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Jason M. Pollack

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Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports

Cover Page Footnote

I dedicate this Note to Mom and Momma, for their love, support, and Chicken Marsala.

TAKE MY ARBITRATOR, PLEASE: COMMISSIONER "BEST INTERESTS" DISCIPLINARY AUTHORITY IN PROFESSIONAL SPORTS

Jason M. Pollack*

"[I]f participants and spectators alike cannot assume integrity and fairness, and proceed from there, the contest cannot in its essence exist."

A. Bartlett Giamatti - 1987¹

INTRODUCTION

During the first World War, the United States government closed the nation's horsetracks, prompting gamblers to turn their attention to baseball, then America's biggest form of entertainment.² In an episode popularly known today as the "Black Sox scandal,"³ eight Chicago White Sox players fixed the outcome of the 1919 World Series, causing the White Sox to lose to the Cincinnati Reds, five games to three.⁴ Gamblers and a group of crooked players had tarnished a sport which, up to that time, had prided itself on its integrity and wholesomeness.⁵ Many believed baseball's lack of a single authority figure to enforce its laws made it possible for the scandal to occur.⁶

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1. A Great and Glorious Game: Baseball Writings of A. Bartlett Giamatti 73 (Kenneth S. Robson ed., 1998) [hereinafter Giamatti].

2. See George F. Will, Bunts: Curt Flood, Camden Yards, Pete Rose and Other Reflections on Baseball 113 (1998).

3. For an account of the events surrounding the 1919 World Series, see Eliot Asinof, Eight Men Out: The Black Sox and the 1919 World Series (1963).

4. See Jerome Holtzman, The Commissioners: Baseball's Midlife Crisis 29 (1998).

5. See G. Edward White, Creating the National Pastime: Baseball Transforms Itself 1903-1953, at 85 (1996) ("Put starkly, the first generation of twentieth-century [baseball] owner-builders was interested in establishing their sport as the personification of middle-class values, which, at the time, were synonymous with morality, respectability, and civic-mindedness.").

Team owners were not the only ones concerned and obsessed with baseball's integrity. The general public also looked to baseball as a source of character and virtue, an "institution occupying a niche just below belief in God and respect for motherhood." Harold Seymour, Baseball: The Golden Age 274 (1971) ("Americans might tolerate corruption in government and business and indeed take a certain amount of it for granted, but baseball to them occupied a loftier sphere."). Even President William Howard Taft noted the sport's integrity, observing that "[t]he game of base ball [sic] . . . is a clean, straight game, and it summons to its presence everybody who enjoys clean, straight athletics." *Id.*

6. See Paul C. Weiler & Gary R. Roberts, Sports and the Law: Cases, Materials and Problems 9 (1993) [hereinafter Weiler & Roberts, Sports and the Law]; see also John Helyar, Lords of the Realm: The *Real* History of Baseball 8 (1994) ("The worst part [of the Black Sox scandal] was that baseball had no leader to restore its good

The scandal, raising "serious doubts about baseball being on the level," sparked a need for professional baseball to restore its integrity.⁷ To accomplish this task, in 1920 the American and National Leagues named Judge Kenesaw Mountain Landis, a federal district court judge from Chicago, as the first commissioner of Major League Baseball ("MLB").⁸

The owners in MLB granted Commissioner Landis broad powers to police the game of baseball.⁹ Commissioner Landis "had agreed to accept the position upon the clear understanding that the owners had sought 'an authority . . . outside of [their] own business, and that a part of that authority would be a control over whatever and whoever had to do with baseball.'"¹⁰ Under the Major League Agreement ("MLA"), baseball's governing document, the commissioner could "investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of base ball [sic] . . . [and] determine, after investigation, what preventive, remedial or punitive action is appropriate"¹¹

As the Black Sox scandal made clear, if professional sports are to maintain their revered status in American society, the public must have confidence that the contests it sees are genuine and real. In other words, the public must believe that, in any given contest, the players are putting forth maximum effort to achieve victory. If external factors such as drug use or gambling impinge on this effort, then interest in professional sports would vanish, as the public would doubt that both teams in a game are trying their best and playing under the

name."); Richard S. Simons, *Indiana's Baseball Magnates: When the Major Leagues Needed Strong Guidance They Turned to Three Hoosiers*, Indianapolis Star, Oct. 9, 1977 (Magazine), at 9 ("The game needed an incorruptible Rock of Gibraltar who would purify it and mete out punishment with a firm hand.").

7. Helyar, *supra* note 6, at 8; see also David Quentin Voigt, *American Baseball Volume II: From the Commissioners to Continental Expansion* 138 (1970) ("[T]he [Black Sox] scandal struck at the very foundation of baseball, threatening the annihilation of the old pattern of order and offering no replacement.").

In 1920, the need for an authority figure to restore integrity in professional baseball became more apparent as America faced many global challenges to its value system. See James Kirby, *The Year They Fixed the World Series*, A.B.A. J., Feb. 1988, at 65, 67. Although the United States emerged victorious from World War I, the threats of Bolshevism, increased foreign entanglements through the League of Nations, and an unsettled Europe placed fear in Americans that they "were losing the peace." *Id.* "Now baseball, that great American institution which represented our finest traditional values, was revealed to be corrupt, done in by . . . criminals who had masterminded and bankrolled the plot. If baseball was no good, what hope was there for the rest of our culture and society?" *Id.*

8. See Holtzman, *supra* note 4, at 22-23.

9. See *id.* at 22.

10. *Finley v. Kuhn*, 569 F.2d 527, 532 (7th Cir. 1978).

11. Major League Agreement § 2(a)-(b), at 1 (1921).

same rules.¹² Thus, to maintain their legitimacy and the public's faith, professional sports leagues must eliminate any act that strikes at a sport's integrity.¹³ Today, the commissioners of MLB, the National Football League ("NFL"), and the National Basketball Association ("NBA")¹⁴ maintain broad powers to protect the "integrity of, and public confidence in," their respective sports, and thus determine the "best interests" of their leagues.¹⁵

The power of a commissioner to determine and police the best interests of an industry is unique in American society.¹⁶ The owners of athletic teams not only bankroll their teams, but also collectively own the league itself.¹⁷ Those owners then voluntarily appoint an individual, who has no authority or power separate from the league, to deter-

12. See Giamatti, *supra* note 1, at 72-73 (stating that acts which damage the integrity of a sport "strike at and seek to undermine the basic foundation of any contest declaring the winner—that all participants play under identical rules and conditions").

13. See *id.* at 73 ("Cheating is contrary to the whole purpose of playing to determine a winner fairly and cannot be simply contained; if the game is to flourish and engage public confidence, cheating must be clearly condemned with an eye to expunging it."). See generally Will, *supra* note 2, at 105 ("Competition can be elevating for participants and spectators. Thus the integrity of sport is a civic concern.").

14. The commissioner's office of the National Hockey League, due to its recent creation, is not part of this study. The NHL named Gary Bettman, the former General Counsel and Vice President of the NBA, the league's first commissioner in December 1992. See Lacy J. Banks, *NHL Hopes to Emulate NBA with Bettman*, Chi. Sun-Times, Dec. 13, 1992, at 19.

15. Basic Agreement between the American Leagues of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association art. XI(A)(1)(b), at 29 (1997) [hereinafter MLB Basic Agreement] (recognizing the commissioner's authority to take action involving "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball"); NFL Constitution and Bylaws § 8.13(a), at 19 (1988) (granting the commissioner the authority to punish any party "guilty of conduct detrimental to the welfare of the League or professional football"). The NBA Constitution is not available for public release.

To stress the power of the commissioners' "best interests" authority, noted baseball historian and political analyst George Will compared the "best interests" clause of baseball's constitution to the Equal Protection and Due Process clauses of the United States Constitution. See Will, *supra* note 2, at 137. "A willful judge can do almost anything in the name of [these] clauses if he is indifferent to the damage done to the texture of the law and the stature of his office." *Id.*

16. See Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 1 ("One of the unique features of sports as a social, economic, and legal institution is the office of commissioner of the league."); see also David Harris, *The League: The Rise and Decline of the NFL* 647 (1986) ("The commissioner's job, of course, is very unique You are hired by the owners, but you are called upon to make decisions that affect them. You can't please everyone, every time. . . . You simply have to do what you think in your judgment is in the best interest of the game." (quoting Pete Rozelle, the second commissioner of the NFL)); Seymour, *supra* note 5, at 323 ("In creating a Commissioner to rule over them, the owners [in MLB] established the first 'industry doctor' in America.").

17. With few exceptions, sports teams are privately owned. These sports teams belong to a "private, voluntary association" and are bound by a contract "that sets forth the rules that govern that association." Roger I. Abrams, *Legal Bases: Baseball and the Law* 95 (1998).

mine what is best for their teams and their sport. The Seventh Circuit has described management of sports leagues through a commissioner as "an exception, anomaly and aberration."¹⁸ The central reason for the existence of the commissioner's office in professional sports remains the same today as in the days of Judge Landis: to protect the integrity and best interests of sports leagues.¹⁹

Commissioners often use their "best interests" powers to discipline athletes or other personnel within the league.²⁰ Employee discipline, however, is a term and condition of employment and, thus, according to a basic tenet of federal labor law, a mandatory subject of collective bargaining.²¹ The present collective bargaining agreements ("CBAs") of the NBA and MLB allow for an individual disciplined by the commissioner to appeal his punishment to an outside arbitrator.²² Convinced that commissioners are biased representatives of management, the National Basketball Players Association ("NBPA") and the Major League Baseball Players Association ("MLBPA") believe that outside arbitration concerning disciplinary actions best protects players' rights.²³ The NFL's CBA, by contrast, does not permit an outside arbitrator to review commissioner-imposed discipline.²⁴ In the NFL, a

18. *Finley v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978) ("In no other . . . business is there quite the same system, created for quite the same reasons and with quite the same underlying policies.").

19. See Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 1.

20. Most recently, Commissioner David Stern of the NBA suspended Latrell Sprewell, a member of the Golden State Warriors, for one year from the NBA for allegedly attacking his head coach, Peter J. Carlesimo, during a practice session in December 1997. See *National Basketball Players Ass'n & Warriors Basketball Club & NBA*, Opinion and Award 11-12 (1998) (Feerick, Arb.) [hereinafter *Sprewell Arbitration*]. Commissioner Stern believed that the discipline of Mr. Sprewell "went to the preservation of the integrity of the game and maintenance of public confidence." *Id.* at 70.

21. See *NLRB v. Independent Stave Co.*, 591 F.2d 443, 446 (8th Cir. 1979) ("A grievance-arbitration procedure is a term or condition of employment and a mandatory subject of bargaining within the meaning of [the National Labor Relations Act].").

22. See *MLB Basic Agreement*, *supra* note 15, at 32-33; *NBA Collective Bargaining Agreement* art. XXXI, § 1(b), at 163 (1995) [hereinafter *NBA CBA*]. Both league's CBAs allow their commissioners to remove a disciplinary grievance involving the game's integrity from the arbitral process. MLB and NBA commissioners, however, have been slow to utilize this power in fear that removing a grievance would exacerbate labor relations. See *infra* notes 198-203 and accompanying text.

23. See Helyar, *supra* note 6, at 37 ("The union regards the commissioner as an extension [and servant] of the multiemployer bargaining unit. . . . There will come a time when there comes an issue that's so compelling for the players' side that . . . [i]f [the commissioner] sides with the clubs, it may look patently unfair." (quoting John Gaherin, MLB management negotiator)). See generally Jeffrey A. Durney, Comment, *Fair or Foul? The Commissioner and Major League Baseball's Disciplinary Process*, 41 *Emory L.J.* 581, 582 (1992) ("[T]here is some question about the propriety of one man . . . wielding unrestricted power over parties forced to submit to his jurisdiction without recourse to the courts [or arbitration].").

24. See *NFL Collective Bargaining Agreement* art. XI, § 1(c), at 29 (1993) [hereinafter *NFL CBA*].

player subject to commissioner discipline may appeal only to the commissioner, whose decision is final and unappealable.²⁵

This Note examines the “tribunal” split concerning deference to commissioner best interests disciplinary decisions in professional sports. Recent decisions by arbitrators within the NBA and MLB have displayed very little deference to commissioner discipline imposed under the “best interests” clauses within each league’s operating agreement. On the other hand, judges have frequently upheld a commissioner’s right to determine the extent and severity of discipline regarding private league matters as long as those decisions are not arbitrary and capricious.²⁶ This Note argues that to protect the best interests of professional basketball and baseball, the MLB, the NBA, and their respective unions should follow the NFL’s lead and collectively bargain to permit their commissioners to be the sole arbiters of disciplinary disputes.

Part I of this Note discusses the creation and development of the commissioner’s office in professional sports and examines various “best interests” decisions made throughout that development. Part II analyzes the two most recent federal court decisions regarding commissioner disciplinary authority, which helped establish and reinforce the judicial deference given to commissioners. Part III scrutinizes two arbitration awards from the 1990s that failed to exhibit judicial and CBA-imposed deference to commissioner disciplinary decisions. Part IV argues that to properly maintain the integrity of professional baseball and basketball, the MLBPA and the NBPA must recognize that commissioners need non-reviewable authority to make disciplinary decisions. This argument rests on the proposition that commissioners, endowed with the responsibility to protect the integrity of professional sports, are better suited to determine what is best for those sports than either arbitrators or judges.

I. THE HISTORY AND DEVELOPMENT OF THE COMMISSIONER’S OFFICE

To fully understand the scope of authority that unions should yield to commissioners, it is necessary to look at the position’s genesis and development, the original power of the office, and the types of actions commissioners have taken to preserve the integrity of their sports. Because professional baseball initially created the commissioner’s office, it serves as the primary “vehicle to examine [this] genesis” and development.²⁷

25. *See id.*

26. *See* Finley v. Kuhn, 569 F.2d 527, 539 (7th Cir. 1978).

27. Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 Va. L. Rev. 1409, 1413 (1990). Two additional reasons exist to focus primarily on baseball here. First, MLB has had more commissioners and

A. Judge Kenesaw Mountain Landis

Judge Kenesaw Mountain Landis's first venture into the world of professional baseball came in 1915 when the Federal League, an independent baseball league, brought an antitrust suit against the National and American leagues ("Organized Baseball") in the United States District Court in Northern Illinois.²⁸ Seeking relief under Section 1 of the Sherman Antitrust Act,²⁹ the Federal League charged Organized Baseball with being a combination in restraint of the interstate trade of baseball.³⁰ Undoubtedly, the Federal League chose Landis's court because of his reputation as a trustbuster.³¹ The Federal League did not know, however, that Judge Landis was an avid baseball fan.³² "Never one to permit judicial impartiality to interfere with his personal biases and leanings,"³³ Judge Landis took the case under advisement for one year to avoid ruling on the matter, thereby forcing the two sides to settle.³⁴

During the trial, Judge Landis made every effort to make his feelings clear concerning the Federal League's attack on Organized Baseball. He warned the Federal League's attorneys that "a decision in this case may tear down the very foundations of this game, so loved by thousands."³⁵ Judge Landis also informed the parties that "any blows at the thing called baseball would be regarded by this court as a blow

conflicts than either the NFL or NBA. Second, the history of baseball, much more than the history of any other sport, has received intense scholarly study.

28. See Seymour, *supra* note 5, at 212.

29. 15 U.S.C. § 1 (1994).

30. See Seymour, *supra* note 5, at 212.

31. See *id.* In only his third year on the bench, Judge Landis fined John D. Rockefeller's Standard Oil Company \$29.24 million for violations of the federal antitrust laws. See Simons, *supra* note 6, at 9. Although a higher court reversed his ruling on appeal, Judge Landis, an appointee of President Theodore Roosevelt, became an "instant folk hero" and a "legend while still a young man." *Id.*

32. See Seymour, *supra* note 5, at 212; see also White, *supra* note 5, at 105-06 ("[Landis] was a baseball fan, but he was first and foremost a patriot, an uncompromising moralist who inevitably saw his decisions as contributing to the uplifting of America's youth, and a man entirely comfortable with exercising power arbitrarily, in accordance with his intuitions.").

33. Seymour, *supra* note 5, at 212. Further evidence that Judge Landis ruled according to his personal biases can be found in his displays of extreme patriotism during and after World War I. See Holtzman, *supra* note 4, at 19. After the war, Judge Landis issued a summons for Kaiser Wilhelm II for his role in the death of a Chicagoan who died in the 1915 sinking of the *Lusitania*. See *id.* Landis also presided over the trial of socialist Victor Berger, a famous German-Austrian emigrant, who Landis found guilty of "impeding the war effort." Helyar, *supra* note 6, at 7. Although Landis gave Berger the maximum punishment, he later remarked: "It was my great disappointment to give Berger only twenty years in Leavenworth. I believe the law should have enabled me to have had him lined up against a wall and shot." *Id.*

34. See Holtzman, *supra* note 4, at 20-21. Landis knew very well that the Federal League could not obtain favorable settlement terms from Organized Baseball. The Federal League folded after receiving a \$600,000 indemnity in settlement from Organized Baseball. See Simons, *supra* note 6, at 9.

35. Seymour, *supra* note 5, at 212.

at a national institution.”³⁶ When it came time for them to name their first commissioner, the owners within Organized Baseball forgot neither Judge Landis nor his assistance during the Federal League suit.³⁷

After approaching Judge Landis concerning the position of commissioner of professional baseball, the owners began to second-guess the absolute authority they offered to him.³⁸ In a last-minute attempt to retain a “shred of their power,” the owners tried to resurrect the pre-commissioner system, where the two league presidents would sit side-by-side with Landis and jointly govern baseball.³⁹ Threatening to reject the position if the owners insisted on adhering to the old system, Landis reminded them that they “had calmly and thoroughly gone into [their] troubles and had a structure outlined which provided for an authority to discharge a responsibility and that part of that authority would be control over whatever and whoever had to do with baseball.”⁴⁰ The owners quickly capitulated and signed the original agreement proposed to Landis, endowing him with the unqualified, unilateral authority to act in the best interests of baseball.⁴¹

In addition to granting Landis absolute authority within baseball governance, the owners submitted to a “Pledge of Loyalty,” promising to adhere to the commissioner’s rulings by forfeiting the right to appeal a Landis decision in court. The pledge read as follows:

We, the undersigned, earnestly desirous of insuring to the public wholesome and high class baseball, and believing that we ourselves should set for the players an example of the sportsmanship which accepts the umpires’ decisions without complaint, hereby pledge loyally to support the Commissioner in his important and difficult task; *and we assure him that each of us will acquiesce in his decisions even when we believe them mistaken, and that we will not discredit the sport by public criticisms of him or one another.*⁴²

With these words, and with the authority granted to him by the Major League Agreement, Commissioner Landis began to shape the powers of an office never held before in any sport.

As commissioner, Landis planned to “clean out the crookedness and the gambling responsible for it and keep the sport above reproach.”⁴³ Landis believed that, as the leader of America’s national pastime, he was “discharging a public trust [and] that he was repre-

36. Simons, *supra* note 6, at 9.

37. See Holtzman, *supra* note 4, at 21.

38. See *id.* at 25.

39. See *id.*

40. *Id.* at 26 (quoting Judge Landis).

41. See *id.* at 28.

42. *Id.* at 22 (emphasis added).

43. White, *supra* note 5, at 110.

senting the baseball lovers of America."⁴⁴ To maintain the sport's integrity, Landis planned on eliminating not only evil, but also the appearance of evil from the game.⁴⁵ To commence this task and set the tone for his entire administration and administrations to come, Commissioner Landis would have to decide the fate of the eight Chicago White Sox who fixed the 1919 World Series.

At first, Landis was slow to act in response to the scandal.⁴⁶ When American League President Ban Johnson asked Landis several months after being named commissioner what he was doing about the case, Landis replied, "Nothing."⁴⁷ With the trial of the eight White Sox underway, Commissioner Landis seemingly wanted to wait until the judicial process ran its course before announcing his decision. On August 2, 1921, after written confessions from three of the Black Sox had mysteriously disappeared, a jury found the accused not guilty of "intent to defraud the gambling public."⁴⁸ After the judge announced the verdict, the courtroom erupted, the jurors carried the players around on their shoulders, and the judge congratulated the jury on its "fair decision."⁴⁹

The celebration, however, was short-lived. The day after the verdict, Commissioner Landis used his best interests powers to impose lifetime suspensions upon the eight crooked players.⁵⁰ In his statement, Commissioner Landis declared:

Regardless of the verdict of juries, no player that throws a ballgame, no player that undertakes or promises to throw a ball game, no player that sits in a conference with a bunch of crooked players and gamblers where the ways and means of throwing games are planned and discussed and does not promptly tell his club about it, will ever play professional baseball. . . . Just keep in mind that regardless of the verdict of juries, baseball is entirely competent to protect itself against the crooks, both inside and outside the game.⁵¹

Beyond his obvious interest in repairing the integrity of professional baseball, Landis believed this decision was necessary to preserve the

44. Ed Fitzgerald, *Judge Landis: The Man Who Saved Baseball*, Sport, June 1950, at 49, 50.

45. See White, *supra* note 5, at 110 ("[Baseball players] must avoid even the appearance of evil or feel the iron hand of his power to throw them out of any part of the game." (quoting Sporting News, Jan. 20, 1921)). See generally Fitzgerald, *supra* note 44, at 53 ("In the Landis lexicon, being clean didn't mean just passably neat; it meant snow white.").

46. See Seymour, *supra* note 5, at 324.

47. *Id.*

48. Holtzman, *supra* note 4, at 31.

49. Seymour, *supra* note 5, at 329.

50. See *Judge Landis Bars "Clean" Sox from Baseball Forever*, N.Y. World, Aug. 3, 1921, at 3 ("The verdict 'Not guilty' returned in the trial of the ball players means nothing to Judge K. M. Landis. To-day [sic] he returned a verdict of his own, ruling the players off the diamonds of organized baseball forever.").

51. *Id.*

spirit of America's youth. After rendering his decision, Landis explained to a reporter: "Baseball is something more than a game to an American boy; it is his training field for life work Destroy his faith in its squareness and honesty and you have destroyed something more; you have planted suspicion of all things in his heart."⁵²

Baseball historians disagree as to the propriety of Landis's behavior and his decision regarding the Black Sox scandal. Some assert that Landis acted appropriately to rid the game of its lingering black eye.⁵³ Others have noted that, although Commissioner Landis's punishment was rough justice, "roughness can make justice effective."⁵⁴ Some earlier historians, however, criticized Commissioner Landis for the arbitrary nature of his ruling.⁵⁵ One argued that Landis, by ignoring the verdict of the jury, "denied [the players] their civil rights by the application of baseball regulations."⁵⁶ Another believed that "[i]n proscribing the players, Landis wielded not a sword of justice but an extra-legal scythe."⁵⁷

Despite these differences of opinion, most commentators agree that Landis's decision helped restore baseball to its rightful place in American society, while also solidifying the power of his office.⁵⁸ Commissioner Landis was baseball's "new symbol of rectitude."⁵⁹ He established his own brand of justice, where he was "the prosecutor, defense attorney, judge, and jury" and gave notice to wrongdoers that his decisions would be absolute.⁶⁰ According to one commentator, Landis's decision "to ban the players, announced on the heels of their acquittal, underscored the independence of his office and its identifi-

52. Helyar, *supra* note 6, at 8 (quoting Landis).

53. See Kirby, *supra* note 7, at 69 ("Landis is widely regarded as a savior—though not a saint—and as having rendered an approximation of justice for the group as a whole.").

54. Will, *supra* note 2, at 114-15 (noting that nothing happened to the gamblers, that some of the players were "guilty primarily of stupidity," and that most of the players were cheated out of their promised money).

55. See Seymour, *supra* note 5, at 338; Voigt, *supra* note 7, at 130.

56. Voigt, *supra* note 7, at 130. Voigt believed that in 1970, the year of his book's publication, Landis's ruling would be considered "preposterous." *Id.* "[I]ts imposition in 1921 rested on the moralistic consensus of baseball people and the support of a populace unaware of the undesirable effect on civil liberties and over-aware of moralistic strictures." *Id.* But see James Reston, Jr., *Collision at Home Plate: The Lives of Pete Rose and Bart Giamatti* 271 (1991) ("To join organized baseball was to divest the traditional rights of American citizenship and cede them to the commissioner.").

57. Seymour, *supra* note 5, at 338 (explaining that Landis "recognized no degrees of guilt [and cut ball players acquitted in a court of law] off from their livelihood").

58. See, e.g., *id.* at 339 ("The end of the Black Sox scandal . . . glorified Landis as a savior whose stern penalties had restored Organized Baseball to purity.").

59. *Id.* at 338.

60. Fitzgerald, *supra* note 44, at 53 ("By the time the 1921 season was over, there wasn't much doubt that Kenesaw Mountain Landis was the boss of baseball. The drastic punishments [he imposed] spoke eloquently of the tremendous power wielded by the dandy little judge with the shaggy white hair.").

cation with the proposition that even the appearance of evil would be rooted out of baseball."⁶¹

In his first decade in office, Commissioner Landis banished nineteen players, including the "Black Sox," from organized baseball.⁶² Throughout his entire reign, Landis wielded his best interests powers broadly, striking at some of the biggest names in the game. Landis, however, did not limit himself to regulating players.⁶³ For example, in 1920, the owner of the New York Giants, Horace Stoneham, and the team's manager, John McGraw, purchased a race track and casino in Havana, Cuba.⁶⁴ Although owners were frequently involved in horse racing before the days of Landis, the new commissioner decided that no one in baseball could associate with gambling and the inevitable crookedness that flowed from it.⁶⁵ He informed Stoneham and McGraw that they would have to choose between their property in Cuba and their executive positions in baseball.⁶⁶ The fact that McGraw owned property in Cuba and vacationed there in the winter meant nothing to Landis.⁶⁷ The two New York Giants executives quickly divested themselves of the race track.⁶⁸

Landis also used his authority to penalize athletes for conduct outside of the game of baseball. In 1920, Benny Kauff, an outfielder for the New York Giants, was arrested and indicted for stealing a car and for receiving stolen cars at an automobile dealership he owned.⁶⁹ Believing the indictment implied probable guilt, Landis placed Kauff on the ineligible list for the 1921 season while the case was pending.⁷⁰ In May 1921, a jury acquitted Kauff, prompting Kauff to apply to Landis's office for reinstatement.⁷¹ After reading the trial papers, Landis determined that the evidence compromised Kauff's character and reputation to the extent that his continued presence in Organized Baseball would "burden patrons of the game with grave apprehension as to its integrity."⁷² Calling Kauff's acquittal "one of the worst miscarriages of justice that ever came under [his] observation," Landis

61. White, *supra* note 5, at 110.

62. See Helyar, *supra* note 6, at 8.

63. See Simons, *supra* note 6, at 10 ("Social position and financial standing had no effect on Landis.").

64. See White, *supra* note 5, at 111.

65. See Seymour, *supra* note 5, at 389.

66. See *id.* Throughout the remainder of his term, Landis would continue to frown on any association between horse racing and baseball. In the 1930s, Bing Crosby attempted to purchase an ownership share in a major league team, but Landis rejected his attempts, "believing that Crosby was too actively involved with the horse racing industry." White, *supra* note 5, at 111.

67. See White, *supra* note 5, at 111.

68. See *id.*

69. See Seymour, *supra* note 5, at 374.

70. See *id.*

71. See *id.*

72. *Id.* at 375.

banned the Giants' outfielder from baseball for life.⁷³ Baseball scholars have also criticized Landis for this decision; the Commissioner banished Kauff for a crime of which he was acquitted, having no relation to baseball.⁷⁴

Landis demonstrated that he feared no player when, in 1921, he took on the great Babe Ruth.⁷⁵ Confident that he was untouchable, Ruth defied Landis by violating a rule that prohibited players who appeared in the World Series from barnstorming⁷⁶ immediately after the Series ended.⁷⁷ When Ruth heard that Landis was contemplating punishment, he suggested that Landis "jump in a lake."⁷⁸ Ruth felt that a player's productive period in his career was short, and that players should be able to take advantage of the opportunity to earn extra money.⁷⁹ The owners, however, had enacted the rule to avoid the possibility of destroying the prestige of the World Series.⁸⁰ Next to the Black Sox scandal, this decision may have been Landis's most critical: "Landis was perfectly aware that he had to sit on Ruth hard or abdicate his new throne. He knew that he would quickly lose his control over the game if it were spread on the record that he had been unable to control the great Ruth."⁸¹

Landis believed that the Ruth case involved the question "of who [was] the biggest man in baseball, the Commissioner or the player who makes the most home runs."⁸² Though inclement weather cut Ruth's barnstorming tour short, Landis declared that Ruth and two other New York Yankees would not receive their World Series shares

73. See *id.* at 374-75.

74. See White, *supra* note 5, at 113 ("Landis seemed to have substituted his intuition that Kauff was a dishonorable character for the judgment of two juries."); Seymour, *supra* note 5, at 375 ("Exonerated under the law of the land, Kauff was still subject to the 'law' of that government within a government which is Organized Baseball.").

75. Babe Ruth has also received considerable credit for reviving professional baseball after the Black Sox scandal. See Bowie Kuhn, *Hardball: The Education of a Baseball Commissioner* 24 (1987) ("Along with Babe Ruth, Landis snatched baseball from the disaster it faced with the Black Sox.").

76. Barnstorming was an activity where, during the off-season, players would tour non-baseball locations in the country playing "pick-up" games for money. See Paul Saitowitz, *Carry a Big Stick: Fullerton Man Went Barnstorming with Satchel Paige's Team*, *Orange County Register* (Cal.), Oct. 15, 1998, at 16.

77. See Fitzgerald, *supra* note 44, at 53 (stating that Ruth was "blissfully confident of his own stature as the No. 1 man in the game").

78. Helyar, *supra* note 6, at 8.

79. See Seymour, *supra* note 5, at 392.

80. See *id.* Although the World Series was baseball's premier event, most treasured the opportunity to see Babe Ruth play in their hometown.

81. Fitzgerald, *supra* note 44, at 53.

82. Seymour, *supra* note 5, at 392 (quoting Landis); see also Helyar, *supra* note 6, at 9 ("It seems I'll have to show somebody who's running this game." (quoting Landis)); Fitzgerald, *supra* note 44, at 53 ("The situation involves not merely rule violation . . . but, rather, a mutinous defiance by the players intended to present the question: Which is the bigger, baseball or any individual in baseball?").

and would be suspended until May 20 of the following season (missing approximately forty games).⁸³ Faced with the loss of Ruth and the revenues he produced, Yankee attorneys pleaded with Landis to alter the suspensions.⁸⁴ Even owners of other teams sought to reduce the suspension to minimize their financial losses.⁸⁵ Finally, Ruth went to the commissioner himself to plead his case, but Landis refused to see the Yankee slugger.⁸⁶ The players eventually received their World Series money, but Landis refused to hedge on the suspensions.⁸⁷ Though the Ruth episode eventually produced a change in the barnstorming rule, Commissioner Landis had again asserted his grandiose authority.⁸⁸ On this occasion, he tamed the game's greatest star.

In 1931, Commissioner Landis faced the only judicial challenge to his authority throughout his term. In *Milwaukee American Ass'n v. Landis*,⁸⁹ Phil Ball, owner of the St. Louis Browns, sued Landis over the disposition of Fred Bennett, an outfielder who played in just seven games with the Browns.⁹⁰ To avoid placing Bennett on the Browns' waiver list, which would have allowed another major league team to claim Bennett's services, Ball "shuttled" the outfielder around five of the Browns' minor league affiliates.⁹¹ Discontented with his treatment, Bennett asked Landis to free him from the Browns and to allow him to contract with another major league team.⁹² An opponent of the minor-league "farm systems,"⁹³ Landis ruled that Bennett "should be returned to St. Louis, which must either retain him as a Major League player for the year or longer, transfer him outright to some club not controlled or owned by St. Louis or its owners or release him unconditionally."⁹⁴

Ball challenged the commissioner's authority to act in this manner, seeking to enjoin the commissioner's interference with the Browns' player relations.⁹⁵ After examining the Major League agreement and reciting its provision within the text of the case, the Northern District of Illinois concluded that the agreement granted the commissioner extremely broad powers to police the sport:

83. See Seymour, *supra* note 5, at 393.

84. See *id.*

85. See *id.*

86. See *id.*

87. See Fitzgerald, *supra* note 44, at 53.

88. See Seymour, *supra* note 5, at 393.

89. *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

90. See Holtzman, *supra* note 4, at 40. Phil Ball was a longtime Landis opponent. Ball was the only owner who did not sign the original Major League Agreement certifying Landis's absolute power. See *id.*

91. See *id.*

92. See *id.*

93. The "farm system" is a collection of minor leagues where major league teams develop young player's talent for possible promotion to the major leagues. See Seymour, *supra* note 5, at 400.

94. *Milwaukee Am. Ass'n*, 49 F.2d at 300.

95. See *id.* at 298-99.

The various agreements and rules, constituting a complete code for, or charter and by-laws of, organized baseball in America, disclose a clear intent upon the part of the parties to *endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias*.⁹⁶

Challenging the MLA's "Pledge of Loyalty,"⁹⁷ Ball argued that such a wide grant of discretion was merely an attempt to "deprive the court of its jurisdiction," and that any agreement not to bring legal action was contrary to public policy.⁹⁸ The court dismissed Ball's argument, pointing out that arbitral agreements were commonly held to be valid.⁹⁹

The court noted that Commissioner Landis maintained his broad powers to "foster keen, clean competition in the sport of baseball, to preserve discipline and a high standard of morale, [and] to produce an equality of conditions necessary to the promotion of keen competition."¹⁰⁰ For the commissioner to accomplish these tasks, the court recognized that the judiciary must defer to commissioner rulings, observing that the parties to the Major League Agreement contractually agreed that Landis's good faith decisions would be "absolutely binding."¹⁰¹ Finding that he did not act in an arbitrary or fraudulent manner, the court held that the commissioner acted within the broad confines of his authority.¹⁰²

Milwaukee American Ass'n v. Landis solidified "Landis's autocratic powers."¹⁰³ A court of law had given credence to what most of baseball already knew—Landis's authority was absolute.¹⁰⁴ Though few disciplinary disputes have reached the judiciary since, the decision set the precedent for future judicial treatment of commissioner disciplinary decisions: unless the commissioner acted in an arbitrary or fraudulent fashion, his best interests decisions would be final and binding upon all parties.¹⁰⁵

Through his effort alone, Kenesaw Mountain Landis neither saved nor revived popular interest in baseball.¹⁰⁶ He did, however, return

96. *Id.* at 299 (emphasis added).

97. *See supra* note 42 and accompanying text.

98. *Milwaukee Am. Ass'n*, 49 F.2d at 303.

99. *See id.* The court stated, however, that a judge may overrule a decision of an arbiter if that decision was "unsupported by evidence, . . . without legal foundation or beyond legal recognition." *Id.*

100. *Id.* at 301.

101. *Id.* at 302.

102. *See id.* at 304.

103. Holtzman, *supra* note 4, at 41.

104. *See Fitzgerald, supra* note 44, at 49.

105. *See Milwaukee Am. Ass'n*, 49 F.2d at 303 ("No doubt the decision of any arbiter, umpire, engineer, or similar person endowed with the power to decide may not be exercised in an illegal manner, that is fraudulently, arbitrarily, without legal basis for the same or without any evidence to justify action.")

106. *See Seymour, supra* note 5, at 420.

accountability to baseball. He provided a "symbol that reassured the public of baseball's honesty and integrity."¹⁰⁷ Some believed that Landis was an "impulsive, opinionated despot whose operative principles were the preservation of his autocratic powers and the implementation of his often whimsical judgments."¹⁰⁸ A journalist once called him "America's only successful dictator."¹⁰⁹ However one may view Landis's arbitrary nature, it is hard to deny that through his impact on the nation's pastime, he "wove himself into the fabric of America."¹¹⁰ Upon his death, the public again regarded baseball "as a sport that deserved to be thought the ideal of youth, a sport that was clean and wholesome."¹¹¹

Kenesaw Mountain Landis did not merely influence the position of commissioner; he defined the very nature of the position itself. Endowed with great powers, he did what he believed was correct to protect the best interests of his sport. Though Landis had his critics and inconsistency plagued his decisions,¹¹² his commitment to baseball never wavered.¹¹³ This steadfast resolve helped Landis rebuild the public's great respect for baseball that had been virtually destroyed by the Black Sox scandal.¹¹⁴ Though many disagreed with the methods by which he ruled, Landis established the benchmark by which all future commissioners would be measured.¹¹⁵

B. *Post-Landis Baseball*

Landis's successor, "Happy" Chandler, was a United States Senator from Kentucky. The owners believed that Chandler's contacts in Washington would aid baseball in retaining its exemption from the nation's antitrust laws.¹¹⁶ Ultimately, history would remember Chandler as the commissioner who permitted the racial integration of base-

107. *Id.* at 422; see also Kuhn, *supra* note 75, at 24 ("[H]e established baseball's reputation for integrity."); Helyar, *supra* note 6, at 8 (noting that "Landis looked like God").

108. White, *supra* note 5, at 126; see also Voigt, *supra* note 7, at 149 ("His death marked the end of the autocratic commission rule.").

109. Simons, *supra* note 7, at 8.

110. Fitzgerald, *supra* note 44, at 49 ("[Landis] loomed as large in the public mind as any of the Presidents of his country. He was as much a part of the national scene as the Golden Gate Bridge, the White House, or the Empire State Building.").

111. White, *supra* note 5, at 126.

112. See *id.* at 111 (pointing out that Landis's decisions appeared "inconsistent to the point of being arbitrary").

113. See generally Simons, *supra* note 6, at 8 ("He exercised [his authority] with an iron fist. There was no recourse from his decisions and he threw as much fear into the hearts of the major league club owners who hired him and paid his salary as he did into erring ball players who violated the rules.").

114. See Fitzgerald, *supra* note 44, at 49 (stating that Landis constructed "a solid rock of public respect under the game").

115. See Seymour, *supra* note 5, at 367.

116. See Holtzman, *supra* note 4, at 45; *infra* note 140 and accompanying text.

ball.¹¹⁷ Although he rarely exercised his best interests authority, he demanded that he retain the authority nonetheless.¹¹⁸

Happy Chandler's primary disciplinary battle came with Leo Durocher, the popular yet controversial manager of the Brooklyn Dodgers. Durocher's questionable behavior began in Landis's term when the Dodgers' manager left four game tickets to film star George Raft, who some believed had ties with gambling and organized crime.¹¹⁹ Over the next six years, Landis and Chandler repeatedly warned Durocher that his personal contacts reflected poorly upon the game of baseball.¹²⁰ The final episode leading to Durocher's suspension occurred when he "declared war" on the New York Yankees before the 1947 season, accusing Larry MacPhail, a one-third owner of the Yankees, of misconduct.¹²¹ MacPhail filed a formal protest with the commissioner's office, arguing that Durocher had slandered the Yankee organization, which constituted conduct detrimental to baseball.¹²² In addition to the above activity, Durocher also faced felonious assault charges for attacking a fan with a blunt instrument.¹²³ A jury later acquitted Durocher of the charges.¹²⁴

On April 9, 1947, Chandler suspended Durocher for one year from Major League Baseball.¹²⁵ Chandler charged that Durocher had "not measured up to the standards expected or required of managers of our baseball teams."¹²⁶ The Commissioner held that the accumulation of Durocher's incidents constituted conduct detrimental to baseball and that suspending Durocher was necessary to protect the game.¹²⁷

MLB's next two commissioners, Ford Frick and General William Eckert, did not engage in any highly publicized disciplinary actions during their terms. Frick had been the National League's president

117. In 1947, Jackie Robinson signed a contract with the Brooklyn Dodgers, becoming the first African-American player in MLB. See White, *supra* note 5, at 148.

118. See Holtzman, *supra* note 4, at 45.

119. See *id.* at 54. Among Raft's alleged contacts were two notorious mobsters, Ownie Madden and Bugsy Siegel. See *id.* at 56.

120. See *id.* at 56-58. Westbrook Pegler, a former sportswriter, reported in 1946 that Durocher kept ties with three high profile gamblers: Joe Adonis, Memphis Engelberg, and Connie Immerman. See *id.* at 56.

121. See *id.* at 59-60.

122. See *id.* at 61.

123. See *id.* at 62. Durocher struck the fan after the fan called the manager a "crook" and a "bum." *Id.*

124. See *id.*

125. See *id.* at 53, 63.

126. *Id.* at 63.

127. See *id.* In 1947, the Catholic Youth Organization of Brooklyn withdrew its membership from the Dodger's Knothole Club, which provided free Dodgers tickets to more than 150,000 children each year. See *id.* at 61. In the letter of resignation, the organization's director, Vincent Powell, stated that Durocher was "undermining the moral training of our youth and represents an example in complete contradiction of our moral teachings." *Id.*

for seventeen years prior to becoming commissioner.¹²⁸ Though Frick took his responsibilities seriously,¹²⁹ he ultimately believed that the individual leagues (American and National) should handle most disciplinary actions. Eckert, on the other hand, knew very little about baseball,¹³⁰ but he had contacts in Washington.¹³¹ Once the owners discovered, though, that Eckert's contacts were in the Pentagon, rather than on Capitol Hill, they ended his term after only three years.¹³²

C. Bowie Kuhn

In 1968, MLB named Bowie Kuhn, a partner in the New York City law firm Willkie, Farr & Gallagher, as its fifth commissioner.¹³³ At Willkie, Kuhn had performed legal services for the National League for eighteen years, thereby becoming a "baseball insider."¹³⁴ From the beginning of his term, Kuhn set out to restore the traditional concept of the commissioner's office, with the commissioner acting as a "benevolent monarch."¹³⁵ He believed that he had a duty to protect the game's integrity and a responsibility to oversee the interests of the owners, players, and fans alike.¹³⁶

Throughout the first ten years of his term, a majority of Kuhn's actions were intrinsically tied to the reserve clause. The reserve clause was a portion of the uniform players contract that, until 1976, gave teams an exclusive and perpetual option to utilize a player's services.¹³⁷ Under this system, a player was inextricably bound to his

128. *See id.* at 85. In addition, Ford Frick had been a New York baseball writer and among Babe Ruth's group of ghost writers. *See id.* at 85, 91.

129. *See id.* at 107

The fundamental power of the commissioner . . . is to deal with conduct detrimental to baseball. That authority is the strongest single agent baseball has for keeping its skirts clear of crookedness, of game-throwing, of gambling and of unsportsmanlike conduct of any kind. Without it, and without the right and authority within our own organization, to keep our own house in order, public confidence and public faith would be destroyed.

Id. (quoting Frick).

130. At Eckert's inaugural press conference, a reporter asked Eckert when he had last seen a major league baseball game. Eckert replied that he had been to Los Angeles and seen the Dodgers play a year or two earlier. As the questioning continued, however, it became clear that Eckert did not know that the Dodgers had previously played in Brooklyn. *See id.* at 122.

131. *See id.*

132. *See id.*

133. *See id.* at 137. A critical factor in Kuhn's decision to join Willkie, Farr & Gallagher was that the "firm's impressive roster of clients included the National League of Professional Baseball Clubs." Kuhn, *supra* note 75, at 17.

134. Holtzman, *supra* note 4, at 134-35.

135. *See Helyar, supra* note 6, at 107; *see also* Kuhn, *supra* note 75, at 18 (titling a chapter in his autobiography "Commissioner Landis Beckons").

136. *See Helyar, supra* note 6, at 107.

137. *See Seymour, supra* note 5, at 6. The reserve clause states that "[i]f, prior to March 1, the Player and the Club have not agreed upon the term of the contract, then, on or before ten days after said March 1, the Club shall have the right by written

team, unless the team traded, sold, or dismissed him.¹³⁸ The owners believed the reserve system was necessary to limit the market for players' services; otherwise, the wealthiest clubs could monopolize the talent within the league and destroy any sense of equal competition.¹³⁹

Baseball's exemption from the antitrust laws¹⁴⁰ and the lack of a player's union precluded any serious challenges to the league's monopsony over player services before 1970. During Kuhn's term, however, the reserve system would come under considerable fire, requiring the commissioner to use his best interests powers to try to save the clause. Ultimately, after the clause's demise, Kuhn had to use his authority to regulate baseball under its new free agency system.

In the early years of Kuhn's term, the commissioner's authority over all league discipline remained absolute. In 1967, however, the newly-named head of the MLBPA, Marvin Miller, aimed to install grievance arbitration into baseball's collective bargaining agreement.¹⁴¹ Miller wanted independent arbitration for player grievances brought against either the league or a particular team.¹⁴² He did not believe that the commissioner of baseball, hired and paid by the team owners, could be an impartial decision-maker in disputes brought against those owners.¹⁴³ In Miller's eyes, the arbitrator would act as a buffer between management and labor, while protecting the players from commissioners' arbitrary rulings.¹⁴⁴ In 1968, Miller failed in his attempt to get independent arbitration, but he did obtain a systematic grievance procedure where players could follow certain channels to appeal their grievances to the commissioner.¹⁴⁵

notice to the player to renew this contract for the period of one year." Holtzman, *supra* note 4, at 157.

138. See Holtzman, *supra* note 4, at 21. Although Judge Landis often confided to friends that he believed the reserve clause was illegal, he "vowed to safeguard the baseball establishment against any professional competition." *Id.*

139. See Seymour, *supra* note 5, at 7.

140. In 1922, the United States Supreme Court ruled that Organized Baseball was not subject to the Sherman Antitrust Act, holding the sport was not involved in interstate commerce. See *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

141. See Helyar, *supra* note 6, at 36 (explaining that to Miller, grievance arbitration "was as basic as breathing"). In 1966, the players elected Miller as the first executive director of the MLBPA. See *id.* at 25. Prior to his election to the MLBPA, Miller was the chief economist and assistant to the president of the United Steelworkers of America. See *id.* at 19-20. At the MLBPA, Miller first aimed to educate his constituency and himself as to the inadequate labor conditions under which the players worked. See *id.* at 28-29. In 1967, Miller used this education to negotiate baseball's first ever Basic Agreement. See *id.* at 29, 35-38.

142. See *id.*

143. See generally Holtzman, *supra* note 4, at 153 ("[Commissioners] could make up any ruling they wanted. They could say up is down and down is up." (quoting Miller)).

144. See Helyar, *supra* note 6, at 36.

145. See *id.* at 79.

In 1970, Miller would have more success. When the new labor negotiations began, the union had gained new leverage: Curt Flood, a St. Louis Cardinal outfielder, had commenced a lawsuit challenging baseball's reserve system.¹⁴⁶ With the lawsuit before the United States Supreme Court,¹⁴⁷ Miller believed that management was vulnerable and that independent arbitration was within his grasp.¹⁴⁸ Miller informed John Gaherin, a management negotiator, that the baseball owners would have to agree to neutral arbitration before the union would sign any labor contract.¹⁴⁹

Commissioner Kuhn was the primary obstacle to Miller's demands. Kuhn was prepared to invoke article IX, section 1 of the Major League Agreement, which the original signers had inserted into baseball's governing document. The clause promised that "no diminution of the compensation or powers of the present or any succeeding Commissioner shall be made during his term of office."¹⁵⁰ At the outset of negotiations, Kuhn would not accept any decrease in his powers.¹⁵¹ He soon realized, however, that for baseball to continue without a labor stoppage, he would have to accept some change in baseball's grievance system.¹⁵² Kuhn approved the use of an outside arbitrator, but only for grievances that did not implicate baseball's integrity or public confidence in the game.¹⁵³ Kuhn especially wanted to retain authority over disputes that involved possible corruption, arguing that baseball's owners created the commissioner's office specifically to grant the commissioner such authority.¹⁵⁴

The parties ultimately agreed that the commissioner would continue to adjudicate any controversies that reflected on the integrity of, and the public's faith in, baseball. An outside arbitrator, though, would handle all other labor grievances and be responsible for interpreting

146. Between the 1969 and 1970 season, the St. Louis Cardinals traded Curt Flood to the Philadelphia Phillies. Having no desire to leave St. Louis, Flood believed that he had the right to consider offers from other teams before being unilaterally placed in Philadelphia. *See id.* at 103-04. When Kuhn informed Flood that he would not become a free agent, Flood challenged the reserve clause under the antitrust laws, charging that he was being deprived of his civil liberties. *See Holtzman, supra* note 4, at 143.

147. *See Flood v. Kuhn*, 407 U.S. 258 (1972).

148. *See Helyar, supra* note 6, at 104 ("How could baseball argue that Curt Flood was wrong and the industry was eminently fair to players if their only appeal on grievances was to the commissioner?").

149. *See id.* at 104-05.

150. Major League Agreement art. IX, § 1 (1921); *see also Helyar, supra* note 6, at 107 ("A commissioner's powers can't be diminished without his assent, under the terms of the Major League Agreement that created the office.").

151. *See Helyar, supra* note 6, at 108.

152. *See Kuhn, supra* note 75, at 141 (pointing out that arbitral grievances were commonplace in American collective bargaining agreements and that sports management could no longer resist their use).

153. *See id.*

154. *See Helyar, supra* note 6, at 109.

the league's collective bargaining agreement.¹⁵⁵ Although the Commissioner maintained his authority to police the game's best interests, Miller had won a "crucial victory": the commissioner could no longer rule without giving thought to the limits of his authority.¹⁵⁶

Initially, the change in the league's grievance procedure did not have a significant impact. The media scarcely noticed the change, and baseball's owners did not truly understand the ramifications of their concession.¹⁵⁷ In 1970, though, for the first time since 1920, an individual other than the commissioner had the last word on a baseball disciplinary decision. During that year's season, the California Angels suspended Alex Johnson, an outfielder, for his lackadaisical play in the field.¹⁵⁸ Although many of the players on the Angels felt the suspension was just, Miller believed that Johnson may have been emotionally disturbed, and that he required placement on the disabled list.¹⁵⁹ The MLBPA filed a grievance on Johnson's behalf challenging the Angels' suspension.¹⁶⁰ Both American League President Joe Cronin and Commissioner Kuhn upheld the suspension as a valid exercise of player discipline by a team.¹⁶¹ Arbitrator Lewis Gill, however, overruled the Angels, Cronin, and Kuhn, deciding that Johnson was emotionally ill and belonged on the disabled list.¹⁶² As a result of this ruling, it became abundantly clear that the commissioner no longer had the final word on player discipline.¹⁶³

Jim "Catfish" Hunter, a pitcher on the Oakland Athletics, was the next to benefit from baseball's new arbitration system. In 1974, Hunter's contract stipulated that Charles Finley, the team's owner, pay \$50,000 of Hunter's \$100,000 salary into an annuity collectible in ten years.¹⁶⁴ Finley was supposed to pay the \$50,000 to a North Carolina insurance company over the course of the season.¹⁶⁵ After discovering the \$50,000 was not immediately tax deductible as an ordinary business expense, Finley refused to make the payment.¹⁶⁶ Upon hearing of Hunter's situation, Miller contacted Hunter to ask if the pitcher wanted the union to become involved. Hunter said yes, and the union notified Finley that unless he complied with the terms

155. *See id.*

156. Holtzman, *supra* note 4, at 153.

157. *See id.* at 154.

158. *See id.*

159. *See id.* at 154-55.

160. *See id.* at 156.

161. *See id.* at 155.

162. *See id.* Arbitrator Gill's decision was groundbreaking, for it was "the first time mental illness was equated with physical injury." *Id.*

163. *See id.* at 154 ("The belief that the commissioner was the all-powerful, all-knowing czar wasn't shattered until a grievance was filed on behalf of Alex Johnson . . .").

164. *See Helyar, supra* note 6, at 137.

165. *See id.*

166. *See id.*

of the contract within ten days, Hunter would terminate his playing agreement.¹⁶⁷

News of the threat prompted Finley to contact Hunter and arrange a meeting with his disgruntled pitcher and American League President Lee MacPhail. At the meeting, Finley offered Hunter a \$50,000 check, which Hunter rejected because the terms of the agreement required direct payment to the insurance company.¹⁶⁸ After this meeting, the MLBPA filed a grievance requesting free agency for Hunter, arguing that Finley's failure to comply with Hunter's contract required such.¹⁶⁹ Arbitrator Peter Seitz found for Hunter, declaring that Hunter was no longer bound to the Athletics under his contract and thus was a free agent.¹⁷⁰

Although Seitz did not overrule a commissioner decision during this arbitration, the events that occurred after the arbitrator's ruling revealed baseball's new power structure. Immediately after the arbitration, Kuhn forbade all teams from bidding on the free agent Hunter.¹⁷¹ The commissioner wanted to review Seitz's decision and give Finley time to appeal before Hunter signed another contract.¹⁷² Miller, however, threatened Kuhn that if the Commissioner abrogated the arbitration award, then the MLBPA would sue the league.¹⁷³ Facing a possible lawsuit, Kuhn backed off and announced that all clubs could begin contacting Hunter and his agents.¹⁷⁴

Despite Kuhn's diminished power in grievance arbitration, he still retained the ability to determine the best interests of baseball by policing owner action. In what would be the first of a number of confrontations with Charlie Finley,¹⁷⁵ Commissioner Kuhn overturned Finley's decision to place his young outfielder, Reggie Jackson, in the minor leagues.¹⁷⁶ In 1969, at the age of twenty-three, Jackson had hit forty-seven home runs. Paid only \$20,000 in 1969, Jackson requested \$75,000 for the 1970 season.¹⁷⁷ Finley offered \$40,000 and would not budge. Although Jackson signed just ten days before the season began, he was a regular in Oakland's outfield.¹⁷⁸ Not surprisingly, his late signing handicapped his performance.¹⁷⁹ To punish Jackson for his insubordination and his slow start, Finley sent him down to the

167. *See id.*

168. *See Holtzman, supra note 4, at 155.*

169. *See id.* at 156.

170. *See Helyar, supra note 6, at 140.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See Holtzman, supra note 4, at 156.* Hunter ultimately received a \$3.2 million contract payable over five years from the New York Yankees. *See id.*

175. *See infra* Part II.A.

176. *See Kuhn, supra note 75, at 127.*

177. *See id.*

178. *See id.*

179. *See id.*

minor leagues.¹⁸⁰ To protect both Reggie Jackson and the reserve system, Commissioner Kuhn stepped in and reversed Jackson's demotion.¹⁸¹ Critics of the reserve system argued that it enabled the owners to hold "complete power over their players and that such power could be exercised arbitrarily or capriciously."¹⁸² To avoid this criticism, Kuhn exercised his best interests authority to protect not only one of the game's rising stars, but also the public's perception that the game and its system of retaining players was fair.¹⁸³

In 1972, Kuhn again battled with Finley over a team dispute with another of the A's young stars. In 1971, Vida Blue won both the Most Valuable Player Award and the Cy Young Award in his first full year in the American League.¹⁸⁴ After the season, Blue asked for a salary of \$115,000, to which Finley offered a non-negotiable \$50,000.¹⁸⁵ Blue refused to sign Finley's contract, and instead of reporting to spring training, returned to his Louisiana home.¹⁸⁶ Unhappy that the game's "hottest talent" was sitting at home at the beginning of the season, Kuhn asked the two parties to come before him and discuss their differences.¹⁸⁷ Finley responded that the matter was beyond the purview of the commissioner's office, because salary disputes were purely a team issue.¹⁸⁸ Kuhn, however, saw the issue in the broader context of what was good for baseball.¹⁸⁹ First, according to Kuhn, the public wanted to see the previous year's most valuable player on the mound.¹⁹⁰ Second, Kuhn again believed that Finley's arbitrary actions threatened the tentative status of the reserve system.¹⁹¹ If Finley continued to treat his players like property, Kuhn reasoned it would be difficult for baseball's hierarchy to continue defending the fairness

180. *See id.* (noting that the action was unfair because "it was motivated by personal reasons unrelated to Jackson's ability").

181. *See id.*

182. *Id.*

183. *See id.*

184. *See id.* at 131.

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.* ("As far as I was concerned, I was the paterfamilias of the game and I could step in wherever I thought appropriate.").

190. *See id.* at 132.

191. *See id.* at 134. In a letter to Finley concerning the Blue matter, Kuhn stated:

It is my continuing judgment that your conduct undermines Baseball's central administrative system and public respect for that system. Unfortunately, you seem to have little or no appreciation of how critically important that system is to the game. You seem to put first and foremost your own desire to act as you feel serves your own interest. Left unchecked, such conduct would destroy the Major League partnership to which you are a party through the Major League Agreement and Rules.

Id.

and legality of the reserve system.¹⁹² Determining that Blue's presence in the league would advance baseball's best interests, Kuhn mediated a twenty-two hour negotiating session between Blue and Finley.¹⁹³ Though both parties were hostile and viewed Kuhn with "equal suspicion," Blue and Finley eventually agreed to a package worth \$63,000.¹⁹⁴

Kuhn's early success with his "best interests" powers came largely at the expense of baseball's ownership. In 1975, however, Kuhn would have to measure his authority in relation to Miller's powerful union as the MLBPA filed grievances on behalf of two pitchers, Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos.¹⁹⁵ Though neither Messersmith nor McNally had signed contracts to play the 1975 season, both of their teams renewed their contracts through the reserve clause.¹⁹⁶ Willing to serve as the union's guinea pigs, Messersmith and McNally gave permission to Marvin Miller to submit before arbitration the issue that the Supreme Court, five years earlier, was unwilling to resolve: what was the proper scope of the renewal provision within the uniform player contract?¹⁹⁷

Commissioner Kuhn now faced a crucial decision. He still retained authority over grievances that implicated the integrity of the game.¹⁹⁸ He could thus remove the Messersmith-McNally grievance from Arbitrator Peter Seitz, claiming that the "potential destruction" of the reserve system threatened the integrity of, and the public's confidence in, baseball.¹⁹⁹ Though Kuhn did indeed believe the issue before Seitz should come before the commissioner, he was reluctant to invoke his authority.²⁰⁰ Kuhn was concerned that taking the grievance away from the arbitrator would destroy relations between the union and ownership.²⁰¹ John Gaherin also advised Kuhn that the players might respond by striking if Seitz did not decide the grievance.²⁰² Ulti-

192. *See id.* ("Finley's abuse of his players was knocking away the props that supported baseball's reserve system.")

193. *See id.* at 132.

194. *See id.* Blue's conflict with Finley, however, clearly flustered the young star. In 1972, Blue won six games while losing ten, and though he had 301 strikeouts in 1971, he never reached 200 again. *See id.* at 134.

195. *See Holtzman, supra* note 4, at 159.

196. *See id.*

197. *See id.* at 157; *see also supra* note 146 and accompanying text (discussing Curt Flood's suit before the Supreme Court).

198. Article 10, item A.1.(b) of the Basic Agreement provided that: "[G]rievance' shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball." Kuhn, *supra* note 75, at 157 (citing the Basic Agreement).

199. *Id.*

200. *See id.* at 157-58.

201. *See id.*

202. *See id.* at 158.

mately, Kuhn allowed the grievance procedure to run its course.²⁰³ Arbitrator Seitz subsequently ruled that the renewal clause in the uniform player contract was not perpetual and that teams could only be exercise the option for one year, thus making both Messersmith and McNally free agents.²⁰⁴

Although Kuhn decided not to meddle in the grievance system, Miller's fear of the Commissioner's power to do so led to further diminution of the commissioner's authority.²⁰⁵ Miller was concerned that Kuhn would unilaterally terminate the union's efforts to obtain free agency²⁰⁶ by determining the new system was not in the best interests of baseball.²⁰⁷ To guarantee that Kuhn would leave free agency untouched, Miller demanded that the 1976 CBA bar the commissioner from interfering in matters subject to collective bargaining.²⁰⁸ Again, Kuhn was the primary obstacle to Miller's demands; Kuhn felt that he had already sacrificed more power than he thought wise to grievance arbitration.²⁰⁹ But Kuhn was still unwilling to stand in the way of an agreement between the parties and relinquished his authority to settle disputes concerning subjects of bargaining.²¹⁰

Though the Messersmith-McNally arbitration had only an indirect impact on the commissioner's authority, baseball's new free agency system played a significant role in solidifying the judiciary's stance on the review of commissioner decisions. In 1977 and 1978, Kuhn's regulation of the new free agency system prompted two federal lawsuits against baseball that challenged the commissioner's authority under the Major League Agreement.²¹¹

Throughout the final five years of his term, Kuhn focused his efforts on the proliferation of drug use within MLB. Kuhn believed that the increased disposable income that came with free agency also increased

203. In his autobiography, Kuhn noted that his greatest regret as commissioner was his failure to remove the grievance from Arbitrator Seitz. *See id.*

204. *See Holtzman, supra* note 4, at 161 ("[A]fter one year there was no contractual bond between player and club. Players who played out their renewal year were free to negotiate with any major league team.").

205. *See Helyar, supra* note 6, at 195-96 ("Miller . . . feared what Kuhn might do, during this unsettled period, in the name of 'integrity of the game.' [He'd] been scared to death [Kuhn] would snatch the *Messersmith* case from Seitz on those grounds.").

206. Generally, a free agent is a player who can sign a player contract with any team in a league.

207. *See Helyar, supra* note 6, at 196 ("I just kept thinking, 'What if we negotiate all this [free agency] and the commissioner stepped in and said, 'I rule that free agency involves the integrity of the game?''" (quoting Miller)).

208. *See id.* Under Miller's proposed system, Kuhn's non-reviewable authority concerning players would be limited to scandal-related issues. *See id.*

209. *See id.* ("This time, Kuhn resisted even more stubbornly. He'd been in office longer, and he'd seen what came of tossing Miller a bone. That independent arbitrator who 'wouldn't handle anything vital?' Right—he only gutted the reserve system.").

210. *See id.* (noting that "Kuhn's powers were, indeed, being whittled away").

211. *See infra* Part II.

the likelihood of player drug abuse.²¹² The commissioner further believed that to maintain the game's relationship with the public, it was necessary to eliminate the influence of drugs from baseball.²¹³

In August 1980, Ontario police arrested Ferguson Jenkins of the Texas Rangers at the Toronto Airport for possession of two ounces of marijuana, two grams of hashish, and four grams of cocaine.²¹⁴ Shortly after the arrest, Kuhn summoned Jenkins to New York to question him about the incident, in hopes of limiting any damage to MLB's welfare.²¹⁵ Jenkins, however, on the advice of his counsel, declined to answer any questions, to avoid any prejudice in his pending case in Canada. Kuhn determined that Jenkins's silence was a violation of the commissioner's contractual right to conduct investigations and suspended the Ranger pitcher pending cooperation.²¹⁶

To Kuhn's chagrin, the union quickly filed a grievance on Jenkins's behalf.²¹⁷ In September, Arbitrator Raymond Goetz overruled Commissioner Kuhn and reinstated Jenkins, calling the commissioner's concern about the drug problem "mere surmise."²¹⁸ Kuhn quickly attacked the decision, noting that athletes had a great responsibility to act as role models for America's youth and to maintain the wholesomeness of the game.²¹⁹ Jenkins was later convicted of cocaine possession, but his reputation and clean record prompted the Canadian judge to discard the verdict and grant the pitcher an absolute discharge.²²⁰

Kuhn believed the arbitration award in the Jenkins grievance sent a bad message: players who abused drugs could always count on the

212. See Kuhn, *supra* note 75, at 304.

213. See *id.* at 303 (explaining that drug abuse was a problem that "had [a] tremendous impact on our fans and threatened the foundations of our relationship with the public").

In a 1984 grievance arbitration involving Kansas City Royals' centerfielder Willie Wilson, the arbitrator agreed with Kuhn's assessment of drugs' influence on the game of baseball: "And drug involvement, because of its threat to athletes' playing abilities, because it is illegal and because of the related connotation of inroads by organized crime, constitutes a serious and immediate threat to the business that is promoted as our national pastime." Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 44.

214. See Kuhn, *supra* note 75, at 305.

215. See *id.*

216. See *id.* For the Major League Agreement's provision on commissioner investigation, see *supra* note 11 and accompanying text.

217. See Kuhn, *supra* note 75, at 305 (noting that the grievance "dashed any hope [the commissioner] might have harbored that the Players Association would take a supportive view of [his] efforts to deal with the drug problem"). To Kuhn, the Jenkins grievance was a sign that the union placed more importance on individual player rights than on the general welfare of the game. See *id.* ("Never mind that player careers might well be destroyed by drug abuse; they were not going to cooperate with the commissioner or management on the subject.").

218. *Id.* at 305-06.

219. See *id.* at 306.

220. See *id.*

protection of the union, despite the impact that drugs had on baseball.²²¹ Over the next several years, the MLBPA filed grievances following most of Kuhn's disciplinary decisions regarding drugs.²²² Kuhn's greatest disappointment with the system came in 1984 concerning a young pitcher from the Dominican Republic, Pascual Perez.²²³ That January, while playing winter ball in his home country, Perez was arrested with a half gram of cocaine in his wallet.²²⁴ In March, Perez was tried, found guilty, and paid a \$400 fine for possession of cocaine.²²⁵ Upon his return to the United States, Kuhn summoned Perez to New York to discuss the incident. Kuhn, believing that Perez's responses to his questions displayed an unwillingness to cooperate, suspended the Atlanta Braves pitcher for one month for his crime.²²⁶ The union's new executive director, Donald Fehr, filed a grievance on Perez's behalf the day after Kuhn made his decision.²²⁷ Midway through the pitcher's sentence, Arbitrator Richard Bloch terminated the suspension and allowed Perez to continue playing.²²⁸ Kuhn was thoroughly disappointed with a system where an outsider could second-guess his judgment, but ultimately conceded that for the sake of labor peace, the commissioner's disciplinary authority could no longer be absolute.

Bowie Kuhn wielded the commissioner's best interests authority more frequently than any commissioner since Judge Landis. He challenged owners, players, and even some of the game's greatest stars.²²⁹ By the end of his term, however, the commissioner's office was no longer the omnipotent institution that Landis had created after the Black Sox Scandal. The commissioner's authority to "determine, after investigation, what preventive, remedial or punitive action [was] ap-

221. *See id.* ("I am afraid [the Jenkins arbitration] knocked the last latches off the floodgates.").

222. For example, in the beginning of 1985, Arbitrator Richard Bloch shortened Kuhn's one-year suspension of Kansas City Royals Willie Wilson and Jerry Martin to six months. *See id.* at 314. Though Bloch agreed with Kuhn that "baseball ha[d] a substantial interest in the implementation and enforcement of drug prohibitions," the Arbitrator believed the one-year suspension was too severe in length. *See Weiler & Roberts, Sports and the Law, supra* note 6, at 44.

223. *See Kuhn, supra* note 75, at 316 ("My earlier disappointments with the arbitration process were mild compared with my reaction to the result in the matter of pitcher Pascual Perez.").

224. *See id.* at 316-17.

225. *See id.* at 317.

226. *See id.* at 317-18. Kuhn also placed Perez on one year probation. *See id.* at 317.

227. *See id.*

228. *See id.*

229. In 1979, Commissioner Kuhn asked Willie Mays, then an employee of the New York Mets, to terminate his contract with the Mets when the former centerfielder signed a part-time employment contract with Bally's Park Place Casino in Atlantic City, New Jersey. *See id.* at 323-30. In 1983, Kuhn asked former Yankee great Mickey Mantle to disassociate himself with the Yankees when he accepted a position with the Claridge Hotel and Casino, also in Atlantic City. *See Mantle Barred from Baseball Activities, Daily Star* (Oneonta, N.Y.), Feb. 9, 1983, at 11.

propriate"²³⁰ in a given circumstance was now subject, at the union's request, to the review of an arbitrator. The days of Judge Landis were officially over.

D. *The 1980s and 1990s: The Fall of Pete Rose*

In the fourteen years since Bowie Kuhn's reign, MLB has had four commissioners. Peter Ueberroth followed Kuhn, serving for one five-year term.²³¹ After Ueberroth came then-president of the National League, A. Bartlett Giamatti.²³² Giamatti's term only lasted 154 days; he died of a massive heart attack on September 1, 1989.²³³ Though his term was short, Giamatti made his mark on baseball and the commissioner's office for his handling of the game's greatest scandal since the Black Sox: the Pete Rose controversy.

In 1927, Commissioner Landis recommended, and the owners adopted, anti-gambling rules that called for a lifetime ban for any player who bet on a game in which he was involved.²³⁴ Though Landis had the ability to impose the punishment without implementing the new standard, the owners chose to enact the rule to make the National Agreement more "particularized."²³⁵ The rules were largely successful; yet, during the 1980s, perennial all-star Pete Rose began to flirt with the most dreaded of baseball crimes.²³⁶

Pete Rose has more hits, singles, at-bats, and seasons with 200 or more hits than any other player in history.²³⁷ Known for his all-out style of play, Rose became a true fan favorite, earning the nickname

230. Major League Agreement, Jan. 12, 1921, § 2(a)-(b), at 1.

231. See Holtzman, *supra* note 4, at 208-09.

232. Before his term with the National League, Giamatti was the president of Yale University. See *id.* at 240-41. After Giamatti's death, Fay Vincent became baseball's ninth commissioner. The Northern District of Illinois rejected one of Vincent's actions in baseball's best interests when it ruled that Vincent's attempt to re-align the Chicago Cubs was an abuse of his authority, for it breached an explicit provision of the Major League Agreement. See *Chicago Nat'l League Ball Club, Inc. v. Vincent* (N.D. Ill. 1992), reprinted in Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 24.

Vincent also suspended New York Yankees owner George Steinbrenner for two years from MLB for Steinbrenner's ties to a small-time gambler with mob connections, whom Steinbrenner allegedly paid to uncover damaging information about Yankee outfielder, Dave Winfield. See Holtzman, *supra* note 4, at 266-69. Allan "Bud" Selig, the former majority owner of the Milwaukee Brewers, is the present MLB commissioner. *Selig Named Commissioner: Baseball's "New" Leader Held Interim Job for 2,131 Days*, *Detroit News*, July 10, 1998, at F1.

233. See Holtzman, *supra* note 4, at 255.

234. See Seymour, *supra* note 5, at 387.

235. *Id.*

236. See Will, *supra* note 2, at 200 ("[G]ambling remained baseball's capital crime.").

237. See Holtzman, *supra* note 4, at 245.

“Charlie Hustle.”²³⁸ But Rose had a severe gambling problem.²³⁹ In the 1980s, to fund his gambling habit, Rose became a fixture on both the baseball card show circuit and in the booming sports memorabilia trade.²⁴⁰ In 1985, he sold the bat with which he had broken Ty Cobb’s hit record for \$125,000.²⁴¹ To maximize his profits from that memorable night, Rose changed shirts three times during the game so that he could sell one shirt while holding onto the other two.²⁴² He associated with drug dealers, bookmakers, and memorabilia hustlers, all of whom both revered him and helped finance his gambling addiction.²⁴³

Ultimately, the negative publicity from Rose’s gambling was too blatant for the commissioner’s office to ignore.²⁴⁴ In his last days in office, Commissioner Ueberroth summoned Rose to his office and asked him whether he had ever gambled on baseball.²⁴⁵ When Rose denied the allegation, Ueberroth cleared Rose’s name and informed the public that no further action would follow.²⁴⁶

A. Bartlett Giamatti, however, would not be as forgiving as Ueberroth. As commissioner, Giamatti believed his role was to purify baseball and fiercely maintain its integrity.²⁴⁷ He wanted to rid the

238. See Will, *supra* note 2, at 197 (“Rose’s willfulness on the field made him much loved in baseball’s inner circle, and in the bleachers. . . . He excelled because he tried harder than anyone else.”).

239. See Helyar, *supra* note 6, at 400.

240. See *id.*

241. See *id.*

242. See Reston, *supra* note 56, at 250. Rose kept one jersey for himself, gave one to Cincinnati Reds owner Marge Schott, and sold the third for \$50,000. See *id.* Logic, however, would dictate that if Rose changed shirts three times throughout the game, he would have four shirts to distribute.

243. See *id.* at 214 (noting that Rose “always had his gaggle of flunkies and parasites”); Will, *supra* note 2, at 198 (reviewing Reston’s book on Rose and Giamatti, Will states: “Reston gives new depth to the term ‘lowlife’ as he recounts Rose’s slide into gambling, debts, drugs, incessant adultery and the company of muscle-bound dimwits resembling characters who wandered out of a Damon Runyon short story that had been rewritten by Elmore Leonard”).

244. See Helyar, *supra* note 6, at 401. See generally Will, *supra* note 2, at 198 (“By 1987 [Rose] was losing \$30,000 a week to bookies—\$34,000 on a single Super Bowl bet.”).

245. See Helyar, *supra* note 6, at 401.

246. See *id.*

247. See Reston, *supra* note 56, at 225; see also Giamatti, *supra* note 1, at 120 (“I believe baseball is an important, enduring American institution. It must assert and aspire to the highest principles—of integrity, of professionalism of performance, of fair play within its rules.”); Holtzman, *supra* note 4, at 232 (stating that Giamatti’s “rigid belief [was that] the commissioner’s essential assignment is to maintain the integrity of the game”). Giamatti was also obsessed with rules, and with adherence to them. See Will, *supra* note 2, at 198 (“Giamatti’s preoccupation, academic and otherwise, was with excellence within the rules.”). When attending baseball games as the commissioner and as the National League president, Giamatti would often visit the umpires before the game, for they were “the keepers of the rules, the ones who controlled the fire of competition.” *Id.*

Ultimately, Giamatti’s intense love for baseball fueled his beliefs concerning his role as commissioner. See Holtzman, *supra* note 4, at 238. When Giamatti’s Yale col-

national pastime of drugs, rude behavior in the stands, sex scandals, and other negative influences.²⁴⁸ Giamatti felt that if left to their natural devices, players were the true threats to baseball, and that it was his duty to "contain their excesses."²⁴⁹ Thus, despite Ueberroth's statement that the Rose matter was moot, Giamatti's investigation was just beginning. First, Giamatti hired a Washington attorney named John Dowd²⁵⁰ to conduct the inquiry.²⁵¹ Dowd's reputation for operating fierce investigations endeared him to baseball's management,²⁵² which granted Dowd complete authority to investigate Rose in the name of MLB.²⁵³ Dowd used this authority to ensure that Rose would cooperate completely, for Rose knew that failure to do so would be contractual grounds for suspension.²⁵⁴

Just days after the investigation began, Dowd spoke with Paul Janszen, a weightlifter and small-time steroids dealer who had been a principal figure in Rose's entourage for two years.²⁵⁵ According to Janszen, he and Rose had a falling out over a \$44,000 debt Rose owed Janszen for gambling losses.²⁵⁶ Dowd also questioned Ron Peters, a bookmaker who accepted and placed bets for Rose.²⁵⁷ Both Janszen and Peters informed Dowd that Rose had gambled on baseball.²⁵⁸ Janszen's girlfriend, Danita Marcum, who was a frequent runner for Rose, revealed that she had placed bets for Rose on the Cincinnati

leagues questioned his career change, Giamatti responded: "I'm almost 50 years old and I have fallen in love. I'm running away with a beautiful redhead with flashing eyes whose name is baseball." *Id.*

248. See Reston, *supra* note 56, at 225. See generally Holtzman, *supra* note 4, at 244 (referring to Giamatti as "[b]aseball's Cardozo").

249. Reston, *supra* note 56, at 263.

250. Dowd's past included time served as a prosecutor with the United States Justice Department, heading a strike force investigating organized crime. See Helyar, *supra* note 6, at 401.

251. See Holtzman, *supra* note 4, at 246-47.

252. See *id.* ("When Dowd sees evil, the gloves come off. If he went after the Pope, he'd bring him down." (quoting then-Deputy Commissioner Fay Vincent)).

253. Dowd indulged in the wide latitude given to him by Giamatti. At the Justice Department, the Bill of Rights handcuffed Dowd's ability to conduct what he believed was a full investigation. As the commissioner's investigator, however, he had only to ensure that the investigation was fair. See Helyar, *supra* note 6, at 402 ("He didn't need a search warrant or a subpoena. He had only to invoke the threat of retribution if a baseball man didn't cooperate with the commissioner. Even a star could be browbeaten into submission."). Dowd would later assert that "[t]he commissioner ha[d] a right to everything." *Id.*

254. See Reston, *supra* note 56, at 279 ("Dowd had repeatedly warned the Rose attorneys that any failure to cooperate with his investigation would be considered by Bart Giamatti to be contrary to the best interests of baseball and would, in itself, be grounds for suspension."); Will, *supra* note 2, at 124 ("The only contractual rights involved are the commissioner's rights [to investigate], rights that Rose and everyone else acknowledges when signing the standard player's contract.").

255. See Helyar, *supra* note 6, at 402.

256. See *id.*

257. See Holtzman, *supra* note 4, at 249.

258. See *id.*

Reds when Rose was the team's manager.²⁵⁹ At the conclusion of the inquiry, Dowd submitted a 225-page report to Giamatti that concluded that Rose placed bets on games in which he was personally involved.²⁶⁰

Dowd's rapacity created trouble for Giamatti, leading a MLB commissioner into court for the first time since 1978. When Dowd approached Peters for information, Peters was awaiting sentencing in an Ohio federal court on charges of cocaine trafficking.²⁶¹ To induce honesty, Dowd promised Peters that Giamatti would write a letter to the sentencing judge that would explain Peters's cooperation in the Rose investigation.²⁶² In the Giamatti-signed letter written to Judge Carl Rubin of the Southern District of Ohio, Dowd wrote: "Based upon other information in our possession, I am satisfied Mr. Peters has been candid, forthright and truthful."²⁶³ Judge Rubin, however, was a diehard Cincinnati Reds fan, and though the letter pleaded for confidentiality, he disclosed and denounced it, concluding that the commissioner had a "vendetta" against Rose.²⁶⁴

After the letter went public, Rose's legal team filed suit in Ohio state court to enjoin baseball's hearing on the Rose allegations, arguing that Giamatti had prejudged the matter.²⁶⁵ They asked that baseball replace Giamatti with an "impartial decision-maker" because of the commissioner's "displayed bias and outrageous conduct."²⁶⁶ In what one commentator described as a "shameless hometown decision,"²⁶⁷ an elected Ohio state court judge granted the injunction, concluding that the commissioner had prejudged the plaintiff's actions.²⁶⁸ Citing no case law authorizing a court to interfere with the commissioner's exercise of his duties,²⁶⁹ the judge temporarily impeded Giamatti's ability to exercise his best interests authority.

259. *See id.*

260. *See id.* at 247. Rose had also placed bets on games in which he was not personally involved. *See id.* at 247-48.

261. *See id.* at 249.

262. *See id.* at 250.

263. *Id.* at 251. Though Giamatti signed the letter, he paid very little attention to the entire matter. Dowd told the commissioner that such letters to sentencing judges were routine. *See Reston, supra* note 56, at 286. In essence, Giamatti forfeited to his private investigator the commissioner's role to judge evidence. *See id.*

264. *See Holtzman, supra* note 4, at 251-52.

265. *See Helyar, supra* note 6, at 403.

266. Holtzman, *supra* note 4, at 252. Rose's attorneys also asked for punitive damages "against Giamatti in a sum sufficient to punish him for his unfair and outrageous conduct in the way he has handled from the outset the proceedings against Pete Rose." Reston, *supra* note 56, at 296.

267. Holtzman, *supra* note 4, at 252 (noting that Nadel was up for re-election).

268. *See Helyar, supra* note 6, at 403 ("We further find that the hearing set for tomorrow in New York before the commissioner of baseball would be futile and illusory and the outcome a foregone conclusion." (quoting Judge Nadel)).

269. *See Will, supra* note 2, at 124.

Incensed by the decision, Giamatti swore to fight the ruling in federal court.²⁷⁰ He filed a notice of removal, arguing that because the commissioner's office was an independent body, diversity jurisdiction existed, enabling the case to be in federal court.²⁷¹ In response, Rose contended that the commissioner's office was a "citizen" in every state in which a MLB team exists, thus destroying diversity jurisdiction.²⁷² To ascertain appropriate jurisdiction, the federal court believed it had to determine the "proper parties to [the] action from 'the principal purpose of the suit.'"²⁷³ Though the court recognized that MLB was a citizen of Ohio through the presence of the Cincinnati Reds and the Cleveland Indians,²⁷⁴ it decided that Rose solely aimed his complaint at Commissioner Giamatti, and not the Cincinnati Reds or MLB.²⁷⁵

To reach this conclusion, the court examined and affirmed both the commissioner's broad powers and the independence of his office. The court noted that the Major League Agreement granted the commissioner's office "extraordinary power" to investigate acts contrary to the best interests of baseball.²⁷⁶ Within these investigations, the court recognized that the commissioner had "virtually unlimited authority to formulate his own rules of procedure."²⁷⁷ Thus, MLB, and the twenty-six teams that made up MLB at the time, had "absolutely no control over such an investigation or the manner in which the Commissioner conduct[ed] it."²⁷⁸ The court reasoned that Rose's suit merely challenged the commissioner's "conduct of the investigation and disciplinary proceedings in this particular case," and thus held

270. See Reston, *supra* note 56, at 297 ("The more this kind of thing goes on, the less inclined I would ever be to consider [removing myself]. I have been challenged in my own personal self here. I am not inclined to roll over." (quoting Giamatti) (alteration in original)).

271. See Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 3. In arguing for removal, the commissioner's counsel asserted:

In the state court in Cincinnati, I need not describe Mr. Rose's standing. He is a local hero, perhaps the first citizen of Cincinnati. And Commissioner Giamatti is viewed suspiciously as a foreigner from New York, trapped in an ivory tower, and accused of bias by Mr. Rose. Your Honor, this is a textbook example of why diversity jurisdiction was created in the Federal Courts and why it exists to this very day.

Id.

272. See *Rose v. Giamatti*, 721 F. Supp. 906, 912-13 (S.D. Ohio 1989).

273. *Id.* at 913. The court went on to state that "[c]onsequently, the Court must determine whether, as the Commissioner contends, the citizenship of these defendants should be ignored for the purpose of determining whether the removal of this case to this Court was proper." *Id.*

274. See *id.*

275. See *id.* at 913-22.

276. *Id.* at 916.

277. *Id.* ("These rules of procedure are not rules adopted by the members of Major League Baseball; they are rules promulgated solely by the Commissioner of Baseball.")

278. *Id.* at 918; see also *id.* at 919 ("[I]t is clear that with regard to disciplinary matters, the major league baseball clubs have made the Commissioner totally independent of their control.")

that the only defendant needed for the court to afford the plaintiff complete relief was Commissioner Giamatti.²⁷⁹

With appeals filed in federal court, the public quickly became exasperated with the Rose proceedings.²⁸⁰ Both sides began to entertain thoughts of settlement.²⁸¹ Giamatti's declining health, along with the bad press surrounding Rose, forced both sides to strive for a quick resolution.²⁸² On August 23, 1989, just eight days before Giamatti's death, the Rose matter came to a close.²⁸³ The parties agreed to put Rose on MLB's ineligible list, allowing him to apply for reinstatement in one year.²⁸⁴ While on the ineligible list, Rose could not work for organized baseball in any capacity, including all teams, major or minor league, and all MLB-recognized broadcast organizations.²⁸⁵ Rose could not participate in MLB-sanctioned Old Timer's games, attend official baseball dinners, or set foot in a team clubhouse or front office.²⁸⁶ The settlement agreement, however, made clear that "[n]othing in this agreement shall be deemed either an admission or a denial by Peter Edward Rose of the allegation that he bet on any major league baseball game."²⁸⁷

At the press conference announcing Rose's suspension, Giamatti reminded all who were in attendance of the importance of professional baseball's integrity.²⁸⁸ He also reassured the public that he would maintain his vigilance, vigor, and patience "in protecting the game from blemish or stain or disgrace."²⁸⁹ Though Pete Rose had tarnished and damaged MLB, the game emerged from the situation just as strong, if not stronger.²⁹⁰ The power of the commissioner's of-

279. *Id.* at 918.

280. *See* Reston, *supra* note 56, at 302.

281. *See* Helyar, *supra* note 6, at 404 ("Finally, *both* sides blinked.")

282. *See* Reston, *supra* note 56, at 303-04.

283. *See id.* at 305.

284. *See* Helyar, *supra* note 6, at 404.

285. *See* Reston, *supra* note 56, at 305.

286. *See id.*

287. Helyar, *supra* note 6, at 404-05 (quoting the settlement agreement). Immediately after the announcement of Rose's banishment, Giamatti disregarded this term of the settlement. A reporter asked the commissioner if he believed Rose had gambled on baseball. In response, Giamatti stated: "In the absence of a hearing and therefore in the absence of any evidence to the contrary, . . . I am confronted by the factual record of the Dowd report. And on the basis of that, yes, I have concluded that he bet on baseball." Holtzman, *supra* note 4, at 254 (quoting Giamatti). Giamatti then asserted that Rose had indeed bet on the Cincinnati Reds. *See id.* Later in the day, Rose held a press conference of his own, where he responded to the commissioner's remarks, declaring that "[r]egardless of what the Commissioner said today, I did not bet on baseball." *Id.* (quoting Rose).

288. *See* Giamatti, *supra* note 1, at 120-21 ("But [baseball], because it is so much a part of our history as a people and because it has such a purchase on our national soul, has an obligation to the people for whom it is played—to its fans and well-wishers—to strive for excellence in all things and to promote the highest ideals.")

289. *Id.* at 121.

290. *See* Reston, *supra* note 56, at 306.

fice to investigate and discipline had been reaffirmed, and Giamatti made clear that "no man, no matter how exalted, was above the game itself."²⁹¹ Ridning the national pastime of a popular hero in the name of integrity, morality, and idealism, Giamatti emerged as a national hero, primed to carry baseball into the 1990s.²⁹²

As for Pete Rose, no American in history had fallen to such great depths in so short a time, with the possible exception of Richard Nixon.²⁹³ In 1990, Rose was convicted on two counts of tax evasion, served five months in a federal prison and paid \$50,000 in fines and \$366,042 in back taxes.²⁹⁴ In February 1991, in anticipation of Rose's first year on the ballot, the directors of baseball's Hall of Fame ruled that no player on MLB's ineligible list could gain entry into Cooperstown.²⁹⁵ To this day, over nine years after his banishment, baseball's all-time hit leader is still not a member of the Hall of Fame.

E. *The NBA and the NFL*

The overall success of the commissioner's office in MLB prompted other professional sports to follow suit. The second commissioner of the NFL was Bert Bell, whose primary function as commissioner was to keep the NFL financially afloat.²⁹⁶ As late as the 1950s, NFL teams were still going bankrupt; the idea that the teams could make substantial sums of money only arose at the end of Bell's life.²⁹⁷ Bell passed away in October 1959, after thirteen years of service to the league.²⁹⁸

On January 26, 1960, the National Football League named Pete Rozelle, then the Los Angeles Rams' General Manager, as the league's third commissioner.²⁹⁹ Quickly labeled the "boy czar,"³⁰⁰ Rozelle concentrated his early efforts towards obtaining a league wide television contract to maximize league revenues.³⁰¹ After convincing the league owners to divide all network television revenue equally, Rozelle negotiated a contract for the 1962 and 1963 seasons with the Columbia Broadcasting System. Before negotiating the contract, though, Rozelle had to secure some sort of antitrust exemption that would

291. *See id.*

292. *See id.* at 307-08. ("Giamatti had moved onto the level he loved . . . where baseball was not simply a game but a treasured American institution, and he was more than the baseball commissioner—he was an American leader. He was showing the leaders of other American institutions that absolute, sincere, passionate stands were possible.").

293. *See Will, supra* note 2, at 194 (citing Reston, *supra* note 56, at 313).

294. *See Holtzman, supra* note 4, at 256.

295. *See id.*

296. *See Harris, supra* note 16, at 12-13.

297. *See id.* at 13.

298. *See id.* at 11.

299. *See id.* at 11-12.

300. *Id.* at 12. Rozelle was only 33 years old when he became commissioner. *See id.* at 7.

301. *See id.* at 12-14.

allow the league to collectively bargain for, and share the fruits of, a joint television contract.³⁰² On September 30, 1961, in response to Rozelle's lobbying, Congress enacted the Sports Antitrust Broadcast Act,³⁰³ allowing sports leagues to pool and jointly sell their television rights.³⁰⁴ Pete Rozelle retired in 1989 after thirty years in the league.³⁰⁵ Shortly thereafter, the NFL named its chief outside legal counsel, Paul Tagliabue, as the league's third commissioner.³⁰⁶

Rozelle's television-related efforts prompted the league to grant the Commissioner "full, complete, and final jurisdiction and authority [over] any dispute involving a member or members in the League."³⁰⁷ In the NFL, if the commissioner believes a player's conduct is "detrimental to the integrity of, or public confidence in, the game of professional football," then he must merely send written notice of the punishment to the player.³⁰⁸ Within twenty days of such notice, the player or the NFLPA may appeal in writing to the commissioner.³⁰⁹ After the commissioner receives the notice of appeal, he schedules a hearing at which either he or his designee presides.³¹⁰ The commissioner or his designee then renders a written decision that constitutes "full, final and complete disposition of the dispute and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement with respect to that dispute."³¹¹

In the NBA, disciplinary conflicts appeared before the league created the commissioner's office. In 1953, the Fort Wayne Pistons selected Jack Molinas in the collegiate draft and signed him to a player contract.³¹² In January 1954, after just a few months in the league, Molinas admitted to placing bets on Pistons games.³¹³ Upon hearing the plaintiff's admission, league president Maurice Podoloff suspended Molinas indefinitely from the NBA for violating anti-gambling provisions located in both his player contract and the league constitution.³¹⁴ Although Molinas applied for reinstatement to the league,

302. *See id.* at 15 (noting that the NFL owners were "[a]pprehensive that such [revenue] sharing might be considered an illegal monopoly under the Sherman Act").

303. Sports Antitrust Broadcast Act, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291-95 (1994)).

304. *See Harris*, *supra* note 16, at 15 (pointing out that Rozelle was "one of the better outside operators Capitol Hill had seen in a while").

305. *See Will McDonough*, *The Rozelle Resignation*, Boston Globe, March 23, 1989, Sports, at 1.

306. *See Bob Oates*, *It's Finally Over—NFL Names Boss*, L.A. Times, Oct. 27, 1989, at C1.

307. NFL Constitution and Bylaws § 8.3, at 17-18 (1988).

308. NFL CBA, *supra* note 24, art. XI, § 1(a), at 29.

309. *See id.*

310. *See id.*, art. XI, § 1(c), at 29.

311. *Id.*

312. *See Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 242 (S.D.N.Y. 1961).

313. *See id.*

314. *See id.*

President Podoloff rejected these attempts, characterizing Molinas as a "cancer on the league."³¹⁵

Molinas then sued both the NBA and Podoloff, arguing that his lifetime ban from, and his lack of reinstatement in, professional basketball for gambling activities constituted a group boycott in violation of the federal antitrust laws.³¹⁶ In a short opinion, the court applied a reasonableness standard to the NBA's disciplinary action:³¹⁷ unless Molinas could establish that the discipline was unreasonable, the league's suspension did not violate the Sherman Act.³¹⁸ The court determined that a disciplinary rule against gambling seemed "about as reasonable a rule as could be imagined,"³¹⁹ and thus held the suspension and lack of reinstatement justified to effectuate the league's policies against gambling.³²⁰ In addition, the court noted that the league's action was necessary to protect the public's confidence in the game.³²¹

Once again, a court showed great deference to the disciplinary decisions of a sports league. Although Podoloff's title was not commissioner, the court gave the league president great latitude to protect the integrity of professional basketball. As in *Milwaukee American Ass'n v. Landis*,³²² the judiciary proved unwilling to decide what was best for a private association, absent any arbitrary or unreasonable behavior by that association.

In February 1984, the NBA named David Stern, a former partner at the law firm of Proskauer Rose Goetz & Mendelsohn, as the third

315. *Id.*

316. *See id.* at 242-43.

317. *See id.* at 243-44.

318. *See id.* ("Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions. Surely, every disciplinary rule which a league may invoke, although by its nature it may involve some sort of restraint, does not run afoul of the anti-trust laws.")

319. *Id.* at 244.

320. *See id.* Molinas argued that because he bet on his own team to win, his conduct, though improper, was not immoral. *See id.* The court believed that the distinction concerning whether Molinas bet on his own team or not was meaningless: the problem the mere act of betting on his own team posed was that the wager, or lack thereof, operated to inform bookmakers as to an insider's opinion concerning the outcome of a game. *See id.* Obviously, when Molinas bet on his own team, the bookmakers knew that a team member believed the Pistons would perform well that night. "Similarly, when he chose not to bet, bookmakers thus would be informed of [Molinas'] opinion that the Pistons would not perform according to expectations." *Id.* Thus, the court concluded that a rule against betting on one's own team was reasonable, and not violative of the Sherman Act. *See id.*

321. *See id.* ("Thus, it was absolutely necessary for the sport to exhume gambling from its midst for all times in order to survive.")

Ironically, while the *Molinas* litigation was pending, Molinas was the mastermind of a nationwide point-shaving scandal in college basketball. *See Weiler & Roberts, Sports and the Law, supra* note 6, at 33. In the spring of 1961, less than five months after the resolution of his antitrust suit, Molinas was indicted and then convicted for his involvement in the national gambling scheme. *See id.*

322. 49 F.2d 298 (N.D. Ill. 1931).

commissioner of the league.³²³ Along with Earvin "Magic" Johnson, Larry Bird, and Michael Jordan, Stern receives extraordinary credit for catapulting both the NBA's popularity and profit margins higher than ever before.³²⁴ When Stern entered office, the NBA's disciplinary procedure was similar to the NFL's: the commissioner's disciplinary decisions were final.³²⁵ Only recently, in the NBA's 1995 CBA, did the league and the NBPA agree to alter the grievance mechanism to allow arbitral review of commissioner disciplinary decisions.³²⁶

The disciplinary matters discussed in this part evoked a "constitutional" theme that pervades sports and the law: "To what extent should public law, speaking through judges [and arbitrators], venture to overturn decisions made by private leagues, speaking through their commissioners?"³²⁷ In the 1920s, baseball's owners envisioned a system where commissioners would have the final word on all disciplinary issues. As time evolved, however, and sports unions blossomed and grew in power,³²⁸ the commissioner's best interests authority diminished. The MLB and the NBA CBAs now gave outside parties the power to review commissioner best interests disciplinary decisions. Whether these outside decision-makers can protect the integrity of professional sports, however, is doubtful. The next part examines how the judiciary has handled commissioner disciplinary rulings.

II. JUDICIAL DEFERENCE TO COMMISSIONER "BEST INTERESTS" RULINGS

Commissioner Kuhn faced two lawsuits in the latter half of the 1970s challenging his authority to discipline members of MLB. This part reviews these decisions and explores the judiciary's deference to commissioner rulings.

A. *Finley v. Kuhn*

In 1960, Charles O. Finley purchased fifty-two percent of the Kansas City Athletics ("A's") for two million dollars.³²⁹ In 1968, poor

323. See Armen Keteyian et al., *Money Players: Days and Nights Inside the New NBA* 26-27, 34-35 (1997). The first two commissioners of the NBA, Walter Kennedy and Larry O'Brien, were not the subjects of any major disciplinary disputes, and thus will not appear in this analysis.

324. Cf. *id.* at 28 (discussing the NBA's "ever-widening profit margin").

325. See Paul C. Weiler & Gary R. Roberts, 1995 Case Supplement to *Cases, Materials and Problems on Sports and the Law* 12 (1995) [hereinafter Weiler & Roberts, 1995 Case Supplement].

326. See NBA CBA, *supra* note 22, art. XXXI, § 1(a)-(b), at 163.

327. Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 5.

328. See Abrams, *supra* note 17, at 96.

329. See Helyar, *supra* note 6, at 73. As seen in part I, Finley always caused trouble for the commissioner's office. MLB, however, did have advance notice that Finley could potentially be a problem. MLB assigned Joe Iglehart, the Orioles' chairman, to investigate Finley before they approved the A's sale to Finley. In his report to MLB,

attendance in Kansas City prompted Finley to move the A's to Oakland, where he built baseball's first dynasty since the New York Yankees of the 1950s.³³⁰ With a plethora of Finley-recruited young talent, the A's won each World Series from 1972 to 1974.³³¹ The Messersmith-McNally arbitration and the coming of free agency, though, scared Finley.³³² In the past, Finley could use the reserve clause to bully his players into signing low contracts.³³³ Now, he could only exercise the options in his players' contracts once, whereupon those players could sign new contracts with other teams the following year.³³⁴

In 1976, Finley used the reserve clause to re-sign Vida Blue, Rollie Fingers, and Joe Rudi to one-year contracts, all at the maximum twenty percent pay cut.³³⁵ Having little interest in losing these three players at year's end without compensation, Finley began his own personal assault on free agency. He planned to sell his contractual rights to Blue, Fingers, and Rudi for cash to obtain the compensation he believed the free agency system had stolen from him.³³⁶ In the beginning of June 1976, Finley began soliciting offers for the three players, asking one million dollars for each.³³⁷ On June 15, the trading deadline, Finley sold Vida Blue's contract to the New York Yankees for one and a half million dollars and sold the contracts of both Rollie Fingers and Joe Rudi to the Boston Red Sox for one million dollars each.³³⁸

News of the sales quickly reached Commissioner Kuhn, who happened to be in Finley's home city of Chicago attending a White Sox game.³³⁹ From the game, Kuhn called Finley at the owner's Chicago office to inform him the transactions were a "disaster."³⁴⁰ Finley responded that the sales were "none of [Kuhn's] damn business," argu-

Iglehart stated that "[u]nder no conditions should this person be allowed into our league." *Id.*

330. See Kuhn, *supra* note 75, at 126. Finley privately referred to Kansas City as a "horseshit town." Helyar, *supra* note 6, at 74.

331. See Abrams, *supra* note 17, at 108.

332. See Helyar, *supra* note 6, at 183.

333. See *id.*

334. See *id.*

335. See *id.*

336. See *id.* ("Finley aimed to get *something* for his stars before he lost them to free agency.").

337. See *id.* at 184; see also Holtzman, *supra* note 4, at 179 ("This is Charlie's meat market. I have several good pieces of meat for sale and the price is a million dollars apiece." (quoting Finley)).

338. See Holtzman, *supra* note 4, at 171. The Boston Red Sox and the New York Yankees were, and continue to be, among the wealthier clubs in MLB. See Tom Haudricourt, *The Great Divide: Chasm Getting Wider Between Haves, Have-Nots*, Milwaukee J. Sentinel, Dec. 21, 1998, Sports, at 1 (noting the Yankees and Red Sox have among the highest payrolls in MLB).

339. See Kuhn, *supra* note 75, at 174.

340. Helyar, *supra* note 6, at 188.

ing that commissioners should not meddle in player transaction.³⁴¹ Already bitter adversaries,³⁴² Kuhn and Finley arranged to meet immediately at the Pick-Congress Hotel coffee shop on Michigan Avenue.³⁴³ At the meeting, Finley expressed concern that he would not be able to re-sign his players at season's end.³⁴⁴ Finley explained that if he could sell these players now, he could use the money to sign younger players and build another dynasty as he had done in the early 1970s.³⁴⁵ Though Kuhn recognized that Finley's arguments were "not irrational,"³⁴⁶ the commissioner's concern for the welfare of the game prompted him to evoke his best interests authority to void the sales three days later.³⁴⁷

On June 18, after holding a hearing on the matter, Commissioner Kuhn called a press conference to announce that he was nullifying the sales.³⁴⁸ Kuhn reasoned that "[p]ublic confidence in the integrity of club operations and in baseball would be greatly undermined should such assignments not be restrained."³⁴⁹ He was concerned that fans in smaller market cities would lose interest in baseball if rich teams could simply buy success during the season.³⁵⁰ Kuhn believed that allowing the sales to go through would be a precursor to a complete reallocation of talent within MLB from poor teams to rich:

If such transactions now and in the future were permitted, the door would be opened wide to the buying success of the more affluent clubs, public suspicion would be aroused, traditional and sound methods of player development and acquisition would be undermined and our efforts to preserve the competitive balance would be gravely impaired.³⁵¹

At his press conference, Kuhn acknowledged that past commissioners permitted player sales. The commissioner held, however, that Finley's

341. *Id.*

342. *See supra* notes 176-95 and accompanying text. John Helyar provided further evidence of Kuhn's and Finley's bitter relationship recounting testimony that Finley gave at a disciplinary hearing in 1973. Commissioner Kuhn had sent Finley a telegram requesting Finley's presence at the hearing. During Finley's testimony, MLB's lawyer asked Finley "[i]sn't it a fact that you told [Kuhn] he could shove that telegram up his ass?" Finley responded: "No, . . . [i]t is my recollection I said he could shove it right up his big, fat ass." Helyar, *supra* note 6, at 189-90.

343. *See* Kuhn, *supra* note 75, at 176.

344. *See id.* (quoting Finley: "Commissioner, I can't sign these guys. They don't want to play for ol' Charlie. They want to chase those big bucks in New York.").

345. *See id.*

346. *Id.* at 177.

347. Norm Miller & Larry Fox, *KO Finley \$1M Deals: Lawsuits Threatened by Yanks, A's*, Daily News (New York, N.Y.), June 19, 1976, at 28.

348. *See* Kuhn, *supra* note 75, at 178.

349. *Id.*

350. *See generally* Helyar, *supra* note 6, at 193 (noting that at the MLB's executive council meeting, Dodgers' owner Walter O'Malley stated "[p]ennants are not to be bought"). O'Malley also argued that if a "player auction in June decided pennant races," no one would attend baseball games. *Id.*

351. *Id.* at 194 (quoting Commissioner Kuhn).

transactions posed a greater potential for harm than past sales because of the "present unsettled circumstances of baseball's reserve system."³⁵² Kuhn also noted that Finley's "debilitation of the Oakland [A's]" would betray the team's fans.³⁵³

In response, Finley proclaimed that Kuhn was the "village idiot," the "nation's idiot," and "his honor, the idiot in charge."³⁵⁴ One week later, Finley sued Kuhn for ten million dollars in an Illinois federal court, challenging the commissioner's authority to disapprove player transactions.³⁵⁵ Finley's complaint alleged that Kuhn, wrongfully depriving the A's owner of his rightful money, intended to "injure, discredit, defame, vex, annoy and ultimately to compel the plaintiff to leave baseball."³⁵⁶

The trial began on December 16, 1976 and lasted fifteen days.³⁵⁷ The litigation produced 2059 pages of transcript from over twenty witnesses, including Kuhn and Finley.³⁵⁸ Finley testified that it was his impression upon entering the league that he could buy and sell ballplayers as he pleased.³⁵⁹ Finley again argued that the sales would allow him to recruit young new talent and build another World Series champion.³⁶⁰ Kuhn's testimony concentrated on the extent and precision of his powers as commissioner. He explained that the Major League Agreement did not establish an objective standard to measure the limits of the commissioner's best interests authority.³⁶¹ As Kuhn understood the position, the commissioner exists to evaluate what he personally believed were baseball's best interests and to rule accordingly.³⁶² Kuhn thus acknowledged the unbounded nature of his authority, but contested that the owners consented to this authority when they signed the Major League Agreement.³⁶³

352. Kuhn, *supra* note 75, at 178.

353. Finley v. Kuhn, 569 F.2d 527, 531 (7th Cir. 1978).

354. Helyar, *supra* note 6, at 194.

355. *See id.*

356. Holtzman, *supra* note 4, at 172. Shortly after Finley filed the lawsuit, MLB owners voted to indemnify Commissioner Kuhn for personal liability. *See id.* Ironically, "[w]in or lose, Finley was on the hook for one-twenty-fourth of Kuhn's court costs." *Id.*

357. *See id.* at 170, 172.

358. *See* Kuhn, *supra* note 75, at 181.

359. *See* Holtzman, *supra* note 4, at 185 ("If I cared to sell a ballplayer or buy a ballplayer, it was my prerogative, and by the same token if I wished to trade a player for a player, players and cash, any combination that I wished, I could make it." (quoting Finley)).

360. *See id.* at 186.

361. *See id.*

362. *See id.*

363. *See id.* at 186-87 ("I don't think there is any precise way [to determine the limits of my power]. It's like the Chancellor's foot; its length is what he finds it to be, given the equities of the situation." (quoting Kuhn)).

In a six-page decision, Judge Frank McGarr held for Commissioner Kuhn and MLB.³⁶⁴ In the decision, the court pointed out that the extensive publicity surrounding the trial tended “to obscure the relative simplicity of the legal issues involved.”³⁶⁵ In presenting the sole legal issue, McGarr stated:

The case is not a Finley-Kuhn popularity contest—though many fans so view it. Neither is it an appellate judicial review of the wisdom of Bowie Kuhn’s action. The question before the court is not whether Bowie Kuhn was wise to do what he did, but rather whether he had the authority.³⁶⁶

To resolve this issue, McGarr examined the intent of MLB’s owners in signing the Major League Agreement and determined that they granted the commissioner broad powers to “prevent any conduct destructive of the confidence of the public in the integrity of baseball.”³⁶⁷ Believing that Kuhn acted within the realm of this grant, McGarr ruled in favor of the Commissioner.³⁶⁸

Describing the decision as “eighteen years of blood, sweat and sacrifice down the drain,” Finley immediately appealed to the Seventh Circuit.³⁶⁹ On appeal, Finley argued that Kuhn’s actions were “arbitrary, capricious, unreasonable, discriminatory, directly contrary to historical precedent, baseball tradition, and prior rulings and actions of the Commissioner.”³⁷⁰ Finley also claimed that Kuhn’s actions were “procedurally unfair,” because the A’s had no warning that transactions such as these were not in the best interests of baseball.³⁷¹

The Seventh Circuit framed the issue as whether the Commissioner was “contractually authorized to disapprove player assignments which he finds to be ‘not in the best interests of baseball’ where neither moral turpitude nor violation of a Major League Rule is involved.”³⁷² To ascertain the owners’ original intent in signing the Major League Agreement, the court examined the history of commissioner authority, dating back to Judge Landis.³⁷³ The court noted that upon Landis’s death in 1944, MLB amended the Major League Agreement in

364. *See id.* at 188-90.

365. *See id.* at 188.

366. Abrams, *supra* note 17, at 111.

367. Holtzman, *supra* note 4, at 189.

368. Kuhn’s reaction was favorable: “This [decision] takes the shadow away from the question of the commissioner’s powers. . . . It’s much clearer now that the commissioner was intended to be able to step into a situation and say, ‘No, you can’t do that because it would be bad for the game.’” Nancy Scannell, *Judge Rules Kuhn Had Right to Nullify Sales by Finley; Judge Rules for Kuhn in Baseball Dispute*, Wash. Post, Mar. 18, 1977, at D1.

369. Kuhn, *supra* note 75, at 182 (quoting Finley).

370. *Finley v. Kuhn*, 569 F.2d 527, 535 (7th Cir. 1978) (quoting Finley’s complaint).

371. *See id.* at 537.

372. *Id.* at 530.

373. *See id.* at 532-34.

two respects to limit the commissioner's authority.³⁷⁴ First, the parties eliminated the portion of the "Pledge of Loyalty" which had waived their right of recourse to the courts.³⁷⁵ Second, the owners added a provision stating that "no action or procedure taken in compliance with any such Major League Rule . . . shall be considered or construed to be detrimental to Baseball."³⁷⁶ The two amendments had remained in effect through the terms of Happy Chandler and Ford Frick.³⁷⁷ Upon Frick's retirement in 1964, and in accordance with his recommendation, the owners eliminated the two amendments.³⁷⁸ These amendments were revealing to the court, for they indicated that if MLB intended to limit the commissioner's authority, the owners fully "knew how to do so."³⁷⁹

With the original provisions of the original agreement almost entirely intact, the court found that MLB granted the Commissioner "broad power in unambiguous language to investigate any act, transaction or practice not in the best interests of baseball, to determine what preventive, remedial or punitive action is appropriate in the premises, and to take that action."³⁸⁰ The court then noted that "[s]tandards such as the best interests of baseball, the interests of the morale of the players and the honor of the game, or 'sportsmanship which accepts the umpire's decision without complaint,' are not necessarily familiar to courts and obviously require some expertise in their application."³⁸¹ The court thus determined that only the commissioner, appointed to practice this expertise, should interpret the rules and best interests of baseball.³⁸² "While it is true that professional baseball selected as its first Commissioner a federal judge, *it intended only him and not the judiciary as a whole to be its umpire and governor.*"³⁸³

374. *See id.* at 534.

375. *See id.*

376. *Id.* In its entirety, the rule stated: "No Major League Rule or other joint action of the two Major Leagues, and no action 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." *Id.*

377. *See id.*

378. *See id.* The owners also changed the language "detrimental to the best interests of baseball" to "not in the best interests of the national game of Baseball" or "not in the best interests of Baseball." *Id.*

379. *Id.* at 537

380. *Id.* at 534.

381. *Id.* at 537.

382. *See id.* at 539.

383. *Id.* at 537 (emphasis added). Finley also argued that MLB limited the commissioner's best interests authority to acts which either violated the Major League Rules or involved moral turpitude. *See id.* As stated in the text, the court pointed out that if MLB intended to limit the commissioner's authority as such, the 1944 amendments demonstrated that "it knew how to do so." *Id.* For a discussion of the 1944 amendments to the Major League Agreement, see *supra* notes 374-79 and accompanying text.

The court also dismissed Finley's unjust procedure argument, where the A's owner claimed the Commissioner acted without giving notice.³⁸⁴ The court concluded that the Major League Agreement, in and of itself, put the owners on notice of the Commissioner's ability to act in any manner he saw fit to police the game's best interests.³⁸⁵ Further, the court observed that the Commissioner provided a notice of hearing, held the hearing, and provided Finley with a written decision.³⁸⁶

Ultimately, unless Finley could prove that Kuhn's ruling was either arbitrary, capricious, or not made in good faith, the court would not second-guess the commissioner's judgment.³⁸⁷ Finding that the Commissioner had acted in good faith, the Seventh Circuit agreed with Judge McGarr that "whether [the Commissioner] was right or wrong is beyond the competence and the jurisdiction of this court to decide."³⁸⁸ In this first lawsuit challenging commissioner authority since 1931, the court reaffirmed the judiciary's deference to baseball's internal governance system:³⁸⁹ "[A]s long as . . . the commissioner of baseball, [sic] followed the procedures set forth in the charter, his judgment would not be disturbed in court."³⁹⁰

B. Atlanta National League Baseball Club v. Kuhn

After 1975's Messersmith-McNally arbitration,³⁹¹ the MLBPA and management representatives met to negotiate a new collective bargaining agreement, taking into account the new system of free

In response to Finley's argument that Kuhn's actions repudiated past tradition, the court recognized that the unstable condition of the reserve clause allowed Kuhn substantial leeway in determining baseball's best interests. *See id.* at 536-37 ("No one could predict then or now with certainty that Oakland would fare better or worse relative to other clubs through the vagaries of the revised reserve system occurring entirely apart from any action by the Commissioner.").

384. *See id.* at 540.

385. *See id.* ("[A]nyone becoming a signatory to the Major League Agreement was put on ample notice that the action ultimately taken by the Commissioner was not only possible but probable.").

386. *See id.* at 540 n.45.

387. *Cf. id.* at 539 n.44 ("There is insufficient evidence, however, to support plaintiff's allegation that the Commissioner's action was arbitrary or capricious, or motivated by malice, ill will or anything other than the Commissioner's good faith judgment that these attempted assignments were not in the best interests of baseball." (quoting the district court's finding of facts)).

388. *Id.* at 539 (footnote omitted). The court also noted that the waiver of recourse clause in the Major League Agreement was a "manifestation of the intent of the contracting parties to insulate from review decisions made by the Commissioner concerning the subject matter of actions taken in accordance with his grant of powers." *Id.* at 543.

389. *See Abrams, supra* note 17, at 113.

390. *Id.* Finley appealed to the Supreme Court, which denied a writ of certiorari. *Finley v. Kuhn*, 439 U.S. 876 (1978).

391. *See supra* notes 195-204 and accompanying text.

agency.³⁹² Within the CBA, the parties agreed to create a special November re-entry draft for those players filing for free agency.³⁹³ At this draft, however, up to twelve teams would be able to obtain the negotiation rights to a free agent.³⁹⁴ From the last day of the season until three days before the draft, however, only the team of record (the player's team that previous season) could negotiate with the free agent.³⁹⁵ During this post-season period, other clubs were permitted to "talk with the free agent or his representative about the merits of contracting with a particular team, *'provided, however, that the Club and the free agent shall not negotiate terms of contract with each other.'*"³⁹⁶ To help ensure that teams adhered to these "tampering" rules, Commissioner Kuhn issued a series of directives to each major league club in 1976 explaining the rule's provisions and warning would-be rule-breakers of the potential ramifications.³⁹⁷

In 1976, a frequent rule-breaker, Robert Edward ("Ted") Turner III, bought control of the Atlanta Braves from Bill Bartholomay.³⁹⁸ Though Turner was the owner of a television station, the Braves were his first "high-profile" acquisition.³⁹⁹ Upon entering the league, Turner had a maverick reputation, labeled an "incurable romantic," an "incorrigible carouser," and a "hyperactive child."⁴⁰⁰ In addition, Turner knew very little about sports other than sailing.⁴⁰¹ Fueled by a love of competition and a flair for the unexpected, Turner was excited

392. *See Atlanta Nat'l League Baseball Club v. Kuhn*, 432 F. Supp. 1213, 1215 (N.D. Ga. 1977).

393. *See id.*

394. *See id.*

395. *See id.* The rule's purpose was to give "the clubs of record . . . the maximum opportunity to retain their prospective free agents in an effort to preserve a competitive balance among the clubs in professional baseball." *Id.*

396. *Id.* (quoting MLB's Basic Agreement).

397. *See id.* at 1215-16. Kuhn issued his first directive on August 27, 1976. His second, issued on September 28 of the same year, spelled out what conduct would be considered tampering. *See id.* at 1216. The commissioner warned that the CBA did not permit contact with a player during the season about the potential of signing a new contract after the season, unless the team making the contact was the team of record. *See id.* The commissioner also pointed out that indirect contact during or after the season, such as conversations with either a player's representative or other third party intermediary, or public comments indicating an interest in a player were illegal. *See id.* The third warning, issued in October, stated that "[p]ossible penalties will include fines, loss of rights under [amateur free agent] and re-entry drafts and suspension of those responsible." *Id.* (alterations in original).

398. *See Kuhn, supra* note 75, at 259.

399. *Id.*

400. Helyar, *supra* note 6, at 177-78. In his sophomore year at Brown University, school officials suspended Turner for his part in a "drunken fracas." *Id.* at 177. Brown University eventually expelled Turner from school "for entertaining a woman in his room." *Id.* In response to the expulsion, Turner's father told his son: "I think you are rapidly becoming a jackass." *Id.*

401. *See id.* at 178. Turner was a skilled yachtsman, participating in his first America's Cup in 1974. *See id.*

to enter the world of baseball.⁴⁰² His eagerness to compete, however, quickly landed him and his team in trouble. In his first season in the league, he became enthralled with a young outfielder on the San Francisco Giants, Gary Matthews.⁴⁰³ During the season, John Alevizos, the Braves' General Manager, twice contacted Matthews about the possibility of signing with the Braves after the season.⁴⁰⁴ In September 1976, Commissioner Kuhn fined the Atlanta Braves \$10,000 for Alevizos's tampering.⁴⁰⁵ Kuhn believed that the fine's impact should have "foreclosed any further problems as to Matthews," but he was sorely mistaken.⁴⁰⁶

Rain washed out the fourth game of the 1976 World Series between the New York Yankees and the Cincinnati Reds. In lieu of the postponed game, baseball's hierarchy retreated to the Americana Hotel in New York for a late-night cocktail party.⁴⁰⁷ Slightly inebriated, Turner approached Giants' owner Bob Lurie to scoff at him for his overreaction to the Matthews tampering.⁴⁰⁸ In his "usual hundred-decibel voice," Turner informed Lurie: "I'll do everything I can to get Gary Matthews."⁴⁰⁹ Turner revealed his plans to post a billboard outside the Atlanta airport welcoming Gary Matthews⁴¹⁰ and to hold a "gala celebration" in his honor.⁴¹¹ Turner also told the Giants' owner: "Whatever you offer him, . . . I plan to pay him double. In fact, I have offered him twice as much as your attendance was last year. Let's see, that was about 630,000 or so. Well, he can count on that much to play for us."⁴¹² The next morning, newspapers throughout the country published Turner's tirade.⁴¹³ Lurie quickly filed tampering charges with the league office.⁴¹⁴

402. *See id.* at 180, 182. Turner revealed his excitement on Opening Day when he led the crowd in a pre-game singing of "Take Me Out to the Ballgame," and later jumped out of the stands to congratulate the Braves' Ken Henderson on a first-inning home run. *See id.* at 181.

403. *See id.* at 198.

404. *See Kuhn, supra* note 75, at 259.

405. *Atlanta Nat'l League Baseball Club v. Kuhn*, 432 F. Supp. 1213, 1216-17 (N.D. Ga. 1977).

406. *Kuhn, supra* note 75, at 259.

407. *See Helyar, supra* note 6, at 198.

408. *See id.* at 199.

409. *Id.*

410. *See id.*

411. *See id.* ("The major celebrities from Atlanta are gonna be present. So is the mayor and the governor." (quoting Turner)).

412. *Id.*

413. *See id.* Turner's harangue would give Gary Matthews great bargaining leverage against the Giants. If he knew he would receive a certain amount of dollars from the Braves, he would have little reason to accept less from San Francisco. *See Kuhn, supra* note 75, at 259 ("Ted's comments not only were a clear violation of our tampering rule but also made it virtually impossible for Lurie to sign Matthews."). This disadvantage to the team of record was the precise reason for the tampering rule's enactment. *See supra* note 395 and accompanying text.

414. *See Kuhn, supra* note 75, at 259.

At the re-entry draft, Turner drafted the negotiation rights to Matthews and subsequently signed him to a five-year, \$1.2 million dollar contract.⁴¹⁵ On the day of the draft, Kuhn held a formal hearing to decipher what had occurred at the New York cocktail party.⁴¹⁶ Turner blamed his comments on the alcohol and begged Kuhn for forgiveness.⁴¹⁷ One month later, during MLB's annual meetings, Turner continued to plead his case, shifting the blame for his behavior from the alcohol to his lack of experience in baseball.⁴¹⁸ Turner then implored the commissioner to exact punishment only on him and not on Matthews.⁴¹⁹

On December 30, 1976, Commissioner Kuhn suspended Turner for one year from MLB, but allowed Matthews to stay with the Braves.⁴²⁰ Citing the gravity of the double tampering violation, Kuhn also deprived the Braves of their first round draft pick in the June 1977 amateur draft.⁴²¹ In response, Turner asked for and received another hearing to make one final attempt to avoid the suspension.⁴²² During the hearing, Atlanta civic leaders explained Turner's great importance to the Atlanta community and cautioned that his removal would "dampen the baseball spirit of the city."⁴²³ Ultimately, Turner pleaded for sympathy, imploring the Commissioner for a shorter punishment.⁴²⁴ Although Kuhn found Turner's performance entertain-

415. See Helyar, *supra* note 6, at 212.

416. See Kuhn, *supra* note 75, at 260.

417. See *id.*

418. See Helyar, *supra* note 6, at 213 ("This was my first year in baseball, and I didn't know very much about it when I came into it. I've been trying to learn and I've been trying to be a good citizen. I needed the help of you and the other leaders to tell me what it is you want me to do." (quoting Turner)).

419. See *id.* at 212-13 ("C'mon, Principal [(Turner's nickname for Kuhn)], you can't take me seriously when I've had a few drinks. But no matter what, you can't take Gary away from me. . . . Take it out on me! Fine me, suspend me, do anything, but don't take away Gary!" (quoting Turner)).

One school of thought held that Turner wanted to be suspended from baseball for the Matthews incident. See *id.* at 212. Throughout his first year owning the Braves, Turner had become a popular icon in Atlanta. See *id.* The next summer, however, Turner planned on racing in the America's Cup and needed an excuse to take a leave of absence from his ownership duties, without appearing as if he had more interest in sailing. See *id.* "How would he explain that he cared more about a yacht race than a pennant race? Where would his 'man of the people' image be then?" *Id.* By imposing a suspension, Bowie Kuhn could solve this problem. See *id.*

420. See *id.* at 213. Kuhn found that Turner's "statements clearly had the effect of subverting the collective bargaining agreement and the re-entry draft procedures adopted pursuant to it. I am therefore compelled to find that they were not in the best interests of Baseball . . ." *Atlanta Nat'l League Baseball Club v. Kuhn*, 432 F. Supp. 1213, 1217 (N.D. Ga. 1977). The commissioner allowed Matthews's contract to stand because of "the urgings of Turner and upon the Commissioner's conclusion that Matthews had not engaged in any improper contact." *Id.*

421. See Kuhn, *supra* note 75, at 260.

422. See *id.*

423. *Id.*

424. See *id.* at 260-61.

ing,⁴²⁵ the Commissioner noted that it was “[m]issing . . . any explanation of how [he] was to ignore successive tamperings by the same club with the same player, especially when [he] had warned after the first tampering that the Braves were running the risk of suspension if there was a repeat violation.”⁴²⁶ Kuhn confirmed the one-year suspension, prompting Turner to sue the Commissioner in federal court in Atlanta.⁴²⁷

Judge Newell Edenfield presided over *Atlanta National League Baseball Club v. Kuhn*⁴²⁸ for a two-day trial in April 1977.⁴²⁹ In a decision that Kuhn described as “a ninety-five percent victory,” the court upheld the Commissioner’s power to suspend Turner, but abrogated Kuhn’s seizure of the Braves’ first round draft pick.⁴³⁰ Like the court in *Finley v. Kuhn*,⁴³¹ Edenfield commenced his analysis by examining the commissioner’s authority under the Major League Agreement.⁴³² The court concluded that “[t]o the extent this case involves a violation of the Major League Agreement, the court has no hesitation in saying that the defendant Commissioner had ample authority to punish [the] plaintiffs in this case, for acts considered not in the best interests of baseball.”⁴³³ The fact that the broken rule appeared in the CBA troubled the judge, for the Major League Agreement, and not the CBA, served as the source of the commissioner’s authority.⁴³⁴ Judge Edenfield found, however, that nothing in the CBA prevented Kuhn “from concluding that conduct which he views as violating the Collective Bargaining Agreement is also not in the best interests of baseball.”⁴³⁵ Further, the court held that the judiciary was in no position to question the wisdom of the decision: “What conduct is ‘not in the best interests of baseball’ is, of course, a question which addresses itself to the Commissioner, not this court.”⁴³⁶ As, according to the court, Kuhn’s decision was not a result of ill will or bias, it held the decision was not arbitrary or capricious.⁴³⁷ The Commissioner, there-

425. Turner beseeched the Commissioner: “I would get down on the floor and let you jump up and down on me if it would help. . . . I would bend over and let you paddle my behind, hit me over the head with a Fresca bottle, something like that. Physical pain I can stand.” *Id.* at 261.

426. *Id.* at 261-62.

427. *See id.* at 262.

428. 432 F. Supp. 1213, 1214 (N.D. Ga. 1977).

429. Judge Edenfield “chided Judge McGarr for stretching the Finley proceedings to two weeks.” Holtzman, *supra* note 4, at 192.

430. *See Atlanta Nat’l League Baseball Club*, 432 F. Supp. at 1225.

431. 569 F.2d 527 (7th Cir. 1978).

432. *See Atlanta Nat’l League Baseball Club*, 432 F. Supp. at 1219-20.

433. *Id.* at 1220.

434. *See id.* (“The question which makes the case confusing and difficult, however, is to what extent the Major League Agreement applies here.”).

435. *Id.* at 1221.

436. *Id.* at 1222.

437. *See id.*

fore, had the authority to punish Turner for his tampering violations.⁴³⁸

The court then examined the sanctions Kuhn imposed.⁴³⁹ Turner argued that his one-year suspension was an abuse of Kuhn's discretion,⁴⁴⁰ deeming that the "punishment [did not] fit the crime."⁴⁴¹ After analyzing the circumstances, however, Judge Edenfield determined that the Commissioner could easily have concluded that multiple tampering violations concerning the same player required harsh discipline.⁴⁴² The court recognized that "honest minds could, and indeed do, disagree as to what is an appropriate punishment. The court, therefore, simply [could] not say the Commissioner abused his discretion."⁴⁴³ Noting that the owners clearly intended to give the commissioner great discretion as to what sanction was appropriate, the court held that ceaseless judicial review of commissioner-imposed punishments would be completely impractical and run counter to the intentions of the Major League Agreement.⁴⁴⁴ Thus, the court upheld the imposition and length of the suspension.⁴⁴⁵ Judge Edenfield, however, held that the Major League Agreement did not give Commissioner Kuhn the authority to revoke Atlanta's first round draft pick for the amateur draft.⁴⁴⁶

As cases such as *Finley* and *Atlanta National League Baseball Club* demonstrate, the judiciary has granted wide authority to commissioners acting within the purview of their sport's operating agreements. In this respect, sports leagues are like private clubs, whose members may dictate the club's rules and procedures through those operating agreements.⁴⁴⁷ As long as a league's commissioner acted in accordance with the guidelines set forth in that agreement, courts have not inter-

438. *See id.*

439. *See id.* at 1222-26.

440. *See id.* at 1223.

441. Kuhn, *supra* note 75, at 262 (quoting Turner).

442. *See Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

443. *Id.*

444. *See id.* ("Judicial review of every sanction imposed by the Commissioner would produce an unworkable system that the Major League Agreement endeavors to prevent.")

445. *See id.* ("Here, Turner was warned of the suspension, he asked for the suspension, the contract specifically authorized it, and he got it.")

In 1977, Ted Turner won the right to represent the United States in sailing in the America's Cup and defeated the Australian challenger in the Cup's final match-up. *See Kuhn, supra* note 75, at 262-63. During his suspension, Turner's behavior was exemplary, prompting him to approach the Commissioner to plead for an early termination of the penalty. *See id.* at 263. After weighing several factors, Kuhn lifted Turner's suspension prior to 1978's spring training. *See id.* at 263-64.

446. *See Atlanta Nat'l Baseball Club*, 432 F. Supp. at 1223-26. Commissioner Kuhn contemplated appealing Judge Edenfield's ruling as to the draft pick, but determined that the suspension was adequate punishment for Turner's offense. *See Kuhn, supra* note 75, at 262 ("I thought [Judge Edenfield] was on thin judicial ice in returning the draft pick to the Braves. Still, we had won the main show . . .").

447. *See Abrams, supra* note 17, at 113.

ferred with the commissioner's decisions, absent any arbitrary or capricious actions.⁴⁴⁸

With the assistance of two maverick owners, Charles Finley and Ted Turner, courts reaffirmed commissioners' authority to discipline ownership under the best interests clauses of league operating agreements. Commissioner Kuhn believed that "the dominance of the commissioner was firmly in place as it had not been since the days of Judge Landis."⁴⁴⁹ Moreover, in the 1989 *Rose* case, the judiciary again confirmed commissioner power to investigate and discipline acts contrary to the best interests of baseball.⁴⁵⁰ Courts have recognized that, just as in the days of Landis, sports leagues appoint commissioners to preserve the integrity of professional sports by acting in a league's best interests.⁴⁵¹ Faced with the rationale behind these appointments, courts have wisely refused to substitute their judgments for those of league commissioners.

Arbitrators, however, have not adopted this judicial deference to commissioner rulings. Empowered by CBAs to review commissioner disciplinary decisions by CBAs, arbitrators often substitute their judgment as to discipline for the commissioner's, sometimes in apparent derogation of CBA-mandated standards of limited review. The next part scrutinizes two arbitration awards from the 1990s and concludes that the arbitrator's lack of deference to commissioner authority damages the integrity of professional baseball and basketball, respectively.

III. GRIEVANCE ARBITRATION OF COMMISSIONER DISCIPLINE

As discussed above, the present NBA and MLB CBAs allow their players unions to appeal commissioner-imposed discipline to grievance arbitrators.⁴⁵² A basic tenet of alternative dispute resolution is that arbitrators are not bound by judicial precedent.⁴⁵³ Thus, the cases discussed to this point of the Note can have as much or as little bearing on an arbitration as a grievance arbitrator wants. This part dissects two grievance arbitrations where players challenged commissioner-imposed discipline. This part argues that arbitrators too often merely substitute their own judgment as to a sports league's best interests for the league commissioner's judgment, rather than reviewing commissioner-imposed discipline under the appropriate standards of review.

448. See *supra* note 390 and accompanying text.

449. Kuhn, *supra* note 75, at 262.

450. See *supra* notes 276-79 and accompanying text.

451. See *supra* notes 381-83 and accompanying text.

452. See *supra* note 22 and accompanying text.

453. See Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 216 (2d ed. 1992) ("[A]rbitrators are not generally required to follow the law, and a failure to do so does not constitute grounds, under the [Federal Arbitration Act], for vacating the arbitrator's award.").

A. *The Steve Howe Arbitration*

Steve Howe was the 1980 National League Rookie of the Year.⁴⁵⁴ In 1981, he played a vital role in the Los Angeles Dodgers' World Series victory over the New York Yankees.⁴⁵⁵ In November 1982, the Dodger pitcher voluntarily entered a five-week drug rehabilitation program.⁴⁵⁶ Just five months after his release, he resumed treatment at another hospital for drug rehabilitation.⁴⁵⁷ The pitcher rejoined the Dodgers on June 29, but encountered trouble again in September when he missed a team flight to Atlanta and later refused to submit to a drug test.⁴⁵⁸ The Dodgers suspended Howe, and he headed back to drug rehabilitation.⁴⁵⁹

In response to these events, on December 15, 1983, Commissioner Bowie Kuhn suspended Steve Howe for the entire 1984 season.⁴⁶⁰ Altogether, between 1982 and 1988, either the Dodgers or the commissioner's office suspended Howe on six separate occasions. After his sixth offense in 1988, MLB suspended Howe for life for violating his drug aftercare program.⁴⁶¹ In 1990, Howe made a personal plea to Commissioner Fay Vincent to give the pitcher "one last chance."⁴⁶² After the MLBPA filed a grievance requesting Howe's return, Commissioner Vincent reinstated the six-time drug offender with certain conditions.⁴⁶³ Aware that Howe was in need of a stringent aftercare program, Vincent contemplated testing Howe three times a week for the remainder of his career.⁴⁶⁴ If any drug test turned up positive, Vincent made it clear that Howe would never return to MLB.⁴⁶⁵ Though Vincent never formally approved or implemented such a drug testing program, Howe submitted to drug tests over the next two years on a "frequent, although irregular, basis."⁴⁶⁶

In 1991, Howe played for the New York Yankees and had a successful season.⁴⁶⁷ After the season, he signed a new contract with the Yankees that, with incentives, tallied \$2.3 million.⁴⁶⁸ In December 1991, however, Howe was arrested in his off-season home of Kalispell,

454. See Kuhn, *supra* note 75, at 309.

455. See *id.*

456. See *id.*

457. See *id.*

458. See *id.* at 309-10.

459. See *id.* at 310.

460. See *id.*

461. See Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 4.

462. Joel Sherman, *Commish to Howe: Strike 7, You're Out*, N.Y. Post, June 25, 1992, at 64.

463. See Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 4-5.

464. See *id.* at 5.

465. See *id.*

466. *Id.*

467. On the Yankees, Howe was a relief pitcher and finished the 1991 season with a 3-1 win-loss record and a 1.68 earned run average. See Helyar, *supra* note 6, at 498.

468. See Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 5.

Montana and charged with two misdemeanors: attempting to purchase cocaine and possession of cocaine.⁴⁶⁹ Although Howe acknowledged he attempted to purchase the cocaine, his plea bargain required that he only enter an Alford plea, whereby he accepted guilt without actually pleading guilty.⁴⁷⁰ In response to Howe's seventh drug infraction, however, Commissioner Vincent declared that "Steve Howe has finally extinguished his opportunity to play" in MLB, and suspended the Yankee relief pitcher for life.⁴⁷¹

The MLBPA quickly filed a grievance before baseball's arbitrator, George Nicolau, challenging Vincent's imposition of the lifetime ban.⁴⁷² The union conceded that Howe was guilty of possession, but urged that a lifetime suspension for attempted possession of cocaine was too severe.⁴⁷³ Though Howe admittedly had "the longest disciplinary record of drug abuse offenses in the history of Baseball,"⁴⁷⁴ the union cited Howe's clean testing record in the time since his last suspension as indicative of his progress.⁴⁷⁵ The union's chief argument revolved around the fact that Howe suffered from adult attention deficit disorder ("ADD").⁴⁷⁶ According to the union, a new medical theory linked ADD and cocaine addiction.⁴⁷⁷ Thus, the union argued that these medical factors should be relevant in reviewing the propriety of the commissioner's ruling.⁴⁷⁸ Arbitrator Nicolau held a hearing on the Howe matter on June 30, 1992.⁴⁷⁹ Four months later, Nicolau finally made his decision, reinstating Howe to MLB after he spent 119 days on the ineligible list.⁴⁸⁰

Before proceeding with his analysis, Nicolau had to determine the appropriate standard of review to apply to the commissioner's disciplinary decision. At the time of the Howe arbitration, Article XII, Section A of baseball's CBA allowed the grievance arbitrator to overturn commissioner-imposed discipline if the arbitrator found no "just cause" for the punishment.⁴⁸¹ Nicolau determined that "[w]hile the Commissioner has a 'reasonable range of discretion' in such matters, the penalty he imposes in a particular case must be 'reasonably com-

469. See Sherman, *supra* note 462, at 64.

470. See *id.*

471. *Id.*

472. See *id.*

473. See Helyar, *supra* note 6, at 498. Howe was the first player ever to receive a lifetime suspension for violating MLB's substance abuse policy. See Sherman, *supra* note 462, at 64.

474. Sherman, *supra* note 462, at 64 (quoting Commissioner Vincent).

475. See Helyar, *supra* note 6, at 498.

476. See *id.*

477. See *id.*

478. See *id.*

479. See *id.*

480. See *Major League Baseball Players Ass'n v. Commissioner of Major League Baseball* (1992) (Nicolau, Arb.) [hereinafter *Howe Arbitration*], reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 4, 10.

481. See Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 11-12.

mensurate with the offense' and 'appropriate, given all the circumstances.'"⁴⁸² Thus, the issue in the Howe Arbitration was whether, given all the circumstances, Commissioner Vincent had just cause to banish a seven-time drug offender from professional baseball.

Nicolau next stated his belief that the commissioner of a sports league has a higher burden than a normal employer in justifying a lifetime ban.⁴⁸³ MLB's counsel had argued that the commissioner was simply an employer who dismissed an employee for breaking the rules of employment.⁴⁸⁴ Nicolau disagreed with this analogy, explaining that the "Commissioner's imposition of Baseball's 'ultimate sanction, lifetime ineligibility' means that no employer in Baseball may hire Howe."⁴⁸⁵ The burden on the commissioner to defend his actions, therefore, "transcends that of the ordinary employer inasmuch as he can effectively prevent a player's employment by anyone at any level of his chosen profession."⁴⁸⁶

Nicolau purported to recognize baseball's interest and need to eradicate drug use among its players.⁴⁸⁷ Nicolau believed, however, that MLB's interest in deterrence had to be considered in light of Howe's individual circumstances, especially his psychiatric illness.⁴⁸⁸ Upon Howe's return to baseball after his sixth suspension, Commissioner Vincent hired a medical advisor to examine Howe's health and determine what Howe needed to remain drug-free.⁴⁸⁹ According to Nicolau, "[i]t was clear from [the doctor's] report that in his expert view continuous testing, including testing in the off-season, was essential if Howe was to succeed in resisting drugs during his career while also seeking to overcome his addiction through therapeutic means."⁴⁹⁰

482. Howe Arbitration, *supra* note 480, (quoting *Nixon* (Panel Decision 84, (1992) (Nicolau, Arb.)), *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 5.

483. *See id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 6.

484. *See id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 6.

485. *Id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 6.

486. *Id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 6. Here, Nicolau's argument is not completely accurate; semi-professional leagues exist that are not affiliated with Major League Baseball. *See* Jeff McLaughlin, *Brockton Considers Pitching a Minor League Stadium*, *Boston Globe*, Jan. 10, 1999, *South Weekly*, at 13 (recognizing independent baseball leagues that have "no formal links to the major leagues"). One such league, the Northern League, gained notoriety when in 1996, the St. Paul Saints signed former New York Met Darryl Strawberry. *See* Chuck Johnson, *Strawberry will Sign with Saints*, *USA Today*, May 3, 1996, at 6C.

487. *See* Howe Arbitration, *supra* note 480, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 6.

488. *See id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 7.

489. *See id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 7.

490. *Id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 7. Dr. Riordan, the commissioner-hired medical examiner, "cautioned against Howe's

Nicolau repeatedly cited MLB's inability to design and implement a testing plan for Howe as a primary cause of Howe's subsequent drug infraction.⁴⁹¹ Consequently, Nicolau held that "[t]o give Howe 'yet another chance' of returning to the game without implementing [testing] conditions was not . . . a fair shot at success."⁴⁹²

Nicolau noted that Commissioner Vincent gave little consideration to Howe's medical records before rendering a decision after his seventh drug infraction.⁴⁹³ Nicolau believed that Vincent should have probed beneath the surface of Howe's medical records to ascertain if Howe's diagnosis and treatment were proper.⁴⁹⁴ To Nicolau's chagrin, Commissioner Vincent considered "medical matters of *little importance* when measured against Baseball's interests."⁴⁹⁵ Nicolau was not convinced that Vincent could make a just decision without considering all the factors relative to Howe's disease.⁴⁹⁶

Next, the arbitrator addressed the Commissioner's concern that MLB needed to deter drug use by other players. Vincent argued that a less severe sanction would fail to deter future drug use, for players would know that re-entry into the league was virtually automatic.⁴⁹⁷ According to Nicolau, however, drug use in MLB was on the decline, and he believed that "this steady progress toward a drug free environment [was] quite likely to continue."⁴⁹⁸ Nicolau then expressed his belief that "[n]o member of the public can seriously contend . . . that the manner in which the industry and the Association have previously dealt with the problem has imperiled the integrity of the game."⁴⁹⁹ The arbitrator concluded that "[d]eterrence, however laudable an ob-

return unless he was tested every other day of the year throughout his professional career . . ." *Id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 7.

491. *See id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 7 ("But the stringent, year-round testing requirement, as we have seen, was not implemented and Howe was unfortunately set on a course without the strategic safeguard Dr. Riordan considered indispensable to his success.").

492. *Id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 8.

493. *See id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 8.

494. *See id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 8.

495. *Id.* (emphasis added), reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 8.

496. *See id.* ("When considering the permanent expulsion of a player, this failure to examine all the circumstances, irrespective of the cause, is not, in my view, consistent with his responsibility."), reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

497. *See id.* ("[A] less severe sanction would have sent the wrong message to players who will view anything short of a lifetime ban as a license to take up and repeatedly use drugs."), reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

498. *Id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

499. *Id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

jective, should not be achieved at the expense of fairness."⁵⁰⁰ The above factors prompted Nicolau to hold that Commissioner Vincent's lifetime suspension of Steve Howe, a seven-time drug offender, was without just cause.

Though Commissioner Vincent resigned from MLB in September 1992,⁵⁰¹ his reaction to the November arbitration award was harsh. Vincent stated:

It's like saying you've had seven chances, but eight is the right number. How can there be soundness in that judgment? That makes the whole thing a joke. Nicolau is saying he's giving him one more chance. Well, I did that in '89. What if a medical theory comes up after the next violation? It could excuse the next violation? Then there would be more chances. It's a daisy chain. You never get to the end of it.⁵⁰²

He added that "[i]t makes baseball look silly I don't think there was any doubt about my having just cause. I think the arbitrator substituted his judgment for mine, and the arbitrator was wrong."⁵⁰³ Players also doubted the wisdom of Nicolau's decision. Rich Monteleone, a former teammate of Howe's on the Yankees, pronounced "as far as having rules, there is a point something has to stop. That goes for players, lawyers, writers. You have rules, and if you break the rules, you have to pay the consequences."⁵⁰⁴

The disturbing aspect of Nicolau's decision in the Steve Howe arbitration was the unilateral imposition of the arbitrator's views concerning the integrity and best interests of baseball. Nicolau's exposure to the world of baseball was limited to testimony in arbitration hearings and possibly the knowledge derived from being a baseball fan. Despite this limited exposure, he felt able to declare that no member of the public could possibly think "that the manner in which the industry and the Association have previously dealt with the [drug] problem has imperiled the integrity of the game."⁵⁰⁵ Nicolau, however, failed to properly identify what MLB perceived to be damaging to the integrity of baseball. The above quote makes it clear that Nicolau believed the manner in which Commissioner Vincent disciplined drug offenders implicated the integrity of the game.⁵⁰⁶ Although he was partially correct, Nicolau missed the bigger picture. Drug abuse itself is cata-

500. *Id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

501. See Weiler & Roberts, Sports and the Law, *supra* note 6, at 27.

502. Weiler & Roberts, 1995 Case Supplement, Sports and the Law, *supra* note 325, at 11.

503. *Howe Suspension Ends with Reinstatement*, L.A. Times, Nov. 13, 1992, at C3 (quoting Commissioner Vincent).

504. Sherman, *supra* note 462, at 64.

505. *Howe Arbitration*, *supra* note 480, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

506. See *id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

strophically destructive of the game's integrity and the public's confidence in baseball.⁵⁰⁷ Commissioner Vincent calculated this damage to baseball's integrity and determined that Howe's suspension was necessary to deter future drug use by other players.⁵⁰⁸ Vincent was not concerned that MLB's handling of drug infractions would imperil the game's integrity—athletes who fail to perform their best in contests that fans pay to attend destroy the game's integrity. Nicolau's failure to recognize this larger issue is illustrative of why only a sport's commissioner should officially evaluate the integrity of his sport.⁵⁰⁹

Vincent's allegedly deficient investigation of Howe's medical records also troubled Nicolau, causing the arbitrator to accuse the commissioner of considering "medical matters of little importance when measured against Baseball's interests."⁵¹⁰ As stated above, MLB created the commissioner's office to protect the sport's integrity and to maintain its best interests. It was not Commissioner Vincent's responsibility to provide the optimal circumstances for Steve Howe to recover from a drug addiction. Steve Howe's problem was far larger than the game itself.⁵¹¹ The Major League Agreement charged Commissioner Vincent with the responsibility of shielding baseball from influences damaging to the game's best interests, not with surveying the health of drug addicts. Thus, sports commissioners *should* primarily consider their sports' interests. Doctors should consider medical matters. If Vincent believed that the game's integrity required Howe's expulsion from the sport, then the Commissioner's calculation of the sport's best interests should have stood.

507. As stated by a previous arbitrator:

At its worst, to the extent that cocaine use becomes habitual or addictive, a player risks both an increased chance of physical deterioration, and a dangerous involvement with the criminals who sell the drug. That involvement may lead to control of the player either because of the addiction or because of the risk of exposure. The consequences of such control over any part of the game are so obviously disastrous as to require no elaboration.

Weiler & Roberts, *Sports and the Law*, *supra* note 6, at 44 (quoting Arbitrator Richard Bloch's decision in the Willie Wilson arbitration).

508. See *Howe Arbitration*, *supra* note 480, ("The Commissioner seeks to justify his exclusive reliance on institutional considerations by resting Howe's permanent expulsion on an obligation to deter repeated drug use by others."), *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

509. In his decision, Nicolau expressed his belief that "given continued education and awareness at both the minor and Major League levels, this steady progress toward a drug free environment is quite likely to continue." *Id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9. It seems highly unlikely that an individual with little day-to-day exposure to the intricacies of MLB can make this assessment.

510. *Id.*, *reprinted in* Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 8.

511. Early in his career, Steve Howe recognized that baseball was insignificant in relation to his drug addiction. After his one year suspension in 1984, Howe stated: "It was the best thing that ever happened to me; I turned all my weaknesses into strengths; without that year off, I couldn't have done it." Kuhn, *supra* note 75, at 310.

As explained above, Nicolau closed his decision by concluding that fairness to Steve Howe outweighed baseball's interest in deterring drug use.⁵¹² Nicolau believed that "[w]hat was considered vital to Howe's sobriety at this point in his life should have been implemented."⁵¹³ Nicolau thus explicitly gives Howe's employer the responsibility of providing an atmosphere conducive to maintaining "Howe's sobriety."⁵¹⁴ Employers, however, do not exist to remedy an employee's drug addiction. As unfortunate as Howe's decade-long addiction to drugs was, it is difficult to perceive that the tenets of fairness would not allow an association to expel one of its members after seven rule violations of the same character. Most certainly, seven drug infractions constitutes just cause for a lifetime suspension from MLB.

B. *The Latrell Sprewell Arbitration*

In 1992, the Golden State Warriors ("Warriors") selected Latrell Sprewell, of the University of Alabama, in the NBA's amateur draft.⁵¹⁵ From 1992 to 1997, Sprewell achieved All-Star status during three seasons.⁵¹⁶ In 1997, the same year the Warriors players elected Sprewell captain of the team, Warriors management hired Peter (P.J.) Carlesimo as their new head coach. Before joining the Warriors, Carlesimo had coached at Seton Hall University and for the NBA's Portland Trailblazers.⁵¹⁷

From the beginning of the 1997 season, the relationship between Carlesimo and Sprewell rapidly deteriorated, leading to discussions of trading Sprewell to another NBA club.⁵¹⁸ On December 1, 1997, approximately one month into the NBA season, the Warriors engaged in a three-man, two-ball drill at a practice in preparation for a game against the Cleveland Cavaliers.⁵¹⁹ As Sprewell participated in the drill, Carlesimo approached him and requested that he use more

512. See *supra* note 500 and accompanying text.

513. Howe Arbitration, *supra* note 480, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

514. See *id.*, reprinted in Weiler & Roberts, 1995 Case Supplement, *supra* note 325, at 9.

515. See Sprewell Arbitration, *supra* note 20, at 74.

516. See *id.* at 15, 74.

517. See *id.* at 74.

518. See *id.* Coach Carlesimo has a reputation of being a screamer. See *id.* at 75 ("Testimony was also given that screaming and profanity in general were not an infrequent occurrence."). Warriors Assistant Coach Mark Grabow, however, testified that he "felt that [Carlesimo's] prodding of players was equally distributed among all the players but because [Sprewell] was his star and he needed [Sprewell's] offense and defensive energy" and that "he needed him more than any other player for [the Warriors] to be successful." *Id.*

519. See *id.* at 76. The drill consisted of one rebounder, one passer, and one shooter, who together worked to create as many shot opportunities as possible in a fifty-five second period. See *id.*

speed on his passes.⁵²⁰ Sprewell slammed the basketball on the ground and eloquently asked Carlesimo to leave him alone.⁵²¹ Carlesimo responded by ejecting Sprewell from the practice.⁵²² Sprewell immediately accosted Carlesimo, grabbing the coach's neck with both hands.⁵²³ Sprewell's hand remained clenched around Carlesimo's neck for between seven and ten seconds, while the agitated player told his coach: "I will kill you."⁵²⁴

After releasing Carlesimo's neck, Sprewell went to the Warriors' locker room to shower before leaving the facility.⁵²⁵ In the locker room, Sprewell knocked over a water cooler, showered, dressed, and decided he wanted to confront Carlesimo again.⁵²⁶ Leaving the locker room, Sprewell re-entered the practice floor and approached Carlesimo.⁵²⁷ Several players and coaches tried to restrain Sprewell, but only managed to enrage him further.⁵²⁸ Though the testimony as to what occurred next was conflicting, an arbitrator would later find that Sprewell threw at least one punch at Carlesimo that landed in "a grazing manner on the Coach's right cheek."⁵²⁹ After teammates and coaches separated Sprewell and Carlesimo, Sprewell left the practice facility, visited with the Warrior's General Manager Garry St. Jean, and demanded a trade.⁵³⁰

That evening, the Warriors announced they were suspending Sprewell for a minimum of ten games and would review the situation further to decide what action was appropriate.⁵³¹ After further investigation, the Warriors utilized provisions of the Uniform Player Contract and the Warriors' Team Rules to terminate Sprewell's contract.⁵³² Meanwhile, the NBA league office launched an investiga-

520. *See id.*

521. *See id.* ("The Grievant proceeded to slam the ball down and express a number of expletives reasonably approximating 'get out of my face, get the fuck out of here and leave me the fuck alone.'").

522. *See id.* ("The Head Coach responded: 'you're the fuck out of here.'").

523. *See id.* at 76-77.

524. *See id.* (noting Sprewell's testimony that he used the words "I will kill you" figuratively).

525. *See id.* at 77-78. Sprewell testified that as he was being led out of the gym, he said "I'm gonna kill your ass" and "I hate you." *Id.* at 19.

526. *See id.* at 19. (repeating Sprewell's testimony that he had enough of Carlesimo's "bullshit").

527. *See id.* at 78.

528. *See id.* at 78-79.

529. *See id.* at 79. Sprewell testified that "he sought to free himself from those grabbing him by kicking his feet and flailing his arms. He said it was possible that in doing so, he may have hit the Head Coach in a flailing motion." *Id.* at 79. Others testified that Sprewell freed his arms from the clutch of others and directed a punch at Carlesimo that contacted his right cheek. *See id.*

530. *See id.* at 79-80.

531. *See id.* at 81.

532. *See id.* at 11-12. Section 16 of the Uniform Player Contract states: "The Team may terminate this Contract . . . if the Player shall . . . at any time, fail, refuse, or

tion of its own, interviewing twenty-one people on December 3.⁵³³ Based on the interviews, Commissioner David Stern suspended Latrell Sprewell from the NBA for one year.⁵³⁴ Stern believed the suspension was necessary to preserve the integrity of, and maintain the public's confidence in, NBA basketball.⁵³⁵ Stern thought that a failure to impose such a penalty "would denigrate that confidence."⁵³⁶

On December 4, the day after the NBA announced its ban, Sprewell and the NBPA filed grievances against the Warriors and the NBA concerning their respective disciplinary actions.⁵³⁷ As agreed upon by the NBA and the NBPA in the 1995 CBA, Arbitrator John Feerick would hear the grievance.⁵³⁸ The hearing began on January 27, 1998 and lasted over nine days.⁵³⁹ Ultimately, Arbitrator Feerick reinstated Sprewell's contract with the Warriors and limited Commissioner Stern's punishment to the 1997-1998 season (the equivalent of approximately seven months).⁵⁴⁰

Feerick began his analysis by "emphasizing that violence in the work place is not tolerated in the field of labor and employment law."⁵⁴¹ Though Feerick strongly castigated Sprewell's conduct, he noted that arbitrators must consider fairness in labor and employment arbitrations.⁵⁴² Thus, according to Feerick, the commissioner's punishment and the investigation leading to that punishment needed to be "fundamentally fair."⁵⁴³ Feerick referred to the required fairness of the investigation as "industrial due process," but noted that this term was not held to the same standards as the Due Process Clause of the

neglect to conform his personal conduct to standards of good citizenship, good moral character . . . and good sportsmanship . . ." *Id.* at 9.

The introduction to the Warriors' Team Rules held that "intentional violations of significant rules will be considered a material breach of your individual contract and could result in the termination of your player contract." *Id.* (emphasis omitted). The rules contained a specific provision regarding violence and warned that "[t]he NBA and your team will take immediate and appropriate action against any player who engages in such [violent] conduct and all personnel are advised that violence must be avoided at all times." *Id.* at 10.

533. *See id.* at 84.

534. *See id.* at 85. Stern considered imposing either a lifetime ban or a two-year ban before settling on the one-year ban. *See id.* at 70.

535. *See id.*

536. *Id.*

537. *See id.* at 3.

538. *See* NBA CBA, *supra* note 22, Exhibit F, at F-15.

539. *See* Sprewell Arbitration, *supra* note 22, at 3 (naming John Feerick the NBA's grievance arbitrator).

540. *See id.* at 100, 103.

541. *Id.* at 85.

542. *See id.*

543. *Id.* at 86. Arbitrator Feerick explained that "[t]he essential question for an arbitrator is not whether disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair." *Id.*

United States Constitution.⁵⁴⁴ He found that the NBA's investigation had been completed in good faith and was "fair and adequate under the exigencies of the well-publicized situation with which it was then confronted."⁵⁴⁵ As to the Warriors' investigation, Feerick noted that in an effort to maintain what team unity existed, the Warriors did not question their own players as to the December 1 incident.⁵⁴⁶ This lack of questioning troubled Feerick, but he ultimately avoided ruling on the matter, deeming that the Warriors' investigation and the NBA's investigation "became, in reality, one after December 1, requiring from a fairness standpoint that any disciplinary actions be treated jointly and not as entirely separate events."⁵⁴⁷

Next, Arbitrator Feerick determined the standard of review he would apply to the NBA's and the Warriors' discipline regarding Sprewell. Feerick believed the Warriors' punishment, terminating Sprewell's contract, was "plain" discipline under the league's CBA.⁵⁴⁸ He felt the Warriors' discipline was merely a severe reprimand for the events that occurred on December 1, rather than a punishment for disparaging the NBA's integrity.⁵⁴⁹ The NBA's CBA demands that for "plain" discipline the grievance arbitrator apply a just cause standard of review.⁵⁵⁰ Thus, as to the Warriors' discipline, the issue was whether the Warriors had just cause to terminate Latrell Sprewell's contract.

Arbitrator Feerick had more trouble deciding what standard of review to apply to Commissioner Stern's one-year suspension of Sprewell. Feerick found that Sprewell's conduct did, in fact, implicate the integrity of, and public confidence in, the game of basketball.⁵⁵¹

544. *See id.* at 86 ("Another aspect of fairness is the notion of industrial due process. It is, however, a less exacting standard than its constitutional counterpart.")

545. *Id.* at 97.

546. *See id.* at 98.

547. *Id.* at 99.

548. *See id.* at 93.

549. *See id.* at 92-93.

550. *See id.* at 93. Article XXXI, section 14(c) of the NBA CBA states: "The parties recognize that a player may be subjected to disciplinary action for just cause by his Team or by the Commissioner (or his designee). Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed." NBA CBA, *supra* note 22, art. XXXI, § 14(c), at 173.

551. *See Sprewell Arbitration, supra* note 20, at 90 ("It is difficult to fashion a bright-line rule for determining conduct that implicates the integrity of or public confidence in the game of basketball. I find that such conduct would include, as in this proceeding, a well-publicized violent subversion of the most fundamental authority relationship in the game, that between player and coach."). The union argued that the only issues which implicated the game's integrity were "gambling, acts affecting the outcome of a game other than by its merits, and the use of performance-enhancing drugs." *Id.* at 89-90. Feerick, however, determined the scope of the NBA Constitution's integrity clause had to address more issues than those offered by the NBPA. *See id.* at 90 ("The scope of Section 5(c), however, must be broader because gambling is dealt with separately in the NBA Constitution, in Section 35(g), and penalties imposed by the Commissioner for such conduct are unappealable.").

He found that “[a]n attack on a head coach puts in jeopardy the entire structure and organization of a team, affecting its morale and the sport at large.”⁵⁵² Thus, according to Feerick, Stern’s discipline was in no way “plain.” The NBA’s CBA dictates that:

In any Grievance that involves an action taken by the Commissioner (or his designee) concerning (i) the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball, and (ii) a fine and/or suspension that results in a financial impact to the player of more than \$25,000, the Grievance Arbitrator shall apply an “arbitrary and capricious” standard of review.⁵⁵³

Feerick admitted that the “arbitrary and capricious” standard was applicable to this proceeding, but puzzlingly decided “that it should be read together with the just cause standard of article XXXI, section 14(c), which provides that ‘in grievances regarding discipline, the issue to be resolved *shall be* whether there has been just cause for the penalty imposed.’”⁵⁵⁴ Feerick provided no explanation as to why he decided to mix the two standards.⁵⁵⁵

Applying the just cause standard to the Warriors’ termination of Sprewell’s contract, Arbitrator Feerick noted that “[t]here has never been a case of contract termination in the history of the NBA for a physical assault”⁵⁵⁶ He also noted that never before had both a team and the league imposed discipline for the same violent conduct.⁵⁵⁷ In the past, only the league had imposed discipline for acts of violence.⁵⁵⁸ Because of the dual punishment’s severity, and the fact that the NBA dominated the investigation, Arbitrator Feerick ruled that the Warriors did not have just cause to terminate Latrell Sprewell’s contract.⁵⁵⁹

The arbitrator next turned to Stern’s discipline. Feerick noted that his “review of the Commissioner’s discipline . . . proved to be exceedingly difficult, since he is entitled to great deference as the spokesperson for the sport of basketball in the National Basketball Association and is accountable for the integrity of the League.”⁵⁶⁰ Feerick explained that because of this accountability, “it would be wrong for me to substitute my judgment for his in terms of discipline. Such is not

552. *Id.* at 90.

553. NBA CBA, *supra* note 22, art. XXXI, § 5(c), at 167.

554. Sprewell Arbitration, *supra* note 20, at 92 (emphasis added by Arbitrator Feerick).

555. *See id.* Feerick did, however, explain that “some arbitrators have linked arbitrary and capricious with just cause.” *Id.*

556. *Id.* at 100.

557. *See id.*

558. *See id.*

559. *See id.* (“I am unable to sustain the termination of the Grievant’s contract as meeting a standard of just cause.”).

560. *Id.* at 101.

the role of a grievance arbitrator.”⁵⁶¹ In the decision’s very next paragraph, however, Feerick asserted that as an arbitrator, his judgment *had to be* a factor. Feerick pondered whether his duty was to judge Sprewell’s action according to the evidence before the Commissioner on December 3, or according to the evidence heard in the arbitration proceedings conducted in the arbitrator’s presence.⁵⁶² If he only reviewed the evidence before the Commissioner at the time of the discipline, Feerick deemed that nine days of hearings, twenty-one witnesses, and the documentary evidence would be a complete waste.⁵⁶³ Feerick determined that “[i]n the end, [the NBA and the NBPA have] asked that I establish the facts and determine whether the penalties were appropriate. Having done so, *they are entitled to the judgment of the Grievance Arbitrator as to what has been established by the evidence.*”⁵⁶⁴

Arbitrator Feerick, concedingly substituting his judgment for the Commissioner’s, ruled that Sprewell’s suspension would end after the 1997-1998 NBA season. Though Feerick condemned Sprewell’s conduct, he noted that the doctrines of fairness must temper the commissioner-imposed discipline.⁵⁶⁵ Feerick also believed that public confidence in the game of basketball “is dependent not only on appropriate punishment for misconduct but also on the fairness of proceedings where that punishment is reviewed.”⁵⁶⁶ Finding the loss of sixty-eight games and \$6.4 million commensurate with Sprewell’s misconduct,⁵⁶⁷ Feerick believed that principles of justice and fairness required that Sprewell start the next season with this “tragic event behind him.”⁵⁶⁸

The most troubling aspect of Feerick’s analysis in the Latrell Sprewell arbitration surrounds his examination of the applicable standard of review as to the Commissioner’s discipline. As discussed above, when commissioner action is taken to preserve the integrity of, or maintain the confidence in, the game of basketball, the arbitrator must apply an arbitrary and capricious standard of review.⁵⁶⁹ The NBA CBA, however, also states that “in Grievances regarding disci-

561. *Id.* at 101 n.13 (explaining that an arbitrator does not “sit to dispense his own brand of industrial justice” (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))).

562. *See id.* at 101-02.

563. *See id.* at 102.

564. *Id.* (emphasis added).

565. *See id.* at 103.

566. *Id.*

567. *See id.* at 104 (“A suspension of practically an entire season is one of great severity, to be sure, but appropriate given the fact that physical altercations with a head coach strike at the very core of a structure that provides stability for a team and an organized sport.”).

568. *Id.* at 103. Little did Feerick know, however, that Sprewell would feel the effects of a one-year suspension because of the NBA’s 1998-1999 labor stoppage.

569. *See NBA CBA, supra* note 22, art. XXXI, § 5(c), at 167.

pline, the issue to be resolved shall be whether there has been just cause for the penalty imposed."⁵⁷⁰ It is not clear how, if at all, an arbitrator should read these two provisions together. An arbitrator could easily consider Stern's one-year suspension of Sprewell both an action to preserve the game's integrity and a normal disciplinary action. Thus, an arbitrator could select either standard of review or, theoretically, mix the two together. Though he offered no explanation, Feerick chose to combine the two standards to analyze the Commissioner's discipline.

Arbitrator Feerick, however, clearly drew a line between "plain" discipline, which required the just cause standard, and integrity-implicating discipline, which required the arbitrary and capricious standard. As explained above, Feerick held that the Warriors' termination of Sprewell's contract "was done to punish [the] Grievant for what he had done on December 1" and thus was "plain" discipline.⁵⁷¹ Feerick then determined that "[s]ince the disciplinary nature of this action is plain, a just cause standard of review . . . is applicable."⁵⁷² On the other hand, Feerick ruled that Sprewell's conduct indeed implicated basketball's integrity, which would permit the commissioner or his designee to impose discipline that the CBA explicitly states is subject to an arbitrary and capricious standard of review.⁵⁷³ In labeling *only* the Warriors' discipline as "plain," Feerick should have recognized that his own characterizations dictated the application of different standards of review for the team's and the commissioner's discipline. Thus, as to the Commissioner's one-year suspension of Latrell Sprewell, the issue should have been simply whether David Stern's punishment was arbitrary and capricious. In drafting the CBA, the NBA and NBPA acknowledged this deference which commissioners must receive to protect the league's integrity. By seemingly ignoring the arbitrary and capricious standard, Arbitrator Feerick neglected this CBA-imposed deference and applied a lower standard of review

Using this hybrid standard of review, Feerick evaluated Stern's discipline. Though Supreme Court precedent ordered that arbitrators should not "sit to dispense [their] own brand of industrial justice,"⁵⁷⁴ Feerick acknowledged that the proceedings before him required the use of his own judgment to review the commissioner's discipline.⁵⁷⁵ Feerick, however, cut the suspension from twelve months to approximately seven, but never explicitly asked or decided whether Stern had either just cause to impose the punishment or, more pertinently,

570. *Id.*, art. XXXI, § 14(c), at 173.

571. Sprewell Arbitration, *supra* note 20, at 93 (emphasis added).

572. *Id.*

573. See *supra* notes 551-52 and accompanying text.

574. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

575. See *supra* notes 560-64 and accompanying text.

whether the Commissioner acted in an arbitrary or capricious manner. Even utilizing the less deferential standard of review, Feerick determined that Sprewell's violent conduct, which admittedly struck "at the very core of [the NBA's] structure," would not be just cause for a twelve month suspension, but would be for a seven month ban.

Feerick did note that if he merely reviewed the evidence before Commissioner Stern when Stern imposed the punishment, then the arbitration decision would have upheld the commissioner's discipline in full.⁵⁷⁶ In doing so, Feerick seemed to admit that Stern would at least have had just cause for imposing the one-year suspension when he did so on December 3. At some point within the arbitration award, however, it seems that Feerick decided that rather than examine the Commissioner's discipline under any standard of review, he would simply impose the punishment that he believed was just. Again, quoting Arbitrator Feerick, "[s]uch is not the role of a grievance arbitrator."⁵⁷⁷

The Howe and Sprewell Arbitrations provide ample evidence that arbitrators, though not bound by the judiciary's deference to commissioner discipline, blatantly choose to substitute their judgment as to what is best for professional sports for the commissioner's judgment. Arbitrators disregard applicable standards upon which to review commissioner disciplinary decisions and merely impose the punishments which they view as fair. Such may be permissible if arbitrators were either granted *de novo* review of a commissioner's decision or had the power to impose the original punishment rather than the commissioner himself. Collective bargaining agreements, however, ask arbitrators to review discipline, not to impose it. Indisputably, arbitrators can ignore the judiciary's deference to commissioner disciplinary decisions. For arbitration to function as a viable means of resolving a dispute, however, the arbitrator must pay heed to the demands and provisions of CBAs.

In ignoring bargained-for standards of review, Arbitrators Nicolau and Feerick neglected their duties "to 'reach a fair solution of a problem' within the letter and spirit of the collective bargaining agreement[s]."⁵⁷⁸ This neglect of arbitral duty begs for a solution that would eliminate an arbitrator's ability to determine the best interests of a professional sports league. As discussed below in part IV, arbitrator neglect, among other things, should prompt MLB and the NBA

576. See Sprewell Arbitration, *supra* note 20, at 101-02

("I considered whether I should apply to the Commissioner's decision a level of review that asked and answered whether the NBA . . . rendered a fair and reasonable judgment based on what was before it as a result of [their] investigation. Applying such a standard, I would sustain the decision of a one-year suspension of the Grievant.")

577. *Id.* at 101.

578. *NLRB v. Strong*, 393 U.S. 357, 365 (1969) (Douglas, J., dissenting) (quoting *United Steelworkers*, 363 U.S. at 597.).

to eliminate grievance arbitration proceedings, and transfer all disciplinary authority to the commissioner, under their CBAs.

IV. COMMISSIONERS NEED UNAPPEALABLE DISCIPLINARY AUTHORITY TO PROTECT THE INTEGRITY OF THEIR SPORTS

This part argues that commissioners must maintain the sole authority to discipline integrity-implicating misconduct without fear of external review. To best protect their integrity, professional baseball and basketball must follow the lead of the NFL and endow only one person with the authority to decide what is best for his sport. CBAs should grant neither arbitrators nor judges the authority to review commissioners' best interests disciplinary decisions. Commissioners, hired for the purposes of protecting and advancing the best interests of their leagues, must have sole control over league discipline.

A. *Grievance Arbitration Fails in Professional Sports*

As discussed in part III, the Supreme Court ruled in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*⁵⁷⁹ that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."⁵⁸⁰ Indeed, Arbitrator Feerick recognized this dictate in the Latrell Sprewell arbitration stating that it "is not the role of a grievance arbitrator . . . to substitute my judgment for [the commissioner's judgment] in terms of discipline."⁵⁸¹ Despite this recognition, however, Feerick admitted that his judgment had to play a key role in the disposition of the Sprewell grievance.⁵⁸²

Herein lies the problem with grievance arbitration in the world of professional sports. Though arbitrators are not supposed to substitute their judgment for the commissioner's, they nonetheless must. To avoid this substitution would be an impossible task. How can anyone reviewing the decision of another not impose his views upon the parties before him? When courts have reviewed commissioner disciplinary decisions, the primary issue has been whether the commissioner had the authority to impose the discipline.⁵⁸³ Courts can simply look to the league's operating agreement to obtain a fairly objective answer

579. 363 U.S. 593 (1960).

580. *Id.* at 597. According to the Court, the arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.*

581. Sprewell Arbitration, *supra* note 20, at 101.

582. See *supra* notes 562-64 and accompanying text.

583. See, e.g., *Finley v. Kuhn*, 569 F.2d 527, 532 (7th Cir. 1978) ("Basic to the underlying suit brought by Oakland and to this appeal is whether the Commissioner of baseball is vested by contract with the authority to disapprove player assignments which he finds to be 'not in the best interests of baseball.'").

as to the extent of the commissioner's authority. In grievance arbitrations regarding discipline, however, the primary issue inevitably is whether the commissioner-imposed punishment is appropriate.⁵⁸⁴ The arbitrator merely asks himself what punishment he believes is fair and rules accordingly. If the arbitrator were to uphold the commissioner's discipline in full, he would do so because, in his judgment, the commissioner's discipline was fair. Though the arbitrator would not replace the commissioner's judgment in this scenario, the arbitrator's judgment would still be dispositive in the matter. In situations where the arbitrator decreases a grievant's punishment, he is naturally substituting his judgment as to the fairness of the discipline for the commissioner's. In the Sprewell arbitration, Arbitrator Feerick admitted as such: "In the end, [the parties] asked that I establish the facts and determine whether the penalties were appropriate. Having done so, they are entitled to the judgment of the Grievance Arbitrator as to what has been established by the evidence."⁵⁸⁵ So, although imposing one's sense of "industrial justice" may not be the role of grievance arbitrators, this imposition has inevitably become commonplace in professional sports.⁵⁸⁶

The potential for arbitrators to impose their judgment as to what is best for a sports league is at complete odds with the duties of the commissioner. When Judge Landis became the inaugural sports commissioner, he did so with "control over whatever and whoever had to do with baseball."⁵⁸⁷ This control allowed Landis and the commissioners who followed him to exercise their personal judgment to decide what was best for their leagues. Commissioners examine the intricacies and minutiae of their sports league on a continual basis to determine what actions would maintain the league's best interests. As an alternative method of dispute resolution, arbitration gives this best interests authority to individuals who could not possibly determine what is best for a sports league. Arbitration is most effective as a means of resolving disputes of first impression. Arbitration should not serve as an appellate tribunal for decisions made in the best interests of an industry. By insisting on grievance arbitration for integrity-implicating discipline, the MLBPA and the NBPA have effectively eliminated the primary purpose of the commissioner's office: Com-

584. See, e.g., Sprewell Arbitration, *supra* note 20, at 7 ("While the parties have presented many issues for resolution, the essential issues are whether the one-year suspension of the Grievant by the NBA and the termination of his Player Contract by the Warriors are appropriate.").

585. *Id.* at 102.

586. An arbitrator's ability to ignore judicial precedent exacerbates his tendency to impose his personal judgment. Unbounded by substantive law, the arbitrator is free to ignore perfectly valid legal arguments. See Kuhn, *supra* note 75, at 156 ("Remember that an arbitrator has enough leeway to virtually ignore your strong legal arguments.").

587. *Finley*, 569 F.2d at 532.

missioners, not arbitrators, are responsible for protecting the integrity of sports leagues and, thus, should receive the sole power to determine that league's best interests.

In this respect, it is also vital for sports leagues to prohibit litigation regarding a commissioner's best interests disciplinary decisions. For the same reasons that arbitrators are not qualified to determine a league's best interests, neither should judges have the opportunity to make decisions that could impact on a sports league's integrity. Though judges have displayed considerable deference to commissioner disciplinary decisions in the past, the most recent litigation involving commissioner discipline shows the danger that can accompany judicial review of commissioner authority.

When Pete Rose sued Commissioner Bart Giamatti in Ohio state court, the locally-elected state judge enjoined baseball's commissioner from presiding over a hearing regarding team sports' greatest sin—gambling on games in which one participates.⁵⁸⁸ In doing so, this judge succeeded in “insinuating himself . . . into baseball's disciplinary procedures [rendering] the commissioner's core function—discipline— . . . permanently problematic.”⁵⁸⁹ Fortunately for MLB, a federal court relieved the Ohio state court of its jurisdiction to adjudicate the matter.⁵⁹⁰ Pete Rose, however, came very close to giving the judiciary the authority to determine MLB's best interests. As one commentator observed:

Yet another functioning American institution—the commissioner's office—almost became a victim of judicial overreaching. Today's courts have an unhealthy itch to supervise and fine-tune virtually every equity judgment in American life. Rose's legal strategy was to find a judge willing to insinuate himself into baseball's disciplinary procedures. If Rose had succeeded, the commissioner's office would have been irreperably damaged. Its core function, which is disciplinary, would permanently have been put in question. Another of civil society's intermediary institutions—those that stand between the individual and the state—would have been broken to the saddle of government. A nannylike judiciary would henceforth have made the commissioner's office negligible—another hitherto private institution permeated by state power.⁵⁹¹

Thus, despite judicial deference, the risk that judges, like arbitrators, could impose their personal judgment onto a professional sports league is too great for sports leagues to allow access to the courts.⁵⁹²

588. See *supra* notes 265-69 and accompanying text.

589. Will, *supra* note 2, at 125.

590. See *supra* notes 270-79 and accompanying text.

591. Will, *supra* note 2, at 201.

592. See *id.* at 138 (“Courts traditionally have been wary about intervening in the internal governance of private associations, but in the current climate of judicial hubris, a judge can almost always be found who will try to fine-tune any contro-

Sports leagues created their commissioner's offices to endow an individual with the authority to determine what actions and reactions were necessary to protect the integrity of, and the public's confidence in, that professional sports league. This duty requires the use of individual judgment to ascertain the best interests of a league. The parties to the NBA and MLB collective bargaining agreements must realize that to best maintain their league's integrity, only their commissioner should exercise and impose this judgment. Outsiders must not receive this authority. Unions, however, have little incentive to voluntarily concede the unilateral authority to impose integrity-implicating discipline to an individual they conceive as being a biased representative of management.

B. *Unions Must Trust that Commissioners Will Impose
Just Discipline*

The National Labor Relations Act dictates that employers and their employees' union must collectively bargain "in respect to rates of pay, wages, hours of employment, or other conditions of employment."⁵⁹³ A procedure to settle employee grievances is certainly a term or condition of employment.⁵⁹⁴ Thus, the owners of a professional sports league cannot unilaterally install a grievance procedure that they alone find suitable. To establish a procedure that involves only the commissioner's unappealable judgment, the NBA and MLB must convince their unions, through collective bargaining, to accept this new system.

Unions must understand that commissioners act to ensure the league's best interests, and not just management's best interests. Players unions have rarely, if ever, concerned themselves with the best interests of their sports leagues.⁵⁹⁵ These unions primarily exist to maximize the amount owners distribute on pay day.⁵⁹⁶ While unions are properly concerned with the rights and welfare of their members,

versy."); *see also id.* at 124 ("America's judiciary has an awful itch to bring every facet of life under its supervision.").

593. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1994).

594. *See NLRB v. Independent Stave Co.*, 591 F.2d 443, 446 (8th Cir. 1979) ("A grievance-arbitration procedure is a term or condition of employment and a mandatory subject of bargaining within the meaning of [the National Labor Relations Act].").

595. *See, e.g., Will, supra* note 2, at 223 ("[Baseball's] union has rarely recognized any responsibility to baseball beyond maximizing players' earnings."). Discussing Marvin Miller, the former head of the MLBPA, Will stated:

Miller's thinking about baseball's collective health as an industry is primitive. When he goes beyond reiteration of the fact that revenues are rolling in, he simply assumes that the union exists to get as much of the money as possible for the players, right now, and that baseball will prosper because it has been prospering.

Id. at 205.

596. *See, e.g., id.* at 206 (describing Marvin Miller as a "single-minded salary-maximizer. . . [who] is not used to thinking about the future of baseball as an industry").

they must realize that if a league loses either its integrity or the public's confidence, players' rights will mean little. Unions must recognize that conduct that strikes at a league's integrity does not only damage the league office—it damages the game as an institution. With that damage to the game, unions and the players they represent will most certainly suffer.⁵⁹⁷ Though this point may seem basic, it must be realized and acted upon for professional sports to survive.

Also damaging to a league's integrity are the length and substance of the proceedings that accompany arbitrations and litigation. The Sprewell arbitration occurred in the middle of the NBA season. Rather than focusing attention on the outcomes of league games, most NBA fans faced the deluge of news coverage surrounding Sprewell's grievance;⁵⁹⁸ pictures of Coach Carlesimo's bruised and scratched neck appeared on television daily. The Sprewell event itself was damaging enough to the NBA's integrity, even without the constant reminder of its occurrence. In the NFL, where the commissioner has the final word on discipline, controversies regarding discipline frequently become a non-issue by the next week's games. By keeping its disciplinary grievance procedure in-house, the NFL can control and limit the damage which any misconduct may create.

From the creation of the commissioners' office, league operating agreements have charged commissioners with the responsibility of protecting the league's best interests. Unions must look past who hires the commissioner, however, and understand that commissioners, in most cases, do not focus their attention on pleasing ownership.⁵⁹⁹ If unions maintain the narrow view that commissioners ignore player interests and welfare, then the integrity of sports leagues will decline as

597. See Mike Lupica, *Mad As Hell: How Sports Got Away from the Fans and How We Get It Back* 130-31 (1996). In discussing the increase in criminal activity among professional athletes, Lupica tells the story of Michael Irvin, a star wide receiver for the NFL's Dallas Cowboys. In 1995, after being arrested with two topless dancers at a Dallas Hotel, Irvin pleaded no contest to a felony charge of drug possession. See *id.* at 114, 117. Though married, Irvin wanted to celebrate his thirtieth birthday with the dancers, a teammate, two ounces of cocaine, and three ounces of marijuana. See *id.* at 114. Though Lupica describes Irvin's punishment as a "slap on the wrists," he states that "[u]nions in sports are always screaming about the players' rights in cases like these." *Id.* at 130-31. Lupica, however, explains that one day, "[t]he unions should understand something sports fans understood long ago, as the crime docket kept getting longer and longer on the sports page: *Every time someone like Irvin makes this kind of spectacle of himself, he damages others in the union the way he damages everything else.*" *Id.* at 131 (emphasis added).

598. Arbitration and litigation also force players to divide loyalties and testify either against their team, the league, or a teammate. See Sprewell Arbitration, *supra* note 20, at 3-4 (listing four members of the Golden State Warriors who testified against the Warriors and the league).

599. See generally Harris, *supra* note 16, at 647 ("You are hired by the owners, but you are called upon to make decisions that affect them. You can't please everyone, every time. . . . You simply have to do what you think in your judgment is in the best interest of the game." (quoting Commissioner Pete Rozelle)).

the commissioners' best interests judgments continue to face a barrage of second-guessing.

C. *Commissioners Should Have a Limited Role in Labor Negotiations*

Players unions regard commissioners "as an extension of the multiemployer bargaining unit . . . and a servant of that group."⁶⁰⁰ Thus, unions will always be slow to give commissioners additional authority to make unilateral decisions that will have an impact on the union constituency. The primary and obvious source of this union sentiment derives from the fact that team owners hire the commissioner without input from the union. What exacerbates this sentiment in MLB and the NBA is the commissioner's involvement in labor negotiations. In both these leagues, the commissioner is management's primary collective bargaining representative.⁶⁰¹ Regarding the commissioner as the primary caretaker of management's interests, the MLBPA and the NBPA have little incentive to believe that their league's commissioners will ever protect a player's rights in the face of management opposition.

The NFL provides a functional model to dampen players unions' anti-commissioner predilection. The NFL commissioner does not handle the owners' day-to-day labor negotiations; rather, the NFL created the National Football League Management Council, "which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League."⁶⁰² By creating a separate entity to negotiate for management, the NFL de-emphasized (somewhat) the commissioner's ties to the NFL's team owners. The MLB and the NBA should adopt a viable management council of sorts to relieve the commissioner of his collective bargaining duties. If the MLBPA and NBPA see their leagues making an effort to decrease their commissioners' alleged management bias, they may be more apt to agree to a system where the commissioner maintains unappealable disciplinary authority.⁶⁰³

600. Helyar, *supra* note 6, at 37 (quoting MLB negotiator John Gaherin).

601. *See generally, e.g.,* NBA CBA, *supra* note 22, Exhibit I (listing side letters to the CBA signed by the Acting Executive Director of the NBPA and the NBA's commissioner).

602. NFL CBA, *supra* note 24, pmb., at 1.

603. David Stern's thorough involvement in the 1998-1999 NBA lockout may prevent the possibility that the NBPA or its constituency will ever see him, in particular, as anything but management's representative. *See* Phil Taylor, *To the Victor Belongs the Spoils*, *Sports Illustrated*, Jan. 18, 1999, at 48, 51 ("Ultimately, the biggest sacrifice Stern may have made involved his image. During the dispute he got his hands dirtier than he normally does, playing hardball out in the open, and he can no longer take pride in the NBA's never having lost a game because of labor strife."). After the NBA and NBPA reached a settlement, Stern made a "no-hard-feelings" speech to the union membership. *See id.* Though Stern exited the speech to a round of applause, a handful of players walked out before the Commissioner began to talk. *See id.*

As to discipline, however, commissioners do not actually exhibit a management bias. Latrell Sprewell's one-year suspension for striking his coach and Steve Howe's banishment for life from baseball were neither victories for management nor losses for the union. Most certainly, the union member who commits the discipline-warranting misconduct will certainly feel the wrath of the management-hired commissioner. But commissioners make these disciplinary decisions for the welfare of the league, not to impose management's will on subordinate players. Though it may be easier for sports unions to believe this argument if commissioners did not engage in collective bargaining, the union should nonetheless forfeit grievance arbitration of integrity-implicating matters for the league's, and thus the players', best interests.

CONCLUSION

In 1921, the team owners in Major League Baseball believed that to restore and maintain baseball's integrity in the wake of the Black Sox Scandal, one person had to guide the league and oversee its interests. That person received the title "Commissioner," and since that time each major professional sports league has chosen to appoint a commissioner to ensure "the integrity of, and public confidence in," its sport. Originally, commissioners had complete, unquestioned control over all disciplinary issues their leagues faced. As sports labor unions grew in strength, however, commissioners increasingly found their disciplinary decisions publicly challenged.

Throughout the last seventy years, the judiciary has displayed substantial deference toward the decisions of sports commissioners regarding issues that implicate the best interests of their sports leagues. Despite the judiciary's tendency to defer to commissioners, arbitrators have eschewed this deference in proceedings regarding commissioner-imposed discipline, replacing commissioners' judgment with their own. In professional football, the National Football League Players Association cannot challenge commissioner-imposed discipline in any external tribunal: the commissioner's word as to discipline is final. In MLB and the NBA, however, arbitrators receive the authority to review commissioner-imposed discipline, even when that discipline regards the integrity of the sport. Because arbitrators and judges have the power to disregard a commissioner's judgment in MLB and the NBA, these leagues and their unions must collectively bargain to eliminate arbitral grievance procedures from their respective CBAs. Only by removing external review of disciplinary actions can commissioners optimally preserve their league's integrity.