Throwing the Challenge Flag on the NFL's Collective Bargaining Agreement

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I. Introduction

The National Football League ("the NFL" or "the League"), founded in 1920 and comprising 32 teams, is the most watched and most profitable professional sports organization in the United States.[2] Each team is allowed to roster 53 players for a league total of 1,696 players.[3] In the 2016 season, the League suspended 66 players, or approximately 4 percent of all players for various violations of NFL rules.[4] From 2002 to 2009, the League suspended just 55 players total.[5] The 2016 season is not merely an anomaly; the League has suspended 297 players since 2011, the year the NFL and the NFL Players' Association ("NFLPA") negotiated the current Collective Bargaining Agreement ("CBA").[6] This astonishing rise in the number of suspended players necessitates a closer look at the power the League exerts over its employees in the context of disciplinary action.

Collective bargaining agreements are negotiated commercial contracts between sophisticated parties, typically between a labor organization and an employer.[7] In the employment context, the contract governs the parties' relationship, establishing terms and conditions of employment as well as policies and procedures for resolving disputes.[8] Collective bargaining agreements are typically governed under the National Labor Relations Act ("NLRA").[9] Many collective bargaining agreements contain arbitration clauses to avoid litigation and reduce the costs of resolving disputes between the parties.[10] Arbitration clauses are typically governed by the Federal Arbitration Act.[11]

Other professional sports organizations often operate under similar collective bargaining agreements.[12] However, procedures for dispute resolution are

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[1] J.D. Candidate May 2019.

[2] STATISTA, *National Football League (NFL) – Statistics and Facts*, https://www.statista.com/topics/963/national–football–league/ (last visited Jan. 2, 2019); Jim Norman, *Football Still Americans' Favorite Sport to Watch*, GALLUP (Jan. 4, 2018) https://news.gallup.com/poll/224864/football–americans–favorite–sport–watch.aspx.

[3] NFL COLLECTIVE BARGAINING AGREEMENT 145 (2011).

[4] *NFL Fines & Suspensions*, SPOTRAC, https://www.spotrac.com/nfl/fines-suspensions/2016/ (last visited Jan. 2, 2019).

[5] *NFL Fines & Suspensions*, SPOTRAC, http://www.spotrac.com/nfl/fines–suspensions/ (last visited Jan 2, 2019) (follow hyperlink; change your "viewing" year to the specific year you desire to view and change your select type to suspensions).

[6] *Id.*

[7] CORNELL LAW SCHOOL, *Collective Bargaining*, https://www.law.cornell.edu/wex/collective_bargaining (last visited Jan. 2, 2019).

[8] *Id.*

[9] *See* 29 U.S.C.S. § 151 (2018).

[10] Lynne MacDonald, *What Are the Benefits of Employment Arbitration?*, CHRON, https://smallbusiness.chron.com/benefits-employment-arbitration-14693.html (last visited Jan. 2, 2019).

[11] *See* 9 U.S.C.S. § 1, 3 (2018).

[12] *Compare* NBA – NBPA COLLECTIVE BARGAINING AGREEMENT (2017), *and* MLB COLLECTIVE BARGAINING AGREEMENT (2012).

drastically different in other professional sports organizations. For example, the National Basketball Association (the "NBA") and the NBA Players' Association ("NBAPA") have agreed to appoint a "Grievance Arbitrator" to resolve all disputes.[13] This Grievance Arbitrator is completely independent, and appointed at the consummation of the collective bargaining agreement to serve a term that runs concurrently to the duration of the agreement.[14] The Grievance Arbitrator may be removed by notice of discharge filed by either the NBA or NBAPA, and the parties must then agree to the appointment of a replacement arbitrator.[15] If the parties are unable to agree on a replacement arbitrator, the parties must jointly request the International Institute for Conflict Prevention and Resolution ("CPR") "or other organization(s) as the parties may agree upon" to submit to the parties eleven (11) attorneys who have no actual or apparent conflicts within the past five (5) years.[16] The parties may choose from these eleven names, or else delete five (5) of the names, and return the remaining six (6) names to the CPR Institute.[17] From the remaining six names, the CPR Institute will choose a new Grievance Arbitrator.[18] Unlike the NFL, the NBA Collective Bargaining Agreement provides clear procedures for dispute resolution, including explicit evidentiary procedures.[19] These procedures clearly provide for a discovery process, the exchange of all relevant evidence and witness lists, and require the parties to agree on a statement of the issues prior to commencement of the arbitration proceeding.[20]

Under each collective bargaining agreement negotiated by the NFL and NFLPA since 1968, the Commissioner of the NFL has retained not only the exclusive power to impose disciplinary action, but also the power to act as the arbiter for any appeal of that action.[21] As previously noted, this arrangement is extraordinary. The NFL Collective Bargaining Agreement does not provide the parties any procedural remedies to remove an arbitrator for bias or select a new arbitrator subject to agreement of both parties.[22] Additionally, the procedures defined by the NFL's Collective Bargaining Agreement are vague, and the process for admitting and utilizing evidence is largely undefined. The combination of broad power afforded to the Commissioner, and the vague standard of dispute resolution procedures have allowed the NFL to take advantage of dispute resolution procedures to the detriment of their players. This Note seeks to examine the power of the NFL Commissioner under Article 46 of the current CBA against the backdrop of the parties' negotiations. In addition, this Note seeks to examine recent high–profile challenges to exercises of the Commissioner's Article 46 power in the court system, scrutinizing Article 46's

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[13] *See*, NBA COLLECTIVE BARGAINING AGREEMENT 399 (2017).
[14] *Id.*
[15] *Id*. at 399–400.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See id.* at 397–98.
[20] *Id.*
[21] Mike Florio, *Commissioner's power under Article 46 has been present since the first CBA*, NBC SPORTS (May 17, 2015, 7:18PM), https://profootballtalk.nbcsports.com/2015/05/17/commissioners-power-under-article-46-has-been-present-since-the-first-cba/.
[22] NFL COLLECTIVE BARGAINING AGREEMENT 113–15; 117–18 (2011).

adherence to the Federal Arbitration Act ("FAA"). This Note argues that the precedent set in *Brady II* was incorrect, has led to at least one other incorrect decision, and empowers the NFL to continue to skirt the requirements of fundamental fairness imposed by the Federal Arbitration Act.

II. The NFL's Current Collective Bargaining Agreement

Negotiations for the current CBA began in 2010, spurned largely by Commissioner Goodell's threat to "lock out" the players if no agreement was reached by March 1, 2011.[23] The most prominent issues included player health and safety protections such as limits on "two–a–days" and offseason practices, as well as full–contact practices in both the pre–season and post season.[24] The NFLPA also focused on securing medical benefits for the players, including the creation of neuro–cognitive benefits for players with concussions and other similar football–related injuries.[25] Finally, the NFLPA negotiated for revenue sharing for the players.[26] This current CBA is effective through the 2020 NFL season.[27] Notably, negotiations did not focus on player discipline or the procedures and protections afforded to players accused of misconduct on or off the field. Statistics mentioned in the introduction illuminate the importance of player disciplinary procedures and the powers afforded to the NFL that were not considered in negotiations. [28] The 400% increase in player suspensions following the 2011 negotiations is astonishing, and it's clearly not an event the parties contemplated in their negotiations.[29]

III. Adherence to the Federal Arbitration Act

The Federal Arbitration Act ("FAA") was enacted by Congress to enable judicial oversight of private dispute resolution, or arbitration. Arbitrators are not bound by the formal rules of evidence and may draw on their own personal knowledge when making their awards.[30] However, Congress did not intend for arbitration to be the Wild West of dispute adjudication and resolution.[31] Section 10 provides grounds for vacating arbitration awards, including "where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to

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[23] *NFL locks out players, who file suit*, ESPN (Mar. 12, 2011), http://www.espn.com/nfl/news/story?id=6205936 [hereinafter "NFL Lockout"].
[24] Nate Davis, *NFL, players announce new 10–year labor agreement*, USA TODAY (July 25, 2011), http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.XC0IZyOZPBI.
[25] *Id.*; *Former Players Receive New Neuro–Cognitive Disability Benefit*, NFLPA (Dec. 7, 2012), https://www.nflpa.com/news/all–news/former–players–receive–new–neuro–cognitive–benefit.
[26] Gregg Rosenthal, *The CBA in a nutshell*, PRO FOOTBALL TALK (July 25, 2011, 2:03 PM), https://profootballtalk.nbcsports.com/2011/07/25/the–cba–in–a–nutshell/.
[27] NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT 1 (2011).
[28] *See supra* footnotes 1–6 and accompanying text.
[29] *See supra* footnotes 4–6 and accompanying text.
[30] Bernhardt v. Polygraphic Co. of America, 350 US 198, 203 (1956).
[31] 9 U.S.C. § 10 (2012).

the controversy. . . . ."[32] Courts have also recognized grounds for vacatur where the process of the arbitration denies a party "fundamental fairness."[33] The case law that surrounds these two pillars of Section 10 is erratic, especially in regard to fundamental fairness. Evidentiary findings of the arbitration are generally not subject to review, but when the findings (or denial of process to make findings) lead to fundamental unfairness, Courts have a role in ensuring equity.[34] In other words, when the arbitrator fails to make findings of material and pertinent information, the error itself amounts to misconduct providing grounds for vacatur of the award on the grounds of fundamental fairness.[35] This is true whether the omission of material and pertinent evidence is intentional, a product of poor judgment, or by mistake; all omissions of material and pertinent evidence amount to error and open the award to judicial review.[36] The following cases illustrate cognitive dissonance in how Section 10 of the FAA operates to protect parties against fundamental unfairness in private dispute resolutions.

IV. Tom Brady

On January 18, 2015, the New England Patriots led by quarterback Tom Brady defeated the Indianapolis Colts in the American Football Conference Championship game and advanced to the Super Bowl.[37] Shortly thereafter, the NFL began an investigation into the Patriots' use of underinflated footballs during the first half of the football game.[38] The investigation was conducted by co–lead investigators Jeff Pash and Theodore Wells ("Pash/Wells Investigation").[39] Pash was serving as the NFL Executive Vice President as well as NFL General Counsel.[40] Wells was an attorney at the firm of Paul, Weiss, Rifkind, Wharton, & Garrison ("Paul Weiss Law

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[32] *Id.*
[33] Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).
[34] *See* Areca, Inc. v. Oppenheimer & Co., Inc., 960 F. Supp. 52, 54–55 (S.D.N.Y. 1997).
[35] *See* Shamah v. Schweiger, 21 F. Supp. 2d 208, 214 (E.D.N.Y. 1998).
[36] *See generally*, Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (1974) (examining the mishandling of evidence not through the lens of intent but through the ultimate impact on the arbitration); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F.2d 34, 39–40 (1st Cir. 1985) (examining the weight given to evidence based upon the prejudice shown to the parties, not through motive); Teamsters, Local Union 657 v. Stanley Structures, Inc., 735 F.2d 903, 906 (5th Cir. 1984) (commenting that courts are restricted when looking at arbitration proceedings to examine whether that proceeding was fundamentally unfair); Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1354–1355 (S.D.N.Y. 1987) (determining whether the arbitrator either was guilty of misconduct or had manifest disregard for the law).
[37] Colts vs. Patriots – Game Summary, January 18, 2015, ESPN, http://www.espn.com/nfl/game?gameId=400749520 (last visited Jan. 2, 2019).
[38] *NFL investigation of balls in AFC title game led by Pash, Wells*, NFL (Jan. 23, 2015, 1:56 PM), http://www.nfl.com/news/story/0ap3000000462476/article/nfl-investigation-of-balls-in-afc-title-game-led-by-pash-wells (hereinafter "*NFL investigation of balls*").
[39] *Id.*
[40] *Id.*; Lorenzo Reyes & Rachel Axon, *NFL files an appeal of Deflategate decision that erased Tom Brady suspension*, USA TODAY (Sept. 3, 2015), https://www.usatoday.com/story/sports/nfl/patriots/2015/09/03/deflategate-tom-brady-roger-goodell-judge-richard-overturned-berman-new-england/71504142/.

Firm" or "Paul Weiss").[41] At the conclusion of the investigation, Pash and Wells issued a report ("Wells Report") in which they determined that "more probabl[y] than not," Brady was "generally aware" of activities of two Patriot equipment staff members who "more probab[ly] than not" deliberately released air from the balls prior to the beginning of the AFC Championship Game.[42] Exercising the disciplinary powers of the CBA, the Commissioner handed Tom Brady a four-game suspension without pay.[43] The Commissioner also disciplined the Patriots organization by fining the team $1 million and garnishing two picks in the upcoming NFL draft.[44]

On May 14, 2015, Tom Brady appealed[45] the decision pursuant to the CBA arbitral process.[46] Pursuant to CBA Art. 46 § 2(a), Commissioner Goodell designated himself as arbitrator to hear Brady's appeal.[47] Brady immediately made a motion seeking Goodell's recusal, arguing among other things that the Commissioner "cannot lawfully arbitrate a matter implicating the competence and credibility of NFL staff," and noting that in other high profile arbitrations that Goodell had publicly commented on, Goodell had recused himself (Rice[48] and Bounty–Gate[49]).[50] Brady's motion was denied by Goodell, citing the Commissioner's Article 46 powers to act as arbitrator at his discretion.[51] Brady made a motion to compel "all documents created, obtained, or reviewed by NFL investigators" in connection with the investigation.[52] This motion, too, was denied by Goodell, who cited to Art. 46 and asserted that it provides for "tightly circumscribed discovery and does not contemplate the production of any other documents in an Article 46 proceeding."[53] Brady also made a motion seeking to compel testimony from NFL Executive Vice

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[41] *NFL investigation of balls supra* note 38; Ben Protess, *Report's Author Is Former Football Player Known Best as Trial Lawyer*, NY TIMES (May 6, 2015), https://www.nytimes.com/2015/05/07/sports/football/ted-wells-reports-author-is-former-football-player-known-best-as-trial-lawyer.html.

[42] PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015 (2015), https://www.documentcloud.org/documents/2073728-ted-wells-report-deflategate.html.

[43] *Troy Vincent's Letter to Tom Brady*, ESPN (May 12, 2015), http://www.espn.com/nfl/story/_/id/12873455/troy–vincent–letter–tom–brady.

[44] *NFL releases statement on Patriots' violations*, NFL (May 11, 2015, 8:48 PM), http://www.nfl.com/news/story/0ap3000000492190/article/nfl-releases-statement-on-patriots-violations.

[45] NFL Mgmt. Council v. NFL Players Ass'n (*Brady I*), 125 F.Supp.3d 449 at 457 (S.D.N.Y. 2015).

[46] The arbitral process is only vaguely defined in the NFL's CBA. *See* NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22 at 187. Essentially, the Commissioner issues a punishment, then the player may appeal by writing to the Commissioner. After receiving the writing, the Commissioner has the discretion to designate himself as the arbitrator, or alternatively, appoint a hearing officer.

[47] *Id*. at 204–05.

[48] Ray Rice was suspended for an incident involving domestic violence in 2014. Video of the assault garnered widespread national media attention. *See Ray Rice Suspended 2 Games*, ESPN (July 24, 2014), http://www.espn.com/nfl/story/_/id/11257692/ray-rice-baltimore-ravens-suspended-2-games.

[49] In 2012 the NFL concluded an investigation into the New Orleans Saints, finding the Saints' organization had designed a system of financial incentives for hard hits and inflicting injuries on opposing players. *See Saints Bounty Scandal*, ESPN: NFL TOPICS, http://www.espn.com/nfl/topics/_/page/new-orleans-saints-bounty-scandal (last updated Feb. 26, 2013).

[50] *Brady I*, 125 F.Supp.3d 449, 458 (S.D.N.Y. 2015).

[51] *Id.* at 457–58.

[52] *Id.* at 458.

[53] *Id.* at 459.

President and co–lead investigator Jeff Pash.[54] Goodell also denied this motion, arguing that as the given absence of defined scope in Article 46, it is within the Commissioner's discretion to determine the scope of the presentations.[55] In support of this denial, Goodell stated "Pash, the NFL's General Counsel, does not have any first–hand knowledge of the events at issue here."[56]

On July 28, 2015, following the arbitral hearing, Goodell published a final decision finding Brady "knew about, approved of, [and] consented to" a scheme to deflate footballs prior to the AFC Championship Game.[57] (As the District Court noted, this finding "goes far beyond the 'general awareness' finding in the Wells Report or the disciplinary notice sent to Brady).[58]

Before the beginning of the 2015 NFL season, the Southern District of New York ordered the NFL to vacate Tom Brady's suspension on the grounds of fundamental unfairness.[59] The Court found Goodell's denial of Brady's motions to compel production of documents and compel testimony of Pash violated [the Federal Arbitration Act] on the grounds of fundamental unfairness.[60] In light of its finding on these grounds, the Court did not reach a determination on Brady's claims of evident partiality under § 10(a)(2).[61] The Court noted that its role in review of an arbitral process is limited but acknowledged the FAA allows vacatur of a decision where the arbitrator refused to hear evidence material and pertinent to the controversy, or where there is evident partiality.[62] A Court is not required to confirm an award obtained without fairness and due process.[63] The Court's role is to review the arbitrator's award to ensure he is effectuating the intent of the parties manifested in the collective bargaining agreement without "dispens[ing] his own brand of industrial justice."[64]

The District Court was correct in finding the arbitrator's denial of Pash's testimony and the refusal to compel production of relevant documents constituted a fundamentally unfair hearing process. The Commissioner proctored no convincing reason for these denials, citing only his discretion as arbitrator under Article 46 of the CBA.[65] This exercise of discretion is insufficient in and of itself. Pash was the co–lead investigator and had access to all documents created and obtained during the course of the Pash/Wells Investigation.[66] Additionally, this information was also available to Wells. Significantly, Wells enjoyed the dual role as "independent

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[54] *Id.* at 458.
[55] *Id.* at 459–60.
[56] *Id.* at 460.
[57] *Id.* at 460–61.
[58] *Id.* at 461.
[59] *Id.* at 474.
[60] *Id.* at 462–63.
[61] *Id.* at 473–74.
[62] *Id.* at 462.
[63] *Id.*
[64] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974); Steelworkers v. Enterprise Car, 363 U.S. 593, 596–97 (1960); 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 527 (2d Cir. 2005).
[65] *Brady I*, 125 F.Supp.3d at 459–60.
[66] *Id.* at 470.

investigator" and partner at Paul Weiss law firm, and the firm retained by the NFL for representation during the arbitration process.[67]

Given this dual role, it is inconceivable to presume the attorneys of the Paul Weiss law firm could have simultaneously fulfilled their duty to zealously represent their client in preparing for the hearing while conducting an "independent investigation."[68] In previous arbitral proceedings involving the CBA at issue here, independent arbitrators had compelled testimony of NFL investigators despite the contention from the NFL that testimony would be cumulative or duplicative.[69] Here, without any contention as to the ways in which such testimony would be cumulative or duplicative, the District Court correctly found the Commissioner's denial of Brady's motion to compel testimony presented fundamental unfairness.[70]

The District Court also correctly found this denial was prejudicial to Brady and foreclosed the possibility of exploring the purported "independence" of the investigation.[71] As to the investigative files themselves, Goodell's denial of Brady's motion to compel production also rests on discretion alone, without any convincing substantive reason.[72] For example, Goodell asserted that "the Paul Weiss interview notes played no role in the disciplinary decisions; the Wells report was the basis for those decisions."[73]

This statement is only barely true. While the decision was ultimately constructed from the Wells Report, the Wells Report was obviously constructed from the underlying investigative documents.[74] These investigative documents were available to the NFL throughout the arbitration, given that the Paul Weiss law firm acted as counsel retained by the NFL for both the investigation and representation purposes throughout the arbitral process.[75]

Additionally, the Commissioner attempts to argue it both ways, asserting that Article 46 sufficiently defines the discovery process, but also that its absence of clarity allows the Commissioner to exercise his discretion to make up the discovery rules out of thin air.[76] The District Court correctly recognized that absent provisions precluding the production of these documents, the arbitrator has the affirmative duty to ensure relevant documents are made available to the other party.[77] Failure to do so

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[67] *Id.* at 472–73.
[68] *Id.*
[69] *Id.* at 471–72.
[70] *Id.*
[71] *Id.* at 472.
[72] *See id.*
[73] *Id.*
[74] *Id.* at 473.
[75] *Id.* at 472.
[76] *Compare Brady I,* 125 F.Supp.3d at 459 (Goodell cites Art. 46 in asserting "the collective bargaining agreement provides for tightly circumscribed discovery" to support denial of motion to compel production of documents), *with Brady I,* 125 F.Supp.3d at 459–60 (admitting that Article 46 does not provide guidance for basic discovery such as witness testimony thus the arbitrator retains discretion to admit or deny motions *sua sponte*).
[77] *Id.* at 473.

is a violation of fundamental fairness and thus grounds for vacating the award under §10(a)(3).[78]

Following this decision by the District Court, the League appealed, seeking vacatur of the District Court decision and reinstatement of Brady's suspension.[79] The Circuit Court granted this appeal over a dissent, reversing and remanding the case to the District Court with instructions to confirm the arbitrator's award.[80] This Note argues the Circuit Court's decision in "Brady II" is wrong and has set defective precedent in favor of the NFL in similar situations, empowering the League to exercise extraordinary unchecked power over its players in disciplinary proceedings. This Note further contends that the essence of the reasoning on which the Circuit Court relies for its decision is contrary to the requirement of the FAA to mandate fundamental fairness as an unwaivable and unmodifiable element of all arbitration agreements, regardless of the discretion granted to the arbitrator. Furthermore, the Circuit Court failed to adequately consider the implications of the conflict of interest presented by allowing one party to the dispute to act as the proverbial "judge, jury, and executioner" without regard to overarching fundamental fairness mandated by the FAA.

The Circuit Court rightly acknowledges that arbitrators appointed by a collective bargaining agreement must be allowed to effectuate the intent of the parties to resolve disputes outside the judicial system.[81] The Circuit Court astutely points out that collective bargaining agreements are the product of negotiations which reflect the priorities of the parties, and arbitrators are chosen because of their trusted judgment to "interpret and apply the agreement in accordance with . . . the various needs and desires of the parties."[82] As discussed previously in this Note, player discipline was not a priority of either the NFL or the NFLPA at the time of the 2011 negotiations.[83] Prior to 2011, League discipline of players was rare, often inconsequential, and performed outside of the public eye.[84] The Circuit Court treats Article 46 of the CBA as if it were meticulously negotiated by the parties, resulting in a determination that the NFL should be permitted to act with plenary dictatorial power to bring accusations of misconduct, use League resources to conduct opaque investigations, and issue decrees of guilt or innocence without providing the accused with access to documents from the investigation, all in the name of providing the League with "discretion."[85] This decision is bewildering in its result, but more troublingly, it is unsupported by sound logic and has resulted in perpetual harm.

The Circuit Court held that the Commissioner's decision to exclude the testimony of Pash did not raise questions of fundamental fairness, and denial of the production of documents is not a grounds for vacatur of the award because the CBA

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[78] *Id.* at 472–73.
[79] NFL Mgmt. Council v. NFL Players Ass'n (*Brady II*), 820 F.3d 527, 531–32 (2nd Cir. 2016).
[80] *Id.* at 548–49.
[81] *Id.* at 536.
[82] *Id.*
[83] *See supra* footnotes 1–29 and accompanying text.
[84] *See supra* footnotes 23–29 and accompanying text.
[85] *Brady II*, 820 F.3d 527 at 539.

did not require the exchange of such notes.[86] In these holdings, the Circuit Court ignores the obvious conflicts of interest presented by the Commissioner's refusal to recuse himself and the retainer of the Paul Weiss law firm as both investigator and representative counsel.

The Circuit Court reasons that arbitrators do not need to comply with strict evidentiary rules and retain discretion to admit or exclude evidence.[87] This is certainly true, but the testimony of a lead investigator is undeniably pertinent and material to the controversy, and thus exclusion is grounds for vacation of an award.[88] While the arbitrator does not have to follow the Federal Rules of Evidence, common sense notions of fundamental fairness suggest the need to include testimony from a lead investigator. Instead, the Circuit Court suggests that pursuant to the parties' bargain, the CBA would theoretically allow the Commissioner to impose punishment, then uphold his own decision on appeal without any investigation or hearing any evidence because this is what the parties must have intended by giving the Commissioner broad authority to regulate procedural matters.[89] The arbitrator's discretion is bound by the intent of the parties in the collective bargaining agreement, and it cannot be argued in good faith that the NFLPA would have intentionally awarded the Commissioner with this sort of dictatorial disciplinary power.

As to the Commissioner's denial of Brady's motion to compel production of investigative documents, the Circuit Court reasons that because the CBA does not provide procedural rules for discovery, the discretion of the Commissioner is absolutely controlling.[90] This is incorrect. In the absence of procedures, the Commissioner is bound by fundamental fairness in exercising discretion and must effectuate the intent of the parties.[91] The Circuit Court reasons that the parties intentionally excluded discovery procedures because elsewhere in the CBA, a proceeding allows for "reasonable and expedited discovery . . . ."[92] This argument is flawed. The difference in language between Art. 15 § 3 –

> . . . Arbitrator shall grant **reasonable and expedited discovery** upon the application of any party where, and to the extent, he determines it is reasonable to do so. Such discovery may include the production of documents and the taking of depositions.

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[86] *Id*. at 545–46.
[87] *See id.* at 546–47.
[88] *See* 9 U.S.C. § 10(a)(3) (2012).
[89] *Brady II*, 820 F.3d at 546, 548.
[90] *Id*. at 546–47.
[91] Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974); 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 527 (2d Cir. 2005); *see also* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).
[92] *Brady II*, 820 F.3d at 546.

(emphasis added), and Art. 46 ("the parties shall exchange copies of any exhibits upon which they intend to rely") is merely semantics.[93] Both provisions contemplate that opposing parties should be allowed to request documents from their adversary. Both provisions also allow collection and presentation of material and pertinent documents from third parties. For the Commissioner to deny Brady's request presents fundamental unfairness, but the Circuit Court props up this ridiculous assertion by concluding that the Commissioner was simply applying the CBA as written.[94] (How can a provision purported to be intentionally excluded also be interpreted as written? The author remains puzzled.)

V. Ezekiel Elliott

In July 2016, Dallas Cowboys running back Ezekiel Elliot was investigated by Ohio law enforcement concerning allegations of domestic violence.[95] More than a year later, in August of 2017, the Columbus City Attorney's Office issued a statement that it would not press charges against Elliott because of "conflicting and inconsistent information."[96] However, the NFL initiated its own investigation, tapping Kia Roberts and Lisa Friel to lead the investigation and prepare a report ("Elliott Report").[97] After reviewing the Elliott Report, the Commissioner imposed on Elliott a six–game suspension pursuant to the League's Personal Conduct Policy.[98] Elliott and the NFLPA appealed.[99] During the appeal, the NFLPA compelled testimony from Roberts.[100] This testimony highlighted Roberts' conclusions that Elliott's accuser was not credible and had provided inconsistent statements, yet Roberts had been excluded from a meeting with Goodell, Friel, and outside advisors when the decision to suspend Elliott was finalized.[101] The NFLPA sought to compel testimony to determine whether key evidence and critical facts had been concealed from decision–makers, but the arbitrator denied this request.[102]

On September 1, 2017 (the day following the arbitrator's announcement that a decision was forthcoming), the NFLPA and Elliott sued the NFL seeking vacatur of the impending decision and a temporary restraining order (or preliminary injunction).[103] The action was commenced in the Eastern District of Texas.[104] On September 5, 2017, the arbitrator issued his decision confirming the Commissioner's six–game suspension, and the NFL filed suit in the Southern District of New York

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[93] NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 22 at 113, 205.
[94] *Brady II*, 820 F.3d at 546–47.
[95] NFL Players Ass'n v. NFL (*Zeke I*), 270 F. Supp. 3d 939, 944 (E.D. Tex. Sep. 8, 2017).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 945.
[101] *Id.*
[102] *Id.*
[103] *Id*.
[104] *Id.* at 939.

seeking confirmation of the award.[105] The motivation behind these dueling lawsuits is *Brady II*, as the NFL sought to take advantage of a particular favorable decision, and the NFLPA sought to avoid it. With the advantage of knowing exactly when the decision would be issued, the NFL would always be able to obtain their preferred venue.

In ruling on the NFLPA's motion for a temporary restraining order (and preliminary injunction) which would stay the suspension, the Texas District Court noted the "unique and egregious facts, necessitating court intervention."[106] The District Court based its concern on the FAA, citing to fundamental unfairness as a reason for intervening into otherwise bargained–for arbitration.[107] In an opinion eerily similar to that of the court in *Brady I*, the District Court raised concerns that the arbitration process had denied the admission of key witness testimony and documents, and such denial amounted to serious misconduct by the arbitrator.[108] Namely, the District Court expressed concern that certain conclusions of Roberts were excluded from the Elliott Report (namely that Elliott's accuser's allegations were not credible), despite Roberts sharing these conclusions with Friel.[109] In fact, Friel colluded with counsel for the NFL and jointly made the decision to exclude Roberts' conclusions from the report and from further discussions with the Commissioner regarding discipline.[110] Moreover, these conclusions were suppressed until the arbitration hearing itself, and the District Court found that if the NFL had succeeded in its overall goal, Roberts' conclusions would still be concealed from Elliott and the NFLPA.[111]

Given this suppression, the District Court concluded the arbitrator's denial to compel testimony from Goodell regarding his knowledge of Roberts' conclusions presented gross error and resulted in a fundamentally unfair hearing.[112] The District Court noted the decisions of *Brady I* and *Brady II*, stating, "the circumstances of this case are unmatched by any case this Court has seen."[113] Seemingly, the Court noted the NFL's willingness to stretch the boundaries of fundamental fairness in its arbitration process even further than the Second Circuit was willing to overlook.[114] The Court noted that fundamental unfairness infected Elliott's appeal from the beginning, and "[a]t every turn, Elliott and the NFLPA were denied the evidence or witnesses needed to meet their burden."[115] On September 8, 2017, the District Court granted the motion for temporary restraining order and preliminary injunction

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[105] *Zeke I*, 270 F. Supp. 3d at 945; NFL Mgmt. Council v. NFL Players Ass'n (*Zeke IV*), No. 17-cv-06761-KPF, 2017 U.S. Dist. LEXIS 171995 at *2 (S.D.N.Y Oct. 17, 2017).
[106] *Zeke I*, 270 F. Supp. 3d at 951.
[107] *Id*.
[108] *Id*.
[109] *Id.* at 951–54.
[110] *Id.* at 951–53.
[111] *Id.* at 952–53.
[112] *Id*. at 953.
[113] *Id*. at 953.
[114] *See id.* at 953–54.
[115] *Id.* at 954.

enjoining the arbitrator's decision, thus effectively lifting the suspension pending a final ruling on the merits.[116]

The NFL appealed to the Fifth Circuit, arguing that because the NFLPA's petition was filed before a final arbitration decision had been issued, the District Court lacked subject matter jurisdiction and the lawsuit was premature.[117] Over a dissent, the Circuit Court agreed with the NFL, vacating and remanding with instructions to dismiss the case for lack of subject matter jurisdiction.[118] The dissent acknowledged that the integrity of the arbitration process had been impugned by the NFL's suppression of information during the arbitration process.[119] However, with this dismissal, litigation could only continue in the Southern District of New York, bound by the misguided precedent of *Brady II*.

The Southern District of New York first issued an opinion on October 17, 2017, maintaining the status quo and preserving the temporary restraining order to stay Elliott's suspension.[120] The short opinion issued by Judge Crotty (a "Part I" substitute judge) granted the TRO and deferred consideration of the preliminary injunction to Judge Failla (who was on vacation at the time). In this short opinion, Judge Crotty noted Elliott and the NFLPA were "deprived of opportunities to explore pertinent and material evidence," and refused to accept the NFL's argument that because of *Brady II*, the NFLPA is foreclosed from making a fundamental fairness argument to attack the arbitrator's award.[121]

Judge Failla held a hearing and issued an opinion on October 30, 2017.[122] The decision found the arbitration proceedings in accordance with the CBA and fundamental fairness, and denied the NFLPA's motion for a preliminary injunction.[123] The opinion relied heavily on the *Brady II* decision, similarly finding that despite withholding key evidence and witnesses, the arbitration process was fundamentally fair.[124] Specifically, the Court declined to find that the suppression of Roberts' exculpatory conclusions amounted to clear error resulting in fundamental unfairness.[125] Furthermore, the Court affirmed the fairness of the arbitrator's decision not to compel testimony of Goodell as to whether he had been made aware of Roberts' conclusions.[126] In reliance on these decisions, the Court explicitly points to the *Brady II* precedent, finding that in *Brady II,* the NFLPA's request for interview notes was comparable to this case.[127] On emergency appeal to the Second Circuit, the NFLPA's petition was summarily denied, the case was effectively dead, and

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[116] *Id*. at 955.
[117] NFL Players Ass'n v. NFL (*Zeke III*), 874 F.3d 222, 231 (5th Cir. 2017).
[118] *Id*. at 229.
[119] *Id*. at 234.
[120] *Zeke IV*, 2017 U.S. Dist. LEXIS 171995, at *6.
[121] *Id*. at *5–6.
[122] NFL Mgmt. Council v. NFL Players Ass'n (*Zeke V*), 2017 U.S. Dist. LEXIS 179714, at *1 (S.D.N.Y. Oct. 30, 2017).
[123] *Id*. at *3.
[124] *Id*. at *22–25.
[125] *Id*.
[126] *Id*. at *24.
[127] *Id*. at *20.

Ezekiel Elliott was effectively suspended based on sketchy evidence and suppressed testimony.[128]

VI. NFL Commissioner as Judge, Jury, and Executioner

As highlighted in the cases of Tom Brady and Ezekiel Elliott, the Second Circuit has produced a precedent that incorrectly and inequitably interprets the "fundamental fairness" requirement of the FAA and its application to NFL Collective Bargaining Agreement. The decision in *Brady II* is rooted in the idea that the NFLPA and the NFL negotiated disciplinary appeal procedures at arm's length and could fully appreciate the impact the negotiations would have on the League and its players over the next decade. This was simply false, as the empirical data shows, and without a crystal ball, disciplinary action appellate procedure was simply not a priority for the NFLPA or the NFL. In the absence of intent to contract for a grant of unilateral power to the NFL Commissioner to act as prosecutor, judge, jury, and executioner, Courts should lean more heavily on ideas of fundamental fairness. Courts should be exceptionally skeptical in light of the arbitration procedures (or lack thereof) that effectively grant the NFL, a party in the supposed neutral arbitration, the power to control the information provided to the player–appellees and ultimately, the evidence available to be presented during the arbitration hearing.

One court has made this logical leap, holding a standard provision in NFL contracts designating the Commissioner (or his assignee) as arbitrator is unconscionable and thus, unenforceable.[129] In a case in front of the Missouri Supreme Court, a former employee of the St. Louis Rams successfully established that allowing the Commissioner of the NFL to arbitrate disputes of NFL policy constituted an unconscionable contract term.[130] The Court agreed that because the Commissioner is an employee of the League, acting as sole arbitrator is unconscionable where the Commissioner is given "unfettered discretion to establish the rules for arbitration," rendering the provision unenforceable.[131] While the author acknowledges there is a difference in a dispute between team management and employees, and a dispute between players and the league, the principles and underlying conflicts are not dissimilar. This part of the decision from the Missouri Supreme Court is not difficult to accept or justify: parties to the dispute cannot also act as impartial arbitrators! When the arbitrator is not impartial, the integrity and neutrality of the proceedings have been impugned, and a presumption of "fundamental unfairness" is created. This comports with common sense. Viewed without cynicism, in the event of disciplinary appeals, Article 46 of the CBA requires an interested party to promulgate procedural rules without contractual framework and unrestrained from precedent. Additionally, Article 46 requires the Commissioner

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[128] Around the NFL Staff, *Ezekiel Elliott Suspension Back; Court Denies Injunction*, NFL (Nov. 9, 2017, 3:41 PM), http://www.nfl.com/news/story/0ap3000000874433/article/ezekiel-elliott-suspension-back-court-denies-injunction.
[129] State *ex rel*. Hewitt v. Kerr, 461 S.W.3d 798, 803 (Mo. 2015).
[130] *Id*. at 803.
[131] *Id*.

to put aside his interests and make a decision as the sole arbitrator, presiding over the issue of whether to overturn his own previous decision. The full extent of issues was not addressed by the Court in *Brady I*, as the case was decided on other grounds. But the Second Circuit's decision to overturn the District Court and uphold the arbitration award without addressing the root of the fundamental unfairness poisoned the well for future NFL players–turned–litigants who have received kangaroo–court justice through the NFL's arbitration procedures.

VII. What's Next?

The NFL's collective bargaining agreement has been widely decried in national sports media. The NFLPA has called the process "a sham and a lie" and called for the NFL Management Council to step in and reevaluate the process moving forward.[132] However, the bottom line is that both the NFL and the NFLPA are stuck in this agreement until 2020 barring extraordinary circumstances. Given this unfortunate reality, it is worth examining other successful collective bargaining agreements and proposing a suggested structure for the next negotiated agreement between the NFL and NFLPA. In closing, this Note seeks to propose revising Article 46 of the NFL CBA in the following ways.

As part of the terms for the 2020 Collective Bargaining Agreement, the NFL and the NFLPA should stipulate to the appointment of a single arbitrator for all off–field player conduct disciplinary appeals to serve a term equal to the duration of the Collective Bargaining Agreement. The Commissioner of the league currently has the power to impose discipline for off–field conduct detrimental to the League, and that power should remain vested with the Commissioner. All appeals of his disciplinary decisions should be heard by a single arbitrator in the interests of uniform decision–making and consistency of dispute resolution. Without cause, the parties should have the option to remove the arbitrator by simple notice and replace the arbitrator from a list of eleven (11) candidates stipulated by the parties at the consummation of the collective bargaining agreement. Should the parties not agree as to the selection of the replacement arbitrator, the parties should be allowed to strike eight (8) names from the stipulated list and allow a pre–determined designated representative select from the remaining three (3) names. While the parties would retain the option to remove the arbitrator at–will, the power to remove should be limited only to future appeals. The parties would not have the power to remove the arbitrator from any appeals processes that had already been initiated by filing notice of such appeal.

Finally, instead of adopting their own half–measure procedures for arbitration, the parties should stipulate that proceedings must follow an established framework for arbitration. The parties should adopt the procedures from the American Arbitration Association. Established procedures will further enhance the credibility of the proceedings in the eyes of the fans, players, and the League stakeholders. Furthermore, adoption of established procedures decreases the risk of misconduct or injustice in the arbitration proceedings.

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[132] *NFLPA Statement on NFL Disciplinary Process*, NFLPA https://www.nflpa.com/news/ezekiel-elliott-disciplinary-process, (last visited Jan 2, 2019).

VIII. Conclusion

The purpose of collective bargaining agreements is to ensure a balance of power between labor organizations and employers. In the context of professional sports, collective bargaining agreements ensure the players are adequately represented and are given the opportunity to preserve a balance of power with their governing organizations.

The CBA between the National Football League and the NFLPA is flawed because it doesn't accurately capture either of the parties' intent to create disciplinary procedures. This flaw results from a lack of information or motivation to negotiate such terms, given the relatively few player suspensions imposed prior to 2011. However, the Second Circuit's decision in *Brady II* has given the Commissioner of the NFL broad dictatorial powers to perform a range of investigative and adjudicative roles within the player disciplinary process. This decision was incorrect and misinterprets the role of the "fundamental fairness" requirement of the FAA. This decision created broad and binding precedent and is used as a weapon by the NFL to avoid consequences for unfair adjudicatory processes. If allowed to proceed in another Circuit court, players may be able to impose a check on this power. However, given the mismatch of information availability, the NFL will always have the first–mover advantage in choice of venue. Finding no fundamental unfairness in a process which conceals material and pertinent information from the accused and allows the arbitrator to effectively act as judge, jury, and executioner requires a suspension of common sense. The Second Circuit should revisit the decision in *Brady II* and either qualify or overturn this decision in the interests of fundamental fairness.

In the process of negotiating the 2020 Collective Bargaining Agreement, the NFL and NFLPA should revisit Article 46 and implement several changes to increase the validity and credibility of appeals proceedings. The parties should stipulate to an unconflicted arbitrator who serves a defined term and may be removed at–will at the request of either party. Furthermore, the parties should adopt recognized framework for all arbitration proceedings. The aforementioned steps would serve to increase the credibility of the appeals process in the eyes of the fans, players, and League stakeholders and lead to fewer disputes requiring resolution in the courts.