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Protecting the Individual Rights of NFL Players as Private Sector Employees

Frederick Vranizan

“It is a privilege to be a part of the National Football League” –
NFL Personal Conduct Policy¹

AUTHOR’S NOTES

Some of the subject matter of this article, and its underlying impetus, has been the subject of much debate for the last several years. Spurred by partisan politics and misinformation, the National Anthem debate that started when Colin Kaepernick knelt for the national anthem has become overwhelmingly divisive. Since then, the conversation has devolved into two camps, one side screaming that to protest a symbol of our country is to disrespect every veteran and active service member that has worked to keep it safe, and the other insisting that free speech should protect a player’s right to protest deadly and discriminatory police treatment of people of color in the US.² The disconnect between these two arguments, and the polarizing figures which have galvanized them, has done little more than add to the chasm that exists in our already divided political world. Unfortunately, rather than address the issues presented, sports fans and politicians have cemented themselves firmly on one side or the other of an unwinnable dispute.

* Note that at the time of this writing, the league was still under the 2011 CBA. However, the new CBA, which will take effect for the 2020 season, still does not address any of the issues covered here.

¹ NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY, LEAGUE POLICIES FOR PLAYERS, 1 (2016), <https://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf> [<https://perma.cc/7VBU-ABR8>].

² Jane Coaston, *2 Years of NFL Protests, Explained*, VOX (Sep. 4, 2018, 12:10 PM), <https://www.vox.com/2018/8/15/17619122/kaepernick-trump-nfl-protests-2018> [<https://perma.cc/V9FK-S3AJ>].

While it may be tempting to wade into the weeds of the “national anthem debate,” picking a side would serve no purpose other than to pay lip service to one argument or the other. Additionally, to do so would mean continuing to overlook some of the fundamental issues that NFL players deal with as private sector employees and members of their union, the NFL Players Association (NFLPA). As has been exemplified by the recent failed National Anthem Rule and litigation involving some of the biggest names in football, this article will highlight how NFL players are subject to vague and biased rule-making and enforcement concerning conduct outside the field of play. This article will then propose changes to both the NFL Collective Bargaining Agreement and the structure of the rulemaking and enforcement processes to protect individuals from the unfair practices that currently exist in the NFL.

Because the structures of the NFL and the current rule-making and enforcement schemes are necessarily rule-intensive, this article attempts to provide a comprehensive description of how they work and the ways in which they are dysfunctional. As will be shown, the current rule-making scheme is rife with both conflicts of interest and incentives to maintain rules, on and off the field, that are intentionally vague and allow for an unfairly biased discipline to be levied against players. This process allows for implementation of rules that are inherently unfair to players, which may or may not violate their rights under the Collective Bargaining Agreement, and subjects the League and its players to unnecessary grievances and litigation. Similarly, this article will show that the disciplinary process which currently exists as part of the Collective Bargaining Agreement is also inherently biased and frequently fails to meet the requirements of the Collective Bargaining Agreement or legal standards. As such, this article will advocate for a comprehensive change to both the rulemaking and disciplinary systems, with a mind to protect players’ rights and the integrity of the NFL as a whole.

I. INTRODUCTION TO NFL RULEMAKING AND ENFORCEMENT

A. *The Current Rulemaking Scheme*

Currently, all rule changes concerning conduct on and off the field must be approved by a three-fourths consensus vote of the executive committee of the NFL.³ The executive committee consists of one representative from each team, usually the owner or an executive.⁴ The powers of the executive committee are derived from Article VI of the Constitution and Bylaws of the NFL.⁵ Article XI of the Constitution and Bylaws requires that any proposed changes to the rules must be submitted, in writing, to the League at least fifteen days prior to “the Annual Meeting or a recessed session thereof.”⁶ An exception to this deadline applies when a recommendation is made by unanimous approval of any League-appointed committee with authority to propose rules to the executive committee.⁷ Under these circumstances, recommendations require only twelve hours of notice before a vote.⁸

Committees are created, and their members are appointed, by the Commissioner under Article VI of the Bylaws and Constitution as the League deems necessary.⁹ Similarly, committees “act under the direction and chairmanship of the Commissioner, who shall be a member ‘ex-officio’ of each committee.”¹⁰ The two most prescient committees in existence are the Competition Committee and the Conduct Committee, which are the focus of

³ NATIONAL FOOTBALL LEAGUE, *Governance*, League Governance (last visited Nov. 20, 2018), <https://operations.nfl.com/football-ops/league-governance/> [<https://perma.cc/2U6Q-D88L>].

⁴ *Id.*

⁵ NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, 23 (rev. 2006), https://onlabor.org/wp-content/uploads/2017/04/co_.pdf [<https://perma.cc/TY5C-DTH7>].

⁶ *Id.* at 48.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

the changes suggested in this article. According to the NFL, “[t]he Competition Committee reviews all competitive aspects of the game, including (but not limited to) playing rules, roster regulations, technology, game-day operations and player protection.”¹¹ In lay-terms, this means that the Competition Committee deals with the rules of the game, regulations regarding the number and type of players a team can employ, rules about what kind of technology teams can use during games, player safety rules, and all other rules regarding player and personnel actions on gameday. Currently the Competition Committee is made up of eight members, two team-owners, two team presidents, two general managers, and two head coaches.¹²

The Conduct Committee, on the other hand, deals exclusively with conduct that is “detrimental to the integrity of and public confidence in the NFL.”¹³ The NFL’s Personal Conduct Policy was most recently updated in 2016, and states that,

To ensure that this policy remains current and consistent with best practices and evolving legal and social standards, the Commissioner has named a Conduct Committee. This committee will be made up of NFL owners, who will review this policy at least annually and recommend any appropriate changes in the policy, including investigatory practices, disciplinary levels or procedures, or service components. The committee will receive regular reports from the disciplinary officer, and may seek advice from current and former players, as well as a broad and diverse group of outside experts regarding best practices in academic, business, and public sector settings, and will review developments in similar workplace policies in other settings.¹⁴

¹¹ *The NFL Competition Committee*, League Governance, NATIONAL FOOTBALL LEAGUE (last visited Nov. 21, 2018), <https://operations.nfl.com/football-ops/league-governance/the-nfl-competition-committee/> [<https://perma.cc/4FT4-YLGD>].

¹² *Id.*

¹³ NATIONAL FOOTBALL LEAGUE, *supra* note 1.

¹⁴ *Id.*

Currently, there are eight members of the Conduct Committee: four team owners; two team executives, both of whom happen to be the children of owners; and two retired players, both of whom have a minority interest in an NFL team.¹⁵

B. The Current Enforcement Scheme

At this time, the NFL enforces rules through a two-part system similar to the committee scheme of rule creation, but with a distinct difference. For in-game rules not pertaining to detrimental conduct, the Football Operations compliance team, appointed by the Commissioner, reviews potential infractions.¹⁶ The compliance team looks for infractions that were collectively bargained for by the NFL and NFLPA, and which are contained in the schedule of fines that the NFL updates and publishes every season.¹⁷ Should the compliance team determine that a player has violated one of the specified rules, that player is informed of their breach and given a video and explanation of why they are being fined.¹⁸ Then, players are presented with an opportunity to protest the decision.¹⁹ Should a player choose to appeal the fine, their case is randomly assigned to one of the League's appeals officers, who reviews the play, listens to both the League's and the player's arguments, and makes a final, binding decision.²⁰ Both of the appeals officers currently hearing fine protests are former NFL players, appointed and paid by the NFL and the NFLPA jointly.²¹

¹⁵ *Minding the League's Business: NFL Committee Assignments*, SPORTS BUSINESS JOURNAL (Sep. 5. 2016),

<https://www.sportsbusinessdaily.com/Journal/Issues/2016/09/05/In-Depth/Committees.aspx> [<https://perma.cc/Y7F6-JTWR>].

¹⁶ *Fines and Appeals*, Enforcement, NATIONAL FOOTBALL LEAGUE (last visited Nov. 21, 2018), <https://operations.nfl.com/football-ops/nfl-rules-enforcement/fines-appeals/> [<https://perma.cc/2XU5-EH8S>].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

For both on- and off-the-field player conduct that is not covered specifically by the NFL play rules, a determination of whether conduct is “detrimental to the integrity of and public confidence in the NFL” is made according to the NFL Personal Conduct Policy.²² When the League office becomes aware of a potential violation of the Personal Conduct Policy, an investigation into the violation is conducted, either by NFL Security, a third party, or both.²³ Additionally, when criminal actions are implicated, the League attempts to cooperate with law enforcement during the League investigation.²⁴ Upon completion of the initial investigation, a disciplinary officer, appointed by the Commissioner, will complete a report detailing the findings and, at the Commissioner’s request, will include a recommendation for appropriate discipline.²⁵ Players who may be subject to discipline under the Personal Conduct Policy are given an opportunity to submit a written rebuttal to the report prepared by the disciplinary officer and are given access to any information collected in the course of the investigation.²⁶ In cases where there has been a legal finding of facts, or a judgment on the merits, the court’s findings and judgment are binding on the investigation.²⁷ The Commissioner himself then reviews every report, and any included recommendation, and determines the appropriate discipline for any violation of the Personal Conduct Policy.²⁸

Following a determination that disciplinary action must be taken, the player in question is notified and given an opportunity to appeal the disciplinary measures.²⁹ Appeals are heard according to Article 46 of the NFL Collective Bargaining Agreement, which grants the Commissioner

²² NATIONAL FOOTBALL LEAGUE, *supra* note 1.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.* at 6.

²⁷ *Id.*

²⁸ *Id.* at 5.

²⁹ *Id.*

authority to hear appeals regarding “any action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football.”³⁰ Alternatively, the Commissioner may appoint any arbitrator to hear the appeal, with no requirement that he consult with the executive committee or the NFLPA.³¹ Hearings are completed following a discovery process in which both the League and the player, or their representative, exchange any materials on which they intend to rely.³² A decision is then rendered as to whether the disciplinary action is to be affirmed, reduced, or vacated altogether.³³ All decisions of this process are delivered in writing to the interested parties, and are binding upon the parties as the final disposition of the dispute in the eyes of the NFL and the Collective Bargaining Agreement.³⁴

C. Governing Laws of the National Football League

1. The Collective Bargaining Agreement

Article 2 of the Collective Bargaining Agreement (CBA) between the NFL and the NFL Players Association (NFLPA), the union certified to bargain on behalf of the players of the NFL, contains a Governing Agreement.³⁵ This section of the agreement provides that the CBA will:

[S]upersede any conflicting provisions in the Settlement Agreement, NFL Player Contract, the NFL Constitution and Bylaws, the NFL Rules, or any other document affecting terms and conditions of employment of NFL players, and all players, Clubs,

³⁰ NATIONAL FOOTBALL LEAGUE AND NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, Art 46, §1(a) (Aug. 4, 2011).

³¹ *Id.* at art. 46, § 2(a).

³² *Id.* at art. 46, § 2(f)(ii).

³³ *Id.* at art. 46, § 2(d).

³⁴ *Id.* at art. 46, § 2(d).

³⁵ *Id.* at art. 2.

the NFLPA, the NFL, and the Management Council will be bound hereby.³⁶

By including this provision, the NFL and the NFLPA agreed that the CBA should be the governing document representing the relationship between the League and the players, and it should supersede any conflicting rules or statements in any of the NFL's other governing documents. Article 2 defines the scope of the CBA as well, cementing that the CBA represents the "complete understanding of the parties on all subjects covered [t]herein, and there will be no change in the terms and conditions of [the] Agreement without mutual consent."³⁷ This section of the Governing Agreement goes on to stipulate that "the parties waive all rights to bargain with one another concerning any subject covered or not covered" by the CBA. Additionally, the Constitution and Bylaws of the NFL, Section 4(a) insists that if any proposed change to the Constitution or Bylaws "could significantly affect the terms and conditions of employment of NFL players," the NFL must give notice to the NFLPA and "negotiate the change in good faith."³⁸ Section 4(b) further explains the process for solving disputes over whether a proposed change would have a "significant" effect or whether the parties engaged in good faith negotiations.³⁹

Non-injury grievances not covered under other sections of the CBA, and not resolved by an answer from the non-filing party, are to be heard by an arbitrator under Article 43 of the CBA.⁴⁰ Article 43 prescribes that an arbitration panel, comprised of four arbitrators whose appointments must be accepted by both the NFL and the NFLPA, will serve to hear, individually, appeals to grievances.⁴¹ Decisions by a member of the arbitration panel are

³⁶ *Id.* at art. 2, § 1.

³⁷ *Id.* at art. 2, § 4(a).

³⁸ *Id.*

³⁹ *Id.* at art 2, § 4(b).

⁴⁰ *Id.*

⁴¹ *Id.* at art 43, § 6.

binding under the CBA, but the authority of each arbitrator is limited.⁴² Arbitrators do not have the ability to alter the provisions of the CBA in any way.⁴³ They can only grant remedies in the form of

a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of this Agreement or any other applicable document, or an advisory opinion pursuant to Article 50, Section 1(c).⁴⁴

While limited in scope, this provision could potentially allow a member of the arbitration panel to, in the event of a finding that the proposed rule change would have a “significant” effect on the terms and conditions of a player’s employment, insist that the NFL bargain in good faith with the NFLPA.

Where Article 43 concerns non-injury grievances, Article 46 covers Commissioner discipline and the process of appealing disciplinary decisions.⁴⁵ As previously explained, the Commissioner ultimately has complete discretion regarding discipline for “conduct detrimental to the integrity of, or public confidence in, the game of professional football,” on and off of the field.⁴⁶ Further, while Article 46 directs the Commissioner to consult with the Executive Director of the NFLPA when appointing a hearing officer for appeals under Section 1(a), “the Commissioner may serve as the hearing officer in any appeal under Section 1(a) of [Article 46] at his discretion.”⁴⁷ Allowing the Commissioner to determine both the punishment

⁴² *Id.* at art 43, § 8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See generally id.* at art. 46.

⁴⁶ *Id.* at art. 46, § 1(a).

⁴⁷ *Id.* at art. 46, § 2(a).

and its fairness has led extensive litigation, illustrating the importance of implementing the changes this article suggests.⁴⁸

2. The Constitution and Bylaws of the NFL

While ultimate authority over the NFL and its players is vested in the CBA, the Constitution and Bylaws, to which the NFL member teams are also bound, are relevant authorities to the extent that they do not conflict with the CBA.⁴⁹ To that end, the Constitution and Bylaws contain in them a covenant requiring all membership clubs to “include in every contract between any member club and its employees, including coaches and players, a clause wherein the parties to such contract agree to be bound by the Constitution and Bylaws of the League.”⁵⁰

As noted earlier, the Constitution and the and Bylaws vest the Commissioner with the power to appoint committees when the League deems it necessary and appropriate.⁵¹ Additionally, the Commissioner has the power to direct and serve as the chairman of those committees he appoints at his discretion, and he serves as an “ex-officio” member of each committee.⁵² While the Commissioner may, or may not, participate as an active member of each committee, it is important to note that all committee members are appointed by, and serve at the direction of, the Commissioner.

Additionally, the Constitution and Bylaws further cement the authority of the Commissioner as judge, jury, and executioner. Of the many powers granted to the Commissioner by the Constitution and Bylaws, one is the authority to arbitrate any dispute that involves “a member or members in the

⁴⁸ See generally Eric L. Einhorn, *Between the Hash Marks: The Absolute Power the NFL's Collective Bargaining Agreement Grants Its Commissioner*, 89 BROOK. L. REV. 393 (2016).

⁴⁹ See NATIONAL FOOTBALL LEAGUE AND NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, at art. 2, § 1.

⁵⁰ NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. III, §3.11(D) (rev. 2006).

⁵¹ *Id.* at art. VI, § 6.7.

⁵² *Id.*

League or any players or employees of the members of the League or any combination thereof that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football,” similar to Article 46 of the CBA.⁵³ The Constitution and Bylaws again grant disciplinary power to the Commissioner, stating that

[w]henver the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director, or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League or has been or is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to: (1) Suspend and/or fine such person... and/or (2) Cancel any contract or agreement of such person with the League or with any member thereof.⁵⁴

While this provision appears to grant similar powers to those under Article 46 of the CBA, it also seems to require a hearing prior to any fine or suspension. To date, it does not appear that a challenge has been made to the Commissioner’s authority with regard to this section of the Constitution and Bylaws, however, such a requirement seems to conflict with the CBA given the supremacy clause referenced above.

3. The Personal Conduct Policy: League Policies for Players

In 2016, the NFL published an updated Personal Conduct Policy (PCP), which stated that “[i]t is a privilege to be part of the National Football League. Everyone who is part of the League must refrain from ‘conduct detrimental to the integrity of and public confidence in’ the NFL.”⁵⁵ The PCP purports to be issued pursuant to the Commissioner’s authority granted under the CBA and the Constitution and Bylaws of the NFL in an attempt to

⁵³ *Id.* at art. VIII, § 8.3(e).

⁵⁴ *Id.* at art. VII, § 8.13(a)(1), (2).

⁵⁵ NATIONAL FOOTBALL LEAGUE, *supra* note 1.

“address and sanction conduct detrimental to the League and professional football.”⁵⁶ The PCP goes on to state that players who have been convicted of a crime, or who are subject to a “disposition of a criminal proceeding” as defined therein, can be disciplined, making it clear that not being convicted of a crime is not grounds to avoid discipline from the NFL.⁵⁷ The PCP then provides a list of fourteen categories, which are not exhaustive and under which punishable player conduct might fall.⁵⁸ Most of the infractions listed are at least somewhat vague, none the least of which is the final one, which reads as follows: “Conduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel.”⁵⁹ The NFL, guided by the Commissioner, thus created a vague standard that allows for great discretion when determining what type of conduct is prohibited under the terminology “detrimental to the integrity” of the League.

As stated previously, when a player is suspected of breaching the PCP, an investigation is initiated, the length and breadth of which are determined by the circumstances and the Commissioner’s direction.⁶⁰ Discipline, following a determination of a violation, can include a fine, a probationary period requiring terms to be met before reinstatement, suspension for a fixed or indefinite term, banishment from the League with an opportunity to reapply, or termination of a contract.⁶¹ Following a rise in public incidents of domestic violence, the PCP now includes baseline disciplinary measures of suspension for six games and a fine for first-time offenders of violent crimes such as assault, sexual assault, and domestic violence, with permanent banishment upon a second offense.⁶² This baseline is the only specific punishment outlined in the PCP, essentially leaving punishment for all other offenses to

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 5,

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 5

⁶² *Id.* at 7.

be determined by the Commissioner as he sees fit.⁶³ The vague wording and permissive discretion granted by the PCP, in addition to the CBA and the Constitution and Bylaws, have caused multiple problems leading to litigation over decisions by the Commissioner and his appointed appeals officers.⁶⁴ Given the examples below, some form of correction to these controlling documents and the structure provided therein is clearly needed.

D. Problems with the Rulemaking Process

The NFL's response to the National Anthem protests led by players in the 2016 and 2017 seasons serves as the most recent, relevant, and polarizing example of the failings of the existing rule-making process.

On August 14th, 2016, San Francisco 49ers backup quarterback Colin Kaepernick sat for the National Anthem to protest police-involved shootings of unarmed African Americans and to show support for the Black Lives Matter movement.⁶⁵ When asked for an explanation for his actions, Kaepernick initially stated, "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color."⁶⁶ Following a conversation with former Green Beret and short-time NFL long snapper Nate Boyer, Kaepernick began kneeling for the National Anthem as a sign of respect to veterans, active service members, and those who have sacrificed their lives for the United States.⁶⁷ As the NFL regular season began in 2016, more players began to kneel for the National Anthem across the League.⁶⁸ As more players began to kneel for the Anthem during the 2017 season, President Donald Trump took to Twitter to disparage players and call

⁶³ *Id.*

⁶⁴ See Einhorn, *supra* note 48.

⁶⁵ Coaston, *supra* note 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

for a boycott of the NFL.⁶⁹ The president's derisive comments both on Twitter and at a rally in Alabama served only to galvanize the movement among players.⁷⁰ Since August of 2016, approximately 200 players have displayed some form of protest during the National Anthem.⁷¹

In response to two years of anthem protests and growing discord between critics and advocates of the movement, the NFL attempted to institute a new policy on the national anthem before the 2018 pre-season.⁷² Players have only been required to be on the field for the anthem since the 2009 season.⁷³ Until 2018, however, the policy did not mandate that players stand or show respect for the anthem ceremony in any specific way.⁷⁴ In May 2018, the NFL announced a drastic policy change, which allowed players to stay in the locker room or come on to the field for the national anthem, but required all personnel on the field to “stand and show respect for the flag and the anthem.”⁷⁵ The new policy instituted fines for teams whose personnel protested during the anthem, and allowed teams to set internal disciplinary measures for players who chose to protest.⁷⁶ Additionally, the Commissioner was granted authority to “impose appropriate discipline on League personnel who do not stand and show respect for the flag and the anthem.”⁷⁷

⁶⁹ Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SBNATION (Sep. 25, 2017, 10:26 AM), <https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl> [<https://perma.cc/7V8W-X5M5>].

⁷⁰ *Id.*

⁷¹ Coaston, *supra* note 2.

⁷² Christian D'Andrea & Adam Stites, *NFL Owners Reach a 'Compromise' About the National Anthem. How Bad is It?*, SBNATION (May 24, 2018, 5:58 PM), <https://www.sbnation.com/2018/5/23/17368782/nfl-national-anthem-protests-rule-annual-spring-meeting> [<https://perma.cc/NTW6-RBHT>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ NATIONAL FOOTBALL LEAGUE, *Roger Goodell's Statement on National Anthem Policy* (May 23, 2018, 1:15 PM), <http://www.nfl.com/news/story/0ap3000000933962/article/roger-goodells-statement-on-national-anthem-policy> [<https://perma.cc/37ZM-QW6D>].

⁷⁶ *Id.*

⁷⁷ *Id.*

Backlash against the new policy was immediate and strong among players and fans alike.⁷⁸ As details emerged, it was clear that, although the NFL was touting the new policy as a compromise, there had been no attempt to work with players or the NFLPA to create it.⁷⁹ Rather, the new policy was a “compromise” among owners.⁸⁰ To that end, during the annual meeting of the NFL executive committee, a formal vote was not even taken after a debate of the proposed rule, and only one team owner did not consent to the proposal.⁸¹

Following the institution of the new Anthem Policy, the NFLPA filed a non-injury grievance under Article 43 of the CBA, challenging the rule.⁸² While the grievance was filed more than a month after the institution of the new policy, the NFLPA planned to go through the arbitration process, encouraging the NFL to come to the table and negotiate a better policy.⁸³ The NFL eventually determined, because of public backlash and mounting pressure, that the best course of action was to not enforce the new policy.⁸⁴ Two months after instituting the Anthem Policy, the NFL released a joint statement with the NFLPA announcing that no new rules regarding the anthem would be introduced or enforced until both parties came to an agreement regarding the anthem protests.⁸⁵ As illustrated here, the process by which the NFL made decisions regarding the creation and implementation of

⁷⁸ D’Andrea & Stites, *supra* note 72.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Charles R. McDonald, *The NFLPA Filed a Grievance Over the NFL’s New Anthem Policy*, SBINATION (Jul. 10, 2018, 12:11 PM), <https://www.sbnation.com/nfl/2018/7/10/17553606/nfl-anthem-policy-protest-players-union-nflpa-grievance> [https://perma.cc/MLP2-VYQ6].

⁸³ *Id.*

⁸⁴ Adam Stites, *What the NFL’s Halted Anthem Policy Means for the Players, Teams, and League*, SBINATION (Sep. 9, 2018, 12:20 PM), <https://www.sbnation.com/2018/7/23/17596078/nfl-national-anthem-policy-ramifications> [https://perma.cc/C8PD-6CQD].

⁸⁵ *Id.*

the Anthem Policy, a player conduct rule, was deeply flawed and set up the League for impending arbitration and potential litigation.

E. Recent Enforcement Issues

1. Deflategate

Perhaps one of the most famous instances of contested discipline was the suspension of New England Patriots quarterback Tom Brady in the wake of the “Deflategate” scandal. During the 2015 season, Tom Brady and the Patriots were accused of deflating footballs below the level allowed by the NFL rules.⁸⁶ At the conclusion of an investigation conducted by an NFL Executive Vice President and the NFL general council, an official determination was made that it was “more probable than not that Brady was at least generally aware of the inappropriate activities.”⁸⁷ Following this finding, the Commissioner decided that Brady’s actions were detrimental to the integrity of the League and instituted disciplinary actions against him under Article 46 of the CBA.⁸⁸ After appointing an arbitrator who issued Brady a four-game suspension, likely at the Commissioner’s direction, the Commissioner appointed himself to hear Brady’s appeal and upheld the suspension.⁸⁹ Brady and the NFLPA appealed his suspension to federal court and the disciplinary decision was vacated as “fundamentally unfair” in violation of the Federal Arbitration Act.⁹⁰ This ruling was eventually overturned on appeal, where the court stated that the court’s only job under these circumstances was to determine whether the Commissioner had acted within the confines of the CBA.⁹¹ The court did, however, note that the

⁸⁶ Einhorn, *supra* note 48, at 415.

⁸⁷ *Id.* at 415.

⁸⁸ *Id.* at 416.

⁸⁹ *Id.* at 416.

⁹⁰ *Id.* at 416.

⁹¹ *Id.* at 417.

powers granted to the Commissioner under Article 46, effectively making him judge, jury, and executioner, were “unorthodox.”⁹²

Irrespective of Brady’s guilt in this situation, it is clear from the sheer quantity of negative press and money spent on litigation within the NFL and federal courts that the Commissioner’s power to determine wrongdoing, assign discipline, and then uphold his own rulings creates a situation rife with potential conflicts. Each step of the way, the Commissioner is incentivized to act as only he sees fit, and as a result, he will never have a reason to overturn his own decisions barring extreme circumstances.

2. The Domestic Violence Issue

Another galvanizing moment surrounding enforcement problems in the NFL accompanied a rise in domestic violence cases involving NFL players. The two most famous incidents, analyzed below, took place before the 2016 revision of the PCP and were mired in conflict due to inconsistent punishments handed out by the Commissioner.

In February of 2015, Ray Rice, a running back for the Baltimore Ravens, was arrested, charged with simple assault, and released.⁹³ After pleading not guilty to harsher charges of aggravated assault, Rice was allowed to enter a program for first-time offenders, which allowed him to avoid jail time provided he stayed out of trouble.⁹⁴ Following a meeting with the team owner, the Commissioner, League officials, other personnel, and Rice’s now wife, Rice was given a two-game suspension.⁹⁵ When the League received public backlash for the light sentence, the Commissioner implemented the current League policy, which mandates fines and a six-game suspension

⁹² *Id.* at 417.

⁹³ Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBINATION (Nov. 28, 2014), <https://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens> [<https://perma.cc/3TXM-972V>].

⁹⁴ *Id.*

⁹⁵ *Id.*

without pay for first offenders.⁹⁶ Following the release of another video showing the brutality of the assault, the Ravens terminated Rice's contract, and the Commissioner suspended him indefinitely.⁹⁷ Rice appealed the Commissioner's decision, and upon completion of an investigation by a neutral third-party, an independent arbitrator overturned Rice's indefinite suspension on grounds that Rice had not misled the Commissioner prior to receiving the two-game suspension.⁹⁸

Around the same time, running back Adrian Peterson was charged with "felony reckless or negligent injury of a child" and was placed on the Commissioner's "exempt list," where he remained after taking a plea deal which reduced the charges to a misdemeanor.⁹⁹ A player on the Commissioner's exempt list cannot play in games or participate in on-the-field practices, but can participate in non-football team activities.¹⁰⁰ Following the granting of a hearing to decide whether discipline would be imposed for a violation of the NFL's Personal Conduct Policy, the Commissioner imposed punishment on Peterson based on the new policy of discipline which arose out of the incident involving Ray Rice.¹⁰¹ Peterson's punishment included an unpaid suspension, a fine, and counselling with an NFL-designated therapist.¹⁰² When the NFLPA appealed Peterson's discipline, the Commissioner recused himself at their request, but appointed an arbitrator with whom he had close ties.¹⁰³ Despite the apparent conflict of interest, the appointed arbitrator did not recuse himself and found against Peterson, ruling that the Commissioner's decision was consistent with both the CBA and the new domestic violence policy.¹⁰⁴ This decision was

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Einhorn, *supra* note 48, at 417.

¹⁰⁰ NATIONAL FOOTBALL LEAGUE, *supra* note 1.

¹⁰¹ Einhorn, *supra* note 48, at 418.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

appealed to federal court and overturned on grounds that the arbitrator, in upholding the Commissioner's disciplinary measures, was "enforcing his own sense of justice outside of the bounds of the established CBA."¹⁰⁵

Both of these cases, abhorrent on their faces, have served as black marks upon the NFL. Ratings and public opinion of the League and the Commissioner were very low following the eventual disposition of the cases.¹⁰⁶ The NFL's attempt to correct the issue by implementing new policy was too little, too late for a public who had already identified and condemned the internal inconsistencies. Another unfortunate side effect of these cases was that the failings of the NFL's Commissioner's discipline were put on full display. Giving *carte blanche* power to one person and expecting an efficient and impartial result has failed, as demonstrated by the Rice and Peterson discrepancies.

II. SOLUTIONS TO PROBLEMS IN RULEMAKING AND ENFORCEMENT

A. *New Rulemaking Committees*

As stated above, there are two rulemaking committees relevant to the proposed rule changes in this article, the Competition Committee and the Conduct Committee. Currently, the members of these committees are chosen by the Commissioner pursuant to the Constitution and Bylaws of the NFL.¹⁰⁷ All members of the Competition Committee are either team owners, executives, or coaches currently employed by teams.¹⁰⁸ As such, while

¹⁰⁵ *Id.* at 419.

¹⁰⁶ Juliet Macur, *N.F.L. Shows it Doesn't Really Care About Domestic Violence*, N.Y. Times (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/sports/football/nfl-domestic-violence-josh-brown-new-york-giants.html> [<https://perma.cc/HZD7-3Q9A>].

¹⁰⁷ NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. VI, § 6.7 (rev. 2006).

¹⁰⁸ *The NFL Competition Committee*, League Governance, NATIONAL FOOTBALL LEAGUE (last visited Nov. 21, 2018), <https://operations.nfl.com/football-ops/league-governance/the-nfl-competition-committee/> [<https://perma.cc/4FT4-YLGD>].

coaches, and to some degree general managers, have a reason to protect players from unfair rules, there is an inherent conflict of interest among these groups, as they are paid by owners, who are in turn members of the NFL Executive. While the Anthem Policy failure was mostly a product of bargaining amongst the Executive Committee, the Competition Committee, had it been involved, would still have run up against the potential issue of not having consulted the NFLPA, since there is no player or union representative on the Committee. Frequently, rules of play, such as the “catch rule,” and multiple iterations of policy governing allowable touchdown celebrations have caused problems with both referee interpretation and public opinion.¹⁰⁹ The illegality of certain celebrations still falls under a “know it when you see it” standard.¹¹⁰ Further, rules advanced by the current rulemaking committees have led to player confusion, unfair fines, and even injury concerns for players.¹¹¹ While there are certainly issues that would not be resolved no matter what group of people make up the competition committee, the individuals in charge cannot be said to have a player-first mentality. In fact, given their income source, it would be hard to argue that, when player rights should be a concern, those rights will fall anywhere close to the top priority for the current committee.

Similarly, the Conduct Committee is currently made up entirely of majority owners, their children, and minority owners of NFL member teams.¹¹² By and large, as with the domestic violence policy issue, the

¹⁰⁹ Adam Stites, *Which Celebrations Are Now Allowed in the NFL This Season?*, SBNATION (Sep. 7, 2017, 7:48 PM), <https://www.sbnation.com/2017/9/7/16157560/nfl-celebration-rule-changes-2017-season>. [https://perma.cc/2WXK-PLBF].

¹¹⁰ *Id.*

¹¹¹ SB Nation NFL, *What is the new NFL helmet rule, and why is it so controversial?*, SBNATION (Aug. 22, 2018, 4:55 PM), <https://www.sbnation.com/2018/3/27/17169040/nfl-helmet-rule-hits-targeting-penalty> [https://perma.cc/N8AU-SBL6].

¹¹² Cindy Boren, *Meet the nine owners who will oversee the NFL's new player conduct policy*, WASH. POST (Dec. 10, 2014), <https://www.washingtonpost.com/news/early-lead/wp/2014/12/10/meet-the-nine-owners-who-will-oversee-the-nfls-new-player-conduct-policy/> [https://perma.cc/RE2N-59LX].

Conduct Committee, and therefore the NFL, has been behind the ball. For example, until quarterback Michael Vic was charged with animal cruelty in 2007, and subsequently suspended for detrimental conduct, the PCP did not include specific language regarding animal cruelty or the like.¹¹³ While it is certainly impossible that any committee members could foresee every possible contingency that might arise, an argument could be made that, as it exists, the conduct committee has an incentive to maintain language in the PCP that is vague and leaves broad discretion to the Commissioner.

First, vague language allows the Commissioner to declare almost any conduct, on- or off-the-field, detrimental to the integrity of and public confidence in the NFL. A good example of this would be the discipline handed down to Tom Brady for the “Deflategate” scandal. While Brady was found to be complicit in violating a gameplay rule, he was disciplined for detrimental conduct.¹¹⁴ While there was certainly public outcry over the incident, given that underinflation of footballs is a violation of an in-game rule, appropriate punishments according to competition rules must have been, or at least should have been, in existence.

Second, like the Competition Committee, the Conduct Committee is appointed by the Commissioner and serves at his direction.¹¹⁵ Also like the Competition Committee, the owner members that make up the Conduct Committee are incentivized to empower the Commissioner in order to maintain their positions of power, and to attempt to ensure that the NFL executive retains power over player employees. Relinquishing control over what is considered detrimental to the League would remove some of the Commissioner’s power to impose discipline in any circumstance wherein he believes the League needs to be protected or that he needs to appease

¹¹³ Mike Phelan, *NFL Suspends Vic Indefinitely*, CNN (May 24, 2007, 9:16 PM), <http://www.cnn.com/2007/US/law/08/24/michael.vick/index.html#cnnSTCText> [<https://perma.cc/24KJ-KPH4>].

¹¹⁴ Einhorn, *supra* note 48, at 416.

¹¹⁵ NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. VI, § 6.7 (rev. 2006).

ownership interests. While League protection should certainly be a concern for any member of the Conduct Committee going forward, the current members of the Committee have no incentive to protect player rights.

In response to the obvious conflicts existing on both the Competition Committee and the Conduct Committee, new structures of membership should be written into the Constitution and Bylaws of the NFL and the CBA. For the Competition Committee, a nine-member committee format should be implemented with three representatives appointed by the NFL; three appointed by the NFLPA; two coaches proposed by the Executive Committee and approved by both the NFL and the NFLPA; and one outside member to serve as a tiebreaker, recommended by the NFLPA and approved by the NFL.

In this situation, the interests of all parties should be represented fairly. The NFL would protect its interests by having a voice to promote marketable gameplay, and the players would be protected by representatives from the NFLPA. Likewise, owners would be protected by representation from the NFL. The coaches' representatives should similarly fairly represent their teams. Those coaches, on a board that is comprised of a more equal membership, would have less incentive to bow to the wishes of ownership, as the committees themselves would not operate at the direction of the Commissioner. Instead, they would be directed by the Constitution and Bylaws to review and supplement the current competition rules to improve rule clarity, quality of gameplay, and player safety. These directives, and freedom from strict League-based interests, should allow coaches to assist in making and improving rules so that they can coach more easily and fairly represent players and owners alike.

Regarding the member appointed from outside the NFL and NFLPA, this final vote would reasonably serve as both a potential tiebreaker concerning difficult rules and an objective voice to moderate between the interests of the League and the players association. This member would be nominated by the NFLPA and approved by the NFL to ensure that both sides are satisfied with the representation and that the voice will be an unbiased one. Allowing the

NFLPA to nominate the member would ensure that the party with less power is not coerced into approving a biased selection. Parallel to the current compensation system for appeals officers for on-the-field violations, this committee member's necessary expenses should be paid equally by the NFL and the NFLPA to safeguard against any monetary coercion.

Similar to the proposed structure of the Competition Committee, the Conduct Committee should be altered to have two representatives from the NFL, two from the NFLPA, and a final member, again proposed by the players association and approved by the NFL. While many of the same concerns regarding impartiality would be cured by this structure, both parties should have a greater vested interest in having a Conduct Committee comprised fairly, with outside impartial assistance. The fifth member of the Committee should ideally be an individual with a background in the law or judiciary, to maintain a level eye towards avoiding potential litigation. This fifth member should be compensated for their work and have necessary expenses funded by both the NFL and NFLPA equally. While it is of course impossible to foresee every infraction that might arise in the future, a fifth member with a legal background, who is compensated for their time, would have the necessary knowledge and independence to assist in clarifying and detailing baseline punishments for more specific infractions of player conduct.

As such, the Conduct Committee's mission, to be written in the Constitution and Bylaws, should not be directed by the Commissioner, but to clarify and create rules to ensure player understanding and a fair but strict code for player conduct to ensure the integrity of and public trust in the NFL. This mission statement would direct Conduct Committee members to flesh out disciplinary guidelines that are less arbitrary and more tailored to specific types of conduct. While some vague language is necessary to allow for consideration of unforeseen conduct, eliminating the guesswork for players and the NFL alike would not only help to avoid arbitration and potential litigation, but hopefully further incentivize players to avoid specific behavior.

B. A New Disciplinary Board

There has been a great deal of criticism aimed at the Commissioner of the NFL for his ability to determine when an infraction has taken place, assign disciplinary measures, and uphold his own judgments regarding conduct considered detrimental to the NFL.¹¹⁶ While the measures suggested above to alter the composition and directive of the Conduct Committee should eliminate a great deal of discretion afforded to the final disciplinarian, elimination of all discretion would make a determination of punishment for unforeseen detrimental conduct all but impossible. As such, like the redistribution of influence in the rule-making committees this article previously proposed, Article 46 of the CBA should be amended or replaced to vest disciplinary power for conduct in a three-member panel instead of the Commissioner. This panel would be comprised of one representative each from the NFL and the NFLPA, and one member appointed in the same manner as the proposed outside appointees of the Competition and Conduct Committees. Like the Conduct Committee, this third disciplinary board member should have a legal background to ensure clarity of decisions and an eye for both proper process and potential future issues. Similarly, this member should be compensated equally by both parties.

Divesting disciplinary power from the sole control of the Commissioner in this way should serve to perform two functions. First, it would eliminate the existing bias inherent in the Commissioner's position towards League-friendly or team-friendly results by including a representative who would advocate for the players' best interests. Additionally, an outside representative would provide an impartial, unbiased view so long as the representative is chosen and compensated in the manner proposed. Second, a panel like the one suggested would provide more than a single voice or rationale to appropriately decide highly controversial disputes that will necessarily arise. Implementing these specific changes would be aimed at

¹¹⁶ See generally Einhorn, *supra* note 48.

protecting both the NFL and the player's rights while maintaining an ultimately unbiased decision-making process. These changes should also lead to fewer appeals and less litigation outside of the NFL itself.

Because Article 46 allows for the appointment of arbitrators by the Commissioner to hear appeals of disciplinary actions, that article should further be amended to create a group of independent arbitrators for this function. A pool of four arbitrators should be created, maintaining the same powers as currently given, with two representatives being chosen by the NFL and NFLPA, respectively, along with the added requirement that each be approved by the other party. In the event of an appeal, an arbitrator would be chosen at random to hear the appeal and make a final, binding decision. All four arbitrators should be compensated equally by the NFL and the NFLPA to avoid any allegiance due to the source of their income. The requirements that each arbitrator be approved by the non-selecting party, and paid equally by both, should help to ensure that both the NFL and the NFLPA are incentivized to select qualified, unbiased arbitrators. Further, the added provision of random assignment to hearings should remove any motivation to select a biased arbitrator, as there is no guarantee that that arbitrator will preside over any given hearing. Like divesting the Commissioner of original disciplinary power, further removing his ability to hear appeals necessarily removes an interested individual's inherent bias and provides for a more equal and impartial panel to hear appeals. While this process will not guarantee the satisfaction of a party who receives an unfavorable outcome, it will at least likely reduce the possibility of having an arbitrator's ruling overturned for attempting to enforce their own ideals of justice outside the bounds of the CBA and governing documents, as in Adrian Peterson's case.¹¹⁷

This newfound neutrality among the disciplinary committee and arbitrators will also work to benefit both the NFL and the NFLPA. While the

¹¹⁷ See *id.*, at 419.

current system protects the interest of the NFL in the sense that the Commissioner may always act in a manner that he believes will best benefit his employer, having an impartial and expanded disciplinary process should ultimately lead to fewer disputed rulings based on biased arbitrators or disciplinarians. Among others, one benefit of this change will be to protect the image of the NFL from negative media circus surrounding litigation like that of “Deflategate,” or the cases of Adrian Peterson and Ray Rice, by following a process that respects the rights and interests of both sides while publicly representing a comprehensive and unbiased process.

C. Implementation

As discussed above, the proposed changes would necessitate changes in the Collective Bargaining Agreement, the Constitution and Bylaws of the NFL, and the Personal Conduct Policy. In the case of the CBA, in order to implement a new disciplinary structure for non-football detrimental conduct, Article 46 must be amended or replaced with a similar article vesting those powers in the disciplinary panel and the group of four arbitrators proposed by this article. While these changes represent a large-scale change to the way the disciplinary process is currently handled for these matters, the overall change to the CBA would be minimal in that it would only affect Article 46. Further, the matters of notice and process would remain relatively unchanged except for the changes in who will be hearing matters.

Another necessary change to the CBA is the addition of provisions allowing for the creation of the proposed new forms of both the Competition Committee and the Conduct Committee. Currently, both committees were created under the powers of the Commissioner granted by the Constitution and Bylaws.¹¹⁸ There is no provision in the CBA that allows for committees to be created, and the NFLPA has no power to change the Constitution and

¹¹⁸ NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE, art. VI, § 6.7 (rev. 2006).

Bylaws of the NFL. Additional provisions must be added to the CBA in order to effect change that is binding on both parties, and over which both parties have a measure of control. The restructured committees and their directives should therefore be implemented into the CBA.

Likewise, the Constitution and Bylaws must be edited to remove committee creation power from the Commissioner with respect to the two newly independent committees. The NFL executive may wish to vest the Commissioner with the power to appoint the NFL's members of the newly created committees; to choose two independent arbitrators for the arbitration panel; and to accept or deny submissions by the NFLPA regarding the independent members of the competition committee, the conduct committee, and the disciplinary board. Such would be acceptable under the system proposed here. The corresponding provision would then be incorporated with an amendment to the Commissioner's power under the Constitution and Bylaws. Finally, the disciplinary power granted to the Commissioner under the Constitution and Bylaws would necessarily be changed to exclude discipline of players for detrimental conduct. Member teams, executives, and coaches may continue to entrust this power to the Commissioner, but as they are well represented by the Executive Committee, which has the power to remove the Commissioner, they do not share the same concerns and effects of bias that players do.

With regard to the Personal Conduct Policy, changes to the structure and mission of the Conduct Committee would necessitate drastic changes over time. The provisions detailing discipline, derivation of powers, and the structure and mission of the Conduct Committee would be amended, and as the Committee performed its functions, definitions of infractions and baseline disciplinary measures would be expanded. Further, the procedures taken from Article 46 of the CBA would have to be altered to reflect the changes made therein.

D. Potential Conflict

While there are clear benefits to both the NFL and the NFLPA to make the changes suggested in this article, there is also a clear road to conflict should these changes be proposed. Article 2 of the CBA allows for good faith negotiation of proposed changes to the CBA and the Constitution and Bylaws and insists on negotiations for any changes the NFL wishes to make that may significantly alter the conditions of players' employment.¹¹⁹ The NFL, however, would likely push back on ceding any of the powers suggested to even a neutral source. Currently, the Commissioner, who is an employee of the NFL, and removable by the Executive Committee, has every incentive to protect the interests of team owners and the League. Whether his actions are in the best interest of players or their rights is of little concern to the NFL as a business. The Commissioner would likely argue that as the man in charge of the NFL itself, he will act in the best interest of the NFL with respect to disputes that are inward- and outward-facing. The fact of the matter is, however, that the Commissioner and the League have been consistently unable to handle the responsibilities of rulemaking and discipline, both on- and off-the-field, without blowback from players and fans alike.

Currently, the failed Anthem Policy implemented in May 2018 remains on the books but unenforced under the agreement between the NFL and the NFLPA.¹²⁰ Given that players are continuing to protest, and there is no resolution between the NFL and the NFLPA, the League continues to face backlash from both sides of the debate. Similarly, the Commissioner and the League have failed to respond quickly or appropriately to scandals such as "Deflategate" and the domestic violence issues that have plagued the League. Public trust and viewership ratings were negatively affected by all of these issues, and yet the NFL continues to insist on vesting all power in the hands

¹¹⁹NATIONAL FOOTBALL LEAGUE AND NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, art. 2, § 4.

¹²⁰Stites, *supra* note 84.

of one individual. As such, it is unlikely that the League will choose to agree to bargain and amend the CBA.

However, despite the fact that the League and Executive Committee will likely not bargain with the NFLPA before the expiration of the current CBA, the NFLPA still has options. The current CBA expires after the 2020 League year, which means that before the 2021 season a new CBA must be bargained and agreed upon. Prior to that time, any rules, such as the Anthem Policy, should absolutely be challenged under the provisions of Article 2 of the CBA. Further, the NFLPA must prepare to vigorously bargain for the changes suggested above. While the process of creating the next CBA will largely center around monetary concerns, a great deal of the conflict between players and the League since the adoption of the current CBA has centered around issues of discipline and Commissioner control. The current structure allows for the Commissioner to all but ignore players' rights in determining what is best for the NFL. This practice cannot continue to be tolerated. The issue with presenting these changes as a bargaining point, however, is that during the bargaining process, one often has to give something to get something. Given current player dissatisfaction, it is not altogether impossible that a potential strike may loom large over the next bargaining process, but this is primarily for monetary reasons. For example, the NFL should consider the incentives for altering the CBA explained above, but in doing so the League would almost certainly demand a concession of some sort in order to agree to implement these changes. This likely means a sacrifice of some potential financial gains in order to preserve the player protections sought here. The NFLPA should, however, lean on the negative optics that have recently plagued the League. Continuous publicized problems with player conduct, and the League's negative treatment of players being disclosed to the public, will only damage the reputation of the League in years to come. More lenient and player-friendly leagues like the NHL and NBA may stand to take market share away from the NFL should these trends continue. As such, while the NFL may request monetary concessions from players, the NFLPA should be

prepared to remind the League just how much it stands to lose should the League's public image continue to move in a negative direction.

While players may be hesitant to agree to lessen their fiscal demands, and thereby gains, it is important to remember that changes in rules and the discretionary whims of the Commissioner are frequently costly to players' rights and their wallets. Changes implemented on the field, and the vague language of the PCP, can arbitrarily cost players money in fines due to unclear and poorly considered rules, such as the Anthem Policy or the recently implemented changes to the "roughing the passer" rule. These rules are currently implemented with little to no input from the NFLPA. With no voice in the process of rulemaking or adjudication procedures, players will continue to find themselves marginalized and without protection from a system that has no internal—and as yet little external—desire to change.

III. CONCLUSION

As explained in this article, the current NFL structures for rulemaking and enforcement of existing rules is deeply flawed. Players continue to be subject to vague and poorly written rules and standards of conduct on and off the field, and with each new conflict that arises, the NFL and its Commissioner have only managed to meet the minimum threshold for competency. Added to this, the inherent conflicts of interest that plague members of the Competition Committee, the Conduct Committee, and the Commissioner himself as both disciplinarian and arbitrator serve only to create an inefficient and biased system that continues to struggle. Given the benefits of creating the new rules committees illustrated here, the NFLPA and the NFL should both be incentivized to change. The benefits of improvements in rule clarity and the potential enhancements to gameplay and player safety far outweigh those of maintaining strict league control over the rulemaking process.

Likewise, the issues arising from complete Commissioner control over the disciplinary process has led to litigation and a litany of public image issues, which cannot be sustained. As such, changes like those proposed in this

article must be implemented for the sake of players' rights and interests and to protect the NFL from itself. Any outside observer can see the harsh detriments to league integrity and its public image that have occurred due to a flawed system of disciplinary actions. These consequences, coupled with a consistent disrespect for players perpetrated by the NFL in the public eye, necessitate the changes advocated herein. Changes must be made for the benefit of professional football, its players, the League, and its fans.

