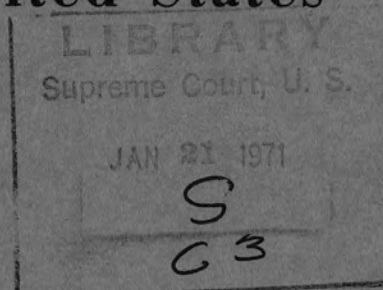


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 144

EUGENE GRIFFIN, ETC, ET AL.

Petitioner,

VS.

LAVON BRECKENRIDGE, ET AL.

Respondents.

pt. 1

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Place Washington, D. C.

Date January 13, 1971

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C O N T E N T S

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Stephen J. Pollak, Esq., on behalf of Petitioners	3
Lawrence G. Wallace, Esq., on behalf of the United States	20

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

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4 EUGENE GRIFFIN, ETC., ET AL., :
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Petitioners, :

vs. :

No. 144

LAVON BRECKENRIDGE, ET AL., :

Respondents. :

Washington, D. C.,

Wednesday, January 13, 1971.

The above-entitled matter came on for argument at
2:25 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

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LAWRENCE G. WALLACE, ESQ.,
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Department of Justice
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Counsel for the United States as Amicus Curiae

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APPEARANCES (Continued):

W. D. MOORE, ESQ.,
Philadelphia, Mississippi
Counsel for Respondents

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1 injury or a deprivation," a civil cause for damages is created.

2 The particular issues as we see them are two, whether
3 this section 1985(3) reaches a conspiracy of private citizens,
4 to prevent persons and class of persons on account of their
5 race from seeking equal protection of the law and from enjoying
6 equal rights, privileges and immunities under federal and
7 state law.

8 Now, if the statute reads as we believe and urge that
9 it be read, then the Court has before it a question of power,
10 whether section 2 of the Ku Klux Klan Act is within the powers
11 of the Congress.

12 Let me state briefly the facts which arise on demurrer
13 as the district court dismissed the petitioner's complaint.
14 One, R. G. Grady of Memphis, Tennessee, was driving his car in
15 Kemper County, Mississippi and had as passengers four young
16 Negro men. He was driving on federal, state and local high-
17 ways. The period was -- the day was July 2, 1966.

18 Two other men, the Breckenridges, white, conspired
19 to drive their pickup truck in the path of the Grady car. They
20 were of the mistaken belief that Grady was a civil rights
21 worker --

22 Q What was Grady, white or Negro?

23 A I don't know. I have closely read everything in
24 the -- that I could lay my hands on, and I believe from this
25 reading that Grady was also Negro.

1 Q The passengers were Negro?

2 A The passengers were all --

3 Q The Breckenridges are white men --

4 A The Breckenridges are white, yes.

5 Q I see. The journey -- while I have interrupted
6 you at least -- was all within one state, was it not, the
7 driving around on the highways?

8 A That's right. The allegation was that they were
9 on federal highways, state and local highways.

10 Q But the travel itself was all intra --

11 A There is no allegation that they went beyond in
12 this travel the State of Mississippi.

13 The purpose of the conspiracy was to deprive the
14 petitioners of exercise and enjoyment of equal rights, equal
15 privileges and immunities under Mississippi laws and under the
16 Constitution of laws of the United States. The conspiracy was
17 carried out, the Breckenridges, using guns, clubs, proceeded
18 to threaten and beat the driver of the car with injuries and
19 thereby, so the complaint alleges, depriving them of rights,
20 including rights to travel on federal highways, rights to
21 petition, rights to movement and a series of rights set forth
22 particularly in the complaint.

23 The occupants of the car initiated this action. The
24 district court dismissed the case, the claim, on a motion on
25 grounds that there was no allegation that the action was other

1 than by purely private citizens. The court of appeals for the
2 Fifth Circuit affirmed. It did so, in its words, reluctantly,
3 feeling bound by the decision of this Court in Collins vs.
4 Hardyman and the opinion of Judge Goldberg states that the
5 Court would not be surprised if Collins were disapproved and
6 section 1985(3) were held to embrace private conspiracies.

7 In our argument before Your Honors, we urge first
8 that section 1985 be given the scope which we see in its words,
9 in its legislative history, to reach purely private conspiracies,
10 persons not acting under color of law, and depriving others
11 of rights afforded by federal and state citizenship, where
12 that conspiracy and the deprivation has a purpose because of
13 the membership of those victims in a class. Here the class is
14 the racial class, it is a racial conspiracy to deprive these
15 Negroes and other Negroes of the exercise of the rights
16 afforded them by federal and state law.

17 Q Mr. Pollak, what if these were five law school
18 students, all white, from Michigan or Minnesota, how would
19 that affect the arguments you are making?

20 A We would believe that our argument rests on
21 their membership in a definable class, the object of the con-
22 spiracy being to vent itself on the enjoyment by that class
23 for the members of the class of their rights. Now, we would
24 not -- we are confronted here with a race case, and the court
25 has indicated that it will decide constitutional questions on

1 the facts of the particular case, but we would not say to the
2 court that there could not be a class beyond race where it is
3 a definable class.

4 Q And you emphasize too your belief of the
5 attackers was mistaken and indeed these passengers were not
6 engaged in any such enterprise as the attackers thought they
7 were engaged in. I wonder if you would enlighten me a little
8 bit on what difference that would make, whether they were mis-
9 taken or not mistaken?

10 A Well, we do not know whether the occupants of
11 the car were engaged in activities of the nature of civil
12 rights activities. The only statement that the record shows
13 is that the Breckenridges had a mistaken belief that Grady was
14 a civil rights worker. The record before the court does state
15 that these particular Negroes and other Negro Americans were
16 deprived of the exercise of rights, were intimidated from the
17 exercise of a battery of rights.

18 Q But the others were not in the car?

19 A Those in the car and others not in the car, yes,
20 sir, and that was the object of this conspiracy. It was -- it
21 occurred at approximately a month after the Meredith March
22 where we know those were times of tension and movement, freedom
23 of movement indeed was the purpose of the Meredith March, the
24 objective of an individual of the Negro race being able to
25 walk from Memphis to Jackson without fear, and we know what

1 occurred.

2 But we would see 1985(3) as formed by the Congress
3 in 1871, at a time when it was concerned with private action
4 developing conspiracies which had as their objective the
5 limitation of newly won rights in the exercise and enjoyment
6 of newly won rights by the recently freed Negro slaves. And
7 that purpose finds expression in 1985 and would find this case
8 right at the heart of the concern of the Congress in drafting
9 the statute.

10 Q Mr. Pollak, I can understand the conspiracy to
11 interfere with, say, a federally protected right like travel
12 or something like that, but if the threshold of 1985(3) means
13 that you have to have a conspiracy by two or more people to
14 deprive someone of equal protection of the law.

15 A Yes, Mr. Justice.

16 Q And how do you have a conspiracy, how does a
17 conspiracy to beat somebody up, how does that involve a con-
18 spiracy to deny equal protection of the law by the state? I
19 mean it is the state that has to deny this protection of the
20 law.

21 A Well, we would not read the powers of the
22 Congress in section 5 --

23 Q This isn't a constitutional question at all.
24 This is a statutory construction question.

25 A Well, the construction as we understand it is

1 that the statute reaches enjoyment of these rights. In other
2 words, there are two sides --

3 Q Well, enjoyment of what right is interfered
4 with in terms of equal protection by being beaten up?

5 A When the individual is beaten up because of
6 his class, he and his class are denied the equal enjoyment,
7 the equal exercise of the right. In other words, the right
8 doesn't exist --

9 Q I know, but the right is only against the state.

10 A Well, the right afforded by the --

11 Q Now how would my being beaten up deprive me of
12 the right I have against the state not to be discriminated
13 against?

14 A Well, if an individual is the subject of an as-
15 sault, we do not urge and we don't think Congress drafted 1985
16 to reach that case. He is not being deprived of an equal
17 right which he enjoys.

18 Q Well, he is just not being deprived equal pro-
19 tection of the law by the state.

20 A Well --

21 Q I mean he has a right, a federal right not to
22 be discriminated against by the state.

23 A That's correct.

24 Q And if he just gets beaten up, he is not de-
25 prived of that right that he has.

1 A That's right.

2 Q Or the right isn't even interfered with.

3 A Well, if he is beaten up by more than one per-
4 son who is engaged in that action in order to prevent him from
5 exercising that right which he has from the state, we think
6 that is what the Congress meant in 1985 or section 2 of the Ku
7 Klux Klan, that is that he was denied the equal protection of
8 the law. He had no right to exercise when it was trenched
9 upon by the conspiracy.

10 Q I don't see that being beaten up interferes
11 with my right to be equally protected under the law.

12 A Well, we are focusing on a climate where there
13 are a series of rights which a citizen has from the state and
14 from the federal government. In order to exercise, to enjoy
15 those rights, and the court used those particular terms in
16 Ex Parte Virginia right after the enactment of the 14th
17 Amendment in these statutes, the citizens must not be intimi-
18 dated from or prevented from enuoying those rights. This
19 statute is directed to preclude the acts of individuals which
20 would interpose their actions or conspiracies between the
21 right and the citizen's enjoyment of that right, and they
22 would make that interposition because of the citizen's rights.

23 Q Well, then, I don't see how you draw the line
24 between the racial case and the non-racial case.

25 A Well, we endeavored to --

1 Q But you go ahead, I don't want to burden you or
2 the Court with my worries.

3 A Well, of course, we have a racial case here in
4 United States vs. Price. The Court said that it did not need
5 to circumscribe the outer reaches of the statute, it could
6 focus on what the coverage was in the particular case before
7 it. Here we have a race case.

8 The first issue that we considered the Court has
9 before it is what the Congress intended to reach in 1985. This
10 is the position the Court took in Collins, that the Congress
11 intended to reach or in fact did reach, only conspiracies
12 under color of law.

13 Now, we think the legislative history, the words and
14 indeed the positions taken by this Court are in the way of the
15 decision of the Court, the reading of the statute in the
16 Collins case. Congress in the 1866, 1870 and 1871 statutes,
17 as this Court has just been reviewing in the Adickes case and
18 in the Arizona vs. United States case, Congress knew well how
19 to distinguish between actions under color of law and purely
20 private actions. It did so in the various sections of the
21 1866 act, it did so in the 1870 act, and it did so here. And
22 in this 1871 act, section 1 of the act, a civil section, which
23 is now 1983, Congress used the words "under color of law," and
24 in section 2 Congress omitted those words. We think it is
25 clear from its use of the words and from the background

1 legislative history that it drew section 1 to reach
2 actions of a single person under color of law which denied
3 rights and that section 2 was drawn to reach purely private
4 conspiracies which has as their objective the deprivation of
5 equal rights and equal privileges and immunities.

6 And we believe that the Congress, sensitive to the
7 questions which were part of the debate, Mr. Justice White
8 raises, that the Congress included the word "equal" with the
9 sensitivity to what it was concerned with, what it directed
10 this statute to reach was group conduct, the conspiracy, which
11 was aimed at denying a class of persons, because of the member-
12 ship in the class of these equal rights.

13 The Congressman that introduced the amendment that
14 added the word "equal", Congressman Shellabarger, explained
15 this use of the term. We think his words have meaning and
16 understand the reach of the statute. He said the objective
17 of the amendment is to confine the authority of the law to
18 prevention of deprivations which shall attack the equality of
19 rights of American citizens, that any violation of the right
20 the animus and effect of which is to strike down the citizen
21 to the end that he may not enjoy equality of the rights as
22 contrasted with his and other citizens' rights, shall be with-
23 in the scope of the remedies. That is at page 476 of the
24 Globe.

25 Now, I don't know that I need dwell on the reach of

1 the statute to purely private action. The Court rather di-
2 rectly, after the 1871 act, in the Harris case, read the
3 statute as reaching purely private action. Mr. Justice Harlan
4 and Mr. Justice Stewart, in their concurrence in Monroe vs.
5 Pape in 1961, gave it that reading. In Adickes, just six
6 months ago, Mr. Justice Harlan makes a similar expression in
7 two footnotes. Mr. Justice Brennan, in a concurrence and
8 partial dissent, states that he believes Collins is no longer
9 the law and that the reach of the statute to purely private
10 actions is clear.

11 In similar decisions of this Court with respect to
12 the language of section 241 of the criminal statute, would
13 recognize and does recognize the words that two or more persons
14 conspire as reaching purely private actions.

15 Q Mr. Pollak, perhaps I would disturb you if I
16 said that I share the same difficulty Mr. Justice White has
17 expressed. Can you pinpoint in a few words just what right --
18 you spoke in general terms of rights -- just what right these
19 people were deprived of, as sad as the circumstances were?

20 A Your Honor, we do not see the case as raising a
21 question of whether they were deprived solely of a right which
22 they have by the force of the 14th Amendment alone. We see
23 the enactment of the Congress as going beyond the 14th Amend-
24 ment and making it a civil cause of action where persons con-
25 spire to deprive the individual of the enjoyment of his rights

1 under state law.

2 Q Well, is it a right not to be beaten up or is it
3 a right to enjoy life -- what -- undisturbed by a conspiracy of
4 this kind?

5 A We would state it as a right to enjoy life as an
6 equal participant in the civil society and not to be the object
7 of conspiracies which aim to limit the enjoyment of that
8 battery of rights which a citizen has as a member of that
9 society.

10 Q Well, Mr. Justice White referred to his being
11 beaten up and I would assume this would take more than the one
12 individual to do. Would it apply to him, this argument that
13 you are making, under those circumstances?

14 A Of course, it would only apply where there were
15 more than one individual --

16 Q Yes?

17 A -- participant.

18 Q This is why I made that assumption.

19 A Pardon me?

20 Q This is why I made that assumption.

21 A The individual would have to have a specific in-
22 tent to assault in order to limit the enjoyment of rights.

23 Q Well, would the Justice have a federal cause of
24 action under 1985?

25 A Leaving aside the fact that he is a member of

1 the federal judiciary and that there might be a purpose to limit
2 his actions in that scope, if he is merely assaulted by two men
3 we would not think he would have a cause. If you lay on top of
4 that that the two men wish to limit his enjoyment of society,
5 we would still not think he has a cause. If you lay on top of
6 that that they attack him because of his membership in a
7 class, a definable class, we would think that then there is a
8 cause under 1985.

9 Q Well, this is becoming clear now.

10 A We think that this is what the Congress meant
11 in framing the statute, to use the term "equal protection of
12 the laws and equal privileges of immunities, equal to others."

13 Now, we believe, may it please the Court, that the
14 scope of the statute as to the rights protected is also clear.
15 Congress had in mind not only federal rights under federal
16 Constitution, rights of national citizens, but also rights flow-
17 ing from the states, and this reflects itself in the words of
18 the statute, it does not say under the laws of the United
19 States, as do other provisions of the laws enacted in that 1860
20 period. It says under the laws.

21 So we see the possible sources of power of the
22 statute as being section 5 of the 14th Amendment, section 2 of
23 the 13th Amendment, and the oft-recognized power of the Congress
24 to make enactments aimed at protecting rights of federal
25 citizens, power which the Court has recognized in various

1 decisions -- Yarborough, Logan, and others.

2 The primary statutory fount of power that the
3 Congress was looking toward was, of course, the 14th Amendment.
4 The front piece of the statute states that it was enacted to
5 enforce the provisions of the 13th Amendment and for other
6 purposes. So we think that the sources of power can be either
7 the 14th and other sources, but we would look initially at the
8 14th Amendment and at section 5. Indeed, the Court is aware
9 that it was the question in Mr. Justice Jackson's framing of
10 the opinion in Collins, the question of whether there was
11 power to make this enactment that led him to circumscribe the
12 reach of the statute in order, I think it is fair to say, to
13 say what he considered to be a very difficult constitutional
14 question.

15 Q Do you think this case can be squared with
16 Collins vs. Hardyman? I mean don't you have to overrule it?

17 A We state in the brief, Mr. Justice Harlan, that
18 you do have to overrule.

19 Q That is what I would think.

20 A We think that the opinion of the court in
21 Collins doesn't, when read sympathetically, the Justice doesn't
22 really say that this was all Congress was seeking to do. I
23 think in line with several decisions of the Court, he is saying
24 this is all we conceive that was constitutional, that they did
25 and we --

1 Q Yes, but --

2 A -- think that since Collins was decided, the de-
3 cisions of this Court have crossed several of the then consid-
4 ered extremely difficult constitutional issues. Katzenbach vs.
5 Morgan, they said that the enforcement clause, as has Jones
6 and as has South Carolina vs. Katzenbach, that the enforcement
7 cluse of the reconstruction amendments are positive grants of
8 power. And as Mr. Justice Stewart stated in the concurring
9 and dissenting opinion in the Arizona case, the Congress may
10 embroider the rights set forth in the 14th Amendment, which
11 was there under consideration.

12 Q Mr. Pollak, is there any question that Congress
13 just in a straight-forward way could pass a valid law prevent-
14 ing interference with movement on the highways?

15 A I don't think there is any question that they
16 could. They could.

17 Q They could --

18 A On an interstate highway.

19 Q Or on any other highway?

20 A The power with the Congress to check what I re-
21 ferred to as the rights of --

22 Q The real hooker here is the first part of 1983,
23 isn't it?

24 A The real -- the toughest issue is the part that
25 addresses itself to the equal protection clause.

1 Q Because the interference with the federal right
2 as the end result, interference with movement on the highway,
3 which this could easily be --

4 A That's right, it could be --

5 Q That would be easy.

6 A -- probably no strike of movement on the highway.

7 Q I don't think that is so easy, because so far
8 as section 5 is concerned the privileges and immunities pro-
9 vision of section 5 is limited by the qualification of state
10 action in terms of the amendment.

11 A Yes, but, Your Honor --

12 Q So why is that so easy as --

13 Q Because the movement on the highway doesn't
14 come from that.

15 A Well, I was addressing the -- or endeavoring to
16 respond to the question in light of Crandall vs. Nevada and
17 the light flowing from what there is referred to as the essence
18 of the federal union.

19 Q The Guest case itself --

20 A Well, the Guest case itself, yes, sir.

21 Q -- has ascribed precedent for that, that the
22 right of interstate travel doesn't necessarily derive from the
23 14th Amendment.

24 A No. The Congress was clearly thinking of the
25 rights of national citizenship, rights under the 13th

1 Amendment and 14th Amendment when it drafted section 1985 in
2 1871. But we think -- we in our brief call forth the opinions
3 of six members of the Court in Guest which state that the
4 Congress has power under the section 5 of the 14th Amendment
5 to reach purely private conspiracies which are aimed at the
6 non-equal access to public facilities. Indeed there are state-
7 ments there that are broader, and we would call that power
8 forth as the basis for the statute which the Congress has en-
9 acted and which this Court endorsed in this case to address
10 the constitutionality.

11 Q You would be making this same argument, I take
12 it, if a band of people had picketed a theater or restaurant,
13 some public accommodation, for the purpose of keeping one class
14 of people from having access to that restaurant. Would you
15 say that is a violation of the same kind you are urging here
16 in this case?

17 A Well, we would say that if the picketing was
18 part of it, that you would have several sources to reach the
19 picketing that would be a right of national citizenship. But if
20 the picketers are addressing a deprivation of rights of
21 Negroes, for example, we would say that that was a denial of
22 equal protection and it would be reached by this statute, yes,
23 we would, Your Honor.

24 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pollak.

25 Mr. Wallace, you will just have time to lay a

1 foundation.

2 ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

3 ON BEHALF OF THE UNITED STATES

4 MR. WALLACE: Thank you, Mr. Chief Justice, and may it
5 please the Court. I wish first to speak to the question that
6 was put by Mr. Justice White and Mr. Justice Blackmun. As we
7 see the issue of what right is that is being denied by the pri-
8 vate conduct here, I think some insight into the --

9 Q Well, that isn't really the question. This
10 isn't really the question. The question is how do the facts of
11 this case satisfy the first sentence of 1985(3).

12 A Yes, why is there a violation of -- why is there
13 a deprivation of the equal protection of the laws.

14 Q Why is there a conspiracy to deprive someone of
15 equal protection of the law?

16 A And we agree with Mr. Pollak that the equal pro-
17 tection of the laws, as used in both the 14th Amendment, and
18 there is no reason to read it differently in this statute,
19 embraces enjoyment of the rights that are guaranteed against
20 the state, and the question is how is this conspiracy interfered
21 with one of those rights.

22 Q And the right we are talking about is the equal
23 protection of the law.

24 A That is correct, the rights that are guaranteed
25 by the 14th Amendment against the state. That, as I understood

1 it, was the question.

2 Q Well, it is the right to equal protection of the
3 law guaranteed by the 14th Amendment.

4 A That is correct, which includes the right to
5 enjoyment of that guarantee as against the states. This was
6 held as far back as Ex Parte Virginia and Slaughter vs. West
7 Virginia. It is not merely the abstract right as against the
8 state, but it is the right to enjoyment.

9 Q I couldn't see the reference including the right
10 of national citizenship.

11 A Well, it could be read that way. We have ex-
12 pressed some difficulty on the facts of this case about tying
13 in the allegations of this complaint with what has traditionally
14 been denominated as one of the rights of national citizenship.
15 I think it is instructive to see our position to look at the --

16 Q I don't see why you zero in on the 14th Amend-
17 ment, to make this exclusively a 14th Amendment case.

18 A Well, it is a statutory case and the terms of
19 the statute that are at issue here are identical to terms used
20 in the 14th Amendment.

21 Q How about the Fifth Amendment? That is equal
22 protection too, isn't it?

23 A Well, it has been interpreted to affect that
24 guarantee, yes, but the words aren't there, Mr. Justice. The
25 words that we use here are words that were used contemporaneously

1 in the 14th Amendment. I thought that was --

2 Q Does that tie you down with the 14th Amendment
3 and limit yourself?

4 A Well, as I say, it is a statutory case but
5 obviously the words of the statute had a background in the pur-
6 pose of the Congress that adopted the 13th, 14th and 15th Amend-
7 ments and contemporaneously used the same words and this, after
8 all, was denominated by that Congress as an act for enforcement
9 of the -- for the purpose of enforcing the 14th Amendment and
10 for other purposes. We say we are not limited in our argument
11 in the 14th Amendment, we rely also on the 13th Amendment,
12 which I think is very helpful in this kind of application of
13 the statute.

14 Q Would you think this would apply to traveling?

15 A Of course. That is what I was hoping to get to
16 but I imagine I will get to it tomorrow, the allegations in
17 the complaint that I think are relevant here. It seems to me
18 that that is an instructive place to begin and I would like to
19 compare those allegations with other provisions of federal law
20 that have been adopted to enforce these two amendments, and I
21 will begin there tomorrow.

22 (Whereupon, at 3:00 o'clock p.m., argument in the
23 above-entitled matter was adjourned, to reconvene on Thursday,
24 January 14, 1971, at 10:00 o'clock a.m.)

25 - - -