

CASE COMMENTS

SECTION 1985(2) CLAUSE ONE DOES NOT REQUIRE ALLEGATIONS OF CLASS- OR RACE-BASED DISCRIMINATORY ANIMUS

Kush v. Rutledge, 103 S. Ct. 1483 (1983)

In *Kush v. Rutledge*,¹ the United States Supreme Court held that a prospective plaintiff need not allege a class- or race-based discriminatory animus² in order to maintain a private cause of action under 42 U.S.C. § 1985(2) clause 1.³

1. 103 S. Ct. 1483 (1983).

2. Animus is defined as “[m]ind; soul; intention; disposition; design; will; that which informs the body. *Animo* (q.v.) with the intention or design. These terms are derived from the civil law.” BLACK’S LAW DICTIONARY 80 (rev. 5th ed. 1979).

3. 42 U.S.C. § 1985(2) (1976) provides:

(2) Obstructing Justice; intimidating party, witness or juror.

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such a juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the *equal protection of the law*, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . .

Id. (emphasis supplied).

The provisions of this section have been informally divided into two clauses: “section 2 clause 1” refers to the text of 42 U.S.C. § 1985(2) prior to the first semicolon; “section 2 clause 2” refers to that part of the statute which follows the semicolon. This division first occurred in *Kelly v. Foreman*, 384 F. Supp. 1352 (S.D. Tex. 1974), in which the district court concluded that no class- or race-based discriminatory animus need be proven to state a cause of action under section 2 clause 1. By dividing § 1985(2) into two clauses, the court rejected the proposition advanced by Professor Antieau that this section be divided into three subsections. See C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS § 95 (1971). Judge Singleton reasoned that by dividing § 1985(2) into two clauses, the statute becomes more understandable. 384 F. Supp. at 1354. While both clauses begin with the language “if two or more persons conspire,” the first clause concerns only conspiracies and does not contain equal protection language, embodied solely in the second clause. *Id.* Judge Singleton concluded that “[i]t is logical to assume that Congress intended the language of § 1985(2) before the semicolon to protect specific activities vital to the functioning of courts of the United States, without requiring any allegation or proof of invidious discrimination.” *Id.* at 355. See also Comment, 42 U.S.C. Section 1985(2) Part One: The Inapplicability of the Animus Requirement from *Griffin v. Breckenridge*, 77 NW. U.L. REV. 168, 180-81 (1982) (recommending that *Griffin*’s animus requirement for § 1985(3) not be applied to § 1985(2) clause 1) [hereinafter cited as Comment, *Inapplicability of Animus Requirement*].

Respondent, a white football player at Arizona State University, claimed that the athletic director, head coach and assistant coach conspired to threaten and hinder potential witnesses from testifying at the respondent's trial in federal court.⁴ The district court dismissed respondent's claim for failure to allege a violation of his civil rights.⁵ The Ninth Circuit Court of Appeals reversed,⁶ concluding that a claim of witness intimidation founded on section 1985(2) clause 1 need not be supported by a class- or race-based discriminatory animus.⁷ The United States Supreme Court granted certiorari,⁸ affirmed the Ninth Circuit and *held*: no allegation of class- or race-based animus need be alleged to sustain a cause of action under section 1985(2) clause 1.⁹

Congress designed section 1985(2) clause 1 to prevent conspiracies that deter individuals from gaining access to or testifying in federal court¹⁰ and to prevent conspiracies that influence grand or petit jurors.¹¹ Congress originally enacted section 1985(2) clause 1 in section 2

4. 103 S. Ct. 1483, 1485 (1983). Rutledge alleged in addition a number of common-law and statutory claims against the University and individual defendants arising out of incidents that occurred while respondent was a member of the Arizona State University football team. *Id.*

5. *Id.* at 1484. The district court held that respondent failed to state a claim under § 1985 because he did not show that he was a member of an identifiable class, and because his allegations of a conspiracy were not supported by specific facts. *Id.* The district court also held that respondent's action was barred by the eleventh amendment. *Id.*

6. 660 F.2d 1345 (9th Cir. 1981), *aff'd*, 103 S. Ct. 1483 (1983).

7. *Id.* at 1354.

8. 102 S. Ct. 3508 (1982).

9. 103 S. Ct. 1483 (1983).

10. To sustain a cause of action under this section plaintiff, must allege and establish a nexus between the conspiracy and a federal court. See *Phillips v. Fisher*, 445 F. Supp. 552 (D. Kan. 1977). *Cf.* 28 U.S.C. § 451 (Supp. V 1981) (statutory definition of "court of the United States").

For cases illustrating conspiracies that denied plaintiffs access to the courts or wrongfully influenced witnesses, see, e.g., *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 342 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981) (defendants retaliated against plaintiffs for filing suits in federal courts); *McCord v. Bailey*, 636 F.2d 606, 608 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) (conspiracy denied plaintiff an opportunity to testify on his own behalf); *Williams v. St. Joseph Hosp.*, 629 F.2d 448, 450 (7th Cir. 1980) (conspiracy denied plaintiffs medical treatment due to filing of malpractice suits); *Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979) (defendants conspired to deter plaintiff from testifying truthfully and freely); *Brawer v. Horowitz*, 535 F.2d 830, 832 (3rd Cir. 1976) (cooperating witness and prosecuting attorney conspired to introduce perjured testimony); *Hoopes v. Nacrelli*, 512 F. Supp. 363, 364 (E.D. Pa. 1981) (conspiracy to intimidate plaintiff and keep him from testifying in previous criminal trial); *People ex rel. Snead v. Kirkland*, 462 F. Supp. 914, 917 (E.D. Pa. 1978) (conspiracy used perjured testimony to obtain indictment and conviction of the plaintiffs); *Britt v. Suckle*, 453 F. Supp. 987, 997 (E.D. Tex. 1978) (conspiracy to bar plaintiffs from state courts); *Crawford v. City of Houston*, 386 F. Supp. 187, 189 (S.D. Tex. 1974) (defendants retaliated against plaintiff because of latter's testimony in court).

11. See, e.g., *Bergman v. Stein*, 404 F. Supp. 287 (S.D.N.Y. 1975); *Jones v. United States*, 401

of the 1871 Ku Klux Klan Act (“Klan Act”).¹² The Klan Act, although motivated primarily by political considerations,¹³ was an attempt by the Republican congressional majority to improve the plight of recently emancipated southern blacks¹⁴ amid reports of growing racial and political unrest in the South.¹⁵

F. Supp. 168 (E.D. Ark. 1975), *aff’d*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

12. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (current version at 42 U.S.C. §§ 1983, 1985, 1986 (Supp. V 1981)). As originally enacted, section 2 of the Klan Act states:

That if two or more persons within any State or Territory of the United States shall conspire together . . . [to threaten] to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, or any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of being or having been such juror . . . and every person so offending . . . shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages so occasioned by such injury or deprivation of rights and privileges, against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or Circuit Court of the United States.

Id. (emphasis added).

13. CONG. GLOBE, 42d Cong., 1st Sess. 157 (1871) [hereinafter cited as 1871 DEBATES]. Speeches during the debates reflected a growing concern among Northern Republicans that their newly constructed governments in the South were being dismantled. *See, e.g., id.*

Republican congressional sentiment was almost unanimous in regarding the Klan as a political force. *Id.* at 504 (Klan organized “to punish men for their political opinions.”) (statement of Sen. Pratt (R. Ind.)); *id.* at 108 app. (Klan constituted “a Democratic organization, in the interests of the Democratic Party.”) (statement of Sen. Poole (R.N.C.)); *id.* at 196 app. (objective of the Klan included the defeat of Republicanism) (statement of Rep. Snyder (R. Ark.)).

14. *See, e.g.,* 1871 DEBATES, *supra* note 13, at 334-35 (remarks of Congressman Hoar).

15. In response to President Grant’s call for immediate legislative action to combat these conditions, *id.* at 326, the House Judiciary Committee drafted a bill in five days protecting all federal statutory and fourteenth amendment rights. *Id.* at 317. The bill contained four sections that empowered all branches of the federal government to enforce the fourteenth amendment in areas where state government officials were either ineffective or unwilling. *Id.* *See generally* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967) (analyzing the Klan Act debates and their impact on congressional power to punish individuals); Frank & Munro, *The Original Understanding of “Equal Protection of the Laws”*, 1972 WASH. U.L.Q. 421 (1973) (discussing history of the equal protection laws); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (lamenting federal enforcement of individual constitutional rights in light of legisla-

Although the Klan Act congressional debates examined the clandestine activities of the Ku Klux Klan and its lasting effect on the South,¹⁶ a considerable portion of the debates focused on Congress' power to intrude in the affairs of individual states.¹⁷ Congressman Shellabarger, the bill's sponsor, argued that the fourteenth amendment gave the Federal Government the power to protect its citizens in the enjoyment of their federal rights against the attacks of private individuals.¹⁸

Other Congressmen vehemently disagreed with this position. They argued that Congress lacked constitutional authority to extend federal jurisdiction to punish offenses traditionally reserved to state law.¹⁹ As

tive history); Note, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402 (1979) (in-depth analysis of the legislative history of section 1985(3)).

16. See, e.g., 1871 DEBATES, *supra* note 13, at 517 (speech of Congressman Shellabarger).

Predictably, the Republicans denounced the politically inspired violence in the South and demanded federal action to ameliorate the dangerous conditions. See, e.g., *id.* at 394 (statement of Rep. Rainey (R.S.C.)); *id.* at 437 (statement of Rep. Cobb (R.N.C.)). See generally 1871 DEBATES, *supra* note 13.

Democratic members of Congress, characterizing reports of outrageous Klan activity as extremely exaggerated, see *id.* at 330-31 app. (statement of Rep. Morgan (D. Ohio)); *id.* at 17-19 app. (statement of Rep. Bayard (D. Del.)); *id.* at 139-40 (statement of Rep. Vaughn (D. Tenn.)), justified the Klan activities as a natural reaction to the poorly administered and corrupt Republican government of the post-Civil War era. See *id.* at 422 (statement of Representative Winchester (D. Ky.)); *id.* at 433 (statement of Representative Cox (D. Ohio)).

17. As originally introduced, § 2 of the Klan Act provided in part that "perjury, subornation of perjury, [and] criminal obstruction of legal process" would be considered felonies. *Id.* The constitutionality of the proposed § 2 was the subject of extensive debate. See *infra* notes 18-20 and accompanying text.

18. Justifying the expansion of congressional power, the Congressman declared:

If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship to make laws abridging or not abridging, to protect or to destroy, by landed murder, these United States citizens, must stand by a powerless spectator of the overthrow of the rights and liberties of its citizens, then not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

Id. at 69.

19. 1871 DEBATES, *supra* note 13, at 336, 337. Congressman Blanchard (R. Ill.) stated: This section [Two] has had different interpretations. If it intends and must be construed to give the Federal Courts jurisdiction to punish combinations or conspiracies to commit murder, mayhem, assault and battery within a state, I can find in the Constitution no warrant for the exercise of such authority. If Congress can provide for the punishment of the offenses themselves, it has this jurisdiction, a revolution in the whole theory of our government has been affected unknown to the people.

Id. at 313. See also *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980).

Congressman Moore of Illinois succinctly stated this position: "[T]he second section, in my opinion, contains provisions which, I fear, cannot be defended, and which override, as I am compelled to think, the vested rights of the States." *Id.* at 112 app. See Note, *supra* note 13, at 411-17.

a result of these debates, Representatives Cook and Willard amended Shellabarger's draft by adding equal protection language to the clauses that had the greatest potential for infringing upon states' rights in hopes of assuring their constitutionality.²⁰

In its final form, the Klan Act contained sections providing the federal government and private individuals with the ability to redress politically inspired conspiracies, violence and discriminatory activities that denied persons their federal civil rights.²¹ Specifically, section 2 of the Klan Act provided a cause of action for individuals denied certain federal rights by conspiratorial public officials or private parties.²²

In 1875, Congress revised the Klan Act; section 2 as amended survives unchanged as the present section 1985.²³ In its revised form, section 1985 contains three subsections.²⁴ Section 1985(1) provides sanctions against conspiracies that prevent federal officers from performing their duties.²⁵ Section 1985(2), divided into two clauses,²⁶ prevents the obstruction of justice and protects an individual's right to equal protection of the laws.²⁷ Section 1985(3) provides a cause of action for individuals against conspiracies that deprive them of equal protection of the laws or equal privileges and immunities under law.²⁸

20. 1871 DEBATES, *supra* note 13, at 485-86 (remarks of Representative Cook (R. Ill.)). See Comment, *Inapplicability of Animus Requirement*, *supra* note 3, at 173-74.

21. Act of April 20, 1871, ch. 22, 17 Stat. 1, 13 (current version at 42 U.S.C. § 1985 (1976)).

22. See *supra* note 12.

23. Pursuant to the authority in 14 Stat. 74 (1866), Congress authorized the revision of the Klan Act, as well as the other revised statutes. Act of June 20, 1874, ch. 333, §§ 2-5, 18 Stat. 113. See Comment, *Inapplicability of Animus Requirement*, *supra* note 3, at 177 n.52.

24. See 42 U.S.C. § 1985 (1976). See *infra* note 25 for text of § 1985(1); see *supra* note 3 for text of § 1985(2); see *infra* note 28 for text of § 1985(3).

25. 42 U.S.C. § 1985(1) (1976) states:

(1) Preventing officer from performing duties.

If two or more persons in any State or Territory conspire to prevent, by force, intimidation or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

26. See *supra* note 3.

27. *Id.*

28. 42 U.S.C. § 1985(3) (1976) states the following:

(3) Depriving persons of rights or privileges.

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the *equal protection of the laws*, or of equal

Unlike section 1985(2) clause 2 and section 1985(3), which contain equal protection language, section 1985(2) clause 1 does not contain such language.²⁹ The Supreme Court addressed the semantic disparity among the clauses in *Griffin v. Breckenridge*.³⁰ In *Griffin*, the black plaintiffs alleged that the white defendants conspired to block their automobile from passing on a public highway, mistakenly believing them to be civil rights workers.³¹ The Court held that section 1985(3) applied to private conspiracies that interfered with the rights of national citizenship.³² It limited the application of section 1985(3), however, to conspiracies motivated by a race- or class-based "invidiously discriminatory animus."³³ The Court required discriminatory animus to avoid an interpretation broadening the statute into a general federal tort law.³⁴ By avoiding federalism issues, however, the Court failed to

privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the *equal protection of the laws*; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby, another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

29. See *supra* note 3.

30. 403 U.S. 88 (1971).

31. *Id.* at 90-91.

32. *Id.* at 92.

33. *Id.* at 102. Justice Stewart stated that "the conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* To come within the ambit of the section 1985(3) equal protection clause "the complaint must allege that defendants did:

- (1) conspire to go in disguise on the highway or on the premises of another;
- (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.
- (3) that the conspirators did, or caused to be done any act in furtherance of the object of [the] conspiracy, whereby another was
 - (4a) injured in his person or property or
 - (4b) deprived of having and exercising any right or privilege of a citizen of the United States.

Id. at 102-03.

34. *Id.* at 102. The Court stressed that constitutional barriers existed that precluded an interpretation of § 1985(3) as a general federal tort law. *Id.* See Note, *supra* note 15, at 429-32. These barriers, which original drafters of the Klan Act also considered, stemmed from the federal-state balance envisioned by the framers of the Constitution. See Note, *supra* note 15, at 423 n.141. In order to effect congressional intent and to avoid the federalism issue, the Court determined that a

clearly indicate whether the equal protection limitation of section 1985(3) applied to the entire statute.³⁵

The *Griffin* Court's equivocal application of the equal protection limitation caused a split among the circuit courts. Some circuit courts held that Congress based section 1985 on the fourteenth amendment and therefore the equal protection language applies to all sections.³⁶ Other circuit courts, however, contended that the legislative history of section 1985(2) clause 1 illustrated Congress' concern with the power of the federal courts, and consequently do not import equal protection language to clause 1.³⁷

The Fifth and Eighth Circuits follow the interpretation that places an equal protection limitation on section 1985.³⁸ The Fifth Circuit's *en banc* decision in *Kimble v. D.J. McDuffy, Inc.*,³⁹ ably illustrates the rationale for this approach.⁴⁰ In *Kimble*, the court held that the *Griffin*

plaintiff must allege discrimination as the result of a class or racially motivated conspiracy to bring suit under § 1985(3). 403 U.S. at 102.

See generally Wildman, 42 U.S.C. § 1985(3)—A Private Act to Vindicate Fourteenth Amendment Rights: A Paradox Resolved, 17 SAN DIEGO L. REV. 317 (1980) (clarifying how one analyzes section 1985(3) as against conspirators who deny an individual equal protection under the fourteenth amendment); Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Suggested Approach*, 64 MINN. L. REV. 63 (1980) (examines the *Griffin* animus requirement as applied subsequent to that case); Note, *supra* note 15 (analyzing the legislative history of 1985(3)).

35. Some of the language in *Griffin* indicates that the limitation could apply to the entire statute. The Court's extensive examination of the Klan Act's legislative history suggests that any limitations found in 1985(3) could be applied to the entire statute. See, e.g., *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 346-47 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981) (*Griffin* analysis of section 2 of the 1871 Klan Act applies to all of § 1985).

36. See, e.g., *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981); *Jones v. United States*, 401 F. Supp. 168, 173 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Davis v. Sprouse*, 405 F. Supp. 45, 47-48 (E.D. Va. 1975); *McIntosh v. Garofalo*, 367 F. Supp. 501, 505 (W.D. Pa. 1973); *Phillips v. Singletary*, 350 F. Supp. 297, 302 (D.S.C. 1972). See also *infra* notes 38-46 and accompanying text.

37. See *infra* notes 46-58 and accompanying text.

38. See *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981); *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 425 U.S. 904 (1977).

39. 648 F.2d 340 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981).

A panel of the Fifth Circuit originally held that § 1985(2) clause 1 did not require a showing of class- or race-based animus. *Kimble v. D.J. McDuffy, Inc.*, 623 F.2d 1060, 1068 (5th Cir. 1980), *rev'd*, 648 F.2d 340 (5th Cir. 1981) (*en banc*). The Fifth Circuit *en banc* reversed the panel holding, dividing twelve to eleven in the question of an animus requirement. 648 F.2d at 348, 349.

40. The Eighth Circuit adopted the same interpretation in *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 425 U.S. 904 (1977). In *Jones*, the plaintiff accused the United States Attorney and his assistants of conspiring to influence a juror in his aborted criminal trial for tax evasion and perjury. 401 F. Supp. 168, 169 (E.D. Ark. 1965), *aff'd*, 536 F.2d 269 (8th Cir.), *cert. denied*, 425 U.S. 904 (1977). The district court carefully analyzed the legislative history of the

class-based animus requirement directly applies to any action brought pursuant to section 1985(2).⁴¹ In a divided opinion,⁴² the circuit court examined the legislative history of the Klan Act and the reasoning of the *Griffin* decision.⁴³ The *Kimble* majority emphasized that *Griffin* required invidiously discriminatory class-based animus to avoid transforming section 1985(3) into a general federal tort law.⁴⁴ Following the *Griffin* rationale, the court concluded that Congress did not design section 1985(2) as a general federal tort law⁴⁵ and, therefore, any action brought under this section must be motivated by some class-based, invidiously discriminatory animus.⁴⁶

The Third,⁴⁷ Seventh,⁴⁸ Ninth⁴⁹ and District of Columbia Circuits⁵⁰

Klan Act and the impact of the *Griffin* decision. *Id.* at 173-74. The district court read section 1985(2) in light of section 1985(3) and determined that the judicial interpretation of subsection 3 applied directly to subsection 2, thereby requiring a racial- or class-based animus for each section. *Id.* at 174. Because the plaintiff failed to allege any racial- or class-based animus, the district court dismissed the claim for failure to state a cause of action upon which relief may be granted. *Id.* The Eighth Circuit summarily affirmed the district court on this issue. 536 F.2d at 271.

41. 648 F.2d at 348. In *Kimble*, the plaintiffs, oil rig workers, alleged that their former employers conspired with each other to deny them employment after they filed personal injury or workers' compensation claims against two former employers. *Id.* at 342.

42. *Id.* at 349. The Fifth Circuit *en banc* divided twelve to eleven on the question of an animus requirement. See *supra* note 39. The dissent concluded that the absence of equal protection language in section 1985(2) clause 1, as well as its apparent purpose—to uphold the integrity of the federal court system—failed to warrant the imposition of any equal protection limitation not found in the language of the statute. *Id.* at 350.

43. *Id.* at 344-45. See *supra* notes 12-20 & 30-34.

44. *Id.* at 345-48.

45. *Id.* at 348. The Fifth Circuit reasoned that:

[g]iven the background of violence and direct intimidation prevalent at the time of the original passage of Section 1985(2), it would be anomalous to find, without any specific support in the legislative history, that Congress intended to create a federal tort remedy for an employer's economic use of public information relating to the filing of federal lawsuits. Section 1985(2) was not designed as a vehicle to remedy such allegedly tortious acts of employers against employees pursuing workmen's compensation or personal injury claims. Rather, it was intended to protect against direct violations of a party or witness's right to attend or testify in federal court.

Id.

46. *Id.* at 348. The circuit court affirmed the district court's grant of defendant's motion for summary judgment because the plaintiff failed to allege an injury for "having attended or testified in a court of the United States in violation of section 1985(2)." *Id.*

47. *Brewer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976).

48. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). In *Stern*, the Seventh Circuit was asked to import the equal protection requirements of § 1985(3) into a cause of action founded on § 1985(1). This contention was based in part on the Eighth Circuit's decision in *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 425 U.S. 904 (1977), which held that the equal protection language in § 1985(3) applied to § 1985(2) actions. See *supra* notes 38-41. The Seventh Circuit rejected this argument, finding *Jones* unper-

adopted a much broader interpretation of section 1985(2) clause 1.⁵¹ These courts held that the section 1985(3) class-based animus limitation does not apply to the other subsections of the provision.

The Third Circuit originally developed this interpretation in *Brawer v. Horowitz*.⁵² Examining the language of section 1985(2) in light of its legislative history, the court divided section 1985(2) into two clauses,⁵³ and held that each clause protects different rights.⁵⁴ The court reasoned that because the second clause contains equal protection language, it only applies to conspiracies to deny equal protection of the laws.⁵⁵ Consequently, any action based on clause 2 must be predicated on a race- or class-based discriminatory animus.⁵⁶ The first clause, however, lacks similar equal protection language.⁵⁷ Therefore, the court concluded that Congress intended the first clause to guard against conspiracies which directly affect the federal judicial process.⁵⁸ While this type of conspiracy must have a distinct federal nexus, it does not require as a predicate act an allegation of class- or race-based discriminatory animus.⁵⁹

suasive, and noted in passing that "the first portion of § 1985(2) aims at protecting the sanctity of federal court proceedings and could be sustained without reference to the Reconstruction Amendments." 547 F.2d at 1341 n.18.

49. *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 103 S. Ct. 1483 (1983).

50. *McCord v. Bailey*, 636 F.2d 606 (D.C.Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

51. See *infra* notes 52-58 and accompanying text for a discussion of the reasoning used by these courts.

52. 535 F.2d 830 (3d Cir. 1976). The plaintiffs, convicted in federal court of conspiring to transport and transporting stolen United States Treasury bills, alleged that the prosecuting attorney and cooperating witnesses conspired to use perjured testimony against them. *Id.* at 832.

53. *Id.* at 840. The court relied on *Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), to support this division. The First Circuit in *Hahn* characterized the first clause as addressing "conspiracies to interfere with parties, jurors, or witnesses in federal courts." *Id.* at 469. Section 1985(2) clause 2 was at issue in *Hahn*, and therefore the court did not discuss whether to infer any race- or class-based discriminatory animus requirement in clause 1.

54. 535 F.2d at 840.

55. *Id.* The court determined that the second clause of section 1985(2) "guards against those obstructions of justice 'in any State or Territory' which have as their objects the denial of equal protection of the laws." *Id.*

56. *Id.*

57. *Id.* The omission of the equal protection language in the first clause constituted not a substantive change, but rather an attempt to clarify congressional intent to prevent conspiracies that interfere with the judicial process.

58. Because the plaintiff alleged that the prosecutor and the cooperating witness merely *influenced* the jurors, the court held that he failed to state a cause of action under the statute. The court "deem[ed] this influence to be too remote to fit within the intended ambit of § 1985(2)." *Id.*

59. *Id.* The District of Columbia Circuit used reasoning similar to *Brawer* in *McCord v.*

In *Kush v. Rutledge*,⁶⁰ the United States Supreme Court resolved this conflict among the circuits by holding that section 1985(2) clause 1 does not require a discriminatory animus in order to maintain a cause of action. The Court rejected the Fifth and Eighth Circuits' interpretation of the statute and refused to apply the reasoning of *Griffin v. Breckenridge*⁶¹ to section 1985(2) clause 1.⁶² Adopting the reasoning of the majority of the circuits,⁶³ Justice Stevens stated three bases for the Court's holding. First, in deciding *Griffin* the Court only considered the equal protection question in the context of section 1985(3).⁶⁴ Second, the framers of the Klan Act added equal protection language to sections 1985(2) clause 2 and 1985(3) because the lack of such language would have caused a constitutionally impermissible invasion of the states' rights.⁶⁵ Third, and most important, the plain language of section 1985(2) clause 1 contains no equal protection language upon which

Bailey, 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). It found that "the first clause, unlike its companion provisions, prohibits conspiracies to interfere with the integrity of the federal judicial system. It does not demand a denial of 'equal protection of the laws,' nor is an implication of such a requirement necessary to avoid constitutional shoals." *Id.* at 614. Writing for the court, Judge Tamm summarized the constitutional bases for these clauses in a footnote:

The constitutional basis for the first clause of § 1985(2) is Congress's plenary power over the federal courts. . . . Congress lacked an equivalent authority over state courts, so the equal protection language in the second half of § 1985(2) was inserted to ground that portion of the statute on Congress's power under § 5 of the fourteenth amendment.

Id. at 614, n.12.

60. 103 S. Ct. 1483, 1484 (1983).

61. 403 U.S. 88 (1971). *See supra* notes 30-36 and accompanying text.

62. 103 S. Ct. 1483, 1484 (1983).

63. *Id.* *See supra* notes 47-54.

64. The *Griffin* Court invoked an invidiously discriminatory animus requirement for § 1985(3) for fear that without such a requirement it might become a general federal tort law. *See supra* note 33 and accompanying text. The defendants in *Kush* argued that the Court must apply the *Griffin* animus requirement to section 1985(2) clause 1, to avoid similar abuse of this section as a general federal tort law. 103 S. Ct. 1483, 1487-88 (1983). The defendant relied on *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir. 1981) (en banc). *See supra* notes 36-45 and accompanying text.

65. 103 S. Ct. 1483, 1487 (1983). As read by Justice Stevens, the legislative history indicated that Congress enacted the Klan Act to protect the integrity of the federal judicial system and stabilize the post-Civil War South. *Id.* at 1487. *See supra* notes 10-14 and accompanying text. The original title of the Act indicated that Congress did not intend the statute to be limited solely to the enforcement of rights guaranteed by the fourteenth amendment. Congress originally entitled the Klan Act "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." Act of April 20, 1871, ch. 22, 17 Stat. 13 (1971) (current version of § 2 of the Klan Act of 42 U.S.C. §§ 1983, 1985, 1986 (1976)) (emphasis supplied). This title indicates that the drafters of the Klan Act intended it to protect all federal statutory and fourteenth amendment rights. *See supra* note 16.

to engraft an invidiously discriminatory animus.⁶⁶

By refusing to adopt an interpretation of section 1985(2) clause 1 which rigidly required a showing of class- or race-based invidiously discriminatory animus, the Supreme Court in *Kush v. Rutledge*⁶⁷ assured a future litigant's right of access to the federal judicial system. The Supreme Court reached this conclusion by respecting the legislative history of the statute, according the plain language of the statute its due weight, and adopting a broad interpretation of that language to fully effectuate the intent of Congress.

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66. 103 S. Ct. 1483, 1488 (1983). Justice Stevens noted that the 1875 revision of the Klan Act clarified its meaning, making it unlikely that the lack of equal protection language in section 1985(2) clause 1 resulted from a drafting oversight. 103 S. Ct. at 1487 n.6. Presumably the Republican dominated Congress would have opposed any subsequent revisions in the Klan Act which might have altered the Act's ability to protect the federal judiciary or slowed the reconstruction of the south. *See supra* notes 11 & 14-15 and accompanying text.

67. 103 S. Ct. 1483 (1983).