

**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
Petitioner V. JERRY TARKANIAN

**CASE NO:** 87-1061

**PLACE:** WASHINGTON, D.C.

**DATE:** October 5, 1988

**PAGES:** 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL COLLEGIATE ATHLETIC:

ASSOCIATION, :

Petitioner, :

v. : No. 87-1061

JERRY TARKANIAN :

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Washington, D.C.

Wednesday, October 5, 1988

The above-titled matter came on for oral  
argument before the Supreme Court of the United States at  
10:01 o'clock a.m.

1 APPEARANCES:

2 REX E. LEE, Provo, Utah,

3 on behalf of the Petitioner

4 SAMUEL S. LIONEL, Las Vegas, Nevada,

5 on behalf of the Respondent

C O N T E N T S

ORAL ARGUMENT OF

PAGE

REX E. LEE, ESQ. JUSTICE ALPHONSO: We'll hear argument 4

on behalf of petitioner 07-1061, National Collegiate

SAMUEL S. LIONEL, ESQ. Jerry Tarkenton. 24

on behalf of respondent proceed whenever you're ready.

REBUTIAL ARGUMENT OF: ARGUMENT OF REX E. LEE

REX E. LEE, ESQ. ON BEHALF OF THE PETITIONER 47

on behalf of petitioner Justices and say it please

the Court, the question in this case is whether the  
National Collegiate Athletic Association's enforcement of  
its own standards, among its own members, is state action  
for Fourteenth Amendment and Section 1983 purposes.

In the early 1970's, the NCAA began an  
investigation of certain alleged practices at the  
University of Nevada at Las Vegas, some of which involved  
its basketball program. As is the case with all NCAA  
investigations, the primary responsibility for the  
investigation rests with the University, and both the  
University and the Association conducted their own  
investigations.

The Association's counsel ultimately affirmed  
some 38 of its Infractions Committee's findings of  
violations, 10 of which involved the respondents who had  
become the head coach after the time that the Association



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PROCEEDINGS

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 87-1061, National Collegiate Athletic Association v. Jerry Tarkanian.

Mr. Lee, you may proceed whenever you're ready.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE PETITIONER

MR. LEE: Mr. Chief Justice, and may it please the Court, the question in this case is whether the National Collegiate Athletic Association's enforcement of its own standards, among its own members, is state action for Fourteenth Amendment and Section 1983 purposes.

In the early 1970's, the NCAA began an investigation of certain alleged practices at the University of Nevada at Las Vegas, some of which involved its basketball program. As is the case with all NCAA investigations, the primary responsibility for the investigation rests with the University, and both the University and the Association conducted their own investigations.

The Association's counsel ultimately affirmed some 38 of its Infractions Committee's findings of violations, 10 of which involved the Respondent, who had become the head coach after the time that the Association

1 first received complaints about UNLV.

2 As part of the prescribed remedy, UNLV was  
3 directed to show cause why three persons should not be  
4 suspended from coaching and any involvement with  
5 intercollegiate athletic activities. Those three persons  
6 were the former head coach, the Respondent, and an  
7 assistant coach. As for the former coach, the suspension  
8 was to be permanent, and as to the other two, the  
9 suspension was to be for two years.

10 QUESTION: The suspension from what, Mr. Lee?

11 MR. LEE: From coaching, and from all  
12 involvement in booster activities and other  
13 intercollegiate activities. It would not have affected  
14 his University appointment.

15 QUESTION: So the NCAA said in effect to UNLV,  
16 "You must suspend so-and-so for a certain period of time"?

17 MR. LEE: Not quite. What it said was -- it  
18 was an order to show cause why they should not do so.  
19 And that is an important point, actually, Mr. Chief  
20 Justice. Pursuant to that order to show cause, the  
21 President of the University assigned a Vice President as  
22 hearing officer, who held a hearing and then as a result  
23 of that hearing identified for the President three  
24 options that were available to the University, and  
25 according to the Hearing Officer's recommendation, those

1 three options were the following:

2 The first was that the university could impose  
3 the recommended discipline, which would involve the  
4 two-year suspension.

5 A second was to refuse to do so, and according  
6 to the Hearing Officer, this ran the risk that the NCAA  
7 might impose other sanctions, some of which might be more  
8 severe.

9 And the third was to withdraw from NCAA  
10 membership.

11 Faced with those choices, the University opted  
12 to impose the suspension, which has never been carried  
13 out, because of an injunction which was ultimately  
14 affirmed by the Nevada Supreme Court, whose state action  
15 holding is now before this Court for review.

16 The Respondent does not contend -- nor could he  
17 -- that the NCAA itself is a governmental entity.  
18 Rather, his argument --

19 QUESTION: Mr. Lee, did the injunction run  
20 against the NCAA, as well as against UNLV?

21 MR. LEE: It ran against UNLV.

22 QUESTION: Well, then how did NCAA get in the  
23 case?

24 MR. LEE: Initially, they were not. The case  
25 went up to the Nevada Supreme Court a first time, and the

1 Nevada Supreme Court held that the NCAA was an  
2 indispensable party -- so it was back, the NCAA was  
3 joined, and then it went up a second time.

4 QUESTION: And the Nevada Court made that at  
5 the Instance of the Association?

6 MR. LEE: Appearing as amicus, that is --

7 QUESTION: Who said that they were an  
8 indispensable part.

9 MR. LEE: That is correct. But we were not  
10 joined, initially. We contended that we should be, and  
11 ultimately the Nevada Supreme Court agreed with us on  
12 that issue, the first time.

13 QUESTION: But why did you contend that NCAA  
14 was indispensable, Mr. Lee?

15 MR. LEE: Well, because the judgment that would  
16 ultimately come out of the court would necessarily have  
17 an important effect -- after all, it was our  
18 determination that that was the appropriate remedy for  
19 the violation of our rules.

20 QUESTION: well, it's a little strange to be  
21 arguing in a way that NCAA was a necessary party to the  
22 action, and yet should not be considered in any way as  
23 State actor. Is there any tension there?

24 MR. LEE: No, no, I think not, because of what  
25 this Court said in 1982 about what are the standards for



1 determining state action, and they are not the same  
2 standards as for determining whether a party is  
3 indispensable.

4 And those two -- there are two requirements,  
5 that this Court announced in *Lugar v. Edmonson Oil*.

6 The first is that you look to the substantive  
7 rule that is being enforced in the particular case and  
8 inquire into whether that rule has its source in some  
9 State authority.

10 The second is whether there is sufficient  
11 interlinking, intermeshing, between them.

12 QUESTION: Do you think that *Lugar* was intended  
13 to be the definitive statement of how we determine state  
14 action in all cases, even those of perhaps delegation or  
15 joint participation?

16 MR. LEE: Well, of course, Justice O'Connor,  
17 you know much about -- much more about what the Court had  
18 intended.

19 QUESTION: Well, you're arguing that that is  
20 now the definitive rule. I'm not sure that I can read  
21 *Lugar* that way, and I'm not sure whether those tests  
22 should be applied in all situations of delegation.

23 MR. LEE: In our argument, is that they  
24 should. Maybe not on its face -- it appears to say all  
25 cases, and it announced two requirements, and it said

1 that the difference between the two requirements are  
2 demonstrated -- is demonstrated by two of the Court's  
3 landmark cases, Moose Lodge, which demonstrates the rule  
4 of decision, or the rule of conduct, requirement, and  
5 Flagg Brothers, which demonstrates the State actor  
6 requirement.

7 And both of those, of course, reach far beyond  
8 the context in Lugar, and far beyond the context in this  
9 case, and therefore in our view it is a general rule.

10 But you don't have to go that far -- excuse me.

11 QUESTION: well, what if NCAA said, for  
12 example, we want drug testing of all participating  
13 athletes on a regular basis, and you either do that, or  
14 you run the risk of the school being cropped out of the  
15 NCAA.

16 Now, is there any -- do we have exactly the  
17 same kind of an issue that we have here?

18 MR. LEE: Not quite. If, as I suggested, the  
19 first line of defense, Lugar applies across the board for  
20 all cases, then it would be the same.

21 But I -- in any event, those two tests, and  
22 particularly the first one, ought to apply in a case such  
23 as this, and here is why.

24 Even if it is not the principled, of the  
25 two-part, across the board test in all cases that we

1 take, at the very least, when the sole issue in the case  
2 is whether a particular rule of conduct has been  
3 violated, as it has in this case -- the NCAA's standards  
4 for eligibility and recruitment -- then, at the very  
5 least when that's the sole, ultimate issue in the case,  
6 then one of the relative inquiries, on a case-by-case  
7 approach -- one of the most important inquiries -- ought  
8 to be whether the rule of conduct in that particular case  
9 had a governmental source or a non-governmental source.

10 QUESTION: Well, Mr. Lee, how did the rule  
11 become applicable to Mr. Tarkanian? Sure, it's an NCAA  
12 rule, but it also becomes a school rule --

13 MR. LEE: No --

14 QUESTION: --because they joined. They're a  
15 member. They say, "we agree to abide by the NCAA rules."

16 MR. LEE: That's correct.

17 QUESTION: So this is now the rule for the  
18 institution. Otherwise, how did Tarkanian -- how did he  
19 get in trouble with the University? He violated one of  
20 their rules.

21 MR. LEE: Yes. The NCAA is composed in part of  
22 public universities and in part of State universities.  
23 But it cannot be the rule, I submit, simply because you  
24 have some State universities and some private  
25 universities, that it thereby becomes, that it thereby

1 becomes --

2 QUESTION: Well, then, you don't -- do you find  
3 something erroneous in what I said, that it became a  
4 University rule when the University joined and said "We  
5 agree"?

6 MR. LEE: It really was not a University rule.  
7 It remained --

8 QUESTION: Well, if it wasn't, how did they  
9 have the nerve to suspend Mr. Tarkanian?

10 MR. LEE: They have the nerve to suspend Mr.  
11 Tarkanian because they decided on the basis of their  
12 exercise of their own judgment that of the three options  
13 available to them, that was the one that was preferable  
14 to them.

15 It was not the NCAA that suspended Tarkanian.

16 QUESTION: It certainly wasn't. It was the  
17 University.

18 MR. LEE: That is correct.

19 QUESTION: For violating its rule.

20 MR. LEE: No, for violating -- the University  
21 suspended Tarkanian not for violating its rule, but  
22 rather because it determined that, of the three options  
23 that were available to it, as a result of the order to  
24 show cause, the one that was most in the University's  
25 interest was the option to impose the recommended, the



1 recommended suspension.

2 QUESTION: Even if they did -- even if the  
3 University suspended him for violating a University rule,  
4 that might make the University a State actor, but I don't  
5 know why that makes NCAA a State actor.

6 QUESTION: What relief does the Nevada court  
7 grant against the NCAA?

8 MR. LEE: The relief was against the University  
9 and not against the NCAA.

10 QUESTION: Well, what business has the NCAA got  
11 here?

12 QUESTION: Well, there's an injunction against  
13 the NCAA for taking any action against the University.

14 MR. LEE: That is correct.

15 QUESTION: Well, then, there was relief granted.

16 MR. LEE: Well, excuse me, in that sense there  
17 was. That is correct.

18 QUESTION: The NCAA is prohibited from taking  
19 any action against UNLV.

20 MR. LEE: That is correct.

21 QUESTION: And you also have to pay its fees,  
22 don't you?

23 MR. LEE: Ninety percent of them, 90 percent of  
24 the --

25 QUESTION: Mr. Lee, I'm a little confused about

1 what was the basis for the firing here.

2 It seems to me if the man has an employment  
3 contract with the University, the University can't say  
4 we're firing you for breaking somebody else's rules. He  
5 must have violated some rule that was imposed by virtue  
6 of his employment with the University?

7 MR. LEE: The rules that he violated were the  
8 NCAA's rules of eligibility and recruitment.

9 QUESTION: well, how did they become applicable  
10 to him? I assume they became applicable to him through  
11 his employment contract with the University.

12 MR. LEE: They became applicable to him only  
13 because the NCAA prescribed "we have determined that  
14 these violations have occurred." And the University was  
15 ordered to show cause why as a result of those violations  
16 he should not be suspended. But it was the University --

17 QUESTION: But he must have had an obligation  
18 to someone not to commit those violations. To whom did  
19 he have that obligation?

20 MR. LEE: Yes, he had an obligation to his  
21 University, in the sense that the University was jointly  
22 responsible with the NCAA for seeing to it that they did  
23 agree that they would enforce those rules.

24 But my point is this: that if you take  
25 seriously what this Court said in Lugar, about looking to

1 the source of the substantive rules, this is the classic  
2 case in which, in which that requirement applies.

3 If you look to all of the factors that might  
4 enter into whether there is or is not state action, the  
5 only issue in this case, at the end of the day, the only  
6 substantive issue, is whether the rules, some rules have  
7 been violated.

8 Those rules are the eligibility rules that have  
9 been set by the University, that have been set by the  
10 NCAA, and which have become the University's rules only  
11 in the sense that the University is one of those members.  
12 But the University did not have to dismiss him. There  
13 were other options that were available to them -- and  
14 particularly, particularly in a case where the only  
15 issue, the only substantive issue, is the issue whether  
16 or not particular rules have been violated, then the  
17 source of those rules ought to be relevant to the state  
18 action issue.

19 QUESTION: Take action against him.

20 MR. LEE: Excuse me?

21 QUESTION: The University decided to suspend  
22 him.

23 MR. LEE: That is correct, but that was --

24 QUESTION: And they decided, well, this is one  
25 or our rules, that we're going to insist he abide by.

1 MR. LEE: This case in that respect, Justice  
2 White, really follows a fortiori from this Court's  
3 holding in Blum v. Yaretsky. In that instance, what you  
4 had was a decision to transfer patients from a  
5 lesser-care facility -- excuse me, from a higher-care  
6 facility to a lesser-care facility. And the decision was  
7 made -- the rule of conduct, or the rule of decision in  
8 that particular instance, if you will, was made by  
9 private individuals.

10 But once those private individuals, the  
11 doctors, made that decision, it had an effect on  
12 important Governmental interests. The Governmental  
13 decision as to how to treat these individuals, the  
14 Medical program is a Governmental program, but the  
15 relevant decisions were in effect made by the private  
16 entities -- including the amount of money that would be  
17 spent by Government.

18 Nevertheless, what this Court said was that all  
19 the Government had done was to respond to those private  
20 decisions, and that is exactly what we have in this  
21 instance.

22 You have the NCAA having set its rules, and its  
23 members then responding to the termination of those rules  
24 violations, and that we submit, under Blum v. Yaretsky  
25 and under Lugar, is not state action.



1 QUESTION: You have a State arbitrator who says  
2 that there are three choices, but that the only viable  
3 choice is to allow the University's delegation to the  
4 NCAA of the power to act as ultimate arbiter of these  
5 matters. And the President of the University adopts that  
6 determination. These are State officials who announce  
7 that the NCAA must be the ultimate arbitrator.

8 Do we not give some deference to that  
9 conclusion by the State officials as a matter of State  
10 law?

11 MR. LEE: As a matter of State law, of course  
12 you give deference to them, Justice Kennedy.

13 But the issue here is whether the state action  
14 rules, which are of course constitutional determinations,  
15 and interpretations of Section 1983 by this Court -- and  
16 what the State did in that instance was simply to  
17 determine, yes, we became members of the NCAA. When we  
18 become members of the NCAA, we determine that we will  
19 abide by their rules.

20 But they also identified that they had other  
21 options.

22 QUESTION: Were their conclusions correct? Was  
23 the arbitrator correct in what he identified as  
24 alternative two?

25 MR. LEE: Yes, I think he was -- yes, he was.

1           Alternative two was that they could have said  
2 no, and they could have -- then other sanctions would  
3 have had to be --

4           QUESTION: He was correct that the University's  
5 only real option was to recognize NCAA as the ultimate  
6 arbiter?

7           MR. LEE: Well, I don't know that he identified  
8 that as the only real option. It was his recommended  
9 option.

10           But the -- I think this point should be made  
11 very clear: UNLV did not have to fire Tarkanian. That  
12 was their decision, their option, and they made it from a  
13 choice of those three.

14           Moreover, this first requirement that the Court  
15 established in Lugar, in any event, is absent in this  
16 case, and regardless of how far it extends, it should be  
17 applicable in a case, in a case such as this.

18           I think that the key to decision is to draw a  
19 careful decision -- excuse me, draw a careful distinction  
20 between what the NCAA did on the one hand, and what UNLV  
21 did on the other hand.

22           QUESTION: Mr. Lee?

23           MR. LEE: Yes?

24           QUESTION: Let me return for a moment to this  
25 line of questioning -- what does Mr. Tarkanian lose if

1 you win?

2 MR. LEE: Well, that is -- we believe that if  
3 we win, this Court, pursuant to the exercise of its  
4 equity powers, does have the authority simply to dissolve  
5 the injunction.

6 QUESTION: Even the injunction against UNLV?

7 MR. LEE: Well, we believe that is basically  
8 what happened in Moose Lodge, and that this Court would  
9 have the authority to do that.

10 But that is not a central part of our case, and  
11 the Court -- in the event that the Court disagrees, then  
12 that is basically UNLV's problem. Because this will be  
13 the status of the case in the event that --

14 QUESTION: So what does Mr. Tarkanian lose, if  
15 you win?

16 MR. LEE: At the present time, he has an  
17 injunction against UNLV that --

18 QUESTION: And there's no reason that he won't  
19 keep on having that, even if you win here.

20 MR. LEE: And in that event -- in the event  
21 that that happens, then here will be the status of the  
22 case. There is still outstanding an order to show cause  
23 applicable to the University of Nevada. And at that  
24 point, there will still be three options available to the  
25 University of Nevada, except that the third one will have

1 changed. And the third one will be to go back to the  
2 Nevada State Supreme Court, to go back to the Nevada  
3 court, and attempt to persuade them that the injunction  
4 should be dissolved because it was based on a premise  
5 which the United States Supreme Court has now declared to  
6 be faulty.

7 QUESTION: If you win, it means that -- you  
8 represent the NCAA, I take it?

9 MR. LEE: Yes.

10 QUESTION: You want the injunction against the  
11 NCAA dissolved?

12 MR. LEE: That is correct.

13 QUESTION: And if that's dissolved, it means  
14 you can take action against the University.

15 MR. LEE: That is correct.

16 QUESTION: And you may or may not?

17 MR. LEE: That is correct.

18 QUESTION: But the University isn't a party  
19 here. Only Mr. Tarkanian is a party.

20 MR. LEE: That is right. The University is not  
21 a party to the action before this Court. And as a  
22 consequence, it will be just as Justice White said. We  
23 can then take action against the University.

24 QUESTION: Mr. Tarkanian, in Mr. Tarkanian's  
25 suit, he got an injunction issued against the NCAA.



1 MR. LEE: That is correct. And that, of  
2 course, can be dissolved.

3 And in the event that that happens, then the  
4 University --

5 QUESTION: Was it at his request that that  
6 court enjoined the NCAA from doing anything to UNLV, or  
7 was it at UNLV's request?

8 QUESTION: Well, they weren't a party.

9 MR. LEE: Excuse me?

10 QUESTION: The University wasn't a party, was  
11 it?

12 MR. LEE: Yes, the University was a party, but  
13 they did not appeal to the Nevada Supreme Court.

14 But there will still be an outstanding order to  
15 show cause pending -- the NCAA's order to show cause,  
16 pending against the University of Nevada. And they will  
17 then still have the same three options, except that the  
18 one option will now be modified because they will either  
19 have to go back and attempt to persuade the Nevada courts  
20 that the injunction was --

21 QUESTION: Why isn't this case just moot, if  
22 Mr. Tarkanian can't win anything?

23 MR. LEE: Well, it isn't moot for two reasons.

24 In the first place, we do have the matter of  
25 the attorneys' fees.

1 QUESTION: But if the only outstanding question  
2 is fees, does that keep a case alive? We've said costs  
3 don't.

4 MR. LEE: Well, I would hope that \$200,000 does.  
5 And I would think that the fee certainly does.  
6 But in addition, more importantly --

7 QUESTION: But on the fee point, Mr. Lee, isn't  
8 it true that the only justification for the fees was the  
9 1983 action, which in turn depends on the state action?

10 MR. LEE: Yes, and that's --

11 QUESTION: And that's why no matter what we do,  
12 we have to decide that.

13 MR. LEE: And that, of course, is more  
14 important, is even more important than the fees itself,  
15 because you do have, you do have an outstanding  
16 determination by a State supreme court that this area of  
17 individual freedom, which is guaranteed by the limitation  
18 of the state action doctrine, as the Court said in Lugar,  
19 has been withdrawn from the NCAA, and its ability to  
20 conduct its investigations in the way that it sees as in  
21 its best interests has been severely curtailed.

22 Let me just say that there are, in addition to  
23 the legal reasons that neither one of the Lugar tests,  
24 neither the rule of conduct issue nor the joint  
25 participation issue has been satisfied in this case.

1 There are good reasons why the state action rules should  
2 not apply to the NCAA's enforcement of its own rules  
3 among its own members.

4 This Court said four years ago that the NCAA  
5 plays a critical role in the maintenance of a revered  
6 tradition of amateurism in college sports, and there can  
7 be no question but that it needs ample latitude to play  
8 that role. This is the classic case that illustrates  
9 both that critical role and why it needs ample latitude  
10 in order to carry it out.

11 The procedures that it follows place principal  
12 responsibility, or divide the responsibility for  
13 enforcement, as between the two. It is not a strictly  
14 adversarial kind of procedure. What the NCAA has  
15 concluded over the years is that it can best be done by a  
16 combination of cooperation and adversarialness.

17 And The accomplishment -- that ample latitude  
18 that this Court observed that the Association needs to  
19 carry out its critical role -- will be aided by leaving  
20 this area of associational freedom continually available  
21 to the NCAA so that it can make its own judgments as to  
22 how best to carry it out.

23 The key to decision, I submit, to this case, is  
24 to distinguish rather carefully between what the NCAA  
25 does on the one hand and what the University did on the

1 other. What the NCAA did was to set its own standards  
2 for conduct. Because they were the NCAA's standards and  
3 not the University's standards, the first of the Lugar  
4 requirements has not been satisfied.

5 QUESTION: But didn't the University make those  
6 standards its own by contract?

7 MR. LEE: Well, I think not, and I think that  
8 to say that, to characterize it in that way, Justice  
9 O'Connor, really does violate the spirit of what I think  
10 to be not only Lugar, but also this Court's more recent  
11 pronouncement in the area, which is West v. Atkins, in  
12 which those two requirements were repeated.

13 As the Lugar opinion says, they really aren't  
14 the same. They are two separate requirements. And  
15 especially in a case where the only substantive issue at  
16 the end of the day is whether rules have been violated,  
17 you ought to ask, "where do those rules come from?"  
18 Those are not UNLV's rules, they are the NCAA's rules.  
19 They are UNLV's rules only in the sense that UNLV is a  
20 member of the Association. But the Association itself is  
21 a private entity, and they are, the Association is, the  
22 source of the rules.

23 What the University did was, what the NCAA did  
24 not do, was to make the decision, was to suspend  
25 Tarkanian. All the the NCAA did in this respect was to

1 determine that its standards of conduct had been  
2 violated, that its conditions of membership had been  
3 violated, and then it was the University that exercised  
4 its choice among three options available to it.

5 For two independent reasons, therefore, we  
6 submit that the judgment of the Nevada court should be  
7 reversed.

8 Mr. Chief Justice, I'd like to save the rest of  
9 my time for rebuttal.

10 QUESTION: Thank you, Mr. Lee.

11 We'll hear now from you, Mr. Lionel.

12 ORAL ARGUMENT OF SAMUEL S. LIONEL

13 ON BEHALF OF THE RESPONDENT

14 MR. LIONEL: Mr. Chief Justice, and may it  
15 please the Court, I'm looking at page three of our brief  
16 here, and I'm reading from the NCAA enforcement program.

17 Among other things, it says, "The enforcement  
18 procedures are an essential part of the intercollegiate  
19 athletic program of each member institution."

20 Thus, when the University became a member of  
21 the Association, its enforcement procedures became a part  
22 of its athletic program. Not only that, by becoming a  
23 member, the University agreed to abide by the  
24 Constitution, the bylaws, the rules, the interpretations  
25 of those rules, and the policies of the NCAA.



1 QUESTION: There is a question that there was  
2 state action in the case in the sense that the University  
3 is a state actor, and it did the suspending. But why is  
4 the NCAA a state actor? That's the question.

5 MR. LIONEL: The NCAA is a state actor because  
6 the University delegated to the Association the right to  
7 make the disciplinary standards and determinations and  
8 have a rule of conduct, as it did here -- and that comes  
9 clearly under the Lugar, the delegation -- there's  
10 delegation under the first prong, Mr. Justice.

11 QUESTION: So this is a sort of a joint action  
12 case?

13 MR. LIONEL: Absolute, in our view, yes.

14 QUESTION: Do you say the University delegated  
15 to the NCAA, or the NCAA delegated to the University?  
16 Which?

17 MR. LIONEL: No, the University delegated to  
18 the NCAA the right to set the standards, disciplinary  
19 standards, with respect to State employees involved in  
20 the athletic program, and to make determinations as to  
21 whether there were violations of those standards, and to  
22 impose penalties against State employees for their  
23 claimed violations of these standards.

24 QUESTION: Well, did the University delegate to  
25 the NCAA the authority to make the final decision as to

1 whether someone should be suspended or not?

2 MR. LIONEL: Yes, it did, and that is exactly  
3 what happened here, because the NCAA said that Coach  
4 Tarkanian would be, should be suspended for two years,  
5 and the Hearing Officer, who held a hearing under the  
6 procedures contained, under the NCAA enforcement  
7 procedures adopted, said that this is what you are, we  
8 are contractually compelled, to carry out that sanction  
9 and recommended to the President of the University that  
10 it be done. And the President of the University within  
11 two days wrote to Mr. Tarkanian and said, "we have -- I  
12 have no alternative, we must -- are contractually bound  
13 to follow the penalties of the NCAA, adjudged by the  
14 NCAA, and you are therefore suspended for two years."

15 QUESTION: When you say contractually bound,  
16 what -- is there a term of years to a membership in the  
17 NCAA?

18 MR. LIONEL: I'm not aware that there is.

19 QUESTION: And is there some liability, some  
20 financial liability, if you pull out?

21 MR. LIONEL: There is no direct financial  
22 liability.

23 QUESTION: Then how can you say you are  
24 contractually bound? The fact is, they could have  
25 repudiated the contract at any time.

1 MR. LIONEL: But --

2 QUESTION: And said, "We do our own hiring and  
3 firing. We don't like this particular decision and,  
4 therefore, we will no longer be part of the NCAA."

5 MR. LIONEL: But as the record indicates, the  
6 NCAA is the only game in town. If a university wants to  
7 engage in major athletics, it must be a member of the  
8 NCAA. If it is not, it cannot engage in major athletics.

9 QUESTION: This was an adhesion contract? The  
10 State of Nevada has been subjected to an adhesion  
11 contract, is that it?

12 MR. LIONEL: Well, that's actually what happens  
13 in this instance here, but that is the only game in town.

14 And As a matter of fact, what happened here,  
15 is Initially Coach Tarkanian sued only the University,  
16 and obtained an injunction. The University was requested  
17 by the NCAA to appeal that, which it did, and then the  
18 NCAA filed an amicus brief taking the position that it  
19 was an indispensable party because the injunction against  
20 the University impaired the right of the NCAA to enforce  
21 the penalties which it had judged under its program.

22 In that amicus brief, it said the following:  
23 that the University was bound by contract to abide by the  
24 NCAA penalties.

25 QUESTION: Even if it wasn't bound, even if it

1 could just have said, "Sorry, we're not going to suspend  
2 Mr. Tarkanian." Even if contractually they could have  
3 done it, they didn't. They said, they did just the  
4 reverse. They said, "We will abide by that rule."

5 MR. LIONEL: Yes, they did. And in any, almost  
6 every state action, there is an option on the part of the  
7 state actor and on the part of the State.

8 When the state fires somebody, and there may be  
9 a constitutional violation involved -- the 1983 case --  
10 they could not have fired that person. There is always  
11 an option.

12 QUESTION: Well, the record looks like the  
13 University basically agreed with Mr. Tarkanian here, and  
14 did not want to fire him, and didn't agree with the  
15 NCAA's assessment of the facts, and chose not to appeal  
16 the State court decision that said the University  
17 couldn't fire -- couldn't suspend him.

18 And it looked very much like the University is  
19 not acting jointly, in a sense, in that sense, with the  
20 NCAA. It basically took Mr. Tarkanian's view of the  
21 thing.

22 MR. LIONEL: I submit that that, Justice  
23 O'Connor, is not really what happened here.

24 Under the rules, the University was supposed to  
25 cooperate when charges were filed -- and they did. They

1 Investigated it as they were required and filed  
2 everything that was filed, participated in the hearing.  
3 There was nothing in the rules that say that the  
4 University must lay down and agree with everything the  
5 NCAA did.

6 They filed charges, and they admitted some of  
7 those charges, and in some cases they did not admit those  
8 charges. And the Committee on Infractions made a  
9 determination, and then they said that Coach Tarkanian,  
10 the University should suspend Tarkanian for two years.

11 And when it came back, the Hearing Officer said  
12 that the basis for those findings and the sanctions  
13 appeared to be clearly in doubt, and the due process that  
14 was followed was somewhat suspect, but we are  
15 contractually compelled, and therefore you should do it,  
16 Mr. President.

17 Mr. President said, "We have no alternative.  
18 We will do it. We will say that there was joint  
19 participation at all times." It is true that the  
20 University did not agree with what happened.

21 QUESTION: Mr. Lionel, are we bound by the  
22 ruling of the Nevada court that the NCAA is a party and  
23 has to be a party? Is there nothing we can do about that?

24 MR. LIONEL: Justice Marshall, it would appear  
25 that is a -- may very well be law of this case,



1 particularly when it came into being at the instigation  
2 of the Association.

3 This case was over, we thought, many years ago,  
4 until they filed that petition to -- the amicus brief.

5 QUESTION: The amicus brief determines what we shall  
6 do?

7 MR. LIONEL: I may have to withdraw. I would  
8 assume this Court can do what it wishes in this case here.

9 [Laughter]

10 QUESTION: No, I don't mean not, no, I don't  
11 mean that. I mean it seems to me that this is a crucial  
12 point, and I just want to know am I bound to recognize it?

13 MR. LIONEL: It would seem to me that one could  
14 very well say that the Association should not be  
15 committed at this time to say that we claim that we were  
16 indispensable, this case has gone on for years only  
17 because the Court agreed that we had rights to protect at  
18 that time. Now we're saying we should not be a party.

19 I think, arguably, it could be estopped from  
20 taking that position. We have been troubled by that.

21 QUESTION: (Inaudible) what you were saying --

22 QUESTION: Mr. Lionel, in looking at our cases  
23 -- although they're not all easy to reconcile -- there  
24 does appear to be one common theme. And that is, is that  
25 the entity in question must be held to be a state actor,

1 or there is no relief -- Mrs. Marsh and the company town,  
2 the Eagle coffee shop, the Lugar case.

3 Here, the State remains a party, it remains  
4 responsible. It remained obligated to Tarkanian, not to  
5 discharge him. Why is it necessary for the NCAA to be in  
6 the suit for any meaningful relief to be given to your  
7 client?

8 MR. LIONEL: If the NCAA is not enjoined from  
9 proceeding against the University, and to take steps  
10 which might ultimately throw the University out of the  
11 NCAA, the victory of Mr. Tarkanian is a hollow one,  
12 because there will be no basketball program anymore. He  
13 will have nothing to coach, he will not be able to get a  
14 job coaching college athletics because of what has  
15 happened in this particular case. The rules say that  
16 before any University hires someone as a coach, they  
17 should check to see what his history may have been with  
18 respect to any claimed violations against the NCAA.

19 And I submit under those --

20 QUESTION: Well, did he claim a reputational  
21 interest in this case? His argument is that he wants to  
22 keep his job, and he won that argument. His argument is  
23 he wants to keep his position, and he won that argument.

24 The University is there, it's a responsible  
25 entity. It's subject to the jurisdiction of the Court

1 for all of the relief that he sought. And so it seems to  
2 me that under our cases, there's no necessity for finding  
3 the NCAA to be a state actor.

4 MR. LIONEL: I would say, I would say he, his  
5 -- as I pointed out, he would have no victory, and not  
6 only that, whether or not -- certainly he has in our view  
7 a 1983 cause of action, because the NCAA is a joint  
8 participant --

9 QUESTION: But you never asserted that in the  
10 Nevada courts. You didn't sue the NCAA.

11 MR. LIONEL: Well, what happened was, we  
12 amended the complaint after the reversal and remand, so  
13 the NCAA could then become a party.

14 We amended it, and stated a 1983 claim against  
15 the NCAA. So this present complaint is against both the  
16 University and the NCAA, stating claims under 1983, and  
17 the courts below found -- the trial court found that  
18 there was a 1983 case against both. Only the NCAA did  
19 appeal to the State court, and is here.

20 But there clearly is a claim, and our position  
21 is that there is such a claim -- that the NCAA is a joint  
22 participant, that the NCAA under West v. Atkins was  
23 delegated these disciplinary rights over a State employee  
24 -- and we say we are a stronger case than West v. Atkins.

25 In West v. Atkins, you find a delegation, and

1 you find a deferral by the State. In this case, there  
2 is a delegation. There is a deferral by the State, and  
3 then the State afforded the NCAA significant assistance  
4 in saying to Tarkanian, "You are now suspended."

5 So, this is a stronger case than that.

6 QUESTION: May I ask a question about your  
7 delegation thought?

8 Am I correct in believing that the rules that  
9 the NCAA enforces are in effect minimums, that say you  
10 can only pay a player so much? But the Nevada University  
11 could impose stricter rules without violating its  
12 obligations to the NCAA, couldn't it?

13 MR. LIONEL: I'm sure that's true.

14 QUESTION: So it hasn't really delegated the  
15 rulemaking power, it merely said our rules will be at  
16 least as strict as those that you prescribe.

17 MR. LIONEL: But the delegation is broader than  
18 rulemaking power and standards, creating standards. But  
19 the NCAA, under the delegation, was permitted to have  
20 investigations, hearings, and make determinations.

21 QUESTION: That were not binding unless the  
22 University agreed to abide by them.

23 MR. LIONEL: The University did, and that's  
24 exactly what the NCAA said in its amicus brief, when it  
25 sought intervention.

1 And it said further --

2 QUESTION: Well, let me just be sure I  
3 understand you. For your delegation argument, you're not  
4 really relying on the fact that they delegated rulemaking  
5 power, but rather that they delegated enforcement power,  
6 Is that it?

7 MR. LIONEL: Yes.

8 QUESTION: So who made the rules would really  
9 not be critical to your case?

10 MR. LIONEL: That's correct, but in fact they  
11 were their rules, and which became part --

12 QUESTION: Nevada did not make them any  
13 stricter than they had to?

14 MR. LIONEL: That's correct.

15 QUESTION: But you're saying that the NCAA had  
16 the authority to discharge or suspend the Nevada coach?

17 MR. LIONEL: Yes. As a matter of fact, the  
18 rules which are set forth in our appendix indicate --

19 QUESTION: They did not have an option to  
20 withdraw from the NCAA?

21 MR. LIONEL: Not a realistic option in any way.

22 QUESTION: But they had a legal option, didn't  
23 they?

24 MR. LIONEL: Just as the judge in Dennis V.  
25 Sparks had a legal option not to accept the alleged --



1 QUESTION: Well, let me give you this example.

2 Supposing United Airlines tells O'Hare Airport  
3 In Chicago that we won't land here anymore, because we  
4 think your airport manager is doing a sloppy job of  
5 turning on the lights, or something like that, at night.

6 They just say, we won't do it. And O'Hare  
7 says, well, we can't operate without United, so we'll  
8 fire him. Would United become a state actor because they  
9 have enough economic power to insist on that kind of  
10 result?

11 MR. LIONEL: The mere -- if you --

12 QUESTION: You want to try to say no.

13 [Laughter]

14 MR. LIONEL: It's a gray area. One can always  
15 see a situation where someone can have enough economic  
16 power to do something.

17 QUESTION: That's what you're saying this  
18 association has. And I give you another example of the  
19 same degree of economic power, and you seem hesitant to  
20 say it's state action.

21 MR. LIONEL: If there is sufficient economic  
22 power to affect them, then I would say --

23 QUESTION: So, any time a private entity can,  
24 as a condition of doing business with a public entity,  
25 insist on something, why, that private entity is a state

1 actor?

2 MR. LIONEL: There's a big gray area in there,  
3 and I'd like to --

4 QUESTION: I don't know if it's all that gray.

5 MR. LIONEL: I can see a situation where an  
6 alumnus of the University would come to the President and  
7 say, "I'm the biggest -- I give you, donate more money  
8 than anybody else, and I will give you an additional \$10  
9 or \$15 million if you fire somebody there." And I would  
10 say that gets pretty close to saying that person could be  
11 a state actor, if that person is fired without due  
12 process of law. I would say that person might be a joint  
13 participant.

14 QUESTION: well, what about if, say, Chrysler  
15 Motors has a plant in Wisconsin, and isn't satisfied with  
16 the way it's working? So it wants to move that plant out  
17 of Wisconsin, but it says, "Okay, we'll negotiate with  
18 the legislature. If you'll revise certain laws, thus and  
19 so, and do thus and so, we won't move out."

20 Now, does that make Chrysler a state actor in  
21 Wisconsin?

22 MR. LIONEL: No. I would say no.

23 That is pressure, that one might get from a  
24 newspaper or something of that nature. That person has  
25 no right to demand that the State give them overt,

1 official significant help.

2 QUESTION: Well, of course, your example, the  
3 alumnus had no "right" to demand anything.

4 MR. LIONEL: Well, it gets very close, in that  
5 it puts them under the gun.

6 QUESTION: Well, what's the difference between  
7 the two cases? It isn't a matter of right, because  
8 neither one had any right.

9 MR. LIONEL: As I -- I find a great gray area,  
10 and at some point if it puts someone arguably out of  
11 business, a university, it's very important that the  
12 university must have this, otherwise it would not be able  
13 to operate, -- this is in this case that the University  
14 needs to be a member of the NCAA basketball program,  
15 which is an important matter --

16 QUESTION: Is there some written indication of  
17 what membership in the NCAA means?

18 MR. LIONEL: From the standpoint of what,  
19 Justice?

20 QUESTION: Well, what do they understand? What  
21 is -- does a member say "We will abide by the NCAA rules"?

22 MR. LIONEL: Yes, well, --

23 QUESTION: Is there something in writing to  
24 that effect?

25 MR. LIONEL: We have not been able to find

1 anything in writing, except the rules of the NCAA, the  
2 constitution and the bylaws say that a member agrees to  
3 abide by our constitution, the bylaws, our rules, and our  
4 enforcement program.

5 QUESTION: So by becoming a member, you say the  
6 member has agreed, in advance, in advance.

7 MR. LIONEL: Yes.

8 QUESTION: This isn't just an ad hoc situation?

9 MR. LIONEL: Absolutely. He has agreed, and  
10 that was the exact position that the NCAA took in its  
11 amicus brief.

12 QUESTION: Mr. Lionel, let me ask you --  
13 assuming I accept your theory of adhesion contract, which  
14 is I think what we've been talking about -- is it clear  
15 that this is an adhesion contract, I mean that there was  
16 no other option? Aren't there a lot of universities that  
17 don't belong to the NCAA? The world comes to an end if  
18 you can't belong to the NCAA? I thought probably more  
19 don't belong than do belong, isn't that right?

20 MR. LIONEL: No, No university with any kind of  
21 athletic program is not a member, is not a member.

22 QUESTION: No university with any kind of an  
23 athletic program?

24 MR. LIONEL: Any kind of a -- let's call it a  
25 major athletic program.

1 QUESTION: It's that much the end of the world,  
2 that there was no realistic option except to belong to  
3 the NCAA?

4 MR. LIONEL: No realistic option.

5 QUESTION: I think a lot of educators would be  
6 surprised to hear that.

7 QUESTION: Well, they can shut down the  
8 football program, basketball.

9 QUESTION: Well, it's not in the record -- is  
10 anything in the record about how many universities belong  
11 or do not belong?

12 MR. LIONEL: Yes, I believe there are  
13 approximately 1,000 universities, at least half of which  
14 are State universities. All the service academies are  
15 members.

16 QUESTION: All?

17 MR. LIONEL: Yes, all the service academies.

18 QUESTION: And all the universities in this  
19 country belong?

20 MR. LIONEL: No, no. But approximately 1,000  
21 universities.

22 QUESTION: Well, how many universities are  
23 there?

24 MR. LIONEL: I don't know that. Justice  
25 Marshall.



1 QUESTION: well, what good is the figure of  
2 1,000 If I don't know what to compare it with?

3 MR. LIONEL: well, it encompasses all  
4 universities which have major athletic programs.

5 QUESTION: I know some who can't belong.

6 MR. LIONEL: There are.

7 QUESTION: The one I graduated from didn't.

8 QUESTION: I just can't help but interjecting  
9 the fact that the University of Chicago survived without  
10 an athletic program.

11 [Laughter]

12 MR. LIONEL: And That survived well.

13 With respect to the Lugar case, we think we  
14 fall clearly under Lugar. The first prong of Lugar  
15 indicates two different types of situations, one where  
16 there is a delegation -- and here there is that  
17 delegation to the NCAA, of the right to make those  
18 disciplinary standards and determination -- and number  
19 two, that if there is, if the State imposes a rule of  
20 conduct -- now, the rule of conduct here is the NCAA  
21 saying that Jerry Tarkanian did this, which he shouldn't,  
22 and there should be a two-year suspension. And the  
23 University imposed that.

24 That clearly comes under Lugar, and there can  
25 be no doubt that insofar as the Association is concerned,

1     Its conduct is attributable to the State.

2             QUESTION: Let me ask you a question. Let's  
3     assume that we agree with you, that the NCAA is a state  
4     actor insofar as Mr. Tarkanian is concerned, that he has  
5     a remedy against the University.

6             But what -- even if that's the case, what was  
7     the basis for the injunction against the NCAA from taking  
8     action against the University itself?

9             MR. LIONEL: Because if it were permitted to  
10    take action against the University, the injunction that  
11    Coach Tarkanian received will not help him any.

12            QUESTION: why? Why?

13            MR. LIONEL: Because if the University no  
14    longer belongs to the NCAA --

15            QUESTION: So?

16            MR. LIONEL: It won't have a major college  
17    athletic program. He will have nothing there that he can  
18    coach.

19            QUESTION: well, did he ask for an injunction  
20    against --

21            MR. LIONEL: Yes, he did.

22            QUESTION: Against the NCAA?

23            MR. LIONEL: Yes. we never sought --

24            QUESTION: Or was that the University?

25            MR. LIONEL: Against both.

1           When we amended the complaint, after the  
2 remand, to make it so the NCAA could become a party, we  
3 amended it and also stated a claim under 1983 against the  
4 Association.

5           And we sought an injunction -- we never sought  
6 damages.

7           QUESTION: So you think that any time the NCAA  
8 thinks one of its rules has been violated, it can be  
9 forbidden to throw the member out?

10          MR. LIONEL: No. It's only if we can -- the  
11 NCAA --

12          QUESTION: I don't see what the basis -- even  
13 if you win on a state action thing, what's the basis for  
14 telling the NCAA that it can't suspend the University, if  
15 the University wants to keep Mr. Tarkanian on, that's  
16 fine. But it's not going to be a member.

17          MR. LIONEL: But the injunction -- Coach  
18 Tarkanian would then have obtained just a Pyrrhic  
19 victory. He has --

20          QUESTION: Maybe that's all he's entitled to.

21          MR. LIONEL: But his constitutional rights have  
22 been infringed on. He's been denied due process in  
23 connection with this, and he --

24          QUESTION: Well, I know, but the NCAA shouldn't  
25 be required to keep a member on that isn't living up to

1     its rules.

2                 MR. LIONEL:   The only rule that would be  
3     involved here would be the non-suspension of Coach  
4     Tarkanian.

5                 QUESTION:   The Constitution forbids the  
6     University from firing Coach Tarkanian without proper  
7     process, but surely the Constitution doesn't require that  
8     the University give him a major-league basketball team to  
9     coach, does it?

10                MR. LIONEL:   No, it doesn't.

11                QUESTION:   So then what is the -- maybe the  
12    Chief Justice is right, that all he is entitled to under  
13    the Constitution is a Pyrrhic victory, that he can coach  
14    whatever basketball team the University has?

15                MR. LIONEL:   Well, it would seem to me that a  
16    court of equity could do what the court below did here.

17                The court said, "He has a right to have  
18    vindicated his constitutional rights." He is not  
19    vindicated but if we are going to say he can't continue  
20    to do what he did before, in which the court found he had  
21    a property right. In effect, if there is no injunction  
22    against the NCAA, he will have lost that property right  
23    to be that basketball coach --

24                QUESTION:   Property right, not just to have a  
25    job with the University, not just to coach the



1 University's basketball team, but a property right to  
2 coach an NCAA basketball team -- that's what the  
3 Constitution guarantees him?

4 MR. LIONEL: Yes, and also, there were other  
5 rights that flowed from that, as we pointed out.

6 He lost -- he had clinics, he had other  
7 matters, and radio programs, all of which came from the  
8 fact that he was the basketball coach at the University.

9 QUESTION: Well, but your position, as I  
10 understand it, is that if the NCAA is a state actor, it  
11 has to follow constitutional procedures when it imposes  
12 sanctions on anybody. And you would really require them  
13 to remodel their whole procedural mechanisms for dealing  
14 with this kind of case and maybe -- you know, if you're  
15 right, it seems to me that they would have an obligation  
16 to follow due process procedures, and not use private  
17 investigators, to rely on hearsay and that sort of thing.

18 So what really is at stake is what kind of  
19 procedures they can use when the member that's being  
20 challenged is a public entity rather than a private one.

21 MR. LIONEL: That's correct.

22 And in fact, as a result of this case, as the  
23 result of a Congressional oversight committee  
24 investigation which followed shortly thereafter, the NCAA  
25 has changed many of their rules with respect to this type



1 of investigation.

2 QUESTION: Well, I think then that even if you  
3 win, as Justice Stevens suggests, if the NCAA wanted to  
4 take some action against a State university, even though  
5 no employee was involved, it would have to follow due  
6 process procedures.

7 MR. LIONEL: Proceeding against the University?  
8 I frankly don't know the answer. The University's under  
9 injunction not to suspend Tarkanian.

10 QUESTION: Well, if the University's become a  
11 member of this association, and it delegated -- it makes  
12 this big delegation, and so -- and the NCAA has some  
13 rules that it must comport with due process?

14 MR. LIONEL: Yes, it must.

15 QUESTION: In moving against the University?

16 MR. LIONEL: No, that may be just private  
17 activity.

18 QUESTION: Well, if it is, what is the basis  
19 here for an injunction against the NCAA from moving  
20 against the University? Even if it can be called a state  
21 actor by Mr. Tarkanian?

22 MR. LIONEL: Because then Mr. Tarkanian has not  
23 -- his property right has not been protected. He's been  
24 denied due process of law.

25 QUESTION: Well, but you certainly are putting

1 the NCAA in a strange position in not being able to throw  
2 out a member that refuses to abide by its rules. Just as  
3 a matter of equity I would think that the injunction is  
4 very suspect against the NCAA.

5 MR. LIONEL: The NCAA was really the moving  
6 party here. The NCAA is really responsible for this  
7 denial of due process to Coach Tarkanian.

8 QUESTION: well, he's had his remedy against  
9 the University. He's no longer suspended.

10 MR. LIONEL: I submit that would be a  
11 meaningless remedy, and that the injunction against the  
12 NCAA should be --

13 QUESTION: He's still going to be paid his  
14 salary. What more does he want?

15 Radio programs. The Constitutional right to  
16 radio programs.

17 MR. LIONEL: His due process rights were  
18 violated.

19 QUESTION: well, his due process rights were  
20 violated were procedural, weren't they?

21 MR. LIONEL: Also substantive.

22 QUESTION: What was the substantive violation?

23 MR. LIONEL: Because there was no basis for the  
24 findings, the court found that they had been  
25 substantively violated.

1 QUESTION: Thank you, Mr. Lionel.

2 Mr. Lee, you have four minutes remaining.

3 REBUTTAL ARGUMENT BY REX E. LEE:

4 MR. LEE: Thank you, Mr. Chief Justice.

5 In answer to Justice White's question, the  
6 obligation that the UNLV is under tort appears on page 80  
7 of the joint appendix. And what it is, of course, is an  
8 agreement to, it's on fundamental policy 2(b), "shall be  
9 obligated to apply and enforce this legislation and the  
10 enforcement program of the Association shall be applied  
11 to an Institution when it fails to fulfill this  
12 obligation."

13 What the UNLV agreed to do was to abide by the  
14 NCAA's rules. What it did not agree to do, and could not  
15 have agreed to do, as a governmental entity, was to  
16 delegate any kind of discipline of State employees or any  
17 other Governmental function to the NCAA.

18 And the way it's tested is this: assume that  
19 what President Bepler had said, back in 1977, was "No,  
20 our answer to the order to show cause is we cannot and  
21 will not, because under our judgment, he just doesn't  
22 deserve to be suspended, and that is a function that is  
23 non-delegable as a matter of Nevada State law."

24 What the NCAA would have done at that point is  
25 to look to other sanctions. They would not have, and

1 could not have required that he be dismissed.

2 QUESTION: So you say it looks like the  
3 University is looking around for a set of rules to have  
4 in its university, and it suddenly runs across the NCAA  
5 which has promulgated a bunch of rules that it recommends  
6 for universities to adopt, and so the university says,  
7 gee, here's a bunch of rules, we'll just adopt them.

8 MR. LEE: No, as a condition of membership,  
9 they have agreed, as a condition of membership --

10 QUESTION: well, they just simply agreed to  
11 adopt this set of rules?

12 MR. LEE: That is correct. As a condition of  
13 membership -- and in the event that they decide not to  
14 follow those rules, or not to follow the NCAA procedures,  
15 they can either accept -- it wasn't just a matter of NCAA  
16 membership, though if it were, the legal rule would still  
17 have been the same.

18 They could have accepted other, less severe  
19 sanctions, such as an extended period of probation, pure  
20 scholarships, etc.

21 QUESTION: Let's assume they're wrong on the  
22 state action, that Tarkanian was entitled to a remedy  
23 here.

24 What was the basis for the injunction against  
25 the NCAA's taking action against the University?

1 MR. LEE: Because the State court judge said  
2 that UNLV had acted wrongfully, and there was a  
3 derivative, there was a derivative right from the NCAA.

4 I do not defend that -- I do not think that's  
5 right -- but that was the basis for the injunction. And  
6 I want to stress that the only relief we're asking for is  
7 the relief of, of the release of the injunction against  
8 the NCAA.

9 QUESTION: And do you argue that even if it's  
10 held to be a state actor, that injunction shouldn't  
11 stand? I don't know --

12 MR. LEE: No, no, no.

13 QUESTION: I've never heard you say that.

14 MR. LEE: No, no, no. I'm not saying that even  
15 if we're held --

16 QUESTION: But that's the argument. That's the  
17 question that I asked you. Even if you lose on state  
18 action, why should you be forbidden to take action  
19 against the University?

20 MR. LEE: I see. I think there are good  
21 reasons why we shouldn't, but we also think we are not a  
22 state actor, for reasons that have been stated.

23 What this whole argument this morning has  
24 demonstrated is the mischief that you get into once you  
25 open the door beyond those two Lugar requirements. There



1 are good reasons for those two Lugar requirements, and  
2 also for the rule in Blum v. Yaretsky.

3 All that happened here was a response by a  
4 governmental entity to a non-governmental entity. Blum  
5 v. Yaretsky says that that is not sufficient. And once  
6 you open that door, you get into problems like the United  
7 Airlines hypothetical, and like the numerous others that  
8 are raised in our brief.

9 There are lots of accrediting agencies, for  
10 example, that set standards, private entities, that set  
11 standards for Governmental entities to abide by. Are  
12 they bound by the full panoply of Fourteenth Amendment  
13 and 1983 restrictions on their area of private activity,  
14 and also subject to damage actions? We would hope not.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

16 The case is submitted.

17 (Whereupon, at 10:56 o'clock a.m., the case in  
18 the above-titled matter was submitted.)  
19  
20  
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#87-1061 - NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner V.

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JERRY TARKANIAN

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher  
(REPORTER)

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