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From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority

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ABSTRACT: This article surveys and compares the legal sources and historical evolution of the Office of the Commissioner in the three major American professional sports (MLB, NBA, NFL). Part I introduces the appeal and relevance of studying the Commissioner’s office and describes the Article’s three-pronged analytical approach. Part II identifies and contrasts the legal foundations for the three sports’ varying scopes of commissioner authority. Part III takes a look at the various individuals who have filled the office in the past, and places them on a “power spectrum” according to the amount of power wielded by each. Part IV is a case study of NFL Commissioner Roger Goodell’s first few years in office (2006-present), with particular emphasis on the Spygate scandal and other developments. Part V compares Goodell to past commissioners and attempts to place him on the “power spectrum” delineated in Part III.

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I. Introduction

As the major three professional sports have grown in popularity, size, and financial complexity over the past century, their commissioners have grappled with problems simplistic and difficult, retrospective and prospective, disciplinary and financial. The problems of the times have required commissioners with different levels of textual authority, different professional backgrounds, and different styles of leadership.

As a result, a study of commissioner power that focuses solely on the textual authority found in the league bylaws or collective bargaining agreements is inevitably incomplete. The priorities that a commissioner sets, as well as the power that the commissioner has to attack those priorities, depend upon the internal and external forces that exist at that moment in time. Internal forces include the motivations of owners, as well as ever-strengthening players’ unions. External factors include the attitudes of fans, the words of newspapers, and in some cases, the mandates of America’s lawmakers.

In addition, the strength of a particular commissioner is in many situations defined by his attitudes and approaches to exercising his authority. History has seen commissioners of various backgrounds – from a federal judge to a former owner. In addition, commissioners have come with different levels of experience in the sport – from neophytes to career professionals. These factors help comprise the personality of the commissioner and influence the success, or lack thereof, that the commissioner experiences.
This paper will endeavor to examine the factors that have influenced commissioner power over the past century, using a variety of authority – including league-based rules, legal analyses, newspaper articles, and Congressional records. Using this framework, the paper will then analyze the early results of the initiatives of new NFL Commissioner Roger Goodell. Goodell has not been a stranger to controversy over the first two years of his term, as he has developed an ambitious disciplinary policy, expanded league revenue streams (e.g., the NFL Network), and most recently, become embroiled in a disagreement with Senator Arlen Specter. Where has Goodell succeeded? Where has he failed? And what are his prospects for future? By looking at history, we hope to provide answers to these questions and project the results that Goodell can expect throughout his tenure as Commissioner.

II. Legal Foundational History of the Offices

a. Major League Baseball: Crisis leads to Commissioner

Early in baseball’s history, the league was governed by a tripartite system that exercised relatively weak authority over the league’s players and owners. In 1903, a three-man National Commission was formed consisting of the presidents of the National and American Leagues and a third member, usually one of the club owners.\(^3\) The limitations that this system caused can be seen in the decision of American Baseball Club of New York (Yankees) v. Johnson.\(^4\) In Johnson, the New York Supreme Court was confronted with a question of the commission’s power to discipline a player for breaking

\(^3\) Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 532 (7th Cir. 1978) (discussing the origins of the office of the commissioner).

\(^4\) 179 N.Y.S. 498 (1919).
his contract to his team. Operating under a strict, narrow view of the league constitution, Judge Wagner, writing for the court, found that the tripartite commission possessed no power to impose discipline in response to player conduct that did not occur in “the performance of [player’s] duties,” a standard that did not include a private contract dispute among the club and its player. Essentially, according to Judge Wagner, the governing body of baseball could act only to remedy violations of rules that governed on-field play, while any external issues would be a matter to be settled between the player and the club.

Ironically, while the Johnson decision would be seen as a short-term victory for the Yankees, the case was illustrative of the deficiencies of a powerless commissioner. The problems of baseball were widely seen in the popular media and among fans of the sport as off-field problems, especially gambling, and in this sense, the Johnson decision could not have come at a worse time. In October 1919, the same month that the New York Supreme Court handed down its Johnson decision, eight members of the Chicago White Sox engaged in the most high-profile example of corruption that has ever been seen in baseball, working in concert with gamblers to purposefully throw the World Series to the underdog Cincinnati Reds.

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5 The controversy in Johnson began when pitcher Carl Mays deserted the Boston Red Sox despite his player contract. After Boston declined to discipline Mays, choosing to sell his rights to the New York Yankees, a furious American League President Ban Johnson attempted to suspend Mays. The New York club brought suit in the New York Supreme Court to enjoin Johnson and the Commission from blocking the sale. 
6 Johnson, 179 N.Y.S. at 148.
7 In the team’s press release just after the decision, the Yankees celebrated the court’s protection of teams from “continual encroachments on club rights by the president.” Paul C. Weiler, Sports and the Law 14 (2004).
8 For a comprehensive examination of the “Black Sox Scandal,” as the events of the 1919 World Series came to be known, see Eliot Asinof, Eight Men Out: The Black Sox and the 1919 World Series (1963).
The events surrounding the 1919 World Series, coupled with the *Johnson*
decision, reinforced the popular belief that the tripartite commission was woefully ill-equipped to deal with the corruption that was threatening the legitimacy and viability of the young sport.9 The *New York Times* summed up the public opinion, editorializing that the Black Sox Scandal had dredged up “all the rumors and suspicions of years past … their general effect is to wrinkle the noses of fans who will quit going to ball games if they get the impression that this sort of thing has been going on underground for years.”10 In response, many club owners, fearful that the game would collapse under the weight of public outrage, looked for a way to modify the governing body of the game, increasing the amount of external control that the commissioning agent could exert over the activities of players.11

As a result, baseball created the first sole commissionership in American professional sports. Kenesaw Mountain Landis, a federal judge, was tabbed by the owners to be the sole commissioner of the sport, with virtually unlimited authority.12 The hiring of Landis resulted in a new Major League Agreement, adopted in January 1921,

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9 After hard evidence surfaced linking several members of the 1919 White Sox, resulting in confessions that debilitated the reputations of the players forever, there was hardly a newspaper in the country that did not express its outrage over the rampant corruption in the game. Id. at 197. As one historian writes, the pride that Americans took in the National Pastime “was shattered. … [i]t was nothing more than another show of corruption” and “[t]here is no way to gauge the extent of the damage on the American psyche.” Id. at 197-98.

10 Id. at 199.

11 There is evidence that plans to dissolve the tripartite commission in favor of a strong one-man Commissioner actually began prior to the Black Sox Scandal. J.G. TAYLOR SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 45 (1947). However, pre-scandal, it appears that there was not the necessary force of will among baseball owners, officials, and the general population to force change, as Ban Johnson succeeded in retaining the tripartite system during baseball’s winter meetings in January 1919. Following that year’s World Series and the embarrassment of the *Johnson* case, Johnson’s powers had ebbed to the extent that he was not even present at the joint meeting that resulted in the selection of Judge Kenesaw Mountain Landis as baseball’s first commissioner. Id. at 73.

12 Id. at 76 (“He was granted autocratic power over everyone in baseball, from the humblest bat boy to a major league president, and the club owners, for themselves as well as their league, waived all recourse to the courts of the land no matter what would be the severity of the new Commissioner’s discipline.”).
with greatly expanded powers for the Commissioner. Though relatively simplistic in nature, the new Major League Agreement would prove to be a powerful tool in the hands of Landis throughout his tenure, particularly the provision giving the Commissioner the power to “investigate, either upon complaint or upon his own initiative, an act, transaction or practice, charged, alleged or suspected to be detrimental to the best interest of the national game of baseball, (and to determine and take) any remedial, preventive or punitive action (he deemed appropriate.)”\(^\text{13}\) Section 2(b) of the Agreement gives the Commissioner the authority to take whatever “preventative, remedial or punitive action” he believed necessary after completing his investigation.\(^\text{14}\) The broad power granted by these brief statements proved solid enough that Landis’ authority went unchallenged for his first eleven years in office,\(^\text{15}\) through the course of numerous suspensions and banishments,\(^\text{16}\) until a case involving an unfortunate player named Fred Bennett.

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\(^\text{13}\) 1920 MAJOR LEAGUE AGREEMENT, art. 1, section 2(a) (excerpt available at http://pressbox.mlb.com/pressbox/about_mlb/history.jsp?content=commissioners).

\(^\text{14}\) 1920 MAJOR LEAGUE AGREEMENT, art. 1, section 2(b). In contrast, Section 3 specifies that an action by the Commissioner “may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars ($5,000.00) in the case of a Major League or a Major League Club and not to exceed Five Hundred Dollars ($500.00) in the case of any officer, employee or player.” 1920 MAJOR LEAGUE AGREEMENT, art. 1, section 3. At least one commentator has noted that Section 3 could be read to limit the Commissioner’s expansive powers under Section 2. Jonathan M. Reinsdorf, The Powers of the Commissioner in Baseball, 7 MARQ. SPORTS L.J. 211, 222 (1996). However, there is evidence that Landis had specified to the owners that he did not expect to be limited by the Section 3 clause, id. at 223. Further, most courts to interpret the issue have decided that Section 2 remedial and preventive powers are not limited by the suggested punitive penalties of Section 3. See, e.g., Atlanta National Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1225 (N.D. Ga. 1977) (finding that while Section 3 limits the Commissioner’s punitive powers, it does not limit his remedial or preventive sanctions); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 535 (7th Cir. 1978).

\(^\text{15}\) WEILER, supra note 5, at 14.

\(^\text{16}\) Not surprisingly, Landis’ first act of discipline was to discipline the players involved in the scandal that had led to his appointment as Commissioner – the eight members of the Chicago White Sox who had conspired with gamblers to fix the results of the 1919 World Series. All eight players were banned from the major leagues for life by Landis. Throughout the rest of his tenure, Landis used his power to ban several more players, including pitcher Ray Fisher for refusing to honor his contract with the Cincinnati Reds, and Jimmy O’Connell, Heinie Zimmerman, and Joe Gedeon (among others) for offenses related to association with gamblers and discussing throwing baseball games.
As much as the *Johnson* case shows the lack of legitimate disciplinary authority of the old tripartite commission, the case involving Bennett, reported under the name *Milwaukee Am. Ass’n. v. Landis*,\(^\text{17}\) shows the sweeping grandeur of Landis’ iron-fisted rule. The case of *Landis* involved St. Louis Browns owner Phil Ball, who secretly controlled several minor league teams, and had transferred Bennett several times to different teams under his umbrella. Landis learned of the arrangement and disallowed a transfer to Milwaukee. In an unmistakable contrast to the *Johnson* decision, the *Landis* court found that the 1920 Major League Agreement had endowed the Commissioner with “almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.” The implication was clear – the 1920 Agreement had eliminated any equivocation, and Landis, in the matter of baseball discipline, ruled over a dictatorship.

However, while Landis was the unquestioned czar of all disciplinary issues, he was not very powerful in terms of shaping the future of the sport. A staunch opponent of the idea of a farm system, Landis proved ineffective in preventing its eventual emergence, which was championed by St. Louis Cardinals owner Branch Rickey.\(^\text{18}\) While the 1920 Agreement had given Landis the authority needed to remedy the stain of the Black Sox, it was ineffective in providing the Commissioner with a voice powerful enough to win battles regarding the underlying structure of the sport.

*b. Football and basketball follow the lead*

Just a year after Landis assumed the role of baseball’s commissioner, Joseph F. Carr became the first president of the American Professional Football League, later

\(^{17}\) 49 F.2d 298 (N.D. Ill. 1931).
\(^{18}\) WEILER, *supra* note 5, at 17.
named the National Football League. Carr, like Landis, assumed his role in a challenging environment, as the league was suffering from unsteady finances, uncertain membership, and rules violations by its member teams.¹⁹ As a result, the National Football League’s office of the commissioner received power of a similar breadth as Major League Baseball’s, though with several differences, which will be explored in the next section.²⁰ Similarly, Maurice Podoloff, the first president of the National Basketball Association, arrived during a turbulent period for the league, and received expansive powers.²¹ Like Landis, he was a strict disciplinarian, and his authority to expel players for gambling withstood legal challenge in at least one instance.²² Thus, the constitutional authority of the commissioners of the three major professional American sports developed under similar circumstances, with similar boundaries on the authority.

III. “The Power Spectrum”: From Landis to Selig and Everywhere in Between

As seen through the tenure of Landis as the first commissioner of Major League Baseball, the power that a sports commissioner is able to exercise begins with his textual grant of authority. Landis enjoyed virtually dictatorial authority due to the broad language of Article 1, Section 2 of the Major League Agreement that created his office. However, this is only the beginning of the story. Landis also benefited from the era in which he served as commissioner. At the start of his term, the owners, terrified at the prospect of running an illegitimate game, were more than willing to grant Landis

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²⁰ See infra Section III, subsection a.
²¹ See Pachman, supra note 17, at 1417 n.55.
²² Molinas v. Podoloff, 133 N.Y.S.2d 743, 745 (N.Y. Misc. 1954) (finding that the president of the NBA had the power to expel gamblers in a “final, binding, conclusive and unappealable” decision).
whatever authority he demanded. Further, an outraged media would have demanded nothing less than a zero tolerance policy toward gambling and corruption, and the scarred psyche of the American populace required drastic remedial steps. Finally, Landis’ own background as a federal judge and personality as a disciplinarian served to outline his actions as commissioner.

It is our conclusion that the most effective way to examine the authority of a commissioner is to use this three part test of (1) textual authority, (2) internal and external pressures, and (3) personality and style of leadership. At one end of the spectrum sits Landis, who enjoyed a sort of “perfect storm” during his reign as baseball’s commissioner. At the opposite end sits Bud Selig, who is widely seen as an ineffective figure in terms of authority, public relations, and foresight. Landis, Selig, and other notable commissioners over the past century will assist us in the following section, as we seek to expand on this three-part test of commissioner power.

a. Textual Grant of Authority

MLB

As delineated above, Landis entered into a commissionership that offered expansive authority for him to issue disciplinary edicts in essentially whatever manner he desired. By the time Selig became acting commissioner in 1994, the broad authority granted to Landis by Sections 2 and 3 of Article 1 had been narrowed considerably by the addition of several other provisions designed to weaken the power of the office.

By 1992, the Major League Amendment provisions that gave the commissioner his textual authority had been amended multiple times, and commissioner power

23 The office of the commissioner was never textually stronger than under Landis. Following Landis’ death, which ended his term in 1944, the owners amended Article 1, Section 3 to specify that “[n]o Major
seemed to be on the upswing in 1984 and 1985, when new commissioner Peter Ueberroth persuaded the owners to give him more “CEO-like” authority over the game. However, the mood of the owners had shifted by the time Selig assumed office, and his authority was diminished by several amendments in 1994. The most important addition was Section 5 of Article 1, which stated “notwithstanding the provisions of Sections 2 and 4, above, the powers of the Commissioner to act in the best interests of Baseball shall be inapplicable to any matter relating to a subject of collective bargaining between the Clubs and the Major League Baseball Players Association.”

In addition, the commissioner was made the permanent chair of the player relations committee (PRC), which turned the commissioner from the neutral arbiter in the model of Kuhn, Ueberroth, and Fay Vincent (previous commissioners who had forced owners to make labor compromises in 1976, 1985, and 1990, respectively) to a partisan in the corner of the owners during the collective bargaining process.  

League rule or other joint action of the two Major Leagues and no act or procedure taken in compliance with any such Major League rule or joint action of the two Major Leagues shall be considered or construed to be detrimental to baseball,” limiting the expanse of the “best interests” clause. In addition, the owners added a new Section 6 to Article 1 (requiring a three-fourths majority of owners to vote in favor of electing or reelecting a commissioner, making it much more important for the commissioner to avoid alienating the owners) and made a deletion from Section 1 of Article 1 (making it possible to appeal a commissioner’s decision to court, which was not an option in the time of Landis). In 1964, Ford Frick, a subsequent commissioner, convinced the owners to revoke the limitation on the “best interests” clause, but in 1974, the owners added a new Article 7, which specified that the commissioner could only act when other provisions of the Major League Agreement did not apply. For a comprehensive examination of the post-Landis Amendments, see ANDREW ZIMBALIST, IN THE BEST INTERESTS OF BASEBALL? 49-50 (2006); Reinsdorf, supra note 12, at 224-27.

The 1984-85 Amendments to the MLA explicitly transformed the role of the commissioner to fit a more corporate leadership model, stating that the commissioner was the “chief executive officer of Major League Baseball.” 1985 MAJOR LEAGUE AGREEMENT, art. 1, section 2(a). Accompanying this change in outlook was an increase in authority, with amendments providing for a simple majority (rather than three-fourths) of owners to approve of a commissioner’s reelection (section 7) and more authority in levying fines against players (section 3). The general idea of the commissionership under Ueberroth was for the commissioner to “be a CEO with all departments, including the NL and the AL presidents, reporting to him.” ZIMBALIST, supra note 21, at 91.

1994 MAJOR LEAGUE AGREEMENT, art. 1, section 5.

ZIMBALIST, supra note 21, at 144-45.
The official removal of the commissioner’s “best interests” authority from collective bargaining codified another key restraint that had emerged in the late 1980s. After several 1980s drug scandals, commissioner Peter Ueberroth unilaterally ordered players to submit to four mandatory drug tests per year. The players’ union filed a grievance, asserting that drug testing was a matter for collective bargaining, and succeeded in preventing the commissioner’s order from taking effect. While the owners’ objective in 1994 was financial, the extrication of the commissioner’s “best interests” power settled the matter of the MLA’s grant of authority to the commissioner to initiate preventative measures such as random testing. While a subsequent commissioner, Fay Vincent, would issue an anti-drug directive in 1991, the commissioner’s text-based authority to confront what was then viewed as a nascent problem was decidedly limited. In the years to come in the late 1990s and early 2000s, the lack of early action on the steroid problem would have a crucial impact on baseball’s legitimacy in the eyes of the media and many fans, though it is questionable what textual

27 Id. at 95
28 Ueberroth’s failed attempt to attain drug testing through his “best interests” powers was echoed in Vincent’s tenure, when he attempted to ban Yankees pitcher Steve Howe after Howe’s seventh drug/alcohol offense. The players’ union filed a successful grievance and Howe was reinstated. Michael Hirsley, “Best interests” clause has benefited commissioners, Chicago Tribune, March 18, 2004, at C8.
29 The owners did not want future commissioners to intercede to end lockouts, as Bowie Kuhn had in 1976, and generally feared circumvention of their labor negotiation stances. Reinsdorf, supra note 12, at 231. See also Craig F. Arcella, Major League Baseball’s Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring, 97 COLUM. L. REV. 2420, 2423 (1997) (arguing that the 1994 restructuring of the Major League Agreement would undermine the legitimacy of the commissioner’s historic disciplinary authority). Others have noted that the sole focus of the 1994 labor negotiations and amendments on the commissioner’s powers to intercede in those negotiations was baseball’s financial structure. See, e.g., Murray Chass, Mitchell Report Revealed Little Original Work, N.Y. Times, Dec. 18, 2007, at D5 (quoting former Commissioner Fay Vincent as saying “[everybody was] wrapped up in the financial aspects of the baseball labor fight” while drug issues “took a distant back seat to the economic issues”).
30 Vincent issued a memorandum to all Major League teams on June 7, 1991, noting that he had added steroids to the banned substances list. However, under the precedent that emanated from Ueberroth’s order, it appears that Vincent would have had no power to order drug testing or other pointed investigatory tools. Vincent had decried the lack of response generated by his memo, saying in 2007 that “[m]y memo was totally ignored by all [teams and by the players union].” Chass, supra note 25.
authority Commissioners Vincent and Selig could have relied upon to confront the problem alone.\textsuperscript{31}

**NFL**

Unlike baseball, the offices of the commissioner of the National Football League and National Basketball Association have not seen much change over time in the level of textual authority granted to the officeholder. The NFL’s constitutional delegation of authority to the commissioner is similar to that of Major League Baseball. Every NFL player contract contains a provision specifying that the commissioner retains the authority to “fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract” if the player is guilty of any “form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.”\textsuperscript{32} The commissioner enjoys several specific, enumerated powers under both the league bylaws and the collective bargaining agreement between the NFL Players Association and the owners of the NFL franchises, and no penalties may be appealed to an entity other than the commissioner or his designee.\textsuperscript{33} These specific powers include the right to suspend players for designated lengths of time pursuant to the Drug Program portion of the CBA.\textsuperscript{34} The fact that commissioner sanctions are appealable only to the commissioner or his designee gives the NFL commissioner an

\textsuperscript{31} Despite the 1994 Amendments, the era of Selig also produced some enhancements to the commissioner’s authority to tackle complicated problems. In 2000, the owners voted 30-0 to give the commissioner “best interests” power to restore competitive balance among Major League teams, a power that even Landis could not have exercised. Eventually, this would lead to Selig’s failed attempt to contract the size of the league by the elimination of four teams (Section III(c), infra). See Phil Rogers, Selig: A czar is born; Saving baseball is his mission, Chicago Tribune, Jan. 23, 2000, at C1.


\textsuperscript{33} NFL Collective Bargaining Agreement, article XI, section 1(c) (2006).

enhanced power that the MLB and NBA commissioners do not enjoy – in effect, the NFL commissioner decides whether his own penalty is reasonable under the circumstances.35

As with baseball, the issue of drug testing proved to test the definition of the “best interests” provision of the NFL’s governing documents in the late 1980s. Similarly to Ueberroth’s attempt to use the force of the “best interests” clause to achieve random drug testing in baseball, NFL Commissioner Pete Rozelle, speaking of the need to protect the “health and welfare of the players,” announced in 1986 that the NFL would be testing for “cocaine, marijuana, heroin, alcohol, LSD, angel dust, Quaaludes and amphetamines.”36 And, similarly to Ueberroth’s attempt, Rozelle’s gambit ended in failure, as an arbitrator ruled with the union’s argument that any drug testing program would be a matter of separate collective bargaining, apart from Rozelle’s granted powers under the CBA, which were more disciplinary than preventative.37 Thus, one significant limitation on the “best interests” power of both baseball and football commissioners has been their ability to unilaterally take player-specific action against drug abuse, especially when preventative rather than disciplinary.

NBA

35 For expansion on this point, see Jason M. Pollack, Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports, 67 FORDHAM L. REV. 1645, 1706 (1999). Through the balance of this article, Pollack makes the contention that the MLB and NBA should grant similar powers to their commissioners, citing two examples. The first, from baseball, is the case of Steve Howe, discussed supra at note 26. The second, from the NBA, is the case of Latrell Sprewell, who attacked coach P.J. Carlesimo, earning a 12-month suspension from NBA Commissioner David Stern that was later reduced by an arbitrator to the remainder of that NBA season. Pollack argues throughout his article that in both cases, the arbitrators’ decisions to reduce the penalties were based on nothing more than the arbitrators’ different notions of fairness and betrayed the traditional notion of judicial deference to sports commissioners’ powers to uphold the integrity of their sports.
The NBA similarly grants the commissioner strong authority to exert disciplinary measures, particularly when the integrity of the league is in question. As with the NFL, the commissioner receives his authority from the league’s collective bargaining agreement, particularly Article VI (setting player conduct rules) and Article XXXI (setting grievance and arbitration procedures). Perhaps the most important provision, § 12 of Article VI, which gives the commissioner the power to promulgate “rules governing the conduct of players on the playing court,” is also the most controversial. In recent years, NBA Commissioner David Stern has attempted to use this power to institute a league dress code and to change the type of basketball used in NBA games.

The question raised by these policies is whether such rule changes are fit into Stern’s textual powers, and if they are inapposite, whether Stern still has authority to issue such policies under the National Labor Relations Act (NRLA). The NRLA allows commissioners to make unilateral changes that do not affect “wages, hours, and other terms and conditions of employment.” At least one commentator has argued that a dress code is a permissive subject of collective bargaining, rather than mandatory.

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38 NBA Collective Bargaining Agreement, article XXXI, section 1(b)(ii) (giving commissioner authority to take action to effect the “preservation of the integrity of, or maintenance of public confidence in, the game of basketball”).
39 Footnote on baseball and football’s relative strength on this provision.
41 The “new ball” was introduced at the beginning of the 2006-07 season. The league claimed that it had “subjected the ball to a rigorous evaluation process that included laboratory and on-court testing.” However, player response to the “new ball” was overwhelmingly negative. See, e.g., Shaq: ‘Whoever [changed ball] needs to be fired, ESPN.com, Oct. 3, 2006, http://sports.espn.go.com/nba/news/story?id=2610976. Stern decided to return to the old ball just two months after the switch.
meaning that it could be unilaterally imposed by the commissioner. In contrast, since a different ball is a condition of employment, it would be a mandatory subject of collective bargaining, and thus outside of Stern’s authority, unless it was deemed to be granted to him in Article VI, section 12 of the CBA. Stern’s aggressive actions over the course of the past three years are indicative of the broad rule-making authority that he enjoys under the NBA’s collective bargaining agreement, an authority that distinguishes him from his peers in baseball and football.

b. Internal and External Pressures

As explained in the previous section, the textual authority enjoyed by sports commissioners is similar across professional baseball, football, and basketball. Therefore, something else must account for the disparities in authority, priorities, and success that exist between commissioners between the three sports, as well as different commissioners within the same sport. Bud Selig’s textual authority is largely the same as Kenesaw Mountain Landis’, yet Selig is widely considered less authoritative and powerful than Landis. The first explanation for this “authority gap” may be seen in the internal and external pressures that commissioners endure throughout their tenure, as evidence clearly shows that Selig faces far more resistance to his agenda than Landis ever encountered.

Generally, internal pressures present themselves from two separate fronts – players’ unions and owners. External pressures present themselves primarily in the form

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44 Id. The author argues that the “new ball” policy exceeded Stern’s authority, as it met neither the “player conduct” condition of his rule-making authority under the collective bargaining agreement, nor his ability to unilaterally change permissive subjects of collective bargaining under the NLRA.
of public opinion – in the form of legislative intervention, fan attitudes, and editorial opinions.

i. Internal Pressures from Other Actors in the Sport

Pre-Selig

Landis enjoyed not only broad textual authority to wield disciplinary authority over baseball, but also an internal mandate. Baseball’s owners were desperate to bring legitimacy to the scarred National Pastime. Since the players’ union was decades away from achieving collective bargaining power, there was no real organized opposition from the players to Landis’ agenda, making his decisions, though “‘inconsistent, arbitrary and unfair … final.’” Without question, Landis’ textual authority expanded exponentially due to the internal mandate that he enjoyed.

The internal atmosphere had changed greatly by the mid-1970s and Bowie Kuhn’s reign as commissioner. The union had strengthened in power, and thus, the Commissioner’s powers were limited by collective bargaining. In addition, the presence of the union had complicated the business of baseball substantially, and much of the business-related strife in the game boiled down to confrontations between the players’ union and the owners. Kuhn often assumed the role of a mediator between the two sides. Several times, Kuhn broke gridlocks between the union and the owners by

45 See note 10, supra.
46 The first players’ union was founded in 1885, with three other attempts to organize in 1900, 1912, and 1946. Each attempt failed to build a cohesive, powerful organization. It was not until 1965, when the players hired economist Marvin Miller to represent their interests. Three years later, they successfully negotiated a collective bargaining agreement – the first such agreement in professional sports history. See MLBPA History, http://mlbplayers.mlb.com/pa/info/history.jsp.
48 Kuhn describes his experiences as mediator between the two sides in his autobiography. BOWIE KUHN, HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER (1987). Notable examples of labor crises under Kuhn’s watch include outfielder Curt Flood’s Supreme Court case aimed at ending baseball’s
forcing the owners’ hand in negotiations, helping to strengthen the union in many respects.49 This was due, in large part, to the fact that legal protections in favor of the union sapped most of the meaningful impact that any of Kuhn’s actions could register.50 By the end of the 1980s, with the emergence of Fay Vincent as commissioner, owners had tired of the commissioner’s influence over labor negotiations. The mandate that Landis enjoyed had reversed on both sides – the players had exceptionally strong and coordinated leadership with solid legal protection from commissioner intervention, while the owners had rebelled against the influence of the very office that had once saved the game.51

Selig

As a result, Bud Selig, owner of the Milwaukee Brewers, became interim commissioner in 1992 when Vincent resigned. Handpicked by the owners,52 Selig was

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49 Kuhn’s actions would infuriate owners, who later made him a target of their frustrations over perceived misjudgments in bargaining. KUHN, supra note 46, at 360.

50 In labor negotiations, the legal protections afforded to the union meant that the commissioner could typically only use his “best interests” powers to force owners to the bargaining table. This disparity in authority proved to be stark in 1981, during a long players’ strike. As Kuhn writes in his memoirs, “I could certainly keep the PRC negotiating, even if they were otherwise disposed … but I had no power to direct a federally protected labor union to do anything.” Id. at 342. Kuhn describes his frustration at the lack of power over the players as “the Landis myth,” implying that with Landis-type powers over the union, “there would have been no strike.” Id. at 353.

51 Vincent summarized the position of owners after a no-confidence vote forced him into resignation in September 1992. “[S]ome want the commissioner to put aside the responsibility to act in the ‘best interests of baseball,’ some want the commissioner to represent only owners, and to do their bidding in all matters. I haven’t done that, and I could not do so, because I accepted the position believing the commissioner has a higher duty and that sometimes decisions have to be made that are not in the interests of some owners.” Resigning ‘in the Best Interests of Baseball,’ N.Y. TIMES, Sept. 8, 1992, at B12. However, Vincent’s predecessor, A. Bartlett Giamatti, had expressed dismay over the labor situation, which allowed the commissioner to exercise power over the owners, yet not the players. Giamatti said of the situation, “[w]hy should I involve myself in a process in which I hold moral suasion over only one side?” Zimbalist, supra note 21, at 146.

52 Selig had strong relations with each owner in the sport, according to a statement he made at the time of his appointment. “I probably talk with every owner at least once a week, and some many times more than
given reduced power to intervene in business and labor matters, and accepted the reduced powers as expressing the original intention of the “best interests” clause, which he claimed was never intended to apply to all business matters.\textsuperscript{53}

Just two years into Selig’s term, the 1994 players’ strike resulted in the cancellation of the World Series for the first time in 90 years.\textsuperscript{54} In the months leading up to the strike, according to one author, the climate was characterized by a “seventeen-month delay in starting negotiations … confusion over who was the commissioner and what was his role … turnover of PRC chiefs … imprudent implementation of unilateral actions that violated labor law.”\textsuperscript{55} While the owners had accused Kuhn of bending their will in order to put baseball games on the field, Selig and the owners stood firm in 1994, and with the union refusing the budge, a stalemate ensued. Without a strong commissioner’s hand to force a compromise, the strike lasted until just before 1995’s opening games, and only ended after a federal injunction against the owners.\textsuperscript{56} Overall, the strike was a financial disaster and public relations nightmare for the entire sport.\textsuperscript{57}

\textsuperscript{53} Zimbalist, \textit{supra} note 21, at 145.

\textsuperscript{54} After originating in 1903, the World Series did not take place in 1904, when New York Giants manager/owner John McGraw refused to legitimize the American League by agreeing to engage in the competition. At the time, McGraw said, “[w]hen we clinch the National League pennant, we'll be champions of the only real major league.” Gerry Fraley, \textit{Rivalry wiped out 1904 World Series}, \textit{DALLAS MORNING NEWS}, Sept. 15, 1994, at 12B.

\textsuperscript{55} Zimbalist, \textit{supra} note 21, at 149-50.

\textsuperscript{56} Finding impending “harm to the public, the players, and the NLRB,” Judge Sonia Sotomayor issued an injunction ordering the owners to implement the Basic Agreement of 1990. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246, 261 (S.D.N.Y. 1995).

\textsuperscript{57} The owners lost an estimated $500 million in revenue, while the players forfeited $250 million in salaries. Daniel C. Glazer, \textit{Can’t Anybody Here Run This Game? The Past, Present and Future of Major League Baseball}, 9 \textit{SETON HALL J. SPORTS L.} 339, 363 (1999). In addition, the strike ended the promising seasons of the first-place Montreal Expos and Cleveland Indians, as well as the potential record-breaking seasons of the San Diego Padres outfielder Tony Gwynn (challenging a 53-year old batting average record), the San Francisco Giants’ Matt Williams (challenging the single-season home run record), and Atlanta Braves pitcher Greg Maddux (who led the league with a 1.56 ERA). Michael Silverman, \textit{Leaders will be biggest losers}, \textit{BOSTON HERALD}, Sept. 15, 1994, at 105.
While the internal forces of the owners and the players’ union sapped Selig’s authority during the 1994 strike, they also limited his ability to take meaningful steps to counter baseball’s growing drug problem. The extent of widespread anabolic steroid use by baseball players throughout the 1990s was not revealed until the 2000s. The period of 2002-2007 saw an avalanche of damaging news, including confessions by players such as former MVPs Jose Canseco and Ken Caminiti, and allegations against star players such as Barry Bonds, Roger Clemens, and Jason Giambi, among others. Selig commissioned former U.S. Senator George Mitchell to examine the extent of performance-enhancing drug use throughout baseball’s recent history and issue a report and recommendations.

The Mitchell Report found that baseball had failed to address the steroid problem during the first 10 years of Selig’s term as commissioner for a variety of reasons. For one thing, action on the steroid front was never a priority during the labor negotiations. While Selig had proposed a drug program in early 1994 during the period preceding the players’ strike, Mitchell’s interviews revealed that after the union rejected the program, Selig and the owners did not press the issue, as “resolution of the economic issues that had led to the stoppage of play took priority.” It was not until 2001, when external forces began to push baseball’s internal forces, that Selig was able to implement mandatory minor league testing, and not until 2002 that baseball’s first major league

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59 Tom Verducci, Totally Juiced, SPORTS ILLUSTRATED, June 3, 2002, at 34.
60 See, e.g., Sam Donnellon, Don’t let steroids turn Cooperstown into Hall of Shame, PHILADELPHIA DAILY NEWS, Jan. 15, 2008, at 65.
61 Dave Sheinin, MLB to Announce Steroid Investigation, WASHINGTON POST, March 30, 2006, at E01.
62 Selig’s program called for “drug treatment,” with no random testing, but with testing for players for whom there was “reasonable cause” to suspect of drug use, and screening of drug use during each player’s examination during Spring Training. MITCHELL REPORT, at 43.
63 Id.
testing program commenced. With the players’ union unwilling to compromise on privacy issues without concessions on other bargaining matters, and the owners oriented completely on financial issues, Selig had no internal mandate to press the issue performance enhancing drugs throughout the 1990s.

**NFL and NBA Internal Forces**

Both the NFL and NBA commissioners’ offices are also guided by the internal forces of the players’ unions and the owners. However, neither of the two unions has achieved the level of bargaining strength as the MLB Players’ Association.

In the NFL, the commissioner is able to initiate a much more proactive strategy than in baseball, particularly in the realm of marketing and business. This influence emanates from the days of Pete Rozelle, who served as commissioner of the league from 1960 until 1989. During Rozelle’s tenure, he played an integral role in laying the groundwork for the NFL’s expansion from a secondary sport to an international brand. Some of Rozelle’s important projects included merging with the AFL, the creation of the Super Bowl, and the launch of the successful *Monday Night Football* telecast. Due to a mixture of political skill and the fact that many owners shared his goals, Rozelle was able to exercise a substantial amount of control over his projects, including lobbying for the lead announcer of *Monday Night Football*, Howard Cosell. Rozelle would not have

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64 *Id.* at 44-46.
66 Rozelle gained respect and deference from the owners, due to both his business-related success stories and his personal toughness. His biography details several instances in which Rozelle stood firm to confrontations with owners such as George Halas and Wellington Mara, and how such episodes “helped convince [the owners] to respect him so much.” *Id.* at 107 (quoting Frank Gifford).
67 Cosell would go on to announce *Monday Night Football* from its inception in 1970 until leaving the program in 1984. Sportswriter Tony Kornheiser, who eventually would serve as an announcer on *Monday Night Football* in 2006, wrote, “Cosell became so big that he could no longer cover the story, because he
been able to accomplish his intricate vision for his business strategies if he was not able to get the backing of football’s internal forces.

Similarly, the NBA’s David Stern has excelled at managing the internal forces of basketball, particularly in extending his authority to make marketing decisions. Throughout his tenure, Stern has succeeded in shaping the will of the owners and players to accede to his vision of how to best strengthen the finances of the league. Additionally, the NBA players’ union has not been able to aggregate the level of bargaining power as baseball’s.\textsuperscript{68} As a result, Stern enjoys a broad ability to impose discipline on players, either through disciplinary sanctions or proactive programs such as the league dress code,\textsuperscript{69} as well as authority to guide the owners through his plan of marketing the league. Most recently, Stern announced his decision to pass NBA TV, the league’s television station, and other digital rights to the Turner Broadcasting System.\textsuperscript{70} Stern championed the effort,\textsuperscript{71} revealing that his mandate from the owners to make decisions in the “best interests” of the league’s financial success is quite broad.

\textit{ii. External Pressures from Fans and the Media}

External factors also play a large role in determining the commissioner’s agenda, since public opinion can provide indications of the league’s financial future or potential legislative occurrences. As has been clear through history, a commissioner with broad public backing for his initiatives obtains leverage over the internal forces of his sport, which is often the difference between success and failure.

\textsuperscript{68} In 1999, the NBA owners succeeded in convincing the union to agree to a salary cap system with a “luxury tax” imposed on teams that exceeded the level of the cap. \textit{See, e.g.}, Frank Swoboda, \textit{This Round May Go to Owners}, WASHINGTON POST, Jan. 8, 1999, at C5.

\textsuperscript{69} \textit{See} Part III, \textit{supra}.


\textsuperscript{71} \textit{Id.}
Selig

The office of the commissioner was created in an atmosphere of public outrage over the 1919 World Series. No question existed in the minds of the owners, the players, or the fans of the sport as to Landis’ priorities upon taking office, and as discussed in Sections II and III, he enjoyed an overwhelming mandate to clean up the sport.

By the time Selig assumed office in 1992, his mandate from the outside world was clear: avoid another labor stoppage. After a long strike in 1981 and relatively brief work stoppages in 1985 and 1990, public frustration with both the union and the owners had risen considerably. Selig had not won many supporters either, at least in the U.S. Senate, as Senator Howard Metzenbaum criticized Selig heavily for accepting the reduced “best interests” powers of the commissioner’s office. Metzenbaum said this would disable the commissioner from effectively protecting the fans from the greed of the owners, who wielded an antitrust exemption from federal prosecution. When the players strike resulted in the cancellation of the 1994 World Series, Selig was eviscerated in the media. His image has yet to recover fully, and perhaps never will.

72 Pervasive public sentiment was that the game had become corrupted by greedy owners and greedy players, and many owners and players did little to rebut the notion, although some seemed saddened. Cardinals President Stuart Meyer said, “[w]e have to stop taking ourselves so darned seriously,” while the Padres Tony Gwynn noted that “the game has changed … [i]t’s all about the money.” Mike Eisenbath, Money matters; Baseball picture is dominated by green, ST. LOUIS POST-DISPATCH, May 16, 1994, at 1D.


74 Id. Baseball has enjoyed its antitrust exemption since the Supreme Court’s decision in Federal Baseball Club v. National League, 259 U.S. 200 (1922). Justice Holmes, writing for the unanimous Court, said, “The business is giving exhibitions of baseball, which are purely state affairs.” While the business of baseball has expanded exponentially in the decades since Federal Baseball, the Supreme Court has affirmed the precedent on several occasions, most notably in Flood v. Kuhn, 407 U.S. 258 (1972). In addition, despite several threats by Congress to rescind the exemption, it remains in effect to the present day, though it has occasionally been narrowed. See, e.g., Salil K. Mehra & T. Joel Zuercher, Striking Out “Competitive Balance” in Sports, Antitrust, and Intellectual Property, 21 BERKELEY TECH. L.J. 1499, 1504 (2006).

75 One newspaper reporter called Selig a “pretending commissioner.” Bud Shaw, Put a cap on baseball’s idiocy, CLEVELAND PLAIN DEALER, Sept. 15, 1994, at 1D. In another, Selig was analogized to Dr. Jack Kevorkian, the well-known doctor who assisted patients in committing suicides. Hubert Mizell, Greed
The public outcry over baseball’s labor problems tore attention away from steroids, creating no public mandate on Selig to attack the problem. In the late-1980s, steroids were looked at by most fans and media as a non-issue. Though Vincent had added steroids to baseball’s banned substances list in 1991, no testing began until 2002, and in the interim, there was very little outcry over the inaction. Even if Selig wanted to tackle the steroid problem, a goal of which there is little indication, he would have been hard-pressed to use his time and energy on that problem while the general public, media, and the legislature was focused on economic issues.

Currently, the situation is reversed. Selig has been called to testify in front of Congress regarding baseball’s steroid problems several times. Steroids and other performance enhancing drugs like human growth hormone and ephedra are dominant issues among baseball fans and the news media. The sheer force of public opinion not only gave Selig the political capital needed to pursue a mandatory testing policy in 2002, but it gave him the mandate to substantially increase the penalties for violation of
the terms of the drug program, one of the few “victories” for the baseball establishment over the players’ union in recent memory.

Through Selig’s term, we have seen the somewhat unique power that Congress can wield over the Commissioner through the antitrust exemption. Just a short time into Selig’s tenure as commissioner, he was called to testify in front of Congress regarding the union’s contention that the antitrust exemption limited their ability to bargain effectively, since they could not sue the owners under antitrust law. Ultimately, a measure to repeal the exemption failed in Congress. When the steroid problem came to light, Congress called Selig back to Capitol Hill to testify before the House Government Reform Committee. Once again, Congressmen warned of possible revocation of the antitrust exemption if baseball’s drug problems were not remedied. In sum, Congress’ control of baseball’s antitrust status, along with a unanimous guilty verdict in the court of public opinion, caused massive changes in the structure of baseball’s drug programs.

Stern

Like Selig, NBA Commissioner David Stern’s mandate is also guided by the power of public opinion. Overall, Stern has enjoyed strong popularity among fans and

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81 Currently, the drug policy calls for a 50-game suspension for a first positive test for steroids, a 100 game suspension for a second positive test, and a lifetime ban for a third test. Baseball Owners Approve New Steroid Policy, L.A. TIMES, Nov. 18, 2005, at D3.
82 Mike Dodd, Selig, Fehr square off on Capitol Hill, BOSTON GLOBE, Sept. 22, 1994, at 4C.
83 Claire Smith, Owners Take Lead in Senate Debate, but Players Hope for Comeback, N.Y. TIMES, Oct. 1, 1994, at Section 1, page 34.
84 Panel One of a Hearing of the House Government Reform Committee. Subject: Baseball and Steroids, 109th Cong. (2005) (statement of Sen. Jim Bunning) (“If baseball fails to fix this scandal, then there are a lot of things we and do to get their attention: By amending the labor laws, repealing the outdated anti-trust exemption that baseball alone enjoys and shining the spotlight of public scrutiny.”)
the media,\textsuperscript{85} which gives him a certain level of political capital in his dealings with the owners and players’ union.

In recent years, however, more negative external forces have somewhat controlled the Stern agenda. For several years in the late 1990s and early 2000s, several high profile behavioral incidents involving NBA players brought close scrutiny to the league and its image, and Stern exercised authority premised under the CBA to restrict offensive player speech\textsuperscript{86} and sanction on-court violence.\textsuperscript{87} In response, Stern instituted the league’s dress code (discussed in Section III(a), \textit{supra}) and instituted rules to strictly penalize arguing over calls or publicly criticizing referees.\textsuperscript{88} In fact, Stern’s reactions were seen as somewhat dictatorial, and perhaps in excess of both his powers as commissioner and his mandate from the public.\textsuperscript{89}

More recently, Stern has become embroiled in a tussle with the Seattle legislature regarding the status of the Seattle Supersonics in what was a reminder of the limits of the

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\textsuperscript{86} In 2000, Philadelphia guard Allen Iverson released a rap CD with a song titled “40 Bars,” which contained controversial lyrics described as misogynistic, violent, and homophobic. Stern met with Iverson to strongly urge him to alter the lyrics, saying a statement that “there is no constitutional right to participate in the NBA and I have the power, under the Collective Bargaining Agreement, to disqualify players who engage in offensive conduct – including inappropriate speech. Celeste E. Whittaker, \textit{Iverson to change lyrics after Stern talk}, COURIER-POST (CHERRY HILL, NJ), Oct. 13, 2000, at 1.

\textsuperscript{87} The most notable episode of on-court violence occurred in Detroit during a game between the Detroit Pistons and Indiana Pacers on Nov. 19, 2004. A confrontation developed between Pacer forward Ron Artest and Pistons center Ben Wallace, which culminated in Artest and Stephen Jackson physically engaging with the crowd. Stern issued record suspensions. Artest was suspended for 86 games, Jackson for 30, Pacer Jermaine O’Neal for 25, Wallace for six, Pacer Anthony Johnson for five, and four other players for one game. Stern remarked, “We must develop and implement new NBA rules to assure that the unavoidable confrontations likely to occur in the heat of competition are not allowed to escalate to the level we witnessed…” \textit{NBA Announces Suspensions from Pistons-Pacers Game}, NBA.com, Nov. 21, 2004, available at http://www.nba.com/news/pacers_pistons_041121.html.

\textsuperscript{88} Chris McCosky, \textit{Stern: Commish or tyrant?}, DETROIT NEWS, July 24, 2006, at 2D.

\textsuperscript{89} Id. (“[I]magine a system where a commissioner, who is hired and put into office by the owners, has the power to fine the owners he serves.”)
bully pulpit of the commissionership. After buying the Seattle franchise in 2006, Oklahoma City businessman Clay Bennett immediately began seeking a new arena, threatening to move if public funding for the project cannot be achieved. In refusing to offer public funding, the Seattle City Council also voted 8-0 to prevent the team from exiting its lease until October 2010. Stern has advocated strongly for Bennett throughout the process, earning him the enmity of many in Seattle who revile Bennett.\footnote{Jim Moore, \textit{Stern presents himself as a Bennett accomplice}, \textit{Seattle Post-Intelligencer}, Nov. 8, 2007, at D1.} Stern spoke out on Bennett’s behalf, but at the 2008 All-Star Game, said that he had “accept[ed] the inevitability at this point. There is no miracle here.”\footnote{Peter May, \textit{Stern reveals Sonics preparing to bolt Seattle}, \textit{Boston Globe}, Feb. 17, 2008, at C11.} During this tussle, Stern has announced his plan to expand the NBA to five European countries within the next 10 years, which has prompted some in the media to criticize Stern for focusing on “romantic European getaways” rather than issues like the Seattle franchise and struggling teams such as the Charlotte Bobcats and New Orleans Hornets.\footnote{Michael Hunt, \textit{Stern looks overseas but has work to do at home}, \textit{Milwaukee Journal Sentinel}, Feb. 18, 2008. Another reporter described Stern as “dream[ing] big without foundation.” Scott Howard-Cooper, \textit{Around the League: New Orleans needs a boost at the gate}, \textit{Sacramento Bee}, Feb. 24, 2008.}

c. \textit{Personality Factors}

The final defining characteristic of commissioner power is personality – which entails relationship-building skills, attitude toward the office, and leadership style. A commissioner cannot define the office entirely on his own, as he must respect both the limits on his textual authority as well as the external and internal factors that guide him in decision-making. However, personality factors can influence both how a commissioner interprets the words that give him his textual authority, as well as how skilled he is in convincing external and internal entities of the correctness of his interpretation.
Throughout this examination of commissioner power, we have seen how the exercise of power has been influenced by the character of the men who have occupied the office. While the American people scarred by the events of the 1919 World Series desired an authoritarian figure to clean up the sport, and while the owners were absolutely willing to find such a figure, their wishes would have been for naught if a dictator like Kenesaw Mountain Landis were passed over for a consensus builder like Bud Selig. For Landis’ personal flaws, it is difficult to imagine a better figure to embody the course that baseball wished to take in the 1920s than the white-haired, craggy-faced former judge with a reputation for firm, sometimes harsh judgment. Likewise, a candidate such as Landis, with a lack of business experience, may not have succeeded if given the responsibility to navigate a complicated labor dispute, such as the 1994 strike.

In all three sports, it is clear that the Landis model can no longer be effective in professional sports. The games have increased exponentially in complexity. Powerful unions exercise substantial control over changes to the sports, especially in baseball, and a commissioner can no longer get by on sheer force of will.

However, a study of Selig reveals deep flaws as well. While professional sports require a commissioner who is generally apt to negotiation and consensus building, Selig, from the beginning of his term as commissioner, has failed to meaningfully separate himself from the team owners. In addition, he lacked foresight on the issue of steroids, which in the eyes of many fans, has tainted much of the last two decades of the sport.

In many ways, David Stern represents a blend of the best of Selig and the best of Landis. While not as domineering as Landis, Stern does not shy away from substantial punishments and controversial rule changes. And while not possessing Selig’s natural
inclination to build consensus, he has strong business vision, along with a background in the law. In addition, while Stern was associated with the NBA for nearly 20 years prior to becoming commissioner,\(^{93}\) he was not an owner, unlike Selig. It is difficult to imagine a better model candidate for a professional sports commissioner, and as would be expected, Stern has had an extraordinarily successful career leading the NBA.

### IV. Commissioner Authority in Practice: A Case Study of Roger Goodell

*He gets an A-plus with me. Right now he’s leading 21-0 in the first quarter.\(^{\text{”}}\)*

- Ralph Wilson, Owner of the Buffalo Bills

On August 8, 2006, the NFL owners selected Roger Goodell to be the eighth commissioner in the 86-year-history of the NFL.\(^{94}\) Although the popular assumption held Goodell to be the “status quo” choice\(^{95}\), Goodell’s tenure has already been marked by several aggressive business decisions; in his first year as commissioner, he has already shut down NFL Europe, presided over the first NFL regular-season game played overseas, dealt with the NFL Network’s now infamous stand-off with “Big Cable”, and “unceremoniously sacked” a preseason game to be held in China.\(^{96}\) While all of these affairs will have significant long-term implications for the League, the “signature move” of Goodell’s first year as commissioner has been his approach to player discipline. The now-infamous “Player Conduct Policy” has already been employed to suspend four NFL players for off-field conduct. As the League currently enjoys an unprecedented

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93 Stern began working for the NBA in 1966 as outside counsel, then joined as General Counsel in 1978, becoming Executive Vice President in 1980.


95 King, n. 92.

commercial boom, the internal, media, legal, and public responses to these decisions will have a significant impact on whether or not the NFL continues to be the “most popular sport in America.”

a. The Selection Process

Goodell’s predecessor, Paul Tagliabue, served as the NFL Commissioner for seventeen years, from 1989 to 2006. Tagliabue presided over the most prosperous period in NFL history. He inherited a league reeling from two work stoppages in the previous seven years and ushered in seventeen years (and counting) of labor peace. Twenty teams moved to new stadiums, there were expansions to Jacksonville, Charlotte, Cleveland and Houston, and the number of minority coaches increased. On the financial side, the NFL saw an unprecedented growth in its revenue from television contracts. Television rights to NFL games are now significantly more economically valuable than the rights to other professional sports leagues. In Tagliabue’s first year, the league’s television contracts brought them $473 million. The contracts were last restructured in 2006 and the NFL now receives a total annual revenue of $3.75 billion.

In other words, each team receives about $70 million more per year from television revenue than they did at the beginning of Tagliabue’s tenure.

100 Will Tagliabue Get Into Hall On Second Try?, n. 97.
Tagliabue announced in March 2006 that he would end his seventeen-year tenure at the end of July.\textsuperscript{104} Roger Goodell, the NFL’s Chief Operating Officer, was quickly tabbed as the “insider” candidate and frontrunner, a position he would hold throughout a four-month search run by Pittsburgh Steelers chairman Dan Rooney and Carolina Panthers owner Jerry Richardson.\textsuperscript{105} Goodell had spent twenty-four years in the league office and was known as Tagliabue’s right hand man.\textsuperscript{106} In his most recent role, he helped negotiate a contract with the NFL Referees Association, dealt extensively with expansion and stadium construction issues, helped create NFL International, and oversaw the administration of the instant replay system.\textsuperscript{107} This broad range of experiences made him an overwhelming favorite amongst the owners – Goodell’s election process was significantly less complicated than the previous selections of Tagliabue and Rozelle.\textsuperscript{108} Small market owners such as Ralph Wilson of the Buffalo Bills voiced some mild opposition, arguing that Goodell was likely to perpetuate what they perceived as a league bias in favor of the large-market teams,\textsuperscript{109} but after five ballots and three hours, Goodell became the new commissioner of the NFL.

Although Goodell worked closely with Tagliabue for years, his personality differs from that of his predecessor. Goodell’s outgoing, sociable, and media-friendly style make him the “anti-Tagliabue” in many respects, and his style has drawn comparisons to


\textsuperscript{107} Corbett, n. 103.

\textsuperscript{108} Corbett, n. 103.

another former public relations man-turned-NFL Commissioner: Pete Rozelle.\textsuperscript{110} Tagliabue, a former corporate attorney, was perceived as a formal, buttoned-up executive, but Goodell seems to be more of a “regular-guy commissioner”.\textsuperscript{111} Despite his low-key approach, owners and players alike have cited Goodell’s decisiveness and toughness.\textsuperscript{112} He’s been described as simultaneously friendly and outgoing yet firm and demanding, and at least one commentator claims that he has “reinvigorated the most powerful office in the league”.\textsuperscript{113}

\textit{b. Goodell’s First Year}

Goodell’s first year as commissioner has been marked by an aggressive approach to several issues facing the NFL. Perhaps more than any other commissioner, Goodell has capitalized on the full scope of his textual authority, internal mandate, and captivating personality. This Section explores some of the major examples of this activity.

\textit{i. Player Conduct Policy}

On April 10, 2007, the NFL introduced a new Player Conduct Policy (PCP) to help control off-field behavior and preserve the league’s public image.\textsuperscript{114} Goodell cited the importance of the NFL being represented by “outstanding people as well as great football players, coaches, and staff”.\textsuperscript{115} He considered the new PCP to be “a further step in ensuring that everyone who is part of the NFL meets that standard [of responsible

\begin{itemize}
\item \textsuperscript{110}Dave Goldberg, \textit{All is good with Goodell, for now}, Associated Press. March 27, 2007. http://www.msnbc.msn.com/id/17804830/.
\item \textsuperscript{112}Corbett, n. 109.
\item \textsuperscript{115}Bell, n. 112.
\end{itemize}
behavior]. Over the next several months the NFL employed the policy to hand down multiple suspensions to notable NFL players like Pacman Jones, Tank Johnson, Chris Henry, and Michael Vick.

The framework of the PCP grants Goodell considerable leeway in determining appropriate punishments for player misconduct. The “General Policy” section of the PCP indicates that it penalizes “conduct detrimental to the integrity of and public confidence in the National Football League.” The policy covers players, all full-time employees of the NFL and its teams, and players that have been selected in the NFL Draft. Teams can also be punished when their players and employees violate the policy. After a lengthy list of examples of prohibited conduct, the Policy explains that such conduct shall be punishable by “fine or suspension at the discretion of the Commissioner.” Any person disciplined under the authority has a “right of appeal, including a hearing, by the Commissioner or his designee.” Enforcement of discipline will be stayed pending completion of the appeal.

Textual Authority:

The PCP appears to rest at least in part on Goodell’s power under the NFL Player Contract to discipline players for “conduct detrimental to the League”, discussed in Section III. It is interesting to note the similarities between the PCP and Rozelle’s failed

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116 Bell, n. 112.
119 Conduct Policy, n. 116.
121 Conduct Policy, n. 116.
122 Conduct Policy, n. 116.
attempt to institute NFL drug testing.\(^{123}\) In striking down the drug testing program, an arbitrator ruled that the commissioner’s authority under the CBA was more disciplinary than preventive. This could explain the difference between the two policies – the PCP is a disciplinary system aimed at punishing off-field conduct pursuant to delegated commissioner, thereby placing it outside the realm of topics which must be collectively bargained.\(^{124}\)

**Internal and External Pressures:**

The Player Conduct Policy quintessentially illustrates the affect that internal and external pressures have on commissioner authority. The NFL has always had some type of framework for disciplining player off-field misconduct, but Goodell’s PCP is far stricter than that of his predecessors.\(^{125}\) The new policy was a natural response to growing public dissatisfaction and perception of rampant off-field misconduct by NFL players. In the fifteen months preceding the implementation of the PCP, approximately fifty players and coaches were arrested.\(^{126}\)

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\(^{123}\) Bell, n. 112.

\(^{124}\) The NFL Player Conduct Policy has not yet been challenged by the players union, and thus it is unclear whether an arbitrator would uphold the policy as a valid exercise of the commissioner’s authority. At least one commentator believes that there could be a series of lawsuits challenging the legitimacy of the PCP. See Barry Wilner, *Goodell Gets Tough, Protects NFL Brand*, Associated Press. April 11, 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/04/10/AR2007041001191.html. Since the NFL commissioner ultimately decides any appeal of his decisions, the success of a legal challenge is debatable.

\(^{125}\) As an example, Baltimore Ravens LB Ray Lewis was indicted for two murders in 2000 but was not suspended by the NFL. See Michael McCann, *Report: NFL to Suspend Vick for 2007 NFL Season*, SPORTS LAW BLOG, Aug. 13, 2007, http://sports-law.blogspot.com/2007/08/report-nfl-to-suspend-michael-vick-for.html. As an example of the impact of external pressures, Mississippi law professor Michael McCann notes, “the NFL has come under increased fire over the last couple of years for player misbehavior, and thus comparing what allegedly occurred in 2000 and 2007 may not be contextually fair”.

\(^{126}\) This group includes an astonishing nine members of the Cincinnati Bengals. Len Pasquarelli, *Expect Goodell to crack down on poor behavior*, ESPN.com. March 26, 2007. http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=2812799. As one AFC owner wryly observed, “Not to crucify one team, but the stuff with the Bengals has just been ridiculous… They talk about the 'Bengals' stripes' in another connotation now. Unfortunately, it's not funny to us.”
As Goodell was being installed as commissioner, fans and media outlets alike were clamoring for the league to address this discipline problem. Although Tagliabue led the league to an unprecedented height in popularity and commercial success, the rash of player arrests caused some worry that it would erode fan support for the league. Additionally, over the last twenty years media coverage of professional sports has exploded, with the Internet, talk radio, and the ESPN family of channels combining to ensure that any allegations of player misconduct will receive their turn on the 24-hour sports news cycle.

A perceived problem with off-field misconduct, whether real or imagined, would not only threaten the integrity of the League – it could naturally lead to fan apathy, lower television ratings, decreased merchandise sales, and media ridicule. Finally, the recent Mitchell Report saga illustrates that when fan and media disillusionment coalesce, congressional action will not be far behind. Thus, the relevant external pressures weighed heavily on Goodell to take decisive action with regard to player misconduct, and as explained in Section III, this pressure implicitly broadened Goodell’s authority to act.

Moreover, the external pressures discussed above inherently created an internal league mandate to fix the problem. Players and owners share an interest in the continued financial success of the league, and they both called for Goodell to reexamine the policy. In fact, Goodell’s PCP has even enjoyed the public support of Gene Upshaw,

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127 As Patriots’ owner Robert Kraff pointed out, “We have to be careful. People in America can’t relate to overindulged athletes not acting responsibly.” Bell, n. 112.
129 See n. 124-125 for examples of owner support. Many players have also come out in support of the new PCP, although response has been mixed. Falcons offensive lineman Wayne Grady: “I think it’s going to save a lot of kids….it seems a little tough now, but in the long run I think it will pan out.” Corbett, n. 18.
the head of the players union.\textsuperscript{130} This internal mandate, coupled with the external forces mentioned above, broadened Goodell’s authority to implement the new PCP.

**Commissioner Personality:**

In addition, Goodell’s personal charm and consensus-building efforts have almost certainly broadened his authority to patrol player misconduct. Before implementing the PCP, Goodell sought out the input of the players union.\textsuperscript{131} These meetings He also met with groups of players and owners, allowing them to voice their opinions regarding the new policy.\textsuperscript{132} By involving all interested parties and taking their suggestions into account, Goodell maintained his internal mandate while lowering the chances that players would feel alienated by the new crackdown. Also, by getting the NFLPA to agree to the policy rather than unilaterally imposing it (as Rozelle unsuccessfully attempted to do with the drug policy), Goodell relied less on his commissioner authority and protected himself against a challenge from the players union.

Once the policy was officially adopted, Goodell’s personality continued to broaden his authority. Goodell met with every team’s players to personally explain the policy, clarify its strictures, and respond to concerns.\textsuperscript{133} This approach earned him the respect of at least some of the players; as Browns RB Jamal Lewis said, “if he didn’t [visit with us] and just put his foot down with his new conduct policy, people would think he’s just a hard-ass. By his coming to get our input, he portrayed the image of a regular

\textsuperscript{132} Maske, n. 129.
\textsuperscript{133} Corbett, n. 109.
guy to the Cleveland Browns today.\textsuperscript{134} It seems likely that these efforts by Goodell will allow him broad discretion in applying the policy that he might not have had otherwise.

\textit{ii. Early Applications of the PCP}

\textbf{Pacman Jones}

Goodell’s first disciplinary action under the PCP involved Pacman Jones. Jones faced felony charges in two states – he faced charges of obstructing justice in Georgia, which he worsened by failing to report the incident (in violation of NFL rules).\textsuperscript{135} He also faced charges stemming from an infamous incident outside a Las Vegas night club. As a result, Goodell suspended him for the entire 2007 season and gave him specific conditions that must be met before reinstatement.\textsuperscript{136}

In a letter to Jones, Goodell based his actions on his power to police “conduct detrimental to the game” and said that Jones’s actions “damaged the reputation of players throughout the league.”\textsuperscript{137} Criticism of the suspension revolved largely around the fact that Jones was suspended despite having not yet been convicted of any crime.\textsuperscript{138} However, under the PCP’s framework no conviction is necessary to trigger disciplinary action.\textsuperscript{139} Tellingly, Jones’s year-long suspension was one of the harshest suspensions in NFL history.\textsuperscript{140}

\textbf{Michael Vick}

\begin{footnotesize}
\begin{itemize}
\item[134] Corbett, n. 109.
\item[135] Bell, n. 112.
\item[136] Bell, n. 112. Although Jones was allowed to appeal his suspension to Goodell after the 10\textsuperscript{th} game of the season, the appeal was unsuccessful.
\item[137] Bell, n. 112.
\item[138] Bell, n. 112. Jones’ attorney, Manny Arora, has said that he would possibly challenge the suspension because it occurred before the court cases were resolved, but to date no challenge has occurred.
\item[139] It seems probable that Goodell’s broad “conduct detrimental to the game” power, combined with the NFL CBA’s designation that Goodell himself hear any appeal, means that he will be able to withstand any legal challenge.
\item[140] Cincinnati Bengals WR Chris Henry and Chicago Bears DT “Tank” Johnson have also been suspended under the PCP, but their cases add little to an analysis of commissioner authority and thus have been omitted.
\end{itemize}
\end{footnotesize}
The most infamous application of the PCP occurred conjunction with Michael Vick’s indictment. On July 17, 2007 Vick was indicted by a federal grand jury for allegedly sponsoring a dogfighting operation. On April 25, authorities raided Vick’s Virginia home and found evidence of dogfighting. Vick initially denied involvement, and as he contemplated a plea deal to avoid additional charges, Goodell ordered a league investigation into the matter to be conducted by a former U.S. Deputy Attorney General. Goodell instructed Vick to stay away from training camp and ordered the Falcons to withhold their own discipline until the league investigation was complete.

On August 24, Vick accepted a plea agreement in which he admitted to participating in the dogfighting ring. The NFL responded by suspending Vick indefinitely, although Goodell stated that he would review the status of the suspension after legal proceedings were entirely complete. In a letter to Vick, Goodell explained that “your actions in funding the betting and your association with illegal gambling both violate the terms of your NFL Player Contract[.] You have engaged in conduct detrimental to the welfare of the NFL and have violated the League’s Personal Conduct Policy.”

“Spygate”

NFL security confiscated a video camera and tape from a New England Patriots’ video assistant during the Patriots’ 2007 opener against the New York Jets. No one could

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142 Corbett, n. 109.
145 NFL suspends Vick indefinitely, n. 142.
have known it at the time, but this action marked the beginning of a controversy that stretched all the way into the following off-season.147

The Patriots were charged with videotaping the Jets’ defensive signals, in violation of league rules. Because NFL teams can be punished under the PCP for the violations of their employees, Goodell initiated an investigation into the alleged incident.148 Speculation ran rampant, as players and commentators alike wondered whether similar videotaping occurred during the three recent seasons when the Patriots were Super Bowl champions.149

Goodell fined the Patriots $250,000, fined coach Bill Belichick $500,000 (the maximum allowed under NFL rules), and ordered the team to forfeit its first-round draft choice the next season.150 He found the episode to be a “deliberate attempt to avoid long-standing rules designed to encourage fair play”.151 Some criticized the punishment as “soft” and revealing a “double standard”,152 in light of a hope that “the commissioner is just as hard on management as he’s been on individual players for making mistakes.”153 Goodell justified his actions, arguing that “the discipline I am imposing of a maximum fine and forfeiture of a first-round draft choice….is in fact more significant and long-

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147 The congressional investigation of Commissioner Goodell, Bill Belichick, and the New England Patriots is discussed in a later section.
151 Belichick draws $500,000 fine, but avoids suspension, n. 148.
153 Bengals QB Carson Palmer, n. 150.
lasting, and therefore more effective, than a suspension.”

The punishment was clearly within the broad discretion afforded Goodell by the PCP.

iii. Summary

The Player Conduct Policy was the centerpiece of Goodell’s first year as commissioner. It was enacted pursuant to his textual authority to discipline “conduct detrimental to the league” and agreed to by the NFLPA. The declining image of the NFL and heightened media scrutiny of player misconduct created broad external pressure for Goodell to address off-field behavior. Additionally, the players’ and owners’ agreed that the financial prosperity of the league hinged on the public perception of its players, resulting in an internal mandate authorizing Goodell to act. Goodell capitalized on his considerable interpersonal skills to continue to grow both of these mandates, and to implement a policy that satisfied the disparate interested parties. As a result of these three factors (textual authority, internal/external pressure, and commissioner personality), the PCP represents commissioner authority at its most expansive.

c. Other Issues from Goodell’s First Year

Goodell has been referred to as “the sport world’s ultimate brand manager.”

His chief concern to date has been protecting the NFL’s image and reputation, as illustrated by the Player Conduct Policy. Immediately after becoming commissioner, Goodell disbanded the NFL’s struggling overseas league (NFL Europa) and sacked a scheduled preseason game in China in order to protect the league’s international profile. In their place, Goodell planned a series of NFL regular-season games abroad –

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154 Belichick draws $500,000 fine, n. 148.
155 Kaplan, n. 94.
156 Kaplan, n.94.
the first NFL game ever played outside of North America took place in London during the 2007 season.\footnote{157}

In another attempt to “brand” the NFL, Goodell laid down several new media restrictions. News outlets can no longer post clips of more than 45 seconds per day from training camps and player interviews, aiding the league’s own online presence.\footnote{158} Photographers are now required to wear vests with sponsor logos during games. And Goodell has ordered owners not to talk to the media about labor or revenue-sharing issues, an unprecedented move this far away from the end of the CBA.\footnote{159} All of these moves can be seen as attempts by Goodell to prioritize the league’s interests above all else – in a year full of controversy, this has arguably been his trademark.

\textit{d. Revenue-sharing and the CBA}

Without question, the biggest challenge facing Goodell’s business vision will be restructuring the revenue-sharing system in a way that will appease both small-market and large-market owners.\footnote{160} The owners can opt out of the current collective bargaining agreement in November 2008, effectively making 2009 the last season of the deal with a salary cap. The potential disaster of an uncapped year cannot be overstated, with NFLPA head Gene Upshaw promising that if the league ever has an uncapped year, the players will never agree to one again.\footnote{161}


\footnote{158} Kaplan, n.94.

\footnote{159} Kaplan, n.94.


Currently, the top sixteen revenue-grossing clubs are required to share their revenue with the lowest sixteen grossing clubs. Small-market owners perceive the current revenue-system as inequitable. Evidence suggests that Goodell aims to confront the problem by appointing a mediator, rather than directly drafting an agreement that satisfies both ends of the owner spectrum.\textsuperscript{162} In an example of the intricacies of external pressure, Senator Charles Schumer has come out in support of Buffalo Bills owner Ralph Wilson, a small-market owner, while large-market owners such as the Dallas Cowboys’ Jerry Jones hold proportionally more support due to the size of their fan bases.

Goodell will be required to utilize each dimension of his commissioner authority in getting a new deal done. His current universal mandate among owners and players could be jeopardized if he attempts a resolution seen as overly benefiting either large-markets or small-markets. With interests that range from Ralph Wilson to Jerry Jones, Goodell will presumably have to use the consensus-building approach that has thus far earned him high marks. In addition, he should capitalize on external forces much like Tagliabue did in convincing the current owners to sign off on the previous revenue-sharing plan by arguing that it was essential to retain the league’s popular support. If Goodell can successfully resolve the revenue-sharing issue without reaching an uncapped year, it will further illustrate the broad power that he wields.

V. Placing Goodell on the Commissioner Spectrum

In this Section we will compare Commissioner Goodell to his colleagues in other sports (Landis, Stern, and Selig) discussed in Section III.

a. Landis

At first blush, the circumstances surrounding Landis’s and Goodell’s ascension to the commissionership could not be more different. Landis arrived at a moment when baseball’s future hung precariously in the balance following the 1919 Black Sox scandal – owners believed that the inadequate structure of the commissionership contributed to the game’s deficiencies, and the new Major League Agreement grew out of that belief. As a result, Landis received virtually “unlimited authority” to run the league as he saw fit, largely because of the new “best interest of the game” clause. Goodell, on the other hand, inherited a stable league which had employed only two commissioners over the previous 46 years. By selecting an insider like Goodell, the owners seemed to indicate that they wanted to continue in the direction established by Tagliabue. Both commissioners enjoyed considerable textual authority.

There is an interesting parallel between Landis’s efforts to curb gambling and Goodell’s crackdown on player misconduct. Both policies occurred within a context of broad media, fan, and internal support, and as a result both Landis and Goodell instituted broad changes that exposed players to tough penalties. The main difference between the two men hinges on their different personalities. Landis suspended and banished several players in his effort to police the sport’s gambling problem, but he did so in a dictatorial and combative manner. Indeed, *Milwaukee Am. Ass’n v. Landis* can be seen as implicit support for the idea that Landis rarely attempted to solicit input from players or owners.

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163 See Spink, n.9.
164 Baseball eventually shrank the commissioner’s authority by limiting the “best interest” clause, but this did not occur until long after Landis had left office.
He exercised his authority “frequently and to the fullest” during his tenure, and he established an independent Commissioner’s Office that did not mind offending players and owners through decisions he felt were in the best interests of baseball. In contrast, Goodell has solicited considerable input before making major decisions; during his first year, he even established a Player Advisory Council to advise him on a variety of issues.

Goodell and Landis each made getting tough on player misconduct a centerpiece of their early days in office, imposing stern disciplinary sanctions on players from the beginning. Both men initially had broad internal and external support which allowed them to utilize their commissioner authority to the maximum extent possible without much challenge. But Goodell’s inclusive approach has allowed him to exercise this authority while maintaining that broad support, while Landis’s mandate diminished as his iron-fisted rule alienated players and owners alike.

b. Stern

Like Landis and Goodell, NBA Commissioner David Stern institutes his share of disciplinary regulation. Over the last decade the NBA confronted media scrutiny and fan outrage over player misconduct analogous to that currently faced by the NFL. The NBA’s conduct problem differed to the extent that they involved on-court conduct such as excessive player complaining and violence, but the comparison remains apt.

Stern and Goodell each responded to these external forces by introducing new rules to control player behavior, and their efforts have been largely successful. As a

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166 See Spink, n.9.
result of the relatively weak NBA players union, Stern faces little opposition to his broad
efforts to impose discipline on players and regulate the image of the NBA.  Goodell’s
close relationship with Gene Upshaw affords him similarly broad leeway in regulating
player conduct – in fact, the NFLPA has supported every major decision of the Goodell
era. This parallel bodes well for Goodell’s efforts to intricately manage the image of the
league; while Stern possessed an internal mandate by default (due to the weakness of the
NBPA), Goodell created a comparable mandate through the force of his personality.

Stern and Goodell also both hold strong ideas about the business and financial
direction of the league. Stern has consistently been able to translate his vision for the
NBA’s future into official policy, through a unique blend of broad textual authority,
effective personality, and considerable public support. Under Stern, the NBA added
seven franchises, greatly increased revenue, expanded television exposure, launched
NBA.com and NBA TV, reformed the league’s management structure, and launched the
WNBA and NBA Development League. Global presence has been a goal of both men,
with Stern presiding over a period of vast internationalization in the NBA that Goodell
hopes to imitate. However, Stern inherited a league much less financially prosperous
than today’s NFL, which may have given him considerably more internal support for
bold and innovative business strategies. Goodell must be careful and measured in pursuit

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168 One example of this effort is the recent NBA dress code.
169 This could be a natural result of another similarity between Goodell and Stern – they both worked in
their league’s office for a number of years before assuming the role of commissionership. This is a
characteristic not shared by Landis or Selig, and not surprisingly, those two men do not possess Stern or
Goodell’s long term vision.
171 The 2005 Finals illustrate this trend, with six international stars featured in the game. David DuPree,
of his long-term business strategy for the NFL, as any significant departure from the Tagliabue era may be viewed suspiciously by the owners.

\textit{c. Selig}

Of all the commissioners discussed in Section III, Goodell’s selection process most closely resembles that of Selig. The propriety of making Selig, a former owner of the Milwaukee Brewers, the commissioner has been widely questioned.\textsuperscript{172} Similarly, Goodell was the ultimate “insider” at the time of his selection, and he enjoyed strong support from the owners. Both men began their reign as commissioner as a result of their close ties with the owners, although the relatively quick and uncontroversial selection of Goodell allowed him to avoid the negative media attention which surrounded the transition from Vincent to Selig.\textsuperscript{173}

As discussed \textit{infra}, Selig holds the least authority of the three major commissioners, a result of the three factors that have been discussed at length above. The 1994 strike and subsequent canceling of the World Series greatly reduced Selig’s authority in the court of public opinion, and his acquiescence to the owner’s reduction of the commissioner’s “best interests” power furthered speculation that he was little more than a “puppet for the owners.”\textsuperscript{174} Conversely, Goodell continues to wield broad textual authority, and his combination of personality, long term business vision, and respect from the media stand in stark contrast to Selig. As a result, Goodell has much more flexibility than Selig to exercise his authority as commissioner.

\textsuperscript{172} As a representative example, see Rob Dibble, \textit{Open letter to Bud Selig}, ESPN.com. http://espn.go.com/talent/danpatrick/s/2001/1119/1280454.html. Selig made matters worse by moving his former team, the Brewers, from the American League to the National League.

\textsuperscript{173} Selig’s role in Fay Vincent’s resignation played a significant role in the controversy. Selig was a vocal opponent of Vincent and served as the leader of a group of owners seeking his resignation. He remained as the Brewer’s owner until 1998, when he finally accepted the permanent commissionership.

\textsuperscript{174} Bamberger, n.71.
The most striking example of this disparity in authority is a comparison of the NFL’s Player Conduct Policy with MLB’s efforts under Selig to stamp out drug use. While Selig waited to pursue meaningful regulation of steroids until public outcry and congressional attention left him little choice, Goodell proactively addressed the NFL’s behavioral issues immediately upon entering office. This could be a result of Goodell’s long-term vision for the league, his broad internal support from players and owners alike, or even a desire by Goodell to avoid the criticism that has plagued baseball. Regardless of the source, it is clear that Goodell has been considerably more firm and hardnosed about player misconduct than Selig was with regard to steroid use. Ironically, both men have been called in front of Congress to explain their lack of disciplinary action, but it appears possible that Goodell’s unsolicited efforts to protect the integrity of his league, as well as the existence of a disciplinary policy such as the PCP that initially had no counterpart in baseball, will save him from Selig’s level of condemnation.

d. Summary

In Section III, we suggested that David Stern might represent an ideal blend of the personalities of Landis and Selig – firm on discipline like Landis, able to build owner consensus like Selig, and possessing a strong and unique business vision that both baseball commissioners lacked. Roger Goodell shares all of these qualities; if anything, he appears even more inclined to solicit and accommodate divergent opinions than

176 Congress has recently began an investigation into Goodell’s treatment of “Spygate”; for a more complete discussion, see Section V, supra.
In addition, Goodell’s ability to avoid arbitration for player conduct decisions gives him a degree of authority that Stern, Landis, and Selig all lack. Goodell also benefits from his short time in office and the context of the league that he took over; since the NFL has guaranteed labor peace for a minimum of Goodell’s first two years as commissioner, he has not been forced to intervene in any messy labor disputes. It will be interesting to see how this intervention, if and when it occurs, will affect Goodell’s persona as the “objective, uninterested Commissioner.”

However, Goodell’s short tenure also leaves it unclear whether he shares Stern’s ability to catapult the league’s profits and popularity. The question may be irrelevant; while Stern inherited a league with struggling finances and waning support, Goodell took over an NFL with extraordinarily high marks on both dimensions.

VI. Spygate Revisited

In February 2008, United States Senator Arlen Specter showed the substantial role that external support plays in the life and authority of the commissioner. Using the NFL’s antitrust exemption as a jurisdictional hook, Specter called for a congressional investigation of Goodell’s handling of the “Spygate” saga involving Bill Belichick and

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177 Prior to becoming commissioner, Goodell was described by his colleagues as a “consensus builder in the mold of commissioner Paul Tagliabue”. See The Insider. NFL’s Goodell Takes on Role to Rebuild Trust, Protect Brand, Brandweek, May 22, 2000.
178 When Stern suspended Golden State Warriors G Latrell Sprewell for an incident of violence during a team practice, his decision was partially reversed by a neutral arbitrator. This is a limitation on commissioner authority that Goodell does not face.
179 The NFL owners can vote to re-open the labor agreement in November 2008.
180 At least one commentator has suggested that Stern’s involvement in the 1998-1999 NBA lockout caused the NBPA to see him as a representative of management. See Phil Taylor, To the Victor Belongs the Spoils, Sports Illustrated, January 18, 1999.
182 The 1961 Sports Broadcasting Act is a large reason why the NFL is the most financially successful league in the history of American sports. It grants an antitrust exemption that allows the NFL owners to pool their television rights, sell them as a single unit, and split the profits.
the New England Patriots. Specifically, Specter aimed to find out why Goodell destroyed the illegal tapes turned over by the Patriots. Goodell justified the destruction of the tapes as protecting against a leak of the footage, an explanation that Specter rejected.

The controversy illustrates the phenomenal degree of internal support that Goodell has created in his short time as commissioner. The league has been united in its support of Goodell, with owners, players, and coaches refusing to cooperate with Senator Specter’s investigation and the league’s Competition Committee issuing a public statement that the matter should be laid to rest. Both the Patriots and the Jets’ outside legal counsel have stated that they regard the incident as a league matter, concerning league rules and sufficiently dealt with by the league’s investigation and enforcement.

Recent reports have alleged that Matt Walsh, a former New England Patriots employee, possesses tapes of illegal spying by the team. Walsh sought legal protection from the NFL before turning over any information to the league. These tapes could have significant implications for the congressional investigation, although it seems almost certain that the new evidence, if relevant, would lead Goodell to re-open the NFL

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183 Specter’s objectivity and neutrality seem questionable. A Philadelphia Eagles season ticket holder, Specter told a Philadelphia sports-talk host that finding out whether the Patriots cheated during the 2005 Super Bowl against the Eagles would “absolutely” be his lead question during a hearing. Specter also receives substantial campaign contributions from Comcast, which is currently embroiled in a battle with the NFL involving the NFL Network. [http://www.opensecrets.org/politicians/allcontri.asp?CID=N00001604.](http://www.opensecrets.org/politicians/allcontri.asp?CID=N00001604) See also Len Pasquarelli, [Specter should stick with politics](http://sports.espn.go.com/nfl/playoffs07/columns/story?columnist=pasquarelli_len&id=3226214). 184 “What’s that got to do with it? There’s an admission of guilt, you preserve the evidence…All you have to do is lock up the tapes.” [Goodell: Destroying Spygate tapes was ‘right thing to do’](http://sports.espn.go.com/nfl/news/story?id=3244687). 185 Mike Fish, [Specter irked by uncooperative Pats, league in Spygate probe](http://sports.espn.go.com/nfl/news/story?id=3259486). 186 The league has been so united that Specter accused them of speaking from the same talking points, arguing that “you have heard everyone say the same thing.” Fish, n.183. 187 Dave Goldberg, [NFL, Walsh Eye Deal for Spygate Material](http://ap.google.com/article/ALeqM5gqc_K0gLaSL82mlwJMRbzfOhPVQD8VA8Lk00).
investigation and attempt to resolve the matter through stern internal punishment.\textsuperscript{188} Even if the congressional investigation does not result in any formal legislative action, it has already succeeded in shaping public behavior.\textsuperscript{189}

As the congressional investigation continues, it is interesting to note how the three factors that we have outlined in this paper contribute to, and affect the outcome of, Spygate.

\textit{a. Textual Authority}

Goodell almost certainly had ample textual authority to destroy the tapes. § 8.3 of the NFL Constitution grants the commissioner “full, complete, and final jurisdiction and authority [over] any dispute involving a member or members in the League”.\textsuperscript{190} When Goodell determines that conduct is “detrimental to the integrity of, or public confidence in, the game of professional football”, he seems to have virtually unlimited discretion to impose the penalty of his choice.\textsuperscript{191} While there have been several cases in the NBA and MLB challenging commissioner “best interest” rulings,\textsuperscript{192} such challenges are absent from football. As noted earlier, even if Goodell were theoretically able to act outside of

\begin{footnotes}
\footnotetext[188]{Goldberg, n.185. As NFL spokesman Greg Aiello put it, “Nobody wants to hear from Matt Walsh more than the National Football League.” The threat of congressional action has already led Goodell to announce on March 7, 2008, that he wants to crack down on spying before the 2009 NFL season with more inspections and harsher penalties. He has asked the NFL Competition Committee to implement rules that allow unannounced inspections of locker rooms, press boxes, and in-game communications equipment. Goodell’s memo said the rule changes were aimed at Goodell’s responsibility to “preserve the integrity of the game” and “maintain public confidence” in the sport, indirectly announcing the textual authority behind Goodell’s decision. \textit{Goodell proposes plan making cheating penalties easier to impose}, ESPN.com news services. March 7, 2008. http://sports.espn.go.com/nfl/news/story?id=3280996

\footnotetext[189]{Goldberg, n.185. Willie Gary, who played for the Rams in the 2002 Super Bowl at the heart of the Walsh negotiations, and three fans recently filed suit accusing the Patriots of fraud, unfair trade practices and engaging in a pattern of racketeering. Specter took credit for the litigation, celebrating the fact that “the lawsuits have been started, that I got the ball rolling, and the plaintiffs’ lawyers are picking it up”.

\footnotetext[190]{NFL Constitution and Bylaws § 8.3, at 17-18 (1988).}

\footnotetext[191]{This is at least true with respect to players; see NFL CBA, art. XI, §1(a).}

\footnotetext[192]{See e.g. \textit{Finley v. Kuhn}, 569 F.2d 527, 532 (7th Cir. 1978); \textit{National Basketball Players Ass’n & Warriors Basketball Club & NBA, Opinion and Award} (1998) (Feerick, Arb.).}
\end{footnotes}
his “conduct detrimental to football” power, he alone may hear and decide on appeal.\textsuperscript{193}

This exclusive appellate jurisdiction largely insulates Goodell’s actions from legal scrutiny.

Ultimately, whether Goodell possessed sufficient textual authority may be irrelevant. Specter’s investigation establishes that even explicit textual authority, without more, cannot insulate a commissioner’s decisions from challenge. Specter is not necessarily accusing Goodell of acting outside the scope of his textual authority as commissioner; rather, he is threatening to revoke the NFL’s antitrust exemption presumably because he normatively disagrees with the decision to destroy the tapes. This situation shows why we have advocated the three-factor model of commissioner authority – here, even if Goodell did act within his textual authority, external pressure may ultimately “reverse” his decision.

\textit{b. Internal/External Pressure}

The congressional investigation into Spygate raises a fascinating question: Does \textit{internal} or \textit{external} pressure yield the most influence on commissioner authority? Goodell remains unapologetic about destroying the tapes, claiming that they are unnecessary because Belichick and the Patriots have admitted the wrongdoing and that the NFL self-disclosed the violation. And thus far Specter has refused to back down, recently accusing the Patriots of failing to cooperate with the congressional inquiry and threatening to extend the investigation until his questions are answered.

The eventual outcome of this saga will say much about the nature of commissioner authority. The NFL antitrust exemption is a substantial bargaining chip, allowing Specter to exert considerable external pressure on Goodell. But the battle of

\textsuperscript{193} See p.10, \textit{infra}. 

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words between Goodell and Specter is ultimately a battle for the support of another
dimension of external pressure: popular support. Specter’s investigation, much like the
congressional investigation of steroids in baseball, appears to be at least partially a
political grandstand, designed to increase the congressman’s notoriety, popularity, and
chances for re-election.\(^{194}\) Thus, if Goodell is able to convince a majority of the public
that his actions were appropriate, necessary, and sufficient, Specter will presumably be
forced to end his investigation in order to avoid a popularity hit.

c. Personality

Goodell’s ability to influence the court of public opinion (and protect his
authority) will require the most effective use of his personality ever. As discussed earlier,
Goodell thus far has exhibited an impressive ability to unite factions, win over skeptics,
and please all of his constituencies by soliciting input and building consensus before
taking action. If he can show the same skill in retroactively defending his decisions in
Spygate, he will be able to win over the public, and with the support of the fans, players,
and owners, Goodell’s mandate and authority will be sufficiently broad to overcome even
a congressional investigation. If this happens, it will be commissioner authority at its
most broad.

\(^{194}\) Lester Munson, *Congressional interest is serious business*, ESPN.com. February 1, 2008.