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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: JAVAN OWENS AND DANIEL G. LESSARD, Petitioners V. TOM U. U. OKURE

CASE NO: 87-56

PLACE: WASHINGTON, D.C.

DATE: November 1, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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JAVAN OWENS AND DANIEL G. :

LESSARD, :

Petitioners :

v. : No. 87-56

TOM U. U. OKURE :

--------------------------------------x

Washington, D.C.

Tuesday, November 1, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:55 o'clock p.m.

APPEARANCES:

PETER H. SCHIFF, ESQ., Deputy Solicitor General of New York, Albany, New York; on behalf of the Petitioners.

KENNETH KIMERLING, ESQ., New York, New York; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (1:55 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 87-56, Owens and Lessard v. Okure.

5 Mr. Schiff, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF PETER H. SCHIFF
8 ON BEHALF OF THE PETITIONERS

9 MR. SCHIFF: Mr. Chief Justice, may it please
10 the Court:

11 The Respondent in this case alleged that he
12 was battered and beaten by the Petitioners during an
13 arrest on the campus at the State University of New York
14 in Albany in January of 1984. This suit was filed 22
15 months later. Petitioners moved to dismiss on the
16 grounds of the statute of limitations contending that a
17 one-year statute of limitations should have been
18 applied. Both the District Court and the Second Circuit
19 rejected our position. The case came up here presumably
20 because of the conflict with the Eleventh, Sixth and
21 Fifth Circuits.

22 I might mention that prior to the time that he
23 filed this suit, Respondent had sought recovery from --
24 in the New York Court of Claims based on a 1983 action
25 against the State, but that was dismissed because 1983

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1 actions did not lie against the State in the Court of
2 Claims.
3 The basic issue here is how to apply the
4 principles that this Court announced in Wilson/Garcia in
5 1985. Respondent also argues that if the Court rules in
6 Petitioners' favor, that the decision should be applied
7 prospectively only. I intend first to discuss the
8 merits of which statute of limitations should be
9 borrowed and then will argue that the decision should
10 not be applied prospectively only.
11 In -- in Wilson, this Court decided that a
12 single statute of limitations should be borrowed under
13 Section 1988 for each state for purposes of 1983 cases,
14 and that the proper choice would be a personal injury
15 statute of limitations of general applicability.
16 Wilson involved the State of New Mexico which
17 has only one such personal injury statute of
18 limitations. Now, in the course of its decision in
19 Wilson, the Court rejected two other possible statute of
20 limitations.
21 One was the one relating to remedies for
22 wrongs committed by public officials and that was viewed
23 as inconsistent with the purposes of 1983 since one of
24 the very purposes of the Act was that the state remedies
25 were insufficient.

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1 And the other statute of limitations
2 considered were for suits arising under statutory
3 claims. But the Court pointed out that back in 1871
4 when 19 -- Section 1983 was enacted as Section 1 of the
5 Ku Klux Klan Act, that there were few such claims, such
6 statutory claims.
7 The difficulty has arisen since Wilson because
8 more than half the states, including New York, have more
9 than one personal injury statute of limitations that are
10 generally applicable. And it is our position that the
11 statute of limitations, consistent with Wilson, should
12 be used as the one applies to intentional personal
13 torts, at least particularly those that encompass
14 assault, battery and false imprisonment.
15 Now, the reason we make this argument is that,
16 as the Court explained in Wilson, the very catalyst of
17 the Ku Klux Klan Act was the campaign of violence and
18 deception in the South that had been fomented by the
19 Klan which was denying decent citizens their political
20 and civil rights. Now, that was being accomplished by
21 the Klan through acts of violence, whippings, shootings,
22 murders and so forth.
23 And it is for this reason that three of the
24 circuits, initially Judge Johnson in the Eleventh
25 Circuit, concluded that the logic was that therefore the

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1 personal injury statute of limitations which dealt with
2 those subject matters was the most appropriate to be
3 borrowed.

4 Now, our opponents suggest in their brief that
5 the -- Section 1 of the Klan Act was not directed
6 against violations by the clansmen themselves, but
7 rather against -- suits against the local and state
8 officials who were not coping with the reign of terror
9 being perpetrated by the Klan.

10 That argument assumes that everyone sued under
11 1983 must be a state official. That simply isn't true
12 under the decisions of this Court. To be sure, there is
13 a need that the action be under color of law. But this
14 Court's decisions in Annex v. Cress, 1970; Dennis v.
15 Sparks, 1980, have made it clear that it is enough that
16 the defendant be a willful participant in joint action
17 with the state or its agents.

18 Private persons jointly engaged with state
19 officials in a challenged action are, indeed, acting
20 under color of law for Section 1983 purposes. And this
21 would be true, as the Court explained in the Dennis
22 case, even if the state actor who provides the basis for
23 the action himself or herself might be immune from suit
24 such as a judge, prosecutor, law enforcement officials.

25 Now, this Court recognized in Annex that state

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1 involvement might result from the police intentionally
2 tolerating violence directed at those seeking to assert
3 their civil rights. And that's exactly the kind of
4 situation that we think Congress did envision in 1871
5 when it enacted the Ku Klux Klan Act. The Klan was then
6 viewed by the Republican supporters of the Act as a
7 group designed to aid the Democratic Party and to deter
8 the supporters of that party, both black and white, from
9 voting.
10 And the -- excuse me -- there are references
11 in the debates, which have been discussed by this Court
12 on numerous occasions, to persist in discriminatory
13 refusals, to enforce the laws by state officials in some
14 parts of the postbellum South. This showed a belief
15 that the Klan was acting with the deliberate acceptance
16 of local law enforcement officials.
17 Indeed, the Congressional Record --
18 Congressional Globe showed the belief that the Klan was
19 acting in collusion. There were signals passed between
20 members of the Klan and law enforcement officials with
21 people in the jury box and so forth.
22 So, we believe that there is every reason to
23 believe that Section 1 of the Klan Act, Section 1983,
24 certainly viewed by the Congress in 1871 as one tool to
25 be used to permit suits with respect to the violent acts

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1 of the Klan members themselves.

2 QUESTION: What does that have to do with the

3 present time?

4 MR. SCHIFF: Well, we think that the analysis

5 of this Court in Wilson was in large measure a historic

6 analysis not totally, but in large measure a historic

7 analysis as which would be the most appropriate statute

8 to use. The 1983 actions essentially are all or mostly

9 intentional torts. Now, they're not all violent torts,

10 but they certainly mostly involve intention. There are

11 still some open questions as to whether wanton

12 misconduct or perhaps a high level of negligence -- and

13 certainly simple negligence is not sufficient for a 1983

14 cause of action.

15 So, we think that the historical context shows

16 a -- the reason why where there's more than one personal

17 injury statute of limitations in the state, that the

18 state -- that the one that should be chosen is the one

19 that does relate to the kind of acts that were being

20 considered back in 1871.

21 We -- Respondents argue in their brief that

22 our position would result in further litigation because

23 of alleged difficulties in choosing among intentional

24 tort statutes in states where there is more than one

25 such statute.

1 We think that the contention -- the assertion
2 of confusion is really not well-founded. Indeed, their
3 own Appendix A to their brief, which lays out the
4 various statutes of limitations, shows that in general
5 where there is more than one, the reason for being more
6 than one is that there's a separate statute of
7 limitations, usually shorter, for libel and slander.
8 Now, it's pretty clear that this history I've
9 just recounted simply doesn't provide a basis for
10 picking libel and slander statutes. It's the ones that
11 involve the more assault directed torts.
12 The -- I'd also point out that looking at the
13 New York statute of limitations, which is not atypical,
14 that if you choose a statute for which they contend, the
15 one that essentially applies to all personal injury
16 statute -- has a -- all personal injuries other than
17 those listed in other statutes, which includes a series
18 of other provisions. There's a separate one for
19 malpractice and then the intentional tort and some other
20 ones.
21 But the bulk of those actions brought under
22 that statute of limitations would relate to negligence
23 actions, product liability cases, the very types of
24 cases that this Court has indicated simply would not
25 give rise to a 1983 cause of action. It would be really

1 quite anomalous to pick the negligence statute.

2 Respondents also make an argument historically

3 that the division that we have made is allegedly

4 inconsistent with the way statutes of limitations

5 reviewed at that time, referring to a text of Professor

6 Prosser, among others -- we think that their discussion

7 there between direct and indirect force kind of torts,

8 while interesting historically, wasn't even valid by

9 1871 as Prosser's text itself shows.

10 And, indeed, if one looks at Appendix B in

11 their brief, it will appear that the kind of dichotomy

12 between assault, battery, false imprisonment, malicious

13 prosecution and so forth and other kind of personal

14 injuries, the kind that is -- exists in today's statute,

15 was pretty much true at that time.

16 The Second Circuit seemed to -- seemed to hold

17 and our Respondents argue that a one-year statute of

18 limitations is inconsistent with federal law. Now, we

19 think there's absolutely no merit to this.

20 This Court, as far as I can read the cases,

21 has never decided inconsistency of a state statute of

22 limitations solely on the basis of the length of time.

23 It has looked -- as in the Burnett v. Grattan case, it

24 has rejected a state statute of limitations on a

25 functional basis. There that related to administrative

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1 discrimination proceedings, and the Maryland statute is
2 not directed to general litigation. So, that was
3 rejected.
4 However, it is of interest that three of the
5 Justices of this Court in Burnett in a concurring
6 opinion pointed to the one-year statute of limitations
7 that relates to Section 1986, which was Section 7 of the
8 Ku Klux Klan Act of 1871, which does include a one-year
9 statute of limitations.
10 And the concurring opinion noted that one year
11 would certainly be appropriate for 1983 actions. And we
12 think that is surely true since the kind of proceedings
13 are not that different. The type of evidence that needs
14 to be obtained in the great bulk of the cases is not
15 materially different.
16 We also think it's important that there -- a
17 one-year statute of limitations has been recognized as
18 being appropriate in many 1983 cases. And, of course,
19 four jurisdictions, including California, apply a
20 one-year statute of limitations to personal injuries
21 generally so that any determination that one year was
22 somehow inconsistent would pose serious problems as to
23 the applicability of Wilson to those -- those states.
24 QUESTION: Mr. -- Mr. Schiff, it may work well
25 in New York where it's easy enough, as you say, although

1 I guess there's some contest on the point, to pick out
2 what is the -- the intentional tort statute. But I
3 don't know how such a line would -- would play in -- in
4 other states where you may have a general personal
5 injury statute, but then one statute for a few personal
6 torts, another statute for a few others, another statute
7 for still a few others.
8 This isn't the kind of an issue I'm anxious to
9 have a lot of litigation about. Why shouldn't we have a
10 -- a clear line? And it seems to me the general
11 personal injury statute is a -- is a clearer line than
12 what you're urging upon us, maybe not clearer in -- any
13 clearer in New York State, but we're talking about all
14 the courts having to apply this in 50 states and with
15 changing statutes in 50 states over the years.
16 MR. SCHIFF: Well, our position is that the --
17 the line that should be chosen is -- is not solely to
18 try to determine whether a statute applies to all
19 intentional torts. Our position is that the one that
20 should be chosen in a state -- and I think it's not too
21 difficult if when you do examine this appendix -- is the
22 one that encompasses assault, battery and false
23 imprisonment. Now, that -- that -- there is one that
24 includes that plus others in at least 24 of the
25 jurisdictions.

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Now, our opponents suggest, well, there would be difficulties. Look at Alabama. But Alabama is a case where the Eleventh Circuit already determined that the intent -- which intentional tort statute should apply.

I -- I think the debate below as to whether New York statute was general or -- or not general is somewhat misconceived and -- because however you look at it, the New York statute admittedly covers the -- the important personal intentional torts in -- in view of the history of the Klan Act.

I'm not sure that I would agree either that --

QUESTION: (Inaudible) that the statute you're referring to covers all intentional torts?

MR. SCHIFF: Well, I think virtually all. Our opponents may be correct that on some malpractice cases that the malpractice litigation, whether it's intentional or not, would take precedence, but --

QUESTION: And do you think that statute covers only intentional torts?

MR. SCHIFF: Which? I'm sorry.

QUESTION: The one you're -- the one you think should apply. Does it cover only intentional --

MR. SCHIFF: Yes, it only covers intentional torts.

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1 QUESTION: But it doesn't say intentional
2 torts. It just lists particular torts.
3 MR. SCHIFF: It lists -- yes, that's right.
4 QUESTION: And the other -- and the other
5 statutes don't say unintentional either, do they?
6 MR. SCHIFF: No, no. It's not broken down
7 language-wise in that context.
8 I should add in finishing the previous
9 question that I don't think it's clear that you have a
10 simple solution if you decide to pick so-called general
11 personal injury statutes. I believe Justice O'Connor
12 pointed out in her dissent in Wilson that the Tenth
13 Circuit -- again, the case arising from Colorado -- I
14 don't quite remember the name -- Mishmash or something
15 like that. The Court did not choose either personal
16 injury statute, but chose one that applied residually.
17 And as I say, one of the difficulties with
18 applying a -- the general personal injury statute that
19 you would be picking a statute that essentially is
20 covering torts that would not possibly give rise to 1983
21 actions.
22 And we don't have good statistics, but there
23 are statistics listed in the appendix to the District
24 Court opinion in the Hobson case in the District of
25 Columbia, which is cited in our -- in Respondent's

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1 brief. And if you look at the actual statistics that
2 Judge Oberdorfer had developed in the District of
3 Columbia, I suggest that it shows -- that there isn't a
4 great deal left of the suits although it's not entirely
5 easy to tell if you carve out the negligence and product
6 liability cases.

7 I'd like to turn to the issue of whether the
8 decision here should be applied prospectively only. It
9 is our position that since this Court would be making a
10 new decision as to the appropriate statute of
11 limitations to be chosen, that the principle described
12 by this Court in Stovall v. Denno in 388 U.S. should
13 apply, and that since this Court only decides concrete
14 cases, it would have to apply the decision here to this
15 case because otherwise there would be no case.

16 The last term there were two cases involving
17 the statute of limitations under Section 1981. Those
18 decisions are perfectly consistent with our position
19 here. In Goodman v. Lukens Steel, the statute of
20 limitations was applied retroactively, but not
21 necessarily on this analysis. However, the reason in
22 that case at least or the facts in that case show that
23 the statute of limitations would not have been fully
24 dispositive of the case, but it simply determined the
25 length of time for which damages would be awarded.

1 There was also injunctive relief so that there was a
2 concrete case regardless of what the decision was in the
3 statute of limitations.
4 The other case is St. Francis College. That
5 case -- both of those cases, Goodman and St. Francis
6 College, both came from the Third Circuit, a -- but they
7 were decided in reverse order by this Court from the way
8 they were decided by the Third Circuit. In the Third
9 Circuit -- the Third Circuit had first decided that the
10 personal injury statute of limitations should apply to
11 1983 actions in Goodman. Then the St. Francis College
12 case came along, and they said we are now applying the
13 Goodman rule to a later case and therefore Chevron Oil
14 v. Huson applied. And that certainly was correct.
15 But when it got to this Court, this Court
16 simply assumed for the purpose of St. Francis that --
17 that the personal injury statute would apply and it
18 wasn't -- didn't make that decision. So, it applied the
19 same principle and it actually decided the merits of the
20 19 -- 1981 statute of limitations and the later Goodman
21 case. In these circumstances, neither of those cases in
22 any way departs from our view that the decision here
23 should be applied in this case.
24 Unless you have further questions, I'd like to
25 reserve the rest of my time.

QUESTION: Thank you, Mr. Schiff.

We'll hear now from you, Mr. Kimerling.

ORAL ARGUMENT OF KENNETH KIMERLING

ON BEHALF OF THE RESPONDENT

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

What Petitioners seek here will undermine everything that this Court sought to accomplish in Wilson v. Garcia. The explicit motivating purpose of the Wilson decision was to provide some uniformity and provide some certainty to the question of the statutes of limitations under 1983 actions and therefore avoid unnecessary and time consuming litigation in 1983 claims.

At that time, the lower courts followed a myriad of different practices in determining the appropriate state statute of limitations. Some courts looked at the specific factual allegations in a complaint and tried to match them with state common law and statutory claims. Other courts took a particular statute of limitations and said this applies in all 1983 claims, but these decisions varied from panel to panel and from circuit to circuit.

What Petitioners seek here will recreate that type of unnecessary and time-consuming litigation

1 because there is not but one statute of limitations that
2 covers intentional torts, but two in 32 or 33 states
3 that we've looked at and put in our appendix. And there
4 is no clear, bright line to deciding among them.
5 In New York, for example, if a prisoner has an
6 Eighth Amendment claim against a prison doctor, do you
7 use the two and a half year statute of limitations that
8 applies for personal injury claimants against doctors,
9 or do you use the one-year provision that applies to
10 certain specific torts? Well, if -- if you go along and
11 say, well, chose the one that -- that specifies
12 intentional torts, what do you do in Alabama where
13 there's a six-year provision that specifies three
14 intentional torts and a two-year provision that
15 specifies three or more intentional torts?
16 And it's not simply a question of choosing
17 which covers the most for in Alabama and in other
18 states, often they're equally divided. And if you're
19 going to go to most, how do you count them? In -- in
20 Arizona, for example, there is a general provision that
21 covers assault and battery, as there is in Texas, but it
22 doesn't specify it. But there is --
23 QUESTION: Do you suppose it might narrow the
24 choice a little bit to say intentional tort is the
25 category you rely on?

1 MR. KIMERLING: It -- it would not, Your Honor.

2 QUESTION: Why not?

3 MR. KIMERLING: Because --

4 QUESTION: Well, it wouldn't -- at least it

5 wouldn't be possible to apply statutes of limitations

6 governing unintentional torts.

7 MR. KIMERLING: Well, I -- I don't think that

8 that's what will happen because many statutes cover

9 both. As you pointed out in your question, there are

10 statutes that cover intentional and unintentional torts,

11 as the Arizona provision does.

12 QUESTION: What if we just said assault and

13 battery? There's -- if you apply the general -- the

14 general statute unless there's a separate one for

15 assault and battery. Would that -- would that create

16 any problem?

17 MR. KIMERLING: I -- I don't think that would

18 create any problems, but I think that line would be an

19 arbitrary one and not consistent at all with the

20 statutory history of Section 1983.

21 QUESTION: Well, I'm not sure it's any more

22 arbitrary than just the general tort statute if that

23 general tort statute wouldn't be -- wouldn't be

24 covering, as it apparently would not in New York, the --

25 the majority of claims that -- that 1983 was concerned

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1 with.

2 MR. KIMERLING: That's -- I think that's

3 important misconception of what 1983 was concerned

4 about. Nineteen eighty-three was not concerned about the

5 direct violence of the Klan.

6 There's a quote that we provide in our brief

7 right out of Monroe v. Pape. In Monroe v. Pape says:

8 "While the main scourge of the evil -- perhaps the

9 leading one -- was the Ku Klux Klan, the remedy created

10 in 1983 was not a remedy against it or its members, but

11 against those representing a state in some capacity who

12 were unable or unwilling to enforce a state law."

13 So that the assault and battery provisions in

14 an historic context aren't the provisions that were the

15 provisions that were most analogous to the types of

16 claims that would have been brought under 1983 and

17 certainly they don't make any sense in the present

18 context of the myriad --

19 QUESTION: (Inaudible) think Wilson made much

20 sense then.

21 MR. KIMERLING: Excuse me?

22 QUESTION: I wouldn't think you would think

23 that Wilson made much sense.

24 MR. KIMERLING: Oh, absolutely. We agree that

25 Wilson makes a lot of sense. Wilson said let's have a

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1 broad characterization and it broadly defined 1983 as to
2 cover personal injury. But to go much narrower than
3 that and to try to get a -- a tighter mesh or fix would
4 create the same lack of uniformity and the lack of
5 certainty that this Court tried to obtain and could --
6 and did obtain in Wilson by -- by designating the -- the
7 statute of limitation that covered the general remedy
8 for personal injury actions.

9 This Court found in Wilson that Congress would
10 have characterized 1983 as providing a general remedy
11 for injuries to personal rights. And I think that's the
12 guiding light that we point to, and that's why we think
13 -- we agree with --

14 QUESTION: Since -- since our decision in
15 Daniels and Davidson, certainly any due process claims
16 sound very much in intent and not in mere negligence.

17 MR. KIMERLING: Well --

18 QUESTION: And those are brought under 1983.

19 MR. KIMERLING: I -- I think that -- that when
20 you try to take the word "intentional tort" and use that
21 word "intent" and apply it in a constitutional context,
22 you have two different words with two different
23 meanings. Certainly when you talk about one of the
24 primary concerns of 1983, which was the denial of equal
25 protection and you talk about intent, you're not talking

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1 about the kind of intent that's involved in an
2 intentional tort.
3 QUESTION: No, but my question to you is about
4 the due process intent, not equal protection.
5 MR. KIMERLING: Well, in the substantive due
6 process area --
7 QUESTION: But a procedural due process.
8 MR. KIMERLING: In procedural due process, I
9 don't think that that's the answer and I don't think it
10 has been resolved in -- in those two cases.
11 QUESTION: You don't think what's the answer?
12 MR. KIMERLING: That is that -- that intent is
13 the -- has been determined.
14 QUESTION: Well, certainly negligence is not
15 there.
16 MR. KIMERLING: I don't think in the area of
17 procedural due process that this Court has determined
18 that intent is an element in the denial --
19 QUESTION: No, but it is determined that
20 simple negligence is not enough.
21 MR. KIMERLING: Well, I'm not sure that that's
22 the -- but if -- that's not my reading of those cases.
23 But, nevertheless, the -- the content and -- and the use
24 of intent in most constitutional settings has no
25 relationship to its use in intentional torts.

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1 And it's -- and it really is a question of
2 statutory interpretation -- excuse me -- statutory
3 interpretation. And if you look back at 1871 and you
4 look back at the statutes of limitations in effect at
5 that time, you see that they retained a lot of their
6 English roots in that they were divided between statutes
7 of limitations that covered trespass claims, assault,
8 battery and false imprisonment and statutes of
9 limitations that covered action on a case, which were
10 the general personal injury provisions of the time.
11 And the difference between trespass and action
12 on the case is not the difference between intent and
13 non-intent. Rather, it's the difference between direct,
14 physical force, which is a trespass, and indirect
15 injury. One of the classic examples that the courts used
16 and continue to use to describe that difference is a
17 situation where someone throws a log onto the highway.
18 If you're hit by that log, you have a claim for trespass
19 because it's a direct, physical force injury. If you
20 come along the highway later and trip over it, you have
21 an action on the case.
22 And if you look at -- at what was at issue in
23 -- in 1871, it wasn't these tortuous acts of the Klan.
24 Yes, they were the catalyst, but what they were trying
25 to do was to insure that the state provided an adequate

and effective remedy for these Klan acts. And if the -- if the state failed to do that, that would be an indirect injury because there would be no direct, physical force so that the current day descendants of the trespass provisions are the intentional tort provisions, and the current day provisions of the action on the case are -- are the general provisions.

And I think it's significant that at that time they -- in Section 1986, they referred to action on the case as the appropriate remedy. Section 1986 -- it was passed as part of this package, the Sherman Amendment -- covers the situation where a state or local government is aware of some purported Klan activity, is capable of doing something to stop it, and takes no action. The person who is injured by that Klan action can then sue that state or local government. And Congress specified action on the case.

And this is a parallel type of remedy, although much more limited in scope than 1983, but it's in recognition that Congress was thinking in these terms and therefore the present day descendants of those provisions -- the action -- excuse me -- the general remedy for -- for personal injuries are the ones that Congress would have designated at that time.

And not only are -- are these provisions the

1 most analogous, but they're the most appropriate. And
2 appropriateness, as this Court defined in Burnett v.
3 Grattan, means that a statute of limitations must take
4 into account the goals and policies underlying Section
5 1983 and as well take into account the practicalities of
6 litigation.

7 And Congress in 1871 was seeking a broad and
8 effective remedy. It was a unique remedy, one -- one
9 that didn't exist and they wanted to ensure that the
10 rights under the Bill of Rights passed on to -- to
11 everyone through the Fourteenth Amendment were being
12 enforced. It would be totally inappropriate and totally
13 inconsistent to attach that broad remedy to some
14 truncated statutory period.

15 The -- if you look at New York's statutory
16 scheme, for example, you see that there's a one-year
17 provision for some of these specified intentional torts,
18 a three-year provision for the general remedy for
19 personal injury, a three-year provision for civil rights
20 claims against state actors, and a six-year provision
21 for certain constitutional claims. That's New York's
22 own view of the -- of the relative importance of those
23 different types of claims.

24 This -- this Court has pointed out that
25 statutes of limitations are a weighing process. What is

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1 a legislature's interest in the vindication of a certain
2 claim as opposed to the interests and repose?
3 And that array represents New York's interest,
4 and it shows that these kinds of intentional torts are
5 at the bottom. Well, certainly Congress in 1871 didn't
6 view these as the least important of its remedies. This
7 was the most important. This is the Constitution of the
8 United States. This is the Bill of Rights. And if
9 anybody should have a right to vindicate that, it should
10 -- it should be --
11 QUESTION: Do you think the New York -- by New
12 York's providing one year for an assault and three years
13 for negligence, it means New York is less interested in
14 seeing a claim for assault vindicated than a claim for
15 negligence vindicated?
16 MR. KIMERLING: I -- I think that's in part
17 the answer, and the other answer is that -- that New
18 York believes that assault types of claims are quickly
19 known and therefore can be quickly brought. That's what
20 the state legislature said in 1960 when it reduced this
21 intentional tort statute of limitations from two years
22 to one.
23 And -- and it goes also to this Burton v.
24 Grattan equation or standard for appropriateness. What
25 is the question about whether or not it takes into

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1 account the practicalities of litigation? We know from
2 this Court's decision in Felder v. Casey last term that
3 in due process and equal protection claims, which are,
4 after all, the heart of 1983 and the heart of the
5 Fourteenth Amendment what -- which -- which it was
6 enforcing these kinds of claims, often there is a lag
7 time between the actual injury and the time that the
8 person who has been injured recognizes that he has a
9 constitutional claim. That's just not consistent with
10 what New York feels about its intentional torts.
11 QUESTION: Well, various states have adopted a
12 one-year personal injury general statute of limitations,
13 haven't -- haven't they?
14 MR. KIMERLING: That's correct.
15 QUESTION: And they're -- they're not
16 inadequate, are they, in your view?
17 MR. KIMERLING: I -- I don't think, one, you
18 have to reach that question, but yes, they are
19 inadequate in our view.
20 QUESTION: So, you would have us hold that
21 even those states that have opted clearly for a one-year
22 statute of limitations can't do that.
23 MR. KIMERLING: I don't think you have to
24 reach that question.
25 QUESTION: Well, it's an exception then to

1 Wilson v. Garcia if a state has a one-year general
2 statute?
3 MR. KIMERLING: I'm sorry. I didn't --
4 QUESTION: Well, I'm just really following up
5 on --
6 MR. KIMERLING: (Inaudible).
7 QUESTION: -- Justice O'Connor's question.
8 You say that Wilson v. Garcia doesn't apply if
9 a state has a general personal injury statute of
10 limitations of one year?
11 MR. KIMERLING: I -- I think that there is a
12 three-step process --
13 QUESTION: Is this derived from Wilson v.
14 Garcia -- what you're talking about?
15 MR. KIMERLING: Yes. Yes, it is. By that I
16 mean under Section 1988, which is the section that you
17 use to choose the appropriate state statute of
18 limitations, the third step is whether or not the
19 particular state statute, if it's the most analogous and
20 the most appropriate, is consistent with federal law.
21 And it's our position that a one-year statute would be
22 inconsistent with federal law.
23 QUESTION: Well, Congress itself adopted a
24 one-year statute of limitations for Section 1986, didn't
25 it?

1 MR. KIMERLING: That's correct, and I think
2 that's why it is inconsistent with 1983.
3 Section 1986 was the Sherman Amendment. That
4 was the most controversial element of 18 -- of the 1871
5 legislation. That's the provision that everybody was
6 debating and fighting over, and it was the subject of
7 numerous compromises. That bill, the Sherman Amendment,
8 went back to conference twice, and it was only coming
9 out of the conference, the joint conference, the second
10 time that it had this one-year provision.
11 At that time, if you had looked at the action
12 on the case, statutes of limitations, which were the
13 ones that Congress said should be the form of action,
14 every state I think except four had more than one year
15 as a statute of limitations. Therefore, it was clearly a
16 restricting provision as the other amendments to the
17 Sherman Amendment were restricting provisions.
18 QUESTION: Mr. Kimerling, it seems to me your
19 position on this -- the one position consumes the other.
20 If you say we should strike down everyone that's --
21 that's one year anyway, then what difference does it
22 make whether -- whether we agree with New York State and
23 -- and select a -- select a statute that in many
24 instances will be a one-year statute? Whenever it is we
25 will ignore it anyway. Right?

1 MR. KIMERLING: That's our -- our position is
2 that -- that -- that it's inappropriate and inconsistent
3 to choose the one-year statute in the first instance.
4 QUESTION: Whichever we choose, you're going
5 to tell us to ignore it whenever it's one year. Right?
6 MR. KIMERLING: Obviously, our position is
7 whatever you choose, we win. I think that's the -- but
8 if we choose that, I don't think not on a -- on a -- on
9 a cynical basis, but I think on a -- on a very
10 consistent basis, that one year simply doesn't take into
11 account the practicalities and the purposes underlying
12 Section 1983. And going back to --
13 QUESTION: But as Justice O'Connor says, no
14 choice available to us will produce that happy state of
15 affairs anyway.
16 MR. KIMERLING: I'm sorry. I don't understand
17 your question.
18 QUESTION: There's -- there's no possible rule
19 we can adopt that will result in the selection in all
20 states of a statute that is more than one year. Right?
21 MR. KIMERLING: That's right. That's right.
22 QUESTION: So?
23 MR. KIMERLING: So, in some subsequent cases,
24 you may be faced with the question as to whether one
25 year is long enough. And you'll have to reach that

1 question in those cases, but you don't have to reach it
2 here if you decide that the general remedy for personal
3 injury claims is -- is the appropriate one. But --
4 QUESTION: Mr. Kimerling, are you suggesting
5 that our search for simplicity that Justice O'Connor
6 thought was illusory, really is illusory if we're going
7 to get this issue next?
8 MR. KIMERLING: No, not at all. I think -- I
9 think that -- that you've gone far down the road to
10 certainty and uniformity. Yes, there may be subsequent
11 questions as to whether or not a one-year provision is
12 consistent or not. We know that -- that in New York the
13 Court of Appeals held in 1981 that anything less than
14 two years would not be consistent and based that
15 two-year cutoff on the fact that the Federal Tort Claims
16 Act provides that in two years you have -- you have two
17 years to file an administrative charge.
18 It would certainly be -- to my mind, it
19 doesn't make any sense to say to somebody, if you get
20 hit by a mail truck, you have two years to file an
21 administrative charge. But if your First Amendment
22 rights are violated, that claim gets extinguished in one
23 year. That doesn't make sense. That's inconsistent it
24 seems to me.
25 QUESTION: Do you happen to know -- in her

1 dissent in the Wilson case Justice O'Connor pointed out
2 there had been several bills introduced in Congress in
3 recent years to prescribe a single statute of
4 limitations for 1983. Do you know what periods of
5 limitations most of those bills --
6 MR. KIMERLING: I -- I -- I researched some of
7 them, and I didn't try to figure out which ones -- they
8 went -- depending on who introduced them, they were
9 short or long. And I don't have to tell you the names.
10 But they came out of the Senate Judiciary.
11 But the -- the -- the -- the -- the one-year
12 provision I think the fact that it was attached to
13 Section 1986, the most controversial provision of this
14 legislation, one in which the sponsor of that
15 legislation, Senator Thurmond and his chief opponent,
16 Senator Thurmond, both concurred after it had gone
17 through this amendment process, one of which was the
18 attachment of this truncated statutory period, that it
19 wasn't worth the paper it's written on. And if you look
20 probably back in -- in -- in the annotations, there are
21 very, very few 1986 cases ever been brought.
22 And I think there's substantial basis to
23 reject it, but again I don't think you have to reach
24 that question here, obviously, because here you have a
25 choice. And the choice is between a general personal

1 injury provision and a specified intentional tort
2 provision.
3 And I think the guidance that this Court
4 provided in Wilson was to choose the one that generally
5 covered personal injuries. After all, we're not just
6 talking about one type of constitutional claim. We're
7 talking about a broad range of claims that -- that are
8 covered by 1983.
9 The previous case, the Texas Monthly case --
10 what kind of intentional tort is involved there? The --
11 the -- to -- to try to pin that down to, as Justice
12 Scalia suggested, to assault and battery makes no sense,
13 but to try to say that it covers personal injury
14 generally I think makes a lot of sense and it -- and it
15 does accomplish primarily what this Court sought to
16 accomplish in Wilson v. Garcia which was to put an end
17 to this litigation by giving some uniformity and some
18 certainty to that decision, a uniformity and certainty
19 that's consistent with the purposes of 1983 and
20 consistent with the legislative history.
21 If the Court has no further questions, I thank
22 you for your attention.
23 QUESTION: Thank you, Mr. Kimerling.
24 Mr. Schiff, you have six minutes.
25 REBUTTAL ARGUMENT OF PETER H. SCHIFF

ON BEHALF OF THE PETITIONERS

MR. SCHIFF: Unless the Court has further questions, I would only ask the Court to reverse and direct that the complaint be dismissed.

Thank you.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 2:40 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY alan friedman

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