ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1675

TITLE FRANK KUSH, ET AL., Petitioners
v.
KEVIN RUTLEDGE

PLACE Washington, D. C.

DATE January 12, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANK KUSH, ET AL.,

Petitioners

v. : No. 81-1675

KEVIN RUTLEDGE

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Washington, D.C.

Wednesday, January 12, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:02 p.m.

APPEARANCES:

MICHAEL L. GALLAGHER, ESQ., Phoenix, Arizona; on behalf of the Petitioners.

ROBERT ONG HING, ESQ., Phoenix, Arizona; on behalf of Respondent.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in the case of Kush versus Rutledge. Mr. Gallagher, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL L. GALLAGHER, ESQ.,
ON BEHALF OF PETITIONERS

MR. GALLAGHER: Thank you. Mr. Chief Justice and may it please the Court:

This case turns on your determination of the breadth of the first clause of 42 U.S.C. Section 1985(2), a Reconstruction Era civil rights statute. The case arises from the alleged mistreatment of a white college football player by his coaches.

Respondent Kevin Rutledge attended Arizona State University in 1977 and 1978 and played intercollegiate football. The Petitioners are Frank Kush, his former coach, two assistant coaches, and Arizona State University's former athletic director.

After Mr. Rutledge left Arizona State University and transferred to the University of Nevada at Las Vegas, he filed a claim with the Arizona Board of Regents reciting a veritable chamber of horrors to which he had been exposed while a student athlete at Arizona State. The filing of that claim was a statutory

prerequisite to the initiation of a lawsuit in Arizona against a state agency such as the Arizona Board of Regents.

That claim was denied by Arizona and Mr. Rutledge's federal court lawsuit followed. One of his claims in the federal suit was that Mr. Kush and others had conspired to intimidate witnesses in violation of 14 U.S.C. Section 1985(2). The district court dismissed the entire lawsuit as to all defendants.

On appeal to the Ninth Circuit Court of Appeals, as pertinent here, the Court of Appeals determined that Mr. Rutledge had stated a claim under the first clause of 1985(2) and specifically held that there was no requirement for invidiously discriminatory class-based animus in such an action.

This holding of the Ninth Circuit aligned it with the Third Circuit and the District of Columbia Circuit, which previously had ruled the same way.

QUESTION: Mr. Gallagher, I would like to get a time sequence straight if I could. This action alleged intimidation of witnesses in the federal court system?

MR. GALLAGHER: Justice Rehnquist, this complaint in this lawsuit alleges that from the time Mr. Rutledge filed his claim against the Arizona State

University Board of Regents, which was prior to the initiation of any suit, and continuing the conspiracy supposedly went on.

Initially, there was no claim pending. As it turned out, Mr. Rutledge filed his case in federal court and shortly thereafter filed virtually the same case in state court, presumably to protect his one-year statute of limitations under 1983.

QUESTION: Did the federal court case go to trial on the merits?

MR. GALLAGHER: No, Justice Rehnquist. However, the state court case did.

QUESTION: Well then, the only case in which there could have been witnesses would I'm sure be the state court case.

MR. GALLAGHER: My understanding of what the Ninth Circuit found in that regard, Justice Rehnquist, was that the language in the complaint, the continuing language, if you would, if you will, suggested that there was intimidation of witnesses going on after the federal court case had been filed.

QUESTION: Well, but there are no witnesses in a case until the case has been tried. There may be potential witnesses.

MR. GALLAGHER: Well, that raises the next

question, Justice Rehnquist, as to how broad 1985(1) as to what is a pending action. There have been discussions as to what "attending court" means in that situation.

But the Ninth Circuit said, while it was a close question, it did state a claim and that it should be remanded, and specifically suggested that the district court ask Mr. Rutledge to file an amended complaint setting forth in specificity the specific acts he claimed gave rise to his cause of action.

QUESTION: Have there been any proceedings on remand in the district court?

MR. GALLAGHER: There have not been, Justice Rehnquist.

As I was pointing out, the circuits have split on the question of a requirement for invidiously discriminatory class-based animus in a 1985, Section 2, clause 1 case. Generally speaking, 1985(2) deals with conspiracies which interfere with the judicial process. The language consists of two clauses separated by a semicolon.

The first clause prohibits conspiracies to deter by force, intimidation or threat parties or witnesses in the federal court processes. The language which follows the semicolon, the second clause,

prohibits conspiracies to impede, hinder, obstruct or defeat due course of justice in any state or territory with the intent to deny any citizen equal protection of the laws.

It is the Petitioners' position that a cause of action under either clause of 1985(2) requires a finding of invidiously discriminatory class-based animus. There seems to be no question today but that that is a co-requirement under second clause or state action lawsuits. That seems to be the teaching of Griffin versus Breckenridge, 1971, and all five circuits who have directly dealt with the question of 1985 have not had any problem realizing that second clause lawsuits have to be based on invidiously discriminatory class-based animus because of the equal protection language.

The diversity of opinion and the problem arises because the first clause simply does not have equal protection language. We believe that the analysis of this Court in Griffin versus Breckenridge applies with equal vigor to the case at bar and that there should be a finding that invidiously discriminatory class-based animus is a requirement under either clause of 1985(2).

In Griffin this Court did not engage in a

hypertechnical dissection of the syntax of the language, but instead took a look at the legislative history in depth, with an eye towards the realities of what was going on in this country in 1871 when the 42nd Congress enacted the Ku Klux Klan Act, which of course is the original Act on which both 1985(3) and 1985(2) are based.

QUESTION: Mr. Gallagher, why do you think the Congress in 1871 did not include the equal protection language in the first clause?

MR. GALLAGHER: I think, Your Honor, that they were not thinking about federal courts as much as they were thinking about state courts. And there were not as many federal courts then. The limitation on jurisdiction of federal courts was much less. I do not think they needed it for a constitutional nexus because under Article I, Section 8 or elsewhere, obviously, there is no problem there.

It is very difficult, Justice O'Connor, to discern what that Congress had in mind 100 years ago. There is a little something in the legislative history for everyone. And as this Court expressed in Navatny, construction, statutory construction in these Civil War, post-Civil War era Reconstruction statutes have given lots of difficulty to statutory construction problems.

There was already a criminal statute in place, Justice O'Connor, and it had been in place for 40 some odd years at the time, governing people that would attempt to impede witnesses in federal court. I don't know why the language was not specifically included here. I believe it was included and sprinkled throughout the Act because of the problems Congress had --

QUESTION: Well, to assure constitutionality in its application to the states, right?

MR. GALLAGHER: I would agree with that, yes, Justice O'Connor. And it wasn't -- there was no constitutional problem with this particular law.

As this Court recognized in Griffin, 1985(2) was initially a criminal statute, but the broad sweep of the language caused the amendatory process to go into gear and ultimately the civil remedies provided by 1985(3) were added to the Act.

As you said in Griffin versus Breckenridge, and it's equally applicable here, the overwhelming concern as expressed by the heated lengthy debates at the time was with the animus or the intent required. That's where all the discussion centered.

I might point out that you also said in Griffin versus Breckenridge that that was the type of

case, involving three Mississippi blacks that had had their constitutional rights impaired because they'd apparently been associated with somebody someone thought was a civil rights worker, was the type of case that went to the core of what 1985 had in mind. This case sub judice is a far cry from that.

The country faced a number of problems in 1871 -- political, economic, social. It was not the intent of the 42nd Congress to solve every ill of the times by enacting the Ku Klux Klan Act back then. Their overwhelming concern was with the attempted disenfranchisement of the newly freed slaves. They were particularly concerned with the dangers presented by the hooded conspirators grouping together to deprive these newest citizens of their federal constitutional rights.

There is no suggestion anywhere in the legislative history that the federal courts were somehow pulled out and examined to see if added protection was needed for the federal courts. It seems reasonable that what happened in connection with the federal courts is that Congress intended to provide them protection from the civil upheaval being caused by the Ku Klux Klan activities of the time, and there simply was no independent consideration given.

It is abundantly clear that the problem

Congress was responding to was racially and otherwise motivated by Ku Klux Klan activity. In view of the fact that there were already ample criminal statutes on hand, they were not attempting -- and such statutes, of course, have never been construed by this Court to create private causes of action, and the 42nd Congress was not attempting to do that with 1985(2).

They were concerned with interference in the federal process, and for that matter the state process. But it was only interference, we respectfully submit, which was grounded on invidiously discriminatory class-based animus.

Extending the coverage of 1985(2) past the point ever intended by the Congress that enacted it will in truth and in fact, we submit, not do one thing to advance the cause of justice. There are today sufficient criminal statutes on the books to act as a chilling effect or a deterring effect to people who would interfere with the process.

Furthermore, the underlying activity, the force, the coercion, the threats, are ordinarily going to be able to be compensated for under state tort action.

Lastly, in any event the Respondent here is not a proper party to maintain this action. This

statute, unlike 1985(3), does not talk in terms of indirect suffering. It talks about direct action. Admittedly, the only court that we were able to discern which has ever addressed this proposition is a district court in Maryland in 1978, but the holding was clear and the holding was sound, and that was that a party does not have a cause of action for interference with his witnesses.

One further indicia of this is the fact that 1985(2), first clause, provides a cause of action for after the fact retaliation or retribution. It provides a cause of action for a juror or a witness who has already testified or already rendered his verdict and is later harassed, intimidated or threatened. That would indicate that someone with standing such as Respondent here, a party, who is not himself intimidated, would have no complaint after the verdict had been entered or after a witness had already testified.

And because of the narrow issue, as we see it, presented to the Court, I would like to reserve the rest of my time for rebuttal, Mr. Chief Justice.

QUESTION: Could I ask you a question?

MR. GALLAGHER: Surely, Justice White.

QUESTION: You indicated that the state trial did go forward and was completed?

MR. GALLAGHER: Yes, sir.

QUESTION: And is part of your claim that any federal issue is res judicata?

MR. GALLAGHER: I don't think, in all candor, we can go far enough, Justice White, to claim that they are all barred, because in truth and in fact a lot of the underlying facts were presented to a jury. As an evidentiary matter, a jury heard --

QUESTION: But couldn't all these claims in federal court have been presented in the state proceeding?

MR. GALLAGHER: They could have been had the state court judge presumably not dismissed the 1985(2) count on, number one, the ground it was barred by res judicata, and number two that it failed to state a claim. That did not -- the civil rights actions were dismissed.

QUESTION: Didn't the federal court -- didn't the federal court -- didn't the Court of Appeals remand to the district court to see whether any claim survived the state action?

MR. GALLAGHER: Yes, and the state action had gone to verdict by the time the Ninth Circuit remanded, and there have been no further --

QUESTION: Well, it could be that -- it could

be that the district court will decide that the entire matter is res judicata.

MR. GALLAGHER: I think it may well, Justice White.

QUESTION: Well, so we're just whistling in the breeze.

MR. GALLAGHER: Well, there's no indication, of course, what the district court's going to do.

QUESTION: All right. Thank you.

MR. GALLAGHER: Thank you.

CHIEF JUSTICE BURGER: Mr. Hing.

ORAL ARGUMENT OF ROBERT ONG HING, ESQ.

ON BEHALF OF RESPONDENT

MR. HING: Mr. Chief Justice, may it please the Court:

Justice Rehnquist -- oh, Justice Rehnquist isn't here right now. With respect to the timing of the amended complaint, this amended complaint was filed after the original complaint, and the allegation is complained in the amended complaint that there was an attempt to intimidate witnesses. And this actually occurred from the time of the filing of the claim itself, but did occur between the time of the filing of the original complaint and the amended complaint.

QUESTION: Do you say the actual intimidation

occurred then? The state court witnesses?

MR. HING: No, Justice Rehnquist. This action was filed originally in the federal court.

QUESTION: But witnesses in what proceeding did it claim was intimidated, or were intimidated?

MR. HING: Mr. Justice Rehnquist, in the federal court proceeding.

QUESTION: How could you determine whether -- who were witnesses in the federal court proceeding if there had been no trial?

MR. HING: Your Honor, let me explain factually how this occurred, which I think would shed some light on it. One of the principle allegations in the complaint, in the amended complaint, was that the Defendant Kush, subsequent to a football game that occurred up in Seattle, Washington, and after the Defendant had shanked a punt and come off the field, the Defendant Kush punched Kevin Rutledge, on the sidelines. This was an allegation in the complaint.

As it turned out, several of the players had witnessed that incident, and when we filed the complaint in the federal court the Defendants did several things to intimidate witnesses.

QUESTION: Well, perhaps my concern can be solved right there. You say the statute extends to

potential witnesses, then, not just people who had been given on witness lists immediately prior to trial or who had been witnesses at depositions?

MR. HING: Yes, Mr. Rehnquist, I believe it does, because at the point that the action was filed we immediately noticed depositions. In fact, we noticed some 20 depositions. And it was with respect to those individuals who were being deposed or who were being noticed for depositions that some of this intimidation occurred. Meetings were held with the football players at which the coach announced: Well, fellows, there's nothing to all of this, so just ignore it.

In the meantime, as it developed, several of the players who were sitting at this meeting said to themselves: Well, gee, we saw this, and what are we supposed to do?

We had situations where at the training table the players were called in and asked: Please sign cards as to whether you saw anything happen up in Seattle, Washington. And the players of course all signed cards: I did not see Frank Kush punch Kevin Rutledge. And some of them even went to the extent of handing the cards to the assistant coaches, saying: Well, tell Kush that he owes me one.

And we had other incidents where two of the

players, or rather the --

QUESTION: Could you explain, Mr. Hing, what happened? These incidents occurred. Then the complaint was amended in the federal court.

MR. HING: And included the --

QUESTION: To include this allegation --

MR. HING: -- allegation under Section 1985.

QUESTION: And then how did the state cause of action develop, and did the state cause of action include this same allegation?

MR. HING: What happened, Justice O'Connor, was that the federal action was subsequently dismissed in its entirety by the federal district court on the ground that the court had no jurisdiction over any of the parties based on the Eleventh Amendment. We appealed that decision, but pending the appeal, because of statute of limitations problems and not wanting to take the risk of having the statute run on us, we of course filed an action in the state court after the federal action was dismissed.

QUESTION: That included this claim.

MR. HING: We did include the 1985 claim. However, the trial court in the state court dismissed the 1985 claim on the grounds that the federal court had already dismissed that claim. And therefore we have

never had a day in court on the 1985 claim.

So regardless of what happens --

QUESTION: And in fact you may never, notwithstanding what we do, is that right?

MR. HING: Well, Justice O'Connor, my assumption is that we will have a day in court on not only the 1985 claim, but depending on what happens on the appeal in the state court action we may very well have a day in court in the federal court on all of the claims, for the simple reason that the Plaintiff made a decision long ago that he wanted to try this case in the federal court, and for very good reasons, and that is that there was a strong prejudice against the Defendant locally.

He was taking on a hero, an idol of the community. And it got so serious that the Plaintiff's life was threatened, his family's life was threatened, his attorney's life was threatened. So he wanted to have this case tried in the federal court.

And if the state court of appeals reverses and sends the case back for a new trial, then obviously at that point the Plaintiff-Respondent would have the choice of determining whether he wants the case retried on the merits in the federal court or the state court.

Now, Kevin Rutledge in his amended complaint

alleged that the Defendants have conspired to prevent by intimidation and threat various material witnesses from freely, fully and truthfully testifying as to matters raised in the within complaint. 42 U.S. Code Section 1985(2), the first portion, gives the injured party a damage action against those who have conspired to deter by force, intimidation or threat any party or witness from testifying in any matter pending in any federal court.

I think the point that counsel made, that Kevin Rutledge is not the injured party, certainly is not supported by the statute, because the portion of Section 1985 which creates the private action, which is contained in the latter part of subsection (3) --

QUESTION: Mr. Hing, do we have the complaint here anyplace?

MR. HING: Yes. The complaint is part of the appendix, I believe.

QUESTION: Well, I have an appendix here that has nothing, and I mean nothing.

Oh, that. Well, now I see what it is. The petition?

MR. HING: It is part of the appendix to the Petitioner's brief.

QUESTION: I see. Well, I got mislaid by this

thing. I don't know what this is. Thank you. I got that.

MR. HING: But the enabling or the section of the statute which creates the private rights says the party so injured or deprived may have an action for the recovery of damage occasioned by such injury or deprivation against any one or more of the conspirators. So I would assume that a party who brings an action and who has all of his witnesses intimidated to such an extent that he can't produce his witnesses is in fact the injured party, and I think that it would strain statutory construction to construe otherwise.

Furthermore, Section 1985(2), first portion, does not require that the Plaintiff be the subject of racial or class-based invidiously discriminatory animus. The significant fact in this case is that the first portion of Section 1985(2) prohibits conduct which forms the basis for the claim which is a serious interference with the judicial process itself. So that the question really is whether Congress gave the federal courts the jurisdiction to hear private damage actions without regard to class-based discriminatory animus where the action is based on interference with the judicial processes of the federal courts themselves.

We suggest that Congress clearly did. First,

the language of the statute supports this interpretation. Second, legislative history supports this interpretation. Third, common sense and logic compels this interpretation. There is also no question that Congress had the power to so legislate.

Now, a close reading of Section 1985 shows that it had basically four parts or four prohibited acts in the first portion of the statute prior to the semicolon. In the first instance, they prohibited the threatening of parties or witnesses who were about to testify in the federal court. The second item was a prohibition against doing injury to a party or witness who had already testified in a federal court.

QUESTION: But that is a crime, isn't it? That's a specific crime -- to injure a witness --

MR. HING: Your Honor, that is.

QUESTION: Can you enjoin a crime?

MR. HING: I do not believe so. But in this case, under this statute the Congress made it a private right of action. In other words, the argument that this was already covered by the criminal statutes does not mean that it cannot also be covered by a civil statute giving the injured party a damage claim, and that is precisely what is done in Section 1985(2).

The third item which the first part of Section

1985(2) prohibits is that you cannot attempt to influence the verdict of a juror or influence a juror. And the fourth item is that you cannot injure a juror after he has assented to a verdict.

So the first part of Section 1985(2) covers all of those four items, the first two having to do with witnesses either before or after testifying and the second two having to do with jurors either before or after participating in a verdict.

And then after the semicolon, the two items which are prohibited involve obstructing justice with intent to deny any citizen equal protection of the law. But it says "obstructing justice in any state or territory. So as soon as you get past the semicolon Congress is talking about actions in a state or territory, not in the federal court, as it was prior to the semicolon.

Then the second item which is covered after the semicolon is action to injure a person who is attempting to enforce his right to equal protection, and that also presumably would be in a state.

So I think clearly Congress delineated what the limits were or what the conditions were with respect to the restricted or the proscribed acts before the semicolon and after the semicolon. There is absolutely

no equal protection language before the semicolon. Each one of the proscribed acts relates to protection of the integrity of the judicial process itself. And after the semicolon they don't talk about federal courts; they now talk about acts in the state, and you have broad, sweeping language with equal protection requirements.

So the statutory language itself is quite clear, even without regard to exploring the legislative intent. Now, legislative intent in many instances, or rather in most instances, is rather difficult to determine, but I think that there is no ambiguity with respect to legislative intent in this instance.

Congress was concerned about restoration of federal courts after the Civil War. They wanted to protect the functioning of the federal courts. There was serious question as to whether state courts were either willing or able to protect the rights of all citizens. And the debates on the legislation show very clearly that where Congress was legislating with respect to any matter which affected an officer or agency of the Federal Government they saw no necessity to insert equal protection language. However, in other areas involving conspiracies having no direct impact on either a federal officer or a federal agency, Congress did insert equal protection language.

I think that it certainly is not a great extension of jurisdiction to the federal court to give the federal court jurisdiction to entertain a private damage action under the present circumstances, because each one of those four items which occurs in Section 1985, subsection (2), first phrase or first clause, involves matters which are within the contempt power of the court. And apparently Congress felt that it would assist the court in protecting the integrity of its own processes by giving private actions to all parties who might be damaged by such interference with the judicial processes of the federal courts.

Finally, I think that clearly we do not require any Fourteenth Amendment mandate or sanction in order to have Congress legislate with respect to the four items occurring in the first part of that subsection. The power to regulate federal courts and to give federal courts whatever powers are necessary to regulate its own functioning is found in Article I, Section 8, of the Constitution.

With respect to the so-called split of districts, or rather Court of Appeals, on this issue, I think that a close reading of the two cases, one in the Fifth Circuit, which is the Kimble case, and the Jones case which was in the Eighth Circuit, would show that

actually none of those cases involved a claim which fell within the first portion of Section 1985, subsection (2).

In Kimble, the Plaintiff sued employers for denying him employment because of his prior history of filing lawsuits under workman's compensation claims. Well, certainly that doesn't fall under any of the four items of the first clause of Section 1985(2). So I think the court correctly ruled that he didn't have a claim under the first portion.

With respect to the Jones case, that involved a case where a mistrial was declared because the U.S. Attorney had used electronic surveillance equipment to monitor a juror to determine whether the juror was going to be contacted by a party. Now, that particular claim I don't think falls under any of the first four items of 1985(2) either.

So a close study of those two cases would indicate that there is nothing inconsistent in the opinions of the Fifth Circuit and Eighth Circuit which is contrary to the position of the Respondent here.

QUESTION: Well, the Court -- of course, the Court of Appeals for the Ninth Circuit, they thought that they were deciding contrary to the Fifth and the Eighth Circuit.

MR. HING: Your Honor, I believe they were, but I don't think an examination of the precise claim that each plaintiff was advancing --

QUESTION: Well, the Court of Appeals below was wrong in saying that they were in conflict with the Fifth and the Eighth.

MR. HING: Your Honor, I believe they were.

QUESTION: Yes, all right.

MR. HING: And I believe that the First Circuit and the Third Circuit and the Court of Appeals of the District of Columbia, of course, were correct in their decisions. But I certainly did not see a claim under the first portion of Section 1985(2) in the Fifth Circuit and Eighth Circuit cases.

With respect to the authority of Griffin v. Breckenridge, I don't think that that of course involves or really is relevant to this case at all, because Griffin v. Breckenridge was based on a 1985 subsection (3) claim, which very clearly contains equal protection language. Furthermore, the Court in Griffin v. Breckenridge based its decision not on the Fourteenth Amendment but on the Thirteenth Amendment and on the right to interstate travel. So I don't think that case is on point.

We certainly don't think that there's any

danger here of creating a federal tort law, because under the circumstances of the case a party would already have to be in the federal court on another matter in order for him to allege that his witnesses were being intimidated. So really, Plaintiff Kevin Rutledge would have to have another claim under federal jurisdiction in order to have a 1985 subsection (2) claim.

QUESTION: You would agree, then, that if a complaint were not yet filed in federal court there could be no claim that potential witnesses in a later to be filed lawsuit were intimidated?

MR. HING: Mr. Justice Rehnquist, that could be possible if the plaintiff were so sure that witnesses were already being intimidated and he had every intention of filing that lawsuit in the federal court. I could see --

QUESTION: How would you define "witness" in that broader sense? I mean, a witness ordinarily is someone who is summoned to testify in court.

MR. HING: Mr. Justice Rehnquist, I believe that a witness under those circumstances would involve potential witnesses, because theoretically I think it would be rather hypertechnical to take the position that you really don't have a witness until you go to trial

and call him.

QUESTION: Well, but isn't the harm which Congress sought to avoid here the harm to the functioning of the federal courts? And if you have no complaint filed, conceivably you, if you ever did file a lawsuit, might be in state court, why is there any offense to the federal system if you simply, say, threaten an eyewitness to a traffic accident?

MR. HING: Well, under those conditions, Justice Rehnquist, I would agree. But if, for example, you had circumstances under which the public passion and prejudice against the particular party was so strong that he was certain that he wanted to proceed in the federal court, then I think it would be a different circumstance. But that would not apply to this case in any respect, because we had a complaint filed at the time the amended complaint was made setting forth this 1985(2) claim.

It was also the position of the Plaintiff-Respondent below that he as a matter of fact was a member of a class, and the class of which he was a member was a group of players who did not meet the standards of the Defendant Kush. And I think that a factual statement would explain why that makes some sense, and that is that beginning in 1978 --

QUESTION: If you have an assault case, can't you say in almost any assault case that the person assaulted was a member of a class who didn't meet the standards of the person who assaulted them?

MR. HING: Mr. Justice Rehnquist, that -- in that context I would agree with you. But the facts in this case were different and I think that you have to recognize that in 1978 Arizona State University suddenly shifted from the Western Athletic Conference, where they were competing with teams like Wyoming and New Mexico and Texas El Paso, to the PAC 10, where they were competing with teams like USC, UCLA, Stanford, Washington, et cetera.

At the same time, under NCAA regulations each coach could give out 30 scholarships per year to athletes, but no more than 95 scholarships total. So this created a situation where you had to get rid of some players. In order to give out 30 scholarships this year, you could not have 30 players stay on the team from which you had given 30 scholarships in the three prior years. You'd have 120 and the maximum is 95.

Now, that particular restriction has been responsible more than anything else to the recent equalization, you might say, in power among the football teams in the nation. And this restriction provided a

grave problem for many coaches, but it had no impact whatsoever on Kush because he had such an effective means of getting rid of players who did not meet his standards. And --

QUESTION: Counselor, I have to ask you. I still don't see the clause or what you're asking for in this document here. I see in one place you're asking for $1 million punitive damages. What exactly did you ask for in your complaint, in a place where I can read it?

MR. HING: In the complaint with respect to this particular claim, the 1985 claim?

QUESTION: With respect to the case you're asking us to decide.

MR. HING: That appears on paragraph 56 of the complaint.

QUESTION: And where will I find that in anything that's here before me?

MR. HING: I believe that's Appendix E-11 of the petition for a writ of certiorari.

QUESTION: E-11? E?

MR. HING: E-11.

QUESTION: Oh, that's it. I can see that. That's just before count five?

MR. HING: Right.

QUESTION: Well, this is some pleading I never understood in my life. Actual damages of a million dollars, punitive damage of another million; that's all you want?

(Laughter.)

MR. HING: Basically.

QUESTION: Oh, except interest.

MR. HING: Basically, the situation was such that it was necessary to get rid of certain players, and under NCAA regulations you could not get rid of a player for any athletic reason. In other words, once you give a player a scholarship and say come to school, he in effect has a scholarship for four years even though he turns out to be a miserable football player, as long as he comes to practice and makes himself available.

Well, the Defendant Kush had an effective means of getting rid of those people in that category, and the Plaintiff Kush was in that group of people, the group that were offered scholarships that did not meet his playing specifications or expectations and players that he wanted to get rid of in order to make scholarships available so that he could continue to give out 30 scholarships every year to incoming players.

In conclusion, the Plaintiff Kevin Rutledge --

CHIEF JUSTICE BURGER: Counsel, your time has expired.

MR. HING: We respectfully submit that the decision of the Court of Appeals be affirmed.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Gallagher?

REBUTTAL ARGUMENT OF MICHAEL L. GALLAGHER, ESQ.

ON BEHALF OF PETITIONERS

MR. GALLAGHER: Mr. Chief Justice and may it please the Court, very, very briefly:

A lot of conversation here has left the record. I would only say that I've heard it all before, four months in trial in a state court proceeding. Those are the same allegations that resulted in a defense verdict for Mr. Kush of any wrongdoing, and I think the Court needs to know that having heard all of the allegations.

The only other point I would make is that, while the Forty-Second Congress in 1871 clearly could have made a law with the expanded interpretation as sought by the Respondents here and as found by the Ninth Circuit, we respectfully maintain that it did not do so in 1985(2).

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:50 p.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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Frank Kush, et al., Petitioners v. Kevin Rutledge - # 81-1675

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BY Pirie Hammond

(REPORTER)