Wilkins & Thomas v. US

Memorandum for the US

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23289

COLLIE LEROY WILKINS, JR., AND
EUGENE THOMAS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The United States submits this memorandum in response to the Court's letter of March 2, 1967, in which the parties were requested to file supplemental memoranda discussing the following questions:

"1. In the absence of state action, is freedom of assembly a right or privilege secured by the Constitution or laws of the United States, within the meaning of 18 U.S.C. 241?"

"2. And in the absence of state action, is the right to petition a state governor for redress of

grievances a right or privilege secured by the Constitution or laws of the United States within the meaning of 18 U.S.C. 241?"

In the circumstances of this case, we answer both questions "yes."

I. Introduction

In our main brief we argued that the right to enjoy the benefits of the federal court order entered by Judge Johnson is derived from Article III of the Constitution and exists without regard to the Fourteenth Amendment. That being so, we urged that, like other distinctly national rights, privileges, and immunities[1/], it is protected from interference by conspiracies of private persons, whether or not state officers are involved in the conspiracy. We adhere to that view. The argument which follows is in response to the questions from the court.

Our answer to the Court's questions does not distinguish between the right to petition a state governor for redress of grievances and freedom of assembly. We believe that in the circumstances of this case each right is protected by §241.

1/ See In Re Quarles Butler, 158 U.S. 532, 536; United States v. Guest, 383 U.S. 745, 757-760; Ex Parte Yarbrough, 110 U.S. 651; Logan v. United States, 144 U.S. 263; United States v. Lancaster, 44 Fed. 885 (W.D. Ga. 1890).

The indictment in this case charged a conspiracy to injure, oppress, threaten, and intimidate citizens of the United States in the exercise and enjoyment of the right and privilege to participate in the Selma march and to present a petition to the Governor of Alabama "pursuant to an order entered on March 17, 1965, by the United States District Court for the Middle District of Alabama, in the case of Williams v. Wallace, Civil Action Number 2181-n." This order, in turn, was based upon a history of denials of the right to register to vote and official interference with peaceful protests intended to persuade officials to permit the free exercise of that right. See Williams v. Wallace, 240 F. Supp. 100 at 103-104, 195, 108, and note 6; Appendix A (240 F. Supp. 112-119). The registration process in Alabama is unitary -- registration entitles one to vote in both state and federal elections[2/] -- which means that the deprivations complained of, which prompted the court order, affected equally the right to vote in state and federal elections. Judge Johnson's order authorized the march. His order authorized both (1) the exercise of the rights of national citizenship -- to assemble and petition for

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2/ Code of Alabama (1958), tit. 17, §§12,32.

the purpose of protesting denials of the right to vote in, and irregularities in the conduct of, federal elections, and (2) the exercise of Fourteenth Amendment rights -- to march from Selma to Montgomery under certain conditions to speak, assemble and petition about the denial by state officials of the constitutional right to vote in elections generally, and to petition the State Governor for redress of grievances.

II. It is a privilege of national citizenship to assemble and petition concerning denials of the right to vote in federal elections

A. The conduct of federal elections is a matter of special concern to the Federal Government. The basic rights, powers and duties with respect to federal elections are set forth in Article I of the Constitution, and Amendment XVII. Article I, §2 declares that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." A similar provision for election of Senators "by the people" is found in Amendment XVII, adopted in 1913. And Article I, section 4 provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

There are two important consequences of these constitutional provisions. First, they create a federal constitutional right in "The People" of the states to vote for Senators and Congressmen. Second, they create a special federal governmental interest in the proper conduct of such elections (an interest not restricted to ensuring an absence of racial discrimination), and vest ultimate and plenary power over the conduct of such elections in the Congress.

In Ex Parte Yarbrough, 110 U.S. 651 (1884), the defendants were indicted under an earlier version of §241 for inter alia conspiring to forcibly injure, oppress, threaten and intimidate one a Negro because he had exercised "the right and privilege of suffrage in the election of a lawfully qualified person as a member of the Congress of the United States of America." 110 U.S. at 656. The Court held that the conspiracy was covered by §241, and rejected the argument that "the right to vote for a member of Congress does not depend on the Constitution of the United States." It said that Article I, §2 "declares how [the office of Congressman] shall be filled, namely, by election," and that "the Constitution of the United States says the same persons [eligible to vote for the most numerous branch of the State legislature] shall vote for members of Congress in that State." "It is not true, therefore,"

the Court said, "that electors for member of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State," for the right is "fundamentally based on the Constitution . . ." 110 U.S. at 663-664. This ruling was reaffirmed in United States v. Classic, 313 U.S. 299, 314-315 (1941), which held that the right to vote in federal primary elections was also granted by Article I, §2.[3/] See also Wesberry v. Sanders, 376 U.S. 1, 7-8, 17.

Second, the necessity for the free exercise of the right to vote in federal elections does not "arise solely from the interest of the party [i.e., the individual voter] concerned, but from the necessity of the government itself,

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3/ In Classic the Court, per Mr. Chief Justice Stone, said:

> We come then to the question whether that right is one secured by the Constitution [within the meaning of section 241]. Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right . . . . While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . .

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that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." Ex parte Yarbrough, supra at 662. See also United States v. Classic, supra at 315. The federal government "must have the power to protect the elections on which its existence depends from violence and corruption", and the free and fair exercise of the franchise in such elections is "essential to the healthy organization of the government itself." Id. at 658, 666. See also, Burrough & Cannon v. United States, 290 U.S. 534 (1934).

3/ (Continued from preceding page)

> this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by §2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under §4 and its more general power under Article I, §8, clause 18 of the Constitution "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers. See Ex parte Siebold, 100 U.S. 371 . . . Ex parte Yarbrough, 110 U.S. 663, 664 . . . .
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> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. [citing cases]

It was to ensure that the officers of the national government would be fairly elected that Article I, §4 vests in Congress the power to "make or alter" state regulations governing federal elections. The power of Congress under this provision is plenary -- it may "assume the entire regulation of the election of representatives" and Senators or may do so "as far as it deems expedient," because Congress "has a general supervisory power over the whole subject." Ex Parte Siebold, 100 U.S. 371, 383, 387 (1880). See also Ex Parte Clarke, 100 U.S. 399 (1880). Thus, State election officials who conduct registration and voting for federal elections may properly be viewed as in effect agents or trustees of the Congress who "are called upon to fulfill duties which they owe to the United States as well as to the State," and "[t]he government of the United States ... is directly interested in the faithful performance, by the [State] officers of election, of their respective duties." Compare Ex Parte Siebold, supra at 387, 388; cf. Burroughs & Cannon v. United States, supra at 545.

Under these authorities it is clear that the proper conduct of federal elections and registration is a subject of special interest to the government and the citizens of the United States. It follows that, if there is a federal privilege implicit in the Constitution itself, apart from the Fourteenth Amendment, to assemble, speak, and petition with respect to federal governmental matters, such activities concerning federal elections must be included within the scope of that privilege. We show next, that there is such a federal privilege implicit in the Constitution itself.

B. When the subject of the assembly or petition is to deal with federal governmental matters, there is a right or privilege of assembly and petition which finds its source in "the nature and essential character of the national government" (In Re Quarles & Butler, 158 U.S. 532, 536) "quite independent of the Fourteenth Amendment."[4/] This was first recognized by the Supreme Court as long ago as the Slaughter-House Cases, 83 U.S. (16 Wall.) 36,

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4/ Cf. United States v. Guest, 383 U.S. 745, 759, n. 17 at 760 (1966).

79 (1872), and was elaborated upon shortly thereafter in United States v. Cruikshank, 92 U.S. 542 (1875). In Cruikshank the Court held not within a predecessor of section 241 an indictment charging private persons with interfering with peaceful assembly, because the assembly was not concerned with federal matters, but observed that (92 U.S. at 552):

> The right of the people peaceably to assembly for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute [now §241] ....

This principle has been recognized in the following cases: In Re Quarles & Butler, 158 U.S. 532, 535 (1895); United States v. Logan, 144 U.S. 263, 286-287 (1892); Hague v. CIO, 307 U.S. 496 (1939); United States v. Guest, 383 U.S. 745, 771-772 (separate opinion of Harlan, J.), 779 (separate opinion of Brennan, Douglas and Warren, JJ.) (1966); Brewer v. Hoxie School District,

238 F. 2d 91, 99-100 (C.A. 8, 1956); Hardyman v. Collins, 183 F. 2d 308, 313 (C.A. 9, 1950), reversed on other grounds, 341 U.S. 651 (1951); Powe v. United States, 109 F. 2d 147, 151 (C.A. 5, 1940), cert. denied, 309 U.S. 679; compare De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Yates v. United States, 354 U.S. 298, 343 (1957) (separate opinion of Black, J.).

The language in Cruikshank refers to a right of assembly, not only for the purpose of petitioning the federal government, but also "for any thing else connected with the powers or the duties of the national government." Thus, in Hague v. CIO, 307 U.S. 496 (1939) the plaintiffs complained of interference with the freedom "to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it ...." 307 U.S. at 512. There was no suggestion that a petition to Congress was involved. Five of the seven Justices participating in the case either held or were willing to assume arguendo that it was a privilege of national citizenship to speak and assemble to discuss

the NLRA. The opinion of Justice Roberts, joined by Mr. Justice Black and Chief Justice Hughes, quoted with approval the relevant passage from Cruikshank and then said (307 U.S. at 513):

> Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom.

Mr. Justice Stone, joined by Justice Reed, thought it more appropriate to base the decision in that particular case on the due process clause of the Fourteenth Amendment, but was willing to assume for the purpose of his opinion that there was a privilege of national citizenship to assemble to discuss the NLRA. 307 U.S. at 522. Justice Roberts' opinion in Hague (buttressed by the willingness of Justices Stone and Reed to agree with it arguendo)[4a/] stands for the proposition that the privilege extends to peaceable assemblies to discuss "federal matters", whether or not a petition to Congress is involved. As Mr. Justice Brennan recently put it, in an opinion joined by two other Justices, there is a privilege of national citizenship to discuss national "public affairs or petition for redress of grievances." United States v. Guest, supra at 779 (concurring in part and dissenting in part) (emphasis added). Cf. Thomas v. Collins, 323 U.S. 516, 533-534 (1945).

4a/ See 307 U.S. at 522.

This Court was certainly of the view, nearly three decades ago, that the privilege extends beyond assemblies called for the purpose of petitioning Congress. In Powe v. United States, 109 F. 2d 147 (C.A. 5, 1940), cert. denied, 309 U.S. 679, involving an indictment under §241 charging a conspiracy to injure and oppress a newspaper editor in the free exercise of his right and privilege as a citizen to speak and publish his views in a newspaper, the Court, discussing the type of case that would be covered by §241, said (109 F. 2d at 151):

> .... we do not doubt that Congress may directly protect its citizens in their right to assemble peaceably and petition the federal government for redress ... under what are called the implied powers of Congress .... Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it. Assuming that for this reason Congress, if it finds it necessary, can legislate to maintain such freedom in that field, it does not follow that Congress can legislate generally to preserve such freedom in ... matters of purely state concern. (emphasis added)

The disposition of the case makes it clear that the Court believed that by enacting section 241 Congress had protected assemblies to discuss federal elections. The convictions were reversed only because the indictment did not disclose "what the speaking and printing conspired against related to", the right to speak and print about "matters in general" is not a privilege of citizenship, and the other counts of the indictment stated that the speaking and printing "related wholly to matters with which the City and County of Mobile were concerned, and with which the United States had no concern ...." 109 F. 2d at 151.[5/] Indeed, if -- as this Court assumed in Powe -- there is a privilege of citizenship apart from the Fourteenth Amendment, to speak, publish, and assemble as well as to petition, it is plain that §241 protects it, since by enacting section 241 Congress intended to protect all rights secured by the Constitution and laws,

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5/ As noted earlier, paragraph 4 of the indictment in this case did not refer to the object of the march, but it did incorporate by reference the court order which, in turn, was based on denials of the right to vote in federal elections.

explicitly or by implication. United States v. Price, 383 U.S. 787, 800, 802-803 (1966).

So, too, in Hardyman v. Collins, 183 F. 2d 308 (C.A. 9, 1950), reversed on other grounds, 341 U.S. 651 (1951), the Ninth Circuit endorsed the language in Powe quoted above concerning the freedom to speak and print about federal elections, and, referring to the relevant language in Cruikshank and citing Hague v. CIO, said that "This passage has been repeatedly cited by the Supreme Court as establishing the right of assembly for national purposes as a federally protected right" (183 F. 2d at 313).[6/]

It is therefore apparent that, where federal governmental matters are concerned, the courts view the privilege as coextensive with the rights protected from

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6/ The Supreme Court reversed Hardyman only because it was a civil action brought under what is now 42 U.S.C. 1985(3), and the Court believed that that statute authorized only equal protection suits against persons acting under color of law. The suit was against members of a mob composed of private persons who broke up a meeting called to discuss the Marshall Plan and to send a petition opposing it to federal officials. The Court's opinion assumed, without deciding, that the case would be within the scope of the privilege described in Cruikshank, 341 U.S. at 660. Justices Burton, Black, and Douglas, dissenting, thought the suit was authorized and that the Cruikshank privilege was applicable. 341 U.S. at 663-664. The position of the dissenters was cited with approval by Justice Brennan in his separate opinion in United States v. Guest, supra at 779.

Congressional or state invasion by the First Amendment and the due process clause of the Fourteenth -- including not only petition but speech, press, association and assembly. 7/ The march was an assembly intended to dramatize federal election grievances, 8/ and Judge Johnson's order was a conclusive determination that the march he authorized at the particular time and place was a valid exercise of the privilege to assemble. Of course, no collateral inquiry could be made into that legal question by the jury, and therefore, the only question the jury needed to -- and did -- decide was whether defendants specifically intended to interfere with the march.

7/ Compare Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353 (1937); Griswold v. Connecticut, 381 U.S. 479, 483 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Gibson v. Florida Legis. Inv. Comm., 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); New York Times v. Sullivan, 376 U.S. 254 (1964).

8/ The end of the march included a rally, which the record shows lasted over five hours and drew many thousands of people (R. 410-412). Only then was it planned that "not more than 20 persons will enter the Capitol Building, proceed to the Governor's office, seek an audience with the Governor and present a petition." 240 F. Supp. at 121.

Moreover, this assembly and march fall within that branch of the Cruikshank doctrine that gives citizens a privilege to petition officials who have powers and duties in connection with federal governmental matters. We note preliminarily that nothing in the Constitution suggests that the right of "petition" may be exercised only by the presentation of a formal document to Congress or to an official. If substance is to prevail over form it must be recognized that Congress may be as effectively "petitioned" by a demonstration in Alabama as by filing a document in Washington. And it would be blind to reality to deny that in truth that was a major object of the Selma-Montgomery march. Indeed, the President in proposing the Voting Rights Act of 1965, the Attorney General in testifying in support of it, and the Congress in enacting the measure, all referred to the denial of voting rights in Selma, dramatized by the march, as indicating the need for the legislation.9/

9/ See Remarks of President to Joint Session of Congress, March 15, 1965, Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 89th Cong., 1st Sess., pp. 5-7; Report of the Committee

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We need not press the point here, however, because presentation of a petition to the Governor of Alabama concerning election grievances -- including federal election grievances -- should be viewed as the equivalent of a formal petition to Congress or to federal officials. The Governor of Alabama, under our constitutional system, is the chief executive officer of a state which conducts registration and voting for federal elections pursuant to Congressional acquiesence (see supra pp. 8). His responsibilities include membership on the board which appoints county registrars[10/] and which has the power to discharge them for malfeasance or misfeasance in office.[11/] And, of course, as the chief executive of Alabama he

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9/ (continued from preceding page)

on the Judiciary, House of Representatives, 89th Cong., 1st Sess., pp. 10-11; Hearings before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pp. 10-12; Joint Statement of Individual Views, Senate Committee on the Judiciary, Report No. 162, part 3, pp. 7-9.

10/ Code of Alabama (1958) tit. 17, §21.

11/ Id., §22.

is charged with taking care that the laws of the state and the United States be faithfully executed, and is sworn to uphold the Constitution of the United States[12/] -- meaning, in this context, doing all in his power to assure that officials under his jurisdiction act properly when managing registration and voting for federal elections.

The Governor of Alabama is thus a logical person to whom a petition protesting discrimination in federal elections should be presented. Insofar as he has responsibilities for those elections, or for supervising and appointing those who directly conduct them, he is in much the same position as a federal official and in effect was carrying out a federal function. See supra p. 8 . Had Congress assumed exclusive control over federal elections directly (see supra pp. 6-8) it would have been logical to petition the appropriate federal election officials; but, Congress not having done so, it was appropriate to present the petition to the Governor. Since his status viz a viz federal elections was in the nature of an agent or trustee

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12/ Id., Const. of Alabama, Art. 16, §279; Art. 5, §120, tit. 55, §17; U.S. Const., Art. VI, cl. 3; see Cooper v. Aaron, 358 U.S. 1, 18 (1958).

of the United States, it was a privilege of these citizens of the United States to present their petition to him.

In sum, those who wanted to conduct the Selma-Montgomery march and petition the governor had a privilege of national citizenship to do so under appropriate circumstances. They asked a federal court to permit them to exercise the privilege and to prevent others from interfering with its exercise. The court issued an appropriate decree which defined the scope of their privilege and the precise circumstances under which it could be exercised. Section 241 is surely applicable to conspiracies to interfere with such federal rights or privileges, quite apart from the existence of a court order. The existence of the court order in this case simplified the proof and the instructions.

III. Section 241 reaches private conspiracies to interfere with the exercise of the Fourteenth Amendment rights to petition a state governor for redress of grievances and assemble and march along a public highway to protest denial of the right to vote

The preceding argument demonstrated that, apart from the Fourteenth Amendment, there is a federal constitutional privilege, protected by §241, to assemble to protest against, and petition the Governor of Alabama with respect to, misconduct in registration for federal elections. We now consider whether the rights, secured by the Fourteenth Amendment against state action, to petition state officials for a redress of grievances and to march along a public highway to protest official racial discrimination in the conduct of registration for state as well as federal elections, are protected by section 241.

The rights which the defendants conspired to interfere with in this case include Fourteenth Amendment rights. To be sure, perhaps not every assault on a person who is speaking in a public place constitutes an interference with the exercise of Fourteenth Amendment rights. If a person is not seeking anything from the state, or asserting rights against the state, or his activity is not in any other way related to the discharge

of the State's duty under the Fourteenth Amendment, it would be difficult to say that he is exercising a Fourteenth Amendment right. For example, a meeting in a private home where the participants discuss the virtues of hunting and fishing, or even the ordinary everyday use of the public streets and roads, may not be exercises of Fourteenth Amendment rights. Where, however, the speaker is not only using a public facility maintained by the State, such as a public street or highway, but is also using it only after a controversy between himself and the State as to his right to use it has been resolved in his favor, and the individual is also speaking about state functions, complaining of the manner in which they have been discharged and demanding that corrective measures be undertaken by the State, there can be no question but that the speaker is exercising his rights under the Fourteenth Amendment. That is the case before this Court. Here a group of Negroes sought to march along a public highway to protest deprivation of constitutional rights by state officials, and to petition the state governor and induce him to take positive action to obtain for them the freedom to register to vote in elections conducted by state officials. Thus, the march was in every sense an exercise of Fourteenth Amendment rights.

In United States v. Price, 383 U.S. 787 (1966) the Supreme Court unanimously held that section 241 protected Fourteenth Amendment rights.[13/] At the same time six members of the Court in United States v. Guest, 383 U.S. 745 (1966) expressed the view, in opinions by Mr. Justice Brennan and Mr. Justice Clark, that Congress indisputably has the power under section 5 of the Fourteenth Amendment "to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (opinion of Clark, J.); see also

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13/ Thus the decision of this Court in Williams v. United States, 179 F. 2d 644 (1950), which the Supreme Court affirmed by a 5-4 vote, is no longer pertinent to the inquiry we have undertaken here. The basis for decision there was that §241 did not reach any conspiracies aimed at Fourteenth Amendment rights, a view adopted on appeal by four of the five-member majority in the Supreme Court. 341 U.S. at 71 (Mr. Justice Black concurred in the affirmance on the ground of res judicata and did not reach the §241 question, 341 U.S. at 85-86). That interpretation of §241, as we noted, was rejected by an unanimous court in United States v. Price, supra.

383 U.S. at 781-784 (opinion of Mr. Justice Brennan).[14/] The remaining question is whether §241 reaches private conspiracies to interfere with the exercise of Fourteenth Amendment rights.

In Guest, the government sought a ruling that section 241 reaches private conspiracies to interfere with the right to equal utilization of State facilities -- a Fourteenth Amendment right. Three Justices (per Stewart, J.) appeared to say that section 241, insofar as it protects rights secured by the Fourteenth Amendment, reaches only conduct in which the State or its officers are somehow involved. But they found the equal

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14/ The opinion of Mr. Justice Stewart, announced as the opinion of the Court, did not reach the question of legislative power under section 5. 383 U.S. at 745. The conclusion of the six-member majority regarding Congressional power under section 5 is buttressed by the subsequent decision in Katzenbach v. Morgan, 384 U.S. 642 (1966), in which the Court, although not considering the question of private conduct, held that "section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651. Morgan holds that once Congress has acted under section 5, the judicial function is to determine, as with any other Act of Congress, whether the ends sought are within the scope of the Constitution and whether the means chosen are appropriate

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protection paragraph of the indictment legally sufficient because it was read to allege a purpose to involve the state in the execution of the conspiracy. Three other Justices (per Brennan, J.) would have held that section 241 did reach private conspiracies that interfered with Fourteenth Amendment rights; and the opinion of the remaining three (per Clark, J.) on this question seems to us to be ambiguous.

The concurring opinion of Justices Clark, Black, and Fortas opens by stating that they "join the opinion of the Court", i.e., of Justice Stewart, and later states that "A study of the language in the indictment clearly shows that the Court's construction is not a capricious one, and I therefore agree with that construction, as well as the conclusion that follows [i.e., that the equal protection paragraph of the indictment is legally sufficient.]" That may be thought to mean

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14/ (continued from preceding page)

to that end. Id. at 650, quoting from McCulloch v. Maryland, 4 Wheat. 316. It is not the task of the Court to determine whether the conduct proscribed by Congress under section 5 violates the Fourteenth Amendment independent of Congressional action. Id. at 649. For a discussion of the relationship between the Morgan and Guest decisions, see Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 117-121 (1966).

that Justice Clark and those who joined him agreed that the equal protection paragraph was sufficient only because it could be read to allege state involvement, and that he did not think it capricious to so construe this part of the indictment in order to save it. But this reading of Justice Clark's views is not compelled when his opinion is considered as a whole, because he went on to say:

> The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. My Brother BRENNAN, however, says that the Court's disposition constitutes an acceptance of appellees' aforesaid contention as to §241. Some of his language further suggests that the Court indicates sub silentio that Congress does not have the power to outlaw such conspiracies. Although the Court specifically rejects any such connotation, ante, p. 755, it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of §5 empowers the Congress to enact laws punishing all conspiracies -- with or without state action -- that interfere with Fourteenth Amendment rights. (Emphasis added)

The underlined sentence probably refers to Justice Brennan's statement that the Court's opinion imposed "severe limitations" on the prosecution by requiring

it to show State involvement in the conspiracy, and that this limitation "could only stem from an acceptance of appellees' contention that ... a conspiracy of private persons to interfere with the right to equal utilization of state facilities ... is not a conspiracy" within the reach of §241. 383 U.S. at 776. Justice Clark alluded to Justice Brennan's view of the Court's construction of the statute, but he in so many words rejected only what Justice Brennan said the Court's opinion meant about the question of constitutional power. He does not appear to have addressed himself to the question of statutory construction.

We therefore believe that it is reasonable to read Justice Clark's opinion as technically leaving open the question whether §241 reaches private conspiracies against Fourteenth Amendment rights. In our view, then, this Court is free to decide the merits de novo.

Turning, therefore, to the merits, there is no reason to read section 241 as not covering private conspiracies to interfere with Fourteenth Amendment rights. The language and the legislative history of §241 leave little doubt that the statute covers such misconduct. The language is unqualified -- it reaches conspiracies to injure, oppress, threaten or intimidate

any citizen "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same ...." In describing who may commit the offense it refers only to "two or more persons;" it does not specify officials; it does not say action "under color of law" or of "authority," as do other reconstruction civil rights laws.[15/] And the legislative history is explicit that the law was to reach private conspiracies against the newly created rights of freemen--rights granted by the Thirteenth, Fourteenth and Fifteenth Amendments.

Senator Pool of North Carolina, in sponsoring the amendment that was to become section 6 of the Enforcement Act of 1870 -- and, ultimately, section 241 of the Criminal Code -- reiterated his preoccupation with private conspiracies. Indeed, in his view, one of the

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15/ Compare 18 U.S.C. 242; 42 U.S.C. 1983; 28 U.S.C. 1443.

principal virtues of his proposal was that it reached individuals acting in conspiracy who held no official powers. As he said (Cong. Globe, 41st Cong., 2d Sess., p. 3611):

> * * * individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the fourteenth amendment, as well as trespass upon the rights conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose.

And, again, asserting the propriety of the legislation, Senator Pool said (id. p. 3613):

> * * * That the United States Government has the right to go into the States and enforce the fourteenth and fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

In United States v. Price, supra, the Supreme Court confirmed this history by relying on Senator Pool's speech -- which it reproduced in full as

an appendix to its opinion -- as a trustworthy guide to construction of section 241. See 383 U.S. at 787. The Court also noted that §241 had its source "in the doings of the Ku Klux and the like." 383 U.S. at 800. Even those disposed to restrict the application of §241 to rights arising from the "substantive powers" of the national government have acknowledged this fundamental purpose. In United States v. Williams Mr. Justice Frankfurter wrote (341 U.S. at 76):

> . . . [I]f language is to carry any meaning at all it must be clear that the principal purpose of §6, [now 18 U.S.C. §2413] unlike §17, was to reach private action rather than officers of a State acting under its authority. Men who "go in disguise upon the public highway, or upon the premises of another" are not likely to be acting in official capacities. The history of the times -- the lawless activities of private bands, of which the Klan was the most conspicuous -- explains why Congress dealt with both State disregard of the new constitutional prohibitions and private lawlessness. The sponsor of §6 in the Senate made explicit that the purpose of his amendment was to control private conduct.

In his Williams opinion, Mr. Justice Frankfurter further stated that "the rights which [§241] protects are those which Congress can beyond doubt constitutionally secure against interference by private individuals." (Id.) Since the combined opinions in Guest establish

"beyond doubt" that Congress has the power to secure Fourteenth Amendment rights against private interference, it must follow that §241 accomplishes precisely that protection.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Memorandum for the United States has been served by official United States mail in accordance with the rules of this Court to each of the attorneys for appellants as follows:

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