Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z385926

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I. INTRODUCTION

Over the past decade, the power and role of the commissioner in the four major professional leagues: the National Football League (hereinafter “NFL”), Major League Baseball (hereinafter “MLB”), the National Hockey League (hereinafter “NHL”), and the National Basketball Association (hereinafter “NBA”), to enforce their “best interest” authority, and subsequently suspend players for rule violations, have been under intense scrutiny. The power granted to commissioners derives primarily from two sources: from each league’s Collective Bargaining Agreement (hereinafter “CBA”), and from each league’s constitution and by-laws. The commissioner’s role and power has expanded immensely since each league created the position.
Recent news commentary reflects the growing influence and power of each professional sports commissioner: For example, a New York Times article examining NHL Commissioner Gary Bettman’s power was titled “Bettman Undisputed N.H.L. Enforcer.”¹ It is not surprising that a Sports Illustrated article; “SI’s 50 Most Powerful People in Sports,” listed NFL Commissioner Roger Goodell as the most powerful person in sports,² and NBA Commissioner David Stern as the second most powerful; MLB Commissioner Bud Selig was the fifth most powerful; and Gary Bettman as the twentieth-seventh most powerful person in all of sports.³ This list is just one example of the influence that these commissioners have on the sports world.

But this influence and power has expanded into uncharted territory. While such power has significantly expanded in each league, the NFL commissioner is the only one whose power appears to be plenary. Nevertheless, even though collective bargaining restrained the other three commissioners’ powers, each of the four leagues would likely benefit from an in-depth review of commissioner power. Specifically, a review of each commissioner’s power to discipline players for conduct on and off the field suggests the desirability of the proposed hybrid system of disciplinary review discussed later in this paper.

Several recent examples have brought into question the disciplinary powers of commissioners. Most recently, the initial 211-game suspension of Alex Rodriguez by MLB Commissioner Bud Selig was unprecedented, and called into question Commissioner Selig’s disciplinary power.⁴ Eventually, an independent arbitrator reduced the suspension to 162-games.⁵ But even with this reduction, a recent Grantland article stated: “Bud Selig and his eventual successor seem to have unlimited power to go after whomever they want, in whatever manner they see fit.”⁶ Still, the MLB system of disciplinary review seemed to function effectively in this instance, as an independent arbitrator reviewed the suspension.

Even though commissioner power issues persist in the other three leagues, the NFL’s power issues remain the most glaring. The most prominent recent

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³. Id.
example is “BountyGate,” a case involving the New Orleans Saints, in which
the players, the union, and even the fans questioned Commissioner Goodell’s
power and role. Further, players and commentators continue to question
Goodell’s disciplinary powers pertaining to fines, suspensions for conduct on
and off the field, and HGH testing. In fact, NFL players and their union, the
NFL Players Association (“NFLPA”), have been seeking review and reform of
Goodell’s powers. Union president Domonique Foxworth, stated, “‘[The union
has] already asked the league to revisit [Commissioner Goodell’s disciplinary
powers] a number of times, to revisit neutral arbitration and commissioner
discipline.’” The “BountyGate” scandal provides a perfect setting for review
of Commissioner Goodell’s powers and for the proposal of an alternate “hybrid
system” for disciplinary power and review that can be implemented by the NFL
and the other professional leagues.

In order to better understand how the commissioners’ powers in the four
major leagues evolved into their current form, Part II provides a chronological
history of the creations and evolution of the commissioner’s role in the four
leagues. Part III examines the current power and disciplinary process of each
commissioner and league respectively, under each league’s CBA, Constitution,
and By-laws. Part IV examines how the NFL is behind the other three leagues
as illustrated in the “BountyGate” scandal, and Part V proposes a hybrid system
of review for the NFL, which will solve the current problems and could benefit
the other three leagues as well.

II. CREATION AND EVOLUTION OF TODAY’S “COMMISSIONER”

The oldest professional sport, baseball, created a three-man quasi
commissioner position in 1903. Yet the power of this three-person committee,
or “National Commission,” was weak, which was readily apparent in the
aftermath of the Black Sox Scandal in 1919. The Black Sox Scandal, likely
the most egregious example of sports corruption, occurred when several
members of the Chicago White Sox’s worked with gamblers to purposefully
throw the World Series. Several critics of the National Commission stated the
commission had “‘[done] nothing while the game was being debauched’

7. See e.g., Mike Garafolo, Goodell’s Role Delays HGH Testing, FOX SPORTS (Aug. 15,
2013), http://msn.foxsports.com/nfl/story/hgh-testing-delay-commissioner-roger-goodell-role-
appeals-process-081513; Kevin Van Valkenburg, Power Mad, ESPN (Dec. 28, 2012),
http://espn.go.com/nfl/story/_/id/8769645/has-nfl-commissioner-roger-goodell-power-gone-too-
far-espn-magazine.
8. Tim Polzer, NFLPA: Players Want to Challenge Roger Goodell’s Powers, SPORTS
ILLUSTRATED (Feb. 3, 2013), http://tracking.si.com/2013/02/01/nflpa-challenge-roger-goodell-
powers/.
9. Id.
10. Colin J. Daniels & Aaron Brooks, From the Black Sox to the Sky Box: The Evolution
11. Id.
12. Id.
because of [internal] petty politics.”¹³ The Black Sox incident led to the creation of the first sole commissionership in any professional sports league, and the owners appointed Judge Kenesaw Mountain Landis as commissioner, giving him almost unlimited authority.¹⁴

In addition to the new commissioner, baseball teams agreed to a new set of standards, which gave Commissioner Landis the authority to take “‘preventive, remedial or punitive action,’” when he believed it was necessary to punish anybody associated with baseball whom he suspected to have acted to the detriment of the sport’s best interest.¹⁵ This new power created a system in which Commissioner Landis acted as judiciary: “an independent individual with the ability to hear cases . . . impose punishments . . . and draft his own rules of procedure.”¹⁶ The first professional commissioner, Landis, had almost complete dictatorial power,¹⁷ but as the commissioner’s role developed in baseball and in the three other professional leagues, this near absolute power receded significantly.

After Landis left the position, the role’s power was immediately reduced through an owners modification to the constitution, which stripped the commissioner’s power to void any owners’ rules the commissioner believed were not in the best interest of baseball.¹⁸ In addition to the owners’ actions, the creation and continued use of CBAs in baseball and other leagues has led to a reduction of commissioners’ powers.

For example, in 1994, the Major League Agreement was limited as follows: “‘the powers of the Commissioner to act in the best interest of Baseball shall be inapplicable to any matter relating to a subject of collective bargaining between the Clubs and the Major League Baseball Players Association.’”¹⁹ However, even with the continued use of CBAs to this day, the power of baseball’s commissioner remains strong.

Today, the NFL Commissioner enjoys strong and broad powers authorized by constitutional delegation.²⁰ The first NFL Commissioner, Joe Carr, took the role in 1921, but it was not until 1946, when Bert Bell became NFL Commissioner that the power of the commissioner began to expand to today’s level.²¹ Further, in 1960, the NFL began to base its organizational

¹⁴.  Daniels & Brooks, supra note 10, at 27.
¹⁵.  Id. (quoting 1920 MAJOR LEAGUE AGREEMENT, art. 1, sec. 2(a)).
¹⁶.  Zelinsky, supra note 13 at 149.
¹⁷.  Daniels & Brooks, supra note 10, at 29.
¹⁸.  Zelinsky, supra note 13 at 152.
¹⁹.  Daniels & Brooks, supra note 10 at 30 (emphasis added).
²⁰.  Id. at 31.
structure on baseball, and gave its new commissioner, Pete Rozelle, significant authority. Commissioner Rozelle possessed “best interest” authority, had “full, complete, and final jurisdiction and authority over any dispute involving a member or members in the League,” and could punish a player for “conduct detrimental” to the integrity of the league or the game.

However, Commissioner Rozelle’s authority and powers were not as explicit as Commissioner Goodell’s authorities are today. Under the current system, the NFL commissioner’s powers are divided mainly between two different documents, the NFL constitution and by-Laws and the CBA. The league constitution is the contract between the member teams, and it “defines the respective powers of the league and its component clubs.”

The broad powers of NFL Commissioner Goodell stem from his ability to not only sanction players, but any sanctions issued by the commissioner are appealable only back to the commissioner. The recent “BountyGate” scandal is the first time that the scope of the NFL commissioner’s power to discipline has come before the civil courts.

Nevertheless, courts have heard professional baseball cases involving the scope of commissioner’s disciplinary power. Finley v. Kuhn, heard in 1978, is perhaps the most important sports case regarding the scope of commissioner’s powers. In that case, MLB Commissioner Bowie Kuhn vetoed team owner Charles Finley’s attempt to essentially sell three of the best players on his team under the auspice of a fair trade.

Acting under his “best interest” powers, Commissioner Kuhn vetoed the trade, claiming that; “allowing [the trade] to proceed would lead to a perception that only the richest teams could compete in baseball,” which would potentially lead to a negative growth of baseball in smaller markets. The United States Court of Appeals for the Seventh Circuit heard two key issues regarding the scope of the commissioner’s authority:

“(1) [w]hether the Commissioner of baseball is contractually authorized to disapprove player assignments, which he finds to be ‘not in the best interest of baseball” where neither moral turpitude nor violation of a Major League Rule is involved, and (2) [w]hether the provision in the Major League Agreement whereby the parties agree to waive recourse to the courts is valid and

23. Id. at 146-47.
24. Mahone, Jr., supra note 20, at 190.
27. Mahone, Jr., supra note 20, at 193.
28. Id.
29. Id. at 193-94.
30. Finley v. Kuhn, 569 F.2d 525 (7th Cir. 1978).
enforceable.”

The court held that Commissioner Kuhn had the power to veto the trade. The Court reasoned that the commissioner’s disciplinary authority is listed in the MLB agreement, and that since the commissioner had previously acted with similarly broad powers, he had the power and authority to veto the trade based on his best interest powers. With regard to the waiver, the court determined that the waiver clause is valid so long as the rules of the private association are not in violation of state or federal laws. This case likely influenced the power that NBA and NHL commissioners later held.

The NBA did not have a commissioner until the 1960s, when the owners appointed Walter Kennedy in 1967. By 1971 Commissioner Kennedy possessed “best interest” authority and broad powers to take disciplinary action, as in the MLB and NFL. This extremely broad disciplinary power, similar to that of Commissioner Landis and Rozelle, lasted into recently retired Commissioner David Stern’s tenure (since replaced by Adam Silver). But as collective bargaining intensified, and with the players wielding more power through key arbitration rulings, the broad authority of Commissioner Stern has been reduced.

When Commissioner Stern took over, he had authority similar to that of the NFL commissioner, in that he could take final disciplinary action not subject to review. For example, Commissioner Stern suspended Michael Richardson in 1985 for drug use under his best interest authority, and did not reinstate him for two years. But through contract negotiation proceedings between the NBA and the NBPA, the 1995 CBA limited Commissioner Stern’s powers.

Under the 1995 CBA, there was an opportunity for a player to have his suspension reviewed by a third-party arbitrator if the discipline was done under the commissioner’s “best interest” authority. It is interesting to note that when this process was used to provide a remedy for Latrell Sprewell’s choking of his coach in 1997-98, the arbitrator stated, with respect to the arbitrator’s standard of review, that the “‘review of the Commissioner’s discipline . . . proved to be exceedingly difficult since [the commissioner] is entitled to great deference as the spokesperson for the sport of basketball . . . and is accountable for the

31. Finley, 569 F.2d at 530; see also Lockwood, supra note 22, at 145.
32. Finley, 569 F.2d 525; see also Mahone, Jr., supra note 20, at 194.
33. Finley, 569 F.2d 525; see also Mahone, Jr., supra note 20, at 194-95.
34. Finley, 569 F.2d 525; see also Lockwood, supra note 22, at 145.
35. Lockwood, supra note 22, at 149.
36. Id.
37. Id. at 150.
38. Id.
39. Id. at 151.
40. Id.
41. Id. at 154.
42. Id.
integrity of the League.'” In the Sprewell incident, the arbitrator applied a fair and reasonable standard. Even under his “best interest” power, Commissioner Stern’s disciplinary actions are subject to third-party review. This is just one example of the recent trend in professional basketball towards cabining of the NBA commissioner’s power.

While the history of commissioner discipline in the NHL is limited, the story of commissioner power in professional hockey is similar. Hockey was the last major professional sport to appoint a commissioner, when the NHL appointed Gary Bettman in 1993. Commissioner Bettman was originally General Counsel for the NBA, and was then offered the NHL Commissioner position. The 1995 NHL CBA dictated that the commissioner had the ability to discipline for off-ice conduct under a “best interest” authority, which gave Commissioner Bettman significant discretion to discipline players. There are not many examples of NHL disciplinary action going to the courts, however, NHLPA v. Bettman provided an interesting case using the “evident partiality” standard that will be examined in the “BountyGate” scandal. The case discussed the notion that an “arbitrator’s award can only be overcome by a showing of ‘evident partiality,’ [is likely] a difficult burden to overcome.” As will be discussed below, it would have been interesting to see how the court in the “BountyGate” case would have ruled relative to the NFLPA’s evident partiality argument.

Having provided a brief history of each of the four professional league’s commissioner position and disciplinary history, an examination of the current state of commissioner authority in each of the four leagues is necessary to understand where the potential problems lie, and how to attempt to fix them.

III. POWER OF COMMISSIONERS’ REVIEW UNDER EACH LEAGUE’S CURRENT CBA, CONSTITUTION, AND BY-LAWS

Two key documents set forth the rules of each professional league. The primary document governing the relationship between the players and the teams is the CBA. CBAs define and limit the power of the commissioner to take disciplinary action against players. In other words, through a contractual negotiation, the CBA “offers professional athletes an opportunity to impose checks on commissioner power, such as . . . arbitration processes, while [still]

43. Id. (alteration in original) (quoting Latrell Sprewell, at 103 (1998) (Freerick, Arb.)).
44. See id. at 155.
47. Id.
48. Id. at 152-53.
49. Id. at 157.
50. Id.
51. Wilson, supra note 45, at 48.
reserving certain [disciplinary] powers for the commissioner.\textsuperscript{52}

Additionally, commissioners’ powers regarding the league and certain
disciplinary actions are set forth in each league’s constitution and by-laws.
Each league’s constitution and by-laws are the starting point in defining the
power and authority of the commissioner.\textsuperscript{53} It is often the case that the
constitution and by-laws set forth the “best interest” authority that provides
commissioners the broad powers to “protect the integrity and best interest of
their sports league.”\textsuperscript{54} Thus, the commissioner has the authority to discipline
crime or actions detrimental to the league. This section details each of the four
commissioners’ current authority to discipline, as set forth in the leagues’
CBAs, constitutions, and by-laws.

\textbf{A. Major League Baseball}

Article II of the Major League Constitution details the commissioner’s
powers.\textsuperscript{55} Section 2(b) states that the commissioner has the authority “[t]o
investigate . . . any act, transaction or practice charged, alleged or suspected to
be not in the best interest of the national game of Baseball.” Section 3 provides
that when a player’s conduct or actions, are not in the “best interest” of
baseball, the commissioner has the ability to take several actions, including
“temporary or permanent ineligibility of [that] player.”\textsuperscript{56}

Article XII of the MLB CBA details the power of the commissioner to
discipline a player whose conduct the commissioner deems either “[M]aterially
detrimental or materially prejudicial to the best interest of Baseball,” which
includes conduct in violation of federal, state, or local law.\textsuperscript{57} The grievance
procedure, under Article XI of the CBA, also outlines the commissioner’s
power with regard to fines and suspensions for conduct on the field.\textsuperscript{58} Baseball
features several different actors, including the Executive Vice President and the
Senior Vice President, who have the authority to issue fines and suspensions
whereas the NFL grants the commissioner the primary power to discipline.\textsuperscript{59}

The MLB CBA also affords the commissioner a source of power. Article
XI, section C details the procedures for suspensions involving conduct on the
playing field.\textsuperscript{60} The appropriate authority will hear an appeal of the suspension
within 14 days.\textsuperscript{61} Under this system:

\begin{itemize}
\item \textsuperscript{52} See id.
\item \textsuperscript{53} Id. at 47.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} MAJOR LEAGUE CONST. art. II (2005), available at bizofbaseball.com/docs/MLConstitutionJune2005Update.pdf.
\item \textsuperscript{56} Id. art. II, § 3(d).
\item \textsuperscript{58} Id. at 38-44.
\item \textsuperscript{59} Id. at 44-45.
\item \textsuperscript{60} Id. at 44.
\item \textsuperscript{61} Id. at 45.
\end{itemize}
The Executive Vice President . . . or the Commissioner . . . shall render a written decision as soon as practicable . . . the decision by Executive Vice President . . . or the Commissioner . . . shall constitute full, final and complete disposition of the complaint and shall have the same effect as a Grievance decision of the Arbitration Panel.\textsuperscript{62}

The “arbitration panel” used in baseball for any appeal made by a player shall either be an impartial arbitrator, or a “tripartite panel so empowered and composed of the impartial arbitrator and two party arbitrators, one appointed by the [Players Association], the other appointed by the [League].”\textsuperscript{63} However, at any point during the current CBA term, either the league or the players association may terminate the appointment of the impartial arbitrator, or the selected arbitrators.\textsuperscript{64} And if the parties cannot agree on an arbitrator, they must request a list from the American Arbitration Association.\textsuperscript{65}

\textbf{B. National Hockey League}

In the NHL, the Commissioner’s powers derive from the NHL Constitution under article 6.\textsuperscript{66} In 2009, negotiations led to modification of the NHL Constitution, which mainly involves league issues—instead of player issues—including commissioner power. For example, Article 6.1 of the NHL Constitution charges the Commissioner with “protecting the integrity of the game of professional hockey and preserving public confidence in the League.”\textsuperscript{67}

Further, in article 6.1(j), entitled “Disciplinary Powers,” the commissioner has the full and complete power to discipline any person associated with the league for conduct that the commissioner deems detrimental to the League or game of hockey.\textsuperscript{68} Article 6.1(j)(3) states that “[i]n all cases, involving player discipline and/or the integrity of the game of hockey . . . the Commissioner’s determinations under section (j), shall be final and not subject to any review.”\textsuperscript{69} However, as will be discussed below, the proposed terms of the new NHL CBA actually restrict the commissioner’s power.

Like in the NFL and MLB, the Commissioner of Hockey has a “conduct detrimental” power for off-ice conduct.\textsuperscript{70} Under the proposed CBA, “[w]henever the Commissioner determines that a Player has violated League

\begin{itemize}
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id. at 41.
\item \textsuperscript{64} Id. At 41-42
\item \textsuperscript{65} Id. at 42.
\item \textsuperscript{66} NATIONAL HOCKEY LEAGUE CONST., 15 (2009), available at http://sportsdocuments.com/2013/11/13/nhl-constitution/
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 17-18.
\item \textsuperscript{69} Id. at 18 (emphasis added).
\end{itemize}
Rules applicable to Players . . . or has been guilty of conduct . . . that is detrimental or against the welfare of the League or the game of hockey, [the commissioner] may discipline such Player . . . .”71 The discipline may involve expulsion or suspension for a definite or indefinite period.72

Proposed terms from 2013 CBA negotiations suggest the NHL and NHLPA might have been attempting to avoid the circumstances that occurred in “BountyGate” by including the following language: “[p]arties (NHL, NHLPA, Clubs, Players) agree to limit public statements/commentary prior to the [suspension] hearing to an acknowledgment that a particular situation is under review [and] the parties may comment substantively only to the extent necessary to explain the basis for the decision to suspend.”73

The proposed NHL CBA language, in contrast to the NFL CBA states that “[a]n appeal for all off-ice conduct discipline may be made directly to the Impartial Arbitrator.”74 The standard of review for the Impartial Arbitrator for “Off-Ice conduct” shall be “[W]hether the Commissioner’s determination was supported by substantial evidence and was not unreasonable based on the following considerations: a) the facts and circumstances surrounding the conduct at issue [and] c) the legitimate interests of both the Player and the League.”75 What’s more, the Impartial Arbitrator has full remedial authority.76 This language stands in stark contrast to that set forth by the NFL, where any appeal for a suspension involving “conduct detrimental” to the league, is only appealable to the commissioner, who made the initial ruling.

As discussed above, in the proposed terms of the new CBA, any player suspended for more than six games for “On-Ice Conduct,” or suspended for “Off-Ice Conduct,” has the opportunity to appeal the decision to an Impartial Arbitrator.77 Thus, the commissioner’s decision is not final, contradictory to the language in the NHL Constitution, which states that the commissioner’s decision is final.78

C. National Basketball League

Article XXXI of the NBA CBA details grievance and arbitration procedures with respect to disputes involving discipline of players.79 Under this article, section 9 details any player discipline by the commissioner, and separates the discipline into two categories: suspension of twelve (12) games or

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71. Id. at 9-10.
72. Id. at 9.
73. Id. at 9-10.
74. Id.
75. Id.
76. Id.
77. Id.
78. NATIONAL HOCKEY LEAGUE CONST., supra note 66, at 15.
less and suspension for more than twelve (12) games. For a suspension of under twelve games, for which the commissioner has suspended a player for in-game conduct or “concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball,” the suspension “shall not give rise to a Grievance, shall not be a subject to a hearing before . . . the Grievance Arbitrator, and shall not be determined by arbitration.” The player may appeal the ruling to the commissioner, and the appeal will constitute a final and complete disposition of the dispute.

However, section 9(a)(5) states that the Player Association can seek a review of the “financial impact of the Commissioner’s decision,” which would be reviewed by the “Player Discipline Arbitrator.” The CBA states that the Arbitrator may only agree with, or lower the financial penalty, and this determination will be the full and final disposition of the dispute. Additionally, similar to the proposed NHL language, section 9(a)(5)(c), the CBA states that the “Player Discipline Arbitrator shall make no public comment regarding the matter.”

Section 9(b) of the NBA CBA discusses player suspensions of more than twelve (12) games for either in-game conduct or to preserve the integrity of the game. Under this section, a player or the union may file a Grievance relative to the suspension, which will start the process of reviewing discipline. Article XXXI, section 2-7 of the CBA details this procedure. Further, section 9(d) provides the commissioner with substantial power to legislate preservation of the “integrity” of the game:

In the event a matter filed as a Grievance . . . gives rise to issues involving the integrity of, or public confidence in, the game of basketball . . . the Commissioner may, at any stage of its processing, order the matter be withdrawn from such processing and thereafter be processed in accordance with the appeal procedure provided in Section 9(a)(1)-(4) above.

Thus, the NBA Commissioner has full authority to discipline and review any player suspended for twelve games and under, and has substantial, but not complete powers, to discipline for a suspension of more than twelve games.

D. National Football League

The primary source of Commissioner Goodell’s power derives from the NFL CBA. However, 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. With regard to detrimental conduct, the commissioner has the
power to:

[T]ake or adopt appropriate legal action [which] he deems necessary and
proper in the best interest of . . . the League or professional football, whenever
any party . . . employed by . . . connected with the League or any member
thereof is guilty of any conduct detrimental either to the League . . . or to
professional football.

Even though the language in the NFL Constitution is ambiguous with
regard to the power of the commissioner to discipline players, the CBA
attempts to clarify this power, but the language in the CBA is also ambiguous,
giving rise to a key issue in the “BountyGate” dispute. Article 46 of the NFL
CBA details the commissioner’s ability to discipline players:

[a]ll disputes involving a fine or suspension imposed upon a player for
conduct on the playing field . . . or involving action taken against a player by
the Commissioner for conduct detrimental to the integrity of, or public
confidence in, the game of professional football, will be processed exclusively
as follows: the Commissioner will promptly send written notice of his action to
the player [and within three days, the player] may appeal in writing to the
Commissioner.

Disputants in the “BountyGate” example argued over the meaning of this
language, as it ambiguously provides that the commissioner has the ability to
make the decision and also has the sole authority to judge any appeal of his
original decision.

Additionally, there is a form player contract in Appendix A of the NFL
CBA, and section 15 of the form player contract is titled “Integrity of Game,”
providing that a

[ ]layer . . . acknowledges his awareness that if [the player] is guilty of
any other form of conduct reasonably judged by the League Commissioner to
be detrimental to the League or profession football, the Commissioner will
have the right . . . after giving [the] Player the opportunity for a hearing . . . to
suspend Player for a period certain or indefinitely . . . .

Thus, 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.

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88. NFL CONST. 29 (2006), available at
89. Id.
90. NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, at 204 (2011)
available at http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-
2020.pdf
91. Id. (emphasis added)
92. Id. at 256.
93. Id.
Commissioner Goodell has the broadest powers of any of the four professional league commissioners. As detailed above, in each of the three other sports, the commissioners’ power to review and discipline are subject to arbitration review for most, but not all decisions. For example, appeals of discipline in the MLB go to either a neutral arbitrator or a tripartite arbitration review panel.

While in the NBA, only the economic impact of a disciplinary action can be appealed to an arbitrator, whereas in the NFL, any reviews of Commissioner Goodell’s actions are only reviewable to him. The NFL system is clearly the worst system of the four. It provides no independent review and grants Commissioner Goodell near unlimited power. The “BountyGate” scandal is a perfect example of how Commissioner Goodell’s nearly unlimited disciplinary power is problematic and requires reform.

IV. NFL’S DISCIPLINARY REVIEW ISSUES THROUGH THE LENS OF THE “BOUNTYGATE” SCANDAL

A. Background

On March 2, 2012, the release of the NFL’s findings shocked the sports world by revealing the New Orleans Saints “pay-for-hit squad,” precipitating the NFL’s issuance of a series of severe suspensions against the New Orleans Saints on March 21, 2012. 94 The suspensions, for what has become known as the Bounty Scandal, or “BountyGate,” came as punishment for what the NFL determined was a system of monetary reward for defensive players “inflict[on of] injuries on opposing player[s],” to knock them out of the game. 95 The NFL investigation found that the bounty system was in place from 2009 until 2011 and that around twenty-five players had participated in the program. 96 Under the program, a defensive player was supposedly rewarded $1,500 for a knockout, and $1,000 for a “cart-off.” 97

Commissioner Goodell and the NFL determined that defensive coordinator Gregg Williams, along with several players, created a pool to pay defensive players bonuses for certain hits that resulted in severe injury. 98 Additionally, Commissioner Goodell determined that head coach Sean Payton was aware of the system, and while he did not actually participate directly, he failed to shut it down immediately upon learning of the program. 99

96. Saints Bounty Scandal, supra note 94.
97. Clayton, supra note 95.
98. Saints Bounty Scandal, supra note 94.
99. Id.
B. Commissioner Goodell’s Initial Decision, & Decision on Appeal

On March 21, 2012, the NFL issued its historic team punishments for the bounty scandal:100

Head coach Sean Payton was suspended for one year without pay, effective April 1 [2012]. GM Mickey Loomis was suspended without pay for the first eight regular-season games of 2012. Saints assistant Joe Vitt was suspended for the first six games of 2012. Former Saints defensive coordinator Gregg Williams . . . was suspended indefinitely . . . [he was reinstated after a one-year suspension]. In addition, the Saints franchise was fined $500,000 and docked second-round picks in 2012 and 2013 drafts."101

On May 2, 2012, the NFL suspended four players for their roles in the “BountyGate” Program.102 Sports Illustrated columnist Peter King wrote a column in the wake of the historic suspensions, titled: “With players suspended, total discipline in bounty saga staggers.”103 The NFL suspended Jonathan Vilma for the entire 2012 season, Anthony Hargrove for eight games, Will Smith for four games, and Scott Fujita for three games.104

Commissioner Goodell suspended the four players for what he deemed “‘conduct detrimental to the NFL as a result of their leadership roles’ with the [bounty scandal].”105 Commissioner Goodell elaborated on the suspensions: “[i]n assessing player discipline, I focused on players who were in leadership positions at the Saints; contributed a particularly large sum of money toward the program [and] demonstrated a clear intent to participate in a program that potentially injured opposing players.”106

The players appealed their suspensions through the NFLPA, but under the terms of article 46 of the NFL CBA, appeal of any suspension for what the commissioner deems as “conduct detrimental,” may appeal the suspension “in writing to the Commissioner.”107 On July 5th, 2012, Commissioner Goodell rejected the appeals of the four players.108 Rather than meeting with Commissioner Goodell personally, the four players fought Commissioner

100. Id.
101. Id.
102. Saints Bounty Scandal, supra note 94.
104. Saints Bounty Scandal, supra note 94.
106. Id.
Goodell’s decision through the federal court system.\textsuperscript{109}

\textit{C. NFLPA Files Lawsuit}

The four players’ lawsuit against the NFL and Commissioner Goodell “center[ed] on the scope of the Commissioner’s authority and the rights of the players to challenge exercises of that authority.”\textsuperscript{110} The NFLPA also questioned the fairness of the process to suspend the players.\textsuperscript{111} The NFLPA released a statement expressing its disappointment with the lack of integrity in the investigation, and claimed that Commissioner Goodell lacked the authority to discipline players under the terms of the CBA.\textsuperscript{112}

Further, the NFLPA questioned the impartiality of Commissioner Goodell: “the commissioner took actions during [the bounty] process that rendered it impossible for him to be an impartial arbitrator.”\textsuperscript{113} In other words, the NFLPA argued that Commissioner Goodell was not an unbiased arbitrator, and that he had already determined the outcome of the appeal, before the players and NFLPA had an opportunity to present their case.\textsuperscript{114} Of the many important legal claims raised, the most important to this paper is the issue of whether Goodell was biased when he heard the appeal.\textsuperscript{115} Even though Commissioner Goodell eventually recused himself in the “BountyGate” scandal, the issue of bias goes to the bigger problem of the nearly unlimited power of Commissioner Goodell and the lack of an appeal process to a different, and hopefully neutral, arbiter or panel.

It is inherently likely that Goodell’s decisions are biased. Under his “best interest” powers, Goodell is charged with protecting the league’s public image, which typically involves public relations management, and the projection of purity. A conflict of interest arises in Goodell’s efforts to cultivate public perception, because his decision has an effect on the League’s public image. To illustrate the potential bias, Goodell has an incentive to engender an arbitral outcome that aligns with his public image campaign, regardless of whether the decision is ultimately correct. Thus, a superior disciplinary approach would remove this inherent bias and take the final decision out of Commissioner Goodell’s hands.

\begin{itemize}
\item \textsuperscript{109} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Feldman, supra note 110.
\item \textsuperscript{115} Id.
\end{itemize}
D. Evident Partiality

The NFLPA’s primary argument in the suit was that Commissioner Goodell, as the “Appeals Judge,” was impartial or did not have “evident partiality” when he made his decision. As mentioned above, the current NFL CBA states that the commissioner can make any suspensions for conduct detrimental to the League. Additionally, under the CBA, if a player chooses to appeal the suspension, the commissioner also has the authority to review the appeal. The NFLPA argued “[t]he commissioner’s decision to participate in a vocal public defense of his discipline created a record of evident partiality and bias that by itself require[d] vacating his arbitration award.”

The case came under the jurisdiction of the United States Court of Appeals for the Fifth Circuit. In cases involving the Federal Arbitration Act, The Fifth Circuit uses the “evident partiality” standard to determine if an arbitrator was biased. Evident partiality exists when “an arbitrator exhibits ‘actual bias at the arbitration proceeding.’” Further, evident partiality analysis asks whether a reasonable person would or could have concluded that the arbitrator was biased towards one party. Additionally, an arbitrator’s reasonable impression of bias increases to the level of evident partiality when the facts of the situation “create[d] a strong impression that [the arbitrator] . . . decided the dispute[] . . . before it began.” Understanding this, the NFLPA argued that Commissioner Goodell’s arguably impartial comments prior to the hearing seemed to indicate that he was not impartial, and that he had already decided the case before it was arbitrated.

Before examining the NFLPA’s arguments against Commissioner Goodell’s evident partiality, it is important to establish that a commissioner is not exempt from serving as a neutral arbitrator. In Morris v. New York Football Giants, Inc., the Supreme Court of New York vacated an arbitration decision because the commissioner was not exempt from the previously stated arbitrator requirements. The court further held that the commissioner lacked

116.  NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, supra note 90.
117.  Id.
119.  Id.
120.  Id. at 40 (quoting Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 549 (N.D. Tex., 2006)).
121.  Id. (quoting Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 550 (N.D. Tex., 2006)).
122.  Id. (quoting Computer Services Inc. v. Michael Motor Co., 761 F. Supp. 2d 459, 465 (S.D. Tex., 2010)).
123.  Id. at 12.
124.  Id. at 40.
125.  Id.
neutrality and “‘evident partiality’” and was biased with regard to the incident in the case. The case involved a dispute between two professional football players and their former football teams over compensation. Under the player contracts, any dispute arising out of the contract would be arbitrated before the commissioner. The court determined that since former NFL Commissioner Tagliabue had previously advocated a position in opposition to the players, he lacked the neutrality required to arbitrate these claims.

The NFLPA Complaint advanced a similar position to that held in *Morris*, stating that Commissioner Goodell made public comments to defend his initial discipline against the Saints’ players, including advocating for the severe punishments to be upheld. Further, the NFLPA argued that Commissioner Goodell, “[a]bandoned all notions of arbitral propriety and cast himself in a role in which he could not possibly serve as the arbitrator of the disciplined without being considered evidently partial.” The NFLPA cited several examples in which Commissioner Goodell, before hearing or rendering the decision of the appeal, made public comments indicating that he was biased.

For example, the NFLPA stated that Commissioner Goodell, while discussing the suspensions with the public, had issued “unprecedented punishments,” and that the purpose of the punishments was to send a message to the other players. Commissioner Goodell “hope[d] by the actions that [had] been taken here that [given] that [the league] discovered it, and the fact that [the league] penalized it with unprecedented discipline, and by the focus that it’s gotten, that the [players] understand not to engage in [similar conduct].”

Further, on several occasions, Commissioner Goodell “repeatedly lauded the discipline that he had imposed at the Players’ expense, telling the media that ‘we do want to make sure that at every point we uphold the standards that our fans expect.’” Perhaps most damning toward his partiality, Commissioner Goodell, while being interviewed by Rich Eisen, implied that the players were guilty, stating that “‘the evidence is quite clear that the players embraced [the bounty situation]. [The players] enthusiastically embraced it.

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127. *Id.* at 1014.
128. *Id.*
129. *Id.* at 1016.
130. *Id.* at 1017.
131. NFLPA Complaint, *supra* note Error! Bookmark not defined.125, at 12.
132. *Id.*
133. *Id.*
134. *Id.*
136. *Id.* at 13.
[The players] put the vast majority of the money into the program and actually are the ones playing the game.”

The NFLPA did not believe that Goodell was impartial, and argued that “[a]ny reasonably objective person who considered Commissioner Goodell’s public comments would conclude that he could not serve as an impartial arbitrator . . . because he had pre-ordained the outcome and was evidently biased on this particular subject.” Finally, the NFLPA argued that each of the above examples “created the public impression that Commissioner Goodell had predetermined that he would severely punish the Players and validate his investigation, regardless of any defense or explanation the Players might make.”

Before the court could rule on any of these issues, Commissioner Goodell recused himself, and then appointed former Commissioner Paul Tagliabue to arbitrate the case and issue a final decision on the appeal by the players.

E. Tagliabue Decision

Former Commissioner Paul Tagliabue issued his “Final Decision on Appeal,” on December 11, 2012. Former Commissioner Tagliabue first provided a background of the “BountyGate” situation and then concluded that “Hargrove, Smith and Vilma - - but not Fujita - - engaged in ‘conduct detrimental to the integrity of, and public confidence in, the game of professional football.” However, he vacated the suspensions of all the players involved. With regard to the legal guidelines and authority for an arbitrator appointed under a CBA, the NFL CBA provided Tagliabue with full authority to determine the outcome.

The arbitrator may render a judgment in the matter because it was “bargained for” between the parties in the CBA.

Former Commissioner Tagliabue determined that Anthony Hargrove should not have been suspended for several reasons, including that Hargrove’s

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137. Id.
138. Id. at 14.
139. Id. at 42.
142. Id. at 2.
143. Id.
144. Id. at 3.
146. See id.
coaches gave him direct instructions to lie, and that he was under significant pressure to follow the chain of command.\textsuperscript{147} Thus, Tagliabue vacated the suspension.\textsuperscript{148}

Former Commissioner Tagliabue went into great length in discussing and determining whether to vacate the suspensions of both Will Smith and Jonathan Vilma. With regard to Will Smith, Tagliabue determined that “selective prosecution of allegations of misconduct... relative to Smith cannot be sustained. Whatever the reason for such selective enforcement, it does not satisfy basic requirements for consistent treatment of player-employees similarly situated,” and thus, vacated Smith’s suspension.\textsuperscript{149} Tagliabue was concerned that the suspension was primarily based on Smith’s role on the team, as a leader, and that this should not be the main, or even a partial reason to suspend a player.\textsuperscript{150}

Former Commissioner Tagliabue affirmed Commissioner Goodell’s findings that Jonathan Vilma fully participated in the Bounty Program and offered some sort of bounty of his own during a Saints’ playoff game.\textsuperscript{151} However, Mr. Tagliabue determined that Mr. Vilma was operating under guidance from his then coach Gregg Williams.\textsuperscript{152} Additionally, there was no evidence that Mr. Vilma actually had the money when he “issued” the bounty, or that he ever paid any money to a player as a result of a bounty-type hit during the playoff game.\textsuperscript{153} Thus, Mr. Tagliabue vacated Mr. Vilma’s suspension, stating that “[h]e could not]... uphold a multi-game suspension where there is no evidence that a player’s speech... was actually a factor causing misconduct on the playing field.”\textsuperscript{154} Tagliabue further stated that the suspension was not justified because the Saints’ defensive coaches, specifically Mr. Williams, created an environment, where such talk of a “bounty” was encouraged and allowed.\textsuperscript{155}

Finally, unlike the suspension of the three players listed above, Mr. Tagliabue did not agree with Commissioner Goodell’s findings, and subsequent suspension, of Scott Fujita.\textsuperscript{156} Regarding Mr. Fujita’s suspension, it was the NFL’s contention that it was not important that Mr. Fujita claimed that he had never offered money for hits on opponents.\textsuperscript{157} Additionally, the NFL contended that offering rewards alone, and being in a leadership role, was enough to...
violate the League Constitution. However, Mr. Tagliabue determined that the “NFL’s decision to suspend a player . . . for participating in a program for which the League typically fines a club certainly raises significant issues regarding inconsistent treatment between players and teams.” Thus, Mr. Tagliabue vacated Mr. Fujita’s suspension because he did not participate in the Program and his actions could not be detrimental to the league.

While former Commissioner Tagliabue vacated all of the player’s suspensions, he did not determine that Commissioner Goodell had acted improperly in his role as arbitrator. In addition, Mr. Tagliabue affirmed the factual findings of Commissioner Goodell, and determined that three of the four players had engaged in conduct detrimental to the integrity of the League, and professional football. It likely would have been too controversial for Mr. Tagliabue to determine that Commissioner Goodell was in the wrong, or had acted in an impartial manner before and after the arbitration proceedings. This is because if Mr. Tagliabue had determined that Commissioner Goodell was biased, that decision would likely have been detrimental to the confidence in the league, through a drastic decline in the confidence of Commissioner Goodell.

The NFLPA responded to former Commissioner Tagliabue’s decision favorably, but the statement did not discuss Commissioner Goodell’s potential wrongdoings. The NFLPA stated “[w]e believe that when a fair due process takes place, a fair outcome is the result . . . . We are pleased that Paul Tagliabue . . . agreed with the NFLPA that [the] previously issued discipline was inappropriate in the matter of the alleged New Orleans Satins bounty program.” The NFLPA furthered stated that “[v]acating all discipline affirms the players’ unwavering position that all allegations the League made about their alleged ‘intent-to-injure’ were utterly and completely false.”

The NFLPA statement did not address Commissioner Goodell’s potential impartiality, nor did the court rule on this issue. However, one might conclude that Commissioner Goodell relinquished the authority to rule in the arbitration, and gave it to former Commissioner Tagliabue, based on how the trial was proceeding and the possibility that his partiality would come under strict scrutiny by the players and the public.

V. PROPOSED HYBRID SYSTEM TO FIX THE NFL’S DISCIPLINARY PROCESS

Having examined the history of commissioner disciplinary authority in

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158. Id.
159. Id. at 17-18.
160. Id. at 18.
161. Id. at 22.
163. Id.
each professional league, and the current scope of each commissioner’s authority, this section will make a proposal specifically for the NFL, but also for the other professional leagues, for a new system of disciplinary review. It is readily apparent that the current NFL disciplinary review system is blatantly unfair to the players. Commissioner Goodell has nearly unlimited power and the ability to make both the initial and final decision.

Further, the current system of disciplinary review is inefficient, as demonstrated by “BountyGate” lawsuits that likely would have been avoided if there had been a neutral review system in place. However, it should be noted that this system of review has been contracted between the NFL and the NFLPA through collective bargaining; any changes must be made during the next round of negotiations, unless the two sides wish to mutually amend the current CBA, which would occur through representatives of both parties signing a written agreement to modify the CBA.\footnote{164}{National Football League Collective Bargaining Agreement, supra note 90., at 254.}

As described above, the NFL is currently the only professional league that does not have a process in place for a suspension under the commissioner’s “best interest” authority to be reviewable and appealable to an independent arbitrator.\footnote{165}{See Michael McCann, Overturning of Bounty Suspensions Backs Goodell into a Corner, S.L.COM(Sept.7,20126:33P.M.),http://sportsillustrated.cnn.com/2012/writers/michael_mccann/09/07/saints-suspensions-overturned/index.html.} The NFL system of disciplinary power creates a “circular system of justice.”\footnote{166}{Id.} In other words, Commissioner Goodell has absolute power and as one other commissioner stated, Mr. Goodell acted as the “‘[J]udge, jury, and executioner,’” in the bounty scandal.\footnote{167}{Id.}

A couple of proposals to fix the “BountyGate” problem offered by commentators differ from the proposed hybrid system. For example, one commentator proposed that all four leagues should remove the appealable ability of a commissioner’s decision altogether, and have the commissioner’s initial decision be final.\footnote{168}{See Jason M. Pollack, Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports, 67, FORDHAM L. REV. 1645, 1706 (1999).} Conversely, this proposed process would actually create a process which would be less efficient than the current one, because players and player associations would have to appeal to the courts, and even if the courts could provide a “fairly objective answer,” an appeal would likely be less efficient than an appeal to an arbitration panel.

Thus, the NFL should adopt a hybrid system of commissioner disciplinary review to limit Commissioner Goodell’s scope of power to only the initial discipline under his “best interest” authority, whereby any appeal would go directly to an independent arbitrator. The hybrid system combines several facets of other professional leagues system of disciplinary review, but is not the
same as any system in use by any major league.

For example, the appeal of Ryan Braun’s suspension for allegedly using steroids went to the tripartite arbitration panel. Under the MLB’s Drug Prevention Program, a player has the right to appeal a suspension to a three-person panel, which is composed of a neutral arbitrator, an arbitrator appointed by the league, and an arbitrator appointed by the players association.170 The inherent problem with this system, and a problem that the proposed hybrid system attempts to avoid, is that the Braun decision, and the vast majority of other decisions, was a two to one decision, with the neutral arbitrator casting the deciding vote.171

In other words, the league arbitrator voted with the league’s position, and the player association arbitrator voted with the player’s position.172 Thus, I recommended that the NFL adopt a three-person arbitration panel, similar to baseball’s tripartite arbitration panel; however, the panel will be compromised differently than that of the arbitration panel in professional baseball. Additionally, the standard of review should be “reasonableness,” which would allow the panel to balance the interest of the player and the league, and yet still have flexibility in its decision.173

While a three-person arbitration panel might be agreeable to both the players association and the league, it is unlikely that the two sides will be able to mutually agree on the three arbitrators. Thus, I propose two solutions to fix this potential problem. First, the arbitrators should come from the American Arbitration Association, or a similar Association, which would provide “access to . . . superior case management services, well-screened expert neutrals who undergo continuous training, and the [specific Association’s] Rules and Procedures that govern the various ADR processes.”174 It should be noted, that MLB uses the American Arbitration Association under the current MLB CBA, whereby the two parties will request a list from the American Arbitration Association if the league and the players association cannot agree on an arbitrator.175

The second part of the proposal is that the three-person arbitration panel should be selected from nine (9) potential arbitrators in a similar manner used for jury-selection. In other words, the arbitration association should provide the

170.  Id.
171.  Id.
172.  Id.
173.  Mahone, Jr., supra note 10 at 208.
174.  Id.
174.  Arbitration, Arbitration, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/aaa/faces/services/disputeresolution/services/arbitration?_afrLoop=597574241693713&_afrWindowMode=0&_afrWindowId=xr7s8f4cb_1#%40%3F_afrWindowId%3Dxrx78f4cb_1%26_afrLoop%3D597574241693713%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dzn5t5r4 (last visited Apr. 13, 2014).
175.  MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT, supra note 57, at 42.
NFL with nine potential arbitrators, and through a jury-selection (voir dire) type process, the NFL and the NFLPA will each have the ability to eliminate three potential arbitrators, leaving them with a three-person panel. This process would also solve the problem that occurred in the Ryan Braun case, where it was only the one neutral arbitrator out of the three casting the deciding vote, as the other two decided along the lines of the position of the entity that selected them. In addition, the NFL and NFLPA would have the ability to question the potential arbitrators and determine whether any of them had biases or conflicts that would prevent them from being an impartial arbitrator. This system would solve the problem created by the current NFL CBA, and the issue in the “BountyGate” of Commissioner Goodell’s potential evident partiality.

Thus, I recommend that the NFL adopt a process through which a three-person arbitration panel would hear any appeal of disciplinary action taken under the “best interest” authority of the NFL Commissioner, and would apply a reasonableness standard of review. The advantage to this system would likely create more consistent disciplinary results, prevent the NFL Commissioner from being the judge, jury, and executioner, and remove the inefficiencies of the current disciplinary review process.

VI. CONCLUSION

The NFL’s current process of review for a disciplinary action under the commissioner’s “best interest” authority is flawed. “BountyGate” is a primary example of these flaws, but it provides an opportunity for both the NFL and NFLPA to see this problem firsthand and take appropriate remedial measures. The proposed hybrid system would likely be the best system for both the NFL and the players. It would create a process by which the NFL commissioner would still hold initial disciplinary powers, but the players would have an adequate appeal process, which would consist of three unbiased arbitrators.

Further, the proposed change would likely also be a welcome change to three other professional leagues, especially MLB, which has witnessed both the unprecedented suspension of Alex Rodriguez by Commissioner Selig, and also witnessed the flaw in their arbitration system during the Ryan Braun Steroid debacle. Arbitrators appointed by the league or by the player’s association are inherently biased towards the side that appointed them. The proposed hybrid system creates a process that would remove these inherent biases.

The role and power of the commissioner has ebbed and flowed throughout the years. However, this power remains strong even during a time when players associations have significant power. “BountyGate” is just one example of the

problems that can arise under the current process of review in the NFL. Each commissioner plays an extremely influential role in today’s sports leagues, but a system of checks and balances needs to be put in place to make sure that the power of the commissioner does not grow out of control under their “best interest” authority.