

**THE ROGER GOODELL STANDARD: IS
COMMISSIONER AUTHORITY GOOD FOR SPORTS?**

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I. INTRODUCTION

One of the most prominent aspects of American popular culture is major league sports.¹ They are pervasive, not only in economic and political arenas, but also within the spheres of community values and ethics.² We look to athletes as bastions of morality and social consciousness, which puts a heavy emphasis on sports leagues and how they adjudicate the conduct of athletes both on and off the field.³ This is why the recent cheating scandal perpetrated by the New England Patriots and, most likely, Tom Brady garnered national and legal attention.

Specifically, the improper conduct involved Tom Brady using underinflated footballs in the 2015 American Football Conference (“AFC”) Championship game.⁴ As a result, not only was Brady suspended, but the New England Patriots were fined \$1 million and lost two future draft picks.⁵ These punitive measures were dictated by Roger Goodell, the National Football League (“NFL”) Commissioner, who serves as arbitrator for all team and player disciplinary issues.⁶ This “Deflategate” incident, particularly the severity of the commissioner’s sanction, illustrates the magnitude of a sports commissioner’s power. The NFL Commissioner’s power, however, is not unique; commissioners in other major sports leagues—Major League Baseball (“MLB”), National Basketball Association (“NBA”), National Hockey League (“NHL”)—have doled out equally strong sanctions.⁷ The commissioners’ power to discipline players and teams for misconduct comes from the respective Collective Bargaining Agreements (“CBAs”) of each league, as well as the leagues’ constitutions and by-laws.⁸

In the case of Roger Goodell, under the terms of the 2011 NFL CBA, “[t]he System [Commissioner] shall make findings of fact and determinations of relief including, without limitation, damages . . .

¹ Kenneth J. Marci, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES J., no. 8 (2012), <http://www.inquiriesjournal.com/a?id=676>.

² *Id.*

³ *Id.*

⁴ David Bunam & Rich Cimini, *NFL Suspends Tom Brady for 4 Games*, ESPN (May 12, 2015), http://www.espn.com/nfl/story/_/id/12867594/punishments-handed-tom-brady-new-england-patriots-deflategate.

⁵ *Id.*

⁶ *Collective Bargaining Agreement between the Nat’l Football League Mgmt. Council and the Nat’l Football Players Ass’n*, NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter 2011 NFL CBA].

⁷ Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93 (2014).

⁸ *Id.*

injunctive relief, fines, and specific performance.”⁹ There are no provisions that currently limit this power, prompting scholars to propose alterations to NFL regulations.¹⁰ Many associated with the league believe the unfettered authority afforded to Goodell under the new CBA is unfair, with no analogues in other major sports leagues.¹¹ The power is so disconcerting to some that they are anxiously awaiting the year 2021, when the CBA will be renegotiated and there will be an opportunity to address Goodell’s authority.¹² For the first time in recent memory, ratings for the NFL dropped, possibly due to an unprecedented public backlash over the league’s authority based on the handling of various player and team issues, especially Deflategate.¹³

The issue with commissioner authority in the major sports leagues is that it unfairly prejudices the players and coaches, placing their actions under a microscope on and off the field, court, or ice. However, while some argue that the power of the NFL Commissioner exceeds that of other leagues,¹⁴ this Note posits that his authority is not incongruous with that of other sports commissioners and that the commissioner authority across all leagues is too broad. The issue with their authority revolves around their unfettered ability to punish players for both on and off field activities due to the ubiquity of “the best interest of the league” clause. Part II of the Note will examine the CBAs of each of the four major sports leagues in the United States—based on highest revenues,¹⁵ similarities in textual construction, and popularity amongst the American people—to elucidate the similarities in the powers of the commissioners.¹⁶ Part III will examine the Deflategate controversy, specifically, in order to show how the issues of review result in the plenary authority of sports commissioners. Part IV proposes legislation that would ameliorate these

⁹ *Id.* at 113.

¹⁰ Eric L. Einhorn, *Between the Hash Marks: The Absolute Power the NFL’s Collective Bargaining Agreement Grants Its Commissioner*, 82 BROOK. L. REV. 393, 395 (2016).

¹¹ Pacifici, *supra* note 7, at 94.

¹² Kevin Van Valkenburg, *Power Mad*, ESPN (Dec. 28, 2012), http://www.espn.com/nfl/story/_/id/8769645/has-nfl-commissioner-roger-goodell-power-gone-too-far-espn-magazine.

¹³ Kevin Seifert, *NFL Facing Unprecedented Rebellion From Teams, Players*, ESPN (Oct. 17, 2016), http://www.espn.com/blog/nflnation/post/_/id/218163/nfl-facing-unprecedented-rebellion-from-the-inside.

¹⁴ Pacifici, *supra* note 7, at 94.

¹⁵ Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season—See How It Stack Up Against Other Pro Sports Leagues*, MARKET WATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01>.

¹⁶ Darren Rovell, *NFL Most Popular For 30th Year in a Row*, ESPN (Jan. 26, 2014), http://www.espn.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd.

issues of review, while also expediting CBA negotiations, thus saving leagues valuable time and revenue.

II. THE POWERS THE COMMISSIONERS OF THE NFL, MLB, NBA, AND NHL

The focus of commissioner review is based on the constitutions and by-laws,¹⁷ because they lay out the original powers of the commissioners that are then limited, qualified, or altered. Then the focus should shift to the CBAs, whose functions are to detail qualified commissioner authority for the period that they are valid, before the new player and league negotiations take place.¹⁸

One must first look at the constitutions and by-laws because they can be clearer in enumerating the exact powers of the commissioner, making them important benchmarks for their authority.¹⁹

“Historically, league commissioners have enjoyed expansive authority to regulate their leagues. The constitutions and by-laws for each league are the starting points in defining the authority of each league [C]ommission.”²⁰ CBAs are significant because they offer “professional athletes an opportunity to impose checks on commissioner power, such as rule change restrictions and arbitration processes, while also reserving certain powers for the commissioner.”²¹ Any real disparity between commissioner powers enumerated in the CBAs can be accounted for by the relative power of the players’ union of the respective leagues.²² As a result, the stronger the players’ union, the weaker the authority of the commissioner under the CBA is likely to be.²³

A. The MLB Commissioner’s Authority

In terms of the MLB, the MLB Player’s Association (“MLBPA”) is quite strong due to the league’s long history, with nearly a century of player-Commissioner negotiations, and is, ostensibly, able to put significant restrictions on the power of the Commissioner in the CBA.²⁴ However, under both the Constitution and the CBA, the Commissioner has pervasive authority for disciplinary purposes.²⁵ Under the

¹⁷ Michael R. Wilson, *Why So Stern?: The Growing Power of the NBA Commissioner*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 45, 48 (2010).

¹⁸ Kevin J. Murphy, *Determinants of Contract Duration in Collective Bargaining Agreements*, 45 INDUSTRIAL AND LABOR RELATIONS REVIEW 352, 352 (1992).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Wilson, *supra* note 17.

²⁴ Wilson, *supra* note 17.

²⁵ Collective Bargaining Agreement between the 30 Major League Clubs and the Major

Constitution, the Commissioner has the authority to impose the following:

(a) a reprimand; (b) deprivation of a Major League Club of representation in Major League Meetings; (c) suspension or removal of any owner, officer or employee of a Major League Club; (d) temporary or permanent ineligibility of a player; (e) a fine, not to exceed \$2,000,000 in the case of a Major League Club, not to exceed \$500,000 in the case of an owner, officer or employee, and in an amount consistent with the then-current Basic Agreement with the Major League Baseball Players Association, in the case of a player; (f) loss of the benefit of any or all of the Major League Rules, including but not limited to the denial or transfer of player selection rights provided by Major League Rules 4 and 5; and (g) such other actions as the Commissioner may deem appropriate.²⁶

The Commissioner is also a member of the Executive Council, an entity comprised of eight team owners, or “chairmen,”²⁷ responsible for protecting the position of baseball in public confidence and investigating whether or not there should be rule changes regarding various matters.²⁸ Under the Constitution, the phrase “best interests of baseball” has been utilized to broadly extend the authority of the Commissioner.²⁹ The phrase was cited numerous times by various Commissioners in justification of the punitive actions taken against players.³⁰

In terms of the CBA, “a Player may be subjected to disciplinary action for just cause by his Club, the Senior Vice President, Standards and On-Field Operations or the Commissioner.”³¹ However, when a player feels as though he was punished unfairly, he may file a grievance in order to be made whole, subsequent to the punishment.³² The legitimacy of the grievance is determined by either a panel chair or, more commonly, by a tripartite committee of arbiters, with two of the arbiters being supplied by each party and an impartial third arbiter selected by both.³³ If the parties do not agree upon an impartial arbiter from the

League Baseball Players Ass’n, 2012-2016 Basic Agreement, (2016), art. XII, https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2012MLB_MLBP_A_CBA.pdf [hereinafter 2012-2016 MLB CBA]; MAJOR LEAGUE CONST., art. II (1921), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLCconstitutionJune2005Update.pdf.

²⁶ *Id.* at art. II, § 3.

²⁷ *Id.* at art. II, § 1.

²⁸ *Id.* at art. III, § 2.

²⁹ Michael Hirsley, ‘Best Interests’ Clause Has Benefited Commissioners, CHI. TRIBUNE (Mar. 18, 2004), http://articles.chicagotribune.com/2004-03-18/sports/0403180405_1_fay-vincent-interests-commissioners.

³⁰ *Id.*

³¹ 2012-2016 MLB CBA, *supra* note 25, at art. XII.

³² 2012-2016 MLB CBA, *supra* note 25, at art. XI.

³³ 2012-2016 MLB CBA, *supra* note 25, at art. XI.

Association and the Labor Relations Department (“LDR”), they must jointly request that the American Arbitration Association provide them with a list of appropriate candidates.³⁴ Similar to the process of *voir dire*, the parties go down the list until one name is agreed upon.³⁵ However, either party may remove the arbiter at any time during the negotiations.³⁶ Essentially, the Commissioner, as the head of the league, has more bargaining power in these situations because he can delay the proceedings and select the arbiter that he wants to adjudicate the matters, even though it technically violates the CBA.³⁷

While it is true that both the players and the league can take advantage of these procedural loopholes, pressure from fans and owners coupled with the risk of losing income allow the league to draw out the process.³⁸ Instances where grievances are appropriate are limited to conduct on the field and in the ballpark.³⁹ That still leaves “[t]hose complaints that involve the preservation of the integrity of the game to be different from the routine grievances of an industrial employment relationship, and it is understandable that the commissioner of baseball believes that he must have final and binding authority to resolve such complaints.”⁴⁰ As evidenced by the detailed powers of the MLB Commissioner, his authority is far-reaching.

B. The NHL Commissioner’s Authority

The position of the NHL Commissioner—currently held by Gary Bettman—does not date back to the 1920s, like the MLB Commissioner.⁴¹ Instead, the position of NHL Commissioner was created in 1993, with its powers amended under the NHL Constitution in 2009.⁴² Similar to the role of the MLB Commissioner, the NHL Commissioner is “charged with protecting the integrity of the game of professional hockey and preserving public confidence in the league,”⁴³ which gives the Commissioner broad discretionary power over matters:

³⁴ 2012-2016 MLB CBA, *supra* note 25, at art. XI.

³⁵ 2012-2016 MLB CBA, *supra* note 25, at art. XI.

³⁶ 2012-2016 MLB CBA, *supra* note 25, at art. XI.

³⁷ *See* 2012-2016 MLB CBA, *supra* note 25, at art. XI.

³⁸ Mark L. Goldstein, *Arbitration of Grievance and Salary Disputes in Professional Baseball Evolution of a System of Private Law*, 60 CORNELL L. REV. 1049, 1073-74 (1975).

³⁹ *Id.*

⁴⁰ *Id.* at 1073.

⁴¹ Joe Lapointe, *HOCKEY; The N.H.L. Employs A Head Of Business*, N.Y. TIMES (Dec. 13, 1992), <http://www.nytimes.com/1992/12/13/sports/hockey-the-nhl-employs-a-head-for-business.html>.

⁴² Pacifici, *supra* note 7, at 101.

⁴³ NAT’L HOCKEY LEAGUE, CONST., art. 6 (1993), <http://sportsdocuments.com/2013/11/nhl-constitution/>.

The specific disciplinary powers of the NHL Commissioner are laid out in Section 6(j) of the NHL Constitution.⁴⁴ The Commissioner has broad authority to punish a person connected with the league or a Member Club for violation of the league's Constitution, By-Laws, or CBA.⁴⁵ Any such action can occur during or outside the season, so long as the violation in question is detrimental to the league.⁴⁶ In accordance with Section 6(j)(1), depending on the nature and severity of the violation, the Commissioner may take action against an unruly player or Member Club through various disciplinary methods such as expelling or suspending players, cancelling contracts, imposing steep monetary fines or team draft pick penalties, and compelling player transfers.⁴⁷

The Commissioner's determinations are also "final and not subject to any review," which further compounds the Commissioner's extensive powers to admonish members of the league.⁴⁸

It might appear under the new CBA that the Commissioner's powers have been limited, but this would be inaccurate.⁴⁹ Under Article 18.13 of the NHL's CBA, a player receiving a suspension of six games or more can circumvent the Commissioner's plenary authority and appeal to a Neutral Discipline Arbitrator ("NDA").⁵⁰ The NDA shall "hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed was supported by substantial evidence."⁵¹ This secondary review "shall be binding and not subject to further review."⁵² Before the implementation of the NHL's CBA, the only instances in which the Commissioner's decisions could be reviewed were: (1) when there was an expulsion from the league or a suspension of more than two years, or (2) when there was an imposition of a penalty that coincided with Section 6(j)(1)(d).⁵³ In those instances, the player would have to appeal to the Board of

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Pacifici, *supra* note 7, at 102.

⁵⁰ Nat'l Hockey League & Nat'l Hockey League Players' Ass'n, Collective Bargaining Agreement, art. 18, § 13 (Sept. 16, 2012). Collective Bargaining Agreement between the Nat'l Hockey League and the Nat'l Hockey League Players' Ass'n, art. XIIIIV, § 13 (Feb. 2, 2013), http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf [hereinafter 2013 NHL CBA].

⁵¹ *Id.*

⁵² *Id.*

⁵³ NAT'L HOCKEY LEAGUE, CONST., art. 6 (1993), <http://sportsdocuments.com/2013/11/nhl-constitution/>.

Governors, and could only prevail with a three-fourths majority vote.⁵⁴

Despite the changes made to the appeals process, there are those who still believe that the Commissioner has complete control over the NHL.⁵⁵ Holding the position for twenty-three years now, and having weathered three lockouts, Commissioner Bettman has increased revenue from \$400 million to \$3.3 billion, garnering the support of the owners.⁵⁶ “I think he’s emperor for life,” said Jonathon Gatehouse, author of the first in-depth biography on Commissioner Bettman.⁵⁷ In furtherance of his outright authority, Article 6.4 indemnifies the Commissioner from a range of pecuniary obligations, including damages and legal fees, provided that he act in good faith and in furtherance of the league.⁵⁸ It would seem, despite the best efforts of the National Hockey League Players’ Association, that Commissioner Bettman has comprehensive disciplinary authority.

C. The NBA Commissioner’s Authority

As previously mentioned, it is commonly held that the NFL Commissioner has the most inherent power of any other league commissioner; however, a close examination of the NBA Commissioner’s authority brings that assertion into question. Beyond direct disciplinary action, one of the strongest powers of the NBA Commissioner is the ability to “promulgate and enforce reasonable rules governing the conduct of players on the court or conduct that is harmful to the preservation of the integrity of, or the maintenance of public confidence in, the game.”⁵⁹ The NBA Commissioner’s ability to generate rules is arguably the most extensive of the four major sports leagues.⁶⁰ The NBA CBA also does not limit the rulemaking authority to conduct matters “on the playing court” and, instead, refers to “conduct in any area of the Arena.”⁶¹ “[A]ny area of the Arena” includes, but is not limited to,

⁵⁴ *Id.*

⁵⁵ Jeff Z. Klein, *Bettman Undisputed N.H.L. Enforcer*, N.Y. TIMES (Sept. 30, 2012) <http://www.nytimes.com/2012/09/30/sports/hockey/on-hockey-bettman-is-the-undisputed-nhl-enforcer.html>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ NAT’L HOCKEY LEAGUE, CONST., art. 6 (1993), <http://sportsdocuments.com/2013/11/nhl-constitution/>.

⁵⁹ Wilson, *supra* note 17, at 49 (quoting Collective Bargaining Agreement between the Nat’l Basketball Ass’n and the Nat’l Basketball Players Ass’n, NBA Collective Bargaining Agreement, art. VI, § 12 (2011), <https://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011>) (internal quotation marks omitted)).

⁶⁰ Wilson, *supra* note 17, at 49 (citing Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 215 (2007)).

⁶¹ Wilson, *supra* note 17, at 49; *see* Collective Bargaining Agreement between the Nat’l

“locker rooms, dormitories, loading docks, and other back-of-house and underground areas, including those used by television production and other vehicles . . . at, during or in connection with an NBA Exhibition, All-Star, Regular Season or Playoff game.”⁶² Under the CBA, there is no requirement for the NBA to provide notice, negotiate, or receive consent before enacting any rule changes.⁶³

The authority of the NBA Commissioner to enforce disciplinary action is both subsumed under his ability to generate rules and expressed in CBA Article XXXI, Section 9.⁶⁴ The extent of this authority, and how it can be disputed, is outlined in Article XXXI of the NBA’s CBA.⁶⁵ This article lays out the “grievance and arbitration procedure and special procedures with respect to disputes involving player discipline.”⁶⁶ Player discipline is broken down into two categories: suspension for twelve games or less and suspension for twelve games or more.⁶⁷ For a suspension under twelve games issued by the Commissioner or his designee, there is no grievance review process and, thus, it will not be reviewable by an arbitrator.⁶⁸ This punishment is disputable only to the commissioner—the person whose authority the suspension invokes—so, this subsequent ruling on appeal is final.⁶⁹ However, the financial impact of such a suspension, whether it is through fine or loss of wages, may be reviewed by the Player Discipline Arbitrator.⁷⁰ The Player Discipline Arbitrator may either maintain or lower, but not extend, the financial penalty on the player, and must keep all considerations private.⁷¹

The guidelines in Section 9(b) of this Article dictate the procedure for situations involving players suspended for twelve games or more.⁷² Such suspensions involve either player conduct or the protection of the integrity of the sport.⁷³ Section 9(b) grants either the player or the union the ability to file for a review of the suspension.⁷⁴ Sections 2–7 of this

Basketball Ass’n and the Nat’l Basketball Players Ass’n, NBA Collective Bargaining Agreement, art. XXXI, § 9(c) (2011), <https://www.scribd.com/doc/172760974/NBA-NBPA-CBA-2011> [hereinafter 2011 NBA CBA].

⁶² Wilson, *supra* note 17, at 49; 2011 NBA CBA, *supra* note 61.

⁶³ Wilson, *supra* note 17, at 49.

⁶⁴ Wilson, *supra* note 17, at 49; 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9.

⁶⁵ 2011 NBA CBA, *supra* note 61, at art. XXXI.

⁶⁶ 2011 NBA CBA, *supra* note 61, at art. XXXI.

⁶⁷ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(a)-(b).

⁶⁸ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(a).

⁶⁹ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(a)(1)-(3).

⁷⁰ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(a)(5).

⁷¹ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(a)(5)(b)-(c).

⁷² 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(b).

⁷³ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(b).

⁷⁴ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(b) (referring to Sec. 2(a)).

Article articulate the exact procedure of the review.⁷⁵ These proceedings are similar to court cases.⁷⁶ There are pre-hearing motions, discovery, full hearings, and final rulings handed down by the Grievance Arbitrator.⁷⁷ Like the MLB, either party can discharge the Grievance Arbitrator at any time before the Grievance Arbitrator delivers the final ruling.⁷⁸ If the parties cannot agree on a new arbitrator, the parties shall jointly request a list of eleven attorneys from the International Institute for Conflict Prevention and Resolution (“the CPR Institute”).⁷⁹ If the parties cannot decide on a new arbitrator from that list, each party may eliminate up to five names before returning the list to the CPR Institute, who will then make a final selection.⁸⁰ However, if at any time the Commissioner believes that the matter, in its essence, involves the integrity of the sport, he may implement the appeals procedure for penalties under twelve games, outlined *supra*.⁸¹ While it may seem that the Commissioner does not have complete authority to discipline players,⁸² the CBA grants the Commissioner full discretion in suspensions for twelve games and under and near-unfettered control in suspensions involving over twelve games.⁸³

D. The NFL Commissioner’s Authority

The handling of the Deflategate scandal sparked the most recent issue of commissioner disciplinary authority. While the NFL CBA is the primary source of the Commissioner’s authority, the NFL Constitution also sets forth important powers.⁸⁴ “Article VIII of the NFL constitution details the commissioner’s power to resolve disputes and to take action against a person connected with the league when the person engages in conduct detrimental to the league.”⁸⁵ In this capacity,

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

⁷⁵ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(b).

⁷⁶ See 2011 NBA CBA, *supra* note 61, at art. XXXI, § 2-7.

⁷⁷ 2011 NBA CBA, *supra* note 61, at art. XXXI, §3-6.

⁷⁸ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 7(a).

⁷⁹ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 7(b).

⁸⁰ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 7(b).

⁸¹ 2011 NBA CBA, *supra* note 61, at art. XXXI, § 9(d).

⁸² Pacifici, *supra* note 7, at 103.

⁸³ Pacifici, *supra* note 7, at 103.

⁸⁴ Pacifici, *supra* note 7, at 103-04.

⁸⁵ Pacifici, *supra* note 7, at 103-04 (citing NFL CONST. art VIII, § 6 (2006)).

any member thereof is guilty of any conduct detrimental to the League, its member clubs or employees, or to professional football.⁸⁶

The NFL is unique in that one can only appeal disciplinary decisions to the Commissioner; this may make the NFL's disciplinary process seem much harsher than those of other professional sports leagues.⁸⁷ The NFL CBA primarily covers playing rules, with a particular focus on player safety.⁸⁸ There is an attempt to clarify the ambiguous powers of the Commissioner in the CBA, but the language utilized to ameliorate the ambiguity is itself ambiguous.⁸⁹ The real issue of the ambiguity revolves around the Commissioner's ability to punish "conduct detrimental to the integrity of, or public confidence in, the game of professional football"⁹⁰ This language is so broad and undefined that it could allow the Commissioner to interpret any transgression as fitting this category. Such authority is woefully unfair to players. The full list of the Commissioner's disciplinary authority is outlined in Article 8, Section 13, of the NFL Constitution, and is beyond the scope of this note, especially considering much of the constitution is inapplicable to player discipline.⁹¹ Also, there is a further expansion of his powers within the form player contract in Appendix A of the NFL CBA.⁹² Section 15 of the form contract is entitled "Integrity of the Game."⁹³ With this section, "the NFL Commissioner possesses the authority to discipline a player for 'conduct detrimental' to the League under the NFL constitution, the NFL CBA, and a standard form NFL player contract."⁹⁴ Ostensibly, the NFL Commissioner seems to have a despotic rule above all others. However, along with the intricate minutia of how each Commissioner enacts discipline, there is a unifying clause in all of the major sports leagues that augments their power beyond reason.

E. The Ubiquity of "The Best Interest of the League" Clause

The concept of a commissioner as protector of a league's integrity dates back to the very creation of the position. The inception of a "sports commissioner" came in 1921 in the MLB as a response to the "Black

⁸⁶ NFL CONST. art VIII, § 6 (2006).

⁸⁷ Wilson, *supra* note 17, at 49.

⁸⁸ Wilson, *supra* note 17, at 49.

⁸⁹ Pacifici, *supra* note 7, at 104.

⁹⁰ 2011 NFL CBA, *supra* note 6, at 204.

⁹¹ NFL CONST. art VIII, § 13 (2006).

⁹² 2011 NFL CBA, *supra* note 6, at 256; Pacifici, *supra* note 7, at 104.

⁹³ 2011 NFL CBA, *supra* note 6, at 256.

⁹⁴ Pacifici, *supra* note 7, at 104.

Sox” scandal of the 1919 World Series.⁹⁵ The original purpose of the MLB Commissioner was to serve as the ethical center of the sport, protecting its integrity and preventing ills, such as gambling, from blemishing it.⁹⁶ Following the MLB’s decision, the other three major sports leagues eventually instituted the position of commissioner.⁹⁷ The external limitations placed on each leagues’ commissioners can be found, primarily, in the National Labor Relations Act (“NLRA”) and, most likely, the First Amendment of the Constitution.⁹⁸

However, despite these external encumbrances, it seems as though each league has found a similar way to strengthen the authority of their respective commissioners. As mentioned in each of the following sections, one of the commonalities we see amongst all four of the major sports leagues is language that gives the Commissioners authority to maintain the “best interests of the sport.”⁹⁹ As such, they all are given substantial discretionary power that goes beyond certain textual limitations in order to maintain the ethereal essence of the sport.¹⁰⁰ This extends to behavior both on and off the court, field, or ice that would challenge the integrity of the league.¹⁰¹ Apart from the expansive language of the clause, the “integrity” of each league is not specifically defined, and, therefore, it falls to each Commissioner to use his own judgment to determine what must be done to uphold this integrity.¹⁰² This authority is so far-reaching that no violation of any league rule is required for it to be activated, which severely limits the autonomy of league members beholden to the rules.¹⁰³ While this “best interest” authority is not unlimited, considering it is constrained by the aforementioned CBA and Constitutional language, it is nonetheless significant.¹⁰⁴ When the enumerated powers of each league’s commissioner are coupled with the authority of this clause, it becomes evident how each commissioner is similarly situated in their control over their respective sport in terms of disciplinary action.

III. ANALYSIS OF LEGAL RAMIFICATIONS OF COMMISSIONER DISCIPLINE

⁹⁵ Wilson, *supra* note 17, at 46.

⁹⁶ Wilson, *supra* note 17, at 46.

⁹⁷ Wilson, *supra* note 17, at 46.

⁹⁸ Wilson, *supra* note 17, at 46.

⁹⁹ Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 235-236 (2003).

¹⁰⁰ *Id.*

¹⁰¹ Wilson, *supra* note 17, at 47.

¹⁰² Wilson, *supra* note 17, at 47.

¹⁰³ Wilson, *supra* note 17, at 47-48.

¹⁰⁴ Wilson, *supra* note 17, at 48-54.

ILLUSTRATED BY DEFLATEGATE

There are many intricacies in the world of sports that could require legal intervention. In 2015 alone, there were five major sports issues that arose across the nation: (1) free markets for college athletes; (2) college athletes' right to unionize; (3) legalization of sports gambling; (4) antitrust litigation over territorial restraints and blackout rules; and (5) the NFL Commissioner's disciplinary authority.¹⁰⁵ While some of these issues may be external to the actual sport and its regulations, they implicate major areas of law from antitrust law to labor law.¹⁰⁶ When reviewing the Deflategate controversy, one of the most prominent sports-law issues, the authority of sports commissioners is brought to light.¹⁰⁷ This case is worth review not only because it is topical, but also because it illustrates the legal ramifications of the unfettered power of sports commissioners and how it should be mitigated through legislation.

A. Deflategate: Before the Courts

Deflategate involved Tom Brady using underinflated footballs in the 2015 AFC championship game.¹⁰⁸ In that game, the Colts' safety, Mike Adams, intercepted Tom Brady twice and the Colts kept both balls, because the team believed the balls were not inflated correctly.¹⁰⁹ It was reported that eleven of the twelve footballs allowed to the Patriots were under the NFL's required range of 12.5 to 13.5 pounds per square inch.¹¹⁰ It was also reported that the game referee, Walt Anderson, inspected the balls two hours and fifteen minutes before the game began, in accordance with protocol.¹¹¹ As a result, the NFL hired Ted Wells as the league-appointed attorney to complete an in-depth investigation into the matter.¹¹² The investigation culminated in a 243-page report that implicated Tom Brady, as well as some of the Patriots' staff members.¹¹³ The primary conclusion was that Tom Brady was probably "at least

¹⁰⁵ Marc Edelman, *Top Five Sports Law Stories for 2015*, FORBES (Jan. 6, 2015), <http://www.forbes.com/sites/marcedelman/2015/01/06/top-5-sports-law-stories-for-2015/2/#fbc9d2631457>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Bunam & Cimini, *supra* note 4.

¹⁰⁹ Kevin Seifert, *FAQ: NFL Investigating Whether Patriots Deflated Game Balls*, ESPN (Jan. 22, 2015), http://www.espn.com/blog/nflnation/post/_id/159490/faq-nfl-investigating-whether-patriots-deflated-game-balls.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Wells Report: Pats Employees Probably Deflated Balls, Tom Brady Likely Knew*, ESPN (May 7, 2015), http://www.espn.com/boston/nfl/story/_id/12833542/wells-report-finds-new-england-patriots-probably-deflated-balls.

¹¹³ *Id.*

generally aware” that the footballs used were underinflated.¹¹⁴ The report also posited the likelihood “that Jim McNally [the Official Locker Room attendant for the Patriots] and John Jastremski [an equipment assistant for the Patriots] participated in a deliberate effort to release air from the Patriots’ game balls after they were examined by the referee.”¹¹⁵ There were also text messages exchanged between the two staffers discussing footballs and their level of inflation.¹¹⁶ However, the report found no conclusive evidence implicating the team coach, Bill Belichick, or team management in the deflation practice.¹¹⁷

Due to these findings, the NFL ruled that Tom Brady would be suspended without pay for the first four games of the 2015-2016 NFL season.¹¹⁸ The NFL also decided to take punitive action against the New England Patriots team, fining it \$1 million and taking away its 2016 first-round and 2017 fourth-round draft picks.¹¹⁹ The Patriots issued a statement expressing its belief that the findings of the Wells Report were incomplete, and that the report did not include evidence of the natural reduction of PSI in the footballs.¹²⁰ The statement also said there was no evidence that Tom Brady had a preference for underinflated balls.¹²¹ In spite of this, the Patriots decided not to appeal the decision of the NFL.¹²² However, the National Football League’s Players’ Association appealed the decision on Tom Brady’s behalf.¹²³ After deciding not to recuse himself from the internal appeal hearing, Commissioner Goodell upheld the suspension based on the protection of the “integrity of the game,” something he held to be the most important of the commissioner’s duties.¹²⁴ Part of this decision was a result of Brady instructing his assistant to destroy his cell phone that he used since November—a period of time including the AFC Championship game and the early investigation—the day he was interviewed by Ted Wells.¹²⁵ As a result of their inability to reach any sort of resolution, Brady and Goodell went before Judge Richard M. Berman of the United States District Court for

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Around the NFL Staff, *Tom Brady Suspension Case Timeline*, NFL.COM (July 15, 2016, 1:16 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Around the NFL Staff, *supra* note 118.

¹²⁵ Around the NFL Staff, *supra* note 118.

the Southern District of New York.¹²⁶ The judge urged them to settle, but ultimately decided that the positions of the parties were too disparate and that he would hand down a ruling.¹²⁷

B. NFL Mgmt. Council v. NFL Players Ass'n

While the judge addressed the court's usual deference to an arbitrator's findings and accepted his findings, he nevertheless decided that the decision should be vacated.¹²⁸ The award in favor of Brady was granted on three legal grounds:

(A) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (B) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pash; and (C) denial of equal access to investigative files, including witness interview notes.¹²⁹

In response to Brady's lack of suspension notice, the court drew a parallel between the NFL's decision and how the league treats steroid use.¹³⁰ The court found that Brady had no notice of a possible suspension equivalent to the use of performance-enhancing drugs or general awareness of a scheme to deflate footballs.¹³¹ The court also found that the suspension could not be based on Brady's failure to cooperate with an ensuing investigation.¹³² While Goodell thought suspending Brady was consistent with the practice of punishing steroid use—reasoning that both gave the violators a competitive advantage—the court disagreed.¹³³ As a result, the court held that no player alleged or found to have had general awareness of inappropriate ball deflation by other parties and failed to cooperate with the investigation could be considered to have reasonable notice of a punishment equivalent to NFL Policy on Anabolic Steroid and Related Substances use.¹³⁴

Based on this reasoning, the court found additional grounds to vacate Brady's suspension.¹³⁵ The court found that Brady's general awareness of a scheme to deflate footballs did not amount to notice of possible punitive action.¹³⁶ The court concluded that, "as a matter of law,

¹²⁶ Around the NFL Staff, *supra* note 118.

¹²⁷ Around the NFL Staff, *supra* note 118.

¹²⁸ NFL Mgmt. Council v. NFL Players Ass'n, 125 F. Supp. 3d 449, 463 (S.D.N.Y. 2015).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 464.

¹³⁴ NFL Mgmt. Council, 125 F. Supp. 3d at 465.

¹³⁵ *Id.* at 467.

¹³⁶ *Id.*

no NFL policy or precedent notifies players that they may be disciplined (much less suspended) for general awareness of misconduct by others.”¹³⁷ The lack of precedent within the NFL, thus, violated the “law of the shop”: “A rule must clearly and unambiguously establish the scope of prohibited conduct, as well as the consequences of violations, in order to be enforceable”¹³⁸ The “law of the shop” refers to “when an arbitrator enforces a past practice,” something that was not applicable here due to lack of precedent.¹³⁹

Finally, the court distinguished between notice of a fine and notice of a suspension.¹⁴⁰ The court found that, under the Player’s Policy, a player has notice of a potential fine.¹⁴¹ However, Brady was punished under the Competitive Integrity Policy, which is only incorporated in the Game Operations Manual that applies to the chief executive, presidents, general managers, and head coaches—but not players.¹⁴² Goodell, in response, contended that conduct detrimental to the league, rather than the Competitive Integrity Policy, was the basis for Brady’s punishment.¹⁴³ The court stated that a player’s right to notice is quintessential to the CBA, as well as criminal and civil justice systems.¹⁴⁴ The court’s holding in favor of Brady was also based on past NFL arbitral precedent that the lack of notice of the Competitive Integrity Policy is grounds for dispensing with punishment.¹⁴⁵

In terms of conduct detrimental to the league, the court dismissed that argument based on NFL precedent.¹⁴⁶ For example, in the domestic violence cases of Ray Rice and Adrian Peterson, the NFL initially punished them on the grounds of conduct detrimental to the league, but ultimately punished them based on the NFL’s policy against domestic violence.¹⁴⁷ As such, the situations are not analogous. Also, the court found that Brady was denied equal opportunity to examine Co-Lead Investigator Jeff Pash.¹⁴⁸ NFL precedent dictates that, in Article 46 arbitration appeals, players must be given the opportunity to confront

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Jerome S. Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQ. L. REV. 695, 698 (1966).

¹⁴¹ *NFL Mgmt. Council*, 125 F. Supp. 3d at 467.

¹⁴² *Id.* at 468.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 469.

¹⁴⁶ *Id.*

¹⁴⁷ *NFL Mgmt. Council*, 125 F. Supp. 3d at 470.

¹⁴⁸ *Id.*

their investigators.¹⁴⁹ Consequently, Brady was unfairly prejudiced.¹⁵⁰ In that same vein, the court found that Goodell improperly denied Brady equal access to investigative files.¹⁵¹ Lastly, Brady contended that Goodell was “evidently partial” within the meaning of 9 U.S.C. § 10(a)(2), which will be essential to the legislation this paper proposes.¹⁵²

C. Goodell’s Appeal: NFL Mgmt. Council v. NFL Players Ass’n

In the wake of the court’s decision, Goodell appealed the case to the United States Court of Appeals for the Second Circuit.¹⁵³ The Second Circuit reversed the ruling of the lower court on several grounds.¹⁵⁴ First, in regards to the Player Policies, the circuit court agreed that the policies did not apply, but did not foreclose the possibility of suspensions.¹⁵⁵ Normally, under the Player Policies, tampering with equipment only called for a fine.¹⁵⁶ While the policy under the Other Uniform/Equipment Violations section mentions nothing about tampering with balls, the court found that Article 46 gives the Commissioner broad authority to deal with conduct that goes against the integrity of the game.¹⁵⁷ Also, while this section cites fines for first-time offenses, the court noted that these fines are minimums and can be augmented based on the severity of the violation.¹⁵⁸

In terms of the steroid comparison, the circuit court found little issue with it, in contrast with the lower court.¹⁵⁹ The court recognized that arbitrators are given broad latitude in their decisions.¹⁶⁰ While Brady had the right to notice of potential punishment, there is no enumerated right that Brady is given notice to analogies made by the arbitrator that would inform their decision.¹⁶¹ Thus, while the court found the comparison imperfect, the Commissioner was still within his rights, because this issue was not essential for his punishment.¹⁶²

In regards to the issue of awareness of the underinflated balls, the

¹⁴⁹ *Id.* at 472.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 473; 9 U.S.C.A. § 10(a)(2) (Westlaw through P.L. 115-61).

¹⁵³ *See* NFL Mgmt. Council v. NFL Players Ass’n, 820 F.3d 527, 527 (2d Cir. 2016).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 539.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *NFL Mgmt. Council*, 820 F.3d at 539-40.

¹⁶⁰ *Id.* at 540.

¹⁶¹ *Id.* at 540-541.

¹⁶² *Id.*

court found that the Wells Report did not limit itself to the standard of general awareness, but rather that report determined that was the most likely level of awareness, rather than direct involvement or potential awareness.¹⁶³ The real issue here for the Commissioner was whether the discipline he imposed was within his Article 46 powers to protect the integrity of the league.¹⁶⁴ The court found that, in conjunction with the evidence presented from the Wells Report, and other exigent circumstances surrounding the investigation, there was a factual basis for Goodell to determine that Brady committed a punishable offense.¹⁶⁵ Therefore, the court held that the Commissioner was within his rights to find that Brady participated in conduct detrimental to the league.¹⁶⁶

The court also found that there were grounds to punish Brady for non-cooperation with the investigation.¹⁶⁷ Again the court found that the league had authority under Article 46 detrimental conduct, but also because of Brady's general notice of the investigation.¹⁶⁸ The court reasoned that Brady was on notice of potential punishment for destroying his phone when he received a letter from the league stating that he failed "to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.)."¹⁶⁹ Also, the court noted that any reasonable litigant would understand that the destruction of evidence days before an arbitration hearing would be a substantial issue.¹⁷⁰ The court also dismissed the issue of the Competitive Integrity Policy, stating the Brady was clearly being punished under Article 46.¹⁷¹

On the issue of exclusion of testimony from the NFL General Counsel, the court found that any of Pash's insight into the matter was collateral to the arbitration and it was not necessary that Brady be privy to it.¹⁷² The court also found that the Commissioner did not receive any extensive information from any of the members of counsel that fell beyond that of the Wells Report and what was disclosed in hearings and the previous case.¹⁷³ With regard to the denial of access to investigative files, the court found that the Commissioner himself did not rely on any

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 542.

¹⁶⁵ *NFL Mgmt. Council*, 820 F.3d at 543.

¹⁶⁶ *Id.* at 552.

¹⁶⁷ *Id.* at 542.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 543.

¹⁷⁰ *Id.*

¹⁷¹ *NFL Mgmt. Council*, 820 F.3d at 544.

¹⁷² *Id.* at 546.

¹⁷³ *Id.*

internal interview notes in making his decision.¹⁷⁴ Therefore, it was not unreasonable for him to assume that Brady would require access to them.¹⁷⁵ Finally, the court found no merit to the issue of the Commissioner being an evidently partial arbitrator.¹⁷⁶ The court cited, yet again, the Article 46 authority of the Commissioner to determine what constitutes conduct detrimental to the league.¹⁷⁷ As such, the Second Circuit reinstated the four-game suspension and the fine.¹⁷⁸

IV. LEGISLATION IN OPPOSITION TO THE “BEST INTEREST OF THE LEAGUE” CLAUSE

A. Why Commissioner’s Broad Authority Is Unfair and Creates Wide-Ranging Problems

In the wake of the Second Circuit’s decision, Brady decided not to appeal the decision to the Supreme Court, accepting the suspension.¹⁷⁹ While it is unclear how the Supreme Court would have ruled, the decision clearly illustrates the overly-broad authority delegated to Roger Goodell in his duty to protect the best interest of the league.¹⁸⁰ Further, the issue is not limited to the NFL Commissioner, as illustrated in Part II. So, the question remains: what can be done?

One might ask: Why is change necessary, considering that these leagues are extremely profitable and popular?¹⁸¹ Apart from the looming issues of player dissatisfaction in some of the leagues,¹⁸² issues may also arise when each leagues’ CBA expires and it becomes time for the players’ unions and the leagues to renegotiate.¹⁸³ Firstly, as the commissioners’ authorities increase, discipline is likely to increase,

¹⁷⁴ *Id.* at 546-47.

¹⁷⁵ *Id.* at 546.

¹⁷⁶ *Id.* at 548.

¹⁷⁷ *NFL Mgmt. Council*, 820 F.3d at 548.

¹⁷⁸ *Id.* at 548-549.

¹⁷⁹ ESPN News Services, *Tom Brady Won’t Appeal Suspension to Supreme Court*, ESPN (July 15, 2016), http://www.espn.com/nfl/story/_/id/17083595/tom-brady-new-england-pat-riots-appeal-suspension-supreme-court.

¹⁸⁰ *NFL Mgmt. Council*, 820 F.3d at 527.

¹⁸¹ Steven Kutz, *NFL Took in \$13 Billion in Revenue Last Season – See How It Stacks Up Against Other Pro Sports Leagues*, MARKET WATCH (July 2, 2016), <http://www.marketwatch.com/story/the-nfl-made-13-billion-last-season-see-how-it-stacks-up-against-other-leagues-2016-07-01>.

¹⁸² Kevin Seifert, *NFL Facing Unprecedented Rebellion From Teams, Players*, ESPN (Oct. 17, 2016), http://www.espn.com/blog/nflnation/post/_/id/218163/nfl-facing-unprecedented-rebellion-from-the-inside.

¹⁸³ Matthew J. Parlow, *Professional Sports League Commissioners’ Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 179 (2010).

resulting in the loss of salary through suspensions and fines, which can be significant for lower level players who do not play as long and make less money.¹⁸⁴ Another reason relates more to player freedom, regarding whether players should be suspended for non-sports affiliated activities.¹⁸⁵ A commissioner does not need to wait for a guilty verdict in a criminal matter to punish a player for actions he finds detrimental to the sport.¹⁸⁶ This practice goes against the societal and legal norm of innocent until proven guilty; however, sports leagues are private organizations that players enter freely.¹⁸⁷ Nevertheless, this still is an incentive for players to want to renegotiate.¹⁸⁸

A secondary question is whether or not leagues should fine players for non-criminal activity that occurred off the court.¹⁸⁹ There are serious implications here that could violate a player's right to free speech, and put their political, religious, and social beliefs at risk.¹⁹⁰ As players begin to act out in different ways, new rules are promulgated to regulate their behavior.¹⁹¹ Any player that feels as though the league has too much control over his personal life may feel disenchanting with the sport and face further action due to acts of frustration.¹⁹²

A final consideration for why legislation is necessary is the economic ramifications of dissatisfaction with commissioner authority that could result in strikes and lockouts.¹⁹³ One such example is the 2011-2012 NBA season lockout.¹⁹⁴ While this strike was primarily based on the allocation of money from various sources, the economic effects are explanatory.¹⁹⁵ Because of the reduction of the season from eighty-two to sixty-six games, the players lost roughly twenty percent of their salaries.¹⁹⁶ The NBA players are guaranteed 51.2% of all basketball-related income.¹⁹⁷ The lockout resulted in a revenue loss of about \$3.3 billion, half of which was borne by the players.¹⁹⁸ If legislation was

¹⁸⁴ *Id.* at 200-01.

¹⁸⁵ *Id.* at 201.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Parlow, *supra* note 183, at 201.

¹⁹⁰ Parlow, *supra* note 183, at 201.

¹⁹¹ Parlow, *supra* note 183, at 201.

¹⁹² Parlow, *supra* note 183, at 201.

¹⁹³ Kristi Dosh, *Tallying Up the NBA Lockout Costs*, ESPN (Apr. 16, 2012), http://www.espn.com/blog/sportsbusiness/post/_id/144/tallying-up-the-nba-lockout-costs.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

enacted to settle any disputes that could arise during a CBA negotiation year, it could result in the saving of millions, if not billions, of dollars.

Examining how the commissioners are compensated in comparison to the average player is illustrative of how entrenched the position of commissioner is and raises questions of self-dealing. This further indicates a need to mitigate commissioner positions in the major sports leagues. Respectively, the average salaries for players in the NBA, MLB, NHL, and NFL (in 2014) and their potential career earnings are as follows: \$5.15 million, \$3.2 million, \$2.4 million, and \$1.9 million.¹⁹⁹ Over the course of an average NBA, MLB, NHL, and NFL career, these averages, respectively, allow for career earnings of: \$24.7 million, \$17.9 million, \$13.2 million, and \$6.7 million.²⁰⁰ These figures, when compared to the salaries of the commissioners of these leagues, show a stark contrast in the yearly and career earning potentials. Based on figures from 2010, Bud Selig, the Commissioner of the MLB, earned \$18.35 million in 2007, with only ten players earning more than him at the time.²⁰¹ The NFL Commissioner was the second highest earner, taking in \$8 million in 2009, after taking a twenty-five percent pay cut.²⁰² The third and fourth highest paid commissioners were the NBA and NHL Commissioners, earning a “modest” \$10 and \$7.2 million respectively.²⁰³ These figures have likely increased in the near decade that has passed since their recording, as have the players’ averages, but the contrast is still as appalling. These earning figures become even more concerning when considering the recent history of the duration of sports commissioners’ tenure. The previous NBA Commissioner, David Stern, served for thirty years in his position.²⁰⁴ The next longest tenured commissioners are the previous MLB Commissioner Bud Selig who served for twenty-four years, including time as active and formal Commissioner,²⁰⁵ and NHL Commissioner Gary Bettman who has served

¹⁹⁹ *Visualizing the Yearly Salary of Professional Athletes, NBA Players Average \$5+ Million a Year*, HUFFINGTON POST (Nov. 1, 2013), http://www.huffingtonpost.com/visualnewscom/visualizing-the-yearly-sa_b_4184716.html.

²⁰⁰ *Id.*

²⁰¹ Mark Riddix, *5 Top-Paid Sports Commissioners*, INVESTOPEDIA (Aug. 11, 2010), <http://www.investopedia.com/financial-edge/0810/5-top-paid-sports-commissioners.aspx>.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Brian Windhorst, *David Stern Has Date for Retirement*, ESPN (Oct. 25, 2012), http://www.espn.com/nba/story/_/id/8550645/david-stern-retire-nba-commissioner-2014.

²⁰⁵ MLB, *MLB Commissioner Bud Selig to Formally Announce Retirement*, BALTIMORE NEWS J. (Sep. 26, 2013), <https://web.archive.org/web/20130928025801/http://www.baltimorenewsjournal.com/2013/09/26/mlb-commissioner-bud-selig-to-formally-announce-retirement/>.

for roughly the same amount of time.²⁰⁶ While NFL Commissioner Roger Goodell has only served since 2006, a meager eleven years, he is an example of the self-dealing inherent to the position.²⁰⁷ It is widely known that Goodell was groomed for the job by his predecessor, Paul Tagliabue, as was the current NBA Commissioner Adam Silver.²⁰⁸ While the owners are required to vote, the unanimity in both instances strongly suggests a dynastic system.

Some people have offered alternatives to legislation, such as a player conduct policy (“PCP”).²⁰⁹ This would undoubtedly be something generated by CBA negotiations, rather than unilaterally by either the players or the league.²¹⁰ A PCP would specifically enumerate how players are meant to comport themselves, alleviating some confusion.²¹¹ However, the specifics would have to be negotiated, which could result in a lockout or ambiguous rules.²¹² Furthermore, PCP would still leave the issue of player autonomy off the court, and would do little to lessen the “best interest of the league” authority, which “[s]cholars have criticized [because] this model of a commissioner sitting as accuser, judge, and jury . . . gives rise to perceived, if not real, bias.”²¹³ As previously alluded to, this could run afoul of restriction of “evident partiality or corruption in the arbitrators” provision of 9 U.S.C. § 10(a)(2).²¹⁴

As such, proposed legislation that would make ambiguous clauses, such as the “best interest of the league” clause, a violation of players’ rights would be beneficial. This legislation could stand on its own or become a provision of some other federal legislation, such as the Federal Labor Relations Act. Congress would have the authority to implement such legislation under the Commerce Clause of the United States Constitution, which allows regulation of interstate commerce, and would apply to all major sports leagues. The primary issue here is that many of the leagues have teams in Canada, which would require a separate source of authority.

²⁰⁶ Steve Keating, *After 20 Years of Booming, Gary Bettman Still Standing*, REUTERS (Jan. 31, 2013), <http://www.reuters.com/article/us-nhl-bettman-idUSBRE91000R20130201>.

²⁰⁷ NFL.com wire reports, *Goodell Chosen as NFL’s New Commissioner*, NFL.COM (Aug. 8, 2006), <https://web.archive.org/web/20060813131624/http://www.nfl.com/news/story/9591854>.

²⁰⁸ *Id.*; Windhorst, *supra* note 204.

²⁰⁹ Parlow, *supra* note 183, at 202.

²¹⁰ Parlow, *supra* note 183, at 202.

²¹¹ Parlow, *supra* note 183, at 202.

²¹² Parlow, *supra* note 183, at 202.

²¹³ Parlow, *supra* note 183, at 202.

²¹⁴ 9 U.S.C. § 10(a)(2) (Westlaw through Pub. L. No.115-61).

This legislation would require each league to specifically enumerate all possible infractions punishable as players of the league, if they do not go so far as to infringe upon their First Amendment rights. The legislation would also prevent athletes from being punished for criminal behavior if they are not found guilty. Finally, the legislation would require that all disciplinary hearings be appealable to a panel of arbitrators, independent of the league. The panel would be provided by one or several outside arbitration sources to ensure impartiality. The players' union and the league will retain the right to remove one or multiple arbitrators from the panel at any time, if they can show good cause. In such an instance, they would have no say in the replacement arbitrators.

B. Privacy and Constitutional Rights Legislation

This section will propose extensions of privacy laws and state-adopted constitutional principles in order to mitigate major sports leagues' commissioner authority to take punitive actions. This section will not argue that there are alterations to commissioner authority in regard to on-field and other related activities, because those powers are strongly enumerated and extend beyond the scope of its purpose.²¹⁵ The first legislative proposal addresses how players are often subject to double punishment for criminal activity, as well as an invasion of their rights to privacy during legal proceedings that do not involve the sports leagues. This parallels a violation of the double jeopardy clause of the Fifth Amendment to the Constitution.²¹⁶ Traditionally, this provision has offered three constitutional protections: (1) protection from a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense.²¹⁷ Admittedly, this does not apply here, because double jeopardy only applies to government action,²¹⁸ but that is why there is a call for legislation to mirror its applicability to private entities. There is clear precedent for expanding constitutional protections through either state or federal action. One example of a state law expanding constitutional rights is N.J.S.A. 2A: 161A-1.²¹⁹ As explained in *State v. Evans*, this statute expands the rights of detainees relating to unlawful search and seizure,

²¹⁵ See 2011 NBA CBA, *supra* note 61, at art. XXXI, § 8(c).

²¹⁶ *North Carolina v. Pearce*, 89 S. Ct. 2072, 2076 (1969).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See generally N.J. STAT. ANN. 2A: 161A-1 (2009).

which is derived originally from the Fourth Amendment.²²⁰ If players were to be punished or acquitted by the courts only to face punishment from the league, it would completely contravene this essential Constitutional principal. Many state constitutions have adopted the principle of double jeopardy and can apply it as they see fit, as long as it does not contradict Supreme Court precedent.²²¹ As such, “[s]tate courts can also interpret any double jeopardy clauses in their own state constitutions which often provide more protection than that which is afforded by the federal constitution since the minimum standards under the U.S. Constitution always apply.”²²² States that have adopted heftier protections include: Alabama, Arkansas, Arizona, California, Florida, Georgia, Illinois, Massachusetts, Michigan, Minnesota, New York, and Texas.²²³ With enhanced protections like these extended to athletes and fines for non-sports related offenses, the ability of commissioners to commit double jeopardy violations would be extinguished.

While this is an extreme example, and there are other exigencies that would need to be considered, the case of Aaron Hernandez is informative in how a sports league could violate the principle of double jeopardy.²²⁴ In an effort to avoid a publicity nightmare, Roger Goodell made it a point to wait until Aaron Hernandez was convicted of murder to suspend him.²²⁵ Obviously, suspending Hernandez subsequent to his conviction would make little sense considering the charges would call for a life sentence, but the point still stands.²²⁶ Assuming a player was convicted of a more innocuous crime, like drug possession, a conviction could warrant a suspension or fine in the eyes of a league commissioner, providing double punishment. This note proposes that legislation should be created that would prevent sports leagues from punishing players for crimes, at least of the non-violent nature. This is not meant to promote non-violent crimes, such as marijuana use, but to protect players as private citizens.

In fact, it could be argued that such treatment by sports leagues

²²⁰ See generally *State v. Evans*, 155 A.3d 580, 580 (N.J. Super. Ct. App. Div. 2017).

²²¹ *Samples of State Court Decisions on Double Jeopardy*, FINDLAW, <http://criminal.findlaw.com/criminal-rights/samples-of-state-court-decisions-on-double-jeopardy.html> (last visited Dec. 27, 2017).

²²² *Id.*

²²³ *Id.*

²²⁴ PTF Commentator, *Aaron Hernandez Still Hasn't Been Suspended by the NFL*, SB NATION (Mar. 27, 2015), <http://www.sbnation.com/nfl/2015/3/27/8299597/aaron-hernandez-should-be-allowed-to-play-in-the-nfl-until-a-verdict>.

²²⁵ *Id.*

²²⁶ Ashley Fantz, *Aaron Hernandez Charged in 2012 Double Homicide*, CNN (May 15, 2014), <http://www.cnn.com/2014/05/15/justice/aaron-hernandez-indictment/>.

perpetuate a false narrative about athletes as criminals, bordering on defamation. As players in the most popular sport in America, many players rise to the level of public figures, but the way many are represented in the media, and the way leagues handle such publicity, often casts them in a false light.²²⁷ Taking the NFL—the league with the most players—as an example, demonstrates that athletes are generally less likely to commit crimes than the average person, despite the rampant reports of misconduct.²²⁸ One study found that the rates of pro-athletes committing assault or domestic violence were half that of the general population.²²⁹ However, teams and leagues do not view players as people, but rather as market commodities that can bring in great revenue, but also terrible publicity.²³⁰ Teams have often stood by players in support of them, adhering to the principle of “innocent until proven guilty.” However, many teams and leagues are quick to repudiate their stars in order to protect their own image, even at the expense of the players involved.²³¹ While this would likely be protected under free speech, teams and leagues alike should be wary of speaking too soon on an issue.

C. Arbitration Legislation

It has been established that the “best interest of the league” clause is detrimental to sports and players, promoting this proposal for legislation. The clause gives commissioners too much authority, even when there is an arbitration process involved. The proposal would create legislation that would include a uniform arbitration process across all of the major sports leagues. This process would serve to be impartial, as well as strip the “best interest of the league” authority from the Commissioners.

The proposal would mandate that arbitration for any transgression related to the sport be brought before an impartial panel comprised of arbitrators that work independently of any league. The process would be similar to standing arbitration process in the MLB, but with certain distinctions.²³² A list of names would be provided by an independent arbitration entity—one that the players’ association and the league have agreed upon.²³³ Once a consensus is reached about who the arbitrators

²²⁷ Tom Keane, *The Myth About Crime and the NFL*, BOSTON GLOBE (July 2, 2013), <https://www.bostonglobe.com/opinion/2013/07/01/the-myth-about-crime-and-pro-athletes/qInKoSMkbhuImiS4pO87WJ/story.html>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² 2012-2016 MLB CBA, *supra* note 25, at art. XII.

²³³ 2012-2016 MLB CBA, *supra* note 25, at art. XII.

will be, then the process can continue. If either party has an issue with any of the arbitrators, they will have to show cause to have them removed from the panel. Examples of justifiable cause could be that the arbitrator is biased or unqualified or not in the right state-of-mind to participate in the proceedings, but there must be cause. It will not be the case, like in the MLB arbitration system, that a party can remove an arbitrator at their whim. Nor will it be like in *voir dire* where each party receives a certain number of jurors that they may dismiss without cause. If adequate cause cannot be shown, the arbitrator will remain on the panel. At the end of the arbitration, if either party is not satisfied, they can take the matter to the courts. However, if a party chooses to litigate the matter and is unsuccessful, the losing party will be responsible for the opposing party's attorney's fees.

This system will allow for a truly fair way to determine what punishment is suitable for a given transgression, especially when the constitution, by-laws, and the CBA are ambiguous on an issue. If such an issue of ambiguity arises, the team owners will vote on how it will be interpreted, and the arbitrators can proceed from there. It is still up to the players' associations and the leagues to negotiate the CBAs and what infractions are punishable, but the punishments will not be left to parties that have a vested interest in the outcome. Only with these legislative changes will players, in all types of situations, be treated fairly and impartially.

V. CONCLUSION

In summation, since the inception of the position in 1921, the authority of sports commissioners has grown to an unacceptable level. Primarily driven by the "best interest of the league clause," commissioners' power must be checked through legislation in order to promote the best interests not only of the leagues, but also their numerous players. Without such legislation, players will remain in the precarious position of negotiating CBAs that leave them open to unfair disciplinary action.