

Volume 39 | Issue 4

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1989

## *NCAA v. Tarkanian: A Delegation of Unfettered Discretion*

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### Recommended Citation

Richard A. Di Lisi, *NCAA v. Tarkanian: A Delegation of Unfettered Discretion*, 39 Case W. Res. L. Rev. 1423 (1988-1989)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol39/iss4/10>

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NCAA v. TARKANIAN: A DELEGATION OF UNFETTERED  
DISCRETION

THE CONTROVERSY in *NCAA v. Tarkanian* arose out of various sanctions imposed by the National Collegiate Athletic Association (NCAA) upon the University of Nevada, Las Vegas (UNLV) and its head basketball coach, Jerry Tarkanian. Jerry Tarkanian became head basketball coach at UNLV in 1973. Prior to his assumption of that position, UNLV's basketball team had a 14-14 record and was virtually unknown on the national level.<sup>1</sup> Four years later, Tarkanian improved the team's record to 29-3 and the team finished third in the NCAA championship tournament.<sup>2</sup> In 1977, UNLV rewarded Tarkanian with tenure.<sup>3</sup>

Tarkanian's employer, UNLV, is a branch of the University of Nevada, which is organized and operated pursuant to the Constitution, statutes, and regulations of the state of Nevada. UNLV depends upon the state of Nevada for its financial support.<sup>4</sup> It is also one of approximately 960 institutions comprising the National Collegiate Athletic Association. Like UNLV, most of the NCAA's members are colleges which conduct major athletic programs.<sup>5</sup> The fundamental policy of the NCAA is to maintain the scholastic aspects of intercollegiate competition among the athletes of its members.<sup>6</sup> The NCAA promulgates rules which specifically prescribe the conduct of its member athletes in order to enforce this ideal. Among other issues, the regulations established by the NCAA specifically address academic standards, admission requirements, financial aid, and athletic recruiting.<sup>7</sup>

The NCAA established a Committee on Infractions to enforce its rules, which is commissioned with the authority to inves-

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1. *NCAA v. Tarkanian*, 109 S. Ct. 454, 456 (1988).

2. *Id.*

3. *Id.* at 457. As head coach, Tarkanian received \$125,000 per year, plus 10% of the proceeds received by UNLV for participating in the NCAA championship tournament. He also received a substantial sum from other activities, such as product endorsements, participation in basketball camps, and television and radio appearances. *Id.* at 456 n.1.

4. *Id.* at 457.

5. *Id.*

6. *Id.*

7. *Id.*

tigate members, make factual determinations, and impose sanctions.<sup>8</sup> Although the committee may not directly sanction an employee of a member institution, it may order that institution to show cause why the institution should not suffer further penalties for failing to punish the violating employee. Members of the NCAA are also required to fully cooperate with the committee and to assist in any investigation.<sup>9</sup>

In the early 1970s, NCAA officials began to suspect UNLV of violating various NCAA recruitment rules.<sup>10</sup> Approximately three years later, the NCAA's Committee on Infractions notified the University that it was going to commence an "official inquiry" and requested UNLV to conduct a thorough investigation. Eight months later, the University responded with a detailed report, denying all allegations and declaring head coach Tarkanian completely innocent of any wrongdoing.<sup>11</sup> The NCAA responded by conducting a four-day formal hearing at which it concluded that UNLV had committed thirty-eight violations of NCAA rules, ten of which were attributed solely to Tarkanian.<sup>12</sup>

The committee also imposed a somewhat severe series of sanctions. These sanctions, which were approved by the NCAA's Council, placed UNLV on a two-year period of probation, during which its "basketball team could not participate in post-season games or appear on television."<sup>13</sup> The committee also forced "UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the university's intercollegiate athletic program during the probation period."<sup>14</sup>

The NCAA ruling put UNLV in a most precarious position — UNLV could decide to: (1) refuse to adhere to the NCAA's mandate and risk further punishment by the NCAA, (2) adhere to its ruling by temporarily banishing Tarkanian, or (3) sever all ties with the NCAA.<sup>15</sup> Although UNLV maintained that Tarkanian was innocent of any wrongdoing, its president opted to adhere to the NCAA's rulings by temporarily precluding

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8. *Id.*

9. *Id.* at 458.

10. *Id.* at 458. The committee initiated a preliminary inquiry in 1972. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 459.

14. *Id.*

15. *Id.*

Tarkanian from involvement in UNLV's intercollegiate athletic programs.<sup>16</sup>

Not surprisingly, this decision upset Tarkanian, who was being forced to surrender his prestigious position as well as a substantial portion of his income.<sup>17</sup> Tarkanian, therefore, filed a section 1983 action, in Nevada state court,<sup>18</sup> seeking declaratory and injunctive relief against his employer.<sup>19</sup> He alleged that the university had "deprived him of property and liberty without the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution."<sup>20</sup> The trial court ruled in favor of Tarkanian.<sup>21</sup> On appeal, the NCAA argued in an *amicus curiae* brief that the suit should be dismissed because a controversy did not exist. In addition, the NCAA argued that even if a controversy did exist, it should be involved in the suit as a necessary party. Concluding that a controversy did exist and that the NCAA was a necessary party, the Nevada Supreme Court ruled that the lower court's decision should be reversed and remanded to permit joinder of the NCAA.<sup>22</sup> Accordingly, Tarkanian amended his complaint by adding the NCAA. After four years of delay, the trial court again held in favor of Tarkanian, enjoining UNLV from disciplining Tarkanian and enjoining the NCAA from enforcing its sanctions against UNLV.<sup>23</sup>

Predictably, the NCAA appealed this decision to the Nevada Supreme Court where the lower court decision was upheld.<sup>24</sup> The Nevada Supreme Court ruled that the NCAA had engaged in state action, which is a necessary finding for a section 1983 claim. In arriving at this preliminary conclusion, the court held that the right or duty to discipline public employees is vested solely within the state and that the state may not dodge the liability attached to such power by simply delegating that duty to a private entity.<sup>25</sup> The court also felt that since the NCAA was composed primarily

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16. *Id.*

17. As a tenured professor, Tarkanian would have earned \$53,000 per year; as a head basketball coach and tenured professor, he would have made at least \$125,000 per year, and enjoyed the benefits flowing from his success and notoriety. *Id.* at 456 n.1.

18. 42 U.S.C. § 1983 (1986).

19. *Tarkanian*, 109 S. Ct. at 459.

20. *Id.*

21. *Id.*

22. *University of Nevada v. Tarkanian*, 95 Nev. 389, 594 P.2d 1159 (1979).

23. *Tarkanian*, 109 S. Ct. at 460.

24. *Tarkanian v. NCAA*, 103 Nev. 331, 741 P.2d 1345 (1987).

25. *Id.* at 337, 741 P.2d at 1348.

of government-funded institutions, the NCAA must be regarded as a state actor for section 1983 purposes.<sup>26</sup> Based upon that conclusion, the Nevada Supreme Court turned to the merits of the controversy and affirmed the lower court's decision.<sup>27</sup>

Unwilling to surrender, the NCAA appealed to the United States Supreme Court. This case presented the Court with an opportunity to lay to rest a brewing controversy as to the proper characterization of the NCAA for purposes of section 1983 actions.

## I. HISTORY

Prior to 1982, most courts confronted with this issue held that the NCAA was a state actor, and therefore, susceptible to suit under section 1983.<sup>28</sup> Among the earlier cases, the best characterization of the NCAA was presented in *Howard University v. NCAA*.<sup>29</sup> In that case, the NCAA sought to place Howard's soccer team on a one-year probation and make it ineligible for post-season competition as a penalty for allegedly violating various NCAA rules pertaining to player eligibility. Following Supreme Court precedent, the *Howard* court determined that the critical inquiry was whether the NCAA's conduct, although initially private in character, became "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."<sup>30</sup> The court further stated that "the government's involvement need not be either exclusive or direct; governmental action may be found even though the government's participation 'was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.'"<sup>31</sup> Thus, an individual need not carry a badge of state authority to be considered a state actor.<sup>32</sup>

Before turning to the merits of the case, the court noted that

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26. *Id.* at 335, 741 P.2d at 1347.

27. *Id.* at 333, 741 P.2d at 1346.

28. *NCAA v. Tarkanian*, 109 S. Ct. 454, 457 n.5.

29. 510 F.2d 213 (D.C. Cir. 1975).

30. *Id.* at 217 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)).

31. *Id.* (quoting *United States v. Guest*, 383 U.S. 745, 755-56 (1966)).

32. This conclusion is contrary to an earlier understanding set forth in *Monroe v. Pape*, 365 U.S. 167 (1961), where the Court stated that liability attaches only to those "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." *Id.* at 172.

approximately half of the NCAA's participants were publicly-funded institutions and that "public institutions provide[d] the vast majority of the NCAA's capital."<sup>33</sup> In addition, representatives from public schools accounted for most of the members of the NCAA's governing council. The court also stated that, in return, the NCAA provided an immeasurably valuable service to public institutions through their supervision of intercollegiate athletics.<sup>34</sup> Based upon the interdependence between state institutions and the NCAA, the court held that state action was present, and therefore, federal jurisdiction existed. The court explained that to hold otherwise would allow states to avoid constitutional restrictions by merely "banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."<sup>35</sup>

Although *Howard* was reaffirmed in several cases involving student-athletes,<sup>36</sup> the Supreme Court brought this trend to an abrupt halt in *Lugar v. Edmondson Oil Co.*,<sup>37</sup> which involved neither the NCAA nor student athletics. In *Lugar*, Edmondson Oil Co. filed suit to collect on a debt from Lugar, a lessee-operator of a truck stop in Virginia. After filing suit, Edmondson sought and received a prejudgment attachment of some of the petitioner's property, pursuant to Virginia law.<sup>38</sup> The attachment was later dismissed by the trial judge, but the petitioner filed suit in federal court against Edmondson pursuant to section 1983 alleging that Edmondson and the state had acted jointly to deprive him of his property without due process of law.<sup>39</sup>

In order to determine whether a private party may be converted into a state actor for the purpose of obtaining subject matter jurisdiction, the Court set forth a two-pronged test:

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33. *Howard Univ. v. NCAA*, 510 F.2d 213, 219 (D.C. Cir. 1975).

34. *Id.* at 220.

35. *Id.* at 220 (quoting *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975)).

36. *See, e.g., Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977)(the university was permitted to avail itself of the federal courts to contest an NCAA ruling placing the university's athletic teams on indefinite probation for refusing to find three students ineligible to compete in intercollegiate athletics); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975)(five collegiate basketball players were permitted to seek injunctive relief to prevent the NCAA from enforcing a ruling which prohibited them from competing in various NCAA tournaments).

37. 457 U.S. 922 (1982).

38. The "attachment procedure required only that Edmondson allege in an *ex parte* petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors." *Id.* at 924.

39. *Id.* at 925.

[T]he first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors."

. . . .  
"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents."<sup>40</sup>

Applying these principles, the Court concluded that the petitioner was deprived of his property through state action and that the defendants were, therefore, acting under color of state law when they participated in the petitioner's deprivation.<sup>41</sup>

Since the decision in *Lugar*, nearly all lower court decisions confronting fourteenth amendment and section 1983 claims against the NCAA have held that the NCAA is not a state actor.<sup>42</sup> For instance, in *Graham v. NCAA*,<sup>43</sup> the Sixth Circuit Court of Appeals held that in order to establish that the NCAA is a state actor, it must be proven either that: "(1) the NCAA was serving a function which was traditionally and exclusively the state's prerogative, or (2) the state or its agencies caused, controlled or directed the NCAA's action."<sup>44</sup> Basing its decision on this conservative standard, the court held that the plaintiff was unable to establish that the NCAA was a state actor under either prong of the test, and that the plaintiff's complaint was properly dismissed.<sup>45</sup>

In the Tarkanian controversy, however, the Nevada Supreme Court applied the rule enunciated in *Lugar* to reach the opposite conclusion. Applying the *Lugar* two-pronged test, the court stated:

The first prong [of *Lugar*] is met because no third party

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40. *Id.* at 939, 941 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

41. *Lugar*, 457 U.S. at 942.

42. *Tarkanian*, 109 S. Ct. at 457 n.5.

43. 804 F.2d 953 (6th Cir. 1986)(two Graham College football players brought suit alleging that the implementation of various university and NCAA rules had prevented them from playing football, in violation of their constitutional rights).

44. *Id.* at 958.

45. *Id.* The *Graham* test was also applied by the Sixth Circuit Court of Appeals in *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987), where the court held that a student who claimed he was denied his constitutional rights by an NCAA ruling declaring him ineligible to play intercollegiate hockey failed to state a claim against the NCAA.

could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and the NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA.<sup>46</sup>

Although the plausibility of the Nevada Supreme Court's approach may seem appealing, the United States Supreme Court was not persuaded.

## II. *National Collegiate Athletic Association v. Tarkanian*

### A. Opinion of the Court

In *NCAA v. Tarkanian*, the Supreme Court was finally given an opportunity to determine the NCAA's status for purposes of section 1983 actions. At first glance, this issue appears simple and well-defined. The Court, however, devoted a substantial portion of its opinion to refining the issue. Eventually, the Court concluded that "the question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action."<sup>47</sup>

The Court began by reiterating a well-known basic principle — the fourteenth amendment's due process clause does not apply to private conduct, "no matter how unfair that conduct may be."<sup>48</sup> Similarly, the Court reminded its readers that section 1983 was intended to provide a remedy for only those constitutional violations which occur "under color of" state law.<sup>49</sup>

Turning to the parties, the Court acknowledged that this was not a typical section 1983 state action case. Tarkanian's primary injury, his suspension, was directly imposed by the UNLV, an undisputed state actor. Thus, through their suspension of a tenured employee, UNLV was clearly bound by the constraints of the fourteenth amendment and susceptible to suit under section

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46. *NCAA v. Tarkanian*, 103 Nev. 331, 337, 741 P.2d 1345, 1349 (1987).

47. *Tarkanian*, 109 S. Ct. at 462.

48. *Id.* at 461.

49. *Id.* at 462.

1983.<sup>50</sup>

With respect to the NCAA, the Court began by considering whether the NCAA acted under color of state law when it promulgated the rules in question. Unlike the court in *Howard*, the Supreme Court focused solely upon the participation of the NCAA representatives from the State of Nevada rather than on the collective participation of all public institutions within the NCAA. From this perspective, the Court concluded that the NCAA's legislation came not from Nevada but from an "organization that is independent of any particular State."<sup>51</sup> Furthermore, the Court assumed that UNLV was free to disassociate itself from the NCAA and create its own rules. Based upon that assumption, the Court ruled that the NCAA was not acting under color of state law when it promulgated its rules even though Nevada had participated in their enactment and implemented their standards.<sup>52</sup>

Next, the Court considered whether the NCAA acted under color of state law when it investigated UNLV and issued its determinations concerning Tarkanian. Tarkanian argued that such authority resulted from a delegation of power from UNLV to the NCAA, and therefore, must be classified as state action.<sup>53</sup> The Court recognized that "a state may delegate authority to a private party and thereby make that party a state actor."<sup>54</sup> The Court, however, insisted that the NCAA was without any authority to sanction any UNLV employee, including Tarkanian. Although the Association could impose severe sanctions upon the university for failing to implement its recommendations, the NCAA could not utilize any governmental form of enforcement to carry them out.<sup>55</sup> Furthermore, since the NCAA and UNLV acted more like adversaries than partners throughout this process, the Court felt that any arguments alleging joint action were clearly without merit.<sup>56</sup>

As a last resort, Tarkanian argued that "the power of the NCAA is so great that UNLV has no practical alternative to compliance with its demands."<sup>57</sup> In response to that argument, the

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50. *Id.*

51. *Id.* (footnote omitted).

52. *Id.* at 463.

53. *Id.*

54. *Id.* at 464.

55. *Id.* at 464-65.

56. *Id.* at 464.

57. *Id.* at 465.

Court held that "even if we assume that a private monopolist can impose its will on a state agency by a threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law."<sup>58</sup> Having countered all of Tarkanian's allegations, the Supreme Court concluded that the NCAA was not a state actor and had not acted under color of Nevada law. Thus, the decision rendered by the Nevada Supreme Court was reversed.<sup>59</sup>

### B. Dissenting Opinion

In reaching the opposite conclusion, the dissent relied upon a more straightforward test. Citing precedent, the dissenters stated that "private parties could be found to be state actors, if they were 'jointly engaged with state officials in the challenged action.'"<sup>60</sup> The dissent applied this test by focusing on the relationship between the NCAA and the UNLV. First, the dissent pointed out that Tarkanian was suspended for violating NCAA rules and that those rules had been contractually embraced by UNLV. Second, under the terms of their membership agreement, the NCAA was to conduct all hearings and serve as the fact finder for all matters involving rule violations. Third, UNLV was bound by any such factual determinations. Furthermore, those findings were not subject to review by any other entity.<sup>61</sup>

The dissent also noted the irrelevancy of the fact that UNLV had the option to sever its ties with the NCAA. The dissent argued that, as in a conspiracy, liability attaches when the parties act in concert with respect to the wrongful act.<sup>62</sup> Based upon this approach, the dissent concluded that the NCAA was a state actor and therefore subject to suit under section 1983.<sup>63</sup>

### III. ANALYSIS

The distinction between the opinion of the majority and that of the dissent lies not so much in the rules that they apply as it does in the manner in which they apply them. The majority chose a technical and conservative approach. The dissent, on the other

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58. *Id.*

59. *Id.* at 466.

60. *Id.* at 466 (quoting *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1985)).

61. *Id.* at 466-67.

62. *Id.* at 467-68.

63. *Id.* at 468 (footnote omitted).

hand, took a more pragmatic approach in an effort to achieve a result that was both logical and just. Although both views have obvious merits, the result of the case seems to indicate that the dissent adopted the preferable alternative.

The critical factor in the majority's opinion was the fact that the university, not the NCAA, was the entity that actually suspended Tarkanian. The majority also relied heavily upon the fact that UNLV was free to ignore the NCAA and to disassociate itself from the organizations. However, that conclusion arguably ignores the importance of NCAA membership. NCAA membership carries with it a tremendous amount of prestige. The resulting notoriety allows member institutions to benefit financially. Often, NCAA games and tournaments are nationally televised. The proceeds from the television contracts "flow directly to the participating schools, primarily the public universities."<sup>64</sup> In the 1970s, member institutions received approximately thirteen million dollars annually through their affiliation with the NCAA.<sup>65</sup> The publicity provided to member institutions by the NCAA also adds a tremendous boost to enrollment. Therefore, public universities cannot simply disassociate themselves from the NCAA because such a parting would be financially damaging to any institution. With the constant threat of expulsion, universities are somewhat forced to heed the recommendations imposed by the NCAA.

As the dissent points out, the NCAA's recommendations are based upon factual determinations which may not be appealed to another entity for review.<sup>66</sup> Thus, the majority's decision grants the NCAA unfettered discretion with respect to such decisions. With this authority, the Committee on Infractions can force a university to suspend employees by threatening the university with expulsion from the Association. Such authority is clearly susceptible to abuse. Jealous committee and council members, which are representatives of other competing universities, could use their positions to initiate and impose sanctions. For the reasons stated above, the view adopted by the dissent is preferable. By determining that the NCAA and the university were joint actors, its decision seems more in touch with the practical realities underlying this controversy.

The potential ramifications of the majority's decision must

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64. *Howard Univ. v. NCAA*, 510 F.2d 213, 220 (D.C. Cir. 1975).

65. *Id.*

66. *Tarkanian*, 109 S. Ct. at 467.

also be considered. As noted in *Howard*, the characterization of the NCAA as a private actor for purposes of section 1983 creates an avenue through which states can dodge section 1983 liability by merely banding together to form a private organization "to which they have relinquished some portion of their governmental power."<sup>67</sup> Under the majority's view, a private organization may be entrusted with the authority to regulate a state agency, along with its employees, provided that the organization does not enforce its regulations with state enforcement mechanisms.<sup>68</sup> Such an organization would be free to make determinations and recommendations concerning employee performance without fear of penalty for any mistakes or intentional abuses of its authority. This unfettered discretion would remain unchecked by section 1983 even if the private organization is a monopolist that could indirectly inflict tremendous hardship on the state agency by simply refusing to deal with the agency if it failed to heed the organization's recommendations.<sup>69</sup>

Suppose a state were to surrender its authority to monitor the performance of police officers to a private organization. Also, suppose that membership in that organization greatly enhanced the ability of states to receive federal funds. Such an organization could indirectly force states to suspend officers, yet remain undaunted by section 1983. Thus, although the majority was unquestionably correct when it stated that section 1983 liability should only be imposed upon state actors, one could easily envision a situation in which a private actor could force a state agency to carry out its will.<sup>70</sup> In such situations, state compliance with the rules and recommendations of a private organization would turn the private organization's conduct into state action which should be subjected to the protections provided in section 1983. Therefore, the rigid view of the majority should be limited to the facts of this case and only be applied to cases involving the characterization of the NCAA. Since the majority acknowledged that the Tarkanian controversy was not a typical section 1983 state action case,<sup>71</sup> lim-

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67. *Howard Univ. v. NCAA*, 510 F.2d 213, 220 (D.C. Cir. 1975)(quoting *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975)). See *supra* notes 35-36 and accompanying text.

68. *Tarkanian*, 109 S. Ct. at 464-65.

69. *Id.* at 465.

70. *Id.* at 461.

71. See *supra* note 50 and accompanying text.

iting the application of the Court's decision does not appear unwarranted.

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