Section 1985(2) Clause One Does Not Require Allegations of Class- or Race-Based Discriminatory Animus, Kush v. Rutledge, 103 S. Ct. 1483

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CASE COMMENTS

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


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

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. The district court dismissed respondent's claim for failure to allege a violation of his civil rights. The Ninth Circuit Court of Appeals reversed, 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. The United States Supreme Court granted certiorari, 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.

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 Congress originally enacted section 1985(2) clause 1 in section 2

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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.


7. Id. at 1354.

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


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

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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.)).


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,\textsuperscript{16} a considerable portion of the debates focused on Congress’ power to intrude in the affairs of individual states.\textsuperscript{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.\textsuperscript{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.\textsuperscript{19} As
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.


\(^{22}\) 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.


\(^{25}\) 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

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29. See supra note 3.
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

(a) injured in his person or property or

(b) 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.\(^\text{35}\)

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.\(^\text{36}\) 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.\(^\text{37}\)

The Fifth and Eighth Circuits follow the interpretation that places an equal protection limitation on section 1985.\(^\text{38}\) The Fifth Circuit's *en banc* decision in *Kimble v. D.J. McDuffy, Inc.*,\(^\text{39}\) ably illustrates the rationale for this approach.\(^\text{40}\) 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.


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).


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


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.

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

The Third, Seventh, Ninth and District of Columbia Circuits...
adopted a much broader interpretation of section 1985(2) clause 1. 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. Examining the language of section 1985(2) in light of its legislative history, the court divided section 1985(2) into two clauses, and held that each clause protects different rights. The court reasoned that because the second clause contains equal protection language, it only applies to conspiracies to deny equal protection of the laws. Consequently, any action based on clause 2 must be predicated on a race- or class-based discriminatory animus. The first clause, however, lacks similar equal protection language. Therefore, the court concluded that Congress intended the first clause to guard against conspiracies which directly affect the federal judicial process. 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.
In *Kush v. Rutledge*, 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 *Griin v. Breckenridge* to section 1985(2) clause 1. Adopting the reasoning of the majority of the circuits, Justice Stevens stated three bases for the Court's holding. First, in deciding *Griin* the Court only considered the equal protection question in the context of section 1985(3). 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. Third, and most important, the plain language of section 1985(2) clause 1 contains no equal protection language upon which

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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).
63. *Id.* *See supra* notes 47-54.
64. The *Griin* 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 *Griin* 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. Rutledge67 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.