NO. 85-2169

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAINT FRANCIS COLLEGE, JOHN WILLOUGHBY, GERVASE CAIN, KIRK WEIXEL, JOHN COLEMAN, RODRIQUE LABRIE, ALBERT ZANZUCCKI, ADRIAN BAYLOCK, MARIAN KIRSCH and DAVID McMAHON, individually and in their official capacities,

Petitioners

v.

MAJID GHAIDAN AL-KHAZRAJI, a/k/a MAJID AL-KHAZRAJI ALLAN,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

December 1986

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QUESTIONS PRESENTED

1. Does a claim by an "Arab" who is admittedly Caucasian, i.e., racially white, when he is presumably claiming other Caucasians or whites were improperly favored over him, constitute an allowable racial or any other allowable claim under 42 U.S.C. § 1981?

2. In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), the United States Court of Appeals for the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ____ U.S.____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981.

The question presented is:

Did the court of appeals err in applying Chevron Oil Co. v. Huson and Wilson v. Garcia when it refused to apply

the two-year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the respondent, Majid Ghaidan Al-Khazraji a/k/a Majid Al-Khazraji Allan, and the petitioners, Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities.

Petitioner, Saint Francis College, has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 784 F.2d 505 and is present in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter sometimes Petition), p. 1a.

The Memorandum Opinion of the United States Court for the Western District of Pennsylvania (Mencer, D.J.) has not been reported. It is present in the Appendix to the Petition, p. 34a.

The Opinion of the United States Court for the Western District of Pennsylvania (Ziegler, D.J.) is reported at 523 F.Supp. 386. It is present in the Appendix to the Petition, p. 46a.

JURISDICTION

The United States Court for the Western District of Pennsylvania had jurisdiction of the claim under 42 U.S.C.

§ 1981, except to the extent that issues herein may operate to remove jurisdiction. On March 12, 1985, the District Court granted petitioners' motion for summary judgment in favor of each of the petitioners. See Petition Appendix 34a.

On respondent's appeal, the United States Court of Appeals for the Third Circuit on March 3, 1986, entered a judgment and an opinion reversing the judgment below and remanding for further proceedings consistent with the Opinion of the Court. See Petition Appendix 1a.

The Court of Appeals denied a timely petition for rehearing on April 4, 1986. See Petition Appendix 80a.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

The named petitioners in this proceeding (defendants in the trial court) are Saint Francis College, John Willoughby, Gervase Cain, Kirk Weixel, John Coleman, Rodrique Labrie, Albert Zanzuccki, Adrian Baylock, Marian Kirsch and David McMahon, individually and in their official capacities. The nine named natural persons were members of the Saint Francis College Committee on Tenure at the time of the Committee's negative vote on the tenure application of respondent, a former faculty member at petitioner college, in February of 1978. Respondent's 42 U.S.C. § 1981 claim of discrimination in denying him tenure is the portion of the proceeding before the Court and the subject of this Brief.

Three complaints were filed on behalf of respondent, Majid G. Al-Khazraji, in the United States Court for the Western

District of Pennsylvania.

The first was filed pro se on October 30, 1980, against petitioner, Saint Francis College, only. The alleged basis for relief in that complaint is a violation of Title VII of the Civil Rights Act of 1964, as amended.[1] (J.A. 16)

The second complaint, labeled "Amended Complaint," was filed by prior counsel for respondent on November 7, 1980, against petitioner, Saint Francis College, and nine members of its faculty and administration (the nine named petitioners) individually and in their official capacities. This Amended Complaint [hereinafter sometimes Amended Complaint or Amended Complaint I] is in

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[1] References to (J.A. __) are to the Joint Appendix. References to (Appendix __a) are to the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. Count II charges a violation of 42 U.S.C. §§ 1985(3) and 1986. While Paragraph 2 of Amended Complaint I states that this action arises under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e, Count II in the Claims for Relief portion of Amended Complaint I restricts itself to 42 U.S.C. §§ 1985(3) and 1986. Count III raises certain state claims, which are alleged to be pendent to the federal claims. (J.A. 22)

The third complaint, labeled "Amendment to Civil Action Complaint No. 80-1550 filed at the United States District Court for the Western District of Pennsylvania," was filed pro se on November 10, 1980, against petitioner, Saint Francis College, and eight of the

nine persons named in the second complaint. (J.A. 51) In this third complaint [hereinafter sometimes referred to as Amended Complaint II], the alleged basis for relief is a violation of Title VII of the Civil Rights Act of 1964, as amended.

Pre-trial motions in essence to dismiss were filed. Portions were granted and portions were denied by District Judge Ziegler. Dismissal of the 42 U.S.C. § 1981 claim was denied. Al-Khazraji v. Saint Francis College, 523 F.Supp. 386 (W.D.Pa. 1981). District Judge Ziegler, in a pre-Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), situation, following Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), applied a six-year statute of limitations. As to the underlying elements of a § 1981 claim, Judge Ziegler, in essence, read the three

complaints filed by respondent together. Even though Amended Complaint I, the only complaint which mentioned a § 1981 claim and the one which he treated as the operative amendment, did not mention race, (Appendix 70a- 71a and 73a) Judge Ziegler concluded, inter alia, that respondent was making a claim that he was denied tenure because he is an "Arabian born in Iraq," (Appendix 71a) and that such a claim may serve as the basis for a civil rights action under 42 U.S.C. § 1981.

The attorney-prepared complaint (Amended Complaint I), the one treated by Judge Ziegler as the operative amendment, charged discrimination on the basis of national origin and religion. As previously stated, it did not mention race. None of the three complaints contained an allegation of discrimination because of color. In the three federal

court complaints (J.A. 16, J.A. 22, J.A. 51) respondent (hereinafter sometimes plaintiff) twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)."

At his deposition in July of 1982, plaintiff stated, at pp. 6, 7-8 (J.A. 66-69) [This matter is discussed at greater length at pp. 6-9 of plaintiff's deposition. (J.A. 66-71)]:

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

* * *

Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie-

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arabian peninsula.

Q. That is the geographical area?

A. That's right. This separates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

Petitioners thereafter moved for summary judgment. This motion was granted and judgment was entered in favor of each of the petitioners. As to the

§ 1981 aspect, District Judge Mencer stated, in part (Appendix 37a-39a):[2]

> Additionally, plaintiff does not qualify as a member of a protected minority under § 1981. Section 1981 is generally considered to apply only to racial and alienage discrimination, 3 A. Larson, Employment Discrimination, § 71.00 et seq.; 4 A. Larson, Employment Discrimination, § 94.00 et seq. The Amended Complaint alleges discrimination on the basis of national origin and religion, and not on the basis of race or alienage. Accordingly, the alleged acts of discrimintion here are not within the scope of 42 U.S.C. § 1981.
>
> Even if the Amended Complaint were to be read as making a racial claim under § 1981, plaintiff factually does not qualify as a protected minority member. At his deposition plaintiff stated:
>
> Q. Are you also taking the position that you were denied tenure because of your race?

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[2]By implication, Judge Mencer treated the attorney-prepared complaint (Amended Complaint I) as the operative complaint.

A. Yes.

Q. What is your race?

A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion.

Plaintiff is claiming that he was discriminated against because of his national origin, Iraq, his ancestry, Arabian, and his religious creed, Muslim. A claim of discrimination on the basis of being an Iraqi or Arab is not cognizable under § 1981. Ibrahim v. New York State Department of Health, 581 F. Supp. 228 (E.D.N.Y. 1984).

Accordingly, we must conclude that plaintiff is unable to establish a prima facie § 1981 case.

On appeal, the judgment of the district court was reversed and the case was remanded for proceedings consistent with the opinion, Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), cert. granted, 107 S.Ct. 62

(1986).

The United States Court of Appeals for the Third Circuit held that "ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them." The Court concluded that "Congress's purpose [in enacting § 1981] was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive." [Footnote number omitted.] (Appendix 24 a) The Court added that, "Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens." (Appendix 25a) It concluded its discussion of this aspect of § 1981

liability by stating [Footnote is omitted.]:

> . . . However, where a plaintiff comes into federal court and claims that he has been discriminated against because of his race, we will not force him first to prove his pedigree. We are unwilling to assert that Arabs cannot be the victims of racial prejudice: "prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is a usage or image based on all the mistaken concepts of 'race.'" Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979).[17]
>
> Accordingly, Al-Khazraji should be allowed the opportunity to prove that the discrimination he alleges is racially motivated within the meaning of Section 1981. (Appendix 26a-27a)

As to the contention of respondents that the statute of limitations had run as to the § 1981 claim, the Third Circuit noted that it had concluded in Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), that the ruling of the Supreme

Court in Wilson v. Garcia, _____ U.S. _____, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under § 1981. However, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Third Circuit refused to apply the two-year statute of limitations and instead held that its decision in Goodman would not be applied to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.

SUMMARY OF ARGUMENT

1. The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian erroneously extends the scope of § 1981.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him.

The Third Circuit's decision here directly conflicts with the decision of the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, 107 S.Ct. 62 (1986), interpreting the race

discrimination provisions of 42 U.S.C. §§1981 and 1982 and holding that "discrimination against Jews is not racial discrimination." 785 F.2d at 527.

This Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), noted that [42 U.S.C. § 1982] "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin." The limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981.

In the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the three federal court complaints he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national

origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by Plaintiff in the § 1981 racial sense, but instead in a national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition in July of 1982, plaintiff stated, in part, at pp. 6 (J.A. 66-67):

> Q. Are you also taking the position that you were denied tenure because of your race?
>
> A. Yes.
>
> Q. What is your race?
>
> A. Caucasian but I was a different branch of the Caucasian race than you are. I am Caucasian but a different branch. I am claiming the national origin which is closer related to race and religion. [p. 6]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976),

is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. Indeed, it is cogent authority for limiting § 1981 to racial discrimination.

A claim based on status as an Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim. If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion

of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1]" [Footnote is omitted.] (Appendix 32a) Additionally, to the extent that applying § 1981 to allegations of purely private conduct is viewed as beyond the intended scope of § 1981 (See dissenting opinion of Mr. Justice White in Runyon v. McCreary, supra, 427 U.S. at 192-214), there is that much less reason to extend § 1981 to the type of situation present here.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination. While the passage of Title VII did not work an implied

repealer of § 1981, no reason of policy appears to justify expansion of § 1981 in light of the existence of Title VII.

2. The decision of the Third Circuit not to apply its decision in Goodman v. Lukens Steel retroactively conflicts in principle with this Court's decision in Chevron Oil Co. v. Huson.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), cert. granted, No. 85-1626 (U.S. Sup. Ct. December 1, 1986) (available on Lexis, Genfed library, US file), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C.§ 1981. The Third Circuit also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-

Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), refused to apply the two year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after. As previously stated, the denial of tenure was in February of 1978.

On the underlying retroactivity issue, as the Third Circuit noted, Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior

> history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in Al-Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations

period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a).

Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], however, did not apply a six year statute of limitations generally to section 1981 actions. In fact, specific language in the Davis opinion refutes the Third Circuit's reliance on Davis as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case

in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis was decided under an earlier version of the Pennsylvania statute of limitations scheme, there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run. The Third Circuit itself stated in Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), an earlier case applying Wilson v. Garcia retroactively to a § 1983 claim, that the 1978 statutory revision undercut the precedential value of Davis.

In view of the status nationally of statute of limitation periods under the various Civil Rights Acts, as discussed in Smith v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and, in great detail, in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The

situation as to § 1981 was no clearer. It is described in 3 A. Larson, Employment Discrimination, § 90.20, at pp. 18-23-18-36, in a release as of November of 1984, as follows [Footnotes and footnote numbers are omitted.]: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."

ARGUMENT

I.

The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian erroneously extends the scope of § 1981.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff may sue under 42 U.S.C. § 1981, even though, based on his own deposition testimony, plaintiff is Caucasian, (Appendix 38a) i.e., racially white, and, therefore, not a protected person under § 1981 when he is presumably claiming other Caucasians or whites were improperly favored over him.[3] This is the first case, to the knowledge of

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[3]It may be of significance that the EEOC, Government-Wide Standard Race/Ethnic Categories, 42 Fed. Reg. 17,900 (1977), read, inter alia: "1. White, not of Hispanic Origin.--Persons having origins in any of the original peoples of Europe, North Africa, or the Middle East."

counsel for petitioners, that has held that a claim of discrimination on the basis of being an Iraqi or Arab is cognizable under § 1981 and one case, Ibrahim v. New York State Department of Health, 581 F.Supp. 228 (E.D.N.Y. 1984), has held squarely to the contrary.[4]

The Third Circuit's decision here directly conflicts with the decision of the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, 107 S.Ct. 62 (1986), interpreting the race

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[4]In one previous case, Abdulrahim v. Gene B. Glick Co., Inc. 612 F.Supp. 256 (N.D. Ind. 1985), the District Court held that an allegation that a Palestinian/Syrian was "non-white" was sufficient to make out a § 1981 claim. As noted previously, there is no such allegation of color in the complaints here.

Since the filing of the instant case by the Third Circuit, the Fifth Circuit, citing Al-Khazraji, applied § 1981 to a woman who was married to an Iranian. See Alizadeh v. Safeway Stores, 802 F.2d 111 (5th Cir. 1986).

discrimination provisions of 42 U.S.C. §§1981 and 1982. In Shaare Tefila Congregation, the Fourth Circuit held that "discrimination against Jews is not racial discrimination." 785 F.2d at 527. While Shaare Tefila Congregation did not involve Arabs, any difference between "Arabs" and "Jews" would not prevent Al-Khazraji and Shaare Tefila Congregation from being substantially indistinguishable for § 1981 coverage purposes.

As background to the present § 1981 issue, this Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 2189 (1968), stated: ". . . In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 . . . the statute [§ 1982] deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin."

(Emphasis supplied) Although Jones v. Alfred H. Mayer Co., was concerned with 42 U.S.C. § 1982, the limitation of § 1982 to racial discrimination applies equally to 42 U.S.C. § 1981. See Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586 (1976); Georgia v. Rachel, 384 U.S. 780, 791, 86 S.Ct. 1783, 1789 (1966).[5]

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[5]42 U.S.C. § 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

As to the argument that the reach of § 1981 and of § 1982 differ as to purely private conduct, see the dissenting opinion of Mr. Justice White, with whom now Mr. Chief Justice Rehnquist joins, to Runyon v. McCrary, 427 U.S. 160, at 192-214. Mr. Justice Powell and Mr. Justice Stevens, in separate concurring opinions, indicate in Runyon that were it not for recent precedents, they would tend to agree with Mr. Justice White's analysis that § 1981 does not apply to private conduct.

In Runyon v. McCrary, supra, 427 U.S. at 167-68, this Court stated:

> It is worth noting at the outset some of the questions that these cases do not present . . . . They do not present any questions of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity. They do not even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds. Rather, these cases present only two basic questions: whether § 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are Negroes, and, if so, whether that federal law is constitutional as so applied. [Footnote number omitted.]

In Georgia v. Rachel, supra, 384 U.S. at 791, commenting on the Civil Rights Act of 1866 [now 42 U.S.C. § 1981 in slightly changed form], the Court noted that the phrase "any law providing for . . . equal civil rights" was not

intended and should not be construed to apply to discrimination on any basis other than race:[6]

> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase 'as is enjoyed by white citizens.' That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected." [Footnote number omitted.]

It should be noted that in the state discrimination complaints filed by plaintiff prior to filing the federal court case plaintiff never claimed racial bias. In the state court action he

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[6] In Runyon v. McCreary, 427 U.S. 160, at 195, Mr. Justice White, dissenting, views § 1981 as derived solely from § 16 of the Voting Rights Act of May 31, 1870, 16 Stat. 144, and not in part from the Civil Rights Act of 1866, as held by the Court.

claimed "ethnic (Arab) and religious (Muslim) background were involved and included" (Exhibit E-3 to Motion for Summary Judgment -- p. 6 of state Amended Complaint) (J.A. 75) and in the Pennsylvania Human Relations Commission complaint, (Exhibit A to Motion for More Definite Statement, etc., of January 23, 1981) (J.A. 63) which it is believed was also the EEOC complaint, "have discriminated against me because of my national origin, Iraq, my ancestry Arabian, and my religious creed Muslim." In the three federal court complaints (J.A. 16, J.A. 22, J.A. 51) he twice claimed "Muslim, Arabian, and Iraqi in national origin," once claimed "national origin and religion," and also claimed "national origin (Iraq), religion (Muslim), and/or race (Arabian)." Race here thus is not used by Plaintiff in the § 1981 racial sense, but instead in a

national origin sense. Furthermore, as previously noted, this term is not used in the Amended Complaint which is the operative one as to § 1981 and the only one which raises a § 1981 claim. At his deposition in July of 1982, plaintiff stated, at pp. 6, 7-8 (J.A. 66-69) [This matter is discussed at greater length at pp. 6-9 of plaintiff's deposition. (J.A. 66-71)]:

> Q. Are you also taking the position that you were denied tenure because of your race?
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> A. Yes.
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> * * *
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> Q. What other reasons did you say you feel you were discriminated against?

A. National origin and religion or a combination of the two.

Q. What is your national origin?

A. Arabian and Iraqie.

Q. Are both Arabian and Iraqie -

A. and Moslem.

Q. Are both Arabian and Iraqie national origin designations?

A. Iraq is part of Arabia.

Q. You are treating Arabia as a place of national origin?

A. You may say so. This is what we call the Arabian peninsula.

Q. That is the geographical area?

A. That's right. This sepa- rates it from Iraq, Pakistan and so forth. It makes the Arabian peninsula separate. [pp. 7-8]

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. Indeed, as

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McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), is not inconsistant with the view that § 1981 does not apply to a claim by a Caucasian when he or she is presumably claiming other Caucasians or whites were improperly favored over him. Indeed, as

viewed in 3 A. Larson, Employment Discrimination, § 94.10, at p. 20-7 [Footnote is omitted.]:

> Indeed, the case [McDonald] is, if anything, one of the most cogent authorities available to support the limitation of § 1981 to racial discrimination, because, in its extended discussion of the point, the Court repeatedly and exclusively speaks of race, or of "black" and "white," beginning with the quotation of its own earlier description [in Georgia v. Rachel, 384 U.S. 780, 791 (1966)] of the "white citizens" phrase as emphasizing "the racial character of the rights being protected."[26]

A claim based on status as an Arab or an Iraqi, it is submitted, is a national origin claim, not a racial claim.[7] If such a claim is treated as a racial claim, then it is difficulty to see much, if any, basis for limiting the extent to which national origin claims are also

[7]As noted previously, there is no allegation of discrimination based on "color" in the federal court complaints here.

racial ones. The Third Circuit here has defined race, for § 1981 purposes, as "membership in a group that is ethnically and physiognomically distinctive." (Appendix 24a). The net result appears to be a substantial expansion in the scope of § 1981 beyond the language of the statute and, based on the discussion of the legislative history in the concurring opinion of Judge Adams, "well beyond what Congress intended when it passed the law.[1]" [Footnote is omitted.] (Appendix 32a) Additionally, to the extent that applying § 1981 to allegations of purely private conduct is viewed as beyond the intended scope of § 1981 (See dissenting opinion of Mr. Justice White in Runyon v. McCreary, supra, 427 U.S. at 192-214), there is that much less reason to extend § 1981 to the type of situation present here.

Furthermore, as a matter of policy, it is respectfully submitted that expansion of 42 U.S.C. § 1981 is inconsistent with the statutory scheme of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which specifically covers national origin discrimination and under which, as noted by this Court in Great American Federal Savings & Loan Association v. Novotny, 422 U.S. 366 (1979), cases are "subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and nonadversary resolution of claims." While this Court has "held that the passage of Title VII did not work an implied repealer of the substantive rights to contract conferred by the . . .statute codified at . . . § 1981," Novotny at 377, no reason of policy appears to justify expansion of

§ 1981 in light of the existence of Title VII.

As to the effect of the expansion here of § 1981, Judge Adams, in his concurring opinion, notes in footnote 1 (Appendix 32a):

> In light of the continual flow of immigrants to the United States, the consequences of this expansion are quite substantial. Persons from most of the Middle East and Asia, for example, would now appear able to sue under § 1981. As of 1980, there were 2,539,800 persons born in Asia living in the United States, as well as 43,400 from Egypt and 71,500 from North Africa. United States Department of Commerce, Bureau of Census, Statistical Abstract of the United States (1985), at 87. I do not mean to suggest that this inflow is in any way undesirable; the figures, rather, point up the extent of the expansion of the statute, which underpins, I believe, the need for Congress, as opposed to the judiciary, to decide on the appropriateness of this result.

One of the potential difficulties possibly present in the approach of the

Third Circuit here is expressed in the following excerpt from the decision in Sere v. Board of Trustees of the University of Illinois, 628 F.Supp. 1543, 1546 (N.D. Ill. 1986) [Footnote and footnote number are omitted.]:

> Sere argues that he is a Nigerian black, while his supervisor and replacement are American blacks with lighter skin pigmentation. But this is insufficient to save Count II. It is settled law in this circuit that discrimination on the basis of national origin is not actionable under § 1981, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984), and although the court recognizes that discrimination based on skin color may occur among members of the same race, plaintiff is unable to offer any authority for the novel proposition that such discrimination may form the basis of a cause of action under § 1981. This court refuses to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit. Count II must therefore be dismissed.

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff respondent.

II

The decision of the Third Circuit not to apply its decision in **Goodman v. Lukens Steel** retroactively conflicts in principle with this Court's decision in **Chevron Oil Co. v. Huson**.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), cert. granted, No. 85-1626 (U.S. Sup. Ct. December 1, 1986) (available on Lexis, Genfed library, US file), the Third Circuit concluded that the ruling of this Court in Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938 (1985), mandated that Pennsylvania's two-year statute of limitations for personal injuries be applied to actions brought under 42 U.S.C. § 1981. The Third Circuit also applied the decision retroactively to a § 1981 action commenced in 1973. However, in the instant case, Al-Khazraji, the Third Circuit, in applying Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), refused to

apply the two year statute retroactively and instead held that its decision in Goodman would not be applied retroactively to § 1981 causes of action accruing, it would appear, after 1977 and for some period after.[8] As

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[8]Petitioners argued to the Third Circuit that Goodman itself held that the decision applying the Pennsylvania two year statute of limitations is to be applied retroactively. In the Post-Argument Submission of Appellees [Petitioners] in Response to Supplemental Brief of Appellant, at p. 2, petitioners argued:

> This Court [the Third Circuit], at p. 13 of the Slip Opinion [in Goodman], stated:
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> "We hold, therefore, that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in Smith v. City of Pittsburgh, we also conclude that our decision should be given the customary retroactive effect. See Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985)."

previously stated, the denial of tenure was in February of 1978.

A summary of the status of retroactivity decisions nationally under the various Civil Rights Acts is presented in the dissent by Mr. Justice White to the denial of certiorari in Mulligan v. Hazard, 777 F.2d 340, cert.

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There is no intimation in the opinion that the statement as to the "decision [being] given the customary retroactive effect. See Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985)" is restricted to the litigants in that case, rather than being a statement of general scope applicable to all Pennsylvania litigants, including those in the case here. Certainly, there is no indication in Fitzgerald v. Larson, 769 F.2d 160 (3d Cir. 1985) [hereinafter sometimes Fitzgerald], cited by the Court in Goodman as authority for retroactivity in Goodman, that the retroactivity decision there is not of general applicability to litigants other than the immediate ones in Fitzgerald.

denied, 106 S. Ct. 2902, 2903 (1986):[9]

> In Wilson v. Garcia, ____ U.S. ___ (1985), we held that an action brought under 42 U.S.C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. Since our decision in that case, the courts of appeals have differed on whether Wilson should be given retroactive effect. In the present case, the Sixth Circuit held, without qualification, that Wilson should be given retroactive effect. 777 F.2d 340 (1985). The Courts of Appeals for the Fifth and Eleventh Circuits have reached similar results. Gates v. Spinks, 771 F.2d 916 (CA5 1985), cert. denied, ___ U.S. ___ (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250 (CA11 1985), cert. denied, ___ U.S. ___ (1986). Two other courts of appeals, however, have determined that when retroactive application would

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[9]The Seventh Circuit has also dealt with the issue in Anton v. Lehpamer, 787 F.2d 1141 (7th Cir. 1986) (nonretroactive), as has the Eleventh Circuit in Williams v. City of Atlanta, 794 F.2d 624 (11th Cir. 1986) (retroactive) and the Eighth Circuit in Ridgway v. Wapello County, 795 F.2d 646 (8th Cir. 1986) (nonretroactive).

shorten the statute of limitatioons, Wilson merits only prospective relief. Gibson v. United States, 781 F.2d 1334 (CA9 1986); Jackson v. City of Bloomfield, 731 F.2d 652 (CA10 1984). Although the Third and Eighth Circuits have applied Wilson retroactively in certain cases, it is unclear whether their holdings are designed to have universal application. See Wycoff v. Menke, 773 F.2d 983, 986-987 (CA8 1985); Fitzgerald v. Larson, 769 F.2d 160, 162-164 (CA3 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 194-196 (CA3 1985).

In addition, the courts of appeals also have reached conflicting results concerning what should be done when more than one state statute of limitations applies to personal injury actions. In Hamilton v. City of Overton Park, 730 F.2d 613 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), and Mishmash v. Murray City, 730 F.2d 1366 (1984) (en banc), cert. denied, ___ U.S. ___ (1985), the Tenth Circuit rejected, for § 1983 purposes, the state statute of limitations for intentional torts, and chose instead a state's residual statute of limitations. See generally Preuit & Mauldin v. Jones, ___ U.S. ___, ___-___ (1986) (White J. dissenting from the denial

> of certiorari). The Eleventh Circuit in Jones v. Preuit & Mauldin, supra, the Fifth Circuit in Gates v. Spinks, supra, and the Sixth Circuit in the present case, however, follow a different rule, and select the state statute of limitations governing intentional torts.

While the instant case involves section § 1981, rather than § 1983, the retroactivity issues are similar, if not identical. It should be noted that the three retroactivity cases in which certiorari was denied--Gates, Jones and Mulligan--are cases which are categorized as those in which Wilson v. Garcia was given retroactive effect.

On the underlying retroactivity issue, as the Third Circuit noted, (Appendix 13a-14a), Chevron requires the federal courts to undertake a three-part analysis [citations are omitted.]:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear

> past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application, for [w]here a decision of this Court could produce substantially inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
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> 404 U.S. at 106-07.

Essentially, the Third Circuit's theory was that after 1977 the precedents in the circuit were sufficiently clear that plaintiff could reasonably have relied on them. Petitioners submit, first, that the precedents were not as clear as the opinion of the Third Circuit indicates. The opinion here in Al-

Khazraji relies primarily on Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978), as making it "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." (Appendix 16a).

A number of comments should be made in response to this statement in the opinion. First, Davis v. United States Steel Supply, 581 F.2d 335 (3d Cir. 1978) [hereinafter sometimes Davis], did not apply a six year statute of limitations generally to section 1981 actions. The opinion specifically states, at 341 n. 8: "We reiterate that, for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that 12 P.S. [section] 31 applies to actions where the gist of a [section]

1981 complaint concerns racially discriminatory discharge of an employee under the facts in this record." (Emphasis supplied.)[10] Thus, from Davis itself, it was not "absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination." Furthermore, Davis was a discharge case and not a denial of tenure case. Counsel for petitioner is not aware of any Third Circuit case or case decided by a District Court in the Circuit, decided prior to the filing of the instant case in November of 1980, that held that the six year statute of limitations applied to a § 1981 denial of tenure case. Furthermore, since Davis

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[10]As counsel for petitioners reads Davis, the Third Circuit did not decide whether the tort action not involving personal injury portion or the contract portion of former 12 P.S. 31 made the six year statute applicable there.

was decided under an earlier version of the Pennsylvania statute of limitations scheme, it is submitted that there cannot have been justifiable reliance on Davis in view of a 1978 revision of the Pennsylvania statute of limitations scheme, particularly as the record shows that petitioner had counsel at least as early as May, 1979, well before the two year statute of limitations would have run.[11] (J.A. 93) As the Third Circuit

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[11]The new Pennsylvania statutory scheme is discussed in more detail in the opinion of Judge Ziegler, at Appendix 60a-65a.

One Pennsylvania federal court borrowed the following language in an attempt to explain, at least in part, the revision:

> [P]eriods applicable to conversion of or injury to personal property and waste or trespass to real property are reduced from six to two years to conform to the modern principle that claims based on conduct, and hence heavily relying on unwritten evidence, should have relatively short statutes of limitations, so as to bring them

itself noted in Smith v. City of Pittsburgh, 764 F.2d 188, 195 n. 3 (3d Cir. 1985), an earlier case applying Wilson v. Garcia retroactively to a § 1983 claim:

> In all of the earlier cases applying the six-year limitation, there was a

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to trial (after allowance for trial delays) before memories have faded.

Fickinger v. C. I. Planning Corp., 556 F. Supp. 434, 439 (E.D. Pa. 1982), quoting The Special Committee on the Judicial Code of the Pennsylvania Bar Association, Explanatory Memoranda Relating to the Proposed Judicial Code 17 (1973).

Chronologically, respondent filed the state law suit in May of 1979 and it was not until after the state (Exhibit B-3 to Motion for More Definite Statement, etc., of January 23, 1981) and federal (J.A. 50) administrative agencies refused relief in May and August 1980 respectively that he filed suit in October 1980. In addition, it should be remembered that neither of his pro se complaints raised a section 1981 claim and, as discussed in Statement of the Case, at p. 6, serious doubt exists that such a claim was raised in the "Amended Complaint" filed on November 7, 1980.

challenge to the legality of the substantive basis for the termination. See, e.g., Davis v. United States Steel Supply, 581 F.2d at 338 (racially motivated discharge); Skehan v. Trustees of Bloomsburg State College, 590 F.2d at 477 (First Amendment discharge and procedural due process without discussion of any distinction). Pennsylvania's 1978 revision of its statute of limitations scheme undercut the precedential value of these earlier decisions. The district courts relied on the new statute in selecting a six-month or two-year statute of limitations rather than the six-year residuary period applied to Skehan and Davis. See cases cited in text at p. 193 supra.

It should be specifically noted that Davis, the case primarily relied upon by the Third Circuit here in Al-Khazraji, is one of the cases whose precedential value the Third Circuit in Smith characterized as undercut by the 1978 revision.

It is also submitted that in view of the status nationally of statute of limitaation periods under the various Civil Rights Acts, as discussed in Smith

v. City of Pittsburgh, 764 F.2d 188, 192-193 (3d Cir. 1985) and, in great detail, in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the determination of what is "precedent on which litigants may have relied" (Chevron, 404 U.S. at 106) is not limited to precedent of the Third Circuit, but is to be determined on a national basis. On such a basis there was no precedent on which respondent may have relied. As this Court said in Wilson v. Garcia, 105 S.Ct. at 1942, "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." The situation as to § 1981 was no clearer. It is described in 3 A. Larson, Employment Discrimination, § 90.20, at

pp. 18-23-18-36, in a release as of November of 1984, as follows [Footnotes and footnote numbers are omitted: "Decisions vary from state to state, with some states using the statute of limitations for contract actions, tort actions, actions for the recovery of wages, or actions brought under antidiscrimination or other state or Federal statutes."[12]

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff-respondent.

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[12]The § 1981 statute of limitations situation is also discussed in Comment, Developments in the Law-Section 1981, 15 Harvard Civil Rights Civil Liberties Law Review 29, 222-235 (1980).

CONCLUSION

For the foregoing reasons, as to the § 1981 issue, the decision of the United States Court of Appeals for the Third Circuit should be reversed and the order of the District Court reinstated and affirmed and judgment be entered in favor of each of the petitioners and against plaintiff-respondent. As to the pendent state claims, the case should be remanded for proceedings consistent with the dismissal of the § 1981 claim.

Respectfully submitted,

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December, 1986