



# The Deflate-gate Drama: A Win for the Patriots scores a Touchdown for Arbitration

By **Lorraine M. Brennan, Esq.**  
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The “Deflate-gate scandal,” in which the New England Patriots, and in particular their star quarterback, Tom Brady, were accused of deflating footballs beneath the required PSI (12.5-13.5 psi) to somehow gain an advantage over competing teams was a very hot topic among American football enthusiasts. However, it has also become a case study on how the arbitration process for vacating and confirming arbitration awards under the Federal Arbitration Act (FAA) worked properly, thus ensuring the integrity and fairness of the process.

During the January 18, 2015 AFC Championship game between the New England Patriots and the Indianapolis Colts, a ball thrown by Brady was intercepted by the Colts linebacker, who turned it over to the Colts equipment staff as he believed the football felt underinflated. The Colts equipment manager, in violation of the rules, used a pressure gauge to measure the football and found that the inflation level was approximately 11 psi, which was below the required standard. At halftime, NFL officials collected and tested 11 of the balls supplied by the Patriots and four balls that the Colts had prepared. All 11 of the Patriots balls were under-inflated below the required 12.5 psi. The balls were re-inflated to 13 psi for the second half of the game, in which the Patriots were victorious.

Not long after the game the NFL commissioned an investigation of the event. Leading the investigation was Ted Wells, Esq., an attorney with the law firm of Paul Weiss, and Jeff Pash, the NFL Executive President and General Counsel. The

investigation was undertaken pursuant to the NFL “Policy on Integrity of the Game & Enforcement of Competitive Rules,” which was sent from Roger Goodell, the Commissioner of the NFL to Chief Executives, Club Presidents, General Managers and Head Coaches. Notably, this policy was not distributed to the players.

The Wells Report concluded that “it is more probable than not” that Brady was at least generally aware of the inappropriate activities of McNally and Jastremski (the Officials Locker Room attendant and Patriots equipment assistant in charge of footballs, respectively) involving the release of air from Patriots game balls.” The Wells report also concluded that “it is unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady’s knowledge and approval.”

Following the issuance of the report, a disciplinary decision letter was sent to Patriots owner. A separate letter was to Brady informing him of the disciplinary action to be taken against him – a four game suspension. Brady appealed the disciplinary action through the Player’s Association. Commissioner Goodell appointed himself as the arbitrator to hear Brady’s appeal, which he had the authority to do under the Collective Bargaining Agreement (CBA) with the Players. The Player’s Union filed a motion seeking Goodell’s recusal from serving as the Arbitrator, but the motion was denied by Goodell, who claimed under the CBA he had the discretion to serve as a hearing officer in any appeal involving conduct detrimental to the integrity of the game.

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Brady, through the Players Association, made several discovery motions. First, he requested “[a]ll Documents created, obtained, or reviewed by NFL investigators in connection with the investigation; Second, he moved to compel the testimony of NFL Executive Jeff Pash, a senior executive of the NFL who had been designated co-lead investigator for the Wells Report, as well as a number of other document requests upon which the Players Association intended to question Pash. These requests were denied by Goodell, citing the CBA wherein documents to be used at the hearing were required to be turned over “no later than three calendar days prior to the hearing,” and that the CBA provides for “tightly circumscribed discovery.”

In July 2015, Goodell published a 20 page Award on Brady’s appeal, which upheld the four game suspension. The Goodell award went far beyond what the Well’s report had concluded, in that Goodell stated that “Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which, with Mr. Jastremski’s support, Mr. McNally tampered with game balls.”

The NFL then moved to confirm the Arbitral Award in the Federal Court in New York, while at the same time the Players Association moved to vacate the award in the Federal Court in Minnesota. As the NFL was first to file, the motion to confirm and the motion to vacate were consolidated in the Federal Court in New York. Judge Richard Berman presided over the proceedings.

Judge Berman recognized that the standard for review of arbitral awards under the FAA 9 U.S.C. Section 10 is a deferential one, yet nonetheless he noted that “the deference due an arbitrator does not extend so far as to require a district court to countenance, much less confirm, an award obtained without the requisites of fairness or due process.” Judge Berman focused on numerous instances in the arbitration where Brady was not given a fair hearing, including the fact that Brady was never provided with the “Policy on Integrity of the Game & Enforcement of Competitive Rules,” nor was he ever advised that he would be subject to suspension from the game for “general awareness” of ball deflation by others.

Judge Berman focused on the fact that Goodell had likened Brady’s conduct to the use of anabolic steroids, a practice that had in the past subjected NFL players to suspensions from games, a comparison he soundly rejected. He also found that Brady had been denied the opportunity to examine the co-lead investigator in the case, Jeff Pash, which was not in line with NFL precedent wherein players must be afforded the right to confront their investigators. Judge Berman ruled that the denial of that opportunity was “fundamentally unfair” and in violation of FAA Section 10(a)(3), which resulted in prejudice to Brady. The Judge also found that Brady was improperly denied the opportunity to have equal access to investigative files, and that this fact was especially noteworthy as Paul Weiss, who participated in preparing the “independent” Wells report, represented the NFL before the Judge and actually cross-examined Brady. The Court ordered the award to be immediately vacated. The NFL is appealing Judge Berman’s decision.

This case is noteworthy as the arbitration process worked as intended. The Court made it clear that while deference is clearly given to arbitral awards, it will not be so when a party is not given basic procedural fairness. So while there will still be those who continue to obsess about deflated footballs, the real win in this process was for the fundamental integrity of arbitration. And that is a touchdown not only for those who work in the arbitration field, but the users of the process as well. ●

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