

# The Burger Court Opinion Writing Database

## *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*

468 U.S. 85 (1984)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 19, 1984

Re: 83-271 - NCAA v. Board of Regents

Dear John:

I join.

Regards,

A handwritten signature in dark ink, appearing to read 'WRS', is written below the typed name 'Justice Stevens'.

Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

May 21, 1984

No. 83-271

National Collegiate Athletic  
Association v. Board of Regents of  
the University of Oklahoma, et al.

Dear John,

I agree.

Sincerely,



Justice Stevens

Copies to the Conference

NO  
MAY 21 1984  
U.S. SUPREME COURT

Supreme Court of the United States  
RECEIVED  
SUPREME COURT U.S.  
JUSTICE MARSHALL 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

84 MAY 17 P2:45

May 17, 1984

Re: 83-271 -

National Collegiate Athletic  
Association v. Board of Regents  
of the University of Oklahoma

---

Dear John,

In due course, I shall circulate a  
dissent in this case.

Sincerely yours,



Justice Stevens

Copies to the Conference

cpm

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: JUN 14 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PETITIONER *v.* BOARD OF REGENTS OF THE  
UNIVERSITY OF OKLAHOMA AND UNIVER-  
SITY OF GEORGIA ATHLETIC  
ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June —, 1984]

JUSTICE WHITE, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 656-657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits. Accordingly, I dissent.

NO

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

'84 JUN 15 P12:04

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Circulated: \_\_\_\_\_

Recirculated: **JUN 15 1984**

p. 5  
2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PETITIONER *v.* BOARD OF REGENTS OF THE  
UNIVERSITY OF OKLAHOMA AND UNIVER-  
SITY OF GEORGIA ATHLETIC  
ASSOCIATION

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[June —, 1984]

JUSTICE WHITE, dissenting.

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Supreme Court of the United States

Washington, D. C. 20543

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 18, 1984

94 JUN 18 P1 36

MEMORANDUM TO THE CONFERENCE

Re: 83-271 - NCAA v. Board of Regents

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John and I plainly have contrary views about this case. We are at issue. I plan no further writing other than to add that because the District Court must substantially amend its outstanding injunction in order to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games, the injunction should be vacated until the conclusion of the proceedings that the Court of Appeals has directed the District Court to undertake.



RECEIVED  
SUPREME COURT U.S.  
JUSTICE MARSHALL

1, 16-17

84 JUN 19 A9:53

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: \_\_\_\_\_

Recirculated: JUN 18 1984

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PETITIONER *v.* BOARD OF REGENTS OF THE  
UNIVERSITY OF OKLAHOMA AND UNIVER-  
SITY OF GEORGIA ATHLETIC  
ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June —, 1984]

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins,  
dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 656-657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits. Accordingly, I dissent.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 6, 1984

Re: No. 83-271-Nat'l Collegiate Athletic Assoc. v.  
Bd of Regents of the University of Oklahoma &  
University of Georgia Athletic Association

Dear John:

I await the dissent.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

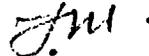
June 20, 1984

Re: No. 83-271-Nat'l Collegiate Athletic Assoc. v.  
Bd. of Regents of the Univ. of Oklahoma and  
Univ. of Georgia Athletic Association

Dear John:

Please join me.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
RECEIVED  
Washington, D.C. SUPREME COURT, U.S.  
JUSTICE MARSHALL

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 21, 1984

74 JUN 21 19 56

Re: No. 83-271, NCAA v. Board of Regents  
of the University of Oklahoma

Dear John:

Please join me.

Sincerely,



Justice Stevens

cc: The Conference

April 6, 1984

82-271 NCAA v. Board of Regents

Dear John:

One of my clerks brought the enclosed article to my attention.

It suggests the kind of market that will exist in free competition, and provides details as to the basketball experience.

Sincerely,

Justice Stevens

lfp/ss

April 4, 1984

## Side- Lines

The University of Iowa officials last week decided to ask the Big 10 Conference to appoint a representative to the College Football Association and to consider joining the group.

The request is expected to be considered by the conference in May.

The C.F.A. includes 60 institutions with some of the most prestigious football teams in the country. But two major conferences, the Big 10 and Pacific-10, have refused to join the group, and relations between leaders of the two factions have been cool at best.

Samuel Becker, the University of Iowa's faculty representative to the National Collegiate Athletic Association, said the board made the recommendation because institutions in the Big 10 and the C.F.A. have so many common interests.

"The organization," he said, "has turned out to be more responsible than people were predicting it would be when it first started. I'm not advocating anything at this point, I just think we need to reconsider the decision not to join them."

The C.F.A. has been criticized by members of the two conferences for its efforts to enhance the commercial value of its members' football programs.

William H. Webster, director of

## Athletics

# Drop in Ratings of Televised Basketball Worries Broadcasters, College Officials

### 'Glut' of regular-season games is blamed; championship tournament not affected

By N. SCOTT VANCE

Television ratings for college basketball games were down significantly during the season that just ended, causing some broadcasters and athletic-conference officials to consider airing fewer games next year.

Many of them blamed the ratings drop on a market "glut," in which television viewers in some areas were sometimes offered 10 or more college games in a single day.

The low ratings caused problems for broadcasters and syndicators, who sell packages of games to TV stations. Many of them have contracts with conferences that have required them to pay more than ever for television rights to games.

And at the same time the broadcasters were paying more, they were taking in less money, since ratings determine how much advertisers pay for commercials.

Some examples of what some describe as a chaotic situation:

► The TVS Television Network, which

syndicates the nine-member Southwest Athletic Conference, has told the league that it may not be able to make a \$2.7-million payment that had been scheduled for this month. Exactly how much money the conference will lose on its deal with the company is not yet known.

► NBC-TV will ask conferences and institutions to renegotiate their contracts for next season to allow the network to show fewer games and pay less. If no concessions are forthcoming, a network official told *The Chronicle* last week, NBC might try to cut its losses by paying the agreed-upon price for rights to the games, while actually televising only a few of them.

► ESPN, the country's largest sports-oriented cable-TV network, saw its average rating for college games drop 21 per cent this season, and it plans to cut significantly the number of contests it will broadcast over the next two years.

► Sports Productions, syndicator for the 10-member Southeastern Conference and other leagues, has renegotiated its con-

tract with the conference to telecast 29 per cent fewer games next year than were originally scheduled. Ratings for the conference games were somewhat higher than predicted, a company spokesman said, but some stations would not pre-empt other programming to show as many games as were offered, which caused a loss in advertising income.

"There has been a proliferation of games on regular TV and on cable," said Roger Valdiserri, associate athletic director at the University of Notre Dame. "I think we've just reached the saturation point, and there's going to be a falloff because the advertisers can't support all this basketball."

Mr. Valdiserri added that Notre Dame, which negotiates its own contracts with broadcasters, has purposely restricted the number of its games that have been televised. Such a strategy, many believe, is the key to keeping ratings high.

The ratings drop that has

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

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SUPREME COURT, U.S.  
JUSTICE MARSHALL

84 JUN -7 A9:30

June 6, 1984

83-271 NCAA v. Board

Dear John:

I voted with you at Conference, and think you have written a fine opinion.

I would like to see what Byron has to say before I finally come to rest.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

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JUSTICE MARSHALL

JUN 18 P1:07

June 18, 1984

83-271 NCAA v. Board of Regents

Dear John:

Please join me.

Sincerely,



Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

94 JUN 15 P1:4

June 15, 1984

Re: No. 83-271 NCAA v. Board

Dear Byron,

Please join me in your dissent.

Sincerely,

*Wm*

Justice White

cc: The Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

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'84 MAY 17 4 23

From: Justice Stevens

MAY 16 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-271

**NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PETITIONER v. BOARD OF REGENTS OF THE UNI-  
VERSITY OF OKLAHOMA AND UNIVERSITY OF  
GEORGIA ATHLETIC ASSOCIATION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

[May —, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act<sup>1</sup> and granted injunctive relief. *Board of Regents v. NCAA*, 546 F. Supp. 1276 (WD Okla. 1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. *Board of Regents v. NCAA*, 707 F. 2d 1147 (CA10 1983). We granted certiorari, 464 U. S. — (1983), and now affirm.

I

*The NCAA*

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of

<sup>1</sup>Section 1 provides in pertinent part:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . .” 15 U. S. C. § 1 (1982 ed.).

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

RECEIVED  
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JUSTICE MARSHALL

84 JUN 15 12:04

June 15, 1984

MEMORANDUM TO THE CONFERENCE

Re: 83-271 - NCAA v. Board of Regents

Because I hesitate to lengthen an already too-long opinion by adding additional material in response to Byron's dissenting opinion, I presently intend to stand on what I have already written. I do think it may be useful to make a few observations concerning the dissent, however, pointing out what I believe to be the answers either in the draft Court opinion or in the findings of the District Court to some of the points he makes.

In essence, Byron makes two arguments: (1) in Parts II and III of his dissent, pp. 7-13, that the NCAA's plan may be procompetitive because it may increase the total number of viewers of football telecasts even though it admittedly limits the number of telecasts; and (2) he suggests that in any event the plan serves the NCAA's interest in maintaining amateurism in college football.

Byron rejects the District Court's finding that the NCAA's television plan restricted output, suggesting that it might have increased viewership for college football. There are a couple of points that occur to me. First, this view of the evidence on this point is not the one taken by the District Court, and the NCAA itself does not suggest that the evidence adduced at trial showed that viewership is increased by the plan. Second, the position seems inconsistent with the finding that the NCAA plan is not responsive to consumer preference. The District Court found that the plan means that many of the games viewers most want to see cannot be shown on television. Creating a system that is not responsive to viewer preferences hardly seems to me to be a procompetitive means of increasing viewership. In fact, the District Court indicated that audiences are

smaller under the NCAA plan than in a free market because the plan does not respond to viewer preference, a finding quoted in note 30 of my opinion on page 19. Third, as a matter of logic, I find Byron's position untenable. If on a given Saturday the two networks are showing a UCLA game and a Notre Dame game in a particular market, with all other college football blacked out in that market, how could total viewership possibly be increased by allowing a third network to show another game of national interest and also allowing local stations to show a fourth or fifth game at the same time? It is true that by increasing the number of games available at the same time, the viewership of the UCLA and Notre Dame games would probably decline somewhat, but total viewership for college football would be certain to increase.

On pages 10 and 11 Byron suggests that the increase in price is procompetitive because it results from higher market shares. I think that justification is simply inconsistent with the Sherman Act. The networks pay more for the exclusive rights because their broadcasts will have no competition and higher market shares. The reason the networks' market share goes up under this plan is because there is no competitor to whom consumers can turn, and that in my view is inconsistent with the competitive ideal of the Sherman Act. Nor do I think the exclusive rights are a new product, because the games are still sold individually. That is the thrust of Part IV of the draft Court opinion, on pages 26-28, in which I explain how the District Court's findings preclude a "new product" argument.

On page 13 Byron notes that "[t]he NCAA has suggested a number of plausible ways in which its television plan might enhance the ability of college football telecasts to compete against other forms of entertainment," citing the NCAA's brief. Of course, the brief is not evidence, and the District Court found none of these justifications to apply to the plan as it actually operates, reaching the commonsense conclusion that raising price and reducing output is not necessary to get people to watch college football on TV. Indeed, the District Court found that without the NCAA plan there would be even more games televised in response to consumer demand. This finding is quoted in note 29 of the draft Court opinion on page 18. Accordingly, I do not think it is correct to suggest as

Byron does on page 13 of his dissent that the NCAA's plan might increase the "market penetration of NCAA football." Instead, it reduces market penetration by reducing the number of games on TV. Moreover, his argument is inconsistent with the finding, which he does not dispute, that there are no reasonable substitutes for college football broadcasts. That means that NCAA football should have no problem competing "effectively" with other forms of television programming even in the absence of the NCAA plan. NCAA basketball seems to have fared well enough without using this type of plan.

The argument that the NCAA football plan is necessary to preserve amateurism, though made by Judge Barrett in his dissent in the Court of Appeals, was not advanced by the NCAA in this Court and is also not supported by any findings of fact. I have three comments on this argument. First, I think the draft opinion already makes it quite clear that any restraint necessary to ensure that college football retains its amateur character would be upheld under the Rule of Reason, particularly in Part VI, pp. 30-33. Second, even if a limit on the number of television appearances per school (or possibly a limit on aggregate revenues per school) were appropriate to ensure that schools remain within the tradition of amateurism, that would not justify the prohibition against selling the telecasts on a local basis or to a third network. A simple limit on the number of times a given school could appear would do the trick, without limiting the competition for the right to broadcast available games. Finally, if there were merit to this justification it surely should have been applied to basketball as well. There is nothing in the record to suggest that the NCAA football plan has made intercollegiate football less professional than NCAA basketball.

Respectfully,

A handwritten signature in black ink, appearing to be the initials 'JA' or similar, written in a cursive style.

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

STYLISTIC CHANGES THROUGHOUT.

'84 JUN 20 P2 100

SEE PAGES: 26

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: Justice Stevens

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Recirculated: JUN 20 1984

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
PETITIONER *v.* BOARD OF REGENTS OF THE UNI-  
VERSITY OF OKLAHOMA AND UNIVERSITY OF  
GEORGIA ATHLETIC ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June —, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

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### I

#### *The NCAA*

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations

<sup>1</sup>Section 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

RECEIVED  
SUPREME COURT JUSTICES CHANGES THROUGHOUT.  
JUSTICE MARSHALL  
SEE PAGES:

'84 JUN 25 A9:56

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: JUN 25 1984

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 83-271

### NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER *v.* BOARD OF REGENTS OF THE UNI- VERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT

[June 27, 1984]

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#### I

##### *The NCAA*

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Supreme Court of the United States  
Washington, D. C. 20543

RECEIVED  
SUPREME COURT, U.S.  
JUSTICE MARSHALL

21 JUN 19 11:45

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 19, 1984

No. 83-271 NCAA v. Bd. of Regents of the  
University of Oklahoma

Dear John,

Please join me.

Sincerely,

*Sandra*

Justice Stevens

Copies to the Conference