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# Deflategate: Tom Brady's Battle Against the NFL and Arbitration

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# DEFLATEGATE: TOM BRADY'S BATTLE AGAINST THE NFL AND ARBITRATION

*David Berger\**

## I. INTRODUCTION

Without much competition or room for debate, professional football has been the most popular sport in America since 1985.<sup>1</sup> Combine this fact with an eighteen-month legal saga that pitted arguably the greatest professional football player in the history of the National Football League (“NFL”), Tom Brady (“Brady”), against arguably the single-most powerful person to ever work in professional sports, Roger Goodell (“Goodell”), and football fans and legal scholars alike had front row seats to one of the most exhausting and arduous legal controversies in professional sports history. In reference to the infamous “Watergate” scandal and two previous NFL disciplinary investigations referred to as “Bountygate” and “Spygate,” this legal battle between Goodell and Brady—which lasted 544 days—will notoriously be remembered as “Deflategate.”<sup>2</sup> Deflategate started in January of 2015, when Goodell and the NFL hired Theodore Wells Jr. (“Wells”) and his New York powerhouse law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP to conduct an investigation into Brady’s alleged misconduct, and ended in July of 2016 when Brady ultimately decided not to appeal to the United States Supreme Court after the Second Circuit ruled to uphold the suspension ordered by Goodell.<sup>3</sup>

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1. *Pro Football Is Still America's Favorite Sport*, HARRIS POLL (Jan. 26, 2016, 5:00 AM), [http://www.theharrispoll.com/sports/Americas\\_Fav\\_Sport\\_2016.html](http://www.theharrispoll.com/sports/Americas_Fav_Sport_2016.html).

2. Ari Gilber, *Tom Brady Ends Legal Battle: 10 Things That Didn't Last as Long as Deflategate*, NY DAILY NEWS (July 15, 2016, 1:50 PM), <http://www.nydailynews.com/sports/football/deflategate-10-didn-long-brady-saga-article-1.2713124>.

3. *Tom Brady Suspension Case Timeline*, NAT'L FOOTBALL LEAGUE (July 15, 2016, 1:16 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>.

This Comment will first analyze the key elements of the Deflategate saga. These include: Brady's alleged deflation of footballs, which led to his suspension; the investigation and report that influenced Goodell to suspend and fine Brady; Brady's appeal and the Goodell-led arbitration that confirmed his suspension; the District Court judicial review of the arbitration award that vacated Goodell's arbitration ruling, and; the Second Circuit's decision to affirm the initial arbitration award in favor of the NFL which reinstated Brady's suspension. This Comment will then parse the legal issues presented by the arbitration appeal that confirmed Brady's suspension. Finally, this Comment will agree with the District Court's conclusion that Brady should not have received the punishment he received from Goodell, and with the reasoning behind the decision.

## II. BACKGROUND

### A. Overview

Following the conclusion of a three-month investigation, which cost the NFL over three million dollars, Goodell, the commissioner of the NFL, suspended Brady, the New England Patriots quarterback, for four games based on Brady's alleged scheme to intentionally deflate footballs during the 2015 NFL American Football Conference (AFC) Championship game.<sup>4</sup> Brady appealed his suspension by requesting arbitration with the NFL Management Council ("NFLMC").<sup>5</sup> Goodell, the same man who ordered Brady's suspension, served as the arbitrator.<sup>6</sup> Unsurprisingly, he affirmed his previous order, which suspended Brady for the first four games of the 2015 regular season.<sup>7</sup>

On behalf of Brady, the NFL Players Association ("NFLPA") filed a motion to vacate the arbitration award.<sup>8</sup> In his review of Goodell's arbitration decision, Judge Richard Berman of the Southern District of New York vacated Goodell's ruling, nullifying Brady's punishment from the NFL.<sup>9</sup> The NFL appealed and the Second Circuit

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4. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 531–32 (2d Cir. 2016); Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 452–53 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

5. *See Nat'l Football League Mgmt. Council*, 820 F.3d at 531.

6. *Id.* at 534.

7. *Id.* at 535.

8. *See id.* at 531–32.

9. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 452.

overturned the lower court, which thereby re-enforced Goodell's arbitration decision.<sup>10</sup> Brady did not pursue an appeal to the United States Supreme Court.<sup>11</sup> He served his four-game suspension in the beginning of the 2016 NFL season, and concluded what will infamously be remembered as "Deflategate."<sup>12</sup> Nevertheless, Brady ultimately prevailed when it mattered most, as the Patriots went on to win the Super Bowl that same season.<sup>13</sup>

### B. *The Deflated Footballs*

On January 18, 2015, the New England Patriots played the Indianapolis Colts during the third round of the 2015 NFL playoffs.<sup>14</sup> During the game, a defensive player for the Colts, D'Qwell Jackson, intercepted one of Brady's passes.<sup>15</sup> Jackson believed that the ball he caught was underinflated, so the Colts informed league officials in the middle of the game about it.<sup>16</sup> During halftime of this game, NFL officials tested eleven Patriots' game balls and determined that the Patriots' footballs were below the permissible level of inflation.<sup>17</sup> Less than a week later on January 23, the NFL retained Wells and his law firm to conduct an investigation together with NFL Executive Vice President and General Counsel Jeff Pash ("Pash").<sup>18</sup> The investigation was ordered to determine whether Brady and the Patriots had engaged in improper ball tampering, which would have provided Brady the unfair ability to better grip and control footballs he threw during that game.<sup>19</sup>

On May 6, 2015, the "Wells Report" concluded and was made public.<sup>20</sup> The Wells Report first determined that before the game

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10. *Nat'l Football League Mgmt. Council*, 820 F.3d at 532.

11. *Tom Brady Suspension Case Timeline*, NAT'L FOOTBALL LEAGUE (Jul. 15, 2016, 1:16 PM), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-time-line>.

12. Michael McCann, *Deflategate, The Final Chapter: Brady's Return Marks End of an Overblown Scandal*, SPORTS ILLUSTRATED (Oct. 5, 2016), <http://www.si.com/nfl/2016/10/05/deflategate-timeline-tom-brady-patriots-roger-goodell>.

13. *Judge Richard Berman Happy The Patriots Won Super Bowl: 'DeflateGate Is Finally Put To Rest'*, CBS BOSTON (Mar. 17, 2017, 3:45 PM), <http://boston.cbslocal.com/2017/03/17/judge-richard-berman-happy-the-patriots-won-super-bowl-deflategate-is-finally-put-to-rest>.

14. *Nat'l Football League Mgmt. Council*, 820 F.3d at 532.

15. *Id.*

16. *Id.*

17. *Id.* at 532–33.

18. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 453.

19. *Nat'l Football League Mgmt. Council*, 820 F.3d at 533.

20. *Id.*

started, Patriots employees Jim McNally and John Jastremski “participated in a deliberate effort to release air from Patriots game balls . . . .”<sup>21</sup> Most importantly, the Wells Report concluded “it was ‘more probable than not’ that Brady had been ‘at least generally aware’ of the inappropriate activities of McNally and Jastremski involving the release of air from Patriots game balls.”<sup>22</sup> The investigation also examined Brady’s role in the deflation scheme.<sup>23</sup> The Report concluded it was “unlikely that an equipment assistant [Jastremski] and a locker room attendant [McNally] would deflate game balls without Brady’s knowledge, approval, awareness, and consent.”<sup>24</sup>

### C. Goodell Suspends Brady and Oversees the Appeal

On May 11, 2015, Goodell suspended Brady for four games pursuant to Article 46 of the Collective Bargaining Agreement (“CBA”) between the NFLMC and the NFLPA.<sup>25</sup> Goodell said that Brady engaged in “conduct detrimental to the integrity of and public confidence in the game of professional football.”<sup>26</sup> The letter Brady received outlining his suspension cited the conclusions from the Wells Report and Brady’s apparent “failure to cooperate fully and candidly with the investigation” as reasons for his suspension.<sup>27</sup> In congruence with the CBA, Brady filed a timely appeal of his suspension on May 14, 2015, and Goodell exercised his right to serve as the arbitrator for Brady’s appeal.<sup>28</sup> The CBA states that for any appeal of an Article 46 suspension, “the Commissioner may serve as hearing officer . . . at his discretion.”<sup>29</sup>

On behalf of Brady, the NFLPA filed several motions prior to the hearing which included a motion to recuse Goodell as the arbitrator, a motion to compel Pash to testify regarding his involvement in the production of the Wells Report, and a motion to compel the production

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21. *Id.* (citation omitted).

22. *Nat’l Football League Mgmt. Council*, 125 F. Supp. 3d at 454.

23. *Nat’l Football League Mgmt. Council*, 820 F.3d at 533.

24. *Id.* (internal quotation marks omitted).

25. *Id.* at 534.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at n.4; NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 46, § 2(a) (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

of Wells' law firm's internal investigation notes.<sup>30</sup> Goodell denied each motion.<sup>31</sup>

After an arbitration hearing on June 23, 2015 comprised of nearly ten hours of testimony and 300 exhibits, Goodell made a final decision on July 28, 2015 that affirmed Brady's four-game suspension.<sup>32</sup> Goodell upheld Brady's suspension for engaging in conduct detrimental to the league and justified the length of the suspension by analogy.<sup>33</sup> He claimed Brady's alleged deflation of footballs gave him a competitive advantage similar to that of players who use steroids to gain an unfair competitive advantage.<sup>34</sup> According to Goodell, Brady's conduct was worthy of the same four-game suspension that first-time steroid users receive.<sup>35</sup> Goodell also emphasized that part of his suspension derived from his obstruction of a league investigation.<sup>36</sup> Goodell claimed that Brady engaged in actions, like personally destroying his cellphone, in order to hide incriminating evidence and to willfully obstruct the NFL's investigation.<sup>37</sup>

#### *D. The District Court Ruling*

The same day that Goodell affirmed Brady's suspension through arbitration, the NFL sought confirmation of the award in the United States District Court of the Southern District of New York.<sup>38</sup> Although judicial scrutiny of arbitration awards is limited, on September 3, 2015, the District Court overturned Brady's suspension by vacating Goodell's arbitration award.<sup>39</sup>

Judge Berman vacated the arbitration award based on three crucial legal deficiencies: (1) Brady did not have adequate notice that his alleged misconduct could lead to potential discipline from the NFL; (2) Brady was denied the opportunity to examine and question Pash, one of the two Wells Report lead investigators during the arbitration, and; (3) Brady was denied access to the complete record

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30. *Nat'l Football League Mgmt. Council*, 820 F.3d at 534.

31. *Id.* at 534–35.

32. *Id.* at 535.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *Nat'l Football League Mgmt. Council*, 820 F.3d at 535–36.

of files, reports, and notes that were gathered by the NFL during its investigation.<sup>40</sup>

Judge Berman determined that Goodell could not arbitrarily create a suspension if the player was not on notice of the possibility of a suspension prior to the player's misconduct.<sup>41</sup> Judge Berman cited precedent from other NFL arbitration rulings to determine that the NFL never put Brady on adequate notice that improper ball deflation or obstruction of a league investigation would result in any type of suspension from the NFL.<sup>42</sup> Those arbitrations vacated suspensions or fines for players who did not receive notice that their misconduct could have led to punishment from the NFL or one of its teams.<sup>43</sup>

Judge Berman next concluded it was fundamentally unfair to deny Brady's examination of Pash about his involvement with the Wells Report investigation, given Pash's status as General Counsel for the NFL and co-lead investigator along with Wells.<sup>44</sup> The Court ultimately held that Goodell violated 9 U.S.C. § 10(a)(3) which states that "refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced," warrants a vacation of the arbitration award.<sup>45</sup>

Lastly, the Court found that Goodell's refusal to allow Brady access to the documents, files, and notes that contributed to the Wells Report was also fundamentally unfair and created an unfair prejudice in violation of 9 U.S.C. § 10(a)(3).<sup>46</sup>

### *E. The Second Circuit Ruling*

The NFLMC appealed the District Court vacatur, and the Second Circuit reached its decision on April 25, 2016.<sup>47</sup> The majority opinion of the Second Circuit concluded that Goodell's decisions throughout the arbitral process were within his entitled authority according to the CBA.<sup>48</sup> Therefore, the Second Circuit reversed the District Court's

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40. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 463.

41. *Id.*

42. *Id.* at 463, 469.

43. *Id.*

44. *Id.* at 470.

45. 9 U.S.C. § 10(a)(3) (2002); *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 471.

46. *Nat'l Football League Mgmt. Council*, 125 F. Supp. 3d at 472-73.

47. *Nat'l Football League Mgmt. Council*, 820 F.3d at 527.

48. *Id.*

decision and affirmed the arbitration award in favor of the NFLMC.<sup>49</sup> The Second Circuit acknowledged each of the District Court's main arguments and explained why it came to the opposite conclusion.<sup>50</sup>

First, the Second Circuit disagreed with the lower court's view of Goodell's power to suspend a player under the CBA.<sup>51</sup> It stated that under Article 46 of the CBA, Goodell had the right to manipulate Brady's alleged actions to conform as a penalty under the "Other Uniform/Equipment Violations" section of an NFL violations handbook distributed to every football player.<sup>52</sup> The opinion also stated that Brady's four-game suspension, which was analogized to a suspension for a player who used steroids, was a reasonable comparison and was an allowable penalty given Goodell's broad discretion to make these types of decisions under the CBA.<sup>53</sup> "[T]he arbitrator is entitled to generous latitude in phrasing his conclusions. We have little difficulty concluding that the comparison to steroid users neither violated a right to which Brady was entitled nor deprived him of notice."<sup>54</sup> It did not matter to the Second Circuit that Brady was denied proper notice that his actions could have resulted in a suspension, nor did it matter that Goodell used his own discretion to consider Brady's alleged actions comparable to a first-time steroid user.<sup>55</sup>

Next, the Second Circuit addressed the argument that Brady was not able to examine Pash. The Second Circuit concluded that Pash's insights into the Wells Investigation and inquiry into his role of the investigation were not pertinent to the issues at the arbitration.<sup>56</sup> To further this point, the Second Circuit stated that Goodell relied on other material information outside of the Wells Report to come to his final decision.<sup>57</sup> Thus, the majority opinion concluded that Goodell's decision to not have Pash testify was within his discretion to exclude evidence and did not create any fundamental unfairness for Brady.<sup>58</sup>

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49. *Id.* at 536.

50. *Id.* at 538.

51. *Id.* at 539.

52. *Id.*

53. *Id.* at 540.

54. *Id.*

55. *Id.*

56. *Id.* at 546.

57. *Id.*

58. *Id.*



Finally, the Second Circuit addressed Goodell's decision to deny Brady and the NFLPA access to investigative files compiled by the NFL and Wells.<sup>59</sup> The majority opinion stated that Goodell did not rely on any of these investigative notes in his initial decision to suspend Brady, and therefore, this extended discovery was unnecessary and did not deprive Brady of any fundamental fairness during his arbitration appeal.<sup>60</sup>

#### *F. The Second Circuit Dissent*

In his dissenting opinion, Chief Judge Katzmman of the Second Circuit argued that Goodell failed the two-step legal test that Second Circuit judges should consider when reviewing an arbitration stemming from a CBA.<sup>61</sup> First, Goodell did not act within the scope of his authority under the CBA, and second, Goodell's arbitral award did not draw its essence from the CBA; rather it was an example of Goodell creating his own brand of justice.<sup>62</sup>

In finding that Goodell exceeded the scope of his authority, Judge Katzmman wrote, "the arbitrator may decide whether the misconduct charged actually occurred, whether it was actually 'detrimental' to the League, and whether the penalty imposed is permissible under the CBA. But the arbitrator has no authority to base his decision on misconduct different from that originally charged."<sup>63</sup> Because Goodell's final written arbitration decision was based on many factual findings that differ from the Wells Report upon which Goodell largely based Brady's initial suspension, Judge Katzmman determined that Goodell exceeded his authority as arbitrator under the CBA.<sup>64</sup>

Next, Judge Katzmman critically disagreed with Goodell's unprecedented punishment because it did not draw its essence from the CBA.<sup>65</sup> Judge Katzmman stated that Goodell should have analogized Brady's alleged conduct to a player who uses stickum, a substance that makes it easier for players to grip and catch footballs.<sup>66</sup>

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59. *Id.*

60. *Id.* at 546–47.

61. *Id.* at 549 (Katzmann, J., dissenting).

62. *See Id.*

63. *Id.* at 549–50.

64. *Id.* at 550.

65. *Id.* at 552.

66. *Id.*

Use of stickum results in a meager \$8,268 fine and no suspension.<sup>67</sup> Because Goodell failed to address this analogous penalty and provide any meaningful explanation for Brady's suspension in his final decision, Judge Katzmman concluded that Goodell was "doling out his own brand of industrial justice."<sup>68</sup>

In conclusion, Judge Katzmman determined that the District Court ruling should be upheld because Goodell decided to suspend Brady based on new facts that were discovered during the arbitration process, and Goodell's murky explanation for this suspension was simply his own brand of justice.<sup>69</sup>

### III. LEGAL STANDARD

Pursuant to the Labor Management Relations Act, this arbitration award needed to be confirmed by the appropriate court in order to be legally enforceable.<sup>70</sup> Under the Federal Arbitration Act ("FAA"), the validity of an award is subject to attack on those grounds listed in 9 U.S.C. § 10.<sup>71</sup> The policy of the FAA is to enforce an arbitration award unless one of the grounds listed in 9 U.S.C. § 10 is affirmatively shown to exist.<sup>72</sup> A United States District Court may make an order vacating an arbitration award upon the application of any party to the arbitration where the arbitrator was guilty of refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.<sup>73</sup>

The United States Supreme Court and many Second Circuit rulings have also mandated provisions and rules for arbitrators in making their decisions. "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement."<sup>74</sup>

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67. *Id.*

68. *Id.* at 553.

69. *Id.* at 552–55.

70. *See Id.* at 527, 535; *see also*, Matthew H. Kirtland, *You Won the Arbitration. Now What?*, AM. BAR (May 2016), [http://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/newsletter/may2016/Kirtland\\_Arbitration\\_Enforcement.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/may2016/Kirtland_Arbitration_Enforcement.authcheckdam.pdf).

71. 9 U.S.C. § 10 (2002).

72. *Wall Street Assocs. L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994).

73. 9 U.S.C. § 10(a)(3) (2002).

74. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

According to the Labor Management Relations Act of 1947, an arbitration award must generally draw its essence from the collective bargaining agreement, and the arbitrator cannot exceed his or her authority that was agreed upon in the collective bargaining agreement.<sup>75</sup> An example of exceeding authority would be awarding a remedy that the arbitrator did not have the authority to award.<sup>76</sup> “[T]he arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties.”<sup>77</sup> When an arbitrator enforces a past practice, he is declaring the common law of the shop.<sup>78</sup> Various decisions handed down by past arbitrators in a given industry form the common law of the shop.<sup>79</sup>

#### IV. ANALYSIS

Under the current CBA, which was agreed upon by the NFLMC and the NFLPA, Goodell has the authority to fine or suspend a player for his misconduct on or off the field.<sup>80</sup> If the player decides to appeal Goodell’s initial penalty, Goodell also has the ability to serve as the arbitrator.<sup>81</sup> But certain provisions that outline the type of conduct players may be punished for and the type of punishment players can receive for the corresponding misconduct limit Goodell’s power.<sup>82</sup> For the reasons below, the Second Circuit should not have deemed Goodell’s arbitration award legally permissible.

##### *A. Goodell Constructed His Own “Brand of Justice”*

Goodell created his own “brand of justice” when he imposed a four-game suspension on Brady that was affirmed by arbitration. Brady’s alleged scheme to deflate footballs during the 2015 AFC Championship does not fall into any specific category of misconduct

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75. 2 GUIDE TO EMPLOYMENT LAW AND REGULATION § 17A:25 (2016).

76. *Id.*

77. *United States v. Int’l Bhd. of Teamsters*, 954 F.2d 801, 809 (2d Cir. 1992).

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

79. *Id.* at 708.

80. NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 46–47.1 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

81. *Id.*

82. *Id.*

as outlined by the CBA. As noted, Goodell categorized Brady's actions related to his deflation scheme and his willful obstruction of a league investigation generally as "conduct detrimental to the integrity of and public confidence in the game of professional football."<sup>83</sup> Goodell also analogized Brady's actions to players who used steroids for the first time, and thus handed down the four-game suspension.<sup>84</sup>

"When it is clear that the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract . . . , the arbitrator has failed to draw the award from the essence of the collective bargaining agreement."<sup>85</sup> Goodell did not distinguish which part of Brady's suspension was applicable to his alleged deflation scheme and which part was applicable to his obstruction of an NFL investigation.<sup>86</sup> It was clear that he decided to combine Brady's alleged misconduct with an apparent obstruction of the league investigation to settle on a suspension of four games.<sup>87</sup>

Goodell also decided on the specific number of four games because he determined that Brady's alleged deflation of footballs was as detrimental to the league as when players use steroids for the first time to gain a competitive advantage.<sup>88</sup> The NFL and the NFLPA bargained for very regimented and thorough guidelines that govern the steroid policy in the NFL and the penalties associated with use of these substances.<sup>89</sup> Failing a steroid test can ruin a player's reputation and career because it is viewed as one of the easiest and most unfair ways in sports to gain a competitive advantage.

Judge Katzmann of the Second Circuit perfectly analogized Brady's alleged misconduct to a player who uses stickum on his hands to make it easier to catch footballs.<sup>90</sup> Goodell would have a stronger justification for his suspension if he analogized Brady's alleged misconduct to an offense that even remotely resembled the same effect as deflating footballs. This further supports the argument that Goodell

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83. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 534 (2d Cir. 2016).

84. *Id.* at 535.

85. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988).

86. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 463 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

87. *Id.*

88. *Id.* at 464.

89. *Id.*

90. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 552 (2d Cir. 2016).

was looking for a comparative penalty in the CBA that allowed him to justify his “own brand of justice” based on a feeling that went outside the CBA.

*B. Past NFL Arbitration Rulings Justify Vacating the Deflategate Arbitration Award*

1. NFL Precedent Establishes that an Alleged Obstruction of a League Investigation Does Not Warrant a Suspension

Goodell should not have determined any part of his arbitration award based on Brady’s alleged obstruction of the NFL’s investigation. Past NFL disciplinary rulings and arbitrations explain why Brady should not have been suspended for obstructing a league investigation or why he should not have received a punishment that was not specifically outlined in the CBA.<sup>91</sup> Goodell did not conform to the “law of the shop” foundation that has been determined by prior NFL arbitration rulings, which dealt with circumstances similar to Deflategate.

For example, in January 2012, the NFL launched an investigation into the reported detrimental conduct by New Orleans Saints defensive players and coaching staff from 2009–2011.<sup>92</sup> After the two-month investigation, Saints players and coaches were accused of and suspended for organizing a bounty program that financially incentivized the Saints’ defensive players to try to injure the opposing team’s quarterback on multiple occasions.<sup>93</sup> Now forever remembered as “Bountygate”, the Saints’ players’ and coaches’ actions demonstrated an abysmal disregard for the rules and sanctity of professional football, and their actions consisted of clear conduct detrimental to the integrity of professional football. Bountygate became one of the most shameful scandals in NFL history.<sup>94</sup>

Using the same power outlined in the CBA that Goodell used to determine Brady’s suspension outlined above, Goodell suspended and

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91. See *Nat’l Football League Mgmt. Council*, 125 F.Supp.3d at 462–63.

92. Katherine Terrell, *New Orleans Saints Bounty Scandal Timeline*, NOLA MEDIA GRP. (Dec. 11, 2012, 5:58 PM), <http://www.nola.com/saints/index.ssf/2012/12/boutyscandaltimeline.html>.

93. *Paul Tagliabue’s Full Decision on Saints Bounty Appeal*, NAT’L FOOTBALL LEAGUE (Dec. 11, 2012, 2:43 PM), <http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal>.

94. *Id.*; Don Van Natta Jr., *His Game, His Rules*, ESPN (Mar. 5, 2013), [http://www.espn.com/espn/feature/story/\\_/page/RogerGoodell](http://www.espn.com/espn/feature/story/_/page/RogerGoodell).

fined four players, three coaches, and the Saints' general manager in accordance with their actions in the Bountygate scandal.<sup>95</sup> On October 19, 2012, Goodell appointed Paul Tagliabue, the former commissioner of the NFL, to act as the arbitrator for the appeals from the four suspended players.<sup>96</sup>

In Tagliabue's decision, he lays the foundation for his vast knowledge about the structure of the NFL, the CBA, and the appropriate CBA Article governing the suspensions.<sup>97</sup> He stated that he drew upon his forty years of experience with the League both as outside counsel and his seventeen years as NFL Commissioner.<sup>98</sup> As part of his experience and decision-making, he felt obligated to be cognizant of the "laws of the shop" in the NFL, namely, the patterns of operations and practices of all the thirty-two NFL teams, as they have evolved over the years.<sup>99</sup> He was certain that due to his past experience and the processes that he employed in hearing the players' appeals, the decisions he reached "fully comport[ed] with the standards applicable to arbitrators who are obligated to make judgments determining conduct detrimental under Article 46 of the 2011 CBA."<sup>100</sup>

Relevant to the Deflategate decision, Goodell originally suspended Anthony Hargrove, one of the four players, for eight games because he was found to have participated in the Bounty program, and apparently he made a deliberate effort to impede the NFL's initial investigation by being untruthful to the League's investigators.<sup>101</sup> Goodell determined that the Saints' coaches instructed Hargrove to provide false information about the bounty program to League investigators.<sup>102</sup> Tagliabue affirmed Goodell's finding that Hargrove did in fact obstruct an NFL investigation, but drawing from his many years of experience and past NFL discipline, he vacated Hargrove's suspension, as it was unwarranted under the CBA.<sup>103</sup> Drawing from

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95. Terrell, *supra* note 92.

96. *Id.*

97. *Paul Tagliabue's Full Decision on Saints Bounty Appeal*, NAT'L FOOTBALL LEAGUE (Dec. 11, 2012, 2:43 PM), <http://www.nfl.com/news/story/0ap1000000109668/article/paul-tagliabues-full-decision-on-saints-bounty-appeal>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

his forty years of association with the NFL, Tagliabue stated in his arbitration decision, “I am aware of many instances of denials in disciplinary proceedings that proved to be false, but I cannot recall any suspension for such fabrication. This is not to mitigate in any way the severity of obstruction of an investigation with substantial issues as unique as those involved here.”<sup>104</sup>

Tagliabue was clearly aware how significant the underlying issue of the bounty program was for the NFL and the safety of its players. Yet Tagliabue determined in arbitration that a suspension for Hargrove’s intentional obstruction of a league investigation did not warrant any suspension, as no player in NFL history had ever been suspended for such conduct.<sup>105</sup>

In another example of precedent in NFL disciplinary actions where an NFL player was not suspended for an obstruction of a league investigation, in 2010, the New York Jets’ quarterback Brett Favre, was investigated for his alleged lewd conduct towards a woman who worked at the Jets’ facility in 2008.<sup>106</sup>

After a full investigation by Goodell and the NFL, which consisted of a series of interviews, review of the communication, and independent forensic analysis of the electronically stored material, Goodell could not conclude that Favre violated NFL workplace conduct policies.<sup>107</sup> However, Goodell did determine that Favre’s actions throughout the League’s investigation into his misconduct resulted in a much longer investigation process and detrimental public attention for Favre, his accuser, and the NFL.<sup>108</sup> Thus, Goodell fined Favre \$50,000 for his “failure to cooperate with the investigation in a forthcoming manner.”<sup>109</sup> Although the NFL could not substantiate the claims against Favre for his scandalous conduct towards this Jets employee, Goodell determined that Favre’s obstruction of this investigation only warranted this \$50,000 fine and no suspension.

Serving as the arbitrator in Brady’s suspension appeal, Goodell was obligated to adhere to the CBA provisions, avoid dispensing his

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104. *Id.*

105. *Id.*

106. *Favre Fined \$50,000 for Lack of Cooperation in Investigation*, NAT’L FOOTBALL LEAGUE (Dec. 29, 2010, 12:16 PM), <http://www.nfl.com/news/story/09000d5d81d4beb7/article/favre-fined-50000-for-lack-of-cooperation-in-investigation>.

107. *Id.*

108. *Id.*

109. *Id.*

own brand of justice, and observe the law of the shop that has been established by past NFL arbitration and suspension decisions.<sup>110</sup> Based on the recent Hargrove and Favre decisions, it is clear the NFL does not have any provisions in the CBA that state players must be suspended for obstructing a league investigation, and it is the law of the shop that players are not suspended for any type of obstruction of a league investigation. Thus, Goodell had no basis to suspend Brady for obstructing a league investigation.

## 2. The NFL Does Not Uphold Suspensions of Players Who Lack Adequate Notice that Their Conduct Can Result in Punishment

Just as Goodell had no basis to suspend Brady for his obstruction of an investigation, he also had no basis to suspend Brady for his alleged misconduct of deflating footballs because the NFL never provided adequate notice that such actions could result in a suspension.

In 1994, the Cleveland Browns suspended their own player Reggie Langhorne for refusing to take part in a team practice and making public statements that proved to be detrimental to the team.<sup>111</sup> Langhorne appealed his suspension in accordance with the CBA in place in 1994.<sup>112</sup> The arbitrator, Richard Kasher, vacated the suspension and fine for several reasons, including that Langhorne was never put on adequate notice that his conduct was the type that could result in such severe punishment.<sup>113</sup>

In the arbitration opinion, Kasher stated that Langhorne was entitled . . . to be placed on notice as to what consequences would flow from his refusal to participate in the last segment of Thursday's practice. Any disciplinary program requires that individuals subject to that program understand, with reasonable certainty, what results will occur if they breach established rules.<sup>114</sup>

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110. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United States v. Int'l Bhd. of Teamsters*, 954 F.2d 801, 809 (2d Cir. 1992).

111. *Reggie Langhorne v. Nat'l Football League Mgmt. Council & the Cleveland Browns*, 1, 10–11 (1994) (Kasher, Arb.), <http://thesportsequires.com/wp-content/uploads/2015/05/Reggie-Langhorne-Decision.pdf>.

112. *Id.* at 2.

113. *Id.* at 25.

114. *Id.*



This is a prominent example of an NFL appointed arbitrator determining that players are entitled to be placed on adequate notice of the types of conduct that can result in a subsequent fine or suspension. This arbitration decision was in full compliance with the CBA current at that time and should have been used as precedent for Goodell's Deflategate arbitration decision.

In a similar and more recent arbitration decision, the Oakland Raiders fined player Ricky Brown in 2009 for missing a mandatory team weigh-in.<sup>115</sup> After miscommunication between Brown and the coach in charge of the weigh-in, the Raiders determined Brown did not complete his weigh-in by a specific time and date and was accordingly fined based on a team rule.<sup>116</sup>

In an arbitration appeal of this fine, the NFLPA argued Brown did not have adequate notice of the Oakland Raiders team rule for which he was fined.<sup>117</sup> The arbitrator determined the crux of the dispute was whether the Raiders provided Brown with adequate notice that his conduct of completing his mandatory weigh-in late was prohibited.<sup>118</sup> Based on clear miscommunication between the Raiders' coaching staff and Brown, the arbitrator determined that Brown did not receive adequate notice that his conduct on the day of the mandatory weigh-in was going to result in a fine.<sup>119</sup> Thus, the arbitrator vacated Brown's punishment.<sup>120</sup>

Based on these two prior rulings, it is evident that the law of the shop in the NFL is to provide adequate notice of the types of misconduct that could result in suspension or fines. The Second Circuit majority opinion continually adheres to the notion that Article 46 of the CBA gives Goodell very broad discretion and power "to deal with conduct he believes might undermine the integrity of the game."<sup>121</sup> Even if Goodell is deemed to possess the authority to handle players' conduct in any way he sees fit, as the arbitrator, he still had a legal obligation to avoid imposing penalties that completely contrast

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115. *Nat'l Football League Mgmt. Council on behalf of the Oakland Raiders v. Nat'l Football League Players Ass'n on behalf of Ricky Brown*, 1, 3 (2010) (Beck, Arb.), <http://thesportsequires.com/wp-content/uploads/2015/05/Ricky-Brown-Decision.pdf>.

116. *Id.* at 8–9.

117. *Id.* at 10.

118. *Id.* at 12–13.

119. *Id.* at 16.

120. *Id.*

121. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 539 (2d Cir. 2016).

the law of the shop for these NFL proceedings. Therefore, Goodell ultimately imposed a penalty upon Brady that did not conform to the law of the shop of the NFL because he did not provide adequate notice that Brady's alleged misconduct could result in a severe penalty.

### *C. Brady Should Have Been Able to Cross-Examine Jeff Pash*

A week after Brady appealed his four-game suspension through the league-mandated arbitral process, he filed a discovery motion in which he requested to cross-examine Pash, general counsel for the NFL and co-lead investigator in the investigation into Brady's alleged misconduct during the arbitration.<sup>122</sup> Brady requested testimony from Pash regarding the NFL's involvement with Wells' and his firm's investigation into Brady's alleged misconduct, the NFL's customary penalties and punishments concerning any type of past incident that involved game-day playing items or apparel, and any type of incident that involved an obstruction of a league investigation.<sup>123</sup>

Regardless of Pash's highly probable and significant involvement in the Wells Report, Goodell denied Brady's motion to compel testimony from Pash because Article 46 of the CBA does not address the permitted scope of witness testimony at appellate hearings.<sup>124</sup> Goodell also claimed that it was within his reasonable discretion to determine the scope of the presentations and only compel the testimony of any witnesses whose testimony is necessary for a hearing to be fair.<sup>125</sup> He justified his discretion to deny Brady's motion to compel by stating Pash did not play a substantive role in the investigation that led to Brady's punishment.<sup>126</sup>

Despite Goodell's reasoning, by denying Brady's motion to compel, he violated 9 U.S.C. § 10(a)(3) because he refused to hear evidence that was pertinent and material to Brady's arbitration appeal. When an arbitrator is determining what evidence to admit for the proceeding, "[a]n arbitrator need not follow all the niceties observed by the federal courts."<sup>127</sup> Even though arbitrators are not required to hear all evidence that would necessarily be admissible in federal court,

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122. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 457–58 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

123. *Id.* at 459.

124. *Id.* at 459–60 (internal quotation marks omitted).

125. *Id.* (internal quotation marks omitted).

126. *Id.* at 460 (internal quotation marks omitted).

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

“an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.”<sup>128</sup> Federal courts’ reviews of arbitrations are restricted to determining whether the procedure was fundamentally unfair.<sup>129</sup> “A fundamentally fair hearing requires that the parties be permitted to present evidence and cross-examine adverse witnesses.”<sup>130</sup> If an arbitrator refuses to hear pertinent and material evidence, which prejudices one party, the arbitration award may be set aside.<sup>131</sup>

For example, in 2014 Goodell initially suspended NFL running back Ray Rice for two games for punching his fiancée in the face and knocking her unconscious.<sup>132</sup> This became national news when video was shown of Rice dragging his fiancée’s unconscious body out of an elevator where the assault took place.<sup>133</sup> Goodell met with Rice after viewing this video and then determined his punishment of a two-game suspension without receiving pay.<sup>134</sup> Goodell received national criticism for Rice’s very light penalty due to the highly violent nature of his attack on his fiancée.<sup>135</sup>

Months after the first video was released, a video from inside the elevator was publically released, and Rice’s brutal actions were seen for the first time.<sup>136</sup> Amidst public outcry, on the same day that this second video was released, Goodell suspended Rice from the NFL indefinitely.<sup>137</sup> Ultimately, former federal judge Barbara Jones, serving as the arbitrator, vacated Rice’s indefinite suspension due to the fact that Goodell exceeded his power in accordance with Article 46 of the CBA because he punished Rice twice for the same misconduct.<sup>138</sup>

Although there is much to say about the horrifying fact that Goodell initially suspended Rice for only two games after witnessing Rice drag his unconscious fiancée out of an elevator and speaking with

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128. *Id.* (internal quotation marks omitted).

129. *Id.*

130. *Kaplan v. Alfred Dunhill of London, Inc.*, No. 96 Civ. 0258 (JKF), 1996 WL 640901, at \*5 (S.D.N.Y. Nov. 4, 1996).

131. *Id.*

132. In the Matter of Ray Rice, 1, 1 (2014) (Jones, Arb.), [http://www.espn.com/pdf/2014/1128/141128\\_rice-summary.pdf](http://www.espn.com/pdf/2014/1128/141128_rice-summary.pdf).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 2.

137. *Id.*

138. *Id.* at 17.

him about the violent assault, before Jones presided over Rice's arbitration appeal, she made an evidentiary ruling that compelled Goodell to testify in the arbitration.<sup>139</sup> Jones cited *Kaplan* in her decision, in which she stated that the "key elements of a fundamentally fair hearing include a grievant's ability to present evidence and cross-examine witnesses, and that an arbitrator should compel the witnesses necessary for the hearing to be fair."<sup>140</sup>

Jones decided that Goodell had crucial information regarding Rice's discipline.<sup>141</sup> Therefore, she determined that limiting the available witnesses knowledgeable about the content that was pertinent to Rice's initial suspension would have prevented Rice from presenting his case, and it ran the risk of offering an incomplete picture of information that was critical to Rice's entire appeal.<sup>142</sup>

Despite the fact that arbitrators do not need to hear all evidence relevant to a certain controversy, it is clear Pash's testimony was critical in Brady's appeal. Testimony from the co-lead investigator of a three month, multi-million dollar investigation, who also happens to have worked for the NFL since 1997, and been the presiding attorney over every legal dispute involving the NFL during his long tenure as general counsel for the League, would undoubtedly be crucial and pertinent evidence material to Brady's arbitration.<sup>143</sup>

Goodell and the NFLMC contended Pash did not play a substantive role in the investigation into Brady's alleged misconduct.<sup>144</sup> Even if true, Pash's very senior role within the NFL as the league's General Counsel and Executive Vice President, would make it evident that Pash had the ability to provide valuable and necessary information about league investigations and legal matters.<sup>145</sup> Therefore, it is very likely that Pash was used as an advisor to Wells and his law firm based on the depth of his experience with NFL legal proceedings and investigations, and at the very least

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139. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 471 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016) (internal quotation marks omitted).

140. *Id.*

141. *Id.*

142. *Id.* (internal quotation marks omitted).

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

144. Nat'l Football League Mgmt. Council, 820 F.3d at 535.

145. *See* Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449, 471 (S.D.N.Y. 2015), *rev'd*, 820 F.3d 527 (2d Cir. 2016).

consistently updated and reported to throughout the Wells investigation.

Pash also could have testified about past NFL investigations, his true involvement with the Wells Report, and the law of the shop in the NFL involving previous arbitration rulings. Pash's knowledge about and involvement with the Wells Report, his extensive experience with NFL arbitration appeals, and his depth of knowledge about the law of the shop would have definitively been pertinent and material to Brady's arbitration.

#### V. ADDITIONAL LEGAL ISSUE

This article would not be complete without addressing the legal conundrum that has made many people question how the CBA between the NFLMC and the NFLPA is legally enforceable. As evidenced by the eighteen-month Deflategate saga, Goodell was the man who hired Wells and his law firm to initially investigate Brady and the New England Patriots. Goodell used this report to suspend Brady for four games and then Goodell served as the arbitrator during Brady's appeal of the suspension that Goodell instituted for Brady's alleged misconduct. But as mentioned above, it was agreed upon in Article 46 of the CBA that Goodell is allowed to serve as the arbitrator in any arbitration appellate proceeding.<sup>146</sup> Yet, it does not take a federal judge or even a law student to be perplexed over this blatant conflict of interest. Although the District Court and the Second Circuit did not thoroughly address Goodell's refusal to recuse himself as arbitrator, Goodell is afforded incredible and almost unbelievable legal power over the penalties for players in the NFL. Goodell's ability to penalize and then serve as the arbitrator over the appeal of the penalties needs to be strongly reconsidered when this current CBA expires in 2020.

#### VI. CONCLUSION

Roger Goodell created his own brand of justice when he concocted Brady's four-game suspension for his alleged misconduct. Goodell did not adhere to the law of the shop of past NFL arbitration appeals, and he denied Brady a fundamentally fair arbitration appeal

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146. NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. 46-47.1 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

when he did not allow Pash to testify at Brady's arbitration hearing. Brady's suspension should not have been upheld because Goodell violated federal law through his actions as the Deflategate arbitrator.

