

DUE PROCESS - A NEVADA STATE STATUTE ATTEMPTING TO
REGULATE THE INVESTIGATIONS BY THE NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION REGARDING ASSOCIATION
INFRACTIONS IS UNCONSTITUTIONAL - *NCAA v. Miller*,
10 F.3d 633 (1993).

In 1991 the National Collegiate Athletic Association (NCAA) was seeking to proceed with an ongoing investigation into the men's basketball program at the University of Nevada at Las Vegas (UNLV) and then head coach Jerry Tarkanian. *Id.* at 637. In *NCAA v. Miller*, 10 F.3d 633 (1993) the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the United States District Court for the District of Nevada, *NCAA v. Miller*, 795 F. Supp. 1476 (D.Nev. 1992), which held that sections 398.115-398.255 of the Nevada Revised Statutes were violative of the United States Constitution's Commerce Clause and Contract Clause. The Nevada Legislature enacted the Statute in 1991 for the purpose of establishing thorough procedural requirements on the investigation of infractions by the NCAA. *Miller*, 10 F.3d at 637. In an effort to obtain protection under the Nevada Statute, former UNLV men's basketball head coach, Jerry Tarkanian along with Ronald Ganulin, Shelly Fischer, and Tim Grgurich (a UNLV assistant coach at that time), initiated the appeal. *Id.* at 635.

The matter was first brought before the district court in 1991 after the NCAA, under the auspices of the Nevada Statute, attempted to continue its ongoing investigation into the men's basketball program at UNLV and Coach Tarkanian. *Id.* at 637. The Statute required the NCAA to provide certain procedural due process protections during an enforcement proceeding, where there had been an accusation of rules infraction, and sanctions were likely. Nev. Rev. Stat. § 398.155-398.255. These protections were to be afforded to any employee, student-athlete, booster, or institution of the state of Nevada. *Miller*, 10 F.3d at 637. The appellants, who were charged with NCAA infractions, asserted their right to have the NCAA proceedings brought against them to comply with the Statute. *Id.* The Statute further provided that any NCAA proceedings violating the Nevada statutory provisions could be enjoined by a state district court. *Id.* The NCAA argued that the Statute was

unconstitutional and violative of the Commerce Clause and Contract Clause, and the NCAA filed a complaint for declaratory judgment and injunctive relief. *Id.* Judge McKibben of the U.S. District Court of the District of Nevada held that the statute was unconstitutional on both Commerce Clause and Contract Clause grounds, and awarded the declaratory judgment and injunctive relief. *Miller I*, 795 F. Supp. at 1476.

On appeal, Circuit Judge Fernandez only addressed how the Statute could not pass Commerce Clause scrutiny and explained that as result of this, there was no need to address the applicability of the Contract Clause, since failing Commerce Clause scrutiny was enough for the Statute to fall. *Miller*, 10 F.3d at 638. In holding the Statute violated the Commerce Clause *per se*, the Court of Appeals for the Ninth Circuit emphasized that the Statute regulated a product in interstate commerce beyond Nevada's boundaries, and that it placed the NCAA in a position of being subjected to inconsistent legislation. *Id.* at 640.

Judge Fernandez applied the Supreme Court's two-tiered approach in his analysis of the Nevada Statute's economic regulations under the Commerce Clause. *Id.* at 638 (citing to *Healy v. Beer Institute*, 491 U.S. 324, 109 S.Ct. 2080 (1986)). This approach requires the court to ask whether the Statute directly regulates or discriminates against interstate commerce; or whether it favors in-state economic interests over out-of-state interests. *Id.* This approach requires the court to strike down the Statute if it were found to directly regulate or discriminate against interstate commerce, or when its effect favored an in-state economic interests over an out-of-state interests. *Id.* If, on the other hand, the Statute is found to regulate evenhandedly and has only an indirect effect on interstate commerce, the court must then balance the burden on interstate commerce against the state's local interests. *Id.* (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970)).

After applying the Healy test to the Nevada Statute, the Court of Appeals held that the Statute violated the Commerce Clause *per se*, since it was found to be directed solely at regulating interstate commerce. *Id.* Judge Fernandez arrived at this conclusion by noting that the Statute was intended to only regulate interstate organizations, such as the NCAA. *Id.* (citing to Nev. Rev. Stat. § 398.055, which defines national collegiate athletic associations, which happen to have member institutions in 40 or more states). The court specifically focused on the fact that courts have invariably found the NCAA to be engaged in interstate commerce by: 1. scheduling events which require that teams travel beyond state borders, 2. controlling national television broadcasting bids, and 3. governing student athlete recruiting on a national level. *Id.* (citing NCAA v.

Board of Regents of Univ. of Okla., 468 U.S. 85, (1984); *Justice v. NCAA*, 577 F. Supp. 356 (D.Ariz. 1983); *Hennesey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977)). The court reasoned that the Nevada Statute would have a consequential effect on the way the NCAA would be able to regulate and administer its rules. *Id.* In agreeing with the finding of the district court, Judge Fernandez stated that the NCAA would not be able to accomplish its goals, since the Statute would not enable the NCAA's enforcement procedure to be applied evenhandedly and uniformly on a national level. *Id.* Judge Fernandez further stated that his finding was consistent with the Supreme Court's view enunciated in *Board of Regents of Univ. of Okla.*, 468 U.S. at 102. *Id.* at 639.

The court addressed the fact that under the Statute, the NCAA would have to adopt Nevada's procedural rules for Nevada schools, in order to avoid liability. *Id.* Moreover, in order to maintain uniform administration of its enforcement proceedings, the NCAA would have to comply with the Statute during enforcement proceedings throughout the United States. *Id.* Such a requirement, according to Judge Fernandez, runs contrary to the Commerce Clause in two ways. *Id.*

First, if a statute directly controls commerce taking place outside the forum state, then the statute would be exceeding the intrinsic limits, and the authority of the state which enacted it. *Id.* When a statute causes this result, it is to be held invalid, despite any contrary legislative intent. *Id.* Judge Fernandez noted that in order to determine whether the Nevada Statute falls into this category, the court would need to look at whether the Statute intended to control conduct beyond the state of Nevada. *Id.* (citing *Healy*, 491 U.S. at 336). The court found that in light of the NCAA's goal of uniformity the Statute was capable of regulating how the NCAA administered its enforcement procedures outside of Nevada. *Id.* Accordingly, the court found that the Statute violated the Commerce Clause. *Id.*

Second, the court found that the Statute would potentially create inconsistent legislation with respect to similar statutes in other states. *Id.* Judge Fernandez stated that the Commerce Clause sought to protect "against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* (quoting *Healy*, 491 U.S. at 336-37). Specifically, the court addressed the potential conflict that was likely to occur between the NCAA and states such as Florida, Illinois, and Nebraska, since each of those states contain similar due process statutes. *Id.* As a result of this potential conflict, the court found that due to the risk of setting forth inconsistent obligations that the Statute's out-of-state effect created, the Statute constituted a *per se* violation

of the Commerce Clause. *Id.* at 640. Since the Statute was violative of the Commerce Clause, the court did not need to balance the burden on interstate commerce against the local benefit derived from the Statute. *Id.* at 640.

After deciding that the Statute violated the Commerce Clause, Judge Fernandez next addressed the issue of whether the Statute should be invalidated partially or entirely. *Id.* The court first acknowledged that it is within the discretion of the courts to determine a statute's validity, whether it be in part or in whole *Id.* (citing *Regan v. Time, Inc.*, 468 U.S. 641 (1984); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987)). Utilizing this discretion, the court held that the Statute violated the Commerce Clause entirely, thus making it completely invalid. *Id.* Judge Fernandez reasoned that since the Statute's main objective was to regulate commerce, it would not be feasible to preserve any provision of the Statute that did not relate to the regulation of interstate commerce, since nothing of consequence would remain. *Id.* Accordingly, the court held that the Statute violated the Commerce Clause entirely, thus making it completely invalid. *Id.*

The *Miller* court felt that Nevada's procedural changes would not disrupt the NCAA in its efforts to remain a consistent national organization. The court believed that the Nevada Statute would threaten this consistency and that the NCAA would perhaps be better suited being regulated by Congressional action. As a result of this, the Statute was found violative of the United States Constitution's Commerce Clause and Contract Clause.

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