OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-264

TITLE CALVIN W. BURNETT, ETC., ET AL., Petitioners
v.
JAMES R. GRATTAN AND ADRIENNE S. HEDMAN

PLACE Washington, D. C.

DATE March 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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CALVIN W. BURNETT, ETC., ET AL., :

Petitioners : No. 83-264

v. :

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN :

- -x

Washington, D.C.

Monday, March 26, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

PAUL F. STRAIN, Deputy Attorney General, State of Maryland; on behalf of the Petitioners.

SHELDON H. LASKIN, ESQ., Maryland; on behalf of the Respondents.

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C O N T E N T S

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CHIEF JUSTICE BURGER: Mr. Strain, I think you may proceed whenever you're ready now.

ORAL ARGUMENT OF PAUL F. STRAIN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. STRAIN: Mr. Chief Justice, and may it please the Court.

This case is here on writ of certiorari to the Fourth Circuit Court of Appeals. It arises from the discharge of two state employees, the Respondents here who were members of the administrative staff of the president of Coppin State College.

The Respondents are white. Coppin State is predominantly black and black-managed. The Respondents sued, claiming racial discrimination and, in one case, sex discrimination; and basing their claims on the Civil Rights Statutes.

The question is whether the statute of limitations of Maryland's Fair Employment Practice Statute is the best analogy to Respondents' suit, or whether the fact that the Fair Employment Statute remedy is not a purely judicial cause of action makes it inappropriate.

I will argue that Maryland's Fair Employment Statute is the wholly appropriate analogy; second, that there are sound reasons of public policy supporting its

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application to Respondents' suit; and finally, that the Maryland statutory six-month limitation period is fully adequate for Respondents to assert their cause of action.

As to the first issue concerning the appropriate analogy. Maryland's Fair Emplcyment Practice Statute which is Article 49B of the Maryland Code is the closest analogy to Respondents' suit. And in that regard, it has almost no competition concerning which is the analogous statute.

QUESTION: On that pcint, I notice that the Respondent cited a case, federal case Davidson v. Koerber that referred tc Article 23 of the Maryland Declaration of Rights, in which the District Court held that it's beyond dispute that Maryland's Article 23 protects the same interests as the 14th Amendment, and therefore Section 1983.

You think the Respondents could have brought an action under Article 23 in this case, then, in Maryland?

MR. STRAIN: Justice O'Connor, I think the Respondents very definitely could not have brought an action under Article 23. Let me correct that slightly. They did bring an acticn under Article 23, and as the district judge found, there is no action under Article 23. Maryland courts have never recognized any direct

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action under the Maryland Constitution.

QUESTION: Despite that Davidson v. Koerber case; is that right?

MR. STRAIN: That's correct, Justice O'Connor.

Judge Miller in the Davidson case did not address the issue of whether Maryland courts have recognized a direct action. Judge Miller did address the issue of the appropriate analogy, but he was evidently not presented with the issue of whether there was such an action. Of course, if the Maryland courts were to address the issue of whether there is a direct cause of action under the Maryland Constitution, I think for the same considerations that led this Court in Bush v. Lucas not to infer such a cause of action where there is a comprehensive statutory scheme, for that same reason, I would expect the Maryland court -- Maryland Court of Appeals not to infer direct cause of action for employment discrimination.

And after all, that is what Respondents Grattan and Hedman are challenging. Their cause of action is for employment discrimination. And Article 49B is the state cause of action for Respondents Grattan and Hedman, and there is no dispute about that.

Where we part company with the Respondents is in their claim that the fact that Article 49B is not

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purely judicial defeats the analogy. And I submit that neither the language nor the logic of this Court's decisions just Respondents' position.

QUESTION: Mr. Strain, the Court of Appeals, though, said that the Maryland legislature intended the three-year statute of limitations period to apply to Section 1983 actions.

MR. STRAIN: Justice O'Connor, I don't recall that precise language in Chief Judge Winters' opinion for the Fourth Circuit. I think I recall language of Chief Judge Winter where he questioned whether the Maryland legislature intended the Fair Employment Statute to apply to Section 1983. I don't think he suggested that the catch-all provision, Article 5-101 of the court's article was intended to apply to Section 1983. If he did say that, I submit very respectfully, he was very wrong.

QUESTION: Well, what if a legislative body expressly said it intended a longer statute of limitations to apply, would you give recognition to that?

MR. STRAIN: Justice O'Connor, if for example the Maryland legislature had intended the catch-all provisions to apply to civil rights statutes, I think that would be important to this Court in determining what was the appropriate analogy.

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Nonetheless --

QUESTION: Would it be binding on us?

MR. STRAIN: I think it would not be binding, Justice O'Connor.

What this Court looks for is the appropriate analogy for the individual Section 1983 cause of action. If it was the Maryland legislature's intention that all civil rights statutes along with -- actions -- along with many other things, be governed by a three-year statute, that would be a point that this court would consider. It would not be binding on this Court anymore than would have been the intention of the New York legislature in the actions to vacate arbitration awards have been binding on this Court in Del Costello or United Parcel Service.

QUESTION: Although I guess we haven't really decided that question, have we? Whether a legislative express intention would be binding.

MR. STRAIN: Justice O'Connor, I think this Court has not directly decided the issue. However, in the Del Costello opinion, there was a footnote -- and I don't recall the number offhand -- but a footnote which dealt with the argument that the Congress, in enacting Section 10(b) of the NCRA, had not intended it to apply to Secton 301 suits. And this Court observed that the

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fact that Congress had not intended that it apply to Section 301 suits was no more despositive than the fact that the New York or Maryland legislatures had not intended their statutes for actions to vacate arbitration awards to apply.

And I think, while this Court has not decided it, that footnote may give a strong indication of how this Court would go.

And as I said, I think there is nothing in either the language or the logic of this Court's decisions which supports the Respondents' position that a statute must be purely judicial for borrowing purposes. There's certainly nothing in the language of this Court's opinions.

In the Del Costello v. Teamsters opinion last term, this Court for a Section 301 suit borrowed the Section 10(b) limitations period, and the Section 10(b) administrative judicial process is remarkably similar to that of Maryland's Article 49B. In fact, the roots of Maryland's Article 49B process can be traced to the National Labor Relations Act process and Section 10(b).

And there was no suggestion in any of the three opinions of this Court that any member of the Court thought that applying a limitations period of a statute that was not purely judicial was in any way

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untoward. And it is not only the language; it is also the logic of this Court's opinions that gives the Respondents no support for their position, because as this Court's opinions on borrowing and applying statutes of limitations demonstrate, what the Court is involved in may be termed an inexorable search for the appropriate analogy based on the nature of the cause of action, a search for the best fit; not a perfect fit, not something that is hand-in-glove.

As the Court observed in the United Parcel Service opinion, the Court does not expect or search for a hand-in-glove perfect analogy, but the best analogy. And for that reason -- for example, in Section 301 suits such as the United Auto Workers v. Hoosier suit in 1966, the Court searched for the nature of the cause of action. Was it more appropriate to an action on an oral contract or on a written contract. And 15 years later, in the United Parcel Service opinion, the Court made the same inquiry as to the nature of the cause of action. Was it more akin to an action to vacate an arbitration award or more akin to an action on contract?

And for Section 1983 and other civil rights suits, the inquiry is the same. The Court chooses the statute of limitations by borrowing and examining the nature of the cause of action, for in Section 1983, even

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beyond the rules of decision act and the other principles that apply in Section 301 suits, in Section 1983 this Court has the benefit of, in Section 1988, Congress's invitation for command to utilize the appropriate state limitations period.

And the Court has examined appropriate limitations periods -- I should say appropriate causes of action in 1983 suits to determine what is the most appropriate analogy.

The Runyon v. McCrary decision in 1976 is an apt example. In that case, this Court rejected a five-year catch-all limitations period for a Section 1981 suit in favor of a two-year period that was -- on which a cause of action depended that was a better analogy for the Section 1981 suit there at issue.

QUESTION: General Strain, may I ask you a question?

MR. STRAIN: Justice Stevens.

QUESTION: Supposing the underlying claim of a constitutional violation here didn't involve discrimination, but rather, was something like a First Amendment claim or something like that; the employee was discharged for speaking out about some issue.

I take it you would then say that that particular 1983 claim -- the limitations period for such

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an 1983 claim would be determined by some other statute, other than the one you're --

MR. STRAIN: That's correct, Justice Stevens.

QUESTION: So you're not contending all 1983 are subject to this?

MR. STRAIN: That's very correct, Justice Stevens. In fact, that was the position in this case because one of the initial causes of action was a free speech claim. We argued for a three-year limitations period on the Section 1983 free speech claim. It wasn't within even the three-year period, and the trial judge, Judge Ramsey, knocked out the free speech claim because it was in violation of the three-year period.

QUESTION: There's a certain practical awkwardness about that result, isn't there? If a person is suing for unconstitutional dismissal from employment, to the extent his claim may sound in free speech, it's three years; to the extent it may sound in racial discrimination, it's a much different period of time, even though it's the same facts perhaps out of which the thing arises.

MR. STRAIN: Well, Justice Rehnquist, I believe that normally it would not be the same set of facts out of which the claim arises. For example, in this case, the contention was either that they were

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dismissed on the grounds of race or dismissed because they were speaking out.

More normally, there would be the coupling of violation of a free speech claim perhaps that did not lead to discharge, and discharge based on racial reasons. And the complaint should set out those different causes of action in separate counts, as they did in this case. So a different limitations period would apply to different counts, as if there was a common law account in contract and account in tort.

And in summary, on the point of the purely judicial cause of action, in each of the cases that have been referred to, and in others, the Court has sought the best analogy. In Del Costello last term, the most appropriate analogy was an administrative judicial limitations period in Section 10(b). And as Justice Blackmon observed for the Court in Railway Express in 1975, when we're talking about civil rights statutes nothing justifies a special reluctance in applying state law, as compared with what the Court does in other situations such as Section 10(b).

Article 49B is the state analogy to Grattan and Hedman's employment discrimination suit. And Article 49B is an administrative judicial remedy that is a lineal descendent of Section 10(b) which this Court

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utilized last term in Del Costello.

The second issue I wish to address this morning concerns the sound policy reasons for borrowing the Fair Employment Practice Statute, statute of limitations.

An important policy reason in favor of that borrowing is the policy of uniformity. Now, this Court has observed that a lack of uniformity is no reason to defeat an application of state law. That observation was made, for example, in the Temonio -- the Board of Regents v. Temonio opinion in 1980. But here, the shoe was on the other foot, so to speak, because the application of state law will not defeat uniformity, it will promote uniformity.

As we make clear in our petition for certiorari in a very long footnote, Footnote 7, there are at least 30 states with Fair Employment Practice Statutes that have limitation periods remarkably similar to that of Maryland. So application of Maryland's Fair Employment Practice Statute limitation period will promote national uniformity in this regard among the states. It will also, of course, promote uniformity within Maryland, because then the state cause of action and the federal cause of action for the same grievance or the same matter will have the same limitations period.

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QUESTION: Is the state of limitations that you want borrowed for this purpose in connection with the discharge of a state employee?

MR. STRAIN: The statute of limitations, Justice White, comes from a statute which covers state employees and privat employees. We ask that it be applied for several -- our case, of course, concerns a public employee, and we ask that it be applied for these public employees.

QUESTION: What does that limitations period say? Does it say that the discharged employee must sue in the state court within a certain time?

MR. STRAIN: It says, Justice White, that the discharged employee must file a claim with the Maryland Human Relations Commission within six months, just as the union employee must file a claim of unfair labor practice charge with the NLRB within six months.

QUESTION: If the claim is what -- racial discrimination?

MR. STRAIN: If the claim is racial discrimination, sex discrimination, handicap, age, national origin.

QUESTION: And that's the period you're referring to?

MR. STRAIN: That's correct, Justice White.

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QUESTION: It isn't a period connected with any kind of a court proceeding?

MR. STRAIN: No, it is not. It is a period -- and I should stress this -- the administrative structure of Article 49B and the Maryland Human Relations Commission is remarkably similar to the administrative structure of Section 10B and the National Labor Relations Act in an unfair labor practice charge with the National Labor Relations Board.

QUESTION: Does the Maryland Code of Statutes have a section on limitations generally and limitations for different kinds of judicial proceedings, like the limit actions in torts?

MR. STRAIN: The Maryland Code does not have such a set of limitations period with that level of specificity. It has the catch-all period, 5-101. It has several other specific periods for categories of actions such as assault and battery, defammation, contracts under seal, and bonds, and things of that sort. And in addition, within Maryland statutes, they create a duty and a remedy. For breach of the duty, there are specific limitations period within those statutes. An example is Article 49B

QUESTION: The specific provision you rely on, as I understand it, is the -- it's really just one

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sentence in Section 9A of the statutory scheme for this relief against discrimination. Is that right?

MR. STRAIN: That's correct, Justice Stevens.

QUESTION: So it's not a separate limitations statute in the sense that these others are?

MR. STRAIN: No, it is not. It is not a separate statute that addresses only limitations. It is contained within Article 49B which creates the duty or the right and defines the remedy.

QUESTION: And more narrowly, it's contained within Subsection (a) of Section 9 of 49B.

MR. STRAIN: That's correct, Justice Stevens.

The other reason of sound public policy that supports our position here -- I was mentioning the uniformity that would be promoted --

QUESTION: On that point, Mr. Strain, I wonder whether national uniformity can be said to be the applicable policy if we're looking to Section 1988 which tells us that if the federal law is deficient, we look to state law. And we know state laws can differ from state to state.

So I wonder if national uniformity is a goal.

MR. STRAIN: I didn't hear the last few words. I'm sorry.

QUESTION: Well, I wonder if national

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uniformity is a governing principle in light of Section 1988.

MR. STRAIN: Justice O'Connor, I think uniformity is not a governing principle. This Court has made that clear, I believe, in the Board of Regents v. Temonio opinion. If the most appropriate analogy creates a lack of uniformity, it will be utilized nonetheless.

The point I wish to make here is that the most appropriate uniformity would have the happy byproduct, if you will, of promoting national uniformity. And what that remarkable similarity among the states for actions such as this demonstrates is that there is a national policy in favor of prompt resolution of employment disputes, and it isn't just among the states. It is reflected in actions of the United States Congress, such as Title VII, and such as 10B, and in many, many opinions of this Court, the national policy in favor of prompt resolution of employment disputes, and I --

QUESTION: But, Mr. Strain, if Section 1988 tells us to look at state law, and if the Court of Appeals says that the Maryland legislature did not intend the shorter period to apply, why doesn't that have to inform our decision?

MR. STRAIN: Justice O'Connor, if the Maryland

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Court of Appeals said that the shorter period was not intended to apply, which it did not --

QUESTION: Well, it did say that, did it not?

MR. STRAIN: It did not, Justice O'Connor.

QUESTION: Well, let's look at the -- the Fourth Circuit said that, did it not? It said, for instance, in the appendix with the petition, reciting the history and referring to Article 49B, "This, too, indicates that the Maryland legislature did not intend that the passing of 165-day period should bar an employee," and so forth.

MR. STRAIN: Justice O'Connor, that passage is referring to Article 64A, a grievance period that is an alternative limitations period. But I would like to --

QUESTION: Well, then, and earlier it said "It is for this reason it was unlikely the Maryland legislature intended that this limitations period apply to civil actions," meaning 49B.

I certainly read the opinion anyway as indicating CA4 thought the Maryland legislature did not intend the shorter period to apply.

MR. STRAIN: Yes. And I would like to respond very directly to that, Justice O'Connor.

I believe what the Fourth Circuit was looking for was any indication that the Maryland legislature had

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1983 in mind one way or the other when it created the six-month period. It did not. Nor did the Maryland legislature have Section 1983 suits in mind when it created the three-year catch-all period. It would be unrealistic --

QUESTION: Well, what if the CA4 meant what I said I thought it meant; namely, that Maryland didn't intend the shorter period to apply?

MR. STRAIN: Then, Justice O'Connor, we get back to the issue that we discussed before and that was of what significance would that be to this Court.

My position is, that would be of some significance. But as this Court noted in the Del Costello opinion, the fact that Congress in Section 10B did not intend that it be utilized for Section 301 suits was no more despositive than the fact that the New York legislature did not intend an action to vacate an arbitration award to be used for that section.

But I want to emphasize, as a matter of fact, that there is no more indication that the Maryland legislature intended the three-year period to apply to Section 1983 than it intended the six-month period to apply. It had no intention about Section 1983 as to either of those two statutory periods.

The Maryland legislature -- there is no

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indication it ever thought about it. Legislative history in Maryland is very skimpy, but there is no indication it had either statutory period in mind. Our position is that on the question of legislative intention, it very simply is a wash, and that avenue is a blind avenue for purposes of this case.

QUESTION: There is some significance that the writer of this opinion, Chief Judge Winter, is from Maryland.

MR. STRAIN: Yes, Justice Marshall, there is.

I would point out as well that the author of the District Court opinion who disagreed with Judge Winter and was reversed by the Fourth Circuit was also from Maryland.

QUESTION: And that you are, too.

MR. STRAIN: Pardon me?

QUESTION: If you are going to go that far, you are, too.

(Laughter.)

MR. STRAIN: I wouldn't be so bold, Justice Marshall.

QUESTION: Were you involved or was the -- I suppose the Attorney General's office was involved in the McNutt case -- or not?

MR. STRAIN: The Attorney General's office was

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not involved in the McNutt case. As I recall, that was a private employment dispute.

QUESTION: I see. I see.

And there was never a petition for certicrari in that case, I suppose?

MR. STRAIN: I honestly don't know whether there was a petition for certiorari or not.

QUESTION: But that's the case that Judge Winter thought was controlling here.

MR. STRAIN: That's correct. Judge Winter relied on McNutt which, of course, was decided prior to Del Costello. And in McNutt, what seems to me to have been at least one motivating factor for the McNutt opinion was that they thought it was wholly inappropriate to use the limitations period of Article 49B because they said it was administrative.

QUESTION: Administrative, yes.

MR. STRAIN: That's correct. And I would sugget respectfully to the Fourth Circuit that McNutt -- the reasoning of McNutt has been completely obviated by this Court's opinion in Del Costello.

QUESTION: Not entirely, General Strain, because there's a footnote in the McNutt opinion pointing out the irony of relying on a Maryland administrative procedure rather than a federal

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administrative procedure.

Do you remember that footnote? That you might as well look to the Title VII, the 180-day provision in Title VII, if you're going to do that. And in Del Costello, we looked to a federal proceeding.

MR. STRAIN: That's correct, Justice Stevens.

Now --

QUESTION: Could you help me on one thing? I didn't mean to interrupt. But under your 49B, the equivalent of Title VII, does a time come when the alleged victim of discrimination may bring some kind of a judicial proceeding and, if so, when?

MR. STRAIN: Justice Stevens, that time comes after the administrative adjudication. The Complainant, the employee, may appeal an adverse decision of the administrative agency. And so it is unlike Title VII where there is an independent cause of action, and very similar to Section 10B where there is an adjudication by the NLRB and then appeal to the Court of Appeals.

QUESTION: He only gets review of the administrative -- he can't then bring his own damage action?

MR. STRAIN: He cannot bring his own damage action. He gets review under the Maryland Administrative Procedure Act. That review is a fairly

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robust or vigorous judicial review, more detailed, more robust, I would say, than the form of judicial review that this Court observed in the New York Fair Employment Practice Commission in the Kroemer case, because the reviewing court in Maryland under the Administrative Procedure Act, does get into the issue of the substantiality of the evidence.

Mr. Chief Justice, unless there are further questions at this time, I would like to reserve the remainder of my time for reply.

CHIEF JUSTICE BURGER: Very well, Mr. Strain.

Mr. Laskin.

ORAL ARGUMENT OF SHELDON H. LASKIN, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. LASKIN: Mr. Chief Justice, and may it please the Court.

Petitioner's position is based upon a fundamental error in the analysis of the functional differences between the statute of limitations triggered by Article 49B, Section 9A, and the routine judicial statute of limitations which applies in litigation.

If applied to employment discrimination suits in Maryland, the use of the Section 9A would lead to three harmful effects: It would encourge a multiplicity of statutes of limitations within one state for actions

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under 42 U.S.C. Section 1983; it would encourage a multiplicity of federal claims which might otherwise not have to be brought, due to the shortnesss of the period; and it would also encourage individuals to avoid utilizing state procedures which, particularly after this Court's decision in Patsy, should be encouraged rather than encouraged.

First, as to the functional differences, the Respondents have never claimed that 49B is an inappropriate statute of limitations to apply merely because it invokes administrative remedies. The reason we say it's an inappropriate period to apply is because of the functional differences in the procedures which are invcked.

Article 49B, like Title VII, is a multistep enforcement procedure which ultimately culminates in a formal adjudicatory hearing under Section 11 of Article 49B. However, all that is invoked by the initial filing of the Section 9A complaint is an administrative investigation. It is only after a very lengthy process -- and the agency has given itself two years and ten months, in effect, from the date of the discriminatory act to complete that process -- a lengthy process of investigation, probable cause-finding, attempts at conciliation which is central to the statutory scheme --

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only after all of these has failed may the Commission issue a formal statement of charges and compel the Respondent to answer and prepare and present a defense.

Until that point, all that happens is an administrative investigation.

The Maryland Court of Appeals has made very clear in the Banach case that the filing of the 9A complaint merely triggers that investigative process, and that a respondent is not entitled to formal notice of the claim in the sense of stating a claim against that respondent until the invocation of the Section 11 enforcement proceedings which, as I've said, can take two years and ten months from the date of the discriminatory action, a period virtually the same as the period we are urging upon the Court.

If 49B were to be applied to employment discrimination suits within the State of Maryland, it would encourage a multiplicity of statute of limitations within one state for claims under 1983 and 1981. 1981 and 1983 apply to discrimination claims broader than that of employment discrimination, broader than that of 49B.

Therefore, if this Court were to hold that the statute of limitations in employment discrimination cases is six months, it would be multiplicity of

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litigation over the issue of what the appropriate statute of limitations is.

While it is true that national uiformity as applied to 1980 is an impossibility, it does not follow from that that internal uniformity should not be encouraged. As this Court made clear in Ricks, statutes of limitations should not commence to run so soon that lay people would find it difficult to invoke the procedures.

If there were a different statute of limitations under each and every 1981 or 1983 claim which might be raised, a lay person might find it very difficult to determine what category they fell into within a very short period of time.

Temanio is simply irrelevant in this case. There is no conflict presented between a state law and a federal policy. There are two state statute of limitations for this Ccurt to consider. The Ccurt will inevitably accept one and reject the other. We submit that as a matter of state pclicy, Article 5-101, the general residuary statute, is a more appropriate statute of limitations. Precisely because it covers more conceivable claims than would be presented under 49B, it is both a residuary contract and a residuary tort statute, so unlike litigation in some other

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jurisdictions, that would not be a problem. It would cover simply a greater variety of claims which could be raised under the Federal Civil Rights Act.

The attorney general has just urged upon the Court in oral argument a separate rule for public employees than that enunciated in McNutt. This further complicates the multiplicity of statute of limitations question, because what the state is in effect urging is the separate statute of limitations for public employees, a separate statute of limitations for private employees, and a separate statute of limitations for everyone else.

QUESTION: There are a great many differences by statutes and otherwise, are there not, among those categories?

MR. LASKIN: Well, not within 49B. I mean 49B applies to everyone.

QUESTION: I'm speaking of other relationships that are different in the private and the public sector. In other words, in the private sector if you had a labor contract, that might control. And if the public sector if there was no labor contract in that state, you would still have another one.

That's the only point I would suggest.

MR. LASKIN: Well, that's certainly true, but

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for purposes of determination of the statute of limitations in a federal claim, I believe the footnote in Hicks still has a great deal of vitality.

QUESTION: Why do you think an absolute uniformity has some special merit?

MR. LASKIN: I don't know if absolute uniformity is every possible. To the greatest extent possible, I think within one jurisdiction, since this is, after all, one federal statute applying to discrimination claims, to the extent possible internal uniformity should be encouraged so that lay people can more easily determine the period within which they have to invoke their rights. Otherwise, there will be a lot of litigation over the status of the plaintiff in order to determine whether or not the proper statute of limitations was invoked with the individuals, an independent contractor, a private or public employee.

QUESTION: Of course, you referred in 1983 as authorizing the bringing of discrimination claims. Actually, it's any right secured by federal law or Constitution.

You look at some of our cases like Sea Clammers and so forth, and other cases where it's been argued there is a private right arising under the various statutes. It's hard to say 1983 just deals with

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discrimination --

MR. LASKIN: I think that's absolutely right. And to the extent that the state is urging a statute of limitations for public employees, then they must be doing that by virtue of the 1983 aspect of the suit. And they're further complicating the question of what statute of limitations would be appropriate outside of the context of employment discrimination in 1983 litigation.

I might point out that in Runyon v. McCrary, one major reason for the decision was this Court was deferring from the decision of the Fourth Circuit on a matter essentially of state law. Justice Stewart pointed this out at 427 U.S. page 181.

QUESTION: May I go back on one question?

I think you mentioned that under the Maryland 49B procedure, it might be two years and ten months before the complaint was served. But is it not correct that under that procedure, at least the administrative complaint must be served on the employer within four months or something like that, after the charge is filed?

MR. LASKIN: The 9A complaint has to be served on the respondent within 120 days after the filing of the 9A complaint.

QUESTION: So that the defendant would at

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least get some notice within no more than ten months.

MR. LASKIN: However, in two cases -- the Banach case and the State Commission case -- the Maryland Court of Appeals and the Court of Special Appeals have made it very clear there is a difference in function between those two notices.

Banach made clear that all the 9A complaint does is put the respondent on notice that an investigation is commencing. The 9A complaint need not bear much of a relationship to the ultimate complaint which the Commission may issue to invoke Section 11 proceedings after an investigation, and that is --

QUESTION: But it does tell the employer who filed the charge?

MR. LASKIN: Yes.

QUESTION: So that he knows who's making the complaint.

MR. LASKIN: Yes.

But according to Banach, it is not until the Section 11 proceedings are commenced that the Commission has stated a claim against the respondent and the respondent is required to answer.

The State Commission reaffirmed Banach to that extent. It drew a distinction as far as the case was before it, in that in that case, a Section 9A complaint

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had been filed, the agency wished to issue an investigative subpoena, and for the purposes of determining whether the subpoena was adequate, the 9A complaint had to at least state how the individual was discriminated against.

But at page 46, Maryland Appeals 56, the Banach court specifically -- I'm sorry, the State Commission v. Baltimore County court specifically reaffirms the Banach court for the proposition that as far as stating a claim, that doesn't have to happen until the Section 11 proceedings are invoked.

Ironically, the statute which the Petitioners urge upon this Court has the effect of discouraging the use of the very state procedures which the Petitioners would wish to encourage, and it in effect forces federa -- I'm sorry -- forces individuals to invoke their federal rights in a very rapid manner, rights which may not have to be invoked if a longer federal period were allowed.

Because of the fact that an individual has six months to file a 49B charge with the Commission, if this Court were to hold that that same period were precisely the period within which an individual has to go to federal court, the individual would very quickly be forced to a choice: to either go through with the

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administrative procedures, attempting to voluntarily conciliate, which serves both federal and state interests; or file the federal lawsuit or forever lose those federal rights. The filing of the litigation will have the inevitable effect, chilling the conciliation procedures which the state wishes to foster.

QUESTION: Why should that necessarily be so, Mr. Laskin?

I would think if both parties told the judge in the federal court before whom the action were filed t that they were still going on state conciliation proceedings, the judge would not force them to trial.

MR. LASKIN: Well, I can speak from personal experience. I used to be a trial attorney with the EEOC for two years, and at the time that the district courts in Maryland began to hold that the 1981 statute of limitations was six months, in order to preserve their rights, individuals represented by counsel filed a 1981 complaint.

Inevitably, the employer responded to the EEOC; we have been sued; we're not going to cooperate in the investigation because we don't want it to be informal discovery.

The reality is that it has the opposite effect. It chills those conciliation procedures once an

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adversarial process has begun.

I just wanted to respond to several things that the state raised. There are 30 states which appear to have administrative statutes of limitations similar to Maryland's statute of limitations. In very few of them have the federal courts actually applied those statute of limitations to federal civil rights claims.

As far as the Davidson v. Koerber point that Justice O'Connor raised, in fact what the Court of Appeals did in this case was to order the district court to certify the question to the Maryland Court of Appeals. They didn't reject it out of hand. In fact, the predecessor of 5-101 did provide a three-year period for actions under Article 23. The only reason that statute no longer exists is because in 1974, since there were a number of three-year statutes, the Maryland legislature simplified the code by codifying them into one general residuary statute -- 5-101 -- irrespective of whether there is, in fact, a cause of action under Article 23. That is an indication that the Maryland legislature would have intended, if there were a cause of action, a longer state statute of limitations to apply to such a cause of action.

QUESTION: What do you think the best reading of the CA4 opinion is regarding the legislative intent?

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MR. LASKIN: In fact, the language you refer to cross-references to 698 F. 2d at 678 and 679 in McNutt. And what appears there is a discussion of the Banach case.

That is where the Court of Appeals is getting its authority for the Maryland legislative intent. I don't think Maryland legislative intent, by the way, is necessarily controlling in this case. It is, however, constructive.

QUESTION: Well, I don't see that Judge Haynsworth referred at all to legislative intent in McNutt.

MR. LASKIN: He refers to Banach, which is the interpretation of Maryland's highest fcrt cn the statute. Now, correct, in a very narrow sense, he's not referring to legislative history.

QUESTION: But, as a matter of fact, he says that he's just as able -- this isn't a question of state law; it's a question of federal law. He rejected any notion that the federal court shouldn't independently choose the statute.

MR. LASKIN: Certainly --

QUESTION: Didn't he?

MR. LASKIN: He did.

The proposition that it is a question of

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federal law is absolutely correct, but in the first instance what the federal courts are to do is to look to state law.

QUESTION: Well, he rejected the suggestion that the question be certified, but earlier he said a relatively short limitations period was clearly thought by the Maryland legislature as appropriate to such an administrative proceeding, but it doe not appear appropriate for applications in a judicial proceeding.

MR. LASKIN: Right.

And the reason for that is discussed in the Banach opinion, cited in McNutt. In fact, I don't have the cites for them, but there were some turn-of-the-century Maryland cases which at least suggested that there was indeed a cause of action under the Maryland Constitution. There are, however, no recent cases.

I believe that question is currently before the Maryland Court of Appeals.

In summary, all this case involves is a choice between two state statutes of limitation. Regardless of what decision this Court reaches, a state statute will be accepted, a state statute will be rejected. There is no conflict presented between federal policy and state policy.

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Article 5-101 better accommodates both the state interests and utilizing state procedures and federal interests in reducing premature federal claims than would 49B.

Unless there are any questions, thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Strain?

MR. STRAIN: Yes, Mr. Chief Justice, and may it please the Court.

ORAL ARGUMENT OF PAUL F. STRAIN, ESQ.

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. STRAIN: Yes, Mr. Chief Justice, and may it please the Court.

On the question raised by my colleague of a different time period within Article 49B, there is a suggestion that there is a longer time period for an administrative complaint.

There is only one time period within Article 49B. That is, the six-month period. That structure, is as I said, a lineal descendant of that in Section 10B. There is a Commission complaint procedure, rarely used, not even dependent upon an individual grievance and as to which there is no limitations period whatsoever.

What my colleague has confused with a second

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limitation period is actually a provision that after investigation and a judicial-like weighing of the facts, the Commission General Counsel's Office shall precede a hearing with a statement of charges.

This gets us into the minutiae of Article 49B process, but I cannot emphasize enough that there is only one limitations period within Article 49B.

QUESTION: Well, what about the common sense argument that utilization of the state procedure will be considerably discouraged by such a short statute for filing suit?

MR. STRAIN: Well, Justice White, I --

QUESTION: Because those agencies move rather slowly sometimes, after a complaint is filed.

MR. STRAIN: Well, in point of fact, Justice White, the Human Relations Commission, the Maryland Human Relations Commission, like the EEOC, has a procedure called "rapid charge processing" which results in a fact-finding, face-to-face, across-the-table conference within one month.

QUESTION: If there's the same limitations period for filing a federal suit as there is for filing a complaint with the Commission -- that's your argument -- that it should be.

MR. STRAIN: Yes, that's correct.

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QUESTION: What is somebody supposed to do -- file both the complaint in the federal court and one in the Human Relations Commission?

What would ycu dc if you were the lawyer? Wouldn't you just pass up the State Commission?

MR. STRAIN: Justice White, no.

What I would do is take advantage of the rapid charge processing which guarantees me an across-the-table conference within one month, and then make a judgment as to whether conciliation, whether there was any reasonable chance of conciliation. If I thought there was, then I would go forward with conciliation.

QUESTION: And forego the federal suit?

MR. STRAIN: And forego the federal suit, or as Justice Rehnquist's question suggested, file a protective suit in the district court and ask the court to hold it abeyance for an appropriate period of time, because the average processing time for the Maryland Human Relations Commission now for the average case is six months only, and I don't think on this matter of --

QUESTION: That's after filing.

MR. STRAIN: After filing; that's correct.

And I don't think that on this matter of policy, that the Court should conclude that the federal

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cause of action was any more intended to serve as a second bite at the apple than this Court concluded on a similar question in Temcnic and the Railway Express cases where these same chilling arguments were made and rejected by this Ccurt.

I thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

We'll hear arguments next in Brown against the Unicn and the consolidated case.

(Whereupon, at 11:49 a.m. o'clock, the case in the above-entitled matter was submitted.)

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