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4-16-2016

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Cardozo Arts & Entertainment Law Journal

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Recommended Citation

Sykes, Jeremy, "Deflategate: Can We Eliminate Litigation in NFL Player Discipline Disputes?" (2016). *AEJ Blog*. 105.

<https://larc.cardozo.yu.edu/aelj-blog/105>

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Deflategate: Can We Eliminate Litigation in NFL Player Discipline Disputes?

BY [JEREMY SYKES](#) / ON APRIL 16, 2016

Though the NFL offseason is set to begin, and many new stories will dominate the media, one story refuses to go away: *Deflategate*. With the case currently on appeal, it is important to entertain the possibility that the *Deflategate* saga has gone on for too long. Are there better ways to resolve the issues surrounding *Deflategate* and NFL player discipline disputes, ones that avoid litigation altogether?

Perhaps the best method of resolving time-sensitive litigation in NFL player discipline cases is to eliminate the need for litigation in the first place. This could be accomplished by changing the scope of the commissioner's disciplinary powers and the nature of the arbitration process. A full, detailed analysis of the extent of the commissioner's player disciplinary powers is beyond the scope of this post. [2] Nonetheless, a comparison to other professional sports leagues' disciplinary procedures can serve as a guide for the NFL in adopting a new process.

Major League Baseball's arbitration process involves an "impartial arbitrator or, where either Party elects in advance of the opening of the hearing in a matter, a tripartite panel so empowered and composed of the impartial arbitrator and two party arbitrators, one appointed by the Association, the other appointed by the L[eague] R[elations] D[epartment]." [3] Furthermore, "[i]n the event the Association and the LRD are unable to agree upon the appointment of the impartial arbitrator, they jointly shall request that the American Arbitration Association furnish them a list of prominent, professional arbitrators." [4] Finally, at any point during the proceeding, both Major League Baseball and the League Relations Department have the opportunity to terminate the appointment of the impartial officer, assuming that the moving party meet the procedural guidelines laid out in the Collective Bargaining Agreement.[5]

Major League Baseball's arbitration process is by no means perfect. One commentator has pointed out that practically, there is no difference between having one impartial arbitrator and Major League Baseball's version of the tripartite panel. [6] Additionally, "[w]hile a three-person arbitration panel might be agreeable to both the players association and the league, it is unlikely that the two sides will be able to mutually agree on the three arbitrators." [7] Despite these flaws however, Major League Baseball's system promotes and requires impartiality in its arbitration process. [8] In contrast, the "NFL Commissioner generally still presides over the hearing and is responsible for final decisions in every case, which abates the procedural safeguard provided by possibly having a designee serve as the arbitrator to a dispute." [9]

The results of arbitration systems like that of Major League Baseball's are staggering. Major League Baseball has not litigated the scope of the Commissioner's disciplinarian powers since Pete Rose challenged his lifelong ban from Major League Baseball, issued by then commissioner A. Bartlett Giamatti. [10] In contrast, the NFL has seen a number of cases challenging Commissioner Goodell's disciplinary powers in recent years. [11] Thus, by implementing a more fair and impartial system for disciplining its players, the NFL can eliminate issues of litigation altogether.

1. *Deflategate* is the allegation against the New England Patriots, and specifically quarterback Tom Brady, for illegally deflating the footballs during the 2015 AFC Championship game against the Indianapolis Colts. For more information on *Deflategate*, see Theodore V. Wells, Jr., Brad S. Karp & Lorin L. Reisner, Investigative Report Concerning Footballs Used During the AFC Championship Game on January 18, 2015 1 (May 6, 2015).
2. For more on this topic, see Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3.1 Berkeley J. Ent. & Sports L. 93 (2014); Joshua A. Reece, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 Val. U. L. Rev. 359, 404 (2010); Logan O'Shaughnessy, *After Review: An Open Letter to NFL Commissioner Roger Goodell Suggesting That Limiting the League's Disciplinary Power Under the Personal Conduct Policy May Be in the League's Best Interests*, 88 U. Det. Mercy L. Rev. 527 (2011); Jeremy R. Abrams, *Making the Right Call: Why Fairness Requires Independent Appeals in U.S. Professional Sports Leagues*, 97 Marq. L. Rev. 469 (2013).
3. Major League Baseball Collective Bargaining Agreement 41 (2012).
4. *Id.* at 42.
5. *Id.*
6. Pacifici, *supra* note 2 at 114 ("The inherent problem with this system . . . is that . . . the vast majority of other decisions, was a two to one decision, with the neutral arbitrator casting the deciding vote.").
7. *Id.*
8. Joshua A. Reece, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 Val. U. L. Rev. 359, 404 (2010). Reece's article discusses the viability of the NBA's arbitration process as well, noting that the NBA hires independent arbitrators from outside organizations. *Id.* Additionally, the NBA disqualifies arbitrators who have had a previous business relationship with any professional athletes or leagues. *Id.* (quoting Grievance and Arbitration Procedure and Special Procedures with Respect to Disputes Involving Player Discipline, Nat'l Basketball Players Ass'n, 326-42, <http://www.nbpa.org/sites/default/files/ARTICLE%20XXXI.pdf>).
9. Reece, *supra* note 8.

10. *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989). (Giamatti was not barred by jurisdictional grounds from his ability to discipline Rose). It should be noted that MLB professional athlete Alex Rodriguez filed an action in New York to vacate an arbitration award suspending him for 211 games. See *Alexander Emmanuel Rodriguez v. Major League Baseball, et. al.*, 2014 WL 114181 (S.D.N.Y.). However, Rodriguez and Major League Baseball settled this case prior to litigation. *Id.*
11. See, e.g., *Nat'l Football League Players Ass'n v. Nat'l Football League*, 88 F. Supp. 3d 1084 (D. Minn. 2015) (Adrian Peterson); *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654 F. Supp. 2d 960 (D. Minn.) *aff'd sub nom. Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009) (Kevin Williams and Pat Williams).

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