

CASENOTES

HANDS ACROSS THE WATER: SHOULD TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 HAVE EXTRATERRITORIAL APPLICATION?

INTRODUCTION

Over the last twenty years the world has become a much smaller place. The growing internationalization of the marketplace has resulted in an increasing number of foreign assignments for employees of American based multinational corporations.¹ The press has chronicled this phenomenon and touted the ability of the "21st Century Executive" to understand and respond to the shifting international marketplace as one of his "key" attributes.² Obviously, the requisite experience will have to be gained at a level below that of the senior executive and will entail assignment of the individual to regions of the world that have not adopted American attitudes toward race and gender equality in the workplace.³ Tension between American culture and legal requirements⁴ and the assignment of Americans to posts in foreign countries will be exacerbated by the changing nature of the American workforce over the next two decades.⁵ With so much at stake, it is of critical importance that American based multinational corporations understand their responsibilities with respect to those employees posted in foreign assignments.

1. In 1970, some 680,060 United States citizens worked overseas in private employment. Social and Economic Statistics Admin., Bureau of the Census, U.S. Dep't of Commerce, *AMERICANS LIVING ABROAD* (1973) (reporting 1970 census). Another indication of the increasing internationalization of American business is the U.S. direct investment abroad which increased more than 49 billion dollars in the years 1986-87. Social and Economic Statistics Admin., Bureau of the Census, U.S. Dep't of Commerce, *SURVEY OF CURRENT BUSINESS*, Vol. 68, No. 8 (Aug. 1988).

2. *The 21st Century Executive*, U.S. NEWS & WORLD REPORT, Mar. 7, 1988, at 50.

3. *See, e.g.*, S. ALTORKI, *WOMEN IN SAUDI ARABIA* (1986).

4. *See, e.g.*, The Civil Rights Act of 1964, Pub. Law No. 88-352, Title VII, §§ 701-17 (current version at 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986)) and The Age Discrimination in Employment Act, Pub. Law No. 90-202, §§ 2-15 (current version at 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986)). *See also*, Exec. Order No. 11246, 3 C.F.R. 567 (1966), *reprinted as amended* in 42 U.S.C. § 2000e app. at 28-31 (1982 & Supp. IV 1986).

5. *See* BUREAU OF NATIONAL AFFAIRS, *WORK AND FAMILY: A CHANGING DYNAMIC*, 3-18 (1986) (discussing the changing role of women in the workforce). *See also* *The Education of a Nation*, U.S. NEWS & WORLD REPORT, Oct. 10, 1988, at 3 (discussing the changing mix of women and minorities college graduates in the workforce).

While American laws relating to such areas as antitrust⁶ and securities regulation⁷ have been applied outside the territorial United States for many years, labor relations and employment laws have historically been viewed as having no extraterritorial effect.⁸ This general rule of application was honored by the courts until challenged by a New Jersey District Court in the 1980 case of *Bryant v. International Schools Services, Inc.*⁹ In upholding the extraterritorial application of Title VII of the Civil Rights Act of 1964, Judge Debevoise summarily rejected the arguments against coverage propounded by the defendant and based his decision on a negative inference from the language of the act. While this decision was reversed on other grounds, the Third Circuit Court of Appeals expressly left open the question of whether Title VII should be given extraterritorial effect, and the approach taken by Debevoise has been endorsed in a number of subsequent decisions.¹⁰ Recently, the Fifth Circuit Court of Appeals directly ruled on the critical question of whether Title VII should be exempted from the general rule against extraterritorial application of American employment law. In *Boureslan v. Aramco*, a divided court decided to continue the long held tradition of applying American employment and labor laws territorially only. The court refused to extend the reach of these laws to Americans based overseas absent "an explicit and unequivocal showing of contrary intent" on the part of Congress.¹¹

The purpose of this note is to explore the issues raised by the *Boureslan* case and to review the arguments for and against the application of Title VII outside the United States. This note will discuss the historical antipathy of American courts toward the extraterritorial application of labor and employment laws. It will outline the position taken by the government agency charged with the enforcement of Title VII in

6. K. KIRSCHNER, *The Extraterritorial Application of Title VII of the Civil Rights Act*, 34 LAB. L.J. 394 (1983) [hereinafter Kirschner].

7. *Id.* at 394.

8. *Id.* See also Brief of Appellee, *Boureslan v. Aramco*, 857 F.2d 1016 (5th Cir. 1988) (No. 87-2206). (This case was granted a rehearing *en banc* by the Fifth Circuit Court of Appeals. Oral arguments were heard on June 19, 1989. A decision is pending).

9. *Bryant v. International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (Judge Debevoise argues that the plain language of the statute indicates that covered employers are exempt from the statute with respect to aliens employed abroad. The fact that the Act expressly excludes aliens alone implies that all American citizens working abroad are covered. Complete silence on the subject would be evidence of Congressional intent to exclude all those working for American employers abroad from coverage.) *Id.*

10. See, e.g., *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590 (D.Md. 1986) (adopting *Bryant's* reasoning); *Love v. Pullman, Co.*, 13 Fair Empl. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd* 569 F.2d 1074 (10th Cir. 1978); see also *Kern v. Dynaelectron Co.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984) (applying Title VII extraterritorially without expressly considering threshold jurisdictional issues).

11. *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988).

the extraterritorial application of its provisions. The note will also examine the position taken by the Fifth Circuit on the issue as reflected in its decision in the *Boureslan* case. The note will further evaluate the practical ramifications of extending the reach of Title VII.¹² Finally, this note will consider the propriety of extending the scope of Title VII in the absence of explicit Congressional action.

I. BOURES LAN: BACKGROUND

Ali Boureslan, a naturalized United States citizen who was born in Lebanon, began working for Aramco Services Company (ASC) in 1979 as an engineer in Houston, Texas. ASC, a Delaware corporation with its principal place of business in Houston, is a subsidiary of the Arabian American Oil Company (Aramco), a Saudi Arabian corporation licensed to do business in Texas. In November of 1980, Boureslan requested a transfer to Aramco. Since Aramco explores, produces and refines oil and gas exclusively within the Kingdom of Saudi Arabia, Boureslan's transfer meant that he was physically transferred from the United States to Saudi Arabia.

Shortly after beginning work in Saudi Arabia, Boureslan began to experience difficulty with his supervisor. After more than three and a half years of difficulty,¹³ Boureslan was terminated.

Boureslan filed discrimination charges against Aramco with the Equal Employment Opportunity Commission (EEOC) in the United States and later instituted a suit against Aramco and ASC in the United States District Court for the Southern District of Texas.¹⁴ These suits focused on the discriminatory treatment Boureslan allegedly received from his Aramco supervisor while in Saudi Arabia and sought relief under Title VII of the Civil Rights Act of 1964,¹⁵ and state law. Aramco and ASC answered by denying liability and separately filed motions to dismiss for lack of subject matter jurisdiction.¹⁶ Aramco argued that the protection of Title VII does not extend beyond the territorial United States,¹⁷ and that it, therefore, offers no protection for acts of discrimination occurring in Saudi Arabia. Boureslan argued that the clear and

12. Title VII of the Civil Rights Act has caused one of the greatest social changes of our times. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* at vii-xii (2d ed. 1983).

13. Boureslan's statement is less circumspect. He alleged a "campaign of harrassment . . . which took the form of racial, religious, and ethnic slurs." *Boureslan*, 857 F.2d at 1016.

14. *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987) *aff'd* 857 F.2d 1014 (5th Cir.), *reh'g granted per curiam* 863 F.2d 8 (5th Cir. 1988).

15. The Civil Rights Act of 1964, Pub. Law No. 88-352, Title VII, (current version at 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986)).

16. FED. R. CIV. P. 12(b)(1).

17. ASC argued that only Aramco could be liable since the transfer from ASC to Aramco

express language of Title VII evidenced Congressional intent to protect American citizens¹⁸ from discrimination by American employers¹⁹ regardless of where the discrimination occurred.

On January 27, 1987, the district court dismissed the suit for lack of subject matter jurisdiction,²⁰ dismissed the state actions for want of pendent jurisdiction, and entered final judgment for both defendants. Boureslan appealed, seeking vindication for his claim that Congress intended to apply Title VII extraterritorially. On October 17, 1988, the Fifth Circuit affirmed the trial court and held that neither the statute's language nor legislative history overcame the presumption against extraterritorial application.²¹

II. HISTORICAL APPLICATION OF AMERICAN EMPLOYMENT LAWS

Historically, courts have construed American employment laws as having no extraterritorial application.²² The courts' reluctance to extend the coverage of these laws beyond U.S. borders is premised upon the following assumptions:

- 1) Congress is assumed to be primarily concerned with domestic employment conditions and not those of other countries;
- 2) Extraterritorial application of American employment laws would bring such laws into potential conflict with those of foreign countries;
- 3) Application of American employment laws outside the borders of the United States would pose a potential challenge to a foreign country's national sovereignty;
- 4) Extraterritorial application of our employment laws could

terminated the employment relationship. Additionally, ASC argued that Boureslan had failed to properly exhaust his administrative remedies since he had failed to name ASC in his charge to the EEOC.

18. See *Boureslan v. Aramco*, 857 F.2d 1014, 1034-35 (King, J., dissenting).

19. Threshold limits for employers are defined at 42 U.S.C. § 2000e (1982 & Supp. IV 1986). To be covered the employer must have more than 15 employees in each of twenty calendar weeks in the current or preceding year.

20. FED. R. Civ. P. 12(b)(1); See *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987).

21. *Boureslan*, 857 F.2d at 1014.

22. See *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Cleary v. United States Lines, Inc.*, 555 F.Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Air Line Stewards & Stewardess Ass'n, Int'l v. Trans World Airlines, Inc.*, 273 F.2d 69 (2d Cir. 1959), *cert. denied per curiam*, 362 U.S. 988 (1960); *Airline Stewards & Stewardesses Ass'n, Int'l v. Northwest Airlines, Inc.*, 267 F.2d 170 (8th Cir.), *cert. denied*, 361 U.S. 901 (1959); *Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138 (1957); *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *Jackson v. S.S. Archimedes*, 275 U.S. 463 (1928); *Sandberg v. McDonald*, 248 U.S. 185 (1918).

have foreign economic, political, and administrative repercussions; and

5) To sanction the extraterritorial application of United States laws in the context of foreign employment would involve "the delicate field of international relations."²³

The courts' concern in this area was established early in cases involving the application of The Seaman's Act of 1915.²⁴ In 1918 the Supreme Court declined to give this Act extraterritorial application stating that "[h]ad Congress intended to make void such contracts and payments [in foreign countries] a few words would have stated that intention, not leaving such an important regulation to be gathered from *implication*." The Court concluded that "such a sweeping and important requirement is not *specifically* made in the statute."²⁵ The judicial concern for a clear expression of congressional intent that legislation have extraterritorial application has remained constant over the last seventy years and extends to legislation regarding employment and labor relations.

In *Foley Bros. Inc. v. Filardo*²⁶ the Supreme Court determined that the Federal Eight Hour Law²⁷ did not apply to employment in Iran and Iraq despite statutory language which indicated coverage for "every contract made to which the United States . . . is a party."²⁸ The Court explained its reluctance to extend extraterritorial coverage by stating:

[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, . . . is a valid approach. An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress . . . [unless there is]. . . a clearly expressed purpose.²⁹

23. Brief of Appellee at 13-14, *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988) (No. 87-2206) (citing the following for the enumerated reasoning: (1) *Foley Bros.*, 336 U.S. at 281; *Air Line Stewards & Stewardesses*, 267 F.2d at 178; (2) *McCulloch*, 372 U.S. at 21; *Air Line Stewards & Stewardesses* at 174; *Pfeiffer*, 755 F.2d at 557. (3) *Air Line Stewards & Stewardesses* at 174; *Hodgson v. Union de Permissionarios Circulo Rojo, S. de R.L.*, 331 F. Supp. 1119, 1121 (S.D.Tex. 1971). (4) *Hodgson*, 331 F. Supp. at 1122 and (5) *McCulloch*, 372 U.S. at 21 and *Benz*, 353 U.S. at 147).

24. Seaman's Act, ch. 153, § 10(a), 38 Stat. 1164, 1165 (1915) (current version at 46 U.S.C. § 596 (1982)). The Seaman's Act made it unlawful to pay a seaman wages in advance.

25. *Sandberg*, 248 U.S. at 195 (emphasis added).

26. *Foley Bros.*, 336 U.S. 281.

27. 40 U.S.C. §§ 321-326 (1940) (current version at 40 U.S.C. §§ 328-331 (1982 & Supp. IV 1986)).

28. Ch. 174, § 1, 37 Stat. 137 (1912) (codified with some differences at 40 U.S.C. § 329 (1982 & Supp. IV 1986)).

29. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285-86 (1949) (citing *Blackmer v. United States*, 284 U.S. 421, 427 (1932)).

In *Benz v. Compania Naviera Hidalgo, S.A.*³⁰ and *McCulloch v. Sociedad Nacional de Marineros de Honduras*³¹ the Court continued its long held opposition to extraterritorial application of employment regulation by refusing to extend both the Labor Management Relations Act³² and the National Labor Relations Act.³³ In both instances, the Court held that coverage would not be justified absent "the affirmative intention of the Congress clearly expressed."³⁴

The Railway Labor Act³⁵ has also been the subject of litigation concerning its coverage, particularly regarding its extension to air carriers. Again the Court applied the rule against extraterritorial coverage stating that "[i]t is an accepted canon of construction that the coverage of a federal statute will not extend beyond our national boundaries unless such a legislative intent clearly appears."³⁶ Furthermore, "[e]xplicitness is to be expected from Congress if its intention is to extend the legislation extraterritorially."³⁷

More recently, the Court has held that the Age Discrimination in Employment Act (ADEA)³⁸ did not apply extraterritorially. In a series of early 1980s cases, the circuit courts were unanimous in their acceptance of the canon against extraterritorial application.³⁹ Significantly, the Third Circuit refused to extend coverage despite what it believed to be compelling policy reasons.⁴⁰

More significantly, Congress reacted to the courts' consistent refusal to apply the provisions of the ADEA extraterritorially by amending the Act in 1984. This amendment indicates that Congress knows how to state its position "with a clear and express statement of an affirmative intent," and is capable of clearly guiding the judiciary in their

30. *Benz v. Compania Naviera Hidalgo S.A.*, 353 U.S. 138 (1957).

31. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 327 U.S. 10 (1963).

32. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-43 (1982)).

33. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1982, Supp. II 1984, Supp. III 1985, Supp. IV 1986)).

34. *Benz*, 353 U.S. at 146-47; *McCulloch*, 372 U.S. at 21-22.

35. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-88 (1982)).

36. *Air Line Stewards & Stewardess Ass'n, Int'l v. Trans World Airlines, Inc.*, 273 F.2d 69, 70 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960).

37. *Air Line Dispatchers Ass'n v. National Mediation Bd.*, 189 F.2d 685, 690-91 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951).

38. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-64 (1982, Supp. II 1984, Supp. III 1985 & Supp. IV 1986).

39. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1987).

40. *Cleary*, 555 F. Supp. at 1263 (where the court observed that "[i]t would not be appropriate for this court to substitute its views as to what Congress should have done for what Congress has actually done." *Id.*

interpretation.⁴¹

A quick review of almost seventy years of case law indicates a consistent refusal by the courts to extend domestic employment and labor regulation extraterritorially without a clear expression of Congressional intent to do so. Numerous policy reasons underlie this judicial reluctance, and the events of almost seven decades point to its utility.

III. AGENCY INTERPRETATION

The Equal Employment Opportunity Commission's (EEOC) position on the extraterritorial enforcement of Title VII is an interesting study in the evolution of the EEOC's willingness to assert jurisdiction. The EEOC's desire to extend jurisdiction seems more attributable to the growing recognition of the importance of the multinational corporation to the American economy than to some new insight into Congressional intent.

Prior to 1980 the EEOC's regulations seemed to concede that Title VII did not have extraterritorial application.⁴² The EEOC's pre-1980 guidelines provided that:

Title VII . . . protects all individuals, both citizens and non citizens, *domiciled or residing in the United States* against discrimination on the basis of race, color, religion, sex or national origin.⁴³

The regulations were revised on December 29, 1980, and the phrase "domiciled or residing in the United States" was eliminated.⁴⁴ No guidelines renouncing this position, however, have ever been published.⁴⁵

Despite the literal absence of any codified guidelines in this area, the EEOC has steadily advanced its contention that Title VII covers American citizens working abroad. In the early 1980s, the EEOC successfully sought the judicial enforcement of a subpoena *duces tecum* in an investigation of an alleged discriminatory discharge of a U.S. citizen working in Algeria for a United States based multinational corporation.⁴⁶ The federal district court enforced the subpoena despite the corporation's direct challenge to the issue of extraterritorial jurisdiction.⁴⁷

41. The amended definition of employee is "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f) (Supp. IV 1986). *Id.*

42. Kirschner, *supra* note 6, at 399.

43. 29 C.F.R. § 1606.1(c) (1972) (emphasis added).

44. Kirschner, *supra* note 6, at 399 n. 24.

45. Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L. REV. 1465, 1474 n. 55 (1985) [hereinafter *Multinational Enterprise*].

46. EEOC v. Institute of Gas Technology, 23 Fair Empl. Prac. Cas. (BNA) 825, (N.D. Ill. 1983).

47. The court did not rule directly on the issue of extraterritorial application of the act.

In *Bryant v. International Schools Services, Inc.*⁴⁸ the EEOC filed an *amicus curiae* brief in support of its contention that Title VII provided jurisdiction over the defendant. The Commission stated that its position was "in accord with the long-standing policy of the Equal Employment Opportunity Commission in which it has found jurisdiction over the employment practices of American companies in their dealings with American employees overseas."⁴⁹ No attempt was made to explain the history of the EEOC's position or to elaborate on the evolution of its philosophy from the pre- to post-1980 era. Since the *Bryant* court did not elaborate on its reasoning for accepting the EEOC's position,⁵⁰ we are left with little guidance on what makes the post-1980 position more valid than the pre-1980 one.

Surprisingly, the EEOC relied on this very assertion, and on its own decision in two other cases,⁵¹ in the *amicus curiae* brief it submitted in the *Boureslan* case.⁵² The EEOC stated that it had "consistently taken the position that Americans working abroad for American companies are protected by Title VII."⁵³ The EEOC argued that "[its own] interpretation of Title VII . . . indicates that Congress intended to make Title VII apply to American citizens employed by American companies outside the United States."⁵⁴ Furthermore since the EEOC is the agency charged by Congress with the interpretation and administration of Title VII, its own construction should be given the deference recognized by the Supreme Court in *EEOC v. Associated Dry Goods*⁵⁵ and in *Espinoza v. Farah Manufacturing Co., Inc.*⁵⁶

While asserting its interpretation of Title VII in the courts, the

In what seems to be a recurring refrain the court stated that "as intriguing as the issue of whether Title VII applies extraterritorially [might be] . . . the court may not determine the merits of that issue in this proceeding." *Id.* at 827.

48. *Bryant v. International School Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

49. *Multinational Enterprise*, *supra* note 45, at 1475 (quoting the EEOC, *Amicus Curiae* at 2, *Bryant v. International School Servs., Inc.*, 675 F.2d 562 (3d Cir. 1982)).

50. Judge Debevoise's analysis was particularly curt. "The short answer to all [the defendant's] arguments against giving extraterritorial effect to Title VII is that Congress has spoken on the subject and that a fair interpretation of the statutory language leads to the conclusion that Title VII is to be given extraterritorial effect." *Bryant*, 502 F. Supp. at 482.

51. EEOC *Amicus Curiae* at 15, *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988) (No. 87-2206) (construing Decision 84-2, Fair Emp. Prac. Cas. (BNA) 1893 (1983) and Decision 85-16, Employment Prac. Dec. (CCH) 6856 (1985)).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 16 (citing *EEOC v. Associated Dry Goods*, 449 U.S. 590, 600 n. 17 (1980)).

56. *Id.* (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973)).

EEOC clarified its position with its own staff by issuing new policy guidelines on the application of Title VII.⁵⁷ These guidelines relied on *Bryant* and an earlier case, *Love v. Pullman Co.*,⁵⁸ for their legal underpinnings. The EEOC also relied heavily on a quote from Congressman Libonati (a member of the Judiciary Committee) for its statutory authority.⁵⁹ The guidelines provide explicit and detailed directions to investigators concerning the standards by which corporations are judged in ascertaining their compliance with Title VII. Evidently the EEOC has finalized its position on extraterritorial application and will not be deterred in pursuing this position until a Supreme Court pronouncement is made.

The EEOC's reliance on *Espinoza* is interesting. In *Espinoza*, the Court ruled against the administrative interpretation at issue, indicating that while the deference accorded to agencies is great, it is not absolute.⁶⁰ Likewise the Court has not hesitated to be "less inclined to defer to Administrative guidance when they have conflicted with earlier pronouncements of the agency."⁶¹ This judicial reluctance to completely defer to administrative guidelines is reflected in the *Boureslan* decision.

IV. THE BOURESLAN DECISION: AN ANALYSIS

Judge Davis' majority opinion reflects the historical traditions enunciated in the early part of this paper. His opinion employs an analysis of the rules of statutory construction. He also makes an inquiry into what guidance, if any, is provided by the language and legislative history, which may reveal the intent of Congress in passing Title VII.

The court first reviewed the canon against extraterritorial application and then turned to the language and legislative history of the Act.⁶² The court noted the long case history underlying the canon, the acceptance of the canon within the Fifth Circuit, and the acceptance of the canon by other circuits. The opinion then turned to the critical task of evaluating Boureslan's sole argument for coverage, the alien exemption provision of Title VII.⁶³

57. Office of Legal Counsel, EEOC, Policy Guidance: Title VII/ International Application, No. N-915.033 (Sept. 2, 1988).

58. *Love v. Pullman Co.*, 13 Fair Emp. Prac. Cas. 424 (D. Colo. 1976), *aff'd*, 569 F. 2d. 1074 (10th Cir. 1978).

59. 110 CONG. REC. H2737 (daily ed. Feb. 10, 1964). "Title VII covers employers engaged in industries affecting commerce — interstate and foreign commerce and commerce within the District of Columbia and the possessions." *Id.*

60. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86,92 (1973).

61. *General Electric Co. v. Gilbert*, 429 U.S. 125, 140 (1976).

62. *Boureslan v. Aramco*, 857 F.2d 1014,1017 (5th Cir. 1988).

63. 42 U.S.C. § 2000e-1. "This title shall not apply to an employer with respect to the employment of aliens outside any State. . . ." *Id.*

The first issue addressed was the proper meaning of the alien exemption. Boureslan argued that the language of the Act would be meaningless if it were not interpreted to cover citizens when they were working overseas because neither citizens nor aliens would be protected while working outside of the country.⁶⁴ This, he argued, would violate the rules of statutory construction which dictate that a statute must not be interpreted to be meaningless.⁶⁵ Therefore, the language must be interpreted to mean that a citizen is covered wherever an American employer locates him.

The court rejected this argument by noting its earlier interpretation of the alien exemption provision. In *Espinoza*, the Supreme Court concluded that the alien exemption reflects a congressional intention to provide Title VII coverage to aliens employed within the United States.⁶⁶ The court observed that “[i]f we decline to give the alien exemption provision the interpretation the appellant seeks, the provision still is a meaningful and useful part of the Act.”⁶⁷

Boureslan next argued that the language, coupled with the legislative history, provided enough clarity to overcome the presumption against extraterritorial coverage. After noting that “legislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; [and that] even in its secondary role legislative history must be used cautiously,”⁶⁸ the court concluded that the legislative history was too equivocal to support the contention that Congress had spoken clearly on the issue.⁶⁹ Several areas that belied a Congressional intent to extend coverage were noted:

- 1) The language and legislative history makes repeated use of the terms “United States,” “states,” and procedures relating to state proceedings without parallel references to foreign countries;⁷⁰
- 2) 42 U.S.C. 2000e(i) defines “state” to include the states and other areas under the jurisdiction of the United States without reference to foreign countries;⁷¹
- 3) References in the legislative history highlight concerns about employment discrimination problems in the states,⁷² the effect

64. *Boureslan*, 857 F.2d at 1018.

65. See F. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES*, 234 (1975).

66. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95, (1973)

67. *Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir. 1988).

68. *Id.*

69. *Id.* at 1019.

70. *Id.*

71. *Id.*

72. *Id.*

of Title VII on the southern states versus other states,⁷³ and the deference generally accorded state employment laws;⁷⁴

4) Congress deleted references to "foreign commerce" and "foreign nations" from earlier House versions of Title VII.⁷⁵

Having satisfied itself that the language and history of the Act did not support the interpretation that the plaintiff sought, the court turned to the policy argument raised by Boureslan and the EEOC.

The court noted that the religious and social customs of many countries are wholly at odds with those of the United States. Requiring application of the Act could well result in the employer having to choose between refusing to employ United States citizens and discontinuing business in the country. The court refused to make such a decision stating:

Construction is not legislation and [it] must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'⁷⁶ Given the serious, potentially divisive policy considerations for and against application of the Act outside the country. . . it is not for this court to decide this policy for the legislative branch.⁷⁷

The court thus refused to place itself in a position superior to the legislature in dealing with an issue of significant legal and social importance. In effect, the court decided that it is for the legislature to explicitly state that this country is willing to sacrifice potentially great economic benefits in order to demonstrate its commitment to this principle. The court, by virtue of this decision, is telling Congress that it should publicly amend Title VII in a clear and explicit manner if application of Title VII extra-territorially is desirable. For the court to judicially extend its coverage would be an ill-advised usurpation of powers.

The dissent contended that "the majority goes astray . . . in its determination of what constitutes an expression of 'contrary intent' sufficient to overcome the presumption [against extraterritoriality]."⁷⁸ The dissent went on to point out that:

- 1) Nothing in the decisions cited by the majority requires an explicit statement to overcome the presumption;
- 2) Section 403 of the RESTATEMENT⁷⁹ provides that a state

73. *Id.*

74. *Id.*

75. *Id.* at 1020 n.3.

76. *Id.* at 1021 (quoting *Addison v. Holly Hill Fruit Prods. Co.*, 322 U.S. 607, 618 (1944)).

77. *Id.*

78. *Id.*

79. RESTATEMENT (THIRD OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987).) [hereinafter RESTATEMENT (THIRD)].

may not exercise jurisdiction to prescribe law with respect to a person or activity having a connection to another jurisdiction when the exercise of such jurisdiction is unreasonable;

3) The inquiry should be whether it would in general be unreasonable to apply Title VII extraterritorially, not whether it would in all cases be unreasonable;

4) Section 403(2) provides standards for reasonableness.⁸⁰

5) Applying those factors, it is clear that extraterritorial application of Title VII would not, in general, be unreasonable when:

a) the interest of the United States in applying its civil rights laws to its own nationals is sufficiently strong to support the exercise of extraterritorial jurisdiction and is consistent with the interest of the international community in eliminating discrimination;⁸¹

b) it would not offend the sovereignty of other nations because the statute does not attempt to regulate the conduct of foreign nationals.⁸²

Based on the statutory language and legislative history, the dissent argued that the majority was, in fact, frustrating the intent of Congress with its narrow reading of the statute and that "we could give effect to Congress' will without intruding upon the sovereignty of other nations."⁸³

The most interesting aspects of the dissent center around three conceptual arguments. First, the question is not so much whether to apply

80. See *Id.* at 244-54 for the full text and explanation. The reasonableness factors include:

a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulations is generally accepted;

d) the existence of justified expectations which might be protected or hurt by the regulation;

e) the importance of the regulation to the international political, legal, or economic system;

f) the extent to which the regulation is consistent with the traditions of the international system;

g) the extent to which another state may have an interest in regulating the activity; and

h) the likelihood of conflict with regulation by another state.

81. Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L.REV. 1228, 1297 n.63 (1987) [hereinafter *Employment Abroad*]. This article notes the growing international consensus against various types of employment discrimination.

82. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949) (where the failure to adequately distinguish between aliens and U.S. citizens was fatal to the statute).

83. *Boureslan v. Aramco*, 857 F.2d 1014, 1035 (5th Cir. 1988) (King, J., dissenting).

Title VII extraterritorially. The proper scope of inquiry is whether extraterritorial application of Title VII would violate international law. Second, to analogize Title VII rights to those provided by labor legislation is to misunderstand their true nature. Unlike traditional economic regulation, Title VII is more closely related to those pieces of legislation which fall within the category of "protections of persons." They are, therefore, more like constitutional rights than civil rights and extraterritorial enforcement should be judged against constitutional, not civil standards. Third, the potential for conflict between Title VII and host country laws is minimized by the fact that Title VII may be construed to reconcile the competing demands of U.S. and foreign law when a conflict does occur.

The dissent relies heavily on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW⁸⁴ for its authority, particularly the measures of reasonableness outlined. The Reporter's notes underlying these sections of the RESTATEMENT are particularly enlightening. Note two discusses limiting the exercise of U.S. jurisdiction pursuant to principle of reasonableness.⁸⁵ In relevant part it reads:

It is more plausible to interpret a statute of the United States as having extraterritorial reach if the act is international in focus . . . [such as] . . . the Trading with the Enemy Act, 50 U.S.C. App. § 1 *et seq.* . . . than when it has a primarily domestic focus, such as the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Legislation dating from an earlier day, when economic regulation was less ambitious, is unlikely to reflect an intention to reach beyond the nation's frontier.⁸⁶

Apparently, the dissent's argument for the reasonableness of the application of Title VII extraterritorially is seriously undercut by its own authority. Additionally, during the early sixties the United States was primarily concerned with its domestic affairs. The historical context of Title VII's enactment strongly favors an interpretation that it was intended to address domestic concerns and that the export of its provisions abroad was unintended and probably unforeseen.

The argument that rights guaranteed by Title VII are constitutional rather than civil does not deal adequately with the basis upon which Congress perceived its power to be formed.⁸⁷ As the dissent admits, the purposes of Title VII are framed in economic terms and the case law legitimizing the statute is concerned primarily with the Commerce

84. RESTATEMENT (THIRD), *supra* note 79, § 402-03 at 237-54.

85. *Id.* at 249, 250.

86. *Id.* at 250.

87. W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS, 132-39 (6th ed. 1986).

Clause.⁸⁸ While it is true that a purpose of the Act was to insure the protection of the rights under the Fourteenth Amendment, the lack of state actors is a fatal flaw to enforcement.

VI. PRACTICAL RAMIFICATIONS OF EXTENDING COVERAGE

The practical significance of extending the reach of Title VII extra-territorially is extensive. The barriers to enforcement include a variety of legal and practical constraints. Employers faced with charges of discrimination in their foreign units can and will respond with a variety of defenses.

One of the first barriers a potential plaintiff encounters in a federal Title VII discrimination suit is an investigation of discriminatory action by the EEOC.⁸⁹ In order to conduct the investigation, the EEOC must have authority to compel the attendance of witnesses and the production of documents. Without a proper investigation, the legal machinery used to combat discrimination cannot be put to use.

Unfortunately for the adherents of extraterritorial coverage, the enabling legislation of the EEOC⁹⁰ is parallel to that of the National Labor Relations Board (NLRB). That language provides the power to require the "attendance of witnesses and the production of . . . evidence . . . from any place in the United States or any territory or possession thereof, at any designated place of hearing."⁹¹ Thus, a threshold question must first be answered regarding the EEOC's ability to investigate a charge in the absence of power to compel the production of evidence and the appearance of witnesses from foreign jurisdictions.

Assuming that this issue could be resolved to the satisfaction of the court, the next hurdle would be the issue of jurisdiction. If the EEOC issued the letter to sue⁹² or brought suit on its own, the question of jurisdiction would inevitably be raised. In order to obtain jurisdiction over the foreign affiliate, the court would have to inquire whether the American parent company could be held liable for the acts of its subsidiary. In evaluating this type of claim, the courts have looked at a number of factors: interrelation of operations, common management, common control of labor relations, and common ownership or financial control.⁹³ If jurisdiction could not be inferred from this test, what other test could be used to obtain jurisdiction?

88. *Boureslan v. Aramco*, 857 F.2d 1014, 1026 n. 11-12 (5th Cir. 1988).

89. 42 U.S.C. 2000e-5(b) (1982).

90. *Multinational Enterprise*, *supra* note 45, at 1470 n. 34.

91. *Id.* at 1470.

92. *See generally* 42 U.S.C. § 2000e-5(f)(1) (1982) (explaining how the EEOC files suit).

93. Kirschner, *supra* note 6, at 401.

The next test would be whether or not the foreign subsidiary had sufficient contacts with the forum state for the exercise of personal jurisdiction over it. The normal test used to activate the state's long-arm statute would be used to assert coverage. In the alternative, asserting jurisdiction based upon the fact that the entity is "doing business" could be useful. However, the ability to assert jurisdiction would be less than automatic in either of these cases.⁹⁴

Interestingly the EEOC acknowledges the potential difficulty of achieving *in personam* jurisdiction over the employer. In one of its mid 1980s cases,⁹⁵ the EEOC included an extensive discussion of the standards elaborated by the Supreme Court in *International Shoe Co. v. Washington*⁹⁶ and in *Shaffer v. Heitner*⁹⁷ before stating its own position on the issue. The EEOC concluded:

that, although a respondent may be an employer within the meaning of § 701(b) and thus come within the coverage of the Act, due process requires that a covered employer have sufficient contacts with the United States to make it reasonable to require the employer to defend a charge that its extraterritorial activities unlawfully discriminated against a U.S. citizen⁹⁸ and [that whether the contacts were sufficient must] be decided on a case-by-case basis. [Furthermore,] the test "cannot be simply mechanical or quantitative . . . [but]. . . rather . . . [depends] . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."⁹⁹

Thus, the EEOC acknowledges that a qualitative judgment is key to the jurisdictional dispute. Employers are left with little in the way of firm guidelines in making determinations as to the jurisdiction of a court and whether they can anticipate having to litigate there. Given the certainty with which foreign regulation of labor is proscribed, the rational employer will most likely adhere to that regulation even when it places him in violation of U.S. statutes, and he will choose to litigate the issue of coverage by U.S. laws.

Another important issue, given the amount of labor regulation existing in European countries, would be that of election of remedies.¹⁰⁰ If the country in which the alleged discrimination occurred has its own

94. *Id.* at 403-04.

95. EEOC Decision 85-16, *supra* note 51.

96. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

97. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

98. EEOC Decision 85-16, *supra* note 51, at 7073.

99. *International Shoe*, 326 U.S. at 319.

100. *See Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1256-57 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3d Cir. 1984).

regulations concerning severance and remedial measures or its own labor court in which grievances may be heard, a judicial decision must be made concerning any overlap in coverage. The conflict between extended coverage and issues of comity is clear. This conflict suggests that Congress had no plan to extend Title VII coverage to foreign jurisdictions.

If Title VII is extended extraterritorially to allow a plaintiff a cause of action, what affirmative defenses would be available for the defendant in this type of case? Three major defenses would certainly be asserted: Act of State, foreign compulsion, and the bona fide occupational qualification (BFOQ).¹⁰¹

The Act of State doctrine precludes American courts from inquiring into the validity of the public or governmental acts of a foreign sovereign committed in the sovereign's own territory. The general rule is that the doctrine applies only to the public or governmental acts of sovereign countries, not to purely commercial activities of the state. Moreover, the doctrine applies only to the commission of illegal acts within the territorial boundaries of the foreign sovereign.¹⁰² These requirements, along with the defendant's burden of establishing the applicability of the doctrine, further narrows the defense.

The foreign compulsion doctrine is really a subset of the Act of State doctrine. In foreign compulsion cases, the defendant tries to extend the immunity granted governments in the Act of State doctrine to individuals and alleges that the unlawful conduct was strongly compelled by the foreign sovereign.¹⁰³ This defense is also a narrow one since the compulsion must be great in order for the desired immunity to attach.

The BFOQ defense is the only one that has actually been raised in cases that have potentially involved the extraterritorial application of Title VII. The defense is authorized by section 703(e) of Title VII and it allows for the consideration of religion, sex, or national origin, where one of these characteristics constitutes a "bona fide occupational qualification" reasonably related to the normal operation of the business. BFOQ's are rigorously examined by the EEOC and by the courts and are interpreted very narrowly. *Kern v. Dynaelectron Corp.* and *Fernandez v. Winn Oil Co.*¹⁰⁴ are illustrative of the difficulty employers may face in operating overseas if Title VII is extended.

In *Fernandez*, a charge of sex discrimination was filed where the

101. *Employment Abroad*, *supra* note 81, at 1301-24 (explaining these defenses and why they should not be honored).

102. Kirschner, *supra* note 6, at 403.

103. *Id.* at 404. Kirschner suggests these defenses may be more important in Title VII than in Antitrust since foreign discrimination is often more blatant in the employment context.

104. *Fernandez v. Winn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); *Kerns v. Dynaelectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984).

plaintiff alleged sex discrimination for her failure to receive a promotion to a more responsible and better compensated position. Ms. Fernandez was denied the position of International Marketing Director, a position that called for significant amounts of travel in South America and involved a client population that is mostly male. The position entailed entertaining customers at restaurants and, on occasion, in hotel rooms. The trial court was willing to accept the employer's alternative defense of BFOQ, reasoning that Latin culture would not accept such a role for females (the so-called customer preference defense). The Ninth Circuit affirmed the decision of the trial court on the basis that Ms. Fernandez was not the best qualified, but pointedly rejected the BFOQ defense.¹⁰⁵ The court indicated that the district court's ruling on BFOQ's would allow other nations to dictate discrimination in this country.¹⁰⁶ This case is an excellent illustration of how grudgingly courts have given in to the BFOQ defense.

Kern is an example of a different variant of the BFOQ defense, the safety requirement. In this case, the plaintiff was hired by defendant to fly helicopters in Saudi Arabia, carrying passengers from Jeddah to Mecca. The district court and the Fifth Circuit accepted the BFOQ of membership in the Moslem faith since Saudi Arabian law prescribes death by beheading for any non-Moslem who enters Mecca. The mere fact that the court had to elaborate¹⁰⁷ on this most obvious of BFOQ's shows the weakness of the defense.

VI. CONCLUSION

Indisputably, Congress can extend the protections of Title VII extraterritorially.¹⁰⁸ The question remaining is whether Congress has spoken so unequivocally that there is no need for clarification. This note suggests that the Congress has not spoken with the requisite "affirmative intention . . . clearly expressed"¹⁰⁹ that would guide the courts.

The Congressional record on the Title VII debate is replete with references to the effects of the proposed legislation upon the economy. No clear concern for citizens working abroad can be gleaned from the voluminous record of the debates. In a period of history when American economic supremacy was assumed, it was unlikely that the legislators

105. In the domestic employment context it has been allowed only when the *essence* of a particular business operation requires a person of a particular sex, religion, or national origin. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1976) and *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

106. *Fernandez*, 653 F.2d. at 1277.

107. *Kern*, 577 F. Supp. at 1200-1201.

108. *Boureslan v. Aramco*, 857 F.2d 1014, 1021 (5th Cir. 1988) (King, J., dissenting).

109. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 (1963).

believed that international business needed regulation of its personnel activities. Congress apparently knew when it passed Title VII that the statute defining the scope of coverage had not been given extraterritorial application,¹¹⁰ and had it desired to give the legislation extended coverage, it surely would have spoken more directly on that point.

While the policy considerations for extending Title VII are weighty, the courts have correctly decided to allow Congress to address them. The serious nature of the conflicts between sovereigns and the issues of comity, separation of powers, and foreign relations point to the conclusion that the Congress, not the courts, should take the lead in this area.

In reviewing the many difficulties of applying the provisions of Title VII in cultures that do not accept gender and racial equality, we noted the traditional defenses asserted in actual cases. Given the potential for various standards of application, it must be for the Congress, through the open forum of debate and deliberation, to decide on a uniform approach. To allow different standards in the application of defenses or to reach jurisdictional issues in a case by case method is contrary to the nondiscriminatory focus of Title VII. In summary, the importance of the international sector to the future of America presents the strongest policy argument for extending Title VII. Policy, however, is the domain of Congress and it should be that body that struggles and decides the many delicate issues involved in regulating the activities of American citizens abroad. The courts can implement and give meaning to the clear language of Congressional direction, but they have correctly decided that "to blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."¹¹¹ If Congress desires to extend Title VII coverage, let it have the courage to speak explicitly and provide the funds and the mechanism to implement its desires.

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110. Kirschner, *supra* note 6, at 400.

111. *Boureslan*, 857 F.2d at 1021 (citing *Addison v. Holly Hill Fruit Prods. Co.*, 322 U.S. 607, 618 (1944)).