to win. Molinas's bets—which he voluntarily admitted placing—violated the NBA policy prohibiting players from betting on any games in which they were to play.⁶⁴ Five years after his unsuccessful suit against Commissioner Podoloff for the penalty—and after Molinas graduated from law school—Molinas filed an antitrust suit against the NBA, claiming that the punishment illegally and unreasonably restrained Molinas's ability to trade with his services. In rejecting Molinas's antitrust suit, the Court found that the punishment was necessary to enforce the NBA's strict anti-gambling policy and to restore public confidence in the game and that Molinas had failed to prove a conspiracy existed.

Compare the legal challenges brought forth by *Rose* and *Molinas*. What role does the MLB "antitrust exemption" play in the outcomes of these two cases?

The NFL has had its fair share of player malfeasance as well.⁶⁵ When Commissioner Pete Rozelle discovered that two of the league's best players, Paul Hornung of the Green Bay Packers and Alex Karras of the Detroit Lions, had bet on NFL games in contravention of the standard player contract, Commissioner Rozelle indefinitely suspended both players in 1963. Unlike Rose and Molinas, Hornung and Karras were reinstated after one season, and Hornung has been inducted into the Pro Football Hall of Fame.

Recent developments related to fantasy sports and daily fantasy sports have resulted in the Leagues carefully monitoring player involvement, though with varying approaches.⁶⁶ The MLB and MLBPA agreed that players receiving prizes for participating in fantasy sports will be subject to discipline under Rule 21—the

⁶² *Rose v. Giamatti*, 721 F.Supp. 906 (S.D. Ohio 1989) and *Rose v. Giamatti*, 721 F.Supp. 924 (S.D. Ohio 1989). See also the Rose/Giamatti Agreement (available at: <http://baseball1.com/files/rose/agreement.html>).

⁶³ 190 F.Supp. 241 (S.D.N.Y. 1961).

⁶⁴ See NBA Constitution Article 13 and NBA CBA §§4-5 and Article VII.

⁶⁵ The NFL Gambling Policy is distributed to all players at the beginning of each year. The full policy is available at: <https://www.scribd.com/document/345012002/NFL-Gambling-Policy>.

⁶⁶ For more information, see Chapter 2, Section IV.

same rule that resulted in a lifetime ban for Pete Rose.⁶⁷ However, given the MLB's efforts to attract younger fans to the game, Commissioner Manfred has opened the door to reconsidering this policy in the future.⁶⁸ The NFL, however, allows their players to participate in fantasy sports, but limits all NFL and team personnel—players, coaches, executives, etc.—to prizes not in excess of two hundred fifty dollars (\$250)—also known as the \$250 rule.⁶⁹ The NBA has allowed expressly prohibited all NBA personnel from playing in fantasy sports for a prize, however, Commissioner Silver has been a strong advocate for legalizing sports betting and the NBA is an equity investor in FanDuel.⁷⁰

Is an indefinite, lifetime suspension appropriate, or is too severe of a penalty? Should it matter if a player or manager is betting on his own team, or on other teams? What, if any, should be the court or arbitrator standard of review of Commissioner penalties against players and managers who have allegedly been gambling?

SUMMARY QUESTION

Should an appeal to a Court ever be allowed related to professional athletes' participation in fantasy sports, now that the CBAs and UPCs clearly govern the area? Would the answer to that question be different in the NFL, given the Commissioner's near plenary authority under the Personal Conduct Policy?

III. MISCONDUCT ON THE PLAYING FIELD⁷¹

At what point should the law intervene for “misconduct on the field”? How can one evaluate, on a principled basis, when a physical act on the field or court goes beyond that which is tolerable, in the context of a physical game, and transcends into the realm of

⁶⁷ Darren Rovell, MLB, union prohibit players from daily fantasy games, ESPN.com, April 10, 2015, available at: http://www.espn.com/mlb/story/_/id/12661248/major-league-baseball-forbids-players-participate-daily-fantasy-games.

⁶⁸ Lindsey Foltin, MLB commissioner admits the league is rethinking its stance on gambling, FOX Sports, February 8, 2017, available at: <http://www.foxnews.com/sports/2017/02/08/mlb-commissioner-admits-league-is-rethinking-its-stance-on-gambling.html>.

⁶⁹ Mike Florio, NFL players can play daily fantasy, they just can't win much, NBC Sports—Pro Football Talk, September 29, 2015, available at: <http://profootballtalk.nbcsports.com/2015/09/29/nfl-players-can-play-daily-fantasy-they-just-cant-win-much/>.

⁷⁰ Brent Schrotenboer, Leagues see real benefits in daily fantasy sports, USA TODAY Sports, January 1, 2015, available at: <https://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

⁷¹ For an example of Misconduct on the Playing Field in the context of the NFL, see the Bountygate Study Guide in Appendix A, Tab 13.

assault? Compare *Sprewell v. Golden State Warriors*,⁷² which stemmed out of an incident during an NBA practice, with the Pacers-Pistons arbitration,⁷³ which stemmed from a fight between players and extended into the stands, with *McSorley*, which stemmed from an on-ice incident during an NHL game.

During practice, Latrell Sprewell choked and threatened to kill Warriors coach P.J. Carlesimo. Sprewell departed the practice facility, then returned to choke and threaten his coach once again. Immediately thereafter, the Golden State Warriors suspended Sprewell. Upon learning of the incident, Commissioner Stern suspended Sprewell for one year, and the Warriors subsequently terminated Sprewell's contract. As explained in Part I, pursuant to NBA rules, any disciplinary decision by a Commissioner that exceeds the then limit of \$25,000 is reviewable by an arbitrator to determine if the punishment is for "just cause." Though the arbitrator found that dual punishments were permissible, upon review, the arbitrator determined that Commissioner Stern's punishment was too severe, and reduced the suspension from 82 to 68 games. Further, the arbitrator determined that the Warrior's termination was void for lack of just cause, because the suspension already made it impossible for Sprewell to play. The Ninth Circuit upheld the arbitrator's decision upon appeal.

In November of 2004, in the final minute of a game in Detroit, Ron Artest of the Pacers and the Pistons' Ben Wallace engaged in a brief shoving match. After the players were separated, a spectator threw a beverage that struck Artest. Artest proceeded to charge into the stands, striking several fans. Fellow Pacer Stephen Jackson also entered the stands and fought with spectators, as teammate Anthony Johnson left the bench to confront another fan. Meanwhile, Jermaine O'Neal attempted to enter the stands, was restrained by an arena official who he pushed away, and then struck a fan who had descended onto the basketball court.

Commissioner Stern invoked his "best interests" powers in suspending Artest for the remainder of the season, Jackson for thirty games, Johnson for five games, and O'Neal for twenty-five games. The players and the NBA filed an appeal under the grievance procedure, claiming a lack of "just cause." The NBA argued that the dispute was not arbitrable and that any appeal was solely within the Commissioner's power to review. The NBA objected to the grievance procedure and did not attend the arbitration. At the conclusion of the hearing, the arbitrator upheld

⁷² 266 F.3d 979 (9th Cir. 2001).

⁷³ *National Basketball Ass'n v. National Basketball Players Ass'n*, 2005 WL 22869, at *1 (S.D.N.Y. 2005).

the full suspensions of Artest, Jackson, and Johnson, but found insufficient just cause to support Jackson's suspension of twenty-five games and reduced it fifteen games.

Before the District Court, the NBA's primary argument was based on Article XXXI, § 8 limiting appeals of discipline for "conduct on the playing court" solely to the Commissioner. The NBA insisted that misconduct "at or during a game" constituted "conduct on the playing court." By contrast, the players argued that the term only applied to conduct occurring as part of the game. The NBPA relied upon Article 35(h) of the NBA Constitution, providing that any challenges to a Commissioner action taken under Article 35, except for those relating to wagering on games, shall be resolved in accordance with the grievance procedure. Since Article 35(d) provides for fines or suspension for player conduct during regular season games, indicating that punishment for in-game misbehavior was appealable under 35(h), the court rejected the NBA's broad reading of "conduct on the playing court," which would render review under Article 35(h) illusory. The court asserted that the Commissioner's authority throughout the CBA and NBA constitution was clearly defined, and that if the parties intended for the Commissioner to have broader powers, they would have explicitly granted them.

In February 2000, Boston Bruin Defenseman Marty McSorley hit Vancouver Canuck Donald Brashear in the helmet with his hockey stick during the final three seconds of a game. Brashear suffered a concussion after the helmet hit and fell to the ice, hitting his helmet once again. McSorley was not only suspended for the rest of the season (23 games) by Commissioner Gary Bettman, but he was also charged with and tried for assault in Vancouver. Following his conviction and 18-month probation sentence, McSorley's suspension was extended to a full year. McSorley never played another NHL game.

SUMMARY QUESTIONS

Should an appeal to a Court ever be allowed in this area, given the CBAs and UPCs clearly govern misconduct on the playing field? Is the result different in each League, per the relevant CBA/UPC? If not, why not?

Should the arbitrator have reduced Sprewell's punishment? What effect, if any, might this have had on the legitimacy of the Commissioner's authority? Should McSorley have been tried in a court of law, or should the matter have been left to the NHL to police? What standard would you suggest ought to be applied to review the Commissioner's decisions for physical acts? What weight, if any, should be given to the context of the situation, e.g. during game play, during practice, or off the field?

Note that in the NBA, the league may promulgate rules governing player “conduct on the playing court” without NBPA approval, provided the league gives notice and consults with the NBPA.⁷⁴ Furthermore, it should be noted that “conduct on the playing court” has been broadly defined to include all activity a player engages in from the time he arrives at an arena for a game until he leaves. On the other hand, in MLB, playing and scoring rules that significantly affect terms and conditions of employment must be negotiated, as must a change in player benefits under an existing rule or regulation.⁷⁵

IV. DRUG USE

Recreational drugs and performance-enhancing drugs work in opposite directions—one diminishes the body’s capacities while the other enhances them—but the use of both is closely regulated by each of the three leagues. Drug issues in the MLB (performance enhancing drugs) and NFL (painkillers) are fully discussed in Chapter 6.

A. Recreational Drugs

Consider and compare the following evolutionary cases of Commissioner discipline for recreational drug use. In so doing, please note that the relevant CBAs and UPCs now much more carefully regulate this area of player misconduct—both on and off the playing field.⁷⁶

Following the arrest of Vida Blue, Willie Wilson, Jerry Martin, and Willie Aikens of the Kansas City Royals for cocaine possession in 1983, Commissioner Kuhn suspended each player for one-year. The players challenged the Commissioner’s ruling under the “just cause” standard before a neutral arbitrator, who agreed with the Commissioner’s conclusion that player drug use was a legitimate threat to the “best interests of baseball.” The arbitrator noted that drug use risked physical harm to the players and increased the chance that dangerous criminals could gain control over players. Despite accepting the Commissioner’s invocation of the “best interests” clause, the arbitrator still reduced Wilson’s suspension to one-month because he had been imprisoned throughout almost all of the 1983 season.

Steve Howe had been suspended from baseball for drug use six times between 1982 and 1988. Although Howe did not test positive during a two-year period when Commissioner Fay Vincent ordered

⁷⁴ NBA Collective Bargaining Agreement Art. VI, § 12 (2017).

⁷⁵ MLB Collective Bargaining Agreement Art. XVIII (2017).

⁷⁶ For more detailed information, *see* the CBA Cheat Sheet Study Guide and the NFL Prohibited Substance Policy and Josh Gordon Study Guide in Appendix A, Tabs 3 and 12.

him regularly tested, Howe was arrested in 1991 for attempted possession of cocaine. Given Howe's history, Commissioner Vincent imposed a lifetime ban, which the MLBPA challenged. Citing the *Wilson* arbitration, Arbitrator George Nicolau called for "careful scrutiny of the individual circumstances and the particular facts relevant to each case." Furthermore, Nicolau noted that the "need for scrutiny is at its zenith here simply because of the nature of the penalty at issue." Conducting a just cause review, the arbitrator determined that baseball had not done enough to justify the imposition of the penalty. For example, Nicolau argued that if Howe had been subjected to more stringent, year-round testing, he would not have engaged in the behavior that resulted in his arrest. The arbitrator ruled that the Commissioner should have examined Howe's circumstances more carefully, evaluating his condition and the adequacy of his treatment, before imposing discipline. Nicolau reduced the suspension to time served, a total of 119 days that cost Howe around \$400,000.

Commissioner Rozelle punished Miami Dolphins Randy Crowder and Don Reese following their arrests for unlawful distribution of cocaine in 1977. After each player was sentenced to one year in jail, Rozelle launched his own disciplinary process. The Commissioner's ruling discussed at-length the high standard of conduct professional players owe the public as role models. However, given the fact that the players had already served a prison sentence, he decided to forego the imposition of a suspension, only ordering that the players each contribute \$5,000 to a drug rehabilitation facility in the state of Florida. The NFLPA challenged the decision to test the scope of the Commissioner's authority. Noting that the CBA enabled the Commissioner to withdraw from the grievance procedure any "action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football," the arbitrator upheld the ruling.

The first ever appeal of an NFL Commissioner's disciplinary decision to the courts was brought by Dallas Cowboy Clayton Holmes. Holmes was suspended for four games and involuntarily enrolled in the NFL's Policy and Program for Drugs of Abuse and Alcohol (the "Drug Program") after testing positive for marijuana. Before signing with the Cowboys as a restricted free agent, Holmes visited the Detroit Lions. As a condition of potential employment, the Lions requested that Holmes submit to a drug test, for the purpose of detecting the use of steroids. After testing positive for marijuana, Holmes was enrolled in Stage 1 of the Drug Program, adopted as part of the collective bargaining process between the NFLPA and the Management Council. A player who is referred to

Stage 1 moves into Stage 2, where he is subjected to unannounced testing. A player who tests positive during Stage 2 faces a four-game suspension and advances to Stage 3, where a positive test can yield a suspension of at least one year. In 1996, Holmes tested positive on three occasions during Stage 2. After Holmes was fined and suspended for four games, he appealed to the Commissioner.

Commissioner Paul Tagliabue determined that Holmes's appeals of his initial positive test and two of the subsequent Stage 2 tests were untimely, and that there was no evidence suggesting that the remaining test was suspect. Before the District Court, Holmes argued that his involuntary enrollment in the Drug Program breached the CBA and that his suspension was improper because he did not receive full due process rights, including the opportunities to confront his accusers, to cross-examine witnesses, and to present evidence. Holmes contended that the traditional judicial deference to resolutions of labor disputes by tribunal would be misplaced in this case because of the alleged due process violations. However, the District Court concluded that since the arbitration was a voluntary component of the labor contract, the arbitrator was not the equivalent of a government official, meaning that constitutional rights did not attach. Furthermore, the breach of contract claim was rejected because the arbitration ruling "drew its essence" from the CBA.⁷⁷

Is the *Steve Howe* arbitration ruling "in the best interests of baseball"? How does it compare to the Randy Crowder/Don Reese NFL arbitration ruling? Which do you think protects the "best interests" of the league?

B. Performance Enhancing Drugs

Arguably more damaging to the game than player use of recreational drugs is player use of performance-enhancing drugs because use of such drugs undermines the authenticity of the game. Nowhere has the effect of such use been more acute in recent years than in MLB. MLB and its Commissioner Allan "Bud" Selig were hounded for years by reports into the allegedly widespread illegal use of steroids and other performance-enhancing drugs by players. While speculation and innuendo had shrouded the sport for years, allegations became firmly entrenched in public discourse after federal agents raided the offices of the Bay Area Laboratory Co-Operative (BALCO) in September of 2003.⁷⁸ The government

⁷⁷ *Holmes v. National Football League*, 939 F.Supp. 517, 519 (N.D. Tex. 1996).

⁷⁸ See Mark Fainaru-Wade & Lance Williams, *Sports and Drugs: How the Doping Scandal Unfolded; Fallout from BALCO Probe Could Taint Olympics*, Pro Sports, S.F. CHRON., Dec. 21, 2003.

officials discovered numerous documents linking players to BALCO, and, by the end of the year, Barry Bonds, Jason Giambi, and Gary Sheffield were called to testify before a grand jury conducting a probe into the company's illegal production and distribution of performance-enhancing drugs. Then, in 2005, former MLB Rookie of the Year, All-Star, and Most Valuable Player Jose Canseco published a tell-all book, "Juiced: Rampant 'roids, Smash Hits, and How Baseball Got Big", that chronicled his own steroid use and that of other MLB players. The fallout from the BALCO investigation and "Juiced" led to congressional hearings in 2005, where the House Committee on Government Reform took Selig and Donald Fehr, Executive Director of the MLBPA, to task for not doing more to curb the use of illegal performance-enhancing drugs in their sport.⁷⁹ Largely in response to Congress's criticism, MLB and the MLBPA negotiated enhanced penalties for steroid use that went into effect before the 2006 season.⁸⁰

On March 30, 2006, baseball began another process that would culminate in condemnation for both the players and management when Commissioner Selig tapped former Senate Majority Leader George Mitchell to conduct an investigation into the use of performance-enhancing drugs in baseball's recent past.⁸¹ Released on December 13, 2007, the Mitchell Report blamed both MLB and the MLBPA for their collective failure to address the problem of steroid use and named eighty-six players, including Bonds, Giambi, Sheffield, and Roger Clemens, who used illegal performance enhancing drugs. In a subsequent hearing before Congress on January 15, 2008, Selig accepted Mitchell's criticisms for baseball's failure to act during the mid-to-late 1990s, but also pointed out that even if he had taken a harder line and proposed a more rigorous drug policy, the MLBPA would have prevented him from imposing a stronger testing regime.⁸² As for the players named in the Mitchell Report, Selig's efforts to punish these players appear to have been stymied by union pressure.

Barry Bonds, baseball's all-time home run king, faced indictments for fourteen counts of making false statements under oath and one for obstruction of justice stemming from his testimony

⁷⁹ Jack Curry, Congress Fires Questions Hard and Inside, and Baseball Can Only Swing and Miss, N.Y. TIMES, Mar. 18, 2005, available at <http://www.nytimes.com/2005/03/18/sports/baseball/18curry.html>.

⁸⁰ Steroid Penalties much tougher with agreement, Associated Press, November 15, 2005, available at: <http://sports.espn.go.com/mlb/news/story?id=2224832>.

⁸¹ Mitchell report: Baseball slow to react to players' steroid use, ESPN.com, December 14, 2007, available at: <http://sports.espn.go.com/mlb/news/story?id=3153509>.

⁸² Steroid Use by Baseball Players: Hearing Before the H. Comm. on Oversight & Government Reform, 110th Cong. (statement of Allan H. Selig, Comm'r of Major League Baseball).

before the grand jury in 2003.⁸³ Bonds was found guilty of “obstruction of justice,” and nearly eleven and half years later, the 9th U.S. Circuit Court of Appeals overturned the conviction.⁸⁴ Roger Clemens was indicted in 2010 on six counts for allegedly obstructing a Congressional inquiry in 2008 by making 15 false statements, including that he had never used steroids or human growth hormone. Clemens was ultimately acquitted on all charges.⁸⁵ Clemens had not been subpoenaed and had volunteered to testify before Congress.⁸⁶

Among the players listed were Alex Rodriguez, the \$252 million dollar man for the Texas Rangers who was arguably known as the best naturally talented player in baseball. After Rodriguez’s test result was released, he admitted to using a performance enhancing drug—he purportedly received from his cousin in the Dominican Republic—from 2001 to 2003. Rodriguez was also involved in the Biogenesis Scandal in 2013, which resulted in a full-season suspension.⁸⁷

Two famous Yankee pitchers, Roger Clemens (see above) and Andy Pettitte, were also accused of using performance enhancing drugs. Clemens, who was known throughout his career for his work ethic, vehemently denied that his trainer, Brian McNamee, injected him with steroids. Pettitte, by contrast, admitted to using human growth hormone to heal after injuring his elbow. In 2009, Miguel Tejada pled guilty to a count of perjury for lying in his testimony to Congress about whether or not teammate former Rafael Palmeiro had used steroids. These famous cases have led commentators to dub the 1990s and part of the 2000s as the “steroid era” in baseball.

The MLBPA and the Commissioner’s Office have agreed to a “Joint Drug Prevention and Treatment Program,” designed “(1) to educate Players. . . on the risks associated with using Prohibited Substances. . . ; (2) to deter and end the use by Players of Prohibited Substances; and (3) to provide for, in keeping with the overall purposes of the Program, an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the existence,

⁸³ Michael S. Schmidt, Prosecutors Rework Indictment of Bonds, N.Y. TIMES, May 14, 2008, available at: <http://www.nytimes.com/2008/05/14/sports/baseball/14bonds.html>.

⁸⁴ Barry Bonds’ obstruction conviction thrown out by appeals court, ESPN.com, April 22, 2015, available at: http://www.espn.com/mlb/story/_id/12743113/barry-bonds-obstruction-conviction-thrown-appeals-court.

⁸⁵ Roger Clemens found not guilty, ESPN.com, June 19, 2012, available at: http://www.espn.com/mlb/story/_id/8068819/roger-clemens-found-not-guilty-all-six-counts-perjury-trial.

⁸⁶ Clemens indicted for making false statements to Congress, ESPN.com, August 20, 2010, available at: <http://sports.espn.go.com/mlb/news/story?id=5476761>.

⁸⁷ The Biogenesis Scandal is further explored in Chapter 6, Section I.

interpretation, or application of this agreement.” Any disputes are resolved through the Grievance Procedure of MLB’s Basic Agreement. An independent administrator oversees the program. The program prohibits the use of both “drugs of abuse,” such as cocaine, LSD, marijuana, and opiates, and “performance enhancing substances,” including anabolic androgenic steroids, designer steroids, and a list of 58 hormones, and “stimulants,” such as amphetamine. Players are tested in spring training and are subject to additional random testing and reasonable cause testing. One of the most famous player to be suspended under the policy is the Los Angeles Dodgers’ Manny Ramirez. After a difficult period of off-season negotiations, in which Ramirez bargained for a two-year, \$45 million contract, at the start of the 2009 season Ramirez tested positive for a women’s fertility drug used to stimulate natural testosterone generation after using performance enhancing drugs. Ramirez apologized and was suspended fifty games. (In response, Selig wanted to close the “loophole” which permitted Manny to play in the minor league system, while still suspended from “MLB” games.) In 2011, Manny once again tested positive for a performance-enhancing drug. Rather than serve the mandatory 100-game suspension, Manny quietly retired.⁸⁸

Under the NFL’s drug testing program, players are designated as being inside or outside of the “intervention program.” Those outside the program—those without a violation—are tested once a year between April 20 and August 9. Those within the program are tested at pre-determined intervals throughout the season. Also, teams and players can contractually agree to more tests throughout a season. Finally, all draft-eligible players are tested at the scouting combines.⁸⁹ Players have three hours after notification that they have been selected to produce a sample.⁹⁰ To avoid deception, players are observed as they urinate. This observation was initiated in response to players using the “Whizzinator,” a device with an artificial bladder, to conceal clean urine. Former NFL running back Onterio Smith was arrested with a “Whizzinator” device in the Minneapolis-St. Paul airport in May 2005.⁹¹

⁸⁸ Ramirez signed with the Kochi Fighting Dogs of the Shikoku Island League on January 14, 2017 at the age of 44 in an attempted comeback.

⁸⁹ Dani Bostick, What you need to know about the NFL’s substance abuse policy, *SB Nation*, August 28, 2015, available at: <http://www.behindthesteelcurtain.com/pittsburgh-steelers-nfl-features-news-blog-long-form/2015/8/28/9218621/what-you-need-to-know-about-the-nfls-substance-abuse-policies-martavis-bryant-steelers>.

⁹⁰ Jacob Feldman, Five things you probably didn’t know about the NFL’s drug policy, *SI.com*, July 12, 2016, available at: <https://www.si.com/nfl/2016/07/11/nfl-drug-policy-substance-abuse-suspensions-tests>.

⁹¹ Associated Press, Viking had ‘Whizzinator’ Drug Masking Kit, May 12, 2005, available at <http://nbcports.msnbc.com/id/7816844>.

The NFL has separate policies for substance abuse versus performance-enhancing substances.⁹² The policy related to performance-enhancing substances was revamped in 2014 to include the use of anabolic and androgenic steroids, stimulants, human or animal growth hormones, and related substances, as well as diuretics and agents that mask the presence of performance-enhancing drugs.

Despite its stringent testing, the NFL still has players that risk taking prohibited substances. In 2016, Bears receiver Alshon Jeffery, Colts linebacker D'Qwell Jackson, Eagles tackle Lane Johnson, Buccaneers running back Doug Martin, Patriots linebacker Rob Ninkovich, and nine other players were suspended violating the league's policy on performance-enhancing drugs.⁹³

C. NBA Anti-Drug Program

Article XXXIII, the NBA and NBPA "Anti-drug Program," prohibits amphetamine and its analogs, cocaine, LSD, opiates, PCP, marijuana, and steroids. A "Prohibited Substances Committee" comprised of one member from the NBA, one from the NBPA, and three jointly selected members issue the definitive list of prohibited steroids, and a Medical Director oversees the program. Players who come forward voluntarily can seek treatment free of penalty for a problem involving a Drug of Abuse. Since its implementation in 1999, only three players have tested positive.

The more pressing issue for the NBA has been recreational drug use. In 2001, veteran Charles Oakley claimed that sixty percent of players smoked marijuana. Prominent players such as Allen Iverson, Chris Webber, and Kareem Abdul-Jabbar have been charged with marijuana possession. In 2008, Dallas Maverick Josh Howard admitted to using marijuana in the off-season. Owner Mark Cuban said the Mavericks would address the issue internally. In January 2017, former NBA forward Stephen Jackson admitted that he would smoke marijuana prior to games throughout his career, and further stated that his coach Don Nelson was aware and even high-fived players when the last scheduled drug test of the season was administered.⁹⁴ In March 2017, the NBA suspended Joakim

⁹² For more information, see the CBA Cheat Sheet Study Guide and the NFL Prohibited Substance Policy and Josh Gordon Study Guide in Appendix A, Tabs 3 and 12.

⁹³ 2016 NFL player suspension tracker, USA TODAY Sports, available at: <https://www.usatoday.com/picture-gallery/sports/nfl/2016/05/09/2016-nfl-player-suspension-tracker/84147186/>.

⁹⁴ Connor Letorneau, Ex-Warrior Stephen Jackson admits to smoking weed before games, SF Gate, January 31, 2017, available at: <http://www.sfgate.com/warriors/article/Ex-Warrior-Stephen-Jackson-admits-to-smoking-weed-10895899.php>.

Noah of the New York Knicks for twenty games without pay for violating the NBA and NBPA Anti-Drug Program by testing positive for Selective Androgen Receptor Modulator LGD-4033.⁹⁵

Is the use of performance enhancing drugs or recreational drugs more objectionable? Do you think that players ought to be permitted to opt into a treatment program for voluntarily coming forward?

D. Player Deaths Related to “Dietary Supplements” in the NFL and MLB

Not only has athletes’ use of steroids and recreational drugs come under scrutiny, but athlete use of “dietary supplements” has as well. The Steve Bechler and Korey Stringer cases have brought this issue to the forefront. During spring training in 2003, Orioles pitcher Steve Bechler died of heat stroke. The stroke was tied to his use of the herbal weight loss supplement Ephedra. Bechler had complained of dizziness less than 24 hours before collapsing. On the day he died, Bechler had taken three Ephedra pills on an empty stomach prior to practice. That, combined with the heat and other issues caused Bechler’s death.⁹⁶

During Minnesota Vikings training camp in 2001, offensive tackle Korey Stringer collapsed from heat stroke and died. Stringer’s death was caused by a heat-related illness. In 2009, Stringer’s wife settled her wrongful death lawsuit against the NFL. Stringer’s widow, Kelci, claimed the NFL failed to ensure that equipment used by players protected them from injuries or deaths caused by heat-related illnesses.⁹⁷ The Vikings claimed that there was a causal link between Stringer’s use of Ephedra and his death.⁹⁸ We will examine each of these subjects in greater detail in Chapter 6.⁹⁹

What role should the Commissioner and/or the courts play in regulating “dietary supplements”? What about over-the-counter supplements players may use? Should players be strictly liable if these supplements contain unlisted traces of prohibited substances?

⁹⁵ James Herbert, Knicks’ Joakim Noah suspended 20 games for violating anti-drug program, CBS Sports, March 25, 2017, available at: <http://www.cbssports.com/nba/news/knicks-joakim-noah-suspended-20-games-for-violating-anti-drug-program/>.

⁹⁶ Jarrett Murphy, Ephedra tied to pitcher’s death, February 18 2003, available at <http://www.cbsnews.com/stories/2003/02/17/eveningnews/main540848.shtml>.

⁹⁷ Associated Press, NFL, Stringer’s widow settle lawsuit, January 26, 2009, available at <http://sports.espn.go.com/nfl/news/story?id=3861331>.

⁹⁸ Chris Williams, Vikings raise ephedra as ‘causal link’ to Stringer’s fatal heatstroke, USA Today, February 25, 2003, available at: http://www.usatoday.com/sports/football/nfl/vikings/2003-02-25-stringer-ephedra_x.htm.

⁹⁹ The StarCaps Litigation is explored in Chapter 6, Section II.

V. DIVERSITY IN SPORTS

Decisions made by the Commissioner affect not only the composition and treatment of league personnel, but also touch upon the rights and privileges of third parties. Athletes such as Jackie Robinson, Hank Aaron, Hank Greenberg, and Roberto Clemente in MLB, Kenny Washington in the NFL, and Chuck Cooper and Nat “Sweetwater” Clifton in the NBA played a role in shaping how race and ethnicity are viewed in America. Moreover, actions by the Commissioner may, at times, touch upon and implicate important Constitutional issues, such as the First Amendment right of free expression and rights under the Equal Protection and Due Process Clauses.

A. Racial, National, and Ethnic Minorities in Sports¹⁰⁰

Today, African-Americans comprise approximately 75 percent of NBA players, 70 percent of NFL players, and 8 percent of MLB players. About 1.1 percent of NFL players and 1.2 percent of MLB players are Asian. About 29.3 percent of MLB players are Hispanic, as compared with 0.7 percent of players in the NFL.¹⁰¹ While a significant percentage of athletes in the three major leagues are from various minority groups, there is still a dearth of minorities in coaching and managerial positions. As of the writing of this book, three African American coaches were hired in the NFL in the span of one week, matching the total from the last five years.

In response to the disparity between the proportion of minority players versus the proportion of minority coaches, the NFL instituted the “Rooney Rule” in 2003.¹⁰² The Rule has been expanded several times, initially requiring an African American be interviewed for each head coaching position, it now applies to executive positions and informally to coordinator positions, and further requires a female be interviewed for vacant executive positions. After the Rule was implemented, there was an initial increase in the percentage of African American coaches, however, after several years of stagnation, the NFL has come under fire by

¹⁰⁰ For more information on racial integration of MLB and issues facing minority players, you may want to read Jules Tygiel, *BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY* (1997); Jackie Robinson, *I NEVER HAD IT MADE* (1995); David Maraniss, *CLEMENTE: THE PASSION AND THE GRACE OF BASEBALL'S LAST HERO* (2006).

¹⁰¹ For the most up-to-date information, see the RGRC (Racial & Gender Report Card), available at: <http://www.tidesport.org/reports.html>.

¹⁰² The Rooney Rule is named after Pittsburgh Steelers' owner Dan Rooney, chairman of the NFL's Diversity Committee. Rooney passed away in April 2017 at the age of 84.

outside organizations, activist groups, and even former Commissioner Tagliabue.¹⁰³ Since 2008, several commentators and activist groups have called for the NCAA to adopt the “Eddie Robinson Rule,” which would require collegiate programs to interview at least one minority for all head coach and leadership positions prior to filling the position.¹⁰⁴

Do you agree with the use of the “Rooney Rule”? Should each league adopt a similar rule? Should the NCAA? If not, is there another policy you can design to encourage more minority applicants and to remove the specter of bias in hiring?

Fair treatment of the athletes who are members of racial and ethnic minority groups is also of concern. College basketball coach Keith Dambrot was fired from Central Michigan University for violating the University’s discriminatory harassment policy after Dambrot used the word “nigger” in the locker room with his players, 11 of whom were African-American and three of whom were white.¹⁰⁵ Though Dambrot testified that he had asked and received permission from a player to use the term and that he intended to use the term in a “positive and reinforcing” manner, as he had heard the players using it themselves, and though the players, when interviewed, said that they had not been offended, the University discharged the coach. Dambrot’s wrongful termination suit claimed the University’s policy violated the First Amendment because it was overbroad and vague. Although Dambrot’s First Amendment challenge to the policy was successful—and the policy was declared unconstitutional—Dambrot could not properly claim wrongful termination because the particular speech he used was not protected by the First Amendment. Therefore, the court reasoned, Dambrot had not suffered any harm, and he was not wrongfully terminated.

Do you agree with the Court’s analysis in *Dambrot*? Do you agree with the University’s decision to fire Coach Dambrot in the first place, or should his players’ interviews have absolved him?

First Amendment issues arise vividly on the playing field itself. When NBA player Mahmoud Abdul-Rauf refused to stand for the Star Spangled Banner before games in 1996—stating that the flag was a symbol of oppression and tyranny—the NBA suspended

¹⁰³ See Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule, Brian W. Collins, June 2007, NYU Law Review, Student Note.

¹⁰⁴ Myron Medcalf, Proposed Eddie Robinson rule would lead to more chances for minority candidates, ESPN, February 4, 2016, available at: http://www.espn.com/college-sports/story/_/id/14530019/national-association-coaching-equity-development-proposes-eddie-robinson-rule-requiring-interviews-minority-candidates.

¹⁰⁵ *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995).

Abdul-Rauf for one game. The league and Abdul-Rauf reached a settlement, whereby he agreed to stand during the national anthem, but he was permitted to look down and not required to sing the words. By contrast, the Commissioner permitted Allen Iverson to sing a “gangsta rap” song on the grounds that the lyrics were similar to rap in general and that the song was artistic expression. MLB’s Carlos Delgado refused to stand on the field when “God Bless America” was played as a symbolic gesture against the Iraq War and the bombing exercises on an island off Puerto Rico. As a symbolic gesture, when Mike Lowell played for the Florida Marlins, he declined to play to protest the treatment of Elian Gonzalez and his return to Cuba.¹⁰⁶

In 2016, Colin Kaepernick drew the attention of the NFL and the country when he began taking a knee during the Star Spangled Banner.¹⁰⁷ Unlike Abdul-Rauf, Kaepernick was not suspended because the NFL policy only recommended that players stand.¹⁰⁸ After kneeling for the remainder of the 2016 season, Kaepernick announced that he plans to stand during the national anthem moving forward.¹⁰⁹ Kaepernick is currently a free agent, and some supporters have suggested the NFL owners are colluding against him.¹¹⁰ Other players around the NFL also began to kneel in support of Kaepernick and for their own beliefs, for instance, Denver Broncos linebacker Brandon Marshall lost endorsement deals with the Air Academy Federal Credit Union and CenturyLink as a result.¹¹¹

Do you agree with the Commissioner’s decision to suspend Abdul-Rauf? Should a different standard apply to Commissioner decisions that impinge on free speech? How does an athlete’s off-

¹⁰⁶ Scott Wilson and April Witt, *For Elian, a Called Strike*, Washington Post, April 26, 2000, D01, available at <http://www.latinamericanstudies.org/elian/called.htm> (last visited May 1, 2009).

¹⁰⁷ Steve Wyche, Colin Kaepernick explains why he sat during national anthem, NFL.com, August 27, 2016, available at: <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

¹⁰⁸ Mike Florio, NFL: players are encouraged but not required to stand for national anthem, NBC Sports—Pro Football Talk, August 27, 2016, available at: <http://profootballtalk.nbcsports.com/2016/08/27/nfl-players-are-encouraged-but-not-required-to-stand-for-national-anthem/>.

¹⁰⁹ Michael David Smith, Colin Kaepernick plans to stand for national anthem, NBC Sports—Pro Football Talk, March 2, 2017, available at: <http://profootballtalk.nbcsports.com/2017/03/02/colin-kaepernick-plans-to-stand-for-the-national-anthem/>.

¹¹⁰ Michael McCann, Some Colin Kaepernick supporters are crying collusion, but what does that really mean?, SI.com, March 24, 2017, available at: <https://www.si.com/nfl/2017/03/24/colin-kaepernick-protest-nfl-collusion-free-agency>.

¹¹¹ Nicki Jhabvala, Brandon Marshall loses another endorsement, says he will kneel again for national anthem, The Denver Post, September 12, 2016, available at: <http://www.denverpost.com/2016/09/12/brandon-marshall-loses-endorsement-national-anthem-kneel/>.

field persona relate to his standing in the league? Could Commissioner Goodell and/or the Forty-Niners have disciplined Kaepernick despite the NFL's policy not requiring the players to stand?

B. Women and Sports

In this context, perhaps the most egregious example of a Commissioner exceeding his authority is *Ludtke v. Kuhn*. Challenged in *Ludtke* was the constitutionality of MLB Commissioner Bowie Kuhn's policy of barring females from the Yankees locker room. Reporter Melissa Ludtke claimed the policy was discriminatory because male journalists were permitted in the locker room, but merely because of her gender, she was not. After finding that the Fourteenth Amendment applied because of a sufficient nexus between the stadium and the state, the court went on to invalidate the policy as contrary to the Equal Protection and Due Process Clauses.

If there had not been state action in this case, do you think Ludtke's constitutional challenge would have been successful? If not, on what other grounds could you invalidate the policy?

In the context of "domestic violence" by professional athletes against women, please consider the thoughtful article published by my former student, Bethany P. Withers in the *Harvard Journal of Sports and Entertainment Law* (Spring 2015): "Without Consequence: When Professional Athletes Are Violent Off the Field."¹¹²

SUMMARY QUESTIONS¹¹³

1. Consider the "review" of the Commissioners' decisions on appeal to courts and arbitrators. Based on that consideration, discuss which were the best legally-reasoned reviews of which Commissioners' decisions, and which were the worst legally-reasoned reviews of which Commissioners' decisions in each of the three major leagues. Consider the ways in which the Commissioner's various decisions were consistent with prior decisions or departed from precedent.

In general, where was it most beneficial in the "Best Interests of the Game," for a court or an arbitrator to intervene into the evolution of the

¹¹² Available at: <http://harvardjsel.com/2015/07/bethany-withers-without-consequence/>. Also, see the 2014 NFL Domestic Violence Suspensions Study Guide and Adrian Peterson Study Guide in Appendix A, Tabs 10 and 11 for more detailed examples of how the leagues now treat these issues, and compare those to the CBA Cheat Sheet in Appendix A, Tab 3, which describes the relevant portions of the policies in each league.

¹¹³ Before completing these questions, see the Legal Writing and Drafting Tips Study Guide in Appendix A, Tab 1. This format is recommended when completing the assignments throughout this book.

game itself? Should Commissioners be given “plenary powers” which would not permit them to be overruled by Courts or arbitrators?

In MLB, for example, does the Commissioner’s historically nearly “plenary powers” help to justify the antitrust exemption because the Commissioner can “protect” the fans’ interest without being “reversed” by the MLB owners? In the exercise of such plenary powers, however, consider Commissioner Landis’s seemingly contradictory rulings in the face of players’ gambling (see, e.g., Landis’ absolution of Ty Cobb and Tris Speaker versus treatment of Hal Chase and the Black Sox scandal’s “Eight Men Out.”)

2. Should the three major leagues adhere to the same evidentiary and procedural standards as courts, or should they be free to adopt their own rules? If they choose to adopt their own rules, what outer limits and review process ought to exist on this power?

3. Finally, how would you redesign the role of the Commissioner if you were starting from scratch? What current aspects from each of the three leagues’ Commissioners would you adopt and which would you discard?

***Writing Exercise: “Confidential and Privileged Memorandum”
Analyzing the Scope of the Commissioner’s
Authority in Each League***

In concluding this section of the Chapter, please review all of the MLB, NFL and NBA Commissioners’ decisions referenced in the assigned reading materials for Chapter 1, as summarized in the Course Study Guide in Appendix B, and consider the review of these decisions on appeal to courts and/or arbitrators. Compare and contrast the powers of the Commissioner in each of the three leagues. Write a confidential and privileged memorandum comparing the scope of the Commissioner’s powers in each league and answering the following questions.

1. *In-Class Group Negotiation/Drafting Exercise*—Do you agree or disagree with the conclusion that the NFL Commissioner model is preferable to the MLB or NBA model? Cite specific CBA and case law references in support of your Group’s conclusions.

In particular, please consider the Proposal for League-Wide Personal Conduct Policies of the above-cited article published by Bethany P. Withers in the Harvard Journal of Sports and Entertainment Law (Spring 2015).

2. In particular, also consider the cases and arbitration decisions in which the Commissioner has been “reversed.” Consider whether it is ever “in the best interests of the game” for outside third-parties, such as an arbitrator or a court to be able to “overrule” a Commissioner. Provide specific case-citation authority in support of your conclusion.

VI. RECENT PUNISHMENTS UNDER COMMISSIONER'S AUTHORITY

A. Tom Brady, the Patriots, and Deflategate

The Incident

Following the AFC Championship blowout between the New England Patriots and the Indianapolis Colts, news began to spread that Patriots' personnel and Tom Brady were being investigated for tampering with the gauge pressure of the game footballs before and during games.

According to league regulations, the gauge pressure of each game ball must be between 12.5 and 13.5 psi (pounds per square inch).¹¹⁴ Since 2006, league rules dictate that each team shall provide their own game footballs for when they are on offense—previously the home team provided the game balls. As a result, one team will only touch the opposing team's footballs on defense and during kickoffs. This policy was implemented at the urging of multiple NFL Quarterbacks, including Tom Brady and Peyton Manning. Most offensive players prefer underinflated footballs because it makes the ball easier to handle and grip, which could arguably create an unfair competitive advantage to a team.

League Investigation and the Wells' Report¹¹⁵

On January 23, 2015, less than one week after the New England Patriots and their quarterback Tom Brady defeated the Indianapolis Colts 45–7 in the AFC Championship Game, Roger Goodell announced that Ted Wells would conduct an investigation into the causes of the deflated footballs discovered during the game, specifically whether there was any intentional misconduct in violation of NFL competitive rules.¹¹⁶ The standard of proof for violations of the competitive rules is a preponderance of the evidence standard, which is interpreted as “more probable than not.”¹¹⁷

Ted Wells conducted an extensive investigation into the deflated footballs, releasing the Wells Report to the public on May

¹¹⁴ NFL Official Playing Rules, available at: <http://operations.nfl.com/the-rules/2016-nfl-rulebook/>.

¹¹⁵ The Wells Report in its entirety is available at: <https://www.documentcloud.org/documents/2073728-ted-wells-report-deflategate.html>.

¹¹⁶ Section 2 of the NFL Policy on Integrity of the Game & Enforcement of Competitive Rules requires any NFL clubs with knowledge of competitive violations to promptly report them and cooperate with investigations. Failure to cooperate is viewed as conduct detrimental to the League. *See* Wells Report at 22.

¹¹⁷ *See* NFL Policy on Integrity of the Game & Enforcement of Competitive Rules, § 4; Wells Report at 22.

6th.¹¹⁸ He considered all evidence available to him, and while the Patriots cooperated with nearly all investigatory requests by Wells, the Patriots refused to provide Wells with a follow-up interview with Jim McNally. The Wells Report found this to be inconsistent with the Patriots' obligations to cooperate with the investigation under Section 2 of the Competitive Rules. Tom Brady also declined to provide certain emails and text messages requested by Wells, as well as his cell phone that was subsequently destroyed.

Tom Brady's Football Preferences

When discussing his personal preferences for the inflation of footballs, Tom Brady has stated that he likes balls inflated to 12.5 psi, the low end of the permissible range.¹¹⁹ The Patriots' equipment personnel who prepare the footballs for each game were aware of Brady's preferences.

John Jastremski, a Patriots employee, has overseen football preparation for the Patriots for the last three years. During a game in 2014, Brady was upset that the footballs were inflated around 13.0 psi, and since then Jastremski claimed to target a 12.6 psi inflation level for each ball.

AFC Championship Game

The day before the AFC Championship Game, the Colts General Manager emailed the NFL expressing concern about the inflation of the Patriots footballs and requesting that the officials check the pressures immediately before play. This email stated: "it is well known around the league that after the Patriots gameballs are checked by the officials and brought out for game usage the ballboys for the Patriots will let out some air with a ball needle because their quarterback likes a smaller football so he can grip it better . . ."¹²⁰ Before the game, NFL officials decided to not ask the game officials to check the pressure during the game since there was no specific factual support provided by the Colts for their allegations. After the game, the Colts officials stated that their concerns came from a game against the Patriots earlier that year when Colts equipment managers picked up Patriots game balls that felt soft.

On the day of the AFC Championship Game, Jastremski prepared the game balls for Tom Brady, who requested that the balls be rubbed down with receiver gloves. After the game, Coach Belichick suggested that this may have led to the decreased air

¹¹⁸ Available at: <http://online.wsj.com/public/resources/documents/Deflategate.pdf>.

¹¹⁹ See Wells Report at 37. Brady stated this preference in an interview on January 22, 2015, as well as in November of 2011.

¹²⁰ *Id.* at 45.

pressure, but the Wells Report ruled out this possibility. After preparing these balls, Jastremski said that he set the pressure to 12.6 psi for each ball.

When the officials inspected the footballs before the game, two of the Patriots' footballs were below 12.5 psi, while the rest were at 12.55 or 12.6 psi. The two underinflated balls were inflated to 12.5 psi. As is standard practice, the officials were expecting to take the game balls straight from their locker room to the field immediately prior to the game, and officials stated that footballs never leave the officials' locker room without the officials' express permission. However, the officials were unable to locate the bag of inspected footballs before the game, as they had apparently been removed from the locker room without permission before the officials headed out to the field.

Video footage revealed that Patriots employee Jim McNally, the Patriots' Officials Locker Room attendant, had taken the balls towards the field before stopping in a single-person, lockable bathroom for one minute and forty seconds before continuing to the field. While the officials stated that McNally's removing the balls without their permission or accompaniment was very unusual, McNally said that he generally does not ask permission to take the balls to the field. Two security guards who work Patriots home games reported that McNally takes the balls to the field unaccompanied roughly half of the time. The NFL Security Representative for the Patriots and officials at the AFC Championship game and from previous games could not remember McNally ever taking the balls to the field unaccompanied or without permission before. The Wells Report also concluded that the officials' locker room is nearly empty during regular season games while the officials are participating in pre-game warmups, which would provide McNally ample time to tamper with footballs in the back room of the officials' locker room before regular season games.¹²¹

During the second quarter of the game, one of Tom Brady's passes was intercepted, and the ball was taken back to the Colts sideline. Colts equipment managers tested the ball and found it to have only 11 psi, well below the 12.5 psi minimum requirement.¹²² The Colts brought this to the attention of the officials, and during halftime, the officials tested eleven of the Patriots' game balls, one

¹²¹ *Id.* at 62, n.34. The officials' locker room was unusually crowded before the AFC Championship Game, as many individuals were watching the conclusion of the NFC Championship Game in the officials' locker room. *See id.* at 55.

¹²² *Id.* at 63, 70. This ball was later tested three times, measuring as 11.45 psi, 11.35 psi, and 11.75 psi.

of which measured 12.30 psi and the rest measured below 12.0 psi.¹²³ The officials inflated all these balls to within the permissible 12.5 to 13.5 psi range, and they were then used for the remainder of the game. Although the Patriots questioned the integrity and objectivity of officials and NFL representatives, the Wells Report found no evidence to substantiate these accusations.

Follow-Up Investigation

As part of the investigation conducted by Ted Wells over the following months, communications by Brady and Patriots employees were scrutinized. In a text message conversation between McNally and Jastremski from May 2014, McNally referred to himself as “the deflator.”¹²⁴ McNally and Jastremski exchanged multiple text messages during the 2014 season discussing pumps and inflation of footballs, including discussing the provision of articles of clothing to McNally. Brady has signed multiple footballs and a jersey for McNally, and Jastremski has also received various gifts from Brady over the years. The day after the AFC Championship game, Brady denied any knowledge about football tampering. Over the next week, Jastremski had multiple conversations with both Brady and McNally about the media coverage of the deflated footballs and preparation for the Super Bowl.

Physicists and other technical experts analyzed the inflation levels of the footballs and determined that the drop in pressure of the Patriots balls between prior to the game and halftime could not be fully accounted for by natural environmental phenomena or the “vigorous rubbing” hypothesized as a possible cause by Coach Belichick.¹²⁵ The scientific experts consulted by Ted Wells concluded “they could identify no set of credible physical or environmental factors that completely accounts for the magnitude of the reduction in air pressure.”¹²⁶ Nine of the Patriots game balls were below the pressure range predicted by the Ideal Gas Law based on temperature fluctuations, but every Colts game ball measured was within the scientifically explainable pressure range. The technical consultants also determined that the period of time McNally spent in the bathroom was sufficient to deflate all of the footballs.

¹²³ *Id.* at 68. At that time, the officials had a total of eleven Patriots game balls available, and they tested them all. The intercepted game ball was not tested, and one football which had been caught and set aside as a memento was not tested.

¹²⁴ *Id.* at 75.

¹²⁵ *Id.* at 111–12.

¹²⁶ *Id.* at 112.

Wells Report Conclusions

Wells interviewed sixty-six people during his investigation, as well as twenty-four additional representatives of Wilson Sporting Goods. The report dove into the scientific and practical analysis of the situation, and how that would apply to the NFL CBA.

The Wells Report concluded that “it is more probable than not that Jim McNally and John Jastremski participated in a deliberate plan to circumvent the [NFL playing] rules by releasing air from Patriots game balls after the examination of the footballs by NFL game officials at the AFC Championship Game.”¹²⁷ The Wells Report also concluded that “it is more probable than not that Tom Brady was at least generally aware of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.”¹²⁸ These “more probable than not” findings satisfied the required standards of proof as set forth by the NFL competitive rules.¹²⁹ These conclusions were based on the text messages between Jastremski and McNally discussing payments to McNally, McNally’s reference to the “deflator,” Brady’s annoyance at inflation levels, the increasing frequency of phone calls between Brady and Jastremski and the unprecedented misplacement of the footballs before the game in conjunction with McNally taking the balls into the bathroom.¹³⁰ Even though some of these discussions appear to have been attempts at humor, the Wells Report concluded that these discussions were based on actual events. The Wells Report concluded that Brady’s denial of knowledge of or involvement in the deflation plan was implausible, due to the many conversations between Brady and Jastremski and Brady’s denial of knowing McNally or anything about his role, even though this was contradicted by both Jastremski and McNally. Brady also refused to provide multiple emails, text messages, and phone records requested by Wells. While there were some questions concerning propriety of kicking balls used in the AFC Championship Game, the Wells Report concluded that there were no improprieties concerning the kicking balls.

Suspension, Draft Pick Forfeiture and Fine

Upon the conclusion of the Wells’ report, Commissioner Goodell announced the following punishments resulting from the Deflategate situation:

¹²⁷ *Id.* at 122.

¹²⁸ *Id.*

¹²⁹ See NFL Policy on Integrity of the Game & Enforcement of Competitive Rules, § 4; Wells Report at 22.

¹³⁰ See Wells Report at 122–125, 127.

- 4-game suspension without pay for quarterback Tom Brady (totaling \$2 million in lost game checks)¹³¹
- \$1 million fine for the New England Patriots
- Forfeiture of the Patriots' 1st-round pick in the 2016 draft
- Forfeiture of the Patriots' 4th-round pick in the 2017 draft

Tom Brady was suspended for conduct detrimental to the integrity of the league¹³², while the Patriots were fined and forced to forfeit draft selections for violating the playing rules and failing to cooperate with the league's investigation.¹³³ The \$1 million fine is the largest ever given to a NFL team.

While the "more probable than not" standard has caused a great deal of controversy amongst fans, it should be remembered that the NFL CBA requires only a preponderance of the evidence to support the standard of proof required by the competitive rules of the NFL. Additionally, Troy Vincent and Commissioner Goodell contemplated the severity of the penalties given to the Patriots as a result of Spygate, when the team was fined \$750,000 and a 1st-round selection.

Following a review of the situation, only Tom Brady appealed the decision—the Patriots and owner Robert Kraft did not appeal the draft pick forfeiture and fine.

Tom Brady's Appeal to the Commissioner

Unlike in the Ray Rice and Adrian Peterson situations, Commissioner Goodell served as the hearing officer for the appeal. Goodell is able to justifiably do this because he did not lead the League's investigation or serve as a witness to the case, even though he handed out the initial suspension to Brady. In his appeal opinion, Goodell stated, "Nor is there any basis for the NFLPA's suggestion that the Wells Report was not the product of an independent investigation. The Report itself makes clear, and the hearing testimony of Mr. Wells confirmed, that the investigation

¹³¹ Richard Sherman on Deflategate: Brady being fined more than Pats raises 'red flags', ESPN.com, Aug. 21, 2015, available at: http://espn.go.com/nfl/story/_id/13473078/seattle-seahawks-richard-sherman-sympathizes-tom-brady-deflategate-fallout.

¹³² NFL Collective Bargaining Agreement, Article XXXXVI (2011). *supra* p. 43.

¹³³ Tom Brady suspended four games, Patriots fined 41 million and docked two draft choices as 'DeflateGate' punishment, THE WASHINGTON POST, May 11, 2015, available at: <http://www.washingtonpost.com/news/sports/wp/2015/05/11/tom-brady-suspended-four-games-patriots-fined-1-million-and-docked-two-draft-choices-as-deflategate-punishment/>.

and report represent solely and entirely the findings and conclusions of the Wells investigatory team.”¹³⁴

In the appeal, Goodell reportedly ran through a rigorous line of questioning with Brady, giving him the opportunity to prove his innocence in the matter—or at least show mitigating circumstances to justify a reduction in the suspension. Goodell stated in his opinion, “I entered into the appeal process open to reevaluating my assessment of Mr. Brady’s conduct and the associated discipline . . . my findings and conclusion have not changed in a manner that would benefit Mr. Brady.”¹³⁵

Ultimately, Commissioner Goodell decided to uphold Brady’s suspension in a thorough opinion.¹³⁶ Relating to Brady’s failure to cooperate with the proceedings, Goodell stated:

“Mr. Brady’s affirmative action to ensure that this information would not be available leads me to conclude that he was attempting to conceal evidence of his personal involvement in the tampering scheme, just as he concealed for months the fact that he had destroyed the cellphone requested by the investigators.

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.”

With these two paragraphs, Goodell was able to significantly damage Brady’s credibility in any future proceedings, which was surely the purpose of emphasizing them in his opinion. In conclusion, Goodell finished his thorough decision with:

“In sum, Mr. Brady had notice, and in fact was fully aware of, the established rule governing the pressure of NFL game balls; he had notice and ample reason to expect that a violation of that rule, especially one that sought to undermine the efforts of game officials to ensure that game balls were in compliance with League rules, would be deemed conduct detrimental; he had notice and ample reason to expect that false or misleading statements and/or destruction of evidence requested for use in an investigation of conduct detrimental would itself be deemed conduct detrimental; and he had notice and ample

¹³⁴ Final Decision on Article 46 Appeal of Tom Brady at p.19, Roger Goodell.

¹³⁵ *Id.*

¹³⁶ Available at: <https://nflabor.files.wordpress.com/2015/07/07282015-final-decision-tom-brady-appeal.pdf>.

reason to expect that such conduct detrimental could lead to his suspension.”¹³⁷

Brady Appeals to the Court System

Following Goodell's decision to uphold his suspension, the NFLPA filed a petition on July 29th on Tom Brady's behalf to lift his suspension. The NFLPA filed in the U.S. District Court in Minnesota, which has been favorable to the NFLPA in previous cases—most recently in the matter of Adrian Peterson. In anticipation of this filing, the NFL filed in the historically league-friendly state of New York, asking to keep the lawsuit in New York and uphold the suspension of Brady. Judge Richard Kyle ordered that the NFLPA's filing in Minnesota be joined with the case filed by the NFL in New York, and as a result, Judge Richard Berman of the Southern District of New York will hear the case between Tom Brady and the NFL.

Key Legal Issues of the Case

1. Whether Commissioner Goodell exceeded his authority in accordance with the NFL Collective Bargaining Agreement.

Article 46 of the Collective Bargaining Agreement gives the Commissioner final, binding authority both at the initial level of discipline and at the appeal level for conduct detrimental to the integrity of the game or the integrity and good character of football player.

In accordance with the CBA, Goodell had the right to hear Brady's appeal, but Jeff Kessler argued on behalf of Brady that Goodell showed “evident partiality” in his role as arbitrator. If that was proven to be true, then Goodell's decision would have been vacated and a second arbitration hearing would have been held before an objective arbitrator. Additionally, the NFL did not make Jeff Pash available as a witness in the arbitration hearing, despite his involvement in the investigation by Ted Wells, which allowed Brady and Kessler to argue that the hearing was “fundamentally unfair.” If the court found the arbitration was not “fundamentally fair” as a result of Pash not serving as a witness, then the hearing would have been held again and the NFL would have needed to make Pash available as a witness (unless Goodell was found to be partial, he would have still overseen this proceeding).

Without being able to prove evident partiality, courts are expected to give a great deal of deference to the arbitrator's decision. Judge Berman could not review the facts of the case and

¹³⁷ *Id.* at p.18.

determine whether Goodell decided the case correctly, but rather whether he exceeded his authority or was not partial in his decision-making—this was the crucial point of the case.

Finally, given that Commissioner Goodell drew his authority from the CBA, the NFL argued that Brady's case is preempted by § 301 of the Labor Management Relations Act, which states that all common law causes of action involving a collective bargaining agreement are preempted.

2. Whether the NFL violated the “law of shop.”

The “law of shop” is quite simple the customs and practices requiring fair and consist enforcement of rules and regulations. Brady is the first quarterback to be suspended under this rule, therefore we must look to comparable situations where players break the rules to gain a competitive advantage—such examples would include: Bountygate,¹³⁸ Ray Farmer's suspension,¹³⁹ and suspensions for PED-use.

Despite the clear precedent that results in a four-game suspension for on-field misconduct, Brady argued that he was not given sufficient “notice,” as the Integrity of the Game Certification was not distributed to players in the league. The notice element here is the only method available to Brady and Kessler that could have resulted in an outright dismissal of his suspension and any future arbitration hearing. However, it should be noted that the court in the StarCaps case rejected the NFLPA's arguments that the NFL violated their fiduciary duty to notify the players because the information was available if requested. Additionally, by signing the Uniform Player Contract, the player agrees to be bound by the terms of the CBA, including Article 46, which outlines final, binding arbitration by the commissioner.¹⁴⁰

Judge Berman's Decision

On Thursday, September 3rd, Judge Richard Berman vacated Roger Goodell's decision to suspend Tom Brady chiefly citing the lack of notice Brady had that a suspension would result from his involvement with or awareness of the deflating of footballs by

¹³⁸ The New Orleans Saints' bounty scandal, where players and coaches were awarding “bounties” for injuring opponents, that resulted in the suspension of four Saints players, head coach Sean Payton, defensive coordinator Gregg Williams and general manager Mickey Loomis, the Saints being fined and the forfeiture of draft picks by the Saints.

¹³⁹ Farmer received a four-game suspension for sending text messages during games to offensive personnel of the Browns on the sideline.

¹⁴⁰ Airing it out (quoting Peter Carfagna), Harvard Gazette, Aug. 20, 2015, available at: <http://news.harvard.edu/gazette/story/2015/08/airing-it-out/>.

Patriots' personnel.¹⁴¹ Berman further rejected Commissioner Goodell's arguments that this suspension could be compared to PED suspensions, given that both are used to gain an unfair competitive advantage.¹⁴² Finally, Berman felt that Brady could not receive a fundamentally fair hearing with Commissioner Goodell withholding Jeff Pash as a witness and the investigative files of Wells and Pash.¹⁴³

NFL Appeals Judge Berman's Decision

Shortly after Judge Berman's ruling, the NFL announced they would appeal the decision to the U.S. Court of Appeals for the Second Circuit. The NFL filed its brief on October 26, 2015, seeking reinstatement of the four-game suspension. The NFL argued that Judge Berman "vastly exceeded the narrow bounds of judicial review," as Commissioner Goodell "plausibly interpreted and applied" CBA Article 46.¹⁴⁴ The NFL also argued that it was wrong of Judge Berman to focus on the comparison to steroid use, as this was instead more comparable to a six-game suspension that would be appropriate to someone who used masking agents. According to the appellant, deceptively covering up steroid use is akin to deceptively covering up the football deflation by destroying his cell phone.

Another central argument for the NFL was to reiterate that Goodell has punished Brady for conduct detrimental to the league, not for an equipment violation. Goodell has "substantial discretion" to punish conduct detrimental, and the NFL stressed that Brady had notice of this potential punishment.¹⁴⁵ Concerning the inability of Brady's counsel to cross examine Jeffrey Pash, the NFL argued that Goodell was not obligated to provide this opportunity under Article 46.

Brady's response brief outlined the legal support for Judge Berman's decision, stressing that Article 46 does not give Goodell unlimited authority to discipline players, as penalties for "conduct detrimental" arguably must abide by the schedules of fines for misconduct.¹⁴⁶ The brief also stressed the lack of notice given to

¹⁴¹ Judge Richard Berman's Decision, pp.21-32, available at: <http://www.gannett-cdn.com/experiments/usatoday/Sports/2015-09-03-nfl-brady-decision.pdf>.

¹⁴² *Id.* at 22.

¹⁴³ *Id.* at 32-38.

¹⁴⁴ Major takeaways from the NFL's appeal brief of Deflategate ruling, SI.com, Oct. 26, 2015, available at: <http://www.si.com/nfl/2015/10/26/nfl-appeal-brief-deflategate-ruling-judge-berman-tom-brady>.

¹⁴⁵ *Id.*

¹⁴⁶ Tom Brady files brief in response to league's appeal of Deflategate ruling, SI.com, Dec. 7, 2015, available at: <http://www.si.com/nfl/2015/12/07/tom-brady-brief-deflategate-appeal-roger-goodell-nfl>.

Brady about the possibility of a four-game suspension, and that Brady did not receive a fair hearing, all points focused on by Judge Berman.

Second Circuit Decision

On appeal, the Second Circuit in a 2–1 decision reversed Judge Berman’s holding and reinstated the 4-game suspension. Judge Parker writing for the majority, explained that a federal court’s review of an arbitration award is “narrowly circumscribed and highly deferential. . . among the most deferential in the law.”¹⁴⁷ The goal of review is to ensure the arbitration met the minimum standards of the Labor Management Relations Act (LMRA) and that the arbitrator “even arguably constru[ed] or appl[ie]d the contract and act[ed] within the scope of his authority.”¹⁴⁸ Judge Parker described the commissioner’s authority under Article 46 as “especially broad”¹⁴⁹ before addressing Judge. Berman’s grounds for vacating the arbitration award in turn.

First, the court addressed the lack of notice argument. Regarding the lack of notice of a potential suspension for equipment infractions, the Second Circuit found that the League’s rule regarding equipment did not apply, and if they did, that they provide only a minimum punishment and do not foreclose suspension.¹⁵⁰ As for the steroid comparison, the court found that it was within the arbitrator’s discretion to draw the analogy.¹⁵¹ The court rejected the NFLPA’s argument that Brady was punished for “general awareness,” finding the record sufficient for the arbitrator to conclude that he was involved, and the argument that Brady did not have notice that he could be punished for destroying his cell phone, finding that claim unsupported in the record.¹⁵²

The court then addressed Judge Berman’s procedural grievances with the arbitration. The Second Circuit held that Commissioner Goodell’s refusal to call Jeff Pash did not “violate[] fundamental fairness” and so was within Goodell’s discretion as the arbiter.¹⁵³ Likewise, it held that the CBA did not require the exchange of investigative notes for Article 46 hearings and that it was not required because Goodell did not rely on those notes in

¹⁴⁷ *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 532 (2d Cir. 2016).

¹⁴⁸ *Id.* at 532 (citing *United Paperworks Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

¹⁴⁹ *Id.* at 532.

¹⁵⁰ *Id.* at 539.

¹⁵¹ *Id.* at 540–41.

¹⁵² *Id.* at 541–44.

¹⁵³ *Id.* at 545–46.

reaching a decision.¹⁵⁴ The court then rejected the NFLPA's remaining arguments as "meritless."¹⁵⁵ Because the appellate court found the district court's grounds for vacating the arbitration insufficient, it reversed the district court opinion and remanded with instructions to reinstate the arbitration award of the four-game suspension.¹⁵⁶

Chief Judge Katzmann dissented. According to the Chief Judge, Goodell changed the factual basis for the suspension from the initial hearing to the appeal such that Brady did not have notice or a chance to challenge the claims against him.¹⁵⁷ Chief Judge Katzmann also believed the steroid analogy was "inapt."¹⁵⁸ Consequentially, he concluded that Goodell's decision reflected his "his own brand of industrial justice" and thus the district court's vacatur should be affirmed.¹⁵⁹

NFLPA Seeks Rehearing, Appeal Denied

In response to the Second Circuit's reversal and reinstatement of the suspension, the NFLPA sought a rehearing *en banc* in the Second Circuit Court of Appeals.¹⁶⁰ In its motion for appeal, the NFLPA argued that vacatur is warranted because Goodell overstepped the CBA's bounds on his appellate authority¹⁶¹ and Goodell failed to address critical provisions in the CBA.¹⁶² Despite having two federal judges find for the NFL and two find for the NFLPA, the Second Circuit denied rehearing in an order without an opinion.¹⁶³

Conclusion of Deflategate

Tom Brady decided to forgo appealing to the Supreme Court.¹⁶⁴ The NFLPA reserved its right to appeal, the plaintiffs decided not

¹⁵⁴ *Id.* at 546–47.

¹⁵⁵ *Id.* at 547.

¹⁵⁶ *Id.* at 548–49.

¹⁵⁷ *Id.* at 549 (C.J. Katzmann dissenting).

¹⁵⁸ *Id.* at 549 (C.J. Katzmann dissenting).

¹⁵⁹ *Id.* at 549 (C.J. Katzmann dissenting) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)).

¹⁶⁰ NFLPA Petitions 2nd Circuit to Rehear Brady Matter "En Banc," *NFLPA*, May 23, 2016, available at: <https://www.nflpa.com/nflpa-petitions-2nd-circuit-to-rehear-brady-matter-en-banc>.

¹⁶¹ *NFL v. NFLPA*, Petition for Panel Rehearing or Rehearing En Banc of Appellees National Football League Players Association and Tom Brady, (2nd Cir. May 23, 2016), <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/NFLPABradyPetitionRehearingOrEnBanc.pdf>.

¹⁶² *Id.* at 12.

¹⁶³ *NFL v. NFLPA* (2nd Cir. July 13, 2016).

¹⁶⁴ Tom Brady Won't Appeal Suspension to Supreme Court, ESPN.com, July 15, 2016, available at: http://www.espn.com/nfl/story/_/id/17083595/tom-brady-new-england-patriots-appeal-suspension-supreme-court.

to seek a stay “in the interest of certainty and planning for Tom prior to the New England Patriots season.”¹⁶⁵ Brady missed the first four games of the 2016 season.

Legal Writing Exercise: Deflategate 2nd Circuit Opinion

Majority vs. Dissenting Opinion—which Opinion is better legally reasoned?

In your Group, act as clerks to the remainder of the 2nd Circuit Judges who were not involved in writing the Deflategate Opinion (as if an En Banc Hearing had been granted), and prepare a Legal Memorandum (per the recommended memo format described in this book) regarding whether the Majority or Dissenting Opinion should be approved. In so doing, fully explain why the court should select your recommendation, why they should not select the opposing opinion, and finally, which side is better legally reasoned. Throughout the answer, support your memorandum with the maximum number of relevant citations to further solidify your point.

B. St. Louis Cardinals and the Houston Astros Hacking Scandal

In June 2015, news began to spread of the FBI investigating the St. Louis Cardinals for hacking the Houston Astros by illegally accessing the Astros’ Ground Control database and viewing proprietary information.¹⁶⁶ Chris Correa, the Cardinals’ director of scouting, was able to access the database by guessing the password of former Cardinals’ employee and current Astros General Manager Jeff Luhnow.¹⁶⁷ Correa’s criminal action led to a 46-month prison sentence and a \$300,000 fine.¹⁶⁸ More importantly to the context of this chapter, Commissioner Manfred announced on January 30, 2017 that the Cardinals must forfeit their first two selections (56th and 75th overall) in the 2017 Rule 4 Draft and pay a \$2 million fine.¹⁶⁹ Furthermore, Manfred placed Correa on baseball’s permanently ineligible list, joining the likes of “Shoeless” Joe Jackson and Pete Rose, thereby preventing any possibility of a front office return in the future.¹⁷⁰ Manfred wrote, “Mr. Correa held positions in the Cardinals’ front office that enabled him to have

¹⁶⁵ *Id.* (quoting an NFLPA statement).

¹⁶⁶ Cardinals being investigated by FBI, accused of hacking Astros, Fox Sports, June 16, 2015, available at: <http://www.foxsports.com/mlb/story/st-louis-cardinals-houston-astros-fbi-investigation-hacking-061615>.

¹⁶⁷ *Id.*

¹⁶⁸ Euan McKirdy, Cardinals fined, must give up draft picks after Astros hacking scandal, CNN, January 31, 2017, available at: <http://edition.cnn.com/2017/01/31/sport/cardinals-mlb-fine-draft-picks-penalty/>.

¹⁶⁹ Jerry Crasnick, Hacking scandal fallout a wake-up call for Cardinals, MLB, ESPN, January 31, 2017, available at: http://www.espn.com/mlb/story/_/id/18588682/hacking-scandal-fallout-wake-call-cardinals-mlb.

¹⁷⁰ *Id.*

input into his club's decisions and processes.¹⁷¹ As a result, I am holding the club vicariously liable for his misconduct." Manfred's punishment is the most severe handed down to a team in league history, and sets the precedent for hacking or hacking-related scandals as technology continues to advance. Considering Deflategate and the other team and executive punishments discussed throughout Chapter 1 and Appendix B, did Commissioner Manfred act appropriately? If not, why not? In so doing, use the maximum number of relevant course-covered citations in order to best prepare for the Final Exam.¹⁷²

¹⁷¹ McKirdy, CNN.

¹⁷² See the Legal Writing and Drafting Tips Study Guide in Appendix A, Tab 1.

