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Can a Private Educational Association ever be Liable under 42 U.S.C. Section 1983 for Depriving an Individual of Fourteenth Amendment Due Process Rights after *NCAA v. Tarkanian*?

I. INTRODUCTION

The Fourteenth Amendment to the Constitution prohibits a state from depriving "any person of life, liberty, or property, without due process of law."¹ A deprivation of these rights, under color of state law, gives rise to a private cause of action under the federal civil rights statute, 42 U.S.C. § 1983, which was enacted by Congress in 1871.² In recent history many individuals have sought relief under section 1983.

Jerry Tarkanian, the respondent in *NCAA v. Tarkanian*, was one such individual. In *Tarkanian*, however, the Supreme Court ruled, in a five to four decision, that there is no cause of action under § 1983 when the alleged violation of a constitutional right was caused by a non-state actor not acting under the color of state law.³

A claim under § 1983 must satisfy two requirements: (1) the action causing the alleged constitutional violation must be committed by a person acting under color of state law;⁴ and (2)

1. U.S. CONST. amend. XIV, § 1.

2. Section 1983 reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

3. *NCAA v. Tarkanian*, 488 U.S. 179, at 199 (1990).

4. See *Burton v. Wilmington Packing Auth.*, 365 U.S. 715, 722 (1961) (As a general matter the protections of the fourteenth amendment do not extend to "private conduct abridging individual rights."); see also *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (§ 1983 gives a remedy for violation of fourteenth amendment when it occurs "under color of" state law, therefore liability only attaches to those wrongdoers "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance [with] their authority or misuse it.").

the conduct must in fact deprive the individual of a constitutional right. In *Tarkanian*, the second prong was never really considered since the first requirement proved to be the central issue in the case. The Supreme Court granted certiorari to determine whether a private actor becomes a state actor when the state actor follows the prompting of the private actor.

Part II of this Note presents the facts of *Tarkanian*. Part III discusses the reasoning of *Tarkanian's* majority and dissenting opinions. Parts IV and V analyze *Tarkanian*, and attempt to propose a guideline for non-state unincorporated educational associations wishing to limit their liability under § 1983.

II. FACTS OF *TARKANIAN*

The National Collegiate Athletic Association (NCAA) is an unincorporated association of 960 public and private universities and colleges from across the country.⁵ Its function is to adopt rules governing member institutions' recruiting, admissions, academic eligibility, and financial aid standards for student athletes.⁶ The NCAA's Committee on Infractions conducts investigations, makes factual determinations, and is expressly authorized to impose penalties upon member institutions which have violated the rules.⁷ The NCAA, however, is not authorized to penalize its member's employees directly.⁸

The NCAA, after a long investigation, found that the University of Nevada Las Vegas (UNLV) had committed 38 violations.⁹ It also found that Jerry Tarkanian had committed ten of the 38 violations personally.¹⁰ In 1977, UNLV informed Tarkanian that it was going to suspend him in accordance with the findings and suggestions of the NCAA.¹¹ UNLV suspended Tarkanian after being notified by the NCAA that UNLV would have to show cause why further penalties should not be imposed upon the University if it failed to suspend Tarkanian for a probationary period.¹²

5. 488 U.S. at 183.

6. *Id.*

7. *Id.*

8. *Id.* at 184.

9. *Id.* at 185-86.

10. *Id.* at 186.

11. *Id.* at 187.

12. *Id.* at 186.

Faced with a serious demotion, a drastic cut in salary and loss of other substantial monetary benefits,¹³ Tarkanian filed suit in Nevada state court claiming that he had been deprived of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983.¹⁴ The trial court found that Tarkanian had been deprived of his due process rights by a state actor (the NCAA) and awarded him an injunction from the suspension.¹⁵ The Nevada Supreme Court affirmed the trial court's decision in relevant part, finding that the NCAA engaged in state action when it conducted its investigation and recommended that Tarkanian be disciplined.¹⁶ The United States Supreme Court then granted certiorari and reversed.¹⁷

III. THE SUPREME COURT'S REASONING IN *TARKANIAN*

With the facts of *Tarkanian* set forth in part II, the purpose of this part will be to discuss the reasoning of both the majority and dissenting opinions of *Tarkanian*.

A. Reasoning of the Majority

Justice Stevens wrote on behalf of the five member majority.¹⁸ He began with a discussion of what constitutes a state actor for purposes of § 1983 and concluded that the NCAA was not a state actor. Justice Stevens reasoned that UNLV played only a small part in the creation of the NCAA's rules, and neither UNLV's following of the NCAA's suggestion to suspend Tarkanian nor the NCAA's great persuasive power over UNLV transformed the NCAA from a private party into a state actor.

13. *Id.* at 181 n.1, The trial court found that Tarkanian, as head basketball coach:

...is annually paid (in lieu of his salary as a professor) \$125,000, plus 10% of the net proceeds received by UNLV for participation in NCAA-authorized championship games, plus fees from basketball camps and clinics, product endorsements, and income realized from writing a newspaper column, speaking on a radio program entitled 'THE JERRY TARKANIAN SHOW,' and appearing on a television program bearing the same name. As a tenured professor alone, he would have earned about \$53,000.

14. *Id.*

15. *Id.*

16. *Tarkanian v. NCAA*, 741 P.2d 1345 (Nev. 1987).

17. 488 U.S. at 182.

18. Chief Justice Rehnquist along with Justices Blackmun, Scalia, and Kennedy joined the majority opinion. *NCAA v. Tarkanian*, 488 U.S. 179, 180 (1990).

1. *An unincorporated association made up of member institutions from a large number of states is not a state actor for purposes of 42 U.S.C. § 1983.*

Justice Stevens noted that the rules promulgated by the NCAA could not be considered Nevada State law. Although UNLV, a state actor, had a small part in the formation of the rules by virtue of its membership in the NCAA, the great majority of member institutions were from other states. Therefore, it follows that the legislation created by the NCAA is "not the product of Nevada," but rather the result of "the collective membership, speaking through an organization that is independent of any particular state."¹⁹ Stevens concluded that the NCAA was a private actor originally, and that only by some other theory could it have been transformed into a state actor.²⁰

2. *A private actor becomes a state actor if a state actor formally delegates authority to the private actor which enables it to conduct itself in a way that deprives an individual of due process.*

The Court next dealt with Tarkanian's first claim that UNLV delegated its functions to the NCAA, clothing the Association with authority to both adopt the rules governing UNLV's athletic programs and to enforce those rules on behalf of UNLV.

Stevens first noted that the typical case raising a state-action issue involves a private party who has taken decisive steps to deprive an individual of his or her due process rights. In such a case, the issue becomes whether the state was sufficiently involved to treat the decisive conduct as state action.²¹ The test in the usual case is "whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor."²²

19. *Id.* at 193; *see also* Clark v. Arizona Interscholastic Ass'n., 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); Louisiana High Sch. Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968).

20. 488 U.S. at 193 n.13 (However, Stevens noted that the result would be different for a private organization with a membership made up primarily of actors from the same state).

21. *Id.* at 192.

22. *Id.* n.12; Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)

However, Stevens pointed out that “this case uniquely mirrors the traditional state-action case.”²³ For in *Tarkanian*, it was not the private party (the NCAA) that ultimately suspended Tarkanian, it was the state actor (UNLV). The question thus becomes “not whether UNLV participated to a critical extent in the NCAA’s activities, but whether UNLV’s actions in compliance with the NCAA’s rules and recommendations turned the NCAA’s conduct into state action.”²⁴ Stevens answered this question in the negative, finding that “UNLV delegated no power to the NCAA to take specific action against any university employee.”²⁵ Rather, “the commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose against UNLV itself.”²⁶ Thus, Stevens concluded that UNLV was a state actor in its suspension of Tarkanian, but that the NCAA was not. Though the NCAA threatened further penalties if the suspension wasn’t made, UNLV made the ultimate decision. UNLV could have, if it had wished, refused to follow the recommendations of the NCAA to suspend Tarkanian and risked further penalties.²⁷

3. *A state’s conferral of monopoly status does not convert a private party into a state actor.*

Finally, Tarkanian argued that the power of the NCAA is so great that UNLV had no practical alternative other than to comply with the NCAA’s demands. In response, Stevens first expressed doubt as to whether this claim was even true,²⁸ but concluded that even if it were, it would not follow that the NCAA became a state actor. In final analysis, Stevens found the issue to be whether “the conduct allegedly causing the deprivation of a federal right [can] fairly be attributable to the

("[T]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.")

23. 488 U.S. at 192.

24. *Id.* at 193.

25. *Id.* at 196.

26. *Id.*

27. *Id.* at 198.

28. *Id.* at 198 n.19 (The Court noted that even though not being in the NCAA would pose an obstacle to being a basketball powerhouse, that UNLV still had options no matter how distasteful those options were).

state."²⁹ Stevens then reasoned that it would be illogical to conclude that the NCAA's imposition of sanctions against UNLV is fairly attributable to the state of Nevada, especially when the Attorney General steadfastly opposed the sanctions during the long adversary proceedings held by the NCAA.³⁰

B. Reasoning of the Dissent.

The dissent, written by Justice White and joined by Justices Brennan, Marshall and O'Connor, focused on whether the private party acted jointly with the state actor in the harmful conduct. The dissent concluded that on the facts of the case the NCAA had acted jointly with UNLV and was therefore a state actor in Tarkanian's suspension.

1. *Prior Supreme Court rulings dictate that the test for the present case be "whether the private party jointly engaged with the state actors in the alleged violation."*³¹

Justice White relied on *Adickes v. S.H. Kress & Co.*³² and *Dennis v. Sparks*³³ for precedent in holding that a private party "jointly engaged with state officials in the challenged action" becomes a state actor.³⁴ White argued that it is irrelevant which party took the final step that caused the alleged harm.

2. *The facts of Tarkanian clearly indicate that the NCAA acted jointly with UNLV in Tarkanian's suspension.*

The dissent found that in *Tarkanian*, "the NCAA acted jointly with UNLV in suspending Tarkanian."³⁵ First, Justice White noted that Tarkanian was suspended for violations of rules made by the NCAA which were accepted by UNLV as a

29. *Id.* at 199 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

30. 488 U.S. at 199.

31. *Id.* at 200.

32. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (plaintiff entitled to relief under § 1983 against a private actor if he can prove that the private party and a police officer had an agreement to cause their arrest on impermissible grounds).

33. 449 U.S. 24 (1980) (The Court held that a private party became a state actor when it willfully participated with a judge in the granting of an illegal injunction).

34. 488 U.S. at 200 (quoting *Dennis*, 449 U.S. at 27-28).

35. 488 U.S. at 200.

condition to being a member of the NCAA.³⁶ Second, he found that UNLV was also forced to let the NCAA conduct hearings concerning the violation of NCAA rules in order to be a member of the NCAA.³⁷ And third, UNLV had to agree that the "findings of fact made by the NCAA at its hearings would be binding on UNLV."³⁸

In short, the dissent found that "it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV."³⁹ Based on these facts, the dissent concluded that the NCAA was "jointly engaged with [UNLV] officials in the challenged action,"⁴⁰ and therefore was a state actor.⁴¹

IV. ANALYSIS

This part of the note focuses on whether an agreement between a state actor and a private party can change the private party into a state actor for purposes of 42 U.S.C. § 1983. The first prong of § 1983 imposes liability on a party who violates an individual's Fourteenth Amendment due process rights while acting under color of state law. *Tarkanian* does not provide a clear standard for determining § 1983 liability of a private party where a state actor commits a violation pursuant to an agreement with the private party.

A. UNLV Had No Reasonable Alternative Other than to Follow the NCAA's Findings and Recommendation to Suspend Tarkanian; Therefore, UNLV Delegated its Authority to the NCAA.

The Court found that UNLV was not contractually obligated to suspend Tarkanian on the findings and recommendations of the NCAA, and therefore, UNLV acted unilaterally when it suspended Tarkanian.⁴² The Court noted, however, that if an actual delegation of power to discipline individual employees of

36. *Id.*

37. *Id.* at 201.

38. *Id.*

39. *Id.* at 202.

40. *Id.* (quoting *Dennis*, 449 U.S. at 27-28).

41. 488 U.S. at 202.

42. *Id.* at 192-94.

member institutions had been contractually made to the NCAA, then it would have been a state actor.⁴³

This view is too rigid and ignores the practical realities of the case. Even though UNLV was not contractually obligated to suspend Tarkanian, it had no legitimate alternative. The NCAA had such power over its member institutions that UNLV was forced to choose between suspending its head basketball coach, Jerry Tarkanian, and having a basketball program at all. Faced with the economic loss which would inevitably happen to any NCAA Division I institution if it were to lose one of its major money-making sports (such as football or basketball), UNLV acted in the only way feasible when it implemented the NCAA's recommendations and suspended Tarkanian. UNLV delegated its decision making authority regarding Tarkanian to the NCAA because the school was effectively, if not literally, bound by the NCAA's recommendations.

B. UNLV's Action is Directly Attributable to the NCAA.

The majority in *Tarkanian* erred when it concluded that the "conduct allegedly causing the deprivation of a federal right' cannot fairly be attributed to Nevada since UNLV had conducted its athletic program under policies adopted wholly by the NCAA without any input from the state of Nevada."⁴⁴

Whether the state of Nevada was responsible for the NCAA's rules and sanctions was irrelevant. Even though the rules promulgated by the NCAA were not a result of Nevada law, Tarkanian was deprived of federal rights pursuant to NCAA rules. UNLV took action against Tarkanian that it otherwise would not have taken but for the NCAA's power over UNLV's ability to operate major collegiate sports programs. Thus, UNLV's action against Tarkanian should be attributable to the will of the NCAA. Therefore, it's only fair that the NCAA be considered a state actor since they essentially dictated Nevada state action.

43. *Id.* at 195.

44. *Id.* at 199 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. at 937).

C. Public Policy Dictates that in Other Cases Arising Along Similar Fact Patterns the Test Should be Whether the Private Party Acted Jointly with the State Actor in the Harmful Conduct to the Individual.

Public policy suggests that the law should discourage private parties from acting jointly with state officials in conduct that deprives individuals of federal rights. In *Dennis v. Sparks*,⁴⁵ a state trial judge enjoined the production of minerals from oil leases owned by the plaintiff. The injunction was later dissolved on appeal as having been issued illegally. The plaintiff then filed suit under 42 U.S.C. § 1983, alleging that the trial judge had conspired with the private party seeking the original injunction—a private corporation—the sole owner of the corporation, and the two sureties on the injunction bond to deprive the plaintiff of due process by corruptly issuing the injunction. The Court held unanimously that under these facts the private parties were state actors because of their “willful participation in joint action with the state or its officials.”⁴⁶

In *Dennis* the trial judge was a more than willing party with the private actors in the harmful conduct. In *Tarkanian*, UNLV did not wish to take the harmful action but was forced to do so because of the powerful position that the NCAA played in relation to UNLV. Suppose that the trial judge in *Dennis*, instead of happily acting in union with the private parties in violating an individual’s federal rights, had been blackmailed into participating with the private parties. Is the private party any less involved because the state actor is reluctant? If a private party becomes a state actor when it acts voluntarily with a state actor in violating a person’s federal rights, public policy should be even stronger that a private party should also be considered a state actor when it prompts an otherwise unwilling state actor to violate a person’s federal rights.

V. CONCLUSION

The reasoning of the Court in *Tarkanian* ignores realities, precedent and public policy. It was a five-to-four decision. Such decisions, have often been subject to later reversals by the Court. However, the Court’s current position is that a private

45. 449 U.S. 24 (1980).

46. *Id.* at 27.

party does not become a state actor when the state actor is the one that takes the final act causing the violation of an individual's federal rights. Therefore, unincorporated educational associations need to be aware of *Tarkanian* and its ramifications on § 1983 liability for them in instances where they formulate rules and sanctions for member institutions.

A. Four Guidelines for Unincorporated Educational Associations to Best Limit Their Section 1983 Liability.

Although there are no sure ways to ever completely limit liability, there are some basic guidelines that *Tarkanian* gives to unincorporated educational associations to greatly reduce their § 1983 liability to member institution's employees.

1. *The association itself must not be made up of member institutions from only one or a few states unless the association is comprised of only private institutions.*

The Court in *Tarkanian* first considered whether the NCAA and its rules could fairly be said to be the result of state law. It found the NCAA was made up of numerous members from a multitude of states and therefore the association or its rules could not be deemed the law of any particular state. However, the Court noted the result would be the opposite if the association was made up of member institutions from only one state with most of the institutions being state actors themselves in their individual capacity. The Court did not indicate what the result would be if the association was made up of member state institutions from a small number of states. It follows that the more states represented the better and the fewer states represented the greater chance of having the association deemed a state actor.

Furthermore, if the organization was made up of only private member institutions it could not be deemed to be a state actor in and of itself.

2. *Unincorporated educational associations should not impose sanctions on member institutions with regard to how those institutions discipline their own employees.*

Although the Court in *Tarkanian* found that the NCAA did not become a state actor by threatening further sanctions if UNLV did not suspend *Tarkanian*, the issue and subsequent

litigation would have never occurred if the NCAA had simply made the sanctions against UNLV itself and left it up to UNLV to decide how best to discipline Tarkanian. On this issue educators need to remember that this was only a five-to-four majority that could easily be reversed if ever brought before the Court again.

3. *Unincorporated educational associations should not let member institutions formally delegate power to the association to take action directly against individual employees of those institutions.*

The Court noted in *Tarkanian* that the result would have been the opposite if UNLV had formally delegated to the NCAA the power to discipline UNLV employees directly. The Court reasoned that if such a delegation had occurred, UNLV would have been contractually obligated to discipline Tarkanian upon the NCAA's findings and recommendations; therefore, the NCAA could have been considered to have been a state actor.

4. *Unincorporated educational associations should not take the final action against member institution employees.*

Finally, Tarkanian ultimately lost his case because it was UNLV, the state actor, that suspended him and not the NCAA (the private party). The decision in *Tarkanian* turned on the Court's reasoning that when a state actor is the party that causes the alleged harm, a private party cannot be considered a state actor. It follows that the question of whether a private party has violated an individual's federal rights under color of state law is only necessary when the private party has in fact taken the action that has caused the alleged harm. Therefore, if the private party does not commit the act, the first requirement of the first prong of § 1983 is not met and whether the act was committed under color of state law is irrelevant.

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