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

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

July, 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, consitute 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.

3. Are individual members of a college tenure committee subject to liability under 42 U.S.C. § 1981, when the function of the committee is only to make recommendations and the committee and its members do not have decision-making capacity and authority, such capacity and authority being in the Board of Trustees?

4. Was the decision of the court of appeals that the district court should reconsider the discovery rulings appealed in light of its (the Circuit's) recent decision in Equal Employment Opportunity Commission v. Franklin and Marshall College in error in that it does not

protect the secrecy and confidentiality of the Tenure Committee proceedings?

[Note: Petitioners reserve the right to argue Question 5 in the event certiorari is granted on the above questions, but do not include Question 5 among the reasons for the grant of certiorari].

5. Is a prima facie 42 U.S.C. § 1981 case present, in a college denial of tenure context, when, inter alia, no one in the plaintiff's department was recommended for or granted tenure until two years after the tenure decision as to plaintiff and that person was plaintiff's wife?

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

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, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 3, 1986.

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 hereto, p. 1a, infra.

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 hereto, p. 34a, infra.

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 hereto, p. 46a, infra.

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 p. 34a, infra.

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 p. 1a, infra.

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

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 petition 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 subject of this petition.

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] (7a)

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 three counts. Count I charges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

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[1]References to the record, e.g., (7a), are to pages in the Appendix filed in the United States Court of Appeals for the Third Circuit. References to (Appendix __a) are to the Appendix to this Petition.

§ 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. (11a)

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 defendant, Saint Francis College, and eight of the nine persons named in the second complaint. 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 (7a, 11a, 26a) 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)."

Thereafter, District Judge Mencer, to whom the case had been re-assigned, denied certain requests by respondent for discovery of, inter alia, the vote of individual members of the Tenure Committee and the reasons for each member's vote.

Petitioners thereafter moved for summary judgment. This motion was granted and judgment was entered in favor of each of the respondents. As to the § 1981 aspect, District Judge Mencer stated, in part (Appendix 37a-39a):

> 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?
>
> 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.

As to the liability of the nine members of the Tenure Committee, Judge Mencer stated, inter alia (Appendix 41a-43a):

> . . . It should be noted that the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure. Thus, the individual defendants lack capacity to be sued and authority to be sued in either an individual or a representative or an official capacity, inasmuch, as previously stated, their

> function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. Furthermore, the Tenure Committee is not a legal entity or an entity subject to suit, and lacks capacity to be sued and authority to be sued, since the function of the Tenure Committee in the tenure process, under the Guidelines for Tenure, is merely to make a recommendation and it does not have decision-making capacity and/or authority. In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff.

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).

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.

As to liability of the individual petitioners under § 1981, viewing § 1981 as in the nature of a tort remedy, the Third Circuit concluded (Appendix 27a-28a):

> If individuals are personally involved in the discrimination against the Appellant, and if they intentionally caused the College to infringe on Appellant's Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. See Manuel v. International Harvester Company, 502 F.Supp. 45 (N.D. Ill. 1980); Coley v. M & M Mars, Inc., 461

F.Supp. 1073 (M.D. Ga. 1978): see also Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236-37 (Section 1982 suit permitted against corporation and its directors.)

In his appeal to the Third Circuit, respondent contended that the District Court abused its discretion in denying discovery as to the deliberations of the Tenure Committee and other matters in the tenure process. Primarily at issue was the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to the extent considered by the Committee, respondent in his Brief filed with the Third Circuit having discussed the credentials in that context.

On the discovery issue, the Third Circuit stated that on remand, the District Court should reconsider the

discovery rulings appealed in light of the recent Third Circuit decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985). Certiorari has since been denied in the Franklin and Marshall case. _____ U.S.L.W. _____ (June 2, 1986).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Third Circuit applying 42 U.S.C. § 1981 to an "Arab" who is Caucasian (a) erroneously extends the scope of § 1981, (b) conflicts with a decision in the Fourth Circuit, and (c) raises an important question of federal law.

As to the race and 42 U.S.C. § 1981 claims, it is respectfully submitted that the Third Circuit erred in concluding that plaintiff-respondent [hereinafter sometimes 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.[2] This is the first case, to the knowledge of 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.[3]

The Third Circuit's decision here directly conflicts with the decision of

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[2]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."

[3]In one previous case, Abdulrahim v. Gene B. Glick Co., Inc., Civil No. F 84-337 (N.D.Ind. June 26, 1985) (available on LEXIS, Genfed library, Dist file), 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.

the Fourth Circuit in Shaare Tefila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), interpreting the race 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.

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); State of Georgia v. Rachel, 384 U.S. 780, 791, 86 S.Ct. 1783, 1789 (1966).[4]

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,

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[4] 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.

> 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:

> "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 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) (190a) and in the Pennsylvania Human Relations Commission complaint, 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 (7a, 11a, 26a) 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 plaintiff stated, at pp. 6, 7-8 [This matter is discussed at greater length at pp. 6-9 of petitioner's deposition.]:

> 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]

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. A claim based on status as a 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) Such a drastic expansion of the statute warrants this Court's attention.

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 footnnote 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, plenary consideration by this Court is essential and respectfully requested.

II

The decision of the Third Circuit not to apply its decision in **Goodman v. Lukens Steel** retroactively (a) conflicts with decisions in other circuits, (b) conflicts in principle with this Court's decision in **Chevron Oil Co. v. Huson**, and (c) raises an important question of federal law.

In Goodman v. Lukens Steel, 777 F.2d 113 (3d Cir. 1985), 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 Court 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, 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.

The present status of retroactivity decisions nationally under the various Civil Rights Acts is summarized by Mr. Justice White in his dissent to the denial of certiorari in Mulligan v. Hazard, 777 F.2d 340, cert. denied, 54 U.S.L.W. 3808 (June 10, 1986): [5]

> 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

[5] The Seventh Circuit has also dealt with the issue in Anton v. Lehpamer, No. 85-2565 (7th Cir. April 3, 1986) (available on Lexis, Genfed library, USAPP file) (nonretroactive application).

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 shorten the statute of limitations, 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.

The Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the courts of appeals; differences that are not likely to disappear without guidance from this Court. Given the square conflicts among the circuits, and the frequency with which these cases arise, I would

> grant the petition for certiorari in this case.

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. The issue is a recurring one. Plenary consideration by the Court thus is essential.

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."
>
> 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.) [6] 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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[6] 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[7]. (207 a)

It is also submitted that 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 Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, ___ U.S. ___, 105 S.Ct. 1938 (1985), the

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

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 is described in 3 A. Larson, Employment Discrimination, § 90.20, at pp. 18-23-18-36, in a release as of November of 1984 [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."

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

III.

The decision of the Third Circuit that the individual defendants may be held personally liable under the facts here (a) erroneously extends the scope of Section 1981, (b) raises an important question of federal law, and (c) appears to be inconsistent in principle with the decision of this Court in **Anderson v. Liberty Lobby**.

As noted by District Judge Mencer in his opinion granting the motion for summary judgment, (Appendix 41a-43a) the crux of the situation as to the individual petitioners-defendants is as follows:

> . . . the function of the Tenure Committee, and its members in voting, under the Guidelines for Tenure, is to make recommendations, and the Committee and its members do not have decision-making capacity and authority. The Tenure Committee, and its members in voting, under the Guidelines for Tenure, are to render a qualitative judgment, which judgment here, as manifested in the vote of

> the Committee, was negative. The authority and power of the Board of Trustees, under the governing College documents, including the Guidelines for Tenure, was exercised to deny and withhold tenure . . . . [T]heir [the individual defendants] function in the tenure process is merely to make a recommendation and they do not have decision-making capacity and/or authority. . . . In view of the limited, non-decision-making role of the individual defendants in the tenure process, they are thus not subject to liability under any of the theories propounded by plaintiff. (Emphasis added.)

It is respectfully submitted that the analysis of the District Court succinctly and correctly analyzes the issue of the liability of the individual petitioners. The cases cited by the Third Circuit, (Appendix 27a-28a) under the facts here, are not to the contrary.

The reversal of the granting of the summary judgment motion appears to be inconsistent with the recent decision of this Court in Anderson v. Liberty Lobby,

No. 84-1602 (U.S. Supreme Court June 25, 1986) (available on Lexis, Genfed library, US file). Based on the limitedd, non-decision-making role of the individual petitioners in the tenure process, a fact not disputed by plaintiff below, the evidence is "so one-sided that one party [,here the individual petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, at _____ _____.

In this regard, as to the summary judgment aspect as to all petitioners, the Third Circuit did not deal with that portion of the district court's rationale for granting summary judgment which is mentioned, in part, in the following excerpt from the Court's Opinion, at p. 7, (Appendix 7a) "Judge Mencer held that Al-Khazraji had not made out a prima facie case under Section 1981 because, since 1978, the only other person to

receive tenure in the Department of Behavioral Science at St. Francis was Al-Khazraji's wife." As to this aspect, Judge Mencer stated (Appendix 36a-37a):

> Proof of intent and purposeful discrimination are necessary elements of a Section 1981 claim. Croker v. Boeing Company, 662 F.2d 975 (3d Cir. 1981).
>
> During the academic year at issue, Academic Year 1977-1978, no other person in the Department of Behavioral Science was recommended for tenure by the Committee on Tenure or granted tenure by the Board of Trustees, no other person in the Department was recommended for, and granted, tenure until Academic Year 1979-1980 (two years after the tenure decision as to plaintiff), that person was Emilie Allan, the wife of plaintiff Majid Ghaidan Al-Khazraji Allan, and no other person in the Department who was a sociologist, the field of expertise of plaintiff, Dr. Al-Khazraji Allan, has since that time applied for, been recommended for, or been granted tenure.

The conclusion of District Judge Mencer is consistent with the principle

that the existence of the following is one of the minimum requirements for a prima facie case of discrimination in a Title VII higher education context, the requirements for a Section 1981 claim arguably being even higher:[8] "Tenure

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[8]The language used is from Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148 (D. Mass. 1980), language being adopted by the Court of Appeals at 648 F.2d 62 (1st Cir. 1981).

This articulation is for the purposes of this Petition only. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981), has in fact eased the role of defendants in employment discrimination cases. The Third Circuit in Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc), describes the procedures under Burdine as follows:

> Once a plaintiff class has made out a prima facie case of discriminatory treatment, the burden shifts to the defendant to rebut the inference of discrimination by showing that the statistics are misleading or inaccurate, or by presenting legitimate, nondiscriminatory reasons for the disparity. See Texas Department of Community Affairs v. Burdine, 450 U.S.

positions in the Department of _____ at _____ College were open at the time plaintiff was denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff was denied tenure."

Again, in the absence of evidence that tenure positions were so open at Saint Francis College, the evidence

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8 CONTINUED

> 248, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); Wetzel, 508 F.2d at 259. It is now clear that a defendant's burden is one of production, not persuasion. It is sufficient to meet that burden if the defendant's admissible evidence clearly "raises a genuine issue of fact as to whether it discriminated against the plaintiff." See Burdine, 101 S.Ct. at 1094.

Furthermore, it is, of course, not conceded that the burden of a plaintiff alleging employment discrimination is as easy in § 1981 cases as it may be in Title VII cases.

present is "so one-sided that one party [,all of the petitioners,] must prevail as a matter of law." Anderson v. Liberty Lobby, supra.

It is respectfully submitted that the effect of not affirming as a matter of law the grant of summary judgment as to the individual petitioners, especially in conjunction with the decision in Equal Employment Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, _____ U.S.L.W. _____ (June 2, 1986), discussed infra in Reason IV, will likely have a devastating effect, at the very least, on the internal peer-review system in tenure deliberations and perhaps even on external review, and ultimately could affect the tenure system itself. If faculty members are to be subject to suit individually for exercising their expertise, who will willingly serve on a

tenure committee or vote negatively on a tenure application.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

IV.

The decision of the Third Circuit in determining that the District Court should reconsider the discovery rulings appealed in light of its recent decision in **Equal Employment Opportunity Commission v. Franklin and Marshall College**, 775 F.2d 110 (3d Cir. 1985), rather than affirming the denial of the discovery appealed, (a) erroneously refuses to protect the secrecy and confidentiality of the Tenure Committee proceedings and (b) raises an important question of federal law.

Let it be noted at the outset that the discovery issue need be determined only if the District Court erred in granting the motion for summary judgment. No portion of the decision of the District Court is dependent on any of the matters about which respondent-plaintiff wanted to inquire during discovery. The dispute is as to those matters which for convenience are described as the "tenure committee" issues.

The questions in dispute as to the Tenure Committee seem to fall into four general categories: (1) the vote, (2) reasons for individuals voting as each did, (3) discussions and procedures followed at the meeting(s), (4) minutes of meeting(s).

For convenience, the term question or questions will be used as a generic term to refer to the inquiries inherent in the Interrogatories, Motion for Production of Documents, and the deposition of the Tenure Committee member. Also, the discussion will be restricted to the appropriateness of allowing inquiry into the Tenure Committee proceedings, including within that term comparative data as to the credentials of successful candidates to

the extent considered by the Committee.[9]

The reasons for objecting to the questions asked are set forth in the Response to Motion For Production of Documents (91a - 99a) and Objections Of Defendant, Saint Francis College, To Certain Of Plaintiff's First Interrogatories To Defendant St. Francis College (100a - 116a) and will not be repeated here. They are incorporated herein by reference. In essence, as relevant here, the objections raise privilege and the trial court's discretion to limit and control discovery.

Comparison of the questions asked here and those asked in Equal Employment

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[9]Brief for Appellant in the Third Circuit discusses the credentials in that context and, therefore, this petition will restrict itself to that context.

Opportunity Commission v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985), cert. denied, 54 U.S.L.W. 3792 (June 2, 1986), reveals that the scope of inquiry is substantially broader here.

It is respectfully submitted that the decision in Franklin and Marshall College is incorrect and that the materials requested here on appeal to the Third Circuit should be protected from discovery.

Petitioner College was one of the Amici Curiae who joined in the Brief of 67 Colleges and Universities as Amici Curiae in Support of Petition in the Franklin and Marshall College case.

Reiteration of the reasons set forth there for granting review appears unnecessary. They have already been

called to the attention of the Court.[10]

However, it should be noted that at issue here, and in every other case where an attempt is made to invade the secrecy and confidentiality of college or university tenure committee processes, is whether or not "peer review" will continue in American higher education or whether the entire tenure process will

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[10] In his dissent to the denial of the petition for certiorari in Franklin and Marshall College, 54 U.S.L.W. 3792 (June 2, 1986), Mr. Justice White stated:

> The United States Court of Appeals for the Third Circuit rejected the asserted privilege [against the compelled production of confidential peer review materials absent a showing of facts supporting an inference of discrimination], 775 F.2d 110 (1985), which has been accepted by another Court of Appeals, see EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 337, n. 4 (CA7 1983). I would grant certiorari to resolve this conflict.

eventually be relegated exclusively to administrators, rather than primarily to teachers.[11] If the confidentiality of the proceedings and the vote is not maintained when provided for, as it is here, in the tenure rules of a college or university, those who will willingly serve on a tenure committee or who will vote negatively on a tenure application on the merits will decrease, to the

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[11]The issues related to the vote aspect were raised in the well-known James A. Dinnan case (Blaubergs v. Board of Regents of the University System of Georgia, 661 F.2d 426 (5th Cir. 1981)), where a University of Georgia professor choose to be jailed for contempt rather than reveal his vote.

Comment on the Dinnan case and its effect on the peer-review system set out in excerpts from the Suggestion For Rehearing En Bank filed by counsel for Dinnan before the United States Court of Appeals for the Eleventh Circuit (former Fifth), at 4-9, were included in the Brief of Appellees College and Gervase Cain in the District Court and the Court is invited to peruse these excerpts.

detriment of higher education in the United States.

Nationally the peer-review system commonly employs confidential votes and deliberations. The procedures here explicitly provide for such confidentiality. The Guidelines for Tenure here provide in Committee on Tenure V.C., "[The chairman] shall inform the committee that all deliberations are to be held permanently confidential." (194a)

The essence of the argument for maintaining the confidentiality of the peer review system is contained in the following excerpt from the District Court opinion in Gray v. Board of Higher Education, City of New York, 92 F.R.D. 87, 92-93 (S.D.N.Y. 1981), rev'd, 692 F.2d 901 (2d Cir. 1982). Gray, at one time the leading case upholding the secrecy of tenure committee votes, based its decision both on a privilege basis

and as a matter of the trial court's discretion to limit and control discovery. The Gray court stated, at 92-93:

> The peer review system of decision making with regard to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure, and has been said to embody "the essence of academic freedom." Kundra v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980). "The peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." Kunda, supra, at 548.
>
> The maintenance of the confidentiality of the decision-making process is generally an integral element of a peer review system for granting or withholding tenure. McKillop v. Regents of the University of California, 386 F.Supp. 1270, 1276 (N.D.Cal. 1975) ("Plaintiff's suggestion that full disclosure encourages more thoughtful and honest tenure evaluations represents a

somewhat utopian view of human relationships."). See, Note, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 Calif.L.Rev. 1538, 1551-52 (1981)....

* * *

The secret ballot has long been regarded as essential to any voting process which is to be free of influence and pressure from those with power and/or influence over those voting. In U.S. v. Executive Committee of the Democratic Party of Greene County, Ala., 254 F.Supp. 543 (N.D.Ala. 1966), the court stated that "[t]he secrecy of the ballot is one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive. This view was recognized by Congress in its passage of the National Labor Relations Act. That Act, specifically 29 U.S.C. §§ 159(e)(1) and 179(b), requires that employee votes to rescind designation of a labor organization as the employees' bargaining agent, or to accept or reject a settlement proposal, must be conducted by secret ballot. The requirement of "complete secrecy of the ballot cannot be waived." Magic Pan, Inc. v. N.L.R.B., 627 F.2d 105, 109 (7th Cir. 1980). See also N.L.R.B. v. Groendyke Transport,

Inc., 372 F.2d 137, 141-42 (10th Cir.), cert. denied, 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed 2d 993 (1967).

The basic arguments made here apply essentially to each of the four categories of questions asked.

Categories (2), reasons for individuals voting as each did, and (3), discussions and procedures followed at the meeting(s), are essentially sub-categories of Category (1), the vote, and in all probability would almost inevitable reveal votes, as well as themselves defeating the confidentiality of the tenure process. Whether Category 4, minutes of meeting(s), would violate the confidentiality aspect would, of course, depend on what is contained therein. To the extent that the minutes would also violate such confidentiality they should be treated the same as Categories 2 and 3. Thus, confiden-

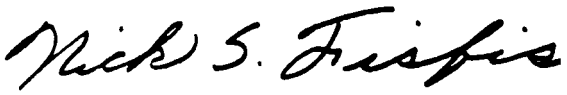
tiality should be retained as to each of the four categories of questions and the College and the witnesses should not be required to answer these questions and produce these documents.

For the foregoing reasons, plenary consideration by this Court is essential and is respectfully requested.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because determination of this issue in favor of petitioners would obviate the need for the expense and disruption of trial for the parties.

Respectfully submitted,



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July, 1986